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To submit articles, contact:
PULP
Faculty of Law
University of Pretoria
South Africa
0002
Tel: +27 12 420 4948
Fax: +27 12 362 5125
pulp@up.ac.za
www.pulp.up.ac.za

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EDITORS' NOTE

The Editorial Board of the *Pretoria Student Law Review* has the pleasure of presenting to you the second edition of this publication. The first edition is available on our website. When we began this process two years ago, we could not have anticipated the overwhelmingly positive response that we would enjoy, or that we would receive articles from students based thousands of miles away.

From our side, we continue to strive to make this student-driven initiative as successful and far-reaching as possible. Copies of the journal have been distributed to judges, law firms and universities across the country, as well as to students across the continent. Within the Faculty, we are working on developing an interactive website for the journal, and offering writing workshops to students to develop the essential writing skills that every legal practitioner needs.

The articles in this edition cover a wide array of topics, ranging from legal philosophy to strictly black-letter law. Delving into the philosophies of the law and the way in which they are applied, the notions of truth and justice are scrutinised, with suggestions on how it may be improved. The question of the extent of the vicarious liability of the Minister of Safety and Security is raised, with reference to the case law on the topic. A comparative analysis of intellectual property law from different jurisdictions is undertaken in this relatively new branch of the law. As for commercial law, matters such as the duties of directors in a company, documentary letters of credit, and the 'advantage to creditors' requirement in insolvency law are critically examined. These topics are all highly relevant in the present legal arena.

South Africa, the continent and the world at large are on the cusp of a new era — socially, economically and politically. With the uncertainties that the future holds, we as law students have a duty to utilise the unique position that we are in to challenge the *status quo*. University is about more than an academic transcript. We must not be complacent. We must strive for the enforcement of the rule of law. We must question why. We must demand answers. And we must be relentless in our search for truth and justice. The *Pretoria Student Law Review* provides a forum for critical thinking, argument and debate. We look forward to hearing what you have to say!

NOTE ON CONTRIBUTORS

The contributors to this edition are from South Africa, Nigeria and India. They also range from students in first to final year of undergraduate study, to master's and doctoral candidates. Kenneth Sithebe and Mlungisi Mahlangu are presently undergraduate students at the University of Pretoria, whilst Harshita Bhatnagar and Vinay Mishra are undergraduate students at the Gujarat National Law University in India. Babatunde Fagbayibo is a doctoral candidate at the University of Pretoria. Further, some contributors have graduated since submitting their article to the *PSLR*: Miguel-Angelo Almeida is currently working at Barclays Bank in Mozambique, and Tenielle Appanna, Tanya Rheeder and Rudolph de Neijs are working as candidate attorneys in law firms around Gauteng.

Articles are accepted from all students, at any university, at any level of study.

NOTE ON CONTRIBUTIONS

All students are invited to contribute to the next edition of this journal. If you have any comments, queries or submissions, please email us at pslr@up.ac.za or visit our website at www.up.ac.za/law. You may also contact us through the Office of the Dean of the Faculty of Law:

Dean's Office: Faculty of Law
4th Floor, Law Building
University of Pretoria
Pretoria
0002

Please note that all contributions must be formatted as per the PULP style guidelines, available on our website at www.up.ac.za/law.

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Whilst it is a source of great pride that this is a student-based journal, the editors would like to thank the following members of staff in the Law Faculty for their invaluable assistance: Professor Christof Heyns, Lizette Besaans, Danie Brand, Tshepo Madlingozi and Elzet Hurter.

TOWARDS THE REALISATION OF JUSTICE IN THE NIGER DELTA: A SOCIO-LEGAL PERSPECTIVE

*By Babatunde Fagbayibo**

> 'You do not interest me; no man can say these words to another without committing a cruelty and offending against justice.'
> – *Simone Weil*[1]

1 Introduction

Apart from the brutal Nigerian civil war (1967 - 1970), nothing else has captured the conscience of the people of the world, *vis-à-vis* the Nigerian Federation, more than the plight of the people of Niger Delta. It remains the open sore (to borrow Wole Soyinka's phrase) of the Nigerian Federation.[2] The devastating impact of oil exploration in the area has wreaked havoc of immeasurable proportions on the health, socio-economic and environmental conditions of the people. From the short-lived armed struggle of the late Isaac Adaka Boro in the 1960's, to the civil resistance method of the late Kenule Saro Wiwa in the early 1990's, and the present guerrilla tactics of the Movement for the Emancipation of the Niger Delta (MEND), the issue of the Niger Delta continues to beg for more constructive attention.

This paper aims to ascertain the (in)justice in the Niger Delta through an examination of the concept of justice, and subsequently to recommend strategies for redressing the inherent anomalies.

2 A brief history of the Niger Delta

Oil was first discovered in commercial quantities in Oloibiri, in the present day Bayelsa State, in 1956. The Niger Delta (also geo-politically referred to as the south-south region) covers an area of

* LLD candidate, Faculty of Law, University of Pretoria. This paper is an abridged version of a research paper submitted in 2006 towards the partial fulfilment of an LLM at the University of Pretoria. I sincerely appreciate the candid comments of Professor Karin van Marle on the draft of this paper.

1 Cited in K van Marle 'Lives of action, thinking, and revolt — a feminist call for politics and becoming in post apartheid South Africa' (2004) *South African Public Law* 626.

2 W Soyinka *The open sore of a continent: A personal narrative of the Nigerian crisis* (1996).

about 70 000 square kilometres; it covers roughly two-thirds of the entire coast of Nigeria.[3] The Niger Delta is spread across nine out of the 36 states of Nigeria: Abia, Akwa Ibom, Bayelsa, Cross River, Delta, Edo, Imo, Ondo and Rivers States.[4] The estimated population is about 20 million, with over 40 different ethnic groups speaking 250 different dialects across 3 000 communities. Farming and fishing are the predominant occupations of the people.[5]

While oil accounts for 90 per cent of Nigeria's total export earnings and over 80 per cent of the government's revenue,[6] the area remains the least developed in the country.[7] According to a 1995 World Bank report, *per capita* income in the region is below the national average of the $280.[8] Health indicators are low; there is high fatality from water-borne diseases, malnutrition and poor sanitation. Less than 20 per cent of the area is accessible by good roads.[9] Human and infrastructural development in the area is abysmally low. Agriculture and fishing, the main sources of livelihood of the people from time immemorial, have been destroyed by the devastating pollution caused by gas flaring and oil spillage. These neglects have aggravated the situation in the area.

These problems are largely as a result of a lack of responsible and accountable leadership at both the federal and local levels. The oil companies and businesses in the region have carried out oil exploration and extraction for over 50 years without proper environmental impact assessment.[10] In spite of the successive agencies that have been created over the years — the Niger Delta Basin Development Board (NDBDB) in 1965; the Oil Minerals Producing Areas Development Commission (OMPADEC) in 1992; and the current Niger Delta Development Commission (NDDC) in 2000 — the plight of the people and the area they inhabit remains unchanged.

3 The theory of justice

Throughout history, no other philosophical concept has been as controversial and widely debated as justice. Justice seems elusive in a world bedevilled with ceaseless strife, a huge divide between the

3 'The Niger Delta: A brief history' http://www.nddconline.org (accessed 20 June 2006).
4 As above.
5 E Alagoa *A History of the Niger Delta* (2005) 13-14.
6 N Budina & S van Wijnbergen 'Managing oil revenue volatility in Nigeria: The role of fiscal policy' http://siteresources.worldbank.org/INTDEBTDEPT/Resources/468980-1207588563500/4864698-1207588597197/AFRI427460Ch10.pdf (accessed 20 May 2008).
7 Soyinka (n 2 above).
8 http://www.ihrhl-ng.org/niger%20delta.html (accessed 1 May 2008).
9 Soyinka (n 2 above).
10 As above.

poor and the rich, unbridled unilateralism, famine, crippled economies, subjugation of the minorities, and institutional racial and gender discrimination. With all of these in mind, one is left with the inevitable questions: What is justice? Where is justice? How is justice measured? In order to gain a purposeful insight into this question, it is pertinent to take a philosophical incursion into the origin of this concept.

The idea of justice is said to have existed as early as the history of mankind.[11] In the biblical Garden of Eden, the first administration of justice was exerted: The injunction not to touch the apple and the eventual conviction and sentencing as a result of the flouting of this order.

From here, we can escalate to the Greek period of 1000 BC by examining Aeschylus's trilogy, *The Oresteia*.[12] The heroine in this ancient mythology, Electra, is the seeker of justice. She sought revenge against those who had killed her mother. The irony of the situation lies in the fact that it was Orestes — her brother — who had committed the heinous crime on the excuse of avenging their father's death. However, Electra did not want vengeance on her brother but on her enemies (read: hypocrisy). While the majority of judges found Orestes guilty, the Goddess Athena — using her casting vote — acquitted Orestes. In order to console the aggrieved, Athena set up a human court to make sure that justice would henceforth be served.

Aristotle referred to justice as 'that kind of state of character that makes people disposed to do what is just and makes them act justly and wish for what is just'.[13] He defines justice as 'giving everyone his due'. This is distributive justice. How does distributive justice — giving everyone his or her due — fit into the Niger Delta question? By using all known parameters, can one safely say that the impoverished people of the Niger Delta have been given their due in terms of education, health, good roads and most importantly a realistic revenue allocation formula? As will be shown in the following, justice remains elusive in the Niger Delta.

According to the positivist school of thought, justice depends on man-made law — 'where there is no commonwealth, there nothing is just'.[14] Hobbes believed that all laws:

> have their authority and force from the will of the commonwealth; that is to say, from the will of the representatives ... the law ... is a

11 K Eso *Anatomy of Justice* (1990) 7-8.
12 C Douzinas & A Gearey *Critical jurisprudence: The political philosophy of justice* (2005) 113-116.
13 Soyinka (n 2 above) 10.
14 Soyinka (n 2 above) 16-17.

> command, and a command consisteth in declaration or manifestation of the will of the commandeth.[15]

This statement implies that subjects are meant to obey any law — regardless of its unreasonableness — as long as it comes from the sovereign. Could it thus be argued that the constitutional provision regulating the revenue allocation, and legislation regulating crude oil exploration in the Niger Delta, are valid in spite of the adverse effect it has on the people? These points will be considered later.

At this juncture, it is instructive to consider two modern day theorists, Roscoe Pound and John Rawls. Roscoe Pound[16] considered law as a means of attainment of justice through social engineering. Rawls' idea of social justice is divided into two principles. According to him, the first principle implies that 'each person is to have an equal right to most extensive social system of equal basic liberties compatible with a similar system of liberty for all'.[17]

The second principle is that social and economic inequalities are to be arranged so that they are both:[18]

- to the greatest benefit of the least advantaged, consistent with the just saving principle; and
- attached to offices and positions open to all under conditions of fair equality of opportunity.

Can it be argued that the pursuit of socio-economic justice in the Niger Delta should be tailored along these lines?

4 An analysis of the cases

4.1 Shell Petroleum Development Corporation v Adamkue[19]

In this case, the appellant, Shell Development Company of Nigeria, had oil concessions all over the Ogoni area. In the course of their crude oil productions, they established flow stations from which crude oil is conducted through pipelines. On 31 July 1994, there was an explosion at one of the flow stations, which led to a massive spillage of crude oil. A large area of the land, creeks, rivers and forest were affected. The respondents, who are natives of the areas affected by the spillage, claimed to have suffered losses.

The Court of Appeal had to deal with *inter alia* the following issues, these being of the greatest significance to this article:

15 As above.
16 Soyinka (n 2 above) 22.
17 J Rawls *A theory of justice* (1971) 302.
18 As above.
19 G Fawehinmi & A Olanrewaju (eds) *Nigerian weekly law reports* (2003) 451-670.

- whether the respondents were entitled to any damages caused in respect of loss of earnings from fisheries, damage to water, creeks, etc because section 3(1) of the Minerals Act[20] vested all natural resources in the state; and
- whether the oil spillage was as a result of the negligence of the appellant.

In dealing with the first issue, the judge held that while section 3(1) of the Minerals Act vests the control of minerals and oils under and upon any lands in Nigeria in the state,[21] fishing within tidal waterways was free to all inhabitants of the country and citizens were entitled to establish temporary occupation on the banks of such waterways.[22] When there is a violation of these rights, inhabitants, like any other owner, are entitled to compensation.

On the second issue, the judge held that the oil spillage would not have occurred if proper care was taken.[23] The Court rejected the appellant's view that the accident was caused by vandals in the area, because this view was in conflict with the evidence of the police officer charged with the responsibility of guarding the pipeline.[24]

4.2 Jonah Gbemre v Shell Petroleum Development Corporation; Nigerian National Petroleum Corporation and the Attorney General of the Federation[25] (Gbemre case)

This case is similar to the aforementioned. The plaintiff, Mr Gbemre of the Iwherekan community in Delta State Nigeria, sought a declaration compelling the defendants (first and second) to stop the continuation of gas flaring in his community without a valid Environmental Impact Assessment (EIA). He claimed that burning gas by flaring in his community has led to the pollution of the environment, exposure to diseases such as cancer, respiratory illnesses and chronic bronchitis, pollution of food and water, etc.[26] He also claimed that continued gas flaring in his community was a violation of the community's rights to life and to a clean, healthy, pollution-free environment, and the dignity of human persons guaranteed by the Constitution of Nigeria and the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.[27]

20 Act 55 of 1945.
21 As above.
22 Fawehinmi & Olanrewaju (eds) (n 19 above) 596.
23 Fawehinmi & Olanrewaju (eds) (n 19 above) 594.
24 As above.
25 http://www.climatelaw.org/media/gas.flaring.suit.nov2005/ni.pleadings.doc (accessed 20 March 2006).
26 'Oil development in Nigeria: A critical investigation of Chevron Corporation's performances in the Niger River Delta' www.n-h-i.org/publicatios/pubs_pdf / Nigeria_corp Account.pdf (accessed 20 May 2006).
27 Act 2 of 1983.

The Court held that the continuation of gas flaring in the applicant's community is a violation of the constitutionally guaranteed rights to life (including a healthy environment) and dignity. In addition, it held that the failure of the first and second respondents to carry out EIA in the community is a violation of the section 2(2) of the Environmental Impact Assessment Act.[28] The Court further held that the provisions of sections 3(2)(a) and (b) of the Associated Gas Re-Injection Act of 1979 and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulation,[29] under which continued flaring of gas in Nigeria may be allowed, is inconsistent with the applicant's right to life and dignity.

The Court made an order of perpetual injunction restraining the defendants from further flaring gas in the applicant's community, and finally ordered the Attorney-General of the Federation to set in motion immediately, after due consultation with the Federal Executive Council, for the enactment of a bill by the National Assembly for the amendment of the relevant sections of the Associated Gas Regulation Act.

4.3 Ethics and justice: any correlation?

The striking similarities between these cases lie in the way the courts have dealt with certain legislation concerning oil exploration in the Niger Delta. The courts have boldly considered the effects of uncontrolled gas flaring in the area, ruling in the *Gbemre* case that both the government and oil companies must stop the further flaring of gas. It is important to discuss the two pieces of legislation that were considered in these cases.

Firstly, section 3(1) of the Minerals Act provides that:

> the entire property in and control of all minerals, in, under or upon any lands in Nigeria, and of all rivers, streams and watercourse throughout Nigeria, is and shall be vested in the State, save in so far as such rights may in any case have been limited by any express grant made before the commencement of this Act.

Secondly, sections 3(2)(a) and (b) of the Associated Gas Re-Injection Act and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations, allows for continued flaring of gas in Nigeria in spite of its devastating impact.

If one was to consider these provisions in the context of Austinian command positivism, Jeremy Bentham's 'pain and pleasure syndrome' and Hobbes' 'command of the sovereign', then one will find no fault with the contents of the aforementioned provisions.

28 Act 86 of 1992.
29 Regulation S.1.43, 1984.

According to the positivist, justice is identified fully with law.[30] Justice excludes the notion of ethics or morals. Situating this within the context of these judgments, the judges are expected not to find any fault with the content of the abovementioned provisions because they are the law. The consequences of these pieces of legislation, however, have little or nothing to do with the law. They fall within the scope of morals, which must be separated from the law. As aptly stated by Aristotle, 'evidently all lawful acts are in a sense just acts, for the acts drawn by the legislative act are lawful, and each of these, we say is just.'[31]

To this extent, can it be argued that these provisions are just, since they are the laws of the land? But realistically speaking, will this help the precarious situation in the Niger Delta?

This is where ethics comes in. In analysing his phenomenology of judgment, Kennedy[32] expressed that there is a conflict between the law and a judge's existential decision; that is, how he wants it to come out.[33] A judge's existential decision is determined by his or her ethics, morals and understanding of his or her environment. In explaining his idea of indeterminate judgment, Aristotle[34] defined practical wisdom or *phronesis* as the method of deliberation followed by the prudent, in order to arrive at judgments that will help achieve the standards of excellence of the various practices as a part of the wider project of establishing the good life.

Can it then be argued that the decisions in the aforementioned cases are in line with *phronesis* or ethics?

One would agree. In the *Adamkue* case,[35] the judge held, in spite of the provisions of section 3(1) of the Minerals Act which vested the ownership of all minerals in Nigeria in the state, that the common right of fishing in tidal water is recognised and not affected by this provision. Recognising that fishing is the main occupation of the people in the area and also considering that the gross negligence of the oil companies has resulted in an oil spillage that has wreaked havoc of immeasurable proportions on the people and their environment, the judge could not help but give a wide interpretation to this otherwise restrictive provision so that justice could be served.

What role has *phronesis* or ethics played in the *Gbemre* case? It is clear that sections 3(2)(a) and (b) of the Associated Gas Re-Injection Act, which allows for continued flaring of gas without any Environmental Impact Assessment (EIA), is more business-friendly

30 Douzinas & Gearey (n 12 above) 132.
31 Eso (n 11 above) 16.
32 Douzinas & Gearey (n 12 above) 235-237.
33 Douzinas & Gearey (n 12 above) 132.
34 Douzinas & Gearey (n 12 above) 167.
35 Fawehinmi & Olanrewaju (eds) (n 19 above) 595-596.

than people-friendly considering its devastating impact. The Court held that this section is a clear violation of the community's rights to life and dignity. It further held that the continued gas flaring must be stopped and the government should amend the conflicting provisions. In situating this within the context of 'indeterminate judgment', one can easily deduce the role ethics has played in influencing the judge's decision. In deciding this case, the judge has been influenced by his sense of morals and conscience, largely shaped by his observance of the devastating effects of gas flaring in the Niger Delta, negligence on the parts of the government and oil companies, and a genuine drive to deliver a judgment that will contribute in a positive way to addressing the Niger Delta imbroglio.

While the judiciary has made strident efforts at making sure that legal justice and equity is applied to the Niger Delta question, one must not neglect certain impediments to the fulfilment of legal justice in the area. It has been observed that oil companies usually respond to litigation with continuous appeals, ensuring that litigants do not benefit from their legal victory.[36] Another hindrance is the cost of bringing a case against the government and the oil companies, considering the fact that most of the litigants are impoverished and uneducated.[37] In this regard, it is important that civil society play a more active role in ensuring that indigent litigants are assisted.

5 The way forward

It must be remembered that there is nothing more difficult to plan, more doubtful of success, or more dangerous to manage than the creation of a new order, for the initiator has the enmity of all who profit by the preservation of the old institution and merely lukewarm defenders in those who would gain by the new one. This was the infamous sentiment of Nicolo Machiavelli.[38]

The Niger Delta challenge remains the albatross hanging around the neck of the Nigerian Federation. No one can argue the fact that there is injustice in the Niger Delta. The reek of injustice pervades the society and can only be ignored at the peril of the Nigerian people. The legacy of 50 years of oil exploration in the Niger Delta includes disastrous ecological degradation, environmental pollution, and zero development. Over 50 per cent of the 70 000 square kilometres of the territory has neither navigable roads nor hospitals.[39]

36 'Oil development in Nigeria: A critical investigation of Chevron Corporation's performances in the Niger River Delta' www.n-h-i.org/publicatios/pubs_pdf / Nigeria_corp Account.pdf (accessed 20 May 2006).
37 As above.
38 http://www.quotedb.com/authors/nicolo-machiavelli (accessed 1 August 2008).
39 'Editorial' *The Guardian* June 13 June 2006 2.

How then do we translate these activist judgments into something concrete and substantial? To answer this germane question, it is instructive to employ the ideas of the aforementioned philosophers in mapping out the way forward.

5.1 The greatest benefit

John Rawls' idea of socio-economic justice implies that the greatest benefit should be given to the least advantaged, consistent with the just-saving principle.[40] It is undeniable that the Niger Delta is the least advantaged if this theory is placed within the Nigerian context. The pertinent question is 'what constitutes the greatest benefits?'.

It has been suggested that what the Niger Delta needs is a 'Marshal Plan' similar to the one given to Germany after the Second World War. Igiebor[41] suggested that there should be a ten year programme of socio-economic infrastructural development aimed at providing basic necessities such as potable water, modern education facilities, hospitals, power supply, and free education to tertiary level for indigenes, funded with a minimum of $1.5 billion to $2 billion. He also proposed the creation of a special saving-*cum*-investment fund specifically for the Niger Delta area for a time in future when the oil would run out.

On 18 April 2006, the Nigerian government adopted the report of the Consolidated Council of Socio-Economic Development of Constitutional State of the Niger Delta.[42] The report suggested that the developmental programme in the Niger Delta be divided into:

- short term (now - two years);
- medium term (two - five years); and
- long term (five years and above).

The report further suggested that developmental programmes must include the federal government's intervention in the employment of indigenes, transport and road infrastructures, education, health, telecommunication, environment-friendly initiatives, agricultural development, and power and water resources.[43]

The greatest benefit requires a vibrant and genuine strategic approach by the government and the oil companies in order to create a sustainable development in the area. The Niger Delta people must also be involved in this process. Any process short of economically improving the lot of the Niger Delta people is reductive and will only exacerbate the already explosive situation in the area. The Niger Delta people not only deserve the greatest benefit because they have

40 Rawls (n 17 above) 302.
41 N Igiebor 'Cry the unbeloved Delta' (2006) *Tell Magazine*.
42 *The Guardian* 19 April 2006 5.
43 As above.

been disadvantaged for a very long time, but because their area is the proverbial goose that lays the golden eggs.

5.2 The mills of justice

Roscoe Pound[44] considered law as a means of attainment of justice through social engineering. The three mills of justice are:

- making of laws, that is legislation by legislators;
- interpretation of laws by the court; and
- application of laws, that is, achievement of purpose.

Interpretation of laws by the courts has earlier been discussed. What is considered now is the making of laws and the application of laws so that the purpose is achieved.

One of the greatest obstacles to the eradication of injustice in the Niger Delta is the 'derivation formula' in section 162(2) of the Nigerian Constitution:[45]

> [P]rovided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen percent of the revenue accruing to the federation account directly from any natural resources.

In essence, this means that only a paltry 13 per cent of the pecuniary benefits derived from the sales of crude oil accrue to the nine states of the Niger Delta. Under the 1960 Independence Constitution, the Niger Delta area was recognised for special development initiative and attention. It recognised that a 50 per cent royalty deriving from oil and gas was to be paid to the oil producing area.[46] This arrangement was in place until the advent of military rule in 1966. The 'royalty clause' has since been replaced with the 'derivation clause'.

There exists a need to overhaul the Nigerian Constitution so that every ethnic nationality has a sense of belonging. Being a diverse nation, what Nigeria needs is a proper federal constitution that reflects these realities, assuages the fears of the minorities and most importantly, entrenches the ethos of social justice and fairness. There should not be any place for laws that are intent on depriving people of their humanity or unnecessarily withholding their dues. It is imperative that national development is reshaped so that policies of the federal government give the utmost priority to oil producing areas.

44 Eso (n 11 above) 22.
45 Constitution of the Federal Republic of Nigeria 1999 (the Nigerian Constitution).
46 Independent Constitution of Nigeria, 1960 sec 134; Constitution of Nigeria 1963 sec 140.

What is required is the immediate amendment of section 162(2) of the Nigerian Constitution so that it may reflect justice. The only way to achieve this is by stipulating a minimum royalty of 50 per cent deriving from oil and gas for oil producing states.[47] This will go a long way in giving the people a sense of belonging and autonomy over their resources. Other measures like strict environmental laws, accountability of oil companies (for example, legislation making it compulsory for oil companies to plough back a stipulated percentage of their profits into both human and material development of the area), involvement of the indigenes in developmental activities and detailed developmental programmes, prioritised and given adequate attention.

6 Conclusion

The restoration of justice in the Niger Delta is not negotiable; it is in fact the only way out of this quagmire. The Nigerian government needs to demonstrate concerted and genuine political will by putting in place frameworks aimed at eradicating the continued marginalisation of the area. The Niger Delta people deserve a better deal from the Nigerian federation. The Niger Delta question is indeed the open sore of the Nigerian federation and only justice can heal this wound. The triumph of justice in the Niger Delta is thus imperative.

47 C Ikpatt 'Understanding the difference between percentage derivation and resource ownership' http://www.ngex.com/news/public/article.php?ArticleID=21 (accessed 15 July 2008). Some Niger Delta activists have demanded a constitutional provision that guarantees full (100%) royalties and rent while the Nigerian government only claims taxes and profit margin.

LEGAL TRUTH: THE CONFLICT BETWEEN REAL JUSTICE AND LEGAL JUSTICE

By Patrick Mayer[*]

1 Introduction

The following article is a chapter taken from my dissertation, and as such needs to be situated for the reader. The dissertation is a philosophical discussion concerning the divergence between 'legal truth' and 'factual truth', practically illustrated by critically evaluating the effect that our law of evidence, criminal procedure as entrenched in the Criminal Procedure Act,[1] and the evidentiary exclusion clause entrenched in section 35(5) of the South African Constitution have on the ultimate decision of the court. It argues that often these rules and procedures obscure the truth rather than assist in finding it.

The crux of the discussion revolves around decisions of our criminal courts, where accused persons who are factually guilty are acquitted due to the operation of our evidence rules and procedures which call for the exclusion of evidence in specific instances or on technical grounds. The result of this exclusion is that relevant reliable evidence is deemed not to exist for the purposes of the trial, and evidence which might otherwise have lead to the conviction of the accused person is put beyond the reach of the courts.

This article then deals specifically with the debate surrounding 'what is justice?'; it looks at various concepts of justice and seeks to show that within the confines of our positivistic criminal justice system — a marriage between positive and natural law approaches — we might well be able to avoid decisions that are 'legally correct' yet offend one, as one cannot really say that justice was served.

Just as a last note, I only refer to relevant and reliable evidence throughout the article. I do so as I operate from the perspective that evidence obtained by torture, undue influence, the making of promises or any such means, by their very nature are never reliable pieces of evidence and should thus automatically be excluded.

* Final year LLB student (University of Pretoria).
1 Act 51 of 1977.

2 Justice versus legal truth

Rodger Berkowitz gives a succinct description of the 'justice versus legal truth' argument:

> The CEO of a Fortune 500 company who pays a fine so that his company can dump toxic waste into a reservoir, or move its corporate address to the Bahamas with the intention of avoiding taxes, does not say: 'I am acting legally if also unjustly.' On the contrary, the very legality of the act is seen as proof of its justness. The divorce of law from justice informs our modern condition. Lawfulness, in other words, has replaced justice as the measure of ethical action.
>
> What does it mean that law — the institutional embodiment of mankind's highest ideals — has become a tool wielded by lawyers and their clients in the pursuit of strategic interests? How is it that law — the rational feeling, as Kant teaches, of man's connection with the ideal of justice — has come to stand for obedience to rules? And what does it mean that this debasement of law into an instrument of politics and economics no longer shocks us?
>
> We are not shocked because we are in denial. We have not yet stared in the face of the hard truth that the pale word 'justice' has lost its fire. Judges, lawyers and law professors all speak vociferously of justice. When they speak of justice, however, they do not mean Antigone's burial of Polynices, or God's divine judgement that struck Ananias dead. Instead, they say that justice is fairness, an objective standard of playing by the rules; they say that justice is efficiency; or cold measure that equates economic gain with moral rectitude; or they say that justice is legitimacy thus reducing justice to whatever is believed to be just or is accepted by the people. *In all of its contemporary guises, justice today means something like a fair and efficient balancing of the interests in a way that produces legitimate legal outcomes.*[2]
>
> To think about justice beyond the calculations of fairness, efficiency, and legitimacy is hard. Justice resists precisely what modern man most craves: the certainty of definition. Whereas rules and efficient norms offer the promise of legitimacy, the imperative to act justly requires us to think. Active thinking — what Emerson, in *The American Scholar,* calls the one thing of value in this world — is irreducible to rules or laws. Similarly, justice demands that man think and in thinking transcend the limits of his own unique self and enter into an ethical community with others. The dream of justice, in other words, is the dream of transcendence.[3]

Berkowitz goes on further to state:

> The distinction between transcendent justice on the one hand and modern conceptions of social justice on the other hand based upon rules on the other is clear to anyone who has seen the final minutes of a basketball game. Players on the trailing team foul their opponents to

2 My emphasis.
3 R Berkowitz *The gift of science* (2005) ix.

> stop the clock. The foul is good strategy; it is also, however, a violation of the rules. As a wrongful act, it is punished according to the rules. Yet sports fans say it is fair to foul as long as the player accepts his penalty. *Fairness requires nothing more than playing the game according to the rules*.[4] The foul reflects a calculation: stopping the clock is worth the pain of the penalty. What is more, basketball players, coaches, and fans not only expect and condone the violation of the rules, but believe that such violation is justified.[5]

What Berkowitz is describing here is the conversion of the natural law concept of justice into the positive law concept of justice. So how did or does this conversion take place? Berkowitz answers this by studying the codification efforts of Gottfried Wilhelm Leibniz:

> Even for those aware that Leibniz was a jurist who pursued his work on a legal code throughout his life, the claim that Leibniz presided over the birth of positive law must sound strange. For, if nothing else, Leibniz is known as one of the canonical thinkers of natural law. Yet the claim that Leibniz is the first thinker of positive law is not necessarily inconsistent with his reputation as a natural lawyer. The distinctive aim of Leibniz's natural law thinking is the accurate knowledge of natural law through science. If law was traditionally understood as something authoritative, a claim of right that originated in what Clastres calls a 'time before men', the enlightenment faith in human reason had put the authority of such *ratio scripta* into question. Leibniz sought to revitalise law's power through a scientific approach to law that promised a true and certain knowing of natural law that would render its existence and authority beyond dispute. Against Leibniz's intentions, however, the turn to science and specifically legal code as a way of knowing law contributed to the very transformation of natural law into positive law that Leibniz sought to prevent.[6]

The importance of the conversion for this discussion is that it corresponds with the philosophical concept of criminal law and its actual practical implementation. The philosophical or natural law concept of criminal law is that mankind has universally distilled concepts of right and wrong, and although each society might have slight variations the basic principles remain universal, for example it is wrong to steal or to commit murder. Justice means seeking the truth about the wrongs and that the wrongdoer is punished for his or her wrongs in accordance with what is fair with regard to the wrongdoer, the person who was wronged and the community, while the actual practical implementation of criminal law is a set of positive rules, regulations and procedures which determine what is just. Thus we have the conversion of natural law concepts into positivist realities.

4 My emphasis.
5 Berkowitz (n 3 above) x.
6 Berkowitz (n 3 above) 10.

We can see that even though each and every one of these rules, regulations and procedures have their roots firmly planted in natural law soil, each one intending that justice be done at each phase of the criminal trial, the result of this collection of just rules, regulations and procedure are often at odds with that of the transcendent or universal ideal of justice.

John Bell discusses justice in great detail in his chapter 'Justice and the law', where he divides justice under two main categories, namely 'justice as abstract value' and 'justice as concrete value'. Within these categories, his discussions on positivism and justice, natural law approaches, justice according to the law, and procedural justice are in my opinion the most applicable to this discussion.

3 Justice as an abstract value

3.1 Positivism and justice

> Positivism dominates much of the legal philosophy at the present period. In a limited sense, positivism would simply deny any necessary connection between law and justice, since law is a human creation, identifiable from purely social sources of legislation, custom, case-law and doctrine. This would in no way deny that the positive law seeks to achieve the extra-legal ideal of justice. It would merely state that law need not necessarily do so and its validity does not depend on conformity to justice. There are, however, wider claims made by some positivists who seek to suggest that no values other than those which are socially determined can be demonstrated and that notions of 'justice' are merely empty categories within which individuals or collective preferences are expressed.[7]

Bell's description of the positivist concept of justice is echoed in Berkowitz's later work on the divorce of law and justice (as discussed above). A well-known caption often used with regard to positivist law is the application of the law as it is, not as it ought to be. This indicates that the positivist approach denies the existence of a higher ideal of justice which law and its institutions should strive to meet.

Again we are faced with the unsettling reality that our faith in the law to protect us from the wrongs and uphold the rights has been misplaced. According to this approach of justice, when dealing with the criminal justice system, the best the community and the victim can hope for is that the police (which in many municipalities are under-funded, under-staffed, under-paid and under-trained) follow each and every procedure to the letter (these procedures are there to ensure admissibility of evidence, respect of the accused's fundamental rights, and to ensure a fair trial for the accused) and that

7 KR Scherer *Justice: Interdisciplinary perspectives* (1992) 116.

the prosecution follows suit and does not leave any loop holes open. Should this be the case, the victim and the community have a fair chance at expecting a just result to be the outcome of the criminal justice process.

However, should the police or the prosecution not have complied with all the procedures, the result is often that crucial evidence to the state's case is excluded, with the consequence that the accused, who would otherwise have been convicted, is set free because solid relevant and reliable evidence is deemed not to exist on technical grounds. With this very positivistic adherence to the rules of procedure and admissibility (with regard to evidence), we summarily kick the truth out the window. In the eye of the positivist lawyer, this is a completely just result to the case, as the law was followed to the letter. However the victim and the community (not to mention the natural law lawyer) are left feeling abandoned, if not betrayed by the law. Should this be an isolated incident that is rare in its occurrence, the community feels that on the whole justice is done and seen to be done.

However, in the South African context where crime rates are amongst the highest in the world, such legal but unjust, not to mention untruthful, decisions are not isolated or a rare occurrence. The growing sense in the community is that the police, and the law for that matter, are helpless to stop the waves of crime. This leads to even more disregard for the law, but this time by the law abiding citizen who feels it is time to take the law into their own hands, feeling that they have no other way to protect what is theirs as the recent spate of xenophobic attacks illustrates.

3.2 Natural law and justice

The natural law approach to justice is 'one which seeks to establish and justify principles of justice which have some independence from particular human communities'[8] or legal institutions for that matter, and these universal principles of justice or 'transcendent justice' (as Berkowitz puts it) is the justice to which all communities or legal institutions should aspire.

> A classic exposition of the natural law view point would suggest that the law ought to adhere to the demands of moral law. The precise content of this ideal is to be obtained from the rational reflection, even though it is recognised that statements of what is just may not be capable of full articulation. A provisional assessment is made in relation to a particular society and culture, even if no absolute standard can be claimed for such a method.[9]

8 Scherer (n 7 above) 118.
9 As above.

Bell adds that the reference to 'moral' is not an attempt to ground the ideal of justice solely in religion; I would say it is more a reference to the *boni mores* of each community, which in turn may be informed by the different religious views of each community, but not wholly based on such views.[10] He further points out here that each community or legal system has its own idea of justice, and that this idea is 'their attempt to understand and express the requirements of an ideal justice[11] to which the community aspires,'[12] and that 'such an ideal forms the basis for criticism of the achievements of particular communities.' This notion that each community or legal system has its own idea of justice is one of the criticisms against justice as an ideal put forward by some positivists, 'who seek to suggest that no values other than those which are socially determined can be demonstrated and that notions of justice are merely empty categories within which individuals or collective preferences are expressed'.[13]

I understand their argument to be that each community or legal system has its own idea of justice, and therefore mankind has no universal principles of justice — just individual communities' own construction of their socially determined justice. This is a narrow-minded and short-sighted argument, in that it fails to take into consideration that should one ask every community across the globe what they believe to be the fundamental rights and wrongs of a community, they will answer you with the following: it is *wrong* to steal, its *wrong* to murder, it is *wrong* to be dishonest, it is *wrong* to cheat; and it is *right* to act with integrity, it is *right* to act fairly, and so on. These are all universal to mankind, and the concomitant universal justice, as Ulpian defines 'giving to each his own', is that mankind universally agrees that the wrongs should be punished and the rights rewarded. The fact that each community may have a slight variation on how each right or wrong is defined and what the concomitant reward or punishment is cannot mean that there is no ideal of justice independent from the individual communities.

For example, one will find discrepancies in the definition of murder, the ambit of the defence of private defence (which is a ground of justification for killing another human being, and absolves the person of the criminal liability for murder), and what is 'just' punishment for the crime of murder in different legal systems across the globe. But it is a universal belief (in that each community will agree) that justice is served when a wrongdoer is punished for their

10 As above.
11 The use of '*an* ideal of justice to which the community aspires' seems to indicate that the author also holds the belief that there are many different ideals of justice to pick from, instead of one universal ideal of justice of which each community attempts to understand and express the requirements thereof. This is a view with which I disagree, as is discussed below.
12 Scherer (n 7 above) 118.
13 Scherer (n 7 above) 116.

wrongdoing. The fact that the wrongdoer must be punished is universal, but each community will differ in what they believe is a just punishment.

Therefore, when a judge is presiding over a criminal case, the ever-present ideal that should be held in the back of their minds should be that we seek the truth about the wrong and wrongdoers who should be punished for their wrongdoing according to what is fair with regard to the wrongdoer, the person who was wronged, and the community. It should not be that as long as all the rules and procedures were followed that the result will be just. What this means in a pragmatic sense is that when it comes to the exclusion of evidence based on the fact that certain technical procedures were not followed, we are adhering to a positivistic approach to justice when a natural law approach which would include such evidence (to fully air the truth, so to speak) would result in a decision compatible with the above ideal.

You might ask why the natural law approach is more likely to yield more just results in our criminal justice system than the positive law approach.

The answer is quiet simple. The positive law approach is short-sighted and loses touch with the purpose of criminal law, this purpose being the collection of relevant and reliable evidence with regard to criminal activities; the placing of such evidence before a judge or magistrate, who in turn based on the strength of the evidence before him or her must evaluate whether or not the crime was in fact perpetrated by the accused person;[14] and in so doing find the truth. Instead the positive law approach gets bogged down with procedural and admissibility rules, which often result in the obscuring of the truth rather than the finding of it.

The natural law approach never loses sight of the purpose of criminal law. This approach ensures that by placing all the reliable evidence before the court, the court is placed in the best position to ascertain the truth about the wrong committed, with the result that the conviction or acquittal of the accused person will mirror the actual true state of affairs as closely as is humanly possible.

[14] PJ Schwikkard & SE van der Merwe *Principles of evidence* (2002) 534. The standard of proof for criminal cases in South Africa is beyond reasonable doubt. This is a very high standard of proof; it means that should the accused's innocent version be reasonably true then the proof against the accused is not beyond reasonable doubt, and the accused is acquitted. For an acquittal, it is not a prerequisite that the court believes that the innocent version of the accused version is true. It is sufficient that it might be substantially true. This high standard of proof that the state must adhere to before the court can making a finding of guilt, coupled with the exclusion of evidence on technical grounds is, in my opinion, the main cause for many of the unjust but legal decisions mentioned above.

3.3 Justice according to the law

Under this heading an important distinction is made; namely legal justice as an independent norm, and legal justice as dependant on social justice. Legal justice independent from the society in which it operates,

> is in a pragmatic sense what is done according to law. The idea of *giving to each his own*[15] expresses a relationship set up by law and the standard by which a situation is judged as 'just' or 'unjust' is that created by law. Thus 'justice' ... is equivalent to 'conformity to law' and, thus 'validity according to law' ... For example ... the common law which sees justice in terms of formal, procedural justice with the emphasis on the impartial application of law, and could apply to notions of equality before the law.[16]

From a practical perspective this makes perfect sense because before we can apply the ideal of giving each his own, we must first establish what belongs to whom. It is to the law that we look to establish this. The impartial application of law and equality before the law are vital parts of a just legal system. However the underlying concept of this view is that justice is what the law prescribes it to be, and it ignores the fact that some of these laws, which are equally applied, may have consequences that offend the greater society's sense of justice. The law is sketched as an ivory tower that dictates to society what is right and wrong, and that as long as things are done according to the legal rules justice is being served. In other words, justice as determined by the law is independent from the social justice of the society in which the law operates.

If we investigate our current criminal justice system, one of the first anomalies that you come across is that we have rules of evidence relating to admissibility, which are designed for a criminal system that makes use of a jury. This is strange since we do not make use of a jury, but instead have a legally trained judicial officer (judge or magistrate as the case may be) that decides the outcome of the criminal case.

The second anomaly that we find is that when the police do not follow the correct procedure in the collection of evidence, or violate any of the fundamental rights of the accused person during the pre-trial investigation, the appropriate punishment seems to be to exclude the evidence collected in such a manner. Whilst that might seem to be a very effective deterrent to prevent the same occurrence in the future, ask the question: Who is it that ultimately bears the burden of such a deterrent? The answer is the victims and society. Not only must they endure the initial detriment of the actual crime, but

15 My emphasis. This is Ulpian's concept of the ideal of justice.
16 Scherer (n 7 above) 123-124.

are then punished for the mistakes of the police when the accused person is acquitted on a technicality and placed back in the society who were initially harmed by the crime of the accused person. This is seen as justice, since every accused person is treated equally, all the procedures set in place to ensure an objectively fair trial are complied with, and should some of the procedures not be complied with evidence collected in contravention of such procedure is excluded to prevent prejudice to the accused person. This exclusion of reliable, relevant evidence is justified by sentiments such as rather setting ten guilty people free than convicting one innocent person. Theoretically speaking, this sentiment is beyond reproach, but if you evaluate the practical effect on our criminal justice system with specific reference to the exclusion of relevant reliable evidence, the result is that the accused's defence team is given a myriad of loopholes with which they can have proof of their client's guilt excluded.

The second concept shows legal justice as being fitted into a structure of social justice, and is necessarily parasitic on it. Legal justice would only be just if the social arrangements which the law enforces are themselves just according to the wider principles of social justice operative in society.[17] It is this second concept of legal justice that, in my view, is most appropriate for the South African criminal justice context. This approach allows legal justice in terms of criminal law to be informed by the various factors extraneous to the substantive and procedural criminal law. There are factors such as:

- the extremely high crime rate;
- the fact that a very large percentage of the crime rate is made up of violent crime;
- the fact that women and children, who are a socially vulnerable group, make up a large portion of the victims of violent crime and abuse;
- whether or not the current crime crisis calls for a crime prevention or control model to be applied;
- the general feeling of the greater society, as to whether the police and the judiciary are performing their constitutional duties towards the society and accused persons with equal balance.

This approach to legal justice allows the criminal justice system flexibility, ensuring that it can evolve and adapt to the demands of dealing with the ever-evolving criminal sphere. South Africa is a constitutional state, and we recognise the Constitution as the supreme law of our land. The preamble has two very important extracts for this discussion:

> Heal the divisions of the past and establish a society based on democratic values, *social justice*[18]and fundamental human rights; Lay

17 As above.
18 My emphasis.

> the foundations for a democratic and open society in which the government is based on the *will of the people and every citizen is equally protected by the law.*[19]

Our Constitution bases the creation of our society on, amongst other values, social justice. This indicates that our legal justice is not an independent norm, but a justice that must be informed by our society. The foundation of our society is that the government is based on the will of the people, and that the law equally protects every citizen.[20] However, the sentiment of the society as a whole, in the present crime crisis, is that our Constitution is being interpreted with a bias towards the accused person, with particular reference to accused persons being acquitted on technical grounds when they would have been convicted otherwise were it not for our overly-regulated evidence rules and related procedures. This results in valid, relevant and reliable evidence being declared as inadmissible in a court of law.

The present climate of distrust and lack of confidence in the judiciary and police is an emphatic indication that our criminal justice system is losing touch with the society in which it operates and the criminal sphere which it must control. It is time to call for review of our law of evidence rules with particular emphasis on rules relating to a jury, and whether or not the exclusionary rule is appropriate for South Africa.

4 Justice as a concrete value

4.1 Procedural justice

The South African criminal justice system has three main sources, namely the Constitution, statutes, and common law. As this discussion is focused on the rules and procedures with regard to evidence in a criminal trial, it is important to know what the sources of these rules and procedures and what their natures are. We find what evidence is and how to go about collecting it from two main sources, namely our common law and the Criminal Procedure Act.[21] Both of these sources are procedural in nature, they indicate what categories of evidence exist, which are admissible and which are not, and they detail the specific procedures that must be followed when collecting and processing such evidence. It is for these reasons that procedural justice is of vital importance, as our criminal justice system is one predominantly based on procedure.

19 My emphasis.
20 This equal protection will be discussed with reference to the *audi alterem partem* rule under the next heading.
21 Act 51 of 1977.

> It is a central theme in much writing that justice involves the impartial application of legal rules without bias and in a way which treats all subjects of the law equally and entitles them to state their point of view ... Procedure concerns the process or steps taken in arriving at a decision; substance concerns the content of the decision. The two are conceptually distinct, for one can use different procedures for the same substantive issues and the same procedures for different substantive issues. A number of values can be discerned in this area, principal among which Bayles identifies as impartiality, an opportunity for each party to be heard, the requirement of reasons to be given for a decision, and the formal justice of consistent adherence to rules ... If, as many think, the central issue of justice is the proper arbitration between mine and thine, then impartial decision-making is the service which the law has to provide either in the distribution or in the correction of holdings of social resources.[22]

The above quote can be summarised by two Latin maxims, which are '*nemo iudex in sua causa*' (*nemo iudex* rule) and '*audi alterem partem*' (*audi* rule). The first maxim, simply put, means that you cannot be a judge in your own case. This is the impartiality requirement to which the above quote refers. The second maxim means that each party to the dispute must be given the opportunity to state their case. These maxims are the equal treatment and equal application of the law requirements also referred to in the abovementioned quote. They form the basis of procedural justice.

It is interesting to note that in our criminal justice system the *nemo iudex* rule is applied without any alteration or adaptation. The same cannot be said for the *audi* rule, as this rule only applies to the accused person in a criminal trial. The classic illustration of the one-sided application of this rule is the workings of our evidentiary procedures and the concomitant inadmissibility rules. The result of these procedures and rules is the exclusion of relevant and reliable evidence that was collected in contravention of either such procedures or rules. If we analyse the effect this has on the two parties to the dispute, we find a situation that benefits one party to the detriment of the other.

Let me explain this further. In a criminal trial we have two parties, namely the accused person and the state. The state however represents the victim and the greater community. The accused person is allowed to present their side of the story; this story is often assisted by the evidentiary procedures and rules, as well as in that evidence can be excluded in terms of these rules. This evidence is usually prejudicial to the establishment of the innocence of the accused person, and the exclusion thereof creates a false credibility or truthfulness with regard to the version of events as told by the accused person which is obviously to their benefit. On the other hand,

22 Scherer (n 7 above) 127.

by excluding this evidence, the state's case – and by extension the case of the victim and community — is severely prejudiced, as critical evidence needed to establish the truth of the state's — and by necessity the victim's — version of the events is no longer available to the state.

Therefore if we accept that procedural justice is based on the *nemo iudex* and the a*udi* rules, we can see that our criminal justice system does not fully comply with the concept of procedural fairness as only one party is afforded the opportunity to fully state their case. Our Constitution guarantees equal treatment before the law for all persons in South Africa; however there seems to be a highly unequal treatment of persons when we deal with the criminal justice system.

The immediate counter-argument to such a statement will be that all accused persons are treated equally before the law, all accused persons are given the same opportunity to state their case and the evidentiary rules and procedures are equally applied; therefore procedural justice is served.

This argument merely serves to illustrate the point that the criminal justice system has become polarised towards the accused person. Pre-1994, our criminal justice system was abused to achieve political goals. The consequences of that past is that in the present, we have a criminal justice system that has over-emphasised the rights of the accused person to such an extent that the purpose which criminal law serves (which is to protect the rights of the community and individuals, to establish law and order, ascertain the truth about criminal activities and punish the offenders accordingly) has been severely undermined. What is required for our current crime crisis is the rebalancing of interest that our criminal justice system seeks to protect, prevention of the abuses of the past on the one hand and dealing effectively with the crime crisis on the other.

THE TWO IMPORTANT DOCTRINES UNDERLYING DOCUMENTARY LETTERS OF CREDIT AND THE FRAUD EXCEPTION

By Tenielle Appanna[*]

1 Introduction

Documentary letters of credit are important tools in relation to international trade. The parties who make use of these instruments usually come from different countries and usually have different views on trade and customs. The parties generally do not know each other personally and have opposite interests in relation to the contract of sale. There is a sense of distrust towards each other, as both parties have serious concerns as to the other's performance in terms of the contract. While the purchaser has a fear of receiving goods of an incorrect quantity or quality, or not receiving goods at all, the seller fears non-payment, or that the buyer refuses to accept the goods on a mere technicality.[1]

Coupled with the abovementioned is the fact that legal recourse will be expensive and may be complex taking jurisdiction into consideration. A documentary letter of credit eases some of these fears due to the unique doctrines which form the foundation of this instrument, and these will be discussed at length. The most frequently encountered exception to documentary letters of credit not being fulfilled is that of fraud, which will also be discussed at length.

2 The definition of and the parties to documentary letters of credit

A documentary letter of credit is an undertaking between three or more parties.[2] The parties are traditionally the account party or applicant, being the buyer or importer; the opening bank or issuing

* LLB (University of Pretoria); the research for this paper was completed in partial fulfilment of an LLM at the University of Pretoria whilst working as academic associate in the Department of Legal History, Comparative Law and Legal Philosophy.

1 R Sarkar *Transnational Business Law: A Development Law Perspective* (2003) 17.

2 Sarkar (n 1 above) 18.

bank, being the applicant bank; and the beneficiary, being the seller or exporter.[3] In some instances the letter of credit may be electronically issued to the beneficiary who presents the draft and documents to any local bank willing to negotiate them for him.[4] In this event, the issuing bank sends the letter of credit to one of its correspondent banks in the same locality of the exporter. This correspondent then becomes the advising bank, the paying bank and the confirming bank.[5] The correspondent bank is the advising bank as it informs the beneficiary that the letter of credit has been opened in his favour.[6] It is the paying bank who may be authorised to pay the beneficiary in local currency when presented with the proper documentation. This correspondent bank in its capacity as advising or paying bank may be required to add its own name to the letter of credit for which it charges the opening bank a fee. In this way the arrangement becomes a confirmed letter of credit where two banks are committed to pay, and thus the correspondent bank also becomes the confirming bank.

2.1 The distinguishable contractual relationships

The most important parties are: the issuing bank, which makes payment on behalf of the applicant to the beneficiary and is therefore a correspondent; and the paying bank, the advising bank and the confirming bank, being different terms for the same bank. Therefore, when dealing with this instrument there are at least three distinguishable contractual relationships present. Firstly, there is the contract between the beneficiary and the applicant.[7] Secondly, there is the contract between the applicant and the issuing bank.[8] Thirdly, there is the letter of credit contract between the issuing bank and the beneficiary.[9] Lastly, there is the contractual relationship described above, between the advising bank and the issuing bank.[10] All of these contracts are completely independent.

2.2 Operation of documentary letters of credit

The issuing bank promises to pay the beneficiary upon presentation of certain documents. Therefore, in simple terms, it is a letter addressed to the beneficiary that is written and signed by the bank

3 Sarkar (n 1 above) 20.
4 As above.
5 As above.
6 As above.
7 JP van Niekerk & WP Schulze *The South African law of international trade: Selected topics* (2006) 292.
8 As above.
9 As above.
10 As above.

acting on behalf of the applicant.[11] In accordance with the letter of credit, the applicant bank will agree that it will accept drafts under the letter of credit if the beneficiary strictly complies with terms set forth under the letter of credit.[12] The beneficiary in most cases is asked to provide certain documents together with the draft.[13] Examples of these documents are negotiable bills of lading, insurance papers, commercial invoices, a draft of a bill of exchange, a government-issued or other legal document which indicates that the goods are ready for export, an inspection certificate, and any other document that may be specifically required.[14] In this way the issuing bank stands in for its customer, being the applicant, by agreeing to pay the beneficiary, as long as the conditions in terms of the letter of credit are fulfilled.[15] The use of a documentary letter of credit has several advantages for the beneficiary.[16] The beneficiary does not have to ship the goods until the account party has opened the letter of credit and it has received the advice of issuing from the bank.[17]

2.3 Legal effect of the issuing of a documentary letter of credit

Since the letter of credit in effect means that the bank will now pay the beneficiary on behalf of the applicant, one needs to question whether, firstly, this constitutes an absolute payment by extinguishing the original debt; and secondly, if so, does the beneficiary have the option of ignoring the letter of credit and merely claiming from the applicant?[18]

The abovementioned is of pivotal importance when the issuing bank becomes insolvent or is unwilling to pay.[19] As to the question regarding whether this constitutes absolute payment, one needs to remember that for this to happen, novation needs to take place.[20] Novation occurs when the earlier obligation is discharged and replaced with a new one.[21] Therefore all three parties — namely the issuing bank, the applicant and the beneficiary — must all intend to extinguish the existing debt and replace it with a new one.[22] Unless there is a clear intention of novation evident from express wording of the contract of sale and letter of credit or the surrounding

11 As above.
12 As above.
13 As above.
14 Sarkar (n 1 above) 19.
15 As above.
16 S Schnitzer *Understanding international trade law* (2006) 80.
17 As above.
18 Van Niekerk & Schulze (n 7 above) 293.
19 As above.
20 Van Niekerk & Schulze (n 7 above) 295.
21 As above.
22 As above.

circumstances, the applicant and the issuing bank are liable towards the beneficiary.[23] It is accepted in our law that when a letter of credit is accepted by a beneficiary, it operates as a conditional payment and not an absolute payment.[24]

3 Doctrines underlying documentary letters of credit

There are two fundamental principles underlying documentary letters of credit namely the autonomy of the credit and the doctrine of strict compliance. These principles are unique and characteristic of this instrument.

3.1 Autonomy of the credit

When looking at the principle of autonomy, all the undertakings in respect of the documentary letter of credit between the parties are considered to be independent from each other. As such, even though all these undertakings are related, failure to fulfil one undertaking does not render the next undertaking unenforceable.[25] The doctrine of autonomy has been entrenched in article 3 of the Uniform Customs and Practice (UCP), which states that letters of credit by nature are independent from the contract of sale or any other contract on which they may be based.[26] Article 3 also states that banks are in no way concerned with or bound by the underlying contract, even if the letter of credit contains a reference to the underlying contract. Due to this, the undertaking by the bank to pay in cash or to accept and pay bills of exchange or drafts, or to fulfil any other obligation under the letter of credit, is not subject to claims or defences by the applicant resulting from its relationship with the issuing bank or with the beneficiary.[27] At the same time the beneficiary cannot avail itself of the contractual relationship existing between the applicant and the issuing bank.[28]

The doctrine of autonomy underpins the character of the letter of credit in international trade as an independent and separate undertaking by the bank to pay the beneficiary.[29] The doctrine serves as a deterrent in a situation where the applicant wants to litigate, due to the beneficiary's breaching the contract, and the applicant seeks

23 Van Niekerk & Schulze (n 7 above) 296.
24 Van Niekerk & Schulze (n 7 above) 294.
25 Sarkar (n 1 above) 32; Van Niekerk & Schulze (n 7 above) 306.
26 Van Niekerk & Schulze (n 7 above) 306.
27 Van Niekerk & Schulze (n 7 above) 306.
28 Van Niekerk & Schulze (n 7 above) 307.
29 *Phillips & Another v Standard Bank of South Africa & Others* 1985 3 SA 301(W); Van Niekerk & Schulze (n 7 above) 307; Schnitzner (n 16 above) 86.

to interfere with the issuing bank's payment to the beneficiary even though all the conditions on the letter of credit have been met.[30]

The issuing bank must not concern itself with the underlying dispute. Therefore the issuing bank must pay under the letter of credit regardless of whether the underlying goods that are the subject of the sales contract between the applicant and the beneficiary conform to the conditions of sale.[31] All that matters is that all the conditions set out in the letter of credit are fulfilled.[32] This means that the confirming bank is obligated to the opening bank and the beneficiary alone.[33] The applicant lacks privacy with the confirming bank based on the letter of credit.[34] The applicant's only recourse lies with the issuing bank, which can institute an action against the confirming bank for wrongful honour or dishonour of the draft.[35] The same can be said with regard to all the other obligations in relation to each party. As mentioned above, the conditions that the seller has a duty to fulfil prior to payment take the form of documents that need to be handed in to the bank. Because most of the evidentiary material take the form of documents, it is possible to obtain summary judgment against a bank that does not honour its obligation to pay.[36]

3.2 Caselaw which illustrates the autonomy principle being upheld: Ex parte Sapan Trading (Pty) Ltd[37]

In this case, the applicant tried to stop payment of an irrevocable letter of credit to the beneficiary by obtaining an attachment of the beneficiary's claim against the issuing bank in order to found or confirm jurisdiction.[38] The Court found that there was no real difference between a situation where the bank is interdicted from paying the beneficiary in its own country, and a situation like this one where the applicant attempted to prevent the issuing bank from effecting payment in a foreign country by rather forcing it to effect payment to the local deputy sheriff who would receive the money on behalf of the beneficiary.[39] The Court further contended that an *incola* has the right to attach the property of a *peregrinus,* and that the Court has no discretion in the matter. The Court solved this problem by reading a term into the relationship between the applicant and the beneficiary, in that the applicant by arranging for an irrevocable letter of credit implied that he would not attempt to

30 Van Niekerk & Schulze (n 7 above) 307.
31 Sarkar (n 1 above) 33.
32 Schnitzner (n 16 above) 87.
33 Sarkar (n 1 above) 33.
34 As above.
35 As above.
36 Schnitzner (n 16 above) 87.
37 1995 1 SA 218 (W).
38 As above.
39 As above.

attach the proceeds from the letter of credit.[40] This case indicates how firmly entrenched this principle is in our law.

3.3 Doctrine of strict compliance

This doctrine provides that the bank can reject any document which is not in strict conformity with the terms set out in the documentary letter of credit.[41] Therefore, firstly, the letter of credit deals purely with documents.[42] Secondly, this doctrine demands that the documents which are tendered by the beneficiary must be in strict conformity with the terms and conditions of the letter of credit.[43] This doctrine is also entrenched in the UCP.[44] Article 4 provides that in a letter of credit transaction, all the parties concerned deal with documents and not with the goods, services or other performances to which the documents relate.[45] The issuing bank relies solely on what appears on the face of the documents presented to it by the beneficiary to determine whether the conditions in the letter of credit have been complied with.[46] The banks that deal with finance, and not with goods, are not aware of all trade customs and usages.[47] Their expertise extends as far as dealing with the documents, and therefore they do not get embroiled in the facts and practices of a particular trade.[48] As far as the standard of examination in arranging for the carriage of goods overseas is concerned, the beneficiary needs reassurance that the standards applied by banks in scrutinising documents will not vary from country to country.

3.4 Effects of the doctrine of strict compliance

The doctrine of strict documentary compliance requires not only that the tendered documents conform to the terms and conditions of the documentary letter of credit, but that they appear on their face to be consistent with one another. This requires that all the documents are consistent with one another in the sense that they make up a set that apparently refers to the same container of goods. A measure of certainty is needed because, if the documents are rejected, this is likely to cause delay and expense in selling the goods elsewhere. The UCP appears to confirm this view by making reference to international standard banking practice. Therefore the overall effect of the doctrine of compliance is that the bank honouring the documentary

40 As above.
41 Schnitzner (n 16 above) 87.
42 Van Niekerk & Schulze (n 7 above) 309.
43 As above.
44 As above.
45 As above.
46 As above.
47 Schnitzner (n 16 above) 87.
48 As above.

letter of credit must strictly conform to the conditions set out in the letter of credit, and should the documents handed in by the beneficiary not meet this criteria then the bank must not pay out.[49] Therefore the required standard is that of strict conformity.[50]

The other component to this doctrine as emphasised above is that the bank deals purely with the documents.[51] It is contended that even if the deviation from the letter of credit is small, the bank must refuse to pay.[52] If the bank pays on non-conforming documents, then it has not fulfilled its mandate towards the applicant.[53] The doctrine of strict compliance does not mean that all of the T's in the credit must be crossed and all of the I's dotted. As stated by the Court in *Angelica-Whitewear*,[54] 'there has apparently been recognition that there must be some latitude for minor variations or discrepancies that are not sufficiently material to justify a refusal of payment'. Due to the fact that the issuing bank deals solely with the documents, it is of no relevance that the goods received by the applicant are not of the quality or quantity as described in the contract.[55] Therefore, slight discrepancies can and must be disregarded if the instructions on the documents make sense regardless.[56]

3.5 Case law to illustrate these principles: Loomcraft v Nedbank and Another[57]

In this case, a documentary letter of credit formed the subject matter of a negotiable combined transport document. This was a start-to-finish document in that it covered every stage of the carriage of goods. By issuing a combined transport document the carrier accepted the responsibility of the performance of the combined transport. Where a creditor calls for a combined transport document and the other stipulations of the credit are met, a bank will only accept a transport document if the following criteria are strictly complied with:

- It appears to have been issued by a named carrier; or
- His agent indicates a taking in charge of the goods; and
- It consists of a full set of originals issued to the consignor.

Subject to the other stipulations of the credit, the bank may not reject the transport document because it indicates a place of taking charge different from the port of loading. An interdict restraining a

49 Van Niekerk & Schulze (n 7 above) 309.
50 As above.
51 As above.
52 As above.
53 As above.
54 1987 1 SCR 59 (SCC).
55 As above.
56 As above.
57 1996 1 SA 812 (A).

bank from paying in terms of a credit will accordingly not be granted at the insistence of the buyer, unless it is an exceptional case. It is, however, well established that courts will grant an interdict restraining a bank from paying the beneficiary under a credit in the event of it being established that the beneficiary was a party to fraud in relation to the documents presented to the bank for payment.

The liability of the bank to the beneficiary to honour the credit arises upon presentation to the bank of the documents specified in the credit, including typically a set of bills of lading, which on their face conform strictly to the requirements of the credit. In the event of these documents being presented, the bank will only escape liability upon proof of fraud on the part of the beneficiary. The Court found that a mere error, misunderstanding or oversight, however unreasonable, does not amount to fraud in this case. This case is of great importance as it embodies the doctrine of autonomy as well as the doctrine of strict compliance.

4 The fraud exception

4.1 Content of the exception

The exception of fraud applies to the doctrine of autonomy as well as that of strict compliance. Fraud, roughly speaking, refers to where a legal rule or interest is enforced in bad faith and that enforcement damages the interests of another individual or the interests of the public at large.[58] To determine what behaviour constitutes fraud, we can look at *fraus omnia corrumpit* which is clearly grounded in ethics and which indicates that a beneficiary who is guilty of fraud is not entitled to payment under the instrument.[59] Documentary letters of credit secure a beneficiary's right to payment from the respective bank involved.[60] When the beneficiary presents a demand for payment, the fraud exception is often used to justify non-payment where payment is not due to be made.[61] The most common type of fraud in the context of documentary letters of credit is where the beneficiary has forged or deliberately falsified the documents in order to fulfil the conditions in the instrument.[62] If the document itself is inadequate as far as the description of one or even several elements necessary to perform the contract, then a suspicion of fraud is

58 J Stoufflet 'Fraud in documentary credit, letter of credit and demand guarantee' (2001) 106 *Dickinson Law Review* 21.
59 As above.
60 As above.
61 As above.
62 Van Niekerk & Schulze (n 7 above) 309.

raised.[63] There is no mention of fraud in the International Chamber of Commerce (ICC) Regulation.

4.2 Pertinent aspects of fraud

When dealing with fraud, there are two very important questions that need to be asked. Firstly, is the fraud by the beneficiary discovered before or after the bank pays on the letter of credit?[64] Secondly, was the fraud committed by the beneficiary on the documents or not?

4.2.1 Fraud discovered after payment[65]

In this instance, the bank will not be liable and can recover the money from the applicant. This is where the bank has made such payment from its own funds. Where, however, payment has been effected from the applicant's own funds and the bank has merely paid it over to the beneficiary, the applicant will not have a claim against the bank. The nature of documentary letters of credit infer this kind of risk because of the difficulty the applicant will incur in attempting to recoup the money from the beneficiary.[66]

4.2.2 Fraud discovered before payment[67]

If the fraud is discovered before payment by the bank, the applicant may approach the court for an interdict to prevent payment. Where the forgery or falsification appears from the face of the documents, the bank is entitled to effuse payment even without court intervention. The basic principle behind both these scenarios is that the unscrupulous beneficiary should not benefit from the use of fraud by using the doctrine of autonomy or that of strict enforcement.

4.2.3 Case law to illustrate the above mentioned principle

A clear distinction needs to be drawn between fraud and innocent breach of contract.[68] This is obviously pivotal to fraud committed before and after payment, and fraud in general, as it would avoid unnecessary inconvenience and court proceedings if the two were clearly distinguishable.

63 As above.
64 As above.
65 As above.
66 *Phillips & Another v Standard Bank of South Africa Ltd & Others* 1985 3 SA 301 (W).
67 Van Niekerk & Schulze (n 7 above) 313-314.
68 Van Niekerk & Schulze (n 7 above) 314.

In the case of *Phillips and Another v Standard Bank of South Africa Ltd and Others*,[69] the South African applicant had imported shoes from an Italian manufacturer, and sought an interdict to prevent Standard Bank from paying as it discovered that some of the shoes were defective. The manufacturer who was willing to consider the complaints did not want to postpone payment. The Court, after re-iterating the doctrine of autonomy, dismissed the application as there was no fraud on the part of the beneficiary. Instead it was found to be consistent with innocent breach of contract.

4.2.4 Fraud committed by the beneficiary on the documents

The fraud exception to documentary letters of credit has offered much insight where the forgery or falsification was committed on the document itself.[70] This is the so-called fraud 'in the narrow sense'. It stands to follow that courts are less likely to allow an interdict preventing a bank from making payment where fraud concerns the performance rather than the document, due to the doctrines of autonomy and strict compliance.[71] There is uncertainty regarding whether we follow a system of fraud in the wide or narrow sense.

In *Loomcraft Fabrics cc v Nedbank Ltd*,[72] the Court found that it was fraud in the narrow sense. However, the *Loomcraft* decision concerned fraud on the documents, and therefore the Court followed suit without considering anything else. Therefore, I agree that the *Loomcraft* decision cannot form the basis of the system of fraud which we follow.

In *Union Carriage & Wagon Co Ltd v Nedcor Bank Ltd*,[73] the Court remarked by way of *obiter dictum* that if the applicant and the beneficiary agreed that the beneficiary would not draw on the documentary letter of credit, and the beneficiary went ahead anyway, the beneficiary would be guilty of fraud.[74] This provides an indication that our courts may be prepared to look beyond the documentation in deciding on whether fraud has been committed.[75] I am of the opinion that fraud should be looked at in the wide sense. Because these international transactions usually concern large amounts of money, we should not allow the applicant to be defrauded merely because our courts often operate with blinkers on as it would be easier, and there would be less administration involved, if we just deliberate on the narrow sense.

69 *Phillips* (n 56 above) 301.
70 Van Niekerk & Schulze (n 7 above) 316.
71 Van Niekerk & Schulze (n 7 above) 317.
72 Van Niekerk & Schulze (n 7 above) para 3.5.
73 1996 CLR 724 (W).
74 Van Niekerk & Schulze (n 7 above) 317.
75 As above.

5 Conclusion

Documentary letters of credit play a vital role in international trade. They serve as an instrument that makes the effecting of cross-border payment effortless. The underlying doctrines of autonomy and strict compliance give certainty to the legalities embodied in the document of credit, and also indicate that the applicant should be well aware of what he is getting into before opting for this mechanism. As such, the impact of fraud should not be underestimated. It is my contention that our courts should consider fraud in the wide sense so as to afford the maximum protection to the party acting in good faith.

VERTICAL RESTRAINTS: TAMING THE COMPETITION DISORDER

By Harshita Bhatnagar[*] *& Vinay Mishra*[**]

1 Introduction

> 'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible, indeed, to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice.'
> - *Adam Smith*

What Adam Smith envisaged decades ago is undisputedly the founding jurisprudence of the antitrust law all over the world today. Competition is not defined in law; however, it is generally understood to mean the process of rivalry to attract more customers, enhance profit or both in the hunger of dictating market dynamics. Even-handed competition is a distant dream, and market-distortionary practices and anti-competitive forces may yet restrict the working of healthy competition in the economy. Also, the era of economic reforms has unleashed ever increasing competitive forces through liberalisation and globalisation. In the absence of adequate safeguards, enterprises may undermine the market by resorting to unfair practices for their short term gains. Restrictive business practices are among the many kinds of practice which the law regulates or prohibits in the public interest to ensure free and fair competition. Anti-competitive agreements as a restrictive business practice occupy the darkest corners of Indian business tactics, and are one of the foremost concerns of the Indian competition law. These agreements primarily aim to restrict competition and include *inter alia* cartelisation, predatory pricing, tie-in sales, re-sale price maintenance, abuse of dominance.

* Final year BA LLB (Honours), Gujarat National Law University, India.
** Final year BA LLB (Honours), Gujarat National Law University, India.

India's Competition Act, 2002, deals with anti-competitive agreements in section 3,[1] dividing them into horizontal and vertical agreements. Horizontal agreements are those between enterprises at the same stage of the production chain, such as between two rivals; these are dealt with under a presumptive rule that appreciable adverse effect on competition is presumed. Vertical agreements are those between enterprises at different stages of the production chain, such as between manufacturer and distributor. These are dealt with on a rule of reason basis, ie appreciable adverse effect on competition needs to be proved by the Competition Commission of India, which essentially means that the positive as well as negative impact of such agreement on competition will have to be taken into account before coming to any conclusion. These concepts will be discussed at length in the later sections of this article.

The focus of this article is on vertical agreements and the resultant market distortions. The following segments of the paper will deal with the legislative history of the infant competition law in India, and will analyse the impressions of the vertical restraints in the Indian competition fabric with reference to the Competition Act, 2002 (yet to be enforced), Monopolies and Restrictive Trade Practices Act, 1969 (MRTP), and the Indian and international case laws. The article also touches on the issues of enforcement and the treating of the consequential developmental disorders in the economy.

2 Legislative backdrop and current legal framework

Vertical agreements under the Competition Act, 2002 are categorised as anti-competitive in spirit, contingent upon the adverse impact they have on the market dynamics. They are in the nature of restrictive trade practices as envisaged under the erstwhile MRTP. Such trade practices originally attracted the attention of several high level commissions, the reports of which proved quintessential in framing the effective regulative law regarding vertical restraints in India.

[1] In the US, anti-competitive agreements are dealt with in the Sherman Act sec 1. In the UK, anti-competitive agreement is covered in Chapter I section 2. In the EU, these are controlled by the re-numbered Article 81 of the Treaty of Rome. In Australia, anti-competitive agreements are covered in Part IV of the Trade Practices Act, 1974. In Canada, Part VI sec 45 covers anti-competitive agreements.

2.1 Monopolies Inquiry Commission Report, 1964

In the context of vertical agreements, the Commission noted that practices restrictive of competition include the insistence of many manufacturers that their goods must not be sold below the price dictated by them. This is usually described as re-sale price maintenance. Even more widespread were the practices of exclusive dealing and tie-ups.[2] The Commission's report was the first insight into the restrictive trade practices prevalent in India during and before the 1960's.

2.2 Monopolies & Restrictive Trade Practices Act, 1969

The Act came into existence after the Commission's report. The relevant provisions of the Act relating to the restrictive trade practices covering vertical agreements include section 2(o) which defines a restrictive trade practice (RTP) as a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner. Section 33 deals with agreements relating to any of the trade practices as enumerated in sub-section (1) of the section, though restrictive in nature and therefore compulsorily registrable as per section 35.[3] Any given vertical agreement will not be *per se* void or illegal as per the sections.[4] The decision whether the trade practice flowing from any such agreement is prejudicial to public interest or not can be made only by the Commission, and that too after an inquiry as prescribed under section 37 read with section 10(a) of the Act. Surprisingly, the Commission has held that sub-clauses (i) and (ii) in section 2(o) are RTPs themselves, without being required to be judged on the touchstone of competition.[5]

2.3 Sanchar Committee Report, 1978

The Committee suggested that bilateral agreements (vertical agreements) relating to the trade practices of minimum resale price maintenance, price discrimination, tie up sales, exclusive dealings, production sharing, conditional know-how and residuary agreements should be prohibited. The Committee further recommended that

2 SM Dugar *Commentary on MRTP law, competition law and consumer protection law (4th edition)* (2006).

3 Section 33: Registrable agreements relating to restrictive trade practices.

4 *Mahendra & Mahendra Ltd v Union of India* (1974) 49 Com Cases 419 (SC). The Supreme Court held that a trade practice does not become a RTP merely because it falls within one or the other clause of section 33(1), but that it must also satisfy the definition of RTP contained in section 2(o).

5 'Standard Motor Products of India Ltd.' RTP Enquiry No. 98/ 1986, 13 April 1991.

compulsory registration should be prohibited on the lines of competition legislation in Australia, Canada and New Zealand.[6]

2.4 Consumer Protection (Amendment) Act, 1993

The Consumer Protection Act, as originally framed, did not cover complaints against RTPs. This Act has however extended the jurisdiction covering the RTP relating to the tie-in sales (section 2(nn) of the Act).[7] Thus, insofar as the tie-in sales are concerned, there is concurrent jurisdiction between the Competition Commission and the Consumer Disputes Redressal Authorities set up under the Act.

2.5 Raghavan Committee Report, 2002

This was a high level committee set by the government of India on Competition Policy and Law. It made recommendations regarding restrictive agreements stated to be anti-competitive agreements. It explained the agreements between enterprises by distinguishing between them as vertical and horizontal agreements, specifically mentioning these terms for the first time. Continuing with the earlier definition though, the report stated that vertical agreements are to be treated more leniently than the horizontal agreements as they are less pernicious.[8] The report stated that the vertical restraints on competition include tie-in arrangements, exclusive supply agreements, exclusive distribution agreements, refusal to deal and re-sale price maintenance (RPM). The report of this committee is said to lay down the framework for the current competition law in the India.

2.6 Competition Act, 2002 (yet to be enforced, thus MRTP is still followed even though it has been repealed)

This Act repealed the provisions of the MRTP. Moreover, in the era of liberalisation, privatisation and globalisation, it was felt that the existing MRTP had become obsolete in certain respects and that there was a need to shift the focus from curbing monopolies to promoting competition. The new competition law provides for a modern framework of competition. Section 3 has been enacted by the Competition Act, 2002 to tackle anti-competitive agreements. The Act declares void any agreement by an enterprise or association of

6 Dugar (n 2 above) 660.

7 Sec 2(nn) states that: 'restrictive trade practice means any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as a condition precedent for buying, hiring or availing of other goods or services'.

8 Dugar (n 2 above) 684, 686. This change in attitude was drawn from the US example, where in recent times, under the rule of reason, vertical agreements are treated more leniently as they can often perform pro competitive functions.

enterprises which restricts the production, supply, distribution, acquisition or control of goods or provision of services. The Act recognises horizontal and vertical agreements as having the potential to restrict competition in an economy.[9] Our detailed analysis of the vertical agreements will now begin in the light of the present competition law in our country.

3 Vertical restraints: Impressions on competition

Vertical agreements are mostly the result of complex business negotiations. Agreements can therefore not be pushed into straight-jacket schemes, since every agreement differs from one another as business relationships do. Therefore, for competition law purposes, classifications take place in form of 'components' of vertical restraints. In practice, many vertical agreements make use of more than one of these components. To give an example, exclusive distribution usually limits the number of buyers the suppliers can sell to while at the same time limiting the area where the buyers can be active. The first component may lead to foreclosure of other buyers, while the second component may lead to price discrimination.

3.1 A different school of thought

In the academic debate, the position had swung from regarding vertical restraints as suspect for competition, to a generalised perception that they were innocuous for competition by the early 1980's. An argument in favour of this change was that economists were more cautious in their assessment of vertical agreements and less willing to make sweeping generalisations.[10] Generally in economic theory two main schools of thought can be distinguished when dealing with vertical restraints.

3.1.1 The Chicago school

The Chicago School has used neoclassical insights to argue in general that only a limited number of cases concern antitrust law. Chicago School researchers asserted that antitrust law should mainly address horizontal arrangements and practices. For vertical arrangements, the Chicago School argued that the occurrence of allegedly anti-

9 The Competition Act sec 3(1).
10 'The Economics of Verticals' Competition Policy Newsletter 1998 http://europa.eu.int/comm/competition/speeches/text/sp1998_020_en.htm> (accessed 8 September 2008).

competitive practices spells no efficiency loss and may in fact even be pro-competitive.[11]

Vertical restraints are agreements between producers of 'complementary' goods or services rather than competing suppliers of substitutes. Suppliers of such goods or services have no interest in raising the price of a complementary product because by definition it will decrease the demand for its own product. This reasoning can also be related to the well-known discussion on inter-brand versus intra-brand competition. From a Chicago-type perspective, a well-functioning inter-brand competition among producers can substitute intra-brand competition among retailers. Recent literature on vertical foreclosure challenges the Chicago School's friendly position on vertical restraints.[12]

Critical voices often find Chicago applications to be unrealistic, divorced from observations in actual markets, and tending to obscure the importance of dynamic considerations, asymmetric information, and strategic behaviour.

3.1.2 Modern European economics (post-Chicago scholars)

This supposes that vertical restraints can be efficiency-enhancing since they can help to eliminate some form of vertical externality in the manufacturer-retailer relationship, as well as horizontal externality such as free-riding problems among retailers. However, the European School does not follow the findings of the Chicago School. According to the European School, some of the vertical restraints can be anti-competitive since they may serve to eliminate competition either at the manufacture level or at the retail level, and reduce consumers' choice and welfare. Which of these effects dominates and which vertical restraints will be adopted in a particular situation depend critically on the informational environment.[13] More recently, work done by Kerber and Vezzoso advocates the utilisation of an analysis as to what extent evolutionary theories of competition

11 D Hildebrand 'Economic analysis of vertical agreements' (2005) 17 *International Competition Law Series* 10. For example, Chicago School scholars have argued that resale price maintenance is likely to be pro-competitive unless it serves to facilitate a horizontal cartel. Otherwise, a rational manufacturer would only engage in this practice to induce retailers to provide consumers valuable but costly services that they would not otherwise provide. As a result of the impact of the Chicago School, the courts rarely consider non-price restraints illegal and the enforcement agencies in the US almost never challenge vertical restraints, even when price-related.

12 Dugar (n 2 above) 11; Tor 'Developing a behavioral approach to antitrust law and economics' http://www.luc.edu/law/academics/special/center/antitrust/torsumry.pdf (accessed 7 September 2008). Some scholars have been applying recent economic insights to challenge the simplistic microeconomic learning of the Chicago School, even while retaining its fundamental economic commitment to efficiency concerns.

13 Hildebrand (n 11 above) 12.

and innovation economics can be used to derive additional new criteria for the assessment of vertical restraints. Specific evolutionary arguments such as subjective and local knowledge, the heterogeneity of knowledge bases of firms, communication and learning problems, and the complementarity of knowledge (systematic innovations) could be used for deriving additional new assessment criteria for vertical restraints.[14]

4 Types of vertical restraints

These agreements as identified in section 3(4) under the following headings:

- Tie-in arrangement;
- Exclusive supply agreement;
- Refusal to deal;
- Re-sale price maintenance.

Such agreements shall be regarded as anti-competitive and in contravention of section 3(1) only when it is established that they fall under sub-section (4) and cause or are likely to cause an appreciable adverse effect on competition in India.[15] The *onus* lies on the complainant to substantiate the allegations.[16] It is first imperative to comprehend the depth and dimensions of the concept of appreciable adverse market effect as mentioned in section 3(4) *vis-à-vis* section 3(1).

4.1 Causes or likely to cause adverse effect on competition: Sub-section (1)

This expression unambiguously states that the agreement should affect the competition within India; such effect must be appreciable — not imperceivably minimal — and either affecting or expected to hinder free and fair competition. Thus, it is noteworthy that the only material factor for consideration here is the potential and impending threat to competition by virtue of the agreement, irrespective of the intention and the actual damage that has occurred to competition.[17]

14 Hildebrand (n 11 above) 13.
15 Competition Act sec 3(4).
16 Dugar (n 2 above) 688.
17 *Summit Health v Pinhas* 500 US 322; *United States v Griffith* 334 US 100. The Court observed that specific intent, in the sense in which the common law uses the terms, is necessary only where the act falls short of the results prohibited by the Sherman Act.

4.2 Appreciable adverse effect on competition: Sub-sections (1), (3), (4)

The term 'appreciable' has not been defined in the Act. However, it has been defined in Law Lexicon as 'capable of being estimated, weighed, judged of, or recognised by the mind, capable of being perceived or recognised by the senses, perceptible but not a synonym of substantial.' In terms of section 19(3), the Commission shall have due regard to the various factors specified therein in clauses (a) to (f) while determining whether an agreement has an appreciable adverse effect on competition under section 3. One must note that it is purely in the realm of estimation, and is subjective. An agreement falling under sub-section (4) in contravention of the provisions of sub-section (1) shall be void.[18]

Interestingly, despite the fact that the two categories of agreements are significantly different, the horizontal agreements under sub-section (3) being *per se* violative and vertical agreements under sub-section (4) are subjected to the rule of reason, both have been treated alike and declared void under sub-section (2). It is a moot point whether these agreements are void *ab initio* or become void after an order is passed by the Commission after enquiry under section 27. Lack of clarity in this regard is likely to cause needless litigation between the parties to the impugned agreement in-as-much as an agreement which is void is not enforceable in a court of law.[19] Now we move on to discuss each of the above mentioned vertical restraints in detail.

5 Vertical restraints *vis-à-vis* theory of economic efficiency: Facing the real challenge

Vertical restraint law in antitrust has not been a very fertile area for commentary in the Indian competition arena. With the economic efficiency approach in antitrust gaining strength in the world economy, vertical restraint law appears to be all but dead.[20] In India the economic efficiency approach[21] has seeped in with the Competition Act, 2002 and MRTP, 1969, restricting those vertical agreements which have or are likely to have an adverse effect on competition. Today, world over, vertical restraints are considered benign, if not beneficial, for consumers. They assert that vertical restraints of any sort — whether territorial restrictions, bans on

18 Under the Indian Contracts Act, 1872 sec 2(g) states that an agreement not enforceable by law is said to be void.
19 Dugar (n 2 above).
20 JW Burns 'Vertical restraints, efficiency, and the real world' (1993) 62 *Fordham Law Review* 597.
21 As above.

discounting, or tie-ins — give consumers more product-mixes from which to choose in the inter-brand market.[22] Our very own Indian anti-trust jurisprudence is based primarily on the economic efficiency approach, and the Competition Act has a categorical systematic pro-consumer approach. However, the time is ripe now to reconsider the long followed economic efficiency approach in India and the world, which Professor Jean W. Burns argues suffers from two fatal flaws. First, there is growing evidence that it is incomplete, in the sense of ignoring issues that society wants considered. Second, consumers are increasingly indicating that they simply do not believe the theory, as it is divorced from the real world. These two novel criticisms are summarily explained below.

5.1 The incompleteness of the economic efficiency approach

The economic efficiency approach has eliminated from the antitrust calculus all consideration of the concerns centring on the dealer's as separated from the consumer's wellbeing; the identical dealer-fairness issues continue to surface in a variety of contexts and legal theories outside of antitrust. Whatever legal theory is invoked, the common denominator in these cases should be a detailed case-by-case, industry-by-industry inquiry into the fairness of the transaction, and the good faith and bargaining power of the parties. In doing so the courts should engage in the balancing of competing supplier and dealer concerns that antitrust courts, more often than not, shun. Jurisprudentially, then, the balancing of fairness versus economic concerns that previously took place within antitrust analysis is now taking place across the bounds of different legal theories. Put another way, these new dealer remedies are filling the very gap left in antitrust by the economic efficiency approach. These theories, *inter alia*, include breach of an implied covenant of good faith and fair dealing,[23] tortious interference with contract,[24] equitable estoppel,[25] breach of an oral contract,[26] and breach of fiduciary duty.[27]

22 One of the principal changes brought about by the economic efficiency approach has been a recognition that vertical restraints may well have pro competitive effects in the inter brand market. JW Burns 'The Chicago school and the evolution of antitrust: Characterisation, antitrust injury, and evidentiary sufficiency' (1989) 75 *Virginia Law Review* 1221, 1231-37.

23 This theory is often used by courts in determining the intention of the parties when the contract is silent on a given point.

24 *American Business Interiors, Inc. v Haworth, Inc.*, 798 F.2d 1135, 1142-46 (8th Cir. 1986); *Machine Maintenance & Equipment Co. v Cooper Industry, Inc.* 661 F. Supp. 1112, 115-17 (E.D. Mo. 1987).

25 *Chem-Tek, Inc. v General Motors Corp.* 816 F. Supp. 123, 131 (D. Conn. 1993).

26 *Lano Equip., Inc. v Clark Equip. Co.* 399 N.W.2d 694 (Minn. Ct. App. 1987).

27 *Domed Stadium Hotel, Inc. v Holiday Inns, Inc.* 732 F.2d 480, 485 (5th Cir. 1984).Of the various common law theories, this one has probably been the least successful for dealers as most courts reject the notion that a supplier has a fiduciary duty toward its dealer.

5.2 Perceived lack of connection with the real world

A second flaw in the economic efficiency approach is its perceived lack of connection with the real world, evidenced by the growing public criticism of the economic theory and vertical restraints in particular. Sophisticated consumer groups, the popular press, and elected officials are all increasingly indicating that, contrary to the economic theory, they regard dealer protection and intra-brand competition as vital for market efficiency and low prices.[28] Rather than supporting the economic efficiency theory, which purports to be pro-consumer, consumer lobbies are working to undo its effects. [29] The consumer advocacy groups cite studies showing that vertical pricing restraints cost consumers over $1 billion each year[30] and raise prices by as much as fifty percent.[31] To these consumer organisations, the true ally of the consumer is not the manufacturer, as the economic efficiency advocates argue, but the discounting dealer.[32]

Various popular press newspapers and magazines echo the same views. These papers and magazines, which are far more likely to reflect the views of the common consumer than the Journal of Law and Economics, characterise vertical restraints as a way in which manufacturers and retailers, 'hungry for fatter profits' 'rig' the marketplace.[33] Hence, the economic efficiency argument in favour of vertical restraints is not a value-neutral theory, but rather is part of a politically pro-business bias.[34]

The above two propositions affect not only the current law of vertical restraints but also raise significant questions about the future of the new dealer remedies and antitrust jurisprudence. Thereby, the simplification of antitrust vertical restraint law brought about by

28 As above.

29 A spokesperson for Consumers Union, for instance, has written: 'Consumers who benefit from the $125 billion discount industry ... should take note [of resale price maintenance] ... Legislation is pending in Congress that would restore some protection afforded to discounters and help turn back the judicial attack on price competition ... [I]f President Bush is at all concerned with the welfare of low and middle income consumers, he should sign the legislation.' MK Rand 'Fixing prices with a nod and a wink' *Christian Science Monitor* (24 April 1990) 19.

30 Consumers Union cites a 1969 Economic Report of the President showing that resale price maintenance costs consumers $1.2 billion per year. Consumers Union 'Why consumers need H.R. 1470, the Price-Fixing Prevention Act of 1991' 1 (unpublished press release), criticising the Chicago School as an 'anti-consumer theory of economics'. House Judiciary Committee Chairman J Brooks has been quoted as saying that resale price maintenance costs consumers $20 billion a year. P Barrett 'Anti-discount policies of manufacturers are penalising certain cut-price stores' *Wall Street Journal* (27 February 1991) B1.

31 Public Citizen's Congress Watch conducted a study that showed a difference of 10 to 45% when RPM was permitted. M Waldman & JW Cuneo 'Business Forum: Doom For Discounters?' *New York Times* 15 May 1988 www.newyorktimes.com (accessed 8 September 2008).

32 Rand (n 29 above) 19.

33 Burns (n 20 above) 58.

34 As above.

economic theory is being proved illusory, especially in the US With the Competition Act (soon to be implemented) relying on the adverse effect on competition to gauge the impact of vertical restraints, India is likely to face the biggest challenge of balancing the fair dealership interests and consumer interests in the Indian competition dynamics.

6 The horizontal-vertical dichotomy: The alternative analysis of agreements

Determining whether a contract, combination, or conspiracy is horizontal or vertical can make or break a case under India's first canon of antitrust law. What the Indian anti-trust jurisprudence religiously follows to distinguish between the two kinds of agreements is what we call the 'source rule'.

6.1 Source rule and the consequent obscurity

Lately courts have trumpeted a single rule for determining whether a restraint is horizontal or vertical: A horizontal agreement occurs when competitors at the same market level agree to restrain trade, whether at their own or another market level, whereas vertical restraints result when persons or firms at different market levels in the chain of distribution of a specific product conspire to restrain trade. The rule as expressed focuses on the source of the restraint. We thus call it the source rule.[35]

Notwithstanding the importance of the horizontal/vertical determination to antitrust law, case law discussing in detail the line between horizontal and vertical is relatively sparse — though the issue may have been decided a number of times without specific detailed analysis in several of the cases.

Belying this scarcity, many common business arrangements would be difficult to classify as either horizontal or vertical under the source rule. As long as competitors participate in or own interests in entities which operate at all levels of distribution, focusing only on the source of the restraint will result in entities being both horizontal and vertical. The source rule therefore cannot be the sole test for whether a restraint is imposed vertically or horizontally.[36] One such example is of the dual distribution cases as discussed below.

35 CR Loftis & V Ricks 'Seeing the diagonal clearly: Telling vertical from horizontal in antitrust law' (1996) 28 *University of Toledo Law Review* 151.

36 As above.

6.2 Challenge posed by dual distribution cases

Dual distribution cases are those in which an entity such as a manufacturer or supplier, with an otherwise clearly vertical relationship to its wholesalers or retailers, enters the wholesale or retail level of distribution and directly competes with those it also supplies.[37] It is in these dual distribution cases where the verticality or horizontality of the manufacturer or supplier is directly at issue.[38]

Often the manufacturer will take up distribution of its product in one of the exclusive areas it has established in order to cut costs further. When the manufacturer thus also becomes a distributor, the other distributors or potential distributors of the manufacturer sometimes complain that, because the manufacturer operates at the same level as the distributors, the arrangement between the manufacturer and the other distributors is horizontal rather than vertical.[39]

It is generally accepted that so long as the dual distribution arrangement promotes inter-brand competition by allowing the vertical entity to pursue its own market strategies by promoting certain efficiencies in the distribution of its product, the arrangement is held for all substantive purposes to be vertical.[40] There is no case of which the researcher is aware of, where the Indian Supreme Court has discussed in detail and specificity the problems of dual distribution cases in relation to determining the border line between the vertical and horizontal restraints and, hence, this area requires analysis and substantive research both by Indian scholars and jurists at the earliest.

6.3 Alternative approaches

Though the researcher does not particularly support any of the alternative approaches for determination of vertical and horizontal agreements from the criteria given and followed by the Indian competition law today, it is still vital for the comprehensiveness of this research project to discuss these approaches in brief.

Professor Leibeler has called for the abandonment of the horizontal/vertical distinction in favour of an analysis based on intra-

37 H Hovenkamp 'Vertical restrictions and monopoly power' (1984) 64 *Boston University Law Review* 521, 546-48.

38 *Oreck Corp. v Whirlpool Corp.* 579 F.2d 126, 131 (2d Cir. 1978). The Court held a dual distribution arrangement to be vertical in effect and purpose while employing rule of reason analysis.

39 As above.

40 *Com-Tel, Inc. v DuKane Corp.* 669 F.2d 404, 409-11 (6th Cir. 1982). The courts in the US have reasoned that dual distribution cases are actually vertical cases except for the sole fact that the manufacturer also participates on the lower distribution level.

brand and inter-brand effects. Under this analysis, an arrangement that only affects intra-brand competition should be judged under the rule of reason regardless of whether it is the result of horizontal or vertical agreements.[41] This distinction has been acknowledged by the Department of Justice in the United States of America. After reviewing traditional antitrust classifications of agreements, Professors Baxter and Kessler, Professors of Economics, Law, and Policy at the Graduate School of Business at Stanford University, concurred that these labels of agreements are unhelpful and misleading. The classification of an agreement as horizontal or vertical provides little guidance as to either its effect on social welfare or its legality under the antitrust laws. The authors propose an alternative system that classifies agreements based on the parties' economic relationships as producers of substitutes or of complements. They also suggest that an unwillingness to recognise that many agreements affect relationships with producers of both substitutes and complements has led to confusion in the antitrust analysis of agreements. In conclusion, they discuss the welfare analysis of such agreements and propose a method of evaluating their legality under the antitrust laws.[42]

7 Model law for vertical arrangements: Do we need to follow the US/EU models?

Even though the Indian competition law claims to be self-sufficient, we must examine the need (if any) for importing relevant jurisprudence/framework from the two strongholds of the world antitrust laws, namely the US and the EU frameworks. In recent years, divergence between United States and European Union's competition policy has garnered a lot of attention. One particular area where these differences are evident is the treatment of vertical restraints. The policies of these frameworks with reference to vertical restraints are analysed in brief below.

7.1 The US model

In the US, a plaintiff can challenge vertical restraints under section 1 of the Sherman Antitrust Act as an unreasonable restraint of trade, or under section 2 as exclusionary conduct in furtherance of monopoly power. Under either cause of action, a plaintiff must show that the agreement in question is likely to harm competition. US antitrust laws seek to maximise consumer welfare by controlling the misuse of

41 WJ Leibeler 'The antitrust paradox: A policy at war with itself' (1978) 66 *California Law Review* 1317.

42 W Baxter & D Kessler 'Toward a consistent theory of the welfare analysis of agreements' (1995) 47 *Stanford Law Review* 615.

private economic power. In other words, the US model, unlike its European counter-part as will be discussed, protects the competitive process — not competitors.[43]

Two cases which claim inevitable reference with regard to US antitrust jurisprudence are *GTE Sylvania, Inc.*[44] where in support of its abandonment of *per se* treatment, the Supreme Court observed how exclusive territories had the potential to 'induce competent and aggressive retailers to make the kind of investment of capital and labour that is often required in the distribution of products unknown to the consumer' A few years later, in *Monsanto Co. v Spray-Rite Service Co.*, the Court again endorsed vertical restrictions that encourage retail service and supported a manufacturer's right to terminate a discounting dealer to prevent free riding.[45]

Vertical restraints can thus be broadly classified into two categories in the US. The first category consists of arrangements that restrict the distribution of a product, such as resale price maintenance systems. Because they have a high potential to result in pro-competitive benefits, courts have analysed these arrangements under a rule of reason approach, but only when there is no agreement to set prices.[46] The second category of vertical restraints consists of efforts by a firm to exclude or foreclose competing firms. These are also analysed under a rule of reason approach.

7.2 Problems with the US framework

As examined above, the economic efficiency approach which the US antitrust law follows, and is imitated by India to a large extent, is recently under a magnifying glass and is being criticised as biased against the manufacturers. One must remember that the United States has a rich history of antitrust case laws on which its federal judiciary can rely in deciding the validity of business practices. However, antitrust policy in India is still maturing with time, and consequently any blind application of the US framework would lead to immense difficulty due to unfamiliarity of the Indian courts with the US business approaches and practices. Almost all the business practices in the United States are analysed under a rule of reason approach, as also followed by India. However, this approach encompasses a great deal of discretion by the judge or finder of fact which may not be ideal in an emerging economy as this uncertainty may deter foreign investors from investing in India at this stage when there is rampant desperation for growth and development.

43 MM Sheth 'Formulating antitrust policy in emerging economies' (1997) 86 *Georgetown Law Journal* 451.
44 433 US 55.
45 465 US 752, 760-61 (1984).
46 *United States v Colgate & Co* 250 US 300, 307 (1919).

7.3 The European Community model

In contrast to American law, EU competition law is far less forgiving of vertical agreements. The antitrust regime in the European Community is based on a dominance concept: any conduct that injures consumers or competitors is a violation of the antitrust laws because it is an abuse of a dominant position.[47] The objective of EC antitrust law is to protect vulnerable competitors against abusive practices by dominant producers.[48]

The Commission can challenge vertical agreements entered into by both dominant and non-dominant firms under article 81, and can challenge those entered into by dominant firms under article 82.[49] The Commission's burden does not require an analysis of competitive effects of the sort undertaken in the US. Rather, EU case law suggests that it is enough for the Commission to show that the agreement in question restricted the economic freedom of either a party to the agreement or a third party, without regard to a likely effect on prices, output, or consumer welfare generally.[50]

The EC recently has promulgated a block exemption regulation (BER) that sets out circumstances under which vertical arrangements are automatically exempted under article 81(3). The BER makes great strides in applying economic rather than formalistic analysis to the antitrust treatment of vertical restraints, and explicitly recognises many of the efficiency-enhancing reasons for vertical restraints.[51] Nevertheless, article 81 is still likely to subject a greater number of agreements to condemnation than would US antitrust law. For example, the exemption applies only to firms with less than 30 per cent market share; US courts typically use a higher market power threshold as a screen for rule of reason analysis.[52] Further, the BER explicitly spells out several categories of so-called 'hard core' distribution restrictions that essentially are *per se* illegal. Dominant firms entering into vertical agreements receive even harsher treatment under EU competition law. The guidelines to the BER

47 AE Rodriguez & MB Coate 'Limits to antitrust policy for reforming economies' (1996) 18 *Houston Journal of International Law* 311.

48 J Cooper *et al* 'A comparative study of United States and European Union approaches to vertical policy' (2005) 13 *George Mason Law Review* 289.

49 Treaty Establishing the European Community, 1997. As of 1 May 2004, national competition authorities and courts of EU member countries can fully apply both articles 81 and 82. See 'Commission Regulation 773/2004, 2003 O.J. (L 1) 37, 39 on implementations of the rules on competition laid down in articles 81 and 82 of the Treaty' http://europa.eu.int/comm/competition/publications/publications/modernisationen.pdf (accessed 10 September 2008).

50 SB Bishop 'Pro-competitive exclusive supply agreements: How refreshing!' (2003) 24 *European Competition Law Review* 229.

51 'Commission Notice: Guidelines on vertical restraints' (2000) C291 *Official Journal* 115.

52 *Jefferson Parish Hosp. Dist. No. 2 v Hyde*, 466 US 2, 26-27 (1984). The Court observed that 30% market share was insufficient for market power in a tying case.

explicitly exclude dominant firms from exemption under article 81(3).[53]

The recent settlement between Coca-Cola and the EC that ended a five-year investigation of Coca-Cola's marketing practices in the EU illustrates EU hostility to restrictions on downstream distributors, regardless of the competitive effect. Although it is impossible to know what evidence the Commission had regarding the effects of Coca-Cola's agreements on consumer welfare, the Commission's press release strongly suggested that the competition issue involved was consumer ability to choose from competing brands rather than supra-competitive pricing of Coca-Cola's offerings.[54]

7.4 Problems with the EC framework

The first problem in adopting the EC framework for an emerging economy like India is that it gives little, if any, consideration to efficiency justifications for violations of antitrust law. Rather, the focus of European competition law is the redistribution of wealth. Implementing such a policy in an emerging economy can entail significant lost opportunities for economic growth. The cost of foregone efficiency benefits not only affects present levels of economic growth and output, but future levels as well because firms are deterred from entering efficiency-enhancing agreements due to fear of violating the antitrust laws.

A second problem with the European framework is that it was specifically designed for a large market (in the hopes of producing a more competitive Community Economy). India is not a part of very large trading blocs or unified markets (though recently the trend is changing, with India joining hands with other developing countries and entering into free trade agreements). Rather, India has a host of bilateral trade agreements with various neighboring countries. Additionally, one of the foremost aims of the Indian economy is to try to attract foreign investment to increase economic growth. Thus, the aims of EC antitrust policy are inconsistent with the size, structure, and goals of Indian economy.

53 *AKZO Chemie BV v Comm'n* 1991 E.C.R I-3359, P 60 (1989); S Bishop & D Ridyard 'E.C. vertical restraints guidelines: Effects based or *per se* policy" (2002) 23 *European Competition Law Review* 35. Dominance is established under EC law when a firm's market share is above 50 percent.

54 European Commission 'Commission close to settle antitrust probe into Coca Cola practices in Europe' 19 October 2004 http://europa.eu.int/rapid/ (accessed 10 September 2008).

8 Does Indian vertical restraint law need modification?

The economic, legal, and political structure of India is very different from those of the United States and the European Community. Though the bulk of Indian competition law is imported from US antitrust jurisprudence, much is left to be desired. Broadly, the three main goals of the Indian economy today include increasing economic growth with the promotion of FDI; to increase access to and development of new technologies; and to increase efficiency of domestic firms. The competition policy in India regarding vertical restraints must, therefore, juggle between the consumer welfare standard and the aggregate economic welfare standard as the benchmark for analysing allegedly anticompetitive conduct of a given agreement.

Indian law at present is consumer-oriented. This will in future enhance healthy competition in the market. However, with the imminent arrival of Wallmart, India may face market distortions and may have to reconsider its stand on the vertical restraint law that is prevalent today. The courts now need to interpret the law not only in a consumer-friendly approach, but also give due credence to the dealer fairness attributes of any agreement to ensure full fledged, unhindered growth of the Indian economy in the twenty-first century. However, it is to be noted that any immediate changes or amendments to the competition law may not be required once the Competition Act is implemented; its results on the Indian competition scenario may eventually trigger the above-explained recourses.

9 Conclusion

As all successful competitive moves tend to exclude rivals, the ability to neatly distinguish between pro- and anti-competitive vertical restrictions is not easy in practice, and continues to be a central focus of antitrust scholarship all over the world today. From the above analysis it is amply clear that courts should reconsider their almost total reliance on the economic efficiency approach in analysing vertical restraints under the antitrust laws. We must understand that no theory, no matter how internally logical, consistent, or simplifying, will long survive if that theory is not believed and does not suit society's needs.

The law of vertical restraints is a good deal broader than we recognise it to be in India, and also includes a variety of common law

theories.[55] Though, as of today, we may let our Competition Act rest in peace as very soon the State legislatures and courts will require case-by-case inquiries into dealer fairness and general business ethics issues. This will in effect circumvent the simplicity and logic of the old antitrust learning from the US model.

While a detailed plan for the future of vertical restraints in antitrust law is beyond the scope of this article, some broad outlines are possible. The growing disbelief in the economic efficiency theory is a clear sign that courts need to rethink their almost total reliance on this theory and its models in anti-trust jurisprudence. Therefore, any adverse effect on the market must not solely be judged in accordance with a pro-consumer outlook. Tie-ins and non-price vertical restraints should be subjected to a fuller rule of reason analysis that includes consideration of intra-brand competition and dealer fairness. In short, the time has come to move away from theory and into the real world, and consider what goals society wants protected and how consumers regard their self interest as best served.

[55] H Saferstein 'The ascendancy of business tort claims in antitrust practice' (1991) 59 *Antitrust Law Journal* 379, 383-384. One recent, although small, survey in USA found a steep decline in the number of purely antitrust lawsuits being filed but an increase in the number of cases alleging both antitrust and state tort claims.

A CRITICAL ANALYSIS OF THE PROPOSED CODIFICATION OF THE DUTIES OF CORPORATE DIRECTORS

By Rudolph Martin de Neijs[*]

1 Introduction

In pursuance of the rectification of perceived shortcomings in the common law duties of directors, including *inter alia* the confusion and uncertainty among prospective and current directors concerning the degree of skill expected of them while carrying out their functions, the Department of Trade and Industry prepared a discussion draft of a proposed new Companies Act for South Africa,[1] which, in contrast with the previous Companies Act,[2] spelled out the duties of corporate directors. Following the discussion draft, a new Companies Bill was introduced in June 2008 in the spirit of the February 2007 bill regarding directors' duties.

In this article I shall attempt to outline the new statutory duties and other relevant sections and explain these duties as they are found in the Companies Bill.

It should be stated that since the following discussion concerns proposed law not yet in force, no court decisions and very few academic articles are available to aid the interpretation thereof. The following interpretations are thus purely speculative and may differ from the ultimate interpretation that the court may give to these sections when applied. The interpretation of these sections can further not be aided by English statutory law, as the English statutory law only refers to fiduciary duties of directors and does not contain any specific criteria of care and skill by which a director's conduct can be measured.[3]

* Final year LLB student (University of Pretoria).

1 Draft Companies Bill for public comment, 31 October 2006 as published for public comment in February 2007. The Companies Bill was introduced in the National Assembly in June 2008.

2 Act 61 of 1973.

3 Campbell *et al* (eds) *Liability for Corporate Directors* (1993) 222-232.

2 The new Companies Bill

2.1 Duty of care and skill as proposed by the new Companies Bill

Section 76 of the new Companies Bill contains both positive (care and skill) and negative (fiduciary) duties of directors. Of importance to this article are the positive duties contained therein. I will now provide and elaborate on the subsections which form the anticipated new duties.

2.1.1 Section 76(3) of the Companies Bill

Section 76(3) reads as follows:

> 3. Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director—
> (a) ...;
> (b) ...; and
> (c) with the degree of care, skill and diligence that may reasonably be expected of a person—
> (i) carrying out the same functions in relation to the company as those carried out by that director; and(ii)having the general knowledge, skill and experience of that director.

From the above, the following can be distilled:

According to section 76(3)(c) there will be a two-stage test according to which a director's conduct will be measured, which consists of an objective and a subjective leg. Section 76(3)(c)(i) sets out an objective test by which the director's care and skill applied during his conduct is compared to the general knowledge, skill and experience that may reasonably be expected of an individual carrying out the same functions as are carried out by that particular director. A director thus takes a large risk when accepting an appointment to a position where specialised knowledge is required, as he will be judged according to the standard of such an expert. Therefore, it may be said that section 76(3)(c)(i) introduced the maxim *imperitia culpae adnumeratur* — literally translated to mean that ignorance or lack of skill is deemed to be negligence — into the field of directors' duties.[4] It follows that section 76(3)(c)(i) lays out the minimum standard by which a director's conduct is measured.

Section 76(3)(c)(ii) contains the subjective leg of the test. According to this section, should a director have certain special knowledge, expertise or experience over and above the minimum

4 J Neethling *et al Law of Delict* (2006) 126.

which may reasonably be expected from someone holding his office, he will be judged according to a higher standard, that is according to the care, skill and diligence someone with his special knowledge should have applied in carrying out his particular obligation. This section thus focuses on the subjective personal knowledge of a director and can only increase the standard by which a director's conduct will be tested over and above the objective standard described in 76(3)(c)(i).

2.1.2. Section 76(4)(a) of the Companies Bill

Section 76(4)(a) reads as follows:

> (4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company—
> (a) will have satisfied the obligations of subsection (3)(b) and (c) if—
> (i) the director has taken reasonably diligent steps to become informed about the matter;
> (ii) ...;
> (aa)...;
> (ab)...; and
> (iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and ...

From the above the following can be distilled:

> Section 76(4)(a)(i) states that a director will have acted reasonably if he has taken reasonably diligent steps to become informed about the subject matter of a specific judgment and can as a result not use ignorance as an excuse for poor judgment or performance.

The relevance of section 76(4) lies in the following: A director will be in breach of his duties if he conducted his obligations without the necessary degree of skill, that is if he conducted himself negligently. With the *Aquilian* action, it becomes a difficult issue to determine whether or not a director has fault in the form of negligence with regard to a certain obligation that he performed as it is not always clear what should reasonably be expected from a director and because courts are loath to second-guess directors' decisions. Section 76(4) gives clarity on when a director's actions will have fallen short of being reasonable and will thus have been negligent.

This section creates the impression that there is no distinction between the criteria which will be applied when determining whether executive directors or non-executive directors have acted negligently, as both are expected to become properly informed before making a decision. This assumption is strengthened by section 76(1) which states that section 76 will also apply to an alternate

director, which is a form of temporary *ad hoc* director.[5] It is submitted that as this section applies equally to alternate directors who are not permanently occupied with the business of the company, it will also equally apply to non-executive directors.

2.1.3 Sections 76(4)(b) and 76(5) of the Companies Bill

Sections 76(4)(b) and 76(5) read as follows:

> (4) A director
> (b) is entitled to rely on—
> (i) the performance by any of the persons—
> (aa) referred to in subsection (5); or
> (ab) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and
> (ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).
>
> (4) To the extent contemplated in subsection (4)*(b)*, a director is entitled to rely on—
> (b) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;
> (c) legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters—
> (i) within the particular person's professional or expert competence; or
> (ii) as to which the particular person merits confidence; or
> (d) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

From the above, the following can be distilled:

> A director is entitled to trust that a delegate will perform his function properly or that the information supplied by such delegate is accurate, subject to certain requirements. These requirements can be elaborated on as follows:

A director can rely on any person to perform any of the board's functions properly provided the specific authority is legally capable of delegation and the board could reasonably delegate such authority to the person in question. It is submitted that section 76(4)(b)(i)(bb), in contrast with section 76(5), does not expressly put any duty on the director to be convinced of the competency or trustworthiness of the delegate.

5 The Companies Bill sec 1.

A director may also rely on the performance or information given by employees or professional persons retained by the company provided the director reasonably believes the specific authority, duty or information falls within the specific delegate's competence and that the delegate is reliable.

Section 76(5)(b) gives criteria by which a director can judge if a professional person is competent with regard to the specific authority or duty. Section 76(5)(b)(i) appears to indicate that a director may rely on a professional person to perform a function or give accurate information if the particular function or information falls within the qualifications of the person. It is submitted that, according to this section, a director may trust that a professional person is competent in the area of his qualifications, provided he has no reason to doubt that person's competence, because it would be reasonable to believe someone with specialised qualifications is proficient in such subject matter.

Section 76(5)(b)(ii) appears to indicate that a director may also rely on the performance or information of a professional person regarding matters that the director reasonably believes fall within that particular person's competence. It is submitted that this section allows a director to entrust a professional person with authority which falls outside their qualifications, but in which the director has reason to believe the particular person is competent.

Furthermore, a director is allowed to rely on the performance or information of a committee of the board, even though the director is not a member. As with all persons mentioned in this section, this is subject to the director's reasonable belief that such persons are trustworthy and competent.

3 Basis of liability for breach of director's duties

3.1 Section 77(2) of the Companies Bill

Section 77(2) reads as follows:

> (2) A director of a company may be held liable—
> (a) ...; or
> (b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of—
> (i) a duty contemplated in section 76(3)*(c)*;
> (ii) any provision of this Act not otherwise mentioned in this section; or
> (iii) ...;

This section makes provision for the enforcement of a director's duty of care and skill by making the common law of delict the basis for liability for any breach. Section 77(2)(b)(i) applies directly to a

director's duty of care and skill, while section 77(2)(b)(ii) will have application on the ancillary duties, such as that described in section 76(5).

4 Conclusion

In this article I have argued that the new Companies Bill contains sections which attempt to codify the duty of care and skill expected from a director. I have shown that the codified duties in the Companies Bill can roughly be divided into two categories: the care and skill a director must apply when conducting the company's business, and when a director may rely on another to perform the duties expected from him. I have also attempted to give guidelines for the interpretation of these duties.

The Bill makes no mention of whether the new director's duties are supplementary to the common law duties or override them. It is furthermore difficult to draw a conclusion purely from such an omission, as the Bill specifies in other sections when it abolishes the common law and when it is merely supplementary.[6] However, it is submitted that as the February 2007 draft contained a clause stating that the new duties operate concurrently with the common law duties, the omission was intentional and thus the new duties abolish and replace the common law duties.

6 Secs 20(8), 49(4)(b), 95(6), 161(2) and 165(1).

MAY THE ACCUSED (MINISTER OF SAFETY AND SECURITY) PLEASE RISE BEFORE THE COURT: POLICE LIABILITY VERSUS PARTIAL IMMUNITY

By Kenneth K. Sithebe[*]

1 Introduction

This article is written in light of the increasing number of civil actions brought against the South African Police Service (SAPS). Among the most recent cases is that of a Witbank woman and her daughter who instituted an action for damages because an escaped prisoner shot and killed the woman's husband with a service pistol that the prisoner had stolen from the police.[1] Another related claim is that of Mr Gerber who was shot during an armed robbery at his home in a security complex. Mr Gerber claimed R5.6 million from the Minister of Safety and Security for failing to protect South African citizens.[2]

In this article I analyse cases brought against the SAPS. I further illustrate that the state is liable for any delictual act committed by the SAPS, and that the state has a legal duty to protect its citizens and prevent them from harm or any form of violence. However, this does not justify the increasing number of civil actions instituted against the SAPS. My submission investigates whether there is any form of defence on which the state can rely – not to escape liability, but to uphold the functions, duties and reputation of the SAPS. I will argue that the monetary amounts claimed in these civil actions are not in the best interest of the public or that of the SAPS.

2 Constitutional provisions related to police liability

Section 7(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) states that the state 'must respect, protect, promote and fulfil the rights in the Bill of Rights'. In addition to this, section 8(1) of the Constitution also puts emphasis on the duty that is imposed on the state and all its organs to meet the requirements of

* First year LLB student (University of Pretoria). I would like to thank Dr Kok, Mr Madlingozi, Ms Appanna and the librarians at the University of Pretoria.

1 *The Citizen* 16 May 2008 11.

2 *Pretoria News* 8 August 2008 2.

section 7(2) and to refrain from performing any act that will infringe the abovementioned rights.[3]

These sections imply that the state and its organs must provide appropriate protection to everyone through the law and other structures in order to effect such protection. Section 12 of the Constitution stresses that everyone in the Republic has the right to freedom and security of the person, and to be free from all forms of violence, either from public or private sources.[4] Therefore, these provisions in the Constitution place a burden on the state to prevent the violation, and to take preventative measures to ensure, the right to safety. In relation to these stipulations in the Constitution, section 205(3) of the Constitution states that:

> [T]he police service is mandated to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law.

The Constitution and the South African Police Service Act[5] (the Act) contain provisions that impose a legal duty on the police and the state to prevent crime and protect everyone in the Republic. Failure to uphold such provisions as stipulated in the Constitution and the Act are discussed in *Minister van Polisie v Ewels* 1975 3 SA 590 (A), *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA), and *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).[6]

In *Minister van Polisie v Ewels,* an off-duty police officer assaulted an ordinary citizen at a police station. The assault took place in the presence of other police officers. In addition, one of the officers enjoyed a higher rank than the off-duty police officer. The respondent claimed that the police officers failed to perform their duty to prevent the assault. The Court held that section 5 of the Police Act[7] (applicable at the time) stipulated that it is the primary functions of the police, *inter alia*, to prevent crime and to maintain law and order.

3 Sec 8(1) reads: 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of State'.

4 The Constitution of the Republic of South Africa, 1996 sec 12(1)(c); M Pieterse 'The right to be free from public or private violence after Carmichele' (2002) 119 *South African Law Journal* 27.

5 South African Police Service Act 68 of 1995.

6 See also *Makhubela v Minister van Polisie & 'n Ander* 1977 1 SA 420 (T); *Mhlongo v Minister of Police* 1977 2 SA 800 (T); *Ramsay v Minister van Polisie & Andere* 1981 4 SA 802 (A); *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); *Moses v Minister of Safety and Security* 2000 3 SA 106 (C); *Ntamo and Others v Minister of Safety and Security* 2001 1 SA 830 (TkH); *Dersley v Minister van Veiligheid en Sekuriteit* 2001 1 SA 1047 (T); *Geldenhuys v Minister of Safety and Security & Another* 2002 4 SA 719 (C); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Botha v Minister van Veiligheid en Sekuriteit* 2003 6 SA 568 (T); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA); *Minister of Safety and Security v De Lima* 2005 5 SA 575 (SCA); *Minister of Safety and Security v Luiters* 2006 4 SA 160 (SCA); *Brooks v Minister of Safety and Security* 2008 2 SA 397 (C).

7 The Police Act 7 of 1958 (repealed by the South African Police Service Act 68 of 1995).

Therefore, the appeal by the Minister was dismissed on the grounds that the police failed to perform a duty imposed on them by section 5 of the Police Act. The Minister was thus held vicariously liable.

In the *Van Eeden v Minister of Safety and Security,* the appellant was sexually assaulted, raped and robbed by one Mohamed, a known dangerous criminal and serial rapist who escaped from police custody through an unlocked security gate approximately two and a half months before the assault on the appellant. The appellant instituted an action against the Minister for delictual damages suffered as a result of the attack. The appellant relied on sections 7 and 12(1)(c) of the Constitution, which imposes a duty on the state to respect her right to freedom and security. Further, she stated that the above sections place a positive duty on the police to protect everyone from violent crimes. She additionally submitted that section 39(1)(b)[8] of the Constitution obliges the state to protect women against violent crimes under international law. The Court held that the police had a legal duty to act positively, in accordance with the above mentioned sections and section 205(3)[9] of the Constitution, to prevent Mohammed's escape. The Court found that the police acted wrongfully. The state was held liable for damages suffered by the appellant.

In *Carmichele v Minister of Safety and Security* (*Carmichele* case),[10] the Constitutional Court changed the South African law relating to wrongfulness. Carmichele, the applicant, was attacked by Coetzee, who had previously attacked and sexually assaulted a woman in the area around his residence. At the time Coetzee was also appearing in court on a number of other charges against him. On one such occasion, the investigating officer stated that there was no reason to deny him bail and recommended that he be released on a warning. In another court, the prosecutor omitted to inform the magistrate of Coetzee's previous convictions and charges and did not oppose Coetzee's release. Before the assault on the applicant, numerous appeals were made to a police officer at the Knysna police station for Coetzee to be kept in custody as he was likely to commit his habitual crimes again. All the attempts were in vain. The police officer in question stated that there was no law to protect the complainants, and that the authorities' hands were tied unless Coetzee committed another offence. On these facts, the Constitutional Court held that the interim Constitution[11] and the final Constitution have provisions that illustrate that the officer in question

8 Sec 39(1)(b) reads: 'When interpreting the Bill of Rights, a Court, tribunal or forum must consider international law'.

9 Sec 205(3) reads: 'The objects of the police service are to prevent, combat and investigate crime, to protect and secure the inhabitants of the Republic and their property and to uphold and enforce the law'.

10 2001 4 SA 938 (CC).

11 Act 200 of 1993.

was negligent and had failed to uphold the duty to protect and the duty of care toward members of the public. The officer omitted to provide the prosecutor with all the relevant information that could have led to Coetzee's being remanded in custody, and therefore the respondent was liable for delictual damages incurred by the applicant.

Various authors have also attempted to address the matter relating to police liability. Leinus and Midgley[12] discussed the liability of the police and the prosecutors in relation to the *Carmichele* case. The authors highlighted that the Constitutional Court went on to state that immunity absolving the police from liability would be inconsistent with our Constitution and its values. They outline the liability of police and prosecutors by *inter alia* noting that the interim Constitution, the final Constitution and the Act each contains provisions which impose a duty on the police to carry out their functions. They argue that the investigating officers had been aware of the allegations of rape levelled against Coetzee and that Coetzee admitted to perpetrating a violent sexual attack on his previous victim. The authors further contend that the investigating officers knew that the prosecutor relied on their recommendations regarding bail, and that they had a duty to inform the prosecutor of all factors relevant to bail. They are of the opinion that prosecutorial liability is not coextensive with that of the police, and that whilst prosecutors do not have specific constitutional duties imposed upon them in the same way as the police, they nevertheless owe the public the duty to execute their functions and mandate independently and in the best interests of the public,[13] as per section 41(1)(b) of the Constitution.[14]

Subsequent to the article by Leinus and Midgley, Pieterse writes about the inherent right to be free from either public or private violence in relation to the *Carmichele* case,[15] discussing section 12(1)(c) of the Constitution which guarantees a right to be free from public and private violence.

It is the crystallisation of all the factors that I have discussed that renders the SAPS open to civil actions. Yet, is there not any form of relief at their disposal with which to defend themselves against further civil actions, taking into account the resources available to them? It is worth noting that South Africa is under-policed: In South Africa there is an approximate average of 260 police per 100 000 of

12 B Leinus & JR Midgley 'The impact of the Constitution on the law of delict: Carmichele v Minister of Safety and Security' (2002) 119 *South African Law Journal* 17.
13 Leinus & Midgley (n 11 above) 22-23, 25-26.
14 *Carmichele* (n 10 above) para 72.
15 Pieterse (n 4 above).

the population, in comparison with the international average of 380 police per 100 000 people.[16]

3 Possible defences

3.1 Immunity

As discussed above, affording blanket immunity to the SAPS against civil actions is inconsistent with the Constitution. 'The principle of English constitutional law that "the king can do no wrong" does not form part of the law of the Republic of South Africa.'[17]

3.2 The Saaiman case

In order to start laying the foundation for a defence — sometimes referred to as 'partial immunity' — for the SAPS, the case of *Saaiman and Other v Minister of Safety and Security and Another*[18] (*Saaiman* case) must be analysed.

In the *Saaiman* case, the plaintiffs were travelling in a motor vehicle on a national road when they stumbled onto an armed robbery. The prime target of the robbers was a cash carrier belonging to the second defendant, a provider of cash transportation services. During the robbery shots were fired resulting in bodily injuries as well as traumatic, emotional and psychological shock suffered by the plaintiffs individually. The plaintiffs instituted a civil action in the Orange Free State Provincial Division for the recovery of damages totalling R776 000 against the defendants, with the first defendant cited as the Minister of Safety and Security. The plaintiffs averred that there was a legal duty on the Minister of Safety and Security to see that vehicles carrying money are escorted by police, and to see that signboards and/or warnings are erected to warn the public to act reasonably. Among the legal questions before the Court, the following could be identified which are pertinent to this article:

(1) Was there a legal duty of care owed by the defendant?
(2) Were the damages or injuries suffered not too remote from the alleged duty?

There should be a recognised relationship between the duty of care and the remoteness of damages or injuries. In totality, the plaintiffs alleged that the failure of the defendant to put in place these safety measures constituted a breach of a legal duty which was owed to the plaintiffs.

16 D Welsh 'Crime and punishment' (2006) 16 *Without Prejudice* 17.
17 M Demdy 'Law of delict' (1994) *Annual Survey of South African Law* 291.
18 2003 3 496 (O).

The Court held that whether a legal duty existed *in casu* or not entails a careful and analytical judicial assessment of numerous factors. There must be a balancing of competing interests of an individual delictual claim on one hand, and that of the community on the other hand.[19] Further, the relationship of the parties involved is a vital factor to be considered. These factors have two aspects. Firstly, where the relationship between the victim and the defendant suffering the action is a general relationship, an ordinary duty of care exists but no binding legal duty arises. Failure by the defendant to prevent harm is not regarded as wrongful conduct that translates into an actionable omission giving rise to delictual liability attached to the defendant in question. Secondly, where the relationship between the victim and the defendant is a special relationship, a particular duty exists. From this a binding legal duty may arise — failure by the defendant to prevent harm might be regarded as wrongful conduct, translating into an actionable omission and giving rise to delictual liability attached to the defendant in question.[20] It is suggested that the only instance where a special relationship arises is when the plaintiff hires the services of a private security company, in terms of Private Security Industry Regulation Act,[21] to complement the inherent security provided by the State through the SAPS.

Further, the powers, functions and duties of the police, as set out in section 13 of the South African Police Service Act read with section 205(3) of the Constitution, in brief boil down to maintaining public order, protecting citizens, and preventing and combating crime. Failure to perform any of these statutory duties does not necessarily give rise to civil liability on the part of the police. This is so because the legislative organ — a parliament which represents the beneficiaries of the police service, the country's inhabitants — does not consider it appropriate to hold members of the police service delictually liable to every member of the general public who suffers damages on account of omissions on the part of any member of the police service who neglects a public duty.[22]

Judge Rampie[23] goes on to quote Judge Hefer in the case *Minister of Law and Order v Kadir*[24] who said:

> The police force is first and foremost an agency employed by the State for the maintenance of law and order, and the prevention, detection and investigation of crime with the view to bringing criminals to justice.

Judge Rampie continues to say that:

19 *Saaiman* (n 18 above) 504.
20 *Saaiman* (n 18 above) para 14.
21 Act 54 of 2001.
22 *Saaiman* (n 18 above) para 17.
23 *Saaiman* (n 18 above) 509.
24 1995 1 SA 303 (A) 319.

> [O]ur society is a civilised and a reasonable society. In all civilised nations of the world, it is reasonably recognised and accepted that every human endeavour under the sun has two inherent aspects: namely, the possibility of success on the one hand and the possibility of failure on the other hand. These public servants who do their bit in very trying circumstances but fail, deserve our society's appreciation instead of condemnation and delictual anxieties for the slightest dereliction of their public duties. Moreover our society also recognises that our police service is an agency with limited financial and human resources expected to perform their policing duties with reasonable diligence and not absolute perfection.[25]

He further states that:

> [E]very day women are exposed to the risk of rape, banks to the risk of robberies, cargo carriers to the risk of ... [being hijacked], police to the risk of ... [being murdered], so are the farmers. The risk of crime is shared by all the members of the general public.[26]

The Judge acknowledges that recognising delictual liability based on omissions, as contended *in casu*:

> [C]an have crippling and adverse effects on the State *fiscus* to run a police service. Such an action will be too general and rangeless. Every single member of the general public will instantly become a potential claimant against the police service. It will diminish drastically the morale of the police. It will discourage young men and young women from serving the country as peace keepers. The protection of the inhabitants of this country by investigating, combating and preventing crime is by no means an easy task. Ideally we all would like to live in a virtually crime-free country. But that remains an ideal. Certainly there is virtue in being idealistic. But we must also be realistic about our limited resources as a nation and human limitations. The fact of the matter is that our police service is run by human beings, but like any other human beings, they make mistakes from time to time. Our law does not require them to be punished by visiting every mistake they make with the sword of delictual liability. The advent of the Constitution has not changed that sound common-law principle. It seems to me that the circumstances of the instant case do not call for the extension of the omission rule.[27]

Further, the Judge says:

> [M]y assessment of all the circumstances of this case leads me to the conclusion that the social ideas of the community are that the loss of the plaintiffs should fall on the criminals involved where it delictually belongs, and not on the defendants.[28]

The Judge rightfully distinguishes the *Carmichele* case from the *Saaiman* case. This distinction is drawn on the grounds that the *Saaiman* case lacks the organic and compelling substance which is the

25 *Saaiman* (n 18 above) para 18.
26 *Saaiman* (n 18 above) 509.
27 *Saaiman* (n 18 above) 510 - 511.
28 *Saaiman* (n 18 above) 511.

core matter of *Carmichele*. The Judge states that, in the *Carmichele* case, liability was based on the grounds that the police, in light of all the circumstances, recommended that Coetzee be released, which amounted to wrongful conduct because the State was obliged by the Constitution and international law to prevent gender discrimination and to protect the dignity, freedom and security of women.[29] Finally, the Court held that the plaintiffs had failed to prove that the Minister had the legal duty to protect them, and consequently that the Minister breached that legal duty by negligently failing to implement safety measure. The Court concluded that there was no proximate *nexus* between their damages and the alleged omission by the Minister.[30]

3.3 The Mpongwana case

In *Mpongwana v Minister of Safe and Security*[31] (*Mpongwana* case), the plaintiff was a passenger in a minibus taxi belonging to a certain taxi organisation when it was fired upon by persons, allegedly members of a rival taxi organisation. The plaintiff was seriously injured and thus instituted an action against the defendant on the basis that the police, knowing the circumstances that prevailed on the day in question and the volatile and violent relationship between the two rival taxi organisations, had owed her a duty of care and had failed negligently to discharge that duty, resulting in the injuries she sustained.

The particulars of claim by the plaintiff did not suggest that the shots fired were fired by a policemen either in the course of their duty or otherwise. The particulars of claim by the plaintiff pleaded that in the circumstances which prevailed on the day in question, the police owed her a duty of care to avert the harm which befell her and that the police negligently failed to discharge that duty. Therefore, had the police fulfilled their duty, she would not have been injured.[32]

Before the Court could reach a decision, the defendant's counsel submitted exceptions to the plaintiff's particulars of claim to the following effect:[33]

> (9) A failure on the part of defendant and/or members of the South African Police Service (the police) to perform their statutory duties does not give rise to liability.
> (10) The defendant and/or the police did not owe plaintiff a duty of care either as alleged in Para 9 of plaintiff's particulars of claim, or at all.

29 *Saaiman* (n 18 above) para 23.
30 *Saaiman* (n 18 above) 512.
31 1999 2 SA 794 (C).
32 *Mpongwana* (n 31 above) 796.
33 *Mpongwana* (n 31 above) 797.

> (11) The foreseeability of plaintiff suffering harm is not decisive of the question as to whether liability should be imposed upon [the] defendant.
> ...
> (13) The dictates of public policy militate against liability being extended in the circumstances of this case and holding [the] defendant liable for plaintiff's damages in that:
> (13.1) The duties of the police are not exhaustive;
> (13.2) The police would be inhibited in their functions should acts or omissions (as alleged in the present matter) give rise to potential claims against the police;
> (13.3) The energy and financial resources of the police would be directed towards guarding against potential claims rather than combating crime;
> (13.4) A multiplicity of actions against the police would ensue.

Therefore, in these circumstances, did the police owe the plaintiff the alleged duty to care?

Amongst other issues in question, the Court held that the activities of the SAPS during the time the incident happened on 30 October 1995 were governed partly by the Act, particularly section 13 read with section 205(3) of the Constitution. The latter emphasises that the functions of the police service shall be to 'prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.

The Court held that the above emphasis does not differ materially from section 5 of the previous Police Service Act of 1958, of which it was held did not *per se* impose upon the police a legal duty in favour of the civilians.[34] The Court goes on to address some issues in relation to prosecutorial liability which were the contention in the *Carmichele* case.[35] Matlala notes that the Judge acknowledged the fact that the plaintiff had an arguable case on the issue of the duty to care.[36] Neethling also points out that the Court was of the opinion that placing a legal duty on the police *in casu* 'would tend to be counterproductive'.[37]

Neethling is of the opinion that the majority of delictual acts committed by the police are done so in their personal capacity. This contention strengthens the possible defences for the SAPS. To substantiate this, one should look at the cases where a complainant was raped, assaulted, intimidated, harassed, discriminated against or

34 *Mpongwana* (n 31 above) 800.
35 The main issue at hand was that prosecutorial services owed no duty of care to those whom it was prosecuting. See further *Carmichele v Minister of Safety and Security And Another* 2001 1 SA 489 (SCA) para 19.
36 D Matlala 'The law reports: Delict' (2003) 19 *De Rebus* 39-40.
37 J Neethling 'Delictual protection of the right to bodily integrity and security of the person against omissions by the State' (2005) 122 *South African Law Journal* 585.

unlawfully dealt with by members of the SAPS contrary to what the Constitution or any other statute mandates. Consequently, the case of *K v Minister of Safety and Security*[38] (*K* case) will be discussed.

3.4 Vicarious liability — and placing it where it delictually belongs

In *K v Minister of Safety and Security*, the applicant was raped by three uniformed and on-duty police officers after she was deserted by her companion in the early hours of 26 March 1996. The applicant was offered a lift by the policemen which she accepted in light that they were police officers, who bore the statutory and Constitutional duty to protect members of the public and to prevent crime. She thus thought they had her best interests at heart.

The Constitutional Court held that it was very difficult to apply the principles of vicarious liability to this case because the three policemen did not rape the applicant upon the instructions of the Minster, nor did they fulfil the legal duty imposed on them by the legislation and the Constitution. The basic principle to establish vicarious liability is whether the employee — police officer — has committed the delict in the course and scope of employment for the employer — the Minister of Safety and Security — to be held vicarious liable.[39]

The Constitutional Court articulated the obscurity in determining the phase where a delict committed by an employee involves or shifts to the employer. Justice O'Regan accepted that the police officers in question were on duty and in police uniform when the act was committed. She further states that the policemen possessed a duty to ensure the safety of the public and to prevent crime. The Constitutional Court discussed the outcomes of the High Court and the Supreme Court of Appeal that culminated in the application to the Constitutional Court.

The Supreme Court of Appeal held that a deviation from the scope and course of employment indemnifies the employer from the liability suffered as a result of such deviation. It was further held that on those grounds the Minister cannot be held liable for the rape. Further, an employer is only responsible for the wrongs committed by an employee during the course and scope of employment, engaged within the affairs of his master. Therefore, only in executing the provisions of the Constitution and the Act would the Minister be liable. These principles are found in both common law and customary law.[40]

38 2005 6 SA 419 (CC).
39 J Neethling *et al Law of delict (5th edition)* (2006) 338.
40 *K* (n 38 above) para 9.

In the Constitutional Court, Justice O'Regan continues to say, however, that the difficulties arise when the delict is committed in the course of a deviation from the normal performance of an employee's duties. The question the Constitutional Court had to answer was whether the employees were still acting within the scope of their duty or were still engaged within the affairs of their employer. The difficulty is predominantly pronounced where the deviation itself is intentional, and even more pronounced where the deviation constitutes an intentional wrong such as in the present case. The Court was cautious to note that an employee's intentional deviation from a duty does not *ipso facto* mean that an employer will be exempted from vicarious liability.[41]

Further, the Court analysed whether the wrong was solely attributable to the employee or whether it was sufficiently close enough to the employer to give rise to vicariously liability, taking into account the principles of vicarious liability and that it should be consistent and fair to the employer.[42] The Court considered the House of Lords decision in the case of *Lister & others v Hesley Hall Ltd* to determine the test that would be just and fair to hold an employer liable for the deviated conduct of his employee.[43] As stated by Lord Millet:

> The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys ... I would hold the school liable.

The Court considered other case law in order to establish a context to the set guidelines to follow when determining vicarious liability in relation to a deviation. In doing so, the Constitutional Court established a new test for liability. The test is narrated to the following effect:

> The principles of vicarious liability and their application had to be developed to accord more fully with the spirit, purport and objects of the Constitution, but that this did not mean anything more than that the existing principles of common law vicarious liability had to be understood and applied within the normative framework of the Constitution, and the social and economic purposes which they sought to pursue. This implied that the Court had to decide whether the case before it was of the kind that should in principle render the employer

41 *K* (n 38 above) para 25.
42 *K* (n 38 above) 437.
43 2001 2 All ER 769 (HOL).

> liable. Whether the principles of vicarious liability themselves required development beyond an acceptance of the normative character of their provenance and application was a different issue.

In light of the above factors and other cases, the Constitutional Court reached a unanimous decision that the Minister will be vicariously liable despite the fact that the rape was clearly a deviation from the duties the officers were employed to execute.[44]

It is exactly that which I fail to comprehend — how can an employer be vicariously liable for an act not condoned, expressly prohibited, and explicitly excluded in the employee's employment contract? I would like to draw your attention to the English case of *Home Office v Dorset Yacht Co Ltd*.[45] Among other aspects discussed in this case, the aspect I agree with in particular is that expressed by Lord Diplock in an *obiter dictum*:[46]

> The risk of sustaining damage from the acts of criminals is shared by the public at large. It has never been recognised at common law as giving rise to any cause of action against anyone but the criminal himself. It would seem arbitrary and therefore unjust to single out for the special privilege of being able to recover compensation from the authorities responsible for the prevention of crime a person whose property was damaged by the [delicious] act of a criminal, merely because the damage to him happened to be caused by a criminal who had escaped from custody before completion of his sentence instead of by one who had been lawfully released or who had been put on probation or given a suspended sentence or who had never been previously apprehended at all.

The same issue is endorsed in *Hill v Chief Constable of West Yorkshire*[47] (*Hill* case). The following extracts, relevant to the issue at hand, are discussed by Lord Keith:[48]

> The question of law which is opened up by the case is whether the individual members of a police force, in the course of carrying out their functions of controlling and keeping down the incidence of crime, owe a duty of care to individual members of the public who may suffer injury to person or property through the activities of criminals, such as to result in liability in damages, on the ground of negligence, to anyone who suffers such injury by reason of breach of that duty.

By common law, police officers owe to the general public a duty to enforce the criminal law.[49]

44 *K* (n 38 above) para 44.
45 1970 2 All ER 294 (HOL) 334.
46 This opinion was also endorsed by Rampie J in the *Saaiman* case (n 18 above) 510-511.
47 1988 2 All ER 238 (HOL) 240.
48 *Hill* (n 47 above) 240.
49 *R v Metropolitan Police Commission, ex parte Blackburn* 1968 1 All ER 763 (HOL); *Hill* (n 47 above) 240.

> From time to time [the police] make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further, it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some actions might involve allegations of a simple and straightforward types of failure, for example that a police officer negligently tripped and fell while pursuing a burglar, others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do.[50]

It is further stated:[51]

> A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted. I therefore consider that Glidewell LJ, in his judgment in the Court of Appeal in the present case, was right to take the view that the police were immune from an action of this kind on grounds similar to those which in *Rondel v Worsley* were held to render a barrister immune from actions for negligence in his conduct of proceedings in court.

In the same case, Lord Templeman holds the following view:[52]

> Moreover, if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties. This action is in my opinion misconceived and will do more harm than good. A policeman is a servant of the public and is liable to be dismissed for incompetence. A police force serves the public, and the elected representatives of the public must ensure that the public get the police force they deserve. It may be that the West Yorkshire police force was in 1980 in some respects better and in some respects worse than the public deserve. An action for damages for alleged acts of negligence by individual police officers in 1980 could not determine whether and in

50 *Hill* (n 47 above) 243-244.
51 As above.
52 *Hill* (n 47 above) 245.

> what respects the West Yorkshire police force can be improved in 1988. I would dismiss the appeal.

I believe that Kok supports the view and judgment of the Constitutional Court in the *K* case.[53] After the Supreme Court of Appeal dismissed the case, Kok writes about the appalling lack of judgment by the Court to develop the common law to align it with the values enshrined in the Bill of Rights. To support his argument, Kok tables how he is of the opinion that the *K* case is indistinguishable from the *Ewels* case. Accordingly, he argues:

> *Ewels* concerned an attack by one policeman while a number of other policemen watched and did nothing to prevent the assault; [*K*] concerned a rape by one policemen (*sic*) while two others watched and did nothing to prevent or stop the rape.[54]

He further outlines how the Supreme Court of Appeal should also have found these cases analogous. Kok presupposes that the Court suggested that the victim finds her remedy in a criminal charge against the perpetrators and not the Minister in a claim for damages. Kok remains convinced that the police officers who watched and did nothing were acting in the scope and course of their employment because they were on duty, in a police car (which they guarded), and in police uniform. Therefore, the Minister should be held vicariously liable.[55]

However, I do not share Kok's view, taking into consideration his interpretation of the case and the constitutional implications of the case, and I remain reluctant to endorse such views.[56] I find the cases of *Ewels* and *K* distinguishable on the grounds outlined by the Supreme Court of Appeal.[57] *Inter alia*, the primary reason for the author's contention in this regard is that, in the *Ewels* case, the officers were at a police station and were obliged and compelled by the situation to act within the course and scope of their employment; in contrast, in the *K* case, the officers had formed a common *mens rea* as that of criminals to rape the victim. In the *K* case, the officers pursued at all times a common intention, which was not present in the *Ewels* case.[58]

According to Neethling *et al*, vicarious liability is when an employee (servant) acting within the scope of his employment commits a delict and his employer (master) is fully liable for the

53 A Kok 'An appalling lack of judgement by the Supreme Court of Appeal' (2005) 68 *THRHR* 506.
54 Kok (n 53 above) 508.
55 As above.
56 The author takes note of the hierarchy system of courts as stipulated in the Constitution, sec 166.
57 *K v Minister of Safety and Security* 2005 3 SA 179 (SCA).
58 *K* (n 57 above) paras 4, 6 & 7.

damage suffered. The authors discuss the requirements for vicarious liability. The three requirements are:[59]

> (1) There must be an employer-employee relationship at the time when the delict is committed.
> (2) The employee must commit the delict.
> (3) The employee must act within the scope of his employment when the delict is committed.

The authors are of the opinion that the decision in the *K* case directly contests the question that is often at hand in our courts, namely, whether employers should be vicariously liable for intentional wrongdoing (such as fraud, theft, assault, sexual assault, sexual harassment and rape) by their employees. The case law, according to the authors, shows that vicarious liability was excluded in such circumstances because the conduct of the employee could (understandably) not be brought within the boundaries of the standard test — not even as 'improper modes' of the execution of his duties.[60]

They further discuss the case *Phoebus Apollo Aviation CC v Minister of Safety and Security*,[61] wherein the Court said that the standard test was in agreement with the Bill of Rights. If a need exists in future to extend vicarious liability for intentional wrongdoing, the basis upon which this was done by the Constitutional Court in the *K* case must in analogous cases receive due consideration. It must further be remembered that employers, to a greater or lesser extent, run a risk that their employees may not be trustworthy (be dishonest or criminal), and many employees exploit the employment situation for their own benefit. This risk factor must at least be considered in answering the question whether the employee acted in the scope of his employment.

I am of opinion that, should any member of the police service assault, rape, damage property, kill or partake in any unlawful conduct that is determined by the Constitution to be outside the mandate issued to the SAPS, civil actions should be instituted against that member in his personal capacity so as to spare the SAPS the burden of having to preserve its reputation, no matter what the circumstances are. This appraisal is based on a thorough analysis of the different sources stated above.

The employer may accordingly only escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interests, but viewed objectively has also completely disengaged himself from the duties of his contract of employment.[62]

59 Neethling *et al* (n 39 above) 339-343.
60 Neethling *et al* (n 39 above) 342.
61 2003 2 SA 34 (CC).
62 Neethling *et al* (n 39 above) 338.

4 Other case law

As stated by Demdy:

> There are many proverbial 'good cops', but also plenty bad ones. Few police forces in the world can combat crime effectively without the active support of the communities. The most vital source of information for the police, are members of the public. If this co-operation lacks, police work is hampered.[63]

By carefully analysing *Minister van Police v Ewels*, it was stated in an *obiter dictum* that the legislature did not intend that the respondent should have a civil action against the police if the latter should fail to carry out any duty imposed upon him under the relevant acts.[64] As stated by Lord Denning:

> We have to consider the interest of society at large in finding out wrongdoers and repressing crime. Honest citizens should help the police and not hinder them in their efforts to track down criminals.[65]

5 Conclusion

The given evaluation does not support the submission that the police should be totally indemnified from liability in all circumstances, but taking into account the number of civil actions levelled against them, legislative measures need to be taken to counter-act the situation. Partial immunity in certain cases should be sufficient to afford the police the opportunity to perform their duties without the fear of being prosecuted. The vicarious liability principles should be adhered to, but in such a way that they will lend some flexibility to an employer should his employee deviate beyond the boundaries of the employment contract.

63 Demdy (n 17 above) 291.
64 *Minister van Polisie v Ewels* 1975 3 SA 590 (A).
65 *Ghani and Others v Jones* 1969 3 All ER 1720 (D).

A ROMAN PERSPECTIVE ON THE ADVANTAGE FOR CREDITORS REQUIREMENT IN SOUTH AFRICAN INSOLVENCY LAW

By Tanya Rheeder[*]

1 Introduction

Ancient Rome, dating from 509 BC, a time which unveiled the early Roman republic, developed a unique and invaluable debt collecting system. This primitive society birthed and nurtured something which is known to us today as insolvency law.

South African insolvency law, an offspring of ancient Rome, is laced with many formalities and requirements, all of which were implemented to create fair distribution of the proceeds of a debtor's property in a situation where the debtor does not have sufficient assets to settle all his debts.[1] In return the debtor obtains a fresh start, as all his previous debt is discharged.[2]

Sections 12(1)(c) and section 6(1) of the Insolvency Act[3] contain a very similar and intriguing requirement. These sections state, respectively, that in the case of a compulsory sequestration, there has to be reason to believe that it will be to the advantage of the creditors if the debtor is sequestrated; and in the case of a voluntary sequestration, that it will be to the advantage of the creditors if the debtor is sequestrated.

The discussion to follow aspires to take a closer look at the birth of the Roman debt collecting system and trace the development for approximately a thousand years, with the aim of clarifying the present state of the law by showing its evolution over time.[4] However, before venturing into the depths of ancient Rome, a thorough understanding of the application of Roman law in South Africa is crucial.

* LLB (University of Pretoria); the research for this paper was done in partial fulfilment of an LLM degree at the University of Pretoria, whilst working as an academic associate in the Department of Legal History, Comparative Law and Legal Philosophy at the University of Pretoria.

1 Nagel *et al Commercial Law* (2006) 401.

2 As above.

3 Act 24 of 1936.

4 T Wier *A history of private law in Europe: With particular reference to Germany* (1995) 226.

2 Relevance of ancient Rome

Economic development and academic institutions were essentially initiated in Northern Italy and progressively spread over Europe.[5] This resulted in Roman law becoming the basis of all studies of law.[6] Roman law was consequently taught at Leiden University in Holland.[7]

In 1652, Van Riebeeck under the authority of the VOC, arrived in Cape Town, South Africa.[8] Cape Town was regarded by the international community as being *res nullius*,[9] and the VOC could thus gain ownership by merely occupying the land. Consequently Van Riebeeck's arrival laid a sound foundation for Roman Dutch Law in South Africa.[10] In September 1795 the rule of the VOC ended by the British conquest of the Cape.[11] This did not, however, lead South Africa to relinquish Roman-Dutch law.[12]

One can thus deduce that Roman law is the skeleton of our modern insolvency law in South Africa, and the study and understanding of the history and development is pivotal in grasping contemporary legislation. An exposition of Roman law will now commence, aiming to uncover the way of life and reasoning of the ancient Roman civilisation.

3 Milestones of insolvency law

Four landmarks can be identified throughout this timeline, each of which indicates the development of insolvency law. The *legis action per manus iniectionem* found in the Twelve Tables represents the first of these milestones.

3.1 Legis actio per manus iniectionem

A class struggle between the plebeians — citizens with no political or social rights — and patrician — wealthy and influential aristocrats — tainted the first half of the republican period.[13] The source of the struggle could be found in the fact that those with no political standing carried no knowledge of the law.[14] The struggle ultimately

5 Thomas *et al Historical foundations of South African private law* (2002) 55.
6 Thomas *et al* (n 5 above) 68.
7 Thomas *et al* (n 5 above) 55.
8 As above.
9 A *res nullius* refers to a thing without owner.
10 Thomas *et al* (n 5 above) 95.
11 Thomas *et al* (n 5 above) 96.
12 *Campbell v Hall* 1774 1 All ER 252. This case laid down the precedent for the continuation of the legal *status quo*, namely Roman-Dutch law.
13 Thomas *et al* (n 5 above) 18.
14 As above.

led to the first codification of law, namely the Twelve Tables in 450 BC.[15]

Subsequently twelve wooden tablets were posted in the market place, laying out the laws to be followed by all Roman citizens.[16] The importance of the Twelve Tables with regards to the 'advantage of the creditors' requirement and insolvency law can be illustrated by the following passage:

> A person who admits to owing money or has been adjudged to owe money must be given 30 days to pay. After then, the creditor can lay hands on him and haul him to court. If he does not satisfy the judgment and no one is surety for him, the creditor may take the defendant with him in stocks or chains 15 pounds in weight, he may not restrain him in greater but if he wishes in less. The debtor may live where he wishes. If he does not live on his own, the creditor must give him a pound of wheat a day. If he wants to he may give more. On the third market day, [creditors] may cut pieces. If they take more than they are due, they do so with impunity.

It is thus clear from the above quote that the Twelve Tables permitted the use of a person's body, which is 'human flesh', as collateral for debt.[17] This brought about equality amongst creditors as they could each be entitled to a portion of such 'flesh' as recuperation for their debt.

The question now arises whether this method of debt collecting is to the advantage of the creditors. It could be argued that although the division of flesh of the debtor brought about no economical value, it served as deterrence for non-performance by current and prospective debtors. In a nutshell it could thus be deduced that the division of the human physique served as the procedure for insolvency law, to enable an individual to pay his debt when his liabilities exceeded his assets, and the only asset remaining was his flesh.

Personal execution is seemingly to the advantage of the creditors and intertwined with the ideology of *concursus creditorum*. Following the above mentioned procedure, the second milestone developed, namely the *nexum*, mortgage of the body.

3.2 Nexum

During the early republic a kind of voluntary mortgage, called *nexum*, developed.[18] According to this contract, entered into by means of

15 As above.
16 As above.
17 C Visser 'Romeinsregtelike aanknopingspunte van die sekwestrasieproses in die Suid- Afrikaanse insolvensiereg' (1980) *De Jure* 44.
18 TC Albert 'The insolvency law of ancient Rome' (2006) 28 *California Bankruptcy Journal* 5.

mancipatio, a creditor could capture the debtor and hold him as a slave if he was in default with regards to his obligations.[19]

The law evolved from a non-economical advantage for the creditor to an economical advantage.[20] This evolution could be explained by a subjective shift in intention: a shift from a procedure developed to punish a defaulting debtor to a voluntary mortgage procedure developed to secure performance.[21] Roman citizens showed antagonism towards this development of law, due to the fact that it stripped children of their youth and embodied a creditor's lust and cruelty.[22] An outcry was subsequently made to the senate to change the law.[23] The *Lex Poetelia Papiria* was thence enacted, abolishing enslavement and execution of debtors.[24]

The importance of this development is vested in the fact that thenceforth only a debtor's goods could be mortgaged as security for debt. Although the *nexum* ascertained an economical advantage for the creditor, it by no means led to equality between creditors.[25]

Due to the abolition of enslavement, the mortgage of goods as security needed to be developed by the citizens. *Missio in bona* is the third milestone in the development of insolvency law.

3.3 Missio in bona

Missio in bona was an order given by the *praetor* which allowed the creditors to obtain possession of all the assets of the debtor.[26] This application to the *praetor* could be made either by one or more of the creditors or by the debtor personally.[27]

An application made by the creditors was called *missio in possessionem*.[28] Interestingly enough, the requirements for the creditors to bring this application did not include proof of the debtor's insolvency.[29] After the relevant time periods had lapsed and the public announcement of commencement of the *bonorum venditio* had taken place, a meeting of the creditors was called.[30] One creditor out of all the creditors at the meeting was then appointed *magister*

19 As above.
20 As above.
21 As above.
22 Albert (n 18 above) 6.
23 As above.
24 As above.
25 HF Stander 'Geskiedenis van die insolvensiereg' 1996 *Tydskrif vir die Suid-Afrikaanse Reg* 371.
26 Stander (n 25 above) 372.
27 As above.
28 As above.
29 Albert (n 18 above) 6.
30 Stander (n 25 above) 373.

bonorum.[31] Once a *magister bonorum* was appointed, the debtor became *infamis*.[32]

The *magister bonorum* did not obtain ownership of the assets.[33] His appointment merely enabled him to sell all the assets of the debtor to the highest bidder,[34] known as the *bonorum emptor*.[35] The *bonorum emptor* only obtained 'bonitary ownership'.[36] He had to pay the creditors according to their claim.[37] Firstly, the mortgage creditors were paid in full, followed by the privileged creditors,[38] and lastly the other creditors.[39] It is crucial to note that if the proceeds of the estate were insufficient to pay all debt, the debtor remained liable for any deficiency.[40]

The only advantage the debtor obtained was that of *beneficium competentiae*,[41] according to which he had the right not to be prosecuted for new assets obtained for the duration of one year after sequestration.[42]

From the above it is clear that compulsory sequestration in ancient Rome provided no release from debt once the relevant procedure was instituted. The creditors, unlike today, had no duty bestowed upon them to prove that this action would be to their advantage. A simplistic explanation for this could be that there was in fact no need for this process. *Missio in possessionem* was already to the advantage of all the creditors, since the debtor was not released from his debt.

An application could also be made to the *praetor* by the debtor. This was known as *cessio bonorum* or *Lex Julia de bonis cendenis* (*Lex Julia*). It remains unclear whether this action was developed by Julius Ceasar or Augustus.[43] This procedure could only be brought in the case where the debtor had no fault for being unable to fulfil all his obligations.[44] It was seen as a privilege only available to deserving

31 As above.
32 M Roestoff 'Skuldverligtingsmaatreels vir individue in die Suid-Afrikaaanse insolvensiereg: 'n historiese ondersoek' (2004) *Fundamina* 123.
33 Stander (n 25 above) 372.
34 JW Wessels *History of Roman Dutch Law* (1908) 662.
35 Stander (n 25 above) 372.
36 As above.
37 As above.
38 Eg the wife, and the persons who paid the funeral expenses; Wessels (n 34 above) 662.
39 Wessels (n 34 above) 662.
40 Roestoff (n 32 above) 123.
41 As above.
42 As above.
43 JQ Witman 'The moral menace of Roman law and the making of commerce: Some Dutch evidence' (1996) 105 *Yale Law Journal* 18.
44 As above.

debtors.[45] These deserving debtors obtained the advantage of keeping all their fame and reputation, also known as *infamia*.[46]

In the later middle ages a new kind of *cessio bonorum* was revived, one known by us to be accompanied by a sanction of dishonour.[47] In addition to all the previous formalities, a debtor was required to declare his insolvency at the 'rock of shame'.[48] In short the debtor had to strike his rear three times against a rock, completely naked, and declare his insolvency.[49] No one can pinpoint the exact reason for this added requirement. It was however contemplated to be in the logic of justice, since it grants the debtor immunity from imprisonment and a full discharge.[50]

Another important point to note is the fact that the *magister* was appointed out of one of the creditors with the primary motive of bringing benefit to him and the creditors who elected him. Public interest was insignificant and consequently ignored.[51] During the reign of Justinian, however, another procedure evolved, namely the *distractio bonorum*.

3.4 Distractio bonorum

This procedure originated to assist *clara persona*.[52] The senate, by decree, would appoint a curator to sell only that portion of the debtor's goods necessary to satisfy the creditors.[53] This procedure could only be implemented if the debtor had a minimum of two creditors and was insolvent.[54]

A very important development was that once this procedure was complete, creditors had no claim on assets which the debtor obtained in the future.[55] Upon application, in terms of *missio in possessionem* or *cessio bonorum*,[56] the *praetor* appointed a *curator bonorum*.[57] The c*urator bonorum* represented public interest, and had no personal interest in the matter.[58]

Distractio bonorum bears a strong resemblance to modern insolvency law, since a minimum of two debtors are required and the

45 Albert (n 18 above) 3; Roestoff (n 32 above) 126.
46 Stander (n 25 above) 372.
47 As above.
48 As above.
49 Whitman (n 43 above) 20.
50 As above.
51 Stander (n 25 above) 372.
52 This refers to an 'illustrious person'; Stander, as above.
53 Stander (n 25 above) 372.
54 Stander (n 25 above) 373.
55 As above.
56 The debtor also retained his *infamia* with the *distractio bonorum* procedure.
57 Stander (n 25 above) 373.
58 As above.

debtor had to be insolvent. *Distractio bonorum* is the basis of South African insolvency law, seeing as it is the first collective debt collecting process.[59]

4 Conclusion

> History as a whole is an ongoing, gradually developing revelation of the absolute and the architect of the organism the sculptor of the work of art, in which the divine idea of law reveals itself.[60]

History is explored in an attempt to clarify the present state of law by showing its evolution over time. The aim of this exposition of ancient Roman law was to find an understanding of contemporary insolvency law and more specifically sections 6(1) and 12(1)(c) of the Insolvency Act. According to these sections, a prerequisite for sequestration — compulsory or voluntary — is that it should be or would be to the advantage of the creditors. The question that needs to be answered is why sequestration should be to the advantage of the creditors at all.

The *legis actio per manus iniectionem* procedure symbolises the beginning of debt collecting. This time period was characterised by the sweat and blood of defaulting debtors. These debtors received the most horrific punishment imaginable for not paying their dues.

The lack of a procedure to aid debtors in these most unfortunate predicaments led to each creditor taking his share of the debtor's estate — in this case his body — to settle their debt. The advantage obtained was simply satisfaction of punishment linked with a warning to other debtors. The reasons for non-performance were irrelevant. A clear message was sent that whenever a debt is due, the law takes no cognisance of rhyme or reason; it simply favours the creditors.

Mortgage of a debtor's body rapidly followed. The law saw no problem with enslavement for a debt. They justified imprisonment of children, with the notion of justice towards creditors. An outcry by citizens to banish the laws that allowed the harshest punishment for defaulting creditors led to a law stating that only a debtor's property could be seized by creditors. This movement indicated a step in the right direction. The law began to recognise rights of the debtor.

The procedure implemented to deal with this new law of seizing a debtor's property reinforced the principle that the whole debt collecting procedure in its entirety was designed to function only for the benefit of the creditors. It is submitted that this is due to the fact that the *magister* in the case of *missio in posessionem* was a creditor,

59 Stander (n 25 above) 374.
60 F Wieacker *Privatreechtgeschidhte der neuzeit* (1967) 356.

and acted with the sole intention of benefiting himself and fellow creditors.

During the reign of Augustus more attention was given to the rights of debtors. This is illustrated by the enactment of *cessio bonorum*. According to this procedure a debtor could keep his *infamia*, which is usually lost during the various preceding debt collecting procedures, if his debt problems could be attributed to hard luck without any fault by the debtor. He was, however, liable for full payment of all debt. So even though a debtor did not lose his reputation, the primary goal was still to benefit the creditor.

Distractio bonorum came to the benefit of the debtor as well as the creditor, as the *curator bonorum* only sold assets as far as was needed to settle the debt. According to this procedure, creditors had no claim on assets obtained in the future.

One can thus clearly see a development of the law from being completely creditor-orientated to a more debtor-friendly system affording the debtor rights. It is submitted that the requirements exist to guarantee that the objective of the debt collecting system is complied with. The objective of this is to establish a system to the sole advantage of the creditors; to guarantee successful and efficient debt collecting.

Initially the requirements were not needed to guarantee the objective of the sequestration procedure, but the more rights debtors obtained the more the need for the requirements existed. It is submitted that a balance should be struck between the interests of the debtor and the creditor respectively. Insolvency law should be approached and implemented with the idea of it being a tool assisting both the creditor and the debtor to find the best solution to any problem arising from debt collection. The objective of benefiting the creditor could remain in force whilst protecting a debtor from public humiliation, enslavement and, as we have seen, death.

TOO POOR TO BE BROKE

By Miguel-Angelo Almeida[*]

1 Introduction

The 'advantage to creditors' requirement has far-reaching adverse consequences and implications for debtors in South African insolvency law. Despite the negative implications, as will be explained below, this requirement has been part of our insolvency law since 1936 and has remained untouched. One of the major impacts of this requirement may be summarised as follows:

> Since the mainstream bankruptcy procedures are out of reach for many debtors ... many debtors are without proper discharge measure in South African law. This is especially evident amongst the previously disadvantaged people who are now fast becoming part of the credit industry. Some may therefore view our system as being discriminatory, since, due to its stringent requirements for sequestration on the one hand, and due to the limited alternatives to sequestration available on the other hand, the formal discharge is only available to an exclusive few.[1]

This paper will focus on the meaning of 'advantage to creditors' in the context of both voluntary and compulsory sequestration. The consequences of this requirement and the efficacy of the alternative debt relief measures to the Insolvency Act[2] (the Act) will also be discussed. Recommendations to remedy the situation as it stands in South Africa will be submitted, taking into account all the proposed changes to South African insolvency law.

2 Background

Insolvency law is a collective debt collecting procedure which provides for fairer distribution of the proceeds of a debtor's estate amongst the creditors where the debtor does not have sufficient assets to settle all his debts in full.[3] The law of insolvency is mainly

* LLB (University of Pretoria); the research for this paper was done in partial fulfilment of an LLM degree at the University of Pretoria whilst working as an academic associate in the Office of the Dean.

1 'Review of administration orders in terms of section 74 of the Magistrates' Courts Act 32 of 1944' Interim research report 83.

2 Act 24 of 1936.

3 C Nagel *et al Commercial Law* (2006) 422.

regulated by the Act and is based on two principles, namely the right which creditors have to satisfy their claims and the concurrency of creditors who do not have a secured or preferent claim.[4] This causes a *concursus creditorum*, as general interests of the creditors as a group have a higher priority than the interests of individual creditors. In *Ex parte Pillay*,[5] Judge Holmes stated that 'the procedure of voluntary surrender was primarily designed for the benefit of creditors, and not for the relief of harassed debtors'. Therefore, even though one of the inevitable consequences of sequestration is the discharge of debts after rehabilitation,[6] discharge is not the main aim of sequestration.

A debtor's estate may be sequestrated by way of voluntary surrender[7] of his or her estate, or by way of compulsory sequestration.[8] Only a high court can make sequestration and rehabilitation orders as these affect a person's status.[9] This results in relatively high costs of proceedings since high court litigation is required.[10]

In terms of section 6 of the Act, the debtor in a case of voluntary surrender must prove the following requirements:

> (a) that he has complied with all the statutory formalities in terms of section 4 of the Act;
> (b) that he is factually insolvent;
> (c) that the sequestration will be to the advantage of creditors; and
> (d) that the free residue will be sufficient to cover the costs of sequestration.

In the case of compulsory sequestration the applicant creditor must provide *prima facie* evidence that:

> (a) he or she has established a claim which entitles him, in terms of section 9(1), to apply for sequestration of the debtor's estate;
> (b) he or she has a liquidated claim of at least R100 and, where more creditors with separate claims apply jointly, that the total of their claims in aggregate is not less than R200;
> (c) the debtor is actually insolvent or has committed an act of insolvency; and
> (d) there is reason to believe that sequestration would be to the advantage of creditors.[11]

From the above it should be clear that the requirements for voluntary sequestration are more stringent than those for compulsory

4 Nagel (n 3 above) 423.
5 1955 2 SA 309 (N) 311.
6 The Act (n 2 above) sec 129.
7 The Act (n 2 above) secs 3-7.
8 The Act (n 2 above) secs 9-12.
9 Nagel (n 3 above) 427.
10 n 1 above.
11 The Act (n 2 above) secs 10(c), 12(1). These sections provide for provisional and final sequestration orders respectively.

sequestration.[12] The degree of proof required in relation to the advantage to creditors principle is lighter in the case of compulsory sequestration due to the wording of section 6(1) compared to the peculiar wording of sections 10(c) and 12(c). Unlike voluntary surrender, which requires positive proof of advantage to creditors, compulsory sequestration requires only a reasonable prospect that it will be to the advantage of creditors. Therefore, it is not necessary for the applicant to prove that it will be to the advantage of creditors, but only that there is reason to believe that it will be so.[13] The reason for the difference in the burden of proof is that a debtor knows his own business and can adduce facts to show advantage to creditors. On the other hand, a creditor is not in the position of being in possession of sufficient facts relating to the debtor's assets as to be able to furnish details to the court.[14]

Furthermore, the standard of proof differs in respect of provisional and final sequestration orders.[15] In both cases the facts must show that there is a reasonable prospect, not necessarily likelihood but a prospect which is not too remote, that some pecuniary benefit will accrue to the creditors. In the case of a provisional order there need only be *prima facie* proof of the facts. In the case of a final sequestration order the court must be satisfied that those facts exist on a balance of probabilities.[16]

The question which then follows is what exactly is the meaning of the term 'advantage to creditors'?

3 Advantage to creditors

3.1 Definition

The Act does not define the 'advantage to creditors' requirement and it has therefore been subjected to several judicial interpretations. In the case of voluntary surrender the estate must provide something substantial for the distribution amongst creditors after costs of realisation have been borne and after costs of sequestration have been paid.[17] In compulsory sequestration the general consensus is that a reasonable prospect of some pecuniary benefit must accrue to the general body of creditors.[18] It is not necessary to prove that the

12 R Sharrock *et al Hockly's insolvency law* (2006) 17.
13 *Amod v Khan* 1947 2 SA 432 (N) 435; *Meskin & Co v Friedman* 1948 2 SA 555 (W) 558; *Arbor Trading Co v Pillay* 1949 4 SA 982; *Sacks Morris (Pty) Ltd v Smith* 1951 3 SA 167 (O) 168.
14 *Hillhouse v Stott; Freban Investments v Itzkin; Botha v Botha* 1990 4 SA 580 (W) 584.
15 *Walker v Walker* 1998 2 All SA 382 (W) 383.
16 As above.
17 *Ex parte Van Den Berg* 1950 1 SA 816 (W) 817.
18 *Meskin & Co* (n 13 above) 59.

insolvent has any assets. Even if there are no assets at all, but there is reason to believe that as a result of an investigation in terms of the Act some assets may be revealed to the advantage of creditors, it is sufficient.[19] Creditors must therefore at least receive a not negligible dividend, and the amount of this dividend depends on the fact of each particular case.[20]

In *Hillhouse v Stott*[21] the question under consideration was whether the requirement of section 10(c) of the Act is satisfied merely by proof that the value of the debtor's assets exceeds the minimum of R5 000 (then considered to be the minimum to cover costs of sequestration) as governed by Rule J5 of the Practice Manual applicable in the Transvaal. The Court held that the Practice Manual does not have the force of law and when determining whether advantage to creditors has been shown the court must have regard only to such considerations as were contemplated by the legislature. This case illustrates that there is no set monetary figure which proves advantage to creditors. The test according to *Epstein v Epstein*[22] remains whether the facts placed before the court show that there is a reasonable prospect – not necessarily a likelihood, but a prospect which is not too remote – that some not negligible pecuniary benefit will result to creditors.

Direct financial advantage is by no means the only benefit to be gained by creditors from the sequestration of the debtor's estate.[23] There are other advantages and factors which the courts will take into consideration besides direct financial advantages, such as the superior legal machinery which creditors acquire after sequestration, the rights of control by the trustee, and an investigation of the estate of the debtor.[24] The examination of the insolvent estate might reveal assets which were not declared by the insolvent and are therefore not within the knowledge of the creditors. Conversely, in *Walker v Walker*[25] it was held that the mere fact that sequestration enables investigation of an insolvent's affairs is not sufficient. There must be additional facts which are not too remote; a possibility that the investigation of an insolvent's affairs might reveal assets. The courts have also considered section 23(5) of the Act in determining advantage to creditors.[26] If income earned by the insolvent could be

19 As above.
20 *Trust Wholesalers and Woollens (Pty) Ltd v Macan* 1954 2 SA 109 (N) 111; *Fesi v Absa Bank Ltd* 2000 1 SA 499 (C) 501.
21 *Hillhouse* (n 14 above) 584.
22 1987 4 SA 606 (C) 609.
23 *Wilkins v Pieterse* 1937 SA 164 (CPD) 196.
24 *Stainer v Estate Bulkes* 1933 SA 86 (OPD) 90; *Awerbuch, Brown & Co. (Pty) Ltd v le Grange* 1939 SA 20 (OPD) 23, 25.
25 *Hillhouse* (n 14 above) 584.
26 *Ressel v Levin* 1964 1 SA 28 (C); *Ex parte Veitch* 1965 1 SA 667 (W).

used to settle the debt in full over time, the courts may refuse sequestration.

Another factor which has been considered by our courts is that in the sequestration of a partnership there is a further advantage to creditors in that, if the sequestration is ordered, it will be a sequestration not merely of the partnership estate but of the private estates of the partners.[27] The partners may have in their private estates considerable assets which will be available for distribution if sequestration is granted. In a case where the partners are married, there is also a possible benefit in the fact that the spouses' assets will also fall in the hands of the trustee.[28]

From the above discussion it should be clear that advantage to creditors is best reached by striking a balance between direct financial advantage and other indirect advantages mentioned. Swart[29] summarises the approaches adopted by the courts to determine whether the advantage to creditors requirement has been met as follows: In the first category, sequestration must be to the advantage of all creditors. Unless the court is satisfied that the sequestration will not be to the advantage of all creditors, it should not dismiss the application for sequestration.[30] The second category takes a general approach by treating the creditors as a general body. This body consists of the majority of creditors, and numbers are important in some cases while other cases emphasise the value of the claim.[31] In the third category, courts treat the creditors as a group. The test is that the group must benefit and not the individual creditor.[32]

3.2 Consequences

According to the Report on Administration Orders[33] the advantage of creditors principle can be seen as the gateway to the bankruptcy regime. If a debtor is insolvent but cannot produce the funds to apply for the proper relief in terms of the Act, or cannot prove advantage to creditors, a sequestration order that would eventually lead to a discharge of the debt would not be an option to such a debtor. Due to the formal requirement to prove advantage to creditors, many creditors are left without a formal discharge remedy.

27 *Behrman v Sideris and Another* 1950 2 SA 366 (T) 372.
28 n 1 above.
29 Unpublished: Swart 'Die rol van 'n *concursus creditorum* in die Suid-Afrikaanse insolvensiereg' unpublished PhD dissertation, University of Pretoria, 1990 279-286.
30 *Provincial Trading Co* 1921 CPD 781; Swart (n 29 above) 279.
31 *Paul v Estate Wakeford* 1926 GWLD 13; Swart (n 29 above) 281.
32 *Stainer v Estate Bukes* 1933 OPD 86; Swart (n 29 above) 283.
33 n 1 above.

It should therefore be accepted that the Act offers no relief to debtors who have no assets or no income. A person who is unemployed and without regular income will have no proper relief due to the advantage to creditors requirement.[34] Most debtors have been categorically excluded from the discharge offered by the sequestration and rehabilitation procedures because of this requirement.

Since this requirement is so paramount in accessing sequestration, every sequestration order granted by our courts should in theory benefit the creditors. However in practice this is not so and many creditors have to contribute to costs of sequestration. According to the Report on Administration Orders[35] a survey conducted in the office of the Master of the High Court (Pretoria) showed that concurrent creditors received dividends in only 28.6% of sequestration cases, while creditors were required to contribute in 40% of the cases included in the survey.[36] Taking these statistics into account the entire existence of this advantage to creditors requirement may be questioned.

3.3 Alternatives to the Insolvency Act

The next question that needs to be answered is what happens if no advantage to creditors is proven? Given the stringent requirements of the Act, one would wonder whether there are appropriate alternatives to sequestration. The alternatives include an administration order in terms of section 74 of the Magistrates' Courts Act,[37] provided the debt does not exceed R50 000. Secondly, should a debtor not qualify for the formal administration order, the creditors may be approached to obtain a release or novation. The third option is debt re-arrangement in terms of section 86 of the National Credit Act.[38] I will now consider these options in turn and test whether they can be considered appropriate alternative debt relief measures to sequestration.

3.3.1 Section 74 of Magistrates' Courts Act

Where an application for an administration order is granted, the debtor must make periodic payments to an administrator who in turn pays the amount to a list of creditors. The administration procedure in terms of the Magistrate's Courts Act is of limited scope since it is

34 As above.
35 As above.
36 'Review of the law of insolvency: Prerequisites for and alternatives to sequestration' Working Paper 29 Project 63 (1989) Schedule 3.
37 Act 32 of 1944.
38 Act 34 of 2005.

only available where the debtor's debt amounts to R50 000 or less. An administration order only lapses when all listed creditors have been paid in full.[39] Therefore it does not provide for a discharge of the debt. Because there is no fixed time within which debts must be paid, many debtors fall into a debt-trap.[40] The result is that the poorest sections of our communities who cannot afford sequestration end up paying for their debts for the duration of their entire lives.

3.3.2 Release or novation

The debtor may enter into an agreement with the creditors to reschedule the debt by, for example, paying it off in monthly instalments. It is up to the creditors to accept the offer or reject it since the agreements are based on the principles of contract. This may result in a discharge of debt, but the problem is that it is at the discretion of creditors to either grant the debtor an extension, to discharge the debt, or to accept partial payment as full and final payment. Furthermore in practice it is often difficult for all creditors to reach consensus on such an agreement.[41]

3.3.3 Debt re-arrangement in terms of the National Credit Act

The National Credit Act applies to agreements which qualify as credit agreements as defined in the National Credit Act itself.[42] The application procedure for debt review is provided in section 86 of the National Credit Act. The debt counselor must determine whether the consumer appears to be over-indebted. If it is concluded that the consumer is over-indebted, the debt counselor may recommend that the Magistrate's Court make an order that one or more of the consumer's credit agreements be declared to be reckless credit and/or that one or more of the consumer's obligations be re-arranged.[43] Roestoff and Renke point out that the provisions dealing with reckless credit may provide for indirect debt relief for consumers.[44] The credit provider has to take reasonable steps to assess a proposed consumer's general understanding of the risks and costs, debt re-payment history and the existing financial means, prospects and obligations.[45]

The effects of debt review or debt re-arrangement are far reaching because they apply to all credit agreements whether small or large, irrespective of their form, the type of goods or amount of

39 Magistrates' Courts Act 32 of 1944 sec 74U.
40 n 1 above.
41 As above.
42 M Roestoff & S Renke 'Debt relief for consumers — the interaction between insolvency and consumer protection legislation (part 1)' (2005) *Obiter* 564.
43 National Credit Act sec 86(7)(c).
44 Swart (n 29 above) 572.
45 National Credit Act secs 80-84.

money involved.[46] However, the limitation is the fact that the National Credit Act only applies to credit agreements as defined in the National Credit Act itself.[47] This, among others, excludes for example delictual debts or where the consumer is a juristic person.[48] The debt re-arrangement procedure also does not provide for discharge.

Having looked at the possible alternatives to sequestration and the disadvantages they pose, it is fair to say that South Africa offers no appropriate solution to debtors who cannot prove the advantage to creditors requirement. What then can be done to resolve this dire economic set back?

4 Possible solutions and recommendations

A good starting point would be to look at foreign jurisdictions for guidance. The United States of America has a pro-debtor system not strictly based on advantage for creditors, but one of its main aims is to grant a fresh start (discharge) to debtors.[49] Advantage to creditors is not a formal requirement, and a natural person may be granted a discharge in terms of chapter 7 of the Code which is a process similar to sequestration in South Africa, but without the requirement of advantage to creditors. A natural person may also be discharged in terms of chapter 13 which is a rescheduling of payments such as a section 74 administration order, but the difference is that the debtor actually receives a discharge of his debts.[50]

However, because of abuse by debtors of the chapter 7 procedure, the USA has introduced the Bankruptcy Abuse Prevention and Consumer Protection Act, 2005 (BAPCPA) in an attempt to make the system more pro-creditor. The main characteristics of a pro-creditor system are that the advantage to creditors principle and the debtor will remain liable until all his debts are paid. The BAPCPA creates a new system that increases the proof necessary to qualify for the filing of bankruptcy. Proponents of the BAPCPA assert that its intent is to increase fiscal responsibility in respect of individuals and business entities.[51] Detractors believe the BAPCPA will have an adverse financial effect on individuals who seek relief from debts

46 Roestoff & Renke (n 42 above) 569.
47 In terms of the National Credit Act sec 8(2), agreements that do not constitute credit agreements are an insurance policy, a lease of immovable property and a transaction between a *stokvel* and a member of that *stokvel*.
48 Other exclusions to the National Credit Act are where the consumer is the state, or organ of state, or the credit provider is the Reserve Bank of South Africa.
49 Bankruptcy Reform Act, 1978 (the Code).
50 As above.
51 http://www.ll.georgetown.edu/guides/bankruptcy_act_2005.cfm (accessed 13 June 2008).

caused by extenuating circumstances such as illness, divorce, or long-term unemployment.[52]

The United Kingdom, in an independent research commissioned by the Department of Constitutional Affairs, identified three types of debtors: the so-called 'could pays', 'can't pays' and 'won't pays'.[53] The 'can't pays' are those who are unable to pay their debts because they have limited or no surplus income, which is similar to the position of most South African debtors. The Department of Trade and Industry proposed a new scheme called the NINA — 'no income, no assets' — debt relief scheme aimed at the 'can't pay' debtors.[54] In essence the scheme would entail an administrative debt relief order that would result in the discharge of the debtor after one year without court intervention which would make it more cost-effective.

After considering the international position it is submitted that the problem with South African insolvency law is not the Insolvency Act or the advantage to creditors requirement. The Act has a pro-creditor purpose which is to make sure that creditors' claims are satisfied and it is not aimed at discharging debtors of their obligations. As far as its purpose is concerned, the Act has not failed; in fact the advantage to creditors requirement is essential to meet this purpose. To remove the advantage to creditors requirement would subject the sequestration procedure to abuse by debtors. It is for this very reason that the United States of America is making amendments to their law to make their system more pro-creditor. The problem with South African insolvency law is in fact the lack of appropriate alternatives to sequestration. It is suggested that the focus should therefore be on reforming and improving the existing inadequate alternatives to sequestration. In this regard I recommend the following:

> As far as section 74 administration orders are concerned, the R50 000 limitation should be adjusted to perhaps R100 000 or R150 000. The administration procedure should be strictly regulated starting with proper supervision of administrators. Only attorneys should be allowed to serve as administrators. The order should provide for a discharge or a time period for repayment to avoid debtors who are bound to their debts for life.[55]
>
> Regarding release or novation, the pre-sequestration composition proposed by the Law Reform Commission[56] is a possible solution to the contractual discretion which creditors enjoy and enables them to refuse offers by the debtors. With the insertion of the proposed section 74X in

52 As above.
53 M Roestoff & S Renke 'Debt relief for consumers — the interaction between insolvency and consumer protection legislation (part 2)' (2006) *Obiter* 107.
54 Roestoff & Renke (n 53 above) 108.
55 n 1 above.
56 'Review of the law of insolvency' South African Law Commission Report Project 63 Draft Bill (2000).

the Magistrates' Courts Act, composition between a debtor and his creditors before liquidation would be possible. The composition would be binding on all creditors if accepted by the required majority. The composition is also supervised by a magistrate and takes place after an investigation of the affairs of the debtors. A composition supervised by a mediator or arbitrator governed by the rules of alternative dispute resolution is also a cheaper and viable solution compared to court supervision.

The duty of credit grantors to investigate the affairs of a possible credit receiver before granting credit in terms of sections 80 to 84 of the National Credit Act should be extended to all credit transactions, even those which do not comply with definition of credit agreement in terms of the National Credit Act.

5 Conclusion

It is clear that South African insolvency law is creditor-driven. Although this reasoning is justified, something more needs to be done to resolve the problem of over-indebtedness in the country. South Africa does not necessarily have to abandon its pro-creditor philosophy but simply implement some pro-debtor measures as recommended above to strike a balance between the impoverished debtor class and the ever developing creditor group. If the situation remains as it is, the poor will become poorer which in turn over-burdens the growing economy. The proposed Insolvency Bill is a good start, but as already stated the focus should be turned to the alternatives to sequestration.

STREET LAW AND ITS ROLE IN ENSURING ACCESS TO JUSTICE AND FURTHERING OF THE SOUTH AFRICAN DEMOCRACY

By Mlungisi Mahlangu[*]

1 Introduction

> 'When two bull elephants fight, it is the grass that suffers'
> - *Jomo Kenyatta*

It has always been with a bit of introspection and guilt that I have considered this statement by the great statesman. However to what extent is this statement still relevant, given the backdrop against which Kenyatta made these infamous words?

Surely, Kenyatta spoke of some sort of intense political battle, waging between coloniser and the rebellious or guerilla political movements of the colonised. Surely this analogy that Kenyatta spoke of decades ago ceases to exist in modern times, as the concretisation of rights has occurred, and no such battle can even exist in modern society.

The above conceptions, although ideologically ideal are practically flawed. A new form of battle is waging war. A new form of battle is waging war. As a consequence of the worldwide acceptance of the political philosophies of democracy and democratic governance, ancillary philosophies like the economic philosophy of capitalism have become intrinsic in society. What we have experienced is rather a shift from this fight for democracy between the colonisers and indigenous African people, to a fight for supremacy between those who advocate individual and those who articulate communal interests.

2 Street law

'Street law tells people about laws that affect them in their everyday life on the street.'[1] This definition, as simplistic as it may seem,

* Third year LLB student (University of Pretoria).

1 D McQuoid-Mason (ed) *Street law: Practical law for South Africans (2nd edition)* (2004) 1.

proposes that law should be engaged in a way which would constitute a radical departure from what has been the norm. Street law operates in such a way as to challenge law as a tool for the observing the *status quo* or as an account of the 'popes, kings and queens'.[2] Street law is meant to offer practical advice which should permeate deeply into society by removing the perception of the law as a means by which the rich exploit the poor, and rather showing it as a means to address specific problems within an individual's life by offering relevant remedies and advice.

In my opinion, however, street law does more than just report on the law or the present legal position. By creating opportunities for communities or groups to be addressed on the law the law is taken to the communities, not with the goal that they will absorb it like a sponge, but rather with the hope that a sector of society that has not yet been indoctrinated in 'legal logic' may critically engage in the law. This transparency will allow those deficiencies which are non-technical and can hence be seen more clearly by those outside the profession, to be exposed, hence creating an opportunity for the legitimacy of our laws to be gauged.

3 Hierarchy

The idea of hierarchy has been closely linked to the contention that legal education does not allow students and subsequent legal practitioners to break free from narrowly defined boundaries, which seek only to serve the *status quo*.[3]

The main proponent of this theory is Duncan Kennedy.[4] Kennedy's main contention is that law schools only prepare students for hierarchy, hence rendering them unable to change the *status quo* which is represented by such hierarchy.[5] He contends that the mechanical analytical manner in which students are taught further derogates from this ability to challenge the law.

Hierarchy creates a *status quo* which is comfortable, with endless promises like 'if you sell your soul to this cause, all your needs will be taken care of'. Most students strive to be offered employment by the top five law firms in the country. These firms are given optimal

2 DP Visser 'The legal historian as subversive or killing the Capitoline geese' in DP Visser (ed) *Essays on the history of law* (1989) 1-31.
3 D Kennedy 'Legal education as training for hierarchy' in D Kaireys *The politics of law* (1998) 54-75.
4 As above.
5 Kennedy (n 3 above) 55.

marketing space on campus;[6] internship programmes are organised with them and are purported as being the epitome of opulence and wealth. The idea that only working for a corporate law firm can assist someone to climb the social ladder is confirmed by the lack of interest in NGO's and rights organisations as viable potential places for one to go post-LLB.

Apart from law schools focusing on the skills and knowledge which would be useful in practice, the Attorneys Act 53 of 1979 recognises that the only way that one can get admitted as an attorney of the Supreme Court is by serving a period of articles of at least one year under a principal who is in practice. The most obvious outcome of this is that even after tertiary education, students who wish to break free from the hierarchical mould are unable to become practising attorneys without succumbing to that self-same ideological system which they are to depart from.

Although the Attorneys Act does not require that the period of articles are served in private practice, students are rarely ever told of the options available to them outside of private practice, almost as if their options are limited to choosing from within firms in private practice. Many universities also have a compulsory subject dedicated to training students for practice.

From the get go, students are told of what it will take to be an advocate or an attorney, and students are introduced to this thought that they are not lay people and that law is best left to those who understand it best. This is illustrated by the limitations to right of appearance in even the Magistrates Courts, the emphasis on *stare decisis* and even the use of terms like legal logic and lay person.

Everyone has the right, and should be encouraged, to participate actively in the law and law-making process.[7] This need to leave law to those who best understand it somewhat usurps the right of everyone to participate in the law and creates a barrier, sustained by legalese and Latin, for lay people who want to engage in the law. Numerous theories exist to explain why legal education has not progressed to 'lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law', as is required by our Constitution. One of the most convincing is that legal practice has not progressed in its thinking and methodology, and hence continues to

6 Good examples of how this happens includes the career days which are organised primarily for the law firms to market themselves; and the procurement by the Law House Committee for Law Students of the services of a former student who has gone into practice to motivate first year students during orientation week, and subsequently tell them about what it takes to be hired by one of the top law firms in the country.

7 H Botha 'Civic republicanism and legal education' (1999) *Codicillus* 23.

influence education which essentially aims to create good students for practice and hence aligns itself to cater for the needs of practice.

Although this may seem like a gross limitation to the role of legal education, I am reminded of the re-igniting of the debate on the adequacy of methods of evaluation within Law Faculty of the University of Pretoria after an article was published in 2006 stating that law schools are not adequately equipping students for practice — that being practice at possible on of the big five law firms. The lack of numeracy and literacy skills among LLB graduates, of which practice complained was a problem which had existed for a long time, but was, in my opinion, only really engaged after this complaint from practice. It seems almost that legal education does not owe a duty to the student to equip them for life, but rather a duty to practice to keep producing good future candidate attorneys.

An interesting commentary as to the inability of lawyers to challenge the *status quo* comes from John Dugard,[8] read in conjunction with the academic challenge posed by Karl Klare.[9] The writings of these two academics, although separated by decades, contains very salient features which interrelate and somewhat explain[10] and then reflect on[11] the reason why legal education has not progressed to embrace our new constitutional dispensation. As stated by Dugard:

> South African judges are all drawn from one small section of the population — the white group. Whether they support the government or not, most have one basic premiss (*sic*) in common – loyalty to the *status quo*. This premiss (*sic*), which seldom surfaces in judicial decisions, may manifest itself in a variety of ways, depending upon the background and outlook of each judge. For instance, it may take the form of opposition to social intercourse between races, of antagonism to radical political change; of sensitivity to foreign criticism of the Republic ... the South African Judiciary has become 'establishment minded'.[12]

Dugard then follows this up by stating that judges hide behind the veil of precedent and that upon deciding a case they have already made their mind up, they only wish to justify their decision by means of the law.[13]

Klare, decades later, somewhat confirms the views of Dugard, but adds a new dimension to this. Klare states that the reason why there

8 J Dugard 'The judicial process, positivism and civil liberty' (1971) *South African Law Journal* 181. The basis of this article was initially an inaugural lecture by Dugard who, at the time, was inducted into being a professor at the somewhat liberal University of the Witwatersrand.

9 KE Klare 'Legal culture and transformative constitutionalism' (1988) *South African Journal on Human Rights* 146.

10 Dugard (n 8 above) 181.

11 Klare (n 9 above) 146.

12 Dugard (n 8 above) 190.

13 Klare (n 9 above) 10.

may be very little change in the nature of our legal profession is because there has been very little change in the mindset of the judiciary:

> The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mindset and methodology are part of the law, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance. Accordingly, the drafters cannot have intended dramatically to alter substantive constitutional foundations and assumptions, yet to have left these rights and duties to be interpreted through classical legalist methods ... the Constitution suggests not only the desirability, but the legal necessity, of a transformative conception of adjudicative process and method.[14]

At the end of the day, judges make the final decision and advocates will only argue based on what will help win the case. As a consequence, attorneys only brief the advocates on the basis or starting point of established law, the so-called Roman-Dutch legal tradition, as this is what appeals mostly to judges. Hence law schools only train their students on the basis of that which will enable them to survive in practice – thereby re-entrenching the *status quo ante*.

4 A new order?

This radical new order spoken of, in which the 'idea of protecting individual rights should become integrated with the idea of litigating to advance a clients pecuniary interest' seems at first guise to be a very noble means of protecting those who cannot protect themselves. It seems to be in the same vein as the transformative constitutionalism of which Klare speaks so highly. However, upon closer inspection, it exhibits the same flaws as early human rights discourse and ultimately renders this whole new order superfluous.

This proposed new order lays strong emphasis on the recognition of individual rights. The recognition of individual rights, although an important exercise is however tainted by capitalism and selfishness and hence cannot, in many instances, be reconciled to the goals of rectifying the inequalities and injustices facing South African society.

This is by no means a proposal for us to return to the Hobbesian conception of a social contract, but rather an indication that there are challenges that are faced in society, linked to or correlating with capitalism and individualism. I will not, however, lobby the ideas of Nozick whilst relegating those of Rawls to a purist departure from the spirit of moral logic. That is a task of another day.

[14] Klare (n 9 above) 156.

A strong emphasis on individual rights entrenches capitalism and some of the malpractices associated with it, as it allows room for justification of certain capitalist exploitative practices by allowing those who perpetrate them to call on certain constitutionally entrenched rights and values like individual autonomy, limited interference by the state in the affairs of the individual, freedom to contract and the right to follow ones trade of choice.[15]

A strong emphasis on individual rights would favour those with the resources to enable them to be able to protect those rights fully. What needs to occur is a shift from the current misnomer that individual rights are sufficient in bringing about wide ranging social change. Individual rights, especially socio-economic rights, are relative and programmatic — being heavily dependent on the state capacity to provide for them.[16] What is needed in the (South) African interest is a stronger emphasis on communal and group interests, than those conflicting interests of individuals. Hansungule[17] correctly points out that the recognition of third generation rights is a key move from the recognition of the individual and his rights to those of the group as a whole. This will be further strengthened by *Ubuntu*, which will ensure that there is communal integration and co-operation which is necessary to ensure the redress of past ills and inequalities. It is very difficult and somewhat unwise to attempt to address on the individual level, problems which have persisted and been perpetuated on a communal level.

5 Street law and the new order

Street law, as a social movement, aims to inform people of their rights. This is important in terms of the contribution that it can make to the new order, as with its strong emphasis on individual rights requires some form of mechanism for distributing its message of individual rights. To put this differently, it will be very difficult to imagine a protection, under the new order, of rights of which no one has any knowledge. Street law can be the vehicle through which the message on rights can be delivered in order to create an awareness and understanding of rights.

I propose street law as a social movement, rather than just an academic exercise, due to the importance that rights dialogue and

15 Although these all seem like strong private law conceptions which, theoretically, should be subject to Constitutional scrutiny, the private law has remained firmly in the grip of Roman-Dutch law and its principles. In some instances, as Botha has stated, it is a common mistake by students to interpret the Constitution in light of Roman-Dutch principles, as opposed to the other way around. Botha (n 7 above).

16 Unpublished: M Hansungule 'Human rights conception from the standpoint of African perspective' unpublished article, University of Pretoria, 2004.

17 As above.

awareness plays. It has been said that poverty is the absence of all rights. Although this may seem a bit radical, this notion is highly correct. Poverty reduces and diminishes ones enjoyment of life and is normally coupled with a gross absence of other fundamental rights. Should things be viewed from this level, awareness of rights, of which street law can be a strong proponent, is the first step to securing critical rights for those who right seemed ancillary to the aims of society.

Street law will also give this abstract notion of the law a face, in the sense that it is individuals who engage with other individuals on a personal level, as opposed to the norm of litigation being the point of convergence for individuals in their direct engagement with the law. The law, which for many years represented a coercive means to control the lives of people,[18] can now be introduced as a vehicle through which people can claim and obtain an improvement of their personal position.[19] This self-same legislation creates positive obligations on the state to be transparent, fair in decision making, and to eliminate obstacles to equality.

The importance of street law operates on many distinct and differing levels, one of which was poignantly summarised by Terri Sussel:[20]

> For most legal scholars, the operation and viability of legal systems is closely related to citizens' views about law, justice, and the legal authorities — views which have been described as constituting legal culture.

Currently, and due to our history, the citizen's view on the law is not one of a social instrument aimed at protecting the most vulnerable, but rather as a means by which ones freedoms are limited and curtailed. It is important for street law to show that law is merely a means of social regulation and not restriction, aimed at ensuring maximum benefit possible for each member of society.

18 Legislation such as the Immorality Act 5 of 1927, Black Administration Act 38 of 1927, Group Areas Act 41 of 1950 and so on are examples of legislation which was aimed to control and regulate even the most personal aspects of individuals and their lives. This legislation has now been repealed.

19 Our new dispensation has attempted to do this by introducing, *inter alia*, the Promotion of Access to Information Act 2 of 2000 and the Promotion of Administrative Justice Act 3 0f 2000, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Through this legislation the government has re-enforced its commitment to advancing communal interests and creating burdens and obligation upon itself, as opposed to sustaining burdens on the population, as the now repealed legislation cited in footnote 20 did.

20 TA Sussel *Canada's legal revolution: Public education, the Charter, and human rights* (1995). Although Terri Sussel is a Canadian scholar and her book is based on the Canadian system, the South African Bill of Rights is based on its Canadian counterpart. This hence provides invaluable insight into the types of problems that the Canadians may have or have had during their post-Constitutional teething phase and hence provide us with insight into how best we can manage similar or analogous problems.

Street law can be used as a model of learning and teaching to shape the legal and social culture by ensuring that it remains relevant to the target group. By creating dialogue to people who would be affected and interested in a particular aspect of the law, a level of legitimacy is extended to the law. Also, new ideas are imparted and canvassed with people, hence moving away from the conception of the law as an instrument of popes, kings and queens. This accessibility of the law will add to its transparency and open the doors for a truly 'open and democratic society founded on human dignity, equality and freedom'[21] and hence 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'.

Essentially, street law encompasses a deep and critical understanding of the law, which encourages people to leave their 'air-conditioned offices in their ivory towers'.[22] The law is what happens in the street, not in textbooks. Street law should seek to influence and encourage other legal academics to shift the emphasis and presentation of their modules from those that promote pecuniary interest through the over-reliance on the *status quo*. With the shift to democracy, legal education should have got on the wagon, and followed suit in transforming its emphasis to one which recognises that the so-called value system or *grundnorm* of our society has changed.

The starting point for legal education, as envisaged by street law, should not be what the current position legal position is, or what our far-removed uncles, Voet, Van Der Keesel or Grotious had to say about the matter. It should rather be what would best address the societal needs of the time. In order for our law to be effective it must be relevant and sensitive to the needs of the time and the people.

Street Law achieves this by continually engaging with people, thereby being in a position to hear of their needs, concerns and fears.

The emphasis of street law should be providing legal advice to indigent people at a pre-legal clinic level, thereby opening up the doors for the law to be equally enjoyed by all. The best means of achieving this objective is by either establishing a society of law students, committed to teaching others about legal topics which affect them in their daily lives; or alternatively requiring all academic staff in the law faculty, including tutors and academic assistants, to, in addition to any research or other requirement of their employment, have to meet a certain benchmark in 'street law hours' during each academic year. This benchmark would be reached by either offering a free advisory service in a particular geographical area or industry,

21 Constitution of the Republic of South Africa, 1996 sec 36(1).
22 T Madlingozi *PULP fictions* (2006).

which aims to inform those in that area of the law. Such advisory service would have to be well-marketed. An alternative to the former approach would be to require such staff to give a certain number of workshops or other information sessions to a targeted audience outside of the university and its academic circles.

Although the above would be a requirement for all academic staff, it should be left open as an avenue for any law student or legally inclined person to pursue. However, due to the danger of letting people loose on the community without being adequately informed, a street law co-ordinator should be appointed to manage and co-ordinate all the street law activities of a faculty. Allowing all students to engage freely with the law and the community it affects will not only allow them to add value to their degrees but will serve as a further deepening of the aims of street law itself.

Street law aims to reconcile the interests and ambitions of the wealthy, with the needs and struggles of the very desolate, thereby creating some form of just legal order as was envisaged by former President Nelson R Mandela, on a plaque which symbolically features prominently in the lobby of the Constitutional Court, which reads '[A] society is not judged by how it treats its most affluent citizens, but rather by how it looks after the most vulnerable and poor inhabitants'.