

## Constitutionality of South Africa's competition policy

Robert W Vivian<sup>1</sup>

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### INTRODUCTION

This paper, as the title indicates, concerns the constitutionality of South Africa's competition regime as can be abstracted from a reading of the Competition Act 89 of 1998. The title suggests the paper should address two aspects, firstly fundamental constitutional principles and secondly the application of these to South Africa's competition regime. Both aspects however, are lengthy and clearly justice cannot be done to both in the short space allocated for the presentation. The first aspect is common whenever constitutional principles are to be applied to any problem. It is of a general nature. I have of necessity previously addressed these principles in relation to other problems.<sup>3</sup> It stands to reason that I should not deal with this first aspect in any detail again and if anyone is interested in this matter the two previous papers can be consulted.<sup>4</sup> To re-deal with this aspect would preclude ever getting to the second aspect and that would happen with any paper where constitutional principles are to be applied to a problem. So the first aspect will be dealt with in overview only and this paper will concentrate on the second, the application of these principles to South Africa's competition regime.

### PART A: FUNDAMENTAL CONSTITUTIONAL PRINCIPLES

#### *The failed experiment - from unchangeable laws to changeable constitutions*

Why does a country nowadays need a constitution? Two reasons can be given, firstly to define the operational relationship of the organs of state<sup>5</sup> and secondly to protect fundamental rights. It is the second which is of interest to this paper. The first reason is largely administrative or regulatory, the second is fundamental. To understand the need to protect fundamental rights via a constitution we

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<sup>1</sup> Professor of Finance & Insurance, School of Economic and Business Sciences, University of the Witwatersrand, Johannesburg.

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<sup>3</sup> Asset Forfeiture and the Government's Software procurement policy.

<sup>4</sup> Vivian (2007); Vivian (2011)

<sup>5</sup> Constitutional legislation, for example, is necessary to define the nature, operation and relationship of courts, Houses of Parliament, president, central bank and so on. This relationship of course has important constitutional ramifications for the protection of fundamental rights.

can start off with the point made by Hayek from which the need for a constitution becomes self-evident. Until comparatively recently, it was accepted that:

the state cannot itself create or make law, and of course as little abolish or violate law, because this would mean to abolish justice itself, it would be absurd, a sin, a rebellion against God who alone creates law. For centuries it was recognized doctrine that kings or any other human authority could only declare or find the existing law, or modify abuses that had crept in, and not create law. Only gradually, during the later Middle Ages, did the conception of deliberate creation of new law - legislation as we know it - come to be accepted. In England, Parliament thus developed from what had been mainly a law finding body to a law creating one. It was finally in the dispute about the authority to legislate in which the contending parties reproached each other for acting arbitrarily, acting that is, not in accordance with recognized general laws that the cause individual freedom was inadvertently advanced.

And so until comparatively speaking, recently, only unchangeable laws existed. Once it was accepted that any “law” can be “made” and Parliament was the body which could do so, or in terms of John Austin’s (1790-1859)<sup>6</sup> notions, Parliament was Sovereign,<sup>7</sup> then the obvious question follows; what is the limit to Parliament’s powers, if indeed any? What would happen, as is usually asked, if Parliament was to pass a law that all blue-eyed babies be put to death – would that indeed be valid law?<sup>8</sup> Different answers have been given to this question. AV Dicey (1835-1922) England’s most famous constitutional jurist argued the solution lay in revolt; in the ancient and fundamental right of defence (Dicey 1915:30 *et seq*).<sup>9</sup> The Americans decided upon a different approach, a constitution. The constitution, as law, would be different. It was not a ‘law’ passed by a Parliament. It derives its legitimacy, especially those provisions which purport to protect fundamental (or unalienable) rights, from other sources. The Declaration of Independence (1776) recognises the existence of these rights.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The fundamental rights exist because they are self-evident endowed by the Creator, not because they are granted in a constitution. The constitution is supposed to protect these unalienable rights; the right of each individual to life, liberty and property.<sup>10</sup> Since these rights are unalienable they are not

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<sup>6</sup> Austin (1832) *The Province of Jurisprudence Determined*

<sup>7</sup> For a more recent discussion on sovereignty consult Barber (2000)

<sup>8</sup> Austin’s idea of sovereignty at a first brush appeared to be attractive but even in his own lifetime serious doubts were expressed about the correctness of this view. Nevertheless Austin’s ideas did much to undermine the idea that certain unchanging laws existed.

<sup>9</sup> Dicey seems to be deluded on this point. He quotes Stephen (1882) with approval, ‘but legislators must go mad before they could pass such a law [that blue-eyed babies be put to death], and subjects be idiotic before they submit to it’ (at p33). Had Dicey lived to see and understand the genocides of Lenin, Stalin and Hitler he would have seen the fallacy of this rather childish argument.

<sup>10</sup> Some would argue that the fundamental rights cannot be protected under all circumstances and circumstances may well exist where these fundamental rights can be violated. This paper is not dealing with these exceptional circumstances such as

derived from the constitution itself or any other document and therefore cannot be abrogated by changes in the constitution or any other document.

The American experiment of replacing the unchangeable laws with an unchangeable constitution when adopted in other parts of the world has not necessarily been a success. The unchangeable law; the law above laws, the constitution, has become but yet another changeable law.<sup>11</sup> Once again blue-eyed babies can be put to death this time by simply inserting a provision to that effect in the now changeable constitution.<sup>12</sup> So for example in South Africa the view is firmly entrenched, in the minds of the public if nowhere else, that property can be taken without compensation, if the constitution be changed to permit this. The constitution becomes yet another changeable law which derives its authority from some or other majority. Should this happen the constitutional experiment will be known to be a failure.

Thus the first principle is that the constitution should embody the protection of what can called the Ancient Rights which embodiment is unchangeable.<sup>13</sup> These rights exist apart from the constitution which rights can and should be but embodied in the constitutional document. Upholding the protection of these rights should be the first principle to be applied when it comes to interpreting legislation and constitutions.

### ***Legitimacy of the constitutional protection of fundamental rights***

The legitimacy of the constitution, when it comes to the protection of fundamental rights can obviously not rest on a majority vote, or the specific wording in the constitution. It rests on the existence of unalienable rights. This leads to the conclusion that constitutions can be unconstitutional, if the document itself violates or fails to protect these fundamental rights.

## **PART B: APPLICATION OF PRINCIPLES TO COMPETITION POLICY**

### **Surreal competition policy and debate**

The debate about competition in South Africa has an air of scurrility about it. In South Africa the major price increases have not come from products sold in the private sector such as the price of

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times of emergency or so-called *crimen exceptum*. I dealt with *crimen exceptum* in Vivian (2007). See also Dyzenhaus (2006), Poole (2009)

<sup>11</sup> The young South African Constitution has already been amended 16 times and further amendments are on the way.

<sup>12</sup> It seems should society get to the position where it arbitrarily puts people to death, genocide; it does not do so via legislation. When Hitler killed his erstwhile friends in the Night of the Long Knives the killing was not done in terms of legislation. The killing however was ratified afterwards in terms of a referendum. The same cannot be said about the taking of property, that is usually done legislatively.

<sup>13</sup> There were reservations against protecting these in a constitutional document since these were already protected as the Ancient Rights of the Englishman in the Common law.

bread. This is not the problem; it is the cost of government controlled monopolies and costs imposed by government institutions which are the problem. These include the cost of electricity which is escalating beyond what many will be able to afford, and in many cases now exceeds the cost of accommodation. An example includes the cost of municipal services, which provide questionable value and which has long exceeded what most pensioners can afford; private firms having to compete with loss making government institutions subsidised out of taxpayers' funds. Under these circumstances, a government institution set-up to administer competition between private sector companies has a surreal air about it.

Further in the debate about competition, involving private companies operating in terms of Adam Smith's exchange economy, an issue which is completely forgotten is that the central problem facing the world today is not the few companies which operate at a profit but the large number of governments which operate at deficits. It is not profits which are the problem but government deficits. The stability of the world economic system is currently threatened by the deficits of countries such as Greece, Portugal, Spain, Italy. In addition to which can be added the United States of America, UK all producing unmanageable deficits. These deficits threaten the stability of the banking systems of many countries, to the extent which cannot even be determined at this stage.

Under these circumstances it is odd to imagine a government attempting to manage private sector competition.

### **Not protecting purchasers' fundamental constitutional rights**

Clearly time will not permit a detailed examination of application of all the Constitutional rights applicable to the competition problem. Usually when one thinks of the role of the state and protection of fundamental rights, one thinks of laws such those against theft. These laws prohibit individuals from violating the fundamental rights of others. Competition laws are different; they govern aspects such as price setting. One would think that as part of owning property the owner has the right to sell his own property at his own price and to do so cannot be illegal. The person who purchases the goods or services agrees to the price and thus setting the price has no intrinsic unlawful aspect about it. If the prices are too high new suppliers (including imports) can enter the market or consumers could substitute the goods in question for others at a lower price. The system has a self-correcting element inherent within it. Competition laws cannot be justified on the basis that the state is protecting purchasers' fundamental rights. To bring competition policy within the conceptual basis for

governing prices is necessary to argue that where persons act in concert to set prices they impose an externality of purchases.<sup>14</sup>

### **Separation of powers – unitary states within states**

The modern constitutional dispensation is based on the separation of powers. In each state there is one legislator which makes law, one executive which operates in terms of the law and where doubt exists regarding the interpretation of the law one judiciary which interprets the law, which is common within the state, binding all.<sup>15</sup> Having spent centuries working to the ideal of the separation of states, a new phenomenon has evolved what I call unitary states within states. The Competition regime is an example of this. The Competition Act creates a unitary state within the state. It is an independent “executive”, it also makes and then enforces its own “laws” and has its own “judiciary”. All of this happens without the separation of powers. It is a state within a state but without the separation of powers; it is a unitary state. Unitary states within states do not operate in terms of laws general application, the due processes of law, adjudicated by the ordinary courts of the land presided over by Judges in the Ordinary. In short all the historical lessons have been ignored.

### **Competition regime has no clear laws of general application**

#### ***Economics of Competition: Prices, consumer surplus and consumer welfare***

From the economic theory of competition one could argue that the purpose of competition is to, where prices are artificially manipulated, to reduce prices to the level which would be set by a competitive market. The goal of competition policy would thus be simple enough but this is not what the Competition Act does nor is it the goals set in the Act. Competition lowers the price of goods and services to consumers. The absence of competition results in the converse, prices increase and suppliers, in the extreme, tend to make monopoly profits. Alfred Marshall, Cambridge’s famous economist pointed out that many consumers<sup>16</sup> will be prepared to pay a higher price than the price which is competitively set. The additional price, the price between that set by the competitive market and the price actually paid, produces what he called the consumer surplus. The purpose of competition law should be aimed at reducing the consumer surplus. Reducing the consumer surplus and recognising budgetary constraints when taken together optimises what can be referred to as

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<sup>14</sup> Arguing that inadequate competition imposes externalities leads to a justification for government intervention and Pigou’s welfare economics.

<sup>15</sup> One of the reasons why the common law is called the common law is because it is the law which is common to the entire realm. It is also the reason why the most senior court is called the Supreme Court – it is indeed supreme throughout the realm. The days of different laws and courts (Church Courts, courts of equity etc) are long long gone.

<sup>16</sup> I say many because of the operation of the law of supply and demand, as the price increases the quantity decreases. With an increase in price not all consumers will remain in the market. Consumers are also subject to budgetary constraints. As consumers are forced to spend more on some goods and services they have less to spend on others. High consumer prices may drive other goods and services out of the market.

consumer welfare, from welfare economics.<sup>17</sup> From economic theory it can be said that the purpose of the competition policy should be to maximise consumer welfare. The beneficiary of competition policy should, exclusively, be the consumer; maximising consumer welfare.

### ***S2 The purpose of the completion legislation***

The so-called ‘laws’, set-out in the legislation, governing competition are anything but clear.

Despite that the economic goals of competition are obvious these are not captured by the South African legislation.<sup>18</sup> In fact the Competition Act fails to define any clear legal objectives. A similar position used to prevail in America as explained by Mr Justice Bork.<sup>19</sup> When he first entered the field of competition law he despaired at its state. This position persisted until the goals became more clearly defined. He concluded that “the exclusive goal of antitrust adjudication is the maximization of consumer welfare.” Once this was understood, he became optimistic that competition law, anti-trust in America, could be workable. South Africa has yet to learn this.

In contrast to the clear single objective of that competition law should have, the purposes of competition law in South African Act as set-out in s2 are confused and contradictory. Whatever the goal is supposed to be, it is not clearly defined and cannot in fact be attained, since the goals set-out in s2 are contradictory. If one goal is achieved, another will be violated. The goals or purposes of the competition legislation as summarised in s2 of the Act being to promote and maintain competition in order to;

- a) ‘promote the efficiency, adaptability and development of the economy’
- b) ‘provide consumers with competitive prices and product choices’
- c) ‘promote employment and advance the social welfare of South Africans’
- d) ‘expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic’
- e) ‘ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy’
- f) ‘promote greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons’

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<sup>17</sup> Welfare economics is attributable to Marshall’s successor AC Pigou (1877-1959). Welfare economics however has never been successfully developed into a coherent economic theory.

<sup>18</sup> The failure to do so is not confined to South Africa.

<sup>19</sup> Bork is not only an authority on competition law because he wrote a book on the subject but also because he spent many years in the field of competition law.

Not only do these fail to provide any achievable goal, they are not even traditional statements of law ie Austin's commands by the sovereign to be obeyed, as for example, "Thou shalt not steal." These are more akin to generalised contradictory ideological or policy statements. They also do not benefit the consumer by lowering prices which is what competition achieves.

Take for example the case of a foreign retailer which wishes to buy a local retail chain, the Wal-Mart type of acquisition.<sup>20</sup> From a competition point of view the matter should only be of concern if there was belief that prices will increase because of lack of competition. There is no suggestion that this is the case. The concern is the opposite that prices will decline. In this case consumer welfare will increase. The acquisition, in law, should thus clearly be approved as meeting goal (b). An argument can be made that the purchase will also 'promote efficiency' (part of goal (a)) since it will provide goods at a lower price and should be approved for this reason. It is however less clear what is meant by 'adaptability and develop the economy.' Since this has no clear meaning, the acquisition can be rejected. However, also, it can be argued that the acquisition will not directly 'promote employment' (goal (c)) since by promoting efficiency (goal (a)) this may well result in fewer employees. The two goals in (a) and (c) are thus contradictory. What is meant by social welfare (also forms part of goal (c)) has no clear specific legal meaning and thus it cannot be said the acquisition will achieve all of the requirements of goal (c). Further it is unclear what must be done 'to expand opportunities for South African participation in world markets'. This implies South African suppliers distributing South African products to other parts of the world. There is no suggestion that this acquisition will achieve this and thus goal (d) will not be met. Further it is not at all clear what this provision has to do with competition since it is a matter for the world trade organisations and international trade treaties. This is thus not only a contradictory goal, it duplicates other pieces of legislation and institutions. Larger organisations can usually lower prices because of economies of scale and thus to link competition to the promotion Small and Medium enterprises (goal (e)) is such a contradictory goal that if goal (d) is seriously to be considered as a goal, consumer prices will never be reduced. Large enterprises would be able to set their prices at the level of small and medium enterprises and enjoy the fruits of regulatory capture. If goal (e) is seriously pursued, the very purpose of competition can be abandoned. Goal (f) is equally problematic since it is not at all clear what competition policy has to do with spread of ownership or 'previously disadvantaged persons'.

It should thus be clear that the set of goals set out in s2 will always be contradictory, not objectively achievable; in short the legislation does not contain clear laws of general application. The competition regime cannot be said to operate within the rule of law. It is all a matter of discretion.

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<sup>20</sup> It is not clear that this acquisition is significant from a competition point of view. The acquisition does not reduce the number of competitors in the market. It is an entry into the market of a foreign retailer. The acquisition is merely the method to facilitate entrance into the market.

Laws, taking Austin's view, are supposed to be clear unambiguous commands of the sovereign. It is clear that the specific legislative provisions in s2 Act<sup>21</sup> clearly fail this test since they have no clear or discernible legal meaning. What this section is, is vague legislation devoid of any clear legal meaning at such grant the 'state' the power to do anything it chooses, when it comes to competition. It is thus not surprising that competition matters have become increasingly expensive and protracted as conflicting goals are pursued.

### ***Some specific provisions***

When it comes to more specific provisions, things do not get much better. Dealing with mergers one aspect is whether or not the merger can or cannot be justified on 'substantial public interest grounds' (s12A(2)(b)). This is a different goal from those set-out in s2 and is not consistent with the confusing objectives set-out in s2. Laws are usually made by parliament in the public interest to protect fundamental rights. An Act of Parliament should not have a provision requiring an administrative body to make decisions in the Public Interest since this is what Parliament does when making laws and to put that in to legislation means Parliament delegates its legislative function to a subsidiary body. Public interest grounds set-out in the section include effect on (a) employment (b) small business, or a firm controlled by historically disadvantaged persons ...' These are much the same as discussed above and are conflicting and contrary to the goal of competition of reducing prices. If for example a merger will result in significantly lower prices, reducing the costs imposed on consumers but this reduction will also reduce employment then the merger can be stopped. This results in increased costs to the consumer. This is a form of transactions tax imposed on consumers.

In any event, the mere fact that a decision is required to be made by individuals and not in accordance with laws, makes it clear that the competition regime does not function in terms of the rule of law.

### ***Competition laws are not of general application.***

Specifically excluded from the operation of the Competition Act is the supply of labour (s3). In other words labour can and does violate all the principles competition. It is interesting to note that there appears to be worldwide trend for government labour costs to be well in excess of private sector labour costs and these costs are the main drivers of government deficits. In both SA and USA it is estimated that the average labour costs of the public sector are 45 per cent higher than the private sector labour costs. In the USA it is the Federal labour costs which are well in excess of the private sector costs.

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<sup>21</sup> This section sets-out the objective of the Act. Clearly if the objective of the Act cannot be set out, it is unlikely that Act can be successfully implemented. If one does not know what one is doing, do not be surprised if the endeavor is a failure.



### ***Conclusion – laws not clear or of general application***

The Competition laws are thus not clear and not of general application. Laws without any clear meaning end-up as cases without end. Referring to Anti-trust cases in the US Mr Justice Bork who prosecuted these cases for a long time noted;

‘The trial of such a case can go on endlessly ... battalions of lawyers. Young lawyers became middle-aged lawyers without working on any other case. Junior associates displayed great ingenuity and energy to avoid being drawn into such black holes. The waste of time, money and talent was staggering’ Bork (1993: 432).

### **Fundamental rights**

The sections discussed above appear to be largely administrative in nature. Since the Competition Act, a system operating as a state within the state, combines and confuses the executive (administrative), judicial, legislative functions it not clear where to draw the line between these functions in the legislation. Some provisions, mainly those contained in Chapter 2 dealing with prohibitions impact on the fundamental rights and these are now considered.

It is usually said that ‘No-one (the accused person) should be deprived of live, liberty or property without the due process of law.’ To discuss the due process of law with respect to the Competition regime it is convenient to follow the usual due process procedure:

- 1 The existence of specific laws protecting fundamental rights
- 2 An accused, accused of violating the specific laws
- 3 An investigation to establish *prima facie* if any of the specific laws have been violated (the investigative function).
- 4 An independent assessment to determine if the evidence *prima facie* establishes that the law has been violated, terminating in the formulation and serving of an indictment (prosecutorial function).
- 5 A trial before an independent and impartial judiciary
- 6 If convicted the imposition of the appropriate sentence.

It is very clear that the competition legislation contravenes ***every conceivable fundamental constitutional safeguard*** something which is becoming quite common with South African legislation.

### *No Law and Order division (investigation and prosecution)*

Where a person stands accused of wrongdoing three institutions are traditionally involved. The first two are the so called Law and Order institutions and the third is the independent judiciary. In the Law & Order division, the one institution investigates and the other prosecutes. These functions can be called the *investigative* and *prosecutorial* functions. Each institution is independently governed by its own legislation.<sup>22</sup> The investigating institution, the police has power to investigate but not prosecute and the prosecuting institution has the power to prosecute by not investigate.<sup>23</sup>

Thus where a person stands accused of violating a fundamental right of another, this is investigated by the police and prosecuted by professional prosecutors in the name of the state in accordance with the procedures set out in the Criminal Procedures Act. In the case of the Competition legislation none of this applies and there is no reason why it should not. This is an aspect where the competition regime acts as a unitary state within a state. It is the police, prosecutor, judge and jury rolled in one, ignoring the usual separate processes. It is by no means clear how the functions of the Competition regime relate to generally understood functions designed to ensure the due process of law is complied with. The Competition Act creates, a Commission, Tribunal and Appeal Court. These are examined in relation to the normal processes.

### *Investigative function*

The combined 'Law & Order' functions are set-out in Chapter 5 (ss44-49A) which is entitled *Investigation and Adjudication Procedures*. Even this division is confusing, since one would expect *Investigation and Prosecuting Procedures* and then later *Adjudication Function*. This section thus confuses the three institutions, law, order and judicial. The Act goes straight from investigating to adjudication. One would expect the Tribunal to be the adjudicator but is also assigned the same function as the Commission that of an investigator.<sup>24</sup> This function is by no means consistent with the more recent amendments to the Act (and other sections) saying something different. There is no concept of prosecution *per se*. Clearly there are difficulties in aligning the legislation with the historical *due process* institutions and procedures.

It seems as if the investigating function is assigned to what the Act calls the Competition Commission (but as pointed out then again, the same function is assigned to the Competition Tribunal). The word

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<sup>22</sup> South African Police Service Act 68 of 1995; National Prosecuting Authority Act 121 of 1998 and the procedure to set out in the Criminal Procedure Act 51 of 1977.

<sup>23</sup> It can be argued that in South Africa this traditional system is flawed and does not go far enough, since the decision to prosecute should be made by a Grand Jury, not the prosecutor. If left to the prosecutor it could institute selective prosecutions. Despite the Constitutional and legislative injunction to prosecute without fear or favour it is clear that this does in fact not happen.

<sup>24</sup> S50 explains what is the outcome of the commission's dealing with

commission has a variety of meanings. In this context I assume it carries a meaning usually assigned to a commission of enquiry. Its function is then to enquire into completion matters, including if the prohibitions set out in Chapter 2 of Act have been violated. The competition commission is established in terms of s19-25 which is headed by the commissioner (s22) who appoints inspectors (s24). The function of the commission is thus *inter alia* to investigate and evaluate alleged contraventions of prohibited practices set out in Chapter 2.

*Prosecutorial function does not officially exist*

Now one would expect, in order to meet the traditional requirements for the due process of law, that when the investigation is complete the docket will be handed over the South African Police Service which would, if necessary, supplement the investigation and take the finalised docket the National Prosecutor which will then decide of a case can be made and if so prosecute the matter in terms of the usual procedures before a normal court of law with the police and or Competition Commission inspectors being called as witnesses. The general laws are then applied and the case is argued before the ordinary courts of the land. However nothing of the sort happens. An inspector who works for the commission can be appointed to investigate the complaint.<sup>25</sup> The findings of the inspector are presumably considered by the competition commission but it is by no means clear what happens to the findings of the inspector. The competition commission can do one of two things; if it decides to do nothing it can issue a notice of non-referral.<sup>26</sup> Alternatively if it presumably if it decides a case exists which requires an answer it refers the **complaint** to the Competition Tribunal.<sup>27</sup> This is odd. The Act does not say the Competition Commission lays a charge against the accused with the Competition Tribunal. The procedure is not stated in the familiar prosecutorial framework. Usually the police investigate a complaint and when complete will refer the docket to the prosecutor who decides if a specific crime has been committed and if so will examine the docket to determine if evidence exists proving that the breach of each element of the crime can be proven and if not, discuss the matter with the police investigating officer to see if additional evidence can be collected. Once so convinced, the prosecutor prepares an indictment which is served upon the accused. The prosecutor does not refer the complaint to the court. If he then did this, the court would not know what to with the complaint. There is nothing in the Act requiring the Commission to set-out its case against the accused in the form of an indictment. The investigative and prosecutorial functions are confounded and confused and not clearly defined. This is not the familiar due process system.

*Not the ordinary courts of the land*

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<sup>25</sup> Ss49B(3)

<sup>26</sup> S50(2)(b)

<sup>27</sup> S50(1)

The operation of the Tribunal to which the complaint is referred to, is now examined. The Tribunal, whatever else it may be, is not an ordinary court of the land. English jurists regard one of the great triumphs of the 19<sup>th</sup> century to be the restoration of the jurisdiction of the ordinary courts of the land as courts of law. This was particularly so with respect to absorption and abolition of the courts of equity. This system of single courts of the land has been completely reversed in the past few decades with a multitude of special tribunals, special courts, quasi-judicial institutions springing up all over the place. The Competition Regime is one of these institutions. In the unitary state within the state model, the Competition regime has its own “courts”. Clearly the Tribunal does not meet the test of an ordinary court of the land. The basis of operation is defined in terms of the Rules of procedure (s55) which resemble the procedures followed in civil cases. In dealing with the complaint referred to it the documents refer to the Competition Commission as the Applicant and the accused as the respondent. It is not at all clear what the commission is supposed to be applying for since the Act merely requires it to refer the complaint to the Tribunal. The Act does not say why it must be referred to the Tribunal or what it must do with the complaint once it receives it. What it says is the Tribunal must conduct a hearing into every matter referred to it (s52). Yet in terms of s27 a function of the Tribunal is to adjudicate on a number of aspects. To adjudicate is to choose between different options as in the case of an adjudicator of a beauty contest. The adjudicator must choose which of the contestants win. In the context of a complaint one would expect the obligation of the Competition Commission is not to refer the complaint to the Tribunal but to serve an indictment on the accused (respondent) and present its case, evidence and all before the Tribunal which must then decide on which of the two views based on evidence is correct. The Act says nothing of the sort. The Competition Commission must refer the matter to the Tribunal which will conduct a public hearing.

There does not seem to be any reason at all why the usual due process procedures should not be followed with the Competition Commission investigating the matter and when finished refer the docket to the police which in turn if convinced a crime has been committed refer the matter to the National Prosecutor who will draft an indictment and bring the matter before the ordinary courts of the land.

There is also a Competition Appeal Court. It is true that the Appeal Court is staffed by pre-selected ordinary judges but that still does not make it an ordinary court of the land. It was originally proposed to staff this “court” with competition people but decided that that would be unconstitutional, so six ordinary judges have been appointed. A special Appeal Court staffed by pre-selected judges still does not meet the requirement of the ordinary courts of the land test. It is interesting to note how some of these state institutions claim to be creating their own jurisprudence. There is some truth in

that. Where cases are not heard by ordinary judges applying the general law, the institutions set about conditioning or training ‘their’ judges.

### ***S68 Proof not beyond a reasonable doubt***

The standard of proof in criminal matters is proof beyond reasonable doubt. There is an increasing tendency in legislation to select the civil standard, on the balance of probability. That the civil standard is selected is no surprise because it is no standard at all. The “civil standard (which is no standard at all)” can be illustrated by a number of cases, for example, in the *Motor Vehicle Assurance Fund v Dumbusane* 1984 (1) SA 700 (A)<sup>28</sup> which involved a claim against the Fund, the deceased was found dead in Soweto next to the road near a pedestrian crossing. There were no witnesses as to what happened. In order to succeed in a claim against the fund it had to be shown he had been knocked down, and in this case killed by a motor vehicle due to negligent driving. It could not even be said with certainty that he had died as a result of motor accident and not an assault, let alone by negligence. The forensic pathologist when asked if he could say that the deceased had come into contact with a vehicle he replied, ‘Absolutely, I think so.’ Of course mere proof of a collision with a motor vehicle is not enough, the negligence of the driver must also be shown. The Appellate Division concluded since the deceased was middle aged wore a white shirt, visibility was good, died near a pedestrian crossing, that this was sufficient to prove on the balance of probabilities that the deceased was in fact killed in a motor accident through the negligence of the driver. That simply is not proof. It is mere conjecture. It was cases such as this which led me, at the time, to examine the rate of escalation of claims costs against the fund and attribute this to cases such as these (Vivian 1984). The fund has long since gone insolvent. It is therefore not at all surprising that increasingly legislation is being passed adopting the so-called ‘civil’ standard of proof and procedure, which is no standard at all. The Competition Act is no exception. S68 of the Act declares that the standard of proof is on a balance of probabilities, the civil law standard.

### ***S55 Convictions without any objective tested evidence – SA’s silent revolution***

A fundamental right of an accused is that guilt must be established by the production of objective evidence which is tested in an open court; *viva voce* evidence. There is an increasing tendency allowing judgments to be made from no objective evidence at all. S55 reads, ‘The Tribunal may accept as evidence any oral testimony, document or thing whether or not given under oath or would be admissible as evidence in court.’ ‘Evidence’ which is not legally evidence at all may be accepted by the Tribunal. The Tribunal can draw its own conclusions from ‘evidence’ even if not led, or revealed to the accused, since it can accept ‘evidence’ which would not be admissible to a court of

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<sup>28</sup> The case has featured subsequently in a number of other cases 1985 (3) SA 916 A, 1988 (4) SA 123 C, 1995 (3) SA 680 C, 1997 (4) SA 766 W, 2004 (2) SA 463 SE.

law. From reading s55 again this becomes clear, 'The Tribunal may accept as evidence any ... document ... whether or not given or proven under oath or would be acceptable as evidence in court.' The Tribunal in terms of this provision could sit in its office page through files, newspaper cuttings, never see a witness and on that evidence come to the conclusion the accused is guilty. The usual rules of evidence, developed over centuries are not applicable to the Tribunal.

In any event, quite apart from the Competition regime what is not generally realised is that there has been a silent evidential revolution underway. The historical standard for evidence, the *viva voce* evidence presented and tested in an open court has been abandoned. Increasingly totally unacceptable 'evidence' is admitted and guilt or innocence is established based on what historically legally would be no evidence at all. Convictions on untested documentary evidence is now possible. There are criminal cases which have gone all the way to the Constitutional Court based on nothing but untested documentary evidence. This is a silent evidential revolution.

Little wonder round the world it is being discovered that innocent people are being sent to goal and when released it is realized with amazement that there has been complete lack of any acceptable evidence, all along, pointing to any guilt.

### ***S56(3) No right of silence***

There is no right of silence where the Competition act is concerned. Because of long experience the American courts have had with the right of silence, it is now regarded as a non-justiciable right. It is an unalienable right no longer open to discussion. No adverse conclusion can be drawn from the exercise of the right of silence.

The right of silence is abrogated by s56(3) which reads, 'The Competition Tribunal may order a person to answer any question, or to produce any article or document, even if it is self-incriminating to do so.'

### ***S47 Search without a warrant***

S47 allows a search without a warrant. Where searches can be carried out with hindrance they become a way of life as has happened in South Africa. Increasingly South Africans are subject to stop and search without a warrant. Road blocks are set up routinely and randomly. People are injured even murdered with impunity by police at roadblocks. This is the natural outcome of a society which forgets the fundamental rights. The Competition Act is yet another piece of legislation which permits yet another set of state agents to enter, search and seize property without a warrant. It can be added, in South Africa, that state agents also tend to steal that which that is seized.

### ***S59(2) and the Lex Talionis***

In practice the Competition regime violates the *Lex Talionis* one of the oldest laws in history. It is traced to the Code of Hammurabi (1772 BC) and also appears in the Old Testament in Exodus 21: 22-25, as 'Any eye for an eye'. Contrary to popular belief the *Lex Talionis* does not require equal punishment but that the punishment must fit the crime. The *Lex Talionis* is not oppressive but limits oppression, as it limits punishment. The principles behind the *Lex Talionis* are well established in law. In South Africa these are applied as a matter of course by magistrates and judges who always apply them when determining the punishment. They weight up the crime, the perpetrator, the victim and society attempt to do justice to all. The Tribunal may impose an administrative penalty (whatever that may mean), the most well-known of which is s59(2) which '... may not exceed 10 per cent of the firm's annual turnover ...'. This can be an enormous amount, far exceeding anything a court of law imposes. It should be noted that s59(2) is not a mandatory penalty but the maximum penalty. There is nothing in the Act suggesting the Tribunal is not bound by the normal sentencing procedures when determining the penalty. The mere fact that it is possible to sentence someone to life imprisonment does not mean everyone must be sentenced to life imprisonment. The Constitutional Court would for example have no difficulty in declaring it unconstitutional to sentence someone to life imprisonment for jaywalking. The punishment must fit the crime – that has been the constitutional principle since the days of Hammurabi. It is the law of the land.

The failure to apply the *Lex Talionis* can lead to what can only be described as institutionalised extortion, possibly criminal extortion. A process similar to the now largely discredited plea bargain system has evolved.<sup>29</sup> In America in case after case where it was discovered that innocent persons have spent years in goal on death row had pleaded guilty the same answer is given, they pleaded guilty rather than face the possibility of the death sentence. By allowing the Competition Tribunal to apply the maximum penalty instead of applying the millennia of *Lex Talionis* allows the Commission and the Competition regime to practice extortion. Companies have the option to either plead guilty and receive a lesser penalty or face the maximum penalty. To allow the Tribunal to avoid the *Lex Talionis* is to perpetrate a grave injustice.

### **Own laws – the state within a state**

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<sup>29</sup> In the Kebble murder the murderer, the person who pulled the trigger ending the life of Kebble was granted immunity in exchange for his testimony, so it was said, that the real killer could be caught. There is only one real killer and that is the one who pulled the trigger. Others may be guilty by association or common purpose but the only real murderer is the murderer – that seems to be too complicated for the state to understand so as in the Kebble case, in the end no one was convicted.



I have been pointing out the existence of this new phenomenon, what I have called unitary states within states. These new intuitions make their own laws, establish their own procedures, and run their own courts. I have argued that the Competition regime is an example of this modern phenomenon. How is it then possible for these institutions to make their own laws, laws after all, it can be argued, laws are made by parliament?. The answer to this question was given by George Stigler, a Nobel laureate in economics in the 1960s. Laws are supposed to be made in the public interest. In the 1960s he examined all the regulations in the US and could not find any made in the public interest. He discovered that they were made in the interest of the regulated and gave the world the concept of regulatory capture. There is no reason why the laws cannot be captured by the regulator, in this case the Competition regime itself. The romantic idea that persons, who are elected to form part of parliament go there to make laws, spontaneously, laws for the benefit of society is just that, a romantic idea. It has been realised at least since the 1960s that virtually all laws come from the government itself, in particular government departments not parliament. Parliament largely rubber stamps what is brought before it from the government. The laws come specifically from government departments and institutions, not the elected. These laws are designed and passed for the benefit of the department, not society. Since the Competition Act was originally passed it has been changed extensively. The changes to the Competition legislation did not emanate from the elected, they emanated from the Competition regime itself. It will be noted that the Competition Act 89 of 1998 has been amended five times since it was passed by parliament and virtually every draconian provision discussed above was been inserted after the Act was promulgated.<sup>30</sup>

## **PART C: AN ILLUSTRATIVE CASE**

### **An enormous ‘fine’**

What is said above can be illustrated by examining a recent matter which worked its way through the Competition regime. Any case would do and the Pioneer (decided on the 30<sup>th</sup> November 2010)<sup>31</sup> case is selected simply because it is well-known. In this case Pioneer Foods ended up paying the following amounts:

- R500 m as an “Administrative” Penalty (par 12.1).
- A reduction in Pioneer’s gross profit by R160m (par 14)
- Increase its capital expenditure by R150 m (par 15)

In addition there was an amount of R196 m imposed by the Tribunal in April 2010. The total amounts involved is thus R1 006m, over a billion rands. This can be compared with the operating profit of the bread division of Pioneer Foods, Sasko which was R982 m. The amounts involved

<sup>30</sup> The right to search without a warrant was inserted by Act 29 of 2000; the right to issue summons by the same act; the abrogation of the right of silence by the same Act; consent proceedings by the same Act.

<sup>31</sup> See also Pioneer Foods Annual Financial Statements for the year ending 30<sup>th</sup> September 2010 and in particular note 28



exceed the operating profit. The **Group** income tax was R359m or the amount involved was 2.8 times the group taxes paid. From a Fiscal point of view the Competition regime is a highly profitable business indeed. This is an enormous fine. Now I am well aware that the Competition regime calls this fine an administrative penalty; but a rose by any other name is yet a rose. Call it what you like, it is in fact a fine.

### **Example of investigative, prosecutorial and judicial confusion**

The procedural confusion which I have referred to above becomes clear when the Competition Tribunal's so-called **Order** is examined. In the **Order** document, the Competition Commission is referred to as the Applicant and Pioneer Foods as the Respondent. So in this sense the Competition Commission begins to look like a prosecutor, but the prosecutor represents the state's case. The document is closer to a Civil Judgment, but in a civil case is brought by the plaintiff who has suffered harm. One can hardly conceive the Competition Commissioner as having suffered harm or being a plaintiff. The Competition Commission is however specifically designated as an investigating body to investigate if the prohibitions in Chapter 2 have been contravened,<sup>32</sup> and for the purposes of the Pioneer matter presumably this is what the commission did. As pointed out from the Act it is not at all clear what the Commission must do with his findings except refer it to the Tribunal (whatever that may be) but in the Pioneer matter it does not matter since the matter was finalised via consent proceedings.<sup>33</sup>

The document is cast in a form one gets from a Court of Law. Clearly the Tribunal sees itself as some sort of courtish institution. Since the Act requires the Commissioner to 'refer the complaint to the Competition Tribunal' not prove its case before the Tribunal, it is not clear what the Tribunal is supposed to do. Presumably it must investigate the complaint *de nova* in so doing hear what the commission has to say. The procedure is governed by one of those new inserted provisions s49D which says the Commission and the accused (called the respondent in the section) may enter into an appropriate order which the Tribunal may confirm as a consent order, without hearing any evidence. This is difficult to understand. The Commission like the police have investigative powers not dispute resolving powers. An accused person may indeed confess or admit facts to the police which can be placed before a court of law as evidence but how does an accused person agree with the police as to what order the court should make? A court of law cannot be bound to make an order of court what the police and accused have agreed to. The prosecutor, on the other hand, could a court of a conclusion which would be acceptable to the state and then, in any event, the accused must confess sufficient facts in court for the magistrate or judge to decide if the state has a proven a case. It is

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<sup>32</sup> S21(1)(c) of the Competition Act 89 of 1998.

<sup>33</sup> S49D one of those inserted provisions referred to above.

difficult to reconcile this inserted procedure with the original functions of the Tribunal to conduct a hearing into every matter referred to it (s52).

### **Alleged contravention**

The alleged contraventions are important, after all what is the terrible act on the part of Pioneer Food which justified the R1bn fine? Whatever it is it must be terrible – no court in South Africa has ever imposed a fine anywhere near that amount. Pioneer Foods stood accused of contravening s4(1)(b)(i) of the Competition Act 89 of 1998 (and a few other sections) which reads as follows:

#### **4 Restrictive horizontal practices prohibited**

- (1) An agreement between, or concerted parties by, firms or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –
  - a. ...
  - b. It involves any of the following restrictive horizontal practices
    - i. Directly or indirectly fixing a purchase or selling price or any other trading condition;

In short the allegation is that Pioneer Foods agreed with one or other competitor to fix some or other prices. It is often pointed out that there is great difference between parliament and the courts. Parliaments pass laws of general application and the courts when applying these laws must sure justice is done between man and man. The courts unlike parliament deal with the facts of the specific case. On the face of it the above section makes no sense at all. It does not refer to any loss and implies that any agreements to fix prices are unlawful. So if suppliers agree to give food to the poor free of charge, so the argument would go, the suppliers breached the above section. The reply to that is of course that the court when applying the above section will ensure that justice is done between man and man. The court could thus for example evoke the legal doctrine *de minimis non curat lex*, - the law does not concern itself with trivialities - and decide no action in the specific case should be taken. It is up to a court of law to consider all the facts to do justice between man and man and to temper justice with mercy. In that way broad legislative statements find practical application.

### **Alleged harm caused by Pioneer Foods**

In order to understand the odiousness of Pioneer Foods conduct it is essential to have some idea of the 'harm' it caused. In economic terms the extent of the externality which it imposed on consumers must be determined. This would be the amount it received in excess of the market price, the price which would prevail if the price fixing did not take place. In the Order document there is no indication at all of the profits made from the price fixing, if indeed any profits were made at all.

There is no indication at all in the Order document of any quantum of ‘harm’ inflicted on the public. Indeed there are indications that no such ‘harm’ occurred. The Order document notes (par 5.2):

“The complaint was initiated after the Commission had observed that, although the prohibited conduct detailed in paragraphs 3 and 4 above had allegedly ceased, the market had seemingly not become more competitive.”

And again (par 6.2)

“The complaint was initiated after the Commission had observed that, although the prohibited conduct detailed in paragraphs 3 and 4 above had allegedly ceased, the market had seemingly not become more competitive.”

### **Lex Talionis**

No attempt is made to estimate if any harm was caused to consumers ie decrease in consumer welfare. Indeed from what is produced it would appear that no harm was done. An indication of the extend of harm is essential to decide if the appropriate sentence is imposed. No attempt is made to justify the fine in the region of R1bn which was imposed. The Order merely states:

“In accordance with the provisions of section 58(1)(a)(iii) as read with 59(1)(a) and 59(2), Pioneer will pay an administrative penalty in the sum of R500 000 000.00 (five hundred million rands).”

This is of course not strictly correct. The Act allows a ‘fine’ to a maximum. It does not absolve the Tribunal from adhering to the ancient principle of the *Lex Talionis*. The fine must be commensurate with the harm caused. No attempt was made by the Tribunal to match the penalty with the harm.

### **Extortion**

As indicated if the harm and penalty are not matched this leads to the danger of institutionalised extortion, that which has resulted in hundreds if not thousands of innocent persons spending considerable time in goal as a result of plea bargains they were forced to enter into. Excessive fines negate all constitutional rights. Excessive fines produce the same outcome torture produced. It is always possible to get a confession via torture but not the truth. Confessions have no probative value. A recent example of this is the so-called Lion Killer case. Three men beat another to death. A fourth arrived after the death and suggested they dispose of the body by throwing the body to the lions. The

state offered one man involved in the death of the deceased a deal. If he would just say the deceased was alive when they threw the deceased body to the lions he can go free and thereby the fourth man who played no part in the death could go to gaol for a murder he did not commit. Not surprising the man took the deal. It should be clear to anyone that his testimony had no probative value. Notwithstanding this the trial court accepted his testimony, convicted the fourth man and denied him the right of appeal. The Supreme Court of Appeal however had no difficulty in pointing out that the evidence was in fact flawed and reversed the trial court's finding. The only surprising aspect of this case is that the trial court actually assigned any probative value to the procured testimony.

As long as the Tribunal does not apply the *lex talionis* it will be able to extort consent agreements from firms. I suggest however that these as probative evidence be taken with the proverbial pinch of salt.

## Conclusion

It should be clear to all that the current Competition regime violates virtually all constitutional rights which protect the fundamental rights. This is becoming a common feature of modern South African legislation.

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