INSTANCES OF SECURITY IN ANCIENT AFRICAN LAW WITH ROMAN EQUIVALENTS

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1 Introduction

Legal literature abounds on ancient as well as modern African law of persons, family and succession. While there are some works on the traditional or ancient African law of contract there is a distinct paucity of material on specific contracts, such as those relating to security. The aim with this article is to provide an exploratory investigation into this aspect of ancient African law.

Because of the virtual absence of material on securing a debt in traditional law in Southern Africa, writings on the law of East and West Africa were consulted as well. Before I embark on an analysis of security in ancient African law, it may be useful to provide a very brief explanation of my source material.

Since ancient African societies were traditionally preliterate, there are no ancient written sources compiled by indigenous Africans themselves. Available written materials are broadly of two kinds. The first and most valuable sources of knowledge are the anthropological writings on African culture[1] and the restatements of the ancient law. Both are based on empirical research: information obtained by doing fieldwork and by questioning informants. By correlating the information thus obtained with other existing historic,[2] ethnographic, archaeological, palaeontological and linguistic materials, a reasonably truthful reconstruction of the ancient law may be created.[3] The

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1 Since law is an aspect of a people's culture, these sources offer important insights into African law, even if not in legal terminology.

2 The sixteenth and seventeenth-century texts of early travellers and historians, often written in Latin or Arabic, provide significant information on the laws and institutions of the indigenous populations of Africa. The works of Ioannis Leonis Africani *De Totius Africae Descriptione, Libri IX* (1556) and Dapper, Ten Rhyne and Grevenbroek have been consulted. The original Dutch and Latin texts of Dapper (1668), Ten Rhyne (1686) and De Grevenbroek (1695) were translated into English by Schapera & Farrington and the translations, together with the original texts and comments, were included in their book *The Early Cape Hottentots* (1933). For a brief exposition of the life of Leo Africanus see the article of Goolam "The Timbuktu manuscripts – Rediscovering a written source of African law in the era of the African renaissance" 29ff in this publication. The Timbuktu manuscripts provide interesting information on Africa prior to European colonisation. These manuscripts – over 300 000 are in circulation in Mali – are being translated from the original Arabic and date from the twelfth century. See, generally, Goolam as well as Jeppie & Farouk-Alli "Timbuktu's manuscript libraries – repositories of African history": http://www.nlsa.ac.za/docs/bibliophilia8_2005/edjeppie.doc (18 September 2006).

3 It has to be borne in mind that the fact that researchers have had to interpret oral communications, presents one with a measure of uncertainty regarding true knowledge of pre-colonial times. Therefore, it is only possible to say that the principles discussed in this article are the true principles relating to security in indigenous African societies *as far*

second source consists of standard textbooks on African law. As a rule these books are of less value for knowledge of ancient law since they rely heavily on judicial decisions and legislation and often reflect an adulterated version of the ancient law, influenced by imposed colonial law.

However, there is no reason to relegate ancient African legal history to the field of pre-history merely because it is based on oral traditions rather than on written material. And, of course, neither should one do so because African conceptions of time and history differ from mainstream Western conceptions. Objections to the study and teaching of pre-literate African history, and with it legal history, have long been overcome by the critical interdisciplinary approach alluded to. Few people today question the value of oral evidence as historical source material.[4]

To understand the concept of security in ancient African law, one has to have a basic comprehension of the non-specialised nature of African legal systems as well as the social ordering within African societies. Ancient African law was essentially group-oriented. Consequently, rights and duties vested in groups, not in individuals. An important feature of ancient African private law is the fact that members of the group shared their rights and duties. A person's share in rights and obligations depended on his or her status. The latter was determined by rank, gender, marital condition and physical maturity.[5] In terms of the familiar Western theory of rights, three types of right in indigenous law concern a group's estate and may thus be compared with patrimonial rights. These are rights in things (analogous to real rights in Western law), rights to performance, and rights of guardianship.[6]

In an attempt to make African law more explicable to the non-African reader, Western dogmatic devices, which are in essence based on common-law and

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as may be ascertained. Vansina *Oral Tradition. A Study in Historical Methodology* (tr) Wright (1965) 17 is of the opinion that the very nature of oral traditions, or communications, makes it possible to establish their reliability without necessarily always having reference to other disciplines.

4 See Davidson *African Civilization Revisited* (1991) 5-8. This is an interesting anthology of historical documentation of African history.

5 Myburgh *Papers on Indigenous Law in Southern Africa* (1985) 82 110; Schapera *A Handbook of Tswana Law and Custom* (1938) 30-34.

6 Holleman "Shona Customary Law" in Cotran & Rubin (eds) *Readings in African Law* Vol 2 (1970) 263 describes the traditional indigenous conception of wealth and an estate as "the capacity to maintain and reproduce one's own kin-group as an organic unit to safeguard its spiritual and material well-being by being able to propitiate the ancestral spirits. ... [T]he estate is primarily regarded as the capacity of the kin-group to reproduce itself, and ... wives and children - that is, their reproductive value - are regarded as natural `assets' of the estate ... . [S]ince the reproductive assets are by far the most important ... the Shona conception of estate is organic rather than economic in Western sense".

civil-law conceptions of law, are generally used as descriptive aids.[7] However, one must be prepared to transcend familiar paradigms and should continuously guard against a forced "Western" or, in this article, specifically "Roman", interpretation of African legal phenomena.

By analogy with Western jurisprudential concepts, it is possible to distinguish certain broad categories and divisions in African law that were also recognised in Roman law. Nevertheless, it should be borne in mind that they are not identical to the categories and divisions of Roman law and that, in view of the non-specialised character of African culture, the distinctions were often very subtle indeed.

As indicated, the law regulating contractual relations has been a much neglected field of study in indigenous African law. Comprehensive theoretical studies in that field have only relatively recently appeared in legal literature. Many of these studies are based upon extensive fieldwork.[8]

One could explain African contract law, loosely, with reference to Gaius' classification of contracts.[9] Because of the lack of abstraction in African law – a feature of all non-specialised legal systems – contracts mostly *resembled* the real contracts (*contractus re*) of Roman law.[10] This does not mean that delivery (ie, transfer/movement of property) was the only means to obtain contractual liability. It merely means that the agreement had to be substantiated by a concrete act in some way for it to give rise to contractual liability. This concretization could take various forms, such as the clapping of hands, spitting, breaking sticks and drinking.[11]

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7 In the same way that lingual phenomena, as cultural universals, may be linguistically explained despite the vast differences between various languages, legal phenomena may be explained by making use of universal jurisprudential ideas and concepts.

8 The following materials provide information on contracts in ancient African law in Southern Africa: Myburgh (n 5) 91-92 112-113, Centre for Indigenous Law, Unisa (ed) *Indigenous Contract in Bophuthatswana* (1990), Whelpton *Die Inheemse Kontraktereg van die BaKwena Ba Mogopa van Hebron in die Odi I Distrik van Bophuthatswana* (unpublished LLD thesis UNISA Pretoria 1991), Schapera "Contract in Tswana law" in Gluckman (ed) *Ideas and Procedures in African Customary Law* (1969) 318ff; Elias *The Nature of African Customary Law* (1956) 144ff, Gluckman "The Ideas of Barotse Jurisprudence" in Cotran & Rubin (eds) *Readings in African Law* Vol 1 (1970) 213-220; Pauw *Die Persone-, Sake- en Immateriële Goedere-, Kontrakte- en Deliktereg van die imiDushane (amaXhosa) en amaBhele (amaMfengu) van Ciskei* (unpublished report University of Port Elizabeth 1985); Strydom *Die Sake-, Kontrakte- en Deliktereg van die Suid-Sotho van QwaQwa* (unpublished LLD thesis University of the Orange Free State 1985); Coetzee *et al Privaatreg van Ses Tswanastamme in die Republiek van Bophuthatswana* (unpublished report IPAS PUCHO 1985). Standard textbooks, the full reference to which will appear later, were also consulted.

9 Gaius 3 88.

10 Whelpton (n 8) 70ff.

11 Allott, Epstein & Gluckman "Conceptions in the substantive law. Agreements and transactions: Contracts?" in Gluckman (ed) *Ideas and Procedures in African Customary Law* (1969) 74f; Lyall "Traditional contracts in German East Africa: The transition from pre-capitalist forms" in 1986 *J of African Law* 118. These actions should not be regarded to have

The concept of a consensual contract (*contractus consensu)* and of contractual liability flowing from a mere agreement was unknown. Unlike Rome, ancient Africa did not experience the substantial economic growth and large-scale expansion of trade that necessitated the development of consensual contracts. While consensual contracts may exist today, it is doubtful that pure consensualism had developed in ancient African law.

Obviously, in view of its oral tradition, contracts resembling *contractus litteris* were unknown. The grey area would be verbal contracts (*contractus verbis*) which, in Roman law, came into being through the uttering of formal words. Although there are no pertinent examples of such contracts, those who argue in favour of the existence of suretyship in ancient African law do provide examples of instances where contractual liability followed on verbal agreements accompanied by some sort of concrete act.[12]

Since legal subjects were not individuals but groups, contracts in indigenous law could be concluded only between different groups. Contractual liability arose only after performance by one of the parties, or arguably after the contract had been concretized.[13] Generally, contracts were concluded in an informal way in the presence of both parties, prescription and set-off were unknown and, as a rule, no provision was made for interest.[14]

There is evidence that the notion of securing a debt did exist in ancient African law.[15] Because of the predominance of real contracts, pledge appears to be the most suitable descriptive device to use in an analysis of African law relating to securing a debt; *fiducia* and *pignus* being the two comparable Roman forms of security. Further, although there are reports of the pledging of land, it would *prima facie* seem incongruent with the ancient African values to use land as an economic commodity. The reason for this is that land had religious and magical

had mere evidentiary value because African societies were preliterate. This will be explained in more detail below: see 3 1 3 3.

12 The concept of concretization will be explained *infra* under 4 “Suretyship”. See, generally, Schapera (n 8) 202; Lyall (n 11) 93 96ff 110-118; Duncan *Sotho Laws and Customs* (1960) 8.

13 Prinsloo & Vorster "Elements of a contract" in *Indigenous Contract in Bophuthatswana* (n 8) 10-11; Elias (n 8) 151ff esp 152-155; Gluckman (n 8) 218-219; Whelpton (n 8) 27-31 248.

14 Whelpton (n 8) 248; see also Prinsloo & Vorster (n 13) 10-11 20; Prinsloo "Exchange" in *Indigenous Contract in Bophuthatswana* (n 8) 36; Lyall (n 11) 118 122; Elias B*ritish Colonial Rule. A Comparative Study of the Interaction between English Local Laws in British Dependencies* (1962) 88 117-118.

15 Among the Tswana an important principle which prevailed in connection with the settlement of debts was that a person should accept what is offered, lest the debtor had nothing else to offer. This principle was contained in two well-known proverbs: m*olato o lefya ka nthla ya lomao* (a debt is paid on the point of a needle) and *lemme le gaisa lefifi* (an ugly thing is better than darkness): Schapera (n 5) 243.

significance and could not be owned individually.[16] Consequently, contracts in connection with land[17] were regarded as unlawful. Land was not regarded as a negotiable article of trade. It belonged to the community as a whole, the living, those yet to be born, and to the superhuman.[18]

In view of its non-specialised nature and the absence of abstraction, there was no institution equivalent to the Roman *hypotheca* where neither possession nor ownership of the hypothecated thing was transferred.[19] For this very reason there seems to be a conflict of opinion as to whether suretyship existed in ancient African law.[20]

2 Suretyship

In ancient Roman society, suretyship, that is personal security, was the preferred and most popular form of security. In contrast, there are conflicting opinions on whether or not suretyship existed at all in ancient African societies.

Ironically, in both these ancient societies similar extra-legal, sociological circumstances impacted on societal perceptions and the very existence, or absence, of this legal institution. The reasons for its popularity in Roman society were the value attributed to friendship, and, concomitantly, the importance of Roman *fides.* Suretyship was thus founded on close human relationships: *amicitia*, which compelled friends to help each other irrespective of the personal sacrifice, and *fides,* according to which the Roman surety would keep his word at all costs, as respects both his friend the debtor and the creditor. The *fides* minimized the risk for the creditor since it ensured that the surety would honour his word.[21] In African societies, close human relationships within the family group eliminated the need for someone else to stand in

16 See, generally, Ayittey *Indigenous African Institutions* (1991) 243 285-287; see also M'Baye "The African conception of law" 1975 *International Encyclopaedia of Comparative Law* Ch 1: "The different conceptions of the law" 149; Paden & Soja *The African Experience* Vol 2 (1970) 39-40; Dalton "Traditional economic systems" in Paden & Soja (eds) *The African Experience* Vol 1 (1970) 71-72; Mönnig *The Pedi* (1983) 340f.

17 Eg, contracts for the exchange of a field or of a residential site for livestock or for movables and contracts for the selling or letting of a field.

18 Ollennu *Customary Land Law in Ghana* (1962) 4f gives a succinct exposition of this concept of land ownership in ancient African law.

19 Although a commonly used method of securing a debt was by transferring the right to marriage goods for a daughter to the creditor group, liability did not flow from the agreement alone. A detailed discussion follows below. The institution of the transfer of marriage goods was also in itself a means of securing the welfare of the wife and her children. This function of the institution of marriage goods had interesting similarities with the Roman *dos*.

20 There are differences of opinion whether or not the concept of securing a debt was known at all in ancient African law since prescription did not exist. One view is that the absence of prescription of a debt rendered it unnecessary to secure its payment.

21 Schulz *Principles of Roman Law* (1936) 233ff; Crook *Law and Life of Rome* (1967) 243 247ff; Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1990) 115.

formally for a debt. The group offered security to the creditor since it was responsible for all debts within the group without the necessity of formalising the security with the creditor. Hence there is conflict of opinion whether this legal institution existed in ancient African law.

There are convincing arguments that it is unlikely that suretyship, as a contract between a surety and a creditor whereby the surety accepted liability for the proper performance of the debtor's duties in terms of a contract between the creditor and the debtor, existed in ancient African law. First, as indicated above, only real contracts were recognised. It has been confirmed by extensive fieldwork among various indigenous tribes in Southern Africa that a mere agreement between a creditor and a surety for the latter to incur accessory liability for another's debt was not enforceable.[22] Secondly, the abstract notion of substitution of a party to a contract is not compatible with the lack of abstraction in non-specialised ancient African cultures. Thirdly, in those ancient societies a debt did not prescribe. In addition the lapse of time did not have the same significance in agrarian subsistence African economies that it had in the economically advanced Roman society. In African societies, contractual obligations were ongoing and the creditor had the assurance that the debt would be satisfied by the debtor or his family group in the course of time. Consequently, some authors have reservations about the existence of any form of security for a debt in African law.[23]

However, opinions in favour of the existence of suretyship have also been recorded. Whitfield,[24] for example, estimates that both suretyship and pledge were well known in indigenous African law. For this view he relies on early case law.[25] His exposition of suretyship in ancient African law must be evaluated against the backdrop of his rule-centred approach to the study of African law and his tendency to superimpose Western rules, principles and divisions on the indigenous law. It may be inferred that his reliance on a "non-African" framework led to assumptions apparently contradicting African reality. The

22 Whelpton "The law of contract" in Bekker *et al Introduction to Legal Pluralism in South Africa* (2006) 70; Prinsloo & Vorster "Parties" in *Indigenous Contract in Bophuthatswana* (n 8) 24-25. Whelpton (n 8) 129ff is of the opinion that it is doubtful whether any of the following forms of security existed: cession of personal rights, pledge or suretyship. See also Strydom (n 8) 495.

23 Whelpton (n 22) 77-78 expresses the view that placement of property in possession of the creditor, or the handing over of the pledged property, should perhaps rather be seen in the light of the non-specialised character of indigenous law, in other words that it is merely concretization of the debt rather than security for the debt. Lyall (n 11) 105, too, states that there was a general reluctance to forfeit pledges and that transfer of property to the creditor should be seen as evidence of a transaction rather than as security.

24 *South African Native Law* (1948) 489.

25 See, eg, *Tshali v Stefana* (1902) NHC 58.

Oliviers,[26] too, claim that suretyship existed, but they do concede that information on this legal concept in African law is scant. Their references, likewise, are to judicial decisions and therefore they offer no contribution to the existing knowledge of ancient African law.

In contrast, Lyall made a comprehensive study of traditional contracts in East Africa.[27] He based his findings on field research conducted under the auspices of the German colonial authorities in that region in the late nineteenth century. Although he states that suretyship was well-known among the indigenous societies of East Africa, it is clear from the responses to the questionnaires employed in the research that he did not, like Whitfield and the Oliviers, refer to purely consensual contracts of suretyship and that he also did not impose Western notions on African law.

In African law, the liability of the surety was not always for the full amount of the debt. He could merely undertake to compel the debtor to pay, or he could undertake to pay a part of the amount of the debt, or to pay it in full. All the examples that Lyall provides contain some measure by which the agreement to stand surety was substantiated by a concrete act: Among some societies the surety was physically seized by the creditor. This was done to force the group to settle the debt. The surety was thus not personally liable to pay the debt. In these cases there was no question of an agreement between the surety and the creditor to stand surety for the debt. However, there were other instances in which the person that was seized could agree to stand surety or refuse, in which case he had to be released.

There were also other ways in which the agreement to stand surety was signified in a concrete way so as to create contractual liability. For example, a small stick was broken in two by the debtor, half was given to the creditor and the other half offered to the surety. If the surety accepted the stick, he became surety for the debt. Another custom was for the surety to spit on his hands, rub them together and offer them to the creditor. The latter would clasp them with his own, thus signifying the creation of contractual liability. Lastly, a person could strike himself on the chest, declaring that he would pay the debt if the debtor was unable to do so. This last example comes closest to the Roman *contractus verbis*, more specifically, suretyship by stipulation of the classical

26 Olivier "Law of contract" in Church & Faris (eds) *Indigenous Law LAWSA* 32 (2004) par 254 (hereafter WH Olivier n 26); Olivier *et al Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* (1989) 552 (hereafter Olivier *et al* n 26). See also Stafford & Franklin *Principles of Native Law and the Natal Code* (1950) 281; Pauw (n 8) 131f.

27 (n 11) 118ff.

Roman law.[28] The other way of creating a contract of suretyship in Roman law, namely through mandate, was not known in ancient African law. Although mandate was known in African societies, it did not create contractual liability. The Tswana legal maxim states *go roma go monate, mme ga go thlapise pelo* (it is nice to send (to give someone a mandate), but it does not please).[29] Furthermore there is no empirical evidence to suggest that, as in Roman law, a mandate could be given in relation to a debt.[30]

A perusal of the information supplied by Lyall reveals some Western assumptions which do not conform with indigenous African values. Thus he refers to individuals, and not groups, as the legal subjects (creditor, debtor and surety) in a suretyship arrangement. Yet he points out that, in line with the African concept of universal succession, the surety's family became liable for the secured debt if he were to die. He further states that members of the group to which the debtor belonged were automatically liable for the debt and could thus not stand surety. In truth, the family of the surety was liabale in terms of the suretyship agreement and not the individual member. In other words, the individual member acted as surety on behalf of his group.

Suretyship has also been recorded for the early Fanti of Ghana and the Ivory Coast.[31] Among these people, too, the agreement to stand surety had to be concretized by the giving of a token. Interestingly, the agreement to stand surety was accompanied by oaths.[32] This is again reminiscent of the Roman *contractus verbis*. Another way of concretizing the agreement was for the debtor to provide a child or relative or servant to live with the surety or creditor as proof of the existence of the debt and "in order that the debtor may expeditiously fulfill his contract". Sarbah regards the person that was transferred in this way as co-surety and states that he too was responsible for the settlement of this debt.[33] This appears to be a forced construction which does not fit the traditional pattern of African legal thinking. Thus someone belonging to the same family group as the debtor, would *ex lege* share the responsibility of the debt and could thus not stand surety. And a slave or servant did not have an individiual estate. The only possible

28 In Roman law A (the surety) could mandate B (the creditor) to make a loan to C (the debtor). A would be directly liable if C did not satisfy the debt. Cf *D* 45 1 75 6; Gaius 3 116; Lee *The Elements of Roman Law* (1952) 359.
29 Nathan "Mandate" in *Indigenous Contract in Bophuthatswana* (n 8) 77f.
30 *I* 3 26 6; Gaius 3 156.
31 See Sarbah *Fanti Customary Law* (1896 reprinted 1904) 74-77.
32 See Elias (n 8) 232f on the significance of oaths in African culture.
33 *Idem* 77.

explanation for this phenomenon is that it was nothing more than concretization of the agreement to create a contractual obligation, given that contractual liability did not follow on mere agreement.

3 Pledge

3 1 General

As in the case of suretyship, there appears to be some controversy regarding the existence of pledge in ancient indigenous African law. Unfortunately, it is apparent from some materials that familiar Western legal principles regarding pledge have again been superimposed on the African law, thus creating the impression that pledge existed there as it existed in Western law. One must constantly bear in mind that Western devices should be employed merely to explain African legal institutions and concepts to those more familiar with Western legal institutions, and one should continuously guard against equating them.

The most important principle of African law to consider in an analysis of the law relating to debt and the provision of security for the payment of debt was, as explained above, the principle that a debt did not prescribe. This principle provides the main reasons for negating the existence – in African law – of pledge. However, those authors who are of the opinion that pledge was not generally known among the African people do not deny the existence of a practice by which a debtor placed property in the possession of the creditor. But they opine that the African institution is just too far removed from the Western institution to make a comparison viable or to employ the principles of Western law to explain the African institution. They regard the placement of property under such circumstances as evidence of the *existence of* the debt, rather than *security for* the debt.[34]

Further, absence of this legal institution in ancient African law has been confirmed in fieldwork among the BaTswana and Southern Sotho.[35] These people indicated that to their knowledge, the only comparable institution was the attachment of the property of a debtor by an order of court. If the debtor failed to honour the debt, the property was given to the creditor to satisfy the debt. Unlike pledge, this was not a voluntary agreement between the debtor

34 Prinsloo & Vorster (n 22) 25; Whelpton (n 22) 71; Strydom (n 8) 490ff.
35 Strydom (n 8) 491.

and the creditor. [36] The informants questioned in empirical research studies had no notion of a connection between a pledge and debt. [37]

Many of the reports of the existence of pledge among southern African tribes are of limited value for an understanding of the position in ancient African law, as the main source of information relied on by the researchers was present-day judicial decisions. Their findings clearly show extraneous influences: The creditor had the right to retain the pledge if the debt was not satisfied; normally possession was not transferred to the pledgee; the pledgee/creditor was accountable for damage or loss of the pledged property if it was in his possession; and the pledgee/creditor was not entitled to use the pledge. Surprisingly in line with ancient African principles, most of these sources indicate that interest was not payable on the debt.[38]

In the School of Oriental and African Studies' restatement of the indigenous African law in Malawi, based on empirical research plus a literature study (including judicial decisions) which appeared in the early 1970s, pledge is likewise described from a distinct Western perspective.[39] It is apparent that the work does not provide a restatement of ancient African law, but gives a survey of adulterated modern law. The imposition of familiar Western ideas on the indigenous African law considerably lessens the value of this study for any knowledge of ancient African law. The only observation that is vaguely in line with indigenous African values is that land cannot be pledged.

There is generally more information available of the institution of pledge in West and East Africa than in Southern Africa. In Kenya, pledge was a common kind of contract, but the institution was not the same as that known in Western law. Ghai[40] points out that those contracts in ancient African law largely concerned land and stock and served as a cohesive force in the community

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36 Lyall (n 11) 117 reported a similar practice of attachment of property by an order of court among certain indigenous tribes of German East Africa.

37 See, eg, Whelpton (n 8) 133ff; Strydom (n 8) 491f.

38 Olivier *et al* (n 26) 551f; WH Olivier (n 26) par 253; Coetzee *et al* (n 8) 150; Bekker & Coertze *Seymour's Customary Law in Southern Africa* (1989) 324f; Whitfield (n 24) 489f. See also Stafford & Franklin (n 26) 281; Pauw (n 8) 130. Strydom (n 8) 492 reports that pledge existed among the Tlokwa, a South-Sotho tribe of QwaQwa. The latter two sources were based on field research and do not rely on judicial decisions.

39 Ibik *Restatement of African Law. Malawi II: The Law of Land, Succession, Movable Property, Agreements and Civil Wrongs* (1971) 169-171: Interest, unauthorized use of the pledged property, specific time spheres relating to the repayment of the debt, and forfeiture of the pledge if the debt is not repaid are but a few matters discussed by the author which are completely foreign to ancient African law.

40 Ghai "Customary contracts and transactions in Kenya" in Gluckman (ed) *Ideas and Procedures in African Customary Law* (1969) 337ff. The contracts of pledge that he discusses all relate to cattle.

and thus strengthened friendships.[41]

Comprehensive empirical studies on the law of Ghana[42] reveal that practices equivalent to the Roman-law pledge existed. However, some unique African features have been attributed to the institution: Thus there was no *pactum commissorium* or tacit understanding that if the pledgor did not pay the debt, the creditor would be permitted to keep the property. A pledge was perpetually redeemable and the debt did not prescribe. Importantly, the pledged thing ensured payment because the pledgor did not like to leave a thing of value for an indeterminate period in the hands of the pledgee, and not because there was a risk that it might be retained by the creditor. Further, a pledgee was entitled to use the pledged thing for his own benefit without being accountable to the pledgor for any deterioration due to its use, but also without having to account to him for profit arising out of such use.[43] The fact that the pledgee could use the pledge without being accountable to the pledgor is regarded by many writers as dispensing with the payment of interest on the loan.[44] However, this would be an imposition of Western values on the ancient African law in which interest was unknown.[45]

The principles that the pledge was perpetually redeemable[46] and that the debt did not prescribe could work to the detriment of a creditor. There are recorded instances where descendents of the debtor settled a minute debt after an extended period of time and after the creditor and his descendents had invested greatly in the pledged land. Upon payment of the debt, of course, the debtor's descendents were entitled to redeem the pledged land. Thus, for example, in *Agbo Kofi v Addo Kofi*[47] the court confirmed a tribal court's decision

41 Ten Rhyne wrote in 1686 of the Khoikhoi that all their wealth was measured in cattle: *eorum omnes in armentis divitiae constent, nullum, nisi de pecore cum hisce Barbaris commercium exercemus, idque hoc pacto.* Schapera & Farrington (n 2) 135.

42 Kludze *Restatement of African Law. Ghana I: Ewe Law of Property* (1973) 237ff.

43 Thus, eg, the pledgee was not liable for pledged animals that had died and only had to report the deaths to the pledgor. Further, the creditor could take the milk and offspring of livestock pledged. Among some East African tribes, however, the offspring belonged to the pledgor (debtor): Lyall (n 11) 103f.

44 Kludze (n 42) 238; Ollennu (n 18) 95; Olawoye "The question of accountability in the customary law of pledge" 1978 *J of African Law* 129f.

45 For the position regarding the absence of the concept of interest in ancient African law see Lyall (n 11) 99 105; Whelpton (n 8) 248; and also Prinsloo & Vorster (n 13) 10f 20; Prinsloo (n 14) 36.

46 Elias *Nigerian Land Law and Custom* (1962) 188-189 refers to this as the principle of “once a pledge always a pledge”.

47 (1933) 1 WACA (West African Court of Appeal) 284: quoted in Kludze (n 42) 240. Similarly, in another case, pledged land had to be returned after the lapse of a long period of time when the principal debt of a keg of gunpowder was handed to the creditor: *Kuma v Kofi* (1933) 1 WACA 128. It appears that during the nineteenth century pledging of land was common among the Ewe of Ghana. See further the various other cases of the redemption of ancient customary pledges discussed by Kludze 240-245. Cf, too, Ollennu (n 18) 68; Olawoye (n 44) 125 esp 128ff; Elias (n 14) 118; Elias (n 8) 167.

that land pledged in 1869 had to be returned, in 1930, upon the payment of the principal debt of six shillings and sixpence.

In African law possession of the pledged thing had to be transferred to the pledgee.[48] As explained above, this is in line with the lack of abstraction and the fact that some kind of concretization of the contract was essential. This requirement distinguishes African forms of security from the ancient Roman *hypotheca* where the hypothecated thing was not transferred to the possession of the creditor. Hypothec found its origins in the lease of land;[49] in ancient African law lease of land was not recognised.[50]

The differences between the African principles regulating pledge and those in Roman law are obvious: Otherwise than in African law,[51] the Roman creditor was not allowed to use the pledge or to make a profit; and if a profit had been made it was deducted from the interest and the debt.[52] Towards the end of the classical period in Roman law the *pactum antichreseos* or *antichresis* was introduced. This was an agreement that the creditor was entitled to the fruits of the pledge in lieu of interest.[53] Both the pledgor/debtor and the pledgee/creditor were liable for *culpa levis*.[54]

3 1 1 Pledge of land

It is noteworthy that most of the recorded materials on the law of West Africa as well as German East Africa[55] refer to the pledging of land. This seems to be inconsistent with African perceptions, stated above, that land was regarded as sacred and could not be commercialised.[56] The easy explanation for these findings would be that the sources described an acculturated legal institution, influenced by Western principles. However, it could also be interpreted as an

48 Whitfield (n 24) 490, referring to case law (*Nkalitshana v Mdyogolo* 3 NAC 208), states that in the Transkeian Territories the practice existed merely to physically point out the pledged thing and not to hand it over.

49 Sohm *The Institutes: A Text-book of the History and System of Roman Private Law* (tr) Ledlie (1935) 354f; Van Zyl *Geskiedenis en Beginsels van die Romeinse Privaatreg* (1977) 194.

50 Van Blerk "Lease" in *Indigenous Contract in Bophuthatswana* (n 8) 73; Strydom (n 8) 460; Whelpton (n 8) 202ff. For a contrary view, see Pauw (n 8) 121.

51 The law applicable in the eastern parts of the Roman Empire, including Egypt, allowed the right to use the pledge, but the parties had to set the proceeds off against the debt. See Crook (n 21) 246.

52 *D* 13 7 22*pr; D* 47 2 55*pr; D* 20 1 21 2.

53 Buckland *A Textbook of Roman Law from Augustus to Justinian* (1966) 476; Lee (n 28) 289; Van *Warmelo Introduction to the Study of Roman Law* (1976) 114f; Kaser *Das Römische Privatrecht* Vol 2 (1975) 319 n 2.

54 *D* 13 6 5 2; *D* 13 7 13 1; *I* 3 14 4.

55 Sarbah (n 31) 82ff; Kludze (n 42) 237ff; Elias (n 46) 188ff; Woodman *Customary Land Law in the Ghanaian Courts* (1996) 145ff. The latter work is of limited value for ancient law because it focuses predominantly on existing law. Ollennu (n 18) 94ff discusses the pledging of land extensively.

56 Ibik (n 39) 169 expressly states that land could not be pledged in the traditional Malawi law of contract.

imposition of Western principles on African law which in turn led to erroneous assumptions about that law.

Upon closer scrutiny of the practice, then, using Roman legal principles merely as explanatory devices, it appears that pledging of land could fit into the ancient African legal paradigm. Pledging of land had to be accompanied by the transfer of possession. This brings the juridical act within the confines of a real contract and concretizes the agreement. The land was placed in possession of the so-called pledgee, and ownership was never transferred. In fact, it was the use of the land which was pledged.[57] The sacred ownership of the extended group, which includes ancestors and those yet to be born, therefore remained untouched. Only possession was transferred and this occurred in accordance with prescribed traditional procedures and with the full knowledge of the different communities involved.[58] The pledgee/creditor, a stranger, never had more rights to the pledged land than the community or group of the pledgor/debtor. The land was redeemable at any time.[59] Finally, all actions regarding the pledging of land were performed on behalf of the family, or group, as a whole and not by individuals for themselves.[60]

3 1 2 Human pledges

There is evidence in ancient African law of a practice of transferring humans as pledges to the creditor group.[61] These so-called "debt-pledges" or "debt-slaves" could be children, wives, family relations, slaves, or the debtor himself. It would be more appropriate to use the term "human or debt-pledge" than "debt-slaves", since these people were not slaves in the known European sense of the word. They were not transferred in ownership. They were incorporated into the creditor group and could not be sold.[62] The purpose of seizing a human pledge was to impose moral pressure on the debtor to pay the debt so that he

57 Elias (n 8) 163; Elias (n 46) 188; Woodman (n 55) 146.

58 See, eg, Ollennu's exposition (n 18) at 103ff where he discusses customs which had to be observed upon the death of the debtor to affirm the debtor's ownership of the pledged land and as evidence of the existence of a pledge; see also 122 regarding concretization of the contract of pledge.

59 Kludze (n 42) 240ff; Ollennu (n 18) 102ff; Elias (n 46) 188ff; Woodman (n 55) 150f.

60 Ollennu (n 18) 142.

61 Lyall (n 11) 103ff 109f 113f 116-118; Elias (n 8) 107 171. For West Africa see Sarbah (n 31) 83; Kludze (n 42) 237; Ollennu (n 18) 94. In the Gold Coast pawning of human beings was declared illegal by the *Gold Coast Ordinance* 1 of 1974. The sources mentioned provide only scant information on this practice.

62 Commercial slave-trading for economic gain was not a relic of ancient Africa. Most references to “slavery” of the pre-contact era seem to refer rather to a form of servitude where the individuals themselves were incorporated into the communities. There are few examples that truly fit the Roman paradigm of slavery according to which slaves were legal objects. See generally Van Niekerk "Slavery in pre-contact Africa" 2004 *Fundamina* 210.

or she could be released. The human pledge was not liable for settlement of the debt.

In line with the principles described above, among most of the tribes the creditor was entitled to the labour of the person pledged. The fruits of such labour were not taken into account in reducing the debt.[63] There appear to be no reported instances where a creditor was allowed to have sexual intercourse with an unmarried girl so pledged. If sexual intercourse had taken place, the creditor would have had to marry the girl and hand over marriage goods to her family. Where a married woman was pledged sexual intercourse with her amounted to an offence. Although, in African law, guardianship could be transferred partially to another group – for example, only marital guardianship[64] is transferred upon the marriage of a daughter – in the case of human pledges one aspect of guardianship, namely labour, would have been transferred, while the pledge's own group retained plenary guardianship. Nevertheless, there are reported cases where the creditor was entitled to sexual intercourse with a pledged woman and to any children born subsequently. This phenomenon is difficult to explain within the framework of African values regarding marriage.

The practice of pledging humans is comparable to *nexum*, a legal transaction known in the Roman Republic. There is much controversy about the exact juridical nature of this transaction. Further confounding the debate is the fact that all the written sources about *nexum* appeared centuries after the *lex Poetelia* of 362BC had mitigated its rigorous consequences and it had fallen into disuse.[65] For purposes of this article it is unnecessary, if not impossible, to consider the technical arguments of a host of renowned Romanists and historians on the nature of *nexum*. However, relevant for present purposes is that a debtor could be seized by a creditor to secure the fulfilment of an obligation. By way of an act *per aes et libram*, the debtor would become liable to the creditor to work back a debt if he could not pay it back. This formal transaction *per aes et libram* led to the construction – refuted by many[66] – that

63 The Swahili, under the influence of Islam, was the only tribe in which the labour of the person pledged paid off the debt: Lyall (n 11) 109 114.

64 Which comprised the earnings, labour, reproductive capacity and sexual privileges of the woman.

65 De Zulueta "The recent controversy about *nexum*" 1913 *Law Quarterly Review* 138 remarks that the only sources which make reference to this institution in its technical meaning "before it fades into a general term for obligation in the Digest and the Codes" are Varro, Festus, Cicero, Gaius, Frontinus and Boethius. See, generally, Amos *The History and Principles of the Civil Law of Rome* (1883) 190f; Sohm (n 53) 50ff; Buckland (n 53) 407 429ff 564; Kaser *Das Römische Privatrecht* Vol 1 (1971) 153f 166ff; Zimmermann (n 21) 4ff.

66 The main proponent of this construction was a historian, namely Niebuhr: See De Zulueta (n 65) 141f; Buckland (n 53) 430f. Criticism against this construction comprises, among others, that self-sale is wholly foreign to Roman law and that on historic Roman legal principles a conditional *mancipatio* is impossible. Moreover, the release from this *nexum* took place by

this was a form of conditional self-sale or self-*mancipatio*. The sale would be subject to a suspensive and resolutive condition in that the *mancipatio* would take effect only if the debt could not be settled and in that it came to an end upon the settlement of the debt. Another construction offered to explain this institution was that *nexum* was a contract *per aes et libram* accompanied by a *damnatio* which in ancient law entitled the creditor to seize the debtor by *manus iniectio* without a judgement.[67]

Buckland points out that in the earliest Roman times, contractual obligations could be made binding only by providing a hostage or a thing that would be forfeited if the obligation was not fulfilled.[68] From this power of seizure developed the practice by which the debtor would agree to be seized as security for the performance of the debt. Being a human hostage (*obligatus*) carried more weight than being liable for the debt. The *persona obligata* was a human pledge and as such in the same position as the pledge, the *res obligata*. His status was no longer that of a freeman. Performance, therefore, did not itself release the bondsman from this bonded status. This had to occur formally, as did the initial transaction, through *solutio per aes et libram.*[69] The *lex Poetelia* did not abolish the *nexum*, but provided that the debtor could work off his debt rather than be sold into slavery or put to death.[70] This differs from the African position in that the human pledge could work off the pledge and in that the creditor had ownership of the pledge.

It is apparent from the available material on ancient African law that ownership of the pledge – whether human or a thing – was never transferred to the creditor, that the pledge was perpetually redeemable, and that lapse of time was not important when it came to the settling of a debt. These principles further provide some certainty that in that law there was no legal institution equivalent to the oldest form of real security in Roman law, namely *fiducia.*[71] In terms of this legal institution a thing was transferred in ownership to a creditor as security for a debt, with an accompanying *pactum commissorium* or *lex commissoria* that if the debt was not paid, the creditor would be entitled to keep the property.

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solutio per aes et libram (Gaius 3 174). Had *nexum* been a *mancipatio*, release should have been by *remancipatio*.

67 This theory was first published by Huschke in 1845.

68 (n 53) 407; see also Zimmermann (n 21) 4.

69 Gaius 3 174; Zimmermann (n 21) 754ff. Buckland (n 53) 564 points out that this form of release did not apply to pledge.

70 Sohm (n 53) 287 372f; Kaser (n 65) n 36.

71 *Fiducia* had fallen into disuse by the time of Justinian. It was usually accompanied by a pact of *fides et fiducia* and reconveyance took place when the debt was paid. The *lex*

3 1 3 Pledge of prospective rights to marriage goods

Before an attempt is made to analyse this phenomenon, it is necessary to explain the role of marriage goods in ancient African law briefly. The institution of handing over marriage goods to the family of the bride was, and still is, universal among most of the indigenous inhabitants of Africa and specifically Southern Africa. Marriage came about as result of performance in terms of a real contract. The transfer of marriage goods was not essential to the validity of a marriage. It was a necessary accessory event to the marriage. Delivery before the marriage rendered the agreement to marry – transfer of the marital authority over the girl – obligatory, while marriage before delivery rendered transfer of the marriage goods obligatory.

As explained earlier, in ancient African law, the right of guardianship or authority over a member of a group or family was a patrimonial right. It entitled the holder of the right, the group, to an individual's earnings and services. In the case of a woman, services encompassed her labour, reproductive capacity and sexual privileges. When she married, these were transferred from her group to that of her husband for the purpose of establishing and maintaining a family. In exchange, her husband's group transferred goods of value (marriage goods) in ownership to her group.[72]

As with other forms of security, there is difference of opinion among academics as to whether the practice to transfer the right to receive marriage goods for a girl to secure satisfaction of a debt actually existed in ancient African law.[73] The instances recorded in which marriage goods were used as security for the payment of a debt were, among others,[74] where a man's family still owed a portion of the marriage goods for his wife to her family and the marriage goods of one of his daughters were used to supplement what was still due; as security for a loan;[75] where the head of a compound family[76] used cattle from one house to fund marriage goods for a further marriage for himself, or where he

commissoria was abolished by Constantine *C* 8 34 3. See, generally, Van Zyl (n 49) 191ff; Crook (n 21) 244ff.

72 Church *Marriage and the Woman in Bophuthatswana: An Historical and Comparative Study* (unpublished LLD thesis, University of South Africa, 1989) 36-37. Marriage goods, which in ancient law consisted mainly of cattle, should not be seen as a *quid pro quo* for the transfer of authority over the daughter, or for the daughter herself, but rather as performance in terms of a contract. This contract is comparable with a real contract in Roman law.

73 There is no doubt that this practice exists in current South African law: this has been confirmed by judicial decisions. See, eg, *Qwabe v Qwabe* (1932) NAC (T & N) 5; *Diniso v Msila* (1941) NAC (C & O) 14; *Vatsha v Mfenenduna* (1936) NAC (C & O) 39.

74 Olivier *et al* (n 26) 576f; Koyana *Customary Law in a Changing Society* (1980) 71ff.

75 Loan was common in ancient African law: Van Blerk "Loan" in *Indigenous Contract in Bophuthatswana* (n 8) 69ff.

76 A polygynist who had more than one wife created various houses.

used cattle from one house to supply marriage goods for a son from another house. It is suggested that in the latter two instances there is no debt since the marriage goods belongs to the compound family as a whole.

There are sound arguments, notably by those academics who also deny the existence of suretyship and pledge, that the transfer of a future claim for marriage goods, with or without the accompanying transfer of the girl, is a modern-day development which is not rooted in ancient African law. The arguments against the existence of both pledge and suretyship are relied on also to refute the existence of this practice. In addition it is alleged that a contract does not yet exist between the debtor (that is the father or group of the girl) and whoever will pay her marriage goods. In other words, there is no claim yet for marriage goods since the marriage of the girl had not yet been negotiated. It was therefore not a claim to future goods,[77] but a future claim which could not come into existence at all. Furthermore, empirical research among the southern African Tswana has shown that cession or any other form of transfer of a claim or personal right by the creditor to a third party without the cooperation of the debtor, was unknown.[78] In fieldwork among the South-Sotho of QwaQwa,[79] too, the existence of this custom was denied since prospective rights to marriage goods could not be pointed out. The Sotho informants contended that this practice would amount to pledging of the girl, something foreign to their culture.

Nevertheless, there are various sources on southern African indigenous law that refer to this manner of securing a debt.[80] The custom was reportedly prevalent also among different tribes in East Africa: A man who had paid a debt owing by his brother-in-law became entitled to the marriage goods of his niece when she married.[81] The apparent reason for this latter practice was to prevent the niece being given as pledge to the creditor.

The best way to explain this phenomenon of transferring a future claim to marriage goods to secure payment of a debt would be with reference to pledge, with the usual caveat, of course, that it should not be equated with the Roman institution, but that the specific nature of pledge in African law provides the point of reference for an analysis. Indeed, some of the arguments against the

77 Lyall (n 11) 110 reports for East Africa that future crops could be hypothecated.
78 Direct representation by the head of the family and stipulation in favour of a third party were the only forms of substitution known in the traditional law of the Tswana: Prinsloo & Vorster (n 22) 22f.
79 Strydom (n 8) 492.
80 Koyana (n 75) 71; Pauw (n 8) 126 135; Bekker & Coertze (n 38) 324f; Olivier *et al* (n 26) 576f; WH Olivier (n 26) par 253.
81 Lyall (n 11) 117.

existence of this practice may be disproved if analysed from an African perspective and may keep open the possibility that such a practice might have existed in ancient African law. Nevertheless, a legal analysis of the phenomenon is fraught with difficulties, not least of all because the girl was physically handed over into the custody of the creditor group.

A pledge was perpetually redeemable and the creditor could never claim it in ownership or have it sold to satisfy his debt. As indicated earlier, the security afforded by pledge lay in the fact that the debtor did not want to be separated from a thing of value for an extended period of time. The same may have applied to marriage goods for daughters. In ancient African law it was only in exceptional circumstances that a daughter would not get married. Marriage in those societies has been described as the "cornerstone around which the whole social structure is locked".[82] This made the coming into existence of a claim for marriage goods, albeit at an uncertain future date, highly likely. It has to be borne in mind that it was not necessarily the claim to marriage goods of a specific daughter that was pledged. If a girl was transferred to the group of the creditor and she died or could not get married for some other reason, another would take her place. Contracts in ancient African law were not time specific, they were ongoing. Moreover, the act of transferring marriage goods did not have only economic implications. It had magico-religious significance which would have rendered it of high security value.[83] A debtor would certainly not have parted lightly with a possible claim to marriage goods, and would have done everything possible to satisfy his debt speedily. Sansom describes the delicate relationship between humans and cattle, the basis of African wealth, and usually the object of marriage goods, as follows: [84]

82 Hammond-Tooke *The Roots of Black South Africa* (1993) 117.

83 See Preston-Whyte "Kinship and marriage" in Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* (1974) 187f; Vorster, Prinsloo & Van Niekerk *Urbanites' Perception of Lobolo: Mamelodi and Atteridgeville* (unpublished research report (2000) 51) for a brief summary of traditional values regarding the transfer of marriage goods. Among others, it is regarded as thanksgiving to the group of the girl for raising her; it compensates for the separation; it strengthens the bond with her new family; it ensures that the ancestors make her fertile; it stabilizes the marriage and it is a spiritual and social symbol of the bond between the families. The transfer of marriage goods is also regarded as the necessary means to restore the equilibrium in the community which has been (or will be) disturbed by the transfer of the limited authority over the women to her husband's group. It played an important role in maintaining the equilibrium in relationships within the woman's group, the relationship between the two groups of the prospective husband and wife, and the relationship between the living members of the social group and the deceased ancestors.

84 "Traditional economic systems" in Hammond-Tooke (ed) *The Bantu-speaking Peoples of Southern Africa* (1974) 163f.

> In herd-management, the reproduction of cattle could be correlated with human increase and mating. Marriage promised children just as ownership of a heifer promised a calf. Thus expectations of human and cattle increase could be balanced against one another to create complicated debt relationships.

If one accepts the possibility that in principle a future claim could provide security and that it was possible to secure a debt with a claim which was only to materialize in future, the next problem is to determine what exactly was transferred as security. Did the transfer of the girl have any significance beyond indicating in a concrete way that the marriage goods would stand security for the satisfaction of a debt?

3 1 3 1 The girl as property

Certain authors aver that the plenary guardianship over the girl was transferred to the creditor, and that he was thus entitled to negotiate the girl's marriage and receive the marriage goods in their totality.[85] It is surprising that Myburgh, a renowned anthropologist who did extensive empirical research and was fluent in various indigenous African vernaculars, underwrites this view.[86] Transfer of the plenary guardianship implies that the girl was treated as property. Although the right of authority in ancient African law fell within the patrimony of the group, members of the group were not regarded as things.

Not even in marriage was plenary guardianship over the wife transferred to the group of her husband. Such a transaction would have amounted to selling of the girl and that would have been regarded as immoral in African culture.[87] Had plenary guardianship been handed over, the girl would have been in the position of the human hostage or the slave of pre-contract primitive societies.[88] The girl was not in any form of bondage and there was no necessity for any formal release from bondage. The ancient Africans' attachment to family and abhorrence of slavery are illustrated by a seventeenth-century text relating to the Magosi or amaXhosa:[89]

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85 Olivier *et al* (n 26) 576f; Bekker & Coertze (n 38) 158ff.
86 Myburgh (n 5) 92.
87 Koyana (n 74) 71.
88 Buckland *A Manual of Roman Private Law* (1939) 352 refers to this practice in societies which lacked orderly judicial procedure and the "scheme of contract". Ancient African societies were neither primitive, nor can they be classified as "pre-contract". See also McAuley "One thousand years of arra" 1977 *McGill LJ* 694 who refers to the *Twelve Tables* in this regard.
89 *[T]estabuntur nec facili usquam gentium parentes, nil vernale redolentes, intimioris in liberos pietatis invenies, nullo aere nec quantovis pretio extraneis eos mancipio distracturos. Liberis quippe servitutis pretium ingratum est*: Grevenbroek *Gentis*

> You would not easily find anywhere in the world parents, who without the least wish to make a profit out of them, have deeper love and respect for their children. No money, no price, will tempt them to sell them into slavery to strangers. Freemen despise the price of servitude.

This construction therefore seems improbable and inconsistent with African values, not only as regards marriage goods, but, importantly, also with reference to the cohesion of the group and the importance of equilibrium within the group. A more probable construction of transfer of the girl is that the creditor was "put into" the marriage goods of the daughter. He received one or more beasts upon her marriage, depending on the debt, but never received any rights in the girl herself, only in the marriage goods.[90]

3 1 3 2 The girl as surety or pledge

The transfer of the girl may also be explained with reference to the Roman contract of suretyship. Could the girl be regarded as a surety who was contractually bound to the creditor as security for the payment of the debt? The answer is no. The girl had no individual estate. She shared in the estate of her group, which was the principal debtor, and, as indicated, members of the group could not stand surety for each other. By regarding her as surety, the anomalous situation would have existed in which she or her group would have been surety for her or their own debt.

Applying the ancient African principles regarding human pledge, it is apparent that the girl was furthermore not regarded as a pledge.[91] The agreement between the debtor and creditor was that the claim to marriage goods, should it become available, would be the security. Had the girl been pledged, the creditor would have been entitled to her labour, which was not the case. In addition, the creditor played no role in marriage negotiations regarding her marriage and the claim for the marriage goods still belonged to her group.

3 1 3 3 The girl as earnest

The handing over of the girl is in line with the lack of abstraction in ancient African law: physical form had to be given to the transfer of the right to marriage goods. The transfer of the girl could probably best be described with

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Africanae circa Promontorium Capitis Bonae Spei Vulgo Hottentotten Nuncupatae (1695). The translation is by Farrington: see Farrington & Schapera (n 2) 196 197.

90 Whitfield (n 24) 489. See also the cases quoted in n 73 above.

91 The South African courts also have explicitly indicated that the girl should not be regarded as a pledge: see the cases quoted in n 73 above.

reference to the earnest or *arra* of ancient Greek and Roman law.[92] In Greek and pre-classical[93] Roman law, when consensual contracts were not yet known, the *arra* was necessary to create contractual liability.[94] *Arra* did not merely have evidentiary value, since that would have presupposed an existing and valid contract. McAuley observes that "[u]nrefined systems of contract have difficulty in separating contract as a personal obligation from contract as a physical bond".[95] He indicates that the practice of taking human hostages evolved to the taking of small objects, such as a glove, clothes and other things which were believed to have a personal, magical link with the debtor.[96] The giving of an *arra* gave force to the contract, it symbolised the person as a means to create a binding effect at a time when informal agreement did not create liability.[97] Both parties had an interest in the *arra.* The giver would forfeit the *arra* in cases of his non-performance, and the receiver would otherwise have to return the *arra* and pay him an additional sum, *alterum tantum.*

In African law, the function of the transfer of the girl could be constructed as the transfer of an earnest. The transfer should not be regarded merely as evidence, since consensual contracts were not recognised.[98] The transfer of something concrete to make an agreement obligatory was a common occurrence in African law of contract and related not only to creditor-debtor relationships. For example, in the case of betrothal, the agreement between the families had to be "confirmed" by gifts for the family of the girl. These could be blankets, a beast or a skirt.[99] The transfer of these gifts is equivalent to the *arra sponsalicia* of post-classical Roman law.[100]

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92 See generally McAuley (n 88) 693; Zimmermann (n 21) 230ff; Kaser (n 65) 179 526 547ff; Buckland (n 53) 407 481ff; Lee (n 28) 303f; *D* 18 1 35*pr.* The latter text makes it clear that giving of a earnest was not a rare occurrence and prevailed also when consensual contracts were recognized.

93 Consensualism entered Roman law during the classical period: Kaser (n 65) 526; McAuley (n 88) 694.

94 The practice was widely used in ancient legal systems and not only in contracts of sale: Lee (n 28) 303; Crook (n 21) 220f; Zimmermann (n 21) 230ff.

95 McAuley (n 88) 695.

96 However, the early forms of transfer of a person as *arra* must be distinguished from *nexum* as explained above.

97 There is much controversy among Romanists regarding the nature of *arra* and the extent to which the Greek institution had been received into Roman law. However, for purposes of a comparison with ancient African law, the brief analysis above will suffice.

98 In classical Roman law, when consensual contracts were common, *arra* served merely as evidence that the contract had been concluded and had no real legal implication. If the contractual obligations were discharged, the arra was handed back: Gaius 3 139: *... nam quod arrae nomine datur, argumentum est emptionis et venditionis contractae*: Cf, too, De Zulueta *The Institutes of Gaius* Part 1 (1946) 196-197.

99 Schapera (n 5) 130ff; Bryant *The Zulu People as they Were before the White Man Came* (1949) 538; Bekker & Coertze (n 38) 98 100ff 158f; Church "Betrothal and marriage: contractual aspects" in *Indigenous Contract in Bophuthatswana* (n 8) 84f. Among the peoples of Malawi gifts are exchanged: Ibik *Restatement of African Law. Malawi I: The Law of Marriage and Divorce* (1970) 151 169 184.

100 *C* 5 1 5; *C* 5 3 15; *C Th* 3 6 1; Lee (n 28) 63 points out that this practice was of eastern origin; see, too, Buckland (n 53) 112; Kaser (n 53) 160ff; Van Zyl (n 49) 93. The latter regards *arra*

Another interesting example, one of the earliest recorded in South African history, prevailed among the Khoikhoi, also called Hottentots. Ten Rhyne described the process of bartering between the indigenes and the early Dutch colonists.[101] Before the actual bartering commenced, gifts had to be exchanged: [O]n these occasions they [the Khoikhoi] come a long distance to meet our traders, bringing with them a prime wether (they call it *etom schaep*) – a portion of the tobacco must be given as a present, for which their return is the gift of the wether.

Arguably the handing over of the girl could be regarded as concretization of the agreement that her marriage goods would secure the debt. The transfer was the physical bond which created the liability. If the debt was discharged, the girl had to be returned to her family. If marriage had been negotiated, marriage goods would have been handed to the creditor to discharge the debt and her own family would have transferred their marital guardianship over her to her husband's family. This meant that she would have been transferred in person. In African law, unlike Greek, pre-classical and Justinianic Roman law, there was never a question of a penalty where satisfaction of the debt did not take place. The reason was simply that prescription did not exist: there was no time within which the debt had to be satisfied.

Nevertheless, some authors do describe instances where the girl was not handed over to the creditor. According to them, in such cases rights to the marriage goods were retained by the pledgor. The debtor or the girl's group was obliged to settle the debt from dowry received for her. Where there was competition with third parties (creditors) the position appears to be uncertain.[102] This exposition seems to be in conflict with the reality that consensual contracts were not recognised in ancient African law. It may well be that these authors refer to modern practices. The fact that present-day judicial decisions are referred to as authority, confirms this.

3 1 3 4 Transfer of a personal right or claim

Securing a debt with a personal right was known in Roman law. The commercial need to transfer personal rights came to the fore early in Roman law – specifically the need to secure a debt by transferring an incorporeal

sponsalicia as a relic of the ancient bride-price in Semitic bride-purchase. However, it is debatable whether bride-price is not a misconception of the transfer of marriage goods – similar to the African institution – which has nothing to do with a contract of sale.

101 *Tumque nostratibus e longinquo obviam eunt mercatoribus (etom schaep dicunt), opimum conferentes vervecem aliqua dictae plantae donatio fieri debet, quam talis vervecis munere compensant*: Schapera & Farrington (n 2) 136 137.

102 Olivier *et al* (n 26) 576f; Bekker & Coertze (n 38) 159 324f.

right.[103] A non-possessory pledge, or hypothec, evolved from a practice where the tenant farmer hypothecated his farming-stock and equipment to his landlord to secure payment of the lease. Initially the praetor granted the landlord an *interdictum Salvianum* to obtain possession of the *invecta et illata* (eg, cattle, slaves agricultural implements) from the tenant.[104] Since the interdict was only available against the tenant, the landlord had no protection if the tenant was no longer in possession of the *invecta et illata*. The praetor consequently introduced the *actio Serviana*, an action available to the landlord against anyone – including the tenant – in possession of the pledged thing. The application of the non-possessory pledge was extended in the classical period to include also other instances of securing a debt by transfer of a claim.[105] But there is conflict of opinion as to the true nature of this institution.[106]

On the one hand, the transfer of a claim to secure a debt has been construed by analogy with pledge, although it is not equated with it. The creditor did not have possessory rights in the claim and thus neither the specific real actions arising out of pledge, nor the praetor's interdicts for retaining and recovering possession were available to him. In line with the Roman tendency to practicality, the assignment of claims was accommodated in praetorian law by granting the creditor an equitable action, the *actio utilis.*[107] According to Kaser, who favours the construction of this institution as one of pledge, the pledgee had an *actio utilis quasi Serviana* which was distinguishable from the *actio utilis* that was available to the cessionary.[108]

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103 Kaser (n 65) 465; Buckland (n 53) 478; Lee (n 28) 172; Crook (n 21) 246ff; Schulz (n 21) 96; Van Warmelo (n 50) 116f; Van Zyl (n 49) 194f; Ph J Thomas *Introduction to Roman Law* (1986) 70.

104 Buckland (n 50) 475ff; Lee (n 28) 172f; Crook (n 21) 246f; Sohm (n 49) 354ff; Amos (n 65) 153ff; Van Warmelo (n 53) 116f.

105 Lee (n 28) 172.

106 For the development in Roman law, see in addition to the sources mentioned in n 92, the following works: Grosskopf *Die Geskiedenis van die Sessie van Vorderingsregte* (1960) 1-21; Pahl *Die Aanwending van Vorderingsregte ter Versekering van Skulde* (unpublished LLD thesis University of Stellenbosch 1972) 4-49ff; Scott *Sessie in die Suid-Afrikaanse Reg* (LLD thesis University of Pretoria 1977) 1-4. In present-day South African law too there exists much controversy as to whether the transfer of a personal right to secure a debt should be characterised as a pledge or as a cession. If it is interpreted as pledge, the cedent retains dominium of the claim. The creditor or cessionary will in such a case merely have a preferential claim out of the proceeds of the right ceded to him. The main criticism against this construction is that it is dogmatically unsound given that a real right of security is created in a personal right. If it is interpreted as cession in the narrow sense of the word, the cedent retains only a claim that the personal right be re-ceded to him once the debt has been discharged: Grosskopf 135ff; Pahl 133ff; Harker "Cession *in securitatem debiti*" 1981 *SALJ* 56; Harker "Cession *in securitatem debiti.* In the nature of a quasi-pledge" 1986 *SALJ* 103; and, generally Scott (ed) *Sessie in Securitatem Debiti – Quo Vadis?* (1989).

107 *D* 20 1 20; *C* 8 16 4 and *C* 4 39 7. Kaser "Zum `pignus nominis'" 1969 (vol 20) *IVRA* 175. Lee (n 28) 425 gives a brief description of the role of the *actio utilis* in Roman law. See Sohm (n 49) 425ff for a discussion of the development of assignment. See also Buckland (n 53) 478.

108 Kaser (n 107) 177 esp 180ff. He emphasises (174f) the pledge-related terminology which appears in the texts dealing with this institution: He points out that *D* 13 7 18*pr*, *C* 8 16 4 and *D* 20 1 13 2 refer to the pledging of a *nomen debitoris,* while *D* 20 1 20 and *C* 4 39 7 refer to

On the other hand, the transfer of the claim has been explained with reference to the principles of cession. But the cession of personal rights was unknown in ancient Roman law, since they were regarded as too personal to allow for their transfer between persons. These rights could be transferred only by creating a new obligation through novation. To overcome the disadvantages of novation,[109] procedural representation was used: The cedent appointed the cessionary as *procurator in rem suam* and authorised him to sue on the claim in his own name. What he recovered was acquired for his own property.[110] Subsequently the praetor developed the *actio utilis* by which the cessionary could claim in his own name.[111] The authors who are in favour of interpreting the institution as cession all appear to construct an adapted form of cession.[112]

Bearing in mind the exposition of the role of marriage goods in African societies, the former explanation would be the better construction to employ as a dogmatic device to explain the African institution of using a claim to marriage goods to secure a debt. The girl's father retains dominium of the claim to marriage goods, as with other instances of pledge. But if this construction is accepted, the transfer of marriage goods as security for a debt could be seen as an institution similar to a Roman hypothec: a non-possessory pledge. In Roman law the rules relating to pledge and hypothec were so similar that many writers do not discuss them separately.[113] In fact, Book 20 of the *Digest* treats these two institutions as a unit. Pledge was used mainly for moveables, and hypothec for immoveables and *iura.* However, for purposes of a comparative analysis of African law, the most important distinctions remain the fact that with a hypothec, the hypothecated thing was not transferred in possession and that the contract was in essence consensual. In the words of *Institutes* 4 6 7:[114]

> But in other points there is a distinction between them. The term pledge is properly applied to a thing which has actually been delivered to a

cautio pignori data. See, generally, Pahl (n 106) 36ff for an in-depth discussion of the pledge construction. For arguments against this construction see 48ff.

109 The debtor's co-operation was required and existing (personal or real) securities were destroyed.

110 The disadvantage was that the cedent retained his position as creditor. Since the procurator only became creditor at *litis contestatio* (until that point he was only the representative of the cedent), the cedent could before *litis contestatio* still sue for the debt himself. See Pahl (n 106) 8.

111 The rules of which had not yet developed in full in Justinianic law: Pahl *idem* 49.

112 See generally Pahl's discussion 39ff.

113 In fact, Marcian said in *D* 20 1 5 1: *Inter pignus et hypothecam tantum nominis sonus differt.* See, too, Buckland (n 53) 475ff; Crook (n 21) 246ff.

114 *Sed in aliis differentia est: nam pignoris appellatione proprie contineri dicimus, quae simul etiam traditur creditori, maxime si mobilis sit: at ea , quae sine traditione nuda conventione tenetur, proprie hypothecae appelatione contineri diimus* (Sandars (tr) *The Institutes of Justinian* (1903) 436f; Oltmans (tr) *De Instituten van Justinianus* (1961) 233f.

> creditor, especially if the thing is moveable; the term *hypotheca* to anything bound by simple agreement without delivery.[115]

While one may accept that in ancient African law a claim could be utilised as a non-possessory pledge, it should however, not be inferred that an institution similar to the Roman hypothec in fact existed. In African law, where the claim to marriage goods was used as security, the agreement was concretized by transfer of the girl – liability did not follow on mere agreement.

4 Conclusion

Although certain legal institutions of Roman law relating to the securing of a debt may be identified in African law, different values were attached to them not only because of the different socio-economic circumstances that prevailed in these two ancient societies but also because of their diverse modes of conceptualising law.

In Roman society, from the time of the *Twelve Tables*, the importance of the family as a whole started giving way to greater individualism. It was the Roman principle of liberty that paved the way for extreme individualism, especially in private law.[116] Roman expansion demanded a rapid adaptation of the law to meet the needs of an advanced and competitive economy in which the individual played a crucial role. Practically, in the law relating to debt, this meant that suretyship was preferred to pledge or hypothec, but also, because of the primacy of the individual, that the creditor had to place his trust in a single person to satisfy his debt. This made security essential. Formulation of legal rules in the abstract was already clearly detectable in the *Twelve Tables* and abstraction in legal reasoning gained greater prominence in the classical and post-classical Roman periods.[117] This meant that consensualism in contract gained importance and with it came the development of the non-possessory pledge or hypothec.

In contrast, in ancient African society abstraction was absent. Thus, legal reasoning was founded on visible, tangible or sensory observation. Mere verbal contracts did not lead to contractual liability. Furthermore, social relations revolved around groups. This implied a built-in measure of security for the creditor: satisfaction of the debt was not the responsibility of a single individual

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115 See also *D* 13 7 9 2 where Ulpian states that "*[p]roprie pignus dicimus quod ad creditorum transit hypothecam cum non transit nec possessio ad creditorum*".
116 Schulz (n 21) 146ff 237f.
117 Schultz (n 21) 40ff.

but that of a group. The agrarian subsistence economy of ancient Africa demanded patience in the natural course of nature, giving time a different meaning. Consequently, the lapse of time was mostly insignificant and contractual relations were an on-going process. These factors shed a different perspective on the concept of debt and security for a debt. The main goal of security was to encourage the debtor to perform sooner. But legal reasoning was also determined by the all-encompassing goal of restoring and maintaining harmony. Hence the maxim emerged that a creditor ought to accept what was offered, lest the debtor had nothing else to offer.