The front cover is a painting by artist Angu Walters. The painting is called 'new born' and is an abstract oil painting of an African family with their newborn baby. The painting was sold in 2014 to an admirer in Las Vegas. Angu was born in Cameroon and draws inspiration from his surroundings and experiences as a young boy in Africa. If you would like to see more or Angu's paintings you can visit his website: www.artcameroon.com.

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EDITORS' NOTE

> 'Education is the most powerful weapon which you can use to change the world.'
> - Nelson Mandela

A sense of satisfaction is felt in presenting the seventh edition of the *Pretoria Student Law Review*. With each successive edition, the Review comes ever closer to being infused into the heritage and culture of the Faculty of Law at the University of Pretoria. Thereby, cementing into legacy a dialogical space for the expression of young people — some being future lawyers, advocates and academics — a space that challenges the *status quo*. As a consequence, the Review, as a true creature of education, may bring about positive change in the world.

I would like to thank the 2013 Editorial Committee consisting of Alicia Allison, Michele Dempster, Thorne Godinho, Alexia Katsiginis, Duncan O'Kubasu Munabi, Michael Potter and Alistair Van Heerden. I thank them for their dedication to the Review. I would also like to extend my respect and appreciation to the Editorial Board consisting of Prof A Boraine, Prof D Brand, Prof C Fombad, Prof P Maithufi, Prof K Van Marle, Prof M Roestoff, and Prof W de Villiers. For their guidance and support, I am truly grateful. It is the influence of experienced minds that has been essential to the success of the Review. The Review has further benefited from the ever-helpful Mornay Hassen, Elzet Hurter, Lizette Hermann and Vuyisile Smith, who have been unwavering in their support and assistance.

This edition covers a diverse range of topics and it is hoped that the reader will explore the pages of the purple review from cover to cover. Alexia Katsiginis writes on a possible failure in space law to regulate objects constructed in space; her writing originates from research conducted for the Manfred Lachs Space Law Moot. Michele Dempster writes on carbon tax with a reflection on the possible impact on South African carbon intensive industries. Tshepo Saloane considers whether Regulation 28 of the Pension Fund Act adequately addresses retirement fund investments. Serena Kalbskopf writes on transformative constitutionalism as a jurisprudential approach of understanding judgments. Lauren Carr writes on the philosophy of judgments with particular focus on environmental law. An acknowledgement is extended to the contributors for their unique expression and argument, and for choosing the Review as their preferred forum for dialogue.

I thank Michele Dempster for her contribution to the Review's new website, which can be accessed at *www.pslr.co.za*. The journal continually strives to encourage debate and the website provides another forum to indulge in expression. We aimed to create a space encouraging discussion, forging ideas and fleshing out arguments;

where ideas may finally become fledged. Once fledged, these ideas may give rise to research and writing that may appear within the pages of this Review. We strive for the complete metamorphosis of an idea to research resulting in writing that may occur within the Review's structures. I encourage you to register on the website and engage in this process.

The Review hosted the *Writing Dangerously* workshop, for which vast appreciation must be shown to Thorne Godinho for making the arrangements. The workshop hosted Prof Pierre De Vos, Prof Karin Van Marle, Michael Clarke and Dr Stefan de Beer. Students were invited to come mull over wine with the aim to encourage not only writing but also dialogue around writing. I would describe the event as a seemingly omniscient flow from the highly regarded speakers to the audience. Overall, it was a pleasant place to be.

Throughout my studies of law I would often come to be disheartened by the encouragement to be a 'note-and-test-taker' — success was found in the ability to memorise information. In my opinion, law students are not 'note-and-test-takers' but rather legal humanitarians. Legal humanitarians who are ever aware of the link between law and people. However the view, whether a legal humanitarian or otherwise, being a law student is not one dimensional. I reflect on the Editor's Note in the first edition of *Pretoria Student Law Review*, which states that 'the *PSLR* represents a student voice […] — it's [sic] up to you to use it and make it stronger'. Do not deprive yourself of this richness and give in to it. Become multifaceted. Become an individual. Write. I encourage you to enrich yourself and be enlightened by your own mind.

Mark Nichol
Managing Editor
December 2013

NOTE ON CONTRIBUTIONS

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

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

You may submit your contribution to:
pretoriastudentlawreview@gmail.com

Alternatively you may submit your contribution by hand at the office of the Dean of the Law Faculty:

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INTRODUCTORY NOTE FROM THE DEAN'S DESK

Congratulations to every student who submitted an article for the 2013 edition of the *Pretoria Student Law Review* and, of course, a special word of congratulations to those whose contributions were accepted for publication. Not all submitted work is accepted, but it is important that aspiring writers learn from the feedback given during the editing process. As you may know by now, the *PSLR* operates on exactly the same principles as any other law journal. Therefore, every contribution is subjected to peer review, which entails a critical analysis of the content, as well as the grammar and style, of the contribution.

Some law students may find strange the notion of putting their fingers on a keyboard to write notes or articles with a view to publication, and yet others may never have given it any thought. The fact of the matter is that lawyers are expected to write. The development of this skill starts with the skill of reading — specifically the development of critical reading skills.

As the law is largely practised by means of the written or spoken word, lawyers must be able to express themselves clearly and concisely. It is therefore important that all law students use their studies to improve their language skills. One day you will be expected to draft legal documents of various kinds — each type calling for a particular format and approach, or you may be required to give a legal opinion on a particular issue. You may even have to compile a contribution to a law journal.

Since the *PSLR* is in the first place a law journal — largely run by students for students — the opportunities offered by the *PSLR* will stand you in good stead to improve your writing skills. The knowledge and skills gained through participation in the *PSLR* will be useful, not only for legal practice, but also if you plan to embark on postgraduate studies, or should you consider pursuing an academic career.

The Faculty of Law at the University of Pretoria ranks amongst the top law faculties in South Africa and on the African continent. Whilst we believe in equipping students for life after the LLB, we also deem postgraduate studies to be part and parcel of such an after-life. In line with the new strategic plan of the University of Pretoria, the Faculty of Law has introduced an inquiry-lead LLB curriculum which emphasises the need to develop critical reading and writing skills amongst law students. Because of this, publications are foremost on the Faculty's agenda, and consequently, much time is invested in improving students' writing skills.

It is understandable that novice student-writers will ask where they should start. Where will you find something to write about? Just a few words of advice on this: First, lecturers should stimulate

thought amongst students by highlighting and discussing topical issues in the various law subjects, giving you an idea of what to write about. Second, you should read a lot — law-related material as well as topics that have a bearing on the law and its development, such as social, political and economic theory. Third, you should discuss interesting issues with other students and with your lecturers, in that way initiating discussion groups in the various subjects.

Most importantly, once you have identified an issue that would call for an argument and ultimately a sensible conclusion, you should be mindful that your writing is not merely descriptive. Rather, discuss the problem you identified, provide a logical answer to the problem and follow this with a clear conclusion.

From the Faculty's side, lecturers are encouraged to teach and assist students to improve their writing skills — every assignment and even test or exam you write should be viewed as part of this process. Ultimately you will be expected to write a dissertation in the final year of your LLB studies. Use this opportunity, do your best and at least aim at reworking your dissertation for submission to the *PSRL*. Supporting the *PSLR* will be time wisely spent during your years of study.

To the outgoing editorial board: a word of sincere appreciation for the hard work that you have done. I wish the incoming 2014 board members all the best!

André Boraine
Dean: Faculty of Law

FALLING THROUGH THE GAPS OF THE REGISTRATION CONVENTION: A NEED FOR REVISION

*By Alexia Katsiginis**

'Law must precede man into space'
- A G Haley[1]

1 Introduction

Space law is a child of the Cold War and the silent start of the space race.[2] It did not take long after the launch of Sputnik 1 for the United States and the former Union of Soviet Socialist Republic (USSR) to come to the understanding that regulations were required to ensure that the use of space be reserved for 'peaceful purposes'.[3] Upon considering proposals from both the United States and the USSR regarding the establishment of a regulatory committee, the United Nations General Assembly (UNGA) finally formed the Committee on the Peaceful uses of Outer Space (COPUOS).[4] The Committee was mandated with the task of recommending feasible and practical means of ensuring international co-operation in outer space.[5] The international community showed a willingness to conform to legal rules in their exploration and use of the unknown universe and in 1967 UN COPUOS gave birth to the Outer Space Treaty.[6]

The Outer Space Treaty has been widely accepted as the Magna Carta of international space law and the heart of space use and exploration.[7] As a general rule of treaty interpretation, the Vienna Convention on the Law of Treaties places limited importance on the *travaux préparatoires* but does not overlook the benefit of

* Second year BCom LLB student, University of Pretoria.

1 AG Haley 'Space age presents immediate legal problems' (1959) 1 *Proceedings of the Colloquium on the Law of Outer Space* 5.

2 S Hobe 'Text of the 1967 Outer Space Treaty' in S Hobe, B Schmidt-Tedd & KW Schrogl (eds) *Cologne commentary on space law* (2009) 4.

3 WA McDougal *The heavens and the Earth -a political history of the space age* (1997) 141.

4 UNGA res 1472 (XIV) 12 December 1959.

5 Hobe (n 2 above) 5.

6 Hobe (n 2 above) 13; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (Outer Space Treaty).

7 H Qizhi 'The Outer Space Treaty in perspective' (1997) 25 *Journal of Space Law* 93.

interpreting a treaty in light of its objectives and purpose.[8] Most of the principles enshrined in the Outer Space Treaty are considered a codification of state practice and enjoy comfort in the certainty of their status as custom.[9] The cornerstone of the Treaty is its definition of outer space as 'the common province of mankind'.[10] The Outer Space Treaty was successful in providing the necessary foundation so that the development of space law could be brought in line with the principles of co-operation and due regard. Jakhu emphasises the importance of enhancing and protecting the common interest of mankind — in the exploration and use of outer space — to be of paramount importance when interpreting the international space regime.[11] The common interest principle is re-enforced by the non-appropriation principle, which confirms that territorial sovereignty does not apply to outer space.[12] These principles have subsequently been refined in the remaining four space law treaties, which — together with the Outer Space Treaty — form the body of space law.[13]

Thirty years after the adoption of the most recent space law treaty – the Moon Agreement — the exploration of outer space has advanced considerably.[14] It has become important to consider whether the current legal regime governing the activities in outer space is capable of regulating 'anticipated developments' of the 21st century.[15] Judge Lachs recognises lawmaking in space as a continuous process underpinned by mankind's shared interest:[16]

> The paramount consideration by which states should be guided in this law-making process for tomorrow, is 'the benefit and interest of all mankind'. This is repeatedly emphasised in all relevant instruments and stressed by writers on the subject. It is amplified by the desideratum that the exploration and use of space serve 'the betterment of mankind'.

The Registration Convention refines the broad objectives of the Outer Space Treaty by establishing a system of registration both to keep account of objects that have been launched into outer space, as well

8 Hobe (n 2 above) 13; Vienna Convention on the Law of Treaties (VCLT) art 31.
9 VS Vereshchetin & GM Danilenko 'Custom as a source of international law of outer space' (1985) 13 *Journal of Space Law* 22.
10 Outer Space Treaty (n 6 above) art I.
11 R Jakhu 'Legal issues relating to the global public interest in outer space' (2006) 32 *Journal of Space Law* 32-33.
12 S Freeland & R Jakhu 'Article II' in S Hobe, B Schmidt-Tedd & KW Schrogl (eds) *Cologne commentary on space law* (2009) 48.
13 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Space Objects Launched into Outer Space (Return and Rescue Agreement); Convention on International Liability for Damage Caused by Space Objects (Liability Convention); Convention on the Registration of Objects Launched into Outer Space (Registration Convention); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement).
14 Hobe (n 2 above) 14.
15 Qizhi (n 7 above) 98.
16 M Lachs 'The international law of outer space' (1964) 133 *Recueil Des Cours D'academie De Droit International* 100.

as to provide a means of vesting jurisdiction.[17] The present position of law regulating and establishing jurisdiction in outer space is highly unsatisfactory.[18] In 2002, Kopal proposed a re-examination of various provisions of the Registration Convention; specifically with regard to the adoption of more detailed requirements concerning space objects.[19]

In this paper, I address the areas of law that have been left unregulated by the Registration Convention, as well as the need to develop the treaty using the cornerstones of space law as a foundation for such development. My first enquiry relates to the definition of a space object and the implications of limiting the treaty's scope to 'objects launched into earth's orbit or beyond'. Further, to what extent can this definition accommodate the registration of objects that are constructed in outer space? My second enquiry focuses on a *lacuna* that is largely unaddressed by space law in general and does not only lack in the Registration Convention. Currently, there is no system regulating the status of objects that are either wholly or partly constructed using lunar resources. It is questionable whether such a construction would pass the environmental threshold required by the due regard principle. However, should such a construction be deemed lawful it is uncertain to what extent a state may lawfully exercise jurisdiction over such an object without its authority being deemed an act of national appropriation. In this paper I will not attempt to creatively interpret available space law in order to accommodate missing regulations. Instead, I rely on the core of space law — represented by the Outer Space Treaty — to provide a contextual backdrop against which the above questions can be answered or highlighted as incomplete.

2 Jurisdiction in outer space

The Outer Space Treaty first provided the notion of jurisdiction but was later better regulated by way of the Registration Convention. Space law provides that a state 'on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object […] while in outer space.'[20] Jurisdiction can be divided into three categories, namely:[21]

17 B Schmidt-Tedd & S Mick 'Article VIII' in S Hobe, B Schmidt-Tedd & KW Schrogl (eds) *Cologne commentary on space law* (2009) 149.

18 B Cheng 'Nationality for spacecraft?' in F von der Dunk *et al* (eds) *Air and Space Law: Essays in Honour of Henri A Wassenbergh* (1992) 155.

19 M Williams 'Final proposal on the review of space law treaties in view of commercial space activities — concrete proposals' (2002) *New Delhi* Conference.

20 Outer Space Treaty (n 6 above) art VIII; Registration Convention (n 13 above) art 2.

21 B Cheng 'Liability regulations applicable to research and invention in outer space and their commercial exploitation' in S Mosteshar (ed) *Research and invention in outer space — liability and intellectual property rights* (1995) 72.

> (a) territorial jurisdiction, relating to the jurisdiction a state enjoys over its own territory;
>
> (b) quasi-territorial jurisdiction, relating to the jurisdiction a state enjoys over its own space object; and
>
> (c) personal jurisdiction, relating to the jurisdiction a state enjoys over its nationals, whether natural or corporate persons.

Each of the above categories is accompanied by legislative supremacy to 'make binding laws within [a state's] territory.'[22] Territorial jurisdiction has been expressly prohibited by way of the non-appropriation principle, providing:[23]

> Outer Space, including the Moon and other celestial bodies, is not subject to national appropriation by claims of sovereignty, by means of use or occupation, or by any other means.

In effect, this provision creates an extra-territorial environment by implying that outer space may not be appropriated to serve the exclusive interests of a single state.[24] Both quasi-territorial and personal jurisdiction is possible. However, the two categories function within a hierarchical relationship where quasi-territorial jurisdiction overrides personal jurisdiction.[25]

The Registration Convention grapples with the concept of jurisdiction by confining it to a framework of qualifying criteria. The treaty places an obligation on states party to maintain a national registry of space objects.[26] To acquire jurisdiction and control, national registration of the space object is required, without which, jurisdiction is not feasible.[27] It appears that the treaty has failed to

22 MN Shaw *International law* (1997) 456.
23 Outer Space Treaty (n 6 above) art II.
24 Jakhu (n 11 above) 44.
25 Cheng (n 21 above) 73.
26 Registration Convention (n 13 above) art 2(1).
27 Schmidt-Tedd & Mick (n 17 above) 152.
Cheng (n 21 above) 76; Outer Space Treaty (n 6 above) art IX; Schmidt-Tedd (n 17 above) 155; N Rodrigues 'The United Nations register of objects launched into outer space' in S Hobe *et al* (eds) *Proceedings of the project 2001 plus workshop: current issues in the registration of space objects* (2005) 25; S Hobe 'Legal aspects of space tourism' (2007) 86 *Nebraska Law Review* 447. Stephan Hobe supports the view that the Registration Convention requires development, citing the decrease in the registration of space objects as an indication of the treaty's ineffectiveness. Further UN COPUOS has considered altering the treaty to encourage states to follow a system of registration. I tend to share the same concern as expressed by Hobe regarding the vague procedures for registration. The Registration Convention fails to address numerous issues that have left it somewhat static. Amongst such issues is that of the disclosure of information that would ordinarily be required by a system of registration and whether the ideal manner of registering a space object –including its space debris — can overcome its practical limitations. State practice regarding the registration of space objects can be divided into three categories namely: firstly, where parties provide information on all space objects, including non-functional objects and objects that are generated during and after launch, including objects generated though impacts; secondly, where parties provide information on functional objects and

address the status of objects that have not been registered.[28] Although jurisdiction serves as an incentive for registration, the exercise of jurisdiction and control is necessary for the fulfillment of international responsibilities.[29]

The Outer Space Treaty makes explicit reference to the term 'jurisdiction and control', establishing a legal relationship between a state of registry and its space object.[30] Lafferranderie argues that 'jurisdiction and control' are interrelated and cannot exist in isolation, explaining that '[j]urisdiction should induce control, and control should be based on jurisdiction'.[31] More importantly, the nature and responsibilities shadowing 'jurisdiction and control' ensure the fulfillment of a state's international obligations.[32] Coupled with the *right* to jurisdiction, the Outer Space Treaty insists on the *obligation* to exercise such jurisdiction.[33] It is not advised that that the provision 'shall retain' be interpreted restrictively as it is unlikely that the drafters of the Outer Space Treaty intended to create a right without a corresponding obligation.[34]

Such obligations become increasingly important in the light of Article IX of the Outer Space Treaty, which provides that where necessary, states partly shall adopt appropriate measures to avoid the

non-functional objects that are produced during or just after launch; and thirdly, where parties provide information on functional objects only. Although the first method of registration is the most ideal, its practical limitations result in states adopting the second category of registration, nevertheless, the Registration Convention's failure to address a preferred system of registration leaves such a decision to be determined by state practice. Although I agree that such deficiencies require revision, I am more concerned about the failure to address the status of objects constructed from material in outer space. Further, the fragility of the moon's environment renders immediate action necessary to preserve the common interest of both contemporary and future generations, in the exploration and use of outer space. Jurisdiction plays a pivotal role in this regard by requiring such a state to give effect to the obligations created by the Outer Space Treaty in its various provisions.

29 Schmidt-Tedd & Mick (n 17 above) 157; LE Viikar 'The legal regime for moon resource utilisation and comparable solutions adopted for deep seabed activities' (2003) 31(1) *Advances in Space Research* 2427-2428.

30 G Lafferranderie 'Jurisdiction and control of space objects and the case of international inter-governmental organisations (ESA)' (2005) 54 *Zeitschrift für Luft- und Weltraumrecht* 230; Outer Space Treaty (n 6 above) art VI & IX; Schmidt-Tedd & Mick (n 17 above) 150. The element of control has been defined to include '[the] adopt[ion] of technical rules to achieve the space object mission'.

31 G Lafferranderie (n 30 above) 231.

32 Viikari (n 29 above) 2427-2428.

33 Schmidt-Tedd & Mick (n 17 above) 158.

34 Schmidt-Tedd & Mick (n 17 above) 158; G Gál *Space Law* (1969) 215; H Bittlinger *Hoheitsgewalt und kontrolle in weltraum* (1988) 33; Outer Space Treaty (n 6 above) art I & IX. In my opinion this position is further supported by the character of the Outer Space Treaty, which — at its core — protects the interests of those states that have yet to reach space-faring capability. See UN GAOR 21st Sess. 57th mtg. at 12 UN Doc. A/AC.105/C.2/SR.57 (20 October1966). Moreover principles such as those of 'due-regard', 'common interest' and 'co-operation' create a code of a conduct and essentially an obligation to ensure that these principles are upheld.

harmful contamination of the moon's environment.[35] As space law is a relatively new *lex specialis* of international law, the Outer Space Treaty provides for the application of general international law to assist in the interpretation of space law principles.[36] The requirement of 'lunar-protection' finds a second voice in customary international law, which provides that 'states have a duty to carry out activities [...] in common spaces with regard for the right of other states'.[37] Included in this duty, is the obligation to ensure that the use of a state's territory is limited to activity that will not damage the environment.[38] In addition, jurisdiction plays a leading role in domains like intellectual property rights, data policies, as well as access to technology.[39]

The exercise of jurisdiction and control is of paramount importance, especially in the plight to achieve environmental protection and sustainable development. Moreover, it is invaluable in matters requiring either criminal or civil jurisdiction. A system of registration that does not regulate the vesting of jurisdiction in every instance is worrying, as it risks crippling the objective of the obligations demanded by the Outer Space Treaty.

3 Structures that do not constitute 'objects launched into outer space'

The effect of the non-appropriation principle is the replacement of state sovereignty with a concept of jurisdiction over a space object instead of state territory.[40] Both the Outer Space Treaty and the Registration Convention rely on the expression 'space object launched into outer space'.[41] This reliance is problematic as the term 'space object' remains inadequately defined.[42] The Registration and Liability Conventions both provide that 'the term "space object" includes component parts of a space object as well as its launch vehicle and parts thereof'.[43] The fundamental problem with this definition is that it refers back to the space object when speaking of 'component' parts and 'its' launch vehicle.[44] Practice does however suggest a common understanding of the term 'space object'.[45] The

35 Outer Space Treaty (n 6 above) art IX.
36 Outer Space Treaty (n 6 above) art III.
37 P Birnie & A Boyle *International law and the environment* (2002) 104.
38 A Cassese *International law* (2001) 382.
39 Lafferranderie (n 30 above) 231.
40 Lafferranderie (n 30 above) 229.
41 Outer Space Treaty (n 6 above) art VIII; Registration Convention (n 13 above) art 2.
42 Schmidt-Tedd & Mick (n 17 above) 150.
43 Liability Convention (n 13 above) art I; Registration Convention (n 13 above) art 1.
44 S Gorove 'Towards a clarification of the term "space object" — an international legal policy imperative' (1993) 21 *Journal of Space Law* 12.
45 Schmidt-Tedd & Mick (n 17 above) 150.

term is understood to broadly include every object that is launched, or intended to be launched, into outer space.[46] The above expression creates two qualifying criteria in order for registration to be possible; namely that the object in question is man-made and that the object is launched into outer space.[47] It is unclear if an object constructed in outer space can in fact be registered, as there is no 'launch'.

The International Space Station (ISS) serves as an example of such an object, as components of the station are launched into outer space separately and later constructed into the 'final' object.[48] Gorove attempts a clarification of the term 'space object', making reference to the ISS:[49]

> The issue that policy makers faced was whether such a station should be conceived as a single space object with the various elements being regarded as the object's component parts or whether it should be taken to constitute a cluster of different space objects requiring separate registration. The latter had notable relevance in connection with the exercise of jurisdiction and control.

This problem was addressed in the US International Space Station Agreement that requires each partner state to register each of the 'flight elements' that it provides.[50] In this regard, by way of a multilateral agreement, the US International Space Station Agreement provides a desired system of registration. However, the Registration Convention does not provide such clarification. The question as to whether each piece of a space object requires separate registration offers various complicated considerations.[51] A restrictive system of registration threatens the ability to identify a space object while an over-detailed registration risks clouding the clarity of the register as a whole.[52]

Although the Registration Convention has not outlined an exact system of registration, it is desirable to consider a broad interpretation of the term 'space object'.[53] In addition, Schmidt-Tedd and Mick agree that although state practice varies in the systems of registration that are applied, it is essential that a space object is

46 M Hintz 'Weltraumgegenstände' in K-H Böchstiegel (ed) *Handbuch des weltraumrechts* (1991) 157; W von Kries *et alGrundzüge des ramfahrechts* (2002) 23.

47 Schmidt-Tedd & Mick (n 17 above) 154.

48 NASA 'International space station' 9 September 2006 http://www.nasa.gov/mission_pages/station/main/iss_construction.html (accessed 10 August 2013).

49 n 44 above, 14.

50 Agreement Among the Government of the United States of America, Governments of Member States of the European Space Agency, the Government of Japan, and the Government of Canada on the Co-operation in the Detailed Design, Development, Operation and Utilization of the Permanently Manned Civil Space Station (US International Space Station Agreement) art 5.

51 Schmidt-Tedd & Mick (n 17 above) 154.

52 As above.

53 L Perek 'Management issues concerning space debris' (2005) *ESA, Proceedings of the 4th European Conference on Space Debris* 587, 589.

registered upon entering outer space in order to clarify 'the status of its jurisdiction and control'.[54] As the definition of a 'space object' expressly includes 'component parts', constructing the 'final' object in outer space should not have any bearing on jurisdiction and control — provided that each element has been registered.

4 Objects constructed from lunar resources

There is no question that space law foresaw that outer space and the moon would be used for commercial purposes.[55] Hobe argues that the term 'use' provided by the Outer Space Treaty should be interpreted to include both non-commercial and commercial exploitation of outer space.[56] The freedom of commercial use, however, generally carries legal concern mostly owed to appropriation and the 'sharing of common space resources'.[57] It is unclear whether the drafters of the Outer Space Treaty envisioned the commercial use of outer space to include the construction of objects from lunar resources. In considering such a construction, two questions should be considered. The first being, whether such a construction is lawful and the second being, to what extent a state may exercise jurisdiction over such an object without its actions constituting national appropriation.

4.1 The use of lunar resources in the construction of a space object

A defence for the commercial exploitation of outer space often battles to find a voice in the requirements of Article I, specifically as far as the provision protects the 'interests of all states'.[58] There are at least four positions representing the varying opinions on the legality of the commercial use of outer space:[59]

(a) all commercial activity in space is unlawful as it is pursued for the benefit of one — or few — state, and therefore is in direct contravention of the 'common interest' principle of Article I of the Outer Space Treaty;

(b) commercial activity in space is lawful to the extent that it embodies an element of 'community service' to all states;[60]

54 n 17 above, 155.
55 Outer Space Treaty (n 6 above) art 1.
56 S Hobe 'Article I' in S Hobe, B Schmidt-Tedd & KW Schrogl (eds) *Cologne commentary on space law* (2009) 35.
57 A Kerrest 'Commercial use of space, including launching' in China Institute of Space Law *Space law conference: paper assemble* (2004) 199.
58 R J Lee 'Creating a practical legal framework for the commercial exploitation of mineral resources in outer space' unpublished PhD thesis, Murdoch University, 2009 321.
59 Lee (n 58 above) 324-325.
60 Such a service may be provided at either no cost or a nominal cost. See Amended Convention on the International Mobile Satellite Organisation, art 3.

(c) commercial activity in space is lawful provided that the goods or services that are produced may be purchased by a third party state or consumer on the basis of equality and without discrimination of any kind;[61] or

(d) commercial activities in space are lawful to the extent that it does not prevent any other commercial or non-commercial entity from undertaking the same activity.

The disagreement between the four positions can be settled by relevant state practice and *opinio juris*.[62] Principle XII of the Principles Relating to Remote Sensing of the Earth from Outer Space provides that the sensed state will have access to the data obtained 'on a non-discriminatory basis on a reasonable cost term'.[63] Lee concedes however that there is no such equivalent requirement for any other commercial space exploitation, provided that the 'fruit' of such activity is made available to third party states or entities on the basis of non-discrimination.[64] I therefore submit that the freedom to use outer space for economic ends is permitted by Article I.[65] Through Article VI, the Outer Space Treaty permits both government and private entities to enjoy the goal of economic profit.[66]

Hobe goes as far as to argue that an activity will only be excluded if it is prohibited elsewhere in the treaty.[67] Hobe's position should not be mistaken as overly liberal as the limitations that he recognises within Article I are nevertheless restrictive.[68] The Outer Space Treaty establishes a code of conduct encompassing a precautionary approach.[69] As such, space law has excluded the ordinary use of the principle 'what is not prohibited is permitted'.[70] As quoted by Vereshchetin, Judge Lachs argues:[71]

> [The above principle] is not valid today. The freedom of action is determined by the possibility of infringing upon the rights of others. Hence the limitation of rights and the need for co-operation and

61 Remote sensing principles, principle XII.
62 Lee (n 58 above) 325.
63 Principles relating to remote sensing of the Earth from outer space, principle XII.
64 Lee (n 58 above) 326.
65 As above; Hobe (n 56 above) 35.
66 n 6 above, art VI; M Gerhard 'Article VI' in S Hobe, B Schmidt-Tedd & KW Schrogl (eds) *Cologne commentary on space law* (2009) 109; S Hobe (n 56 above) 35.
67 Hobe (n 56 above) 35.
68 n 56 above, 36-39; Jakhu (n 11 above) 39. Hobe concedes that the extent to which the 'benefits and interest of all states' provision should be applied is doubtful and that its interpretation should rely on state practice. Nevertheless, Hobe does make reference to the importance of the 'due regard' principle as a limitation on the freedoms provided by Article I of the Outer Space Treaty and seems to be in support of Jahku's argument that 'space activities are not granted in an unlimited way, but only under the condition that such activities are undertaken for the common benefit of all states'.
69 P B Larsen 'Application of the precautionary principle to the moon' (2006) 71 *Journal of Air Law and Communications* 299.
70 Jakhu (n 11 above) 42.
71 V S Vereshchetin 'Against arbitrary interpretation of some important provisions of international space law' (1982) 25 *Colloquium on the Law of Outer Space* 153.

> consultation in all cases where a state may by its activity affect the rights of others. This is of particular importance in regard to outer space.

This position was supported by Vlasic, who criticised that:[72]

> Major space powers have demonstrably been acting on the premise that whatever is not prohibited *verbis expressis* by the treaty is permissible, and therefore lawful. While the document as a whole does not permit such an interpretation, the muddle text of Article IV can be used, and has been used, to undermine the legally and politically sounder interpretation.

In stressing the common interest shared by all states in the 'exploration and use of outer space', the Outer Space Treaty ensures that the '*Lotus* case [–which provided the principle of 'what is not prohibited is permitted'-] does not constitute a precedent in favour of unrestricted national uses and activities in outer space'.[73] The Chilean delegate to the COPUOS legal subcommittee elaborate on what constitutes an abuse of freedom by stating that:[74]

> [E]xploration and use of outer space [is] lawful only if [it seeks] to satisfy the needs of mankind as a whole, and in particular those of the poorest nations. Otherwise [such activity] would constitute an abuse of rights.

The above comments have assisted in creating a culture of consideration that is underpinned by the principle of 'due regard' and the need to protect the interests of both contemporary and future generations. For these reasons, I share Larsen's opinion that the precautionary principle is applicable in regulating state activity in the exploration and use of outer space.[75]

It is likely that the construction of an object from lunar resources threatens to undermine the precautionary approach underscored by the five space law treaties.[76] The Moon Agreement demands that states be cautious of disrupting the moon's environmental balance, going as far as to permit the designation of 'international scientific preserves for which special protective arrangements are to be agreed upon'.[77] The approach adopted by the International Court of Justice

72 I Vlasic 'Disarmament decade, outer space and international law' (1981) 26(2) *McGill Law Journal* 171.
73 C Christol *International law of outer space* (1962) 267.
74 U.N. GAOR, 21st Sess. 362nd mtg. at 2, UN Doc A/AC.105/C.2/SR.362 (1982).
75 Larsen (n 59 above) 301.
76 At this point I would like to differentiate between the construction of a space object 'using' lunar resources and the construction of such an object 'from' lunar resources. The former would include the mining of lunar resources which would then be processed into a final product; in contrast the latter involves the removal of lunar resources to be used in their raw form as an element in the construction of a space object. I will not elaborate on the lawfulness of lunar mining, but instead focus this paper on the lawfulness of constructing a space object from lunar resources.
77 As above; Moon Agreement (n 13 above) art 7.

(ICJ) in the *Gabcikovo-Nagymaros* case is similarly echoed by the relevant practice of outer space activities.[78] In the *Gabcikovo-Nagymaros* case the court noted that:[79]

> Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into considerations […] when [s]tates contemplate new activities […]. This need to reconcile economic development with protection of the environment aptly expressed in the concept of sustainable development.

This movement towards sustainable development has been well received by states and evident particularly in their growing tendency to tackle the problem of environmental preservation of outer space and protecting the space environment to the greatest extent possible.[80] Various instruments have been used to achieve this purpose, for example the International Charter on Space and Major Disasters, which assists in the preparation of risk-related events, as well as the adoption of the Committee of Space Related Research (COSPAR) Planetary Protection Policy, which aims at providing acceptable guidelines to prevent planetary contamination.[81] Most recently, the US introduced the Apollo Lunar Landing Legacy Bill recognising the need to protect the scientific data and cultural significance of the Apollo artefacts as well as the benefit of ensuring that they remain unharmed by future lunar landings.[82]

The actions of states are only lawful to the extent that they do not conflict with the rights and interests of other states. The fragility of the moon's environment would render the use of lunar resources in the construction of space objects unlawful.[83] It appears that commercial activity is permitted if it does not become a mechanism

78 S Marchisio 'Article IX' Treaty' in S Hobe, B Schmidt-Tedd & KW Schrogl (eds) *Cologne commentary on space law* (2009) 178.

79 *Hungary v Slovakia* ICJ (25 September 1997) (1997) ICJ Reports 7.

80 Marchisio (n 78 above) 178.

81 COSPAR Planetary Protection Policy; http://disastercharter.org/index_e.html%3E (accessed 11 August 2013).

82 Apollo Lunar Landing Legacy Act http://www.govtrack.us/congress/bills/113/hr2617/text (accessed 11 August 2013). It is arguable that the provisions of the Bill amount to national appropriation as they facilitate the creation over a demarcated heritage park around part of the moon. I will not discuss the legality of such a Bill as I am more concerned about the movement that it supports. Consequently, although the means of achieving the intended protection may be rejected by the international community, the Bill is an indication of international concern regarding the protection of the moon's environment.

83 PB Larsen (n 59 above) 298. For a discussion on the fragility of the moon's environment.

for discrimination. More importantly however, such activity must not threaten the balance of the moon's environment as such action would directly infringe upon the interests of non-space-faring nations, as well as future generations. At its very core, the Outer Space Treaty seeks to protect the interests of mankind by setting a standard that is mandated by the principle of due regard.[84] As the construction of a space object from lunar resources would deny the subsequent use of such resources, the construction of an object from lunar resources would be unlawful.

4.2 The exercise of jurisdiction over objects constructed from lunar resources amounts to national appropriation

Although it is likely that the construction of such an object is unlawful, it is the status of such an object that is of interest. General international law provides a number of well accepted modes of acquisition of territory namely: by way of conquest, occupation, prescription, cession and/or accretion.[85] The extra-territorial character of space renders the use of such modes inappropriate.[86] Space law is quite clear in emphasising a prohibition on national appropriation.[87] The non-appropriation principle of Article II received almost immediate acceptance and remained a largely uncontested provision.[88] In his dissenting opinion in the *North Sea Continental Shelf* case, Judge Lachs makes reference to this principle as adopted by the Outer Space Treaty:[89]

> The first instrument that men sent into outer space traversed the airspace of states and circled above them in outer space, yet the launching states sought no permission, nor did the other states protest. This is how the freedom of movement into outer space, and in it, came to be established and recognised as law within a remarkably short period of time.

The view that outer space should be free from property rights has been maintained from the start of the space age.[90] Goedhuis asserted that 'it was realised that by denying the legality of such [sovereignty] claims the interest of the world community as a whole would best be

84 Outer Space Treaty (n 6 above) art I & IX.
85 MN Shaw *International law* (2008) 495-507.
86 J Thomas 'Privatisation of space venture proposing a proven regulatory theory for future extra-territorial appropriation (2005) 1 *International Law and Management Review* 191; S Freeland & R Jakhu 'Article II' in S Hobe, B Schmidt-Tedd & KW Schrogl (eds) *Cologne commentary on space law* (2009) 46. Although there have been proposals that 'traditional property jurisprudence' be applied to outer space acquisitions, this would require the re-interpretation of the principles of non-appropriation.
87 Outer Space Treaty (n 6 above) art II.
88 Freeland & Jakhu (n 86 above) 45, 47.
89 *Republic of Germany v Denmark and Federal Republic of Germany v The Netherland*s ICJ (20 February 1969) (1969) ICJ Reports 3.
90 Freeland & Jakhu (n 86 above) 51.

served'. President Lyndon B Johnson emphasised the importance of the non-appropriation principle in saying that:[91]

> In November 1958, President Dwight D Eisenhower asked me to appear before the United Nations to present the US resolution [on outer space] […]. On that occasion, speaking for the United States, I said: 'Today, outer space is free. It is unscarred by conflict. No nation holds concession there. It must remain this way. We of the United States do not acknowledge that there are landlords of outer space who can presume to bargain with the nationals of the Earth on the price of access to this domain[…]'. I believe those words remain valid today.

Freeland and Jakhu go as far as to call the prohibition of national appropriation a *jus cogens* norm and one that has been observed by states from the start of the space age.[92] In the context of outer space appropriation implies the 'exercise of exclusive control or use and denial of use of others'.[93] The non-appropriation provision is broad by prohibiting appropriation by 'claims of sovereignty' or 'means of use or occupation'.[94] Further, the insertion of 'other means' permanently excludes appropriation in any form.[95]

The principle of non-appropriation has an inclusive character and to a large extent is inflexible. The increase in mankind's interest in outer space and its ability to participate in a spectrum of activities has introduced various legal challenges.[96] In citing Goedhuis, Sittenfeld notes that '[t]he traditional territorially orientated concept of sovereignty is engaged in a particularly slow and problematic reconciliation with current developments in outer space'.[97] The Moon Agreement provides a more commercially desirable interpretation of the principle, which does not include the exploitation of natural resources as national appropriation.[98] Admittedly, the Moon Agreement has not received the same support as the preceding four space-law treaties.[99] Be that as it may, the Moon Agreement is intended to be an expansion of the Outer Space Treaty and therefore complements the core principles of space law.[100] Although the agreement does repeat the non-appropriation principle, it does so in the context of the 21st century's commercial necessities by providing a backdrop to promote the exploitation of

91 'Treaty on outer space: hearing before the committee on foreign relations' 90th Congress (1967) 105-196.
92 Freeland & Jakhu (n 86 above) 55.
93 Jakhu (n 11 above) 44.
94 Outer Space Treat (n 6 above) art II.
95 As above.
96 LR Sittenfeld 'The evolution of a new and viable concept of sovereignty for outer space' (1980) 4 *Fordham International Law Journal* 199.
97 Sittenfeld (n 96 above) 199-200.
98 Moon Agreement (n 13 above) art 11(2) & (3).
99 Having been ratified by only 13 states, of which only Australia is likely to be considered to have space-faring capability.
100 EM Galloway 'Agreements governing the activities of states on the moon and other celestial bodies' (1980) 5 *Annual Air & Space Law* 498-499.

lunar resources and the establishment of an international regime.[101] Freeman and Jakhu conclude this point by stating:[102]

> [T]his prohibition [of national appropriation] would not prevent public or private entities from receiving […] what might be termed as 'extra-terrestrial exploitative rights' in relation to the natural resources of outer space, although they must, of course, comply with the principles set out in the space treaties […]. Such rights are consistent with the *res communis* nature of outer space, since the natural resources to which they relate remain part of the 'common heritage of mankind' […].

The Moon Agreement makes reference to the prohibition of ownership rights over 'natural resources in place'.[103] It is therefore questionable if the use of lunar resources in the construction of a space object would constitute appropriation, or if the Moon Agreement intends to differentiate in this regard. In Article 6(2) the agreement provides several rights to states, in each case however, the right is confined to scientific purpose.[104] Lee argues that under certain circumstances a commercial activity, no matter how capitalistic in nature, may yield scientific benefit and in doing so blurs the lines between what is permitted and what is prohibited.[105] Even in such arguments however, Lee restricts his discussion to either the collection of data or commercial mineral prospecting activities, leaving construction of a space object 'from' lunar resources largely unaddressed.[106]

5 Conclusion

AG Haley states that law must precede man into space.[107] Mankind's need to regulate outer space activities was quickly recognised from the start of the race to the moon. The development of the Outer Space Treaty was achieved within the multilateral framework of the UN.[108] In a speech made by US President JF Kennedy, he explained

[101] Moon Agreement (n 13 above) art 11(7). The international regime envisioned by the Moon Agreement provides:
'The main purpose of the international regime to be established shall include:
(a) The orderly and safe development of natural resources of the moon;
(b) the rational management of those resources;
(c) the expansion of opportunities in the sue of those resources;
(d) an equitable sharing by all states parties in the benefit derived from those resources, whereby the interests and needs of developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.'

[102] Freeman & Jakhu (n 86 above) 60.

[103] Moon Agreement (n 13 above) art 11(3).

[104] Moon Agreement (n 13 above) art 6(2).

[105] Lee (n 58 above) 368.

[106] As above.

[107] Haley (n 1 above) 5.

[108] Hobe (n 2 above) 14.

why man was inherently drawn to the mystique of the unknown universe:[109]

> We choose to go to the moon. We choose to go to the moon in this decade and do the other things, not because they are easy, but because they are hard, because that goal will serve to organise and measure the best of our energies and skills, because that challenge is one that we are willing to accept, one we are unwilling to postpone, and one which we intend to win, and the others, too.

Since the adoption of the Outer Space Treaty in 1969, scientific and commercial development has progressed tremendously and therefore demands the continuous development of space law.[110] Danilenko comments on mankind's stagnated response to the once rapid development of outer space policy:[111]

> For a certain period, which may be described as the "golden age" of space law-making, rapidly developing space activities were accompanied by the adoption of a number of general multilateral treaties which deal exclusively with outer space and space activities. Despite the adoption of these treaties and related conventions, however, key issues remain unresolved. Continuous law-making is essential to ensure a viable and coherent system of space law.

In this paper I have attempted to criticise the lack of development of the Registration Convention, which in a time of commercial and scientific lust, requires urgent revision. I posed two questions, namely whether the Registration Convention addressed the status of objects constructed in outer space, and whether the exercise of jurisdiction over an object constructed from lunar resources would be possible.

With regards to the first question, I am satisfied in concluding that provided that the elements of a space object are launched into outer space, the object's extraterrestrial construction should have no bearing on its status.[112] Using the ISS as a reference, a state would be able to exercise quasi-territorial jurisdiction over the individual elements of the object and registration of the object in its entirety would not be required.[113] Consequently, state practice in this regard accommodates the Registration Convention's failure to expressly address such an occurrence.

What is more worrying is the failure to address the status of an object that has been constructed from lunar resources. I am in the opinion that such a construction would violate a number of core

109 JF Kennedy 'Moon Speech' 15 September 1962 http://er.jsc.nasa.gov/seh/ricetalk.htm (accessed 12 August 2013).
110 Hobe (n 2 above) 14.
111 GM Danilenko 'Outer space and the multilateral treaty making process' http://www.law.berkeley.edu/journals/btlj/articles/vol4/Danilenko.pdf (accessed 12 August 2013).
112 NASA (n 48 above).
113 US International Space Station Agreement (n 50 above) art 5.

principles that already govern activities in outer space. A precautionary approach towards outer space activities is implied by the importance that the space law endows upon the common interest principle.[114] The fragility of the moon's environment would render the construction of such an object an abuse of freedom. My second enquiry leads me to the question of how jurisdiction would be vested in terms of such an object.

Although I am wary of conceding that such a construction would be lawful it is desirable to determine the hypothetical legal status of such an object. The Moon Agreement does not seem to consider the exploitation of the moon's resources to constitute appropriation; however its provision for such activity seems to be contained within a scientific motive.[115] As such, I am not convinced that the exercise of jurisdiction over parts of the moon — albeit no longer in place — would not constitute an act of appropriation by means of sovereignty.

Should the international community elect to declare the construction of an object from lunar resources to be lawful; and further elect to deem the exercise of jurisdiction over such an object to be lawful, the Registration Convention would nevertheless require revision. For the vesting of jurisdiction to be possible registration is considered a prerequisite.[116] Moreover, for an object to be capable of registration it must be both man-made and have been launched into outer space.[117] In terms of an object constructed from lunar resources both of the above qualifying criteria would not be met and registration would not be possible. Subsequently, no state would be vested with jurisdiction and such an object would suffer without a legal regime. I recommend a revision of the Registration Convention to accommodate the commercial and scientific demands of the 21st century. Either through the introduction of an expressed provision regulating an occurrence that was clearly unforeseen by drafters of the treaty; or by limiting the right to jurisdiction, once again, subjecting it to the already established common interest principle. My latter suggestion allows for the development of space law within the current framework of treaty law. As a right vested in terms of the Outer Space Treaty, jurisdiction is not absolute and perhaps a revision of the Registration Convention could translate the principle of jurisdiction into a principle more familiar to outer space.

114 Larsen (n 69 above) 297; Outer Space Treaty (n 6 above) art I.
115 Lee (n 58 above) 368; Freeland & Jakhu (n 86 above) 59.
116 Hobe (n 28 above) 447.
117 Schmidt-Tedd & Mick (n 17 above) 154.

CARBON TAX: PROGRESS OR PLATITUDE FOR SOUTH AFRICA?

*By Michele N Dempster**

1 Introduction

In light of the 2009 United Nations Copenhagen climate change conference,[1] South Africa announced that in order to combat climate change it would commit to reducing domestic greenhouse gas (GHG) emissions by 34 per cent by 2020 and 42 per cent by 2025.[2] Due to this commitment, a carbon tax will be implemented as from 1 January 2015.[3] This market-based instrument has received broad attention sparking debate as industries most affected, namely Eskom and the petroleum sector, have rallied together in complaint.[4] The main debate being that despite the politically ambitious commitment to reduce GHG emissions, little scientific, economic or comparative evidence has been given to show that an influence will actually be had on the amount of GHG emitted.[5]

The purpose of this article is not to provide a detailed analysis of the entire scope of the South African climate change policy. It focuses on the more limited issue of carbon taxation. This does not however mean that the numerous other competing policy options, which still beg for attention, are not viable or will not be implemented in the future.[6]

1.1 What is a carbon tax?

Carbon Tax is a pollution tax levied on businesses and industries that produce carbon dioxide through their operations. A carbon tax is aimed at reducing the amount of GHG emitted into the atmosphere.

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1 National Treasury *Reducing greenhouse gas emissions: the carbon tax option* (2010) 4.

2 National Treasury (n 1 above) 6.

3 National Treasury *Reducing greenhouse gas emissions and facilitating the transition to a green economy* (2013) 11.

4 F Saliem 'The carbon tax debate' *Engineering Weekly* 21 July 2013 1.

5 Saliem (n 4 above) 1.

6 National Treasury (n 1 above) 15.

GHG is any atmospheric gas that contributes to the greenhouse effect.[7] The main GHG contributing to such effect is carbon. Carbon is present in coal, petroleum, and natural gas; when burnt or used in production it is released as carbon dioxide. Carbon dioxide (CO^2) is a colourless, odourless, incombustible gas.[8]

The carbon tax policy of a country is specifically designed to tax fossil fuel usage of an industry, individual or business according to the amount of carbon emitted by such role player.[9] It can also be seen as a fixed charge or price placed on GHG emissions that are set by the government for certain sectors individually. Tax on these emissions can be levied by taxing the carbon content of fossil fuels at any point in the production cycle.[10]

2 South Africa's climate change policy and the development of a carbon tax

A future with carbon tax is set in stone for South Africa. While, other options, such as renewable energy and energy efficient technology, have not yet made their way to the table and, yet further, programmes such as the Carbon Capture and Storage (CCS) are fast developing but yet to be considered.[11] The progress from implementing a climate change policy to a carbon tax is thus discussed.

South Africa has long thought itself a leading African country in international climate negotiations.[12] The earliest indication of South Africa taking action towards climate change was at the Climate Change Convention held in Bali, in November and December 2007.[13] A series of conferences and other measures took place after the Bali convention, namely:[14]

- Long Term Mitigation Strategy Scenarios (2008);
- South African Climate Change Policy Summit (March 2009);
- Green Economy Summit (May 2010);
- National Climate Change Response Green Paper (November 2010); and

7 The phenomenon whereby the earth's atmosphere traps solar radiation caused by the presence in the atmosphere of gases such as carbon dioxide, water vapour, and methane that allow incoming sunlight to pass through but absorb heat radiated back from the earth's surface.
8 N Wallart *The political economy of environmental taxes* (1999) 54-61.
9 R Hagemann 'Fiscal consideration: what are the best policy instruments for fiscal consideration' (2012) *OECD Economic Journal* 93.
10 Baumol & Wallace T*he use of price and standards for protection of the environment* (1971) 42.
11 National Treasury (n 3 above) 21.
12 National Treasury (n 1 above) 15.
13 National Treasury (n 1 above) 16.
14 National Treasury (n 3 above) 32.

- National Climate Change Response White Paper (NCCRP) (November 2011).

The Department of Environmental Affairs (DEA) issued the 2011 White Paper stating a coordinated and consistent policy framework that addressed climate change issues. The DEA had the intention of aligning and contextualising climate change efforts.[15] The aim stated was to 'effectively manage the negative impact of climate change by adopting policy interventions'.[16] This requires the need to adapt processes, systems and approaches that mitigate climate change as well as build technology, gather financial resources and develop monitoring and evaluation systems.[17] Carbon tax became the leading initiative to realise these goals. During the 2013 budget speech, Minister of Finance, Pravin Gordhan, announced that a carbon tax would come into effect as from 1 January 2015.

2.1 Structure and design of the South African carbon tax

The National Treasury has stated that the main objective of implementing carbon taxes is to alter future behaviour and in doing so, lower GHG emissions.[18] To begin with, a relatively low carbon levy will be charged with the intention to raise the levy progressively after five years, thereafter this levy will be significantly raised after ten years and so on.[19] Supposedly this approach gives major carbon-emitting industries the opportunity to invest in greener technologies and lower their GHG emissions in a gradual manner.[20]

A carbon tax will work to encourage producers and consumers to change their behaviour in three ways.[21] Firstly, carbon pricing forces a shift in production and consumption patterns that are low-carbon and energy efficient driven.[22] This is done by raising prices of goods and services based on the amount of the emission necessary to produce the related goods or services.[23] The higher the price the less likely a consumer is to purchase such goods or services.[24] Secondly, factors influencing production, goods and services that have high emissions will be replaced with low carbon-emitting alternatives in order to keep costs down and save money.[25] Lastly, carbon taxing

15 Department of Environmental Affairs and Tourism *Long-term mitigation scenario* (2010) 18.
16 Department of Environmental Affairs and Tourism (n 15 above) 18.
17 Department of Environmental Affairs and Tourism (n 15 above) 14.
18 National Treasury (n 3 above) 32.
19 As above.
20 National Treasury (n 3 above) 33.
21 As above.
22 As above.
23 As above.
24 National Treasury (n 3 above) 34.
25 As above.

should allow for motivation to invest in research and development of technology that allows for low-carbon alternatives.[26]

GHG emitters will initially pay a levy of R120,00 per tonne of CO^2 emitted and the intention is to increase this by 10% each year starting from 2015 and ending in 2019. From 2020 onwards no rates have been discussed and the National Treasury stated that further investigation will be done on the matter at a later stage.[27]

To start with, a 60% across-the-board tax-free threshold will be created and a further 10% reduction will be offered to certain sectors that cannot necessarily provide for technical and structural reductions in their emissions. These sectors include the iron and steel sectors as well as the cement and glass sectors. Agricultural and waste sectors will be completely exempt from carbon taxes. This exemption will possibly be reviewed after 2019 as yet the Treasury has given no definitive answer. The electricity sector, namely Eskom, will qualify for a 70% tax-free threshold and the petroleum sector will qualify for a tax-free threshold of up to 90%.[28]

When calculating this mathematically, industries mentioned (apart from the agricultural and waste sectors — who will be entirely exempt) the actual per tonne levy for GHG emitted is between R 12,00 and R 48,00.

2.2 Effectiveness of a carbon tax

Despite any advantage or disadvantage a carbon tax may hold, and notwithstanding the possibility of a perfect carbon tax design or even perfect implementation, the most important question is whether the object of introducing a carbon tax will be fulfilled. Government's main objective for introducing a carbon tax is to lower GHG emissions thus transforming South Africa into a low-carbon economy as per the climate change policy of the country.[29]

Norway has had a carbon tax system in place for over a decade now, implementing a high carbon tax since 1991.[30] The Norwegian taxes are one of the highest in the world and extensive research conducted has shown that carbon tax has had little effect on emissions.[31] The Treasury has suggested a similar set up whereby some industries are taxed and others are not. In Norway, industries that were taxed on emissions showed an average of 1.5% decrease in

26 As above.
27 As above.
28 National Treasury (n 3 above) 35.
29 Department of Environmental Affairs and Tourism (n 15 above) 7.
30 M Anderson *Environmental and economic implications of taxing and trading carbon: Some European experiences* (2008) 3.
31 Anderson (n 30 above) 3.

CO2 emissions.[32] With industries not taxed at all, an average increase of 18.7% in emissions has been recorded.[33] If Norway has a far higher tax levy resulting in very little change in emissions, can it be said that a smaller tax levy would affect any change in South Africa?

The difference will be found in what government decides to do with the revenues; a question the National Treasury is yet to answer.

> Potential recycling measures — through either the tax system or expenditure — will be explored. The most common implementation of revenue recycling is to reduce employers' social security contributions or income taxes in compensation. Reductions in corporate taxes are unusual and there are no examples of reductions in indirect taxation such as value-added tax. Both ex ante and ex post studies analysing the impact of environmental tax reform with recycling tend to find positive impacts on employment and output.[34]

At the Centre for the Study of Science at the libertarian think tank, the Cato Institute, a recent study found that an increase in global average temperature was about 3 degrees Celsius in the past decade.[35] The study showed that if the United States of America (USA) were to somehow completely eliminate all its GHG emissions, the result in the future would be a mere 0.2 degree Celsius decrease by 2100.[36]

Such results discourage industries and make them question why such a tax should be implemented if little change is affected.[37] Surely, if such a minimal difference is made then introducing a carbon tax will not fulfil the South African government's aim and ultimately, it will not fulfil the climate change policy of the country. The opposing side to such debate however, is the fact that the research done on the USA did not include a *global* action to combat climate change. No research has been done on the effect should the USA and, for example, China eliminate all their GHG emissions.[38]

In finding a better way to observe the necessity for a carbon tax in South Africa one could look at the 'Tragedy of the Commons'.[39] This is a concept based on ecologist Garrett Hardin's idea that there is a pasture open to all. Animals graze in the pasture. Men continue to add animals to the pasture because the more animals they have the more wealth they generate. However, the more animals they add to the pasture, the more the pasture begins to deteriorate. Although

32 Anderson (n 30 above) 6.
33 As above.
34 National Treasury (n 3 above) 65.
35 JE Milne 'The reality of carbon taxes in the 21st century' (2012) *Vermont Environmental Journa*l 65.
36 Milne (n 35 above) 65.
37 Saliem (n 4 above) 1.
38 As above.
39 'Tragedy of The Commons' http://www.youtube.com/watch?v=MLirNeu-A8I (accessed 31 July 2013).

each animal added only degrades the pasture a small amount, added all together there is eventually no pasture left at all. When applying this concept to that of pollution, society is affected by the resulting pollution of all GHG emitting industries combined. When looking at one firm or company on its own little impact or damage is seen, however, when combining the overall impact the result is devastating. Thus, just as each country has seemingly contributed a small amount — or one extra animal — in order to increase their wealth, they must now withdraw that small amount so that a combined reduction will allow for greater impact. Put in another way, it would not help to only tax the biggest contributor in South Africa — for example Eskom — as this will only allow for a few 'animals' to leave the pasture.

3 Problems with carbon tax design and an alternative to carbon tax

3.1 Problems with carbon tax design

Government has a general belief that a carbon tax will have a considerable and pioneering effect on the amount of GHG emitted.[40] When taking into account the exemptions proposed by government for certain fossil fuel-intensive industries, very few actual levies end up being paid.[41] The industries that one would expect a carbon tax to target are in fact the industries that will be exempted and allowed 'off-sets'.[42] Of course the exemptions are necessary, according to government, in order to curb the worry that these industries will lose competitiveness in the domestic, as well as the international market.[43]

When looking at it plainly, if the metal sector and industrial chemicals sector are not exempted from carbon tax, a large amount of companies within these sectors will become unprofitable.[44] Similarly, if the fishing and sea transport sectors are not exempted then economic analysis suggests a reduction in production level.[45] Agricultural and waste sectors have been completed exempted from paying carbon taxes for the first few years, with the intention of reviewing such policy in the future.[46] It seems redundant then if those

40 National Treasury (n 3 above) 14.
41 Saliem (n 4 above) 2.
42 As above.
43 National Treasury (n 3 above) 15.
44 Winkler & Marquard 'Analysis of the economic implications of a carbon tax' (2012) *Journal of Energy* 91.
45 Winkler & Marquard (n 44 above) 91.
46 National Treasury (n 3 above) 14.

actually being taxed for carbon emissions are not the only contributors, and moreover are not the main contributors.

Carbon tax is a relatively good concept and can encourage behavioural change; however it seems less likely that a carbon tax is going to succeed in South Africa.[47] The impact on the economy appears negative due to the fact that South Africa has high carbon intensity, mostly coming from a state-owned entity (Eskom).[48] It is never a good idea to implement policy that will clearly drive away investment.[49] Doing nothing at all, however, is not possible and when considering the alternatives carbon tax appears nearly perfect.

3.1 Alternative to carbon tax

Cap-and-trade is the only other viable instrument that can be considered in South Africa. It is a regulatory instrument that limits or 'caps' the amount of carbon emissions and pollution allowed per company. Companies are then permitted to sell or 'trade' the portion they have not used to other companies that have been unable to comply or are struggling to do so. Under this form of environmental protection, the idea is to reduce certain kinds of emissions and pollution and to provide companies with a profit incentive to reduce their pollution levels.[50]

Theoretically, a cap-and-trade system achieves similar results to a carbon tax and ultimately has the same aim.[51] However, the conditions necessary to allow for a cap-and-trade system to succeed are a lot more involved and require certain challenges to be overcome before any implementation can take place.[52] Cap-and-trade systems require the allocation of permits, as well as a new set of financial regulations to which industries must adhere.[53] In any case, cap-and-trade will cause tax implications as it is possible for income to be earned from the trading of excess emissions.[54]

A carbon tax thus seems more appropriate when trying to put a price on carbon.[55] The design of a carbon tax is also fairly easy to understand and model.[56] Although many arguments are made against the measuring of GHG emissions in a carbon tax system, a similar form

47 Saliem (n 4 above) 2.
48 Eskom is a state-owed entity that is an electricity producing facility.
49 C Arndt 'Measuring the carbon intensity of the South African economy' (2013) *South African Journal of Economics* 55.
50 Milne (n 35 above) 65.
51 Saliem (n 4 above) 3.
52 Anderson (n 30 above) 5.
53 Anderson (n 30 above) 4.
54 Anderson (n 30 above) 3.
55 Saliem (n 4 above) 2.
56 As above.

of measurement would also be used in a cap-and-trade system.[57] With a carbon tax, the tax levy is gradually introduced allowing time for the taxpayer to adjust.[58] Cap-and-trade systems require immediate adjustments in order to correctly measure and trade emissions.[59] A large portion of the industries in South Africa would be unable to allocate revenue to the cost of the adjustments necessary in a cap-and-trade system.[60] With regard to the competitive concerns, many sectors are being afforded offsets, tax reductions or are in fact zero rated to begin with.[61] Both options are viable for South Africa and in an ideal economy both could be applied simultaneously (thus allowing for a hybrid system).[62]

4 Conclusion

It seems apparent that a well-structured carbon tax may result in some form of GHG emission reduction. With the development of a carbon tax in South Africa having taken place over a period of three years, Government has had more than enough time to correctly structure and model a perfectly suited carbon tax. Many questions are still left unanswered as to what will happen after the implementation of the carbon tax. The important crux of the information given, however, is that such a carbon tax is in line with South Africa's climate change policy; that being to reduce GHG emissions and transform South Africa into a low-carbon economy. Whether South Africa's reduction in GHG emissions makes little difference in global warming or perhaps no difference at all, it is important that it remains a role player in the international action towards mitigating climate change.[63]

57 Anderson (n 30 above) 4.
58 National Treasury (n 3 above) 16.
59 Anderson (n 30 above) 4.
60 Anderson (n 30 above) 6.
61 National Treasury (n 3 above) 65.
62 Arndt (n 49 above) 55.
63 United Nations *Gateway to systems work on climate change policy* (2010) 2.

REGULATION 28 OF THE PENSION FUNDS ACT: REGULATING PRUDENTIAL INVESTMENT

*By Tshepo Seloane**

1 Introduction

On 23 February 2011, the Minister of Finance, Pravin Gordhan, announced that there would be changes made to Regulation 28 of the Pension Funds Act (the 1998 regulation).[1] In terms of this amendment, the objectives of the new regulation would be to ensure that contributions made by South Africans towards their retirement savings would be invested in a prudent manner that would not only protect the investor but would also be geared towards economic growth and development.[2]

The idea of protecting retirement savings was first introduced into South African law in 1962 through the promulgation of Regulation 28 (the 1962 regulation).[3] Due to vast changes in the market structure at the time, the 1962 regulation had to be revised. The beginning of 1998 saw the updated version of Regulation 28 come into force in terms of Section 36(1)(bB) of the Pension Funds Act. It had therefore undergone a major revision to bring it more in line with other regulations and with the ever-changing investment environment;[4] but this would not be the only change Regulation 28 would undergo.

2 The primary aim of Regulation 28

Regulation 28 was initially created with the primary aim of reducing certain risks, which are inherent in investments.[5] In order to achieve

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1 Act 24 of 1956, thereafter 'the Act'.

2 Momentum (n.d) 'The Act on regulation 28' https://www.momentum.co.za/for/you/markets-and-funds/regulation-28 (accessed 27 July 2013).

3 In terms of GNR 98 in Government Gazette 162 of 26 January 1962.

4 STANLIB Insights 'Regulation 28 and the RA reason — what to consider' January 2012 http://www.stanlib.com/Insights/012012/regualtion_28_ra.htm (accessed 25 June 2013).

5 G Gehle 'Where can a member of a retirement annuity fund complain about the benefits and values of the retirement annuity policy on his life?' (2005) 20 *Insurance Tax Journal* 7.

this, the regulator would have to impose limits on the investments made to funds.[6] The intention behind the imposition was to protect funds and their members against imprudent investment decisions because once the requirement to invest in asset classes (for example debt, property or cash) was complied with, the investor would, for the most part, no longer have protection.[7]

Since 1998, and perhaps even before, the number of retirement fund options, which have become available to investors in collective investment schemes, have become more complicated. The new developments have also caused much instability and confusion for trustees, who generally have no prior investment skills or knowledge of the goings-on in derivatives, structured products and foreign investments.[8] This lack of skill and training robs trustees of their ability to fulfill their duties. Many of these new types of investment options were not included in the 1998 regulation due to international developments in collective investment scheme structures, which were mainly brought about by the revision of the UCITS III model.[9] This oversight by the regulator left a significant part of the industry open to abuse.[10] This was the case in *Shabalala v The Grain Industry Provident Fund*[11] where the trustees elected to exercise their common law discretion against the interests of the beneficiary and place the entire fund benefit into trust despite the fact that the complainant was a major. This attempt to exploit the loopholes created by this *lacuna* had no punishable legal consequences even though it clearly amounted to a conflict of interest.

3 The need to develop and regulate prudential investment

Trustees have a number of management functions that need to be carried out and are critical to the execution of their functions or duties.[12] These functions are more important now than they have

6 National Treasury 'Explanatory memorandum on the final regulation 28 that gives effect to section 36(1)(dB) of the Pension Funds Act 1956' February 2011 ftp://ftp.fsb.co.za/public/pension/Reg28_EM.pdf (accessed 27 June 2013).

7 K MacKenzie 'Who will guard the guards?: an appraisal of minors' pension benefits placed into trust income' (2007) 22 *Tax, Insurance and Tax Journal* 40.

8 M Lowther 'Regulation 28: new challenges for trustees — and the registrar!' *Retirement Planning Pensions World Archives, Governance & Due Diligence* June 2011.

9 Although South Africa is not a EU member state, any changes to the UCITS model that affect a trading partner will also have a significant impact on South Africa.

10 N Jeram 'The pension funds adjudicator — a jurisdictional nightmare' (2005) 38 *Industrial Law Journal* 1849 fn 135.

11 PFA/FS/6784/06/NVC (unreported), determination of the Pension Funds Adjudicator issued on 19 October 2007.

12 M Wierzycka (n.d) 'Be a feature of pension fund investments?'. http://0-beta.mylexisnexis.co.za.innopac.up.ac.za/Index.aspx (accessed 25 June 2013).

been in the past under the 1998 regulation as fund members belong to defined contribution funds in which investment risk is carried directly by members.[13] In these instances it is the members who carry the risk and as a result, most members will be directly affected by loss, or a lower than average return which is earned by the fund. Currently in South Africa, a plethora of retirement fund options are available for the choosing and the Financial Services Board measures these options in a number of different ways:[14]

- by the size of assets; or
- by the type of fund; or
- by the number of members; or
- by the financial sophistication of trustees and their advisors.

Many trustees are newly appointed and have received only a modest education on their duties.[15] It was because of this predicament that the regulator was prompted to put systems in place in order to ensure that trustees are adequately guided in the investment of funds. In the end, everyone could agree on the basic premise of the new regulations: Regulation 28 would ensure that investors do not end up investing large portions of their money in complex instruments that they do not understand.[16]

4 Current position

The amended Regulation 28 of the Act came into effect on 1 July 2011 with the Financial Services Board (FSB) granting retirement funds a six-month implementation period.[17] Although this was the case on paper, the changes made by the implementation of regulation 28 only took effect in January and February of 2012.[18]

In order to achieve the objectives set out in the amended regulation, it became important that the regulator impose what it called 'prudent asset diversification principles'.[19] These principles are stated in general terms: calling for universal compliance with the

13 Financial Services Board 'Latest developments' http://www.fsb.co.za/pension/latstdev.html (accessed 27 June 2013).
14 Lowther (n 8 above).
15 Gehle (n 5 above).
16 Anon 'Managing retirement fund assets - regulation 28 under the spotlight: long term' (2010) 4 *Enterprise Risk* 18; http://0-search.sabinet.co.za.innopac.up.ac.za/WebZ/images/ejour/sh_eprise/sh_eprise_v4_n6_a9.pdf?sessionid=01-49569-1865792526&format=F (accessed 25 June 2013).
17 W Van der Merwe 'Changes to regulation 28 affirm immovable property's place in retirement fund investments' http://www.fedgroup.co.za/pdf/regulatory%20developments.pdf (accessed 28 June 2013).
18 STANLIB Insights (n 4 above).
19 H Victor 'The administrative complexities of member investment choice' *Retirement Planning Pensions World, Archives: Trustees' Update* September 1998.

provisions of the Act;[20] the establishment of an investment policy statement, which is reviewable annually;[21] and various provisions that deal with the funds and their board members.[22]

The regulator made an immediate effort to come to the rescue of investors by implementing 'percentage limits' that deal with the amount each retirement scheme can invest in each asset class or instrument provided for in the Act. An example of the impact that the limit has had in practice is that retirement funds are no longer permitted to have more than 75% of total assets invested in equities in terms of the current Regulation.[23]

The current Regulation 28 also regulates all tax incentivised retirement savings, including retirement annuity funds (RA funds), pension funds, provident funds and preservation funds.[24] It is important to note that endowments and unit trusts — unless they specifically claim to be Regulation 28 compliant — are not regulated by the current Regulation 28. They do, however, still fall under the scope of Collective Investment Schemes Control Act.[25]

5 The major changes introduced by the current Regulation 28

The amendment to Regulation 28 preserved some aspects of the 1998 regulation as far as it relates to the narrowly defined pension funds structures. This, however, is not the case as far as the broad spectrum of collective investment schemes are concerned of which the following deserve special notice:

(1) compliance at member level. This means that every member of a retirement fund must be statutorily compliant. Previously only the fund was required to be compliant, which often lead to individual member investments being non-compliant. As the spirit of the legislation is to protect individual members' retirement savings from undue market risks, this loophole has now been closed;[26]

(2) the requirement to perform reasonable due diligence before investing in an asset;[27]

20 This is the first Principle, Regulation 28, subsection 2(a) National Treasury Memorandum.
21 Financial Services Board (n 13 above); H Victor (n 19 above).
22 Financial Services Board (n 13 above); National Treasury (n 6 above); Regulation 28 subsection 2(c).
23 A Swanepoel 'Apportionment of pension fund surpluses' (2002) 17 *Income Tax Insurance and Tax Journal* 33.
24 National Treasury (n 6 above).
25 Act 45 of 2002.
26 STANLIB Insights (n 4 above).
27 Swanepoel (n 23 above).

(3) the application of the 'look-through' principle, which involves aggregating a fund's holdings for reporting purposes by including each underlying instrument (with the exception of hedge funds and private equity funds — in other words — guaranteed insurance policies);[28]

(4) significant changes to respective asset-class limits and groupings. The aim is to encourage diversification among funds through the use of different asset classes, as well as favouring listed instruments over unlisted ones;[29]

(5) the entrenchment of the principle that a fund's assets must be appropriate for its liabilities;[30] and

(6) the requirement that trustees integrate environmental-social governance (ESG) aspects into their investment decision-making process.[31]

6 Views on the Amendment

6.1 Criticism

Commentary about the new Regulation 28 has been mainly positive, especially from industry players, such as hedge fund managers and private equity funds; perhaps this is influenced by the new 'status of benefit' they acquire under the current Regulation. It is not surprising that the amendment has been lauded almost exclusively from the investment industry.[32] What remains interesting to note is that there is no standing to speak on behalf of the 7 million or so retirement savers. This of course does not come as a heavy shock, especially when the outcome is a policy document that benefits the industry and government far more than it does those who *actually* invest.[33]

6.2 Their concept of 'prudence' does not exist

The arguments raised are mainly that, despite its claims, Regulation 28 does not set prudent asset limits.[34] It merely restricts the maximum exposure to each asset class and underlying security, sets minimum limits and diversification principles, ultimately ignoring or failing to protect the retirement fund member.[35] The resultant effect is as follows:

28 These fall under the Collective Investment Schemes Control Act.
29 S Nathan 'What exactly is the point of Regulation 28?' July 2011 http://www.10x.co.za/blog/what-exactly-is-the-point-of-regulation-28/ (accessed 25 June 2013).
30 As above; STANLIB Insights (n 4 above).
31 Nathan (n 29 above); MacKenzie (n 7 above).
32 Van der Merwe (n 17 above).
33 Nathan (n 29 above).
34 MacKenzie (n 7 above).
35 K Kopke 'A fine balance to avoid overregulation of hedge funds' (2012) *De Rebus* 43.

Firstly, the Regulation ignores the investment time factor, as it is not very 'prudent' to hold just one asset class, for example bonds, for any length of time in order to compel someone nearing retirement to invest 75% in equities or for someone who is a novice to put down 100% in cash.[36]

Secondly, given the Rand's volatile history, it would not be prudent for the regulator to require a high financial weighting for the elderly who intend on investing in offshore funds (the so called UCITS IV compliant investment vehicles).[37]

Thirdly, the provisions of Regulation 28 do not apply to Government Employees Pension Fund, which is by far the largest pension fund in South Africa; this should have been the Regulation's start.[38]

Finally, with regards to the trustees, it is submitted that 'prudent' investment is a matter of individual circumstance and professional judgement. Investment and all its labours have always been left to those who have the necessary skill and experience in such matters.[39] Prudence in such specialised areas of industry thus cannot be based on rules that are imposed upon an industry because no set of rules can be sufficiently wide to encompass all circumstances, especially in a market as volatile as the pension funds market.

It is quite clear that the regulator is still unsure of the trustees' competence to handle the task at hand. The principles, for example, impose a burden upon the fund to invest in the 'education of the board with respect to pension fund investment, governance and other related matters'.[40] Surely the required level of education should be a prerequisite rather than an objective.[41] This is not immediately evident when one gleans over the provisions of the Explanatory Memorandum. There is seemingly a slight admission by the regulator that there is 'a general lack of investment expertise among trustees, [furthermore] the Regulation remains primarily rule-based',[42] only affirming the very little faith that the regulator has in the competency levels of trustees.

Investors need trustees who are financially literate. They need trustees who *fully* understand their responsibility towards the investors, who understand diversification, risk-appropriate investing,

36 As is usually permitted for cash and government debt.
37 Undertakings for Collective Investment in Transferable Securities IV as interpreted in sec 65 Collective Investment Schemes Control Act.
38 http://www.gepf.gov.za/index.php/about_us/article/who-is-gepf (accessed 27 July 2013).
39 Portfolio managers or fund managers in terms of the general management collective investment schemes affairs.
40 National Treasury (n 6 above).
41 Nathan (n 29 above).
42 National Treasury (n 6 above).

different assets and investment products, and the impact of cost and investment styles on the savings outcome.[43] They need trustees who have strong, well-founded investment beliefs, and who can translate these into an investment policy statement that will help achieve investors' retirement objectives.[44] Further, they need trustees who act solely in their interest; in other words, they need professional and independent trustees. This aspect has been overlooked many times before and continues to be overlooked by the regulator. It is submitted that the regulation has gone a little too far this time around with an ambitious feat that will do more harm than good because of its impractical considerations.

7 The way forward

Unsurprisingly, the new Regulation 28 brings about a reform that has been largely well received by the industry. It does, however, also impose some onerous responsibilities on retirement fund trustees: the regulation requires *inter alia* that a well-documented, sound process be followed to ensure compliance.[45] This means that trustees will need to ensure their asset managers have adequate administrative and compliance systems to provide the necessary data and reporting facilities in place within the required time frame and in the prescribed format.

The compliance obligation ensures that asset managers and their clients benefit from the implementation of pre-trade compliance monitoring systems.[46] These systems allow an asset manager to assess the effect of the proposed 'buy or sell' decision on the total portfolio and how its Regulation 28 status is affected before the trade is executed.[47] If the trade will result in a breach of the regulation, the trade will subsequently be blocked. Therefore, all asset managers should, in terms of the current regulation, be in a position to acquire similar systems over time.[48]

Where trustees use multiple asset managers, who deal with various collective investment schemes, the services of an asset

43 Nathan (n 29 above).
44 Kopke (n 35 above).
45 S Cranston 'Black Fund Managers: Black Gems' September 2006 http://free.financialmail.co.za/report06/fmfmsep06/afms.htm (accessed 27 June 2013).
46 STANLIB Insights (n 4 above).
47 Investment Solutions 'Regulation 28 as it relates to the asset-management industry' April 2012 http://blog.investmentsolutions.co.za/regulation-28-as-it-relates-to-the-asset-management-industry/ (accessed 25 June 2013).
48 There is no indication of what this time length is in terms of the Act or the Memorandum. Kopke (n 44 above).

consultant or investment platform may be required to achieve full compliance with the regulation at a total fund level.[49]

8 Conclusion

Employed South Africans contribute millions of Rand to different retirement funds annually. Most of these individuals will be completely dependent on this money for subsistence when the time for their retirement comes. It does not come as a huge shock that the measures adopted by Regulation 28 are — although overly ambitious — fundamentally created to protect the interests of these South Africans. It is from the provisions of the Regulation that the intention of the legislature to ensure that no irresponsible trading by asset managers or the abandonment of fiduciary duties by trustees is to be tolerated.

If government is serious about regulating the retirement industry, it needs to address the concerns raised and driven by investor needs, and not those raised by the policy objectives of government and industry. It needs to direct the appointment of trustees in order to safeguard the best interest of investors. Finally, the main focus should be on the most vulnerable in our country — the poor. The needs of the poor can be addressed more efficiently by inculcating a culture of saving at the earlier stages of life, not only through mechanisms of asset allocation.

[49] National Treasury (n 6 above).

THE *SHILUBANA* JUDGMENT IN LIGHT OF TRANSFORMATIVE CONSTITUTIONALISM

*By Serena Kalbskopf**

1 Introduction

In this essay I explore Karl Klare's notion of transformative constitutionalism explored in light of the case of *Shilubana*.[1] Firstly, I define transformative constitutionalism and the circumstances present in the South African Constitution (Constitution) that give its interpretation a post liberal propensity are set out. This is followed by establishing why it is important to dull the distinction between law and politics, and by a consideration of the influence of legal culture when interpreting the law. Thereafter, I give a brief background of *Shilubana*. I argue that *Shilubana* was informed by some transformative constitutionalism principles as far as enhancing multiculturalism is concerned although it was limited by the legal culture of Justice Van Der Westhuizen. Lastly, I attempt to show that the final outcome of the case did effect desired social change envisaged through or by the project of transformative constitutionalism.

2 Transformative constitutionalism

After establishing the important role that adjudication plays in the making of law,[2] Klare defines transformative constitution to mean a large scale revolutionary endeavour to cause social change by way of political processes grounded in law.[3] His primary argument is not to convince the legal community that transformative constitutionalism is the correct legal interpretation but rather to open dialogue in general as to the nature of legal interpretation.[4]

Klare claims that essential features of the Constitution are among other things multiculturalism and gender identity,[5] as well as a vision

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1 *Shilubana & Others v Nwamitwa* 2008 (9) BLCR 914 (CC).
2 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 147.
3 n 2 above 150.
4 Klare (n 2 above) 152.
5 n 2 above 153.

for 'collective self determination'.[6] From this, it would be expected that a document that departs from most classical liberal documents would establish a case for a post liberal reading of the Constitution. However, this is often not the case.[7] Klare argues that the reason for this is the notion that the correct legal interpretation is a traditional liberal view and a post liberal interpretation is a political, non-legal view.[8] In light of this, Klare highlights aspects of the constitution that would support a post liberal reading.

For purposes of this essay, the Constitutional facets that relate to social rights and the substantive conception of equality, affirmative state duties and multiculturalism are briefly examined. Social rights are furthered by the Constitution with a departure from an individual rights focus, to that of goals that should enhance communities.[9] In addition to social rights, substantive equality is also a predominate feature.[10] The government is called upon to promote human rights and equality — thus establishing positive state duties.[11] Klare argues that the Constitution celebrates multiculturalism including respect for cultural tradition.[12] With the presence of the substantive changes to the post 1994 Constitution, Klare states that this calls for a new judicial mindset to promote the values in the Constitution.[13]

Following from this, Klare's theory of judgement is set out by examining the relation between law and politics. Firstly, in terms of the idea of the Rule of Law, judges are seen as neutral enforcers of the law with no intimation of their own politics or subjective views, which are seen as synonymous.[14] This raises the question as to the actions that should be taken by judges when they face a problem where there is no clear cut solution in a legal text.[15] Notwithstanding the numerous approaches to suppress legal ambiguities, Klare argues that the strict separation between law and politics drawn by a traditional legal approach is a shortcoming and simplistic.[16] His theory is an alternative that seeks to 'blur' the distinction between law and politics.[17]

The point of departure is that legal texts, regardless of their certainty, operate within legal constraint.[18] Generally, legal texts do

6 Klare (n 2 above) 153.
7 Klare (n 2 above) 168.
8 n 2 above 152.
9 Klare (n 2 above) 153.
10 Klare (n 2 above) 153; Constitution of South Africa, 1996, sec 9(2).
11 Klare (n 2 above) 153; Constitution of South Africa, 1996, Preamble, secs 1(a), 7(2) & 39(1)(a).
12 n 2 above 155.
13 n 2 above 156.
14 Klare (n 2 above) 157.
15 Klare (n 2 above) 157.
16 n 2 above 158, 159 & 161.
17 Klare (n 2 above) 159.
18 Klare (n 2 above) 160.

not lend themselves to certain interpretations that provide for an initial impression of the nature of legal constraint. However, legal constraint does still bear an individual and cultural dimension.[19] When a number of different scenarios are considered where the tension between legal constraint and political values of a judge are explored, Klare arrives at the conclusion that a judge's political values cannot be excluded from the interpretation of a legal text.[20] As it is impossible to remove individual values from adjudication, the morals that underpin such adjudications should be evaluated and criticised.[21] From the existence of the great role that judges have in the creation of law comes a sense of responsibility as far as candidness is concerned.

With regard to the role that judges play, the legal community needs to be more open about the politics that encompass the judicial process. Doing so, it can be argued, would fulfill the Constitution's call for organs of state to 'provide ... transparent, accountable and coherent government'.[22] Moreover, the denial of the power that judges bear re-enforces legislative supremacy, which is not a characteristic of South Africa; a country in which the constitution is supreme.[23] Therefore, central to the idea of transformative constitutionalism lies in the candidness of the more delicate line between law and political ideals that individuals hold.The final point that Klare makes after his examination of law and politics relates to the cultural aspect involved in legal constraint. For Klare legal culture refers to 'habits of mind and intellectual reflexes' or what argument judges may find convincing.[24] Its origin lies in the failure of participants to recognise that the existence of what they may consider to be normal or convincing belongs specifically to their culture.[25] This inhibits constitutional interpretation and slows down transformation. A critical examination of our legal culture is therefore appropriate.[26] What follows below is a critical consideration of the link between South African legal culture and the resulting legal interpretation.

3 The cultural context of the *Shilubana* decision

South African legal culture is described as conservative where interpretation is a very structured rule bound approach.[27] Klare uses

19 Klare (n 2 above) 160.
20 n 2 above 163.
21 Klare (n 2 above) 164.
22 The Constitution of South Africa, 1996, sec 4(1)(c).
23 Klare (n 2 above) 165.
24 Klare (n 2 above) 167.
25 Klare (n 2 above) 167.
26 Klare (n 2 above) 168.
27 Klare (n 2 above) 169.

the United States of America's (US) legal culture to show a clear contrast between the two legal cultures. The US legal culture has a more policy based approach with far less emphasis on the reverence for law and the rejection of legal formalism as a result of the concretisation of realism.[28] What results from South Africa's judicial conservatism is a resistance to a post-liberal Constitutional approach to interpretation and to the interpretive work of legal materials.[29] It is due to this that it is feared that Constitutional transformation will be impeded, especially when a judge is restrained from legal interpretation that veers away from the formalistic culture.[30]

4 The *Shilubana* case

Before Klare's concept of transformative constitutionalism is viewed alongside the judgement in *Shilubana,* a brief background of the case is given. The Respondent, Mr Nwamitwa challenged Ms Shilubana's right to succeed Hosi Richard, the father of Mr Nwamitwa. Ms Shilubana was the daughter of Hosi Fofoza Nwamitwa who had no male heirs; as a result, succession was conferred to his younger brother Richard. In 1996, the Royal Family met and decided to confer Hosi onto Ms Shilubana and Hosi Richard further confirmed in the presence of a magistrate that upon his death, the position of Hosi would fall on Ms Shilubana. However, when Hosi Richard died Mr Nwamitwa sought an order in the High Court declaring him to be the rightful Hosi and not Ms Shilubana.[31] Following from both the High Court's and Supreme Court of Appeal's finding in Mr Nwamitwa's favour, Ms Shilubana appealed before the Constitutional Court.

An interpretation of section 39(2) of the Constitution was the primary basis on which the decision was made, that is, the development of customary law is featured to solve the dispute.[32] Thus, Klare's form of interpretation of a legal text would be most instructive and perhaps aid in a sound judgement. Transformative constitutionalism could be the recipe that could determine the ingredients and their respective amounts that would create a value laden result. Justice Van Der Westhuizen began by establishing what the customary law is,[33] and it is within the judicial establishment of customary law that transformative constitutionalism would employ an interpretation that would enhance the idea of 'multiculturalism'

28 Klare (n 2 above) 169.
29 Klare (n 2 above) 171.
30 Klare (n 2 above) 171.
31 D Cornell 'The significance of the living customary law for an understanding of law: Does custom allow for a woman to be Hosi?' (2009) 2 *Constitutional Court Review* 396-397.
32 *Shilubana* (n 1 above) para 42 & 48.
33 *Shilubana* (as above) 43.

which it most sternly supports.[34] To establish what measures should be used to decide what customary law is, the test in *Van Breda v Jacobs* was reviewed.[35] Van Der Westhuizen noted that customary law is an independent source of law and that the *Van Breda* test is thus not appropriate.[36] In this context 'customary law' is a body of law, and not a source, and has developed as a result of the wants and customs of a distinct group of people. Thus, transformative constitutionalism would agree with such an approach as it promotes the true cultural tradition of the Valoyi community where customary law is recognised as a flexible and changing system of law.[37] A test established under a judiciary system that sought to undermine many cultural traditions would have to be interpreted in a transformative way so as to promote democratic values.[38]

Notwithstanding Van Der Westhuizen's more post liberal approach to the determination of customary law, it is lacking a fundamental element of transformative constitutionalism — the recognition that a judge's own political and subjective experiences influence his or her decision.[39] As it is impossible for adjudication to take place without a judge's politics to be involved and specifically because this case involved a culture completely outside of Justice Van Der Westhuizen's point of reference, candidness about this would have enlightened the Constitution's call for organs of state to be more transparent.[40] However, the judgement in *Shilubana* does have redeeming transformative constitutional elements as far as candidness about political involvement is concerned. This is seen in how firstly the amicus of the National Movement of Rural Women are invited to the case,[41] and secondly how Van Der Westhuizen takes into account their submission.[42] This shows some acknowledgement of Van Der Westhuizen's awareness of his individual values, which are likely lacking in the awareness of customary law.

The narrow view of the High Court that, because incorrect parties within the traditional leadership decided to make Ms Shilubana Hosi, the decision was illegitimate, was found to be incorrect.[43] The more conservative strictly formalistic approach that the High Court adopted was a reflection of a legal culture that understands law as being a technical ritual. This is a failure to understand the context specific nature of customary law, and upholding the true nature of a culture's

34 Klare (n 2 above) 153.
35 *Van Breda & Others v Jacobs & Others* 1921 AD 330.
36 *Shilubana* (n 1 above) para 55.
37 Cornell (n 31 above) 403.
38 Klare (n 2 above) 150.
39 Klare (n 2 above) 162-163.
40 The Constitution of the Republic of South Africa sec 4(1)(c).
41 Cornell (n 31 above) 395.
42 Cornell (n 31 above) 403-404.
43 *Shilubana* (n 1 above) para 45.

tradition is intrinsic with that culture's dignity. Further, the Constitution calls for a post-liberal reading that would call for development of law in order to realise the principle of dignity and a positive duty in the establishment of rights in adjudication,[44] and the High Court and Supreme Court fail to do such by ignoring the context specific nature of customary law. The Constitutional Court in *Shilubana,* to an extent, rectifies this by recognising the contemporary developments of the law. Thus, Van Der Westhuizen used his interpretation within legal constraints to effect social change and a transformative decision followed.

5 The question of transformation

Although it can be argued that further transformation could have been achieved in the *Shilubana* case, one must raise the question: was there actual transformation? To answer the question one has to look at the change achieved in *Shilubana* in light of the past roles traditional leaders have had.

Before colonialism, traditional leaders played an important role within the social constructs of South Africa.[45] However, colonialism and the apartheid reduced them to instruments of indirect rule, thereby lessening their power significantly. The apartheid government in particular, used traditional leaders to further their idea of segregation within constructed homelands.[46]

As the post apartheid era government strives to correct the ills of the past, giving traditional leadership a space in South Africa has been one aim of the government. Different takes on the role traditional leadership has made the decision of 'what role traditional leaders should play?' more difficult. Modernist thinkers focus on traditional leaders in relation to gender equality and its mechanism as the basis of rural patriarchy, whereas traditionalists focus on the role of traditional leaders as the heart of rural governance, political stability and rural development.

The question of whether transformation was indeed achieved by the judgement is found between the modernist and traditional approach. The *Shilubana* decision manages to find the middle ground between these two ideas by not maintaining the important role that traditional leaders have, but engaging in social change by removing some patriarchal elements of traditional leadership. Thus, Klare's idea of a 'long term project' is embodied in the middle ground

44 Klare (n 2 above) 156.
45 SF Khunou 'Traditional leadership and independent bantustans of South Africa: some milestones of transformative constitutionalism beyond apartheid' (2009) 12 *Potchefstroom Electronic Law* Journal 4.
46 Khunou (n 45 above) 5.

between two ideas that will eventually open the way to more transformation.

6 Conclusion

To conclude, it has been shown that transformative constitutionalism in adjudication encourages social change in the spirit of democratic values such as multiculturalism. Further, transformative constitutionalism is achieved through the candidness of the influence of politics in adjudication. In the *Shilubana* decision, multiculturalism was recognised — although probably not to its fullest possible extent due to the influence of the South African legal culture which is always a possible impediment to the realisation of transformative constitutionalism. Notwithstanding *Shilubana*'s failures in a transformative constitutional sense, its final decision still affected positive social change.

ABALONE POACHING: A PHILOSOPHICAL APPROACH

*By Lauren Carr**

1 Introduction

The question that I raise is whether one's judgment, in other words, knowing the difference between right and wrong, can be clouded by monetary rewards, especially with regard to criminal activity. I take a philosophical approach with specific focus on the environmental concern of abalone poaching.[1] I draw parallels and theoretical answers from Karl E Klare's 'Legal culture and transformative constitutionalism',[2] James Boyd White's 'Justice in tension: an expression of law and the legal mind',[3] John Dugard's 'The judicial process, positivism and civil liberty'[4] and the theories of judgment of Hannah Arendt.[5]

Environmental crime is a rising epidemic, especially in South Africa. I argue that not enough attention is paid to such crimes. Sensational crimes seem to have an increased popularity in the press and environmental crimes seem to go deprioritised. There appears to be very few viable solutions for crimes that yield great economic returns. In the mind of the offender, the motivation of great economic returns can be said to override the sense of morality or judgment.

2 Judgment

'Judgment' can be defined as 'the ability to make considered decisions or come to a sensible conclusion'.[6] It is the tension between freedom and constraint. My approach towards interpreting the term 'judgment' is a three-fold one. The first workings of judgment occur within the offender's conscience. There is a rebuttable presumption

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1 Abalone is an edible sea mollusk, in an ear-shaped shell lined with mother-of-pearl http://www.http://oxforddictionaries.com/definition/english/abalone (accessed 10 May 2013).

2 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 -172.

3 J Boyd White 'Justice in tension: an expression of law and the legal mind' (2012) *No Foundations: An Interdisciplinary Journal of Law and Justice* 1-19.

4 J Dugard 'The judicial process, positivism and civil liberty' (1971) *South African Law Journal* 181-200.

5 D Villa (ed) *The Cambridge Companion to Hannah Arendt* (2005) 245-261.

6 http://oxforddictionaries.com/definition/english/judgement?q=judgment (accessed 10 May 2013).

in the South African legal system that an individual is mentally sound unless proven otherwise.[7] To be 'mentally sound' would imply rationality and the presence of a conscience. In line with the question at hand, this notion implies that most crime is premeditated and considered, as it can be assumed that most individuals would know the difference between right and wrong.[8] I will thus be following the assumption, as subscribed to by Arendt, that all people possess the ability to judge right from wrong and essentially consider their decisions before committing crimes.

The second form of judgment is the judgment held by the offender's representation. No lawyer can truly be objective. Boyd White explains that there are tensions between the opposing lawyers. Their legal language usage, readings of the law and personal views on justice will all have underlying influence on their actions and in turn, their judgment.[9]

Lastly, there is judgment in sentencing. Klare explains that judges use their imaginations and creativity in judging cases. Without it, law would not develop and will become stagnant.[10] This creativity however, can lead to possible indeterminacy in judgment.

3 Public awareness and deterrence

Information on the illegality of environmental crimes is very easily accessible and should be of vital importance to the citizens of South Africa. Section 21 of the Constitution[11] states that every South African citizen has the entrenched right to have the environment protected for the benefit of present and future generations.

There are a vast number of statutes such as the Marine Living Resources Act,[12] the National Environmental Management Act,[13] and the South African Maritime Safety Authority Act,[14] which serve in the protection of abalone. The Consumer Protection Act[15] and the Game Theft Act[16] give the Environmental Courts provision to issue orders to offenders for damages incurred. The Prevention of Organised Crime Act[17] aims at combating and preventing gang and organised crime.

7 *Prinsloo's Curators Bonis v Crafford & Prinsloo* 1905 TS 669; *Ken Barnard Motor en Bandediens (Edms) Bpk v Pretorius* 1970 (4) SA 712 (T) 713.
8 Villa (n 5 above) 245.
9 Boyd White (n 3 above) 1-19.
10 Klare (n 2 above) 146 -172.
11 The Constitution of the Republic of South Africa, 1996, thereafter 'the Constitution'.
12 Act 18 of 1998.
13 Act 107 of 1998.
14 Act 5 of 1998.
15 Act 68 of 2008.
16 Act 105 of 1991.
17 Act 121 of 1998.

Section 34 of the National Environment Management Act (NEMA)[18] contains provisions for sentencing offenders and gives the courts power to recover costs needed to rehabilitate the environment.

Every fishing season, permit conditions for abalone fishing are publicly released on the Government of South Africa's website.[19] Catch limitations, validity of permit, restricted fishing areas and violations, to mention a few, are published in this document. A branch of environmental law serves to protect and enforce the biodiversity of species. Specific Environmental Courts are recognised in terms of section 166 of the Constitution whose function is aimed at charging offenders with environmental crimes.

Abalone (the endemic species *haliotis midae*) has been listed in Appendix III according to CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora, 2007). This has been in effect since 3 May 2007. This is made public on the CITES website. The Department of Agriculture, Forestry and Fisheries of South Africa release frequent media statements, where complete updates are provided to the public about arrests, confiscations and sentences given to offenders involved in abalone poaching.[20]

In light of all the protection, legislation and awareness of the illegality of poaching and other environmental crimes, one has to ask: why is there such a recurring problem and why are the deterrence measures not effective enough in order to sustain a healthy and diverse environment?

There is a well-known theory of crime in the field of criminology, known as the 'Rational Choice Theory' by Cornish and Clarke.[21] It proposes that offenders make decisions or choices to commit criminal behaviour, through a process of rationality. They weigh the benefits against the potential consequences. If the benefits seem to outweigh the latter, the probability of choosing to commit the crime increases. I have discussed the consequences in the above paragraphs and I will now cover the potential benefits and the outcomes as a result.

18 Act 107 of 1998.

19 'Permit conditions: abalone fishery fishing season 2011/2012' found at http://www.nda.agric.za/doaDev/sideMenu/fisheries/21_HotIssues/April2010/FishingPermitsConditions2012/Abalone%20Permit%20Conditions%20for%202011_2012%20season.pdf (accessed 31 March 2013).

20 Department of Agriculture, Forestry and Fisheries 'The fight against poaching and corruption shall continue' on 1 August 2012 found at http://www.daff.gov.za/docs/media/01AUG2012-Anti-PoachingStatement.pdf (accessed 31 March 2013).

21 D Cornish et al *The reasoning criminal: rational choice perspectives on offending* (1986) 1.

4 Benefits or rewards reaped through criminal behaviour

South Africa is a third world country. There is a large division between rich and poor countries, not only in the standard of living but when you look at the currency value of the country in question. Poaching syndicates' largest target-markets are Asian buyers. The poached stock is usually paid for in dollars. The Rand-Dollar exchange rate is currently at 1$ = R9.98.[22] This monetary reward will clearly cloud the judgment of an offender's mind when dealing with importing illegal goods — thus making the decision to commit crime an easier one.

To put it into context with regard to abalone poaching, there is a high level of attractiveness in this form of crime. The illicit market for abalone started rising at an incredible rate in the 1990's when the rand started weakening against the dollar.[23] This may seem irrelevant, but abalone is internationally traded in dollars. This yields high profits for the poachers, when profits are converted back into Rands. A conservative valuation of the South African abalone market price is R350/kg.[24] Bartering in return for low-priced drugs acquired from the Asian countries (such as methaquolone) also became increasingly common, especially in the Cape Flats drug market.[25] In 2002 for instance, authorities confiscated more abalone than that collected by commercial fisheries.[26]

5 Explaining motives for criminal behaviour through Arendt's theories of judgment

The motives of the crime in question can be explained by using Arendt's theory models. The first theory of judgment is largely political and does not have proper relevance to this case study. Arendt's second theory of judgment concerns itself with the linkages between judgment, understanding and thinking. Judgment is seen as a 'component in the life of the mind' the ideas of public policy and universality of ideals and rules are emphasised.[27] She explains that once rules lose their validity, it becomes difficult to understand or

22 Exchange rate at the time of writing as provided for by http://www.xrates.com (accessed 7 June 2013).

23 J Steinberg 'The illicit abalone trade in South Africa' April 2005 found at www.iss.co.za: http://www.iss.co.za/pubs/papers/105/Paper105.html (accessed 7 June 2013).

24 590 tons of abalone confiscated by South African authorities in 2010 – 2011, 9 November 2011, found at http://internationalabalonesociety.org/africa_news.html (accessed 31 March 2013).

25 Steinberg (n 23 above) 3.

26 Steinberg (n 23 above) 1.

27 Villa (n 5 above) 246.

exercise our judgment accordingly.[28] Rules only lose their validity if the accepted public standards, morals and ideals so allow.

I believe that this theory relates, in particular to my case study. Abalone poaching is a rising epidemic. It is difficult to deter, or keep record of the numbers and the incidents, if nonchalant attitudes towards protecting endangered species are maintained. This becomes prevalent especially in small coastal towns, where societal attitudes and standards of judgment towards this issue may be negative. It may also be that there is no awareness that the act of poaching is a crime, which hence increases the likelihood of offences. A large problem we are also facing is that there are unknown figures regarding the corruption in the authority, the number of illicit permits out there, or the number of poachers who are practising undetected.

The second point that Arendt makes is that the activity of thinking and judging produces conscience as a byproduct that 'tells' us what is wrong behaviour.[29] This relates back to my previous notion that it is accepted in the South African legal system, that every individual has a sound mind unless proven otherwise. It can be interpreted in such a way that one can assume that every 'offender' has a sound mind and the predisposition to therefore consider and premeditate their actions beforehand.

Abalone poaching typically takes its form in that of a criminal syndicate. It is well organised and planned. There are three levels of the activity chain in abalone poaching: the divers, the middlemen, who collect the abalone from the divers, and then lastly, the processors, usually the Asian entities who import the abalone stock at a high price. It is evident that serious consideration must be taken before getting involved in such a syndicate.

A troubling question, especially with regard to poaching, is that of 'worth'. With regard to an environmental crime taking place, this is a conscious weighing-up of the worth of money versus the worth of the environment. The former is typically favoured and the potential environmental damages are ignored. According to Arendt, in order for one's judgment to be valid, one must be able to think 'representatively' — from the view of someone else. It can be said that poaching offenders therefore have errors in judgment because of the disregard for the potential consequences that their actions may have on the environment.

28 Villa (n 5 above) 247.
29 Villa (n 5 above) 249.

6 Tensions in law and judgment

In his work 'Justice in tension: an expression of law and the legal mind', James Boyd White writes that law is not an abstract system, but rather parallels it with the concept of a language — one must work to understand and translate it.[30]

There is a clear power struggle between opposing lawyers in court — both lawyers want to win.[31] This causes a dynamic tension of thought and action, as lawyers will have, even if it is subconscious, differing moral judgements. Both lawyers will interpret the same set of facts differently, leading to tension arising from the opposing arguments, despite both arguments being premised on the same legal system.

It is for the judge to decide on the outcome of the case, however, judges can never really be completely unbiased and objective in their judgments. In Dugard's 'The judicial process, positivism and civil liberty' he addresses the flaws of positivism. He writes that as long as judicial function is entrusted to men, judgment will never be free of subconscious.[32]

Dugard states that human limitations will always obstruct true judgment and that there will always be a risk of subconscious personal biases, causing tension between the individual and the state.[33]

7 Case study: *S v Barnard*

In the 2005 case, *S v Barnard*,[34] the accused was caught pulling bags from the water. He was also discovered to be in possession of bags on the beach containing 666 Abalone. He was accused of three charges: being in possession of abalone without a permit (more than four per day); fishing or collecting abalone during the closed legal season without a permit, and being in custody or in possession of more than 15 abalone at any given time. The accused was only found guilty on the first charge, with the last two being set aside on the basis of redundancy.

The offender was sentenced to a fine of R 40 000 or an alternative jail imprisonment of 2 years. The average weight of an abalone, 80 grams, and the conservative market value price of R350/kg, can be used to calculate that the offender would have earned R 18 648.[35]

30 Boyd White (n 3 above) 1-19.
31 Boyd White (n 3 above) 1-19.
32 Dugard (n 4 above) 181-200.
33 Dugard (n 4 above) 181-200.
34 *S v Barnard* 2005 JOL 14758 (E).
35 0.8kg x 666 x R350/kg = R18 648.

This is disappointing, as the fine imposed on the offender was 2 times more than the potential revenue that would have been received from the sale of the illegal abalone. Further, the accused would likely have sold it to an international buyer paying in dollars, proving even more lucrative.

I believe that such a fine does not serve as a sufficient deterrence, thus contributing to higher recidivism rates. Boyd White explains that with regard to the judgment, there is tension between the different readings of the law. Judges have tension in their mind where they must make their own choice of judgment, whether it be making a choice over sentencing or a fine. Thereafter, they must accept responsibility for it. The tension between law and justice will never be perfect. One of the two will never be fully met and fulfilled.[36]

8 Conclusion

In conclusion, I argue that large monetary benefits definitely surpass the criminal sanctions in the judgement of an offender thereby resulting in the commission of crime. By consequence, I argue that considerations for the law or the environment are too surpassed. Human judgment is flawed, whether it is the judgment belonging to a civilian, a criminal or even a judge. It is prevalent in all. It rests on the willpower of the individual on whether to exercise freedom or constraint.

[36] Boyd White (n 4 above) 1-19.