Examining Attachment of Earnings Orders: Does the English Wage Garnishment Mechanism Offer Solutions to the Challenges Experienced by its Contemporary South African Counterpart?

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Abstract

The ability to garnish a debtor's wages is a popular and important contemporary legal mechanism to facilitate civil debt collection in many jurisdictions, including South Africa. Despite recent amendments to the primary legislation regulating South African emolument attachment orders, the mechanism remains prone to a number of significant shortcomings which facilitate debtor abuse. Consequently, calls have been made for further legislative intervention. In order to guide this development, comparative wage garnishment mechanisms should be investigated. A detailed analysis of the ostensibly effective and historically relatable English attachment of earnings order mechanism could provide meaningful insights to improve the system and enhance debtor protection in South Africa. The article therefore conducts an examination and evaluation of the historical development and contemporary application of English attachment of earnings orders in order to determine whether the mechanism provides any solutions that could assist further legislative development.

Introduction

The collection of civil debt has evolved into a major industry in the South African emerging economy and billions of South African rands[1] are at issue.[2] During May

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[1] In October 2022, £1 is worth 20.84 South African rand (ZAR). See, *https://www.xe.com/currencyconverter/convert/?Amount=1&From=GBP&To=ZAR*.

[2] In *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC), affidavits were filed on behalf of the seventeenth respondent, Flemix and Associates, which disclosed that they represent (only) 45 credit providers with 150,000 active cases, totalling a book value of R1,597,585,832 (over one and a half billion rand). In his minority judgment in *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic; Mavava Trading 279 (Pty) Ltd v Clinic* 2016 6 SA 596 (CC) at [6], Jafta J referred to evidence on affidavit stating that the credit industry "supported 20 million credit consumers out of a population of 52 million. At the time the total debtors' book was

2019 alone, 18,973 judgments for debt with a total value of ZAR 342.1 million were granted by South African courts.[3] A staggering 47,360 summonses were issued for debt during this short period.[4] Various factors contribute to this reality.

South African society is characterised by a stark disparity in the social and economic classes of its population.[5] Oxfam's 2017 inequality report measured the total net wealth of just three billionaires in South Africa as equivalent to that of the bottom 50% of the country's population, making South Africa one of the most economically unequal countries in the world.[6] This inequality serves as a catalyst for the thriving lending industry, as the rich accumulate savings that are lent out to the poor who are desperate to improve their position.[7] Incurring debt has therefore become commonplace in South African society. Due to the high percentage of the adult population[8] living below the poverty line,[9] a large portion of the South African population incurs debts in the form of micro-loans to make ends meet. It is estimated that 73% of all disposable household income is expended on debt and that South Africa's total unsecured store and credit card debt amounts to approximately ZAR 18 billion.[10] This has a significant impact on the economy of the country.[11] The concern of South Africans being the most indebted people in the world, is exacerbated by their frequent regress into over-indebtedness.[12]

The debt-related challenges of inequality and impoverishment are aggravated by the general financial illiteracy[13] and naiveness amongst consumers regarding

estimated at ZAR 1.47 trillion, of which ZAR 168 billion comprised unsecured debts". It has since been reported that South African consumers owe over ZAR 2 trillion, of which ZAR 200 billion is overdue. See M. Hesse, "South African consumers owe over R2 trillion, of which a tenth is overdue — report" (12 January 2023), *IOL*, *https://www.iol.co.za/personal-finance/debt/south-african-consumers-owe-over-r2-trillion-of-which-a-tenth-is-overdue-report-d21f114a-6df6-4755-ba66-0676ac12bfdc*.

[3] Statistics South Africa, "Statistics of Civil Cases for Debt (Preliminary)" (May 2019), *http://www.statssa.gov.za/publications/P0041/P0041May2019.pdf*.

[4] Statistics South Africa, "Statistics of Civil Cases for Debt (Preliminary)" (May 2019).

[5] See, e.g. Oxfam South Africa "Reclaiming Power: Woman's Work and Income Inequality in South Africa" (November 2020), *https://www.oxfam.org.za/wp-content/uploads/2020/11/oxfam-sa-inequality-in-south-africa-report-2020.pdf*.

[6] G. Quintal, "SA's Rich-Poor Gap is Far Worse than Feared, Says Oxfam Inequality Report" (*Business Live*, 16 January 2017), *https://www.businesslive.co.za/bd/national/2017-01-16-sas-rich-poor-gap-is-far-worse-than-feared-says-oxfam-inequality-report/*. According to recent reports from Statistics South Africa "we have seen a slight improvement in inequality, but from extremely high levels". See Statistics South Africa, "Inequality Trends in South Africa: A Multidimensional Diagnostic of Inequality" (3 October 2019), *http://www.statssa.gov.za/publications/Report-03-10-19/Report-03-10-192017.pdf*. Also see D. Webster, "Why South Africa is the World's Most Unequal Society" (Mail & Guardian, 3 October 2019), *https://mg.co.za/article/2019-11-19-why-sa-is-the-worlds-most-unequal-society/*.

[7] B. Keeley, *Income inequality: The Gap between Rich and Poor* (Paris: OECD, 2015), pp.66, 71; M. Brei, G. Ferri and L. Gambacorta, "Financial Structure and Income Inequality" (2018) *BIS Working Papers No.756* 14–15.

[8] Estimated to amount to 55.5%. See World Bank Group, "Poverty & Equity Brief South Africa", *https://databank.worldbank.org/data/download/poverty/33ef03bb-9722-4ae2-abc7-aa2972d68afe/global_poveq_zaf.pdf*.

[9] ZAR 1,268 per person per month in 2020. See Statistics South Africa, "National Poverty Lines 2020", *http://www.statssa.gov.za/publications/P03101/P031012020.pdf*.

[10] G. Crouth, "Reviewing Your Credit Profile Makes Sense" (Press Reader, 6 May 2019), *https://www.pressreader.com/south-africa/weekend-argus-saturday-edition/20190504/282918091886057*. Also see O. Fatoki, "The Causes and Consequences of Household Over-Indebtedness in South Africa" (2015) 43 J Soc Sci 97, 97.

[11] For the role of micro-lending in the broader economy, see, e.g. Anonymous, "Meeting Report Trade and Industry Portfolio Committee; Finance Portfolio Committee: Joint Meeting 22 February 2000; Micro-Lending Industries: Briefing", *https://pmg.org.za/committee-meeting/4474/#_Hlk476673711*, quoting Dr Alan Hirsch:

> "[I]t was clear that micro-lending was a macro issue. The scope of this issue had still not been gauged properly. There are at least 8 000 companies formally (not necessarily legally) involved in the industry. There is currently over R15 billion handed out in such loans. There are millions of borrowers and thousands of people working in the industry. It is a vast industry with challenges and problems which the DTI [Department of Trade and Industry] is addressing …"

[12] H. Coetzee and C. van Sittert, "Reflections on Recent Developments Regarding Wage Garnishment in South Africa" (2018) 9 *Int J Private Law* 107, 109–110.

[13] G. Pearson, P. Stoop and M. Kelly-Louw, "Balancing Responsibilities—Financial Literacy" (2017) 20 P.E.L.J. 1, 2–3 define financial literacy as "generally the ability to understand how money works, how a person can earn

the associated risks.[14] In 2019, 4.4 million adults in South Africa were illiterate and 12.1% of persons in the population aged 20 and above had not completed primary school (grade 7).[15] The percentage of individuals aged 20 years and older who had attained at least grade 12 was estimated at only 46.7% of the population.[16]

Another reason for many South Africans' proclivity to incurring debt could be found in the country's recent history. Under the apartheid regime, the South African financial sector was characterised by discriminatory practices, including affording unequal access to financial services,[17] and specifically credit, to the detriment of previously disadvantaged members of society.[18] One of the important consequences of the end of apartheid was that it opened the regulated financial markets to millions of citizens who were previously denied access. This development was initially encouraged by government, which recognised the value of credit to assist in the reconstitution of society.[19] As the credit flood gates opened,[20] the public was exposed to the lure of credit and creditors rushed to offer largely unregulated indiscriminate loans.[21] Particularly targeted was the rising black middle class, whose emergence was largely driven by debt.[22] James argues that the level of middle-class debt illustrates the extent of the "fragility of new black wealth" in view of the "precariousness and lack of economic sustainability that underpins their lifestyle".[23] The post-apartheid economic reality for many previously disadvantaged citizens is that, ironically, they have been freed from political tyranny, only to become enslaved by debt.[24]

It is, however, not only the previously disadvantaged segment of South African society that suffer the adverse consequences of bad debt.[25] James argues that it is not the whites or the blacks, but the wage and salary[26] earners who owe the most

money or make it more. It specifically refers to the set of skills and knowledge that allows people to make informed and effective decisions with all of their financial resources".

[14] D. James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (Johannesburg: Wits University Press, 2014), p.64.

[15] M. Khuluvhe, "Fact Sheet: Adult Illiteracy in South Africa" (DHET, March 2021), p.6, *https://www.dhet.gov.za/Planning%20Monitoring%20and%20Evaluation%20Coordination/Fact%20Sheet%20on%20Adult%20Illiteracy%20in%20South%20Africa%20-%20March%202021.pdf*.

[16] Statistics South Africa, "General Household Survey" (2019), p.21, *http://www.statssa.gov.za/publications/P0318/P03182019.pdf*.

[17] Pearson, Stoop and Kelly-Louw, "Balancing Responsibilities—Financial Literacy" (2017) 20 P.E.L.J. 1, 14 discuss the "two vastly different financial sectors" under the apartheid regime.

[18] James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (2014), pp.13 and 30–31.

[19] E. Torkelson, "Collateral Damages: Cash Transfer and Debt Transfer in South Africa" (2019) *World Development* 5; James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (2014), pp.27 and 35. James notes the truism that while debt is seen as bad, credit is viewed as good. Later, as the abuses in the credit industry became apparent, government intervened by enacting the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008 to curb reckless lending and other malpractices—James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (2014), pp.3, 14 and 35.

[20] James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (2014), p.235.

[21] J. Schraten, *Credit and Debt in an Unequal Society: Establishing a Consumer Credit Market in South Africa* (New York: Berghahn Book, 2020), pp.67–68.

[22] See James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (2014), p.7.

[23] James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (2014), p.39.

[24] James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (2014), pp.2, 165 and 232. Sadly, escaping this form of economic slavery may prove challenging, perhaps even unlikely. See, e.g. S. van der Merwe, "Failure to Discharge. A Discussion of the Insufficient Legal Recourse Afforded to Judgment Debtors in the South African Context" (2008) JJS 71.

[25] James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (2014), p.2.

[26] The terms "emoluments", "earnings", "salaries" and "wages" are used interchangeably to refer to the remuneration and allowances that an employee is paid in accordance with their employment contract.

and are the most vulnerable consumers[27] in chief need of rescue.[28] As long as the debtor has a stable source of income,[29] however small, the creditor can be confident that they will be able to collect the debt by garnishing the debtor's wages through the legal mechanism of emolument attachment orders (EAOs), also referred to as (wage) garnishee orders.[30] This encourages reckless lending,[31] as unsophisticated debtors are enticed to incur unaffordable debts[32] by creditors who are mainly concerned with a consumer's employment status.[33] Debtors are also charged excessive interest and collection costs to compensate creditors for the supposed risks associated with unsecured lending,[34] while the reality is that they are reaping most of the benefits of securitised lending.[35]

The contemporary South African EAO mechanism functions as a civil debt collection instrument, usually following the granting of a default judgment,[36] where the debtor is judged to be legally liable to their creditor.[37] Through the application of EAOs, debtors' wages are exposed to execution to satisfy the creditors' expectations of performance. In this manner, a portion of workers' wages are withheld from them by the debtors' employers (the garnishees) after being legally reserved by creditors. The EAO mechanism is a popular debt collection instrument affecting the lives of potentially millions of people.[38] Creditors favour debt

[27] For more on the concept of "vulnerable consumers", see, e.g. Consumer Affairs Victoria "What Do We Mean by 'Vulnerable' and 'Disadvantaged'" (2004), p.3, *https://www.consumer.vic.gov.au/library/publications/resources-and-education/research/what-do-we-mean-by-vulnerable-and-disadvantaged-consumers-discussion-paper-2004.pdf*, which defines a vulnerable consumer as one who "is capable of readily or quickly suffering detriment in the process of consumption". G. Clarke et al, "Financial Lives: The Experiences of Vulnerable Consumers" (*Financial Conduct Authority*, July 2020), p.9, *https://www.fca.org.uk/publication/research/financial-lives-experiences-of-vulnerable-consumers.pdf* argues that the consumer characteristics that are drivers of vulnerability include consumers' health, life events, resilience and capability.

[28] James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (2014), pp.3 and 90; I. Ramsay, "Consumer Redress and Access to Justice" in C. Rickett and T. Telfer (eds), *International Perspectives on Consumers' Access to Justice* (Cambridge: Cambridge University Press, 2003), p.24 refers to "the fragile middle class"; F. Mullen, "Fifty Years after the Consumer Credit Protection Act: The High Price of Wage Garnishments" (2019) 45 Mitchell Hamline L. Rev. 204–205; Staff Writer, "South Africa's Middle Class is in Trouble" (16 August 2021), *BusinessTech*, *https://businesstech.co.za/news/finance/513260/south-africas-middle-class-is-in-trouble/*.

[29] James, *Money from Nothing: Indebtedness and Aspiration in South Africa* (2014), p.234. As a legacy of apartheid, many black people did not own property to secure debts, but debts could now be secured against their salaries.

[30] In South African jurisprudence, there is a slight, but important difference between garnishee orders, a term used to describe an order that empowers the creditor to attach any debt owed to the debtor by any third party, and EAOs, which are specific forms of garnishee orders applicable to the employer-employee relationship. (See *Minter NO v Baker* 2001 3 SA 175 (W)). In many foreign jurisdictions, the latter concept is commonly referred to as wage garnishment.

[31] D. Wood, "Wage Garnishment Under the Consumer Credit Protection Act: An Examination of the Effects on Existing State Law" (1970) 12 Wm & Mary L. Rev. 357.

[32] See, e.g. G. Brunn, "Wage Garnishment in California: A Study and Recommendations" (1965) 53 Cal. L. Rev. 1244.

[33] C. van Sittert and F. Haupt, "The Incidence of and Undesirable Practices Relating to 'Garnishee Orders'—A Follow Up Report" (2013), p.56, *Adra Online*, *https://www.adraonline.co.za/file/5e0b80159406fe9270c9415d60db0d64/2013-garnishee-orders-follow-up-report.pdf*.

[34] Schraten, *Credit and Debt in an Unequal Society: Establishing a Consumer Credit Market in South Africa* (2020), pp.67–68.

[35] D. James, D. Neves and E. Torkelson, "Social Grants: Challenging Reckless Lending in South Africa" (BlackSash, September 2020), p.16.

[36] Van der Merwe, "Failure to Discharge. A Discussion of the Insufficient Legal Recourse Afforded to Judgment Debtors in the South African Context" (2008) JJS 71, 78.

[37] The definition of EAOs is apparent from their function, which is explained in s.65J(1)(b) of the Magistrates' Courts Act 32 1944.

[38] As far as author can ascertain, there are no statistics available on the exact number of EAOs currently in circulation. F. Haupt et al, "The incidence of and the undesirable practices relating to garnishee orders in South Africa" (NCR, 2008), pp.85–104, *https://www.ncr.org.za/documents/pages/research-reports/oct08/GARNISHEE-ORDERS-STUDY-REPORT.pdf* experienced a similar challenge and relied on estimates to provide some indication of the extent of EAO use at the time. Author's estimation of the number of lives affected by EAOs, including extended family members, is aligned with data regarding the extreme scale of South African indebtedness (see, e.g. Coetzee and Van Sittert, "Reflections on Recent Developments Regarding Wage Garnishment in South Africa" (2018) 9 *Int J Private*

collection through the EAO mechanism since it offers a relatively convenient and secure form of debt enforcement.[39]

Unfortunately, the EAO mechanism has garnered a deserved reputation for being particularly prone to abuse by unscrupulous creditors.[40] The experience of vulnerable debtors over the course of many decades is that EAOs have been weaponised as an instrument of financial oppression.[41] This systemic debtor exploitation has had catastrophic consequences on the South African economy and broader society,[42] and eventually necessitated dedicated judicial and legislative intervention during the second decade of the twenty-first century.[43] These attempts to address the injustices wrought by EAO abuse have been met with staunch opposition and have, regrettably, achieved limited success, falling short of securing much needed EAO-related reforms.[44] Despite these developments,[45] the existing EAO framework does not provide sufficient debtor protection. Debtors are still exploited by a system that lacks effective measures to prevent, monitor, identify and then correct irregularities in the collection of debt through EAOs.[46]

Arguably, the main concern with the EAO mechanism is the persistent paucity in adequate judicial oversight during the extent of the entire process, including the granting, maintenance, and discharge of orders. In addition, there are also concerns regarding the proportionality and transparency of EAO enforcement, including the impact of a lack of legal certainty due to the legislative dispersion of EAO related provisions. Further consideration must also be given to the issues of debtor recourse and creditor sanctions available in the EAO landscape.[47] As a result of these systemic deficiencies, unscrupulous creditors are able to obfuscate the extent, and then extend the term, of debtor liability. This allows them to, inter alia, charge excessive costs, fees and interest, and to continue collections even after the legally due amounts should have been settled.

Law 107, 110) and earlier indications of the prevalence of EAOs in circulation. See, e.g. S. van der Merwe, "Traversing the South African Emolument Attachment Order Legal Landscape Post 2016: Quo Vadis?" (2019) Stell L.R. 77, 80, fn.26 referring to an audit of a portion of the 1.75 million EAOs in existence in 2007.

[39] South African labour laws are relatively protective of employees and EAO debtors are specifically safeguarded from employer retaliation as a result of EAO deductions. See P. Smit and B. van Eck, "International Perspectives on South Africa's Unfair Dismissal Law" (2010) *The Comparative and International Law Journal of Southern Africa* 47, 65–66. In terms of s.185 of the Labour Relations Act 66 of 1995, every employee has the right not to be unfairly dismissed.

[40] See, e.g. van der Merwe, "Traversing the South African Emolument Attachment Order Legal Landscape Post 2016: Quo Cadis?" (2019) Stell L.R. 77, 79–81.

[41] Van der Merwe, "Traversing the South African Emolument Attachment Order Legal Landscape Post 2016: Quo Vadis?" (2019) Stell L.R. 77, 79–81.

[42] See, e.g. van der Merwe, "Traversing the South African Emolument Attachment Order Legal Landscape Post 2016: Quo Vadis?" (2019) Stell L.R. 77, 81–90, referring to the Marikana tragedy and the subsequent high court and constitutional court litigation which culminated in the 2018 amendments to the relevant sections in the Magistrates' Courts Act 1944. Also see van der Merwe, "Failure to Discharge. A Discussion of the Insufficient Legal Recourse Afforded to Judgment Debtors in the South African Context" (2008) JJS 71, 76, referencing allegations that "over a billion rand [has been] over-deducted from already distressed borrowers and [are] going into the pockets of unscrupulous lenders and collectors alike".

[43] *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2016 6 SA 596 (CC). During 2018, the Courts of Law Amendment Act 7 2017 introduced amendments to the primary EAO legislative source, the Magistrates' Courts Act 1944, aimed at alleviating future EAO abuse.

[44] See, e.g. S. van der Merwe, "Developing a Procedural Framework for Advanced Debtor Protection: The Case of Emolument Attachment Orders" (Doctorate Thesis; Stellenbosch University, 2022).

[45] Inter alia, the enactment of the Courts of Law Amendment Act 2017.

[46] See, e.g. van der Merwe, "Developing a Procedural Framework for Advanced Debtor Protection: The Case of Emolument Attachment Orders" (Stellenbosch University, 2022).

[47] See, e.g. van der Merwe, "Developing a Procedural Framework for Advanced Debtor Protection: The Case of Emolument Attachment Orders" (Stellenbosch University, 2022), pp.206–257.

Due to these remaining shortcomings in the EAO system, recent calls have been made for further legislative intervention.[48] Importantly, several commentators lamented the lack of appropriate comparative analysis during the formulation of the previous legislative interventions.[49] It is regrettable that only scant mention of the use of wage garnishment in foreign jurisdictions was made during the deliberations that preceded these amendments.[50] It is in this context that this article will consider the English[51] attachment of earnings order (AEO) as a comparative wage garnishment instrument. The aim is to determine whether the AEO provides any solutions to the various EAO challenges that could assist further legislative development.

To facilitate this examination, this article will briefly explain why a comparison between the English and South African wage garnishment systems is appropriate. This will be followed by an overview of the historical development of the English AEO mechanism. This background information is necessary to set the context and to inform an understanding of the concept of AEOs. Following the historical overview, the article will consider the contemporary AEO mechanism before concluding with an evaluation of the mechanism. This exposition will lay the foundation for the application of the AEO process to the main areas of concern regarding the South African EAO to establish what lessons could be leant for improving the latter mechanism.[52] The purpose of the article is therefore not to present a detailed discussion of EAOs,[53] but, having described its purpose, abuse-prone history and nature, and identified the main concerns, seek solutions from the examination of the AEO mechanism.

The English AEO as an appropriate comparative mechanism

The first reason for choosing to examine the English system is due to its important EAO-related similarities to South Africa in terms of its political, social, and legal landscape. The South African EAO mechanism's roots can be traced to the English

[48] See, e.g. *Bayport Securitisation Limited v University of Stellenbosch Law Clinic* 2022 2 SA 343 (SCA) at [20]–[21].

[49] Coetzee and van Sittert, "Reflections on Recent Developments Regarding Wage Garnishment in South Africa" (2018) 9 *Int J Private Law* 107, 119; van der Merwe, "Developing a Procedural Framework for Advanced Debtor Protection: The Case of Emolument Attachment Orders" (Stellenbosch University, 2022), pp.295–296.

[50] Parliamentary Monitoring Group, "Courts of Law Amendment Bill: Summary and Analysis" (PMG, 23 August 2016). p.13, *https://static.pmg.org.za/160824courts.pdf* limited its relevant discussion to the extent that foreign systems were referenced in *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC). The Parliamentary Monitoring Group "Report on the Courts of Law Amendment Bill [B8-2016]: Public Hearings" (PMG, 31 August 2016), *https://pmg.org.za/committee-meeting/23177/* minutes criticism of the "aloof" and "desktop research" in which the Association of Debt Recovery Agents referred to the handling of caps on deductions in foreign jurisdictions. No consideration of comparative research is contained in other relevant reports, including the Parliamentary Monitoring Group "Justice and Correctional Services Budgetary Review and Recommendations Report; Courts of Law Amendment Bill: Deliberations" (PMG, 26 October 2016), *https://pmg.org.za/committee-meeting/23518/*.

[51] In this study the term "English" is used as opposed to "British" in order to emphasise that the focus is on the system employed in England and Wales, rather than the rest of the United Kingdom or British Isles.

[52] An approach followed by Desai J in *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC) at [42].

[53] For more details on EAOs see, e.g. T. Broodryk, *Eckard's Principles of Civil Procedure*, 6th edn (Cape Town: Juta & Co, 2019), pp.317–324; S. Pete, M. Du Plessis and T. Palmer, *Civil Procedure*, 3rd edn (Cape Town: Oxford University Press, 2017), pp.394–396. For a comprehensive discussion of the EAO mechanism see van der Merwe, "Developing a Procedural Framework for Advanced Debtor Protection: The Case of Emolument Attachment Orders" (Stellenbosch University, 2022).

common law.[54] The Cape colony was initially occupied by the British from 1795 to 1803 and, after a brief relinquishment to the Dutch, for a second time from 1806.[55] While the substantive law remained mostly unaffected, a commission of enquiry into the administration of justice in the Cape found the civil-law procedure to be undesirable and recommended that it be replaced with a British model.[56] The result was that a number of legal reforms were implemented that, except for the retention of a few Roman law procedural remedies,[57] facilitated a total replacement of the procedural law with the English common law system.[58] In addition to sharing a common-law background, South Africa and England are democratic nations whose legislative branches are governed by a parliamentary body. South Africa has a written constitution, entrenched as the supreme law of the country.[59] Although England does not have a single, written constitutional document, it does have an "unwritten or uncodified constitution … that exists in an abstract sense, comprising a host of diverse laws, practices and conventions that have evolved over a long period of time".[60] The wage attachment mechanisms of these two jurisdictions are all legislatively, and ultimately constitutionally, regulated. Both jurisdictions also have a predominantly capitalist, free-market economy where debt-related challenges, including exploitation of the poor, have required legislative intervention as discussed below.

A further reason for choosing the English wage garnishment mechanism as a benchmark is because it is supported by a significant body of scholarship that arose through the continuous development and improvement of the framework regulating wage garnishment in England. As this article will demonstrate, the scholarship provides critical insight into the functioning of the AEO in England which, in turn, will assist to facilitate South African legal development that takes account of the English developmental experiences. Furthermore, England is widely referenced internationally, indicating that its system is arguably often viewed as benchmark for legal comparison.[61] Previous research on EAOs has also frequently, albeit

[54] M. Harring, "Wage Garnishment: Remedy or Revenge?" (1974) 5 *Loyola University Chicago Law Journal* 140, 141 argues that the common-law practice of wage garnishment found its origin in the English equity courts' introduction of the "creditor's bill". This instrument was developed as a means to extend the reach of the two writs of execution (the *fieri facias* and *elegit*) to include the debtor's property held by third parties. "The creditor could use this device to satisfy his judgment by confiscating assets belonging to, but not actually held by, the judgment debtor."

[55] Broodryk, *Eckard's Principles of Civil Procedure* (2019), p.1.

[56] H. Hahlo and E. Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (London: Stevens & Sons, 1960), pp.204–205.

[57] For example, the provisional sentence procedure and *mandament van spolie*. See C. Theophilopoulos, C. van Heerden, A. Boraine and A. Rowan, *Fundamental Principles of Civil Procedure*, 4th edn (Durban: LexisNexis, 2020), p.405.

[58] Hahlo and Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (1960), p.205.

[59] Constitution of the Republic of South Africa, 1996.

[60] R. Blackburn, "Britain's Unwritten Constitution" (British Library, 13 March 2015), *https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution#*.

[61] The English law related to wage garnishment is cited by various international sources, including Australia (e.g. L. Ford, "Attachment of Earnings Legislation: Enforcement without Pain" (1979) 5 *Monash University Law Review* 244; New South Wales Law Reform Commission, *Report 46—Community Law Reform Program: Attachment of Moneys Deposited with Building Societies and Credit Unions* (1985), p.2.2), United States of America (N. Levy Jr, "Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience" (1972) 5 Conn. L. Rev. 399; Harring, "Wage Garnishment: Remedy or Revenge?" (1974) 5 *Loyola University Chicago Law Journal* 140, 140–141; R. Millar, "Formative Principles of Civil Procedure" (1923) 18 *Illinois Law Review* 1, 7; P. Benson, "The Implication of a Private Cause of Action under Title III of the Consumer Credit Protection Act" (1974) 47 *Southern California Law Review* 423) and Canada (T. Puckett, "Credit Casualties: A Study of Wage Garnishment in Ontario" (1978) 28 *The University of Toronto Law Journal* 97).

briefly, referred to the English system.[62] Historically, South African legal comparisons in general, and regarding procedural law and wage garnishment specifically, have made ample reference to the English system.[63] In addition, the seminal South African case on EAOs, *University of Stellenbosch Legal Aid Clinic v Minister of Justice*,[64] also referred to the English system.[65]

The third reason is that England has a relatively well-developed and established wage garnishment system, offering the benefit of centuries' worth of data based on its experience of dealing with challenges in the wage garnishment landscape. As will be discussed later in this article, the English AEO system has grown through various iterations motivated by considered criticism of the status quo. Many of the lessons that were learnt are directly relatable to the South African scenario.[66]

Finally, English AEOs are directly comparable to EAOs, as AEOs "are court orders that require a debtor's employer to make weekly or monthly deductions from the debtor's salary in satisfaction of the judgment debt".[67] As is the case with its South African counterpart, the English AEO must be distinguished from other apparently similar debt collection mechanisms, including third-party debt orders which function akin to South African garnishee orders.[68] While the popular AEO mechanism is the most widely used form of judicially sanctioned income attachment,[69] the English system is also familiar with direct earnings attachments,[70] deduction from earnings orders[71] and council tax attachment of earnings orders.[72] These bespoke attachment mechanisms are employed in more specific scenarios and a thorough analysis of the various uses of, and differences between, these mechanisms falls outside the scope of this article. Suffice it to state, for present purposes, that it is arguable that the introduction of these various and diverse collection methods serve testimony to "a serious extension of the intrusion of debt recovery into spaces of work".[73]

It is suggested that an examination of the contemporary South African EAO mechanism's English counterpart will highlight the extent to which domestic

[62] See Haupt et al, "The Incidence of and the Undesirable Practices Relating to Garnishee Orders in South Africa" (NCR, 2008), p.63; Van Sittert and Haupt, "The Incidence of and Undesirable Practices Relating to 'Garnishee Orders'—a Follow Up Report" (2013), pp.24–26.

[63] The English law in respect of wage garnishment was, for example, consistently referenced in the Select Committee 10-1913, Report of the Select Committee on Garnisheeing Wages, established by the House of Assembly of the Union of South Africa to enquire into and report upon the practice of garnishing wages in 1913.

[64] *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC).

[65] *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC) at [42]–[49].

[66] For example, regarding the restriction on the amounts deducted from a debtor's earnings.

[67] J. Baldwin and R. Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 C.J.Q. 159, 170.

[68] See Civil Procedure Rules 1998/3132 Pt 72, available at: *https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part72*.

[69] See, e.g. M. Wilson, J. Ford and M. Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364 indicating empirical data proved that AEOs were the second most popular enforcement procedure after warrants of execution. Also see Check My File, "What is an Attachment of Earnings Order" (2021), *https://www.checkmyfile.com/jargon/attachment-of-earnings-order.htm*.

[70] These salary deductions occur in circumstances where there has been an overpayment of benefits in terms of the Social Security Administration Act 1992 (c.5), which affords the Secretary of State the power to recover these payments in terms of s.71.

[71] These orders are relevant where a person is liable to make payments for child support maintenance in terms of ss.31–32 of the Child Support Act 1991 (c.48).

[72] These orders are issued in pursuance of liability orders granted by Magistrates' Courts against persons liable towards a billing authority for instalments in respect of unpaid council tax. See regs 37–44 of the Council Tax (Administration and Enforcement) Regulations 1992 (SI 1992/613) promulgated under the Local Government Finance Act 1992 (c.14).

[73] S. Kirwan, "On 'Those Who Shout the Loudest': Debt Advice and the Work of Disrupting Attachments" (2019) 98 *Geoforum* 323.

factors influenced the development of, and current challenges experienced with, EAOs. Perhaps as a result of its codification, there is a relative scarcity of case law on AEOs.[74] This may suggest that this mechanism is largely settled and uncontroversial in nature. As will be indicated in the following parts of this article, the assumption that AEOs are uncontentious is not necessarily accurate.[75] Nonetheless, investigating the ostensibly effective and historically relatable English system could provide meaningful insights to enhance debtor protection in South Africa.

In what follows, the comparison will be focused on the key challenges in the South African EAO mechanism. This approach is followed to determine which problems are unique to, or shared by, the two legal systems considered. Any solutions that may become apparent during a comparative study of legal systems would need to be evaluated carefully to determine whether they are suitable for adoption in South Africa.[76]

Historical overview of the English AEO

Roman-law influence on the procedure in the English courts ceased by the end of the 1500s.[77] Apart from this early influence, the English law of civil procedure developed autonomously with scant regard to other legal systems.[78] This procedural development included the creditors' remedy which enabled them to attach and sell assets that belonged to their debtors. As a mechanism for the collection of judgments, this practice was already firmly established in common law by the time that it was afforded legislative recognition by s.12 of the Judgments Act of 1838.[79] However, the ability to attach *debts* was a different matter, not regulated under the Judgments Act, and only later introduced by the Common Law Procedure Act 1854 (CLPA 1854).[80]

The CLPA 1854 introduced detailed provisions governing the attachment of debts.[81] Judgment debtors could be examined orally and required to produce records to establish whether there were any debts owing to them.[82] The CLPA 1854[83] allowed creditors to subsequently apply to court for a garnishee order[84] to execute their judgment "by attachment of a debt due from a third party [the garnishee] to

[74] A case search under the keywords "attachment of earnings" on Westlaw UK produced only 17 results, of which 10 judgments were delivered in the almost five decades since the enactment of the Attachment of Earnings Act 1971 (AEA 1971). Also see J. Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 53.

[75] Baldwin and Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 C.J.Q. 159, 170 point out that "while the English AEO appears on paper to be a very useful method of enforcement, the procedure is in practice riddled with deficiencies …".

[76] However, see Ramsay, "Consumer Redress and Access to Justice" in Rickett and Telfer (eds), *International Perspectives on Consumers' Access to Justice* (2003), pp. 40 and 42 where the author argues that consumer law offers the ideal vehicle for legal transplants. He argues that the cultural connection caveat against applied comparative law is less applicable in the context of establishing consumer law policy.

[77] Millar, "The Formative Principles of Civil Procedure" (1923) 18 *Illinois Law Review* 1, 1.

[78] Millar, "The Formative Principles of Civil Procedure" (1923) 18 *Illinois Law Review* 1, 1–2.

[79] Judgments Act 1838 (c.110) (Regnal. 1_and_2_Vict). This attachment of the debtor's physical goods was orchestrated by means of a writ of *fieri facias*. See J. Pinsler, "Section 13 of the Supreme Court of Judicature Act and Enforcement against the Judgement Debtor's Earnings" (2004) 16 *Singapore Academy of Law Journal* 28.

[80] Common Law Procedure Act 1854 (c.125). See Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51.

[81] Sections 60–67 of the CLPA 1854.

[82] In terms of s.60 of the CLPA 1854.

[83] Section 61 of the CLPA 1854.

[84] In the wide sense, not an AEO specifically.

the judgment debtor".[85] The garnishee was able to dispute their liability and the creditor could execute the alleged debt against the garnishee directly.[86] Payment under this order would serve as a discharge of the garnishee's responsibility toward the judgment debtor, even if the proceedings were later set aside or the judgment reversed.[87] Importantly,[88] orders for the attachment of debts could only be granted at the discretion of the court.[89] The court's discretion extended to determining the costs of the application for attachment of debt.[90] Before granting an order to attach debts, the relevant judge was required to consider evidence presented by the judgment creditor, including proof that:

> "Judgment has been recovered, and that it is still unsatisfied, and to what Amount, and that any other Person is indebted to the Judgment Debtor, and is within the Jurisdiction."[91]

It is important to emphasise that the relevant creditor could attach all debts owing, without limitation.

The CLPA 1854 also required records to be kept of the relevant debt attachments:

> "In each of the Superior Courts there shall be kept at the Master's Office a Debt Attachment Book, and in such Book Entries shall be made of the Attachment and Proceedings thereon, with Names, Dates, and Statements of the Amount recovered, and otherwise; and the Mode of keeping such Books shall be the same in all the Courts; and Copies of any Entries made therein may be taken by any Person, upon Application to any Master."[92]

Although no provisions specifically aimed at the attachment of wages in the hands of the debtor's employer were included in the CLPA 1854, its application was extended by an Order in Council in 1867.[93] The consequence was that the attachment of a wider range of debts, including wages due and payable, grew in popularity.[94] Due to the CLPA 1854's provision for attachment for all debts owing, there was no limitation on the amount that could be deducted from employees' earnings. It was, therefore, possible to deduct their entire wage in satisfaction of creditors' judgments.[95] Some specific exceptions did however serve to exclude the wages of certain employees, for example, merchant seamen[96] and tradesmen

[85] Pinsler, "Section 13 of the Supreme Court of Judicature Act and Enforcement against the Judgement Debtor's Earnings" (2004) 16 *Singapore Academy of Law Journal* 28.
[86] Sections 63–64 of the CLPA 1854.
[87] Section 65 of the CLPA 1854.
[88] See discussion below regarding the influence of judicial oversight in the EAO process.
[89] Sections 60–61 of the CLPA 1854. In contrast, no discretion was previously required in the case of attachment of physical goods by means of a writ of *fieri facias*. See Pinsler, "Section 13 of the Supreme Court of Judicature Act and Enforcement against the Judgement Debtor's Earnings" (2004) 16 *Singapore Academy of Law Journal* 28.
[90] Section 67 of the CLPA 1854.
[91] Section 61 of the CLPA 1854.
[92] Section 66 of the CLPA 1854.
[93] Preamble to the WAAA 1870. Also see Pinsler, "Section 13 of the Supreme Court of Judicature Act and Enforcement against the Judgement Debtor's Earnings" (2004) 16 *Singapore Academy of Law Journal* 28.
[94] Pinsler, "Section 13 of the Supreme Court of Judicature Act and Enforcement against the Judgement Debtor's Earnings" (2004) 16 *Singapore Academy of Law Journal* 28, 28.
[95] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 52; *Gordon v Jennings* [1882] 9 Q.B.D. 45.
[96] Section 233 of the Merchant Shipping Act 1854 (17 and 18 Vict. C. 104). See M. Cababe, *Attachment of Debts: Receivers by Way of Equitable Execution and Charging Orders on Stock and Shares, Together with Forms of the Summonses, Orders Affidavits, &C., Used Therein*, 3rd edn (London: Sweet & Maxwell, 1900), p.40. As discussed below, this exception has been included in the AEA 1971.

included in the application of the Truck Act of 1831.[97] These exceptions were expanded upon in later years.[98] In addition, it was evident that the attachment of wages was only possible in circumstances where the wages were already due and payable.[99] It was therefore not feasible to hold the garnishee responsible for future wages before the same actually became due and payable to their employee.[100] In practice, this created great difficulty in timing attachments for a period after the wage became due but before it was distributed to the employee.[101]

In response to concerns about considerable inconvenience arising from the growing practice of wage attachment,[102] the English Parliament introduced the Wages Attachment Abolition Act (WAAA 1870)[103] in 1870. Positing that the prevention of wage attachment to satisfy judgments was expedient,[104] the WAAA 1870 provided that "no order for the attachment of the wages of any servant, labourer, or workman shall be made by the judge of any Court of Record or inferior Court".[105] The WAAA 1870 passed without debate and without detailed consideration for imposing such a serious limitation on the remedies of judgment creditors.[106] Undoubtedly, the intention was to protect the most indigent members of the labour force from forfeiture of the income which they relied on for their own and their dependants' survival.[107]

During the years following the introduction of the WAAA 1870, it became apparent that the protection afforded by it was not intended to extend to all employed debtors.[108] The restriction was emphasised in a limited number of judgments in which creditors sought to attach their debtors' income.[109] In *Hall v Pritchett*,[110] the court ignored the provisions of the WAAA 1870 in a case where the £250[111] *per annum* salary of a medical officer (as opposed to the "wage" of a "servant, labourer, or workman") was targeted for attachment. In *Booth v Traill*,[112] the court found that the superannuation allowance of a retired police constable fell outside the ambit of the WAAA 1870.[113] Wood refers to the case of *Marks v*

[97] Section 19 of Truck Act 1831(1&2 Gul IV) CAP 37.

[98] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 54.

[99] *Holmes v Millage* [1893] 1 Q.B. 551 CA; *Mapelson v Sears* (1911) 105 L.T. 639; *Hall v Pritchett* (1877) 3 Q.B.D. 215 QBD.

[100] In *Hall v Pritchett* above the court found that future earnings were not "a debt, due, owing, or accruing" to the judgment debtor which could be attached in terms of the relevant County Court Rules of 1875.

[101] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 53.

[102] Preamble to the WAAA 1870. Also see Pinsler, "Section 13 of the Supreme Court of Judicature Act and Enforcement against the Judgement Debtor's Earnings" (2004) 16 *Singapore Academy of Law Journal* 28, 28–29, where the author states that the WAAA 1870 followed in response to the frequency of wage attachments.

[103] 1870 (33 & 34 Vict) Chap. 30.

[104] Preamble to the WAAA 1870.

[105] Section 1. See also, *European Hotel, Pretoria v Beckett* 1911 TPD 31.

[106] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 51–52.

[107] Pinsler, "Section 13 of the Supreme Court of Judicature Act and Enforcement against the Judgement Debtor's Earnings" (2004) 16 *Singapore Academy of Law Journal* 28, 29, 34–35.

[108] Pinsler, "Section 13 of the Supreme Court of Judicature Act and Enforcement against the Judgement Debtor's Earnings" (2004) 16 *Singapore Academy of Law Journal* 28, 29; Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 52–54; Cababe, *Attachment of Debts* (1900), pp.40–41.

[109] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 53 mentions the "little judicial consideration of this [servants, labourers, or workmen] phrase".

[110] *Hall v Pritchett* (1877) 3 Q.B.D. 215.

[111] The purchasing power of £250 in 1877 equates to £34,444 in November 2022. See I. Webster, "Why a Pound Today is Worth Only 0.8% of a Pound In 1877" (CPI Inflation Calculator, 12 July 2023), *https://www.in2013dollars.com/uk/inflation/1877*.

[112] *Booth v Traill* (1883) 12 Q.B.D. 8.

[113] Cababe, *Attachment of Debts* (1900), pp.40–41.

Booth,[114] where a clerk was regarded to be outside the scope of the definition.[115] The judgment in *Gordon v Jennings* (*Gordon*)[116] further illustrates the restrictive interpretation that the courts adopted to the scope of the WAAA 1870.[117]

In the *Gordon* case the debtor, a company secretary, argued on appeal that the WAAA 1870 intended to exempt wages of "persons earning only sums of moderate amount essential to their daily subsistence".[118] The debtor contended that his position fell within this scope and that he should not be excluded merely on the basis of semantics, specifically for the use of the more pretentious terms of "secretary" and "salary", as opposed to "workman" and "wages", to describe his position.[119] Grove J held that the popular signification of the words was important and that the WAAA 1870 was aimed at persons of small means who received small wages at short periods.[120] Applying this definition to the debtor *in casu*, the court found that the £200[121] *per annum* salary of a company secretary was "not 'wages' of a 'servant' within the [WAAA 1870] and [was] therefore not exempted from attachment by that Act".[122] The court was confident that the protection of the WAAA 1870 was unsuitable in the specific circumstance, faced with a debtor who would not run the risk of being dispossessed of their daily means of survival.[123] The court did, however, acknowledge that there could undoubtedly be cases where it would be difficult to make this distinction.[124]

It is submitted that the manner in which the court dealt with the question of the attachment of debtors' earnings in the *Gordon* case above is questionable. The judgment serves as a telling example of the problems and limitations with the early English AEO mechanism. The court held that debtors were excluded from the protection offered by the WAAA 1870 if they earned in excess of what could be described as a "small wage".[125] Arguably, this exclusion may be reasonable if one accepts that the court adopted a restrictive interpretation of the ambit of the WAAA 1870's applicability. Before consideration was afforded to exclusion in terms of the WAAA 1870, the court was however supposed to exercise its discretion under s.61 of the CLPA 1854, in deciding whether to grant the attachment. Even if one accepts that this was the case, and that the court considered the factors listed in s.61,[126] the court was not expected to apply itself to the question of what proportion of the debtor's salary should be deducted.[127] On the contrary, s.61 of the CLPA 1854 simply provided that *all* of the relevant debt should be deducted from the debtor's earnings. In *casu*, this meant that the specific debtor forfeited his entire

[114] *Marks v Booth* (1891) 90 L.T. Jo. 302.
[115] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 53.
[116] *Gordon v Jennings* (1882) 9 Q.B.D. 45.
[117] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 53.
[118] *Gordon* (1882) 9 Q.B.D. 45 at 45.
[119] *Gordon* (1882) 9 Q.B.D. 45 at 46.
[120] *Gordon* (1882) 9 Q.B.D. 45 at 46.
[121] The purchasing power of £200 in 1882 equates to £27,806 (about ZAR 545,000) in August 2022. See I. Webster, "Why a Pound Today is Worth Only 0.8% of a Pound In 1877" (CPI Inflation Calculator, 13 August, 2022), *https://www.in2013dollars.com/uk/inflation/1882*.
[122] *Gordon* (1882) 9 Q.B.D. 45 at 45.
[123] *Gordon* (1882) 9 Q.B.D. 45 at 47.
[124] *Gordon* (1882) 9 Q.B.D. 45 at 46.
[125] *Gordon* (1882) 9 Q.B.D. 45 at 46–47.
[126] The case does not deal with the issue of discretion before awarding the relevant AEO. This may be so since the case was heard on appeal and the appeal was limited to the WAAA 1870 question.
[127] See discussion below regarding challenges with establishing proportionality in EAO deductions.

salary for a period of three months.[128] Allowing creditors to take *all* of the debtor's earnings without any judicial oversight is likely to cause undue hardship, even if those earnings consist of more substantial salaries. The scope of the court's discretion in wage attachment enquiries should, therefore, have been extended to include all relevant factors.[129]

Despite its exclusion in matters concerning higher income earners, it stands to reason that the WAAA 1870 played a significant role in limiting the use of AEOs in cases concerning the general labour force.[130] This restriction on infringing upon "[t]he principle of the security of the wage packet" garnered popular support by the early to middle twentieth century, when both employers and employees were generally antagonistic towards wage deductions.[131] Collection through wage attachment was viewed by some as an attack on the right to earnings[132] and on the income of the wage-earner.[133] It was widely criticised by employers because of the inconvenience of the added administrative burden and because it was viewed as an obstacle in the way of effective industrial relationships.[134] Employees were understandably even more resentful of the system, since it was viewed as an intrusion on their dignity and privacy.[135] It could also cause the dismissal of a gainfully employed worker and prejudice the application of a desperate job seeker. In addition, the mechanism would unfairly discriminate against regular wage earners who fell within the ambit of wage deductions, as opposed to self-employed, unemployed and casual workers, who did not.[136]

Nevertheless, the prospect of attaching an employee's income to satisfy their due and payable debts remained part of the public debate. The topic was considered by various committees in different contexts such as family law, the levying of fines and short-term imprisonment.[137] Despite the criticism that the attachment of wages mechanism was subject to, it offered the benefit of forcing a debtor to carry out their important social responsibilities.[138] It was also a more attractive solution than its contemporary alternative, the imprisonment of debtors, specifically in the

[128] *Gordon* (1882) 9 Q.B.D. 45 at 45. The debtor earned £200, payable in 4 quarterly instalments. A deduction of £50 was made against his salary.

[129] Although the scope of the court's judicial oversight was subsequently extended in both English and South African wage garnishment law, this is still an area of concern. See, e.g., van der Merwe, "Developing a Procedural Framework for Advanced Debtor Protection: The Case of Emolument Attachment Orders" (Stellenbosch University, 2022), pp.208–212.

[130] See, e.g. S. Ware, "A 20th Century Debate about Imprisonment for Debt" (2014) 54 *American Journal of Legal History* 374, where the author indicates that the abolition of wage garnishment after 1870 limited solutions to the challenge of debtor imprisonment. Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 57 argues that the prohibition against the attachment of future income was an even bigger deterrent to the wider implementation of wage attachment.

[131] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 55.

[132] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51.

[133] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 55.

[134] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 55.

[135] Ware, "A 20th Century Debate about Imprisonment for Debt" (2014) 54 *American Journal of Legal History* 374, 375. Employees would "consider it a gross indignity that they should have their wages interfered with" and did not want their "employer to know anything at all about [their] private affairs".

[136] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 55, 57. The author questions the veracity of these arguments against wage attachment, stating that the trouble with the system is overstated. Considering the extent of EAO abuse referenced earlier in this article, such hostility is arguably appropriate.

[137] O. Kahn-Freund, "Maintenance Orders Act, 1958" (1959) 22 *The Modern Law Review* 175, 179; Ware, "A 20th Century Debate about Imprisonment for Debt" (2014) 54 *American Journal of Legal History* 374, 374–375 indicates that the Select Committee on Debtors (Imprisonment) of 1909 "declared that garnishing the debtor's wages 'would be undesirable'". Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 55 refers to the work of the Royal Commissions of 1912 and 1951–55 and Departmental Committees of 1934 and 1957 where wage attachment was considered as an option.

[138] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 56.

context of default maintenance orders.[139] It was in this regard that the English AEO mechanism was eventually reintroduced in its wider form of application, through the Maintenance Orders Act 1958 (MOA 1958).[140]

The MOA 1958 made "provision for the attachment of sums falling to be paid by way of wages, salary or other earnings or by way of pension for the purpose of enforcing certain maintenance orders".[141] The intention was therefore to expand the use of AEOs in maintenance-related matters to all income classes. The legislator saw fit to devote an entire part of the MOA 1958 to AEOs.[142] This part, and especially s.6, afforded to the court extensive powers in awarding, monitoring, varying and discharging English AEOs, and emphasised the court's discretion in each of these steps.[143] This discretion extended beyond the question of whether an AEO should be awarded, to include the revolutionary[144] introduction of a discretionary protected earnings rate (PER). This is:

> "the rate below which, having regard to the resources and needs of the defendant and the needs of persons for whom he must or reasonably may provide, the court aforesaid thinks it reasonable that the relevant earnings within the meaning of the Schedule to this Act should not be reduced by a payment made in pursuance of the attachment of earnings order".[145]

As a result of the above provision, it would no longer be possible to attach the debtor's entire earnings, as was the case in the *Gordon* case above. The requirement for judicial overview would ensure that the debtor had at least enough earnings left to cater for their needs. The MOA 1958 also provided that the employer had to pay the relevant earnings to an officer of court, who was responsible for its administration.[146] In addition, employers would be able to retain "the sum of sixpence" out of the balance of their employees' earnings for every AEO processed.[147] It is noteworthy that this amount was deducted from the wages due to the employee, and not from the amount to be paid to the recipient of the AEO.[148]

In the wake of the simultaneous expansion (to include all types of earnings) and limitation (to maintenance matters) of the use of AEOs provided by the MOA

[139] M. Freeman and C. Lyon, "The Imprisonment of Maintenance Defaulters" (1981) 20 *Howard Journal of Penology and Crime Prevention* 15, 23 argues that attachment of earnings is the most significant alternative to the imprisonment of debtors. Also see Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 56. The author argues that the reasons for rejecting imprisonment of debtors in the case of maintenance matters also hold true with regard to civil debtors in general.

[140] Maintenance Orders Act 1958 (c.39). See Freeman and Lyon, "The Imprisonment of Maintenance Defaulters" (1981) 20 *Howard Journal of Penology and Crime Prevention* 15.

[141] Maintenance Orders Act 1958 (c.39), Introductory text.

[142] Part II, ss.6–15. Kahn-Freund, "Maintenance Orders Act, 1958" (1959) 22 *The Modern Law Review* 175, 180 comments on the level of detail with which the relevant legislation deals with AEOs.

[143] See, e.g. s.6(1) of the MOA 1958. For more detail on the extent of the maintenance court's discretionary powers; see Kahn-Freund, "Maintenance Orders Act, 1958" (1959) 22 *The Modern Law Review* 175, 179–180.

[144] Kahn-Freund, "Maintenance Orders Act, 1958" (1959) 22 *The Modern Law Review* 175, 175, 180. The author submits that the inclusion of AEOs in the MOA 1958 was a fundamental measure of reform and that it meant that the "court is thus not, like the courts in some countries, hamstrung by any narrow arithmetical formulae [in determining] these vital figures". In following the example of the MOA 1958, PERs were later included in other international wage attachment instruments. See, e.g. Wages Arrestment Limitation (Amendment) (Scotland) Act 1960 instituting the "first four pounds" restriction—see Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 54; s.46(4) of the Australia Child Support (Registration and Collection) Act 3 1988.

[145] Section 6(3)(b) of the MOA 1958. *Billington v Billington* [1974] Fam. 24; [1974] 2 W.L.R. 53 HC (Fam Div) held that the court has a discretion concerning the calculation of the PER of every individual.

[146] Sections 6(3)(c) and 13(1) of the MOA 1958. See below regarding the challenge of a lack of judicial oversight during the EAO process.

[147] Section 13(3) of the MOA 1958. In effect, a modest administration fee.

[148] Kahn-Freund, "Maintenance Orders Act, 1958" (1959) 22 *The Modern Law Review* 175, 181.

1958, the debate about the possible extension of AEOs to other forms of judgments persisted.[149] At the time of the MOA 1958's enactment, maintenance was seen as a special case and the Home Secretary declared that "it is not the intention of the Government to extend attachment [of wages] to any of these things [such as civil debt, hire purchase agreements, fines or any other purposes]".[150] Yet, factions from commerce[151] and academia voiced their support for the wider use of AEOs and questioned the ideological distinction between maintenance orders, other special social obligations, and more general civil debts.[152] They submitted, and it is contended correctly so, that the absence of an AEO mechanism leads to several significant disadvantages, including disruptive communications from creditors.[153] On the other hand, expanding the application of the AEO mechanism would offer advantages such as reducing the number of debtor imprisonments.[154] Pressure grew for a properly regulated AEO mechanism, fortified by judicial oversight and the application of reasonable and informed PERs to afford adequate protection for the interests of debtors.[155] These calls were acknowledged and addressed by the enactment of the Attachment of Earnings Act 1971 (AEA 1971),[156] which has regulated the AEO environment since then.

Current position of the English AEO

The present-day English AEO mechanism is regulated by the AEA 1971 and Pt 89 of the Civil Procedure Rules 1998 (CPR).[157] As a result of its inclusion in the CPR, the AEO mechanism is directly aligned with the overriding objective of the CPR.[158] In this regard, the CPR states that "[t]hese Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost".[159] The CPR also emphasises the court's duty to advance this overriding objective by engaging in active case management.[160] According to the CPR, this active case management may assist in achieving partial or full settlement of the case[161] and in establishing timetables to monitor the case's progress.[162]

[149] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51.

[150] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51; Kahn-Freund, "Maintenance Orders Act, 1958" (1959) 22 *The Modern Law Review* 175, 178 explains that:

> "The problem of the attachment of wages for the enforcement of maintenance orders involves a clash of two social policies: the policy to protect the wage earner by guaranteeing to him the payment of his earnings clear of deductions, and the policy to protect his family in the event of his failure to provide proper support."

[151] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51 at fn.2 refers to the 1961 Conference of the National Union of Shopkeepers.

[152] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 56–57. These special social obligations included rates, taxes and council rents.

[153] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 57. The author argues that creditors are more likely to address unsolicited communications and visits to employees and employers during work hours if there is no alternative debt enforcement measure. Employees could also abscond from work as they attempt to avoid such creditor intrusions.

[154] Kahn-Freund, "Maintenance Orders Act, 1958" (1959) 22 *The Modern Law Review* 175, 179.

[155] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 57.

[156] In Attachment of Earnings Act 1971 (c.32).

[157] Civil Procedure Rules 1998 (SI 1998/3132) (L.17) as amended by The Civil Procedure (Amendment) Rules 2016 (SI 2016/234) (L.3) which inserted the current Part 89. The CPR apply to all proceedings in the County Court, High Court and the Civil Division of the Court of Appeal (r. 2.1(1)). Part 89 of the CPR replaced order 27 of the County Court Rules 1981 on 6 April 2016.

[158] CPR Pt 1.

[159] CPR r.1.1(1).

[160] CPR r.1.4(1).

[161] CPR r.1.4(1)(f).

[162] CPR r.1.4(1)(g).

The AEA 1971 introduces itself as "[a]n Act to consolidate the enactments relating to the attachment of earnings as a means of enforcing the discharge of monetary obligations".[163] This description is appropriate considering its record of AEO-related enactments repealed, as set out in Sch.6 to the AEA 1971. The AEA 1971 repealed previous provisions regulating AEOs in the Family Income Supplements Act 1970[164] and the MOA 1958.[165] The AEA 1971 also repealed a substantial part of the Administration of Justice Act 1970,[166] which itself previously repealed various AEO-related sections of the MOA 1958.[167] It is also fitting to describe it as a consolidation of AEO legislation due to its broad application to all AEOs made by the various courts empowered by the AEA 1971 or Sch.5 to the Courts Act 2003.[168]

As a legislative instrument that essentially regulates a single collection mechanism, the AEA 1971 is quite detailed and comprehensive in its scope.[169] It empowers the High Court, Family Court and Magistrates' Courts,[170] upon application of the creditor, debtor or officer of the Family Court,[171] to issue an AEO to make periodical deductions from the earnings of a debtor.[172] The AEO directs the employer of the relevant debtor to make these deductions at specified times and to pay these amounts, usually,[173] to the collecting officer of the court.[174] An AEO can be issued to recover unpaid maintenance, fines[175] or civil debts[176] that total at least £50.[177]

Section 19 of the AEA 1971 and Pt 89 of the CPR describe the procedure involved in an AEO application. An application to issue, discharge or vary an AEO may be made by complaint.[178] The relevant forms are available on the government website[179] and it appears that the courts actively engage in their role to manage and assist in these cases.[180] Creditors are directed to the necessary information and informed of the required court fees,[181] which can be recouped from their debtors.[182] The AEO application must be accompanied by a certificate confirming the remaining indebted amount,[183] a certified copy of the court order sought to be

[163] Preamble to the AEA 1971.
[164] In Family Income Supplements Act 1970 (c.55) s.14.
[165] Section 9 and parts of ss.20 and 23.
[166] Administration of Justice Act 1970 (c.31). Sections 13–26, parts in ss.27–30, 53 and 54.
[167] Sections 4(3), 6–8, 9(1), (3) and (6), 10–15 and parts of s.21.
[168] Courts Act 2003 (c.39). See s.1A of the AEA 1971.
[169] The AEA 1971 has 29 sections and six schedules dealing with a wide range of relevant issues, including the establishment of a PER to discourage debtor abuse.
[170] Section 1.
[171] Section 3.
[172] Section 6(1)(a).
[173] See below regarding the alternative CAPS payment system.
[174] Section 6(1)(b) of the AEA 1971.
[175] Including Council Tax.
[176] Section 1 of the AEA 1971. AEOs for maintenance orders and fines are prioritised above deductions based on civil debts—see Sch.3, Pt 2, para.8(a). AEOs regarding fines are issued under Sch.5 to the Courts Act 2003 (c.39) and require the involvement of a fines officer.
[177] CPR r.89.7(14) provides that no AEO can be issued where the debt or the remaining amount payable under a judgment is less than £50.
[178] Section 19(1) of the AEA 1971.
[179] HM Courts and Tribunals Service, "Court and Tribunal Forms" (21 March 2018), *Gov.uk*, *https://www.gov.uk/government/collections/court-and-tribunal-forms*.
[180] Repeated offers to lend assistance are made in various documents. See, e.g. HM Courts and Tribunals Service, "EX323 2–3: Attachment of earnings" (2020), *Gov.uk*, *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865024/ex323-eng.pdf*.
[181] As authorised by CPR r.89.10.
[182] HM Courts and Tribunals Service "EX323 2–3: Attachment of earnings" (2020).
[183] CPR r.89.4(1).

enforced and a witness statement verifying the amount due. In cases where the AEO deductions must be paid to the collection officer of the court, the required witness statement will be replaced by the collection officer's certificate in confirmation of the amount due.[184] Notice of an AEO application must be served on the debtor by the court.[185] AEOs cannot be issued against legal entities or debtors who are disabled, unemployed, self-employed, enlisted in the army, navy or air force, or merchant seamen.[186]

Unless the application relates to maintenance, the AEO must indicate the entire amount due under the relevant judgment, including all costs.[187] The AEO must also specify the normal deduction rate (NDR). The NDR is the "rate (expressed as a sum of money per week, month or other period) at which the court thinks it reasonable for the debtor's earnings to be applied to meeting his liability under the relevant adjudication".[188] In addition, the AEO must indicate the relevant PER, which the AEA 1971 defines as the rate "which, having regard to the debtor's resources and needs, the court thinks it reasonable that the earnings actually paid to him should not be reduced".[189] AEOs can only be applied to certain types of earnings, known as attachable earnings, which exclude income tax, specified social security contributions and superannuation scheme deductions.[190]

The issuing of an AEO protects the debtor to the extent that it serves as a bar to the issuing of warrants of commitment (imprisonment) and execution against the property of the debtor.[191] The debtor's interests are further safeguarded by allowing them to apply to vary the quantum of an AEO by increasing the PER on the basis of a substantial change in their resources and needs since the order was made or modified.[192] When the debtor and creditor are involved in considering the issuing or continued existence and quantum of an AEO, which is not always the case,[193] the application will be transferred and heard in the debtor's home court.[194]

The debtor's employer is afforded seven days from receipt of the AEO to set their affairs in order and will thereafter be expected to comply with its terms.[195] Failure to do so may result in a fine, or even imprisonment.[196] The employer's responsibilities regarding deductions of earnings under the AEO are discussed in Sch.3 to the AEA 1971. It is the employer's duty to determine the debtor's attachable earnings, from which amount the PER is to be deducted, before deducting and paying the lesser of the excess (if any) or the NDR.[197] The AEA 1971 assists

[184] CPR r.89.4(2).

[185] CPR r.89.5. It is interesting that the court assumes this responsibility. In South Africa, for example, this function is performed by the sheriff of the court.

[186] Section 24(2) of the AEA 1971; HM Courts and Tribunals Service, "Attachment Orders: A Guide for Employers" (August 2008), p.4, *https://www.rbkc.gov.uk/pdf/aoehandbook-eng.pdf*; HM Courts and Tribunals Service "EX323 2–3: Attachment of earnings" (2020).

[187] Section 6(4) of the AEA 1971. Costs for court proceedings involving AEOs are allowed under CPR 89.10.

[188] Section 6(5)(a) of the AEA 1971.

[189] Section 6(5)(b). This definition appears to be a derivative of the definition initially formulated in the MOA 1958, as described above.

[190] "Attachable earnings" are defined in Sch.3, Pt 1 of the AEA 1971.

[191] Section 8 of the AEA 1971. Debtors can still face incarceration if they ignore court orders regarding the production of documents or attendance in court. See s.23 of the AEA 1971.

[192] Section 9(3)(b) of the AEA 1971.

[193] CPR r.89.14(11).

[194] CPR r.89.7(4). CPR r.89.1(2)(e) provides that the "'debtor's home court' means the County Court hearing centre for the district in which the debtor resides or carries on business".

[195] Section 7(1) of the AEA 1971.

[196] Section 23 of the AEA 1971.

[197] Paragraph 5, Pt 1, Sch.3 of the AEA 1971.

the employer by prioritising payments in cases where multiple AEOs must be processed against the same debtor's earnings.[198] Priority is afforded to AEOs not based on judgments and administration orders, in other words, AEOs originating from maintenance orders and fines.[199] AEOs based on similar origins are dealt with in chronological order, with later orders disregarded until an earlier one has been satisfied.[200] This arrangement is also followed where both priority and non-priority AEOs have to be processed, meaning that the latter orders will only be serviced where there is a residual amount available for deduction after maintenance and fines-related AEOs are paid.[201]

The employer must also inform the court's collection officer within ten days should the relevant debtor not be in their employment when the AEO is served, or leave their employment thereafter.[202] The employer is allowed to deduct an amount of £1[203] from the debtor "towards his clerical and administrative costs",[204] and must furnish the debtor with a written account of every AEO payment.[205] To lighten their burden, employers[206] may apply for a consolidated AEO to secure the collection of various judgment debts originating from different courts against the same employee.[207] The court also has the power to create a consolidated AEO on its own initiative.[208] In the process, the courts will follow a flexible approach, which allows for limited variation or exclusion of provisions of the AEA 1971 if required for the effective functioning of the AEO mechanism.[209]

Significantly, these deductions are paid by the debtor's employer directly to a collecting officer of the court[210] or, alternatively, to the Centralised Attachment of Earnings Payments System (CAPS) office.[211] The duties of the collection officer include, inter alia, to apply the sums received pursuant to AEOs as if paid by debtors in order to satisfy the relevant judgments against them.[212] In practice, this places a heavy burden on the courts, who are responsible for these AEO payments "to be recorded, receipted and transferred afterwards".[213] The collection officer or

[198] Part 2, Sch.3 of the AEA 1971.
[199] Paragraph 8, Pt 2, Sch.3 of the AEA 1971.
[200] Paragraph 7, Pt 2, Sch.3 of the AEA 1971.
[201] Paragraph 8(b), Pt 2, Sch.3 of the AEA 1971.
[202] Section 7(2) of the AEA 1971.
[203] See The UK Rules, "Attachment of Earnings Order Employer's Guide" (2021), *https://www.theukrules.co.uk/rules/employment/employing/payroll/attachment-of-earnings-order.html*.
[204] Section 7(4)(a) of the AEA 1971. Although this is not clear from the AEA 1971, it seems that the employer's cost can be deducted from the PER. See HM Courts and Tribunals Service, *Attachment Orders* 17; Croner-i, "Attachment of Earnings: In-depth" (2021), *https://app.croneri.co.uk/topics/attachment-earnings/indepth*.
[205] Section 7(4)(b) of the AEA 1971.
[206] Or, in terms of s.17(3)(c) of the AEA 1971, any other prescribed party.
[207] Section 17 of the AEA 1971.
[208] CPR r.89.20.
[209] Section 17(3)(e) of the AEA 1971.
[210] Section 6(1)(b) of the AEA 1971. The challenges prevalent in the South African EAO mechanism due to the lack of judicial involvement in the payment of EAOs is discussed below.
[211] Money Claims UK, "What are Centralised Attachment of Earnings Payments (CAPS)?" (undated), *https://www.moneyclaimsuk.co.uk/creditor-and-claimant-questions-and-answers/what-are-centralised-attachment-of-earnings-payments-caps.aspx*:

> "CAPS is able to monitor for payment, process payments and, where enforcement is required, will refer orders back to the local court. CAPS therefore provides savings to HM Courts & Tribunals Service, provides a streamlined effective form of enforcement to claimants, and also provides one payment point for employers. Payments under a judgment order are paid out weekly."

Also see Government of the United Kingdom "Make Debt Deductions from An Employee's Pay" (undated), *Gov.uk*, *https://www.gov.uk/debt-deductions-from-employee-pay/making-payments*.
[212] Section 13(1) of the AEA 1971.
[213] Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364, 365; HM Courts and Tribunals Service, "EX323 2–3: Attachment of earnings" (2020).

CAPS office will therefore act as an intermediary between the creditor and their collection agents on the one side, and the debtor and their employer on the other. Both debtor and creditor can liaise with these intermediaries to enquire into and verify the payment history and the balance of the remaining debt under the AEO.[214] This monitoring function of the court and CAPS office includes all steps up to the discharge of the AEO, when it will furnish the debtor, their employer and creditor, with a notice of discharge to confirm that the debt has been settled.[215] This process allows the court to not only vary[216] but also discharge an AEO of its own volition.[217] The court is also empowered to commence remedial action to assist creditors in cases of non-payment of an AEO, although they are not eager to do so in cases of consumer debt, unless prompted by the creditor.[218]

It is perhaps this highly intrusive approach, and the extent to which the state is empowered to regulate and carry out deductions from the earnings of private citizens, that sets the AEO mechanism apart from its contemporary counterparts in other jurisdictions.[219] In AEO-related enquiries, the CPR and AEA 1971 authorise the court to compel the debtor and their employer to furnish it with detailed statements and information related to the debtor's current and anticipated earnings.[220] The debtor and their employer must also inform the court, not the creditor, of any changes to the employment or earnings of the debtor.[221] In addition, the court will decide whether a certain payment to the debtor qualifies as earnings for the purposes of the AEA 1971.[222] The extent of the court's ability to intervene is further reinforced by s.4 of the AEA 1971, which allows the court, of its own volition, to issue an administration order if the debtor's liabilities originate from more than one creditor.[223] This enables the court to deal with all of the debtor's liabilities collectively.[224] To facilitate this process, the court can order the debtor to furnish it with a list of all their creditors, indicating the amount of debt owed to each.[225] The court can then issue an AEO to recover the payments due under the administration order.[226]

[214] Government of the United Kingdom "Make Debt Deductions from An Employee's Pay" (undated).

[215] HM Courts and Tribunals Service, "Attachment Orders: A Guide for Employers"; Government of the United Kingdom, "Having Debt Repayments Taken from Your Wages" (undated), *Gov.uk*, *https://www.gov.uk/debt-payments-from-your-wages/when-debt-paid-off*. It is significant that it is the court who sends the discharge order to the employer, who must cease deductions under the AEO after the expiration of seven days of receipt thereof. See s.12(2) and (3) of the AEA 1971.

[216] Section 10 of the AEA 1971 allows a NDR to be reduced to vary AEOs for the collection of maintenance orders in circumstances where it appears to the collecting officer of the court that the amount of the deduction is inappropriate in consideration of the need that it services. Also see CPR r.89.14.

[217] Section 9(3)(a) of the AEA 1971; CPR 89.14. Under CPR r.89.14(11) the court has a discretion to allow the debtor and creditor the opportunity to address the court before varying or discharging the AEO on its own initiative.

[218] Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364, 366–367.

[219] Kirwan, "On 'Those Who Shout the Loudest': Debt Advice and the Work of Disrupting Attachments" (2019) 98 *Geoforum* 323.

[220] CPR r.89.6; s.14 of the AEA 1971.

[221] Section 15 of the AEA 1971.

[222] Section 16 of the AEA 1971 with reference to the meaning of earnings as defined in s.24. The court, not the clerk or collecting officer, will make this determination upon application by the employer, debtor, creditor, or collection officer.

[223] Section 4(1)(a) of the AEA 1971.

[224] Section 4(1)(a) of the AEA 1971. The court is also able, on its own initiative, to issue a consolidated AEO as discussed above—see s.17.

[225] Section 4(1)(b) of the AEA 1971.

[226] Section 5 of the AEA 1971.

Evaluation of the English AEO

The preceding discussion indicated that the English AEO mechanism has reaped significant benefits based on experience gained over the course of several centuries. The iterative process involved has allowed it to grow, for the most part, into a well-regulated and well-refined system. It may therefore appear, at least to the casual observer, to be a well-functioning debt collection mechanism. However, closer examination reveals that the AEO mechanism remains plagued by some perennial challenges which may, at least in some respects, be attributed to the flawed broader debt collection system.[227] These challenges are not unique to the English mechanism, but "endemic in most, if not all, common law and civil law jurisdictions".[228] Nor are they novel: As discussed above the Payne Committee, and others, identified and considered these challenges as far back as 1969.[229]

Civil judgments are of little value in and of themselves.[230] Creditors are mainly interested in the benefits derived from the enforcement of these judgments,[231] and debtors are concerned about the protection of their rights during this enforcement process. Yet, despite being "an integral part of the civil justice system",[232] debt enforcement is typically afforded scant attention in debates and enquiries into civil judicial reform.[233] The most striking example of this neglect is probably found in the renowned reports commissioned under the direction of Lord Woolf during 1994.[234] The purpose of these reports was to present a comprehensive review of the rules of civil procedure, and the project was carried out with great care and diligence.[235] Regrettably, despite the extensive and ground-breaking nature of these reports, the subject of enforcement of civil judgments was disregarded.[236] It should therefore come as no surprise that the quality of the civil enforcement process in

[227] See, e.g. J. Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354; Baldwin and Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 C.J.Q. 159; Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 363, 364.

[228] Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354, 363 referring to W. Kennett, "Enforcement of Judgments" (1997) 2 *European Review of Private Law* 321–428.

[229] J. Baldwin and R. Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 311; Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354; Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364, 368 inform that the Payne Committee "suggested that the process could have positive consequences for creditors and for the majority of defaulters; and was or should be acceptable to employers".

[230] Apart from enforcement, civil judgments could possibly serve as deterrents to errant debtors due to the threat of receiving a negative listing from credit bureaus.

[231] Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364, 369.

[232] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 309. The authors correctly make the point that an ineffective enforcement system casts a shadow over the entire civil justice system and the right to court and a fair trial.

[233] See Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354, 355 quoting Sir Jack Jacob noting that "the subject of enforcement is 'in a kind of backwater, seldom examined or studied'".

[234] Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellor's Department, 1995); and Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellor's Department, 1996).

[235] A. Zuckerman, "Lord Woolf's Access to Justice: Plus ça Change …" (1996) 59 *The Modern Law Review* 773.

[236] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 309; Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354, 355; Baldwin and Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 C.J.Q. 159, 160.

England is generally considered below par.[237] Empirical studies have proven that this view is justified and that there are indeed reasons for concern.[238] In one study, a third of the judgment creditors involved indicated that they received no payment within six months after the judgment was rendered.[239] As is also the case in other jurisdictions, like South Africa,[240] it is often the case that obtaining a judgment is a far less onerous task than enforcing it.[241] This is a serious concern, as the right and ability to enforce a judgment is integral to the right to a fair trial.[242] Frustrating or delaying the efficacy of this right therefore facilitates human rights abuses.

This overarching criticism against the difficulty of enforcement of civil judgments seems to be at the root of the critique levelled against the AEO mechanism, which has been described as being "riddled with deficiencies".[243] Empirical studies have confirmed that the general failure in the judgment enforcement system is also apparent in the AEO mechanism.[244] Unscrupulous debtors can manipulate the system and can avoid honouring the judgments against them on an indefinite basis.[245] This causes negative creditor attitudes and a lack of confidence in the system.[246] Arguably, some of the responsibility for creditors' frustrations should, however, be placed at their own doors, as reckless lending practices still abound.[247]

Debtors are equally distrusting of the process.[248] Despite the provisions in the AEA 1971 that allow courts to discharge AEOs *mero motu*,[249] studies show that debtors are trapped in long-term servitude to debt collection processes.[250] They also run the risk of facing unfair or heavy-handed collection methods that facilitate

[237] Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354; Baldwin and Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 C.J.Q. 159.

[238] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 307.

[239] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 308.

[240] Creditors have their own challenges in this regard, which arguably serves as motivation to over-collect when given the opportunity.

[241] Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354, 355; Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 317 and 319 where the authors draw comparisons with drawing "blood out of stone".

[242] See Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 305–307, 309, 318 referring to the European Court of Human Rights' decision in Immobiliare *Saffi v Italy* (22774/93) (2000) 30 E.H.R.R. 756 ECtHR, where the Court "reiterated that the right to a court … also protects the implementation of final, binding judicial decisions. Accordingly, the execution of a judicial decision cannot be unduly delayed".

[243] Baldwin and Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 C.J.Q. 159, 170.

[244] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 322.

[245] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 311.

[246] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 320.

[247] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 326.

[248] See, e.g. Kirwan, "On 'Those Who Shout the Loudest': Debt Advice and the Work of Disrupting Attachments" (2019) 98 *Geoforum* 323.

[249] Section 9(3)(a) of the AEA 1971.

[250] Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364, 367:

> "The study of attachment of earnings reported in this paper, found that on average the predicted payment period, based on the amount owed and the normal deduction rate, was three years, and nine months, ranging from seven weeks to 41 years."

the further abuse of already victimised debtors.[251] The interests of the debtor's employer should also be considered, as they are burdened with enforcing the AEOs.[252] This burden could place strain on the employment relationship.[253] The author supports efforts to strive for a fair and balanced approach between the interests of creditors and debtors.[254] Unfortunately, due to the reality that a perfect civil enforcement system does not exist, this goal is, however, not easily attainable.[255]

The English legal system's struggles with civil enforcement[256] have not gone unnoticed, and there have been further attempts by the government to address the challenge. An Enforcement Review[257] was commissioned by the Lord Chancellor and embarked on in 1998, with the hope that this "most rigorous and comprehensive review of civil enforcement ever undertaken in this country" would realise drastic improvements in the system.[258] The review was, however, frustrated by a lack of dependable information, being based on "a mixture of anecdote, informed and ill-informed speculation and assertion rather than upon factual evidence".[259] Amongst the many uncertainties, the main issue was (and still remains) the difficulty in establishing which form of enforcement is best suited to a specific situation and debtor. This conundrum is amplified by the difficulty in distinguishing between debtors who are in default because they are unable to pay, and those who simply refuse to do so.[260]

During 2003 the continued enquiry into civil enforcement led to the publication of a White Paper containing proposals for amendments to the enforcement system.[261] Some commentators were pessimistic but hopeful that at least limited positive change could be effected as a result of the emphasis on the need to furnish courts

[251] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 326.

[252] Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364, 369.

[253] It may, for example, be possible for an employee to forfeit their work or promotion prospects due to having an AEO issued against them. The AEA 1971 contains no provisions restricting employee dismissal in this regard. Although a discussion of English labour law falls outside the scope of this article, it appears that the employment contracts of employees who are in a position of trust may provide for dismissal under these circumstances. To prevent this, a debtor could request the court to suspend the AEO subject to honouring a payment agreement with the creditor. See Payplan, "Attachment of Earnings Order (AEO)" (undated), *https://www.payplan.com/debt-info/law/attachment-of-earnings-order/*; National Debtline, "Attachment of earnings orders" (undated), *https://nationaldebtline.org/fact-sheet-library/attachment-of-earnings-orders-ew/*.

[254] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 326, 328; Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354, 363.

[255] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 326.

[256] Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354: "it has been estimated that there is now about £600 million worth of unpaid post-judgment debt per annum".

[257] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 311 fn.25.

[258] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 312.

[259] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 313.

[260] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 313, 327–328.

[261] Lord Chancellor's Department, White Paper, *Effective Enforcement: Improved Methods of Recovery of Civil Court Debt and Commercial Rent and a Single Regulatory Regime for Warrant Enforcement Agents* (HMSO, 2003), Cm.5744.

with proper information on debtor circumstances.[262] By 2010, these commentators were disappointed, puzzled and thoroughly depressed.[263] The reason was the announcement that amendments that were scheduled for the AEA 1971 under the Tribunals, Courts and Enforcement Act 2007, would not be implemented.[264] These amendments were aimed at the provision of a fixed deduction schedule[265] and the disclosure of information.[266] In addition, they provided for the suspension of AEOs levied at rates and times that were inappropriate.[267]

The failure to implement changes, which would lend more transparency to the AEO mechanism, is regrettable. The mechanism would undoubtedly benefit from the availability of crucial information originating from all relevant sources.[268] Baldwin argues that it is especially in this regard that the wage garnishment mechanism of the United States of America (USA) is more efficient.[269] In comparing the position of the USA creditor with that of their English counterpart, he states that:

> "[T]hey [the USA] have greater access to information from third parties about defendants' financial circumstances. Having little information about this creates difficulties for claimants in this country [England]. It means that decisions about the most appropriate enforcement measure to choose are often based upon no more than guesswork."[270]

Application

The examination of the English AEO mechanism has demonstrated that it is by no means beyond reproach. The AEO does, however, appear to offer a number of noteworthy solutions to the problems plaguing the contemporary South African EAO.[271]

Judicial oversight

An amendment to the South African EAO-related legislation, the Magistrates' Courts Act 32 of 1944, enacted in 2018,[272] has ensured compulsory judicial oversight prior to the issuing of an EAO. Consequently, EAOs may only be issued for amounts that are just, equitable and appropriate.[273] Crucially, judicial oversight is

[262] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 326–327.
[263] Baldwin and Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 C.J.Q. 159, 173.
[264] Baldwin and Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 C.J.Q. 159, 162.
[265] Section 91 of the Tribunals, Courts and Enforcement Act.
[266] Section 92 of the Tribunals, Courts and Enforcement Act.
[267] Schedule 15, para.1.5 of the Tribunals, Courts and Enforcement Act.
[268] Baldwin and Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 C.J.Q. 159, 162–163, 166, 168–169, 171.
[269] Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354, 363.
[270] Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354, 363.
[271] Some of the problems with EAOs are addressed in the introduction to this article. A detailed discussion of the problems with EAOs falls outside the scope of this article and has appeared elsewhere. See, e.g. van der Merwe, "Traversing the South African Emolument Attachment Order Legal Landscape Post 2016: Quo Vadis?" (2019) Stell L.R. 77; Coetzee and van Sittert, "Reflections on Recent Developments Regarding Wage Garnishment in South Africa" (2018) 9 *Int J Private Law* 107.
[272] Courts of Law Amendment Act 2017.
[273] Section 65J(2) of the Magistrates' Courts Act 1944.

only relevant to the *issuing* of EAOs. There are no provisions in the Magistrates' Courts Act 1944 that oblige courts to have *mero motu* input in the monitoring or eventual discharge of EAOs. As a result, unless a garnishee or debtor has the means to intervene, unscrupulous creditors are able to continue collecting exorbitant amounts on legally unwarranted EAOs.[274]

English AEOs allow for periodic deductions of debtor earnings[275] and direct courts to be active participants in the process of case management.[276] AEOs can be issued by the court or by the relevant fines officer, but only in cases where the officer is presented with sufficient information to make such order,[277] including the debtor's reply form to the notice of application for an AEO.[278] Contrary to the position in South Africa, judicial oversight is also extended to the process after the issuing of the AEO. This extended court participation is achieved in numerous ways. Deductions from earnings are transferred from the debtor's employer to the collecting officer of the court,[279] or, alternatively, to the CAPS office.[280] The collecting officer or CAPS office will issue receipts, record and transfer the payments to the relevant creditors.[281] The court is also directly involved in the procurement of evidentiary documents and information related to the debtor's earnings.[282] In this capacity, judicial oversight is extended to include verification of the payment history and the reducing balance of AEO-collected debt.[283] This monitoring function enables courts to vary and discharge AEOs *mero motu*.[284] The courts also have the power, of their own initiative, to constitute a consolidated AEO[285] and issue an administration order[286] based on their assessment of the debtor's AEO responsibilities.

It is therefore recommended that, as is the situation in England, legislation be enacted to extend judicial oversight over the South African EAO mechanism to include the entire process, from the issuing of the order up to and including its final discharge. This step will undoubtedly result in the advancement of debtor protection in the case of EAOs.

Proportionality

The concept of proportionality regarding EAO enforcement is used in relation to establishing a fair quantum for the periodic deductions from an employee's earnings.[287] Historically, it was not uncommon for EAO deductions to lay claim

[274] See, e.g. van der Merwe, "Traversing the South African Emolument Attachment Order Legal Landscape Post 2016: Quo Vadis?" (2019) Stell L.R. 77, 93.
[275] Section 6(1)(a) of the AEA 1971.
[276] CPR r.1.4(1).
[277] CPR r.89.4(1) and (2).
[278] Section 6(1) of the AEA 1971 and CPR r.89.7(1).
[279] Section 6(1)(b) of AEA 1971.
[280] Money Claims UK, "What are Centralised Attachment of Earnings Payments (CAPS)?" (undated), *https://www.moneyclaimsuk.co.uk/creditor-and-claimant-questions-and-answers/what-are-centralised-attachment-of-earnings-payments-caps.aspx*.
[281] Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364, 365; HM Courts and Tribunals Service, "EX323 2–3: Attachment of Earnings" (2020).
[282] Section 14 and 15 of the AEA 1971; CPR r.89.6.
[283] Government of the United Kingdom "Make Debt Deductions from An Employee's pay" (undated).
[284] Section 9(3)(a) and 10 of the AEA 1971; CPR r.89.14.
[285] CPR r.89.20.
[286] Section 4(1)(a) of the AEA 1971.
[287] It is suggested that the accurate balancing of conflicting rights required by proportionality will aid efforts to establish a fair quantum. Conversely, a fair quantum will be proportional.

to half of a debtor's monthly salary, making it almost impossible for a debtor to maintain themselves and their families.[288] The legislature has attempted to address this issue by reinforcing the role of judicial oversight[289] and imposing a standard, nonspecific 25% limit on the amount deductible as a result of one or more EAOs against a debtor's gross monthly salary.[290] Although the 25% cap is subsidiary to the court's evaluation as to the appropriateness of the amount of the EAO deduction,[291] the merit of this limit warrants interrogation. In the absence of proper judicial oversight, as has often proven to be the situation in the past, this limit is the distressed debtor's only lifeline. The imposition of the cap begs the question of whether it creates an arbitrary classification that will unfairly discriminate based on a debtor's income. The cost of basic food, household and hygienic items for South African households has been estimated at approximately ZAR 2,900 per month.[292] This cost remains consistent, irrespective of the income that a debtor receives. It is therefore submitted that forfeiting 25% of a minimum-wage salary of, for example, ZAR 3,000 per month,[293] will make it considerably more difficult for the debtor and their family to support themselves, than would be the case with a debtor earning 10 times that amount. The cap would thus actually have an undesirable, disproportionate effect on poorer households. There is also uncertainty about the interplay between the 25% limit imposed in the Magistrates' Courts Act 1944 and s.29(3) of the Maintenance Act 99 of 1998, which prioritises the payment of EAOs based on maintenance claims.[294]

Before the enactment of the AEA 1971 and the CPR, the English AEO mechanism lacked proportionality. A debtor could forfeit their entire salary because of wage deductions.[295] This atrocious situation was remedied by the AEA 1971 and the CPR's inclusion of numerous provisions aimed at establishing a basis for fair wage deductions. These provisions include the requirement for full disclosure by the creditor of the amount due under the relevant judgment, including all costs.[296] One of the CPR's main objectives is to ensure legal costs are proportionate.[297] Restrictions on the issuing of AEOs for minor debts prevent creditors from manipulating the system to escalate legal costs through frivolous debt collections. The AEO must also specify the NDR, which represents the court's estimation of the reasonable quantum of the periodic deductions against the specific debtor's salary.[298] In addition, the AEO must indicate the relevant PER, which represents the court's estimation of the reasonable limit below which the specific debtor's periodic salary payments should not be reduced.[299] The PER therefore represents

[288] See, e.g. van der Merwe, "Developing a Procedural Framework for Advanced Debtor Protection: The Case of Emolument Attachment Orders" (Stellenbosch University, 2022), p.121.
[289] Section 65J(2) of Magistrates' Courts Act 1944.
[290] Section 65J(1A)(a) of Magistrates' Courts Act 1944.
[291] Section 65J(2E)(b) of Magistrates' Courts Act 1944.
[292] C. Bhengu, "The National Minimum Wage is Set to Increase in March—Here's What it can Get You" (10 February 2021), *Times Live*, *https://www.timeslive.co.za/news/south-africa/2021-02-10-explained-the-national-minimum-wage-is-set-to-increase-in-march-heres-what-it-can-get-you/*.
[293] Bhengu, "The National Minimum Wage is Set to Increase in March—Here's What it can Get You" (10 February 2021), *Times Live*.
[294] Coetzee and van Sittert, "Reflections on Recent Developments Regarding Wage Garnishment in South Africa" (2018) 9 *Int J Private Law* 107, 116.
[295] See discussion of *Gordon* (1882) 9 Q.B.D. 45 above.
[296] Section 6(4) of the AEA 1971. This is the case for all causes of action except maintenance.
[297] CPR r.1.1(1).
[298] Section 6(5)(a) of the AEA 1971.
[299] Section 6(5)(b) of the AEA 1971.

the amount of money that the debtor needs to support themself and their family, and includes necessary expenses such as food, rent, mortgage, electricity and gas.[300] The PER is determined by the court and can be adjusted to protect the debtor's interests where they have experienced a substantial change in their financial position.[301] Priority is afforded to AEOs originating from maintenance orders and fines.[302] Similar orders are processed in chronological order, while later orders are postponed until earlier ones have been satisfied.[303] The court can therefore ensure that there is proportionality in terms of the percentage of the debtor's salary that is susceptible to wage deduction and can vary or suspend the AEO on its own initiative.[304] Restrictions are not only imposed on the deductible portion of a debtor's earnings but certain types of earnings and debtors are completely excluded from wage deduction via AEOs.[305]

It is submitted that the 25% limit imposed by the Magistrates' Courts Act 1944 should be reconsidered in light of its discriminatory implications. The English model of establishing an appropriate PER is preferable. The PER provides a fair standard with every case being considered on its own merits to determine whether the relevant debtor would be able to support themselves and their family after an EAO deduction.[306] This arrangement would also assist in the effort of prioritising deductions based on multiple EAOs. In addition, collection costs, legal fees, and interest should be limited in proportion to the size of the judgment debt to avoid debtor exploitation through EAO collections on insignificant amounts.

Certainty and transparency

In the context of the EAO mechanism, two important concepts are closely related to each other. These concepts, or principles,[307] are certainty and transparency. As legal requirements, these concepts are interconnected and interdependent, and adherence to these concepts is not only essential for the successful operation of the EAO mechanism, but for the rule of law in general.[308]

Although legal certainty is a generally recognised principle in the legal systems of numerous jurisdictions, there is no universally accepted definition of the concept.[309] Certainty, and specifically legal certainty, requires that parties should have clarity on their legal positions.[310] It seems obvious that a lack of uniformity and clarity regarding the laws and regulations applicable to a specific aspect would obfuscate this principle. The law should therefore not only be clear but also

[300] *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2015 5 SA 221 (WCC) at [48].
[301] Section 9(3)(b) of the AEA 1971.
[302] Paragraph 8, Pt 2, Sch.3 of the AEA 1971.
[303] Paragraph 7, Pt 2, Sch.3 of the AEA 1971.
[304] Section 9(3)(a); CPR r.89.14.
[305] Income tax, specified social security contributions, and superannuation scheme deductions are excluded from the amount of earnings susceptible to deduction through AEOs. See Sch.3, Pt 1 of the AEA 1971; HM Courts and Tribunals Service "EX323 2–3: Attachment of earnings" (2020).
[306] As provided by s.65J(6)(a)(i) of the Magistrates' Courts Act 1944.
[307] See, e.g. M. Fenwick and S. Wrbka, "The Shifting Meaning of Legal Certainty" in M. Fenwick and S. Wrbka (eds), *Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives* (Singapore: Springer, 2016), p.1, where the terms "concept" and "principle" are used interchangeably to refer to the idea of legal certainty.
[308] Fenwick and Wrbka, "The Shifting Meaning of Legal Certainty" in Fenwick and Wrbka (eds), *Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives* (2016), p.1.
[309] W. Brown, *Legal Certainty and Competition Law: Can They Be Reconciled?* (Doctorate Thesis, Stellenbosch University, 2018), p.1.
[310] Fenwick and Wrbka "The Shifting Meaning of Legal Certainty" in Fenwick and Wrbka (eds), *Legal Certainty in a Contemporary Context: Private and Criminal Law Perspectives* (2016), p.1.

reasonably stable and predictable.[311] The concept of legal certainty is crucial as it lies at the foundation of the rule of law.[312]

Like certainty, transparency is another foundational principle of sensible legal practice.[313] Ironically, there is a lack of clarity and uniformity regarding the meaning of transparency in a legal context.[314] Arguably, the principle concerns the requirement that the actions of the important role-players, conducted in accordance with the relevant conditions of a clear legislative framework, should be open and plain to other role-players whose rights are affected. Clearly, this involves concerns regarding the generation, dissemination, availability and accessibility of reliable and relevant information.[315]

Various statutes and regulations have the potential to make a substantial impact on the EAO mechanism and related process.[316] The scattering of legislative regulations pertinent to the EAO process results in an unnecessarily complicated and fragmented EAO procedural framework which lacks legal certainty.[317] Lack of transparency is another factor that encourages EAO-related abuses, as it places undue reliance on the creditor's *bona fides*, both before and after judgment.[318] Creditors have consistently proven to be unreliable in supervising EAOs, and measures are therefore necessary to monitor and evaluate their operations.[319] Creditors who ignore legal directions obfuscate the process of quantifying the initial loan, and the resulting judgment debt, and accounting for the repayments made by the debtor.[320] It is especially in South Africa's rural society, where loans are often extended in cash, that the lack of transparency is compounded by the fact that there is no digital or physical paper trail to evidence the initial transaction which eventually leads to the issuing of an EAO.[321] Debtors are often purposefully

[311] Brown, *Legal Certainty and Competition Law: Can They Be Reconciled?* (2018), p.1.

[312] As Lord Bingham explained when he delivered the 2006 Sir David Williams Lecture at the University of Cambridge, which was entitled The Rule of Law: "First, the law must be accessible and so far as possible intelligible, clear and predictable. This seems obvious: if everyone is bound by the law they must be able without undue difficulty to find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it. There is English authority to this effect, and the European Court of Human Rights has also put the point very explicitly … ." See Lord Bingham, "The Rule of Law", Sixth Sir David Williams Lecture (Centre for Public Law, University of Cambridge 16 November 2006), pp.6–7, *https://sms.cam.ac.uk/media/1174397*.

[313] C. Zoellner, "Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law" (2006) 27 Mich. J Int'l L. 580.

[314] Zoellner, "Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law" (2006) 27 Mich. J Int'l L. 580, 583, 585.

[315] A. Chayes and A. Handler, *The New Sovereignty: Compliance with International Regulatory Agreements* (London: Harvard University Press, 1995), pp.22, 135.

[316] Although the primary sources are the Magistrates' Courts Act 1944 and the Rules regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa GN R740 in GG 33487 of 23 August 2010, the Maintenance Act 99 of 1998, the Debt Collectors Act 114 of 1998, the Consumer Protection Act 68 of 2008, the Promotion of Access to Information Act 2 of 2000, and the particularly problematic National Credit Act 34 of 2005, all contain provisions that have bearing on EAOs.

[317] See, e.g. van der Merwe, "Developing a Procedural Framework for Advanced Debtor Protection: The Case of Emolument Attachment Orders" (Stellenbosch University, 2022), pp.236–240.

[318] For the importance of disclosure and transparency in credit transactions, see R. Goodwin-Groen, "The National Credit Act and its Regulations in the context of access to finance in South Africa" (Finmark Trust, 2006), pp. 19–21, *https://finmark.org.za/system/documents/files/000/000/298/original/NCA_AccesstoFinance_2006.pdf?1614582083*, where disclosure is described as the second pillar of consumer protection. Also see the abuses resulting from deficient disclosure and transparency at pp.44–45.

[319] Van der Merwe, "Traversing the South African Emolument Attachment Order Legal Landscape Post 2016: Quo Vadis?" (2019) Stell L.R. 77, 92.

[320] James, Neves and Torkelson, "Social Grants: Challenging Reckless Lending in South Africa" (BlackSash, September 2020), p.16.

[321] James, Neves and Torkelson, "Social Grants: Challenging Reckless Lending in South Africa" (BlackSash, September 2020), p.36.

kept in the dark about the amounts they owe, the interest that accrues and the collection costs and legal fees that are attributed to them.[322] Cartwright states that "[i]t is well-established that rational traders may be reluctant to give consumers information from which such consumers would benefit".[323]

The importance of transparency was emphasised early in the legislative existence of the English AEO mechanism. The CLPA 1854 required Superior Courts to keep a debt attachment book, containing detailed records of attachment proceedings.[324] Any person could apply to be furnished with copies of these records.[325] Toward the end of the twentieth century, the AEA 1971 and County Court Rules 1981 (CCR)[326] required an officer of each county court to maintain records of AEOs, specifically:

> "[A] nominal index of the debtors residing within the district of his court in respect of whom there are in force attachment of earnings orders which have been made by that court or of which the proper officer has received notice from another court".[327]

The maintenance of, and access to, these records of AEOs were, however, limited to the district of each county court, and parties were unable to gain automatic access to records from other districts, and there was no consolidated national record.[328] As discussed above, the current provisions of the AEA 1971 and the CPR have continued this tradition of judicial and state involvement in the AEO mechanism. The court can compel the debtor and their employer to furnish it with detailed statements and information related to the debtor's current and anticipated earnings.[329] The courts are also directly involved with the transfer of funds from the debtor's employer to the creditor,[330] extending transparency to the verification of the payment history and monitoring of reducing balances of AEO-collected debt.[331] Although there are, as can be expected, still areas of uncertainty with the practice of the AEO, debtors and creditors are assisted by ample directions and available assistance at courts and government websites.[332] In addition, the existence of a single statute, the AEA 1971, regulating the AEO mechanism, greatly enhances legal certainty.

Based on the example of the AEO system, it is recommended that a unifying Act containing the comprehensive body of regulations relevant to EAOs should be formulated to combat legal uncertainty. This Act should contain provisions to empower courts and parties to conveniently access records to increase transparency.

[322] James, Neves and Torkelson, "Social Grants: Challenging Reckless Lending in South Africa" (BlackSash, September 2020), p.45.
[323] P. Cartwright, "Understanding and Protecting Vulnerable Financial Consumers" (2015) 38 *Journal of Consumer Policy* 122.
[324] Section 66 of the CLPA 1854.
[325] Section 66 of the CLPA 1854.
[326] 1981 No.1687 (L 20). Part 27 of the CCR was replaced by Pt 89 of the CPR on 6 April 2016, *https://www.lexisnexis.co.uk/legal/guidance/attachment-of-earnings-orders-challenge-variation-discharge*.
[327] Rule 27.2 of the CCR. See now CPR Pt 5 and CPR r.89.2.
[328] Coetzee and van Sittert, "Reflections on Recent Developments Regarding Wage Garnishment in South Africa" (2018) 9 *Int J Private Law* 107, 118.
[329] CPR r.89.6; s.14 of the AEA 1971.
[330] Section 6(1)(b) of the AEA 1971.
[331] Government of the United Kingdom "Make Debt Deductions from An Employee's Pay" (undated).
[332] See, e.g. HM Courts and Tribunals Service, "EX323 2–3: Attachment of Earnings" (2020).

Remedies and sanctions

In South Africa's traditionally adversarial, court-driven civil process, the public has had to rely on legal practitioners and the courts to manage their cases.[333] Currently, the courts perform a limited administrative role in the EAO mechanism.[334] There is no court official dedicated to assisting debtors to query EAOs, and the clerks of the Magistrates' Courts have often proven to be unreliable in performing their existing tasks.[335] Creditors can certainly not be relied on to come to debtors' aid and employers, in general, are still unlikely to involve themselves in their employees' bad debt concerns. Exploited and vulnerable EAO debtors, who are unlikely to be able to afford legal representation, are therefore left to their own devices to combat EAO abuse. There is also little hope of discouraging unscrupulous creditors and their legal practitioners from persisting with their abusive EAO practices while organisations like the Legal Practice Council fails to bring offending legal practitioners to task.[336] These creditors will keep exploiting debtors while there is little risk of any substantial penalty for any abuse of the vulnerable position of debtors.

As a result of the active role of the courts,[337] there is considerably less scope for debtor exploitation resulting from the implementation of the English AEO mechanism as compared to EAOs. In recent decades, the English court system has been intentional about making civil justice more accessible and affordable to the public.[338] Court officers ensure that wage deductions are affordable and engage with applications for the variation of deductible amounts.[339] Courts keep records of payments[340] and will move to vary or rescind AEOs of their own initiative.[341] The courts will inform employers when AEOs are discharged to cease deductions.[342] Employers are also much more involved in the process and are, inter alia, charged with determining the debtor's attachable earnings.[343] Despite these admirable interventions, the English AEO system is not without its challenges. These challenges are more concerned with the availability of debtor information and the

[333] Theophilopoulos, van Heerden, Boraine and Rowan, *Fundamental Principles of Civil Procedure* (2020), p.7.

[334] Other than the judicial oversight required for its issuing, there are no arrangements for mandatory administration of EAOs by court officials.

[335] See, e.g. van der Merwe, "Developing a Procedural Framework for Advanced Debtor Protection: The Case of Emolument Attachment Orders" (Stellenbosch University, 2022), pp.63–66.

[336] The Legal Practice Council (LPC) is the South African statutory body established in terms of s.4 of the Legal Practice Act 28 of 2014 to regulate the affairs of and exercise jurisdiction over all legal practitioners. See van der Merwe, "Developing a Procedural Framework for Advanced Debtor Protection: The Case of Emolument Attachment Orders" (Stellenbosch University, 2022), pp.96–98 regarding the LPC's failure to properly prosecute Flemix and Associates per the order of Desai J in *University of Stellenbosch Legal Aid Clinic v Minister of Justice*. Also see *Legal Practice Council v Van Wyk* (3920/2013) [2021] ZAWCHC 223 (4 November 2021) at [3] where Sher J castigates "the regulatory bodies responsible for the control and governance of the profession [for their failure] to properly carry out their duties".

[337] As discussed above. The court's commitment to active case management is emphasised by CPR r.1.4(1). An example of the extent of the court's role is that notice of an AEO application must be served on the debtor by the court under CPR r.89.5. The court shares some of its responsibilities with the CAPS office.

[338] Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354, 366.

[339] HM Courts and Tribunals Service "EX323 2N3: Attachment of earnings" (2020); Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364, 380.

[340] Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364, 365; HM Courts and Tribunals Service "EX323 2–3: Attachment of earnings" (2020).

[341] Section 9(3)(a) and 10 of the AEA 1971; CPR r.89.14.

[342] HM Courts and Tribunals Service, "Attachment Orders: A Guide for Employers" (July 2008), p.11, *https://www.rbkc.gov.uk/pdf/aoehandbook-eng.pdf*.

[343] Schedule 3, Pt I, para.5 of the AEA 1971.

enforceability of AEOs, especially when debtors change employment.[344] From a debtor's perspective, the main concerns are the disruption to employment and the long-term servitude the system establishes, perhaps resulting from the mechanism's focus on debtor affordability.[345] As a result, claims for debtor repayments and calls for creditor sanctions appear to be alien to the contemporary AEO landscape.[346]

While ensuring every EAO debtor has access to legal aid would be preferable, it is not a reasonable expectation. It is therefore necessary to ensure courts are more accessible and to re-evaluate the roles of courts and court officials within the EAO landscape. As is the case in England, unrepresented debtors, as well as employers and creditors, should be able to approach a suitably qualified, objective court official during any stage of the EAO process. This official should be able to advise on, and also action, aspects such as the discharge and amendment of EAOs. In addition, more emphasis should be placed on creditor sanctions. It is argued that creditors will be less inclined to exploit debtors if they are convinced of the real threat of facing severe sanctions.[347] These sanctions should be substantial, appropriate, and proportional to the extent of the exploitation.[348] These penalties should be enacted in legislation and enforced by objective authorities, not by the professional bodies to which these creditors pay membership fees.

Conclusion

Similar to their South African counterpart, the English AEO has been criticised for its propensity to facilitate debtor discrimination and human rights abuses. It has been argued that the AEO mechanism unfairly discriminates between regular wage earners and self-employed, unemployed and casual workers.[349] As is the case with the South African EAO mechanism, the English AEO is also faced with the challenge of striving for a fair and balanced approach between the interests of creditors and debtors.[350] These mechanisms need to be attuned to the need to balance the interests of creditors, in being empowered to collect their judgments, and the often competing rights of debtors, to be protected against exploitative collection processes.[351] Creditors are vulnerable to the wiles of deceitful debtors who manipulate the system to source credit while they avoid honouring their debts.[352]

[344] Baldwin and Cunnington, "The Abandonment of Civil Enforcement Reform" (2010) 29 C.J.Q. 159, 171–173.

[345] Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364, 367, 369.

[346] It is telling that s.23 of the AEA 1971, the enforcement section, only implicates the debtor and employer in conduct that may be deemed as offences punishable by fine or imprisonment. No mention is made of the creditor in this section.

[347] Possibly akin to National Credit Act 2005 sanctions imposed on creditors due to the granting of reckless credit. See Pt D of the National Credit Act 2005 for regulations concerning over-indebtedness and reckless credit.

[348] In contrast to the slap on the wrist received by Flemix and Associates in the LPC disciplinary hearing.

[349] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 55, 57.

[350] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 326, 328; Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354, 363; Wood, "Wage Garnishment Under the Consumer Credit Protection Act: An Examination of the Effects on Existing State Law" (1970) 12 Wm & Mary L. Rev. 357, 359, 361; C. Ondersma, "A Human Rights Framework for Debt Relief" (2015) 36 *University of Pennsylvania Journal of International Law* 343.

[351] Wood, "Wage Garnishment Under the Consumer Credit Protection Act: An Examination of the Effects on Existing State Law" (1970) 12 Wm & Mary L. Rev. 357, 361; Wilson, Ford and Hughes, "Recovering Debt: The Effectiveness of Attachment of Earnings?" (1992) 11 C.J.Q. 364, 369.

[352] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 311.

Studies have confirmed that effective debt collection remains a serious concern.[353] Wage garnishment is an important and popular collection method to force debtors to meet their obligations,[354] and creditors rely on it to satisfy their claims.[355] Low judgment enforcement rates are however also apparent in especially the English AEO mechanism.[356] This causes negative creditor attitudes and a lack of confidence in the system.[357] The right and ability to enforce a judgment is integral to the right to a fair trial.[358] Frustrating or delaying the efficacy of this right therefore infringes on creditors' human rights. Creditors should, however, shoulder some of the responsibility for their frustrations as the practice of extending reckless credit against the security of wage garnishment, still flourishes.[359] Although creditors therefore also have grounds to complain, it is undoubtedly debtors who are most disadvantaged by the problems with the current EAO system. It is not only the obvious abuse of using EAOs to recover more than is owed that is problematic. The delaying effect of the failure to discharge EAOs that are abused to collect disproportionate amounts from debtors extends debtor indebtedness and prolongs the duration of the existence of the judgment against them.

In light of the importance of wage garnishment as a civil debt collection method, the above analysis is useful in demonstrating that the English system has, over the course of many years, been confronted with similar challenges as those experienced by the wage garnishment mechanism of South Africa. The analysis has indicated that the AEO mechanism offers possible solutions to many of the EAO's weaknesses. Measures should be taken to heed this advice in order to further develop and refine the contemporary EAO mechanism.

Anonymous Peer Review

Editor's Note: This article was reviewed under the CJQ's new peer review pilot in which reviewers are advised that, if accepted for publication, their anonymous review will be published alongside the article. Please note this review relates to an earlier version of the article, which the author/s subsequently revised including to take account of the reviewer's comments. Comments in the review identifying typographical errors have been removed.

[353] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 307–308, 317, 319; Baldwin, "The Enforcement of Judgments in Undefended Claims in the Civil Courts in England and Wales" (2004) 23 C.J.Q. 354, 355.

[354] Wood, "Attachment of Wages" (1963) 26 *Modern Law Review* 51, 56.

[355] S. Willborn, "Wage Garnishment: Efficiency, Fairness, and the Uniform Act" (2019) 49 Seton Hall L. Rev. 848; Wood, "Wage Garnishment Under the Consumer Credit Protection Act: An Examination of the Effects on Existing State Law" (1970) 12 Wm & Mary L. Rev. 357, 358.

[356] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 322.

[357] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 320.

[358] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 305–307, 309, 318.

[359] Baldwin and Cunnington, "The Crisis in Enforcement of Civil Judgments in England and Wales" (2004) *Public Law* 305, 326; Wood, "Wage Garnishment Under the Consumer Credit Protection Act: An Examination of the Effects on Existing State Law" (1970) 12 Wm & Mary L. Rev. 357, 362.

Review

Respect for the civil justice system demands that there has to be an effective, swift and uncomplicated set of procedures for enforcing judgments if they are not complied with. A mature civil justice system will recognise that it is also necessary to ensure that enforcement procedures are not used oppressively against judgment debtors. This article is a welcome analysis of the procedures available in South Africa and England and Wales for enforcement of money judgments by attachment of the judgment debtor's wages or salary, motivated by concern over the dangers of abuse by creditors where the exercise of the procedures is not effectively monitored by the courts.

The early form of the procedure in 19th century England was a development of the older procedure for the attachment of debts through garnishee proceedings. It was soon realised that attaching the whole of an employee's wages was going too far, and legislative protection was enacted through the Wages Attachment Abolition Act 1870. This seriously limited the scope of attachment against wages, which was a problem because the alternatives (at that time principally imprisonment and execution against goods) were either too draconian or not often likely to result in payment of the judgment debt.

While no system is perfect, the modern attachment of earnings order in England and Wales as provided for by the Attachment of Earnings Act 1971 achieves a good balance between the interests of creditors and debtors. It provides an effective method of enforcement against a reluctant judgment debtor who is employed, while protecting the judgment debtor and their family by requiring the court to consider the financial circumstances of the individual judgment debtor, and specifying a protected earnings rate which must not be used to pay the periodic deductions laid down by the normal deduction rate. The article argues that court involvement along these lines, together with courts providing information to judgment debtors on the state of their account and notifying them when they have discharged their debts, would provide a useful basis for law reform in South Africa.

It may well be that a hidden message in the article is that better regulation of emolument attachment orders, the equivalent procedure in South Africa, would not only address some of the excesses identified in the article, but might also reduce the enthusiasm of lenders in South Africa whose business models probably rely on the overly creditor-friendly procedures in South Africa as an encouragement to reckless lending. As the author says, while the availability of credit is often hailed as a good thing, debt accompanies credit, and the heavy burden of debt as described in the article is a problem that needs to be addressed.

The article is a strong piece, and I would recommend that it is published in CJQ. The author has taken on board all the points I made previously.