Constitution and Law IV: Developments in the Contemporary Constitutional State

2–3 November 2000
Faculty of Law
Potchefstroom University for Christian Higher Education

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Introduction

"Development in the Contemporary Constitutional State" is a broad theme, though also focused within the ambit of legal scholarship and practice. The focus involves the two most topical issues in contemporary South Africa: the need for development and the development of constitutionalism.

The conference of 2–3 November 2000 addressed the theme in four sessions:

- The significance of constitutional values
- Urban and rural land planning and development
- Environmental law implications of mining
- The limitation of export risks

Added to this was the judicial perspective of Justice Deon van Zyl on the constitutional development of the common law.

Participation was wide-ranging, both in geographical and in institutional terms. Academic participation hailed from Japan, Scotland and a number of South African universities. Commercial inputs were made from the mining and petro-chemical industries. Attendance included academics, students, legal practitioners and the public sector.

The conference reflected four years of fruitful cooperation between the Konrad Adenauer Foundation and Potchefstroom University's Faculty of Law, in the presentation of colloquia and conferences under the title *Constitution and Law*. The collaboration is highly valued by the Faculty. This publication is a concrete manifestation of the work resulting from a joint effort founded in shared values.

Professor Francois Venter
Director, Research Focus Area:
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Potchefstroom University for Christian Higher Education (PU for CHE)

Welcoming Remarks

Michael Lange

INTRODUCTION

On behalf of the Konrad Adenauer Foundation (KAF), I would like to extend a very warm welcome to you all.

This is the fourth time KAF has worked in collaboration with Potchefstroom University for Christian Higher Education's (PU for CHE's) Faculty of Law to organise a conference on "Developments in the Contemporary Constitutional State". This conference forms part of a series of seminars started in 1997 under the title *Constitution and Law*.

It has been our common objective since then to introduce current constitutional issues to a wider audience of constitutional lawyers, law practitioners and law students not only, but regularly, in Potchefstroom.

During our previous one-day seminars, we have usually highlighted diverse constitutional issues, and I am pleased we shall now have the luxury of two days of proceedings, which will allow for more discussion and therefore more academic exchange between participants.

1. BRIEF BACKGROUND

For those not yet familiar with KAF, allow me to provide some of the reasoning behind the Foundation's involvement in South Africa in general, and in this project in particular.

KAF is one of six political foundations operating from Germany at present. Since our last meeting in 1999, another political foundation has been created.

This new foundation is closely affiliated to the ex communist party of democratic socialism in East Germany. The fact that this foundation is sponsored by Germany's democratic government may be considered an example of the constitutional relaxation that has taken place in Germany, when it comes to left wing politics and its respective organisational configuration.

Not so relaxed – and for good reason – is the attitude towards right wing political parties in Germany today, where an intense debate is raging whether the German Parliament should engage the Federal Constitutional Court in disallowing the political activities of the National Democratic Party of Germany.

It might be worthwhile some time in the future to assess the constitutional regulations of party political activities in this country, if only to get a clearer picture as to how South Africa views, constitutionally, the activities of political organisations, their role in protecting the constitutional state and their methods of financing.

But coming back to KAF's work abroad, where we have been engaged now for more than 35 years. Some 85 colleagues oversee some 200 projects and programmes in more than 100 countries. It therefore comes as no surprise that international cooperation accounts for approximately half KAF's total budget of approximately DM200 million.

As a result of the work undertaken by KAF, especially in developing countries, we have adopted the promotion of democracy and the strengthening of the constitutional state as our main objectives abroad. We have become convinced that the creation and consolidation of a constitutional framework is one of the essential conditions on which any development process depends.

2. STRENGTHENING THE CONSTITUTIONAL STATE

The strengthening of institutions and structures that guide the development of a constitutional and legal order and that favour the consolidation of the rule of law, as in the case of your Faculty, has been gaining importance among the Foundation's activities – especially since transformation processes worldwide have been offering greater opportunities for direct involvement.

By helping to build a legal order that supports human rights, an independent judiciary and the rights of minorities, KAF believes it does not interfere with the internal affairs of a country, but rather helps to implement universal values for the benefit of the citizen.

The implementation of the rule of law and the development of the new democratic order are therefore foremost objectives of our work in South Africa, too. For these reasons we cooperate not only with political parties and their respective think-tanks but also with reputable education and research institutions, as can be seen from today's event. Constitutional development has always been a priority for us. For this reason we try to inculcate and explain the fundamentals of a liberal democracy from a Christian Democratic viewpoint as well as to enhance political competence among all citizens of South Africa.

We utilise all the tools available to us to further our objectives. These include international and national seminars, such as this one; short-term expertise; study tours to Germany; research programmes and, where appropriate, publications through our series of seminar reports and occasional papers.

3. HUMAN DIGNITY

Looking at the conference programme, I was pleased to notice that we will be concentrating on, among others, the question of the significance of constitutional values and on environmental issues.

As far as the significance of constitutional values is concerned, the German constitution (*Grundgesetz*) makes in its preceding statement (*Präamble*) particular reference to human dignity, which man possesses as a supreme, inviolable right. This can be seen as a result of the fact that the German Constitution, like the South African Constitution, was adopted in the aftermath of a political order that showed little respect for the inherent dignity of all persons. All enumerated rights that follow the reference to human dignity are therefore interpreted and applied by the German Federal Constitutional Court in the context of the foundational value of dignity. Also, the decisions of the German courts, in the view of the South African Constitutional Court president, Justice Chaskalson, are said to provide a prodigious jurisprudence of dignity. One can therefore say that the connection between human rights and dignity is comparably strong in German law.

4. ENVIRONMENTAL ISSUES

Turning to environmental issues, the other major topic at our seminar, it may come as no surprise that KAF has – especially during the past couple of years – been increasingly inclined to promote environmental issues, particularly environmental protection laws, as well as to support organisations dealing with this issue. I trust we all believe that environmental protection is a task shared by the state and all its citizens.

Within the framework of international cooperation, KAF has defined environmental protection as a subject cutting across all sectors. We believe, however, that it is not enough simply to carry out a few isolated ecology projects. Instead we should try to improve the framework conditions for enhanced environmental awareness in all areas of (business) management.

When it comes to our activities in the field of environmental protection and management abroad, KAF generally uses two approaches to address environmental issues.

One is to try and guide the framework conditions of environmental policy through consultation, while the other is to implement concrete projects in support of sustainable development.

To preserve the stability of the global ecosystem, parliaments must define limits to the exploitation and pollution of the environment, and defend those limits against the selfish interests of economic role players.

Next to regulatory instruments – which are obviously necessary in certain areas and phases and therefore form part of tomorrow's proceedings – market-related instruments are gaining in importance as they often prove to be more efficient than bans and controls.

However, as the price of environmental pol-

lution is not fixed in the marketplace but defined in a political process , it is the politicians' turn to act.

All KAF's activities in the field of environmental protection are designed to influence the environmental policies of national governments as well as to enhance society's awareness of environmental concerns.

All this, I believe, clearly shows the importance given by KAF to developments in South Africa, and we are grateful to PU for CHE's Law Faculty for accepting our offer to continue cooperating in the organisation of conferences such as this, while at the same time tackling issues of common concern.

CONCLUSION

South Africa has, only a few years ago, set out on a most difficult path towards increased political participation and economic emancipation. This has led, and will for some time to come lead, us all through difficult territory. By transforming white minority rule to black majority government, the foundations of a peaceful democratic society have been laid.

Building and maintaining a strong and enduring democracy on those foundations will, however, depend on a continuing commitment by all segments of South Africa's diverse population to reconciliation and far-reaching economic and social transformation. The environment should no doubt be a prominent area of sustainable transformation and development.

This conference is designed to stimulate debate on particular aspects of the contemporary constitutional state in South Africa. I can only hope you find the proceedings enjoyable, interesting and worthwhile.

The Significance of Constitutional Values

Hiroshi Nishihara

1. MODERN CONSTITUTIONALISM AS AN ALLEGEDLY VALUE-NEUTRAL SYSTEM

1.1 Notion of "constitutional values"

In this paper, I will address the question regarding the significance of constitutional values. In order to fulfil this task, we have to begin with the question, "What are constitutional values?" Is the adjective "constitutional" equivalent to the circumstance that the *pouvoir constituant* or the congress establishing the constitution happens to write those values into the text of the constitutional document? Such usage of the word "constitutional" presupposes the idea that a written constitution may raise any value to constitutional values, including, for example, a religious virtue in favour of some comprehensive confession. Or, are there any limitations to what we properly call constitutional values? For the latter, there follows the question about how and on what definition of the word "constitutional" we can limit the scope of constitutional values.

In the 21st century, the century of human rights as is anticipated by many, we cannot use the concept of constitutional values to signify arbitrary value judgment met by the drafter of constitutional documents. It is no longer allowed to legitimise the discriminatory and inhuman treatment of people in the name of constitutional values. There exists also a consensus across the globe about the fairness of the democratic process and the unfairness of the deprivation of political rights. Therefore, if we speak of constitutional values, we take for granted a certain frame of reference as to what belongs to these values. This is the very fact resulting from the effort of many nations, during and after the Cold War, to establish a free and democratic government, including the effort of the Republic of South Africa to "heal the division of the past", as it reads in the preamble of its final Constitution.

However, problems relating to constitutional values and their legal significance are by no means already solved by the existence of this overwhelming consensus. In reality, the case is quite the contrary. There is namely only a vague framework of what can be legitimately called "constitutional". Every constituent convention may stress these or those aspects among existing values that can be recognised as "constitutional". Consequently, the design of a political entity as a result of constitutional choice differs a great deal from nation to nation. Nor is it only the matter of giving a new constitution. Constitutional provisions are always interpreted according to the *Zeitgeist*, the dominant idea of a time, so that the fundamental rights and requirements of democratic process mean, even within a single constitution, something different from time to time. We need, therefore, some frame of reference in order to confine ourselves within the proper interpretation of constitutional rights and principles.

Without a system of constitutional values, the constitutional praxis would run the risk of favouring one particular value and right in a biased manner and pervert them to something totally opposite, into legitimation of injustice in the name of constitutional law. Such would be the case if the value of democracy justifies a dictatorship grounded on one-way popular election (as Hitler's regime was defended to be

democratic), or if the values of equality are realised by state planning which guarantees perfect equality of result, rejecting human freedom.

Professor Venter's well-known effort[1] should be understood in this context. In his thesis presented at this symposium three years ago, he developed a hierarchical system of values, which were enumerated in Section 1 of the South African Constitution. This provision demands the Republic of South Africa to be founded on these values. In his hierarchy, Professor Venter assigned the value of human dignity to the very core and understood equality and freedom as the supporting values, while democracy and rule of law are the structural values. This effort builds up a system of constitutional values. As we can see from this effort, values appropriately identified as "constitutional" construct a certain framework of a legitimate form of government, but we should always be careful not to deviate from the system of fundamental constitutional values. Setting up *Auslegungsmaxime*, general rules of interpretation, constitutional values contribute to proper understanding of constitutional provisions.

1.2 Freedom, equality and democracy as value-neutral criteria of fairness

The framework of constitutional values has been, somewhat vaguely, established in the consensus of most nations. In any case, the system of constitutional values builds an oval with two central points: the substantive value of human rights and the procedural value of democracy. Section 1 of the South African Constitution is also devoted to the fulfillment of this value system.

But, here we are faced with a question. Why do the values of human dignity, freedom and equality deserve more respect than other values? Are they, in their nature, superior to other religious, ethical and cultural values? If so, to what extent? The history of constitutional values in the 20th century has actually been a history of challenges against them. Challenges from a totalitarian point of view and those based on religious motivations have characterised the debates on fundamental rights.

To answer these questions, it is not enough to affirm the notion of human dignity, so important it also is. Every religious doctrine has its own idea about human nature that can come into conflict with the constitutional understanding of human dignity. Similarly, there are values that are allegedly rooted in the culture of each country. If the anthropological background of cultural values were considered to be relevant in forming legal order, it would be hard to establish the supremacy of constitutional values based only on the notion of human dignity. Equality, freedom and democracy are values also characterised by their origin in the culture of European Christianity. Why should the Christian cultural values prevail over other culturally founded values?

One of the most convincing answers to this question emphasises the value-neutral character of freedom, equality and democracy. These values designate only some rules in reconciling value conflicts among the people instead of establishing a certain comprehensive doctrine as an officially recognised belief. They leave enough room for every individual to design his/her own life according to his/her belief and bind only communication in the public sphere to some formal rules.

Of course, constitutional values are not fully procedural, as John Hart Ely asserted in relation to the heightened judicial review grounded on some fundamental rights. He understood the strict scrutiny applied by the United States (US) Supreme Court to be a reinforcement of the democratic process. Legislation curtailing, for example, freedom of expression or the equality rights of separate minority groups damages the process of democratic decision making itself and therefore deserves especially careful control by the courts. Although this opinion can justify the scrutiny based on fundamental rights without favouring certain values, it cannot be applied to answering the question as to why constitutional values require more attention than other cultural, moral and metaphysical values. For, Ely's thesis takes for granted the validity and legitimacy of democratic process and does not analyse the structural preconditions of democratic governance.

Rather, constitutional values are substantive in their nature. It does not mean that such values always construct a system that embraces the entire scope of human life. For example, freedom as a constitutional value does not necessarily demand a lifestyle of autonomy and independence. It also acknowledges a devotion

to religious or cultural values and permits people's obedience to some absolute authority. What the constitutional notion of freedom does not allow is the state's coercing people into such independent forms of life.

Ronald Dworkin[2] expressed such a limitation of state activity as neutrality on the question of good life. According to his opinion, government treating its citizens as equals must be as independent as possible of any particular conception of good life. Since every citizen of a society differs in his/her conception, the government does not treat its citizens as equals if it prefers one such conception to another. John Rawls[3] developed this idea and introduced a formula of the "neutrality of aim". Government cannot be neutral in the effect of its activity, but, in his view, justice as fairness hopes to satisfy the neutrality of aim in the sense that basic institutions and public policies are not to be designed to favour any particular comprehensive doctrine.

In the contemporary world, the factual plurality of moral and ideological conceptions among people must take precedent to legal order. In terms of this plurality, a government has only two choices: either it fully relies on a certain comprehensive doctrine and tries to maintain ideological unity among its subjects, or it bets on the potential ability of the people to live autonomously and guarantees freedom and equality. Attachment to constitutional values leads to abandoning the first alternative, which may result in some collectivistic regime.

If a constitutional state seeks to secure the good order by guaranteeing freedom of conscience, it would be disrupting to have its own moral position underlying its activities. In order to keep sound social order, it lies in the interest of the state to consider seriously the condition on which its citizens may exercise freedom of conscience. Similarly, it would be impossible to treat people from different cultural backgrounds equally if the state represents as an institution of one particular culture.

1.3 Individualistic view of constitutional values

The notion of human dignity upholds, as we have seen, the primary value of the constitutional system. In contemporary society, this notion may not be understood in relation to a particular comprehensive doctrine. Instead of relying on such a perfectionistic argument, constitutional values should defend themselves as founding a value-neutral framework for reconciling social antagonism. The central idea of human dignity should then be sought in the equal quality of every individual against autonomous judgment. This assessment leads to some theoretical conclusions. Interpreting constitutional values from this fundamental viewpoint amounts to an individualistic understanding of freedom and equality.

The concept of freedom can cover a wide range of human desire. However, not all of them could be legitimately considered as constitutional values. Particularly, the question of whether and to what extent fundamental rights include the so-called positive freedom must be addressed for every constitutional system. To illustrate this problem, let us consider a German case of the crucifix in the classroom. In the German theory, religious freedom also includes positive freedom, the freedom of the Christian majority to have their religion officially supported within the institution of public schools. Of course, such governmental support of one particular confession amounts to a clash with the negative freedom of non-Christian minorities. The German Federal Constitutional Court[4] gave priority to this negative freedom. It condemned a statutory provision requiring schools to hang a crucifix in their classrooms, on the premises that such practice violates the right of young citizens to develop their confession without intentional influence by the government. This decision met a passionate criticism resting on the notion of positive freedom, but the court was unable to give priority to the will of the majority.

In countries where church and state are constitutionally separated, such as the US, France and Japan, it would be impossible for positive freedom of the majority to wear the mask of constitutional rights.[5] The principle of this separation establishes, in the limited sphere of religion, the neutrality of the state. A state that wishes to guarantee maximal religious freedom should abandon its own confession and treat each religion equally. Otherwise, governmental actions based on an official religion could not avoid exercising negative influences on the religious growth of its citizens.

Needless to say, governmental neutrality cannot be understood to include neutrality in

effect. The separation of church and state, even if it is adopted in the constitution, applies only in relation to institutionalised religions such as the Christian church or Muslim organisations. Outside this realm, neutrality disqualifies only intentional identification with certain religious, moral or ideological doctrines. To punish a murder means, of course, to adopt a moral view that murder constitutes an evil. This is only justified if the government is interested in preventing an actual harm to the life of its citizens. It would be difficult to support such governmental actions seeking to maintain moral beliefs among the people.

In the face of this fundamental neutrality, the notion of constitutional freedom does not include the positive will of the majority to reflect their own confessions in the state institutions. Such a desire demands something impossible to the state, because it may not identify itself with one particular confession even though the confession is shared by a majority of its members. The state can, and does, realise the majority's interests expressed through the process of democracy, but only to the extent that such interests can be put into rational terminology. When the majority pursues goals only explainable on the basis of a certain system of ideological thought, they are beyond the reach of the secular state.

Similarly, the notion of equality should be defined as an individual right if the core idea of human dignity could be sought in the equal quality of every individual. To what kind of group an individual happens to belong is a fully irrelevant issue in law. The constitutional guarantee of equality requires every individual to have an equal chance in self-determination. This also ties in with the fundamental neutrality of the state. The state should always try to be colour-blind and sex-blind in allocating benefit and burden among its citizens.

In the South African context, this thesis would support – in spite of Professor Fagan's criticism[6] – the dignity-analysis of "unfair discrimination" in the sense of Prinsloo judgment.[7] Here, JJ. Ackermann, O'Regan and Sachs interpret the "unfair discrimination" prohibited in Section 8 (2) of the Interim Constitution (or Section 9 (3) of the final Constitution), in reliance on J. Goldberg's theory in Hugo judgment[8] and also in reliance on Dworin's definition of dignity,[9] as prohibiting a differentiating treatment of people which impairs their fundamental dignity as human being.[10] In rejecting this position, Professor Fagan maintains that this dignity-analysis would amount to be too strict, so strict that this provision would be unable to play the expected central role in South Africa. The Interpretation of the "unfair discrimination", however, cannot lose connection to the system of fundamental constitutional values with human dignity at the center of the system. This is also shown in the fact that Professor Fagan himself introduces reference to Dworkin's definition of dignity in interpreting the dignity clause in Section 10 of both Interim and final constitutions and thus incorporates this understanding of dignity in construing Section 8 (2).

Furthermore, it makes no sense in the legal order to speak of the parity of different racial, ethnic or cultural groups. As a neutral state treats each individual as an equal member of its society, it cannot recognise groups as such. The only exception to this principle would be the statutes providing for the possibility of affirmative action. But in this field as well, a group-oriented approach is not appropriate.

Although we know that the problem of discrimination applies only to certain groups, discriminatory praxes are not unfair because they treat each group partially. Actually, they violate the fundamental right to equal respect, because they disregard each individual's worth according to his/her ability and achievement and evaluate a person superficially based on his/her group membership that has nothing to do with individual performance. Remedial measures should therefore counterbalance any stereotyped judgment.

The prevailing view on affirmative action plans interprets them as measures to compensate historical evil done to the discriminated group. Reverse discrimination resulting from such plans is, according to this view, tolerable insofar as it curtails the ruling group's benefit that would not have been due to them but for the discrimination in the past. This view only tries to compensate past evil through creating new evil. It cannot justify the special burden on a particular individual who does not have personal responsibility for the past discrimination and who usually comes from a discriminated segment of the privileged group. The goal that an affirmative action plan may properly pursue

in the framework of constitutional values is to counterbalance the contemporary influences of discrimination toward a person from a traditionally discriminated group.

In such a way, the concepts of freedom and equality understood individualistically serve as elements of the value-neutral system for reconciling racial, cultural or moral conflicts. In the modern world, citizens develop their personal identity on the bases of their different, or even conflicting beliefs and cultural background. We need a legal system that can make possible the coexistence of individuals on this plurality of opinion. Constitutional values deserve to be called "constitutional" if and because they are indispensable to the system guaranteeing peaceful coexistence.

2. VALUE-NEUTRALITY AS A CULTURALLY CONDITIONED VALUE?

2.1 Challenges from collectivistic notions

In establishing the theory about the neutrality of aim in his book on "political liberalism", Rawls presupposes existence of overlapping consensus among citizens and reasonable doctrines in a well-ordered society. We are, however, not always dealing with well-ordered societies. In the contemporary world, most countries represent only a weak consensus in favour of constitutional values. They are always challenged by many kinds of ideas.

The most direct challenge comes from different forms of collectivism. Totalitarian regimes in the past, such as Fascism in Europe in the 1930s, are the best examples. A totalitarian dictatorship is not a historical fact. There are also many countries today under military dictatorship, where citizens are often excluded from political decision under a one-party system.

However, there are countries that are, at first glance, democratic in their political structure but are still under the influence of collectivism. In such cases, totalitarian regimes are in some sense democratic. Where the majority feels free to exercise power on the minority without being limited by legal order and without worrying about accountability, their attitude toward the minority tends to lose control. In several countries, the moment of violence expresses itself less directly but more indirectly through the social mechanism.

One example of this social mechanism is a particular idea of equality. There are societies where individual freedom is misunderstood as an arbitrary request of self-willed individuals out of egoism. If the ruling group is convinced by such a view, the notions of rule of law and equality are sometimes drawn into perversion. Originally, the principle of rule of law intends to subject governmental power to law to prevent the arbitrary use of such power and thus to protect the fundamental rights and interests of citizens. In some Asian countries, such as Japan, the concept of rule of law is sometimes misconstrued. Where this principle is traditionally misused in order to legitimise the ruling by law, individual freedom has no place in the system. Equality means, then, equality in obligation. Based on this understanding, the government is prevented from allowing exceptions for individuals who assert their rights of freedom, even in order to guarantee equality.

One typical example of such a sophisticated form of totalitarian regime can be observed in Japan. In the early years of its democracy after World War II, it failed to divide the continuity of social structures. People were still dependent on the moral and economic instruction of the imperial government. This dependence was founded first in the era of this country's modernisation in the late 19th century and strengthened before and during the war. Also under the new democratic constitution of 1946, Japan failed to establish a proper concept of freedom, mainly because those constitutional theories put too much emphasis on the realisation of social rights and acknowledged a national unity of interests that should be fostered by government control.

In such a sophisticated collectivism, people who express their awareness in the irrationality of the dutiful structure run the risk of being excluded from social life. It is, certainly, much better than the direct application of violence by the state. In Japan in the 1930s and 1940s, social criticism often led to death by horrible torture. In comparison, contemporary Japanese do not have to worry about their life when, for example, they express dissatisfaction toward the governmental praxis by refusing to sing the national anthem. What they have to worry about is, maybe, their career in their company, or their school records. The slightness of punishment makes the unfair praxis less notable, but this still does not make it fair.

Such praxis is based on the notion that people

do not always deserve equal respect. Some conduct is wrong, leaving no space for excuses; people who engage in such conduct deserve no respect, because they are unable to respect common sense.

The distinction between right and wrong, then, depends on the judgment of authority, and this usually comprises persons in leading positions who are entitled to imperative over subordinates. In the framework of such authoritarian thought, the weaker the position of an individual, the stronger the power applied. Notwithstanding the Japanese notion of equality in obligation, an authoritarian society is by no means a fair society.

In Japan, this authoritarian structure comes from the continuity of power exercised by the elite since the era of Fascism before World War II.

Some say that the existence of an imperial system lies behind such authoritarian thought and that the Japanese people cannot free themselves from it without abolishing this typical example of feudalism. It may or may not be true; collectivism in Japan is clearly the remains of an outdated model. This does not mean that it is easy to overcome collectivism, partly because it represents a convenient system for the majority of the society. The Japanese government, however, can no longer avoid respecting personal freedom today more than ever. It cannot be held responsible for the economic prosperity of every citizen any more, because the process of globalisation affects Japan much more than Japanese bureaucracy can somehow control. In this stage, the Japanese government cannot but respect the free choice of every individual.[11]

Such a development is probably not limited to Japan. The background to the Japanese system are the cultural influences of Confucianistic ethics and the Buddhist religion, which supported the moral duty to obey one's superior. Some Asian nations have, at least partly, the same cultural background. Now we can see in several Asian countries concentration of power for the sake of economic development, which is the result of their cultural background, if applied to their economic conditions. But this common form of Asian dictatorship shares the fate with its model of Japanese bureaucracy, as is already shown most typically in development in Indonesia.

2.2 Communitarian view of individual freedom

The antagonism between individualism and collectivism is rooted in a metaphysical conflict: is the human being properly understood to be the master or only a dependent member of a social group? Individualism tends to adopt the first view, demanding rationality to be the inherent ability of every individual. This view is criticised by many forms of communitarian thought. The latter maintains that personality does not precede membership in a society, but is only an outcome of the person's development in his/her society. Such a theory acknowledges no culturally neutral values.

This fundamental idea first leads to a republican understanding of personal freedom. Republicanism tends to define persons to be members of a nation; their personalities are determined by the national culture, expressed most clearly in its language; the nation-state is a process of integrating such cultural unity.[12] From these fundamental ideas, republicanism explains why a nation-state guarantees the freedom of every individual. Freedom does not intend to enlarge individual arbitrariness; rather, its aim lies in the intention to let every member of the nation contribute in his/her way to the nation. Since individual members have different abilities, it is efficient for the national body to leave many ways open to contribute to the national society. However, a limitation of freedom is inherent to this interpretation. Since it looks like nonsense to make personal arbitrariness possible, freedom may only be guaranteed in relation to conducts that benefit the nation, evaluated according to the cultural measure of respecting society.

If there were a nation-state in the right sense of the term, i.e. a closed society of people sharing a fundamental belief and rule, it might be possible to understand personal freedom in favour of this republican view. Nevertheless, there is no such closed society in the world today. Every country has a population with multicultural backgrounds. There are always people with different beliefs and ideologies. Within such a plurality, the significance of constitutional values lies not in maximising the contribution to national culture at the expense of the rights and interests of minorities, but in making peaceful coexistence possible.

The republican view takes national unity for

granted. Such a theoretical prerequisite is at best criticised by multiculturalism and feminism. It is interesting, however, to note that these beliefs share the same metaphysical understanding of human nature with republicanism. Feminism asserts the cultural difference between men and women and criticises the traditional social order as that of masculine culture. Similarly, multiculturalism seeks to overcome the dominance of one particular – Western – culture over others. In doing so, it explains the personality of human beings as an outcome of cultural identity. The difference between multiculturalism and feminism on the one hand and republicanism on the other, lies only in the answer to the question of what kind of group serves as a frame of reference in finding the determining factor for personal identity.

For that reason, the same question applies also to multiculturalism and feminism. Is there any closed group of one particular culture? Not all women share a single culture; every woman is determined under the influence of various cultural elements, such as her nation, her gender, her sex, her local community, her school, her classmates, her standing, her family, and what she finds personally suitable to her. Similarly, there is no closed culture of one racial or ethnic group. It is an established fact that the range of personal differences is much larger than that of cultural difference.

Given this fact, it is not appropriate to accept these communitarian views of human nature in establishing the fair order of a political society. If an individual is considered to be a member of a certain cultural group, he/she is compelled to be a fighting member of his/her group. But, in reality, he/she is always a member of several groups at the same time. It seems fatally impossible for a pluralistic view of political fairness, which looks for good order in a well-balanced allocation of power among relevant groups, to take all forms of culture into consideration. Cultural balance is something that cannot be realised, and it would be nonsense to pursue such a balance. As we have seen in relation to the group-oriented understanding of equality rights, only every individual counts.

3. A COSMOPOLITAN VIEW OF FREEDOM AND THE RIGHT TO PEACE

The metaphysical question about the correct way to understand human nature cannot be answered here. Certainly, the individualistic concept of freedom and equality prefers to some extent an individualistic position in the metaphysical discussion. But this combination is not necessary.

In seeking a fair constitutional order, we have to consider why constitutional values are needed. As I have already repeated several times, it is because we have to find a way for the peaceful coexistence of conflicting, even antagonistic comprehensive doctrines and cultures. There is therefore no point in rejecting the fact of confessional plurality and trying to return to a world of cultural unity. Instead, we must be aware of the fact that every individual forms his/her identity under the influence of cultural, religious and moral plurality.

This does not deny the worth of evaluating human conduct according to its contribution to a greater entity. Now that we have rejected the closed society of single culture as a reference for this measurement, we can only look at the global community of human beings as a proper source of all values.[13] It is the only way to avoid antagonism among the cultures and establish peaceful coexistence, without always regarding individuals as soldiers of cultural groups struggling for dominance.

When the Japanese Constitution established in 1946 declared the right of the people to live peacefully and put it in a concrete form of constitutional disarmament, it had the cosmopolitan concept of fundamental rights in mind. War is the most severe violation of human rights, demanding a citizen's life for the sake of some allegedly overriding national interest. From the victim's point of view, it makes no sense to justify war in the name of overriding benefits. It was at least necessary, then, for national interest to reject the status of the last and highest source of values.

The pacifist clause in Article 9 of the Japanese Constitution has not been realised yet in alliance between Japan and the US, and it is now challenged by the movement of constitutional revision. Revisionists argue that Japan needs to be armed with highly-developed weapons in order to contribute to the maintenance of world peace. Even in pursuing this goal I think we also have to be aware of the significance of the constitutional prohibition for the state to be armed.

Certainly, only physical power makes the

maintenance of good order possible. Also, it goes without saying that every state should protect the safety of social life for its citizens. It is, however, highly questionable whether modern states can properly solve the problems alone. We need, rather, a global organisation independent of national interest, an organisation in which not every state, but every individual across the globe, is represented.

At the end of the 20th century, we have reached a stage where we have to establish constitutional values at a global level. Those values with the same components should now be respected nationally and supra-nationally. Individual rights such as freedom and equality as well as the procedural principle of democracy should always be central to political judgments. This is because we can only guarantee peaceful coexistence on the basis of those constitutional values.

We have had to observe that those constitutional values are not respected as they ought to be worldwide. Though there are still a log of difficulties, in part somewhat difficulties of a totally different kind, I hope we can continue to collaborate in further establishing constitutional values in our states and also at the supra-national level.

ENDNOTES

1) Venter F "A Hierarchy of Constitutional Values" Konrad Adenauer Stiftung *Constitution and Law* (Johannesburg 1997) 17.
2) Dworkin R *A Matter of Principle* (Harvard UP. Cambridge 1985) 191.
3) Rawls J *Political Liberalism* (Columbia UP. New York 1993) 193-194.
4) BVerfGE 93, 1 (1995).
5) Cf. Nishihara H "Die Trennung von Staat und Religion in der japanischen Verfassung" *Der Staat* 39 (2000) 86.
6) Fagan A "Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood" 1996 *South African Journal on Human Rights* 220. His opinion is influenced by Westen's theory. Cf. Westen P "The Empty Idea of Equality" (1982) 95 *HarvLR* 537. Professor Fagan demands, on this theoretical background, "unfair" discrimination to be one that infringes either an independent constitutional right or a constitutionally grounded egalitarian principle. The first requirement – even sometimes observed, for example, in Article 14 of the European Convention of Human Rights – leads to limit the application of the equality clause to cases in which some independent constitutional rights are violated and to make the equality clause superfluous. Because he demands the second requirement, his criticism of the dignity analysis amounts only to be postponed. Furthermore, the justice-oriented understanding of equality as Professor Fagan puts forward is now criticised by the right-oriented understanding of equality, which tries to establish a proportionality test within some limited area such as gender and racial discrimination. Such effort can at best be observed in the judgments of the Court of European Communities. Cf. Nishihara H "Two Models of Equality" 2000 Waseda Bulletin of Constitutional Law (in printing). Paper presented at the 5th World Congress of the IACL in Rotterdam 1999.
7) *Prinsloo v Van der Linde 1997* (3) SA 1012 (CC) par. 31-32.
8) *President of RSA v Hugo 1997* (4) SA 1 (CC) par. 41.
9) Dworkin op cit (note 2) 191.
10) Cf. Grupp T *Südafrikas neue Verfassung* (Nomos, Baden-Baden 1999) 47-49.
11) Nishihara H/Kim SS *Vom paternalistischen zum partnerschaftlichen Rechtsstaat* (Nomos Baden-Baden 2000) 25-36.
12) Smend R *Staatsrechtliche Abhandlungen*[2] (Duncker & Humblot Berlin 1968).
13) Nussbaum M "Preface" Nussbaum (ed.) *For Love of Country* (2000) 1.

Values, Values, Values or Mere Words, Words, Words? Values in the 1996 Constitution

Dawid van Wyk

INTRODUCTION

The essential thesis of this paper is: in everything except values, the 1996 Constitution improved on its forerunner, the 1993 Constitution.

Why do I say this, given the obvious comfort with which the open community of constitutional interpreters (to borrow from Lourens du Plessis[1]) have slipped into the values mode? It will take a while, but I shall get to the point.

1. WORDS AND VALUES

We sometimes describe our activities, attitudes and feelings in words which sound right, but are not – or, if caution is called for, words which are somewhat offbeat. "Investor" is an example. Day after day every newspaper, every radio station and every television channel tells us about the fortunes and misfortunes of "investors" on the world's markets. After a while, when a pattern emerges – wrapped in phrases like "jittery, "nervous", "anxious" – one starts wondering whether the "investors" are in fact "investing" or whether they are "speculating". The line between the two has become blurred.[2] A diffusion of meaning occurs: investment is investment and/or speculation; speculation can be investment and/or speculation; investment and/or speculation can be investment; and speculation and/or investment can be speculation. Or perhaps speculation remains speculation because we judge it to be of a lesser class – we feel better thinking of the billions of "investors'" funds in the hands of "investment" managers as investments, despite the fact that much of that money is often moved in mind-blowing volumes and equally rapidly from one speculative good deal to the other. In other words, we elevate speculation to investment, for whatever number of reasons – or for no reason at all.

Do we have a similar situation with "values"? Having read some of the vast body of literature that has sprung up around our Constitution over the past six years, I get the impression that the word "values" in both the 1993 and the 1996 constitutions is accepted as understood. The main mission is to discover the values.[3] However, there is arguably a significant, if unintended, difference between the approach to values in the two constitutions. This difference is obscured by at least three factors that I can think of: first, the smooth and seamless transition from the "Interim" to the "final" Constitution; secondly, the fact that since their first interpretations our courts have understood the Constitution as a single document, not as "the Bill of Rights" and "the rest";[4] thirdly, when South Africa eventually joined the democratic world, its constitutional rolemodels were so comfortable with values that we glided into their slipstream.[5] More about this later.

The 1993 Constitution explicitly introduced the idea of values via a single subsection, namely section 35(1),[6] read with section 35(3),[7] without attempting to indicate what such values could be. This led to a creative set of suggestions from the academic world and, since its inception in 1995, energetic attempts on the part of the Constitutional Court to put flesh on the bone.[8] Even before the 1993 Constitution came into force, Henk Botha[9] and Gerhard Erasmus[10] provided us with a list of possible constitutional values. Professor

Botha[11] (as he now is) identified the following as "values and principles" in the 1993 Constitution: national unity, limited government; liberty and equality; pluralism. Professor Erasmus[12] described the same Constitution as "basic-values-oriented". To him the Constitutional Principles in schedule 4 of the 1993 Constitution reflected values; he went on to single out democracy, constitutionalism, the rule of law, freedom, equality, an open society, the protection of fundamental rights, the separation of powers, the independence of the judiciary and the freedom of information. Like Botha, he reminds us that these "values" must always be seen against the backdrop of our past. Underlying his exposition is the assumption that "the courts will be required to give concrete meaning to constitutional values in the context of specific disputes".[13] This the Constitutional Court has done with vigour, if not always with sufficient rigour (according to Professor Cockrell[14]).

The interesting, if not strange, thing about values in the Interim Constitution remains the fact that section 35(1) with its limited literal scope – the role of values in interpreting the Bill of Rights, not the rest of the Constitution[15] – has not stood in the way of a broader search for and application of "constitutional" values. On the contrary, one gets the impression from the literature that section 35(1) was simply understood to have a two-fold role: first, to guide the courts in interpreting the Constitution (including the Bill of Rights – and not the other way round);[16] second, to incorporate values associated with a democratic order into the Constitution (and the Bill of Rights).

Compared to its predecessor and judging by the number of times the word appears in it, the 1996 Constitution surged ahead with "values".[17] In doing so, it converted the narrow formal base on which values rested in the 1993 Constitution – a single subsection directing the courts in their understanding of the Bill of Rights – to the plinth course of the whole constitutional structure. With it came the risk of turning "investment" into "speculation".

This must not be bad, even if it means that one has to be ever mindful of the fact that with "values" under the 1996 Constitution, idea must prevail over original meaning. Phrased differently: we should not be arrested in our search for "values" by the meaning given to the word by the 1996 Constitution. By its indefinite wording the "Interim" Constitution has allowed us – as the collective of constitution makers, interpreters, applicators, writers, commentators, onlookers – to spread the meaning of "values" over a conceptual landscape marked by difference in emphasis, assumption, tradition, experience and understanding. Looking at some of the values proposed for the 1993 Constitution, it is clear to me that we have stretched "value" and "values" to points where they flow into other words and meanings, where they no longer fit the profile of the dictionary.[18] (Which does not mean that the dictionary holds the final sway over meaning, but it remains an obvious and convenient starting point.) The Interim Constitution was open to such a consequence, and the safeguard against an abuse of values (if it is possible!) would have been in a debate about the meaning of "values". Strange enough, that never took place in our legal literature. Nor did anybody ever seriously challenge someone else's identification of something as a "constitutional value".

In my view the 1996 Constitution has to a mild extent solidified the perversion of the concept "values".[19] Let me begin my explanation with the assistance of the oft-quoted and lofty section 1 of the Constitution, which reads as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters' roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness."

"Human dignity", "equality", "human rights and freedoms" and "universal adult suffrage" could be "values". Their quality as such should not be influenced by the fact that there are also clear rights to "human dignity",[20] "equality",[21] the enjoyment of "freedoms"[22] and "universal adult suffrage".[23] "Non-racialism" and "non-sexism" sound like typical values; but in my understanding, "supremacy of the constitution"

is first and foremost an unequivocal constitutional norm, if not a fact;[24] and the "rule of law" is a collection of principles, norms and values (sic!) with soft edges. In other words, the rule of law embodies or represents values, it is not *a* "value" (or can it be both?). Taking the point a step further: it requires some straining to fathom the threesome of a "national common voters' roll, regular elections and a multiparty system of democratic government" as "values" – unless the key lies in reading them together with "to ensure accountability, responsiveness and openness". But it becomes awkward, even if only grammatically. Moreover, "accountability", "responsiveness" and "openness" look more like the values than the other three.

So, I am toying with two questions. The one is: what does section 1 mean by "values"? On the arguably wrong assumption that there is a difference, or that it matters, the other question is: is "equality" the value,[25] or "the achievement of equality", or both – plus any further combination of words with "equality" as part of them? Is "universal adult suffrage" the value, or that which it is intended to help assure, or both? To me, "the *achievement* of equality" and "the *advancement* of human rights and freedoms" postulate process rather than "values".[26]

Perhaps one should accept that a certain looseness of expression is not inappropriate in values language: a most recent and authoritative example comes from the third Bram Fischer lecture[27] delivered by Mr Justice Arthur Chaskalson, President of the Constitutional Court, on 18 May 2000. The title of the lecture is "Human dignity as a foundational value of our constitutional order". In this form it follows the words of section 1 of the Constitution. However, in declaring his intended focus, Mr Justice Chaskalson expressed it in the following words: "I will focus on the foundational value of respect for human dignity, an attribute which Bram Fischer displayed in every aspect of his life."[28] Is "respect for human dignity" a value or an attribute or both?

Section 7(1) adds further colour to the picture. "Human dignity", "equality" and "freedom" are described as "democratic" values.[29] Which raises the question: is there human dignity, equality and freedom which is not "democratic". (In passing, I must mention that in the preamble we, as the people of South Africa, commit ourselves to the establishment of a society – note the unqualified breadth of the term "society" – based on, among others, an unspecified number of "democratic values".)

Section 39(1)(a) – the successor to the worthy section 35(1) of the 1993 Constitution – gives the tale a further twist. It says:

> "When interpreting the Bill of Rights, a court, tribunal or forum . . . must promote the values that underlie an open and democratic society based on human dignity, equality and freedom."

Pressing the point a little in view of the preamble and the use of "values" in section 1 and 7, section 39(1)(a) may then read as follows:

> "When interpreting the Bill of Rights, a court, tribunal or forum . . . must promote the *democratic* values that underlie an open and democratic society based on the *democratic* values of human dignity, equality and freedom."

Technically correct, perhaps, but it does not sound right, and we maintain the extant wording as close enough to know what is meant.

Section 195 is the final provision of the Constitution with a relevant reference to values.[30] It is headed "Basic values and principles governing public administration". Subsection (1) introduces the subject by asserting that public administration "must be governed by the democratic values and principles enshrined in the Constitution, including the following principles". The opening statement is followed by a list of nine "principles". Modelled on the example of section 1 of the Constitution and with a slight shuffling of words, a number of these principles could be stated as "values". And then one is tempted to think aloud: are some of the "values" in section 1 perhaps "democratic" principles, rather than "values"? Or, to push the point to some conclusion: can every reference in the Constitution to "values" safely be read to mean (a) "values" in the typical sense and (b) ideas and principles which are not strictly speaking values, but which bolster democracy, an open society, human dignity, freedom, equality, accountability and so on?

Nothing material turns on this; and I am not accusing the framers of the Constitution of slipshod drafting: it just appears to me that in the 1996 Constitution the word "values", like "investors", has been opened to meanings which are not really values. I find little consola-

tion in Lourens du Plessis's otherwise persuasive assertion that the "open community of constitutional interpreters presupposes that language allows for more than one (equally) valid reading of the Constitution".[31] To me, a common voters' roll will never be a constitutional "value", even when the Constitution proclaims it to be. The 1996 Constitution, I suggest, has in some little way devalued constitutional values.

2. THE REAL DIFFERENCE BETWEEN 1993 AND 1996

However, the 1996 Constitution has added a dimension to values which can easily be overlooked as a result of the factors suggested earlier. By the way in which "values" appear in it, the current Constitution declares in so many words that values are more than interpretive aids. As with section 36 and its precursor, section 33 of the Interim Constitution, it can of course be argued that the "final" Constitution merely confirmed understandings developed under the Interim Constitution;[32] as a result, it is "values" business as usual under the "final" Constitution. In my view, this would be an impoverishing interpretation of the 1996 Constitution. The manner in which it espouses value language makes it more than a legal document. It becomes the primary official statement of our aspirations as a nation, as "we, the people of South Africa". It is verily intended to be the mirror of our nation's soul.[33] The Constitution of 1996 addresses itself to every organ of state, high and low, to every public servant in every nook and cranny of our bureaucracy, to every court of law, to every institution of civil society, to every group and every person in South Africa and demands: that we establish a society based on democratic values (the preamble); that we accept the foundational values of our democratic state (my reservations about the Constitution's articulations of those values notwithstanding); that we respect the fundamental rights of others (in different shades and shapes according to sections 7 and 8, but still); that everyone entrusted with governing this country in whatever important or menial capacity, does so in a value-conscious way (section 195 and 196).

Somehow, this dimension is largely lost on us. Extra-curial talk about constitutional values is mostly "discourse" – an interesting, informative but highly intellectual interaction among a sizeable number of academics and intellectuals of repute, from within and outside South Africa. The Constitutional Court is part of the encounter, with references to "values" in well over half its annual judgments. The chapter 9 institutions – state institutions supporting constitutional democracy – have a chequered record.[34] The same applies to the state administration in general, despite a number of imaginative initiatives.[35]

Much of the intellectual debate is highly relevant to society at large – but how do we bring it to them? Perhaps it is being done through workshops, seminars, information sessions and formal programmes, however, too little of it is seen.

Thus, despite the glimmers, the larger South African "values" picture looks bleak. Mr Justice Chaskalson alluded to this in his Bram Fischer lecture. This part of his address made headlines, but bears repeating:[36]

> "The Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another. We are capable or realising this vision but in danger of not doing so. We seem to have temporarily lost our way. Too many of us are concerned about what we can get from the new society, too few with what is needed for the realisation of the goals of the Constitution . . . All of us have an obligation to make the Constitution work, and it is in all of our interests that this be done."

When the National Assembly finds it necessary to have a special debate on "restoring the moral fibre of society", and the Deputy President is reported to have said that "moral degeneration was one of the biggest challenges facing South Africa, and at the core of many of society's ills",[37] we seem to have lost our way for the moment. When newspapers have to carry double page advertisements informing children and adults about the scourge of child abuse;[38] or when a five-year-old dies at the hands of those in whose care he was, with the police and welfare authorities aware of his plight but not lifting a finger,[39] it is a far cry from any of the values premised by our Constitution. When, two years after the report of the Truth and Recon-

ciliation Commission had been handed to the government, a conference has to be held to ensure that the issue of reparations remains on the agenda because, as Mr Dumisa Ntsebeza reportedly said, "[t]he least we expect is response from government – which has not been forthcoming",[40] it does not sound like a society overflowing with social justice and alive with "values".

We need to become more creative and critical in our attempts to realise the values of our Constitution. As Lourens du Plessis recently showed, "seemingly colourless constitutional mechanisms can often do more to bring constitutional values to life than a rhetorically hollow invocation of sweet-sounding value statements".[41] Admittedly, Du Plessis's exercise fell squarely within the four corners of "law", but the point remains valid. We need to keep thinking, talking, doing constitutional values with a critical mind. As Professor André van der Walt reminds us in one of his most recent intellectual tours de force, one of the gravest dangers facing us is complacency about our constitutional order.[42] "In this case"; he writes, "the problem is . . . that traditional notions and assumptions will be smuggled in through a complacent, uncritical, massaging of the new constitutional order as a supposedly benign, innocuous source of stable common-sense meaning."[43] I would add that an even greater danger lurks in not taking the Constitution seriously, in ignorance of the Constitution, in turning a blind eye to it. The ultimate danger, perhaps, sits in the possibility that we, the lawyers, the men and women with a more intimate knowledge of the meaning of the Constitution and its values, and hence a greater responsibility, will allow our deliberations to become so exclusive to us that the other "we, the people of South Africa" remain largely marginalised in constitutional values talk.[44]

CONCLUSION

As a final observation: our Constitution is silent about tolerance, and I mean tolerance of values other than our own. From a methodological point of view it might have been superfluous, because the Constitution supposes values already agreed upon by "we, the people of South Africa". In other words, we no longer quarrel about the values embedded in the Constitution. Six years of constitutional democracy in South Africa must have shown that this is an idealistic, even fallacious view. Many things point in the opposite direction, namely that what the Constitution supposes, still have to be actually agreed upon by "us, the people of South Africa". Of course, this is being done by and in the many institutions comprising the South African constitutional and political "enterprise".[45]

The success of the process is heavily dependent on "value tolerance". As two Swiss authorities write in the latest edition of their work on Swiss constitutional law (in paraphrased form):[46] A democratic system cannot be functional without sufficient tolerance of their respective values among its members. Such tolerance is a precondition to the building of agreement about fundamental issues. "We, the people of South Africa" would do well to remember this.

ENDNOTES

1) Cf his "Legal academics and the open community of constitutional interpreters" 12 (1996) *SAJHR* 214.
2) Dictionary meanings reveal only subtle differences in any event. According to the *Collins concise English dictionary* (3 ed 1992) one of the meanings of "invest" is "to lay out (money or capital in an enterprise) with the expectation of profit", while "speculate" is described as "to buy or sell securities, property, etc., in the hope of deriving capital gains". A much older edition of the *Concise Oxford dictionary* (5 ed 1964) casts a telling perspective on it by describing "speculate" as to "make investment, engage in commercial operation, that involves risk of loss . . .".
3) See eg Du Plessis & Corder *Understanding South Africa"s transitional Bill of Rights* (1994|) 77, 120; Van Wyk et al (eds) *Rights and constitutionalism*. *The new South African legal order* (1994) (notably the following contributions: Davis, Chaskalson & De Waal "Democracy and constitutionalism: the role of constitutional interpretation" 1 at 127; Erasmus "Limitation and suspension" 629 at 633ff); Cachalia et al *Fundamental rights in the new Constitution* (1994) 121 ("The first clause of s 35(1) is merely a statement of principles of interpretation which have been recognised by many courts"); Basson *South Africa's Interim Constitution. Text and notes* (revised ed 1995) 59; Lourens M du Plessis "The Bill of Rights in the working draft of the new Constitution: an evaluation of aspects of a constitutional text s*ui generis*" 1995 *Stell LR* 3 at 6ff; Lourens M du Plessis "Evaluative reflections on the final text of South Africa's Bill of Rights" 1996 *Stell LR* 283 at 284ff; Lourens M du Plessis "Menseregte in die skadu's en skanse van die ivoortoring" 1997 *Stell LR* 181 at 184ff; CJ Botha *Waarde-aktiverende gronwetuitleg: vergestalting van die materiële regstaat* (LLD, Unisa 1996) passim; GM Ferreira & JA Robinson "Reflections on the *boni mores* in the light of chapter 3 of the 1993 Constitution" (1997) 60 *THRHR* 303 (esp 307ff); Gerhard Erasmus & Johan de Waal "Die finale Grondwet: Legitimiteit en ontstaan" 1997 *Stell LR* 31 at 32; Chaskalson et al *Constitutional law of South Africa* (notably Kentridge & Spitz "Interpretation" 11.6ff; 11.23f; 11.35ff; Francois Venter "Regte, gesag en waardes" 64 (2 & 3) 1999 *Koers* 157 at 170-171; Deon van Zyl "Geregtigheid, billikheid en waarheid in Platoniese ne hedendaagse perspektief: antieke waardes in Suid-Afrikaanse konteks" 64 (2 & 3) 1999 *Koers* 197 at esp 207-211; Gretchen Carpenter (ed) *Suprema lex: Essays on the Constitution presented to Marinus Wiechers* (1998) (notably the following contributions: Yvonne Burns "Hate speech and constitutional values" 35-56; Chisto Botha "Maatskaplike geregtigheid, die 'animering' van fundamentele grondwetlike waardes en regterlike aktivisme: 'n nuwe paragdigma vir grondwetuitleg" 57-70) Dawid van Wyk "Subsidiariteit as waarde wat die oop en demokratiese Suid-Afrikaanse gemeenskap ten grondslag lê" 251f); Butterworths *Bill of Rights compendium* 1A-15/16; De Waal, Currie & Erasmus *The Bill of Rights handbook* (3 ed, 2000) 33, 59, 129; GE Devenish *A commentary on the South African Bill of Rights* (1999) 11-12. Two useful contributions which go beyond the mere term "values", are those by Francois Venter "Die betekenis van die bepalings van die 1996 grondwet" and Jan Swanepoel "Die dialektiek in die waardes van die 1996 grondwet", to be found in 1998 *Potchefstroomse Elektoniese Regsblad* (http://www.puk.ac.za/ lawper/tydskrif/1998v1.html).
4) See eg *Qozoleni v Minister of Law and Order* 1994 1 BCLR 75 (E) 78-81; 1994 3 SA 625 (E); *S v Zuma* 1995 4 BCLR 401; 1995 2 SA 642 (CC) para 14, 17; *S v Mhlungu* 1995 7 BCLR 793; 1995 3 SA 867 (CC) para 8-15; 45; and in particular the judgment of Sachs J (part of the majority, but in a separate opinion: par 102-146).
5) Cf the tenor of Gilbert Marcus's article "Interpreting the chapter of fundamental rights" 10 (1994) *SAJHR* 92-102; also Henk Botha "The values and principles underlying the 1993 Constitution" 1994 *SAPR/PL* 233 at 237 ("the new Constitution signifies

South Africa's international 'home-coming').

6) The relevant part of s 35(1) read as follows: "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality . . .".
7) "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter." For the history of this subsection, see Du Plessis & Corder *Understanding South Africa's transitional Bill of Rights* (1994) 110-113.
8) Alfred Cockrell "Rainbow jurisprudence" 12 (1996) *SAJHR* 1 assured his place in the gallery of constitution watchers with a thoughtful and incisive appraisal of the way in which the Constitutional Court succeeded in its "values mission" during its first year. Due recognition should also be given to other courts that seized the advent of the Interim Constitution to lay solid foundations for our constitutional "values jurisprudence". Without underplaying efforts by others, the judgments of Froneman J in *Qozeleni and Gardener v Whitaker* must be mentioned. In a still unpublished paper entitled "Doing things with values: the role of constitutional values in constitutional interpretation" Irma Kroeze recently made an assessment of the courts' approach to "constitutional values".
9) (Note 5). For a further discussion, see Botha's LLD thesis (University of Pretoria, 1998) entitled *The legitimacy of law and the politics of legitimacy: beyond a constitutional culture of justification* 331-348 and in general the final chapter (398ff).
10) "Limitation and suspension" in Van Wyk et al (eds) *Rights and constitutionalism: the new South African legal order* (1984) 629.
11) (Note 5) 241-243.
12) (Note 10) 633-637. Some of Professor Erasmus's sentiments are echoed by Davis, Chaskalson & De Waal in the same publication: "Democracy and constitutionalism: the role of constitutional interpretation" 129.
13) At 636.
14) (Note 8) 37.
15) I assume Professor André van der Walt's misquote of section 35(1) to read "this Constitution" instead of "this chapter" was a printer's gremlin: "Tradition on trial: a critical analysis of the civil-law tradition in South African property law" 11 (1995) *SAJHR* 169 at 191.
16) Despite, eg, Du Plessis & Corder's proper analysis: (n) 119-120.
17) One finds "values" in the plural in the preamble and in s 1, 7(1), 39(1), 143(2)(a), 195(1) and the heading of the section, 195(3) and 196(4)(a), (d) and (e). Where it appears in singular form, the word "value" deals with more mundane matters such as the market value of land (s 25(3)), the value of the Rand (s 224(1)), and value added tax (s 228(1) and 229(1)).
18) According to the *Collins concise English dictionary* "value" meaning no 5 is: "(*pl.*) the moral principles or accepted standards of a person or group."
19) See in particular the interesting and more than useful contributions by Venter ("Die betekenis van die bepalings van die 1996 grondwet") and Swanepoel ("Die dialektiek in die waardes van die 1996 grondwet") – cf n 3 for the reference – for their understanding of "values" in the 1996 Constitution.
20) Section 10: "Everyone has inherent dignity and the right to have their dignity respected and protected."
21) Section 9(1): "Everyone is equal before the law and has the right to equal protection and benefit of the law."
22) Section 9(2): "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance person, or categories of persons, disadvantaged by unfair discrimination may be taken."
23) Section 19(3): "Every adult citizen has the right – (a) to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret . . .".
24) Section 2: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."
25) In 1994 Catherine Albertyn & Janet Kentridge opened an article with the statement that "[e]quality is a value foundational to the Constitution of the Republic of South

Africa 1993": "Introducing the right to equality in the Interim Constitution" 10 (1994) *SAJHR* 149.

26) See also Venter "Die betekenis van die bepalings van die 1996 grondwet" (n 3) 27; Swanepoel "Die dialektiek in die waardes van die 1996 grodwet" (n 3) especially 6ff.

27) Arthur Chaskalson "Human dignity as a foundational value of our constitutional order" 16 (2000) *SAJHR* 193.

28) At 195.

29) The subsection reads: "The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all the people in our country and affirms the democratic values of human dignity, equality and freedom."

30) The reference in s 195(3) and 196(4) to "values" is for the purposes of this paper a cross-reference to the "values and principles" in s 195(1).

31) (Note) 220.

32) It is commonly accepted and easily demonstrated that s 36(1) of the 1996 Constitution is essentially the Constitutional Court's rendering of s 33(1) of the Interim Constitution in the famous para 104 of *S v Makwanyane* 1995 3 SA 391 (CC).

33) Borrowed from the oft-quoted dictum of Mahomed AJ in the Namibian case of *S v Acheson* 1991 NLR 1 (NmHC) 10; 1991 2 SA 805 at 813.

34) See Jeremy Sarkin "An evaluation of the role of the Independent Complaints Directorate for the Police, the Inspecting Judge for Prisons, the Legal Aid Board, the Human Rights Commission, the Commission on Gender Equality, the Auditor-General, the Public Protector and the Truth and Reconciliation Commission in developing a human rights culture in South Africa" 15 (2000) *SAPR/PL* (forthcoming) for an evaluation of some of these institutions.

35) Such as the Education Department's *Batho pele* project, the *Code of conduct for public servants and the newly announced South African Children's Media Council* (an initiative driven by the Office of the President – *The Star* (1 Nov 2000) 6).

36) Chaskalson (n) 205.

37) "Zuma calls for reversal of moral decay and urges media not to glorify violence" *The Star* (1 Nov 2000) 6. For a fuller account of what he has said, see Zuma "Join the fight for society's moral fibre" *The Star* (6 November 2000) editorial pages.

38) Supplement to *The Star* (31 October 2000), entitled "Secure our children".

39) This is a reference to the brutal killing of Manual Makwa, whose story enjoyed prominence in the Gauteng press during the last week of October 2000.

40) "Recommendations part of the national agenda on reconstruction and development" in *Reparation & memorialisation (the unfinished business of the TRC)* 3 supplement to *The Star* (31 October 2000).

41) "The status of legislation and the realisation of constitutional values in the new constitutional dispensation" 2000 *Stell LR* 192.

42) "Modernity, normality and meaning: The struggle between progress and stability and the politics of interpretation (part 2)" 11 (2000) *Stell LR* 226 at 240. The first part was published under the same title in 11 (2000) *Stell LR* 21.

43) Ibid.

44) Cf Dennis Davis *Democracy and deliberation. Transformation and the South African legal order* (1999) 179: "Needless to say, democracy and human rights are not the exclusive preserve of lawyers and judges, even in terms of their claims to be the custodians of the constitutional enterprise. However, a developing democratic culture can be supported and strengthened by a wider, more inclusivist, less formalistic notion of law, particularly within the context of a state which possesses such dubious administrative efficiency, as is the case with the current South African state." See also Rautenbach *General provisions of the South African Bill of Rights* (1995) 18, who also reminds us with reference to the German Peter Häberle's *Verfassung als öffentlicher Prozess* (1978), that constitutional interpretation is not only the work of the courts, but of all of us. For a similar sentiment, with Häberle as support, see Du Plessis "Legal academics and the open community of constitutional interpreters" (n 1) 215-215.

45) A term favoured by Dennis Davis (n44.)

46) Walter Heller & Alfred Kölz *Allgemeines Staatsrecht* (2 ed, 1999) 66.

Human Dignity – Our Supreme Constitutional Value

Nazeem Goolam

"Everyone has inherent dignity and the right to have their dignity respected and protected."[1]

INTRODUCTION

There can be little doubt that, as far as constitutional interpretation and statutory interpretation in general is concerned, South Africa is undergoing a transformation from a formal, positivistic vision of law to a substantive, natural law vision of law.[2] And the most significant singular factor in this transformation is the existence of constitutional values. Of these values, the three most fundamental in any open and democratic society are human dignity, equality and freedom. Among this trinity of values human dignity, it is submitted, finds pride of place. In sections 1, 7, 36[3] and 39[4] of South Africa's final Constitution, human dignity takes primary mention. Section 1 provides:

> "The Republic of South Africa is one, sovereign democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms ..."

Elsewhere I have stated:

> "It is not insignificant that the value of human dignity does not appear either after the values of equality and freedom or between the value of equality and freedom. On the contrary, it is highly significant that human dignity appears before both equality and freedom because essentially, human rights law must serve the purpose of effectively protecting the human dignity of the members of any society."[5]

But what does human dignity entail? As section 10 spells out it is a *right*, but is it not also a *duty*? How should it be understood in a plural society such as ours? What about the impact of modern technology on human dignity? Is our understanding of the concept/value/idea of human dignity not too European/Western? These are some of the pertinent issues which, I believe, need to be canvassed in attempting to understand the concept/value/idea of human dignity.

1. WHAT DOES HUMAN DIGNITY ENTAIL?

First, then, what does human dignity entail? Article 1[6] of the 1949 German Constitution or Basic Law (*Grundgesetz*) provides:

> "(1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.
>
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world."

The original German equivalent of the first sentence of Article 1 (1) reads: "*Die Würde des Menschen ist unantastbar*." The word *Würde* may be translated as "worth" or "value." In the now well-known South African Constitutional Court decision of *S v Makwanyane*,[7] Madam Justice O'Regan expressed a similar view. According to her:

> "Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in ... [the Bill of Rights]."[8]

Referring to Kantian philosophical thought, Jones writes that dignity is "above all price and so admits of no equivalent".[9] Commenting on the significance of the concept of human dignity in German constitutional jurisprudence, Donald Kommers states:

> "Germany's emphasis on dignity is nevertheless important, and for three reasons: First, the principle of human dignity makes normative demands on the state; second, it informs the scope and meaning of all the rights and guarantees of the Basic Law; and third, it is the source of the so-called objective value that the Federal Constitutional Court has inferred from the Basic Law's principles and structures. In short, the Constitutional Court envisions the Basic Law as a unified structure of objective principles and rights crowned by the master value of human dignity."[10]

Elsewhere, commenting on the human dignity clause as the centre of Germany's scheme of constitutions values, the learned author writes:

> "In the view of the Federal Constitutional Court, this clause expresses the highest value of the Basic Law, informing the substance and spirit of the entire document. While encompassing all guaranteed rights, the concept of human dignity also includes a morality of duty that may limit the exercise of a fundamental right."[11]

2. HUMAN DIGNITY – RIGHT OR DUTY?

This leads to the second question, namely is human dignity merely a *right* – as section 10 declares – or is it not also a *duty*/an *obligation*/ a *responsibility*? Indeed, a value – which human dignity is – implies that people are duty-bound to uphold it. Every human being has a responsibility to treat every other human being in a dignified and humane manner. *Human dignity is therefore a universal human duty, a universal human responsibility.* In this regard, the Universal Declaration of Human Responsibilities is highly instructive. Its preamble commences as follows:

> "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and implies obligations or responsibilities."[12]

Articles 1 and 2 – which fall under the heading Fundamental Principles for Humanity – of the Declaration reads:

> "Article 1 Every person regardless of gender, ethnic origin, social status, political opinion, language, age, nationality or religion has a responsibility to treat all people in a humane way.
>
> Article 2 No person should lend support to any form of inhumane behaviour, but all people have a responsibility to strive for the dignity and the self-esteem of all others."[13]

Indeed, non-Western philosophies – African, Asian and indigenous traditions – lay great emphasis on the obligations/responsibilities of an individual as compared with his/her rights. In this regard, it is apt to quote the words of one of the most dignified human beings of the past 100 years, Mohandas Gandhi. The Mahatma did not advocate individual rights in the Western sense. Rather, he advocated "*dharma*, an ethic of community, responsibility and loyalty."[14]

He said :

> "All rights to be deserved and preserved come from duty well done. Thus the very right to live accrues to us only when we do the duty of citizenship of the world."[15]

Dharma has been described or defined as:

> "... that which is established or firm, steadfast decree, statute, ordinance, law; usage, practice, customary observance or prescribed conduct, duty, right. Justice (often as a synonym of punishment); virtue, morality, religion, religious merit, good works, ... according to the nature of anything, ... holding to the law, doing one's duty, ... nature, character, peculiar condition or essential quality, property, mark, peculiarity, ... sacrifice, ... associating with the virtuous, ... devotion, ... a bow ..."[16]

It is this "ethic of community", this communal approach, this communitarianism which distinguishes the approach to human rights discourse – and thus the concept of human dignity – in African and non-Western societies from the liberal, individual-centred Western tradition. It is submitted that the Western emphasis on individual rights and freedoms is often to the detriment of the collective. In poetic form, the communitarian critique of liberalism may be couched thus:

> "Communitarian ideas
> Of 'situated selves' as such

Ensure peace and co-existence
If theory is to be taken as a base.

The individual self is raised
By the communial commitments, values, vice
He is not accidental or contingent
Since personhood pertains to 'socialise'.

The reason for it is straight forward –
'Endorsement of communial life'
Is a more fulfilling way tha[n] others,
Which every country ought to strive.

The time has passed, I hope, when people
Would only care for themselves,
South Africa today is more than just 'some' people,
Community is more than just some 'selves'".[17]

As Madam Justice Mokgoro so adequately explained in the *Makwanyane*[18] decision, the spirit of *ubuntu* emphasises respect for human dignity. Metaphorically speaking, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. The point is that we in South Africa, in Africa, should not – and cannot – rely solely on Western/European jurisprudence in attempting to understand the concept/value/idea of human dignity.

3. HUMAN DIGNITY IN A PLURAL SOCIETY – THE NOTION OF TOLERANCE

How, then, should human dignity be understood in a plural society such as ours? Paul Sieghart states that the hallmarks of a democratic society are "pluralism, broadmindedness and tolerance."[19] If dignity is to be truly respected and protected – as provided for in section 10 of the South African Constitution – the notion of tolerance, labelled by Unesco (United Nations Educational, Scientific and Cultural Organisation) as the endangered virtue demands broader understanding. A brief examination of Unesco's 1995 Declaration on the Principles of Tolerance[20] is appropriate. The document preceding the declaration, entitled *A Global Quest for Tolerance*, declares that tolerance has always been considered a moral virtue and that it is also the foundation of democracy and human rights. Tolerance is appreciation of diversity, the ability to live and let others live, the ability to adhere to one's convictions while accepting that others adhere to theirs and the ability to enjoy one's rights and freedoms without infringing on those of others. Intolerance in multi-ethnic, multireligious or multicultural societies leads to violations of human rights, violence or armed conflict.

Article 1 of the Declaration is headed "Meaning of Tolerance" and it is necessary, in the context of this paper, to reproduce its first two paragraphs, which state:

> "1.1. Tolerance is respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human. It is fostered by knowledge, openness, communication and freedom of thought, conscience and belief. Tolerance is harmony in difference. It is not only a moral duty, it is also a political and legal requirement. Tolerance, the virtue that makes peace possible, contributes to the replacement of the culture of war by a culture of peace.
>
> 1.2. Tolerance is not a concession, condescension or indulgence. Tolerance is, above all, an active attitude prompted by recognition of the universal human rights and fundamental freedoms of others. In no circumstance can it be used to justify infringements of these fundamental values. Tolerance is to be exercised by individuals, groups and states."

Article 4, which is devoted to education, states that education for tolerance should aim at countering influences that lead to fear and exclusion of others, and should help young people to develop capacities for independent judgment, critical thinking and ethical reasoning.

4. HUMAN DIGNITY IN THE AGE OF TECHNOLOGY

The value of human dignity will, of course, impact not only on the other two values – equality and freedom – in the trinity of fundamental democratic values but also on the manner in which the rights in the Bill of Rights is interpreted. One thinks of the right to life (including the beginning and end of life), issues relating to criminal justice, freedom of religion, and from a global perspective, the right to asylum. But, perhaps, the most pertinent question in this regard is: what about the protection of

human dignity in the age of technology? How can human dignity be protected in the computer age or when considering the dramatic potential of modern gene technology, *in vitro* fertilisation or other technical and scientific developments? Weeramantry, Vice-President of the International Court of Justice, has further asked: "What are the technologies that erode this high recognition of human dignity through their impact upon the human body?"[21]

Weeramantry is of the view that research on the human body for therapeutic and preventive purposes must always go ahead. He warns, however, that as more knowledge is acquired, new possibilities open up the use of that knowledge for unethical purposes or for purposes the ethical value of which is debatable.[22] Therefore, he says, "constant vigilance is required to ensure that new advances in medical technology are kept within ethical guidelines". The learned author lists a host of possible sources of the denigration of human dignity by scientific power. His comprehensive list of sources includes, *inter alia*, foetal experimentation, human experimentation, embryo transplantation, *in vitro* fertilisation, foetus farms, sperm and ova banks, selective breeding, genetic structuring of humans, sex preselection, organ transplants, enzyme engineering, sale of human tissue, euthanasia techniques, computerised regimentation of society and data bank infringements of privacy.

5. EXPLORING A PHILOSOPHY OF HUMAN DIGNITY

Finally, a word on the origin of the idea/concept/value of human dignity. The first draft of Article 1 of the German *Grundgesetz* produced by the Herrenchiemsee Conference stated that "the dignity of man is founded upon eternal rights with which every person is endowed by nature". The main parties to the conference agreed that human dignity is anterior to the state and thus transcendental. However, the Western individual-centred human rights paradigm views the individual as the ultimate measure of all things. There is thus no notion of the human being subordinating him/herself to a Transcendental Reality which, in fact, establishes the parameters for the exercise of one's rights. Seen in this light, is there not a need to explore a philosophy of human dignity having its roots in the moral, theological and spiritual traditions of the world? In the words of a leading scholar, Chandra Muzaffar:[23]

> "[W]hether one articulates rights or upholds responsibilities, shouldn't they be guided by universal moral and spiritual values which would determine the sort of rights we pursue and the type of responsibilities we fulfil. Without a larger spiritual and moral framework, which endows human endeavour with meaning and purpose, with coherence and unity, wouldn't the emphasis on rights per se lead to moral chaos[24] ... What are human rights if they are not related to more fundamental questions about the human being. Who is the human being? Why is the human being here? Where does the human being go from here? How can one talk of the rights of the human being without a more profound understanding of the human being him[her]self?"[25]

Muzaffar declares:

> "The great challenge before us is to develop this vision of human dignity culled from our religious and spiritual philosophies into a comprehensive charter of values and principles, responsibilities and rights, roles and relationships acceptable to human beings everywhere. To do this we should first distinguish what is universal and eternal within our respective traditions from what is particularistic and contextual."[26]

ENDNOTES

1) Section 10 of the Constitution of the Republic of South Africa, Act 108 of 1996.
2) Certainly not the cynical vision of "Rainbow Jurisprudence' put forward by Cockrell. See Cockrell "Rainbow Jurisprudence" *SAJHR* (1996) 1.
3) The limitation clause.
4) The interpretation clause.
5) Goolam "The interim Constitution, the working drafts and South Africa's new Constitution – some observations" *S A Public Law* (1997) Vol. 12 No. 1 186.
6) Protection of human dignity.
7) 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC).
8) *Supra* at para 328.
9) Kant's *Principle of Personality* (1971) 127; see also De Waal, Currie and Erasmus *The Bill of Rights Handbook* 2nd ed. (1999) 217.
10) July 1998, on receiving an honorary doctor of laws degree from Ruprecht – Karl's University, Heidelberg, Germany.
11) *The Constitutional Jurisprudence of the Federal Republic of Germany* 2nd ed. (1997) 298.
12) Schmidt *Grundpflichten* (1999) 306.
13) Ibid.
14) Ayoub "Asian Spiritual and Moral Values and Human Rights" Paper delivered at International Conference on Rethinking Human Rights, 6–7 December 1994, Kuala Lumpur.
15) Traer *Faith and Human Rights Support in Religious Traditions for a Global Struggle* (1991) 131; See also Muzaffar *Human Rights and the New World Order* 1993.
16) See Monier – Williams *Sanskrit–English Dictionary* (1899) 510; see also Domanski "Stemming the blood – dimmed tide of lawlessness: the rediscovery of duties" XXXIII *CILSA* 2000 248.
17) See Cranova "The communitarian critique on liberalism" *Codicillus* XXXX No. 2 41.
18) See n 6 *supra* at para 308.
19) *The International Law of Human Rights* (1983) 784–791.
20) Adopted by Unesco Member States in Paris on 16 November 1995.
21) Weeramantry *Justice Without Frontiers: Protecting Human Rights in the Age of Technology* (1998) 89.
22) *Supra* at 89–99.
23) Recently elected the Wiegand Foundation Distinguished Visitor by Duke University, USA.
24) "From Human Rights to Human Dignity", Paper delivered at International Conference on Rethinking Human Rights, 6–7 December 1994, Kuala Lumpur.
25) Ibid.
26) Ibid.

Utilising Constitutional Values in Constitutional Comparison

Francois Venter

1. CONSTITUTIONAL COMPARISON[1]

We are living in an era in which constitutional law has become a comparative science. This is not true only for developing constitutional states, but for the constitutional law of all constitutional states. The reason for this is that the history of modern constitutionalism has reached a global fullness of development, from which emanates a distinct set of commonalities, principles, standards and values that have gained currency in constitutional dialogue all over the world. Perhaps the best proof of this ripeness of constitutionalism is to be found in the signs that new, postmodern thinking about the state, the law and the sustainability of the established tenets of constitutionalism is pushing at the gates of globally received constitutional doctrine.[2]

Despite this push for a postmodern replacement of modernist constitutional thinking, which is essentially the product of Euro-American thinking over many centuries, the contemporary constitutionalist inevitably continues to operate with this product. It entails constitutionally enshrined values, entrenched fundamental rights, judicial review, the separation of powers, democratic processes, etc. Exactly because these and similar constitutional notions share a multinational history and universal acceptance as standards for sound constitutional structuring, the constitutional lawyer cannot but be a comparatist.

For the comparatist, the first question must be what the material one wishes to compare, is to be compared with. This is often dealt with in terms of the notion of the *tertium comparationis*.

I would suggest that comparison, especially of *legal* institutions, rules, procedures and principles, will seldom produce valid knowledge if undertaken *in abstracto*. This does not mean that abstract comparison, be it by way of finding similarities or by listing contrasts and differences, is impossible. In fact, such a procedure will probably form part of every comparative exercise. It is, however, to be doubted that such an approach alone, unenriched by other methods, would produce results of much scientific value.

It is my contention that it becomes essential to identify the measure, standard, concept or basis against which legal comparison is to be undertaken as soon as one goes beyond a mechanical and superficial or abstract identification of similarities and differences. In order to be able to undertake a comprehensive comparison of complex material, it is necessary to delineate one's comparative framework, i.e. the *tertium comparationis* that is to be employed.

However, the nature of a specific comparative enterprise and of the material being compared must influence methodological decision making. The comparability of material may be determined by the proximity of the legal problems, mechanisms and solutions in the compared systems, or by the complete diversity, the analysis of which could be considered to be useful precisely because of its "otherness".[3]

Much in the process of legal comparison depends on the *purpose* for which it is undertaken. The purposes of one's comparative work can vary widely. There can be no doubt that the primary purpose of any exercise in legal comparison should be the creation of new knowl-

edge or understanding of the law.[4] This basic purpose is, however, not sufficient to determine the appropriate method and approach to a specific comparative project. Many other more specific purposes might be pursued.

The more profound the purpose of comparison becomes, the more paradigmatic will the *tertium comparationis* be; the more emphasis is put on the production of new and verified scientific knowledge, the more important does the sensible *comparability* of the material become. But the degree and nature of comparability will most likely be co-determined by the nature of the chosen comparative standard or framework, i.e. the *tertium comparationis*.

There is no consistency of method to be observed in the practice of legal comparison – no less so in the field of constitutional law. Nor are there defensible grounds for the elevation of comparative law to the level of an autonomous legal discipline. One must simply accept that jurists have a need for comparative forays into foreign territory: some for very limited purposes of gathering information, and others for the generation of more fundamental knowledge. There can, it is therefore submitted, be no such thing as a universal, monolithic science or discipline of comparative law, be it in the field of private or of public law. On the other hand, juridical comparison done unscientifically will not yield the fruits of useful knowledge.

It is possible to distinguish various layers of legal comparison, some yielding superficial knowledge, and others varying degrees of richness of scientific insight. None of these is to be rejected, since it is unavoidable that the top layers must be penetrated and dealt with in order to reach the deeper, richer layers of comparative knowledge.

It is useful for constitutional comparison to distinguish between *constitutional law* and the *law of the constitution*. The former could indicate the broad discipline of law which concerns itself with the principles, mechanisms and rules applicable to the establishment, functioning and government of a state. Seen thus, the term "constitutional law" refers to all the relevant positive rules of law, but also to the concomitant doctrinal matters. The *law of the constitution*, on the other hand, could be used to indicate a subset of constitutional law, namely the actual provisions of a written constitution.

For the constitutional comparatist, it is unavoidable to deal with the *law of the constitution* of the systems being studied. At first blush, this is not a difficult exercise, because it involves a simple juxtaposition of actual provisions dealing with similar subject-matter. However, constitutional texts require interpretation, and constitutional interpretation tends to be system-specific: the comparatist can easily misjudge the actual meaning of a foreign text if such a text is not interpreted in the relevant national hermeneutic context. It can thus be said that superficial textual comparison will very frequently represent the first layer of comparison, almost inevitably followed by a search for authoritative native interpretation. Such a search will in many cases lead one into a labyrinth of contextual, historical, judicial and academic analyses, penetrating to a deeper comparative layer. The comparatist's equipment to deal with these complexities will determine the degree of the effectiveness and depth of the comparison.

Constitutional law is very seldom revolutionary in the sense of completely replacing a previous system without leaving any traces of the replaced constitutional law. This is usually true also in cases of dramatic remodelling of systems or even where fundamental constitutional doctrines are replaced.[5] It is also typical of renovated constitutional systems that they are influenced by foreign systems.

It is therefore not surprising that history plays such an important role in the study of any constitutional system. Nor is it strange to note that the study of the history of any element of the law of the constitution or of the constitutional law of a state enhances one's insight into the current state of the law. Moreover, conceptual commonalities between different systems can frequently be discovered and understood only against the background of history. Constitutional history is therefore a most valuable instrument for the comparatist working on a foreign system.

The deepest layer of understanding of a constitutional system takes the form of the philosophical precepts determining the principles and doctrines prevailing in that system. Owing to the multifaceted and abstract nature of the philosophical underpinnings of a constitutional system, they are often unknown or disregarded even by native lawyers. It is also very difficult, or even impossible, to achieve accuracy or con-

clusiveness in this regard, since philosophy, doctrine and principle can be highly subjective, speculative and contentious. Nevertheless, comparison of constitutional principles and doctrines holds the promise of a sound understanding of similarities and contrasts in the constitutional law of different states.

The purpose of an exercise in constitutional comparison is a very important consideration. Aimless comparison tends to result in meaningless and inconclusive juxtaposition. In order to produce valuable results, it should be clear what the stimulus for the comparative exercise is, what the nature of the framework within which the comparison will take place is, and also what the enterprise's purpose or goal is.

Comparability not only involves horizontal considerations of the nature of the subject-matter, but is also determined by the balancing of vertical penetration. This must be understood against the background of the foregoing exposition of the "layers of comparison": one cannot expect to achieve valuable results (or viable constitutional development) when, for example, the naked constitutional text of one system is compared with the philosophical precepts of another. Were this not the case, there would have been no reason why new constitutions might not be written by means of a transnational process of "cut-and-paste". That this has actually happened in various instances, is demonstrated by the failures and successes of the "reception" in places of foreign constitutional systems.[6]

2. VALUES IN CONSTITUTIONS

The lawyer dealing with a constitutional document which serves as the foundational norm of the legal system concerned, is often confronted with broad formulations and imprecise notions.[7] This may inspire unwarranted reactions, such as the rejection of the law of the constitution as "real" or "black letter" law, or it may seem like a justification of the idea that the constitution means what the judges wish it to mean. Such reactions are, however, not justifiable. Law, after all, is not merely composed of a closed set of clear-cut rules. Were that the case, lawyers and courts might have been replaced by computers. The law in general is in fact replete with unspecific notions such as justice, reasonableness, public interest, *boni mores*, and many others. It should therefore not be disturbing to find that values are often foundational to the operation and application of constitutional law.

However, what do we mean by "a constitutional value"?[8] In the current context the term "value" certainly does not carry any connotation of material worth. As an abstract concept, it indicates a standard or a measure of good. A constitutional value may therefore be deemed to set requirements for the appropriate or desired interpretation, application and operationalisation of the constitution and everything dependent thereupon. If something were not to conform to the standards of a particular value, it would mean that the standards of a lower, different, conflicting or extra-constitutional measure is being applied, which would therefore lead to unconstitutional results. Constitutional values may therefore be said to be distinguishable but related to principles in the sense that the principles of the constitution would be founded in and give expression to the values. For example, the principle that the law must be applied fairly and equitably, is founded in and gives expression to the values of justice and equality.

To employ constitutional values in the process of constitutional comparison therefore requires quite a penetrating consideration of the foundations of the systems being compared. Where the systems have, either in express constitutional terms or in terms of established doctrine, given expression to specific values, it is necessary for the comparatist to ascertain what the actual influence of those values are in the constitutional reality concerned. Where this is possible, a value chosen for comparison might be used profitably as a *tertium comparationis*.

Sundry examples of the expression of values in constitutions and international instruments help to demonstrate what we are dealing with:

The preamble of the Constitution of the United States (US) of 1789 reads as follows:

> " We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

Popular sovereignty, justice, peace, public wel-

fare and liberty may be considered to be some of the founding constitutional values of the US expressed in the preamble. The preamble is, however, not the only source of values, as will appear from the discussion below.

The preamble of the Hungarian Constitution of 1949 (as amended) reads:

> "In order to facilitate a peaceful political transition to a constitutional state, establish a multiparty system, parliamentary democracy and a social market economy …"

Thus the constitutional state (*Rechtsstaat*), multiparty democracy and an economic system described as "a social market economy" were laid down as constitutional principles.

Article 1 of the Constitution of Greece of 1975 provides:

> "(1) Greece is a Parliamentary Democracy with a President as Head of State. (2) Popular sovereignty is the foundation on which the form of government rests."

Here, parliamentary democracy and popular sovereignty are entrenched as constitutional principles.

The preamble of the Moroccan Constitution of 1996 reads:

> "An Islamic and fully sovereign state whose official language is Arabic, the Kingdom of Morocco constitutes a part of the Great Arab Maghreb. As an African state, it has, among its objectives, the realisation of African unity. Aware of the need of incorporating its work within the frame of the international organisations of which it has become an active and dynamic member, the Kingdom of Morocco fully adheres to the principles, rights and obligations arising from the charters of such organisations, as it reaffirms its determination to abide by the universally recognised human rights. Likewise, it reaffirms its determination to continue its steady endeavours towards the safeguard of peace and security in the world."

Article 1 provides: "Morocco shall have a democratic, social and constitutional Monarchy", and article 2: "Sovereignty shall be that of the People who shall exercise it directly, by means of referendum, or indirectly, through the constitutional institutions". The constitutional values enunciated here are Arabic Islamism, the promotion of African unity, the promotion of human rights and world peace and security, social democracy and popular sovereignty.

The preamble of the Constitution of Paraguay of 1992 reads:

> "Through their legitimate representatives convening at the National Constituent Assembly; pleading to God; recognising human dignity for the purpose of ensuring freedom, equality and justice; reaffirming the principles of a representative, participatory, pluralistic republican democracy ..."

Thus it may be said that the Paraguayan constitutional values are human dignity, freedom, equality, justice and "representative, participatory, pluralistic republican democracy".

In the cases of the German *Grundgesetz* and the Constitution of the Republic of South Africa 1996, substantive foundational provisions elevate specified values to a level of key importance.

Article 1(1) and (2) of the *Grundgesetz* of 1949 provide:

> "(1) The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority.
> (2) The German people therefore uphold human rights as inviolable and inalienable and as the basis of every community, of peace and justice in the world."

Here we find human dignity as an indisputable key value, supported by human rights, peace and justice.

The South African case is probably one of the most comprehensive contemporary examples. Section 1 of the South African Constitution provides as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b) Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d) Universal adult suffrage, a national common voters' roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness."

To distil from these casually selected constitutions, and from many others that may be referred to, a set of universally acknowledged

constitutional values might be an interesting empirical exercise, but one that will not necessarily glean substantive truths. An identification of values that may be said to underpin modern constitutionalism may perhaps better be undertaken by means of a study of the history and underlying philosophy of constitutional theory. To do so here, is not the intention, but from only these few examples it appears that constitutional values that tend to crop up frequently are human dignity, human rights, popular sovereignty, democracy, justice and equality.

3. COMPARING WITH VALUES

In the process of the identification of a value or set of values to be used as a comparative reference, the comparatist can expect to discover whether the systems that are being considered for comparison, are indeed good candidates for comparison. Comparability would not necessarily depend on whether the systems involved share the values exactly – comparison may also involve contrasting disparate systems. It may also be that systems share a particular value, but that it is interpreted and applied differently because of different histories and conditions in which they apply.

To briefly demonstrate – albeit superficially – the proposed method of constitutional comparison, let us select *equality* as value and *tertium comparationis*. Let us then consider, with reference to equality as value, the manner in which the perennially controversial mechanism of affirmative action is currently dealt with in the US, Canada and South Africa. This choice of jurisdictions is based on the known role that considerations of equality promotion have played and continue to play in the three chosen societies, as well as the expectation that persuasive and exemplary or dissuasive influence has flowed from the oldest to the youngest of them.

As a first step it is necessary to identify the nature of our *tertium comparationis*. However it may present itself in constitutions, complete equality cannot be considered to be an achievable state of affairs in this life, but it does constitute an important goal in the perpetual quest for justice and equity. Complete arithmetical equality among humans does not exist and therefore a "right to equality" is, realistically speaking, not enforceable. As little as the law can achieve the perpetuation of life beyond the natural lifespan of the bearer of the right to life, can unqualified equality be brought into being by the juridical guarantee of equality. These are considerations that render equality to be a value, and not merely the object of a right.

The next step in our brief comparative undertaking must be the identification of the purpose of the comparison. From a South African point of view it can firstly be expected to be useful to trace the evolution of the constitutional notion of equality in systems that have influenced the local system; it would for this purpose be instructive to determine how our law relating to affirmative action coincides or differs from that of other systems; lastly, the comparative mirroring of the relevant law should provide one with insight into the essence of our own law relating to affirmative action.

Let us then plunge into a small comparative exercise.

Mainly through the application of the Fourteenth Amendment to the US Constitution,[9] equality has achieved major importance in American jurisprudence.[10] Given the heavy emphasis on procedural matters that typify the constitutional law of the US,[11] it may not be self-evident that equality actually operates as a constitutional value in that system. Laurence H Tribe, however, removes any doubts on this account in Chapter 16 of his book. The following statement encapsulates it:[12]

> "Indeed, the notion that equal justice under law may serve as indirect guardian of virtually all constitutional values is evidenced by more than a maxim carved in marble on the United States Supreme Court. That notion, expressed with growing frequency and even stridency throughout this century, wars with the idea that equality is liberty's great enemy and can be purchased only at an unacceptable price to freedom."

Affirmative action which is intended to benefit a race group, by definition relies on classification. In the famous *Bakke* case[13] two divergent approaches to the matter of identifying a race group for affirmative preference were demonstrated in a divided court: in the one approach, strict racial classification for the purpose of preferring disadvantaged students access to medical school above students from the advantaged sections of society, was rejected, whereas the other approach considered it justifiable for the law not to be "colour-blind" under circumstances of historical racial disadvantagement.

This "colour-blind" metaphor originated in a decision of the US Supreme Court of 1896.[14] The judicial attitude towards affirmative action in the US has since then, however, changed substantially, although opinions continue to be split in the judgments. In 1989, the US Supreme Court rejected the constitutionality of a scheme to reserve the award of 30% of public construction contracts to racial minority–owned companies.[15] In 1995 the majority of the Supreme Court confirmed that, after almost a century, it now once more favoured an approach of "colour-blind" interpretation of the Constitution, allowing for affirmative action only where it is sharply focused to achieve a compelling governmental interest.[16] In 1996 the State Constitution of California was amended following the popular approval of "Proposition 209", prohibiting discrimination against or the granting of preferential treatment to any individual or group on the basis of race, sex, colour, ethnicity or national origin in the operation of public employment, public education or public contracting, thus severely limiting the lawful pursuance of affirmative action programmes. The validity of this amendment was maintained by the courts.[17] These tendencies show that the American perspective on the nature of equality as it features in the Fourteenth Amendment has over time shifted towards a marked resistance to exceptions to the rule against discrimination even for affirmative action purposes.[18] The American experience also shows that the notion of affirmative action severely challenges the realisation of the ideal of equal treatment.

The role of constitutional values in Canadian law is also quite prominent, despite the absence of any constitutional mention of values. With reference to the limitation of rights in terms of section 1 of the Charter, this role was described very clearly in the *Oakes* judgment:

> "The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified."[19]

A further indication that equality may be considered to be a value underpinning the Canadian Constitution, appears from the introductory words of section 15(1).[20] There, the equality before and under the law is stated as a matter of fact, not of law, i.e. equality is projected as a pre-constitutional given, giving rise to the constitutional creation of the right to equal protection and equal benefit of the law.[21]

However that may be, in the recent *Granovsky* judgment[22] the Supreme Court distinguished "three broad inquiries"[23] required by section 15(1). The idea of a three-stage enquiry under section 15 has, however, been settled in Canadian law for more than a decade.[24]

In terms of section 1 of the Canadian Charter the rights that are protected in subsection (1) may be subjected to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The scope for such limitation is naturally relatively limited, especially if a need is perceived for the advancement of particular persons or components of society.

The *Bakke* judgment of the US Supreme Court influenced Canadian thinking at the time of the drafting of the Canadian Charter of Rights and Freedoms. The need for government-sponsored affirmative action programmes was considered to be desirable, and the drafters wished to avoid the difficulties that such a programme encountered in the US.[25] That would appear to have been the reasoning behind the wording of section 15(2) of the Canadian Charter.[26]

Doctrinally, Canadian affirmative action programmes that are expressly permitted by section 15(2), are deemed by some to constitute an exception to the prohibition of discrimination contained in subsection (1), inevitably involving "some element of reverse discrimination."[27] Others, however, argue that subsection (2) "serves as an interpretative aid to subsection (1) and helps explain the concept of equality on which the entire section is based."[28] The Charter itself does not extend to private action, and therefore does not protect an affirmative

action programme which is not run by the state.[29] However, provincial human rights codes, which in most cases also provide for affirmative action programmes, have on rare occasions had the unexpected effect of indirectly justifying private affirmative action.[30]

In the South African Constitution, the notion of equality appears in the heavily entrenched founding provision (section 1), in various provisions of the Bill of Rights and in sections 185 and 187 with reference to two constitutional commissions.[31]

In the Bill of Rights,[32] section 9 addresses equality most specifically in subsections (1) and (2). Subsections (3)–(5) deal with the opposite of equal treatment, namely discrimination. Subsection (3) prohibits unfair discrimination by the state, subsection (4) prohibits private discrimination and subsection (5) creates the assumption that discrimination on specified grounds is unfair. Express provision is made in subsection (4) for legislation to be adopted to prohibit private discrimination.[33]

Without the employment of the specific term, "affirmative action" is allowed in subsection (2), supported by the second sentence of subsection (4), section 217(2) of the Constitution allowing for a procurement policy favouring the disadvantaged and section 146(2)(c)(v) which is aimed at ensuring that national legislation which promotes equal opportunity and access to government services will prevail over concurrent provincial legislation.

In the Constitution, equality as a constitutional value is presented in two forms: firstly as an idealistic aim ("the achievement of equality")[34] and secondly as a descriptive element of the kind of treatment that one should receive ("equal protection and benefit of the law"[35] and "equal enjoyment of all rights and freedoms").[36]

A substantial volume of South African constitutional jurisprudence on equality has accumulated over the past few years.[37]

The Constitutional Court has developed a compact methodology for the structured application of the anti-discrimination clause.[38] It amounts to three main stages in the form of answers to the following questions:

- Does the conduct differentiate between people or categories of people?
- If so, does such differentiation amount to unfair discrimination?
- If unfair discrimination is established, can the conduct be justified under the limitation provision (section 36)?

The similarity of this test to the Canadian test described above, is so obvious that it cannot be coincidental.[39]

Affirmative action measures are allowed by the second sentence of section 9(2) "to promote the achievement of equality" while the first sentence defines "the full and equal enjoyment of all rights and freedoms" as a constituent element of the state of equality. This wording reduces the contrast between the proscription of discrimination and the admission of preferential treatment of the disadvantaged. The wording chosen for section 9(2) therefore tends to counter the interpretation favoured by some in Canada that affirmative action represents an exception to the right to equal treatment. I would, however, suggest that the provision would still not allow unfair discrimination in the name of affirmative action. The appropriate mechanism for the determination of the borderline between lawful promotional programmes and unconstitutional discrimination, probably lies in the nature of the programmes and the meaning that should be given to the term "disadvantaged".[40]

The notion of *disadvantage* is key to the justification in all three systems of government action that benefits some above others, despite the constitutional injunctions to equal treatment. In a footnote in the judgment of the US Supreme Court of 1938 in the *Caroline Products* case,[41] the term "discrete and insular minorities" was coined. The Supreme Court took the position that such minorities required special protection by the judiciary because the ordinary democratic processes could not afford them appropriate protection.[42]

The phrase was adopted in 1989 by the Canadian Supreme Court in the *Andrews* case[43] when it suggested that section 15 of the Canadian Charter required disadvantage on the part of groups protected by the provision.[44] Since then, however, it would appear that it has been settled in Canadian law that "while historical disadvantage or a group's position as a discrete and insular minority may serve as indicators" that discrimination took place on a ground analogous to those expressly mentioned in section 15, they are not prerequisites for finding such grounds.[45] It, however, speaks for itself that affirmative action measures are pertinently

directed at disadvantaged persons or groups, since section 15(2) expressly utilises the term. In the Canadian Charter the notion of "disadvantaged" is left open and unqualified ("disadvantaged individuals and groups").

In section 9(2) of the South African Constitution, however, the condition that qualifies persons and categories of persons to benefit from protective or advancing measures, is "disadvantaged by unfair discrimination". In the historical context of the country, this certainly cannot be understood to refer only to "discrete and insular minorities", but the wording of section 9(2), which allows for affirmative action, would certainly have to be interpreted with reference to the meaning of "unfair discrimination". Persons who are to benefit from special programmes must therefore be characterised by the fact that they have been "disadvantaged by unfair discrimination".

For comprehensive results, the foregoing comparative foray into the three systems needs to be extended substantially, but even this very brief exercise has produced some useful insights:

- In the US, equality increasingly underpins a strict proscription of discrimination, thus shrinking the scope for justifiable affirmative action programmes.
- The South African law relating to discrimination and upliftment of the disadvantaged was clearly influenced by, and is therefore better understood against the background of, the equivalent arrangements in Canada, which was in its turn possibly conceived against the backdrop of early developments in this regard in the US.
- The Canadian doctrine and law of the constitution deals with affirmative action as an exception to the prohibition of discrimination and does not favour private affirmative action programmes.
- The South African approach seeks on the one hand to promote equality as a near-absolute prohibition of discrimination, while on the other hand affirmative action is projected not as an exception to non-discrimination, but as a means of achieving equality.
- Whereas the identification of disadvantage in the US and Canada tends to focus on discrete and insular minorities, the South African Constitution deals with an obvious reality of past disadvantage of a substantial majority, thus probably giving preferential programmes in South Africa a different character.

In broad terms it emerges from our short survey that equality is indeed a key foundational value in all three jurisdictions, but that important differences in emphasis exist, limiting comparability. To illustrate: it would not be convincing to quote the latest American decisions in South Africa to make a case for a "colour-blind" approach to affirmative action. Nor would one be justified to argue, with reference to one Canadian school of thought, that affirmative action should be dealt with as an exception to the proscription of discrimination while there is also a persuasive argument in Canadian literature that the affirmative action provision gives content to the basic concept of equality. In fact, the latter approach appears to fit in very well with the wording of the South African Bill of Rights.[46]

CONCLUSION

The question that may arise, is whether the methodological proposals advanced in this paper, would really make any difference to the validity, usefulness or comprehensiveness of the results that may be gleaned from constitutional comparison. Put bluntly, is it *really* necessary go about systematically, identifying and describing a *tertium comparationis* when doing comparative work?

One possible answer to this may be that lawyers have not been doing too badly by going about their comparisons in an instinctive and unstructured manner. This is naturally true for some of the work that has been published, but certainly not of all.

In South African writings and jurisprudence a huge amount of comparison has been going on since 1994. One does, however, get the impression that too much eclecticism has accompanied comparisons in some instances, while in others, much benefit could have been gleaned from comparison, if it were done.

In the inaugural decision of the South African Constitutional Court, the landmark death penalty case,[47] a great deal of comparative information is reflected in the main judgment. This was, however, done against the background of a slightly laconic consideration of the need for comparison,[48] leading to the conclusion that there was no strong obligation on the Court to do so. Nevertheless, reference, in some cases

extensively, was made to material from the US, Canada, Germany, India, Hungary, Tanzania, Zimbabwe, European human rights documents and jurisprudence and various instruments of international law. Exactly how all this comparative material impacted on the eventual finding of the Court (the correctness of which is not here in dispute) is not particularly clear.

In contrast to the wealth of comparative information in the *Makwanyane* judgment, the opportunity, or, it is submitted, need, for comparative analysis, was wholly absent from the Constitutional Court's decision in the *Lesapo* case,[49] where much reliance was placed on the notion of the rule of law.

The Court did refer to some previous *dicta* of its own in which the uncertain content of the doctrine and its relationship to the German notion of the *Rechtsstaat* were intimated,[50] but refrained from contributing anything to an authoritative interpretation of the phrase "rule of law" in section 1(c) of the Constitution, other than quoting Dicey.[51]

It is naturally impractical when doing comparisons always to provide an explication of one's methodology. It is, however, submitted that the absence of an appropriate comparative method, be it expressed or not, puts the tenability and usefulness of the comparative exercise at risk. Employing fundamental notions such as constitutional values as a *tertium comparationis*, holds the promise of profoundly meaningful results.

Comparing with values has, at the very least, the potential of revealing to us which foreign sources can justifiably be used locally as authoritative or persuasive references, and which not.

ENDNOTES

1) The approach to constitutional comparison followed here, is more extensively dealt with in Venter F *Constitutional Comparison* (Juta and Kluwer Cape Town, Cambridge (MA) and Dordecht 2000) Chapter 1.
2) Cf Venter 257-262.
3) Cf e.g. *Burkens MC Methodologie van staatsrechtelijke rechtsvergelijking* (Deventer 1975) 9: "Vergelijken is gericht op het zichtbaar maken van verschillen, door de te vergelijken objecten te betrekken op een gezichtspunt, waarin zij gelijkenis vertonen."
4) Zweigert K and Kötz H *Einführung in die Rechtsvergleichung* 3 ed (Tübingen 1996) 14 puts it succinctly: "Die primäre Funktion der Rechtsvergleichung ist - wie die aller wissenschaftlichen Methoden - Erkenntnis."
5) Thus, e.g. Canadian constitutional law underwent fundamental change in 1982 through the introduction of the *Canadian Charter of Rights and Freedoms* and con-

stitutional adjudication, but its original constitutional instrument of 1867 continues in operation.

6) In this regard E McWhinney *Supreme Courts and Judicial Law-making: Constitutional Tribunals and Constitutional Review* (Dordrecht 1986) XIII revealingly states: "The phenomenon of 'reception' from one legal system to another, across differences of language and culture and legal-systematic organisation and experience, is not new of course; and sometimes, as with the Meiji 'reception' in Japan from 1867 onwards, it has been widespread and fundamental, where elsewhere, in comparison, it may have been a purely mechanical eclecticism that has never taken firm root and so has disappeared."
7) Concepts such as "democracy", "liberty" and "popular sovereignty" abound in constitutions.
8) Some difficulties regarding the meaning of and distinction between terms such as principles, values and guidelines are to be found in Swanepoel J "Die dialektiek in die waardes van die 1996 Grondwet" 1998 *Potchefstroomse Elektroniese Regstydskrif* http://www.puk.ac.za/lawper/1998-1/jansw-die.html
9) The part most relevant for present purposes, is to be found in the last sentence of section 2 of the Amendment. It provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The Fifth, Thirteenth and Fifteenth Amendments have, however, also been employed for the purpose by the courts: Tribe LH *American Constitutional Law* 2nd ed (The Foundation Press Mineola 1988) 1437.
10) Consider e.g. Nowak JE, Rotunda RD and Young JN *Constitutional Law* 2nd ed (West Publishing Co. St. Paul 1983) 585: "In recent years the equal protection guarantee has become the single most important concept in the Constitution for the protection of individual rights." Cf also Davis's discussion of American precedent in this regard in Van Wyk D (et al) *Rights and Constitutionalism, The New South African Legal Order* (Juta Cape Town 1994) 198-200.
11) Cf Erasmus in Van Wyk et al 633.
12) Tribe 1436.
13) *Regents of the University of California v Bakke* 438 U.S. 265 (1978).
14) *Plessey v Ferguson* 163 U.S. 537 (1896) – cf Tribe 1521.
15) *City of Richmond v JA Croson Co* 488 U.S. 469 (1989).
16) *Adarand Constructors, Inc. v Pena* 515 U.S. 200 (1995)
17) Shirley LW "Reassessing the Right of Equal Access to the Political Process: The Hunter Doctrine, Affirmative Action, and Proposition 209" 1999 *Tulane Law Review* 1415 at 1425-8.
18) A slightly cynical comment may, however, be that majority opinion or interests tend to be more influential in giving content to constitutional values than other factors.
19) *R. v Oakes* [1986] 1 S.C.R. 103, para. 64.
20) "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."
21) Curiously Hogg PW *Constitutional Law of Canada* 4th ed (looseleaf) (Carswell 1997-1999)52-12 – 52-13 construes section 15(1) to provide for "four inequalities", the first two being equality before the law and equality under the law.
22) *Granovsky v Minister of Employment and Immigration* [2000] 1 S.C.R. 703
23) (1) Whether there is a differential treatment for the purpose of section15(1);
(2) whether this treatment was based on one or more of the enumerated and analogous grounds; and,
(3) whether the differential treatment brings into play the purpose of section15(1).
24) The cases of *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143 and *R v Turpin* [1989] 1 S.C.R. 1296 have provided the foundation. In chapter 14 of Beaudoin G-A and Mendes E *The Canadian Charter of Rights and Freedoms* 3rd ed (Carswell Scarborough 1996) 14-17, William Black and Lynn Smith described it in the following terms:
(1) Is there a denial of equality before or under the law, or of the equal protection or

equal benefit of the law, to an individual? (2) If there is a denial of equality, is it with discrimination, as defined by the Supreme Court in *Andrews*? There are two aspects to the determination of discrimination:

(a) the identification of the ground upon which the claim is based, to exclude cases not based upon enumerated or analogous grounds;

(b) meeting the definition of "discrimination" . . .

(3) If there is a denial of equality with discrimination, is the provision or practice nevertheless a reasonable limit demonstrably justified in a free and democratic society, under section 1 of the Charter?

25) Weber A "Minderheitenschutz und Nichtdiskriminierung in Kanada in rechtsvergleichender Perspektive" 1994 *EuGRZ* 537 at 546-7. Black and Smith, however, seem to doubt this: cf Beaudion and Mendes 14-29 n122.
26) Subsection (1) does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
27) Hogg 53-46
28) Beaudoin and Mendes 14-27 *et seq*.
29) Hogg 52-1152-12 and section 32 of the Charter.
30) Such human rights codes are ordinary statutes, and are therefore subject to the Charter. Should provision be made in a human rights code for exceptions to equal treatment additional to the exceptions of section 15(2) of the Charter, such additions are exposed to the danger of being struck down. This occurred e.g in the *Blainey* case in 1986 (Hogg 52-11 – 52-12) where a girl complained of being discriminated against on the grounds of her sex by being excluded from a boys' hockey team. The Ontario Human Rights Code prohibited sexual discrimination, but excepted single-sex sports teams as justifiable. This exception was found to be inconsistent with the provisions of section 15 of the Charter, thus leaving only the prohibition of sexual discrimination, and thus opening the boys' team to membership for the girl!
31) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities and the Commission for Gender Equality.
32) 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

33) The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 has been adopted for this purpose.
34) Section 1 and the second sentence of section 9(2).
35) Section 9(1).
36) Section 9(2).
37) *Brink v Kitshoff* 1996 4 SA 197 (CC), *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC), *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC), *Harksen v Lane* 1998 1 SA 300 (CC), *Larbi-Odam and Others v MEC for Education (North West Province)* 1998 1 SA 745 (CC) and *Pretoria City Council v Walker* 1998 2 SA 363 (CC). These judgments on the 1993 Constitution have been found to be equally applicable to the 1996 Constitution: cf par [15] of the judgment per Ackermann J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC).

38) Para [53] of the *Harksen* judgment, paras [17] and [18] of the *Gay and Lesbian* judgment. In para [24] of *Hoffmann v South African Airways* CCT 17/00 (decided on 28 September 2000), Ngcobo J compactly formulated the first enquiry more comprehensively: does "the provision under attack make a differentiation that bears a rational connection to a legitimate government purpose"?
39) It is, however, mildly puzzling that the South African Court has, as far as I could ascertain, not expressly given the Canadian Court the credit due to it.
40) A comprehensive and well-argued analysis of the equivalent provisions of the 1993 Constitution was made in *Public Servants Association of South Africa v Minister of Justice* 1997 3 SA 925 (T).
41) *United States v Caroline Products Co.* (1938) 304 U.S. 144
42) Hogg 52-37 – 52-38.
43) *Andrews v Law Society of B.C.* [1989] 1 S.C.R. 143.
44) Hogg 52-36.3
45) *Egan v Canada* [1995] 2 S.C.R. 513, 599, described and quoted by Hogg 52-40 – 52-41.
46) Cf e.g. Van Reenen TP "Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa" 1997 *SAPR/PL* 151 at 162.
47) *S v Makwanyane* 1995 3 SA 391 (CC).
48) In para [34] Chaskalson P wrote: "The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention." This is followed in para [37] with the following statement: "Comparative 'bill of rights' jurisprudence will not doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw." The Court, however, concludes at the end of that paragraph that the Constitution did not contain an injunction to the courts to do more than to "have regard to" foreign case law.
49) *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC)
50) E.g. in paras [16] and [18]
51) Para [16].

Regulating Land Use: The Role of Private Law

Kenneth Reid

INTRODUCTION

In this paper I am concerned only with restrictions impose by private law. Further, I am not concerned with all such restrictions. In particular there is nothing in this paper about restrictions imposed by the *general* law, that is to say, about restrictions which apply in general terms, and to all properties. Thus the paper has nothing to say about the law of nuisance (or equivalent),[1] or abuse of rights, or, more widely, about the law of delict as it applies to property matters. Instead I am concerned with bespoke law – with restrictions that are specially tailored for particular properties and which, for those properties, provide a kind of local law.

Individual regulation can be achieved both under the law of obligations and under the law of property. An obligational restriction will bind the owner accepting the obligation but not his successors as owner. It is true that use can be made of contractual "chains" whereby the first acquirer is placed under an obligation to impose like restrictions on the next acquirer. But such chains are only as effective as the weakest link, and not infrequently break down. In this paper I am concerned only with restrictions which, of their own force, bind successive owners of the affected property. In short I am in the territory of negative servitudes and restrictive covenants.

It need hardly be said that here, as elsewhere in the law, the distinction between private law and public law is imprecise and not always helpful. In South Africa, for example, property developments ("townships") are regulated by conditions ("conditions of title") which are statutory in origin and which have a public law dimension, at least to the extent that they require to be approved by a public body in advance of their imposition on individual properties.[2] Yet they are imposed by a method which is, unquestionably, one of private law, and their enforcement thereafter is, almost always, by private individuals one against the other. Another example is restrictive covenants conceived in favour of public bodies. When local authorities or other public bodies come to sell land, it is commonplace – in some countries at least – for the land to be sold under restrictions which the public body is then able to enforce. This regulation by private law is for a purpose which is largely a public one. If classification is insisted on, both examples may probably be classified as lying on the private law side of the dividing line. At any rate, both are covered in this paper.

In this paper I am concerned mainly with negative servitudes and with restrictive covenants or their equivalents. Naturally the terminology varies from country to country, and is not always consistent even within countries. A "servitude" in South Africa or Scotland is an "easement" in England or the United States (US). A "restrictive covenant" in England is a "real burden" in Scotland. For convenience I will use "covenant" as a collective term for all devices of this kind. The treatment of covenants in the paper is comparative, but I will concentrate on certain common law or "mixed" jurisdictions: Scotland, England, South Africa and the US.

For reasons which will shortly appear, civil law systems are of less interest in this area of law. My treatment will cover four main topics:

taxonomy; justifications; limitations; and extinction.

Finally I should make clear that I am concerned with the mechanism rather than with its use. Like other legal tools, covenants may be used in many different ways. It is not for me to suggest how they ought to be used in South Africa. Rather my aim is to re-examine a traditional means of land regulation, on the view that it is often better to use what one has than to invent a palette of new and untested concepts. And in re-examining the mechanism of covenants I will draw attention to the latest thinking in other countries.

1. TAXONOMY

A comparative survey shows that the restrictive covenant is, almost exclusively, a creature of common law or mixed jurisdictions. In the civil law jurisdictions of Europe, the (negative) servitude is the main device used to restrict the use of land. Sometimes it is the only device,[3] although there has been a tendency for statute to allow the creation of burdens, under a common scheme, for the regulation of strata titles and other forms of community development.[4] Private regulation of land use is in any event less common in civil law than in common law systems. In common law jurisdictions, by contrast, the servitude has largely been overtaken by the restrictive covenant, or its equivalent. In England, freehold restrictive covenants assumed their modern form in the first half of the 19th century. In the landmark decision of the House of Lords in *Tulk v Moxhay*[5] it was decided that such covenants were enforceable in equity against successive owners of the burdened property. From England, restrictive covenants were exported all over the common law world – to the US, Canada, Australia and South Africa, among others. Scotland did not receive the restrictive covenant from England but developed, at a slightly earlier period, an equivalent device of its own known as the "real burden". The real burden was feudal in concept, if not always in execution, and this feudal origin may explain the fact that, from the very first, it was possible for a real burden to impose affirmative duties, for example, obligations to build or to maintain.[6]

The taxonomic ordering of these obligations is of interest. In civil law systems, the imposition of restrictions is seen as a development of the Roman law of servitudes. They are obligations imposed on one plot of land (the "servient tenement") for the benefit, usually, of the owner of another plot of land (the "dominant tenement"). From the point of view of the holder, the obligation is a limited real right.

In common law systems the position is more complex. There are (at least) two different kinds of obligations – servitudes (easements) and restrictive covenants; the two are close not only functionally but also juridically. It has often been said that restrictive covenants are merely a type of negative servitude.[7] Certainly the resemblances are persuasive. There is the same requirement of two properties, a dominant and a servient tenement. The obligation runs with both, i.e. it is enforceable by successive owners of the dominant tenement against successive owners of the servient. And the allowability of obligations tends to be governed by the same, or equivalent, rules, in particular by the requirement of *utilitas*. But there are also differences. In all countries with a dual system of servitudes and covenants, the rules of constitution are not identical. Often this is the defining difference, without which the distinction would probably be abandoned. Later I consider whether the difference is of value. Another difference is content. In both England and Scotland negative servitudes are subject to a virtual *numerus clausus*, the main permitted restrictions being those concerned with the protection of light,[8] although whether this difference is a cause of the dual system, or merely its consequence, seems an open question. In England, there is also a difference in remedy. Being enforceable only in equity, restrictive covenants do not usually give rise to a claim for damages.[9] Finally, in Scotland there is a difference in scope. As already mentioned, a real burden can, and often does, impose an affirmative obligation. Servitudes, however, are subject to the familiar restriction that *servitus in faciendo consistere non potest*.

In practice, restrictive covenants tend to be used in two main types of situations. One is subdivision. If A divides his land and sells part to B, the use which B is to make of the land can be regulated by restrictive covenant. In such a case the covenant is enforceable by A and his successors as owners of the retained land against B and his successors as owners of the sold land. The other situation is development

under a common scheme. Here the developer divides land into a number of units and sells the units under a common set of conditions. The idea is that the conditions should then be reciprocally enforceable by the owners of each unit, and sometimes also (or even instead) by the developer. This device of the common scheme is in widespread use for houses, and, to a lesser extent, for commercial developments as well.

Differences in practice have sometimes led to differences in law. Common scheme cases are intrinsically more complex than those involving subdivision, and may require special rules. In England, for example, decisions such as *Elliston v Reacher*[10] led to the development of a series of rules for determining the location of enforcement rights in common schemes. South Africa was one of a number of countries to receive those rules. In the US, the new Restatement on Servitudes has a dedicated chapter on "Common-Interest Communities".[11] And in Scotland the draft Title Conditions Bill produced recently by the Scottish Law Commission devotes a special part to "community burdens", which gives special rules for decision making, and for variation and discharge.[12] Special rules acknowledge the differences on the ground between subdivision cases and common scheme cases. In South Africa the distinction is taken a stage further. Restrictive covenants (in which I include conditions of title)[13] are confined to common scheme cases. For subdivision cases it is necessary to use negative servitudes.

1.1 Assimilating servitudes and covenants

Servitudes and covenants are close, both practically and juridically. The reason for the dual structure seems often a matter of historical accident – in England the *numerus clausus* of servitudes, in Scotland the feudal system, in other common law countries, the influence of English law. It is not clear that there is a continuing justification for the distinction. If concepts are different, they should of course be treated separately, for otherwise there would be an inappropriate mixture of ideas. But if concepts are strongly similar, it may be damaging to keep them apart. Excessive classification is the enemy of legal development.

Professor A M A van Wyk argues strongly that, in South Africa at least, servitudes and covenants are different and should be kept apart. Her main reasons are as follows:[14] first, the rules of creation are different. Second, the methods of termination are different. And third, and most importantly, restrictive covenants regulate whole communities. The obligations are reciprocal and are reciprocally enforceable. In a servitude, by contrast, there is only one dominant tenement and one servient tenement. "A reciprocal servitude is a contradiction in terms". Although the arguments are persuasively put, I am not convinced of the need for the distinction which is advocated. The differences in methods of creation and discharge are, usually, slight. There seems nothing in them which turns on a functional difference between servitudes and covenants; but if that is correct, the differences are arguments in favour of assimilation rather than arguments against. For example, in South Africa the main difference in the rules of creation is that, while both types of obligation must appear on the register, there is no need, in the case of covenants, to disclose the dominant tenement. In Scotland, by contrast, the main difference is that servitudes do not require to be registered at all. The contrast is instructive. In South Africa the rules for covenants are less exacting. In Scotland they are more. It is difficult to believe that the differences between servitudes and covenants reflect some deep-seated doctrinal or functional divide. Rather it looks a matter of chance.

Professor Van Wyk is more persuasive in her account of the third difference (numbers of tenements). But even here there are difficulties. Reciprocal servitudes are not the novelty that she suggests. Two adjacent owners might enter into a reciprocal servitude that neither should build within 10 metres of the common boundary. Further, it is not true that in a servitude there is always a single dominant tenement. Admittedly that is often true at the point of creation, but the position may easily be changed by later subdivision. The original dominant tenement might come to be divided into 100 different parcels. So might the servient tenement. In Scotland, if a property affected by covenants (i.e. the servient tenement) is subdivided, the owner of each subdivided part has enforcement rights against the owners of all other parts.[15] A subdivision obligation has come to be converted into a common scheme obligation, and should then be subject to like rules. In summary, a classification which is based on numbers of tenements seems suspect.

Comparative law is also against this view. I know of no other country in which the covenant/servitude distinction is expressed in this way. Certainly in England, the parent country for this purpose, no such distinction is made. And it may be that the true basis of the distinction is that, in South Africa, the reception of restrictive covenants from England was incomplete. This is not, of course, to deny the difference between common scheme cases, and others. But that difference seems best acknowledged by making a few *additional* rules for common scheme conditions rather than by trying to keep them apart from servitudes altogether.

In conclusion. That there are differences between covenants and servitudes is undeniable. But they do not seem greater than the differences between, say, positive servitudes and negative servitudes. Whether therefore the differences are sufficient to justify separate classification seems doubtful.

During the year 2000, two law reform bodies have sought to reform and re-state the law of restrictive covenants. Both have abandoned the covenant/servitude distinction.[16] In the new Restatement on Servitudes published by the American Law Institute, covenants, easements and profits are joined together under the umbrella term "servitudes" and uniform rules are applied. In the view of the American Law Institute, "the term 'negative easement' has no descriptive utility and is likely to cause confusion by suggesting that negative easements and restrictive covenants have different attributes".[17] Similarly, in Scotland the Title Conditions Bill produced by the Scottish Law Commission fuses negative servitudes with covenants ("real burdens").[18] But the Scottish solution does not go as far as the American. Servitudes are retained as a separate category insofar as they are positive in nature. This recognises that rules of creation and extinction are not only different but are properly different. In particular, a positive servitude can be created by acquisitive prescription and without writing or registration. Negative servitudes, however, disappear. All existing negative servitudes are reclassified as real burdens, and no new such servitudes can be created. Scotland therefore retains the dual solution, but in a more rational form. Real burdens are used for negative and affirmative obligations. Servitudes are used for the passive obligation of allowing the dominant owner to make some temporary use of one's land.

One final taxonomic point may be mentioned. In the case of South Africa, Professor Van Wyk makes a further distinction between (i) restrictive covenants and (ii) conditions of title, i.e. conditions agreed by a "township" developer with the "Administrator" or other public official (or body) charged with this purpose. Her view is not shared by most other writers, and the courts have tended to apply uniform provisions to both types of obligation. I too find Professor Van Wyk's analysis unconvincing. She is, of course, correct to point out that, while restrictive covenants arise by contract (classified as a contract in favour of third parties), conditions of title arise by statute. But the end product is the same. The conditions affect the land if, and only if, they appear in the conveyance, and on the register. And the emphasis on a contract in favour of third parties overlooks the fact that in English law, from which the whole concept of restrictive covenants is imported, there is no contract in favour of a third party – for the simple reason that, until recently, English law rejected such a device.[19] The fact is that conditions of title are, for all practical purposes, identical both in form and in function to restrictive covenants. It is no service to their development to treat them apart. The only difference – and in practice probably a slight one – is that a breach of a condition of title may in theory attract criminal sanctions.

2. JUSTIFICATIONS

Covenants grew up more or less spontaneously, the invention of conveyancers rather than of legislatures or theorists. And this very spontaneity is itself a kind of justification. Nonetheless, in some jurisdictions the case for covenants has come to be questioned. Not all covenants are under challenge. The traditional Roman servitudes to protect light and prospect have been accepted, no doubt partly because they are Roman. And there has been greater support for common scheme covenants than for those imposed on subdivisions. An obvious objection to the latter is that they are one-way, i.e. that the owner of the dominant tenement regulates the use of the servient without himself being subject to such regulation. The scrutiny of covenants has often coincided with the rise

of planning law and of regulatory law of other kinds, and once an adequate public framework is in place, the case for private regulation is less compelling.

A number of arguments have been developed on both sides of the debate.[20] In favour of the elimination of covenants it is argued, firstly, that covenants are too long-lasting and have the effect of sterilising the use of land. This means that the preferences of the past are being imposed on the present.[21] Secondly, covenants are too autocratic, an objection which is redoubled if the obligation is not a reciprocal one. And thirdly, covenants are too open to abuse. Particularly as they become more elderly, covenants may confer little more than nuisance value. They allow the blocking of a neighbour's development without adequate reason, or the charging of money for the privilege of being relieved of the restriction.

But there are counter-arguments. If the task of public law is to protect the public interest, so the task of private law is to protect private interests. It should not be assumed that the private interest is less worthy of protection. On this view, a person should be entitled to protect the amenity, and hence the value, of his property by means of restrictive covenants on the property of his neighbour. And in common scheme cases, the private benefit is of an altogether wider nature. Then there is the issue of certainty. Covenants are clear and predictable. Public law regulation, by contrast, is subject to change, both in the rules and in the manner in which they are applied. Predictability is an important virtue in property law, as well as being economically efficient. I may want to spend money on my property in reliance on a restriction imposed on the property of my neighbour. If the restriction is not reliable I may not spend the money. Next, there is the question of cost. From the point of view of the state, private law regulation is free, at the point both of creation and of enforcement. Further, enforcement rates are likely to be higher, and hence regulation more successful. For enforcement is in the hands of the person most affected by the potential breach. Finally, there is a special argument for subdivisions. When I divide my land and sell part of it, I will often want to impose restrictions on the part I am selling for the benefit of the part I am keeping. If I cannot do this, I may not sell at all. Covenants therefore have a role to play in the availability of land. In areas where land is in short supply, that role might be crucial.

Central to this whole debate is the use of planning law. In many respects, covenants seem to mimic the restraints imposed by planning by providing a parallel system of regulation. On one view, this is over-regulation, which should be met by the elimination of covenants. Yet, the regulation by covenants is different in a number of respects from regulation by planning law. One is specificity. Planning, necessarily, deals in general rules. Covenants are detailed and, often, specially designed for the situation in hand. They are micro and not macro rules. There may be argued to be a place for both.

A second difference is that covenants are generally more demanding than planning law. They impose a higher standard, although the extent to which this is true will vary from country to country. In a recent article Kevin and Susan Gray have argued that, in England, restrictive covenants have:[22]

> "begun to function as the residual guarantor of a degree of environmental amenity which the individual citizen can no longer count on receiving at the hands of his or her local planning authority. And if there is one person in England less sensitive than local planners to the preservation of local environmental amenity, it must be the Secretary of State on appeal ... To adopt the words of the Psalmist, 'Put not your trust in planners, nor in the Secretary of State, in whom there is no help.'"

The position may be different in the civil law countries of Europe, where public law is accorded a more prominent role.

There are supplementary arguments also, for example, that covenants have a longer reach, dealing with subjects which are not dealt with by planning law, or that, whatever the law might be, the actual enforcement of planning control is sometimes patchy or inadequate, usually due to a lack of resources.

These then are the arguments. They have in fact been tested. In 1997 the Law Reform Commission of Western Australia invited views on whether restrictive covenants should be abolished.[23] More recently still, the Scottish Law Commission has done likewise. The answer in both cases was overwhelmingly that

they should not be abolished. In the case of Scotland, the invitation of views was supplemented by a survey conducted in a number of housing estates throughout the country. The researchers asked ordinary house owners whether or not they agreed with the idea that the use of their property should be subject to limitations in the interests of neighbours. Once again, the answer was in the affirmative.

The answer of the marketplace seems to be the same. One might expect the advance of public law to be accompanied by a retreat of private law. If covenants are less needed, they will be used less often. In fact the trend seems to have been the other way. The American Law Institute, for example, has commented that:[24]

> "The 20th century saw dramatic increases of the use of servitudes as the amount of land devoted to urban and suburban uses increased. Demands for amenities and control of the environment drove the adoption and widespread acceptance of both public and private land-use devices unthinkable in the 19th century. Zoning, subdivision controls, and environmental legislation became commonplace in the public sector; mandatory property-owner associations, privately financed utilities, security, maintenance and amenities, use controls, design controls, and conservation servitudes became commonplace in the private sector. Controls on the number and types of businesses permitted in a development, as well as controls on competition from businesses on previously owned property, also became common. Governmental bodies increasingly used privately created servitudes for a variety of purposes including supplementing public land-use controls and environmental protections, shifting development costs to the private sector, and providing controls and governance structures for development and redevelopment projects."

If the principle is accepted of dual regulation – by covenants as well as by planning law – then it would seem almost inevitably to follow that covenants should survive the granting of planning permission and that a use which has been approved under public law can nonetheless be prevented under private. I have encountered only one jurisdiction where this is not so. In New South Wales local plans, known as environmental planning instruments, are regulated by s 28 of the Environmental Planning and Assessment Act 1979. In terms of s 28(2):

> "an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument [including restrictive covenants] specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument."

The effect is not for planning automatically to prevail over covenants. For that to occur there must be express provision in the environmental planning instrument itself, and, by s 28(3), the Governor's approval is required. It appears, however, that current practice in New South Wales favours such an express provision.[25] In other jurisdictions the covenants are unaffected. However, the grant of planning permission is quite often a factor which may be taken into account by the Lands Tribunal or other court in the exercise of a jurisdiction to vary covenants or discharge them.[26]

I summarise. For the reasons given, covenants have survived the introduction of a modern planning regime and of other forms of public law control. But the effect of such a regime is to change their role. Planning law is a statement of public interest; and covenants may then be seen as marginalised, as concerned exclusively with private interest. Of course, this is not always true. If covenants lead to the orderly development of land, then this too may be characterised, in part at least, as a matter of public interest. In South Africa the position is made overt by the statutory basis afforded to conditions of title.[27] Nonetheless, for the most part covenants are concerned with the protection of private interests. This conclusion has implications for their treatment. For while covenants are accepted by many countries, they are treated with a certain amount of suspicion; and that suspicion is reflected in the imposition of limitations on their operation and scope. The limitations affecting covenants are the subject of the next section.

3. LIMITATIONS

The, sometimes grudging, acceptance of private regulation is reflected in a number of features in the law. If the case for covenants is that they allow the control of one property for the benefit

of another, then it follows that they should not be permitted to the extent that this role is not being performed. This had led to justification-based limitations in the law of covenants. Naturally, different countries have not all gone about this the same way, and some are more liberal than others. The following are the devices principally found:

- a requirement of a dominant tenement
- a rule that the condition must benefit – "touch and concern" in the language of the common law – the dominant tenement
- a rule that a condition must not be contrary to public policy
- a rule that a condition cannot be enforced unless, in the circumstances of the particular breach, the enforcer can show an interest to enforce which relates to his property.

I consider these limitations in turn.

3.1 The need for a dominant tenement

Private conditions are designed to preserve amenity, whether, narrowly, of one particular property or, more widely, of a group of properties forming a distinct community. But such a justification presupposes the existence of a dominant tenement. Traditionally, therefore, it has been of the essence of a servitude or covenant that there be a dominant tenement. In England, for example, a servitude or covenant cannot be created "in gross", i.e. in favour of a person, unconnected with property.

Not all countries insist on a dominant tenement, however. In South Africa, for example, servitudes can be personal as well as praedial.[28] The same is true of restrictive covenants and conditions of title.[29] In Germany, personal servitudes are recognised.[30] The same is true in the Netherlands, in substance if not in name.[31] In the US, servitudes in gross are freely permitted but not covenants, but the new Restatement allows covenants to be created in gross.[32] In Scotland, the theoretical requirement of a dominant tenement has sometimes been evaded by use of the feudal system (which, in theory, still survives), which appears to allow a real burden to be created in favour of a feudal "superior" who may own no other land in the vicinity.[33] Quite often, such servitudes and covenants have a limited life. In some systems they are confined to the lifetime of the first holder, and may not be assigned. But in Louisiana, for example, such servitudes are perpetual, and freely assignable.[34] Of course, if the first holder is a governmental body or a body corporate, there is little difference in practice between these two positions.

These are the exceptions, however. In most jurisdictions, most of the time, the requirement of a dominant tenement remains.

3.2 *Utilitas*/touching and concerning

A servitude or restrictive covenant must have something to do with the land. And if there is a dominant tenement, as usually there is, it must have something to do with both plots of land. In civil law systems this rule is sometimes expressed by the concept of *utilitas*: a condition must confer utility or benefit on the dominant tenement. In common law systems the rule is that a covenant must "touch or concern" the land. The rule remains pretty much of universal applicability although, as will be seen later, the US is now departing from it.

The rule has two aspects. In the statutory restatement proposed by the Scottish Law Commission it takes the following form.[35] First, a covenant "must relate in some way to the burdened property". And second, it must "in a case where there is a benefited property ... be for the benefit of that property". The Commission's bill recognises the special position of common scheme covenants – "community burdens" in the terminology of the bill – by further providing that "a community burden must be for the benefit of the community to which it relates or of some part of that community".

The rule, and particularly the first part, involves distinctions which not everyone would accept. The rule presupposes a difference between conditions which benefit the property and conditions which benefit the person who happens for the time being to be its owner. In practice the two are not readily distinguished. Most conditions do both. If, being allergic to cats, I impose a covenant that my neighbour must not keep cats, is the covenant praedial or personal? My allergy is not triggered, but my land is also free from an animal which, notoriously, wanders from garden to garden.

As this example suggests, the effect of the rule is to give the court a large measure of discretion. With inventive argument, most conditions can be presented as being in some degree for the benefit of the dominant tenement. And

if that is correct, then the main function of the rule is to keep covenants in check, on grounds which may in reality be unconnected with praedial benefit.

3.3 Public policy

In Scotland, servitudes and covenants are subject to general considerations of public policy,[36] and in modern times the US has also given prominence to this limitation.[37] By contrast, other jurisdictions either disregard public policy altogether, or do not give it much weight.[38] The reformulation of the Scottish Law Commission is:[39]

> "A real burden must not be contrary to public policy as for example an unreasonable restraint of trade and must not be repugnant with ownership (nor must it be illegal).
>
> Except insofar as expressly permitted by this Act, a real burden must not have the effect of creating a monopoly (as for example, by providing for a particular person to be or to appoint (a) the manager of property or (b) the supplier of services in relation to any property)."

To the list of invalid servitudes (covenants) the American Restatement adds "a servitude that unreasonably burdens a constitutional right".[40] In *Shelley v Kraemer*,[41] the most famous example of this principle at work, the Supreme Court held that state courts that enforced racially restrictive covenants denied equal protection of the law to the persons thereby excluded. This decision has an obvious resonance for South Africa. But in practice it is often difficult to use constitutional protections in a context such as this, because a covenant involves the relationship of citizen to citizen and not of citizen to state. In Shelley itself the decision was based on the fact that the covenant was being enforced by a state court; but it is not clear, more than 50 years later, whether Shelley advances a general principle which would allow constitutional protections to apply to all covenants or whether it is confined to certain protections only.[42]

3.4 Interest to enforce

In general, a person seeking to enforce a covenant need not show that any particular interest has been harmed. The mere fact that he owns the dominant tenement is, of itself, a sufficient ground for enforcement.[43] In Scotland, however, it has always been necessary to show a special interest to enforce. The new restatement gives the rule as being that:[44]

> "A person has such interest if ... in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person's ownership of, or right in, the benefited property."

At first sight, this may seem no more than a re-expression of the principle of *utilitas*. Yet it is different. *Utilitas* is concerned with the general question of whether a condition is for the benefit of the dominant tenement. Interest to enforce – as the words "in the circumstances of any case" indicate – is breach-specific. The former is a rule of constitution, the latter a rule of enforcement. A separate requirement of interest to enforce ensures that trivial breaches are overlooked. It also limits enforcement rights in the context of common scheme conditions. If a development of 200 houses is regulated by the same conditions, not all owners are likely to have interest to enforce in any particular case. A close neighbour will be able to enforce, of course, because he is most affected by the breach, but the owners of more remote houses may well fail through lack of interest.

The idea of interest to enforce is taken up by the American Law Institute in its *Restatement*.[45] But this is largely a response to the new rule that restrictive covenants can be held in gross (i.e. without a dominant tenement), and the requirement of interest does not apply in other cases.

3.5 An example

The interrelationship of the various limitations can be illustrated by an example. In *Newton Abbot Cooperative Society Ltd v Williamson & Treadgold*,[46] a decision of the High Court in England, a Mrs Mardon carried on business as an ironmonger at premises known as "Devonia". She also owned property on the other side of the street. Later, when she came to sell the other property, she imposed a covenant prohibiting its use as ironmongers or for the sale of ironmongery products. The question before the court was whether such a covenant was enforceable. The case was analysed as being about the "touch and concern" requirement. Did a covenant against ironmongers touch and concern the dominant tenement ("Devonia"), or

was it merely to protect the business conducted by Mrs Mardon? In the view of the court, the covenant was enforceable:[47]

> "Mrs Mardon may well have had it in mind that she might ultimately want to sell her land and the business and the benefit of the covenant in such manner as to annex the benefit of the covenant to Devonia for, by so doing, she would get an enhanced price for the totality of assets which she was selling ... Devonia could be sold at an enhanced price to someone intending to carry on the business of an ironmonger, because, if, as part of the sale transaction, he obtained the benefit of the covenant, he could prevent competition from the defendants' premises opposite."

Not all jurisdictions would focus on *utilitas*. In the US, the question is whether the covenant is against public policy as being an unreasonable restraint of trade. Obviously the use of a different limitation is apt to produce a different result. In Scotland both *utilitas* and public policy are considered relevant.[48]

3.6 Breaking free

The ironmonger case – and cases like it – throw doubt on the value of *utilitas* as a filter for covenants. So far as Devonia was concerned, the covenant was of value if, and only if, it was eventually to be sold to another ironmonger. If it was sold to a fishmonger instead – which was just as likely – the covenant would be of no benefit whatsoever. The argument might have been stronger if ironmongers have special requirements not found in other retail outlets, and if Devonia had been specially adapted for these requirements. But this does not appear to have the case. Decisions such as this deprive the *utilitas* test of most of its value.

The two recent reform exercises have turned a critical eye on the limitations described above. They have not always survived the scrutiny. In the US, the new *Restatement* abandons both the requirement of a dominant tenement and, in cases where such a tenement exists, the doctrine of *utilitas*. Instead the filter is to be public policy.[49] The thinking behind the change is explained in this way:[50]

> "The traditional constraints on servitude creation ... grew out of concern that servitudes pose substantial risks to the value and alienability of land, to competition, and to other social values. Although widespread use of servitudes has established their great value in land development and conservation, it has not diminished their potential to cause social harm. Racial restrictions provide a dramatic example, which was not prevented by the traditional constraints on servitude creation. The traditional constraints failed because they interfered with too many servitude uses that became desirable and proved ineffective against others that were harmful. They offered protection that was both over- and under-inclusive."

If the American solution is characteristically free-market and libertarian, the response from Scotland is altogether more cautious. With the exception of conditions concerned with conservation and granted in favour of a recognised conservation body, the requirement of a dominant tenement remains, and with it the *utilitas* test. The Scottish Law Commission rejects the idea that a person should be able to control the use of land without a proprietorial interest in that, or in neighbouring, land. For if the control is seriously meant, it usurps the role of planning and other public authorities; and if it is not seriously meant, it is no more than a device for extracting money in exchange for discharging the condition.[51] But in the scheme introduced by the Title Conditions Bill the idea of public policy is given greater prominence.[52]

4. THE PROBLEM OF PERMANENCE

A restriction directly imposed by legislation can be removed by the repeal or amendment of the legislation itself. Private law restrictions are less flexible, and less easy to change. In principle, restrictions imposed by a covenant will last forever. The difficulty, therefore, is not that they are ineffective as a means of land regulation, but rather that they are too effective. Put simply, covenants last too long. Of the attempts which have been made to address this difficulty, I mention here only the two most important. One is the introduction of a court power of variation and discharge. The other, more far-reaching in effect, is the use of a "sunset rule", i.e. a rule that, at the end of a stipulated period, the conditions will automatically fall.

4.1 Extinction by court or administrative process

By legislation passed in 1925, there was intro-

duced into English law a special judicial procedure for the variation or discharge of restrictive covenants.[53] The procedure was – and is still today – for the burdened owner to apply to a special court known as the Lands Tribunal. A number of possible grounds of application (such as change of circumstances) were provided. If one could be satisfied, the Tribunal had a discretion to grant the discharge. The timing of the legislation is unlikely to have been coincidental. By 1925, covenants had been used on a regular basis for the best part of a century, and many were now obsolete. From England the idea of judicial extinction was exported throughout the common law world, and in many cases the grounds on which an application could be granted were a direct copy of the 1925 Act. Scotland adopted equivalent provisions in 1970.[54] To the modern eye, the grounds of application seem capable of improvement.[55] They were re-ordered and reformulated in Northern Ireland in 1978,[56] and a change is now in prospect for Scotland also.[57]

While the US did not adopt the English model, it developed its own jurisdiction for judicial termination, and this is reworked in the new *Restatement*.[58] Even in its revised form, it is considerably less generous than the English original. Finally, it may be mentioned that in South Africa, covenants can be removed by virtue of an administrative process.[59]

4.2 Extinction by a sunset rule

In the state of Massachusetts, a law of 1961 provides that all existing restrictive conditions are to cease to have effect after 50 years, while no new condition can be created with a life exceeding 30 years.[60] The province of Ontario limits covenants to 40 years.[61] In both cases there is an opportunity for the covenant holder to seek renewal for a further period. But while there are other examples, such jurisdictions remain the exceptions. In England a recommendation by the Law Commission that covenants be limited to 80 years was rejected by the government.[62] In both Scotland and Western Australia, law reform bodies consulting on the issue found only limited support for the idea of a sunset rule.[63] The reasons are not hard to discover. Age is an imprecise indicator of the value of covenants. In a settled neighbourhood where nothing has changed for 200 years, a covenant may be as valuable today as when first imposed. Conversely, even quite young burdens can become obsolete or inappropriate. Thus a rule which restricts the duration of covenants in a mechanical way is likely to be both over-inclusive and also under-inclusive. Such a rule is simple, of course, but it is also capable of operating in a manner which is unacceptably crude.

In the case of Scotland, the Title Conditions Bill proposes an interesting compromise.[64] After 100 years any covenants (subject to some exceptions)[65] can be discharged if a person affected by them goes to the trouble of drawing up and registering a notice of termination. But registration must be preceded by notification to those entitled to enforce, and the enforcers have a period of eight weeks in which to make an application to the Lands Tribunal for renewal of the covenant. If no application is made, the covenant falls on registration. This scheme may be categorised as a form of "triggered" sunset. There is no automatic extinction at the end of a fixed period, and covenant holders are not required to keep track of the passage of time – in practice often an unrealistic requirement. Termination is triggered if, and only if, a notice of termination is prepared. But in that case the covenant holder is given due notice. The result, it may be argued, is fair to both parties. A mechanism is introduced for extinguishing elderly burdens. But in the cases – probably few in number – where the covenant is of real and continuing value, steps can be taken to prevent its extinction.

CONCLUSION

As a very broad generalisation, the development of covenants in common law countries may be said to have passed, or be passing, through three distinct stages. First there was cautious emergence of the covenant, in response to industrialisation and urbanisation. In Scotland and England this took place in the early years of the 19th century, while in other jurisdictions it mainly occurred some 50 years later. This emergence was often followed by attempts to keep covenants under control through devices such as the *utilitas* (touch and concern) rule or the insistence on a dominant tenement. Once public law began to take an interest in land regulation, there was a further issue as to whether there remained any legitimate place for private law. Finally there was an

acceptance of the distinctive role which covenants could play coupled, in some jurisdictions, with a move towards reform. Both the US and Scotland have prepared restatements of the law which attempt to achieve a balance between the interests of dominant and servient owners. In England, a proposal for reform made by the Law Commission in 1984 did not prosper,[66] but the Law Commission is now returning to the subject.[67]

A final comment may be made. It is a familiar feature of covenants that they are strictly interpreted in favour of freedom and, *contra proferentem*, against the person seeking to rely on them. But at times these rules have been applied with such rigour as to amount almost to extinction by interpretation.[68] When this occurs, it is a sign that all is not well with the law. In particular it is a sign that inappropriate covenants are too readily created, or are too difficult to discharge. An efficient and properly balanced set of rules has no need of interpretative tricks. Whether the new rules proposed by the American Law Institute and by the Scottish Law Commission will attain that goal remains to be seen. But it is striking that, in both cases, the traditional rule of strict interpretation is expressly displaced.[69]

ENDNOTES

1) For South Africa, see in particular Derek van der Merwe, "Neighbour Law" in Reinhard Zimmermann and Daniel Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996) pp 759-84.
2) A M A van Wyk, *Restrictive Conditions as Urban Land-Use Planning Instruments* (LLD thesis, University of South Africa, 1990).
3) The inflexibility of the servitude has sometimes led to the development of alternative devices. One recent development is the "qualitative obligation" (*kwalitatieve plichten*) introduced by art 6:252 of the (new) Dutch Civil Code. Although classified as part of the law of obligations, this seems barely distinguishable from a restrictive covenant in gross (i.e. in favour of a person, without a dominant tenement).
4) See generally C G van der Merwe, *Apartment Ownership* (being vol VI chap 5 of the *International Encyclopaedia of Comparative Law*). In this context one might also mention annexure 9 to the (South African) Sectional Titles Act 95 of 1986, which contains model "conduct rules" which can be applied to a new sectional title development either as they stand or in an amended form.
5) (1848) 2 Ph 774.
6) Kenneth G C Reid, *The Law of Property in Scotland* (1996) para 391. By contrast, affirmative obligations were not permitted in most other countries, although exceptions include the United States (US) and Germany. Affirmative obligations will not be discussed further in this paper.
7) E.g. Silberberg & Schoeman's *The Law of Property* (3rd edn by D G Kleyn & A Boraine, 1992) pp 393-4, and the texts cited there.
8) The standard modern study of the law of servitudes in Scotland is D J Cusine & R R M Paisley, *Servitudes and Rights of Way* (1998).
9) R Megarry & W Wade, *The Law of Real Property* (6th edn by Charles Harpum, 2000) paras 16-051 and 16-052.
10) [1908] 2 Ch 374 & 665.

11) American Law Institute, *Restatement of the Law, Third: Property, Servitudes* (2000).
12) Title Conditions (Scotland) Bill part 2. The Bill is contained in and explained by the Scottish Law Commission's *Report on Real Burdens* (Scot Law Com No 181, 2000). The full text is available on the internet at www.scotlawcom.gov.uk .The Bill is expected to be enacted by the Scottish Parliament in 2002.
13) In South Africa it is possible to distinguish (i) restrictive covenants proper from (ii) "conditions of title". The authority for conditions of title is statutory; in relation to any particular development they must be approved by an administrative body; but they are then imposed by deed in the same way as restrictive covenants. In practice, they have superseded such covenants. See Van Wyk, *Restrictive Conditions* chap 3. In this paper, except where the context indicates otherwise, "restrictive covenants" (or "covenants") includes conditions of title.
14) Pp 99-105.
15) Reid, *Law of Property* para 401.
16) However, it should be noted that the new Dutch Civil Code actually introduces the distinction for the first time into Dutch law by allowing contractual obligations to run with the land as a form of pseudo-covenant (art 6:252), while at the same time preserving servitudes as a separate category.
17) *Restatement Third, Property (Servitudes)* vol 1 p 17.
18) Title Conditions (Scotland) Bill ss 2(1)(b), 75 and 76.
19) The position has now been changed by the Contracts (Rights of Third Parties) Act 1999.
20) For a fuller account of the arguments, see Scottish Law Commission, *Discussion Paper on Real Burdens* (Scot Law Com DP No 106, 1998) paras 2.10 to 2.27. The summary which follows is indebted to that account.
21) Stewart Sterk, "Freedom from freedom of contract: the enduring value of servitude restrictions" (1985) 70 *Iowa Law Rev* 615 at pp 634 ff.
22) Kevin Gray and Susan Francis Gray, "The Future of Real Burdens in Scots Law" (1999) 3 *Edin LR* 229 at 234. The context is the role of the Lands Tribunal in refusing applications for discharge or modification of covenants.
23) Law Reform Commission of Western Australia, *Report on Restrictive Covenants* (Project No 91) (1997) para 5.1.
24) American Law Institute, *Restatement Third, Property (Servitudes)* vol 1 pp 348-9. See also Scottish Law Commission, *Report on Real Burdens* para 1.34.
25) See a series of articles published by Peter Butt at (1995) 69 ALJ 482, (1997) 71 ALJ 910, (1998) 72 ALJ 181 and (1998) 72 ALJ 584.
26) Law of Property Act 1925 s 84(1A), (1B) (as inserted by the Law of Property Act 1969 s 28(2)) (England and Wales); The Property (Northern Ireland) Order 1978 art 5(5); Title Conditions (Scotland) Bill s 94(f). I mention here only the provisions which apply in the United Kingdom, but there are numerous examples from other common law jurisdictions.
27) Van Wyk, *Restrictive Conditions* chap 3.
28) Silberberg & Schoeman's *The Law of Property* pp 385-9.
29) Van Wyk, *Restrictive Conditions* pp 98-9.
30) German Civil Code arts 1090-3.
31) Dutch Civil Code art 6:252.
32) *Restatement* § 2.6.
33) Scottish Law Commission, *Report on Real Burdens* para 9.6. The remnants of the feudal system will be abolished in the near future when the Abolition of Feudal Tenure etc (Scotland) Act 2000 comes into force.
34) Louisiana Civil Code art 644.
35) Title Conditions (Scotland) Bill s 3(1)-(4).
36) This has been true from the very beginning. See Reid, *Law of Property* para 391.
37) American Law Institute, *Restatement Third, Property (Servitudes)* vol 1 p 350.
38) For England, see *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1986] AC 269.
39) Title Conditions (Scotland) Bill s 3(6)&(7).
40) *Restatement* § 3.1(2).
41) (1948) 334 US 1.
42) American Law Institute, *Restatement Third, Property (Servitudes)* vol 1 p 353.
43) Preston & Newsom's *Restrictive Covenants* (9th edn, 1998) para 8-04;

American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, p 477;Van Wyk, *Restrictive Conditions* pp 195-9.

44) Title Conditions (Scotland) Bill s 7(3)(a).
45) *Restatement* § 8.1. The rule is that "a person who holds the benefit of a covenant in gross must establish a legitimate interest in enforcing the covenant". No attempt is made to define "legitimate interest".
46) [1952] Ch 286. See generally Preston & Newsom's *Restrictive Covenants* paras 3.19 and 3.20.
47) At pp 293-4 per Upjohn J.
48) In the leading modern case, however, the emphasis was on public policy. See *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1939 SC 788. See further Reid, *Law of Property* para 407.
49) The change is embodied in § 3.1 of the *Restatement*, which begins: "A servitude created as provided in Chapter 2 is valid unless it is illegal or unconstitutional or violates public policy".
50) American Law Institute, *Restatement Third, Property (Servitudes)* vol 1 pp 350-1.
51) Scottish Law Commission, *Report on Real Burdens* para 9.8.
52) Title Conditions (Scotland) Bill s 3(6)&(7).
53) Law of Property Act 1925 s 84, as amended by s 28 of the Law of Property Act 1969. See further chaps 10 to 16 of Preston & Newsom's *Restrictive Covenants*.
54) Conveyancing and Feudal Reform (Scotland) Act 1970 ss 1 and 2.
55) Scottish Law Commission, *Report on Real Burdens* paras 6.64 to 6.69.
56) The Property (Northern Ireland) Order 1978 (SI 1978/459) art 5.
57) Title Conditions (Scotland) Bill s 94.
58) *Restatement* § 7.10.
59) The current legislation is the Removal of Restrictions Act 84 of 1967. For a commentary, see Van Wyk, *Restrictive Conditions* pp 272-8.
60) Massachusetts General Laws ch 184 ss 27 and 28 (inserted by an Act of 1961 ch 448).
61) Land Titles Act (c 230) s 118(9); Registry Act (c 445) ss 104 and 106.
62) Law Commission, *Transfer of Land: Obsolete Restrictive Covenants* (Law Com No 201, 1991) part III.
63) Scottish Law Commission, *Report on Real Burdens* paras 5.22 to 5.25; Law Reform Commission of Western Australia, *Report on Restrictive Covenants* paras 5.15 and 5.16.
64) Title Conditions (Scotland) Bill ss 18 to 22. For a discussion, see Scottish Law Commission, *Report on Real Burdens* paras 5.26 to 5.57.
65) In particular for "facility burdens", i.e. burdens which regulate the maintenance or use of common facilities such as shared parts of a building or a mutual road.
66) Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants* (Law Com No 127, 1984).
67) Law Commission, *Seventh Programme of Law Reform* (Law Com No 259, 1999) pp 12-13.
68) See eg Reid, *Law of Property* paras 415-22; American Law Institute, *Restatement Third: Property (Servitudes)* vol 1 p 497.
69) *Restatement* § 4(1): "A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created"; Title Conditions (Scotland) Bill s 13: "Real burdens shall be construed in the same manner as other provisions of deeds which relate to land and are intended for registration".

Dancing with Codes: Protecting, Developing, Limiting and Deconstructing Property Rights in the Constitutional State[1]

André van der Walt[2]

INTRODUCTION: THE LONG WALK TO FREEDOM – ACROSS THE BRIDGE OF CONSTITUTIONAL TRANSFORMATION

> "Waren die klaren Bedeutungen aus dem Haus, tanzte die Sprache auf dem Tisch."
>
> *Thea Dorn "Ultima Ratio" in Dietrich Schwanitz et al* Amoklauf im Audimax: Stories[3]

The possibility of a reformed, equitable system of land rights in a constitutional democratic state, of a future founded on development opportunities for all South Africans, irrespective of their colour, race, class, belief or sex, was introduced in the so-called "postamble", entitled "National Unity and Reconciliation", in the 1993 Interim Constitution:[4]

> "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and *development opportunities for all South Africans*, irrespective of colour, race, class, belief or sex."

What I have in mind in this paper is neither a feel-good reformist nor a business-as-usual instrumentalist evaluation of current land reform initiatives,[5] but rather a reflective analysis of the codes of post-1990 constitutional discourse; a critical assessment of the theoretical spin that mainstream jurisprudence places on the notion of transition to constitutional democracy. My starting point is the bridge metaphor in the "postamble" to the 1993 Interim Constitution. According to this metaphor, the Constitution is a "historic bridge" between the past of apartheid and the future of constitutionalism; between the injustices of apartheid land law and the future of an equitable system of land rights that will provide development opportunities for all South Africans.[6] The "postamble" and the bridge metaphor were left out of the 1996 final Constitution,[7] but the image of the Constitution as a bridge between the old and the new social and legal order survived as a paradigm metaphor for constitutional transformation discourse in general.

In a now famous and oft quoted journal article,[8] the late Wits law professor Etienne Mureinik described the Interim Constitution as a bridge that facilitates the transition "from a culture of authority to a culture of justification", entrenching the image of the Constitution as a bridge that spans the abyss of potentially violent transition. This interpretation of the bridge metaphor has become established in constitutional discourse and in popular consciousness as a positive and empowering image for social, political and legal transformation and progress. In Mureinik's interpretation, the bridge metaphor presupposes a certain linear progression, a journey from one place to another, or – to borrow from another transformation metaphor – a "long walk to freedom".[9] In the bridge metaphor, the starting point and the destination of the journey are separated by an abyss, and the bridge facilitates the crossing of the abyss, not as a goal in itself, but as a necessary stage in realising the goal, namely movement from one position to the other. Normative social and political values attach to being on one side (new and good, culture of justification) rather than the other (old and bad, culture

of authority), and to getting from the one side to the other quickly and with minimum upheaval. Mureinik underlined this point when he identified the abyss as a metaphor not for the past to be left behind, but for "the sewer of violent and contentious transition",[10] and the bridge as a metaphor not for the destination of the journey, but for an instrument that facilitates the transition from the old culture of authority to the new culture of justification. This interpretation characterises the abyss as an unavoidable but temporary problem to be overcome in an otherwise untroubled linear progression, and the bridge as an instrument of escape and liberation, of linear movement from old to new, from inside to outside, much as a rope is an instrument for breaking out of gaol.

In this interpretation, the metaphoric link between the bridge and the abyss is instrumental and temporary – the bridge is an emergency measure that loses its metaphorical and rhetorical significance as soon as the crossing has been made successfully. In fact, the bridge of constitutional transformation should probably be burned down as soon as we have crossed it, to ensure that nobody crosses back, by design or by mistake, ever again.[11] Regarded in this way, the bridge metaphor is the expression of a deep wish to break with the past and to open a new chapter in South African history, an expectation of a clean and complete transition from old to new, from bad to good, from a culture of authority to a culture of justification. The point of the exercise is to make the transition and get it over and done with.[12] Once the transition has been made there is no return – like an escape from gaol, like the long walk to freedom, the transformation of apartheid society is a one-way journey.

Most constitutional theorists would interpret the theme "Development in the Contemporary Constitutional State" with reference to the bridge metaphor, the argument going something like this: we have crossed the bridge from the old authoritarian order and we have left the unequal, discriminatory system of land planning and development behind us, and now we find ourselves on the other side, in the contemporary constitutional state, characterised by democracy and the culture of justification, which is "founded on the recognition of human rights, democracy and peaceful coexistence and *development opportunities for all South Africans*, irrespective of colour, race, class, belief or sex".[13] We now have to practise land planning so as to provide development opportunities for all, and the question that should occupy us is this: what are the possibilities for, and how do we realise equitable land planning and create development opportunities for all South Africans?

Formulated like that, it sounds wonderful, doesn't it? Just the kind of enquiry that newly sensitised and context-oriented organisers of a conference and research funding institutions would be drawn to. However, this interpretation of the bridge metaphor places a very particular theoretical spin on the transition from the old to the new constitutional order and on the discourse of constitutional transformation in general, and by implication on the theme of development in the constitutional state as well. In this paper I will tease out some assumptions upon which this interpretation of the bridge metaphor relies: that the transition from the old to the new constitutional order is in the nature of crossing a bridge from one place to another; that crossing that bridge is the only, or the major, requirement for the transition from a culture of apartheid authoritarianism to a culture of constitutional justification; that such a bridge is or was indeed available to us; that we have crossed (or are in the process of crossing) the bridge to the new constitutional order; and that we now find (or will soon find) ourselves in a new position that is characterised by the absence of the old culture of authority and by the presence of a new culture of justification. These presuppositions are undoubtedly representative of the dominant vision of constitutional transformation in South Africa, but they deny and suppress other interpretations of, and discourses about, transition and constitutionalism. In this paper, I argue that we should reconsider the bridge metaphor and the assumptions accompanying it when we assess the moves involved in land reform and in a constitutional transition to democracy.[14]

In the next two sections of this paper, I compare some aspects of apartheid land law with features of land reform initiatives in the new constitutional order, and I argue that we cannot discuss apartheid land law and post-1994 land reform as two stages along the walk to freedom, or as the starting point and end goal in the historical progression from problem to solution.

I approach the comparison from an unconventional vantage point, based on two critical insights formulated by Yale Law and History professor Robert Gordon.[15] The first insight is that "[t]he discourse of law – its categories, arguments, reasoning modes, rhetorical tropes, and procedural rituals – fits into a complex of discursive practices that together structure how people perceive and that therefore act to reproduce or to try to change people's social reality".[16]

The second insight is that, "[a]lthough they are the product of political conflict, legal forms and practices don't shift with every realignment of the balance of political forces", but "tend to become embedded in 'relatively autonomous' structures that transcend and, to some extent, help to shape the content of the immediate self-interest of groups".[17] On the basis of these two critical insights, I question the theoretical validity of the picture of apartheid land law and post-1994 land law as two different places, on either side of an abyss bridged by the Constitution, and I argue that both apartheid land law and post-1994 land law, as well as the process of transition from one to the other and the role of the Constitution in this process, should be understood in terms of complex relationships between a number of "relatively autonomous" political, social and legal codes that affect and shape both pre- and post-1994 constitutional law and land law and our interpretations of them.

My analysis in the paper should be judged at two different levels. At one level, I argue that the image of a journey, a walk, might be suitable as a metaphor for the personal history of a political activist and statesman, but not for constitutionalism – or transformation-talk: for that, we need more complex images of movement in the sphere of social, political and legal relations. In the rest of the paper, I therefore propose a different metaphor for movement – that of dancing,[18] which allows us to imagine social relations in a more complex sense. However, even when we trade the linear imagery of walking for the more complex imagery of dancing, we still have to resist the temptation to see transformation from authoritarianism to justification – from one dancing code to another, from *volkspele* jurisprudence to *toyi-toyi* jurisprudence – as progress. Trading one culturally and ideologically over-determined code of progression for another does not liberate us from instrumentalism, even if we make the transition without bloodshed. At a second level, I therefore suggest that we should not only switch to a more complex metaphorical code such as dancing when discussing social and legal transformation, but that we should also deconstruct the codes we dance to.

Deconstruction of the codes we dance to means that we should pause to reflect upon the codes, the language, in terms of which we think and talk and reason about constitutionalism, about rights, and about transformation, and recognise the liberating and the captivating potential of the codes shaping and shaped by that language.[19] If political protest was an attempt to articulate other options for meaningful change,[20] we should use the liberty won by the struggle for freedom and continually dare to imagine alternatives, not in an attempt to design or develop something better than we have now, but to open our imagination to alternative visions, to the possibility that things can be different. Once clear meanings are out of the house, we can allow language to dance on the table.

1. *VOLKSPELE* JURISPRUDENCE

> "Nothing's changed but the surrounding bullshit – that has grown."
>
> Pearl Jam "Off he Goes" on *No Code*[21]

Ten years after the formal abolition of apartheid,[22] it is tempting to see a discussion of apartheid land law as a waste of time – after all, we should be looking forward, to the future, seeing that apartheid is something of the past, outdated, like traditional Afrikaner *volkspele* (folk dancing). In fact, *volkspele* is an interesting metaphor for apartheid jurisprudence. In traditional Afrikaans-speaking communities, the name *volkspele*[23] and the cultural image of the *volkspele* movement depend on subliminal impressions of good, clean, innocent fun, enriched by a healthy connection to its roots in Afrikaner history and culture.[24]

This impression supports the popular image of *volkspele* as a culturally contextualised but politically innocent code of dancing, of playing games.[25] At its best, *volkspele* represents an opportunity for dressing up in romantic Voortrekker clothes[26] and for a fun display of folk dancing; at its worst, it is associated with cultural excess like eating too much *braai-*

vleis[27] and clandestine kissing behind the *koeksister*[28] tables.

Closer scrutiny reveals a more complex relationship between the cultural and the political codes of Afrikaner folk dancing. The *volkspele* movement received its major growth in popular support and the inspiration for its traditional Voortrekker dress from the symbolic Ossewa Trek of 1938,[29] when a close and lasting symbolic connection was established between the *volkspele* movement and the mythical, ideologically-inspired image of the Voortrekkers as brave and independent spirits who crossed the Drakensberg and moved deeper into the continent to escape from English imperialism.[30] New *volkspele* "games" or dances such as the "wagon wheel"[31] and the "ox-wagon"[32] were designed around the time of the centenary celebration of the Great Trek, based on images borrowed from Voortrekker history and folklore, and displayed at cultural, religious and political Afrikaner meetings.[33] In the same vein, *volkspele* dancing as a cultural activity received support from a major church grouping when the foundations of *volkspele* in Afrikaner patriotism were demonstrated at a national synod of the Nederduits Gereformeerde Kerk in 1940, where the new "wagon wheel" dance[34] was demonstrated, accompanied by a reading of Voortrekker leader Andries Pretorius' words to Sir Harry Smith: "There is a wheel turning in South Africa which neither you nor I can stop".[35] The dress and dancing codes of the *volkspele* movement were thus integrated with symbols of the rise of Afrikaner exclusivist political consciousness.

In addition to its popular image of good, clean fun and healthy cultural festivity, *volkspele* therefore turns out to be a code for a very particular set of cultural, social and political ideals and aspirations connected to exclusivist ethnic Afrikaner nationalism. As the wagon wheel dance illustrates, the metaphorically rich cultural signifier is also a political signified – the seemingly natural link between the sign and its cultural meaning turns out to be arbitrary and unstable.[36] Moreover, the cultural and the political codes were hopelessly, inextricably mixed up in the sign, in the dress codes and the games of *volkspele* dancing – once the fun of dancing and the spontaneity of cultural festivity have been pushed aside by the urgency of political posturing, the political meaning of Afrikaner nationalism could never be exorcised from the dance to leave an apolitical, "purely" cultural husk. When Voortrekker "rhetoric" was introduced to *volkspele*, it did not simply add a dress code and a few new games to the movement's repertoire – it sucked meaning and significance from, even as it added to, the notion of dancing.

Apartheid law also consisted of legal codes that were mixed up with the ideological code of Afrikaner ethnic nationalism and exclusivism, and again the mutual cross-references between the legal and the political codes created a whole new, inseparable layer of legal and political meaning. Important for my purposes here is the fact that apartheid brought about a fundamental synergy between apartheid ideology and Roman-Dutch law. Apartheid law relied on a mixture of Roman-Dutch property codes and apartheid ideology, where two properties were mixed up in such a way that a completely new mixture was created, from which the original elements could no longer be separated and extracted.[37] During the early days of the new constitutional order, there were tentative political calls for the abolition of Roman-Dutch law[38] and passionate rhetoric against it,[39] but it was clear from the beginning that the mere abolition of apartheid laws was never going to rid South African society or law of the legacy of apartheid completely. Apartheid law was not a statutory, political aberration; a foreign, external attachment or a malignant growth that could be removed mechanically or separated surgically from the underlying structures of South African common law, without leaving a trace of damage[40] or scar tissue – the different codes were too closely mixed up for that.

The complex relationship that was established between ideological and legal codes can be illustrated with reference to Robert Cover's notion of the relationship between violence and the word.[41] To establish and enforce a legal structure for the embodiment of apartheid ideology, to translate it into social and legal practice, required something similar to what Cover referred to as "the social organisation of legal violence",[42] the ability to assume "an entire structure of social cooperation", including "conditions of effective domination"[43] and enforcement. For apartheid to work effectively as a legal system, apartheid law had to rely on the separation of powers: the legislature had to

be able to promulgate the necessary race-based segregation statutes[44] without interference from the courts;[45] the courts had to be able to interpret and adjudicate these statutes without debilitating conflicts of conscience; and the legislature and the courts had to be able to trust that laws and court orders would be carried out by the executive. It is the second of these requirements that interests me – for the courts to interpret and adjudicate the segregation statutes without conflicts of conscience, they had to be able to rationalise their decisions with reference to some commonly accepted code of sound judgment.[46]

The ideology of apartheid required words, legal codes as provided by Roman-Dutch property law,[47] to make its legal violence intelligible in the community. Lawyers, including the judges, would play their assigned role more readily if they could explain and justify at least some (part) of their decisions with reference to what they regard as politically neutral principles of law. Robert Cover has argued convincingly, albeit in a different context, that a "bonded interpretation"[48] based on the structure of organised legal violence, inherent in a shared code of sound judgment, provides a reciprocal guarantee: the words of the law (interpretation) will be backed up by organised violence (power of enforcement), and the violence of the law (organised enforcement) will be made intelligible and acceptable by the right legal words (interpretation). Apartheid could establish the violence of racial segregation ideology more successfully when it was explained and rationalised in seemingly neutral and reasonable words of an established legal system such as Roman-Dutch law. As it happened, Roman-Dutch law of private property could provide just the right kind of code to suit the purpose.

To understand the justificatory synergy between the violence of apartheid ideology and the words of Roman-Dutch private law, it is necessary to distinguish between two seemingly conflicting characteristics of land law in the apartheid era, namely that it was simultaneously dynamic, functional and goal-oriented,[49] and static, spatial and position-oriented[50] – the legal equivalent of an artwork that displays all the essential characteristics of a painting and of a movie at the same time. In its dynamic, instrumental mode, apartheid law treated land and land rights as instruments for social change and transformation – individual rights were subjected to large-scale state interferences for the sake of building the dream, establishing the goals of the "colossal social experiment" that was apartheid.[51] This "jurisgenerative"[52] aspect of apartheid law was aimed at large-scale and often disturbing changes and social transformations, for which the apartheid government could not rely on existing law, and therefore the role of the legislature was supreme – legislation created the "sacred texts"[53] around which the ideological and instrumental meaning of apartheid law was generated.[54]

The dynamic, functional aspect of apartheid land law is illustrated most clearly by the instrumental role that apartheid land law played in social engineering, in the sweeping social and legal changes that were involved in spatial race-segregation. In this mode, apartheid land law required dramatic and fundamental statutory changes in the law and in society, including the manipulation of existing land rights and the creation of new land rights, to suit the requirements of racially segregated land holding and development. First of all, the country was divided into exclusively white and black areas, people from one race group being prohibited statutorily from owning or using land in an area designated for people from another group.[55] This involved a certain amount of expropriation of land from (mainly) black landowners and forced removals in order to "clean up" inconsistent (mainly) "black spots" in areas designated for whites, and to "consolidate" the respective designated white and black areas.[56]

Secondly, land rights in the black areas had to be redefined to suit the perceived circumstances and requirements of black people in the rural areas and in the black townships in white areas – in both instances, this redefinition meant that black land rights were downgraded, transformed into insecure, precarious rights, even in instances where the black people used to have ownership before they were removed from "white" land.[57]

The dynamic aspect of apartheid land law was presented as temporary, something that was supposed to become redundant once the goal of segregation had been realised. The changes required by this dynamic were justified by the end goal, which was the realisation of the grand dream of apartheid, namely total separation of race groups. This teleological justifi-

cation of temporary injustice characterises apartheid as what Robert Gordon described as "evolutionary functionalism",[58] which means that "the natural and proper evolution of a society ... towards the type of [society idealised in the dominant ideology, requires] that the natural and proper function of a legal system is to facilitate such an evolution".[59] The aim of apartheid land law was to facilitate the transition to a situation where separate political, social and legal structures have been established for each race group, and where each group could enjoy its own (and probably, but not necessarily, equal) rights within the exclusive space set aside for it. The infamous apartheid land laws[60] and the weak statutory rights afforded to black people during the apartheid era were therefore seen as unavoidable products of the grand social experiment of apartheid, and while the establishment of apartheid created inequalities, suffering and disadvantage, the evolutionary spirit of instrumentalism allowed the architects of apartheid to argue that the inconvenience was temporary and justified, and that the rights of black people could enjoy the necessary attention once the space had been created within which suitable rights could be established for them.[61]

In this instrumental mode, apartheid-talk was largely political, ideological rather than legal, and its legal aspect was restricted to the promulgation of "politically inspired" legislation, creating the false impression that the whole of apartheid law could be identified with this legislative aspect and therefore abolished easily by scrapping a few laws. The rhetoric of the instrumental mode of apartheid land law was largely future- and goal-oriented, justificatory, explaining the injustices brought about by apartheid as inconvenient but temporary, transitional situations that were inevitable on the way to reaching the goal.

In its analytic, spatial mode apartheid law treated land and land rights as space, as exclusive areas for the autonomous growth and development of individuals and race groups. In this mode, the ideology of racial purity and separation found support for its exclusivist vision of individual autonomy and human flourishing in the dominant theory of Roman-Dutch property law.[62] Whereas the dynamic, instrumental aspect of apartheid land law was primarily "jurisgenetic", creating new law through legislation to promote the ideological goals of apartheid, the analytic mode of apartheid land law was entrenched by the "jurispathic"[63] role of the courts, where the hierarchies of apartheid were upheld by suppressing rules or interpretations that did not fit in with the grand social experiment of apartheid, and by selecting and enforcing rules and interpretations that did fit in.

In its static, spatial, position-oriented mode, the apartheid system looked palatable, politically neutral, rational, especially to lawyers who held the Roman-Dutch tradition in high regard or who were accustomed to its rhetoric. If one ignored the dynamic, instrumental, "temporary" aspect of apartheid land law and the changes and upsets it brought about, the underlying system of land rights in the apartheid scheme – presented in the language of Roman-Dutch land rights – had an air of legal and moral respectability. In its analytic, static mode, apartheid land law treated land rights basically as position, as space that could embody and guarantee apartheid's segregationist aspirations with regard to the physical security, economic power and political status of (especially white) people. The analytic rhetoric of position, of boundaries between autonomous spaces, and of exclusion that underlies apartheid philosophy relied on an essentialist definition of whiteness (race classification) as well as an exclusivist definition of land rights. The definition of whiteness was provided by the race-based ideology of the minority government and embodied in the core legislation that identified, established and upheld the exclusivity of separate areas for the "separate development" of different race groups,[64] but segregationist politics also required a separation-oriented system of land law, based on the definition, maintenance and protection of existing land rights in a spatialised framework, which emphasises the exclusivity of individual and (race) group land holdings. In this quest, apartheid policy discovered a felicitous (but not altogether coincidental) partnership with Roman-Dutch private law. The definition of rights as exclusive spaces that allowed for free exercise of individual autonomy was provided by Roman-Dutch private property law and its dominant Pandectist vision of rights.

Two characteristics dominated the Roman-Dutch view of property as it was established in

South African law by the early decades of the 20th century: ownership was regarded as the pinnacle of a hierarchy of rights in property,[65] and seen as a fundamentally individual, exclusive and absolute right.[66] To say that ownership was an absolute right does not mean that it was unrestricted, but that its default mode was unrestricted – it could accommodate restrictions, either in the form of public law limitations or in the form of conflicting rights held by others, but in the absence of clear proof, such restrictions were assumed not to exist.[67] Similarly, to say that ownership was exclusive does not mean that co-ownership or other forms of communal or social ownership was impossible, but it does mean that they were uncommon and often regarded as weak or impractical. The hierarchical superiority of individual ownership compared to any other property right or even any other right was clear in Roman-Dutch property law – all things being equal, the owner's right would always be stronger than any other claim, unless another person could prove the existence of a limited, conflicting right created or assented to by the owner.[68] This was particularly clear with regard to the superiority of the right of ownership as against possession or use-rights with regard to the property. Carey Miller points out that, with regard to land, the exclusivity and hierarchical superiority of ownership were entrenched during the apartheid era by the system of land registration, which provided both a handy control over the acquisition and transfer of land rights in the exclusive racially defined areas and a way of ensuring that black land rights in white areas remained weak and insecure.[69]

By the middle of the 20th century, land rights and the image of a landowner as supreme master of his[70] well-defined and fenced-off property[71] was an established metaphor for property rights and even for rights in general,[72] and this metaphor suited the requirements of apartheid law perfectly. With reference to the exclusivity, absoluteness and hierarchical superiority of individual ownership as the most complete and the most important right that one could hold with regard to property, Roman-Dutch private property law can be described as a system of mutually exclusive rights, backed up by a system of remedies that are either aimed at the prevention of interferences with existing property rights,[73] or at reclaiming property that had been dispossessed,[74] or at claiming compensation for loss caused by unlawful interferences with property.[75] The main function of law in this perspective is to define rights, to determine the boundaries between competing rights, to uphold their mutual exclusivity, and to identify and award remedies for breaches of the boundaries.[76] Nowhere else is this pattern more clearly demonstrated than in the law of neighbours, which defines the function and status of boundaries between contiguous properties and the reciprocal rights and duties of neighbouring owners, and thereby offers an almost paradigmatic 19th century, Kantian vision of property rights and of rights in general to fit in with liberal live-and-let-live sensibilities. Within the boundaries of his own property, each owner can virtually do as he likes, provided only that he respects the rights of his neighbours to do the same, that he does not encroach on the neighbours' land by his actions, and that he generally adheres to the principle of reasonableness.[77] Terms such as "nuisance", "annoyance", and "encroachment" are important organising principles in this rhetorical structure.[78] Although the relationship between neighbours is unique in law,[79] the neighbour relationship assumed the format of a paradigm, a general model for all land rights, property rights and even other private rights, in the sense that it exemplifies the typical private-law picture of rights as spaces for the free exercise of individual autonomy, restricted only by the measure in which they meet and conflict with other rights, in which case the conflicting rights have to accommodate each other on the basis of reasonable exercise.[80]

Interestingly, apartheid land law confirmed its allegiance to the static, spatialised, hierarchical perception of existing property holdings even when the very development of property institutions was at stake. This is illustrated nicely by the development of the so-called "new patterns of landownership" during the last decades of the 20th century,[81] which were intended to meet the growing demand for new, progressively commodified forms of land rights.[82] Dynamic and suitable new land-use rights such as sectional title ownership, share-block ownership and property timesharing were created and protected by statute. Interestingly, all the novelties were carefully cast in the traditional Roman-Dutch hierarchy of ownership,

real rights and personal rights, with suitable statutory support in places where personal rights lacked the required security or access to financing.[83] Within the Roman-Dutch paradigm, these new rights were also cast in the traditional hierarchy of spatially exclusive land rights, even in cases where new use rights in one single property were created for a number of different people.[84]

The historical origin of the South African common-law's hierarchical, spatialised vision of property as exclusive spaces of personal autonomy was probably German Pandectism. Bernhard Windscheid, one of the most influential Pandectists, provides some interesting perspectives in this regard.[85] Windscheid describes all private-law rights as norms or principles, issued by the legal system (objective law) for the benefit of a specific individual subject, which allows the individual to decide whether to enforce his/her freedom in the face of opposition or interference from others. Every private right is therefore described and analysed as an opportunity, provided by the legal system and backed up by force, for an individual to enforce his/her will against others. Real rights, of which property ownership is the most important, are characterised by their exclusivity: they allow their holders to exclude all other people from the use and enjoyment of property and from actions that interfere with such use and enjoyment. Ownership is distinguished from other real rights in terms of its scope: it allows the owner to exclude all other people from the use, enjoyment or interference with the property in all its relations and aspects.[86] This right is described primarily as a right of one person against another person (or against all other people), and not as a right to an object, and so it acquires special social significance. In his theory of ownership, Windscheid sets out a theory of society, which is based on the notion of exercise of individual free will through ownership of property – property is a requirement for and guarantee of individual liberty and personhood, and simultaneously individual ownership is required and justified by individual personhood and liberty.[87]

For my purposes, the most interesting feature of this vision of property rights is its spatial orientation. Rights and the relationships between them are literally seen as spaces, basically in the same way that pieces of land and the boundaries between them are portrayed on a map. The underlying presupposition of this vision of land rights (and especially of other rights, once the metaphor has been extended) is that this is the only or the best or at least a suitable or morally, socially, politically and legally defensible way of enjoying and exercising rights. Rights are held and exercised individually, in clearly and strongly demarcated zones of exclusive autonomy, where the emphasis falls on the holder of the right's ability to exclude others, to enforce his will on them. The function of the law is to define, patrol and enforce respect of the boundaries and to punish transgressions. This vision of rights depends on a basically atomist, Hobbesian theory of society and of law.[88]

The correlative of the spatial exclusivity of Roman-Dutch property law in the apartheid scheme was the spatialisation of the so-called homelands in grand apartheid and the definition of exclusively white, black, Indian and coloured residential areas in the white urban areas. If exclusivity and boundaries were required and therefore justified for the sound development of individual freedom and personhood, exclusively white (black, etc.) group areas were also required and justified for the sound development of group identity and "group-hood", and land rights could therefore be enjoyed optimally in an area reserved exclusively for a specific race group. Most importantly, since land rights are seen in terms of the possibility they provide for individual opportunity to enforce one's will on others in an exclusive sphere of autonomy, it stood to reason that different land rights would be available to different race groups in their respective race areas. This resulted in a system where different areas were not only reserved for different race groups, but where different property rights with different characteristics and features applied in each of these areas.[89]

In areas reserved for whites, land law was based on Roman-Dutch property law, and more specifically on the paradigmatic position of private, individual ownership with all its accompanying characteristics and entitlements: absoluteness, exclusivity, permanence, assessment according to market value, privacy, protection against state interference. In areas reserved for other race groups, and especially for blacks, land law was based on customary

law, as amended and supplemented by legislation and various ordinances and proclamations, or on the notion of precarious holding from the state, which was basically feudal in nature, fundamentally open to state manipulation and interference. The spatial separation also extended to the traditional divisions of law: white private property law was an important aspect of private law, but black property law was regarded as part of customary law or public law.

The fact that the dominant orientation of the apartheid enterprise was spatial and that its spatial "aesthetic"[90] was so strongly built on the Roman-Dutch vision of property as an exclusive right, resulted in an ironic twist in a number of cases where Roman-Dutch private law (and particularly neighbour law) principles and remedies[91] were used to confront the white government that, during its final years, was trying to undo some of the damage caused by its own apartheid policies. In a number of cases decided during the difficult years between the realisation that the system of apartheid could not be upheld indefinitely and the advent of the new democratic order,[92] groups of white landowners attempted to prevent the state from settling groups of black people on land in their vicinity,[93] relying on the notion of these settlements creating a "public nuisance". In the 1989 case of *East London Western Districts Farmers' Association and Others v Minister of Education and Development Aid and Others*,[94] the farmers succeeded because the state failed to execute its statutory duty to care for the residents in the settlement while simultaneously taking due care to protect the established property rights of the existing residents in the area.[95] Neighbour law and nuisance rhetoric and language featured prominently in the decision, although immunity resulting from statutory authority could provide the state with a valid defence if it could satisfy the onus of proof (which it could not).[96] In the later *Diepsloot* case,[97] it was particularly the first decision of De Villiers J in the Transvaal Supreme Court that rang with the phrases of nuisance law,[98] although this kind of private-law rhetoric was toned down substantially in the later decisions of McCreath J in the Transvaal Supreme Court[99] and Smalberger JA in the Appellate Division.[100]

The ironic twist in the "public nuisance" cases from the last years of apartheid illustrates the inability of apartheid land law to really accommodate dynamic change and reform – despite the dynamic, instrumentalist rhetoric which apartheid ideology required (and used) to justify its social and legal interferences with existing (black) property rights, it appears that the heart and soul of apartheid land law was always its analytic, static, spatial rhetoric, the language of space, position, boundaries and exclusivity it found so handily embodied in Roman-Dutch property law discourse. This discourse of space and exclusivity offered a perfect opportunity for the ideology of racial exclusivity to produce a legal explanation for dancing the *volkspele* wagon-wheel,[101] for closing the circle around its exclusive space of autonomy. Defining personal and group autonomy and the exercise of land rights in terms of exclusive space, protected strongly against invasion or trespass from anybody else, was thereby sanctified in terms of seemingly rational legal principle. The crucial moment in the history of apartheid land law was the opportunity to create a new land rights code by mixing the exclusivist rhetoric of apartheid racial ideology with the exclusivist rights-talk of Roman-Dutch property law, influenced by 19th century Pandectism.[102] In this mixture, the apparently neutral and rational language of Roman-Dutch law made the violence of racist apartheid ideology appear legally intelligible and acceptable,[103] by creating the impression that there was a rational and legally respectable connection between owning land and excluding others from land, and that land rights were about drawing boundaries and excluding others.

Moreover, the apparent rationality of our Pandectist vision of Roman-Dutch property law helped to lend respectability to the dominant jurisprudence of apartheid land law, *volkspele* jurisprudence, by creating the false impression that we were legally impelled to do what we did, that we had no other choice, rather than realising that apartheid land law was created by free choice and on the basis of ideological motivation.[104]

2. *TOYI-TOYI* JURISPRUDENCE

> "Of course we Tippex out our treachery, purge our perfidy, and offer retrospectively a tabula rasa of the heart ... but that's all bollocks, isn't it?"
>
> Julian Barnes *Love, etc*[105]

During the last years of the apartheid era, it became popular wisdom that the establishment of a nonracial constitutional democracy was a requirement for lasting peace and a sine qua non for development in South Africa.[106] To avoid a bloody revolution, a full-scale transformation was required to dismantle apartheid, to eradicate the legacy of what the 1993 Constitution eventually described as "the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice", and to establish "a future founded upon the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".[107] The obvious and immediate concern was to abolish segregation and inequality and to create a broad constitutional framework for political and social justice, based on a constitutional guarantee of equality, human dignity and freedom for all,[108] but the transformation also urgently required substantive social justice: the creation and delivery of jobs, medical services, pensions, education, land, housing, water.

In the end, the nonviolent transition from apartheid authoritarianism to a constitutional democracy was brought about by a number of interlocking and overlapping factors, one of which was the tradition of largely nonviolent protest and mass action established during the 1980s by the Mass Democratic Movement. Appropriately, a unique dancing code played a role in the culture of mass demonstration and protest. The *toyi-toyi*[109] is a protest dance, which involves a jogging movement (on the spot or while moving forward slowly)[110] with high lifting of the knees, imitating a demanding military drill and usually performed in crowds marching shoulder-to-shoulder, not unlike a military squad doing fitness training.[111] The dance, which is accompanied by the singing of protest songs, was introduced to South African townships during the 1980s by Umkhonto we Sizwe guerrillas returning to South Africa from training camps in Zimbabwe, and was regularly performed by crowds during the protest marches of the last decade of apartheid rule and the first years of transformation.[112]

As a protest dance, the military image and political purpose of *toyi-toyi* dancing is right out in the open, with none of the coy cultural posturing of *volkspele* dancing. In fact, the military origins of the dance resulted in an upright, knees-up style that distinguishes the *toyi-toyi* from traditional African dancing styles, where the essential body position is bent forward and the essential movements are downward and inward[113] – in this respect, *toyi-toyi* dancing resembles traditional western dancing styles, where the body position is straight and upright and the movements are upward and outward. The upright body position of the *toyi-toyi* dance and its performance in a marching squad reflect the confrontational, provocative, demanding attitude of semi-military political protest, and its imagery and rhetoric confirm that: challenge, protest, demonstration, demand.

However, despite its military origins and the confrontational and provocative political challenge projected by a *toyi-toyi* march,[114] it is significant that these marches played a role in bringing about a relatively nonviolent political revolution in South Africa, much as the nonviolent protests and candle processions contributed to the velvet revolution in Europe during the late 1980s.[115] *Toyi-toyi* dancing is essentially nonviolent, playfully enacting an informal black opposition politics of demonstration and protest, on the boundary of order, in a system where formal black opposition politics was ruled out by state violence.[116]

Two aspects of the *toyi-toyi* dancing code illustrate the political motivation that allowed it to help inspire nonviolent transition to a constitutional democracy. On the one hand, the dance is characterised by its urgency, illustrated by the dynamic, strenuous and exaggerated marching movements, combined with the singing of protest songs. This dynamic, active aspect of the dance underlines the serious intent, the barely contained energy and the potential violence underlying the demand for change, and distinguished the South African *toyi-toyi* marches from the silent European candle processions of the late 1980s. On the other hand, though, *toyi-toyi* protest action displays a remarkable patience, a strategy of waiting, of marking time, while nevertheless and unmistakably confronting and challenging the existing order. The fact that a *toyi-toyi* dancer basically remains in place while executing exaggerated marching movements emphasises the confrontational and demanding presence of the marchers, but simultaneously embodies the restraint which ultimately allowed the power of

these demonstrations to remain relatively non-violent. Significantly, the *toyi-toyi* was a struggle dance of demanding, of waiting, and not of taking.

Toyi-toyi dancing, in the context of protest marches and mass action, was instrumental in the transition to constitutional democracy in South Africa, and in the creation of a new political dispensation in which the demands of social and land reform could be addressed. In this respect, this dance is a metaphor for the jurisprudence of transformation in general and land reform in particular. A small number of examples from transformation legislation and case law unpicks some of the meanings of *toyi-toyi* jurisprudence. Any evaluation of land reform laws and initiatives is difficult,[117] both because of the scope of the laws involved and because of the relatively short time during which these laws have been in operation. Moreover, any evaluation of land reform depends on what one expects of it. I suspect that David Carey Miller's approach is that land reform is necessary but should bring about justice and equity with the minimum upheaval, which explains why he says that land reform can be limited insofar as it does not involve or require a departure from the "ruling common law of property",[118] and then immediately recognises that land reform has resulted in "a number of major changes to the law of property, in both substance and emphasis."[119] If, on the other hand, one considers, as I do, that the merit of land reform depends on how far it can succeed in breaking away from the language, from the ideological, conceptual and systematical codes of apartheid land law and of common law, the discontinuities rather than the continuities between apartheid land law and land reform are valued and embraced more radically. In describing *toyi-toyi* dancing as a metaphor for land reform and transformation jurisprudence, I will emphasise the extent to which this jurisprudence succeeds in bringing about a significant break with apartheid, but remains locked into struggle aesthetics and rhetoric. My intention in the next few paragraphs is to analyse and evaluate land reform measures, briefly and superficially, to demonstrate my thesis that it can be characterised as *toyi-toyi* jurisprudence.

The transition to social justice in the new constitutional order was guaranteed in a cluster of provisions[120] in the Bill of Rights.[121] The 1996 Constitution[122] contains a property clause that not only secures existing property holdings against improper state interference, but makes explicit provision for land reform, including provision for regulatory deprivation and for expropriation of property for the sake of land reform.[123] In addition, section 26 FC provides that everyone has the right to have access to adequate housing, that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right, that no one may be evicted from their home or have their home demolished without a court order in which all relevant circumstances have been considered, and that legislation may not permit arbitrary evictions.[124] Legislation has been promulgated since 1993 to secure the delivery of these socio-economic rights in accordance with the constitutional provisions.

Carey Miller[125] refers to the "prevalent misconception [that] treats the restitution process as a barometer of land reform achievement". Restitution is an emotionally loaded and symbolically important part of land reform, and highly visible because it deals with concrete, individual land claims, but it can obviously not afford a reliable picture of the success or failure of the land reform process as a whole. This is so not only because land reform comprises other, different and equally important projects apart from restitution,[126] or because the apparently disappointing restitution delivery numbers are probably misleading,[127] but also because it restricts the discussion and evaluation of land reform to narrow matters of delivery and instrumental or pragmatic success, and precludes a broader philosophical evaluation of land reform with reference to its ideological, conceptual, and rhetorical codes.

Judged from the perspective of ideology and rhetoric, restitution is definitely not the best example of reform in the sense of breaking with the conceptual and rhetorical codes of the past. Restitution is defined[128] as a limited process whereby specific parcels of land (or alternative land or compensation) are returned to specific people (or their direct descendants) from whom it had been taken (whether by due process of law or not) in terms of racially discriminatory laws. The very notion of land restitution implies that land rights that have been taken

away on the basis of racially discriminatory laws and practices have to be restored, and consequently the rights to be restored are more often than not individual ownership rights in the hierarchical, exclusivist mould of Roman-Dutch law. In very simple terms, the dispossessions were very often aimed at taking land from black owners and moving them out to the rural areas. Now, those people want restitution of the land that was taken from them. Consequently, there is a strong emphasis in the restitution process on restoring patterns of landownership to their pre-apartheid status. In a limited restitution process[129] with a limited lifespan,[130] the emphasis on restoring the balance, on returning what had been taken away, is understandable, and restoring the sense of exclusivity and of autonomy that goes with individual ownership of land plays an important role in restoring the dignity and security of people whose land was taken away from them under apartheid.

However, the result is that restitution does not promise a great deal of breaking away from the Roman-Dutch rhetoric of individual, exclusive land rights. Moreover, the rhetorical and aesthetic code of restitution remains firmly embedded in (perhaps characterises) *toyi-toyi* jurisprudence, in the sense that it takes place in a confrontational setting, where the claimant assumes a waiting position from where she challenges the defendant, demanding restoration and justice. The confronting groups are well-defined, representative of the apartheid dispossession and post-apartheid restitution process: black dispossessed versus white dispossessor. The confrontational setting resembles *toyi-toyi* protest action: "here I am, you have wronged me, I demand restitution from you." This is what the nonviolent revolution and the transformation to constitutional democracy was all about; this is what restoration and reconciliation is all about. Restitution jurisprudence is clearly and essentially *toyi-toyi* jurisprudence, and as such it is closely linked to the codes of apartheid land law.

Amazingly, and against expectations, the restitution process goes further than the narrow concept of restitution – it also includes more imaginative and exciting processes that transcend the limited exchange economy of restoring the equilibrium that was disturbed by apartheid.[131] An example is the case of *Ex parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area and Another*,[132] where a comprehensive settlement agreement between potential restitution claimants, the local authority and land developers was incorporated into a restitution order by the Land Claims Court even though it implied that certain restitution claims had to be substituted by alternative rights, some of which were unusual. Claimants who wanted to return to the area and who wanted to proceed with their individual claims were allowed to do so, while others who did not want to return to the area were allowed to claim either monetary compensation or a beneficial right in the development of the area. The Land Claims Court judged this scheme to be justified under the heading of land restitution, because it was in accordance with the public interest.[133] Similarly, in instances where whole communities had been dispossessed of land, section 2 of the Communal Property Associations Act 28 of 1996[134] provides that a restitution award to the community shall be made in terms of the tenure framework set out in the Act, thereby ensuring that the community is restored and that the land is given back to the community, as opposed to individual claimants.[135] In both cases, restitution is pushed beyond the logic of individual restoration and into the realm of richer possibilities, of alternative visions, by establishing a connection between land reform and the healing and rebuilding of communities around urban redevelopment schemes and rural communal land holding.

As a second category of land reform, redistribution of land[136] is a less limited process whereby land or access to land is given or made available to people who have no land or inadequate land, either for agricultural (subsistence or commercial) or residential purposes. Provision of housing forms part of this process, which is more difficult to define and to evaluate than restitution, because the concrete, visible procedure of claim and judgment is absent in this instance. For the most part, this process is embodied in state[137] policies regarding the allocation of funds for development of land and building of houses or for housing subsidies, and in laws that promote wider access to land and housing, in pursuance of the redistribution imperative embodied in section 25(5) of the 1996 Constitution.[138] As is perhaps to be expected, these laws provide for wider access

to land and housing on the basic assumption that individual ownership is the ultimate objective, although provision is made for security of tenure in cases where ownership is not feasible.[139] By and large, the redistribution policies and laws function within the common law conceptual and institutional structures that date back to the days of apartheid, the difference being that the strictures of racial discrimination have been removed and that access to land and housing is extended to people and communities previously excluded from it. On the whole, land redistribution also functions within the boundaries of *toyi-toyi* jurisprudence, in the sense that it involves a challenge, a demand to restore the balance, a claim to correct the maldistribution of land brought about by centuries of colonialism and decades of apartheid government. Of course, in this case the claim is not for a specific parcel of land that was taken away, but a more general claim based on a general imbalance in land holdings, and consequently the standoff is not between the black dispossessed and the white dispossessor, but between the black landless and homeless and the current government, who has taken the place of the white minority government. The picture nevertheless remains the same: redistribution jurisprudence is also *toyi-toyi* jurisprudence of claim and demand.

The exception, as far as redistribution is concerned, is the Transformation of Certain Rural Areas Act 94 of 1998, which provides alternatives for rural land holding, allowing certain rural communities to abandon their traditional or current tenure systems and adopt a better or more suitable system, notably in the form of the structures provided in the Communal Property Associations Act 28 of 1996 (mentioned earlier).[140]

Conceptually, tenure reform is the category of land reform where one would have expected the most imaginative, ground-breaking changes, since it involves the transformation of the apartheid legal system of weak, insecure and generally unsuitable black land rights.[141] Tenure reform is defined as a process whereby insecure or unsuitable forms of existing land tenure are transformed legally to provide better or more suitable rights. This can concern the security of the landholding as such, or the possibility of procuring loans with the land right as security, or any aspect of the tenure under which the land right is held or exercised. One of the greatest problems caused by apartheid land law was that black land rights, both in urban and in rural areas, were cast in legal forms that rendered them permanently insecure, weak, and open to the manipulation that characterised the forced removals and evictions of the apartheid era. In a sense, black land rights under apartheid land law were caught up in a politically inspired and racially defined feudal system, which meant that black land holders and occupiers could never be sure that their overlords (either white state officials or black tribal officials) would not retract or amend the precarious privilege under which the land was held. Occupiers and users of tribal and urban land in rural areas, occupiers of houses in white urban areas, farm labourers, occupiers of informal settlements in both rural and urban areas, family members of workers on farms and in urban areas and many other categories of black occupiers and users of land were living under the continuous threat of eviction and removal.

Against this background, tenure reform was intended to restore a minimum of security and permanence, to restore the land rights of those who have lost their rights under apartheid, to formalise the land rights of those whose occupation or use of land justified it, and to establish land rights for those who needed it. Two basic options were open as far as the philosophical approach to tenure reform was concerned: to restore, formalise and establish land rights within the broad categories of common law, or to take a different road and establish land rights with direct reference to their context and function, without much regard for the question whether these rights fitted into the common law system of rights. The latter option, which has been described as the "fragmentation of land rights",[142] would imply that the context and requirements of those who occupy or use land (rather than its conceptual or dogmatic position in the common law system) should dictate the form, characteristics, content, protection and limitations of a given land right, somewhat similar to the statutory development of sectional title, timesharing and shareblock interests in the 1970s and 1980s. With two important exceptions that are discussed separately below, the expectation that tenure reform might follow the functional, fragmentation option was not realised, and the tenure reform laws remain

firmly entrenched in the hierarchy of common law land rights,[143] their major merit deriving from the fact that they lift previously insecure and undervalued land rights above the constitutional threshold of minimum protection, either by upgrading it to a recognised common law property right or by prohibiting or curtailing eviction.[144]

Tenure reform is the most abstract land reform process, involving manipulation of the laws that determine the legal form and nature of land rights rather than physically establishing people on land, and therefore it does not present the easily identifiable picture of land claims and demands that are associated with restitution and redistribution processes. However, tenure reform and particularly the laws through which the new government attempts to stem the tide of evictions from farms, informal settlements and squatter camps, display their own version of *toyi-toyi* jurisprudence in the sense of a process of confrontation and demand for justice, and in a sense this version is closer to the original *toyi-toyi* protest marches than any other kind of land reform. The typical aesthetic here is a standoff between a white landowner, claiming his right to evict people from his land in terms of the common law entitlement of exclusion, and black occupiers of the land whose labour is no longer required and who are threatened with eviction. In this picture, the white landowner is dancing the *volkspele* wagon-wheel, drawing the circle according to the code of exclusion, while the black occupiers of the land are dancing the *toyi-toyi* of demand, claiming justice according to the code of transformation. Both call on the state to uphold their rights. The state, understandably, attempts above all to stabilise the situation and to prevent further evictions that would increase the already catastrophic situation of landlessness and homelessness. The main purpose is to stall the common law logic of absolute ownership and entitlement of exclusion, and therefore the answer is mainly cast in the form of common law logic of land rights as positions secured by boundaries.

Two exceptions are all the more significant against this background: the possibilities for the creation of new communal property rights in the Communal Property Associations Act 28 of 1996, and the special protection of the weak in the Extension of Security of Tenure Act 62 of 1997. The Communal Property Associations Act, which is basically a tenure reform law but is applied in the contexts of both restitution and redistribution, creates an interesting possibility for communities to establish their own communal property regime to suit their unique circumstances and requirements[145] – a kind of Sectional Titles Act for rural communities. This Act, as was pointed out earlier, takes land reform out of the realm of individual common law landownership and of customary tribal landownership, and creates real opportunities for the restoration, creation and development of communities around communal property, without the baggage of apartheid land law[146] or of tribal law.[147] In a very real sense, the limits of the possibilities for the innovative creation of communal land rights in terms of this Act are determined only by the 1996 Constitution and the imagination of the members of the community and their legal advisers.[148]

The Extension of Security of Tenure Act 62 of 1997 introduces a different (but related) innovation to the notion of land reform: the purpose of all land reform laws and measures (and particularly of the tenure reform laws) is to reverse the damage done to black land holdings and rights by apartheid land law, and especially to improve the security of tenure of black land holders and users who have been excluded from full ownership of land, thereby making them particularly vulnerable to arbitrary evictions and removals. Various tenure reform laws, such as the Land Reform (Labour Tenants) Act 3 of 1996, the Communal Property Associations Act 28 of 1996, the Interim Protection of Informal Land Rights Act 31 of 1996, the Extension of Security of Tenure Act 62 of 1997, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, are aimed at achieving this purpose on various levels and in various contexts. Generally, the protection assumes the form of a prohibition against evictions unless they have been sanctioned by a court order, which may only be given once the court has followed a prescribed procedure, requiring the court to consider all the relevant circumstances, including the availability of alternative accommodation. This basic theme runs through all the tenure reform laws.[149] However, the Extension of Security of Tenure Act 62 of 1997 adds an interesting and important element to the stabil-

ising protective effect of tenure reform by making special provision for vulnerable occupiers of land such as the elderly and the sick and disabled.[150] Small and insignificant as it might appear, the aspect of vulnerability (and fairness issues connected with it in the context of eviction) introduces a wholly new consideration, unknown to Roman-Dutch law, into the question of security of tenure and thereby opens up new possibilities for the innovative re-imagination of land rights.

On the whole, it seems fair to say that land reform legislation remains largely within the conceptual, systematic and hierarchical code of common law land law, in the sense that it rearranges the distribution of land rights within that code rather than debunking the code. The most important features, characteristics and aspirations of the land reform programme can be explained with reference to the code of common law land law: land reform is aimed at restoring imbalances brought about by apartheid dispossessions (restitution); improving the maldistribution of apartheid property holdings by opening up access to land and housing to a wider spectrum of people, especially from the previously disadvantaged communities (redistribution); and improving the insecurity of existing black land holdings and occupancies by improving or at least stabilising their legal status to prevent forced removals and evictions (tenure reform). In this perspective, land reform basically retains the structure and the code of common law land law, although it improved the position of previously disadvantaged and dispossessed people by moving them or the status of their land rights to a different, better position in that structure. The analytic or static aesthetic of rights as secure places divided by boundaries is maintained, even while the distribution of places and the security of some places are improved by land reform legislation.

It also seems fair to say that land reform by and large remains within the rhetorical, ideological and aesthetic code of *toyi-toyi* jurisprudence, in the sense that it remains locked in the confrontational standoff between the legacy of the apartheid era and those who were disadvantaged by it. As an important aspect of social and legal transformation, land reform law operates largely within the aesthetic of protest and demand, with one party confronting the other and claiming justice to repair the damage done by past injustice. It was said earlier that the nostalgic restoration of disturbed equilibrium that characterises the restitution process is understandable in view of its purpose and of the circumstances and expectations surrounding it, and that pragmatic and instrumental concerns and tactical considerations explain and justify the *toyi-toyi* stance of challenge and demand in redistribution and tenure reform programmes. However, that does not change the fact that land reform jurisprudence is essentially *toyi-toyi* jurisprudence, which tends to feed off the energy of confrontation with the very apartheid land law system that it is meant to reform, just like the *toyi-toyi* marches fed off the energy of the apartheid system which it confronted, demanding change, waiting for change. In the confrontational standoff of challenge and demand, the reform process derives its power and dynamics from its position as confronting and facing the other, waiting for something to be given or done by the other. The inherent recognition of the confronted other as the source of injustice is understandable in this aesthetic, but the implication is also that the confronted other is still recognised as the source of power, which is more worrying at a time when political power has been wrested away from the other.

This does not mean that either the *toyi-toyi* marches or land reform processes that display its rhetorical or aesthetic stance are wrong or somehow lacking or impotent – they have proved their justification and their efficacy beyond question. The meaning of this observation is not political or strategic or moral but aesthetic, namely that the shadow, the ghost of apartheid land law continues to hover over *toyi-toyi* jurisprudence and above land reform jurisprudence, even after the formal demise of apartheid politics and law, thereby potentially restricting our sources of energy and power to imagine a different future, where change and justice no longer depends on opposition to the denounced other of the past. *Toyi-toyi* has been described as a "carry-over from the apartheid era", where it served to enact opposition politics, playfully operating on the boundary of order, in a search for consensus.[151] This characterisation neatly encapsulates both the dynamic, creative and the static, sterile aspects of the *toyi-toyi* stance: on the one hand, it has helped to inspire a nonviolent transition to constitu-

tional democracy; on the other, it easily lapses into immobility, locked into the mode of permanently highlighting the failures and injustices of the past and demanding change and reparation from the opponent, rather than making a positive move[152] inspired by its own energy. And, even more importantly for a culture of transition from authoritarianism and discrimination, the confrontational stance and patience of the *toyi-toyi* code can render it exclusionary, which in its turn can result in division and violence.[153]

Professor Njabulo Ndebele made a similar point recently,[154] when he expressed reservations about the discourse framework of the recent national conference on racism,[155] in saying that he was:

> "bothered by the phenomenon of a black majority in power, seeming to reduce itself to the status of complainants as if they had a limited capacity to do anything more significant about the situation at hand, than drawing attention to it. It is not that the complaints have no foundation, on the contrary, the foundations are deeply embedded in our history. But I cannot shake off the feeling that the galvanising of concern around racism reflects a vulnerability, which could dangerously resuscitate a familiar psychology of inferiority, precisely at that moment that the black majority ought to provide confident leadership through the government they have elected.
>
> I worry that the complaining may confusingly look like a psychological submission to 'whiteness' in the sense of handing over to 'whiteness' the power to provide relief. 'Please, stop this thing!' seems to be the appeal. 'Respect us.' I submit that we moved away from this position decisively on April 27, 1994. We cannot go back to it. It should not be so easy to give up a psychological advantage."

In my terminology, Professor Ndebele is referring to the tendency to remain locked into the *toyi-toyi* code of confrontation and demand, waiting for justice from outside, unable to move beyond the aesthetics and the rhetoric of a position that we have already left behind us, thereby restricting the innovative and imaginative energy and power that we need to address the problems that face us in the position we find ourselves in now.

So, am I confirming that we have crossed the bridge, that we have left the place where either *volkspele* or *toyi-toyi* dancing was the appropriate code, and that we now need a new dancing code for a new place? Am I saying that we need a post-revolutionary, constitutionally democratic dancing code for festivities on this side of the bridge? I am saying no such thing.

3. IMAGINING AN ALTERNATIVE JURISPRUDENCE – DANCING WITH CODES

> "No more turning away
> from the weak and the weary –
> no more turning away"
>
> Pink Floyd "On the Turning Away"
> on *A Momentary Lapse of Reason*[156]

The bridge metaphor in the 1993 Constitution reveals an interesting dichotomy. On the one hand, the metaphor is dynamic, its goal being progressive evolution, crossing the abyss of potentially violent transformation. The dynamic rhetoric of transformation discourse is spiced with goal-oriented concepts and phrases such as *restructuring of society*,[157] *transition*,[158] *land reform*,[159] *affirmative action*,[160] and *purposive interpretation*.[161] On the other hand, though, the bridge metaphor is static, in that the significance and value of the journey is explained analytically, in terms of the spatial values of its point of departure and its goal. The value of the move from A(partheid) across the B(ridge) to C(onstitutionalism) is not inherent in movement as such but in the perception that being in one place is better than being in another. The assumption is that apartheid is a place, a position, and that constitutional democracy is another place, a different position, the two being separated by the divide of transition from the one to the other. This places a static or analytic spin on the notion of transformation, in that it privileges certain value choices. More or less uncontroversially, it privileges one *place* or *position* over another (constitutional democracy over authoritarianism), and one *transformation process* over another (peaceful and constitutional transition over violent revolutionary change), but it also privileges other, less obvious and more controversial value choices: a preference for eventual stability over continuous change (position is more important than movement); a linear vision over a more complex vision of the history of the transition from apartheid to constitutional democracy (transi-

tion is a linear movement from A across B to C, and will end once we reach C); a spatial, position-oriented vision over a more complex vision of land rights in a constitutional democracy (land rights are spaces for autonomous self-realisation); and a spatial, position-oriented and thus strictly past/present, outside/inside, absent/present vision over a more complex vision of the relationship between pre-1994 and post-1994 law and jurisprudence in the transition.

In the previous two sections of the paper, it was argued that a spatial, analytic approach to transformation tends to restrict us to static, position-oriented jurisprudential attitudes, two of which have been characterised above as *volkspele* jurisprudence and *toyi-toyi* jurisprudence. *Volkspele* and *toyi-toyi* jurisprudence tend to condemn us to the confrontational attitudes of the struggle, in which both the energy and the options for change are defined by the confrontation between the reactionary exclusivism of rights as trumps and the reformist exclusivism of restitution demands. In the discourse of claims for the protection of rights and demands for the restitution of wrongs, the meaning of transformation is reduced to a process by which the contest, the standoff, and its solution are moved from the battlefield of revolutionary struggle to the courtroom of constitutional due process. The aesthetic of confrontation and the economics of claim, counterclaim and award remain unchallenged and unchanged. In this interpretation of the metaphor, the bridge of transformation takes us to a different ballpark where the rules against physical violence are stricter, but the object of the game and the basic plays remain the same.[162] This impoverished interpretation of transformation is too thin to reflect the social and political aspirations of constitutional democracy.

However, the bridge metaphor also allows for another interpretation, where the bridge is not simply an instrument for getting out of one place and into another, but an edifice that is inherently related to the abyss which it spans. Here, the focus is not on the two places on either side of the abyss, but on the abyss itself[163] – the bridge is functionally and essentially linked to and obtains its significance from the abyss beneath it, so that the bridge is not a temporary instrument for a single crossing, one way, but allows and invites multiple crossings, in both directions, since there is no inherent value attached to being on one side of the bridge rather than the other. In this alternative interpretation of the bridge metaphor, the danger is to stay on one side, while the bridge allows us to connect one side with the other.

Robert Cover provides us with an alternative image of the law as such a relational bridge.[164] In his view, "law may be seen as a system of tension or a bridge linking a concept of a reality to an imagined alternative". In Cover's view of law and society, an essential element of our normative universe is "alternity", the images and propositions of the other possibility, the imagining of a different state of affairs than the presently prevailing one.[165] It should be easy, so soon after the end of the struggle against apartheid, to remember what it was like to imagine that things can be different – after all, a source of energy during the struggle was the belief that things could be different, that protest action could articulate other options for meaningful change.[166] However, now that the first big steps in the process of transformation have been taken, the danger is that we should become complacent. The extent to which we subscribe to the linear evolutionary interpretation of the bridge metaphor would be an indication of complacency, in that we think we know where we are and where we want to be, and only need the constitutional process of transition to get us there. In this vision of transformation, there is no longer room for imagining that things could be different, that there might be further options and more complex alternatives to the two places between which we have chosen to choose.

The linear interpretation of the bridge metaphor of transformation unnecessarily restricts both the past and the future of constitutional democracy in the post-1994 era. The first fallacy is to think that we can rid ourselves of the legacy of the past as easily as crossing a bridge, leaving our accepted version of the past (and the possibility of other versions) behind us decisively. The second fallacy is to think that we should be eager to get to the other side of the bridge and get the whole thing behind us, leaving no room for imagining alternative futures.

The discussion of apartheid land law in the second part of the paper above illustrated the

first fallacy. The legacy of apartheid land law remains with us even after the transformation to constitutional democracy. For one thing, the inequalities and inequities of the past, the unequal distribution of land and housing and other resources, will continue to affect social and legal relations as long as the balance of social and political power remains unequal. The Constitution makes it clear that the Abracadabra vision of socio-economic transformation is nonsense – we have to deal with the legacy of the past more substantively and continuously.[167] Secondly, it was argued above that the ghost of apartheid law, and particularly apartheid land law, will also stay with us as long as the dominant Roman-Dutch common law vision of private property as a superior, exclusive and absolute right continues to influence the nature and social balance of property holdings. The ghost of apartheid land law will also stay with us as long as transformation jurisprudence remains locked in the confrontational mode of demanding justice from the apartheid structures and hence feeding off its continued presence, even long after political power has changed hands. In all of these ways, the codes of apartheid law still haunt us and restrict the futures we can imagine.

Robert Gordon explains this kind of historical hangover with reference to what he describes as a process whereby legal forms and practices, even though they are shaped by social and political processes, "don't shift with every realignment of the balance of political forces, but tend to become embedded in 'relatively autonomous' structures that transcend and, to some extent, help to shape the content of the immediate self-interest of groups".[168] In other words, legal codes and traditions that were not so visibly and obnoxiously central to the ideology and politics of apartheid that they would have been purged in the first wave of reforms, but which nevertheless formed part of the legal consciousness, the structure of laws and practices that made up apartheid law, tend to survive reform initiatives and remain part of the new legal system. In some cases the survival of these relics and ghosts from the past will make little difference, but in others, particularly when these codes relate to the core of legal consciousness, to our deepest beliefs and assumptions about the nature and the function of rights and of law in society and about the nature of legal reform, it can make a huge difference. In this paper,[169] I argue that the basic beliefs and assumptions that inform the dominant Roman-Dutch common law vision of individual ownership were so closely related to and entangled with the ideological, political and legal aesthetics and rhetoric of apartheid land law that we cannot really reform or transform land law without asking some serious and searching questions about those beliefs and assumptions and their meaning for land law in a constitutional democracy. An important part of my argument in this connection is that the continued existence of a static, position-oriented and exclusivist vision of ownership will, even in the absence of apartheid legislation, still leave the option for interpretations and judgments that tend to entrench existing property and power relations in society rather than to undermine or transform them, especially if transformation jurisprudence remains locked in the position-oriented, confrontational *toyi-toyi* code.

Robert Cover[170] explains why seemingly minor and innocent relics of discredited and abandoned legal codes can still dominate adjudication in a new paradigm, with reference to what he describes as the "multiplicity of meaning",[171] the phenomenon that many possible interpretations and meanings are produced by the "forces of jurisgenesis" in society, and the process by which business-as-usual, ideologically, politically and jurisprudentially uncritical operation of the law – which Cover describes as "the sober imperial mode of world maintenance" – "imposes the discipline of institutional justice upon norms" by selecting and enforcing one meaning only. In the context of my argument, I want to emphasise that the chosen meaning will possibly be the most comfortable one, known from a previous life or from a seemingly politically unsullied part of tradition. The process of "jurispathic" selection that imposes such a meaning is essentially a ruling from the past which closes off possibilities of the future. It is complacency about our leaving our accepted version of the past behind us decisively that will prevent us from imagining alternative futures.

A set of examples from recent case law highlights the difference between a linear and a more complex, imaginative approach to transformation and land reform. An earlier case

decided in the old Transvaal Supreme Court and dealing with the early land reform measures of the De Klerk government illustrates the dangers of a linear and unimaginative vision of transformation painfully well. In *Mnisi v Chauke and Others; Chauke v Provincial Secretary, Transvaal, and Others*,[172] Mr Mnisi brought application for the eviction of members of the Chauke family from a house in the township of Atteridgeville near Pretoria. Mnisi owned the house, and alleged that the Chauke family were occupying the house unlawfully and refused to vacate it. During the hearing it appeared that Mr Aaron Chauke bought a right of occupation with respect to the property from the Atteridge Town Council during 1982. In 1983 he married Mrs Makwena Sarah Chauke in community of property, and when he died intestate in 1989, she was issued with a certificate of occupation in her name, being his sole heir. On 1 January 1989 the Conversion of Certain Rights to Leasehold Act 81 of 1988 came into operation, and in 1991 Mrs Chauke was granted a leasehold in respect of the property by the Provincial Secretary in terms of this Act. On 1 September the Upgrading of Land Tenure Rights Act 112 of 1991 came into operation, and in 1992 Mrs Chauke was issued with a certificate of ownership with respect to the property in terms of this Act. She then sold and transferred the property to Mr Mnisi. The rest of the Chauke family objected to the sale of the family residence, but their objections were overruled and they were evicted from the property, eviction being the remedy by which an landowner can assert the exclusivity of his right of ownership.

In the *Mnisi* case, "reform" of land rights completed a full circle of legal violence, from violence by white landowners against black tenants to violence by black landowners against black tenants. In a few more recent Constitutional Court judgments, a small group of Constitutional Court judges[173] adopted a different attitude, recognising that insensitive forging ahead with reform measures could have disastrous results for people who were supposed to benefit from transformation, and therefore deciding that the continued existence of a particular remnant of apartheid inequality could be constitutionally fair or justified in the context of still prevailing imperfect circumstances, In such a situation, the Constitutional Court judges in question decided, all-out reform or transformation must be held back for the sake of a temporary, limited benefit in cases where nobody was detrimentally affected in the process.[174] I will restrict most of my remarks on this topic to the *DVB Behuising* case, since the effect of a non-linear approach to transformation is perhaps most striking in this decision.

The decision in *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another*[175] involved the purported abolition of Proclamation R293 of 1962,[176] which made provision for the establishment of a special kind of township by the Minister of Bantu Administration and Development for blacks in areas of land held by the South African Native Trust,[177] and for limited forms of precarious land tenure for residents in those townships.[178] The Proclamation also made provision for the establishment of special deeds registries and for the registration of deeds of grant to reflect the relevant land holdings.[179] The legislature of the North West Province promulgated the North West Local Government Laws Amendment Act 7 of 1998, section 6 of which purported to repeal the Proclamation in its entirety. In the High Court, DVB Behuising successfully challenged the constitutional validity of section 6, *inter alia* contending that the repeal of the Proclamation made it impossible for persons to whom DVB had sold houses in a township established under the Proclamation to have their deeds of grant registered by the Registrar of Deeds. On appeal, the majority of the Constitutional Court decided, after a lengthy analysis of the legislative powers of the provinces, that the repeal of the Proclamation was not unconstitutional, especially because the Proclamation was a racially discriminatory measure in conflict with the Interim Constitution and the 1996 Constitution – Ngcobo J remarked that "its terms are a timely reminder of where we have come from and the progress we have made in our transformation to democracy".[180] However, in a dissenting judgment Goldstone, O'Regan and Sachs JJ argued that the province did not have the legislative competence to repeal the Proclamation, since the development of new forms of land tenure and registration are matters that require regulation at the national level, according to uniform norms.[181] More importantly for my purposes,

the three dissenting judges made the following closing observation:[182]

> " ... jurisprudence of the transitional era necessarily involves a measure of contradiction. Fundamental fairness at times requires that aspects of the old survive immediate obliteration and are kept alive pending their replacement by appropriate forms of the new."

In substantiating their argument, the three minority judges referred to the *Mpumalanga* education case,[183] where O'Regan J made the following similar remark in her judgment for the Court:

> "This case highlights the interaction between two constitutional imperatives, both indispensable in this period of transition. The first is the need to eradicate patterns of racial discrimination and to address the consequences of past discrimination which persist in our society, and the second is the obligation of procedural fairness imposed upon the government. Both principles are based on fairness, the first on fairness of goals, or substantive and remedial fairness, and the second on fairness in action, or procedural fairness. A characteristic of our transition has been the common understanding that both need to be honoured."

The *Walker* case[184] and the *Mpumalanga* education case[185] dealt with the rights of those who were previously advantaged by the allocation of state funds, while the *Hugo* case[186] and *DVB Behuising*[187] were concerned with the rights of the previously disadvantaged. One or more of Justices Goldstone, Mokgoro, Sachs and O'Regan were nevertheless convinced in these cases that an oversimplified, linear vision of transformation could do more harm than good, and that the Court should take the context and circumstances in each case into account carefully and frame its decision accordingly. This is not the way to envision land reform – rushing over the bridge of transformation to the other side, and simply denying the reality or the continued relevance of the past will sometimes produce exactly the opposite result than was intended. As the minority point out in their judgment in *DVB Behuising*:

> "[t]he meritorious desire manifested in the majority judgment for a clean sweep of the past in the name of modernisation and deracialisation has an unintended and ironic consequence [in that] it deprives underprivileged communities from gaining access to a cheap form of land tenure which in terms of national legislation can be upgraded to freehold,"[188]

thereby contravening rather than obeying the constitutional obligation of the government to provide access to land. These judges demonstrated the possibility and the liberating advantages of refusing to hold themselves bound to an oversimplified vision of reform and transformation. It remains possible, they seem to be saying, to think again about the transformation process and to come up with imaginative and creative alternatives that suit the context. Our future possibilities are not restricted to a choice between *volkspele* or *toyi-toyi* jurisprudence. It can be different.

The possibility of a different jurisprudence of property rights and of transformation has been raised by several academics before these cases were decided. To lay claim to a right, Jennifer Nedelsky wrote,[189] is only the beginning and not the end of a public discussion about rights and entitlements – rights do not trump, they just open the debate.[190] With this relational argument, Nedelsky turned her theory of rights away from the dominant spatial logic of status and exclusivity and towards a logic of complex relationships in society. Johan van der Walt[191] supported Nedelsky's departure from the logic of status and exclusivity on the basis of a deconstruction of property rights – in his view, Frank Michelman's version of republicanism represents a similar departure in that it requires us to conceive the common good as a response to otherness, again moving away from the individualist exclusive vision of property and in the direction of a relationship-oriented model of society. In this model, the individual is no longer "an entity with a closed identity" whose rights form an exclusive and conclusively defined barrier against others – in Van der Walt's judgment, Michelman embraced the possibility of a politics based on empathy or friendship,[192] a possibility that Van der Walt explored further, with reference to Derridean philosophy,[193] under the heading of "deconstructive republicanism". In this respect he concludes, after analysing the relevant aspects of Derrida's work, that:

> "if the law is to remain a concern with jus-

> tice in the way Derrida conceives of this concern, that is, a concern with the as yet impossible and unthinkable, it will indeed be the bridge that Cover invokes between the 'world that is' and 'worlds that might be', the bridge that 'connects reality to alternity'."[194]

The closest that we can come to a politics that would not be the subjective wish of what we want but a response to what is required of us, Johan van der Walt concludes, is to deconstruct property rights, to remain concerned with "sensing the precariousness and impossibility of complete contingency", which "must always again *come* to be seen as disrupted or deferred by the *disclosure* of the mark of the outside – the impossible demands of justice".[195] This is what I understand under the intriguing notion of rights "balanced on the edge of the legal order",[196] where the possibility of change is kept alive by a constant awareness of the possibility of otherness, that things can be different.

In a recent book,[197] Joseph William Singer explores aspects of this notion from the perspective of the obligations of ownership. Taking his point of departure from the same relational theory as Nedelsky, Singer assumes that property is "an intensely social institution" and not just an individual right, and that commitment to compassion, empathy, and fellow feeling are just as important as self-reliance in the social relationships that shape and are shaped by the institution of individual ownership of property.[198] Despite and even contrary to the dominant vision of individual ownership in public consciousness, the law recognises and protects the interests of non-owners as part of the law of property, both by limiting the rights of owners and by opening up access to ownership.[199] Moreover, we are not doomed to accept and live by the dominant vision of individual ownership: culture, religions and the law sustain the virtues of mutual support.[200] In fact, Singer concludes in a phrase that holds particular meaning for this article: "the law today is less compassionate than people are, *but it does not have to be*".[201] It can be different.

In the previous section of the paper, I referred to examples of land reform laws and judgments that went beyond the economic logic of restitution, the instrumentalism of redistribution and the pragmatic goals of tenure reform to open up imaginative possibilities for a completely different kind of land law. With regard to restitution, I referred to case law[202] and legislation[203] that establish a connection between land reform and the rebuilding of communities instead of merely giving land back to individuals. In the context of redistribution of land[204] and tenure reform I referred to legislation[205] that allows for imaginative land reform by creating possibilities to restore and strengthen rural communities around a transformed notion of communal land holding and by securing the residential occupation rights of weak and vulnerable members of the community.

Common to all these aspects of the land reform process is the fact that they bring a new energy, an alternative vision – something that was unknown to Roman-Dutch common law, in apartheid legislation, and in the confrontational demand for change that characterised the struggle against apartheid – to the development of land law in the constitutional state. The new energy and alternative vision that I refer to results from the notion of weakness, vulnerability, marginality, being introduced into the property rights discourse. The fact that one is weak and vulnerable, relegated to the margins of society, is a novel factor that was never before[206] of any significance in the determination of rights and entitlements between owners and non-owners, but even more importantly it is a consideration that actually undermines, deconstructs, the exclusivist power rhetoric of property rights in traditional jurisprudence and in the confrontational demand rhetoric of property rights in struggle jurisprudence. As soon as considerations related to marginality, vulnerability, and powerlessness enter the property rights discourse, the power rhetoric of rights, claims and demands of both the traditional and the struggle jurisprudence loses much of its logic and conviction. Vulnerability and marginality does not claim or demand, it hopes and trusts, and therefore it effectively undermines and nullifies the logic of autonomous spaces, of claim-rights to protect and demand-rights to restore dispossessed spaces.

A recent decision of the Constitutional Court seems to lend support to the possibility that land reform jurisprudence could open up the jurisprudential imagination to search for alternatives by placing emphasis on the position of the most marginalised and vulnerable members of society. The case I refer to is, of course,

Grootboom.[207] The Grootboom community, consisting of some 390 adults and 510 children,[208] was living in what Yacoob J described as "lamentable" conditions[209] in an informal squatter settlement at Wallacedene on the eastern fringe of the Cape metropolitan district. Many were on the municipality's waiting list for subsidised low-cost housing,[210] but judging that they were not likely to receive support soon, and because of the inhuman living conditions at Wallacedene, the community of its own accord moved to and settled on what they considered to be vacant land at an area they called New Rust. However, this land was privately owned and was already earmarked for development of subsidised low-cost housing, and accordingly the owner obtained an eviction order against them.[211] The community did not comply with the eviction order and a new eviction order was issued for 19 May 1999, directing the parties and the municipality to identify alternative land for the permanent or temporary resettlement of the community by way of mediation. No mediation took place, and eventually the community was forcibly evicted, at the municipality's expense, on 18 May 1999, in a style described by the Constitutional Court as "reminiscent of apartheid-style evictions":[212] the respondents were taken by surprise by the premature eviction and many were not home, and their shacks were bulldozed and burnt and their belongings destroyed. The community was then moved temporarily to the Wallacedene sports field, where they erected temporary shelters as best they could. A week later, the winter rain season started. The community instituted action in the Cape High Court to claim temporary accommodation from the municipality. The Cape High Court[213] dismissed the claim based on the right to housing in section 26FC, but granted the claim based on section 28(1)(c) FC, arguing that the section provided an unqualified right against the state to shelter for children, and that it was in the interests of the children in the community that they be accompanied by their parents, with the effect that the state was obliged to provide temporary shelter to the children in the community and their parents.[214] The Constitutional Court decision of 4 October 2000 resulted from an appeal by the state against the Cape High Court order.

In the Constitutional Court decision, Yacoob J significantly introduces his decision with a discussion of the housing situation, its roots in apartheid land policy and laws, and the commitment of the new constitutional state to the protection of social justice.[215] When setting out the applicable constitutional provisions at stake in this case,[216] he emphasises that the justiciability of socio-economic rights as enshrined in the Constitution has been put beyond question in the text of the Constitution as interpreted in the Certification judgment of the Constitutional Court:[217] the question is not whether these rights are justiciable, but merely "how to enforce them in a given case."[218] The Court thus signals its intention to enforce these rights but, interestingly, not on the basis that Davis J chose in the Cape High Court – his decision on the basis of the right of children to shelter in section 28(1)(c) FC is set aside and his reasoning described as producing "an anomalous result",[219] because people with children indirectly acquired a directly enforceable right to shelter via their children, while others without children have no such right, regardless of the possible merit of their own circumstances. The Constitutional Court dismisses the distinction between housing and shelter[220] and the argument that children acquire a right to shelter in the company of their parents from section 28(1)(c),[221] and the government's appeal against the High Court decision is upheld on this ground.

However, the Constitutional Court also arrives at a different interpretation than the Cape High Court of section 26 FC, and this is the most interesting part of the decision. By way of introduction it is stated that the right to housing in section 26 FC cannot be seen in isolation from the other socio-economic rights and that they should all be seen together in the context of the Constitution as a whole and against the background of their social and historical context;[222] and that the relevant international law (and especially the notion that every state party is bound to fulfil a "minimum core obligation"[223] by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to housing) can give direction to but cannot determine the interpretation of section 26 FC, because it is not possible for the Court to determine what would comprise the minimum core obligation of the duty to provide access to adequate housing in the South African context.

In his analysis of section 26 FC,[224] Yacoob J holds that section 26(1) FC,[225] which has to be read together with section 26(2) FC,[226] places at least "a negative obligation on the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing."[227] This negative right is further spelt out in the prohibition against arbitrary evictions in section 26(3) FC.[228] However, according to the judgment, the heart of section 26 FC is whether the measures taken by the state to realise the right to access to adequate housing are *reasonable*,[229] and eventually the case is decided on that basis: the policy, legislation and programmes of the government[230] with regard to housing do not satisfy the requirement of reasonableness in section 26 FC in that these measures do not accommodate the needs of crisis relief with regard to housing and shelter. According to the Court, reasonable state housing measures would establish a coordinated and comprehensive public housing programme that allocates tasks and responsibilities between the various national, provincial and local housing authorities, and which is directed towards the progressive realisation of the right to access to adequate housing within the state's available means. This does not mean that the Court wants to prescribe policy to the government – "the precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive"[231] – but the responsible authorities must ensure that these measures are reasonable, "both in their conception and their implementation."[232]

The crucial question is, of course, when a housing policy will be reasonable. In this regard Yacoob J sets out the applicable considerations:

> "In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short-, medium- and long-term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review."[233]

In view of these considerations, Yacoob J sets out and reviews the housing policy and legislation that pertains to the situation of the Grootboom community. Although the Court's overall evaluation of the policy is favourable,[234] the measures in place nonetheless fail the reasonableness test because they exclude a major portion of the community by not making any provision for "housing that falls short of the definition of housing development in the Act"[235] and therefore not providing the required flexibility to include those in desperate need of housing.[236] The national housing programme is not reasonable because it fails to realise the national government's obligation to provide access to housing not only in the medium- and long-term, but also in the short-term, to those who find themselves in a crisis situation. Although the Constitutional Court clearly states its intention not to prescribe policy to government, the Court in effect interprets the right to access to adequate housing in section 26 FC in such a manner that the government's duty is not restricted to the medium- and long-term provision of access to housing in the "normal" planning and development process, but also includes the short-term *provision of access to housing for those in crisis*, the poorest of the poor and the weakest and most vulnerable members of society, those whose circumstances and living conditions are so horrendously inadequate that the government cannot reasonably expect them to wait patiently in line until they qualify for housing according to normal procedures.

This decision obviously creates problems and questions. A major problem will be to define the new line – drawn implicitly in this decision – between those whose living conditions are so inadequate that they can expect to jump the "normal" queue and qualify for crisis relief, and those whose conditions are almost as inadequate, but not quite.[237] The position of those clearly and obviously in crisis is perhaps not so difficult to address under this decision: those whose houses have been destroyed by natural disasters such as flooding or tornadoes or fire, or those, like the Grootboom community, whose houses have been destroyed by or with the assistance of state authorities will qualify for crisis relief in most cases, to the extent that state funding allows. However, there will inevitably be individual families and communi-

ties – like the Grootboom community before their move to New Rust – who consider their own circumstances so inadequate as to be unbearable, and their rights in terms of this decision could prove to be difficult to assess and enforce.

In one sense, the Constitutional Court's decision in *Grootboom* can be seen as a new departure compared to certain previous decisions,[238] and there are very interesting comparisons between the Court's quite far-reaching substantive evaluation of the government's housing policy in *Grootboom* and its greater unwillingness to scrutinise the government's policy with regard to provision of health care services in *Soobramoney v Minister of Health (KwaZulu-Natal)*,[239] even though the duty to provide health care is also subject to the requirement that the state should take reasonable steps.[240] Although the differences could possibly be explained away with reference to the fact that there was explicit provision for emergency health care in the Constitution, so that it was not necessary to do a *Grootboom* marginality or vulnerability analysis of the health care policy in *Soobramoney*,[241] that argument raises exactly the point that will probably come up for decision most often in the aftermath of *Grootboom*: how to distinguish between those who qualify for emergency assistance and those who don't, although their circumstances may be extremely bad. Mr Soobramoney did not qualify for emergency medical care because his condition was long-standing and not caused by a sudden new occurrence, although his ailment was life-threatening, and he actually died within days after the Constitutional Court decision. Must we conclude that the Grootboom community did or might qualify for emergency housing assistance because their position was caused by an *novus actus interveniens*, a new action partly sponsored by the government itself, and that the Soobramoneys of the housing situation are those whose living conditions are admittedly terrible, but not of an emergency or crisis nature because it is long-standing?

It is possible to attach a fairly conservative and restrictive interpretation to the decision in *Grootboom*, along the line that this decision allows the Constitutional Court to decide again, on another day – the decision lays down the principle of how to construe the government's duty with regard to housing policy and programmes, but it does not make any finding with regard to any specific claimant of the right, including the Grootboom community.[242] Consequently, actual application of this principle and enforcement of the right to emergency housing in terms of section 26 FC is left open for another day and, although the decision creates the impression that a far less restrictive version of rationality review was applied in this case, rationality review was actually just postponed to later decisions, where it can be applied on the merits of a specific claim for assistance in terms of the revised housing policy. Questions pertaining to the drawing of the line between those who qualify for this right and those who do not, as well as questions regarding the actual effect of the decision,[243] are therefore left open for the time being. Such a restrictive interpretation would be more in line with earlier decisions where a fairly thin form of rationality review was employed by the Court, and it seems to provide a reasonable explanation of the apparent contradictions between this case and others.

However, and this brings me back to my own point in this paper, even if the more restrictive interpretation of the *Grootboom* decision is the right one – and I don't think it is – the decision nevertheless opens a door that may be harder to shut than it seems right now; it raises new possibilities and alternative visions of what are proper and reasonable measures for the state to take in achieving the rights to social welfare and security.

Most importantly for my purposes here, it raises the new possibility of taking the position of the weakest and most vulnerable members of the community into account when deciding whether the delivery measures and policies of the government are reasonable and therefore constitutionally adequate and, in effect, when deciding what land reform and land rights are all about.[244]

As I have already pointed out with reference to land reform measures such as the Communal Property Associations Act and the Extension of Security of Tenure Act, I see this kind of initiative as the introduction of a completely new code, a new way of thinking that opens up new possibilities and fresh alternatives, free from the baggage of either *volkspele* or *toyi-toyi* jurisprudence, that can help realise the social ideals of the new constitutional democracy.

Reasoning according to this code, we can possibly disarm the relentless exclusionary logic of common law property rights and entitlements. Perhaps we can also escape the stationary impasse of struggle jurisprudence, moving away from the confrontational demand logic of restitution and into a much more disarming and disconcerting appeal of hope and trust from a position of marginality and powerlessness.

It can be different.

ENDNOTES

1) This paper is the background text for a shorter paper with the same title, read at a conference entitled *Development in the Constitutional State*, presented by the Potchefstroom University for Christian Higher Education 2-3 November 2000. Loot Pretorius planted the seed for the idea of a critical analysis of constitutional metaphors and rhetoric at a conference presented by RAU in September 1997(see L Pretorius "A Response to Professors Michelman and Van der Walt" 1998 *Acta Juridica* 282-287 283-286), and he must therefore take credit for the idea, although I accept full responsibility for shortcomings in the execution. Thanks to Geo Quinot for expert research assistance and for valuable comments and discussion, and to Greg Alexander, Tom Allen, Henk Botha, Lourens du Plessis, Danie Goosen, Robert Gordon, Irma Kroeze, Wessel le Roux, Frank Michelman, Hanri Mostert, Jenny Nedelsky, Juanita Pienaar, Loot Pretorius, Jed Rubenfeld, Joe Singer, Laura Underkuffler, Johan van der Walt and Karin van Marle for reading a draft and for helpful comments and discussion.
2) B Iur Honns(BA) LLB LLD (PUCHE) LLM (Witwatersrand). <ajvdwalt@akad.sun.ac.za>
3) (1998) Rowohlt Taschenbuch Verlag 7-46 18.
4) Constitution of the Republic of South Africa 200 of 1993. Emphasis added.
5) Mainstream analysis of land rights in the new constitutional state would typically focus on the creation of development opportunities for all South Africans, and survey land reform initiatives to indicate how we are progressing on the way to

successful transformation; or explore further possibilities for a more equitable land planning and development system, suggesting that there is still work to be done.

6) Loot Pretorius has already drawn attention to the bridge metaphor and its uses in recent case law, see L Pretorius "A Response to Professors Michelman and Van der Walt" 1998 *Acta Juridica* 282-287 283-286; Pretorius refers to *Qozeleni v Minister of Law and Order and Another* 1994 1 BCLR 75 (E) 80G-H; *De Klerk and Another v Du Plessis and Others* 1994 6 BCLR 124 (T) 131.
7) Even if the bridge metaphor was limited to the transitional role of the 1993 Constitution, the image was cemented in constitutional discourse. The official numbering of the 1996 Constitution as "108 of 1996" is a mistake, since this Constitution was not an act of parliament like its interim predecessor; see D van Wyk "'n Paar Opmerkings en Vrae oor die Nuwe Grondwet" (1997) 60 *THRHR* 377-394 378-379; EFJ Malherbe "Die Nommering van die Grondwet van die Republiek van Suid-Afrika 1996: Vergissing of Onkunde?" 1998 *TSAR* 140-142.
8) E Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31-48 31-32.
9) Nelson Mandela's autobiography: *Long Walk to Freedom: The Autobiography of Nelson Mandela* (1994). The two metaphors are not identical: the long walk to freedom is also based on the notion of moving from one position to another, and the same normative value attaches to reaching the destination, but the image of the abyss and the bridge that spans it is absent, although the general idea of overcoming hurdles and obstacles in the way of progress towards freedom is of course there. The imagery is equally spatial, but the spatial image in the bridge metaphor is less complex: two positions are divided by an obstacle that prevents crossing from one side to the other. In the walk metaphor, there is at least a possibility of a more complex movement through time and space. The two combine in popular consciousness as transformation metaphors.
10) Mureinik (1994) 10 *SAJHR* 31-48 31.
11) Although a case could perhaps be made out for preserving the bridge as a permanent reminder, a monument of the German *Mahnmal* (as opposed to *Denkmal*) variety, to embody the message that the old, abandoned position should never be entered again: "Nie wieder!" (the German meaning attached to this kind of memorial: "Never again!"). See in this respect J Snyman "Interpretation and the Politics of Memory" 1998 *Acta Juridica* 312-337 318; and compare Sarah Nuttall & Carli Coetzee (eds) *Negotiating the Past: The Making of Memory in South Africa* (1998).
12) Impatience with the process of transformation could perhaps be explained with reference to this perception. Those who expect to benefit from the transformation (and from land reform, for example) would like to receive the benefits as soon as possible. Those who expect to be affected detrimentally by some aspect of the transformation (by expropriations for the sake of land reform, for example) would also like to have the uncertainty over and done with.
13) See the quotation from the "postamble" to the 1993 Constitution above.
14) Politicians and legal theorists of the new constitutional order will perhaps find my questioning of the dominant vision and discourse of constitutional transformation counterintuitive. To avoid confusion I should therefore state clearly, right at the outset, that my approach does not imply that there is no need for or no possibility of a transition from the apartheid order to a new constitutional order, or that the new constitutional order or the land reform process is unnecessary or fundamentally flawed or politically suspect, or that reform and development in the new constitutional order is unnecessary – when I question the metaphors in terms of which the new constitutional order is contrasted with the old apartheid order, and with it the image of historical progression in terms of which the transition to the new constitutional order is presented and dis-

cussed, I am taking issue with the theoretical spin placed on transformation, and not with the necessity or the justification or the beneficial possibilities of the transition to a new legal order. I subscribe to Karl Klare's thesis that legal discourse "typically ... operates to deny us access to our transformative capacities, our power to alter and abolish existing patterns of domination ...", and that by "... exploring, mapping, and criticising the prevailing forms of legal consciousness, we may hope to release our political imagination and gain access to transformative possibilities immanent in our situation"; see Karl E Klare "Critical Theory and Labour Relations Law" in David Kairys (ed) *The Politics of Law: A Progressive Critique* 3rd ed (1998) 539-568 549.

15) Robert W Gordon "Critical Legal Histories" (1984) 36 *Stanford LR* 57-125.
16) Gordon (1984) 36 *Stanford LR* 57-125 95. More generally, this insight can also be associated with the linguistic or interpretive turn and its implications for legal and constitutional discourse; see in this regard the useful introductory discussion of Rosemary J Coombe "'Same As It Ever Was': Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603-652; and see the following contributions in 1998 *Acta Juridica* (also published as Graham Bradfield & Derek van der Merwe (eds) *"Meaning" in Legal Interpretation* (1998)): Johan van der Walt & Derek van der Merwe "Introduction" vii-xiii; AJ van der Walt "Un-doing Things with Words: The Colonisation of the Public Sphere by Private-Property Discourse" 235-281. David M Trubek "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36 *Stanford LR* 575-622 600-605 refers to this view of the relationship between social order, law, and valid knowledge of law and society as "interpretivist" as opposed to "behaviourist".
17) Gordon (1984) 36 *Stanford LR* 57-125 101. Compare the point Gordon makes in "Paradoxical Property" in John Brewer & Susan Staves (eds) *Early Modern Conceptions of Property* (1996) 95-110 101. Gordon's critical insights are discussed further in the last section of the article.
18) Interestingly enough, former state president Nelson Mandela is as well-known for his image of the long walk to freedom as he is for his signature dance steps – the Madiba jive.
19) See the quotation from Karl E Klare "Critical Theory and Labour Relations Law" in David Kairys (ed) *The Politics of Law: A Progressive Critique* 3rd ed (1998) 539-568 549 in n 14 above..
20) OB Lawuyi "Democracy and Resistance in South Africa" (1998) 41 *Development* 49-53 52.
21) (1996) 8 Sony Music Entertainment Inc. Lyrics by Eddie Vedder.
22) The main legislation in this regard was the Abolition of Racially Based Land Measures Act 108 of 1991; Population Registration Repeal Act 114 of 1991; Discriminatory Legislation Regarding Public Amenities Repeal Act 100 of 1990.
23) The word *volkspele* (literally "folk games") was chosen rather than "folk dancing" to prevent criticism from the conservative Calvinist Afrikaans churches, which were (some still are) opposed to dancing. Eventually, the influential Nederduits-Gereformeerde Kerk (Dutch Reformed Church) was convinced to support the *volkspele* movement by a combination of the impression that *volkspele* was not "really" dancing and a demonstration that the political heart of the movement was in the right place. See Tannie Juds (Ms Judith Pellisier) "Die Afrikaanse Volksang- en Volkspelebeweging" in Afrikaanse Volksang- en Volkspelebeweging *Ons Volkspele-Erfenis* (1989) 1-8, 32, and compare the discussion below.
24) See Tannie Juds (Ms Judith Pellisier) "Die Afrikaanse Volksang- en Volkspelebeweging" in Afrikaanse Volksang- en Volkspelebeweging *Ons Volkspele-Erfenis* (1989) 1-8.
25) See n 23 above.
26) Voortrekker clothes consisted of colourful long dresses with close-fitting waists, wide skirts and long sleeves (later amended to short sleeves for the *volkspele*

movement), worn with a triangular neckerchief and a typical Voortrekker bonnet (kappie) for the women (*niggies*, literally "nieces"); and for the men (*neefs*, literally "nephews") dark pants with a white shirt, worn with a colourful neckerchief and a dark vest embroidered with a flower motif, the latter being copied from the Charl Cilliers vest in the Voortrekker museum in Pietermaritzburg. The dress could be informal or more formal as the occasion demanded. See Tannie Juds (Ms Judith Pellisier) "Die Afrikaanse Volksang- en Volkspelebeweging" in Afrikaanse Volksang- en Volkspelebeweging *Ons Volkspele-Erfenis* (1989) 6-8.

27) Barbeque meat, mostly in the form of beef steaks, mutton ribs, and sausage (*boerewors*); a traditional staple at Afrikaner cultural gatherings.
28) Traditional sweet consisting of deep-fried dough twists dipped in syrup.
29) Ox-wagon Trek or Great Trek. The centenary celebration of the 1838 Great Trek was a symbolic or ritual re-enactment of the original Great Trek, culminating in laying the foundation stone of the Voortrekker Monument outside Pretoria, and organised under the auspices of the Federasie van Afrikaanse Kultuurverenigings (Federation of Afrikaans Cultural Organisations). 1938 was also general election year, when Afrikaner politics was boosted by an increased representation of 27 in the Assembly (including later prime minister JG Strijdom), and the year of later prime minister DF Malan's *Geloftedag* (Day of the Covenant, 16 December) speech at Blood River, where he called Afrikaner people to a second, greater trek, back to the towns and cities where the new battle with black power would take place. See TRH Davenport *South Africa: A Modern History* (1988, 1st ed 1977) 322-323. Other important aspects of the rise of Afrikaner nationalism connected with the symbolic re-enactment of the Great Trek was the establishment of the Voortrekker movement for boys and girls (as an Afrikaans alternative to the Boy and Girl Scout movements) and the promotion of the *volkspele* movement.
30) The linear movement from inside to outside (the reach of English imperialism), across the Drakensberg, offers an interesting comparison with the linear movement of the bridge metaphor for constitutional transformation discussed in the introduction above. The Voortrekkers did not have or want a constitutional transformation, they simply moved away, across the mountains, by using the democratic option of exit, thereby establishing *being separate*, *being elsewhere*, *being in a different space*, *outside* as an important part of the Afrikaner political myth of independence.
31) The *wawiel*: pairs of dancers form a circle and move round to resemble a turning wheel. Initially known as "the gallop" because of the "galloping" steps used (skipping with one foot staying in front of the other), the game was renamed when the words of Voortrekker leader Andries Pretorius were read over the PA system at a demonstration of the game in Bloemfontein in 1940; see the discussion in the text below and fn 23. See Tannie Juds (Ms Judith Pellisier) "Die Afrikaanse Volksang- en Volkspelebeweging" in Afrikaanse Volksang- en Volkspelebeweging *Ons Volkspele-Erfenis* (1989) 1-8, 31-32.
32) The *ossewa*: the men assume the position of oxen in two rows, the women (all in white) form an "ox-wagon" behind them. See Afrikaanse Volksang- en Volkspelebeweging *Ons Volkspele-Erfenis* (1989) 21 for a photograph of this game demonstrated in front of the Union Building in Pretoria.
33) See "Die Afrikaanse Volksang- en Volkspelebeweging" in Afrikaanse Volksang- en Volkspelebeweging *Ons Volkspele-Erfenis* (1989) x (pages not numbered) for a photographs of a display at the Paul Kruger House in Clarens, Switzerland.
34) See n 23 above.
35) "Daar is 'n wiel wat draai in Suid-Afrika, nog u, nog ek kan dit keer". See Tannie Juds (Ms Judith Pellisier) "Die Afrikaanse Volksang- en Volkspelebeweging" in Afrikaanse Volksang- en Volkspelebeweging *Ons Volkspele-Erfenis* (1989) 1-8, 32.

36) The recipient of the message is clear in these cultural codes, though – perhaps unlike the recipients of legal codes. See David M Trubek "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36 *Stanford LR* 575-622 610 on the theoretical problem of assuming (as the CLS movement does, according to Trubek) that the recipient of the partially false messages of the legal code are identifiable.
37) Similar to common law original acquisition of ownership through *commixtio* and *confusio*. Mixing and fusing take place when solids (*commixtio*) or liquids (*confusio*) belonging to different owners are mixed in such a way that they become inseparable, without the knowledge or agreement of the owners. The original owners acquire ownership of the new mixture in the ratio of their contribution. See CG van der Merwe *Sakereg* (2nd ed 1989) 263-265.
38) An alternative with much the same effect as abolition of Roman-Dutch law, as far as land is concerned, is to nationalise all (or at least agricultural) land; see Tessa Marcus "Land Reform - Considering National, Class and Gender Issues" (1990) 6 *SAJHR* 178-194 188-190; Zola Skweyiya "Towards a Solution to the Land Question in Post-Apartheid South Africa: Problems and Models" (1990) 6 *SAJHR* 195-214 208-214.
39) The status of Roman-Dutch law in the post-1994 legal system was briefly debated during the first few years of the new constitutional order, but the proposals for its abolition and in favour of a comprehensive new codification of South African law were soon drowned out by the consensus in favour of retention and reform of the common law within the new constitutional order. See generally AJ van der Walt "Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law" (1995) 11 *SAJHR* 169-206. For examples of the passionate pleas for the retention of Roman-Dutch private law, see JM Potgieter "The Role of the Law in a Period of Political Transition: The Need for Objectivity" (1991) 54 *THRHR* 800-897 802: "It must be stressed that the basic assumption that the South African legal system as a whole has become illegitimate, is unfounded. The crisis in South Africa lies primarily in the socio-political rather than the legal sphere"; TJ Scott "The Future of our Roman-Dutch Law: Reflections and a Suggestion" (1993) 26 *De Jure* 394-400 399; J Neethling "'n Toekomsblik op die Suid-Afrikaanse Privaatreg - Volwaardige Naasbestaan of Versoenende Sintese?" in Annél van Aswegen (ed) *The future of the South African Private Law* (1994) 1-9 3: "In the first instance, the apartheid era cannot be attributed to Roman-Dutch law – the blame must be placed squarely on the shoulders of the ruling minority who introduced the system of apartheid by way of legislation, and they were primarily enabled to this end by the doctrine of parliamentary sovereignty which derives from English constitutional law." Even some judges joined in this opinion; see former Chief Justice MM Corbett "Trust Law in the 90s: Challenges and Change" (1993) 56 *THRHR* 262-270 264: "And this process demonstrates, I venture to suggest, the genius of Roman-Dutch law; its capacity to sustain development in new directions, to branch out when necessary, to absorb concepts from elsewhere and generally to adapt to the needs of society. It demonstrates, too, the advantages of a legal system based upon a common law rooted in broad principle, as compared with one whose common law has been created casuistically or has been subjected to the relative rigidity of a codification."; former Chief Justice I Mahomed "The Future of Roman-Dutch Law in Southern Africa, Particularly in Lesotho" 1985 *Lesotho LJ* 357-365 360. Justice of the Constitutional Court Albie Sachs, in Chapter 8 ("The Future of South African Law") of his *Protecting Human Rights in a New South Africa* (1990) 90-103 recognises the fact that defences of Roman-Dutch law are often somewhat overenthusiastic, but nevertheless thinks that people might, in a democratic legal order, decide to retain Roman-Dutch law for pragmatic reasons (at 93): "In other words, RDL is

already here, we know it more or less, we have the books and the rules and the procedures available, we might as well use it." Even a recent source such as DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 558-559 seems to recognise the radical nature of land reform only grudgingly, apparently wishing that it was still possible to argue that apartheid land law was a mechanical attachment to politically neutral common law, and that apartheid and its legacy could now again be removed and remedied by reforms that left the basic structure of the common law intact.

40) In Roman-Dutch law, the fact that an attachment cannot be removed from the principal thing without causing damage proves that the attachment is permanent and irreversible. Recent South African case law tends to abandon this "traditional" view and follow the "new" approach, according to which the subjective intention of the owner of the movable is considered to be decisive in concluding that the attachment was permanent; see most recently *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 3 SA 273 (A) 281.

41) Robert Cover "Violence and the Word" (1986) 95 *Yale LJ* 1601-1629. I refer to the reprinted version in Martha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 203-238 221-224. I apologise for the inappropriateness of my references to Cover's essays "Violence and the Word" and "Nomos and Narrative" in the rest of this section – although Cover certainly did not have apartheid ideology in mind when he wrote these essays, his analysis fits and explains the structures and mechanics of apartheid law so well that I could not resist using it to illustrate my analysis. I certainly do not suggest that Cover's analysis was in any way open to interpretations that justified apartheid – if anything, he would probably have been able to extend his arguments with reference to further illustrations of the violence of apartheid law.

42) Cover "Violence and the Word" in Martha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 203-238 221-224.

43) Cover "Violence and the Word" in Martha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 203-238 223, 222.

44) Particularly the Black Land Act 27 of 1913; Black Administration Act 38 of 1927; Development Trust and Land Act 18 of 1936; Population Registration Act 30 of 1950; Reservation of Separate Amenities Act 49 of 1953; Black Education Act 47 of 1953; Black Affairs Act 55 of 1959; Group Areas Act 36 of 1966; Black Local Authorities Act 102 of 1982; Black Communities Development Act 4 of 1984.

45) Much has been written about the judicial deference or "executive-mindedness" of the apartheid courts. See generally in this regard Hugh Corder *Judges at Work: The Role and Attitudes of the South African Appellate Judiciary, 1910-1950* (1984); Adrienne E van Blerk *Judge and be Judged* (1988); David Dyzenhaus *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991).

46) There were other requirements too, such as: the courts should not be required to face the enforcement of their decisions too closely; the courts had to be able to work on the assumption that apartheid laws were no more than temporary and partial amendments to the common law; a basically deferential attitude to the effect that judges' task was to apply the law and not to make it; a liberal belief in the rule of law and the separation of powers; political control over the appointment of judges to restrict outbreaks of conscience to a minimum; and so on. Compare Cover "Violence and the Word" in Martha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 203-238 221-224.

47) Or, on a different level, social codes such as *volkspele* dancing.

48) Cover "Violence and the Word" in

Martha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 203-238 223-224.

49) What Pierre Schlag describes as the instrumental aesthetic of rights: Pierre Schlag "Rights in the Postmodern Condition" in Austin Sarat & Thomas R Kearns (eds) *Legal Rights: Historical and Philosophical Perspectives* (1997) 263-304 267-300.
50) What Pierre Schlag describes as the analytic aesthetic of rights: Pierre Schlag "Rights in the Postmodern Condition" in Austin Sarat & Thomas R Kearns (eds) *Legal Rights: Historical and Philosophical Perspectives* (1997) 263-304 267-300.
51) *Minister of the Interior v Lockhat* 1961 2 SA 587 (A) 602D.
52) See Cover "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative" (1983) 97 *Harv LR* 4-68. I refer to the reprinted version in Martha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 95-172. For the section on jurisgenesis see 103-113, 120-138.
53) Cover "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative" in Martha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 95-172 120-138 coined the term in a different setting and with a different intention.
54) The importance of legislation in the dynamic, instrumental aspect of apartheid law created the idea that apartheid could again be exorcised from law by scrapping the relevant legislation, but that oversimplifies apartheid law by focusing on the dynamic, instrumental side of apartheid law only and ignoring the analytic, static aspect – both aspects were required to establish apartheid as an overarching political, social and legal structure. See n 38 above.
55) Particularly the Black Land Act 27 of 1913; Development Trust and Land Act 18 of 1936. See n 43 above and surrounding text, as well as the following notes below and the next section of the article below.
56) Relevant legislation was the Black Land Act 27 of 1913; Development Trust and Land Act 18 of 1936; Reservation of Separate Amenities Act 49 of 1953; Group Areas Act 36 of 1966; Black Communities Development Act 4 of 1984. Expropriation did not always take place in terms of the Expropriation Act 63 of 1975; various other laws allowed for the expropriation of black land.
57) Compare the next section of the paper below.
58) Robert W Gordon "Critical Legal Histories" (1984) 36 *Stanford LR* 57-125 59-67.
59) Gordon "Critical Legal Histories" (1984) 36 *Stanford LR* 57-125 59.
60) This phrase is usually understood as referring to the Natives Land Act 27 of 1913 (later renamed the Black Land Act) and the Native Trust and Land Act 18 of 1936 (later renamed the Development Trust and Land Act), but for present purposes one can include the Black Administration Act 38 of 1927, the Black Local Authorities Act 102 of 1982, the Black Communities Development Act 4 of 1984, the separate housing laws for whites, Indians and coloureds (see AJ van der Walt "Towards the Development of Post-Apartheid Land Law: An Exploratory Survey" (1990) 23 *De Jure* 1-45 20-23), the Group Areas Act 36 of 1966, the Prevention of Illegal Squatting Act 52 of 1951, the Trespass Act 6 of 1959, the Slums Act 76 of 1979 and others.
61) There is no clearer illustration of this point than the holding by the then appellate division of the supreme court, in *Minister of the Interior v Lockhat* 1961 2 SA 587 (A) 602D, that the policy of spatial segregation was "a colossal social experiment and a long term policy" which would "inevitably cause disruption and, within the foreseeable future, substantial inequalities", and that the state president could therefore establish racial differentiation even if it resulted in substantial inequalities and discrimination, without interference by the courts.
62) Of course there are earlier antecedents.

One can trace this vision of property back to the Roman law, where property rules emerged from the arrangements that structured the household and its property. Feudal law provides an excellent set of examples of a spatialised vision of property law, and there are Anglo-American examples as well. See Robert W Gordon "Paradoxical Property" in John Brewer & Susan Staves (eds) *Early Modern Conceptions of Property* (1996) 95-110 95, 101, 107; David M Trubek "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36 *Stanford LR* 575-622 594 fn 54; Elizabeth Mensch "The History of Mainstream Legal Thought" in David Kairys (ed) *The Politics of Law: A Progressive Critique* 3rd ed (1998) 23-53 28-29, 37.

63) Robert Cover "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative" in Martha Minow, Michael Ryan & Austin Sarat *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 95-172 138-144 had something else in mind when he coined the phrase.

64) The Population Registration Act 30 of 1950, repealed by the Population Registration Repeal Act 114 of 1991.

65) The emphasis on the moral and political superiority of individual ownership was still riding the wave of modernity, of the victory of humanism over feudalism. For an interesting view on the historical development of this process in South Africa see DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 3-15. For a philosophical perspective on this development see JWG van der Walt "The Critique of Subjectivism and its Implications for Property Law – Towards a Deconstructive Republican Theory of Property" in GE van Maanen & AJ van der Walt (eds) *Property Law on the Threshold of the 21st Century* (1996) 115-159.

66) On the characteristics of ownership see CG van der Merwe Sakereg (2nd ed 1989) 169-176; DG Kleyn & A Boraine assisted by W du Plessis *Silberberg and Schoeman's The Law of Property* (3rd ed 1992) 161-164; DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 556-559. On the hierarchy of property rights and the position of ownership in this hierarchy see AJ van der Walt "Towards a Theory of Rights in Property: Exploratory Observations on the Paradigm of Post-Apartheid Property Law" (1995) 10 *SAPL* 298-345 338-344; A Van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" (1999) 64 *Koers* 259-294 261-264.

67) This definition goes right back to the first formal definition of *dominium in* the history of romanist property law, that of Bartolus de Saxoferrato (*ad* Dig 41.2.17.1 n 4) in the 15th century: "dominium est ius de re corporali perfecte disponendi, nisi lege prohibeatur" (*dominium* is the right of complete disposal over a corporeal thing, insofar as it is not prohibited by law). This definition was restricted to corporeals, was intended to emphasise the distinction between *dominium* and *possessio*, and laid the foundation for the subsequent assumption that ownership was unrestricted unless a specific restriction was proved. See AJ van der Walt "Bartolus se Omskrywing van Dominium en die Interpretasies daarvan sedert die Vyftiende Eeu" (1986) 49 *THRHR* 305-321.

68) Hence the principle that, in a vindicatory action, the owner need only prove ownership and that the defendant is in possession; it is up to the defendant to aver and prove a defence on the basis of a conflicting right such as lease: *Chetty v Naidoo* 1974 3 SA 13 (A); *Hefer v Van Greuning* 1979 4 SA 952 (A).

69) DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 556-559.

70) The male form is historically and intrinsically suitable here and is used advisedly.

71) Of course this is not to suggest that all or even most land is or ever was owned privately – in fact, quite a sizable portion of land was, and still is, owned publicly or in some form of common or public arrangement. However, as Robert W Gordon "Paradoxical Property" in John Brewer & Susan Staves (eds) *Early Modern Conceptions of Property* (1996) 95-110 explains, the notion of absolute

private dominion is so powerful that it continues to exist and to appeal to all people, despite its negative political connotations and regardless of all the evidence about contradictions and inconsistencies. At 107-108, Gordon points out that even the "disintegration" of property announced by Thomas C Grey "The Disintegration of Property" in J Roland Pennock & John W Chapman (eds) *Nomos XXII: Property* (1980) 69-85 was never realised, even though all the economic developments and the almost boundless expansion of alternative forms of wealth and value upon which Grey based his thesis have in fact taken place.

72) See David M Trubek "Where the Action Is: Critical Legal Studies and Empiricism" (1984) 36 *Stanford LR* 575-622 594 fn 54; Elizabeth Mensch "The History of Mainstream Legal Thought" in David Kairys (ed) *The Politics of Law: A Progressive Critique* 3rd ed (1998) 23-53 28-29, 37; Robert W Gordon "Paradoxical Property" in John Brewer & Susan Staves (eds) *Early Modern Conceptions of Property* (1996) 95-110 95-97, 101, 107-108. At 95, Gordon notes that "civic humanism, with its independent yeoman freeholders forming the necessary social basis of self-governing republics", was one of the historical sources of the "ideology of property as absolute dominion". Schlag "Rights in the Postmodern Condition" in Sarat & Kearns (eds) *Legal Rights: Historical and Philosophical Perspectives* (1997) 263-304 275-280 works out some of the detail of this image of the owner as master of his domain.

73) Mainly interdicts (*Setlogelo v Setlogelo* 1914 AD 221), but also similar remedies such as the declaratory order and the *mandament van spolie* (*Nino Bonino v De Lange* 1906 TS 120; *Yeko v Qana* 1973 4 SA 735 (A)).

74) The possessory action and the *rei vindicatio* (*Chetty v Naidoo* 1974 3 SA 13 (A); *Hefer v Van Greuning* 1979 4 SA 952 (A)).

75) The normal delictual claim for damages (*actio legis Aquiliae*), but also the possessory action and the *condictio furtiva* (*Clifford v Farinha* 1988 4 SA 315 (W)).

76) For a strong theoretical explanation which is not necessarily shared by all South African theorists, see JD van der Vyver "The Doctrine of Private-Law Rights" in SA Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 201-246.

77) See *Prinsloo v Shaw* 1938 AD 570 590; *Demont v Akal's Investments (Pty) Ltd* 1955 2 SA 312 (D) 316B-G; *Die Vereniging van Advokate (TPA) v Moskeeplein (Edms) Bpk* 1982 3 SA 159 (T) 163; *Malherbe v Ceres Municipality* 1951 4 SA 510 (A) 517-518; *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A); *East London Western Districts Farmers' Association v Minister of Education and Development Aid* 1989 2 SA 63 (A) 66. See CG van der Merwe *Sakereg* (1989 2nd ed) 185-197, 201-204; DG Kleyn & A Boraine assisted by W du Plessis *Silberberg and Schoeman's The Law of Property* (3rd ed 1992) 168-173, 180-185, 191; D van der Merwe *Oorlas in die Suid-Afrikaanse Reg* (1982) 539-549, 582-597.

78) See the previous endnote, and compare Robert W Gordon "Paradoxical Property" in John Brewer & Susan Staves (eds) *Early Modern Conceptions of Property* (1996) 95-110 100, who makes a similar point with regard to early modern Anglo-American law.

79) D van der Merwe *Oorlas in die Suid-Afrikaanse Reg* (1982) 582-585.

80) See JD van der Vyver "The Doctrine of Private-Law Rights" in SA Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 201-246 211 for a theoretical explanation of the same idea. The Dabinian definition and classification of rights preferred by Van der Vyver distinguishes between various categories of rights only on the basis of their different objects, and thus the structure or notion of a right is similar across the board, which made it easier for the spatialised concept of rights to be applied to non-property rights as well. Compare Van der Vyver 224-230, 230-236. In this regard, Robert W Gordon "Paradoxical Property" in John Brewer & Susan Staves (eds) *Early Modern Conceptions of Property* (1996) 95-110

95 notes that the notion of property rights as absolute dominion "is rapidly and recklessly generalised to intangibles, then to any type of potentially valuable expectancy, and ultimately to public, political rights as well".

81) A term borrowed from DV Cowen (1984) *New Patterns of Landownership. The Transformation of the Concept of Landownership* as Plena in Re Potestas; see further AJ van der Walt "Introduction" in AJ van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (1991) 1-7. The developments often referred to with this term are sectional title ownership (Sectional Titles Act 66 of 1971, replaced by the Sectional Titles Act 95 of 1986); property timesharing (Property Time-Sharing Control Act 75 of 1983); and shareblock holding (Share Blocks Control Act 59 of 1980). See AJ van der Walt "The Future of Common-Law Landownership" in Van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (1991) 21-35 26 ff for references.

82) See AJ van der Walt "The Future of Common-Law Landownership" in Van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (1991) 21-35 26; A Van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" (1999) 64 *Koers* 259-294 263-264.

83) This applies particularly to personal rights acquired in terms of shareblock schemes.

84) In the case of sectional title ownership, this spatial organisation is obvious. The sectional title unit is defined in section 1 of the Sectional Titles Act 95 of 1986 as consisting of a section of the property plus an undivided share in the common property. The section is indicated on the sectional plan, much as individual lots or erven are indicated on a township register. The undivided share in the common property is apportioned to each unit by means of the participation quota, which is calculated by dividing the floor area (measured to the middle of the separating walls) of the section with the combined floor area of all the sections together (sec 1, secs 32(1)). The possibility exists to "carve out" one's own piece of the common property for exclusive use (exclusive use areas) through transfer by notarial deed. The structure of timesharing rights indicates the same focus on exclusivity, as a timesharing interest is described in the Property Timesharing Control Act 75 of 1983 (sec 1) as any right to or interest in the exclusive use or occupation of accommodation, but ultimately this definition is more closely related to the use-agreement than to the right on which timesharing is based. A more interesting illustration appears from the fact that a time-based institution of timesharing was avoided in the South African law, while an ownership-based approach was adopted: the standard form of timesharing is where the party obtains an undivided co-ownership share in a sectional title unit, coupled with a contractual apportionment of exclusive use for a limited period of time. Traditional ownership is thus retained and the novelty of these schemes contractually arranged. It is possible, though, to obtain timesharing on the basis of a personal right in a shareblock company, but then the shortcomings of the personal right are compensated for in the Act. A third example of the ownership paradigm is evidenced by the failure to develop a legislative framework for air space development. Despite the need to be able to dispose of air space separate from the land, there has been no such development yet, partly due to the problem this would cause for the traditional spatial definition of immovable property, which could seemingly only be bridged by the impractical registration of such air space. See generally A Schoeman "Sectional Title, Time-Sharing and Air Space Ownership" in AJ van der Walt (ed) *Land Reform and the Future of Landownership in South Africa* (1991) 103-116. Compare further GJ Pienaar "Eiendomstydsdeling – Die Aard van die Reghebbende se Reg" 1986 *TRW* 1-14; GJ Pienaar "Legal Aspects of Private Airspace Development" (1987) 30 *CILSA* 94-107; GJ Pienaar "Drie-Dimensionele

Registrasie van Onroerende Goed – 'n Lugkasteel?" 1989 *De Jure* 257-274.

85) See AJ van der Walt "Property and Personal Freedom: Subjectivism in Bernhard Windscheid's Theory of Ownership" (1993) 56 *THRHR* 569-589, particularly 572-579. See See Robert W Gordon "Paradoxical Property" in John Brewer & Susan Staves (eds) *Early Modern Conceptions of Property* (1996) 95-110 for a similar point concerning early modern Anglo-American law.

86) AJ van der Walt "Property and Personal Freedom: Subjectivism in Bernhard Windscheid's Theory of Ownership" (1993) 56 *THRHR* 569-589 572-579.

87) AJ van der Walt "Property and Personal Freedom: Subjectivism in Bernhard Windscheid's Theory of Ownership" (1993) 56 *THRHR* 569-589 581. JWG van der Walt "The Critique of Subjectivism and its Implications for Property Law – Towards a Deconstructive Republican Theory of Property" in GE van Maanen & AJ van der Walt (eds) *Property Law on the Threshold of the 21st Century* (1996) 115-159 115-116 points out that the liberty supported by property in Anglo-American common law was basically political liberty, whereas the liberty supported by property in continental European law was economic liberty. In the continental background of Roman-Dutch common law, the close connection between individual property and economic liberty justified the exclusivity of individual ownership. A different and more complex argument is required to make a similar point about Anglo-American common law.

88) Although the emphasis in this article is mainly on the exclusivist vision of property in Roman-Dutch law, this vision was by no means unknown to Anglo-American law. Robert Gordon "Paradoxical Property" in John Brewer & Susan Staves (eds) *Early Modern Conceptions of Property* (1996) 95-110 95 refers to Blackstone's fundamentally static and spatial definition of ownership, and Gregory Alexander has explained and analysed the static nature of what he refers to as "propriety" in American law convincingly and in great detail: see Gregory S Alexander *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776-1970* (1997). Kevin Gray "Property in Thin Air" (1991) 50 *Cambridge LJ* 252-307 even elevated exclusivity to the fundamental characteristic of property.

89) The following table illustrates some of the most interesting characteristics:

White areas	**Black areas**
Only available in white areas	Only available in black areas
Restricted to whites	Restricted to blacks
Paradigm right is ownership	Paradigm right is use or use permit
Governed by private law	Governed by public law
Source: Roman-Dutch law	Source: legislation, customary law
Essentially permanent	Essentially limited time-frame
Essentially an individual right	Based on tribal or state grants
Resists regulation as a rule	Based on regulation
Absolute or complete right	Circumscribed, restricted right
Strong protection, secure	Weak protection, insecure
Provides good real security	Provides no basis for real security
Basis for derivative rights	In principle no derivative rights
Paradigm is unitary and hierarchical	Paradigm is fragmented
Structure is liberal, modern	Structure is feudal

See A Van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" (1999) 64 *Koers* 259-294 263-264 for a similar table and discussion of some aspects. Schlag "Rights in the Postmodern Condition" in Sarat & Kearns (eds) *Legal Rights: Historical and Philosophical Perspectives* (1997) 263-304 275-280 works out some aspects of the spatial or analytic "aesthetic" of law based on the property model.

90) See Schlag "Rights in the Postmodern Condition" in Sarat & Kearns (eds) *Legal Rights: Historical and Philosophical Perspectives* (1997) 263-304.

91) Especially the notion of a so-called "public nuisance"; see the discussion below.

92) See e.g. *East London Western Districts Farmers' Association and Others v*

Minister of Education and Development Aid and Others 1989 2 SA 63 (A); *Diepsloot Residents' and Landowners Association and Others v Administrator, Transvaal, and Others* 1993 1 SA 571 (T); 1993 3 SA 49 (T); 1994 3 SA 336 (A).

93) In the earlier case of *East London Western Districts Farmers' Association and Others v Minister of Education and Development Aid and Others* 1989 2 SA 63 (A), the settlement was established in terms of the old Development and Trust and Land Act 18 of 1936; in the later *Diepsloot* case, the state was using one of the De Klerk government's hesitant land reform laws, the Less Formal Township Establishment Act 113 of 1991.

94) 1989 2 SA 63 (A).

95) 1989 2 SA 63 (A) 65H-I, 75J-76B per Hoexter JA, Vivier JA and Steyn JA concurring; Viljoen JA and Nestadt JA dissenting.

96) 1989 2 SA 63 (A) 69G-H.

97) *Diepsloot Residents' and Landowners Association and Others v Administrator, Transvaal, and Others* 1993 1 SA 571 (T); 1993 3 SA 49 (T); 1994 3 SA 336 (A). See most recently *Rademeyer and Others v Western Districts Council and Others* 1998 3 SA 1011 (SEC), where the public nuisance action of the applicants was defeated because the occupants of the respondent's land occupied the land with consent or tacit consent of the landowner, thereby bringing the matter under the auspices of the Extension of Security of Tenure Act 62 of 1997, which prohibited the kind of eviction order the applicants applied for. This kind of struggle about the effect of the new constitutional order on the common law and its dominant vision of ownership is not over; in *Betta Eiendomme (Pty) Ltd v Ekple-Epoh* [2000] 3 All SA 403 (W), the Transvaal High Court held that the common law right of ownership and contract have not been affected by the Constitution, and that the prohibition against eviction under sec 26 FC was intended for cases where legislation dealt with property rights, not with cases "of ordinary trespass", where the common law of ownership and eviction could still be applied.

98) *Diepsloot Residents' and Landowners Association and Others v Administrator, Transvaal, and Others* 1993 1 SA 571 (T) 578I-J, 583E, 584C.

99) *Diepsloot Residents' and Landowners Association and Others v Administrator, Transvaal, and Others* 1993 3 SA 49 (T).

100) *Diepsloot Residents' and Landowners Association and Others v Administrator, Transvaal, and Others* 1994 3 SA 336 (A).

101) See n 31 and surrounding text above.

102) An interesting by-product of the synergy between apartheid ideology and Roman-Dutch property rhetoric was that Roman-Dutch private law was, for the most part, isolated from politics and statutory law and "freeze-framed" in the state in which it was most obviously not involved in apartheid politics but in fact most useful to it. For many years during the apartheid era, apartheid legislation and politics were studiously ignored by private law specialists and in private law courses at universities, thereby preserving the "purity" of Roman-Dutch private law. Interestingly, this tendency changed quite markedly in the last decade or so of apartheid rule, and now a more comprehensive view of property law is the rule rather than the exception, although the defence of "pure" private law, unsullied by politics and constitution-talk, is by no means dead.

103) Cover "Violence and the Word" in Martha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 203-238 223-224.

104) This is what Peter Gabel refers to as the "pact of the withdrawn selves"; see P Gabel "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1984) 62 *Texas LR* 1563-1599 1581: "the meaning of ... 'rights-consciousness' ... [is] that it is intended to secure the denial of desire in the face of contingency and the fear of loss by representing our false selves as legally compelled."

105) (2000) Jonathan Cape, London 14.

106) OB Lawuyi "Democracy and Resistance in South Africa" (1998) 41 *Development* 49-53 49.

107) "Postamble", entitled "National Unity and Reconciliation", to the Constitution of the Republic of South Africa 200 of 1993, already cited and discussed in the introductory section of this paper above.
108) Ssec 9, 10 FC; see further ssec 11 FC (life), 12 FC (freedom and security of the person), 13 FC (slavery, servitude and forced labour), 14 FC (privacy), 15 FC (freedom of religion, belief and opinion), 16 FC (freedom of expression),17 FC (assembly, demonstration, picket and petition), 18 FC (association), 19 FC (political rights), 20 FC (citizenship), 21 FC (freedom of movement and residence); all of which secure rights not enjoyed by all South Africans under apartheid rule.
109) The origin of the word is unclear, see J Maluleke "*Toyi-toyi* Freedom Dance of the 90s: Where did it Originate?" *Drum Magazine* August 1993 32-33; sv faq "What is the Origin of the Word '*toyi-toyi*'?" http://www.pasteur.fr/infosci/faq/african-faq/south-africa; "Life in Mandela's South Africa: Glossary of South African Terms" http://www.geocities.com/CapitolHill/ Senate/6367/ glossary.htm; Van Dalen "Nieuwe Woorden: *Toyi-toyi*" http://www.vandale.nl/(noframes)/ editie11/S_nieuwwoord_antw.html.
110) As a protesting, marching dance, and given its origin in military fitness training, the *toyi-toyi* is by nature a dance of moving the legs as if moving forward but while in fact staying in the same place, like treading water, a dance of waiting. In this regard, it bears an interesting resemblance to the *volkspele* "wagon-wheel" dance, and perhaps to all forms of dancing.
111) Sources on the origin of the *toyi-toyi* are hard to come by. See "Appendix A: Glossary of Terms" sv "*Toyi-toyi*" in Viviene Taylor *Social Mobilisation: Lessons from the Mass Democratic Movement* (1997) 267; OB Lawuyi "Democracy and Resistance in South Africa" (1998) 41 *Development* 49-53 52-53; J Maluleke The origin of the word is unclear, see J Maluleke "*Toyi-toyi* Freedom Dance of the 90s: Where did it Originate?" *Drum Magazine* August 1993 p 32; Greg Snyder "Life's Truth Aesthetically Interpreted", interview with South African poet Keorapetse Kgositsile, *Bulletin* #21, New School for Social Research http://www.newschool.edu/centers/ ecep/twenone.htm; Mayibuye Centre "Toyi Toyi" http://www.museums.org.za/mayibuye/ toyi-toyi.htm (where one can also listen to an audio clip of a *toyi-toyi* chant); sv faq "What is the Origin of the Word '*toyi-toyi*'?" http://www.pasteur.fr/infosci/faq/african-faq/south-africa; Mandla Langa "The Future of the Arts in Africa: In our History and in our Blood" *Financial Mail* 17 December 1999 http://www.fm.co.za/report/milennium/gd.htm; Gay W Seidman "Blurred Lines: Nonviolence in South Africa" *Political Science and Politics* June 2000, republished by the American Political Science Association Online http://www.apsanet.org/PS/june00/seidman. cfm.
112) See the previous n, and Thobo Mxotwa "Chat Avenue: *Toyi-Toyi* Forever" in *Dispatch Online* Monday 6 February 1998 http://www.dispatch.co.za/1998/02/16/editoria/MXOTWA.HTM.
113) This is true even for the so-called stamping dances, where the leg is lifted high and the foot then stamped into the ground – the essential direction of this movement is always downward, gathering force for and moving into the stamping, with the essential body position bent forward, while the body position in the *toyi-toyi* is upright and almost leaning over backward, and the essential knee movement is upward, holding the knee up as long as possible. See Esther A Dagan "Origin and Meaning of Dance's Essential Body Position and Movements" in Esther A Dagan (ed) *The Spirit's Dance in Africa: Evolution, Transformation and Continuity in Sub-Sahara* (1997) 102-103.
114) And despite the violence often accompanying or provoked by the marches and by police and military reactions to them.
115) Viviene Taylor *Social Mobilisation: Lessons from the Mass Democratic Movement* (1997) 72-96; Gay W Seidman "Blurred Lines: Nonviolence in South

Africa" *Political Science and Politics* June 2000, republished by the American Political Science Association Online http://www.apsanet. org/PS/june00/seidman.cfm.

116) OB Lawuyi "Democracy and Resistance in South Africa" (1998) 41 *Development* 49-53 52. In this context, Lawuyi at 52 describes "protest of any kind as an attempt to articulate other options for meaningful development", in other words as an effort to imagine the alternative.

117) For recent evaluations see DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 555-589; A van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" (1999) 64 *Koers* 259-294; Willemien du Plessis, Nic Olivier & Juanita Pienaar "Land Issues: An Assessment of the Failures and Successes" (1999) 14 *SAPL* 240-270.

118) See DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 564. In this regard, Carey Miller reflects that apartheid land law "was largely represented by law which did not need to make inroads into the ruling common law of property", so that reform measures can afford to be "more to do with the restoration and delivery of land rights than about departure from the existing system of land law".

119) See DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 564. In this regard, Carey Miller obviously considers the greater emphasis on land rights deriving from simple possession or occupation important, since that breaks down the hegemony that the registration established with regard to the exclusionary power of white ownership and the feudal vulnerability of black land occupancy in the apartheid system; compare Carey Miller at 556-559. This is an important aspect of the transformation process that is well noted by Carey Miller. Compare AJ van der Walt "The Doctrine of Subjective Rights: A Critical Reappraisal from the Fringes of Property Law" (1990) 53 *THRHR* 316-329 319-324.

120) According to the recent decision of Yacoob J in *Government of the Republic of South Africa and Others v Grootboom and Others* CCT 11/00 http://www.concourt.gov.za/judgments/2000/ grootboom1.pdf [19], [24] the rights in this "cluster" of provisions regarding socio-economic rights have to be considered together. The *Grootboom* case is discussed in more detail in the concluding section of the paper below.

121) Freedom of trade, occupation and profession (sec 22 FC), labour relations (sec 23 FC), environment (sec 24 FC), property and land (sec 25 FC), housing (sec 26 FC), health care, food, water, and social security (sec 27 FC), education (sec 29 FC).

122) The 1993 IC also provided for land reform, but in ssec 121-123, which did not form part of the Bill of Rights. I will not attempt a complete discussion of land reform measures here. For an overview of literature on apartheid land law and a summary of some main features see AJ van der Walt "Towards the Development of Post-Apartheid Land Law: An Exploratory Survey" (1990) 23 *De Jure* 1-45 2-34; DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 1-42 and sources referred to there in the footnotes. For an overview on land reform see A van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" (1999) 64 *Koers* 259-294; DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 239-589; G Budlender, J Latsky & T Roux *Juta's New Land Law* (1998); CG van der Merwe & JM Pienaar "Land Reform in South Africa" in Paul Jackson & David C Wilde (eds) *The Reform of Property Law* (1997) 334-380 and sources referred to there in the footnotes.

123) Property may be expropriated for the sake of land reform, and when property is expropriated for that purpose, the amount of compensation will reflect the history of the acquisition and use of the land and the purpose of the expropriation: sec 25(3) read with sec 25(4) FC; the state must take reasonable legislative and other measures, within its available resources, to foster conditions which will enable citizens to

gain access to land on an equitable basis: sec 25(5) FC (legislation enacted to give effect to this provision includes the Less Formal Township Establishment Act 112 of 1991, the Provision of Land and Assistance Act 126 of 1993, the Development Facilitation Act 67 of 1995, the Transformation of Certain Rural Areas Act 94 of 1998 and the Housing Act 107 of 1997); persons and communities whose tenure of land is insecure because of past racially discriminatory laws and practices are entitled to secure tenure as provided for by legislation or to comparable redress, and parliament must enact the necessary legislation to effect this reform: sec 25(6) FC read with sec 25(9) FC (legislation enacted to give effect to this provision includes the Upgrading of Land Tenure Rights Act 112 of 1991, the Land Reform (Labour Tenants) Act 3 of 1996, read with the Land Restitution and Reform Laws Amendment Act 63 of 1997, the Communal Property Associations Act 28 of 1996, the Interim Protection of Informal Land Rights Act 31 of 1996, the Extension of Security of Tenure Act 62 of 1997, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998); persons and communities dispossessed of property after 13 June 1913 as a result of past racially discriminatory laws and practices are entitled to restitution as provided for in legislation or to comparable redress: sec 25(7) FC (the major piece of legislation enacted to give effect to this provision is the Restitution of Land Rights Act 22 of 1994, read with the Land Restitution and Reform Laws Amendment Act 63 of 1997); and no provision of section 25 FC may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racially discrimination, provided that any departure from the provisions of section 25 FC is in accordance with the general limitation provision in section 36(1) FC: sec 25(8) FC.

124) Sec 26(1)-(3).

125) DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 574.

126) I.e. redistribution and tenure reform; see A van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" (1999) 64 *Koers* 259-294 269-270 and ffn 12-15 there.

127) The Land Claims Court took a considerable time to develop a jurisprudential basis from which larger numbers of cases could be judged and disposed of more quickly, although it now appears that the Court's limited time is consumed to a considerable degree by review of ill-considered and inattentive judgments on the Extension of Security of Tenure Act 62 of 1997. See further Willemien du Plessis, Nic Olivier & Juanita Pienaar "Land Issues: An Assessment of the Failures and Successes" (1999) 14 *SAPL* 240-270 528-529, 552; Du Plessis, Olivier & Pienaar "Land Reform – Trends Developing in Case Law" (1999) 14 *SAPL* 528-553 270. The two review articles by Du Plessis, Olivier & Pienaar provide information concerning the numbers of claims received and processed until February 1999 and September 1999 respectively.

128) In the Department of Land Affairs' *White Paper on South African Land Policy* (1997) vi, viii, 9, 10. The controlling constitutional provision is sec 25(7) FC. The controlling law is Restitution of Land Rights Act 22 of 1994, read with the Land Restitution and reform Laws Amendment Act 63 of 1997. See generally T Roux "The Restitution of Land Rights Act" in G Budlender, J Latsky & T Roux *Juta's New Land Law* (1998) chap 3; DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) chap 7.

129) The process is limited in that it does not apply to land rights that were expropriated under the Expropriation Act 63 of 1975 (or its predecessors or any act incorporated under it by reference) and for which just compensation had been paid: sec 121(4) IC.

130) The restitution process does not extend backwards to dispossession that took place prior to 19 June 1913 (the promulgation date of the Black Land Act 1913, commonly considered to be the first major apartheid land law; this date is set

down in sec 121(3) IC (read with sec 121(2)(a) IC) of the original restitution provision in the 1993 Constitution and in sec 2(3) of the subsequent Restitution of Land Rights Act 22 of 1994), or forwards to claims instituted later than 31 December 1998 (sec 2(1)(b) of the Restitution of Land Rights Act 22 of 1994, read with sec 3(1) of the Land Restitution and Reform Laws Amendment Act 63 of 1997; but see T Roux "The Restitution of Land Rights Act" in G Budlender, J Latsky & T Roux *Juta's New Land Law* (1998) 3A-5 fn 1, 3A-22 - 3A-23).

131) I consider restitution of alternative land and payment of additional compensation as part of the normal logic of restitution, and not as something new and different. Sec 25(7) FC already amended the notion of restitution of land rights to a broader concept of alternative relief. The amendment of sec 35 of the Restitution of Land Rights Act 22 of 1994 by sec 25 of the 1997 Amendment Act supports this wider approach. Even the ostensibly new and innovative approach of Gildenhuys J in *Hermanus v Department of Land Affairs*, in re: Erven 3535 and 3536, Goodwood LCC 39/98 http://www.law.wits.ac.za/lcc/2000/39_98.wp, where damages and *solatium* were awarded in addition to further compensation for the original expropriation, does not take the matter further than the normal principles of expropriation; *solatium* was always available for "normal" expropriation cases under the Expropriation Act 63 of 1975.

132) 1998 1 SA 78 (LCC). The Land Claims Court will not agree to such development plans too easily, as it has to be convinced that the development plan is adequate; compare *In Re Kranspoort Community; Re the Farm Kranspoort 48 LS* LCC26/98 http://www.law.wits.ac.za/lcc/2000/2698.wp.

133) Sec 34(6) of the Restitution of Land Rights Act 22 of 1994 allows the Court to make an order that excludes certain established restitution claims, provided such order is in the public interest. In this case the settlement had been concluded with all potential claimants, and was therefore judged to be in the public interest even though certain restitution claims were excluded from it in the sense that those claims could not be upheld in the normal way of restoring the property or alternative property.

134) The Act is discussed separately below.

135) These comments again illustrate and emphasise my criticism of the proposal of DP Visser and T Roux to the effect that the common law institution of compensation for unjust enrichment (known as restitution in Anglo-American law) could be used as a theoretical framework for the restitution process, thereby smuggling a very politically loaded, public process of apology and restoration out of the public realm where it belongs and back into the private, seemingly neutral, business-as-usual mould of private law adjudication and restoration of equilibrium. See DP Visser and T Roux "Giving Back the Country: South Africa's Restitution of Land Rights Act, 1994 in Context" in MR Rwelamira & G Werle (eds) *Confronting Past Injustices: Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany* (1996) 89-111 101ff; and compare AJ van der Walt "Un-Doing Things with Words: The Colonisation of the Public Sphere by Private-Property Discourse" 1998 *Acta Juridica* 235-281 262-265.

136) As defined in the Department of Land Affairs' *White Paper on South African Land Policy* (1997) vi, viii, 9, 10. The current controlling constitutional provision is sec 25(5) FC.

137) At all three levels, i.e. national, provincial and local authorities, in accordance with the principles of cooperative government laid down in Chapter 3 of the 1996 Constitution.

138) Legislation enacted to give effect to this provision includes the Less Formal Township Establishment Act 112 of 1991, the Provision of Land and Assistance Act 126 of 1993, the Development Facilitation Act 67 of 1995, the Transformation of Certain Rural Areas Act 94 of 1998 and the Housing Act 107 of 1997. See DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) chap 8; J Latsky "The Development

Facilitation Act 67 of 1995" in G Budlender, J Latsky & T Roux *Juta's New Land Law* (1998) chap 2.

139) An interesting example is initial ownership provided for in sec 62 of the Development Facilitation Act 67 of 1995. Initial ownership is created and registered even before the land is fully developed, and the Act ensures that this form of ownership is secure to enable the initial owner to obtain financing to purchase the land, thereby reducing the development and holding cost considerably and facilitating speedier and cheaper delivery of residential land. The holder of initial ownership may occupy and use the land, encumber it by a mortgage or personal servitude (but not otherwise), sell the initial ownership (but not full ownership), and acquire full ownership as soon as the development process reaches the stage where the land is fully registrable

140) See DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 449-455.

141) In the Department of Land Affairs' *White Paper on South African Land Policy* (1997) vi, viii, 9, 10 The current controlling constitutional provision sec 25(5) FC, and the most important laws that have been promulgated are the Upgrading of Land Tenure Rights Act 112 of 1991, the Land Reform (Labour Tenants) Act 3 of 1996, read with the Land Restitution and Reform Laws Amendment Act 63 of 1997, the Communal Property Associations Act 28 of 1996, the Interim Protection of Informal Land Rights Act 31 of 1996, the Extension of Security of Tenure Act 62 of 1997, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. See G Budlender, J Latsky & T Roux *Juta's New Land Law* (1998) chaps 4-8 (currently still without commentary on the text of the acts); DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) chap 9.

142) See AJ van der Walt "The Fragmentation of Land Rights" (1992) 431-450.

143) Tenure reform laws tend to either upgrade land rights to full ownership or another kind of recognised common law right, or to simply stabilise the occupation of land by prohibiting eviction or subjecting it to strict due process controls. For more detailed analysis see A van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" (1999) 64 *Koers* 259-294; and compare DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) chap 9 for detail of specific laws.

144) For further discussion of this notion of security thresholds in the hierarchy of common law rights see AJ van der Walt "Towards a Theory of Rights in Property: Exploratory Observations on the Paradigm of Post-Apartheid Property Law" (1995) 10 *SAPL* 298-345; A van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" (1999) 64 *Koers* 259-294.

145) See DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 467-491 for a discussion, and compare the evaluation of A van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" (1999) 64 *Koers* 259-294 284-285.

146) Which abused the system of communal property to pin rural black land rights down in the feudal structure of insecurity and unsuitability for development. The Act provides a structure within which the community can determine the outline and detail of their property association themselves, provided some democratic and transparency requirements are met.

147) The Act provides explicitly that decision making in the property association should be democratic and transparent, and that (e g gender or sex) discrimination is prohibited: ssec 9(1)(a)(ii), 9(1)(b)(i).

148) See A van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" (1999) 64 *Koers* 259-294 284-285.

149) See DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 499-510 for an overview of the relevant provisions in the Extension of Security of

Tenure Act 62 of 1997; 519-524 on the Prevention of Illegal Eviction and Unlawful Occupation of Land act 19 of 1998; and 532-537 on the Land Reform (Labour Tenants) Act 3 of 1996.

150) Sec 8(4): occupiers over 60 years of age and employees or former employees who have occupied the land for at least ten years and who, as a result of ill health, injury or disability, are unable to supply labour, cannot be evicted (in that their right of residence may not be terminated lawfully) simply on the basis of failure to provide labour. See DL Carey Miller with Anne Pope *Land Title in South Africa* (2000) 500-501. The right of residence of spouses and dependants of deceased occupiers is also protected in certain circumstances in that it may not be cancelled for a period of 12 calendar months.

151) OB Lawuyi "Democracy and Resistance in South Africa" (1998) 41 *Development* 49-53 52.

152) OB Lawuyi "Democracy and Resistance in South Africa" (1998) 41 *Development* 49-53 52-53.

153) OB Lawuyi "Democracy and Resistance in South Africa" (1998) 41 *Development* 49-53 49.

154) Njabulo S Ndebele "'Iph' Indlela? Finding our Way into the Future" First Steve Biko Memorial Lecture read on 12 September 2000 in Cape Town, http://www.fm.co.za/00/0915/covopin/ guest-biko1.htm Part 3. An edited version of the paper was published as "We are more than Dumb Victims" *SA Mail & Guardian* 15-21 September 2000 35. A similar sentiment was expressed by Prof. Ndebele in his inaugural lecture as the new rector and vice-chancellor of the University of Cape Town, 21 September 2000, entitled "Reaching Out to the World" http://www.uct.ac.za/general/announce/newvc/ inaugadd.fdp, in the context of the "psychic prison of inherited divisions" of South African universities, where the concept of "'redress' remains locked up in with 'entitlement'".

155) Presented by the South African Human Rights Commission, Sandton, 30 August–2 September 2000, details and copies of some papers delivered at the conference http://www.sahrc.org.za/ national_conference_on_racism.htm. For a slightly different perspective on the race issue see Xolela Mangcu "Race can Help Lay Depraved Past to Rest" *SA Sunday Independent* 15 October 2000 8.

156) (1987) 8 Pink Floyd Music Ltd / EMI Records Ltd. Lyrics by DJ Gilmour & A Moore 1986.

157) Preamble IC.

158) "Postamble" IC.

159) Sec 121-123 IC, sec 25(5)-(8) FC.

160) Sec 8(3) IC.

161) Sec 33 IC, sec 36 FC. See *S v Zuma and Two Others* 1995 4 BCLR 401 (CC) [13]-[18]; *S v Makwanyane and Another* 1995 6 BCLR 665 (CC) [9]; *In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 10 BCLR 1253 (CC) [34].

162) We hardly need to be reminded at this stage that you don't need blood to qualify the game as violent, since legal interpretation takes place in a field of pain and death in any event, as Robert Cover so poignantly and unforgettably reminded us: Cover "Violence and the Word" in Martha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 203-238.

163) During a visit to South Africa in 1997, Jacques Derrida planted this idea in my mind at a public lecture at the University of South Africa. In answer to a question that I cannot remember, he said something to the following effect: But what is a bridge? A bridge spans a divide, a chasm, and without the chasm, it is no bridge at all.

164) Cover "The Supreme Court, 1982 Term B Foreword: Nomos and Narrative" (1983) 97 *Harv LR* 4-68. I refer to the reprinted version in Martha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 95-172 101 ff.

165) Cover at 101, with reference to George Steiner *After Babel* (1975).

166) OB Lawuyi "Democracy and Resistance in South Africa" (1998) 41 *Development* 49-53 52.

167) Provisions such as sec 9(2) FC, concern-

ing affirmative action or substantive remedies to eradicate the legacy of inequality, and the sections of the 1996 FC dealing with socio-economic rights (ssec 25(5)-(9), 26-28) are examples.

168) Gordon (1984) 36 *Stanford LR* 57-125 101. Compare the point Gordon makes in "Paradoxical Property" in John Brewer & Susan Staves (eds) *Early Modern Conceptions of Property* (1996) 95-110 101. Gordon's critical insights are discussed further in the last section of the paper.

169) And in earlier articles, see AJ van der Walt "De Onrechtmatige Bezetting van Leegstaande Woningen en het Eigendomsbegrip: Een Vergelijkende Analyse van het Conflict tussen de Privaat Eigendom van Onroerende Goed en Dakloosheid" (1991) 17 *Recht & Kritiek* 329-359; "Squatting and the Right to Shelter" 1992 *TSAR* 40-55; "The Fragmentation of Land Rights" (1992) 8 *SAJHR* 431-450; "Marginal Notes on Powerful(l) Legends: Critical Perspectives on Property Theory" (1995) 58 *THRHR* 396-420; "Tradition on Trial: A Critical Analysis of the Civil-law Tradition in South African Property Law" (1995) 11 *SAJHR* 169-206; "Towards A Theory of Rights in Property: Exploratory Observations on the Conceptual Paradigm of Post-Apartheid Property Law" (1995) 10 *SAPL* 298-345; "Un-doing Things with Words: The Colonisation of the Public Sphere by Private Property Discourse" 1998 *Acta Juridica* 235-281; "Property Rights and Hierarchies of Power: An Evaluation of Land Reform Policy in South Africa" 1999 *Koers* 259-294; "Modernity, Normality, and Meaning: The Struggle Between Progress and Stability and the Politics of Interpretation" (2000) 11 *Stell LR* 21-49, 226-243.

170) Cover "The Supreme Court, 1982 Term - Foreword: Nomos and Narrative" (1983) 97 *Harv LR* 4-68. I refer to the reprinted version in Martha Minow, Michael Ryan & Austin Sarat (eds) *Narrative, Violence and the Law: The Essays of Robert Cover* (1993) 95-172 103-144.

171) At 109.

172) 1994 (4) SA 715 (T).

173) O'Regan J was involved in three of the four judgments; Sachs J in two; Goldstone and Mokgoro JJ in one each. In Hugo, Sachs was the only CC judge who thought that nobody else was detrimentally affected by the retention of a historical differentiation although it implied that residents of white townships were prosecuted for outstanding municipal charges.

174) I will not discuss all these cases here. See the minority judgments of O'Regan J and Mokgoro J in *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) (the fairness or justifiability of giving an advantage relating to child-rearing to female prisoners but not to males, in view of the relatively small disadvantage this involves for males and the benefit it gives to women, even though the differentiation tends to entrench or confirm existing gender stereotypes and inequality); the minority judgment of Sachs J in *Pretoria City Council v Walker* 1998 2 SA 363 (CC) (the fairness of justifiability of differentiation in rates levied against residents of advantaged and disadvantaged areas, even though the areas were still largely white and black respectively); the minority judgment of Goldstone, O'Regan and Sachs JJ in *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) (the constitutional validity and even obligation to uphold remnants of racially discriminatory land laws from the apartheid era for a limited time in view of the benefits it still offers to previously disadvantaged land users; see the discussion in the text below); and the judgment for the Court of O'Regan J in *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) (the fairness and justifiability of retaining a race-related school subsidy for a limited period, even though it benefits white children unfairly, because the procedures for amending the subsidy structures had not been completed or followed yet; see the discussion in the text below).

175) 2000 (4) BCLR 347 (CC).
176) Issued in terms of the Native Administration Act 38 of 1927: *Government Gazette* 373 16 November 1962.
177) Established by the Native Trust and Land Act 18 of 1936, and one of the infamous "land acts" that effectively made it impossible for the black majority to own land in some 87% of the country; see the second section of the paper above.
178) The tenure could be cancelled by the township manager: see Regulation 23(1)(a)(iv) of the Proclamation.
179) Chapter 9 of the Proclamation.
180) In the Introduction (paragraphs there not numbered).
181) At [78]-[83].
182) At [85].
183) *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) [1].
184) *Pretoria City Council v Walker* 1998 2 SA 363 (CC).
185) *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC) [1].
186) *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC).
187) *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC).
188) *DVB Behuising* at [85].
189) J Nedelsky "Reconceiving Rights as Relationship" (1993) 1 *Rev Const Stud* 1-26 16.
190) See further in this respect JWG van der Walt "The Critique of Subjectivism and its Implications for Property Law – Towards a Deconstructive Republican Theory of Property" in GE van Maanen & AJ van der Walt (eds) *Property Law on the Threshold of the 21st Century* (1996) 115-159, on which I rely quite heavily in the following section.
191) JWG van der Walt "The Critique of Subjectivism and its Implications for Property Law – Towards a Deconstructive Republican Theory of Property" in GE van Maanen & AJ van der Walt (eds) *Property Law on the Threshold of the 21st Century* (1996) 115-159 148-153; with reference to Frank Michelman "Law's Republic" (1988) 97 *Yale LJ* 1493-1537; "Justification (and Justifiability) of Law in a Contradictory World" in JR Pennock & JW Chapman (eds) *Nomos XXVIII: Justification* (1986) 71-99. See further in the same vein Frank I Michelman "The Supreme Court 1985 Term: Traces of Self-Government" (1986) 100 *Harv LR* 4-77; "Constitutional Authorship by the People" (1999) 74 *Notre Dame LR* 1605-1629; "Property as a Constitutional Right" (1981) 38 *Washington & Lee LR* 1097-1114; "Possession vs. Distribution in the Constitutional Idea of Property" (1987) 72 *Iowa LR* 1319-1350; "Human Rights and the Limits of Constitutional Theory" (2000) 13 *Ratio Iuris* 63-76; Margaret Jane Radin & Frank Michelman "Pragmatist and Poststructuralist Critical Legal Practice" (1993) 39 *Univ Penn LR* 1019-1058.
192) A topic that Johan van der Walt did not consider separately and which I would have loved to consider here if time and space permitted, is Michelman's writings on socio-economic rights. For the moment I will assume that Johan van der Walt's analysis reflects those sufficiently for present purposes. See Frank Michelman "Welfare Rights in a Constitutional Democracy" 1979 *Wash Univ LJ* 659; "In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice" (1973) 121 *Univ Penn LR* 962; "The Advent of a Right to Housing: A Current Appraisal" (1990) 207 *Harv Civil Liberties LR* 207-216.
193) JWG van der Walt at 153-155.
194) At 155.
195) At 157.
196) The phrase was coined by Gerrit van Maanen in an article on a theme that sadly lost its urgency in Dutch legal literature, namely the legal relationship between individual ownership and the phenomenon of squatting or *kraken*: GE van Maanen "Balanceren op de Grens van

de Rechtsorde" (1982) 8 *Recht en Kritiek* 467-471; compare AJ van der Walt "De Onrechtmatige Bezetting van Leegstaande Woningen en het Eigendomsbegrip" (1991) 17 *Recht & Kritiek* 329-359, where Van Maanen's notion was analysed in the context of squatting and its relationship to the dominant code of individual ownership in South Africa, the Netherlands and Germany.

197) Joseph William Singer *The Edges of the Field – Lessons on the Obligations of Ownership* (2000).
198) At 3.
199) At 5, 41-42.
200) At 5, chaps 3 & 4.
201) At 5, see further 84-93.
202) *Ex parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area and Another* 1998 1 SA 78 (LCC), where the Land Claims Court ratified a settlement agreement that accommodated restitution claims within an urban development plan for the township in question. See the previous section above.
203) Specifically the practice of making restitution awards to communities that have been dispossessed of land in terms of the tenure framework set out in the Communal Property Associations Act 28 of 1996.
204) The Transformation of Certain Rural Areas Act 94 of 1998, which allows for greater access to land in the rural areas within the structures of the Communal Property Associations Act 28 of 1996.
205) The Communal Property Associations Act 28 of 1996 creates possibilities for communities to establish their own communal property regime to suit their unique circumstances and requirements, without the baggage of apartheid land law or of tribal law; while the Extension of Security of Tenure Act 62 of 1997 stabilises existing land tenure against evictions by making special provision for vulnerable occupiers of land such as the elderly and the sick and disabled.
206) This is not strictly true; weakness and vulnerability were very likely important factors in the social construction of property rights, at least during certain phases (e.g. medieval law) of the development of western law, but this is a topic for another paper.
207) *Government of the Republic of South Africa and Others v Grootboom and Others* CCT 11/00 http://www. concourt.gov.za/judgments/2000/grootboom1.fdp.
208) According to the decision of the Cape High Court in *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) 281A.
209) A quarter of the households had no income at all, more than two-thirds of them earned less than R500 per month (which is roughly one-third of the minimum living wage). All households lived in shacks, without any water supply or refuse removal or sewage facilities. About 5% of households had access to electricity. The whole settlement was in an area that is partly waterlogged in the rainy season, and was situated near a major road. See *Government of the Republic of South Africa and Others v Grootboom and Others* CCT 11/00 http://www.concourt.gov.za/judgments/2000/grootboom1.fdp [7].
210) And have been for as long as seven years.
211) The question whether the eviction order complied with the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 was never raised or settled; see *Government of the Republic of South Africa and Others v Grootboom and Others* CCT 11/00 http://www.concourt.gov.za/judgments/ 2000/grootboom1.fdp [10].
212) *Government of the Republic of South Africa and Others v Grootboom and Others* CCT 11/00 http://www.concourt.gov.za/judgments/ 2000/grootboom1.fdp [10].
213) Per Davis J, Comrie J concurring; reported as *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) 281A.
214) See *Government of the Republic of South Africa and Others v Grootboom and Others* CCT 11/00 http://www.concourt.gov.za/judgments/ 2000/grootboom1.fdp [13]-[16] for a summary of the case in the Cape High Court.

215) At [1]-[6].
216) Ssec 26 FC (housing) and 28(1)(c) FC (childrens' basic right to shelter).
217) *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) [78].
218) *Government of the Republic of South Africa and Others v Grootboom and Others* CCT 11/00 http://www.concourt.gov.za/judgments/ 2000/grootboom1.fdp [20].
219) At [71].
220) At [73].
221) At [77]-[79]. Sec 28(1) FC reads: "Every child has the right – [...] (c) to basic nutrition, shelter, basic health care services and social services."
222) At [24]-[25].
223) Deriving from a 1990 report of the United Nations Committee on Economic, Social and Cultural Rights with regard to the interpretation and application of the International Covenant on Economic, Social and Cultural Rights, article 11.1 of which recognises the right to housing. See the Constitutional Court's *Grootboom* decision at [26]-[33].
224) At [34]-[46].
225) Sec 26(1) FC reads: "Everyone has the right to access to adequate housing."
226) Sec 26(2) FC reads: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."
227) At [34].
228) Sec 26(3) FC reads: "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."
229) At [33].
230) At all three levels, national, provincial and local. Housing policy and legislation and programmes are coordinated at these three levels according to the constitutional obligation with regard to cooperative government (chap 3 FC); see the decision at [39], [47]-[51].
231) At [41]. Yacoob J emphasises that the question whether the measures are reasonable does not involve enquiry "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent."
232) At [42].
233) At [43].
234) At [53]: "What has been done in execution of this programme is a major achievement."
235) At [52]. The reference is to the definition of housing development in the Housing Act 107 of 1997, which is aimed at providing permanent residential structures with secure tenure, ensuring internal and external privacy and to provide adequate protection against the elements, in a properly planned housing development with access to economic opportunities and to health, educational and social amenities. See further at [51].
236) At [66].
237) Of course, the very imposition of a duty to redesign the housing policy so as to include a sizeable percentage of provision for crisis relief means that the available funds for "normal" housing provision are reduced, thereby possibly increasing the potential for crisis requirements arising.
238) Although Yacoob J makes it clear in *Grootboom* at [41], [66] that the Court will not prescribe policy to the legislature and the executive, the difference between his decisions in this case and in *Jooste v Score Supermarkets Trading (Pty) Ltd* 1999 2 SA 1 (CC) [12], [17], where the "invitation ... to make a policy choice under the guise of rationality review ... was firmly declined", is striking. In Jooste the Court had to decide upon the rationality of an economic policy choice in view of the equality guarantee in sec 9(1) FC.
239) 1998 1 SA 765 (CC). Compare further *Van Biljon v Minister of Correctional Services* 1997 4 SA 441 (CC).
240) Sec 27(1) FC provides: "Everyone has the right to have access to – [...] (a) health care services, ...". Sec 27(2) FC provides: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

240) Sec 27(3) FC provides: "No one may be refused emergency medical treatment."

242) See the decision at [90]-[[92]. The Court could perhaps afford to make this decision, and thereby effectively depriving the Grootboom community of the relief they obtained in the Cape High Court even though the government's housing policy and the eviction action were held to be inadequate, because temporary relief had already been obtained by the Grootboom community, on the strength of the Cape High Court decision, in an urgent application to the Constitutional Court to force the government to act on the order to provide the community with temporary relief in the form of water, sanitation and financial assistance to improve their shacks. See *Grootboom and Others v Government of the Republic of South Africa and Others* CCT 38/00 (21 September 2000) http://www.concourt.gov.za/judgments/ 2000/grootboom.fdp

243) In an e-mail discussion of the case on 5 October 2000, Frank Michelman alerted me to the question whether the decision does not smuggle the notion of a "minimum core obligation" with regard to the provision of access to housing in the back door after having thrown it out of the front door.

244) There are indications that the position of the very poor and the weakest in the community might enjoy more attention from government in future; see Howard Barrell & Jaspreet Kindra "Battle for the Poor Vote" *SA Mail & Guardian* 13-19 October 2000 4; Bobby Jordan "Shock Report on Starvation in SA Spurs Call for Food Aid" *SA Sunday Times* 15 October 2000 2.

The Registration of Fragmented Use-Rights as a Development Tool in Rural Areas

Gerrit Pienaar

INTRODUCTION

Land tenure in post-apartheid South Africa is a contentious issue. For a variety of reasons there are considerable differences of opinion about the rights to be recognised and the ways in which these rights should be protected and secured. The most important development purpose of security of tenure is that the rights should be used as collateral for private development funds and loans. That is only possible where land rights are individualised. But it is a known fact that individualised land rights do not necessarily have a positive economic effect in Africa. There are also indications that some indigenous people do not want security of tenure outside their tribal structures and customs. Therefore, it is a question as to how individualised rights could be obtained within the system of communal property.

The different stakeholders are the state, landowners (especially of farmland), financial institutions, occupiers in terms of the new land tenure legislation, occupiers with informal land rights based on the permit system (PTOs) issued by the former government or granted by tribal chiefs according to their version of communal property in rural areas, and occupiers of land (with or without permission) in informal settlements. Although necessary, it will clearly be an extremely difficult task to reform the land tenure system in South Africa in such a way that all, or at least most of, the above-mentioned stakeholders will be reasonably satisfied and the land system will offer security of tenure.

As is the case in many transitional political situations, there are also differences of opinion regarding the role and definition of ownership and other rights in property.[1] An additional factor to keep in mind, is that the existing deeds registration system in South Africa is generally perceived as accurate and reliable, offering to a large extent security of title in the case of rights which can be registered (ownership and limited real rights to immovable property).[2] But it is also at present slow, cumbersome and expensive and does not provide for the registration of all the different land tenure rights that are statutorily recognised or envisaged.[3]

Thus, the key issues to be decided are firstly, what the nature and contents of the rights in immovable property should be and secondly, what means or methods should be used to ensure security of tenure within the basic (limited) resources available to the government.

1. STATUTORY MEASURES

The Constitution of the Republic of South Africa Act 108 of 1996 provides in section 25(1) for the acknowledgment of different rights in property.[4] It is clear that not only ownership, but also other rights in immovable property are recognised and protected in terms of the property clause.[5] Furthermore, in terms of section 25(6) the state has the obligation to secure by means of legislation, other forms of land tenure which are insecure as a result of the apartheid legislation and policies (section 25(9)).

The Department of Land Affairs started with an ambitious programme of land reform by means of restitution, redistribution and tenure reforms that has already resulted in several new acts (laws) being promulgated. For instance, the Restitution of Land Rights Act 22 of 1994

(regarding the restitution of land to persons dispossessed of land after 1913 as a result of racially discriminatory legislation), the Development Facilitation Act 67 of 1995 (regarding quicker and cheaper planning and development methods), the Land Reform (Labour Tenants) Act 3 of 1996 (regarding the security of housing, grazing and cultivating rights of labour tenants), the Communal Property Associations Act 28 of 1996 (regarding the creation of associations to own, control and deal with communal or common property), the Interim Protection of Informal Land Rights Act 31 of 1996 (regarding the interim protection of the rights of people in rural areas), the Extension of Security of Tenure Act 62 of 1997 (regarding the protection of labourers other than labour tenants in rural areas) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (regarding the measures to protect vulnerable occupiers and evict squatters).[6]

The policy of the Department of Land Affairs is mainly stated in the White Paper on Reconstruction and Development of 1994[7] and the White Paper on South African Land Policy of 1997.[8] In the former document the land policy has been defined as redistribution of land, tenure reform and restitution of land, and these aspects were formally sanctioned in the Constitution 108 of 1996.[9] The White Paper on South African Land Policy reconfirms these policy objects and states the following principles regarding informal land tenure in rural areas:

- It is necessary to recognise the underlying land rights that belong to individuals and groups (e.g. tribes) on land which is nominally state owned.
- These rights should vest in the people who are exercising the rights and not in institutions such as tribal or local authorities. In some cases, the underlying rights belong to groups of people and in other cases to individuals or families. Where the rights to be confirmed exist on a group basis, the right holders must have a choice about the system of land administration which will manage their rights on a day-to-day basis.
- In situations of group-held land rights, the basic human rights of all members must be protected, including the right to democratic decision-making processes and equality. Government must have access to members of group-held systems in order to ascertain their views and wishes in respect of proposed development projects and other matters pertaining to their land rights.
- Systems of land administration that are popular and functional should continue to operate. They provide an important asset, given the breakdown of land administration in many rural areas. The aim is not to destroy or harm viable and representative institutions. Popular and democratic tribal systems should not be threatened by the proposed measures.[10]

However, the following problems which are caused by the lack of legally enforceable rights in property, must be addressed:

- Vulnerability to interference with or confiscation of rights whether by the state or others.
- Difficulty in securing housing subsidies and other development finance.
- No administrative support for the system of land rights which operates in practice, which in turn contributes to internal breakdowns and administrative chaos giving rise to abuses of power by officials, some chiefs and powerful elites; the position of the poor and the vulnerable is exacerbated by the lack of legal certainty and administrative protection.
- Unscrupulous individuals taking advantage of the lack of enforceable land rights to bring others on to land in exchange for money and to bolster their personal power.[11]

These problems do not only relate to the nature of the land tenure rights, but also to the security offered by these rights (a registration problem) and the system wherein these rights are recognised and enforced (an administration problem). Therefore, it is not sufficient only to analyse the nature of the different land tenure rights, but the security of tenure and the administrative environment wherein these rights are functioning should also be examined carefully.

2. NATURE OF RIGHTS

Previously, rights in immovable property were divided into ownership and registered limited real rights, which were registered in a deeds registry in accordance with section 63(1) of the Deeds Registries Act 47 of 1937, and other forms of land tenure which were not registrable in a deeds registry.[12] The former rights were strictly enforced and protected by means of real actions, could only be alienated by registration

in the deeds registry according to the principles of the derivative acquisition of real rights[13] and were considered as absolute in nature. The latter, on the other hand, were considered as "weak" rights, or in most instances not even as rights, but as subservient, permit-based entitlements to occupy or use land which was owned by the state.[14] One of the main objectives of the Department of Land Affairs is to eradicate the distinction between ownership and registrable limited real rights (the absolute or "strong" rights) and other forms of land tenure (the "weak" rights).[15]

According to this scheme, Van der Walt[16] distinguishes between an *ownership orientation model* and a *fragmented use-rights orientation model*. In the former, ownership qualifies as the strongest right in the hierarchy of rights, where title and use are united, security depends on title and title is absolute in the sense that it has no natural ceiling and tends to resist regulation. In the *fragmented use-rights orientation model*, there is no hierarchy of rights; title and use are separated, and security is based on legislation. Van der Walt prefers the model of fragmented use-rights, as such rights tend to absorb regulation, and have a natural ceiling of restrictions without any inherent power relations. Tempting as this methodical exposition may sound, some practical problems exist in the case of both these models.

2.1 Ownership orientation model

According to this model, a hierarchy of rights exists with ownership at the top and all other kinds of rights are regarded as inferior to ownership due to their lower ranking in this hierarchy.[17] Apartheid land rights were based on the strength and security of ownership and registrable limited real rights against the insecurity of weaker use-rights that were often not registrable and in most cases not even acknowledged as rights, but as entitlements based on permits (PTO-system).[18] The deeds registration system in South Africa has strengthened this notion of ownership as an absolute right.[19]

According to Roman-Dutch principles, however, ownership is not always superior to other rights. The *huur gaat voor koop* rule and the registration of mortgages are often cited as examples of rights that enjoy preferential protection to ownership in certain circumstances. These limited real rights are deemed to be temporary in nature, though, giving rise to the characteristic of elasticity of ownership, i.e. that ownership is basically unrestricted and that it will regain its superior quality as soon as these temporary and limited real rights fall away. Previously, this notion of ownership as an absolute and individual right was used to resist regulation or limitations on ownership, and the social responsibilities of a landowner were to a large extent ignored. The debate about the individuality and absoluteness of ownership was not only a feature of South Africa's apartheid policy, but has raged (and is still raging) in many countries,[20] notably in the fields of environmental protection and planning law. It is also not only a bone of contention in civil-law countries, but also in countries with a common law property tradition.

The mere fact that the civil-law concept of ownership was distorted by apartheid laws and policies does not mean that ownership should be forever tainted. There has already been a significant redefinition of ownership in South Africa and the notion that ownership is individualistic and absolute has been convincingly refuted.[21] Ownership is nowadays defined in accordance with its social context, including the responsibilities of a landowner towards society at large. These social responsibilities are not only towards neighbours and other entitled persons in a private law sense but, as an inherent characteristic of ownership, such responsibilities should be exercised in the public interest. Therefore, ownership can and should be limited and regulated by legislation and other public law instruments. Economic, social and political considerations in South Africa have led to the concept of ownership being radically amended and limited to provide for planning, development and nature conservation measures. This notion is implicit in section 25(1) of the Constitution 108 of 1996, whereby rights in property on a general basis and not within a hierarchical structure are acknowledged and safeguarded. These rights have also been acknowledged by case law[22] and the new land tenure legislation.

The challenge will be to contextualise ownership as one of a diverse range of land tenure rights, not superior to other rights, but necessary or useful in certain circumstances. The limitations on ownership should not be temporary and exceptional, but ownership, just as

other land tenure rights, should inherently be limited to the benefit of society at large and by other kinds of land tenure rights. In such a description of ownership there should not be any place for "traditional" characteristics such as elasticity, individuality or absoluteness. By the regulation of ownership, a natural ceiling can be placed on ownership with no underlying power structure indicating a hierarchy of rights.

One of the main problems in placing ownership on an equal footing with other land tenure rights is that ownership is better protected than most other rights. This feature is mainly ensured by the application of the publicity principle in that ownership of immovable property can normally only be acquired and transferred by means of registration in terms of section 63(1) of the Deeds Registries Act 47 of 1937. Ownership and other registrable real rights are protected because of the existence of a trustworthy and accurate record of such rights. These registered rights ensure that the titleholder can use the rights as security to obtain financial assistance and that the economic value of the property can be fully exploited.

2.2 Fragmented use-rights model

There is merit in Van der Walt's claim that the fragmented use-rights orientation seems to be the most logical model to choose in a country such as South Africa with a property situation where there are so many different kinds of land-use rights to be reckoned with. All such rights should be strong and valuable because they must suit specific needs and requirements, and not because they assume a privileged position in an abstract hierarchy of stronger and weaker rights.[23] According to this model, the threshold for any use-right should be statutory recognition, and not necessarily any form of title. Use and title should therefore be separated and security afforded only by means of legislation.

In the case of the fragmented use-rights orientation, the main problem lies in the fact that title and use should be separated and that security would be offered by legislation only. Examples of such legislation are the Land Reform (Labour Tenants) Act 3 of 1996, the Interim Protection of Land Rights Act 31 of 1996 and the Extension of Security of Tenure Act 62 of 1997. In all these acts the use-rights are generally acknowledged and safeguarded by legislation but such rights can in individual cases only be protected by means of a court order, arbitration or mediation, which can be time consuming and, in certain instances, expensive to obtain. The property under consideration will, for all practical purposes, be taken out of the property market for the entire time of the dispute. Although the rights of occupiers are theoretically and in general acknowledged by legislation, there is no security of tenure in individual cases where the rights are in dispute until the dispute has finally been settled. The objectives of land tenure reform were, *inter alia*, to provide security of tenure for all; to reduce poverty and promote economic growth through land reform and to establish a system of land management that would support sustainable land use patterns and rapid land release for development.[24] These objectives can hardly be achieved in circumstances where there is a dispute over the legitimacy of a claim or a right in terms of the above-mentioned legislation, although it offers temporary security of occupation for the occupier.[25]

The main cause of this insecurity is that rights conferred in general by legislation do not comply with the requirements of the publicity principle[26] and are therefore uncertain until, in individual cases, such rights are confirmed by a court order, arbitration, mediation or agreement. To obtain security of use or occupation, some kind of individualisation has to take place. Legislation alone is not sufficient to obtain security of tenure, but has to be confirmed by the additional registration of title. To separate title and use often leads to insecure tenure. It would offer much more security to labour tenants or any other kind of occupiers if their use-rights were not only recognised by legislation, but if some or other form of registration also took place so that title and use were not separated. In a system where security of tenure depends on registration, there may be a dispute initially, but the problem will not perpetuate itself in the way it may happen if security depended on legislation only. The importance of the rights-based strategy of the government is not in the promulgation of the legislation, but in making the rights a reality for people, especially in rural areas.[27] To do that, the rights must become concretised and individualised by an applicable system of governance.

Another practical problem is that it seems

highly improbable that financial institutions or private development agencies would be willing to advance development loans against the security of a use-right awarded by general legislation only, as such right might be used repeatedly in dispute in future. The only funding for development projects would then come from the state, which is a limiting factor considering the limited financial resources of the state. This would probably cause fragmented use-rights to remain weak or second class rights. In countries where the main sources of development financing are the state and state agencies, an individualised title is not as important as in the case where the private sector has the financial means and know-how to contribute significantly to development programmes on the condition that security for the repayment of development money is furnished.[28] To facilitate and encourage sustainable development in rural areas, financed not only by the state, but also by the private sector, some kind of individualisation of use-rights has to take place to ensure that a secure title can be obtained as security for development financing.

It is a notable feature of section 25(1) of the Constitution that no distinction is made for the protection of different rights in property. Rather than taking away the security offered by registration, I am of the opinion that the advantages of registration according to the publicity principle should be extended to other forms of land tenure. Thus it will improve the security of land tenure rights if the security offered by legislation is extended by the additional security of a registered title. The viability of a system of title-based security depends, however, on the ability of the South African deeds registration system to be adapted to a system where all land tenure rights can be registered in an affordable way.

2.3 Fragmented use-rights based on title

One of the most important principles regarding immovable property is that "title" does not necessarily mean "ownership"[29] and that different people can have different forms of title regarding the same immovable property at the same time.[30] This can be illustrated by the fact that a usufructuary can obtain title simultaneously with the owner regarding the same property. Other examples are the titles of registered leaseholders and the holders of mineral rights. Use-rights can thus be fragmented to the extent that different people exercise different use-rights in terms of different titles over the same property. This principle is not prohibited by the Deeds Registries Act 47 of 1937.

Furthermore, it has always been recognised that in the case of more than one title existing simultaneously over the same property, ownership does not in all circumstances confer a preferential title to an owner. The principle that mineral rights can be permanently separated from ownership of the property, and that the holder of the mineral rights enjoys preferential protection in the event of an irreconcilable clash of interests with the owner, illustrates this point.[31] The preference of a holder of mineral rights was brought about by legislation, namely the Minerals Act 50 of 1991 and its predecessors.[32] However, it is possible to enact similar preferences by legislation.

The answer to the problem of obtaining parity between ownership and other land tenure rights does not lie in degrading ownership, but in upgrading the different forms of land tenure rights while maintaining a realistic view of the inherently limited nature of ownership.[33] To obtain a realistic view of ownership, a balance should be maintained between the notion that ownership is an absolute, individualistic and inherently unlimited right, on the one hand, and the view that private ownership is the cause of poverty and class distinction and should therefore be regarded with suspicion.[34] As soon as it is accepted that ownership is not a right characterised by individuality, absoluteness and elasticity, but that it is inherently limited to the benefit of the society and by other rights and that no hierarchy of rights or powers exists, it follows logically that ownership cannot be considered a preferential right or a stronger right than other use-rights.

The best way to upgrade other use-rights to enjoy the same protection as offered for ownership, is to devise the same kind of publicity for use-rights as for ownership, namely publication by registration. In such case, the security of the use-right does not only lie in legislation, but also in a registered title. The viability of the registration of the different use-rights will be discussed in 3. below.

As no hierarchy of rights or inherent power relations should exist, the criteria to determine which use-right should enjoy preferential pro-

tection are determined by the circumstances of the specific case. It can be determined by certain existing legal norms like *prior in tempore potior in iure*, an existing registered title or the preference of other rights to ownership (e.g. the rights of mineral holders and lessees), but in other circumstances these preferences will have to be introduced by legislation. Thus, it should be an inherent characteristic of all the use-rights that they can be regulated and restricted. To ensure that parity is achieved and retained, the administrative system wherein these use-rights are exercised and the restrictions applied, is of utmost importance. This will be discussed in 4. below.

The view of fragmented use-rights based on title as the central policy on land tenure in South Africa, can be summarised as follows:

- Different use-rights (titles), including ownership, simultaneously over one property.
- No hierarchy of rights.
- Security by legislation and registration.
- Use and title united.
- Statutory security threshold.
- Natural ceiling of restrictions by regulation.
- No inherent power relations.

3. REGISTRATION OF USE-RIGHTS

At present, the South African deeds registration system is regarded, not only in South Africa but also by foreign jurists, as an accurate and reliable system of the registration of title by way of deeds.

However, it is characterised by its exclusivity – a relatively low volume of transactions is being registered as a result of transactions between a relatively small part of the population. It is therefore easy to maintain a procedure of thorough examination of deeds by deeds registry personnel, resulting in the maintenance of the accuracy and reliability of the system.[35] But a large part of the population – notably people in informal urban settlements and in rural areas where a system of communal property still prevails – is excluded from the deeds registration system. The reason for this is that the land in question has either not been properly surveyed or that the individualisation of land-use rights in communal property is not at present possible.

In the White Paper on South African Land Policy,[36] a part of the envisaged land policy has been set aside for development of the registration system to make the registration of informal land rights in urban and rural areas possible. Several needs are identified in this regard:

- A speedy, reliable, and cost-effective system of demarcating land and recording the identity of those who are entitled to occupy it, followed by rapid release of land to meet the pressing needs in urban areas.
- A reliable and cost-effective system of recording rights to land which should be established in the process of tenure reform.
- A reliable and cost-effective system of recording the rights of those who are entitled to use and occupy land which is held on a communal basis.

The following strategy is recommended in the White Paper. The:

- establishment and maintenance of a comprehensive land information system which would include alphanumeric as well as spatial data on land-related matters
- collection and maintenance of cadastral and topographic information
- maintenance and extension of the deeds registration system
- establishment of norms and standards to structure and manage the land information process
- compilation of a comprehensive state land register to improve the management of state land.

To understand any proposed amendments to the registration system, it is necessary to describe the characteristics of the present system. If the accuracy and reliability of the present registration system is to be maintained, the registration system shall have to be adapted to provide for the increase in registration transactions of the diverse fragmented use-rights.

3.1 Negative system

In South Africa, a negative registration system has been used since the reception of the deeds registration system from Dutch law in the 17th century.[37] Deeds (documents), whereby title is being transferred, are registered in the nine deeds registries without the correctness of the registers, the registered data or the content of such deeds being guaranteed by the state or the personnel of the deeds registry. The reason for this lies mainly in the fact that it is an established principle of material property law to distinguish between the original and derivative acquisition of ownership and limited real rights

to immovable property. In the latter case, registration only takes place after a written deed of alienation has been signed by both parties to the transaction and a deed of transfer (title deed) has been registered.[38] Where ownership or limited real rights pass from one person to another as a result of original acquisition, it happens without the cooperation of the previous owner or entitled person, e.g. in the case of prescription, expropriation, accession or marriage in community of property. In these instances no compulsory registration takes place and the information in the deeds registry is not always rectified immediately to indicate what the factual position is.[39]

In addition to this, in the case of the derivative acquisition of real rights, the abstract system of transfer of real rights is followed. This entails that the subjective intention of the owner or entitled person to transfer ownership or real rights, as embodied in the real agreement, is a requirement for the actual transfer of such rights.[40] Therefore, as the consent to the transfer of such right is a requirement, any wrong or mistaken registration in the deeds registry without the owner's or entitled person's consent does not result in the transfer of ownership or a limited real right.[41] It is thus not only the act of registration in the registry, but also the subjective intention of the transferor as embodied in the real agreement, which causes the rights to be legally transferred.[42]

Normally such a negative deeds registration system would not be very accurate. The South African system differs in this respect in that several requirements that are normally regarded as part of the title registration procedure, are incorporated to maintain the accuracy and reliability of the registered information. Examples of these requirements are the duty of the deeds registry personnel to investigate the deeds documents and to establish whether the provisions of the Deeds Registries Act 47 of 1937 regarding the transfer of title have been complied with;[43] registration only takes place when the documents and the transactions have complied with all the legal and statutory provisions for the transfer of real rights;[44] the property description in any deed must be in accordance with the cadastral map kept by the surveyor-general;[45] the registration of transactions has to follow the sequence of preceding legal acts[46] and all simultaneous transactions are linked and are therefore registered simultaneously.[47] The registers kept in the various deeds registries are all fully computerised.

3.2 Liability of deeds office personnel and conveyancers

The state or the deeds office personnel do not guarantee the correctness of the registered data but, in terms of the Deeds Registries Act, they are liable to compensate all damages suffered as a result of their negligence or failure to comply with the statutory registration requirements.[48] The investigative duties of the deeds registries, aiming at keeping the registration system accurate and reliable, is the main reason for the South African procedure being relatively slow, cumbersome and expensive.[49] Furthermore, many duties are duplicated because the sellers' conveyancers have the duty to investigate and certify to the correctness of the names and identities of the parties, their capacities to transfer or accept property rights, the capacities of the representatives of incapable or legal persons and the validity of the transfer documents and concomitant acts by the parties.[50]

The Department of Land Affairs, and more particularly the Chief Registrar of Deeds, is in the process of introducing a fully computerised, partly privatised electronic deeds registration system, more or less comparable to the Dutch registration system. This electronic system should be in operation by 2002.[51] It is envisaged that this development will enable conveyancers, who are linked to the central registration system by computer, to make use of paperless lodgings and electronic verification of information for the transfer of real rights together with simultaneous electronic transactions such as the cancellation of existing bonds and the registration of new bonds without the necessity of the full investigative procedure being followed by the deeds registry personnel. When such a system will be fully implemented, private conveyancers will be liable to compensate all damages in the case of negligence or failure to comply with the statutory requirements.

The importance of this development is that the nine deeds registries, which will still form the central registration system, will to a large extent be decentralised. The main responsibility to maintain the accuracy of the registers will still rest on the deeds registry personnel, but

private conveyancers will have the responsibility to maintain the accuracy of the transfer of real rights, and therefore the accuracy of title. This will no doubt speed up the time of registration, improve the ability to handle an increased volume of transactions, prevent the duplication of functions between conveyancers and deeds registry personnel and may perhaps result in lowering the registration costs.[52] Private conveyancers are already obliged to undertake a long list of responsibilities prescribed by the Deeds Registries Act[53] and there is no reason to believe that the privatisation of the duties of the deeds office personnel will cause the accuracy of the registration system to deteriorate.[54] This new and fully computerised registration system also opens the possibility to adapt, in several ways, to allow for the registration of some of the statutory fragmented use-rights which are presently not registrable.

3.3 Fragmented use-rights in urban settlements

The problem of registration of fragmented use-rights will not often surface in the case of formal or informal settlements in urban areas where the land has been properly surveyed or where the land is in the process of being surveyed and developed. The Development Facilitation Act 67 of 1995 provides for the registration or upgrading (where necessary) of existing land rights, or for the registration of initial ownership where the process of development and land surveying has not been finalised, but is envisaged and possible.[55]

Section 62 provides for the registration of initial ownership before the land is fully developed by the opening of a register in a deeds registry for the purposes of such registration and a deed of initial ownership being registered and issued. The registered initial ownership may be encumbered with a mortgage or personal servitude and may be alienated as initial ownership, but not as full ownership. It becomes full ownership as soon as the land surveying and development requirements have been fulfilled.

The main purpose for this measure is that the owner of initial ownership is able to obtain financial assistance at a much earlier stage of the development process by means of a mortgage. This normally results in the development costs being lower because the developer does not have to carry the burden of the development costs for such a long time.[56]

In informal urban settlements where it is not possible to survey or develop the land properly as a result of overcrowding (the notorious squatter camps at the fringes of cities and towns), it is problematic to grant any use-right based on title to the inhabitants or occupiers of such land. As a result of overcrowding it is impossible to survey and develop the land to such an extent that any suitable use-right based on title can be registered. The use-rights of people in these squatter camps are at this stage unprotected,[57] except for the statutory right of temporary occupation which is being protected in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

In some instances, the nature of a squatter camp makes it possible that land surveying and development may take place at a later stage, and in some instances an informal record of use-rights has been developed,[58] but these are exceptional cases. In the case of overcrowded informal settlements on land belonging to the state or local governments,[59] there are, in addition to the above-mentioned protection, three solutions to the problem where normal development and land survey requirements cannot be complied with, namely:

(i) to establish and maintain with the cooperation of the occupants an informal record of the land-use at municipal or local government level until it is possible to obtain agreements and settlements regarding existing or preferential rights, and thereafter to relocate the other (rightless) inhabitants in an area where proper development has taken place and where they can obtain proper title;[60] or
(ii) to establish with the cooperation of the occupants a communal property association in terms of the Communal Property Associations Act 28 of 1996, which association protects the informal rights to occupy the houses and structures of its members and endeavours to obtain security of title by registration of the whole or part of the property; or
(iii) if (i) or (ii) is impossible, the only solution will be for the occupants to be relocated in an area where it is possible to grant formal use-rights, either in the form of ownership, initial ownership or another suitable title.

All the above-mentioned solutions are temporary in nature, as security of tenure can only be obtained permanently by way of a form of a registered title. It is possible to protect the right to occupy the houses or structures temporarily by legislation, but it is not possible to obtain security of tenure by legislation only. Even in the case of (ii) above, the occupants do not obtain an individualised right (security of title) which can be used as collateral to obtain financial assistance, although they may obtain security of occupation against the association as a result of their membership to the association (see in this regard 3.5 below).

Members of such associations are in the same position as shareholders of a share-block company – they only obtain personal rights against the association based on their membership, but they do not obtain any real right or limited real right to the property itself.[61]

It therefore seems impossible to adapt the registration system to such an extent that the above-mentioned problems in urban areas could be solved. The only solution would be for the land to be properly surveyed and use-rights be awarded and registered within the exiting registration framework.

3.4 Fragmented use-rights in rural areas

Some legislative measures exist to protect the right to occupy and use rural land belonging to farmers or employers. The rights of labour tenants[62] are protected by the Land Reform (Labour Tenants) Act 3 of 1996 in areas where the institution of labour tenancy has been practised for at least a generation and where a person can be described as a labour tenant in terms of the requirements of this Act. The rights of occupation, grazing and cultivating of lands are recognised[63] and are transferable,[64] but the Act does not specifically provide for the registration of these rights.

It is proposed that these rights should, on demand, be registered as limited real rights[65] and that security of title in this form be obtained for as long as the labour tenants comply with the requirements of the Act (in the same manner as a registered long-term lease). Furthermore, it is necessary to develop a computerised registration procedure so that a simplified certificate of title could be issued and a register of these rights, in addition to the existing registers in the deeds registries but linked to such registers, could exist. This proposal will be further discussed in 3.5 below.

The Extension of Security of Tenure Act 62 of 1997 is applied in all circumstances where labourers or employees do not comply with the definition of a labour tenant, but have obtained the right to occupy land outside the jurisdiction of a local government as part of a contract of service or by consent of the owner. The right to occupy is protected by legislation, but it is not registrable in terms of the Act. These rights can on demand be registered as personal servitudes, but such registration is expensive and the registration procedure does not protect relatives such as widows, elders, or infirm persons who are in precarious circumstances. A simple registration system should also be available in this case (see 3.5 below).

In rural areas, people are furthermore granted permission to occupy communal land (PTO or permit system) in terms of Proclamation R188 of 1967,[66] temporary or more permanent protection of occupation in terms of legislation[67] or permission by chiefs and tribal authorities on land which is allocated and administered as communal land. The Upgrading of Land Tenure Rights Act 112 of 1991 provides for the upgrading of a permission to occupy to ownership, but due to the fact that such permissions are often exercised on improperly surveyed land or the records of the permissions are inaccurate, these measures are not sufficient to protect the rightholders.

The Interim Protection of Informal Land Rights Act 31 of 1996 provides temporary protection to the above-mentioned informal or insecure land rights. Section 5(2) provided for the Act to lapse on 31 December 1998 but this date was extended to 31 December 2000. The new Land Rights Bill has not yet been published by the Department of Land Affairs. At this stage, all these informal rights are insecure and the promulgation of the final Land Rights Act is eagerly awaited, but in the interim, the rights of millions of people are insecure.

One of the most urgent problems regarding these forms of land tenure is the question of how communal land should be administered and use-rights be secured. Overcrowding and conflicting land rights are among the results of the previous policy and administration of these lands. Often people who were forcibly removed or evicted were dumped on land that had been

occupied by other groups, resulting in disputes and severe pressure on the land.[68] Furthermore, there are serious disputes between traditional leaders and local authorities regarding development which, for all practical purposes, is bringing such development to a standstill. In the process of such disputes between traditional leaders and local authorities, the use-rights of the occupiers of such land are often overlooked. The unclear legal status of the land and the land administration processes inhibit development and investment in the land.[69] To clear up this "messy matrix", it is initially necessary to undertake a full land audit of land rights and land use to establish which persons or families are entitled to use the land, then to negotiate settlements and legally binding agreements between the different stakeholders and thereafter register the applicable rights.[70] This could take decades, and in the meantime the land users are for all practical purposes unprotected.

The policy of the Department of Land Affairs is the following:

- rights should vest in the people who are exercising the rights and not in institutions such as tribal or local authorities
- rights that are vested in individuals or families, as well as rights vested in groups are acknowledged
- where the rights are vested in a group, the members must have a choice regarding the structures which manage and administer their land rights
- the group must be able to decide according to democratic principles, including gender equality, how the land-use rights should be distributed, exercised and transferred
- systems that are popular and functional should continue; the aim is not to destroy representative institutions and popular and democratic tribal systems should not be threatened by the proposed measures.[71]

In suitable circumstances ownership can be transferred from the state to individuals, families or groups so entitled by way of ordinary deeds of grant or deeds of transfer. However, the Department of Land Affairs acknowledges the fact that all the members in a group or tribe are not interested in individualised ownership and that such transfer of land to legal entities will be a slow, intricate and costly process, including formalities such as the survey of the land. Another possibility would be the registration of a communal property association in terms of the Communal Property Associations Act 28 of 1996 to act as owner of the property. However, as the rules of such associations are often perceived by members of a tribe as too sophisticated and as it often clashes with the basic rules of the tribe, intensive training of the tribe would normally be required (it is envisaged that such training could take up to a year).[72]

It is therefore a reality that land will still for some time to come be vested in the state and that strong statutory rights should be created to give the occupiers of the land protected use rights and decision-making powers in respect of the land.[73] Although these forms of land use will be protected by legislation, the holders of these rights will not be able to obtain private development loans or financial assistance because the rights are not individualised. To obtain the full financial or economic benefit of these rights it should be possible to register fragmented use-rights.

3.5 Registration of fragmented use-rights

The main obstacles to the registration of some[74] of the fragmented use-rights described in 3.4 are the following:

- the land is not properly surveyed (mostly in the case of communal property in rural areas)
- the rights are not exercised on a specific or defined part or parcel of surveyed land (overlapping rights like grazing rights or cultivating of a part of land not specified)
- it is too expensive (labour tenants or other tenants which can obtain a personal servitude)
- the landowner refuses to cooperate
- the rights are based on group membership or membership of a communal property association.

In the last-mentioned instance, the tribe or communal property association may have adequate protection of the right to occupy the communal land or may obtain the financial means to develop the land to the benefit of the whole community. Thus it may in such circumstances be possible that there will be no need for the individualisation of the property or land-use rights in order to obtain economic benefits in a personal sense. However, in many cases the individual members of the association or the tribe may need to use their land-use or property

rights as collateral to obtain individual financial assistance or development aid, in which case the membership rights will not suffice.

The use-rights of labour tenants and other tenants are often registrable as limited real rights, but it may be too expensive for the right-holder to register it or the owner of the land may refuse to cooperate. It will be necessary to amend the relevant legislation[75] to the extent that an owner who refuses cooperation to register these rights may be compelled to do so by a court order. Furthermore, the deeds registration procedure should be amended in the case of these rights so that a separate register of the rights could be maintained within the central registration system and a one-page certificate of title could be awarded to the right-holder instead of a deed of transfer. Especially in the case of communal property, an additional computerised and comprehensive land information system should be maintained as part of the central registration system (see 4. below).

To keep an affordable, accessible register of the statutory fragmented use-rights of labour tenants and communal property in rural areas, the following principles should be followed:

- it should be a computerised register of persons and rights exercised within a cadastrally defined piece of land
- registration should take place on demand only, as the right-holders are already partly protected by legislation
- no long-winded deeds are necessary, but only a one-page certificate of title indicating name and description of the right-holder, the specific use-rights, e.g. occupation, grazing, water or cultivation rights[76] and the cadastral description of the property where the rights are exercised
- an additional comprehensive and computerised land information system should contain as much information as possible regarding the right-holder, duration and transferability of the right, consent by the tribe or group to alienate and the extent of the use-right[77]
- the land information system should form part of the central registration system, although it does not necessarily need to be maintained by deeds registry personnel (see 4. below)
- if the right is exercised on a part of the property (e.g. labour tenants or communal property), a description of the specific part of the property with reference to natural beacons or features of the land will be necessary, although not necessarily a surveyed map[78]
- in the case of communal property rights, information of the limitations on the rights by group members or the administrative system wherein the rights are exercised, as well as secondary or more distant right-holders must be included, unless the position of these people is already protected by legislation or existing rules of the tribe[79]
- information of encumbrances by real security rights should be available
- the computerised register should form part of the land register so that information of these rights will be accessible whenever a search is conducted in the land register
- the deeds registry does not guarantee the correctness of the registered information – thus it is a negative system[80]
- in instances where the rights are completely individualised to the extent that the land in question has been surveyed and the rights are exercised outside a group or tribe, such rights should be registered on demand in the ordinary land register according to existing deeds registration procedure.

3.6 A proposed land information system for fragmented use-rights

There are several existing models of computerised land information systems, mainly in operation in developing countries.[81] The most suitable model to adapt to South African conditions is the one proposed by Ventura and Mohamed.[82] Their proposal is based on the following principles regarding communal property:[83]

- The system must provide for complex, overlapping, fragmented use-rights associated with informal land tenure by recognising secondary and more distant right-holders.
- The communal rights, when individualised, must continue to be exercised in a group context according to general accepted rules, e.g. inheritance rules, alienation only with consent of the group and limitations imposed by the group, or the administrative system wherein the rights are being exercised (see 4. below).
- It must include an affordable, accessible register of use-rights, coupled with an additional computerised land information system.

The land information system is based on the

development of a conceptual model for documenting and recording communal property where multidimensional rights exist. This is done by identifying the recordable components of communal property and providing a corresponding database template for documenting and recording all aspects of tenure associated with a given person, with reference to a specific unit of land.[84] Land units or the boundaries of the communal property can only be identified with reference to existing deeds,[85] data such as aerial photography[86] or by means of land surveying.

For the further individualisation of land-use rights within the communal property, there may be existing deeds or data, but these will mainly be obtained from a description of the spatial element of the use of communal property by the group, tribe or administrative system wherein these rights are exercised.

It is important to note the following:

- The above-mentioned model is an example of the computerised land information system that can either be kept by the deeds registry or an administrative body (see 4.3 below). The certificate of title and the register of these rights should not include all this information.
- The information regarding the spokesperson or head of the family may change from time to time. This information should be brought up to date before any registration of a transfer or mortgage may take place.
- In the case where communal or group rights are exercised, any transaction or variation in rights can only take place with the consent of the tribe, group or administrative system wherein these rights are exercised.
- It will not be possible to record all transactions regarding communal property and other statutory use-rights in this way because of the sheer magnitude of these rights. In many cases people do not want these rights registered because the rights are properly protected by statutory measures and/or the administrative process involved. These rights should therefore only be registered on demand, for instance, in cases where conflict necessitates it or financial assistance is needed and the right has to be used as security.

4. ADMINISTRATIVE SYSTEM

4.1 Indigenous communal property

In the case of indigenous communal property, the proposed system for the registration of an individualised title to land-use can only function properly if these rights are exercised within an existing system of group rights.[87] It has been proven in several legal systems in Africa that the abolishment of indigenous systems disrupts traditional rules, values and customs that have historically governed the use of land and have well developed conflict resolution mechanisms. Replacement strategies often introduce new institutions of land administration that may not be readily accepted, causing disputes and conflict over access to land.[88]

On the other hand, there are well-known incidents of traditional leaders who have over a long period of time abused their powers and without popular consent, either used the land under their control largely to their own benefit or alienated communal property.[89] For more than a century, the legal precedent in South Africa has been that communal property belongs to the chief as trustee for his people. However, it has been decided in several cases that, when alienating communal property, the chief only needs the consent of his councillors and not the consent of the people living on the communal property. Klug[90] convincingly indicates that the true meaning of the chief acting as trustee for his people, has been distorted by several court cases to fit in with the general political idea of the rightlessness of indigenous people. The power of the chiefs was therefore abused by colonial administrators to develop a system where the rights vested exclusively in the chiefs, while the chiefs formed part of the administrative authority of the colonial power.[91] This concept of the lack of land rights of individual people, based on the distortion of the true meaning of communal property rights, was then used to deny political rights to indigenous people.

The Department of Land Affairs took cognisance of the above-mentioned tension and has adapted its policy to the effect that systems of land administration which are popular and functional should continue to operate, as they provide an important asset when considered in the context of the breakdown in many rural areas. The aim of the department is not to destroy or harm viable and representative institutions. Popular and democratic tribal systems are therefore not threatened by the proposed measures. However, the conditions for the con-

tinued participation of tribal chiefs in the system of land administration are that the basic human rights and democratic values in terms of the Constitution 108 of 1996 should not be undermined[92] and that the government should have access to members of group-held systems, to ascertain their views and wishes.[93] To obtain these goals in the present system is not so easy. It is necessary to devise a structure where the influence and skills of reliable chiefs are combined with the administrative infrastructure of the Department of Land Affairs.

4.2 Administration of communal property

In the case of indigenous communal property, the proposed system for the registration of an individualised title to land-use can only function properly if these rights are exercised within an existing system of group rights. Replacement strategies often introduce new institutions of land administration that may not be readily accepted, causing disputes and conflict over access to land. Traditional rules, values and customs often include well-developed conflict resolution mechanisms within the tribe. I want to refer to two examples of the administration of communal property, the first one an African system, namely Botswana, and the second a first world system, namely Scotland.

In Botswana[94] the Tribal Land Act 58 of 1968 provides for almost 71% of the available land to be administered as tribal land according to an adapted system of customary land tenure. The Act provides for the establishment of land boards for specified tribal territories to take over the administrative functions from chiefs and other tribal authorities. Land boards maintain their own record or registration systems according to the statutory requirements embodied in the Tribal Land Act and issue certificates of customary grants or occupation. Although these certificates are not registered in the central deeds registry of Botswana (apparently to keep them more affordable), provision has been made for the conversion of these certificates into titles registrable in the deeds registry once demand arises to deal with these certificates in the commercial property market.

An adapted form of the Botswana idea of decentralised land boards is a workable solution for the administration of statutory land-use rights and communal property. It should be adapted for South African conditions in the following ways:

- The land board should consist of the tribal chief in the area, as well as two or three democratically elected tribe members and a number of appointees by the Minister of Land Affairs. If the chief governs his/her tribe democratically, the elected tribe members should be able to agree with the chief; if not, the elected tribe members would be able to protect the democratic rights of the members of the tribe by vetoing the chief.
- The land board should allocate land according to the customary rules of the tribe and issue certificates of land-use. In the case of land rights other than communal property rights, like labour tenants, the land board must also issue certificates of land-use after such rights have been acknowledged, and keep a record of transactions regarding these rights.
- The applicable deeds registry must keep a register of all certificates issued by the land board according to the information supplied by the computerised land information system. The land information system can be maintained by the land board, but linked to the central deeds registration system.
- The record should basically be one of persons (right-holders) and rights, but the cadastral description of the property or a description of where the rights are exercised must be stated.
- The land board must decide on a policy of alienation of land-use rights with the approval of a majority of the land-users, which approval must be obtained in a democratic way. Although the land-use rights will be individualised by the issuing of certificates, the rights may only be transferred according to the policy of alienation followed by the land board (including tribal customs and rules).
- The principles of equality and democratic values of the Constitution 108 of 1996 must be adhered to by the land board.

Another example of the development of a land information system and the administration of communal property is the Scottish crofting system,[95] which has developed since 1886 into a reliable land tenure system and has provided since 1985 for registered crofting rights to be upgraded to ownership. A cofter is a tenant with the right to occupy and use a dwelling and the adjacent garden area, together with the right

to grazing, cultivating, fishing or the gathering of peat on communal property. The Scottish land tenure system has been developed to such an extent that a reliable record of crofting tenure secures the use-rights of tenants in such a way that it is possible to upgrade communal tenure to ownership within a set procedure and with the minimum registration cost. The work of the first Crofters Commission in Scotland from 1883 to 1885 stresses the importance of negotiated settlements between land users. Furthermore it had taken almost 70 years (1883–1951) to develop the crofting system to such an extent that security of tenure was achieved, and a further 25 years (1951–1976) before it was possible to upgrade crofting tenure to registered ownership.

The grazing committees in Scotland, consisting of crofters, are good examples of the administration of communal property according to democratic values and principles. The importance of the grazing committees has been increased considerably and such committees largely contribute to the success of crofting tenure in Scotland. In South Africa, communal property associations display some similarities to grazing committees. Communal property associations should be established in South Africa where and when such associations offer a viable solution for the administration of communal property, but it is clear that alternatives to communal property associations should be developed and recognised in cases where these associations do not offer such solutions.

The Crofters Commission and Land Court in Scotland handle the administration, adjudication and transfer of crofting tenure in such a way that security of tenure and the solving of disputes are attained quickly and without high cost. In South Africa it is necessary to regulate the administrative matters of communal property by way of an administrative body consisting of members of the Department of Land Affairs and representatives of tribal chiefs and councillors in specific areas. Without a representative and acceptable administrative body, security of tenure, the solving of disputes and sustainable development in rural areas will be impossible.

CONCLUSION

In a country such as South Africa, with different forms of land tenure, it is only realistic to acknowledge a system of fragmented use-rights. It is also necessary to contextualise ownership to the extent that it is not a stronger or better land-use right, but one of many land-use rights that can be exercised simultaneously over the same property. However, it is not necessary to degrade the value of ownership in order to acknowledge and protect the other use-rights, but the protection of other use-rights should rather be upgraded. Such protection cannot be effectuated by legislation only, but also by the application of the publication principle in the form of registration of these rights. A good point of departure is a computerised land information system.

The registration of use-rights entails a certain amount of individualisation. In the case of communal property, such individualisation should take place by means of the adaptation, rather than the replacement of traditional customary principles. Furthermore, it is important that the individualised use-rights should be exercised within the existing group rights or customs of a tribe.

A representative administrative system wherein these rights are acknowledged, exercised and protected should be instituted to ensure that the rights are exercised within the customary tradition and fulfil the requirements of equality, accountability and transparency. Owing to the magnitude of these use-rights, they should initially only be individualised on demand.

The success of the proposed system will depend on the adaptability of the registration system, as well as the ability of the Department of Land Affairs to convince traditional leaders that such a system will be to the benefit of their tribespeople. The last mentioned factor seems to be a formidable, but necessary task.

ENDNOTES

1) Bruce (ed) *Country profiles of land tenure: Africa, 1996* LTC Research Paper 130 University of Wisconsin-Madison (1998) 5-6.
2) Pienaar "Is 'n eenvormige stelsel van registrasie van onroerende goed moontlik" 1990 *TSAR* 29-44; Pienaar "Die Suid-Afrikaanse akteregistrasiestelsel – waarheen vorentoe?" 1996 *TSAR* 205-226.
3) Pienaar 1990 *TSAR* 31-38. The deeds registration system based on the registration of absolute rights of ownership, open to allocation and division in only particular prescribed ways, was also used to enforce racial control over landownership – see Carey-Miller "Revision of priorities in South African Land Law" in Barry (ed) *Proceedings of the International Conference on Land Tenure in the Developing World* University of Cape Town 1998 49 50; Claassens "For whites only – land ownership in South Africa" in De Klerk (ed) *A harvest of discontent – the land question in South Africa* (1991) 43-45.
4) Van der Walt "Towards a theory of rights in property" 1995 *SAPL* 298-345.
5) Van der Walt and Pienaar *Introduction to the law of property* (1999) 336-338; Van der Walt 1995 *SAPL* 298-345.
6) For a discussion of these statutory measures, see Budlender, Latsky and Roux *Juta's New Land Law* (1998) ch 3; Bouillon *Stedelike ruimtelike en grondontwikkeling in Suid-Afrika* (unpublished LLM dissertation) Potchefstroom University (1999) chs 3 and 4; Pienaar "Huurarbeiders: baas of klaas?" 1997 TSAR 131-144; Carey-Miller *Proceedings* 49-60; Thomas, Sibanda and Claassens "Current developments in South Africa's land tenure policy" in Barry (ed) *Proceedings* 527-535; Van der Walt AJ "Property rights and hierarchies of power: an evaluation of land reform policy in South Africa" 1999 *Koers* 259 270-281.
7) President's Office 1994.
8) Department of Land Affairs 1997.
9) See s 25(5) redistribution; s 25(6) tenure reform and s 25(7) restitution; also the provisions of the Restitution of Land Rights Act 22 of 1994.
10) White Paper on South African Land Policy 1997 60-61; Thomas, Sibanda and Claassens *Proceedings* 527 528.
11) Thomas; Sibanda and Claassens *Proceedings* 527.
12) Van der Merwe Sakereg (1989) 65-83; Kleyn and Boraine *Silberberg-Schoeman's Law of Property* (1992) 50-58; Van der Walt and Pienaar ch 3.
13) In South African law certain ways of original acquisition of real rights in immovables are recognised, e.g. by prescription in terms of the Prescription Act 68 of 1969, expropriation in terms of section 25(2) of the Constitution 108 of 1996 and the Expropriation Act 63 of 1975, accession and marriage in community of property. In such cases ownership is acquired without the cooperation of the previous owner and such acquisitions are often not registered in the deeds registry, resulting in the South African deeds registration system being classified as a negative registration system of deeds (and not a positive registration system of title where the deeds registry guarantees the correctness of the registered data) – see in this regard Pienaar "Die Suid-Afrikaanse aktesregistrasiestelsel – waarheen vorentoe?" 1996 *TSAR* 205-226. Although the South African registration system is classified as a negative registration system of deeds as a result of the acknowledgment of the original ways of acquisition of ownership, it is nevertheless considered as accurate and reliable concerning the noting of transactions in terms of the derivative acquisition of ownership.
14) Klug "Defining the property rights of others" 1995 *Journal of Legal Pluralism and Unofficial Law* 119 123-124; Jensen "South Africa country profile" in Bruce (ed) *Country Profiles* 252 253-254.
15) According to Van der Walt 1999 *Koers* 263 this distinction is founded on the traditional civil-law hierarchy of powers based on the theories of civil-law jurists like Hugo Grotius and Bernard Windscheid, who distinguished between ownership as the strongest right at the top, followed by limited real rights, personal

rights deriving from contract and statutory use-rights and permits with little or no security at the bottom.

16) Van der Walt 1999 *Koers* 267-269.
17) Van der Walt 1999 *Koers* 264-269.
18) Thomas; Sibanda and Claassens *Proceedings* 527.
19) Carey-Miller *Proceedings* 50: "Ownership could only be acquired on a derivative basis by an act of registration and racial controls over land ownership were exercised through the Deeds Registries. The emphasis of the Deeds Act upon the concept of an absolute right of ownership, open to allocation and division in only particular prescribed ways, reflected South African common law development." See also *Johannesburg City Council v Rand Townships Registrar* 1910 TPD 1314.
20) For instance Gray "Property in the thin air" 1991 *Cambridge Law Journal* 252-307; Van der Walt "Subject and society in property theory" 1995 *TSAR* 322-345; Jacobs "Whose rights, whose regulations?" 1996 *Environment Planning Quarterly* 3-8; Singer "Property and social relationships: from title to entitlement" in Van der Walt and Van Maanen (eds) *Property law on the threshold of the 21st century* (1996) 69 70-75; Gray "Property in civil law systems" in Van der Walt and Van Maanen (eds) 235 245-252; Jacobs "Fighting over land" 1999 *Journal of American Planning Association* 141-149.
21) See in this regard Van der Merwe "Land tenure in South Africa: a brief history and some reform proposals" 1989 *TSAR* 663-692; Olivier "Grondreghervorming: Die erwe van ons vaad're" 1991 *Obiter* 1-15; Van der Walt and Kleyn "Duplex dominium: the history and significance of the concept of divided ownership" in Visser (ed) *Essays on the history of law* (1989) 213-260 and Van der Walt "Tradition on trial: a critical analysis of the civil-law tradition in South African property law" 1995 *SAJHR* 169-206; Fourie "Property in post apartheid South Africa" in Barry (ed) *Proceedings* 165-167.
22) E.g. *Diepsloot Residents' and Landowners' Association v Adminstrator, Transvaal* 1994 3 SA 336 (A); *Rademeyer v Western Districts Council* 1998 3 SA 1011 (SEC). See also Van der Walt and Pienaar 48-51 and 352-361 and the cases and legislation cited therein.
23) Van der Walt 1999 *Koers* 267-269; see also Van der Walt "The fragmentation of land rights" 1992 *SAJHR* 431-450.
24) White Paper on South African Land Policy 1997 7; see also Barnes A *comparative evaluation framework for cadastre-based land information systems (CLIS) in developing countries* LTC Research Paper 102 University of Wisconsin-Madison (1990) 28-32 for the advantages of a cadastre-based land information system in obtaining security of tenure.
25) Cf regarding labour tenants the case of *Ngcobo and Others v Salimba CC* 1999 2 SA 1057 (SCA) and the authorities cited in n62; regarding security of tenure *Conradie v Fortuin* 1999 3 SA 1027 (LCC); *Dhlamini v Mtembu and Another* 1999 3 SA 1030 (LCC); *Malan v Gordon and Another* 1999 3 SA 1033 (LCC); *De Kock v Juggels and Another* 1994 4 SA 43 (LCC); *De Villiers v Msimango* 1999 4 SA 59 (LCC) and *Ngwenya and Others v Grannersberger* 1994 4 SA 62 (LCC).
26) Sonnekus "Property law in South Africa: some aspects compared with the position in some European civil law systems – the importance of publicity" in Van der Walt and Van Maanen (eds) *Property Law* 285-326; Pienaar 1990 *TSAR* 29-30.
27) Cousins "How do rights become real?" in Barry (ed) *Proceedings* 88-99; see also Feder and Nishio "The benefits of land registration and titling – economic and social aspects" in *International Conference on Land Tenure and Administration* Florida 1996 19-25.
28) Bassett and Jacobs "Community-based tenure reform in urban Africa: the community land trust experiment in Voi, Kenya" 1997 *Land Use Policy* 215-229.
29) Regarding "title" in the case of leasehold and mineral rights, see Knoll *Butterworths Forms and Precedents* vol 8 (1994) 204 and 356 respectively. For different forms of title over the same property in English law, see Walker *The Oxford companion to the law* (1980) 1221: "The word is most commonly used in connection with land. Various kinds of title to land may be

recognised. The highest is the title of the absolute owner, in English law the owner of the fee simple absolute in possession. Lesser rights are conferred by the interest for life, the term of years, the mortgage, down to the title of occupancy or bare possession. The squatter has no title and may be evicted at any time."; see also Riddall *Introduction to land law* (1993) 479-481; Gray *Elements of land law* (1993) 176-178. For the Dutch law, see Reehuis *et al Goederenrecht* (1994) 70: "Onder 'titel' is in het eerste lid van art. 3:84 te verstaan: de rechtsverhouding die aan de overdracht ten grondslag ligt en deze rechtvaardigt"; and for the meaning of title in the case of limited real rights, see 84 (usufruct); also Snijders and Rank-Berenschot *Goederenrecht* (1996) 248.

30) Regarding the fragmentation of title, see Van der Walt "The fragmentation of land rights" 1992 *SAJHR* 431-450; Van der Walt "Unity and pluralism in property theory – a review of property theories and debates in recent literature" 1995 *TSAR* 15-42.
31) S 70(4) Deeds Registries Act 47 of 1937; Van der Merwe Sakereg 562-564; Kleyn and Boraine 412-415; Badenhorst "Towards a theory of mineral right" 1990 *TSAR* 465 467; Badenhorst "The revesting of state-held entitlements to exploit minerals in South Africa: privatisation or deregulation" 1991 *TSAR* 113 124; Gibbens *Die billikheidsgrondslag van die regsverhouding tussen die mineraalreghouer en die grondeienaar* (unpublished LLM dissertation) Potchefstroom University (1993) 161-188.
32) Mining Rights Act 20 of 1967; Mining Titles Registration Act 16 of 1967; Mineral Laws Supplementary Act 10 of 1975.
33) Jacobs "Fighting over land" 1999 *Journal of the American Planning Association* 141 147.
34) Gray and Gray "The Idea of property in land" in Bright and Dewar (eds) *Land law: themes and perspectives* (1998) 15-51; see also n20.
35) Kleyn and Boraine 105-107; Pienaar "Die Suid-Afrikaanse aktestregistrasiestelsel – waarheen vorentoe?" 1996 *TSAR* 205-226.
36) Department of Land Affairs 1997 106-107.
37) Ss 16 and 16A of the Deeds Registries Act 47 of 1937. See also Heyl *Grondregistrasie* (1977) 20-21; Jones "Conveyancing and deeds registration" 1977 *De Rebus* 759-761; Sonnekus and Neels *Sakereg Vonnisbundel* (1994) 402-403; Pienaar 1996 *TSAR* 219.
38) Van der Merwe *Sakereg* 333-345; Kleyn and Boraine 105-108; Van der Walt and Pienaar 157-159.
39) Kleyn and Boraine 105; Pienaar 1996 *TSAR* 219-220.
40) Pienaar 1996 *TSAR* 220; Sonnekus and Neels 391-394.
41) Naturally this is only the position in the case of the derivative acquisition of ownership and not in the case of the original acquisition of ownership, where the owner's consent is never required. See Kleyn and Boraine 68; Van der Walt and Pienaar 112.
42) *Klerck NO v Van Zyl and Maritz NNO* 1989 4 SA (SEC) 273D-H; *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 3 SA 517 (Bop) 545B-D; Carey Miller *The acquisition and protection of ownership* (1986) 164; Kleyn and Boraine 77-108.
43) S 3(1)(b).
44) S 4; see also Knoll *Forms and Precedents* 23-27 for other applicable legislation.
45) E.g. s 18(1) and see *Knoll Forms and Precedents* 40-41.
46) S 14.
47) S 13(1).
48) Ss 99 and 100.
49) See in this regard Pienaar 1996 *TSAR* 221 for a schematic exposition of the deeds registration procedure.
50) S 15A and reg 44A Deeds Registries Act 47 of 1937; see also Knoll *Forms and Precedents* 45-47.
51) Pienaar 1996 *TSAR* 210-219; see also Radloff "Electronic land registration progress report" February 1999 *De Rebus* 34-35.
52) Conveyancers' fees are prescribed by legislation.
53) S 15A; reg 44A; Knoll *Forms and Precedents* 45-47.
54) See in this regard the Dutch and German

systems which completely rely on private conveyancers, named "notaris" and "Notar" respectively.

55) Chapter VII.
56) Bouillon *Stedelike ruimtelike en grondontwikkeling* 106 and 110.
57) Barry "Secure land tenure for informal settlement communities: the effectiveness of the cadastral system in Cape Town" in Barry (ed) *Proceedings* 21-31; White Paper on South African Land Policy 1997 33.
58) Ibid.
59) *Rademeyer v Western Districts Council* 1998 3 SA 1011 (SEC)
60) Compare the Milnerton experience described by Barry *Proceedings* 21-29; see also Fourie "Property in post apartheid South Africa" in Barry (ed) *Proceedings* 170-171, who proposes to solve the problem of the allocation of rights on overcrowded land by a full land audit of land rights and land use; negotiating a settlement and legal binding agreements; and registration of the new agreements.
61) Van der Walt and Pienaar 79-80.
62) For a description of a labour tenant, see s 1(xi) of the Land Reform (Labour Tenants) Act 3 of 1996; *Mahlangu v De Jager* 1996 3 SA 235 (LCC); *Zulu and Others v Van Rensburg and Others* 1996 4 SA 1236 (LCC); *Ngcobo and Others v Salimba CC* 1999 2 SA 1057 (SCA); Pienaar 1997 *TSAR* 131-144; Pienaar "Land reform, labour tenants and the application of the Land Reform (Labour Tenants) Act 3 of 1996" 1997 *TSAR* 538-548.
63) Ss 1(xi) and 3(1).
64) S 3(4).
65) The rights of labour tenants comply with all the requirements of the "subtraction from the dominium" test and are therefore registrable as limited real rights – see Van der Walt and Pienaar ch 3.
66) Pienaar "Toekenning en registrasie van grondregte in die nasionale state" 1989 *Tydskrif vir Regswetenskap* 1-19; White Paper on South African Land Policy 1997 23; see also Cross "Informal tenures against the state: landholding systems in African rural areas" in De Klerk (ed) *A harvest of discontent* 63 68-80.
67) See par 2 above, as well as Van der Walt 1999 *Koers* 281-288.
68) Anonymous *Tenure Newsletter* 1/1998 1; Kies *Evaluation of the upgrading of tribal land from an ethnological point of view* (1993) 14-16.
69) *Tenure Newsletter* 2; Cousins *A role for common property institutions in land distribution programmes in South Africa* (1995) 4-9.
70) Cousins *Proceedings* 96-97; Fourie "Property in post apartheid South Africa" in Barry (ed) *Proceedings* 170-171.
71) *Tenure Newsletter* 2; see also Thomas; Sibanda and Claassens *Proceedings* 528.
72) Rutsch *South African experiences in communal property associations, community land trusts and other forms of group ownership* (1997) 13-14.
73) *Tenure Newsletter* 2; see also Van der Walt 1999 *Koers* 281-288.
74) Some are registrable.
75) Land Reform (Labour Tenants) Act 3 of 1996; Extension of Security of Tenure Act 62 of 1997.
76) This procedure has already been applied in the case of mineral rights where the right may be limited to a single mineral – s 70(2) Deeds Registries Act 47 of 1937; Knoll *Forms and Precedents* 340 (n7).
77) This information can be obtained from the land information system maintained as part of the administrative system of governance – see par 5 below, as well as Fourie "The role of local land administrators and land managers in decentralisation, land delivery and information management in developing countries" in *International Conference on Land Tenure and Administration* Florida (1996) 1-28.
78) Blue-blood conveyancers will turn in their graves, but this is necessary to keep the process as affordable and accessible as possible. The existing procedure for the description of servitudes that are not surveyed, can be followed – see Heyl *Grondregistrasie in Suid-Afrika* (1977) 170.
79) This information need not be contained in the certificate of title, but should be incorporated in the data of the computerised land information system.
80) Other negative title registration systems include the Netherlands and Hong Kong.
81) Barnes *A comparative evaluation framework for cadastre-based land information*

systems (CLIS) in developing countries LTC Research Paper 102 University of Wisconsin-Madison (1990).

82) Ventura and Mohamed *Use of information technologies to model indigenous tenure concepts* University of Wisconsin-Madison (1999).
83) Ventura and Mohamed 4.
84) This refers to the unit where the rights are exercised, and not a cadastrally defined parcel of land.
85) Deeds of Grant or Transfer to the South African Development Trust and other state agencies where the land was not held by the state.
86) Registers kept at the different offices of the Department of Land Affairs and/or deeds registries kept by the different national states or homelands.
87) Rutsch *South African experiences* 2-4.
88) Barnes *Comparative evaluation* 33-34; Bruce and Freudenberger *Institutional opportunities and constraints in African land tenure: shifting from a 'replacement' to an 'adaptation' paradigm* University of Wisconsin-Madison (1992) 1-6; Bassett and Jacobs 1997 *Land Use Policy* 216-217; Ventura and Mohamed 4.
89) Klug 1995 *Journal of Legal Pluralism and Unofficial Law* 119-147; Cousins *Proceedings* 92; Cross "Reforming land in South Africa – who owns the land" in Barry (ed) *Proceedings* 106-108.
90) See the discussion of *Tsewu v Registrar of Deeds* 1905 TS 130; *Hermansberg Mission Society v Commissioner of Native Affairs and Darius Mogale* 1906 TS 135 and *R v Ndobe* 1930 AD 484 by Klug (n9) 119-147; see also Letsoalo *Land reform in South Africa – a black perspective* (1987) 18-19 and *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 3 SA 517 (Bop) 545-551.
91) Klug *Journal of Legal Pluralism and Unofficial Law* 141: "Having constructed a vision of African land tenure under 'customary law' in which the most important rights – allocation, alienation, and reversion – were vested exclusively in the political authority embodied by the chief, it was a short step to the assertion that the loss of sovereign powers to the colonial authority made African land rights subject to administrative authority. This collapse of property rights into the realm of chiefly authority had equally debilitating consequences for the political rights of Africans. Founded in the practices of 'indirect rule', first advocated by Theophilus Shepstone and modified by Lord Lugard, the 'preservation' of 'native lands and traditional authorities' became the justification for the exclusion of Africans from broader political participation." See also McIntosh; Sibanda; Vaughan and Xaba *Traditional authorities and land: the position in KwaZulu-Natal* (1995) 4-6.
92) E.g. equality (the gender issue) – see ss 9 and 39(2) of the Constitution.
93) Thomas, Sibanda and Claassens *Proceedings* 528.
94) See Ng'ong'ola "Aspects of land tenure and deeds registration in Botswana" in Barry (ed) *Proceedings* 478 480-482; Knox "Botswana country profile" in Bruce (ed) *Country profiles* 213-217; Bruce "Learning from the east Asian, Latin American and African land reforms" in Barry (ed) *Proceedings* 46-47; Pienaar "Registration of informal land-use rights in South Africa" 2000 *TSAR* 442 464-467.
95) See Stair Memorial Encyclopaedia T*he Laws of Scotland* Vol 1 (1987) 334-361; MacCuish and Flyn *Crofting law* (1990) 2-17; McAllister *Scottish law of leases* (1995) 198-200; Pienaar "Crofting as a way of communal land-use – the Scottish experience" 2000 *THRHR* 442 448-457; Crofters (Scotland) Act of 1955; Crofters (Scotland) Act of 1961; Crofting Reform (Scotland) Act of 1976.

Post-1994 Rural Development Measures: Current Issues

Juanita Pienaar and Deborah Balatseng

INTRODUCTION

The South African Constitution enjoins all South Africans (including government) to recognise the injustices of the past, to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights, and to improve the quality of life of all citizens (Preamble). The inception of democracy brought with it insurmountable challenges to the government and the peoples of South Africa. These challenges are manifold and cover a broad spectrum of issues. Central to these challenges is the issue of development. Development being the password that has brought with it expectations, fears, hopes and anxieties.

The first session of the second democratic parliament was opened by the President with an urgent plea to all the peoples of South Africa to recommit themselves to the challenge of building a caring society:

> "The weakest who were denied access to power became the landless, the unemployed, the uneducated, the surplus people deported to the so-called homelands, the victims of abject poverty."

While development is geared towards all South Africans, emphasis is directed towards the rural areas:

> "The rural areas of our country represent the worst concentrations of poverty. No progress can be made towards a life of human dignity for our people as a whole unless we ensure the development of these areas."

In view of this, the implementation of a rural development programme was announced. An Intergovernmental Coordinating Unit was established in the Deputy President's Office to coordinate all relevant government departments and role players with regard to all aspects of rural development. It is therefore clear that rural development will become one of the most important footprints of the Mbeki government.

Although current issues dealing with rural development relate to a very broad spectrum (e.g. gender,[1] children's rights, economic development,[2] resources management, access to housing[3] and natural resources, agriculture,[4] local government structures, traditional authorities, education, access to training and financial support) it is impossible to cover all of these issues in the time allocated. Instead, the paper will give a brief background to the rural developmental crisis and thereafter focus on planning as one of the key issues.

1. BACKGROUND TO THE RURAL DEVELOPMENT CRISIS

1.1 The racially based land control system

The role that the racially based land control system played in bringing about vast disparities referred to above, is undeniable.[5] The facts are well-known and well-documented.[6] The inequitable distribution of land, especially since 1913, not only deprived persons from their livelihoods and dispossessed them from ancestral lands, but left millions of people to subsist on patches of unproductive land, degrading these areas to dormitories of cheap labour.[7]

This approach to land gave rise to an intricate and complicated legislative framework dealing with land in both rural and urban

areas,[8] with the emphasis on the development of white urban areas.[9]

With regard to the rural areas, a distinction was made between:

- South African Development Trust (SADT) land
- the six former self-governing territories
- the TBVC (Transkei, Bophuthatswana, Venda, Ciskei) states
- the so-called coloured rural areas.

Different sets of legal measures applied in these areas. In respect of proclaimed SADT towns, Proc R293[10] and Proc R29-30 and GN 402-405 (GG 11166 of 1988-03-09) applied. In rural SADT areas Proc R188[11] provided for quitrent on surveyed land and permissions to occupy on unsurveyed communal land. These provisions did not relate to socio-economic realities and were not linked to progress, advancement and development but were aimed at land tenure issues and town planning in general.[12] Similar problems existed in the former self-governing territories (Proc R293, Proc R154 in GG 8933 of 1983-10-14 [towns] and Proc R188 [rural areas]). The complexities resulting from diverse land control systems were exacerbated in those self-governing territories which issued their own land legislation.[13] Apart from these measures introduced by government, communal land tenure and customary practices still remained in place.[14] The perceived insecurity of land tenure due to the possibility of deprivation by traditional leaders and the consequent inaccessibility of rural land holders to development finance, were furthermore problematic. In respect of the so-called coloured rural areas, another separate and complex land control system applied.[15]

1.2 Rural areas

Forty-seven per cent of the national population are presently rural dwellers, most of whom are unemployed. The Northern Province with a rural population of 82% has the highest unemployment rate (47%). There is a general correlation between unemployment (and low monthly income) and rural areas (e.g. also Free State [35% rural, 32% unemployed] and the North West [65% rural, 40% unemployed]). As yet, abject rural poverty and a lack of meaningful development characterise these areas.

In addition to the sparsely populated areas in which people farm or depend on natural resources, the 1997 Rural Development Framework also included the large settlements in the former homelands that were created by apartheid removals and which depended on migratory labour and remittances for their survival as part of rural South Africa.

Another very important aspect of rural South Africa, are the areas held under the trusteeship of traditional leadership institutions. One of the functions of traditional leaders was to promote the development of land in their areas of jurisdiction.

However, neither financing nor expertise was provided. Although land is usually allocated to male family heads, changing socio-economic circumstances have resulted in communal land being allocated, albeit in a limited number of instances, also to women.[16] These women have, however, mostly been excluded from decision making regarding the land they were allocated. They have to seek the assistance of their male guardians to obtain financing to develop the land.[17] Broadening access to land in rural areas to women, as envisaged by the Land Reform Policy, remains a burning issue which, unfortunately, will have to be dealt with in another paper, another time.

2. CONSTITUTIONAL AND POST-1994 DEVELOPMENTS

Since 1994 a vast number of land-related policy documents and legislation have been published, for example:

Policy Documents and Programmes:

- Reconstruction and Development Programme – 1994
- Housing Policy and Strategy for South Africa – 1994
- Green Paper on Land Reform – 1995
- Rural Development Strategy – 1995
- Growth, Employment and Redistribution: A Macroeconomic Strategy for South Africa – 1996
- White Paper on SA Land Policy – 1996
- Rural Development Framework – 1997
- Report on Poverty and Inequality in South Africa – 1998
- White Paper on Local Government – 1998
- Green Paper on Development and Planning – 1999
- Integrated Programme of Land Redistribution and Agricultural Development – 2000

Legislation:
- Regular amendments to the Upgrading of Land Tenure Rights Act 112 of 1991
- Restitution of Land Rights Act 22 of 1994
- Land Administration Act 2 of 1995
- Development Facilitation Act 67 of 1995
- Communal Properties Associations Act 28 of 1996
- Interim Protection of Land Rights Act 31 of 1996
- Land Reform (Labour Tenants) Act 3 of 1996
- Extension of Security of Tenure Act 62 of 1997
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998
- Transformation of Certain Rural Areas Act 4 of 1998
- Provision of Certain Land for Settlement Act 26 of 1998.

Apart from the above-mentioned legislation, other land-related acts were also promulgated (e.g. the Land Survey Act 8 of 1997, the Water Services Act 108 of 1997, the National Water Act 36 of 1998 and the National Environmental Management Act 107 of 1998).[18] Special institutions have also been created to give effect to land reform, especially with regard to restitution and tenure reform (the Land Claims Court and the Commission on the Restitution of Land Rights).[19]

3. PRESSURE TO ADDRESS RURAL DEVELOPMENT

Although the above-mentioned legislation has resulted in the beneficial upliftment of some communities, the protection of vulnerable occupiers of land and some improvement in security of tenure, the impact on South Africa's rural areas has been piecemeal and not on the scale envisaged by government.[20]

Before the general elections of 1999 the Rural Development Initiative was established.[21] It consisted of a coalition of rural non-governmental organisations (NGOs) and trade unions and was aimed at pushing rural issues. The movement gained momentum when the Rural People's Charter was adopted in Bloemfontein by over 600 representatives so "that rural development is given political and financial priority and that rural people are given space to play an active role in planning and implementing a rural development strategy".[22]

4. FOCUS ON RURAL PLANNING

4.1 Background

As already mentioned above, various aspects, all of them important, impact on rural development. For purposes of this paper the focus will be on rural planning. The effectiveness of the South African planning system was seriously questioned in view of the slow delivery of development.

During 1999 the National Development and Planning Commission, established under the Development Facilitation Act 67 of 1995, was approached to advise the government on a development and planning strategy. Since most development issues have spatial implications, it is imperative that land and planning issues be dealt with together. The ideal is an efficient, integrated and equitable land planning and development system for the whole of South Africa.

The following matters will be dealt with:
- What was the role of the planning system of the former government in the promotion, or non-promotion of development. In order to determine this matter, the main characteristics of the previous planning system will briefly be commented on.
- What is the context of the present planning system?
- Does the present system address the shortcomings of the former planning framework?
- If not, what are possible ways of addressing continued gaps and problems?

The "new" South Africa inherited a fragmented, unequal and incoherent planning system with the following main characteristics:
- *Fragmentation:* across race groups,[23] ethnic lines,[24] geographic areas,[25] provinces,[26] jurisdictional boundaries and jurisdictional instruments.[27]
- *Control-based:* zoning predetermined the use of land parcels.[28]
- *Modernist influences:* the ideal of a free-standing building within a large private green space, inward-orientated neighbourhood and the dominance of the private motor car.[29]

These factors contributed to the phenomenon of displaced urbanisation in the form of large settlements without basic infrastructure, overcrowding with the inevitable result of generating enormous movement between these areas and job locations with the corresponding loss of time, money, energy and an increase in pollution.[30]

4.2 The post-1994 planning framework

4.2.1 Constitutional context

The new constitutional requirements of cooperative governance and procedural and participatory rights ensure accountability, promote social and economic rights and protect the environment – all factors that impact on planning. Under the Constitution, provincial planning is a functional area of exclusive provincial legislative competence as set out in Part A of Schedule 5. Parliamentary legislation plays a role if the aim is to maintain national security, economic unity or national standards, to establish minimum standards for the rendering of services or to prevent provinces from taking unreasonable or prejudicial action.[31]

Municipal planning and the function of regulating land management and development are included in Part A of Schedule 4. These are areas of concurrent legislative competence in that either national or provincial laws can deal with municipal planning and land development. Although national laws can set norms and standards, frameworks and policies, it cannot regulate the details.

4.2.2 Institutional context

4.2.2.i Local government

The White Paper on Local Government places municipalities at the centre of planning which is founded on the concept of "developmental local government". It emphasises integrated development planning as a tool for realising this vision.[32] There is, however, some confusion around the level of exclusivity of jurisdiction of municipalities with regard to local planning. A significant problem is the lack of clear definition of roles and responsibilities of the different government role players.

4.2.2.ii Development tribunals

Provincial development tribunals have been established under the Development Facilitation Act 67 of 1995. The impact of the tribunals has not been that great, given the extensive powers they have to promote fast-track development.[33]

4.2.2.iii Coordination and Implementation Unit

The Unit is based in the office of the Executive Deputy President and is a national institution with the potential to promote planning through coordination and communication.[34]

4.2.2.iv Traditional and Tribal Leadership

Traditional leaders and tribal authorities have had powers to allocate resources in rural and informal communities and have also played an administration role with regard to land matters. Various capacity problems exist in this regard and their relationship with local government has been somewhat problematic. The role that traditional leaders have to play in municipal governance is, however, recognised.

4.2.3 Legislative context

4.2.3.i Background

Post-1994 planning legislation is characterised by a shift from being control-orientated towards being normatively based. In other words: the law introduces substantive principles (or norms) that guide all land development and decision making. The planning principles are supported by the introduction of land development objectives. The latter are policy plans approved by politicians with an exposition of objectives and targets for development which inform the spatial and development imperatives of a specific area. Normative legislation calls for proactive planning as opposed to the rigid application of standardised rules and regulations. The new approach has also been followed in various of the provinces.[35]

4.2.3.ii Development Facilitation Act 67 of 1995

The long title of the Act announces its aim as being "to introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land".[36] The central theme of the Development Facilitation Act (DFA) is the integration of various aspects of land development, including the integration of an all-encompassing development approach with physical planning, developing policy making as a technique to give direction for decision making, and formulating procedural measures to achieve policy aims. The DFA is in many ways a unique planning law: it provides for both rural and urban planning, applies parallel to existing planning procedures, fast-tracks the planning route, and ensures security of title at an early stage in the planning process.[37]

Central to the new planning approach, are the planning and development principles incorporated in Chapter 1 of the DFA.[38] These

principles reject low density, sprawling, fragmentation and mono-functional forms of development which resulted under the former government. They call for more compact, integrated and mixed-used settlement forms. They promote a harmonious relationship between settlements and the environment, security of tenure and the maximum use of conflict resolution and public participation. The list is not a *numerus clausus* of principles; in fact, ministers and provincial premiers are empowered and encouraged to add to these in view of new demands, developments and provincial specifics.

Land Development Objectives (LDO) are prescribed by Chapter 4. Local government planning is effected by way of LDOs which are based on the development and planning principles listed in Chapter 1. In practice it is similar to a business plan for the use of land in accordance with the specific needs of the local government area. When applications are lodged with the tribunals, approval will depend *inter alia* on whether the application is consistent with the LDOs.

Chapter V applications will typically occur in an urban context and Chapter VI applications are more appropriate in rural circumstances. The idea is not to deal with large-scale farming operations, but rather to enable smaller farming projects. It would, for example, be ideal to use the Chapter VI provisions for small-scale farming operations where communities have succeeded with claims for the restitution of their land or have become beneficiaries of state-assisted farming programmes or where upgrading projects are carried out.

The value of the Act is furthermore in the various mechanisms to expedite land development (when compared to conventional methods) or to overcome obstacles that would otherwise make land development difficult or even impossible. The latter applications relate *inter alia* to the suspension and repeal of title deed conditions,[39] the suspension of certain laws and applications for "non-statutory" procedures. "Non-statutory procedures" relate to informal settlements, subject to the general rule that illegal occupation of land should be discouraged, but with due recognition of informal land development processes.[40]

4.2.3.iii Other legislation that plays a role

Apart from the DFA, other legislation that had been promulgated under the former government is still relevant with regard to planning, e.g. the Less Formal Township Establishment Act 113 of 1991, Provision of Land and Assistance Act 126 of 1993,[41] and the Physical Planning Act 125 of 1991.

The Physical Planning Act sets the physical planning framework by providing for the division of the country into various planning regions based on policy plans, namely a national development plan, regional development plans, regional structure plans and urban structure plans.[42] These policy plans contain broad guidelines for future physical development of the area for the benefit of all its inhabitants. Although the policy plans are drafted by planning committees, the urban structure plans are the responsibility of the local and regional authorities. Development may not be in contravention with the principles set out in urban structure plans. However, since the commencement of the DFA and the introduction of LDOs, the plans under the Physical Planning Act will be deemed to be amended by the LDOs if they are in conflict with each other. Although much planning was done under this Act, national, regional and urban structure plans are presently mainly used as points of reference by planners and developers to obtain information that might be relevant to their development project.[43]

The Provision of Land and Assistance Act, for lack of better legislation, is presently used by the Department of Land Affairs to provide land and assistance for land reform projects in mainly rural areas. According to the long title of the Act, its aim is to provide for the designation of certain land and to regulate the subdivision of land and consequent settlement. Applications can be lodged in relation to state land as well as land that had been made available by private owners. The allocation of land coincides with certain developmental conditions and may be used for residential, small-scale farming, public, community, business or related developmental purposes.[44] The provisions of this Act in a way mirror those of the Less Formal Township Establishment Act, but relating to rural areas. Although the procedures for the designation, development, settlement and transfer of ownership are very similar, they appear to be aimed at the establishment of *agricultural settlements* and not for purely residential use.

The aim of the Less Formal Township Establishment Act is to provide for shortened procedures for the designation, provision and development of land, the establishment of townships and for less formal forms of residential settlement. Chapter I of the Act is specifically aimed at providing shortened procedures for less formal *settlement* (when there is an urgent need for land), while Chapter II deals with less formal *township* establishment (where the demand for housing justifies township establishment). The process is shortened in that certain laws do not apply in the case of Chapter I designations, or could be excluded in the case of Chapter II applications.[45] In Chapter I cases, planning and development of the land need to be approached in a way that allows for the subsequent upgrading of services. The Act has various shortcomings, such as insufficient public participation procedures in certain cases and a lack of integration with provincial legislation. It was, for instance, never clear why two different procedures were provided for in the Act, with only slight differences.[46]

5. SHORTCOMINGS

> "While the pattern which emerged varies (there are considerable differences between regions, between spheres of government, between rural and urban authorities and between larger and smaller local authorities) the overall picture is a disturbing one. It is not an overstatement to say that the practice of spatial planning is in considerable disarray."[47]

5.1 Lack of shared vision

Although development (and less so, planning) is characterised by a plethora of policy documents,[48] national government has not yet successfully promoted a strong shared vision and direction for planning. Most of these policy documents have addressed a specific perspective and were not necessarily concerned with the "bigger picture". Although the urban and rural development strategies,[49] respectively, were important documents with sound insights which could impact positively on planning as such, there was no mention of how these intentions should be achieved and what the specific *planning* implications were.

The clearest planning direction is contained in the planning and development principles in Chapter I of the DFA, but have, unfortunately, had a very limited impact on planning practice in general. In many local authorities, historical practices and procedures still apply, despite the normative approach being introduced.[50]

5.2 Lack of intergovernmental coordination

There is some confusion about the different spheres of government and their relationship with each other. Although the planning principles mentioned above do play a directive role, the DFA fails to provide a clear framework within which provinces can draw up provincially specific legislation, but still complies with national principles. Rural areas have historically been dominated by national legislation with a control basis. The normative approach leaves local authorities in charge of land management and development for which they do not (yet) have the confidence or capacity.

5.3 Intragovernmental relations

At a national scale, various national departments have policy documents that fall within the spatial planning field.[51] Unfortunately most of these initiatives have occurred largely in isolation, with the relevant department claiming centre stage. Because all departments have the same status, they rarely take coordination seriously. The separation between spatial development (in the form of integrated development plans) and transport, water and environmental issues is particularly disturbing. Poor intragovernmental relations also impact negatively on the private sector by way of unacceptable time delays and huge land holding costs.[52]

5.4 Issues of capacity

Lacking capacity has already been commented on. This is such a major issue, that it warrants further emphasis. Local, provincial and national government are all battling with decreased capacity. The problem applies to officials and decision makers alike. The discretionary-based planning system requires a different kind of capacity to that required by the previous rule-based system. Many persons actively involved in planning now find their training inadequate for the new demands.

A major problem too, is the struggle to find a workable balance between participatory planning and the needs for speedy decision-making procedures.

5.5 Legal and procedural complexity

Both the 1993 and the 1996 Constitutions provided that existing legislation would continue to apply until repealed. Much of the pre-1994 legislation is therefore still in place. The diverse land control system has already been referred to above.[53] The legal uncertainty was exacerbated by the promulgation of own planning legislation in the former TBVC and self-governing territories.[54] In some parts of the country it is almost impossible to state with certainty which land-related laws apply.

Legal confusion is also alive and well in local government where a number of the major planning tools (e.g. zoning and building regulations) derive their powers from different legislation. Furthermore, planning instruments that have been created previously (e.g. guide plans, master plans, etc.) are still in existence, but differ in status from land development objectives (of the DFA) and integrated development planning which was introduced by the Transitional Local Government Act.

The commencement of the DFA did not bring with it rationalisation and a uniform planning route. Even today, various planning routes are still available, for example: the former provincial town planning ordinances may still be used as an option available next to the DFA, then there is the procedure for less formal settlement and another procedure for less formal township establishment (both in Less Formal Township Establishment Act) and finally the procedure for agricultural settlement in rural areas (Provision of Land and Assistance Act).

The shortcomings and characteristics of the pre-1994 planning system have not been addressed by policy documents and post-1994 legislation. In fact, there are few signs that significant and far-reaching improvements have been set in place since the new constitutional dispensation. The only national planning guidelines are found in the DFA. The problem with provincially led law reform processes is that each province is pursuing its processes independently from others, which could again lead to legal uncertainty.[55]

6. PLANNING FOR THE FUTURE

The importance of an effective, creative, proactive planning system is emphasised. The failure of the planning system is no reason for its abandonment. A positive planning system is important for various reasons: to provide vision and constant direction, to protect the rights of people who have gained access to land, to protect natural systems and the environment, to make efficient use of resources and to set priorities in order that the developmental needs of the country be met in a fair way and to direct resources to where they are needed most.

Planning should remain a function of the public sector. It requires public agencies to give direction to changing settlement forms in the areas of jurisdiction. Not only would it require creative thinking, but also rapid decision making, particularly relating to historically disadvantaged communities.

The current three-sphere spatial planning system is sensible and logical. In view that most spatial planning decisions would be made in the local government sphere, it should be the cutting edge of planning. However, the function of the various role players needs to be addressed.[56]

The value of the planning and development principles of the DFA should be emphasised and further promoted. Provinces are encouraged to add to or reword the list of basis principles. In this regard the provincial act of KwaZulu-Natal may be followed as an example. The effectiveness of the principles could also be furthered by a vigorous communication and education campaign by the Department of Land Affairs.

Spatial plans should not attempt to be comprehensive, but should take the form of frameworks made up by the integrated public elements of green space, movement, public facilities and institutions, hard open space and utility and emergency services. It is left to the imagination and initiative of the relevant authorities who work with these plans on a daily basis to enact the minimum public actions necessary to achieve the goals and objectives of the plan. The form of the plan would obviously differ from circumstance to circumstance and could be more complicated if the circumstances so require.

The promotion of cooperative governance and integration between and within spheres of government is furthermore imperative. Joint planning projects would not only build capacity, but would also enhance intergovernmental cooperation.

It is useless to have a planning system that

"looks" efficient, but is not applied in practice. For this reason, monitoring is so important.[57] The focus of national monitoring needs to be the DFA principles. Due to capacity problems at local government level, a simple monitoring system is needed. The monitoring system should ideally link up with an educative and communication campaign relating to the planning and development principles. In this regard the planning and appeal tribunals, the Department of Land Affairs and the South African Council of Town and Regional Planners could all play a role.

A reality that cannot be ignored, is the capacity crisis within rural local government bodies. In view of the fact that the situation, however undesirable at present, will in all probability remain the same for now, it is imperative that district councils should become the primary instruments in rural planning. The development problem is commonly severe in these areas and considerable urgency requires that resources be allocated which would have a significant impact. The social impact of large projects is greatest in these areas and therefore needs a sound planning basis.

Not only should present capacity be promoted and broadened, but investment should also be made in tomorrow's planners. Technical training should therefore also be reviewed. A normative approach requires a different attitude and way of thinking than a control-based system. Many of our planners are still trained in terms of standardised rules and are not taught to think creatively about issues and to deal with new needs and demands.

The key problem with traditional authorities from a spatial planning viewpoint, is that land is frequently allocated without any reference to planning principles.[58] The result is sometimes settlement forms which are highly inefficient and almost impossible to service. Effective planning is also imperative for these areas to ensure viable settlements. Although the legal position with regard to traditional authorities is as yet still unclear, it is important that tribal authorities have an input in the planning process. Cooperation between traditional leaders and developers and planners would go a long way in making the planning process more effective. The formulation of the LDOs, for example, could borrow from traditional leaders' experience who have all the information necessary with regard to the area involved.

Many provincial legislatures have already formulated new planning legislation, based mainly on the DFA guidelines. A uniform approach to development and planning within the province, is supported. In other words: there should not be different systems and procedures for different areas or different types of development. Provincial planning law should be streamlined, efficient and clear. The setting of time-limits is also proposed in order to expedite development applications.

Finally, spatial planning lacks a political champion; it has no departmental home. It would be natural to house spatial planning under the Department of Land Affairs and Agriculture in order to spearhead planning in coherence with land and agricultural initiatives.

CONCLUSION

> "Development is a process of change involving people travelling along a road to new destinations somewhere in the future. People are the key role-players in this process; people who reach out to embrace a better quality of life for themselves and their children".[59]

In South Africa, the rural road to travel is a long, winding road full of potholes and obstacles, and often treacherous and unpredictable. One should never endeavour to walk this road without a map in hand, albeit a map with some gaps and shortcomings. The more effective the map, the more effective the journey. Therefore, embark on an effective, proactive planning system for South Africa in light of the treacherous road ahead.

APPENDIX: PLANNING AND DEVELOPMENT PRINCIPLES OF THE DFA

(a) Policy, administrative practice and laws (hereafter PAL) should provide for urban and rural development and should facilitate development of formal, informal, existing and new settlements.

(b) PAL should discourage the illegal occupation of land, with due recognition of informal land development processes.

(c) PAL should promote efficient and integrated land development in that they

(i) promote the integration of the social, economic, institutional and physical aspects of land development;

(ii) promote integrated land development in rural and urban areas in support of each other;

(iii) promote the availability of residential and employment opportunities in close proximity to or integrated with each other;

(iv) optimise the use of existing resources including such resources relating to agriculture, land, minerals, bulk infrastructure, roads, transportation and social facilities;

(v) promote a diverse combination of land uses, also at the level of individual erven or subdivisions of land;

(vi) discourage the phenomenon of 'urban sprawl' in urban areas and contribute to the development of more compact towns and cities;

(vii) contribute to the correction of historically distorted spatial patterns of settlement in the Republic and to the optimum use of existing infrastructure in excess of current needs; and

(viii) encourage environmentally sustainable land development practices and processes.

(d) Members of communities affected by land development should actively participate in the process of land development.

(e) The skills and capacities of disadvantaged persons involved in land development should be developed.

(f) PAL should encourage and optimise the contributions of all sectors of the economy (government and non-government) to land development so as to maximise the Republic's capacity to undertake land development and to this end, and without derogating from the generality of this principle –

(i) national, provincial and local governments should strive clearly to define and make known the required functions and responsibilities of all sectors of the economy in relation to land development as well as the desired relationship between such sectors; and

(ii) a competent authority in national, provincial and local government responsible for the administration of any law relating to land development shall provide particulars of the identity of legislation administered by it, the posts and names of persons responsible for the administration of such legislation and the addresses and locality of the offices of such persons to any person who requires such information.

(g) Laws, procedures and administrative practice relating to land development should –

(i) be clear and generally available to those likely to be affected thereby;

(ii) in addition to serving as regulatory measures, also provide guidance and information to those affected thereby;

(iii) be calculated to promote trust and acceptance on the part of those likely to be affected thereby; and

(iv) give further content to the fundamental rights set out in the Constitution.

(h) PAL should promote sustainable land development at the required scale in that they should –

(i) promote land development which is within the fiscal, institutional and administrative means of the Republic;

(ii) promote the establishment of viable communities;

(iii) promote sustained protection of the environment;

(iv) meet the basic needs of all citizens in an affordable way; and

(v) ensure the safe utilisation of land by taking into consideration factors such as geological formations and hazardous undermined areas.

(i) PAL should promote speedy land development.

(j) Each proposed land development area should be judged on its own merit and no particular use of land, such as residential, commercial, conservational, industrial, community facility, mining, agricultural or public use, should in advance or in general be regarded as being less important or desirable than any other use of the land.

(k) Land development should result in security of tenure, provide for the widest possible range of tenure alternatives, including individual and communal tenure, and in cases where land development takes the form of upgrading an existing settlement, not deprive beneficial occupiers of homes or land or, where it is necessary for land or homes occupied by them to be utilised for other purposes, their interests in such land or homes should be reasonably accommodated in some other manner.

(l) A competent authority at national, provincial and local government level should coordinate the interests of the various sectors involved in or affected by land development so as to minimise conflicting demands on scarce resources.

(m) PAL relating to land development should stimulate the effective functioning of a land development market based on open competition between suppliers of goods and services.

ENDNOTES

1) It is well known that women on farms, domestic women and rural women are three of the most oppressed and marginalised groups of women in South Africa – Kehler J "Women and Poverty" *Rights Now* June 2000 14-18; Serole J "Women and land rights" *Journal* 4:99 8-9. A subdirectorate land reform Gender Policy and Implementation was established during 1999 to ensure that gender issues are core to all land reform programmes. As yet it is too early to evaluate the effectiveness of this initiative.
2) In this regard the Spatial Development Initiatives (SDIs) might be mentioned. The Department of Trade and Industry introduced SDIs and proposed its Industrial Development Zone (IDZ) policy in order to embody the practical implementation of GEAR. The idea is to develop internationally competitive zones of economic growth. The problem is that the SDIs are usually poorly coordinated with local and provincial plans. See also Moloi D "There's logic in SDIs, but…" *Land & Rural Digest* June/July 1998 15-18.
3) This aspect also relates to the very important issue of unlawful occupation of land. Other programmes that have been designed to bring about land redistribution also impact on access to housing, e.g. Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act 3 of 1996 which have the effect that long-term security of tenure is provided and with it, also access to housing.
4) The announcement of the Integrated Programme of Land Redistribution and Agricultural Development in South Africa was eagerly awaited. This programme's aim is to grant access to land for agricultural purposes on a grand scale. The idea is to transfer 30% of the country's agricultural land to persons whose access were previously limited. The programme also introduced a grant system (R20 000–R100 000) based on a contribution in kind, labour or cash. Beneficiaries will only qualify if the land is to be used for agricultural purposes, if the project is viable and if the applicants contribute something of their own. The minimum contribution by the applicant is R5000.
5) Visser D and Roux T "Giving back the country: SA's Restitution of Land Rights Act, 1994 in context" in Rwelamira RW and Werle (eds) *Confronting Past Injustices* (1996) 89-11.
6) Van der Merwe and Pienaar "Land Reform in South Africa" in Jackson & Wilde *The reform of Property Law* (1977) 334-359; Olivier "Settlement and development: land reform at the crossroads" 1992 *SAPR/PL* 215-227; Van der walt AJ "Towards the development of post-apartheid land law: an exploratory survey" 1990 *De Jure* 1-45, Jaichand V *Restitution of Land Rights – A Workbook* (1997) 1-8.
7) Pienaar "Farm workers; extending security of tenure in terms of recent legislation" 1998 *SAPR/PL* 423-437.
8) Du Plessis, Olivier and Pienaar "Legislation affecting land: an overview" 1990 *SAPR/PL* 266-276.
9) Ramphele (ed) *Restoring the Land* (1991) 91-95; Dodson "The right to housing as a basic human right and law relating to informal settlement" 1996 *Human Rights Constitutional Law Journal of Southern Africa* 19-18, Pienaar & Muller "Impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on Homelessness and Unlawful Occupation within the Present Statutory Framework" 1999 *Stellenbosch Law Review* 370-396.
10) GG 373 of 1962-11-16.
11) GG 2486 of 1967-07011.
12) Pienaar *Stedelike beplannings- en bewaringstegnieke in die lig van die grondbeheersisteem* (1994) 184-252.
13) E.g. QwaQwa Land Act 15 of 1989 and the KwaZulu Land Affairs Act 11 of 1992.
14) Kerr *The Customary Law of Immovable Property and Succession* 3rd ed (1990) 109-113.
15) Coloured Rural Areas Act 9 of 1987.
16) Letsoalo *Land Reform in South Africa* (1987) 3 17-27 78; Mbatha "Women and Land" 1997 *Gender Research Project Bulletin* 2: 1-2.
17) Du Plessis "Status of black women regard-

ing land transactions" 1996 *Obiter* 127-132; Sande & Hamman "Entitled to what? Gender, land reform policy and the role of law in mediating access to land" (unpublished paper 1996).

18) Small & Mhaga "Gender, land tenure and environment" 1996 *Agenda* 29: 55-61.
19) Originally provided for in ss 121-123 of the Interim Constitution 200 of 1993, later confirmed under the Restitution of Land Rights Act 22 of 1994.
20) Fakir "Community projects drown in ideology" *Weekly Mail and Guardian* (199-06-25) 36.
21) Greenberg S "Mbeki's Rural Plan of Action" *Land and Rural Digest* November/December 1999 12-15.
22) Munnik V "Will this election be serious about rural issues?" *Land and Rural Digest* July/August 1999 19-21.
23) See 1.1 above – different planning rules and regulations for the different race groups.
24) The establishment of the former national states and self-governing territories occurred on ethnic grounds which inevitably resulted in different planning systems.
25) Urban and rural areas have historically operated under different legal systems.
26) Each province had (and still has) its own planning ordinance, namely Land Use Planning Ordinance 15 of 1985 (C), Town Planning Ordinance 27 of 1949 (N), Townships Ordinance 9 of 1969 (F) and Town Planning and Townships Ordinance 15 of 1986 (T).
27) Different allocation and land planning systems operate in areas under traditional leadership.
28) Set out in terms of the town planning scheme. The usual uses for parcels of land are residential, business, open space, recreational, industrial etc.
29) The idea of self-contained neighbourhoods and homelands all fitted in perfectly with the apartheid planning ideal.
30) Among all the challenges facing the restitution programme, it also faces the challenge of contributing towards a process of re-integrating segregated cities and towns. Re-integration projects have already been undertaken in Port Elizabeth –Pelcra, East London – West End and Cato Manor in Durban.
31) S 44(2) of the Constitution.
32) See in this regard Scheepers *Law and Development* 232-235.
33) Department of Land Affairs Annual Report – 1999 21. Although there has been an increase in the work load during 1999, it seems that since their establishment, applications affecting 35 000 households have been processed. Tribunals have been appointed in all of the provinces, except in the Free State and the Western Cape.
34) The Green Paper on Development and Planning 1999 identified a human resources shortage in the Unit with a negative impact on its efficiency.
35) E.g. KwaZulu Natal, Western Cape and the Northern Cape.
36) See in general Budlender, Latsky and Roux *Juta's New Land Law* (1998) 2A 1-72.
37) See the excellent discussion of the Act in the Chapter 2 of Budlender, Latsky and Roux *Juta's New Land Law* (1998).
38) See the *Appendix* for the list of planning and development principles.
39) Servitudes and restrictive conditions of title.
40) S 3(1)(b). See in this regard Budlender and Roux *Land Law* 2A-17-18.
41) As amended in 1998; previously known as the Provision of Certain Land for Settlement Act.
42) Pienaar "Fisiese beplanning in Suid-Afrika" 1995 *TSAR* 81-105.
43) See Scheepers *Law and Development* 66.
44) S 5.
45) E.g. the National Building Regulations and Building Standards Act 103 of 1977, as well as any measures relating to the establishment of townships and town planning; those relating to the standards and requirements with which buildings have to comply and laws requiring the approval of the authority for the subdivision of land.
46) See also Pienaar and Muller 1999 *Stellenbosch Law Review* 370-396.
47) Green Paper on Development and Planning 1999 23.
48) See 2. above.
49) Government Notice 1153 *GG* 16679 of 3 November 1995. The rural vision and goals were set out in view of the rural realities. The vision was that by 2020 the rural people will have dignity, security and freedom

from poverty; full and productive employment; a more diverse agriculture; greater integration between town and rural areas; a more logical spatial network of towns, services roads etc; close availability to water, fuel and sanitation; accessible and democratic local government structures and a healthy and productive environment.

50) The Green Paper on Development and Planning identifies the following probable reasons: (a) lack of knowledge, (b) difficulties with the interpretation of the principles and (c) wilful recalcitrance – see 24.
51) E.g. Constitutional Development, Housing, Land Affairs, Transport, Environment, Trade and Industry.
52) Other factors that contribute to the process being time-consuming are the requirements for additional approvals, decreasing capacity within local authorities and the need to deal with a variety of line-function departments.
53) See 1.1 above.
54) Also keep in mind that major planning acts, for instance the Physical Planning Act 125 of 1991 did not apply to the self-governing or national states. An aspect like physical planning, with implications for the country as a whole, was therefore approached piecemeal and with the exclusion of large tracts of land.
55) The following provincial governments have either promulgated own planning legislation or amended existing planning ordinances: KwaZulu Natal Planning and Development Act 5 of 1998; Western Cape Planning and Development Act 7 of 1999 and Free State Townships Ordinance Amendment Act 10 of 1998.
56) This matter also relates to the various capacities and powers of authorities. See also *Ex Parte Western Cape Provincial Government: In Re DBV Behuising (Pty) Ltd v North West Provincial Government* 2000 (4) BCLR 347 (CC) in this regard.
57) Although a Monitoring and Evaluation Directorate was established in the Department of Land Affairs, its energy was mainly channelled to land reform issues and the functioning of the Department of Land Affairs itself.
58) Anon "Chaos in communal land allocation" *Land and Rural Digest* July/August 1999 36-39.
59) Scheepers *Law and Development* 1.

The SAVEing of Sigma

Kate Farina

INTRODUCTION

Sasol Mining, a subsidiary of the South African–based petrochemical giant, Sasol, recently experienced the pressure that environmentally concerned groups can wield. The company was taken to task by SAVE (Save the Vaal Environment), regarding its proposed expansion of mining activities at Sigma mine, which is adjacent to the Vaal River in an area known as the North West Mine. The Vaal River is a main source of drinking water and is of huge recreational importance to South Africa's Gauteng region.

The public participation process initiated as part of the impact assessment was abandoned by SAVE, which instead took its concerns to court.

The core issues, which became highly publicised in the media, centred around SAVE's opinion that a wetland serving as a tributary to the Vaal River would be irreparably damaged if mining was permitted to go ahead. SAVE's decision to take the matter to court was essentially based on a lack of trust and respect for the current legal process regarding authorisation of mining activities in terms of the Minerals Act, 1991.

Litigation between SAVE and the Department of Minerals and Energy (DME) – joined by Sasol Mining – ended in an Appeal Court decision, lauded as a watershed precedent for the protection and promotion of environmental concerns and constitutional rights in South Africa.

Sasol Mining was then faced with the challenge of rebuilding a relationship with its stakeholders, and particularly SAVE, in order to ensure that its remaining mining activities were conducted in line with sustainable development principles.

Many lessons have been learnt in this long, arduous and ultimately positive process, which may contribute towards the way in which the following issues are dealt with in the future:

- Getting to the root of stakeholder concerns.
- Working around restrictions on disclosure of sensitive information.
- Coping with the use of the media by stakeholders.
- Dealing with the use of environmental objections to mask real concerns.
- Rebuilding community relations following litigation.
- Moving from rights-based to interest-based negotiations.

This paper aims to give a broad outline of what the North West strip mine issue was all about, what went wrong, the implications for Sasol and the steps subsequently taken.

1. THE HISTORY

Sasol has a guiding policy which irrevocably expresses its corporate values and ethics. These policy principles are intended to guide and manage the impact of Sasol's activities on the environment and relevant communities. They express far-reaching and laudable sentiments about the role that Sasol has to play and the obligations it carries as it operates in the South African and, indeed, the world arenas.

Sasol Mining is one of many divisions within Sasol, standing together under the umbrella of one guiding policy. This policy – together with the processes supporting its implementation –

were to be tested by the public confrontation that flared up in respect of the proposed North West strip mine.

The barrage of criticism launched against this division was in stark contrast to the values expressed in the environmental policy and the public image that Sasol strives to attain.

Sasol Mining was unprepared for the volatility of the response to its plans to mine the North West strip mine. It was previously unconceivable that a campaign of such magnitude would be coordinated and funded by community members, nor that it would capture the attention of the media on the scale that it did. The intensity of the community's reaction took Sasol Mining by surprise, and meant that its response in terms of a legal and communications strategy was retroactive rather than proactive.

Certainly, a general awareness existed within the mining industry at the time of the environmental clause contained in the Constitution. Constitutional environmental rights had, however, never really been tested since their inclusion in the Bill of Rights, in 1994.

The South African mining industry had hitherto operated within the defined, and to some extent rigid, framework of the Minerals Act, 1991. In terms of this Act, the DME is given the role of both coach and referee. The Act promotes optimal utilisation of South Africa's mineral resources, and the DME has historically vigorously supported and protected the associated mineral rights. However, the DME is also expected to regulate the environmental impacts of the exploitation of such mineral resources.

2. THE ISSUES

How did it come about that Sasol Mining eventually found itself at the centre of a dispute being publicly aired in the highest court in South Africa – the Appeal Court in Bloemfontein?

Why was it left to this court to try and weigh up the traditional rights implicit in minerals development against the rights of all South Africans to have their environment protected – and still ensure that jobs could be provided, and the economy protected?

To begin at the beginning, it is necessary to fill in the background as to why Sasol Mining proposed an extension of its mining operations into an area known as the North West.

Sigma, one of the mines within the Sasol mining stable, is geographically closely associated to Sasol Chemical Industries (SCI), one of the founding companies of the Sasol group which was built up around the conversion of the by-products of synthetic fuels production, into downstream chemicals. The SCI plant was in fact located in Sasolburg, adjacent to the Sigma mining operation, to facilitate access to coal which is used to generate power for the steam stations that drive the plant.

In the mid-1990s it became clear that an additional source of coal would be required – coal that met the quality requirements of the SCI process in terms of ash content. The existing Sigma underground mine was in the process of closing down and there was the additional problem of job losses if the mining operations could not be transferred to another area.

The mineral rights were already held by Sasol Mining in an area known as the North West. After extensive surveys it was, however, concluded that there were major safety problems attached to mining this area by underground methods. The only option considered feasible was a strip (or open cast) mine.

It was clear from aerial photographs as far back as the 1970s, that the area adjacent to the Vaal River – and more particularly along the Rietspruit (a tributary of the Vaal River) – had already been cultivated as farmland.

The area along this portion of the Vaal River has affectionately been termed "Millionaires Row" due to the costly residential developments along the river. The Vaal River itself is a major source of drinking water and is also of great importance in terms of environmental and recreational activities.

The Rietspruit was compared by some environmentalists to the Okavango Swamps in Botswana in terms of its filtering capacity. In reality, however, although a swampy area is found along this tributary, the area proposed to be mined, further away from the Rietspruit, is dry, barren *veld* (grasslands) for most of the year. Of particular concern to residents living alongside the river, was the potential visual impact of the drag lines, as well as dust, noise and night-time illumination. Despite proposed mitigatory measures, local residents believed their property values would be detrimentally affected by mining activities in this area.

3. THE PROCESS FOLLOWED

It should be noted that the potential impacts of

mining the North West area were, however, recognised upfront by Sasol Mining. In line with Sasol's policy, a decision was taken at the beginning of the project to adhere to a full environmental impact assessment process which went substantially beyond the existing legal requirements of the Minerals Act.

A world class environmental study was initiated with numerous specialist assessments and extensive public participation. Open days held involved both the local communities and all relevant authorities. The input of all interested and affected parties was encouraged.

The regulatory authorities, including the notoriously difficult Department of Water Affairs and Forestry (DWAF), were satisfied as to the process of identification of potential impacts as well as proposed measures to mitigate such impacts.

All issues of concern raised by any interested and affected party were noted and addressed in terms of the environmental impact assessment process. These included a variety of environmental and social issues, most of them common to any proposed mining activity. However, the real challenge quickly became evident – the separation of true environmental issues from concerns regarding the reduction of property values of residential developments along the Vaal River.

In addition, a perception was quickly entrenched in the public's mind that a "wetland" fell within the mining area and would be irreversibly damaged by Sigma's mining operations.

Various measures were suggested to try and counteract concerns and to reduce the potential impacts of proposed mining activities. An effective sterilisation of a portion of the reserves was proposed in order to move the mining area further away from the Rietspruit.

An extensive berm was proposed to address concerns relating to noise, dust, night-time illumination and visual impacts on residential developments across the river. A comprehensive water management plan and an extensive rehabilitation plan were also tabled. Re-engineering of machinery design was undertaken in order to reduce noise impacts and, similarly, a complex blasting programme was designed to this effect.

Mitigation plans are not, however, easily sold once perceptions have been entrenched.

4. THE LEGAL CHALLENGE

Many of the interested and affected parties concerned about the impact on property values took their environmental concerns to the media. What Sasol Mining quickly discovered is that a wetland can be as emotional a subject as baby elephants. Certainly, Sasol found it close to impossible to rebut the assumptions made in the media that a classified wetland was at risk.

SAVE as an organisation was constituted by residents along the river to take their concerns forward and to publicise them. SAVE withdrew from the public participation process and declared that any environmental management plan coming out of the process would be a "non document" in their view.

Frustrated at the authorities' apparent lack of response to their concerns, SAVE then appealed to the High Court for a review of the administrative actions taken by the DME in terms of the Minerals Act.

The mining authorisation procedure had traditionally been a two-phased process. The first stage was the granting of the mining licence, mainly on the basis of the financial and technical ability of the applicant. The letter of the law did not provide for environmental considerations to be taken into account at this stage, and it was generally perceived to be the screening process whereby the DME could satisfy itself that the applicant would have the resources to ensure optimal utilisation of the mineral reserves. Only departmental officials were therefore previously involved in decision making during this phase.

This mining licence did not, however, constitute authorisation to commence mining operations before an environmental impact assessment had been conducted and an environmental management programme report (EMPR) formulated. This was the stage at which interested parties were consulted in respect of the proposed mining method, potential impacts and mitigation thereof.

SAVE believed, however, that for added security, interested and affected parties should have been consulted when the mining licence was granted as well.

Although the action was essentially brought against the DME, Sasol Mining was joined as a respondent due to its interest in the matter. Based on legal opinion obtained, the view supported by both the DME and Sasol Mining was

that the mining licence process was essentially an administrative procedure entailing the involvement of the department only, while the opportunity for the interested and affected parties to be heard was provided for in terms of the EMPR requirement. It is important to note that this "rights approach" was based on well established precedent set in the past by the Minerals Act. A decision was therefore taken by the DME and Sasol Mining to defend the court case, while the rest of the mining industry looked on with much interest.

The High Court decided that interested and affected parties do indeed have a right to be heard during the mining licence application. Again, legal opinion received advised the DME and Sasol Mining to defend their interpretation of the technicalities of the Minerals Act, and this court decision was subsequently appealed. There was much pressure from the rest of the mining industry for a successful outcome to this appeal as the court's decision essentially meant that extensive public participation would be required in both stages of the licensing process in getting go-ahead for mining – involving additional cost and time delays. The mining industry was also wary about being dictated to by the community, an idea which contradicted the precedence that mineral rights had taken over other rights in the past.

The Appeal Court reaffirmed the Brundtland definition of sustainability, and further interpreted the right of interested and affected parties to be involved in all decision-making processes as part of the constitutional right to protect their interest in the well-being of the environment.

The case was therefore not about saving a wetland, but rather a determination of the role of interested and affected parties in all mining industry activities.

It is important to note that the appeal lodged by the DME and Sasol Mining was not an attempt to restrict the rights of any interested and affected parties to be heard, but rather to clarify at what stages this should happen in terms of the process laid down by the Minerals Act.

5. THE RESULTS

The mining licence covering the rest of Sigma's mining operations was subsequently declared invalid as a result of the court's decision. Sigma now faced the added pressure of having to legalise its existing mining operations which had been in operation since 1952. The mining licence would have to be reapplied for in order to legalise these mining activities, which would entail consultation with the very interested and affected parties that Sigma had come up against in court.

Sasol Mining began the difficult process of rebuilding trust and cooperation in an atmosphere of intense hostility.

Numerous roundtable discussions were commenced with SAVE, the primary opponents to Sigma's mining activities. For the first time, core issues and concerns were discussed in a frank and open manner and the discussions became interest-based rather than rights-based.

SAVE was able to discuss the concerns its members had regarding the potential impact on property values, without having to resort to the cry of "wetland" in order to make their concerns seem more politically correct.

Sasol was able to discuss the implication of the introduction of natural gas as an alternative fuel source.

It was significant that both parties were feeling their way through a new process without the safety net of clear legal rules and without guidance from the authorities. They had only the court judgment to work with, which dealt generically with the upholding of constitutional rights and the promotion of sustainable development.

After many long hours spent in often heated discussions, Sasol Mining and SAVE were finally able to release a joint media statement.

SAVE agreed to support constructively the reapplication for mining authorisation of Sigma's existing operations, while Sasol Mining in turn undertook to consider alternative coal and energy resources to supplement the SCI feedstock. Significantly, both parties agreed to continue their partnership in the interests of pursuing continued sustainable development.

6. THE LESSONS LEARNT

The greatest lesson learnt from this process was the often misjudged significance of constitutional rights and their practical implementation in terms of overriding all other legislation. This goes hand in hand with the active law reform process in South Africa in terms of which the rules are constantly changing.

Another valuable lesson which has been applied to other projects within Sasol, is the need to avoid, wherever possible, the settlement of disputes in the legal arena, in the interests of trying to maintain constructive relationships. It is only through such relationships that sustainable development can properly be explored.

Sasol Mining has continued with its strategy of continual and on-going communication with its neighbours. It commenced with an open and transparent programme for finalising the licence for its existing operations and is open to the inputs of impact assessment processes in terms of their value in promoting sustainable development.

The local community in turn is committed to helping Sasol Mining to balance social and environmental aspects with developmental needs.

A programme of open days has been initiated whereby the community and the mine come together for interactive sessions on subjects such as the technicalities of blasting, ISO 14001, rehabilitation, water management, etc.

CONCLUSION

The road ahead has no end and is often rocky, however, there is no alternative but to continue the journey towards the mystical goal of "sustainable development".

The Potential Impact of the National Environmental Management Act on the South African Mining Industry

John Kilani

INTRODUCTION

The National Environmental Management Act (NEMA) came into force in January 1999. It was the product of over three years of extensive consultation through the Consultative National Environmental Policy (Connep) process, which was carried out by the Department of Environmental Affairs and Tourism (DEAT).

NEMA is not intended to set environmental standards, but instead provides the framework for the implementation of the national environmental policy. The DEAT has embarked on a process of legal review aimed at developing supporting legislation and regulations under the overall framework of NEMA.

This paper will discuss some aspects of this important piece of legislation, and will review and examine the positive and negative aspects of the Act from the perspective of responsible environmental management in the mining industry.

1. INSTITUTIONAL STRUCTURES

The institutional provisions of the Act are indicated diagrammatically over page. The industry is generally happy with this arrangement.

2. KEY POSITIVE ASPECTS OF NEMA

NEMA has some positive provisions, which are discussed below.

2.1 Committee for Environmental Coordination

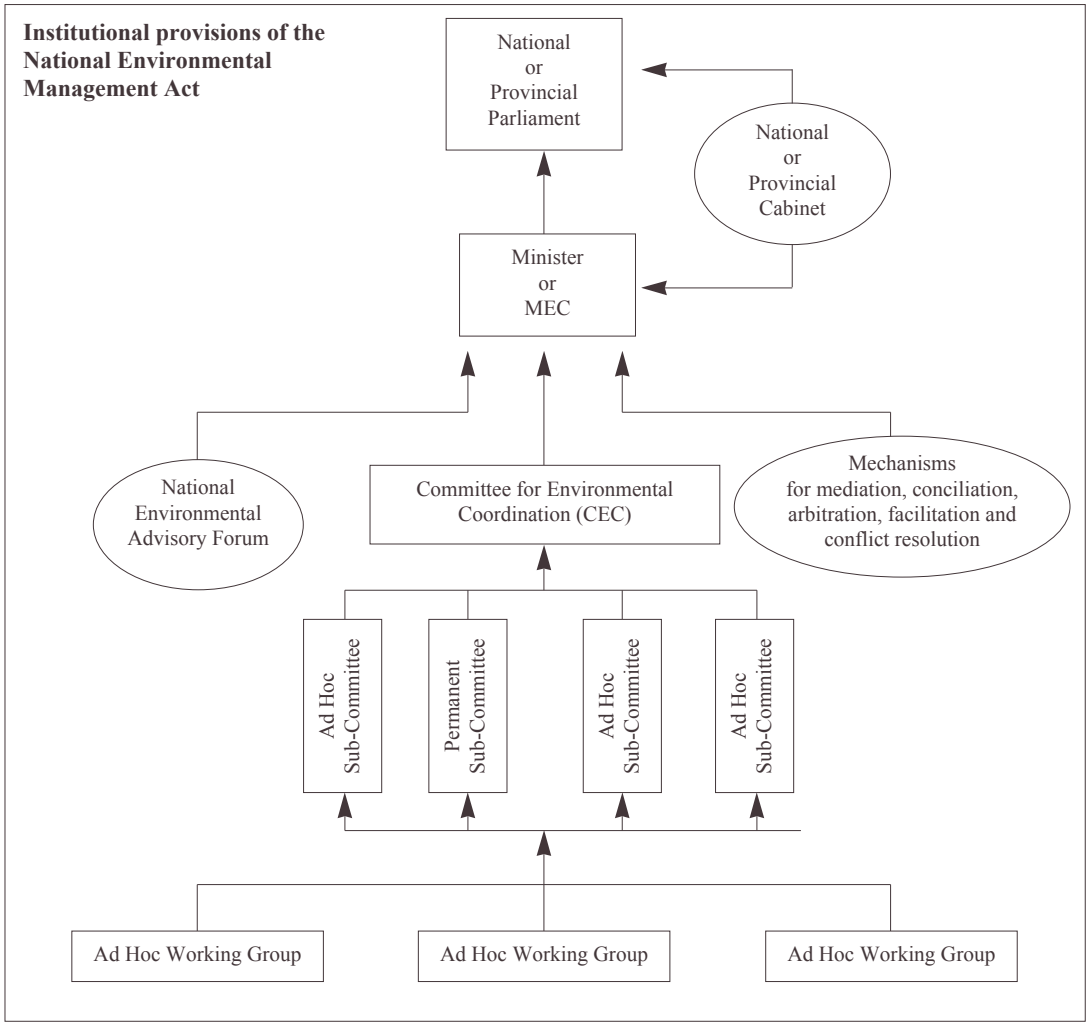
The establishment of the Committee for Environmental Coordination (CEC) (sections 7–10) is one of the most significant positive aspects of NEMA. Throughout the entire Connep process, intense lobbying was done by environmental non-governmental organisations (NGOs) and community-based organisations for the establishment of an independent environmental agency similar to the United States Environmental Protection Agency (EPA). The mining industry opposed this because such an agency would be costly, duplicate line department functions, involve the establishment of a huge bureaucracy, and would not promote public– private partnerships but operate largely on the basis of a "command-and-control" approach.

The CEC comprises the directors-general of the major departments that manage or affect the environment and the provincial heads of environmental departments. It is chaired by the Director-General of Environmental Affairs and Tourism. Its objective is to promote the integration and coordination of environmental functions by national and provincial government departments. As such, it is an important and powerful body.

Although the previous CEC was ineffective, the preference for a CEC instead of an independent EPA-type agency is a significant demonstration of government's commitment to effective coordination of the environmental activities of all relevant departments. The industry will need to support the department in ensuring that the new CEC works effectively.

2.2 Fair decision making and conflict management

The Act (sections 17–22) recognises the desirability of first referring disputes to conciliation



and arbitration before a final decision is taken or court or tribunal proceedings on disputes are finalised.

Although the terms "conciliation", "mediation", "facilitation" and "arbitration" are sometimes used interchangeably in NEMA, the considerations (section 22(1)) relevant to deciding on the need to refer differences or disagreements to conciliation provide an opportunity to avoid or minimise costly litigation.

The mining industry will explore opportunities for constructive use of the provisions of these sections of the Act as they should enhance the partnership relationship the mining industry seeks to develop with communities and other stakeholders.

2.3 International obligations and agreements

Sections 25–27 require that an international environmental instrument or convention should not be signed or ratified by South Africa without adequate consideration of several factors. The most important of these are:

- available resources to ensure implementation
- views of interested and affected parties
- benefits and disadvantages to the country
- the respective responsibilities of all national departments involved
- the potential impact of ratification on the country.

The mining industry welcomes this thoughtful approach to the country's international rights and obligations.

2.4 Procedures for cooperative governance

Sections 11–16 provide for the preparation of environmental implementation plans by national departments that exercise functions which

may affect the environment, and for the preparation of environmental management plans by national departments that exercise functions involving management of the environment.

These provisions are important from the point of view of the mining industry because they provide a legal framework for the role of the Department of Minerals and Energy (DME), as the department that exercises functions involving management of the environment in the mining sector. The DME needs to package the environmental management programme report (EMPR) approach as an appropriate environmental management plan to be submitted to the CEC in terms of the provisions of these sections of NEMA. An endorsement of such a management plan by the CEC will give the EMPR system the necessary recognition by other relevant departments.

2.5 Integrated environmental management

The purpose of Chapter 5 (sections 23 and 24) of NEMA is to promote the application of appropriate environmental management tools in order to ensure integrated environmental management.

Mining was the first industry sector to attempt to give practical effect to the principles of integrated environmental management through the EMPR system. It is therefore significant that section 24 takes cognisance of the need to avoid unnecessary duplication of effort by people initiating activities to be regulated.

There are now sufficient grounds in the provisions of NEMA to resolve amicably the mode of application of the EIA regulations to mining activities.

3. SOME NEGATIVE ASPECTS OF NEMA

NEMA contains some provisions that could be problematic and costly to the mining industry. Most of these provisions, which are contained in Chapter 7 of the Act and relate to compliance and enforcement, could result in costly, divisive and time-consuming litigation without adding any commensurate benefit to the nation's efforts to develop a culture of responsible environmental management. The potential consequence is that both development and the environment could lose out in the long run.

To ensure that NEMA facilitates a "win-win" approach, it is essential that the negative aspects of NEMA are addressed. The challenge facing industry is to assist government to devise creative ways of fixing these shortcomings without alienating the sectors of society which perceive that the provisions of this chapter of the Act give them a role and responsibility to monitor and ensure responsible environmental management by business.

3.1 Recovery of remediation costs

The Act provides a list of people from whom the director-general or provincial head of department may recover all costs incurred in remediation of environmental damage. These people are:

- anyone who is or was responsible for, or who directly or indirectly contributed to the damage
- the owner at the time, or that owner's successor
- the person in control of the land or any person who had a right to use the land at the time
- any person who negligently failed to prevent the damage occurring.

This subsection could be problematic in that the director-general or provincial head of department may be tempted always to go for easy targets.

In cases where such easy targets are not the major culprits, the people actually responsible for the environmental damage could escape penalties. Thus, the provision for cost recovery may not serve as a deterrent to fly-by-night operators who may leave a long trail of environmental damage behind them as they hop from one development activity to another. Consequently, the main aim of this provision will be defeated and the environment will be the ultimate loser.

It would be possible to avoid these negative consequences if section 28 were to include provisions of the type contained in section 30, where responsibilities are considered in a hierarchical manner.

3.2 Disclosure of information

The Act makes provision (sections 31(4) and (5)) for someone to disclose information without being held liable or being subject to dismissal or harassment if they, in good faith, reasonably believe that it is evidence of an environmental risk. These clauses are problematic for the following reasons:

- Section 31(4) does not provide a sufficient check against people who disclose information with malicious intent. People only need, in good faith, to believe at the time of the disclosure that they are disclosing evidence of an environmental risk, and they will be free from any action being taken against them.
- The section that deals with disclosure of information to the press is particularly problematic and counterproductive for the following reasons:
  – It has potential to result in sensationalism.
  – It could lead to the polarisation of different sectors of society, which may make conciliation or arbitration difficult.
  – It could result in "trial by the media".

3.3 The right to refuse work

The right of workers to refuse to do environmentally hazardous work, as provided for in section 29, is highly contentious for the following reasons:

- It is easy for an employee to refuse work for frivolous reasons as he or she is only required, in good faith, to reasonably believe that at the time of the refusal the performance of the work might result in an imminent and serious threat to the environment.
- It is difficult to determine what constitutes an imminent and serious threat to the environment.
- The Act does not encourage employees to use any other applicable external or internal procedure to remedy the situation. Thus, the refusal to work might always be the first course of action taken by an employee.

The provisions of section 29 will have to be carefully negotiated with labour as it is not in the interests of either employers or employees to have a law that has the potential to perpetuate a state of conflict. Provision should be made for determining good faith, reasonableness and what constitutes a serious threat to the environment through administrative procedures agreed by both parties. Alternatively, NEMA could provide for the right of workers to refuse to do any work that constitutes a breach of any provisions of the Act.

3.4 (Not) awarding costs

Section 32(2) allows a court not to award costs against someone who loses a case that he/she launches in terms of NEMA if the court believes that the person acted reasonably and had made due effort to use other means to obtain relief. Where the case was successful, the court may (section 32(3)) award costs to that person and to a lawyer who provided free legal advice. These sections do not offer any protection for people who are wrongly accused. While it may be argued that these provisions are necessary in order not to stifle legitimate concerns, they do not provide for the necessary compensation for the potentially substantial damages that could be incurred by someone who is wrongly accused.

In section 32(2), the court's discretion in determining whether or not to award costs against people who launch unsuccessful suits is based solely on the motive of the complainant. The same benefit is, however, not extended to the accused in section 32(3). The discretion of the court to award costs should also be made subject to whether the court believes that the accused was negligent and had persistently ignored all reasonable opportunity to redress the issue. In such cases where the court decides not to award costs, the realisation of the goal of protecting the environment and showing concern for the public interest should be sufficient compensation and incentive to warrant the action, not the potential of financial reward.

These provisions could cause lawyers to act as freelance touts, constantly in search of environmental cases. While it could be argued that this is good for the environment as it will make developers more conscious of their environmental responsibilities, it could prove disastrous for the following reasons:

- An imbalance in the provisions relating to awarding of costs coupled with the aggressiveness of lawyers who seek opportunities to make money could result in many frivolous cases being brought to court, as there is no compelling reason for lawyers to analyse critically the merit of cases before litigation.
- It will divert the limited resources of the courts from attending to environmental cases that have real merit.
- The legal enforcement of certain key provisions of the Act will become problematic and the environment will suffer.

3.5 Criminal proceedings

Industry accepts that a role of government is to seek appropriate means to enforce regulations

and legislation through prosecution, fines, litigation and any other necessary measures. Furthermore, to secure sustainable development and to protect the well-being of citizens, punishment of environmental crimes should reflect the gravity and extent of the degradation and damage to the environment. The provisions of section 34 could, however, lead to some serious unintended or undesirable consequences for the following reasons:

- There is no justification for environmental offences being singled out for treatment different from other classes of criminal offences which are equally, or more, morally and socially repugnant. For example, the provision for a court to order a convicted person to pay the costs and expenses of the prosecution discriminates against people convicted of environmental offences compared to people convicted of other offences.
- The strict liability provisions and the provisions shifting the evidential burden on to the accused could be unconstitutional.
- Some of the compensatory provisions seem to unjustifiably duplicate or add to the powers given to the courts by the Criminal Procedures Act.
- Provision for the vicarious liability of directors duplicates section 332 of the Criminal Procedures Act, which provides for the liability of directors of a company under certain circumstances.

CONCLUSION

NEMA is an important piece of legislation; the mining industry is happy with the bulk of it, and is committed to making it work. Certain negative aspects of the Act have, however, the potential to retard the progress of South Africa towards achieving sustainable development.

In trying to draw attention to the need to address the negative aspects of NEMA, the mining industry has to contend with counter arguments to the effect that these provisions are only meant to ensure that the Act is enforced and that industries which have nothing to hide have nothing to worry about.

The industry has a major role to play in ensuring that the Act is implemented in a manner that enables all sectors of society to work towards a framework based on a "win-win" approach to the environment and development. The consequences of failure are such that "win-lose" is not a tenable option. The only alternative to a "win-win" approach is a "lose-lose" situation where neither environmental protection nor the nation's developmental needs are realised.

Impact of Environmental Legislation on Mining in South Africa[1]

Mmagadi Mabiletsa & Willemien du Plessis

INTRODUCTION

The coming into being of a new, democratic government in South Africa brought with it different approach to the agenda of development. This agenda encourages putting the interests of the people first, and involving them in decision making and development that is sustainable in that the use of resources has to always take into consideration future generations. Sustainability can be said to encompass the future generation's health, confirmed well-being and the existence of resources to be able to lead that existence.

How then does the current mining legislation feature in the process of development and the environment? On the one hand, the exploitation of South Africa's natural resources through mining contributes to the economic development of the country. On the other, mining is an activity that has possible impacts on the environment. Government policies[2] require, however, that any development process involve the sustainable use, among other things, of natural resources.

With the current rate of demand for development, care should be taken that natural resources are not over-exploited to the detriment of the environment and humankind's future existence. The continued negative impact on the environment should also be avoided in order not to threaten people's health and general well-being and so as not to erode the natural resources upon which development is dependant. A properly managed system of limiting exploitation and ensuring optimal use and sustainability is therefore necessary.

Section 24 of the Constitution of the Republic of South Africa, 1996 states as follows:

> "Everyone has the right –
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

Mining is one of the activities that has a severe impact on the environment.[3] The impacts range, *inter alia*, from soil, water, human health and the built-up environment, to air, plants and animal life and differ from one mining activity to another. The aim of mining companies is to maximise the extraction of ore in South Africa to ensure wealth creation.

Some mines regard the Minerals Act 50 of 1991 as the only Act applicable to them. There are, however, several other legislative measures applicable to mining, which may hinder this goal.[4] The duty is placed on the state to enforce section 24. The state does not always have the capacity to do so and this results either in legislation being ignored (e.g. the Atmospheric Pollution Prevention Act [APPA])[5] or in the implementation of self-regulation by the mines (ISO 14001).[6]

Since the implementation of the 1993 and 1996 constitutions of the Republic of South

Africa,[7] new legislation has been promulgated, for example, the National Water Act 36 of 1998; the Water Services Act 108 of 1997, the National Environmental Management Act 107 of 1998 and the Local Government: Municipal Demarcation Act 27 of 1998.[8] South Africa also became a signatory to various international conventions and treaties dealing, *inter alia*, with the reduction of CFCs and the sustainable use of biodiversity.[9] This legislation has several implications for mining.

In 1998, a White Paper on a Mineral Policy[10] was published foreseeing a totally different perspective on minerals and mining in the future South Africa. The Department of Minerals and Energy (DME) is in the process of drafting a Mineral Development Bill to give effect to the White Paper.[11]

Environmental law is not static and is constantly updated. Not only is it a problem keeping up with new legislation, but it is also sometimes difficult to determine its impact on mining.[12] It is also uncertain how the legislation has impacted on mining activities in terms of achieving the goal of sustainable development. Current legislation seems to encourage cooperative governance.

The purpose of this paper is to indicate the impact of some of the new environmental and other legislation on mining activities in South Africa.

In this paper, the problems experienced by mining companies will be referred to briefly, after which the Environment Conservation Act (ECA),[13] the National Environmental Management Act[14] (NEMA)[15] and the Minerals Act[16] will be discussed as the framework legislation dealing with mining. Thereafter, legislation dealing with natural resources, nuclear energy, waste, cultural resources and other legislation will be discussed in order formulate a conclusion.[17]

1. PROBLEMS EXPERIENCED BY MINING COMPANIES

The White Paper highlighted some of the problems experienced by mining companies. Only a few of these problems pertaining to legislation are listed here:

- Mining companies face some problems regarding the application and administration of legislation concerning mining, including the role of provincial government.
- Mining companies also experience the influence of the right to information contained in NEMA and the Constitution as a problem, as the right to information may be in conflict with a mine's right to confidential commercial information.
- A conflict exists between the Environment Conservation Act 73 of 1989 and the Minerals Act 50 of 1991 regarding environmental impact assessments.
- Small-scale mining operations are not so strictly controlled, as is the case with larger mining companies.
- The mining sector has liability in terms of the "polluter pays" and cradle-to-grave principle – a closing certificate issued in terms of the Minerals Act may not mean the end of liability for a mining company.[18]

Other problems not necessarily listed in the White Paper entail the following:[19]

- In terms of the new legislation, responsibilities of local authorities, landowners, developers and the state are not clearly spelled out. This results in no authority taking, for example, a decision to authorise a development.
- A lack of decision making results in a loss of income and time for developer.
- In other instances, excessive restrictions and conditions are placed on the approval of a development project, resulting in it not taking place due to the costs thereof.
- In the case of the cradle-to-grave principle, it is also not clear what the responsibility of the state *vis-à-vis* the mining company is – it is uncertain who should do what.
- Problems are also experienced with the legal aspects dealing with the formulation of rehabilitation standards.

2. NEMA AND ECA

ECA and NEMA can be regarded as environmental framework legislation.[20]

2.1 ECA

In terms of ECA, environmental impact assessments have to be done for certain listed activities.[21] The environmental impact regulations are, however, not applicable to mining activities. In terms of the Minerals Act,[22] environmental management programme reports (EMPRs) have to be completed.[23]

The contents and approach of environmental management as prescribed by NEMA and ECA

on the one hand, and the environmental management programmes prescribed in terms of the Minerals Act on the other, differ and may be in conflict. There is an argument between the Department of Environmental Affairs and Tourism (DEAT) and the DME on whether all activities undertaken on mine land will fall under the EMPR or whether an environmental impact statement (EIS) will be needed. As a result of the conflict between the two departments and the two programmes, the goalposts shift constantly.[24]

Some mining companies argue that when land is declared a mining area, all activities on that land fall under the scope of the Minerals Act and that other legislation is therefore not applicable to them.[25] This is not necessarily the case as nearly all new environmental legislation is also applicable to mining areas. For any development that is not mining specific (e.g. the building of a road on mining land), certain procedures are prescribed in terms of the Development Facilitation Act.[26] The processes of this Act overlap with that of ECA. In terms of both acts, public participation is, for example, prescribed; sometimes mining companies are forced to do two public participation processes in order to comply with both acts.[27]

EMPs are no longer effective but mines still have to comply with these measures in order to obtain mining authorisation. Due to these problems the DME is in the process of revising the *Aide Memoire* to bring EMPRs in line with EISs.[28] The responsible authority will still be the DME and not the DEAT. In the KwaZulu-Natal draft regulations compiled by the KwaZulu department dealing with environmental affairs, mining is listed as an activity for which an EIS will be necessary. The provincial DEAT will be responsible for approving the EIS.

2.2 NEMA

NEMA is important for the mines. In terms of section 2, principles are laid down that will be taken into consideration when government departments make decisions regarding the environment.[29] Mines also have to take note of section 29, giving workers the right to refuse to do environmentally hazardous work. Mines will also be obliged to control emergency incidents[30] and will be liable for significant pollution or degradation of the environment in terms of section 28.[31]

It will be possible for mining groups or a mining company to conclude environmental management cooperation agreements with the relevant minister, MEC or municipality.[32] These agreements may contain an undertaking to improve the standards laid down by law for the protection of the environment or to set targets for the fulfilment of the undertaking. It can also make provision for periodic monitoring, independent verification of reports, independent monitoring and inspections and verifiable indicators of compliance with any targets, norms or standards laid down in the agreement. Such an agreement can only be entered into after a prescribed public participation process has been complied with.[33]

In terms of Section 16(1)(a) of the NEMA, every organ of state that exercises a function which may significantly affect the environment must draw up environmental implementation and management plans, as approved by the DEAT.

Mining is a function that has serious environmental implications. Schedule 1 of the NEMA lists those departments, which in the exercise of their functions and activities may affect the environment. Several departments are listed, save the DME. The concern this raises is that it seems government does not regard mining as an activity that may have detrimental effects on the environment. It also implies that the DME does not have to have environmental implementation and management plans by which the environmental performance of the department will be judged.

Though in terms of section 9 of the Minerals Act, the licensee must submit an EMPR before mining activities commence, this requirement is still inadequate to prevent environmentally harmful activities from being carried out. This is due to the fact that the licensee can bypass the EMPR requirement by applying for an exemption in terms of section 39(2) or the licensee may be granted temporary authorisation to commence mining operations pending the report, in terms of section 39(4).

Though such exemption should only be granted after consultation with the ministers from the DEAT and the Department of Agriculture, there is no indication as to the extent to which the opinions of the DEAT and the Department of Agriculture hold water. In cases of conflict regarding the granting of such

an exemption – it is also unclear whether the DME can overrule the other departments.

It is submitted that all mining activities be made subject to peremptory consideration and decision by the DEAT when negative environmental implications are identified. This can only be possible if mining is listed as an activity in terms of the ECA. In order for the department to be forced to draw up both environmental management and implementation plans, the DME needs to be identified as a department exercising functions having a possible impact on the environment. The DME will then be forced to coordinate with other government departments in that it will no longer be able to act independently on matters affecting the environment.

3. MINERALS ACT 50 OF 1991

The Minerals Act is the principal Act on mining and activities connected thereto.

3.1 Aims

The Act was enacted to achieve the following aims:[34]

- Effective control by the state of prospecting and mining activities regardless of who holds the mineral right.
- Ensuring optimal exploitation and orderly utilisation of minerals.
- Ensuring the safety and health of persons.
- Rehabilitation of the surface of affected land.

3.2 Authorisations

How then has the Act set about achieving those aims? By providing for a system of authorisations (in the form of a permit if an activity will be undertaken for less than two years or a licence if the activity will be undertaken for two years or more). In terms of section 5 of the Act, no prospecting or mining activity should take place unless an authorisation has been obtained from the regional director: mineral development. Authorisation is an important mechanism by which reckless damage to the environment can be avoided or minimised and mitigated if such damage cannot be avoided totally. This is also in line with the principles in the NEMA.[35]

When an application for an authorisation is made, the applicant is supposed to prove to the regional director that:[36]

- the manner and scale of the activity will not lead to over-exploitation
- such activity will not be detrimental to the health and safety of workers (and third parties)
- the applicant is capable of carrying out any rehabilitation to the damaged surfaces.

The applicant must provide the regional director with the necessary information to enable him/her to decide on the above requirements. To ensure confirmed compliance with the conditions set out in the authorisation, the Act prohibits any form of transfer, cession or any type of action that will lead to a third party making use of the authorisation.[37] Secondly, the authorisation may be suspended or cancelled if the conditions listed in the authorisation are not complied with or if it is found that the provisions of the Act have been contravened.[38] The minister also has a right to call for an investigation if he/she suspects that the mining operations are being conducted contrary to the aim of optimal utilisation.[39] On receiving the report he/she can decide whether mining operations should continue, and if so, under what conditions.[40] These provisions can therefore be said to be in keeping with the principles of continuous impact assessment as promoted by NEMA. Lastly, the prospector or miner remains liable for any damage that may occur as a result of the activities, even long after such activities have ceased until such time that a certificate has been issued by the regional director to the effect that the provisions of the Act have been complied with.[41]

Though care is taken not to over-exploit minerals, there is equally the concern environmental degradation might lead to under-exploitation, which might affect the development process negatively. The aim of the Minerals Act therefore is to find a balance between the two concerns. Hence, the Act contains provisions which can be said to discourage the non-use of natural resources. The Act provides for the rights of holders to be overridden by public interest by ceding the mineral rights to persons who are willing to exercise them under the Act,[42] or for the state to expropriate such rights[43] if the holders of the mineral rights do not make use of the mineral rights, in order to make optimal utilisation a reality. This will also have to comply with the process of authorisations in terms of the Act.

This type of a problem was highlighted in the recent case of *The Director: Mineral Develop-*

ment, Gauteng and Sasol Mining (Pty) Ltd v SAVE and Others.[44]

In this case, Sasol Mining was a mineral rights holder in three farms in the Sasolburg district, fronting the Vaal River. Sasol mining applied to the Directorate: Mineral Development for a mining licence for open cast mining of coal in terms of section 9 of the Minerals Act. Residents of the areas around the Vaal River then raised environmental objections to the issuing of the licence to the Director. They alleged that their objections were to be considered by the Director in his decision whether to issue such a licence or not.

The Director refused the residents a hearing,[45] believing there was nothing in the legislation obliging him to do so. This, despite the serious environmental concerns raised by the residents. Their concerns related to the possible destruction of the wetlands, the threat to fauna and flora, the loss of water quality and pollution thereof, as well as general light, dust and noise pollution.

The implications of such a refusal indicate, perhaps, that the case at hand was not an isolated matter, but rather the general approach of the DME when dealing with mining licence applications.

The Appeal Court agreed with Save the Vaal Environment (SAVE) and held that the residents were entitled *audi alteram partem* because the requirements under Section 9 involved environmental matters. Though SAVE succeeded in its action, this cannot be said to be a guarantee that possible future interested or affected parties will automatically be granted a hearing.

Having mining as a listed activity in terms of the ECA could solve the problem. That way, the DEAT as a custodian of all matters related to the environment can have a legally binding authority to object to the issuing of an authorisation if certain environmental concerns have not been addressed to the department's satisfaction.

3.3 EMPR

Once an authorisation has been issued but before any mining activities can commence, an EMPR must be drawn up by the person intending to mine, which report must be submitted to the Director: Mineral Development.[46] The EMPR has to cover a description of the pre-mining environment, a motivation for and detailed description of the proposed project, an EIS and an indication of how the impact will be managed. To determine whether an EMPR will be approved or not, a cost-benefit analysis has to be made. From the policy, it is expected that any short- and long-term benefits should far exceed the costs associated with the mining activity.

In terms of GN R801 in GG 20219 of 1999-06-25, regulations were issued to amend GN R992 of 1970-06-26 issued in terms of the Mines and Works Act.[47] The purpose of the amendments was to impose certain environmental requirements on prospecting and mining operations. It also provided for the auditing and monitoring of EMPs, which was not previously done.[48]

3.4 Rehabilitation

In terms of the Act, mines have to be rehabilitated during the mining process and after closure.[49] The rehabilitation of land must be carried out by the holder of the mining authority in accordance with the EMP[50] as an integral part of the mining. The Director: Mining Development must be notified five years before closure of a mine.

Before the mine can dispose of its assets, it must obtain a certificate from the director.[51] Mining companies have to set aside funds to this effect. At present the debate is whether mines have raised enough funds or are in the process of raising sufficient funds for closure.[52]

It is sometimes difficult to obtain a closure certificate, as the DME is not always convinced that all potential environmental risks have been eliminated. A mine might receive a closure certificate but its responsibilities in terms of, for example, the National Water Act continue.[53]

Due to the Merriespruit disaster, a new code of practice (SABS 0286) was published to deal with the disposal of mine residue deposits.[54] The code is based on ISO 14001 to ensure continual improvement:

> "The primary focus of the new code is to ensure that the appropriate safety and environmental objectives are set and achieved."

It is recommended in the code that residue disposal should be integrated into the main activities of the mine, taking into consideration the variety of residue types, disposal methods and climatic conditions.[55]

4. NATURAL RESOURCES[56]

4.1 Water

In many instances under the previous dispensation, mines provided their own water. Since the introduction of the National Water Act 36 of 1998, new priorities have been identified and the mining sector has "to compete on an equal footing with other interests which may be of greater or lesser importance when it comes to demands placed on the use of the country's resources. The playing fields have been levelled".[57]

4.1.1 Water Services Act

In terms of the Water Services Act[58] industrial use of water is regulated. In terms of section 7(1), no person may obtain water for industrial use from any source other than the distribution systems of a water service provider nominated by the relevant water services authority. In the same manner, no person may dispose of industrial effluent other than in the approved manner.[59] A person who obtained water from a source or disposed of industrial effluent into that source before the commencement of the Act, has to apply for a new authorisation.[60]

4.1.2 National Water Act[61]

Sustainable water use is another aspect of maintaining our environment as a source of life. Water pollution constitutes a threat to human, animal and plant life alike. Water quality is also an important aspect of development. It serves as an indicator of the level of improvement in people's lives. Mining is one activity that has the potential to threaten the availability of water, if water use in mining is not regulated. Water quality might also be threatened if care is not taken to prevent pollution of underground water, streams and rivers by mining activities.

4.1.2.i USE

The National Water Act[62] (NWA) has given the Minister of Water Affairs and Forestry the responsibility of regulating water use. In order to ensure equitable allocation and beneficial use of water in the public interest, water use is defined, among other things, as including activities that reduce stream flow, waste discharges and disposals altering a watercourse or removing underground water for certain purposes.[63]

Previous mining legislation gave certain persons the right to use water (water rights) as a right ancillary to or attached to existing mineral rights or mining rights. These water rights were, however, not uniform in character and were granted on different terms and conditions depending on the legislation authorising such issue. Rights were granted, for example, in terms of the Precious Stones Act[64] and the Mining Rights Act.[65]

The Minerals Act deals in the transitional provisions chapter with these different categories of water rights. Some of the water rights granted in terms of the repealed legislation have lapsed.[66] Some categories of water rights, however, have remained in force subject to the terms and conditions under which they were granted.[67]

Section 4(2) of the NWA recognises these rights as constituting lawful water use, which use has to be registered in terms of sec 26(1)(c) of the NWA. Since most of these water rights are linked to mineral rights or mining rights, it means that any enforcement of mineral rights or mining rights in a form of prospecting or mining right will have a direct impact on the water quality and the availability of such water as a resource. The existing lawful use of mines therefore continues (subject to the conditions in section 34 of the NWA) until reviewed by the Department of Water Affairs and Forestry (DWAF).[68]

Though the NWA does not expressly include mining as constituting water use in terms of section 21 from the description of the activities listed thereunder, mining can be said to constitute a water use since it involves almost all those activities.[69] In terms of section 22(2), a lawful water user is subject to any limitation, restriction or prohibition in terms of the NWA of any other applicable law. The DWAF has drawn up regulations with limitations, restrictions and prohibitions relating specifically to mining activities aimed at the protection of water resources.[70]

In cases where a mining activity is being carried out, the owner or person in control is responsible for avoiding pollution of the water resource.[71] If, however, pollution does result, the responsible person or owner is strictly liable for any damage that has been caused by such pollution, for the clean-up and remedial expenses as well as for any benefit that the person has derived from the pollution.[72]

Mining companies also have to control emer-

gency incidents according to section 20. Any spills must, *inter alia*, be reported and cleaned-up.

4.1.3 Regulations on mining activities for the protection of water resources

4.1.3.i THE OBLIGATION TO SUPPLY INFORMATION

A person intending to mine has to notify the DWAF at least 14 days before the commencement of the mining activity.[73] An existing activity or mine must submit a copy of its EMPR and amendments to the DWAF.[74] The department must also be notified if the activity is suspended and when it resumes, as well as emergency or potential emergency incidents involving a water resource. Detailed information must be furnished about the incident and the intended measures that will be taken to correct or prevent the re-occurrence of such incident.[75]

4.1.3.ii RESTRICTION ON LOCALITY

No residue deposit, dam, reservoir or associated structure within the 1:100 year floodline or within a 100 metres horizontally from any watercourse, estuary, well or borehole is allowed except those used to monitor the pollution of ground water.[76] No open-cast mining or prospecting is allowed within the 1:50 year floodline or 100 metres horizontally from any watercourse or estuary.[77] One may also not use any area or locate any sanitary convenience, fuel depots, reservoir or deposits for any substance which causes or is likely to cause pollution of water within the 1:50 year floodline of any watercourse or estuary.

No person may use material that is likely to cause pollution of a water resource for the construction of a dam or other impoundment for any other purpose which is likely to cause pollution of a water resource.[78] Those in control of a mine must have the capacity to determine, construct, maintain, operate and confine a clean water system at the mine to avoid spillage into a dirty water system for at least 50 years. The capacity should also exist to collect dirty water into a dirty water system and to be able to design, construct, maintain and operate a dirty water system.[79]

4.1.3.iii PROTECTION OF WATER RESOURCES

Every person in control of a mine must take reasonable measures to prevent water containing waste from entering any water resource, to construct and maintain all water systems, have effective measures to minimise the flow of surface water or floodwater into, *inter alia*, mine workings, opencast workings through cracks or openings.[80] Access to areas that contain any poisonous, toxic or injurious substances must be restricted by fencing-off those areas. No person should be allowed, and such an area may not be used, for any purpose that might cause pollution to a water resource.[81]

Any cessation of mining activities, whether permanent or temporary, must have all pollution control measures in place.[82] The winning of sand and alluvial minerals from a watercourse or estuary will not be allowed unless precautions are taken to ensure that the stability of the estuary or watercourse is not affected by such operations, that scouring, erosion, damage to instream and riparian habitat is prevented and that the water in the estuary or bed of a watercourse is treated to the standard prescribed in GN R991 of 1984,[83] as amended.[84] Additional regulations exist dealing with the rehabilitation of coal residue deposits, technical investigation and monitoring and offences and penalties.

In essence, mining activities cannot take place unless the provisions of the NWA and regulations thereof have been satisfied. Registration of a water use in terms of section 21 of the NWA is compulsory unless exempted from such registration.[85] This includes water use obtained in terms of previous mining legislation and retained in terms of the Minerals Act.

The compulsory registration of existing lawful water uses means that, whatever the conditions attached to those rights, they still have to comply with the requirements of the NWA in the prevention or minimisation of pollution. Failure to register a use falling within the scope of section 21 of the NWA is an offence punishable by a fine or imprisonment.[86]

4.1.4 Safety of dams

Mines have to take notice of sections in the Act dealing with the safety of dams.[87] The definition of "dam" refers to "any existing or proposed structure, which is capable of containing, storing or impounding water (including temporary impoundment or storage) whether that

water contains any substance or not".[88] Sludge dams can also be interpreted as a "dam with a safety risk"[89] – these dams have to be registered.[90] The NWA prescribed the control measures that an owner of a dam must take to avoid risk.[91]

4.2 Soil and biota

The Conservation of Agricultural Resources Act[92] controls soil erosion, weeds, the protection of wetlands and other matters on mining land. Mines have to comply with the measures in the Act. The Act also deals with the protection of wetlands.[93] Some mines are situated in areas with internationally declared wetlands and therefore have to comply with the Ramsar Convention, to which South Africa is a signatory.

Weeds[94] are controlled by chapter 5 of the Act. New draft regulations were published dealing with the control of invader species.[95] The person in control of a piece of land is directly liable to control invaders on that land. Mining authorities will therefore in future be responsible for the control of these species.

Forestry is an aspect of the environment. Sustainable forest management and use, benefit the environment and contribute to economic development as well. Mining activities, as mentioned before, have an effect on forestry conservation. The National Forest Act[96] recognises that and regulates as such.[97] In terms of section 23(e), any use of land in a state forest for commercial purposes has to be licensed. In terms of the Draft Forestry Regulations,[98] mining is such an activity. A licence can only be issued for a period of not more than ten years.[99] This licence can only be issued together with a prospecting or mining authorisation under the Minerals Act.[100] The implication of this regulation is that the Minister of Water Affairs and Forestry will not issue a section 23 licence unless the Directorate: Mineral Development is satisfied that the granting of the licence will not frustrate the intention of the section 6 and 9 requirements in terms of the Minerals Act.[101]

Mines also have to take notice of the National Veld and Forest Fire Act.[102] The purpose of this Act is to prevent and combat veld, forest and mountain fires throughout the Republic.[103] Owners may form fire protection associations for the purpose of predicting, preventing, managing and extinguishing veld fires. The association may apply for registration to the DWAF.[104] Mines also have to comply with the regulations regarding firebreaks.[105]

In terms of the Fertilizers, Farm Feeds and Stock Remedies Act,[106] mines may only use qualified and registered pest control operators[107] to apply registered pesticides and herbicides on mining land.[108]

Mines are also subject to the various nature conservation ordinances and must protect plant and animal species on their land.[109]

4.3 Air quality

If an activity is listed in schedule 2 of APPA, permission is needed from the chief atmospheric pollution control officer. Some mining activities fall under the schedule. Various processes used, for instance, in platinum reduction works are listed.[110] As an example, the Department of Health and Impala Platinum came to an agreement to revise existing permits and to reduce sulphur emissions substantially and in accordance with the department's guideline documents. This was a result of public criticism regarding air quality in the areas surrounding platinum mines.

Mines falling into areas outside a municipal area and whose activities include the use of fuel burning devices are controlled by APPA. In terms of the demarcation of new municipal areas, all land in South Africa will be regarded as land over which a local government has control. Some local governments control smoke in their areas of jurisdiction if authorised by the minister to do so.[111] The new mega-cities would, for example, not have been granted the authority to control this pollution and the newly introduced municipalities will have to receive new authorisation in this regard.

Dust is also controlled by local authorities.[112] Dust control in mining areas is, however, transferred to the DME.[113]

5. NUCLEAR ENERGY

In terms of the Nuclear Energy Act,[114] mines were regarded as a nuclear plants if they complied with certain requirements dealing with radio-active waste. These mines had to obtain a registration certification from the then relevant council. In terms of the new National Nuclear Regulator Act,[115] mines are no longer regarded as nuclear plants and, in this regard, control over mines has lessened. There is still some

debate whether these mines should be controlled by the Department of Health in terms of the Hazardous Substances Act[117] or if the DME will take responsibility for radio-active waste.

6. WASTE

A distinction for the purposes of this discussion can be made between hazardous substances and other waste.

6.1 Hazardous substances

Mines with clinics that use isotopes or where closed isotopes are used to measure products, must obtain licences from the Department of Health.[118]

6.2 Other waste

Mines are excluded from obtaining permits for mining waste under section 20 of the ECA.[119] Household waste (e.g. from hostels or offices) is, however, not exempt. If a mine has a waste site on its land for such waste, it has to comply with section 20.

7. PROTECTION OF CULTURAL RESOURCES

Mines are also exempt from section 12(2A) of the National Monuments Act 28 of 1969.[120] They need not protect, *inter alia*, meteorites, fossils, drawings, paintings or objects of anthropological or archaeological interest in the normal course of mining. The finder of the item must, however, report the find to the relevant institution.

It seems that the new National Heritage Resources Act[121] does not contain a similar provision. Exemption is only allowed where an environmental impact assessment or an EMPR was completed in terms of the ECA, the Minerals Act 51 of 1991 or any other legislation.[122] The consenting authority must, however, ensure that the requirements set out in section 38(3) are met.[123] Comments and recommendations of the relevant heritage resource authority have also to be taken into account prior to granting the consent.

In terms of the National Monuments Act[124] a historical site is defined as any identifiable building older than 50 years[125] which cannot be demolished without the permission of the relevant authority.[126] In terms of the Minerals Act,[127] however, buildings must be demolished as soon as a prospecting permit or mining authorisation is suspended, cancelled, terminated or lapses.[128] Many mines demolish buildings older than 50 years and are not aware of this provision in the National Monuments Act. In terms of the National Heritage Resources Act, the period is extended to 60 years. In the case of demolition, permission of the relevant provincial heritage resources authority is needed.[129]

In terms of section 28(1), SAHRA[130] may designate land covered by a mine dump as a protected area. Regulations for the protection of such areas must be issued if they are seen to be of national importance.[131] The designation must be done in consultation with the owner, the Minister of Minerals and Energy and interested and affected parties within the mining community.

This Act places a burden on mines, but may also ensure a change by mining authorities towards conserving the environment. Interested and affected parties also have to be consulted – something that was not done in the past.

8. OTHER LEGISLATION

Mines are subject to the Explosives Act 26 of 1956.[132] Only authorised explosives may be used.[133] The recent explosion in Pretoria indicates again the importance of the safe handling of explosive materials. Mines have to obtain several licences, authorisations and permits in this regard.[134]

Mines are, however, exempt from the National Building Regulations and Building Standards Act 103 of 1977, which again is an indication of how mines were not properly controlled by the previous government.[135] This led, for example, to poor housing for mine workers resulting in, *inter alia*, ill-health and poor living conditions.

In terms of the Promotion of Access to Information Act 2 of 2000, mines will have to divulge information to individuals protecting a right or to the state acting in the public interest.[136] Information can only be refused if it falls under one of the grounds for refusal.[137] Mines have to disclose information in the public interest if there was a substantial contravention or failure to comply with a law or if an imminent and serious public safety or environmental risk exists.[138]

9. MINERALS DEVELOPMENT BILL

As stated before, the DME is in the process of

drafting a Mineral Development Bill. The aim of the Bill is to recognise the state as the custodian of South Africa's minerals. The Bill will change the legal status of mineral rights. The orderly prospecting and mining of mineral resources will also be regulated.[139] According to the minister, international law recognises that states have the right to exercise full and permanent sovereignty over their natural resources. The principle of public ownership is also recognised. The government, however, undertakes to guarantee the security of tenure with regard to all prospecting and mining operations.[140]

Another aim of the Bill is to contribute to mining and mineral development in general and to develop cooperative governance. National environmental policy and legislation will also be taken into account.[141]

The following fundamental principles underpin the Bill:[142]

- Mineral resources are the common heritage of all South Africans and belong collectively to all the peoples of South Africa.
- It is a universally recognised right of the state to exercise full and permanent sovereignty over all its natural resources.
- The state, as the representative of the people, is the custodian of the nation's mineral resources.
- To redress the results of past racial discrimination and to ensure that historically disadvantaged persons participate in the mineral and mining industry and benefit from the exploitation of the nation's mineral resources.
- To guarantee security of tenure in respect of prospecting and mining operations.

10. LOCAL GOVERNMENT: MUNICIPAL DEMARCATION ACT 27 OF 1998

The demarcation of the whole of South Africa into local government areas, also has an influence on mining. Mines will fall under either larger municipal areas or under district management areas.

In terms of the Constitution, the developmental duties of municipalities are set out as follows:[143]

> "A municipality must –
>
> (a) structure and manage its administration, budgeting, and planning processes, to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
>
> (b) participate in national and provincial development programmes."

This implies that mines falling under the jurisdiction of local authorities will also be responsible to contribute to the development of the community around them. This places a new responsibility on mines whose responsibilities were elsewhere. It is also interesting to note that many of the schedule 4B and 5 functions listed in the Constitution have a bearing on mining, indicating government's intention to decentralise control over mines.

Mines will also have to approach water suppliers (mostly local governments) identified in terms of the Water Services Act.[144] Previously, mines provided their own water.

CONCLUSION

Mines in South Africa are subject to various pieces of legislation. However, not all these measures are complied with, sometimes due to ignorance, sometimes due to conflict between the DME and the DEAT.

The DME (and its predecessors) has always been a strong government department. The trend was, and still is, to centralise all decisions regarding mining whether environmental or not, in the department itself. Legislation since 1994, however, made this more difficult. The new environmental legislation puts certain obligations on mines that they previously did not have. They are also forced to comply with certain procedural requirements that were ignored in the past.

Mines can no longer hide behind the fact that the only responsible authority they have to deal with is the DME. They can no longer ignore the legislation that is applicable to them; they must adhere to all legislation, except that which they have been explicitly exempt from. They not only have to adhere to local legislation, but also to the various international conventions and treaties applicable to them.

In order to solve existing or future problems, it is suggested that the rights and obligations of mining concerns, government officials and all interested and affected parties in terms of legislation and other measures must be spelled out clearly, especially when it comes to decision making. This should also be done with regard to the various government departments at

national, provincial and local level. The NEMA can be used as the tool to ensure cooperative governance.

The importance of mining cannot be ignored as the South African economy is heavily dependent on this industry, both financially and in terms of employment for its citizens. In a country such as South Africa where development is urgently needed, mines cannot shut because they are damaging the environment.

At the same time, however, a solution must be found whereby mines take responsibility for their actions. Proper plans and systems must also be introduced to ensure legal compliance and to give effect to section 24 of the Constitution.

ENDNOTES

1) The inputs of Johan Nel from the Potchefstroom University for CHE's Environmental Management Unit is hereby acknowledged with appreciation.
2) See e.g. White Paper on a Mineral Policy for South Africa of 1998 (GN R2359 in GG 19344 of 1998-10-20); hereafter White Paper; White Paper on Environmental Management (GN 749, GG 18894 1998-05-15), National Water Policy (1997) and the Sustainable Forest Development Policy (1996).
3) White Paper on a Mineral Policy for South Africa of 1998 (GN R2359 in GG 19344 of 1998-10-20); hereafter White Paper.
4) Chamber of Mines *Interview* 1998-03-17 Johannesburg. See 4 hereafter.
5) 45 of 1965.
6) If a mine is, for example, in possession of a certified internationally recognised EMS (ISO14001) it may in some instances be exempted from an Environmental Management Programme

Performance Assessment in terms of GN R801 in GG 20219 of 1999-06-25 – reg 15(18)(2).

7) Constitution of the Republic of South Africa 108 of 1993; Constitution of the Republic of South Africa, 1996.
8) See 5-10.
9) White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity GN 1095 in GG 18163 of 1997-07-28; Kyoto Protocol on the UN Framework Convention on Climate Change 11 December 1997; the 1985 Convention for the Protection of the Ozone Layer (Vienna Convention); the 1987 Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) – see Glazewski *Environmental Law* 302-312, 710-717 in this regard.
10) See n 1 above.
11) See 9. The draft Bill was not yet available for public comment on 1 November 2000.
12) See also Dixon C "The puzzle of media and sector legislation: putting the pieces together to create the legal picture for the mining industry" 1999 *The Journal of the South African Institute of Mining and Metallurgy* 149.
13) 73 of 1989.
14) 107 of 1998.
15) See also the paper of Kilani J "Implications of the National Environmental Management Act (NEMA) for the South African mining industry" Conference: *Developments in the contemporary constitutional state* 2-3 November 2000 Potchefstroom.
16) 51 of 1991.
17) It is not the purpose of this paper to discuss all the legislation and other measures in detail but to give an overview of the most important measures that impact on mining and development in South Africa. For this purpose a selection of some aspects dealing with mining was chosen. It is, for example, impossible to discuss all the measures of the National Water Act 36 of 1998 that impact on mining.
18) See, for example, Feris LA "The asbestos crisis – the need for strict liability for environmental damage" 1991 *Acta Juridica* 287-302.
19) Sutton M (Vaal Reefs) *Interview* 1999-06-22; Jansen van Rensburg P (Environgreen) *Interview* 1999-06-23.
20) See Nel J and Du Plessis W "Environmental framework legislation v NEMA" Unpublished paper delivered at the Congress of the Society of Law Teachers of Southern Africa 3-6 July 2000 Durban.
21) GN R1182 and 1183 in GG 18261 of 1997-09-05.
22) 51 of 1991.
23) Section 39.
24) See also Glazewski *Environmental law* 280-288; and with regard to NEMA 288-292.
25) See also Dixon 1999 *The Journal of the South African Institute of Mining and Metallurgy* 145-146.
26) 67 of 1996.
27) These two pieces of legislation need to be harmonised – Sutton M *Interview* (Vaal Reefs) 1999-06-22.
28) See also Faulds D "The environment affects everyone, and all must play a part" 1999 *Mining World* May 2.
29) See Kilani J "Implications of the National Environmental Management Act (NEMA) for the South African mining industry" Conference: *Developments in the contemporary constitutional state* 2-3 November 2000 Potchefstroom. See also various articles on NEMA in 1999 *South African Journal of Environmental Law and Policy* 1-66.
30) Section 29.
31) Other measures of importance are section 31 (access to information), section 32 (legal standing); section 33 (private prosecution); section 34 (criminal proceedings) and sections 23-24 that will most probably come into effect once new regulations for EIAs in terms of NEMA are issued. At this stage sections 21-22, 26 of ECA and the regulations issued in terms thereof are still applicable.
32) Section 35.
33) Section 35(2)(b).
34) See Kaplan M and Dale MO *A guide to the Minerals Act 1991* (Butterworths Durban1992).
35) Section 2.
36) Sections 6 and 9.
37) Section 13.

38) Section 14.
39) Section 22.
40) Section 22.
41) Section 12.
42) Section 17.
43) Section 24.
44) Case no:133/98 delivered 12 March 1999. See also the discussion of Farina K "Public participation and mining" conference: *Developments in the contemporary constitutional state* 2-3 November 2000 Potchefstroom; Kidd M "Vaal Environment Saved? *The Director: Mineral Development, Gauteng and Sasol Mining (Pty) Ltd v SAVE and Others*" 1999 SAJELP 149-160; Ferreira G, Du Plessis W and Van der Walt I "A licensee to mine, *audi alteram partem* and NEMA" 1999 *SAJELP* 245-256.
45) The decision of the Director was later overruled by the Appeal Court.
46) Section 39.
47) 27 of 1956.
48) See in this regard Glazewski *Environmental law* 578-580.
49) Section 38(1).
50) Section 39.
51) See also section 32(1) of APPA where the Minister of Mineral and Energy Affairs must be notified by a government official that a mine is "likely to cease mining operations within a period of five years". The owner of the mine may not after notification dispose of any assets before receiving a certificate from the chief air pollution prevention control officer that adequate provision has been made to prevent pollution of the atmosphere by dust – section 32(2).
52) See in this regard Smithen AA "Environmental considerations in the preparation of bankable feasibility documents" 1999 *The Journal of the South African Institute of Mining and Metallurgy* 317-320; Coppin GD "Should mines take account" 2000 *Mining World* March 26-27; Charles G "Providing for mine rehabilitation – making your environmental trust work for you" 2000 *Mining World* March 28; Anon "Facing early closure funding shortfalls" 2000 *Mining World* May 32.
53) Molete T "Environmental risk exposures – a thorny issue for mine closures" 1999 *The Journal of the South African Institute of Mining and Metallurgy* 55; see also Cessford F "Mine water monitoring – past, present and future" 2000 *Mining World* February 26.
54) This includes all waste produced by a mine as defined in terms of the Minerals Act 51 of 1991.
55) Anon "SABS mine residue code published" 1999 *Mining World* April 6.
56) See also Glazewski *Environmental law* 581-589 for a discussion of other legislation impacting on mining.
57) Dixon 1999 *The Journal of the South African Institute of Mining and Metallurgy* 140.
58) 108 of 1997.
59) Section 7(2).
60) Section 7(3).
61) 36 of 1998.
62) Hereafter NWA.
63) Section 21 NWA.
64) 73 of 1964.
65) 20 of 1967.
66) Section 45 and 48 Minerals Act.
67) Section 48(1)(a) Minerals Act.
68) Hereafter DWAF.
69) Especially (a) taking water from a water use; (b) storing of water; (c) impeding / diverting the flow of a water course; (d) stream flow reduction; (e) disposal of water containing waste.
70) GNR 104 in GG 20119 of 4 June 1999, the regulations have been made in terms of section 26(1)(b), (g) and (i) of the NWA.
71) Section 20 NWA.
72) Section 20.
73) Reg 2(1).
74) Reg2(2)(a).
75) Reg 2(2((b) and (c).
76) Reg 4(a).
77) Reg 4(b).
78) Reg 5.
79) Reg 6.
80) Reg 7.
81) Reg 8.
82) Reg 9.
83) In GG 9225 of 18 August 1984.
84) Reg 10.
85) Reg 3 GN 1352 in GG 20606 of 12 November 1999 on regulations regarding existing lawful water use.

86) Reg 13.
87) Sections 117-123.
88) Section 117(b).
89) Section 117(c) read with section 121 (factors to be considered in declaring a dam or category of dams with safety risk). See also GN R1560 in GG 10366 of 1986-07-25.
90) Section 120.
91) Section 118.
92) 43 of 1983.
93) "Water course" in section 1 read with sections 3 and 6 and regulation 7 in GG R1048 in GG 9238 of 1084-05-25. Some wetlands are also declared as Ramsar sites. See also the Ramsar Convention. Cf also Kidd *Environmental law* 96-98.
94) See GN R1048 in GG 9238 of 1984-05-25 for list of weeds. It also deals with soil loss, vleis and the salination of land etc.
95) GN 2485 1999 - http://www.polity.org.za/govdocs/notices/1999/not99-2485.html. These regulations were published due to the severe veld fires in the Cape. It was alleged that the existence of invader species heightens the possibility of veld fires.
96) Hereafter NFA. See also Glazewski *Environmental law* 440-453.
97) The minister may declare certain tree species to be protected trees. Once it is so declared, it may not be cut, damaged, disturbed or removed without a licence from the minister – sections 12 and 15. See GN 1330 in GG 5242 of 1976-08-06 for a list of protected trees and the application form in terms of section 15.
98) Reg 15 – Draft Regulations 2000. By the writing of this paper the regulations have not yet been published for public comment.
99) Section 24 NFA.
100) Regulation 15.
101) See 4.2 above.
102) 101 of 1998. See also Glazewski *Environmental law* 454-456.
103) Section 1.
104) Section 3.
105) Sections 12-17.
106) 36 of 1947.
107) The registered pest control operator must before administering the pesticide or herbicide notify the land owner of the purpose of the administration, the registered name and number of the substance used, the registration certificate and precautions taken during and after the administration – section 10.
108) Section 3.
109) Cf also Glazewski *Environmental law* 435-439.
110) Item 1 – sulphuric acid processes; item 39 – waste incineration processes; item 27 – roasting processes and item 60 – vanadium processes. Item 29(c) deals with "processes in which … (c) any fuel burning appliance is used that is not controlled in terms of Part III of this Act, excluding appliances in private dwellings." This item is sometimes overlooked by mines that have fuel burning appliances other than the generation of electricity for public purposes or boilers capable of burning fuel at a rate of 10 tons per hour to raise steam for the supply of energy (items 29(a)-(b)).
111) Section 14(3) APPA.
112) Section 18.
113) Section 6(2)(a)-(b) – see also dust control regulations under the repealed Mines and Works Act 27 of 1956. See also GN R992 in GG 2741 of 1970-06-26 – chapter 10.
114) 131 of 1993.
115) 47 of 1999.
116) Section 1 – "definition of nuclear installations". See section 1 of the Nuclear Energy Act 131 of 1993 – definition of "nuclear installations" where mines with certain processes were regarded as nuclear installations.
117) 15 of 1973 – schedule 4.
118) Schedule 4 Hazardous Substances Act 15 of 1973.
119) GN 1956 in GG 12703 of 1990-08-24. In terms of the *National Waste Management Strategies and Action Plans for South Africa Version D* (15 October 1999) 20, mining waste is included in the definition of waste. Mines will also have to compile integrated waste management plans. It is foreseen that 2002 will be the date for the implementation of these strategies and action plans. Integrated waste management plans for abandoned mine sites will be implemented in 2004.
120) Section 12(3).

121) 25 of 1999. The Act has not been put into operation by end October 2000.
122) Section 38(8).
123) Section 38(3) determines that the following must be completed: "(a) The identification and mapping of all heritage resources in the area affected; (b) an assessment of the significance of such resources in terms of the heritage assessment criteria set out in section 4(2) or prescribed under section 7; (c) an assessment of the impact of the development on such heritage resources; (d) an evaluation of the impact of the development on heritage resources relative to the sustainable social and economic benefits to be derived from the development; (e) the results of consultation with communities affected by the proposed development and other interested parties regarding the impact of the development on heritage resources; (f) if heritage resources will be adversely affected by the proposed development, the consideration of alternatives; and (g) plans for mitigation of any adverse effects during and after the completion of the proposed development."
124) 28 of 1969.
125) Section 1.
126) Section 2A(f). See also Glazewski *Environmental law* 606-607.
127) 51 of 1991.
128) Section 40.
129) Section 34(1). It seems that grade 3 structures will be dealt with by the local authorities – Glazewski *Environmental law* 622.
130) South African Heritage Resources Agency established in terms of section 11.
131) Section 28(4).
132) See also GN R991 in GG 274` of 1970-06-26 – reg 8 and 9 (arrangements for safe use of explosives).
133) Section 5.
134) See, for example, section 6 – prohibition of storage of authorised explosives except in licensed premises; prohibition of blasting of explosives without a permit – section 9; section 22 – magazines for storage; section 8 – importation of explosives must be done with a permit. See also GN R 1412 in GG 7648 of 1981-06-03 for authorised explosives and chapter 6 of GN R 1604 in GG 3648 of 1972-09-08 (transportation of explosives); chapter 7 (licensing of storage magazines); chapter 8 (storage of blasting materials); chapter 15 – destruction and disposal of explosives.
135) Section 2(6).
136) Section 50.
137) Sections 62-69.
138) Section 70. This Act should be read with the Protected Disclosures Act 26 of 2000.
139) Booth *Contact Update* http://www.contacttrust.org.za/services.htm 4 Sep 2000.
140) http://www.contacttrust.org.za/documents/meminspeech0009.htm 11 Oct 2000.
141) *Contact Update* http://www.contacttrust.org.za/services.htm 4 Sep 2000.
142) http://www.contacttrust.org.za/documents/meminspeech0009.htm 11 Oct 2000.
143) Section 153. See also section 19 of the Municipal Structures Act 119 of 1998. Municipalities also have to compile integrated development plans – mines will have to form part of the process in which these plans are formulated – see *inter alia* sections 1, 44(2), 56(2) and 83(3).
144) 108 of 1997.

Constitutional Development of the Common Law

Deon Van Zyl

INTRODUCTION

In any discussion of development in a contemporary constitutional state such as South Africa, the development of its law must necessarily be considered. More particularly, cognisance must be taken of the impact of the 1996 Constitution,[1] described in section 2 thereof as the "supreme law" of the land, on existing common law. In doing so, one must bear in mind that the South African legal system has, justifiably, been described as "mixed" or "hybrid". This refers to the fact that it has drawn from a vast array of Roman or civil law sources, on the one hand, and the impressively casuistic English common law, with its rich history of institutions and precedents, on the other hand. The former has frequently been described by the misnomer of "Roman-Dutch law", whereas it relates in fact to the far wider concept of European common law (*ius commune europaeum*), as it has developed from classical Roman law to its substantially Roman law-based form in pre-codification Europe.[2]

1. REFERENCES TO COMMON LAW IN THE CONSTITUTION

It was to be expected that the introduction of a new constitution containing a bill of rights would have a radical effect on existing law. It was not, however, intended that it should supplant such law. On the contrary, its continued existence is deliberately and unequivocally recognised in a number of sections of the Constitution. This appears more particularly from the application section of the Bill of Rights contained in chapter 2 of the Constitution.

1.1 Section 8

Section 8(1) provides that the Bill of Rights "applies to all law". Section 8(2), which has been interpreted as containing the seeds of horizontality,[3] renders it binding on a "natural or juristic person". This is expanded upon in section 8(3), which imposes certain duties upon, and grants certain powers to, a court applying any provision of the Bill of Rights to a "natural or juristic person". Thus, in accordance with section 8(3)(a), it is required that a court, aiming to give effect to a right contained in the Bill, "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right". Section 8(3)(b), again, provides that a court "may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)".

Section 8(3)(a) makes it eminently clear that a court is not only obliged, under certain circumstances, to apply the common law, but may also be called upon to develop it to the extent that such development is not already contained in legislation on the subject. In this regard, as I read section 8(3)(b), a court has the power to develop common law rules or principles with a view to restricting or limiting a right emanating from the Bill of Rights.

1.2 Section 36

The power to develop the common law is, logically, subject to the provisions of section 36(1). This section allows a limitation of rights "only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society

based on human dignity, equality and freedom, taking into account all relevant factors". The "law of general application" is none other than the common law, as tempered by its innate general considerations of justice and reasonableness. Such considerations, to which I would add fairness or equity, good faith and good morals or public policy, are fundamental to establishing an "open and democratic society based on human dignity, equality and freedom". This is in accordance with the ideal, as set forth in the preamble to the Constitution, namely that the Constitution, as the supreme law of the land, is directed at healing the divisions of the past and establishing "a society based on democratic values, social justice and fundamental human rights".

1.3 Section 39

These considerations are repeated in the interpretation provisions contained in section 39 of the Constitution. Section 39(1)(a) requires that a court, in interpreting the Bill of Rights, "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom". In doing so it must, in terms of section 39(1)(b), consider international law and may, in terms of section 39(1)(c), consider foreign law. This leaves the door wide open for the application of wide ranging comparative law, public and private, which has frequently, in the past, been used to elucidate and expand upon the applicable common law. Such provisions serve to characterise the Constitution as flexible: it is not restricted to the application of human rights-orientated law, but takes full cognisance of the wealth of the common law and comparable international or foreign law.

Whereas section 39(1) deals with the interpretation of the Bill of Rights, section 39(2) relates to the interpretation of legislation. It also refers to the development of common and customary law. For present purposes I shall restrict my comments to the development of the common law, in regard to which a court is required to "promote the spirit, purport and objects of the Bill of Rights".

This is encapsulated in the preamble and is fundamental to the Constitution as a whole. It does not, in my view, alter the flexible nature and character of the Constitution in giving full recognition to common law, and even to international and foreign law, subject to the considerations referred to above.

1.4 Section 173

The power of the higher courts to develop the common law is confirmed in section 173 of the Constitution, subject thereto that such development must take into account "the interests of justice".

2. UNDERLYING VALUES AND CONSIDERATIONS

Justice in this context must, I believe, be read with the legal and moral considerations referred to above: the development of the common law must be consonant with justice, equity (fairness), reasonableness, good faith and good morals or, as it is better known, public policy (the public interest). These concepts are deeply embedded in our common law sources in varying terminology, including their Latin form, occurring as *iustitia*, *aequitas*, *ratio recta*, *bona fides* and *boni mores* respectively. They are, indeed, basic to the values underlying an open and democratic society based on human dignity, equality and freedom. They form part and parcel of the concepts of social justice and fundamental human rights and are hence wholly consistent with the requirements of the Constitution.

3. THE NEED TO DEVELOP THE COMMON LAW

It is implicit, in any exercise relating to the development of the common law, that the relevant law must be established. This means that it should be studied and considered methodically in the context of contemporary requirements.

No legal system can afford to stagnate: it must keep up with the needs of the time, as eloquently put by Innes CJ in *Blower v Van Noorden*:[4]

> "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the Legislature."

In similar vein is the graphic description of

Roman-Dutch law by Lord Tomlin in *Pearl Assurance Co v Union Government*:[5]

> "That law is a virile, living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society."

Our courts have not been averse to effecting changes to existing law when circumstances require that it be done. It is then that justice, equity and reasonableness dictate that the courts exercise a policy function by effecting modifications to the law in accordance with the needs of the time. This is the function emanating from the good morals (*boni mores*) of the community or, in contemporary nomenclature, public policy.

It may, of course, be said that the exercise of this function flies in the face of the maxim *iudicis est ius dicere, non dare* ("it is the function of a judge to speak [i.e. interpret] the law and not to give [i.e. make] it"). This has been the subject of earnest debate over a period of many years, as appears from a recent contribution by Professor Derek van der Merwe.[6] I am, however, firmly of the view that it is incumbent upon the judiciary to adopt an activist approach in applying law and legal precepts, with reference to changing circumstances and the needs of the time. Not only was this a principle firmly embedded in the common law itself, but it is also expressly required by those sections of the Constitution referred to above. This means that judges should be prepared to make the necessary amendments or modifications to the existing law if such law no longer answers to the needs of the time, even if it should result in new law being created. Certainly the Constitution envisages, and calls upon judges to develop the common law in the spirit of the Constitution and subject to the considerations set forth therein. When they respond to this calling they are not legislating, but honing, adapting and modifying the existing law to bring it in line with the needs of the time.

4. THE APPROACH OF THE COURTS

The law reports contain numerous examples of the exercise of this development function. Thus in *Phame (Pty) Ltd v Paizes*[7] it was held that the aedilitian actions are available even when a misrepresentation (by way of a *dictum* or *promissum*) is innocently made. See also J*anse van Rensburg v Grieve Trust CC*,[8] in which the application of the aedilitian actions was extended to a misrepresentation relating to the object (a motor vehicle) forming part of the purchase price in a "trade-in" agreement. In the same way Aquilian liability was substantially extended in the cases of *Bester v Commercial Union Versekeringsmaatskappy van Suid-Afrika Bpk*[9] (liability for emotional shock), *Minister van Polisie v Ewels*[10] (liability for omissions) and *Administrateur, Natal v Trust Bank van Afrika Bpk*[11] (liability for economic loss arising from negligent misstatements).

There have, unfortunately, been cases in which the development has been retrogressive. The reason has usually been that the legal historical method has not been applied properly or at all. A prime example is the majority judgment in *Bank of Lisbon v De Ornelas*,[12] in which it was held that no *exceptio doli generalis* exists in our law. I discussed the case in detail in my unpublished inaugural address as extraordinary professor at the University of the Orange Free State under the title "The Legal Historical Method in Perspective" (1997) and do not propose to repeat it here. Suffice it to say that any legal historical or, for that matter, legal comparative, study will have little or no value unless it is executed in accordance with the relevant legal historical or comparative method. If this is not done, it is probable that the result will be an eclectic, irrelevant academic exercise. See in this regard the remarks of Professor Derek van der Merwe in a recent article on "constitutional colonisation" of the common law in South Africa:[13]

> "Many judges treat the Roman-Dutch law, in typical positivist-formalist fashion, as an instance of a pre-determined, pre-cast legal form from which the judge, much as a shopper in a supermarket, can select – indiscriminately – from the shelves of legal scholarship, a rule, a principle, a doctrine or an insightful comment or pithy maxim appropriate to the determination of a solution in the instant case. The outcome has been a brand of common law scholarship that, at times, has produced results more than mildly quaint and even quirky …"

A ray of light edging its way through the ever increasing darkness was the common law development which Farlam J boldly undertook

in *Ryland v Edross*.[14] Therein he held that the public policy considerations relating to Muslim marriages and contractual relationships, as applied in *Ismail v Ismail*,[15] were no longer applicable.

The common law, as reflected in the *Ismail* case, required to be developed in accordance with the spirit, purport and objects of the fundamental rights provisions contained in the then applicable Interim Constitution. This accords with the principle set forth by Chaskalson P in *Amod v Multilateral Motor Vehicle Accidents Fund*:[16]

> "The Supreme Court of Appeal has always had an inherent jurisdiction to develop the common law to meet the needs of a changing society. The circumstances in which it elects to do so and the manner in which it develops the law form part of this jurisdiction. With the coming into force of the Interim Constitution, and later the 1996 Constitution, this power must now be exercised in accordance with the 'spirit, purport and objects' of the Bill of Rights."

5. THE *BOGOSHI* CASE

Although these sentiments have been approved, and sometimes repeated, in a number of reported cases, only lip service has been paid to the need to identify and develop the relevant common law. So powerful has been the apparent influence of the Constitution that common law development has become an exercise in weighing up interests with reference only to policy or public interest considerations. This has been pointed out in the aforesaid article by Derek van der Merwe,[17] in which he launched a strong attack on the judgment in *National Media Ltd v Bogoshi*.[18] This was one of those rare cases in which the Supreme Court of Appeal overturned one of its own previous decisions, namely *Pakendorf en Andere v De Flamingh*.[19] It did so by rejecting the principle of strict or faultless liability of the press for negligent reporting and publication, as introduced in the *Pakendorf* case. The decision was generally applauded as being consonant with justice, fairness and public policy, but it also attracted sharp criticism for the way in which it was reached.

There is no doubt, with great respect, that the *Bogoshi* finding is correct. Unfortunately, as appears from the appraisal given below, I cannot associate myself with the *ratio* for such finding.

In considering the *Pakendorf* decision, Hefer JA observed that the court in that case had taken a policy decision without setting great store by previous decisions. In the process it had overlooked the inconsistent reasoning in the case of *Suid-Afrikaanse Uitsaaikorporasie v O'Malley*[20] and likewise had not taken cognisance of the rejection of strict liability of the press in English law. In addition it had failed to strike a balance between the right to reputation on the one hand and freedom of expression on the other.

With reference to a number of foreign legal sources, Hefer JA considered the importance of the relevant rival interests (freedom of expression as opposed to the good reputation and dignity of the individual), and concluded:[21]

> "If we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf*."

For these reasons the *Pakendorf* decision had to be overruled on the basis of its being clearly wrong.

The learned judge then turned to a discussion of justification as a defence to a claim based on unreasonable or untrue defamatory statements. In this regard he held that the same policy considerations as those leading to the overruling of *Pakendorf* were applicable. With reference to certain foreign authorities, he concluded:[22]

> "[T]he publication in the press of false, defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time."

In this regard, however, the learned judge held that the *onus* is on the defendant to prove reasonableness and lack of negligence.

I have grave doubts, with respect, as to the correctness of this finding on the *onus*.[23] For present purposes, however, it is not necessary to deal with it.

The next aspect to be dealt with, is whether or not the court's policy findings in respect of *Pakendorf* were compatible with section 35(3)

of the Interim Constitution, on the basis that sufficient account had been taken of the "spirit, purport and objects" of chapter 3 thereof. On this issue the learned judge held:[24]

> "In the present case I have not sought to revise the common law conformably to the values of the Interim Constitution: I have done no more than to hold that this Court stated a common-law principle wrongly in *Pakendorf* ."

6. APPRAISAL OF THE *BOGOSHI* DECISION

An appraisal of this judgment leads one inevitably to the conclusion that the merest lip service has been paid to the development of the relevant common law. No single source of Roman or European *ius commune* is mentioned in regard to strict liability and defamation by the media. No attempt is made to establish what the common law was before the *Pakendorf* case. A discussion of the Roman delict of *iniuria* and the pivotal prerequisite of *animus iniuriandi* ("the intent to harm another") is nowhere to be found. Nor is there a whisper of centuries of development thereafter.

The essence of Hefer JA's criticism against the *Pakendorf* case is that the court in that matter failed to exercise an appropriate policy decision and likewise failed to effect the appropriate balancing of the relevant competing values, interests or rights. As Van der Merwe points out,[25] this is a constitutional argument, which is far removed from what one would expect of a judicial consideration of the development of the common law. Elsewhere Van der Merwe describes it as "constitutional argument in drag" and explains the defective nature of the argument as follows:[26]

> "The judges, in their laudable enthusiasm to fully embrace the new constitutional jurisprudence, seemingly have simply assumed that the direct application of the bill of rights to private legal relationships has given them a certain license in the conduct of their judicial inquiry. They assume that an inquiry into the solution of private disputes is best conducted by means only or primarily of the determination of the content of competing fundamental rights, and their balancing and limitation in the regulation of social relationships. Hefer JA and other like-minded judges have failed to apply an important distinction. This is the distinction between, on the one hand, the constitutional obligation to *determine the compatibility of* the common law with the constitutional provisions (as provided for in section 8(2) of the Constitution) and, on the other hand, the obligation to *develop* the common law in accordance with this determination (as provided for in section 8(3)). These are two distinct intellectual enterprises. The first involves an initial determination of whether the common law gives due recognition to a right recognised in the bill of rights as fundamentally important. This determination involves an evaluation of the nature of the dispute and of the nature of the right. If the answer is yes, then *caedit quaestio* and the substance of the dispute can be addressed forthwith. If the answer is no, then the common law must be developed so that the right is incorporated into the fabric of common law doctrine in a manner that allows for due recognition of the right in common law. The common law is, as it were, 'fleshed out' and reorganised by the addition of other considerations of fundamental importance."

I am in full agreement with the criticism contained in this comment. Despite the court's apparently reminding itself that it was dealing with the common law, and not the constitutional law, it proceeded to base a substantial portion of its *ratio* on constitutional considerations.

7. SUGGESTED DEVELOPMENT METHODOLOGY

My own approach to the development of the common law, as illustrated in the *Grieve Trust* case,[27] has been, firstly, to establish and identify the relevant common law sources, and then to extrude therefrom the applicable law. If such law no longer answers to the needs of the time, it must be adapted or modified.

With its innate flexibility and built-in principles of justice, equity, reasonableness and good faith, and with reference to current public policy considerations, the necessary changes can be effected without recourse to competing human rights, which may or may not be applicable.

Thereafter the modified or adapted law must be put to the constitutional test: is it, as developed in this way, consonant with the spirit, purport, objects and underlying values of the Constitution and Bill of Rights. This would, I

submit, be illustrative of an exercise in the development of the common law and not simply a constitutional balancing of interests.

CONCLUSION

If the *Bogoshi* case is to be followed as a precedent for dealing with the development of the common law as provided in the Constitution, I have grave fears for the future of the common law. To have recourse to a balancing of competing rights or interests without first establishing and, if necessary, adapting the common law, will of necessity have a detrimental effect on the further development of the common law. It may in fact be developed right out of the system.

I firmly believe that South Africa has room for both common law and constitutional approaches to resolving legal disputes.[28] Let us not destroy the one in our enthusiasm to promote the other.

ENDNOTES

1) The Constitution of the Republic of South Africa, Act 108 of 1996.
2) D H van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (Butterworths, Durban 1979) 498-500. But see the thought-provoking observations of Ph J Thomas "Deconstruction of Myths: Roman-Dutch Law and Pan-European Ius Commune" in *South African Law Journal* 116 (1999) 784-790.
3) On the vexed issue of "horizontal" operation of the Constitution see S Woolman and D Davis "The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions" in *South African Journal on Human Rights* 12 (1996) 361-404; l Wolhuter "Horizontality in the Interim and Final Constitutions" in *South African Public Law* 11 (1996) 512-527; K Govender "Horizontality Revisited in the Light of *Du Plessis v De Klerk* and Clause 8 of the Republic of South Africa Constitution Bill 1996" in *Human Rights and Constitutional Law Journal of Southern Africa* 1.3 (1996) 20-23; H Cheadle and D Davis "The Application of the 1996 Constitution in the Private Sphere" in *South African Journal on Human Rights* 13 (1997) 44-66; M Wallis "The Evolution of Private Law under the Constitution" in *Obiter* 18 (1997) 206-220; A J Jeffery "The Dangers of Direct Horizontal Application: A Cautionary Comment on the 1996 Bill of Rights" in *Human Rights and Constitutional Law Journal of Southern Africa* 1.4 (1997) 10-

16; P J Visser "Enkele Beginsels en Gedagtes oor die Horisontale Werking van die Nuwe Grondwet" in *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 60 (1997) 296-303; C Sprigman and M Osborne "Du Plessis is *Not* Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes" in *South African Journal on Human Rights* 15 (1999) 25-51; I M Rautenbach "The Bill of Rights Applies to Private Law and Binds Private Persons" in *Tydskrif vir die Suid-Afrikaanse Reg* (2000) 296-316.

4) 1919 TS 890 at 905.
5) 1934 AD 560 at 563.
6) D van der Merwe "*Iudicis est ius dicere, non dare*: Judicial Law-Making by Institutional Development of the Common Law" in *Nihil Obstat: Huldigingsbundel vir W J Hosten* (1996) 225-000. See my observations on this maxim, in the context of judicial activism, under the title "A Humane Approach" in *Frontiers of Freedom* (*S A Institute of Race Relations*) issue 14 (1997.4) 13-15.
7) 1973 (3) SA 397 (A).
8) 2000(1) SA 315 (C).
9) 1973 (1) SA 768 (A).
10) 1975 (3) SA 590 (A).
11) 1979 (3) SA 824 (A).
12) 1988 (3) SA 580 (A).
13) D van der Merwe "Constitutional Colonisation of the Common Law: A Problem of Institutional Integrity" in *Tydskrif vir die Suid-Afrikaanse Reg* (2000) 12-32 at 13. Another thought-provoking contribution by the same author is D van der Merwe "The Roman-Dutch Law: From Virtual Reality to Constitutional Resource" in *Tydskrif vir die Suid-Afrikaanse Reg* (1998) 1-19.
14) 1997 (1) BCLR 77 (C).
15) 1983 (1) SA 1006 (A).
16) 1998 (4) SA 753 (CC) at 763 F-G (par 22).
17) Note 13 above.
18) 1998 (4) SA 1196 (SCA).
19) 1982 (3) SA 146 (A).
20) 1977 (3) SA 394 (A) at 407 D-G.
21) At 1210 G-H.
22) At 1212 G-H.
23) See in general on this decision J Burchell "Media Freedom of Expression Scores as Strict Liability Receives the Red Card: *National Media Ltd v Bogoshi*" in *South African Law Journal* 116 (1999) 1-11; J R Midgeley "Media Liability for Defamation" in *South African Law Journal* 116 (1999) 211-225; J Neethling and J M Potgieter "Die Lasterreg en die Media: Strikte Aanspreeklikheid word ten gunste van Nalatigheid Verwerp en 'n Verweer van Mediaprivilegie Gevestig" in *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 62 (1999) 442-450; J Neethling "Die Lasterreg, die Grondwet en *National Media Ltd v Bogoshi*" in *Tydskrif vir Regswetenskap* 24.2 (1999) 104-121.
24) At 1216 E-F.
25) In his article cited in n 13 above, at 20.
26) At 21.
27) *Janse van Rensburg v Grieve Trust CC* 2000 (1) SA 315 (C) at 326 E-I.
28) This is as I understand a recent contribution by Constitutional Court Justice, Kate O'Regan "The Best of Both Worlds? Some Reflections on the Interaction between the Common Law and the Bill of Rights in our New Constitution" in Potchefstroom *Electronic Law Journal* (http://www.puk.ac.za/lawper/) 1999 (1) (20 pages). Her approach (in par 4 at p 10), in dealing with a conflict, or potential conflict, of a rule of the common law and the Constitution, is the following:"[T]he Constitution clearly envisages two ways in which the Constitution's normative impact may be resolved. The first is by direct application of the provisions of the Constitution to a rule of the common law in circumstances where the Constitution is applicable and the second is by the development of the common law in a manner which is consistent with the spirit, purport and objects of the Constitution. The second area in which there is likely to be considerable interaction between the common law and the Bill of Rights relates to situations where the common law already provides some or complete protection for the rights provided by the Bill of Rights." A recent example of common law development is the insightful judgement of Judge van Dijkhorst in *Marais v Groenewald en 'n Ander* 2001 (1) SA 634, relating to negligence in defamation actions.

Interaction Between International and Regional Trade Treaties

Sieg Eiselen

INTRODUCTION

International trade and international trade relations are today areas that to a large extent have become regulated by international treaty law. International and regional treaties and agreements have on their part largely institutionalised international trade law. The situation in Southern Africa – which encompasses South Africa, Botswana, Moçambique, Namibia, Zimbabwe, Zambia and Swaziland – is no different. The regulatory instruments or treaties that are relevant to this area and which will be considered, are the following: the General Agreement on Trade and Tariffs (GATT), the World Trade Organisation (WTO) treaty, the Southern African Development Community (SADC) treaty and its accompanying protocols and the Southern African Customs Union (SACU) agreement. The GATT and SACU agreements have been in force in Southern Africa for quite some time whereas the SADC agreement and its accompanying Trade Protocol only came into force on 1 September 2000.

The interrelationship between GATT, SACU and the SADC agreements are to a large extent uncoordinated and there is much uncertainty about the application of these three instruments where they govern the same area or issues. There are no clear guidelines in these instruments or any available case law.

According to the rules of interpretation of international treaties, such treaties and agreements must be interpreted to reconcile any apparent conflict between any of the treaties or agreements, but where no such conciliatory interpretation is possible, there is uncertainty as to which instrument will be given preference. It seems, however, that the regional instruments, such as the SADC and SACU agreements, will be subordinate to truly international instruments such as GATT.*

1. A HYPOTHETICAL PROBLEM

For the purposes of this discussion the following hypothetical problem will be used: A is an exporter of pig-feed to Swaziland. There is an overcapacity of plants that manufacture specialised pig-feed in South Africa.

2. THE PROVISIONS OF GATT

Both South Africa and Swaziland are members of the GATT treaty, South Africa as a founder member and Swaziland since 8 February 1993. Both parties are also members of the WTO since 1995. As members of GATT and the WTO, both countries are bound by the provisions of GATT and are liable in international law to meet their obligations in terms of GATT.

The obligation to eliminate quantitative restrictions in international trade is one of the core pillars of the regime relating to the trade in goods. The basic obligation is expressed in article XI subparagraph 1 of GATT in the following terms:

> "No prohibitions or restrictions other than duties, taxes or other charges, whether made through quotas, import or export licences or other measures, shall be instituted or maintained by any member on the importation of any product of the territory of another member or on the exportation of sale for export of any product destined for the territory of any other member."

Subparagraph 2 of article XI contains certain exceptions, none of which are applicable in the current situation.

1. Article XII makes provision for restrictions to safeguard the balance of payments of a particular country. It provides that notwithstanding the provisions contained in article XI, any contracting party, in order to safeguard its external financial position and its balance of payments, may restrict the quantity or value of merchandise permitted to be imported. These restrictions may, however, only be employed in instances where there is an *eminent threat of a serious decline* in the monetary reserves of the country, or, in the case of a contracting party with a very low monetary reserve, to achieve a reasonable rate of increase in its reserves. The proposed actions of the Swaziland government do not fall, in my opinion, within these restrictions and exceptions.
2. Article XVIII of GATT makes provision for measures in which there is governmental assistance for economic development. Subsection (1) recognises that the attainment of the objectives of GATT will be facilitated by the progressive development of countries with economies that can only support a low standard of living and are in the early stages of development, such as Swaziland.
3. Subsection (2) recognises further that it may be necessary for those contracting parties, in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports, and that such measures are justified insofar as they facilitate the attainment of the objectives of GATT. It is therefore agreed that those contracting parties should enjoy additional facilities to enable them to maintain sufficient flexibility in their tariff structure to grant tariff protection and to apply quantitative restrictions for balance of payment purposes in a manner which takes full account of the continued high level of demand for imports likely to be generated by their economic development programmes.
4. Subsection (3) of article XVIII contains certain restrictions on these additional facilities provided to developing countries. These restrictions are contained in sections A and B to this article. Despite these restrictions, subsection (3) also contains a general exception that there may be circumstances where no measure consistent with the provisions contained in sections A and B is practicable to permit a developing country to grant the governmental assistance required to promote the establishment of particular industries with a view or raising the general standards of living of its people. Special procedures are then laid down in sections C and D of article XVIII. Subsection (4) stipulates that any developing country is free to deviate temporarily from the provisions of the articles of GATT as provided for in sections A, B and C of article XVIII. If insufficient relief is provided for in sections A, B and C, a developing country may submit applications to other contracting parties under section D of article XVIII.
5. Section C contains the following exception and procedures for developing countries deviating from their obligations in terms of the agreement:

   "13. If a contracting party coming within the scope of paragraph 4(a) of this Article finds that governmental assistance is required to promote the establishment of a particular industry with a view to raising the general standard of living of its people, but that no measure consistent with the other provisions of this Agreement is practicable to achieve that objective, it may have recourse to the provisions and procedures set out in this Section.

   14. The contracting party concerned shall notify the CONTRACTING PARTIES of the special difficulties which it meets in the achievement of the objective outlined in paragraph 13 of this Article and shall indicate the specific measure affecting imports which it proposes to introduce in order to remedy these difficulties. It shall not introduce that measure before the expiration of the time-limit laid down in paragraph 15 or 17, as the case may be, or if the measure affects imports of a product which is the subject of a concession included in the appropriate Schedule annexed to this Agreement, unless it has secured the concurrence of the CON-

TRACTING PARTIES in accordance with the provisions of paragraph 18; Provided that, if the industry receiving assistance has already started production, the contracting party may, after informing the CONTRACTING PARTIES, take such measures as may be necessary to prevent, during that period, imports of the product or products concerned from increasing substantially above a normal level.

15. If, within thirty days of the notification of the measure, the CONTRACTING PARTIES do not request the contracting party concerned to consult with them, that contracting party shall be free to deviate from the relevant provisions of the other Articles of this Agreement to the extent necessary to apply the proposed measure.

17. If, within ninety days after the date of the notification of the proposed measure under paragraph 14 of this Article, the CONTRACTING PARTIES have not concurred in such measure, the contracting party concerned may introduce the measure proposed after informing the CONTRACTING PARTIES."

Unless Swaziland complies with these requirements it shall not be entitled to implement quantitive restrictions as contemplated.

3. PROVISIONS OF THE SADC AND THE TRADE PROTOCOL

On 17 August 1992 Member States of the South African Development Coordinating Conference (SADCC) signed a treaty establishing SADC which replaced the previous SADCC treaty. The SADC treaty is aimed at the progress and well-being of the peoples of Southern Africa, conscious of the interdependence and the integration of the national economies of the states involved. Section 2 stipulates that in order to achieve the objectives of the treaty, SADC shall develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally among Member States.

In article 6, the Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC and to refrain from taking any measure likely to jeopardise the substance of its principles, the achievement of its objectives and the implementation of the provisions of the duty.

In terms of article 22, Member States shall conclude protocols as may be necessary in each area of cooperation, which shall spell out the objectives and scope of, and institutional mechanisms for, cooperation and integration.

Article 33 makes provision for the following sanctions against any Member State that persistently fails without good reason to fulfil its obligations assumed under the treaty and to implement the policies which undermine the principles and objectives of SADC. It may be imposed against any Member State on a case-by-case basis in terms of this article.

The most important part of this treaty lies in the implementation of a number of protocols for which provision is made as indicated above. During the course of 1999 the SADC Trade Protocol was negotiated between the different Member States, and this protocol is said to come into effect on 1 September 2000. Although the Protocol is not yet in force, it contains a number of provisions and principles which may be relevant to consultant's case at the political level.

Article 2 of the Protocol sets out the objectives of the Protocol, namely to further liberalise intraregional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements and to establish a free trade area in the SADC region.

Article 3 of the Protocol makes provision for the elimination of barriers to intra-SADC trade. Subsection 1 stipulates that the committee of ministers shall be responsible for the phased elimination of tariffs and non-tariff barriers between Member States, having regard to the fact, *inter alia*, that the elimination of trade barriers shall be achieved within a time frame of eight years from entry into force of the Protocol.

Article 6 then goes on to provide that except as provided for in the Protocol, Member States shall in relation to intra-SADC trade, adopt policies and implement measures to eliminate all existing forms of non-tariff barriers and to refrain from imposing any new non-tariff barriers. It is this last prohibition, especially, that is relevant to consultant's case. It may be embarrassing to the Swazi government to be seen at this late stage – just before the Trade Protocol is to be implemented – to sneak in a new prohi-

bition prior to 1 September 2000 when the Protocol is due to enter into force.

Article 6 must also be read with article 7 which stipulates that Member States shall not apply any new quantitative restrictions and shall in accordance with article 3 phase out the existing restrictions on the import of goods originating in Member States. All of these provisions run counter to the proposed Swazi action.

Article 9 contains certain general exceptions in terms of which the above provisions shall not apply. Article 9 provides that nothing in article 7 of the Protocol shall be construed so as to prevent the adoption or enforcement of any measures by a Member State necessary to ensure compliance with laws and regulations which are consistent with the provisions of the WTO, or necessary to ensure compliance with the existing obligations under international agreements. None of these exceptions make provision for the introduction of a non-tariff barrier, like an import prohibition, as contemplated in consultant's case.

Article 11 of the Protocol then further stipulates that Member States shall accord immediately and unconditionally to goods traded within the community the same treatment as to goods produced nationally in respect of all laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use.

The only other exceptions contained in the Protocol that may be relevant to consultant's case, are found in article 21 of the Protocol. This article deals with the protection of infant industries. It provides that, notwithstanding the provisions of article 4, which deal with the elimination of import duties, a Member State may apply to the Committee of Ministers Responsible for Trade to suspend a certain part of a party's obligations to the Protocol in respect of like goods, imported from other Member States, as a temporary measure. It is important to note that article 21 refers only to article 4, which deals with tariffs and not article 6, which deals with non-tariff barriers. Under article 21 therefore, a Member State may apply to levy import duties on certain goods, but on a proper interpretation of article 21 it may not apply for the imposition of a non-tariff barrier such as a trade prohibition.

It is therefore clear that the Swazi government is not entitled to implement a prohibition on the importation of feed in terms of the SADC Trade Protocol. Even if section 21 is interpreted to mean that the Council of Ministers is entitled to suspend any part of the Trade Protocol, the Swazi government should first apply to the Council of Ministers for permission to implement such a scheme.

However, because the SADC Trade Protocol is not yet in force, the Swazi government is free to introduce such restrictive measures before 1 September 2000, even if it runs against the principle and spirit of the SADC Treaty, which is already in force. On the other hand, it may prove politically embarrassing to the Swazi government to be seen to introduce new trade barriers at this very late stage without any consultation with the other members of SADC.

4. THE PROVISIONS OF SACU

Since 1969, a customs union agreement has been in operation between the governments of South Africa, Botswana, Lesotho and Swaziland. Namibia has also been a member of this agreement since 1990. The aim of this agreement is to maintain the free interchange of goods between the various countries and of applying the same tariffs and trade regulations to goods imported from outside the common customs area as defined in the agreement.

Article 2 of the agreement stipulates that, except as elsewhere provided for, a contracting party shall not apply quantitative restrictions or impose any duties on goods grown, produced or manufactured in the common customs area on importation of such goods from the area of any other contracting party. The agreement contains exceptions to this general prohibition in article 2 in the following articles, namely article 6, article 11 and article 12.

Article 6 deals with exceptions aimed at the protection of so-called infant industries. In terms of subsection (1), the governments of Botswana, Lesotho or Swaziland may levy additional duties on goods imported into its area to enable new industries in its area to meet competition from other producers or manufacturers in a common customs area, provided that such duties are levied equally on goods grown, produced or manufactured in other parts of the common customs area and like products imported from outside that area. Subsection (2) then stipulates that before any such duties may

be imposed or amended, the government concerned shall consult the other contracting parties in terms of article 20 of the agreement and such parties may then make recommendations thereon. Subsection (3) then further provides that such protection shall not exceed a period of eight years without the consent of the other contracting parties. Lastly, subsection (4) defines a new industry as an industry which has been established in the area of that party for not more than eight years.

It is clear that the protection of infant industries may in terms of the agreement be achieved by the levying of additional duties for protective purposes. Article 6, however, does not deal with any non-tariff barriers such as permits or a prohibition on the importation of certain goods. A Member State may therefore not impose any non-tariff barriers to protect such infant industry in terms of article 6, but may only impose additional duties for such purposes.

Article 11 of the agreement deals with other import and export prohibitions and restrictions. In terms of subsection 1, the contracting parties recognise the right of each party to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons. Subsection (3) then further stipulates that the provisions of subparagraphs (1) and (2) of article 11 shall not be construed to permit the prohibition or restriction of the importation by any contracting party into its area of goods grown, produced or manufactured in other areas of the common customs area solely for the purpose of protecting its own industry producing such goods.

It is therefore clear that on a proper construction of article 11 the term "economic reasons" in subparagraph (1), may not be interpreted in such a manner that a prohibition or a restriction on the importation of goods from South Africa may be imposed to protect an infant industry. There must be other economic reasons, such as a negative trade imbalance, or insufficient foreign reserves, which form the primary reasons for the introduction of such a prohibition. That, clearly, is not the case in this instance.

Subsection (2) of article 11 also provides that the provisions of this agreement shall not be deemed to suspend or supersede the provisions of any law with any part of the common customs area which prohibits or restricts the importation or exportation of goods. Currently, there seems to be no such law in force in Swaziland. On the contrary, the provisions of GATT which apply in Swaziland, place a restriction on the introduction of non-tariff trade barriers. This will also be the case with the entering into force of the SADC Trade Protocol. Such a prohibition will then be in clear contravention of both of those instruments, unless Swaziland applies for the necessary exemptions under those instruments.

Article 12 of the agreement is the only other exception that may be relevant to this case. In terms of article 12, whenever an arrangement for regulating the marketing of an agricultural commodity is in operation in any area of the common customs area, such arrangement shall be applied on an equitable basis to similar commodities produced in any other area of the common customs area and marketed in the area where the marketing arrangement is in operation.

However, the introduction of an import prohibition cannot be seen as an arrangement for regulating the marketing of agricultural products and will also be discriminatory in regard to the South African products. It is therefore clearly not applicable.

ENDNOTE

* Bethlehem D "International Economic Relations" in Dugard J *International Law A South African Perspective* (Cape Town 2000) 354-355.

Protecting the Exporter: Contractual Measures to Reduce the Risk of Non-Performance

Elizabeth Snyman

INTRODUCTION

The nation states of the past are being transformed into a global marketplace. But despite the attempts at levelling the international trading field, the legal terrain between individuals doing business across traditional national borders is still uneven.[1] In export and import trade, international sales transactions play an important role and as such one is confronted with those commercial and legal problems which generally arise in connection with this species of contract. However, due to its international element the scope of potential difficulties in this regard increases almost exponentially. The international sales transaction is in essence a sale of goods and presents all those commercial and legal problems that are part of any transaction for the buying and selling of goods. The major difference between an ordinary sale of goods transaction and the international sales transaction is the fact that the buyer/importer and seller/exporter are based in different countries, and most problems experienced with international sales transactions also arise from this.[2]

The presence of risk elements is an ever present reality for contractants to any legally binding agreement. The nature of the risk varies according to the nature, circumstances and parties to each contract and international sales transactions have their own particular problems in this regard. By their very nature import/export transactions are subject to a wide variety of risks. Naturally such transactions are potentially at risk from endless sources. Accordingly, it would not be possible to even list these endless probabilities. However, this paper will deal with some of the most commonly encountered contractual dangers that have bearing on this type of transaction as well as the various means by which parties to the contract may make provision for the regulation of such risks.

An international sales transaction for exports/imports may be executed in various ways. Generally, an exporter may either elect to sell goods directly to the importer abroad or he may create a sales organisation abroad and conduct business though distributors, agents' branch officers or off-shore subsidiaries. Serious factors – legal, financial or otherwise – may dictate exactly how the exporter structures his business.[3]

The exporter is naturally reluctant to part with the control of goods without receiving payment for them unless he can retain an interest in the goods as some sort of security for payment. The importer is equally reluctant to pay for goods before he has received them unless he can be given some kind of legal right over them. Furthermore, neither party wishes to have capital tied up in goods in transit.[4]

Although any seller is more than likely to be concerned about payment, this concern is increased when the buyer is in another country and another jurisdiction. The reason for this is that the seller/exporter is less likely to be familiar with the buyer/importer, his solvency, creditworthiness and integrity. Furthermore, any attempt by the exporter, should the importer default, to obtain payment through the legal process is likely to be a much more serious matter and, of course, it would be a matter for the application of a foreign system of law.[5]

To protect the exporter or seller against non-

performance the first step to be taken is during the negotiating process. Sensitivity to negotiating in an international context is a valuable skill. An international sales negotiation includes timing, procedure, substance, language and culture.[6] The contract between the exporter and the importer is of utmost importance and extensive attention should be given to it. The exporter will seek to ensure that the contract of sale will protect his rights and ensure that the contract sets up a system of payment that will give him recourse against a bank in his/her own country. The exporter must also ensure that export licenses and exchange controls are in order.[7]

Naturally, contracts may be infinitely varied in their formulation and provisions, yet in practice the exporter and importer in an international sales transaction will usually adopt a standardised contract, the incidents of which are known and understood by both parties. This does not serve to remove all uncertainty regarding the rights and duties of the parties as there may still be some doubt as to the legal implications of certain of the contractual provisions. Although such contract are recognised internationally insofar as their general nature is concerned, there may still exist differing approaches within various jurisdictions regarding the legal effect of specific provisions.[8] In this regard it is important to take note of various attempts to standardise or harmonise the international law of sale. Numerous international conventions and other mechanisms can be used to simplify and unify the contract and contractual terms to avoid, for example, different interpretations and cultural differences.

1. INTERNATIONAL HARMONISATION AND/OR UNIFICATION OF TRADE LAWS

The impressive growth of international trade including importing and exporting of goods over the past five decades and the increasing economic interdependence of the world has challenged the traditional regulation of international business transactions by national laws.[9] This led to increasingly complex and challenging legal problems encountered by businesspeople who want to conduct their commercial activities across national borders. It requires new, common and appropriate solutions at an international level. Furthermore, the immense differences in economic development and bargaining power among the developed, developing and least developed countries highlights the need for the creation of a worldwide legal framework in the field of international trade including international sales.[10]

Fortunately, according to Kaczorowska, the winds of change have blown through international trade law. The process of unification of international trade law has been energetically, though not always successfully, promoted by many organisations.[11] This development and improvement of uniform commercial law is desirable since it leads to the facilitation of international trade.[12]

First, there are the attempts by the United Nations (UN) bodies and other specialised agencies: the UN Commission on International Trade Law (Uncitral); the UN Conference on Trade and Development (Unctad); the UN Development Programme (UNDP); the UN Industrial Development Organisation (UNIDO); the General Agreement on Tariffs and Trade (GATT); the Centre on Transnational Corporations (CTC); the International Bank for Reconstruction and Development (IBRD); the World Intellectual Property Organisation (WIPO);[13] and the World Trade Organisation (WTO).

Second, there are intergovernmental organisations promoting the process of unification of international trade law. These organisations include the Customs Cooperation Council (CCC); the African Economic Community (AEC); the Asian-African Legal Consultative Committee (AALCC); the European Union (EU); the Hague Conference on Private International Law; the Intergovernmental Organisation for International Carriage by Rail; and the International Institute for the Unification of Private Law (Unidroit).[14]

Third, there are also non-governmental organisations attempting to assist in the unification of international trade law including the International Chamber of Commerce (ICC); the International Maritime Organisation (IMO); and the International Law Association.[15]

Although activities of some of these organisations do not fall strictly within the scope of international trade law, they are all closely related to this field. The accomplishments achieved by these progressive attempts at unification and harmonisation of international trade law by different international and regional

organisations is considerable. This is demonstrated by the many areas of international trade law that are already unified, e.g. sale of goods; payments; credits and banking; electronic data interchange; transportation, arbitration, etc.[16] Uniform law is, however, not something that can be drafted in the same way as domestic law.

There are mainly two methods that are employed to create uniform law, namely international conventions and model acts.[17] The traditional method to attempt the unification of international trade law, especially in international sales law, is by international conventions.[18] These include the Geneva Convention on the Unification of the Law Relating to Bills of Exchange and Promissory Notes (1930); the Geneva Convention on the Unification of the Law Relating to Cheques (1931); the Convention Relating to a Uniform Law on the International Sale of Goods (1964); the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (1964); and the Vienna Convention for the International Sale of Goods.[19] However, international conventions are mostly concerned with limited issues. Where these issues lead to the change of domestic legal concepts, it is very likely that states will make reservations towards the parts relating to these items. Where the possibility of making reservations is not provided for, they may not even begin the ratification process.[20]

2. UN CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

The UN Convention on Contracts for the International Sale of Goods was approved on 11 April 1980 in Vienna during a diplomatic conference.[21] The Convention was drafted by Uncitral and seeks to provide a single set of rules for international sales transactions to provide a degree of certainty in these transactions.[22] The Convention is often referred to as the Vienna Sales Convention.[23] This Convention has been ratified or accepted by over 50 nations ranging from developed world economies and including economic powers (e.g. the United States [US]) as well as developing nations.[24] Once it has been ratified, it is self executing and automatically forms part of the laws of such countries.[25] The Convention is important in that once the contract falls within its sphere of application it finds application unless the parties provide otherwise.[26]

Although its predecessors – the Convention Relating to a Uniform Law on the International Sale of Goods (ULIS) and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods or Hague Convention (ULF) – did not achieve much success,[27] the Vienna Convention is "rapidly becoming one of the most successful multilateral treaties ever in the field of agreements designed to unify rules traditionally addressed only in domestic legal systems".[28] It is also described as a "quantum leap",[29] a "triumph of comparative legal work"[30] and "monumental".[31] The success is further illustrated by the number of states that have ratified the Convention. Even legal scholars from non-contracting states value this Convention.[32]

One of the most fundamental aspects of the Convention is to determine what transaction will be governed by it.[33] Article 1(1) reads as follows:

> "This Convention applies to contracts for the sale of goods between parties whose places of business are in different States:
> (a) when the States are Contracting States; or
> (b) when the rules of international law lead to the application of the law of a Contracting State."

The Convention rules will therefore apply where both parties doing business are from states that are party to the Convention. The Convention will also apply wherever the rules of international law lead to the application of the law of a contracting state, thus a choice of law clause may have the effect of invoking the provisions of the Convention. According to Duncan, if the clause is badly drafted, it can have the effect that the Convention is applicable against the actual intent of the parties to the contract.[34]

The general obligations of the exporter are to deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention. The Convention provides rules for use in the absence of contractual agreement as to when, where and how the seller must perform his/her obligations.[35] The Convention also provides the rules that implement the seller's obligations in respect of the quantity, quality

and description required by the contract and that are contained or packaged in the manner required by the contract. Another duty of the seller is to deliver goods that are free from any right or claim of a third party, including rights based on industrial property or other intellectual property. The Convention places an obligation on the buyer to inspect the goods.[36] He must give notice of any lack of conformity with the contract after he has discovered such breach, or ought to have discovered it, and at the latest two years from the date on which the goods were actually handed over to the buyer, unless this time limit is inconsistent with a contractual period of guarantee.[37]

The buyer's obligations are less extensive and relatively simple; namely to pay the price for the goods and take delivery of them as required by the contract and the Convention. The Convention provides supplementary rules for use in the absence of contractual agreement on how the price is to be determined and where and when the buyer should perform his obligations to pay the price.[38]

However, despite the successes mentioned above, the Vienna Convention is not perfect as it does not cover all the issues that can arise out of a sales contract.[39] There are several gaps in the Convention. For example, article 4(a) explicitly excludes contract validity issues from the material sphere of application of the Convention and article 4(b) expressly excludes the transfer of ownership from the issues covered by the Convention.[40] Article 4 reads as follows:

> "This Convention governs only the formation of the contract of sale and the rights and obligations of the buyer and the seller arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> (a) the validity of the contract or any of its provisions or any usage;
>
> (b) the effect which the contract may have on the property in the goods sold."

This exclusion is due to the impossibility of drafting a uniform rule on the transfer of ownership as there is such diversity of rules in municipal law on this point that unification was considered impossible. In some legal systems property passes at the time of the conclusion of the contract. In other systems, property passes at some later time, for example, when the goods are delivered to the buyer.[41] With this another problem arises, namely the transfer of risk and the transfer of ownership.[42] This problem can be solved in two ways. First the seller can, in terms of article 6 of the Convention, exclude the Convention in order to avoid the occurrence of inequity and avoid the existence of two parallel sets of rules, namely the Vienna Convention on the transfer of risk and domestic rules on the transfer of ownership.[43] Article 6 reads as follows:

> "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."

Visser proposes the second solution to the problem based on the fact that the problem only exists because it was considered to be impossible to unify the rules on the transfer of property. It is suggested that uniformity is possible by adopting the delivery principle. If the principle of delivery is adopted as the uniform rule for the transfer of property, it would solve the problem because in terms of the Vienna Convention, risk passes at the time of delivery.[44]

It is of major importance to determine the precise moment when the risk of loss or damage to the goods passes from the seller to the buyer. Parties may regulate the issue in their contract either by an express provision or by the use of a trade term, but for cases where the contract does not contain such a provision, the Convention sets forth a complete set of rules.[45] The two special situations contemplated by the Convention are when the contract of sale involves carriage of the goods and when the goods are sold while in transit. In all other cases the risk passes to the buyer when he/she takes over the goods or from the time when the goods are placed at his disposal and he commits a breach of contract if he/she fails to take delivery, whichever comes first.

In the case where the contract relates to goods that are not identified, the goods must be identified to the contract before it can be considered to be placed at the disposal of the buyer and the risk of its loss can be considered to have passed to him/her.[46] Chapter IV of the Convention deals with passing of risk. Article 66 reads as follows:

> "Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the

price, unless the loss or damage is due to an act or omission of the seller."

This section states that the buyer is not excused from paying the price if the goods are damaged or lost after the risk of loss has passed to him. The important question is when that transfer is deemed to take place and this question is addressed in art. 67-69. The concluding language holds the seller responsible for any loss or damage to the goods caused by his act or omission even though the risk of loss has passed to the buyer.[47]

Article 67 states that:

"(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise."

The rules for the transfer of risk in this paper are based on the "control" theory and do not focus on the locus of title at the time of loss. The common law rule of *res perit domino* has been widely criticised over the years and in practice it is often by-passed either because of the courts' willingness to find that title had not passed to the buyer or because of the use of trade terms, such as FOB (Free and Broad) or CIF (Cost Insurance Freight), which adopt the control test of risk of loss. There is no reason therefore to feel concern about the abandonment of the title test in the convention. It would in any event have been an inappropriate test for the Vienna Convention to adopt in view of the fact that the convention contains no rules for the transfer of title in the goods to the buyer.[48]

Article 68 reads as follows:

"The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller."

This section deals with the time for the transfer of risk of loss where the goods are sold in transit. In draft form it provided that the risk of loss was assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. This departure from the control test was justified on the practical ground that it is generally not easy to determine the exact moment in time when goods in transit suffered casualty. Furthermore, it is more convenient for the importer/buyer to pursue a claim for such loss or damage against the carrier and the insurance company than it is for the exporter/seller. The retroactivity rule was opposed at Vienna by a number of countries and a compromise was reached. The version agreed upon only transfers the risk from the time of the conclusion of the contract, but under certain circumstances the transfer of risk may be deemed retroactive to the date of shipment. The article does not indicate what circumstances will satisfy the displacement of the ordinary rule, but it is clear that it does not require an express agreement and, in practice, especially in documentary sales, a finder of fact may readily draw the implication.[49]

Article 69 reads as follows:

"(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than the place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to

be placed at the disposal of the buyer until they are clearly identified in the contract."

Article 69 deals with the time of transfer of risk where the seller is not required to send the goods to the buyer. Article 69(1) is directed to those cases where the buyer is obliged to remove the goods from the seller's place of business. This is not stated expressly but is to be inferred from the language of subsection (2). The second sentence of subsection (1) is concerned with the consequences of the buyer's delay in taking over the goods. Art. 69(2) addresses those situations where the goods are in the hands of a bailee other than the seller. The purpose of subsection (2) is to transfer the risk of loss to the buyer as soon as the goods have been put at his disposal even though the buyer is not in breach in not yet having collected them from the bailee.[50]

Article 70 states that:

"If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach."

The practical effect of article 70 appears to be the same as if risk of loss had not passed since, by avoiding the contract, the buyer will be relieved from having to pay the price if he has not yet paid it and will be able to recover it if he has.[51]

The remedies of the buyer for breach of contract by the seller are determined in relation to the obligations of the seller and the remedies of the seller are determined in relation to the obligations of the buyer.[52] This approach makes it easier to use and understand the Convention. The general pattern of remedies is the same in both cases. If all the required conditions are fulfilled, the aggrieved party may require performance of the other party's obligations, claim damages or avoid the contract. The buyer also has the right to reduce the price where the goods delivered do not conform with the contract.[53]

3. CONTRACTS

The preferred remedy for an aggrieved seller, if buyer should breach, is a cause of action for the price, which is a seller's functional equivalent of an action for specific performance. A cause of action for damages, but not the price, is distinctly secondary. In addition, the seller may wish to reclaim the goods if they are delivered or he/she may obtain some protection for them if they are rejected.[54]

As previously stated, international sales are subject to unique problems that, while possibly also present in domestic contracts, do not manifest themselves to the same extent. In order to deal with such problems, various unique solutions have been tailored. These problems must been kept in mind when drafting an international sales agreement and will enable the practitioner to better advise his/her client on export risks, etc. A few of these problems are:[55]

- *Physical problems:* These relate to geographical separation of the contractants that may lead to difficulties in negotiation, logistical problems and particularly in the case of bulk carried goods in the commodities trade which are bought and sold in transit in order to take advantage of movements in the markets.[56]
- *Commercial problems:* These relate to concerns as to the other parties creditworthiness and the structured financing of the sale in order to expose each party to the least risk in the case of default, whatever the cause thereof.[57]
- *Political problems:* These relate to protectionism in international markets where governments seek to encourage exports and discourage imports although in many instances this problem has been reduced by international agreement. Another aspect of political risk relates to instability of governments in various parts of the world and how this may potentially increase risk factors for exporters/importers.[58]
- *Legal problems:* Litigation in cases of breach is complicated in international sales agreements and even where one party may secure judgment in one jurisdiction, execution of such judgment in another may be problematic.[59]

3.1 Incoterms

International contracts of sale often contain standard abbreviations for the place of delivery and/or place and time of passing of the risk, for the transfer of ownership, for the insurance of transported goods, etc.[60] Mercantile practice has developed a number of standard formulas for international sales. Today, the International Chamber of Commerce provides most of these trade usage terms or standardised sets of trade terms. By simple reference in a contract to the

relevant Incoterm, the parties will be able to incorporate a detailed set of provisions regulating the precise conditions on which goods are to be delivered. The provisions are tried and tested and respond to the practical needs of businesspeople internationally.[61] These terms includes the familiar: EXW; FRC; FOR; FOT; FAS; FOB; CFA; CIF; CIP; EKS; EKO; ORF; and DDP.[62]

This paper does not warrant a full discussion of all these terms. A consideration of the most regularly used terms is sufficient in order to demonstrate how the incorporation of the Incoterms will affect a contract and the contractants' rights and duties, namely FOB and CIF.[63]

Broadly, it may be stated that ex works and ex ship represent opposite ends of the spectrum. Under the ex works term the seller/exporter makes the goods available for the buyer/importer at the exporter's own premises. Under such a term the exporter's duties are at a minimum. Under an ex ship term the exporter only fulfills his/her obligations once the goods have reached the port of destination, have been unloaded and released by the importer. The exporter must make the arrangement and payment for carriage, insurance as well as loading and unloading of goods. It may be seen here that the exporter's obligations are extensive.[64]

Under the FOB contract the exporter must supply goods conforming to the contract and bears the responsibility for ensuring that they are shipped at the port designated by the contract. Although under FOB contracts the importer usually arranges carriage, the exporter must oversee the loading of the goods on the ship and is bound to pay such loading costs.[65] All charges up to and including delivery of the goods over the ship's rail must therefore be borne by the exporter, whereas the importer must pay all subsequent charges including storage, freight, marine insurance, unloading costs, import duties, etc.[66] Under an FOB contract, risk of loss will pass to the importer once the goods have passed the ships' rail upon loading.[67] Although this excludes the situation where unascertained goods are sold under the Vienna Convention where it is provided that risk shall not pass until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the importer or otherwise. Under the FOB contract the general point of departure is that property in goods passes when they cross the ship's rail, which is also the point of delivery.[68]

Under the CIF contract the exporter is bound to supply the goods, arrange for their carriage as well as insurance during carriage to the designated port, the costs of which are usually included in the contract price.[69] Such a term is only appropriate in cases of waterborne carriage.

Although the exporter must arrange and pay insurance during carriage to port of destination, the risk, as the case in the FOB contract, passes at the time the goods pass the ship's rail at the port of shipment. The exporter is obligated to notify the importer that the goods have been delivered on board.[70]

Under CIF contracts documents play a central role and give the contract its special characteristics. The exporter performs by tendering the bill of lading, insurance policy and invoice along with any other documents required by the contract. These documents represent the goods and protect the importer against most risks of loss during transit. The importance of the documents is represented by the rule that provides that the exporter may tender the documents even after the goods represented by them have been damaged or lost, and also that where the documents conform to the contract, the importer is obligated to accept them even where the goods themselves do not comply with the contract.[71]

The following factors distinguishes the FOB and CIF contracts from each other:

- In terms of an FOB contract the exporter bears the risk of fluctuating freight rates and insurance premiums. A CIF contract is always an export contract whereas it is not necessarily the case with an FOB contract.
- Under the CIF the exporter is able to fulfill his obligations by tendering goods already afloat. It is possible for the exporter to buy goods afloat in order to fulfill his obligations. A CIF contract cannot be frustrated by an export as is potentially the case in an FOB contract in terms of which the exporter must ship the goods in accordance with the contract.
- Under the FOB contract the designated port is the port of shipment whereas under the CIF the designated port is the port of destination.[72]

3.2 Finance of export/import transactions

In the usual international commercial transaction, financing plays a key role.[73] By careful structuring of the export/import agreement it is possible to control some of the risk elements inherent in transactions of this nature. Although the export/import transaction can generally be termed as a sale, it is in fact more complex. Owing to the geographical separation of the parties to the agreement, different legal systems and logistical obstacles are but some of the problems experienced. Breaking up one single contract of sale into its many constituent parts and dealing with these separately is an important means of risk limitation. In doing so the agreement is more carefully structured and regulated and a single difficulty or problem need not necessary lead to a breakdown of the contractual relationship.

By securing third party guarantees, the parties may also gain greater security. This can be of particular importance in cases where the parties are unfamiliar with each other and uncertain as to their respective creditworthiness. The means of effecting payments in export/ import transactions and their relative advantages and disadvantages for the exporter/ importer differ.

The buyer can make payment in cash in advance. This is known as cash with order. It is the ideal situation for the exporter. He/she receives payment once the contract is concluded and is covered in the event of any future difficulty. He/she does not have liquidity problems and no collected debts on his/her books. However, the fact that the payment has already been made, places the buyer in a less ideal situation. He/she pays the exporter for goods that are not necessarily even in existence at time of payment. Furthermore he/she places himself/ herself at considerable risk in the case of serious breach by the exporter. If the deal should fall through he/she may be severely hampered in his/her efforts to recover his/her payment from a seller in a foreign jurisdiction.

Another possibility is the sale on open account. Where goods are on an open account, the exporter must first perform by sending the goods to the importer who in turn makes payment within the agreed upon period of credit. The importer is in the ideal situation and the exporter bears the risk of non-payment as well as the burden of financing.

3.2.1 International letter of credit

Over the past three decades, the letter of credit has become an indispensable, inexpensive and effective tool for financing international commercial transactions while reducing the risks related to such transactions.[74] However, along with its increased use, fraud increased as well and the litigation over fraud and the exporter must take this into consideration.[75]

Exporters found it unsatisfactory to place goods on a carrier and then have to wait for the importer to inspect the goods and decide how much or whether to pay at all and when.[76] Exporters wished some guarantee of prompt payment upon completing their part of the bargain. The letter of credit arrangement has provided that exporters would be paid upon presentation of a set of documents (bill of lading, commercial invoices and other documents) that conform to requirements of the issuing or correspondent bank.[77] Certain risks can be shifted from the exporter to the importer.[78] The South African High Court of Appeal stated in *Loomcraft Fabrics CC v Nedbank Ltd*[79] that the autonomous nature of the obligations owed by the bank, whether the issuing of confirming bank, to the beneficiary under a credit has been stressed by the courts both in South Africa and overseas. An interdict restraining a bank from paying in terms of a credit will accordingly not be granted at the insistence of the buyer, save in the most exceptional cases.[80] The Court referred to the approach of courts with regards to such interdicts in the judgement of Kerr J in *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd*[81] that:

> "It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional

> wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged."

Lord Denning warned in *Power Curber International Ltd v National Bank of Kuwait SAK*[82] that:

> "no foreign seller would supply goods to that country on letters of credit because he could no longer be confident of being paid. No trader would accept a letter of credit issued by a bank of that country if it might be ordered by its courts not to pay."

The contract for the sale of goods between the exporter and the importer is conceptually and actually independent from the letter of the credit contract. In the typical letter of credit transaction, the importer instructs a bank (issuing bank) in his/her own country to open a documentary credit for the exporter. The issuing bank then instructs a bank in the exporter's country (the correspondent or confirming bank) to accept, negotiate, or pay an amount specified on the importer's draft to the exporter, provided that the exporter presents certain shipping and sales documents to the correspondent bank. The correspondent bank then specifies to the importer which documents the exporter must present before the correspondent bank will accept and pay the importer's draft. After performance by the exporter under the contract with the importer, and after the exporter then presents conforming documents to the correspondent bank, the correspondent bank pays the importer. At that point, the actual goods may not be in the hands of the importer. The correspondent bank's obligation to pay the exporter upon presentation of conforming documents is not conditional on the importer's prior receipt of the goods or on the actual quality or quantity of the goods in transit. In essence, the letter of credit arrangement is a documentary sale, not a sale of goods.[83] Along with the independence principle, the strict compliance principle also applies to the letter of credit.

Since the letter of credit is a contract to exchange documents for cash, the documents matter more than what they represents (the independence principle) and the banks will not pay on documents that are not exactly in conformity with the letter of credit requirements (the strict compliance principle).[84] In a letter of credit transaction there are at least five separate contracts involved, namely:

- the underlying sales contract between the exporter and the importer
- a contract between the importer and the issuing bank
- a contract between the issuing bank and the confirming or correspondent bank
- a contact between the confirming or correspondent bank and the exporter
- a contract between the issuing bank and the exporter.[85]

It should be noted that letters of credit are not the only form of documentary credit. Other types of documentary credits include revocable and irrevocable credits; confirmed and unconfirmed credits; revolving credits; back-to-back credits; and "red clause" credits.[86]

The 1992 Uncitral's Working Group on International Contract Practices proposed a convention on guarantee letters. The Convention on Independent Guarantees and the Stand-By Letters of Credit have been approved by the UN General Assembly.[87]

3.3 Bills of lading

The rules governing bills of lading include the Hague Rules,[88] the Hague-Visby Rules,[89] the Hamburg Rules[90] and to a lesser extent the Brussels Protocol.[91]

There are various types of bills of lading dependent upon their functions. These are those:

- issued with printed clauses for conventional or through traffic on liner terms
- issued for goods accepted under "Combined Transport" conditions
- "short form" or "blank back" documents
- bills of lading issued under a charter-party
- bills of lading issued by a freight forwarder.[92]

Developments in transport and globalisation led to the development of the combined transport document in place of the so-called marine bill of lading. The combined transport document is meant to be what has been described as a "start-to-finish" document and to make it unnecessary to issue separate documents for every stage in the carriage of goods involving more than one stage, known as combined transport. This form of transport plays a major role in the international transport of goods and is effected largely by the use of containers.[93] The obvious advan-

tage of containers in combined transport is that if the goods are to be carried by a combination of land and transport, it will travel in the same container from start to finish with the obvious saving in labour and costs. By issuing a combined transport document the carrier accepts full responsibility for the combined transport. The advantage of this method of transport to the exporter is that it will ordinarily permit him/her to send his/her goods to the nearest container loading depot. These depots are situated in most major industrial centres.[94] As a further result of this development in the transport of goods, bills of lading can be divided into two kinds, namely the traditional ship bill of lading and the combined transport kind.[95] It should be noted that in the case of combined transport the relevant Incoterm to be used is FCA rather than FOB.

4. INSURANCE

No discussion of risk regulation may be considered complete without consideration of the applicable principles and rules of the law of insurance. An important means of controlling exposure to risks associated with the loss of goods to which the contract of sale relates is to take out a short-term insurance policy, which covers such eventuality during the period of transshipment. In South Africa the majority of marine insurance contracts are based on the Lloyd's policy, the basic form of which has existed for over three hundred years. Pecuniary or propriety interest that may be exposed to dangers that are insured against may constitute the basis of a contract of marine insurance, the most important of these are the ship, the goods, freight, profits and loans on bottomry or *respondentia*.[96] From the exporter/importer point of view insurance of the goods is probably the most significant of these. The term goods or the phrase are used in the standard form and the Lloyd's "goods and merchandise" refers to objects that are placed aboard the vessel for merchandise purposes. Where such objects fall within the ambit of this definition/description, they will be covered and it is not necessary to specify them where there is a usage to the contrary.[97]

The scope of a marine insurance policy is determined either with reference to a period of time, voyage or a combination of these. Where the policy covers the insured interest for a definite period of time, it is a time policy; where the policy covers a particular voyage or voyages defined by "reference to local termini but not to time" it is termed a voyage policy. For such a policy it is essential that the policy specify the voyage insured.[98] Such voyage policies have certain terms that are implied by operation of law and can only be excluded or varied by express provision in the contract of insurance.[99] These terms resemble certain of the duties of the carrier under a bill of lading and thereby complement one another. Firstly, there is an implied warranty of seaworthiness which entails that at each stage of the ensured voyage the ship is required to be in fit condition to encounter the ordinary hazards of that stage of the voyage. Secondly, there is an implied term that there will not be an abandonment or change of voyage and similarly there is a warranty against unreasonable delay.[100]

It is possible to insure against a comprehensive range of risks factors related to the export/import transaction. Generally such insurance is usually aimed at providing coverage for loss or damage to the *res vendita*. Naturally, the beneficiary under an insurance contract of this nature will be determined with reference to the passing of risk under the contract of sale. For this reason there is necessarily a nexus between the commercial terms used to determine this matter (FOB, CIF, FAS, CF, etc.). The transfer of insurance documents will obviously form part of those included in the documentary sale.

Insurance understandably increases the costs involved in the export/import transaction, but due to heightened risk elements in such agreement, it may be said to be essential.

It should also be noted that the South African Department of Trade and Industry in its effort to attract foreign investors and to promote international trade and increase exports, launched an export reinsurance incentive that enables exporters to reinsure their exports.

CONCLUSION

From the abovementioned, one fact that becomes abundantly clear is that the best protection that parties to an export/import agreement have against the uncertainties and other problems of this species of contract is to be found in the form of clear contractual provisions for such eventuality. Where all parties to the agreement are clear and certain as to their

rights and obligations under an export/import transaction, it is less likely that disputes may arise in this regard.

Consequently, great care should be taken in drafting such contracts and it should be ascertained in detail from both parties what their expectations under the contract are. Leaving matters as implied or entirely unclear is certain to cause no end of trouble in cases where disputes arise.

It is in this regard that the advantage of the international documentary sale lies. This form of contract structures the transaction in such a manner that it is broken down into a number of stages each dealing with separate elements of risk and in so doing, introduces a number of checks into the contract in the form of hurdles the parties must cross to ensure proper performance. The fact that risk is broken down into separate elements and that each risk aspect is then dealt with independently, plays an important function in creating more certainty in the agreement. Making the agreement out in the form of one of the international commercial terms is also significant since, by doing so, the parties will usually automatically understand the extent of their rights and obligations under such an agreement based upon the term used. This may furthermore be of great assistance to the person drafting the agreement insofar as it provides an immediate structure to the contract in terms of which he/she can proceed in his/her task.

Insurance is a very important issue in such transactions: since goods are transported over such long distances, they are as a general rule more exposed to risk than would be the case in a local transaction relating to the sale of goods. Accordingly, the elements of the insurance contract generally forms a significant part of the international documentary sale.

In the final analysis, short, unclear contracts in which questions on the various rights and duties of the parties are left open to unclear and different interpretations must be avoided. The protection of the parties lies in certainty and clarity. The contract should also address matters such as choice of law and jurisdiction to avoid problems that may arise where it becomes necessary to subject contracts to the rules of international private law to provide answers to such questions.

Risk and risk elements by their very nature can never be comprehensively dealt with in any contract, owing to their almost limitless nature. By careful and considered drafting of contracts such uncertainties may, however, be greatly reduced.

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Trading in Terms of the SADC Trade Protocol

Engela Schlemmer

INTRODUCTION

The Southern African Development Community (SADC) as we know it, was formed on 17 August 1992. Two years later, South Africa became a member. The main aim of the establishment of SADC, was to ensure that a community was formed within which the Member States could work closely together, providing a vehicle for the development and integration of the region.[1] The provision of a framework for the development of a regional market in order to promote regional trade and new investments is one of the pillars for cooperation in the economic sphere.

Article 22 of the Treaty establishing SADC provides that Member States may conclude Protocols as may be necessary in each area of cooperation. These Protocols should spell out the objectives and scope of, as well as the institutional mechanisms for, cooperation and integration. On ratifying these Protocols, it is assumed that Member States will introduce measures into their legal systems to give effect to the aims and objectives of each Protocol. This is a prerequisite for cooperation in the region, since these protocols would otherwise have no legal force or effect.[2]

For the purposes of this seminar, the Protocol on Trade is of particular significance.

1. PROTOCOL ON TRADE

The objectives of this Protocol are:

- to further liberalise intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade arrangements, complemented by protocols in other areas
- to ensure efficient production within SADC reflecting the current and dynamic comparative advantages of its members
- to contribute towards the improvement of the climate for cross-border and foreign investment
- to enhance economic development diversification and industrialisation of the region
- to establish a free trade area (FTA) in the SADC region.

The establishment of an FTA entails, *inter alia*, a process and modalities for the phased elimination of tariffs and non-tariff barriers. Due regard will have to be given to existing preferential trade arrangements between Member States and the elimination of barriers to trade. This should be achieved within a time frame of eight years from the entry into force of the Protocol, subject to certain exceptions.

The process and method of eliminating barriers to intra-SADC trade, and the criteria of listing products for special considerations will be negotiated within the context of the Trade Negotiating Forum. Together with this process, there will be a phased reduction and eventual elimination of import and export duties in goods originating in Member States. No new quantitive restrictions may be applied and any existing restrictions on the import of goods originating in Member States must be phased out, except where it is otherwise provided for.

A Member State may, however, adopt and enforce measures necessary to protect public morals, to secure compliance with laws and regulations that are consistent with the provisions of the World Trade Organisation, and protect intellectual property rights and mea-

sures which will ensure compliance with existing obligations under international agreements. Some other aspects that might affect exports more directly, even though only on an administrative basis, is that Member States are obliged in terms of the Protocol to facilitate the simplification and harmonisation of trade documentation and procedures. In this regard mention is made of using electronic data storage measures and other instances of electronic and computer aids.

Keeping this in mind, as well as the idea of a harmonised, closer knit Community, the doors have been opened for negotiations on the development of a harmonised system of rules, especially with reference to aspects influencing trade and the debate and discussion around electronic commerce.

But what is the importance of all this for an exporter of goods or services?

All the issues mentioned fall within the sphere of the legislature and government institutions and do not really influence an exporter in his capacity as such (that is, apart from the lower tariffs which will have to be paid). However, it is precisely the opening up of the regional market by adopting the Protocol, which introduces the potential risk for an exporter.

By adopting this Protocol, the South African government has shown its willingness to take part in the economy of the region. An FTA creates the possibility for smaller industries that might not have considered embarking on international trade previously, to enter this arena. Although this creates new opportunities, it obviously entails a number of risks.

The Annexes to the Protocol make provision for regulations to be passed to ensure the proper functioning of the different aspects dealt with in the Protocol. A lawyer dealing with clients who are trading internationally thus has an increasingly difficult task to keep abreast of all the regulations and rules that might influence his client's position and which will be passed on a regular basis. An exporter therefore has to ensure that the lawyer he employs has the necessary expertise and experience in international trade in order to limit his risks.

The following will give an overview of some of the factors that should be taken into account when dealing with international trading partners, especially in the SADC region.

2. RISKS IN TRADING INTERNATIONALLY – GENERAL

The business lawyer dealing with international trade issues must cope, not only with his client's interests, but also with the variety of different national laws applicable to an export or import transaction and its contracts. This can create considerable difficulty since no harmonised system of law exists, not even among SADC and its Member States. However, payment and financing techniques used in the export/import business are similar throughout the world and these similarities are reflected in similar contractual provisions and documents.[3] Apart from the different legal systems involved, and regional rules and regulations, a proper screening of at least payment and financing techniques will enable less risky international negotiations. The lack of uniformity in the legal systems of international trading states results in an increasing number of factors which should be borne in mind by the exporter and importer when dealing across borders. This is particularly true for dealing across Southern African borders.

> "In a perfectly functioning regional market, international trade flows would be determined exclusively by the economic performance and international competitiveness of each country which also determines its international financial status, i.e. its balance of payment, its international solvency and creditworthiness, and the strength and exchange rate of its currency."[4]

Reality clearly shows that this is not the case. Many factors influence international trade and are very often not linked to market forces. According to Horn,[5] the two most important factors that distort international trade flows, are:

> "(1) the weak international financial status of many countries (based on a variety of economic and political factors), and the scarcity of hard currency reserves lead to tough currency exchange controls which constitute barriers to trade and investment; (2) within and among industrialised countries with market oriented economies and convertible currencies, large and increasingly mobile international financial flows disturb the balance of payment of countries and bring about misaligned and volatile currency exchange rates."

These factors can clearly be seen in the SADC

region. The SADC Protocol on Trade and the SADC treaty in itself, seek to address these issues, but can do so only to a limited extent. These economic problems are clearly counter-productive to a sustainable and balanced trade environment in the region. There is no clear solution to these problems. For the time being, the only way to deal with the risks inherent to these factors, is to structure agreements in such a fashion that these risks are addressed in a manner beneficial to the South African exporter.

3. THE USE OF FOREIGN CURRENCY

3.1 Exchange control

International trade obviously necessitates the use of foreign currency by at least one of the contracting parties. If, for example, a contract between a South African exporter and a Zimbabwean importer, provides that the payment of goods should be made in South African rand or even in US dollars, a number of problems arise. Firstly, foreign exchange controls, and secondly questions as to the exact rights and duties of the parties with respect to their foreign currency debt.

A number of harsh exchange control regulations have been passed by the Zimbabwean government. This is due to the scarcity of hard foreign currency in that country and has led to severe restrictions on the use of foreign currency by its citizens. The extra-territorial effect and recognition of such measures need to be taken into account, as well as the effect of other legislative and administrative measures (of SADC Member States within their territories).

3.2 Money of account and money of payment

When dealing with a contract in terms of which payment should be performed in a foreign currency, a distinction has to be made between the money of account and the money of payment. The money of account refers to the currency in which a debt is expressed, or as Horn[6] puts it "the value of the purchase price to be received by the exporter". The money of payment is the currency in which the debt has to be discharged.[7] If the exchange rate of the money of account deteriorates between the time of the conclusion of the contract and the payment date, the exporter will receive a lesser price. If the currency of payment is different to the official currency of the place of payment, exchange control regulations may have a huge impact on the transaction. This will all depend on whether it is permissible to effect payment in a foreign currency. If the debtor does not, the question arises whether the creditor would be successful in trying to claim specific performance in the local courts if the courts only express judgment in the currency of the forum.[8] Dicey and Morris[9] comment on this aspect as follows:

> "Irrespective of the currency in which a debt is expressed or damages are calculated (money of account), regard shall be had to the law of the country in which the debt or liability is payable in order to determine the currency in which it may, or must, be discharged (money of payment), but (semble) the rate of exchange at which the money of account must be converted into the money of payment is determined by the law applicable to the contract or other law governing the liability."

The conversion of the foreign currency debt into the currency of the forum is also problematic. According to South African law,[10] when such conversion is to take place, the conversion should be carried out at the time of the execution of the court order (conversion date rule).[11]

The volatility of currency markets makes it imperative to eliminate exchange rate risks by means of, for example, hedging transactions, since it is not always possible to have the money of account and money of payment determined in the exporter's own domestic currency.

The essence of a hedging transaction lies "in der Verbindung eines auf tatsächliche Lieferung von Ware gerichteten Hauptgeschäfts (Kauf oder Verkauf) mit einem daneben laufenden Termingeschäft, das nur dazu dienen soll, die im Hauptgeschäft liegenden, durch unvorhersehbare Kursschwankungen bedingte Gefahren in geeigneter Weise auszuschalten."[12]

4. RISKS INVOLVED IN FINANCING INTERNATIONAL TRANSACTIONS

The moment aspects of financing come to the fore, the risks inherent to the borrower need to be assessed. On the national front, it is a fairly easy task since a number of methods exist that can be employed to determine the borrower's risk. However, these methods cannot be used with the same kind of success in the international arena. The same type of data used to determine borrower risk in national transactions

may not be that easily (if at all) accessible in international transactions.

Apart from assessing the international borrower personally, environmental and political factors need to be taken into account. A borrower from an unstable democracy in Africa will inevitably have to be looked at with more circumspection than a borrower from, for example, the United Kingdom or Germany. This is because the government in the unstable democracy may institute import and export control measures or exchange control.[13] Nationalisation of certain assets or industries[14] in the country may be a possibility and, in the event of a change in government, this may lead to sanctions or moratoria inhibiting trade. Labour unrest and, perhaps, revolutionary situations can also disrupt the importer's production, making it impossible to earn the money needed to comply with obligations in terms of a transnational agreement.

Apart from these considerations, if finance or credit is granted, by whatever means, devices should be put in place which would enhance the likelihood that payment would indeed take place.[15] It is not guaranteed that the methods or devices used for national transactions would also be successful in international transactions. The exporter may have to look at different possibilities. For example, reservation of ownership is often not practical in an international transaction. If, for instance, the goods in question are complicated, specialised machines, the seller may not find an alternative buyer and it may not be feasible for the seller to complete the plant and bring it into operation not even speaking of transporting the machinery back to the country from where it was exported. Furthermore, there may be obstacles to seizure in case of default so that it may not be practical for a foreign buyer to exercise rights that in theory have been preserved.[16]

The availability of legal remedies in the event of a default is another important factor to consider. If doubt exists as to whether such remedies will be available in a specific legal system, this should be addressed in the contract.

In dealing with some of the risks mentioned, lawyers play only a subordinate role – a number of these risks deals with pure business decisions. However, lawyers should play a role to counter risks associated with exchange control problems, the availability of legal remedies and making sure that the devices to ensure payment will be effective. It is obvious that a single lawyer would not be in a position to know all the national laws applicable to a transnational transaction.

When we look at credit risk analysis, it is clearly shown that various approaches to the identification and measuring of credit risk have been developed nationally. When these techniques or approaches are transferred to the transnational arena, difficulty is encountered. The availability of financial information about a borrower is of utmost importance. However, different accounting techniques exist which leads to different results when assessing a borrower's creditworthiness. For example, working capital in one country is not the same as in another country. Attempts to standardise accounting practices are being undertaken by a Commission of the European Community and others. A similar process need to be done in the Southern African region.

It can be very expensive to employ a risk analyst to assess the creditworthiness of a foreign party and, apart from this, the inherent uncertainty may also deter many businesses from exporting their products or alternatively, to seek security through other means.

CONCLUSION

The adoption of the Protocol on Trade by the South African government creates the opportunity for South African undertakings to participate in a fast-growing regional market. This paper pointed out that when dealing internationally or regionally, exporters face real financial risks, apart from the normal business risks one is exposed to in any economy. Only a few of these risks were mentioned and some suggestions were made as to how they could be addressed.

Developments in this region give South African exporters opportunities which they might not have had previously, but it also places a burden on exporters to ensure they acquire the necessary expertise to assist them in negotiating contracts and assessing possible risks. This in turn places a burden on South African lawyers to ensure they keep abreast of new developments in the regional, as well as making contacts with their regional counterparts, thereby providing their clients with the best possible advice.

ENDNOTES

1) Member States shall cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit.

   Member States shall, through appropriate institutions of SADC, coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects in the areas of cooperation.
2) See in general Schlemmer "Die ontwikkeling van 'n streeksgebaseerde ekonomiese reg in Suider-Afrika – 'n vergelyking met die Europese Unie" 2000 *TSAR* 249 266 ff.
3) Horn "Uniformity and Diversity in the Law of International Commercial Contracts" in Horn and Schmitthoff (eds)(1982) *The Transnational Law of International Commercial Transactions* 3 ff; Horn "Payment and Financing in International Trade" in Horn (ed) *The Law of International Trade Finance* (1989) 6 ff.
4) Horn (1989) 8.
5) (1989) 8 ff.
6) (1989) 9.
7) *Bonython v Commonwealth of Australia* 1951 AC 201 206 221; Edwards "Conflict of Laws" vol 2 (reissue) in Joubert (ed) *LAWSA* par 470.
8) See Horn (1989) 10 and the sources he refers to.
9) *The Conflict of Laws* 12 ed (1993) 1579.
10) Edwards par 478. The judgment debtor may, according to South African law, elect to satisfy the judgment debt in the foreign currency.
11) *contra* the exchange rate of the contractual payment date (breach date rule) which is used in some other jurisdictions.
12) *RGZ* 107,24; 146,192 cited by Kümpel 1987 *WM* 1321 1326. For a fuller and more critical discussion see Hellwig and De Lousanoff "Die Verbindlichkeit sogenannter Hedge-Geschäfte" in *Festschrift Stiefel* (1987) 309 322f.
13) This type of risk can better be shifted to banks or export insurers that are better able to evaluate and spread those risks than an exporter.
14) This may be under circumstances in which the new governmental successor is unwilling or unable to keep up with the original agreement.
15) E.g. security in the form of assets to be pledged, registration of mortgage bonds, reservation of ownership, etc.
16) See in general Vagts 32 f.