

**Essays in Honour
of
Lovell Derek Fernandez**

Lawyer, Linguist, *Mensch*

LAW AND JUSTICE
AT THE DAWN OF THE 21ST CENTURY
Essays in Honour of Lovell Derek Fernandez

EDITORS

Bernard Martin

Raymond Koen



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Preface

The *festschrift* is one of those eternal paradoxes. On the one hand, it is a celebration of the life and achievements of the honouree. It is about friends and colleagues saying a collective *bravo* and *merci* to a person whom they value and who has had a positive influence on their own lives. On the other hand, it is a manner of saying farewell, of bringing to a clinical close the academic career of the honouree and of despatching him or her to a respectable and, it is hoped by all, a lengthy retirement.

Fortunately, our honouree, Lovell Derek Fernandez, breaks the mould, as he has been wont to do all his life. He deserves the first element of the *festschrift* paradox manifold. But he has said a rather stern *nein* to the second element. His official retirement actually commenced about a year ago already. His response was to make academic plans for the next decade! He has been instrumental in launching a new LLM programme in anti-money laundering law and anti-corruption law at UWC. Currently he is supervising seven LLM students. He is preparing to qualify as a member of the International Association of Certified Anti-Money Laundering Specialists. He is making arrangements with colleagues to write two books, one on South African anti-money laundering law and the other on South African anti-corruption law. Later this year he will be at the centre of the launch of an international journal on anti-corruption law by the Department of Criminal Justice and Procedure. And he continues as the local pivot of the South African-German Centre for Transnational Criminal Justice housed in the Department of Criminal Justice and Procedure. As lawyers like to say, that catalogue is not exhaustive. It shows, however, that Lovell remains the doyen of criminal justice at UWC. So much for taking retirement lying down!

Lovell is one of a handful of people whom one could never regret having met, worked with and come to know. His range of legal knowledge is vast. Combine that with a fund of non-legal knowledge that is positively astounding and you have a consummate jurist. He has been offended ever by the grotesqueries of black letter law and always has injected socio-economic and political considerations into all his teaching and writing. A key component of his legal prowess lies in his love of language. He is fluent in English, Afrikaans, German and Tshivenda and more than competent in isiXhosa and isiZulu. And recently he has acquired one of his ancestral languages, Portuguese. Language is to the lawyer what the microscope is to the scientist and the theodolite to the surveyor. Lovell's legal expertise is due in no small part to the fact that he is a linguist *par excellence*.

Lovell is a very good man to know because he knows everybody – and God! And by God - everybody knows Lovell! His is not a very common name. Yet everybody who meets him remembers it immediately. Of course, it might be because the name is memorable for being rare. But it really is the man bearing the name who is rare and hence memorable. Quite simply, you do not forget Lovell because he is pretty much unforgettable! Yet, he is easy to underestimate. He is not very imposing. He is tolerant to a fault and not very demanding. But he is commanding. He is tough as nails. He will argue for and defend what is right unrelentingly and *contra mundum* if necessary. He engenders respect and loyalty in all who interact with him. He is a natural but self-effacing leader. The Department of Criminal Justice and Procedure has been built around his presence and experience as a senior academic. And, boy, can he spin a yarn!

The essays here presented are for a very special colleague and dear friend: Lovell Derek Fernandez, lawyer, linguist, *mensch*. His life and work are something to behold. Woe betide those who underestimate him! He is our own Renaissance man. He has subverted Western assertions of academic hegemony and appropriated that which colonialist intellectuals fancied to be a WASP preserve. He is an African scholar and gentleman!

Notes on Contributors

Charles Goredema is a consultant focusing on policy research and capacity development pertinent to economic crime in Africa. He is a lawyer by training, with a professional background in public prosecution and academia. He holds the BL Honours and LLB from the University of Zimbabwe) and the LLM from the University of London. He entered full time research on joining the Institute for Security Studies (ISS) in Cape Town in August 2000, focusing on transnational organised crime and money laundering, and the capacity of states to curb these activities. He led the Organised Crime and Money Laundering programme at the ISS from 2006 to 2012. He has undertaken consultancy and advisory work for regional bodies – mainly the Southern Africa Police Chiefs Co-operation Organisation (SARPCCO), the Inter-Governmental Authority on Development (IGAD), the East & Southern Africa Anti-Money Laundering Group (ESAAMLG), the United Nations Economic Commission for Africa (UNECA) and the African Development Bank (AfDB).

Abraham Hamman BA LLB LLM LLD (UWC) is a Lecturer in the Department of Criminal Justice and Procedure, Faculty of Law, University of the Western Cape. He is an admitted Attorney and Conveyancer of the High Court of South Africa. He lectures: the Law of Evidence, Conveyancing and SA Anti-Money Laundering. E-mail: ajhamman@uwc.ac.za.

Shamiel Jassiem LLB LLM (UWC) is the Director Law Clinic, Faculty of Law, University of the Western Cape. He is an Admitted Attorney of the High Court of South Africa. He lectures: Legal Process, Preparing for Legal Practice and Street law. E-mail: sjassiem@uwc.ac.za.

Raymond Koen has been a law teacher at the University of the Western Cape for some 20 years. He continues his quest to become an academic.

Judge Sanji Monageng (International Criminal Court) served as a Judge of the Pre Trial Division from 2009 until March 2012, when she was appointed a Judge of the Appeals Division, and presently holds the position of President of the Division. She also served as the 1st Vice President of the Court from March 2012 to March 2015. Previously Judge Monageng served as an expert High Court Judge in the Kingdom of Swaziland, under the auspices of the Commonwealth Secretariat. Prior to this, she served as a Judge of the High Court of the Republic of the Gambia in the same capacity. She started her legal career as a Magistrate in Botswana. Judge Monageng was also a member of the African Commission on Human and Peoples' Rights appointed by the African Union, between 2003 and 2009, and was appointed as the Commission's Chairperson in November 2007. She also served as Deputy Chief Litigation Officer in the United Nations Observer Mission to South Africa in 1994.

Judge Monageng served as the founding Chief Executive Officer of the Law Society of Botswana for many years. She possesses expertise in women's human rights issues, indigenous peoples and communities and children among others. She is a member of the International Association of Women Judges and the International Commission of Jurists, among others.

Najma Moosa is Professor of Private Law in the Faculty of Law at the University of the Western Cape. She was Dean of the Faculty from 2002 to 2008. She is an advocate of the High Court of South Africa and was a member of the Project (59) Committee (Islamic Marriages & Related Matters) of the South African Law Reform Commission from 1999-2003. She is a guest lecturer in the annual summer school Programme on Transnational Criminal Justice and Crime Prevention organised by the South African-German Centre for Transnational Criminal Justice at Humboldt University in Berlin, Germany from 2011 to 2016. E-mail: nmoosa@uwc.ac.za.

Jamil Ddamulira Mujuzi is an Associate Professor in the Faculty of Law, University of the Western Cape (UWC). He holds an LLB (Makerere University, Uganda); LLM (Human Rights and Democratisation in Africa), University of Pretoria, South Africa; LLM (Human Rights Specialising in Reproductive and Sexual Health Rights), University of the Free State, South Africa; and LLD (life imprisonment in international criminal law and selected African countries), UWC, South Africa. His research interests include international co-operation in criminal matters, criminal procedure, law of evidence and human rights generally (especially from an African perspective). He is the author of more than 100 articles and chapters in books which have been published in some of the most prestigious peer-reviewed law journals in Africa, Asia, Europe and North America.

Lukas Muntingh is an Associate Professor and CSPRI Project Coordinator at the Dullah Omar Institute for Constitutional Law, Governance and Human Rights. He holds a PhD (Law) from the University of the Western Cape and has been involved in criminal justice reform since 1992. He has worked in Southern and East Africa on child justice, prisoners' rights, preventing corruption in the prison system, the prevention and combating of torture, and monitoring legislative compliance.

Mark Pieth is Professor of Criminal Law and Criminal Procedure at Basel University, Switzerland since 1993. He chaired the OECD Working Group on Bribery in International Business Transactions from 1990 to 2013. He was appointed by the UN Secretary General to the Independent Inquiry Committee into the Iraq Oil-for-Food Programme in 2004. He also served as a Member of the Integrity Advisory Board of The World Bank Group (IAB). Prof Pieth was appointed as the Chairman of the Sanctions Appeals Board of the African Development Bank (AfDB) in spring 2013. He is the founder and Chairman of the Board of the Basel Institute on Governance (BIG). Sussex University, UK presented him with an honorary doctorate in July 2014.

Nico Steytler is a professor of Public Law and the South African Research Chair in Multilevel Government, Law and Policy at the Dullah Omar Institute of Constitutional Law, Governance and Human Rights of the University of the Western Cape, Cape Town, South Africa. His research focus is on constitutional law and multilevel government. He was a member of the South African Municipal Demarcation Board (2004-2014) and is a commissioner of the Financial and Fiscal Commission (2013-2017). He has provided expertise on multilevel government internationally in Kenya, Sudan, Democratic Republic of Congo, Ethiopia, Libya, and Zimbabwe. He was a UN expert consultant to the Yemeni Constitutional Drafting Committee and the Libyan Constitutional Drafting Assembly. He is the president of the International Association of Centers for Federal Studies (2010-2016).

Dirk van Zyl Smit is Professor of Comparative and International Penal Law at the University of Nottingham. He was Professor of Criminology at the University of Cape Town, from 1982 to 2005 where he was also Dean of the Faculty of Law from 1990 to 1995. Dirk was Global Visiting Professor at the New York University School of Law in 2012 and he has in recent times also held appointments as visiting professor at Humboldt University in Berlin, the Paul Cezanne University in Aix en Provence and the Catholic University of Leuven. He holds BA and LLB degrees from the University of Stellenbosch and a PhD from the University of Edinburgh. Ernst-Moritz-Arndt University of Greifswald in Germany awarded him an honorary doctorate in law in 2008. He has been an Alexander von Humboldt Fellow at the Max Planck Institute of Foreign and International Penal Law in Freiburg and a Senior Fulbright Research Fellow at the New York University School of Law. He is also an Advocate of the High Court of South Africa.

Charles Villa-Vicencio teaches and undertakes research at Georgetown University in Washington DC in the northern hemisphere fall semester of each year, spending the rest of each calendar year working in his native South Africa and other parts of the continent. He was Professor of Religion and Society at the University of Cape Town prior to founding the Institute for Justice and Reconciliation based in Cape Town in 2000 and serving as its executive director for eight years. He is also a senior research fellow in the Institute. He was earlier the National Research Director in the South African Truth and Reconciliation Commission. He is presently an Emeritus Professor of the University of Cape Town. His latest publications include: *Africa Renaissance and Afro-Arab Spring: A Season of Rebirth*, edited with Erik Doxtader and Ebrahim Moosa (2015); *Walk with Us and Listen: Political Reconciliation in Africa* (2009); *Conversations in Transition: The South African Story* (2012).

Life Imprisonment in a Globalised World

Dirk van Zyl Smit

Dedication

It has been my privilege to know Professor Lovell Fernandez for more than 30 years. We first met at the University of the Witwatersrand in Johannesburg in the early 1980s, where Lovell was beginning work on his PhD and I was a neophyte lecturer. Our backgrounds were very different but Lovell soon told me that he had been student of my wife, Betine, at the University of Western Cape in the 1970s. A bond was established that has survived the years. We share an interest in German scholarship, some of which is reflected in this essay. More important, though, is Lovell the man: someone of honesty, humility and compassion. I am delighted to be able to contribute this essay in his honour.

1 Introduction

Historically, nation states have had very different approaches to the imposition and implementation of life imprisonment. They range from total prohibitions on its use, to mandatory requirements for it to be imposed for certain offences and implemented in a way that allows no realistic prospect of release before the offender dies in prison – and many variations in between.

Until relatively recently, these different approaches to life imprisonment did not create a major problem for international co-operation in criminal matters. In cases involving the extradition of criminal suspects or the transfer of sentenced prisoners - two staple forms of co-operation in an increasingly globalised world where crime control requires states to work together – states simply accepted each other's approaches to this form of punishment and did not enquire too closely into what happened to extradited or transferred persons after they had been sent back.

This *laissez faire* approach to life imprisonment is somewhat surprising, as states have a broad discretion not to co-operate with other states. The possibility that the implementing state may punish the person whose extradition or transfer is sought in a way that is unacceptable to the requested state has been a basis for non-cooperation for many years. In particular, it has long been the case that where the person whose transfer was being sought might face the death penalty in the requesting state, the requested state *could* decline to extradite an offender. International law initially did not compel a state to decline extradition or transfer because of the threat of the death penalty, or any other form of penalty, but national constitutional standards in practice ensured that governments would not extradite in instances where they

did not allow capital (or corporal) punishment, but the receiving state did. Since the decision more than 25 years ago of the European Court of Human Rights (ECtHR) in the case of *Soering v The United Kingdom*,¹ this possibility to refuse to extradite an offender facing the death penalty has been extended in Europe. It has become a *legal* duty not to take any steps that would result in offenders facing inhuman or degrading treatment or punishment in the states to which they are sent.

In more recent times, the different approaches adopted to life imprisonment by various countries have become more controversial. Questions have arisen about whether extradition or transfer should be allowed if the form of life imprisonment adopted in a state requesting this punishment does not conform to that practised in the state from which extradition is requested. This stems from an upsurge of international debates about whether particular forms of life imprisonment may be inhuman or degrading and therefore illegal, thus placing a legal duty on states not to allow extradition or transfer in such cases.

The types of mutual accommodation between states in life imprisonment cases, as well as the more aggressive legal strategies used to seek to deny extradition or transfer when the form of life imprisonment to be applied is deemed to be unacceptable are both considered in this essay. Together, they reveal much about the nature of life imprisonment and the dangers that its misapplication poses to offenders who face this severe form of punishment.

2 Accommodating Different Approaches to Life Imprisonment

Successful accommodation can take a number of forms.

2.1 Extradition Treaties

General extradition treaties can provide a framework for accommodation of different approaches to life imprisonment. Sometimes a mere reservation to a treaty will suffice to meet national requirements in this regard. One example is the reservation that Portugal, the Constitution of which explicitly and absolutely forbids life imprisonment, made to the 1957 European Convention on Extradition.² The reservation provides simply that “Portugal shall not grant the extradition of persons ... who are being demanded in connection with an offence punishable by a life-long sentence or detention order”.

This Portuguese reservation seems unambiguous, yet Germany accepted it only conditionally: “only if refusal to grant extradition for offences punishable by a life-long sentence or detention order is not absolute”. Germany was able to do so because it took the reservation to mean that:

1 *Soering v UK* ECtHR (app no 14038/88) 7 July 1989; (1989) 11 EHRR 439.

2 European Convention on Extradition (1957) CETS No 024.

the only circumstance in which extradition will not be granted is where there is no possibility under the law of the requesting state for the person sentenced to life imprisonment, having completed a certain proportion of the sentence or period of detention, to obtain a judicial review of his case with a view to having the remainder of the sentence commuted to probation.

This interpretation appears to allow life imprisonment as it is practised in Germany, where there is a prospect of release from all life sentences. The German position seemingly undermines the original Portuguese reservation, which does not exclude certain forms of life imprisonment. Fortunately, it has not been interpreted in that sense by Portugal. This becomes clear when one looks at the careful explanation that Portugal attached to the reservation that it made to the subsequent 1996 Convention on Extradition between member states of the European Union.

Having entered a reservation in respect of the European Convention on Extradition of 1957 to the effect that it will not grant extradition of persons wanted for an offence punishable by a life sentence or detention order, Portugal states that where extradition is sought for an offence punishable by a life sentence or detention order, it will grant extradition, in compliance with the relevant provisions of the Constitution of the Portuguese Republic, as interpreted by its Constitutional Court, only if it regards as sufficient the assurances given by the requesting Member State that it will encourage, in accordance with its law and practice regarding the carrying out of sentences, the application of any measures of clemency to which the person whose extradition is requested might be entitled.³

What this means is that, in spite of its explicit prohibition on life imprisonment in the Portuguese Constitution, Portugal will accept the sort of life sentences found in most European states, where there is provision for prisoners so sentenced to be considered for release.

A similarly accommodating approach has been adopted by the Constitutional Court of Spain. Although Spain currently has no provision for life imprisonment in its Penal Code,⁴ the Spanish Constitutional Court has held that in order to deny a request for extradition where the offender would be subjected to a sentence of life imprisonment, it needs to be established that the execution of the life sentence would in practice “constitute a strict sentence of

3 Convention relating to Extradition between Member States of the European Union OJ C 313 of 23.6.1996.

4 That has changed by an amendment to the Spanish Penal Code, introducing sentences of life imprisonment adopted in April 2015 which came into force in July 2015.

imprisonment for an indefinite time, with no possibilities of attenuation or flexibility".⁵

In the Americas, where the majority of countries do not have provision for life sentences in the national law, the issue of life imprisonment is dealt with more directly in the relevant treaties than it is in Europe: Thus Section 9 of the Inter-American Convention on Extradition provides that:

The States Parties shall not grant extradition when the offence in question is punishable in the requesting State by the death penalty, *by life imprisonment*, or by degrading punishment, unless the requested State has previously obtained from the requesting State, through the diplomatic channel, sufficient assurances that none of the above-mentioned penalties will be imposed on the person sought or that, if such penalties are imposed, they will not be enforced.⁶

The 1998 Extradition Agreement of Rio de Janeiro,⁷ which applies with treaty status to the MERCOSUR states (Argentina, Brazil, Paraguay, Uruguay and Venezuela) as well as to Bolivia, Chile and Ecuador, goes even further. Section 13.1 of the Agreement provides without qualification that "the requesting Member State is not allowed in any case to impose a sentence of death penalty or life imprisonment". Section 13.2 of the same Agreement establishes that in such cases the penalty must be limited to the maximum sentence that could be imposed in the requested state.

It was the Agreement of Rio de Janeiro that the Supreme Court of Bolivia was asked to interpret in the case of *Alejandro Saúl Schayman Klein*.⁸ The case involved extradition from Bolivia, which does not have life imprisonment, to Chile, where it is allowed. In this instance the Chilean courts had sentenced Schayman, who had fled to Bolivia, to "qualified life imprisonment" for parricide. According to section 32.bis1 of the Criminal Code of Chile, the offender serving such a sentence becomes eligible for parole after serving a minimum of 40 years. The Supreme Court of Bolivia was not prepared to allow Schayman to face this sentence, which would not be acceptable in Bolivia. Accordingly, as the Agreement of Rio de Janeiro allowed, it made the extradition conditional on the life with parole sentence being commuted to a sentence of fixed-term imprisonment with a maximum of 30 years. In this way the extradition could go ahead without the standards of the requested state being violated.

5 Spanish Constitutional Court: STC 91/2000, 30 March 2000. See also Spanish Constitutional Court: STC 148/2004, 13 September 2004.

6 Inter-American Convention on Extradition OAS TS, No 60. Emphasis added.

7 Extradition Agreement of Rio de Janeiro (1998) MERCOSUR CMC 14/98. Extended to Chile and Bolivia pursuant to MERCOSUR (1998) CMC 15/98.

8 Sala Plena Auto Supremo: 157A/2010 EXP. N°: 609/2009 FECHA: 21 de mayo de 2010.

2.2 Bilateral Agreements

The United States of America is not a party to any of these Pan-American extradition arrangements. Instead, when seeking to extradite offenders, it has to deal individually with states in the region, which are opposed in principle not only to the death penalty, but also to life imprisonment. There have been suggestions that in such cases the US, while being prepared to give a guarantee that it will not impose the death penalty and then sticking to it, is not as punctilious about carrying through on promises not to impose life imprisonment.⁹ However, in *US v Pileggi*,¹⁰ a recent decision of the Fourth Circuit of the US Court of Appeals, the court just below the level of the United States Supreme Court, it was demonstrated that the US *can* be meticulous in ensuring that international penal exchanges take place without national standards relating to life imprisonment being violated.¹¹

The case against Pileggi, a Canadian citizen resident in Costa Rica, was that he had committed multiple frauds against elderly US citizens as a result of which they suffered losses of more than US\$8 000 000. The US sought his extradition for crimes for which, on conviction, he would face a possible sentence of life imprisonment, on the basis that the effect of his crimes was felt primarily in its jurisdiction. However, the Constitution of Costa Rica prohibits both death and life sentences. Accordingly, Costa Rica requested assurances that, upon conviction following extradition to the United States, Pileggi would not be subjected to the death penalty or life imprisonment. In response, the United States assured Costa Rica that, if extradited, Pileggi would not receive the death penalty or a sentence that required that he would “spend the rest of [his] natural [life] in prison”.¹² Both governments considered themselves bound by this precise agreement and Pileggi was duly extradited to the US, tried and convicted.

At Pileggi’s trial, however, the prosecutor wrongly told the court that the agreement was that he could not be sentenced to more than 50 years imprisonment. The trial court found that, because of the agreement, it could not impose a life sentence. However, it duly imposed a fixed term of 50 years (and an obligation to repay almost \$4 000 000) on Pileggi, who was already 50 years old. On appeal the 4th Circuit set aside the sentence. The matter was referred back to a differently constituted trial court and Pileggi was re-sentenced to a term of 25 years.¹³

9 Labardini (2005).

10 *United States v Pileggi* 703 F.3d 675 (4th Cir. 2013).

11 Worster (2012).

12 *United States v Pileggi*, 361 Fed. Appx. 475, 479 (4th Cir. 2010).

13 Described in *United States v Pileggi* 703 F.3d 675 C.A.4 (N.C.) 2013.

What is particularly impressive about the *Pileggi* case is that the 4th Circuit sought to give effect to the substance of the agreement with Costa Rica. It ruled that 50 years was a “de facto whole life sentence” when imposed on someone of Pileggi’s age. This finding is significant as there is relatively little jurisprudence in any jurisdiction about what a *de facto* whole life sentence is. The outcome too is satisfactory for the wider perspective of justice. A major fraudster who had committed a large and particularly cruel fraud did not get off scot free because of different approaches to punishment between two very different jurisdictions. Instead, he was convicted and sentenced in a way that met the concerns of Costa Rica and yet could hardly be described as an excessively light sentence, thus presumably satisfying the US courts, too.

2.3 Prisoner Transfers

The transfer of sentenced prisoners can raise particular problems when the prisoners who are transferred are facing life sentences. Transfer agreements between states often provide that the state that agrees to receive the prisoner, who is often a national whom the public would want to see being transferred “home”, must recognise the sentence imposed on the prisoner by the sentencing state. It must do so even if such a sentence may be far more severe than that which would have been imposed by the receiving state. This issue does not arise in Germany, which, for constitutional reasons, has elected only to allow such transfers in cases where its courts convert the sentence by re-sentencing the transferred prisoner. However, it does arise in the United Kingdom and other common law jurisdictions, where the recognition of sentences imposed in the transferring state is the norm, provided that the sentences fall within the range of sentences that could theoretically be imposed for a crime of the kind of which the prisoner was convicted in the receiving state.

A case in point concerns the transfer of a young British subject from Laos to the United Kingdom. Samantha Orobator had been convicted of smuggling heroin into Laos for which she faced the death penalty. Presumably, in order to avoid that sentence, she became pregnant while in prison, as pregnant women cannot be sentenced to death in Laos. In June 2009, she was convicted and subsequently sentenced to life imprisonment. She was then transferred to serve her sentence in the UK. In terms of the transfer agreement between the UK and the People’s Republic of Laos, the British government had to enforce the life sentence imposed by the Laotian court, for the imposition of such a sentence was technically possible in the UK for drug smuggling. This is the case, even though in practice such a sentence would not have been imposed in the UK in a case like this one, where there was strong evidence that the offender had been under the influence of other drug dealers and where her trial did not meet

British procedural standards. Therefore, the UK court upheld the original life sentence, in spite of the shortcomings in the Laotian process that led to its original imposition. However, the court set a minimum term of only 18 months before release for the life term could be considered.¹⁴ The offender had already served that time and, as she posed no risk to society, she could be released on parole almost immediately to serve her life sentence in the community with her child. In this way the formal sentence of life imprisonment was not violated as technically she could be recalled to prison if she breached the conditions of her licence, although in practice she had to serve only a short period in prison.

2.4 Mandatory Extradition

Finally, particular mention has to be made of international instruments that do not merely create a framework for co-operation but place a legal obligation on states to co-operate if certain criteria are met. Thus, for example, the Council of Europe Convention on the Prevention of Terrorism,¹⁵ requires states parties to extradite persons suspected of certain offences. However, it makes it clear that nothing in the Convention is to be interpreted as imposing an obligation to extradite in instances where the law of the requested Party does not allow for life imprisonment, if it would mean that the person would be exposed to the risk of being sentenced to life imprisonment without the possibility of parole, unless the “requesting Party gives such assurance as the requested Party considers sufficient ... that the person concerned will not be subject to life imprisonment without the possibility of parole”.¹⁶

Similarly, the European Arrest Warrant¹⁷ is a treaty-based form of compulsory extradition between EU states, provided that criteria are met for persons suspected of having committed certain offences. Again there is a qualified exception relating to life imprisonment. Article 5.2 of the Framework Decision on the European Arrest Warrant provides that:

if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply

14 *Orobator v Governor of Her Majesty's Prison Holloway and Secretary of State for Justice* [2010] EWHC 58 (Admin).

15 ETS No. 196.

16 Article 21.3 of the Convention.

17 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure.

Neither of these instruments covers the full range of objections that can be brought against the life sentences of extradited persons by requested countries who either do not themselves impose life sentences, or subject their implementation to strict judicial controls. Both allow life sentences to be imposed on persons who have been extradited subject only to somewhat vague requirements for their review. Thus far, the courts too have been reluctant to enforce them too strictly. For example, the German Federal Court has decided that Polish life imprisonment is not incompatible with Article 5.2 of the Framework Decision on the European arrest warrant, even though 25 years must elapse before the continued detention of a person serving a sentence in Poland can be reviewed.¹⁸ The Federal Court did so on the grounds that the power that the Polish president has to exercise clemency and commute a life sentence before 25 years has elapsed was a sufficient safeguard, but it did not pay close attention to the limited use that is made of this power in life imprisonment cases. Nevertheless, both instruments indicate a willingness to engage with the very different approaches to life imprisonment, even amongst states that have agreed to co-operate particularly closely.

3 Disputed Extradition of Prisoners Serving Life Sentences

The most dramatic disputes in recent years have arisen about whether prisoners should be extradited potentially to face so-called life without the possibility of parole (LWOP) sentences in the United States of America.¹⁹ Initially, even in Germany where such a life sentence would manifestly be unconstitutional, the Federal Constitutional Court rejected a request to block extradition on the flimsy ground that the relevant US law did not fully exclude the possibility that even an offender who had no prospect of parole could theoretically receive a presidential or gubernatorial pardon. In this decision of 6 July 2005, the German Constitutional Court's rationale for doing so was that the necessity of meeting international obligations to deal with serious offenders outweighed detailed procedural safeguards that the German constitution would require, as long as the foreign legal system, viewed in the round, was fair. As the German Court explained:

The mandatory constitutional principles include the core area of the precept of proportionality, which may be derived from the principle of the rule of law. Under this principle, the competent institutions of the Federal Republic of Germany are barred from extraditing a person sought if the punishment the

18 BGH, Beschl. v. 19. 6. 2012 – 4 ARs 5/12; (2012) 2980-2985.

19 Kromrey & Morgenstern (2014).

person faces in the requesting state is intolerably harsh ... [I]t is also one of the mandatory principles of the German constitutional system that a punishment that may be imposed or is imposed may not be cruel, inhuman or degrading. The competent institutions of the Federal Republic of Germany are therefore prevented from co-operating in the extradition of a person sought if that person must anticipate or serve such a sentence.

But the situation is different if the sentence to be served is merely to be seen as extremely harsh and, if assessed strictly against German constitutional law, could no longer be regarded as reasonable. For the [German] Basic Law proceeds on the basis that the state constituted by it is integrated into the system of international law of the community of states. At the same time, it requires that, in particular in matters of judicial assistance, the structures and contents of foreign legal systems and views of the law must in principle be respected even if in detail they do not comply with domestic German views. If international extradition practice, which exists to mutual advantage, is to be maintained, and the Federal Government's freedom of foreign policy is to remain untouched, the courts may treat only the violation of the mandatory principles of the German constitutional system as an insurmountable obstacle to an extradition.²⁰

A few years later, in 2009 in *R (Wellington) v Secretary of State for the Home Department*,²¹ the House of Lords, then the apex court of the United Kingdom, adopted a similar approach and ordered the return of an offender to the United States. Its point of focus was not the unwritten national constitution, but the development of the jurisprudence of ECtHR, which was beginning to indicate that life sentences from which there was no prospect of release in law or in fact might be inhuman and degrading and thus infringe Article 3 of the European Convention on Human Rights (ECHR).

The House of Lords found some support for its decision in *Wellington* in the hypothetical way in which the ECtHR had phrased its objections to whole life sentences in the then leading case of *Kafkaris v Cyprus*.²² A number of judges in the House of Lords in *Wellington* also sought to balance the importance of extradition of serious offenders against the possibility that they might face life sentences without a prospect of parole, or indeed any other clear prospect of

20 BVerfGE 113,154 Order of the Second Senate of 6 July 2005 – 2 BvR 2259/04, para III.1 (internal references omitted). See however, also the Order of the Second Senate 16. September 2010 - 2 BvR 1608/07 in which the Second Senate of the Federal Constitutional Court held that extradition should not be allowed to Turkey where the person whose extradition was being sought would face a form of life sentence from which the possibility of release would only arise shortly before his death was expected.

21 *Regina (Wellington) v Secretary of State for the Home Department* [2008] UKHL 72, [2009] 1 AC 35 (HL).

22 *Kafkaris v Cyprus* [GC] (app no 21906/04) 12 February 2008; (2009) 49 EHRR 35.

release, in the country to which they were being sent. They did this in the light of a passage in the *Soering* decision, which, although it prevented extradition to face the death sentence, as explained above, apparently qualified the application of human rights principles to other forms of inhuman or degrading punishment or treatment:

Inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.²³

Since the decision in *Soering*, the ECtHR has moved to considerably qualify this dictum and asserted that there was a single standard for assessing the prohibition of torture as well as inhuman or degrading treatment or punishment. This standard should be applied both internally and to people who may be sent out of a state that has ratified the ECHR.²⁴ However, in 2012 in another extradition case, *Babar Ahmad and others v the United Kingdom*,²⁵ the ECtHR again emphasised that the ECHR was not a means of requiring state parties to impose its standards on other states. The ECtHR explained that this meant that “treatment which might violate Article 3 because of an act or omission of a Contracting State might not attain the minimum level of severity which is required for there to be a violation of Article 3 in an expulsion or extradition case”.²⁶

On this weaker test the ECtHR in *Babar Ahmad* also held, as had the House of Lords in *Wellington*, that life sentences without a prospect of parole (LWOP) as applied in the US did not contravene Article 3. This weaker test has been heavily criticised. Critics suggest that, if torture and inhuman or degrading treatment should effectively be dealt with

23 *Soering v UK* 1.

24 See in particular *Saadi v Italy* (app no 37201/06) 12 February 2008; (2009) 49 EHRR 30.

25 *Babar Ahmad and Others v UK* (applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09) 10 April 2012; (2013) 56 EHRR 1.

26 *Babar Ahmad and Others v UK* para 177.

in the same way, any qualification of the test should be abandoned, and the same standard applied in extradition cases as is applied to European states.²⁷

Since 2012, however, the jurisprudence of the ECtHR has developed dramatically in regard to both whole life imprisonment and extradition. In 2013, in *Vinter and others v United Kingdom*,²⁸ the Grand Chamber of the ECtHR clarified the standard to be met in Europe in respect of life sentences. It found that all sentences, including those of life imprisonment, should seek also to rehabilitate individual offenders and held unambiguously that the imposition of whole life sentences from which an offender does not have a realistic prospect of release infringed Article 3. Prisoners were entitled to a right to hope and this hope had to be based on knowing at sentence that they had a prospect of release and what procedures they would have to follow to have their release considered in due course.²⁹

This strengthened the argument that *Babar Ahmad* had been wrongly decided, for US-style LWOP simply does not give a realistic prospect of release. As the US Supreme Court has explained in the context of juveniles subject to life without parole, such a life sentence “foreswears altogether the rehabilitative ideal” and “gives no chance for fulfilment outside prison walls, no chance for reconciliation with society, no hope”.³⁰ The same applies *a fortiori* to adults.

In 2014, in *Trabelsi v Belgium*,³¹ the ECtHR applied the *Vinter* judgment of the Grand Chamber to the question of extradition to the United States. The unanimous judgment of the Fifth Section of the ECtHR, which has since become final, meaning that the Grand Chamber will not reconsider it, ruled firmly that the same test should be applied to potential contraventions of Article 3, whether they occurred in Convention countries or elsewhere. As the *Vinter* judgment had now made clear, all prisoners require a clear prospect of release. American release procedures should be tested absent this standard. If *Trabelsi* were to be sentenced to life without parole in the USA, his only prospect of release would be a presidential pardon. The ECtHR examined US

27 Mavronicola & Messineo (2013) 589.

28 *Vinter and others v UK* (app nos 66069/09, 130/10 and 3896/10) 9 July 2013.

29 See van Zyl Smit *et al* (2014); Mavronicola (2014).

30 *Graham v Florida* 130 S Ct (2011) 2030 and 2032. Although this was said in the context of life without parole for a juvenile in a non-homicide case, it is a proposition of general relevance. See also *Solem v Helm* 463 US 277 (1983) at 300-301 in which, in a case involving an adult, the US Supreme Court emphasized the difference between parole and the remote possibility of executive clemency that did not mitigate the harshness of the whole life sentence.

31 *Trabelsi v Belgium* (app no 140/10) 4 September 2014.

practice for pardoning persons convicted of terrorism and concluded that the manner in which this power was exercised did not give Trabelsi any such realistic prospect. Accordingly, the Court found that Article 3 had been infringed by the extradition of Trabelsi.

The decision in *Trabelsi v Belgium* may have settled the law in Europe on the extradition of whole life offenders in favour of the recognition of their right not to be subjected to inhuman or degrading treatment or punishment in contravention of Article 3 of the ECHR, but what happened in practice in this case is particularly unedifying. In addition to applying to the ECtHR, Trabelsi had sought a declaration from the Belgian *Conseil d'Etat* that he should not be extradited. After the decision of the Grand Chamber in *Vinter*, but before Trabelsi's application had been considered by the ECtHR, the *Conseil d'Etat* nevertheless ruled that the extradition could go ahead,³² and the Belgian authorities immediately put him on a flight bound for the US;³³ this in spite of a specific order from the ECtHR that Belgium should not take any such steps before the matter could be finalised in Strasbourg. The Belgian government tried to explain its actions in terms of an obligation that it had to assist the US in combating terrorism, but the ECtHR was unimpressed and found that it had deliberately breached the ECtHR's interim order and therefore the ECHR, too.

4 Conclusion

The unsatisfactory outcome of the *Trabelsi* case, as well as the cases preceding it in which life imprisonment has been bitterly disputed, should not overshadow the reality that, in dealing with life imprisonment, states are bound by a web of treaties and informal agreements. These continue to facilitate the very necessary movement of criminal suspects and sentenced offenders around the world.

What this essay has shown is that these agreements too require careful interpretation. In particular, courts that are responsible for sentencing or implementing sentences, as in the *Pileggi* and *Orobator* cases discussed above, have the opportunity to use their powers to achieve just outcomes within the legal framework that leads to their having to decide the fate of persons initially arrested or sentenced outside their jurisdictions. With some legal imagination they can produce outcomes that are substantively just, while meeting the concerns of both the requested and the requesting states.

In instances where the request is for extradition that may lead to the imposition of a life sentence from which the offender has no prospect of release, requested states that are legally bound not to allow such sentences should stand their ground. They should not agree to extradition until the

32 L'arrêt n° 224.770 du 23 septembre 2013.

33 Eeckhaut & Temmerman (2013).

requesting state has put appropriate release procedures in place. In this way the human rights abuse that such sentences would entail can be avoided.

A firm approach to hard-line requesting states may well have the desired effect, as it did in the *Soering* case, which led to the USA subsequently acceding to all requests for assurances that the death penalty will not be imposed on an extradited person. Such requesting states will be faced with a difficult penal policy decision. They will have to choose between setting up a sound system for considering the release of all persons serving life imprisonment or watching impotently as those suspected of committing very serious crimes evade justice because they cannot be extradited.

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Threats to the International Criminal Court's Mandate

Justice Sanji Monageng

Editors' note: Judge Monageng submitted this essay before the Al-Bashir crisis broke in South Africa and she has not had the opportunity of revising it.

1 Introduction

The title itself suggests that the Court itself is under attack – but rest assured, the International Criminal Court (ICC) is not presently under siege in its home in The Hague! However, limitations in the ICC's mandate are certainly apparent and have a substantial effect on the ICC's work. Three such limitations will be briefly explored hereunder:

- structural limits to the ICC's jurisdiction;
- practical limits to the ICC's jurisdiction; and
- advantageous limits to the ICC's mandate.

2 Structural Limits to the ICC's Jurisdiction

The Court's jurisdictional mandate is enshrined in the 1998 Rome Statute, which is the founding instrument of the Court. The ICC is the world's first permanent international criminal court and there are currently 122 States Parties to the Statute.

When the ICC was originally designed, its jurisdictional mandate was carefully calibrated by States' representatives. As a consequence, the powers of the ICC can only reach so far and certain kinds of criminal cases, no matter how terrible they may be, do not fall within the Court's jurisdiction.

First, the Court has a limited temporal jurisdiction. The ICC's jurisdiction cannot be exercised in relation to crimes committed before 1 July 2002; the day on which the Statute received enough ratifications to enter into force.¹ No matter how serious an international crime may be, if it was committed before this date, the ICC cannot exercise jurisdiction over it.

Second, the Court is only able to exercise jurisdiction over four crimes: (i) genocide, (ii) crimes against humanity, (iii) war crimes and (iv) the crime of aggression.² As to the crime of aggression, given that the definition of this crime was only adopted in 2010, the Court must wait to exercise its jurisdiction over the crime until at least the year 2017.³

1 Article 11 of the Rome Statute.

2 Article 5 of the Rome Statute.

3 Article 15*bis* of the Rome Statute.

Third, the Court only has jurisdiction over the territory of States Parties or against nationals of States Parties.⁴ There were proposals during the drafting of the Statute to give the ICC universal jurisdiction so that a case could proceed irrespective of who was a State Party, but these proposals were rejected.⁵ As a result of the way jurisdiction is set out in the Statute, the Court can generally not exercise its jurisdiction over a non-State Party. There are some exceptions, namely (i) when a national of a non-State Party commits a crime within the Court's jurisdiction on the territory of a State Party;⁶ (ii) when the United Nations Security Council refers a situation to the ICC⁷ (this has happened twice already, with the Darfur and Libya referrals); and (iii) where a non-State Party has accepted the jurisdiction of the Court on an *ad hoc* basis (this has happened in respect of Côte d'Ivoire).⁸

The structural limitations on its jurisdiction significantly affect the work that the ICC can do. Serious international crimes, such as the genocides in Rwanda and Srebrenica, cannot be prosecuted at the ICC because they were committed before 1 July 2002. International criminal prosecutions for the crimes in Rwanda and Srebrenica have taken place, but these prosecutions happen at *ad hoc* tribunals established by the United Nations and not at the ICC because, among other reasons, of the time limit on its jurisdiction. As another example, serious crimes such as drug trafficking or terrorism are not criminalised directly in the Rome Statute, meaning that a conviction for these crimes could not be entered at the ICC unless the elements of an international crime, such as a crime against humanity, have been met.

3 Practical Limits to the ICC's Jurisdiction

In addition to the structural limits inherent in the ICC's jurisdiction, certain practical difficulties have arisen in the Court's work, which have the effect of limiting its jurisdiction also.

One important aspect of the ICC's jurisdiction is that the Court does not have a police force to enforce its requests for arrest warrants. When the ICC issues an arrest warrant, it is dependent upon state co-operation for the relevant person to be arrested and surrendered to the Court.⁹ By virtue of ratifying the terms of the Rome Statute, all States Parties are obligated to co-

4 Article 12(2) of the Rome Statute.

5 See Wilmschurst (1999) 132-39.

6 Article 12(2)(a) of the Rome Statute. This exception does not apply to the crime of aggression, which has its own jurisdictional regime. Article 15*bis*(5) of the Rome Statute.

7 Articles 12(2) and 13(b) of the Rome Statute.

8 Article 12(3) of the Rome Statute.

9 Part IX of the Rome Statute.

operate fully with ICC requests for arrest, surrender and other forms of collaboration.¹⁰

This system of co-operation has been effective in many instances, but there have been certain challenges when the Court requests co-operation and it does not follow. For example, Mr Omar Al-Bashir is the subject of two ICC arrest warrants, but, at the time of writing, he has not been arrested. Mr Al-Bashir has set foot in the territory of States Parties to the Statute, such as Malawi and Chad,¹¹ but these countries have not arrested him.

The ICC has the option, when requested co-operation does not occur, to make a finding to that effect and refer the matter to the Assembly of States Parties (ASP), which is the ICC's legislative body, and, where relevant, to the United Nations Security Council (UNSC).¹² After receiving such a referral, the ASP and UNSC would take whatever steps they see appropriate to address the lack of co-operation. In fact, Malawi, Chad and the DRC have been referred to both the ASP and UNSC for failing to arrest and surrender Mr Al-Bashir to the Court when he was on their territory.¹³

Another challenge which can limit the Court's jurisdiction is the challenge of resource constraints. There are far more perpetrators of crimes within the Court's jurisdiction than it will ever be able to prosecute itself, and the Office of the Prosecutor must decide which cases should be prosecuted and which should not. It is an enormous undertaking to investigate crimes of this scale, particularly when the investigation must occur in countries which have been destabilised by the crimes under investigation. The Court has to expend a lot of resources in order for the results of these investigations to be presented in ICC trials, including expenses incurred from translating witness statements, protecting witnesses and ensuring that adequate facilities exist for the defence to conduct its work.

A consequence of all these expenses is that ICC trials take a long time to complete, which necessarily limits the number of new cases which the Court can process at any given time. These time delays are also aggravated by the fact that the ICC has a unique criminal procedure which blends aspects of both common and civil law traditions. Hence, procedural litigation at the ICC often becomes quite complicated and presents issues of first impression. None of

10 Article 86 of the Rome Statute.

11 See Pre-Trial Chamber I, *Prosecutor v Omar Hassan Ahmad Al Bashir*, 12 December 2011, (hereinafter "Malawi Co-operation Request"); Pre-Trial Chamber I, *Prosecutor v Omar Hassan Ahmad Al Bashir*, 13 December 2011 (hereinafter "Chad Co-operation Request").

12 Article 87(7) of the Rome Statute.

13 See DRC Co-operation Request reported in Pre-Trial Chamber II, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, 9 April 2014; Malawi Co-operation Request; Chad Co-operation Request.

these issues mean that the Court cannot be more efficient in conducting its work; it can improve in many respects. However, to some degree, it is inevitable that ICC trials will demand a lot of resources and that resource constraints shape the Court's work.

4 Admissibility as an Advantageous Limit

Not all limits upon the ICC hinder its work however. Some limits to the ICC's mandate are actually desirable.

One of the hallmarks of adjudication at the Court is that it is a complementary institution.¹⁴ Cases that fall within the Court's jurisdiction may still be inadmissible if, under the circumstances described in the Statute,¹⁵ a State Party is addressing the case domestically. This means that the ICC will not proceed with a case if a national jurisdiction can establish that it is genuinely investigating the same person for substantially the same conduct as the case before the Court.¹⁶ However, the case may become admissible once again if it turns out that the national jurisdiction is unwilling or unable genuinely to conduct the investigation or prosecution.¹⁷

A consequence of the complementarity regime is that it incentivises States Parties to prosecute international crimes. Many States Parties have modified their national legislation in order to ensure that they can successfully challenge the admissibility of cases if they wish to prosecute them domestically. This helps expand the reach of international criminal justice and improves the capabilities of national judicial systems.

The ICC is designed to be a Court of last resort. It would be a better world if all international crimes committed were genuinely prosecuted at the national level, even if the consequence of that world would be that the ICC would not have any cases.

5 Conclusion

The ICC's role is as a kind of gap filler in international criminal justice and, when this role is understood, it can be seen why not every limitation upon the Court's functioning qualifies as a "threat" to its work. The ICC will continue to do its work within the constraints of its mandate and endeavour to overcome any practical challenges that arise.

14 Preamble to and Article 1 of the Rome Statute.

15 Article 17 of the Rome Statute.

16 See Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 24 July 2014, para 297; Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 21 May 2014, para 213; Appeals Chamber, *Prosecutor v. William Samoei Ruto et al*, 30 August 2011, para 40; Appeals Chamber, *Prosecutor v. Francis Kirimi Muthaura et al*, 30 August 2011, para 39.

17 Article 17 of the Rome Statute.

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Twenty-One Years On: The South African Settlement in Retrospect

Charles Villa-Vicencio

Editors' note: This essay is based on the Seventh Annual *Beyond Juba Memorial Lecture*, delivered by the author at Makerere University, in Kampala, Uganda on 18 March 2015. The issues raised in the lecture then are particularly pressing now.

1 Introduction

Asked what enabled South Africans to reach a relatively peaceful settlement that led to the country's first democratic elections in 1994, Archbishop Tutu famously observed: "It's a miracle." It was a hard-earned *human* miracle, involving a mass-militant struggle that rendered the country ungovernable. It was nevertheless a "miracle" to the extent that other countries have undergone similar and worse levels of violence without reaching a settlement.

Ours was a costly uprising. It involved school children (many of whom forfeited their own education at the time) and members of religious and sporting bodies, as well as industrial strikes, trade boycotts, economic sanctions and the birth of political and trade union formations. There were armed attacks on government and other installations, as well as the scourge of necklacing campaigns and the heinous government instigated "black-on-black" violence. The apartheid regime declared two successive States of Emergency and deployed troops in the townships. Its attacks on alleged African National Congress (ANC) bases in Zimbabwe, Botswana and Zambia resulted in extensive civilian casualties. Frontline states were destabilised and the South African security and intelligence forces meddled in the affairs of states across the continent.

The country was on the brink of financial collapse when both the apartheid regime and the ANC eventually conceded that a military and political stalemate had been reached. The liberation movements and the government were consistently disrupting each other's activities; however, neither side had the capacity to defeat the other. This political and military stand-off opened the way to negotiations between the ANC and the government that would later draw in other liberation movements and political groupings. The outcome was an historic and deeply compromised settlement.

Analysts and critics of the South African transition need to be reminded that the alternative was an escalation of suffering and war. There are few "glorious revolutions" that result in the transformation of society to the benefit

of the poor and alienated. Settlements are embedded in the social, political and economic realities of real time – not in some hoped-for but non-existent serene and perfect moment.

Karl Marx reminded us that the past weighs down like a body of death on the living, insisting that we make our future not under self-selected circumstances but under circumstances that are transmitted to us by our past.¹ In case you don't trust Marx, try the Bible: "The sins of the fathers are visited unto the third and fourth generations."² We need to remember the past if we want to escape its stranglehold and create a new future.

2 The South African Settlement

Kick-started by the 1976 student uprisings, the struggle against apartheid intensified through the 1980s. Popular resistance deepened, international pressure escalated and secret talks between the apartheid government and Nelson Mandela, as well as emissaries of the government and the exiled ANC, got underway. The government began to demonstrate a measure of political sanity and President FW de Klerk, on 2 February 1990, announced the pending release of Nelson Mandela from prison and the unbanning of the liberation movements.³ A period of tough negotiations led to an historic political compromise and the country's first democratic elections followed. Optimism in the country soared to new heights when Nelson Mandela was inducted as the country's first democratically elected president on 10 May 1994. The world celebrated the "South African miracle" and the country's political realism was promoted (indeed marketed!) as an example to be emulated in countries undergoing transition in Africa, Latin America, Eastern Europe and elsewhere.

Not everyone was satisfied with the terms of the settlement. Some were sceptical – although no one proposed an alternative to the settlement that found political traction in South Africa or internationally. Acknowledging this, most regional and global pundits commended the manner in which issues that separated the apartheid regime and the liberation movement were acknowledged and addressed.

The major obstacles to the settlement included the protection of *minority rights* (including racial, gender, sexual orientation and disability rights) *economic justice and development*, and how to address the gross *violations of human rights* committed during the apartheid years. The government eventually dropped its demand for the constitutional protection of group minority rights, agreeing instead to the protection of individual rights and the protection of language, culture and religion. The ANC initially insisted on a

1 Karl Marx (1994).

2 Exodus 34:7.

3 Barnard (2015).

strong interventionist role for the state in economic policy, while ultimately adopting a brand of market capitalism that included a social welfare programme and an agenda for Black Economic Empowerment (BEE). However, it became increasingly evident that this policy was giving rise to a small black elite while neglecting the basic needs of the poor, and so the policy was adjusted to a Broad-Based Black Economic Empowerment Programme (BBBEE). The [new?] policy was a clear shift away from the original focus on poverty relief, job creation and development, as embodied in the ANC election campaign of 1994. The matter of prosecutions was, in turn, dealt with in a postscript to the Interim Constitution which referred the matter to the first democratically elected parliament which created the Truth and Reconciliation Commission (TRC), on the basis of a legally restricted mandate. The Commission invited victims of gross violations of human rights committed during the apartheid years to share publicly the stories of their suffering with the nation. Perpetrators of gross violations of human rights were given the option of applying for amnesty in exchange for the acknowledgement of their deeds before a panel of High Court Judges, and the Commission was tasked with the responsibility of recommending reparations designed to “restore the human dignity of victims”.

3 The Rome Statute

The question of what political options faced the country in 1994 and what realistic alternatives were available to the country at the time have been debated ever since the settlement. South Africa was confronted with two challenges. One: haunted by the spectre of failed transitions elsewhere in Africa, the question was whether South Africans could make peace with themselves by transforming the political and economic structures that brought the country to the brink of collapse. Two: how was the country to respond to the pending adoption and ratification of the Rome Statute, which gave birth to the International Criminal Court (ICC) in 2002?

Facing decades of impunity that spiralled into civil wars, regional conflict, genocide and oppressive rule in Africa and elsewhere, the international community insisted that perpetrators of crimes against humanity, war crimes and genocide be prosecuted. The fact that 30 African states (out of 53 sovereign states) have ratified the Rome Statute indicates a general acceptance of the terms of the Statute by most African countries.

The 1994 South African settlement had preceded the ratification of the Rome Treaty and the establishment of the ICC in 2002. This impending legislation did, however, place the South African settlement under the international spotlight, with pressure being applied by international human rights organisations to honour the proposed requirements of the Treaty.

Caution was, however, expressed by some within the international community who anticipated future political difficulties regarding the ratification of the Treaty. Huyse & Salter, for example, warned that the notion of the “interests of justice” is an “extremely technical and diffuse concept”. Their concern was that, to the extent that the terms of the Treaty required that these technicalities be unravelled solely at the level of international law, the judgment and participation of governments and others involved in peace-building could be diminished.⁴ This gives the ICC the final word in such matters, reducing local and regional African peace initiatives to the status of lesser cousins in the international arena. Herein lies the current tension between African countries and the ICC.

Responding to concerns about the South African settlement raised in the debate on the Rome Statute prior to its adoption and ratification, President Mandela stressed that “the majority party [the ANC] must show understanding ... to ensure the confidence of minority parties ... and see to it that their views are fully accommodated”.⁵ When Amnesty International and other human rights groups warned that the amnesty clause in the TRC legislation threatened the integrity of international human rights law, Dullah Omar, the Minister of Justice at the time, stated: “We are building a future for South Africans [and as] there is conflict between what the international community is saying and what is in the interests of the people of South Africa then I think that we will have to live with that kind of conflict.”⁶ This poses the question what the response of the international community would have been had the South African settlement been reached after the establishment of the ICC in 2002.

The legal mandate of the TRC, which limited the definition of gross violations of human rights to killings, abduction, torture and severe ill-treatment, was criticised by human rights organisations as being too narrow. The Commission was, in turn, accused of not giving sufficient attention to forced removals, Bantu education and other institutionalised aspects of apartheid in its interpretation of its mandate.⁷ There was no overt pressure exercised by spokespersons for the newly elected government or the TRC on the bureaucrats or the responsible ministers of state, to apply for amnesty and no one was prosecuted specifically for enforcing these policies. This was interpreted by Kader Asmal as being a consequence of the Commission’s

4 Huyse & Salter (2008).

5 Doxtader (2008).

6 Doxtader (2008).

7 The Promotion of National Unity and Reconciliation Act of 1995 defined gross violations of human rights solely as “torture, killings, disappearances, abductions and severe ill-treatment”.

adoption of what he defined as the “liberal procedures of transition”.⁸ This said, the TRC was an outcome of the negotiated settlement which favoured a combination of accountability, truth-telling and reconciliation as a means of bringing closure to the past, rather than the level of court justice demanded by the critics of the transition. This resulted in an inevitable amount of “non-closure” at the level of legal and moral accountability for past atrocities.

The debate on this reality continues to be widely addressed at political and academic levels and in a plethora of publications. The current political conflict in the country has, in turn, intensified questions concerning the nature of the settlement and what, within the broad parameters of the settlement, could (should) have been done differently. Suffice it to say there is growing consensus that the developments in the country have not met the expectations of those who promoted the settlement in 1994 and further angered those critics of the settlement who say “we told you so”!

Speaking at the height of the debate on the nature of the Rome Statute and the international legitimacy of the South African TRC, Kofi Annan, the former UN Secretary-General, argued that the purpose of the Statute “is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies”. He continued:

No one should imagine that it would apply to a case like South Africa’s, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.⁹

The debate between proponents of prosecutions who defend the ICC (at times with uncompromising, legal fundamentalism) and those who side with Annan regarding the status of the ICC, is intensifying in Africa and around the world, as has been seen in the response by African states and the African Union to the request by the ICC for the arrest of President Omar Al-Bashir on his arrival in South Africa to attend the 24th African Union (AU) Summit in June 2015. Al-Bashir faces an arrest warrant issued by the ICC for crimes against humanity and war crimes, which obliges South Africa, as a signatory to the Rome Statute, to arrest and transfer him to The Hague. In defiance of this obligation, South Africa, having guaranteed immunity to all delegates attending the Summit, and in defiance of a ruling by the Pretoria High Court,

8 Asmal, Asmal & Suresh (2000).

9 Annan (1 September 1998).

refused to carry out its international obligation, by allowing him to leave the country.¹⁰

Clearly, South Africa and African nations need to clarify the level of their commitment to the international law, which is beyond the reach of this particular essay. Effectively it poses questions concerning the international status of the AU and whether the ICC has jurisdiction over its decisions regarding who attends its meetings, in what situations and where.

4 What Went Wrong?

Whatever the moral judgement on the South African transition and the ramifications of the Rome Statute for transitional justice concerns in South African and on the African continent, few would argue that the 1994 settlement of the South African conflict has realised its goals as outlined in the Constitution. Asked what he feared most in politics, British Prime Minister, Harold Wilson, famously answered “events, dear boy, events”. South Africa has experienced its share of events, ranging from the inevitable internal power struggles to a downturn in global economics, which emasculated a naïvely anticipated peace dividend and international delivery on a “Marshall Plan” to rebuild the economy. The government was, in turn, slow to implement the recommendations of the TRC or to follow-up on the prosecution of those who failed to receive amnesty from the Commission.

Acknowledging the complexities of transition, I offer three comments on the South African settlement, the tardy response of the government to the TRC’s moderate and restrained recommendations and the government’s cautious commitment to the empowerment of the poor.

4.1 An Economic Deal

Seeking to promote a balance between the interests of the essentially white owners of the economy and the disinherited black majority, the country found it was trapped in a Faustian economic pact. Short of a bloody revolution, some kind of economic pact was both inevitable and necessary. The challenge was (and continues to be) how to ensure a viable balance among those entering the pact. Black South Africans needed to be drawn into the economy. White South Africans, who owned the economy, needed to be placated, and foreign investors required reassurance that their investments were safe.

White business looked to the ANC as the ruling party to provide social and political stability. The ANC, in turn, needed the support of business to grow the economy.

The details of the economic pact are complex and beyond the confines of this essay. Sampie Terreblanche, in his monumental book, *A History of*

¹⁰ See, for example, *Mail and Guardian* (9-25 June 2015).

Inequality in South Africa, insists that the pact was orchestrated by the country's minerals-energy complex, major corporations and financial institutions under the influence of white business and international capital.¹¹ Effectively the "pragmatists" in the ANC were outgunned by economists who favoured a free-market, capitalist economy.¹² This limited the scope for pursuing redistributive economic and social policies. It opened the way for those in the established white economy to cling to their wealth and for some in the emerging black sectors of the post-apartheid economy to pursue new options for economic gain, with greed and determination. This unleashed a cycle of corruption, cronyism and lavish lifestyles – things that still characterise South African society today.

Most whites continue to live extremely comfortable and secure lives in South Africa. There is a comparatively small emergent first generation of black middle-class citizens, many of whom remain vulnerable in a teetering economy, while a smaller black elite has established itself alongside an entrenched white economic elite. Archbishop Emeritus Desmond Tutu suggests the economic gravy train stopped just long enough for a few blacks to get on board before exiting the station, leaving the destitute poor on the platform, where they vacillate between intensified anger and resignation.

The South Africa economy is under bigger threat than it has been since the birth of our democracy. This threat is underlined by the deterioration in economic measures. Economic growth has declined since its pre-2008 financial crisis peak to under 2% in 2014. South African unemployment stands at over 25%, with youth unemployment being nearly double that figure. In addition to skills and education problems, the South African economy is hamstrung by an inflexible labour market that contributes to chronically high unemployment. According to the World Bank, slow growth is limiting employment opportunities, even as an unqualified labour force is limiting growth prospects. The World Bank also singles out high inequality as being a key factor in South Africa's inability to generate employment opportunities on a large enough scale.¹³

Analysts suggest that the underperformance of the economy is driven largely by weak political leadership, poor decision-making and economic policy paralysis. This is both the bad news and the good news. The bad news is that the economy will continue to falter if these internal causes are not tackled. The good news is that the root causes of South Africa's economic state can

11 Terreblance (2003).

12 Johnson (2003).

13 World Bank (2014).

potentiality be changed internally through negotiations between government, business and labour – recognising that it will be a vigorously contested process.

4.2 Social Suffocation

We have allowed past habits and institutional practices to suffocate the opportunity to be different. Some form of economic pact was required but 21 years later we know that the terms of the pact need adjustment. In essence, the patterns of the South African economy have remained unchanged since the 1994 transition. A small but significant number of black South Africans have come to enjoy the privileges of the middle and upper classes. Most black citizens are, however, still excluded from these classes. Briefly stated, the post-apartheid economy has failed to break out of the colonial and apartheid structures of the economy – which Steven Friedman reminds us was an exclusive club, “never meant to be for everyone”.¹⁴ Old habits and institutional practices die hard. Those who are offered access to privilege for the first time grasp this opportunity with as much determination as those who have clung to privilege all their lives.

The ending of formal apartheid was a crucial step forward and it would be wrong to suggest that the changes have been insignificant, but structural and institutional privilege persists. As the immediate threat of revolution subsided in 1994, the country reverted to economic normality, with some black South Africans gaining access to the benefits of the privileged classes.

The reality is that by the 1980s structural racial advantage no longer needed apartheid laws to reproduce economic privilege. Whites continue to prosper. They are joined by a small black elite, with the ruling party in South Africa being indebted to special interests, and saddled with incompetent management in municipal, provincial and national government, and deeply entrenched corruption. It is largely as a consequence of this that the high profile Economic Freedom Fighters (EFF), led by Julius Malema, have grabbed the political headlines in fighting back against those who have prospered from the post-apartheid economy – thrusting the country ever deeper into a class conflict which some hoped the 1994 settlement would overcome.

The present national mind-set is very different from what it was in 1994. There is less willingness among sections of society to work within the framework of the rule of law. On the one hand, there are a growing number of chauvinist men and women among the millionaire tycoons who evade economic regulations and corporate social responsibility while, on the other hand, inadequately paid workers are ready to shut down mines and industry with strikes.

14 Friedman (2015).

4.3 A Crumbling Centre

The current government is showing signs of being unable to hold the centre in a manner that enables us to meet the challenges we face.

Fearing the loss of power, the ruling party is demanding submission, acquiescence and obedience from citizens and sections of the security sectors in government seem to be out of control. Witness the Marikana mine massacre in August 2012 that left 34 striking mineworkers dead. The price of the president's property upgrade in Nkandla, at a cost of R248 million in tax-payer money, indicates that state expenditure is not being adequately controlled. Other nations in the world, not least on the African continent, have allowed their hard-won democratic victories to fall victim to oppressive laws and corruption, often with tacit acceptance by a group of citizens who benefit from government policy.¹⁵ The situation in South Africa suggests that the country is in danger of following a similar path.

South Africa clearly needs to rediscover the deeper meaning and connection between reconciliation and national reconstruction that was at the heart of the dream that led to the overthrow of apartheid. It involves a vision embedded in the roots of our religious and secular legacies which, when taken seriously, calls into question the life-styles of both current political leaders and those in the top echelons of business. If we lose sight of this dream while our democracy is still young, we are likely to find ourselves in the kind of entrenched sectarian hatred that prevails in Israel/Palestine, Syria, Ukraine, Afghanistan, and in other parts of Africa.

5 Lessons from the South African Transition

African countries are as different as they are similar. No one size fits all. Writing at the time of the Algerian War of Independence (1954-62), Frantz Fanon expressed the fear that the African bourgeoisie would betray the revolution.¹⁶ Few revolutionary leaders agreed with Fanon's scepticism. His basic insights cannot, however, be ignored on a continent where, more than 50 years after liberation, the poorest of the poor still await economic liberation and in many situations continue to experience political exclusion.

Drawing on the three underlying dimensions of exclusion (a skewed economy, social suffocation and an undermining of social cohesion) in South Africa, the question is what the struggle for constructive political and socio-economic transition elsewhere in Africa can learn from South Africa's flawed miracle.

15 Burgis (2015).

16 Fanon (1961).

5.1 Economics

The first lesson involves economics. Capitalism is deeply entrenched in the global economy. The Marxist-inspired socialist dogma which has been tried in some parts of Africa has, in turn, spectacularly failed to promote economic growth and participatory development on the continent.

The challenge in South Africa is how to restructure an economic edifice – born in colonialism, adjusted in apartheid and developed in the post-apartheid period – to something “new”. While several African economies are showing economic growth that exceeds that of South Africa, the entire continent is required to bridge the gap between those benefitting from development and the poor who continue to be excluded from the economic situation. This is arguably the biggest challenge facing African countries.¹⁷

The need is for an economic compromise that acknowledges the reality of the global market within which business expects adequate (often excessive) profits in a highly competitive world market, while workers are fighting for a living wage. Africa’s economic growth needs to satisfy both the needs of business and workers, at the same time drawing its jobless poor into the economy. This requires policy and the implementation of urgent reform, as well as capable and honest management to promote a sustainable economy. The question is whether Africa and those owners who control the global market in the West, China and elsewhere have the moral capacity, political will and economic savvy to negotiate such a deal.

This economic challenge has not been adequately managed in South Africa and elsewhere in Africa. More concerning is that if capitalism is an exclusive club, “never meant to be for everyone”,¹⁸ the challenge facing Africa could be beyond its reach.

There is little chance of Africa meeting this challenge without the global market being honestly managed, with a view to ensuring that peripheral economies are given a fair opportunity to prosper and for those at the bottom end of these economies to benefit from this growth. Clearly, legal and moral mediations into the global market and Africa’s domestic market are required to counter what Burgis defines as Africa’s “looting machine”.¹⁹ This will at least limit the extent of the exorbitant share of the African economic spoils claimed by the Africa elite, to the detriment of the poor.²⁰

Professor Lovell Fernandez, who is being acknowledged and honoured in this *Festschrift*, is to be commended for the work that he and his colleagues are doing in teaching a post-graduate course on “Transnational Criminal Justice

17 Foster (2015).

18 Friedman (2015).

19 Burgis (2015).

20 See Rotberg (2013).

and Crime Prevention” in the Law Faculty at the University of the Western Cape. The course attracts students from across the continent. The research papers I have been privileged to read as an external examiner in the Faculty bear witness to the relevance for African countries of the academic work being undertaken in the Law Faculty.

5.2 Nation Building

The second dimension of exclusion involves a fragmented nation-building process that continues to be demarcated by remnants of colonial and (in South Africa) apartheid racial politics. Basil Davidson argues that the assumption that state boundaries in Africa ought to coincide with cultural boundaries is “the curse of the nation state”.²¹ This assumption is also an underlying dimension of the divisions and underdevelopment in regions *within* African states, as is seen in the underdevelopment of north-east Nigeria, the eastern parts of the DRC, the northern regions of Uganda and elsewhere.

Mahmood Mamdani contends that the African conflict is largely a consequence of an inadequate notion of state that has its roots in colonial law and is perpetuated in post-independence African countries. In brief, he argues that state construction that results in the political domination by a particular group with cultural specificities, to the exclusion and denigration of other groups within inherited national boundaries, is a recipe for violence. The problem, indeed the “crime”, says Mamdani, in African nation-building is the politicisation of culture, religion and indigeneity, which excludes those who are seen to be different.²² Viable change requires serious economic and cultural transformation as well as constitutional and legal adjustments. The South African transition has (to date) failed adequately to address the racial, the cultural and economic divisions of the colonial and apartheid state.

5.3 Civil Society

The third dimension of exclusion is partly a result of inadequate participation by civil society, not least organisations that work among poor and marginalised communities, in the economic and political decision-making of government. For this participation to be enhanced there needs to be free access to information for all citizens. This is seen clearly in the country reports emanating from the African Peer Review Mechanism of African countries, where civil society is left to play a limited role in these reviews.²³ In South Africa, the government threat to curtail the flow of information has resulted in the current dispute concerning the Protection of State Information Bill. Despite

21 Davidson (1992).

22 Mamdani (2002).

23 Landsberg (2015).

South Africa's constitutional guarantees of access to information and institutional decision-making, this is a process that continues to be controlled by government bureaucrats – with the flow of information proving to be a fiercely contested process. This is seen nowhere more clearly than in the current enquiries into the cause of the Marikana Massacre and the nature of the public expenditure of R246 million on the president's Nkandla residence.

The sad irony is that, despite the response of the government to the public outcry, the courageous report of the Public Protector into the Nkandla extravagance and the parliamentary enquiry into the authorisation of public funding of the project suggest a level of democratic participation in the affairs of state that few other African countries would tolerate. To date, however, no action has been taken to retrieve the loss of public resources.

6 An Enduring Struggle

Writing in his *Long Walk to Freedom*, Nelson Mandela argued that “where there is something wrong in how we govern ourselves, it must be said that the fault is not in our stars but in ourselves”. He argued that “we have it in ourselves, as Africans, to change all this”. The African quest for transformation is not over. Ghanaian author, Ayi Kwei Armah, in 1968 published a disturbing novel set in the wake of the *coup d'état* that removed Kwame Nkrumah from office. Corruption and greed was engulfing the country at the time. He gave his novel the evocative title: *The Beautiful Ones Are Not Yet Born*.²⁴ South Africa today hovers between defeat and triumph. This is a journey that begins anew each day – a lesson that all of Africa waits to make a reality.

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Justice Beyond Borders: Criminal Responsibility of Parent Corporations for Offences of their Subsidiaries

Mark Pieth

1 The Challenges

1.1 From Apartheid to Globalisation

While other nations in Africa fought their wars of independence in the aftermath of World War II,¹ the people of South Africa were confronted with their very own form of suppression in Apartheid. Not forgetting the struggles and sacrifices through all those years for liberation, South Africa was in the end lucky to be able to rely on the wisdom of its leader, Nelson Mandela, and his advisers to achieve a peaceful transition. There is, however, no denying that several countries continuously broke the UN-Embargo² and supplied South Africa with arms (for example, French arms companies with the help of Luxemburg Banks)³ or ensured that the Apartheid state stayed financially stable (for example, Swiss officials and representatives of the Swiss financial services industry). As a Swiss citizen I feel particularly bitter about this legacy.⁴

Lovell Fernandez has lived through these times and has experienced Apartheid first-hand. He has had the stamina to survive in a difficult academic environment and he has since given a lot to those who were lucky enough to be born after Apartheid.⁵

Times have changed since 1994 and not only in South Africa. After the fall of the Berlin Wall and the opening of the East post-1990, economic globalisation picked up speed. South Africa is an economy in transition, well recognised and a proud member of the G20. And yet, many of the old structures – such as the military complex (Arm Scor)⁶ – have been put to new use by the current leaders of the country.

1 Compare Algeria, Angola, Kenya and Mozambique.

2 UNSC Resolution 418, 4th November 1977, establishing a total and mandatory embargo on arms and related materials.

3 For example, the helicopter deal with Aerospatiale, involving smuggling of the goods by the Portuguese army and a vast financial support operation by Kredietbank Luxembourg (KBL), organised on behalf of the Armaments Corporation of South Africa (Arm Scor).

4 Switzerland only joined the UN in 2002 and prior to this date rarely participated in trade-embargos. See Boesch *et al* (2014) 288 & 382.

5 Lovell Fernandez, besides his academic work on criminal law and procedure, is the UWC Director of the South African-German Centre for Transnational Criminal Justice which presents an LLM programme focusing on transitional justice and international economic criminal law, with alumni all over Africa and many other parts of the world.

6 Feinstein (2011).

1.2 Corporate Human Rights Abuses

It is not my task to criticise the current political system of South Africa. Rather, my topic is to explore the responsibility of states in the North in particular and of companies for acts for their economically dependent units. With the economic crises since 2008, exporting corporations have become aggressive in their search for new markets and they have increasingly ventured into more challenging environments. Africa is becoming a more and more attractive destination.

However, exporters may find themselves between a rock and a hard place: In many of these markets they are solicited for bribes. Now, solicitation is not an excuse for bribery,⁷ therefore they will face legal action, possibly both in their home country and in the so called “victim state”. However, refusing a bribe will frequently lead to the loss of a welcome contract.⁸ There may be ways out of the dilemma, but not all companies rise to the challenge.⁹

Variations on this theme are human rights violations, say by mining corporations in Zambia employing child labor or polluting the air or the drinking water of neighbouring communities. Again, the question is whether the head office which might be based in a capital in the North can be held responsible for acts committed by employees or agents of a local subsidiary.

Finally, to complete the series of examples, how about the possible liability of a major oil company for the acts of guards employed in the Niger Delta (Nigeria) to fend off angry villagers suffering from spills caused by oil exploitation. Imagine armed guards or local police shooting at protesting villagers on behalf of the corporation.¹⁰

1.3 Multinational Enterprises

Most likely the lawyers of the corporations in question will argue that the head office had no knowledge of what was going on locally and, besides, that the foreign subsidiary was an entity in its own right, that it was incorporated separately and is legally independent.

It must be admitted that frequently the situation within a multinational enterprise is rather complicated. In a large multinational enterprise there would be hundreds of separate legal entities serving all sorts of purposes (“internal outsourcing”) and holding structures may be interspersed as legal owners of subsidiaries (possibly without legal personality of their own). To

7 Pieth (2011) 70.

8 Pieth (2011) 105ff.

9 Pieth (2012).

10 A similar case, involving the Danzer Group, a company specializing in trade in tropical wood, and the Republic of Congo is currently under investigation in Germany, based on the intervention of the European Center for Constitutional and Human Rights (ECCHR) and Global Witness. See Saage- Maaß (2014) fn 41.

make things yet more complex, in everyday life company officers may not follow the strict matrix structure¹¹ defined by the head office. Sometimes they act as officers of the parent and the subsidiary concurrently. US law enforcement has spoken - in the case of *Tyco*¹² - of “dual roles” of the corporate officers.¹³ Obviously, such factual digressions will have to be considered also in law. In general, multinational enterprises may have all sorts of reasons to create complexity (including tax optimisation). This is, however, no excuse to limit their responsibility. Rather the contrary applies: if the corporation is allowed to organise itself in a non-transparent manner, it will have to face liability if something goes wrong within its area of influence.

1.4 Individual and Corporate Liability

This essay will focus on criminal liability for human rights violations (including corruption). Obviously, the traditional approach to criminal law has been an emphasis on individual responsibility. It has gradually been extended to the responsibility of senior company officials (*Geschäftsherrenhaftung*), as a basis of corporate liability. There is still disagreement over whether corporations should be held criminally¹⁴ or merely administratively liable.¹⁵ This distinction is, however, of secondary interest to our purpose. The main focus of this essay is on the question of (criminal or administrative) liability of the parent company for the behaviour of (representatives or agents of) a subsidiary or some other economically dependent subsystem. The essay intends to analyse the issue using as examples the domestic laws developed in the US, the UK, Germany and Switzerland. In the final section it will explore the influence of international standards on national law.

2 National Laws

2.1 Complicity

The laws of the jurisdictions mentioned have in common that there is no automatic or strict liability of parent companies for activities of subsidiaries.¹⁶ This is a consequence of their legally separate incorporation.

11 Low (2013) 635.

12 *SEC v Tyco International, Ltd*, no. 12-cv 1583-RJL (D.D.C., 24 September 2012), complaint; *United States v Tyco Valves & Controls Middle East, Inc*, no. 12-cr-418 (E.D. Va., 24 September 2012), information.

13 Low (2013) 635 and Urofsky & Won Moon (2013) 698.

14 See Pieth & Ivory (2011) 7 *et seq* for a discussion of the position in Belgium, Denmark, France, Switzerland, UK and US.

15 See Pieth & Ivory (2011) 11 *et seq* for a discussion of the position in Chile, Germany, Italy and Russia.

16 Low (2013) 637.

However, the four jurisdictions are clear that the responsible officers of the head office are liable if they have acted as accomplices to concrete offences of subsidiaries: Where they instigated the offence, where they authorised it, funded it or committed other acts in support of the illicit conduct of subsidiaries,¹⁷ they are held liable. All these forms of complicity obviously require knowledge of the concrete illicit activity of the subsidiary in the parent corporation.

The discussion below goes beyond this elementary entry point to take a closer look at the individual national solutions.

2.2 United States

Corporate liability in the US has evolved from civil law and still relies on the concept of *respondeat superior* or vicarious liability.¹⁸ This fundamental concept applies in general. It has, however, been deepened in certain areas, in particular in the field of foreign bribery. The US Department of Justice (DoJ) and the Securities and Exchange Commission (SEC) have recently published a *Resource Guide*¹⁹ to the Foreign Corrupt Practices Act (FCPA).²⁰ According to the *Resource Guide*, “there are two ways in which a parent company may be liable for bribes paid by its subsidiary”.²¹ It first mentions direct responsibility for participation. Then it adds:

Second, a parent may be liable for its subsidiary’s conduct under traditional agency principles. The fundamental characteristic of agency is control. Accordingly, DoJ and SEC evaluate the parent’s control – including the parent’s knowledge and direction of the subsidiary’s actions, both generally and in the context of the specific transaction – when evaluating whether a subsidiary is an agent of the parent. Although the formal relationship between the parent and subsidiary is important in this analysis, so are the practical realities of how the parent and subsidiary actually interact.²²

The *Resource Guide* goes to great lengths to assure its readers that this is no departure from traditional rules:

17 See Low (2013) 637ff, Pieth & Ivory (2011) 36, Ruggie (2007) 819ff & 832 and Urofsky & Moon (2014) 698.

18 Pieth & Ivory (2011) 7.

19 *Resource Guide* (2012).

20 Pub L No 95-213, 91 Stat 1494 (FCPA 1977); Pub L No 100-148, 102 Stat. 1107 (FCPA 1988, Omnibus Trade and Competitiveness Act of 1988); Pub L No 105-366, 112 Stat. 3302 (FCPA 1998).

21 *Resource Guide* (2012) 27.

22 *Resource Guide* (2012) 27.

If an agency relationship exists, a subsidiary's actions and knowledge are imputed to its parent. Moreover, under traditional principles of respondeat superior, a company is liable for the acts of its agents, including its employees, undertaken within the scope of their employment and intended, at least in part, to benefit the company. Thus, if an agency relationship exists between a parent and a subsidiary, the parent is liable for bribery committed by the subsidiary's employees.²³

In a recent case, both the DoJ and SEC have held the parent company responsible for acts committed by a manager of its subsidiary:²⁴ The manager of Ralph Lauren Corporation's subsidiary in Argentina bribed customs officials there over the span of five years to obtain improperly the paperwork necessary for goods to clear customs.²⁵ According to Philip Urofsky, a former Deputy Chief of the Fraud Section of the DoJ, the parent responsibility was based on the assumption that the manager was an employee of both the subsidiary and the parent. In a recent article he is critical of the DoJ's "charge-the-parent" approach to corporate liability.²⁶

If legal opinion disputes that this is a simple consequence of general rules,²⁷ the approach is not uncommon. The difficulty is now to distinguish agency from more open forms of business partnerships. Essentially, it boils down to control.²⁸ A fully-owned subsidiary may be legally independent but it is economically under full control of the parent. That is what is meant when the *Resource Guide* talks of "the parent's knowledge and the direction of the subsidiary's actions". It does not mean that the parent had actual knowledge of the offence itself.²⁹

2.3 United Kingdom

Corporate liability in the UK has a long tradition. However, its conventional approach is hardly effective, as it – according to the identification theory³⁰ – focuses exclusively on the behaviour of the most senior official(s), the so-called "brain of the company", through which the corporation acts.³¹

Again, statutes have digressed from this approach only in particular areas, notably in the regulation of corruption. According to section 7 of the UK Bribery Act of 2010, the traditional approach has been supplemented by strict

23 *Resource Guide* (2012) 27.

24 *US v. Ralph Lauren Corporation*, RLC, Deferred Prosecution Agreement of 22 April 2013.

25 Department of Justice, Media Release of 22 April 2013.

26 Urofsky (2013).

27 Urofsky & Moon (2014) 699.

28 Low (2013) 637.

29 Urofsky & Moon (2014) 698ff.

30 See Pieth & Ivory (2011) 6 & 8 and Wells (2001).

31 *Tesco v Natrass* [1972] AC 153.

liability for commercial organisations which fail to prevent bribery.³² Section 7, however, allows for a defence of adequate procedures, that is, sound corporate organisation.³³ Section 12 clarifies that the UK Bribery Act applies to all citizens as well to all bodies incorporated under the law of the UK. It goes on, in section 12(5), to ensure that section 7 applies “irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere”. According to section 8(3), the law extends responsibility of the parent to activities of “associated persons”, including explicitly the employee, agent or subsidiary.³⁴ Beyond corruption, however, the classic identification theory continues to be used.

2.4 Germany

In German law individual responsibility and administrative corporate liability are closely intertwined. Traditional criminal law holds senior company officials responsible for acts and, in particular, also for inactivity in the face of imminent offences by persons under their supervision. Direct individual criminal responsibility for human rights violations is applicable where the manager of a company has a responsibility to act (*Garantenpflicht*) and falls short of his or her duties.³⁵ This so-called *Geschäftsherrenhaftung* has evolved from the Nuremberg trials after World War Two into an established concept. However, responsibility is limited to the area of duties of the particular manager.³⁶ In Germany, there currently is no criminal corporate liability.³⁷

However, so-called *Ordnungswidrigkeitenrecht*, that is, legislation allowing for administrative sanctions (*Ordnungswidrigkeitengesetz (OWiG)*), adds to the traditional criminal law. Thus, §130 of the *OWiG* impeaches the “violation of supervisory duties in companies”.³⁸ §30 of the *OWiG* builds on §130 and creates a corporate liability based on an extended form of “identification theory”. If a senior official, as defined in §9 of the *OWiG*, breaches his duties deliberately or by negligence, §30 imputes the violation to the corporation itself. The definition of corporation (*Verband*) includes holding companies (*Konzerne*). Literature and case law are of the opinion that the parent company has a supervisory duty over subsidiaries.³⁹ Much depends on the definition of the supervisory duties. So far the rules have been applied mostly in domestic cases. However, the *OWiG* has served as the legal basis of several high profile international

32 Raphael (2010) 57ff.

33 Raphael (2010) 61ff.

34 Raphael (2010) 60.

35 BGHSt 54, 44, 60.

36 Saage- Maaß (2014) fn 37.

37 Pieth (2014) 47 & 276ff.

38 Rogall (2006) N. 37ff to §130 of the *OWiG*.

39 Rogall (2006) N. 25 to §130 of the *OWiG*.

corruption cases (for example, Siemens or Ferrostahl). The major limitation is that the offence needs to be *betriebsbezogen*, that is, it has to have a link to the company goal. Obviously, defence lawyers will argue that the crime transcended the company interest. However, child labour, manslaughter in defence of installations and the like – in my view – would all fall within the company interest to make money.⁴⁰

2.5 Switzerland

Switzerland has applied liability to senior company officials in a manner similar to Germany.⁴¹ Furthermore, it has enacted corporate criminal liability as part of its criminal code (CC).⁴² However, it makes a distinction between serious economic crime, in particular where international instruments (conventions combating corruption, money laundering, organised crime and terrorism) have demanded corporate liability,⁴³ and other crime. Thus far an independent objective responsibility applies to companies. In other areas, including corporate manslaughter and serious environmental damage, a much weaker rule applies – a subsidiary form of corporate liability in cases where, due to the disorganisation of the corporation, an individual cannot be held liable⁴⁴. As far as the rule on economic crime goes,⁴⁵ the company is held directly responsible for its disorganisation and its failure to prevent the offence.⁴⁶ It may, however, put forward a defence that it was adequately organised. It is sufficient that the disorganisation takes place in Switzerland to trigger territorial jurisdiction, even if the underlying offence has been committed abroad.⁴⁷

The responsibility of the parent for the subsidiary is, however, somewhat uncertain: If the disorganisation leads to relevant economic crime, the liability is more direct than in comparable laws (such as the German legislation). Here there is no need to take the detour via the lack of supervision of an individual senior member of staff. However, the responsibility is limited to activity within the company, raising the question of whether a multinational is one or possibly hundreds of companies.⁴⁸ As in US law, it is likely – but yet untested – that an economic perspective would be applied. Less of a problem is the restriction to typical company-related risks. This clause will exclude classic individualised

40 BGH 4 StR 71, 11; Rogall N. 72ff to §130 of the OWiG.

41 BGE 96 IV 155; 105 IV 172; 122 IV 103.

42 Article 102 of the CC.

43 Pieth (2003) 353 ff.

44 Pieth (2003) 365.

45 Article 102, section 2 of the CC.

46 Pieth (2004) 597 ff.

47 Cassani (2010) 17 ff; 25 ff.

48 Niggli & Gfeller (2007) 171ff.

behaviour (rape or theft amongst employees), but it will hardly exclude crime committed in furtherance of the economic goals of the corporation.⁴⁹

2.6 Summary

Overall, in the four jurisdictions discussed, a relatively homogenous pattern emerges. The parent is held responsible for all forms of participation in the crimes of its subsidiary. Furthermore, where the subsidiary qualifies as a “business partner”, an “associated person” or an “agent”, responsibility is triggered in a similar way as by employees. Obviously, there are shortcomings, where there is neither general responsibility for employees nor an extended form of “identification theory” (as in the UK). Equally insufficient is a rule covering merely some human rights violations (as in Switzerland). An opening towards further developments is offered, though, by laws stipulating obligations of supervision (as in Germany and Switzerland) - let alone those countries applying strict liability.

3 The Emergence of a New Paradigm

3.1 Treaty Law

Thus far, criminal courts have been reluctant to “pierce the corporate veil”.⁵⁰ Corporate responsibility for human rights violations by subsidiaries may be addressed in international treaties. The traditional human rights treaties, however, do not raise the issue explicitly.⁵¹ Specialised treaties, such as the OECD Convention on Corruption,⁵² though, do require corporate liability and they add in ancillary texts and in their monitoring practice requirements to hold the parent responsible for the subsidiary.⁵³ In particular, Annex II to the OECD Recommendation of 2009 makes it clear that compliance systems to prevent bribery must extend to business partners.⁵⁴

3.2 Soft Law

Beyond treaty law, a growing body of soft law is emerging. The OECD Guidelines for Multinationals⁵⁵ of 1976 were redrafted in 2011.⁵⁶ The OECD has

49 Pieth (2003) 361ff.

50 Thompson, Ramasastry & Taylor (2009) 841 ff; 873; Pitts (2009) 334; Spiesshofer (2014) 2478.

51 Ruggie (2007) 833.

52 OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997.

53 Zerbes I in: Pieth *et al* (2014) 159ff.

54 OECD, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions adopted by the Council on 26 November 2009, Annex II, Good Practice Guidance on Internal Controls, Ethics, and Compliance.

55 OECD (1976).

56 OECD (2011).

upgraded its enforcement mechanism. Individual complaints to National Contact Points (NCPs) are now permissible. However, there is still no direct sanction system and implementation remains uneven⁵⁷. Be that as it may, the new edition stipulates that it is the obligation of corporations to minimise negative effects on human rights, wherever the corporation is active.

The so-called Ruggie Report titled *Protect, Respect and Remedy: A Framework for Business and Human Rights* of 2008,⁵⁸ led to the *UN Guiding Principles on Business and Human Rights*⁵⁹ adopted on July 6, 2011, which include the activities of business partners in their scope.⁶⁰

Rightly, it is pointed out that what used to be soft law can easily become the basis of domestic legal requirements, that is, of binding law.⁶¹ The concept of *Garantenpflicht* (obligation to supervise, for instance, a corporation) as applied in Germany and Switzerland, can be filled with non-criminal obligations. Increasingly it is to be expected that the UN or OECD Standards will become legally binding due diligence standards in the context of both manager liability and corporate liability.⁶²

3.3 Gradual Change

In many areas of the world we are confronted with human rights abuses by corporations. Traditionally, parent companies have tried to escape responsibility by referring to the activities of their economically dependent but legally independent subsidiaries or of other entities within their supply chain. Increasingly, international law and domestic criminal law are raising the bar for such easy defences. Soft law instruments expect companies to assume responsibility for their supply chain. The standards emerging – and adopted by member states of international organisations – are gradually evolving from soft law on corporate social responsibility to binding legal rules governing corporate liability. If the trend is visible, cases are yet rare.

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57 Ruggie (2007) 834; Spiesshofer (2014) 2475ff.

58 Ruggie (2008).

59 UN Guiding Principles on Business and Human Rights, UNHRC, Resolution 17/4 Adopted on July 6, 2011 (UN Doc A/HRC/17/4).

60 See Principles 13(a), 15 and 17.

61 Ruggie (2007) 834; Saage- Maaß (2014) Fn 45; Spiesshofer (2014) 2479.

62 Pieth & Ivory (2011) 48 ff; 393 ff.

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Curbing Illicit Financial Flows in Sub-Saharan Africa: New Approaches and Strategic Entry Points for Anti-Corruption Efforts

Charles Goredema

1 Introduction

This essay has several objectives. It considers strategies against the corrupt activities which facilitate and feed on illicit financial flows (IFFs) in sub-Saharan African countries. It does so without implying that corruption is the sole or most significant determinant of such flows. In defining the relevant issues in charting fresh approaches and strategic entry points, the essay gives an overview of:

- the relevance of corruption to IFFs;
- key dimensions of IFFs in the region;
- areas where anti-corruption efforts should focus in the short to medium term.

Each sphere is potentially amorphous.

The overview is regional, in that the challenges discussed are experienced across sub-Saharan Africa, have trans-national impacts and thus require collaborative responses. The issues are considered in the light of what appear to be the most significant initiatives to reduce corruption and the illicit drain of resources from the region, which include several global conventions, measures adopted by the region's main trading partners, and the work done by specialised structures such as the Financial Action Task Force (FATF) and its sub-regional offshoots. The essay draws on recent literature, including reports by the African Union's High Level Panel (HLP) on Illicit Financial Flows from Africa chaired by former South African president Thabo Mbeki, by Global Financial Integrity (GFI) and by the Africa Progress Panel. It recommends new approaches and possible entry points to address some enduring challenges.

2 Contextual Background

Sub-Saharan Africa comprises forty-eight distinct nation-states. While there are differences among them in terms of resources, development and levels of corruption, they share characteristics that make corruption and illicit financial flows issues of universal concern. A much-quoted 2009 authoritative study by GFI, titled *Illicit Financial Flows from Africa: Hidden Resource for Development*, found that:

- In four decades (1970-2008) Africa suffered a total outflow of between \$854 million and \$1,8 trillion in IFFs;
- Sub-Saharan Africa accounted for the bulk of that figure, with its largest economies (Nigeria and South Africa) being placed highest and fifth highest respectively;
- IFFs outnumbered total development assistance received from abroad by a factor of 2:1, and were increasing at the rate of 11,9% each year.¹

GFI's subsequent report, *Illicit Financial Flows from Developing Countries 2003-2012*, concluded that, as a percentage of gross domestic product (GDP), sub-Saharan Africa sustained the biggest loss, with IFFs averaging 5.5% of GDP, far in excess of the global average of 3,9%.²

This essay is based on a survey of some of the common characteristics shared by jurisdictions in sub-Saharan Africa. At its January 2015 summit, the African Union endorsed a report by the HLP. The Panel's report pointed out that IFFs from Africa erode tax revenues, drain scarce foreign exchange, aggravate levels of national debt and thereby worsen economic dependency. The governance challenges of IFFs include weakening both public institutions and domestic private sector development, and reducing the capacity of the state to provide public resources and social welfare. The report highlighted the symbiotic link between corruption and IFFs, and concluded that both stifle Africa's socio-economic progress.³

As is the case with concepts such as money laundering, the shadow economy and corruption, the term "illicit financial flows" is "vague and highly politicised".⁴ The essence of IFFs is the *movement* of funds or assets either *earned* or *transferred illegally*. Reed & Fontana argue that funds are illicit if (i) they are proceeds of illegal activity, or (ii) although not proceeds of an illegal act, their transfer is illegal.⁵ This would be the case if laws banning trade in the specific commodity, or requiring the payment of export tax, have been violated. GFI and the HLP have adopted this formulation, and added "illegality of use" as a further reason why a transfer could be illicit.⁶

There is consensus that IFFs are attributable to three main spheres of activity, namely:

1 GFI (2009) 66.

2 GFI (2014) 25.

3 The HLP summarises the perceived impact of illicit outflows from Africa in Chapter 3 of its report.

4 Brown & Cloke (2007) 309.

5 Reed & Fontana (2011) 6.

6 GFI has conducted substantial research on and analysis of the nature and directions of illicit financial flows, which is accessible on its website at www.gfintegritty.org. Up to December 2014, GFI had published six annual reports on IFFs from developing countries.

- (a) corporate tax evasion, trade mis-invoicing and abusive transfer pricing;
- (b) high value criminal activities, including fraud, the drug trade, human trafficking, illegal arms dealing and smuggling of commodities; and
- (c) public sector corruption.

Each sector is potentially amorphous.

In the view of the Organisation for Economic Co-operation and Development (OECD), IFFs “are generated by methods, practices and crimes aiming to transfer financial capital out of a country in contravention of national or international laws”.⁷ Category (a), for instance, includes not only the value of the transferred commodities, but also the price of services and intangible rights. While much of the recent literature might give the impression that IFFs consist of cross-border movements of resource transfers,⁸ there is no reason in principle why entirely domestic transfers should be defined out. IFFs could occur as income transfers between associated enterprises located in different parts of the same country, or in different sectors of the same economy. Without suggesting that cross-border IFFs overshadow domestic IFFs in terms of magnitude and impact, this discussion is centred on the former.

3 Illegitimate Transactions and Illicit Financial Flows

IFFs are difficult to measure. On the one hand, where they are derived from recordable commercial transactions, the questionable transactions are often concealed within huge volumes of trade. The forensic skills required to detect and track suspect transactions are formidable and scarce. IFFs derived from criminality and corruption, on the other hand, are either not recorded or disguised by false documentation.

A growing body of opinion suggests that proceeds generated through tax avoidance, achieved by transfer mispricing or the abusive shifting of income can also be illicit. The HLP’s report captured and built on this sentiment, as did the 2013 report by the Africa Progress Panel.⁹ The argument is premised on the realisation that, with multi-national corporations (MNCs) dominating global investment, up to 60% of recorded global trade involves intra-group transactions. MNCs can decide, among several associated enterprises, which of them to attribute their income to, and which to burden with business expenses.¹⁰ The resulting income shifting is often detrimental to commodity producing economies in Africa. The contention is that this renders the income thus shifted illegitimate.

7 OECD (2014) 20.

8 See GFI (2009), GFI (2010), GFI (2011) and GFI (2014).

9 Africa Progress Panel Report (2013).

10 Piccioto (2009) 1.

Furthermore, the income shifting methods used by MNCs have been emulated by high net worth individuals (HNWIs) using corporate entities and trusts to minimise their tax liability. The financial transactions by which to avoid tax, while not illegal in the sense implied by Reed & Fontana, occur “at the shady boundary between the regular economy and the illicit economy” and are arguably corrupt. Their precise form, and the decisions on the optimal junctures at which to use them, are determined by “a global industry” of advisers.¹¹ Both MNCs and HNWIs utilise financial institutions and advisers, who in turn rely on offshore centres. The Tax Justice Network (TJN) has found banks to be the largest users of offshore secrecy jurisdictions. The ultimate ownership or beneficial control of corporate entities that are significantly invested in secrecy jurisdictions has consequently become central to debates on financial transparency in the FATF, its affiliates and the Group of 8 (G8) meetings. Critical to the discussion is whether the prevailing international tax regime regards income distribution among affiliated companies in different locations, which prejudices any of the affected locations as illicit. Piccioto and others point out that the tax rules which determine how intra-group commercial transactions are perceived are outdated and inappropriate. They are ostensibly intended to protect investors and businesses from being unfairly subjected to double taxation. Current double taxation treaties do not necessarily attribute income to the country where economic activities occur or where the bulk of the value is created.¹² They are often intended to achieve the opposite. In addition, Piccioto argues that double taxation treaties generally “give governments the right to tax returns from an investment in the investor’s country of residence (while) business profits ... are taxable in the source country where the activity takes place”.¹³

The HLP concluded that the largest share of illicit outflows from Africa is derived from the manipulation of intra-group commercial transactions. In this respect, it echoed the findings of an earlier study jointly conducted by the African Development Bank (AfDB) and GFI, which concluded that, between 1980 and 2009, such transactions accounted for 65% of IFFs from Africa. The study estimated that during that period, some US\$30.4 billion per annum flowed out of Africa, mostly in the form of IFFs. This added up to a resource drain of between US\$1.2 - \$1.3 trillion. IFFs from Africa were dominated by outflows from West and Central Africa (37%), with North Africa’s share being 31%, and Southern Africa’s 27%. According to the HLP, these statistics are worsening. The report identified prominent destinations of IFFs, which include

11 Brown & Cloke (2007) 312.

12 Piccioto (2009) 1.

13 Piccioto (2009) 1.

Western Europe. For instance, 22.5% of the illicit flows emanating from Nigeria's oil sector were traced to Spain, 11.7% of IFFs from Algerian oil ended up in Italy and 23.6% of IFFs derived from the cocoa sector in Cote d'Ivoire ended up in Germany.¹⁴

Both GFI and the HLP concede that their estimates do not include outflows attributable to distorted fees for services and manipulated payments for intangible commodities. Services include management, financing, marketing and insurance. Intangibles would include the value of intellectual proprietary rights, such as branding names, goodwill, patents, trademarks and licences. A proportion of IFFs from Africa is undoubtedly generated through the pricing of services and intangibles.¹⁵

One could also include, as a sub-sector of illegitimate transactions, falsely invoiced commercial transactions between unrelated parties, through the manipulation of trade documentation to falsify the volume, quality or value of commodities. In such instances, the kind of falsification depends on the parties' perception of where the tax advantage is greater, and their assessment of the risk of detection. In a typical transaction, "a buyer and a seller might collude in a scheme in which the buyer only pays the standard market price for some imported goods, but is billed for the goods at a higher price. The seller then deposits the difference in a bank account in a secrecy jurisdiction on behalf of the buyer."¹⁶ The variant is for the buyer to collude with the seller for the latter to understate the price on the invoice, or to issue more than one invoice. The invoice with the lower price is then used to support a declaration of the official price of the commodities, for import tax purposes. Some transactions between unrelated parties facilitate illicit transfers of the value of extractive resources. In the case of rough diamonds, consignments may be undervalued at the point of export and routed to refining centres through third countries where they are revalued. The role of Dubai in transfers of this kind is frequently cited.

14 HLP Report (2015) 100.

15 An example is the transfer by SAB Miller of certain payments from its subsidiaries in various parts of Africa to three destinations, where other subsidiaries were located. The case was investigated and profiled in the report titled *Calling Time* by Action Aid. The report showed how, over a five-year period, Africa's biggest brewer shifted millions of dollars of taxable profits from African economies into tax havens, ostensibly as:

- Management fees to Switzerland;
- Brand royalties to the Netherlands;
- Procurement expenses via Mauritius;
- Financing services from Mauritius.

The tax diverted thus amounted to approximately \$25 million.

16 Fontana (2010) 1.

4 The Structure of Illicit Transfers

IFFs derived from illegitimate transfers invariably comprise documented and undocumented transfers. This makes mapping the architecture on which they rely problematic, as they do not conform to a particular pattern. Some of the identifiable features are outlined below.

4.1 Transactions Arranged by MNCs

These typically involve:

- A multi-enterprise network of corporations that comprise a group;
- Regular business transactions within the network under controlled conditions (quality, fees and prices);
- An identifiable structure that manages the network, in particular to set prices and determine the distribution of value;
- Location of one or more parts of the network (geographic or virtual) in a favourable jurisdiction (defined by reference to status as a tax haven or secrecy jurisdiction);
- The disproportionate attribution of value to the associated enterprises located in favourable jurisdictions – when compared to their contribution to the productive activities of the network.

Box 1: Glencore-Mopani Case Study

Weaknesses in the collection of trade-based taxes, which were exposed in an audit of the Mopani Copper Mines Plc in Zambia, have eroded the tax base. Mopani Copper Mines runs the second largest copper mine in Zambia, and became part of the Glencore conglomerate in 2000. Investigations by the Zambian Revenue Authority through the tax auditors Grant Thornton and Econ Poyri alleged that the company: (1) overestimated operating costs, compared to other firms in the industry; (2) under-reported production volumes; and (3) manipulated its financial statements, particularly the selling price of copper. The company was selling copper to its parent company Glencore at a quarter of the official price quoted at the London Metal Exchange. As a result, Glencore reported losses in its operations in Zambia, which adversely affected its tax liability. The loss to the Zambia revenue authority over a four-year period was estimated at US\$100 million. Action Aid estimated it to be in the region of £76 million (approximately US\$111 million) a year.

Source: Action Aid (2010) and Audit Report by Grant Thornton in 2009.

4.2 Unrelated Party Commercial Transactions

These replicate some of the characteristics of MNC arranged transactions, except that the parties act in opportunistic collusion. This requires:

- An industry or business sphere in which trade transactions occur in relative secrecy, typically
 - in which the range of suppliers and destinations of a given commodity are limited or controlled;

- with actors that have access to commodity handling and/or processing facilities (such as refineries);
- Incentives to transfer funds to other jurisdictions, which creates the façade of moral legitimacy;
- Use of corporate entities to conceal the interests of the parties;
- Access to offshore banking or investment opportunities;
- Patronage or the tacit support of political elites.

These elements may also be present in outflows emanating from transactions derived from criminal activities. This is amply demonstrated by analyses of widespread wildlife poaching activities conducted by military establishments in apartheid South Africa in Angola (mid-1970s to late-1980s), and Zimbabwe in Mozambique (mid- to late-1980s).¹⁷

5 Criminally Derived Illicit Flows

The criminal activities which dominate the HLP's second category of sources of IFFs appear to have grown in scope and complexity in the last two decades. They include trafficking in wildlife and its products, drug trafficking, trading in counterfeit consumer commodities, trafficking in marine produce and smuggling of precious minerals. These activities have nurtured a vibrant money-laundering sub-sector, only part of which is visible in Africa. With the exception of the drug and counterfeit commodity trades, they involve resources that should be legitimately exploited for the benefit of African economies. Proceeds of these criminal activities are tributary to IFFs of unquantified scale. Susceptibility to IFFs from crime is worsened by:

- the prevalence of informal, patronage and cash-based economies;
- correspondingly limited financial regulatory mechanisms;
- patchy legal frameworks [that rely on] weak law enforcement and judicial capacity;
- a contested understanding of the [issues];
- poorly managed and porous borders;
- political instability and armed conflict; and
- the growing presence of transnational criminal networks in the region [involved in major predicate crimes].¹⁸

¹⁷ Van Vuuren (2006) 49 and Montesh (2012) 16.

¹⁸ ISSP & CGCC (2012) 1.

Box 2: IFFs from Poaching

Proceeds from the sale of extractive resources are the subject of substantial money laundering and IFFs. In the case of timber and wildlife, they are illegally procured by networks of criminal entrepreneurs, corrupt public officials, retired military personnel and politicians. Detecting, tracking, and recovering the proceeds raise vastly different challenges to those emanating from other forms of predatory criminality. The location and structure of the markets, the use of cash transactions and the invariably lofty positions occupied by key actors combine to make these tasks formidable. In the case of ivory and rhino horns, most markets for African products are in East Asia.

The poaching of ivory in Tanzania is attributed to networks of criminal entrepreneurs, often jointly led by Chinese nationals and corrupt Tanzanian bureaucrats.

The routes used emanate from southern Tanzania to Dar es Salaam or Zanzibar. In Dar es Salaam ivory tusks are stored in “safe houses”, where they are packed ready for shipment to China through routes that include Malaysia, the United Arab Emirates (UAE) and Hong Kong (HK). The indirect routing facilitates the concealment of contraband. HK is a strategic entry point because of the volume of cargo handled there – HK being the third busiest container port in the world. Some intermediaries facilitate smuggling of ivory through HK port, with some customs officials being implicated in covering up the shipments. An alternative route is to transport ivory on trucks conveying other goods, such as cement or maize through Malawi, using front companies based in Malawi and Tanzania. Shipment is through Mozambican ports.

Seizures that have occurred since 2011, and records from the Tanzania Wildlife Research Institute show that Tanzania has been losing up to 30 elephants daily to poaching. The estimated value of ivory tusks in 2014 was \$2,200 per kilogramme.

The department responsible for protecting wildlife in Tanzania is severely under-resourced, in terms of personnel, funding and equipment.

Source: *Vanishing Point: Criminality, Corruption and the Devastation of Tanzania's Elephants* (Environmental Investigation Agency) 2014 www.eia-international.org.

In comparison to ivory, rhino horn is believed to have a market price of as much as \$65,000 per kilogramme. In view of the volumes and value involved, and the length of time of its subsistence, the poaching of wildlife is generally regarded as one of the largest (and perhaps most visible) current contributors to IFFs from Africa.

The infrastructure of IFFs related to criminality revolves around the factors referred to above. Any mechanisms which regulate cross-border asset transfers that permit such transfers to occur secretly facilitates criminally derived IFFs. The most common are:

- Corporate entities that offer anonymity to their beneficial owners and/or controllers. In some cases, beneficial interests are concealed behind corporate vehicles that apparently belong to the state, such as mining

- companies registered in the name of the army or the police, operating in partnership with foreign syndicates;¹⁹
- Poorly managed and porous borders;
 - The involvement of criminal networks with trans-national linkages in major predicate crimes.

Box 3: Smuggling of precious minerals: gold and diamonds

The smuggling of gold consignments from the DRC into and through Kenya to various destinations in Europe and Asia has been going on for a long time, only occasionally attracting public attention. Just as the Goldenberg export subsidy scam several years before²⁰, the murder of a senior investigator from the Kenya Revenue Authority, while investigating the smuggling of 2,5 tonnes of gold into Kenya in February 2011, prompted public outrage. Among the facts revealed was the involvement of trans-national criminal networks comprising Congolese, Nigerian, Zimbabwean, Lebanese, and Kenyan nationals. The commodity smuggled is often in the form of partially refined nuggets, destined for refineries in Dubai, Israel, Switzerland or South Africa. Some of the smuggling rings include Congolese militias, based in eastern Congo, who use part of the proceeds from the disposal of the gold along the value chain to replenish military supplies. Some of the gold is sold to dealers in Nairobi. As Cuvelier noted, “cross-border gold trading networks have managed to attract international gold buyers to the Kenyan capital with promises about the availability of large quantities of minerals of Congolese origin”.²¹

Together with this is the growing role of Dubai as a trading centre for commodities, including diamonds from other parts of the world. These include producing centres such as Zimbabwe, which until recently could not trade on legitimate markets. This resulted in large scale smuggling activities through third countries such as Mozambique. To this day, rough diamonds from illicit trade routes continue to be received in Dubai. Its popularity has been attributed to its dual role as a transit hub for the revaluation of diamonds and a centre for disguising their provenance. Revaluation can be done to rough diamonds with no tax implications, because of Dubai’s tax free exports regime. In general the revaluation results in significant disparities between the value of the diamonds imported into Dubai and the value of the same diamonds when exported to cutting centres beyond Dubai. The estimated loss through under-valuation

19 Between 2011 and 2014, the Zimbabwean defence forces and police had interests in a company called Matt Bronze, which was in partnership with Chinese miner Anjin in diamond mining. Concerns were expressed by that country’s Minister of Finance that, between 2009 and 2012 the revenue expected from the partnership’s mining activity was not paid to the state. Of interest also is the partnership of the intelligence service with some Hong Kong based entrepreneurs in two companies, Sino-Zimbabwe Development and Sino-Zim mining.

20 Warutere (2005) 1.

21 Cuvelier (2011) 1.

sustained by Zimbabwe between 2008 and 2012 was between \$770 million and \$2 billion.²² As the FATF has observed, diamonds can be used in all stages of money laundering and terrorist financing.²³

It has been argued that trafficking in stolen oil (oil bunkering) that has plagued Nigeria since the 1980s is so intractable because of the rent-seeking activities of numerous actors, including politicians and the security establishment.

6 Corruption and Illicit Flows

Although the HLP did not dwell on the funding of electoral politics, it is relevant to any discussion of corruption and IFFs in Africa. Opportunism in politics is intricately linked to the overcrowded nature and dynamism of the playing field in most of Africa. Election campaigns are generally expensive as they must reach a poor and largely politically illiterate electorate, which is settled in geographically vast areas and is not particularly savvy technologically.²⁴

In some African countries, the cost of participating in electoral politics is so high as to excludes anyone who does not have access to significant resources. Political power is highly prized. Part of the explanation why this is so lies in the relatively lucrative spoils that come with it. In Kenya, for instance, parliamentarians are among the best paid public functionaries in Africa. At the same time, a candidate for one of the Nairobi constituencies in the 2013 general elections, for instance, would have required about KSh25 million (\$271,000 at the March 2015 rate of exchange) to mount a competitive campaign.²⁵ In

22 Statistics derived from the Kimberley Process. The higher figure was the estimate by the NGO Partnership Africa Canada.

23 FATF (2013) 23.

24 Sokomani (2005) 82.

25 An expert in electoral politics in Kenya argues that most of the money is spent 2-3 months before elections, to pay the following costs:

1. Research - this happens during the early party of the campaign (about KSh 800,000);
2. Popular marketing - calendars, T-shirts, caps etc - during the last quarter of the election year (KSh 2 Million);
3. Multi-media campaign through the radio, TV and print media - mostly happens during the election month. This is the most expensive budget item, in the region of KSh 9 Million;
4. Transport and logistics, involving the hiring of vehicles, "boda bodas" motor cycles, some "matatu" taxis, and perhaps a helicopter (KSh5 million);
5. Hiring of party agents for polling stations (KSh 500,000);
6. Party politics including securing party nomination (KSh 2 million);
7. Occasional "donations" at funerals, weddings, etc (KSh 2 Million).

Sixty percent of the budget can be expected to be spent during the actual election month, particularly after the approval of the political party nominations. An expert on electoral democracy in Kenya whom the writer interviewed estimated that a candidate seeking the

Nigeria, a “dynamic, overcrowded political economy drives competition for looted resources. Poor governance has encouraged violent opportunism around oil and opened doors for organised crime”.²⁶

The private funding of political parties is a matter of enduring concern. Most parties have no access to open, public sources, which drives them to rely on donations. As Matlosa notes, private donations:

- often come with strings attached;
- are generally not publicly disclosed; and
- are not regulated in the same way as public funding.²⁷

In the absence of institutionalised regulation, private donations and other privately sourced forms of funding have the potential to corrupt not only “the management of parties and their affairs but even ... the overall governance project at the national level”.²⁸ The financial demands of maintaining political parties in between elections creates incentives for corruption on the part of the political parties, and opportunities for criminal networks and even some MNCs to buy influence.

Box 4: Anecdote from the 2015 Nigerian elections

At stake for most politicians was the power to dispense and receive cash and patronage rather than competing ideologies ... with annual salaries and benefits of as much as \$2million a year, Nigeria’s lawmakers earn more than four times Barack Obama’s salary as US president. Whoever wins the presidency has a critical say in dispensing about \$70 billion a year in state revenue, more than two thirds of which comes from oil and gas exports.

Source: *The Cape Times’ Business Report* 25 March 2015

Acknowledging the potential role of illicit finance in electoral politics implies a recognition that IFFs include inflows. This raises the question of who benefits from IFFs.

7 Neo-Patrimonialism and Illicit Flows

The neo-patrimonial tendencies that dominate African political economies are, in a sense, the proverbial “elephant in the room” in discussing corruption and IFFs. Writing on neo-patrimonialism in contemporary African politics, Francisco describes the concept as:

governorship of Nairobi County may have to spend almost KSh 100 million (\$1,14 million).

26 Katsouris & Sayne (2013) 2.

27 Matlosa (2005) 38.

28 EISA (2013) 1.

The vertical distribution of resources that gave rise to patron-client networks based around a powerful individual or party. Once argued to be necessary for unification and development after decolonisation, these regimes have supplanted the role of the inherited colonial institutions for the benefit of a few individuals. It is significant nowadays because it affects almost all sub-Saharan states to differing degrees and is not regarded as corrupt behaviour by the population, who rely on the system for their own survival.²⁹

The political parties that dominated the immediate post-colonial phase of sub-Saharan states, almost without exception, have sought to embed their hegemony through neo-patrimonial arrangements. This initially took the form of a charismatic or powerful leader establishing an informal oligarchy whose authority and influence rivalled the formal institutions of the state. The oligarchy was often established through the ruling party. Criminal networks and MNCs involved in IFFs benefited from the resulting “hybrid” regimes, alternately using structures of the political party and state institutions. Occasionally they co-opted elements of the ruling party through “joint investment” ventures, some of which would yield private sources of funding for the party. Invariably, deals struck with the ruling party facilitated suspect business by crime networks and some MNCs in the extractive sector, such as the unregulated export of mineral resources or the grant of generous tax concessions. Since party structures provide the personnel to run the public sector, and exert a lot of influence over that sector, the perception that much of the IFFs from Africa happen with the direct involvement and complicity of high-ranking government officials, their families and business associates is not surprising. In essence, “the workings of the neo-patrimonial state ... resulted in a fusion of political and economic elites” and policy making converged on “the very particular needs of that small circle of overlapping elites”.³⁰

Neo-patrimonialism has become more complex than simply dominance by a single patron, as the composition of the elite families changed over time. Across the continent, neo-patrimonial practices negate the prioritisation of a common anti-corruption system,³¹ and present a formidable challenge to the work of the AU Advisory Board on Corruption, whose mandate, the HLP suggested, should be expanded to monitor IFFs.

29 Francisco (2010) 1.

30 Handley (2013) 37.

31 See also the critique of the HLP report by Olaniyan (2015) 1. The experience of the portfolio committee on mining led by the late Mr Chindori Chininga in Zimbabwe illustrates how arrogant some of these shady actors can become. The committee found its work blocked as it tried to investigate dealings in the diamond-mining sector in Marange.

The persistence of neo-patrimonialism even in the era of multi-party political contestation is a strong factor behind the resilience of IFFs. It is complemented by off-shore secrecy jurisdictions, which facilitate the integration of illicit assets into the mainstream, using their links to global bourses, banks and other financial institutions.³² Particular attention needs to be paid to the role of offshore centres in the high-concentration zone of the Caribbean islands, in which the Cayman Islands, Jersey and the British Virgin Islands prominently feature. The role played by European financial and commercial networks in facilitating IFFs also cannot be ignored. Key networks operate from hubs such as the city of London, Geneva and Paris.

8 Challenges and Pertinent Initiatives

A recurrent aspiration of most recent initiatives is the alignment of priorities, policies and strategies to stem IFFs. The complexity and multi-dimensional nature of contemporary IFFs renders this a formidable challenge. As analysts such as Christiansen, Murphy, and Piccioto have shown, incentives for tolerating the routing of illicit corporate income through certain jurisdictions vary significantly between countries.³³ This leads to the creation or existence of weak links in the international financial system. Offshore centres through which IFFs are routed are potential beneficiaries, at least in the sense that the management of IFFs creates employment at the expense of the economies of commodity producing countries. They are unlikely to support a change in the prevailing international tax regime.

A feature that is common to all types of IFFs encountered in Africa is the significance of secrecy. Secrecy facilitates the production, concealment and transmission of IFFs. This applies as much to global business transactions as it does to transfers by crime networks and corrupt entrepreneurs. It enables the blurring of the lines that should separate the administration of public institutions from the private interests of the bureaucrats entrusted to do so for a limited tenure. In the context of patronage discussed above, it may dissolve the distinction between the state, business and political elites. Through corruption, the latter then end up using the other two sectors to further their own interests.³⁴ Within confidential settings, investment deals are struck that offer irrational tax concessions. Simpasa *et al* graphically describe the regime of concessions granted to the mining companies participating in the initial privatisation of copper mines in Zambia in the early 1990s as follows:

32 Blum *et al* (1998) 11.

33 Christiansen (2009), Murphy (2012) and Piccioto (2013).

34 This is a contention that has frequently been made with reference to Zimbabwe by Partnership Africa Canada.

[T]here was no VAT charge for mine products; capital expenditure had a deductible allowance of 100 percent; and (there were) 'stability periods' of 15 to 20 years during which no changes could be made to the agreements. Mining companies have been enjoying excise duty rebates on electricity supplied by the state utility firm. A major concern was the low average rate of mineral royalty, which in most cases was set at 0.6 percent and thus way outside the global average range of 2 percent to 6 percent and below the IMF's own estimates of between 5 percent and 10 percent for developing countries ... It is worth noting that the first batch of privatised companies paid a royalty rate of between 2 – 3 percent. But this rate was revised downwards, following negotiation of a highly generous 0.6 percent by Anglo America Corporation, which was subsequently applied uniformly across all mining firms. This reflects the dangers to governments of negotiating discretionary tax regimes applicable to individual companies, a tendency prevalent in countries emerging from crisis situations and eager to attract foreign direct investment by offering overly generous terms and conditions.³⁵

To the extent that secrecy protects investment agreements from the scrutiny of actors in society at large, it is inimical to good governance and conducive to IFFs. In terms of the concessions referred to above, Zambia was stuck with agreements which not only defined out massive capital transfers from what could be termed IFFs, but also hugely prejudiced the economy for years to come. The commentary above further highlights the risk inherent in decisions taken in haste during crisis situations. The same kind of costly arrangements that occurred in Zambia have been replicated in Zimbabwe, as reported by a parliamentary committee.³⁶

One of the challenges is therefore to infuse and institutionalise transparency and accountability in the spheres identified to be susceptible to IFFs. In this regard, noteworthy developments have occurred in making payments to governments in the resource extraction sector transparent. In March 2015, Statoil of Norway became the first major oil company to publish its payments to governments for various projects in Angola, Nigeria and Libya under a new transparency standard.

The HLP report called for public registers of beneficial owners and controllers of companies and trusts to be prepared. Registers of beneficial ownership and control, if up to date and accessible, can provide important information about a company's operations across the jurisdictions in which it has a presence. They can also be a useful database. While the EU as a bloc has yet to agree to this idea, it appears that France, Denmark and the UK (on

35 Simpasa *et al* (2013) 8.

36 As documented by the portfolio committee led by Mr Chindori Chininga, cited in note 31 above, in respect of deals struck with Chinese companies involved in chrome extraction.

companies only) are amenable to making their registers public. Combined with such registers is a regime of comprehensive country-by-country reporting. Country-by-country reporting of the activities of MNCs provides revenue authorities with a basis for targeted audits where glaring incongruities between productive activities and the allocation of profits, which is one of the pillars of the architecture on which IFFs depend. It would have enabled Zambian revenue authorities to detect suspect income transfers between Glencore's refining arm and its subsidiary Mopani Mine early enough to query them. The standards adopted by the EU for its banking industry through the Capital Requirements Directive offers hope that country level reporting is achievable and imminent.

Tax relevant information should be automatically exchanged across the globe, to enable concerned tax authorities to detect and/or follow up suspect financial flows. The EU's Directive on Administrative Co-operation (DAC) sets out a framework that could be used for this purpose. Concern has been expressed that some developing countries may find it onerous to reciprocate the obligation to share tax relevant information. The HLP suggested gradual development of the competence to comply, which will allow developing countries a transitional period in which they receive information automatically even though they are not yet able to send any information back. Evaluation reports on compliance with FATF Recommendations on beneficial ownership of corporate entities show a generally poor record of compliance by African countries and the rest of the FATF membership.³⁷ This is a global problem that requires concerted global action. In its revised recommendations, the FATF elevated the identification and verification of the ultimate beneficial ownership of corporate entities. Access to such information could enhance the capacity of financial institutions and government agencies to combat IFFs currently achieved through corporate structures.

It has repeatedly been pointed that the dependence on extractive natural resources increases vulnerability to IFFs.³⁸ In many countries, the extractive industries are a particularly important source of government revenue, often accounting for more than half of total revenue in petroleum-rich countries and for over 20% in mining countries. Reliance on resources that are largely exported in their raw state is problematic, for at least two reasons.

Firstly, intra-African trade remains low, averaging between 10% and 12% of the continent's total trade. This compares poorly with 40% in North America and 60% in Western Europe. Tafirenyika echoes a familiar lament: "Africa

37 FATF Recommendations 24 and 25 require the beneficial ownership and control of corporate entities and trusts to be documented so as to prevent their abuse to launder money or finance terrorism.

38 See Africa Progress Panel (2013) and HLP (2015).

produces what it does not consume and consumes what it does not produce.”³⁹ This is so despite the huge demand for manufactured commodities and infrastructure expansion on the continent. A greater and co-ordinated focus on industrialisation and the expansion of related infrastructure will arguably positively affect intra-African trade. This might minimise opportunities for trade-based IFFs. At the same time, this should improve scope to expand other sectors that can relieve the load currently borne by extractive commodities in the economy.

Secondly, the resources committed to exploratory work by African governments before foreign investors are invited need to be increased. This relates to the development, production and marketing potential relevant to “greenfield” investments in, for instance, extractive resources. The absence of exploratory work, in the minerals sector, for instance, weakens the negotiating position of government.

Progress has been made in recent years in addressing corruption in the extractive industries. Section 1504 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which came into effect in 2012 in the United States, requires companies operating in the oil, gas, and mining sectors to publicly report on the payments they make to foreign governments. In June 2013, the European Parliament passed landmark transparency provisions for oil, gas, mining and logging companies. The EU legislation requires large, privately owned European companies and all publicly held European firms operating in the oil, gas, mining and logging sectors to disclose information on payments above €100,000 (approximately US\$131,000) made to governments on a project-by-project basis. The payments include taxes, royalties and licence fees. These measures are intended to bring increased stability, accountability, and transparency to the sector, and reduce embezzled illicit outflows of capital, in other words, what the OECD refers to as “stemming illegal earnings at source”.

9 Possible Short Term Interventions

The HLP highlighted the central role of informed political will if the competent authorities are to stem IFFs in the medium to long term. Its existence can be determined by how it affects key points in the anti-corruption chain. Revenue collection is one such point. Revenue collection and management authorities operate closest to the economic zones in which IFFs are encountered. Some of the investment contracts, which include prejudicial tax concessions and double taxation agreements, directly relate to revenue collection. Since the beginning of this century, many countries have set up semi-autonomous revenue authorities to improve tax collection. Yet, some of these authorities are not

39 Tafirenyika (2015) 1.

consulted when tax incentives are considered or double tax agreements are negotiated.

At another level, tax administrations do not receive sufficient support, in the form of legislative frameworks, to empower them to investigate “unexplained wealth”.⁴⁰ Domesticating Article 20 of the United Nations Convention against Corruption (UNCAC) offers scope for combining the energies of anti-corruption and financial intelligence units in detecting IFFs.

Revenue administrations can also benefit greatly from capacity development,⁴¹ to address the challenges confronting them in analysing intra-group commercial transactions. The AfDB hosts the African Legal Support Facility, which supports the African countries in negotiating complex commercial transactions. It is mandated to assist in contracts in the natural and extractive resources sector, in infrastructure projects and sovereign commercial debt.

Tax administrators generally do not have the resources needed to monitor trade between related enterprises to detect suspect transactions. The UN Committee of Experts on International Co-operation in Tax Matters has highlighted the identification of comparables to be used in assessing the legitimacy of transfer pricing as a significant problem for developing countries. This is especially so in respect of services and intangible commodities, such as management fees and the cost of intellectual property rights. The lack of comparable data for assessing “arms-length” resale prices of goods and services exchanged within a group of companies is a challenge.

McNair suggests that this deficiency could be ameliorated by regional co-operation between revenue authorities in identifying appropriate comparables.⁴² In addition, transfer pricing legislation needs to stipulate the information and documentation required from the taxpaying MNC undergoing a tax audit. The UN Committee of Experts has developed a Practical Manual on Transfer Pricing for Developing Countries. However, legal assistance from transfer pricing lawyers would go some way in reducing the power asymmetry in taxing rights between developing countries and taxpayers in developed countries.⁴³

The HLP added a note of caution, however, to the effect that there are limits to what capacity development can achieve, pointing out the contradiction of

40 Article 20 of UNCAC obliges states parties to consider adopting legislative and other measures to criminalise illicit enrichment. A small minority of African countries (Botswana, Kenya, Malawi, Tanzania and Zambia as of March 2015) has domesticated this provision. The record of implementation, even in those countries, remains poor.

41 UNTT Working Group on Sustainable Development Financing (2013) 6.

42 McNair *et al* (2010) 11.

43 McNair *et al* (2010) 11.

providing technical assistance and development aid to Africa while maintaining an outdated international tax regime.

10 Conclusion

Reacting to the HLP's report, Hussaini Abdu of Action Aid urged African governments to put in place mechanisms to implement its recommendations. He pointed out that they should prioritise investment in training lawyers, accountants and tax experts to carry out the oversight functions along the routes followed by IFFs. He also argued that every revenue authority should have a transfer-pricing unit, and be linked to the local anti-corruption agency and financial intelligence unit. At minimum, they should expeditiously develop capacity to monitor intra-group financial transactions and intra-group funds transfers by MNCs.⁴⁴

The Environmental Investigation Agency has strongly recommended that "the ivory poaching trade should be disrupted at all levels of criminality, the entire prosecution chain needs to be systemically restructured and all stakeholders, including communities exploited by the criminal syndicates and those on the frontlines of enforcement, given unequivocal support. All trade in ivory should be resolutely banned, especially in China."⁴⁵

The question is whether the recommended remedial measures have good prospects of success in the face of the governance challenges stemming from the patrimony-based hybrid regimes discussed above. The networks feeding on the dichotomous management systems can be expected to resist any reforms to governance that will imperil their access to largesse. As in all instances where fundamental changes are considered, powerful national and local actors in a position to flout, co-opt, thwart or even reverse such initiatives will try to do so. Significant change in the environment that encourages IFFs depends partly on success in constitutional re-modelling and partly on fostering a culture of transparency throughout the productive sectors of economies in Africa. Such re-modelling as has been attempted in Kenya promises to produce institutions of state that are sufficiently autonomous as to be able to hold the executive to account. This is important, as the executive can easily abuse patronage. As Muzita cautions:

We cannot expect seasoned kleptomaniacs that are addicted to corruption to simply turn themselves in, confess and then play arresting officer, prosecutor, judge, jury and jailer. Put simply we cannot expect (political parties implicated

44 Abdu (2015) 1.

45 EIA Report (2014) 2.

in corruption) to fight corruption except in the exceptional cases ... where this is ... used as an effective tool to purge political rivals.⁴⁶

Where political and economic elites perceive it to be beneficial to keep institutions that could control their acquisitive instincts weak and ineffective, they can be expected to do precisely that. What assists them is the “secrecy space” created by the liberalisation of the financial market – and which does not effectively address the secret enclaves constituted by banking secrecy, non-disclosure of ownership of corporations and trusts, dispersed systems of accounting by MNCs, and unstructured exchange of information between competent authorities.

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46 Muzita (2015) 1.

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Meeting the Public Security Crisis in South Africa: Centralising and Decentralising Forces at Play

Nico Steytler and Lukas Muntingh

1 Public Safety Issues and Federal Institutions

South Africa is facing a major public safety crisis which is threatening its constitutional democracy. Personal violent crime (murder, rape and robbery) remains among the highest in the world; corruption in the public service is rife; public protests about poor service delivery are frequent, widespread and often turn violent; xenophobic attacks threaten to re-ignite; and industrial strike action has resulted in violence.

The state institutions concerned with public safety and corruption are mainly located at the national level, but perform poorly to meet the challenge. Moreover, the national government's response to crime has focused almost exclusively on law enforcement, neglecting primary, secondary and tertiary crime prevention of a socio-economic nature. The South African Police Service (SAPS) has been demoralised by corruption from the top to the bottom, politicised, and its public order policing is ill-equipped and inadequately trained to deal with *frequent* public disturbances. The National Prosecuting Authority (NPA), too, has been politicised, and its success rate is declining. The national court system has run up huge backlogs in trying cases and the national Department of Correctional Services does little more than warehouse a large and growing awaiting trial prison population. Sentenced prisoners seldom receive the necessary services to reduce the risk of re-offending.

Against this backdrop, the provinces play a very limited supervisory role over the SAPS but metropolitan municipalities are emerging as state institutions that are increasing their complementary role to the SAPS's crime combating efforts through their own police forces.

However, the public, living in fear and defenceless, has sought protection elsewhere; there are now two and a half private security personnel for every police officer and, for those who cannot afford privatised security, mob justice is often an attractive option.

It is thus argued that the public safety state apparatus is in crisis as it is experiencing "a relatively strong decline in (followed by unusually low levels of) legitimacy".¹ It will be further argued that given the crisis in the national public safety institutions, a more decentralised response is emerging from the bottom. The opposition-held Western Cape Province and City of Cape Town

1 Boin & T'Hart (2000) 13.

(but also other metropolitan municipalities) are forging ahead, exploring the limited constitutional space they have with a more independent stance on public safety initiatives, opposed by the national government that seeks to centralise all public safety institutions. However, further decentralisation will not by itself provide the answer; the transformation of the central institutions as non-political, professional institutions providing a public service will have the greatest impact, along with an all of government coherent approach to addressing the root causes of poverty and inequality.

1.1 Nomenclature

A number of terms are used in the broad field of public security. In the first democratic government, the old Minister of Police was replaced by the Minister of Safety and Security, a title which lasted for 15 years, when the name reverted to the old, as a sign of being tough on crime. The provincial ministries responsible for policing oversight are often referred to as “Community Safety”. The private “security” sector is also principally concerned with crime. The general trend is thus that references to “public security” or “public safety” (often used interchangeably, or jointly) have a narrow meaning, focusing directly on crime and law enforcement. In this essay, then, we use the term “public security” as encompassing matters that are linked to crime, which is also our main focus.

1.2 Main Public Safety Risks

Crime and the fear of crime occupy significant space in the South African discourse and with good reason. Since 1990 there has been a dramatic increase in violent as well as property crimes. Reflecting on crime levels post-1994, Altbeker concludes that “every piece of reliable data we have tells us that South Africa ranks at the very top of the world’s league tables for violent crime ... [It is] an exceptionally, possibly uniquely, violent society.”²

From four victimisation surveys between 1998 and 2010, perceptions of safety revealed, first, that more than 40 percent of households surveyed believed that the level of crime had come down in their area from 2008 to 2010, but 32 percent believed it increased and 26 percent that it remained the same. Therefore, even though a notable proportion perceived an improvement in the crime situation in their area of residence, nearly 60 percent saw no change or deterioration. Second, 63 percent of South Africans feel unsafe when walking in their neighbourhoods after sunset and this feeling is primarily driven by the fear of being robbed.³ Undoubtedly, this fear affects people’s behaviour and the

2 Altbeker (2007) 12.

3 Nearly 41% of survey participants indicated that street robbery is a common crime. Only residential burglary received a higher rating at 53%. See Statistics South Africa (2011) 7.

extent to which they can enjoy life in the area in which they reside. This reality of fear is recognised by the national government in the National Planning Commission's *Diagnostic Report*.⁴

The high levels of crime are, no doubt, attributable to the South Africa's socio-economic conditions, but not due to general poverty. Rather, South Africa exhibits one of the highest level of income disparity (income Gini coefficient 57.8),⁵ with nearly half of its 50 million population living in poverty evenly spread across urban and rural areas. Public protests about poor service delivery, as well as against a lack of housing and jobs, are almost a weekly occurrence throughout the country, with a tendency to turn increasingly violent.⁶ Labour disputes are increasingly accompanied by violence also. To add to the poor's woes, there are the millions of undocumented migrants from neighbouring countries, notably Zimbabwe, who compete for scarce jobs. The underlying tensions boiled over in 2008 in widespread violent and often fatal xenophobic attacks, which threatened to erupt again following the economic downturn since 2008 which saw the loss of over a million jobs.

With crime rampant and public order ever under threat, the SAPS and the other national institutions in the criminal justice system are making slow progress in the battle against crime. The SAPS, reflecting much of the civil service, is riven with corruption from top to bottom. Two National Commissioners have lost their positions due to corruption.⁷ Further indicative of the rot in the police is that in 2011/12 more than 600 police officers were arrested in Gauteng province alone on criminal charges.⁸ Not only is the police service marked by corruption, but also by ineptitude and lack of training. Crime detection rates are abysmal, as a fifth of the 25 000 detectives are untrained,⁹ resulting in low conviction rates.¹⁰ Public order policing is also

4 National Planning Commission (June 2011) 245.

5 UNDP (2012) Table 3.

6 Karamoko (2011).

7 The former Police Commissioner, Jackie Selebi (now deceased), had a 15-year jail sentence imposed on him for corruption because he received cash from a known mobster in exchange for information and protection. His successor, Bheki Cele, did not fare much better and was dismissed for maladministration. The appointed head of Crime Intelligence, Richard Mdluli, was suspended under investigation for using a crime intelligence slush fund to fund his family and girlfriend (apart from a murder charge which was inexplicably dropped by the NPA and later reinstated).

8 Legal Briefs (3 May 2012).

9 Essop (6 September 2012) 2.

10 For example, in a number of Cape Town townships 1469 murders cases were opened over the past five years, but only 11.8 percent resulted in convictions. See De Wee (6 September 2012) 5.

inept, as evidenced by the police killing of 34 striking mineworkers on 16 August 2012 at Marikana in the North West province.

The NPA does not engender much confidence either. In recent years the performance of the NPA has seen a decline as measured by the number of prosecutions and the number of offenders sentenced to imprisonment. From 2004/5 to 2010/11, the number of cases finalised by the NPA (obtaining a verdict) declined by 13 percent or just more than 50 000 cases. The decline occurred whilst the change in the rate of violent crime showed negligible variations. However, the police arrest some 1.6 million people annually, but the majority of these arrests are for crimes less serious than shoplifting,¹¹ a practice that suggests that arrest targets are chased to demonstrate impact, rather than tackling major crime problem areas that would show effectiveness. The SAPS is consequently spending a significant amount of time and resources on crimes not posing a serious threat to public safety.

Against the backdrop of an ineffective state, the safety needs of communities, individuals and businesses have created an enormous demand for private security. Armed with guns and flak jackets, private security officers patrol streets, respond to alarms, and provide a sense of security for walled-in communities. The demand for public safety has created a high growth sector in an otherwise sluggish economy and there are now two and half private security operatives for every police officer. For the majority of the population who cannot afford privatised police, self-help becomes the only option. Unlike private sector security that can legally provide only preventive services, community justice includes punishment as well. In a three month period (May to July 2012) in impoverished Cape Town townships, which are also poorly policed, 14 suspected criminals were most brutally executed in vigilante actions.¹² In this sorry tale of institutional failures, crumbling social cohesion and the unravelling of the constitutional state, South Africa's constitutional system of devolved government hardly features; provinces have no police force of their own and may only perform a limited role in supervising the SAPS. Most of the metropolitan municipalities have established metropolitan police forces with restricted powers, and even these powers are under the threat of centralisation.

It is argued that the roots of the centralised criminal justice system are to be traced to the repressive and ignominious policing practices of the apartheid past. The negotiated "revolution" that led to the creation of the system of multilevel government (national, government, provinces and local government), established a unique system in terms of which provinces have no

11 SAPS (2011) 66.

12 See Maregele (11 July 2012) 3 and Cape Times (3 August 2012) 10.

policing powers, other than the power to monitor national policing but without any sanctions. This “federal” design has yielded no fruit yet and is unlikely to do so. What is of general significance, however, is the response to the failure of centralised policing. First, a victimised population has turned to private security (where they can afford it) or to vigilantism (where they cannot). Second, there are limited but telling signs that metropolitan police forces are increasingly picking up the slack and going even beyond their constitutional mandate. It is further argued that in a situation of poor performing provinces and the majority of municipalities, the decentralisation of policing does not provide the answer to better public security. Greater effectiveness of the national police force and increasing the role of local police forces may provide a partial solution but, most importantly, the disconnect between crime combating and crime prevention should be bridged. This would bring provinces into a whole of government approach to crime.

2 Historical Roots of the Centralised Public Safety System

The design of the security state in the 1993 and 1996 Constitutions was firmly embedded in the context of the pre-1994 history of the repressive South African state. During the apartheid era the national security establishment, comprising the South African Police (SAP), the South African Defence Force and intelligence agencies, supported by the courts and prisons, was central to keeping the apartheid state afloat. In the 1980s the main focus of national security was on the low intensity civil war and uprisings in the black townships. The repressive apartheid security apparatus was complemented and bolstered by black ethnic-based police forces of the four “independent” homelands and ten self-governing territories. Being under the control and in the service of the South African security apparatus, they, too, became targets of the liberation movements and black communities.

Some of the principal features of public safety during this period are the following. First, very tight control was exercised by the centre over all security matters. This control did not lie with the national cabinet but with an inner group of “securocrats”, the State Security Council, a case of centralising the centre. Second, within the closed community of securocrats, secrecy and the absence of accountability were the order of the day. The impunity that followed led to the emergence of covert and clandestine operations that mirrored the death squads of Chile and Argentina.¹³ Third, the role distinctions between the SAP and the Defence Force disappeared. When the police failed to quell internal protest, their efforts were complemented by the Defence Force in patrolling the black townships with white conscripts. At the same time the SAP drifted into a militarised mode of functioning. Fourth, the police and defence

13 See generally Steytler (1990).

forces in the black homelands were an integral part of the apartheid state, and their defence of their meagre spoils of the apartheid system was as repressive as their white counterparts. The emergence of local security forces in black townships added to the toxic mix. The illegitimate local councils in black urban townships were allowed and encouraged to employ ill-trained and poorly-equipped armed personnel to suppress popular revolts. The outcome of these features was the narrow construction of public safety, focusing largely on white interests and homeland survival, thereby failing to serve the security concerns of the majority of the population, and ignoring the socio-economic drivers of crime and a lack of safety.

The unbanning of the liberation movements in 1990 made possible the negotiations towards an inclusive democratic South Africa. Responding to the apartheid regime that sought to establish a type of ethnic divided-and-rule federalism through “independent” homelands and self-governing territories, the liberation movements (the African National Congress (ANC) in particular) fought for a centralist state that could build national unity and redress the ravages of apartheid. The white minority government, along with some ethnic homeland leaders, sought to retain a grip on some levers of power through a federal system. The outcome of the “negotiated revolution” was a hybrid state, displaying some federal elements within a strong central state structure; nine provincial governments were established with allocated powers, but a strong central supervisory hand was secured. The federal elements in the Constitutions were, paradoxically, the result of a process of devolution. Although South Africa was on paper in 1990 a fractured state, comprising a white dominated state, plus 14 self-governing black territories, the very object of the liberation war was to establish a united, non-racial state. The constitutional settlement of 1994 was thus at one and the same time a unification of ethnic and racial structures into a single non-racial South Africa, and a devolution of limited power to nine provinces. The same scenario also played itself out in the security arrangements.

From 1990 the major policy imperative about the reshaping of public safety was the need to democratise policing, by making the police transparent and accountable to the communities they served. “Community involvement” in decision-making became the mantra of reform during the 1990s. As to suitable methods, opinions differed. On the one hand, there was the fear of a centralised police force that could be abused for narrow political ends. Arguments were thus advanced for the unbundling of the SAP, and mooted the model of the fragmented police force in England and Wales. This model was not, as in England, coupled to a federal state structure. The countervailing argument was the need for central control to ensure stability and peace in a country that was at war with itself. The notion of a provincial police force was out of the

question. Given the high level of on-going conflict at the time in KwaZulu-Natal, the illegitimacy of all the homeland's security forces and the fear of renegade provinces with own armed forces, one national police institution which exercises direct line authority over all armed forces was the only real option on the table. The concept of community-based policing fitted in with the overall project of democratising the state, and led, among other things, to changing the name of the SA Police to the SA Police *Service* (SAPS). These policy choices were reflected in the interim Constitution of 1993 as well as the final Constitution of 1996. However, a measure of path-dependency was apparent. The new democratic wine was poured into the old apartheid bottles; the past forms of centralist control and an emphasis on crime combating, at the expense of crime prevention, were never abandoned and shaped the range of changes during the next two decades.

3 Constitutional Landscape of Public Safety Institutions

The 1993 interim Constitution was in essence a peace agreement between the ANC and the white minority government. Provinces were established as a compromise, and consequently they received limited powers over the national police force. The 1993 Constitution provided that the South African Police Service (SAPS) would be "structured at both national and provincial levels" and would function under the direction of both the national and provincial governments.¹⁴ The powers of provinces included approving the appointment of a provincial police commissioner, passing legislation not inconsistent with national legislation on the functioning of the police in the province, directing the activities of the police commissioner, and approving the establishment of local (municipal) police services with powers limited to crime prevention and the enforcement of local by-laws.

The 1996 Constitution, adopted by the democratically elected Constitutional Assembly, watered down the provincial policing competency considerably. This was in line with an overall down-grading or hollowing out of provincial competencies, reflecting the ANC's less than enthusiastic stance towards their reluctant compromise on provinces, and strengthening the role of local government. The point of departure was that "[t]he security services of the Republic consist of a single defence force, a single police force and any intelligence services established in terms of the Constitution".¹⁵ Furthermore, "security services must be structured and regulated by national legislation".¹⁶ Responding to a legacy of impunity, a governing principle of national security

14 Section 214 of the 1993 Constitution.

15 Section 199(1) of the 1996 Constitution.

16 Section 199(4) of the 1996 Constitution.

is that it is “subject to the authority of Parliament and the national executive”.¹⁷ Furthermore, the interim Constitution required the establishment of an independent complaints mechanism in respect of the police.¹⁸

The shift to the centre affected provinces’ role in and influence over policing. While policing remained a concurrent function of the national and provincial governments, provincial powers are limited to the following. First, a consultative duty is imposed on the national executive to take into account “the policing needs and priorities of the provinces as determined by the provincial executives”.¹⁹ A province has a reciprocal entitlement to liaise with the national minister responsible for police on crime and policing in the province.

Second, the main provincial function is that of oversight. A province is entitled:

- To monitor police conduct;
- To oversee the effectiveness and efficiency of the police service, including receiving reports on the police service; and
- To assess the effectiveness of visible policing,²⁰ including the establishment and maintenance of police stations, crime reaction units, and patrolling services.²¹

In order to give effect to its oversight role, a province may also investigate complaints of police inefficiency or a breakdown in relations between the police and any community. It cannot act upon any findings with any sanctions, but is limited to making recommendations to the responsible national minister.

Third, on a more proactive level, a province may “promote good relations between the police and the community”.²² The result is thus that the provincial role was designed to be a good, ineffectual, arm’s length away from the “hard side” of policing in South Africa.

The diminution of provinces’ policing role also attracted the attention of the Constitutional Court when it had to certify that in the 1996 Constitution the powers and functions of provinces were “not substantially less than or substantially inferior” to those in the interim Constitution.²³ The Court concluded that the 1996 Constitution had indeed substantially diminished provincial powers and two of the grounds were that the role of provinces over the police service had been reduced and local government was no longer a

17 Section 198(d) of the 1996 Constitution.

18 Section 222 of the 1993 Constitution.

19 Section 206(1) of the 1996 Constitution.

20 Section 206(3) of the 1996 Constitution.

21 These are defined in section 219(2)(d) of the 1993 Constitution.

22 Section 206(3) of the 1996 Constitution.

23 Constitutional Principle XVIII.2 of the 1993 Constitution.

provincial competence.²⁴ When an amended constitutional text was submitted for certification, a few minor changes increased the powers of provinces slightly, but neither policing powers nor powers over local government were among them. The constitutional outcome was that the police service is a national one, with limited oversight functions for provinces.

In line with local government's enhanced status as a sphere of government alongside the national and provincial governments,²⁵ the Constitution also provides that national legislation must make provision for municipal police services. The South African Police Service Act of 1995 thus mandates any local or metropolitan government to seek the approval of the provincial government to establish a police service. Municipal and metropolitan police forces are subject, *mutatis mutandis*, to any regulations that the Minister of Police may issue in respect of the SAPS under the SA Police Service Act. The functions of a municipal police service are: traffic policing, subject to any legislation relating to road traffic; the policing of municipal by-laws and regulations which are the responsibility of the municipality in question; and the prevention of crime. The Act affords municipal police officers the legal powers of arrest, search and seizure within their area of jurisdiction or with permission of another municipality outside their jurisdiction. They are allowed to make arrests but must hand over any arrested person to the SAPS. They cannot investigate crimes and are required to hand over any case to the SAPS.

Table 1 sums up the competences of the three levels of government with respect to policing as well as the practice that is discussed below.

Table 1: Competences of the Three Levels of Government

Level of Government	Law and Practice			
	Crime Prevention	Investigation & Arrest	Public Order	Oversight
National	Policy	SAPS	SAPS	Civilian Secretariat; Independent Police Investigations Inspectorate
Provincial	Social Services	None	None	Department of Community Safety (Limited in practice)
Local	Social Services	(Some limited instances)	(Limited)	None

While the Constitution provided for a level of autonomy for both the NPA and its investigative arm, the Directorate for Special Operations (known as the

24 *In re: Certification of the Constitution of the Republic of South Africa 1996*, 1996 (10) BCLR 1253 (CC).

25 Section 40(1) of the 1996 Constitution.

Scorpions), the story of the latter tells not only the story of the quest of political hegemony over the police services, reflective of the past, but also the role of courts. There is a single integrated national judicial system, with the Constitutional Court at the apex on all matters constitutional. The Constitutional Court's most dramatic decision on policing was the invalidation of the law that abolished the Scorpions. When the Scorpions stung the then Deputy President, Jacob Zuma, on corruption charges, the abolition of this institution on allegations that it was used for political ends, became an article of faith for the Zuma supporters. When Zuma successfully deposed Thabo Mbeki in 2008 as the president of the ANC, and was later elected President of the country in 2009, the Scorpions were the new regime's first casualty; they were transferred to and placed under the control of the SAPS (now called the Directorate for Priority Crime Investigations, or the Hawks). This signified an intent to place all investigative agencies under the political control of the national executive, a move of which the Constitutional Court did not approve. It invalidated the legislation effecting the transfer, because the Hawks, compared to the Scorpions, would have too little institutional independence from the political bosses responsible for the SAPS.²⁶ Whether the legislation aimed at curing the constitutional defect will ensure the independence of the Hawks, was at the time of writing before the Constitutional Court.²⁷

While the institutions of armed force reside at the national level, it is the provinces and local government that must address the socio-economic conditions that engender crime. The principal functions of provinces are education, health services, social development (including social services), housing, roads and transport. Municipalities are mandated to provide basic municipal services such as water, sanitation, electricity, and municipal health services. While these levels of government have only their toes in the security waters, they must stem the social tide of crime. Although there is a constitutional disconnect between the two functions, some provinces and metros are willing to wade a bit deeper into the muddy and treacherous crime waters, as described below.

4 Metrics, Fiscal Dimensions and Developments

The 1996 National Crime Prevention Strategy (NCPS) followed on President Mandela's 1995 State of the Nation Address.²⁸ There were great expectations from the NCPS, and government departments and civil society would rally around it. The NCPS articulated a dual approach where more effective law

26 *Glenister v President of the Republic of South Africa and Others*, 2011 (7) BCLR 651 (CC).

27 *The Helen Suzman Foundation v The President of the Republic of South Africa and Others* CCT 07/14 and *Hugh Glenister v President of the Republic of South Africa and Others* CCT 09/14.

28 Rauch (2001) 1.

enforcement would be balanced with addressing the social causes of crime. It would unavoidably require a long-term approach, but this long-term view resulted in diminished political support for the NCPS.

The high violent crime rate and public demands for action prompted government to opt for more visible short-term strategies focusing on priority crimes as described in the National Crime Combating Strategy (NCCS) released in 2000, a policy document produced in-house by the SAPS.²⁹ By the late 1990s the initial political support for the balanced approach of the NCPS had fizzled out despite the 1998 Presidential Review Commission having regarded its integrated approach in a favourable light.³⁰ The focus on law enforcement became overt after a review of the NCPS in 1998.³¹ Political rhetoric, espousing a tough-on-crime approach, found popular support and in his 1999 State of the Nation Address President Mbeki was convinced that more effective law enforcement would reap dividends.³²

While the NCPS was in substance and approach inclusive of the three spheres of government and non-governmental organisations, and balancing law enforcement with addressing the social causes of crime, the NCCS was exclusive in defining government's response to crime as a SAPS function. In effect, the national government had monopolised the policy-making on crime and safety, defining it as a law enforcement problem and marginalising crime prevention.³³

A further consequence was that the overarching policy framework (the NCPS) to steer responses from the three spheres of government to crime and safety effectively disappeared. If a requirement for effective policy-making is that it should be joined-up by taking a holistic view looking beyond institutional boundaries to the government's strategic objectives and seeking to establish the ethical, moral and legal base for policy,³⁴ the national government's response to crime and safety did not achieve this. Instead of overarching and cohesion-building strategic objectives, the emphasis on law enforcement and the prominence given to SAPS, proved to be divisive and unable to guide responses to crime and safety.

With the emphasis on crime combatting the SAPS has grown significantly over the last decade to nearly 200 000 employees, or 372 officers per 100 000 of the population. This is well below the recommended UN standard of one police official per 500 persons but as already noted there are serious concerns about

29 Du Plessis & Louw (2005) 430-431.

30 Presidential Review Commission (1998) para 2.5.8.10.

31 Rauch (2001) 21.

32 Mbeki (1999).

33 Frank (2003) 22.

34 Bullock, Mountford & Stanley (2001) 8.

their effectiveness and adherence to constitutional requirements in respect of human rights and good governance.

The SAPS budget has accordingly grown in leaps and bounds resulting in a near three-fold increase since 2002/3; a trend reflective of government's emphasis on law enforcement as the crime management strategy. The increase in the SAPS budget was, however, not accompanied by a concomitant increase in provincial safety and security budgets. The centralisation of control over safety and security was therefore very much reflected in a centralisation of the budget by the national government. Comparatively, the Western Cape budget for public safety does not constitute even half a percent of the SAPS budget.³⁵

The increased spending on national crime combating is no doubt a result of the centralised nature of policing. There has, consequently, been no significant increase in provincial spending. As explained below, with provinces having hardly any own revenue, crime levels, which may differ between provinces, also do not feature as an element in determining the equitable share of each province. Although such block grant is unconditional, the provinces' discretion is very much limited by expenditure constraints imposed by national standards and obligations in the key areas of education and health. The end result is that there is hardly any revenue to improve public security significantly.

In Parliament, the National Assembly's Portfolio Committee on Police and the National Council of Provinces (NCOP) Select Committee on Security and Constitutional Affairs are mandated to perform an oversight function. The effectiveness and thoroughness of these committees are, however, uneven at best. The oversight of the expenditure by the SAPS is primarily done by both the Portfolio Committee and the Standing Committee on Public Accounts (SCOPA). Important independent bodies that perform an oversight function are the Auditor General, the Public Protector (the South African version of the ombudsman) and the SA Human Rights Commission. Limited to investigation and recommendations to the responsible political authority (the national executive in the case of the SAPS), the Public Protector has since 2009 performed a valuable role, as shown in her damning report on Commissioner Bheki Cele which led to his dismissal.

4.1 Provinces

Given the emphasis on crime combating and the absence of an overall crime prevention strategy, the scope for provinces to play a meaningful role is minimal. Each province has established a department of public or community safety (often in combination with traffic police), but each comprises of civilian employees only. Very little is publicly visible about how provinces exercise their oversight, and judging from their budgets, this is not surprising. The

³⁵ Western Cape Provincial Legislature (2012).

budgets of the departments responsible for policing comprise a miniscule item in the provincial budget. The Western Cape Department of Community Safety, perhaps the most active in the country, consumed 0.84 percent of the 2010/11 provincial budget, of which 53% is spent on traffic officers. These figures have not changed much over time as little effect is given to the oversight mandate.

This limited budget is sourced from national transfers to provinces. In a case of extreme vertical fiscal imbalance, provinces receive on average 97 percent of their income from national transfers through both untied block grants (80 percent) as well as conditional grants (20 percent). None of the conditional grants is linked to policing.

4.2 Local Government

As the crime combating door is slightly ajar for local government, most of the metropolitan municipalities have established metro police services, and Cape Town is seeking concertedly to get its foot further through the door. Metropolitan police services were established in Johannesburg (2001), Cape Town (2001), Ethekewini (Durban) (2002), Ekurhuleni (East Rand) (2002), Tshwane (Pretoria) (2002) and Nelson Mandela Bay (Port Elizabeth) (2003). Only one local rural municipality, Swartland, has followed suit. The number of police officers is not insignificant. For example, Johannesburg has in excess of 4 400 officers, Cape Town 1 400 and Nelson Mandela Bay 720. The training of the metropolitan police is effected by the municipalities themselves but in terms of regulations prescribed by the SAPS. The majority of metro-police officials were absorbed from the municipal traffic departments and concerns have been expressed about the quality of the training they receive. Discipline is also suspect, illustrated by the temporary police officers of the Ethekewini Metro Police (Durban) who threatened in August 2012 to burn down the City Hall if their demand for permanent appointment was not met.³⁶

Given the number of officers, the expenditure on metro policing is not insignificant. Having real police officers on the beat, the expenditure by the City of Cape Town, for example, on policing and fire protection was 7,8 percent of its 2008/09 budget, with half of that on policing. Expenditure on social welfare (which falls outside the constitutional competence) is less than 2.3 percent. The expenditure is covered by the municipality's own revenue collected mainly from property taxes. An additional expenditure is the employment by the municipality of private security companies to provide security in particular neighbourhoods, so-called "city improvement districts". In a partnership with the rate payers in a particular neighbourhood, who are willing to pay a

36 IOL (21 August 2012). In 2008, when the Ekurhuleni Metropolitan Police Service went on strike and blockaded roads, a violent confrontation erupted between it and the SAPS with an exchange of fire.

surcharge on their property rates, the municipality contracts a security firm to provide additional security for that area. These have been popular in inner city districts as well as wealthier suburbs, although their impact has been little more than crime displacement.

Given the uneven service provided by the SAPS, metropolitan governments are seeking to fill the vacuum within the available constitutional space (and beyond). The City of Cape Town, under the control of the main opposition party, is at the forefront of such initiatives. It distinguishes between traffic officers, law enforcement officers and metro police officers both by uniform and job description. While the law enforcement officers are concerned with the enforcement of municipal by-laws (and preventing illegal land invasions) and the traffic police with traffic, the metro police officers have bigger fish to fry. They, according to the City, “work closely with SAPS on serious criminal issues with a strong emphasis on crime prevention”, which includes holding roadblocks to search vehicles for illegal firearms and drugs.³⁷ In 2012 it increased its budget for a Gang Task Force to crack down on gangs and the drug trade.³⁸ The most audacious initiative yet was the establishment of a unit to fight abalone poachers along Cape Town’s 300 km coast line, because nature conservation falls squarely in the lap of the provincial and national governments, both of which have shown an ineptness in preventing the decimation of this shellfish delicacy.

Unlike the lack of co-ordination between combating and preventing crime, metropolitan governments are better placed to draw the linkages. For example, the City’s anti-crime initiatives are broad in scope; through by-laws on inner city dwellings, places of ill-repute are closed down. Through the municipality’s central strategic planning document, the Integrated Development Plan (IDP), anti-crime strategies are forged through proper township planning, the installation of street lighting, and nuisance legislation. A further example is the Violence Prevention through Urban Upgrading (VPUU) Project, initiated in 2006 by the City of Cape Town, which aimed to reduce crime and increase safety levels in designated areas of Khayelitsha, and to upgrade neighbourhoods, to improve social standards and to introduce sustainable community projects to empower the local residents.³⁹

37 City News (June 2012) 5.

38 Nicholson (1 September 2012) 5.

39 This includes programme elements such as:

- Crime mapping;
- Situational crime prevention that aims to change the physical and environmental conditions that generate crime and fear of crime through improved urban design and planning;
- Social crime prevention by supporting a partnership of organisations or units drawn together so as best to serve the broader Khayelitsha community in respect of crime

Other metropolitan governments also focus on the social side of crime prevention. One aspect has been the need for ex-prisoner re-integration. On a monthly basis an estimated 3 000 sentenced prisoners are released, in addition to even larger numbers of unsentenced prisoners whose detention is no longer required. The overwhelming majority will return to their communities of origin where they have families, friends and associates. Re-entry and re-integration present numerous challenges and former prisoners often face basic socio-economic challenges such as accommodation, employment and re-connecting with their communities of origin. Failed re-entry and re-integration frequently see these individuals revert to criminal activities.

The City of Johannesburg recognised re-offending as a significant threat to public safety. The City's website lists under its Human Development Programme numerous services aimed at reducing vulnerability and which could also be of benefit to former prisoners, such as the vulnerable households support programme, the skills development programme and the youth development programme.⁴⁰

Whereas further local government intrusions into the policing domain are likely to be resisted by the national government, the placement of the metro police forces under national control is on the cards. At the ANC's Policy Conference in June 2012, the party resolved that there should be a single police service. The reasons advanced by the ANC Western Cape delegation is that currently there is no uniform training of officers and serious crime scenes are botched because there are no prescribed and mutually agreed upon standards between the SAPS and metropolitan police on how to handle such scenes. It therefore called for the municipal, metropolitan and traffic police to be placed under the command and control of the national commissioner of SAPS.⁴¹ The DA, which governs the City of Cape Town and Western Cape Province, saw it as yet another attempt to seize powers of a functioning municipality in opposition hands.⁴² For commentators, it was yet another example of the ruling

prevention, and which includes patrolling and the package of plans approach (precinct, project and building plans);

- Institutional crime prevention which aims to mainstream situational and social crime prevention within City of Cape Town standard project implementation frameworks.

40 An example of how the City assisted offender re-entry is a job training programme for 55 young former prisoners. Through the City's Gateway Project, young people accused or convicted of a minor crime and referred by the National Department of Correctional Services, were provided with an opportunity to undergo on-the-job work experience in a City Department. This initiative is in line with the City's Youth Development policy which targets, among others, young people who have come into conflict with the law.

41 Hartley (3 July 2012) 4.

42 Ndenze (4 July 2012) 5.

party wanting to be in control of all law enforcement bodies, the previous case being the closing down of the Scorpions, as noted above.⁴³

5 Intergovernmental Relations

With no police force of their own, provinces' monitoring role of the SAPS is embedded in intergovernmental relations. This relationship must be comprehended against the constitutional framework of co-operative government amongst the three spheres of government.⁴⁴ More specifically, the Constitution provides for an intergovernmental committee (a MinMEC), consisting of the national Minister and the Members of the (provincial) Executive Committee (MECs) responsible for policing, with the aim of ensuring "effective co-ordination of the police service and effective co-operation among spheres of governments".⁴⁵ Such a committee has been established and meets regularly, but its impact on the functioning of the SAPS is limited. The MinMEC meets two to three times a year and then it is a case of nine MEC's competing for space on the agenda and the ear of the Minister of Police. With such limited opportunity and time for discussion it is unlikely that provincial, let alone local, crime and safety matters will receive adequate analysis and discussion. It is reported that, except for rare instances, there is little evidence to suggest that the SAPS has tailored its strategies to local needs.⁴⁶ As with MinMECs in other sectors, the national Minister usually dominates his or her ANC colleagues in eight provinces. The Western Cape, the only province under the control of the main opposition party, the DA, has thus far had little impact on strategic decisions. As there are no separate police forces whose co-ordination and co-operation must be secured, the forum is about the provinces' oversight function. This makes for fraught intergovernmental relations, because it is the only example in the Constitution where the usual hierarchical monitoring relationship is turned on its head – provinces monitoring the national government.

Although oversight includes the fairly intrusive appointment of an investigation or commission of inquiry, a province has little substantive

43 Dr Johan Burger, as cited in Hartley (3 July 2012) 4.

44 See Chapter 3 of the 1996 Constitution.

45 Section 206(8) of the 1996 Constitution.

46 Paremoer, Africa & Mattes (2012) 137. One example comes from the Western Cape. Nationally, the SAPS decided to abolish a number of specialised crime-fighting units, including one that focused on gang-related violence. While Cape Town has a very high murder rate, the location of these crimes is confined to a few townships where gang violence is rife, as mentioned above. The Western Cape Minister for Community Safety thus decried the national decision to abolish the specialist gang unit because it would prejudice local policing efforts to combat gang violence. See De Wee (6 September 2012) 5.

remedies; it can make recommendations to the national police Minister and introduce removal proceedings against a provincial commissioner, but it cannot fire the incumbent. A further dampener on vigorous monitoring is that if the province's good efforts pay off in improved policing, the SAPS, rather than the province, will garner the credit for improved performance. There has been no evidence emerging of any success of this model of reverse supervision.

Even where a province seeks to exploit the constitutional space of oversight, it is a rocky road. In ANC-controlled provinces, exercising this oversight role occurs within a strongly centralised party system. Even the DA-controlled Western Cape has encountered national resistance to its initiatives, as they are perceived as politically motivated. It makes, of course, political sense for the DA to improve policing in the Western Cape; its national platform for expansion is a record of better service delivery and achieving more effective policing through its oversight activities, which could be received well by electorates in other provinces demoralised by ineffective policing. The Western Cape's first initiative was the Western Cape Community Safety Act⁴⁷ aimed at formalising the oversight function, the constitutionality of which was disputed by the national Minister. The national Minister did, however, not take the matter to the Constitutional Court. Subsequently, the provincial government has appointed an ombudsman to deal with complaints against the police and is also moving full steam ahead to draft the regulations to the Act, which would, amongst others, deal with monitoring and evaluating police performance, as well as monitoring police detention. The Act grants the Provincial Minister wide powers in respect of monitoring police-community relations, monitoring police performance, and assessing efficiency and effectiveness of resource utilisation. The Provincial Minister is mandated to:

- monitor and record the interaction between the police and the community at crime scenes, protests or other scenes of police activity;
- monitor and evaluate the allocation, distribution and use of human and other resources for policing;
- inspect police stations, or other police premises in order to (a) monitor police conduct; (b) oversee the effectiveness and efficiency of the police service in the area; (c) oversee the effectiveness and efficiency of the police service in dealing with complaints from the community regarding policing in the area;
- evaluate the relations between the community and the police;
- monitor the treatment and conditions of persons held in police custody.

The second action was the call by Premier Helen Zille (the national leader of the DA) for President Zuma to deploy Defence Force troops in certain township

47 Act 3 of 2013.

where gang warfare raged seemingly beyond the SAPS's control. The request was turned down as being unnecessary. The third, and probably most controversial, initiative has been the appointment by Premier Zille in August 2012, contrary to the wishes of the Minister of Police, of a provincial commission of inquiry into the poor state of policing in Khayelitsha, the largest Black township in Cape Town and site of numerous incidents of mob justice. The Minister sought unsuccessfully in the Western Cape High Court an interdict to stop the Commission because, among other claims, the Province did not follow the appropriate intergovernmental procedures of consultation. The Minister then took the matter to the Constitutional Court, which agreed with the Western Cape High Court and the Commission proceeded.⁴⁸ The recommendations from the Khayelitsha Commission dovetail well with the aims of the Western Cape Community Safety Act, and three of the main recommendations relate to establishing an oversight mechanism, developing guidelines in relation to visible policing in informal settlements, and the entering into a memorandum of understanding between the SAPS and the Department of Community Safety so that the latter can monitor police stations and police conduct. The recommendations from the Khayelitsha Commission are centrally aimed at giving the provincial government insight into operational and strategic decisions of the police in the province. Such penetrative oversight is markedly different from the more passive oversight provided by the legislature. In a very real way, the province can now tell the police how it will measure its performance through active monitoring.

6 Overall Assessment

By all accounts, the current, very centralised, system to secure public safety is, euphemistically put, not working. A more accurate description is that South Africa is experiencing a public safety crisis. Not only do levels of violent and fear-inducing crime remain unacceptably high (although some declines are noted), but the institutions of state responsible for addressing crime and public safety are experiencing rapidly declining levels of legitimacy. In particular, reference is made here to the SAPS as government's embodiment of a "law and order" and "get tough on crime" strategy. Apart from this approach being ineffective, there is a growing chasm between the population in general and specifically disgruntled communities with reference to their socio-economic position, and law enforcement. They have resorted to self-help by enlisting private security where they can afford it and, on occasion, mob violence where they cannot. Some provincial governments, notably the opposition-held Western Cape, are seeking to take their monitoring mandate seriously, while metropolitan governments are devoting increasing resources to crime

48 *Minister of Police and Others v The Premier of the Western Cape*, Case 13 of 2013.

combating through their metropolitan police services. The national government is contesting the expansive interpretation of the constitutional provisions.

The question then arises as whether the very centralist nature of the state's efforts at securing public safety is the root cause of the problem. Does the answer, then, lie in the decentralisation of policing?

Centralised policing in a broad sense would appear to be a major cause of the problem. First, there are fundamental problems with the substance of current policies addressing crime and safety, as well as with the processes of policy-making. The national response to public security has been crime combating, a policy conceived and implemented without an all of government (and society) approach. Second, there is evidence that the SAPS has been ignoring provincial and local priorities, and therefore has been unsuccessful in its endeavours to bring down specific manifestations of crime. Equally important, the SAPS has by and large failed to engage constructively with community-based stakeholders, such as community-based organisations, and thus aggravating its own legitimacy woes.

Is the decentralisation of crime combating and prevention, then, the answer? For the National Planning Commission (NPC), the answer does not lie down this avenue, but in the re-invigoration of the national institutions. At a national level, the various organs of state, constituting the criminal justice system, do not co-operate well by effectively co-ordinating efforts. Moreover, the SAPS lacks professionalism in many respects and is plagued by poor management and corruption. The specific accountability institutions are also not succeeding in their task. In the NPC's analysis, the lack of effective provincial oversight does not feature as a contributing factor. This is not surprising as the NPC's *Diagnostic Report* decries the lack of capacity and abundance of corruption in provinces to perform even their basic functions of providing effective education and health services. The implicit view is that moves towards decentralising some policing functions to provinces will exacerbate the problem in most provinces. Thus, in the NPC's *Vision 2030*, the provinces do not feature in the policing context, but only in the socio-economic responses to crime. The NPC's five priorities to achieve a crime-free South Africa are thus:

- Strengthening the national criminal justice system, by ensuring better co-operation between the police, prosecution, judiciary and correctional services;
- Making the police service more professional;
- Demilitarising the police service;
- Building safety by using an integrated approach, focusing on the fundamental socio-economic causes of crime; and
- Building community participation in community safety. On this score, municipalities are expected to play an important role in the

establishment of community safety centres to build safe and healthy communities.

The NPC's approach of two-tracking state endeavours to secure public safety (policing remaining a central responsibility, while tackling the socio-economic causes of crime is an all of government task), resuscitates the inclusive and context sensitive approach of the 1996 National Crime Prevention Strategy in terms of which provinces and local government must intervene to deal with the roots of crime within their functional areas. We are in agreement with this approach, but would add the codicil that a modest asymmetrical devolution of policing powers to capable metropolitan governments may add some value to address localised crime conditions. This will also bolster the policing powers already claimed by provinces and cities which are responding to the needs of their fearful and despondent residents.

With respect to the second track of crime prevention, the need for a co-ordinated approach by all spheres cries out. The first step towards public safety will be to recognise that there is indeed a crisis at hand. Recognising a crisis, and doing so quickly, would bring a number of advantages, the most important being that it creates the opportunity and the pressure for innovation – for policy decision-makers to consider options that have hitherto fallen outside the prevailing paradigm. The second step is the non-centralisation of policy formation - an approach that emphasises inclusivity of all the spheres of government as well as the citizenry in an effort to build a common vision of a more just South Africa.

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Decriminalising Abortion in South Africa: Implications for the Unborn's Right to Life

Najma Moosa

1 Introduction

The 1975 Abortion and Sterilisation Act (ASA)¹ was the first statute to regulate abortion in South Africa. The ASA provided that abortion was illegal. Although the default legal position adopted by it appeared to be clearly pro-life, it nonetheless allowed abortion in certain circumstances. Although much more restrictive, abortion was also allowed in terms of the common law prior to the enactment of the ASA. With the formal advent of democracy in 1994, two parallel legal processes pertaining to abortion were simultaneously taking place alongside the transition from apartheid. The first process led to the statutory legalisation of abortion in 1996 when the ASA was replaced by the current statute regulating abortion, namely, the Choice on Termination of Pregnancy Act (CTOPA).² Unlike the ASA, the CTOPA assured a default legal position that clearly favoured a secular, pro-choice view. Its enactment also resulted in the offence of abortion being largely decriminalised. Since then it also became more politically correct to use the word "termination" instead of "abortion". The second process during the transition led to the adoption of a neutral position on the "right to life" clause³ in the interim Constitution⁴ which also contained South Africa's first justiciable Bill of Rights. A neutral position, because it is tantamount to fence sitting, implies support for either a pro-life or a pro-choice view but at the same time does not rule out the possibility of support for a combination of these opposing views. This neutral position remained unchanged in the current Constitution⁵ in terms of which a right to abortion is not clearly guaranteed and can therefore only be inferred from it. The CTOPA and the Constitution both entered into force in 1997, and in this order.

This essay will address and attempt to answer the following questions: Given that, during apartheid, legislation was already in place in terms of which abortion was possible, was it really necessary to introduce a new abortion law? Why was the old law simply not amended? What may have motivated, and

1 Act 2 of 1975.

2 Act 92 of 1996.

3 Du Plessis & Corder (1994).

4 Section 9 of the 1993 Constitution.

5 Section 11 of the 1996 Constitution.

what was achieved by, the new law uncharacteristically coming into operation literally days before a new Constitution? How has this new law fared since its inception? Is there any scope in the provisions of both the new law and the Constitution for it to be interpreted to protect the unborn? Is there any hope that criminal law and constitutional law (public law) can be combined with the already existing private law protections to provide the unborn with further protection?

The CTOPA did not receive blanket support from South Africans and was also not passed by the South African Parliament without controversy. It appears that in 1990⁶ and 1991⁷ South Africans had held opposing views on the ASA. The 1995 Report of the *Ad Hoc* Committee on Abortion and Sterilisation⁸ appointed to review the ASA, indicated that more “pro-life” than “pro-choice” submissions were received. The pro-choice position subsequently adopted by the CTOPA implies that the former may have been discounted. The conclusion reached by a reliable, though dated (2003-2006), study also indicated that most South Africans may still oppose abortion and view it as “wrong”.⁹ Opposing views on abortion appear to be reflective of a larger rift in the broader South African society that has not yet quite closed. There can be no denying that the ravages that apartheid left behind as a legacy for the majority of South Africa’s impoverished people included “unwanted” (accidental) children and “backstreet” (illegal) abortions. Although the large number of illegal abortions may have been touted as the main motivating factor for introducing the CTOPA¹⁰, this does not explain why, as recent newspaper reports and research studies highlight, illegal abortions continue unabatedly¹¹ and many children are still abandoned.¹² Salient points of some reports which are referred to in this Chapter paint a grim picture of abortion that closely resembles a scenario one would expect from a country in which it is still a crime and banned! This implies that the CTOPA appears to have largely served its intended purpose, but may not be doing so effectively nor adequately. Although pro-lifers are not necessarily anti-choice in all cases, the status quo implies that the discounting of the (majority) sentiment may have been a contributing factor. It may also imply that the adoption of a neutral constitutional position on abortion was

6 Du Plessis (1990) 44-59.

7 Du Plessis (1991) 339-357.

8 Nkomo (1995) vi.

9 Mncwango & Rule (2008) 6 -7.

10 See Sarkin (1995) 63.

11 See Farber (2014) 1 & 3 and Skosana (2014). A 2010 report (based on a 2008 study) indicated that 48.5% of abortions accessed by young women aged 13-19 were obtained at a place other than a hospital or clinic (unsafe). See Reddy *et al* (2010) 33.

12 See Blackie (2014).

little more than a convenient strategy to appease a pro-life sentiment, and may have had little to do with protecting the life of the unborn.

The legalisation of abortion may have meant that abortion no longer occupies a central position on the current political agenda. While it may therefore be thought that the choice of abortion for a contribution to the Festschrift may only be of mere historical value, it is clear from the above questions and current status quo that abortion remains an ambiguous and complex topic which still holds much current legal relevance and future interest.

The essay is divided into five sections, in addition to the Introduction, to address the stated questions. §2 provides a brief overview of the abortion statutes and focuses on the current abortion legislation. The question of “viability”, the ability of a foetus to independently survive outside the uterus or womb of the mother, forms the focus of §3 and is also a theme that straddles the essay. §3 outlines the compromising role, in favour of protecting developing life, that viability currently inadvertently already appears to play in defining and reducing the legal boundaries of abortion in terms of the CTOPA. It is contended that there may be more scope than meets the eye in the CTOPA to base a right to prevent the abortion of a *legally* “younger” (as opposed to a *medically* “older”) *viable* foetus. Such a novel interpretation has the potential to limit a woman’s choice to abort as from the point of legal viability onwards and thereby prevent an abortion at an earlier stage than the medical cut-off point for viability. §3.1 explains how such an interpretation of legal viability could be strengthened by the application of the existing private law based *nasciturus* rule in terms of which an unborn is deemed to have already been born when it is to its advantage. In typical cases where the *nasciturus* rule is applied, abortion is usually not the contested issue. However, since this rule appears to protect the interests of an unborn regardless of its “age”, as long as it is subsequently born alive, it is contended that it could therefore be invoked to prevent a pregnant woman from aborting a foetus as from the point of legal viability or even before this stage if the CTOPA is amended, as proposed in §4.1, to reduce the timeframe for abortion on request (demand). In both these instances the rule need not be amended nor would it be necessary to accord the unborn with legal subjectivity or personality, as has been suggested. As is currently the case, any interests accruing to the unborn during the pregnancy ought only to be secured with live birth. The application of the rule therefore has the potential to avert an abortion, which, if allowed to occur, would deprive the unborn of any such interests and negate the rule’s very operation. This will also allow for closer co-operation between public law and private law, rather than treating them as independent legal silos as is often the case. §3.2 provides practical examples pertaining to succession, foetal surgery, medical emergencies and

active and passive euthanasia to briefly illustrate possible ways that the *nasciturus* rule may be applied to protect legally viable fetuses and protect them against being aborted.

§4 examines possible ways forward by exploring various options, such as, amending the law (for example, by reducing the existing (extended) timeframe for an abortion on request), making adoption more attractive, as well as providing, as alternatives to abortion, for the proactive prevention of pregnancies. §5 briefly highlights the constitutional challenges associated with controversial CTOPA provisions that have resulted in recourse being had to the courts by pro-life parties who clearly are not readily going to concede. Although they have met with little success to date, the judgments in question did not leave them without hope that the position may change in the future. This is especially so since the Constitutional Court, which has hitherto only addressed the right to life in the context of capital punishment, has yet to do so in the context of abortion. A view was expressed that Christianity may have played a role in the restrictive nature of abortion law under apartheid¹³ until the interim Constitution.¹⁴ Although Christianity remains a dominant¹⁵ religion in South Africa, and this may partly explain why the court challenges were essentially initiated by Christian pro-life groups, Christianity, or religion generally, appears not to have had any impact on the new abortion and related laws which, as will be detailed in Section two and elsewhere, are clearly secular in nature. For this reason, and apart from cursory references thereto, the role of religion, or even culture for that matter, falls beyond the ambit of this essay.

§6 concludes the essay by highlighting that although a Constitutional Court decision on abortion has yet to be written, it may remain necessary to interpret both neutral and implicit constitutional provisions in support of the right to abortion. It is contended that the reasons for doing so may have little to do with whether life is revered and more to do with current socio-economic and fiscal realities. This may be borne out by the fact that it was only after 21 years of freedom that South Africa recently ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in January 2015.

2 Historical and Critical Overview of Abortion Legislation

2.1 The Common Law and the ASA

Prior to the enactment of the ASA in 1975, abortion in South Africa had not been statutorily defined, and guidance had to be sought in the Roman-Dutch

13 Du Plessis (1996) 74.

14 Du Plessis (2001) 439-466.

15 This can be gauged from population censuses taken in 1991, 1996 and 2001, although the latest (2011) census excludes religion as a consideration.

common law, and case law. The common law had severely restricted abortion and considered it to be a crime with only one exception - the defence of necessity.¹⁶ The ASA was intended to clarify the application of the common law.¹⁷ Although the expectation was high that the ASA would be a progressive law¹⁸, its “liberalisation” did not entail abortion on request (demand). It was pointed out that its aim was deemed to be to protect the “potential” life of the foetus against being killed.¹⁹ The Commission of Inquiry that had been appointed by the then apartheid government to review the problem of abortion consisted only of White males.²⁰ Unsurprisingly, the ASA applied equally to, and discriminated against, all women regardless of their race although it appeared to have discriminated between Black and White women given the latter’s preferred racial and class hierarchy over all other women.²¹ There was also a stage during its operation when the ASA overlapped with other laws that prohibited mixed marriages. This resulted in it being construed²² to be a racist law given that it was possible during this period to justify its use to deprive an unborn of life purely on the basis of its “mixed” race.

Abortion remained illegal under the ASA;²³ however, it retained the common law therapeutic exception²⁴ and extended the circumstances for allowing an abortion to include eugenic²⁵ and humanitarian²⁶ considerations.²⁷ The ASA contained a conscience clause which allowed doctors to refuse to perform an abortion without having to proffer any reasons;²⁸ the CTOPA does not contain a similar clear provision.

2.2 The CTOPA

The Preamble to the CTOPA clearly provides that the right to an abortion cannot be denied on the basis of race, sex or religion, and that the offence²⁹ of

16 A therapeutic abortion was legally allowed only if the life of the mother was in danger. See Hawthorne (1982) 238.

17 Hawthorne (1982) 238.

18 Strauss (1968) 459.

19 See Hawthorne (1982) 252.

20 Sarkin-Hughes (1990) 373.

21 Guttmacher *et al* (1998) 191. See also Rebouché (2011) 7-8.

22 See Du Plessis (1974) 231. The Immorality Act 23 of 1957 was repealed by the Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985.

23 See Section 2.

24 Sections 3(1)(a) and (b).

25 Section 3(1)(c). An abortion is permitted if the pregnancy would end in the birth of an infant with a severe mental or physical abnormality.

26 Section 3(1)(d). An abortion is permitted if the pregnancy resulted from rape or incest.

27 Sections 3(1)(a)-(e).

28 Section 9.

29 Burchell (2013) 557. See also Carstens & Du Plessis (2009) 587-634.

abortion has largely been decriminalised by it. Although the Preamble refers to access to abortion, it is of little legal value, and such right is also not clear from the text of the CTOPA.

As a secular democracy, what currently sets South Africa apart from all but three other countries in Africa,³⁰ where abortion is also legally permitted, is that it was the first country in which all women, that is, “any female person of any age”³¹ (including *minor* girls), acquired the unconditional right to obtain an abortion on request, without restriction as to reason, during the first trimester of pregnancy, that is, up to, and including, the first 12 weeks of gestation (which is roughly 10 weeks of pregnancy) as the upper limit.³² In the second trimester (from the 13th week up to, and including, the 20th week of gestation) abortion is permitted if a continuing pregnancy would pose a risk to the woman’s mental or physical health (therapeutic considerations), if it would end in the birth of an infant with a severe mental or physical abnormality (eugenic considerations), or if it resulted from rape or incest (humanitarian considerations). Additionally, and controversially, abortion is also available on request during the second trimester, if carrying the foetus to term would “significantly affect the social or economic circumstances of the woman” (social and economic considerations).³³ In the last trimester (after the 20th week, or “viability”) terminations are only available in very limited circumstances and are allowed only if the continuing pregnancy would endanger the woman’s life or result in a severe foetal malformation or a risk of foetal injury.³⁴

The CTOPA was amended in 2004³⁵ and 2008³⁶ to make provision for an increase in access to abortion by expanding both the pool of trained health care providers (doctors, midwives and nurses)³⁷ and types of designated public health facilities (State hospitals and clinics) that may now offer free abortion services throughout South Africa’s nine provinces. Yet, restrained practical access to abortion services continues³⁸, and the grant of the right to abortion to a larger group of women, including minors, may have led to an increase,

30 They are Tunisia, Zambia and Cape Verde. See “The World’s Abortion laws” (2014).

31 See definition in section 1 of the CTOPA. See also §5 below for a critical discussion of the implications for minor girls.

32 Section 2(1)(a).

33 Sections 2(1)(b)(i-iv).

34 See sections 2(1)(c)(i)-(iii).

35 Choice on Termination of Pregnancy Amendment Act 38 of 2004.

36 Choice on Termination of Pregnancy Amendment Act 1 of 2008.

37 Section 2(2) indicates that providers performing the abortion include medical practitioners, trained registered nurses and midwives.

38 In 2012 only 40 per cent of designated abortion facilities were operational. See Ludman (2012).

rather than an expected decrease, in pregnancies among adolescent girls.³⁹ There are cultures in which a young girl is only accepted as a woman once she has proved her fertility by having a baby.⁴⁰

Furthermore, abortion is available to all women, whether married, single, major or minor, at their request and with only their informed consent. However, the CTOPA does not contain a clear “conscience” clause that allows health care providers to refuse to perform an abortion, although such a right can be inferred,⁴¹ and may therefore conflict with provisions in the Constitution that allow for conscientious objection. Although objecting providers, therefore, are not forced to perform abortions, they must inform women seeking an abortion of their rights in terms of the CTOPA and provide them with related information to enable them to make informed choices⁴², and must advise minors to do so in consultation with their “parents, guardians, family members or friends”.⁴³ Minors are not obliged to heed this advice and therefore parents may not only have no knowledge of the abortion obtained by their minor daughters to begin with, but their consent thereto is also not necessary.⁴⁴ However, the independent choice of minors does not relieve parents of their duty nor the State of its responsibility to still take care of them in terms of constitutional provisions that may be interpreted to have more to do with their economic welfare than the minors’ best interests.

2.3 The Interim and Current Constitutions

It has been argued⁴⁵ that the interim Constitution did not deal with abortion because of disagreement among its negotiators. In seeking to reach a compromise between the two opposing views on abortion, the constitution makers adopted a neutral position on the right to life in both the interim and the current Constitutions. Neither Constitution therefore expressly provides for the right to an abortion on request. Section 9 of the interim Constitution simply stated that “[e]very person shall have the right to life”, while section 11 of the current Constitution states that “[e]veryone has the right to life”.

The African National Congress (ANC) (the then incoming, and still current, ruling party) negotiators initially indicated that for them abortion was one of those issues that could only be settled in a final Bill of Rights that was drafted

39 Mchunu *et al* (2012) 426–434.

40 “South Africa: Teenage pregnancy figures cause alarm” (6 March 2007).

41 Section 6 of the CTOPA provides that “[a] woman who in terms of section 2(1) requests a termination of pregnancy from ... [designated providers] ... shall be informed of her rights under this Act by the person concerned”.

42 Section 5(1).

43 Section 5(3).

44 Section 5(2).

45 See Du Plessis (2001) 440–441.

by a truly representative body. In hindsight, this was not what eventually transpired.⁴⁶

Several other provisions in the Constitution⁴⁷ clearly conflict with the neutral position adopted because a pregnant woman is also granted the constitutional right to reproductive autonomy which comes very close to her being afforded a right to abortion which overrides the rights of the unborn that she is carrying. Section 12(2)(a) explicitly recognises the right to make decisions concerning reproduction as part of the right to bodily and psychological integrity and guarantees the reproductive rights (construed to include abortion) and health of women.⁴⁸

The human rights contained in the Bill of Rights are not absolute. Section 7(3) provides that they are subject to the limitations contained in section 36, or elsewhere in it. Thus, the section 27(1)(a) right to access health care services is dependent on the availability of State resources (section 27(2)) and may therefore be limited, in terms of section 36 (general limitation clause), when these are lacking.

It can be inferred from sections 39(1)(a) and (b) of the Constitution (interpretation clause) that South Africa may only be obliged to apply the provisions of international United Nations (UN) instruments once it has ratified them. While it signed both the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR in 1994, and had already ratified the ICCPR in 1998, the South African government only ratified the ICESCR as recently as January 2015. While little reliance can be placed on, or further guidance obtained from, the provisions of the ICCPR (for example, see Article 6(1) for an interpretation contrary to that of section 11 (right to life) of the Constitution), the same cannot be said of the ICESCR. It is contended that the reason for the delay in ratifying the ICESCR may have been related to the creation of further financial expectations from, and strain on, State resources. For example, Article 10(2) of the ICESCR not only provides that “special protection” be accorded to pregnant women “during a reasonable period before and after childbirth” but that they also be “accorded paid leave or leave with adequate social security benefits” during this time. While South African law⁴⁹ currently provides new mothers with four months of unpaid maternity leave, it is up to employers to decide whether to offer paid maternity leave or

46 Du Plessis (1994) 145-163.

47 For example, Section 9 (equality clause) which provides for protection against unfair discrimination on grounds of, amongst others, religion, conscience, and belief, but also includes grounds like marital status, culture, sex, gender and pregnancy (sections 9(3) and (4)); section 10 (human dignity); and section 12 (freedom and security of the person).

48 See Du Plessis (1990) 72-73 for details.

49 See Section 25 of the Basic Conditions of Employment Act 75 of 1997.

maternity leave beyond four months. Thus, although the fact that statutory provision is already made for maternity leave can be seen as a positive measure by the State in favour of protecting the life of an unborn, Article 10(2) may yet create further financial expectations with the ICESCR's entry into force in South Africa in April 2015.

The Constitution does not contain a right to establish a family. However, Article 10(1) of the ICESCR appears to accord special status, and Article 23(1) of the ICCPR, special protection, for the family. The Constitution also does not explicitly contain any reference to the rights of parents or the protection of such rights, but clearly burdens them with the financial wellbeing of their children (including pregnant minors), for example, through its provision of a child's right to "family care or parental care" in section 28(1)(b). Such an interpretation is supported by the fact that section 27(1)(c) of the Constitution enshrines the right of everyone to access "appropriate social assistance" from the State if they are unable to support themselves and their dependants. This explains why mothers, who may be apprehended for abandoning unwanted children and face a range of criminal charges, continue to abandon them, often in the hope that someone will care for them. It is inevitably the State that ends up with the financial responsibility of providing support to such children through a Foster Child Grant (FCG). The Western Cape Province was reported to have the highest rate in the world of babies born with foetal alcohol syndrome (FAS).⁵⁰ Yet, the mothers of babies with FAS, who may have inflicted lifelong damage on their children because of heavy drinking during their pregnancies, still opt to give birth to their children. While the CTOPA allows women to have an abortion until the end of the second trimester of pregnancy for 'social reasons' without subjecting them to a potential criminal prosecution, a further financial incentive, the Child Support Grant (CSG), which is also provided by the State, may be a major motivating factor in the decision not to abort. While the liberality of the CTOPA may encourage women to fall pregnant and opt for an abortion, the CSG, or "womb fee" as it is also commonly referred to at the grassroots level, may be seen as a major financial incentive for young girls to fall pregnant and not to have an abortion.

A further conflict is evident in yet another important constitutional provision, namely, section 15(1), which provides that "everyone has the right to

50 Zolotova (2011) 398–399. FAS in South Africa has its roots in colonialism and the apartheid based tot ("dop") system. See Larkin (2015) who argues that: "The dop system is one in which employers pay their labourers cheap wine, or dops. Today, the dop system is no longer legal in South Africa, but alcoholism remains one of the major challenges facing the health services in the Western Cape ... Communities report that alcohol-related trauma, exceptionally high rates of TB, child and adult malnutrition, and Foetal Alcohol Syndrome (FAS) are common in the Western Cape."

freedom of conscience, religion, thought, belief and opinion". This provision appears to be wide enough to be invoked by all interested parties who may raise valid objections to an abortion. However, section 15 may hold special significance for objecting health care providers who can only rely on the CTOPA for an inferred right to object. As professionals, they are expected to provide abortion services. This is quite unlike the situation of other objectors, who may voice moral objections to, or theorise about abortion services, but who can safely ignore their views in their private lives. However, while objecting providers may be able to invoke section 15 or even section 23 (1) (unfair labour practice) of the Constitution, especially in cases where women repeatedly have 'elective' abortions, their right to object may be limited by section 36 when compelling medical situations or emergencies necessitate that abortions be performed.

Instead of allowing, and waiting for, the Constitution to finalise the abortion issue, as the ANC claimed should happen, the Constitution was not only enacted after the CTOPA, but is moreover expected to provide interpretative guidance with regard to ambiguous or conflicting provisions within the CTOPA, and to do so notwithstanding its own conflicting provisions in this regard.

Women constituted the majority of the members of the Committee reviewing the ASA.⁵¹ Part of the motivation behind the need to enact the CTOPA before the Constitution was enacted may have been based on the fact that at the time the struggle for gender equality was still a "stepchild of national liberation".⁵² In hindsight, it is contended that using the window period of opportunity that the transition provided may not have been the appropriate time to introduce the CTOPA and may have resulted in women being short-changed by it. Although the CTOPA, unlike the Constitution, clearly guarantees women the right to an abortion, like the CTOPA, the Constitution does not guarantee access to a legal abortion.

The ANC had in several policy documents⁵³ already expressed a pre-defined liberal position on abortion and may have been motivated by the neutrality of the interim Constitution on abortion to in fact speed up the process. The formulation of the CTOPA must also have been influenced by provisions which favour reproductive rights, for example, Article 16(1)(e) of the 1979 UN Convention on the Elimination of Discrimination Against Women (CEDAW), signed by South Africa in 1993 and ratified by it in 1995 without any reservations.

51 See Nkomo (1995) ii.

52 Andrews (2001) 326-358.

53 See ANC (1994) and ANC (1995).

There was division on the issue of abortion within the ANC itself and therefore the CTOPA was not passed by Parliament without controversy. The ANC did not allow its members to vote freely on the Bill according to their conscience, but compelled them to vote as a party.⁵⁴ Given that the ANC, as the majority ruling party, clearly did not have to worry about the CTOPA not being passed because of a lack of support, one has to question whether doing so meant that it may have harboured some doubts or insecurities in this regard. In the light of this, should the fact that many South Africans still consider abortion “wrong” not then be taken more seriously since the CTOPA has failed to make a difference thus far?

3 The Compromise Role of Viability in Defining and Reducing the Boundaries of Legal Abortion to Favour Life in terms of the CTOPA

The ASA did not define a “foetus”. The ASA, in the instances that it did permit abortion, allowed it at any stage of a pregnancy, that is, with no time restrictions, and therefore it appears that viability did not play a crucial role in abortion legislation prior to its legalisation. It is contended that with legalisation, the reverse may in fact be the case because the CTOPA has adopted, and operates within, a convenient trimester approach. The CTOPA, too, has not defined a “foetus”. Hence, guidance regarding the issue of “viability” is to be sought from the medical field. Given that the CTOPA clearly makes provision for abortion within restricted timeframes, it is contended that there does appear to be a time (viability) when the CTOPA itself can be deemed to oblige the State to step in and protect developing life.

Burchell sums up the current position as follows:

As a result of the process of *conception* an *embryo* is implanted on the wall of the maternal uterus. After about six weeks it acquires a recognisably human form (after which it is called a *foetus*) and begins, at 20 weeks [five months], to display signs of life (“quickening”). By about 24 weeks [six months] the foetus is able to sustain its life independently of its mother (“viability”). After about 36 weeks [nine months] it is, by the process of birth, expelled from the womb as a human being (as to when, in law, it is recognised as a human being).⁵⁵

Burchell’s summary may explain why legally the removal or loss of a foetus before viability would be defined as an abortion, and doing so after viability as a premature birth. However, from a medical point of view viability is not considered a fixed point in the development of the foetus but merely an estimate of its likely survival outside the uterus (womb). Given that traditionally it is medically acceptable that viability can range from around 24

54 Guttmacher *et al* (1998) 193.

55 Burchell (2013) 557 n 1.

to 28 weeks, it is contended that the position in South Africa is currently that the CTOPA has *legally reduced* the traditional medical upper limit from around 28 weeks (7 months) as the 'accepted' cut-off point for viability to after 20 weeks (5 months).⁵⁶ Viability therefore currently stands at the midpoint between when Burchell proposes it is attained (6 months) and what the medical upper limit may deem it to be (7 months). Given that abortion is currently only legally allowed, as an exception, after 5 months of pregnancy, it is contended that "viability" is, therefore, a factor that may be used to tilt the balance of life in favour of an unborn.

3.1 The Application of the *Nasciturus* Rule to Limit a Woman's Choice to Abort

According to the common law, a person is legally deemed to come into existence at birth. Hence, in terms of South African law, legal subjectivity only starts at birth. Legal personality therefore begins when the birth is complete, that is, when the child is separated from its mother, and is breathing.⁵⁷ Support for the definition of a "child" as a person under the age of 18 is found in both the Constitution⁵⁸ and the Children's Act.⁵⁹ The ASA did not make provision for any ring-fencing of the moment of life. While the common law position that legal subjectivity only starts with live birth may have been regarded as archaic,⁶⁰ none of the above laws appear to have had a basis in Christianity or any other religion. However, that the law had, during apartheid, not formally accorded the foetus any legal status until it was born was probably acceptable, given that the default legal position in terms of the ASA was that abortion was illegal and therefore an unborn had a greater chance of survival than it would currently have in terms of the CTOPA. Protective legal measures exist in both the common law and statutory law to safeguard the interests of the unborn. A typical example is the *nasciturus* rule. However, this rule will only help an unborn to secure its interests if it was subsequently born alive. It has been pointed out that a foetus would be disadvantaged by the *nasciturus* rule

56 Currently, there is no internationally accepted, uniform gestational age that defines viability, scientific thresholds ranging from around 23 to around 27 weeks. See South Australian Perinatal Practice Guidelines Workgroup (2013) which makes the following important points: "Infants who are born prematurely at 21 weeks gestation or earlier are not considered viable. Their extreme physical and physiological immaturity means that survival is not possible with current technology and expertise. Infants born later, but still extremely early, for example between 22 and 24 weeks gestation, may be able to be supported with intensive care, but have a high risk of dying despite treatment. This period is sometimes referred to as the 'threshold of viability'".

57 Carstens & Du Plessis (2009) 588 and 593.

58 Section 28(3).

59 Section 17 of Act 38 of 2005.

60 See Barnard *et al* (1978) 346.

because the premise upon which its operation depends, namely, subsequent live birth, will not be present because of an abortion.⁶¹ The requirement of “live birth” was therefore not regarded by all as an insurmountable obstacle and a view was expressed some 25 years ago already that the South African law was woefully remiss in providing sufficient protection to the unborn and that the time had arrived to consider amending the law. It was argued that more protection could be afforded to a foetus by according legal subjectivity and personality to it through an extension of the *nasciturus* rule as a possible “preventive protection” measure.⁶² While conceding that according legal subjectivity and personality may be stretching the law too far and may therefore garner little support, it is contended that the private law based *nasciturus* rule, because it is available to an unborn regardless of age or stage of development, may be able to work in conjunction with the CTOPA and the (neutral) Constitution in preventing the abortion of a legally viable foetus. Furthermore, if the CTOPA is amended so that the period for an abortion on request is reduced to the first trimester as suggested in §4.1, the rule could ensure such protection even before legal viability. The following examples are further indications that the rule could be invoked to prevent an abortion in terms of the CTOPA.

3.3 Practical Examples of the Application of the *Nasciturus* Rule to Prevent an Abortion

A woman can have a lawful abortion today on request until the end of the second trimester of pregnancy. Hypothetically, if an unscrupulous pregnant woman has been widowed, and no-one is aware of her pregnancy, nothing legally precludes her from circumventing the application of the *nasciturus* rule in matters pertaining to succession by furtively seeking an abortion in order to augment her share of the inheritance. However, the outcome could be different where the woman’s pregnancy was known and the foetus was viable, if the *nasciturus* rule was utilised. If the CTOPA is amended as proposed in §4.1 the abortion could be prevented at an even earlier stage.

There is a clear indication in the CTOPA that a foetus is capable of suffering severe physical or mental abnormality⁶³ and may be at risk of severe malformation⁶⁴ or of sustaining injury.⁶⁵ It can, therefore, be inferred from these provisions, together with the Act’s determination of gestation or age by reference to periods of time, that viability ought to be a factor that could be

61 See Du Plessis (1976) 17.

62 The theory of extending the *nasciturus* rule as a “preventive protection” measure was proposed in Du Plessis (1990) 49-52 and Du Plessis (1991) 339, 348-350 & 353-354.

63 Section 2 (1)(b)(ii).

64 Section 2 (1)(c)(ii).

65 Section 2 (1)(c)(iii).

used to accord a foetus both “mercy” and “dignity”. Specialist doctors in South Africa are now performing open (intra-uterine) foetal surgery in order to avert pain and suffering to a growing foetus, and to give it a greater chance of a normal life.⁶⁶ A pertinent question would therefore be whether the *nasciturus* rule could be invoked by interested parties, like health care providers, to prevent a lawful abortion of a (legally) viable foetus in cases like these?

Although an earlier radical “pro-choice” view advocated,⁶⁷ in the context of a mother giving up her life to preserve that of a foetus where it poses a threat to her life or health, that such a pregnant woman be afforded the right to refuse emergency medical treatment in order to grant her unborn life when an emergency warranted a therapeutic abortion, such a situation will be dealt with very differently today. It is expected that if the pregnancy (foetus) threatens the life of the woman, a doctor will be duty bound to choose “the” life of the mother over “a” potential human life and provide an abortion as an emergency service when the woman’s life is at stake. The mother’s life would be deemed the more valuable of the two and the doctor cannot be found guilty of a crime since his or her conduct would be justified on the basis of necessity. Although there was no similar ground of justification (necessity) in this case, the Court in *S v Mshumpa* ruled that the killing of an “unborn child” did not constitute murder.⁶⁸

However, it remains to be seen whether the *nasciturus* rule can be of assistance to an unborn to prevent an abortion if an ill, pregnant woman is requesting active (as opposed to passive) euthanasia. Active euthanasia is a form of mercy killing and can occur when a person helps another to commit suicide. It is tantamount to murder and currently illegal in South Africa.⁶⁹ The unborn is out of the equation because its life does not count till its birth, and therefore there ultimately also is only one life at stake. In a recent groundbreaking decision in April 2015, the North Gauteng High Court in *Stransham-Ford v Minister of Justice and Correctional Services and Others*⁷⁰ ruled in favour of a doctor assisted suicide. Given that the decision goes contrary to the existing legal position, the Justice Ministry has, not surprisingly, indicated that it would appeal the judgment. However, the case appears to suggest that the current legal position may be subject to change in the near future. If, and when this

66 See Cole (2014).

67 See Barnard *et al* (1978) 349.

68 In *S v Mshumpa* 2008 (1) SACR 126 (E), the Court ruled that the perpetrators at most may be prosecuted only for an assault on the prospective mother.

69 Killander (2009) 84.

70 *Stransham-Ford v Minister of Justice and Correctional Services and Others* Case Number (27401/15) [2015] ZAGPPHC 230 (4 May 2015). See also Hartleb (2015).

happens, it may also mean that an unborn will be entitled to even less protection than it currently has.

The position with passive euthanasia is quite different since it is currently not considered unlawful.⁷¹ For example, the removal of life support may be permitted at the request of close relatives of a pregnant patient who is in a permanent coma and is certified to be clinically dead. In such a case the unborn may or may not, depending on the stage of the pregnancy, abort spontaneously or survive when delivered. However, notwithstanding the fact that the law does not afford an unborn any rights until its birth, the CTOPA does appear to provide it with protection from the time of legal viability by limiting a woman's choice to abort from that point onwards. This position would lend support to a court ruling that it will not condone keeping such a woman on life support merely to allow an unborn that has not reached the stage of viability or may be far from reaching it to be safely delivered, especially if the woman's personal views are unknown. However, with the aid of the *nasciturus* rule, the matter could be viewed differently if a foetus has reached legal viability or is very near to reaching it. In such a case, and especially where family members may be giving expression to the informal or formal wishes of the woman, and are able to substantiate them, it is contended that the "best" interests of the unborn would be protected by keeping its mother on life support until it is able to be safely or prematurely delivered. However, if the woman has informally during her lifetime, or formally through a (living) will, indicated otherwise, this raises two further difficult questions: should the wishes of such a brain dead woman count and should the fact that the foetus may or may not have reached the point of viability matter? If the *nasciturus* rule is there to preserve the interests of the foetus, and the question is: preserve the life of the 'to be born' foetus against the 'death' of the brain dead mother - would (potential) life not trump death? In this equation, why should the wishes of the mother be of any value, whether known or unknown? Does the *nasciturus* rule not apply from the moment of conception, so viability is not in issue? However, perhaps there is value in the viability element combined with the *nasciturus* rule, to tip the balance in favour of the (to be born) foetus? A further thought that comes to mind is: could the *nasciturus* rule be applied after viability to deny a legal abortion? In a recent article, adopting a view which may be more in line with the law, McQuoid-Mason indicates that unlawfully and intentionally keeping a pregnant brain dead woman alive could result in a criminal charge of violating a corpse.⁷²

71 Currie & De Waal (2013) 267.

72 McQuoid-Mason (2014) 44-46.

4 The Way Forward

It is contended that the following options could be considered so that an abortion either occurs early (and even before legal viability) or is avoided altogether by preventing pregnancy and through other legal measures. All options ultimately involve elements of choice and accountability.

4.1 Amending the CTOPA and Related Laws

Abortion in terms of the CTOPA is legally available on demand during the first two pregnancy trimesters for various reasons. As already indicated, a first trimester abortion may occur on request, that is, without having to provide any reason. Although some of the second trimester reasons may be serious, for example, rape, it is contended that none of the reasons (humanitarian, therapeutic, eugenic or social and economic considerations) that would justify an abortion in the second trimester would justify having to wait until such an advanced stage of pregnancy to have an abortion. It is proposed that a possible way forward would be to consider amending the CTOPA (and related laws) so that the default position would be to allow an abortion on request in the first trimester only; at any stage thereafter only cogent medical grounds would afford pregnant women an opportunity to make an informed choice to abort. The CTOPA's 'legal' earlier determination of viability should remain because it creates a balance between these two extremes, favours life, and has the potential to serve as a guide when dealing with the application of the *nasciturus* rule which could be used to protect an unborn from the beginning of four months rather than only from the beginning of six months (legal viability).

The motivation for the default position to be limited to the first trimester is explained as follows. Section 1 of the CTOPA refers to "medical" and "surgical" abortions without defining what is meant thereby. A medical abortion occurs through the use of prescription drugs and is less physically invasive than a surgical abortion which occurs by means of instrumentation. A medical abortion will allow a woman to self-induce an abortion in the confines and privacy of her own home with little need for medical supervision. However, abortifacient drugs are scheduled drugs and not readily available over the counter at pharmacies. While approving doctors may provide scripts to obtain such drugs and may themselves also dispense them, not all doctors are pro-choice. Although there are "ways" for women to obtain such drugs, these may involve time which is of the essence to a pregnant woman carrying a growing foetus. One such way would be if a woman, who knows that she is pregnant and who knows that her doctor may not consent to an abortion, still goes to her doctor and through, for example, feigning an ulcer, may still obtain the same or similar drugs from the doctor or, if he or she does not dispense such drugs, a script from him or her to legally obtain it from a pharmacy.

Although a pregnancy test may show a positive result, or a menstrual period may be missed which may indicate a pregnancy, providers are usually only able to perform an abortion at both private clinics and State institutions when the foetus is over one month old. It is contended that both the “mother” and the “baby” become the victims of such an abortion when it occurs at this early, yet “late”, stage. Furthermore, given that currently a surgical abortion may be delayed because it may only be initiated once a foetus is detected, there is no such thing as a “quick” abortion. It is therefore further contended that an abortion should be encouraged to occur as early as possible, and preferably medically through drugs (because that procedure may be safer and less invasive than a surgical abortion), in order to avert both an unborn and its mother any further “pain and suffering”. This contention is based on the latest research which indicates that clinically life may also begin with “brain birth” and which highlights that the human brain begins forming three weeks after conception and begins to function in the fifth week after conception.⁷³ Women who have endured an abortion can attest to the physical and psychological trauma that invariably follows (especially when the life of the foetus has been unnecessarily prolonged) and which they often have to bear alone. Allowing women to self-abort and to do so early in the pregnancy will afford them both the dignity and privacy which the CTOPA, by giving them alone the choice to an early abortion, must have intended to be the case. Support for this view may be found in the Preamble to the CTOPA which emphasises choice in the context of an ‘early, safe and legal’ abortion and section 14 of the Constitution which guarantees everyone the right to privacy. Research conducted in the Western Cape Province highlighted that the prevalence of failed attempts at self-induced unsafe abortions persisted during the first trimester and resulted in increased numbers of second trimester legal abortions. Of the small sample of women, a large number were Black and unemployed and had resorted to using herbal products or tablets bought from unlicensed providers.⁷⁴ In 2010, second trimester abortions accounted for 25 per cent of all abortions.⁷⁵

Further, it appears that a female prison inmate (a criminal) in South Africa will probably stand a better chance of having a safe abortion than a poor black woman living in a township who has to resort to an illegal abortion or abortifacients. It is currently possible for inmates to have an abortion in terms of the CTOPA at State expense albeit only during the second and third trimesters

73 Information obtained from the website of “ZERO TO THREE”, a national non-profit organisation.

74 See Constant *et al* (2014) 302-305.

75 Boland (2010) 1–23.

but not on request during the first trimester.⁷⁶ While this position would need to be rectified, it in any event appears that the Constitution⁷⁷, in addition to its equality provision (section 9), also permits inmates to consult with, and be attended to by, their own private medical practitioners at their own cost. This therefore provides women with a loophole, and a means with which to obtain a first trimester abortion with a doctor's assistance; and neither could be found guilty of having transgressed the CTOPA or the Correctional Services Act.

4.2 Preventing Pregnancy and Other Legal Measures

Is sterilisation a better socio-economic alternative to abortion in South Africa? It is contended that depending on the age of the woman, it may or may not be a viable solution but that 'implanon', a new, user friendly contraceptive device introduced in 2014, and which has been made freely available, may have taken away the need to consider such a drastic step for women regardless of their age. This is explained as follows. Women use contraception as a preventative measure when they do not want children at a particular (usually early) stage of their life. Sterilisation, because of its permanency, may be a viable solution for older women who already have children. However, sterilisation, while it may prevent pregnancies, does not exclude the risk of contracting deadly diseases, like HIV/AIDs (a pandemic in South Africa), and will still require the use of condoms which may help in preventing the transmission of sexually transmitted infections, including HIV, which can pass through the skin of the penis or vagina. Men who fail to use condoms may ultimately cost many teenage mothers their lives, when HIV turns into full-blown AIDS. The pro-life ASA regulated both abortion and sterilisation. It may therefore even be possible to construe from the fact that abortion and sterilisation are currently separately regulated⁷⁸, and given that sterilisation has a more permanent outcome whilst a woman undergoing an abortion may have more children, that the CTOPA ultimately also favours the preservation of life.

In 2013, the then Minister of Health expressed the view that young girls are "using abortion as contraception",⁷⁹ which confirmed that abortion had become a form of failed contraception in South Africa in spite of a contrary assertion in the Preamble to the CTOPA. It also highlights that contraception may not be effective or properly utilised. This has led to the introduction of "implanon", an implant that not only prevents ovulation, but is effective for three years.

76 See Regulation 7(9)(b) of the Regulations accompanying the Correctional Services Act 111 of 1998 which were promulgated in 2004 and amended by the Correctional Services Amendment Act 25 of 2008.

77 Section 35 (2)(f)(iv).

78 The Sterilisation Act 44 of 1998.

79 See Halata (2013).

Although there is no contraception that can claim to be 100 per cent effective, its effect is reversible and it is deemed to be 99.95 per cent effective.⁸⁰ By preventing pregnancy, “implanon” will hopefully allow women better reproductive freedom than an abortion. Since the effect of “implanon” is temporary, it may therefore be more a more attractive option than sterilisation. Although it will also still require the use of condoms to prevent infections, it is certainly a welcome and positive step in the direction of reducing abortions. It is therefore a great pity that it was only launched in South Africa in 2014 and not 17 years ago when it was first made available in Indonesia in 1998 when the CTOPA was barely a year old.

We allow the abandonment and infanticide of babies without seriously considering or exploring other viable legal alternatives to abortion. There are many women whose careers may have stood in the way of them having children or who may have decided not to have children of their own. There are also many women who cannot bear children naturally and have to go through great pain and expense to do so through an artificial process. There are also many parents who have lost children. Adoption, in contradistinction to abortion, may also be permanent. For example, while the outcome of an abortion is the permanent loss of life of a “yet to be born” foetus, the outcome of an adoption may also be the permanent relocation of a child with a couple who desires the experience of parenthood. Adoption is also a viable option for an unmarried prospective mother who may have contemplated having an abortion over giving birth to a child out of wedlock for fear of stigmatisation or for economic reasons. However, adoption may also be a viable option for mothers in cases other than these. Adoption will also allow the prospective biological father of such an unwanted unborn who is able to support it, an opportunity of fatherhood in ways that the CTOPA will never be able to assure him. Simplifying the complicated process and requirements for legal adoption as set out in Chapter 15 of the Children’s Act could, for example, provide many people, both locally and abroad (inter-country adoption), with the opportunity of parenthood. Unlike the *nasciturus* rule as it currently applies and which does not protect rights unless an unborn is subsequently born alive, an adoption order does not terminate any property rights a child may have before the adoption.

80 The website medicines.org.uk explains that: “Nexplanon is a radiopaque, non-biodegradable, progestagen-only, flexible implant preloaded in a sterile, disposable applicator. Each radiopaque implant contains 68 mg of etonogestrel; the release rate is approximately 60-70 µg/day in week 5-6 and has decreased to approximately 35-45 µg/day at the end of the first year, to approximately 30-40 µg/day at the end of the second year and to approximately 25-30 µg/day at the end of the third year.”

5 A Future Judicial Stance in Relation to the *Status Quo*

Given controversial provisions of the CTOPA, which include not requiring parental knowledge or “participation” for any type of abortion, it is not surprising that these issues were among those raised in judicial challenges brought in relation thereto.

Christian pro-life groups have, in two separate High Court cases decided in 1998 and 2004, unsuccessfully challenged the constitutionality of the CTOPA. It, therefore, seems that there is little point for the pro-life lobby to continue with a legal, or even a constitutional, challenge to abortion given that from the point of view of the Constitution itself (which “locks in” support for abortion), it will more than likely be unsuccessful. During the period of the operation of the interim Constitution, the Constitutional Court in its first case, *S v Makwanyane*, abolished the death penalty.⁸¹ It considered the right to life in the context of capital punishment and not abortion. Given therefore that there has as yet not been a Constitutional Court decision which pertains directly to abortion and which provides the last word on it, the abortion issue may not have been decided “once and for all”, as many believe. However, it was predicted that if the Constitutional Court were to take its cue from private law, it would probably not recognise the foetus as a legal subject worthy of constitutional protection.⁸² Having regard to what is implicit in the following ruminations on some of the interim Constitution’s implications for abortion by Mahomed J and O’Regan J, in their separate judgments in *S v Makwanyane*, such prediction may not have been wrong. Mahomed J states that:

[T]he Constitution...prescribes in peremptory [definite] terms that “every person shall have the right to life”. What does that mean? What is a “person”? When does “personhood” and “life” begin? Can there be a conflict between the “right to life” and the right of a mother to “personal privacy”...and her possible right to the freedom and control of her body?⁸³

O’ Regan J holds that:

[T]he right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life ... This concept of human life is at the centre of our constitutional values.⁸⁴

In 1998 (the CTOPA came into operation in 1997), Christian pro-life groups unsuccessfully challenged the constitutionality of the CTOPA on the ground

81 *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 22.

82 See Du Plessis (1994)162.

83 *S v Makwanyane* para 268.

84 *S v Makwanyane* para 326.

that it violated the right to life of the foetus in *Christian Lawyers Association of SA and Others v Minister of Health and Others*.⁸⁵ McCreath J rejected the challenge on the basis that the word “everyone” used in section 11 (the right to life) of the Constitution did not include a foetus within its ambit and that therefore a foetus was not a bearer of rights (yet he refers to the unborn as a ‘child’).

Currie & De Waal express the following view regarding the first *Christian Lawyers* case:

[T]he issue of the constitutionality of permissive abortion legislation cannot simply be reduced to the question of whether the foetus is a person ... the question is whether the state has a constitutional *duty* to protect developing human life ... If so, the extent of the duty must be established.⁸⁶

As indicated, the CTOPA governs abortions up to and including the point of viability. Given that an abortion thereafter will only be legally allowed in certain exceptional circumstances, does this not also imply that the CTOPA therefore can be interpreted to mean that the State would be responsible for the welfare and protection of the foetus from the time of viability until its birth? Although the first *Christian Lawyers* case was not expected to consider the matter from this angle, it is contended that such a challenge in the future is not precluded, and that the possibility that the unborn will be entitled to State protection once it has reached the stage of legal viability cannot be ruled out entirely.

The outcome of the first *Christian Lawyers* case did not discourage Christian groups from bringing a second challenge to the CTOPA in 2004.⁸⁷ It is contended that while the second *Christian Lawyers* case initially also did not rule out the possibility of a future challenge in other courts, including the Constitutional Court, the 2005 Children’s Act may have laid any such challenge to rest. In this case it was argued that minor girls below the age of 12 were not capable of giving informed consent, as defined by the CTOPA, without parental involvement. Although the plaintiff’s claims were dismissed in this particular case, it appeared that the Court, per Mojaelo J, may have left the door open to deny an immature minor the right to an abortion without parental involvement.⁸⁸ However, this may not be the case after all, because in 2005 legislation pertaining to the child was amended by the Children’s Act. Although some of its provisions came into operation earlier (2007), all the other

85 *Christian Lawyers Association of SA and Others v Minister of Health and Others* [1998] (11) BCLR 1434 (T) 1435.

86 Currie & De Waal (2013) 266.

87 *Christian Lawyers’ Association v National Minister of Health and Others* [2004] (10) BCLR 1086 (T).

88 *Christian Lawyers’ Association v National Minister of Health* [2004] 1094 & 1104.

provisions, including section 129, only came into force in 2010. Section 129 nonetheless defers to the CTOPA. The CTOPA, in turn, defers to the Constitution which, given its support for abortion as a reproductive right, would probably support an interpretation and conclusion requiring no need for parental consent.

Section 129 of the Children's Act sets the age limit for consenting to medical treatment at 12 years. However, section 129(1) clearly states that it is "subject to" section 5(2) of the CTOPA in terms of which "no consent other than that of the *pregnant woman* shall be required for the termination of a pregnancy" (emphasis added).

The CTOPA's definition of "woman" means that even a minor girl under the age of 12, regardless of her maturity and capacity, has the right to give confidential permission for an abortion to be performed on her without the consent of her parents or guardians. This also technically means that a seven-year-old girl (a minor, nonetheless) who menstruates and is therefore able to fall pregnant can have an abortion regardless of whether or not it may be in her "best interests" which in terms of both section 28(2) of the Constitution and section 9 of the Children's Act ought to be 'paramount'. Two South African girls aged nine and ten are reported as having given birth in 1966 and 2009, respectively.⁸⁹ The former would not have been able to have an abortion in terms of the ASA but the latter would have been eligible in terms of the CTOPA. Thus, a minor, who is not able to possess an ID document in South Africa until the age of 16, and who is considered not to have sufficient discretion to vote in elections until the age of 18, will be able to have a legal abortion at any or whatever age. It therefore does seem that it would be futile for a parent to try and stop a minor's abortion through a court challenge in the future.

Hawthorne has argued that the mere existence of the ASA provided a sufficient basis for the protection of the rights of prospective fathers.⁹⁰ However, the CTOPA does not afford men any assurance of fatherhood. It is irrelevant today whether men, because of their maintenance obligations, may want to raise a child by themselves or may be reluctant to become fathers. If unmarried, it may be understandable that women may want to make the decision to abort alone. The fact that the law requires unmarried fathers to contribute to the maintenance and upbringing of their children, and the fact that their views are not taken into consideration with regard to an abortion, may only be questioned but not challenged, given that the CTOPA assures that

89 There is a long list of known biological mothers under the age of 11, from as young as five. See ABC News Point (15 July 2015).

90 See Hawthorne (1982) 278.

women alone are to make a choice. It is contended that while fathers currently may be unable to influence a woman's decision to keep a child, a question that may yet be open to challenge is whether men, who do not want to be fathers, will be able to influence a woman's decision so that she in fact has an abortion. The latter scenario has already had deleterious consequences for an unborn, and the undue "pain and suffering" it must have endured, when in *S v Mshumpa*⁹¹ an unmarried man who did not want to become a father had arranged for the killing of his unborn at 38 weeks when its birth was imminent.

6 Conclusion

The ASA paradoxically did not confer all rights on an unborn. The CTOPA preceded the Constitution and therefore it was not necessary for the ASA to have been repealed by a constitutional or judicial challenge. The CTOPA, in turn, may not necessarily spell the death knell for life in all instances because several of its provisions may be interpreted to imply that the State may yet be duty bound to protect the unborn from the time of legal viability. It appears that it remains both necessary and possible to bridge the gulf between competing pro-life and pro-choice perspectives on abortion in South Africa. A future review of the CTOPA, and other South African laws affording protection to the unborn, should therefore not be ruled out.

The CTOPA may have many shortcomings. The manner in which it has dealt with controversial issues may even have backfired to be the very obstacles standing in the way of its successful implementation today. It may yet still face a Constitutional Court challenge. However, the CTOPA will not be abolished any time soon for reasons that may have more to do with fiscal pragmatism on the part of the State than either the welfare of the unborn or of the most underprivileged women, or, in the case of minors of all ages, their best interests. More than a decade ago we were alerted to the fact that the 'prosperity gap' between the 20 per cent rich ('overwhelmingly white') and the 80 per cent poor population in South Africa had not been closing fast enough since the advent of democracy.⁹² The CTOPA may justifiably still be viewed as a 'first world developed' law in a 'third world developing' country. The fact that South Africa has only very recently ratified the ICESCR lends further support to this view. The extended timeframe in terms of which abortion on request is currently permitted may justifiably be in need of reduction. Yet, realistically, legal abortion has to remain a woman's personal choice until the elimination of situations, such as the following: husbands or partners who are abusive and poor providers; husbands or partners who unreasonably withhold consent to an abortion; and contraception that may fail even when properly

91 *S v Mshumpa* 2008 (1) SACR 126 (E).

92 See Du Plessis (2002) 5-6.

utilised. Ultimately, whether or not women exercise the choice to have an abortion, is a matter of individual, cultural and religious conviction and not the function of the government or religious bodies to dictate. The CTOPA, by assuring women of a right to decide not to become mothers, merely provides them with a choice. When they do so indiscriminately and unnecessarily delay an abortion, it is a strong indicator that their own moral attitudes towards a developing foetal life may have changed. The mere possibility of a future review of the existing law and of a Constitutional Court challenge highlights the fact that the last word on abortion in South Africa has yet to be written.

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Bank Secrecy: Implementing the Relevant Provisions of the United Nations Convention against Corruption in South Africa

Jamil Ddamulira Mujuzi

Abstract

For many decades South African law has recognised a bank's duty to keep its client's information confidential. This is popularly known as bank secrecy. However, this duty is not absolute. National and international law provide for circumstances in which a bank may disclose information relating to a client. The UN Convention against Corruption, which South Africa ratified in 2004, has three Articles which deal directly with the issue of bank secrecy, namely, Articles 31(7), 40 and 46(8). The purpose of this essay is to discuss whether South Africa has measures in place to give effect to Articles 31(7), 40 and 46(8) of the UN Convention against Corruption.

1 Introduction

For many decades South African law has recognised a bank's duty to keep its clients' information confidential. This is popularly known as bank secrecy. However, this duty is not absolute. The law also provides for circumstances in which a bank may disclose information relating to a client.¹ These exceptions are provided for under common law, statutes and also some of the multilateral and bilateral international treaties to which South Africa is a party. The multilateral treaties include the United Nations Convention against Corruption,² the United Nations Convention against Transnational Organised Crime,³ the African Union Convention on Preventing and Combating Corruption,⁴ and the Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters.⁵ The bilateral treaties include the Mutual Legal Assistance in Criminal Matters Treaty between the Republic of South Africa and the Republic of India⁶ and the Convention between the Republic of South Africa and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income.⁷ South Africa ratified the

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- 1 These exceptions are discussed later in this essay.
 - 2 Articles 31(7), 40 and 46(8)
 - 3 Articles 12(6) and 18(8).
 - 4 Article 17.
 - 5 Articles 2(3) and 20(3).
 - 6 Article 4(3).
 - 7 Article 25(3).

United Nations Convention against Corruption in November 2004 and South African courts have held that this treaty, although not yet domesticated in South African law, imposes obligations on South Africa which must be complied with. For example, in *S v Shaik and Others* the Constitutional Court held that:

South Africa has ratified the United Nations Convention against Corruption and thus bears international law obligations under it ... Article 31 of that Convention requires States Parties to legislate to provide for confiscation of the proceeds of crime or property the value of which corresponds to that of such proceeds to the greatest extent possible.⁸

In *Glenister v President of the Republic of South Africa*, the Constitutional Court held that Article 6 of the UN Convention against Corruption "imposes an obligation on each State party [including South Africa] to ensure the existence of a body or bodies tasked with the prevention of corruption".⁹ In *Potgieter v Tubaste Ferrochrome*, the Labour Appeal Court held that South Africa is obliged by the UN Convention against Corruption to protect whistle-blowers.¹⁰ Courts in different African countries, such as Namibia,¹¹ Kenya¹² and Seychelles¹³ have also emphasised the importance of the UN Convention in the fight against corruption. This treaty has various provisions dealing with the issue of bank secrecy. The first is Article 31 which provides for freezing, seizure and confiscation of proceeds derived from corruption or property, equipment or other instrumentalities used in or destined for use in corruption. Article 31(7) provides:

8 *S v Shaik* para 73.

9 *Glenister v President of the Republic of South Africa* para 183. However, in *Helen Suzman Foundation v President of the Republic of South Africa and Others*; *Glenister v President of the Republic of South Africa*, the Constitutional Court did not refer to the UN Convention against Corruption in holding that the government has a duty to establish an independent corruption fighting unit.

10 See *Potgieter v Tubaste Ferrochrome* para 14: "The fostering of a culture of disclosure is a constitutional imperative as it is at the heart of the fundamental principles aimed at the achievement of a just society based on democratic values. This constitutional imperative is in compliance with South Africa's international obligations. Article 33 of the United Nations Convention against Corruption (UNCAC) enjoins party states to put appropriate measures in place 'to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences' established in accordance with that convention."

11 *S v Goabab* para 15 and *Shalli v Attorney-General* para 15.

12 *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission* and *Okiya Omtatah Okiiti v Attorney General*.

13 *Dugasse v R* para 25.

[E]ach State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

Article 40 of the treaty provides that:

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

The above two provisions deal with the issue of bank secrecy in a domestic context. That is, the information is needed for the purpose of investigating or prosecuting or combating corruption at a domestic level. Article 46, which deals with mutual legal assistance between states parties to the Convention, provides that: "States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention."¹⁴ If a state party requests mutual assistance in obtaining bank records, for example,¹⁵ Article 46(8) provides that: "States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy." The effect of Article 46(8) is that South Africa has an international obligation to assist other countries in the fight against corruption, even if the information that is being requested by those other countries requires a South African bank to hand over a client's confidential information. It should be noted that South Africa ratified the UN Convention against Corruption without making a reservation to or declarative interpretation of any of the articles being discussed in this essay.¹⁶ This means that it has a duty to implement these articles as they stand. The

14 Article 46(1).

15 Article 46(3) provides that: "Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes: (a) Taking evidence or statements from persons; (b) Effecting service of judicial documents; (c) Executing searches and seizures, and freezing; (d) Examining objects and sites; (e) Providing information, evidentiary items and expert evaluations; (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; (h) Facilitating the voluntary appearance of persons in the requesting State Party; (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party; (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention; (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention."

16 South Africa made a reservation to Article 66(2).

purpose of this essay is to discuss whether South Africa has measures in place to give effect to Articles 31(7), 40 and 46(8) of the UN Convention against Corruption. I shall start by discussing the drafting history of these articles, followed by a discussion of the law of bank secrecy in South Africa, and finally assess the effectiveness of those laws in giving effect to the above-mentioned articles of the UN Convention against Corruption.

2 The Drafting History of Articles 31(7), 40 and 46(8) of the UN Convention against Corruption

As early as 1996, the General Assembly of the United Nations was concerned with the direct link between bank secrecy and corruption and bribery. As a result of that concern, it passed the Declaration against Corruption and Bribery in International Commercial Transactions in terms of which member states were committed to ensuring that "bank secrecy provisions do not impede or hinder criminal investigations or other legal proceedings relating to corruption, bribery or related illicit practices in international commercial transactions, and that full co-operation is extended to Governments that seek information on such transactions".¹⁷ The issue of banking secrecy was discussed at different forums that preceded the negotiations leading to the adoption of the UN Convention against Corruption.¹⁸

During the negotiations towards the UN Convention against Corruption, the issue of bank secrecy came up three times – when draft articles 31(7), 40 and 46(8) were being discussed. At the first session¹⁹ delegates were presented with five texts (options) of the draft provision of what would later become article 37 (then it was article 42). The drafts from Austria and the Netherlands, Colombia and the Philippines proposed that one of the clauses of article 37 should provide, *inter alia*, that: "States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy."²⁰ The one from Mexico was to the effect that "each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized".²¹ The one from Turkey did not include a provision on banking secrecy.²² At the second session,²³ the rolling combined text which was submitted by Austria, Colombia, Mexico, the Netherlands, Pakistan, the Philippines and Turkey, provided that: "States Parties shall not

17 See Declaration against Corruption and Bribery in International Commercial Transactions para 10.

18 UNODC (2010) xxxvi & xxxix.

19 It took place in Vienna from 21 January-1 February 2002.

20 UNODC (2010) 264, 266 & 267.

21 UNODC (2010) 265.

22 UNODC (2010) 266.

23 It took place in Vienna from 17-28 June 2002.

decline to act under the provisions of this paragraph on the ground of bank secrecy.”²⁴ At the fourth session,²⁵ the revised rolling text that had been discussed at the second session was considered and no amendments were made to the words of the article that dealt with bank secrecy.²⁶ This is also what happened at the fifth session.²⁷ As a result, the proposal that was put forward at the second session was the one that was later adopted and became Article 31(7) of the Convention.²⁸

The most comprehensive provision of the Convention on bank secrecy is Article 40. The first draft on bank secrecy which was discussed at the first session was submitted by Mexico and it provided that:

1. The requested State Party shall not invoke bank secrecy as a ground for refusal to provide the assistance sought by the requesting State Party. The requested State Party shall apply this article in accordance with its domestic law, its procedural provisions or bilateral or multilateral agreements or arrangements with the requesting State Party.
2. The requesting State Party shall be obligated not to use any information received that is protected by bank secrecy for any purpose other than the proceeding for which that information was requested, unless authorised by the requested State Party.
3. States Parties shall strengthen their laws in order to prevent bank secrecy from being used to obstruct criminal or administrative investigations that relate to the subject of this Convention.²⁹

The rolling text that was discussed at the second session substantially reproduced the one discussed at the first session, except that a slight amendment was made to clause 3 to read: “States Parties shall strengthen their laws in order to prevent bank secrecy from being used to obstruct criminal or administrative investigations that relate to offences covered by this Convention.”³⁰ The rationale behind the amendment was that: “During the first reading of the draft text, at the second session of the Ad Hoc Committee, the

24 UNODC (2010) 269. It should be recalled that Mexico’s draft, which was combined with the other countries’ drafts to form the rolling text that was discussed at the second session, did not include a provision on bank secrecy. This is because Mexico thought it was unnecessary as the draft Convention contained a provision dedicated exclusively to bank secrecy. See UNODC (2010) 249 fn 15.

25 It took place in Vienna from 13-24 January 2003. The drafting history is silent on whether this issue was also discussed at the third session. If it had been discussed, that fact would have been mentioned.

26 UNODC (2010) 271.

27 UNODC (2010) 272.

28 UNODC (2010) 273.

29 UNODC (2010) 319.

30 UNODC (2010) 320.

phrase ‘offences covered by this Convention’ was deemed to be more in line with the general formulation of this article and was thus inserted in the draft text.”³¹

At the fourth session, the United States presented another proposal to the effect that: “States Parties shall ensure that appropriate mechanisms are available within their domestic legal systems to overcome obstacles to the investigation of offences covered by this Convention that may arise out of the application of bank secrecy laws.”³² However, the Ad Hoc Committee did not review the Mexican proposal after its distribution.³³ After the fourth session, the Ad Hoc Committee reported:

Article 58 [the Mexican draft] was deleted. Following the second reading of the draft text, at the fourth session of the Ad Hoc Committee, the Vice-Chairman with responsibility for this chapter of the draft convention established an informal working group, co-ordinated by the United States, to produce a revised text of this article. The informal working group proposed the deletion of article 58 on the following basis: (a) the inclusion of a second paragraph in article 50 *bis* on ‘International co-operation’; (b) the insertion of paragraphs 1 (without the first sentence) and 2 of article 58 in the footnote attached to paragraph 8 of article 53 (mutual legal assistance), noting that Mexico wished those paragraphs to be considered in that context; (c) the deletion of the brackets in paragraph 8 of article 53 and around the last sentence of paragraph 8 of article 42; and (d) the reformulation of paragraph 3 of article 58 and its inclusion in the draft text as new article 42 *bis*. The Ad Hoc Committee did not have the opportunity to review the proposal of the informal working group at its fourth session.³⁴

At the fifth session, the following article on bank secrecy was proposed:

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established by that State Party in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.³⁵

It is reported that:

2. At its fifth session, the Ad Hoc Committee provisionally approved article 42 *bis* of the draft convention.

31 UNODC (2010) 320 fn 5.

32 UNODC (2010) 321.

33 UNODC (2010) 320 fn 6.

34 UNODC (2010) 321.

35 UNODC (2010) 321.

3. At its seventh session ... the Ad Hoc Committee considered, finalised and approved the article, as orally amended. The last amendment is reflected in the final text of the convention ... that was submitted to the General Assembly for adoption at its fifty-eighth session.³⁶

Had the Mexican draft been included in the Convention it would have obliged states parties to provide information requested by other states parties without being hindered by bank secrecy laws; it would have been applied in the light of the requested state party's domestic law, or procedural provisions or bilateral or multilateral agreements or arrangements; the information could only be used for the purpose for which it was sought unless the requested state party authorised the requesting state party to put it to another use; and measures were supposed to be put in place to ensure that criminal or administrative investigations were not hindered by bank secrecy laws. This should be contrasted with the article that was included in the Convention which has the following two features. One, it is applicable only to domestic investigations. In other words, information or evidence obtained on the basis of Article 40 should not be transferred to a state party to the Convention. Two, it is applicable only to criminal investigations. In other words, it does not extend to administrative investigations.

Another provision which deals with the issue of bank secrecy is Article 46(8), which focuses on mutual legal assistance in criminal matters. During the negotiations towards the Convention, some delegates proposed that the current Article 43 (which deals with international co-operation) should also deal with the issue of bank secrecy. The rolling text which was discussed at the fourth session³⁷ was presented by Cameroon, Mexico, the Netherlands and Thailand and stated:

States Parties shall consider adopting legislative and administrative measures to provide that assistance in relation to investigations of administrative offences and civil and administrative proceedings shall not be refused on the ground of bank secrecy [or taxation provisions].³⁸

However, in a revised proposal by Thailand "following consultations with interested delegations" the issue of bank secrecy was excluded from the current

36 UNODC (2010) 321.

37 It was held in Vienna from 13-24 January 2003.

38 UNODC (2010) 341. Another formulation which was tabled by some delegates provided that: "States Parties shall consider adopting legislative and administrative measures to provide that assistance in relation to proceedings other than criminal proceedings shall not be refused on the ground of bank secrecy [or taxation provisions]." See UNODC (2010) 341 fn 3.

article 43.³⁹ This does not mean that bank secrecy laws may be invoked to frustrate international co-operation in the fight against corruption. Article 43 has to be read with Articles 44 – 50 of the Convention. In this range falls Article 46(8) which, as stated earlier, deals with the issue of bank secrecy in mutual legal assistance. It is now imperative to have a look at the drafting history of Article 46(8).

At the first session delegates had three draft articles (options) to consider on mutual legal assistance.⁴⁰ The first draft was submitted by Austria and the Netherlands⁴¹ and it provided in the relevant part that: “States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.”⁴² The second draft was presented by Mexico⁴³ and it was identical to that of Austria and the Netherlands.⁴⁴ The third draft was submitted by Turkey⁴⁵ and it provided in the relevant part that: “States Parties shall not prevent the implementation of this article on the ground of bank secrecy.”⁴⁶ At the second session,⁴⁷ Turkey withdrew its proposal,⁴⁸ and Austria, the Netherlands and Colombia merged their drafts.⁴⁹ The relevant provision in the merged draft was to the effect that: “States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.”⁵⁰ However, Mexico was of the view that the paragraph on bank secrecy should be deleted as the Convention contained an independent provision on bank secrecy.⁵¹ The rolling text which was discussed at the fourth session⁵² included the same provision on bank secrecy and “some delegations proposed the deletion of” the paragraph on bank secrecy as the issue had been provided for in other provisions of the Convention.⁵³ The rolling text which was discussed at the fifth session⁵⁴ still included the same provision on bank secrecy.⁵⁵ This means that the Ad Hoc Committee did not delete it after the

39 UNODC (2010) 342.

40 It was held in Vienna from 21 January-1 February 2002.

41 UNODC (2010) 365.

42 UNODC (2010) 366.

43 UNODC (2010) 370.

44 UNODC (2010) 371.

45 UNODC (2010) 374.

46 UNODC (2010) 375.

47 It took place in Vienna from 17-28 June 2002.

48 UNODC (2010) 378 fn 7.

49 UNODC (2010) 378.

50 UNODC (2010) 380.

51 UNODC (2010) 380 fn 16.

52 It was held in Vienna from 13-24 January 2003.

53 UNODC (2010) 386 fn 26.

54 It was held in Vienna from 10-21 March 2003.

55 UNODC (2010) 391.

fourth session. The reasons for this are not stated in the *travaux préparatoires*.⁵⁶ At the sixth and seventh sessions, there was no debate on the provision on bank secrecy and it was later to be included in the Convention.⁵⁷ It should be recalled that Article 46(8) is silent on the purpose for which the information or evidence obtained from a bank could be used.

Another provision that could be used to acquire information protected by bank secrecy laws in the context of mutual legal assistance is Article 46(19) which provides that:

The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

According to the drafting history of Article 46(19):

It was agreed that the *travaux préparatoires* would reflect the understanding that the requesting State party would be under an obligation not to use any information received that was protected by bank secrecy for any purpose other than the proceeding for which that information was requested, unless authorized to do so by the requested State party.⁵⁸

The above fact is clearly reflected in the interpretive notes to the *travaux préparatoires*.⁵⁹ It is argued that articles 46(8) and 46(19) should be read in tandem so that any information which the requesting state party obtains from the requested state party which is protected by bank secrecy is not used for any purpose other than that stipulated in the request. It is important to note that although South Africa made submissions on draft Article 46(9), it did not make submissions on draft Article 46(8).⁶⁰ This could be interpreted as implying that it had no objection to the way in which the article was phrased. It is now necessary to have a look at South African law on bank secrecy and later discuss

56 UNODC (2010) 395.

57 UNODC (2010) 397–404.

58 UNODC (2010) 399 fn 34.

59 UNODC (2010) 409.

60 UNODC (2010) 401–402.

whether or not it meets South Africa's obligations under the UN Convention against Corruption.

3 South African Law on Bank Secrecy

South African bank secrecy law is based on common law, statute⁶¹ and international law (bilateral and multilateral agreements). The seminal decision of the English King's Bench on a bank's duty of confidentiality, *Tournier v National Provincial and Union Bank of England*, has been adopted by South African courts. It is therefore important that the conclusions reached in that decision are highlighted in this essay. In *Tournier v National Provincial and Union Bank of England* the Court emphasised the principle of the bank's duty of confidentiality towards its clients in the following terms:

At the present day I think it may be asserted with confidence that the duty is a legal one arising out of contract, and that the duty is not absolute but qualified. It is not possible to frame any exhaustive definition of the duty. The most that can be done is to classify the qualification, and to indicate its limits.⁶²

The Court added:

On principle I think that the qualifications can be classified under four heads: (a) Where disclosure is under compulsion by law; (b) where there is a duty to the public to disclose; (c) where the interests of the bank require disclosure; (d) where the disclosure is made by the express or implied consent of the customer.⁶³

The Court gave some examples under each of the above qualifications. It stated:

An instance of the first class is the duty to obey an order under the Bankers' Books Evidence Act. Many instances of the second class might be given. They may be summed up in the language of Lord Finlay in *Weld-Blundell v. Stephens* ... where he speaks of cases where a higher duty than the private duty is involved, as where 'danger to the State or public duty may supersede the duty of the agent to his principal'. A simple instance of the third class is where a bank issues a writ claiming payment of an overdraft stating on the face of the writ the amount of the overdraft. The familiar instance of the last class is where the customer authorises a reference to his banker. It is more difficult to state what the limits of the duty are, either as to time or as to the nature of the disclosure. I certainly think that the duty does not cease the moment a customer closes his account. Information gained during the currency of the

61 Jones & Schoeman (2006) 6.

62 *Tournier v National Provincial and Union Bank of England* 471–472.

63 *Tournier v National Provincial and Union Bank of England* 473.

account remains confidential unless released under circumstances bringing the case within one of the classes of qualification I have already referred to. Again the confidence is not confined to the actual state of the customer's account. It extends to information derived from the account itself. A more doubtful question ... is whether the confidence extends to information in reference to the customer and his affairs derived not from the customer's account but from other sources, as, for instance, from the account of another customer of the customer's bank.⁶⁴

There are only a few South African cases in which the issue of bank secrecy has been dealt with. The paucity of cases should be understood against the background that this is an area in which traditionally there have not been many cases.⁶⁵ There have been cases in which South African courts have invoked *Tournier v National Provincial and Union Bank of England* to hold that a bank owes its client a duty of confidentiality. The first case (as far as the author is aware) in which this decision was referred to was the Appellate Division (now Supreme Court of Appeal) decision of *Densam (Pty) Ltd v Cywilnat (Pty) Ltd*. This case was about the bank disclosing to a third party in cession proceedings that the appellant was indebted to it. The trial court invoked the principle in *Tournier v National Provincial and Union Bank of England* and held that:

[I]n the absence of agreement to the contrary, the contract of a banker and customer obliges the banker to guard information relating to his customer's business with the banker as confidential, subject to various exceptions, none of which is presently relevant; that such duty of secrecy imparts the element of *delectus personae* into the contract; and that the banker's claims against his customers are accordingly not cedable without the consent of the customer.⁶⁶

In commenting on the above finding, the Appellate Division held that:

The first part of the learned Judge's conclusion, viz the finding that an obligation rests on the banker as against the customer to maintain confidentiality and secrecy, followed upon a discussion in the judgment ... of the nature of the contractual relationship between a banker and a customer. From an analysis of the discussion it appears that the learned Judge found that in the contract between banker and customer there exists a 'tacit or implied term of secrecy' ... arising 'as a matter of law, or as representing the tacit

64 *Tournier v National Provincial and Union Bank of England* 473.

65 In *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 479, the court held that: "It is curious that there is so little authority as to the duty to keep customers' or clients' affairs secret, either by banks, counsel, solicitors or doctors. The absence of authority appears to be greatly to the credit of English professional men, who have given so little excuse for its discussion."

66 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 109.

consensus of the parties' ... but that such term was 'not an absolute provision', there being circumstances in which a banker may be relieved of the duty of secrecy ... and that for both these findings the learned Judge relied mainly on the English case of *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 (CA).⁶⁷

On appeal, the respondent's lawyer argued that in South African law "unlike as in the English law, there was no duty of secrecy as between banker and customer, and that [South African] law demanded of a banker no more than ... to act in good faith and not fraudulently".⁶⁸ The Court held that on the facts of the case:

[T]here is no need to embark upon a consideration of the juristic nature of the contract between banker and customer, nor upon an investigation as to whether the banker owes the customer a duty of confidentiality or secrecy and, if so, what its origin or limits may be. For the purposes of deciding this appeal I shall simply assume ... (but, I must make it plain, without deciding) that the Bank was contractually obliged to [the appellant] to maintain secrecy and confidentiality about its affairs, in accordance with the decision in *Tournier's* case supra.⁶⁹

However, the Court "disregard[ed] the so-called exceptions to the general rule as laid down in that case".⁷⁰ The above case is very clear that the Court did not decide the question of whether a bank owes its client a duty of confidentiality. It just assumed that such a duty exists. The court did not find it necessary to state the legal position of the exceptions in *Tournier's* case in South African law. This means that those two important questions remained unanswered. The reason for this was that the outcome of the case did not hinge on the Court's deciding whether or not the bank owed its client a duty of confidentiality. This position was not to remain unchanged indefinitely.

In *Optimprops 1030 CC v First National Bank of SA Ltd*,⁷¹ the issue of bank secrecy arose. The plaintiff's cheques had been stolen by one of its employees and cashed at one of the defendant's branches. The plaintiff suspected that one of its employees, who was a client of the defendant, had stolen the cheques and requested the defendant to provide him with the following information: the full names and addresses of the account holder; the full details or references that were obtained at the time that his account was opened with the bank; the name and address of his employer at the time the account was opened; full

67 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 109.

68 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 110.

69 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 110.

70 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 111.

71 *Optimprops 1030 CC v First National Bank of SA Ltd* [2001] JOL 7817 (D).

details of his banking history in the bank's possession at the time the account was opened; what references he gave to the bank at the time the account was opened; and the name and address of his landlord.⁷² This information was requested on the basis of section 81(3) of the Bills of Exchange Act,⁷³ which provides that:

If a person took any such cheque into his possession or custody after the theft or loss, and fails to furnish the true owner or any person who has in terms of subsection (7) the rights of a true owner, at his request, with any information at his disposal in connection with the cheque, he shall for the purposes of subsection (1) be deemed to have been a possessor of the cheque and either to have given a consideration therefor or to have taken it as a donee.

The Court held that:

The object of section 81(3) is obviously to enable the true owner to identify the previous possessor of the cheque or cheques to enable him to recover his loss under section 81(1). Section 81(3) virtually holds a gun to the head of the bank and says: 'If you refuse to give the information you do so at your peril.' The section constitutes an inroad into the duty of secrecy of a bank and confidentiality which the banker owes to its client. The obligation placed on the bank however overrides the duty of confidentiality as it is a disclosure under compulsion of law which is a recognised exception to the bank's duty. (*Tournier v National Provincial and Union Bank of England* 1924 (1) KB 461.) A bank can be placed in an invidious position where it receives a letter requesting information regarding an account holder particularly where the information is not stated to be required in connection with a cheque crossed and bearing the words 'Not negotiable' and it is not said to be required in terms of section 81(3). The logical course to be adopted by a prudent bank would be to enquire for what purpose the information is sought and only once it is established that it is in connection with a crossed 'Not negotiable' cheque which has been lost or stolen and paid, furnish the information requested. In my view the section should be restrictively interpreted. The section introduces the English Law of Conversion which is completely foreign to our law.⁷⁴

The Court, in dismissing the case, held that the bank did not have a duty to provide the plaintiff with the information it had requested as the plaintiff had the relevant information it could have used to ascertain that its employer had stolen the cheques.⁷⁵ The plaintiff appealed against the Judge's finding

72 *Optimprops 1030 CC v First National Bank of SA Ltd* 6.

73 Act 34 of 1964.

74 *Optimprops 1030 CC v First National Bank of SA Ltd* 11–12.

75 *Optimprops 1030 CC v First National Bank of SA Ltd* 14.

successfully and, without referring to the case of *Tournier v National Provincial and Union Bank of England*, the Appeal Court held that:

I have some difficulty, with all due respect to the judge *a quo*, with the concept that a restrictive interpretation is warranted because section 81(3) erodes the sanctity of confidentiality which banks invoke in respect of information concerning their clients' business and dealings. Nor, in my respectful view, does the circumstance that the subsection introduces a principle equivalent to the English doctrine of 'conversion' into our legal system necessarily mean that our courts should, in the process of interpretation, restrict its ambit.⁷⁶

The Appeal Court does not dispute the fact that a bank owes its client a duty of confidentiality. It concentrates on the correct interpretation of section 81(3) of the Bills of Exchange Act which obliges a bank to disclose information about its client to a person whose negotiable instruments have been stolen and have been cashed at the bank.

In *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd*, the High Court dealt with the issue of whether a bank may invoke its duty of confidentiality towards its clients to prevent a newspaper from publishing information which would reveal that the bank misled its clients by advising them to invest in a given scheme. This information would have revealed the clients' details. The bank argued that it brought the application because it had a "substantial interest" in the matter "based on the confidential nature of the relationship between a bank and its clients".⁷⁷ The Court referred to *Tournier v National Provincial and Union Bank of England* and held that a "banker's contractual obligation to preserve the confidentiality has long been recognised in the English law".⁷⁸ The Court went on to explain the nature and extent of that relationship and the circumstances in which the bank is permitted to disclose its client's information.⁷⁹ The Court referred to the relevant case law and held that in South Africa "this duty of confidentiality (or secrecy as it is sometimes referred to) [has been] recognised" since 1914.⁸⁰ The Court held that several authors and some pieces of legislation also recognise "the confidential nature of the relationship between a bank and its client".⁸¹ The Court concluded that:

It seems to me that for considerations of public policy the relationship between a bank and its client must be of a confidential nature. Equally - for considerations of public policy - this duty is subject to being overridden by a

76 *Optimprops 1030 CC v FNB of SA* 9.

77 *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* para 18.

78 *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* para 18.

79 *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* para 18.

80 *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* para 19.

81 *FirstRand Bank Ltd v Chaucer Publications (Pty) Ltd* para 19.

greater public interest ... Although the duty not to disclose rests with the bank, the privilege not to have the details of its dealings with the bank disclosed belongs with the client. It is therefore the client alone who can invoke this privilege and insist that the bank keeps the information about its dealings with the client confidential. In this case it is not the bank who wishes to publish confidential information about its clients. It is a third party who obtained certain documents, and who wishes to publish the information reflected therein. Insofar as it may be argued that the mere publication of the names of the clients may impinge on the bank's right to privacy or its confidential relationship with its clients, the mere publication of the fact that a person is a client of FirstRand cannot, in my view, impinge on FirstRand's privacy. FirstRand is merely seeking an interdict to prevent the identities of its clients and their trusts from being published. The common law did not recognise class actions and ... prior to 1994 a class action was foreign to our law. I therefore conclude that FirstRand has not shown that it has *locus standi* at common law.

In other words, a bank has a duty not to disclose its client's information unless public policy requires that that information should be disclosed. However, a bank does not have a right to prevent a third party from disclosing its client's (the bank's) information. Whether or not that holding accommodates some exceptions is debatable.⁸² In *Stevens v Investec Bank Limited*, some banks were being investigated for allegedly committing financial crimes. Subpoenas were issued for them to appear before a magistrate to answer questions that would be put to them by prosecutors. The answers to these questions would have forced them to reveal their clients' confidential information.⁸³ They challenged the validity of the subpoenas and applied to the High Court for an interdict. In granting the interdict, the Court held that:

There is no doubt that a banker-client relationship requires the highest *uberrimae fides* and that confidentiality is one of the essential aspects of such relationship of trust as between ... banker and client. Privacy in financial and banking affairs is often an important aspect of successful business enterprise in a competitive economy.⁸⁴

However, the Court added that "[p]enetration of the banking vault and disclosure of that which is contained therein is not always a breach of confidentiality or unlawful" and that one should "realise" that in terms of the law "there must always be circumstances where the needs of privacy must give way to the needs of the administration of justice".⁸⁵ However, what is clear is

82 See, for example, Schulze (2007) 122-126.

83 *Stevens v Investec Bank Limited* para 7.

84 *Stevens v Investec Bank Limited* para 10.

85 *Stevens v Investec Bank Limited* para 11.

that South African case and common law recognise bank secrecy and that there are exceptions to the general rule that a bank has to keep its clients' information confidential.

Furthermore, bank secrecy is also recognised in a number of pieces of legislation. These include section 43 of the Land and Agricultural Development Bank Act, which states that:

(1) Subject to the Constitution and the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), no person may— (a) in any way disclose any information submitted by any person in connection with any application for any agricultural financial service rendered or offered by the Bank; or (b) publish any information obtained in contravention of paragraph (a), unless ordered to do so by a court of law or unless the person who made such application consents thereto in writing.

(2) Any person who contravenes subsection (1) is guilty of an offence.⁸⁶

The general rule under section 43 therefore is that information submitted to the Bank by any person who applies for agricultural finance is to be confidential. However, this information may be disclosed if the Constitution requires its disclosure; if the disclosure is required in terms of the Promotion to Access to Information Act; if a court of law orders that such information should be disclosed; or if the person who submitted that information consents to its disclosure.

Another provision which deals with bank secrecy is section 33 of the South African Reserve Bank Act.⁸⁷ It stipulates that:

(1) No director, officer or employee of the Bank, and no officer in the Department of Finance, shall disclose to any person, except to the Minister or the Director-General: Finance or for the purpose of the performance of his or her duties or the exercise of his or her functions or when required to do so before a court of law or under any law— (a) any information relating to the affairs of— (i) the Bank; (ii) a shareholder of the Bank; or (iii) a client of the Bank, acquired in the performance of his or her duties or the exercise of his or her functions; or (b) any other information acquired by him or her in the course of his or her participation in the activities of the Bank, except, in the case of information referred to in paragraph (a) (iii), with the written consent of the Minister and the Governor, after consultation with the client concerned.

(1A) The provisions of subsection (1) shall not be construed as preventing any director, officer or employee of the Bank who is responsible for exercising

⁸⁶ Land and Agricultural Development Bank Act 15 of 2002.

⁸⁷ Act 90 of 1989.

any power or performing any function or duty under the Exchange Control Regulations, 1961, issued in terms of section 9 of the Currency and Exchanges Act, 1933 (Act No. 9 of 1933), from disclosing to the Commissioner for the South African Revenue Service any information as may be required for purposes of exercising any power or performing any function or duty in terms of any Act administered by the Commissioner.

The director, officer or employee of the bank is permitted to disclose confidential information under the following circumstances: to the Minister or the Director-General: Finance; for the purpose of the performance of his or her duties; for the purpose of the exercise of his or her functions; when required to do so before a court of law; where required to do under any law; and to the Commissioner of South African Revenue Service. Although the South African Reserve Bank Act, unlike the Land and Agricultural Development Bank Act, does not specifically refer to the Constitution and to the Promotion of Access to Information Act, it cannot be argued successfully that it is not subject to those two pieces of legislation. Therefore, if the Constitution or the Promotion of Access to Information Act requires that information should be disclosed, it has to be disclosed under the general exception of "under any law". In terms of section 10 of the National Payment System Act, the Reserve Bank may also disclose any confidential information relating to a payment system: "(a) in the course of performing functions under any law; (b) for the purpose of legal proceedings; (c) when required to do so by a court; (d) if in the opinion of the Reserve Bank, disclosure is in the public interest, or (e) that is already publicly available".⁸⁸ The Banks Act does not include a provision imposing a duty on all banks to keep their clients' information confidential.⁸⁹ However, section 87(2) provides that "[t]he husband of a woman who is a depositor with a bank shall, save with her written consent, not be entitled to demand or receive from the bank any particulars concerning the deposits she holds with that bank". It is argued that, in the light of the fact that South African common law imposes a duty on banks not to disclose their clients' information unless such disclosure falls within one of the exceptions, banks have a duty not to disclose that information. It should be recalled that the common law and the pieces of legislation discussed above allow banks to disclose their clients' confidential information if the law requires that disclosure.⁹⁰

Although there are many pieces of legislation which allow a bank to disclose its clients' confidential information, the main piece of legislation on corruption in South Africa, the Prevention and Combating of Corrupt

88 National Payment System Act 78 of 1998.

89 Act 94 of 1990.

90 For an outline of other pieces of legislation see Schulze (2007) 122.

Activities Act, is silent on that very important issue.⁹¹ This should be understood against the background that it was enacted before South Africa ratified the UN Convention against Corruption which, *inter alia*, requires states parties to put in place measures to ensure that bank secrecy does not become a stumbling block in the investigation of corruption. This explains why its Preamble states that: "South Africa desires to be in compliance with and to become Party to the United Nations Convention against Corruption." Therefore, for South African authorities to compel a bank to disclose confidential information of a client in a corruption investigation, they have to invoke other pieces of legislation, if they are relevant, otherwise they would have to rely on common law principles developed by the courts. This means that there may be a need to amend the Prevention and Combating of Corrupt Activities Act to ensure that it expressly provides that bank secrecy will not be invoked where information is required from the bank for the purpose of investigating corruption. This is an approach adopted by some African countries, such as Sierra Leone,⁹² Rwanda,⁹³ Uganda,⁹⁴ Malawi,⁹⁵ Namibia,⁹⁶ Lesotho,⁹⁷ and Zambia.⁹⁸ In the light of the above discussion, it is submitted that South Africa has mechanisms in place to guarantee that bank secrecy will not be invoked to prevent an investigation or prosecution of corruption. This is in line with the UN Convention against Corruption and, in particular, with Article 40.

4 South African Banks Disclosing Confidential Information to Foreign Authorities

Bank secrecy would not pose a problem to South African authorities if they are investigating any corruption matter. This is so because there are many pieces of legislation which allow the disclosure of confidential information held by banks. Should these pieces of legislation not apply in a given case, the common law will be invoked to disclose such information. This would be on the basis of the principles established in the cases discussed above. However, the situation is not that simple when it comes to disclosing such information to an authority of a foreign country or pursuant to an order issued by a foreign court. The question that one has to answer is whether that order would be issued on the

91 Act 12 of 2004.

92 See section 53 of the Anti-Corruption Act, 2008.

93 Article 35 of Law No 23/2003 Related to the Punishment of Corruption and Related Offences, 07/08/2003.

94 Section 41(2) of the Anti-Corruption Act 6 of 2009.

95 Section 12A(2) of the Corrupt Practices Act, Chapter 7:04.

96 Section 26(2) of the Anti-Corruption Act 8 of 2003.

97 Section 8(2) of the Prevention of Corruption and Economic Offences Act 5 of 1999.

98 Section 8(1)(d) of the Corruption and Economic Crime Act, 1994.

basis of the UN Convention against Corruption or in terms of relevant legislation, such as the International Co-operation in Criminal Matters Act.⁹⁹ It should be noted that the Banks Act empowers South African registered banks to conduct banking businesses outside South Africa. Section 1 of the Banks Act defines a "branch of a bank" to mean "an institution by means of which a bank conducts the business of a bank outside the Republic". The Registrar's permission is required for a South African bank to open or acquire a branch outside South Africa.¹⁰⁰ South African banks have indeed opened or acquired branches outside South Africa, especially in many African countries.¹⁰¹

There are at least three challenges that face anyone trying to obtain confidential information from a South African bank for use in a corruption related investigation or trial. One, South Africa is yet to domesticate the UN Convention against Corruption. Therefore, this Convention is not part of South African domestic law.¹⁰² This means, *inter alia*, that South Africa cannot invoke it as the basis to force a South African bank to disclose confidential information for an investigation or prosecution outside South Africa. Two, the South African Prevention and Combating of Corrupt Activities Act is silent on the issue of bank secrecy. In other words, it cannot be invoked to compel a South African bank to disclose confidential information for use in a foreign investigation or trial. And, three, the UN Convention against Corruption does not require states parties which do not have a specific law on mutual legal assistance on the issue of compelling banks to disclose their clients' information to foreign authorities to consider the Convention as the basis to honour such a request.¹⁰³ Against that background, it is imperative to have a look at the relevant mechanisms in place to ensure that South African authorities compel banks in South Africa to disclose their clients' information to foreign authorities for either investigations or prosecutions.

The first mechanism would be to invoke the relevant sections of the International Co-operation in Criminal Matters Act. What a foreign court or authority would have to do is to issue a letter of request for evidence or information from South Africa. Section 7 of this Act provides that:

99 Act 75 of 1996.

100 Section 52 of the Banks Act.

101 See Ndzabela (2012).

102 For a discussion of how international law becomes part of South African law, see *Glenister v President of the Republic of South Africa*.

103 The Convention approaches the issue of extradition differently by providing that states could extradite persons on the basis of the Convention if such extradition would not be possible under national law. See Article 44(4)-(6). The same approach is followed with respect to mutual enforcement co-operation. See Article 48(2).

- (1) A request by a court or tribunal exercising jurisdiction in a foreign State or by an appropriate government body in a foreign State, for assistance in obtaining evidence in the Republic for use in such foreign State shall be submitted to the Director-General.
- (2) Upon receipt of such request the Director-General shall satisfy himself or herself - (a) that proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; or (b) that there are reasonable grounds for believing that an offence has been committed in the requesting State or that it is necessary to determine whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State.
- (3) For purposes of subsection (2), the Director-General may rely on a certificate purported to be issued by a competent authority in the State concerned, stating the facts contemplated in paragraph (a) or (b) of the said subsection.
- (4) The Director-General shall, if satisfied as contemplated in subsection (2), submit the request for assistance in obtaining evidence to the Minister for his or her approval.
- (5) Upon being notified of the Minister's approval the Director-General shall forward the request contemplated in subsection (1) to the magistrate within whose area of jurisdiction the witness resides.

On the basis of section 7, a foreign state may request evidence for the purpose of a trial or for the purpose of an investigation. The Act defines "evidence" to include "all books, documents and objects produced by a witness".¹⁰⁴ This definition is broad enough to include confidential information held by South African banks. In *Thatcher v Minister of Justice and Constitutional Development*, the Court held that section 7 "does not require the requesting state to motivate or substantiate its request. Provided it is a genuine request made in good faith it should, and would in all probability, be accepted as such."¹⁰⁵ Section 7 has to be read with section 8, which provides that:

- (1) The magistrate to whom a request has been forwarded in terms of section 7(5) shall cause the person whose evidence is required, to be subpoenaed to appear before him or her to give evidence or to produce any book, document or object and upon the appearance of such person the magistrate shall administer an oath to or accept an affirmation from him or her, and take the evidence of such person upon interrogatories or otherwise as requested, as if the said person was a witness in a magistrate's court in proceedings similar to those in connection with which his or her evidence is required: Provided that a person who from lack of knowledge arising from youth, defective education or other cause,

104 Section 1.

105 *Thatcher v Minister of Justice and Constitutional Development* para 58.

is found to be unable to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in the proceedings without taking the oath or making the affirmation: Provided further that such person shall, in lieu of the oath or affirmation, be admonished by the magistrate to speak the truth, the whole truth and nothing but the truth.

- (2) A person referred to in subsection (1) shall be subpoenaed in the same manner as a person who is subpoenaed to appear as a witness in proceedings in a magistrate's court.
- (3) Upon completion of the examination of the witness the magistrate taking the evidence shall transmit to the Director-General the record of the evidence certified by him or her to be correct, together with a certificate showing the amount of expenses and costs incurred in connection with the examination of the witness.

The effect of sections 7 and 8 is that a witness, that is a bank official, does not travel to a foreign country to give evidence in court or to investigating officers. All the evidence is given to a magistrate in South Africa who then forwards it to the Director-General who transfers it to the relevant foreign authority. Such a witness cannot be prosecuted or sued in South Africa for breach of his duty of confidentiality towards his client. If he were to be prosecuted, he would argue, successfully, that he was compelled by a court of law to give that evidence. It should also be noted that the International Co-operation in Criminal Matters Act does not specifically provide that a witness who has been subpoenaed to give evidence shall not decline to do so on the basis of bank secrecy. However, if the country which has sought evidence from South Africa is in Southern Africa and has ratified the Southern African Development Community Protocol on Mutual Legal Assistance in Criminal Matters, it would not present a major hurdle for the bank to disclose confidential information at such a hearing. This is so because this Protocol makes it very clear that "state Parties shall, to the extent permitted by their laws, not decline to give assistance under this Article on the grounds of bank secrecy".¹⁰⁶ The same applies to proceedings where evidence or information is required in a country which is a state party to one of the treaties mentioned above and which South Africa has ratified.

One issue that needs to be examined closely is whether an employee of a South African bank is immune from prosecution or from civil suit before a South African court if he gives evidence in a foreign court which discloses his South African based client's confidential information. For example, a South African citizen, D, is doing business in Malawi and has a bank account in a Malawian bank, Bank A, which is a subsidiary of a South African registered bank, Bank B. He also has an account in South Africa with Bank B. The

106 Article 20(3).

manager of Bank A is a South African expatriate working in Malawi. D has been arrested in Malawi for allegedly financing unlawful activities. It emerges during the investigation that some of the money used to finance such activities originated from his bank account in South Africa and was transferred to the bank account of his accomplice in Malawi. A Malawian court, on the application of a prosecutor or investigator, orders the manager of Bank A to produce in court all the transactions that have taken place on D's accounts, including his South African account. He is advised (or misadvised) by his Malawian lawyer that under Malawian law he is obliged to disclose this information and that he will not be prosecuted. He is not sure whether this legal position is correct as regards the information held by a South African bank. However, he is aware that under South African law, there are exceptions to the rule that a bank has a duty to keep its client's information confidential. It is argued that should the manager disclose the South African bank details on the basis of an order by a Malawian court or investigator, he could be sued successfully in a South African court. He cannot successfully argue that the disclosure is protected by South African statute or case law. This is so because South African law, unless otherwise expressly stated, is not of extra-territorial application. The question that arises is: how does one ensure that the Malawian investigators acquire D's South African account details legally? The only way to ensure that this evidence is obtained legally from South Africa is to invoke South African law. Assuming that the Malawian authorities do not invoke the International Co-operation in Criminal Matters Act, it is argued that a manager of a South African bank who has been ordered or requested by a foreign state to disclose his client's confidential information may apply to a South African court to invoke its inherent jurisdiction and rule on whether it would be unlawful for him to disclose such evidence. The court may also be asked to rule on whether such manager may be indemnified from prosecution under South African law for disclosing such evidence before a court in a foreign country. This is an approach that banks have taken in Malaysia¹⁰⁷ and in the United Kingdom¹⁰⁸ to avoid being sued by their clients when they have given evidence

107 See *Attorney General of Hong Kong v Zauyah Wan Chik & Ors and Another Appeal* [1995] 2 MLJ 620. The Court of Appeal invoked its inherent jurisdiction to declare that bank officials would be indemnified from criminal and civil proceedings if they gave evidence in a court in Hong Kong disclosing their client's confidential information.

108 *Pharaon and others v Bank of Credit and Commerce International SA (in liquidation) (Price Waterhouse (a firm) intervening); Price Waterhouse (a firm) v Bank of Credit and Commerce International SA (in liquidation) and others* [1998] 4 All ER 455. The court in the United States of America ordered one of the parties to disclose its UK client's confidential information. The UK court held that, on the basis of the US order, the bank should go ahead and give evidence in the US court and that it will not be prosecuted or sued in the UK for breach of the duty of confidentiality towards its client.

in foreign countries on the basis of requests from or orders by foreign courts. The above discussion shows that South Africa has mechanisms in place to comply with its obligations under the UN Convention against Corruption when it comes to co-operating with foreign countries in the fight against corruption. The most important piece of legislation through which foreign countries may obtain evidence from South African banks about their clients is the International Co-operation in Criminal Matters Act.

5 Conclusion

It has been pointed out above that the South African Banks Act does not include an express provision imposing an obligation on banks to keep all their clients' information confidential. The only provision which imposes such a duty is section 87(2) which deals with the duty not to disclose a wife's information to her husband. It is recommended that a section should be inserted into the Banks Act making it very clear that banks have a duty to keep their clients' information confidential. This would strengthen the existing common law duty. This example has been followed in some countries, such as Singapore¹⁰⁹ and the United Kingdom.¹¹⁰ It is recommended that South Africa should domesticate the UN Convention against Corruption so that its provisions have direct application in South African domestic law.

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109 Section 47(1) of the Banking Act (Cap 19, 2003 Rev Ed) provides that: "Customer information shall not, in any way, be disclosed by a bank in Singapore or any of its officers to any other person except as expressly provided in this Act." The Court of Appeal of Singapore held that 'In light of the plain wording of s 47, our current statutory regime on banking secrecy leaves no room for the four general common law exceptions expounded in *Tournier* to co-exist. They have been embraced within the framework of s 47 of the Banking Act, which is now the exclusive regime governing banking secrecy in Singapore. Section 47 makes it plain that no customer information shall be disclosed by a bank in Singapore or any of its officers except as expressly provided for in the Banking Act. A breach of any of the prescribed statutory obligation amounts to a criminal offence. The Third Schedule to the Banking Act sets out, in illuminating detail, the circumstances, conditions, and details of permissible disclosure. It is axiomatic that, in terms of details and scope, this is a more comprehensive regime than that articulated in *Tournier*. There is simply no room, in Singapore, for the less sophisticated and more general common law rules articulated in *Tournier* to have any further relevance save for the perspective of historical evolution and context it provides."

See *Susilawati v American Express Bank Ltd* [2009] SGCA 8 (27 February 2009) para 67.

110 Section 204 of the Banking Act, 2009.

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The South African Legal Practice Act and the Requirement for University Law Clinics to Have Trust Accounts: Oversight or Deliberate Barrier?

Abraham Hamman and Shamiel Jassiem

1 Introduction

The Legal Practice Act (LPA) appears to have far-reaching implications for legal practitioners at university law clinics.¹ This essay will focus only on the compulsory requirement that attorneys at university law clinics should have Fidelity Fund Certificates (FFCs) and therefore open (and presumably operate) separate trust accounts to permit them to practise.² This requirement did not exist in terms of the Attorneys Act,³ so the essay explores the viability of this new requirement, investigates whether it is essential and is consonant with the mandate of law clinics. The rationale for establishing university law clinics is investigated and their activities scrutinised to ascertain whether the requirement is justified. The first part of the essay sets out why attorneys are required to have trust accounts and explains the relevant provisions in the LPA. The next part of the essay examines the rationale for the change and the role of attorneys at law clinics in an endeavour to explain why this requirement is imposed on attorneys at law clinics. We conclude the essay by questioning the reasonableness of the legislative requirement that attorneys employed at university law clinics have FFCs.

2 Why the Stipulation that Lawyers have Trust Accounts?

Prior to the enactment of the LPA only attorneys were required to have trusts accounts.⁴ Historically the legal profession has always been referred to as a divided profession, split into two branches, namely, advocates and attorneys.⁵ Although the LPA is aimed at consolidating the two professions, legal practitioners will still have a choice to either be an attorney or an advocate.⁶ This essay focuses only on trust accounts of attorneys. An individual who

1 Legal Practice Act 28 of 2014. See McQuoid-Mason (2013) 561.

2 See sections 34(5)(c), 34(8) and 84(8) of the LPA.

3 Act 53 of 1979. See Hawkey (2013) 36.

4 Section 78 of the Attorneys Act 53 of 1979.

5 See De Klerk (2006) 11, Meintjies van der Walt (2011) 166, Maisel & Greenbaum (2001) 67, Maisel (2010) 15, Meadows (1996) 475 and McQuoid-Mason (2013) 561.

6 Sections 1, 24 and 30 of the LPA propose a new type of practitioner, who can choose to practise as an attorney or as an advocate who has a trust account.

wishes to practise law must have obtained a law degree.⁷ Thereafter, depending on his preference, he must become either an attorney or an advocate.⁸ Law graduates may pursue careers other than private practice, such as public prosecutors, state advocates or state attorneys; seek employment in government departments, such as the Master's Office or the Deeds Office; or become corporate legal advisers. However, more often than not they are admitted either as advocates or attorneys.⁹

Pre-LPA legislation did not require advocates to have a trust account.¹⁰ An attorney's trust account is required by law; any attorney, who wants to commence practising for their own account, must open, in addition to a business banking account, a separate trust banking account.¹¹ It is required that practitioners should keep their clients' money separate from their own, with the aim of protecting the clients' money.¹² The trust account is also the account in respect of which the Attorneys Fidelity Fund (AFF)¹³ requires an annual audit to determine whether an attorney is to be granted a FFC which he requires in order to practise.¹⁴ The purpose of the FFC is to insure against the misuse of client trust funds.¹⁵ A chartered accountant must undertake an annual trust account audit and the report must be submitted to the relevant Law Society.¹⁶ There are certain advantages for the public: a client, who has been the victim of the theft of trust funds by an attorney, can claim from the Attorneys Indemnity Insurance Fund (AIIF). The AIIF is a registered short term insurer funded by the AFF. Its objective is to protect the public by providing professional indemnity insurance to all South African attorneys' practices.

The discussion above makes it clear that there are sound reasons why attorneys are required to have trust accounts. The requirement provides the Law Societies with a quality control mechanism which ensures that attorneys

7 Section 15 of the Attorneys Act 53 of 1979. See also De Klerk (2006) 13 and McQuoid-Mason (2013) 565.

8 Meintjies Van der Walt (2011) 166.

9 De Klerk (2006) 13.

10 Admission of Advocates Act 74 of 1964. See Sections 1, 24 and 30 of the LPA for the definition of legal practitioner.

11 Section 78 of the Attorneys Act 53 of 1979. See also Palmer & Crocker (2012) 345.

12 See Palmer & Crocker (2012) 345, *Law Society Transvaal v Mathews* 1989 (4) SA 389 (T) and Hoffman (1997) 269.

13 Section 25 of the Attorneys Act 53 of 1979.

14 See sections 41 & 42 of the Attorneys Act 53 of 1979. See also Hamman & Koen (2012) 69 and Maisel (2010) 21.

15 Maisel (2010) 21.

16 Hamman & Koen (2012) 69. The various Law Societies have rules which require their members to undergo an annual audit in order to apply for a Fidelity Fund Certificate. See, for example, Rule 13 of the Rules of the Cape Law Society and Rule 70 of the Rules of the Law Society of the Northern Provinces.

deal properly and honestly with other clients' money.¹⁷ The annual trust audit required for the issue of a FFC is a barometer that attorneys have complied with their obligations.¹⁸ Should the auditor submit a qualified report or note any discrepancy in the operation of the trust account, the relevant Law Society will conduct an investigation, and if not satisfied with the practitioner's explanation, they may face disciplinary action or even be interdicted from practising.¹⁹

There are good reasons why it is necessary to have proper controls and mechanisms in place to avoid the abuse of trust funds. Some attorneys' practices manage substantial amounts of their clients' money on a daily basis.²⁰ Attorneys perform a variety of services, such as, the incorporation of legal entities, instituting claims against the Road Accident Fund, and dealing with conveyancing matters.²¹ The private practice of an attorney is mostly fee driven and fees are primarily provided for as payment of the professional services that the attorney renders. Attorneys must also generate sufficient fees to cover overhead expenses, such as, rental, telephone, salaries and wages, and must have an office infrastructure with the latest technology in computer equipment as well as internet facilities.²² They, therefore, have to charge their clients fees for professional services rendered, in order to sustain themselves and to cover their expenses.

Operating a trust banking account involves attorneys dealing with other people's money, which should be kept separate from their business and private accounts. The interest earned by attorneys on the money in their trust accounts must be paid over to the AFF.²³ In the event of the misappropriation of a client's funds, a claim for compensation can be submitted to the Attorneys Insurance Indemnity Fund (AIIF).²⁴ The next part discusses whether university

17 Hamman & Koen (2012) 69. See also *Hirschowitz Flionis v Bartlett and Another* 2006 (3) SA 575 (SCA) para 30.

18 Sections 41 & 42 of the Attorney's Act 53 of 1979.

19 See *Law Society, Transvaal v Matthews* 1989 (4) SA 389 (T), *Holmes v Law Society of the Cape of Good Hope and Another* 2006 (2) SA 139 (C), *Summerley v Law Society, Northern Provinces* 2006 (5) SA 613 SA, and *The Law Society of the Cape of Good Hope v Peter* [2006] SCA 37.

20 Hamman & Koen 2012 81.

21 Hamman & Koen (2012) 81. Section 34(8)(e) of the LPA prohibits attorneys at law clinics from performing this type of work.

22 See Bodenstein (2005) 304.

23 Section 78(2)(a) of the Attorneys Act 53 of 1979. Practitioners may invest in trust clients' money which is not immediately required. This type of account will generate a higher interest to be paid over to the Attorneys Fidelity Fund. Section 78(2A) of Act 53 of 1979 regulates the position where money is invested on the written instructions of the client and the interest accrues to the client. See Palmer & Crocker (2012) 346 and Hamman & Koen (2012) 82.

24 See AIIF Claims Procedure.

law clinics render the type of services which can be equated to those of private practitioners. This section helps bolster the argument that principal attorneys at law clinics should not be required to have FFC and trust accounts.

3 The Legislative Landscape

The LPA was enacted in September 2014 and section 120 provides that Chapter 10, which deals with the National Forum, came into operation in February 2015. Other parts of the Act will come into operation on a date to be fixed by proclamation.²⁵ Chapter 2 which deals with the South African Legal Practice Council, will only come into operation 3 (three) years after Chapter 10 and the rest of the Act will come into operation on a date to be proclaimed after the commencement of Chapter 2. The LPA will repeal statutes such as the Attorneys Act, the Admission of Advocates Act and the Right of Appearance of Attorneys Act in its entirety.²⁶ The fact that not all the provisions of the LPA have come into operation, means that the legal profession is being regulated by different statutes in South Africa. Please note that at the time of writing the provisions which require that principal attorneys at law clinics should be in possession of a Fidelity Fund Certificate are not yet in operation.

Section 84(1) of the LPA specifically states that any attorney and any advocate, other than a legal practitioner in the full-time employ of the South African Human Rights Commission (SAHRC) or of the state, who practises for his own account, either alone or in partnership, or as a director of a practice that receives or holds money or property belonging to any person, must be in possession of a FFC. The wording of the provision means practitioners at a university law clinic are not exempted from being in possession of a FFC. The Legislature would after all have had no difficulty in explicitly exempting such practitioners from the said requirement.

The argument above is bolstered by the fact that attorneys, who are employed by Legal Aid South Africa (LASA),²⁷ are expressly exempted from obtaining a FFC. It thus stands to reason that section 84(8) of the LPA requires that law clinics must now have FFCs.²⁸ Consequently it will be imperative for every attorney, including those attached to law clinics, to have a FFC and to operate a trust account.²⁹ The term “legal practitioner” in the LPA is used to

25 The National Forum was established in February 2015.

26 See the schedule to the LPA repealing the Attorneys Act 53 of 1979, the Admission of Advocates Act 74 of 1964 and the Right of Appearance in Courts Act 62 of 1995.

27 Section 84(8) of the LPA. The provisions of the section do not apply to legal practitioners who practise in the full-time permanent employment of Legal Aid South Africa.

28 Section 84(8) of the LPA. See footnote 388 of Draft 3 of the LPA which records that John Jeffrey MP asked the department to clarify the position of non-profit organisations and, specifically, law clinics.

29 Section 86 of the LPA.

include both attorneys and advocates.³⁰ The definition of “attorney”, in the LPA restricts practitioners to legal practitioners practising with a FFC.³¹ This definition in the LPA, effectively excludes all practitioners currently practising at a university law clinic, who are not in possession of a FFC.³² It will also affect law clinic attorneys’ eligibility to serve on the Council. In terms of section 7(1)(a) of the LPA, 16 legal practitioners will be members of the Council. It appears that attorneys practising in their current capacities at law clinics will be excluded from serving as Council members. They are to be excluded from the definition of “legal practitioner” and “attorney” in the LPA and will, therefore, not be represented on the Council. University law clinics will thus not be able to participate in the establishment of the Attorneys Fidelity Fund Board³³ by the Council. This could influence the funding of law clinics as they are dependent on financial support from the AFF with which they have had a long-standing relationship.

In terms of section 34 of the LPA it is permitted that a law clinic may be established by any university on condition that it is constituted and governed as part of the Faculty of Law at that university;³⁴ that all legal services at the law clinic are rendered by a legal practitioner or under their supervision, which refers to legal services by candidate attorneys and senior law students;³⁵ that the legal services provided must be accessible to the public;³⁶ and that the legal services must be rendered free of charge.³⁷ The requirement that they must render services free of charge, in fact, illustrates that law clinics are not generally required to handle money in the same manner as private practitioners do. An exception is granted to law clinics, in that they may recover amounts that were actually disbursed on behalf of clients.³⁸ Law clinics are prohibited from performing any work: in connection with the administration or liquidation or distribution of deceased or insolvent estates; for mentally ill persons or for any person under any other legal disability; and regarding the judicial management, business rescue or liquidation of a

30 Section 1 of the LPA. It is envisaged that both attorneys and advocates will be referred to as legal practitioners.

31 Section 4 read with s 34(2)(b)(i) of the LPA.

32 This means that all the attorneys currently practising at law clinics at South African universities will be excluded from the definition of attorney, unless the principal attorney opens a trust account and applies for a Fidelity Fund Certificate.

33 See section 63(1) of the LPA which provides for the establishment of the AFF Board.

34 Section 34(8)(a) of the LPA.

35 Section 34(8)(b) of the LPA.

36 Section 34(8)(c) of the LPA.

37 Section 34(8)(d) of the LPA.

38 Section 34(8)(d) of the LPA.

company.³⁹ Conveyancing and the lodging of Road Accident Fund claims are likewise prohibited.⁴⁰

Although section 34(8) of the LPA provides for the establishment of university law clinics, it does not make provision for attorneys practising there⁴¹ and also makes no reference to advocates who practise at university law clinics.⁴² This is a glaring omission in the LPA, which implies that such practitioners must be in possession of a FFC and by implication open and operate a separate trust account. The requirement for trust accounts for lawyers was specifically inserted in the Attorneys Act⁴³ to protect clients against abuse and theft of trusts moneys. The nature of the work undertaken by law clinic negates the risk of abuse of client's trust funds.

4 The Rationale for the Change

There appears to be no logical and well-reasoned explanation for the new requirement of compulsory FFCs for law clinics. An analysis of the Parliamentary process preceding the promulgation of the Act evidences an absence of significant discussion of the reasons for the proposal of this departure was or why it is necessary. Former Deputy Minister of Justice, John Jeffery, questioned whether law clinics should have trust accounts during parliamentary deliberations.⁴⁴ Unfortunately the question was not afforded due consideration or the debate that it warrants. It was merely confirmed that law clinics should have trust accounts.

Mr Jassiem, on behalf of South African University Law Clinics Association (SAULCA),⁴⁵ made submissions to the justice portfolio committee.⁴⁶ Jassiem argued that attorneys at law clinics should not be required to obtain Fidelity Fund certificates, even though law clinics do apply for accreditation to the appropriate law societies. He pointed out that the definition of 'attorney' in the Bill, at that stage, was restricted to a legal practitioner practising with a FFC and that this excludes practitioners practising at law clinics or justice centres. SAULCA furthermore submitted that attorneys at law clinics should not require FFCs and that the *status quo*, as at 2012, should remain. Justification for

39 Section 34(8)(e) of the LPA.

40 Section 34(8)(e) of the LPA.

41 Hawkey (2013) 36.

42 Section 34(5) of the LPA where it refers to advocates.

43 Section 78 of the Attorneys Act 53 of 1979.

44 See note 28 above.

45 According to its website <http://www.saulca.co.za>: "SAULCA is a voluntary association of all South African University Law Clinics, established in approximately 1982, to promote and protect the interests, values and goals of its members."

46 Hawkey (2013) 36.

not supporting the legislative change included, *inter alia*, that law clinics did not charge clients fees for their services.

There is only one exception to the general rule that law clinics do not charge clients for their services; that is when attorneys are awarded costs in their favour following successful litigation. In such instances clients usually cede their right to recover legal costs to the law clinic. This is one of the exceptional times when a law clinic will be paid for its services. This is however not a client's money to be kept in trust by the clinic. Hence this exception does not necessitate law clinics to have trust accounts. It was pointed out to the Parliamentary committee that the Bill was silent on this point.⁴⁷

The University of the Witwatersrand (Wits) Law Clinic, in a separate written submission made to Parliament, expressed itself in favour of this new requirement for their attorneys.⁴⁸ The reason the Wits Law Clinic advanced was that their attorneys litigate in the civil courts and often receive trust monies in the form of damages recovered on behalf of clients, as well as deposits for disbursements. Wits's position stands in contrast to the rest of SAULCA's members. Its opinion was that such monies should be properly accounted for and subjected to auditing in the normal course in terms of the rules of the various Law Societies.⁴⁹ While the new requirement is suited to the unique needs of the Wits Law Clinic, due consideration should also have been afforded to the submissions of SAULCA, the official body which represents all law clinics in South Africa. Moreover, given that the legislative change will impact on the operations of all law clinics and significantly so, it may be argued that it should have been preceded by greater consultation with law clinics. This omission from the democratic process will undoubtedly have major implications for access to justice in South Africa and may to some extent defeat or frustrate the mainstay of what some believe to be a functional and improving justice system. The next part of this essay discusses the position of attorneys practising in university law clinics.

5 University Law Clinics

SAULCA documents that, at present, 17 South African law faculties have university based law clinics.⁵⁰ Many universities do not fund the access to

47 Hawkey (2013) 36.

48 Wits Law Clinic (2012).

49 Wits Law Clinic (2012).

50 See McQuoid-Mason (1999) 247 and McQuoid-Mason (2013) 570. The clinics are: UNISA Legal Aid, Witwatersrand Law Clinic, Johannesburg Law Clinic, Pretoria Law Clinic, Free State Law Clinic, Rhodes Law Clinic, Fort Hare Legal Aid Clinic, Walters Sisulu Law Clinic, Nelson Mandela University Law Clinic, Fort Hare Law Clinic, UKZN Howard College Law Clinic, UKZN Pietermaritzburg Law Clinic, Limpopo Law Clinic, Venda Law Clinic, University of Potchefstroom Law Clinic (CCLD), University of

justice component in law clinics, which have to source funding, *inter alia* from external donors.⁵¹ Certain universities are responsible for the salaries of some clinic staff; provide free or highly subsidised office accommodation, furniture, copying, telephone and fax facilities as well as student assistants, in order to alleviate the financial burden of their clinics.⁵² Generally clinics do not charge clients a fee and at most require them to cover some of the disbursements. The LPA requires that law clinics provide free services to clients. This requirement appears to contradict or obviate the need for FFCs and trust accounts for law clinics.

The operations of law clinics and the financial dynamics they face are such that it might be wholly inappropriate and impractical for them to comply with the requirement of having FFC and trust accounts. Law clinics must increasingly justify their expense and need for funding, as funding has become a major issue with donors imposing ever more stringent funding requirements over the years. Law clinics are now also competing for funding with other public interest law firms.

Law clinics receive funds also from their respective Law Faculties, grants by international donors, the AULAI TRUST, and the AFF.⁵³ In addition, with the restructuring of LASA and the increase in its resources and capacity to provide legal services to the poor and marginalised, it became important for law clinics to redefine their role in providing access to justice in view of these challenges.⁵⁴ Law clinics have also acquired more specialised areas of expertise which concentrate on the needs of vulnerable groups such as women, children, people living with HIV/AIDS, the landless, farm workers, refugees, and so forth.⁵⁵ They have established specialist legal units, which enable them to receive funding from international as well as national donors.⁵⁶ Law clinics operate either from premises provided by the university or from satellite offices in nearby communities. Some of them will have no overhead expenses, such as, rental, telephones and other incidental expenses, which are either covered in full or in part by the universities.⁵⁷ It could be that in some instance certain law

Potchefstroom Mafikeng Campus Law Clinic, University Western Cape Law Clinic, University of Cape Town Law Clinic, University Stellenbosch Law Clinic. Before the university mergers there were 21 university-based law clinics. See Mhlungu (2004) 1022.

- 51 See Bodenstein (2005) 316 and McQuoid-Mason (2013) 570. Funding for the Aulai trust is sourced from the Ford Foundation, grants from Attorneys Fidelity Fund of the Law Society of South Africa and other organisations.
- 52 Bodenstein (2005) 316.
- 53 Bodenstein (2005) 316.
- 54 Bodenstein (2005) 312.
- 55 Bodenstein (2005) 312.
- 56 Bodenstein (2005) 316.
- 57 Bodenstein (2005) 316.

clinics will have certain overhead expenses for which they will be liable, but not to the extent as that of an independent law firm. The financial controls required for private practices should therefore not be the same for law clinics.

Attorneys and advocates at law clinics perform various functions related to the law clinics' purposes: assisting the indigent, providing opportunities to candidates to enter the legal profession and training of senior law students.⁵⁸ Although these three functions are interrelated and indeed overlap in certain instances, they will be discussed separately.

5.1 Clinical Legal Education

One of the mandates of law clinics is to provide clinical legal education especially to final year law students.⁵⁹ Providing indigent people with legal services is a corollary of the training of students. Law clinics incorporate a clinical methodology whereby students learn through practice and the focus is mainly on civil litigation.⁶⁰ The students who work at law clinics obtain academic credit for doing so.⁶¹ It may be either on a voluntary or compulsory basis. Students consult with actual clients, take statements, open files, assist with the drafting of legal documents and pleadings, research points of law, and attend court appearances as observers.⁶² It gives them excellent exposure to many practical techniques,⁶³ such as, interviewing clients,⁶⁴ discussing clients' statements with them,⁶⁵ and preparing possible questions that might be asked during a trial.⁶⁶ All of this is done in a controlled environment and under the close supervision and mentoring of qualified attorneys at the law clinics.⁶⁷

Some institutions make participation in mock trials a compulsory element of the final assessment of senior law students. Participants are divided into groups to act on behalf of "defendants" and "plaintiffs" or they act as "prosecutors" and representatives of "the accused" in criminal "trials".⁶⁸ Their theoretical understanding of subjects, such as, the law of evidence, the law of criminal procedure and the law of civil procedure, is given a practical dimension when they must consult with and prepare witnesses for trial, lead

58 Mhlungu (2004) 1005.

59 Du Plessis (2015) 66.

60 McQuoid-Mason (2013) 570.

61 This course is compulsory at Wits. See McQuoid-Mason (2013) 570 and Bodenstein (2005) 312.

62 Meadows (1996) 491, McQuoid-Mason (2013) 570 and Bodenstein (2005) 310.

63 Mhlungu (2004) 1024.

64 Marnewick (2007) 3.

65 Amsterdam (1984) 616.

66 Amsterdam (1984) 617 and Marnewick (2007) 237.

67 McQuoid Mason (1999) 247, Meadows (1996) 491 and Bodenstein (2005) 312.

68 Amsterdam (1984) 616, Maisel (2010) 16 and Barrat *et al* (2008) 277.

witnesses in evidence in chief or cross-examine or re-examine them. It also allows them to apply their knowledge of substantive law to “real” situations. They acquire skill in analysing the facts of a case and marshalling arguments when submitting closing arguments and arguments during mitigation of sentence. Their drafting skills are also being honed in that they are required to draft heads of argument. They also develop the confidence to speak in front of the adjudicators, such as, practising attorneys, advocates, magistrates and judges.⁶⁹ It provides them with invaluable experience, demystifies legal practice and reduces the fear of making presentations in open court.

This function of a law clinic, although it replicates what may be encountered in private practice, never involves situations where a student has to work with funds. “Billing” clients is not part of their training, hence opening of trust accounts are futile. This is a reality and should have been considered during parliamentary deliberations.

5.2 Assisting Indigent People

The mandate of law clinics includes not only the training of students, they also provide free legal services and access to justice to the poor and marginalised communities in urban and rural areas.⁷⁰ Certain law clinics not only provide free legal services on their campus, but have established satellite offices to accommodate the residents of the poorer, more populous areas.⁷¹ Law clinics, while fulfilling their primary aim of training students in the practical application of the law,⁷² provided the surrounding poor communities with legal aid.⁷³ The clinics deal with a variety of matters but do not, however, provide services such as conveyancing, third-party claims, and personal-injury claims.⁷⁴ Indigent clients seeking legal assistance make an appointment and are interviewed either by a law clinic student under the direct supervision of a qualified attorney or by a professional staff member. In order for clients to qualify for legal assistance, they generally satisfy a means test.⁷⁵

The motivation for the establishment of law clinics in South Africa at the various universities, mainly during the 1970s and the 1980s,⁷⁶ reinforces the

69 Du Plessis (2015) 66.

70 McQuoid-Mason (1999) 247, Meadows (1996) 491 and Bodenstein (2005) 312.

71 Amsterdam (1984) 500.

72 Bodenstein (2005) 318. See also Hawkey (2013) 36.

73 McQuoid-Mason (1999) 247 and Bodenstein (2005) 312.

74 Law clinics are specifically excluded from this type of work. See section 34(8) of the LPA.

75 Legal Aid South Africa (2014) 157. The law clinics in South Africa apply the means test laid down by the Legal Aid Board South Africa which is revised from time to time.

76 The first South African university legal aid clinic was established in September 1971 at the University of Cape Town. The University of Witwatersrand set up an “off-campus” clinic at the beginning of 1973. Clinics were started at the University of Natal in Durban

argument that the requirement for attorneys to have trust accounts does not resonate with the historical and contemporary mandate of law clinics. In 1986 the law clinics formed the AULAI, now called SAULCA.⁷⁷ The establishment of the clinics was a response to the need for legal services for the marginalised and indigent.⁷⁸ Many clinics operated in places where there was a need for legal representation as state legal aid was absent. In the early 1990s various clinics obtained formal law clinic accreditation and this allowed them to employ candidate attorneys, often drawn from the ranks of the previously disadvantaged. The issue of providing articles of clerkship to candidate attorneys will be further discussed below.

5.3 Providing Articles for Candidate Attorneys

Prior to the 1993 amendment of the Attorneys Act prospective “non-white” lawyers, in particular, faced overwhelmingly complex barriers to admission to legal practice.⁷⁹ They encountered many difficulties to find articles of clerkship in an otherwise white dominated profession. One of the innovative proposals at that stage was to expand their access to both legal representation and the legal profession involved the expansion of law school clinical programmes.⁸⁰ The Attorneys Amendment Act of 1993 allowed prospective attorneys to fulfil their articles of clerkship requirement by performing community service at a university law clinic.⁸¹ The amendment allows a candidate attorney to serve under a contract of service in a law clinic for two years in order to be exempted from serving articles of clerkship with a principal in private practice.⁸² The provision that an attorney shall at no time have more than three candidate attorneys under articles of clerkship does not apply to principals who engage candidate attorneys under contracts of community service.⁸³ The amendment also allows candidate attorneys to attend a four to six months practical training

in 1973 and in Pietermaritzburg in 1974. This was followed by Port Elizabeth (1974), Stellenbosch and Western Cape (1975), Durban Westville and Zululand (1978), Rhodes (1979) and Pretoria (1980). The remaining universities all founded clinics in the 1980s.

77 Bodenstein (2005) 310 and McQuoid-Mason (2013) 570. See also *www.aulai.org.za* and *www.saulca.co.za*.

78 Bodenstein (2005) 318.

79 Meadows (1996) 454.

80 Bodenstein (2005) 312 and Meadows (1996) 454.

81 The LPA defines “community service” as “service at a law clinic, a legal-aid centre controlled by a non-profit agency, or a legal-aid clinic controlled by the Legal Aid Board, such as a public-defender office”. “Law clinic” is defined as “a centre for the practical legal education of students located at a law school in the Republic”. See further Meadows (1996) 454, McQuoid-Mason (1999) 241 and Bodenstein (2005) 312.

82 Act 115 of 1993. See McQuoid-Mason (1999) 241.

83 Section 3(3) of the Attorneys Act 53 of 1979. See also *Ex parte Natal Law Society* 1995 (2) SA 946 (N).

course approved by the Law Society in the province where they are registered.⁸⁴ Upon completion of the course to the satisfaction of the Law Society, the candidate can serve either one year under articles of clerkship or perform one year of community service under an approved contract of service.⁸⁵

SAULCA figures indicate that in 2013 there were approximately 72 attorneys and 72 candidate attorneys employed at law clinics in South Africa.⁸⁶ Law clinics are, together with Legal Aid South Africa, one of the major providers of legal aid and civil and human rights assistance in the country. Law clinics employ advocates, attorneys, candidate attorneys and in some instances paralegals. In 2007 SAULCA entered into an agreement with the Department of Justice and Constitutional Development to provide 100 candidate attorneys with the opportunity to do community service; in 2009 this number was increased to 150.⁸⁷ Law graduates who would otherwise have been employed were thus enabled to serve their period of articles of clerkship at a law clinic.⁸⁸ Their attachment to educational institutions means law clinic attorneys are not only actively involved in the practical legal training of law students, but also fulfil a mentoring role for candidate attorneys.⁸⁹ Candidate attorneys, on the other hand, also have an opportunity to mentor law students and assist them with their clinical legal training.⁹⁰ It is thus clear that university law clinics are not focused on generating fees. Law clinics have a dual objective: to provide clinical legal education and to provide legal assistance to the poor.

6 Should Attorneys at Law Clinics have Trust Accounts?

In summation there are cogent arguments against the requirement of FFC and trust accounts for attorneys at law clinics. In the ordinary course of operations at law clinics attorneys offer clinical legal education to students and render legal services to the indigent.⁹¹ It is conceivable that on very rare occasions such attorneys may, if they act in civil matters and in High Court litigation, work with substantial amounts of money.⁹² Additionally, if a law clinic is successful

84 Section 1 of Act 115 of 1993.

85 Section 1 of Act 115 of 1993.

86 See <http://www.saulca.co.za/statistics>.

87 Hawkey (2013) 36.

88 Meadows (1996) 491. An agreement between the Department of Justice and law clinics at one stage enabled up to 10 articulated clerks to complete their contract of community service at each law clinic.

89 Meadows (1996) 491.

90 Meadows (1996) 491.

91 Meadows (1996) 475 and Bodenstern (2005) 318.

92 Wits, in its submission, states that its attorneys institute civil claims on behalf of clients.

in a civil matter and receives a cost award in their favour, then such cost will be allocated to the coffers of the law clinic. Attorneys at the law clinic would, therefore, not need a trust account for such funds as it belongs to the clinic and not their client.

Attorneys at law clinics are not burdened by the financial commitments which private practitioners must meet: as mentioned earlier attorneys at law clinics do not have to sustain the clinic financially. They can fairly be described as law teachers, who practice only for the benefit of the indigent.

The legislature should have considered that the sole purpose of requiring attorneys to have FCCs is to protect clients who may be duped by dishonest practitioners: such clients can submit their claims to the AIIF for relief. Whilst there might be ways in which attorneys at law clinics could manifest dishonest behaviour, the nature of the work and the practices of law clinics are such that stealing money from a client is virtually impossible. The protection of the AIIF is therefore not applicable to clients of law clinics. The requirement that law clinic attorneys must have trust accounts will at best place an unnecessary burden on them and at worst undermine the real interests of the majority of clients.

Apart from the burden to attorneys there are a number of difficulties that arise out of such a requirement. The challenges include: deciding in whose name a trust account should be opened; should all the attorneys at the clinic have trust accounts or only the principal? This begs the question of whether the new legislative requirement could possibly lead to clinics being unable to deliver services for which they were traditionally established. This change might undermine the original mandate of law clinics and impact negatively on the training that they are supposed to offer to final year law students and candidate attorneys. It is suggested if a law clinic such as Wits wants to apply for a FCC and a trust account, they should be allowed to do so, but this should not be a requirement imposed on all the law clinics.

7 Conclusion

We submit that the requirement in the LPA that attorneys based at university law clinics must be in possession of a FCC is neither reasonable nor justified. We recommend that the legislature seriously consider exempting law clinics from this requirement of the LPA. If not, this part of the Act could lead to burdening law clinic attorneys unnecessarily by compelling them to have trust accounts. The reason why this particular matter did not receive much attention could be that the profession focussed too sharply on the independence of the profession and its attempt to minimise government's influence on the organised profession. Unfortunately the matter of trust accounts for law clinics

was not debated in any significant detail and the role players such as the law clinics were not consulted - a serious flaw in the democratic process.

The South African legal profession is facing complex challenges⁹³ and law clinics provide a service that is crucial to addressing the imbalances of the past. Impediments should not be placed in their way by requiring attorneys at university law clinics to have trust accounts.⁹⁴ We, therefore, recommend that the definition of “attorney” in the LPA should be amended to read:

Either a legal practitioner practising with a FFC or an attorney practising at a law clinic or justice centre without a FFC.⁹⁵

We further suggest that section 84(8) should be amended to read as follows:

The provisions of this section do not apply to an Attorney who practises in the full time employ of Legal Aid South Africa or of a law clinic attached to a university.⁹⁶

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93 Meadows (1996) 502.

94 Hawkey (2013) 36.

95 Hawkey (2013) 36.

96 Hawkey (2013) 36.

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Restorative Justice as Postmodern Justice: Exegesis and Critique

Raymond Koen

Abstract

This essay explores the relationship between postmodernism and RJ. Postmodernism quickly outgrew its non-legal origins and has extended its reach to incorporate matters legal. Already, it has established a significant presence in the law, as increasing numbers of legal theorists have adopted or included a postmodern perspective in their analytical endeavours. The particular concern of the essay is with the impact of postmodernism upon the field of criminal justice. In this connection, it is submitted that RJ is the exemplification of the postmodern attitude in criminal justice. This submission is grounded in an investigation of the interrelations between postmodernism and RJ in six spheres, namely, the state, history, alterity, power, subjectivity and consumerism. This investigation shows that in each sphere there is a discernible and compelling postmodern flavour to the RJ tenet in question. In consequence, it is posited that the intersection between postmodernism and RJ is significant enough to justify the proposition that if there is a postmodern criminal justice it is RJ. In other words, RJ is postmodern justice. However, the relationship between postmodernism and RJ is steeped in contradiction. The latter part of the essay seeks to probe this contradiction, via an exposition and critique of the political economies of postmodernism and RJ, with a view to comprehending its implications for the future of RJ.

1 Introduction

Postmodernism is predatory. It long has superseded its origins in art, architecture and literary theory, and has wended its way voraciously through a large number of disciplines. It has conquered even the famously conservative defences of the law and already has made a noticeable imprint upon the analysis of legal relations. Indeed, it has implanted a colonising footprint in the legal form. There are today not a few legal academics who challenge the perceived certainties of legal modernism and who routinely subject law and justice to subversive interrogations through the postmodern lens.¹

The postmodern invasion of the law extends also to the field of criminal justice, where resort is had to the postulates of postmodernism in the comprehension and critique of crime and punishment. Restorative justice (RJ)

¹ See, generally, Edgeworth (2003), Davies (1996), McVeigh (2002), Hunt (1990), Stacy (2001) and Feldman (2000).

figures prominently here in that it encapsulates the postmodern offensive against the criminal justice system.² Indeed, it is a central proposition of this essay that the notion of RJ is the exemplar of legal postmodernism in the arena of criminal justice. In other words, if there is a postmodern criminal justice, it is RJ.³

There is a palpable correspondence between postmodernism and RJ, in that many of the major tenets of RJ have a discernibly postmodern flavour about them. The synchronicity between the two is neither episodic nor accidental. It is genetic. In this regard, RJ may be understood as one of the many progeny of postmodernism. There is enough constitutional intersection between them to justify RJ being theorised as a genus of postmodern justice, that is, as a form of criminal justice informed by the premises of a postmodern jurisprudence. The overall purpose of this essay, then, is to develop a critical comprehension of RJ as a postmodern presence in the criminal justice system. To this end, the first half of the essay is exegetical and seeks to establish the postmodern character of RJ, while the second is critical and attempts to elaborate a materialist critique of RJ as postmodern justice.

2 The Postmodern Impulse of Restorative Justice

The notion that RJ is constitutionally postmodern likely is a novel one for most of its advocates. As a rule, the proponents of RJ have little or nothing to say about postmodernism. Certainly, they do not confess readily to postmodern sensibilities, and still less do they identify expressly any postmodern provenance for their work. The literature of RJ is remarkable for displaying no wilful adherence to or conscious concurrence with the philosophical premises or operational axioms of postmodernism.

Arrigo has taken up the theoretical cudgels for a reciprocal engagement between postmodernism and RJ, bemoaning the apparent distance of RJ

2 See, for example, Edgeworth (2003) and Cunneen (2003).

3 There are two versions of restorative justice. Comprehensive restorative justice is the strong or maximalist version, conceived as a systemic alternative to criminal justice. The weak or minimalist version is partial restorative justice, which is content to be an adjunct to criminal justice. The former is abolitionist, the latter accommodationist. The partial version of restorative justice holds negligible philosophical attraction and is of minimal theoretical consequence. It is little more than a pragmatic adaptation to the contradiction between criminal justice and comprehensive restorative justice. Comprehensive restorative justice is engaging analytically precisely because it entails a radical rejection of what is. Partial restorative justice is not, precisely because it seeks a *modus vivendi* with what is. It therefore does not demand sustained analytical attention. In any event, it makes sense only in its relation of incompleteness to comprehensive restorative justice. In this essay, then, any unqualified reference to restorative justice means comprehensive restorative justice. See further Pavlich (2005) 16-20.

principles from postmodern social theory.⁴ He canvasses the challenges which postmodernism poses for RJ, and urges that the “tools of affirmative postmodernism” be harnessed as a “liberating blueprint for reform in RJ”.⁵ For him, RJ is the poorer for not embracing postmodernism and he considers that it is high time that its advocates begin to “apply postmodern principles to the logic and practice of restorative and community justice”.⁶ In a word, he entreats adherents and practitioners of RJ to become affirmative postmodernists, the better to advance their pursuit of a justice system which is responsive alike to the needs of victims, offenders and their communities.

Arrigo’s concerns may carry weight insofar as members of the RJ movement generally do not style themselves affirmative postmodernists or do not profess reliance upon the resources of postmodernism. However, the fact that they do not proclaim adherence to “postmodern principles” in itself is not an obstacle to the argument of this essay, that RJ is a thoroughly postmodern way of doing justice. As intimated above, and as will be demonstrated below, there is a constitutional coincidence between RJ and postmodernism which exists independently of the ideational preferences of their adherents. In this regard, Arrigo’s concerns are misplaced, for the practice of RJ already is decidedly postmodern, and the proponents of RJ need not be exhorted now to apply principles which already are inscribed, more or less, in their practice. In other words, RJ is postmodern in objective terms, notwithstanding the apparent unconcern of its followers with things postmodern.

It bears noting here that Armstrong makes a similar argument in his treatment of the drug courts in the USA as dispensers of postmodern justice. According to him, the drug court is almost instinctively postmodern in its ontological disposition and diversionary practice, breaking radically with the punitive propensities of the modern criminal court.

[I]t appears to me that the DC is postmodern because it combines ideas strongly influenced, perhaps even shaped, by postmodernism. The DC is not postmodern by design, its prime movers are not adhering to any preconceived intellectual or philosophical tradition. Instead the DC is a developing institution whose creators add components and adapt features based on first-hand consideration of the problem at hand. This, it turns out, is exactly what individuals engaged in the postmodern project do when they challenge adherence to universally applicable frameworks of interpretation.⁷

4 See Arrigo (2008) 477-480 and Arrigo (2004) 93-98.

5 Arrigo (2008) 481.

6 Arrigo (2004) 98.

7 Armstrong (2008) 272.

RJ is postmodern in much the same sense. It, too, departs radically from the mores of conventional criminal justice and comprehends the problems of crime and punishment from a postmodern perspective. But its postmodernism, too, is not espoused consciously or has not been developed deliberately by its adherents. Rather, it is a spontaneous postmodernism, which has emerged from their attempts to fashion an alternative to criminal justice. Like the drug court, RJ is extemporaneously postmodern. Not unlike Topsy, nobody never made its postmodernism, it just grow'd!

3 Methodological Excursus

It is necessary, at this juncture, to make some effort to forestall misinterpretation of the methodological conspectus of this essay. Patently, the analysis presented here entails a considerable degree of simplification, in respect of both postmodernism and RJ. And certainly, it is unable to do representational justice to the complexities and nuances which render postmodernism the proverbial moving target. However, all analytical endeavours, by definition, are exercises in simplification.⁸ It is not possible to analyse postmodernism or RJ or the relationship between them without simplifying their constitutional totalities. Wholeness must yield to partialness in the process of analysis. "Pigeon-holing" is unavoidable in the pursuit of comprehension.⁹

Simplification, in turn, always and necessarily involves the analyst in a process of abstraction.¹⁰ A social form or a concept cannot be theorised without abstraction, that is, "the intellectual activity of breaking [the] whole down into the mental units with which we think about it".¹¹ The process of abstraction isolates and purifies the relations chosen for analysis, and reduces them to "certain standard types, from which all characteristics irrelevant to the relation under examination are removed".¹² It is about avoiding periphera and highlighting essentialia in the pursuit of analytical clarity. The point, as Hegel put it, is for "the essential to be distinguished and brought in to relief in contrast with the so-called non-essential".¹³

The methodology which informs this essay is grounded in the process of abstraction. The objective was to get to the heart of the relationship between postmodernism and RJ. The six issues isolated for analysis were identified by abstracting them from the complex matrices of postmodernism and RJ. They

8 See Ollman (1993) 24.

9 See Mouton & Marais (1994) 58 & 126.

10 Marx (1954) 19.

11 Ollman (1993) 24.

12 Sweezy (1942) 17.

13 Hegel (1956) 65.

emerged from the process of abstraction as the locus for comprehending the relationship between RJ and postmodernism.¹⁴

It may be owned, readily, that the analysis undertaken here is susceptible to a charge of failing to apprehend the constitutional complexities of its objects. This is especially so in respect of the oftentimes knotty intricacies of the postmodern worldview, marked by an antipathy to essentialism, truth-talk and metanarratives, and a commitment to indeterminacy, dislocation and eclecticism. However, as Eagleton has observed, "postmodernism is such a portmanteau phenomenon that anything you assert of one piece of it is almost bound to be untrue of another".¹⁵ The focus of this essay is thus upon the "received wisdom" of postmodernism,¹⁶ that is, upon those fundamentals of the postmodern ontology by which we are able to recognise a phenomenon or a perspective as postmodern.¹⁷ It is submitted that the six precepts around which this essay revolves constitute a part, at least, of the "received wisdom" of postmodernism.

The discussion which follows engages only those aspects of postmodernism which seem pertinent to the analysis of RJ as a postmodern way of doing justice. Thus, those aspects of postmodernism are singled out for analysis which appear to be most helpful in tracing the intersections between postmodernism and RJ. They have been chosen, not because they delineate or even approximate the structure of postmodernism or of RJ, but because they facilitate analytical access to the relationship between the two. That is, they offer crucial insights into the comprehension of RJ as a postmodern jurisprudence. The primary objective of this essay is to apprehend the contours of the relationship between RJ and postmodernism. It is submitted that the methodology adopted facilitates analytical access to that relationship in its pristine form, unencumbered by disposables and digressions.

Finally, it has to be recorded that for the purposes of this essay postmodernism is taken to be the worldview that corresponds to postmodernity, and that postmodernity is the political economy of the current epoch, which began in the early 1970s, of the capitalist mode of production. As

14 They are identified and analysed below.

15 Eagleton (1996) viii.

16 Eagleton (1996) viii.

17 See Callinicos (1995) 734 who, some time ago already, classified postmodernism as a "normal science", following the Kuhnian designation of "normal science" as "the state of affairs which comes into being when a group of researchers come to accept certain ways of proceeding intellectually as the basis of their future inquiries". He goes on to suggest that the "principal claims" of postmodernism have acquired "the solemn countenance of orthodoxy" for a goodly number of intellectuals. It would appear that, nuances and differences notwithstanding, there does exist an identifiable corpus of postmodern postulates which constitutes a "received wisdom".

a mode of production, capitalism is in historic decline. It is in the grip of a structural crisis of capital accumulation which goes to the vital issue of its reproduction as a mode of production. Postmodernism, then, is the intellectual disposition and cultural mood accompanying the contemporary stage of the capitalist crisis. It is the economic crisis expressed in non-economic terms. It is the generalised superstructural conjugate of the material contradictions embedded in the marrow of the capitalist mode of production.

4 Mapping the Constitutional Concordance

The next several sections of this essay comprise a presentation of a sestet of theses pertaining to the state, history, alterity, power, subjectivity and consumerism. It is submitted that these six theses are germane to the comprehension of RJ as a postmodern critique of the modern sensibilities founding the criminal justice system. In other words, they have been chosen because they appear to be most apposite for mapping the intersections between RJ and postmodernism and for facilitating analytical admission to the relationship between the two.

The analysis of each of the designated theses will traverse two stages: firstly, an exposition will be offered of the basic postmodern viewpoint on the issue in question, in contrast to the modern viewpoint; secondly, an enquiry will be undertaken into the extent to which RJ shares the postmodern position.¹⁸ However, it must be urged that the discussion which follows cannot and does not purport to be comprehensive. Certainly, it is not presented as any finished description of RJ, and even less as any catholic elaboration of the constitution of postmodernism. The aim is much more pedestrian, namely, to provide a prolegomenon to the analysis of RJ as postmodern justice.

4.1 The State Thesis

Postmodernism posits the decline of the nation-state in the era of globalisation. The argument is that postmodernity is the epoch of the global market, peopled by autonomous subjects, with little or no room for the strong state of modernity. The point is underscored by Edgeworth's characterisation of the postmodern state as a contracting state.¹⁹ This characterisation has a dual

18 It is appropriate to note here that postmodernism is discursively hyperbolic. Extravagant notions such as hyperreality, pastiche, hyperspace and simulacrum are all integral to postmodern discourse. And postmodernists present their arguments in similarly exaggerated terms. See, in this regard, Best & Kellner (2001) 1-2 and Rosenau (1992) 5 & 7. Generally, it is not possible to engage postmodernism, in any of its aspects or relations, without having recourse to and replicating some of its discursive conventions. If, therefore, parts of the presentation below strike the reader as hyperbolic, it is because hyperbole is intrinsic to the discourse of postmodernism.

19 Edgeworth (2003) 53-63.

import. On the one hand, it refers to the retreat of the state as a public institution and the diminution of its traditional hegemonic role in structuring the lives of its citizens. On the other hand, it signifies the increasing privatisation of public functions, as the law of contract is relied upon more and more in respect of both the provision of (whatever remains of) state services and the internal functioning of state departments. Essentially, the postmodern state has reversed the modern trend to centralisation and corporatism. It is a state for which, according to Edgeworth, "privatisation, deregulation and marketisation are the preferred mechanisms by which governance is secured".²⁰

The welfare state was the pinnacle of the evolution of the modern state. It was centralisation and regulation epitomised, and, from the postmodern perspective, was the left liberal political metanarrative materialised. The postmodern state is defined by the neoliberal disavowal of the perceived welfarist errantry of left liberalism. The watchwords of neoliberalism are the self-same trilogy identified by Edgeworth as the preferred mechanisms of postmodern governance.²¹ In other words, postmodernism champions the neoliberal drive towards the attenuation of all the welfare functions of the modern state. Postmodernism prefers the invisible hand of the free market to the visible hand of the centralised state. Ideally, the postmodern state is an absentee state or, at best, a minimalist one, divested of many of its traditional functions, which become privatised in the hands of capitalist corporations.²²

The vision of the state held by postmodernism coincides with its rejection of the notion of the grand narrative which it considers to be the defining flaw of modernism. In this connection, the modern nation-state is perhaps the grandest of all narratives. It is a cohesive, centralised and authoritative institution, which is uniquely competent to implement and realise its own truth claims. It is omnipotent and, for as long as it enjoys a monopoly of force, is impervious to

20 Edgeworth (2003) 56.

21 But see MacEwan (1999) 19: "Markets are always infused with state actions, and the neo-liberal position is not in reality an advocacy of a weak state; it is an advocacy of a particular kind of strong state." For an amplification of this argument, see MacEwan (1999) 125-139.

22 Postmodernists tend not to notice that the minimalist state which they extol is often party to the commodification of properly public functions, and that such commodification is achieved at the cost of increased immiseration of the oppressed and exploited classes. It would appear that for them the freedom of the individual which such a state supposedly brings is valuable enough to offset the deleterious impact upon the living standards of the masses. Postmodernism is a profoundly individualistic worldview. The autonomy of the subject is a centrepiece of the postmodern project (in much the same way as it was the centrepiece of the modern project). The freedom of the individual which accompanies privatisation is crucial. Its impact upon the living standards of the masses matters little.

the claims of competitors within its national borders. Postmodernism entails the break-up of the modern notion of state supremacy. State power becomes fragmented and localised, and state authority, like everything else in the postmodern world, becomes negotiable. The status of the state, as narrative, is reduced from the grand to the quotidian. In the postmodern perspective, most, if not all, traditional state functions can be performed as well, if not better, by non-state actors.

RJ shares this postmodern vision of a minimalist or absentee state. Indeed, easily the most conspicuous property of comprehensive RJ is its militant anti-statism. Its project to replace criminal justice with RJ is simultaneously a bid to eject the state from all matters criminal. In its search for a solution to the crime problem, RJ considers the state to be a hindrance which must be removed. The proponents of comprehensive RJ are, in this regard, all decidedly postmodern in their pursuit of a fully privatised system of criminal justice. The same is true, *mutatis mutandis*, of partial RJ. Although its proponents have reconciled themselves to the continued supremacy of state criminal justice, they too advocate the withdrawal of the state from those areas of the criminal justice system into which RJ may be admitted. Both versions of RJ thus embrace the postmodern argument for a minimalist or absentee state. Both believe that non-state actors are capable of solving, in whole or in part, the problem of criminality upon which the efforts of state agencies hitherto appear to have made little impact.

The intersection between postmodernism and RJ on the question of the state is extensive. Essentially, they are at one in their critique of the modern state in that both want an end of the state as the decisive authority and as the political metanarrative. The anti-statism of RJ mirrors the postmodern assault upon the intrusive character of the modern state. Both the postmodernist and the adherent of RJ advocate privatised relations to replace the current state forms. The RJ critique of the state thus is infused thoroughly with the ethos of postmodernism.

4.2 The History Thesis

Postmodernists readily trawl the past for both inspiration and ammunition in their battle against the configurations of modernism. In the result, historical references bulk large in the postmodern rejection of the perceived tyranny of the metanarrative. While such references are most evident in postmodern architecture and art, they form an integral facet of the postmodern project in most disciplines.²³ Indeed, it has been argued that postmodernism has

23 See Heartney (2001) 12 & 20 and Hutcheon (1988) 93.

embraced a “return to history” and appreciates the ontological value of historical consciousness.²⁴

Postmodern historicism is concerned primarily with excavating premodern social artefacts and organisational forms which may be enlisted in the crusade against the supposedly totalising machinations of modernism.²⁵ Postmodernists, following Lyotard, generally comprehend the premodern epoch in narrative terms, as opposed to the modern metanarrative.²⁶ The narrative model of knowledge accepts no fixed origin which structures the narrative, and refuses to grant the narrator autonomy from the narrative. It is a model which presumes narrator heteronomy and which values epistemological contingency.²⁷

The postmodern commitment to the narrative tradition translates into a fascination with tribalism and localism as historical constructs. It is, more or less, already a postmodern conventional wisdom to endorse the narrative devices of tribal societies which survive on the fringes of the contemporary capitalist world in Latin America, Africa and Asia. These societies are prehistoric in organisation and technics, and supposedly are free of the metanarrative immoderations of the modern epoch.²⁸ This is why, for example, arguments for a postmodern re-organisation of society invariably rely heavily upon notions of independent crafts, cottage industries, parochial economies and yeoman democracy.²⁹ The idea is to exorcise the demons of modernism and rejuvenate the perceived idyll of premodern community.³⁰

24 Hutcheon (1988) 91-94.

25 Of course, the postmodern recourse to premodern principles and concepts is a highly selective one. Invariably, the contradictions of the premodern world are avoided. The premodern epoch is wide. It spans both prehistoric and historical societies and includes at least two historical modes of production, namely, slavery and feudalism. The cultural and other achievements of the ancients were based on slave labour. The attractions of localism and community harmony omit the feudal structures of exploitation and oppression which dominated the day-to-day existences of serfs and peasants.

26 Lyotard (1991) xxiv famously pronounced that: “Simplifying to the extreme, I define *postmodern* as incredulity toward metanarratives.” See also Edgeworth (2003) 234.

27 Davies (1996) 68-70.

28 The postmodern faith in a prehistoric world free of the metanarrative is unsubstantiated. Custom was the grand narrative of the prehistoric world. See Seagle (1946) 33: “The great reality of primitive society is not ‘civil’ law or ‘criminal’ law, but custom.” The savage horde and the barbarian gens were totalising institutions to the core. Contemporary tribal societies survive not only because they are geographically excluded from the reach of the capitalist mode of production but also because they are structured by their own metanarratives, arguably even more totalising than those of modernism.

29 See Kumar (1995) 48. This premodern historical bias is an inevitability, more or less. History offers only the choice between premodernism and modernism. Since postmodernism stands contrary to all that is modern, the only viable historical alternative is premodernism. If, therefore, postmodernism seeks to validate itself

Proponents of RJ share the postmodern predilection for premodern historical justifications. Indeed, RJ is perhaps more strident than postmodernism in its reliance upon history to advance its cause. The opposition between RJ and retributive justice has become firmly established as a RJ article of faith. Retribution is portrayed as a modern response to crime which has no or little foundation in the history of punishment. Adherents of RJ believe that the premodern world was, as regards penal sanctions, a world of RJ. Thus, Christie relies heavily upon the justice regime of premodern African tribes as the basis for his proprietary theory of RJ.³¹ Similarly, the republican theory of RJ espoused by Braithwaite & Pettit is rooted historically in the premodern Roman notions of *libertas*, *civitas* and *dominium*.³² Other RJ advocates such as Zehr and Considine concur with the view that the premodern era was, more or less, a golden era of restoration in the history of criminal justice.³³

Supporters of RJ identify retribution with large-scale industrial society. In other words, they conceive of it as the penal regime of the modern capitalist world. But they are adamant that retributive justice is neither the natural nor the necessary response to the problem of criminality. For them, RJ is not only the aboriginal but also the more natural way of doing justice. It was the justice of preindustrial, tribal, small-scale societies and, as such, was the archetypal premodern form of justice. And it was successful in keeping the premodern world free of the kind of rampant criminality in which every modern society has been languishing for decades. As the paradigmatic modern approach to punishment, retribution allegedly has brought about its own demise by its signal failure to make any significant impact upon the contemporary crisis of criminality. Hence the argument for its replacement by RJ which, it is

historically, it is entirely logical that it should draw upon premodernism as its primary source of such validation. What is more, the premodern epoch has the added attraction of being more unequivocally past than the modern era. It is no longer a component of living memory and thereby is available readily for a postmodern makeover, literally.

30 For a dissenting view, see Davis (1988) 83-84: "At least 100,000 apparel homeworkers toil within a few miles' radius of the Bonaventure [the Los Angeles hotel which has become a postmodern icon] and child labour is again a shocking problem. This restructuring of the relations of production and the productive process is, to be sure, thoroughly capitalist, but it represents not some higher stage in capitalist production, but a return to a sort of primitive accumulation with the valorisation of capital occurring, in part, through the production of absolute surplus value by means of the super-exploitation of the urban proletariat."

31 Christie (1977) 2 *et seq.*

32 Braithwaite & Pettit (1990) 9 *et seq.*

33 Zehr (1995) 95-157 and Considine (1999) 10-11 & 80-96.

contended, has become necessary because it alone possesses the radical vision required to resolve the crisis.

If retribution is the apogee of the modern way of doing justice, then there can be little doubt that RJ is the prototypical postmodern approach to justice. It defines itself in terms of its opposition to retribution and considers itself to be imbued with the palliative and regenerative powers of its premodern pedigree.³⁴ From the postmodern perspective, retributive justice is a version of the modern metanarrative whereas RJ is imbued with the spirit of the premodern narrative. And the key to overcoming the tyranny of the former is to revert to the freedom of the latter. RJ and postmodernism evidently are coeval in their partiality to the supposedly emancipatory promise of the premodern narrative.

4.3 The Alterity Thesis

Postmodernism has a preoccupation with alterity. It is a preoccupation which has resulted in the idea of the Other becoming acknowledged generally as being “crucial to any discussion of postmodernism”.³⁵ Such a focus upon alterity is concerned to engage and thereby to foreground the traditional outgroups which have been marginalised by the modern metanarrative. Women, people of colour, homosexuals, indigenous populations, the disabled and the aged: these are the Others, ostracised and silenced by modernism, with whom postmodernism has chosen to identify. A large part of the postmodern project is devoted to embracing and championing the claims of the outsider. It is about giving a voice to the narrative of every outgroup which hitherto has been reduced to “a sideshow in the grand narrative of world history” by the domination intrinsic in totalisation.³⁶ The postmodern ideal is a world free of the modern bias against the Other, in which there is no longer any ontological difference between insider and outsider, and in which otherness has ceased to be a concept of marginality.

The postmodern credo is one of perfect equality, in terms of which every perspective is accorded absolute validity. There is no room for either hierarchy or domination in the postmodern worldview. If the postmodern ideal comes to pass, we shall find ourselves, to mangle Marx, in a very Eden of the innate equality of narratives.³⁷ Postmodernism is, in this connection, the self-appointed saviour of the Other. If postmodernism is an emancipatory movement, then outsider emancipation is at the top of its agenda. There is

34 See Pavlich (2005) 34-42 who provides a trenchant critique of the technicism of the medical model of crime and punishment embedded in the RJ perspective.

35 Heartney (2001) 51.

36 Heartney (2001) 65.

37 See Marx (1954) 172.

nothing more quintessentially postmodern than the endeavour to find and legitimate the outgroup narrative. Therein, for many postmodernists, lies the true meaning of their project.³⁸

Postmodern jurisprudence, unsurprisingly, is populated heavily by schools of outsider jurisprudence. The engagement between postmodernism and the law is dominated by the jurisprudence of the traditional outgroups identified above.³⁹ Such outsider jurists typically present an alternative truth to that installed as modern law. They seek to secure for their constituencies the same substantive legal subjectivity which modernism had reserved for able-bodied white heterosexual men.⁴⁰ The jurisprudence of alterity desires to integrate outgroups into the concept of legal subjectivity, and thereby to construct a properly universal and neutral subject. It is, ultimately, about validating otherness by subverting the axiom of sameness which lies at the heart of the modern legal form.

RJ may be understood as the outsider jurisprudence of the criminal justice system. Like postmodernism in general and postmodern jurisprudence in particular, it too is dedicated in a fundamental sense to the cause of the Other in the criminal justice system. The traditional outsider of criminal justice is, of course, the victim. Victimologists preceded the proponents of RJ in their advocacy of victims' rights and their overall concern with improving the status of the victim in the criminal justice system. However, RJ has taken a far more radical approach and installed the victim at the epicentre of the restorative process.⁴¹ The victim is no longer someone who must be taken into account by those who manage the disposition of criminal conflicts. She is no longer someone to or for whom justice must be done. In the RJ programme, the victim is an agent of justice. She is transformed from outsider to insider and becomes an indispensable participant in the restorative process. Her otherness, originally a source of powerlessness, is transfigured into a source of power. She becomes a "stakeholder". RJ vindicates the narrative of the victim in the face of the metanarrative of the criminal justice system.

The community is the other Other of the criminal justice system. It may be true that courts usually are enjoined to take into account the interests of the community when sanctioning a criminal offender. However, the determination of the interests of the community is seldom, if ever, made by the community

38 See Harvey (1989) 47 who refers to the seduction of "the most liberative and therefore the most appealing aspect of postmodern thought – its concern with 'otherness'".

39 Feldman (2000) 158-159.

40 Davies (1996) 70-74.

41 Pavlich (2005) 44-48.

itself.⁴² The community has, in this sense, much the same outsider status as the victim in the criminal justice system. RJ aims to do for the community essentially what it hopes to do for the victim, that is, to bestow upon it the capacities of an agent of justice.

The traditional insiders of the criminal justice system are the state, the legal professionals and the offender. RJ wants no truck with the first two.⁴³ Of course, the offender remains crucial. However, he is now, along with the victim and the community, a member of a triumvirate of equals, through whom justice must be done. RJ, in this regard, is about reconciling a trilogy of narratives, none of which is authoritative. It is about finding a restorative sanction in the engagement of each agent with the truth-claims of the others. And it is about ensuring that the traditionally muted are given voice. That is a typically postmodern way of doing justice.⁴⁴

4.4 The Power Thesis

Foucault's position on power has acquired the exalted status of a postmodern presupposition.⁴⁵ In accordance with its rejection of the grand narrative, postmodernism detaches power from its modern association with the state and the repressive and ideological state apparatuses. The state monopoly of power is denied, and the locus of power is dispersed throughout the social structure, from the apex of political power to the relations between individuals in a myriad of everyday power relations.⁴⁶ In contrast to the centralised notion of power comprehended by modernism, postmodernism posits a multiplicity of

42 It may be made by a magistrate or judge, who may or may not be assisted by lay assessors. Or it may be made by a jury. RJ does not consider either lay assessors or jurors to be adequately representative of the community.

43 The ejection of the state and legal professionals does not amount to the creation of new Others. It simply means that they are no longer pertinent to the justice process. Those who have no interest in the process are not outsiders in the sense used here. See Christie (1977) 2-5.

44 The postmodern language of alterity has become part and parcel of the advocacy literature of restorative justice. RJ advocates routinely call for those "other" voices which have been silenced by the criminal justice system to be heard. See, for example, Toews & Zehr (2003) 262: "Maintaining the crime experience in the hand of experts contributes to othering and the creation of social distance between offenders, victims and the rest of society. The public is never permitted to encounter offenders and victims as multi-dimensional individuals with personal stories and unique experiences. Instead, offenders as well as victims become stereotypes of the 'other'. These others are often associated with ethnic groups and social classes different than the majority of society."

45 See Feldman (2000) 169-174 who notes that, in their analysis of power, "postmodern legal scholars follow Foucault".

46 See Stacy (2001) 69: "For Foucault, power does not merely emanate clearly from identified political and legal domains, but can be found amorphaously circulating everywhere in society."

power relations which penetrates into every nook and cranny of our lives. Power, from this perspective, is primarily a local phenomenon. It becomes what Foucault refers to as a micro-physics of power.⁴⁷ Given the perceived decline of the nation-state, it is the power configurations of non-state relations which matter most in the postmodern worldview.

The Foucauldian perspective also implies that the postmodern self is, at bottom, a power construct. We do not precede the micro-physics of power. Instead, we emerge as “the meeting-point in the flows (or discourses) of power”.⁴⁸ We are a creation of the self-same power which operates upon us every day in a multitude of ways. In postmodern terms, the legal subject is “intrinsically heteronomous, constituted by power”.⁴⁹ The juridical is, in this regard, the core notion of a paradigm in which legal subjectivity is the discursive effect of intersecting power plays.

Its proponents do not comprehend RJ publicly as a site of power relations. To be sure, they are consistent critics of the criminal justice system as a matrix of centralised power. And, if they advocate comprehensive RJ, they also advocate the end of state power in all criminal matters. However, they tend to be silent on the question of power within the structure of the restorative process itself.⁵⁰ Of course, such silence cannot conceal completely the fact that RJ is implicated as deeply in the connivances of power as the criminal justice which it maligns so routinely.

The rejection of state-sponsored criminal justice suggests that, as a structure-in-power, RJ is sensible to the postmodern belief in the omnipresence of power in the constitution of social relations. To the extent that RJ is committed to a decentralised justice system, it is committed also to the parcellisation of adjudicatory and punitive power. Hence its advocacy of a restorative process which presumes a localised disposition regime. Criminal justice will no longer be state justice, visited upon offenders from on high. It will be neighbourhood justice, structured by the restorative process which embraces both victim and offender as empowered agents of justice. Each restorative community will become a separate locus of power. There will no longer be a metanarrative of power. It will be dispersed into a series of narratives in RJ locales.

Whereas RJ comprehends centralised juridical power in relentlessly negative terms, its appreciation of the localised variant of such power generally

47 Foucault (1977) 139.

48 Kumar (1995) 131.

49 Dews (1987) 161.

50 This, of course, is to be expected. The connotations of power are predominantly negative, and no self-image is eager to admit of such negativities.

is positive.⁵¹ At the parochial level, power is considered to be a productive phenomenon which constitutes the victim and the community, and which reconstitutes the offender, as agents of the restorative process. It is an unspoken presumption of the RJ catechism that power relations within the restorative process will be fundamentally symmetrical, which will discourage or stymie efforts by any party to lord it over any other. The restorative process is supposed to be one of equalisation, not of domination.⁵² It would appear that the supporters of RJ need to believe that, in their case at least, the fragmentation of power entails a qualitative transformation in the composition of power, such that, at the neighbourhood level, it becomes an instrument of emancipation.⁵³ At this level, then, power is a progressive heteronomy in the constitution of the legal subject.

4.5 The Subjectivity Thesis

Postmodernism comprehends the subject as a composite of a plurality of equal identities. It rejects the notion of the essential subject, rigorously defined and exactly delineated, which is at the centre of modernism. For the postmodernist, the subject is a social construct. Subjectivity is context bound and historically specific. There is no overarching pre-given subjectivity which delimits our person. We are created and re-created as subjects within the social milieu in which we find ourselves.⁵⁴ All of us “live in many different worlds simultaneously”.⁵⁵

51 Dews (1987) 161-162.

52 Postmodernists generally have not given attention to the structural factors which militate against such equalisation. It would appear that their primary goal is to transform the criminal justice system from a centralised to a decentralised one. And whereas they have problematised criminal justice as state justice, they have presumed, naïvely, that the restorative process will render power relations at the local level unproblematic.

53 It must be noted here that local power is potentially as dangerous as central power. Local power also tends to agglomeration in the same way as does central power. Local power is as susceptible of metanarrative pretensions as central power. Indeed, many local powers of disposition tend to come into existence as a version of central power. If such powers are a concession from the state, they are comprehended easily within the grand narrative of state power. In other words, there is nothing inherent in the dispersal of the power of disposition to regional or neighbourhood structures to suggest the dissipation of the tyranny of the grand narrative.

54 See Feldman (2000) 174-176, Davies (1996) 73-74 and Stacy (2001) 11-12.

55 Jamieson (1991) 583. As Wicke (1992) 11-21 points out, although the postmodern position on subjectivity entails a “deprecation of ‘identity’ in any form”, postmodern politics remains “entirely identity-based”. In other words, there is a basic contradiction between the postmodern assault upon the essentialism of the modern notion of identity and the postmodern embrace of identity-based outsider politics. See the discussion under the alterity thesis above.

Whereas modern subjectivity is centred, postmodernism proceeds from a decentred subjectivity. It is always in formation and is never a nucleus of sovereignty for the self.⁵⁶ Feldman identifies two implications of postmodern subject decentredness. Firstly, the subject is not an autonomous site of power which is capable of directing the course of social development.⁵⁷ Secondly, the subject does not possess an immutable centre upon which its elements may be elaborated or from which they may be extrapolated.⁵⁸ Postmodern subjectivity is fragmented to the core. There is, in other words, no postmodern subject who has not been constituted from the asymmetries and incommensurables which make up social existence.⁵⁹

Postmodern jurists transpose this idea of the social construction of subjectivity to their critique of the legal subject. The modern conception of the legal subject is singular and indivisible. Only those characteristics which qualify as juridical are factored into the constitution of the legal subject. Any other sources of subjectivity are discarded summarily. In other words, the law recognises only the legal subject. In the modern view, all non-legal derivations of subjectivity are considered trivial. Postmodern legal analysts are highly critical of this exclusionary proclivity of the modern conception of legal subjectivity.⁶⁰ Their major aspiration in this regard is to have non-legal subjectivities acknowledged and accepted, alongside legal subjectivity, as indispensable to the construction of a truly just dispensation.⁶¹

RJ is similarly impatient with the proscriptions and preclusions embedded in a strictly legal subjectivity. Indeed, the restorative process cannot accommodate the modern conception of the legal subject. It is a process which

56 Wicke (1992) 17-20.

57 Feldman (2000) 174.

58 Feldman (2000) 175.

59 See Stacy (2001) 12 and Jamieson (1991) 583.

60 See Beger (2002) 187-188 who describes the modern conception of legal subjectivity in the following terms: "The legal arena cannot operate without the logic of identity, yet subjects of the law do not exist prior to their negotiation in the legal processes. The power of law lies in representing something as real, as the only possible representation of the real. So, while subjects in court rooms are real people, they can only ever be represented partially in their diversities. The legal subject can only present itself *as subject* in the discursive logic of the juridical. Other possible truths and realities exist, but the reality that can be heard by legal interpretation is hegemonic and dominant. Thus, the power of the law is its acclamation of one reality as the most true reality, the most important reality."

61 Postmodernism is keen to widen the ambit of the juridical. However, there is no evidence that it is willing to abandon the juridical as the defining element of legal subjectivity. It is one thing to incorporate features of the traditionally non-juridical into the composition of the juridical. It is another thing altogether to replace the juridical with the non-juridical. The radicality of postmodernism does not contemplate the latter.

seeks to comprehend both victim and offender as more than mere legal subjects, as real people who lead complicated and unpredictable lives in disparate and contradictory conditions. Criminal justice reduces them to “mere” legal subjects. RJ proposes a subjectivity which extends to all those other aspects of their lives which, albeit non-judicial, are pertinent to the construction of a properly restorative sanction.⁶²

The RJ rejection of the limitations of legal subjectivity emulates its rejection of a state presence in the restorative process. Ultimately, legal subjectivity is a state-guaranteed status. The absence of the state invariably has a disintegrative effect upon legal subjectivity, thereby allowing for the activation of non-legal sources of subjectivity in the restorative process. The anti-statism of RJ is, in this connection, crucial to exploding the formal bounds of legal subjectivity. Indeed, RJ cannot stay within the prescribed parameters of legal subjectivity without subverting itself and its goals. The legal subject is germane to criminal justice. The restorative process needs to take account of “the diversity of the human condition” if it is to be distinguishable at all from the criminal justice process.⁶³ And the restorative sanction needs to be constructed according to realities which lie outside the ambit of legal subjectivity if it is not to be just another variant of state punishment. Again, RJ emerges as a decidedly postmodern way of doing justice.

4.6 The Consumerism Thesis

Sardar identifies consumerism as “the quintessential characteristic of the postmodern era”.⁶⁴ In the same vein, Jameson refers to postmodernism as a “culture of consumption” which reproduces the “logic of consumer capitalism”.⁶⁵ There can be little serious discontent about this characterisation. If postmodernity can be reduced to any single condition, it has to be the complete triumph of consumerism. The postmodern subject is constituted, literally, by his “consumption of mass-produced objects and images”.⁶⁶ And the postmodern world is a hyperreality of representations of the universal consumer.⁶⁷ It is a world in which:

62 Compare the argument of Christie (1977) 9 for neighbourhood courts in which are considered “every detail regarding what happened – legally relevant or not”.

63 Stacy (2001) 12.

64 Sardar (1998) 59-60.

65 Jameson (1991) 206 and Jameson (1988) 29.

66 Heartney (2001) 42.

67 Khanom (2010) 62-63.

the department store [becomes] the cathedral of postmodern desire and the act of shopping [becomes] the postmodern version of democratic choice.⁶⁸

Postmodern society is, in a word, consumer society writ large.

Consumerism is, of course, more than the drive to accumulate and consume mass-produced goods and images. It is also, and crucially, the triumphant materialisation of commodity fetishism. It is the high-water mark of exchange relations in an economy structured by generalised commodity production. The relations between postmodern subjects are constituted as relations between commodities, the accumulation of which becomes, so to speak, a consuming passion. In other words, consumerism entails the fetishisation of human relations. Postmodern subjectivity is consumerist to the extent that it is a commodified subjectivity.⁶⁹

Consumerism, then, is commodification unbridled. It is a culture which is distinguished by the commodification of everything.⁷⁰ Everything is a commodity and the commodity is everything. The commodity is the elemental form of capitalist property and all commodity exchange relations are thus fundamentally proprietary in nature. In other words, the notion of consumerism is an essentially proprietary notion. The postmodern culture of consumption is the spirit of capitalist property made tangible, if somewhat rudely and gaudily. If rampant consumerism exemplifies postmodernism, then rampant commodification exemplifies postmodernity. And if the postmodern subject is first and foremost a consumer, then the postmodern consumer is first and foremost a proprietor.

Postmodernism, then, is deeply complicitous in the reproduction of the property relations of capitalism. However, and in keeping with its quest for diversity and multiplicity, postmodernism is not committed to the conventionally private and unencumbered form of capitalist property. The postmodern conception of property is an expansive and a flexible one. And while it may accept that bourgeois property is primarily private, postmodernism does not accept that it has to be exclusively private. Indeed, it

68 Heartney (2001) 47.

69 Khanom (2010) 63.

70 The following statement by Marx (1975) 34 is uncannily prescient of this aspect of postmodernism: "Finally, there came a time when everything that men had considered as inalienable became an object of exchange, of traffic and could be alienated. This is the time when the very things which till then had been communicated, but never exchanged; given, but never sold; acquired, but never bought – virtue, love, conviction, knowledge, conscience, etc. - when everything finally passed into commerce. It is the time of general corruption, of universal venality, or, to speak in terms of political economy, the time when everything, moral or physical, having become a marketable value, is brought to the market to be assessed at its truest value."

urges that the private fundament be augmented by a social or public dimension, in terms of which private ownership is charged with collective duties and responsibilities. In other words, postmodernism seeks to dethrone the individualist and absolutist notion of proprietorship which typifies modernism. Such proprietorship is disapproved as totalising and tyrannical. The regime of private bourgeois property must therefore be detotalised, by confronting it with the sensibilities of public service and community obligation. The postmodern conception is thus one which comprehends a decentred proprietary regime structured by an engagement between private rights and public claims.⁷¹

RJ may be considered a version of postmodern consumerism. This proposition, especially its conjoining of restorative doctrine with an unsavoury culture of consumption, likely will offend the bulk of RJ advocates. However, it is a proposition which is properly defensible. To be sure, RJ by no means displays or condones the excesses of wanton consumerism. But it is as deeply inculcated as such consumerism in the process of accelerated and generalised commodification which characterises the postmodern epoch. In other words, the difference between RJ and postmodern consumerism is a quantitative one, based on the extent to which the one is restrained and the other not. It is submitted that they are qualitatively akin in that they both embrace a foundational proprietary axiom. Both espouse property as their organising principle.

The proprietary nature of consumerism is obvious and incontrovertible. Albeit not patently so, RJ, too, is a fundamentally proprietary concept. The idea that RJ is proprietary in nature was originated by Christie, who is the acknowledged doyen of RJ theory. In his 1976 Foundation Lecture of the Centre of Criminological Studies at the University of Sheffield, Christie proposed a theory of criminal justice which since has become the premier theory of RJ. The lecture, published under the title *Conflicts as Property*, is easily the most quoted single piece in the capacious corpus of RJ literature, and its arguments have become "a modern orthodoxy amongst RJ supporters".⁷²

71 See Feldman (2000) 167. Whereas it may wish to infiltrate alterity into the composition of capitalist property, postmodernism accords property as a socio-economic category the status of an irrebuttable presumption. In other words, it leaves intact the modern metanarrative of property. The postmodern insurrection against all things modern stops short of capitalist property relations. The postmodern project to subvert and decentre the elements of modernism has had no impact whatsoever upon the modern commitment to the sanctity of property. In the midst of the maelstrom of postmodern destabilisation, property survives unscathed as the most stable of capitalist categories. What is more, it has suffused postmodernism with its own ethos.

72 Ashworth (2003) 171. See also Wright (1991) 54, Johnstone (2003) 24, Hudson (2003) 177 and Bottoms (2003) 82 & 80 footnote 2.

The Christie thesis expressly conceives of crimes as forms of property. Every crime is the property of the offender and the victim, and every criminal conflict is resolved in consumption by its owners. RJ is, in this connection, the Christie thesis given flesh. Indeed, the very idea of restoration is an inherently proprietary idea. That which is restored to a person must have belonged to that person originally. Property is the natural object of restoration. Its natural subject is the owner. Restoration presumes the unlawful loss or deprivation of that which one is legally entitled to have. It is about making good the loss or deprivation, and returning that which was taken, usually by means foul. The goal is unambiguous: to re-unite the owner with his property or an equivalent replacement, and thereby to recover the *status quo ante*.⁷³

Property is entailed in restoration. It is the relationship between the owner and his property which has to be restored. That relationship has been disturbed, and has to be reinstated. What is more, the proprietary relationship is a natural one which has to be recovered.⁷⁴ Thus, there is embedded in the notion of restoration an idea that a natural proprietary relationship has been rent, and that the aim of restoration is to repair that relationship. The premise is that a person has been deprived of something or access to something that is his or hers. The person may have a right of ownership in the thing or a right of possession. In either case, it is a proprietary right. And it is a taken-for-granted proprietary right. In other words, the relationship between the person and the thing is understood to be an organic one. Restoration is, in this regard, about re-establishing this relationship when it has been sundered unlawfully. It is about repairing what is considered to be normal and proper, namely, the fundamental proprietary relationship.

The appropriation by RJ proponents of the Christie thesis as the theoretical fulcrum of their project has made patent the proprietary constitution of RJ. The proprietary postulate once identified, it becomes obvious that RJ shares the consumerist ethos of postmodernism. To be sure, RJ may share none of the

73 The *Chambers 21st Century Dictionary* offers a definition of “restore” which includes the expressly proprietary “to return something lost or stolen to the rightful owner”. The definition contained in the *Oxford Universal Dictionary* is equally, if not as patently, proprietary: “To give back, to make return or restitution of (anything previously taken away or lost)”.

74 Thus the *Chambers 21st Century Dictionary* adds that “restore” also means “to bring someone or something back to a normal or proper state or condition”. The *Concise Oxford Dictionary* includes a similar definition of “restore”: “replace, put back, bring to former place or condition”. The established meaning of the nominal “restorative” as a health-restoring agent reinforces the idea of a natural or normal relationship which requires repair.

extravagances usually associated with consumerism.⁷⁵ But insofar as consumerism recasts human relations in proprietary terms, RJ is resolutely consumerist.

The conception of property adhered to by RJ cements its affinity with postmodernism. Although Christie theorised crimes as forms of property, he did not comprehend them necessarily as forms of private property. The conventional notion of property in the capitalist world is that it is private and that its private nature entails the exclusion of all non-owners from asserting proprietary rights over it, or deriving advantage from it without the consent of the owner. Christie's property postulate does not accord with convention. He proposes a proprietary form which deviates from the private norm of capitalism, namely, common property. When Christie declares both that a criminal conflict is not private property and that it is the property of victim and offender, he is referring, it is submitted, to a species of capitalist property which is located outside the classically private, insofar as non-owners enjoy access to it and possess certain rights in it.⁷⁶ Thereby, he is broadening the ambit of the capitalist property regime beyond its traditional parameters to include common property. But, importantly, it is a common property to the benefits of which individuals have enforceable claims. In other words, and in concurrence with the individualist catechism of the bourgeois world, it is a common property demarcated in terms of individual rights. For Christie, then, a criminal conflict is a form of common capitalist property in which all directly involved parties enjoy individual rights.

Following Christie, the RJ position on property thus replicates the postmodern position in its willingness to decentre bourgeois property and theorise it in terms other than the traditionally private. Both positions foreground a form of property which usually exists only in the penumbra of the dominant form. And while such an approach may leave the dominant form intact, it does undermine the dominance hitherto enjoyed by modern attempts to resolve the crisis of criminality.⁷⁷

5 Restorative Justice is Postmodern Justice

It is submitted that, *en bloc*, the six theses discussed above support the conclusion that RJ is the paradigmatic form of postmodern criminal justice. The analysis has shown that RJ replicates significantly the postulates of postmodernism in these six spheres. And the intersection is extensive enough

75 The extravagances of restorative justice lie elsewhere, in the promises embedded in what Daly (2002) 70 refers to as "the exceptional or 'nirvana' story of repair and goodwill".

76 Christie (1977) 8-12.

77 Indeed, the modern conception must take a not inconsiderable share of the responsibility for precipitating the crisis.

to sustain and defend the proposition which comprehends RJ as the exemplar of postmodern justice.

The postmodern character of RJ is perhaps most evident in its reliance upon narrative techniques to structure restorative conferences. In this area even the language of postmodernism has become integrated into the discourse of RJ. Participants in restorative conferences are encouraged to tell their own stories, to speak their truths, to highlight their individual experience of the crime and its consequences. The focus is upon the personal perspective, not the universal. Narrative is a "personalised approach" which does "not attempt to generalise or universalise".⁷⁸ The aim always is to render visible and thereby meaningful the particularities of the criminal episode as apprehended by the parties to it. Van Ness & Strong make the point thus:

At the [restorative] meeting, the parties talk to one another; they tell their stories. In their narrative they describe what happened to them and how that has affected them, and how they see the crime and its consequences. This is a subjective rather than objective account and, consequently, it has integrity both to the speaker and to the listener ... Narrative permits the participants to express and address emotions.⁷⁹

This is classic postmodern multi-perspectivism, engendered directly by RJ's rejection of the metanarrative of criminal justice.⁸⁰ Similarly, Toews & Zehr posit that justice is not "a generalisable experience" and argue for "multiple perspectives on a crime event" and hence for "multiple interpretations of the same event".⁸¹ Other prominent RJ supporters also routinely incorporate restorative narratives into their work.⁸² In other words, they adopt a typically postmodern strategy in their pursuit of a RJ resolution to a criminal conflict. RJ, in this connection, is structured by the calculus of idiosyncrasy which is so pivotal a dimension of the postmodern project.

It may be owned that, besides its penchant for narrator heteronomy, postmodern paraphernalia do not figure large in the self-image of RJ. However, that is no barrier to a legitimate designation of RJ as postmodern justice. This is exactly what Edgeworth does when he identifies the growth of RJ strategies as a manifestation, in the criminal sphere, of the advance of legal postmodernisation.⁸³ He refers to RJ as a new paradigm of justice which, in true postmodern fashion, advocates both the elimination (or, at least, severe

78 Van Ness & Strong (1997) 76.

79 Van Ness & Strong (1997) 77.

80 Van Ness & Strong (1997) 76-78.

81 Toews & Zehr (2003) 261-264.

82 See, for example, Zehr (1995) 15-18, Consedine (1999) 9-10 and Braithwaite (2003) 54-55.

83 Edgeworth (2003) 155.

reduction) of state involvement in criminal justice, as well as the ample expansion of the sources of legal subjectivity to include non-legal considerations.⁸⁴ The point is that between RJ and postmodernism there exists an objective intersection, the nature and ambit of which permit the properly reasonable inference that the former is indeed a species of the latter.

5.1 The Political Economy of Postmodernism

It remains to present a critical appreciation of RJ as the representative postmodern response to the contemporary crisis of criminality. In this regard, the first order of business is to engage the perceived newness of the postmodern epoch. Postmodernism is eponymously subversive. And postmodernists have a fondness for things unorthodox and imprudent. In the turbulent world of the early twenty-first century, postmodernists are self-consciously on the cusp of a dystopian revolution in sensibilities. The “new times” in which we find ourselves are, on this account, also “postmodern times”.

It is submitted, however, that the supposed newness of these “postmodern times” conceals a fundamental continuity with “modern times” and, hence, that the confrontation with postmodern novelty must focus upon the elements of this continuity. Such a focus is not an attempt to avoid grappling with the newness of postmodernism. Rather, it is a choice which is intended to throw light upon the political economy of this newness. The interrogation of postmodernism must proceed from the historical and material context of its evolution. In this regard, the paramount feature of postmodernism is that it is grounded in the social relations of production of contemporary, that is, late capitalism. Thus, whereas the identification and demarcation of postmodernism must of necessity proceed from its newness, the critique of postmodernism must commence with the capitalist constants which underlie its newness.

Notwithstanding its revolutionary posturings, postmodernism is a rather moderate phenomenon.⁸⁵ It is a superstructural manifestation of the contemporary epoch of capitalism, which is one marked by explosive material contradictions. Postmodernism is the intellectual expression of the structural economic crisis which is ravaging the heartland of the capitalist mode of production. It is simultaneously the ideological pivot of the bourgeois

84 Edgeworth (2003) 170.

85 Wenger (1991 & 1994) established years ago already that postmodernism, as an expression of intellectual despair in the face of the structural crisis of late capitalism, is philosophically idealist. Idealism, of course, long has been the philosophical handmaiden of bourgeois hegemony.

endeavour to stay the threat of total collapse.⁸⁶ Therefore, and despite its apparently historic newness, there is no cogent reason to analyse postmodernism as anything other than a superstructural effectivity of capitalism.

What is more, there is no fundamental difference between modernity and postmodernity insofar as they are comprehended as eras of the capitalist mode of production. Postmodernism may represent an intellectual sea-change from modernism. But postmodernity is not as fundamentally different from modernity as to qualify as some sort of post-capitalist epoch. Postmodernity is, quite simply, the contemporary conjuncture of capitalism. And the essentials of the capitalist constitution remain unreconstructed. That is, capitalist social relations of production are still defined by the struggle between bourgeoisie and proletariat; labour-power remains the only true source of surplus value; the anarchy which marks all departments of capitalist production continues unabated; the capitalist property regime continues to be defined in individualist terms; and the bourgeois worldview remains fundamentally juridical.⁸⁷ This catalogue of constants is by no means exhaustive. But it is comprehensive enough to convince that there is no basis upon which to comprehend postmodernity as anything other than an epoch - the current one - in the life and death of the capitalist mode of production. And while postmodernity is arguably the last epoch of the capitalist mode it is by no means the first of a post-capitalist mode.

As an economy of generalised commodity production, capitalism has an inherent tendency to commodify social relations. The history of the capitalist mode of production is, in this connection, the history of the process of commodification. The commodity is the primordial expression of capitalist

86 Following Harvey (1989) 173-197, the crisis is best comprehended as one of overaccumulation, requiring a flexible regime of accumulation to counteract the tendency of the rate of profit to fall.

87 Engels (1990) 598 describes the juridical worldview as "the classical one of the bourgeoisie". It is the worldview which holds that law is the fundament of human affairs. It is the ideological expression of the political economy of the commodity. The predominantly theological world outlook of the pre-capitalist era was an obstacle to the free development of the commodity economy. It had to be replaced. The bourgeoisie found the juridical world outlook to be the most appropriate ideational expression of its class interests. Engels explains: "The economic and social relations, which people previously believed to have been created by the Church and its dogma - because sanctioned by the Church - were now seen as being founded on the law and created by the State." The juridical worldview replaced church with state and religious dogma with law. It was, according to Engels, the theological worldview secularised. It enabled the bourgeoisie to present the commodification and sale of labour-power as transactions between legal equals. The economic exploitation and political oppression of the proletariat were secreted behind their juridical forms of equality and right.

property. The postmodern subject is a man or woman of property whose very existence is a personification of the organising principle of the commodity economy. Postmodernism has elevated commodification to heights unheard of in the evolution of capitalism. "Postmodernism is the consumption of sheer commodification as a process."⁸⁸ And postmodernity is the unmitigated triumph of the commodity. It is the stage of capitalism in which "social reality is pervasively commodified".⁸⁹ It is the era which is delineated by "the systematic commodification of everyday life".⁹⁰ The dictatorship of the bourgeoisie materialises as the dictatorship of the commodity.

The acceleration of the process of commodification entails the extension of capitalist property relations into new areas of social life which, traditionally, have had no relation to the market. As the cultural countenance of contemporary capitalism, postmodernism operates as the medium of such commodification. However, the march of the commodity is not merely about the colonial-type conquest of areas of social existence hitherto unsullied by grubbing acquisitiveness. It is also, and arguably more importantly, about equalisation. In its pure form, divorced from diversionary encumbrances, commodification in the postmodern world reduces to the vindication and amplification of the principle of equivalence which governs the market in commodities⁹¹ and which lies at the heart of the juridical worldview. Essentially, the postmodern promotion of commodification is an exercise in the universalisation of the principle of equivalence which defines the capitalist exchange relation. It is the augmentation of the principle from its origins in commodity exchange to the exchanges of everyday life.⁹² Postmodernity is, in a

88 Jameson (1988) x.

89 Eagleton (1986) 133.

90 Callinicos (1989) 151.

91 The commodity is at the epicentre of life in the capitalist system. The commodity form concentrates in itself all the constitutive elements of capitalism as a mode of production. It stipulates equivalence as the governing principle of capitalist social relations of production. The legal form which accompanies the commodity form is nothing other than the equality postulate given the imprimatur of the capitalist state. The legal subject is the postulate made flesh. He exists first and foremost as a commodity owner. And as such, he has no superiors or subordinates, only equals. In the epoch of competitive capitalism, it was in the market in commodities that the principle of equivalence mattered most. The development of the free market depended upon all-round respect for and acquiescence in the principle. The epoch of late capitalism has seen the steady extension of the principle of equivalence into more and more of the non-economic facets of the social relations of production. In other words, there has been an increasing intrusion of the spirit of the commodity into more and more areas of human relations.

92 See McVeigh (2002) 279: "Much of the work of postmodern theory in United States of America has disputed modern jurisprudence in the field of epistemology. It has been

word, the commodification of everything. It is the high-water mark of the fetishisation of the social relations of production. The absolute dominance of the commodity has transformed existence itself into a hyperreality of infinite simulacra.⁹³

It is tempting to take the accelerated commodification of the postmodern era as an index of the vitality of capitalism. That would be a mistake. By the time it entered its monopoly stage at the beginning of the twentieth century, capitalism was no longer a developing mode of production, and it has been degenerating ever since. Modernism was a response to this historic decline of capitalism. Postmodernism, too, is an expression of crisis, not of vitality.⁹⁴ The postmodern intensification of commodification is, in this regard, part and parcel of the attempt to resolve the current capitalist crisis of overaccumulation⁹⁵ by restructuring the regime of accumulation along more flexible lines.⁹⁶ Flexibility requires a more expansive domain of accumulation opportunities. Hence the intrusion of the commodity form into areas of life traditionally not associated with the ethos of the market. Accelerated

concerned to work towards a jurisprudence that recognises, and respects, equality in difference.”

- 93 This transformation assumed a phantasmagorical aspect in Baudrillard’s bizarre pre-war pronouncement that the Gulf War would not take place and his even more bizarre post-war declaration that the Gulf War had not taken place. See Norris (1992) 15 who avers that postmodernism has rendered truth obsolete, “in so far as we have lost all sense of difference – the ontological or epistemological difference – between truth and the various true-seeming images, analogues and fantasy-substitutes which currently claim the title. So the Gulf War figures as one more example in Baudrillard’s extensive and varied catalogue of postmodern ‘hyperreality’. It is a conflict waged – for all that we can know – entirely at this level of strategic simulation, a mode of vicarious spectator-involvement that extends all the way from fictive war-games to saturation coverage of the ‘real-world’ event, and which thus leaves us perfectly incapable of distinguishing the one from the other.”
- 94 See Davis (1988) 83 who observes that “the crucial point about contemporary capitalist structures of accumulation [is] that they are symptoms of global crisis, not signs of the triumph of capitalism’s irresistible drive to expand”.
- 95 See Harvey (1989) 180-181 who defines overaccumulation as “a condition in which idle capital and idle labour supply could exist side by side with no apparent way to bring these idle resources together to accomplish socially useful tasks”. He continues: “A generalised condition of overaccumulation would be indicated by idle productive capacity, a glut of commodities and an excess of inventories, surplus money capital (perhaps held as hoards), and high unemployment.”
- 96 According to Harvey (1989) 147, flexible accumulation “is marked by a direct confrontation with the rigidities of Fordism. It rests on flexibility with respect to labour processes, labour markets, products and patterns of consumption. It is characterised by the emergence of entirely new sectors of production, new ways of providing financial services, new markets, and, above all, greatly intensified rates of commercial, technological and organisational innovation.”

commodification is thus a symptom of weakness, not of strength. It is a sign that capitalism is able no longer to countenance significant spheres of social relations outside the market in commodities. The contemporary imperatives of its reproduction as a mode of production demand that human existence be commodified as far and as fully as possible. Everything must become a potential source of capital accumulation. Flexible accumulation means absolute obedience to that basic law of the commodity, the principle of equivalence.

This is the context in which postmodernism becomes a celebration of equality. It is, in fact, equalisation untrammelled. Here the Lyotardian postmodern incredulity towards metanarratives may be apprehended as an incredulity towards the inequality inscribed in such metanarratives. The premodern narratives towards which postmodernism is especially partial are comprehended as perfect equals of one another and are understood to display none of the despotic propensities of the metanarrative. There is no grand narrative; there is only an infinite series of equally valid narratives. In other words, the repudiation of the metanarrative is simultaneously an assertion of the principle of equivalence.

Postmodernism, then, professes an unqualified commitment to equality in all things. It is a commitment which is embedded in constitutive notions such as polycentrism, multi-perspectivism, destabilisation, anti-totalisation, decentredness and the like, all of which are variants of the hegemonic principle of equivalence, all of which repudiate hierarchy. In the postmodern world nothing is absolute except absolute relativism. Nothing is certain except that every point of view enjoys the same claim to validity as any other point of view. No discursive formation is prior to any other and no person is more valuable than any other. The postmodern subject is constituted in terms of the principle of equivalence. He lives and dies by the law of the commodity.

The immersion of postmodernism in the culture of commodification necessarily implies that it subscribes to a worldview that is fundamentally juridical.⁹⁷ The equality postulate which defines the postmodern moment also structures the juridical moment. The common factor is the commodity. In the evolution of exchange, to commodify is to juridify. This is why, despite its nihilistic excesses and random subversions, postmodernism is unequivocally wedded to the bourgeois, that is, the juridical worldview. Indeed, it is militant in its purveyance of this patently sectional worldview as the generalised worldview of all social classes; and it is radical in its advocacy of the principle

97 See McVeigh (2002) 274: "The account presented here has emphasised that law has changed the means and objects of its regulation. Regulation through law no longer proceeds according to a principle of limited unity marked by distinctions between public and private spheres, State and civil society and so forth. Instead regulation proceeds according to a juridical saturation of social reality."

of equivalence as the determining principle of all human interactions. This is why the postmodern era has witnessed the exponential intensification of the process of commodification. It is also why the equality postulate now reaches into areas which would have been off limits during the modern era.

5.2 The Political Economy of Restorative Justice

It is time to revert to the theory of RJ expounded by Christie. If, according to its self-image, RJ is to be comprehended as the negation of criminal justice and a crime is to be understood as a private legal transaction, then it is Christie's notion of conflicts as property that continues to provide a theoretical springboard for the RJ project. In this sense, Christie's proprietary theory of RJ is archetypal. Therefore, the remainder of this essay will be concerned to assess this theory, as an epistemological fundament of RJ, in relation to the central argument, that RJ is the exemplar of postmodern criminal justice.

Although his theory does not rely expressly upon the discourse of equivalence, Christie does show a strong intuitive grasp of the place of the process of commodification in the constitution of the legal form. Christie is concerned with criminal justice in "industrialised large-scale society".⁹⁸ It is, of course, an analytical truism that "industrialised large-scale society" is more or less coincident with capitalism, a mode of production delineated by generalised commodity production and structured by class conflict. In other words, Christie is concerned with capitalist criminal justice. And he agitates for crimes in capitalist society to be redefined as forms of property. Since capitalism is a society of generalised commodity production governed by the legal regime of private property, it follows that Christie's argument that criminal conflicts be comprehended as property forms is, upon examination, an argument for their commodification.⁹⁹ In "industrialised large-scale society" property is perforce a commodity, and the broadening of the ambit of property is perforce an extension of the domain of the commodity. In this context, to privatise the criminal episode is to commodify it.

Christie's proprietary thesis, then, turns upon the process of commodification as its central theoretical premise. He is proposing, in effect, that RJ be theorised in terms of the extension of the process of commodification to criminal behaviour itself. In other words, every criminal episode is, or must become, a commodity. Christie's work is primarily about grounding RJ theoretically, and in his elaboration of a theory of RJ he grasps the basic truth that legal relations are the superstructural manifestation of commodity

98 Christie (1977) 1.

99 See Pashukanis (1978) 126: "Private property first becomes perfected and universal with the transition to commodity production, or more accurately, to capitalist commodity production."

relations, and that the legal form is, at bottom, a proprietary form which is suffused with the ethos of the market. Christie's thesis is more or less universally accepted as an unsurpassed theory of RJ, and rightly so. Certainly, it may be asserted with confidence that not a single proponent of RJ has taken issue with Christie. But it may be asserted with equal confidence that the true import of the Christie theory rarely, if ever, has been engaged and excavated by its adherents.

Christie's real achievement is that he grasped the fundamentals of the political economy of RJ. He discerned that the crisis of criminality had its material basis in the crisis of capitalism and fashioned a theory which comprehended the pivotal position occupied by proprietary relations in the social relations of production of capitalism.¹⁰⁰ When Christie conceptualises a crime as a form of property, he is commodifying it. He appreciates the proprietary bias of contemporary capitalist society and celebrates it as the cornerstone of the theory of RJ. However, this celebration is also his major weakness, for it fails to engage the singular fact that capitalist society is historically decadent and that RJ is a product of this decadence.

The material roots of the RJ movement are to be found in the economic crisis which has ravaged the capitalist world, more or less unabated, for the past four decades at least. The severity and depth of the crisis have spawned the neo-liberal drive to unburden the state of the social and welfare responsibilities which it had to assume after the Second World War. Privatisation is the watchword of this project, and is touted as the answer to public waste and bureaucratic inefficiency which apparently underlie the crisis of capitalist profitability. The neo-liberal project is supposedly about rejuvenating the free market, unencumbered by the "dead hand" of public claims and responsibilities. Its proponents argue that private enterprise will achieve the levels of profitability and general prosperity which hitherto have evaded those who make public policy. The state and its agencies are perceived as impediments to the blossoming of the free enterprise system. Hence the neo-liberal credo that the state ought to step aside and leave the business of the economy to those who have their lives invested in making it functional.¹⁰¹ These are not salaried state officials, for whom economic concerns are little

100 It may be noted here that Christie's idea of criminal conflict as property is a quite stunning vindication of the analysis of the legal form proposed by the Marxist jurist Evgeny Pashukanis during the Bolshevik years of the Russian Revolution. In Christie we see a respected member of the non-Marxist criminological community proffering an analysis of crime and punishment which is spontaneously but uncannily Pashukanian in its essentials. See Koen (2103) for an extended exploration of the relationship between Pashukanis and Christie regarding RJ.

101 Pavlich (2005) 6-7.

more than an item in a job description, but the entrepreneurs for whom the health of the economy and the stability of the social order are absolutely vital. In other words, from the neo-liberal perspective it is the private sector, not the public, which holds the key to the solution of the structural crisis of capitalism and its expanded reproduction as a mode of production.

The neo-liberals found ideological justification for their project in the notion of popular capitalism. They sought to obfuscate the class character of privatisation by re-presenting capitalism as a people's mode of production.¹⁰² The precepts of popular capitalism were formulated with a view to giving all citizens a material stake in the mode of production, that is, to create a "stakeholder society", or at least the illusion thereof.¹⁰³ Ordinary working people were assured by capitalist ideologues that they too could enjoy a slice of the profit pie and were lured by opportunities to invest in the economies of their countries via the equity market. The idea was to free the economy from state interference and control, and thereby to prove that capitalism was a dynamic system which could bring good fortune to all who embraced its methods and mores.¹⁰⁴ Capitalism was no longer only for the capitalists. It was for everybody. It was a people's mode of production, and all people could profit by investing in it. Welfare capitalism had enabled the state, which had now become a hindrance to capitalist progress. Popular capitalism wished to liberate the market from the strictures of state control. The free market was the key to prosperity. The wider the process of commodification, the more opportunity there would be for avoiding crises and promoting growth. Hence

102 The idea of popular capitalism does suggest a certain "publicness". However, it is a dimension which is entirely subsumed under the popular capitalist drive towards privatisation.

103 Here it is worth noting that RJ advocates habitually refer to the persons for whom they aspire to obtain justice as "stakeholders", a term heavy with proprietary overtones. The collection edited by Zehr & Toews (2004), for example, devotes more than a hundred of its 400-odd pages to what are called "stakeholder issues". This trend appears to be derived from the popular capitalist idea of a "stakeholder society", in the success of which everyone is supposed to have a proprietary interest.

104 For a detailed exposition of the tenets of popular capitalism see Redwood (1989) 24-45. The primary target of the popular capitalist ideologue was the state. It was argued that capitalism was in trouble because of too much state interference in its operations. The problem with capitalism was, according to the popular capitalists, not structural but conjunctural, deriving from the overbearing presence of the state in affairs which ought to be private. The state was an undesirable interloper and had to be expelled from the relations between private commodity owners. The key to prosperity was not in class solidarity but in individual achievement. The possibility of a better life lay in a private, not a social, future. Such were the pledges of popular capitalism: it was not an elitist system; it could uplift the masses.

privatisation. Hence the celebration of the market as the great leveller. Hence the enthusiasm for entrepreneurship and free enterprise.¹⁰⁵

RJ may be comprehended as the penological correlate of the neo-liberal economic vision and the ideology of popular capitalism. There is an almost palpable correspondence between the crisis of profitability and accumulation besetting the economy and the crisis of criminality and penalty besetting the administration of justice. RJ represents the incursion of the spirit of the market into the arena of criminal conflict. Whereas this arena has been an eminently statist one hitherto, the advocates of RJ have taken an expressly anti-statist position. For them, RJ is a sphere of privatised justice in which the state has no place. They view the criminal justice system as a state asset which needs to be privatised, like so many other state assets which have been privatised already. Privatisation is necessary because the state has been unable to administer the criminal justice system “profitably”, and has earned but minimal returns upon its investments on the anti-crime *bourse*.

The RJ argument is that the state has failed in its bid to solve or even manage the crisis of criminality which continues to run amok in most capitalist social formations, and now needs to hand it over to those who can. In this regard, RJ seeks to bring to criminal justice a remedy of the order which neo-liberalism purportedly has brought to the economy. A crucial feature of this remedy is the transfer of hitherto public assets to the private sector, and the import of the principles of the market into existing state institutions. Adherents of RJ seek to sever the link between the state and criminal justice. They wish to remove criminal conflicts from the public sphere and reconstruct them according to the precepts of the private sector. They are convinced, more or less, that it is the entrepreneurial spirit which holds the answer to the worldwide crisis of criminality. They are the free-marketeers of the criminal justice system.

The RJ antagonism to statist criminal justice is a radical one. Comprehensive RJ is the first and only criminological movement to advocate that the state be ejected entirely from the criminal justice process. However, it is a localised radicality. It is concerned to re-organise the manner in which capitalist society deals with crime. It proposes that such re-organisation be founded upon the

105 Of course, popular capitalism meant serious cutbacks in the hard-won social rights of the workers. But, they were told, every worker now had the right to break free of a life of dependence upon and charity from the state, and to discover his true worth in the heady atmosphere of the free market. Popular capitalism was proffered by its ideologues as the solution to the structural crisis of and proletarian disaffection with the mode of production. It promised to sideline the class struggle and to transform every citizen into a property owner, motivated by the ideals of individual incentive and self-promotion, and dedicated to making capitalism work. Popular capitalism was, in this regard, an attempt to replace classes with consumers. See Mawby & Walklate (1994) 80-86.

privatisation of criminal justice, which, in terms of the proprietary approach pioneered by Christie, entails the extension of the process of commodification to the criminal conflict itself. In other words, RJ appropriates the defining form and process of the capitalist economy as its theoretical touchstone. Thereby it classifies itself as a bourgeois theory of criminal justice.

6 Conclusion

It should be evident from the preceding presentation that the political economies of postmodernism and RJ are coterminous in many respects. In particular, its commodification of the criminal episode, which is entrained in Christie's comprehension of criminal conflicts as property, locates RJ squarely within the compass of postmodernism. The latter, it will be recalled, represents the high-water mark in capitalist culture of the process of commodification and thereby of the principle of equivalence upon which commodification rests. If the idea of popular capitalism was part of an ideological response of the ruling class to the economic crisis of the mode of production, then the idea of postmodernism represents the ethos of popular capitalism extended to the superstructure as a whole.

RJ is the criminal justice of postmodernity. It is the postmodern moment in the evolution of the criminal justice system. The objective affinity between postmodernism and RJ is unmistakable. They have the same material and historical origins in the long-term decline of the capitalist mode of production. Like postmodernism, RJ understands the world in juridical terms. Both are structured by the core juridical principle of equivalence, which is embraced as the organising axis of social relations. Both comprehend the legal form in relation to the commodity form. And they both take commodification to new heights in their respective fields of influence. The restorative "stakeholder" in a criminal conflict is the analogue of the postmodern consumer. Postmodernism commodifies everyday life relentlessly. RJ commodifies the criminal conflicts which have become a relentless fixture of everyday life. If postmodernism demarcates the general configuration of the superstructure of late capitalism, then RJ is postmodernism expressed in legal superstructural terms. It is the commodified character of postmodernism which structures the proprietary character of RJ. RJ is postmodernism writ small.

However, it is precisely the postmodern nature of RJ which stands as an impassable barrier to its success. The proponents of RJ may be true radicals in their rejection of a state-sponsored criminal justice and their agitation for a privatised RJ. However, they turn out to be true conservatives about the notion of the juridical which underlies both criminal justice and RJ. The devotees of RJ relate to criminal justice in the same way that anarchists relate to bourgeois law: they reject its external characteristics while preserving "its inner essence,

the free contract between autonomous producers".¹⁰⁶ Insofar, therefore, as its opposition to the state is a parochial one which never ventures outside the conceptual confines of the bourgeois worldview, the radicality of RJ is overwritten in reaction. The RJ demand for the demise of criminal justice is simultaneously a vote of confidence in the perpetuity of the commodity form and its homologous legal form.

Even within the parameters of the juridical, the radicality of RJ soon runs aground upon the tenacity with which the state holds its position in the criminal justice system. There is here a debilitating contradiction between the theoretical premise of RJ and the nature of capitalist criminal justice, a contradiction which has the effect of undoing the former. For it is a vain hope that, within the confines of the social relations of the capitalist mode of production, it is possible to construct a response to the problem of crime which does not rely upon state participation. Christie and his adherents do not understand that capitalist criminal justice is necessarily state justice. The neo-liberal project may encourage the privatisation of policing and corrections. But crime and its punishment are off limits. Even in the world of popular capitalism, they must remain public functions. They must retain their statist fundamentals.

The regime of criminal justice as we know it is a thoroughly juridical regime, in the sense that it is dedicated to the principle of equivalence which defines the legal form. However, since every crime is a negation of this principle, the entry of the state as party to every criminal matter is simply necessary to ensure that the principle is upheld. The neo-liberal assault upon its hegemony notwithstanding, the capitalist state cannot and will not allow itself to be ejected from a system which is predicated upon its involvement. Capitalism, however popular, contains no space for the transformation of criminal justice into RJ. When all is said and done, RJ will not supplant criminal justice. The social relations of production themselves constitute an insurmountable impediment. The radicality of RJ dissipates in the face of bourgeois class power. And the desideratum of comprehensive RJ ceases to be a viable alternative to criminal justice. Instead, it is broken up into so many discrete pieces, each operational only at the behest and under the auspices of the capitalist state and its criminal justice system, but never combining into a RJ system. The only future for RJ within the parameters of capitalism is a partial one.

That, then, is the essential difficulty facing RJ: the very material conditions which engendered it also conspire to prevent it attaining its goal. RJ is postmodern justice. But the material constitution of postmodernity militates

106 Pashukanis (1978) 124.

against the ultimate success of RJ over criminal justice. The triumph of RJ requires nothing less than a post-legal and, hence, a post-capitalist world, which has transcended the parameters of postmodernism. Absent such a transformation, RJ stands in jeopardy of being despatched, along with postmodernism, to the rubbish heap of historical curiosities.

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