Pretoria University Law Press
PULP
www.pulp.up.ac.za

ISSN: 1998-0280

PRETORIA STUDENT LAW REVIEW

2014 • 8

PRETORIA STUDENT LAW REVIEW 2014 • 8 PULP

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(2014) 8

Pretoria Tydskrif vir Regstudente
Kgatišobaka ya Baithuti ba Molao ya Pretoria

Pretoria University Law Press
PULP

2015

(2014) 8 Pretoria Student Law Review

Published by:
Pretoria University Law Press (PULP)
The Pretoria University Law Press (PULP) is a publisher, based in Africa, launched and managed by the Centre for Human Rights and the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa.

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Printed and bound by:
BusinessPrint, Pretoria

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ISSN: 1998-0280

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EDITORS' NOTE

> 'Reading and writing, like everything else, improve with practice. And, of course, if there are no young readers and writers, there will shortly be no older ones. Literacy will be dead, and democracy- which many believe goes hand in hand with it- will be dead as well.' ~ Margaret Atwood

What an honour and privilege it has been to serve upon and represent the eighth edition of the *Pretoria Student Law Review*. Having also been part of the seventh edition, it gives me great pride to see how the Review is constantly expanding, changing and consistently providing a space which allows for an open dialogue amongst young law students -encouraging critical thinking and engagement. As each successive issue is released, we are exposed to an array of new topics, thoughts and ideas, which are the consequences of brilliant young legal minds who refuse the notion of complacency in the law- indicating a bright and prosperous future for the legal profession.

I would firstly like to extend my everlasting gratitude, respect and appreciation to both Prof D Brand and Prof A Kok, without whom this edition would not have been possible, for their dedication and constant assistance. I also thank the 2014 Editorial Committee, Alexia Katsiginis and Michael Potter, for their hard work, not only in this edition but also the one prior. I also extend my gratitude and thanks to the Editorial Board – Prof A Boraine, Prof K van Marle, Prof M Roestoff, Prof W de Villers, Prof A van der Linde, Prof C Fombard and Prof D Brand, whose extensive legal experience and knowledge helped make this edition a success. A final thanks to Lizette Hermann, who has always been an asset and unwavering help to the Review.

I am filled with pride and excitement over the articles published in this issue as they cover a wide range of topics, of which I am certain all readers will be intrigued by and appreciate. Alexia Katsiginis and Cherrie Olivier write about a Post-Colonialist approach to Transformative Constitutionalism, Cara Furniss about Arendt's theory of judgment for Post-Apartheid South Africa, Cherrie Olivier about the advantage to creditor's requirement, Petronell Kruger and Nomfundo Ramalakana regarding a comparative constitutional analysis of the right to life in Africa, Quinton Joubert about Construction and Engineering Law in South Africa and whether that results in a gap in the LLB curriculum, Saloni Khanderia-Yadav and negotiations on a trade and competition policy under the World Trade Organisation and lastly Wesley Martin Grimm and the concept of constitutional damages. I extend my gratitude to these writers for their contributions and choosing the *Pretoria Student Law Review* to publish their work.

In order for one to understand and start to challenge the notions and stigmas of the world, one must read and write. Law students, lawyers, academics and the legal profession in its entirety require a higher level of understanding and comprehension, especially between the law and people. How can one seek justice and equality without understanding and being able to challenge what is in front of us? I therefore encourage us all to read, write and to engage with those around us, for it is only those who realise that there is no 'box' who can change the world.

Alicia Allison
Managing Editor
2014

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.

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AN [UN]MAKING OF THE WORLD:[1] A POSTCOLONIALIST RESPONSE TO TRANSFORMATIVE CONSTITUTIONALISM

by Alexia Katsiginis & Cherrie Olivier***

> 'The power to re-enchant the world is not ours. We no longer believe in dragons because dragons no longer appear to us.'[2]
>
> 'The world at present is full of angry self-centred groups, each incapable of viewing human life as a whole, each willing to destroy civilisation rather than to yield an inch.'[3]

1 Introduction

In this paper we critically engage with transformative constitutionalism as a project of imagination and a response to disenchantment. Drawing on post-colonialist feminist conceptions of the law, we explore the promise of the 'legal imagination' and its ability to re-enchant our understanding of equality and redefine universal standards employed by the law. The critique of disenchantment is two-fold. First, the formal application of rules mandated by the law allows for the absence of thought and by extension, the absence of judgement. Hannah Arendt understands the employment of 'pure' scientific knowledge as possessing the means to destroy the world.[4] Similarly, a legal tradition founded on formalism possesses the means to destroy the society it claims to protect. Second, the law's commitment to disenchantment has entrenched a universal standard that privileges the masculine and disparages the feminine 'other'. Indeed Drucilla Cornell argues that no known society has successfully escaped 'symbolic traces of an ideological masculinity'.[5] In a postcolonial context disenchantment is further entrenched by the colonial relationship that serves to marginalise all that is in conflict with the western universal. Reference will be made to Hélène Cixous' work on dualist thinking which not only results in

* Third year BCom Law, Tutor in the Department of Private Law, University of Pretoria.
** Third year LLB, Tutor in the Department of Private Law, University of Pretoria.
1 E Scarry *The body in pain* (1985).
2 M Antaki 'The return to imagination in legal theory: the re-enchantment of the world?' (2012) 23 *Law and Critique* 17.
3 B Russell *In praise of idleness* (1976) 36.
4 J Kohn (ed) 'Introduction' in H Arendt *The promise of politics* (2005) xxii.
5 D Cornell *At the heart of freedom* (1998) 15.

separating one element from another but also in arranging them in terms of an implied hierarchy which renders the one element as subordinate to the other.[6] This hierarchal structure and the perspective that the weaker element is passive, uncivilised, colonised and female will serve as the crux of disenchantment in the community and the legal culture for the purposes of this essay. Disenchantment itself can be understood as symptomatic of a masculine tradition.

Specific focus is given to the possibility of the legal imagination to respond successfully to the identified problem and re-enchant not only the legal sphere but also the broader South African community. In doing so, each of the four legal imaginations proposed by Mark Antaki will be considered and critiqued according to its ability to displace the hierarchal structure and attribute value to the views of those who are presently oppressed.

This critique of imagination begins by us evaluating the strength of the law as a system that can realise its own transformation. In doing so we first assess Ronald Dworkin's interpretation of law as a theoretical imagination, and argue that 'integrity' in a post-apartheid context nurtures the system's fundamental injustices.[7] We show that Dworkin's project ultimately entrenches privilege and neglects transformative opportunity. Dworkin's theory of legal interpretation will ultimately be rejected on the basis of its uncompromising striving towards one single truth that is ascertainable only by a masculine force greater than human reason.

Thereafter transformative constitutionalism is considered as a possible hope for reform. It is evaluated as a project of enchantment in terms of both the progressive and transformative imaginations. First, an attempt is made to understand the progressive imagination as a possible project of *ubuntu*. The critique of this project is based on its inability to deconstruct the law and its failure to expose the violent tradition of rationality that has infiltrated the law's interpretive community.

Karl Klare's project of transformative constitutionalism[8] is analysed with regard to the content of the transformative imagination. The critique of Klare's project involves his understanding of the tensions of law and his failure to deconstruct the constitutional values that inform his entire project. In light of the emphasis Klare places on the 'conscientious judge', Albie Sachs' understanding of the function of a judge and particularly the

6 H Cixous 'Contemporary philosophy' in S Atkinson (ed) *The philosophy book* (2011) 322.

7 E Christodoulidis '"End of history" jurisprudence: Dworkin in South Africa' (2004) *Acta Juridica* 64.

8 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal of Human Rights* 146.

importance that he attributes to persuasion is evaluated. The potential ascribed to the institution of the law and a 'post-liberal' constitution to effect transformation of the community and the law itself is questioned and consequently faulted due to its inability to recognise that the law is limited. The transformative imagination is also critiqued for using the imagination to discover and invent unchartered territories as opposed to identifying the value of reflecting on the past in the pursuit of reconciliation.

The nostalgic imagination is discussed as a means of remembering the past and (re)examining the particular. Reference is made to Arendt's insistence that the past remains alive in the reproductive imagination. In our analysis of her theory of judgement we focus on the importance she ascribes to the activity of thinking and her rejection of the universal standard. In this argument we rely on Arendt's emphasis on the particular to identify the ability of her project to overcome the obstacles of disenchantment. In a colonial relationship a 'parallel relationship' is drawn between the relationship of men and women and the relationship between the colonisers and the colonised.[9] Much like Arendt postcolonial feminist theorists draw on the past to understand the oppression of women in the modern world.[10] Their aim is to address oppression that occurs not only between men and women, but oppression that occurs on basis of race and class as well in order to avoid 'totalising strategies' which result in the thoughtless perception that all women are equally oppressed.[11]

Finally, we attempt to extend Arendt's concern with the particular beyond the activity of judgement. In doing so, we explore Cornell's conception of the 'imaginary domain' in order to read her project as complimentary to the nostalgic imagination.

2 The disenchanted state of the South African legal culture

The concept of disenchantment is explored in Antaki's piece on the potential of the legal imagination to effect re-enchantment.[12] Disenchantment is described as a state where the western world stresses only the knowledge which is related to the economic aspect of the community, the economic system in question being capitalist in nature.[13] Scientific advancement has resulted in rationality and

9 Viljoen 'Postcolonialism and recent women's writing in Afrikaans' *World Literature Today* 70 (1996) 65.
10 E Bonthuys & K van Marle 'Feminist theories and concepts' in E Bonthuys & C Albertyn (eds) *Gender, law and justice* (2007).
11 As above.
12 Antaki (n 2 above) 1.
13 Russell (n 3 above) 28.

systematic method taking a front seat, resulting in the prevailing mentality that all views need to be justified in terms of an established empirical method.[14] In keeping with this tradition, individual economic rights and liberty are deemed to be of more value than communal sharing and being bound to one's community, as the practical value of the latter has not been established in terms of a capitalist, empirical and imperial method. Although the law has not single-handedly rid the modern world of its enchantment, it has also been affected by and does support and maintain these modernist ideals. This is evident in the laws which promote modernity and the approach taken in understanding the nature and process of adjudication.

Apartheid assisted in entrenching disenchantment as it found legitimacy in the comfort of positivism and consistency. Such a tradition has been woven into our understanding and interpretation of the law and threatens the passing of a utopian ideal. Carol Smart writes that '[i]n attempting to transform law, feminists are not simply challenging legal discourse but also naturalistic assumptions about masculinity'.[15] The entrenchment of disenchantment raises a moral demand that we turn away from the law as it *is* and contemplate it as it *ought to be*. It is only through the deployment of the imagination that the conception of justice can be realised.

The emphasis placed on rationality, on calculative reasoning and weighing up terms with already established meaning in terms of a systematic method is characteristic of disenchantment.[16] Due to this approach of calculative reasoning and the contribution of capitalism, a perception has developed that 'useful knowledge' is that which can effect something practical and of economic worth.[17] Law, an institution of a modern society, is also approached as a tool of practical use to man.[18] In order to make law more capable to fulfil this purpose, it has been codified and its language has been 'simplified' to make it more certain and less cumbersome to employ.[19] Legal positivists argue that words and legal terms which describe things that we can't experience in the material world make for an inconsistent application of the law.[20] In the modern world, concepts like 'community' and 'character' are not highly valued as such values cannot be reduced to anything tangible or practical.[21] This desire for consistency is akin to the modern scientific method where certain values are always fixed.

14 Antaki (n 2 above) 2.
15 C Smart *Feminism and the power of law* (1989) 86-87.
16 Antaki (n 2 above) 4.
17 Russell (n 3 above) 28-29; Antaki (n 2 above) 6.
18 Antaki (n 2 above) 4.
19 As above.
20 Antaki (n 2 above) 7.
21 Antaki (n 2 above) 14.

South African law is composed in part of codified sources of law such as numerous pieces of legislation, the Constitution and reported case law which creates precedent.[22] Although a case can be made for the underlying values of some of these sources, which aim to promote post-liberalist values,[23] the codification of law remains a modern western institution, which has been imposed due to the colonisation of South Africa. In keeping with the legal positivist tradition, the South African legal culture has strong faith in the 'precision and determinacy' of legal terms.[24] Legal interpretation in South Africa takes a very structured and technical approach.[25]

This legal positivist approach had resulted in some moral outcomes during the apartheid era, due to the fact that judges did not have to substantiate their judgements in terms of the underlying political ideal they wished to advance, but could instead cling to the literal interpretation of the term in question to justify the conclusion they reached.[26] Despite the fact that the positivist tradition does not always have entirely detrimental effects, it should not be regarded as an approach that does not maintain a hierarchal structure in terms of which certain groups are oppressed and others are advantaged. Positivist judges fail to acknowledge the discretionary power that adjudication offers them and that they do indeed take a political stance when deciding the outcome of a matter.[27] By claiming that the law constrains one to interpret a term in a specific manner, a judge can deny an opportunity for necessary change and still come to a 'sound' conclusion.[28] Even judges aiming to incorporate the ideals of the post-liberalist South African Constitution find themselves unable to move away from the positivist tradition in their interpretation of the law. [29]

A trend in modern thinking is the tendency to group elements into oppositional pairs such as man and nature; science and language; rationality and emotion; white and black and male and female.[30] These oppositional pairs are ranked according to a hierarchy, where one element is perceived as dominant and the other subordinate.[31] The dominant element is always associated with the western male (coloniser) who actively imposes his will unto nature and his subordinates; in contrast the weaker element is associated with the passive objects upon which he exercises his will (the indigenous and

22 D Kleyn & F Viljoen *Beginner's guide for law students* 39.
23 Klare (n 8 above) 150.
24 Klare (n 8 above) 168.
25 As above.
26 Klare (n 8 above) 170.
27 Klare (n 8 above) 171.
28 As above.
29 As above.
30 Cixous (n 6 above) 322.
31 As above.

the female).[32] Disenchantment is the warped perspective that calculative reasoning and individual rights are superior to emotion, literature and being connected to one's community.[33] Oppression is also perpetuated by the distorted perspective that maleness and domination are superior to femaleness and passivity. What should be sought is the reconciliation of the oppositional pairs in order to escape our distorted view and see humanity as a whole.[34]

Roberto Unger identifies oppositional pairs which are hierarchically structured within the law.[35] The dominant element maintains the state of affairs whereas the subordinate element, in certain cases, allows us to criticise it.[36] Due to the indeterminate nature of the law, either element of the pair can be preferred in making a judgement.[37] In order to demonstrate this, Unger analysed the doctrine of contract law: first he considered it from an individualistic perspective by which great value was given to the principle of the 'freedom to contract'.[38] Upon considering the doctrine from a communitarian outlook, Unger argues that the 'counter-principle' of 'fairness of contract' became more relevant.[39] Precedent for supporting either side of the oppositional pair can be found in the law, illustrating that the law is not determinate, contrary to the positivists claim that it is.[40]

These points of contention within in the law serve to reflect conflicting views within society — in the above instance the political systems of individualism and socialism.[41] This shows that the law is not separate from the contrasting political ideologies in society, its standards are not clear and certain and it is not merely a tool that can be employed uncritically to effect justice. The law is both an active contributory cause to oppressive hierarchies as well as a passive recipient influenced by its dominance in our modern times. The possibility of the legal imagination addressing these concerns within the law is explored by considering whether the proposed alternatives they offer sufficiently escape the confines of modernity and the oppressive hierarchal structure.

Facing the traumatic events in South Africa's past as opposed to wishing them away could result in citizens gaining more insight into the current troubles we face. In Arendt's discussion of judgment and validity she rejects the view that opinions should be measured by a

32 As above.
33 Antaki (n 2 above) 2.
34 Antaki (n 2 above) 8.
35 S Veitch *et al Jurisprudence* (2007) 116.
36 Veitch *et al* (n 35 above) 117.
37 As above.
38 Veitch *et al* (n 35 above) 117.
39 As above.
40 As above
41 Veitch *et al* (n 35 above) 118.

'standard of truth' and suggests that opinions should arise out of collective deliberation where a proponent of a view should persuade others and develop the Kantian idea of an 'enlarged mentality'. This idea ultimately serves to reject law as a tool to better society and looks towards the entire community and not only the legal fraternity to provide a platform on which to incorporate the views of others.

3 Dworkin's theoretical imagination

Central to the theoretical imagination is the deployment of Hegelian dialectic.[42] Dworkin argues that a proper understanding of the relationship between the *concepts* of jurisprudence and the subjects' — specifically the judges' — *conception* of those concepts is indispensible in constitutional construction.[43] His reliance on the 'aesthetic hypothesis' fosters his appreciation of the law as literature.[44] In turning to 'creative interpretation', Dworkin refuses to abandon the ideal of the rule of law and promotes the exercise of the *Herculean imagination* in order to reach a legally correct answer.[45] A critique of Dworkin's legal reasoning will be based on his understanding of *interpretation* and *integrity* as independent principles that constitute the foundation of his project.

For Dworkin the law must be understood as the interpretation of a practice that exists within a particular community. As such the meaning of law can only be retrieved from within a shared context.[46] Such a community will emerge through the coherent interpretation of past practices and the combined participation of its members.[47] In this way Dworkin understands legal interpretation as a contribution to a chain-novel where the interpreter becomes a co-author bound to ensure that her contribution allows the novel read as a coherent *whole*.[48] The role of a legal participant is therefore merely to see the law in its *best light* and subsequently restructure it in terms of that meaning.[49] In other words, to interpret means only 'to apply an intention'[50] and must not be understood as a law-making opportunity. Dworkin's construction of interpretation fails to grapple with the indeterminacy of the law. Unger accuses Dworkin's project of being a liberal attempt to separate the law from politics and propagate the conception of legal neutrality.[51] This attempt to depoliticise the law

42 Antaki (n 2 above) 9.
43 Veitch *et al* (n 35 above) 114-115.
44 Antaki (n 2 above) 8.
45 Veitch *et al* (n 35 above) 114.
46 Veitch *et al* (n 35 above) 113. The authors further explain that the law cannot be identified outside of what the community holds as its practice of law.
47 Christodoulidis (n 7 above) 65.
48 Veitch *et al* (n 35 above) 116.
49 Christodoulidis (n 7 above) 66.
50 R Dworkin *Law's empire* (1986) 47.
51 Veitch *et al* (n 35 above) 120.

fails to engage critically with the current distribution of power and privilege that informs the legal order. Further, the value that Dworkin ascribes to understanding the law as a coherent whole remains unconvincing. Cornell calls for the redefining of equality so as to serve freedom.[52] Deconstructing the law's normative standards offers greater hope of finding the forgotten values tainted by apartheid and displacing the power structures that underpin Dworkin's chain-novel.

In the context of Dworkin's understanding of interpretation and the purpose of the legal participant he offers the *Herculean imagination* as a means of reaching a legally correct answer.[53] The use of this mythological figure as a proposed solution serves to illustrate the functioning of the hierarchal structure: reasoning is valued so highly that it transcends the human body and the use of a masculine western figure to enlighten the world marginalises the non-western and the female. Such an answer requires deploying those principles that carry the most weight within a legal order and those best able to rationalise rules and decisions into a single coherent scheme of justice.[54] This insistence for the right answer informs Dworkin's legal theory of 'law as *integrity*', which requires retrieving a principle from precedent and consistently applying it.[55] *Integrity* therefore serves to sustain unity within a community and provide a consistent understanding of legal practice.[56] Drawing on Etienne Mureinik, Emilios Christodoulidis applies the logic of *integrity* to argue that once an iniquity has substantially infiltrated a legal system, the system will yield to its fundamental injustice and assist its entrenchment throughout the legal landscape.[57] In a post-apartheid context *integrity* will merely reaffirm the present distribution of power together with its accompanying hierarchies. Mureinik notes that under *integrity*, iniquity becomes 'cancerous'.[58] Although legal interpretation will now take place in a post-apartheid context, Mureinik's concern is that apartheid laws have infiltrated the interpretative principles and values of the legal system with the weight necessary to nurture the iniquity and allow for its perpetual entrenchment.[59] As *integrity* requires loyalty to that which has been entrenched as 'institutional record' the principle rejects transformation in a post-apartheid context as it allows the injustice of the past to proliferate under its own momentum.[60]

52 Cornell (n 5 above) xiii.
53 Veitch *et al* (n 35 above) 116.
54 Veitch *et al* (n 35 above) 114.
55 Christodoulidis (n 7 above) 66.
56 Veitch *et al* (n 35 above) 116.
57 Christodoulidis (n 7 above) 64.
58 Christodoulidis (n 7 above) 68.
59 Christodoulidis (n 7 above) 69.
60 Christodoulidis (n 7 above) 64, 69.

Antaki criticises the theoretical imagination as being symptomatic of disenchantment.[61] Dworkin's demand that the limits of reason be overcome by the imagination is merely a revised commitment to disenchantment in light of man's limitations.[62] The insistence on a legally correct answer reaffirms the modern's desire for certainty and her infatuation with calculative reasoning. Dworkin proposes overcoming the restrictions of the human and her finite reason, by transcending the body and entering a faculty that can master in a more effective way. In doing so Dworkin seeks to invoke a masculine conception of the imagination. Claudia Springer notes that the desire to transcend beyond the body and its material limitations is rooted in a masculine tradition.[63] The desire to access the *Herculean imagination* acknowledges the body as an obstacle that must be overcome in order to better realise the aspirations of modernity. Dworkin's proposal of the transformative imagination cannot emancipate the law from disenchantment as it remains trapped in the 'iron cage of modernity'.

4 Walking over the bridge: transformative constitutionalism

Transformative constitutionalism must be understood as a project that facilitates a democratic transition from an authoritarian past to a new culture of constitutional justification.[64] Transformative constitutionalism calls for the realisation of human rights and the remembrance of values stifled by the formalism of the apartheid culture. In light of these objectives, transformation can be understood to invoke either a progressive or transformative imagination.

4.1 Transforming the progressive imagination into a project of ubuntu

Martha Nussbaum argues that the imagination is an 'essential bridge to social justice'.[65] Central to her understanding of the progressive imagination is the 'fostering of a psychological identification with the other'.[66] It is through this identification that one is able to appreciate

61 Antaki (n 2 above) 8.
62 Antaki (n 2 above) 8-9.
63 C Springer 'The pleasure of interface' in P D Hopkins (ed) *Sex/machine: reading in culture, gender, and technology* (1998) 484.
64 Klare (n 8 above) 147.
65 Antaki (n 2 above) 9.
66 As above.

the autonomy of the individual and understand the social contract as rooted in the respect for all human beings.[67] In this way, the progressive imagination can find an ally in the African jurisprudence of *ubuntu*, insofar as both philosophical concepts seek to understand the commonality between human beings. Similarly to the progressive imagination, *ubuntu* adopts an ethical identity rooted in moralism and understands that human beings are intertwined in a world of ethical relations.[68] Although each concept was born in different traditions of philosophical thought, *ubuntu* can inform the progressive imagination to render it particular to South African jurisprudence as both projects rely on a common understanding of the importance of empathy. Indeed, *ubuntu* directly relies on empathy in its call for *sympathetic impartiality* as it understands the progressive requirement of 'psychological identification' as an imperative for fostering an ethical understanding of both the other and ourselves.[69] Cornell and Fuller explain that this connection to the other is possible precisely because we are intertwined in an ethical relationship with others.[70] In this way, *ubuntu* goes beyond the progressive imagination by requiring the judge to step into an ethical domain of interpretation.

Although not expressly provided for in the Constitution, Yvonne Mokgoro argues that the values of the new Constitution coincide with the key values of *ubuntu*-ism.[71] In *S v Makwanyane* Mokgoro J explained that in its fundamental sense *ubuntu* denotes morality that is concerned with compassion, dignity, and the respect for others.[72] Chief Justice Ismail Mahomed follows Mokgoro by stating that '[the cultural] maturity [of Africa] expresses itself through collectivist [emotion] of communal caring and humanism, and of reciprocity and caring'.[73] Although the progressive imagination and *ubuntu* belong to different legal traditions they share the same underlying philosophy and goal. The progressive imagination is present in *ubuntu* insofar as it appreciates empathy as a necessary concern for justice.

In his critique of the progressive imagination Antaki argues that progressives celebrate modernity and support the systematic theorising of ethics.[74] In this regard it becomes necessary to examine the philosophical traditions that gave rise to the progressive imagination and *ubuntu* respectively. As western jurisprudence has been largely influenced by the Enlightenment ideals of logic and methodology, a western understanding of the progressive imagination

67 As above.
68 D Cornell & S Fuller (eds) *Ubuntu and the law of South Africa* (2012) 1, 3.
69 Cornell & Fuller (n 68 above) 4.
70 As above.
71 Y Mokgoro 'The development of ubuntu jurisprudence' in Cornell & Fuller (n 68 above) 320.
72 *S v Makwnayane & another* 1995 6 BCLR 665 (CC).
73 Mokgoro (n 71 above) 322.
74 Antaki (n 2 above) 9.

believes that a neat separation of morality and immorality is possible.[75] In terms of this understanding the ethical relationship between people can only occur in the imagination, therefore rendering a modern understanding of morality necessary. In contrast, *ubuntu* avoids this criticism as it does not conceive the social bond as an imaginary experiment but as a relationship into which one is born.[76] As such the progressive imagination's reliance on modernity must be understood in light of the community that fostered its development and must not in itself cause the rejection of the imagination as a possible project of *ubuntu*. Antaki's second point of critique is that the progressive imagination runs the risk of allowing too much discretion and questions whether the approach will necessarily relieve the disenfranchised groups.[77] *Ubuntu* transcends this concern by requiring an ethical domain of interpretation. Such a requirement can be accepted as providing the necessary discretion against which Antaki warns. *Ubuntu* can save the progressive's ideal of 'psychological identification' from modernity by re-interpreting it from an African jurisprudential position.

Although escaping the traditional opposition suffered by progressives, *ubuntu* nevertheless fails to appreciate the extent to which the apartheid tradition of disenchantment has infiltrated our interpretive community. *Ubuntu* merely requires an evaluation of our participation in an ethical community and does not demand a deconstruction of the law, therefore failing to expose the normalised positions inherent in legislative approaches.[78] The event of the Truth and Reconciliation Commission (TRC) illustrated the law's inability to sever itself from a disenchanted tradition even against the backdrop of a progressive imagination informed by *ubuntu*. Quoted by Karin van Marle, Antjie Krog criticised the amnesty process for favouring a commitment to judicial procedure above 'moral' outcomes.[79] Van Marle notes that the legalised process employed by the TRC prevented it from meeting its goals of 'reconciliation and healing'.[80] In seeking to realise the values of *ubuntu* the TRC was unable to escape the rational approach mandated by a disenchanted tradition. The progressive imagination's failure to engage critically with the normalised positions employed by the law will ultimately result in its own failure.

75 Antaki (n 2 above) 10.
76 Cornell & Fuller (n 68 above) 42.
77 Antaki (n 2 above) 10.
78 K van Marle 'Law's time, particularity and slowness' (2003) 19 *South African Journal of Human Rights* 250.
79 Van Marle (n 78 above) 244.
80 As above.

4.2 Transformative constitutionalism as a transformative imagination

The transformative imagination must be considered in light of the ideologies present in and strengthened through the application of the law.[81] The transformative imagination demands that ideology be recognised as an active element of the social world that operates through the language of the law.[82] Structural hierarchies are so deeply entrenched that they perpetuate a nihilistic acceptance of the world as it *is* and frustrates the possibility of imagining the world as it *ought* to be.[83] The purpose of the transformative imagination is therefore to overcome the constraints imposed by ideology and persuade society that the possibility of change is achievable.[84] In other words, the transformative imagination understands society as something that is created and not given.[85] In this understanding, the imagination allows for the opportunity to 're-invent the future' and construct a social world that is based on the ideals of justice and equality.[86] Pierre De Vos identifies the transformative vision of the Constitution as the creation of a society in which all people can live their lives in dignity irrespective of their social difference.[87] Rising from authoritarian atrocity, the Constitution represents the realisation of the transformative imagination as it re-invents an unjust social order by attempting to create an egalitarian community founded on the values of freedom and human dignity.

For Klare the Constitution represents a post-liberal document that embraces an 'empowered model of democracy'.[88] He recognises the necessity of employing a transformative conception of the adjudicative process to allow the Constitution the ability to realise its transformative aspirations.[89] He defines his project of transformative constitutionalism as:[90]

> a long term project of constitutional enactment, interpretation, and enforcement committed […] to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.

It can be asserted that the Constitution breaks away from the modern understanding of liberation. The values echoed in the Constitution are

81 Antaki (n 2 above) 11.
82 As above.
83 As above.
84 As above.
85 Antaki (n 2 above) 12.
86 As above.
87 P De Vos '*Grootboom*, the right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal of Human Rights* 265.
88 Klare (n 8 above) 152.
89 Klare (n 8 above) 156.
90 Klare (n 8 above) 150.

reflective of being conscious about its historical context by embracing various cultures and promoting the participation of all its citizens.[91] It also expressly provides for gender equality and respect for cultural tradition.[92] As Klare aptly explains, it holds a 'vision of collective self-determination'.[93] This would then be in direct contrast to the modern inclination to employ 'individual self-determination'.[94] In doing so, the Constitution aims to address the hierarchal structure that advantages certain individuals at the expense of others. Nevertheless, the concept of a Constitution, of codified law legitimising other laws and practices, is a purely western invention.

Klare focuses his project on adjudication and the tensions that challenge the 'conscientious judge' under South Africa's new constitutional dispensation. He understands the adjudicator as performing her work through a medium that is simultaneously constraining and malleable.[95] In this way Klare argues that the 'conscientious judge' in the new South Africa will be constrained by her duty to promote and fulfil the democratic values at the heart of the Constitution.[96] It is in light of this tension between the indeterminacy of law and the inevitable constraints experienced during interpretation that Klare's understands the success of his project. Under the Constitution, the 'conscientious judge' is expected to promote the values of an egalitarian community.[97] The legal constraints that demand interpretive fidelity, that would ordinarily flaw a legal order, have the opposite effect in a constitutional State as they function within the limits of freedom, equality and human dignity.

Although the South African legal culture has come to accept the conduct of the latter to be the norm, the judge is nevertheless subscribing to a political stance — she is choosing to ignore an opportunity to effect social change.[98] The former approach may not always yield results which are in line with the values in the Constitution either, as there is no guarantee that judges' political views will coincide with it. As there are many principles and precedents which are aligned with the hierarchal view that renders certain elements inferior to others, the very values in the Constitution can be limited or even ignored to see a contrary view flourish. Klare argues that the legal profession must accept its responsibility for constructing the social order envisioned by the Constitution and its role in realising the constitutional vision of transformation.[99]

91 Klare (n 8 above) 153.
92 Klare (n 8 above) 155.
93 Klare (n 8 above) 153.
94 As above.
95 Klare (n 8 above) 160.
96 Klare (n 8 above) 148-149.
97 Klare (n 8 above) 149.
98 Klare (n 8 above) 162.

As a Constitutional Court Justice, Sachs serves as an example of Klare's 'conscientious judge'. For Sachs the role of a judge is to best express the law in relation to a particular case that occurs in a 'particular moment'.[100] He accepts that the law is indeterminate and therefore rejects the possibility of a legally correct answer; in doing so Sachs breaks away from the modernist desire to achieve certainty.[101] He understands judgement as a persuasive activity that must convince the readers of a judgement that the outcome is just.[102] However, this activity of persuasion must be approached apprehensively as it fails to grapple with the ideologies that functions through the law. Such ideologies can serve a persuasive function as they have been normalised through legal institutions and are therefore easily mistaken for universal truths. In describing the law as indeterminate and concluding that judges do indeed take a political stance when making a judgement, Klare advocates that judges should admit their stance openly and substantiate it in the public view.[103] Although there is merit in this suggestion, it seems highly unlikely that a judge will admit, perhaps even to herself, that she has political views contrary to that of the supreme law when it is currently very comfortable to hide behind a traditionally, 'politically neutral' approach. The indeterminate nature of the law and its dependency on legal agents who not only need to practice transparently but also realign themselves entirely with post-liberalist ideals, limits the law and its hope of achieving transformative change.

The transformative imagination seeks to transform the 'law-abiding citizen into the law-inventing citizen' with the power to re-create and re-structure the social order in which she lives.[104] This transformation of the individual reverts to a modern understanding of the world as something that can be controlled. Similarly, the re-inventing nature of transformative constitutionalism — and Klare's conscientious judge — does not overcome modernity but merely reaffirms the modern desire to master through the imposition of will. The injustice of apartheid cannot be divorced from its disenchanted legal tradition and so the re-enchantment of our legal system and our understanding of justice cannot occur without abandoning modernity.

In addition to their worrying commitment to modernity, transformative theorists look to the future to re-invent their social order.[105] The absence of retrospective contemplation denies the opportunity to deconstruct the values on which transformative constitutionalism relies. The purpose of deconstruction is to draw

99 Klare (n 8 above) 164.
100 A Sachs *The strange alchemy of life and law* (2009) 145.
101 Sachs (n 100 above) 144.
102 Sachs (n 100 above) 141.
103 Klare (n 8 above) 164.
104 Antaki (n 2 above) 12-13.
105 Antaki (n 2 above) 12.

attention to that which is 'unsaid' and expose the open spaces of the text that allow for underlying assumptions and normalised positions.[106] The transformative imagination fails to challenge the normalised positions from which we understand the values of the Constitution. In other words, although our Constitution has allowed for equality to displace discrimination we can only understand equality as the opposite of discrimination and the meaning it held under the apartheid regime. Sachs J concedes that the norms and standards that define the law are continuously evolving.[107] Although the Constitutional Court has attempted to re-interpret fundamental standards it has done so by reverting to unchallenged constitutional values. Sachs offers the 'reasonable man' test as an example of such a re-interpretation. Rejecting the original masculinity of the standard, the Court accepted that the standard should be re-interpreted under the new constitutional dispensation to mean a reasonable person 'deeply sensitive to the values of our Constitution, including the right to equality'.[108] In its re-definition the Court failed to consider that the values of the Constitution, including the right to equality are still understood from a predominantly masculine perspective that is strongly rooted in an appreciation for logic and calculative reasoning.

Would imposing a model of imagination upon the community and reinventing its social structures truly lead to the reconciliation of the present democracy and the occurrences of a colonist past? It is worth considering whether facing the past 'in all its starkness' wouldn't perhaps enable us to understand its unjust consequences better.[109] A society cannot be understood as free and equal if the universal standard informing a legal culture remains unchallenged as it presupposes the colonial-masculine perspective and fails to validate the particularity of the 'other'.

5 A turn to the nostalgic: remembering the past and re-examining the particular

The nostalgic imagination is founded on an appreciation of the past and an understanding of the imagination as more than instrumental in achieving social transformation.[110] Nostalgics insist that the past and its specific meaning remain alive in the reproductive imagination.[111] It is through our historical reality that the future becomes possible

106 Van Marle (n 78 above) 250.
107 Sachs (n 100 above) 150.
108 Sachs (n 100 above) 151.
109 M D'entrèves 'Arendt's theory of judgment' in D Villa (ed) *The Cambridge Companion to Hannah Arendt* (2000) 247.
110 Antaki (n 2 above) 13.
111 Kohn (n 4 above) xxiii.

and symbolises our return to an enchanted world.[112] This coincides with Arendt's conception of judgement which involves understanding occurrences by placing them in the past context within which they originated from.[113] Post-colonial feminism also draws from the past by seeking to understand the position of women in modern society as descending from a history of imperialism.[114]

The nostalgic imagination is characterised by a concern with equality and pursues a 'return to humanity'.[115] Frans Viljoen identifies similarities in the relationship between the colonisers and the colonised and the relationship between men and women.[116] Colonisers have impressed upon themselves the notion that they are liberating the colonised by introducing them to 'civilisation'.[117] The colonisers seek to dominate and use 'civilisation' as a ruse in very much the same way that patriarchy functions to oppress women whilst justifying itself by the idea that it enables men to protect and provide for women. Post-colonial feminists wish then to displace patriarchal and oppressive structures by focussing on those who are marginalised due to their historical disposition.[118] This necessarily involves addressing the past in a way which is not distorted by the very same hierarchal order and prejudicial conceptions that are sought to be eradicated.

Arendt proposes coming to terms with past events in a manner that does not structure them in a hierarchy of relevance or importance.[119] According to Arendt the imagination enables us to place these events in their proper perspective and judge them without 'pre-given' rules.[120] This would involve embracing uncertainty which is foreign to the modern world, a world which has managed to delude itself into believing that established methods; set standards and precedent constitute certainty.[121] A component of this act of judging is thinking, which occurs internally and assists an individual in judging without making use of any pre-established norms.[122] Postcolonial feminism identifies ideologies which dominate society by imposing the view that one aspect is always advantaged and the other oppressed.[123] This implied hierarchy functions because it is not drawn into question, it has pre-established itself amongst all

112 Antaki (n 2 above) 13.
113 D'entrèves (n 109 above) 247.
114 Bonthuys & Van Marle (n 10 above) 39.
115 Antaki (n 2 above) 13.
116 Viljoen (n 9 above) 65.
117 E Said 'Contemporary philosophy' in S Atkinson (ed) *The philosophy book* (2011) 322.
118 Bonthuys & Van Marle (n 10 above) 39.
119 D'entrèves (n 109 above) 247.
120 As above.
121 Antaki (n 2 above) 15
122 Antaki (n 2 above) 23; M Antaki (n 2 above) 249.
123 Bonthuys & Van Marle (n 10 above) 38.

the other pre-established grounds and structures with which moderns approach social life. In law, like many other discourses, the use of masculine pronouns is taken for granted, which in itself is seemingly innocuous but denotes the perspective from which these discourses operate and therefore effectively suppresses the voice of women.[124]

Arendt's theory of judgement developed as an attempt to understand the tragedy of totalitarianism. She relied on the nostalgic imagination to define a faculty of retrospective assessment that would prevent our estrangement from our historical reality.[125] Arendt understands judgement in terms of the universal rule that assists in defining the particular.[126] She argues that the effect of totalitarianism is that it destroys the value of the universal rule, making it impossible to judge the particular.[127] In contrast to Antaki's pessimistic appreciation of re-enchantment, Arendt identifies man's capacity to start anew, and in doing so the ability to formulate new standards and categories of judgement.[128] The travesty of totalitarianism — or in a South African context, apartheid — does not destroy our ability to judge but merely our conventional categories of interpretation.[129] It is in this regard that the imagination becomes important as it provides the distance and the closeness necessary to formulate an impartial judgement.[130] Arendt attempts to understand judgement in conjunction with the activity of thinking.[131]

For Arendt the value of thought is two-fold. First, thinking releases the particular from the grip of the universal.[132] Through this process the individual is able to liberate her judgement from the universal category and conventional standards of behaviour.[133] In her search for the particular, Arendt employs Kant's notion of an 'enlarged mentality' as the capacity to think representatively.[134] In this regard, judgement becomes a political activity insofar as it allows the individual to orient herself in the public realm.[135] Arendt's attraction to Kant's aesthetics lies in its obsession with the particular and provides the individual with the ability to address the particular in its particularity without exposing it to an established universal standard.[136] Instead the particular is used to re-define the universal. Arendt proceeds to identify the conscience as 'by-product' of

124 Bonthuys & van Marle (n 10 above) 38.
125 D'entrèves (n 109 above) 247.
126 As above.
127 D'entrèves (n 109 above) 247.
128 As above.
129 As above.
130 D'entrèves (n 109 above) 248.
131 As above.
132 D'entrèves (n 109 above) 247.
133 As above.
134 D'entrèves (n 109 above)) 250
135 As above.
136 As above.

thought.[137] The conscience represents the notion of acting ethically and the inner check by which we evaluate our actions.[138] As the conscience presupposes the ability to recognise right from wrong, abandoning the universal becomes an imperative. The conscience is not possible while the universal category remains protected, as an invalid universal taints the individual's judgement and her perception of right and wrong. Arendt's understanding of judgement is complimentary to her appreciation of the public realm. She understands the validity of political judgement to correspond with the ability to think representatively as this requires evaluating one's opinion from various perspectives.[139] In this way Arendt's theory of judgement enters the public domain as it is within a public forum that individuals are given the opportunity to exchange and test their opinions.[140]

Arendt's concern with the particular is indicative of her appreciation for difference and the need to give the individual the right to claim who she is through her own representation. Disenchantment relies on legal formalism to apply such a universal standard and in doing so, to assert a position of certainty that maintains a rational and (in)coherent system of law.[141] Such normalised positions are never selected democratically but are imposed by a dominant culture of privilege. In the absence of public participation, representative opinion becomes impossible and universal standard is rendered invalid. Arendt's theory of judgement requires that the individual abandon universal standards and foster a representative thinking to establish ethical relationships within a community. Such an approach requires that the underlying assumptions informing our legal order be deconstructed and reformulated in the particular's image.

It is imperative that 'totalising strategies', such as categorising all 'black women' and 'white women' under the same banner be avoided.[142] These unifying terms are rejected in order to address the differences which exist among women, to make feminists more aware of the true position of women.[143] In South Africa there are many factors to be taken into consideration to establish how oppression functions – class, gender, race and cultural as well as social oppression affect every woman and person differently.[144] Therefore Arendt's notion of 'representative thinking' could pose valuable answers for

137 D'entrèves (n 109 above) 248.
138 D'entrèves (n 109 above) 249.
139 D'entrèves (n 109 above)) 253.
140 D'entrèves (n 109 above) 254.
141 Veitch *et al* (n 35 above) 95.
142 Bonthuys & Van Marle (n 10 above) 40.
143 As above.
144 As above.

post-colonial feminists as the only way one can truly understand the social position of another is by engaging with them.

Arendt does however also attribute value to factual truth as it makes for an accurate account of past events.[145] Facts necessarily involve people — it is concerned with events and circumstances which affected humanity in some way.[146] The opinions explored above will have little merit if they are based on incorrect information.[147] Facts are therefore essential in the formation of sound opinions.[148] In South Africa it is of particular importance to be cognisant of the past, of past atrocities, colonisation and the historical position of women in order to form valid and inclusive opinions. It is not the use and acceptance of established facts which flaws our judgment, but the distorted perception that the facts have already been correctly interpreted and valued. For Arendt it is the imposition of standards, the conditioned belief that there is already an answer which precludes the individual from questioning, from debating with others.[149] This preclusion of communal debate, of uncritical acceptance of manmade standards is symptomatic of disenchantment.

Arendt's concern with the particular is limited to her understanding of judgement and although it demands re-evaluating the universal category it does not specifically provide the individual with the space to re-evaluate herself. As quoted by Van Marle, Cornell notes that transformation cannot limit itself to transforming the structures of a system but must also provide the individuals within a system the freedom to change.[150] In this assertion Cornell calls for the protection of a psychic and moral space — the imaginary domain — that will allow the individual to evaluate and represent *herself*.[151] The right to self-representation has historically been a right afforded only to men.[152] Indeed the right to the 'imaginary domain' challenges the dominance of the masculine perspective and validates the particularity of the woman. The 'imaginary domain' provides an ethical basis for the protection of the individual's right to self-representation by protecting the right to escape the universal's image.[153] In the absence of this freedom, addressing inequality between men and women becomes an impossible task, especially against a disenchanted backdrop of proceduralist conceptions of

145 D'entrèves (n 109 above) 257.
146 D'entrèves (n 109 above) 257.
147 As above.
148 As above.
149 As above.
150 K van Marle '"No last word" — reflections on the imaginary domain, dignity and intrinsic worth' 13 *Stellenbosch Law Review* (2002) 307.
151 Cornell (n 5 above) x.
152 Cornell (n 5 above) 17.
153 Van Marle (n 150 above) 307.

justice.[154] Cornell explains that 'if we are not evaluated as free persons as an initial matter, we will be unable to fairly correct that definitional inequality.'[155] A response to disenchantment must therefore include the protection of the 'imaginary domain'. All egalitarian legislation must be adjusted so as to be consistent with this freedom.[156]

Similarly to Arendt's nostalgic imagination, the imaginary domain calls for the deconstruction of the universal in search of the particular. In this way both projects seek to disturb the dominant position. For Arendt the danger of the universal is that its systematic application precludes thought and its acceptance as a recognised truth renders public deliberation unnecessary. For Cornell the danger of the universal is more pertinent as it disallows the realisation of equality. For both theorists the imagination is necessary to achieve freedom from the universal. By informing the nostalgic imagination with the notion of the 'imaginary domain' reconciliation of equality and freedom is possible as the project of imagination then extends beyond the limits of the law.

6 Conclusion

In his analysis of the 'legal imagination' Mark Antaki is critical of man's power to re-enchant the world and finds (dis)comfort in his conclusion that man cannot escape Holmes' 'iron cage of modernity'.[157] The challenge to disenchantment cannot be rooted in the law, as such an approach will always demand a measure of certainty and predictability. Dworkin's call for the *Herculean imagination* fails to understand the indeterminacy of law and seeks to overcome disenchantment by employing a masculine imagination to realise the modern desire of certainty. Failing to grapple with the complexities of the law, Dworkin's theory of integrity and judicial interpretation is driven by the value of certainty and worryingly re-affirms man's desire to master.[158] The transformative values in the Constitution cannot in themselves provide re-enchantment as they are understood in terms of a disenchanted interpretive tradition. Although the Constitutional Court has attempted to re-define standards fundamental to the law, such attempts fail insofar as they rely on constitutional values that remain informed by a disenchanted tradition of interpretation. A transformative project must always employ a deconstructive approach in order to disturb the normative assumptions that underpin the legal order.

154 Cornell (n 5 above) 159.
155 Cornell (n 5 above) 20.
156 Cornell (n 5 above) 159.
157 Antaki (n 2 above) 17-18.
158 Antaki (n 2 above) 8-9.

By participating in 'representative thinking' it is possible to reassess that which is deemed to be true as well as the value attributed to all types of knowledge. As opposed to Klare's transformative response where imagination takes on invention, creating entirely new methods by the imposition of imagination, Arendt proposes looking to the past in order to re-establish understanding. This nostalgic approach will enable society to come to terms with the past in a meaningful way, instead of explaining it away by referencing new imposed standards. It would not be possible to take into consideration the views of everyone if you aim to separate their present position from the past which constituted it.

The right to equality must include the right to an ethical space where the individual can realise her freedom of self-evaluation and representation. The nostalgic imagination must be used in conjunction with the imaginary domain to extend the project of imagination beyond the law. In her understanding of judgement, Areendt rejects the formal application of rules as they allow for action in the absence of thought. Her concern with the particular demands that the universal be re-understood and the normative assumptions of judgement be reassessed. Finally Cornell seeks to extend the project of imagination beyond the law's restrictions by requiring that transformation not be limited to structural change but include the individual's freedom to self-representation. Reconciling Arendt's nostalgic imagination and Cornell's imaginary domain challenges disenchantment beyond legal interpretation and introduces re-enchantment into the lives of those already oppressed by the law's commitment to disenchantment and the masculine tradition.

Perhaps in embracing the past, the value of the community will be recognised and the individual will be reconciled with the communal. By basing our opinions on accurate facts but placing due emphasis on our ability to reassess the way in which factual truth is evaluated, we can reconcile the established scientific method with the unexplored. In questioning what we deem to be certain and conclusive we can identify the hierarchal structure, which values certain elements and groups of people higher than others and makes equality a near impossible pursuit. Arguably the most important step for South Africans will be the reconciliation of the past with the present, which can pave the way forward for a truly equal, democratic and humane community.

Indeed the modern lawyer is faced with the herculean task of seeking justice while grappling with the slow death of the law. However, the prospect of realising a utopian society is not lost and although it requires the disruption of the entire social order, the possibility of re-enchantment lingers in our imaginations and contemplation of the world as it *ought to be*.

> Is it then utopian to think that we could share in life's glories? Is it a mere fantasy, or is the presence of the dream *itself* not proof enough that it might be possible? At last it is up to us to turn yesterday's utopia into a new sense of reality.[159]

[159] Cornell (n 5 above) 186.

ARENDT'S THEORY OF JUDGMENT FOR A POST-APARTHEID SOUTH AFRICA

*by Cara Furniss**

1 Introduction

In this essay I will attempt to examine the ways in which judgment as described by Arendt, could have be applied to the decision of the court in *Three Rivers Ratepayers Association v Northern Metropolitan*[1] in order to reach a more just decision than the court *a quo*. The court *a quo* ordered the eviction of a group of homeless individuals from land owned by the applicants. The evicted group was destitute and the court order made no mention of assisting them in finding alternative accommodation. From this situation, I will infer that an application of Arendt's theory of judgment may lead to a space where homelessness, poverty or class disempowerment can be addressed, ultimately resulting in a new sense of justice in post-apartheid South Africa. I will apply Arendt's theory alongside the theories of Boyd White exemplified in his reference to 'tensions',[2] Dugard's disillusion with the formalism within the South African judiciary[3] and Klare's notion of 'transformative constitutionalism'.[4] These four theorists will collectively demonstrate how the decision in the court in the *Three Rivers* case[5] failed to employ a more careful process of judgment thus neglecting an important opportunity to encourage the development of judgment as an art where the creation of justice is a real possibility.

2 Judgment as a process; identifying a shift

An important departure point and essentially the crux of this essay which must be understood, is the notion of judgment as a process. The belief that judgment is an end result arrived at by a mechanical and

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1 2000 4 SA 377 (W) (*Three Rivers*).

2 This essay will pay close attention to only some of the tensions discussed fully in J Boyd White 'Justice in tension: An expression of law and the legal mind' (2012) 9 *No Foundations: An interdisciplinary journal of law and justice* 1.

3 J Dugard 'The judicial process, positivism and civil liberty' (1971) 88 *South African Law Journal* 181.

4 This essay will look only at selected aspects of the term "transformative constitutionalism" which is extensively examined in K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

5 *Three Rivers* (n 1 above).

faultless application of generic rules to a variety of problems, is a belief which harbours a false sense of justice. This belief finds its foothold in the illusions of objective judges, fault free judgments and statutes created to serve all members of society, equally. The success of such false justice is highly dependent on the application of rules without regard. Thus as part of a post-apartheid judiciary, underpinned by a new Constitution,[6] judgment must transform from a recipe to an undertaking of the mind. The theories hereunder illustrate elements of judgment which can assist in the transformation of judgment from a stagnant end-product to a living system.

3 Examining Boyd White, Dugard and Klare

Boyd White's analysis of the law and legal systems, centres around the instability of law; a structure prone to unpredictable movement. Boyd White explains the existence of several tensions apparent in law as an unstable structure, more specifically the tensions that arise around the process of judgment.[7] Boyd White importantly notes two tensions, one 'between the opposing lawyers' and a second 'between competing but plausible readings of the law' where the process of judgment is paramount.[8] It is these tensions that illustrate most comprehensively Boyd White's understanding of judgment.

Firstly, the tension between opposing lawyers refers to a tension inherent in the legal practitioner herself. This tension comes into existence when the lawyer employs introspection during a legal dispute. With this introspection comes a judgment of the self, resulting in an assessment of the eventual justice which the case will or will not achieve. Boyd White notes that while in the process of litigating the lawyer must ask herself what she is becoming.[9] Why this introspection? The moment the lawyer introspects through the lens of judgment, she realises the process and what it entails. She come to know that what she is taking part in has an effect on some or another person, be that herself or others. Because of this potential effect, the process is an important one and the importance comes in the form of the time and energy taken to reach a decision and the respect afforded to the process of judgment.

Secondly Boyd White refers to a tension between plausible but opposite readings of the law. In this identification of numerous readings of one set of legal facts, Boyd White employs the concept of plurality in the nature of legal disputes. Each dispute, whether consisting of similar or different facts have many different readings

6 The Constitution of the Republic of South Africa (1996) ('the Constitution').
7 White (n 2 above) 1.
8 White (n 2 above) 8.
9 White (n 2 above) 9.

within them and thus can lead to numerous different decisions. In this plurality the judge experiences a tension which is only resolvable by employing judgment. The judgment employed consists of different facets; thinking, discerning and deliberating.[10] Important to note is Boyd White's insistence on judges taking responsibility for their decisions. This insistence on taking responsibility places a specific importance on the process of judgment and the careful thinking it demands as this process has real consequences not only for the parties involved in the dispute but also for the legal system as a living and developing organism.[11]

Boyd White regards judgment as an art invoking an imaginative thought process. Through these two specific tensions, Boyd White highlights his interest in the importance of judgment. Most noteworthy in this regard is Boyd White's identification of a judgment as not only important to the specific case but that 'it matters to the world how cases are debated and resolved'[12] thus allowing members of the legal community to understand that the creation or destruction of justice depends on the daily workings of lawyers and judges. Such an understanding has the potential of creating a 'topoi' or as Arendt describes it 'a common place or shared reference' where members can judge the judgments of others'.[13]

By way of examining Dugard's disillusion with the positivistic tradition of the South African judiciary, it is clear how judges are not only avoiding the tensions exposed by Boyd White but also refusing to engage with them, resulting in a reinforcing of an already fractured and ill-suited system of adjudication. The Constitution attempts, however, to remedy this situation by forcing the judiciary to evolve from a largely mechanical system of application to a system more sensitive to the duty they are tasked with in developing a post-apartheid livelihood for an entire country. However, as Dugard notes, this duty has been largely ignored by the judiciary and where progress has been made, such progress has been slow.[14] Dugard heavily critiques the still apparent positivist interpretation methods employed in court decisions in present day South Africa.[15]

Dugard notes that positivism as a means by which to interpret law allows judges to 'apply the harshest of laws with an easy conscience'[16] leading to a process of judgment that is devoid of

10 These elements of judgment are emphasised in the Legal Philosophy 311 (RFF311) tutorial notes (2013) *Specific theories on judgment*.
11 White (n 2 above) 3.
12 White (n 2 above) 4.
13 DL Marshall 'The Origin and Character of Hannah Arendt's Theory of Judgment' (2010) 38 *Political Theory* 383.
14 Dugard (n 3 above).
15 Dugard (n 3 above) 182.
16 Dugard (n 3 above) 187.

careful thinking, discernment and deliberation.[17] The tensions discussed by Boyd White are ignored and processes by which to avoid them are encouraged. The judiciary has bought into the premise that judges are expected to be 'purely passive'[18] and have no creative power whatsoever. This premise is one which enforces empty judgment, judgment lacking in consideration and responsibility. Filtering decisions through mere legislation and precedent is thoughtless and this thoughtlessness leaves no space for a move into a post-apartheid context but rather inches closer to the legal system of pre-1994 South Africa.

An important instrument by which to encourage 'process driven' judgment is the Constitution. Klare describes the current Constitution as 'transformative'[19] which implies that in order to bring about a realisation of the founding principles of the Bill of Rights, the South African judiciary must change its manner of adjudication so as to develop and establish the imperative mandate that the Constitution prescribes. This change in the manner of adjudication moves away from Dugard's description of a 'mechanical judiciary'[20] by compelling the judiciary to employ a creative type of judgment and an engagement with Boyd White's 'tensions'[21] as described above.

The Constitution according to Klare, opens up a new 'imagination and self reflection'[22] in respect of legal methods (including adjudication). This new process (including the process of judgment) is necessary because the Constitution makes provision for new socio-economic rights (for the purposes of this essay one should consider the section 25(1) and section 26(1) rights especially) and these rights require a different approach to adjudication. According to Klare, 'transformative adjudication'[23] is a form of adjudication that employs a process of judgement. However, he also notes that the judiciary's 'balking'[24] at the idea of transformative adjudication slows down true transformation in a post-apartheid South Africa as judges are weary of acknowledging their own participation in political projects by way of creative judgment. Klare notes that there is need for 'conscientious judges'[25], judges who carry out their professions in a manner that fulfills the founding principles of the Constitution. After all, a transformative Constitution is worth little if adjudication within

17 White (n 2 above) 9.
18 J Frank *Law and the modern mind* (1930) 32 as mentioned in Dugard (n 3 above) 182.
19 Klare (n 4 above) 146.
20 n 3 above, 187.
21 White (n 2 above) 1.
22 Klare (n 4 above) 156.
23 Klare (n 4 above) 157.
24 As above.
25 Klare (n 4 above) 149.

the judiciary does not suit the document which encapsulates the basic principles upon which the legal system is founded.

According to Klare, transformative adjudication in line with the Constitution requires value judgments.[26] It is by way of these value judgments that Klare identifies a tension of his own; one between freedom and constraint.[27] Judges of the post 1994 era are faced with the challenge of balancing public interest and individual rights (especially in cases such as *Three Rivers* [28] where the interests of the homeless and that of homeowners were pitted against one another). Furthermore they find themselves in the push and pull of creative decision making while still following the legal texts. This challenge can only be resolved through employing careful judgment influenced by the understanding of the responsibility and holistic impact of judicial decisions on an entire community of persons.

Boyd White, Dugard and Klare have each, in a unique manner, discovered elements of adjudication which destabilise the notion of judgment as rule bound and impartial. These three theorists resonate in Arendt's notion of judgment which stretches far beyond the application of rules but rather towards an exercise of 'enlarged mentality'[29] by which the judge employs plurality in an attempt to reach a just decision. Thus her complex theory deserves discussion hereunder.

4 Hannah Arendt's theory of judgment

Arendt's theory of judgment is a theory centered about the element of 'natality' existing in the human species as the base of what will 'save the world' from 'human affairs'.[30] Arendtian judgment is unique in that it explores the process of judgment from the starting point of creating something anew. The judging of any set of facts or any problem must be undergone afresh, free from the constraints of tradition rule-bound judgment. This form of judgment, which does not balk at new crises, is a potentially valuable tool to be used in the challenges facing a post-apartheid South African judiciary.

For Arendt, judgment is a process whereby the decision maker must endeavor to approach a problem as a wholly different set of facts, each time. The decision maker or judge cannot fall into the trap of attempting to find old rules or precedent by which to judge a case (again reinforcing the notion of judgment not as fixed rules imagined

26 Klare (n 4 above) 164.
27 Klare (n 4 above) 149.
28 *Three Rivers* (n 1 above).
29 MP D'Entrèves 'Arendt's theory of judgment' in D Villa (ed) *The Cambridge Companion to Hannah Arendt* (2000) 250.
30 H Arendt *The human condition* (1998) 247.

by Boyd White, Klare and Dugard). Applying old rules to new situations and attempting to find an already existing mold by which to judge, however, deceptively easy, bears pitfalls. It lacks a development component. It stagnates our ability to create and this in turn results in a lack of thinking as noted by Arendt.[31]

Judgment poses specific challenges because of its placement within the realm of action. This realm can be seen as one filled with a tension noted by Arendt as one between theory and practice.[32] Judges may see one path of action as theoretically sound while another seems like the practically efficient path. Judgment must then be employed to decide which path to follow and even further, whether it might be possible to follow a combination of both.

Arendt also notes a further, closely linked tension; one between Aristotle's focus on the 'particular' and Kant's focus on the 'universal'. Judgment as a process entails that the judge first draws the problem close to her in order to truly grasp the intricacies of the lived experiences of the participants while in the same instance driving the problem away from her in order to obtain an unbiased and holistic view of the issues apparent in the problem.[33] Judging as well as understanding must exist within this process. Arendt however, does not leave the judge without any recourse. She responds to the challenge posed by these tensions in her construction of the tool of 'imagination' when judging.

'Imagination' is the core tool to be used in order to achieve Arendt's goal of judging anew.[34] Judgment of contemporary problems requires thinking based on imagination. Without this imagination the judge will fall back on rules, precedents and predetermined molds leading to a lack of thinking. Arendtian 'imagination' entails that the judge employs a 'enlarged mentality'.[35] This is a difficult task but because of a human's ability to create, Arendt believes that this is indeed possible. An enlarged mentality combined with imagination stems from being able to imagine a plural community when making decisions. The judge must fathom all the different decisions to be made in order to make the most informed and thoughtful one possible. Arendt calls this process 'thinking representatively'.[36]

Representative thinking entails that the judge attempts to find the 'universal' and apply this 'universal' to the 'particular'.[37] Thus this type of thinking employs 'imagination' because it requires the judge to create a plural community in her mind as the way in which

31 D'Entrèves (n 29 above) 248.
32 D'Entrèves (n 29 above) 245.
33 D'Entrèves (n 29 above) 246.
34 D'Entrèves (n 29 above) 247.
35 D'Entrèves (n 29 above) 250.
36 As above.
37 As above.

to find the 'universal'. Furthermore, representative thinking enables the judge to acknowledge the tensions present in judgment while employing 'natality'[38] in order to reach a decision based on careful thought and which will facilitate justice within the problem faced by her.

5 The *Three Rivers* decision; a possible lack of judgment

In the case of *Three Rivers*[39] the applicants sought an eviction order against occupiers of an informal settlement in their vicinity. They averred that the settlement and its occupiers constituted a public nuisance in that the settlement suffered from lack of water and sanitation combined with an increase in crime. Furthermore, the applicants averred that the creation of the settlement caused a decrease in the value of their property as well as an increase in anxiety amongst the residents of the area. The court considered the definition of a public nuisance and specifically considered whether the respondent, the Municipality, had taken reasonable steps to abate the nuisance. Although the court took cognisance of the dire situation in which the occupiers were plunged, the court decided that the occupiers did indeed constitute a public nuisance and ultimately ordered their eviction within 48 hours.

In this case the rights of a group of individuals were pitted against the individual rights of each property owner. The Constitution allows certain rights regarding property and housing in terms of section 25(1) and section 26(1) respectively. Firstly the Constitution provides that 'no one may be deprived of property except in terms of law of general application ...'[40] and secondly that 'everyone has the right to adequate housing.'[41] These two rights often collide because of their stark public versus private elements and the effect this contrast has on the private rights of the individual while attempting to redress issues of public welfare among the impoverished in South Africa (as can clearly be seen from the *Three Rivers*[42] case). It is this collision that charges courts with a difficult instance of adjudication. However, as difficult as these challenges may appear, it is because of their complexity that they offer a unique opportunity to develop a slower paced process of judgment concerned with not merely the rights of individuals but moving as far as to protect the rights of the

38 Arendt (n 30 above).
39 *Three Rivers* (n 1 above).
40 Sec 25(1) of the Constitution.
41 Sec 26(1) of the Constitution.
42 *Three Rivers* (n 1 above).

group above such individual rights (employing a type of 'transformative adjudication').[43]

The *Three Rivers*[44] decision was made shortly after the new Constitutional dispensation in South Africa. The judiciary of the apartheid era faced a new challenge in the way in which they understood the law and adjudicated disputes. A post-apartheid judiciary did not yet exist and thus judges found themselves in a modern crisis similar to the 'crisis in understanding' as envisaged by Arendt.[45]

Arendtian judgment requires that when a new problem arises the adjudicator must resort to 'imagination'[46] in order to conceive the multiple decisions that could be made, discerning between them and ultimately choose a single one. Boyd White further requires the judge to take responsibility for such a judgment. Judgment is thus clearly a slow and important process. However, what is apparent in the *Three Rivers*[47] decision is the manner in which the judge used the common law principle of 'public nuisance' and applied this definition to a group of homeless individuals to come to a decision. The decision to force the occupiers to vacate the area within 48 hours could be seen as a 'thoughtless'[48] end to a complicated set of facts. Mention of the dire situation in which the occupiers found themselves was briefly made however, no real attempt was undertaken to imagine the concrete affects which homelessness would have on any human being.

Had the theory of Arendtian judgment been employed in this case, transformative adjudication been strived towards, the positivistic trend among the judiciary been challenged and the inherent tensions in the law been recognised and confronted, this decision would have differed. It was possible for justice to be found in the problems faced by the occupiers of Three Rivers but it is clear that a lack of engagement with the process of judgment combined with a lack of thought cannot accommodate justice in its new form struggling in a post-apartheid South Africa.

6 Conclusion

It is this essay's claim that judgment in this case was undertaken in a rushed manner. The theories presented above have each attempted to show that judgment is detailed, complex and wrought with the danger of injustice and a repeating of past injustices.

43 Klare (n 4 above) 157.
44 *Three Rivers* (n 1 above).
45 D'Entrèves (n 29 above) 247.
46 As above.
47 *Three Rivers* (n 1 above).
48 D'Entrèves (n 29 above) 248.

This essay has shown that an application of Arendt's theory of judgment leads to an addressing of poverty issues by way of a closeness and distance to those affected by it. The tensions described by Boyd White can assist in understanding the role of members of the legal community and their partaking in the process of judgment not only in the public realm but also in their private actions and thoughts. However, it becomes clear that the only way to employ this theory of judgment is by a doing away of formalist approaches identified by Dugard and truly embracing the concept of transformative adjudication suggested by Klare.

The absence of thoughtful judgment and the affects it carries along with it is apparent in the *Three Rivers*[49] case which reminds all too strongly of past injustices towards the poor and destitute members of South African society.

[49] *Three Rivers* (n 1 above).

SEQUESTRATION OF THE INSOLVENT ESTATE: THE 'ADVANTAGE TO CREDITORS' REQUIREMENT

*by Cherrie Olivier**

1 Introduction

This essay deals with the 'advantage to creditors' requirement imposed by the Insolvency Act,[1] in South African law. This essay is divided into four parts. Firstly, the requirement will be examined in order to establish the objective it aims to achieve. It will then go on to describe the various ways in which the requirement is implemented during the sequestration process in order to achieve this objective. The second part will discuss how courts interpret the relevant provisions with reference to case law. In the third part, South African insolvency law will briefly be compared to foreign insolvency law in order to raise some potential concerns about the emphasis on the 'advantage to creditors' requirement in our law. Finally, with due regard to the current legal institutions and proposals for legal reform in South Africa, conclusions will be drawn as to the necessity of revisiting the scope and implementation of this requirement.

2 The meaning and implementation of the 'advantage to creditors'

The common law principle *concursus creditorum* is described as being 'fundamental' to insolvency law.[2] The Insolvency Act is argued to give effect to this principle by creating procedures for the division of the insolvent's estate and the distribution of dividends to the group of creditors.[3] The main objective of the Act is to provide for the fair distribution for the insolvent's assets in the event where the assets are insufficient to satisfy all of the creditors' claims.[4] Each creditor

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1 Act 24 of 1936.

2 CH Smith 'The recurrent motif of the Insolvency Act — advantage of creditors' (1985) 7 *Modern Business Law* 27.

3 As above.

4 M Roestoff & H Coetzee 'Consumer debt relief in South Africa; lessons from America and England; and suggestions for the way forward' (2012) *South African Mercantile Law Journal* 53 55.

will then receive a dividend which is calculated on a basis of 'orderly sharing' of all the assets in the insolvent's estate.[5] While the insolvent's estate is being sequestrated, the estate is deemed to be 'frozen' and no creditor can act to alter or prejudice the rights of the other creditors.[6] The 'advantage to creditors' requirement therefore functions not to serve the benefit of an individual creditor but rather the entire group of creditors as an entity.[7]

Sequestration can be effected through the Act either by way of the debtor applying for voluntary sequestration of her (or his) estate or the creditor(s) can apply to have the estate sequestrated.[8] The Act provides that in the instance of applying to a court for the voluntary surrender of the debtor's estate, advantage to creditors must be proven.[9] Voluntary surrender is a procedure that is designed for the benefit of the creditors.[10] This can be justified with reference to the cumbersome venture the creditor has to pursue in order to obtain her (or his) assets[11] as well as the possibility that the creditor could be liable to contribute to a shortfall.[12] In the compulsory sequestration procedure, the Act provides that a provisional sequestration order will only be granted with the court is *prima facie* of the opinion that there is reason to be believe that there will be advantage to the creditors.[13] It will thus follow that the Act provides that a final order of sequestration will only be ordered if the court finds that there is reason to believe that there will be advantage to the creditors.[14]

The above provisions expressly states that it is operating to the 'advantage of creditors'. However, there are other sections which, albeit do not make use of the term, are designed for the same purpose.[15] For example, when a partnership is sequestrated the Act provides that all partners' estates must simultaneously be sequestrated.[16] This is done for the benefit of the creditors: the partnership may be insolvent, but the partners could potentially have private assets which can assist in satisfying the creditors' claims.[17]

Another instance of provisions in Act working toward the benefit of the creditor is the various provisions which enable the trustee (or the creditor in the name of the trustee) to apply to a court for an order setting aside agreements made by the insolvent prior to the

5 Smith (n 2 above) 27.
6 As above.
7 Smith (n 2 above) 27.
8 Roestoff & Coetzee (n 4 above) 55.
9 Insolvency Act 24 of 1936 secs 3(1) & 6.
10 As above.
11 As above.
12 Smith (n 2 above) 27.
13 Insolvency Act (n 9 above) sec 10(c).
14 Insolvency Act (n 9 above) sec 12(1)(c).
15 Smith (n 2 above) 29.
16 Insolvency Act (n 9 above) sec 13(1).
17 Smith (n 2 above) 29.

sequestration process.[18] The Act provides for the setting aside of 'dispositions without value'; 'voidable preferences'; 'undue preferences' and 'collusive dealings'.[19] These provisions clearly give effect to the principle of *concursus creditorium*. Creditors who are prejudiced in that assets ordinarily available for distribution are no longer available, can apply to have those assets made available via a court order that retrospectively sets the prejudicial agreement aside.[20] Consequently the advantage to a group of creditors, as opposed to only a few creditors or single creditor, is protected.[21]

There are also measures in place to prevent undue benefit to a creditor after the sequestration process has begun. It is explicitly provided for in the Act that no composition offer may be accepted if it contains a condition whereby any creditor would obtain as against another creditor any benefit to which (s)he would not be ordinarily entitled to upon the distribution of the estate.[22]

Mention must also be made to the provision in the Act allowing for the interrogation of the insolvent and other witnesses during a meeting with the creditors.[23] The scope of the interrogation is wide: Enquiry can be made to all matters of the insolvent, her (or his) property and business affairs or the affairs of her (or his) spouse.[24] The purpose of this interrogation is to the advantage of creditors in that it assists them in recovering assets which would otherwise be concealed, improperly disposed of or unfairly dealt with.[25]

The indirect advantages the Act provides for in isolation cannot truly be advantageous if not accompanied or linked to a potential financial gain to the creditors.[26] The 'advantage to creditors' requirement is then only fulfilled if there is potential of some 'pecuniary benefit' to the group of creditors.[27]

3 The courts' interpretation of the 'advantage to creditors'

In *Ex parte Arntzen,*[28] the applicant requested the court for a voluntary sequestration order in terms of the Act. The court held that the requirements for a voluntary sequestration order are set out in

18 Smith (n 2 above) 30.
19 Insolvency Act (n 9 above) secs 26, 29, 30 & 31.
20 Smith (n 2 above) 30.
21 As above.
22 Insolvency Act (n 9 above) sec 119(7).
23 Insolvency Act (n 9 above) sec 65(1).
24 Smith (n 2 above) 30.
25 Smith (n 2 above) 31.
26 Smith (n 2 above) 32.
27 *Ex parte Bouwer* 2009 6 SA 382 (GNP) para 13.
28 2013 1 SA 49 (KZP) para 1.

section 6(1) of the Act.[29] These requirements are *inter alia* that the debtor has sufficient assets to cover the sequestration costs (that is to be paid from the free residue) and that the sequestration of the estate will be to the advantage of the creditors.[30] The court emphasised the need for full and comprehensive disclosure from the side of the debtor in an application for voluntary surrender.[31] Gorven J went on to explain that the 'advantage to creditors' requirement is more strictly dealt with by the court in these applications compared to applications for forced sequestration.[32] This approach is justified due to the fact that there is a greater risk of abuse and the potential of undermining the creditors' rights in a voluntary surrender of the insolvent's estate.[33] Therefore there is an onus upon the applicant to relay detailed evidence, which includes the disclosure of all available documentation, to the court in order to prove that all the necessary requirements are complied with.[34] The applicant in this particular case failed to fully disclose all the information required and hence failed to convince the court that his assets will cover the sequestration costs and that there will be an advantage to his creditors.[35] The voluntary sequestration was therefore not granted.[36]

In *Ex parte Bouwer*[37] the court also dealt with applications for voluntary sequestration. Firstly, the court dealt with the statement of affairs the debtor needs submit to the Master as required by section4 of the Act.[38] The statement of affairs needs to consist of *inter alia* the debtor's property (inclusive of both movable and immovable property) and a detailed record of the cause of the debtors insolvency.[39] Makgoka J had contentions regarding information disclosed by the applicants on basis that it failed to provide adequate facts to prove the state of insolvency.[40] Sufficient detail regarding their movable assets and their income and expenditure was also not relayed in the statement of affairs.[41] In turning to the substantive requirements provided for in section 6(1) of the Act, the court found that the valuator of the insolvents' estates failed to lay a basis for her valuation.[42] Makgoka J termed the valuation to be a 'bald assertion of values' which rendered the dividends allegedly accruing to the

29 *Arntzen* (n 28 above) para 2.
30 As above.
31 *Arntzen* (n 28 above) para 5.
32 *Arntzen* (n 28 above) para 4.
33 *Arntzen* (n 28 above) para 12.
34 As above.
35 *Arntzen* (n 28 above) para 22.
36 *Arntzen* (n 28 above) para 23.
37 *Bouwer* (n 27 above) para 2.
38 *Bouwer* (n 27 above) para 3.
39 As above.
40 *Bouwer* (n 27 above) para 11.
41 As above.
42 *Bouwer* (n 27 above) para 18.

creditors equally 'unreliable'.[43] The information given by the applicants did not successfully assist the court in establishing an advantage to creditors and the applications were thus dismissed.[44]

The advantage to creditors requirement was again emphasised by Satchwell J, in *Ex parte Shmukler-Tshiko*,[45] in dealing with an application for voluntary sequestration. The learned judge found that in most instances the applications displayed that the shortfall between the assets and liabilities of the debtor were exceeded by the sequestration costs.[46] Not only would granting the sequestration order place the applicants further in debt, but it would also reduce the amount available for the distribution among the creditors.[47] Being mindful of this fact, Satchwell J also commented on the provisions in the Act which offer advantage to creditors such as the right to investigate the insolvent's estate.[48] However, there was no indication in any of the applications that exercising this right would hold any benefit to the creditors in question.[49] Satchwell J reasoned that in voluntary sequestration the investigation is not likely to be to the advantage of creditors as an applicant debtor is unlikely to argue that further enquiry into her (or his) affairs would result into disclosure of concealed assets.[50] The majority of the applications were dismissed due to the lack of indication of advantage to the creditors.[51]

In determining whether an advantage to creditors exists, the ırt has the discretion to consider whether there are other appropriate procedures available from legislation such as the National Credit Act.[52] In *Ex parte Ford*, the debtors applied for the voluntary sequestration order, but upon considering their applications the court found that the source of their indebtedness resulted from credit agreements as defined in the National Credit Act.[53] The applicants held that the National Credit Act did not provide a solution to the debt problems they were encountering.[54] The applicants also contended that they have a constitutional right to bring forth an application for voluntary surrender in terms of the Insolvency Act.[55] Binns-Ward AJ, held that the primary objective of voluntary surrender is not to grant relief to 'harassed' debtors.[56] The court further argued that the purpose of both the Insolvency Act as well as the National Credit Act

43 *Bouwer* (n 27 above) paras 18 & 19.
44 *Bouwer* (n 27 above) para 34.
45 [2013] JOL 299999 (GSJ) para 7.
46 *Shmukler-Tshiko* (n 45 above) para 30.
47 *Shmukler-Tshiko* (n 45 above) paras 30 & 31.
48 *Shmukler-Tshiko* (n 45 above) para 59.
49 As above.
50 As above.
51 *Shmukler-Tshiko* (n 45 above) paras 68, 69, 77, 78, 88, 89, 92, 93, 97 & 98.
52 Act 34 of 2005; *Ex parte Ford* 2009 3 SA 376 (WCC) para 1.
53 *Ford* (n 53 above) para 2.
54 *Ford* (n 53 above) para 15.
55 *Ford* (n 53 above) para 21.
56 As above.

is to manage the way in which creditors are paid, not to deprive them of their claims.[57] The applications were dismissed due to the fact the court considered the debt review process in the National Credit Act to be the most appropriate procedure for debt relief in this instance.[58]

It is evident from the judgments discussed above that the court places great emphasis on the advantage to creditors in the granting of voluntary sequestration orders.

4 Foreign insolvency law

There is an emerging international trend to adapt insolvency law to assist over-indebted debtors.[59] However, South African insolvency law has not been affected by this trend and remains largely centred around the interests of the creditor.[60] Most of the debt relief procedures in our system are also court driven which makes them an expensive option.[61] Below two countries with aims to protect both the interest of the creditors as well as the debtors are explored.

In American insolvency law, equal treatment of the creditors is also of the essence, but it differs from South African law in that the effective rehabilitation of the debtor is also deemed to be a main objective.[62] As opposed to South African insolvency law, that has debt relief procedures originating from various statutes, American debtors rely on one act, the Bankruptcy Reform Act of 1978.[63] The American legal system allows debtors who are honest in their dealings but unfortunate due to their circumstances to obtain a fresh start.[64] Chapter 7 of the Bankruptcy Code provides for petitions to be filed voluntarily or involuntarily to effect the liquidation of the debtor's estate and discharge of the claims of the unsecured creditors.[65] An aspect that is distinctly different from the South African system is that the advantage to creditors is not a requirement for the granting of the discharge order.[66]

In the English and Welsh system, debtors who have no income and no assets (referred to as the 'NINA debtors') are especially provided for.[67] A debt relief order may be granted to a debtor with liabilities less than £15 000 and a minimum monthly surplus (after normal household expenses are paid) of £50. In addition the debtor's assets

57 As above.
58 *Ford* (n 53 above) para 22.
59 Roestoff & Coetzee (n 4 above) 75.
60 As above.
61 As above.
62 Roestoff & Coetzee (n 4 above) 71.
63 Generally referred to as the Bankrupcy Code.
64 Roestoff & Coetzee (n 4 above) 71.
65 Roestoff & Coetzee (n 4 above) 72.
66 As above.
67 Roestoff & Coetzee (n 4 above) 73.

should not exceed £300.[68] This order is granted with no court involvement. the official receiver makes the order which places a moratorium on the enforcement procedures.[69] No creditor can apply for bankruptcy procedures during this period (usually 1 year) and after the completion of the period all qualifying debts will be discharged.[70]

The interests of the creditors are also taken into consideration in the English and Welsh system, as it is only permissible for debtors to apply for a debt relief order once every six years.[71] Creditors can also object to the granting of the debt relief order or to the inclusion of debts on the list of debts to be discharged.[72] If the debtor should experience an increase in her (or his) monthly salary, notice should be given to the official receiver.[73] During the subsistence of the period the debtor cannot receive credit exceeding £500 without disclosing to the creditor that (s)he is subject to a debt relief order.[74]

The South African insolvency law may stand to improve if certain aspects of the above mentioned foreign legal systems are incorporated into our law. A single source of legislation dealing with insolvency, as is in this case in America, will eliminate duplication of debt relief procedures and eliminate ambiguities as to the most appropriate procedure to follow.[75] Granting special debt relief to NINA debtors, as provided in the English and Welsh legal system, poses a two-fold benefit to the South African legal system. Firstly, the cumbersome venture of initiating a costly court procedure with little chance of success will be avoided and secondly, it will be a step towards a more debtor orientated approach and thus in line with international trends in this regard. that the South African legal system should take.[76]

5 Revisiting the scope and implementation of 'advantage to creditors'

There are currently proposals for the reform of the South African insolvency law system. The South African Law Reform Commission, recommends these changes in the 2010 Insolvency Bill.[77] In view of the fact that some debtors become insolvent due to circumstances for which they are not to blame and that some creditors exploit their

68 Roestoff & Coetzee (n 4 above) 74.
69 As above.
70 As above.
71 As above.
72 As above.
73 As above.
74 As above.
75 Roestoff & Coetzee (n 4 above) 75.
76 Roestoff & Coetzee (n 4 above) 76.
77 Roestoff & Coetzee (n 4 above) 59.

debtors, the Bill proposes procedures with the aim to achieve a balance between the interests of the creditors and the interests of the debtor in our insolvency law.[78]

Roestoff and Coetzee suggest that in order to achieve an advantage for the creditors, distribution of the insolvent's estate should not result in the payment of 'negligible dividends' to the creditors.[79] Currently, the statistical prevalence of creditors who receive dividends is strongly outweighed by creditors who are required to pay a contribution.[80] Thus, despite the clear requirements laid down by the Act preventing sequestration without potential advantage to creditors, an advantage to creditors is meagrely achieved.[81]

In order to circumvent this, the Commission has proposed to amend the Act by including a provision which allows for a provisional order of voluntary sequestration.[82] The Commission further suggests that a meeting with all the creditors should be held prior to the return date and after the appointment of the liquidator.[83] This meeting will then allow the creditors to establish whether sequestration would be to the advantage of the creditors if the final voluntary sequestration order would be granted.[84]

The Commission also suggests that the applicant debtor should offer security for the payment of the administration costs in the instance where the costs cannot be recovered from the free residue, and that less expensive remedies should be made available to the debtor if sequestration proves to be financially impossible.[85] The fact that concurrent creditors fail to receive sufficient dividends can also be attributed to the extensive list of secured creditors (who have preferential claims against the estate).[86] The Commission thus recommends that the preferential claims be limited to claims for maintenance, salaries in arrears and the claims of bondholders.[87]

Although the advantage to creditors requirement needs to be more effectively enforced, due regard also needs to be given to the plight of the debtors. Court orders do not provide sufficient relief to debtors as 'poor' debtors who cannot prove the advantage to creditors are excluded from using the relief procedure in the Act.[88]

78 Roestoff & Coetzee (n 4 above) 76.
79 As above.
80 As above.
81 As above.
82 Roestoff & Coetzee (n 4 above) 59.
83 Roestoff & Coetzee (n 4 above) 59 and 60.
84 Roestoff & Coetzee (n 4 above) 60.
85 Roestoff & Coetzee (n 4 above) 60.
86 As above.
87 As above.
88 Roestoff & Coetzee (n 4 above) 75.

Court decisions such as the decision in *Ford*[89] show that our courts do not consider the best possible solution for the debtor's financial dilemma.[90] The only focus seems to be whether the 'advantage to creditors' requirement is achieved and debtors' interests are disregarded.[91]

The court in *Ford* has now created a precedent, which may result in debtors in future not being able to rely on the debt relief procedures provided for the Insolvency Act. Instead they would be forced to use the procedures in terms of the National Credit Act which provides considerably less relief.[92] The debt review procedure in terms of the National Credit Act does not allow for the court to force the discharge of a portion of the creditor's claims against the debtor.[93] Thus, a debtor who does not have sufficient income would not be able to relieve herself (or himself) from her (or his) debts.[94]

A potential solution for this dilemma would be for the court to take a more balanced approach to exercising its discretion when considering the granting of a sequestration order.[95] This approach would then entail having regard for the interests of the debtor.[96] For such an approach to be effectively realised, Parliament may need to amend the Act to include an advantage to the debtor as a requirement for the voluntary sequestration process to take place.[97]

The Commission has also proposed that a pre-liquidation composition be made available in insolvency law for the benefit of debtors.[98] Debtors, who are excluded from using the debt relief procedure in the Act due to the fact that advantage to creditors cannot be proven, will be able to enter into a composition with creditors in order to find alternative debt relief.[99] The debtor and creditors will be able to enter into a composition if two-thirds of the concurrent creditors are in favour of the agreement.[100] In order to initiate such a process the debtor will be able to lodge a signed composition and a sworn affidavit with the magistrate's court. The composition will be supervised by the court and an investigation will be conducted into the financial affairs of the debtor.[101] In the period between the lodging of the application and the judgment order on the composition, no creditor will be able to apply for an order to

89 *Ford* (n 53 above).
90 Roestoff & Coetzee (n 4 above) 63.
91 As above.
92 Roestoff & Coetzee (n 4 above) 63.
93 Roestoff & Coetzee (n 4 above) 75.
94 As above.
95 As above.
96 As above.
97 Roestoff & Coetzee (n 4 above) 63.
98 Roestoff & Coetzee (n 4 above) 70.
99 As above.
100 Roestoff & Coetzee (n 4 above) 70
101 As above.

sequestrate the debtor's estate.[102] The preferential claims against the estate will only form part of the composition if the secured creditors gave written consent to that effect.[103] If the court grants the composition it will be binding on all creditors who attended or were aware of the hearing.[104] If the composition is unsuccessful, the debtor will be in the position (s)he was in prior to the initiation of the proceedings.[105] However, it may be even more beneficial to the debtor if there are compulsory out-of-court negotiations to this effect, as opposed to a composition order that requires court involvement and can hence prove to be costly.[106]

6 Conclusion

In South African insolvency law, the interests of debtors are currently almost entirely outweighed by the need to satisfy the interests of creditors. Both the legislature and the judiciary have failed to accommodate debtor interests and a cost effective debt relief procedure that results in successfully relieving the debtor of her (or his) debt should be introduced. However, as explained above, the procedure used to secure the claims of creditors also falls short of fulfilling its purpose. There is a clear need to address these concerns and effective insolvency law reform is thus vital. However, whether the proposals of the Commission will effect the necessary reform is yet to be seen.

102 Roestoff & Coetzee (n 4 above) 71.
103 As above.
104 As above.
105 As above.
106 Roestoff & Coetzee (n 4 above) 76.

A COMPARATIVE CONSTITUTIONAL ANALYSIS OF THE RIGHT TO LIFE IN AFRICA

by Petronell Kruger & Nomfundo Ramalakana***

1 Introduction

This article provides a brief study of the constitutional protection of the right to life in Africa. This entails looking at the provisions on the right to life contained in various constitutions of African States, as well as jurisprudence on the matter of the right to life, and a comparison with the relevant international standards (United Nations and African Union). This article is based on a clinical group led by Prof Christof Heyns, the United Nations (UN) Special Rapporteur on extra-judicial, summary or arbitrary executions. The focus of the clinical group was issues surrounding the right to life as envisaged in his mandate.

As a point of departure, we will discuss the relevant international instruments enshrining the right to life, as well as looking at African jurisprudence on the issue of the right to life. This will be followed by a textual categorisation of the different constitutional provisions relating to the right to life in the 54 UN member States in Africa. We will compare the different formulations of the right to life, attempt to identify patterns of States with a similar colonial heritage and then attempt to source the reasons for such emerging patterns. After this investigation and comparison we will attempt to draw a corollary link between a clear enunciation of the right to life in constitutions and low levels of violence. Based on our findings, we will propose some recommendations.

This article will not consider the constitutions of any country that is not a member of the United Nations. Hence, entities such as Somaliland and the Sahrawi Arab Democratic Republic will not be considered. Only the constitutional provisions directly linked to the protection of the right to life will be examined. The relevant Egyptian, Libyan and Tunisian constitutional provisions will be briefly looked at, but excluded for purposes of analysis.[1]

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1 See 5.4. below for a discussion on the reasons for the exclusion.

2 Brief overview of the international standard

The right to life is protected in a number of human rights instruments. Article 3 of the Universal Declaration of Human Rights provides that everyone has the right to life, liberty and security of the person.[2] Article 6 of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone has an inherent right to life which is to be protected by law and that no one may be arbitrarily deprived of his life.[3] Furthermore, Article 4 of the African Charter on Human and Peoples' Rights provides that human beings are inviolable and that every human being shall be entitled to respect for his life and the integrity of his person and no one may be arbitrarily deprived of this right.[4]

The right to life is a fundamental right as no other right can be exercised and enjoyed without it. It has thus been referred to as a meta-right.[5] Article 4 of the ICCPR clearly states, that no derogation from the right to life is permissible, not even during a state of emergency. The use of the words inherent in Article 6 of the ICCPR and 'inviolable' in Article 4 of the ACHPR stresses the importance of this right. In General Comment No 6, the Human Rights Committee states that 'inherent right to life' should not be understood in a restrictive manner and that the protection of the right to life entails both a negative obligation not to take someone's life and a positive obligation to protect the right to life, except in certain exceptional cases.[6]

The African Commission recognises the uniqueness of human rights in Africa and has interpreted the right to life to provide the widest possible protection to persons. In the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria,* it recognised the right to life of the Ogoni Community as a whole and held that continuous pollution, killings and the widespread terrorisation of the Ogoni people was a violation of their way of life.[7] Furthermore, the African Commission recognise the right to life, beyond the scope of merely prohibiting the arbitrary deprivation thereof by the state and its organs. In the *Malawi African Association and Others v Mauritania* communication, the complainant was still alive but in hiding for fear

2 Universal Declaration of Human Rights GA res 217A (III), UN Doc A/810 at 71 (1948).
3 International Covenant on Civil and Political Rights GA res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966), 999 UNTS 171.
4 African Charter on Human and Political Rights OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).
5 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Death Penalty, A/67/275.
6 General Comment No 06: The right to life (art 6):1982/04/30.
7 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), 67-68.

of his life. The African Commission held that it would be 'a narrow interpretation of this right — the right to life — to think that it can only be violated when one is deprived of it' and the right to respect for one's life and the dignity is protected even when the violation is due to inducing a person to live in a 'state of constant fear and/or threats'.[8] In the words of the African Commission in the *African Commission Forum of Conscience v Sierra Leone*, the right to life is the 'fulcrum of all other rights, it is the fountain through which other rights flow.'[9]

The right to life is threatened both vertically and horizontally. In the vertical relationship between the state and its legal subjects, the right to life is threatened particularly by arbitrary deprivation of the right by the state and its agents. The right to life is also threatened in the horizontal relationships between people. As already mentioned, this paper will specifically be focusing on the right to life from the vertical perspective, dealing with arbitrary or summary executions, the death penalty and the use of force by police and law enforcement agencies.

General comment No. 6 provides that the right to life should not be interpreted narrowly. It further states that there is a 'supreme duty' on states to prevent wars, acts of genocide and other acts of mass violence which causes the arbitrary loss of life, prevent the arbitrary deprivation of life and in relation to the death penalty. It states that although there is no obligation to abolish the death penalty, there is an obligation to limit its use and, in particular, to abolish it for other than the 'most serious crimes'.[10]

The right to life as it is guaranteed, entails that at the very least, states should refrain from the arbitrary and targeted killings of individuals under their jurisdiction. However, the right to life, although supreme, is not absolute and can be limited by laws that provide for the death penalty as well as those that govern the rules relating to private defence, either by law enforcement officials or individuals.

3 General overview of the right to life in African Constitutions

As base to all subsequent rights, it is difficult to imagine that the right to life could be formulated in divergent ways. However, it is clear after a brief examination of the textual framing of the right to life in

8 *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000), para 120.

9 *African Commission Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000) para 19.

10 General Comment No 06: The right to life (art 6): 1982/04/30.

the 54 constitutions of African states that no true uniformity is present. This paper will divide the different manifestations into one of three categories; the right to life as protected in the absence of any internal limitation clauses, the right to life protected subject to internal limitations and an inferential protection of the right to life. In addition, the differences in the protection of the right to life in the revolutionary documents of the Arab-Spring countries, i.e. Tunisia, Egypt and Libya and the predecessors to such documents will be briefly explored.

3.1 The right to life protected in the absence of internal limitations

Cape Verde incorporates a two-step approach by first stating that '[h]uman life and the physical and spiritual integrity of the people shall be inviolable' and that 'in no case shall there be the death penalty.'[11] Guinea-Bissau, Mozambique, Namibia and São Tomé and Principe also follow this model.[12] Cote D'Ivoire expands on this structure a little by prefacing the text that gives expression to the right of life by reiterating that the 'individual is sacred', 'born free and equal before the law' and that the right is inalienable.[13] The same provision then holds that '[p]ublic authorities have the obligation to respect, protect and promote the individual' Any sanction leading to the deprivation of human life is forbidden.'[14]

Other States opt for a very simple provision, mentioning nothing substantive other than acknowledging or guaranteeing the right to life. Angola, Burundi, South Africa, Tanzania and Rwanda fall into this sub-category. The Rwandan Constitution states in article 20 that '[e]very person has the right to life. No person shall be arbitrarily deprived of life.'[15] The Angolan text provides that '[t]he state shall respect and protect human life, which is inviolable.'[16] The South African Constitution concisely states that '[e]verybody has the right to life' without expanding on the concept further.[17] Tanzania's constitution provides that every person has the 'right to live and to the protection of his life by the society in accordance with law' — a relatively simple formulation also.[18] Burundi's Constitution simply

11 The Constitution of the Republic of Cape Verde 1999 secs 27(1) & (2).
12 The Constitution of the Republic of Mozambique 2004 secs 40(1) & (2); The Constitution of the Republic of Namibia 1990 sec 6; The Constitution of the Democratic Republic of São Tomé and Principe 1990 sec 21(1); The Constitution of the Republic of Guinea-Bissau 1996 sec 36 & 38.
13 The Constitution of the Republic of Cote D'Ivoire 2000 sec 2.
14 Section 2.
15 The Constitution of the Republic of Rwandan 2003 sec 20.
16 The Constitution of the Republic of Angola 2010 sec 30.
17 The Constitution of the Republic of South Africa 1996 sec 11.
18 The Constitution of the Republic of Tanzania 1977 sec 14.

states that '[e]very woman, every man has the right to life.'[19] The Algerian Constitution doesn't use the word 'life', but does provide in article 34 that the 'State guarantees the inviolability of the human entity.'[20] This is deemed an unqualified right to life provision.[21] The Constitution of Morocco describes the right to life as 'the first right for every human being.'[22] The Provisional Constitution of Somalia enshrines the right to life in article 13.[23]

Finally, there are some states that group the right to life with other rights under the same provision. These are states such as Benin and Mali (other rights: security, integrity and liberty), Congo (right to free development and the full flowering of personality), Democratic Republic of Congo (physical integrity and development of personality), South Sudan and Sudan (dignity and integrity), Togo (integrity and safety), Chad (personal integrity, security, private life and property) and Burkino Faso which lists the right to life along with the prohibition on forms of the 'deprecation of man' such as slavery, torture, cruel and degrading treatment and the mistreatment of children.[24] Djibouti has a large grouping of rights. Article 10 of its Constitution protects the right to life, liberty, security and various rights to give effect to a fair trial in one provision.[25] The Senegalese Constitution groups the rights it refers to as 'sacred and inalienable' which forms the basis of 'human community' and of 'peace and community'.[26] Guinea also lists a large array of protections in one provision.[27]

3.2 The right to life protected subject to internal limitations

There seem to be four general formulations which include an internal limitation; listing the exception of the death penalty, listing the exception of the death penalty plus the circumstances under which the death penalty can be imposed, listing the death penalty plus other circumstances to limit the right to life and instances where there is

19 The Post-Transition Interim Constitution of the Republic of Burundi 2005 sec 24.
20 The Constitution of Algeria 1996 sec 34.
21 LM Chenwi *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) 75.
22 The Constitution of the Republic of Morocco 2012 sec 20.
23 The Provisional Constitution of the Federal Republic of Somalia 2012; The Somalian Constitution is in the process of being redrafted, but this report will not rely on such document as it is still subject to intense commentary and the likelihood of content-change is high.
24 The Constitution of the Republic of Benin 1990 sec 15; The Constitution of Burkino Faso 2000 sec 2; The Constitution of the Republic of the Congo 2006 sec 7; The Constitution of the Republic of Mali 1992 sec 1; The Constitution of the Republic of South Sudan 2011 sec 11; Constitution of the Republic of Togo 1992 sec 13; Constitution of Chad 1996 sec 17; Democratic Republic of Congo 2001 sec 16; The Interim National Constitution of the Republic of Sudan 2005 sec 28.
25 The Constitution of the Republic of Djibouti sec 1992.
26 The Constitution of the Republic of Senegal 2001 sec 7.
27 The Constitution of Guinea 1990 sec 6.

no mention of the death penalty but other limitations are included. To aid in summarising the different formulations, the following table is employed:

	Death penalty alone	**Death penalty plus the circumstances**	**Legitimate use of force by police or military**	**Self-defense or private defense**	**Lawful act of war**	**Abortion**
Botswana[a]	Y	N	Y	Y	Y	N
Equitorial Guinea[b]	Y	N	N	N	N	N
Ethiopia[c]	Y	N	N	N	N	N
Eritrea[d]	Y	N	N	N	N	N
The Gambia[e]	N	Y	Y	Y	Y	N
Ghana[f]	Y	N	Y	Y	Y	N
Kenya[g]	N	N	N	N	N	Y
Lesotho[h]	Y	N	Y	Y	Y	N
Liberia[i]	Y	N	N	N	N	N
Malawi[j]	Y	N	N	N	N	N
Mauritius[k]	Y	N	Y	Y	Y	N
Nigeria[l]	Y	N	Y	Y	N	N
Seychelles[m]	N	N	N	N	Y	N
Sierra Leone[n]	Y	N	Y	Y	Y	N
Swaziland[o]	Y	N	Y	Y	N	Y
Uganda[p]	Y	N	N	N	N	Y
Zambia[q]	Y	N	Y	Y	Y	Y
Zimbabwe[r]	N	Y	N	N	N	Y

a The Constitution of Botswana 1966 sec 4.
b The Constitution of the Republic of Equatorial Guinea 1999 sec 13.
c The Constitution of Ethiopia 1995 sec 15.
d The Constitution of Eritrea 1997 sec 15.
e The Constitution of the Republic of the Gambia 2001 sec 18(1).
f The Constitution of the Republic of Ghana 1996 sec 13(1).
g The Constitution of Kenya 2010 sec 26.
h The Constitution of Lesotho 2001 sec 5.
i The Constitution of the Republic of Liberia 1984 sec 20.
j The Constitution of the Republic of Malawi 2001 sec16.
k The Constitution of the Republic of Mauritius 2001 sec 4(1).
l The Constitution of the Federal Republic of Nigeria 1999 sec 33(1).
m The Constitution of the Republic of Seychelles 1993 sec 15.
n The Constitution of Sierra Leone 1996 sec 16(1).
o The Constitution of the Kingdom of Swaziland 2005 sec 15.
p The Constitution of the Republic of Uganda 1995 sec 22.
q The Constitution of the Republic of Zambia 1996 sec 12.
r The Constitution of the Republic Zimbabwe 2013 of sec 48.

(Y = yes; N = no)

A last additional category is also present. This is where the state's constitution makes a vague reference to an internal limitation such as is illustrated by article 3 of the Central African Republic's Constitution that holds while '[e]veryone has the right to life and bodily integrity' such rights 'may only be affected by the application of law.'[28] Niger's constitution protects the right to life, amongst other rights, according to 'the conditions established by law.'[29]

3.3 Inferential protection of the right to life

Some states don't have a clear protection of the right to life in their constitutions but such a right can be inferred through mechanisms such as the incorporation of international instruments. Cameroon is an apt example. The preamble alone provides for the protection of fundamental rights as can be found in the Universal Declaration of the Rights of Man.[30] The Comoros follow a similar approach.[31] The Constitution of the Gabonese Republic actually mentions certain fundamental human rights within the body of the text,[32] but fails to make express mention of the right to life. The right to life can nevertheless, be incorporated through a reference in the preamble to the Universal Declaration of Human and People's Rights and the African Charter.

3.4 Arab-Spring countries

The Violet Revolution of 2011 in Tunisia started the so-called Arab Spring which led to mass civilian uprising and regime changes in a number of Arab-speaking countries. This impacted on the legitimacy of at least three African countries' constitutions — Tunisia, Egypt and Libya. The separation of a discussion on the right to life in these states is due to the irrelevance of the states' old constitutions and the paradigm shift within these countries concerning the role and rights of the populations.

Tunisia started drafting a new constitution in 2012. The Tunisian constitution provides that '[t]he right to life is sacred and cannot be prejudiced except in exceptional cases regulated by law.'[33] In Libya, an official constitutional declaration was made in 2011 which reads: 'Human rights and his basic freedoms shall be respected by the State. The state shall commit itself to join the international and regional declarations and charters which protect such rights and freedoms.'[34]

28 The Constitution of the Central African Republic 2004.
29 The Constitution of the Seventh Republic of Niger 2010 sec 12.
30 The Constitution of the Republic of Cameroon 1996 preamble.
31 The Constitution of the Comores 1996 preamble.
32 Constitution of the Gabonese Republic 1991 sec 1.
33 Draft Constitution of the Republic of Tunisia 2014 sec 22.
34 The Libyan Constitutional Declaration 2012 sec 11.

This stands in contrast with the 1977 Constitution, which contained no right to life provision.[35] The Egyptian Constitution of 1980 did not contain a provision protecting the right to life and the new 2014 constitution also has no express provision.[36] Due to the unique circumstances prevailing in these countries, we will exclude them from further analysis or discussion in this paper to try and normalise our data findings.

4 Patterns, comments and conclusions

4.1 Correlation between categories and previous colonial powers

As a brief point of interest, the three different categories of formulations as identified in 4.1 to 4.3 will be sub-divided into the previous colonial powers each state was subject to immediately prior to gaining independence.

Right to life categories by former colonising power					
FORMER COLONISER / **CATEGORIES AND SUB-CATEGORIES**	Belgium[a]	Britain[b]	France[c]	Portugal[d]	Other[e]
No Internal Limitations					
Prohibition of death penalty	0	1[f]	1[g]	5[h]	1[i]
Only right to life	2[j]	2[k]	3[l]	0	1[m]
With other rights	1[n]	2[o]	9[p]	0	0
	3	5	13	5	2
Internal Limitations					
Express limitation	0	13[q]	0	0	2[r]
Other	0	0	2[s]	0	
		13	2		2
Inferential					

35 Chenwi (n 21 above) 73.
36 The Constitution of the Arab Republic of Egypt 2014.

	0	0	4[t]	0	0

a Burundi (1962), Democratic Republic of Congo (1960), Rwanda (Belgian administered UN Trusteeship — 1962).
b Botswana (1966), Egypt (1922), The Gambia (1965), Ghana (1957), Kenya (1963), Lesotho (1966), Malawi (1964), Mauritius (1968), Nigeria (1960), Seychelles (1976), Sierra Leone (1961), South Africa (1961), Sudan & South Sudan (1956), Swaziland (1968), Tanzania (1964), Uganda (1962), Zambia (1964), Zimbabwe (1980).
c Algeria (1962), Benin (1960), Burkino Faso (1960), Cameroon (French administered UN Trusteeship — 1960), Chad (1960), Central African Republic (1960), Comores (1975), Congo (1960), Cote D'Ivoire (1960), Djibouti (1977), Gabon (1960), Guinea (1958), Madagascar (1960), Mali (1960), Mauritania (1960), Morocco (1956), Niger (1960), Senegal (1960), Togo (French Administered UN Trusteeship — 1960), Tunisia (1956).
d Angola (1975), Cape Verde (1975), Guinea Bissau (1974 — although Guinea Bissau unilaterally declared the State independent in 1973), Mozambique (1975), São Tomé and Principe (1975).
e Spain: Equitorial Guinea (1968); Italy: Libya (1951), Somalia (1960); American Colonization Society (1847); South Africa as a British Colony and later independent: Namibia (1990).
f Seychelles.
g Cote D'Ivoire.
h Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Principe.
i Namibia.
j Burundi, Rwanda.
k South Africa, Tanzania
l Algeria, Mauritania, Morocco.
m Somalia.
n Democratic Republic of Congo.
o South Sudan and Sudan.
p Benin, Burkino Faso, Chad, Congo, Djibouti, Guinea, Mali, Senegal, Togo.
q Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Sierra Leone, Swaziland, Uganda, Zambia, Zimbabwe.
r Equitorial Guinea, Liberia.
s Niger, Central African Republic.
t Madagascar, Gabon, Cameroon, Comoros.

The above table highlights three interesting findings. Firstly, all the previous Portuguese colonies not only contain no limitation on the right to life in their respective constitutions but such constitutions expressly prohibit the death penalty in municipal systems. In contrast, a clear majority of constitutions providing for an express limitation (especially providing for the legality of the death penalty) belong to previous British colonies. Finally previous French colonies have a tendency either to group the right to life with other rights or only infer the right to life through the preamble of their constitutions. As a side note, it can be stated that the Belgian colonies contained no internal limitation on the right to life, but with only a data range of three countries it is hardly worthy of concern.

It comes as no surprise that the approach to formulating fundamental rights, such as the right to life, was strongly influenced by previous imperial powers. The first postcolonial constitutions of

many African states were little more than 'dysfunctional duplications of their former imperial masters.'[37] We will briefly investigate the reasons for the trends noted.

4.2 Previous French colonies

Most previous French colonies adopted the constitutional model of Charles De Gaulle — the so-called Fifth Republic Constitution — under the auspices of joining the *Communauté francaise*.[38] The effect was that just under half of previous French Colonies or French Administered territories expressly referred to the French Declaration of the Rights of Man of 1789.[39] Even the contemporary French Constitution still contains this reference.[40] An equal number of colonies opted rather to refer directly to the Universal Declaration of 1948; some states referred to both. Other colonies, while not expressly referring to the 1789 or 1948 Declarations followed the same sequential form of the fourth and fifth republic constitutions by proclaiming or listing certain rights in the preamble, rather than the usual practice of enumerating these rights in separate chapters or title headings in the body of the constitution.[41] Gabon, Comoros, Seychelles and Cameroon still follow this French constitutional tradition.[42] The Independence Constitution of the Central African Republic also incorporated rights via the preamble alone, but subsequent constitutional amendments removed this feature.

4.3 Previous British colonies

The previous British colonies in Africa deviated from the British model insofar as introducing a Bill of Rights. The British system, relying heavily on common law, does not incorporate fundamental rights into the written constitutional document.[43] This tradition continued in the

37 J Go 'Modelling the state: Post-colonial constitutions in Asia and Africa' (2002) 39 *South East Asian Studies* 559.

38 JM Mbauke 'What should Africans expect from their Constitutions?' (2013) 41 *Denver Journal of International Law and Policy* 161. Guinea was the only Sub-Saharan French Colony that rejected De Gaulle's offer.

39 Go (n 37 above) 574.

40 Preamble of the Constitution of the Republic of France 1958: "Le peuple français proclame solennellement son attachement aux Droits de l'Homme et aux principes de la souveraineté nationale tels qu'ils ont été définis par la Déclaration de 1789."

41 EM Fernando 'The American constitutional impact on the Philippine legal system' in LW Beer (ed) *Constitutionalism in Asia: Asian Views of the American* Influence (1979) 168.

42 See table (C) below; note the Comores are not included in the table as it is not ranked on the Global Peace index.

43 DW Vick 'The Human Rights Act and the British Constitution' (2002) 37 *Texas International Law Journal* 337.

legal systems of commonwealth countries such as Australia and New Zealand that sets out citizen's rights in separate statutes.[44]

The source of the constitutions thus has to be traced elsewhere. Nigeria, for example, out of a fear of insufficiently providing for minority groups, decided to deviate from the British model so as to provide certain constitutional guarantees. A committee established for minority rights in Nigeria recommended following a rights formulation as can be found in the European Convention for Human Rights.[45] The Convention strongly influenced the Constitution and numerous critical similarities between the two documents can be noted. There seems to have been a strong diffusion effect: once Nigeria adopted the European Convention as a model, so too did many others.[46] Article 2 of the Convention provides that '[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.' Article 2 continues to list private defence, use of force by law enforcement officials when absolutely necessary and the quelling of riots and insurrections as acts not deemed a violation of the right to life. The fingerprints of the European Convention can therefore clearly be observed in the former British colonies with similar express limitations on the right to life in their domestic constitutions.

4.4 Previous Portuguese colonies

Constitution of Cape Verde (1992) bears striking similarities on both substance and structure to the Constitution of Portugal.[47]

4.5 Violence rates per identified category

By assigning each State their ranking based on the Global Peace Index results of 2013 and determining the average per category, we will attempt to draw a corollary link between the protection of right — which must be interpreted in terms of the levels of violence in a country — and the manner of articulation within the state's respective constitution.

To give credibility to this approach, a brief comment on the Global Peace Index (GPI) is necessary. The GPI is an index created by the Institute for Economics and Peace in consultation with independent experts, think-tanks and organisations. It uses 22 different indicators to roughly rank countries from least to most

44 New Zealand Statute, Australian Statute.
45 The European Convention for Human Rights, Rome, 4 November 1950.
46 Go (n 37 above) 579.
47 M Bogdan 'The law of the Republic of Cape Verde after 25 years of independence' (2000) 44 *Journal of African Law* 88 86-95.

violent and has been endorsed by Kofi Annan, Mary Robinson, Jimmy Carter, Archbishop Desmund Tutu and the Dalai Lama to name but a few. While the resultant ranking on the GPI cannot be described as 100 percent accurate, it is deemed to be the leading index of sorts and accurate especially with reference to identifying trends.

The first table (A) is an exposition of States whose constitutions contain no express internal limitation to the right to life:

The Right to Life Protected in the Absence of Internal Limitations				
Categories	**Country**	**Global Peace Index rating**	**Subtotals and Totals**	**Average**
Specific prohibition of the death penalty				
	Angola	102		
	Cote D'Ivoire	151		
	Guinea-Bissau	132		
	Mozambique	61		
	Namibia	46		
			492	**98.40**
Only mentions right to life				
	Algeria	119		
	Burundi	144		
	Guinea-Bissau	132		
	Mauritania	122		
	Morocco	57		
	Rwanda	135		
	Somalia	161		
	South Africa	121		
	Tanzania	55		
			1046	**116.22**
Grouped with other rights				
	Benin	104		
	Burkino Faso	87		
	Chad	138		

	Congo	107		
	Democratic Republic of Congo	156		
	Djibouti	63		
	Guinea	116		
	Mali	125		
	Senegal	85		
	South Sudan	143		
	Sudan	158		
	Togo	67		
			1349	**112.42**
TOTAL				**109.01**

The following two tables set out the data for the two remaining categories: Constitutional formulations with internal limitations (B) and constitutions where the right to life has to be inferred (C):

The Right to Life subject to Internal Limitations				
Categories	**Country**	**Global Peace Index rating**	**Subtotals and Totals**	**Average**
Death penalty				
	Botswana	32		
	Equitorial Guinea	89		
	Eritrea	120		
	Ethiopia	146		
	Ghana	58		
	Kenya	136		
	Lesotho	49		
	Liberia	80		
	Malawi	74		

	Mauritius	21		
	Nigeria	148		
	Sierra Leone	59		
	Swaziland	88		
	The Gambia	93		
	Uganda	106		
	Zambia	48		
	Zimbabwe	149		
			1496	**88**
Other				
	Central African Republic	153		
	Niger	146		
			299	**149.5**
Total				**118.75**

The Right to Life by inference	
Country	**Global Peace Index rating**
Madagascar	90
Gabon	76
Cameroon	108
Total	**274**
Average	**91.33**

The data from Tables (A), (B) and (C) is summarised into Table (D) below. Table (D) serves as a summary of the average peace rating for each formulation of the right to life. The table does not include data on Cape Verde. The Comoros, São Tomé and Principe and the Seychelles as the Global Peace Index does not rate smaller island nations.

Right to life provisions		
The Right to Life Protected in the Absence of Internal Limitations		
	Specific prohibition of the death penalty	98.4
	Only mentions right to life	114.25
	Grouped with other rights	112.42
		108.36
The Right to Life subject to Internal Limitations		
	Express limitation (e.g. Death penalty)	88
	Other	149.5
		118.75
The Right to Life by inference		
		91.33

The data does not show any corollary link between clearer stipulation of the right to life or between unqualified versus qualified protection and violence. This amounts to a null hypothesis in which the unfortunate conclusion must be drawn that the wording -or upon extrapolation of this even the constitutional enshrinement- of the right to life is irrelevant in the on-the-ground reduction of violence. It is for this reason that we enter into a general discussion and look at specific instances of the perpetuation of violence.

4 Violence in Africa and the right to life

As already stated, the data analysed shows no link between clearer stipulation of the right to life or between unqualified versus qualified protection and violence in African Countries. The question then comes, what are the factors that continue to perpetuate violence in Africa?

Civil war, coups d'état, organised group violence for political, religious and economic ends, civil protest due to poor service delivery and robbery by gangs as well as individual murder and assault are some of the pre-dominant forms of violence in Africa.[48] The right to

[48] C Leys 'Violence in Africa' *Transition*, No 21 (1965) page 18.

life and its protection in Africa rests on more than just its legislative recognition and protection but on more complex social-economic and political factors. The legislative protection of the right to life in Africa, however, is important as it equips persons with a tool to hold their governments accountable for acts of violation of the right to life.[49]

5 Recommendations

It is our recommendation that the right to life be provided for in the body of all African Constitutions and entrenched so as to make it a non-derogable right. It should not be made subject to any limitations and mechanisms should be put in place to ensure that the right is justiciable. We suggest a model definition of the right to life as 'everyone has an inherent, non-derogable right to life.' 'Inherent' to stress that it's a an essential characteristic of being human, it need not be earned, that there are no classes of persons entitled thereto and those who aren't; 'non-derogable' in that, as in international law which recognizes the right to life as a peremptory norm that on a hierarchical scale, it must be placed higher than other rights and trump all other rights in competition therewith.[50]

49 It must however be noted that this is only effective if the right to life is justiciable.

50 C D'Amato 'It's a bird, it's a plane, it's *jus cogens*!' (2010) Faculty Working Papers. Paper 61 accessed online at http://scholarlycommons.law.northwestern.edu 10 September 2013.

CONSTRUCTION AND ENGINEERING LAW IN SOUTH AFRICA: A FUNDAMENTAL GAP IN THE LLB CURRICULUM?

*by Quinton Joubert**

1 Introduction

Since the implementation of a new constitutional dispensation in 1994, South Africa has experienced a tremendous increase in economic development and is now regarded by the world at large as forming part of what is known as the BRICS countries — Brazil; Russia; India; China; and South Africa, all of which are countries experiencing a rapid level of economic growth and development.[1]

Economic development has without a doubt directly resulted in what can be referred to as a 'boom' in the engineering and specifically the building construction industry. Between 2012 and 2013 the overall unadjusted real GDP at market prices increased by 2,0% year on year. The most outstanding performers by industries in the fourth quarter of 2013 compared to the fourth quarter of 2012 were, among others, the construction industry which increased by 4,5 per cent.[2]

Construction companies throughout South Africa have continuously been active in major projects, the building of new power plants such as Medupi, new road networks, stadiums for the 2010 soccer world cup that was held in South Africa as well as the building of the tunnels and bridges that now host the Gautrain. The extent of communication technology has also seen a growth in recent years and thus calls for further infrastructure by service providers in this area. The environmental conscience of South Africans and many companies in the search for alternative energy sources has also led to a further growth in 'green' technology which is more efficient and productive.[3] More examples of construction projects include but are not limited to the building of various malls, roads, residential houses, lying out of pipelines, and a number of other engineering feats, etcetera.

* Second year LLB student, University of Pretoria.

1 M Fransman (2012) http://www.dfa.gov.za/docs/speeches/2012/frans1121.html (accessed 4 March 2014)

2 http://beta2.statssa.gov.za/publications/P0441/P04414thQuarter2013.pdf (accessed 4 March 2014).

3 M Kidd *Environmental law* (2008) 1.

2 Reason for concern

With such a great level of growth in the construction industry there is now not only a higher demand for civil engineers or quantity surveyors, but also for legal practitioners that are trained in what is referred to as Building and Construction Law. These lawyers are able to provide excessive knowledge and advice to construction companies with regard to specific contracts that are used on a daily basis to regulate the relationship between these companies and their various clients.

'Construction law' is universally understood to cover the whole of the specialised field of law that affects the construction industry and the legal framework through which it operates.[4] Author John Uff states in his book on Construction law as follows:[5]

> In legal terms there is no difference between a building and an engineering contract and the term construction contract is adopted to cover both. Construction law is thus an interactive subject in which both lawyers and construction professionals, including managers have an essential part to play.

Why then are so many law students not even aware of the fact that this branch of law exists and even more so, not aware of the opportunities that lie in this greatly increasing and specialised field? Law students undertake a rigorous four or even five year journey into the exploration of various fields of law reaching fields that are as diverse as international business law or even street law, However after obtaining a LLB degree many legal practitioners are left with little idea, if any at all of the principles that underlie construction and engineering law and thus evidently enter the corporate world with no further training in this field except for their knowledge of basic contract law.

3 Arguments against the implementation of construction and engineering law in the LLB

Contracts with regard to construction however, differ greatly from those entered into by consumers such as purchase and sale, letting and hiring or even marriage contracts which law students study thoroughly during their years at university. Many factors make a construction or related services contract different from most other types of contracts. These include the length of the project, its complexity, its size, the immense risk involved and the fact the price agreed upon and the amount of work done may change a number of

4 J Uff *Construction law* (2013) 1 265.
5 Uff (n 4 above) 1.

times as the project proceeds.[6] Unfortunately the LLB degree as it is compiled at present focuses solely on general contract law and other aspects of specific contracts such as sale and lease, yet pay little attention whatsoever to the importance of engineering and construction or services contracts, including building contracts that form a fundamental part of society as we know it.

Some may argue that contract law with regards to construction and engineering may not take place as frequently as, for example, purchase and sale contracts concluded by everyday consumers. However, this is not at all true. Government entities, being one of the construction industries largest consumers, implements new projects on a monthly if not weekly basis that involve creating new infrastructure or improving already existing infrastructure with the aim of creating more job opportunities.[7] Put aside the government's investment in construction projects and one is left with an immense number of projects that must be completed by large companies in South Africa. For example, Sasol petroleum or even every day entrepreneurs that wish to build malls with their goals fixed on profit in South Africa's rapidly expanding economy. The expenses of any one of these projects may revolve around the millions of Rands, it is thus of utmost importance that these firms hire trained and specialised lawyers that are able to assist them in their construction law matters.

The continued success rate for the completion of these projects is not only subject to the efficient work of engineers, quantity surveyors or project directors but also of legal practitioners. The Preamble of the Construction Industry Development Board Act[8] reads in part as follows:

> The construction industry impacts directly on communities and the public at large and its improved efficiency and effectiveness will enhance quality, productivity, health, safety, environmental outcomes and value for money to (the) South African society.

The Act in its preamble clearly points out that the 'improved efficiency' of the construction industry will be highly beneficial to the country and this undoubtedly calls for legal practitioners with the necessary knowledge in construction law to assist in the promotion of its effectiveness.

4 From a professional viewpoint

Even on a weekly basis most people require the services of another, for example for plumbing, electrical services and repairs, cell phone

6 J Adriaanse *Construction contract law* (2010) 1.
7 A Venter & C Landsberg *Government and politics in South Africa* (2011) 86-87.
8 38 of 2000.

and internet network services, and also repairs to and servicing of vehicles. Is it not then, by obvious observation, where X hires Y to perform any one of the previous mentioned services, the conclusion of an important type of contract? With the exception of purchase and sale agreements, construction and services agreements are the most prolific agreements concluded. Although it falls under the Consumer Protection Act[9] where it involves a 'consumer', this is not the case for juristic persons. An important question is whether familiarity with and understanding of general contract law and general principles of contract is sufficient for the specific problems that may arise in construction and service contracts. The answer is twofold. It is 'yes', in the sense that all contracts, whether letting and hiring or building contracts are founded and based on the same 'basic principles of contract' that regulate all contracts. But the answer can also very easily be 'no'. For one thing, any legal practitioner who encounters a building or engineering contract for the first time has little or probably no understanding of the nature of the contract. In scope and essence it differs greatly from that of, for example, letting and hiring and he or she will more than likely encounter problems while trying to understand it. Now imagine this on a much larger scale, where the contract in question is a standard form contract undertaken between a construction company and its client, which includes a number of other, smaller sub-contractors.[10] These contracts are vast in their nature and structure and include clauses that are often bespoke and do not as a general rule appear in any other contracts.

Various forms of alternative dispute resolution and so forth exist in the construction and engineering industry. Legal practitioners with the necessary knowledge in these contracts are essential to the efficient and smooth running of such a large project. Above and beyond the contracts that are regulated by the Consumer Protections Act, the LLB syllabus of most if not all universities in South Africa choose to ignore dedicated training and education with regards to the contracts mentioned above. Training on these essential issues is also not included in the syllabi offered by the Law Schools for candidate attorneys.

5 The issue at hand

After taking all of the above mentioned facts into account one must ask the question: 'Where is building and construction law in the present day LLB curriculum?' How can a field that is so rich in opportunity and of fundamental importance to the country's ever-

9 68 of 2008.
10 CJ Nagel et al *Commercial Law* (2011) 662-663.

changing economy be missing in what is regarded as South Africa's universal degree requirement for legal practitioners?

As Law students we are taught not to view the law as an already finished article but rather one that we must help complete. In certain circumstances this calls for criticising what is already thought to be complete. The LLB is aimed at training law students in every core aspect of the law in order that they may enter the corporate world with full knowledge of legal matters facing the country, and the failure to include construction, building and engineering law in the LLB degree leaves them with a serious and problematic gap in their legal education.

If Construction law cannot be included in a general study of specific contracts, this important and vast branch of law should at least be considered as a possible elective module for final year LLB students who wish to increase their knowledge in this field and thus be better equipped for the challenges they might encounter should they wish to follow a legal career in commercial practice or specifically construction and building.

NEGOTIATIONS ON A TRADE AND COMPETITION POLICY UNDER THE AUSPICES OF THE WORLD TRADE ORGANIZATION: AN INDIAN PERSPECTIVE OF EMERGING ISSUES

*by Saloni Khanderia-Yadav**

1 Introduction

The adoption of protectionist policies by countries is nothing new. The existence of protectionist economic policies and the quota-type restrictions in the inter-war period (1920-1940) were the primary causes of the Second World War, deeply impeding international trade; consequently making it imperative for policies to be developed with the co-operation of various States forming part of the international community. Therefore, it was desired that trade policies between nations must be liberalised; thereby sowing the seeds of a more globalised world. Hence, while Organizations like the OECD,[1] the UNCITRAL,[2] the WTO[3] and conferences like UNCTAD[4] came into being in order to regulate matters concerning international trade, it was in turn important that these efforts at the international level are complemented and supplemented at the domestic level as well. This marked the beginning of competition law regulation at the domestic level.

Approximately a hundred nations across the globe have legislated to regulate and promote competition in their respective domestic spheres. These laws are more or less modelled on the United States'

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1 The OECD was established in the year 1961 with its headquarters in Paris, France. The Organization endeavours to achieve enhanced social and economic welfare of the people of its Member States (which are mostly developed nations). For a detailed discussion on the OECD, visit www.oecd.org.

2 UNCITRAL was established by the General Assembly Resolution in 1966; and serves as an important body for the reasons of aiming to bring about harmonisation and unification of the disparities between the various national laws with regard to governance of international trade. For a detailed perusal of the work of UNCITRAL, visit http://www.uncitral.org/uncitral/en/about/origin.html.

3 Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: The Results of The Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 UNTS 154, 33 ILM 1144 (1994) (hereinafter Marrakesh Agreement or WTO Agreement).

4 UNCTAD was established in the year 1954, and for the very first time incorporated the active participation of developing countries. It endeavours to bring about coherence between domestic and international policies for sustained development. For a detailed discussion on the work of UNCTAD, see Final Act and Related Documents on the United Nations Conference on Trade and Employment, UN Doc E/CONF2/78 (1948) (hereinafter referred to as the UNCTAD).

Sherman Act[5] or the European Union's principles on competition (particularly Articles 81 and 82 of the Reform Treaty).[6] [7] Some nations, like the US[8] and the EU[9] also have provisions in their respective laws to tackle anti-competitive conduct across their national borders; in other words, anti-competitive conduct which takes place outside the border but nevertheless *impacts or has an effect* on the territory of their state. However, over time it has been realised that these provisions may not be sufficient by themselves and that the problem must be tackled on a multilateral basis.[10]

While several efforts have been made by the OECD and UNCTAD on a multilateral level, these efforts have somewhat failed to serve the purpose because they are recommendatory and non-binding in nature. At the same time, it is considered that the WTO would be a more suitable option to regulate matters pertaining to cross-border anti-competitive conduct because the rulings of the Panel and Appellate Body of the WTO are binding by nature. Not merely this, but the goals of the WTO seem to be more in keeping with that of competition policy. In other words, when both the WTO and competition policy endeavour to promote competition, improve the economy and the standard of living,[11] it would only be more appropriate that the WTO regulates and checks anti-competitive conduct that takes place across the border. In addition, with the WTO liberalising trade policy, nations have not merely had better access to each other's markets, but have also been in a better position to engage in anti-competitive practices. Thus, while international trade policy as regulated by the WTO has provided an impetus to

5 The Sherman Antitrust Act (Sherman Act, July 2, 1890, ch 647, 26 Stat 209, 15USC §§ 1–7).

6 The origins of the Reform Treaty may be traced to the Treaty of Rome. The Treaty of Rome was created by the then European Economic Community (now known as the European Union) in 1958; with Article 85 addressing concerted practices in the form of cartels to hamper competition and Article 86 prohibiting abuse of dominant position. It is important to note that Articles 85 and 86 are currently renumbered as Articles 81 and 82 by the Amsterdam Treaty of 1997. As time progressed, independent member states began adopting their own competition laws with Articles 81 and 82 serving as a model for these laws.

7 For a detailed discussion on the EC law, see, Craig & De Burca *EU Law: texts, cases and materials* (4th ed 2007); Watt & Dashwood *European Union law* (5th ed 2006); H Ullrich 'Harmonization within the European Union' (1996) 17 *European Competition Law Review* 178.

8 *United States v Aluminium Co of America* 148 F2d 416, 433 (2d Cir 1945).

9 *A Ahlsirom Osakeyhito v Commission* (1988) ECR 5242-43, (1988) CMLR 901 (commonly referred to as the Wood Pulp Case); See Commission Decision, *Raymond/Nogoya*, June 9, 1972, (1972) OJ L143/39, 41; Commission Decision *Dyestuffs*, 24 July 1969, (1969) OJ Spec Ed L195/11, 14; *Gencor v Commission*, judgment of 25 March 1999, 1999 ECR II-753.

10 This is primarily due to the fact that negotiations on a bilateral basis involve merely the interests of the parties to such a (bilateral) Agreement. Hence when competition law violations involve the concerns of the larger community, such bilateral agreements may not serve the purpose at all times.

11 'Working Group Report on interaction between trade and competition policy submitted to the General Council', WT/WGTCP/W/127/7, 22 (7 June 1999).

privatisation and liberalisation, it has also acted as a vehicle for anti-competitive practices in various forms; and despite there being several laws to effectively combat such practices, these laws seem to be redundant so long as these practices take place across borders. In such scenarios, it is imperative for governments to think of ways and means to combat such behaviour effectively at an international level.

It was against this backdrop that it was decided during the Singapore Ministerial Conference that an Agreement on Trade and Competition Policy be negotiated under the scope and ambit of the WTO, popularly referred to as one of the 'Singapore issues'.[12] This led to the birth of the Working Group on the Interaction between Trade and Competition Policy in the year 1996 and was spearheaded by Professor Federic Jenny. In particular, the work of the WGTCP underlined the contribution of trade and competition policy in achieving further development,[13] and also threw light on the needs of developing nations for technical assistance and capacity building in these areas.[14] A series of impasses later, the work of the WGTCP was halted as a result of the decision of the General Council in 2004,[15] due to disagreements among the Members of the WTO, particularly from the developing nations and the United States. India was one such nation to have vehemently opposed an Agreement on Trade and Competition policy owing to India's 'level of development'.

Against this backdrop, the purpose of this paper is to develop an understanding of the Indian perspectives concerning the regulation of competition policy by the WTO, which would in turn require understanding the country's perspectives at various Ministerial Conferences and its experience with competition policy in the first place.

2 Indian perspectives

2.1 The Indian perspective at the Singapore Ministerial Conference

To begin with, during the time the subject came to be initially discussed during the Singapore Rounds, India did not seem to have adopted a very optimistic view on the negotiation of a trade and

12 World Trade Organization, Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC, 36 ILM 218 (1997) para 20 (hereinafter Singapore Ministerial Conference).

13 As above.

14 World Trade Organization, Ministerial Declaration of 14 November 2001 WT/MIN(01)/DEC/1, 41 ILM 746 (2002) para 24 (hereinafter referred to as the Doha Ministerial Conference).

15 WTO, Doha Work Programme: Decision Adopted by the General Council on 1 August 2004, 3 WT/L/579 (2 August 2004).

competition policy. Instead, India as represented by the then Minister of Commerce, Dr BB Ramaiah, preferred to observe the work of the UNCTAD on competition policy.[16] It was stated that UNCTAD had also drawn up a Code of Conduct for Transnational Corporations in this regard which remained moribund.[17] Hence, some form of distrust in holding further negotiations in the area of competition policy was seen. The Code of Conduct first began with the efforts of the Ad Hoc Inter-Governmental Working Group, which was set up by the UNCTAD Commission on Trans-national Corporations. In addition, Dr BB Ramaiah in representing the country on the matter was of the view that competition policy being closely linked with that of investment policy should only be included within the agenda of the TRIMS; and until that can be done, should be taken care of by the UNCTAD.[18] To this end, it was believed that while investment policy as regulated by the Agreements on TRIMS strives to create a more favourable investment climate amongst Member-states, in the form of more liberal FDI regulations, the same in turn creates competitive opportunities among nations.

2.2 The Indian perspective at the Doha Ministerial Conference

The situation did not seem to improve in the next Ministerial Conference either, with India continuing to oppose the inclusion of competition policy.[19] In particular, it viewed the inclusion as something which could be deliberated exclusively after scrutinising

16 Final Act and Related Documents on the United Nations Conference on Trade and Employment, UN Doc E/CONF2/78 (1948) (hereinafter referred to as the UNCTAD), reprinted in Clair A Wilcox *A Charter for World Trade* (1949) 231 (Clair A Wilcox represented the US during the ITO and GATT negotiations).

17 United Nations Conference on Trade and Development, Draft United Nations Code of Conduct on Transnational Corporations (1974) http://www.unctad.org/sections/dite/iia/docs/.../en/13%20volume%201.pdf (hereinafter known as the Code of Conduct).

18 Speech by BB Ramaiah, Minister of Commerce, India, Singapore Ministerial Conference, WT/MIN(96)/ST/27(Dec 9, 1996), http://www.wto.org/english/thewto_e/minist_e/min96_e/st27.htm. In particular, Ramaiah stated, 'In respect of competition policy also, we would like to see the work to be initially undertaken in UNCTAD. I recall at this juncture, that UNCTAD had drawn up a Code of Conduct for Transnational Corporations. However, because of lack of enthusiasm on the part of major delegations for the concept of supervision over transnational corporations the Code of Conduct was not approved. Just as in respect of investment policy, in the case of competition policy also, the subject has to be looked into as part of the TRIMS review in 1999-2000. In the meanwhile, UNCTAD should examine all the aspects of competition policy as already decided at Midrand.'

19 Speech by Murasoli Maran, Minister of Commerce, India, Doha Ministerial Conference, WT/MIN(01)/ST/10) 10th November 2011, http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_statements_e.htm. In particular, it was stated: 'In the areas of … Competition … basic questions remain even on the need for a multilateral agreement. Most importantly, do the developing countries have the capacity to deal with them? Will we be able to say that they do not impinge strongly on domestic policies that are well removed from trade? Are the basic trade principles like non-discrimination or market access appropriate for

firstly whether developing countries indeed have the capacity to deal with such an inclusion; secondly whether the core principles of the international trade regime are appropriate for competition policy and thirdly whether competition policy is capable of being regulated by the WTO, which essentially regulates international trade between nations and is multilateral in nature.[20] These issues that were raised in the Doha Ministerial Conference by Mr Murasoli Maran, the then Minister of Commerce did not permit a *prima facie* inclusion of competition policy within the WTO until the same were 'carefully studied' and an 'explicit consensus' on the same could be obtained.[21]

2.3 The Indian perspective at the Cancun Ministerial Conference

India seemed to have a growing skepticism about the inclusion of competition policy with the framework of the multilateral trading system. This skepticism reappeared in the discussions that formed part of the Cancun Ministerial Conference before which the decision to 'drop-out' deliberations about including competition policy within the framework, were made. It was argued on behalf of India that the country could not be expected to be ready for such an inclusion, given the fact of the diverse economic culture that forms part of the WTO Membership and that a uniform competition policy between developed and developing nations would be hard to imagine.[22] Prior to anticipating whether such an inclusion is desirable or not, it was argued that it would be preferable to analyse the core principles of international trade policy, the cooperation mechanisms and the ways and means by which hardcore cartels can be prohibited.[23]

Therefore, albeit that the fact that the decision to include competition policy within the ambit of the WTO was rejected finally

dealing with issues like Investment and Competition? Would the Marrakesh remit for WTO which talks only of multilateral trade relations permit these other issues to be covered? We are very doubtful if we can give affirmative replies to all these questions. It is our considered view that we need to carefully study them further before rushing to decisions. In any case, the Singapore Declaration requires an explicit consensus for any decision to move to negotiations. Let us therefore wait till an explicit consensus emerges on these issues.'

20 As above.

21 As above.

22 Speech made by Arun Jaitley, Minister of Commerce and Industry and Law and Justice, India, Cancun Ministerial Conference, WT/MIN(03)/ST/7 (10 September 2003), http://wto.org/english/thewto_e/minist_e/min03_e/min03_statements_e.htm. It was stated that: 'Countries at different stages of development have viewed competition issues differently based on the effects they have on their economies. Convergence in views can arise only between countries at similar stages of development. The WTO membership is too diverse to admit a framework that suits all. Further work needs to be done on understanding elements in competition such as core principles, cooperation mechanisms and the coverage and prohibition of hardcore cartels through appropriate mechanisms before we can start comprehending the implications of any multilateral discipline.'

23 As above.

as part of what is commonly known as the 'July Decision' in 2004, India's response to such deliberations and negotiations remained lukewarm.

To this end, it was seen that India's main objection with regard to the negotiations on trade and competition policy pertained to the fact that it considered it dangerous for its economic development, to blindly transplant the competition policy suggested by its developed counterparts. For this reason, India did not desire to commit itself to the sort of negotiations the WTO would conduct on the subject matter.

In answer to the doubts and inhibitions mentioned above, it must be noted that competition policy and trade policy, albeit possessing certain differences, are policies which complement and supplement one another. Hence, despite the fact that international trade policy does not *per se* seek to address the conduct of private individuals, its main aim remains that of improving competitive opportunities.[24] For this reason, the one policy would find it difficult to sustain without the other. Where international trade policy operates and regulates market access at the international level, competition policy is mainly at the domestic level.[25] In addition, both trade and competition policies go hand in hand in achieving economic development.[26] With the reduction of trade barriers, it has been seen that international trade policy has improved the standard of living of the people around the world, due to a substantial reduction in world commodity prices. At the same time, competition policy too has created competitive opportunities in the market and sought to bring about economic development and consumer welfare.

24 The Preamble, Marrakesh Agreement Establishing the World Trade Organization, Apr 15, 1994, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade negotiations 4 (1999), 1867 UNTS 154, 33 ILM 1144 (1994) (hereinafter Marrakesh Agreement or WTO Agreement). The WTO aims at improving competitive opportunities in the markets of its respective Members. For this reason, the preamble of the WTO addresses the Organization's mandate of improving the standard of living, increasing employment and the production of trade in goods and services.

25 It is said that competition policy is mainly at the domestic level, because, apart from the recent growth in international competition policies in the form of bilateral, regional and multilateral agreements, competition policy mostly operates exclusively at the domestic level in most jurisdictions.

26 United Nations Conference on Trade and Competition Policy, *The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy*, in The Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive business practices, td/rbp/conf.7/3, New York, Geneva (8-10 Nov. 2010); United Nations Conference on Trade and Development, Trade and Development *Report*, United Nations, New York, Geneva (1995); Working Group Report, Working Group Report on interaction between Trade and Competition Policy submitted to the General Council, WT/WGTCP/W/127/7, 22 (June 7, 1999).

2.4 The Indian experience with competition policy

The Indian experience with competition policy may be traced back to the year 1950. The yearning to create competitive opportunities and shun monopolistic practices which thwart economic development was seen in provisions of the Directive Principles of State Policy (DPSP) of the Indian Constitution, which came into force in the year 1950. In particular, Articles 38 and 39 of the Indian Constitution sought to bring about distributive justice. To this end, Article 38 aims at achieving economic justice, among other things.[27] Article 39 on the other hand is more direct in its aim of reducing monopolistic power. Thus, it seeks to prevent the concentration of wealth in the hands of a select few.[28] In addition, it also desires the distribution of ownership of wealth in such a manner that it brings about the common good of the people.[29] These constitutional aims of bringing about distributive justice with the reduction of monopolistic power were however crystallised via the various industrial policy statements from time to time.

2.5 The Indian industrial policy statements

It is important to appreciate that a country's industrial policy goes a long way in determining the ability of the country to create conditions of competition. Basically, industrial policies are the 'government efforts to alter industrial structure to promote productivity based growth.'[30] Therefore, in general the industrial policy includes the rules, regulations and policies that governments adopt in order to achieve industrial growth.

Prior to 1991, industrial policy statements included government participation in the development of the country in a large manner.[31] In other words, industries were more or less government controlled. This situation changed immensely after 1991, with the policy statements now preferring more of private participation as against

27 The Indian Constitution, Art 38. Art 38 provides: 'State to secure a social order for the promotion of welfare of the people — (1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.'

28 As above. Article 39(c), which provides: 'that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women.'

29 As above. Article 39(b) which provides: 'that the ownership and control of the material resources of the community are so distributed as best to sub-serve the common good.'

30 Definition provided by the World Bank (1992) available at www.worldbank.org/research/trade (last visited 11 December 2012).

31 B Thakur, R Gupta & R Singh 'Changing face of India's industrial policies: A look' (1972) 2(12) *International Journal of Scientific and Research Publications*.

industries being controlled by the government. This would help one comprehend *the extent to which* the country's industrial policy has in fact played a role in achieving economic growth, making India the third largest economy.[32]

3 India's industrial policy statements

3.1 India's Industrial Policy Statements prior to 1991

India's industrial policy can be traced back to the year 1948. They have a longer history than the Indian Constitution, which came into force in the year 1950. However, the coming into force of the Indian Constitution changed people's perception; creating more focus on economic acceleration, raising the standards of living for its citizens and forming a socialist pattern of society.[33] Given that India had newly achieved independence from the shackles of British rule, the State was responsible for the development of all the industries.[34] Consequently, the private sector played a modest role in economic acceleration as part of the Industrial Resolution of 1956.[35]

The subsequent years sowed the seeds for the creation of greater competitive opportunities in India and increased her potential to be part of the world economy. Against this backdrop, the government decided to set up a Monopolies Inquiry Commission to review issues pertaining to concentration of power, given how that unduly restricts economic growth.[36] This in turn led to the setting up of the Monopolies and Restrictive Trade Practices Act in the year 1969.

The subsequent policy statements in addition saw an increasing trend towards the country's realisation about how concentration of economic power in the hands of a select few could dampen the aspirations of raising the standards of living for the people and the rate at which her economy would be as strong as that of her Western counterparts. This in turn led to the government's preference for

32 Banerji & Rishi Shah 'India overtakes Japan to become third-largest economy in purchasing power parity' *The Economic Times* (April 19, 2012), http://articles.economictimes.indiatimes.com/2012-04-19/news/31367838_1_ppp-terms-india-s-gdp-power-parity.

33 Industrial Policy Resolutions, available at http://eaindustry.nic.in/handbk/chap001.pdf

34 As above.

35 As part of the Industrial Resolution of 1956, the administration of industries was played into three broad categories, namely: 17 industries placed under the exclusive domain of the State; 12 industries placed into the domain of the State, albeit with the private sector permitted to supplement the efforts of the State; and the remaining industries wherein it was the sole responsibility of the private sector to initiate development and with the State permitted to take part in the administration as well.

36 The Industrial Policy Measure, 1964.

small and medium enterprises especially when the same concerned mass consumption by the people.[37]

Decolonisation further provided an impetus for India to slowly but steadily introduce conditions of competition in the nation; i.e. to say that as compared to the previous years, when the State held the exclusive responsibility for growth, there was a growing concern towards technological upgrading and modernisation apart from the creation of higher employment levels, promoting exports and the protection of consumers from unfair trade practices.[38] In addition to the respective industrial policies that helped the nation respond to the emerging and pressing needs requisite for economic development, specific agendas for growth were also seen in the successive five-year plans that were responsible for the initiation of various measures to achieve these targets.[39] There was also a shift in focus towards greater deregulation of market forces.[40] Thus, while the (industrial) policy statements of the previous years focused more on the role played by the State and its responsibility in the administration of most industries, the same was believed to be largely inappropriate in the later years. This consecutively called for greater autonomy in the regulation of industries which could be achieved by giving away the licensing requirements.[41]

3.2 India's industrial policy statement post 1991

India has remarkably transformed itself in terms of economic growth that has led to greater integration into world markets as a result of its policy initiatives since 1991. In general, the policy statement of 1991 proved to be promising so far as entrepreneurship, indigenous technology, research and development, creation of new technology and the development of capital markets essential for increasing competitiveness and raising the standards of living went.[42] This in

37 The Industrial Policy Statement, 1973.

38 In order to encourage technological innovation and modernisation, the State provided special incentives to industries that were engaged in doing so by raising the investment limits and thus providing greater opportunities to participate in the expansion of the economy; the Industrial Policy Statement, 1980.

39 Therefore, while the respective Industrial Policy Statements were largely concerned with 'what is to be done' in order to achieve accelerated growth, it may be said that the successive five-year plans were largely concerned with 'how it is to be achieved' thereby calling for the laying down of various measures that must be taken if growth is to be achieved.

40 Industrial Policy Statement, 24 July 1991, Government of India, Ministry of Industry, New Delhi.

41 It must be noted that the initial phases of deregulation of the Indian markets permitted doing away with the licensing requirements of all but 26 industries, as part of the Industrial Policy Statement of the 1980's.

42 Industrial Policy Statement, 24 July 1991, Government of India, Ministry of Industry, New Delhi.

turn reflected upon India's ideals to become an industrialised nation.[43]

As globalisation became an increasing trend with almost all countries focusing on molding policies to accommodate these changes in trends and increase competitive possibilities with a view to answer the increasing demands of the citizens, the Industrial Policy Resolution of 1991 did away with the compulsory licensing of an additional number of industries. Thus, compulsory licensing was now required for merely 18 industries.[44] Furthermore the government eased the procedure for the recruitment of specialised expertise; and also concentrated more on the control of restrictive business practices that unduly hamper trade and efficiency in the way markets function.[45] However, policies cannot function in a vacuum and must be largely supplementary and complementary in nature. While thus recognising the need to constantly upgrade technology, given the bearing the same has on the economic development and consequently on consumer welfare, it became incumbent to shift focus from inward looking policies that rely exclusively on domestic goods and inputs.[46] This consequently led to a shift from a strictly regulated environment to a deregulated one; it became incumbent to now focus on outward looking strategies in the light of the new international economic scenario and the requirements of the global agenda.[47] This led to the encouragement of foreign direct investment, especially in industries relying on high investment required to upgrade the existing technology and the one's relying on the exports of their merchandise; albeit with a ceiling limit of 51%[48] which was subsequently increased to 100% in sectors revolving around those in Special Economic Zones, petroleum products, natural gas pipelines and magazines, and periodicals and journals promoting scientific and technical knowledge.[49]

The period post 1991 saw landmark changes in the governance of the country, marking a shift from 'government' to 'governance.'

43 To this end, seen in a holistic manner, the Industrial Policy Resolution aimed at increasing competitiveness in India with a view to achieve international competitiveness.

44 Industrial Policy Statement, 24 July 1991, Government of India, Ministry of Industry, New Delhi.

45 As above. The Industrial Policy Statement of 1991 included the mandate of enacting the Monopolies and Restrictive Trade Practices Act (MRTP Act), in order to effectively combat restrictive trade practices that deter competition in India.

46 As above.

47 As above.

48 This reflects a change from the past industrial policies on foreign direct investment that permitted fully owned foreign companies in areas that require sophisticated technology or are purely export oriented. In the remaining industries, it was considered unnecessary to permit foreign collaboration in financial and technical matters, considering that indigenous knowledge over the same was already available. See Industrial Policy Resolution, 1977.

49 The Industrial Policy Statement, 1991.

The Monopolies and Restrictive Business Practices Act passed as a result of the Policy Statement in 1969 was considered to be largely irrelevant in the light of new reforms.[50] This made the passing of the Competition Act, 2002 important given the nature of the new transnational movement that made illegal the entering into anti-competitive agreements with regards to production, supply, storage, distribution, acquisition and more broadly any act that causes or is likely to cause an adverse impact on competition in India. In addition, the Competition Act of 2002 called for the setting up of the Competition Commission of India: a much needed forum to hear disputes and enforce the provisions of the Act. Considering that the promotion of competition was relatively new to an orthodox Indian regime the Competition Commission of India is also imposed with the duty of increasing awareness of the importance of competition in increasing consumer welfare and economic efficiency.

4 The role of India's Industrial Policy in achieving economic development

Apart from taking important initiatives in reforming India's economy by means of increasing its ability to compete in world markets, the policy initiatives post 1991 went a long way in transforming the Indian image by opening up to the private sector those sectors that were once the monopoly of the State.[51]

India now became increasingly aware of the significance of the interdependence with the progressive introduction of new policies and strategies on international trade and foreign direct investment. This new approach facilitated India to achieve high growth rates in terms of GDP that accelerated manifestly from 5.5% in the period between 1989-1998 to 7.2% from 1999-2010[52] and then to an

50 This primarily refers to reforms in the form of de-regulation of industries and enhanced inclusion of the private sector in the economic development of India.

51 For instance, there were some sectors that were the exclusive responsibility of the State by means of a State monopoly in the same; these included telecommunications, electricity, post and transport. In addition, the Government also permitted foreign direct investment up to 100% in matters such as the maintenance and construction of roads and ports; considering the bearing of the same on the up gradation of technology and innovation in the means of manufacture. In addition, the private sector is largely responsible for meeting India's global needs and in particular the problem concerning inadequate infrastructure, electricity, roads, power, telecommunication, sanitation and irrigation to name a few; in which public administration over the above-mentioned matters was considered to be insufficient. It was thus seen that investments by the private sector in augmenting the growth that is necessary to achieve India's goal. Also See, World Trade Organization, *Trade policy review - India*, WT/TPR/S/249 (14-15 September 2011), http://www.wto.org/english/tratop_e/tpr_e/s249_sum_e.pdf.

52 As per the Indian Ministry of Finance, *Economic survey*, 2010-11.

astounding 9% (approximately) in the year 2011.[53] Consequently India began to be considered as one of the ninth largest traders after the US, EU and Japan.[54]

The new approach that India had adopted was a major achievement as far as investment and the innovation of new technologies was concerned. Hence, small and inefficient undertakings were under constant pressure to reform. Industrial restructuring was a priority.[55] By introducing the new policy statements post 1991, especially those relating to permitting foreign direct investment, inefficient undertakings were motivated to reform due to enhanced competition which was now international in scope.[56] With this, it was incumbent to fashion new policies to accommodate these changes. Apart from that, India incorporated significant changes in the five-year plans to introduce new policies from time to time; and thus create an environment in which the economy grows rapidly to create livelihood for its people.

5 The significance of competition policy in achieving the goals of the Indian Industrial Policy Statement

In the event that goods are trans-nationalised not only due to globalisation and the subsequent liberalisation of tariffs, but also due to the progressive changes in the industrial policies of a nation; which increase the exports and the imports of the nation, it is important to protect the same from anti-competitive practices.

The mere incorporation of changes in the industrial policy of any nation in general, and in this case, with reference to India is not

53 This meant that India's per capita income had increased from US $204 in the year 1978 to $208 in the year 1991 and to $1,202 in the year 2008.

54 World Trade Organization — Economic Research and Statistics Division *Evolution of Asia's outward-looking economic policies: Some lessons from trade policy reviews* (14 September 2011) http://www.wto.org/english/res_e/reser_e/wpaps_e.htm.

55 Industrial Policy Statement, July 24, 1991, Government of India, Ministry of Industry, New Delhi; For a detailed discussion on industrial restructuring in India, see Thakur, Gupta & Singh (n 31 above); and J Ghosh, 'Trade liberalization and economic restructuring: Can India skip the industrial phase?' IDEAs Conference on Post Liberalization Constraints on Macroeconomic Policies Muttukadu,http://www.networkideas.org/feathm/mar2006/trade_liberalisation.pdf.

56 Indian Industrial Policy, 1991. Primarily, the Industrial policy statement of 1991 recognised that: 'The attainment of technological dynamism and international competitiveness requires that enterprises must be enabled to swiftly respond to fast changing external conditions that have become characteristic of today's industrial world. Government policy and procedures must be geared to assisting entrepreneurs in their efforts. This can be done only if the role played by the Government were to be changed from that of only exercising control to one of providing help and guidance by making essential procedures fully transparent and by eliminating delays.'

adequate, and must be accompanied by changes that are more holistic in nature. To this extent, it may be stated that albeit the fact that India definitely has achieved potentials for high growth since the post-independence era, the same cannot be sustained unless and until it has *supportive policies* in place. These may be time-consuming but are nevertheless vital in the event any real place in the world is to be achieved.

In the light of the changes brought about by the economic reforms providing undertakings with a greater autonomy in their management, the same impacted competitiveness in the market to a large degree. Thus in the year 2000-01 where exports of goods and services formed merely 14% of the GDP, exports were able to form 22% of the GDP in the year 2010-11.[57]

The lofty economic reforms that 'push forward' a robust private sector must not only ensure that the interests of the private sector are protected but must also assure *all* competitors that any anti-competitive activity will not be tolerated. Furthermore, an effective competition policy also seems to be the need of the day in view of other policies that target economic growth. For instance, in light of India's current objective of accelerating its exports to 25% p.a. accompanied by various policies such as tax incentives and export promotion, it only appears practical that the promotion of a robust competition policy would be extremely beneficial, especially since the same would not only increase the GDP with technological innovations but would in addition decrease the cost of inputs that are used in the manufacturing of these exports.[58] Thus, increasing competition would substantially decrease the cost; but there is an increasing risk that the inputs might be eventually 'hit' by anti-competitive practices that are trans-national in nature, so as to make all the above mentioned policies redundant.[59]

There is thus an urgent need to lay the foundations for the same given the increased role played by the private sector that may eventually be in a position to monopolise and abuse their market

57 Planning Commission, Government of India, *Draft: A faster, sustainable and more inclusive growth: an approach* http://planningcommission.nic.in/plans/planrel/12appdrft/appraoch_12plan.pdf.

58 It must be noted that India seeks to double her share in global trade by 2020 by accelerating the export growth to 25% as part of her Foreign Trade Policy (FTP): 2004-09 and 2009-14; See, Trade Policy Review Body, World Trade Organization, *Trade Policy Review: Report by the Secretariat: India*,WT/TPR/S/249 (10 August 2011) http://www.wto.org/english/tratop_e/tpr_e/s249_sum_e.pdf (14 September 2011).

59 This once again refers to the need for policy objectives to be more holistic in nature. The exclusive concentration on increasing exports and the share of the same does not seem to be practical; nor does the 'neutralization' of the costs of the inputs seem holistic. Therefore, policy makers must in all cases have their eyes set on an effective competition policy *in the absence of which* or for that matter *with the failure of which* the goals mentioned above appear to be highly unrealistic.

power. This in turn calls for a greater cooperation and the consolidation of many policies in the event the economy is perceived to be at a higher growth level.

6 The significance of the differences in 'levels of development' in arriving at a consensus for negotiations on a trade and competition policy

Despite the fact that India does possess a competition law to tackle anti-competitive conduct on its territory, it is well known that problems are bound to arise and impact the economic development of the country, when such conduct is at the trans-national level. However, India's stand has been that negotiations on a trade and competition policy would be difficult given the differences in the development levels.[60] For this reason, it becomes important to analyse the significance of these differences in order to ascertain whether or not India would be a beneficiary to such negotiations.

Traditionally, the legal order has been driven by a large variety of developments that have in turn led to a large variety of changes in the society. Subjects that exist today need not have existed in the past. With respect to international trade, the development of the same has been driven largely to prevent the communal and in turn economic tensions that caused the Second World War.[61] Hence, international relations that in the past governed only a limited variety of subject-matters today encompass almost all the subject-matters that govern human life. The growth of competition law and policy also as seen, was compelled by an increase in trade; and no longer remained to be the exclusive priority of the US, EU or Japan. Motivated by its welfare enhancing objectives and the escalation in the number of cartels, about 100 nations were compelled to enact this law; India being one such country. In addition, it has also been seen that competition

60 Speech made by Arun Jaitley, Minister of Commerce and Industry and Law and Justice, India, Cancun Ministerial Conference, WT/MIN(03)/ST/7 (10 September 2003), http://wto.org/english/thewto_e/minist_e/min03_e/min03_statements_e.htm. It was stated that: 'Countries at different stages of development have viewed competition issues differently based on the effects they have on their economies. Convergence in views can arise only between countries at similar stages of development. The WTO membership is too diverse to admit a framework that suits all. Further work needs to be done on understanding elements in competition such as core principles, cooperation mechanisms and the coverage and prohibition of hardcore cartels through appropriate mechanisms before we can start comprehending the implications of any multilateral discipline.'

61 Terborgh 'The post-war rise of world trade: Does the Bretton Woods system deserve credit?' Department of Economic History London School of Economics: working paper series no 78/03, September 2003, http://www.lse.ac.uk/economichistory/pdf/wp7803.pdf; L Briscoe 'The growth and structure of international trade since the Second World War' (1975) 1 *British Journal of International Studies* 209-225.

policy and trade policy are differing in certain aspects, making it incumbent to consider an enlargement of the current scope of the new international economic order.

By and large, the development and growth of the new international economic order has been prompted by the vast inclusion of countries which did not earlier form part of the same.[62] This has in turn necessitated the inclusion of new subjects, in keeping with the interests of the new members of the international community. These new members of the international community are none but the members of the third world,[63] making the membership of the new international economic order extremely diverse. This diversity in the membership of the new international economic order therefore calls for compelling changes in the administration of the same. However, it has been argued that these changes brought about in the new international economic order have been more or less based on the Western culture and philosophy.[64]

The inclusion of the subject matter of 'competition policy' in the legal order has largely been the result of decolonisation; and the increasing need for the members of the third world to model their economic development on the path followed by their Western counterparts. As a result of decolonisation or in other words, the emancipation from the bondage of British Colonies, the transformation of India's economy can be seen as the direct result of its wishes to mimic the western economic structure; and is aptly recognised by ben Salah (1957) to be the 'profound revolution of mental, moral, social and economic structures.'[65] To this end, competition law and policy are merely means to an end and not ends in themselves.

Hence, where the subject matters of international law have traditionally been the creation and a vision of developed nations, will it be right to imply that the subsequent inclusion of developing nations into the family of international law would mean a structural change in the international economic order?[66] In a related vein, Freidman observes that:

62 ben Salah 'Significations et perspectives de la decolonization' (1957) 25 *L'Esprit* 891; W Friedman 'The position of underdeveloped countries and the universality of international law' (1963) 2 *Columbia Society of International Law Bulletin* 5-12; W Friedman 'The changing dimensions of international law' (1962) *Columbia Law Review* 1150-53.

63 A third world country is one that is markedly different from the developed nations of the United States, European Union, and the Soviet Bloc in respect of their economic development, differences in culture, tradition and turbulences in the political regime, and involves largely countries in the South: Asia, Latin American and Africa.

64 Verizijl 'Western European influence on the foundation of international law' (1955) *International Relations* 137.

65 ben Salah (n 62 above) 891.

> Despite all the difference in religious, cultural, and historical background, the traditional attitude of the major centers Asian civilization with regard to international politics and law has not been markedly different from that of their Middle Eastern or European counterparts. Further, whether the differences may have been in the past, the facts of modern state organization and international life has completely overshadowed any traditional difference of outlook and philosophy. The representatives of Asian values have become modern nation states, of greater or lesser power, organized on the lines developed by the European nations in previous centuries, and seeking to realize national aspiration. In doing so, they are subjected to the same tensions between international community interests, reflected in international law, and national aspirations, reflected in the power politics of States.[67]

Primarily, the models of growth of nations of the third world, or in other words, newly decolonised nations, have been on the lines of mostly European nations. To further enunciate, it may be stated that due to the reason that cultural values cannot be seen in a flux and seem to be the driving force to influence the values and political and economic regime, the latter is largely based on Western values.[68] However, the inclusion of new members in the international community means and involves the understanding of new realities of the international life. Hence, where the international trade regime once generally concentrated on tariff barriers and trade concessions, non-tariff barriers are now coming to the forefront. Anti-competitive practices are one such type of non-tariff barrier. Consequently, every time a new international rule is sought to be fashioned, differences in the economic development cannot be ignored. The inclusion of the third-world countries calls for greater changes, and 'changes the number and intensity of the differences of conflicts and interests among the members of the world society.'[69]

Referring to the defunct talks on negotiations of a trade and competition policy within the ambit of the WTO, it would be totally incorrect to state that the levels of economic development must not be taken note of. Therefore, such negotiations would not only bring

66 This position can be succinctly elaborated with reference to the international trade policy. The birth of the GATT in 1947 witnessed developed nations form the majority of the Membership, with merely 10 out of 23 of its Members being developing nations. Further, it was only in the 1960's and the 70's that a transformation in the economic scenario that provided an impetus for a change in the existing circumstances and the developing country Membership was on a 2:1 ratio. Therefore, there was a shift in traditional international law that was mostly if not exclusively ruled by developed nations; as a result of developing countries constantly striving for change in the economic, driven by the political and cultural regimes felt in the West. See also Hudec *Developing countries in the Gatt system* (1st ed 1987) 117.

67 Friedman (1963) (n 62 above) 5; Friedman (1962) (n 62 above) 1150-1153.

68 Fatouros 'International law and the Third World' (1964) *Virginia Law Review* 783 822.

69 As above.

about enhanced economic development, but also strengthen the rules of the current the international trade regime. It is on this basis that a nation like India would have the most to gain from the new international economic order. This is because such consensus necessary for negotiations may not always be there among members of the international community. Rather, such consensus should, like most norms of the international legal order, be reached after having due regard to the *interest* these negotiations (on trade and competition policy) *seeks to serve*. Consequently, a norm that is generally domestic in nature may be substituted for an international norm, given the large scale developments in the international economy. In a related vein, Fatouros rightly points out that:

> In the first decade after the Second World War, the international legal order was being threatened by the struggle between two powerful blocs whose conceptions of the international order were different but were claimed to be incompatible. The emergence of the third world did not eliminate the conflict, but it has changed its character by introducing new powerful elements of diversity. The role of universal international law and organization has now become more important, since these provide a degree of cohesiveness, *the need for which is more evident in a pluralistic than in a bipolar society.*[70]

Given the nature of the changes in the new international economic order, the interest of developing countries has completely changed the face of older conflicts in the international community. This complete transformation of the international order in general and in India's development policies meant that problems are no longer domestic but transnational in nature. However, is the international legal order well equipped to deal with the new transnational problems? Thus it must be noted that despite the fact that there is a large number of treaties and international organisations to govern a large variety of these transnational problems, there seems to be a vacuum in addressing certain problems. With respect to competition law and policy also, the situation has been the same. The changes in the international sphere have necessitated that countries like India act as creators and catalysts of change.

In the discussions pertaining to the India's industrial policy statements, it was seen that post-independence years called for an enhanced change in the way the international community perceived the country. The nation's keenness to mimic the model of development of the Western countries (and in particular Western Europe) may be seen by the establishment of parliamentary democracy modelled on the West. Further, the desire to form part of the international life with the setting up of various ministries should also be noted. India is a party to many conventions and takes part in

70 As above.

international conferences.[71] Decolonisation therefore led to the large scale inclusion of India as a nation in the global scenario.[72] Further, ignorance of such interests would only lead to legal and political chaos.[73]

7 A favourable resolution to the new problems in trans-national activity

The path towards liberalisation and its consequent increase in competitive opportunities is only one side of the story. In reality, increased liberalisation only means that anti-competitive practices are on the rise.[74] To enunciate, it may be stated that as a result of this increased globalisation and the opening up of world markets, market players are only more able to interact with each other. Not only did market players interact with the birth of the new international economic order but they also compelled the State to delegate its functions, given the increasing role of the private sector. Picciotto describes such delegation as one of the drivers for transnational government networks, given how international trade has changed to include the operations of multinational enterprises, in turn mirroring this trend towards a regulated state that is compelled to delegate its authority to specialist agencies.[75]

Secondly, it becomes important to consider the deliberations regarding the negotiations of a trade and competition policy within the ambit of the WTO in the light of a country's industrial policy. A reasons for this is the fact that competition policy at the domestic level in most countries has primarily been to achieve the goals and

71 Friedman underscored that the desire by the developing countries in general to form part of the international life relates to the fact that non-participation works as a sanction. That is to say, the significance of international law lies in the fact that it endeavours to enforce certain rules and standards of international life. To this extent, non-participation would only work to the detriment of such nation states. See generally W Friedmann 'National sovereignty, international co-operation, and the reality of international law' (1963) 10 *UCLA Law Review* 739-753; W Friedman *Law in a changing society* (1959).

72 The inclusion of India in the global scenario has been discussed in some detail in the previous part of this paper. In brief, it was highlighted, that India vide its industrial policy, and especially that post 1991 made some structural changes for further economic development in the country. Hence, regulations on foreign direct investment were liberated further; permitting up to 100% in certain sectors. These changes further increased India's participation in international life.

73 This is for the reason that given the current changes in the international scenario, i.e. with the inclusion of the members of the third world; it has become obvious that such countries strive for economic and political development. Ignorance of such wishes on the part of developed nations would lead to instability in the international life due to enhanced rivalry among nations.

74 Stigler 'A theory of oligopoly' (1964) 72 *Journal of Politics and Economics* 43.

75 S Picciotto 'Networks in international economic integration: Fragmented states and the dilemmas of neo-liberalism' (1996-7) 17 *Northwestern Journal of International Law and Business* 1014 1018.

objectives of the industrial policy, namely that of accelerated economic development.[76] In a related vein, it would also be vital to consider whether international competition policy would in fact complement the industrial policy of India; and to what extent would such negotiations serve India's vital economic interests.

In the words of Union Corporate Affairs Minister Dr M Veerappa Moily, the competition policy of India would be the second best reform after the 1991 economic reforms[77] that led to stabilisation and structural adjustment with the aid of the World Bank and the IMF, industrial deregulation, trade liberalisation and in particular foreign direct investment as an impetus to globalisation. These structural reforms also led to a shift in policy from economic liberalisation to what is termed as neo-liberalism:[78] in turn leading to the maximisation of the role played by the private sector in the economy of the country. Thus, while on one hand the global integration into the world markets has assured India a place in the world economy and a sound growth in the GDP, on the other hand, this growth does not seem to come free of uncertainties. Hence, where India has secured the place of being the fourth largest economy in the world and a GDP of $4.06 trillion, growing at 8% in the year 2011, how far can it be stated that this is sans tribulations?

Globalisation marked by an increase in the interaction between market players has certain trade-offs in the form of anti-competitive activities that stagnate the process of development. Anti-competitive practices occur in almost all the industries and may last from a certain amount of days to a number of years; the most common of them being cartelised agreements or arrangements and agreements governing price fixing activities. However, where these cartelised activities impact developing countries, the impact is overwhelming for the reason that developing countries may not always be well equipped to deal which such activities by reason of lack of sound laws. Where countries like India do possess a sound law on competition to thwart such activities, the motivation to enforce it may be missing. To add

76 For a detailed discussion on how Competition Policy is promoted to achieve economic development, see, Roberts 'The role for competition policy in economic development: The South African experience' Trade and Industrial Policy Strategies, Working Paper Series: 8-2004, http://www.idrc.ca/EN/Documents/The-Role-of-Competition-Policy-in-Economic-Development.pdf; Teo 'Competition policy and economic growth' ASEAN Conference on Fair Competition Law and Policy in the ASEAN Free Trade Area, Bali 2003, http://www.jftc.go.jp/eacpf/04/singapore_p.pdf.

77 V Moilly 'Competition distortions in India- A dossier, July-Sept 2011' (10 February 2012) http://www.cuts-ccier.org/pdf/CDIDossier-July-Sep11.pdf.

78 For a detailed discussion on economic liberalisation and neoliberalism, see Scholte 'The sources of neoliberal globalization' United Nations Research Institute For Social Development, Overarching Concerns Programme http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/9E1C54CEEB19A314C12570B4004D0881/$file/scholte.pdf; DM Kotz *Globalization and neoliberalism* (2002) 12(2) *Rethinking Marxism* 64-79.

to the injury, such activities hamper consumer welfare for reason that even though they have been shown to exist, consumers lack the ability to tackle them by reason of the peculiar legal, political and economic circumstances that prevail here.[79] Lack of antitrust complaints by consumers does not entail that these impacts are lesser in the jurisdictions of developing countries. For example, the Vitamin cartel badly affected the consumers of India with a loss of approximately $25.71 million to the economy due to the rise in prices of an essential commodity like vitamins.[80] This cartel operated in the form of price fixing and division of market agreements; involving the collusion of leading producers such as BASF and Roche AG: Germany, Rhone-Poulenc: France, Takeda Chemical: Japan.[81] This entails that an absence in the ability to effectively tackle such cartels on the part of a country like India would create a large gap between the Constitutional goals and the operation of the enforcement mechanisms with respect to competition laws and policies. This means that where on one end, the country seems to strive hard to ensure a higher standard of living for its citizens, ensure consumer welfare and economic development, these goals are highly watered-down with the existence of transnational cartels and the inability of the country to tackle them. The influence of transnational cartels on the economy had therefore directly increased the prices of such an essential commodity, directly impacting the power of the poor to be able to purchase the same.

In addition to rising prices, restricted output and the lack of capability of India to tackle the same given the discrepancies in the legal and administrative system, the Indian economy seems to be at a greater disadvantage due to the capability of anti-competitive activities to limit the access to important information: information that determines the economic future of India. Restriction of and limits to access to information is the usual mode to freeze out new competitors. By doing so, barriers to entry are raised to a level where entry is already difficult for reason that in order to be competent to acquire entry into a market where entry norms are significantly high,

79 This appears to be in contrast to situations prevailing in the developed countries like the US and the EU which encourage antitrust actions by affected consumers.

80 JL Clarke & SJ Evenett 'A multilateral framework for competition policy' in Evenett, SJ (ed) *The Singapore issues and the world trading system: The road to Cancun and beyond* (2007) 14; Levenstein & Suslow 'What determines cartel success?' University of Michigan Business School, Working Paper No 02-001, (Jan 2002); Centre of Competition Law, Inv and Econ Regulation, Consumer Unit and Trust Society *Pulling up our socks: A study of competition regimes of seven developing countries of Africa and Asia: the Seven-Up project* (2003) http://cuts.org/pulling.pdf.

81 Europa, *Commission Imposes Fines on Vitamins Cartel*, IP/01/1625, Brussels, (21 November 2001), available at europa.eu/rapid/press-release_IP-01-1625_en.pdf.

it is imperative to possess the relevant technical know-how.[82] The buck does not seem to stop here. Colluders and participants of anti-competitive activities often use other forms of non-tariff measures to harm non-participants.[83] So, while the international trade policy seems to be concentrated largely on tariff barriers by reducing tariffs and eliminating barriers to trade, and condemning non-tariff measures in the form of quotas, or regulations or lack of transparency; it seems to be currently missing the bull's eye as far as anti-competitive practices are concerned. This is so because even non-participants in anti-competitive practices tend to 'free-ride' and thereby sell under the price fixing umbrella. In addition, there are other significant losses to our economy.[84] Even in the event that Indian undertakings may not be a part of the anti-competitive arrangements and agreements, there is an probability that besides making the economy vulnerable to the rising costs, lack of information and hence restriction on the outputs, the entry of Indian undertakings may be blocked artificially by means of false anti-dumping investigations and tariff barriers.[85] Hence where anti-competitive practices tend to raise costs artificially, every time a product is sold into the territory of another Member which is not a party to such an anti-competitive practice, it will only mean that the price of the latter product will be compared to the *artificial* price of the former by reason of a certain cartel or price fixing arrangement or an agreement to restrict the output.[86] So, each time the price of such a product is high, other products in comparison only have a lower cost (and therefore appear to be an act of predatory pricing); and are susceptible to enormous damages by means of authorised WTO remedies. Such problems may be overwhelming to the Indian economy given the fact that she relies tremendously on international trade as one of the major goals to increase the growth rate; and is only one side of the coin. Competitors that are a part of anti-competitive practices also tend to retaliate by means of indulging in predatory pricing in the territory of the country that attempts to compete with the undertakings indulging in anti-competitive practices. For example, at the time Indian undertakings tried to take advantage of

82 For example, the laminated plastic tubes cartel that was a result of the collusion between American National Can and the KMK Maschinen AG, wherein the latter licensed the former tube making and exclusive rights to purchase the same and also agreed to exit the American market and not sell or license to any other company for fifteen years, made entry extremely difficult for any other company: raising barriers where they were already high. Such agreements hamper development enormously, especially when developing countries greatly rely on such entry to accelerate their economic development; *United States v Am Nat'l Can Co* No 96 Civ 0145, 1996 WL 760292, 7-9.

83 Levenstein & Suslow 'Contemporary international cartels and developing countries: Economic effects and implications for competition policy' (2004) 71 *Anti-trust Law Journal* 801-852.

84 Levenstein & Suslow (n 83 above) 820.

85 As above.

86 Levenstein & Suslow (n 83 above) 822.

the Graphite electrode cartel[87] that 'vandalized' the market for the same by selling under the cartel price 'umbrella' and increased its world market share by 25% as against 14%;[88] there was a huge retaliation by the cartel operators and the Indian graphite producers 'claimed that the graphite electrodes are being dumped into India at the price of $2,200 per ton as against the international price of $ 3,200 per ton.[89] The retaliation by the US, EU and Japanese producers was in the form of restrictions on import of graphite electrodes from India;[90] which thus directly impacted India's share in the world market.[91] The cartel therefore had significant negative impacts on the Indian economy. Not only did it limit the access to the technology, but completely curbed the entry into any of the markets it operated in by means of dumping or alleging dumping on the part of the Indian graphite electrode producers each time they attempted access to the territory the cartel operated. After the crack-down of the graphite electrode cartel mentioned above, the market for the same experienced an increase in the price by 45-90%; and it was in fact an extremely harsh lesson learnt by India, given the fact that graphite electrodes were a vital input in the manufacturing of steel products.[92] Hence, not only did this increase cause momentous losses to the competitors, distorting competitive opportunities in the steel market, but also to the dealers and suppliers and final consumers of steel. In adding to India's injury, she was not even in a position to calculate the quantitative damages caused to the exchequer, given the lack of prosecutions in the Indian jurisdiction in turn leading to lack of information on the subject matter.[93]

It is for these reasons that the rationale of the sort adopted by India that it may not be urgent for India to consent to negotiations on trade and competition policy because she is not developed enough and hence neither are her markets large enough nor is she an active participant of global mergers, could be extremely detrimental to the

87 'Japanese subsidiary charged with international conspiracy to fix prices for graphite electrodes in the US' US Department Of Justice Press Release 23 February 1998.

88 'CVD on graphite electrodes imports likely' Fin Express, 20 April 1997, 2.

89 As above.

90 It was alleged that 'the growth of Indian exports is not being liked by the American/European and Japanese producers. In order to counter India's growth in exports, they are resorting to large scale dumping in India, and have cornered more than 30 per cent of the domestic market.'

91 Shirsat & Samata Dhawade 'Graphite electrode sector: Huge export potential waiting to be tapped' (1997) Business Standard.

92 The Wall Street Journal in its report stated that the demand for graphite electrodes accounts for approximately 85% of the demand. It was not clear whether the figure represented merely the demand in the European market or the global demand; but was expected to mean the global demand; See 'Canadian Subsidiary of UCAR Pleads Guilty of Price Fixing' *Wall Street Journal* 19 March 1999.

93 For a detailed discussion on the Graphite electrode cartel, see Commission Decision of 18 July 2001 Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement.

achievement of other economic policy objectives. The developing countries and in particular India are no longer vulnerable to the demands of her developed counterparts.

8 What is so notable about India's presence?

In the year 2010, India saw an unprecedented growth rate and was one of the largest growing economies among the developing countries, showing a 19.9% change in the export earnings and an 11.2% change in the import earnings.[94] The WTO's Press Release noted that the rises in import earning were 'driven to a large extent by rising import demand on the part of fast-growing developing economies like India'.[95] Against this backdrop, India witnessed a 25% growth rate in the year 2010, constituting 40% of the European Union's imports; thereby making imports worth $598 billion from India.[96]

India thus constitutes an important part of the international trading system with its trade in goods constituting $216 billion out of the world's $14,855 billion; thereby accounting for 31% and 25% of the world's exports and imports respectively. This makes India rank 20th in terms of export performance and rank 13th for import performance.[97]

On the other hand, India's performance in terms of commercial services is also accelerating and cannot be left unnoticed. In the year 2010, India exported services worth $110 billion out of the worlds $3,665 billion and imported commercial services worth $177 billion; thereby ranking 10th and 7th in terms of its export and import performance respectively.[98] However, in the event that intra-EU trade is excluded, India ranked 6th and 5th respectively for exports and import performance.[99]

India's trade policies and its unprecedented growth rate have therefore made it one of the leading developing countries in the world. Being part of the international trading system seems to have benefited India enormously. Despite the financial crisis faced by the world in the year 2008, India still seems to have done comparatively well in the later years; and thus now constitutes a major source of the developed countries' imports and also one of the major markets for their exports.

94 World Trade 2010, Prospects For 2011, Press Release, PRESS/628,7 April 2011 (11-1714) 5.
95 World Trade 2010 (n 94 above) 6.
96 World Trade 2010 (n 94 above) 16 & 18.
97 World Trade 2010 (n 94 above) 19 & 21.
98 World Trade 2010 (n 94 above) 23.
99 World Trade 2010 (n 94 above) 24.

Given the rate at which India seems to be experiencing growth, the existence of anti-competitive practices cannot be disregarded. Hence, as the majority or even a portion of her exports and imports are lured by anti-competitive practices, the rate of her growth will largely be eclipsed. In addition, the fact that she is one of the major markets of the developed nations' exports and also makes them dependent for a large number of their imports, only makes her comparable to no other. It is for this reason that the arguments that India at *this stage of development* is not prepared to negotiate a multilateral competition policy lack substance, arise. The question that therefore must be posed before such arguments are raised is whether India is in fact ready if anti-competitive practices over-shadow the rate at which the country is growing in terms of the economy. On the other hand, can she at this stage of development afford to miss such an opportunity? In the light of her past experience and her lack of ability to tackle such international cartels and other anti-competitive practices, the answer appears to be in the negative. This is especially so when the current international trade regime appears to be insufficient to tackle anti-competitive practices of all sorts. A large variety of anti-competitive practices thus appear to be out of the reach of the current WTO system; for instance, the WTO is not well equipped to deal with anti-competitive practices such as bid-rigging,[100] tying and bundling,[101] resale price maintenance[102] and most importantly cartelisation, which are regarded as 'cancers on the open market economy'[103] or even 'the supreme evil of antitrust.'[104]

Secondly, apart from requiring an international trade policy that is holistic in its approach to facilitate trade globally and secures her economy from the ill-effects of international anti-competitive practices, India lacks the legal and the political regime that can tackle such practices itself, since it is not currently well equipped to

[100] Bid rigging is a *per se* illegal agreement wherein different bidders pre decide amount of money they will bid for, even if the amount is for a low bid.

[101] Tying agreements have been declared as *per se* illegal agreements as it persuade the buyer to buy a product he desires on the pre-condition that the said product shall be sold only when another product of the manufacturer is also bought by him. It may also include not buying a product from any other supplier. In doing so, the seller uses his market power to restrain free competition. In order to prove that the tying agreement is *per se* illegal, the seller should agree to sell the desired product only on the pre-condition that the buyer buys a second product; the seller wants to sell the second product that is distinct in character in the sense that it has no relation to the product the buyer wants to purchase, and lastly, the seller in doing so is abusing his market power.

[102] In case the producer not merely maintains his retail price but enters into an agreement with the consumer where the later will charge a certain price in case s/he wants to resell the product, such agreements are illegal *per se*. Such agreements are considered as resale price maintenance agreements. This means that the buyer is induced or coerced to resell at not below a certain price.

[103] See Speech by Mario Monti, Former European Competition Commissioner, (11 September 2000) http://www.ec.europa.eu/comm/competition/speeches.

[104] *Verizon communications Inc v Law Offices or Curtis* (02-682) 540 US 398 (2004) 305 F3d 89.

gather information needed to prove such anti-competitive practices independently. Apart from this, the impetus to enforce its own Competition law also seems to be weak. Hence, even where the country does have its own Competition law, the plea that provisions in the same would be sufficient to handle anti-competitive conduct that is extraterritorial in nature,[105] does not seem to be sound. This is because a large percentage of the population in this country is illiterate or poor, and unable to understand the benefits of competition. Hence, information about what constitutes anti-competitive conduct in most cases is not even present.[106] For this reason, the underlying problem in a country like India is not the mere presence of a competition law, but rather the lack of enforcement of the law.

These gaps can be significantly filled in with negotiations on competition policy at the WTO level, which will enhance cooperation between Members in order to obtain requisite information; in the light of the fact that information sharing is one of the most crucial steps in the enforcement of competition policy. Hence, despite the fact that India may be witnessing economic growth, she does not possess the requisite legal and political resources to prosecute international cartels. In addition, as precisely stated in the CUTS report on competition policy,

> [t]he inadequacy or lack of legal clarity in dealing with cases, though prevalent in all countries, was most prominent in the case of India. The lack of research and investigative capacity makes it very difficult for the competition authorities to deal with cases judiciously.[107]

In addition to being unable to deal with anti-competitive practices, given the inefficiencies in the legal and political regime, there exist other significant reasons as well to internationalise competition policy: what the researcher would call in brief the 're-evaluation of policies in the light of globalization'. Re-evaluation of policies in the light of globalisation entails the fact that globalisation has compelled such changes in the society that Synder (1999) elucidates skillfully as a 'multifaceted, uneven and contradictory economic, political and social process'.[108] Given the nature of this uneven and contradictory nature of globalisation, the birth of new policies cannot be ignored and the existing policies that govern the system may no longer be relevant. Hence, with the increasing sphere of international trade,

105 Indian Competition Act, No 13 of 2003, § 32.

106 The researcher mentions 'anti-competitive conduct in most cases' due to the fact that apart from certain obvious cases of anti-competitive practices such as cartelisation and price fixing, about which information is widely dispersed by way of newspapers, etc; information about certain other practices such as tying, bundling and rebating is lesser or maybe not known at all.

107 Centre of Competition Law (n 80 above) ix.

108 Francis & Snyder 'Governing economic globalization: Global legal pluralism and European law' (1999) 5 *European Law Journal* 334.

the economy calls for a change in the way one perceives globalisation by re-evaluating the structures that govern the society. The change in the economic and the structural nature of the society makes the internationalisation of the other policies that drive globalisation inexorable, compelling one to perceive the latter in a holistic manner.[109] [110]

Speaking about international trade relations that are driven by increasing globalisation and consequent liberalisation in an extensive array of subject-matters, *Hay and Rosamond* are of the view that in the arena of trade relations, policy makers are bound to act in a manner that is consistent with the global trade rules, for the reason that trade policy and its liberalisation tactics are such a 'powerful rhetorical device' and are the driving forces that legitimate and prompt states to take certain courses of action.[111]

9 Concluding Remarks

Globalisation is such that, firstly it calls for a great interaction between states and secondly globalisation is by itself a great motivating factor for change, for the way it induces and obligates change in the society. The increasing nature and occurrence of international problems calls for a fresh look at the way India perceives a solution for the same.

At the same time, while it may be true that traditional rules of international law encompass the behaviour of the governments of the Member-states, a certain amount of change may be desired to accommodate these new changes in the international sphere. To this extent, while private conduct may not be the subject of international trade law, it must be appreciated that neo-liberalism has facilitated and increased the participation of private persons in international trade. For this reason, despite the fact that international trade law merely regulates government actions of the Member-states, it is

[109] By this the researcher means that globalisation began with the liberalisation of trade policies. This in turn meant that if trade policies were liberalised by the removal and reduction of tariff and non tariff barriers and measures, the same would also influence the way the entire society functions. Hence, liberalisation that once merely began and concentrated on trade polices came to include a wide array of subjects in its agenda: ie to say for instance, services, intellectual property, environmental issues and the like; they once being the sole agenda of the individual Member states.

[110] Sylvia & Ostry 'Beyond the border: The new international policy arena in competition policy in an interdependent world economy' in Katzenbach *et al* (eds) *Competition policy in an inter-dependent world economy* (1993) 261; Mortensen 'The institutional requirements of the WTO in an era of globalization: Imperfections in the global economic polity' (2000) 6 *European Law Journal* 176.

[111] C Hay & B Rosamond 'Globalization, European integration and the discursive construction of economic imperatives' (2002) *Journal Of European Public Policy* 147.

desirable that private actions be brought within the ambit of the GATT-WTO to a certain extent. Hence, it may be suggested that as far as trans-national anti-competitive conduct is concerned, States take stringent action against the same. This may be in the form of limited regulation of private persons (i.e. individuals and corporations) in the arena of international trade relations. Such form of regulation may ideally be by making governments of the Members-states responsible for the acts of the private persons. Hence, while the current responsibility of the government for such acts is limited, it must be enlarged to include private anti-competitive conduct.[112] In other words, governments of Member-states must be responsible for both toleration of any anti-competitive conduct in their territory and failure to enforce the provisions of the competition law. Thus, while the current rule with regard to government responsibility is the co-operation and co-ordination of the government or the provision of incentives by the same; it must be widened to include even that conduct which is not penalised in the territory of the respective Member-state.

For the reasons mentioned above, it becomes imperative that competition policy is regulated at the international level to discipline the domestic market, given the low level enforcement of the competition law.

[112] See R Jennings & A Watts (eds) *Oppenheim's International Law* (9th ed 2008) for a detailed discussion on principles of international law.

THE DEVELOPMENT OF THE CONCEPT OF CONSTITUTIONAL DAMAGES

*by Wesley Martin Grimm**

Any question dealing with the development of law requires, by its very nature, a discussion of sometimes factually distinguishable but legally interwoven points; thus focus is placed on the law of constitutional damages. Every effort is made to present cases in a manner that solidifies an argument of progress and refinement in relation to the concept of constitutional damages as a remedy. The anchor of this work is the Constitution.[1] *Fose*,[2] the *locus classicus* on constitutional damages, introduces the notion of constitutional damages as a remedy in South African litigation and is threaded throughout this work. Strong reliance is placed, *inter alia*, on the decisions of *Kate*,[3] *Modderklip*,[4] *Dikoko*,[5] and *Mboweni*.[6] The thrust of my argument is that the remedy of constitutional damages should only be relied upon when most appropriate and practical to ensure the vindication of constitutional rights in light of the facts of a particular case and alternative legal remedies.

2 Origins: The Constitution and *Fose*

In a constitutional democracy like South Africa founded on human dignity, the achievement of equality and the advancement of human rights and freedoms has direct reliance on the very basis of our new dispensation, the Constitution. The Constitution not only allows litigants to enforce but also to vindicate their rights.[7]

Indeed, the Constitution permits a court to grant 'appropriate relief, including a declaration of rights' to litigants seeking to enforce their rights in manner that the court views as 'just and equitable'.[8] Based on the aforementioned the court in *Fose* found that constitutional damages do in principle fall under the umbrella of

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1 The Constitution of the Republic of South Africa, 1996, 'The Constitution'.
2 *Fose v Minister of Safety & Security* 1997 3 SA 786 (CC) '*Fose*'.
3 *MEC: Welfare v Kate* 2006 4 SA 478 (SCA) '*Kate*'.
4 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) '*Modderklip*'.
5 *Dikoko v Mokhatla* 2006 6 SA 235 (CC) '*Dikoko*'.
6 *Minister of Police v Mboweni & Another* 2014 6 SA 256 (SCA) '*Mboweni*'.
7 The Constitution sec 1(a) & (c).
8 The Constitution sec 38 (note this was contained in sec 7(4)(a) of the Interim Constitution of 1993); The Constitution sec 172(1)(b)(ii).

appropriate relief but this remedy's practical application would depends on the facts of each particular case and the particular right(s) infringed upon.[9] The court in *Dikoko* held that the same considerations in respect of 'appropriate relief' as under section 7(4)(a) of the interim constitution apply under section 38 of the Constitution when an award of damages is necessary to protect and enforce rights encapsulated in the Bill of Rights.[10] But is an award of damages by the constitutional court necessarily constitutional damages? What does 'constitutional' damages refer to?

It must be noted at this early point that the principle of subsidiarity has diffused so effectively into the area of constitutional litigation that it may be considered trite law and is of consideration in this instance. The *Jayiya* case,[11] on appeal, explained this principle in a constitutional damages context, albeit *obiter*, where the Court held that constitutional damages as envisaged in *Fose* might be awarded as appropriate relief where no statutory remedies have been given or no adequate commonlaw remedies exist.[12] Deduced from this is that where parliament has legislated statutory mechanisms to enforce and vindicate constitutional rights they must be used to the extent that they are consistent with the constitution.[13] Additionally, it is worth bearing in mind that in most cases where a constitutional right has been infringed and loss occasioned a delictual action will lie.[14]

3 An appropriate remedy must be an effective remedy

The focus of this work is the development of the remedy of constitutional damages. Out of necessity any appropriate relief — be it legislative, delictual or constitutional — must be effective relief.[15] When is relief seen to be 'effective'? Courts have a particular responsibility to ensure that the values underlying the rights entrenched in the Constitution can be effectively vindicated by creating innovative remedies where appropriate.[16] Harms JA in *Modderklip* deals with this point adeptly by reiterating that it is the duty of the court to mould an order that will provide effective relief

9 *Fose* (n 2 above) para 60.
10 *Dikoko* (n 5 above) para 91.
11 *Jayiya v MEC Welfare, Eastern Cape* 2004 2 SA 611 (SCA) '*Jayiya*'.
12 *Fose* (n 2 above) para 69; *Jayiya* (n 11 above) para 9.
13 *Jayiya* (n 11 above) para 9.
14 O' Regan K 'Fashioning constitutional remedies in South Africa: some reflections' (2011) 24 *Advocate* 43.
15 *Modderklip* (n 4 above) para 58.
16 *Fose* (n 2 above) para 69.

to those affected by a constitutional breach without being overawed by practical problems.[17] In so doing the real world will be synchronised with the ideal construct of a constitutional world.[18] Harms JA therefore appears to imply that the constitutional damages remedy will be the most appropriate where and when it is the most practical remedy in a given set of facts.[19]

4 Constitutional damages: The interface of remedy & rights

As practicality is important in the fashioning of constitutional damages and the peculiar facts of different cases are therefore determinative in such claims, certain factual circumstances are now presented. The factual discussion begins with *Modderklip* and ends with the unreported case of *Ngomana*.[20]

In *Modderklip*, where the inability of a landowner to enforce an eviction order against occupiers of an informal settlement on his land was at issue, constitutional damages were awarded in the form of a fair rental value for the duration of the unlawful occupation of the plaintiff's private property in violation of the constitution.[21] The constitutional rights in question were those of property, housing and human dignity. Constitutional damages were held to be the most appropriate remedy, as neither could the lawful eviction order be practically executed nor did the state attempt to lawfully expropriate the land from the plaintiff.[22]

In *Kate*, dealing with damages resulting from the failure of the state to pay social assistance benefits which were due, an amount of money equal to the interest payable when money unlawfully withheld was awarded as constitutional damages.[23] This case dealt with the infringement of the plaintiff's constitutional right to social security and related to her right to human dignity.[24] Constitutional damages were found to be the most appropriate and most practical relief for the following reasons: the plaintiff did not have the wherewithal and capacity to enforce her rights through a *mandamus*[25] and a declaration of rights is most suitable to clarify and provide legal

17 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) '*Modderklip SCA*' para 43.
18 *Modderklip SCA* (n 17 above) para 43.
19 *Modderklip SCA* (n 17 above) para 25.
20 *Ngomana v CEO South African Social Security Agency* 23036/09 2010 ZAWCHC 172 (13 September 2010): unreported case '*Ngomana*'.
21 *Modderklip* (n 4 above) para 65 & 66; The Constitution s25(1) and s26(1)-(3).
22 *Modderklip* (n 4 above) para 64.
23 *Kate* (n 3 above) para 33.
24 *Kate* (n 3 above) para 1 & 33; The Constitution s27(1)(c) and s10.
25 *Kate* (n 3 above) para 31.

guidance to resolve an underlying dispute where government officials comply voluntarily, promptly and in good faith.[26]

In *Fose* constitutional damages were held not to be appropriate as the compensatory function of the law of delict provided sufficient vindication of the infringed constitutional right.[27] The action in that case arose out of the alleged assault and torture of the plaintiff by unknown members of the South African Police Services, infringing on the plaintiff's rights to human dignity, freedom and security of the person, privacy and lawful detention.[28]

Dendy saw a failed attempt at a claim for constitutional damages for alleged injury to the constitutional right of human dignity flowing from an unsuccessful job application process.[29] The court emphasised the test of what is the appropriate relief to vindicate and protect the infringed rights.[30]

In *Darson*[31] constitutional damages for loss of profit were held not to be an appropriate remedy due to the practical difficulty to calculate it without providing evidence. The constitutional right to fair administrative action was in question in that case which dealt with review proceedings by an unsuccessful tenderer to a civil engineering contract.[32] The decision to award the tender was made by the wrong official and consequently breached the constitutional right to fair administrative action.[33]

Dikoko dealt with a delictual claim of defamation.[34] The constitutional rights in question were human dignity juxtaposed to and balanced against the right to freedom of expression.[35] In referring to *Fose* the Court held that it would be strange if damages could not be claimed by a plaintiff to protect and enforce his fundamental rights.[36] Interestingly the Court commented that the remedy of sentimental damages, though common law in origin, is also located within the ambit of 'appropriate relief' found in section 38 of the Constitution.[37] The Court simply assumed in favour of the applicant that defamation could give rise to constitutional damages without finally deciding on the issue.[38] Thus, helpful though the decision of

26 *Kate* (n 3 above) para 28.
27 *Fose* (n 2 above) para 62.
28 *Fose* (n 2 above para) 12; Klaaren J 'Judicial Remedies' in Woolman S *et al (eds) Constitutional Law of South Africa* (2014) 9-10.
29 *Dendy v University of the Witwatersrand* 2005 5 SA 357 (W) para 5.
30 *Dendy* (n 29 above) para 45.
31 *Darson Construction (Pty) Ltd v City of Cape Town & Another* 2007 4 SA 488 'Darson' para 510E-G.
32 *Darson* (n 31 above) 488.
33 The Constitution s33(1).
34 *Dikoko* (n 5 above) para 90.
35 The Constitution secs 10 & 16(1) respectively.
36 *Dikoko* (n 5 above) para 90; *Fose* (n 2 above) para 61.
37 *Dikoko* (n 5 above) para 90.
38 *Dikoko* (n 5 above) para 92.

the court is, it ultimately is not a case of the successful application of the constitutional damages remedy. Resort was had to the usual delictual remedy in defamation matters namely the *actio iniuriarum*.[39]

Ngomana dealt with the same constitutional rights as *Kate* namely human dignity, access to social security and fair administrative action.[40] The Court, in distinguishing between the two cases, held that in *Kate* the administrative process had run its course while in *Ngomana* several of the claims for constitutional damages were incidental to the principal relief sought by way of judicial review, that is, a review of decisions to refuse social assistance.[41] The court held further that in cases like *Kate*, going forward, compliance with the Institution of Legal Proceedings Against Certain Organs of State Act (the Legal Proceedings Act) is required: that is to say proper notice and the constitutional damages claim must be framed as a 'debt' within the ambit of the Legal Proceedings Act.[42] Failure to do so may still be condoned by the court.[43] This compliance is now mandated by the Social Security Act.[44]

5 Reflection on factual instances

Flowing from these factual instances we see a pattern emerge: Firstly, all successful constitutional damages claims mentioned were against the state; secondly, the award of constitutional damages is discretionary in the sense that it is the facts and issues of practicality that mostly determine its application; thirdly the remedy of constitutional damages succeeded where it was most practical; and finally, the awards for constitutional damages were relatively small in quantum, for example the restriction on interest in the *Kate* order.[45]

As against this, Courts have refused to grant constitutional damages as a remedy for the following five reasons.

39 *Dikoko* (n 5 above) para 102.
40 The Constitution secs 10, 27 & 33(1).
41 *Ngomana* (n 2 above) para 32.
42 *Ngomana* (n 20 above) para 35 & 36.
43 *Ngomana* (n 20 above) para 36; Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002.
44 Social Security Act 9 of 2004 sec 14.
45 *Kate* (n 5 above) para 35.

6 Reasons for failed application of constitutional damages

6.1 Double remedy

Constitutional damages should not be awarded in addition to statutory or common law damages as a penal vindication of constitutional rights.[46] The Court in *Fose* reasoned that a substantial compensatory damages award is in and of itself a considerable vindication of infringed upon constitutional rights.[47]

6.2 To serve a penal purpose

Mokgoro J held for the majority (on the merits) in *Dikoko* that punishment and deterrence are functions of the criminal law and not the law of delict.[48] This is consonant with what Ackermann J held in *Fose* in that constitutional damages as a penalty would result in a taking-over of criminal sanctions into the realm of civil law without the protective mechanisms afforded to alleged offenders.[49]

6.3 Financial penalties and windfalls

Ackermann J went on to find that, so far as could be ascertained, there is in our jurisprudence no indication that a substantial penal award against the state or an individual has any directly preventative effect; this notion is illusionary.[50] Where a plaintiff is fully compensated for injuries sustained he needs no further financial windfall from relying directly on the Constitution as this will not guarantee a deterrent or preventative effect.[51]

6.4 Exposure to double jeopardy

If awarded in addition to compensatory damages then constitutional damages will have the effect that a party is 'punished' twice should such award be preceded or superceded by a criminal case with an equally adverse finding.[52]

46 *Fose* (n 2 above) para 62.
47 *Fose* (n 2 above) para 67.
48 *Dikoko* (n 5 above) para 75.
49 *Fose* (n 2 above) para 70.
50 *Fose* (n 2 above) para 71.
51 *Fose* (n 2 above) para 72.
52 *Fose* (n 2 above) para 63; A Funnah & O Sibanda 'Towards a selective awarding of punitive damages awards in South Africa? A comment on *Fose v The Minister of Safety & Security*' (2008) 48 *Codicillus* 42.

6.5 Subsidiarity and appropriateness

Interlaced with the principle of subsidiarity is the notion that subject to its entrenched supremacy the Constitution does not deny the existence of any other rights that are recognised and conferred by, *inter alia*, the common law and legislation.[53] The courts appear to interpret this to mean that recourse in a matter should at least in part first be had to remedies originating in legislation and/or the common law.[54] Failing which and in circumstances where most appropriate and practical reliance on constitutional damages as a remedy may be had.[55] The decisions of the court seem to suggest, in my view, that diligent counsel should plead constitutional damages in the alternate as the decision to award constitutional damages lies exclusively within the court's discretion.[56]

Following these limitations the question may now be asked: 'Going forward, how do I determine when constitutional damages should be pleaded?' The answer is to be found in the very recent case of *Mboweni*.[57] The Court held in that case that in order to determine the question of remedy: firstly the relevant infringed constitutional right must be identified and pleaded or admitted facts must show infringement – simply put, the wrong must be identified;[58] secondly, the damages must be causally linked to the wrong suffered, that is, the damage must flow from the infringement;[59] thirdly, a court will ask in view of all circumstances of the particular case and other possible remedies whether the remedy of constitutional damages is the most appropriate and practical relief or whether the development of an existing common law (or statutory I argue) remedy is more appropriate to vindicate the right.[60]

7 Final remarks

So it seems that where the legislature has expressly provided damages, à la the Promotion of Administrative Justice Act 3 of 2000,[61] the resolution of the matter is simple: reliance must be placed on such a provision.[62] This is in accordance with the principle of subsidiarity. In the absence of such express provision resort must then

53 The Constitution sec 39(3)
54 *Fose* (n 2 above) para 60-68.
55 *Kate* (n 3 above) para 25.
56 *Ngomana* (n 20 above) para 38.
57 *Mboweni* (n 6 above).
58 *Mboweni* (n 6 above) para 6.
59 *Mboweni* (n 6 above) para 14.
60 *Mboweni* (n 6 above) para 22.
61 'PAJA' sec 8(1)(c)(ii)(bb); *De Jongh & Others v The Trustees of the Simcha Trust & Another* 2014 (4) SA 73 (WCC) para 30.
62 Klaaren (n 28 above) 12.

be had to whether the common law in its various and flexible forms provides for such a claim.[63] This again takes account of the subsidiarity principle.

It would appear then that only on a broad assessment by the court, taking all socio-legal considerations into account as to a claim's reasonableness and justifiability, might a civil claim for damages to enforce constitutional rights succeed going forward.[64] This, however, is not the whole picture for it must be remembered that constitutional damages as a remedy falls under the umbrella of 'appropriate relief' that is 'reasonable and justifiable' and therefore cannot be considered a remedy of last resort.[65] While the absence of other remedies may be a factor to be taken into account in the awarding of constitutional damages it is not decisive.[66]

The discretion to award constitutional damages in appropriate circumstances lies with the courts.[67] Judicial restraint is mandatory in deciding these matters to ensure equity in litigation between plaintiff and defendant. Constitutional damages have become a recognised and applied remedy in South African jurisprudence. It is applicable where practical necessity demands its application to vindicate rights enshrined in the Bill of Rights as the most appropriate manner to do so — legally and factually.

63 *Jayiya* (n 11 above) para 9.
64 O' Regan (n 14 above) 45.
65 *Kate* (n 3 above) para 27; The Constitution s38 & s172(1).
66 O' Regan (n 14 above) 45.
67 Klaaren (n 28 above) 13.