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EDITORS' NOTE

You hold in your hands the very first edition of the *Pretoria Student Law Review*. It has been a tremendous journey in completing the first edition, due largely to the process of finding our feet in everything from footnote styles to page sizing to the task of editing the articles (which in truth was made simple by the exceptional quality in contributions and contributors). The spirit with which the many who made this possible have worked has enabled the creation of a fantastic opportunity for us, as students, to publish our own concepts and ideas.

Academic legal writing in South Africa has, with a few exceptions, traditionally been the domain of lecturers and practitioners. One result of this is that, as students, we tend to forget that law applies to the whole society. As citizens (and especially as legally trained citizens) we have a right – even a duty – to think critically about the laws which govern our society. We need to question and to analyse deeply whether the positive law as it stands necessarily meets its objectives. Where it doesn't, we must highlight its shortfalls precisely because we are part of a broader society. With our Constitutional dispensation and the prominence it gives to the rule of law, we must further determine whether our current law meets the demands that we, as society, set for it in 1993 and 1996.

The *PSLR* represents a forum to students for at least a small portion of this debate. It has been started with two main aims – to stimulate critical legal thought amongst law students and to develop students' writing and research skills. As a student-run journal for publication by students it is entirely dependant on student support. We appeal for, request, encourage – even demand – criticism, submissions, assistance and any other form of participation, because without it, this project will lack the richness it may otherwise have had it. The *PSLR* represents a student voice in a previously exclusive domain - it's up to you to use it and make it strong.

There should be no misconception that the law student merely ambles from classroom to classroom. Throughout the years law students have sat on everything from the University Council and the Senate Appeals Committee through the SRC to Disciplinary Hearings in the form of the Student Court (now the Constitutional Tribunal). We are an integral part of the governance of the University as a whole but we are also academics, leading minds in the legal sciences/arts.

A Law Faculty is an exciting place to be with opportunities for students to be involved in every possible way. It is clichéd but you truly get out more than what you put in and it is for the individual student to reach out and take these opportunities. Write an article, become a member of a student body, participate in moots and

debating. Take this opportunity to leave a legacy at the University. It will make your time at varsity so much richer.

February 2008

Note on Contributions

All bar one of the articles in this edition of the *PSLR* were written by students, some of whom have subsequently graduated and moved on. The students whose contributions were accepted ranged from first years to doctoral students at the University so this is neither a forum for only the highly experienced nor one for only 'young' students. All articles are welcome. Further, while only journal articles were published in this edition, submissions are not limited to this style. We welcome case notes, responses to articles, current affairs updates or anything which comes to mind.

To submit articles to the *PSLR* do so electronically to pslr@up.ac.za or physically through the Dean of Law's office:

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0002

POVERTY ALLEVIATION AND THE CONTROL OF PUBLIC REVENUE IN NIGERIA: LEGAL AND EQUITABLE ISSUES

*by Emmanuel Okon**

1 Introduction

Apart from the dreaded Acquired Immune Deficiency Syndrome (AIDS) now ravaging the world, and particularly the African continent, no other scourge has had such a devastating impact on both the ancient and modern world as the scourge of poverty. According to the World Health Organisation, poverty wields its destructive influence at all stages of human life, from the moment of conception to the grave. It conspires with the most deadly and painful diseases to bring a wretched existence to all who suffer from it. The desire to alleviate, or if possible, eliminate poverty, has engaged the attention of successive governments in Nigeria: Civilian, *quasi*-civilian[1] and military administrations. At present the world is still in search of a solution to global poverty, which is why the United Nations currently puts poverty reduction at the top its agenda.[2] The continual search for ways to achieve poverty alleviation in Nigeria, particularly as it relates to the legal and equitable issues involved, is the topic of this paper.

However, first it is important to define terms so as to make for clarity of thought, better understanding and for *consensus ad idem*.

* LLD candidate, Faculty of Law, University of Pretoria, South Africa, Lecturer, Faculty of Law, University of Uyo, Nigeria. This paper was first presented by the author at the 38th Annual Law Teacher's Conference held at Lagos State University in April 2002. It has been adapted here to suit this publication.

1 Such as when Nigeria had elected civilian governors in the states and State Assemblies, but with a military 'president' who, along with his cabinet, doubled as law-makers at the national level.

2 17 October of every year has been declared World Poverty Eradication Day by the United Nations General Assembly.

2 Definition of terms

Poverty is generally equated with indigence, or, in other words, insufficient resources to sustain a person in life, financial disability or a lack of means of comfortable subsistence so as not to be in want.[3] It may be argued that 'insufficiency of means' is a relative term. Accordingly, there are two basic types of poverty. One is relative poverty, and the other is absolute or real poverty. My concern here is not with relative poverty, as there is no way this category of poverty can be eradicated. Indeed, such eradication is not even desirable, particularly in a capitalist society like Nigeria because it is an incident of capitalism. As such, one person will always be better or worse off than another. Even among different countries, the comparative conditions of a group, a household or individuals will never be the same. Therefore, not much can be done about this type of poverty. However, even in such cases government can and ought to, as a deliberate public revenue policy, adopt measures to narrow the gap in relative poverty.

Our concern here is with real or absolute poverty. Real or absolute poverty is the absence of basic or fundamental human needs and expectations. Under such a situation, the condition of a group, a household or an individual is below the poverty line.[4] For this group of people, poverty becomes synonymous with a lack of a future, lack of progress, lack of prospects, lack of development, and the need for poverty alleviation becomes imperative. The right to development is now universally acknowledged as a third generation (human) right.[5] 'Development' in this sense is itself synonymous with 'modernisation'[6] and embraces both individual and national betterment. It also cuts across the mental, physical, educational, health, social and commercial sectors of national life. Like development, poverty alleviation implies better educational opportunities and an enlightened creative populace, better road networks, and a constant water and electricity supply. Other implications of this concept include gainful employment, better clothing, better food intake and houses. It also involves ownership of automobiles, radio and television

3 *Powers v State,* 194 (Kan) 820, 402 P.2d 328, 332.

4 This is the minimum level of income deemed necessary to achieve an adequate standard of living.

5 RB Seidman *The state, law and development* (1978) 55. There is admittedly no commonly agreed upon definition of 'development' and the definitions that abound only reflect the intuitive value-sets of their authors.

6 D Seers 'The meaning of development' (1969) 2 *International Development Review* 2.

sets and a functional telephone system – a generally better and happier lifestyle. Since freedom from real poverty - or the right to development - is an inalienable human right[7] it is saddening that the Nigerian government, which is saddled with the responsibility to formulate appropriate national development and poverty alleviation policies, aimed at constant improvement of the well-being of the citizenry, has not done enough towards achieving this goal.

Public revenue is the income received by the government, from taxes, custom and excise duties, franchises or services, and from sale of petroleum products.[8] Public revenue is often used, or is supposed to be used, for public good: for the provision of infrastructure and those economic goods and services which the government (federal, state or local) dispenses to its citizens. These include good public roads, good public health programmes, good public libraries, good public parks, good education and a better standard of living.

3 Poverty alleviation measures in Nigeria

It is generally understood that poverty cannot be eradicated - it can only be alleviated. Even in developed economies of first world countries, like the United States or Britain, we will find a handful of groups who live below the poverty line – pimps, rednecks, Rastafarians, and so on. Nigeria has had many poverty alleviation programmes over the years, none of them a success. Such programmes have been packaged under labels which were as many and as divergent as the type of administration the country has had, and those programmes have always reflected the ethnic background of those who devised them.[9] For instance, we can vividly recall the 'Operation Feed the Nation' (OFN), embarked upon by the then General Obasanjo's military administration between 1976 and 1979. The object was to make food available for all and thereby reduce hunger and poverty. There was also the Green Revolution of the Alhaji Shehu Shagari civilian administration put in place between 1979 and 1984. The General Babangida military regime came up with poverty alleviating programmes such as the Structural Adjustment Programme (SAP) and the National Directorate of Employment (NDE) Scheme. The Peoples' Bank, Community Bank, Mass Transport Scheme and the Directorate for Economic Reconstruction Programme all formed part of the package. The Directorate for Food, Road and Rural Infrastructure (DFRRI) and the Better Life for Rural Women programme, meant to enhance the welfare of rural women (but which

7 See the Preamble, and arts 2 and 8 of the Declaration on the Rights to Development, adopted by General Assembly Resolution 41/128 of 4 December 1986.

8 *Business Dictionary* 79, appendix to the *New Lexicon Webster's Dictionary of the English Language* (1991) Deluxe Encyclopaedic Edition.

9 'Again the challenge of poverty alleviation' *Guardian* (1 February 2000) 12.

actually enhanced the welfare of the already rich urban women) cannot be forgotten. General Abacha's regime further evolved the Family Support Programme (FSP) and the Family Economic Advancement Programme (FEAP).

The second Obasanjo administration embarked upon the Poverty Alleviation Programme (PAP). Under this programme, the government earmarked the sum of ten billion Naira for the creation of 200 000 jobs in the year 2000. The creation of jobs was reportedly born out of the government's desire to eradicate poverty because the incidence of poverty and unemployment had assumed a dimension that was socially, economically and politically unacceptable.[10] Government noted that as at the year 2000, over 60 per cent of the citizens of Nigeria were living below the poverty line.[11] The government consequently came up with the idea of the National Economic Empowerment and Development Strategy (NEEDS). The due-process procedure in the award of government contracts was the child of this programme.

It is sad, however, that in real terms these poverty alleviation programmes did not create any real jobs, and much of the funds went to cover overheads and into the pockets of government officials – the so-called 'haves' rather than the 'have-nots'. It is also no surprise that the government came up with another poverty eradication programme - NEEDS[12] - which benefited only the rich. It is the view of this writer that poverty alleviation programmes in Nigeria are often laudable in their conception, but that the fault always lies in the implementation of such programmes. It is submitted that to alleviate poverty, the government has to create real jobs – not just odd jobs or jobs meant only to postpone the evil day.

To create such real jobs, however, government has to diversify the economy as a deliberate policy. It has to encourage private sector participation in development. It has to provide real and qualitative education to its citizenry. In a socially stratified society like Nigeria, a child from a poor family or home can automatically move up the social ladder to being middle-class if he acquires a university education. This is because a higher education can equip him with knowledge thereby guaranteeing him a better job and respect in society.

But this, however, is not the case in Nigeria where education is not of high quality. A situation where the basic laboratory equipment is non-existent in college and university laboratories, and where law

[10] 'Guideline for the implementation of the Poverty Alleviation Programme of the Federal Government of Nigeria' 3.
[11] Seidman (n 5 above) 55.
[12] It is worth noting that NEEDS had the same effect as the Structural Adjustment Programme first introduced by the Babangida regime.

libraries can neither subscribe to standard journals and basic law reports, nor purchase good textbooks due to gross under-funding, cannot lead to any real or quality education. Quality education is that which equips graduates to fend for themselves, using the knowledge they have acquired. Half-baked graduates are turned out due to the poverty of instructional facilities and the 'education' of these graduates in fact worsened rather than enhanced. The result is that we have graduates who do not have enough confidence to apply their trade or profession, staying idle and looking for white-collar jobs.

It is submitted that 'poverty alleviation' has to be linked directly to government policies,[13] particularly government's educational policies. There is no way to alleviate poverty in Nigeria without government's policy towards education being reversed. As has been shown above, it is true that Nigeria has had quite a number of programmes aimed at alleviating poverty. So far, all of these programmes have failed. This should convince us that the answer does not lie in abstract programmes; but that, rather, the answer lies in the proper implementation and strict adherence to well-articulated poverty-related government policies.

It remains true that proper education is a very potent escape route out of poverty. Both access to education and freedom from poverty are now matters of international concern, and Nigeria cannot afford to ignore this trend. The United Nations Human Rights Charter recognises poverty as the brutal denial of human rights. This probably is why the outgoing Obasanjo administration embodied the poverty reduction and alleviation programme in its *Economic Blueprint for 1999-2003*. Under this programme, the poverty alleviation scheme in Nigeria was broken into four phases.

In the first phase emphasis was placed on the education or training of youths who had no education at all, along with school certificate holders, to bring them to school certificate level. This was done under the Capacity Acquisition Programme. Under this programme, youths were sent on a three-month training course to enable them to acquire some skills. Whilst in training, they were paid N3 000.00 per month.[14]

Participants in the poverty alleviation programme in the second phase were university graduates and Higher National Diploma holders. They were attached to industries, organisations and firms under the Mandatory Attachment Programme (MAP). This enabled them to acquire experience in their different fields of study (a tacit admission that their university education was deficient). They were expected to

13 'Bad policies crippled poverty' *Guardian* (6 January 2000) 11.
14 Approximately $25 (twenty-five US dollars).

set up their own trades, occupations or professions at the completion of their tutelage or attachment.

The third phase in the poverty alleviation programme of the Obasanjo regime was the Rural Infrastructure Development Scheme (RIDS). The intention here was to supply portable water and irrigation to rural areas. Other projects within this scheme included transportation, waterways and jetty development as well as other social welfare projects (SOWEES). The fourth phase was the National Resources Development and Conservation Scheme (NRDCS), which was concerned with the exploration of all mineral resources in the country and the development of water resources. Other projects within this scheme included the protection of the environment from degradation, and the protection of marine as well as aquatic creatures.

Under the micro-credit scheme, 'soft loans' were granted to participants to enable them to purchase equipment in order to set up their trade or profession. It was hoped that this would eventually enable them to employ others and generate a multiplier effect from there. These were all heart-warming expectations and conceptions as earlier stated. However, their implementation left much to be desired. Even in their conception, their emptiness become glaring when compared with well-articulated and honestly implemented poverty alleviation programmes in other countries.

In the United States of America, for instance, the war on poverty was initiated by President Lyndon Johnson in the 1960's through the Economic Opportunity Act of 1964, which created the Office of Economic Opportunity (OEO) to administer the programme. OEO started a number of projects to combat poverty on a broad scale. In addition the Community Action Programme (CAP) provided legal assistance to the poor in dealing with problems such as housing violations, sales agreements and welfare regulations. CAP also assisted impoverished children through pre-school. Impoverished young people were provided with vocational training and remedial education in centres outside slum areas. In collaboration with the Department of Labour and Health Education and Welfare, OEO assisted adults through a number of programmes providing jobs, job training and literacy improvement classes.

In addition, an Unemployment Insurance Scheme was introduced in America in 1935. According to this scheme, qualified workers received cash payments during limited periods of unemployment. These payments were meant to protect the individual worker from complete loss of income whilst unemployed. They also helped prevent unemployment from triggering a loss of income in businesses dependent on purchasing power. Under the Social Security Act of 1935, all states were compelled to introduce compulsory unemployment insurance programmes. Through this, the average

unemployed worker in the United States receives a weekly payment for a period of 26 weeks during low unemployment periods. During periods of high unemployment, weekly benefit payments are extended. The programme is financed by the federal and state payroll taxes, and is paid for by employers.

Many modern industrial nations have supported and adopted unemployment insurance programmes. In the United Kingdom, for instance, a gradually evolved social welfare and security system was set up in 1948. It provides national insurance, individual injuries insurance and family allowances. The National Insurance Scheme provides citizens with benefits for sickness, unemployment, maternity and widowhood, death grants and so on.

In France, the Social Security Administration controls social insurance, family allowances and workmen's compensation. The law of 1966 made social insurance compulsory in France. In Germany, on the other hand, social insurance services have been in place since 1881. It includes insurance for sickness, accidents, old age and disability, unemployment insurance, workmen's compensation, and so on. The social insurance system is financed entirely by the state.

There are some similarities between the American and Nigerian poverty alleviation programme. However, the Nigerian programme was not tailored to helping adults. Besides, apart probably from phase one (with the Capacity Acquisition Programme), the Nigerian programme is generally still on the drawing board. In any case, the Nigerian programme does not directly tackle the three basic necessities of life: food, clothing and shelter. The idea appears to be that once a person is gainfully employed, he will be able to take care of himself. This is a fundamental misconception, as there is always an alarming number of unemployed, the unemployable and the underemployed. If any progress is to be made in the war against poverty in Nigeria, there must be direct provision for the basic necessities of life.

According to the World Food Organisation, poverty alleviation must start with agriculture, because the poor and undernourished are heavily concentrated in rural areas. This fight must necessarily begin with agriculture and rural development. It is important to note that, in its war against poverty in America, food supplements were offered. Nigeria can do the same. The government must also build houses for the poor instead of engaging in the real estate business for profit in the name of poverty alleviation. How can a man who cannot even feed himself find enough money to purchase a two or three-bedroom flat which costs thousands if not millions of Naira? As we all know, many Nigerians in urban areas sleep under bridges and on roadsides. As for clothing, it is my view that the plight of the poor can be alleviated by providing cheap clothing such as '*aso-oke*' fabric or '*ankara*'. This

would not be half as expensive as the warm clothing allowance which is paid to the poor and low income groups in winter in some countries.

What Nigeria lacks is political will, a social focus and honesty of purpose. The so-called 'Nigerian factor' (a euphemism for greed, avarice, nepotism and corruption) has eaten deep into the moral and psychological fabric of Nigerians. One hopes, however, that the adage is indeed true: that every cloud has a silver lining, and that the new administration in Nigeria, headed by President Umaru Yar'Adua, will implement these programmes with greater conviction.

5 Control of public revenue

It hardly requires saying that public revenue, as earlier defined, has to be prudently controlled and applied if poverty alleviation is to be achieved.

Embezzlement, misappropriation and brazen looting of Nigeria's public revenue by those occupying public or political offices have fast become a way of life. The Corrupt Practices and Other Related Offences Act of 2000 (sometimes referred to as the Anti-Corruption Law), does not appear to have any impact on the endemic corruption in government. Part of the reason for corruption, which is also part of the reason why the poor majority still remains poor, is the over-centralisation of public revenue. The central federal government is super-rich at the expense of the federal states. It is suggested that fiscal federalism would make for poverty alleviation. It would be recalled that fiscal federalism existed under the 1963 Constitution, which allowed the regions to own, control and develop natural resources located in their territories.

By that arrangement, owner and producer-states ceded an agreed percentage of their revenue to the federal government as tax for the maintenance of the common services of the federation.[15] In that case, the principle of derivation will only be relevant in the sense that the federal government derives revenue from the states and no distribution or allocation back to the states is required. It is submitted that if states are allowed to control the natural resources in their territories, they would better channel the generated funds to poverty remedial needs of the people at the grassroots-level than can be done by the federal government. This is so because it is the individual states which are nearer to the people and are thus better-placed to appreciate the immediate needs of the people. This would aid the monitoring of poverty-alleviation programmes and prevent the overburdening of central government.

[15] DA Ijalaye *The imperatives of federal/state relations in a fledging democracy: Implications for Nigeria* (2001) 22. This includes factors such as defence, foreign affairs, currency, immigration, customs, etc.

The existing revenue allocation formula completely ignores the environmental, ecological and health effects of oil company activities on the poor indigenes of the oil-producing areas, and this has resulted in hostage-taking and terrorism in the Nigeria Delta area. Water pollution throws the local fishermen into joblessness; land defacement and oil spillage further aggravate the poverty of local farmers. Generally speaking, it is the particular oil-producing states and indigenes thereof who feel the negative, impoverishing effects of crude oil exploration, exploitation and production. These people should not be denied the means to better their lot. Something must be done immediately to alleviate their suffering. It is only when this is done that the word 'justice' would have its proper meaning.

It is particularly sad that the Presidential Committee on the Review of the 1999 Constitution appreciated this injustice in the revenue allocation formula of just 'not less than 13%' derivation principle or formula in the Constitution,[16] but then played the ostrich by not making a specific recommendation other than that it should be 'increased substantially beyond the 13 per cent minimum'[17] thus beginning another controversy as to what is 'substantial'. Right now, Nigeria's main source of public revenue is oil, and this has been so since the 1970's. Unless there is a major defect in government policy, there is no reason why those who come from areas where the wealth of the nation is derived should be the most poverty-stricken. There is also no reason why the bulk of the country's poorest people should be in, or come from, oil-producing areas – the most naturally endowed areas. It is a cruel paradox that those who live by the seaside are the ones who wash their hands with spittle. There is an urgent need to address and reverse this trend.

6 Legal and equitable issues

A number of legal, equitable and even politico-legal issues lie in the way of poverty alleviation in Nigeria. Take the issue of population control for instance. It may be argued that over-population is a cause or a consequence of poverty.[18] It is, however, possible that a controlled population will reduce poverty. It may well be that poor people tend to have more children than they can cater for, and thereby engender greater poverty. But, if this view is correct, it follows that a policy of real job creation will have the dual effect of checking over-population and alleviating poverty. The problem in Nigeria is that population figures are deliberately inflated in some

16 Sec 162(2) of the 1999 Constitution.

17 'Report of the Presidential Committee on the Review of the 1999 Constitution, vol 1' (2001) 44.

18 According to the 2006 census, the population of Nigeria stood at 140 million people.

areas so as to influence revenue allocation beneficially to such areas. As long as this trend continues, the areas with a truly large population will remain financially cheated and impoverished. The only way of solving this problem is by conducting an accurate and honest census in the country.[19] Every citizen should be issued with a national identity card to be used for most purposes, including voting during elections.[20]

Still on legal matters, there is a need to enact a statute on poverty alleviation in Nigeria. At present Nigeria has a poverty alleviation policy comprising statements in annual budgets of the federal and state governments without any legal backing. It is instructive that without the Economic Opportunity Act of 1964 in the United States, for instance, the war against poverty in that country could not have gathered the momentum it did.

To alleviate poverty, social security and insurance legislation should be introduced in Nigeria as is done in other countries of the world. To stem the tide of public revenue disappearing into private pockets,[21] the Corrupt Practices Act must be revisited,[22] amended and given teeth. It is not enough to know how much public revenue has accrued; public revenue must be equitably distributed and used for the public good. We often hear about petrol subsidies, for instance, and other such subsidies, but nobody feels the effect of these subsidies. Prices of essential goods escalate instead of decreasing. Nigeria should not follow the popular third-world practice of subsidising the rich more than the poor because of their larger consumption and easier access to resources. In a system committed to equity and social justice and the promotion and implementation of the tenets of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of the United Nations, only those who are unable to pay market prices should be helped.

The best way to help the poor is not by dysfunctional subsidies. It is through substantially increased scholarships, relief payments, guaranteed income and supplements paid out of appropriations made for this purpose by the government that can help the poor. By having control over a portion of income they can call their own, the poor

19 Even the 2006 census figures are controversial.
20 The National Identity Card Project has been a dismal failure too.
21 'Poverty and its brigade' *Guardian* (25 January 2002) 22: 'Nobody has heard from one Nigerian, and I mean one single Nigerian, to the effect that his or her poverty has been ameliorated. No government official has given a credible account of where the billions for Poverty Alleviation went. It enables some wealthy Nigerians to put away more of the nation's dwindling resources ... perhaps some of them were able to build more houses, get more cars, buy expensive jewellery or fatten their bank account. What we had is otherwise a wealth augmentation (or wealth enhancement) and not Poverty Alleviation.'
22 The Economic and Financial Crimes Commission (EFCC) has now been set up.

would be able to make their own choices and be in a better position to take advantage of or create opportunities for income improvements.

There is also the need for land reform. Recently there has been an increased call for the review or abrogation of the Land Use Act of 1978 in Nigeria on the grounds that it is 'unduly oppressive', 'anti-people' and 'undemocratic', and 'directed at depriving the people of the dividends of their God-given resources'.[23] With the aid of the Land Use Act, the rich have acquired most land in urban areas and cities in Nigeria. The poor have remained rent-paying tenants. It should be stressed that the distribution of land is a major determinant of the distribution of income. Countries that have combined economic growth with an equitable distribution of landholding, such as Japan, Libya, Taiwan, South Korea and Costa Rica, have been able to achieve a relatively more equitable distribution of income, while countries which have allowed the concentration of landholding in a few hands to continue, suffer from a higher incidence of poverty and a more inequitable income distribution.[24] Right now, the limitation on the extent of individual landholding is observed more in the breach. This is an area that requires close government and legislative attention.

7 Conclusion

Issues touching on poverty and public revenue are not only sensitive, they are also controversial. Poverty is highly visible in Nigeria. It is also a matter of common knowledge that Nigeria is a rich country blessed with an abundance of natural and human resources. Yet, Nigerians as a people are one of the poorest and most impoverished in the world. In fact, even foreign governments find the Nigerian situation a paradox, hence their reluctance or unwillingness to write off the country's foreign debts. While the great majority of Nigerians are wallowing in poverty with its attendant consequences, a few others are basking in affluence. The source of their wealth is public funds. Government positions are coveted because they provide a sure source of wealth and thus an escape from poverty and social exclusion.

As this paper has shown, there have been many programmes aimed at poverty alleviation in Nigeria and there has not been a lack of funds. The problem is the absence of good governance, as demonstrated by flagrant corruption, abuse of office and a lack of commitment in prosecuting government programmes. It is my firm

23 n 17 above, 64-65.

24 YN Kly 'Human rights and socio-economic policy' (1992) 2 *Journal of Human Rights Law and Practice* 124-125.

belief that, if the legal and equitable issues raised herein are attended to, poverty in Nigeria would be a thing of the past.

SHIELDING THOSE WHO HIGHLIGHT THE EMPEROR'S NEW CLOTHES – DOES THE CONSTITUTION DEMAND A JOURNALISTIC PRIVILEGE?

*by Jonathan Swanepoel**

Met Prince Phillip at the home of the blues
Said he'd give me information if his name wasn't used
He wanted money up front, said he was abused
By dignity[1]

1 Introduction

In his judgment in the English case of *R v Derby MC, ex parte B*,[2] the then Lord Chief Justice of England, Lord Taylor, stated that legal professional privilege was a 'fundamental condition on which the administration of democracy as a whole rests'.[3] This privilege holds that a legal practitioner may not, without the leave of his client, answer any question addressed to him on the witness stand regarding information provided by the client.[4] Thus, in the interests of justice, we allow (even force) a witness who may have crucial information on the matter at hand to refuse to provide such information.

Whilst on similar lines English law recognises a journalistic privilege,[5] South African law recognises no journalistic privilege.[6] This means that when a journalist is asked a question whilst on the witness stand, they must answer that question. This includes questions regarding journalistic sources. Failure to answer any such question is harshly penalised, including imprisonment for up to five years.[7]

At the heart of the matter is this: Should a journalist ever be forced to reveal his or her sources in the preparation of an article?

* BCom LLB (UP), candidate attorney, Webber Wentzel Bowens, Johannesburg.

1 Bob Dylan *Dignity* (1994).

2 1996 AC 487.

3 n 2 above, 507.

4 PJ Schwikkard 'Private Privilege', in PJ Schwikkard & SE Van der Merwe (eds) *Principles of evidence* (2002) 134. The statement above is obviously oversimplified in that various requirements must be met before the privilege can exist. These include that the information provided must have been made in confidence for the purposes of obtaining legal advice. Also interesting is in whom the privilege vests. The client and not the legal practitioner is the owner of the privilege, and only the client may waive it.

5 See eg *X Ltd v Morgan Grampian (Publishers) Ltd* 1990 2 WLR 1000.

6 *S v Cornelissen, Cornelissen v Zeelie NO* 1994 2 SACR 41 (W); Schwikkard (n 3 above) 141.

7 See eg sec 189 of the Criminal Procedure Act 51 of 1977.

Journalists need sources to enable them to produce stories. The term 'off the record' is synonymous with journalism, and one must wonder how many people would provide journalists with information if there was a chance that their identity could or might be made public. Stated differently, how many more people would provide journalists with material if they knew that a journalist could not be compelled to reveal their identity?

In its current state, both South African criminal and civil law offer mechanisms designed to compel witnesses to answer questions posed to them by sanctioning a refusal to answer a question with detention.[8] In the absence of a recognised journalistic privilege, journalists, if asked about their sources, must answer the question posed to them or risk being incarcerated. This clearly places journalists in a Catch-22 type of situation: risk your career for revealing your sources or your liberty for not.

2 Section 189 proceedings

Section 189(1) of the Criminal Procedure Act reads as follows:

> If any person present at criminal proceedings is required to give evidence at such proceedings and refuses to be sworn or to make an affirmation as a witness, or, having been sworn or having made an affirmation as a witness, refuses to answer any question put to him or refuses or fails to produce any book, paper or document required to be produced by him, the court may in a summary manner enquire into such refusal or failure and, unless the person so refusing or failing has a just excuse for his refusal or failure, sentence him to imprisonment for a period not exceeding two years or, where the criminal proceedings in question relate to an offence referred to in Part III of Schedule 2, to imprisonment for a period not exceeding five years.

Despite the rather clumsy formulation, the core – and sting – of section 189 are immediately apparent. At the heart of the section lies the notion that if a witness refuses to testify, he bears the onus of establishing that he had a just excuse not to.[9] The constitutionality of this reversed onus will be addressed below. Clearly, a failure to provide the court with a just excuse will result in incarceration, for

8 Sec 31 of the Supreme Court Act 59 of 1959; sec 189 of the Criminal Procedure Act 51 of 1977.

9 That this formulation resulted in a reverse onus for the witness to discharge was confirmed by Ackerman J in *S v Leepile* 1990 3 SA 988 (W) 998B. In his judgment, Ackerman J held that the witness bears the onus of proving on a balance of probabilities that he has a just excuse. Interestingly, in reaching his conclusion, the learned judge rejected an argument by counsel that is perhaps more reflective of current jurisprudence when the impact of the Constitution is considered. According to counsel, sec 189 proceedings should work in such a way that where the witness concerned provides evidentiary material which could be considered a just excuse, the state must then prove beyond reasonable doubt the non-existence of such material (997I-J).

up do to five years, should the crime for which the testimony is sought be of a particular nature.[10]

In addition to functioning in the broadest sense whenever a witness is on the stand, section 189 operates in tandem with section 205 of the Criminal Procedure Act. Section 205 allows for any person who 'is likely to give relevant and material information' about an alleged offence to be subpoenaed to appear before a judicial officer to testify under oath.[11] Section 205(2) incorporates the provisions of section 189 *mutatis mutandis*, thus extending section 189 beyond the trial phase. The penal provisions that characterise section 189 are watered down in section 205. In terms of section 205(4), a judicial officer may only impose imprisonment if he believes that the information sought by the subpoena is 'necessary for the administration of justice or the maintenance of law and order'.

Thus, the essential question is: What may be considered a just excuse?

3 Pre-constitutional case law

3.1 Kader

Prior to the Supreme Court of Appeal decision in *Attorney General, Transvaal v Kader,*[12] the position in South African law was that only a legal excuse could be considered to be a just excuse. In other words, only if a witness could claim some form of legal privilege or other legally recognised reason for not testifying, was it recognised as being a just excuse.[13] In *Kader,* EM Grosskopf JA convincingly ended the uncertainty regarding the section. Whilst refusing to define all the circumstances which would give rise to a just excuse, the Court felt that to restrict the phrase to simply a legal excuse would be contrary to the intention of the legislature.[14] In *Kader*, the Court recognised that where it was humanly intolerable for a witness to testify, that witness would have a just excuse. However, the Court was

[10] The crimes listed in Part III of Schedule 2 of the Criminal Procedure Act are sedition, public violence, arson, murder, kidnapping, child-stealing, robbery, housebreaking, whether under the common law or a statutory provision, with intent to commit an offence, contravention of the provisions of secs 1 and 1A of the Intimidation Act 72 of 1982, any conspiracy, incitement or attempt to commit any of the above-mentioned offences, and treason.

[11] Sec 205(1).

[12] *Attorney-General, Transvaal v Kader* 1991 4 SA 727 (A).

[13] Prior to *Kader,* the Supreme Court of Appeal touched on the matter in *S v Weinburg* 1966 4 SA 660 (A), where Steyn CJ was of the opinion that the term 'just excuse' contained in the Criminal Procedure Act 56 of 1955 could embrace more than simply a legal excuse, but that 'the excuse tendered would have to be of sufficient cogency ... for the witness to be absolved of the duty not to withhold the truth from the Court' (666A).

[14] For criticism of this approach to statutory interpretation under the 1996 Constitution, see C Botha *Statutory interpretation* (2005).

simultaneously mindful that there would be cases where a just excuse would be present, but it would not necessarily be humanely tolerable for the witness to testify, adding the rider to its judgment that it (the judgment) should not be treated as a legislative enactment.

3.2 Cornelissen

Directly relevant to the current discussion, the High Court in *Cornelissen* was faced with what, for a journalist acting in his professional capacity, would constitute a just excuse.[15] The facts of the case, briefly, were that C reported on a meeting where certain slogans were chanted by the main speaker, including 'Kill the farmer, kill the boer'.[16] After publication of the article, the police opened a docket against the speaker, and subpoenaed the testimony of C. C refused to testify. He cited the fact that the press needed to be seen to have a relationship with their sources – to compromise this would damage his reputation and hamper his future ability to obtain news. These factors were rejected by the Court *a quo*. C was sentenced to 12 months imprisonment.

The finding[17] and the sentence were subsequently appealed in the High Court. On appeal and in response to argument by the appellant,[18] the Court (*per* Schabort J) held that, with regard to the issuing of a subpoena to journalists the Court had to strike a balance amongst three factors.[19] This test, and the three factors which need to be balanced, are only to be applied in determining whether or not to issue a subpoena, and not to determine whether or not a subpoenaed journalist has a just excuse not to testify.

The Court stressed again that no journalistic privilege exists. However, the Court found that, *in casu*, it was not a proven necessity for the appellant to testify and that the potential public advantage of his testimony was outweighed by the potential public prejudice thereof. Thus, at its crux, the Court's decision is a weighing up of public interest in the administration of justice and the public interest in allowing the press to act free from interference or threat of forced testimony.

15 *S v Cornelissen; Cornelissen v Zeelie NO* 1994 2 SACR 41 (W).
16 Considered to be hate speech by the South African Human Rights Commission: *Freedom Front Plus v Human Rights Commission* 2003 11 BCLR 1283.
17 The court *a quo* held that there was no just excuse.
18 The appellant argued that, in the current case, the issuing of a subpoena against him simply amounted to a failure by the police to exercise their role properly as all the information sought by the prosecution against the appellant could have been ascertained by a reasonable police investigation.
19 These were (1) freedom of the individual and in particular his right to retain information for himself, (2) the need for effective prosecution of crime which could result in witnesses to that crime being compelled to testify, and (3) the need for the press to be able to report freely and fairly but responsibly on newsworthy events.

4 *Nel v Le Roux*

Both *Kader* and *Cornelissen* were decided prior to the enactment of both the interim[20] and the final Constitutions.[21] It is interesting that, although in a different context, section 189 was amongst the first to be placed under the lens of the Constitutional Court. In *Nel v Le Roux*, the court was forced to address the constitutionality of section 189.[22] The challenge in *Nel* was based on a violation of the rights to freedom and security of the person and privacy, as well the rights to remain silent and to be presumed innocent.[23] In the verdict of a unanimous court, Ackerman J chose not to deal with what would be deemed to be a just excuse in terms of the Constitution and states that 'it is not … our task, but that of other courts ... to determine what this means although such determination have due regard for the objects of the Constitution'.[24]

It is submitted that this position is unsatisfactory. The closest that the court gets to finding any concrete principle is its holding that 'there is nothing in the provisions of section 205, read with section 189 of the Criminal Procedure Act, which compels or requires the examinee to answer a question (or for that matter to produce a document) which would unjustifiably infringe or threaten to infringe any of the examinee's Chapter 3 rights.[25] This broad stroke is limited - an inquiry should then be made as to whether it is possible to save any such infringement by use of the limitation clause.[26] The *modus operandi* proposed by the learned Judge is the following:

This is what the magistrate in the present case should have done in the first instance. If he had found that in answering any of the questions the examinee's chapter 3 rights would be infringed, he should have held that this constituted a 'just excuse' for the examinee's refusal to answer, unless of course he came to the conclusion in respect of any particular question that the section 189 compulsion to answer constituted, in the context of the section 205 enquiry, a limitation on the examinee's right which was justified under section 33(1) of the Constitution. If he had concluded that there

20 Constitution of the Republic of South Africa 1993. The interim Constitution entered into force on 27 April 1994.
21 Constitution of the Republic of South Africa 1996.
22 *Nel v le Roux* 1996 3 SA 562 (CC). The actual section forming the challenge in *Nel* was sec 205 of the Criminal Procedure Act. As highlighted above, sec 189 is incorporated into sec 205. Thus the constitutionality of sec 189 was at stake in *Nel*.
23 n 21 above, para 4-5.
24 n 21 above, para 8. The objects of the Constitution are described in sec 1 of the Constitution.
25 n 21 above. *Nel* was decided under the interim Constitution, where the Bill of Rights was included in Chapter 3 as opposed to Chapter 2.
26 n 21 above, para 9.

was no such infringement nor any other just excuse for refusing to answer, he should have compelled the applicant to answer.

This means that a witness is not obliged to answer any question which would violate a fundamental right, unless there can be a reasonable or justifiable limitation of the right in the opinion of the judicial officer. This would at face value imply some form of shield, certainly. However, the onus requirement is still vague. The wording is that 'unless of course he can come to the conclusion that the question was a reasonable limitation of the right'. Little is said about how this conclusion is to be reached – is it *mero meto* or must the party seeking the evidence establish such?

Even more worrying than this, though, is something which goes directly to the constitutionality of section 189. According to Ackerman J, a witness who refuses to testify is not an accused person for purposes of enjoying the rights afforded to accused persons.[27] In terms of section 35(3)(f), every accused person has the right to be legally represented at proceedings. Section 35(2)(c) allows for detained persons to enjoy the same right. This creates a bizarre situation. If a witness refuses to answer a question, in terms of the natural reading of section 189, an inquiry into whether that witness has a just excuse is then held. As the witness is not an accused person, the witness does not automatically have a right to be represented. However, if no just excuse is found, then the same person becomes a detained person entitled to legal counsel.

Further, even though a witness falling within the scope of section 189 is not entitled to 'fair trial' rights in terms of section 35(5), he or she is entitled to 'the interposition of an impartial entity, independent of the executive and the legislature to act as arbiter between the individual and the state'.[28] This distinction drawn by the Court is perhaps both overly-fine and alarmingly broad. The Court's reasoning is unconvincing – because a recalcitrant witness is not formally charged with any crime and not actually convicted of an

27 Currently contained in sec 35(2) of the final Constitution; *Nel* (n 21 above) para 11.

28 *Nel* (n 21 above) para 14. These requirements are laid down by Ackerman J so as not to constitute detention without trial. What is interesting in the judgment is that the learned Judge refuses to equate a fair trial in terms of the rights of accused persons with a trial in the context of detention without one. To him, the latter is far less stringent.

offence, they are not accused of anything.[29] This is contrary to even the section headings in the Criminal Procedure Act which, for section 189, refer to 'Recalcitrant Witnesses'. Thus, they are indeed accused of something – the contravention of a legal duty to testify.

The broadness of the court's approach is equally disquieting – a person may be deprived of their liberty provided that it is an impartial entity, independent of the executive and the legislature and able to act as an arbiter between individual and state. Whilst in *Nel* the court clearly envisages a judicial entity, it opens the door for a number of other entities which meet the requirements laid out in the judgment to detain people without a formal, criminal trial.[30] What adds to this is that where such detention is ordered, it does not amount to a violation of the right to freedom and security of the person and hence no limitation analysis is allowed.

To return then to the question at hand – has the Constitutional Court opened the door for some form of journalistic privilege? From the pre-*Nel* case law it is clear that some form of expansive interpretation of section 189 should be allowed. What then is the impact of *Nel* on the *status quo*?

Ackerman J's opinion is that where a question infringes, or threatens to infringe, upon a fundamental right, the witness has a *prima facie* just excuse. In the context of journalists, compulsory disclosure of sources clearly poses problems to the right to privacy and to freedom of expression. It is to these areas that attention is now drawn.

[29] This distinction in itself renders any reverse onus argument relating to sec 189 totally defective. The presumption of innocence is included in sec 35(3)(h) of the Constitution – the very body of rights that is excluded by the judgment in *Nel*. The same subsection includes the right to remain silent and the right of the accused not to testify. Thus, despite the Court's rejection of reverse onus clauses in cases such as *S v Zuma* 1995 1 SACR 568 (CC) (where sec 217(1)(b)(ii) of the Criminal Procedure Act was declared unconstitutional). Also in *S v Coetzee* 1997 3 SA 527 (CC), the Court declared unconstitutional a statutory provision that presupposed guilt unless a defence could be raised. This is exactly the situation imposed by sec 189. Finally, sec 189 does not impose a mere evidentiary burden – it imposes a legal burden which is problematic in terms of the Court's decision in *Scagell v Attorney-General of the Western Cape* 1996 2 SACR 579 (CC). For a discussion of these and other cases, see PJ Schwikkard 'A constitutional perspective on statutory presumptions' in Schwikkard & van der Merwe (n 3 above) 482-483.

[30] Eg, independent bodies such as ICASA theoretically act in exactly the capacity contemplated by the Court.

5 The infringement of privacy

The right to privacy is contained in section 14 of the Constitution and specifically includes 'the right not to have the privacy of [one's] communications infringed'.[31]

As with a legal practitioner's privilege, an essential point to be determined is to whom such a privilege attaches. Is it to the journalist or is it to the source? The answer, perhaps surprisingly, appears to be both.

In *Bernstein v Bester*,[32] the Constitutional Court contemplated the question of a legitimate expectation of privacy. In terms of Ackerman J's judgment, such an expectation will exist when there is a subjective expectation of privacy which has been recognised by society as being objectively reasonable.[33]

In terms of the common law, a breach of privacy occurs where facts derived from a confidential relationship are disclosed.[34] The relationship between a journalist and his sources is at heart strictly confidential. The words 'off the record' are denoted in the dictionary as meaning confidential. Thus, where a source provides information 'off the record', he has, at least in terms of the common law, an expectation of privacy which is breached by the subsequent disclosure of the information. Whilst, according to the Constitutional Court in *Bernstein v Bester*, we should not automatically equate common law notions of privacy with its fundamental right relatives,[35] it seems that such a determination must inform the notion of a subjective expectation of privacy on behalf of a source providing off the record information to a journalist.

This therefore goes to the reasonableness of the privacy reliance – is it reasonable for someone to expect to be afforded anonymity when giving information off the record? It is widely acknowledged that any interference with a journalist's ability to harvest information has a chilling effect on the media.[36] Considering the importance of the role of the media as an agent of democracy,[37] there is clearly tremendous importance that in an open and democratic society the media is able to operate 'unchilled', so to speak. This would then establish a right to privacy for the source, suggesting that, as for legal

31 Sec 14(d) of the Constitution.
32 *Bernstein v Bester* 1996 2 SA 751 (CC).
33 *Bernstein* (n para 31 above) 75.
34 J Neethling *et al Law of delict* (2001) 356.
35 *Bernstein* (n para 31 above) 71.
36 See eg the decision of the European Court of Human Rights in *Goodwin v United Kingdom* 2002 35 EHRR 18; G Price 'Pack your toothbrush: Journalists, confidential sources and contempt of court' (2003) 8 *Media and Arts Law Review* 259 265.
37 *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 24.

professional privilege, the privilege may vest not in the journalist but actually in the source. This in turn has far-reaching implications for a journalist – as for a lawyer who breaches privilege – both legally and ethically.[38]

But at the same time, a journalist enjoys a specific right not to have the privacy of his communications infringed.[39] Whilst there can be no doubt that much of the ambit of this section relates to electronic surveillance,[40] by the same measure it is a very limited interpretation of the section that excludes non-surveillance infringements of such communications. Information relayed from one person to another clearly constitutes communication[41] and to force the details (including the identity of the parties) of that conversation to be revealed destroys its privacy.

It is, therefore, apparent that in line with the formulation of section 189 proposed in *Nel*, forcing a journalist to reveal sources constitutes a violation of the right to privacy.

6 Freedom of expression

In *Freedom Front v South African Human Rights Commission,*[42] a special committee of the South African Human Rights Commission held that the right to freedom of expression was, whilst not the pre-eminent right, fundamental to the protection of constitutional democracy. The committee remarks that freedom of expression sits with human dignity and equality at the heart of a value system underlying the Constitution. The Constitutional Court, meanwhile, has held that it is an essential foundation for a democratic society.[43]

Specific components of the right to freedom of expression include freedom of the press and of other media, as well as the right to receive and impart information and ideas.[44]

The Constitutional Court has previously identified the importance of the media and has gone so far as to claim that the media has a duty to act with 'vigour, courage, integrity and responsibility'.[45]

[38] See eg MISA's reaction to former City Press editor Vusi Mona's testimony before the Hefer Commission of Inquiry '"Disgraced" editor an embarrassment to journalism'. http://www.za.misa.org/pdf_mediabrief/vol1_15.pdf (Accessed 10 September 2007). On the opposite side of the spectrum, the legal pressure brought to bear to compel witnesses to reveal sources at the same commission is evident from *Munusamy v Hefer NO* 2004 5 SA 112 (O).

[39] Sec 14(d) of the Constitution.

[40] See eg the discussion in I Currie *et* al *Bill of Rights handbook* (2005) 332-335.

[41] JV Thill & L Bovée *Excellence in business communication* (2001) 11.

[42] 2003 11 BCLR 1283 (SAHRC).

[43] *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) 27.

[44] Secs 16(1)(a) & 16(1)(b) of the Constitution.

[45] *Khumalo* (n 36 above) para 24.

International courts have held that for the media to be free, protection of sources is one of the fundamental conditions required.[46] Or, as Currie and de Waal have it, the press can neither live freely nor operate effectively if they live 'under the shadow of legal compulsion to reveal its sources of information'.[47] The conclusion is clear – any forced disclosure violates section 16(1)(a).

The right to receive and impart information was extensively canvassed by the Constitutional Court in *Case v Minister of Safety and Security*.[48] In her judgment, Mokgoro J quotes from *Stanley v Georgia,*[49] where the US Supreme Court was of the view that the right to receive information and ideas was fundamental to a free society. As has been noted above, the compulsory disclosure of journalistic sources has been found to have a chilling effect on the media. Sources are more reluctant to come forward where there is a chance that their involvement may be made public. This then directly impacts upon the media's right to receive information in the most drastic way possible – it cuts such information flows off.

The European Court of Human Rights has recognised a duty on the press to impart information for the media to play its 'vital role of public watchdog'.[50] Thus, as an agent of democracy, the press has an undeniable interest in the free-flow of such information. To frustrate it – even possibly – clearly is a violation of the constitutional protection granted in terms of section 16(1)(b).

Both of these sections are knocked over by the working of section 189. The press is not free when it has to consider constantly whether the publication of a story will lead to a journalist possibly being detained for simply knowing something and refusing to compromise the ethical foundations of his profession. Likewise, there can be no doubt that the right to impart and receive information is violated where there is a shut off of the flow of such information.

7 A justifiable limitation?

Having established that, in its current form, section 189 violates at least two fundamental rights, the question to be asked is that which was highlighted by Ackerman J in *Nel*: What impact does section 36 of the Constitution bring to bear on the situation? Section 36 regulates

46 *Goodwin* (n 35 above) 39.
47 Currie *et* al (n 39 above) 366.
48 *Case v Minister of Safety and Security* 1996 3 SA 617 (CC).
49 *Stanley v Georgia* 1969 399 557 (US) 564.
50 *Jelsild v Denmark* 1995 19 EHRR 1.

society in that it holds no right absolute, no interest beyond the law.[51] In terms of section 36, any right contained in the Bill of Rights may be limited if the limitation is 'reasonable and justifiable in an open and democratic society, based on equality and freedom' and taking into account all relevant factors.

For there to be a limitation of a right, there must be a law of general application. Whilst this particular phrase has a very particular, if well-hidden, meaning,[52] it seems clear that section 189, as part of a duly enacted legislative scheme, passes muster.[53] Passing this hurdle opens Pandora's box, so to speak, and begins the process of evaluating the rights.

Section 36 lists five factors which should be taken into consideration in determining whether a limitation is reasonable and justifiable.[54] These are the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and any less restrictive means of achieving the purpose.

The purpose behind section 189 – and the section 205 procedure – has an undeniably important objective: it is designed to ensure the free flow of relevant information during a trial. This is coupled with the protection of a fundamental right – section 35(3)(i) of the Constitution provides all accused persons with the right to adduce and challenge evidence. Having no procedure to ensure that witnesses provide evidence renders such a right rather bald. Many people would, if possible, prefer not to testify.

51 S Woolman & H Botha 'Limitations' in S Woolman *et al Constitutional law of South Africa* (2006) 34-1, except of course where a limitation fails to comply with the dictates of sec 36 and the factors that it demands receive attention by a court.

52 Woolman & Botha (n 50 above) 34-47 *et seq*.

53 So as not to gloss over the point, Woolman and Botha identify four criteria which have to be met for a law to be a law of general application. These are that the law must ensure parity of treatment, there must be a discernable standard (ie that the law must not be arbitrary), the law must be precise enough to tailor individual conduct to it and that the law must be accessible. It is submitted that sec 189 does comply with such. In *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) para 47, the court identified that the concept of the rule of law demanded that rules be accessible and clear. This, according to Currie *et al* (n 40 above) 169, means that people should be able to tailor their conduct to meet the demands of the law. Moreover, the law should apply impersonally and equally to all.

54 It must be noted that, in this respect, the language of sec 36 is very clear. By use of the word 'including', the five factors presented in sec 36 cannot be said to represent a *numerus clausus*. This would, therefore, allow a court to add additional factors should it see the need.

But it is the contextualised situation which is the relevant one. Excluding for the present the issues of detention without trial, opaquely addressed by the Court in *Nel*, and the wider constitutional position of section 189,[55] the reality is that under certain circumstances the law allows – no, demands – that persons with relevant admissible evidence do not disclose it. The rationale behind legal practitioners' privilege, alluded to above by Lord Taylor, is that the public interest which is at stake far exceeds the interest which may be infringed by disallowing such evidence. Likewise, it is legally recognised that spouses are generally incompetent to testify against one another. To propose that the vital interests which a media privilege would protect are any less important would fly in the face of the jurisprudence of the Constitutional Court in recognising the need for a free-flow of information and expression.[56]

There is at stake a wider societal interest. It has been mentioned above that the forced disclosure of a journalist's sources has a chilling effect on the media. To chill the media denies it the freedom granted in terms of section 16(1)(a) of the Constitution. It removes the very freedom which the press is notionally supplied with. It deprives it of the opportunity of exercising its constitutionally demanded role of promoting the free flow of information,[57] without living under the constant shadow of possible detention.

The Supreme Court of Appeal in *Bogoshi*[58] was quick to remove the burden of strict liability for publishing falsehoods that had been imposed on the press in the *Pakendorf* case.[59] Its reasoning was based precisely on the chilling effect that such potential liability imposed on the media.[60] There is therefore clear support for the notion that the media should be 'unchilled'. Likewise, the same argument has to apply to other indirect restraints such as section 189.

The current breakdown in institutions supporting democracy, parliament's constant deferral to the executive as well as the opaque decision-making process of the ruling party, have left the press as the

55 The view of Kriegler J in *S v Mamabolo* 2001 3 SA 409 (CC) as to the desirability of such summary procedures is directly relevant. Here the court held that such procedures are generally undesirable, especially as courts are the guardians of constitutional rights. They should be reserved for the most exceptional cases, according to Kriegler J.

56 The court's *dictum* in *Khumalo* (n 36 above) para 24 is evidence of such.

57 *Khumalo* (n 36 above) para 24.

58 *National Media v Bogoshi* 1998 4 SA 1196 (SCA); 1998 4 All SA 357 (A).

59 *Pakendorf v De Flamingh* 1982 3 SA 146 (A).

60 *Per* Hefer JA 359 (All SA).

most important agent supporting democracy.[61] This is a task which goes to the heart of an open and democratic society – it is its very lifeblood.[62]

The right to freedom of expression has been exalted by the Constitutional Court. In *Mamabolo*, Kriegler J held that it was of utmost importance to the open and democratic society to which we aspire.[63] Likewise, O'Regan J in *South African National Defence Union v Minister of Defence*,[64] recognised that freedom of expression is the guarantor of democracy. It is therefore submitted that interests protected by section 189 should be subordinate to the rights infringed.

There is yet another facet to this argument. The right to dignity is, constitutionally, both a distinct right and a foundational value.[65] Journalistic ethics militate strongly against any form of source disclosure, precisely because this undermines the integrity of the profession as a whole.[66] Dignity, the Court in *Dawood* was quick to point out,[67] seeks to foster respect for the intrinsic worth of all human beings. But not only other human beings – in *Williams,* the Court struck down provisions of the Criminal Procedure Act because of the deprivation of the dignity of the person of the offender.[68] Section 189 imposes what may be described in context of judicial decision-making as a hard choice on a journalist who is asked on the stand to reveal sources. He is forced to confront breaking an ethical rule of his profession or being incarcerated. He is also forced to choose whether to betray the trust that his source placed in him. Although perhaps not the most serious violation of dignity that has ever occurred, it is still a violation. It goes directly to his self-respect, his integrity.

61 See eg events leading up to the Hefer Commission of Inquiry; *Tshabala-Msimang v Mahkanya* (unreported WLD decision of 30 August 2007, *per* Jajbhay J); SABC exposé regarding the suspension of NDPP Vusi Pikoli and an arrest warrant for National Police Commissioner Jackie Selebi. All of these events have exposed political wrangling at the highest level and have shed light on matters which otherwise would not, I believe, have been granted the oversight required in a democracy based on human dignity, equality and freedom.

62 In *Jelsild* (n 49 above) 35, the European Court held that news reporting constitutes one of the most important means for the press to play its role as public watchdog.

63 *Mamabolo* (n 54 above) para 37.

64 1999 4 SA 469 (CC).

65 Sec 11 embraces the right, amongst others, sec 2 the value.

66 See eg n 39 above.

67 n 52 above, para 35.

68 *S v Williams* 1995 7 BLCR 861 (CC). The relevant sections allowed for corporal punishment of convicted persons.

The link between the need for information and the violation of the rights is perhaps fairly clear. However, section 189 is not necessarily effective at ensuring that a witness testifies.[69] A witness could choose to remain silent indefinitely. Thus, the purpose for the violation is frustrated. Likewise, especially in the context of section 205, the current violation is not the most narrowly tailored way of obtaining the information.

An accessory after the fact in a criminal context can be someone who impedes the course of justice after a crime has been committed.[70] Thus, a journalist who is questioned by a policeman about the identity of a supposed criminal and who fails to disclose this could, in principle, be criminally liable as an accessory to the crime. This may, at first glance, seem draconian. But at least this would ensure that a journalist from whom information is sought is clothed with the rights of an accused person, and not the summary procedures endorsed in *Nel* and doubted in *Mamabolo*. It would also require that the state prove all five elements of criminal liability beyond reasonable doubt. This includes unlawfulness. It therefore grants a journalist who knows the identity of a criminal far greater protection, whilst being constitutionally acceptable.

It is therefore submitted that in its current form and general application, section 189 is not a reasonable and justifiable limitation of the rights of freedom of expression and privacy. Obviously, and given the flexibility suggested in *Nel*, under certain circumstances the societal interest in the disclosure of information would exceed the prejudice caused. However, in such cases, it is submitted that the person seeking such disclosure must bear the onus of proving that the limitation is reasonable and justifiable. Furthermore, such situations should be very clearly the exception with regard to journalists.

8 Summary

Despite massive doubts about the actual constitutionality of section 189, which were in no way allayed by the decision of the Constitutional Court in *Nel v Le Roux,* the decision perhaps has an effect thus far unrecognised. Ackerman J's finding that a witness is under no obligation to answer a question which infringes, or threatens to infringe, any fundamental right in a manner not saveable under section 36, does indeed establish a journalistic privilege. This privilege is flexible enough to prevent a total frustration of the aims of section 189 in so-called 'ticking bomb' cases.

The forced disclosure of journalistic sources is a violation of the right to privacy and freedom of expression. To adopt the *Nel* approach

[69] Or if part of a sec 205 investigation, that the details of the offence are revealed.
[70] J Burchell *Principles of Criminal Law* (2006) 611.

to section 189 holds nothing less than the realisation of such a privilege – and at the same time perhaps even saves section 189 from being struck down, a fate alluded to by Ackerman J in *Nel*.[71]

[71] Sec 189 was not the actual subject of *Nel* (n 21 above) – rather its inclusion in sec 205. Ackerman J seems to suggest that had sec 189 itself been referred, the decision of the court may have been different (*Nel* (n 21 above) para 26).

WHY MUST I CRY? JUSTIFICATION, SACRIFICE, LONELINESS, MADNESS AND LAUGHTER IN POST-APARTHEID JUDICIAL DECISION-MAKING

*by Michael Bishop**

> Why must I cry
> these tears from my eyes?
> Why must I cry
> these tears from my eyes?
>
> Why must I trod
> this lonely, lonely, lonely road?
> Why must I carry
> this heavy, big heavy, big heavy load?
>
> Why must I cry
> these tears from my eyes?
> Why must I cry
> these tears from my eyes?
>
> Why must I trod?[1]

1 Introduction

Peter Tosh's plaintive – 'Why must I cry?' – is normally interpreted to be about a lost lover. It probably is. But I am going to propose a different reading. I am going to pretend that Peter Tosh is a conscientious South African judge with postmodernist and critical legal tendencies. This judge is concerned with the massive responsibility she feels as a judge in post-apartheid South Africa. Not only must she walk the lonely, lonely, lonely road of ordinary judicial office, she must bear the big heavy load of the specific social, economic and political circumstances that place added pressure on her to transform, both society and herself.

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1 Peter Tosh 'Why must I cry?' from the album *Legalise it* (1976).

At the same time, she is confronted with critical theories that seek to impose an even greater burden on her in the form of unanswerable calls to justice and unfulfillable duties to the other. These theories are, on the whole, framed in a way that is both critical of judges and largely pessimistic about the possibility of success. Many of the theories specifically require the judge to mourn her inability to do the impossible. For many reasons then, our hypothetical judge asks: 'Why must I cry?' My answer in brief is: She need not cry. She must not cry. I will argue that the best means to address the various responsibilities imposed on judicial officers is through laughter, not tears.

I begin by detailing the 'culture of justification' that dominates both judicial and academic thinking (I will look specifically at Mureinik, Klare and Botha) and examine exactly what burdens this philosophy imposes on judges. Next I acknowledge that the burdens of justification, onerous as they may be, are not enough. I adopt Van der Walt's ideal of 'law as sacrifice' to argue that all judges have the additional duty to acknowledge the sacrifices that are an inescapable part their profession.

Having heaped all these duties on judges, I acknowledge that all this responsibility must make them rather lonely. The paintings of Edward Hopper serve as both a reflection of this loneliness and a possible cure. In his paintings there dwells both a sadness and a joy – a joy that I hope can be shared by judges and that may, sometimes, enable them to acknowledge sacrifice.

But even with our altered concept of loneliness developed through the suppressed beauty of Hopper's art, judges must, if they take their work seriously at all, go a little crazy with the weight of their unbearable burden. That leads me to the idea of madness, specifically Derrida's notion of madness as the moment of decision. This brush with Derrida forces us to consider whether there is a way, even if sacrifice is acknowledged, to achieve just decisions.

I conclude by looking at humour and the law. Humour in judicial decisions has played an often unnoticed role (more in America than South Africa!) in the law reports, but it is one that I think should be encouraged. Uses of humour by other facets of the legal profession should also be encouraged for the way it confronts the law and lawyers with their own failures and weaknesses. But the most important role of humour is to facilitate the madness that Derrida requires for justice. In the madness of laughter there is the space for the trace of justice and the ghost of plurality born of the acknowledgment of sacrifice. Laughter cannot ensure justice, but it can make it easier to attain and easier to lose.

If I can laugh – why must I cry?

2 Justification

Justification permeates all corners of our post-apartheid legal order. Possibly the most far-reaching endorsement for justification is the limitations clause. While the Bill of Rights guarantees more extensive protection of human rights than any other constitution in the world, any one of those rights can be limited by section 36 if the limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[2] But a section 36 analysis is only the beginning of the way in which justification has been woven into the fabric of our constitutional jurisprudence.

At the dawn of the new constitutional era, Mureinik wrote a highly influential article in which he engaged with the reference in the postamble of the interim Constitution[3] to a bridge.[4] Mureinik argued that apartheid society had been characterised by a culture of authority, where unjust laws were enforced not because of their content, but because of the power wielded by those who made them.[5] If that was the apartheid past, it was clear to Mureinik what the post-apartheid future should hold: the bridge of the Constitution 'must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.'[6] This 'culture of justification' has been embraced by the courts as supporting the proposition that power can no longer be exercised arbitrarily but must be rationally related to a legitimate government purpose.[7]

2 Constitution of the Republic of South Africa 1996 (Constitution) sec 36.

3 Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution).

4 E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.

5 Mureinik (n 4 above) 32. This culture was also 'an indispensable nursery for the feature of apartheid that most people would consider its defining characteristic: the reduction of law to racial discrimination – differentiation on the ground of race that is not justified. Without a culture of authority it is difficult to imagine how its gardeners would have cultivated the forest of apartheid statues whose most distinctive feature was their want of justification' (footnote omitted).

6 n 5 above. This linear conception of the bridge metaphor has been criticised in more recent times. See eg A van der Walt 'Dancing with codes – Protecting, developing and deconstructing property rights in a constitutional state' (2001) 118 *South African Law Journal* 258 296, who argues for a bridge that 'allows and invites multiple crossings, in both directions' that denies an ending to transformation or interpretation and leaves room to 'imagine alternative futures'; W le Roux 'Bridges, clearings and labyrinths: The architectural framing of post-apartheid constitutionalism' (2004) 19 *South African Public Law* 629 640-642, who examines various concepts of the bridge and advocates a bridge that takes limits of imagination as its starting point.

7 See *Prinsloo v Van der Linde & Another* 1997 3 SA 1012 (CC) para 25; *Pharmaceutical Manufacturers Association of SA & Another: In re Ex parte President of the Republic of South Africa & Others* 2000 2 SA 674 (CC) para 85.

But this culture of justification impacts the courts far more directly. Klare was the first to argue that post-apartheid South Africa and Mureinik's culture of justification demand a transformative constitutionalism.[8] This transformative constitutionalism has two aspects – a commitment to social change and a shift in legal culture – both of which impact on the responsibility of judges. Under the first leg, judges are mandated, through their decisions, always to seek out the best way to forward the achievement of social equality.[9] More importantly for present purposes, under the second leg, judges must acknowledge the limits of legal constraint. The new transformative culture demands that judges accept the role they already play in shaping the meaning of legal texts and acknowledge and take responsibility for the choices they make. Judges can no longer hide behind 'ordinary meanings' or 'established precedents' – they must be honest and candid, with us and with themselves, about how they reached their decisions.[10]

Botha explores in slightly more depth just how judges understand the notion of constraint to which Klare refers and how this affects their perception of their duty to be candid.[11] Botha offers three metaphors to explain judicial constraint based on the work of Duncan Kennedy. The first metaphor represents the traditional legal thinking that 'constraint is a function of the objective properties of legal materials'.[12] The judge is trapped in a forest where the trees are the constraints of legal precedent. The adventurous judge searching for justification in this forest cannot avoid or cut down the trees and only experiences freedom if he happens to reach a clearing that has not yet been 'cultivated by precedent'.[13]

The second metaphor portrays legal argument as the 'play of argument bites'. Each side of a legal dispute has a number of accepted argument-bites that they can employ. However, for each bite there is a counter-bite that their opponent can employ that cancels out the original bite.[14] For example, an applicant in a socio-economic rights case might argue that the court must order the government to take immediate action as she needs effective relief. This would be met by the counter-bite that the court should respect

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

9 Klare (n 8 above) 150 ('Transformative constitutionalism connotes an enterprise of inducing large-scale social change through political processes grounded in law').

10 Klare (n 8 above) 164. ('[T]he legal profession needs to be more candid with itself and with the community at large about the politics of adjudication and to accept more forthrightly our responsibility (however limited and partial) for constructing the social order through adjudicative practices').

11 H Botha 'Freedom and constraint in constitutional adjudication' (2004) 20 *South African Journal on Human Rights* 249.

12 n 11 above.

13 n 11 above, 255.

14 n 11 above, 256-257.

the separation of powers and not unduly interfere in the domain of the legislature or executive. Judges are constrained because they must phrase their argument in terms of the predetermined bites. This is ultimately a very cynical view as judges are left with a 'free' but uncontestable choice between the two sides. Judges still do not have to take responsibility for their judgments.

The final metaphor is of law as a field of action. In this metaphor the law is a field with visible boundaries that represent legal rules. Legal results fall either within or outside the field of legal activity. However, the judge can manipulate the field by shifting the boundaries or re-characterising or reworking arguments so that results fall on different sides of the boundary. The judge is free and constrained at the same time – the law constrains him as he cannot ignore it, but he can (often) overcome that constraint if he is willing to apply the necessary effort to the legal materials.[15]

This metaphor forces judges to take full responsibility for their decisions as they alone choose how far they are willing to go to achieve a particular outcome. Only in rare cases will they be absolutely unable to achieve the result they deem just so the outcome of the case is placed principally in the hands of the judge, not the objective hands of the legal system. The judge can no longer avoid the yoke of her decision. She must provide a full and acceptable justification for her decision. Anything less fails to live up to the ideal of the 'culture of candour' that has become an essential part of post-apartheid judicial decision-making.

3 Sacrifice

> Human nature is such
> That incompletion is all
> That remains with us.[16]

However, even this substantial responsibility is not the final layer of the massive burden that judges must bear. No matter how honest, how complete, how 'just' a judge's reasons, there is, in reality, no such thing as justification. According to Van der Walt[17]

> every judicial decision is an inevitable representation of the law in a particular case, the inevitable representation that reduces to oneness the multiple conflicting desires and concerns that inform the law in a contradictory fashion.

The reduction inherent in every judicial decision demands the economic sacrifice of one of the litigants. This 'economic' sacrifice

15 n 11 above, 260-264.
16 Tl Liyong 'The Throbbing of a Pregnant Cloud' in Frantz *Fanon's uneven ribs* (1971) 26.
17 J van der Walt *Law and sacrifice* (2005) 11.

does not refer to the loss of money or property. What is at issue here is the destruction of the litigant's honest expectations that his legal claim is right. If a litigant loses a case, he is told that the legal claim that he made is not reasonable and fails to conform to society's accepted law or morality. In order to remain a part of the community and a subject of the law, he must abandon his belief in his cause on the altar of the law where it will be sacrificed to the Gods of reason. The sacrificial lamb must choose between the acceptance of his violation or banishment from the political community: a rock and a hard place.[18]

This sacrifice is unavoidable and unjustifiable: 'The invocation of just grounds to justify sacrifice would effect but another failure or refusal to acknowledge sacrifice'.[19] No extent of balancing or judicial candour can save the judge from sacrifice. A judge must perform the sacrifice; his only choice is which party comes under the knife. The only possibility open to the judge is to acknowledge the sacrifice of his decision. Through the acceptance that a litigant is 23 rificed and that this is unalterably unjustifiable, but must occur nonetheless, the 'trace of plurality', the 'trace of justice' is created. Indeed, as Van der Walt notes, plurality can exist only as a trace, a ghost, but more importantly, 'the decision itself [is] a trace of what is always left or being left behind.'[20] In essence then, it is only through the acknowledgment of the sacrificial character of law that plurality (as trace) can exist.[21]

While this realisation offers hope to us all for the validity and ultimate 'justice' (as trace) of law as an ideal, it offers little solace to the judge. The judge must still sacrifice. Acknowledgment may permit plurality, but it does not prevent the sacrifice from taking place. The judge retains the unbearable burden of the unjustifiable sacrifice of one of the litigants. The judge must bear the burden alone. There is no help, no recourse to principle or precedent. No recourse to justice. It is a terribly lonely decision.

18 J van der Walt 'Law as sacrifice' (2001) *Journal for South African Law* 711. ('On top of having his honest expectations frustrated by a judicial decision, that person is also deprived of his honest expectations. He is told to let go of them. They are simply wrong ... To the extent that the person is not prepared to see reason, he simply does not share in the good morals of society').

19 See Van der Walt (n 17 above) 14. See also Van der Walt (n 18 above) 711 ('Judicial reasoning should not ratify this banishing effect by evoking a rhetoric of justice').

20 Van der Walt (n 17 above) 12.

21 Van der Walt argues that law and sacrifice are so intimately interwoven that not only must law be described in terms of sacrifice, sacrifice exists as the first instance of law (n 17 above, 132).

4 Loneliness

> Making decisions is all we as judicial officers have to offer. Each one should be as legally correct, fair and equitable as possible. One decision sticks out in my mind. For some reason it did not at the time feel that it fit on the easy-hard continuum. The only adjective that really seems to fit is 'lonely.' It just felt lonely.[22]

Judge Smith wrote this passage to describe a decision he had to make regarding a mentally disturbed man, one 'Mr Mitchell'.[23] Mitchell had stopped taking his medication and as a result had severely assaulted his father. He was charged with both misdemeanours and felonies. His public defender argued that the felonies should be reduced to misdemeanours as this would allow him to receive appropriate psychiatric care. His father supported the proposal as he believed that his son could lead a perfectly stable life with the correct treatment. However, the law stated very clearly that a felony should only be reduced if the actions could in fact be characterised as the less serious 'misdemeanour' which the assault clearly could not. Smith (if he had been in post-apartheid South Africa) was obliged to justify his decision, constrained by legal precedent, and compelled to sacrifice either Mitchell or the public's interest in consistent law enforcement. It is easy to understand why he felt lonely.[24]

It is not only the 'hard cases' that are lonely; judges are always alone as they always bear the final responsibility for their decisions. Judges often talk about the loneliness of their office. In *S v Malgas*, the Supreme Court of Appeal, while interpreting minimum sentence legislation, noted that '[s]entencing has rightly been described as "a lonely and onerous task"'.[25] The old Appellate Division has described the 'application of modern western standards' to customary beliefs as a 'lonely and at times frighteningly difficult task' of the trial judge.[26] A former clerk of US Supreme Court Justice Harlan wrote of him after his death that '[o]n Friday afternoons when he returned to chambers from the court conference and reported the votes, I thought I

[22] C Smith 'A lonely decision' (1999) 41 *Orange County Lawyer* 10.

[23] Judge Smith does not give the name or citation of the case in order to maintain the man's anonymity.

[24] Judge Smith ultimately refused to reduce the charge. Although he was moved by the particular circumstances of the case, he maintained faith that ultimately justice would be better served by maintaining the internal consistency of the legal system. 'It is important to understand that this decision was not just an act of elevating process over result. It was also an act of faith: faith that adhering to the law - following the appropriate process - would best serve the interests of all involved. It was an act of faith that treating the defendant's conduct for what it was in fact would trigger the appropriate responses of penal institutions, mental health services and other public and private agencies which would respond to Mr Mitchell's conduct and his condition' (n 22 above, 13).

[25] 2001 2 SA 1222 (SCA) para 1 quoting J Hogarth *Sentencing as a human process* (1971) 5.

[26] *S v Mkhonza* 1981 1 SA 959 (A) 963F. The case concerned whether a family feud that mandated a killing reduced the moral blameworthiness of the accused.

sometimes caught a hint of resignation to the loneliness of his position'.[27] A similar sentiment was expressed about Justice Jackson who at one stage in his career slipped into 'a sad, silent, ineffectual loneliness of dissent'.[28]

This judicial loneliness finds possibly its most powerful portrayal in the paintings of the renowned American artist Edward Hopper. As Proulx notes, '[a]lmost every critic, artist, writer (especially writers), art savant, book-jacket designer or media hack sees in Hopper's mature paintings solitude, alienation, loneliness, psychological tension'.[29] The subject of Hopper's art is the main source of this alienation. Hotels, diners, gas stations, lighthouses and trains are the focus, but also the backdrop for isolated, introspective figures who[30]

> look as though they are far from home, they stand reading a letter on the edge of a hotel bed or drinking in a bar, they gaze out of the window of a moving train or read a book in a hotel lobby. Their faces are vulnerable and introspective. They have perhaps just left someone or been left, they are in search of work, sex or company, adrift in transient places. It is often night and through the window lie the darkness and threat of the open country or of a strange city.

For example, in *Nighthawks* Hopper's focus is a diner, late at night, in what seems to be a large American city. A barman is pouring a drink while staring vacantly out of the large window that encircles the whole scene. There is a couple facing us. The woman looks absently at her fingernails and seems lost in thought, hardly noticing

27 C Nesson 'Mr Justice Harlan' (1971) 85 *Harvard Law Review* 390.
28 L Jaffe 'Mr Justice Jackson' (1955) 69 *Harvard Law Review* 942.
29 A Proulx 'Only the Lonely' *The Guardian* (8 May 2004).
30 A de Botton *On seeing and noticing* (2005) 1.

the man at her side. Her partner seems resigned and is carelessly observing the barman pouring his drink. They are not looking at each other and although they are physically close, their minds are worlds apart. The final figure has his back to us. He is slightly hunched and clearly lost in his own reflections. He has come there to be alone. All the figures 'appear to be silently awaiting for their respective times to return to home as they stand at the bar, engaging in little, if any, conversation. Each customer seems to be attempting to escape from the pain of the sad and lonely night'.[31]

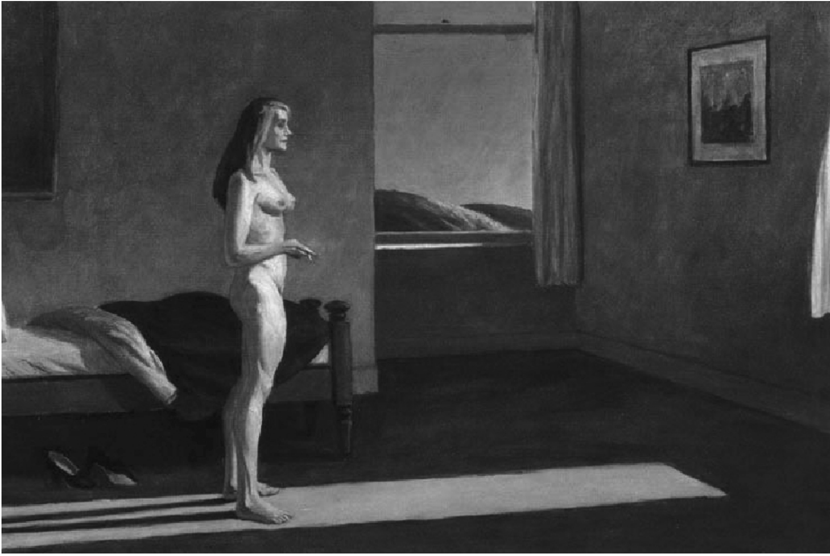
Architecture always formed a central part of Hopper's work.[32] According to De Botton, 'Hopper is the father of a whole school of art which finds as its subject matter "liminal" spaces, buildings that lie outside homes and offices, places of transit where we are aware of a particular kind of alienated poetry'.[33] *Hotel by the Railroad* is a remarkable study of a house that evokes in us mixed feelings of empathy and foreboding. The house is totally alone, kept company

31 B Ungles 'Edward Hopper'. http://www.missouri.edu/~bkuc97/edhopper.html (Accessed 13 July 2006).

32 For an excellent look at post-apartheid legal architecture, see Le Roux (n 6 above).

33 De Botton (n 30 above) 3.

only by the railroad, and we cannot but help feel sorry for it. Yet at the same time its stark lines and undeniable eeriness put us off balance and make us think twice before going up to give it a hug. The house seems 'more like a place to die than a place to live'.[34] But its solitude also emanates a certain strength – an unflinching conviction in itself, necessitated because there is nothing else but the occasional passing train to keep it company.

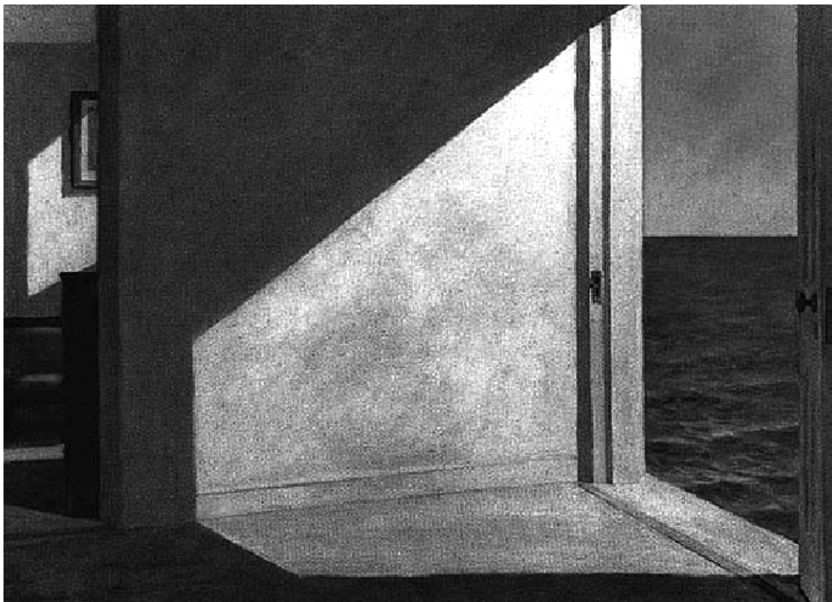


In *Woman in the Sun* a naked woman stands in a hotel room at sunrise staring out of the window. She has just climbed out of bed and is smoking a cigarette that she holds carelessly at her side. She is staring directly at the sun, lost in contemplation. She is not sad, but she is undoubtedly alone, remembering someone she has loved or lost, or contemplating some great obstacle that she has just overcome or will soon be facing. Basking in the sunlight, 'embedded in [her] existence, in [her] intimate knowledge of the solitude of the self'.[35]

So accomplished was Hopper at his craft that he could induce the most basic feelings of emptiness and longing with nothing more than rays of light. Although the use of light was essential to all his paintings, *A room by the sea* is unique in capturing an intense feeling of incompleteness, but also of hope, with nothing more than a door, a wall, a floor, the sea and a beam of light. The light only reaches

34 Ungles (n 31 above).
35 Proulx (n 29 above).

partly into the room – much of the floor and wall are left in shadow. On the right side we see the vast expanse of the sea, while on the left is the shadowed echo of a living room. The whole room seems to want to burst out and become one with the sea, yet it is constrained and can only admire its beauty and unbridled splendour while it is drenched in the sun's light. Later, when the sun continues its journey westwards, the light will fade and the room will be left alone again, hearing the waves, but seeing nothing. For its part, the light is stretching to explore the whole room, but can only reach so far, forever constrained by the angle of the wall and confines of the door.



But there is much more to Hopper's paintings than loneliness. Hopper himself is quoted as saying that 'the loneliness thing is overdone'.[36] A recent art critic agreed with him: [37]

> there is far too much seminar talk about alienation, isolation, and psychic dislocation. Of course, they are an essential part of Hopper and America. But it is Hopper's rapturous joy in his melancholy that really commands interest - isolation and despair being otherwise rather common, modern and dull.

This embracing of sadness is exactly what De Botton finds so magnetic and consoling about Hopper's work. Strangely, it is the apparent

[36] G Levin *Hopper's places* (1985) 6.
[37] Proulx (n 29 above) 12, quoting Mark Stevens (New York, 10 July 1995).

bleakness of Hopper's paintings that allows them to inspire, rather than depress. 'Perhaps' De Botton reflects, '[this is] because [his paintings] allow viewers to witness an echo of their own griefs and disappointments, and thereby to feel less personally persecuted and beset by them. It is perhaps sad books that console us most when we are sad, and the pictures of lonely service stations that we should hang on our walls when there is no one to hold or love'.[38] If De Botton is correct, and I believe he is, then every judge should have a Hopper painting on their wall.

Indeed, it is not difficult to imagine that any one of the figures in Hopper's paintings, the barman, the woman, the house, the room or even the light, is a judge who is burdened by the weight of their office. They are searching for the answer to a case, an answer they know they cannot justify. Indeed, the paintings tell a story.

After hearing a case, a judge leaves the court late at night and walks to an all-night diner. She orders a drink and enjoys the quiet and isolation. It allows her to think about the case, about what she must face before she comes to a decision. She is lonely and apprehensive, but determined ...

Next to the railroad, a judge is stuck deep in indecision, unable to find any solution she is lost in despair. Yet there is a 'poetry' in the despair as it is an indispensable part of the process that will lead her to his destination – decision. If we do not reach into the depths of our own depression, how can we properly acknowledge the sacrifice we demand of others?

A judge staring out of the window may, after a sleepless night, have finally reached a conclusion. The sunlight is purging her of all her doubts and giving her the resolve to stay the course while she continues to regret the sacrifice she must make ...

The sacrifice is made. The judge strains to fully acknowledge it. She reaches, stretches for that elusive trace of a trace at the heart of the heart. So close, coming together, but never complete, always absent. As it should be.

Perhaps it is possible, as the story suggests, that through lonely reflection alone a judge can come to acknowledge sacrifice, but as I will argue later, it is more likely (and more fun) that the judge's loneliness must be transformed into laughter to fully appreciate the depths of sacrifice. But the journey through loneliness remains a vital stage to reach our destination.

[38] De Botton (n 30 above) 1.

5 Madness

> If the [judge] ... must pass through hell, then she must affirm the price that the Dionysian poet has to pay – loneliness and madness.[39]

As a result of the comforting melancholy of Hopper's paintings, De Botton argues that[40]

> [i]t's a curious feature of Hopper's work that though it seems concerned to show us places that are transient and unhomely, we may, in contact with it, feel as if we have been carried back to some important place in ourselves, a place of stillness and sadness, of seriousness and authenticity: it can help us to remember ourselves. How is it possible to forget 'oneself'? At stake is not a literal forgetting of practical data, rather a forgetting of those parts of ourselves with which a particular sense of integrity and well-being appears to be bound up. We have many different selves, not all of which feel equally like 'us', a division we confront most clearly in relation to our physical appearance, where we may judge that the person a photographer has captured, while something to do with the being bearing our name, in fact has very little connection with the spirit and attitude we would choose to identify with. This visual dynamic has a psychological equivalent, for within our minds too, we are made aware of constellations of ideas and moods distinct enough to feel different personalities – an inner fluidity which can on occasion lead us to declare, without any allusion to the supernatural, that we are not feeling as if we are ourselves.

This feeling of separation from 'ourselves' is a natural consequence of loneliness. But it also betrays a hint of madness. Loneliness always creates a separation from normality that causes our minds to work in different ways and our eyes to see things differently. The loneliness of the judge may also alter his perception of law. He might even lose it.[41]

> Have you not heard of the madman who lit a lantern in the bright morning hours and, like Diogenes searching for an upright man in the Agora, ran to the marketplace and cried: 'I seek Law! I seek Law!' Whither is Law? I shall tell you: we have killed him – you and I.

This journey through loneliness is necessitated by the dilemma of the unjustifiability of law and the need to acknowledge sacrifice and leads to the possibility of madness. It also leads us to Jacques Derrida. While Van der Walt is concerned about the unjustifiability of judicial decision making, Derrida, although following a similar line of thinking, requires more than mere acknowledgment to discover the traces of justice. He requires a madness. It is therefore vital that those who

39 A Gearey 'African Nietzsche: Poetry, philosophy and African legal thinking' (2003) 24 *Cardozo Law Review* 913.

40 De Botton (n 30 above) 4-5.

41 F Nietzsche *The gay science* (1974) at Book III para 125, as altered in J Yovel 'Gay science as law: An outline for a Nietzschean jurisprudence' (2003) 24 *Cardozo Law Review* 638 (the word 'God' has been replaced with the word 'Law').

enter his castle of deconstruction do so with a lonely and empty mind that can easily be unhinged.

But first, some clarity. Derrida argues that 'for a decision to be just and responsible, it must, in its proper moment, if there is one, be both regulated and without regulation, it must preserve the law and also destroy or suspend it enough to have to reinvent it in each case'.[42] This contradiction means that all legal decisions (possibly all decisions!) are undecidable. A decision can never be fully regulated and unregulated, it always flows from a rule or establishes a new rule, never both fully and simultaneously. A decision can therefore never be '*presently* just, *fully* just'.[43] Decisions approach justice but never touch it. Indeed, the ghost of the undecidability never leaves, it haunts forever the 'decision' so that nobody 'will ever be able to assure and ensure that a decision as such has taken place'.[44]

Coupled with this insight, Derrida insists, in the same vein as Van der Walt, that just decisions demand a gift in the true sense – 'a gift without exchange' – to fulfil the duty to the other and that such unanswerable justice, which is akin to deconstruction, is in itself a madness.[45] Finally, Derrida acknowledges that justice as impossibility rests on the horizon, reclines in the 'not yet'. It is this very unattainability that defines justice. 'Yet' at the same time 'justice, however unrepresentable it remains, does not wait. It is that which must not wait.'[46] A just decision must be immediate and infinitely postponed – must at once embody and deny all that came before it – must exist in the past, the present and the future all at once!

After trying to accept all these contradictions that are the hallmark of the 'justice is deconstruction' model (if one can speak of models and Derrida in the same breath) that Derrida advocates, it is easy to conclude, as he does, that '[t]he instant of decision is a madness ... that must rend time and defy dialectics.'[47] It is an instant in which not only rules disappear, but the instant between a rule and a non-rule vanishes into non-time so that there is only a cloud of uncertainty and undecidability. Yet out of this cloud must come a decision, must emerge justice. It seems that madness in decision-making is not only a consequence of the nature of Derridean justice, it is a prerequisite – the madness of the instant of the decision of justice lights the spark in the justice's ghost that emerges as a bolt of lightning from the cloud of unknowability!

42 J Derrida 'Force of law: The mystical foundations of authority' in *Acts of Religion* (2001) 251.
43 n 42 above, 253.
44 n 43 above.
45 n 42 above, 254.
46 n 42 above, 255.
47 n 46 above.

Sounds good. But what does it mean? My difficulty with Derrida has always been fairly simple. I agree with him on a theoretical level. Justice 'is' the unattainable contradiction of rules, responsibilities and time – but how does that translate into a change in the current approach to judicial decision-making? Derrida (purposefully I am sure) offers no practical suggestions on how judges should approach their work to ensure more 'just' 'decisions'. I am sure Derrida would respond to any request for guidelines with a laugh and possibly a brief explanation that a practical guide to achieving justice in decisions would prevent justice in decisions. Justice cannot be learnt or taught or predicted, to think so is to deny the very essence of justice. The core of the decision is the denial of rules, the abandonment of direction, an embrace of insanity.

Surely the madness that Derrida talks about is not a literal requirement? Can it mean that in order to extract a just decision from the madness of decision, one must in fact be mad? Surely not? But maybe something similar?

I can hear Derrida's ghost laughing at me ...

6 Laughter

> Perhaps I know best why it is man alone who laughs; he alone suffers so deeply that he had to invent laughter.
>
> Friedrich Nietzsche

Laughter, especially when it is brought on by loneliness or depression, is the closest most of us will come to madness. As will become clearer later, laughter is, like madness, a suspension of reason. Perhaps the only difference is that laughter is more temporary than madness. But laughter is hardly associated with law or with judges. The law is a dignified, sombre and serious profession. What role can laughter play in the lofty hallways, dusty libraries and three-piece suits of the legal world? More than you would think.

Humour has for centuries been part of (at least the Anglo-Saxon) judicial tradition. It has not always been encouraged, but it has flourished nonetheless. However, before I begin with an examination of the place of judicial humour in the legal landscape, I would like to offer the reader a few prize extracts from the often dusty and boring pages of the law reports. The first example is a judge's response to a defendant's claim on the charge of sheep-stealing that the sheep killed itself by rubbing its neck against a sharp rock: [48]

> [T]hat is a very plausible suggestion to start with, but having commenced your line of defence on that ground, you must continue with

[48] Quoted in M Rudolph 'Judicial humour: A laughing matter?' (1989) 41 *Hastings Law Journal* 180.

> it, and carry it to the finish. And to do this you must show that not only did this sheep commit suicide, but that it skinned itself and then buried its body, or what was left of it, after giving a portion to the prisoner to eat, in the prisoner's garden, and covered itself up in its own grave. I don't say the jury may not believe you; we shall see. Gentlemen, what do you say? Is the sheep or the prisoner guilty?

This next example is the full text (including footnotes) of *Brown v State*:[49]

> The D. A. was ready
> His case was red-hot.
> Defendant was present,
> His witness was not.
>
> He prayed one day's delay
> From His honor the judge.
> But his plea was not granted
> The Court would not budge.[50]
>
> So the jury was empanelled
> All twelve good and true
> But without his main witness
> What could the twelve do?[51]
>
> The jury went out
> To consider his case
> And then they returned
> The defendant to face.
>
> 'What verdict, Mr Foreman?'
> The learned judge inquired.
> 'Guilty, your honor.'
> On Brown's face-no smile.
> 'Stand up' said the judge,
> Then quickly announced
> 'Seven years at hard labor'
> Thus his sentence pronounced.
>
> 'This trial was not fair,'
> The defendant then sobbed.
> 'With my main witness absent

49 134 Ga App 771 (1975).

50 I profoundly apologise to Judge Sol Clark, of this Court, for invading the field of innovation and departure from normalcy in writing opinions; especially in the copious use of footnotes.

51 This opinion is placed in rhyme because approximately one year ago, in Savannah at a very convivial celebration, the distinguished Judge Dunbar Harrison, Senior Judge of Chatham Superior Courts, arose and addressed those assembled, and demanded that if Judge Randall Evans Jr ever again was so presumptuous as to reverse one of his decisions, that the opinion be written in poetry. I readily admit I am unable to comply, because I am not a poet, and the language used, at best, is mere doggerel. I have done my best but my limited ability just did not permit the writing of a great poem. It was no easy task to write the opinion in rhyme.

I've simply been robbed.'

'I want a new trial-
State has not fairly won.'
'New trial denied,'
Said Judge Dunbar Harrison.

'If you still say I'm wrong,'
The able judge did then say
'Why not appeal to Atlanta?
Let those Appeals Judges earn part of their pay.'

'I will appeal, sir'-
Which he proceeded to do-
'They can't treat me worse
Than I've been treated by you.'

So the case has reached us-
And now we must decide
Was the guilty verdict legal-
Or should we set it aside?

Justice and fairness
Must prevail at all times;
This is ably discussed
In a case without rhyme.[52]

The law of this State
Does guard every right
Of those charged with crime
Fairness always in sight.

To continue civil cases
The judge holds all aces.
But it's a different ball-game
In criminal cases.[53]

Was one day's delay
Too much to expect?
Could the State refuse it
With all due respect?

Did Justice applaud
Or shed bitter tears
When this news from Savannah

52 See *Murphy v State* 132 Ga App 654-658, 209 SE2d 101, wherein a well-written and well-reasoned opinion discusses the reasons why a denial of motion to continue in a criminal case was erroneous and subject to reversal.

53 See *Hobbs v State* 8 Ga App 53, 54, 68 SE 515, where it is demonstrated that a motion to continue in a criminal case must not be judged with the same meticulous severity as in civil cases.

> First fell on her ears?
>
> We've considered this case
> Through the night - through the day.
> As Judge Harrison said,
> 'We must earn our poor pay.'
>
> This case was once tried-
> But should now be rehearsed
> And tried one more time.
> This case is reversed.

The next three examples are all short extracts from judgments by Judge Kozinski who has become somewhat infamous for his judicial wit. The first relates to a government informer while the last two speak for themselves.

> Miller was a prostitute, heroin user and fugitive from Canadian justice; but otherwise she was okay.[54]
>
> ***
>
> We answer unequivocally: yes and no.[55]
>
> As a linguistic matter, 'and' and 'or' are not synonyms; indeed, they are more nearly antonyms. One need only start the day with a breakfast of ham or eggs to be duly impressed by the difference.[56]

There seems to be divided opinion about the appropriateness of humour in judicial decisions. On the one hand, there are those who regard judicial humour as 'an *enfant terrible* that, like any undisciplined child, amuses its inordinately tolerant judicial "parents" at the expense and dismay of the rest of society'.[57] They argue that humour in judicial opinions is disrespectful to the litigants of the specific case and to society's perception of the law as a solemn and dignified institution. The important interests at play in any case demand that, '[h]owever amusing someone else's dispute may be, it is anything but funny to have one's own right to property, liberty, or, good reputation determined by a judge'.[58] Marshall Rudolph (an unfortunate humour-impaired[59] ex-student of Stanford University)

54 *United States v Simpson* 927 F 2d 1088, 1089 9th Cir (1991).
55 *United States v Redondo-Lemos* No 90-10430, slip op 1149, 1152 9th Cir (1992).
56 *MacDonald v Pan Am World Airways Inc* 859 F 2d 742, 746 9th Cir (1988) (Kozinski J dissenting).
57 Rudolph (n 48 above) 178.
58 n 48 above, 179.
59 For more on humour-impairment, see D Golden 'Humor, the law and Judge Kozinski's greatest hits' (1992) *Brigham Young University Law Review* 509 n 7.

has gone so far as to suggest that the American Code of Judicial Conduct should be amended to include the following provision:

The use of humor in a judicial opinion is inappropriate if:

> (a) a reasonable litigant would feel that he or she had been made the subject of amusement, or
>
> (b) opinion utility would be compromised by the humor.[60]

In the other camp, some jurists see judicial humour as generally harmless and sometimes useful. Indeed, the best time for judges to stray from the traditional, solemn approach to legal writing is when they can 'subtly use wit or satire to articulate complex points of law'.[61] In the slightly different context of legal journals, Knight has argued that a dash of humour would make generally tedious articles more bearable[62] ... and prevent headaches.[63]

As I see it, there is indeed a place for judicial humour. The presence of humour in a judicial decision automatically calls into question the hallowed, unquestionable status of the law. It returns the law to earth and opens up in it more honest spaces for interpretation and dissent, but, more importantly, for enjoyment and laughter. I cannot improve on the following passage by Justice Sachs to explain what I mean:[64]

> A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. It enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an exilir of [judicial] health.

However, as the same Sachs J notes one paragraph earlier, 'laughter too has its context. It can be derisory and punitive, imposing indignity on the weak at the hands of the powerful'.[65] Courts are indeed in a position of power and that position should not be abused to unnecessarily mock litigants for the personal amusement of judges. But at the same time, as will appear more fully below, humour is an

60 Rudolph (n 48 above). Seriously. Golden's response to this needs no addition. 'This is great! We endow our judges with power to adjudicate disputes involving life, liberty, and property. But we stop right there! We will tolerate no wit in an opinion. We cannot trust judges to use their discretion in anything so life and death as humor. And we will have absolutely no "compromised opinion utility" (whatever that is). We have standards!' Golden (n 59 above) 512.

61 Golden (n 59 above) 514. On the contrary, '[a] judicial opinion designed solely to invoke a laugh would be as substantively deficient as a poem about pig lard. Although the opinion would be memorable, it would have no impact on the law.'

62 JT Knight 'Humour and the law' (1993) *Wisconsin Law Review* 900 n22.

63 n 62 above, 900 n 18.

64 *Laugh It Off Promotions CC v Sab International (Finance) Bv t/a Sabmark International* (*Freedom of Expression Institute as amicus curiae*) 2006 1 SA 144 (CC) para 109.

65 n 64 above, para 108.

indispensable tool in the search for justice. It is a fine line to tread that is best expressed by this passage by De Botton in an essay 'On comedy': [66]

> Rather than *mocking* us for our concern with status, the kindest comics *tease* us: they criticise us while implying that we remain essentially acceptable. Thanks to their skills, we acknowledge with an open-hearted laugh bitter truths about ourselves that we might have recoiled from in anger or hurt had they been levelled at us in an ordinary, accusatory way.

As amusing and welcome as judicial humour is, humour has a decidedly more central part to play in law than brightening up unbearably dull law reports. In the hands of legal academics and legal practitioners (and hopefully judges!) humour is a tool to challenge and redefine the law by exposing, as incisively as possible, its shortcomings. That role is best illuminated by examining the work of Goodrich.

In his study of satire, Goodrich offers 'three theses' that describe the extent of the role that humour, and satire in particular, play in law.[67] Before we move to address Goodrich's three theses directly, we must ascertain what precisely he means by 'satire'. Goodrich embarks on an extensive examination of the origin and historical development of satire from its Greek and Roman origins in religious theatre to it's inception in England and it's spread to the rest of the world. Satire has certain decidedly religious and moralistic roots that in the past operated to pull man-made law back to its God-made counterpart, 'to restore moral order ... and thereby draw the listener back from evil'.[68] While it maintains many of its restorative and stabilising ancestry, the varied history of satire means that it has a 'slightly ambivalent definition' which is, considering its function, appropriate. Satire has always been bound to law in a symbiotic relationship, the one feeding off the other; the one cannot exist without the other. In the legal context, then, satire plays many roles: it challenges and attacks law, exposes the limits of law, and introduces an outside of law within the domain of legality and through all this supports and fosters the law.[69] Ultimately perhaps, satire is about the questioning of power and the revelation of its vulnerability.

To return now to Goodrich's theses. We begin with the argument that 'all effective humour is satirical'. Law is characterised by solemnification – it is a place for reason, serenity and decorum from which all humour and levity must be expunged to maintain its

66 De Botton (n 30 above) 55.
67 P Goodrich 'Three theses on the unbearable lightness of legal critique' (2005) 17 *Law and Literature* 293.
68 n 67 above, 297-298, quoting G de Conches *Glosae in juvenalem satiras* (*circa* 1135) 89.
69 Goodrich (n 67 above) 300.

purity.[70] This solemnity combined with the pervasiveness of law is precisely why humour, to be effective, must be satirical:[71]

> All humor is satirical in that it is directed at something that is either individually or collectively laughed at so as to restore or subvert an order, practice, or norm. In either case, whether conserving or exploding convention, humor laughs at or laughs with and simultaneously at those outside the group, and external to the faith, the illicit, the illegitimate, the outlawed and outlandish. Whether good is bad or bad is good, humor threatens order and it is precisely the non-conformist use of humor, the exemplar of satire, that institutes the category of the unbound or of the outsider ... Levity and humor are alike denounced as discomposing order and confusing hierarchy. They are irrational because they refuse to recognise the solemnised site of rational worship.

In brief, humour is only funny if it subverts what we know and expect - the essence of satire. For de Botton recognising this nature of humour entails that '[t]he underlying, unconscious aim of comics may be to bring about – through the adroit use of humour – a world in which there will be a few less things to laugh about.'[72]

The next thesis states that all satire is juridicial. As Goodrich himself notes, this thesis flows easily from the first thesis and his historical exposition of satire.[73] By challenging existing law, satire of necessity also asserts the primacy of an alternative 'higher' law or morality with which human law fails to comply: 'Satire engages most profoundly with divine law and with the law of nature because laughing at the extant order, ridiculing the hierarchy or institutions of government necessarily places the political order in question and implicitly challenges what medieval lawyers termed the beauty of rule.'[74] But satire is not a normative project – there will never be a law that it will not subvert. Satire is not beholden to any particular

70 n 67 above, 303-4. Goodrich later refers to law as resting on 'an attitude of faith, a sanctity prior to law, a hieros or holy space, a gap that founds the hierarchy of law and the descending order of norms' the challenging of which is the satirical task par excellence' (n 67 above, 309). This notion correlates with Derrida's ideas about the 'mystical foundations of authority'. According to Derrida, '[t]he authority of laws rests only on the credit that is granted them. One believes in it; that is their only foundation. This act of faith is not an ontological or rational foundation' (n 42 above, 340). What is important about this similarity is that if satire can challenge and expose Goodrich's 'holy space', it can do the same to Derrida's 'mystical foundation'.

71 Goodrich (n 67 above) 304-5.

72 De Botton (n 30 above) 56.

73 Goodrich (n 67 above) 306.

74 n 67 above, 307. Goodrich uses the imagery of the closet and clothes to describe how satire works. Satire is about looking into the closet or through the clothes to find the imperfect reality within (309-10). A satirist for Goodrich is 'someone, anyone who is willing to stare through the veil of social presence, solemnity and authority, at the closeted individual, the fragile body that subtends it' (311). The king, for example, exists as king only because of his crown and sceptre and the other signs that identify him as king. A judge is only a judge because of his robes (even if they are green!). The satirist looks past the external signs to see the person behind them.

set of natural laws, but to the ideal of natural law that is forever unattainable. This idea of an unattainable natural law is not new – Derridean justice and Douzinasian human rights[75] are virtually indistinguishable. What Goodrich brings to the party is the link of the ideal to a method: satire.

The final leg of the argument is that 'all law is vulnerable to humour' which Goodrich bases on 'unpacking the verbal closet of law'.[76] The fundamental indeterminacy of all language, including legal language, can easily be exploited by the satirist. The law is particularly vulnerable to this line of attack because it relies on words as the central part of its sacred ritual. By undermining the meaning of words, satire destabilises the sacred – removing the veil for all to see.[77]

And now we have stripped all the layers of the onion and we are at its centre. All the tears have been shed. We are nearing the end.

The interaction of humour and the law described above is important – humour in judicial decisions and satire in our approach to law are fantastic, exciting, radical goals. They will engender a more plural, more reactive law. More importantly, they make it possible for judges, and the whole legal fraternity, to laugh in and at the law. That is vital. But someone has yet to have the last laugh.

I described above the madness of decision that Derrida describes and those impossible contradictions that create that madness. I also suggested that laughter might offer a clue for judges to embrace (without suffocating) the madness that is the condition for justice. I do keep my promises.[78]

No laughter then without a crossing of boundaries, an implicit judgment, and an overturning of the norm.[79]

The satire and the humour described are the condition for laughter, but it is the laughter itself that is the trace of decision in our undecidability. Laughter has been described as an 'involuntary convulsion of the body' that has 'an imperious force of its own.' This force (dis)connects us not only from reason – for laughter is the very negation of reason – but from time and from the need for recognition.

75 See C Douzinas *The end of human rights* (2005).
76 Goodrich (n 67 above) 312.
77 This framework for the application of satire in law is not just a theory. Goodrich has also undertaken an extensive study into the practice of 'Satirical Legal Studies' (SLS) throughout history. He has identified a number of themes and schools of SLS, although the movement did not exist until he created it. P Goodrich 'Satirical legal studies: From the legists to the lizard' (2004) 103 *Michigan Law Review* 397.
78 Although I am sometimes late.
79 Goodrich (n 67 above) 301-302.

Laughter is not rational – cannot be rational – we can laugh only when reason departs, indeed that is the reason why we laugh. Laughing also transports us to a different time – a time of which is completely removed from where we were, because we were in reality, and laughter cannot exist in reality. There is no room for reality when we laugh, and no room for laughter when we are real. We become so completely consumed by laughter that everything stops. The world stops spinning. Our hearts stop beating. And we laugh.[80] Normal time continues, but we are not a part of it. We must abandon and submit to the (dis)location, of reason of law of life of love of dreams of banana peels of three men sitting in a bar of a dead parrot, that caused our laughter before we can return to 'normal' time.

And in that laughing time and space there is no more impediment to giving uncontrollably, unreservedly 'without exchange, without circulation, without recognition or gratitude'.[81] In the absence of reason and time the ghost of hospitality comes to visit. (If you were a ghost, would you not rather visit a laughing man than a crying one?) Derrida tells us that 'giving oneself in hospitality entails deciding to expose oneself and offering oneself, giving oneself, but this decision cannot remain mine, because if I master this decision I do not give anything'.[82] But that is the beauty of laughter – it is involuntary! We do not 'choose' to laugh – cannot choose. It is in laughter that the scent and the trace (the scent that is the reality, the trace that is the whole) of madness and of hospitality, of justice and of fully-acknowledged sacrifice reside.[83]

That is not to say that every decision made while laughing is just, nor that all a judge needs do is get his clerk to tell him knock-knock jokes while he works. Firstly, knock-knock jokes are not very funny. But even if they were, it is not laughter as a physical action but laughter as a mental attitude that judges should cultivate: laughter as a constant appreciation and creation of humour and satire. The opening up of all law and understandings of law to the full force of judicial wit and critical satire can only help to breed judges who take themselves and the law slightly less seriously. Judges must become complicit, no, active, in destroying the hallowed, unapproachable

[80] The time of laughter is different to the 'time of reconciliation'. That time is 'marked by a Heideggerian "whiling" or lingering (*verweilen*) with fellow mortals' while the time of laughter is not one of waiting or of doing, but of being. J van der Walt 'The time of reconciliation' (2004) 19 *South African Public Law* 583.

[81] Derrida (n 42 above) 254.

[82] J Derrida 'Accueil, Éthique, droit et politique' in Seffahi (ed) *Manifeste pour l'hospitalité* (1999) 152, as quoted and translated in J van der Walt 'The (im)possibility of two together when it matters' (2002) *Journal for South African Law* 475.

[83] All these factors only apply 'within the laughter'. As Van der Walt writes: 'Outside the play of the political event singularity again gets displaced by unity' Van der Walt (n 80 above) 577. Laughter is a political event.

corridors of the law. They must laugh them to the ground. Not because the problems of litigants or of legal principle are trivial or amusing, but simply because the only way a judge can truly, honestly take his job seriously, is not to.

7 Conclusion

> I think the next best thing to solving a problem is finding some humour in it.
>
> Frank A Clark

I honestly believe that an approach of judicial laughter can solve all the problems that I have arrayed against it. Laughter is nothing if not honest and can easily be candid about justification. Laughter can help to overcome the inevitable Hopperesque loneliness of judicial office and thereby lead them to the best manner of acknowledging sacrifice, through humour rather than depression. However, the loneliness of office cannot be avoided; it is a vital ingredient for judicial humour and a condition for justice through sacrifice. It is the absurdity and impossibility of a judge's position that should help him find something to laugh at. Finally, laughter creates the possibility for a 'just madness' – a madness of decision-making in which all the contradictions of Derridean justice can be traced and retraced back to the madness of laughter.

But even if I am wrong – at least it was fun!

THE STRUGGLE FOR RECOGNITION AND THE POLITICS OF IDENTITY: A FEMINIST JURISPRUDENTIAL APPROACH TO *PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA V HUGO*

*by Amit Parekh**

1 Introduction

Equity feminism characterised by an almost egalitarian idealism, raises an irreconcilable paradox: is it possible to be egalitarian or profess to be fighting for equality when presenting a view of the world solely from a woman's perspective; impoverished from the very thing it desires? It is this ideological framework under which this paper seeks to redress the majority judgment made in *President of the Republic of South Africa v Hugo*.

2 Facts and judgment

In *President of the Republic of South Africa v Hugo,*[1] the then South African President granted a remission of prison sentences in respect of all imprisoned mothers who had minor children below the age of 12 years old. This was in terms of the Presidential Pardon Act 17 of 1994. The Constitutional Court ruled that the Act did not amount to unfair discrimination against imprisoned fathers of minor children.

3 The struggle for recognition and the politics of identity

Two approaches to law, feminist legal theory and critical race theory are sometimes considered together under the label 'outsider jurisprudence' because they can both be seen as emanating from the same core problem: '[t]he extent to which the law reflects the perspective of and the values of white males and the resulting effects on citizens and on members of the legal profession who are not white males'.[2]

This therefore highlights the defining premise of the contemporary feminist theory – that is, that we live in 'a male-dominated culture', and that the feminist agenda as well as the goal

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[1] 1997 4 SA 1 (CC).

[2] S Brewer 'Introduction: Choosing sides in the racial critique debate' 103 *Harvard Law Review* 1850–1851.

of the feminist jurisprudence is not equal treatment of all 'persons', but redistribution of power and assets from the 'oppressor class' (men) to the 'oppressed class' (women), thereby stripping men of their rights, so as to 'equalise' the 'power disparity' they claim exist.

Even 'equity feminism' (or commonly referred to as the 'second wave feminism'), which seeks to be distinguished (from its other ideological counterparts) as egalitarian, raises an irreconcilable paradox - an oxymoron on the grandest scale: it is impossible to be egalitarian or to profess fighting for equality when presenting a view of the world solely from women's perspective. It is this very ideological framework under which this paper seeks to redress the majority judgment in the case of *President of the Republic of South Africa and Another v Hugo*.

In light of the convictions made by feminist proponents, consideration must consequently be given to societal pressure placed upon men in traditional popular culture. The ensuing result of such a miss-conceptualisation about men has been always to keep a stiff upper lip through the repression of deeply-seated emotions – thus obviating the chances of exposing oneself to vulnerability; thereby causing considerably higher suicide rates and cases of depression and other psychiatric phenomena.

Further, whilst feminism seeks to remove itself from its own and super-imposed male ideological shackles, many proponents often lose sight of the fact that men, so too, gain sexual hegemony through the reinforcement of the mytho-anthropological hunter-gatherer scenarios of men risking their lives for their family, whose domestic life is managed by women. Since fathers transmit their views of life to their sons, a strict political-economic order is maintained – thus marginalising the rights of single fathers in contexts in which men are the sole breadwinners.

However, as will be elucidated below in my analysis of the *Hugo* case, it must be determined whether or not the stereotypes entrenched amongst civil society, in which men should never be seen or heard to complain or feel ashamed if victimised by a female partner or wife, have been swept under the dark recesses of society's heavily interweaved carpet – tainted by stains and spillages of deeply-seated stigmas, associations and ideological fallacies.

It is the author's contention, therefore, that by reinforcing such stereotypes, to which Kriegler J dissents in his judgment, men are not allowed to 'compete' with women for the status of societal 'victims,' as men are conditioned to be responsible (traditionally seen as the primitive hunter-gatherer and protector) so they automatically 'lose'.

Placing this in the context of *Hugo*, with the resultant finding that the remissions of 440 female prisoners as opposed to no remission for male prisoners is not unfair discrimination, despite the judgment

being based upon an often-misconstrued, misappropriated and outdated stereotype[3] of women bearing sole child-rearing duties. In this way, it is my contention that such an assertion by liberal feminists rejects any possible claim by proponents of the Queer Theory – one which focuses upon the capabilities and rights of gay men to foster an environment which is capable for the healthy upbringing of children.[4]

In this way, the postmodernist questioning of what it means to be a '(wo)man' is brought to a brilliant intellectual crescendo.[5]

Feminists assert that history was written from a male point of view and does not reflect women's role in making history and structuring society. 'Male-written history has created a bias[6] in the concepts of human nature, gender potential, and social arrangements'[7] of which men and women must stereotypically adhere to. Such a contention is no more apparent than in the language, logic and structure of the majority judgment in *Hugo* in which male values are reinforced, and which at the same time denies men any chance of ever receiving parental rights on the basis of equality.

By presenting male characteristics as a 'norm' and female characteristics as a deviation from the 'norm', prevailing conceptions of law reinforce and perpetuate patriarchal power.

However, in the *Hugo* case, the contrary seemed more apparent, the very notion that: 'women are to be regarded as primary care-givers of young children is a root of inequality in our society … relegates women to a subservient occupationally inferior yet increasingly onerous role'.[8]

This highlights that it is not the celebrated patriarch who holds women to such a role, but rather the women *in casu* who, in seeking such remission, rely on a stereotype. It may be said therefore that the assertion that such stereotypical denigration is all too often not necessarily perpetrated by the hands of men, but rather women; women who often complacently fall upon such a role as their God-given duty, thereby necessitating their release: ' ... the benefits in this case are to a small group of women – the 440 released from prison

3 *Hugo* (n 1 above) 37B.

4 C Albertyn 'Feminism and the law' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 308, where it has been argued that the 'radical assumption that gender is the sole or dominant form of oppression has masked other inequalities such as race, class or sexual orientation'.

5 See in this regard V Woolf's *Orlando*.

6 This is of fundamental concern for liberal feminists who 'challenge the content rather than the form of the law' - a duality challenged by postmodernism which sees the eradication of gender bias not indispensable to 'neutral and impartial institutions'.

7 'Feminist jurisprudence' http://www.law.cornell.edu/wex/index.php/Feminist_jurisprudence (accessed 24 June 2007).

8 *Hugo* (n 1 above) 37B-C.

– and the detriment is to all South African women who must continue to labour under the social view that their place is in the home'.[9]

In this way, the prejudicial implications of sexual subservience are not only cast upon by the bench in their reinforcement of patriarchal values, but the women in question – who like anyone regardless of their sex – could have asked that each case be weighed on its merits, thereby looking at the women's subjective experiences and realities as women and not as child-bearers capable only of fulfilling maternal duties and not self-actualisation. Rather, as will be contended, the court simply cast upon them (and consequently men) a baby blanket dampened by the stench of generalisation of short-sightedness.

Feminists challenge the belief that the biological make-up of men and women is so 'different that certain behaviour can be attributed on the basis of sex'. Gender, feminists say, is created 'socially, not biologically'.[10] Sex determines such matters as physical appearance and reproductive capacity, 'but not psychological, moral, or social traits'. Is it therefore not contradictory, as purported in the majority judgment in the *Hugo* case, that women, stereotypically speaking, are the ones who bear child-rearing responsibilities?

If gender is simply an ideological construct by society, then why are male inmates subjected to judicial scrutiny through separate and independent applications which are scrutinised further through means testing in which to prove their child rearing capabilities and women not? Is this not reinforcing patriarchal stereotypes? Ultimately, this highlights, perhaps pre-emptively, the sameness-difference debate (which will be engaged with further) where in this case both men and women are incarcerated for the 'same' reason – their conduct - whether directly or indirectly - contravened state law and thus they are both, regardless of the sex or gender, subject to sanctions.

Why, then, should women be treated differently when they in fact are incarcerated for the same fundamental reason? To my mind, therefore, such an implicit understanding of such a proposition as propounded in the *Hugo* judgment contradicts the very foundation on which the rule of law is based, further enshrining gender-based distinctions in both legal theory and practice.[11]

This in the author's opinion highlights a severe discrepancy in feminist theory – the irreconcilable difference of what is written and discussed in long corridors of academia, and what happens in practice when male and female rights are invariably pitted against one another.

9 *Hugo* (n 1 above) 38D.
10 n 7 above.
11 Albertyn (n 4 above) 292.

Thus, if sex only serves scientific purposes, socially and morally speaking, men are just as, if not more, capable of attending to the responsibilities of child maintenance. Recent trends in family law, for example, highlight such an assertion in that the overwhelming population of men who find themselves in custody disputes pay child support for children they have not and will not see.[12]

Such a state of affairs is abhorrent and begs the question whether or not there exists institutionalised bias by members of the judiciary, as in the *Hugo* case, who still continue through their judgments to reinforce the patriarchal stereotype of which feminists seek to rid themselves, which is that they are the only ones capable of child-rearing duties, thereby perpetuating perceptions relating to maternal duty, and not the fathers who have been biologically, emotionally and spiritually instrumental in the creation of the child, but who is now simply seen as an omniscient financial transaction which occasionally may take a human form and be 'lent' to him for a weekend or during the school holidays. To my mind, therefore, the sentimentality often accorded to 'the best interests of the child' is simply a homage to women clad in political correctness, as often, according to judges, the best interests of the child is that their custody be awarded to their mother.[13]

This highlights my contention that mothers are not given rights to their children because of their personal disposition to empathy and support, but because of heavily entrenched constructs purported by the majority of society. In other words, the women in *Hugo* are not given a remission of sentence because they are capable, enduring mothers but because, quite simply, they are women. In this way, the reasonable person could quite simply assert that such a justification for the remission is blatantly discriminatory.

This point was also poignantly elucidated by Kriegler J, who contended that the

> President nowhere mentioned that it was his purpose to benefit women generally or the release of mothers in particular. There is no suggestion of compensation for wrongs of the past or an attempt to make good past discrimination against women. On the contrary, the whole thrust of the President's affidavit for the main supporting affidavit is the interests of the children. The third category of prisoners released under the Act was not women in their own right but solely in their capacity as perceived child minders.

12 See *Fraser v Childrens Court, Pretoria North & Others* 1997 2 SA (CC) para 261 in respect of a provision of the Child Care Act which dispensed with the father's consent in the adoption of his illegitimate child. This section was found to constitute unfair discrimination.

13 See *Van der Linde v Van der Linde* 1996 3 SA 509 (O) 515A-B, where the maternal preference rule is closely scrutinised; and *Madiehe v Madiehe* 1997 [2] All SA 153 (B) 157F-G, where such a principle was rejected.

Thus, in the *Hugo* case, the 440 women themselves, in terms of their application under the Act, rely upon such a stereotypical construct – which then begs the question, who is reinforcing the entrenchment? Is it men? Or is it the women *in casu* who relied upon such an ideological premise?

Even if we accept that women have assumed this role because of societal conditioning, this would highlight another discrepancy in feminist discourse, namely that women are free autonomous individuals with the capacity to make meaningful choices, which govern their lives. Thus, the notion of the 440 women relying upon such a stereotypical construction negates such an argument by proponents of equity feminism.[14]

It is my view that, whilst men are to be blamed by some for the repression of women and their subsequent relegation to sexual subservience, in the twenty-first century there exists a misguided animosity towards all men as being chauvinistic bigots. What feminists must reappraise, instead, is whether they wish to be seen as individual and autonomous beings capable of making choices with their own implications without being tested against the controversial reasonable 'man', or do they wish, as in the *Hugo* case, to rely upon self-perpetuated ideologies of women as child bearers? I am by no means implying that women should therefore be forced to choose between their careers and their children, but this choice is common place. The title of child-bearer and 'maternal deity' is therefore often used and manipulated in what I believe to be the wrong contexts.

The act of being a mother, according to feminist discourse, has always been seen as a demeaning and unworthy profession. If (wo)men change their perception to such a position, then perhaps some of the social connotations of being such a contributory member of society may subside. However, as long as men and women perceive being a stay-at-home mom as an intellectually and physically inferior task, (wo)men will forever entrench their own social demise. Again, this point is emphasised by Kriegler J who states: 'Reliance on the generalisations that women are primary care givers is harmful in its tendency to cramp and stunt the efforts of men and women to form their identities freely.'[15]

Though feminists share common commitments to notions of women's equality with men (how much is often ambiguous), feminist jurisprudence is not uniform in its construction of the importance and/or relevance to the female rights discourse. There are three

[14] Post-modern jurisprudence sees this disposition as a resultant effect of the way scholars and legal discourse have portrayed women. See in this regard C Smart *Feminism and the power of law* (1989).

[15] *Hugo* (n 1 above) 37E-F.

major schools of thought within feminist jurisprudence. Traditional feminists assert that women are just as rational as men and therefore should have an equal opportunity to make their own choices. Liberal feminists challenge the assumption of male authority and seek to erase gender-based distinctions recognised by law, thus enabling women to compete in the marketplace. What strikes me as ironic, however, is that by seeking to extinguish the primitive flames of gender-based distinctions in terms of women's rights, the invariable consequences is the creation, as highlighted in *Hugo,* of further gender-based distinctions which reaffirm male inadequacy in child rearing and maintenance.

Another school of feminist legal thought, cultural feminists, 'focuses on the differences between men and women and celebrates those differences'.[16] This group of thinkers asserts that 'women emphasise the importance of relationships, contexts, and reconciliation of conflicting interpersonal positions, whereas men emphasise abstract principles of rights and logic'.[17]

The goal of this school is to give 'equal recognition to women's moral voice of caring and communal values'.[18] However slightly embittered, how is it possible to celebrate such differences when such difference is what impugns gender-based discrimination and ideological loggerheads? The question which ensues therefore is that, in light of common characteristics of both sexes and genders, is it possible to deliver a judgment which is free from stereotypical generalisations? Or is it that the judges are removing themselves from the position of mechanical operators, and instead are heightening their argument on (arguably subjective) moral pedestals? Surely then one must question the very foundation, historically speaking, of such generalisations.

Such an insight may be gleaned through the employing of the deconstructionist methodology by postmodernist Jacques Derrida,[19] arguing that from the earliest age women are raised with the belief that their ideal character is one that is the opposite to that of men, not self-willed and governed by self-control, but of submission and yielding to the control of others.[20]

16 n 7 above.
17 n 7 above.
18 Albertyn (n 4 above) 309.
19 W le Roux & K van Marle 'Postmodernism(s) and the law' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 368.
20 See generally the works of Robin West who argues for a 'reconstructive jurisprudence' that 'unmasks the patriarchy behind a purportedly ungendered law'.

Like the liberal feminist school of thought, radical or dominant feminism focuses on inequality. It asserts that 'men, as a class, have dominated women as a class, creating gender inequality'.[21] For radical feminists, gender is a question of power. Radical feminists urge society to abandon traditional approaches that take maleness as their reference point. They argue that sexual equality must be constructed on the basis of woman's difference from man and not be a mere accommodation of that difference. I agree with such an ideological disposition, as society should instead use a more gender-neutral and encompassing point upon which to ascertain rights, by using a more egalitarian approach which also does not demean men. Doing so may allow us, within the confines of legal discourse, to achieve an equilibrium of power.

Instead, however, what the court did in *Hugo* was in fact to accommodate women as being different, not because they are women, but rather that they are perceived as child minders.

The *Hugo* case, amongst other things, highlights a sharp tension which emerged from the womb of feminist discourse: the ideas of equal treatment and special treatment. The premise under which the 'sameness/different debate' operates is shrouded in the idea that if women need not be treated precisely the same as men, then law should not accommodate women or offer rights unclaimed by men.

What the *Hugo* case poignantly displays is that the aspiration and conversely unrealistic goal of gender neutrality can and will produce rules and practices making lives worse, not better, for women. That is to say, had women been seen as being the same as men in the *Hugo* case, the judgment would invariably have been different.

That said, however, the notion of different or special treatment is warranted in light of public policy considerations. Take, for example, arenas in which women face victimisation and need special protections; a battered woman who kills her batterer in his sleep needs a different kind of self-defence defence to the one available to a man who could physically repel his aggressor.[22]

Conversely, such merits must also be tested against post-modernist feminist thinking, which recognises and celebrates that all women can choose as freely as men can. They also, realistically speaking, recognise that women should not always consider themselves 'victims' but are, in fact, capable of free choice in which to leave their abuser and pursue a life of autonomy. Simply put, women's own choices as free autonomous individuals warrant their

21 Albertyn (n 4 above) 307.

22 See generally C Mackinnon *Feminism unmodified: Discourse on life and law* (1987).

own change without the presence of an 'alpha male' in which to direct them.

Whilst *Hugo* serves as authority for the development of South African feminist jurisprudence in its contention regarding women's rights and differential treatment, the following American Supreme Court decision is an example from a foreign jurisdiction as to the perception of women and the law.[23] In *Michael M v Superior Court of Sonoma County*,[24] a teen-age boy challenged a California law which punished any male who had sexual intercourse with a female under age 18, but not *vice versa*. The majority decision rejected the challenge by asserting that men and women are not in an equal position in the context of sexual intercourse and child bearing, allowing each group to be treated differently.

In this case, the court's contention was centred on the deterrence of teen pregnancy, which they argued 'supplied a sufficient rationale for the law'. It was contended by the court, therefore, that females have the deterrent of the risk of pregnancy; the criminal penalty imposed solely on males roughly serves to equalise the deterrents on the sexes. Thus, as was the case in *Hugo*, the female litigant was not treated as different because of her sex or gender, but rather because of the risk of teen pregnancy which is burdensome to government's social welfare and, arguably, to society in general.

However, I believe that what the court did in handing down such a judgment, shrouded under the cloak of under-age women's best interest, is the presumptuous act of assuming that in sexual relations between two persons under the age of 18, it is the male who is always the aggressor. This implies that only men or boys are capable of inflicting harm. This once again highlights my assertion made with reference to *Hugo*, that, whilst patriarchal values are endemic in society, such judgments seek to do nothing but further entrench misconceptions and the carnivorous image of society about men and the stigmatisation of women and society's hapless victims. [25]

In this way, I contend that whilst women are crippled by this distinction on the basis of their maternal and biological capabilities, thereby confining them to subordinate roles in all areas of public life, the redress of such unequal rights must not begin through the process of 'penalising' men for quite simply being men. In this way, the distinction that was made in the *Hugo* case frustrates society as a whole and not just a particular gender group, as it prevents both genders from demolishing the ideological and sociological barriers of

23 'Feminist legal theories' http://cyber.law.harvard.edu/bridge/CriticalTheory/critical3.txt.htm (accessed 28 June 2007).

24 450 US 464 (1981).

25 This is consistent with liberal feminism which asserts that such gender differences have built up over time and are embedded in culture.

sex and gender stereotypes which is characteristically an attribute of postmodernist feminist jurisprudence.

Moreover, if courts in their adjudication of equality disputes seek to redress women's rights, this is invariably at the cost of both males and females – as women are not seen as individuals who ought to be provided with equal rights generally, but rather that they should be allowed rights because of their capacities, (as elucidated in *Hugo*), as child bearers.

Thus, I agree with Kriegler J's minority judgment, in which he saliently expresses the voice behind this paper, that: 'constitutionally the starting point is that parents are parents'.[26]

4 The duality of idealism and paradox of femininity

However, the notion of sameness, meaning that women wish to be treated the same as men, becomes increasingly difficult when differentiation is made 'along the lines of race, ethnicity, disability, sexual orientation, class, and religion, and other potential lines'.[27]

Take, for example, a woman from orthodox and conservative Iran. According to feminists, women should be treated the same as men, however, cultural and religious ideology prevent such women from ever engaging in the sphere of traditional male activities.[28]

It has been submitted, therefore, 'that for many of these women, the solution is not to dispense with the customary systems but to develop them in accordance with principles which affirm women, at the same time ... legal rights are addressed'. [29]

Thus, the point that needs to be made is that the feminist contention of 'sameness' is often unrealistic and ill-considered when weighed against cultural and social discrepancies around the world. Ultimately, the values of traditional western liberal feminist jurisprudence, characterised by democratic establishments, fall short when used in developing states where democracy, let alone transient civil rights, are nothing more than an ideal.

It is submitted that the path upon which feminists should walk is a post-modern one, whose 'signs' are unclear and roads unpaved – ensuring that, as intellectual thought based upon the premise of questioning becomes more apparent, the women who travel on such

[26] Hugo (n 1 above) para 85.
[27] n 22 above.
[28] Mainstream media has taken the testaments of Islamic women as revealing the inner workings of an inherently patriarch dominated sociological and theological framework.
[29] Albertyn (n 4 above) 317, who refers to R Coomaraswamy 'To bellow like a cow: Women, ethnicity and the discourse of rights' in R Cook (ed) *Human rights of women: National and international perspectives* (1994) 39.

a path are clear that their rights should not be seen as proportionate to and on par with men.[30] Rather, they should identify experiences and modes of self-actualisation which lend meaning to their own subjective experiences, thereby creating a way of identifying who they are and what it truly means to be a woman.

Postmodernism as a discourse realises that, because we all see out of different eyes, and have no way of knowing that we even see the same 'colours', let alone the same reality, there can be no truly objective 'reality'. All reality is filtered through individual senses, which render sensory experiences subjective. Such a mode of thinking, therefore, highlights internal inconsistencies within feminist (legal) discourse and therefore refutes possible constructions which have become coherent.

In this way, women should be treated differently, but not so differently that it prejudices men's rights; but to the extent that it will highlight the need of recognising their own subjective experiences as defining their own reality and what it means for them within a given social, political and thus legal context to be truly a woman.

One of the core premises of post-modern thought is that the self and 'reality' are all constructions.[31] If my 'self' can be reinvented as often as I wish, then I do not want to limit my options now. I might want to change my mind later.

That said, postmodernism has also grappled with the 'contradictions between theoretical approaches' which threaten to deconstruct and invalidate categorical constructions of women versus the 'political (establishment) which has sought to maintain this'.[32]

Thus, if the focus is then shifted away from women's rights in relation to that of their male counterparts, women in society are therefore encouraged to concentrate much more upon the ideological self and thus the construction of their identities, which then may have the consequent effect of re-evaluating the societal standards and expectations of traditional female roles.

It is submitted that it would be a mistaken assumption to treat all women as having the same interests, identities, needs and values, especially since doing so tends to privilege the preferences and viewpoints of privileged white women who are in the position to assert their rights free from theological and sociological constraints, ironically, often to the exclusion of our fictional Iranian woman

30 This seems hardly allegorical to arguments of gender oppression being 'a source of unity among women'.

31 Such an assertion is similar to that of proponents of Critical Race Theory who also contend that race, like gender, are all constructions supported by society for the purposes of categorically developing universal values and norms.

32 Albertyn (n 4 above) 300.

above. Thus, 'concrete identities are constructed in psychological, social and political contexts – they are in psychoanalytical terms, the outcome of a situated desire of the other'.[33]

Such a position therefore necessitates that we reconsider the communitarian ideal of relativism and thus the 'possibility of universal values and human rights'. More importantly, however, what must be redressed are the 'norms across cultural difference' and the 're-engaging of transnational conversations about law, feminism and social change'.[34]

Postmodernism within legal discourse is highly sceptical of explanations, which claim to be valid for all groups and cultures, traditions or races. What should have been done in terms of the *Hugo* judgment is to focus on the relative truths of each person,[35] or specifically each woman as opposed to categorically placing them as one, all with the same mothering capabilities and interests in pursuing a life, which focuses upon the family. In doing this, such a methodology obviates the effect of reinforcing the patriarchal stereotype as each woman then is seen to be an individual – disassociated from the class-based society of which she emanates.

In closing, it is submitted that what should be established, as subtly purported by Kriegler J, is a rational mode of analysis that uses men and women, of all kinds of socio-political and demographic backgrounds, as the starting point of analysis and consequently developing rules for workplaces, families, politics and society which are fully inclusive.[36] In doing so, it would enable us to meet not only our constitutional obligations but also end an era of relegation and subservience upon which equality is made the dominant ideology.

33 C Douzinas & A Gearey *Critical jurisprudence: The Political philosophy of justice* (2005) 195.

34 Albertyn (n 4 above) 317, in referring to M Nanda 'Do the marginalised valorise the margins: Exploring the dangers of difference' in K Saunders (ed) *Feminist post-development thought* (2002).

35 Albertyn (n 4 above) 293, in referring to S Dahl 'Taking woman as a starting point: Building women's law' (1986) 14 *International Journal of Sociology of Law* 239.

36 n 22 above.

THE MAGISTRACY AND JUDICIAL INDEPENDENCE: A STATE OF MIND OR THE STATE OF CIRCUMSTANCES?

*by Dawn Neethling**

> Conscience is the chamber of justice
>
> Origen

> I expect nothing, I fear nothing, I am free
>
> Nikos Kazantzakis

Is judicial independence merely a state of mind or is institutional independence essential for judicial independence? This question is especially relevant with regard to the South African magistracy.

Before 1994 the magistracy functioned in a system where no institutional independence existed. It was only with the advent of the interim Constitution in 1994 that institutional independence and the protection thereof began to apply to the magistracy. The question arises whether the Constitution freed the minds of the magistracy as if by magic, and whether institutional independence necessarily brings with it an independent state of mind.

The following aspects are dealt with in this discussion:

- the lack of institutional independence of magistrates before at least 1993, and the views of magistrates on their judicial independence at that stage;
- the reality that magistrates did perform a substantial amount of judicial work at that stage;
- the changes brought about by the Magistrates Act in 1993[1] and the interim Constitution in 1994;[2]
- different opinions on and definitions of judicial independence;
- the current attitude of the executive towards the independence of the judiciary.

There seems to be a general perception that before 1994 the magistracy did not enjoy judicial independence at all.[3] This perception is based on the fact that magistrates were public servants up to 1993 and not institutionally independent before 1994. Even

* BJuris LLB (PU for CHE), Additional Magistrate, Pretoria Magistrate's Court.

1 Act 90 of 1993.

2 Act 200 of 1993.

3 See R Laue 'Judicial independence and accountability' (1998) 1 *The Judicial Officer* 89-99.

amongst magistrates themselves, opinions differ on whether they were judicially independent before 1994. Some magistrates interviewed during research done for the Centre for the Study of Violence and Reconciliation[4] maintained that they had always regarded themselves as judicially independent in the pre-1994 period. They regarded judicial independence largely as freedom from political interference in their judicial work. The generally accepted opinion, also expressed by some magistrates interviewed for the abovementioned research, however, seems to be that magistrates were manifestly not independent and were accountable to the state. These opinions are based on the fact that before 1994 (or at least before 1993) magistrates were not institutionally independent. Learned writers and researchers generally accept that magistrates who maintain that they were judicially independent are either not telling the truth or are deluding themselves. They seem to be more inclined to accept the opinion of those individual magistrates who were prepared to paint a grim picture regarding the absence of judicial independence of the pre-1994 magistracy. This group of magistrates acknowledged that the fact that they were public servants was unacceptable. They also acknowledged that the subjective fears of not being promoted or being transferred by the executive if the state was dissatisfied with a judgment, might have impacted on their independence.[5]

What was evident from the research was that magistrates expressed a sense of an individual capacity to be independent while occupying a compromised structural position. The researchers also reported that, at the time of delivering their report, independence and accountability were issues of considerable and ongoing significance for the magistracy. This has of course become even more acute in the period subsequent to the publication of the report. The researchers reported that magistrates perceived the implications of judicial independence to be the absence of interference, the freedom to criticise the state and the ability to administer justice to all.

Mr Laue, a senior magistrate at the Magistrates Court in Durban, clearly supports the idea that institutional independence is a *sine qua non* for judicial independence. He states: '[b]efore 1994 the impact of parliamentary sovereignty on ... magistrates, who were public servants, was that those magistrates who presided in the lower courts were beholden to no one but the laws and their makers. Judicial independence in the constitutional sense of meaning the protection of the magistrates so that they could administer justice and protect human rights ... [was] severely inhibited in the result'.[6]

4 Reports by L Kgalema & P Gready, 'Transformation of the magistracy: Balancing independence and accountability in the new democratic order; Magistrates under Apartheid: A case study of professional ethics and the politicisation of justice'.

5 Refer to Laue (n 3 above), and the reports of Kgalema and Gready (n 4 above).

Laue also states that the independence of judges goes back in history and tradition (a statement that cannot be accepted unconditionally in the light of the political influence that came to play in the appointment of judges), while the independence of the magistracy is a relatively recent innovation and a creation of statute. He does, however, also concede that the expression 'judicial independence' means different things to different people. Some may say that it is merely a state of mind, whilst others consider it to be impartiality and fearlessness.

Section 165 of the Constitution[7] provides that the judicial authority of the Republic is vested in the courts. The courts are subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice. No person or organ of the state may interfere with the functioning of the courts; and the organs of state through legislative and other measures must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. In terms of section 166(d), Magistrate's Courts are part of the 'courts'.

Before 1994, Parliament was supreme. Not even the Supreme Court had, except in the limited sense of testing procedural correctness, the authority to strike any legislation down on the grounds that it infringed on the constitutional rights of the citizens. Magistrates were public servants who, apart from their judicial duties, were (and have until recently been) heavily burdened with administrative duties and also in later years, with certain onerous tasks in terms of the security legislation. The appointment, promotion, transfer, dismissal, disciplining and training of magistrates vested in the hands of the executive. Magistrate's Courts then, as now, were the courts with which the biggest part of the population came into close contact.

Magistrates administered law on a daily basis in courts that were not institutionally independent. The executive did not have a duty to assist and support the magistracy or to protect its independence, but controlled it. When the interim Constitution came into operation in 1994, those same magistrates continued to occupy the bench. It was required of them to take a new oath of office, in which they *inter alia* had to swear to uphold the Constitution. Suddenly the Constitution provided for their institutional independence and appointed the same executive who had until now been in control in a supportive and protective position.

The ability to apply the law independently, without fear, favour or prejudice, could not have been miraculously bestowed upon each

[6] n 5 above.
[7] Constitution of the Republic of South Africa 1996.

serving magistrate overnight. Most magistrates had the desire and the ability to serve justice and to act without fear, favour or prejudice. If these subjective attributes are enough to make the magistracy independent, institutional independence becomes irrelevant.

The Constitution does not, however, refer to the independence of a magistrate, but clearly states that the court,[8] of which the Magistrate's Courts form part, is independent, subject only to the Constitution and the law, which it must apply independently, without fear, favour or prejudice.

The essence of judicial independence was summarised by a Canadian judge, Judge Dikson:[9]

> Historically the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide cases that come before them. No outsider - be it government, pressure groups, individual or even other judge should interfere with the way in which a judge conducts his or her case and makes his or her decision.

The ability of the individual judge to make decisions in a concrete case, free from external interference, continues to be an important and necessary component of the principle.

Judge Le Dain distinguished three essential elements of judicial independence, namely:[10]

- security of tenure;
- a basic degree of financial security, free from the interference by the executive that could affect judicial independence; and
- institutional independence with respect to matters that relate directly to the exercise of the tribunal's judicial function. Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to certain issues and the parties in a certain case. The word 'impartial' connotes absence of bias, actual or perceived. The word 'independence' ... reflects or embodies the traditional constitutional value of judicial independence. As such it connotes not merely a state of mind or an attitude in the actual exercise of a judicial function, but a state of relationship to others, particularly to the executive branch of the government that rests on objective conditions and guarantees.

> The test ... should be whether the tribunal may reasonably be perceived to be independent, and the test for independence should include that perception.

8 Sec 165.
9 *Canada v Beauregard* 186 30 DLR 48.
10 R v Valente (1985) 2 SCR 673 (Canadian judgment).

> It is generally agreed that judicial independence involves both individual independence of the judge, as reflected in such matters as matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive or legislative branches of the government ... The relationship between the two aspects is that an individual judge may enjoy the essential conditions of judicial independence, but that if the court or tribunal over which he or she presides is not independent of the other branches of government in what is essential for its function, he or she cannot be said to be independent.

These two judges differ substantially in their approach. Judge Dikson places the emphasis on the state of mind of the individual judge and the protection of subjective independence, while Judge Le Dain clearly sees the objective independence of the tribunal as the most important element of judicial independence. Even when referring to the individual judge, he sees the objective requirement of security of tenure and financial independence as a prerequisite.

In the case , the Judge found that:[11]

> The status of a tribunal must guarantee not only its freedom from interference by the executive and legislative branches of government, but also by any other external force, such as business or corporate interests or pressure groups.

Here the emphasis once again seems to be on the subjective independence and freedom of the individual judge although the reference is to the tribunal.

The matter of the judicial independence of the magistracy has also been dealt with in tthe Constitutional Court and the High Court of South Africa.

In the matter *De Lange v Smuts NO*,[12] the Constitutional Court, in deciding on the constitutionality of Section 66 of the Insolvency Act,[13] dealt with the concept of the judicial independence of magistrates. The Honourable Judge Ackermann, in his judgment supported by the majority, dealt only with the separation of powers between the judiciary and the executive. 'This question, though simple, raises issues concerning the nature of the constitutional state and the separation of powers which must ultimately be solved within the context of the 1996 Constitution'.[14] With reference to section 12(1)(b) of the Constitution, the judge concludes that a 'fair trial' requires,[15]

11 1992 88 DLR (4th) 110 (Canadian judgment).
12 1998 (3) SA 785 (CC).
13 Act 26 of 1936.
14 *De Lange* (n 12 above) para 43.
15 *De Lange* (n 12 above) para 57.

> apart from anything else, a hearing presided over and conducted by a judicial officer in a court structure established by the 1996 Constitution and in which section 165 has vested the judicial authority of the Republic.
>
> ... Officers in the public service – in the executive branch of the state – do not enjoy the judicial independence which is conditional to and indispensable for the discharge of the judicial function of a constitutional democratic state based on the rule of law. This independence, of which structural independence is an indispensable part, is expressly proclaimed and protected and promoted by sections 165(2), (3) and (6) of the Constitution.

The requirement set by the Constitutional Court for judicial independence is clearly that of institutional or structural independence.

It is interesting, though, to note the opinion of the dissenting judges on the issue of judicial independence. The Honourable Judge Didcott held that public officers that fall outside the magistracy (ie public servants) are unlikely to be less independent or impartial than those that are located within the magistracy (with special reference to the authority vested in the chairperson presiding over an inquiry in terms of the Insolvency Act to order the detention of a recalcitrant examinee detained in terms of section 66(3) of the Insolvency Act). The Judge pointed out that at the time of the judgment, the separation of the executive and the judiciary was not total and the magistracy, according to him, was a striking illustration of this. Magistrates had, besides their judicial work, a host of administrative tasks that fell within the exercise of the executive power, moving readily and frequently from the bench to the bureaucracy and back.

The Honourable Judge's opinion can be interpreted as meaning that institutional independence is not a prerequisite for judicial independence, and that a public servant can also act independently in exercising the discretion to order the detention of an examinee in terms of section 66. It can also mean that at the time of the judgement, he still regarded magistrates as actually not judicially independent.

In her judgment, Judge O'Regan dealt with the principle of judicial independence in the following way:[16]

> ... but the independence and impartiality of the presiding officer is only the first aspect of judicial independence. It seems to me that the institution must also exhibit independence and impartiality in the judicial sense.

16 *De Lange* (n 12 above) para159.

This opinion seems to balance the requirements of an independent state of mind and institutional independence for judicial independence.

Judge Sachs seems to hold a similar view:[17]

> By way of contrast, the authority to incarcerate for purposes of imposing penalties for past or continuing misconduct belongs to the judiciary, and to the judiciary alone. In my view, the doctrine of separation of powers prevents Parliament from entrusting such authority to persons who are not judicial officers performing court functions as contemplated by section 165(1).

Unlike other appointees, a magistrate exercising the power of committal to prison under section 66(3) of the Act will enjoy institutional independence and can be expected to apply the law impartially and without fear, favour or prejudice.

The protection of the judicial independence of the Magistrate's Court was the subject matter of two separate decisions in the Constitutional Court and the Transvaal Provincial Division of the High Court.

In the matter *Van Rooyen and Others v The State and Others (General Council of the Bar intervening)*,[18] the Constitutional Court considered the questions of separation of powers, the independence of the judiciary and the comparison between the requirement of judicial independence of the High Court as compared to that of the Magistrate's Court. It is interesting to compare the way the Constitutional Court dealt with the judicial independence of the Magistrate's Court in this matter where they had to deal with the protection thereof, in comparison to the opinions on the matter in *De Lange v Smuts NO*.[19] In the last mentioned case, with the exception perhaps of Judge Didcott, the Constitutional Court did not differentiate between the independence of the higher courts and the Magistrate's Court. In *Van Rooyen*, the Constitutional Court held that 'the constitutional protection of the core values of judicial independence accorded to all courts by the South African Constitution meant that all courts were entitled to and had the basic protection that was required.'[20] Section 165 of the Constitution provided for this. The paternalistic view that the Constitutional Court took regarding the protection of the independence of the Magistrate's Courts is rather worrying. It was held that, in spite of the wording of section 165, the fact that all courts were considered by the Constitution to be independent, did not mean that that the lower courts had, or were entitled to have, their independence protected in

[17] *De Lange* (n 12 above) 176.
[18] 2002 5 SA 244 (CC).
[19] n 12 above.
[20] *Van Rooyen* (n 18 above) para 22.

the same way as the higher courts. In deciding whether a particular court lacked the institutional protection that it required to function independently and impartially, it was relevant to give regard to the core protection given to all courts by the Constitution, to the particular function that such a court performed and its place in the hierarchy. It does not mean that the lower courts had, or were entitled to have, their independence protected in the same way as the higher courts. Lower courts are entitled to the protection of the higher courts should any threat be made to their independence. Although the Constitutional Court in the same judgment found that judicial independence was a constitutional norm and principle that went beyond the Bill of Rights and was not subject to the limitation clause, the effect of the judgment was that the lower courts' right to protection of its independence was limited. Surely, an unlimited right to judicial independence should enjoy unlimited legal protection.

In *Botha v White*,[21] Judge Botha, in dealing with the question as to the nature of judicial independence, referred to the pronouncement of the late Chief Justice, Judge Ismail Mohammed:[22]

> What judicial independence means in principle is simply the right and duty of judges to perform the function of judicial adjudication through the application of their own integrity, and the law, without any actual or perceived interference from or dependence on any other person or institution.

As shall be seen later, the late Judge President Mohammed placed a high premium on the subjective attributes of a judicial officer in establishing and maintaining his or her judicial independence.

The opinion expressed in *Botha v White* was also quoted in the matter of *Graham Noel Travers v The National Director of Prosecution and Others*[23] in which, with reference to most of the authority quoted above, the learned Acting Judge stated:[24]

> In the final analysis I am of the view that undoubtedly magistrates enjoy the same level of judicial independence as judges do. Thus any decision on the part of the prosecuting authority regarding the finalisation of cases by magistrates amounts to an interference with the judicial independence of the magistrate.

It seems clear that there are divergent opinions even amongst judges from the High Court and the Constitutional Court as to whether judicial independence is a state of mind, or whether it can only exist in the context of institutional independence.

21 2004 (3) SA 184 (T).
22 n 21 above, para 37.
23 Judgment delivered by Ismail AJ in the Transvaal Provincial Division of the High Court of South Africa, Case 16611/04.
24 n 23 above, para 30.

It is also necessary to consider the opinions expressed by magistrates and other of the principal role players regarding the judicial independence of magistrates. Mr Laue states that it is important to remember that that judicial independence is neither self-executing nor static.[25] The nature of judicial independence depends as much on the nature of the objective guarantees that are put in place (legislation and practical measures) as it does on the extent to which judicial independence is protected, assisted or undermined. With this must come the realisation that the expression means different things to different people. Some may say it is merely a state of mind while others label it as impartiality and fearlessness. While acknowledging the existence of differing viewpoints, Mr Laue is clearly an exponent of the view that institutional independence is a prerequisite for judicial independence.

On 26 June 1998, the late Judge Mohammed[26] delivered a speech at the Second Annual General Meeting of the Judicial Officers Association of South Africa.[27] His speech dealt with judicial independence and he remarked, *inter alia*:

> Magistrates therefore have a very direct and crucial interest in securing their reputation for independence and integrity in order to protect themselves and the civilisation that they legitimately seek to mediate through the power of the law.

Judge Mohammed set out various institutional and infrastructural matters, which, according to him, directly or indirectly impacted on the capacity of magistrates to discharge their functions effectively, and enjoy public confidence. He then proceeded to discuss certain matters which, according to him, fell substantially in the domestic control of magistrates themselves, and was the basis of the capacity of an individual magistrate to strike a balance fairly coherently and ethically in the pursuit of justice. The Judge regarded these aspects to be arguably even more crucial to judicial independence than the institutional and infrastructural support basis. He set out the following aspects:

- experience
- scholarship
- dignity
- rationality
- forensic skill
- some measure of humility
- capacity for articulation
- discipline

25 n 23 above.
26 At that time, Judge Mohammed was the Chief Justice of the Republic of South Africa.
27 Published in (1998) 1 *The Judicial Officer* 47.

- diligence
- intellectual integrity
- intolerance of injustice
- emotional maturity
- courage
- objectivity
- energy - both intellectual and physical
- rigour
- wisdom
- efficiency and a proper sense of relevance
- a healthy dose of scepticism about the correctness of a view of law which compels a manifestly unjust result
- the moral ability to distinguish right from wrong or two wrongs against each other.

Although the learned Judge regarded the institutional independence of the Magistrate's Court as important and worthy of the vigilance of magistrates, it is obvious that, in his opinion, it would be an empty 'independence' if individual magistrates lacked those subjective qualities that would make them fearless, fair and unbiased.

If institutional independence is in reality a prerequisite for judicial independence, Magistrate's Courts can only be truly independent if no interference or control by the executive or political interference exists, or if such interference is attempted, unconditional protection can be found in the higher courts.

Before 1993 and 1994, the executive would have had no perception of the judicial independence of magistrates, as it was effectively in control of the Magistrate's Court.

Some changes were brought about in the position of magistrates by the Magistrates Act and the 1994 and 1996 Constitutions as well as the fact that magistrates are now public office bearers. In spite of this, the influence of the executive and political powers has not been eliminated.

The Minister of Justice still plays an important role in the discipline of magistrates and still needs to be consulted by the Independent Remuneration Commission, before any recommendation regarding the remuneration of magistrates can be made to the President. The two houses of Parliament must approve any recommendations made to the President by the Independent Remuneration Commission, and this has in the past led to intolerable interference by politicians in the recommended remuneration of magistrates.

There are worrying indications that the executive still does not understand its constitutional role in terms of section 165 of the Constitution. On 14 December 2005, the Constitution of South Africa

14th Amendment Bill was published for public comment under circumstances that led to a huge outcry from the legal fraternity. Although the Bill does not deal with the position of magistrates, it is a clear indication of the attitude of the executive towards the principle of judicial independence. The Bill was intended to be part of a package of measures designed to rationalise the judiciary in terms of section 6 of the Constitution. Although the outcry eventually led to the decision by the President to send the Bill back to the drawing board, the intention of the Bill still pops up every now and then. According to a recent press report,[28] the provisions of the Bill have been resuscitated in a draft document by the ANC National Executive Council, drafted by a Department of Justice and Constitutional Development committee, chaired by the Minister of Justice and Constitutional Development, Ms Mabandla, and whose members included the Deputy Minister of Justice and Constitutional Development, Mr. De Lange, as well as a previous Minister of Justice, Advocate Penuell Maduna and various other politicians.

Professor Cathy Albertyn, Director of the Centre of Applied Legal Studies, came to the following conclusion regarding the proposed amendment:[29]

> I have argued that several of the provisions of the Constitution 14th Amendment Bill demonstrate a worrying trend by the executive redrawing the lines of judicial independence and the separation of powers. In each case the line is shifted in favour of the executive. It also feeds into the perception that the government will step in to 'fix' things by extending the sphere of control or failing to relinquish it where appropriate.

The constitutional imperative to restructure the courts in line with the new Constitution needs to be carried out in a manner that engages the institutions of the state in a democratic dialogue that has the establishment of an independent, accountable and efficient judiciary as a goal. This entails breaking away from the current impasse and the executive instinct of constraining judicial institutional development. This instinct is clear from various comments made by the Deputy Minister of Justice and Constitutional Development on various occasions.

[28] 'ANC touches a sore judicial point' www.pretorianews.co.za/index.php?f ArticleId=3748992 (accessed 28 March 2007).

[29] C Albertyn 'Judicial independence and the Constitution 14th Amendment Bill' (2006) 4 *South African Journal on Human Rights* 126 at 142.

The Honourable Judge-President of the Transvaal Division of the High Court, Judge Ngoepe, commented as follows on the relationship between the executive and the judiciary:[30]

> Yet, occasions may arise when the executive is so much in control of the infrastructure in which judges operate, that the latter's' independence is imperilled. That is when judges are at the mercy of the executive. What is generally accepted is that judicial independence can be whittled away through a subtle process ... The final responsibility to protect the independence of the judiciary lies with the judges who should eventually decide whether any measures such as Acts of parliament undermine that independence and if they do, to strike them down.'

In order to protect the judicial independence of the magistracy, magistrates should vigilantly guard against any action on the part of the executive to infringe upon it, and act fearlessly to take steps to protect it. Magistrates, although they are bound by the Constitution and have a duty to interpret and even develop law according to the principles of the Constitution, cannot rule on the constitutionality of any Act of Parliament. They therefore have to look to the High Court and the Constitutional Court to protect their independence.

In my opinion it is clear that the executive still does not understand its constitutional role. In the case of magistrates the executive shows signs of suffering from separation anxiety, and in the words of Professor Albertyn, failing to relinquish control where it is appropriate. Even the Independent Remuneration Commission, whose report and recommendations regarding the remuneration of public office bearers, recently handed to the President, still fails to deal with the magistracy as an integral part of the judiciary, but applies different criteria to the remuneration of judges and magistrates. It seems that the remuneration of members of the executive still plays a role in the formulation of the recommendations regarding magistrates. On their website,[31] the Independent Remuneration Commission also clearly distinguishes between the judiciary and the magistracy as separate groups of public office bearers. It sends the clear message that the constitutional position of the magistracy as part of the judiciary is not recognised even by the entity that is supposed to deal with the remuneration of magistrates.

The institutional independence of magistrates is a concept that has not been clearly established and developed. Magistrates, therefore, have to cherish and develop their subjective perception of independence by continuing to, subject to the control of the

30 'The relationship between judicial independence and judicial accountability: The package of draft laws on the judiciary' (A paper delivered on the occasion of the debate on the judiciary in a changing terrain. The debate was organised by the Institute for Democracy in South Africa (IDASA) in collaboration with Democratic Governance and Rights Unit (Unviersity of Cape Town): 11-12 October 2005).

31 http://www.remcommission.gov.za (Accessed 12 January 2007).

Constitution, act independently, without fear, favour or prejudice in order to eventually establish total institutional independence. This can only be achieved by maintaining at all times an independent state of mind.

Although I have not dealt with judicial accountability, it is obvious that judicial independence can never mean the freedom to act outside the bounds of the law and the Constitution. The Constitution sets clear boundaries for judicial independence and the judiciary should guard against individual judicial officers who overstep those boundaries. The executive should, however, not be allowed to, under the guise of judicial accountability, undermine the independence of the courts.

HUMAN RIGHTS AND AMERICAN FOREIGN POLICY

*by Johann Spies**

1 Introduction

American involvement in the international arena vacillates and shifts at a fast pace. Since the terrorist attacks on US soil in 2001, the Bush administration has aggressively returned the US to internationalism. The American interaction on the international stage has always been unique. Currently, as the only true superpower in the international system, the effect of US foreign policy on the global human rights regime is likely to be greater than at any other time in their history.

The significant question, then, is to the position, if at all, of human rights concerns within US foreign policy. Ruggie states that international regimes which are closer to a superpower's core security interests will necessarily be stronger than those further away.[1] One may then suppose that regimes which are dominant in the foreign policy of a superpower will be stronger than those less dominant.

This article analyses the position of human rights within the current administration in the US in order to determine if US foreign policy concerns itself at all with these issues when making policy decisions.

2 Unilateralism in the Bush administration

The Bush administration is characterised by a unilateral foreign policy, discarding the multilateral approach which predominates the foreign policy of other great powers. Continuing the firm tradition of US policy, national interests have triumphed over any incentives to seek these multilateral solutions. The Kyoto Protocol serves as an example of this phenomenon.

As one of his first acts as President, Bush withdrew executive approval from the Kyoto Protocol. A determining factor in this decision was that joining the Protocol was likely to raise energy prices due to a greater demand for natural gas, which conflicted with the Byrd-Hagel Resolution's requirement that such a treaty did not 'result in serious harm to the economy of the United States'.[2]

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1 JG Ruggie 'Human rights and the future international community' 112 (1983) *Daedalus* 93 at 104.

2 GW Bush 'Text of a letter from the President to Senators Hagel, Helms, Craig and Roberts' (13 March 2001).

In 2002, however, Bush announced an alternative strategy according to which he committed to the reduction of greenhouse gases, including carbon dioxide, totalling 18% per unit of GDP. This plan was criticised for falling far short of the planned reductions offered by the Kyoto Protocol, however it poses a paradox with regards to actual policy.[3] Instead of returning to the negotiation table for the Kyoto Protocol in order to whittle away at the treaty, the Bush administration preferred implementing a domestic plan.

This paradox in US behaviour in the international arena has often been remarked upon. It is frequently attributed to the particular rights culture which is predominant in the US. A combination of factors has led to this stance and thereby contrasts the US tendencies with that of Western Europe. Historically, the US has placed a great emphasis on domestic human rights enforcement, on the one hand, yet emphasised sovereignty in the international stage on the other. This American 'exceptionalism' is characterised by a strong human rights culture in the US but a refusal on the part of the US to make significant commitments to human rights treaties or acknowledge international court systems. Whether academics attribute these unilateral tendencies to the particular socio-polity of the American people, the political culture of isolationism or the 'pluralist' analysis of US social interests and institutions,[4] there is general consensus that a failure of the US to act multilaterally does not in itself suggest that human rights is not a distinct factor in its formulation of foreign policy.

3 Bush's foreign aid policy: The Millennium Challenge Account

Foreign aid spending has long been a powerful tool in the US arsenal. It is also itself a useful tool in determining the factors which most strongly influence policy. Domestically, changes in foreign aid allocation are easier to effect than trade or military sanctions as they have less of an impact on the economic conditions within the US and the allocation itself, rather than the initial funding, is often within the executive function and not that of the legislative. As a result of this greater ease, foreign aid is more likely to be sensitive to individual policy considerations and would reflect human rights as sole considerations should it be present.

The Bush administration has been unexpectedly rather generous in calling for large foreign aid increases, considering that it is both a Republican administration and that their rhetoric suggested

[3] JM Taylor 'Bush announces Kyoto alternative' (2002) April *Environment and Climate News* 1.

[4] M Ignatieff *American exceptionalism and human rights* (2005) 1-26.

otherwise. In 2002, Bush called for an increase of 50% to foreign aid spending through the Millennium Challenge Account (MCA). This aid would be allocated to countries on the basis of good governance, including that they should not contrive human rights standards. Surprisingly, the targeted countries were not failed states likely to harbour terrorists which would suggest a much closer link to national security issues.[5]

In theory this meant that the aid provided by the Millennium Challenge Account would be retracted where a state failed to observe such good governance, regardless of other national interests which were at play. Since 2006, 16 criteria have been put in place in order to qualify for this funding and include economic indicators on the one hand and civil, political and socio-economic rights adherence on the other.[6] While the funding did not quite reach its originally expected level, $650 million has been made available in 2004 and a further $1,5 billion in 2005.[7]

The criteria by which states are deemed eligible fall within three broad categories, namely, 'Ruling justly', 'Investing in people' and 'Economic freedom'. These are again divided into different indicators which total 16 individual criteria. The individual criteria are each tested against reports released by independent organisations, including Freedom House, the World Bank Institute, the World Health Organisation, UNESCO and others.[8] The importance of such a structure is the independence of the results on which criteria eligibility are decided, which has the possible effect of preventing issues which are not defined as criteria from influencing decisions on eligibility.

Yemen is one of the states which have qualified in terms of the MCA criteria. It failed to qualify for full compliance but became eligible in terms of the threshold assistance program in 2004. Countries eligible in this manner are not able to access the larger compact grants, but are eligible for aid whilst they continue to progress towards full compliance on the 16 criteria. Towards the end of 2005, Yemen was removed from eligibility due to it having 'experienced slippages' in nine indicators, so that by 2006 it had failed on almost every single indicator.'[9]

Yemen was returned to eligibility in early 2007. The state undertook a significant reform initiative which included comprehensive restructuring of the judiciary through the retiring,

5 S Radelet 'Bush and foreign aid' (2003) September *Foreign Affairs* 104.
6 MCC: Indicators http://www.mcc.gov/selection/indicators/index.php (accessed 3 April 2007).
7 J Blum *et al* 'Nuts and bolts of Bill' *The Washington Post* (7 December 2006) A23.
8 MCC: Indicators (n 6 above).
9 'MCC willing to say no (or at least, no more)' http://blogs.cgdev.org/mca-monitor/archives/2005/11/mcc_willing_to.php (accessed 14 June 2007).

sanctioning and suspension of 30 judges, removing the President from the Supreme Judicial Council, and further economic reform and commitments as well as a re-evaluation of press laws which would have curtailed the freedom of the press further.[10]

Yemen illustrates two points in regards to the US foreign policy in respect of foreign aid. Firstly, it demonstrates the potential for significant success in achieving human rights practice reforms in states. For our purposes, however, it demonstrates that the Bush administration's expansion of foreign aid into the MCA has allowed for aid to be removed from a state for failure to abide by human rights standards *unaffected* by other considerations.

This was further reflected by the removal of eligibility of The Gambia which had achieved full compact eligibility for the fiscal year 2006.[11] Approximately a year after having been acknowledged as eligible, their eligibility was suspended by the Millennium Challenge Corporation (MCC) for 'slippage by the government of The Gambia that is inconsistent with the MCA selection criteria'.[12] The MCC based this decision on 'evidence of growing human rights abuses, increased restrictions on political rights, civil liberties and press freedom, as well as deteriorating economic policies and anti-corruption efforts'.[13]

The Millennium Challenge Account is a clear indication that the Bush administration is following a global trend in having foreign aid inextricably linked with 'human development concerns'.[14] The structure and functioning of the Millennium Challenge Account are such that it has made it possible to effect policies sensitive to human rights practices in states in order to determine whether foreign aid should be granted. While this is a much sought after progression in foreign policy as it concerns foreign aid distribution it is currently still limited, both in terms of the states which are affected by the fund and the percentage which the MCA funds form of the total foreign aid distributed by the US.

4 Bush's realism

In 2004 and 2005, the Middle East and North Africa region was the biggest beneficiary of US aid and received more than twice the aid of its closest rival, the sub-Saharan Africa region. The ten top recipients

10 'Yemen's eligibility for assistance reinstated by Millennium Challenge Corporation Board' http://yemen.usembassy.gov/yemen/MCC_feb_07.html (accessed 6 April 2007).
11 Millennium Challenge Corporation 'Report on the selection of eligible countries for fiscal year 2006' (28 July 2005) 1.
12 Millennium Challenge Corporation 'MCC notification to The Gambia' (16 June 2006) 1.
13 n 9 above.
14 O Stokke *Foreign aid towards the year 2000* (1996) 86.

of aid in that period were dominated by states which have direct national security considerations for the US, including Iraq, Afghanistan and Egypt, which were the three largest recipients, and Pakistan, the Palestinian Administered Areas and Ethiopia which were 10, 9 and 5 on the list respectively.[15]

Further, the MCA forms part of a larger foreign policy which is not reflective of human rights concerns. The National Security Strategy of the United States[16] outlined the Bush administration's commitment to a Reaganite assertion of US dominance in the international arena. This document makes it clear that the US has no intention of abandoning a unilateral approach to foreign policy, stating that '[t]he US national security strategy will be based on a distinctly American internationalism that reflects the union of [their] values and [their] national interests'[17] and '[w]hile the United States will constantly strive to enlist the support of the international community, [it] will not hesitate to act alone'.[18]

Prior to the 11 September 2001 attacks on the US, Bush had declared himself a 'realist' in terms of international politics[19] and a significant part of his administration was, and continues to be, dominated by individuals who either aligned themselves with a realist philosophy or were already so established.[20] While the administration's decision to pursue military intervention in Iraq came under heavy criticism by realist academics,[21] the criticism was aimed mainly towards the aspect of 'pragmatism' in that it was felt such an act would endanger the relationship between the US and its allies.

An important aspect of the realist approach to international politics has been the notion of 'egoism'.[22] Morgenthau, a classical realist, stated that '[r]ealism maintains that universal moral principles cannot be applied to the actions of states'.[23] Donnelly re-iterates this as '[e]thical considerations must give way to 'reasons of state',[24] or national interest.

This aspect of realism has been apparent in the Bush administration's foreign policy. Economic and military sanctions have been used unilaterally only in cases where national security, or some

15 Statistics used were sourced from the Organisation for Economic Co-operation and Development http://www.oecd.org/dac/ (accessed 2 June 2007).
16 GW Bush 'The national security strategy of the United States' (September 2002).
17 Bush (n 16 above) 1.
18 Bush (n 16 above) 6.
19 Speech by Governor Bush 'A distinctly American internationalism' http://www.mtholyoke.edu/acad/intrel/bush/wspeech.htm (accessed 6 April 2007).
20 M Boyle 'Utopianism and the Bush foreign policy' (2004) April *Cambridge Review of International Affairs* 84.
21 Boyle (n 20 above) 85.
22 RG Gilpin 'The richness of the tradition of political realism' in RO Keohane (ed) *Neo-realism and its critics* (1986) 305.
23 H Morgenthau *Politics among nations: The struggle for power and peace* (1973) 9.
24 S Burchill *et al Theories of international relations* (2005) 31.

other conceived national interest, has been threatened. The administration's realist approach to the 'War on Terror' has reignited the distinction drawn between 'authoritarian' and 'totalitarian' states to which the Reagan administration so firmly held.[25]

The result of such a distinction on foreign policy is that where national interests dictate, the call for democratisation or human rights reforms becomes tepid at best. While Pakistan was 'cold-shouldered' by the US when Musharraf had first taken power, the relationship between the two states flowered after the 'War on Terror'. Musharraf's rule of Pakistan, rather than becoming more democratic, has centred around a consolidation of the authoritarianism he enjoys. Regardless of this, the US has 'waived various economic sanctions, assembled a handsome aid package that exceeded $600 million in 2002, and restarted US-Pakistan military co-operation'.[26]

5 Conclusion

The paradox between the Millennium Challenge Account initiative and the greater part of the Bush administration's foreign policy is consistent with Carother's appraisal of Bush and his foreign policy team as having a 'split-personality'.[27] The MCA's structure has made it independent of national interest concerns and creates the opportunity for foreign aid spending which is dominated by human rights concerns. On the other hand, the majority of foreign aid dispensed by the US under the Bush administration is still done in the name of national security and national interest. Further, the Bush administration's use of other foreign policy tools has not been a departure from the historic methods employed by the US.

The MCA itself has so far proved successful in effecting policy and practice change in states. Those who hope for foreign aid to become a meaningful tool in democratisation and altering state practices should not expect very much from the initiative, however. The limited scope of applicability of the MCA, as well as the unique structure it enjoys within the foreign aid dispensation of the US, makes it unlikely that it will herald massive changes in the future of US aid disbursement.

One can conclude that the vast majority of US foreign policy decisions under the Bush administration fail to take into account the human rights practices of the state with which they are dealing. While

25 D Carleton & M Stohl 'The foreign policy of human rights: Rhetoric and reality from Jimmy Carter to Ronald Reagan' (1985) 7 *Human Rights Quarterly* 205 at 208-209.

26 T Carothers 'Promoting democracy and fighting terror' (2003) January *Foreign Affairs* 84.

27 Burchell (n 24 above) 1.

this is an unsurprising conclusion, there is a measure of hope that the proliferation of non-governmental organisations, such as those involved with the MCC, and greater participation by civil society might effect change in US foreign policy eventually.

FOR THE SAKE OF SAVING A VIABLE LIFE: ARGUMENTS FOR COURT ORDERS PREVENTING TERMINATION OF PREGNANCY PROCEDURES AND THE FORCING OF *IN UTERO* SURGERY IN SURROGACY AGREEMENTS

by Gustav Preller and Ian Learmonth***

This article addresses two questions, namely, whether a court can prevent a surrogate mother from terminating a pregnancy and, secondly, whether a court can force a surrogate to undergo *in utero* surgery. To introduce the reader to a situation where the arguments of this article could become relevant, we add a hypothetical case.

A couple discover that they both have cancer. Their cancer treatment will result in them becoming sterile. Therefore, they decide to enter into a full surrogacy agreement, that is, where both their gametes are implanted in a third party's uterus. Before the cancer treatment begins, they donate the required genetic material. No further conception by way of full or partial surrogacy is possible. Just before birth it is discovered that the foetus has a severe defect. The surrogate mother wants to terminate the pregnancy, despite the fact that the defect may be corrected *in utero*.

The biological parents apply to court asking the court to:

(1) prevent the surrogate mother from terminating the pregnancy;
(2) compel the surrogate mother to undergo *in utero* surgery.

1 Preventing the termination of pregnancy procedure

The legal position regarding terminations of pregnancy is currently clear. In *Christian League of Southern Africa v Rall,*[1] it was ruled that the mother of a child categorically has the right to terminate her pregnancy, regulated by the provisions of the Choice on Termination of Pregnancy Act.[2]

Interesting questions arise in the case of surrogacy: who is the 'mother' for the purposes of terminating the pregnancy; what considerations must be kept mind in determining the rights of both the surrogate mother (referred to as the mother) and the biological

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1 1981 2 SA 821 (O).
2 Act 92 of 1996.

parents (referred to as commissioning parties or commissioning parents). This obviously raises the issues of the right of the mother to terminate her pregnancy by way of exercising her section 12 constitutional right to make reproductive decisions, as well as her right to bodily and psychological integrity,[3] which has to be weighed against the biological parents' rights to make decisions regarding reproduction.

At present, the law is unclear over the regulation of such circumstances. Should the entire Chapter 19 of the Children's Act[4] come into force, then the position will be positively regulated. The Children's Act provides that the woman may terminate the pregnancy and that such a termination ends the surrogacy agreement. However, at present, the relevant sections are not in force.

Should such a dispute come before the courts, then the matter will remain subject to existing legal principles. The most relevant of these would be a limitation of rights in accordance with section 36 of the Constitution as well as the law of contract.

Provided all the other relevant requirements for a contract are met, the crux of the matter would be whether the contract is lawful and moral. As surrogacy agreements do currently take place, it seems unlikely that they will be found to be in conflict with the *boni mores*. To declare such a practice unlawful would have serious implications and would in effect prevent surrogate pregnancies and as such is unlikely.

This then raises the issue over what the legal effect of such a contract would be. The most obvious answer to this question would be that a person cannot waive their constitutional rights. The other would be the doctrine of informed consent,[5] which holds that no person can agree to what they have not foreseen or been made aware of.

As the mother would not be able to waive her right to make reproductive decisions, she would still maintain this right, which in effect guarantees her the right to terminate the pregnancy.

In addition, the mother would not reasonably have foreseen that the foetus would become so severely injured that it would require surgery that poses a risk to her life of so great a degree that she would prefer to terminate the pregnancy. Thus, she would not incur contractual obligations to refrain from terminating the pregnancy.

It would appear the there would be no contractual grounds for preventing the mother from terminating the pregnancy.

3 Sec 12(2) of the Constitution.
4 Act 38 of 2005.
5 PA Carstens & D Pearmain *Foundational principles of the South African medical law* (2007) 877.

However, as constitutional rights come into conflict in these circumstances, one must evaluate which rights can and should be limited. The most obvious clash would arise over the right to reproductive decisions[6] of both parties as well as the implicit right of the mother to terminate the pregnancy.

Therefore: the nature of the right, the importance and purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and the existence of less restrictive means to achieve the purpose must be considered when considering whether it is reasonable and justifiable in an open and democratic society.[7]

The nature of the right to reproductive decisions is affected by the fact that it stems from the right to bodily and psychological integrity.[8] Thus, it applies in a more direct manner to the mother as it relates specifically to her body. Nonetheless, of course, the right does protect the right to make reproductive decisions and, as the child will eventually become the biological child of the commissioning parents, their rights are also protected to a degree.

The purpose of the limitation would be to protect the rights of the commissioning parents by preventing the termination of the pregnancy or to protect the rights of the mother by allowing her to terminate the pregnancy.

The relationship between the limitation and its purpose when applied in relation to the commissioning parents creates a variety of unique circumstances. If the foetus has an injury of a life-threatening nature, preventing the termination of pregnancy would not necessarily achieve the purpose of providing the parents with the child. For the pregnant mother, obviously, a limitation to the rights of the commissioning parents would achieve its purpose of allowing the woman to exercise her right to make reproductive decisions.

Obviously for the purpose of allowing a woman to terminate her pregnancy, there is no less restrictive means to achieve this purpose as the only way would be to allow her to terminate the pregnancy. For the purposes of protecting the rights of the commissioning parents, if there is no possibility of another child being conceived (by either full or partial surrogacy) the only way to enforce this right would be to prevent the termination.

Thus, it can be seen that the situation could become quite delicate, especially if the circumstance would prevent the conception of another child. Thus, the matter would effectively hinge on which right is more important to protect. Part of such a decision would be

6 Sec 12(2)(a) of the Constitution.
7 Sec 36(a)-(e) of the Constitution.
8 Sec 12(2) of the Constitution.

the fact that, should the termination take place, the rights of the commissioning parents will be permanently extinguished, whereas the rights of the mother will only be limited for the duration of the pregnancy.

The legal position is clear that in most circumstances the right of a woman to terminate a pregnancy trumps other rights. This is confirmed in *S v Mashumpa,*[9] which states that even though the community considers the killing of a foetus after 25 weeks to be murder, the mother would still be allowed to terminate the pregnancy. However, the issue over the rights of commissioning parents has never come before the courts.

Thus it would seem that if shortly before the birth is due the foetus is viable and no risk is posed to the mother, it would be possible to prevent the termination from taking place. One must note in this conclusion that it is crucial that there be no risk to the mother as the law would not be likely to compel a person to incur a risk to their life.

2 Compelled surgery

With any pregnancy, there is always the risk of possible complications arising regarding the development of the foetus. Medical technology, such as *in utero* surgery, offers many remedies that can correct possible defects or ailments of the foetus. But what may the commissioning parents in a surrogacy agreement do if the surrogate mother refuses to undergo these procedures on the grounds of possible medical risk or any other personal conviction? This article will discuss a possible legal remedy to be used by the commissioning parents to compel a surrogate mother to undergo a medical procedure. We first look at past court orders for forced surgeries, and then we discuss an argument in favour of compelling a surrogate mother to undergo *in utero* surgery.

South African court orders compelling a person to undergo surgery beneath the skin remain particularly scarce, considering the obvious constitutional clashes with the ever-developing medical technology. The most important right which is infringed in the case of any forced surgery is the section 12(2) constitutional right to bodily and psychological integrity and, more specifically, the right to security and control over the body.[10]

There have only been two reported cases in South Africa where a person has been forced to undergo surgery. These were *Minister of Safety and Security v Gaqa*[11] and *Minister of Safety and Security v*

[9] Unreported case CC27/2007 ZAEHC 23 48 http://www.saflii.org (Accessed 23 May 2007).

[10] Sec 12 of the Constitution.

[11] 2002 1 SACR (C).

Xaba.[12] In both these cases, the matter dealt with an application for the forced surgical removal of a bullet from the respondent's leg in the light of the Criminal Procedure Act 51 of 1977. These cases, although seemingly far removed from forced *in utero* surgery, remain the closest precedent for any forced surgery beneath the skin. In *Gaqa*, the court granted the order, whereas in *Xaba* the court refused the order and stated that the question should rather be left to the legislature. Distinguished authors such as Carstens prefer the decision in the *Gaqa* case, considering that it takes into account that none of the rights in the Bill of Rights are sovereign, but that they are all limitable.[13] In the *Gaqa* case the court applied section 36 of the Constitution in order to limit the respondent's rights. The court decided that granting orders for forced surgical intrusions by a limitation of the section 12(2) rights in terms of section 36 calls for the balancing of different interests which must be done on a case-by-case basis with reference to the facts and circumstances of the particular case. Therefore, the individual's interests in bodily and psychological integrity must be weighed up against the community's interest in conducting the operation for the court to grant the order.

Coming back to an order for forced *in utero* surgery, we find that if a situation would arise such as in the above-mentioned facts, that *in utero* surgery becomes necessary to save the life of the child, certain rights become relevant. Firstly, the surrogate mother's right to bodily and psychological integrity reigns supreme. This right grants her full autonomy over her body and it is therefore obvious that it is this right that has to be limited in order to compel her to undergo surgery. Section 36 states that the limitation of a right can only be done if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

- *the nature of the right.* The right to bodily and psychological integrity is of a limitable nature as has been shown in *Minister of Safety and Security v Gaqa.*[14]
- *the importance of the purpose of the limitation.* The fact that the foetus' only chance of survival depends on the *in utero* surgery and the parent's ability to exercise their right to reproduction make this limitation important.
- *the nature and extent of the limitation.* Here one would look at the medical risks for the surrogate mother during the *in utero* surgery.
- *the relation between the limitation and its purpose.* In the case of *in utero* surgery, the limitation is usually directly related to the

12 2003 7 BCLR 754 (D).
13 Carstens & Pearmain (n 5 above) 924.
14 n 11 above, 659.

purpose, which is to grant the parents a child of their own and to grant the foetus a healthy life.
- *less restrictive means to achieve the purpose.* In the case of *in utero* surgery, there are no less restrictive means to achieve the purpose. Considering that the operation is usually only effective during a short window period, any other means would merely defeat the purpose and result in the foetus being born ill and possibly dying prematurely.

We have therefore shown that the surrogate mother's right to bodily and psychological integrity can be limited. However, one still has to force the surrogate mother to undergo the surgery. Referring back to the *Gaqa* case, one realises that, in order to grant an order for forced surgery, the court has to weigh the surrogate mother's right to bodily and psychological integrity against the community's as well as the parents' interests in the surgery.

The parents' interests in the surgery obviously involve their section 12(2) right to reproduction. The most important question, however, is whether the community has an interest in the forced surgery to save the life of a foetus. *Prima facie* one would assume that the community has no interest in the protection of the foetus, for the case of *Christian Lawyers Association v Minister of Health*[15] has made it very clear that a foetus is not a legal person until birth and that no rights can be allocated to it. However, we are not aiming at allocating any rights to the foetus. We are merely looking at whether the community has an interest in protecting a foetus after the 25th week of gestation.

For this, we refer to the unreported case of *S v Mashumpa and Another.*[16] In this case, medical evidence was given that in the eyes of the medical community, a foetus after 25 weeks of gestation is viable, ie in lay terms a baby. Judge Froneman in this case stated that if the community convictions were to be tested as to whether the killing of an unborn foetus would amount to murder, that it would be in the affirmative. The notion that the community wants to protect viable foetuses is also reflected in the Choice of Termination of Pregnancy Act[17] where, after the 20th week of gestation, the measures for having a legal abortion become very stringent. Therefore, a foetus after the 25th week of gestation is viable and the community has an interest in protecting it.

Section 11 of the Constitution, read in terms of section 7, states that the state has a duty to keep a high regard and respect for human life that has been born. Surely, if the state has a duty to have a high regard and respect for human life that has been born, the state must

15 1998 4 SA 113 (T) 1122 (F-I).
16 n 9 above.
17 Sec 2(c) of Act 92 of 1996.

also have a duty to have a high regard and respect for developing human life. And even more so if the developing human life is already viable, for as I have shown, the community now views a foetus after 25 weeks of gestation as viable. How can the state have a high regard and respect for developing human life? The state can have such high regard and respect for developing human life by offering the foetus the best medical attention available, which in the particular circumstances would be *in utero* surgery.

One therefore finds that the law at present does not reflect the community convictions and medical realities of our time. In the case of *Carmichele v Minister of Safety and Security and Another*,[18] it was decided that the courts have a duty to develop the common law so as to reflect the *boni mores* of the community. We have already shown that the *boni mores* of the community are moving in a direction that protects foetuses after 25 weeks of gestation. Therefore we argue that the common law be extended to protect viable life after the 25th week of gestation.

Therefore, it has been shown that the legal position regarding a viable foetus after 25 weeks of gestation is rather murky. One finds that with the current medical technology it may be possible that, if a situation as mentioned above does occur, one could compel a surrogate mother to undergo a surgical procedure such as *in utero* surgery. This surgery would, however, have to pose very little or no risk to the surrogate mother and its rationale must be purposive, necessary and important.

[18] 2003 2 SA 656 (C) 33-35.