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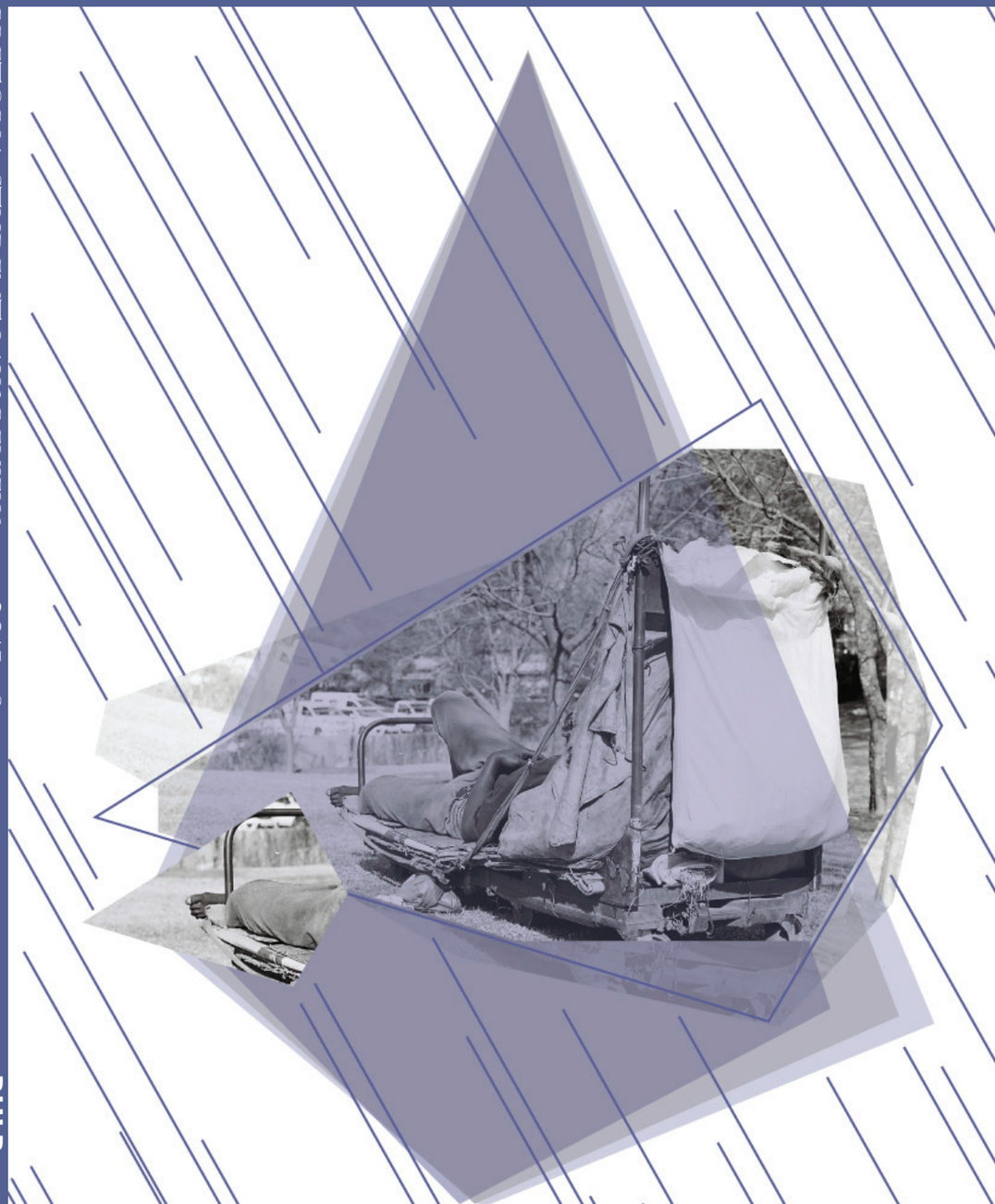

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EDITORS' NOTE

> Who wants to become a writer? And why? Because it's the answer to everything … It's the streaming reason for living. To note, to pin down, to build up, to create, to be astonished at nothing, to cherish the oddities, to let nothing go down the drain, to make something, to make a great flower out of life, even if it is a cactus. Enid Bagnold

Words fail to describe what an honour it has been to have been part of the ninth edition of the *Pretoria Student Law Review*. The sense of satisfaction is overwhelming in this being the third edition I have had the privilege to be a part of. Having spent three years as part of this publication I cannot begin to describe and expand upon all that I have learnt in this time, but one thing which I guarantee is the bright and prosperous future of the legal profession of South Africa. With each successive edition I see a thirst and hunger for knowledge from law students, each year those yearnings becoming more intense and providing us with the most thought provoking and well-founded articles. The desire to challenge the *status quo*, to reject the notions of complacency and outright refusal of facile thought is truly something all these writers should be proud of and us along with them. To read and to write is the essence of not only thought, but of life itself.

I would like to thank the 2015 Editorial Committee without whom this would not have been possible — Sarah Burford, Carin Cross, Cara Furniss, Danielle de Bruyn and Khanyizondo Mthiyane. Your dedication, hard work and determination are truly and sincerely appreciated and I could not have asked for a better committee, it was such a privilege to have been able to work with you all.

I would also like to give thanks to Prof Danie Brand, our guardian, for always finding the time to meet with us and assist us wholeheartedly with this edition. Thanks also to our Editorial Board, Prof K van Marle, Prof A Boraine, Prof C Fombard, Prof M Roestoff, Prof W de Villiers and Prof A van der Linde, as well as all the lecturers who assisted with the peer review process. A final thanks to Lizette Hermann and Elzet Hurter for their never-ending dedication to assisting us with the *PSLR* year-in-and-year-out.

The edition this year covers many different topics in the legal realm; Adebayo Okeowo writes about the use of force during peaceful protests in Nigeria, Nicole King discusses the effect of South African media upon HIV/AIDS awareness, Tamryn Gorman expands into 'rainbow theory' and the constant tension between substantive and formal equality in the new constitutional dispensation, Sewela Masie & Kaitlin Morris discuss liability in Space Law, Marko Svicevic and Antjie Krog's globally renowned novel *Country of my skull* and the application of African Jurisprudence thereto, Sarah Hartman devolves

into how the patriarchal society has created the 'irrational' woman, Romy-Anne Templeton dissects socio-economic rights jurisprudence in the case of *Coughlan NO v Road Accident Fund*, JJ van der Walt and the impossibility of being lost in transformation and Devon-Lee Andries' article regarding how law influences society, identity of feminism. I thank each of these writers for providing us with these wonderful articles and for choosing the *PSLR* as their platform for their thoughts and writings.

I once again emphasise what a pleasure it has been to have been a part of this publication for the last three years. Being able to work with such bright and talented individuals and being exposed to such an array of different topics and schools of thought is something I shall forever cherish. I encourage you all to continue reading and writing, to expand your minds and question everything around you. It is only through reading, writing, rereading and rewriting that we come to find ourselves and who we are, not only as legal scholars and professionals, but as individuals. So please, I encourage you to constantly expand your minds and challenge all that is in front of you, for it is the only way we can grow and ensure a prosperous and bright future for us all.

Alicia Allison
Managing Editor
2015

FROM THE DEAN'S DESK

We often hear lecturers say that 'students must write' and, indeed, it is true, especially law students. The various assignments and dissertations that law students have to write during the course of their studies should be embraced by them as golden opportunities to develop and improve their analytical and writing skills to the fullest. Good writing skill will also stand them in good stead in the various career paths in law.

The *PSLR* is an important writing platform provided for students in the Faculty of Law. I, for one, am a staunch supporter of our student law journal and encourage students to engage with the *PSLR* and to submit draft articles to be considered for publication. The process of preparing a draft article and working through the submission process, in itself, provides a valuable learning experience. You will feel a great sense of satisfaction if your article is approved and published in a law journal. The *PSLR* is an open journal in that any law-related topic may be submitted for consideration (as is evident when glancing through the current edition).

Finally, I want to congratulate both the authors whose papers have been accepted for publication in this edition, as well as the new student editors on their appointments. I also want to commend the editors for finalising the 2015 edition so swiftly and in such an admirable way.

Prof André Boraine
Faculty of Law
University of Pretoria

NOTE ON CONTRIBUTIONS

We invite all students to submit material for the ninth edition of the *Pretoria Student Law Review*. We accept journal articles, case notes, commentary pieces, response articles or any other written material on legal topics. You may even consider converting your research memos or a dissertation chapter into an article.

Please visit our website at www.pslr.co.za for more information.

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0002

CHALLENGES TO PEACEFUL PROTEST IN NIGERIA: THE USE OF FORCE

*by Adebayo Okeowo**

> Everyone must be able to express their grievances or aspirations in a peaceful manner, including through public protests without fear of reprisals or of being intimidated, harassed, injured, sexually assaulted, beaten, arbitrarily arrested and detained, tortured, killed or subjected to enforced disappearance.[1]

1 Introduction

The freedom or the right to engage in peaceful protest is one that can be perceived to have been enshrined, and guaranteed, under the right to freedom of expression[2] while also being closely linked to the right to freedom of association[3] and freedom of speech.[4] This right is a core feature and foundation of a democratic society as it ensures that the people's representatives can be interrogated in the people's court for any act not in conformity with the wishes of the people.[5] Civil society groups are usually at the forefront of many protests — serving as the rallying point and the report by the Office of the High Commissioner for Human Rights (OHCHR) recently recognised this, stating that civil society plays a crucial role in the realisation of human rights on the ground.[6]

Unfortunately, most governments around the world feel threatened once faced with a group of people demanding accountability from government on specific issues. Their default response almost always is to shut down protests by resorting to the

* LLD candidate at the Centre for Human Rights, University of Pretoria.

1 Preamble, Human Rights Council Resolution 22/10 'The promotion and protection of human rights in the context of peaceful protests' March 2013.

2 Art 19(2) of the International Covenant on Civil and Political Rights (ICCPR).

3 Art 22 of the ICCPR.

4 Freedom of speech is not directly phrased as a right within international treaties but can, however, be delineated as a political right to hold and express one's opinions without interference and this is protected under art 19(1) of the ICCPR.

5 Wilton Park Conference Report 'Peaceful protest: a cornerstone of democracy — How to address the challenges?' (26 - 28 January 2012) WP1154.

6 Report of the Office of the United Nations High Commissioner for Human Rights 'Summary of the Human Rights Council panel discussion on the importance of the promotion and protection of civil society space' (26 June 2014) A/HRC/27/33.

use of force and other violent means.[7] The civil society space is being eliminated by governments even as they continue to face threats, bans on peaceful demonstrations, confiscation of computers, imprisonments and even killings.[8] This unfortunate reality was described by CIVICUS:

> Democratic South Africa's National Assembly passed the so called "secrecy bill", which places hurdles against CSOs and journalists obtaining information to expose official wrongdoing, despite fierce civil society resistance.
>
> Such laws are brought in and applied under a number of guises. Commonly, rhetoric around national security and controlling terrorist activities was used to justify new restrictions on fundamental freedoms in the years following the 9/11 terrorist attacks in 2001.[9]

Nigeria is not an exception to this unacceptable trend and this paper will look at how the use of force in Nigeria has become one of the biggest impediments to peaceful protests and has in some instances, resulted in fatalities.

2 Use of force in Nigeria

Security forces the world over are known to use excessive force in the execution of their duty as law enforcement officers. But it would seem that there is a particular notoriety that comes with the Nigerian Security Forces, especially the police. Aside from being perceived as the most corrupt institution in the country,[10] the Nigerian police do not hesitate to use deadly force, and this comes as no surprise, because the Police Force Order 237 practically authorises a police officer to shoot on sight, irrespective of whether the target poses a threat or not.[11] Several local and foreign organisations have called for the repeal of the Order as it directly contravenes the presumption of innocence and aids the violation of the right to life, which is fully

7 For instance, the government of Sudan deployed repressive tactics including excessive use of force involving live ammunition against protesters who held demonstrations between late September and early October 2013. See Amnesty International 'Sudan: Excessive and Deadly: The Use of Force, Arbitrary Detention and Torture Against Protesters in Sudan' http://www.amnesty.org/en/library/asset/AFR54/020/2014/en/da16ca4b-6e61-4deb-9d0e-cbb3f85f6274/afr540202014en.html (accessed 29 September 2014).

8 UNHCHR (n 6 above) 4.

9 CIVICUS State of civil society report 'A disenabling environment for civil society: push-back, persecution and protection strategies in 2011' (2011) 97.

10 O Chima 'Police, PHCN named as most corrupt institutions' 23 March 2011 http://www.thisdaylive.com/articles/police-phcn-named-as-most-corrupt-institutions/88306/ (accessed 14 November 2015).

11 Amnesty International 'Nigeria: Loss of life, insecurity and impunity in the run-up to Nigeria's elections' (2011) *Amnesty International Publications* 8.

guaranteed under section 33 of the Constitution of Nigeria.[12] However, to date, the Order is still in force.

'The Police is Your Friend' is a parlance within the Nigeria Police Force which citizens find to be inconsistent with reality. Several instances of police brutality, both within detention cells and in public spaces, have crushed any possible ardent relationship between Nigerians and those mandated to keep them safe.

Even though the Constitution guarantees the right to peaceful assembly and association,[13] as well as the freedom of expression,[14] holding a peaceful protest in Nigeria has increasingly become extremely difficult, if not impossible. The police force is always present to tear up peaceful rallies and protests using not just gas canisters but even guns. In January 2012, there was a coordinated civil disobedience to protest the removal of fuel subsidy by the Federal Government. During this period, economic activities ground to a halt and for about 7 days, Nigerians kept gathering peacefully at public spaces nationwide to protest the removal of the subsidy. However, before long, the streets became militarised, while in some states of the Federation, the police used lethal force on protesters that led to the death of at least 16 people.[15]

Further complicating the situation is the Public Order Act.[16] A provision of the Act that states that a police license must be obtained prior to engaging in a peaceful protest, has been declared unconstitutional in the case of *All Nigeria Peoples Party v Inspector-General of Police*.[17] In this case, Justice Chinyere of the Abuja Federal High Court gave a historic verdict stating:

> the requirement of police permit or other authority for the holding of rallies or processions in Nigeria is illegal and unconstitutional as it violates section 40 of the 1999 Constitution and Article 11 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap 10) Laws of the Federation of Nigeria, 1990.[18]

12 S33 of the Constitution of the Federal Republic of Nigeria 1999 (the Constitution) reads: 'Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of a criminal offence of which he has been found guilty in Nigeria.'

13 S40 states 'Every person shall be entitled to assemble freely and associate with other persons or political party.'

14 S39 states 'Every person shall be entitled to freedom of expression, including freedom to hold opinions.'

15 Ladybrille '#OccupyNigeria Video: CNN coverage - Nigeria rocked by second day of nationwide protests' 10 January 2012 http://ladybrillemag.com/occupynigeria-video-cnn-coverage-nigeria-rocked-by-2nd-day-of-nationwide-protests/ (accessed 14 November 2015).

16 Laws of the Federation of Nigeria (1979) Chapter 382.

17 (2006) CHR 181.

18 F Falana 'Limits of police powers in Nigeria' 9 December 2013 http://pmnewsnigeria.com/2013/12/09/limits-of-police-powers-in-nigeria/ (accessed 22 September 2014).

In this case, the Judge issued an injunction restraining the Inspector General of Police and his agents 'from further preventing the Plaintiffs and other aggrieved citizens of Nigeria from organizing or convening peaceful assemblies, meetings and rallies ...'.[19]

The police appealed the judgment of the court. The Justices of the Court of Appeal however unanimously upheld the judgment of the Federal High Court.

This case lays a strong precedent but it has not been sufficient in curbing police excesses as it has suffered from lack of implementation. In November 2013, the police still reportedly fired gunshots and released teargas canisters in a bid to disperse a peaceful gathering of anti-corruption protesters.[20] Also on the Police's fault sheet was an assault on Senator Magnus Abe, who was shot at with rubber bullets by the police during a rally in Port Harcourt.[21]

The Organisation for Security and Cooperation in Europe also support the position taken by Nigeria's Court of Appeal as it prescribes that spontaneous assemblies should be lawful and there should not be a requirement of prior permission but rather prior notice.[22]

Nevertheless, the Nigerian police continue to suppress peaceful protests, a more recent instance being that targeted at the 'Bring Back Our Girls' movement. The protesters had to attempt to institute court proceedings to challenge the police ban placed on their right to peacefully protest the abduction of schoolgirls by the Boko Haram terrorist group.[23]

While it is understandable that in some instances force will have to be resorted to in maintaining law and order, such force need not be deadly, excessive or lethal. Unfortunately, these excesses have been the most difficult aspect to curb among Nigeria's security forces and with the backing of Order 237, the police are able to justify virtually every form of killing.

The use of lethal force should be seen as a last resort and the only condition under which it should be deployed is in the protection of life. In the event that lethal force is being resorted to, the principle

19 As above.
20 Premium Times 'Police disperse anti-corruption protesters in Abuja' 21 November 2013 http://premiumtimesng.com/news/150121-police-disperse-anti-corruption-protesters-abuja.html (accessed 22 September 2014).
21 Sahara Reporters 'Police fire rubber bullets and teargas at Senator Magnus Abe in Port Harcourt' 12 January 2014 http://saharareporters.com/news-page/police-fire-rubber-bullets-and-teargas-senator-magnus-abe-port-harcourt (accessed 12 January 2014).
22 OSCE Office for Democratic Institutions and Human Rights (ODIHR) *Guidelines on freedom of peaceful assembly* (2nd ed) (2010).
23 Agence France-Presse 'Bring back our girls campaign in court over Nigeria protest ban' 3 June 2014 http://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/10872543/Bring-Back-Our-Girls-campaign-in-court-over-Nigeria-protest-ban.html (accessed 14 November 2015).

of proportionality should be adhered to. In other words, the extent of force used must not be disproportionate to the crime committed.

In Nigeria, the challenges experienced by civil society from engaging in peaceful protests do not entirely reflect the other diverse challenges faced by civil society groups. The recently passed anti-gay law by the Nigerian government, for example, restrains civil society groups from expressing opinions in defence of the rights of the LGBTI community.[24]

3 The responsibilities and limitations

The right to protest, like many other rights, is not absolute.[25] However, it needs to be established that the full enjoyment of this right should be the norm while any form of restriction should be the exception.

A peaceful protest requires no definition because it is easily recognisable — it is devoid of any form of violence. It must however be stated that the fact that it is a peaceful protest does not mean it will not have negative impacts on the state. For instance, a peaceful protest can lead to economic hardship especially if protesters are able to stage a successful boycott using trade union groups.

There are primarily two instances under which this right may be curtailed: to respect the rights of others, and for the protection of national security or public order.[26] In as much as states may limit this right under the foregoing circumstances, the Human Rights Committee has stressed that 'a law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.'[27] In other words, whatever limitations the state is imposing, such limitations must not impair the essence of this right.

Protesters have a duty to conduct themselves in an orderly and peaceful manner. But there an equal obligation on states to ensure that the rights of protesters are protected and the right to protest cannot be arbitrarily interfered with simply because the views and opinions being expressed do not conform with those held by the

24 S5(3) of the Same Sex Marriage (Prohibition) Act 2013 provides a sentence of ten years for anyone who advocates for gay rights.

25 Limitation clauses are introduced to ensure that certain rights are not absolute. The question however is usually not about whether certain rights can be limited but whether the extent of limitation is lawful within a democratic society. See Democracy Reporting International Briefing Paper 'Lawful restrictions on civil and political rights' (2012) 2.

26 Art 19(3) ICCPR.

27 Human Rights Committee General Comment 27, Freedom of Movement UN Doc CCPR/C/21/Rev.1/Add.9 para 13.

government in power.[28] The ability to welcome criticism should be one of the hallmarks of a democratic government.

4 Significance of peaceful protest

The aim of peaceful protests is to generate dialogue with the ultimate aim of having government abandon a previously held anti-people position or reverse an unpopular law. This has been seen to work in instances around the world where concessions are made. This was the case during the 'Occupy Nigeria' movement — a protest that started out demanding that the Nigerian government reverse the removal of fuel subsidies but eventually grew into national civil disobedience.[29] Another relevant example is that of Yemen, which was ready to enter into discussions following the 2011 protests, demanding that the government respects freedom, equality and human dignity.[30]

There are several methods that civil society groups and the general public can resort to when carrying out peaceful protests and Sharp has curated 198 of such methods.[31] Sharp in his list, classified these methods into three broad categories namely: non-violent protest and persuasion, non-cooperation, and non-violent intervention.[32] The first category is one that is of particular concern to this paper — the non-violent protest and persuasion. It is worthy to note that this category itemises 54 methods, the practicality of which is hinged on the existence of a democratic system that recognises the freedoms articulated above (speech, assembly, expression, and association). No matter how peaceful or non-violent a protest is, if a society does not allow itself to be governed by democratic tenets, such peaceful protests will continue to be met with hostility from law enforcement agents.

28 Liberty 'Article 11 Right to protest and freedom of association' https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/article-11-right-protest-and-freedom-association (accessed 27 September 2014).

29 The resultant effect of the removal of the fuel subsidy was that fuel prices jumped from N65 per litre` to N141 per litre. At the end of the protests however, the government took several steps back and fixed the fuel price at N97 per liter. It is believed that had the protests been sustained for longer than seven days, government would have entirely reverted back to the initial pump price of fuel. See O Emmanuel and B Ezeamalu '#OccupyNigeria: One year later, the gains, the losses' 12 January 2013 https://www.premiumtimesng.com/news/114890-occupy nigeria-one-year-later-the-gains-the-losses.html (accessed 30 September 2014).

30 General Assembly HR/CT/741 March 2012.

31 G Sharp 'How nonviolent struggle works' (2013) *The Albert Einstein Institution* 21 - 46.

32 G Sharp *The politics of non violent action, Part Two: The methods of non violent action* (1973) 3.

As has been seen in many instances, governments usually ignore peaceful protests, expecting that they will quickly dissipate.[33] However, contrary to expectation, the strength of these protests grow, the demands ring louder and the numbers of protesters swell into thousands. Subsequently, government reacts, not by having a dialogue with the protesters, but by deploying its security agents to contain the protest and it is at this point that a disconnect occurs because the people are protesting not to have government unleash its police force on them but to have government listen to their grievances. Thus, what starts out as a peaceful protest degenerates into a clash between law enforcement agents and protesters.

5 Provisions of international law

International Law is saturated with provisions guaranteeing the right to protest. Beginning with Article 11 of the African Charter which provides that 'every individual shall have the right to freely assemble with others' to the International Covenant on Civil and Political Rights (ICCPR) which, under Article 19(2) guarantees as follows:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The Human Rights Council also provides for the rights of protesters.[34] Through paragraphs 9 and 11, the resolution especially makes strong statements against the use of force:

> 9. Urges all States to avoid using force during peaceful protests, and to ensure that, where force is absolutely necessary, no one is subject to excessive or indiscriminate use of force.
>
> 11. Affirms that nothing can ever justify "shoot to kill" practices as well as indiscriminate use of lethal force against a crowd, acts which are unlawful under international human rights law.

The resolution goes further under paragraph 10 to call on states to ensure that their domestic laws are in tandem with international standards. It also urges states to abide by the applicable principles of law enforcement in relation to proportionality in order to ensure that lethal force is only deployed in the face of an imminent threat to life.

33 A very recent example is the youth led pro-democracy protest in Hong Kong which initially started out as sit ins but eventually had the police using force to disperse the crowd, see J Pomfret & Y Lee 'Democracy protests in Hong Kong turn violent' 27 September 2014 http://www.huffingtonpost.com/2014/09/27/hong-kong-democracy-protest_n_5892862.html (accessed 30 September 2014).

34 UN doc A/HRC/25/L.20 'The promotion and protection of human rights in the context of peaceful protests'.

In General Comment No 34, the Human Rights Committee affirmed that the freedom of expression is a key component of the enjoyment of the rights to freedom of assembly and association.[35] Also underscoring the global concern for the use of force during peaceful protests, the United Nations Human Rights Council in 2010 appointed a Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association.[36]

6 Conclusion

In the case of Nigeria, it is necessary that international human rights standards are adhered to. This will include abolishing laws such as the Public Order Act and the Police Force Order, while enacting domestic legislations that tackle management of peaceful assemblies in conformity with what is expected under a democratic society. Protecting protesters still falls within the ambit of state obligation to protect its citizens from human rights violations including those by state agents and other third parties.

Nigeria must recognise that the vibrancy of democracy is partly premised on the ability of the citizenry to disagree with government policy and, through peaceful protests, bring the same to the attention of the state. Peaceful protests must therefore not be instinctively seen as a threat to public order but as a process necessary for the strengthening of democracy.

35 Human Rights Committee General Comment No 34 CCPR/C/GC/34 para 4.
36 Resolution adopted by the Human Rights Council A/HRC/RES/15/21 *The rights to freedom of peaceful assembly and association* (6 October 2010) para 5.

(WO)MAN IN THE MIRROR — A REFLECTION: LAW'S INFLUENCE ON SOCIETY, IDENTITY AND FEMINISM

*by Devon-Lee Andriés**

1 Introduction

The law is a saviour to many in times of despair, a remedy for conflict and an instrument for change. However, despite its power and good work, many challenges arise in the application of the law. The law creates social structures and hierarchies that have a huge impact on society. The problem that I address in this essay is that these social structures influence and perhaps even hinder human identities. If society as a whole is impacted by factors such as stereotypes, gender roles and hierarchies, it makes sense that individuals would be easily swayed by a similar thing. These structures change the way humans see themselves and each other. Furthermore, women are affected to a larger extent by this problem in that patriarchy still reigns strong, despite society's best effort to transform in this regard. It seems that society 'programs' individuals into identifying themselves as the community does.

A legal system, which proposes one thing while implementing another, lacks integrity and accountability – values the Constitution aims for the South African legal system to uphold. I propose that a more open approach to the law will result in a legal system that provides for true freedom in dignity and identity for those falling under its jurisdiction. Furthermore, moving away from a modernist approach to a post structural, more general jurisprudence will lead to inclusion of women (providing a remedy to their oppression) and to a more substantially equal application of the law. I will be structuring my research around the work of a couple theorists and will use their perspectives to supplement my own argument. These include the work of Marx,[1] Foucault,[2] Veitch,[3] Barnett,[4] de Beauvoir,[5]

* Final Year LLB Student, University of Pretoria.

1 As discussed in C Douzinas & A Gearey *Critical jurisprudence: The political philosophy of justice* (2005).

2 As discussed in S Veitch *Jurisprudence: themes and concepts* (2nd ed) (2007).

3 Veitch (n 2 above).

4 H Barnett *Introduction to feminist jurisprudence* (1998).

5 S de Beauvoir *The second sex* (1949) Parshley, HM (ed and trans) (1988).

Dowling,[6]Botha[7] and Douzinas and Geary.[8] To add flavour to this investigation, I will include some neuro-scientific perspectives based on the work of David Rock.[9] Veitch[10] suggests that the law plays a large role in protecting the autonomy of the individual — an area of great neuro-scientific research.

I will structure my findings around three research questions. In the first part I ask how it is that the law gives rise to social structures. Secondly, I look at how these social structures influence society's idea of gender roles. In this section I look deeper into the effect these structures have on women from a feminist perspective. Next, I ask what effect these societal structures have on an individual through a neuro-scientific lens. Finally, I will conclude by looking at a way forward and a solution to the abovementioned problem.

2 How does the law create social structures?

Section 9 of the Constitution states that all are equal before the law.[11] This implies that our country is not hindered by the burden of rigid structures and hierarchies. It is made clear by Botha the paradox that exists in our law: The Constitution aims to free people from social categories of race and sex, and yet affirmative action, which should be remedying this, is feeding these very categories.[12] Perhaps unpacking the work of Marx and Foucault will assist in understanding class structures and power dynamics in any society.

Marxism is a movement that fights against a capitalist society. Marxism aims to rid society of the structures that oppress the working class and give power to the bourgeoisie. Marx explains that every society is constituted in the following manner: the base of society is the economic system that governs it e.g. communism or capitalism. Birthed by this base while working to enforce it, is the superstructure that includes institutions, such as the law, which assist in enforcing the economic system. This super structure gives rise to a hierarchy by which the bourgeoisie are the rich class who own the means of production of such a society. The proletariats, who are the majority, the labour force, are also owned by the bourgeoisie. Lastly, the

6 DS Dowling 'The problem of gender stereotyping' (1998) 12 *South African Journal on Higher Education* 41.
7 H Botha 'Equality, plurality and structural power' (1995) 25 *South African Journal on Human Rights* 1.
8 Douzinas & Gearey (n 1 above).
9 D Rock *Your brain at work: strategies for overcoming distraction, regaining focus and working smarter all day long* (2009); D Rock 'SCARF: a brain-based model for collaborating with and influencing others' (2008) 1 *NeuroLeadership Journal* 1; and D Rock & Y Tang 'Neuroscience of Engagement' (2009) 2 *NeuroLeadership Journal* 1.
10 Veitch (n 2 above) 264.
11 S 9 of the Constitution of the Republic of South Africa, 1996.
12 Botha (n 7 above) 1-2.

lumper proletariats are the unemployed persons. The bourgeoisie exploits both the proletariats and lumper proletariats. The rich have power through money and use it to enhance their position in society. Marxism aims to emancipate the proletariats to free them of this oppression.[13] Douzinas and Gearey criticise Marxism for being too modern an approach to the law.[14] Marxism diminishes social being to nothing more than identification by the economy.[15]

Foucault is the father of power dynamics and is a post-structuralist. Foucault identifies two forms of power that govern society: sovereign power, which relates to those born with power, and normalising power, which relates to the right to control and administer life. As elements making up normalising power, Foucault distinguishes between discipline and biopower.[16]

Discipline is 'a mechanism of power which regulates the behaviour of individuals in the social body.'[17] This power is manifested through various forms of surveillance. Foucault uses the panopticon prison design by Jeremy Bentham as a metaphor for the monitoring of society by government.[18] This design dictates that prisoners are constantly being watched by guards in a guard tower, which is central to the prison.[19] These guards can see each and every cell. The idea here is that each individual acts as if they are constantly being watched, whether there is a guard in the tower or not. This is a way of regulating the behaviour of members of a community. Applying this to our society today, it is clear that perhaps we are being monitored through institutions such as schools, universities, South African Revenue Services (SARS) and the like. This can be seen as a form of imprisonment as individuals are not free to make their own decisions without a consequence or judgment. Perhaps there are some who are able to escape the walls of this monitoring, but many are confined and unable to break free from the mould in which society has placed them.

Biopower relates to the administration and production of life.[20] This dictates that society has been governed to such an extent that we now govern ourselves. Foucault explains that power is not a thing, but rather a relation and it is present at even the most micro levels of social relations.[21] Through understanding Foucault's ideas on power

13 https://www.marxists.org/reference/subject/philosophy/help/marxism.htm (Accessed 31 May).
14 Douzinas & Gearey (n 1 above) 12.
15 As above.
16 Veitch (n 2 above) 265.
17 Michel-Focault.com 'Key Concepts' 30 October 2010 http://www.michel-foucault.com/concepts/index.html (accessed 31 May 2015).
18 Veitch (n 2 above) 267.
19 As above.
20 As above.
21 Michel-Focault.com 'Key Concepts' 30 October 2010 http://www.michel-foucault.com/concepts/index.html (accessed 31 May 2015).

dynamics, it is clear that power gives rise to structures. Although Foucault disagrees with the structures created, he was able to identify them and suggest we move away from such a hierarchy. The law today, is a source of power and although power seems positive, perhaps it is the very thing hindering our freedom of identity.

Hobbes and Locke's ideas on the social contract into which all citizens enter, dictate that we give over our own power to the state in exchange for protection. As beneficial as this may seem for individuals, perhaps we are ultimately handing over our identities in conforming to that which society dictates we should be. Does the power of the state result in a decrease in our independence? It is possible that by allowing this difference in power, we are subjecting ourselves to ownership by the state just as the proletariats are owned by the bourgeoisie?

To summarise the above points, through the power dynamics and inherent levels of authority in any society, structures are created with or without the law. The law adds to these levels, a binding force which makes them a reality. It is clear that these structures will hinder the ability of society to find their own identities whilst they are under constant surveillance. This obligation to conform to society and abide by its rules, results in a suppression of the freedom we think we are afforded in a democratic society.

3 How do these societal structures influence gender roles? A feminist perspective

The first thing doctors assess at the birth of a child, and often even while the foetus is still developing, is the sex of the baby. As mentioned above, our Constitution provides for equality for all human beings, regardless of their sex. This begs the questions why the sex of a child is such a concern. Jurisprudence tutorial classes have influenced my thinking on the importance of the distinction between sex and gender. Sex relates to the biological make up of an individual — their reproductive organs, while gender refers to the sexual orientation of a person – the way in which they identify themselves. The gender of a person does not have to be and often isn't inline with their sex. Perhaps we could relate sex and gender to a restricted and general perspective on the law. Sex — a restricted determination of what a person shall be identified as, for the remained of their lives: a boy or a girl. Only two options — the answer is selected before a person has even breathed their first breath, let alone before they have the cognitive ability to make a choice (I will discuss the importance of choices to the human brain and functioning below). However, gender — the general approach, allows one to make this choice at any stage in their lives. This is an ever changing, more fluid

concept. One may be a boy or a girl or anything in between.[22] I am aware of the flaw in this metaphor, as we will never be able to drive out sex or gender as a whole, as perhaps we could drive out a restricted or general approach to the law. However, we still have a choice as to whether sex or gender will be the factor by which we identify each other and ourselves.

Traditional societies often restrict a person to a heterosexual orientation.[23] Should the law be structured to accommodate this traditional approach alone? Holmes so eloquently answers this question: 'It is … revolting if the grounds upon which [a rule of law] was laid down have vanished long since, and the rule simply persists as a blind imitation of the past.'[24] Douzinas and Gearey suggest that social being is not found through the 'static repetition of … a series of laws' but through change and transformation in social relations.[25]

In Dowling's article, 'The problem of gender stereotyping'[26] the focus is on the fact that although certain biological differences exist between men and women, the gender roles allocated to them by society are not justified sufficiently by those differences.[27] Dowling presents a variety of arguments relating to gender roles. Regarding traditional domestic roles of men and women, women bear children and have the nurturing, caregiver abilities necessary for the maintaining of a household.[28] Men, on the other hand, take on the role of providing food, clothing and financial maintenance of the mother and child.[29] This seems to be the 'natural' arrangement of domestic roles, which leads to men and women assuming their positions as such.[30] Wilson speaks of societies exaggerating the sexual differences of its members.[31] This can be seen as a form of programming by society.

Men are most likely able to perform the duties of a woman, just as women are most likely able to perform a man's duties, but by exaggerating their sexual differences, which insinuate strength and rationality and weakness and emotion in men and women respectively, individuals are moulded to perform their traditional gender roles. Some may say that despite these allocated roles,

22 The LGBTQIA (lesbian, gay, bi-sexual, transgender, queer, intersexual or asexual) movement reiterates the various possibilities of gender — the spectrum of options from which an individual may choose to identify as.
23 R Jewkes & R Morrell 'Gender and sexuality: Emerging perspectives from the heterosexual epidemic in South Africa and implications for HIV risk and prevention' (2010) 13 *Journal of the International AIDS Society* 9.
24 O Holmes 'The path of the law' (1897) 10 *Harvard Law Review* 469.
25 Douzinas & Gearey (n 1 above) 11.
26 Dowling (n 6 above) 41.
27 As above.
28 As above.
29 As above.
30 As above.
31 EO Wilson *On human nature* (1978) 132.

members of society are free to choose not to follow this same pattern. Wilson provides a counter argument to this: 'we are discouraged from trespassing on what is regarded as the other's role by various sorts of social disapproval.'[32] It is seen even in case law, that courts condone the set gender roles of society. In the *Hugo* case, the court had to decide whether or not to grant a presidential pardon to an imprisoned father. The court recognised that not granting the pardon would seem to be in favour of the stereotype that women are the primary caretakers of their children but still found that not granting the pardon was not unfair discrimination.[33] Botha believes the court missed an opportunity to challenge these gender roles and allow for transformation of gender equality in South African legal precedent.[34]

In the past, women have been reduced to nothing more than glorified housekeepers. This is true to an extent in the work place. Women are undermined for being too emotional or for not being rational enough. Women experience a 'glass ceiling' which bars them from advancing to executive-level jobs.[35] Ann Morrison describes this glass ceiling barrier as being so subtle that it is transparent, yet so strong that it prevents women from moving up the corporate hierarchy.[36] Is there a way to avoid this oppression or are women born subject to it?

'One is not born but becomes a woman.'[37] The famous words of Simone de Beauvoir serve as food for thought when considering the influence society has on females. It is suggested that females are born females and then groomed by society to become women. Barnett looks at the reason women are still oppressed in society despite the formal equality provided through education, employment and the likes.[38] Radical feminists argue that the law, which is a male dominant institution, supports the inequality of women.[39] It is suggested that the inherent masculinity of the law prevents women being afforded the equality they appear to be given in the Constitution and legislation. To understand why this is, we should place the law in context to understand the history that brought it into existence.[40] In the *Persons case*, Lord Sankey stated that:

> The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of

32 Wilson (n 31 above) as discussed in Dowling (n 6 above) 42.
33 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) as discussed in Botha (n 7 above) 18.
34 As above.
35 S Wärnich & S Platt (eds) *Human resource management in South Africa* (2015) 114.
36 Feminist Majority Foundation 'Empowering women in business' 2014 http://www.feminist.org/research/business/ewb_glass.html (accessed 1 June 2015).
37 de Beauvoir (n 5 above) 239.
38 Barnett (n 4 above) 21.
39 Barnett (n 4 above) 18.
40 Barnett (n 4 above) 23.

> the times often forces on man customs, which in later years were not necessary.[41]

This quote brings to mind the importance of memory in our South African culture, as this is applicable to the courts' current approach to the law. Understanding where we come from and why certain laws were created will assist in understanding the purpose of such laws. That being said, if a law serves no purpose now, it should not exist. It is all very well to be able to recognise that a law existed out of necessity many years ago, but if we are a country of transformation, we should be constantly adjusting our laws to meet the needs of society. More women want to leave the home and build careers for themselves in the corporate world. Although formal equality dictates that this is allowed while in reality, there is a large amount of substantive equality lacking. Women are wanting to change the way they see themselves and the way they are identified by their peers. In order to do this, the law needs to be enforced in a gender-neutral manner. This will require in depth assessment of the laws governing women, women's rights and their application. To understand the purpose of laws in relation to women, let us look at what a woman really is and the needs of a large part of the population.

'Woman' is a socially constructed individual.[42] To define the concept of a woman, it is essential to look at its opposite: men.[43] When comparing these two concepts through the use of words such as 'masculine' and 'feminine', 'strength' and 'weakness' it is clear that men are seen as superior and women, inferior.[44] Perhaps Derrida's thoughts on fundamental contradictions[45] leading to a parasitic effect where one creature makes itself stronger by weakening another, could explain the way in which women are seen as inferior and 'incidental'[46] to men. Perhaps through enhancing the volume of women's voices, the oppression by societal structures and the law may be shifted to a more inclusive, general approach to women in society. By looking at women's experiences during times of oppression (i.e. memory), we are able to use the past as a basis from which to move forward in societal transformation.[47] Barnett makes a very valid point in stating that the awareness of women needs to be increased because many women do not recognise oppression despite being the object of it.[48] The inferiority of women has become so natural, that it is not disputed.[49] De Beauvoir and other feminists argue that this

41 *The Persons case* (n above) 128.
42 Barnett (n 4 above) 15.
43 As above.
44 As above — discussing the opinion of Jacques Derrida.
45 G Minda *Postmodern legal movements: Jurisprudence at century's end* (1995) 111.
46 de Beauvoir (n 5 above) 16.
47 Barnett (n 4 above) 20.
48 Barnett (n 4 above) 12.
49 As above.

acceptance stems from a 'socially fostered ignorance of women's alternatives'.[50] If women do not know any better, they do not realise the severity of their circumstances.

So, what the issue boils down to is this: over many centuries, society has been abiding with specific gender roles. These were created by the law at first and have continued to exist through human tradition. In terms of these gender roles, women are belittled and believed to be inadequate to compete with men — be that in the workplace, education or financial standing in society. Furthermore, many women do not realise they are being oppressed due to the normalness of their role as a caretaker or maintainer of the home. Furthermore, there is no obvious alternative to this role. This influences the way in which women see themselves and ultimately their identities. If women are not free to determine their role in their own home or workplace, it is not likely they will be able to form an individual identity. In our democratic society, our Constitution promotes freedom of all individuals, yet the traditional roles in society dictate women abiding by a pre-set routine and practice that provides no freedom or leeway. In addition to the effect these societal structures have on women, let us look at the impact they have on the human brain.

4 How do societal structures influence the individual? A neuro-science perspective

David Rock, co-founder of the Neuroleadership Institute, has focused his research in the field of social neuroscience, which looks at the way humans relate to each other and to themselves.[51] The crux of Rock's work revolves around the SCARF model, an acronym for the five domains of human experiences: status, certainty, autonomy, relatedness and fairness.[52] These five domains activate either a 'primary reward' or 'primary threat' response in the brain.[53] For example, if one feels the fairness of a situation has been threatened, their brain will react in the same way it would had their life been threatened.[54] If a person's ego is boosted and therefore their status rewarded, their brain will respond as if they had received a monetary reward.[55] Through a basic understanding of the brain, employers can enable increased employee productivity. It seems fitting to discuss autonomy and status in more depth, since these are most applicable to my research.

50 de Beauvoir (n 5 above) 29 as discussed by Dowling (n 6 above) 45.
51 Rock (2008) (n 9 above) 1.
52 As above.
53 As above.
54 As above.
55 As above.

Autonomy can be defined as a person's ability to make his or her own choices and influence the outcome of a certain situation. This domain of the SCARF model, in application, dictates that if individuals have a choice between two or more options, or even the perception of choice, their reward circuitry will be activated. It is clear, therefore, that when individuals are micro-managed, and deprived of choice, the brain generates a strong threat response.[56] This will send a person into the well-known fight or flight mode. This affects, among others, productivity and creativity.[57] If we relate this example to society as a whole, it is possible that we are micro-managed by the government through various forms of regulation tactics. Furthermore, we are born into a world where our gender and roles in society have been decided before hand and we are groomed into a life of complying with that. This means we do not even get a choice regarding who or what we would like to identify as or with. Botha mentions that previously disadvantaged individuals are excluded from certain political communities and are therefore denied the right to exercise their own autonomy "to shape their identities".[58] Without choice about our own identities, the brain is in a constant mode of defence — fighting off what it perceives to be a life-threatening situation: a lack of autonomy. Perhaps the rebellion of many individuals in society can be attributed to the fact that social structures deprive them of making decisions regarding their own identities. For example, 'a study of teenagers in Western cultures found that teenagers have fewer choices than a felon in prison.'[59] These very communities experience teenage rebellion or the 'terrible teens' as it is commonly known, to a large extent. A coincidence? I think not.

Status, as an element of the SCARF model also seems applicable to a certain extent regarding human identification. Status has to do with importance relative to others, and seniority.[60] This implies that when a person feels important and valued, this triggers their primary reward response. Perhaps in a society where many people are undermined and particularly women, as discussed above, feeling valued could make a significant difference to a person's engagement with society and productivity.

It is my belief that although social neuroscience has focused primarily on the workplace, if these factors are considered in the drafting of legislation, the deciding of judgments and the implementation of the law, this could make a huge impact. If members of the community feel important, and instrumental in

56 Rock (2008) (n 9 above) 5.
57 Rock & Tang (n 9 above) 5.
58 Botha (n 7 above) 12.
59 Rock (2009) (n 9 above) 125.
60 Rock (2008) (n 9 above) 3.

making a decision and having a choice, and therefore rewarded, attitudes toward the law could change. This may lead to more obedience to the rules and regulations of society. Including these scientific factors in the implementation of the law could serve to expand our approach: a more general jurisprudence.

My argument regarding neuro-science is that if the brain is impacted through a lack of choice in the making of everyday decisions, we can only ask what the impact is when individuals are deprived of autonomy in decisions about their identity. If society's traditions and roles determine how individuals should be identified, this leaves them with no choice in the matter — a situation to which, we can see, the brain does not respond well. Furthermore, being categorised to match the standards of society's 'boxes' results in a lack of a feeling of importance and a decrease in the status of an individual. These outcomes give rise to the primary threat response described above. Prolonged stress results in high cortisol levels leading to ill health. This response should be avoided at all costs. In maximising performance in an organisation, it is proposed by Rock and Tang that the average level of activation of threat circuitry be reduced.[61] It is my view that leaders of our country and implementers of the law should aim to do the same. Deep engagement from a community is experienced when people feel rewarded from all five domains of SCARF.[62]

5 Conclusion — the way forward: The law and our identity

Through the above discussion, it is clear that social structures play a major role in the way humans identify themselves. Firstly, they are not able to make decisions regarding their identity without society 'programming' them to fit a mould that was determined many centuries ago. Through the gender roles allocated to individuals of different sexes, society is able to regulate the way in which people define their existence. Alongside being 'boxed' and categorised, women have the added pressure of trying to escape the inherent maleness of society. This engrained practice in society of undermining women is one that is difficult to suppress and changes the way women see themselves. This alters their identities without women even making a conscious decision to acknowledge such oppression. Furthermore, research has shown the impact on the brain of strict social structures, which restrict an individual's choice. Lack of

61 Rock & Tang (n 9 above) 5.

62 Rock & Tang (n 9 above) 3 — an example of a way to do this is through working for the greater good and improving some social condition. People in positions of power would benefit the community while benefiting themselves.

autonomy regarding large life-altering decisions such as one's identity should not be hindered by outdated, irrelevant practices of society. It is my hope that a more general and open approach to the law will allow for a more inclusive approach to women. By considering factors other than just the economy, class, race and sex, hopefully we will be able to experience true transformation in our country. In bringing back the importance of individuality, identity and moral to the law, we may reignite the law's spirit. 'A law without a spirit is like a body without a soul: at best a corpse, at worst a zombie.'[63]

63 Douzinas & Gearey (n 1 above) 18.

THE IMPOSSIBILITY TO BE 'LOST IN TRANSFORMATION'

*by JJ Van der Walt**

1 Introduction

> This Constitution[1] provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development [of] opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.[2]

This quote is the product of the National Unity and Reconciliation statement provided for in the Interim Constitution. The quote is neither ambiguous nor difficult to comprehend as the first sentence thereof makes it patently clear that the Interim Constitution is a bridge between our past and future. Accordingly, from the adoption of the Interim Constitution South Africa, as a nation, was all too aware from what point this new constitutional democracy took its inception (an inegalitarian society that was the product of Apartheid) and where it is heading (*inter alia,* towards the *achievement* of equality and the establishment of 'a society which affords each human being equal treatment on the basis of equal worth and freedom').[3] I can only wonder in dismay how one can lose oneself in a process that was all too clear from the start.

I must pause my discussion in order to indicate that I purposefully took it upon myself *not* to consult other authors on the specific topic of 'lost in transformation' for the simple reason that I intend to

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1 The reference here is to the Constitution of the Republic of South Africa Act 200 of 1993 (hereafter the 'Interim Constitution').

2 National Unity and Reconciliation statement of the Interim Constitution.

3 *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 41 (hereafter '*Hugo*').

convey to the reader that the law, together with some, albeit limited, recourse to legal philosophy can provide a concise answer to the question whether it is *possible* to be lost in transformation. I am taking a step back and asking whether the question posed is an appropriate one. Accordingly, the purpose of this work is an attempt to argue that South Africa as a society cannot be lost in transformation, but that the process of transformation can be misguided or ineffective is, in my opinion, irrefutable.

Because of our particular history, equality jurisprudence will be used as the subject matter to indicate whether our society can be lost in transformation. In the first instance, I discuss the *condictiones sine quo non* of post-apartheid South African equality jurisprudence in the second part. Thereafter, in the third part, the aspirational *end* — the achievement of equality — serves to identify, through our constitutional values and section 9 of the Constitution,[4] three power relations which require addressing for our society to transform. With reference to Legal feminism, Critical Race Theory and Queer Theory, patriarchy, white supremacy and heteronormativity are identified as power relations that are the, current, object of transformation in our society.

2 The *conditiones sine qua non* of South African post-apartheid equality jurisprudence

It is trite within the South African constitutional jurisprudence that the Constitution is inherently transformative and therefore committed to transformation.[5] Furthermore, dignity, as a foundational value, adopts a role of hermeneutic importance, alongside freedom and equality, in determining the content of the rights contained in the Bill of Rights as well as the justifiability of the limitation of these rights.[6] It is therefore important to discuss

4 S1 of The Constitution of the Republic of South Africa, 1996 (hereafter the 'Constitution') provides for the values of 'the achievement of equality', 'non-racism[,]' and 'non-sexism' and s9(3) prohibits discrimination on the grounds or, *inter alia*, race, gender and sexual orientation.

5 *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 9 BCLR 891 (CC) par 7 (hereafter '*Bel Porto*'); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC) para 76 (hereafter '*Bata Star*'); *Minister of Finance v Van Heerden* 2004 11 BCLR 1125 (CC) para 25 (hereafter "*Van Heerden*"); *South African Police Service v Solidarity abo Barnard (Police and Prisoners Civil Rights Union as amicus curiae)* 2014 10 BCLR 1195 (CC) para 29 & 78 (hereafter '*Barnard*').

6 O'Regan 'From form to substance: the constitutional jurisprudence of Laurie Ackermann' (2008) *Acta Juridica* 15.

Transformative Constitutionalism and the centrality of dignity[7] as *condictiones sine qua non* of South African post-apartheid equality jurisprudence.

2.1 Transformative constitutionalism

As stated above, recognition of Transformative Constitutionalism is indisputable as the text of the Constitution itself evokes notions of transformation.[8] Furthermore, not only the Constitutional Court[9] recognises the importance of Transformative Constitutionalism, but other courts[10] also follow its stead.[11] The meaning of this concept is, however, not settled or uncontested.[12] Because the meaning of Transformative Constitutionalism is contested, I will provide but *one* conception thereof, which is by no means *novel*, but is the only relevant one for the discussion at hand. Accordingly, I subscribe to Klare's basic understanding of the concept as a basis from which I will extract the 'elements' of Transformative Constitutionalism, which are relevant for the enquiry as to what the content of equality ought

7 The Constitutional Court has placed the value of dignity at the core of our equality jurisprudence, *Harksen v Lane* 1997 11 BCLR 1489 (CC) para 46 & 49 (hereafter '*Harksen*'); *Prinsloo v Van der Linde* 1997 9 BCLR 759 (CC) para 31 – 33 (hereafter '*Prinsloo*'); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 124 (hereafter '*National Coalition*').

8 Preamble of the Constitution read with s1(a) of the Constitution.

9 *Barnard* (n 5 above) para 29 & 78, Moseneke ACJ, writing for the majority, observed that the Constitution has 'a transformative mission and permits government to take remedial measures to redress the lingering and pernicious effects of [A]partheid' and Cameron, Froneman JJ and Majiedt AJ added that '[i]t does this even though this commitment means that individuals may be adversely affected by the process of transformation'; *Bata Star* (n 5 above) para 76, Ngcobo J, as he then was, described transformation as a process and that 'profound difficulties … will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them'; *Van Heerden* (n 5 above) para 25, Moseneke J, again writing for the majority, affirmed that 'our Constitution heralds … the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework'; *Bel Porto* (n 5 above) para 7, Chaskalson CJ explained that '[t]he difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with … the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others'; Langa 'Transformative constitutionalism' (2006) *Stellenbosch Law Review* 351 — where the previous chief justice draws attention to *S v Makwanyane* 1995 6 BCLR 665 (CC) para 262 where it was acknowledged that 'the Constitution expressly aspires to … provide a transition from … grossly unacceptable features of the past to a conspicuously contrasting … future' and *Du Plessis v De Klerk* 1996 5 BCLR 658 (CC) para 157 for yet another example where the Constitutional Court accepted that '[the Constitution] is a document that seeks to transform the *status quo ante* into a new order'.

10 *Rates Action Group v City of Cape Town* 2004 12 BCLR (C) para 100; *City of Johannesburg v Rand Properties (Pty) Ltd* 2006 6 BCLR 728 (W) para 51 – 52.

11 Langa (n 9 above) 351.

12 As above; Pieterse 'What do we mean when we talk about transformative constitutionalism?'(2005) *South African Journal of Public Law* 155.

to be. For the learned author this concept entails an enduring and long lasting project of 'constitutional enactment, interpretation, and enforcement … *committed* to transforming a country's political and social institutions and *power* relationships in a[n] … *egalitarian* direction' [own emphasis].[13]

The Constitution is committed to transformation and the object of transformation is the hierarchical structure of our society and therefore the power relationships prevalent therein. The requirement that transformation must be conducted in an egalitarian direction has two consequences. The first of these consequences is the recognition of a substantive notion of equality[14] and the second, which is not that evident, entails that equality is to be achieved in an egalitarian *fashion*. Equality is to be achieved and aspired to while having regard to human dignity:

> [a] transforming Constitution such as ours will only succeed if … restitutional equality becomes a reality and basic material needs are met, because it borders on the obscene to preach human dignity to the homeless and the starving. This must, however, be achieved in a manner consonant with the human dignity of all. [15]

Transformative Constitutionalism is accordingly the constitutionally recognised basis upon which the enquiry into the consent of equality must be founded on and from which it must be expanded. To this end, there are two necessary 'elements' of Transformative Constitutionalism: a commitment to an egalitarian directed process of transformation and the transformation of power relations.

Substantive equality within Transformative Constitutionalism can be read in conformity with the Constitutional Courts' understanding of substantive equality because it has been held that the Constitution provides for not only the right to and the value of equality, but rather the *achievement* of equality, which is both a value and a constitutional right.[16] In *Bato-Star* it was made clear that our Constitution is *committed* to the *transformation* of our society and for Klare Transformative Constitutionalism entails an enduring and long lasting constitutional project of a *committed transformation* of a country in an *egalitarian* direction.

The commitment to an egalitarian process of transformation must be guided by the value of dignity. The reason why the mentioned process need by guided by dignity is because the process of transformation must be carried out within the precepts of our Constitution. Although our Constitution heralds the start of a credible

13 Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150.
14 Langa (n 9 above) 352; Pieterse (n 12 above) 159.
15 Ackermann 'The legal nature of the South African constitutional revolution' (2004) 4 *NZ L Rev* 678 – 679.
16 *Van Heerden* (n 5 above) para 22.

and abiding process of reparation for past exclusion, dispossession, and indignity, such process must be carried out within the discipline of our constitutional framework and the profound difficulties facing our constitutional order must not stand to be underestimated.[17] Thus, it cannot be overemphasised that this process should be carried out in accordance with the Constitution and its Bill of Rights.[18]

Moving towards the ever-prevalent power relations within any society, substantive equality is appropriate because of its context driven approach; in other words a court in determining a question on equality (discrimination) will have regard to the position of the complainant in the society; for example, he or she forms part of a group, which was discriminated upon in the past.[19] It is also important to note that regard must be had to the *nature of the power*[20] in terms of which the discrimination was effected.[21] It is also trite that constitutional interpretation comprises of a purposive approach where the text is interpreted with due regard to context and generosity.[22]

The position as provided up to this point is admirable, but insufficient. With utmost respect, our positive law regarding equality requires something more. Although our Constitution is aspirational in its approach to equality, or its achievement rather, any 'rational' human being must accept the impossibility of the achievement of equality. Therefore, the following passage in *Hugo*, with respect, stands to be criticised:

> … [a]lthough a society which affords each human being equal treatment on the basis of equal worth and freedom *is our goal*, we cannot *achieve* that goal by insisting upon identical treatment in all circumstances before that goal *is achieved*.[23] [own emphasis]

It is argued that a society that affords equal treatment on the basis of equal worth and freedom is but an aspirational end to long for, but never to realise; one we all seek, but stands never to be found; an end to strive for, but never to be achieved. By accepting the hermeneutic role of dignity, I will advocate and support an *ethical* understanding

17 *Van Heerden* (n 5 above) para 25; *Bel Porto* (n 5 above) para 7.
18 *Bel Porto* (n 5 above) para 7.
19 *Harksen* (n 7 above) 49.
20 Although the Court did write in the context of presidential pardon, I argue that this passage can appropriately be applied to, for example, the use of public power (position of authority) to discriminate, under the guise of 'affirmative action' against a white male — this will be evident where a public official clearly acts *mala fide* based on racial considerations, i.e. acting in a racist manner. Furthermore, in the private sphere where a male dominates the female within the normalized understanding of the so-called 'nuclear family' where the role of the male is one of domination over the female; i.e. this power is patriarchy.
21 *Hugo* (n 3 above) para 43.
22 Currie & De Waal *The Bill of Rights Handbook* (2014) 135; *Viking Pony Africa Pumps (Pty) Ltd t/a Tricon Africa v Hidro-Tech Systems (Pty) Ltd* 2011 1 SA 327 (CC) para 32.
23 *Hugo* (n 3 above) para 41.

of the Constitution. Thus, and to draw from Cornell, the Constitution is as much law as it is an ethical summons directed at South African citizens to admit, subscribe to and live in accordance with the aspirational ideals as enumerated in section 1 of the Constitution.[24] Accordingly, the Constitution is not the 'final' Constitution,[25] but rather a legal instrument providing us with aspirational ends and the means with which we can and should transform our society through the continuum of freedom, equality and dignity. Transformation, in my opinion, is encapsulated in an aspirational 'spirit of transformation' as opposed to a social fact, being static in nature.

2.2 Human dignity

In the previous sub-section, I expressly stated that Transformative Constitutionalism requires an egalitarian directed process of transformation and it is my submission that such process is to be found in the value of and the right to human dignity.

As already indicated, both the Constitution[26] and Transformative Constitutionalism provide for substantive conceptions of equality, but the question is equality of what? Discussions on equality usually entail the notion of treating or dealing with those who find themselves in the same legal position or situation the same, alike, or similarly.[27] The latter can be associated with an Aristotelian understanding of equality, which entails that 'equals ought to be treated equally and "unequals" treated unequally in proportion to their inequality'.[28] This conception of equality is too narrow and simplistic and therefore stands to be rejected, because it fails to answer the question: equal in respect of what? Accordingly, and to answer the posed question: human beings are equal in respect of their innate, common and inalienable human worth (or human dignity).[29]

The reduction of equality to an essentialist understanding of treating 'like' 'alike' cannot be justified in a post-apartheid

24 Cornell 'Bridging the span towards justice: Laurie Ackermann and the ongoing architectonic of dignity jurisprudence' (2008) *Acta Juridica* 18.
25 As above.
26 *Barnard* (n 5 above) para 28; *Van Heerden* (n 5 above) par 25; *Brink v Kitshoff* 1996 6 BCLR 752 (CC) para 42 (hereafter '*Brink*'); *Bata Star* (n 5 above) para 74.
27 Hahlo & Kahn *The South African legal system and its background* (1968) 34 – 45; Currie & De Waal (n 22 above) 210.
28 Ackermann 'Equality and non-discrimination: some analytical thoughts' (2006) 22 *South African Journal on Human Rights* 597 600.
29 Ackermann (n 28 aove) 610 – 612; *Hugo* (n 3 above) para 41 & 47; *Prinsloo* (n 7 above) para 31 – 33.

constitutional democracy and equality as 'sameness in treatment' is contrary to the values of equality[30] and dignity. The nub of my argument is that substantive equality requires treatment of human beings as being of *equal human worth* (or dignity) as opposed to requiring mere equality in treatment.

To bring this discussion back to whether being lost in transformation is possible the reader is referred to the two *condictiones*. The Constitution is transformative, requiring transformation along *egalitarian* lines. The latter introduces human dignity as the lodestar[31] of achieving equality, in other words the *manner* in which we aspire to transform from a grossly unequal society to one which affords each human being equal treatment on the basis of equal worth and freedom.[32]

3 The achievement of substantive equality

It has been argued that Transformative Constitutionalism and human dignity are *condictiones sine qua non* for post-apartheid South African *equality* jurisprudence. Accordingly, for South Africa to achieve equality transformation is constitutionally mandated and this process must be conducted in such a manner as to have regard to the human dignity every person involved therein. For my argument to succeed I must authoritatively answer the questions of *what* needs to be transformed, *from* where or what point must the process of transformation commence and *into what* or *where to* is transformation required or mandated? It is to these questions to which I now turn.

Albertyn & Goldblatt, writing in the early years of our constitutional democracy, stated that our new society is one based on substantive equality and the transformation from one side of the bridge to the other (or rather in accordance with my understanding of transformation – the journey on the bridge of transformation) will:

> require a complete *reconstruction* of the state and society, including a redistribution of *power* and *resources* along *egalitarian* lines. The challenge of achieving equality within this transformation project involves the *eradication* of *systemic* forms of *domination* and *material disadvantage* based on *race, gender, class* and other *grounds of inequality,* [for example sexual orientation]. It also entails the

30 *Van Heerden* (n 5 above) para 25, Moseneke J, as he then was, affirming that the Constitution has a 'conception of equality that goes beyond mere formal equality and the mere non-discrimination which requires identical treatment, whatever the starting point or impact'; *Bata Star* (n 5 above) para 74, Ngcobo J, as he then was, observed that '[i]n this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in doing so entrench existing inequalities'; Currie & De Waal (n 22 above) 213 – 215.

31 Ackermann 'Human dignity: lodestar for equality in South Africa' (2012) 74.

32 *Hugo* (n 3 above) para 41.

> *development of opportunities* which allow people to realise their full human potential within positive social relationships.[33] [own emphasis]

The Constitutional Court has on multiple occasions given guidance on the questions posed in the first paragraph of the third part of this discussion. In *Barnard*, Moseneke ACJ, writing for the majority, observed that the Constitution has 'a transformative mission and permits government to take remedial measures to redress the lingering and pernicious effects of [A]partheid' and Cameron, Froneman JJ and Majiedt AJ added that '[i]t does this even though this commitment means that individuals may be adversely affected by the process of transformation'.[34] It was also acknowledged by the Constitutional Court in *Makwanyane* that 'the Constitution expressly aspires to … provide a transition from … grossly unacceptable features of the past to a conspicuously contrasting … future'[35] and in *Du Plessis* the Constitutional Court accepted that '[the Constitution] is a document that seeks to transform the *status quo ante* into a new order'.[36] As a transformative document, our Constitution enjoins us to re-imagine the power relations within our society, because it requires, from us as citizens, to take active steps to achieve substantive equality,[37] in order to assist those who are *still* victim of past discrimination by developing and enhancing their economic and social well-being so as to enable them to *fully* exercise their inherent capacity as full citizens of the Republic.

O'Regan has, rather convincingly, conveyed that the Constitution affirms the moral human agency of every human being.[38] O'Regan considers this moral human agency as being normative in nature in the sense that this agency is indicative of the capacity of every human being to exercise a morally responsible choice.[39] Furthermore, the society must enhance this capacity and the Constitution imposes a *positive* duty on the State to develop the conditions in which the moral agency of every human being is to prosper.[40]

One of the consequences of past discrimination is material disadvantage and the latter solidifies some South Africans as 'still-victim' of past discrimination and in consequence constrain their ability to act as moral agents and fully exercise their inherent capacity as full citizens. This disadvantage is structural in nature and found in the power relations *still* prevalent in our society. I

33 Albertyn & Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248 249.
34 *Barnard* (n 5 above) para 29 & 78.
35 *Makwanyane* (n 9 above) para 262.
36 *Du Plessis* (n 9 above) para 157.
37 *Barnard* (n 5 above) para 29.
38 O'Regan 'The three Rs of the Constitution: responsibility, respect and rights' (2004) *Acta Juridica* 92.
39 O'Regan (n 38 above) 88 & 92.
40 As above.

accordingly allude the reader to some of these power relations which must be identified and eradicated in our process of transformation.

3.1 Legal feminism: Patriarchy and male supremacy

Feminists agree to the inclusion of patriarchy within Legal Feminism in general, but seeks recourse to the concept and accords importance thereto differently.[41] Patriarchy is a concept that denotes the systems and structures in society that sustain male power[42]. Accordingly, because of the systemic nature of patriarchy the privilege of being male exists independently from the intention and actions of a male.[43]

For transformation to succeed the systemic nature of patriarchy must be eradicated by transforming (not merely changing or reforming) the social structure of our society. In other words, the normality of men dominating women must be exposed and discarded. A contemporary example to convey the point: the accepted normality of the conception of reality as conveyed by sport. The role of women is that of a 'sporting wife'. Another example is that of the role portrayed by politics: 'the wife of the politician'.

To my knowledge there have not been made any mention of a 'sporting man', as in the same context of a 'sporting woman', nor of 'the husband of the politician'. The message that I am attempting to convey is that the structure of the society is of such a nature as to normalise the role of the female as supporting the male in order for the latter to achieve his own success as if the success of the female is dependent upon that of the male. The female is not known for that which she *is* but rather for *being* the *wife* of the male in her role of supporting the latter. In following upon an ethical conception of the Constitution, the author will develop content from the thought of Ethical Feminism. Neither the right to equality nor the value of equality should therefore be defined nor understood as it *is* but rather as it *ought* to be — the emphasis being on the aspirational commitment of *achieving* substantive equality.

In following Ethical Feminism there is no quest for the transfer of power by appropriating that which 'belonged' to the man. Conversely, Ethical Feminism involves *redefinition* of 'fundamental concepts' and I associate this redefinition of concepts with the re-imagining of power relations[44] because the redefining concepts (for

41 Bonthuys *et al Gender, law and justice* (2007) 19.
42 As above.
43 As above.
44 De Vos 'The past is unpredictable: race, redress and remembrance in the South African Constitution' (2012) *South African Law Journal* 80; This re-imagining of power relations exactly that which Moseneke, DCJ conveyed in *Barnard* (n 5 above) para 29.

example equality) will lead to the re-imagination of power relations, which re-imagined relations can question and reject the normality of the structural organisation of society and thereby produce *social* transformation. There is a call for redefining concepts as well as defining equality with emphasis upon the aspirational ends, but the question that needs to be answered is from whose perspective? I argue for and advocate a so-called 'feminist standpoint theory', in other words: to put women in the centre of legal thought, to direct that thought from the standpoint of a woman[45] and to recognise that sameness/difference between man and woman is an issue of power (male supremacy), and that one can distance oneself from pre-determined (male) norms.

In conclusion, by adopting the post-modernist tool known as deconstruction and applying an Ethical Feminist approach by expressing how something *ought* to be, not how it *is*, transformation, in this context (patriarchy and male supremacy), might just be possible.[46] One can accordingly and authoritatively argue that we are *not* lost in transformation.

3.2 Critical race theory: White superiority

De Vos alludes to the complexities of 'questioning the positions and discourses of privilege and dominance that stem from an ideology of "white" superiority and hegemony'.[47] White superiority is indicative of the power relationship between races, that being the white minority standing in a dominant relation to the black majority in South Africa. This power is expressed in economical, educational and accordingly developmental terms. The latter exposition is not merely fancy and popular terms stringed together, but signifies a developed understanding of white superiority and the extent thereof. Disadvantage is not only the product of a person's material conditions, but also 'a person's social status associated with his or her race'.[48] A person's social status is determined by his or her race and the latter is indicative of his or her economical position, level of education and thus his or her development as a citizen. The centrality of race and its determinative role is the outcome of the perpetuated consequences of past discrimination still prevalent today.

One of the core principles of Critical Race Theory is 'intersectionality', which emphasises the interconnection between, *inter alia*, race, gender, sex and sexual orientation.[49] I will draw from this concept in order for my notion of substantive equality to be

45 Bonthuys & Albertyn (n 41 above) 47.
46 Bonthuys & Albertyn (n 41 above) 46.
47 De Vos (n 44 above) 80.
48 As above.
49 Harris *Race and equality law* (2013) xxi.

contextual and therefore in reasoning one must move from the specific to the general and not from the general, which is abstract and usually from the point of view of the dominant class or position, to the specific. Thus, if one places race, where appropriate, in the centre of a specific equality conundrum and accept that *not only race* will play a determinative role in identifying disadvantage, transformation and its direction is anything but vague.

3.3 Queer theory: Heteronormativity

Heteronormativity is the situation that persists in a society where heterosexuality is the accepted legal, as well as moral 'norm' — thus the term heteronormativity. Heteronormativity is ostensibly not only a legal concept, but also one that 'permeates our cultural understanding of sexuality'[50] and is grounded upon the understanding that homosexual and heterosexual categories of desire are socially constructed[51] through power relations within a society in a manner that privileges heterosexual desires and oppresses (marginalise) homosexual desire.[52] The crux of the oppression that persists within a heteronormative state is that homosexual individuals cannot claim full citizenship.[53] Protection is awarded to them only to the extent that they 'conform to the hierarchal assumptions of the heteronormative state'.[54]

I identify heteronormativity as a strand of Queer Theory that can aptly indicate yet another power relation in society, but more importantly it is my opinion that the marginalisation and oppression of homosexual individuals is subject to an even more sophisticated normalising power than the oppression and marginalisation of women or people based on their race. If one identifies heteronormativity as a power relation present in our society, therefore an object of transformation, as well as understands and appreciates the consequences of heteronormativity the direction of transformation is yet again anything but ambiguous.

4 Conclusion

When the object of transformation is known as well as *into what* such object need be transformed, one can only but wonder how 'being lost

50 De Vos 'From Heteronormativity to full sexual citizenship?: equality and sexual freedom in Laurie Ackermann's constitutional jurisprudence' (2008) *Acta Juridica* 256.
51 De Vos (n 50 above) 257: 'In a heteronormative world citizens … are discursively constructed as heterosexual'.
52 De Vos (n 50 above) 56.
53 De Vos (n 50 above) 257.
54 As above.

in transformation' is even a possibility. Both the Interim Constitution and the Constitution makes it patently clear that transformation is constitutionally mandated as well as a constitutional objective. Both these documents as well as the Constitutional Court provide for guidance concerning the object of transformation[55] as well as *into what*[56] such object needs to be transformed. I therefore argue that being 'lost in transformation' is not possible in a post-apartheid South Africa because we are all too aware of our past and we have envisioned a very specific society.[57] What remains for us as South Africans is not to ponder about *where* we are in this process but to work towards achieving the constitutional ideal that is the achievement of substantive equality. In my opinion the words of Ngcobo, J (as he then was) summarises the issue at hand rather appropriately:

> [t]he *achievement of equality* is one of the fundamental goals … in the Constitution. Our constitutional order is *committed to the transformation of our society* from a grossly unequal society to one "in which there is *equality between men and women and people of all races*". In this fundamental way, our Constitution *differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities*. Our Constitution *recognises* that decades of *systematic* racial discrimination entrenched by the [A]partheid legal order cannot be eliminated without *positive action* being taken to achieve that result. *We are required to do more than that*. The effects of discrimination may continue indefinitely unless there is a *commitment* to end it.[58] [own emphasis]

Three power relations prevalent in our society are identified as objects of transformation and it must be patently clear that the achievement of equality is the *end* we sought to achieve. The content of equality and the manner in which transformation is to be conducted is also sufficiently clear for the impossibility of the state of 'lost in transformation' to be constituted as a reality. My message is accordingly clear, rather than pondering about our position in the process of transformation we can *do more* as there is no excuse in law nor fact that South Africa is 'lost in transformation. One need not have recourse to the *impossible* to discover a banal and conceptually unacceptable excuse.

55 *Barnard* (n 5 above) para 29, where the re-imagination of power relations were identified by the Constitutional Court.
56 *Makwanyane* (n 9 above) para 262; *Barnard* (n 5 above) para 29 & 78; *Du Plessis* (n 9 above) para 157.
57 Preamble and s1 of the Constitution.
58 *Bato Star* (n 5 above) para 74.

THE POLITICAL CONSTRUCTIONS OF JUSTICE: REVIEWING ANTJIE KROG'S *COUNTRY OF MY SKULL* AND THE APPLICATION OF AFRICAN JURISPRUDENCE

*by Marko Svicevic**

1 Introduction

The South African legal sphere shows a deficit in applying a general jurisprudential approach to the law. In doing so, it neglects the general jurisprudential perspective that law and politics are inherently interrelated. General jurisprudence is the approach to the legal sphere that grants the law indulgence into its sociological, psychological, linguistic and political aspects in order to determine and lay down laws which ultimately embody a true sense of justice. I therefore define the main research problem of this article as an over emphasis of restricted jurisprudence in the South African legal sphere. Restricted jurisprudence is that approach to the legal sphere which, adhering to the positive law, aims in its continuous endeavour to rid the law of any and all ethical considerations, thereby excluding morality from the legal domain.[1] Restricted jurisprudence's operation and application are in contradiction to the South African context, where a remarkable combination of historical, cultural and legal pluralistic features create a unique legal atmosphere upon which restricted jurisprudence has limited effect. I argue that if South Africa is to allow for the adoption of African jurisprudence and the incorporation of the principle of *Ubuntu* into its legal domain, such legal reform will only be achieved through a general or critical[2] jurisprudential approach. General jurisprudence would allow for an increased recognition of legal pluralism and African jurisprudence. I further argue that African jurisprudence and *Ubuntu* cannot be

* Third year BA (Law) LLB, University of Pretoria. I wish to thank Prof. Karin van Marle from the Department of Jurisprudence, who initially encouraged me to submit this paper for publishing, and especially for showing us, her students, the extremely important need to return back to a general jurisprudential approach in our law.

1 C Douzinas & A Gearey *A critical jurisprudence: The political philosophy of justice* (2005) 7 (hereafter 'Douzinas & Gearey').

2 General jurisprudence and critical jurisprudence are synonymous. However, for the purposes of this article, I use the term 'general jurisprudence'.

directly incorporated into South Africa's legal sphere, but rather, must be adopted through the South African political landscape.[3] The executive authority of the state together with its legislature, while consciously drafting and promulgating laws adhering to and incorporating African philosophy, will result in a state governed by such a philosophy. Thus, I will show that restricted jurisprudence no longer holds a position within the South African legal context and that a general jurisprudence will aid in promulgating African jurisprudence and the principle of *Ubuntu*.

This research aims to prove that politics shapes the law and, as such, can act as a catalyst to shape the law in accordance with African jurisprudence and *Ubuntu*. I structure my approach by explaining the difference between general and restricted jurisprudence and their foundations with the natural and positive law, respectively. In addition, I attempt to show that law and politics are inherently interrelated and should be viewed through a general jurisprudential perspective. I will further elaborate on the character played by politics on the South African law, both pre-1994 and in the post-apartheid era. I direct my literature review to Antjie Krog's *Country of my skull*.[4] Krog's account of the Truth and Reconciliation Commission (hereinafter referred to as the TRC) provides a platform for observation and analysis of the influence politics exerted on the law (and law enforcement) during apartheid. Krog's account of the TRC also acts as a grounding for emphasising the particular African jurisprudence portrayed by the TRC itself and, finally, showing that a political atmosphere which incorporates African jurisprudence and *Ubuntu* into its political agenda will allow for the reflection of such a jurisprudence in the legal sphere. Krog's illustration of the political shaping of the law creates a clear perspective of the influence of politics over the law. Furthermore, in attempting to illustrate this inherent power politics holds, particularly focusing on apartheid policies shaping the law (pre-1994), I too aim to show the power that politics can still play in shaping the law today, in accordance with African philosophy.

2 The jurisprudential spectrum: natural law v positivism

General and restricted jurisprudence are two focal points of viewing the law: conflicting perspectives based on conflicting schools of thought founded on opposing ideas. The dominant type of legal

3 The politics I refer to here adheres to state authority with specific focus on the executive (political) authority.

4 A Krog *Country of my skull* (1998) (hereafter 'Krog') 5 -11, 29 – 89, 113 – 198, 204 – 231.

thinking currently seen can be referred to as restricted jurisprudence.[5] Restricted jurisprudence is the endless perception of the substance of law, in which the question of 'what is law?' is revolved around.[6] It is a 'law of the law' and predominantly focuses on adherence to the positive law.[7] It is this adherence to positive law in which the problem is situated. Positivism is both the cause and effect of the moral poverty within jurisprudence.[8] The positive law is more concerned with the authority to enact rather than its substance, as John Gardner puts it:

> [Positive law] in any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of that system, depends on its sources, not its merits.[9]

The application of restricted jurisprudence should therefore not be regarded as justful, but systematic. Ultimately, the law in place represents the dominant ideology of society — 'the canonical expressions of (among others) its … political power.'[10] Furthermore, as Derrida puts it, a restricted jurisprudential perception of law is not justice but a system of regulations which ensures the enduring possibility of the use of violence to enforce the law in future and is thankful to state monopoly for this.[11]

On the contrary, general jurisprudence is centred on the ideals of justice and, as such, places a broader focus upon the law and its inherent interrelatedness, in particular, with the humanities. General jurisprudence includes the political economy of the law, the legal constructions of subjectivity, and the ways in which gender, race or sexuality create forms of identity.[12] As such, general jurisprudence is grounded in the natural law. Natural law theorists such as Plato and Aristotle argue for legitimate and just laws which can only be achieved if they promote a common good.[13]

In light of the vast array of differences (and contradictions) between general and restricted jurisprudence, it should be clear that a legal perspective which is more concerned about the law of the law, rather than the law of the people, should be avoided. This warrants

5 Douzinas & Gearey (n 1 above) 10 put it that this legal perspective imposing such limitations on jurisprudence 'may be called restricted jurisprudence'.
6 Douzinas & Gearey (n 1 above) 7.
7 J Modiri 'The crisis in legal education' (2014) 46 (3) *Acta Academia* 1– 24.
8 Douzinas & Gearey (n 1 above) 5.
9 J Gardner 'Legal positivism: 5½ myths' (2001) 46 *American Journal of Jurisprudence* 199.
10 Douzinas & Gearey (n 1 above) 8.
11 J Derrida 'The force of law: The mystical foundation of authority' (1990) 11 *Cardozo Law Review* 911.
12 C Douzinas 'A short history of the British Critical Legal Conference or, the responsibility of the critic' (2014) 25 *Law and Critique* 189.
13 W Le Roux 'Natural law theories' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 25 – 47.

that general or critical jurisprudence should be the norm for legal contemplation, both in legal education and adjudication.

3 General jurisprudence, Antjie Krog and the TRC

3.1 Antjie Krog's *The country of my skull*

Krog reflects on her intricate life during and post-apartheid and also focuses on her experiences of the TRC. The TRC was a body assembled after the fall of apartheid which dealt with restorative justice.[14] Instead of 'satisfying abstract legal principles' by punishing offenders, the TRC focused on the needs of victims, offenders and the community at large, bringing about much needed reconciliation among South Africans. *Country of my skull* can therefore be understood not only as a biographical account of Krog's experiences during the TRC, but also as a collection of testimonies during the TRC hearings and a portrayal of the influence politics played in the law (and law enforcement) during apartheid.

Although *Country of my skull* is a collection of direct testimonies of human rights violations from all sides of the struggle against apartheid, I place particular focus on the human rights violations committed by the apartheid government. I choose this as my focus in order to place it in context with the fact that it was the apartheid government that drafted and promulgated the law according to its own political agenda.

3.2 The TRC: a portrait of the political philosophy of 'justice'

A total of 21 800 testimonies were given and heard during the TRC, with roughly 1 800 perpetrators being granted amnesty for their actions. In order for a perpetrator to receive amnesty from the TRC, they had to tell the truth and prove that their actions were politically motivated — just as the law was politically-sided. As the Postamble to South African's Interim Constitution of 1993 described the TRC:

> In order to advance … reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions, and offences associated with political objectives and committed in the course of the conflicts of the past.[15]

14 The TRC was set up in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995.

15 Postamble to South Africa's 1993 'Interim' Constitution (the Constitution of the Republic of South Africa, Act 108 of 1993).

In this context, Krog's account of the TRC hearings can be viewed as a portrait depicting the political shaping of the law during the apartheid era. Throughout Krog's account of the testimonies heard during the TRC, it is made clear that the majority of those who sought amnesty relied on the assumption that their actions were indeed politically motivated.[16] A large number of Krog's accounts can be linked directly to apartheid era legislation, which in turn was created and enforced by the apartheid government.

Through her accounts, Krog clarifies that politics can completely shape the law in its favour, just as it did during apartheid. A simple reading of the testimonies and the corresponding legislation clearly shows the political shaping of the law in a way which best suited apartheid policies. Here follows a select few examples of such testimonies and the corresponding politically motivated legislation. It should be noted that this analysis is in line with a general or critical jurisprudential approach and allows for critical discussion surrounding the politics of law.

Krog subtly uses a metaphor to describe the TRC's dispensation of justice by saying that 'truth has become a woman, everybody knows her but nobody recognises her.'[17] This powerful statement can very well be applied to the politics of law. Law is a body of regulations known to everyone, yet the political landscape determines its recognition and its construction.

Several of Krog's testimonies deal with individuals being arrested on the basis of their support and/or involvement in communism and/or communist activities. On 26 June 1950, the then ruling National Party passed the Suppression of Communism Act[18] which banned the South African Communist Party and prohibited any such subscription to communist ideologies. The Act particularly restricted the lives and activities of political activists, just as the TRC's Final Report confirmed.[19] Krog inadvertently expresses the effect this law had on individuals and their families by emphasising the banishment and detention[20] of individuals based on their free will and political association.

Several testimonies relating to political crimes also sparked Krog's interest. She documented several cases where no warrant was given for the arrest of a person on the basis of being suspected of a political crime.[21] Political crimes, as Krog clarifies, are those acts that were

16 Krog (n 4 above) 5 – 11, 46 – 47, 48.
17 Krog (n 4 above) 58.
18 Act 44 of 1950. This Act was renamed in 1976 to the Internal Security Amendment Act 79 of 1976.
19 'Truth and Reconciliation Commission Final Report' Section 1, Chapter 3, Volume 2.
20 Krog (n 4 above) 65 – 68, 228 – 231.
21 Krog (n 4 above) 113 – 114, 138 – 139.

committed against the state and therefore against the ruling apartheid government.[22] The General Law Amendment Act,[23] which commenced on 2 May 1963, allowed a police officer to detain, without a warrant, any person suspected of such a political crime for a 90-day period.[24] Coupled with a legal principle referred to as the *Sobukwe* clause, any person detained for political crimes could be detained for a further twelve months.[25] The General Law Amendment Act also gave the president the power to declare certain organisations unlawful, such as the ANC's *Umkhonto we Sizwe*.[26]

Furthermore, upon the commencement of the Unlawful Organisations Act,[27] both the ANC and the Pan African Congress were immediately declared unlawful as they opposed the apartheid government. Notably, this piece of legislation was enacted just over a year after the Sharpeville Massacre. The Indemnity Act[28] was subsequently enacted to protect the apartheid government from any legal action for, among others, the Sharpeville massacre. The Act prevented the courts from hearing any criminal or civil cases against the government for actions taken from 21 March 1960 up until 5 July 1961.[29] Such intrusions into people's political involvement and affiliation are now extensively guarded in the post-apartheid South African democracy. The right to freedom of political association has been specifically enshrined in the Bill of Rights of the Constitution, with several provisions specifically protecting individual's rights to political affiliation.[30]

Krog also paid particular attention to documenting testimony from individuals and families whose members were arrested and detained without trial. Section 6 of the Terrorism Act[31] in particular allowed for such an occurrence.[32] According to this section, anyone suspected of involvement in terrorism, which was broadly defined as anything which might 'endanger the maintenance of law and order',[33] to be

22 As above.
23 Act 37 of 1963.
24 M Horrell 'Laws affecting race relations in South Africa 1948-1976' (1978) *South African Institute of Race Relations* 469 (hereafter 'Horrell').
25 Truth and Reconciliation Commission 'Human rights violations: question and answers' submission dated 12 May 1997.
26 Horrell (n 24 above) 416.
27 Act 34 of 1960.
28 Act 61 of 1961.
29 Act 61 of 1961 (sec 1(1)).
30 Section 19 of the Constitution of the Republic of South Africa, 1996 grants every citizen of the country the freedom to make political choices (sec 19(1)), which includes the freedom to form a political party (sec 19 (1)(a)), participate in political activities, recruit members for a political party (sec 19(1)(b)) and campaign for a political party or cause (sec 19(1)(c)).
31 Act 83 of 1967.
32 J Dugard *Human rights and the South African legal order* (1978) 118.
33 Notable is the broad definition of the word 'terrorism' as defined by the Act. This broad definition was a clear advantage to the apartheid government as it allowed for increased suppression of any acts against the government.

detained for a period of 60 days without trial. It further allowed for the renewal of detention without trial on the authority of a senior police officer.[34] This, as Krog illustrates, often resulted in the detained individual 'disappearing' completely.[35] More often than not, Krog allegorically explains that these disappearances resulted in the death of the detainees.[36]

In documenting these testimonies, Krog was able to capture the effects experienced by South Africans from laws which stemmed directly from the country's political authority. It is therefore possible to conclude that politics not only shapes the law and law enforcement, but also shapes legal and constitutional discourse.

3.3 The TRC: an embodiment of African jurisprudence

The TRC's focus, placed on restorative justice and justice at large, particularly links to the aims of natural law. The natural law, which seeks to critically analyse the content of the law and address and administer justice, is what the TRC was able to implement.[37] The TRC, however, embraces a further aspect — African philosophy of community and the notion of *Ubuntu*. Krog illustrates African jurisprudence and the role that forgiveness and *Ubuntu* play in African legal philosophy. Krog explicitly places *Ubuntu* within the context of the TRC to illustrate that the TRC is in itself a reflection of *Ubuntu* and truly embodies the meaning of forgiveness. However, it is the ideals of African jurisprudence and the African notion of 'forgiveness', 'restoration' and 'humanness' which allowed for the TRC to implement restorative justice as it did.

Natural law theorists' arguments for legitimate and just laws, which can only be achieved if they promote the common good, are embodied by the TRC. African jurisprudence, particularly the notion of *Ubuntu*, compliments this with its view on justice, fairness and equality. If the matter of justice and fairness are to be spoken of, then it must be borne in mind that law is not an abstract set of rules or a set of institutional arrangements, but rather, inherently an unstable structure of thought and expression — a form of life and a process of renewal.[38]

34 Terrorism Act 83 of 1967 sec 6(1).
35 In international human rights, the term disappear refers to a person being abducted or imprisoned by a state or political organisation with the knowledge of that state or political organisation.
36 Krog (n 4 above) 60, 147 – 151, 197 – 198, 200 – 204.
37 The TRC may not have completely or successfully achieved restorative justice, as Wessel Le Roux & Karin van Marle (eds) critically note in their *Law, memory and the legacy of Apartheid: Ten years after AZAPO v President of South Africa* paras 17, 24, 27 – 28, 45, 74, 107 – 108, 172. However, to an extent, the TRC was a clear attempt at administering restorative justice.
38 J Boyd White 'Justice in tension: An expression of law and the legal mind' (2012) 9 *No Foundations* 1 - 17.

4 General jurisprudence and African Jurisprudence — the Golden Thread

4.1 African Jurisprudence: toward justice as law

I begin here by laying out the groundwork for African jurisprudence by explaining its perspective on justice and restoration. The *Ubuntu* understanding of justice is seen as the restoration of equilibrium.[39] *Ubuntu* views the law as a continuous and living feature of humanity, and thus it can never be finalised.[40] *Ubuntu* law is both flexible and not formalised and is always linked to morality. The *Ubuntu* perspective on justice is ultimately one of harmony and balance which seeks restoration[41] while being inclusive of the importance of forgiveness and fairness.

Through the clever and logical use of the narrative in a chronological order, Krog allows for an important aspect to be realised — memory and the fostering of justice through African philosophy. Krog writes that:

> If its [the TRC's] interest in truth is linked only to amnesty and compensation, then it will have chosen not truth, but justice. If it sees truth as the widest possible compilation of people's perceptions, stories, myths and experiences, it will have chosen to restore memory and foster a new humanity, and perhaps that is justice in its deepest sense.[42]

It is clear that African jurisprudence focuses on restoration by using truth and forgiveness as a tool for achieving justice. Hence, it is possible to say that African jurisprudence contradicts Leviathan's stance on the power of authority — *Auctoritas, non veritas, facit legem* (authority, not truth, makes law).[43] This contradiction is exactly what general jurisprudence entails: a critical and extensive analysis of the content and reasoning behind the law, and an investigation into justice and truth as not being part of the law, but being the law.

4.2 Through the looking glass: the application of African jurisprudence through the political arena

Ever since South Africa's new constitutional dispensation in 1994, the legislature has taken an active stance on the incorporation of African

39 MB Ramose 'An African perspective on justice and race' (2001) 2 *Forum for Intercultural Philosophizing* 7.
40 Ramose (n 39 above) 6.
41 Ramose (n 39 above) 1.
42 Krog (n 4 above) 21.
43 T Hobbes & JCA Gaskin *Leviathan* (1998) 9, 13, 38, 161, 170, 200.

jurisprudence into the legal sphere.[44] However, this process of incorporation has been rather ineffective as South Africa's legal structure is still predominantly shadowed by that of the Roman-Dutch and English common law.

I argue that this failure to incorporate was due to the political anatomy of the legislature by the executive as well as the reliance and inclination towards a restricted jurisprudence approach.[45] If it is to be accepted that politics does in fact shape the law, then it must be considered that any alteration to the law will best be done through a political arena. Coupled with a general jurisprudential perspective as a legal 'looking glass' through which such a proposal can be viewed, African jurisprudence can be adopted through an indirect route in South African law. It should also warrant no further elaboration that African jurisprudence stems from the African native population which was suppressed during apartheid.[46]

It is therefore crucial that, as part of the adoption of African jurisprudence, black consciousness be mentioned here. Black consciousness seeks to unify all black people and, in doing so, rid every individual of their perceived limitations and their perceived life of servitude.[47] I argue that in order to allow for black consciousness to become more than something merely reduced to writing, the aspect of education needs to be mentioned as well. Although I do not wish to delve into legal and philosophical education more than necessary, a brief point from one of the Anti-Racism Forum's sittings[48] must be made here. There is a paramount need for the

44 A strong example of this is the Law of Evidence Amendment Act 4 of 1988, which empowered courts to take notice of indigenous South African law. However, as JY Mokgoro points out in her '*Ubuntu* and the law in South Africa' (1998) 1(1) *Potchefstroom Electronic Law Journal* 4 not much has come of this law.

45 The doctrine of separation of powers focuses on the different spheres of authority between the executive, the legislative and the judicial authority. This doctrine can, however, also be seen as a product of positivism because of its predominant concern with authority and placement thereof, rather than substantive law making. It should also be noted that the doctrine of separation of powers is based on Western legal development and not African legal thinking – it therefore clearly illustrates the subordinate position that African philosophy holds in relation to western rooted laws, such as those of the Roman-Dutch laws in South Africa. As Judge Phineas M Mojapelo in his The Doctrine of Separation of Powers: a South African perspective [37] explains it, the 'modern design of the doctrine of separation of powers is to be found in the theory of John Locke.' Mojapelo further explains that it was the French philosopher Montesquieu who is usually credited for the first formulation of the doctrine and based his exposition on the British Constitution.

46 I do not find it necessary to elaborate on the degradation and dehumanisation of non-whites during apartheid as there is no debate or contest to this fact.

47 S Biko *I write what I like* (2004) 52 – 53.

48 T Delport 'Rhodes falling and UP: last monuments to racism?' unpublished paper presented at University of Pretoria (23 April 2015).

adoption of African philosophy and African legal philosophy in tertiary education.[49] In order for a political atmosphere conducive to African philosophy and jurisprudence to be realised, a change in current tertiary curriculums is needed to encompass the teaching of African jurisprudence and African philosophy. Once such an understanding among South Africans has been reached, the political arena will play a more pivotal part in developing African jurisprudence.

5 Concluding remarks

In conclusion, restricted jurisprudence limits any given legal system, and its limitations extend not only to legal development and construction but to legal education and adjudication. Restricted jurisprudence falls short of justifying its lack of morality and disconnect with justice, and its concern with the absence of morality in law is the centre of the problem.[50]

A general jurisprudential paradigm is a strong pursuit needed in the adaptation of law in South Africa. It allows for the true meaning of justice to be realised and applied proportionally and consistently with society and morality. Law is inevitably built on morals and values, and therefore, must function within a higher and broader scope. A widening of this scope allows for a radical rethinking of the nature of rights, justice, sovereignty and judgment.[51] In returning back to a general jurisprudential approach, we are required to re-assess the substantive form of the law and to re-assess its purpose in an evolving society with evolving perceptions. This re-assessment, coupled with a justful political agenda and one in the spirit of African jurisprudence and the principle of *Ubuntu*, will allow for the reflection of such jurisprudence in the legal sphere. Douzinas and Gearey phrase the returning to a general jurisprudential approach — as a reminder to ourselves that law without a spirit is like a body without a soul: at best a corpse, at worst a zombie.[52]

49 Here I must give credit to the Anti-Racism Forum and the Society for Global and Current Affairs. It is because of these bodies as well as the 'Rhodes Falling and UP: Last monuments to racism?' presentation that I have gained the incredibly important understanding of the need for the incorporation of African philosophy in tertiary education curriculums. I choose to add this as paramount importance, because without this African philosophical education, I do not believe there will be any shift toward the incorporation of African jurisprudence in South Africa's political sphere. This incorporation is, however, an extensive debate on its own and involves, among others, the decolonisation of tertiary curriculums, an increase in black consciousness, an increase in feminist activism, an increase in constitutional criticism, and an increase in legal pluralism education.

50 Douzinas & Gearey (n 1 above) 4 – 7.

51 Douzinas & Gearey (n 1 above) 1.

52 Douzinas & Gearey (n 1 above) 19.

THE EFFECT OF THE SOUTH AFRICAN MEDIA ON HIV/AIDS AWARENESS

*By Nicole King**

1 Introduction

A gap exists in the South African media law with regards to HIV/Aids because HIV/Aids is normally dealt with in a scientific context rather than looking at the issue from a media law perspective. HIV/Aids is, however, still an issue which is highly relevant, particularly in a South African context, and oftentimes there is insufficient emphasis which is placed on the ever-growing pandemic in our country. Radio, television, newspaper and other forms of media possess the power to reach many people across the country and therefore they have an important and integral role to play in the fight against HIV/Aids. The media can have a significant impact on the stigmatisation of a person living with HIV/Aids and they will also have a role to play in the promotion of various preventative campaigns. The impact of the media on the disclosure of one's HIV/Aids status should also be considered. Therefore, by conducting research and exploring these topics, it can be determined whether the media are fully utilising their power as an educational and preventative tool in the fight against HIV/Aids or whether there is room for improvement.

2 The effect of the South African media on the stigmatisation of a person living with HIV/Aids

2.1 Introduction

According to the *South African Pocket Oxford Dictionary*[1] the definition of 'stigmatise' is to 'regard or treat as shameful'[2] or 'a mark or sign of disgrace'.[3] In South Africa, those people who are living with HIV/Aids are often subjected to a certain degree of stigmatisation because of how the disease is transmitted from one person to another. A person living with HIV/Aids is often seen by others as someone who has led a promiscuous lifestyle or taken drugs

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1 C Soanes (ed) *South African Pocket Oxford Dictionary* (2002) 893.
2 Soanes (n 1 above) 893.
3 As above.

intravenously[4] and therefore, these people are regarded as having diverged from the socially recognised norms that govern our community. This then results in a negative social context surrounding people living with HIV/Aids and can result in the loss of employment, friends and family.

However, South Africa is aiming to move away from the discrimination that surrounds people living with HIV/Aids. In the Employment Equity Act,[5] an individual may not be subject to discrimination based on their HIV/Aids status and a person's HIV/Aids status may not be tested for, except in certain circumstances.[6] In the Bill of Rights,[7] all of the basic socio-economic rights, such as the right to basic education,[8] the right to privacy[9] and the right to bodily and psychological integrity,[10] must be available to people living with HIV/Aids.

The South African media plays a very important role in the fight against discrimination towards those people living with HIV/Aids, because the media has a direct influence on the public's perception of the world that they live in. If the media presents the disease in a positive light and aims to destroy some of the negative connotations surrounding the disease, then the public too will follow this positive example. However, because of the power of the media, the language and reporting styles that they use can also have a very damaging effect on people living with HIV/Aids' reputation. Therefore, there are two aspects which must be looked at more closely namely; the amount of media coverage which surrounds the topic of HIV/Aids, and then the way in which journalists are reporting on matters dealing with HIV/Aids. By examining these two issues, and the way in which they affect each other more closely, it can be determined whether the South African media is having a positive or negative effect on the way in which the community perceive people living with HIV/Aids.

2.2 Media coverage regarding HIV/Aids

The powerful influence of the media on the stigmatisation of a person living with HIV/Aids comes not only from the amount of time that newspapers, radio stations and television broadcasters report on matters dealing with HIV/Aids, but also the length and placement of the newspaper articles or the duration, time slot and particular radio

4 National Institute on Drug Abuse 'HIV/AIDS and Drug Abuse: Intertwined Epidemics' http://www.drugabuse.gov/publications/drugfacts/hivaids-drug-abuse-intertwined-epidemics (accessed 7 July 2015).
5 Sec 6(1) of the Employment Equity Act 55 of 1998.
6 Sec 7(2) of the Employment Equity Act.
7 Sec 7(1) of the Constitution of the Republic of South Africa, 1996.
8 Sec 29(1) of the Constitution.
9 Sec 14 of the Constitution.
10 Sec 12(2) of the Constitution.

station or television channel of a television or radio broadcast. Also, the genre of the television or radio show and whether the person whom the story is about, is a public or well-known figure. These are factors that can easily influence the public's perception on how to view a person who is HIV-positive because these are tools that the media uses to subconsciously persuade the society to view the world in a certain way. It all depends on whether the media wants to use these tools to persuade the South African community to think in a positive or negative light.

2.2.1 Reporting in the newspapers

In 'HIV/Aids reporting in three South African newspapers'[11] it is revealed that since the HIV/Aids epidemic first came about some 25 years ago, there has been extensive media reporting on the issue. However in 'HIV/AIDS and the Media: A literature review'[12] it is argued that even though there is now a large volume of articles being written about HIV/Aids, the newspapers 'have yet to do full justice to the impact and scale of the epidemic'.[13] In the article by Swanepoel, three South African newspapers namely, *Sunday Times, Sunday Sun* and *Rapport*, were evaluated to see if their articles dealing with HIV/Aids related issues were in accordance with reporting which was ethically acceptable.[14] The results revealed that both the frequency and prominence of certain news articles can lead to the impression that the issue is top of the news agenda.[15] In the *Sunday Times* there was more emphasis placed on the issue of HIV/Aids because there was an average of 5.2 HIV/Aids related items per copy of the newspaper which was higher than any of the other newspapers, and the editor confirmed that the *Sunday Times* wants to take an active role in the fight against HIV/Aids.[16] *Rapport* had the lowest average number of items per copy and the reason given for this was that the white population of South Africa was less likely to become infected with HIV/Aids and therefore the issue was not relevant to the readers of this predominately Afrikaans newspaper.[17] This notion is not true and currently there is an increase in the spread of the disease in the white, wealthy populations of South Africa,[18] but because *Rapport* has decreased the number of articles reporting on the disease, the readers of *Rapport* not only think that they will never be affected by

11 T Swanepoel 'HIV/Aids reporting in three South African newspapers' (2007) 12 *Journal for Communication Sciences in Southern Africa* 74.
12 Stein J 'HIV/AIDS and the Media: A literature review' http://www.cadre.org.za/files/LITREV_media_and_HIVAIDS.pdf (accessed 23 March 2015) 10.
13 As above.
14 Swanepoel (n 11 above) 76.
15 Swanepoel (n 11 above) 78.
16 As above.
17 Swanepoel (n 11 above) 79.
18 As above.

it but they also create the misconception that a person who is living with HIV/Aids will probably be black.

The most common manner in which HIV/Aids related issues are presented in the newspapers is through news reports.[19] This creates a problem because there is no background information or contextualisation given, which can result in the misinterpretation of the information that is given in a short news report.[20] This means that currently there is a need for in-depth reporting on HIV/Aids related issues so that society can be fully informed about the disease when they make important decisions. Even though the *Sunday Times* prefer short news reports rather than in-depth articles, the newspaper allows articles and editorials to be written by 'role players in the field'[21] which is important as it inserts a personal element into the reporting and allows the reader to form their own opinions which are based on the views of people who they can relate to.[22]

2.2.2 Reporting on the television

Specific types of television broadcasts are more likely to garner more attention from viewers than other type of broadcasts. For example, a news broadcast may not grab the attention of a teenager because they think that listening to news is boring or irrelevant to their lives and age group. However, a reality show or a soap opera, for example, may be attractive to a young teenager who is seeking drama and excitement whilst watching television. This becomes very important when looking at the media's influence on the stigmatisation of a person living with HIV/Aids because if these programmes include storylines dealing with issues surrounding HIV/Aids, then they can become a useful tool in educating an audience who may not be interested in watching or reading the news. However, in 'Sex, "soaps" and HIV: Multiple and concurrent partnerships in South African soap operas',[23] it is revealed that the HIV/Aids theme does not feature prominently in many of the local South African soap operas. According to 'Isidingo — The Need: A mainstream approach to HIV/AIDS communication?',[24] there is a need for the broadcasting of 'edutainment-strategies'[25] which will combine education on the topic

19 As above.
20 As above.
21 As above.
22 As above.
23 N Ridgard & H Struthers 'Sex, "soaps" and HIV: Multiple and concurrent partnerships in South African soap operas' (2010) 29 *Journal for Communication Sciences in Southern Africa* 48.
24 N Wildermuth 'Isidingo — The Need: A mainstream approach to HIV/AIDS communication?' https://www.academia.edu/408755/Isidingo_The_Need_A_mainstream_approach_to_HIV_AIDS_communication_extended_version_ (accessed 23 March 2015).
25 Wildermuth (n 24 above) 1.

of HIV/Aids with an entertainment factor that will draw the audience's attention in the first place. This will then enable broadcasters to use more creative and innovative ways to report on issues which are not necessarily perceived as having an entertainment value.[26] An example of such an edutainment programme is *Soul City*[27] which is a locally produced soap opera.

The problem with portraying very important and sensitive information about HIV/Aids in soapies arises from the melodramatic nature of the genre.[28] Soap operas are renowned for their over-the-top storylines and combining these sensational stories with educational information may be confusing for viewers who know that soapies have a reputation for being dramatic. An example of this in *Isidingo* is when a young girl, Lolly, was gang raped as a teenager but her HIV status has never been tested.[29] This shows that the need to make the soap opera more dramatic has resulted in a failure to educate the audience on the dangers of gang rape and the need for prompt HIV-testing. In the *Isidingo* episodes watched by Wildermuth, he also noticed that only one character asked their sexual partner to get tested for HIV/Aids[30] which again fails to place any emphasis on the need for prior testing between sexual partners.

2.2.3 Reporting on celebrities and public figures

Media reports pertaining to the HIV/Aids status of certain celebrities or public figures are more likely to be viewed or read by the community because the public holds a certain fascination with this group of people. In 'HIV/AIDS and the Media: A literature review,'[31] it is revealed that there was an approximate 29% increase in HIV-testing after the media extensively covered basketball player Magic Johnson's HIV diagnosis.[32] In 'HIV/Aids reporting in three South African newspapers'[33] the *Sunday Sun* newspaper would only deal with HIV/Aids stories which relate to sensational information about celebrities such as DJ Fana Khaba.[34] The role and influence that public persons have over the lives of the everyday person is evident here and this can be used as a tool by journalists to reach out to the members of the community.

26 Wildermuth (n 24 above) 2.
27 Ridgard & Struthers (n 23 above) 41.
28 Wildermuth (n 24 above) 12.
29 Wildermuth (n 24 above) 15.
30 As above.
31 Stein (n 12 above) 5.
32 As above.
33 Swanepoel (n 11 above) 80.
34 Swanepoel (n 11 above) 80.

2.3 How the media covers an issue dealing with HIV/Aids

Despite the frequency of reporting on HIV/Aids issues, if the issues are not reported in a manner which decreases the stigmatisation of a person living with HIV/Aids then it almost seems as if the matters should not be reported at all. The media makes use of various techniques in order to influence the audience's reaction to a publication. The language which is used by writers in their articles or broadcasts can result in connotations being formed which can then affect the overall tone of the article or broadcast. If the tone of the publication is positive then it will lead to the audience forming a positive perception of people living with HIV/Aids; but the audience can also form a negative perception about an HIV-positive person if the overall tone is negative. Another aspect that can have a large effect is how educated a journalist is about HIV/Aids. Journalists need to have sufficient knowledge and experience to be dealing with such a sensitive topic and a lack of education can have a detrimental effect on the way that the public is informed about HIV/Aids in South Africa. It will be determined if all of these factors can largely influence the media's role in the stigmatisation of a person living with HIV/Aids.

2.3.1 Guidelines for HIV/Aids reporting

Even though the media has reported on the topic of HIV/Aids fairly frequently, as was indicated above, there is still an issue with regards to the manner in which the issues are presented. It was revealed in 'HIV/Aids reporting in three South African newspapers',[35] that some South African journalists have 'struggled to develop a positive attitude towards the epidemic since its onset'[36] which then leads to a stigma surrounding the disease. Even though there is criticism of the manner in which journalists report on HIV/Aids related issues, there have been no formal guidelines created which will help journalists to report on these issues accurately.[37] Currently, journalists are merely following the general guidelines,[38] set out by the Press Ombudsman, for ethical reporting and are simply applying these guidelines to the reporting of HIV/Aids.[39] Previously, the code of the South African Union of Journalists set out accurate criteria for HIV/Aids reporting, but this code is now inactive.[40] This means that there is a gap in our law with regards to ethical reporting about HIV/Aids-related issues and this needs to be filled in order to avoid stigmatisation.

35 Swanepoel (n 11 above) 75.
36 As above.
37 Swanepoel (n 11 above) 76.
38 South African Press Council 'South African Press Code' http://www.presscouncil.org.za (accessed 4 November 2015).
39 Swanepoel (n 11 above) 76.
40 As above.

2.3.2 Tone of the publications

In the three newspapers which were studied, namely *Sunday Times*, *Sunday Sun* and *Rapport*, there was a balance between negative reporting, and reporting which created a positive and uplifting impression that the disease can be managed and controlled with the correct medicine and care.[41] If a newspaper continuously publishes articles about the disease as being a death sentence, then this will have vast ethical implications and will further the stigmatisation of a person living with HIV/Aids. Therefore, articles about HIV/Aids must not predominately pursue a negative tone because this can lead to the misconception that persons living with HIV/Aids will only bring negativity to those who interact with them.

2.3.3 Images which accompany the publications

When journalists report on HIV/Aids, very little graphic material accompanies the coverage and this is in line with the framework of ethical reporting, according to Swanepoel.[42] However, there is also a lack of visuals pertaining to HIV/Aids prevention. According to Ridgard & Struthers, images of condom use were only shown four times during the monitored soapie episodes.[43] Despite the fact that this will have an impact on the prevention of HIV/Aids; it will also influence the way in which one views people living with HIV/Aids. Therefore, an audience may view a HIV-positive person as being the cause of their infection as they were irresponsible when it came to protection, but in many circumstances this will not be the case. Images of HIV/Aids patients who were 'in a passive, submissive position — reclining, huddled ... lying in a hospital bed'[44] are images which will have a profound impact on the negative social context of a person living with HIV/Aids and should be avoided. Therefore, graphics must be used correctly as a deterrent and educational tool, rather than contributing to the stigma of an individual living with HIV/Aids as being in need of constant care.

2.3.4 Language used in the publications

The use of language, has the biggest effect on the stigmatisation of a person living with HIV/Aids. Language which is firm, explains that the disease is of utmost concern in our country, and can have a devastating effect on the lives of the people who become infected must be used to show the community that they should treat HIV/Aids

41 Swanepoel (n 11 above) 82.
42 Swanepoel (n 11 above) 83.
43 Ridgard & Struthers (n 23 above) 52.
44 Stein (n 12 above) 9.

as a serious concern.[45] However, the language must also not 'fall into the trap of sensationalism'.[46] An example of the correct use of language, which avoids sensationalism, is instead of using the words 'prostitute' and 'innocent victim' rather use 'sex workers' and 'person living with HIV/Aids'.[47] When a person living with HIV/Aids is represented as a 'patient' by the media then the public perception that this person is in need of care and sympathy and cannot lead a normal life, is fuelled.[48] This will then eliminate the impression that a person living with HIV/Aids is a victim and is rendered helpless by the disease, which can cause members of the community to view a HIV positive person as different. Therefore, the language used by journalists must not be underestimated and they must be careful to represent persons living with HIV/Aids in a positive light. In doing so, the media will influence members of the community to have an optimistic attitude towards people living with HIV/Aids.

HIV/Aids terminology is comprised of mainly scientific terms, and if the media use these terms incorrectly or do not explain these terms in an easy-to-understand language then this can result in a failure, on the part of the media, to provide an adequate analysis of the disease or an incorrect social standpoint.[49] However, the medical terms must not be simplified to such an extent that they lose their meaning completely. Therefore, a balance must be achieved between representing the medical information accurately, but still in a way which is easy for the ordinary member of society to understand.

2.3.5 Stereotypes created by the media

One of the hardest stigmas to reverse is the idea, created by the media, that all HIV/Aids suffers are poor, black woman. The characters who are HIV positive in the storylines of the soap operas are all black women and this creates an extremely unfair stereotype that black woman are the face of HIV/Aids.[50] An example of such a character is Nandipha in *Isidingo* who not only is a black woman living with HIV/Aids, but is also 'depicted as passive, silent and selfless'.[51] Other male characters' involvement in HIV/Aids is implied but never seen.[52] This is a very serious problem of stigmatisation that must be urgently addressed in order to dispel the impression that HIV/Aids chooses who to infect, which is not the case. HIV/Aids does not discriminate and being part of a certain group will not make a person

45 Swanepoel (n 11 above) 85.
46 As above.
47 As above.
48 Stein (n 12 above) 7.
49 Stein (n 12 above) 6.
50 Ridgard & Struthers (n 23 above) 54.
51 Wildermuth (n 24 above) 17.
52 As above.

more prone to getting HIV/Aids.[53] This stereotyping will also lead to more unsafe behaviour in persons who do not fall within the stereotypical 'poor, black woman' group as they believe that they are immune from contracting the virus.[54] This example of stereotyping and stigmatisation can easily be eliminated by ensuring that journalists make reference to all races and genders when reporting on people who are HIV-positive.

2.3.6 Journalists' lack of education

When a journalist is not educated on the topic of HIV/Aids, it quickly becomes apparent in their writings. According to 'SA media's blind spot on AIDS'[55] the biggest problem pertaining to HIV/Aids reporting is the lack of knowledge and sensitivity about the topic, which can result in reporting which is 'sensational rather than educational'.[56] The use of incorrect terminology or spelling the terminology incorrectly is a clear indicator of this lack of knowledge.[57] Journalists who do not write about HIV/Aids topics frequently are also more likely to make mistakes and they find it very difficult to contextualise the situation so that the report is accurate and in-depth.[58] In the *Sunday Times* news reports there is often an overload of information given, in-depth reporting and lots of background information about the disease which allows readers to successfully form their own opinions and make informed decisions.[59] Therefore, it is clear that in order to reduce uniformed and biased reporting, training should be given to journalists to provide them with the knowledge and the empathy that is required to report on HIV/Aids related matters.[60] A specialised HIV/Aids desk in media newsrooms will also ensure educated reporting.[61]

2.3.7 Journalistic sources

The use of appropriate sources by the media is integral in ensuring that the readers can relate to the article or broadcast. According to Swanepoel, the three newspapers do use appropriate sources but they do not make use of alternative types of sources.[62] The sources that would be the most relevant to a reader who has HIV/Aids would be perspectives of a person living with HIV/Aids because they would be

53 Ridgard & Struthers (n 23 above) 54.
54 Wildermuth (n 24 above) 17.
55 Anonymous 'SA media's blind spot on AIDS' (2004) 2 *Media Tenor International* 30.
56 As above.
57 Swanepoel (n 11 above) 85.
58 Swanepoel (n 11 above) 86.
59 As above.
60 Anonymous (n 54 above) 31.
61 Stein (n 12 above) 13.
62 Swanepoel (n 11 above) 86.

the most qualified to make comments about the disease.[63] According to Stein, *The Sowetan* and *Cape Times* make regular use of columns which present the views of HIV-positive journalists and *Cape Talk* radio station started an HIV/Aids-related talk show which is co-hosted by people who are HIV positive.[64] This is important because if the public is constantly exposed to only one opinion then they could become bored and they will only be able to form their own opinions based on a single view of the epidemic.[65] If this source creates a negative view about a person living with HIV/Aids, then this can result in the stigmatisation of a person living with HIV/Aids. The use of statistics is also important because this ensures credibility of a report.[66]

2.3.8 Positive journalism

In *Isidingo* the only HIV positive character, Nandipha, is portrayed as healthy, she leads a normal life[67] and she is able to touch and kiss members of her family without infecting them.[68] This is an example of counter-stigmatisation and is used to depict the image that a person living with HIV/Aids is capable of leading an ordinary life whilst living with a terminal disease. This is how the writers and producers of *Isidingo* are trying to inspire a 'positive-optimistic' storyline,[69] which can be used to help educate the viewers that people who are living with HIV/Aids are no different to people who are not, even though their personal struggles with the disease may differ somewhat. The struggle of a person living with HIV/Aids must not be portrayed in a despondent manner but rather as an encouragement.[70] It is this sort of approach that all newspapers and broadcasts should strive to achieve.

2.4 Conclusion

After exploring the research on these issues, it can be deduced that there is a careful link between the frequency and manner of reporting on HIV/Aids related issues. It is irrelevant whether HIV/Aids related issues are frequently reported or broadcasted, because if these issues are not reported or broadcasted in an accurate manner then this will directly lead to the increase in stigmatisation. It appears that, despite the media taking steps to reduce the negative stigmatisation of a

63 As above.
64 Stein (n 12 above) 13.
65 Swanepoel (n 11 above) 86.
66 Swanepoel (n 11 above) 87.
67 Wildermuth (n 24 above) 18.
68 Wildermuth (n 24 above) 19.
69 Wildermuth (n 24 above) 18.
70 As above.

person living with HIV/Aids, there is still much more that can be done. Instead of increasing the frequency of reporting rather ensure that there are in-depth and contextualised articles which provide the reader with sufficient information so that they can make informed decisions, and programmes with an 'edutainment'-oriented approach so that viewers are both entertained and educated about HIV/Aids simultaneously. In order to ensure that the manner in which these issues are reported on is accurate and uplifting, journalists should aim to shed a positive light on the issue of HIV/Aids in their publications. Then the public will view a person who is living with HIV/Aids not as a victim, but as someone who is determined not to let this disease get them down. The need for journalistic training as well as a set of accurate guidelines is imperative in order to educate the media on not only the scientific side of the disease, but also on what images should be used, how the article or programme should be written and what type of sources will be the most relatable to a person who is affected by HIV/Aids. The media plays an important role in the stigmatisation of a person living with HIV/Aids and, because of their power over the South African community, they can single-handedly reverse the negative social context that currently surrounds those who are living with HIV/Aids.

3 The effect of the South African media on the prevention of HIV/Aids, specifically referring to educational programmes and campaigns

3.1 Introduction

> The lack of a medical cure for Aids puts the spotlight on preventative measures.[71]

This quote indicates that there is a need for effective campaigns and educational tools in order to prevent the spread of HIV/Aids in the South African community. There are various HIV/Aids awareness campaigns out there such as *loveLife*, which was launched in 1999 and is South Africa's largest HIV/Aids prevention campaign aimed at young people,[72] and *ZAZI*, which was launched in 2013 under the guidance of the South African National AIDS Council and is aimed at women and girls.[73] These campaigns utilise various methods in order to convey their messages to the public. Direct, face-to-face interactions are the

71 SR Melkote *et al* 'What makes an effective HIV/AIDS prevention communication campaign? Insights from theory and practice' (2014) 9 *Journal of Creative Communications* 85.
72 Anonymous 'About Us' http://www.lovelife.org.za (accessed 20 July 2015) 1.
73 Anonymous 'New campaign calls on South Africa's women and girls to ZAZI' http://www.zazi.org.za (accessed 20 July 2015).

most popular method of reaching the community,[74] but HIV/Aids campaigns also make use of the media to create awareness.

As a result of the media's popularity and influence over society,[75] the media's role in the prevention of HIV/Aids and the creation of awareness about educational programmes and campaigns becomes important. However, there is a need for the media to combine efforts with HIV/Aids testing stations, the distribution of condoms and door-to-door education in order to ensure that every member of the community is reached.

The main point of discussion is whether media-based HIV/Aids awareness campaigns are actually effective in South Africa. It must, therefore, be established whether the media is presenting the right type of information in their campaigns in a manner which is able to reach the individuals who need to be educated on how to prevent HIV/Aids. In order to fully understand the media's influence on the prevention of HIV/Aids the community must be questioned on what impact the media campaigns have had on them personally. By questioning the community, the media's role in the promotion of educational programmes and campaigns can be established and it will also be determined whether media campaigns are actually more effective than door-to-door campaigns. Finally, by giving examples of various media campaigns from here in South Africa and from around the world, it can be determined what exactly forms a successful media HIV/Aids awareness campaign. By discussing these issues in detail it can be determined whether the South African media has a positive or negative effect on the prevention of HIV/Aids.

3.2 What makes an effective campaign?

The lack of a cure for HIV/Aids makes media-based campaigns essential in the fight against HIV/Aids, but it is often questioned whether these campaigns are actually effective. Media campaigns have the ability to reach a large audience, all at once, and the man-power required to do so is low, therefore, it is suggested that media campaigns should be the most successful way to reach the community. However, if the incorrect information is portrayed by the media then these media-based campaigns can cause more harm than good. By determining whether media campaigns are relaying the correct information to the people who need to be educated on this topic, the effectiveness of these campaigns can be established, which will then indicate whether the South African media is having a positive or negative effect on the prevention and education of HIV/Aids.

74 As above.
75 Global Media AIDS Initiative 'The Media and HIV/AIDS: Making a difference' http://data.unaids.org/publications/irc-pub06/jc1000-media_en.pdf (accessed 23 March 2015) 4.

3.2.1 Are campaigns in South Africa effective?

HIV/Aids awareness campaigns are a necessary step in the prevention of HIV/Aids because they provide the public with information about the virus. They illustrate ways in which the virus can be spread, how to prevent the spread of the virus and what to do if you are a person living with HIV/Aids.[76] Campaigns also encourage communication about the virus and therefore reduce discrimination and stigmatisation.[77] They also persuade members of the community to go and get tested at their nearest testing station.[78] Therefore, it is essential that the media creates successful campaigns in order to decrease the spread of HIV/Aids in South Africa. According to Swanepoel,[79] the question of whether media campaigns are effective is not a novel question and no exact answer has yet been established.[80] In South Africa, the obvious answer to this question must be no, because the spread of HIV/Aids has not yet decreased.[81] However, due to a lack of research into this topic it is virtually impossible to know why media campaigns are not effective in South Africa.[82] In order to determine the effect of a media-based campaign 'process evaluations' are needed to work out the link between the impact of the campaign, and its design process and features,[83] but these process evaluations are limited in South Africa.

South African media campaigns are targeted at very diverse audiences and there are certain individual factors which are not taken into account when establishing a campaign.[84] These factors can include culture, gender, language, illiteracy, access to precautionary resources such as condoms, and poverty.[85] Therefore, 'an over-reliance on mass-media to effect HIV/Aids related behaviour changes'[86] becomes problematic, and because the campaigns are not specified to the context of a particular community, the individual element of the campaigns becomes lost.[87] In order to combat these problems, various models, for example the Intervention Mapping model, for the design of the media-campaigns, have been created.[88]

76 Avert 'Introduction to HIV and AIDS Education' www.avert.org (accessed 24 August 2015) 1.
77 As above.
78 As above.
79 P Swanepoel 'Stemming the HIV/Aids epidemic in South Africa: Are our HIV/Aids campaigns failing us' (2005) 31 *South African Journal of Communication Theory and Research* 61.
80 Swanepoel (n 79 above) 64.
81 Swanepoel (n 79 above) 65.
82 As above.
83 As above.
84 Swanepoel (n 79 above) 68.
85 As above.
86 As above.
87 As above.
88 Swanepoel (n 79 above) 69.

These models can therefore, be used to create an effective media campaign which is both extensive and specific to the particular community at whom it is aimed.

3.2.2 What are the requirements of an effective campaign?

According to Swanepoel,[89] the only way to design a successful campaign is to adhere to a set of design guidelines.[90] Sticking to these guidelines will then ensure that the campaign is in line with what Swanepoel describes as the requirements of an effective campaign.[91] The requirements for a successful campaign are:[92]

- The campaign must be theory and evidence based.
- The campaign must be designed in accordance with the feedback given by target audiences, to ensure that the specific problems within the area where the campaign will be targeted are addressed.
- The campaign must be culturally sensitive and aimed at a specific audience.
- The campaign must be meticulously pretested before it is produced and implemented in the community.

3.2.3 Designing an effective campaign

The design of a campaign is fundamental in ensuring that campaign's effectiveness. There are certain behaviour changing strategies that can be used to create an HIV/Aids awareness campaign that will be successful.[93] Currently, the most successful behaviour changing strategy experienced worldwide is the ecological approach.[94] According to this approach, media-based campaigns must be:

> … supported by various and different types of interventions; must be tailored to the stages of the epidemic within a community, and must target audiences with regard to where they find themselves on the continuum of behaviour change.[95]

This basically means that HIV/Aids awareness campaigns must be targeted at the desires and culpabilities of specific audiences in order to have an effective impact on those audiences.[96] Therefore, as mentioned above, South African media-based campaigns need to follow a more community-based approach in order to ensure that each community, regardless of the problems experienced by that

89 Swanepoel (n 79 above) 63.
90 As above.
91 As above.
92 As above.
93 Swanepoel (n 79 above) 66.
94 As above.
95 As above.
96 Swanepoel (n 79 above) 67.

community, will be able to receive the preventative information. There are also various design models which can help with the creation of an effective campaign. As previously stated, the Intervention Mapping Model is such an example. This model aims to make use of a target group of people from a specific community throughout the development of the media-based campaign to ensure that it will be effective in that community.[97] Therefore, it appears from the above that by applying the Intervention Mapping Model and the ecological approach, a HIV/Aids media-based campaign can be created which will be effective, successful and assist in the prevention of HIV/Aids.

One of the most important aspects of designing a campaign is the messaging, and it is necessary to ensure that the message targets the critical beliefs that encourage members of the community to engage in HIV/Aids causing risky behaviours.[98] In order to determine what these critical beliefs actually are, empirical research and subsequent analysis must be conducted in each community, as the critical beliefs may differ from one community to the other.[99] Another important aspect of the message is the language used.[100] South Africa has twelve official languages, therefore it is essential that a HIV/Aids media campaign makes use of the language spoken by the majority of the community where the campaign is targeted. However, most campaigns only appear in English with a few appearing in Afrikaans.[101] The use of other African languages such as Sotho and Nguni is very low.[102] This will mean that as a result of the language barrier, some of the important information in the campaign will be missed by the members of the community. A final problem encountered when establishing the campaign message has to do with the literacy levels of the target community. It is vital to ensure that the campaign message makes use of simple language which does not contain any medical terminology.[103] This is where the use of images becomes necessary in order to combat the language barrier as well as make the message more attractive and memorable.[104] Therefore, by targeting those specific critical beliefs in the campaign messaging, ensuring that the campaign is in a comprehensible language and making use of simple language or visuals, the community will be able to engage better with the campaign on a more personal level and understand the campaign's purpose as well as how to take steps to prevent the spread of HIV/AIDS.

97 Swanepoel (n 79 above) 69.
98 Swanepoel (n 79 above) 71.
99 As above.
100 O Shisana '*South African national HIV prevalence, behavioural risks and mass media*' (2002) 7.
101 Shisana (n 100 above) 7.
102 Shisana (n 100 above) 93.
103 M Ahmad-Hanan 'HIV/AIDS prevention campaigns: a critical analysis' (2007) 5 *Canadian Journal of Media Studies* 149.
104 Ahmad-Hanan (n 103 above) 145.

Therefore, it is evident that there is a need for media-based campaigns to up their game in order to become more effective within South Africa. There is a need for various models and strategies to be followed in order to produce campaigns that are not generalised within the whole country, but rather focus on a community-based, individualised approach. It is also important to use the correct message when creating a campaign to ensure that it will be related to that community's critical beliefs. The South African people are very diverse and therefore, a media-based HIV/Aids awareness campaign that does not cater for that diversity will remain ineffective and unsuccessful.

3.3 Community Attitudes

In the United States 72% of Americans have revealed, in national surveys, that television, radio and newspapers are their primary source of HIV/Aids awareness campaigns, and in India 70% of respondents in a survey revealed that they received their HIV/Aids information predominantly from the media.[105] These surveys reveal that the success of HIV/Aids prevention campaigns all depends on what effect that campaign has on the community at whom it is aimed. It is also essential to obtain the opinions of the members of the community to ensure that the personal element is not ignored in the fight against HIV/Aids. By obtaining the opinions of the community, this will enable government and other organisations to produce the most effective educational campaigns. These personal attitudes towards various media campaigns will then indicate what affect the South African media is having on the prevention of HIV/Aids.

3.3.1 Survey in Wesselton Township

A survey was done on four male and four female members, aged 25-30 years, of the community of Wesselton Township which is situated in Ermelo in Mpumalanga,[106] where the participants were questioned about their knowledge and perception of HIV/Aids prevention and awareness campaigns.[107] The participants defined HIV/Aids awareness campaigns as people who are involved in teaching members of a community about the virus,[108] people who provide support for those who have been infected,[109] and people who encourage members of the community to go for HIV/Aids testing.[110]

105 Global Media AIDS Initiative (n 75 above) 8.
106 NM Khoza 'HIV/Aids awareness campaigns as perceived by young people in Wesselton Township, Mpumalanga' (2012) 8 *New Voices in Psychology* 18.
107 Khoza (n 106 above) 19.
108 As above.
109 As above.
110 Khoza (n 106 above) 20.

When first questioned about the awareness campaigns, most of the participants did not identify any campaigns that made use of assorted forms of media, and it was only after being probed further did they mention that they did know of some campaigns on the television or radio.[111] Only one participant said that they had seen a campaign advertised in print media and none of the participants mentioned campaigns that made use of billboards.[112] When questioned on the lack of knowledge about media campaigns the participants said that although they own televisions and radios they do not have enough time to watch or listen to them.[113] They also indicated that they had forgotten about the campaigns portrayed by the media, which could indicate that these campaigns did not have a great impact on the participants because of the ordinary, everyday names that are being used.[114] The campaigns were also being depicted by the media in a way that the participants did not recognise them as being HIV/Aids awareness campaigns.[115] Therefore, the HIV/Aids media campaigns were unimpressionable on the participants of the survey.

However, several of the participants indicated that reality television programmes are effective awareness campaigns.[116] In these reality television programmes people who are affected and living with HIV/Aids are interviewed and they speak out about how they contracted the virus and how they live with it.[117] These HIV positive members of the community then educate other members of the community on the prevention of HIV/Aids, and because they deal with HIV/Aids on a daily basis, their opinions are highly regarded.[118]

3.3.2 Analysis of the survey

In 'HIV/Aids awareness campaigns as perceived by young people in Wesselton Township, Mpumalanga',[119] it is indicated that, in comparison to previous reports which identify radio as being the most relied upon source of awareness campaigns; door-to-door campaigns were the most memorable campaigns according to the participants of the survey, followed by television.[120] The reason given for this was that, although members of Wesselton have access to televisions, radios and billboards, they have limited exposure to them as they do not have the time to watch TV or listen to the radio.[121] Therefore,

111 As above.
112 As above.
113 Khoza (n 106 above) 21.
114 As above.
115 As above.
116 Khoza (n 106 above) 23.
117 As above.
118 Khoza (n 106 above) 24.
119 As above.
120 As above.
121 As above.

because the door-to-door campaigns were more influential their impact on the participants was greater and this made them more successful than the campaigns promoted by the media.

Creators of HIV/Aids awareness campaigns are under the assumption that, by making use of media platforms, they will reach a large number of people around the country, but they do not bear in mind the possibility that not all households may own a television or radio or have the time to watch or listen to them.[122] Therefore when establishing a campaign these types of factors must be considered and it would be ideal to make use of many different platforms to allow the relevant information to reach all types of people.[123] It is necessary to make use of various methods of campaigning 'as one channel might be useful for certain individuals and not for others'.[124] Therefore, in my opinion, there is a need to individualise campaigning methods which allows them to be specific to each area's means of receiving important information. However, it is also important to ensure that 'the face of HIV/Aids awareness campaigns should be persons who have direct HIV/Aids experience',[125] as this makes the information more authentic and believable.[126]

Therefore, it appears as if the community attitude is that there is a need for various platforms to be utilised in order to create an effective awareness campaign. Above it was revealed that in the survey it was determined that HIV/Aids campaigns have reduced risky behaviour and promoted the use of condoms and monogamous relationships by the participants; but that, even though the information is available to the community it is still up to the individual to make use of this information. Therefore, HIV/Aids media campaigns need to be supplemented with door-to-door campaigns to ensure that the educational message is being conveyed to all members of the community, despite their individual circumstances.

3.4 Examples of HIV/Aids media-based campaigns

Including examples of various media-based HIV/Aids awareness campaigns is fundamental in establishing what the characteristics of a successful campaign are and which design flaws to avoid when creating a campaign. Examples of campaigns that have had success in other countries are also important, as these campaigns can serve as a model for the establishment of future South African campaigns. However, the design of these foreign campaigns should not be too heavily relied upon, because of the individuality of every country and

122 Khoza (n 106 above) 25.
123 As above.
124 As above.
125 Khoza (n 106 above) 27.
126 As above.

therefore, awareness campaigns should be tailor-made to suit the circumstances of each country and to identify with the different communities within those countries.

3.4.1 Campaigns around the World

In 2001, all members of the United Nations adopted the Declaration of Commitment on HIV/AIDS and even though this new Declaration helped to boost resources and create a fresh political commitment to fighting against the virus,[127] there is still more that needs to be done before the United Nations Millennium Development Goal of stopping and starting to reverse the spread of HIV/Aids can be achieved.[128] Therefore, there is a need for more campaigns to be utilised worldwide which are in line with the United Nations' Goal to stop the spread of HIV/Aids. India's national television service, Doordarshan, has created a programme which combines education with entertainment.[129] *Jasoos Vijay* (*Detective Vijay*) was created to give the audience information about HIV/Aids and how to prevent it, whilst entertaining them simultaneously.[130] This 'edutainment'-driven approach has proved extremely popular all over the world and these types of programmes have been linked to successful awareness campaigns.

In Africa there are also different countries that are utilising various media platforms in order to get the message out to their populations. In Tanzania, Radio Tanzania has utilised radio as a form of media to create a soap opera, first broadcast in 1993, called *Twende na Wakati* (*Let's Go with the Times*) which opened the channels of communication about HIV/Aids.[131] After surveys were done, eight in ten Tanzanians said that, after listening to the radio soap opera, they had taken up an HIV/Aids safety measure.[132] This radio show allows members of the community to talk openly about the virus, which does not only reduce the stigma surrounding people living with HIV/Aids, but also serves as an effective awareness campaign measure; because the more the people talk about a campaign the more likely it is to have an impact on them and reach all the members of the community. The Straight Talk Campaign in Uganda also encourages open communication about HIV/Aids.[133] This campaign makes use of the publication of various newspapers and a radio show which is broadcast in English as well as a range of local languages.[134]

127 Global Media AIDS Initiative (n 75 above) 7.
128 As above.
129 Global Media AIDS Initiative (n 75 above) 19.
130 As above.
131 Global Media AIDS Initiative (n 75 above) 14.
132 As above.
133 Global Media AIDS Initiative (n 75 above) 15.
134 As above.

These media platforms offer the youth of Uganda a safe space to talk about their problems and struggles. They can also listen to the stories of other youths who are in the same situation, which can help them to relate, which will then lead them to feel safe and not so ashamed of living with HIV/Aids.[135] Therefore, there is a need for campaigns to create an intimate and safe space in which open discussions about HIV/Aids can be had. *SIDA dans la Cité* (*AIDS in the City*), which is produced in Cote d'Ivoire, is shown all across West Africa and aims at promoting the use of condoms,[136] instead of just making use of a media campaign. Population Services International, who produces the series, tries to make condoms readily available to members of the audience who will be influenced to use them as they have seen the condom use in the programme and therefore will associate the two together.[137] Therefore, programmes should promote condom use and then make those condoms used in the show available to the public; because the impact of the series will then encourage the audience to make use of the protection.

3.4.2 Campaigns in South Africa

In South Africa there are various examples of successful campaigns. *Soul City* is a popular soapie which was developed by the Soul City Institute of Health and Development Communication, a non-governmental organisation.[138] This soapie, which was first broadcast in 1994 on South African televisions, deals with predominately HIV/Aids-related storylines and helps to bring 'about social policy change at a national level'.[139] *Soul City* has a large impact on the community and, together with The National Network on Violence against Women, its media campaigns even influenced the government to implement the Domestic Violence Act in 1999. According to the *Soul City* website, *Soul City* aims at 'strengthening individuals, communities and society'[140] in order to develop the quality of health for all South Africans. The Soul City Institute of Health and Development Communication makes use of various multi-media campaigns[141] which means that their information is being received by all members of the community regardless of their age, economic wealth, literacy level or access to a television or radio. Therefore, this increases the impact that the campaign has on the community and makes it an effective one. The children's character Kami, which means 'acceptance' in Tswana, is a HIV-positive character on the popular children's show

135 Global Media AIDS Initiative (n 75 above) 1.
136 Global Media AIDS Initiative (n 75 above) 17.
137 As above.
138 Global Media AIDS Initiative (n 75 above) 16.
139 As above.
140 Anonymous 'Soul City Institute for Health and Development Communication' http://www.soulcity.org.za (accessed 27 July 2015).
141 As above.

Takalani Sesame.[142] This character was created to educate young children about HIV/Aids. Storylines where Kami has been isolated and picked on by his friends because of his HIV-status have been aired to show how Kami copes with this type of negative prejudice and how he overcomes it.[143] Kami is portrayed as full of life, energetic and active[144] which therefore creates the impression on young children that people living with HIV/Aids can lead normal and happy lives despite the virus that they have been infected with. Therefore, it is necessary to start HIV/Aids awareness campaigns early so that children can be educated, whilst they are still impressionable, on how to treat a person living with HIV/Aids and be made aware of the seriousness of the virus. As already mentioned, *loveLife* is South Africa's largest HIV/Aids prevention campaign. *loveLife* wanted to extend the reach and extent of its media campaigns; so it joined forces with key media organisations in order to reduce costs.[145] Therefore, by partnering up with The South African Broadcasting Corporation, *loveLife* is able to receive 'extensive radio and television airtime, as well as co-production funding'.[146] This resulted in more than three quarters of respondents in a national survey admitting that *loveLife* made them conscious of the dangers involved in unprotected sex.[147] It can be said that *loveLife* was innovative. They saw that there was an issue of financial support and they came up with a solution that would help with the money shortage, as well as have an extensive impact on audiences. Therefore, in order to mimic the success of the *loveLife* campaign, ground-breaking ideas are needed to keep ahead of any current problems being faced.

3.5 Conclusion

It appears as if the South African media are not doing everything within their power to create effective and successful campaigns which will assist in the prevention of HIV/Aids in our country. Even though there are examples of effective media-based campaigns, most of the campaigns need guidance in order to become more successful. It appears as if there is a need for a more community-based approach, as opposed to campaigns which are related to the country as a whole. By gathering information about the problems which a particular community faces and designing a campaign specific to those issues, the campaign will have a greater impact on the members of that community.

142 Global Media AIDS Initiative (n 75 above) 16.
143 As above.
144 As above.
145 Global Media AIDS Initiative (n 75 above) 19.
146 Global Media AIDS Initiative (n 75 above) 20.
147 As above.

It is also important to note that not every household will have access to a television or radio. Therefore, it is essential to ensure that media-based campaigns collaborate with door-to-door campaigns and other media platforms, such as newspapers or billboards, to ensure that the message is communicated to the whole community. It is also necessary to look at effective foreign campaigns for ideas and then modify them to the South African context. Relying on various models and approaches in order to guarantee that when a campaign is being designed, it is following some sort of researched guidelines is crucial in ensuring a campaign's success. Therefore, in my opinion, media-based campaigns have the potential to revolutionise the prevention and education of HIV/Aids in a country which is so diverse but in order to achieve this campaigns which are innovative, community-based and ingenious need to first be designed.

4 The effect of the South African media on the problem of disclosing a person's HIV/Aids status

4.1 Introduction

In *NM and Others v Smith and Others*,[148] Madala J of the Constitutional Court indicated that the disclosure of an individual's HIV/Aids status warrants protection because of the negative social context which surrounds the disease, as well as the potential discrimination and intolerance which can be a consequence of disclosure.[149] This means that disclosing a person's HIV/Aids status without their consent will amount to a wrongful publication of a private fact, which is an infringement upon a person's constitutional rights to privacy and dignity.[150] However, what will the case be if an individual's HIV/Aids status is published by a journalist exercising their freedom of expression? Can a balance be achieved between an individual's right to privacy[151] and dignity,[152] and a journalist's right to freedom of expression?[153] The views of the Freedom of Expression Institute,[154] who was admitted as *amicus curiae* in this case, will be examined to see if this balance can indeed be achieved.

In *NM*[155] the Constitutional Court also had to decide whether the common law remedy of the *actio iniuriarum* could be developed to

148 2007 7 BCLR 751 (CC) para 42 (*NM case*).
149 *NM* (n 148 above) para 42.
150 *NM* (n 148 above) para 47.
151 Sec 14 of the Constitution.
152 Sec 10 of the Constitution.
153 Sec 16 of the Constitution.
154 *NM* (n 148 above) para 66.
155 *NM* (n 148 above) para 56.

include negligence as a requirement instead of intention. By taking a closer look at the majority and minority judgments in this case, it can be examined what impact this potential development would have on the right to freedom of expression.

The problem of disclosure is ultimately an individual one and various HIV/Aids awareness campaigns will try to highlight the positives and negatives about disclosing one's HIV/Aids status. By examining the advantages and disadvantages of disclosure set out in the *Living positively* campaign, it can be determined whether disclosing one's status is in the best interest of a person living with HIV/Aids, and if they decide that it is, how to go about disclosing their status to family and friends.

4.2 The Constitutional Court in *NM and Others v Smith and Others*

NM[156] is a very important case as it deals directly with the wrongful disclosure of an individual's HIV/Aids status and what effect this disclosure has on the individual as well as what effect non-disclosure will have on the right to freedom of expression. The case examines whether the disclosure of a person's HIV/Aids status constitutes an infringement of the applicants' constitutional rights and which of those rights it will infringe. It also examines the opinions of the Freedom of Expression Institute on whether a balance can be achieved between the protection of the applicants' constitutional rights and the exercise of the respondents' right to freedom of expression.

4.2.1 Facts and judgment

The *NM*[157] case follows the story of three applicants whose names and HIV statuses were disclosed without their consent in a biographical book about politician Patricia de Lille's life.[158] The three applicants took part in a clinical trial run by the University of Pretoria which aimed to decrease the patients' HIV levels.[159] However, due to some concerns about the trial; an inquiry was held and a report about the inquiry was drafted.[160] In this report the applicants consented to having their names and HIV statuses disclosed and the report was sent to Patricia de Lille because of the role she played in the initial inquiry.[161] When author Charlene Smith (1st respondent) was compiling information to write de Lille's autobiography, she came

156 *NM* (n 148 above) para 1.
157 As above.
158 As above.
159 *NM* (n 148 above) para 7.
160 *NM* (n 148 above) para 8.
161 *NM* (n 148 above) para 15.

across the report and made use of the names and statuses of the applicants in her book.[162] The applicants then wanted to sue the respondents for damages in the Johannesburg High Court[163] as a result of the infringement of their constitutional rights to privacy, dignity and psychological integrity. The trial court said that the disclosure of the applicants' names was not unlawful because the respondents did not act negligently when assuming that consent had already been given in the report.[164] In the Constitutional Court the applicants reiterated that there had been a violation of their constitutional rights and said that the common law must be developed in order for them to receive damages in terms of the *actio iniuriarum*.[165] The majority found that the applicants' right to privacy, dignity and psychological integrity had been infringed, because the disclosure of private medical information amounts to the violation of fundamental rights.[166] However, the majority stated that the common law remedy of the *actio iniuriarum* should not be developed to include negligence as a requirement instead of intention;[167] even though there was no need for this development in the first place as the court decided that the respondents had indeed acted intentionally.[168]

4.2.2 Freedom of Expression Institute

The Freedom of Expression Institute was admitted as *amicus curiae* in *NM*.[169] They reiterated to the court that the constitutional right to freedom of expression is very important in our open and democratic society based on freedom and equality, and that without this right, the concept of openness will certainly be compromised.[170] However, they said that the right to freedom of expression is not central to our democracy[171] and the Constitutional Court has only recognised it as one of a 'web of mutually supporting rights'.[172] The Freedom of Expression Institute was very clear that if the common law remedy of the *actio iniuriarum* were to be developed to include negligence as a requirement, this would impose an added burden on the right to freedom of expression and would be an unjustifiable limitation of this right.[173] However, because the majority judgment was against this

162 *NM* (n 148 above) para 16.
163 *NM* (n 148 above) para 19.
164 *NM* (n 148 above) para 23.
165 *NM* (n 148 above) para 21.
166 *NM* (n 148 above) paras 47-48.
167 *NM* (n 148 above) para 57.
168 *NM* (n 148 above) para 65.
169 *NM* (n 148 above) para 6.
170 *NM* (n 148 above) para 66.
171 *NM* (n 148 above) para 67.
172 *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) in *NM* (n 148 above) para 66.
173 *NM* (n 148 above) para 67.

common law development; the limitation on the right to freedom of expression was avoided.[174]

Therefore, it becomes clear that the Freedom of Expression Institute is of the opinion that even though the right to freedom of expression is important in our democratic society; it is secondary to the rights to privacy and dignity. Therefore, it is essential for the parties involved to weigh up the need for protection of an individual's rights to privacy and dignity against the right to freedom of expression.[175] Because an individual may suffer harmful effects as a result of the disclosure of private medical information which, in turn, may affect their ability to make certain basic choices,[176] it seems that in the case of the disclosure of a person's HIV status, the need to maintain an individual's rights to privacy and dignity outweighs a journalist's freedom of expression.[177]

4.3 Developing the Common Law

The majority decided that the common law remedy of the *actio iniuriarum* should not be developed to include negligence as a requirement.[178] However, the dissenting judgments of Langa CJ and O'Regan J indicated that there should be some development. O'Regan J held that the respondents did not act intentionally when disclosing the applicants' HIV statuses,[179] but that they acted negligently and therefore, the *actio iniuriarum* should be developed so that the respondents can be held accountable for their wrongful disclosure under the remedy.[180] As has already been discussed above, the Freedom of Expression Institute is of the opinion that the development of the common law remedy of the *actio iniuriarum* will have a negative effect on the balance between the right to privacy and freedom of expression. However, O'Regan J seemed to think otherwise.

4.3.1 The dissenting judgment of O'Regan J

O'Regan J revealed that in order to fully understand the right to privacy one must understand that 'the right to privacy might suggest that certain facts should not be published while at the same time the right to freedom of expression might suggest that those same facts should be able to be published'.[181] She concurred with the Freedom

174 *NM* (n 148 above) para 69.
175 *NM* (n 148 above) para 43.
176 *NM* (n 148 above) para 41.
177 *NM* (n 148 above) para 45.
178 *NM* (n 148 above) para 57.
179 *NM* (n 148 above) para 125.
180 *NM* (n 148 above) para 189.
181 *NM* (n 148 above) para 144.

of Expression Institute that the right to freedom of expression is important in our society as it allowed for the open exchange of ideas.[182] O'Regan J insisted that freedom of expression develops human dignity as it is fundamental in ensuring the growth of individuals by allowing them to form opinions and exchange ideas freely.[183] Therefore, there is a close and direct link between the constitutional rights to freedom of expression, privacy and dignity because the underlying notion of all these rights is that individuals will be able to be self-sufficient human beings who can independently form beliefs and then take action on them.[184]

However, it is clear that O'Regan J did not believe that freedom of expression has no limit as she indicated that in some cases it is necessary for the right to freedom to be limited in order to protect another constitutional right.[185] Therefore, a balance must be achieved between these rights and it was in O'Regan J's opinion that the *actio iniuriarum* could be used to regulate this relationship.[186]

In making the decision whether to develop the common law remedy of the *actio iniuriarum,* O'Regan J relied on the decision in *National Media Ltd and Others v Bogoshi*.[187] In this case it was decided that the *actio iniuriarum* should be developed to include negligence as a requirement in cases of wrongful defamation.[188] According to Scott,[189] applying the judgment of *National Media Ltd*[190] to cases where there was a wrongful disclosure of a private fact was incorrect, because O'Regan J just assumed that by adding a negligence requirement to the *actio iniuriarum*, a balance would be achieved between the right to privacy and the right to freedom of expression.[191] However, the media's defence of a reasonable publication in cases of defamation will result in a better protection of the right to freedom of expression; whereas when the negligence requirement replaces intention in terms of the *actio iniuriarum* in the case of the wrongful publication of private facts, the right to freedom of expression will be notably limited.[192] According to Scott, the fact that the development of the common law remedy of the *actio iniuriarum* will limit rather than support the right to freedom of expression has not been discussed or even noted by the dissenting

182 As above.
183 *NM* (n 148 above) para 145.
184 *As above*.
185 *NM* (n 148 above) para 146.
186 *NM* (n 148 above) para 147.
187 1998 (4) SA 1196 (SCA) (*National Media Ltd* case) in *NM* (n 145 above) para 177.
188 *NM* (n 148 above) para 173.
189 H Scott 'Liability for the mass publication of private information in South African law: *NM v* Smith' (2007) 18 (3) *Stellenbosch Law Review* 398.
190 *National Media Ltd* (n 185 above) 1998 (4) SA 1196 (SCA) para 1.
191 Scott (n 189 above) 398.
192 As above.

judgment of O'Regan J.[193] This is also in line with the views expressed by the Freedom of Expression Institute on the balance between the right to privacy and dignity and the right to freedom of expression.

Therefore, it appears that the judgment of O'Regan J was not a sound one, which means that the majority judgment that the common law remedy of the *actio iniuriarum* should not be developed to include negligence as a requirement was correct, and served to promote the right to freedom of expression rather than restrict it.

4.4 The Advantages and Disadvantages of Disclosure

When a person chooses to disclose their HIV status there are a number of dangers they face, such as discrimination, being treated unfairly, being denied access to various services,[194] being rejected or ostracised from the community or facing sexual abuse or violence.[195] An individual may also experience discrimination in the workplace as a result of a non-consensual disclosure of their HIV status, which may lead to a person not being able to take out life insurance policy or become a medical aid member.[196] Overcoming these dangers on a daily basis will dramatically reduce the general quality of life of a person living with HIV/Aids.[197]

The answer to the question of whether to disclose or not is not a simple one, as it depends on the personal circumstances in which each individual finds themselves.[198] There are no rules or guidelines in place which can help individuals make the personal choice whether to disclose their HIV status or not, and even though campaigns try to offer some assistance, there is still a long way to go before disclosing one's HIV status will not give rise to stigmatisation and a negative social context.

4.4.1 Advantages

Living positively, an HIV/Aids awareness campaign, tries to convince people living with HIV/Aids to disclose their HIV status to friends and family.[199] The *Living positively* pamphlet says that if an individual decides to disclose their status they will experience feelings of relief, and instead of being met with hostility and intolerance, they will only experience feelings of love, support and care from their family and

193 As above.
194 A Le Roux-Kemp 'HIV/Aids, to disclose or not to disclose: That is the question' 2013 (16) *Potchefstroom Electronic Law Journal* 202.
195 Le Roux-Kemp (n 194 above) 230.
196 As above.
197 As above.
198 Le Roux-Kemp (n 194 above) 202.
199 Swanepoel (n 79 above) 85.

friends.[200] Before disclosing one's status, one must decide who to disclose this information to and how to go about doing it.[201] *Living positively* says that making a list of trust-worthy friends and family is a good way to start.[202] Once the list is made, a HIV-positive person can educate their friends and family about HIV/Aids by giving them pamphlets and encouraging them to talk about HIV/Aids and their fears surrounding the virus.[203] This will help friends and family feel more at ease. Therefore, the *Living positively* campaign tries to promote the fact that disclose is in the best interest of a person living with HIV/Aids because there is a bigger advantage in disclosing one's status rather than keeping it a secret.

4.4.2 Disadvantages

The *Living positively* campaign says that by giving examples of the disadvantages of disclosure, individuals will be persuaded to disclose their statuses because it will show that the advantages outweigh the disadvantages.[204] However, the main problem with disclosing one's HIV status to friends and family is predicting how people will react to the revelation.[205] Even the *Living positively* pamphlet does not offer sound advice on what to do if friends and family react negatively, and it appears as if the authors of the pamphlet simply assumed that a person living with HIV/Aids will be accepted.[206] Another problem the disclosure process faces is whether those friends and family who have been chosen will keep that information confidential.[207] A person living with HIV/Aids fears a breach in confidentiality because this will open them up to the threat of stigmatisation and prejudice.[208] The campaign also does not mention ways in which a person living with HIV/Aids should cope with the emotional distress endured by those to whom the information was disclosed.[209]

Therefore, it appears that the *Living positively* campaign encourages people living with HIV/Aids to disclose their statuses and gives them a method on how to go about doing this, but then does not provide them with good enough reasons why they should disclose. It seems as if the disadvantages and fear of discrimination outweigh advantages of disclosure given in the pamphlet. Herein lies the critical problem that media awareness campaigns have yet to address.

200 As above.
201 As above.
202 As above.
203 Swanepoel (n 79 above) 86.
204 Swanepoel (n 79 above) 85.
205 Swanepoel (n 79 above) 86.
206 Swanepoel (n 79 above) 87.
207 As above.
208 As above.
209 As above.

4.5 Conclusion

Therefore, it appears that there is some conflict between the media and people living with HIV/Aids on the topic of disclosure. On the one hand, the media has a right to exercise their freedom of expression, but on the other hand, it is shown that disclosing one's HIV status will open them up to a multitude of potential discrimination and stigmatisation. Wrongful disclosure of a person's HIV status infringes upon their fundamental constitutional rights, and it is revealed that a balance cannot be achieved between these rights and the right to freedom of expression. It has also been revealed that the development of the common law remedy of the *actio iniuriarum* to include negligence as a requirement will only further damage the relationship between these rights, as this development would lead to an additional restriction on the right to freedom of expression. Campaigns try to promote the disclosure of an individual's HIV status but they have yet to come up with enough convincing reasons why this is so. Therefore, it appears as if the media are trying to have a positive effect on an individual's decision on whether to disclose their HIV status; but the need for a balance between the various constitutional rights and the lack of good enough advantages in disclosing, are standing in the way of this positive effect.

5 Conclusion

When establishing what effect the South African media has on the stigmatisation of a person living with HIV/Aids, it appears that the South African media has often portrayed a person living with HIV/Aids in a negative fashion and has therefore added to the stigma surrounding such a person. Even though the media is taking various steps towards reducing the negative social context surrounding a person living with HIV/Aids, a lack of journalistic training and appropriate guidelines on how to report about HIV/Aids-sensitive topics means that the media is indeed having a negative effect on the stigmatisation of a person living with HIV/Aids.

When looking at the effect of the South African media on the prevention of HIV/Aids, it can be said that the need for more community-specific awareness campaigns has not been met by the South African media, which in turn means that a national campaign may not have a great an impact on the members of a particular community. The media must also be aware that not every member of the community will have access to television or radio, therefore combining media campaigns with door-to-door platforms will result in the most effective spread of preventative information. Therefore, it appears as if the media is not having a direct negative effect on the

prevention of HIV/Aids, however, there is still plenty room for improvement in this field.

When examining what effect the South African media has on the problem of disclosing a person's HIV/Aids status, it was established that there is a need for a balance to be achieved between the right to freedom of expression, and the disclosure of private information. Although a need for a balance between the different constitutional rights exists, this balance has yet to be achieved, and the proposed development of the common law remedy of the *actio iniuriarum* will only obstruct the search for this balance. It is also crucial that the South African media ensure that utmost importance be given to protecting a person's HIV/Aids status. The media are trying to offer members of the community advice about disclosing their statuses through various campaigns, and even though the disadvantages do not seem to outweigh the advantages given in these campaigns, the media is still making the effort to resolve the problem of disclosure in a way that will reduce the stigmatisation of a person living with HIV/Aids. Therefore, despite the intention to have a positive effect; at this stage the South African media are having a negative effect on the problem of disclosing a person's HIV/Aids status.

The South African media still has a long way to go before they achieve an overall positive effect on HIV/Aids awareness in this country. There is a gap in the South African media law with regards to HIV/Aids, and there is room for legislation, rules and guidelines to be formed which can help regulate the relationship between the media and HIV/Aids. There is a need for more empirical research to be done on the ways in which the media are impacting those living with HIV/Aids within their specific communities. Only then will government, non-governmental organisations, non-profit organisations and various other groups be able to determine exactly how to create a relationship between the media and a person living with HIV/Aids that is positive, reduces stigmatisation and discrimination; results in effective prevention and education; and leads to disclosure without the fear of prejudice.

A NEW 'RAY OF LIGHT' IN SOCIO-ECONOMIC RIGHTS JURISPRUDENCE? A NOTE ON *COUGHLAN NO V ROAD ACCIDENT FUND (CENTRE FOR CHILD LAW AMICUS CURIAE)* (CCT160/14) [2015] ZACC 9

by Romy-Anne Templeton

1 Introduction

The justiciability of socio-economic rights in the South African courts has been the subject of much academic debate. This issue of justiciability spans back to the drafting of the final Constitution — the question at the time concerned whether or not these rights should be included in Chapter II of the Constitution. The fact that the justiciability of socio-economic rights has been an on-going concern for the last two decades illuminates the difficulties faced by the courts in giving substantive content to these rights. The courts often respond to these situations by way of deference.[1] Brand defines deference as 'a strategy of the courts, when faced with difficult, technical or contested social questions…to leave the decision of those issues in different ways and to varying degrees, to the other branches of government.'[2] The judgment of *Coughlan NO v Road Accident Fund (Centre for Child Law Amicus Curiae)* (CCT160/14) [2015] ZACC 9 is arguably described as a ray of light amongst the dark clouds that normally shroud socio-economic rights jurisprudence. The discussion on the judgment will comment on the decision with reference to the following issues:

- The clarification of the relationship between the general socio-economic right to social assistance and the right related to children;
- The distinction between foster child grants and a damages award;
- The extension of the principle to child support grants; and
- The justiciability of the child's right to social assistance.

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1 D Davis 'To defer and then when? Administrative law and constitutional democracy' (2006) *Acta Juridica* 23.

2 D Brand 'Judicial deference and democracy in socio-economic rights cases in South Africa' (2011) 22.3 *Stellenbosch Law Review* 614.

2 Factual background

The plaintiff, one Coughlan, brought the application in his representative capacity as curator *ad litem* to claim damages in respect of past and future loss of support on behalf of three children.[3] The children were maintained solely by their mother, Ms Beyers, as their father had predeceased their mother.[4] Their mother was subsequently killed in a road accident in June 2002.[5] The issue before the High Court was whether the grants had to be deducted from the damages.[6] The High Court, as per Henney J, held that the grants did not need to be deducted as they constituted *res inter alios acta*.[7] The RAF appealed against the decision in the Supreme Court of Appeal which, per Lewis JA, reversed the decision of the High Court. It reasoned that but for the death of Ms Beyers, the grants would not have been claimed.[8] It continued to say that the award of damages in addition to the grants amounted to double compensation which was impermissible.[9] It therefore upheld the RAF's appeal.[10] Coughlan appealed against the decision of the Supreme Court of Appeal in the Constitutional Court.[11]

3 The decision

The High Court had to decide whether the foster child grants were to be deducted from the amount agreed upon for loss of support or whether the social grant payments were classified as *res inter alios acta* and therefore not deductible.[12] The curator's contentions were twofold. Firstly, he contended that the social grant payments were *res inter alios acta* and therefore not deductible because they were paid to people who elect to become foster parents.[13] Payments are not made directly to the children. The curator relied on *Makhuvela v Road Accident Fund* 2010 1 SA 29 (GSJ)[14] where the High Court held that social grant payments are necessary to realise the constitutional rights of the child — payment is made to the foster parents who aid in the realisation of these constitutional rights. The curator's second contention was premised on establishing how to determine whether

3 *Coughlan NO v Road Accident Fund (Centre for Child Law Amicus Curiae)* (CCT160/14) [2015] ZACC 9 at para 2.
4 *Coughlan* (n 3 above) para 7.
5 As above.
6 *Coughlan* (n 3 above) para 10.
7 *Coughlan* (n 3 above) para 16.
8 *Coughlan* (n 3 above) para 19.
9 As above.
10 As above.
11 *Coughlan* (n 3 above) para 21.
12 *Coughlan* (n 3 above) para 10.
13 *Coughlan* (n 3 above) para 11.
14 *Makhuvela v Road Accident Fund* 2010 1 SA 29 (GSJ) paras 8-9.

the payments were deductible.[15] He relied on *Zysset & Others v Santam Limited* 1996 1 SA 273 (C) which held that the enquiry concerned two conflicting public policy considerations: the dependent should not receive double compensation yet the wrongdoer should not be relieved of his liability. The RAF submitted that if double compensation resulted it would be at the expense of taxpayers. This is because the foster care grants and the RAF funding are both pooled from the National Treasury.[16] The RAF relied on *Road Accident Fund v Timis* [2010] ZASCA 30 which held that it was not the purpose of the legislation to permit double compensation, and thus social grants were deducted from the RAF damages award. The High Court rejected the RAF's reliance on *Timis* owing to the fact that it concerned child care grants and not foster child grants.[17] It further held that death of Ms Beyers merely formalised the guardianship that Ms Beyers' parents had over her children as the children were already in their care before Ms Beyers' death.[18] The RAF was ordered to make payments accordingly.

In the Supreme Court of Appeal, the RAF argued that the High Court had incorrectly relied on *Makhuvela* and thus urged the Supreme Court of Appeal to place reliance on the judgment handed down in *Timis* and therefore extend its reasoning to foster child grants.[19] The Supreme Court upheld the appeal on the ground that there was no difference in substance between child care grants and foster child grants.[20] It noted that no evidence was produced to indicate that Ms Beyers' parents needed additional funds for the support of the children after the death of their mother.[21] It also submitted but for Ms Beyer's death, her parents would not have claimed foster child grants. The Supreme Court subsequently set aside the decision of the High Court.[22]

4 The relationship between the general right to social assistance and its relation to children

The Court looked at the relationship between the general right to social assistance set out in section 27(1)(c) of the Constitution and its relation to the constitutional rights of children set out in section 28 of the Constitution.

15 *Coughlan* (n 3 above) para 12.
16 *Coughlan* (n 3 above) para 13.
17 *Coughlan* (n 3 above) para 15.
18 *Coughlan* (n 3 above) para 16.
19 *Coughlan* (n 3 above) para 17.
20 *Coughlan* (n 3 above) para 19.
21 As above.
22 *Coughlan* (n 3 above) para 21.

The state, in terms of section 27(2) of the Constitution, has an obligation to take legislative and other measures to realise the general constitutional right of social assistance. Because the issue concerned the welfare of children, the Court was obliged to read section 27(1)(c) with the relevant provisions set out in section 28 of the Constitution. The relevant sections were sections 28(1)(b), (c), (d) and (2). The Court placed reliance on the dicta in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC)[23] which held that sections 28(1)(b) and (c) underscore the child's need for care. The Court observed that the state had enacted three pieces of legislation to give effect to these section 27 and 28 constitutional rights.[24] These are namely the Children's Act,[25] the Child Care Amendment Act[26] and the Social Assistance Act.[27]

Section 156(1)(e) of the Children's Act was analysed by the Court. This section lists different options of care from which the Children's Court can choose if it finds that a child's current standard of care, or lack thereof, is seriously wanting. In respect of the matter before it, the Court observed that foster care was a means of care listed in section 156(1)(e).[28] The Court contrasted the situation where a child is placed in foster care with one where the child is relocated to a youth centre.[29] The enquiry that followed was whether the expense that the state incurred by caring for the child in one of its youth centres should be deducted from a damages award made by the RAF?[30] The Court concluded that it would amount to unreasonable differentiation between children placed in foster care and those residing in youth care centres.[31]

5 The distinction between a damages award and foster child grants

The Court highlighted the difference between foster care grants and damages for loss of support.[32] The difference between the two lies in the content that the Court prescribed to each. This was accomplished by looking at the difference between 'care' in terms of the Children's Act and 'compensation' in terms of the Road Accident Fund Act. According to the Children's Act, 'care', in relation to a child, encompasses a multiplicity of aspects all closely associated with the

23 *Makhuvela* (n 14 above) para 76.
24 *Makhuvela* (n 14 above) para 36.
25 Act 38 of 2005.
26 Act 96 of 1996.
27 Act 13 of 2004, which repealed Act 59 of 1992.
28 *Coughlan* (n 3 above) para 37.
29 As above.
30 As above.
31 As above.
32 *Coughlan* (n 3 above) para 40.

provision of suitable accommodation, appropriate living conditions that promote the child's well-being as well as the necessary financial support.[33] It then considered the purposes of foster care in terms of section 181 of the Children's Act which underscored the need to provide children with a supportive and nurturing family environment.[34] The Court gave relatively substantive content to what 'foster care' entails and that foster care 'is expansive and extends beyond mere money and encompasses parenting, love, care, nurturing, discipline and other benefits of raising a child in a family environment.'[35] Foster care, as per the Children's Act attempts to place the child in a family set up that seeks to provide them with the many benefits that accrue to family life.[36] This is contrasted with an award of damages which is not calculated on the basis of care.[37] A damages award is intended to be compensatory to the extent that it wishes to reimburse the child for loss related to his material needs.

It then looked at the monetary and non-monetary components of 'care' and 'compensation'. Reference was made to the case of *Jooste v Botha* 2000 2 SA 199 (T)[38] which decidedly held that the parent-child relationship is twofold. There is a psychological aspect, which is classified as a non-monetary component, as well as an economic aspect. The non-monetary components of 'care' have already been abovementioned. The Court noted that although material needs can be 'adequately compensated' by a monetary award, the same cannot be said for the loss of parental care.[39] On this premise it ruled that an award for damages for the loss of support cannot replace the purposes for which foster parenting is permitted.[40]

Finally, it considered who the payments were made to. According to the Regulations for the Social Assistance Act, grants are paid to foster parents if they meet the eligibility requirements.[41] The grant forms part of the foster parent's patrimony and must be spent according to the best interests of the child. The Court relied on the dictum in *Makhuvela* which held that '[the] primary purpose [of the grant] is the realisation of constitutional rights of the child through foster parent intervention.'[42] In contrast, RAF payments are made directly to the child to replace the income upon which they would have survived but for the death of the parent caused by a motor vehicle accident.[43]

33 *Coughlan* (n 3 above) paras 38-39.
34 *Coughlan* (n 3 above) para 40.
35 As above.
36 As above.
37 *Coughlan* (n 3 above) para 41.
38 *Jooste v Botha* 2000 2 SA 199 (T) 201E-F.
39 *Coughlan* (n 3 above) para 44.
40 As above.
41 *Coughlan* (n 3 above) para 45.
42 *Makhuvela* (n 14 above) paras 8-9.
43 *Coughlan* (n 3 above) para 46.

In sum, the Court illuminated that there is a difference between the nature and purpose of social grants and that of compensatory payments. The purpose of the social grants is directly related to the constitutional obligation placed upon the state to provide for children in need of care.[44] In light of this finding, the Court established that there was no double compensation and therefore it was not required to establish whether or not the payments were *res inter alios acta*.[45]

6 Extending the principle

One of the most important and most interesting aspects of this judgment is that the Court overturned a decision that was not argued before it. The Centre for Child Law requested the Court to consider extending the principle concerning the deductibility of foster child grants from a damages award to child support grants.[46] The Court underscored that the importance of this decision was one of public importance especially in light of the constitutional obligation of the state to come to the aid of vulnerable people and children.[47] It was mentioned that the only distinguishing feature between foster child grants and child support grants is the application of the means test to determine the eligibility of primary care givers for child support grants.[48] Child support grants can only be claimed if the primary care giver(s) earns an income below the established threshold. Foster child grants are awarded irrespective of the foster parent's level of income. The Court looked at the nature and purpose of the two social assistance grants and held that they are both predicated on the realisation and achievement of care of the child.[49] In its decision to reject the finding made in *Timis*, the Court reasoned that the judgment failed to acknowledge that the state plays very different roles when it makes the payments.[50] On the one hand the state acts as a caregiver when it makes social grant payments. On the other hand, the state assumes the role of the wrongdoer when it makes RAF payments.[51] The Court finally examines the RAF Act and accordingly observes that if the RAF Act intended for double payment to be avoided (as is the position payments made in terms of the Compensation for Occupation Injuries and Disease Act)[52] then the RAF Act would have expressly acknowledged this.

44 *Coughlan* (n 3 above) para 51.
45 As above.
46 *Coughlan* (n 3 above) para 54.
47 *Coughlan* (n 3 above) para 53.
48 *Coughlan* (n 3 above) para 55.
49 As above.
50 *Coughlan* (n 3 above) para 57.
51 As above.
52 Act 130 of 1993.

7 The justiciability of the right to social assistance

Another noteworthy aspect of this decision is founded in the way the Court employed reasonableness review to adjudicate the matter. In spite of the fact that the rights issue before the Court was very narrow this judgment makes a contribution towards socio-economic rights jurisprudence. The Introduction hinted that the justiciability of socio-economic rights is fraught by a complex matrix of enquiries and subsidiary issues which the courts elect not to properly adjudicate upon. One of the strategies that the courts employ to skirt around deciding these issues is judicial deference. Although deference can manifest itself in numerous ways, a discussion on these variations detracts from the focus of this note. It is proposed that the standard of review imposed by reasonableness was utilised by the Court in a manner that resulted in popular support for the outcome.

Price defines reasonableness as 'an act … in everyday life.'[53] Essentially, the RAF, an organ of state, sought a judicial pronouncement that would effectively deprive children of their right to social assistance. In assessing the reasonableness of the RAF's request regard must have been had to 'an evaluation of competing considerations, costs and benefits, likely consequences and side effects, and a decision, on balance, that the 'reasons for' defeat the 'reasons against'.[54] It is argued that the Court engaged fully with this process which resulted in an outcome favourable to socio-economic rights jurisprudence. To that end, and upon request by the Centre for Human Rights, it extended the ruling so that it would apply to child support grants.

8 Conclusion

The judgment of *Coughlan* is hailed for two important reasons. The first is explained in the following terms: the Court decided a matter before by employing reasonableness review, an arguably deferential structure of review that concerns itself with processes instead of demarcating the substantive content that should accrue to rights. Within the framework of reasonableness review, the Court decided the matter in favour of Coughlan, and subsequently in the esteem of socio-economic rights jurisprudence. Regard was had to the numerous competing considerations between the RAF and Coughlan. The RAF ultimately sought to restrict the child's right to social assistance and

53 A Price 'The content and justification of rationality review' (2010) 25 *South African Public Law* 357.
54 Price (n 23 above) 357.

this was unreasonable, and unjustifiable. Regard was also had to the constitutional obligations of the state to protect children and have their rights to care and social assistance realised. For numerous reasons, and in light of public policy considerations, the Court held that to deduct the foster child grants from an award for damages would be unreasonable. Furthermore, it stood, unequivocally, against the purpose of the RAF Act which was 'to give the greatest possible protection to claimants'.[55] The second important aspect of this case was the fact that the Court overturned a decision of the Supreme Court of Appeal that was not an issue before it. This stands in stark contrast to the deferential stance that the courts normally assume in socio-economic rights cases where it fears encroaching upon the domains of the Legislature and the Executive. For this reason, this judgment is a feat for socio-economic rights jurisprudence, albeit a small one, because the Court sought to aggressively defend the child's right to social assistance.

55 *Coughlan* (n 3 above) para 59.

THE 'IRRATIONAL' FEMALE WAS INVENTED BY THE PATRIARCHAL SOCIETY

*by Sara Hartman**

1 Introduction

The main research problem that will be addressed is the reasons why a patriarchal system of law developed. This will be addressed by looking at the shifts in natural law, the rise of positivism and modernity and thus a restricted jurisprudence all of which contributed to a male dominated system to the exclusion of females.

The following assumptions can be presumed from this research problem. Firstly, the shifts in natural law with the rise of modernity and restricted jurisprudence and the development of the positive law have favoured the development of a patriarchal system. These changes can be seen as factors which facilitated the development of a patriarchal system. For example, from the importance of the community to a shift to the individual, a shift from a prescribed duty to that of unrestricted freedom; a shift from divine law to the laws made by man and; a shift of morality to survival of the fittest (where women were deemed as the weaker sex) et cetera. These shifts coupled with the development of positive law and the rise in restricted jurisprudence have led to a male dominated society in which the 'irrational' female's only place is in the home.

Secondly, it can be assumed that the law and those it governs may be better off if the law was not an ingrained, prescribed patriarchal system of rules and commands but rather an all-encompassing system which makes provision for every social being through a general jurisprudence. This essay will thus suggest and explore how this patriarchal society and the law is challenged through the rise of feminism, general jurisprudence, legal pluralism and even *uBuntu*.

Thirdly, it can be assumed that substantive equality would be more beneficial than a formal equality through the incorporation of a 'feminine law' in order to make place for emotions, compassion and the so called 'irrationality' of females.

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Theoretical challenges to this patriarchal legal system will be looked at in order to achieve substantive equality over formal equality. In order to make this analysis, one must take into account the intersectionality of individuals through a general jurisprudence, over a restricted jurisprudence. This is necessary in order to achieve transformation from a legal system that supposedly protects everyone but favours only that of the rich, white male. In a South African context, the Constitution becomes an important tool in order to achieve substantive equality. As it is both a monument and a memorial which protects the rights of all citizens, irrespective of class, gender, sex et cetera, the Constitution caters for every citizen's intersectionality, thus making it necessary for substantive equality.

2 Shifts in natural law that contributed to the development of the patriarchal system

By looking at these shifts the origin of patriarchy will be traced within these theories. It will show how these shifts favoured the development of patriarchy throughout history and how it led to a modern patriarchal society today in response to the first assumption.

Natural law can be traced as far back as 442BC when Sophocles staged a play showing the trial of Antigone.[1] Here Sophocles demonstrates that man could not override the unchanging laws of the gods. He believed in a higher law, not created by legislatures made of men, which could therefore not be overridden by the positive law of the state. Instead, a higher duty is established according to relationships between man and the gods and between human beings themselves (the community or cosmos is more important than the individual.) Here the female Antigone stands before the King and challenges him. She does not fear man because the gods and their law are on her side.[2]

The next shift was that of the Sophists[3] where the authority of the gods lost its force. Man was now seen as the measure of all things and thus the free and self-serving individual took centre focus. According to Callicles natural law consists of the strong man who should live to his utmost power and give way to his natural desires. This view lacked morality and natural law became a disregard for any rules with only the powerful individual allowed to be in charge. The beginnings of a patriarchal system have started to develop in the law (not necessarily in history; even at this point in time women were still subordinate to

1 W Le Roux 'Natural law theories' in C Roederer & D Moellendorff (eds) *Jurisprudence* (2004) 6.
2 Le Roux (n 1 above) 27.
3 Le Roux (n 1 above) 30 & 31.

men, but in the law where the natural desires of men become more prevalent and are now protected and justified by that law.)

If we look at the next shift, Plato[4] rejects the written laws of the state and the individualistic, radical law that Callicles suggests. Aristotle[5] believed that a judge's task is to find a just solution which was to be found in relationships of nature; not merely to apply laws. This propensity to revert back to nature instead of merely applying laws can be contrasted to positivism. Already here, it can be seen that the law should not be applied blindly but rather a just solution (in other words a substantive equality) should be sought in order to serve the community justly rather than the individual. Even though women were confined to the home, there was more of an overall benefit to the community in terms of the law.

A new understanding of natural law came from the Stoics[6] who moved natural law from the external to the internal where the inner state of mind must be in harmony with a universal reason. All individuals became equal before the law and their rights were determined by a universal law that was applicable everywhere and at all times. This approach would have been more beneficial for women because the law would have provided some protection but it did not last as it was a temporary period in legal history which was replaced by the next shift.

Augustine[7] claimed that justice could only be obtained through the presence of God. The will of God now replaced the will of man. Obedience to God was now the only moral imperative to the exclusion of morals in every other aspect of life. Aquinas[8] then tried to reconcile God with reason. He identifies two types of law within natural law; divine law and positive law (which recognises private property and individual ownership.) This rise in subjective rights shifted the focus once again from the community to the individual. This shift to the individual, particularly the dominant male, could have further developed the patriarchal society as wealthy men were the only ones who could acquire such rights. As men were the *paterfamilias*, women and children were subjugated to men's control under those households, similarly to that of females on the homestead in an African context.

The next shift came about with William Ockham[9] who defended the nominalist view as well as voluntarism. He re-asserts the primacy of God's will as prime, free and absolute. According to this view there

4 Le Roux (n 1 above) 32.
5 Le Roux (n 1 above) 33.
6 Le Roux (n 1 above) 34.
7 Le Roux (n 1 above) 35, 36, 37.
8 Le Roux (n 1 above) 37 & 38.
9 Le Roux (n 1 above) 39 & 40.

are only words to describe nature. This disenchanted view of nature was one from which no meaning or guidance could be derived. Thus modern law developed as a coordinated system of subjective rights. From this thinking came Hugo Grotius[10] who claimed that ownership (a subjective right) is wilful, not naturally given, by agreement or contract. Thus ownership as a share in the common world turned into an unlimited, subjective power of the individual. This way of thinking once again favours the wealthy male, who can afford to acquire ownership rights, which places power and control in their hands.

The next shift can be characterised by Thomas Hobbes,[11] who believed in an unlimited sovereign power where every person confers all their power and strength onto the state in terms of a social contract. This is undesirable because the state could be corrupt or based on unequal, unjust principles which would be implemented without question as the state has full power. The state would not be held accountable as it has the power to define what a right is and what it deems just. Citizens would then have to abide by it in terms of the social contract, thus creating a platform in which patriarchy can flourish. John Locke[12] found this problematic. He rather combined natural law with subjective rights developed by Grotius to provide an objective moral limit to the power of the state and its positive laws. This, however, does not stop those laws from being rooted with patriarchy.

This 'denunciation of women in the early doctrinal and constitutional writings of common law was the repression of a figure of femininity.'[13] Thus we have a 'classic, liberal (male) vision of social life as the exercise of subjective rights' where these subjective rights belong to 'individuals [primarily men] wielding absolute power within legally circumscribed' positive laws.[14]

Lastly, in a South African context, the struggle lawyers[15] appealed to a higher duty that all lawyers have to respect the natural law which demands respect for basic human rights. They rejected the positive laws of the state because it did not meet the standards of the natural law. Nelson Mandela believed that every African has a 'conflict between his conscience … and the law.' A conflict between the morality of people and the legality of laws of the state (just because something is law does not mean it is fair). A duty arises to oppose these positivist laws when they disregard the morals and wellbeing of the society they govern. This view by Mandela can not only be applied to an opposition of apartheid for black African people but can also be

10 Le Roux (n 1 above) 40.
11 Le Roux (n 1 above) 41 & 42.
12 Le Roux (n 1 above) 43, 44, 45.
13 P Goodrich *Oedipus lex: Psychoanalysis, history, law* (1995) 12.
14 Le Roux (n 1 above) 44.
15 Le Roux (n 1 above) 25 & 26.

utilised for women of all races who are oppressed by these positivist laws. For example white women in South Africa were enfranchised only on 19 May 1930.[16] Considering how long women were excluded from the right to vote before this date, 1930 was just the other day in the broader timeline of history. The point, is that immoral laws excluding women were enforced blindly by lawyers and the state without consideration of the rights of women in terms of equality. Women of all races were subject to this male dominant law, some more so than others but not because of their gender but based on skin colour. Mandela urges against this blind following and urges for a law that encompasses the rights and morals of all citizens not only to combat racism but to combat a patriarchal society as well. Meaningful transformation in the law is what Mandela pleads for: Law that reflects the conscience of the social identity[17] of a new South Africa and not one that is *contra bonos mores;* law that takes into account the intersectionality[18] of the people which it governs, factors such as race, gender, class, etcetera that make a person who they are. People consist of multiple facets and in order to achieve substantive equality, these factors must be taken into account.

3 Positivism, modernity and the rise of restricted jurisprudence

In relation to what Mandela says above, John Dugard[19] also criticises positivism. Positivism, according to John Austin and Jeremy Bentham[20] in nineteenth-century England, was based on the command theory which states that the law is a set of commands connected to a punishment where the state's power is unlimited as it is the creator of law. According to this view there is a strict separation between law and morality. This positivism was adopted in South Africa because of the decrease of natural law and the increasing influence of English law.[21] This can be seen with the purely mechanical function of judges who merely find the intention of the legislature and apply it, with no creative power. Thus was in order to keep in line with the separation of powers principle.[22] This positivism is what has laid the foundation for a patriarchal system of law. The

16 South African History Online 'The women's suffrage movement' http://www.sahistory.org.za/archive/womens-suffrage-movement (accessed 18 May 2015).
17 C Douzinas & A Gearey *Critical jurisprudence: The political philosophy of justice* (2005) 1.
18 D Bell 'Who's afraid of critical race theory' (1995) *University of Illinois Law Review* 893-910.
19 J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181.
20 Dugard (n 19 above) 184 & 185.
21 Dugard (n 19 above) 184.
22 Dugard (n 19 above) 186.

status of women dates back to Plato and Aristotle who tried to find the role of women in society.[23] They came to the conclusion that women should be confined to the private sphere as they were thought of as irrational and incapable of handling life in the public sphere particularly in politics. Thus the law was created by a sovereign made up of men who did not consider the equality of women. Legal systems thus reflect the characteristics of their largely male architects who are legislatures and judges.[24]

Dugard suggests that the judiciary should not play a merely mechanical role but that they should be guided by accepted legal values.[25] He further suggests that a positivist approach when interpreting statutes is a pretence that hides 'inarticulate premises'[26] within these statutes. The worth of the individual is important and constitutional values (particularly that of the South African Constitution which is based upon equality, freedom and human dignity) should be taken into account during the judicial process. This is particularly important for women as this will give them the necessary power from the law that is needed for transformation from a patriarchal system to a system that empowers every individual.

With the rise of modernity came a rise of restricted jurisprudence. According to Douzinas the evolution of jurisprudence started in a pre-modern time where natural law theories were prevalent leading to a general jurisprudence.[27] They argue that as modernity rose and the positivist theories became more prevalent a rise of restricted jurisprudence or impoverished law occurred.[28]

Restricted jurisprudence is said to be a set of strict rules and outcomes that produce a set of desired results[29] similarly to positivism theory. Lawyers and judges are forced to abide by these rules rather than relying on any personal opinions or experiences that they might have in other disciplines.[30] The law must contain legality and not personal, political or moral values.[31] The law can be shortened, memorized and regurgitated because it lacks influence from other disciplines leading to an impoverishment in the law.[32] This impoverished law would favour the development and implementation of a patriarchal system because such laws would be applied and enforced regardless of their fairness even if they are immoral. Even if

23 H Barnett *Introduction to feminist jurisprudence* (1998) 3.
24 Barnett (n 23 above) 26.
25 Dugard (n 19 above) 187 & 195.
26 Dugard (n 19 above) 187.
27 Douzinas & Geary (n 17 above) 1 & 2.
28 Douzinas & Geary (n 17 above) 4 & 6.
29 J Boyd White 'Justice in tension: an expression of law and the legal mind' (2012) 9 *No Foundations* 4, 10 & 14; Douzinas & Geary (n 17 above) 4.
30 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 & 149.
31 Klare (n 30 above) 158.
32 Douzinas & Geary (n 17 above) 4.

they are blatantly discriminatory to women they will be learnt, taught and enforced as a set of strict rules with no deviation in order to achieve a desired result. Modernity, along with the rise of restricted jurisprudence is said to negate legal pluralism because a restricted jurisprudence favours a single unified system of law based on patriarchy which excludes all other pluralities including the law from a female voice. This further reasserts a patriarchal system of law.

Therefore, the shifts in natural law combined with the development of the positive law (and its acceptance in South Africa) together with a rise of modernity and restricted jurisprudence, have favoured the implementation of a patriarchal society and system of law which responds to the first assumption.

4 An all-encompassing system of law is needed for transformation

The law and those it governs (especially females) may be better off if society was not an ingrained, prescribed patriarchal system but rather an all-encompassing system that makes provision for every social identity. So the question is whether a general jurisprudence is the answer to this second assumption?

General jurisprudence is an expansion of the law through different influences, sources and disciplines. The law should be an open system of interpretation, creativity and language.[33] Boyd White argues that we are 'free to use every resource at our disposal' such as religion, public opinion and social theories in order to interpret the law[34] in order to find a just outcome rather than one already prescribed by positive law. Democratic values, such as human dignity, freedom and equality, should be taken into account in order for the law to provide justice especially for fundamental human rights.[35]

Thus a system of general jurisprudence would be a better approach to follow as it makes room for the intersectionality of individuals and allows the law to become an all-encompassing law where the conscience of a nation[36] is taken into account rather than blindly following a set of strict rules bringing it in line with constitutional values. Douzinas argues that the law is starting to return to a more general jurisprudence as awareness of the need for justice and human rights becomes widespread and a new hermeneutical jurisprudence arises.[37] This rise in a general

33 Boyd White (n 29 above) 16.
34 Boyd White (n 29 above) 17.
35 Klare (n 30 above) 149.
36 Le Roux (n 1 above) 25.
37 Douzinas & Geary (n 17 above) 1 & 7.

jurisprudence is challenging patriarchal law favoured by a restricted jurisprudence thus providing an answer to the second assumption.

5 Theoretical machinery that has challenged patriarchal ideals to achieve general jurisprudence.

Firstly, the importance of memory must be looked at. Klare argues that in order for 'transformative constitutionalism' to occur, constitutional enactment and interpretation must not be done in isolation but taking into account the historical context of the law.[38] The past is an important tool for transformation as it enables us to reflect on prior mistakes, to learn from them and not to repeat those atrocities again.

Feminism thus sought to challenge patriarchal structures by opposing the roles in which men had placed them. Females began to demand equality[39] and aimed to break down this socially constructed[40] male society. Substantive equality over formal equality can be used to challenge this patriarchal society as it would take into account things such as the 'irrationality' of females, emotions, class and other social factors (in other words the intersectionality of individuals) which the positive law attempted to keep out. Liberal feminism may be too close to a restricted jurisprudence and a formal equality. However, it contains some merit; formal equality is still needed in the law as it allows for the right to vote, right to education and so on but it needs to go beyond this which is why substantive equality is needed. Cultural and relational feminism would provide the necessary challenge to patriarchy and provide for substantive equality. Cultural and relational feminism[41] is based on an essentialist view that embraces the differences between men and women. These differences that women have should be celebrated[42] and embraced in the law rather than shut out. This makes room for a general jurisprudence and more than one system of law in terms of legal pluralism.[43] Peter Goodrich advocates for a minor jurisprudence, more specifically a feminine jurisprudence, which he believes is a 'challenge to the science of law and a threat to its monopoly of legal

38 Klare (n 30 above) 150.
39 Barnett (n 23 above) 4. Feminism began to reflect the demands of women, irrespective of their race, age or class as they wanted to be recognised as equal parties to the social contract.
40 Barnett (n 23 above) 4.
41 This can be seen as part of 2nd and 3rd wave feminism.
42 Anonymous Feminist Theory 'Examining Branches of Feminism' http://www.sascwr.org/files/www/resources_pdfs/feminism/Definitions_of_Branches_of_Feminisn.pdf (accessed 30 May 2015).
43 S Veitch *et al Jurisprudence: Themes and concepts* (2007) 248.

knowledge-'[44] — in essence, a threat to patriarchy. Minor jurisprudence is neither merely poetic nor aesthetic but a threat to the history of the practices to which they were tied[45] (a history saturated with patriarchy) which is why minor jurisprudences have been denied.

Another challenge to patriarchy (not only to be used for indigenous law) is the principle of *uBuntu*[46] together with cultural feminism. *uBuntu* contains aspects that can be embraced in the struggle against patriarchy. For example, *uBuntu* in its most fundamental meaning describes humaneness and morality. It promotes group solidarity and unity. This is important for the survival of the group and an individual's well-being is relative to that of the group. Thus by excluding females, it violates the morality and humaneness of *uBuntu*. It is detrimental to the group because half of that group is oppressed. *uBuntu* is a 'humanistic orientation towards fellow beings'[47] thus irrelevant of gender. Therefore, feminism can use these values from *uBuntu* in order to challenge patriarchy to achieve meaningful transformation.

Lastly, in terms of a South African context, the Constitution is both memorial and monument.[48] The memorial aspect is used to remember the past. It reminds us of a time of inequality, not only in terms of apartheid and race but also in terms of where women were treated as inferior to men. This is important as it acts as a constant reminder that the past must never be repeated; it was a gross violation of human rights. But the Constitution also serves as a monument. It serves to remind us of the victories that have been won, of how far we have come and how far we still have to go. It acts as a safeguard that protects the equality, human dignity and freedom of all those who fall under its protection. The Constitution is the supreme law of the Republic but it is not an 'all-encompassing, super law.' The principle of subsidiarity[49] means that other legislation, statutes, cases etcetera should be used first before relying on the Constitution in order to solve legal problems. To respond to the third assumption; meaningful transformation and substantive equality, will only be possible if legislation is free from patriarchy and embraces a general jurisprudence.

44 P Goodrich *Law in the courts of love: Literature and other minor jurisprudences* (1996) 1.
45 Goodrich (note 44 above) 2, 3.
46 Y Mokgoro '*uBuntu* and the law in South Africa' in D Cornell & N Mavangua (eds) uBuntu *and the law: African ideals and post-apartheid jurisprudence* (2012) 317.
47 Mokgoro (n 50 above) 318.
48 L Du Plessis 'The South African constitution as monument and memorial, and the commemoration of the dead' in R Christensen & P Bobo (eds) *Rechtstheorie in rechtspraktischer Absicht* (2008) 189.
49 Du Plessis (n 48 above) 194.

The law, like history, mourns as it recognises the past which will make a 'deeper impression on the soul and be retained in the memory more than all the memorials that have been rehearsed.'[50] Peter Goodrich emphasises the importance of history that enables us to mourn for the past and its atrocities. Mourning and emotions are feminine traits, which he states are important as mourning creates a long lasting impression on the soul that allows us to accept and move forward towards transformation.

6 Conclusion

The main problem of patriarchy in the law has been discussed by looking at the shifts in natural law, the development of positivism and the rise of modernity with a restricted jurisprudence. This problem was responded to and has shown how the 'irrational' woman was created through the process. It can be seen that patriarchy through time has been consistent and there hasn't been any significant challenges to it yet because patriarchy is still evident within the public sphere throughout the world. Theoretical suggestions were made that can be used to challenge this patriarchal law such as feminism combined with *uBuntu* in order to achieve a general jurisprudence that incorporates the intersectionality of individuals and legal pluralism so that transformation can be realised. Transformation according to Nelson Mandela is important because 'deny[ing] people their human rights is to challenge their very humanity.'

50 Goodrich (n 44 above) 19.

LIABILITY IN SPACE LAW: QUESTIONS ON PRACTICAL APPLICATION OF ABSOLUTE AND FAULT LIABILITY

*by Sewela Masie & Kaitlin Morris**

1 Introduction

With modern advances in technology, mankind is now faced with new legal problems and situations previously unanticipated. Space law in particular is relevant as, while most of the documents were drafted and assented to in the mid 1990's, there have since been great advances in space exploration and technology. This means that potential situations exist which are not expressly provided for in International Space Law. Therefore, since the answers for hypothetical questions cannot always be found explicitly in space law, we will be relying on the sources of international law listed in article 38(1) of the International Court of Justice Statutes, namely international conventions, international custom, general principles of law and judicial decisions and teachings.[1] The rules of the Vienna Convention regarding the interpretation of Treaties must also be kept in mind, including that a state is obliged to refrain from acts that would defeat the object and purpose of a treaty that it has ratified.[2]

In practice the has not been any cases dealing with liability in Space law, thus we shall use the hypothetical case that was presented in the 2015 Manfred Lachs Space Law Moot Competition Compromis to look at how fault liability and absolute liability will work in practice. This fact complex considers two space faring nations, the United Republic of Adventura (URA) and the Sovereign Peoples Independent Democratic Republic (SPIDR) who both launch space craft to the same celestial body, and one of whose space craft then takes action against a near-Earth object which results in damage to the other state. The following hypothetical situation is described:

Within three days FUSA [Federal URA Space Agency] decided to station the spacecraft ahead of the asteroid to speed it up in order to ensure that the asteroid would miss the 2028 keyhole. Within three

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1 The Statute of the International Court of Justice, art 38 (1).

2 Vienna Convention on the Law of Treaties (23 May 1969) UN Doc a/Conf.39/27 / 1155 UNTS 331 / 8 ILM 679 (1969) 63 AJIL 875 (hereinafter Vienna Convention) art 18(a).

more days, FUSA announced that TYRUS [an unmanned spacecraft] had been able to move itself into a relatively stationary position ahead of the asteroid, and that the process of gravity tractoring to gradually speed it up had been successfully initiated.

Following the announcement of the decision on 22 August 2024 to speed up Syd-1, the SPIDR Space Agency quickly calculated that the effects of the TYRUS mission on the asteroid would amount to virtually dragging the potential impact point across the surface of, inter alia, SPIDR before it would disappear off the Earth altogether. This also meant, according to the SPIDR Space Agency, that if something went wrong in the course of TYRUS' operations, the chances of Syd-1 actually crashing into SPIDR territory would be considerably larger. (…)

URA launched TYRUS from Floyd-4 and knocked KNUD-1 [an unmanned space craft belonging to SPIDR] over in the launch process. This resulted in the loss of communication between SPIDR and KNUD-1. As such KNUD-1 was unable to fulfil its purpose of sending information to the SPIDR agency regarding any developments on the Floyd-4. In addition, SPIDR lost control of the space craft.[3]

There are therefore two main questions that will be discussed in this article: whether a state can be held absolutely liable for its actions if it, in changing the course of an asteroid affect the area of damage and whether a state can be held liable on the basis of fault for damage caused by its space craft to another space craft if the damage was anticipated and the second state was warned not to be in that specific location.

2 The absolute liability of a state with regards to damage caused by a near-earth object which they have affected

Article 7 of the Outer Space Treaty states that the launching State of any space object is internationally liable to the victim State for damage caused by its space object to the other State party.[4] Article 2 of the Liability Convention provides that the launching State shall be held absolutely liable to pay compensation for damage caused by

3 2015 Manfred Lachs Space Law Moot Court Competition Compromis para 19, 20, 6 & 8.

4 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *entered into force* 10 October 1967, art 6, 18 UST 2410, 610 UNTS 205 (hereinafter Outer Space Treaty) art 7.

its space object on the surface of the Earth or to an aircraft in flight.[5] It is by scholarship that in order to prove liability under Article 2 of the Liability Convention, three elements must be established. Firstly, damage must be shown. Secondly, this must be because of a space object. Finally, the damage must be shown to have been caused by the space object.[6] Furthermore he states that as absolute liability is present in Article 2, no negligence needs to be shown.[7]

It is further stated that this absolute liability is essential for cases involving outer space because of the high risk posed by outer space activities, and because it protects the interests of non-spacefaring States which may suffer damage.[8] Although it is stated in Article 6 of the Liability Convention that the launching State may be exonerated from this absolute liability when it is established that there is negligence or an act or omission made by the claimant state which places the claimant state at fault[9] this principle may not be relevant if no negligence or act has been shown to have caused the damage on the victim state's part. Thus, absolute liability and the three elements discussed by Gorove are will be discussed.

2.1 The possibility of a broad interpretation of absolute liability

When interpreting treaties, the Vienna Convention can be used. Article 31 of the Vienna Convention outlines the general rules of interpretation and states:[10]

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

According to Article 32 of the Vienna Convention, supplementary means of interpretation may be used if interpretation using Article 31 '(a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable'.[11] In this instance, as it may be argued that the exact meaning with regards to who is liable in this hypothetical case, supplementary means may be used.

5 The Convention on International Liability for Damage Caused by Space Objects, United Nations, *Treaty Series*, vol 961, No 13810 (hereinafter Liability Convention), art 2.
6 S Gorové 'Cosmos 954: Issues of law and Policy' (Fall 1978) 6 *Journal of Space Law* 139.
7 Gorové (n 6 above) 139.
8 L J Smith and A Kerrest 'Article II (Absolute Liability) LIAB', in S Hobe, B Schmidt-Tedd & K Schrogl (eds) *ll Cologne Commentary On Space Law* (2013) 118.
9 The Liability Convention (n 5 above) art 6. This may also be linked to Article 2 of the Articles on State Responsibility.
10 The Vienna Convention (n 2 above) art 31.
11 The Vienna Convention (n 2 above) art 32.

Article 2 of the Liability Convention states that a State shall be held absolutely liable for damage caused by its space object either on the ground or to an object in flight.[12] Literature states that, in this sense, absolute liability is taken to mean liability without the need to prove fault or negligence.[13] It is important to consider the great threat that could be posed by an asteroid. According to information from the NEO Shield Project, an asteroid of that size colliding with the Earth would release energy equivalent to about 80 megatons of TNT and create a crater approximately 2 kilometres in diameter. The energy released would be similar to that released in the largest H-bomb detonation.[14] The largest nuclear bomb ever detonated, the Tsar Bomba, occurred on the 30 October 1961 and created a ring of absolute destruction for 35 kilometres around the blast site.[15] This should be expanded to the extent that in cases such as this where the launching State acts in order to prevent future harm, they are not held liable for the damage that results if the attempt is not completely successful.

The hypothetical situation of a future impact of a NEO with the Earth is discussed in literature. The possible actions that could be taken are discussed, and this includes the gravity tractoring method employed by FUSA. It is stated that should a NEO pose a threat to the Earth, states may be deterred from acting to address the threat by attempting to change the course of the asteroid because of the liability they would then incur should the attempt not be completely successful and the asteroid still collide with the Earth.[16] The problem in this situation is that the presence of the absolute liability may then prevent the mitigation of damage for fear of being held liable for such damage. Scholarship suggest that in order to solve this, the definition of absolute liability in the Liability Convention and the Outer Space Treaty needs to be expanded so that States which act in good faith in order to mitigate the damage caused by a NEO cannot then be held liable for the damage caused by the collision of the asteroid they attempted to deflect.[17]

Absolute liability, specifically with regards to space law, is discussed by scholarship. It is stated that as a principle it was initially applied in international law with regards to nuclear energy in order to impose liability on a third party, regardless of the length of the chain

12 The Liability Convention (n 5 above) art 2.
13 Gorové (n 6 above) 137.
14 Neoshield 'The Threat from Near-Earth Objects', http://www.neoshield.net/en/near-earth-objects/the-threat-from-near-earth-objects.htm (accessed March 2015)
15 CTBTO Preparatory Commission '30 October 1961 — The Tsar Bomba' http://www.cbto.org/specials/testing-times/30-october-1961-the-tsar-bomba/ (accessed March 2015).
16 M Bucknam & R Gold 'Asteroid Threat? The Problem of Planetary Defence' (2008) 50 *Survival: Global Politics and Strategy* 141.
17 Bucknam and Gold (n 16 above) 141.

of causation or intervening factors.[18] Literature further states that defendant's liability is not exonerated, as it usually is, by 'tortious acts, force majeure, acts of God or intervening acts of third persons' or even by an act of causation in part by the plaintiff.[19] In making recommendations for space law, it is stated that absolute liability should be applied but that it should have certain maximums set for different areas of space law; the author specifically states that uses of space for peaceful activities, such as scientific research and communication, should have a low maximum liability amount.[20] This further supports the idea that absolute liability, as outlined in Article 2 of the Liability Convention should be extended.

2.2 The damage

Scholarship states that damage under Article 7 of the Outer Space Treaty includes both material and immaterial damage.[21] Article 1 (a) of the Liability Convention defines damage as including the loss of life and the loss of or damage to property of a State or person.[22] The general international principle of damage as loss, either by physical injury or consequences of this injury, can also be applied. It is also stated that a claim may be made for both *damnum emergens* (loss suffered) and *lucrum cessan* (gain or profit loss).[23] An exhaustive list of the possible types of damage incurred would have been impossible to achieve in the Liability Convention, so the basic definition is used along with the understanding that reparation must, as far as possible, remove all consequences of a wrongful and damaging act.[24] In the event of an asteroid collision with Earth, the expected damage may include the destruction of property and the loss of lives; thus there is no argument that damage has not occurred.

2.3 The space object

A space object is defined in Article 1 of the Liability Convention as including component parts of a space object as well as its launch vehicle and parts thereof. It is further stated that within the Liability Convention, a space object may be defined as any man-made object originating from the Earth which is designed for use in outer space.[25] The space object in this case is therefore the space craft used to alter

18 L Goldie 'Liability for damage and international law' (1965) 14 *The International and Comparative Law Quarterly* 1216.
19 Goldie (n 18 above) 1217.
20 Goldie (n 18 above) 1218.
21 L J Smith & A Kerrest 'Article VII' in S Hobe, B Schmidt-Tedd & K Schrogl (eds) *I Cologne Commentary On Space Law* (2009) 141.
22 The Liability Convention (n 5 above) art 1 (a).
23 Smith & Kerrest (n 21 above) 141.
24 Smith & Kerrest (n 21 above) 105.
25 Gorové (n 6 above) 141.

the course of the asteroid, yet the damage may directly be caused by the near-Earth object. When using these definitions, it could be argued that the asteroid, which directly caused the damage, does not qualify as a space object. In Article 2 of the Liability Convention it states that a launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight.[26] A launching State is defined by the Liability Convention as both the State which launches or procures the launching of a space object and the State from whose territory or facility the space object is launched.[27] Nevertheless, liability can be attributed to the launching state on the basis of proximate causation.

2.4 Whether the space object caused the damage

The victim state may argue that by implementing gravity tractoring and speeding up the asteroid the space object the space craft of the acting state caused the damage to the town and thus the acting state is liable. The damage may be caused as the change in orbit caused a change in the impact area, and caused the damage to occur to a specific location as opposed to another area of the Earth. In order for a space object to be deemed to have caused the damage, proximate causation needs to exist between the damage and the activity from which the damage resulted.[28] This occurs when there is a direct link between the act and the damage, as opposed to consequential damage. Literature defines consequential damage as that which occurs from the consequences of an act and does not flow directly and immediately from the act itself.[29] Although proximate causation is a principle of general international law, Article 3 of the Outer Space Treaty allows for the use of international law where areas of space law are lacking. It is further explained that this principle in applicable in determining liability in space law. Gravity tractoring may be used to change in the asteroid's course and the subsequent damage area of collision. The natural sequence of events occurs when there is an unbroken chain of events that can be established between the action and the damage. This is elaborated on by authors who state that in order for the damage to have been caused by the object, an unbroken causal chain needs to be established.[30] Natural sequence may be present as the change in course, and change in likely impact zone, can be directly linked to the change in the orbit of the asteroid by the space object. This shows that proximate causation may exist between the actions of the acting state's space agency and the damage, and thus liability can be proven.

26 The Liability Convention (n 5 above) art 2.
27 The Liability Convention (n 5 above) art 1 (c).
28 Gorové (n 6 above) 141.
29 Gorové (n 6 above) 141.
30 Smith and Kerrest (n 21 above) 126.

The test for proximate causation, as it is applied in international liability law, as consisting of two elements. Firstly, it must be shown that there is a natural sequence of events between the act and the damage. Secondly, a degree of foreseeability must exist, shown in the amount of precaution a State took.[31] Foreseeability is not applicable in this instance because the Liability Convention applies absolute liability in Article 2 and therefore only natural sequence needs to be established in order to prove liability. If the result could have been foreseen and guarded against, it is considered as a natural consequence of the act.[32] It is also established by scholarship that the damage defined in the Outer Space Treaty and expanded on in the Liability Convention is not limited to local and immediate damage, and may be the result of a chain of events stemming from the action of the space object.[33] The change in course of the asteroid may lead to placing a specific area at a greater risk as the centre of the uncertainty ellipse was moved towards them. The change in impact area is therefore a natural consequence of the change in course of the asteroid that could have been foreseen before the action was taken.

It is further stated that damage may be extended to include instances where physical contact has not been made between the space object and the object of damage, for example in the case of electronic or laser interference. Literature expands further on damage by stating that indirect or consequential damage should also be included in claims covered by the Liability Convention.[34] This shows how, even though the space object did not cause the damage by physical contact with the asteroid or the Earth, its actions can still be included as the causation of damage. In addition, it is stated that in the drafting of the liability convention no distinction was made between direct and indirect damages in regards to damage claims, and that thus both are covered in terms of the convention.[35] Direct damage is outlined as that directly or immediately from, and as the probable natural consequence of, the act of the space object. Indirect damage is defined as *tortious harm* which flows naturally, but not directly, from the wrongful act.[36] It is further shown how something classified as consequential damage can be used to claim

31 L Castellanos-Jankiewicz 'Causation and international state responsibility' (2012) Amsterdam Center for International Law Research, paper no 2012-07 *Research Project on Shared Responsibility in International Law* 52.
32 F H Bohlen 'The probable or the natural consequence as the test for liability in negligence' (1901) 49 *American Law Register* 85.
33 Smith and Kerrest (n 21 above) 141.
34 F von der Dunk 'International space law' in F von der Dunk & F Tronchetti (eds) *Handbook of Space Law* (2015) 85.
35 C Christol 'International liability for damage caused by space objects' (1980) 74 *The American Journal of International Law* 361.
36 Christol (n 35 above) 360.

compensation, as is the case with the clean-up costs of the Cosmos 954 incident.[37] The damage caused by the asteroid collision, while it may be indirect, can still be traced back to the actions of the acting state and its space object, and it was thus still caused by such actions.

Scholarship states that in order to place a claim of liability, four elements should be proven: that damage was suffered, that the damage was caused by a space object, that the instrumentality was a space object and that the launching State launched the space object. The key issue here is that of instrumentality; this shows that it is not enough for a space object's action to lead to consequential damage, but that the space object itself needs to be the instrument of causing damage.[38] Scholarship makes the distinction between two possible situations: the space object may be an instrument of the actual damage, or the instrument of an action which eventually resulted in action. Consequential damage is defined as that which occurs from the consequences of an act and does not flow directly and immediately from the act itself.[39] If instrumentality of the space object is not proved, a claim cannot be made. This supports the view that direct cause of damage by the space object is essential in order to establish liability of the launching state.

2.5 Whether the launching state alone would be held liable if more than one state is involved

Article 2 of the Liability Convention states that the launching state of a space object shall be held absolutely liable for damage caused by that space object on the surface of the Earth or to an aircraft in flight.[40] Article 1 of the Liability Convention defines a launching state as a State which launches or procures the launching of a space object or a State from whose facilities or territory a space object is launched.[41] Authors argue that a State which procures the launching of a space object is one which places an order for the launch of a space object.[42] The launching state cannot be exempt from liability based on the joint launching of the space object by them and the fellow states of any consortium or group involved in the launching of the space object. Article 5 of the Liability Convention states that when two or more States jointly launch a space object, they are *jointly and severally liable*.[43] Furthermore, a State which sustained

37 Christol (n 35 above) 362.
38 L P Wilkins 'Substantive bases for recovery for injuries sustained by private individuals as a result of fallen space objects' (1978) 6 *Journal of Space Law* 161.
39 Gorové (n 6 above) 137.
40 The Liability Convention (n 5 above), art 2.
41 The Liability Convention (n 5 above), art 1.
42 LJ Smith and A Kerrest 'Article I (Definitions) LIAB' in S Hobe, B Schmidt-Tedd & K Schrogl (eds) *II Cologne Commentary On Space Law* (2013) 107.
43 The Liability Convention (n 5 above) art 5.

damage is permitted to claim the whole amount of compensation from one of the liable States. This State would then, if joint liability is present, be allowed to claim reimbursement from the other liable States for the amounts they are liable for.[44] This means that if joint launching is shown, the victim state may still hold the launching state liable for the damage and claim compensation.

2.6 Whether the situation changes if the launching state failed to consider the interests of other states and violated its obligation to prevent damage

2.6.1 The obligation to maintain peace and security

Article 3 of the Outer Space Treaty provides that in their exploration and use of outer space State parties to the treaty should do so in the interest of maintaining international peace and security and promoting international cooperation and understanding.[45] Literature states that a binding obligation is imposed by this article on States to uphold it.[46] The obligation to maintain international peace and security extends to ensuring that a State's actions in the exploration and use of outer space do not jeopardise international peace and security.[47] Peace and security is stated by scholarship to have the same meaning in this context as it does in the United Nations Charter,[48] which includes taking 'effective collective measures for the prevention and removal of threats to the peace'.[49]

Furthermore, it is stated in the UN Resolution on International Cooperation in the Peaceful Use of Outer Space that the term 'peaceful purposes' that the definition had expanded to including the broader perspective of space security rather than simply the need to prevent military action.[50] This is in line with the definition given by the Human Development Report which established human security as freedom from want or fear.[51] This is discussed particularly in relation to natural disaster and threats. According to the report, human security consists of two main aspects: security from chronic threats and security from sudden and harmful disruptions. It can be lost over

44 As above.
45 The Outer Space Treaty (n 4 above) art 3.
46 O Ribbelink 'Article III' in S Hobe, B Schmidt-Tedd & K Schrogl (eds) *I Cologne Commentary On Space Law* (2009) 66.
47 Ribbelink (n 46 above) 67.
48 As above.
49 UN Charter, art 1, para 1.
50 GA Res 69/85, UN GAOR, 69th Sess, at 4, UN Doc A/RES/69/85 (2014).
51 M Futamura, C Hobson & N Turner 'Natural Disasters and Human Security' (2011) United Nations University, http://unu.edu/publications/articles/natural-disasters-and-human-security.html (accessed March 2015).

a long period of time or in a sudden event and may be caused by man's actions, natural forces or a combination of the two.[52]

Environmental security, as an element of human security, is particularly relevant in this matter as the security of the people of the affected area was compromised by the environmental event of the asteroid, which occurred there due to the launching state's actions. Other forms of natural events that have been discussed under environmental security are earthquakes and tsunamis.[53] Human security is established as an international law concept by the report. It is inherent that human security be used in this case as the threat to the victim state was not one of military action but of a natural event altered so that they were placed at risk.

Furthermore, it is stated in Article 9 of the Outer Space Treaty that State parties to the Treaty should be guided by the principle of cooperation and mutual assistance and should conduct all activities in space with due regard to the corresponding interests of all other states.[54] Literature states that the principle of cooperation as outlined in Article 9 should not be misinterpreted as an actual obligation on the part of parties to the treaty, but rather as a general guiding principle.[55] Scholarship further states that the principle of due regard serves to limit the freedom of State's actions in outer space by requiring them to ensure that their actions do not interfere with or compromise the safety of other space operations. The state should prove beyond reasonable doubt that everything possible was done to prevent a harmful action from occurring. These articles show that in their activities in outer space, States should keep the interests of all States in mind. It is stated that this extends to ensuring non-space-faring countries and States still benefit, to some degree, from the results and benefits gained from space activities.[56] This is upheld by the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space which states that in their exploration and use of outer space states should ensure their actions are to the benefit and in the interest of all mankind.[57] It is clear from an examination of these provisions that they do not in fact place any obligation on State parties to the treaties to directly protect other States from damage or harm. The United Nations Draft Report on the UN Inter-Agency Meeting on Outer Space Activities,

52 United Nations Development Programme, Human Development Report 1994, 23 (1972).
53 Futamura, Hobson & Turner (n 51 above).
54 The Outer Space Treaty (n 4 above) art 9.
55 S Marchisio 'Article IX' in S Hobe, B Schmidt-Tedd & K Schrogl (eds) *I Cologne Commentary On Space Law* (2009) 174.
56 Marchisio (n 55 above) 174.
57 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, 13 Dec, 1976, adopted by the General Assembly in Resolution 1962 (XVIII).

however, uses the term when discussing how satellite geographic imaging systems (GIS) can be used in the detection and management of natural disasters, such as earthquakes.[58] As such, it may be argued that the obligation to ensure peace and security extends to protecting the general security of other states, and not simply abstaining from acting against them.

2.6.2 Whether the launching state's action amount to unlawful use of its territory to cause the victim state harm if consultation did not occur

Scholarship explains that a duty exists in international law for states to 'avoid causing damage to other states and to natural person'.[59] Furthermore in the *Corfu Channel* case it was asserted that every state has an obligation to not knowingly allow its territory to be used for acts contrary to the rights of other states.[60]

Literature discusses the possible future implications that a NEO collision such as that of discussed in this hypothetical situation could have. It states that in such instances, if amendments were not made to the Outer Space Treaty and Liability, governments involved in deflecting a NEO would be held responsible.[61] Scholarship states that States, in that case, may attempt to reduce damage caused by deflecting the asteroid to another area that would result in less damage, specifically to the State itself. Should a state act to protect their own interests rather than those of the world this could directly go against the principles of the Outer Space Treaty and the UN Charter, which stipulates that one of the purposes of the United Nations is to maintain international peace and security.[62]

Article 9 of the Outer Space Treaty states that if a State has reason to believe that their actions may potentially interfere harmfully with the activities of another State it should undertake consultations with such a State before taking such action.[63] Furthermore, it is stated that if a State is aware of the potential risk that another State's activities may pose to them, they may request consultation.[64] There may occur instances when the launching state may inform the victim states or the world in general of their

58 Draft Report on the Peaceful Uses of Outer Space, UN SGOR, 30th Sess, Supp #, Geneva, 10-12 March 2010 Agenda Item 3(b) Report of the Secretary-General on the coordination of space-related activities within the United Nations system: directions and anticipated results for the period 2010-2011.
59 Christol (n 35 above) 353.
60 Corfu Channel (*UK v Albania*) (Merits) 1949 ICJ 4 (Apr 9) reprinted in 43 AJIL 558, 4 and 22.
61 Bucknam and Gold (n 16 above) 152.
62 UN Charter art 1 para 1.
63 The Outer Space Treaty (n 4 above) art 9.
64 The Outer Space Treaty (n 4 above) art 9.

intentions to take action against an asteroid without disclosing the full effect or consequences thereof. Scholarship states that States have an obligation to consult with other States that may be negatively affected by their actions before they undertake such an action.[65] Literature further states that in terms of Article 9 the protection of the outer space extends to include the safety of outer space and the terrestrial environment.[66] The consultation necessary by the State implementing the action needs to occur before the action is authorised, while the State to be affected may request consultation at any stage, even once the action has been implemented.[67]

A recommendation as to the consultation that is necessary is outlined in the Draft Code of Conduct for Outer Space Activities.[68] This states that States should inform other States that may be at risk because of their actions in a timely manner and to the greatest extent that it is feasible of the risk posed by the actions.[69]

2.6.3 The application of reciprocity and liability

It is stated in Article 3 of the Outer Space Treaty that actions should be in line with international law.[70] Under this, interpretations of liability can be used from international law. Richard Epstein discusses a form of causation and the obligation to prevent harm under the concept of strict liability that deal with reciprocity. The basis of this is that in preventing doing harm to another person, the first person suffers harm as a result.[71] This is particularly apparent in this case as the launching state acted to prevent future possible harm. Had they not been allowed to act, or had they been made to change their course of action to slow down the asteroid, they may have placed themselves at risk of damage similar to that incurred by the victim state. The launching state has no direct obligation to protect the victim state from harm, and thus their actions may have been taken in order to allow for the least amount of harm. Scholarship further expands on causation by listing four general types, the final of which is causation and dangerous conditions. A dangerous condition occurs in one of three ways. First, an object may dangerous in itself, such as an explosive. Secondly, the object may be placed in a position that makes it dangerous, either by inhibiting right of way or in a position that it may cause damage. Finally the object may be dangerous because it is defective, for example a chair manufactured incorrectly.

65 Marchisio (n 55above) 179.
66 Marchisio (n 55 above) 176.
67 Marchisio (n 55 above) 180.
68 Marchisio (n 55 above) 181.
69 Council Conclusions of 27 September 2010 on the revised draft Code of Conduct for Outer Space Activities, UN General Secretariat, UN Doc 14455/10, 9.
70 The Liability Convention (n 5 above), art 3.
71 R Epstein 'Theory of Strict Liability' (1973) *The Journal of Legal Studies* 164.

This becomes important because causality and liability can only be established if the condition created by defendant is seen to be one of these three, and is not a 'mere condition'.[72]

3 Fault liability of a state for damage caused in outer space

Article 3 of the Liability Convention provides that a launching State is liable for damage caused by its space object to another space object in outer space, if the launching State is at fault.[73] From this provision it becomes clear that a claiming state must then prove that firstly there is damage which they suffered and then lastly that the launching state was at fault in causing the damage. Continuing with our hypothetical case of two space faring nations.

> URA launched TYRUS [an unmanned spacecraft] from Floyd-4 and knocked KNUD-1 [an unmanned space craft belonging to SPIDR] over in the launch process. This resulted in the loss of communication between SPIDR and KNUD-1. As such KNUD-1 was unable to fulfil its purpose of sending information to the SPIDR agency regarding any developments on the Floyd-4. In addition, SPIDR lost control of the space craft.[74]

3.1 Damage in question fall within scope of the Liability Convention

The first thing that must be established is that damage has been suffered by the claimant state in terms of the Liability convention. Article 1 (d) of the Liability Convention defines damage to mean:

> loss of life, personal injury or other impairment of health; or loss of or damage to property of states or of persons, natural or juridical, or property of international intergovernmental organizations.[75]

In our hypothetical case above the harm suffered by SPIDR, the claimant, is loss of communication. From a positivistic reading of this provision, it could be argued that communication does not form part of damage and thus the harm suffered is not covered within the liability convention. This is looking at the fact that communication is not included in the enumerated list. Furthermore article 31(4) of the Vienna Convention on treaty interpretation says we give words special meaning if the parties to the treaty so indented.[76] However the liability convention does not define what is meant by physical

72 Epstein (n 71 above) 179.
73 The Liability Convention (n 5 above) art. 3.
74 Manfred Lachs Compromise (n 3 above) 19, 6 & 8.
75 The Liability Convention (n 5 above) art. 1(d).
76 Vienna Convention on the Law of Treaties (23 May 1969) UN Doc A/Conf.39/27 / 1155 UNTS 331 8 ILM 679 (1969) 63 AJIL 875 (hereinafter Vienna Convention) art 18(a).

damage, in the convention. However Article 12 of the Liability Convention, which provides that compensation for damage must be in accordance with international law and the principles of justice and equity.[77] In the *Chorzow Factory* case, the Permanent Court of International Justice (PCIJ) held that 'the function of the international law of tort is to restore an injured person to the condition that would have existed had the harm not been experienced'.[78] In our hypothetical case KNUD-1's mission was to collect data regarding the NEO Floyd-4 and send this data back to the SPIDR agency in order to assist the agency in ascertaining the risks involved in attaching a larger space craft to the asteroid.[79] According to Scholarship the destruction of property that renders the property unfit for the use which was intended constitutes a form of physical damage.[80] Scholarship supports this view in that 'any direct interference that destroys the normal use of property also appears to fall under this definition'.[81] Therefore the ability to send and receive information was intrinsic to the purpose of the KNUD-1 spacecraft. When TYRUS knocked over the KNUD-1 all communication with the spacecraft was lost.[82] As URA's actions damaged KNUD-1's ability to transmit data, the loss of communication rendered the KNUD-1 unfit for its purpose — therefore falling within the scope the Liability Convention.

3.2 Proving fault

The next and most important aspect to be proven is that the offending state is indeed at fault. Article 3 of the Liability convention provides for fault liability and not strict liability which is the general form of liability in International law.[83] The difference is that fault liability requires the accused state to have acted either with malicious intent (dolus) or negligence (culpa).[84] From the current sets of facts there is no indication of dolus, thus we will deal with proving negligence. According to scholarship 'fault denotes the failure to adhere to, or breach of, an obligation imposed by law'.[85] As such in order for URA to be liable the must be an obligation imposed by law and URA must have failed to adhere to the obligation. In other words the must be an objective minimum standard of care, to which the launching state failed to adhere to. In the case of Space law the minimum standard is

77 The Liability Convention (n 5 above) art 12.
78 Factory at Chorzow (Germ V Pol),1927 PCIJ (ser A) No 9 (July 26)
79 The Chorzow Catory case (n 78 above).
80 C Christol *The Modern International Law of Outer Space* (1982) 94.
81 The Liability Convention (n 5 above) art. 1(a).
82 Manfred Lachs Compromise (n 3 above) 19.
83 L J Smith & A Kerrest 'Article III: LIAB' in S Hobe, B Schmidt-Tedd & K Schrogl (eds) *II Cologne Commentary on Space Law* (2009) 132.
84 Smith & Kerrest (n 83 above) 133.
85 As above.

defined in Article 9 of the Outer Space Treaty, under the principle of due regard.[86] There is literature which argues that 'due regard refers to the performance of an act with a certain standard of care, attention of observance'.[87]The general standard of care as practiced in general international law is due diligence.

In our case URA would be found negligent if it was reasonably foreseeable that the harm suffered by the KNUD-1 would occur. This is because we are dealing with fault liability and the one element of fault is negligence. Thus it is at this point that we ask was it reasonably foreseeable that the prelaunch of TYRUS, URA's Space object, would cause harm to the KNUD-1? According to scholarship 'If a State has not or could not reasonably have been aware of a potential harm of an activity or, if it did not know and could not reasonable has known it cannot be obligated to regulate such activities'.[88] The question of foreseeability is a factual one and must be determined on case by case bases.

Thus in our hypothetical, the claimant State would have to show that it was reasonable foreseeable that the relaunch of TYRUS would cause harmful interference with their Space craft KNUD-1. Factors such as the general volatility of outer space environment, coupled together with the close proximity of the TYRUS to the KNUD-1 on the asteroid would help to show that it was reasonably possible to foresee harm occurring from such a relaunch. Thus triggering another obligation of URA that of consultation before the relaunch.[89] Thus their failure to consult or at the very least alert SPIDR of the relaunch. Adds to the launching State's culpability, as it speaks to the requirement that the Launching state must have taken the necessary measures to prevent the harm.

If the respondent state is successful in proving that the harm suffered was purely accidental and thus not foreseeable, there then can be no liability based on negligence. This is because due diligence does not require a state to prevent unforeseeable harm, that is harm which is objectively foreseeable.

3.3 Violation of jurisdiction and control.

Article 8 of the Outer Space Treaty provides a State with the right to maintain jurisdiction and control over its space object.[90] According Scholarship jurisdiction means 'legislation and enforcement of laws

86 The Outer Space Treaty (n 4 above) art 9.
87 Marchisio (n 55 above) 175.
88 M Flemme 'Due Diligence in international law 'unpublished LLM Thesis, University of LUND, 2004 6.
89 The Outer Space Treaty (n 4 above) art 9.
90 The Outer Space Treaty (n 4 above) art 8.

and rules in relation to persons and objects'.[91] Control is subsequently interpreted as 'the exclusive right and the actual possibility to supervise the activities of a space object and if applicable the personnel thereof'.[92]

According to scholarship the control competence of a State is a factual situation which is ensured by technical means.[93] Without the technical means to ensure control, a state would have no *de facto* control.

In the case of the KNUD-1 the technical means were communication. The ability to communicate with the KNUD-1 spacecraft enabled SPIDR agency to supervise the KNUD-1's mission on the Floyd-4. This is even more important in the case of the KNUD-1 since it was an unmanned space craft. As such when KNUD-1 lost its ability to send and receive all communication the SPIDR agency lost actual control. The Applicant would submit that this right to exercise control over KNUD-1 was lost due to the loss in communication caused by the TYRUS.

Therefore, in addition to causing damage to the KNUD-1, it interfered with SPIDR's right as a sovereign State over its own space craft. It must be noted that such an application for a violation of a state's right by another can only be brought under article 7 of the outer state treaty which provides for a launching state's international liability for damage caused by its space object.[94] The liability convention does not provide for such a claim; however this does not mean there is no recourse for SPIDR. SPIDR can still rely on article 2 of the Articles on State responsibility, as the basis for this claim. The applicant would have to show that the elements of an internationally wrongful are present. That is there is an act which is attributable to the launching state and that act constitutes a breach of an international obligation of the state.[95] Jurisdiction and Control feed into each, without Jurisdiction one cannot have control, and you need control over the object in order to be able to enforce your own laws on the space object. This right is afforded to the launching State, in terms of article 1(a) of Liability Convention, not necessarily the owner of the space craft.[96]

91 B Schmidt-Tedd & S Mick, 'Article VIII' in S Hobe, B Schmidt-Tedd & K Schrogl (eds) *I Cologne Commentary on Space Law* (2009) 157.
92 Schmidt-Tedd & Mick (n 91 above).
93 S Marchisio 'National Jurisdictions For Regulation Space Activities of Governmental and Non- Governmental Entities' (2010) http://www.unoosa.org/pdf/pres/2010/SLW2010/02-02.pdf. (accessed March 2015).
94 The Outer Space Treaty (n 4 above) art 7.
95 The international Law Commission's Articles on State Responsibility, art 2.
96 The Liability Convention (n 5 above) art 1(a).

3.4 Liability for loss in potential harvesting

SPIDR attached KNUD-1 to the Floyd-4 successfully; subsequently URA announced its plan to send TYRUS to the asteroid during it next near earth pass. SPIDR warned URA of that attaching a second space craft to Floyd-4 may alter the surface area of the asteroid. URA ignored this warning and proceeded with its mission to the asteroid without any prior consultation with SPIDR. Subsequently, TYRUS altered the surface area of the asteroid when trying to attach to it. This damage caused to the asteroid severely hampered SPIDR's harvesting mission.[97]

3.4.1 Appropriate measures to prevent harm

Article 1 of the Outer Space Treaty identifies outer space as the province of mankind.[98] In doing so it requires that activities in outer space be carried out for the benefit of all mankind.[99] In addition, States are obligated to carry out their missions with due regard for the corresponding interest of other States.[100]

There is scholarship in support of the view that both the Outer Space Treaty and the Moon Agreement recognise the fragility of the moon environment and the environment of other celestial bodies, as they both obligate States to take measures to mitigate damage.[101] Article 9 of the Outer Space Treaty requires a State to take appropriate measures to avoid possible harm to outer space and celestial bodies.[102] Article 7(1) of the Moon Agreement further obligates State parties to the treaty to take preventative measures in order to avoid disruption of the environment of celestial bodies.[103] The provisions in Articles 9 Outer Space Treaty and 7(1) of the Moon Agreement respectively recognise the need to preserve the outer space environment. According to scholarship the provisions mentioned above together with the fragility of outer space environment warrant the application of the precautionary principle to outer space as it is in line with the obligation to exercise due regard.[104]

The precautionary principle is applied in cases where there exist uncertainties about the dangers regarding possible harm to the

97 Manfred Lachs Compromise (n 3 above) 8, 10, 19, 22.
98 The Outer Space Treaty (n 5 above) art 1
99 The Outer Space Treaty (n 5 above) art 1.
100 The Outer Space Treaty (n 5 above) art.9.
101 P Larsen 'Application of the Precautionary Principle to the Moon' (2006) 71 *Journal of Air Law and Commerce* 298.
102 The Outer Space Treaty (n 5 above) art 9.
103 The 1979 Agreement Governing the Activities if States on the Moon and other Celestial Bodies, art7(1).
104 Larsen (n 101 above) 298.

environment.[105] There is scholarship in support of the view, that the precautionary principle is the acceptance of uncertainty and the need to take the uncertainty into consideration regarding lunar activities. Indeed, in order to mitigate harm, a State must use the best scientific data available.[106] Scholarship identifies two types of uncertainties: epistemic and ontological uncertainty. Epistemic uncertainty is the lack of enough data regarding possible harm that the activity in question may cause to the environment. In contrast; ontological uncertainty has to do with the nature of the environment itself.[107] In the current case scientific data that pointing to the certainty of harm occurring to the asteroid Floyd-4, involving the attachment of a second space object was available.[108] URA ignored SPIDR's warnings, which ultimately lead to the alteration the surface of the Floyd-4.[109] Moreover URA did not consult with SPIDR before launching TYRUS to the Floyd-4. URA's failure to consider SPIDR's warning fails to meet the minimum standard mandated by the precautionary principle. The precautionary principle specifically requires preventative action to be taken even before scientific proof of harm can be submitted.[110] URA failed to take reasonable step to inform itself of factual and scientific components,[111] which would have allowed the state to take appropriate measures in time.[112] As such URA failed to meet the minimum standards of the precautionary principle. As the principle is intrinsically linked to the obligation to act with due regard URA failed to fulfil its duties mandated by both the Outer Space Treaty and the Moon Agreement respectively. The provisions just dealt with above deal with the protection of the Outer Space environment.

Outer space is the province of all mankind and all States have free and equal access to outer space.[113] Moreover Article 3 of the Liability Convention holds a launching State is liable for damage caused by its space object in outer space.[114] A State's activities in outer space must not preclude other State parties from exploring outer space.

105 R Cooney 'The precautionary Principle in Biodiversity Conservation and Natural Resource Management: An issues paper for policy makers, researchers and practitioners' *IUCN* (2004) 5.

106 Cooney (n 105 above) 5.

107 As above.

108 Manfred Lachs Compromis (n URA launched TYRUS from Floyd-4 and knocked KNUD-1 [an unmanned space craft belonging to SPIDR] over in the launch process. This resulted in the loss of communication between SPIDR and KNUD-1. As such KNUD-1 was unable to fulfil its purpose of sending information to the SPIDR agency regarding any developments on the Floyd-4. In addition, SPIDR lost control of the space craft. above) 8.

109 As above.

110 O McIntyre & T Mosedale 'The Precautionary Principle as a Norm of Customary International Law' (1997) 1 *International Environmental Law* 236.

111 Manfred Lachs Compromis (n URA launched TYRUS from Floyd-4 and knocked KNUD-1 [an unmanned space craft belonging to SPIDR] over in the launch process. This resulted in the loss of communication between SPIDR and KNUD-1. As such KNUD-1 was unable to fulfil its purpose of sending information to the SPIDR agency regarding any developments on the Floyd-4. In addition, SPIDR lost control of the space craft. above) 8.

This is why appropriation of outer space is prohibited whether it's done out right through a moratorium by any other means.[115] According to scholarship damage which results directly from the act of the launching State is recoverable under the Liability Convention and that loss of profits is one such type of damage which may be recovered by a state which has suffered injury.[116]

He further asserts that if the causation requirement is present and if harm has been experienced, loss of profits is recoverable under the liability convention.[117]Furthermore international law of tort requires that a victim be restored to the position they would have been but for the harm done.[118] In this case TYRUS damaged the surface area of the Floyd-4, and which subsequently lead to KNUD-2's inability to attach properly to the surface of Floyd-4. As a result KNUD-2 could only harvest 10 percent of the planned harvest.[119] Therefore an unbroken

112 Marchisio (n Furthermore, it is stated in Article 9 of the Outer Space Treaty that State parties to the Treaty should be guided by the principle of cooperation and mutual assistance and should conduct all activities in space with due regard to the corresponding interests of all other states. Literature states that the principle of cooperation as outlined in Article 9 should not be misinterpreted as an actual obligation on the part of parties to the treaty, but rather as a general guiding principle. Scholarship further states that the principle of due regard serves to limit the freedom of State's actions in outer space by requiring them to ensure that their actions do not interfere with or compromise the safety of other space operations. The state should prove beyond reasonable doubt that everything possible was done to prevent a harmful action from occurring. These articles show that in their activities in outer space, States should keep the interests of all States in mind. It is stated that this extends to ensuring non-space-faring countries and States still benefit, to some degree, from the results and benefits gained from space activities. This is upheld by the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space which states that in their exploration and use of outer space states should ensure their actions are to the benefit and in the interest of all mankind. It is clear from an examination of these provisions that they do not in fact place any obligation on State parties to the treaties to directly protect other States from damage or harm. The United Nations Draft Report on the UN Inter-Agency Meeting on Outer Space Activities, however, uses the term when discussing how satellite geographic imaging systems (GIS) can be used in the detection and management of natural disasters, such as earthquakes. As such, it may be argued that the obligation to ensure peace and security extends to protecting the general security of other states, and not simply abstaining from acting against them. above) 180.

113 The Outer Space Treaty (n Article 7 of the Outer Space Treaty states that the launching State of any space object is internationally liable to the victim State for damage caused by its space object to the other State party. Article 2 of the Liability Convention provides that the launching State shall be held absolutely liable to pay compensation for damage caused by above) art 1.

114 The Liability Convention (n its space object on the surface of the Earth or to an aircraft in flight. It is by scholarship that in order to prove liability under Article 2 of the Liability Convention, three elements must be established. Firstly, damage must be shown. Secondly, this must be because of a space object. Finally, the damage must be shown to have been caused by the space object. Furthermore he states that as absolute liability is present in Article 2, no negligence needs to be shown. above) art 3.

115 The Outer Space Treaty (n Article 7 of the Outer Space Treaty states that the launching State of any space object is internationally liable to the victim State for damage caused by its space object to the other State party. Article 2 of the Liability Convention provides that the launching State shall be held absolutely liable to pay compensation for damage caused by above) art 2.

chain linking the damage suffered and the space object is present. A possible defence that can be raised by the respondent state to this argument that, both the Outer Space Treaty and the Moon Agreement are silent as to the nature of the measures to be taken by a State. Article 3 of the Outer Space Treaty requires that parties conduct their activities in outer space in accordance with international law.[120]

Therefore Article 3 permits us to look to international law where there is a gap in space law or where the provisions of a treaty are not clear enough. A State is required to act with due diligence in the prevention of harm to the environment of celestial bodies as stipulated in Article 9 of the Outer Space Treaty. According to scholarship due diligence is not an absolute duty to prevent all harm, but a requirement for a State to take reasonably measures as to avoid harm.[121] Since the precautionary principle is merely read into the provisions of Article 9 of the Outer Space treaty, compliance with due diligence would amount to the fulfilment of due regard.[122] This would satisfy URA's obligation completely.

Liability for damage occurring in outer space is based on fault, thus you need either dolus or culpa on the launching state. The most important and somewhat contentious elements to a liability claim are the scope of the damage and actually establishing fault on the part of

116 Christol (n In our hypothetical case above the harm suffered by SPIDR, the claimant, is loss of communication. From a positivistic reading of this provision, it could be argued that communication does not form part of damage and thus the harm suffered is not covered within the liability convention. This is looking at the fact that communication is not included in the enumerated list. Furthermore article 31(4) of the Vienna Convention on treaty interpretation says we give words special meaning if the parties to the treaty so indented. However the liability convention does not define what is meant by physical damage, in the convention. However Article 12 of the Liability Convention, which provides that compensation for damage must be in accordance with international law and the principles of justice and equity. In the Chorzow Factory case, the Permanent Court of International Justice (PCIJ) held that 'the function of the international law of tort is to restore an injured person to the condition that would have existed had the harm not been experienced'. In our hypothetical case KNUD-1's mission was to collect data regarding the NEO Floyd-4 and send this data back to the SPIDR agency in order to assist the agency in ascertaining the risks involved in attaching a larger space craft to the asteroid. According to Scholarship the destruction of property that renders the property unfit for the use which was intended constitutes a form of physical damage. Scholarship supports this view in that 'any direct interference that destroys the normal use of property also appears to fall under this definition'. Therefore the ability to send and receive information was intrinsic to the purpose of the KNUD-1 spacecraft. When TYRUS knocked over the KNUD-1 all communication with the spacecraft was lost. As URA's actions damaged KNUD-1's ability to transmit data, the loss of communication rendered the KNUD-1 unfit for its purpose — therefore falling within the scope the Liability Convention. above) 94.

117 As above.

118 The Chorzow Factory Case (n 78 above).

119 Manfred Lachs Comproise (n 2 above) 12, 22.

120 The Outer Space Treaty (n above) art 3.

121 A Kiss & D Shelton *Guide to International Environmental Law* (2007) 90.

122 See the discussion of due regard principle above.

the launching state. Some violation of right a type of damage occurring in outer space may not be covered under the Liability Convention Jurisdiction and control being such a right as was demonstrated above. Damage such as loss in potential harvesting capability though seems to fall within the scope of the liability convention may prove somewhat difficult to prove on claimant state. This is due to their environmental nature. As it is based on the principles such as due regard, which are not hard and fast rules as to stands that must be applied.

4 Conclusion

Liability in space law is thus a complex issue, and while there is much discussion on the matter by academics, the fact that few cases have occurred involving liability in space means that it is still unsure exactly how these concepts and differing opinions will be applied in practical cases. While it is clear that space law does make provision for situations such as the hypothetical one discussed, more clarity is needed on certain aspects particularly given the great advances in space technology over the past few years.

INTRODUCING DECONSTRUCTIVE INTERSECTIONALITY: THE GENERAL JURISPRUDENTIAL RAGE AGAINST RAINBOW THEORY

*by Tamryn Gorman**

1 Introduction

Despite South Africa's post-modern constitutional dispensation[1] — which, at first glance, seems to celebrate and entrench substantive equality — various judgements have been passed by the Constitutional Court where the Constitution was interpreted through a formal equalitarian lens.[2]

On the one hand, substantive equality recognises and celebrates our diversity and differences whereas formal equality, on the other hand, obsesses with the idea of sameness.[3] This constant tension between substantive and formal equality is aptly portrayed by the term 'rainbow jurisprudence'.[4] This term was coined by Alfred Cockrell to explain a quasi-theory depicted by the newly born South African constitutional adjudication which was lacking in substantive reasoning (which I equate to substantive equality) and the absence of a rigorous jurisprudence.[5] He goes so far as to assimilate the finding of genuine substantive reasoning within these judgements to the possibility of touching a rainbow — a mythical task which, although alluring, seems impossible.[6] Thus, I have identified the problem that South Africa is still submerged in rainbow jurisprudence. This can be seen through various court cases that will be discussed below, ranging from cases that were clearly decided from a formal equalitarian perspective to those which depict a wolf in sheep's clothing —

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1 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 150 – 151.

2 The Constitution of the Republic of South Africa 1996 sec 9; *Prince v President, Cape Law Society* 2002 (2) SA 391 (CC); *Jordan and Others v S* 2002 (6) SA 642 (CC).

3 A Smith 'Equality constitutional adjudication of South Africa' (2014) 2 *African Human Rights Law Journal* 609 – 632.

4 A Cockrell 'Rainbow jurisprudence' (1996) 12 *South African Journal of Human Rights* 11.

5 Cockrell (n 4 above) 11.

6 As above.

seemingly substantive judgements disguising the formal equality lurking beneath.[7]

In order to prove the survival of this rainbow jurisprudence, I will discuss, in the first part of this essay, how modernism has influenced the perpetuation of rainbow jurisprudence and the negative effects that this has had on the law. More specifically, I will rely on positivism and liberalism as two branches of modernist theories to explore their contribution to the idea of sameness, as well as the connection between these jurisprudential perspectives and formal equality, resulting in a restricted jurisprudence.

In the second part of this essay, I will contrast the modernist legal culture - that is littered with rainbow jurisprudence and damaged by formal equality as described above — to substantive equality and a post-liberal reading of the Constitution.[8] I will argue that substantive equality aims to eradicate formal equality: the latter perpetuating systemic inequality through the ideal of sameness which is presented by both positivism and liberalism, the former ensuring that laws do not re-inforce the subordination of classes/ groups who were already suffering by accommodating their differences.[9] The approach of favouring substantive equality will highlight that subordination and deprivation still exists today and has survived because of our reception of legal positivism, as well as through our liberal reconciliatory practices due to the injustices of Apartheid.[10]

I will provide a two part solution to the problem of rainbow jurisprudence and the ideal of achieving substantive equality in the third part, through what I call, 'deconstructive intersectionality'.[11] This term incorporates both a critical realist perspective based on Jacques Derrida and John Dugard, as well as the notion of intersectionality from the second wave feminists. This solution will be applied specifically to judges for various reasons discussed below. I will further rely on Magistrate Van Der Ligt from Ettiene Van Heerden's *Ancestral Voices*, resembling (but different from) Dworkin's Hercules J, as the model judge. Lastly, I will discuss how this two part solution will allow South Africa to move towards a general jurisprudence.

7 See for example *Prince v President, Cape Law Society* 2002 (2) SA 391 (CC); *Jordan and Others v S* 2002 (6) SA 642 (CC); *Minister of Home Affairs and Another v Fourie and Another/Gay and Lesbian Equality Project and 18 Others v S* 2002 (6) SA 642 (CC).

8 Klare (n 1 above) 151-156.

9 H Botha 'Equality, plurality and structural power' (2009) 25 *South African Journal on Human Rights* 4.

10 Botha (n 9 above) 4.

11 Botha (n 9 above); G Minda *Post-modern legal thought: Law and jurisprudence at century's end* (1995) 117.

2 The contributions of a modernist legal culture towards rainbow jurisprudence, formal equality and restricted jurisprudence.

In this part of this essay I aim to show that modernist legal culture is the vehicle driving rainbow jurisprudence and formal equality which results in a restricted jurisprudence. In order to do this, I aim to link modernism to state-centeredness and the resultant approach of positivism. Secondly, I attempt to connect modernism with liberalism and its individualist claims to sameness. Finally I relate the above two traits of modern theory to the application of formal equality, perpetuation of rainbow jurisprudence and the resultant restricted jurisprudence.

Modernism depicts an era in legal theory that is a result of the power of the sovereign being absolute.[12] During the later developments in Natural Law thinking, the primacy of God's will as depicted through the voluntarism as per Ockham was replaced by De Groot and the primacy of Man's will.[13] This was eventually replaced by the superiority of the State's power which was created through the sacrifice of part of man's freedom according to Hobbes and Locke.[14] These theories depict natural law shifts in terms of which the will of the sovereign is at the centre of the enquiry and through this, the state obtains absolute power.[15] This change in thinking resulted in the birth of liberalism and therefore, modernism as well.[16] Veitch supports this through his opinion that modernism, as a dominant legal understanding, regarded law as a body of rules stemming from the State as the single source of law.[17]

The above shift in thinking to absolute power of the sovereign links to Bentham's positivist ideal of utilitarian command, which argues that the State, as the sovereign, is not a creature of the law, but rather the creator thereof.[18] Therefore, the State is superior and has to be obeyed without question.[19] Moreover, it relies on the strict separation of law and morality which separated all non-law from law, resulting in a purer version of the law with a strict reliance on rules and principles.[20] This brand of positivism was the dominant legal

12 W Le Roux 'Natural law theories' in C Roederer & D Moelendorff (eds) *Jurisprudence (*2004) 46.
13 Le Roux (n 12 above) 39-41.
14 Le Roux (n 12 above) 41-46.
15 Le Roux (n 12 above) 42.
16 Le Roux (n 12 above) 46.
17 S Veitch *Jurisprudence: Themes and concepts* (2nd ed) (2007) 248.
18 Veitch (n 17 above) 248.
19 Le Roux (n 12 above) 42.
20 C Douzinas & A Geary *Critical jurisprudence: The political philosophy of justice* (2005) 4.

theory in England in the 18th century and was brought to South Africa through the British annexation of the Cape in 1806.[21]

Even today, over two centuries later, this legal tradition is especially observed in its purest form in the court room where judges interpret the law through a strict adherence to the rigid distinction between the branches of government — a characteristic intrinsic to Bentham's command theory — as well as upholding a firm distinction between law and morality.[22] Thus, the judiciary's rejection of legal values is seemingly justified through its allegedly mechanical approach in finding the intention of Parliament.[23]

The positivistic rejection of legal values and strict separation between law and morality led to an allegedly apolitical reading of the Constitution whereby one objective and rational standard was applied to everyone.

Above, I have shown the link between modernism, state-centeredness and the approach of positivism. I will now attempt to connect modern theory with liberalism and its individual claims to sameness.

Modernism is also generally portrayed through another shift in natural law through the challenge of law based on the individual claims to subjective rights carved in the inner conscience of all human beings as opposed to the basis of external legal relationships.[24] This is supported by Locke who argued that every human has subjective rights — such as life, liberty and property — and that the State needs to respect these rights.[25] Therefore, this is the start of the liberal theory where Locke's idea of subjective rights ultimately led to the formation of constitutional rights. Furthermore, according to Veitch, the three distinct characteristics of modernism are: 'the law being at the centre for the constitution of political power, regulating economic transactions and governing social life.'[26] These characteristics of modernity are said to mirror the arguments of liberals.[27]

The main objective of a Liberal bill of rights is to secure the liberty and property of a person from imposition by the State.[28] In addition to this, a liberal constitution is largely individualistic, accommodates very few socio-economic rights, places few

21 J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 184.
22 C Albertyn & D Davis 'Legal realism, transformation and the legacy of Dugard' (2010) *South African Journal of Human Rights* 188-216.
23 Dugard (n 21 above) 187.
24 Le Roux (n 12 above) 27.
25 Le Roux (n 12 above) 43.
26 Veitch (n 17 above) 264.
27 As above.
28 Klare (n 1 above) 153.

affirmative duties on the government, is highly protective of private property, is mostly vertical in its application and lacks a caring/ communitarian ethos.[29] Through this it can be seen that liberalism discards the objective good for the promotion and protection of subjective rights.[30] The modern idea of rights is that they are subjective domains of absolute power, thus once again the notion that they cannot be questioned.[31]

Liberals define existence as an individual matter of free will.[32] Thus, they would accentuate the race, class, gender and sex neutrality of their efforts — as well as the neutrality of the law that serves them — in order to emphasise the purpose of their movement being that of equality with the state of the oppressor.[33] However, this neutrality of the law and the liberal movement risked essentialising humanity, meaning that one person's experiences were equated to the experience of another, irrespective of aspects such as class, age, race and sexual orientation.[34] Hence, Douzinas argues that this is too simplistic and doesn't accommodate other areas of life, such as race, gender, sexual orientation and religion.[35] Such simplistic characterisation of others based on a single group/class formulates grand theories that become stereotypical in their thinking that *all* women or *all* black people are in the same class, thus their experiences are identical.[36] Through this, liberalism denies the values of community and human relationships by their universal perspective that prioritised the values of autonomy and self-interest only.[37]

Moreover, liberalism utilises a simplistic approach of opposing individual rights with public interest. Through this concentration on human rights, liberalism has reduced humans to walking rights — mere objects to hold the absolute power of these rights and nothing more.[38] This, coupled with the view that the subjective rights are automatically inscribed in all individuals — irrespective of the sovereign, allowed liberal theory to mask subjective choices in the law as these rights.[39]

As I have shown above, positivism flourishes in South Africa because of our adherence to a conservative legal culture. Secondly, with the introduction of our bill of rights we see a rise in liberal legal theory in the context of the introduction of rights to all people. The

29 Klare (n 1 above) 169.
30 Le Roux (n 12 above) 29.
31 Le Roux (n 12 above) 39.
32 Douzinas (n 20 above) 12.
33 H Barnett *Introduction to feminism* (1998) 19.
34 Barnett (n 33 above) 20.
35 Douzinas (n 20 above) 12.
36 Douzinas (n 20 above) 12.
37 Minda (n 11 above) 112.
38 Minda (n 11 above) 108.
39 Minda (n 11 above) 108.

two together shows the perpetual existence of modernist thought in South Africa today. As a result of this, lawyers were trained to apply the law mechanically and to never question what the law ought to be but rather to blindly accept the law as it is.[40] Hence, modernism is seen as the 'norm' and is the mainstream thinking of the majority of lawyers in South Africa.[41]

The law is extremely exclusionary if it is applied from one dominant perspective.[42] I have shown so far that the current legal culture of South Africa is typically positivistic. Furthermore, this positivism is supplemented by liberalism which perceives itself as a mere extension of traditional theory and not an alternative theory altogether.[43] Thus, both elements of positivism and liberalism are incorporated into modernism as the traditional legal culture within South Africa that is the current dominant perspective and is responsible for exclusionary methods — as will be argued in the proceeding paragraphs.

Modernism viewed all rational law to be the height of progress for humanity.[44] This is supported by Douzinas who states that law and reason are fundamental to modernity.[45] Law today emphasises the divide between law and politics by providing for rational processes that allow lawyers to arrive at determinate legal outcomes by basing this process on supposedly neutrally phrased rules and principles.[46] Through positivism and liberalism, the law has pretended to be objective, rational and neutral.[47] However, beneath this façade of detached neutrality, law is actually permeating with inarticulate premises, male-centric norms and white supremacy.[48]

South Africa's unique history of colonisation, Apartheid and patriarchy portrays vast material and structural inequality and subordination.[49] If colonisation introduced positivism — a theory which I have argued above is still the dominant jurisprudence in South Africa today – and the attempts of liberals to reconcile the injustices of the past which has resulted in the recognition of comfortable difference and grand theorising, is it possible then that this structure of the law, which is neutral and objective at face value — is still perpetuating structural inequality?[50]

40 Dugard (n 21 above) 185.
41 Klare (n 1 above) 158.
42 Barnett (n 33 above) 23.
43 Barnett (n 33 above) 25.
44 Veitch (n 17 above) 248.
45 Douzinas (n 20 above) 9.
46 Klare (n 1 above) 158.
47 Barnett (n 33 above) 4.
48 Dugard (n 21 above); Barnett (n 33 above).
49 Botha (n 9 above) 4.
50 As above.

An important issue that arises from a discussion of inequality is discrimination. Section 9 of the Constitution filters complaints regarding alleged discrimination through broad group-based classes such as race, gender, sex or sexual orientation.[51] This seems to suggest that differences among individuals can be reduced to these basic social categories. This is a complacent understanding of difference based on a universal principle which grandly theorises group-based distinctions stating that the identities and experiences of *all* blacks or *all* women or *all* homosexuals are the same.[52] Not only does this categorisation of individuals into one specific group or class reject this important history of all other classes, but it also fails to acknowledge that discrimination can overlap and intersect over various classes and groups.[53] Therefore, it may be found that a black woman who alleges discrimination constitutes fair discrimination based on race, however, this discrimination may be unfair in terms of sex. Through this we can see how positivism's reliance on strict rules and principles and liberalism's fight to bring *different* people to the same level is unreceptive to true differences.[54]

Rather, this structure of the law acknowledges comfortable differences founded on broad group/class based categories which actually assimilate, for example, the experiences of a black heterosexual man as well as a black homosexual man as the same because they are both black, or both men – depending on the group based discrimination that is being alleged.[55] This shows how the recognition of this comfortable difference has actually equated difference with sameness.[56] These class/ group based categories that humans are divided into represent the perspectives of the middle-class westernised elite based on their experiences.[57] Thus, these class/group based categories have been merged through the perspectives of these middle-class westernised elite who have been schooled in positivism ever since the colonisation, who represent the liberal views that all people must be equal regardless of their circumstances and have particularly male-centric norms.[58]

This means that these group based classifications have to comply with the conventions of this norm as set by this westernised, middle-class elite. Therefore, the law has become reductionist in these simplistic categorisations as well as exclusionary through the use of

51 Botha (n 9 above) 2.
52 Botha (n 9 above) 5.
53 Botha (n 9 above) 5 – 6.
54 Botha (n 9 above) 6.
55 As above.
56 Botha (n 9 above) 18.
57 As above.
58 As above.

conventional understandings and norms based on the dominant approach of modernism.[59] Through the essentialism, reductionism and exclusionary nature of law, the freedom of individuals to make their own decisions is non-existent as their decisions are already circumscribed for them based on these group/ class based categories.[60] As a result of this, a gap is created between the law and the materiality of human life through the failure of the law to address individual needs by the objective approach that the law follows.[61]

In light of the above, both branches of modernity have failed to acknowledge the complexities of human existence. Moreover, through the single objective standard incorporated by positivism and the stereotypical grand theorising of liberalism, it can be argued that both perspectives assimilate difference to sameness. This assimilation of different people being treated the same is achieved through the use of formal equality as will be argued below.

Formal equality is a form of interpretation with the belief that all persons in the same situation should be treated exactly the same, irrespective of other aspects such as race, religion, sex, gender etc — which are seen as arbitrary.[62] Through this it can be seen that formal equality has a deep obsession with sameness as it equates the experiences of one person belonging to a specific group based on a specific class as the same as all the others of that class. Thus, although formal equality differentiates between dichotomies — such as black/white, male/female — formal equality actually assimilates these differences to sameness by the blatant attempt to ignore all other intersecting aspects of human life.[63] Through this, systemic inequality is perpetuated whereby, for example, the previously disadvantaged black men are classified as simply men or black women are grouped as simply black. Such simple dichotomies ignore the existence of human life, the social being and feed into laws which aid in the survival of the subordination of such people.

This formal equality can be expressed as the dominant form of legal interpretation through its obsession with sameness. Formal equality is a product of modernity as the dominant legal culture through the strict reliance on the pure law of positivism and the essentialism of liberal theory which both aid in the objective and rational standards of modernism as explored above.

This has perpetuated the survival of rainbow jurisprudence which describe the tactics used by judges to beguile the eyes of the reader

59 Botha (n 9 above) 6.
60 Botha (n 9 above) 8.
61 Botha (n 9 above) 6.
62 Smith (n 3 above) 610.
63 *Prince v President, Cape Law Society* 2002 (2) SA 391 (CC); *Jordan and Others v S* 2002 (6) SA 642 (CC).

with flashy judgements and magical wording in order to distract us from the actual lack of substantive equality as envisaged by the Constitution in order to conceal the formal equalitarian interpretation that was relied on due to our modern legal culture.[64] This commitment to mainstream thinking in line with formal equality and modernism has contributed to the impoverishment of law into a body of principles and rules that are void of any values, meaning, morality and substance, thus the law has been reduced to a restricted jurisprudence.[65]

Thus, a chasm exists between the traditional approach of the courts (reflecting positivism and liberalism) and the transformative constitutionalism envisaged by the Constitution.[66] Therefore, the only antidote for the illness that is rainbow jurisprudence is a pure, radical reliance on substantive equality.

3 Substantive Equality

Previously it was shown how positivism, and liberalism by extension, prefers an apolitical and liberal reading of the Constitution. However, under the 'new' constitutional dispensation, we have a duty to challenge the modern legal culture that we are faced with as well as the interpretive practices that accompany it.[67] If the current legal culture is damaged by modernism, then I argue that a post-modern theory is the next logical approach to reach constitutional transformation. A post-modern theory denies the sorting of individuals into class/ group based categories, thus it rejects the obsession with sameness caused by formal equality, positivism and liberalism.[68] Furthermore, it acknowledges the differences between individuals as well as their differing circumstances by recognising that each individual has various characteristics that all intersect with one another such as a race, sex, religion, gender, sexual orientation.[69]

For the reasons mentioned above, I argue in favour of Klare's post-liberal reading of the Constitution.[70] The reasons for this are that, in contrast to a liberal constitution, the Constitution of the Republic of South Africa supports a collective self-determination as well as an individual self-determination.[71] This can be seen through the inclusion of positive duties on the State which has a social, redistributive and caring ethos.[72] Thus it can be argued that the South

64 Klare (n 1 above) 156.
65 Douzinas (n 20 above) 10.
66 Klare (n 1 above) 170.
67 Klare (n 1 above) 168.
68 Barnett (n 33 above) 8.
69 Barnett (n 33 above) 9.
70 Klare (n 1 above) 150.
71 Klare (n 1 above) 153.
72 Klare (n 1 above) 153.

African Constitution portrays a departure from liberalism.[73] The Constitution is said to recognise diversity, celebrate *uBuntu*, emphasise the need to reconcile the injustices caused under Apartheid, identify the need for self-realisation and be self-conscious of our history.[74] Furthermore, the Constitution visualises an equality that can exist in the space of the world and not just within the law — a substantive rather than a formal equality.[75] This can be seen through section 9 of the Constitution which entrenches substantive equality in order to exterminate and remedy the influence of the group based disadvantage mentioned above.[76] Through this the Constitution can be both the potential for power as well as the agent for legal reform within South Africa.[77] However, the Constitution is not self-executing and the interpretation of the Constitution is what holds the power to humanise or to dehumanise the world.[78] The more accommodating interpretation of the Constitution — being through substantive equality, which will be explained further below — would lead to a post-modern identity in terms of which the law can become more self-conscious and reflective, which is in line with the post-liberal reading of the Constitution.[79]

According to Barnett, the law needs to be placed in its wider context as it does not exist in a vacuum.[80] From this it follows that the concrete life experiences of the people who are regulated by the law must be considered when dealing with the law.[81] In order to do this, we need to dismantle the systemic inequality of the law by recognising the diversity of the people of South Africa.[82] In order to do this, people need to challenge the majority beliefs in positivism and liberalism as well as the practice of formal equality.[83]

The law is not a set of rules but rather a form of life.[84] Therefore, the law should claim meanings from experience and make that meaning real.[85] In order to make experiences mean something, the law must recognise the complexity of human experience in that the social beings who have these lived experiences cannot be reduced to separate autonomous regions such as *merely* race, *merely* class,

73 Klare (n 1 above) 152.
74 L Du Plessis 'The South African constitution as monument and memorial and the commemoration of the dead' in R Christensen & P Bobo (eds) *Rechtstheorie in rechtspraktischer Absicht* (2008) 191–192; Klare (n 7 above) 154-155.
75 Klare (n 1 above) 154.
76 Botha (n 9 above) 4.
77 Barnett (n 33 above) 11.
78 J Boyd White 'Justice in tension: an expression of law and the legal mind' (2012) 9 *No Foundations* 18.
79 Minda (n 11 above) 125–126.
80 Barnett (n 33 above) 23.
81 Botha (n 9 above) 10.
82 Barnett (n 33 above) 21.
83 Botha (n 9 above) 15.
84 Boyd White (n 78 above) 1.
85 Boyd White (n 78 above) 5.

merely sex, *merely* gender etc.[86] These bases of existence are not closed and non-negotiable, but are rather the crossroads that creates experiences where they meet and intersect.[87] In order for the law to recognise this complexity of human life, the Constitution needs to be interpreted through substantive equality.

Substantive equality treats individuals as substantive equals.[88] This means that the law realises that not all people are 'on the same playing field' and therefore, ensures that it does not perpetuate the subordination of groups who have already suffered from some form of disadvantage.[89] Moreover, substantive equality recognises the importance of social beings and the intersections between their race, sex, class, gender and sexual orientation.[90] Through this, substantive equality celebrates diversity and difference.[91]

Thus substantive equality rejects grand theorising and is tailored to the needs of individuals by recognising the complexity of social life.[92] Through this, the law can accommodate diversity, the variability of humans in South Africa and be open to radical difference.[93] This radical difference treats humans as ends in themselves and not as mere bodies of walking rights or objects of bureaucratic power.[94] This destabilises the dichotomies of objective and subjective or black and white or male and female that the modern legal culture relies so heavily on.[95] The possibilities under substantive equality would be infinite as opposed to the grand theories which aim to limit and assimilate.[96] This will allow the people to reimagine the world we live in and create new identities for ourselves as opposed to those fixed on us by the middle-class, westernised elite.[97] Through this, every human being will once again be responsible for his/ her own choices.[98] Moreover, this celebration of difference brings together both the community as well as the self by constantly being moulded and shaped through the relationships we have with others and not on fixed, objective criteria.[99] A progressive legal culture such as this commitment to substantive equality is necessary for the long term successful constitutional transformation in order to create

86 Douzinas (n 20 above) 11.
87 Douzinas (n 20 above) 12–13.
88 Smith (n 3 above) 611.
89 Smith (n 3 above) 611.
90 Smith (n 3 above) 612.
91 Smith (n 3 above) 612.
92 Barnett (n 33 above) 9, 18.
93 Barnett (n 33 above) 4; Botha (n 9 above) 4-6, 14.
94 Botha (n 9 above) 15.
95 Botha (n 9 above) 33.
96 Douzinas (n 20 above) 16.
97 Douzinas (n 20 above) 16; Botha (n 9 above) 5.
98 Botha (n 9 above) 8.
99 Botha (n 9 above) 28; Minda (n 11 above) 114.

power in the community and allow people to have a capacity for self-determination outside of seemingly neutral dichotomies.[100]

Therefore, 'a rigorous engagement for substantive [equality] will … make us aware of constitutional colours that we never even dreamed of … under our fixation of rainbow jurisprudence — not just green and blue, but emerald, jade, azure, turquoise and aqua'.[101]

However, once again, the Constitution is not self-executing. The drafters of the Constitution could not have perceived that the wide phrases (in order to accommodate change in a changing society) would be interpreted with positivism and formal liberalism as habits of mind.[102] Therefore, we need a new, radical approach to adjudication in order to move towards constitutional transformation.[103]

4 Deconstructive intersectionality and Magistrate Van der Ligt

Although the judiciary are not the only ones to blame for this rainbow jurisprudence — there appears to be a mentality of formal equality among the population as well — I have chosen the judiciary as a focal point for this essay for various reasons which will now be discussed. Our legal imagination has been constricted by hierarchies created through modernism, therefore, we balk at any mention of adjudicative transformation.[104] This is seen as an uncomfortable way of thinking because it goes against the mainstream norm of preservation of judicial sterility when interpreting statutes.[105] Therefore, the constant use of bizarre and unusual theories will push against the conventional understandings which will then allow space for transformation.[106]

Judges represent the moment that the abstract principles of the law meet the world and they represent an intersection of all aspects of life.[107] Therefore, the courts need to use substantive equality in order recognise radical difference and diversity within the law, however, they rely on positivism and liberalism to eradicate choice and power within their judgements that this causes an objective and formal equalitarian approach to interpretation.[108]

100 Klare (n 1 above) 153, 170.
101 Cockrell (n 4 above) 38.
102 Klare (n 1 above) 156.
103 Klare (n 1 above) 152.
104 Botha (n 9 above) 29.
105 Dugard (n 21 above) 183; Klare (n 1 above) 158.
106 Botha (n 9 above) 15, 37.
107 Boyd White (n 78 above) 15; Douzinas (n 20 above) 12.
108 Botha (n 9 above) 5, 6, 18; Klare (n 1 above) 165.

Thus, we cannot move towards constitutional transformation through substantive equality without rethinking the manner in which the judiciary approaches interpretation.[109] Moreover, the Constitution encourages self-reflection regarding legal methods, specifically with regard to the judiciary.[110] The judiciary is not criticised by many legal academics (once again a result of our legal culture) however, 'the absence of criticism does not promote infallibility, it merely encourages the belief therein'.[111] Lastly, a slightly more obvious reason being that there is little point in schooling future lawyers about substantive equality if they are to end up fighting a claim in the court room in front of a judge who is institutionally biased and formulates his/ her judgements through the application of positivist techniques.[112]

If we accept for a moment that I am correct in saying that the above is sufficient reasoning to centre this essay on the judiciary, then it makes sense to proceed on with a discussion of how the judiciary interpret statutes based on our legal culture of rainbow jurisprudence and modernity.

The Constitution is phrased widely in order for it to be interpreted in light of the changes in society. Therefore, there are gaps and ambiguities in the Constitution that judges are required to interpret and fill.[113] Interpretation is a meaning creating activity and judges need to work within the law as the material through which this meaning needs to meet the world.[114] Thus, especially in constitutional adjudication, it cannot be denied that value judgements need to be made, relying on extra-legal concepts.[115]

Through the arguments of lawyers and inherent flexibility of legal materials through interpretation, cases represent an opportunity to open the law up to endless possibilities by providing the judiciary with a wide discretion.[116] This creates tension within judges because their discretion introduces moral and political influences.[117] These tensions cannot be resolved by mere recollection of and reliance on pure rules and principles, but rather by an art of using one's mind and interpreting languages, representing a set of possibilities, giving life to the law.[118] However, the judiciary downplay these influences and

109 Klare (n 1 above) 152.
110 Klare (n 1 above) 156.
111 Dugard (n 21 above) 181.
112 Klare (n 1 above) 148.
113 Klare (n 1 above) 157.
114 Klare (n 1 above) 159.
115 Klare (n 1 above) 158.
116 Boyd White (n 78 above) 9,10.
117 Douzinas (n 20 above) 6.
118 Boyd White (n 78 above) 10, 16.

tensions by a strict adherence to their alleged mechanical approach in merely finding the intention of the legislatures.[119]

Dugard argues that judges are also subjected to human limitations, such as their likes, dislikes, race, class gender, sex, sexual orientation etc as these are all aspects that shape human experience, mould their perspectives and create their identities; these are cultural imperatives which shape the human being.[120] These cultural imperatives also establish inarticulate premises which subconsciously influence the judgements handed down by the judiciary.[121] Although positivism has attempted to make the judiciary insusceptible to value judgements and act purely mechanically, it cannot remove these inarticulate premises.[122] Positivism merely denies that these premises exist (which allows them to flourish) thereby concealing them behind seemingly objective and neutral laws.[123] However, by denying their existence, positivism is only encouraging the existence of subliminal forces that influence judges through their institutional bias to the modern legal culture.[124] This merely undermines the transparency of the law.[125]

As a solution to the above, Dugard emphasises that judges need to acknowledge that they are influenced by these inarticulate premises.[126] However, how is this to be accomplished through a judiciary so heavily reliant on hiding behind positivism and denial?

The first step in my two part solution introduces a critical realist perspective of a feminist concept, what I call 'deconstructive intersectionality.'[127]

The term intersectionality is a feminist notion which means that a person is not just one isolated class/group based category, but rather a multiple-way crossing in terms of which all aspects of life, such as race, sex, gender, sexual orientation and religion meet.[128] These various aspects of life are cultural imperatives which orient our perspectives regarding how we see the world, rights from wrong, shape our identity, likes and dislikes and determine who we are, what we see and how we see it.[129] Therefore, if judges can acknowledge this intersectionality existing within themselves, then they would be more accommodating to recognise this intersectionality of the claimants whose fate lies in their hands. Through this, radical

119 Dugard (n 21 above) 182.
120 Albertyn, (n 22 above); Dugard (n 21 above) 188; Boyd White (n 78 above) 2.
121 Dugard (n 21 above) 190.
122 Dugard (n 21 above) 187.
123 Dugard (n 21 above) 188, 189, 191.
124 Klare (n 1 above) 171.
125 As above.
126 Dugard (n 21 above) 195.
127 Dugard (n 21 above); Minda (n 10 above).
128 Barnett (n 33 above) 8.
129 Klare (n 1 above) 157.

differences will be celebrated, systemic inequality will be properly addressed and interpretation can occur through substantive equality.[130]

Du Plessis argues that there are two approaches to constitutionalism, namely memorial and monumental.[131] A memorial approach is conscious of its limits and looks at the past while a monumental approach celebrates life and achievements.[132] In order for judges to fully commit to this acknowledgement of their own intersectionality and transformative constitutionalism, they need to accept their own personal memory as memorial while simultaneously monumentalising the memory of the people on trial by using the personal experiences of the judges based on their class, race, sex, gender and sexual orientation to constantly allow them to be aware of the possibility of a slip of their impartiality into potential bias and disadvantage based on the intersectionality of the person sitting in front of them.[133] By this I mean that instead of celebrating their personal influences through judgements that perpetuate systemic inequality due to their particular experiences, they need to memorialise this memory as well in order to allow these inarticulate premises to warn them of the potential that their judgement could be unfairly decided based on these cultural predispositions. By so doing, these judges will be able to identify the memorial memory of the person sitting in front of them as a victim of subordination through systemic inequality perpetuated by class/ group based distinctions. Once this has been identified, the judge can monumentalise this memory (being that of the person on trial) through commemorating the past injustices but allowing the person to be seen as a substantive equal who can celebrate their radical difference based on their individual aspects of life such as race, gender, class etc.[134]

This intersectionality is described as deconstructive. This description follows the formation thereof by Derrida, a critical legal scholar, who argues that deconstruction challenges the law to reshape our dominant legal culture by reversing the hierarchies that modernity has caused in order to affirm elements of human life through the affirmation of the complexity of human existence and rejection of essentialism.[135]

The aim of this deconstructive intersectionality is therefore to abandon the positivistic divide between law and morality and to reject the essentialism of the liberalist movement by acting as a port-modern solution in terms of which judges can acknowledge that they

130 Smith (n 3 above) 631.
131 Du Plessis (n 74 above) 189.
132 As above.
133 As above.
134 As above.
135 Minda (n 11 above) 114, 118, 120.

are influenced by subliminal forces and use this acknowledgment to eradicate systemic inequality and celebrate radical difference, a movement towards substantive equality.

This recognition of intersectionality to play a deconstructive role will allow the law to be more truthful with itself and allow judges to make value laden decisions and accept their moral responsibility in the choices that follow.[136] This will be more in step with a post-liberal reading of the Constitution.[137]

An example of a model judge who embraces a deconstructively intersectional approach, akin but not identical to Dworkin's Hercules J, is that of Magistrate Van de Ligt from Ettiene van Heerden's novel *Ancestral Voices*.[138] Upon reading about the travels of the Magistrate on the train to Toorberg, I was reminded of the strong positivism of the South African judges through his memorisation of abstract papers of neat drawings of blood lines instead of an actual experience of physical relationships of human beings who actually exist in the reality of the novel.[139] Moreover, the Magistrate was obsessed with pre-determined questions that constituted a rational process in terms of which he would be able to extract one determinate legal answer from the general principles of clinical guilt — the one person who was clearly guilty of the murder of the young deceased.[140] However, as the novel progresses, Magistrate van der Ligt quickly realises that the black letter of the law that he has practiced in for so many years is not sufficient and does not apply in this context where the abstract rules of the law are failing to adhere to the social problems when these rules meet with the real world. Eventually, through a metamorphosis, the Magistrate acknowledges that his personal influences have become involved in his investigation of the mysterious death of the young Trickle Du Pisani, completely against his will, but through this he was able to realise that there was more to the world than the basic concepts of the legal culture he found himself in. As a result, he acknowledged the full life of Ella Moolman (through her history, sex, race, gender and all other parts of her intertwined existence) and admired her for this. Hence, Magistrate Van der Ligt accepted his inarticulate premise of loving Ella Moolman as the monumental reincarnation of his deceased wife and that this ultimately would have had a subconscious influence on his decision about the guilt of the Moolmans in Trickle's death. In order to memorialise this, in the last letter that the Magistrate wrote to his deceased wife, it seems as though he could not find Abel Moolman guilty in such a basic sense of the word that the law circumscribed.

136 Klare (n 1 above) 164, 165.
137 Klare (n 1 above) 165.
138 E van Heerden *Ancestral voices* (2011). [page number for reference]
139 Van Heerden (n 138 above). [page number for reference]
140 Van Heerden (n 138 above). [page number for reference]

The second step in my two step solution relies on Dugard's argument that once judges can accept that they are influenced by inarticulate premises, then they will be more accustomed to be influenced by accepted legal values.[141] In Dugard's argument, these values are those found in common law.[142] However, it is my contention that the accepted legal values that judges would be more accommodating of in the new constitutional dispensation is those entrenched in the Constitution, specifically substantive equality and *uBuntu*.[143]

Although it is difficult to define, *uBuntu* has been described as a philosophy of life.[144] The values of *uBuntu* include humanity, respect, personhood, human dignity, compassion and morality.[145] *uBuntu* is specifically important in this context as it used to describe the potential of a human being due to the fact it differentiates, not only between comfortable dichotomies such as man and woman, but also between radical differences in the varying gradations of the essence of those individuals, this is a progressive African concept of substantive equality.[146] Moreover, the inclusion of this philosophy of life into the law will enhance the ability of any jurisprudence to move towards a transformative constitutionalism by recognising the vast networks of human existence that can be found within the South African dispensation.[147]

It is my argument that deconstructive intersectionality, as I have defined it in the previous section, will pave the way for the courts to consider the circumstances of people as substantive equals. This means that the law will reflect a plurality of voices, needs, races, religions, cultures, interests, sexes, genders and classes, not only creating the capacity for plurality in the self, but also in the community.[148] Through this, various aspects of the individual as well as the complexity of human life will continue to be recognised on a case by case basis which will allow for the recognition of the possibilities of life in law.[149] Thus, social being and social existence will form part of the law.[150] Substantive equality will allow extra-legal considerations to loom large in the 'new' jurisprudence that South Africa finds itself in, which will include aspects such as economics, politics, sociology, psychology etc merged with the law in order to create a platform that will knot human experiences together

141 Dugard (n 21 above) 195.
142 As above.
143 *S v Makwanyane and Another* 1995 (3) SA 391 (CC).
144 Y Mokgoro 'uBuntu and the law in South Africa' in D Cornell & N Mavangua (eds) *uBuntu and the law: African ideals and post-apartheid jurisprudence* (2012) 317.
145 Mokgoro (n 144 above) 317.
146 Mokgoro (n 144 above) 318.
147 Mokgoro (n 144 above) 319.
148 Boyd White (n 78 above) 14; Botha (n 9 above) 5.
149 Boyd White (n 78 above) 16.
150 Douzinas (n 20 above) 10.

in order to 'attach the body to the soul and bind it to the broader community' as a representation of social being.[151] This being is always becoming in endless relationships with others as a 'communism of the heart'.[152] This is the essence of a general jurisprudence; it is the joint reconstruction of social life, humanity and the law in order to deconstruct bureaucratic power structures and the harsh and unjust application of mere rules, principles and essentialist, universal stand points.[153]

5 Conclusion

I have argued that the current legal culture of South Africa is damaged by modernism, plagued by positivism, littered with liberalism and stuck in rainbow jurisprudence which has contributed to a formal equality perspective on interpretation and a restricted jurisprudence. I have argued that this has perpetuated systemic inequality through group/class based categories that have resulted from formal equality's obsession with sameness. Furthermore, in order to counter this problem, I have shown that a post-liberal reading of the Constitution which supports substantive equalitarian interpretation is a more accommodating approach in light of South African transformative constitutionalism. The two part solution that I envisaged in order to reach this transformation is the introduction of a feminist concept in light of a critical realist perspective, namely the acknowledgement of what I call 'deconstructive intersectionality' by the judiciary. The second step in my solution is that after the acceptance of this deconstructive intersectionality, judges can be more accommodating of accepted legal values such as constitutional values and *uBuntu*. Furthermore, I made use of Magistrate Van der Ligt in Ettiene van Heerden's novel *Ancestral Voices* as the model judge. Lastly I described how this movement from rainbow jurisprudence to substantive equality through deconstructive intersectionality would create a pathway for general jurisprudence. After all, without a shift towards substantive equality and the influence of general jurisprudence, positivism and liberalism aid in the perpetuation of inequality through simple dichotomies of life that fail to unearth radical differences while obsessing with sameness, resulting in a 'law [which] is at best a corpse and at worse, a zombie'.[154]

151 Douzinas (n 20 above) 1, 13.
152 Douzinas (n 20 above) 16.
153 Minda (n 11 above) 120.
154 Douzinas (n 20 above) 18.