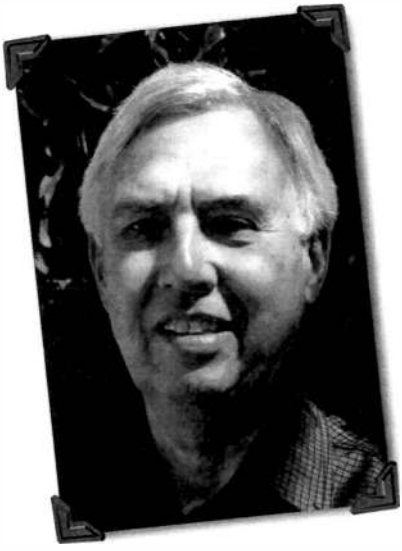

Essays in honour of
Huldigingsbundel vir
CR Snyman

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Redakteursvoorwoord ▪ Editor's preface

Afgesien van enkele persoonlike bydraes oor Kallie Snyman die mens, ampsgenoot en vriend, word daar in hierdie publikasie 'n aantal vakbydraes byeengebring wat spesifiek geskryf is vir die huldigingsbundel vir Professor CR Snyman, uitnemende strafregjuris en gewaardeerde kollega in die Department Straf- en Prosesreg van die Universiteit van Suid-Afrika oor 'n tydperk van drie dekades. Tans 'n professor *emeritus* van hierdie departement, is Professor Snyman ook 'n Navorsingsgenoot van die departement en lewer hy steeds 'n beduidende bydrae tot die *corpus* navorsing van departementslede.

Die aanvoorwerk vir hierdie bundel is gedoen deur die redaksionele komitee: Professore Louise Jordaan, Sunette Lötter en Stephan Terblanche van die Departement Straf- en Prosesreg. Ek bedank hulle graag vir hul samewerking.

Thanks are due to Professor Danny Titus, former Acting Executive Dean of the College of Law and to the Publications Committee of Unisa for the means of financing the publication of these essays (and the presentation function).

The publication effort was considerably eased by the valued assistance of Ms Mariki Rudolph of the Institute of Foreign and Comparative Law of this university and Ms Hetta Pieterse of Unisa Press. Furthermore, I should like to thank Ms Alexa Barnby, Ms Jane Smith and Ms Marianne Visser of the Directorate: Language Services for their assistance in the English and Afrikaans language editing of the various contributions, and Mr Oswald Davies for his assistance in the language editing of the article in German.

A special word of thanks to all those (colleagues and others, nationally and internationally) who have collaborated with Professor Snyman during his career and made contributions to this publication – the fruits of which will be a lasting tribute to Kallie Snyman.

JJ Joubert
Editor
Head: Department of Criminal and Procedural Law

July 2007

Preface

Rita Maré[*]

Professor Kallie Snyman is without doubt *the* most prominent scholar in Criminal Law who has ever been attached to Unisa. His contribution to the debate around contentious issues in criminal law and ultimately on the development of criminal law theory and criminal law practice in South Africa is immeasurable.

Professor Snyman's publications are indeed impressive. The Afrikaans edition of his textbook *Strafreg/Criminal Law* saw its fifth edition in 2006. This major work is supplemented by two books namely *Misdade betreffende afhanklikheidsvormende misdade* (1974) and *A draft criminal code* (1995) as well as numerous chapters in books and more than forty articles in accredited journals. Assessing Professor Snyman's impact on South African law on the basis of these numerous publications and contributions is such an immense task that it may in itself be the subject of a thesis in years to come!

I am convinced that Professor Snyman himself would regard his work on the normative theory of culpability as one of his major contributions to the development of criminal law in South African law. Based on German legal theory, the normative theory of culpability regards culpability as an evaluation of the offender's intention or will. According to this theory an offender whose unlawful conduct and state of mind comply with all the elements of a crime can, in the words of Professor Snyman in *Criminal law* (4ed 2002) at 153, only be blamed if he acted 'in circumstances under which the law could fairly have expected him to act differently, namely to refrain from proceeding with his unlawful act'. The application of this theory of culpability offers a basis for finding an accused who intentionally killed another under coercion not guilty without recognising such coercion as a ground of justification excluding the unlawfulness of the act. Professor Snyman also pointed out that the application of the normative theory of punishment would also limit the defence of mistake of law, recognised in *S v De Blom* 1977 3 513 (A), in that only unavoidable or unreasonable mistakes of law would be a defence.

The normative theory of culpability received some recognition in cases such as *S v Goliath* 1972 3 SA 1 (A), *S v Bailey* 1982 3 SA 772 (A) and *S v Mandela* 2001 1 SACR 156 (C) and sparked a lively debate in academic circles. (See for example Van Oosten 1995 THTHR 361 and 568.)

[*]Vice Principal: Academic and Research, University of South Africa.

One of Professor Snyman's first contributions to criminal law in South Africa is probably his doctoral thesis on theft in South Africa, accepted in the early 1970s by the then University of the Orange Free State. In this thesis he argued that the act of theft should be defined as an act of appropriation and not as a *contrectatio*, a term favoured by the courts at that stage. He correctly pointed out that the term *contrectatio* originally referred to a handling or touching of the object of theft, and that this view of the act of theft was inappropriate in a modern economy. His excellent exposition and explanation of an act of appropriation, namely an act which deprives the lawful owner or possessor of his property and whereby the thief himself exercises the rights of an owner in respect of the property, paved the way for the courts in a number of cases to accept that the act of theft is more than a mere handling of an item and provided a sound basis to distinguish between a completed theft and an attempted theft. His systematic analysis of the crime of theft, as is evident in his textbook *Strafreg/Criminal Law* went a long way toward demystifying and clarifying this complex crime for students, researchers and legal practitioners.

Other areas of note to which Professor Snyman made important contributions are the structure of criminal liability with the introduction of the concept of the definitional elements of a crime; the principle of legality with the introduction of the five Latin phrases of *ius acceptum, ius certum, ius praevium, ius strictum* and *nulla poena* to explain this theoretical concept; the law relating to *aberratio ictus* with the criticism against the so-called 'doctrine of transferred intent'; causation in law with the promotion of the causal theory of causation; the law relating to criminal liability for omissions, private defence, putative crimes, mistake and participation as well as the law relating to the crimes of contempt of court, incitement and assault.

An excellent feature of the later editions of *Strafreg/Criminal Law* is the detailed incorporation and discussion of the impact of the Bill of Rights and the Constitution on substantive criminal law. Noteworthy aspects are the impact of the Bill of Rights on the principle of legality and crimes with vague definitions.

Though Professor Snyman followed a theoretical, dogmatic and scientific approach to criminal law, he also firmly believed that criminal law should serve and protect society. He openly propagated a deviation from the dogmatic approach in instances where he believed that dogmatism would not serve the interests of society. He was critical of the recognition of the defence of mistake in law in *S v De Blom, supra,* the recognition of voluntary intoxication as a complete defence in *S v Chretien* 1981 1 SA 1097 (A) and the recognition of the defence of non-pathological criminal incapacity in *S v Campher* 1987 1 SA 940 (A) and *S v Wiid* 1990 1 SACR 561 (A). Professor Snyman thus welcomed the creation of the offence of 'statutory intoxication' in the Criminal Law Amendment Act 1 of 1988 and the erosion of the defence of non-pathological

intoxication in *S v Eadie* 2002 1 SACR 663 (SCA). Professor Snyman is also one of a few legal academics who propagates the reinstatement of the death penalty. In *Criminal Law* 4ed 29 he states that the judgment in *S v Makwanyane* 1995 3 SA 391 (CC); 1995 2 SACR 1 (CC), in which the death sentence was abolished as unconstitutional, had been catastrophic for the country. He believes that the high murder rate in the country justifies an amendment to the Constitution to reinstate the death penalty, which he believes will go a long way toward protecting society against violent crimes.

Professor Snyman's research and scholarly work is of such a high quality that it is no wonder that he was honoured by the FAK for the Afrikaans edition of *Strafreg* and received the Chancellor's Prize from Unisa as the best senior researcher.

Like the true scholar and academic he is, Professor Snyman never required his colleagues to agree with him on his views on criminal law or any other issue for that matter. As a colleague he was always willing and prepared to listen to opposing views and to debate issues. I fondly remember many discussions and debates in the tearoom on issues such as accomplice liability for murder, the doctrine of common purpose, causation and the normative theory of culpability.

Professor Snyman's enthusiasm for the discipline of criminal law is clearly reflected in his tuition of the subject at Unisa. He was course leader of undergraduate and postgraduate modules on criminal law. The management and quality of all these modules were excellent. The slogan 'students come first', coined by Unisa in 2006 as part of the drive to improve service delivery in the institution, was in effect practised by Professor Kallie Snyman for many years. Students and their academic needs were important to Kallie, and he was always prepared to walk the extra mile to ensure that students understood the intricacies of criminal law. When, in the early 1990s, Unisa introduced the team approach to the development of study material, involving educationalists, curriculum designers, graphic designers and editors, many academics refused or were reluctant to adopt this approach, fearing that 'outsiders' would prescribe to them what their study material should contain. Kallie, however, volunteered his criminal law course as the pilot project for the Department of Criminal and Procedural Law. The first experience of converting what was essentially a text book into open distance learning study material could not have been an easy process. I can still recall the numerous meetings Kallie and his team had and the endless discussions on how the material should be designed. Even Kallie was despondent at times. However, the study package created during that process – as refined in similar processes later – is in my view one of the best study packages at Unisa. As Head of the Department of Criminal and Procedural Law and as Executive Dean of the College of Law, I had very positive feedback from students on the criminal law modules. When Unisa applied for accreditation

from the DETC (Distance Education and Training Council of the USA) during the time I was Head of the Department, I submitted the criminal law guides for evaluation to the inspectors. Although they were quite critical of some other study packages submitted to them, they were extremely positive and complimentary about the criminal law guides.

Professor Snyman played an important mentorship role in the Department of Criminal and Procedural Law. During my first years at Unisa he would often walk into my office with a Law Report in his hand, telling me that he had just read this very interesting case and suggesting that I write a case discussion, at the same time offering to read and comment on the discussion when concluded. That was how some of my first publications saw the light of day.

A number of academics had the privilege of having their academic careers shaped under the guidance of Professor Snyman as members of his criminal law team. I think especially of Dr Tertius Geldenhuys (now with SAPS), Mr Abel Ramolotja, Mr Loutjie Coetzee and what Kallie used to call 'die meisies' (the girls), namely Professor Sunette Lötter, Professor Louise Jordaan and Professor Karin Alheit. I am convinced that 'the girls' formed the backbone of the criminal law team. Whenever there was a specially daunting, difficult or urgent task to be performed, Kallie, on a number of occasions, was heard to say that 'the girls' would complete the task in no time.

I have referred to the role Professor Snyman played at Unisa as a scholar, researcher, law teacher and mentor. Kallie Snyman is much more than that. He is a friend to all his colleagues, a true and refined gentleman, a connoisseur of music, art and films, a musician in his own right and with his wife Fernanda at his side, the perfect host. Who will forget the wonderful piano duet Kallie and Fernanda played on one occasion when they entertained the criminal law team at their home?

Professor Johan Joubert and the colleagues of the Department of Criminal and Procedural Law should be commended for their initiative in honouring Prof Kallie Snyman with this publication.

Carel Rainier Snyman, juris, akademikus, mens: 'n woord van waardering

SA Strauss[*]

Summary

This is a brief word of appreciation of the work of Professor CR ('Kallie') Snyman, professor *emeritus* of law of the University of South Africa, contributed by SA Strauss, a former colleague and friend of Professor Snyman, and of his wife, Mrs Fernanda Snyman.

Mention is made of how Snyman and Strauss first became acquainted when the former was lecturer in Criminal Law at Rand Afrikaans University in Johannesburg and the latter rendered services there as second examiner. In 1975 Snyman joined the Department of Criminal and Procedural law of which Strauss was the head. Soon Snyman started specialising in Criminal Law. He published a substantial number of articles in legal journals and became an outspoken protagonist of the codification of South African criminal law. In 1995 he published a draft criminal code for South Africa.

His *magnum opus* was a substantial handbook on criminal law which was first published in 1981 in Afrikaans. Soon thereafter an updated English version of the book appeared. The fifth edition of the Afrikaans version was published in 2006 and the fourth edition of the English version in 2002. The book has become a leading work in this field in South Africa, both as textbook in law schools and as handbook in the criminal courts. A special feature of the work is the extent to which it reflects contemporary juristic thought in Continental jurisdictions as well as Common Law jurisdictions. It also contains many references to Roman-Dutch legal sources that form the basis of South African common law.

Special tribute is paid to Mrs Fernanda Snyman, who has worked for many years in the Language Services Department at Unisa, specialising in legal terminology and editorial style.

Dit is vir my werklik 'n eer en 'n voorreg om 'n kort woord van waardering tot die inhoud van hierdie bundel by te dra.

[*]Professor *emeritus* in regte en voormalige hoof (1960–1979), Departement Straf- en Prosesreg, Universiteit van Suid-Afrika.

Ek het Kallie Snyman, soos hy algemeen bekend is, leer ken kort nadat hy aangestel is as senior lektor aan die Randse Afrikaanse Universiteit (RAU), onlangs herdoop tot die Universiteit van Johannesburg.

Die RAU het teen die middel van die jare 60 van die vorige eeu tot stand gekom as 'n doelbewuste kultureel-politieke daad van die destydse sterk regering van die Nasionale Party. Die Universiteit se eerste – en hoogs bekwame, doelgerigte en dinamiese – rektor was professor Gerrit Viljoen, vroeër professor in klassieke tale aan die Universiteit van Suid-Afrika, en 'n man wat onder sy vele kwalifikasies ook nog die graad LLB agter sy naam kon skryf.

RAU se begindae was beskeie. Die Universiteit, befonds deur sowel die staat as die private sektor, het die taamlik gehawende gebouekompleks van 'n groot bierbrouery wat na 'n ander, groter en hoogs moderne fabriekskompleks verhuis het, oorgeneem en betrek.

Rektor Viljoen se eerste groot taak was om akademiese en administratiewe personeel te werf om die universiteit te beman. Daar is op 'n groot skaal visgevang in die akademiese waters van Unisa, wat self toe in 'n ongeëwenaarde groeifase was. Professor Willem Joubert, destyds dekaan van ons regsfakulteit, moes met 'n seer hart afskeid neem van bekwame jong dosente soos Johannes van der Walt, Schalk van der Merwe, Giel Reynecke, George Barrie en andere.

In sy begindae kon die RAU egter nie die mas opkom met sy eie, pasaangestelde personeel nie, maar moes ook nog tydelik en ad hoc die dienste aankoop van personeel van ander Afrikaanssprekende dosente verbonde aan Unisa, die Universiteit van Pretoria en die Potchefstroomse Universiteit vir Christelike Hoër Onderwys. RAU het voortgegaan om vaste personeel elders te werf, en so het dit dan gekom dat CR Snyman, advokaat in Bloemfontein, in 1970 gewerf is. Spoedig ná sy aankoms by RAU, waarvan die studentetal gou begin groei het ná sy totstandkoming, is Snyman betrek as dosent in Strafreg. Deel van die take waarmee ek destyds by RAU versoek is om te help, was om as eksterne eksaminator te dien, in besonder by die afneem van mondelinge eksamens. So het dit toe gekom dat ek as taamlike senior van Kallie saam met hom by eksamens moes sit.

Nou moet ek eers hier afwyk van my verhaal en sê dat ek op 'n vroeë leeftyd reeds ontdek het dat benewens talle moontlike klassifikasies, mense in twee groepe verdeel kan word: dié mense – en hulle is 'n oorweldigende meerderheid – wat eers praat en dan dink, en diegene wat eers dink en dan praat. Ek het Kallie Snyman kategories by laasgenoemde groep ingedeel. Laat my ook verder sê dat die hoë presteerders oorweldigend uit laasgenoemde groep kom.

Teen die tyd dat ek Snyman leer ken het, was ek reeds meer as 20 jaar met die reg en regswese doenig sedert ek in 1949 in die regte begin studeer het. Dit was vir my spoedig duidelik dat hierdie stil jongman sy loopbaan ernstig bedryf het en groot potensiaal aan die dag gelê het. Met alle eerbied gesê, het ek begin wonder of sy kollegas aan die RAU hom regtig na waarde skat. Moontlik was 'n faktor die feit dat hy oënskynlik nie sy doktorale studie kon afhandel nie. Ek sê 'oënskynlik', want hy het my op 'n stadium vertroulik meegedeel dat sy promotor – 'n vooraanstaande Vrystaatse juris, nou reeds lankal oorlede – helaas vanweë stadspolitieke bedrywighede gladnie by sy konsepverhandeling kon uitkom nie! Hoe dit ook al sy, en ek sny 'n lang storie kort, na aanleiding van gesprekke tussen hom en my het hy in 1974 nog as senior lektor by Unisa aansoek gedoen om 'n vakante betrekking en 'n aanbod ontvang vir aanstelling in die departement waarvan ek destyds hoof was. In 1973 is sy doktorale verhandeling uiteindelik gefinaliseer en in 1975 het hy professor in Straf- en Prosesreg geword.

Ek kies my woorde nou baie versigtig in die stelling wat volg: ek was vir 20 jaar lank hoof van die departement – 1960 tot 1979 – en was sedertdien nog betrokke as lid van keurkomitees vir baie jare. In al daardie jare het ons in daardie departement geen beter aanstelling gemaak of geen verdiensteliker kandidaat tot professor bevorder as CR Snyman nie. Dit was ook gou duidelik dat die opset by Unisa hom soos 'n handskoen gepas het. Hy kon die primêre taak van 'n dosent verrig, maar kon hom ook deurlopend laat geld by wyse van navorsing en skryfwerk.

Die dae van publiseer om geldelike toelaes vir jou departement te verdien het toe nog nie aangebreek nie. Dit was grootliks 'n geval van soos Goethe dit gestel het in 'n beroemde gedig: '*Ich singe wie ein Vogel der in den Zweigen wohnet. Das Lied das mir aus der Kehle dringt, ist Lohn der reichlich lohnet.*' Snyman se publikasies, sy dit omvangryke artikels, vonnisbesprekings, korter aantekeninge of boeke, was deur die bank van hoë gehalte. Boweal getuig sy werke van deeglike navorsing, indringende denke en die hoogste gehalte. Sy betoog vir die kodifikasie van die strafreg in Suid-Afrika is besonder oortuigend en sy *Draft Criminal Code for South Africa* (1995) is 'n 'moet lees'.

Sonder twyfel is sy *magnum opus* sy handboek oor *Strafreg* wat in 1981 die lig gesien het en herhaaldelik in hersiene weergawes gepubliseer is; die jongste is die vyfde uitgawe van 2006. Hy het die boek in Engels vertaal en die vertaling het het reeds vier uitgawes beleef, die jongste in 2002. Die strafreg was in 1981 reeds 'n deeglik beskrewe deel van ons reg. In 1917 het Gardiner en Lansdown se *South African criminal law and procedure* die lig gesien. Die werk het vir dekades die toneel oorheers. Teen die tyd dat die sesde (en laaste) uitgawe van hierdie steeds groter wordende werk in 1957 die lig gesien het – in twee bande wat *in toto* 2 029 bladsye beslaan het – sou geen regspraktisyn dit in 'n strafhof

gewaag het sonder dié werk nie. Die werk het egter vanaf sy eerste verskyning sterk aangeknoop by die Engelse reg en was bowendien grootliks 'n kompilasie van wettereg en gewysdes.

Intussen, in 1949, het professore JC de Wet en HL Swanepoel se *Strafreg* – een van die eerste regshandboeke in Afrikaans – verskyn. Dit was die eerste regswetenskaplike werk oor die strafreg in Suid-Afrika. Die skrywers het die Romeins-Hollandse reg deeglik erkenning gegee. Boonop het veral Prof JC sterk aangeknoop by die hoogstaande Duitse strafregwetenskap. Daarby het hy op sy kenmerkende satiriese wyse talle regters, van Lord de Villiers tot regters wat in 1949 nog op die regbank gesit het, skerp gekritiseer. Prof JC se studente op Stellenbosch het hom aanbid en sy *Kontraktereg en handelsreg* (met medeskrywer James Yeats) sowel as sy *Strafreg* feitlik uit hul koppe geleer. Regspraktisyns en regters wou aanvanklik weinig van dié twee werke weet, maar die skrywers se goed gedokumenteerde kritiek het mettertyd deeglik inslag by die howe gevind.

Toe die eerste band van 'n sogenaamde heruitgawe van Gardiner en Lansdown, met outeurs van die eerste band professor EM (Exton) Burchell en twee medeskrywers, in 1970 die lig sien, was dit inderdaad 'n splinternuwe werk wat weinig van die kompilatoriese kenmerke van die ou werk vertoon het en sterk aangeknoop het by meer moderne gedagterigtings soos vervat in De Wet en Swanepoel en die tydskrifartikels van 'n moderne geslag regskrywers. Teen die einde van die 20ste eeu is die strafreg te lande oorheers deur twee werke: dié van Snyman en die derde uitgawe (ten dele) van Burchell en Hunt (laasgenoemde 'n medeskrywer van dié 1970-reeks). Intussen het 'n meer akademies gerigte, enkelbandige boek *Principles of criminal law* deur JM (Jonathan, seun van Exton) Burchell en Milton ook nog in die vroeë 1990s verskyn, met 'n tweede uitgawe in 1997. Voorts moet melding gemaak word van die derde uitgawe van De Wet en Swanepoel in 1975, deur Prof JC – nou reeds professor *emeritus*, en alleenskrywer van dié uitgawe omdat prof Swanepoel intussen oorlede is. Helaas het die derde uitgawe van hierdie gewilde baanbrekerswerk nie goeie resensies in die regstydskrifte ontvang nie, en in die strafregspleging op die agtergrond getree.

Vanweë die geweldige omvang van die strafreg-wetgewing, regspraak en juristestandpunte oor haas alle fasette, verg dit groot dissipline van handboekskrywers om hul werke binne redelike perke te hou: om te veralgemeen, onder 750 bladsye. Daar is deesdae nog die faktor van ellelange betoë oor menseregte wat in besonder sedert ons nuwe grondwet feitlik mode geword het. Die reg betreffende menseregte – *human rights law* – het vir sommige juriste en pseudo-juriste feitlik 'n nuwe soort godsdiens geword. Standpunte word deur sommige skrywers verkondig wat weinig verband hou met die werklikheid en die eise van 'n veilige, ordelike samelewing. Teen die

tyd dat die regte van wrede, genadelose misdadigers groter aandag geniet as die belange van 'n ordelike samelewing, behoort rooi waarskuwingsligte te flikker.

Snyman gee in sy werk erkenning aan ons grondwetlike Handves, maar op 'n gebalanseerde wyse. Vandag, aan die begin van die 21ste eeu, staan sy boek oor strafreg op die voorgrond as 'n werk van die hoogste gehalte, beskikbaar in twee landstale, en bowendien as die grootste Suid-Afrikaanse stuk werk op dié gebied as geheel wat tot dusver uit die pen van 'n enkele juris gevloei het. Die boek is nie slegs aanvaar as 'n ideale handboek vir studente nie, maar as ware *vade mecum* vir sowel regspraktisyn as regterlike beampte. 'n Groot verdienste van sy werk is dat terwyl De Wet se pionierswerk die begin verteenwoordig van erkenning te lande aan Duitse strafregswetenskaplike denke van die vroeë 20ste eeu, Snyman se werk algehele vernuwing gebring het deur ons strafregdenke in lyn te bring met die jonger Vastelandse regswetenskap. Dit het vanselfsprekend nie net 'n teoretiese of sisteembouende uitwerking nie, maar bring ook vernuwende praktiese resultate. Snyman het ook geput uit moderne Engelse, Skotse en Amerikaanse regsdenke. Dit was 'n uitdaging om uit 'n oewerlose oseaan betekenisvolle en tersaaklike sienings na Suid-Afrika te bring.

Snyman se werk is nie net vanuit sy Unisa-kantoor en sy studeerkamer gelewer nie. Hy het talle besoeke aan oorsese universiteite en navorsingsinstitute gebring. Dit was veral in Duitsland waar hy navorsing gedoen het, maar hy het ook akademies gaan put uit kennisbronne in Skotland en die VSA.

En nou het ek nog nie eers gekom by Kallie Snyman as kollega en vriend nie! Ek volstaan daarmee om te sê dat dit moeilik is om veel name te noem van mense op wie 'n mens so kan staatmaak as hardwerkende en betroubare kollega – en as lojale vriend – as Kallie. Wel het ons deur die jare nie mekaar se drumpels deurgetrap nie – ons was albei baie bedrywige mense – maar die stewige band van vriendskap was altyd daar. 'n Karaktereienskap van Kallie Snyman is dat hy stil van aard is en jy nooit 'n woord van kwaadwilligheid teenoor kollegas en prominente mense in die samelewing uit sy mond sal hoor nie. Ten spyte van sy steeds groeiende status as akademikus was daar nooit enige sweem van verwaandheid of grootdoenerigheid by hom nie. Hierdie swygsame akademiese reus het rustig sy gang gegaan, vriendelik en korrek teenoor almal met wie sy pad gekruis het.

En dan het ons nog nie eens by die belangrikste persoon gekom nie! Sy is mevrou Fernanda Snyman. Min het ons geweet, toe Kallie in 1975 by ons departement te Unisa aansluit, welke juweel hom vergesél het. Spoedig het ons haar leer ken as 'n staatmaker tuisteskepper, uitnemende gasvrou, talentvolle musikus – nes Kallie – maar bowenal 'n taalkundige wat deur die jare heen ontsaglik veel waarde sou toevoeg tot Unisa-studiemateriaal wat die kern van onderrig by dié universiteit uitmaak. Ek weet dat sy haar laat geld het vanaf dag

een. Haar taalvaardigheid met Afrikaans sowel as Engels, haar arbeidsaamheid, haar hulpvaardigheid, haar wye kennis, haar perfeksionisme ... waar hou ek op? As jy hierdie woorde lees, Fernanda, moet jy weet dat dit diep uit die hart kom van 'n man wat 'n groot ereskuld teenoor jou het vir wat jy vir hom oor baie jare heen beteken het. Self gesteld op goeie taalgebruik en 'n soort amateurtaalkundige, was daar baie dae dat ek met 'n eie geskrif of dié van 'n kollega voor my gesit het en dan in my binneste die kreet van die Psalmdigter geopper het: Heer, waar dan heen? Dan het ek maar die draad na jou geslaan – soms selfs teësinnig, maar in wanhoop, na jou woonhuis. En nooit, ja nooit het jy my 'n onwillige oor gegee nie! Daarvoor bly ek jou dankbaar vir solank ek leef – en ek is seker daar is talle ander kollegas wat presies net so voel.

Carel Rainier Snyman: enkele biografiese notas

Curriculum vitae

17 Desember 1940: Gebore op Barkly-Oos

1947: Begin skoolopleiding in Calvinia

1958: Slaag matriek aan die Hoërskool Sentraal, Bloemfontein

1961: Behaal BA (Regte) aan UOVS

1963: Behaal LLB aan UOVS

1962–1963: Regtersklerk van Regter S Hofmeyr in die Hooggeregshof, Bloemfontein

1964–1969: Praktiseer as advokaat aan die Vrystaatse balie in Bloemfontein

1970–1974: Senior lektor in Publiekreg, Randse Afrikaanse Universiteit, Johannesburg

1973: Behaal LLD aan UOVS op grond van 'n proefskrif wat handel oor die misdaad diefstal

1975–2005: Professor in die Department Straf- en Prosesreg aan Unisa

***

Op 5 Julie 1969 getroud met Fernanda Malherbe in Bloemfontein

Twee kinders, 'n seun (Rainier) gebore in 1971 en 'n dogter (Marina) gebore in 1972

Eerste keer oorsee vir twee maande in Desember 1973 en Januarie 1974 by die Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg, Duitsland

In 1977 elf maande navorsing by dieselfde instituut met behulp van 'n beurs van die Alexander von Humboldtstigting in Duitsland

1982–1983 verdere elf maande navorsing by dieselfde instituut danksy, onder meer, dieselfde Von Humboldtbeurs

Daarna by verskillende geleenthede vir korte tydperke navorsingsbesoeke aan oorsese universiteite, onder meer UCLA in San Francisco, Edinburgh, München, Regensburg, Bonn, en by die Freie Universität in Berlyn

Lys van publikasies

A BOEKE:

Misdade in verband met afhanklikheidsvormende medisyne (Butterworths, Durban 1974).

The law of South Africa volume 6, *Criminal law*. Ek is een van verskeie skrywers van hierdie boek. Ek het omtrent 'n derde van die boek geskryf

Strafreg (1 uitg Butterworths, Durban, 1981. Hierdie boek beleef verskeie latere uitgawes. Die vyfde uitgawe is in 2006 gepubliseer)

Criminal law (1 uitg Butterworths, Durban, 1984. Hierdie boek beleef eweneens verskeie later uitgawes. Die vierde uitgawe is in 2002 gepubliseer)

Strafregvonnisbundel / Criminal law case book (1 uitg Juta en Kie, Kaapstad. 1991 en die derde en jongste uitgawe in 2003)

A draft criminal code for South Africa (Juta en Kie, Kaapstad 1995)

Werkboek vir strafreg (1 uitg 1989. Die tweede uitgawe word in 1994 gepubliseer)

Workbook for criminal law (1 uitg 1989. Die tweede uitgawe word in 1994 gepubliseer)

B ARTIKELS, AANTEKENINGE EN VONNISBESPREKINGS

'Die verweer van regsdwaling by opsetmisdade: 'n regsvergelykende studie' 1968 *Responsa Meridiana* 131

'Opsetlike strafbare manslag?' 1971 *THRHR* 184

'Die regsbelange beskerm deur die misdaad abduksie' 1972 *THRHR* 265

'Die begrippe *contrectatio* en *animus lucri faciendi* in die Romeinse reg' 1973 *Acta Juridica* 271

'*Mens rea* in drug offences – onus of proof' 1973 *SALJ* 222

Vonnisbespreking: '*S v Rabson*' 1973 *THRHR* 185

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'The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and the continental systems' 1975 *CILSA* 100
'Watering the dagga pot plant: an uncertain reward' 1975 *SALJ* 372
'Die vermoënsmisdade in die lig van die eise van die moderne samelewing' 1977 *SASK* 11
'Laying a false criminal charge' 1978 *SALJ* 454
'The "finalistic" theory of an act in criminal law' 1978 *SASK* 3; 136
'Die misdaad hoogverraad heroorweeg' 1979 *De Jure* 167
'The normative concept of mens rea – a new development in Germany' 1979 *International and Comparative Law Quarterly* 211
'The "finalistic" theory of an act in criminal law' (1) 1979 *SASK* 3
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'Sedition revived' 1981 *SALJ* 14
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'Vrywillige terugtrede as 'n verweer op 'n aanklag van poging' 1981 *SASK* 189
'Die invloed van Engelse en Duitse reg op die Suid-Afrikaanse strafreg' 1981 *De Jure* 148
'Die misdaad sameswering' 1984 *SASK* 3
'The history and rationale of criminal conspiracy' 1984 *CILSA* 65.
'The attack on German criminal legal theory – a retort 1985 *SALJ* 130
'Die trouvereiste by die misdaad hoogverraad' 1988 *SASK* 1
Vonnisbespreking: '*S v Molubi* 1988 (2) SA 576 (B)'1988 *SASK* 457
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'Minagting van die hof en vonnisbesprekings van beslissings waarin 'n appèl hangende is' 1988 *THRHR* 233
'Die verweer van nie-patologiese ontoerekeningsvatbaarheid' 1989 *TRW* 1
'*Dolus eventualis* in the offences of terrorism, subversion and sabotage' 1990 *SALJ* 365
'Die misdaad *crimen laesae majestatis*' 1990 *THRHR* 259
'Normatiewe skuld en redelik verwagbare gedrag' 1991 *THRHR* 4
'Provokasie as 'n algehele verweer in die strafreg' 1991 *Consultus* 35
'Opmerkings omtrent die legaliteitsbeginsel in die strafreg' 1991 *THRHR* 629
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'Professor De Wet se statuur as 'n regsvergelykende juris' 1991 *SASK* 136
'Wanneer die doodvonnis vir moord opgelê kan word' 1992 Julie *Servamus* 59
Vonnisbespreking: '*S v Bazzard* 1992 (1) SASV 302 (NK)' 1992 *SAS* 335
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'Die normatiewe skuldbegrip in die strafreg – 'n antwoord' 1996 *THRHR* 638
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'Potensiële nadeel by bedrog' 1997 *THRHR* 691
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'Nuwe lig op die handelingsvereiste by diefstal' 1998 *TSAR* 118
'Is daar plek in die Suid-Afrikaanse reg vir die "doctrine of transferred intent"?' 1998 *SAS* 1
'Die statutêre misdaad van deelname aan 'n kriminele bende' 1999 *SAS* 213
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'Die herlewing van vergelding as regverdiging vir straf' 2001 *THRHR* 218
'Broadening the scope of statutory *furtum usus*' 2001 *SAS* 217
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'Die erkenning van objektiewe faktore by die verweer van provokasie in die strafreg' 2006 *Tydskrif vir Regswetenskap* 57
'Die begrip "besit" in die Strafreg' (1) (aanvaar vir publikasie in *THRHR* 2007)
'Die begrip "besit" in die Strafreg' (2) (aanvaar vir publikasie in *THRHR* 2008)

Lewensloop

Tussen 1940 en 1945 neem my pa, wat 'n polisie-offisier was, deel aan die Tweede Wêreldoorlog en word krygsgevangene geneem. Tydens hierdie oorlogsjare woon ek en my twee sussies saam met my ma by familie in Cradock. Na my pa in 1945 terugkeer van die oorlog, word hy verplaas na Calvinia, waar ons omtrent drie jaar bly. Ek begin my skoolopleiding daar. In 1948 verhuis ons na Bloemfontein, waar ek my laerskoolopleiding aan die President Brandlaerskool voltooi en daarna my hoërskoolloopbaan in 1958 aan die Sentrale Hoërskool.

Vanaf 1959 tot 1961 studeer ek aan UOVS en woon drie jaar in universiteitskoshuise, eers die Reitzsaalkamerwonings en daarna in die Huis Malberbe. Gedurende die twee jaar waarin ek my LLB-studie onderneem, woon ek in die stad en loop aandklasse by die universiteit. Destyds was al die klasse vir LLB slegs in die aand aangebied. Gedurende hierdie twee jare werk ek in die Hooggeregshof as regtersklerk van Regter S Hofmeyr.

Vanaf 1964 tot 1969 praktiseer ek as advokaat aan die Vrystaatse balie. Doen meestal strafhofwerk, en gaan dikwels op rondgaande hof in die Vrystaat. Ek het ook in 'n aantal sake in die Appèlhof in Bloemfontein verskyn. Destyds was dit die 'lot' van junior advokate in Bloemfontein om *pro Deo* sake in die Appèlhof te moet argumenteer.

Na my huwelik, in 1969, met Fernanda kry ek koue voete vir die advokaatswerk en besluit om liewer tot die regsakademie toe te tree. Ek het gevoel ek is meer in die wieg gelê vir die regsteorie as die regspraktyk. Ek kry 'n pos as senior lektor in Publiekreg aan wat destyds bekendgestaan het as die Randse Afrikaanse Universiteit. Die regsfakulteit daar het toe bestaan uit slegs omtrent agt lede.

Grootliks deur die ondersteuning en medewerking van Professor Sas Strauss word ek vanaf die begin van 1975 aangestel as Professor in Straf- en Prosesreg aan UNISA. Toe ek by die departement begin werk het, was daar, as ek reg onthou, slegs so ses of sewe dosente in die departement: Sas, wat departementshoof was, André Rabie, wat kort daarna 'n professoraat by Stellenbosch aanvaar het, Cor Eckhardt (wat sedertdien na Nieu-Seeland verhuis het) John Middleton, Jannie van Rooyen, en Johan Joubert. Al drie laasgenoemde het later departementshoof geword. Kort daarna het Chris

Schmidt vanaf die departement Staats- en Volkereg na ons departement oorgekom, asook Peet Bekker vanaf Tukkies.

Aanvanklik het ek Siviele Prosesreg en Kommunikasiereg aangebied, maar kort daarna het ek begin om Strafreg aan te bied. Dit was aangename jare en die samewerking in die departement was, soos nog altyd daarna, baie goed. Ek onthou hoe ons kort na my aankoms nog lesings gedurende Juliemaand in Pretoria moes aanbied vir studente, en dat daar met groot moeite afsonderlike klasse vir blankes, swartes, 'Asiate' en 'kleurlinge' aangebied moes word. Party van hierdie lesings het ek in my kantoor aangebied vir slegs twee of drie studente.

Unisa het gedurende die dertig jaar wat ek hier gewerk het, natuurlik baie verander. Tot 1989 was die regsfakulteit nog in wat bekend gestaan het as die ou Samuel Pauwgebou in die middestad, op die hoek van Skinner- en Van der Waltstrate. Ons het maar selde by die 'Nuwe Jerusalem', soos skertsend na die indrukwekkende nuwe Unisagebou op Muckleneukrand verwys is, gekom. Die manlike dosente was almal stemmig gekleed in das en baadjie, en die senaatsvergaderings het die mans almal ewe vroom met pakke klere bygewoon. Die biblioteek, toe reeds baie goed toegerus, was 'n doodstil plek waar 'n mens ure kon deurbring met navorsing. Ons het dikwels tee gedrink in een of ander teedrinkplek in die middestad. Een so 'n plek was in 'n arkade wat in Schoemanstraat geleë was, en by die ingang van die arkade was daar aan die een kant 'n winkel wat godsdienstige literatuur verkoop het, en aan die ander kant een wat grafstene verkoop het. Ek onthou nog goed hoe Sas by die ingang van die arkade altyd met sy hand na hierdie twee winkels gewys het en gesê het: 'Híér berei jy jou voor vir dáár!'

Onderrig aan Unisa en navorsing

In die loop van die dertig jaar wat ek aan Unisa verbonde was, het ek gesien hoe die studiemateriaal baie verbeter het. Studiegidse het byvoorbeeld baie meer gebruikersvriendelik geword. Studentegetalle het egter die hoogte ingeskiet, wat 'n swaar las op dosente geplaas het, veral gedurende eksamentye. Ofskoon dit verblydend is om die sterk groei in studentegetalle te merk, is dit 'n kommer dat soveel studente wat nie in hulle moedertaal studeer nie, dit baie moeilik vind om hulle korrek en behoorlik uit te druk. Ek vermoed dat die standaard van taalonderrig op skool, en veral op sekondêre vlak, nie baie goed is nie en een van die hoofoorsake vir hierdie probleem is.

Na my mening was die LLB-kursus wat die studente vroeër jare geneem het, 'n kursus wat hulle 'n beter regskwalifikasie gebied het as die LLB-kursus wat die universiteite tans aanbied. Die vroeëre LLB-kursus het 'n minimumstudie van vyf jaar behels, en studente moes, voordat hulle vir LLB kon inskryf, eers 'n Baccalaureus - graad slaag. Hierdie studente se taalvaardighede was beter as

vandag se LLB-studente, en hulle het in die algemeen ook 'n breër agtergrondkennis van die geesteswetenskappe gehad as vandag se studente.

Ek is ook van mening dat die LLM-graad wat studente tans kan behaal deur bloot eksamens te skryf, sonder om enige verhandeling te skryf, 'n te maklike meestersgraad-kwalifikasie is. Studente behoort, ten einde 'n meestersgraad te behaal, na my mening minstens 'n verhandeling te skryf wat die produk van selfstandige navorsing is, en waarin hulle gedwing word om hulle gedagtes samehangend in aanvaarbare stellings te formuleer. Ongelukkig is dit nie tans die geval nie.

Drie dekades gelede toe ek by Unisa begin werk het, was die klem in navorsing op die sogenaamde 'swartletter reg' ('black-letter law'), dit wil sê die reg soos wat dit in werklikheid is, in teenstelling tot die reg soos wat dit behoort te wees. Met die politieke en staatkundige veranderinge wat veral sedert 1990 ingetree het, het die klem verskuif na grondwetlike onderwerpe en, daarmee saam, menseregte. Ofskoon hierdie staatkundige veranderinge natuurlik verwelkom moet word, wonder ek tog of daar nie tans te veel gepubliseer word oor menseregte en verandering van die reg en die maatskaplike bestel nie. Baie artikels wat oor hierdie onderwerpe handel, word dikwels gekenmerk deur spekulatiewe redenasies oor redelik vae onderwerpe. Miskien is dit weer tyd om meer aandag te wy aan die konkrete onderwerpe. Wat die strafreg meer in besonder betref, is daar op die gebied van die besondere misdade sommer baie onderwerpe wat met vrug van naderby ondersoek kan word.

Dit is opmerklik dat daar die afgelope tyd betreklik min akademici is wat hulle in hulle navorsing toelê op die materiële strafreg. Hierdie verskynsel kan moontlik toegeskryf word aan die invoering van die Handves van Regte in die nuwe Grondwet, wat gelei het tot 'n groot belangstelling in konstitusionele strafprosesreg – 'n afdeling van die reg waaroor daar wel die afgelope tyd heelwat geskryf word. Daar is na my mening nog baie ruimte vir verdere navorsing in die materiële strafreg.

Die studie van die strafreg het my nog altyd baie na aan die hart gelê. Een van die redes hiervoor is die universaliteit van die probleme of onderwerpe van veral die algemene leerstukke van die strafreg. Ongeag die onderwerp in die algemene leerstukke wat 'n mens ondersoek, is daar altyd veel daaroor te lees in die literatuur oor die ooreenstemmende onderwerp in ander lande. Die strafreg leen hom by uitnemendheid tot regsvergelykende ondersoeke.

Na my mening openbaar die strafreg in Suid-Afrika, vergeleke met die strafreg in ander lande, 'n groot leemte deurdat dit nie gekodifiseer is nie. Tot tyd en wyl ons strafreg gekodifiseer is, kan die legaliteitsbeginsel in die strafreg nie tot sy reg kom nie. Ek het my eie kodifikasie van die strafreg gepubliseer en volstaan

met die argumente ten gunste van kodifikasie wat ek in die voorwoord van hierdie publikasie geskryf het.

Die krisis in die strafregpleging

As ander mense vir my vra wat die vakgebied is waarin ek 'n professor is, en ek 'die strafreg' sê, volg daar gewoonlik 'n kreun of een of ander uitdrukking van die ander persone waaruit dit duidelik blyk dat hulle nie veel van my vakgebied dink nie. Die rede hiervoor is die misdaadgolf wat gedurende rofweg die afgelope dekade en 'n half oor Suid-Afrika spoel, en die oënskynlike onvermoë van die strafregsisteem om dit hok te slaan.

Hierdie is nie 'n gepaste geleentheid om my opinie oor die oorsake van die huidige misdaadgolf te bespreek nie. Ek het die reeds in my boeke oor die strafreg (en meer bepaald in my bespreking van die strafteorieë) gedoen. Soos dit tans in Suid-Afrika aangaan, is ons besig om die stryd teen misdaad te verloor. Daar kan baie redes hiervoor aangevoer word, maar onder die vernaamstes is die onvermoë en onbevoegdheid van 'n te klein polisiemag, asook die afskaffing van die doodstraf deur die Konstitusionele Hof in *Staat v Makwanyane* 1995 3 SA 391 (KH); 1995 2 SASV 1 (KH). Hoe goedbedoel hierdie uitspraak ook was, het die geskiedenis bewys dat dit verkeerd was. Nog nooit in die vredestydse geskiedenis van Suid-Afrika was die waarde van die menslike lewe laer as sedert in die invoering van die 'reg op lewe', die begrip 'sanctity of human life' en gepaardgaande daarmee, die afskaffing van die doodstraf nie. Hierdie stelling is nie 'n eie subjektiewe, persoonlike of selfs ideologiese opinie nie. Dit is 'n koue statistiese feit. Ek gee nie te kenne dat daar iets verkeerd is met die Handves van Regte en die reg op lewe daarin vervat nie. Na my mening het die Grondwetlike Hof in *Makwanyane* se saak egter die Handves verkeerd vertolk. Meer gedetailleerde motivering vir hierdie standpunt kan in my handboek oor die strafreg gevind word, en ek bly by hierdie standpunt.

Die howe het ook in hulle benadering tot strafoplegging na my mening die afgelope paar dekades te veel waarde geheg aan die relatiewe strafteorieë soos afskrikking en hervorming ten koste van vergelding, of soos hierdie teorie in polities meer korrekte taal deesdae in Amerika genoem word, 'verdiende loon' ('just desserts').

Afrikaans as regstaal

Dit is vir my jammer om die afgelope tyd te merk hoe Afrikaans as regstaal verwaarloos word. Afrikaanse regsakademici skyn meer en meer onwillig te wees om in hulle eie moedertaal te skryf en verkies om eerder in Engels te skryf. Ek vind hierdie verskynsel bejammerend. Om in Afrikaans te skryf is nie 'n teken van politieke verkramptheid nie. Die Afrikaners kan daarop trots wees dat

hulle, anders as ander taalgemeenskappe buite Engels, deur die jare 'n eie vaktaal en regsterminologie geskep het. Selfs regstydskrifte wat voorheen byna uitsluitlik Afrikaanse artikels gepubliseer het, se inhoud is deesdae byna uitsluitlik in Engels. As ek so voorbarig mag wees om 'n voorstel te maak oor hoe om Afrikaans as regstaal beter te beskerm, sou dit wees om voor te stel dat iemand die voortou neem om 'n nuwe regstydskrif genaamd 'Die Afrikaanse Regstydskrif' te stig.

Belangstelling buite die reg

Wat my belangstellings buite die reg betref, het die akademiese lewe my 'n relatiewe vryheid gebied het om allerhande ander belangstellings te volg.

Ek hou baie van reis, binne sowel as buite Suid-Afrika.

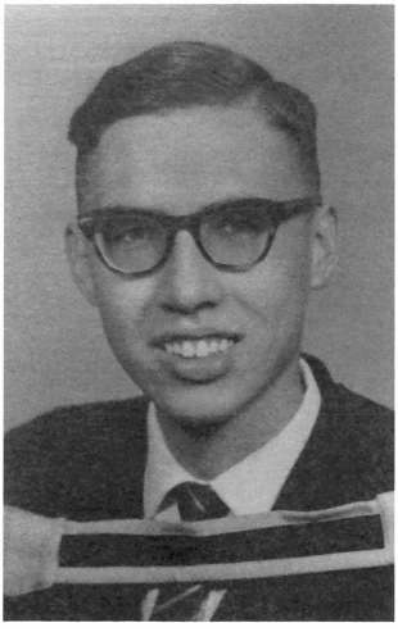
Ek lees graag, en wat ek lees sou ek nie beskryf as 'populêre leesstof' nie. Ek het nog altyd baie belanggestel in filosofie, en lees graag boeke daaroor. Moontlik het hierdie belangstelling van my ook 'n invloed op my geskrifte oor die strafreg gehad.

Sedert my hoërskooldae het ek 'n groot liefde vir klassieke musiek – Schubert se 'Du holde Kunst'. Benewens om daarna te luister oor die radio of op CD's, hou ek ook van goeie klassieke musiekkonserte. Ek speel self 'n bietjie klavier, meestal klavierduette of komposisies vir twee klaviere saam met my vrou. Ek speel ook tjello, en het in die verlede in amateur-simfonie-orkeste soos die Johannesburgse simfonie-orkes en die Universiteit van Pretoria se simfonie-orkes gespeel. Tans is ek 'n lid van 'n kamermusiekgroep wat kamermusiek soos trios, kwartette of musiek vir ander kombinasies van instrumente speel. Na my aftrede neem ek ook soms waar as orrellis in verskillende kerke. Dit is nogal lekker om na my aftrede om nege-uur op 'n Maandagmôre nie op kantoor hoef te worstel met een of ander lastige administratiewe probleem in verband met afstandsonderrig nie, maar in plaas daarvan in 'n dolleë kerk agter die orrel in te skuif en te oefen aan 'n Bach koraalvoorspel!

Carel Rainier Snyman 17.12.1940

1946

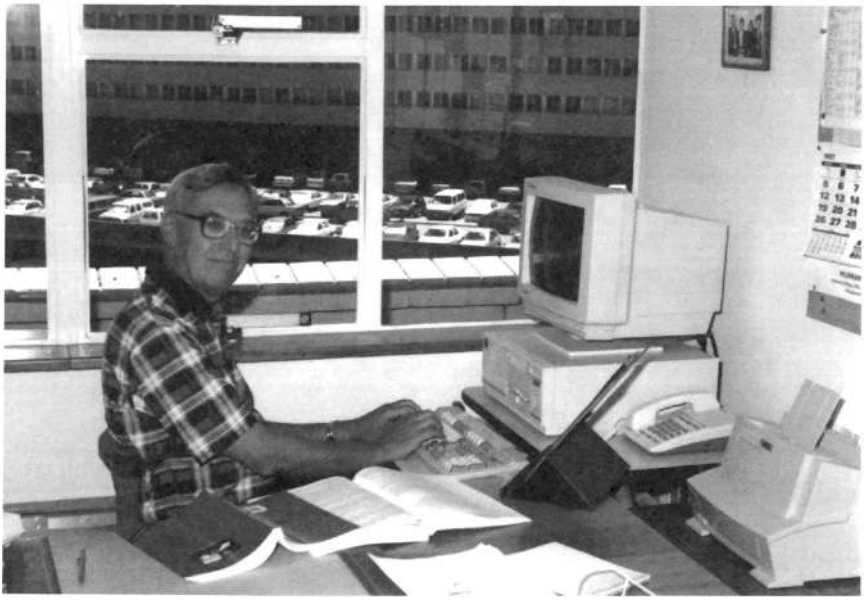
1954



BA 1961

2007

Tydens 'n navorsingsbesoek by die Max-Planck-Institut Für ausländisches und internationales Strafrecht, Freiburg im Breisgau, Duitsland, 1973



Op kantoor in die Departement Staf- en Prosesreg, Universiteit van Suid-Afrika

Vakhoof van die Strafregvakgroep, Departement Straf- en Prosesreg, saam met
voor: Proff Sunette Lötter, Louise Jordaan en Karin Alheit
agter: Advv Abel Ramolotja en Loutjie Coetzee

... du holde Kunst ...

Met eggenote Fernanda, dogter Marina en seun Rainier

Money to be paid to a tsunami relief fund as a condition of a suspended sentence or as a fine in traffic offences

Peet M Bekker[*]

HULDEBLYK

Ek ken Kallie persoonlik sedert 1975. Ons het vir 18 jaar binne loopafstand van mekaar gewoon en sedert 1977 vir 13 jaar daagliks per bus Unisa toe en terug gery!

Dit is 'n groot plesier om iemand soos Kallie persoonlik te ken en ook om saam met hom te werk. Hy is 'n goeie vriend en kollega. Dit is so gerusstellend om Kallie in die omgewing te hê want geen probleem in die strafreg kon hom ooit onderkry nie. Hy word inderdaad as een van die grootste kenners op die gebied van die strafreg beskou. Sy werk Strafreg/ Criminal law *word as gesaghebbend beskou en is 'n ontontbeerlike bron wat onder andere in die biblioteek van elke hof in die land aangetref word.*

Saam met sy uiters bekwame en aangename eggenote, Fernanda, was Kallie deur die jare 'n groot bate vir Unisa.

GENERAL BACKGROUND

The tsunami that struck several countries in the Indian Ocean area on 26 December 2004 is believed to have killed more than 220 000 people and left more than one million homeless. Relief funds were established, among others, by the Scottburgh Rotary Club. A Scottburgh magistrate took a bold, innovative and controversial step in ordering fines imposed by him to be donated to this Tsunami Relief Fund. Later he diverted a total of R44 500 in fines to the fund run by the local Rotary Club. Some time later the same court imposed a fine of R22 000 which was also given to the Rotary fund. In the same court an accused pleaded guilty to cheque forgery and was fined R 22 000, payable to the fund. In another case a person who was trapped driving at 220 km/h in a 100 km/h zone and who allegedly attempted to evade arrest, appeared in the same court pleading not guilty. The state entered into a plea bargain with the accused. He was offered a suspended sentence on condition that he pay a portion of the fine to the tsunami relief effort. The accused accepted and the magistrate fined him R 20 000 or one year's imprisonment which was suspended for five years on

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condition that he was not caught speeding again during the period of suspension, and that he pay R 8 000 to the Scottburgh Rotary Tsunami Relief Fund – which he did. The magistrate said that every other traffic offender after that entered into a plea bargain with the state and offered their fines to be paid to the same relief fund, to which the magistrate agreed. Another person who was caught speeding at 184 km/h, was fined R15 000 (or sixth months' imprisonment) suspended for five years on condition he pay R5 000 to the fund. An attorney was caught driving at 172 km/h and was fined R4 000, also suspended on condition that he pay R4 000 to the fund.[1]

SUSPENDED SENTENCES[2]

Definition

A suspended sentence is a sentence which has been imposed, in all the detail that is required for the proper imposition of such sentence, but of which the operation is suspended for a specified term, subject to the offender fulfilling the conditions on which the suspension has been based. A sentence that is wholly suspended is not executed unless the conditions for its suspension are broken by the offender. Sentences can also be partly suspended. In such cases the unsuspended part is executed, but the suspended part not – unless the conditions are not complied with.[3]

The statutory provision for suspended sentences

A court may suspend any sentence except for an offence in respect of which any law prescribes a minimum punishment,[4] but this is largely negated because section 297(4) still allows for the partial suspension of such punishment. Even though the Act does not provide for other exceptions, two more have received some attention. The first is if a particular statute specifically excludes the suspension of any portion of a sentence imposed in terms of that statute. A second potential exception results from mandatory punishment, although Terblanche is of the opinion that, as long as there is no express provision to the contrary, even a mandatory punishment can be suspended.[5]

Sentences which may be suspended

Section 297(1)(b) of the Act simply states that the court may pass sentence and then suspend it. It neither specifies nor limit these sentences. It is fair to assume that all sentences which a court may impose are included. There is no doubt that sentences consisting of ordinary imprisonment and fines can be suspended.[6] The maximum term for which a sentence may be suspended is five years. In the Free State exceptional circumstances are required before the maximum of five years

[1] This happened at the beginning of 2005. See *The Sunday Tribune* 23 January 2005 page 1.
[2] I make full use of Terblanche *The guide to sentencing in South Africa* (1999) 412 *et seq*, as well as Hiemstra/Kriegler *Suid-Afrikaanse strafproses* (6ed) 750 *et seq*.
[3] JJ Joubert *Criminal procedure handbook* (7ed 2005) 291.
[4] Section 297(1) of the Criminal Procedure Act 51 of 1977 – hereafter referred to as the Act.
[5] Terblanche n 2 above at 413–4.
[6] *Id* at 413.

is employed,[7] but this is not required in the other divisions.[8] The Free State point of view gives the impression that it is unreasonable to expect of people not to commit crime, a view that cannot be supported.[9]

The decision to suspend sentences

The decision whether to suspend the imposed sentence or not is part of the sentence discretion of the trial court.[10] Suspended sentences have two main functions:

(1) to serve as alternative to imprisonment in situations where the offender cannot afford a fine and where other forms of punishment are improper, mainly because the offence was not particularly serious; and

(2) to serve as an individual deterrent to the offender since it is in effect, a sword over his head.[11]

The purpose of suspending sentences

The purpose which the court wishes to achieve through the suspension of the sentence is an important consideration in the decision to suspend the sentence. It should always be a realistic purpose such as deterrence and rehabilitation.[12] One of the earliest reported judgments on the question of the purpose or the effect of suspended sentences is that by Hawthorn JP in *Persadh v R*:[13]

> Ordinarily [a] suspended sentence has two beneficial effects: it prevents the offender from going to gaol ... The second effect of a suspended sentence, to my mind, is of very great importance. The man has a sentence hanging over him. If he behaves himself he will not have to serve it. On the other hand, if he does not behave himself he will have to serve it. That there is a very strong deterrent effect cannot be doubted.

With this background in mind, the purposes of a suspended sentence can now be discussed.[14]

Individual deterrence

There is little doubt that the suspension of an imposed sentence on a negative condition (see below) has one major overriding purpose, namely to act as individual deterrent on the offender.[15] Du Toit[16] considers prevention to be one of the purposes of a suspended sentence. He argues that the 'first offender can usually be prevented from repeating his criminal conduct because he has a

[7] *S v Nabote* 1978 1 SA 648 (O).
[8] *S v Cobothi* 1978 2 SA 749 (N); *S v Van Rensburg* 1978 4 SA 481 (T).
[9] Joubert n 3 above at 291–292.
[10] *S v Herold* 1992 2 SACR 195 (W).
[11] *S v Allart* 1984 2 SA 731 (T).
[12] *S v Roscoe* 1990 2 SACR 125 (W) 129b–c.
[13] 1944 NPD 357 358.
[14] I can do no better than to quote extensively, sometimes verbatim, from Terblanche n 2 above at 417–419 and Joubert n 3 above at 291–293
[15] See *eg S v Dreyer* 1990 2 SACR 445 (A) 448d.
[16] *Du Toit et al Commentary* 28–42B.

sentence hanging over him.' Prevention in this sense is nothing other than individual deterrence, since a suspended sentence cannot actually prevent an offender from re-offending. It is often said that this suspended sentence hangs over the head of the offender like the proverbial 'sword of Damocles'.[17]

Mitigation of sentence

Mitigation of sentence is the second purpose of suspended sentences. It has been well summarised by Cloete J in *S v Herold:*[18]

> It is equally the purpose of a suspended sentence to prevent, where this can legitimately be done, a productive member of society being sent to prison or a particular offender (especially a young offender) being exposed to the undesirable influence of hardened criminals.

Rehabilitation

The purpose of suspending a sentence is to ameliorate the sentence with mercy (compassion) with the view to rehabilitating the offender. This happens with the expectation that the offender will follow the correct course while carefully observing the suspended sentence.[19]

Suspension of lengthy term of imprisonment

It is generally inappropriate to suspend long terms of imprisonment in conjunction with long terms of effective imprisonment.[20]

It is also inappropriate to impose a long term of imprisonment, and then to suspend it, or most of it.

THE CONDITIONS OF SUSPENSION

When considering the conditions of suspension it is useful to distinguish between *negative* and *positive* conditions (even though our courts do not use this distinction, but see Hiemstra and Kriegler 754). *Negative conditions* are the most common conditions and require of the offender not to repeat the crimes specified. They are called 'negative' because they do not require any positive action by the offender, only the requirement that he/she refrains from doing something criminal. *Positive conditions* however, require positive action on the part of the offender in order to fulfil the conditions of suspension; examples are payment of compensation or performing community service. In other words, the offender is required to do something positive in order to prevent the suspended sentence from being carried out. When positive conditions are imposed, they are usually combined with a negative condition also.[21]

[17] Terblanche n 2 above at 417.
[18] 1992 2 SACR 195 (W) 197I–J.
[19] *S v Allart* 1984 2 SA 731 (T) 733H.
[20] *S v Mhlakaza* 1997 1 SACR 515 (SCA) 524b.
[21] Terblanche n 2 above at 292; 413.

Examples of positive conditions include compensation, community service, correctional supervision, submission to instruction or treatment and the attendance of courses or treatment at specified centres.

Statutory provision

A sentence may only be suspended if such suspension is subjected to 'any condition referred to in paragraph (a)(i) (of section 297)'. Without a condition the suspension is incomplete and improper. The conditions mentioned in the Act are both specific and general.

Specific conditions

These are:
(1) Compensation (subparagraph (aa))
(2) Benefit or service in place of compensation (subparagraph (bb))
(3) Community service (subparagraph (cc))
(4) Correctional supervision (subparagraph (ccA))
(5) Submission to instruction or treatment (subparagraph (dd))
(6) Submission to supervision by probation officer (subparagraph (ee))
(7) Attendance of or residence at a centre of some kind (subparagraph (ff))

General conditions

These are:
(1) Good conduct (subparagraph (gg))
(2) *Any other matter* (subparagraph (hh)), the latter being a free discretion for the court in relation to sentencing and the conditional suspension of sentence.[22] This discretion is very wide indeed but it must be interpreted in the spirit of the preceding paragraphs and take into consideration the fact that the conditions must be related to the offence in question.[23]

Requirements for conditions in general

Introduction

The *locus classicus* with regard to the requirements which conditions of suspension should meet, is *R v Cloete*.[24] Reynolds J stated:

> (Two) principles at least should be observed. The first is that the condition imposed should bear at least some relationship to the circumstances of the crime which is being punished by the imposition of a suspended sentence. It need not be closely related but should be related to it in some degree at least, even though slightly related, and not divorced from it. The second is that the condition be stated with such precision that the convicted person may understand the ambit of the condition.

Any condition of suspension has to conform to three basic requirements:

[22] *Du Toit* 375–6.
[23] *Hiemstra/Kriegler* 761.
[24] 1950 4 SA 191 (O).

(1) It must be related to the committed offence.
(2) It must be stated clearly and unambiguously.
(3) The conditions must be reasonable.[25]

(1) It must be related to the offence in question

Any condition must have some relation to the crime for which the accused was convicted and it was again emphasised that conditions of suspension should not be framed too widely.[26] Generally this requirement has been used to determine which crimes a negative condition should be made subject to. No direct connection is required, with the result that the conditions need not be restricted only to the crime for which the offender has been convicted. Whether a condition is sufficiently related is a matter of 'logic and equity'.[27] Various attempts have been made to define this relationship more clearly, *eg* by stating that it must be 'material',[28] but generally such definitions have not lasted.[29]

In *S v Stanley*[30] it was decided that there must be 'a rational and causal connection between the offence and the damage in respect of which the compensatory order is made'. Nor must it be so wide that it has no nexus with the offence concerned.[31] Where a suspended sentence is imposed subject to the condition that the accused not again be convicted of an offence of which dishonesty is an element, the condition of suspension is too vague.[32] In *S v Grobler*[33] it was decided that conditions of suspension should not be unduly onerous and should remain reasonably possible for the accused to comply with. On the other hand, there is every reason to impose a condition covering any future commission of common assault where the accused was convicted of common assault but the sentence was suspended on condition only that he was not convicted of assault with intent to do grievous bodily harm.[34] In *S v Tsanshana* [35]a term of imprisonment imposed for theft was suspended on condition that the accused not be convicted of an offence of which dishonesty is an element and committed during the period of suspension. It was held that the condition was cast too widely and that it should be amended to 'that the accused is not convicted of theft or attempted theft committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine'.

[25] Joubert n 3 above at 292–3.
[26] *S v Mjware* 1990 1 SACR 388 (N) 389q.
[27] *S v Stanley* 1996 2 SACR 570 (A) 574a-b.
[28] *S v Radebe* 1973 3 SA 940 (O).
[29] *S v Van den Berg* 1976 2 SA 232 (T) 234 H; *S v Tshaki* 1985 3 SA 373 (O) 376G–J and the cases referred to there.
[30] 1996 2 SACR 570 (A).
[31] *S v Maluleke* 1977 4 SA 545 (T).
[32] *S v Goeieman* 1992 1 SACR 296 (NC).
[33] 1992 1 SACR 184 (C).
[34] *S v Louw* 1992 1 SACR 688 (Nm). Also see *S v Titus* 1996 1 SACR 540 (C).
[35] 1996 2 SACR 157 (EC).

(2) The conditions must be stated clearly and unambiguously

The condition must be clear and the accused should know exactly what conduct may lead to his having to serve the sentence.[36] It is undoubtedly more clear to specify the crimes which an accused should not repeat rather than to use phrases such as 'crimes of which force is an element'; 'crimes of which dishonesty is an element'[37] or 'crimes for which theft is a competent verdict'.[38]

In *S v Point Blank Promotion CC*[39] the court referred to unnecessary and very onerous conditions including reference to a number of offences involving petty offences. The conditions were set aside.

Where the condition is related to prevention of criminal conduct by the accused, it should be made clear that a conviction of an offence committed within the period of suspension will break the condition.[40]

The condition must not be such that it can be breached by some occurrence outside the control of the accused,[41] nor should it be breached by a petty contravention (which may bring into operation a heavy sentence).[42]

A suspended sentence must be such that the magistrate thinks it will probably be put into force and which he/she thinks can justifiably be put into force if the conditions for suspension are breached. What is of cardinal importance is that the suspended sentence must be an appropriate sentence for the offence committed.[43]

The determination of what the accused had to do in order to avoid the sentence being carried out should be determined by the court and not left to the discretion of, for example, a probation officer.[44]

A condition of suspension stipulating that the accused has to submit an essay on the evils of an offence (*eg* shoplifting) gives rise to a number of problems and a sentence that contains such a condition is normally not a proper sentence.[45]

(3) The conditions must be reasonable

In addition to the two requirements which stem from *S v Cloete*[46] another requirement has developed over the years. This requirement is that the suspending conditions have to be reasonable. In essence this means that they

[36]*S v Xhaba* 1971 1 SA 232 (T); *R v Cloete (supra)* 192; *S v Valashia* 1973 3 SA 934 (O).
[37]*S v Mjware* 1990 1 SACR 388 (N); *Goeieman* 1992 1 SACR 296 (NC).
[38]See Terblanche n 2 above at 426.
[39]1996 2 SACR 275 (T).
[40]*S v Malgas* 1979 3 SA 178 (A)181; *S v Xhaba* 1971 1 SA 232 (T).
[41]*S v Gaika* 1971 1 SA 231 (C).
[42]*S v Allart* 1984 2 SA 731 (T).
[43]*S v Schultz* 1991 1 SACR 679 (E).
[44]*S v Cronje* 1991 2 SACR 619 (C).
[45]*S v Mbola* 1992 2 SACR 175 (E).
[46]See note 23.

should be formulated in such a manner that they will not cause future unfairness or injustice. This means, *inter alia,* that compliance with the conditions should not be outside the control of the accused[47] and should be reasonably possible for the offender to comply with and not be too onerous.[48] The conditions should also take into account human fallibility.[49]

The conditions should not be worded in such a way that a petty offence may trigger a severe suspended sentence. In several cases the accused was convicted of dealing in dagga and sentenced to a (partially) suspended term of imprisonment on condition that, *inter alia* the accused was not found guilty of the possession of dagga. One can hardly argue that these two offences are not sufficiently related, but possession of a minute amount of dagga would normally breach the conditions upon which the (usually) severe sentence for dealing in dagga was suspended. For this reason it has become customary to include an extra condition for the latter offence, such as 'for which imprisonment, without the option of a fine, of more than four months is imposed'.[50]

Fines

According to s 90 of the National Road Traffic Act, No 93 of 1996, all fines imposed or moneys estreated as bail in respect of any offence in terms of that Act shall be paid into the appropriate accounts as determined by the laws of each province.

Except in cases where statutory authority exists for such an order, a court is not entitled to direct that any portion of the fine go to the complainant in the case or to an informer or anybody else. The fine must go to the state.[51]

CONCLUSION

Suspended sentences

The applicable general condition for the relevant suspended sentence is '**any other matter**' – see s 297(1)(a)(i)(hh) of the Act. It creates a free discretion for the court to conditionally suspend a sentence and the condition must be related to the offence in question. As a requirement for conditions in general the condition of suspension must also be related to the offence in question.[52] It is submitted that there is no relationship between a traffic offence in South Africa and the tsunami of 2004. As was stated by Kessie Naidu, former chairman of the Road Accident fund:

> While it is worthy to make a contribution to the Tsunami Relief Fund, I am certain there are deserving organisations in South Africa that deal with

[47] *S v Gaika* 1971 11 SA 231 (C) 232A–B.
[48] *S v Grobler* 1992 1 SACR 184 (C) 185i–j.
[49] *S v Allart* 1984 2 SA 731 (T) 736A; *S v Herold* 1992 2 SACR 195 (W) 198j.
[50] *S v Adams* 1986 3 SA 733 (C); S v *Herold* 1992 2 SACR 195 (W), and see Joubert n 3 above at 292.
[51] Joubert n 3 above at 285.
[52] See the text next to footnotes 22–23 and 24–35.

victims of road accidents, which would have been a more relevant cause to contribute to.[53]

Fines

It is submitted that it is also irregular to order that a fine should not go to the state but to a relief fund.[54]

[53]See article in *Sunday Tribune*, 23 January 2005 1.
[54]See text accompanying footnote 51.

A saga of snitches and whistleblowers: the boundaries of criminal liability for breach of statutorily-imposed duties especially in the context of organised crime

Jonathan Burchell[*]

> It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing his duty is too harsh for man. (Justice Marshall in *Marbury v Brooks* 20 US 556 at 575–6 (1822).)

Introduction

The common law, both in its civil and criminal form, has always been reluctant to extend the boundaries of liability to include failures to act or speak. To a large extent the motivation for this reticence is to maximise the liberty of the individual who fails to act or speak, allowing him or her to remain supine or silent in certain circumstances – but also acknowledging that in different, exceptional instances the law might compel action or speech.

The divide between Anglo-American and Continental jurisprudence on liability for omissions reflects a fundamental difference of approach to the nature of law itself. The Anglo-American system of tort and criminal law developed from a premise that law essentially prohibits one from causing harm to another, including the state, and generally does not require one to benefit another. Continental systems tend to approach the problem from the perspective of altruism or beneficence, requiring positive duties in more circumstances than their Anglo-American counterparts and recognising the confluence of law and morality.[1] While South African law, influenced by Anglo-American legal philosophy, has tended to follow the approach to liability for omissions that maximises individual liberty at the expense of altruism, there are signs that the list of exceptional duties to act or speak is

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[1]Jonathan Burchell & John Milton *Principles of criminal law* (3ed 2005) 187.

being judicially expanded in the civil law and legislatively extended in the criminal sphere. This development has unfortunately occurred in a piecemeal fashion.

The Constitutional Court and the Supreme Court of Appeal in South Africa have recently broadened the base of civil liability by imposing duties on the state to protect persons from violent crime and human rights abuses.[2]

At the same time, the legislature has been busy extending statutory duties, especially in the context of the fight against organised crime, corruption and terrorism and has in the process imposed criminal liability, often carrying severe penalties, on ordinary persons for failing to act or to speak. The focus of this article is on a critical evaluation of these newly imposed statutory duties and how they encourage a culture of informing and how they in fact threaten fundamental principles underpinning the common law. The article attempts to develop theoretical and policy reasons for distinguishing the commendable recent judicial imposition of positive duties on the state to protect others from violent crime and human rights abuses from the less defensible legislative imposition of positive duties on ordinary citizens to assume the role of the state in protecting it and others from organised crime. In the process, a distinction emerges between what Garland calls the 'responsibilization strategy'[3] (whereby the state invokes the assistance of non-state organisations and individuals to assist in the fight against crime and where the watchwords are 'partnership' and 'cooperation')[4] and the transfer of state functions in criminal detection to civil society under threat of criminal sanction.

These new reporting duties that appear in legislation designed to combat organised crime and corruption epitomise the insidious relocating of the burden of crime investigation and detection onto the shoulders of the ordinary citizen. It might be argued that in this way the primary duty in the detection and prosecution of crime that rests on the state is shared with the individual. Compulsory enlisting of the assistance of citizens in the fight against organised crime on pain of criminal sanctions is clearly distinguishable from the voluntary cooperation of citizens in community policing endeavours. It is, perhaps, understandable that a state that has limited resources to deal with all manifestations of crime will try to enlist the help of its citizens in the detection of crime on a voluntary basis – it is

[2]See generally Burchell & Milton n 1 above at 188, 191–4, 196–205 and the cases discussed there. The survey in the work was written before judgment was delivered by the Constitutional Court in *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC). This judgment confirms the 'accountability' of government as the basis for the extension of this legal duty on the part of the state.

[3]D Garland 'The limits of the sovereign state: strategies of crime control in contemporary society' (1996) 36 *British Journal of Criminology* 445 at 452.

[4]See also Valsamis Mitsilegas *Money laundering counter-measures in the European Union – a new paradigm of security governance versus fundamental legal principles* (2003) 12 and 151–4.

another matter for the state to punish its citizens with the full force of the criminal law if they do not provide the appropriate level of assistance. If one wants to widen the chasm between the state and the individual in the matter of crime control, the imposition of criminal sanctions against those who refuse to speak out against their fellow citizens is a very effective way of doing so.

The most debatable strategy is where the state imposes often severe criminal sanctions on private organisations and ordinary persons for failing to report criminality or suspected criminality to the police (sometimes based on a negligence fault element) rather than encouraging voluntary vigilance and engaging the private sector in a collaborative venture in combating crime. Even if reliable evidence sufficient to reinforce a prosecution for money laundering could be secured by this heavy-handed means of compelled reporting (and statistics indicate that the contrary is true),[5] the price paid for interfering with confidentiality and privacy would be far too high.

Legal duties to act or speak can never be considered in isolation. Even if a legal duty to act or speak were to be imposed, whether by statute or common law, liability for its breach would only follow if the other elements of civil or criminal law were established. This means that in many cases, a causal link between omission and unlawful consequence would have to be established and fault in the form of intention or negligence would have to be proven. Causation and fault provide additional limiting devices that serve to curtail the scope of criminal or civil liability within reasonable proportions. If, for instance, statutory liability is imposed for failing to report to the police, or some other public authority, the suspicion that a crime might be or has been committed, then if this liability is not dependent on proof of a *causal link* between the failure to act or speak and the commission of the offence and is, furthermore, not dependent on proof of an *intentional or deliberate* failure to report but is, at most, based on a *negligent* failure to report, these limiting devices are absent or at least diminished.[6] Should such open-ended individual liability be countenanced by a system of criminal (or even civil) law that should be based on maximising individual freedom of action and fundamental rights? Does one's civic duty extend to being an informer? It is debatable whether it should but, even if it does, should criminal breach of this duty extend to *negligent* conduct when a breach of the duty to report is the sole determinant of the *actus reus*?

[5]See the data cited by Mitsilegas n 3 above which indicate that although the number of reports of money laundering is high, the translation of this evidence into actual convictions is disappointingly low.

[6]It is interesting to note that even Pamela H Bucy, a proponent of imposing enforceable legal duties on private individuals to report transactions over a certain financial limit in the fight against money laundering, advocates that this duty only apply in cases where there is clear proof of *intentional* wrongdoing: 'Epilogue: the fight against money laundering: a new jurisprudential direction' (1993) 44 *Alabama LR* 839 at 861. See further, below, where the argument for an intention-based liability for failure to report is developed.

Section 34 of the Prevention and Combating of Corrupt Activities Act[7] imposes a duty on certain persons to report corrupt practices; section 12 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act[8] imposes a duty on a person, who has reason to suspect that another intends to commit, or has committed, a 'terrorist' offence or is aware of the presence at any place of a person who is so suspected of intending to commit or having committed such offence to report the suspicion to the police; and section 29 of the Financial Intelligence Centre Act (FICA)[9] imposes a duty on a person who carries on a business or who is employed by a business to report suspicious or unusual transactions regarding the proceeds of unlawful activities. Not only is the imposition of criminal liability for such omissions in the above statutory instances highly contentious, but the potential linking of liability to *negligent* failures to act or speak is doubly contentious. This article both challenges the practice of suggesting negligence as the fault basis for criminal liability in these new statutory duties imposed on individuals and questions the overall legal justification for compelling ordinary persons, under threat of the criminal sanction, to become agents of the state.

Before critically evaluating the precise formulation of the new statutory duties, the scene needs to be set by highlighting the reasons for the underlying antipathy of the general public and the law to 'informers'.

The semantic scene

Words such as 'snitch',[10] 'grass', 'rat' and 'squealer' reveal the disdain with which not only the criminal fraternity, but also the general public, regards the informer. An allegation that a person is an informer may even be defamatory.[11] The rather more neutral term 'informer' itself carries unpleasant connotations, often linked to the exchange of money for information.[12] The evolution of the Zulu word *phimpi* (meaning a species of cobra) to '*impimpi*' (informer) would appear to chart a not inappropriate derivation and one that carries considerable apartheid baggage.[13]

More recently, the term 'whistleblower' has come into vogue, perhaps in an attempt to restore some respectability to the conduct of the informer or, at

[7] 12 of 2004, which came into force on 27 April 2004.
[8] 33 of 2004, which came into force on 20 May 2005.
[9] 38 of 2001, which came into force on 3 February 2003.
[10] The noun 'snitch' is probably derived from the underworld slang meaning 'the nose' and the verb 'snitch' is a variant of 'snatch' meaning to 'steal, pilfer': *Online etymological dictionary*. In terms of prisoners' slang 'snitch' means 'An informant. rat': a *prisoner's dictionary* http://dic-tionary.prisonwall.org/, accessed 21 October 2005.
[11] See JM Burchell (1974) 91 *SALJ* 178 at 192–5.
[12] John Ellison Kahn *et al* (eds) *The right word at the right time – a guide to the English language and how to use it* 291.
[13] *The Truth and Reconciliation Commission of South Africa Report* (1998) contains reference to the fact that during apartheid '[t]argets of attack were repeatedly people seen as linked to the apartheid system (councillors or their families, police, sell-outs) and invariably rumoured to be, or identified – whether justifiably or not – as *impimpis* (informers)'.

least, to attempt to show that the disclosure is linked to warning the authorities of some potential illegality that can possibly be prevented by the disclosure. However, there is little doubt that reporting the activities of another to the police, whether these activities are criminal, merely suspected of being criminal or innocent, carries connotations of some underhanded behaviour. In fact, any potential justification for reporting actual or supposedly illegal conduct to the authorities is stronger where the conduct reported is unanimously considered criminal in nature. Justification for reporting conduct which is not uniformly regarded as criminal (or where the clear-cut definition of the illegal nature of the conduct is less obvious) is more contentious. Justification for reporting to the authorities apparently innocent conduct that *might* lead to illegal behaviour is also difficult to justify.[14] Any stain attaching to the informer attaches even if the reporting is unremunerated although in practice such reporting is often rewarded in some way.

At best, the attitude of the criminal justice system to informers is ambivalent.[15] Like the use of criminal traps they are seen in some instances as a necessary evil in the fight against crime. But, even in those cases where the pragmatic justification for the use of informers might be seen as strong, any benefit in encouraging informers to disclose information must be weighed carefully against the disadvantages of disclosure to society and possibly the pursuit or the vocation of the informant. Furthermore, the imposition of a duty to speak enforced by criminal law sanction must be regarded as a last resort and, even where exceptional circumstances impelling such duty exist, proof of *intentional* failure to disclose must be established.

In short, the activities of the snitch, the 'grass' or 'impimpi' is often not only frowned upon by society but even subjected to physical retribution or retaliation. The unenviable Hobson's choice facing individuals in South African society, in the context of the legislation reviewed in this article, is stark: comply with one's statutory obligations to inform on suspected criminal activities but ultimately face potential extra-legal retaliatory vengeance from society generally; alternatively, remain loyal to one's fellow citizens and breach the statutory duty of disclosure so running the risk of conviction of a criminal offence and sentence to a hefty fine or imprisonment for a considerable period.

[14]The law of defamation recognises this by regarding an allegation that someone has reported apparently innocent conduct to the authorities as a clearer impairment of the alleged informer's reputation than where the informer is alleged to have informed the authorities on clearly criminal conduct: see JM Burchell (1974) 91 *SALJ* 178 at 192–5. An instance of a duty to report on innocent (as well as possibly criminal activity) is that which might be imposed on accountable and reporting institutions by s 28 of the Financial Intelligence Centre Act 38 of 2001 to report cash transactions over a certain prescribed limit. This section has been passed by the legislature but a date has not yet been set for its implementation.

[15]Gerard E Lynch 'The lawyer as informer' (1986) *Duke LJ* 491.

Statutory duties to report criminal activity and negligence in failing to do so

Although the informer holds the future of others in his or her hands, in making the decision to disclose information to the police he or she seldom applies objective, legal reasoning or a painstaking analysis of the evidence before reaching conclusions.

While a number of informers freely choose to reveal their information, others are pressurised into disclosure. This pressure to become an informer is particularly strong when it is reinforced by a criminal sanction for failing to report certain activities or suspicion thereof to the authorities. The pressure to speak becomes almost intolerable when disclosure to the police of information about another's activities is required not merely for actual subjective knowledge or foresight, but merely upon inferred reasonable foreseeability of criminality, that is, where criminal liability results from a failure to disclose information in circumstances where a reasonable person would have suspected that some illegal activity had occurred, or might occur, even though the accused did not actually foresee or suspect it.

What is the public-policy justification for imposing positive duties on an ordinary person to disclose a mere suspicion that someone else is engaged in possible criminal conduct? Surely the state, by imposing such a duty and enforcing it by criminal sanctions is pressurising future persons to disclose this information under threat that, if they don't they will be prosecuted, convicted and sentenced for such failure? The possible benefit to the state of this course of action is that it will ultimately obtain the cooperation of the public in the detection of serious crime by means of the threat. This benefit, often ephemeral in nature, depends on the assumption that loyalty to one's fellows is less important to the ordinary person than fear of criminal conviction. As far as the individual who is prosecuted for failure to 'rat' on his or her fellow citizens is concerned, the state might hope to impel this person by means of the threat of imminent conviction and sentence to 'spill the beans' while under arrest or under prolonged awaiting trial detention. Any elusive future benefit of this nature must be weighed against the reality that, if the state does obtain the benefit of disclosure from this accused, there is no guarantee that the information obtained by the police will lead to the successful conviction of others.[16]

Furthermore, disclosure under threat of criminal sanction might result in a challenge to the legality or admissibility of the information so obtained, based on an infringement of the accused's fundamental rights to privacy or

[16]See n 5 above. See also Laura ML Maroldy 'Recordkeeping and reporting in an attempt to stop the money laundering cycle; why blanket recording and reporting of wire and electronic fund transfers is not the answer' (1991) 66 *The Notre-Dame LR* 863 at 872 where the author cites an instance where money launderers complied with all the reporting requirements and still carried on their business unimpeded.

to remain silent and might even bring, in its wake, a challenge to the admissibility of the information gained *in a subsequent trial of another person*. On a cost-benefit analysis, it would be advisable for the state to spend its time and resources honing *its own* investigative skills, educating the public in vigilance and, at most, endeavouring to obtain the *voluntary* collaboration of private entities and individuals in the fight against crime. A strategy based on identifying appropriate incentives for cooperation in supplying information might be more effective than simply resorting to criminal conviction and punishment for failure to do so.[17]

Statutory duties under section 12 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004

In terms of section 12 of the recently enacted anti-terrorism legislation in South Africa it is an offence, punishable by a maximum of five years' imprisonment, for a person who has reason to suspect that any other person intends to commit, or has committed, a 'terrorist activity' (as defined in the Act) or is aware of the presence at any place of a person who is suspected of intending to commit or having committed such an offence, to fail to report such suspicion or presence to the police as soon as reasonably possible. In terms of the 'definition' section of the Act, the phrase 'ought reasonably to have suspected' is defined as referring to a negligence criterion and the term 'reason to suspect', with its apparent meaning of 'facts giving rise to such belief',[18] would, on a *literal* interpretation of the words used in the sections, probably be interpreted as implying an objective inquiry. This would mean that if I, as a reasonable person, ought to suspect that another person is linked to 'terrorist activities' and I do not report this to the police, I could be charged with a breach of the duty imposed by section 12 of the anti-terrorism legislation and spend up to five years in prison if convicted.

The damning feature of the apartheid versions of terrorism laws was that, amongst other obnoxious features, they provided for detention of persons without trial if a government official had reason to believe that these persons were withholding information relating to terrorists. The period of detention for interrogation depended on whether a member of the executive was satisfied that the detainee had satisfactorily replied to all questions.[19]

[17]It is argued that the existence of corporate compliance programmes should operate as a defence to crimes requiring a culpable mental state: Charles J Walsh & Alissa Pyrich 'Corporate compliance programs as a defense to criminal liability: can a corporation save its soul?' (1994/5) 47 *Rutgers LR* 605ff. On the possibility of self-reporting as a possible defence to criminal liability and the existence of corporate compliance programmes as a possible factor mitigating sentence: see Matthew R Hall 'An emerging duty to report criminal conduct: banks, money laundering, and the Suspicious Activity Report' (1995/6) *Kentucky LJ* 643 at 647–8 esp n35.

[18]*London Estates (Pty) Ltd v Nair* 1957 3 SA 591 (D) at 592E–F.

[19]Section 6(1) of the Terrorism Act 83 of 1967.

Any reference to detention without trial contained in the early drafts of the new South African anti-terrorism legislation[20] was wisely dropped from the final version which is now on the post-apartheid statute book in South Africa. However, under section 12 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, a person who merely ought to suspect that another person is a 'terrorist' and fails to report this suspicion to the police can be incarcerated for up to five years. Of course, the conviction under section 12 involves a trial with all its due process protections whereas the apartheid equivalent involved detention without trial. Thus the accused under section 12 is given the benefit of the exercise of his or her right to silence or freedom from self-incrimination.

However, a recent Working Group on Arbitrary Detention of the United Nations Commission on Human Rights investigation into pretrial detention and police custody conditions in South Africa has revealed that, although arbitrary detention is not institutionalised, for the large number of pre-trial detainees in the country, the excessive length of pretrial detention and the conditions under which pre-trial detainees are held could lead to de facto arbitrary detention.[21] Persons suspected of having knowledge that might prove useful to the state in its fight against terrorism could well fall into this pre-trial vortex. One can only imagine how vague definitions of 'terrorism' and stereotyping of offenders could serve to exacerbate the potential infringement of the fundamental rights of the individual accused.

Furthermore in a prosecution under section 12 the state has merely to prove a failure to comply with the positive duty imposed by the section, accompanied possibly by mere negligence on the part of the accused regarding suspected terrorist activities, in order to achieve a conviction, even if subsequently the suspicion turns out to be groundless. The breach of the obligation to disclose the suspicion under section 12 in fact forms the essence of the offence and, at the outset, places practical limits on the accused's right to remain silent – at least on issues covered by the suspicion. In essence, a duty-to-report offence requires the person to speak out, not voluntarily, but under pain of criminal conviction and penalty. Duty-to-report offences not only pose due process obstacles but also evoke the obvious issues attendant on breaches of confidentiality and invasions or privacy. Such offences, if they are to exist within a just and fair system of criminal law, must at least be subject to restrictive interpretation.

Protection for whistleblowers is provided by section 17(7) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, which states that no 'action, whether criminal or civil, lies against a person

[20]See Esther Steyn 'The Draft Anti-Terrorism Bill of 2000: the lobster pot of the South African criminal justice system' (2001) 14 *SACJ* 179 at 182.
[21]http://www0.un.org/apps/news/story.asp?NewsID=15917&Cr=south&Cr1=africa (press release of 19 Sept 2005) accessed 21 October 2005.

complying in good faith' with the reporting duty under section 12(1) of the Act.

Statutory duties under section 28 and 29 of the Financial Intelligence Centre Act 38 of 2001

Reporting duties imposed on 'accountable' and 'reporting' institutions in terms of the Financial Intelligence Centre Act (FICA)[22] to report cash transactions over a certain prescribed limit[23] or reporting duties imposed on any person who 'carries on a business' or who 'is employed by a business' to report suspicious or unusual transactions regarding the proceeds of unlawful activities,[24] are all enforced by severe criminal penalties. European legal systems tend to opt for administrative remedies[25] rather than the criminal law to obtain information from corporations about suspicious transactions and these systems try to foster a partnership relationship between corporations and law enforcers. The United States, England and South Africa prefer to rely on the heavy-handed, and potentially counterproductive, use of criminal sanctions to enforce duties of disclosure on corporations and persons carrying on businesses. In South African, the FICA imposes particularly severe punishments for breaches of statutory duties.[26]

[22]38 of 2001.

[23]Under s 28. The duty is to report to the Financial Intelligence Centre.

[24]Under s 29. The duty is to report to the Financial Intelligence Centre.

[25]For instance, the German Money Laundering Act of 8 August 2002 not yet in force on 1 December 2006 (*Federal Law Gazette* 1 of 14 August 2002) s 17 refers to an 'administrative offence' leading to a fine of up to €50 000 for failing to report; the Belgium Law of 11 Jan 1993 on Preventing Use of the Financial System for Purposes of Laundering Money and Terrorism Financing art 22 refers to a 'supervisory or regulatory authority or the competent disciplinary authority' publishing its decisions and the measures that the institution or individual shall adopt and concludes that 'an administrative fine of not less than €250 and not more than €1 250 shall be imposed. Of course, the imposition of a fine will have the same practical effect whether it is imposed by a criminal court or a supervisory, regulatory or competent disciplinary authority but the stigma of a criminal conviction must not be neglected. On the matter of the enforcement of the duty to inform it is perhaps not without significance that the overarching European Union Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purposes of money laundering art 8 refers to furnishing information to the authorities responsible for combating money laundering by credit and financial institutions and their directors and employees 'co-operating' and informing 'on their own initiative'. An administrative remedy would, of course, be more attractive in jurisdictions that do not have a well-developed form of corporate criminal liability (Stessens n 30 above at 205). The debate on whether the appropriate approach is 'criminal trial, conviction and penalty (with of course, the advantage of attendant due process protections for the accused)' or 'administrative body, administrative offence and fine (possibly without due process protection)' has not yet been exhausted. A possible middle course would be to have a combination of administrative fines (imposed by supervisory bodies that are required to comply with due process norms because the proceedings are seen as analogous to a criminal trial) and selective criminal penalties only for the most serious offences.

[26]Penalties for failing to report suspicious or unusual transactions under s 29 are: imprisonment not exceeding 15 years or a fine not exceeding R10 million. The penalties for failing to report cash transactions over a certain prescribed limit are not yet in force.

Not only is the use of the criminal sanction for failures to report certain information to the authorities dubious, the criminal definition incorporated in section 29 of the FICA is too vague and, therefore, arguably infringes the fundamental principle of legality. Who is a person who 'carries on a business'? The term is not defined in the legislation and, in its ordinary meaning, would cover an almost limitless class of persons.[27] Furthermore, what constitutes 'unusual' conduct depends on the knowledge of what is 'usual' for that person or entity. The unusual quality of a transaction becomes a highly personal issue that will vary not only with each type of business transaction but also with the type that precedes or succeeds it.[28]

One might argue that the concept of what constitutes 'suspicion'[29] or what is 'suspicious' would imply some subjective state of mind. However, section 52(2) of the FICA clearly states that a *negligent* failure to report under section 29 will, in itself, be an offence. The same criticism of a negligence-based liability voiced in the preceding and succeeding sections of this article apply equally here.

As Stessens[30] notes, the Financial Action Task Force on money laundering in 1990 'urged countries to apply appropriate administrative, civil or criminal sanctions to financial institutions, but only in respect of one feature of the preventive anti-money laundering system, namely for those institutions which fail to maintain records for the required retention period'. Furthermore, Stessens observes that article 14 of the Inter-American CICAD[31] Model Regulations on money laundering designates the *wilful* failure of financial institutions to comply with the prevention of anti-money laundering measure as a criminal offence.[32]

In terms of section 37 of the FICA, an obligation of secrecy or confidentiality or any other restriction on the disclosure of information under common law or statute does not override the obligation of an accountable institution, supervisory body, reporting institution, SARS or any other person of complying with the reporting duty under the Act. As wide as the consequent infringement of confidentiality and privacy may be, it is at least encouraging that the scope of legal professional privilege (in respect of communications made in confidence between attorney and client for the purposes of legal advice or litigation which is pending, contemplated or commenced or between third party and attorney for purposes of litigation

[27]See Burchell & Milton n 1 above at 997.
[28]Opportunities for innovative commerce activities compound the problem of deciding what is, in fact, unusual. Legislation directed at traditional banking and other institutions might become obsolete as new economic opportunities of hiding the origin of money emerge.
[29]See *Powell NO v Van der Merwe NO* 2005 1 SACR 317 (SCA) at 333 where Cameron JA endorsed Lord Devlin's formulation of 'suspicion' as a 'state of conjecture or surmise'. If the suspicion has to be *reasonable* then it has to be *objectively* assessed (*ibid*).
[30] Guy Stessens *Money laundering – a new international enforcement model* (2000 CUP) 202.
[31]The Inter-American Drug Abuse Control Commission.
[32]*Loc cit*.

which is pending, contemplated or commenced) does, in terms of section 37(2), specifically override the duties of disclosure under the Act. Furthermore, in terms of section 38 of the FICA, no civil action or criminal prosecution will lie against the discloser of information for complying in good faith with duties under the Act.

It is quite likely that heavy criminal sanctions placed on financial institutions to ferret out money launderers, even if successful in identifying culprits, will simply stretch the ingenuity of the criminal mind into other ways of hiding the nefarious origins of money, possibly using the potential hiding places provided by the ever-expanding opportunities of an electronic age.

In terms of section 38 of the FICA, no civil action or criminal prosecution will lie against an accountable or reporting institution, supervisory body, SARS or any other person who complies in good faith with the reporting duties under the Act. Whistleblowers therefore receive some protection under this legislation.

Of course, responsibilities placed on financial institutions to establish and verify the identity of their clients and to keep records of business relationships and transactions[33] reflect sensible business practices and fall into a category different from statutory duties of disclosure placed on financial institutions and enforced by criminal sanctions.

Statutory duty under section 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004

In terms of section 34 of the recently enacted anti-corruption legislation in South Africa, 'any person who holds a position of authority and who knows *or ought reasonably to have known or suspected* that any other person has committed' an offence of corruption as defined in the Act '*or the offence of theft, fraud, extortion, forgery or uttering a forged document*' involving an amount of R100 000 or more, must report such knowledge or suspicion to any police official (italics added).

On the face of it, this duty to report, based as it is on a 'person who holds a position of authority' (defined in the Act as essentially someone who occupies a public or quasi public office)[34] would seem to comply with the common-law exceptional obligation to act, in so far as this common-law duty to act could extend to public or quasi-public officials. But the italicised words reveal a major departure from common-law principles: negligence is the fault criterion for liability for failing to report in terms of the section and,

[33]Under ss 21 and 22 of FICA

[34]Inexplicably, the definition of 'persons who hold a position of authority' in s 34(4) does not include auditors: see Oliver Pragal 'An evaluation of the Prevention and Combating of Corrupt Activities Act No 12 of 2004' mini-dissertation in part fulfilment of the requirements of the LLM degree (UCT, 2005).

what is more, the section extends the negligence basis for liability for failing to report to failing to report common-law offences such a theft, fraud, extortion, forgery and uttering.

It is arguable that the fault element for the new offences of corruption should be interpreted as intention (and possibly even *dolus directus*).[35] It is beyond doubt that the common-law offences listed in section 34 and any liability for accomplices or accessories after the fact to these offences are founded on intention. The legislature, in its fervour to suppress corruption, has interfered with centuries of precedent and authority that have established the pre-eminence of intention-based liability in the case of all common-law offences (apart from culpable homicide and contempt of court by the editor of a newspaper) and that has endorsed intention as the basis of the common-law liability of anyone charged with being an accomplice or accessory after the fact to any of these offences.

The South African anti-corruption legislation, unlike the FICA and the anti-terrorism legislation, does not provide protection from civil suit or criminal prosecution for persons who hold positions of authority and who are obliged to report suspected corruption in terms of the Act. However, in the *employment* context, the Protected Disclosures Act[36] provides protection from 'occupational detriment' for certain disclosures made under that Act.

A proposed statutory duty to inform a sexual partner of HIV-positive status
In the process of preparing draft legislation redefining the nature and scope of sexual offences in South Africa, it was argued by the erstwhile South African Law Commission that any new overarching sexual offences law should contain a specific provision punishing the non-disclosure of HIV-positive status to a sexual partner. In the tabled version of the Bill the Law Commission opted for the inclusion of the intentional failure to disclose infection with a life-threatening, sexually transmissible disease in circumstances where there is a significant risk of infection to a sexual partner as a false or fraudulent means sufficient to lead to a prima facie case of unlawful conduct for rape. The 2004 working draft of the Criminal Law (Sexual Offences) Amendment Bill contained options for legislative reform in this area which would punish 'criminal exposure of another to HIV or

[35]See below. In the Prevention and Combating of Corrupt Activities Act 12 of 2004 the mental element of the general offence of corruption in s 3 is expressed in the following words: 'in order to act ... or by influencing another so to act' and 'designed to achieve an unjustified result' and these words reappear in the specific offences of corruption contained in ss 4, 5, 6, 7, 8 and 9. These words carry a strong indication that *dolus directus* is required for liability in terms of these sections. The wording of some of the other specific types of corruption mentioned in the Act clearly imply a fault element of *dolus* and probably *dolus directus* (*eg* 'intent to influence' (s 11); 'in order to improperly influence' (s 12); 'aim' and 'intent to obtain' (s 13); 'in order to conduct' and 'in order to influence' (s 14); 'intent to influence ... cause or induce' (s 18).
[36]26 of 2000.

another sexually transmissible infection' as a separate statutory offence rather than defining the conduct as rape.

A commendable feature of both of these suggestions for reform was that the punishment of any omission or failure to disclose HIV-positive status was linked to intentional rather than negligent conduct.[37] However, the enactment of a statutory provision based on either the original tabled version of the Draft Sexual Offences Bill or the 2004 working draft options would still be unwise for two main reasons: first, the existing criminal law in its common-law principles in fact adequately punishes the non-disclosure envisaged and, secondly, the enactment of a statutory provision specifically criminalising the non-disclosure of HIV-positive status would, in practice, be both counter-productive in the fight against HIV/AIDS and could well result in further discrimination against groups at risk of contracting the virus.

The common-law of rape,[38] assault,[39] *crimen injuria*, fraud and attempted murder[40] would be potentially broad enough to cover instances of intentional non-disclosure of HIV-positive status to a sexual partner – whether the virus was actually communicated to the complainant or not. In those special circumstances where it could be proved beyond reasonable doubt that the virus had been communicated by the accused to the victim and had caused (both in fact and in law) the death of the victim, a conviction of murder could result if the non-disclosure was intentional; if the non-disclosure was not intentional, but only negligent, a conviction of culpable homicide might result. If the common law is capable of encouraging the disclosure of HIV-positive status to a sexual partner, the legislature would be well advised not to enter the arena by criminalising yet another failure of an individual to speak.[41] It seems that the wisdom of non-intervention has been acknowledged

[37]Section 229 of the German Penal Code (which reads: 'whoever causes bodily harm to another through negligence should be punished by up to 3 years imprisonment or fine') would be broad enough in principle to cover the negligent non-disclosure of HIV-positive status but this section has seldom, if ever, been used to cover such conduct.

[38]Assuming the courts adopt the approach that a non-disclosure of HIV-positive status to a sexual partner negates true consent to engage in sexual intercourse (the approach advanced in Burchell & Milton *Principles of criminal law* 342 and now encouraged by the English Court of Appeal's over-ruling in *R v Dica* [2004] 3 All ER 593 of the antiquated and unduly restrictive attitude of the 19th century English decision in *R v Clarence* (1888) 22 QBD 23). Although the *Dica* decision opens up the possibility of a conviction of assault, similar reasoning could apply to a conviction of rape. A recent South African High Court decision (*S v Nyalungu* 2005 JOL 13254 (T)) has affirmed that a conviction of rape could result from a non-disclosure of HIV-positive status to a sexual partner (although in this case the accused's conduct exceeded mere non-disclosure of sero-positive status and amounted to sexual intercourse by threats).

[39]See, for instance, the Canadian Supreme Court decision in *R v Cuerrier* (1998) 127 CCC (3d) 1 (SCC) and the English Court of Appeal in *R v Dica* n 38 above.

[40]*S v Nyalungu* n 38 above.

[41]It is not without significance that in New Zealand, where there is legislation requiring persons to disclose their HIV-positive status, a Wellington court has acquitted an accused of this offence (criminal nuisance) where he failed to disclose his HIV-positive status to his sexual partner but had *protected* sexual intercourse with her. See: http://www.news24.com/News24/World/News/0,,2-10-1462_1811533,00.html accessed 21

by the legislature in the 2006 version of the Criminal Law (Sexual and Related Matters) Amendment Bill.

Minimum fault requirements

Kent Roach, in comparing South African anti-terrorist legislation with post-September 11 anti-terrorism legislation in Canada, has concluded that the equivalent Canadian offences 'explicitly require subjective fault in the form of knowing participation or facilitation of terrorist activity and participation for the subjective purpose of enhancing the ability of the group to carry out terrorism'.[42] Roach argues convincingly: (i) that it is unfair to punish *negligent* conduct linked to 'terrorism'[43] as harshly as equivalent conduct of an *intentional* nature (because principles of fundamental justice in the Canadian Charter require fault in the form of intention to be proved regarding certain serious crimes[44] as a result of their stigma and punishment); and (ii) that principles of 'fair labelling' and 'proportionality' in sentencing require different degrees of punishment for intentional as opposed to negligent facilitation of terrorism.[45] According to Roach, it is not sufficient to leave the imposition of the appropriate sentence to judicial discretion. These criticisms would apply with even greater vigour to offences where negligent *non-disclosure of suspicion* of terrorist activities is involved (as opposed to positive conduct amounting to assistance).

There is compelling argument that terrorist-related offences should be based on proof of intentional, not simply negligent, conduct. In fact, there is even a convincing argument that the fault requirement for such serious offences, carrying such severe punishments, should be based on proof of *dolus directus* that is, that the accused's aim and objective was to bring about the particular unlawful consequence or circumstance. Even the Appellate Division in apartheid South Africa was aware of the need to interpret draconian security legislation that punished no more than legitimate 'opposition politics', such as organising an unlawful strike, causing dislocation to industries or services to society, or even destroying a building out of a personal grudge against an employer, as requiring a fault element of

October 2005.

[42]Kent Roach 'A comparison of South African and Canadian anti-terrorism legislation' (2005) 18 *SACJ* 127 at 141.

[43]Section 3(1) of the South African anti-terrorism legislation punishes a person 'who does anything which will, or is likely to, enhance the ability of any entity engaging in a terrorist activity, and who knows or ought reasonably to have known or suspected, that such act was done for the purpose of enhancing the ability of such entity to engage in a terrorist activity is guilty of an offence ...'. Section 3(2) punishes 'any person who...collects or makes a document; or possesses a thing, connected with the engagement in a terrorist activity, and who knows or ought reasonably to have known or suspected that such ... document or thing is so connected, is guilty of an offence ...'. Both of these subsections of section 3 specifically punish *negligent* conduct.

[44]Which he argues should include offences of 'terrorism'.

[45]Note 42 above at 142–3.

dolus directus rather than *dolus eventualis*.[46] If a person's conduct was not accompanied by the specific statutorily defined aim and object then, under the statutory relics of apartheid, he or she could not be convicted .

The wording of section 3 of the anti-corruption legislation in South Africa[47] is amenable to the interpretation that not merely *dolus eventualis*, but in fact *dolus directus* is required for liability, implying that the prosecution would have to establish that it was the accused's aim and object to influence another to act in an unlawful or unethical manner as defined in the Act, rather than merely foresight of the possibility that another will be influenced to act in such an unlawful or unethical manner.

Organised crime, manifesting itself in varying degrees of criminality ranging from 'intentional murder and maiming of innocent civilians in order to intimidate a population or to compel a government or an international organisation to act'[48] to economic crimes such as money laundering and corruption, carries heavy penalties imposed by statute. The severity of penalty and the indelible quality of the stigma attached to conviction arguably demand a higher intention threshold than for other serious offences. Similarly, new statutory offences based solely on a breach of a duty to speak or act, introduced often with precipitous haste in the desperate desire of states to be perceived as being 'tough on crime', should *at least* be interpreted to be based on *dolus eventualis* – the lowest form of intention rather than objectively assessed negligence – and preferably *dolus directus*.

Deference to the United Nations

The supposed justification for the statutory extension of duties to act or speak, as well as the expansion of negligence-based liability, is often given as the imperative of complying with United Nation's directives or guidelines. The preambles to the terrorist, organised crime and corruption laws in South Africa all refer to international or United Nations obligations to combat these forms of criminality and to enact legislation in furtherance of this objective. Commentators have, however, rightly questioned the implications of this genuflecting of the guidelines and instructions issued by the United Nations

[46]See *Minister of Law and Order v Pavlicevic* 1989 3 SA 679 (A) and *S v Nel* 1989 4 SA 845 (A), discussed in Jonathan Burchell & John Milton *Principles of criminal law* (2ed 1997) 333–4 (and briefly in (3ed 2005) 501). A contemporary analogy lies in the international sphere of criminal law. The commission of the crime of genocide under art 6 of the Statute of the International Criminal Court clearly requires *dolus directus* – a special form of intent *ie* 'an intent to destroy, in whole or in part, a national, ethnical, racial or religious group ...'.

[47]Section 3 of the Act uses the words 'in order to act...or by influencing another so to act ...'. These words at least import some 'intention' element and, strictly speaking, could imply *dolus directus* in terms of the normal meaning of the words 'in order to' which mean 'with a view to' or 'for the purpose of' (*Concise Oxford dictionary*).

[48]Kent Roach's definition of terrorism n 42 above at 133.

Security Council for the separation of powers, human rights and the rule of law in South Africa.[49]

In fact, the definition of the *mens rea* element of money laundering demonstrates that the South African legislature has even exceeded the parameters of article 6 of the United Nations Convention Against Transnational Organised Crime 2000 by extending liability for this offence beyond intentional conduct to cover negligent conduct also.[50] Following United Nations', or even United States',[51] models of criminalisation of organised crime might well result in the ultimate rejection of the transplanted matter by its host. Exceeding the crime control objectives of the United Nations (which are often based, in any event, on premises of co-operative expediency in prosecuting transnational crime) is even more difficult to justify than slavishly following the United Nations' blueprint for minimum intervention.

Some features of recent legislative attempts to impose duties on ordinary citizens to act or speak on pain of criminal penalty

Under the common law, the rule at the moment is that there is no general duty to act or speak except in those circumstances where the common law imposes such a duty. One of the categories where a duty to act for the benefit of another, or even the state, exists is when the legislature itself imposes such a duty. But obviously the legislature should not simply overturn the emphasis of the common law on individual autonomy by imposing legal duties to act in a wholesale or piecemeal way so that the common-law rule of no liability

[49]See especially CH Powell 'Terrorism and the separation of powers in national and international spheres' (2005) 18 *SACJ* 151 (who focuses essentially on the adoption of the Security Council list of 'terrorist' organisations in the South African legislation). See also Kent Roach n 42 above at 148–9.

[50]See Burchell & Milton n 1 above at 990. The Convention which entered into force on 29 September 2003, and which has been ratified by South Africa, does not extend liability for money laundering beyond a person who *knows* that the property constitutes the proceeds of crime or *knows* (at the time of receipt) that the acquisition, possession or use is of property which is the proceeds of crime. Furthermore, it has been pointed out (see Powell, below) that Security Council Resolutions, issued under Ch VII of the United Nations Charter, require states to prevent terrorist acts, to refrain from supporting terrorist groups and to prosecute terrorist offences and that certain obligations also rest on state parties to the Convention for the Suppression of the Financing of Terrorism of 1999 (which South Africa has ratified). Despite the parameters set out in these international documents, Powell, in a comparative study of anti-terrorism regimes in South Africa, Uganda, Tanzania and Kenya, has concluded that, although the above Convention does not mandate civil forfeiture of assets (as opposed to criminal confiscation after conviction), all four states under review exceeded the provisions of the Treaty by requiring civil forfeiture and South Africa and Uganda have express provisions for permanent forfeiture of terrorist property: C H Powell 'Terrorism and Governance in South Africa and Eastern Africa' in Victor V Ramraj, Michael Hor & Kent Roach (eds) *Global anti-terrorism law and policy* (2005) CUP 577.

[51]Neil Boister has highlighted some of the potential problems in simply transferring penal norms from a developed to a developing country: 'Transnational penal norm transfer: The Transfer of civil forfeiture from the United States to South Africa as a case in point' (2003) 16 *SACJ* 271. See also Burchell & Milton n 1 above at 976*ff*, where some of the pitfalls in the South African importation of the criminalisation of 'racketeering' from the United States are raised.

is completely undermined. The only way in which this could be done by the legislature would be after a thorough examination of the inadequacy of the common-law rule and its replacement with one that is more akin to the Continental rule of intervention. Of course, even here the final word on whether the rule of no liability, subject to limited exceptions or general liability for failures to act subject to limited exceptions, would comply with Constitutional norms is for the Constitutional Court, not the legislature, to decide.

Similarly, the general rule of the current criminal law is that *mens rea*, preferably in the form of intention[52] and exceptionally in the form of negligence, is required for criminal liability. Furthermore, a criminal trial inevitably brings in its train all the due process requirements, including the presumption of innocence and right to remain silent. There does not have to be any specific invocation of these requirements – they apply by virtue of the criminal nature of the proceedings. The legislature might wish to dilute or even circumvent the *mens rea* requirement of liability, or even avoid the due process limitations on liability (as apparently was the intention of the legislature in enacting the civil forfeiture provisions of the Prevention of Organised Crime Act (POCA)),[53] but the Constitutional Court will, fortunately, always have the final say.

Furthermore, common-law principles of criminal liability relating to degrees of participation in crime or inchoate offences can be read into statutory offences by legitimate process of inference. The inferring of common-law rules in the interpretation of a statutory instrument is not always sufficiently acknowledged by legislative drafters – hence the recent omnibus statutes that try to cover every single manifestation of criminal conduct. For instance, the corruption legislation attempts to identify every conceivable aspect of corrupt practices and by doing so leads to both an overlap between general and specific offences of corruption and potential confusion between the common-law offence of bribery and legislative forms of corruption.

The legislature has in section 21 of the Prevention and Combating of Corrupt Activities Act stated that any person who 'attempts, conspires with any other person; or aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person to commit an offence in terms of this Act, is guilty of an offence'. By statute[54] and in terms of common-law principles, attempts, liability for incitement or conspiracy are already defined

[52]Jansen JA in *S v Ngwenya* 1979 2 SA 96 (A) at 100A.

[53]By stating that the proceedings are civil in nature rather than criminal and by using civil terminology like 'proof on a balance of probabilities' or referring to the 'defendant' rather than the 'accused' but the use of this tendentious terminology does not preclude a court piercing the veil to find that the proceedings are in fact criminal in nature and all the principles of criminal justice apply: see Burchell & Milton n 1 above at 1011–7.

[54]Section 18(1) and (2) of the Riotous Assemblies Act 17 of 1956 and see Burchell & Milton n 1 above at 622,3.

and further legislative restatement of the principles is superfluous and misleading.[55] The common law of accomplice liability would also apply to statutory offence by inference and so one could even adopt the above reasoning in the context of the duty to report. Why is it necessary to have a legislative duty to report when a common-law failure to report amounting to complicity in the crime, provided the complicity is intentional and the common-law rules relating to liability for omissions are satisfied, could lead to liability?[56]

A thorough study in order to identify possible gaps in the common law of crime must take place before legislation that overlaps with common law is drafted. Such legislation also does not always grant sufficient respect to due process and Rule of Law prerequisites of the common law and the Constitution. The civil forfeiture provisions of POCA are prime instances of this phenomenon.[57]

Is codification of the criminal law the answer?

This volume of essays is in honour of a distinguished exponent of South African criminal law who, apart from his extremely significant contribution to the elucidation of the general principles of criminal liability in this country (especially in the light of German jurisprudence) in his impressive four editions of *Criminal law* and five editions of *Strafreg*, is an ardent supporter of the codification of the criminal law. Kallie Snyman's *Draft criminal code for South Africa*[58] is one that, in the tradition of the Model Penal Code of the American Law Institute, provides an influential restatement of the general principles and some of the more common specific crimes in South Africa. Its objectives are to identify these principles, place them in an accessible form and further the principle of legality by striving towards reasonable certainty in legal definition.

Perhaps a new argument for codification has now arisen: codify the common-law principles of criminal liability in order to prevent the legislature from further abridging or attempting to override the fundamental principles of criminal justice that have evolved over the centuries.

For instance, in the domain of liability for omissions, the civil and criminal law has, over the centuries, developed a *modus vivendi* which seeks to find

[55]For instance, s 2(3)(*a*)(i) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 states that to accept, agree or offer to accept any gratification includes 'to demand, ask for, seek, request, solicit, receive or obtain ...'. Thus the legislation penalises as a completed crime (*ie* not merely an attempt) mere offers of or demands for bribes. The scope for attempt liability under the Act is clearly narrower than under the common law.

[56]See Pamela H Bucy n 6 above at 850. An example of the pitfalls of duplication of definition arises in the context of a statutory definition such as that contained in s 21 of the South African anti-corruption legislation which uses the words 'aids and abets'. Does this mean that the English concept of 'aiding and abetting' applies in South African law?

[57]Burchell & Milton n 1 above at 1001ff.

[58]CR Snyman *A draft criminal code for South Africa* (1995).

a balance between conflicting interests. Over the years the courts have identified factors that point towards the imposition of legal duties in the civil and the criminal law: viz prior conduct creating a potentially dangerous situation; where a person has control of a potentially dangerous thing or animal; where a protective or special relationship exists between the parties; where a person occupies a public or quasi-public office or calling which imposes on him or her a duty to act; and where contract or statute imposes such a duty.[59] Courts have emphasised that the list of exceptional common-law duties to act is not closed but will depend for its delineation on the legal convictions of the community or legal policy makers. In other words, the courts, the legislature and the framers of the Constitution provide the ultimate criterion for imposition of legal duties.

It is true that the role of the legislature in developing the list of legal duties to act or speak is specifically acknowledged in the common law, but the legislature should only intervene when the common law is proven clearly to be unable to deal with the imposition of a legal duty. In particular, the legislature should not compound the problem by creating a proliferation of legal duties to act or speak in such a way that the common-law general rule of immunity for a failure to act is *incrementally* turned on its head[60] and the general rules relating to intention-based liability rejected.

In the common-law jurisprudence, failure to inform the police of the commission or suspected commission of an offence is not in general criminal in itself.[61] A duty to disclose the identity of a detainee being questioned by the police is, however, imposed on a public official such as a police officer (in keeping with the common-law duty to act resting on a person occupying a public office or calling). Furthermore, certain offences are defined in such a way that an omission to act may be criminal.[62] Imposing a general criminal liability for such failure to inform the police would overturn the fundamental emphasis on individual autonomy in the common law, and would result in certain fundamental rights being infringed and established fault criteria being compromised.

In the civil law, extensive duties imposed on the state to protect persons from violence and human rights abuses have recently been founded on a theory of

[59]See Burchell & Milton n 1 above chap 10.

[60]If the South African approach, based on the maximising individual liberty is to be replaced with the continental approach which maximises altruism and beneficence then this can only be done after a thorough examination of the weaknesses of the current position and the benefits of change.

[61]This is also the position in the United States: Matthew R Hall n 17 above at 743ff. The offence of misprision of felony, which is hardly ever used, is confined to active concealment *loc cit*.

[62]See the crime of defeating or obstructing the administration of justice (*S v Binta* 1993 2 SACR 553 (C)) and treason where the failure to report an act of treason constitutes treason itself (*S v Banda* 1990 3 SA 446 (B). For a general criticism of the scope of the offence of treason, see Burchell & Milton 924–5 and Snyman *Criminal law* 323–4.

governmental accountability[63] and such duties could also be justifiable under common-law categories of exceptional duties to act.[64] This last-mentioned expansion of legal duties portrays a more protective and caring face of government – a caring spirit that is also reflected in the growing jurisprudence on the protection of socio-economic rights.

The shift from the initial cynicism of the amputee in Coetzee's novel *Slow man*[65] to a more optimistic perception of his predicament, based on recognition of a spirit of caring of which he is the recipient, reflects a recent *literary* recognition of this beneficial development in the context of individual relationships.

However, there is a vast difference between imposing responsibilities on the state (and even individuals) to protect persons, particularly the weak and vulnerable, from violence and exploitation (or even to foster the protection of socio-economic rights) and imposing duties on the citizens of the state to assume the role of the state by reporting on suspected and sometimes nebulously defined criminal activities of their fellow citizens on pain of criminal sanction. A community of coerced informers will only serve to turn citizens against each other and impose additional strains on already overcrowded prisons by a process of over-criminalisation, without solving the underlying problem of poor detection of criminal activity.

A final word of caution may not be out of place: any drafting of a Criminal Code in order to prevent the further erosion of common-law principles of criminal liability by the legislature[66] must be achieved by a body that not only carries general credibility in the field of law reform, but that is also acknowledged as respecting the heritage of the general principles of criminal liability. In the process of such drafting, areas of duplication and uncertainty

[63]See above 1 and the most recent judgment of the Constitutional Court in the *Metrorail* case, 2005 2 SA 359 (CC).

[64]Burchell & Milton 192–4 and 196–205. See especially Marais JA in *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) at 451.

[65]J M Coetzee *Slow man* (2005) – a novel set in Australia, in which Paul Rayment utters the following cynical words in the initial stages of confronting his injury: 'In the brave new world into which both he and Mrs Putts have been reborn, whose watchword is *laissez faire*!, perhaps Mrs Putts regards herself as neither his keeper nor his brother's keeper or anyone else's. If in this new world the crippled or the infirm or the indigent or the homeless wish to eat from rubbish bins and spread their bedroll in the nearest entranceway, let them do so: let them huddle tight, and if they wake up alive next morning, good on them' (23). As a dedicated Croatian nurse ministers to Rayment he can 'feel the ice within him begin to thaw' (208). Coetzee's novel underscores the distinction between care ('good nursing') and loving care ('loving hands') (261). Law and society can at least *compel* 'good nursing' or protective care of others by the state, even if it could never *compel* one individual's affection or love for another.

[66]The recent erosion of common-law principles of criminal liability by the legislature is not necessarily deliberate although, in the context of the adoption of civil forfeiture, in addition to criminal confiscation, in the prevention of organised crime legislation in South Africa (see n 50 and n 57 above and Burchell & Milton *Principles of criminal law* 101 ff) the potential adverse consequences for due process protection of individuals would seem to have been deliberately intended. At other times the intervention of the legislature might have been as a result of ignorance of the common-law parameters.

in the criminal law should also be minimised, while casting the common-law principles in a more permanent and accessible form.

The accused's right to cross-examination vs the admission of hearsay evidence: a balancing of interests?

Fawzia Cassim[*]

TRIBUTE

I first met Professor Snyman in 1996 when I joined the Department of Criminal and Procedural Law at Unisa as a junior lecturer. Professor Snyman was, of course, the subject head for the discipline, Criminal Law. His textbook entitled Criminal Law was the prescribed textbook in criminal law at the University of Natal, where I had studied for my LLB degree a few years previously. Naturally, I was quite chuffed and overwhelmed to make his acquaintance. Over the years I have found Professor Snyman to be very pleasant and helpful to the younger colleagues in the department. He is a noted researcher who has published extensively in his field. Indeed, his research output is an inspiration to us all. He will be sorely missed by all in the department and the College of Law.

Abstract

This contribution considers the impact of hearsay evidence on the accused's right to cross-examination. The article examines the right to cross-examination and the limitations to the right to cross-examination, such as hearsay evidence. The article explores whether a balancing of interests can be achieved between the accused's right to cross-examine evidence and the admission of hearsay evidence. Foreign jurisdictions such as the United States of America and the United Kingdom, and certain decisions of the United Nations Human Rights Committee and the European Court of Human Rights are examined for guidance. The article concludes that the state should not have *carte blanche* to admit hearsay evidence against the accused to his prejudice, but should only admit such evidence where there are compelling reasons. The European Court's approach of evaluating the impact of hearsay evidence on the trial as a whole should be followed. One should endeavour to look for alternative safeguards or 'counter-balancing' procedures to ensure an equitable balance.

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INTRODUCTION

It is a fundamental principle that the accused should be allowed to present his case in court in an effective manner. This will enable him to establish the truth about his guilt or innocence.[1] The right to present one's case applies to all aspects of court proceedings where the court makes a factual finding.[2] This right is an expression of the *audi alteram partem* principle and is part and parcel of the right to a fair trial.[3] The notion of a fair and adversarial hearing requires that the accused be given an adequate opportunity not only to challenge and question witnesses against him, but also to present his own witnesses in order to establish an effective defence.

Cross-examination is a marked characteristic of the common law adversarial trial system.[4] According to Wigmore, it is 'the greatest legal engine ever invented for the discovery of truth'.[5] It has strong historical and symbolic roots.[6] The object of cross-examination is firstly, to obtain information that is favourable to the party on whose behalf the cross-examination is conducted and secondly, to cast doubt upon the accuracy of the evidence-in-chief given against such party.[7]

[1]It is noteworthy that no onus rests on the accused to convince the court of the truth of any explanation he gives. If he gives an explanation, even if the explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation is improbable, but that beyond any reasonable doubt it is false. As *per* Watermeyer AJ (as he then was) in *Rex v Difford* 1937 AD 370 at 373. It should be stated at the outset that the accused will be referred to in the masculine form for purposes of convenience.

[2]The right to present one's case contains a number of sub-rights, which appear in the trial phase of the criminal process. They comprise the following rights such as the right to cross-examine witnesses, the right to address the court on evidence to be adduced, the right to give and adduce evidence, the right to address the court at the conclusion of evidence and the right to address the court on sentence.

[3]The *audi alteram partem* principle literally means 'hear the other side'. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity of expressing their views. See *S v Suliman* 1969 (2)SA 385 (A). The rules of natural justice come into play here. The *audi alteram partem* principle is followed in judicial proceedings in a number of countries throughout the world, along with the rights such as legal representation, the right to argument and cross-examination, and the leading of evidence.

[4]The adversary system's real genius, the heart of the concept, lies in the use and perfection of cross-examination. The central philosophy is that by testing the statements of one against the questions of an adversary, the fact finder may determine the truth. See Singer 'Forensic misconduct by federal prosecutions and how it grew' (1968) 20 *Alabama Law Review* 227 at 268.

[5]See Wigmore *Evidence in trials at common law* (1979) s 1367.

[6]See Van der Merwe 'Regterlike inkorting van kruisondervraging: 'n gemeenregtelike, statutêre en grondwetlike perspektief' (1997) 3 *Stellenbosch Law Review* 348. Also see Underwood 'The limits of cross-examination'(1997) 21/1 *American Journal of Trial Advocacy* 113 at 113–118, regarding the history and mythology of cross-examination.

[7]See Cross and Tapper *Cross on Evidence* (7ed 1990) 303. Also note that usually a party may not cross-examine his own witness. However, the advantage of having a witness declared hostile is that the party calling him may thereafter cross-examine the hostile witness. See *S v Dolo* 1975

This article will examine the right to cross-examination and the limitations of this right, such as hearsay evidence.[8] The aim of the article is to ascertain whether a balancing of interests can be achieved between the accused's right to cross-examination and the admission of hearsay evidence. Foreign juris\dictions such as the United States of America and the United Kingdom, and decisions of the United Nations Human Rights Committee and the European Court of Human Rights are examined for guidance.

THE RIGHT TO CROSS-EXAMINATION

South African law

The right to cross-examine state witnesses

Section 166 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the 'Act') provides that the accused has the right to cross-examine state witnesses and any witness called by the court, before he presents his case for the defence.[9] This gives him the opportunity to elicit favourable evidence from witnesses (known as adducing evidence) and to undermine the value of incriminating evidence (known as challenging evidence). The defence is entitled to cross-examine each and every state witness.[10] The accused's right to cross-examine also has a constitutional basis, and is derived from section 35(3)(i) of the Constitution.[11]

The right of cross-examination also exists in respect of a co-accused who has elected to testify.[12] Where the defence proposes to submit another version of any fact or event testified to by a state witness, there usually rests a duty upon the defence to put its version to the state witness whose evidence the defence will contradict in the course of its own case. It is only as a result of proper cross-examination along these lines, that the court will be placed in a position to

1 SA 641 (T).

[8]It should be noted that the other limitations to the right to cross-examination are face-to-face cross-examination and documentary evidence, which are beyond the scope of this article.

[9]Section 166(1) of the Act provides that the accused may cross-examine any co-accused who testifies at a criminal proceeding. This section also provides that after every witness has been cross-examined by the other party, the party who called the witness may re-examine the witness on any matter raised during the cross-examination of that witness. Also see *S v Ramalope* 1995 1 SACR 616 (A), regarding the meaning of the right to re-examination in terms of s 166(1) of the Act. Also see *S v Mashaba* 2004 11 SACR 214 (T), where the court emphasised the need to fully explain the right to cross-examine and the purpose of cross-examination to an unrepresented accused. This ensures that the accused has had a fair trial.

[10]See Joubert *et al Criminal procedure handbook* (5ed 2001) 222. Also see *S v Langa* 1963 4 SA 941 (N) and *S v Lesias* 1974 1 SA 135 (SWA).

[11]Section 35(3)(i) of the Constitution of the Republic of South Africa, 1996 provides that the accused has the right 'to adduce and challenge evidence'. The right to 'challenge evidence' includes the right to cross-examine evidence. This is part of the accused's right to a fair trial.

[12]It is accepted practice that co-accused persons exercise their right to cross-examine their co-accused or his witness in numerical order before the state is given the opportunity to cross-examine.

ascertain the relative acceptability of the two versions. However, if this rule is not followed, it may require the recalling of state witnesses and lead to an unnecessary waste of time.[13] Assertions made on behalf of the accused during his cross-examination of state witnesses and which are intended to reflect the defence case may, in exceptional circumstances, have the effect of curing the deficiency in the state case where the evidence adduced by the state is insufficient to establish a *prima facie* case.[14] However, the decision not to cross-examine may often be a risky one and should be taken only after careful consideration.[15]

The right to cross-examine witnesses for the defence

The prosecution may cross-examine each defence witness and the accused if he elects to give evidence.[16] Cross-examination of the accused by the state should be conducted with courtesy and without prejudice to the accused. It should not be conducted in an intimidating, offensive or mocking fashion. The accused should obtain a full opportunity to answer questions. Improper cross-examination by the prosecutor may lead to the accused's conviction being set aside on appeal and review.[17] There may be occasions when a prosecutor may decide not to cross-examine an accused person or a defence witness. Such a decision is a risky one because courts will be reluctant to reject a defence version which went untested and unchallenged by cross-examination.[18]

The right to recall witnesses for cross-examination

Presiding officers have the power to refuse a request to recall a witness for cross-examination or even for further cross-examination. However, they should exercise this power sparingly, and only when it is clear that the request is made frivolously or as part of delaying tactics.[19] The position is that where an accused has already cross-examined the state witnesses and put his defence to them, he suffers no prejudice if the court refuses the request to recall a witness for further cross-examination made by his legal representative who was appointed

[13]See *S v M* 1970 3 SA 20 (RA). However, see *S v Motlhabane* 1995 (8) BCLR 951 (B), where it was held that the death of a state witness during cross-examination threatens the right of an accused to a fair trial to the extent that the evidence remains untested and the court should consider disregarding such evidence *in toto*.

[14]See *S v Offerman* 1976 2 PH H215 (E).

[15]See *S v Gobozi* 1975 3 SA 88 (E).

[16]Section 166(1) of the Act also provides that the prosecutor may cross-examine any witness including an accused called on behalf of the defence at criminal proceedings. Regarding the question of whether cross-examination is an appropriate tool for testing expert evidence, see Meintjies-Van der Walt 'Expert evidence and the right to a fair trial: a comparative perspective' (2001) 17 *South African Journal of Human Rights* 301.

[17]See *S v Nkibane* 1989 2 SA 421 (NC). Also see *S v Gidi* 1984 4 SA 537 (C), regarding guidelines for proper cross-examination.

[18]See *S v Gobozi supra*.

[19]See *S v Kondile* 1974 3 SA 774 (Tk) and *S v G* 1992 1 SACR 568 (B).

subsequently.[20] Where a witness is to be recalled, the nature of the proceedings should be explained to such witness.[21] It should be explained that the proceedings are not a new trial but that further questions will be put in order to clarify certain issues.

The position in foreign jurisdictions and international law

The position in other countries and international law is similar to our law. In the United States, the right to confrontation and cross-examination is seen as an essential and fundamental requirement of a fair trial.[22] The primary object of the Confrontation Clause is to prevent depositions of *ex parte* affidavits being used against the prisoner in place of a personal examination and cross-examination of the witness, in which the accused has an opportunity not only to test the recollection and sifting of the conscience of the witness, but also to compel him to stand face to face with the jury so that they may look at him, and judge by his demeanour upon the stand and the manner in which he gives his testimony whether he can be believed.[23] Thus, the primary interest secured by the Confrontation Clause is said to be the right of cross-examination.[24] The Sixth Amendment Confrontation Clause also guarantees defendants (accused) the right to meaningfully cross-examine witnesses who appear at the trial, but who cannot or will not respond to questions. The defendant's inability to cross-examine a witness on important matters because that witness has invoked a testimonial privilege or witness 'shield' law violates the Sixth Amendment.[25] However, granting the accused an opportunity to cross-examine witnesses can

[20]See *S v M* 1976 4 SA 8 (T).

[21]See *S v Msiwa* 2001 1 SACR 413 (Tk).

[22]See *Pointer v Texas* 380 US 400 (1965), where the accused had objected against the use of a transcript of the witness's statement at the trial, which denied him any opportunity to have his counsel cross-examine the principal witness against him. The court found that the Sixth Amendment guarantee of confrontation and cross-examination was denied to the accused. Also see *Chambers v Mississippi* 410 US 284 (1973) at 294, where the court remarked that the rights 'to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognised as essential to due process'.

[23]*Mattox v United States* 156 US 237 (1895). The court held that the trial court could admit into evidence the transcribed testimony of a witness who has testified at trial but had since died prior to the second trial, and the witness had been fully cross-examined. The testimony was found to be admissible because the defendant's lawyer had the opportunity to fully cross-examine the witness at the first trial, thereby preserving the defendant's constitutional guarantees. It should be noted that the accused is referred to as the defendant in Anglo-American law.

[24]See, *inter alia*, *Davis v Alaska* 415 US 308, 315 (1974), *Ohio v Roberts* 448 US 56 (1980) at 63, *California v Green* 399 US 149 (1970) at 149 and *Douglas v Alabama* 380 US 415 (1965). Also see *Delaware v Fensterer* 474 US 15, 21-22 (1985), where the court held that the Confrontation Clause is usually satisfied when the defence is given a full and fair opportunity to probe and expose infirmities of testimony such as forgetfulness, confusion and evasion through cross-examination.

[25]See *Olden v Kentucky* 488 US 227 (1988).

be meaningless if the accused does not have skilled counsel to conduct the questioning.[26]

The United Nations Human Rights Committee has extended the right to examine witnesses to include the right to confront directly and to cross-examine witnesses. The Committee has found that a failure to make a witness statement available to the defence seriously obstructed the defence in its cross-examination of the witness, thereby precluding a fair trial.[27] The Human Rights Committee has also remarked that article 14(3)(e) of the International Covenant on Civil and Political Rights (hereinafter referred to as the 'ICCPR') protects the 'equality of arms' between the prosecution and the defence in the examination of witnesses, but does not prevent the defence from waiving or not exercising its right to cross-examine a prosecution witness during the trial hearing.[28] In *Compass v Jamaica*[29] the accused alleged that he had not been given the opportunity to cross-examine one of the main prosecution witnesses, who was unable to give evidence during the trial because he had left the country. However, the Committee found no violation because the witness had been examined by the defence under the same conditions as by the prosecution.

The European Court is not willing to accept written statements from absent witnesses as a substitute. In the case of *Kostovski v Netherlands*[30] the conviction for armed robbery was based on reports of statements by two anonymous witnesses, who were interviewed in the absence of the accused and his counsel by the police. The court found that the fact that the prosecution witnesses' identities had been withheld, meant that the accused was not only denied the right to cross-examine but also that he was unable to demonstrate prejudice,

[26]See *Powell v Alabama* 287 US 45 (1932), where it was held that 'the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel'.

[27]It transpired that in the following cases *Garfield and Andrew Peart v Jamaica* Comm Nos at 464/1991 and 482/1991 UN Doc CCPR/C/54/D/464/1991 (1995), a statement made to the police by the main prosecution witness regarding the murder for which the complainants were charged, was not made available to the defence. It appeared that the statement differed materially from the statement at the preliminary hearing and at the trial. Also see De Zayas 'UN human rights treaties' in Weissbrodt & Wolfrum *The right to a fair trial* (1998) 687.

[28]Weissbrodt *The right to a fair trial* (2001) 138. Article 14(3)(e) provides that everyone charged with a crime has the right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

[29]No 375/1989 UN Doc CCPR/C/49/D/375/1989 (1993). There was no violation because on the one hand, the accused was present during the preliminary hearing when the witness gave his statement under oath and was cross-examined by the accused's lawyer, and on the other hand, no objection was voiced either at the trial or on appeal, regarding the submission of the witness statement, and his answers in cross-examination as evidence.

[30]See *Kostovski v Netherlands* (1989) 12 EHRR 434. It was emphasised by the European Court that its duty was not to express a view on whether the statements were correctly admitted and assessed by the trial court, but to ascertain whether the whole proceedings, including the way in which the evidence was taken and the defence rights were honoured, was fair.

hostility or unreliability. Although the possibility existed that, in serious cases, witnesses could be intimidated, there was a need to balance the use of anonymous statements with the interests of the accused, and the conviction was found to be irreconcilable with the guarantee in article 6.[31] The court has also made it clear that the right to examine prosecution witnesses has to be balanced against the interests of the witnesses.[32] The *Kostovski* judgment was followed in *Windisch v Austria*,[33] where the defence was given no opportunity to question the two anonymous witnesses. Because the trial court had relied heavily on their written statements, the court held that the restrictions on the defence rights deprived the applicant of a fair trial. Although the court has accepted that some jurisdictions exempt certain witnesses from testifying, it has reiterated that the rights of the defence must be protected.[34]

In England, the accused has the general right to cross-examine prosecution witnesses.[35] However, questions must be relevant and answers on collateral

[31]Article 6(3)(d) of the European Convention for the Protection of Human Rights (hereinafter referred to as the 'ECHR') provides that the accused has the right to examine or have examined witnesses against him, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. According to Cheney, art 6 seems to echo the due process requirements of Anglo-American law. To illustrate this, when paragraph (3)(d) guarantees the right to cross-examine witnesses, this represents the right of confrontation which underlies the adversarial process. As long as the cumulative effect of the proceedings, notwithstanding the existence of some specified defect is not a denial of a fair hearing, the European Court will not find that the trial infringes art 6. See Cheney *et al Criminal justice and Human Rights Act 1998* (1999) 76.

[32]See *Doorson v The Netherlands* (1996) 22 EHRR 330, where the conviction was based on the evidence of anonymous witnesses. No violation was found in the circumstances.

[33](1991) 13 EHRR 281. Similarly, in *Ludi v Switzerland* (1993) 15 EHRR 173, the written statement of an undercover agent had played a role in the conviction. The court found that the anonymity of the undercover agent should have been preserved without denying the applicant his rights of defence.

[34]To illustrate this, the non-compellability of members of the accused's family was found to be acceptable in *Unterpertinger v Austria* (1991) 13 EHRR 175. However, the European Court added that the use of the statements made by the family members must comply with the rights of the defence which Article 6 aims to protect. *Ibid* at para 31.

[35]The tradition of cross-examining a witness is said to be a recent development in England. The procedure involved the judge examining the witnesses who were allowed to relate their stories in their own words. It was only during the 18th century that the practice developed of having barristers prosecute and defend. See Müller K and Tait M 'The child witness and the accused's right to cross-examination'(1997) 3 *Tydskrif van die Suid-Afrikaanse Reg* 519 at 521.The position at common law is that all witnesses are subject to cross-examination. See *R v Hilton* [1971] 3 All ER 541. According to the English common law, defendants are granted the right to confront witnesses according to the concept of trial as combat. The right to confront assumes the right to cross-examine, which is performed by the respective parties. This is also the position under the European Convention. Also see *Allen v Allen* [1894] P 248, where it was held that the evidence of one party cannot be received as evidence against another party in the same litigation unless the latter has had an opportunity of testing it by cross-examination.

issues are usually accepted as final.[36] The judge has a discretion to prevent any questions which in his opinion, are unnecessary, improper or oppressive.[37] The judge's consent is also required if the accused in a rape case wishes to adduce evidence or cross-examine about any sexual experience of the complainant with a another person. Consent may only be granted if the judge is satisfied that it would be unfair to the accused to refuse it.[38] Similarly, it has been held that where one prisoner gives evidence on oath inculpating another charged on a joint indictment, he is liable to be cross-examined by or on behalf of that other.[39] English law also prefers live testimony to statements from absent witnesses. However, a statement may be admitted if a credible witness testifies under oath that the deponent is dead, ill, or prevented from attending by the defendant or his agent.[40] The deposition must take place in the defendant's presence, and the defendant or his lawyer must be given the opportunity to cross-examine the witness.[41]

LIMITATIONS ON THE RIGHT TO CROSS-EXAMINATION

South African law

However, the right to cross-examination is not absolute. The possibility exists that the right to cross-examination can be abused in a system which requires the judicial officer to play a passive role. The legislature has tried to remedy this situation with the introduction of section 166(3) to the Criminal Procedure Act.[42] Section 166(3)(a) of the Act provides that the court may if it appears that cross-examination is being 'protracted unreasonably and thereby causes the proceedings to be delayed unreasonably', request the cross-examiner to disclose

[36]Harris & Joseph *The International Covenant on Civil and Political Rights and United Kingdom Law* (1995) 229.

[37]*Id.* For a discussion about improper cross-examination of the accused by prosecutors, see Taylor & Byrne 'Reflections on crown attorneys and cross-examination' (2001) 45/3 *Criminal Law Quarterly* 303–330. The writers suggest that crown attorneys should begin canvassing with trial judges whether the probative value of a proposed line of questioning will be outweighed by its prejudicial effect before they embark on improper cross-examination. Nevertheless, just as the judiciary must become more active in stopping inappropriate cross-examination and correcting improprieties after they occur, similarly, the defence must become more vigilant in objecting to improper cross-examination.

[38]In practice however, leave is refused if the evidence or cross-examination relates only to credit, and granted if it is relevant to an issue. Nevertheless, the distinction can be difficult to draw. *Id.*

[39]See *R v Hadwen* [1902] 1 KB 882; *R v Stannard* (1962) [1964] 1 All ER 34. Also see *Murdoch v Taylor* [1965] AC 574 at 592, where it was stated that a trial judge has no discretion whether to allow an accused to be cross-examined regarding his past criminal offences once he has given evidence against his co-accused.

[40]See Sherman 'Sympathy for the devil: examining a defendant's right to confront before the International War Crimes Tribunal' (1996) 10 *Emory International Law Review* 833 at 857.

[41]*Id.*

[42]It has been inserted by s 8 of the Criminal Procedure Amendment Act 86 of 1996. The position at common law and statutory law is that an accused does not have an absolutely free hand to cross-examine at will. These restrictions are inherent to the right itself, or require justification in terms of the limitation clause under the Bill of Rights.

the relevancy of any particular line of examination.[43] The court may also impose reasonable limits regarding the length and line of the cross-examination in terms of section 166(3).[44] The court may also order that any submission regarding the relevance of cross-examination be heard in the absence of the witness.[45] It should be noted that section 166(3)(a) does not limit the right to challenge evidence. However, it gives the court the power to control unreasonable questioning.

A judicial officer has both a discretion and a duty to control undue or improper cross-examination.[46] The court also has a discretion to restrain and control the ambit of cross-examination in terms of section 197(b) of the Act.[47] This discretion must be exercised in the light of the principles governing relevance.[48] The court remarked that the right to cross-examination is not absolute in *Klink v Regional Court Magistrate NO*[49] the court remarked that the right to cross-

[43]De Waal *et al* suggest that s 158 may also impose a limitation on the right to challenge evidence. Section 158 provides that a court may order that evidence be given by means of closed-circuit television or similar form of electronic media, provided that the prosecutor and the accused retain the right to question the witness and to observe the reaction of that witness. See De Waal *et al The bill of rights handbook* (4ed 2000) 555.

[44]According to De Waal *et al*, this provision is not unconstitutional. Instead, it confers a discretion and it is therefore possible to apply it in a manner which does not violate the accused's right to a fair trial. *Id.*

[45]In terms of s 166(3)(b). Both ss 166(3)(a) and 166(3)(b) raise constitutional issues which concern the right of the accused to a fair trial, and more specifically, the right to challenge evidence and the right to be present during the trial. Van der Merwe argues that whilst both sections are constitutional, they ought to be applied with caution in order to secure a fair trial as guaranteed by s 35(3) of the Constitution. See Van der Merwe *op cit* 359.

[46]*S v Cele* 1965 (1) AD 82. The court noted that latitude in the cross-examination of witnesses, where credibility is the issue, should be allowed until the court is satisfied, either that the right to cross-examine is being misused or abused, or that the particular line of cross-examination could never produce anything which could assist the court in its eventual decision on credibility. Also see *S v Pitout* 2005 1 SACR 571 (BD) at 576, where the court stated that a judicial officer should realise that whenever questioning has to start on a previous inconsistent statement, he or she has a duty to see to it that the cross-examiner first lays the basis of such questioning. Failure to observe this rule may adversely affect the probative value of such evidence.

[47]In terms of s 197(b), the accused giving evidence is protected from questions showing that he has been charged with any offence other than that which he is charged, or that he is of bad character, unless he testifies against another accused charged with the same offence.

[48]See *S v Pietersen* 2002 1 SACR 330 (C), where it was held that the cross-examination has to be relevant to the issue of credibility and it cannot prejudice the accused being cross-examined in the conduct of his defence to the extent that his right to a fair trial is undermined.

[49]See *Klink v Regional Court Magistrate NO and Others* 1996 (3) BCLR 402 (SE). Also see *S v Mayiya* 1997 (3) BCLR 386 (C), where the court held that although an accused should be allowed to cross-examine unhampered, the court may disallow questions that are irrelevant, misleading, vexatious, abusive, oppressive and discourteous. The court on appeal considered the duty of disclosure, and held that it also places the accused in a better position to test the reliability and credibility of state witnesses by means of cross-examination in the interests of a fair trial. The prosecutor's failure to disclose the medical report to the accused rendered the trial unfair.

examination is not absolute in that the trial court retains a discretion to disallow questioning that is irrelevant, unduly repetitive, oppressive or improper. The court also remarked that it may also prevent a lawyer from conducting a bullying or intimidating form of cross-examination, or if it appears that his line of questioning is calculated to confuse the witness.[50] To this end, cross-examination should always be conducted with restraint and dignity.[51]

An accused cannot therefore state that his right to a fair trial has been infringed if the court intervenes to prevent his lawyer from conducting a bullying or intimidating form of cross-examination, or if it appears that his line of questioning is directed at confusing the witness. Thus, the circumstances of each case will dictate whether or not the curtailment or limitation of cross-examination has resulted in the violation of a right to a fair trial. However, where an accused has been deprived of the opportunity to cross-examine a witness due, for example, to the latter's death, the use of such untested evidence will result in the infringement of his constitutional right to challenge evidence sufficiently.[52] It may also happen that accused who are physically disruptive in the courtroom may forfeit their right to be present. Similarly, section 159(1) of the Act provides that if an accused conducts himself in a manner which makes the continuation of the proceedings in his presence impracticable, the court may direct that he be removed and that the proceedings continue in his absence. This will impact on his right to cross-examine state witnesses. However, he is later given the opportunity to question or to confront witnesses who testified in his absence.[53]

The position in foreign jurisdictions and international law

Similarly, in the United States, the court may limit cross-examination if the questions are prejudicial, irrelevant, cumulative or collateral.[54] The court may also restrict cross-examination if it contains no sufficient factual basis or will jeopardise an ongoing government investigation.[55] Indeed, it has been held in *Davis v Alaska*[56] that an accused's right to cross-examine is subject only 'to the

[50]See *Klink v Regional Court Magistrate supra* at 410 D–E.
[51]See *S v Gidi* 1984 4 SA 537(C).
[52]See *S v Motlhabane supra* at 951 .
[53]See s 160 of the Act.
[54]See, *inter alia*, *US v Diaz* 26 F 3d 1533, 1539-40 (11th Cir 1994), *US v Gonzalez-Vazquez* 219 F 3 d 37, 45 (1st Cir 2000).
[55]See, *inter alia US v Alvarez* 987 F 2d 77, 82 (1st Cir 1993), *US v Balliviero* 708 F 2d 934, 943 (5th Cir 1983).
[56]See *Davis v Alaska* 415 US 308 (1974) at 316. Also see *R v Rewniar* [1949] 1 WWR 177; 93 CCC 142; 7 CR 127 (CAN), where it was held that judge may check cross-examination if it becomes irrelevant, prolix or insulting, but so long as it may be fairly applied to the issue or touches the credibility of the witness it should not be excluded. Also see *R v Ignat* (1965) 53 WWR 248 (CAN), where it was stated that counsel for an accused in a criminal case must be allowed the widest latitude in the examination and cross-examination of witnesses subject to the limitations imposed by the rules of evidence and of fair advocacy. Serious curtailment of this

broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation'. To disallow such questions is not regarded as a limitation on an accused's right to challenge evidence, because they do not achieve the legitimate purpose of cross-examination. Accused persons may be found to have forfeited their constitutional and evidence-law rights to confront and cross-examine a prosecution witness. This occurs if that witness is unavailable for trial owing to threats or other misconduct of the accused, or owing to the misconduct of others to which the accused has agreed to.[57] Certain decisions of the European Court of Human Rights also demonstrate that the accused's right to cross-examine every prosecution witness is important but not absolute.[58] Thus, reliance on pre-trial witness statements is not contrary to the Convention as long as the rights of the defence are respected.[59]

HEARSAY EVIDENCE

The position in South Africa

The common-law position

Hearsay evidence is regarded as being untrustworthy because it cannot be tested by cross-examination.[60] It is not only the maker of the statement who might have been deliberately lying. He may simply have been mistaken owing to deficiencies in his powers of observation or memory, or he may have narrated the facts in a garbled or misleading manner. The purpose of cross-examination is to expose these deficiencies. If the maker of the statement is not present before the court, then this safeguard is lost.[61]

According to Zeffertt *et al*, the common-law rule was rigid.[62] All hearsay evidence which does not come within some established exception was excluded, no matter how reliable it may have been. This could lead to a grave injustice. The common-law rule prevented the court from discovering the truth

right by the court, and any suggestion of partiality on the court's part, may result in the conviction being squashed.

[57]See *People v Geraci* 649 NE 2d 817 (NY Ct App 1995) at 817. The accused is also said to have waived the right to cross-examination if he prevents a witness from testifying or fails to make a timely objection to a violation. See *inter alia*, *US v Houlihan* 92 F 3d 1271, 1278 (1st Cir 1996), *US v Burton* 937 F 2d 324, 329 (7th Cir 1991).

[58]See *inter alia*, *Unterpertinger v Austria supra.*

[59]See *inter alia*, *Windisch v Austria supra* at para 26.

[60]Hearsay is defined as any oral or written statement, or conduct, reported on the witness stand by someone other than the person who stated, wrote or engaged in the questionable conduct. Such evidence is usually excluded unless it falls within one of the common law or statutory exceptions. See Zeffertt *et al The South African law of evidence* (2003) 381 regarding the status of the common law and statutory exceptions.

[61]See *Teper v R* [1952] AC 480 at 486; [1952] 2 ALL ER 447 at 449.

[62]Zeffertt *et al op cit* 366.

in cases where no policy could have justified its application. This led to a new approach in South Africa, namely, the statutory position.[63]

The statutory position

The statutory position is regulated by section 3 of the Law of Evidence Amendment Act 45 of 1988.[64] Section 3(1)(a) states, *inter alia*, that hearsay shall not be admitted as evidence at criminal or civil proceedings unless each party against whom the evidence is to be adduced agrees to the admission of such evidence at such proceedings.[65] The person upon whose credibility the probative value of such evidence depends, must himself testify at such proceedings in terms of section 3(1)(b). Section 3(4) defines hearsay evidence as evidence (whether oral or in writing) as evidence, the probative value of which depends upon the credibility of any person other than the person giving such evidence. It is evident from the above that section 3(4) no longer requires a statement, that it is to be hearsay, to be tendered for the purpose of asserting the truth of its content.[66]

It has been held that the implied assertion of verbal conduct will be hearsay in terms of subsection (4) if its probative force depends on the credibility of anyone other than the witness.[67] Hearsay may be provisionally admitted in terms

[63]It should be noted that the common law exceptions to the hearsay rule are now regarded as being obsolete but not irrelevant. They are factors which the court may consider in exercising its discretion to admit the evidence in the interests of justice. Also see Schwikkard 'The challenge of hearsay' (2003) 120/1 *The South African Law Journal* 63–71 at 63.

[64]It should be noted that the legislation was hugely influenced by a PhD thesis completed by Professor Andrew Paizes, entitled 'The concept of hearsay with particular emphasis on implied hearsay assertions' (1984). See Zeffert *et al op cit* 365. Also see Rall 'The new hearsay rules'(1990) 3/1 *Consultus* 53–55 for a critical look at section 3 of the Law of Evidence Amendment Act 45 of 1988.

[65]However, where the agreement is express, courts should act with caution where accused persons are unrepresented, and instead consider the contents of s 3(1)(c).

[66]The case of *International Tobacco Co (SA) Ltd v United Tobacco Cos (South) Ltd* 1953 3 SA 343 (W), illustrates this. The plaintiff brought an action for defamation and injurious falsehood, alleging that the defendants had spread rumours that cigarettes manufactured by the plaintiff company had caused tuberculosis. A commercial traveller's testimony that statements to this effect had been repeated to him by customers was found not to constitute hearsay since the evidence was tendered not to prove that the statements were true, but to show that rumours were circulating. The question arises whether the probative value of the evidence depends on the credibility of any person other than the witness? Thus the statements which were held not to be hearsay at common law, in the *International Tobacco* case, would be hearsay under the statute because of their probative force. An inference could be drawn from them that a rumour which was circulating would be governed or controlled by the credibility of both the witness and the non-witness. See Zeffertt *et al op cit* 368.

[67]See the case of *S v Van Niekerk* 1964 1 SA 729 (C), where it was held that the implied assertion fell within the ambit of the rule against hearsay. The facts were that a magistrate was charged with the theft of a gun, which he had confiscated from a drunk who died shortly afterwards. The magistrate admitted having sold the gun and having kept the proceeds, but said that the deceased had asked him to sell the gun and had later told him to keep the money. The prosecution tried to

of section 3(3) if the court is informed that the declarant will testify subsequently. If he does not, it will be excluded unless it can be admitted by agreement or if the court is of the opinion in terms of section 3(1)(c), that it would be in the interests of justice to do so. Thus, section 3(1)(c) of the Evidence Amendment Act 45 of 1988 gives courts the discretion to admit hearsay evidence if they are of the opinion that such evidence 'should be admitted in the interests of justice'.[68] The phrase 'interests of justice' must be interpreted in the context of the Bill of Rights and an accused's right to a fair trial.

Hearsay evidence is said to deny an accused the right to cross-examine the witness. This is because the declarant of a statement is not in court, and thus cannot be challenged. A judge should therefore hesitate when admitting or relying on hearsay evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act, where such evidence plays a decisive or even important role in convicting an accused unless there are compelling reasons for doing so.[69] The case law illustrates that the courts have been reluctant, even before the Constitution, to use the exception lightly in criminal cases against the accused. However, hearsay evidence has been admitted more readily where it is tendered by the accused. In the case of *S v Cekiso,*[70] it was held that section 3(1)(c)

rebut this defence by producing letters written by the deceased to his brother before and after the sale, asking him to collect the gun from the magistrate. The letters were tendered as conduct by the deceased tending to show that he did not think that he had authorised the magistrate to dispose of his gun and in order to show that his view was correct. The court held that the letters should have been excluded as hearsay evidence. Also see Zeffertt *et al op cit* 364.

[68]The court may consider the following factors: (i)the nature of the proceedings; (ii)the nature of the evidence; (iii)the purpose for which the evidence is tendered; (iv)the probative value of the evidence; (v)the reason why the evidence is not given by the person upon whom the credibility the probative value of such evidence depends; (vi)any prejudice to a party which the admission of such evidence might entail; and (vii)any other factor which should in the court's opinion be taken into account. Also see *Mnyama v Gxalaba* 19901 SA 650 (C), where the issue concerned a dispute amongst the next of kin as to where an intestate deceased should be buried and who should attend to the burial. Evidence of a verbal wish of the deceased expressed to his widow regarding his place of burial was tendered. The court found that it was empowered by s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 to admit hearsay evidence in the interests of justice. However, the court analysed the hearsay evidence and rejected it as not having sufficient cogency to warrant acceptance.

[69]See *S v Ramavhale* 1996 1 SACR 639 (A) at 649. When the court convicted the appellant of murder, it had relied on a piece of hearsay evidence by a state witness as to what the deceased had said. The prosecutor did not lead the evidence in question, but slipped it inadvertently. The court found clear prejudice to the appellant in admitting the hearsay at the stage of judgment. It held further that the irregularities were so gross that the trial could be vitiated.

[70]1990 4 SA 20 (E) at 21 E. The state had applied for the admission of certain hearsay evidence. In a criminal trial, the court had refused to allow the evidence of what the deceased had told a witness about the accused having entered the deceased's house. The accused had denied that they had entered the deceased's house at all. The court considered s 3(1)(c) and found that it would not be in the interests of justice to allow such evidence, which cannot be tested in the normal way. The application to lead such evidence was therefore refused.

should not be exercised in favour of allowing hearsay evidence on controversial issues about which conflicting evidence has been given. To allow such evidence would result in severe prejudice to the person against whom the evidence is given. The discretion in terms of section 3(1)(c) will seldom be exercised in favour of the admission of hearsay in criminal cases owing to the presumption of innocence and the court's reluctance to allow untested evidence to be used against an accused in a criminal case.[71] However, this does not affect the position in civil matters where the section will be constructively applied to search for the truth.

However, in *S v Dyimbane*[72] the court admitted certain evidence which had not been challenged and which was highly relevant material in the prosecution case. Thus the court found that it was not 'hearsay' evidence. It was held in *S v Mpofu*[73] that if the probative value of what has been adduced is so diminished as a result of unreliability, then the resultant prejudice caused by its reception may persuade the court to exercise its discretion against admitting it. The case of the undefended accused was considered in *S v Ngwani*[74] where it was held that the court should explain the provision to such accused, and give them the opportunity to address the court on the question of whether the admission of the hearsay evidence would be prejudicial to them.

Hearsay evidence is more readily admitted in a bail hearing because it is not regarded as 'criminal proceedings'. This includes the introduction of affidavits by the accused.[75] The court is more likely to admit hearsay evidence where

[71] See *Metadad v National Employers' General Insurance Co Ltd* 1992 1 SA 494 (W) at 499 H. The court found that it is bound to apply Act 45 of 1988 when so required by the interests of justice. Also see *S v Saat* 2004 1 SA 593 (W), where the issue arose regarding the admissibility of the record of evidence in previous proceedings in terms of s 3(4) of Act 45 of 1988. After weighing up all the factors and particularly that the witnesses had already been extensively cross-examined and that the usual objection to the reception of hearsay evidence did not exist, the court held that it was in the interests of justice to admit such evidence in terms of s 3(1) of Act 45 of 1988.

[72] 1990 2 SACR 502 (SE) at 504. The court remarked that when hearsay evidence is prejudicial to the accused, the court must consider this factor. However, it need not be decisive. Hearsay evidence is very prejudicial where it concerns proof of guilt. In this case, it should only be admitted if there are compelling reasons. Steytler suggests that this view is correct in the light of the constitutional right to challenge and adduce evidence. See Steytler NC *Constitutional criminal procedure: a commentary on the Constitution of the Republic of South Africa, 1996* (1998) 351. The court also remarked that in deciding whether or not to admit hearsay evidence in terms of s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, it must consider all the factors set out in s 3(1)(c) and take an overall view at the end of the case.

[73] 1993 2 SACR 109 (N).

[74] 1990 1 SACR 449 (N). The magistrate had invoked s 3(1)(c) of Act 45 of 1988, but he had not explained the effect of the subsection to the accused. He had also not informed the accused on the question whether the subsection should be invoked or not. The court set aside the conviction.

[75] *S v Pienaar* 1992 1 SACR 181 (W). The court held that there is nothing in the Criminal Procedure Act that renders the use of affidavits in bail applications inadmissible. However, an affidavit will have less probative value than oral evidence which is subject to the test of cross-

evidence is tendered regarding the imposition of a proper sentence. This is because the nature of the sentencing enquiry which requires a complete picture of a convicted person in the interest of society, requires evidence which often will include hearsay evidence.

The constitutional position

The question arises whether the admission of hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988, is constitutional. It has been held in *S v Ramavhale*[76] that hearsay evidence may be accepted 'subject to the broad, almost limitless criteria set out in section 3(1)'. However, the courts have approached the two statutory exceptions in section 3 with caution. An accused is entitled to legitimately waive the right to challenge evidence by consenting to the admission of such evidence in terms of section 3(1)(a). It is also preferable to insist on his express consent, and not to construe a failure to object to its reception as implied or tacit consent.[77] It has been suggested that in view of the constitutional right to challenge evidence, this practice should be given constitutional force, and that any consent should meet the requirements of a valid waiver and be explicitly noted on the record.[78] Common law hearsay exceptions should also be subjected to the requirements of section 36(1) of the Constitution. However, they will probably survive because they are based on trustworthiness and necessity.[79]

The constitutionality of section 3 was challenged before the Supreme Court of Appeal in *S v Ndhlovu and Others*,[80] where it was held that the use of hearsay

examination. On the other hand, an affidavit will also carry more weight than a mere statement from the bar. Also see *S v Maki en Andere* (1)1994 2 SACR 630 (EK), where the court had to consider an opposed bail application where one of the accused did not give oral evidence but relied on an affidavit he had made, which was handed in on his behalf. The state contended that the affidavit was not admissible. The court held that bail applications are not 'criminal proceedings' because they are not 'proceedings directed by the state against the accused in order to secure his conviction and punishment'. The court noted that a bail application is couched in the form of an application with some characteristics of civil proceedings. Therefore, it is regarded as 'civil proceedings' for the purposes of s 3 of the Law of Evidence Amendment Act, and hearsay evidence is admissible. Accordingly, the court applied the above principles and held that the affidavit was admissible.

[76]See *S v Ramavhale supra* at 650b.

[77]Steytler *Constitutional criminal procedure op cit* 351.

[78]*Id.*

[79]*Ibid* at 353.

[80]2002 2 SACR 325 (SCA) at para 24. The court also found that since the Constitution did not guarantee an entitlement to subject all evidence to cross-examination; it contained the right (subject to limitation) to 'challenge evidence'. According to Zeffertt *et al*, a more realistic approach would be to regard the provisions of s 3 which constituted a limitation of the accused's right to challenge evidence as a reasonable and justifiable limitation in terms of s 36 of the Constitution. See Zeffertt *et al op cit* 381. Also see Schwikkard *SALJ op cit* 63–71 for a detailed discussion about the case. Although she welcomes the judgment, she maintains that it left many questions unanswered such as the ambit of the right to challenge evidence or that the depth of

evidence by the state does not violate the accused's right to challenge evidence by cross-examination at all, since 'where the interests of justice require that the hearsay statement be admitted, the right to 'challenge evidence' does not encompass the right to cross-examine the original declarant'. The Supreme Court of Appeal therefore confirmed that the Law of Evidence Amendment Act 45 of 1988 provides a constitutionally sound framework for the admission of hearsay evidence.[81]

The position in foreign jurisdictions and international law

In the United States, the general position is that all hearsay statements are inadmissible, but there are many exclusions and exceptions to this rule.[82] However, the following types of hearsay are sometimes admissible, provided that the declarant is not available to testify at the trial owing to a testimonial privilege or refusal to testify, lack of memory, death or infirmity in a re-trial, testimony from a prior trial, and in a homicide trial, statements of the circumstances of what the declarant believed was his impending death. The prohibition against hearsay is based on the rationale that statements made out of court are not subject to cross-examination, and therefore do not give a defendant a chance to challenge their veracity and truthfulness.[83]

In a number of decisions since 1965, the US Supreme Court seemed to equate the Confrontation Clause with the hearsay rule It held that a major purpose of the clause was 'to give the defendant an opportunity to cross-examine the witnesses against him'.[84] The right to confront prosecution witnesses entrenched in the Sixth Amendment also prevents the use of hearsay statements against the accused, unless the statement has sufficient 'indicia of reliability', and the declarant is not available to testify at the trial.[85] A witness is said to be

the role of cross-examination was not explored (at 71).

[81] See *S v Ndhlovu supra* at 341c.

[82] The following types of statements are generally excluded from the definition of hearsay, and are therefore admissible at trial (see Minn Rule Evd 801(d)): they include prior consistent or inconsistent statements of a trial witness, prior statements identifying a suspect, or describing an event or condition while it is observed, or immediately afterwards, and prior admissions of an opposing party (including criminal defendant) or that party's agent or co-conspirator. See Frase 'USA' in Weissbrodt and Wolfrum (1998) *op cit* 55.

[83] See *Pointer v Texas supra* at 400, where a conviction was reversed. This was because the trial court had admitted transcript testimony from the previous hearing in which the defendant's counsel was not present, and the witness was not cross-examined.

[84] *Ibid* at 406--407, where the use of preliminary hearing testimony was found to violate the defendant's right of confrontation. Also see *Douglas v Alabama supra* at 418 and *Bruton v US* 391 US 123 (1968).

[85] See *Ohio v Roberts supra* at 56, which raised the issue concerning the testimony of an unavailable witness. The court allowed the admission of the out of court statement where actual cross-examination during the preliminary hearing did not occur, and where the declarant was unavailable for cross-examination at trial. The rule in *Roberts* was narrowed in *United States v Inadi* 475 US 387 (1986), where the court held that the rule of 'necessity' is confined to the use of testimony from a prior judicial proceeding, and does not apply to co-conspirators' out-of-court

unavailable if the government is unable, despite good-faith efforts to procure that witness' attendance at trial.[86] However, a trend has developed in some of the modern state evidence codes and Federal Rules of Evidence towards a more open admissibility of all types of evidence, including hearsay.[87] The US Supreme Court has also dispensed with the unavailability requirement for statements admitted under certain admitted exceptions to the hearsay rule (*eg* statements made to obtain medical diagnosis or treatment).[88]

Recently, the US Supreme Court's decision in *Crawford v Washington*[89] overruled *Ohio v Roberts*, thus marking a fundamental shift in the Supreme Court's interpretation of the Sixth Amendment Confrontation Clause. Whilst the *Ohio v Roberts* case allowed the admission of hearsay statements provided they were reliable, even though the accused had no opportunity to cross-examine the hearsay declarant, *Crawford* requires that the accused be given an opportunity to cross-examine the declarant as to hearsay statements in which the clause applies. *Crawford* therefore, takes the position that the purpose of the clause is

statements. See Smith 'When to hear the hearsay: a proposal for a new rule of evidence designed to protect the constitutional right of the criminally accused to confront the witnesses against her' 32(4)(1999) *The John Marshall Law Review* 1287–1309, where Smith argues that a standard should be developed that will allow uncross-examined and inculpatory hearsay statements to be admitted against the defendant only when these statements are truly reliable. The Confrontation Clause will satisfiy once such a standard is implemented. Also see Lathi 'Sex abuse, accusations of lies, and videotaped testimony: a proposal for a federal hearsay exception in child sexual abuse cases'(1997) 68 *University of Colorado Law review* 507, where the writer also proposes a hearsay exception to the Federal Rules of Evidence for the out-of-court statements of children who allege sexual abuse. Also see Imwinkelried 'The constitutionalization of hearsay: the extent to which the Fifth and Sixth Amendments permit or require the liberalization of the hearsay rules' 76 (1992) *Minnesota Law Review* 521.

[86]See *Mancusi v Stubbs* 408 US 204, 212 (1972).

[87]Watkins 'The double victim: the sexually abused child and the judicial system' 7 (1990) *Child and Adolescent Social Work* 29 at 37. Also see Douglass 'Beyond admissibility: real confrontation, virtual cross-examination, and the right to confront hearsay'(1999) 67/2 *The George Washington Law Review* 191, where the writer discusses a new approach to the confrontation-hearsay dilemma. He believes that the answer lies in the tool of confrontation.

[88]See *White v Illinois* 502 US 346 (1992). The US Supreme Court has also held that out-of-court statements of co-conspirators, spontaneous statements and those made in the course of procuring medical services are examples of firmly rooted hearsay exceptions which make proof of unavailability and reliability unnecessary. See *Bourjaily v United States* 483 US 171, 183 (1987). Also see Layton 'Hearsay, reliability and prior inconsistent statements made by co-accused, Part 11' (1999) 41 *Criminal Law Quarterly* 501–516. Also see Gray 'The medical treatment hearsay exception in Maryland: a low point in clarity for practitioners and protection for litigants' (2000) 29 *University of Baltimore Law Review* 237.

[89]124 SCt 1354 (2004). The facts were that the defendant stabbed a man he claimed tried to rape his wife. He claimed that it was done in self-defence. At the trial, the prosecution offered a tape-recorded statement that the defendant's wife gave to the police which cast doubt on the self-defence theory. The court admitted the evidence and the defendant was convicted of assault. The Supreme Court found that the admission of the tape-recorded statement violated the defendant's rights under the Confrontation Clause.

to ensure that reliability be tested by confrontation through cross-examination.[90] The effect of *Crawford* is that when the Confrontation Clause applies, it requires that the accused be given an opportunity to cross-examine the declarant of the hearsay statement, regardless of the statement's reliability.[91]

In England, accused persons have the right to call witnesses on their own behalf and to cross-examine witnesses called by the prosecution. However, witnesses cannot testify about statements made by persons who are not subject to questioning in court.[92] Article 6 of the ECHR prohibits the use of statements by absent witnesses.[93] The common law position is that such statements cannot be adduced as evidence in terms of the hearsay rule. Thus, such statements are inadmissible as evidence of any fact asserted. The reason for the exclusion of hearsay is that it is unreliable and because the witness is not subject to cross-examination. The use of hearsay also means that the trial can be stigmatised as being unfair and an abuse of due process.

However, written witness statements may be admissible under sections 23 or 24 of the Criminal Justice Act 1988. The presence of the witness is not required. The witness must be dead, physically or mentally unfit, out of the jurisdiction, unable to be traced, or have been intimidated. However, the trial judge has an exclusionary discretion under section 25 not to admit the evidence if, in the interests of justice, it ought not to be admitted.[94] However, the burden of persuading the court that the document should be excluded rests on the party objecting to admission. If the statement is one prepared for the purposes of criminal investigation, a positive duty rests on the trial judge in terms of section 26 to ensure that the party tendering the statement bears the burden of persuading the court that the admission of the statement is in the interests of

[90] *Ibid* at 1374.

[91] For a detailed discussion of the *Crawford* case and its impact on the interpretation of the Sixth Amendment Confrontation Clause, see Counseller and Rickett 'The Confrontation Clause after *Crawford v Washington* : smaller mouth, bigger teeth' (2005) 57/1 *Baylor Law Review* 1–22.

[92] This rule against hearsay evidence has been reviewed by the Law Commission. See Dickson 'England and Wales' in Weissbrodt and Wolfrum (1998) *op cit* 508. Also see Tapper 'Hearsay in criminal cases: an overview of Law Commission report no 245' (1997) *The Criminal Law Review* 771, for a discussion about the Law Commission's report. Also see *R v Kearley* (1992) 2 WLR 657 (HL), where requests for drugs were made by callers on the telephone but not in the defendant's presence or hearing. On appeal, the House of Lords held that the implied assertion involved in the request for drugs should be excluded as hearsay.

[93] The relevant article provides for a witness to be called, to give oral evidence and to be cross-examined. The Human Rights Act 1988 incorporates the European Convention on Human Rights into UK law.

[94] Section 25(2) directs the court to look at the following elements: the nature and source of the document; the extent to which other evidence on the issue is available; the relevance of the evidence; or the risk of unfairness. See Cheney *et al op cit* 101. Section 25 is similar to s 3(1)(c) of the Law of Evidence Amendment Act.

justice.[95] The weight to be attached to the inability to cross-examine and the magnitude of any risk that the admission of the statement will result in unfairness to the accused will depend partly on the court's assessment of the quality of the evidence shown by the contents of the statement.[96] Any potential unfairness which arises from an inability to cross-examine on the particular statement, may be effectively counterbalanced by a warning and an explanation in the summing up to the jury. The court also has to consider whether the interests of justice will be properly served by excluding the statement if one considers other evidence available to the prosecution.[97]

The effect of the Criminal Justice Act 1988 and the statutory duty to consider any unfairness to the defendant before admitting documentary hearsay ensures that there is a 'fair hearing' and that these provisions do not infringe article 6.[98] It has been suggested that article (6)(3)(d) prohibits the prosecution from adducing hearsay evidence, but the court has not adopted such a strict interpretation. In the case of *Unterpertinger v Austria*[99] the court concluded that the conviction had been substantially based on written statements of absent witnesses, and therefore there was a breach of article 6. A similar view was taken in *Kostovski v Netherlands*.[100] These cases demonstrate that where hearsay evidence is the main or decisive evidence against the defendant, reliance on it

[95]The case of *R v Cole* [1990] 2 All ER 108, illustrates the different functions of ss 25 and 26. It involved a case of assault in which the prosecution tried to introduce the statement of an eyewitness who had subsequently died. Leave was required in terms of s 26 and the appellant argued that this should have been refused because the only way of denying the statement under s 26(ii) would have been for the defendant to testify or to call witnesses. This would have led to improper pressure on the defendant. The court of appeal rejected this submission. However, it accepted that a balance had to be struck between the widening of power to admit documentary hearsay and ensuring that the accused received a fair trial.

[96]Cheney *et al op cit* 102.

[97]See *R v Cole supra.*

[98]Article 6(3)(d) embodies the accused's right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. Article 6(3)(d) is phrased in such a way as to ensure the presence of witnesses, and thereby prohibit hearsay introduced on behalf of the prosecution. Similar material may be introduced on behalf of the defence, although there is no obligation as a result of art 6 for a domestic court to admit such evidence. See Cheney *et al op cit* 105.

[99]See *Unterpertinger v Austria supra* at 175. The accused was charged with assault on his stepdaughter and wife. The police took witness statements from the two victims. The witnesses were not compellable under Austrian law. At the trial, both victims refused to testify and the interviews with the investigating judge were read out. Unterpertinger applied to the Commission on the grounds that the acceptance of written evidence of interviews with the judge and the police infringed art 1 and art (6)(3)(d), because he was unable to cross-examine the victims.

[100]See *Kostovski v The Netherlands supra* at 434. Here, the conviction was based on accounts by two witnesses, who were allowed to remain anonymous and not to testify because of the fear of reprisals. Also see *Saidi v France* (1993) 17 EHRR 251.

in court will lead to a breach of the Convention.[101] Other decisions stress that the hearsay evidence must not be the only item of evidence.[102] However, the cases are not wholly consistent on this point.[103] According to Andrew Ashworth, the *Trivedi* ruling demonstrates that in certain cases it will be possible to hold that the trial was fair, largely because of the strength of other evidence.[104]

The impact of article 6 may require amendment to the rigid application of the rule regarding defendants. The case of *R v Blastland*[105] involved a murder case in which a third party made a statement which strongly suggested that person's involvement in the killing. However, the House of Lords found the statement to be inadmissible. In *Blastland*, therefore, the result of the exclusion of the items of evidence involved (the third party's confession and his knowledge of the crime), was to deprive the jury of information which might have left it with a reasonable doubt about the defendant's guilt. The argument has been advanced that the concept of a fair hearing requires an inclusionary discretion to admit hearsay statements on behalf of the accused.[106] According to Emerson and Ashworth, the presumption against hearsay embodied in Article 6(3)(d) is

[101]See *Van Mechelen v The Netherlands* (1997) 25 EHRR 647at 657, where the court held that the trial was unfair when eleven police officers gave evidence for the prosecution, remained anonymous, and were questioned by the judge whilst prosecuting and defence counsel were kept in another room, with only a sound link to the judge's chambers.

[102]See *Doorson v The Netherlands supra* at 330, where the court held that the trial was not unfair when two prosecution witnesses remained anonymous and were questioned by the judge in the presence of counsel but not the accused. The court found that there were certain 'counter-balancing' procedures and sufficient other evidence to justify the conclusion that there was no violation. In *Asch v Austria*, 12 HRLJ 203 (1991), the court held that where a victim of an assault declined to testify at the trial, then the statements relied on were not the only evidence.

[103]The European Commission has also considered the relationship between the provisions of the Act and art 6 in *Trivedi v UK* [1997] EHRLR 520. Here, a doctor was charged with false accounting by claiming for more night visits to a patient than had actually occurred. The prosecution had relied on written statements by the patient who was elderly and infirm. The Commission declared that the application was inadmissible because the statements were not the only evidence. The judge had conducted an enquiry into the patient's condition, and evidence on the patient's reliability had been admitted. The jury had been warned against attaching undue weight to the patient's evidence. Thus, in this case, the admission in evidence of pre-trial statements made by an elderly witness unfit to give oral evidence at the trial did not render the proceedings unfair as a whole. However, the Commission came to a different conclusion in *Quinn v UK* 23 EHRR CD 41 (1996). Here, the statements were regarded as important evidence where the applicant had not been allowed to cross-examine the witnesses in person.

[104]However, this does not alter the fact that the provisions of the Criminal Justice Act 1988 do not, at face value, comply with art 6(3)(d), and that judicial discretion cannot be relied upon to ensure compliance unless judges take account of such matters as the need to keep departures from art 6(3)(d) to an essential minimum, the need to devise other 'counter-balancing' procedures to compensate for any incursion on defence rights, and the importance of not basing a conviction solely or mainly on evidence admitted by these means. See Ashworth 'Article 6 and the fairness of trials' (1999) *The Criminal Law Review* 261at 270.

[105][1985] 2 All ER 1095.

[106]However, it is a principle of common law that any evidence admissible for the defence must also be admissible for the prosecution. Cheney *et al op cit* 104.

worded so as to apply only to witnesses who give evidence against the accused, and there is no equivalent rule against the introduction of hearsay evidence by the defence.[107] Where national law allows the admission of such evidence, there is nothing in Article 6 to prevent this. However, no obligation rests on a court to admit hearsay evidence which purports to exonerate the accused in terms of Article 6.[108]

The Criminal Justice Act 2003 (hereinafter referred to as the 'CJA 2003') has rationalised and modernised the existing system on hearsay evidence in England.[109] Under the CJA 2003, hearsay evidence will be the subject of a statutory definition for the first time in criminal cases.[110] However, CJA 2003 does not specifically cater for a confession made by a third party which remains inadmissible unless one of the exceptions applies.[111] If the maker of the confession is an available witness, then the accused can use the safety valve.[112] Section 116 includes a number of refinements on s 23 of the 1988 Act.[113] Although the new scheme has been welcomed as a definite improvement on the existing system, it does not have all the answers to the hearsay dilemma.[114]

CONCLUSION

The accused's right to present an effective defence includes the right to cross-examine evidence in terms of s 166 of the Act.[115] This enables him not only to elicit favourable evidence, but also to test the truthfulness of the evidence presented by the opposing party. Cross-examination is regarded as the principal method of testing the veracity and reliability of evidence. A judicial officer is

[107] See Emerson and Ashworth *Human rights and criminal justice* (2001) at 471.

[108] See *Blastland v UK* (1988) 10 EHRR 528.

[109] See Birch 'Criminal Justice Act 2003 (4) Hearsay, same old story, same old song?' (2004) *Criminal Law Review* 556–573 for a detailed discussion about the impact of the CJA 2003 on hearsay evidence.

[110] *Ibid* at 561.

[111] Also see *R v Blastland supra*. It should be noted that the four hearsay exceptions comprise the following: (a)statutory exceptions including those in the 2003 Act (s 114(1)(a); (b)common-law exceptions preserved by s 118 (s 114(1)(b); (c)hearsay admitted by agreement of all parties to the proceedings (s 114(1)(c);.(d)the 'safety valve' or limited inclusionary discretion which allows the use of what otherwise would be inadmissible hearsay (s 114(1)(d). *Ibid* at 562; 559–560.

[112] *Id*.

[113] Section 116 deals with proof by absent witnesses. The new provision applies to all first-hand hearsay, unlike s 23 of the 1988 Act which was confined to documentary evidence. It is important that the maker of the statement is 'identified to the court's satisfaction'. The discretion and leave provisions of ss 25 and 26 of the 1988 Act have been shorn away so that a statement which fulfils the conditions of admissibility under s 116 is automatically admissible. The reasons advanced for such removal is that it has led to inconsistent and arbitrary decision-making. *Ibid* at 566–567.

[114] *Ibid* at 572.

[115] Also see s 35(3)(i) of the Constitution which provides that the accused has the right to 'adduce and challenge evidence'. The right to 'challenge evidence' includes the right to cross-examine evidence. The right to cross-examination is seen as a fundamental requirement of a fair trial.

obliged to assist an unrepresented and illiterate accused in presenting his defence by way of cross-examination.[116] However, the right to cross-examination is not absolute.[117] A judicial officer has a discretion to control improper cross-examination,[118] and may disallow questions that are irrelevant, vexatious, abusive, oppressive and discourteous.[119]

Hearsay evidence is said to deny to the accused the right to cross-examination. Hearsay evidence is generally excluded because of its possible fabrication and the danger of innocent misreporting, unless it falls under the common law or statutory exceptions.[120] However, the exclusion of the hearsay statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. The fact that the statement is untested in cross-examination, therefore, is a factor to be considered in assessing its probative value.[121] Statutory hearsay is presently regulated by the Law of Evidence Amendment Act 45 of 1988. The case law demonstrates the court's reluctance to use the exceptions lightly in criminal cases against the accused.[122] However, it is more readily admitted when it is tendered by the accused in a bail hearing because bail applications are not regarded as criminal proceedings.[123] The Supreme Court of Appeal held in *S v Ndhlovu and Others* that admission of hearsay evidence by the state does not violate the accused's right to challenge evidence by cross-examination.[124] This decision confirmed that admission of hearsay evidence in terms of s 3 of Act 45 of 1988 is constitutional. However, the case is not without criticism.[125]

In international law, hearsay evidence is generally excluded because of its unreliability, unless it falls under one of the recognised exceptions. A denial of the right to cross-examination may lead to the trial being rendered unfair. A balance has to be struck, therefore, between the admission of hearsay evidence and the accused's right to a fair trial. To illustrate this, the Confrontation Clause entrenched in the Sixth Amendment also prevents the use of hearsay statements against the accused, unless the statement is sufficiently reliable and the

[116]See *S v Mashaba supra.*
[117]See *S v Klink supra.*
[118]See *S v Cele supra.*
[119]See *S v Mayiya supra* and *S v Klink supra.*
[120]As stated by Judge Conradie:"'Talk is cheap" is an old adage which, I think, is apt to hearsay evidence as it is to unkept promises. Fabrication of hearsay evidence is always a danger. So is the danger of innocent misreporting.' See *Mnyama v Gxalaba supra* at 654.
[121]See *Metadad v National Employers' General Insurance Co Ltd supra* at 499.
[122]See *inter alia*, *S v Cekiso* and *S v Ramavhale supra.*
[123]See *S v Pienaar* and *S v Maki en Andere* (1) *supra.*
[124]See *S v Ndhlovu and Others supra.*
[125]See Zeffert *et al op cit* 381 and Schwikkard *op cit* 71.

declarant cannot testify at trial.[126] However, the interpretation of the Sixth Amendment Confrontation Clause has fundamentally changed as a result of the decision in *Crawford v Washington*.[127] The British criminal justice system also demonstrates that an accused has the right to cross-examine witnesses and to be present in the court-room.[128] The Criminal Justice Act 1988 has regulated hearsay evidence subject to Article 6 of the ECHR. However, the CJA 2003 has now rationalised and modernised the existing system.[129]

The article 6 decisions of the European Court demonstrate that the overall fairness of the trial was not undermined by the reception of evidence from anonymous witnesses[130] nor by the admission of a statement of an absent witness.[131] This is because in all cases there was sufficient other evidence available, and the conviction was not based mainly on the evidence admitted in breach of article 6. On the other hand, where the court has come to the conclusion that such evidence was the sole or main basis for a conviction, it has found little hesitation in finding the trial unfair and in violation of article 6.[132] The Convention appears to require that the trial as a whole must be fair.[133]

The innovative decision in *Crawford* v *Washington* favours the accused's right to cross-examination over the admission of hearsay evidence, whilst *S v Ndhlovu and Others* clearly favours hearsay evidence over the accused's right to cross-examination. The European Courts require the whole trial to be fair. If the hearsay evidence is the sole or main evidence against the accused, then the trial is unfair. Similarly, our courts should not have *carte blanche* to admit hearsay evidence against the accused to his prejudice, unless there are compelling reasons.[134] Instead, our courts should consider whether the admission of hearsay evidence is a justifiable and reasonable limitation in terms

[126]See *Ohio v Roberts supra*. In reviewing the hearsay exception, the court emphasised that the primary purpose of the Confrontation Clause is to ensure the right of cross-examination.

[127]*Crawford* has overruled *Ohio v Roberts*. *Crawford* requires that the accused be given an opportunity to cross-examine the declarant of the hearsay statement regardless of the statement's reliability. See *Crawford v Washington supra*.

[128]See *R v Hilton supra*.

[129]See Birch *op cit* 557.

[130]See *Doorson v The Netherlands supra*.

[131]See *Trivedi v UK supra*.

[132]See, *inter alia*, *Unterpertinger v Austria supra*, where the conviction was mainly based on evidence untested by cross-examination; *Kostovski v Netherlands supra*, where the conviction was based 'to a decisive extent' on evidence from anonymous witnesses whom the defence was unable to see; and *Saidi v France supra* at 251, where written witness statements were the 'sole basis for applicant's conviction'.

[133]Ashworth *op cit* 272.

[134]See *S v Dyimbane supra*, where the court held that if hearsay evidence is prejudicial, it will only be admitted if there are compelling reasons.

of s 36 of the Constitution, 1996.[135] In so doing, the courts will like their European counterparts, evaluate whether the trial as a whole is fair.

Every party must be given a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.[136] The ideal is to ensure that the accused will be able to present his case effectively by way of cross-examination, and thereby exercise his right to a fair trial. A balance has to be struck between the admission of hearsay evidence and the accused's right to a fair trial. It is accepted that some diminution of the procedural rights of the accused is necessary to ensure protection of considerations of public policy and the necessities of the case. After all, 'the balancing process accepts that justice is not perfect, or even as perfect as human rules can make it. A fair trial according to law does not mean a perfect trial, free from possible detriment or disadvantage of any kind or degree to the accused.'[137] Nevertheless, any measure restricting the defence must be strictly necessary, and if a less restrictive measure can be found, then that measure must be applied.[138] Thus, a concerted effort is needed to reform the justice system to find a better balance between the rights of the accused and the interests of society. Indeed, one should always look for alternative safeguards or 'counterbalancing procedures' to ensure an equitable balance. The approach of the European Courts and the *Crawford* decision are steps in the right direction.

[135]See Zeffert *et al op cit* 381.

[136]Thus, the parties must have the opportunity to have knowledge of and comment on all evidence adduced or observations filed. See *inter alia*, *Dombo Deheer BV v Netherlands*, October 27, 1993, Series A, No 274 A; 18 EHRR 213.

[137]See Momeni 'Balancing the procedural rights of the accused against a mandate to protect victims and witnesses: an examination of the anonymity rules of the International Criminal Tribunal for the former Yugoslavia'(1997) 41/1 *Howard Law Journal* 155 at 178.

[138]See *Van Mechelen v Netherlands supra* at para 59.

The seriously ill or dying patient's right to know

LC Coetzee[*]

INTRODUCTION

Doctors are often confronted with the decision whether or not to inform a patient that he or she is seriously or terminally ill. In fact, '[i]nformed consent and telling the truth to terminally ill patients are two of the major recurrent ethical issues in contemporary health care'.[1] In many societies a patient's right to know is considered to include, as a general rule, the right to be informed of a diagnosis. But does the patient have a right to know that he or she is dying? Most Western legal systems admit of a so-called 'therapeutic privilege' which entails that a doctor may withhold information from the patient if the disclosure of such information may cause the patient harm. Although therapeutic privilege usually concerns the withholding of information relating to risks associated with a proffered medical intervention, it is also mentioned in the context of the seriously, or terminally, ill patient.[2] It has been argued, for example, that the deliberate omission to convey the diagnosis of a terminal disease to a patient may be considered a legally justifiable act of paternalism where the doctor believes that disclosure of such information will advance the patient's condition and will seriously affect his or her mental state.[3] Some even believe that it is a doctor's *duty* to treat terminally ill patients, especially children, with the 'drug named illusion', to withhold the truth from them, and even to lie to them.[4]

In German legal literature one often comes across references to the case of the well-known German literary figure, Theodor Storm. Laufs and Uhlenbruck[5] use Storm's case to indicate that there is no shortage of 'impressive evidence' for the view that doctors must often deceive seriously ill patients. At a rather advanced age, Storm was taken ill with cancer of the stomach and demanded the truth about his illness from his doctor. Apparently, the disclosure of the incurable, terminal nature of his disease caused him to break down. The concerned family arranged for an expert opinion declaring the diagnosis to be wrong and the illness to be harmless. Storm immediately believed this and

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[1]D Welz 'The boundaries of medical-therapeutic privilege' (1999) 116 *SALJ* 299 at 307.

[2]See, *eg*, DA Dickerson 'A doctor's duty to disclose life expectancy information to terminally ill patients' (1995) 43 *Cleveland State LR* 320; HW Smith 'Therapeutic privilege to withhold specific diagnosis from patient sick with serious or fatal illness' (1946) 19 *Tennessee LR* 352.

[3]G Laurie *Genetic privacy: a challenge to medico-legal norms* (2002) 196.

[4]J Türkel 'Remarks on telling the truth or lying' (1985) 4 *Medicine and Law* 92–93. *Cf* Welz n 1 above at 308–309.

[5]A Laufs & W Uhlenbruck (eds) *Handbuch des Arztrechts* (3ed 2002) 498. *Cf* Welz n 1 above at 319–320.

enjoyed a great summer, in the course of which he celebrated his seventieth birthday in good spirits and victoriously completed his '*Schimmelreiter*'.[6]

BRIEF HISTORICAL OVERVIEW OF TRUTH-TELLING

Ever since the time of Hippocrates, there has been a divergence of opinion regarding the issue of truth-telling in cases of terminal illness. Whereas Hippocrates himself cautioned doctors to reveal 'nothing of the patient's future or present condition' to him, since this may lead to the patient's taking a turn for the worse,[7] some of his contemporaries thought that patients needed to know the truth in order to prepare themselves and their loved-ones for their demise.[8] Hippocrates' advice should be read against the background of his ethics. According to the Hippocratic Oath, the purpose of medicine is to benefit the sick and to keep them from harm and injustice.

One of the pre-eminent figures in the history of medical ethics at the end of the eighteenth century, was Thomas Percival.[9] Like many before him, Percival followed beneficence as a guiding principle in his ethics. His advice to doctors was not to make 'gloomy prognostications' but to give timely notice of danger to the friends of the patient and even to the patient himself, 'if absolutely necessary'.[10] Percival called for honest disclosure to be the norm but saw terminal cases as an exception to this norm.[11] Percival's work formed the basis of numerous codes of ethics, notably the American Medical Association's first Code of Medical Ethics of 1847, and continued to influence the views of medical students and doctors for almost a hundred years.[12] Percival's ambivalent stance in respect of the issue of truth-telling made him a forerunner of many modern advocates of therapeutic privilege.

In the 19th century, doctors showed a clear reluctance to disclose the diagnosis of life-threatening disease (typically, cancer) and an even greater unwillingness to share information on prognosis.[13] It appears, though, that the motivation for withholding a diagnosis was often the fear that the patient will interpret the diagnosis to be an indication of fatal prognosis.[14]

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[6] *Cf* G Brenner *Arzt und Recht: Leitfaden und Nachschlagewerk des medizinischen Rechts für die ärztliche Praxis* (1983) 37; HD Laum 'Wahrheit und schweigen am Krankenbett: die rechtliche Bewertung' (2000) 125 *Zentralblatt für Chirurgie* 921. Ironically, this implies that the impact of bad news can be reversed by subsequent deception.

[7] See SJ Reiser, AJ Dyck & WJ Curran *Ethics in medicine: historical perspectives and contemporary concerns* (1977) 8. *Cf* J Katz *The silent world of doctor and patient* (1984) 4; R Faden & TL Beauchamp *A history and theory of informed consent* (1986) 61.

[8] MA Krisman-Scott 'An historical analysis of disclosure of terminal status' (2000) 32 *J of Nursing Scholarship* 48.

[9] 1740–1803.

[10] CD Leake (ed) *Perscival's medical ethics* (1975) 91; Faden & Beauchamp n 7 above at 68; Katz n 7 above at 17–18.

[11] See, *eg*, Leake n 10 above at 194–195.

[12] Faden & Beauchamp n 7 above at 69, 70, 73; Katz n 7 above at 20–21.

[13] See EJ Gordon & CK Daugherty '"Hitting you over the head": oncologists' disclosure of prognosis to advanced cancer patients' (2003) 17 *Bioethics* 146 and the authorities cited there.

[14] *Ibid.*

The trend to conceal the truth – especially that of terminal illness – prevailed through the early 20th century.[15] The fifties saw the first surveys in the United States to determine patients' informational needs and the extent to which doctors met those needs. These revealed that patients overwhelmingly wanted to be informed, but that doctors very often did not inform cancer patients of their diagnosis.[16] In the sixties the work of Glaser and Strauss, as well as Kubler-Ross, started to question the idea that the truth inevitably hurts. However, the practice of non-disclosure was still very common and it was only in the seventies that doctors' attitude to truth-telling started to change significantly.[17] Currently, it would appear from the limited empirical data available that doctors do not usually disclose the prognosis (of advanced cancer) to the patient unless there is a significant clinical reason to do so.[18] One recent study found that doctors said they would withhold information about survival estimates from patients in 23% of cases, would give survival estimates different from the ones they actually estimated in 40% of cases and would give the survival estimates they actually estimated in 37% of cases.[19]

THE POSITION IN SOUTH AFRICAN LAW

Case law

There is some vague authority in our case law for the viewpoint that a doctor's duty to disclose may be restricted in circumstances where disclosure may scare or frighten the patient into refusing treatment which would be in his or her best interest to undergo.[20] In *Castell v De Greef*,[21] Ackermann J (as he then was) ruled that the obligation to warn a patient of a material risk inherent in a proposed treatment 'is subject to the therapeutic privilege, whatever the ambit of the so-called "privilege" may today still be'. Ackermann J pointed to the fact that a number of authors have commented on the dangers inherent in the so-called therapeutic privilege, and in particular the inroads that it might make on patient autonomy. He found it unnecessary to pursue this issue further in the case at hand because therapeutic privilege had not been invoked.[22] He expressed the view that it 'does, however, form part of the wider debate concerning consent to medical treatment and whether emphasis should be placed on the autonomy and right of self-determination of the patient in the light of all the

[15] Krisman-Scott n 8 above at 49.
[16] *Id* at 49–50.
[17] Id at 51; Gordon & Daugherty n 13 above at 147; DH Novack, R Plumer, RL Smith, H Ochitill, GR Morrow & JM Bennet 'Changes in physicians' attitudes toward telling the cancer patient' (1979) 241 *J of the American Medical Association* 897.
[18] See Gordon & Daugherty n 13 above at 148 and the authorities cited there.
[19] EB Lamont & NA Christakis 'Prognostic disclosure to patients with cancer near the end of life' (2001) 134 *Annals of Internal Medicine* 1096. There are, however, considerable cultural differences in disclosure preferences – see *eg* JL Mitchell 'Cross-cultural issues in the disclosure of cancer' (1998) 6 *Cancer Practice* 153.
[20] See *SA Medical and Dental Council v McLoughlin* 1948 2 SA 355 (A) 366; *Richter v Estate Hammann* 1976 3 SA 266 (C) 232. See also SA Strauss *Doctor, Patient and the Law* (3ed 1991) 19; P van den Heever 'Therapeutic privilege in the South African medical law' 1993 *De Rebus* 624; Welz n 1 above at 299.
[21] 1994 4 SA 408 (C) 426H.
[22] At 418F–G. *Cf* Welz n 1 above at 300.

facts or on the right of the medical profession to determine the meaning of reasonable disclosure'.[23] Later on in the judgment,[24] Ackermann J took a firm stance in this 'wider debate' and acknowledged that our law is moving away from paternalism and recognises the patient's right to autonomy and self-determination.[25]

The question whether therapeutic privilege can justify the withholding of information from a terminally or seriously ill patient has not yet received pertinent attention in our case law, although an interesting case is recorded by Margo.[26] In this case, the patient-plaintiff, herself a general medical practitioner, asked an orthopaedic surgeon for his opinion on a lump on the calf of her left leg. The pathologist's report returned the result of a malignant melanoma, but this information was not conveyed to the patient-plaintiff. In fact, the plaintiff alleged that the orthopaedic surgeon had deceived her by stating in writing that the lump was benign. The plaintiff claimed that her life would have been prolonged by two to three years if the appropriate steps had been taken in response to the pathologist's report, and that the orthopaedic surgeon's negligent failure to apprise her of the malignant nature of the lump had denied her that extra life span. She claimed substantial damages for loss of life span and loss of enjoyment and other advantages sustained as a result of this failure on the part of the orthopaedic surgeon. Because of her poor prognosis the plaintiff was granted permission to take her evidence on commission. The plaintiff died before this task could be completed and her executors withdrew the action.

Most recently, the question of therapeutic privilege within the context of the withholding of the diagnosis of a life-threatening illness arose indirectly in *VRM v Health Professions Council of South Africa and Others*.[27] A doctor examined a woman pregnant with her first child one month before its birth and established that she was HIV positive. The doctor did not inform the woman because he considered it 'heartless and cruel' to do so. He was of the opinion that the disclosure of such information could not change anything at that stage. The baby was eventually still-born. A committee of preliminary inquiry of the Health Professions Council resolved not to refer the matter to a disciplinary

[23] At 418G–H.
[24] At 426D–E.
[25] Welz n 1 above at 299–300 states that Ackermann J appears to hold the view that the therapeutic privilege does not accord fully with the present-day developments of our law which clearly promote patient autonomy and self-determination. FFW van Oosten 'Patient rights: a status report on the Republic of South Africa' in Roger Blanplain (ed) *Law in motion: recent developments in civil procedure, constitutional, contract, criminal, environmental, family & succession, intellectual property, labour, medical, social security, transport law* (1997) 987 at 999 remarks that the court adopted a rather ambivalent approach to the therapeutic privilege since, on the one hand, it appears to accept that the defence sets a limit to the doctor's duty of disclosure, but on the other hand it seems to associate the defence with medical paternalism. See also L Dreyer 'Redelike dokter versus redelike pasiënt *Castell v De Greef* 1994 SA 408 (K)' (1995) 58 *THRHR* 532 at 538.
[26] CS Margo *Final postponement: reminiscences of a crowded life* (1998) 119–121.
[27] 2003 TPD, unreported.

committee. The court ruled that in the circumstances of the case there was a duty on the Council to refer the mother's complaint.

Legal opinion

Generally speaking, before the coming into operation of the National Health Act 61 of 2003,[28] the doctor's duty to disclose did not include an obligation to disclose the diagnosis.[29] Scant authority existed for the viewpoint that the doctor should avoid causing the patient anxiety or distress by disclosing an adverse diagnosis.[30] It was suggested in the legal literature that the doctor may invoke the therapeutic privilege and deliberately refrain from informing a patient who is anxious to be cured of the nature of the serious disease diagnosed, because such information may have the effect that the patient would become depressed and desperate to such an extent that he or she refuses further medical treatment. The cancer patient was mentioned specifically.[31] The use of therapeutic privilege in such circumstances is justified by the arguments that truth-telling may be contrary to the patient's own best interests and that disclosure of an unfavourable or adverse diagnosis or prognosis may have a harmful effect on the patient and therapy.[32]

Legislation

National Health Act 61 of 2003

The new National Health Act 61 of 2003 now stipulates that it is the doctor's duty to inform patients of their health status. However, the Act also recognises that under certain circumstances disclosure of a patient's health status may be withheld.

In terms of section 2 of the Act, its objects are to regulate national health and to provide uniformity in respect of health services across the nation by, inter alia, setting out the rights and duties of health care providers, health workers, health establishments and users,[33] and protecting, respecting, promoting and fulfilling the rights of, *inter alia*, vulnerable groups.[34] It is hard to imagine a more vulnerable group than those afflicted by life-threatening illness. It is also hard to imagine a vulnerable group that would be more unwilling or unable to pursue

[28]The provisions relevant in the present context came into operation on 2 May 2005.

[29]FFW van Oosten *The doctrine of informed consent in medical law* (1991) 59, 67 and the authorities cited there. However, the doctor had to disclose the diagnosis where the patient made his or her consent to a proposed intervention conditional upon such disclosure. It remained very difficult for the patient to prove that he or she had suffered harm as a result of the doctor's breach of a contractual duty to inform him or her of the diagnosis.

[30]Van Oosten n 25 above at 999.

[31]Strauss n 20 above at 92; MA Dada and DJ McQuoid-Mason *Introduction to medico-legal practice* (2001) 14; Welz n 1 above at 308. *Cf* J Wawersik 'Die Auswirkungen juristischer Aufklärungserfordernisse auf das Arzt-Patient-Verhältnis' in H Jung & HW Schreiber (eds) *Arzt und Patient zwischen Therapie und Recht* (1981) 90 at 92.

[32]FFW van Oosten 'The so-called "therapeutic privilege" or "contra-indication": its nature and role in non-disclosure cases' (1991) 10 *Medicine and Law* 31 at 33; Welz n 1 above at 309.

[33]S 2(b). See ss 5–20.

[34]S 2(c)(iv).

their rights by going to court. The Act contains certain provisions specifically dealing with a patient's right to information and informed consent.

Subsection (1) of section 6 provides as follows:

> Every health care provider must inform a user of —
> (a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
> (b) the range of diagnostic procedures and treatment options generally available to the user;
> (c) the benefits, risks, costs and consequences generally associated with each option; and
> (d) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.

Whatever the position may have been in our common law, it is now clear that section 6(1)(a) places a duty on every health care provider[35] to inform a user[36] in an appropriate manner of the user's health status but simultaneously recognises a therapeutic privilege to withhold such information where there is substantial evidence that the disclosure thereof would be contrary to the best interests of the user.[37] The term 'health status' is not defined in the Act, but would probably include diagnosis, and could possibly include prognosis.

Section 6 does not expressly relieve the doctor of the duty to inform the patient of the risks or consequences associated with diagnostic procedures and treatment options where such disclosure would be contrary to the best interests of the user. Whether the doctor could still raise the defence of therapeutic privilege under such circumstances, is uncertain.

Importantly, the exception provided for in section 6(1)(a) is not created in the best *medical* interest of the user, but simply in the best interests of the user. Presumably, a determination that disclosure would be contrary to the best

[35]'Health care provider' is defined in s 1 as a person providing health services in terms of any law, including in terms of the Allied Health Professions Act 63 of 1982, the Health Professions Act 56 of 1974, the Nursing Act 50 of 1978, the Pharmacy Act 53 of 1974, and the Dental Technicians Act 19 of 1979.

[36]According to s 1, 'user' means 'the person receiving treatment in a health establishment ... or using a health service, and if the person receiving treatment or using a health service is (a) below the age contemplated in s 39(4) of the Child Care Act, 1983 ... "user" includes the person's parent or guardian or another person authorised by law to act on the firstmentioned person's behalf; or (b) incapable of taking decisions, "user" includes the person's spouse or partner, or, in the absence of such spouse or partner, the person's parent, grandparent, adult child or brother or sister, or another person authorised by law to act on the firstmentioned person's behalf'.

[37]It is not clear from whom information may be withheld in the case where it is feared that the disclosure of the health status of a minor below the age contemplated in s 39(4) of the Child Care Act 74 of 1983 would be harmful. Because the definition of 'user' includes such a minor's parent or guardian or another person authorised by law to act on the minor's behalf, a literal interpretation would allow the withholding of such information from the parent or guardian if disclosure would be contrary to the latter's, or the minor's, best interest.

interests of the user can only be made after weighing up the user's interest in knowing against his or her interest in not knowing. The wording of section 6(1)(a) suggests that the user's non-medical interests could also be taken into account when weighing up these interests.[38] Obviously, the better the doctor is acquainted with the patient's circumstances, the better he or she will be able to weigh up the interests at stake.

Promotion of Access to Information Act 2 of 2000

The Promotion of Access to Information Act 2 of 2000 also contains provisions aiming to protect patients from the harm that might result from the disclosure of information. These provisions specifically deal with the protection of patients against possible negative effects resulting from access to information held in medical records. The Act provides[39] that, if the information officer[40] or the head of a private body[41] who grants[42] a request for access to a record provided by a health practitioner in his or her capacity as such about the physical or mental health, or well-being, of the requester or person on whose behalf a request has been made, is of the opinion that the disclosure of the record to the relevant person[43] 'might cause serious harm to his or her physical or mental health, or well-being', the information officer or head of the private body may, before giving access,[44] consult with a health practitioner.[45] If, after being given access to the record concerned, the health practitioner consulted 'is of the opinion that the disclosure of the record to the relevant person would be likely to cause serious harm to his or her physical or mental health, or well-being' the information officer or head of the private body may only give access to the record if the requester proves to the satisfaction of the information officer or head of the private body that 'adequate provision is made for such arrangements as are reasonably practicable before, during or after the disclosure of the record

[38]See, *eg*, *Arato v Avedon* 858 P 2d 598 (Cal 1993) at 602. In this case, doctors withheld statistical life expectancy data from a patient because the patient appeared anxious about his condition and they did not want to deprive him of any hope of cure. The plaintiffs argued that the doctors failed adequately to disclose the 'shortcomings' of chemotherapy and radiation therapy in treating the patient's cancer and thus failed to obtain an informed consent. They argued that the information on the statistical morbidity rate of pancreatic cancer was material to the patient's decision whether or not to undergo postoperative treatment; had he known the bleak truth concerning his life expectancy, he would not have undergone the rigours of an unproven therapy, but would have chosen to live out his last days at peace with his wife and children, and would have used the opportunity to arrange his business affairs. Instead, the plaintiffs asserted, in the false hope that radiation and chemotherapy could effect a cure, the patient failed to order his affairs in contemplation of his death. They claimed that this omission led to the failure of his contracting business and to substantial real estate and tax losses following his death.

[39]In s 30(1) and s 61(1). The former section applies in the case of a public body and the latter applies in the case of a private body.

[40]S 30(1).

[41]S 61(1).

[42]In terms of s 11 (where a public body is concerned) or s 50 (where a private body is concerned).

[43]I e, the requester or, if the request has been made on behalf of the person to whom the record relates, that person.

[44]In terms of s 29 and s 60, respectively.

[45]Nominated by the relevant person or, in the case of a person under the age of 16 years, a person having parental responsibilities for the relevant person.

to limit, alleviate or avoid such harm to the relevant person'.[46] The Act provides that before access is so given to the requester, the person responsible for such counselling or arrangements must be given access to the record.[47]

Discussion

In terms of the National Health Act, potentially harmful information regarding the patient's health status may simply be withheld. The Promotion of Access to Information Act, on the other hand, does not allow the (indefinite) withholding of access to information. Rather it makes provision for counselling and other arrangements aimed at limiting, alleviating or avoiding such harm. This difference of approach could possibly (and partially) be explained by reference to the fact that, as a general rule, the case in favour of truthful disclosure is much stronger where the patient solicits information.

In an attempt to limit the circumstances under which information may be withheld, the National Health Act requires *substantial evidence* that disclosure would run against the patient's best interests. The Promotion of Access to Information Act, on the other hand, restricts the circumstances under which provision must be made for measures to limit, alleviate or avoid harm. Only where the potential for harm resulting from disclosure is both *likely* and *serious,* should provision be made for such measures or arrangements.

Whereas in terms of the National Health Act, the harm guarded against is defined in terms of what would be in the patient's best interests, the Promotion of Access to Information Act restricts such harm to the patient's physical or mental health or well-being

FOREIGN CASE LAW

In the absence of any directly applicable and authoritative cases in South African law, it would seem advisable to look at the issues that arose and the approaches followed in such cases in foreign jurisdictions.

In the United States, the Supreme Court of Kansas hesitantly acknowledged the existence of a privilege to withhold the diagnosis of a 'dread disease' from a patient.[48] The court in an obiter dictum severely limited the discretion to withhold information on this ground. Only where the patient is unstable, temperamental or severely depressed does the possibility arise that the withholding be justified, and then only if the disclosure of the specific diagnosis of a dread disease like cancer may seriously jeopardise the patient's recovery.

[46]S 30(3)(a) and s 61(3)(a).
[47]S 30(3)(b) and s 61(3)(b).
[48]*Natanson v Kline* 350 P 2d 1093 (1960) 1103.

Therapeutic privilege and the extension of the intervention beyond that to which the patient had consented

The issue of therapeutic privilege arose in two cases – one serving before the *Tribunal Fédéral Suisse* and the other before the *Reichsgericht* – where the patients had consented to the removal of a tumour but the subsequent surgical interventions were extended beyond that for which the patients had given consent. In the first of these cases, the patient was not informed of the diagnosis of cancer and in the second, of the suspicion of cancer.

In the Swiss case[49] the patient consented to the removal of a tumour at the base of his colon but in the course of the operation the doctor decided to remove the patient's colon and a part of his small intestine. The patient-plaintiff averred that if he had been duly informed of the established diagnosis and the extent of the operation planned, he would have postponed the operation in order first to consult a number of specialists.

The court confirmed that in terms of Swiss doctrine, the doctor was in principle under a duty to inform the patient of the nature of his or her illness, and of the foreseeable consequences of the proposed treatment and the consequences of forgoing therapy.[50] However, the duty to inform does not extend to information that would only alarm the patient, and, consequently, would prejudice the patient's physical or psychological condition, or would compromise the success of the treatment.[51] The object of medical science entails the conservation and the restoration of health and the doctor's duty to inform may be limited so as not to violate such object.[52]

The court held that an ominous or fatal prognosis – such as often accompanies a diagnosis of cancer – can be withheld from the patient, but must in principle be disclosed to his or her near relations. The doctor ought to assess the risks attached to a full disclosure and limit the information so as to be compatible with the patient's physical and psychological state.[53] *In casu*, the defendant had informed the patient's doctor and spouse of the diagnosis. They knew the patient and his reactions much better than he did and dissuaded the doctor from revealing the diagnosis to the plaintiff.[54] From the reports furnished to the defendant by the plaintiff's doctor, it appeared that the plaintiff had consulted the latter on a number of occasions because he had been depressed, had professional worries and feared that he had a stomach ulcer. The patient's doctor was of the opinion that the plaintiff was not psychologically in a condition to bear the disclosure of the diagnosis. The court concluded that, in these circumstances, the defendant could not be expected to ignore this advice and to

[49] *ATF* 105 II 284.
[50] At 287.
[51] *Ibid.*
[52] At 288.
[53] *Ibid.*
[54] At 288–289.

furnish information for which the plaintiff had not asked when the patient was duly informed of the existence of a tumour and of the necessity of its resection.[55]

This judgment fails to address the question why the doctor did not inform the patient of the possible extent of the operation. To my mind, there is nothing to be said for the doctor's decision not to inform the patient of the possible extent of the operation. Certainly, such a radical resection of the small intestine and colon cannot be kept secret for very long. Is it not to be expected that, once the patient discovers such a disturbing *fait accompli*, he or she will start inquiring into the reason for such a vastly extended resection? And would such inquiry not ultimately lead the patient to discover the diagnosis? This case illustrates just how difficult it can be to truly guard the patient from disturbing information.

The *Reichsgericht* approached the issue of therapeutic privilege quite differently in the other case under discussion. In this case[56] the patient consented to the doctor's proposal of the removal of a lump in her right breast by way of incision. In the course of the operation, the doctor found sufficient reason to believe that the lump was cancerous, whereupon he removed the entire right breast. Only when the dressings were removed, which was done a considerable period of time after the operation, did the patient discover that her breast had been amputated. The pathological examination of a piece of the removed lump established that it was not malignant.

The patient's claim for damages and compensation was brought on the basis that the defendant-doctor had performed this drastic operation without her knowledge and against her will. She averred that, in the circumstances, the intervention was not necessary, and that had the defendant proceeded with the necessary care, he would have known this.

The defendant alleged that he had suspected breast cancer before the intervention. The plaintiff was at that stage still deeply touched by her mother's recent death of breast cancer and he did not want to upset her with the news that she might also be suffering from breast cancer. The defendant alleged that, in the course of the operation, he found more evidence that the growth was cancerous. He believed at the time that it was necessary to remove the entire breast in order to save the plaintiff's life.

The court granted that in a case of this nature, it may be difficult or even impossible to obtain the patient's consent to an intervention which the doctor considers to be necessary without at the same time suggesting to the patient that he or she might be suffering from cancer. Although this may be highly undesirable for the doctor, the patient's right to self-determination is so fundamental and is based on such well-founded considerations that it must nevertheless prevail against the reservations expressed. Obviously, the doctor

[55]At 289.
[56]*RG* 8.3.1940 *III* 117/39 *RGZ* 163 129.

will try to protect the patient from harmful anxiety, will even lead the patient to a hopeful assessment of his or her condition, and will not needlessly draw the patient's attention to all the bad consequences that the disease might bring about. However, the overriding principle remains: the doctor must ensure that the patient has a clear and accurate idea of the nature and consequences of the intervention (even though he or she need not be acquainted with all the details) and that the patient actually consents prior to the intervention. The court took the view that the patient must be informed even if disclosure of the information that is necessary to obtain an informed consent leads to the depression of the patient's mood or a deterioration of his or her general condition.[57]

Information needed to convince patient of need for follow-up

Sometimes disclosure of a diagnosis or of the suspicion of a particular diagnosis is necessary to convince the patient of the need to undergo treatment or further diagnostic interventions, or to have his or her health monitored. This is illustrated by the following two cases, one Japanese and one German.

In *Makino v The Red Cross Hospital*,[58] the patient was not informed of the preliminary diagnosis of cholecystic cancer but was told, rather euphemistically, that her cholecystis was swollen.[59] Further tests were necessary to arrive at a final diagnosis. For these, Makino had to be hospitalised, but believing that a gallstone operation could be put off[60] and facing other pressing personal commitments, she decided not to go back to the hospital. About three months after her last consultation, her health deteriorated drastically. She was hospitalised and received aggressive treatment but died six months later. Makino's family brought an action claiming that timely disclosure of the cancer diagnosis would have impelled her to seek immediate treatment and could have saved her life.[61] The district court held that the doctor had not breached his duty to inform the patient. The court took into consideration the psychological blow the patient would supposedly sustain upon being told of the suspicion, together with the prevailing medical practice of not informing patients of a diagnosis of cancer, and the fact that the doctor had warned the patient twice of the necessity of

[57]At 137–138. *Contra* P Bockelmann *Strafrecht des Arztes* (1968) 62.

[58]Nagoya District Court 1325 HANJI 103. See N Higuchi 'The patient's right to know of a cancer diagnosis: a comparison of Japanese paternalism and American self-determination' (1992) *Washburn Law Journal* (1992) 458–461; RB Leflar 'Informed consent and patients' rights in Japan' (1996) 33 *Houston LR* 52–54; RB Leflar 'The cautious acceptance of informed consent in Japan' (1997) 16 *Medicine and Law* 711–712; TS Elwyn, MD Fetters, DW Gorenflo & T Tsuda 'Cancer disclosure in Japan: historical comparisons, current practices' (1998) 46 *Social Science and Medicine* 1151 at 1152; ND Kristof 'When doctor won't tell cancer patient the truth' *New York Times* 25 February 1995 p 4; D Brahams 'Right to know in Japan' (1989) 2 *The Lancet* 173.

[59]At 107. See Higuchi n 58 above at 459.

[60]Leflar (1996) n 58 at 52–53; Leflar (1997) n 58 at 711; Brahams n 58 above at 173.

[61]Leflar (1996) n 58 above at 53; Leflar (1997) n 58 above at 711.

hospitalisation.[62] The court's decision was affirmed by the Nagoya High Court[63] and the Supreme Court of Japan.[64]

In contrast to this judgment, the *Bundesgerichtshof* in Germany affirmed that a patient must be informed of a diagnosis if that is necessary in order to persuade the patient to undergo follow-up tests, even if such information were to upset the patient. In this case,[65] the plaintiff's left eye was surgically removed in second defendant's hospital. First defendant (the patient's ophthalmologist) was informed that the histological examination of the removed eye established the diagnosis of a high grade non-Hodgkin lymphoma. In view of the patient's psychological instability, first defendant withheld this information from the patient, but informed the latter's wife and father. The patient was never asked to undergo further examinations or check-ups. Three years later, the plaintiff again showed up at the second defendant's hospital complaining of problems with his right eye. A computer tomogram showed a malignant growth. The plaintiff claimed that the failure to inform him had led to metastasis and to serious damage to the right eye.

The *Bundesgerichtshof* held in favour of the plaintiff and rejected the defendants' contention that they relieved themselves of the duty to inform by breaking the news to the patient's family.[66] The unfounded contention raised by first defendant that, because of his 'psychological instability' the plaintiff would not be able to cope with the disclosure of a cancer diagnosis, did not entitle the first defendant to inform the patient's wife and father but not the plaintiff himself. The court held that first defendant had to inform the patient of the need to undergo further tests.

If the plaintiff were to appear doubtful of such need, he had to emphasise the necessity of undergoing such tests and the dangers of neglecting to undergo them.[67] If attempts to obtain the patient's cooperation without informing him of the nature and seriousness of his condition prove unsuccessful, the doctor must inform him.

This is a sober approach that allows the doctor much needed leeway in minimising the negative impact of unfavourable information without foredating the patient's right to know. It also leaves the doctor some room in deciding when to share the potentially harmful information.

[62] *Ibid.*
[63] Nagoya High Court 1373 HANJI 68.
[64] Supreme Court (Petty Bench) 1530 HANJI 53.
[65] *BGH* 25.4.1989 *VI ZR* 175/88 *BGHZ* 107 222.
[66] At 226–227.
[67] *Ibid.*

Damages even in the absence of a loss of a chance of recovery?

It should be clear by now that the withholding of information from a seriously ill patient may prevent the patient from seeking appropriate care. Even so, it may be very difficult for the patient to prove that he or she suffered harm as a result of the doctor's failure to inform him or her of the diagnosis. In *Laferrière v Lawson,*[68] a surgeon failed to inform his patient that the lump he removed from her breast was cancerous. The Supreme Court of Canada refused to award damages to the patient for the 'loss of a chance' of recovery since the causal relationship between the doctor's fault and the patient's death could not be established on a balance of probabilities. Even though the patient was unlikely to survive her illness, her estate was awarded damages for the psychological distress she suffered as a result of the fact that she was unaware of her true situation and thus deprived of the possibility of pursuing active treatment in the hope of obtaining a remission.

THE SIGNIFICANCE OF THE KNOWLEDGE OF AN UNFAVOURABLE DIAGNOSIS OR PROGNOSIS FOR PATIENT SELF-DETERMINATION

Convincing authority exists for the opinion that if a patient can only be convinced of the necessity of undergoing a test or treatment by being given an indication of the nature and meaning of the disease from which he/she is suffering, the doctor may not shy away from this duty,[69] even in the case of a grave illness.[70] The knowledge of impending death has great significance for patient self-determination.[71] It is important for the doctor carefully to consider whether, in each particular case, the disclosure of the truth is necessary to enable the patient to make decisions.[72] Non-disclosure may deny the patient the opportunity to make end-of-life decisions and of exercising control over what remains of his/her life.[73]

THE IMPORTANCE OF PROPER TIMING OF DISCLOSURE

Although in the case of terminal illness there is usually no urgency in matters of disclosure (apart from disclosure of information necessary for urgent treatment which is seldom necessary),[74] it must be kept in mind that the closer

[68][1991] 1 SCR 541.
[69]Van Oosten n 29 above at 59.
[70]See Laum n 6 above at 922, 924; GH Schlund '14 Grundsätze zur Risikoaufklärung durch den Arzt' (1994) 42 *Hals-, Nasen-, Ohren-Heilkunde* 143.
[71]See *eg* NB Cummings 'Ethical issues and the breast cancer patient' (1994) 118 *Archives of Pathology and Laboratory Medicine* 1077 at 1080; Freedman n 77 above at 573, 574. Scanlon & Fleming n 74 above at 982 demonstrate that truthful information about diagnosis and prognosis enables the patient to express his/her preferences in respect of the palliative care and nutrition he/she should receive during the advanced stages of his/her illness.
[72]See Brenner n 6 above at 38; Gordon & Daugherty n 13 above at 143.
[73]Krisman-Scott n 8 above at 47.
[74]F Carnerie 'Crises and informed consent: analysis of a law-medicine malocclusion' (1986) 12 *American J of Law and Medicine* 89–90; J Lynn 'Choices of curative and palliative care for cancer patients' (1986) 36 *CA – A Cancer J for Clinicians* 100 at 101; C Scanlon & C Fleming 'Ethical issues in caring for the patient with advanced cancer' (1989) 24 *Nursing Clinics of North America* 977 at 982.

one is to death the more likely one is to be aware of the realities of dying. On the other hand, one is also more likely to be incompetent or subject to duress, either because of the effects of the illness or the mental strain involved in expecting death.[75] Thus, the timing of disclosure can indeed be instrumental in maximising the exercise of patient autonomy.[76] It is important to engage, from the outset, in open communication that heeds the patient's readiness to learn bad news. This would enable the dying patient time to digest information in small doses, to make decisions concerning treatment, cessation of treatment, pain management,[77] financial affairs and personal affairs. It would also enable the patient to draft an advance directive or a will whilst fully competent and to name a surrogate decision-maker.

THE EMOTIONAL DIFFICULTIES SURROUNDING OPEN COMMUNICATION AND PERSONAL FACTORS PREDISPOSING DOCTORS TOWARDS WITHHOLDING INFORMATION

According to some studies the doctor's own emotional reluctance, embarrassment, fears, uneasiness and anxieties to confront the patient with grim diagnoses and risks often provide the motive for non-disclosure.[78] It would seem logical, therefore, to expect the unwillingness to make proper disclosures to increase with the grimness of the information.[79] It goes without saying that dealing with the dying can emotionally be a very taxing experience, and that having to break the news of terminal illness presents doctors with one of the most difficult tasks

[75]MH Shapiro & RG Spece *Cases, materials and problems on bioethics and law* (1981) 695–696. *Cf* Lynn n 74 above at 101; Scanlon & Fleming n 74 above at 978–979, 982.
[76]See *eg* Lynn n 74 above at 101; Scanlon & Fleming n 74 above at 978–979, 982.
[77]*Cf* B Freedman 'Offering truth: one ethical approach to the uninformed cancer patient' (1993) 153 *Archives of Internal Medicine* 572 at 573. The patient may opt to leave these decisions to the doctor. See Lynn n 74 above at 101. *Contra* Brenner n 6 above at 38.
[78]JH Loge, S Kaasa & K Hytten 'Disclosing the cancer diagnosis: the patients' experience' (1997) 33 *European J of Cancer* 878 at 881; A Meisel 'The "exceptions" to the informed consent doctrine: striking a balance between competing values in medical decisionmaking' 1979 *Wisconsin L R* 413 at 460–461, 469; A Meisel & M Kuczewski 'Legal and ethical myths about informed consent' (1996) 156 *Archives of Internal Medicine* 2521 at 2525; Carnerie n 74 above at 82; ES Glass 'Restructuring informed consent: legal therapy for the doctor-patient relationship' (1970) 79 *Yale LJ* 1533 at 1566; MJ Mulvaney 'The therapeutic privilege: defense in an informed consent action' (1996) 42 *Medical Trial Technique Quarterly* 63 at 80–81; P Mosconi, BE Meyerowitz, MC Liberati & A Liberati 'Disclosure of breast cancer diagnosis: patient and physician reports' (1991) 2 *Annals of Oncology* 273; Higgs 'On telling patients the truth' in TL Beauchamp & L Walters (eds) *Contemporary issues in bioethics* (4ed 1994) 137 at 140; J Fletcher 'Medical diagnosis: our right to know the truth' in TL Beauchamp & S Perlin (eds) *Ethical issues in death and dying* (1978) 146 at 151; RM Green 'Truth telling in medical care' in MD Hiller (ed) *Medical ethics and the law: implications for public policy* (1981) 183 at 185–187; AM Capron 'Informed consent in catastrophic disease research and treatment' (1974) 123 *U of Pennsylvania L R* 340 at 388–390; R Weir 'Truthtelling in medicine' in S Gorovitz, R Macklin, AL Jameton, JM O'Connor & S Sherwin (eds) *Moral problems in medicine* (2ed 1983) 202 at 207; L Moutsopoulos 'Truth-telling to patients' (1984) 3 *Medicine and Law* 237 at 241; RJ Goldberg 'Disclosure of information to adult cancer patients: issues and update' (1984) 2 *J of Clinical Oncology* 948 at 950; J Gillan 'The right to know. The nurse's role in informing patients' (1994) 90 *Nursing Times* 46; PR Myerscough (ed) *Talking with patients: a basic clinical skill* (1989) 60–61.
[79]*Cf* MR Pfeffer 'Ethics and the oncologist' (1993) 12 *Medicine and Law* 235 at 236.

in respect of their duty to inform.[80] It is not surprising to learn that, in this context, some of those who avow to the principle of truth-telling do not practise what they preach.[81]

There are certain personal factors that may predispose doctors towards withholding information from a fatally ill patient. It is important for decision-makers to recognise such personal factors in order to prevent these from interfering with objective decision-making.[82] One such factor is the doctor's own fear of death.[83] Some researchers have found a significantly higher fear of death among doctors compared with other groups.[84] Veatch[85] asserts that if an individual has a high or low fear of death and then asks himself or herself what the impact of disclosure of terminal illness would be on another, he or she may systematically misjudge the impact by appealing primarily to his or her own high or low fear of death.[86]

Another such factor – and, in my opinion, a more important one – is the doctor's fear of therapeutic failure.[87] A number of authors have argued that to the doctor who is committed to life, a patient's death, even if inevitable, represents failure.[88] It is said that terminal illness and dying patients symbolise doctors' helplessness and the limits of their skills.[89] Green[90] points out that among the medical specialists dealing with cancer, those able to provide effective treatment

[80]R Buckman *How to break bad news: a guide for health care professionals* (1992) 29–39 discusses certain factors (social attitudes to dying and patient fears of dying) that make the task of informing the dying more difficult. See also Loge n 78 above at 881.

[81]See *eg* S L Faria & L Souhami 'Communication with the cancer patient: information and truth in Brazil' (1997) 809 *Annals of the New York Academy of Sciences* 163 at 168.

[82]See RB Jones 'Life-threatening illness in families' in C A Garfield (ed) *Stress and survival: the emotional realities of life-threatening illness* (1979) 353 at 361; GA Shady 'Death anxiety and care of the terminally ill: a review of the clinical literature' (1976) 17 *Canadian Psychological R* 137–142; R Schulz & D Aderman 'How medical staff copes with dying patients: a critical review' (1976) 7 *Omega* 11–21. *Cf* Goldberg n 78 above at 953.

[83]See *eg* Buckman n 80 above at 27–28; Green n 78 above at 186. Some psychologists have theorised that the fear of death may be partly responsible for providing the motivation to be a health care professional – Schulz & Aderman n 82 above at 12.

[84]Schulz & Aderman n 82 above; H Feifel, S Hanson, R Jones & L Edwards 'Physicians consider death' *Proceedings of the 75th Annual Convention of the American Psychological Association* (1967) 201 at 201–202; LA Bugen 'Emotions: their presence and impact upon the helping role' in C A Garfield *Stress and survival: the emotional realities of life-threatening illness* (1979) 138 at 140.

[85]RM Veatch *Case studies in medical ethics* (1977) 144. *Cf* RM Veatch 'Truth telling' in WT Reich (ed) *Encyclopedia of bioethics* (1978) 1677–1682. Moutsopoulos n 78 above at 241 fully agrees with Veatch.

[86]See also Bugen n 84 above at 141–142. Bugen found that doctors' anxiety directly affects their perception, and that perception may in turn affect the way they respond to the patient. Bugen remarks that doctors' perceptions and behaviour toward a person with a life-threatening illness may reflect their own discomfort and not that of the patient. Also interesting is Bauer's report on his experience with doctors suffering from cancer – see Brenner n 6 above at 36–37.

[87]See Buckman n 80 above at 21.

[88]M Mannes *Last rights* (1973) 32; Green n 78 above at 185–186; Buckman n 80 above at 21; Myerscough n 78 above at 66–67.

[89]Green n 78 above at 185–186; Carnerie n 74 above at 82.

[90]Green n 78 above at 185–186.

(eg dermatologists) report a much higher willingness to reveal the truth. This, he says, lends support to the claim that medical truth-telling is more strongly related to the doctor's own sense of competence than to the patient's immediate reaction.[91]

FUTILITY OF ATTEMPTS TO SHIELD FATALLY ILL PATIENTS FROM THE TRUTH

Attempts to shield fatally ill patients from the truth are very likely to be futile. Most seriously ill and dying patients appear to know how sick they really are.[92] Various studies have found that a high percentage of terminally ill patients who had not been informed, nevertheless knew or had a high degree of suspicion of their diagnosis and/or that they were going to die.[93]

POSSIBLE NEGATIVE CONSEQUENCES OF NON-DISCLOSURE

Because of the likelihood of the futility of attempts to shield fatally ill patient from the truth, there is considerable potential for distrust and psychological suffering arising from non-disclosure of the seriousness of the illness.[94] Moreover, patients who are surrounded by medical staff or family members denying their state of serious illness often find themselves in a situation where they collaborate in maintaining the denial of truth in order to spare others the seemingly unbearable knowledge of their own awareness of the truth.[95]

[91]See WT Fitts & IS Ravdin 'What Philadelphia physicians tell patients with cancer' (1953) 153 *J of the American Medical Association* 901 at 902. *Cf* Carnerie n 74 above at 82.

[92]RC Erickson & BJ Hyerstay 'The dying patient and the double-bind hypothesis' in CA Garfield (ed) *Stress and survival: the emotional realities of life-threatening illness* (1979) 298 at 299; Green n 78 above at 188–189; A Surbone & A Flanagin 'Truth telling to the patient' (1992) 268 *J of the American Medical Association* 1661; J Katz & AM Capron *Catastrophic diseases: who decides what?* (1975) 102; BC Meyer 'Truth and the physician' in TL Beauchamp & S Perlin (eds) *Ethical issues in death and dying* (1978) 156 at 158–159; F Rosner 'Emotional care of cancer patient' (1974) 74 *New York State J of Medicine* 1467 at 1469; Freedman n 77 above at 573; Pfeffer n 79 above at 236; CC Lund 'The doctor, the patient, and the truth' (1946) 19 *Tennessee L R* 344 at 347–348; Doyle 'Talking to the dying patient' in PR Myerscough (ed) *Talking with patients: a basic clinical skill* (1989) 108 at 109; Editorial 'On telling dying patients the truth' (1982) 8 *J of Medical Ethics* 115; Faria & Souhami n 81 above at 168; Dickerson n 2 above at 336.

[93]See, *eg* C Centeno-Cortés & JM Núñez-Olarte 'Questioning diagnosis disclosure in terminal cancer patients: a prospective study evaluating patients' responses' (1994) 8 *Palliative Medicine* 39; C Seale 'Communication and awareness of death: a study of a random sample of dying people' (1991) 32 *Social Science and Medicine* 943; M Ryan 'Ethics and the patient with cancer' (1979) 2 *British Medical J* 480.

[94]See *eg* M Reich & L Mekaoui 'La conspiration du silence en cancérologie: une situation á ne pas négliger' (2003) 90 *Bulletin du Cancer* 181; LJ Fallowfield, VA Jenkins & HA Beveridge 'Truth may hurt but deceit hurts more: communication in palliative care' (2002) 16 *Palliative Medicine* 297.

[95]*Cf eg* American Academy of Pediatrics: Committee on Pediatric AIDS 'Disclosure of illness status to children and adolescents with HIV infection' (1999) 103 *Pediatrics* 164 at 165. See also Doyle n 92 above at 111–112; Krisman-Scott n 8 above at 47.

Pemberton[96] sketches the very sad denouement of this drama:

> When the stage has been set by distrust and denial of the personal right to know the truth, all participants play their assigned roles through to the end, and the patient usually lives and dies in isolation and loneliness ... By withholding the truth the doctor and family think they are being kind. The terrible irony of this situation is that the patient, who has the greatest need for their love and concern, is left in loneliness and isolation through their kindness.[97]

Although the practice of deception is not restricted to any particular age group,[98] children appear to be particularly vulnerable.[99] Like adults, seriously ill or dying children are usually aware of how sick they really are,[100] but their perceptiveness is often underestimated.[101] Research has shown that attempts to protect children from knowledge of terminal illness and death are often futile.[102]

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[96]Pemberton 'Diagnosis: CA – should we tell the truth?' (1972) *Bulletin of the American College of Surgeons* 8 at 12. *Cf* I Lichter *Communication in cancer care* (1987) 138; JT Maher & *eg* Pask 'When truth hurts ...' in DM Adams & EJ Deveau (eds) *Beyond the innocence of childhood* vol 2 *Helping children and adolescents cope with life-threatening illness and dying* (1995) 267 at 276; Seale n 93 above at 951.

[97]*Cf* American Academy of Pediatrics: Committee on Pediatric AIDS n 95 at 165; Freedman n 77 at 573, 574. See also Surbone & Flanagin n 92 at 1661; JF Hermann 'Psychosocial support: interventions for the physician' (1985) 12 *Seminars in Oncology* 466 at 469; W Ruddick 'Hope and deception' (1999) 13 *Bioethics* 343 at 345, 346, 356. The patient may have many concerns that can never be shared unless an atmosphere of honesty is created – see Hermann 468. *Cf* Doyle n 92 at 109–110 who mentions a number of these concerns.

[98]See *eg* K Atkinson 'Professional nurse study. Informing older patients of a terminal illness' (2000) 15 *Professional Nurse* 343; Reich & Mekaoui n 94 at 181.

[99]See GM Koocher 'Foreword' in DJ Bearison & RK Mulhern *Pediatric psychooncology : psychological perspectives on children with cancer* (1994) ix. AE Evans & S Edin 'If a child must die ...' (1968) 278 *The New England J of Medicine* 138 argued in favour of 'benign lying' to dying children. Also Türkel n 4 at 93; Welz n 1 308–309.

[100]J Vernick & M Karon 'Who's afraid of death on a leukemia ward?' (1965) 109 *American J of Diseases of Children* 393 at 394; CM Binger, AR Ablin, RC Feuerstein, JH Kushner, S Zoger & C Mikkelsen 'Childhood leukemia: emotional impact on patient and family' (1969) 280 *The New England J of Medicine* 414 at 415; JJ Spinetta 'The dying child's awareness of death: a review' (1974) 81 *Psychological Bulletin* 256; DM Adams & EJ Deveau *Coping with childhood cancer* (1984) 16–18; JJ Spinetta *Disease-related communication* (1980) 257–258; S Sanger 'Honesty and sensitivity in managing emotional problems of the child with cancer' in C Pocheldy (ed) *Pediatric cancer therapy* (1979) 275 at 278; Green n 78 at 188, 190; Meyer n 92 at 158–159; BF Last 'Reacties bij kind en gezin' in H Behrendt (ed) *Kinderen en kanker* (1987) 136 at 139–140; M Parker & D Mauger *Kinderen met kanker* (1981) 71; Goldberg n 78 at 953.

[101]CH Flanagan 'Children with cancer in group therapy' in JE Schowalter, PR Patterson, M Tallmer, AH Kutscher, SW Gullo & D Peretz *The Child and Death* (1983) 266 at 289–290; Maher & Pask n 96 at 275–276; LA Slavin, JE O'Malley, GP Koocher & DJ Foster 'Communication of the cancer diagnosis to pediatric patients: impact on long-term adjustment' (1982) 139 *American J of Psychiatry* 179; Goldberg n 78 at 948. CA Garfield 'A child dies' in CA Garfield (ed) *Stress and survival: the emotional realities of life-threatening illness* (1979) 314 shows that children rely more heavily on non-verbal information. A child often detects discrepancies between verbal and non-verbal messages, leading to confusion which is far more likely to torment the child than the truth.

[102]KJ Doka 'The cruel paradox: children who are living with life-threatening illnesses' in CA Corr & DM Corr (eds) *Handbook of childhood death and bereavement* (1996) 89 at 96–97; Binger *et al* n 100 at 414; Spinetta n 100 at 256; CE Claflin & OA Barbarin 'Does "telling" less protect more? Relationships among age, information disclosure, and what children with cancer see and feel' (1991) 16 *J of Pediatric Psychology* 169.

Attempts to protect the child from the truth may inhibit the child from seeking support, affect interaction with others, hinder proper communication, create additional anxiety, impair trust, complicate the child's response to the crisis, lead to loneliness and deprive the child of the opportunity to come to terms with inescapable reality.[103] Withholding information may even impact negatively on the child survivor's long-term psychosocial adjustment.[104] As survival rates for paediatric cancer patients increase, the long-term psychosocial adjustment of survivors should be a concern. Research by Slavin *et al* suggests that honesty and openness with paediatric cancer patients can be advocated out of a practical concern about the mental health of those patients who will ultimately survive the disease, as well as out of a humanitarian concern about the feelings of isolation, guilty fantasies and unexpressed fears that have been found among seriously ill children.[105]

Apart from its potential to affect the patient negatively, non-disclosure may lead to tension between health care providers.[106] A doctor's decision not to inform a patient may place other health care workers such as medical consultants, nurses and social workers in a position where they find it difficult to discharge their functions.[107]

INADEQUATE OR INAPPROPRIATE MEDICAL CARE RESULTING FROM NON-DISCLOSURE

There is some evidence that the failure to disclose the diagnosis of a terminal illness to patients may directly result in inadequate medical care. For instance, a patient may be denied adequate pain relief[108] or chemotherapy.[109] Non-disclosure can also lead to a situation where nursing staff find it difficult to lie to the patient and start to avoid the patient.[110]

Conversely, creating unrealistic expectations may result in the administering of unnecessary treatment and its accompanying unpleasant, and even harrowing, side-effects.[111] Say for instance the doctor is confronted with informing a cancer

[103]Doka n 102 above at 97. *Cf* Lichter n 96 above at 125; Binger *et al* n 100 above at 415–416; Meyer n 92 above at 158; Goldberg n 78 above at 953.
[104]Slavin *et al* n 101 above at 179.
[105]Slavin *et al* n 101 above at 179.
[106]Freedman n 77 above at 576.
[107]Freedman n 77 above at 572; Dickerson n 2 above at 345. A number of authors have raised the issue of the ethical dilemma faced by the nurse who knows that the doctor withheld the truth from (or deceived) a patient – see *eg* D Evans 'An ethical dilemma: the dishonest doctor' (1995) 30 *Nursing Forum* 5; JA Erlen 'Should the nurse participate in planned deception?' (1995) 14 *Orthopaedic Nursing* 62; Gillan n 78 above at 46.
[108]Freedman n 77 above at 573–574 (patient denied morphine since it was felt that the use thereof would lead her to conclude that her situation was grave).
[109]Freedman n 77 above at 574 (family of patient suffering from advanced but treatable blood cancer insisting that patient not receive chemotherapy in order to spare her the knowledge of her disease). See also LC Coetzee 'A critical evaluation of the therapeutic privilege in medical law: some comparative perspectives' (2003) 36 *CILSA* fn 10 and accompanying text.
[110]Gillan n 78 above at 46–47.
[111]Ruddick n 97 above at 356.

patient who has only a minimal chance of cure, or one to whom only palliative treatment can be offered. In an attempt to nurture the patient's hope of cure, the doctor carefully paints the patient's outlook in unrealistically rosy hues. Inherent in this approach is the danger that the oncologist may feel obliged to offer the patient chemotherapy when, in fact, it would be of only marginal effect, if of any effect at all.[112]

KEEPING HOPE ALIVE

It is often argued that informing patients of a grim outlook will destroy their hope.[113] Although to some – those who see the breaking of a grim diagnosis or prognosis as a 'death sentence', or describe it as 'cruel' or 'inhumane'[114] – the preservation of hope is an end in itself, others see it as a factor that may positively influence the patient's prognosis, or that may influence the patient to comply with treatment, or that may contribute to the avoidance of relapse.[115] However, there is also evidence that studies claiming a positive association between pychosocial factors (such as hopefulness) and survival should be approached with caution.[116] It has been found, for instance, that in the case of certain patients with advanced, high-risk malignant diseases, the inherent biology of the disease alone determines the prognosis, overriding the potentially mitigating influence of psychosocial factors.[117] If this should be the case, there would be little room for the argument against disclosure based on the patient's best medical interest where the patient is diagnosed with an advanced, high-risk malignant disease.

Some are convinced that, in almost every case, it is possible to confront patients with the truth, even if he or she is suffering from incurable cancer, without depriving the patient of hope.[118] Maintaining optimism within the context of realism can be achieved by being honest, compassionate and life affirming, and by avoiding pessimism.[119] The doctor can, for instance, relate the probability outcome to the patient whilst at the same time making it clear that, although

[112]Pfeffer n 79 above at 236–237; Ruddick n 97 above at 345, 354.
[113]RB Purtilo & AM Haddad *Health professional and patient interaction* (5ed 1996) 363. See *eg Arato v Avedon supra* n 38 above at 600–601; Welz n 1 above at 320; Laum n 6 above at 921–922; Gillan n 78 above at 46–47; Dickerson n 2 above at 338; A Begley & B Blackwood 'Truth-telling versus hope: a dilemma in practice' (2000) 6 *International J of Nursing Practice* 26. It has been claimed that hopelessness may lead to death – see A Reitelmann *Die ärztliche Aufklärungspflicht und ihre Begrenzung* (1965) 33–34.
[114]LJ Blackhall, G Frank, S Murphy & V Michel 'Bioethics in a different tongue: the case of truth-telling' 78 (2001) *J of Urban Health* 59 found that some ethnic groups may consider truth-telling as cruel and even harmful to patients whereas others may view it as empowering.
[115]Ruddick n 97 above at 344. See, *eg* S Greer, T Morris & KW Pettingale 'Psychological response to breast cancer: effect on outcome' (1979) 2 *Lancet* 785 who found that a fighting spirit and optimism were associated with recurrence-free survival in malignant disease.
[116]BR Cassileth, EJ Lusk, DS Miller, LL Brown & C Miller 'Psychosocial correlates of survival in advanced malignant disease?' (1985) 312 *The New England J of Medicine* 1551 at 1555.
[117]*Ibid.*
[118]Pfeffer n 79 above at 236. *Cf* F Dekkers *Patiëntenrecht en patiëntenbeleid* (1981) 78.
[119]WS Schain 'Physician-patient communication about breast cancer: a challenge for the 1990's' (1990) 70 *Surgical Clinics of North America* 917 at 931.

statistics provide us with information about the prognosis of certain classes of patients, there is no certainty about the outcome for any given patient.

CONCLUSION

Debates on the issue of truth-telling to the seriously or terminally ill patient have been with us for a very long time. Until recently, however, there was no clear requirement in our law that a patient be informed of a diagnosis. This position has changed. Evidence of the growing realisation of the importance of the knowledge of one's health status for patient self-determination is to be found in the National Health Act which now requires health care providers to inform patients of their health status. However, the concerns that the truth may hurt, present ever since the days of Hippocrates, are still echoed in the exception to this rule provided for in the Act. The introduction of a therapeutic privilege ensures that doctors are relieved from the legal-ethical duty to inform the patient of his or her health status where fulfilment of the duty would imply a breach of their medico-ethical duty not to harm. There are many reasons why this exception to the general rule of disclosure should be severely restricted and some of these reasons were discussed in the present contribution.

The approach taken in the National Health Act is one that implies a weighing up of interests. Whilst it is often obvious that the patient may suffer some harm upon disclosure, it is not always immediately apparent that the withholding of information may also negatively affect the patient. This point was emphasised with reference to the available literature. In this context, the following remarks are apposite:[120]

> It is indisputable that most people suffer anguish when they learn that they have a fatal disease which is likely to kill them. Far less obvious is that such information causes more harm than good, for against the anguish must be set such benefits as: relief of uncertainty (many such people already suspect that something is seriously wrong); the possibility of informed reflection and discussion about the likely course of events; the opportunity to take stock, mend bridges, make farewells, arrange affairs and even help family and friends to come to terms with their loved one's impending death; the avoidance of the extensive web of deceit in which an initially limited medical (or family) decision to deceive often results – deceit which may supplant a lifetime's mutual trust; and finally the amelioration of the process of dying which honest preparation for death may achieve.

It has been contended that it is not so much a question of whether information that holds potential prejudice for the patient should be divulged, but of how the information is to be communicated, or better still, to be shared.[121] This approach

[120]Editorial n 92 above at 115.

[121]D Giesen & I Fahrenhorst 'Civil liability arising from medical care – principles and trends' (1984) *International Legal Practitioner* 80 at 84. *Cf* Faria & Souhami n 81 above at 170–171; JT Newton & T Fiske 'Breaking bad news: a guide for dental healthcare professionals' (1999) *British Dental J* 278; Purtilo & Haddad n 113 above at 366; Capron n 78 above at 390–391; Buckman n 80 above at 11; Pfeffer n 79 above at 236; FFW van Oosten 'HIV infection, blood

to the issue of truth-telling is also reflected in the Promotion of Access to Information Act. In terms of this approach, it is the doctor's responsibility to devise ways and means of breaking bad news to patients without causing them undue harm.[122] Overcoming the problem of avoiding harm through disclosure does not necessarily demand the withholding of information, but rather calls for the development of a duty to inform patients carefully and tactfully.[123] Finally, I want to raise the question whether there is any sound reason for the difference in approach between the National Health Act and the Promotion of Access to Information Act, and whether a uniform approach along the lines of the one taken in the latter would not be preferable.

tests and informed consent' in JJ Joubert (ed) *Essays in honour of SA Strauss* (1995) 281 at 310; D Giesen *Arzthaftungsrecht: die zivilrechtliche Haftung aus medizinischer Behandlung in der Bundesrepublik Deutschland, in Österreich und der Schweiz* (3ed 1990) 165–166; *BGH* 16.1.1959 *VI ZR* 179/57 *BGHZ* 29 176 184. See also G Holland 'Now we tell – but how well?' (1989) 7 *J of Clinical Oncology* 557; Goldberg n 78 above at 951; Scanlon & Fleming n 74 above at 978.

[122] *Cf BGH* 16.1.1959 *VI ZR* 179/57 *BGHZ* 29 176 184.

[123] W Sommer 'Comparison of informed consent in English and German law' (1986) 5 *Medicine and Law* 353 at 358; CH Montange 'Informed consent and the dying patient' (1974) 83 *The Yale LJ* 1633 at 1655; PC Hébert 'Truth-telling in clinical practice' (1994) 40 *Canadian Family Physician* 2105 at 2108. See also Higgs n 78 above at 140–141. *Cf* also D Giesen & J Hayes 'The patient's right to know – a comparative view' (1992) 21 *Anglo-American L R* 101 at 117.

The development of *ficta confessio* as a principle of pleading in South African civil procedural law

JA Faris[*]

TRIBUTE

Professor Snyman has been a life-long colleague. In fact, he has been present during every stage of my academic development. Although we specialise in very different fields of law, it has always been possible as the younger colleague to consult with Prof Snyman on a variety of matters, both personal and professional. I have invariably been impressed by his judicious responses, deep analytical insight and incisive knowledge of the law, especially in his own field. In personal terms, Prof Snyman represents for me the epitome of a lawyer-gentleman, a model of a concerned family man and, in addition, a disciplined and dedicated musician.

INTRODUCTORY REMARKS

Tracing the historical foundations of the principle of *ficta confessio* as it occurs in South African civil procedural law is possibly a futile exercise. Based on an Olympian view of civil procedure, the emphasis is on *how* and *why* certain rules of modern practice have developed and not on the *manner* in which the rules are or ought to be applied. The pressure and pragmatism of court practice leaves little time for ruminating about the origin and historical development of the rules of pleading, let alone the intrinsic nature of the system within which these rules function. The theory of procedure is distant from the exigencies of practice yet this in itself is not uncommon. There is always tension between science and art – the composer and the musician, the choreographer and the dancer, the inventor and the mechanic, the proceduralist and the practitioner. This article therefore broaches civil procedure in its science-form in contrast to its art-form.

At the outset a variance in terminology ought to be noted. In Anglo-American parlance, the principle of *ficta confessio* is known as the constructive admission, the deemed admission, the implied admission or the admission by non-denial. In different jurisdictions, each of these terms might have their own nuances but, on the whole, they express an enduring principle of pleading immanent in all major systems of Anglo-American civil procedure embodied in the rule that an allegation of fact in a pleading which is not denied is deemed to be admitted.

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As part of the family of Anglo-American civil procedural law, in South Africa the principle of *ficta confessio* is identified in rule 22(3) of the Uniform Rules of Court, which is stated as follows:

> Every allegation of fact contained in the combined summons or declaration which is not stated in the plea to be denied or not to be admitted, shall be deemed to be admitted ...

The expressed wording of rule 22(3) indicates that in our system of pleading, *ficta confessio* is identified as the deemed admission.[1]

Two side notes are necessary before commencing to the main body of the work. The first is procedural in nature; the second seeks to establish whether Roman-Dutch procedure in any manner contributes to the development of the principle of *ficta confessio* in our system of pleading.

First, rule 22(3) represents the culmination of an ancient line of development of *ficta confessio*. Initially, the correlation between rule 22(3) and *ficta confessio* as it functioned within the classical system of common-law pleading is extremely diffused. Association with the classical pleading mechanism from the perspective of the contemporary system is at the most notional. The reason is mainly that in classical common-law pleading *ficta confessio* operated as a means of ensuring singleness of pleading and enforcing the rule against duplicity within the general framework of the formulary system. *Ficta confessio* of the classical period starts to loose its prominence as the system of pleading is modified and eventually reformed. As the general system moves toward the demise of the forms of action and hence the diminishing need for safeguarding singleness of pleading, *ficta confessio* in its classical form is progressively integrated into the developing system of fact-pleading where it serves among other rules of pleading to promote specificity in pleading. The progression is one of doctrinal association to procedural recognition of *ficta confessio* as it is expressed in rule 22(3).

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[1]Daniels *Beck's The theory and principles of pleading in civil actions* (6ed 2002) 77–78; Van Winsen, Celliers & Loots *Herbstein and Van Winsens' The civil practice of the Superior Courts of South Africa (now the High Courts and Supreme Court of Appeal)* (4 ed 1997) 463. Rule 22(3) is soundly based on a procedural fiction. The deeming of an allegation that is neither denied or not admitted, to be admitted, assigns the procedural consequences of a formal admission to the allegation concerned although in reality an admission was not employed as a mode of response. As in the case of a formal admission, the deemed admission is therefore regarded as being an unambiguous acknowledgement of a factual allegation made by the opposite party. In effect, a party is estopped from raising anything to the contrary to that which has been admitted either formally or by operation of fiction: Daniels above at 77–80; Pretorius *Burgerlike prosesreg in die landdroshowe vol 1* (1986) 498–499; Van Winsen, Celliers & Loots above at 363–364. For the deemed admission as applied in magistrates' courts pleading, see the Magistrates' Courts Rules rule 19(10), which provides as follows: 'Every allegation of fact by the plaintiff which is inconsistent with the plea shall be presumed to be denied and every other allegation shall be taken to be admitted.'

Second, because of its colonial past, the South African legal system is influenced by both English law and the law of Holland, as the latter had received Roman law of the Justinian period into its domestic system of Germanic law.[2] Consequently, it is necessary to determine whether Roman-Dutch procedure influenced the development of *ficta confessio* in our contemporary system of pleading. Perhaps the answer is a foregone conclusion, but it is nevertheless important to treat the matter briefly for the sake of clarity and completeness.

This line of enquiry of necessity must take into consideration the fundamental differences between the mode of pleading in both the classic Continental and common-law systems. The differences are pronounced as is evident from the following concise appraisal:

> From the ancient Germanic law came the rule that, in allegation, the party admits what he does not deny; from the Roman, the oppositive rule, namely, that nothing is admitted save what is expressly admitted.[3]

In the broadest terms, the distinction is between the negative system of common-law pleading and the admissive mode of pleading in Continental procedure.

Under the general system of Romano-canonical law, the positional procedure was developed by which a party was compelled to respond explicitly to a specifically formulated set of facts.[4] Central to this mode of proceeding was the putting of propositions.[5] A proposition was an allegation prefaced by the word '*pono*' or 'I propound' to which an adversary was compelled to answer either '*credo*' or '*non-credo*'. Any qualified response such as: '*non-credo ut ponitur*' was therefore not permitted. The purpose of this process was to determine with great precision which of the propositions, framed on the basis of the pleadings exchanged prior to *litis contestatio*, had been admitted or not admitted. Those propositions which had been admitted were regarded as proved and those that were not admitted formed the basis of the proof-articles which were in the nature of interrogatories and put to proof by witnesses at the hearing in a

[2]See Hahlo and Khan *The South African legal system and its background* (1968) 580–586. The situation is succinctly express by the following metaphor at 585: 'Like a jewel in a brooch, the Roman-Dutch law in South Africa today glitters in a setting that was made in England.'

[3]Millar 'Some comparative aspects of civil pleading under Anglo-American and Continental systems' 1926 *American Bar Association Journal* 405.

[4]See Engelmann *A History of continental civil procedure* (1969) 471–474 480–481; Millar 'The mechanism of fact discovery: a study in comparative civil procedure' 1932 *North Western University LR* 261 268–273.

[5]The constraints of this article permit only a brief description of the positional procedure, which is based on the clear description given by Huber *Hedendaegse rechtsgeleertheyt* 5.24 (1686) as translated by Gane *Huber's Jurisprudence of my time vol 2* (1939). See also Damhouder *Praxis rerum civilium* ch 152–154 (1567).

manner similar to those described above in relation to the propounding of propositions.[6]

Huber describes the principle of *ficta confessio* within the context of this particular mode of pleading:

> If no answer at all is given or an irrelevant one, the proposition is taken to be admitted, unless the question was foreign to the case, or contrary to law and good morals; then it may be said that there is no obligation to answer it at this stage.[7]

The principle of *ficta confessio* is evident in this text. The production of issue was achieved not by admission or denial as at common law, but by admission or non-admission. Therefore, the fiction operated to remedy a refusal to respond by deeming the proposition concerned to be admitted, but in a manner that differs fundamentally from common-law pleading as is evident from the following text:

> If the opponent does not appear to answer the articles, then he is accused of contumacy, and a fresh citation asked for. If he still does not appear, he is accused of a second contumacy, on exhibiting proof of which the accuser may make petition on the roll that *the articles shall be deemed to be admitted*.[8] (own italics)

Although the principle of *ficta confessio* was recognised in Roman-Dutch procedure, it was not applied in plenary form. The application of the principle of *ficta confessio* was dependent upon an act of contumacy and subject to judicial control.[9] Unlike its operation under rule 22(3), in the Roman-Dutch procedure *ficta confessio* was not applied as an autonomous principle of pleading. For this reason, the enquiry into the development of *ficta confessio* focuses on its common-law origins, commencing with the classical system of common-law pleading.

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[6]See generally, Huber n 5 above at 5.24.2–3 8–10 14–15 18–19 21; Gane n 5 above at 265–268.

[7]Huber n 5 above at 5.24.20; Gane n 5 above at 268.

[8]Huber n 5 above at 5.24.25; Gane n 5 above at 268. Huber n 5 above at 5.24.26 notes that in the inferior courts three contumacies were necessary before the proof-articles were deemed to be admitted. See also 5.24.27 where Huber relates that in the case of the Mennonites, who refused to take the oath, that 'all the articles are taken as admitted to their prejudice', unless an opponent waived the taking of the oath.

[9]By way of example, Huber n 5 above at 5.24.28 refers to a decision given in 1643 in the case of *Polman v Coumans*. In this particular matter, the plaintiff had twice put his propositions to which the defendant had failed to respond in each instance and the articles were deemed to be admitted. The defendant however managed to obtain relief but for a second time was barred for his contumacy and the articles were taken to be admitted.

THE CLASSICAL COMMON-LAW SYSTEM

Doctrinally, rule 22(3) may be identified with a singular rule of common-law pleading which expressed in its archaic form, was articulated as: 'Every pleading is taken to confess such traversable matter alleged on the other side, as it does not traverse.'[10]

The main object of this rule was ' ... to reduce the controversy to a single material issue decisive of the case'.[11] This principle was literally applied: if a defendant could raise several defences he was obliged to elect only one of these, upon which his case would then rest.[12]

In practical terms this meant that a pleader was entitled to traverse only a single issue alleged by an adversary and all the other issues were deemed to be admitted. Hence the rule which evolved against duplicity[13] in pleading. Stephen tersely sums up the situation according to the practice of that period:

> ... (in) an action on an indenture of covenant, the plea of release, as it does not traverse the indenture is taken to admit its execution; and the replication of duress, on the same principle, is an admission of the execution of the release ...[14]

The principle of *ficta confessio* as it was applied in the classical common-law system of pleading may be further identified by reference to two selected cases taken from the common-law record that illustrate the manner in which *ficta confessio* was applied in the setting of the practice of the time. The case of *Blake v West*[15] was based on an action for *replevin*,[16] in this particular instance the

[10]Koffler & Reppy *A handbook of common law pleading* (1969) 465–466; Stephen *A treatise on the principles of pleading in civil actions* (1860) 181; Sutton *Personal actions at common law* (1929) 178.

[11]Koffler & Reppy n 10 above at 475.

[12]For the theory and principles relating to the production of a single issue, see Koffler & Reppy n 10 above at 475–477; Stephen n 10 above at 117–126; Sutton n 10 above at 157–158. See also Pollock & Maitland *The history of English law before the time of Edward I vol 1* (2 ed 1968) 615–616 which contains the following remark alluding to the inception of this principle: 'The curious rule which in later days will confine a man to a single "plea in bar" appears already in Bracton, justified by the remark that a litigant must not use two staves to defend himself with all.' For a light-hearted yet instructive satire on to the incongruous results arising from the literal application of the rule on the singleness of pleading, see Holdsworth *The history of English law vol 9* (3 ed 1966) appendix 2, especially at 423–426.

[13]See, further, Koffler & Reppy n 10 above at 475–477 480–484; Sutton n 10 above at 158–161. See also Reeves *The history of English law from the time of the Saxons to the end of the reign of Phillip and Mary vol 3* (1787; 1969 reprint) 438 in which the rule against duplicity is succinctly summarised: ' ... neither would they [the courts] allow one [a plea] that contained a multiplicity of matters, to each of which a distinct answer ought to be made: such was called a double plea. Thus where bastardy was pleaded as to one act, and joint tenancy to the other, this plea was held double, because bastardy went to both.'

[14]Stephen n 10 above at 182.

[15]1 Ld Raym 504; 91 Eng Rep 1236. See also appendix 1.

[16]*Replevin* means 'a redelivery to the owner of the pledge or thing taken in distress.': Wharton *The Law Lexicon* (3ed 1864) 792. The action of *replevin* at common law was the process whereby the owner of chattels obtained the redelivery of these chattels which had wrongfully been distrained, normally in satisfaction of rent allegedly due and unpaid, upon the owner

taking of two cows in distress[17] *damage feasant*.[18] The cattle were distrained in a place called Downfield. The defendant[19] avowed[20] that the *locus in quo*[21] pertained to two acres called Marsh-Acre in Downfield and two acres called Stretfield in Downfield. He further avowed that he was the rightful owner of these two *erven*[22] and that he took one cow on each of these *erven damage feasant*. The plaintiff then raised a plea in bar[23] that 'the defendant took two cows in Downfield, and traverses the taking in Marsh-Acre and Stretfield in Downfield'. In phrasing the plea in this manner, counsel for the plaintiff was preparing in advance a strategy which could be used if an unfavourable verdict was given by the jury. Furthermore, the fact that the plea traversed 'the taking in Marsh-Acre and Stretfield in Downfield' could in terms of this strategy be

giving sufficient security for the rent or chattels and the costs of the action, and undertaking that he would pursue the action against the *destrainer* to determine the latter's right to distrain: Walker *The Oxford companion to law* (1980) 1059. See also Koffler & Reppy n 10 above at 253–254; Sutton n 10 above at 66–716.

[17] *Distraint* refers to the seizure of goods taken by means of distress: Walker n 16 above at 365. In turn, *distress* signifies a summary remedy by which a *distrainer* could, without legal process, take possession of the personal chattels of another and hold them to compel the performance of a duty, the satisfaction of a debt or demand or the payment of damages caused by the trespass of cattle; the latter form of distress was known as *distress damage feasant*: Walker n 16 above at 365. See also Koffler & Reppy n 10 above at 254 note 3; Wharton n 16 above at 288–289.

[18] *Damage feasant* means the damage done on a person's land by the trespass of another's animals or fowls which justified the distraint or impounding of same until their owner had paid damages for the damage done; the remedy was abolished in 1971: Walker n 16 above at 332; Wharton n 16 above at 251.

[19] In contemporary terms, the word 'defendant' is a suitable equivalent for the word 'avowant' used in the report: see, further, n 20 below.

[20] The words *avow, avowant, avowry* and a plea in bar or peremptory plea have a technical meaning in relation to the action for *replevin*. Koffler & Reppy n 10 above at 500 succinctly explain the technicalities involved: 'Where the defendant desired to justify his taking as landlord, or on behalf of someone else from whom he derived his right to distrain, he pleaded what was known as an Avowry, which justified the taking of the goods in his own right, or Cognizance, under which he claimed the goods or chattels in the right or on behalf of another. The usual grounds were the taking on Distress Warrant for rent in arrear, or taking under Legal Process, such pleas avowed or acknowledged the seizure of the goods or chattels in question and set forth the facts of a tenancy and arrearage in rent, and concluded by demanding a return of the seized property. The Avowry or Cognizance thus admits that the plaintiff is the owner of the goods, and alleges a right to take or detain them as security for rent alleged to be due. Such a Plea was in the nature of a Cross-Declaration, and hence the plaintiff's Next Plea was not a Replication but a Plea in Bar, after which followed the Replication, Rejoinder, etc., the ordinary name of each Stage of Pleading being thus postponed one step further than in an ordinary action.' See also Stephen n 10 above at 169 note (p); Sutton n 10 above at 91–94; Wharton n 16 above at 792–794.

[21] Locus in quo lit the place in which; a standard phrase used in pleadings to indicate the place where the alleged alienation of rights had occurred; in an action for *replevin* the place where the taking was alleged to have occurred was a material issue in this action: Wharton n 16 above at 551; Stephen n 10 above at 161; Sutton n 10 above at 93.

[22] That is, in the words used in the report 'seised of them in fee'; see Walker n 16 above at 463 1127.

[23] See n 20 above.

later interpreted as a plea in *prisel in auter lieu*[24] which was a specific plea in abatement used only for the purposes of an action of *replevin*, the ground for abatement being that the taking had occurred in a place other than that averred. Issue was joined on the plaintiff's plea and the jury gave a verdict for the defendant. At this stage Lord Raymond,[25] the reporter, states that counsel for the plaintiff moved for the arrest of judgment[26] since 'the issue was immaterial', the reason being that the plaintiff had 'traversed the taking in two places' (which it was contended should be considered as a *plea in prisel in alter lieu*) but in so doing had not traversed the *damage feasant*. On these grounds counsel argued that, although the verdict was for the defendant, the defendant had no title to the two cows which in terms of the verdict were to be returned to him, 'because the *damage feasant* is not found'. To this the court responded *sed non allocatur*, signifying that it was not in agreement with counsel. Contrary to the contentions of plaintiff's counsel, the court held that the *damage feasant* was admitted by the issue of taking and that the two cows were therefore taken *damage feasant*. In brief, because the plaintiff had not traversed the allegation of *damage feasant* in the defendant's avowry,[27] the *damage feasant* was thereby regarded as being admitted, hence giving title to the defendant and confirming the verdict of the jury. From a contemporary point of view it is difficult to identify the principle of *ficta confessio* since it is ensconced in the technical legal usage of the time.

Yet another example of the application of the principle of *ficta confessio* is to be found in the case of *Hudson v Jones*.[28] Once more the principle of *ficta confessio* is not expressly evident but is obscured by the legal technicalities of that period. This is particularly so in *Hudson*. As in the case of *Blake*, *Hudson* is based on an action of replevin.[29] Both cases therefore share the same form of action. However, since under the English formulary system substance and procedure were intermingled in a specific form of action, *Blake* and *Hudson* may be distinguished on grounds that might seem peculiar in contemporary terms. In *Blake, ficta confessio* is applied for purely procedural purposes since the court's decision turned upon this point: by traversing the single issue of the defendant's taking of the cattle at a specific place, the issue of *damage feasant* could not and was not traversed and was held to be therefore admitted. However, in *Hudson* the principle of *ficta confessio* was used to sustain singleness of pleading in regard to a principle of substantive law *viz* that upon

[24] *Prisel in auter lieu* lit a taking in another place; refers to a plea in abatement used only in actions in *replevin*: English *A dictionary of words and phrases in ancient and modern law* (1987) 641.

[25] Lord Raymond, like his father, was also a judge and so too, as his father had done, compiled common-law reports; his reports cover the period 1694–1732: Walker n 16 above at 1035. Because the year of this report is 1699, the reporter is Lord Raymond and not his father.

[26] Arrest of judgment refers to the instance in which judgment was withheld on the ground that there was some error appearing on the face of the record which vitiated the proceedings: Stephen n 10 above at 87; Wharton n 16 above at 80.

[27] See n 20 above.

[28] 1 Salk 90; 91 Eng Rep 84. See also appendix 2.

[29] See n 16 above.

joining of issue on a defence of *non concessit*, an attornment need not be given in evidence but must be pleaded.

Hudson may be reconstructed as follows:[30] Hudson was the plaintiff and being an action for replevin it may be presumed that Jones had distrained certain goods or chattels belonging to Hudson. Jones, the defendant, is specifically referred to in the report as the avowant.[31] The term 'avowant' would indicate that Jones had title to the land upon which, it is stated in the report, a grant of reversion[32] for life had been made on the estate to Hudson. In all probability the action was instigated by Hudson's failure to pay the rent due. As the avowant, the pleading that Jones would have used was known as an avowry.[33] Accordingly, in his avowry Jones would have admitted that he took Hudson's chattels in distress[34] but, in terms of the given facts, would have avowed that he had made a grant of reversion for life to the plaintiff in consideration of the payment of rent, to which terms of the grant – *ad quam quidem concessionem* – the plaintiff did attorn.[35] To the avowry the plaintiff responded, in the customary manner with regard to an action for replevin, by means of a plea in bar.[36] In this plea Hudson raised the defence of *non concessit*[37] with regard to the grant of reversion; it may be presumed that he had not traversed the issue of attornment which was raised in the avowry. The latter is confirmed by the fact that the issue before the court was ' ... whether the want of attornment might be given in evidence upon this issue. Counsel on both sides argued whether it was necessary to plead attornment in an instance where issue had been joined on a defence of *non concessit*. Counsel for the plaintiff contended that the defence of *non concessit* challenged the effect and operation of the deed concerned and that if the deed was ineffectual it was therefore void, the implication being that in such circumstances attornment would be unnecessary. Counsel for the defendant argued that in specifically pleading to a grant of reversion a plaintiff must always traverse the attornment. The court held that, although evidence of attornment need not be given upon a plea of *non concessit,* the attornment itself

[30]On account of the pithy style of reporting during this period, interpolation has been necessary; hopefully any misconstrual of this case will be excused.
[31]See n 20 above.
[32]*Reversion* refers to the interest in land arising by operation of law whenever the owner of an estate grants to another a particular estate for a specified period but does not dispose of the whole of his interest; the reversion is the interest the owner has during the duration of the particular interest: Walker n 16 above at 1069; Wharton n 16 above at 804–805.
[33]See n 20 above.
[34]See n 17 above.
[35]*Attornment* means the agreement of the owner of an estate in land to become the tenant of one who has acquired the estate next in reversion; prior to 1709 an *attornment* was necessary to complete the grant of a reversion, whether it was by express deed or implied in law: Walker n 16 above at 94; Wharton n 16 above at 91.
[36]See n 20 above.
[37]*Non concessit* lit he did not grant; a plea of a stranger denying that a deed or patent was granted as alleged, thereby bringing into issue the title of the grantor as well as the operation of the deed: English n 24 above at 570; Wharton n 16 above at 632.

must be pleaded. In the words of the reporter, the court reached this conclusion on the following grounds:

> And the reason of their opinion was, because it [*ie* the attornment] is traversable, and whatever is traversable, and not traversed is admitted, and the grant is perfect as far as the grantor can perfect it.

To summarise: It is probable on the face of it that Hudson could have elected to pursue one of two defences namely, that of *non concessit* thereby challenging the validity of the deed granting the reversion or alternatively, the want of attornment with regard to the grant of reversion. Had he chosen the latter it is likely that he could have challenged the validity of the deed by showing the want of attornment. However, he relied upon the first-mentioned defence and in so doing was prevented by the rules relating to the singleness of pleading from raising a plea that traversed the attornment. The court did not uphold this defence and therefore judgment was given for the defendant because by not having traversed the attornment it was deemed to have been admitted by the plaintiff. Accordingly, the grant of reversion was valid since the substantive element of attornment was fulfilled by operation of a fiction that is because the attornment was taken to have been admitted.

Blake and *Hudson* are two of many cases off the common-law record that indicate that *ficta confessio* was applied in classical common-law procedure in its plenary form so as to promote the production of a single issue. However, in order to indicate fully the extent to which *ficta confessio* pervaded common-law pleading reference needs to be to made to what was know as 'protestation'.[38]

[38]For the sake of completeness, apart from protestation, the subsidiary rules relating to the operation of *ficta confessio* ought to be stated briefly in order to establish the ambit and procedural consequences of *ficta confessio*. Stephen in n 10 at 468 sets out these rules as follows (a) the rule relating to *ficta confessio* did not apply to those matters which were not traversable; and (b) the admission obtained upon the operation of the principle of *ficta confessio* bound the related party thereto although a contrary verdict had been given by a jury. The case of *Dominus Rex v Bishop of Chester, Pierce and Cook* 2 Salk 560; 91 Eng Rep 472 illustrates the first rule. An *action quare impedit* (a real possessory action to try, among others, a disputed title to an advowson) was brought in regard to an advowson (refers to the right of patronage to a church or benefice, the right being incorporeal and capable of being inherited) granted by the King. One of the issues in contention, heard upon a writ of error, was whether the advowson in question was granted in the 12th or 13th year of the reign of Elizabeth I. In this regard the court at 561;473 held: 'That which is not material or traversable is not admitted nor confessed when it is alleged, and not traversed.' The case of *Wilcox v The Servant of Sir Fuller Skipwith* 2 Mod 4; 86 Eng Rep 908 is an example of the application of the second rule. The cause related to an action for replevin (see n 16 above). The defendant in his avowry justified the taking of cattle as a heriot due upon every alienation without notice (in relation to feudal law, a heriot referred to the right of the lord of the manor, as the king's tenant-in-chief, to take a tenant's best beast or other chattel on the tenant's death; in later law, the heriot became an incident of freehold tenure, eventually evolving into a form of rent, heriot custom being a payment due under copyhold tenure on alienation of the holding or on death). The plaintiff in his plea in bar (see n 20 above) denied that the heriot was due in these terms, whereupon issue was joined. The defendant in his avowry had alleged that the rent due amounted to 12s 14d and the plaintiff in his plea had admitted same. The matter was put to

Protestation was an independent pleading mechanism, also known as a plea in protestation or *protestando*, which developed in order to counteract the consequences arising from the operation of the principle of *ficta confessio* in the system. Moreover, protestation exemplifies the interaction between the rule against duplicity[39] in pleading and the application of the principle of *ficta confessio*.

In a classic phrase attributed to Sir Edward Coke, protestation is defined as 'the exclusion of a conclusion'.[40] To the contemporary mind this does not make much sense. A definition which is a little less obscure is given by Serjeant Williams in a note to the case of *Holdipp v Ottway*:[41]

> A protestation is defined to be, a saving to the party who takes it from being concluded by any matter alleged or objected against him on the other side, *upon which he cannot take issue*.[42] (own italics)

To elaborate upon this definition: Protestation was used in a pleading in an instance where the pleader was ensnared by the rule that pleadings must not be double and by the rule that every pleading is taken to admit such traversable matter as it does not traverse.[43] Consequently, if a pleader wished to retain the right to contest in future litigation those issues which had been admitted because they had not been traversed, he would make a declaration incidental to the main pleadings protesting that the issue not so traversed is untrue.[44] The effect of a protestation was not to release the issues in an existing suit from being admitted

a jury for a special verdict. Among other matters, the jury found that the rent due amounted to 3s ld. Argument on the findings of the special verdict were put to the court. However, only the contentions of the defendant's counsel are reported. One of the arguments raised by the defendant's counsel was based upon the variance between the amount of the rent stated in the avowry and that found to be due by the jury in its special verdict. In this respect, he contended that both the plaintiff and defendant in their pleadings had admitted that 12s 14p was the amount of the rent outstanding and in this regard stated: 'It is a rule in law [ie common law], that what the parties have agreed in pleading shall be admitted, though the jury find otherwise.' The view was upheld by the court on the principle that ' ... what is agreed in pleading, though the jury find contrary, the Court is not to regard. Both these cases illustrate the subsidiary rules which evolved to circumscribe and determine the effect of the application of the principle of *ficta confessio* within the classical system of common law pleading.

[39]See n 13 above.

[40]See, further, text to n 46 below.

[41]2 Wms Saund 102; 85 Eng Rep 802.

[42]See Note 1 at 103;803. For a detailed description of the various rules applicable to protestation in common-law pleading during its classical period, see the remainder of Note 1 at 803-806. *Holdipp* was reported by Edmund Saunders who was called to the bar in 1664 and in 1683 was appointed Chief Justice of the King's Bench. His reputation stands on his volume of reports of King's Bench cases covering the years 1666-1672. Later editions of his reports were edited and annotated by Serjeant Williams (1799 and 1809) and by E V Williams (1824 and 1845), hence these reports are referred to as the 'Williams' Saunders' reports: Walker n 16 above at 1103. Note 1 to the *Holdipp* case may therefore be ascribed to Serjeant Williams because this Note deals with protestation during the classical period of common-law procedure.

[43]See Koffler & Reppy n 10 above at 484; Sutton n 10 above at 178.

[44]See Koffler & Reppy n 10 above at 466.

because they had not been traversed, but was rather to prevent such admissions from being 'concluded' against him for the purposes of future litigation.[45] The passage below, taken from Blackstone, is lengthy yet functional for it succinctly explains protestation in the general context of the system of classical common-law pleading:

> Every plea must be simple, entire, connected and confined to one single point; it must never be entangled with a variety of distinct independent answers to the same matter; ... Yet it frequently is expedient to plead in such a manner, as to avoid any implied admission of a fact, which cannot with propriety or safety be positively affirmed or denied. And this may be done by what is called *protestation*; whereby the party interposes an oblique allegation or denial of some fact, protesting (by the gerund, *protestando*) that such a matter does or does not exist; and at the same time avoiding a direct affirmation or denial. Sir Edward Coke hath defined a protestation (in the pithy dialect of that age) to be 'an exclusion of a conclusion.' For the use of it is, to save the party from being concluded with respect to some fact of circumstance, which cannot be directly affirmed or denied without falling into duplicity of pleading; and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted.[46]

The case of *Young v Rudd*[47] illustrates how protestation was applied in practice. The action was one of *indebitatus assumpsit*[48] for goods sold and delivered, the object of the dispute being a beaver hat. Responding to the 'promises in the declaration', the defendant traversed same stating that 'he gave and delivered unto the plaintiff a beaver-hat in satisfaction and discharge of the said several promises in the declaration; and that the plaintiff then and there had, and accepted the hat in full satisfaction and discharge of the promises'. Upon this the defendant joined issue signified in the report by the term '& hoc &' which in the old Latin form of pleading represented the words: *de hoc ponit se per patriam* – meaning 'and of this he puts himself upon the country', which indicated that he had tendered the issue to a jury for its verdict.[49] The plaintiff, Young, by replication traversed the contention that he had accepted the beaver hat in satisfaction and discharge of the promises stated in the declaration and upon this he joined issue *hoc petit quod inquiratur per patriam* – meaning 'and this he prays may be inquired by the country', signifying that he had put this single issue to the jury for a verdict.[50] The plaintiff by means of his replication had no option but to tender issue to the jury on the single issue that he had accepted the beaver hat in full and final settlement of the promises stated in the declaration; he was bound by the rules of pleading to traverse only a single issue. Yet it is evident that there was a second issue which the defendant had raised in his plea

[45]See Koffler & Reppy n 10 above at 466–467.
[46]Blackstone *Commentaries on the Laws of England* (3ed 1869) 311–312.
[47]Carthew 347; 90 Eng Rep 803. See also appendix 3.
[48]*Indebitatus assumpsit* lit being indebted, he undertook; the equivalent of the common-law action for debt: Walker n 16 above at 607; Wharton n 16 above at 446.
[49]Blackstone n 46 above at 313.
[50]*Idem.*

namely, that the defendant *gave* the hat to the plaintiff; the plaintiff also wished to contest this issue. However, had the plaintiff in his replication also traversed this second issue, he would have infringed the rule against duplicity in pleading. On the other hand, by not traversing this latter issue it would have been taken to be admitted. In order to prevent his pleading from being double and to avoid being bound by the said admission for the purposes of any future litigation, in the words of the report:

> The plaintiff replied *protestando*, that the defendant never gave him [the plaintiff] any such hat in satisfaction and discharge of the said promises ...

Pleading in protestation does not directly deal with the application of the principle of *ficta confessio* but it does show the extent to which this principle had been integrated in the classical common-law system of pleading. Reeves in his *History of the English Law*[51] describes the incidence of protestation during the period from the reign of Henry VI (1422–1461) to that of Edward IV (1461–1483), thus showing that the principle of *ficta confessio* had been established in an early stage of the development of common-law pleading, for *ficta confessio* was a first principle without which protestation could not have existed.

During the classical period of common-law pleading, a vague doctrinal association between rule 22(3) and *ficta confessio* as it was applied during this period is evident. Procedurally, it is impossible to draw a comparison between the ancient and modern forms of *ficta confessio* since in the ancient system of pleading litigants were confined to pleading the single issue that was maintained by application of *ficta confessio*. As such, the principle of *ficta confessio* upheld the rule against duplicity. The underlying premises of classical common-law pleading are therefore antithetical to those of our contemporary system in which the deemed admission as embodied in rule 22(3) is applied.

THE MODIFIED SYSTEMS OF COMMON-LAW PLEADING

Eighteenth century modification

The year 1705 marks a significant stage in the development of common-law pleading. Under the Statute of Jeofails[52] of that year[53] the mode of classical common-law pleading was altered. Prior to the commencement of this statute, multiple pleas to the issues raised in the declaration were not permitted; the principle of *ficta confessio* operated to admit every issue except that single issue

[51] See n 13 above at 437. The reign of Edward IV was interrupted from October 1470–April 1471 when Henry VI was restored to the throne during this brief period.

[52] *Jeofail* derived from the Anglo-Norman phrase *j'ay faillé* lit 'I have made a mistake'; refers to the expression of a pleader who had realised that he had made a mistake in his oral allegations during the period when pleadings were still oral, and sought leave to amend: Walker n 16 above at 662–663; Wharton n 16 above at 480. See also Stephen n 10 above at 87 note (e); Sutton n 10 above at 119–120.

[53] 4 Anne c 16.

which a pleader elected to traverse. The importance of the statute is that it sanctioned multiple pleas in the following terms:

> ... it shall be lawful for any defendant or tenant in any action or suit, or for any plaintiff in *replevin*, in any court of record, with the leave of the same Court, to plead as many several matters thereto as he shall think necessary for his defense.[54]

A defendant was therefore entitled, with the permission of the court, to plead as many several issues as he regarded as being necessary for his defence subject to the limitation of the pre-existing rule which required that a defendant could not raise a plea and a demur[55] simultaneously. The statute distinctly favoured the defendant. Its wording indicates that pleading severally in replication by the plaintiff was not permitted (except in the case of replevin by means of a plea in bar[56]) nor in the case of any other subsequent pleadings. In this latter regard the singleness of pleading was maintained. A defendant was thus permitted to respond to each issue, not in a single plea upon which his case would rest as was previously the situation, but in several and distinctly separate pleas.[57] Moreover, every one of the defendant's pleas was treated independently as if pleaded alone; each plea stood on its own merits and could not be used by a defendant to prove another plea neither could a plaintiff use one plea to disprove another of the same multiple series of pleas. However, for the purpose of trial, the several pleas concerned were heard simultaneously.[58]

[54]Koffler & Reppy n 10 above at 477.

[55]*Demurrer* is described by Koffler & Reppy n 10 above at 384–385 as follows: 'If the Allegations of the Pleading Party are legally insufficient upon their face to sustain the cause of action alleged or to Constitute a Defense, as the case may be, Objection may be taken by demurrer. A demurrer will lie for insufficiency either in substance or in form. And since a demurrer does not deny the facts which are alleged in the pleading to which it is interposed, they stand admitted, with the result that the only question remaining is one as to their sufficiency in law.' See also Walker n 16 above at 350–351; Wharton n 16 above at 272–274.

[56]In *replevin* the plaintiff's replication to the defendant's avowry or cognisance was in effect a plea in bar and named such since the defendant's pleading was in the nature of a cross-declaration to the plaintiff's declaration, the latter being regarded as merely a matter of form. See, further, n 20 above.

[57]See Sutton n 10 above at 161–162.

[58]See generally Koffler & Reppy n 10 above at 477–480. For an example of the new mode of pleading and the application of the principle of *ficta confessio* under this dispensation, see *Henry Grills v Mary Mannel* Willes 378; 125 Eng Rep 1223. For the sake of convenience, only the essential part of the judgment (380; 1225) which relates to the sufficiency of the first of several pleas is cited verbatim: 'And we are of the opinion that the first plea is bad ... [B]ecause the plaintiff has denied that he was seised in fee by virtue of the lease and the release, though he has in effect admitted it before. For in his plea he has not denied, not even by way of *protestando*, that M Mannel was seised in fee at the time of the making of the lease and release; and though he has denied it in his second plea, that will make no alternation, it being a known rule and never controverted that one plea cannot be taken in to help or destroy another, but every plea must stand or fall by itself. And as he has admitted in his plea that Mary (Mannel) was seised in fee, and that being so seised she made a lease and release to the plaintiff and his heirs, the necessary consequence of that is that he must be seised in fee by virtue of such lease and release ... .'

Accordingly, under this dispensation the effect of the principle of *ficta confessio* was confined to the particular plea to which it related and could not be used to intrude upon issues raised in any other plea of the same series.[59] However, the conventional application of *ficta cofessio* was retained in regard to the replication and subsequent pleadings. Moreover, the application of the principle of *ficta confessio* was also influence by the increased prominence given to the general issue.[60] Under the modified system of pleading that permitted the use of multiple pleas there was an obvious inducement for a defendant to plead the general issue along with any other plea(s) which contained his actual defence(s). The effect of the general issue was to shift the onus of proof back to the plaintiff, thereby effectively obstructing the operation of the principle of *ficta confessio*.[61]

Although these modifications sought to introduce some procedural flexibility into the system, the rules of pleading were still basically directed at the production of a single issue. Accordingly, it is evident that the application of the principle of *ficta confessio* during this period cannot be harmonised with the operation of rule 22(3).

Nineteenth century modification

Introduction

On account of the insistent demand to reform,[62] the early part of the 19th century saw moves in this direction. Of the numerous statutes passed which modified the system, only two have any bearing on the principle of *ficta confessio*. First is the Civil Procedure Act of 1833,[63] its provisions being more fully applied in the Rules which came into operation in the Hilary Term of 1834, commonly known as the Hilary Rules;[64] the second is the Common Law Procedure Act of 1852.[65] The provisions of these statutes as well as the Hilary Rules did not deal directly with the application of principle of *ficta confessio*; modifications in this regard were incidental to the changes effected by the legislation concerned.

[59]Millar '*Ficta confessio* as a principle of allegation in Anglo-American civil procedure' 1928 *North West University LR* 215 220–222.

[60]*General issue* is described by Koffler & Reppy n 10 above at 457 as follows: 'The General Issue is a Denial of the Legal Conclusion sought to be drawn from the Declaration. It denies by a General Form of expression the defendant's liability, and enables the defendant to contest, without specific averments of the Defense to be asserted, most of the Allegations which the plaintiff may be required to prove in order to sustain his action, and in some actions to raise also Affirmative Defenses. It fails to perform the Functions of Pleading, either in giving Notice or in reducing the case to Specific Issues.' See also Sutton n 10 above at 162–168; Walker n 16 above at 515; Wharton n 16 above at 398.

[61]See Koffler & Reppy n 10 above at 477–478; Millar n 59 above at 222.

[62]See Sutherland 'The English struggle for procedural reform' 1926 *Harvard LR* 725–748.

[63]3 & 4 William IV c 42.

[64]For the text of the Hilary Rules, see 2 C & M 1–30; 149 Eng Rep 651–663.

[65]15 & 16 Vict c 76.

The Hilary Rules, 1834

In broad outline, the purpose of the Hilary Rules was to restrict the use of the general issue and extend the system of special pleading.[66] For instance, in regard to an action for debt on speciality or on covenant,[67] the plea of *non est factum* which was the form of the general issue in regard to both these actions, was prohibited except if it operated as a specific factual denial of the deed; all other defences had to be specially pleaded including matters which rendered the deed void or voidable.[68] This example illustrates the manner in which the Rules dealt with the general issue in regard to numerous other forms of action. The effect of the Hilary Rules on the application of the principle of *ficta confessio* was therefore incidental. By inhibiting the function of the general issue and thereby forcing an issue to be specially pleaded, the scope for the application of the principle was extended. Examples extracted from the common-law reports dating from time of the inception the Hilary Rules in 1834 to the commencement of the Common Law Procedure Act in 1852, show that the principle of *ficta confessio* was adhered to and applied in the same manner as during the classical period of common-law pleading, subject to the modified rules of pleading introduced under the Hilary Rules. These sample cases from the beginning, middle and end of this period are *Jones v Brown*,[69] *King v Norman*[70] and *Richard Hewitt v MacQuire*[71] dated 1835, 1847 and 1851, respectively.

[66]See Holdsworth 'The new rules of pleading of the Hilary Term, 1834' 1923 *Cambridge LJ* 261–278 especially at 270–273. See also Baker *An introduction to English legal history* (2 ed 1979) 78–79; Sutton n 10 above at 162–168.

[67]See First General Rules and Regulations II.1, in 2 C & M 21; 149 Eng Dep 659.

[68]*Debt on speciality* refers to an action based on a debt relating to outstanding payment in lieu of, for instance, rental upon a lease or the payment of a mortgage bond, the claim being founded on a sealed instrument; *covenant*, as its name implies, refers to the action for damages for breach of contract under a sealed instrument. Although these actions differed from each other on finer points of substance, they shared certain common requirements. Prior to the Hilary Rules, under the general issue the form of defence for both was *non est factum* which encompassed a denial of the execution and validity of the deed. The general issue in both these instances operated to deny the execution of the deed or to show that the deed was void in law on the grounds of, inter alia, execution of the deed by a married woman or by erasure. However, matters which rendered the deed voidable, such as infancy or duress, had to be specially pleaded, normally affirmatively (*ie* by confession and avoidance). As stated in the text, under the Hilary Rules, the defence *non est factum* was confined to a factual denial of the execution of the deed and all other matters which rendered the deed either void or voidable had to be specially pleaded. See, further, Koffler & Reppy n 10 above at 503–504 505–507; Sutton n 10 above at 47–48 162–164.

[69]1 Bing (NC) 484; 131 Eng Rep 1204.

[70]4 KB 884; 136 Eng Rep 757.

[71]7 Ex 82; 155 Eng Rep 80.

In *Jones v Brown* the action was one of trespass[72] for the breaking and entry upon the plaintiff's close[73] and taking his goods. Judgment by default was given against the defendants in regard to breaking and entering the close. In respect of the taking of the goods, the defendants pleaded not guilty on the grounds that the goods were not the goods of the plaintiff. In a third plea, by confession and avoidance,[74] the defendants confirmed that they had taken the plaintiff's goods but alleged that this had been done lawfully in their capacity as assignees to one Metcalf, who they alleged had been declared bankrupt. The plaintiff by means of a replication joined issue on the first two pleas. In response to the third plea, being an affirmative defence given in confession and avoidance, the plaintiff in his replication contended that the goods mentioned in the declaration were not the goods of the assignees in the manner as alleged in the plea, but that these goods belonged to the plaintiff. At the trial, the plaintiff led evidence to show that Metcalf was carrying on business with the approval of the assignees and that the goods in question had been transferred to him *bona fide* and being so in possession of the goods the defendants had seized same. Defendants' counsel called no witnesses but declared the transfer to have been fraudulent. At this point, the court directed the jury to establish whether Metcalf was trading with the consent of his assignees and whether the transfer of goods to the plaintiff was *bona fide*. Plaintiff's counsel interposed and contended that the verdict should be given for his client because the defendants had no proof of title unless they gave some evidence that they were Metcalf's assignees. The judge overruled the objection, contending that it had come too late and that because the plaintiff had only traversed the defendants' allegation that they had a right to the goods, the plaintiff had thereby admitted the allegation that the defendants were Metcalf's assignees. Verdict was given for the defendants, the jury being satisfied that the transfer of goods to the plaintiff had been fraudulent. The plaintiff obtained a rule *nisi* for a new trial. The rule was discharged by Tindall CJ (Park J, Vaughan J and Bosanquet J concurring). The court's analysis of the facts is set out in the following passage taken from the judgment:

[72] *Trespass* refers to the ancient form of action dated to medieval English law; originally it was applied in instances in which the defendant under the king's writ was called upon to show cause in regard to damage done to the plaintiff and in breach of the king's peace. Later, the original writ was extended to include actions on case which related to, for instance, a breach of a statute which caused damage to a plaintiff; trespass and case were later clearly distinguished, trespass being applied only for direct and immediate injuries. See, further, Walker n 16 above at 1237–1238; Wharton n 16 above at 912.

[73] *Close* refers to a piece of land separated from other land and enclosed by a bank or a hedge; the unjustified entry upon another person's close was known as trespass for breaking a man's close or technically, trespass *quare clausum fregit*: Walker n 16 above at 232; Wharton n 16 above at 185.

[74] The word 'verification' as it appears in the report at the end of the description of the defendants' plea signifies that the plea had concluded with a *common verification*; every pleading subsequent to the declaration which introduced any new matter had to end in a verification thereby indicating that issue had not been joined *eg* a plea in confession and avoidance, which introduced an affirmative allegation. See, further, Sutton n 10 above at 86–87.

> The third plea contains several matters which were capable of being denied, and which, if not denied, show title in the assignees. But it is contended on behalf of the Plaintiff that, having taken issue on a single allegation, he is not to be considered as having therefore admitted all the other allegations of the plea, and that the Defendants ought to establish by proof the truth of those other allegations. I think however, that this is not the result of such a state of the pleadings; but, on the contrary, that, as the Plaintiff, who might have denied all the allegations, has singled out only one to put in issue, he must be taken, for the purpose of this cause, to have admitted the rest.[75]

In these terms. Tindall CJ concluded:

> I think that the Plaintiff, having omitted to contest the Defendants' title at the proper season, cannot now object that it was not supported by evidence at the trial. The rule must be discharged.[76]

The *Jones* case shows a distinct bias on the part of the court in favour of maintaining the rule relating to the singleness of pleading, thereby strictly upholding the principle of *ficta confessio*. However, in *King v Norman* the tendency is to treat this matter with more discretion.

In an action for debt on a bond, the plaintiff in *King v Norman* contended that the defendant was indebted to him in the sum of £500 on the grounds that he had stood surety for the defendant and his associate, Strachan, who were both tax collectors and that as surety he had been compelled to pay the receiver-general the said amount of £500, since Strachan had failed to pay to the receiver-general certain taxes collected. The pleadings were conducted in the following manner. The defendant in his plea, by confession and avoidance,[77] admitted the deed and conditions therein, as had been stated in oyer,[78] but contended that the plaintiff had in no manner suffered any loss as a result of any of the conditions contained in the deed. In his replication, plaintiff alleged that as surety he had been compelled by the receiver-general to pay the sum of £500 and that neither Strachan nor the defendant had reimbursed him. The defendant replied in his rejoinder that the plaintiff was in no manner compelled to have paid the receiver-general the sum of money stated in the replication and that 'the plaintiff of his own wrong paid the same', thereby 'concluding to the country'[79] indicating that he (the defendant) had joined issue. At the trial no evidence was led as to the actual receipt of the money by Strachan, but it was admitted that he had not paid over the money to the receiver-general. It was proved though that the plaintiff had, as surety, paid the amount of £500 to the receiver-general

[75] 488; 1205.
[76] 489; 1206.
[77] See n 74 above.
[78] *Oyer*, the counterpart of *profert*. In an instance where a deed formed the basis of an action or defence and was alleged in a pleading, the party claiming or defending thereunder had to disclose the deed by *profert*; *oyer* was the demand of the other party to have the deed read in an open court and the deed was included as part of the record: Koffler & Reppy n 10 above at 125–126 368–369; see, also, Sutton n 10 above at 102–103.
[79] See, further, n 49 above.

under a judge's order to which he had submitted. However, the defendant's counsel contended that the plaintiff was only entitled to nominal damages in the absence of proof of any specific sum having come to Strachan as tax collector. The court awarded damages to the full amount of £500, being of the opinion that the sum of £500 had been admitted upon the record. In the context of the case as a whole, it seems that the court regarded the sum of £500 to have been admitted because this allegation had not been traversed by the defendant in his rejoinder. Defendant's counsel obtained a rule *nisi* for a new trial. In the ensuing argument the central issue was whether the sum of £500 was traversable or not. The judgment per Boltman J (Maule J and Creswell J concurring) was based on the conventional application of the principle of *ficta confessio*. Judgment was founded on the following:

> It is an established rule of pleading, that, by pleading over, every traversable allegation which is not traversed is admitted, as is said in *Hudson v Jones* (1 Salk. 90); but what is not material or traversable, is not admitted or confessed, when it is alleged, and not traversed: *Rex v The Bishop of Chester* (2 Salk. 560, 1 Lord Raym. 292).[80]

The court then analysed the facts: It was material to the success of the plaintiff's action that he showed that an amount of money had been received by Strachan but that the amount received was not material because 'whether it was 51 or 500 which he had received, the bond was equally forfeited'. However, the plaintiff contended that there was a positive allegation that Strachan had received an amount in excess of £500 and that the defendant was entitled to have traversed this allegation. Consequently, it was essential to establish ' ... what the defendant has admitted, by omitting to traverse the allegation.' On the authority of *The King v The Bishop of Chester*[81] a pleader was not considered to have 'admitted anything but what is materially alleged'.[82] On the facts, it was the court's opinion that even if the defendant had specifically traversed the allegation that over £500 had been received by Strachan, it would have been sufficient for the plaintiff to have substantially proved that only an amount of money had been received by Strachan since this was the material issue, the specific amount being immaterial. In the pithy language of the time the court concluded:

> ... and it is impossible, we think, to contend that a party admits more by omitting to traverse an allegation, than an opposite party would have been compelled to prove, in order to sustain the issue, if it had been traversed.[83]

The rule was accordingly confirmed.

[80]895: 762.
[81]2 Salk 560; 91 Eng Rep 472.
[82]See, further, n 38 above.
[83]897; 762–763.

Hewitt v MacQuire is yet another example of the strict application of the principle of *ficta confessio*. This case also illustrates the extent to which the principle was still integrated with the technicality of pleading. The action was one of trespass[84] for breaking and entering the plaintiff's house and taking his goods. The salient facts are evident from the exchange of pleadings. In his plea the defendant, a bailiff, admitted the seizure of the plaintiff's goods but excused such seizure on the grounds that, upon judgment being entered for a certain Sir Isham, a writ of *fieri facias*[85] was issued, whereupon the sheriff delivered a warrant to the defendant to have it executed against the plaintiff's goods. The plaintiff responded with what was known as a replication *de injuria*, in this instance being a specific form of such replication, namely, the *de injuria absque residuo causae*. This is signified in the words of the report: ' ... the defendant ... of his own wrong, and without residue of the cause in the plea alleged ...'. The *de injuria* was only permitted at the replication stage of the pleadings, usually in actions for trespass, and in instances where the defendant had tendered an excuse for the alleged wrong; in its form it consisted of an introduction or inducement re-affirming the wrong stated in the declaration followed by a denial of all that had been previously alleged.[86] The form of the replication *de injuria* is evident in the report: the plaintiff in his inducement stated the facts contained in his declaration relating to the trespass and then in the mode of the *de injuria* contested the defendant's trespass *ie* the plaintiff admitted 'the existence of the writ and warrant but alleges that the defendant of his own wrong, and without residue of the cause, committed the trespass; that is, although he held the warrant, he was not justified in entering under the warrant'.[87] With regard to what occurred at the trial, it should be noted that the plaintiff had not under this form of the replication traversed the validity of the warrant but had instead, in his inducement, admitted the warrant and was therefore in a precarious situation. It is evident that the defendant had traversed the declaration by means of a plea in confession and avoidance because the reporter notes a common verification[88] at the end of the plea. The plaintiff had been caught in a pincher movement: he had to determine whether the defendant's affirmative allegation was given in justification or in excuse of the alleged trespass. If the plaintiff had decided that it was the former, he could have responded in his replication by confession and avoidance, that is, he could have admitted the existence of the warrant but avoided it by affirmatively alleging that the assignment of the

[84]See n 72 above.

[85]*Fieri facias* lit cause it to be done, abbv *fi fa*; a mode of execution of judgment under a writ of *fi fa* for the seizure and sale of a defendant's goods and chattels to satisfy the judgment: Walker n 16 above at 448 470; Wharton n 16 above at 367 470 367.

[86]See Koffler & Reppy n 10 above at 520–522; Sutton n 10 above at 90–91; Wharton n 16 above at 269. The common form was known as the replication *de iniuria sua propria absque tali causa* meaning that the defendant 'of his own wrong, and without any such cause', motive or excuse, committed the matters alleged in the plea. In the present case a different form of the *de injuria* was used, being the replication *de injuria absque residuo causa* whereby only part of the plea is admitted *ie* without the rest of the cause alleged: see, further, Black *Black's law dictionary* (4 ed 1978) 481. See also *Crogate's Case* 8 Co Rep 666; 77 Eng Rep 574.

[87]See 84; 866 *per* Platt B.

[88]See n 74 above.

warrant was invalid, thereby forcing the defendant in his rejoinder to raise the issue of the validity of the warrant. However, if the defendant's affirmative allegation was not in justification but rather in excuse, the plaintiff's replication in confession and avoidance would have been bad and subject to a special demurrer[89] raised by the defendant. It is probable that the defendant foresaw this and, wishing to avoid the issue of the validity of the warrant, phrased the affirmative allegation in his plea as an excuse thereby entrapping the plaintiff into admitting the warrant by means of the replication *de injuria.* Not having expressly traversed the warrant, the plaintiff at the trial contended that the assignment of the warrant from the sheriff to the defendant was invalid. The court overruled this contention, stating that the warrant had been admitted in the plaintiff's pleadings. The jury gave a verdict for the defendant, whereupon the plaintiff moved for a new trial on the grounds of misdirection. The matter was heard by the court of Exchequer and the law barons[90] refused the rule on the grounds that, in the absence of proof to the contrary, there was evidence to suggest that the defendant had entered the plaintiff's dwelling under the authority of the warrant.

The Hilary Rules did not directly effect any alteration in the application of the principle of *ficta confessio*. This is borne out by *Jones*, *King* and *Hewitt*. These examples show that the classical common-law application of the principle remained intact. However, this should not create the impression that the application of *ficta confessio* was unaffected by the modified rules of pleading. On account of the procedural changes effected under the Hilary Rules, a re-evaluation of the principle of *ficta confessio* did occur.

In so far as the principle of *ficta confessio* was concerned, two modifications of the system should be considered. Firstly, the Hilary Rules placed emphasis on special pleading because facts relating to matters which had previously been pleaded under the general issue had to be specifically pleaded, thereby enhancing the principle of *ficta confessio.*[91] This focused attention on admissions on the record. Secondly, protestation was abolished in the following terms:

> No protestation shall hereafter be made in any pleading; but either party shall be entitled to the same advantage in that or other actions as if a protestation had been made.[92]

At first glance there seems to be no direct correlation between, firstly, special pleading and admissions on the record nor secondly, between the latter and the abolition of protestation. However, in regard to the first, the modification of the

[89]See *Croate's Case* n 86 above at note (B) at 576; see also Wharton n 16 above at 269.
[90]The abbreviation 'B' as it appears in the report after the names of the judges represents the word 'baron'; dating from approximately the 12th century, the judges of the court of Exchequer were known as the lord chief baron and barons of the Exchequer: Walker n 16 above at 104 114 115.
[91]See, further, text to n 66 above and further.
[92]First General Rules and Regulations rule 12; see 2 C & M 18; 149 Eng Rep 658.

mode of pleading in regard to *assumpsit*[93] will be used as an example. The second is based on differing views arising out of the interpretation of the specific rule which abolished protestation, that is, whether, in the case of the principle of *ficta confessio* being applicable, the rule operated only to prevent a fact from being afterwards raised in the same suit or that it was not conclusive in regard to the truth of that fact in any other subsequent litigation between the parties.[94]

There were a number of decisions which dealt with these related matters. However, three have been selected because they share the same form of action, that is, *assumpsit*, and are based on fundamentally the same set of facts; they also show a divergence of opinion between the court of Exchequer and the court of Queen's Bench. Most important of all, against the background of *Jones*, *King* and *Hewett*, these cases illustrate the state of pleading for the purposes of further comparison with the provisions of rule 22(3). In all three cases the facts were as follows: the defendants in their respective pleas to the declarations concerned contended that the bill of exchange in each instance had been given for illegal purposes and without consideration; the plaintiffs by replication contended that good consideration had been given. On a motion for a new trial, the respective defendants argued that the plaintiff by traversing only the consideration had admitted the illegality, thereby impeaching the consideration.

In *Edmund v Groves*[95] the court of Exchequer was the first to give attention to admissions on the record. The controversy was succinctly formulated during argument on a motion for a non-suit brought by the defendant. Alderson B put it to counsel for the defendant: 'The pleadings are not before the jury, but only the issue.' Counsel responded: 'They try the issue only, but they try it with reference to the other facts appearing on the face of the record. It is very desirable that this question should be settled, in order that the parties may know, when they go to trial, whether an allegation admitted on the record is to be taken as a proven fact, with all its consequences, or not.'[96] In refusing the rule, Alderson B made a statement which was to be taken up in subsequent decisions in point:

> An admission on the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on other facts in dispute; but if any inferences are to be drawn by the jury, they

[93] Assumpsit lit he undertook; the form of action which developed out of trespass on case (see n 72 above) based on the allegation that the defendant undertook either expressly or tacitly, to do something and his omission to do so caused harm to the plaintiff's person or property: Walker n 16 above at 89–90; Wharton n 16 above at 87–88.

[94] See, further, comment by EV Williams in note (a) to *Holdipp* at 803-804. For EV Williams, see n 42 above.

[95] 2 M & W 642; 150 Eng Rep 914 (1837).

[96] 643; 914.

> must have the facts from which such inferences are to be drawn proved like any other facts. [97]

The court of Queen's Bench in *Bingham v Stanley*[98] was given the opportunity to respond. Lord Denman CJ rejected the opinion of Alderson B given in both *Edmunds* and *Bennion*,[99] stating:

> Upon full consideration, we cannot agree with the doctrine thus stated. We think that an admission made in the course of pleading, whether in express terms or by omitting to traverse what has been before alleged, must be taken as an admission for all purposes of the cause, ... provided the allegation so made be material. We find no authority to the contrary; and, indeed, in former times, before the new rules, such admission, in the absence of a protest, estopped the party even in another cause from disputing the fact so admitted.[100]

In *Smith v Martin*[101] it was the turn of the court of Exchequer to take issue with the court of Queen's Bench, once again per Alderson B:

> I must say it seems to me to be unjust and unreasonable to prevent a party, by the rules of pleading, from denying a particular fact, yet call upon the jury to treat that fact as proved. If that be the law, then a double replication is the very essence of justice.[102]

The singleness of pleading and the consequent application of the principle of *ficta confessio* are clearly being called into question.

These cases go deeper than merely relating to the application of the *ficta confessio*. They indicate that the system of pleading was in a state of flux. All three cases have in common the action of *assumpsit* in regard to bills of exchange and promissory notes. Pleading on the action of *assumpsit* was regulated by the Hilary Rules in the following terms:

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[97]645; 915 (Lord Abinger CB and Bolland B concurring). Although the cause of action did not relate to a bill of exchange, the court of Exchequer confirmed this view in *Bennion v Davison* 3 M & W 179; 150 Eng Rep 1106 (1838) in which, although it was held that immaterial allegations which had not been denied were not admitted by the traversing of another allegation, Alderson B stated at 183; 1108: 'It is clear that this averment, being an immaterial one, was not admitted; but it is not to be taken for granted, that, if it had been material, there was an admission of it as a fact to go to the jury.'

[98]2 QB 117; 114 Eng Rep 47 (1841).

[99]For *Bennion*, see n 97 above.

[100]126–127; 50. In *Robins v Maidstone* 4 QB 811; 114 Eng Rep 1103 (1843) at 816; 1105 this view was upheld by Lord Denman though on different grounds.

[101]9 M & W 304; 152 Eng Rep 129 (1842).

[102]308; 131 (Lord Abinger CB and Gurney B concurring). Especially in regard to the abolition of protestation, it was held in *Carter v Jones* 13 M & W 136; 153 Eng Rep 57 (1844) at 148; 61 per Alderson B that a plaintiff was entitled to contest an admission on the record made to his prejudice in a previous but related action.

> I.1 In all actions of *assumpsit*, ie except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial of fact of the express contract or promise ...
> 2 In all actions upon bills of exchange and promissory notes, the plea of non assumpsit shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact: ex. gr., the drawing, or making, or indorsing, or accepting or presenting, or notice of dishonour of the bill or note.[103]

The implication of the Rule is that, in instances in which it was averred that a bill or note was void, the issue had to be specially pleaded on specific and factual grounds; the denial of *non assumpsit* under the general issue prior to the Rules which included the issue that an instrument was void, was no longer permitted.[104] To state the matter differently: A defendant could no longer challenge the legality of an instrument by generally denying liability, thereby on the pleadings placing the onus on the plaintiff and then, at the trial, raise the issue of fraud in evidence. The Hilary Rules narrowed the issues in pleading by prescribing that the factual basis relating to the illegality of the instrument had to be specially pleaded. By the same token, because special pleading had been extended, if a defendant's plea contained an affirmative allegation it was incumbent upon the plaintiff to allege by replication that good consideration had been given. Therefore, in the final analysis, the divergence of opinion in *Edmunds*, *Bingham* and *Smith* stems from the adapted mode of pleading under the Hilary Rules which indirectly affected the application of *ficta confessio* and matters incidental thereto.

Both trilogies of cases are functional. *Edmunds*, *Bingham* and *Smith* bring to the fore the unsettled issues caused by uncertainties regarding the interpretation of the Hilary Rules. What they underpin is the modification of the classical mode of pleading under the Hilary Rules, especially in relation to the restriction of the scope of the general issue and the corresponding emphasis on special pleading. The Hilary Rules merely tampered with the classical system of pleading, which basically remained unaltered. This is borne out by *Jones*, *King* and *Hewett*, which indicate that from the commencement of the Hilary Rules in 1834 until the adoption of Civil Procedure Act in 1852, the principle of *ficta confessio* had been applied in the conventional manner and that the mode of pleading the single issue was still practised. In fact, very little had changed because substance was still commingled with procedure since the forms of action had not as yet been abolished. Although there is doctrinal association with the provisions of Rule 22(3), it is still necessary to look beyond the practice and procedure of this period in order to find a congruent historical precedent.

[103]See 2 C & M 20–22;149 Eng Rep 659.
[104]See also n 68 above for application of general issue in regard to debt on specialty and covenant.

The Common Law Procedure Act of 1852

The importance attached to the Judicature Acts of 1873[105] and 1875[106] tends to understate a major reform of the common-law system of pleading which occurred prior to the promulgation of these Acts. As far as common-law procedure is concerned, the Common Law Procedure Acts of 1852,[107] 1854[108] and 1860[109] effected a fundamental reform of the system; the Supreme Court of Judicature Acts, 1873 and 1875 refined and consolidated these reforms. As was the case under the Hilary Rules, no express provisions dealt specifically with the principle of *ficta confessio* although its application was affected by the statutory modification of the system of pleading. Of the three Common Law Procedure Acts mentioned, only the Common Law Procedure Act of 1852 is of importance for present purpose because this statute alone influences the inquiry into the formation of the principle of *ficta confessio* as it relates to rule 22(3).

Two major changes in regard to the mode of pleading influenced the application of the principle of *ficta confessio* during this period.[110] Under the Hilary Rules the classical common-law mode of pleading the single issue was retained, subject to the modification introduced under the Statute of Jeofails of 1705.[111] The provisions of the Common Law Procedure Act of 1852 abolished this antiquated mode of pleading. The change was effected in the following terms:

> A Plaintiff in any Action may, by Leave of the Court or a Judge, plead in answer to the Plea or subsequent Pleading of the Defendant, as many several Matters as he shall think necessary to sustain his Action; and the Defendant in any Action may, by Leave of the Court or a Judge, plead in answer to the Declaration, or other subsequent Pleading of the Plaintiff, as many several Matters as he shall think necessary for his Defence, ...[112]

In isolation this provision could have caused havoc in the system. By abolishing the singleness of pleading the other extreme, a multiplication of issues, could have arisen. This eventuality was foreseen. The Act provided:

> A Defendant may either traverse generally such of the Facts contained in the Declaration as might have been denied by One Plea, or may select and traverse

[105] 36 & 37 Vict c 66.
[106] 38 & 39 Vict c 77.
[107] 15 & 16 Vict c 76.
[108] 17 & 18 Vict c 125.
[109] 23 & 24 Vict c 126.
[110] For a brief summary of the measures introduced by the Common Law Procedure Acts of 1852, 1854 and 1860, see Sutton n 10 above at 197–200; for a general outline of pleading and procedure under the Common Law Procedure Act of 1952, see Broom & Hadley *Broom's commentaries on the laws of England vol 3* (1869) 338–355; see also Millar n 59 above at 223–24 regarding the effect the provisions of the Common Law Procedure Act of 1852 had upon the operation of principle of *ficta confessio*.
[111] See, further, n 52 above and accompanying text.
[112] Section 81.

> separately any material Allegation in the Declaration, although it might have been included in a general Traverse.[113]

The provisions described so far are confine to the conduct of the defendant in relation to the plaintiff's declaration. This situation is reminiscent of the Statute of Jeofails of 1705 which caused a procedural imbalance in regard to the participative rights of a plaintiff because only a defendant could avail himself of a 'double plea'.[114] The draftsmen obviated this problem in the following manner:

> A Plaintiff shall be at liberty to traverse the whole of any Plea or subsequent Pleading of the Defendant by a general Denial, or, admitting some Part or Parts thereof, to deny all the rest, or to deny any One or more Allegations.[115]

In order to ensure that both parties were placed on an absolutely equal footing it was further provided:

> A Defendant shall be at liberty in like Manner to deny the whole or Part of a Replication or subsequent Pleading of the Plaintiff.[116]

A notable characteristic of these provisions is that they used a vocabulary foreign to the formulary system of pleading. They referred to a 'general denial' and not to the general issue; to pleading 'several matters' and to the traversing of 'facts'. Somewhere there is a missing link which accounts for this altered mode of pleading.

The Act introduced a provision so subtle in its wording that its implications for the process of pleading, and consequently for the application of the principle of *ficta confessio*, tend to be inconspicuous. Section 3 abolished the use of the forms of action for the purposes of pleading.[117] The brevity of this section understates its importance:

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[113]Section 76.
[114]See, further, n 52 above and accompanying text
[115]Section 77.
[116]Section 78.
[117]Sutton n 10 above at 197 states that under the Act: 'Forms of action were abolished and under that act proceedings were started in one uniform manner by a writ which was much the same as the present writ.' Koffler & Reppy n 10 above at 58 point to 1832, under the Uniformity of Process Act 2 Wm IV c 39 of that year, as the start of the gradual demise of the use of the forms of action for the purposes of procedure and in regard to the Act state: 'A second assault upon the Status of the Personal Actions came in 1852 when the Common Law Procedure Act eliminated the requirements that the plaintiff should mention in any Summons any Form or Cause of Action. Even so the Personal Forms of Action as developed at Common Law remained substantially intact.' It should be noted that under s 25 of the Act special endorsements were introduced and that the comprehensive extension of the system of endorsements provided under the Judicature Acts of 1873 and 1875 finally led to the elimination of the forms of action and the intimate interaction between substance and procedure. For present purposes, though, it would suffice to say that s 3 of the Act prohibited the forms of action for the purposes of pleading.

> It shall not be necessary to mention any Form or Cause of Action in any Writ of Summons, or in any Notice of Writ of Summons, issued under the Authority of this Act.

Section 3 did not abolish the forms of action *per se*; it prohibited the use of the forms of action for the purposes of pleading. To state the matter differently: the forms of action still remained as the embodiment of substantive principles, but the process of pleading was no longer restricted to the procedural requirements of a particular form of action. However, because the forms of action no longer constituted the basis of pleading, pleading was founded upon the allegation of facts in relation to the merits of the case[118] in contradistinction with the situation prior to the commencement of the Act in which allegations of fact were formulated as conclusions of law in relation to the specific form of action employed. In a rather unobtrusive manner the Common Law Procedure Act of 1852 took the first tentative step in introducing a system of fact-pleading. Under this new dispensation, the principle of *ficta confessio* was applied within a system in which the mode of pleading had been altered materially.

The new mode of pleading both promoted and derogated from the principle of *ficta confessio*. The provisions of section 81[119] were in direct contrast to the classical mode of pleading: Each party was entitled to plead 'as many several matters' to sustain his action or defence, subject only to judicial control. The principle of *ficta confessio* was no longer maintained in relation to the omission to raise a plea but by the failure to deny a material allegation in the prescribed manner. Sections 76–78, on the other hand, diminished the importance of the principle in the system: the principle was inhibited by the operation of the general denial[120] permitted in the defendant's plea to the declaration as well as in all subsequent pleadings.[121]

Both in principle and practice there are broad similarities between the provisions of rule 22(3) and the model of pleading established under the Common Law Procedure Act of 1852; the principle of *ficta confessio* was applied in regard to those material allegations of fact contained in a previous pleading which had not been denied in a subsequent pleading. However, although the principle and application of the *ficta confessio* can be positively identified under this model in regard to its application under rule 22(3), as yet *ficta confessio* had not been expressly and formally stated as a principle of allegation in any legislative

[118]This is particularly evident from the wording of ss 76–78; s 76 specifically refers to the traversing of 'facts' contained in the declaration.
[119]For s 81, see text to n 112 above.
[120]It should be noted though that under the Common Law Procedure Act of 1852, a general denial was not synonymous with the general issue, because in terms of s 3 of the Act the general issue was divested of any allegation of a substantive nature.
[121]This is also confirmed by s 79 of the Act of 1852 which facilitated a prompt joinder of issue by providing that such joinder could be effected by either party and such joinder was deemed to be a denial of the substance of the plea or other subsequent pleading and an issue thereon and that the plaintiff could add a joinder of issue for the defendant in an instance where the plaintiff's pleading was a denial in part or of the whole of the defendant's pleading.

instrument. Moreover, the general system of pleading was not at this stage sufficiently developed to allow for a complete identification with the provisions of rule 22(3). Recourse must therefore be had to the Supreme Court of Judicature Acts, 1873 and 1875 in this respect.

THE REFORMED SYSTEM

The Judicature Acts of 1873 and 1875[122] are milestones in the history of the administration of justice in England. Civil procedure and, more specifically, pleading is one of the many diverse matters dealt with under these statutes. As far as pleading was concerned, these statutes did not introduce anything novel. Their importance for the purposes of pleading and procedure lies in the fact that both Acts consolidated, refined and improved upon the reforms already accomplished under the Civil Procedure Acts of 1852, 1854 and 1860[123] as well as those under the Chancery Practice Act of 1850[124] and the Chancery Practice Amendment Acts of 1852,[125] 1858[126] and 1860,[127] thereby establishing a unitary system of courts and of procedure.

With regard to pleading in particular, reference must be made to the Rules contained in first schedule to the Judicature Act of 1875. These Rules replaced the original Rules issued under the Judicature Act of 1873.[128] Hence, it is in terms of Order XIX entitled: *Pleading generally*, that the inquiry into the principle of *ficta confessio* is directed. The first formal legislative expression in English procedure of the principle of *ficta confessio* was contained in Order XIX rule 17 in the following terms:

> Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of an opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition.

Both doctrinally and in substance, the provisions of rule 22(3) may be identified with this rule. Moreover, the same is true in regard to the application of the principle under the general system of pleading so introduced. The mode of pleading was conducted within a system of fact-pleading and characterised by

[122]The Judicature Act of 1875 s 1 provided that the Judicature Act of 1875 was to be construed jointly with the Judicature Act of 1873 and further provided that when construed together with the Judicature Act of 1873 ' ... may be cited as the Supreme Court of Judicature Acts, 1873 and 1875, and this Act may be cited separately as the Supreme Court of Judicature Act, 1875'.
[123]See ns 107, 108 and 109 above.
[124]13 & 14 Vict c 35.
[125]15 & 16 Vict c 86.
[126]21 & 22 Vict c 27.
[127]15 & 16 Vict c 87.
[128]See the Judicature Act of 1875 ss 16 and 33 read with sch 2.

the specificity which was to be brought to pleading.[129] Order XIX rule 4 required

> Every pleading shall contain as concisely as may be a statement of material facts on which the party pleading relies, but not evidence by which they are to be proved, such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation.[130]

However, Order XIX rule 4 along with the rules dealt with below should not be read in isolation. The Judicature Act of 1875 finally abolished the forms of action. There were no provisions which deal directly with this matter. The manner whereby the forms of action were abolished was by means of the introduction of an intricate system of endorsements[131] and special endorsements initiated under the Common Law Procedure Act of 1852[132] and extended under the Judicature Act of 1873.[133] The Judicature Act of 1875 dealt with endorsements extensively and in the minutest detail.[134] Although there were numerous implications in regard to substantive law, in procedural terms what in fact was abolished was the necessity of shaping pleadings in the form of different classes of actions. Within this new procedural dispensation that finally established the system of fact pleading, it was imperative that individual and material allegations of fact were to be specifically pleaded.[135]

In accordance with the mode of fact-pleading, it followed that specificity in pleading should be required. For present purposes, only the following examples will be examined. In terms of Order XIX rule 4 cited above,[136] every material allegation of fact had to be dealt with seriatim. A response by means of a general denial was forbidden under Order XIX rule 20:

> It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the statement of claim, or a plaintiff in his reply to deny generally the facts alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth.[137]

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[129]See Jacobs *The reform of civil procedural law and other essays on civil procedure* (1982) 216-217 315-316.

[130]By comparison, see the Uniform Rules rule 18(3)-(4).

[131]An indorsement for the purposes of pleading refers to a writ of summons in a superior court which was and still must be indorsed with a statement of claim made or the remedy or relief sought: Walker n 16 above at 613; Lely *Wharton's law lexicon* (7ed 1883) 405.

[132]See s 25.

[133] See rs 3 7-8 contained in the schedule to the Act.

[134]See Order II r 1 read with Order III rs 1-8 contained in sch 1 to the Act as well as the form of such endorsements contained in appendix A parts 1-2 annexed to sch 1.

135 See Holdsworth n 12 above at 329-330.

[136]For Order XIX rule 4, see text to n 130 above.

[137]The Uniform Rules do not contain a rule equivalent to Order XIX r 20; it is contended that such a rule would in contemporary terms be redundant because specificity in pleading has already been achieved. However, Order XIX r 20 was introduced into the Cape Rules under

The provisions of Order XIX rule 22 required that a party must not answer a pleading evasively:

> When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance ...[138]

Not only did the Rules facilitate specificity in pleading but they also sought to expedite a joinder of issue under Order XIX rule 21:

> Subject to the last preceding Rule, the plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to the reply, may join issue upon the previous pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.[139]

Within this altered procedural environment the principle of *ficta confessio*, as embodied in Order XIX rule 17, was retained but assigned a new function. The principle no longer operated to admit by fiction all but one issue in order to achieve the production of a single issue; its purpose was altered to enforce specificity in the pleading of multiple factual allegations and thereby promote the production of issue.

Order XIX rule 17 of the Rules to the Judicature Act of 1875 may finally be identified an apt historical precedent for the contemporary application of rule 22(3). As was the case throughout the development of common-law pleading, the doctrinal association between the two remains distinct. However, of primary significance is that in this instance Order XIX rule 17 is formally stated in a legislative instrument and embodies a definitive and substantive rendering of the deemed admission as it is recognised in South African civil procedure. Furthermore, the affinity between the historical precedent and rule 22(3) is now highly conspicuous since both find placement within a general system of fact-

rule 330(d). As was the case under Order XIX r 20, r 330(d) inhibited the general denial. Beck *The theory and principles of pleading in civil actions* (1ed 1923) at 58 and 59 comments on Cape rule r 330(d) which had been taken up into the Rules of the various provincial division after Union: 'The rule of all courts also provide expressly that a defendant must deal specifically with every allegation of fact which he intends to put in issue. A mere general denial will not be sufficient to destroy or repute particular allegations in the declaration which could be specifically denied ... . The rule abolishes the old practice which permitted a plea of the general issue. The effect of such a plea was held to be a denial of everything not admitted, but as at the present day the converse is the rule and everything not specifically denied is taken to be admitted a general denial cannot be allowed and is liable to be struck out.' The final paragraph of this passage refers to a plea of the general issue. This same passage which appears in Isaacs *Beck's the theory and principles of pleading in civil actions* (5ed 1982) 71 has been retained, probably because of its historical significance.

[138]By comparison, see Uniform Rules r 18(6).

[139]By comparison, see Uniform Rules r 25(3).

pleading. What remains is to trace the manner in which the historical precedent was received into the South African system of pleading.

Ficta confessio: final synthesis

The first definitive formulation in South African civil procedure of the deemed admission was introduced into the Colony of the Cape of Good Hope in 1880 under rule 330(d), as follows:

> It shall not be sufficient for a defendant in his plea in convention, or for a Plaintiff, in his plea in reconvention, to deny generally the facts alleged by the declaration or claim in reconvention, as the case may be; each party must deal specifically with each allegation of fact of which he does not admit the truth, and every allegation of fact contained in the declaration or claim in reconvention and not specifically denied in the plea in convention or plea in reconvention, shall be taken to be admitted.[140]

Rule 330(d) cannot be evaluated in isolation since it formed part of the general reform of the mode of pleading introduced under the amendments to the Cape Rules in 1880. The amendment of the Cape Rules in 1880[141] repealed rules 18 and 19 which were originally promulgated on 2 March 1829;[142] rules 18 and 19 were replaced by rule 330. In contradistinction with repealed rules 18 and 19, rule 330 expressly introduced specificity in pleading. This innovation was based directly upon the Rules to the Judicature Act of 1875.[143] The penultimate and final sentences of rule 330(a) determined the manner in which pleadings were to be framed:

> ... Where the Plaintiff seeks relief in respect of several distinct claims or causes of complaint founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. And the same rule shall apply where the Defendant relies upon several distinct grounds of defence, set-off, or claim in reconvention.[144]

There is a distinct correlation in this regard with Order XIX rule 9 of the Judicature Rules of 1875.[145] Under rule 330(c) the defensive mode of pleading

[140]See Tennant *Rules, orders etc., touching the forms and manner of proceeding in civil and criminal cases, before the Superior and Inferior Courts of the Colony of the Cape of Good Hope* (5ed 1905) 76–77.

[141]See GN 340 of 26 March 1880. There was no formal expression of the principle of *ficta confessio* in the Cape Rules prior to 1880.

[142]For rs 18 and 19, see Van der Sandt *Rules, orders etc., touching the forms and manner of proceeding in civil and criminal cases, before the Supreme, Circuit, Magistrates' Courts of the Colony of the Cape of Good Hope* (1864) 59–61.

[143]Hereinafter referred to as the Judicature Rules of 1875.

[144]See Tennant n 140 above at 76.

[145]Order XIX r 9 need not be cited because it is contained verbatim in rule 330(a) with the exception that whereas r 330(a) used the term 'claim in reconvention', the English rule used the words 'counter-claim founded upon separate and distinct facts'.

by the defendant *vis-à-vis* the plaintiff's declaration or claim, as is similarly expressed in the Uniform Rules rule 22(2), is set out as follows:

> The Defendant, in his plea or answer, shall admit, deny, or confess and avoid, all the material facts alleged in the declaration or claim of the Plaintiff, and shall clearly and concisely state the material facts on which the defendant relies.[146]

Rule 330(c) had no equivalent in the Judicature Rules of 1875 but was based upon the same wording originally contained in rule 19 published on 2 March 1829.[147] This should not be regarded as any deviation from the Judicature Rules of 1875 because rule 330(c) retained a fundamental principle of common-law pleading, as originally received and modified to suit local circumstances under the Cape Rules of 1829.

To return to the theme of specificity in pleading: Order XIX rule 22[148] is repeated verbatim in rule 330(f):

> When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance ...[149]

In order to limit the proliferation of issues arising from the introduction of a system of fact-pleading, joinder of issue was accelerated. Order XIX rule 21 was stated almost verbatim in rule 330(e) which dealt with joinder of issue.[150] Lastly, rule 330(d) cited above, is an amalgam of Order XIX rules 17 and 20.[151] As was the intention under the Judicature Rules of 1875, the objective of rule 330(d) was to compel specificity in pleading. It is therefore significant that the principle of *ficta confessio* was introduced under rule 330(d), indicating that in the context of the general system of pleading at the Cape, the purpose of the principle of *ficta confessio* was to enforce specificity in pleading so as to expedite a production of issue. It is also evident from the wording of rule 330(d) that the principle of *ficta confessio* was applied without any procedural qualification and was therefore plenary in form. Furthermore, the application of the principle was not subsidiary to any other procedural mechanism and became operative immediately upon a defendant's failure to deny a material allegation of fact contained in the prior pleading.

[146]See Tennant n 140 above at 76.
[147]See Van der Sandt n 142 above at 61.
[148]For Order XIX r 22, see text to n 138 above.
[149]See Tennant n 140 above at 77.
[150]Idem. For the wording of Order XIX r 21, see text to n 139 above.
[151]For Order XIX r 20, see text to n 137 above.

Rule 330(d) was received into the general system of South African civil procedure through its introduction, virtually verbatim, under rule 29 of the Rules of the Orange River Colony and the rule 29 of the Colony of the Transvaal as well as under Order XI rules 32–33 of the Colony of Natal. These rules were retained under the Rules of the various provincial divisions of the Supreme Court established after Union. The final synthesis occurred in 1965 when, under the Uniform Rules of Court issued in that year, the principle of *ficta confessio* contained in the separate Rules of the various provincial divisions was consolidated under rule 22(3).

In this manner, as our contemporary expression of the deemed admission, rule 22(3) takes its place as one of the rules of Anglo-American procedure which, given minor variations, apply the principle of *ficta confessio*.[152] In common with other Anglo-American models, *ficta confessio* under rule 22(3) is applied as an autonomous method of allegation and is therefore plenary in nature within the context of a negative system of fact pleading.[153]

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Appendix 1
Blake v West
1 Ld Raym 504; 91 Eng Rep 1236

Every material allegation upon pleadings, which is not answered, is admitted.

Replevin of two cows. The captain was said to be in a place called Downfield. The defendant avows, for that, that the place where, &c. contains two acres called Marsh-Acre in Downfield, and two acres called Stretfield in Downfield, and that he was seized of them in fee, and took the cows, *viz* one in Marsh-Acre, and the other in Stretfield, damage feasant, &c. The plaintiff pleads in bar, that the defendant took the two cows in Downfield, and traverses the taking in

[152]Australia: Federal Court Rules Order 11 r 13, Australian Capital Territory Order 23 r 13, New South Wales Part 15 r 20(1), Northern Territory r 13.12, Queensland r 166, Southern Australia Order 19 r 11, Tasmania r 250, Victoria r 13.12, Western Australia Order 20 r 14(1); Canada: Ontario r 25.07(6); Ireland: Order 19 r 13; New Zealand: Code of Civil Procedure r 127; United Kingdom: Civil Procedure Rules Part 16 r 16.5(5); United States of America: Federal Rules of Civil Procedure r 8(d).

[153]See *Griqualand West Diamond Mining Co Ltd v London and South African Exploration Co* (1883) 1 Buch App 239; *Rance v Union Mercantile Co Ltd* 1922 AD 312; *Gordon v Tarnou* 1947 3 SA 525 (A); *AA Mutual Insurance Association Ltd v Biddulph* 1976 1 SA 725 (A); *FPS Ltd v Trident Construction (Pty) Ltd* 1989 3 SA 537 (A) 542; *ABSA Bank Ltd v Blumberg & Wilkinson* 1995 4 SA 403 (W); *ABSA Bank Ltd v IW Blumberg* 1997 3 SA 669 (SCA), 1997 2 All SA 307 (A); *Sterling Consumer Products (Pty) Ltd v Cohen* 2000 4 All SA 221 (W); *Pinro Building & Steel Merchants (Edms) Bpk v Yawa* 2003 1 All SA 318 (C) 321; *Daewoo Heavy Industries (SA) Pty Ltd v Banks* 2004 2 All SA 530 (C) 537.

Marsh-Acre and Stretfield in Downfield. And issue thereupon, and verdict for the avowant. And now Mr Carthew moved in arrest of judgment, that the issue was immaterial, because the plaintiff has traversed the taking in the two places, which he understood to be a plea of prisel in auter lieu, but has not taken any notice of the damage feasant; so that though a verdict is for the avowant, yet he has no title to have return, (1237) because the damage feasant is not found, &c. Sed non allocatur. For that is admitted by the issue of the taking, viz if they were taken there, that they were taken there damage feasant.

Appendix 2
Hudson v Jones
1 Salk 90; 91 Eng Rep 84

Upon issue *non concessit*, an attornment need not be given in evidence.

In replevin the avowant made title by grant of a reversion in the *locus in quo* expectant on an estate for life to the plaintiff, unto which reversion there was a rent incident, *ad quam quidem concessionem* the plaintiff (being particular tenant) did attorn: the plaintiff pleaded *non concessit modo & forma*; and the question on trial before Holt CJ was, whether the want of attornment might be given in evidence upon this issue... (85) And being made a point for the resolution of the whole Court, it was urged for the plaintiff, that *upon non concessit* and effect of the grant is put in issue, and a deed, if it be ineffectual, [91] is void: if the grantee dies before attornment, it can never be made good; if a second grant be made, and attornment obtained to that, the first grant is avoided. That upon non feoffavit livery must be proved; *per quod*, &c.

On the other side it was said, that in pleading a grant of a reversion, an attornment is always alleged, but not of a feoffment: and if a feoffment be of a manor, it is neither necessary to allege a livery not an attornment, because it is res integra, and the tenants are supposed to be numerous; yet if the feoffee avow on any particular tenant for rent, &c. he must shew his attornment. Also in pleading a grant of a reversion, the plaintiff must allege a *venue* for the attornment, which shows it was traversable, and that which is traversable, and not traversed, is admitted. To this opinion the Court inclined; but held that want of attornment might be given in evidence, because the operation of the deed is put in issue; and livery differs, for that is the act of the feoffor to complete his feoffment, but this is the act of another, and nothing farther remains on the part of the grantor.

Afterwards the Court held, that an attornment need not be given in evidence upon *non concessit*, though it must be pleaded; and though it must be pleaded,

yet it need not be pleaded with a *venue*, but shall be tried where the land lies, upon which it is supposed to be made as a surrender is. And the reason of their opinion was, because it is traversable, and whatever is traversable, and not traversed, is admitted and the grant is perfect as far as the grantor can perfect it.

Appendix 3
Young v Rudd
Carthew 347; 90 Eng Rep 803

Indebitatus assumpsit for wares sold and delivered.

The defendant pleaded, that after the promises in the declaration mentioned, (viz) on such a day, he gave and delivered unto the plaintiff a bever-hat in satisfaction and discharge of the said several promises in the decla-[348]-ration; and that the plaintiff then and there had, and accepted the said hat in full satisfaction and discharge of the promises, & hoc, &c.

The plaintiff replied protestando, that the defendant never gave him (the plaintiff) any such hat in satisfaction and discharge of the said promises, pro placito dicit that he never accepted a bever-hat in satisfaction and discharge of the said promises, prout, &c. & *hoc petit quod inquiratur per patriam*.

(The rest of the report is not material to the point in issue.)

A peregrination through the law of provocation

*Shannon Hoctor**

> If weakness may excuse,
> What murderer, what traitor, parricide
> Incestuous, sacrilegious, but may plead it?
> All wickedness is weakness.[1]

INTRODUCTION

The very idea of allowing provocation to function as a defence excluding an accused person's criminal liability is inherently controversial. Surely a person is expected to control his or her urges, emotions and passions? From a moral and ethical perspective it is clear that one is expected to control oneself, even under provocation or emotional stress. The community demands no less.[2] Thus, the argument goes, allowing provocation to function as a complete defence, as opposed to a mitigating factor acknowledging human frailty, cannot be countenanced:

> ... [W]ere one to do otherwise then one would be giving credence to the belief that retaliation is justified in the eyes of the law in certain circumstances and it seems to me that this is the very thing our criminal law guards against; it does not allow people to take the law into their own hands, and it would be coming very close to that to allow provocation to operate as a complete defence.[3]

It follows that weakness, in the realm of provocation at least, should not excuse. And yet, in South African law over the past quarter of a century the development of the defence of non-pathological incapacity based on provocation has allowed just that. This phenomenon is founded on the principle-based or psychological approach to liability, which holds, essentially, that 'unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him'.[4]

Despite the well-established nature of the defence of non-pathological incapacity, the law has been thrown into flux by the decision of the Supreme Court of Appeal in *S v Eadie*,[5] which, it is submitted, constitutes a serious erosion of the notion of criminal capacity, with a concomitant 'ripple effect on other topics within the general principles of criminal law'.[6] This chapter seeks to examine the issues arising out of the *Eadie* judgment as follows: first, by tracing the development of the defence of provocation in South African law,

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[1] John Milton *Samson agonistes* (1671), cited in D Shrager & E Frost (eds) *The quotable lawyer* (1986) 257.

[2] PF Louw 'Die algemene toerekeningsvatbaarheidsmaatstaf' 1987 *TSAR* 362 at 368.

[3] *S v Zengeya* 1978 2 SA 319 (RAD) at 321A.

[4] HLA Hart *Punishment and responsibility* (1968) 181.

[5] 2002 2 SACR 663 (SCA).

[6] CR Snyman 'The tension between legal theory and policy considerations in the general principles of criminal law' 2003 *Acta Juridica* 1 at 22.

within which inquiry the notion of '*toerekeningsvatbaarheid*' or criminal capacity will be briefly discussed; secondly, by examining the position leading up to the *Eadie* decision, the judgment itself, and the evaluation of the judgment by Professors Burchell and Snyman; and thirdly, a concluding summation.

Two further points which should be noted: even though I have indulged myself in a lengthy disquisition, what follows does not have any pretensions to comprehensiveness. Indeed, the primary excuse for my discursive excesses is the critical importance of the debate underlying the issue of the nature of the provocation defence. Shortly, what should our system of criminal law look like? The discussion which follows is merely a modest contribution to this debate, submitted for the counsel of wiser minds.[7] Further, it should be noted that whilst the discussion will focus on provocation, the point of departure is that the factors relating to emotional stress are often inextricably linked to provocation – that the two notions are, in Snyman's words, 'merely the flip sides of the same coin'[8] – and consequently the discussion proceeds on this basis.

DEVELOPMENT OF THE DEFENCE OF PROVOCATION (EMOTIONAL STRESS)

From an objective to a subjective approach

Anger[9] was regarded as a ground mitigating punishment in the Roman law,[10] with a distinction being drawn between crimes that were committed with premeditation (*proposito*) and those committed on the spur of the moment

[7]Indeed, the nature of legal scholarship is that one is almost always standing on the shoulders of those who have gone before. In this regard, I would like to acknowledge my debt to a number of people. First, Kallie Snyman's thoughtful and thorough writings on the criminal law have never failed to challenge and inspire me. Despite his retirement, there is no doubt that his legacy will continue for many years in South African criminal law. I am grateful for his encouragement and example. Ronald Louw's premature death has been a sad loss. In writing this piece, I was constantly aware of Ronald, and how profoundly and eloquently he would have dissented from some of my arguments below. His feisty discussion of criminal law theory and generosity of spirit are greatly missed. Jonathan Burchell's masterly grappling with, and lucid and elegant exposition of, criminal law concepts has been invaluable to me, and his warm collegiality is much appreciated. Finally, Solly Leeman's gracious and wise guidance and gentle prodding to write have been the primary formative forces in my career. In the midst of the many hours of labour and discussion that we have shared, something priceless has emerged – a joy in the journey, and a genuine love for criminal law theory. I am exceedingly grateful to Solly for this gift. I readily acknowledge these men and my debt to their intellectual prowess, along with the many unacknowledged writers and students who have helped to shape my thinking.

[8]Snyman n 6 above at 21; JM Burchell and JRL Milton *Principles of criminal law* (1994 revised reprint) 238; see also par [57] of *S v Eadie* n 5 above.

[9]Holmes JA in *S v Mokonto* 1971 2 SA 319 (A) at 324F–G stated: 'Provocation and anger are different concepts, just as cause and effect are. But, in criminal law, the term provocation seems to be used as including both concepts, throwing light on an accused's conduct.' In *S v Mandela* 1992 2 SACR 661 (A) at 665b–d the terms 'provokasie' (provocation) and 'toorn' (anger) appear to be used interchangeably.

[10]JC de Wet *De Wet & Swanepoel strafreg* (4ed 1985) 130. JG Bergenthuin *Provokasie as verweer in die Suid-Afrikaanse Strafreg* (1985) unpublished LLD thesis (University of Pretoria) 18 argues that D 50 17 48 indicates that there were instances in which provocation could be regarded as a defence excluding imputability. It seems that the sources (through the Republican, Classical and Post-Classical periods) are however not conclusive on this point – see discussion in Bergenthuin 11 22.

(*impetu*).[11] This approach appears to have been followed into the Middle Ages, with indications that on occasion anger could operate as a complete defence.[12] The Roman-Dutch writers also regarded anger as a factor mitigating punishment, rather than a ground excluding capacity, and then only where the anger was justified.[13]

This view of provocation was however subordinated to that of the English law in the practice of the courts. In *R v Pascoe*,[14] where the accused was charged with the murder of his wife and her suspected lover (upon finding them together in the bedroom), Lord de Villiers instructed the jury that whilst killing in circumstances where a couple were caught in adultery was not justified, this would be a case of culpable homicide, and not murder. A similar approach (similarly involving a killing upon discovery *in flagrante delicto*) was adopted in *R v Udiya*.[15] In *R v Tsoyani*, the accused were held to have exceeded the bounds of defence, but as a result of the provocation which they endured, it was held that the verdict should be one of common assault, rather than assault with

[11] The former were regarded as more serious than the latter – see D 48 19 11 2 and 16 2; D 48 11 7 3. Thus in D 48 5 39(38) 8 it is stated that a man who traps his wife in adultery and kills her *impetus tractus doloris* should not be punished with the usual punishment of the *lex Cornelia de sicariis*, but with a lighter punishment, as it is extremely difficult to control a reasonable passion. See further D 48 8 1 5; C 9 9 4 1; De Wet n 10 above at 131.

[12] De Wet n 10 above at 131. The Italian writer Julius Clarus was however of the view that provocation could only serve to mitigate punishment – see Bergenthuin n 10 above at 22 26.

[13] EM Burchell, JRL Milton and JM Burchell *South African criminal law and procedure* Vol I: General principles (2ed 1983) 306; De Wet n 10 above at 131. Matthaeus *De Criminibus* Prol 2 14 states that passions such as love and rage cannot be regarded as complete defences since each person has the necessary reason to control such passions. Since the actor consciously falls in love, and consciously becomes angry, he cannot later claim that he was acting unconsciously if he acts fired by passion. See also Moorman *Inl* 2 31; Van der Keessel *Praelectiones ad jus criminale* Vol III 998; Van der Linden 2 1 5 (cited in De Wet *ibid*); Barels *Crimineele advysen* LXVIII. It appears that the indigenous criminal law of several tribes also treats provocation as a mitigating factor, as opposed to a factor giving rise to exculpation – see JMT Labuschagne and JA van den Heever 'The effect of provocation and drunkenness on criminal and delictual liability in indigenous law' (1995) *Obiter* 51 at 55ff.

[14] 2 SC 427.

[15] 1890 NLR 222.

intent to do grievous bodily harm.[16] Thus the courts' adoption of the English 'specific intent' approach[17] is evident in relation to provocation.[18]

Nonetheless, it seems that the crucial factor for the courts not adopting the Roman-Dutch approach to provocation was not founded so much in doctrinal preference as the need to take account of a ruthless sentencing regime, in terms of which the death penalty was mandatory with no provision made for extenuating circumstances.[19] As De Wet points out, there was temptation for judges to ensure, in circumstances where the killing was less blameworthy, that the death penalty was not in question by handing down a verdict of culpable homicide rather than murder.[20] A convenient vehicle for such circumvention[21] proved to be s 141 of the Native Territories Penal Code (NTPC, aka the Transkeian Penal Code),[22] which was adopted by the Appellate Division, in *R v Butelezi*,[23] as 'correctly laying down our law upon this subject'.[24] Thus, at this stage, the test for the defence of provocation, allowing for the reduction of the crime of murder to culpable homicide, was objective in nature, in that the provocation had to be 'such as would deprive a "reasonable man" of his power

[16]1915 EDL 380 at 382.

[17]In terms of this theory, where an accused was charged with a crime requiring a 'specific intent', such as murder or assault with intent to do grievous bodily harm, such 'specific intent' could be negated by factors such as provocation or intoxication, resulting in a conviction for a less serious crime, for which a lesser form of *mens rea* was required, such as culpable homicide or common assault (see CR Snyman *Criminal Law* (4ed 2002) 224). For a brief synopsis of the operation of this approach prior to the case of *S v Chretien* 1981 2 SA 1097 (A), see JM Burchell 'Intoxication and the criminal law' 1981 *SALJ* 177ff. Whilst this formulaic approach is perhaps pragmatic and even practical, its antipathy to an approach founded on principle is clear. As JC de Wet & HL Swanepoel *Strafreg* (1949) 85 noted, in respect of the *Tsoyani* case (n 16 above): 'As die provokasie dan so erg was dat die mense nie tyd gehad het om 'n bedoeling te vorm om ernstige liggaamlike leed toe te voeg nie, dan wonder mens waar hulle die tyd kon gevind het om die bedoeling te vorm om gewone aanranding ... te pleeg, of vat dit langer om die een soort bedoeling te vorm as die ander?'

[18]See, for example, *R v Potgieter* 1920 EDL 254, where Gane AJ states (at 256): 'One of the circumstances under which a charge of murder may be reduced to culpable homicide is where there has been great provocation, resulting in a justifiable heat of mind which prevents the accused from forming an actual intention which he would have been able to form had these circumstances of provocation not existed.'

[19]In terms of the Criminal Procedure and Evidence Act of 1917. See De Wet n 10 above at 134; Burchell, Milton and Burchell n 13 above at 306.

[20]De Wet n 10 above at 134.

[21]For an example of an application of the reduction/specific intent theory, see *R v Bulani* 1938 EDL 205.

[22]The provision, laid down in Act 24 of 1886 (C), states the following: 'Homicide which would otherwise be murder may be reduced to culpable homicide, if the person who causes death does so in the heat of passion occasioned by sudden provocation. Any wrongful act or insult of such a nature as to be sufficient to deprive any ordinary person of the power of self control may be provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool. Whether any particular wrongful act or insult, whatever may be its nature, amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received shall be questions of fact.'

[23]1925 AD 160.

[24]At 163 (per Solomon JA), and at 170 (per Kotzé JA). Kotzé JA notes (at 169) that in applying the doctrine of reduction, following the specific intent rule, '[o]ur own law and that of England are in agreement ...'.

of self control'.[25] This was consistent with the objective nature of the erstwhile test for intention, flowing from the presumption that a person was presumed to intend the natural and probable consequences of his actions.[26] This approach to the defence of provocation,even after the law changed to allow courts to hand down a lesser sentence than the death penalty in cases of murder where extenuating circumstances were present.[27]

Despite occasional instances where the court applied a subjective test for provocation[28] – holding that the accused was guilty of culpable homicide rather than murder on the basis that the provocation excluded intent, or because he was considered less blameworthy – the objective test held sway,[29] at least until *R v Thibani*.[30] Schreiner JA, following the developments in the English case of *R v Woolmington*[31] and the South African decision of *R v Ndhlovu*,[32] held that provocation had assumed its proper place

> ... as a special kind of material from which, in association with the rest of the evidence, the decision must be reached whether or not the Crown has proved the intent, as well as the act, beyond reasonable doubt.[33]

The subjective nature of the enquiry into provocation envisaged by this dictum is evident in the light of the focus on the accused's state of mind.[34] However the fact that the development towards a completely subjective test for provocation

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[25] *R v Mbombela* 1933 AD 269 at 273. In *Mancini v Director of Public Prosecutions* 1942 AC 1 at 8 (cited in *R v Sofianos* 1945 AD 809 at 812) it was stated that murder by secret poisoning could not give rise to a reduction of the crime charged due to provocation.

[26] See discussion of this presumption in Burchell, Milton and Burchell n 13 above at 189ff. For an application of this presumption, see, *eg*, *R v Westrich* 1927 CPD 466 at 467: 'If a man uses a revolver, except in certain circumstances, such as self-defence, then he is guilty of the reasonable and probable consequences of his act.'

[27] In terms of the General Law Amendment Act 46 of 1935. See De Wet n 10 above at 134.

[28] For example, the cases of *R v George* 1938 CPD 486 and *R v Cebekulu* 1945 (2) PH H176 (A). See also the minority judgment of Stratford JA in *R v Ngobese* 1936 AD 296 at 306, and the Rhodesian case of *R v Mahoko* 1949 (2) PH H110 (R). These cases are discussed by SA Strauss 'Opmerkings oor toorn as faktor by die vasstelling van strafregtelike aanspreeklikheid' 1959 *THRHR* 14 at 21.

[29] *R v Attwood* 1946 AD 331; *R v Blokland* 1946 AD 940; *R v Tshabalala* 1946 AD 1061; *R v Zwane* 1946 NPD 396. See the summary of the legal position at this stage in CWH Lansdown and AV Lansdown *South African criminal law and procedure* (5ed 1946) Vol I 78.

[30] 1949 4 SA 720 (A). It was held (at 731) that it was not required that the victim's act be unlawful, as required by s 141 of the NTPC. Writing in 1950, W Pittman (*Criminal law in South Africa* (3ed 1950) 123) states that provocation affords a defence to a murder charge, by negativing the existence of the intent to kill. The writer is of the view that the rules of the common law are in accord with s 141 (at 125).

[31] 1935 AC 462.

[32] 1945 AD 369, in which it was authoritatively stated at 386 that the onus of proof in criminal cases rests on the State.

[33] Note 30 above at 731. EM Burchell and PMA Hunt *South African criminal law and procedure. Volume I: general principles* (1970) 240n10 submit that the new approach adopted in *Thibani* relates not so much to the onus, as to the concomitant switch to the subjective test of intention in South African law.

[34] Burchell and Hunt n 33 above at 242 point out that the approach in *Thibani*, in terms of which the focus is on the accused's mental state, can give rise to a complete acquittal due to lack of intent, in that the provocation could possibly negate the formation of any unlawful intent.

still had some way to go was evident from the entirely objective approach adopted by the Appellate Division in *R v Kennedy*.[35] In *R v Molako* somewhat tentative support was evinced for a subjective assessment of the effect of provocation on the accused, although the court was careful to stress that there should be no weakening of the principle that a sane person is responsible for the ordinary consequences of his acts.[36]

The next twist in the saga of the provocation defence came in the Federal Supreme Court case of *R v Tenganyika*,[37] where the court (per Tredgold CJ) attempted to provide a solution that would cater for both principle[38] and policy[39] by setting out a two-stage test.[40] First it should be enquired whether, despite the provocation (and in the context of other evidence), the accused, subjectively assessed, had 'intent to kill'. If this was not present, the accused would be acquitted of murder, and found guilty of culpable homicide. If it was held that the accused indeed had the necessary intent to kill, the second stage of the enquiry would be, on an objective assessment, whether the reasonable person would have lost his self-control in the circumstances. If so, then the court would reduce the crime to culpable homicide, despite the accused's intent to kill. Whilst the *Tenganyika* approach has received some academic support from South African writers,[41] it seems clear that this objective approach, unlike that in *Thibani*, provides for, at least, a conviction of culpable homicide.[42]

Schreiner JA had an opportunity to address this matter in *R v Krull*,[43] and while dismissing the *Tenganyika* approach for an unjustified mixture of subjective and

[35] 1951 4 SA 431 (A) at 438H, where the court explicitly followed the *Attwood* (n 29 above) line. See also 439H, where the use of the objective test is made plain. Curiously, Schreiner JA concurred in the judgment, delivered by Greenberg JA, who in turn had delivered the judgment of the Appellate Division in the *Cebekulu* (n 28 above) case, which favoured a subjective approach. It appears that inconsistency amongst judges in respect of the elements of *mens rea* is not a new problem. Notably, CWH Lansdown, WG Hoal and AV Lansdown *South African criminal law and procedure* (6ed 1957) Vol I 102 in 1957 continued to maintain that the objective approach, founded on the application of s 141, represented the South African legal position.

[36] 1954 3 SA 777 (O) at 781B-G. The court was particularly concerned with the evidentiary difficulties which would arise out of a consideration of all the subjective factors relating to the accused.

[37] 1958 3 SA 7 (FSC). Tredgold CJ noted at 11F G that he regarded the 'assumption' accepted in *Thibani* (n 30 above) that provocation is a special kind of material from which, along with other evidence, proof of the presence or absence of intent is to be found, to be incorrect. This case was followed in *R v Bureke* 1960 2 SA 49 (FSC); *S v Howard* 1972 3 SA 227 (R); *S v Nangani* 1982 3 SA 800 (ZS).

[38] *Ie* a subjective approach to *mens rea*.

[39] *Ie* to ensure that a provoked accused not simply be acquitted.

[40] Note 37 above at 11G H; 13A E.

[41] EM Burchell 'Provocation: subjective or objective?' 1958 *SALJ* 246; JvZ Steyn 'The basis of provocation re-examined' 1958 *SALJ* 383. See also DA Dawes 'The nature of provocation in Southern African law' 1965 *Rhodesian Law Journal* 109, who writes in the context of Rhodesian law.

[42] DP van der Merwe *Die leerstuk van verminderde strafbaarheid* (1980) unpublished LLD thesis (Unisa) 245.

[43] 1959 3 SA 392 (A).

objective elements in both enquiries,[44] he set out the duty of the trial court in such cases:

> ... to examine all the evidence which throws light on the mental state of the accused at the time of the killing in order to see whether, having regard to the effect of provocation and intoxication on his powers of understanding and self-control, but excluding mental abnormalities short of insanity and excluding normal personal idiosyncracies [sic], he had the intention to kill.[45]

If it was Schreiner JA's intention to set out a test without a conflation of subjective and objective elements, this was unfortunately not the result. As Burchell points out, in respect of 'mental abnormalities short of insanity' and 'personal idiosyncrasies' it appears as if conduct is assessed according to an objective standard.[46] This approach smacks of inconsistency, and cannot be reconciled with the approach in *Thibani*.[47] The difficulty with this approach is evident from the valiant, but ultimately failed attempt of Jansen J in *S v Lubbe*[48] to corral all the aspects of this dictum into the confines of the subjective test. In order to accomplish this, Jansen J held that where Schreiner JA had used the phrase 'excluding normal personal idiosyncrasies' this did not entail use of an objective test, but simply meant that such factors should not be taken into account in the enquiry into subjective intent.[49] However, by excluding evidence of personal idiosyncrasies the subjectivity of the test for provocation is inevitably compromised – either such factors on the part of the accused must be taken into account, or the test will include an objective aspect.[50]

Nevertheless, it is clear that despite the difficulties in the formulation of the subjective test in *Krull*, the progression to a completely subjective criterion was gathering pace. Williamson JA, in *S v Mangondo*,[51] noted that an objective test had been applied to provocation in the cases of *Kennedy*, *Attwood*, and *Butelezi*, as opposed to the subjective test which now applied for intention, and suggested that it was now necessary to review the law relating to provocation.[52] Subsequent judgments followed the subjective trend, providing that where the provocation negated the accused's intent, he or she could be acquitted of a crime requiring intention.[53] Perhaps particularly notable in this regard were the

[44] At 399F H.
[45] At 400A.
[46] EM Burchell 'Provocation and intoxication' 1959 *SALJ* 385 at 386.
[47] Burchell and Hunt n 33 above at 246; see Strauss n 28 above at 20 who points out that a test which is at the same time both objective and subjective for the determination of one and the same intention is 'onbestaanbaar'.
[48] 1963 4 SA 459 (W). See discussion of this case in HTJ Naudé 'Case discussion: *S v Mangondo* 1963 4 SA 160 (A); *S v Lubbe* 1963 4 SA 459 (W)' 1964 *THRHR* 68; EM Burchell 'Provocation: subjective or objective' 1964 *SALJ* 27.
[49] Note 48 above at 464H–465C.
[50] Burchell n 48 above at 29; Naudé n 48 above at 70.
[51] 1963 4 SA 160 (A).
[52] At 162E–F.
[53] See, *inter alia*, *S v Arnold* 1965 2 SA 215 (C); *S v Gerber* 1966 (1) PH H53 (T); *S v Dlodlo* 1966 2 SA 401 (A); *S v Lushozi* 1968 (1) PH H21 (T); *S v Delport* 1968 (1) PH H172 (A). For examples of the application of the objective test for provocation in other Southern African

Appellate Division cases of *S v Dlodlo*,[54] where the court's unequivocally subjective approach was hailed by Dugard as 'a rejection of the last remaining traces of objectivism in provocation',[55] and *S v Delport*,[56] where it was held that where the presence of intent was in issue,

> ... it is self-evident that the trier of a fact is required to have regard to all the evidential material which, in the light of our available knowledge of how the human faculty of volition functions, is relevant to the determination of the state of mind of the accused concerned.

The death knell for the objective approach to provocation in relation to intent finally sounded in the Appellate Division case of *S v Mokonto*.[57] Holmes JA, having rejected the accused's defence that his conduct fell within the ambit of self-defence,[58] proceeded to examine the alternative defence based on provocation. In this regard, the court held that s 141 of the Transkeian Penal Code[59] reflected an objective approach to provocation which was inconsistent with the 'subjective approach of modern judicial thinking',[60] which eschewed doctrines such as the presumption that a person intends the reasonable and probable consequences of his act,[61] and the *versari in re illicita* doctrine.[62] In conclusion, it was held that s 141 of the Transkeian Penal Code should be confined to the territory for which it was passed, and that provocation was

countries, see *R v Shongwe* 1969 (2) PH H224 (HC Swaziland); *S v Stans* 1969 (2) PH H225 (HC Botswana).

[54]Note 53 above.

[55]CJR Dugard 'Provocation: no more rides on the Sea Point bus' 1966 *SALJ* 261 at 263.

[56]Note n 53 above.

[57]Note 9 above. The context of the killing upon which the murder charge was founded was the provocative statement of the victim, apparently a practitioner of witchcraft, whom the accused blamed for causing the death of his two brothers through the dark arts, that the accused would not 'see the setting of the sun today' (at 321D). The accused's response was to almost behead her with a cane knife. The issue of belief in witchcraft, and the response of the criminal law to provocation arising in this context, is discussed, in the light of the dictum in *Mokonto* at 324C-D (cited in the following footnote), in JCW van Rooyen 'Toorkuns-noodweer-toorn' (1971) *Scintilla Iuris* 50; NJ van der Merwe 'Vonnisse: *S v Mokonto* 1971 2 SA 319 (A)' 1972 *THRHR* 193; JJ Brinkhof 'Enige opmerkingen over pluralisme' 1972 *THRHR* 367; B van Niekerk 'A witch's brew from Natal – some thoughts on provocation' 1972 *SALJ* 169; G Feltoe 'Witch murder and the law' (1975) *Rhodesian Law Journal* 40; A van Blerk 'Sorcery and crime' (1978) *CILSA* 330; TW Bennett & WM Scholtz 'Witchcraft: a problem of fault and causation' (1979) *CILSA* 288; and MS Motshekga 'The ideology behind witchcraft and the principle of fault in criminal law' (1984) *Codicillus* 4.

[58]At 324C–D: '...[T]he apprehended danger being that of supernatural death...the common law of South Africa in regard to murder and self-defence reflects the thinking of Western civilisation. Hence, in considering the unlawfulness of the appellant's conduct, his benighted belief in the blight of witchcraft cannot be regarded as reasonable. To hold otherwise would be to plunge the law backward into the Dark Ages.' The court did however allow for the possibility that a subjective belief in witchcraft could be regarded as an extenuating circumstance.

[59]Act 24 of 1886 (C).

[60]Note 9 above at 325D. Significantly, Holmes JA specifically rejected (at 326D–F) the *obiter* comments of Schreiner JA in *R v Krull* n 43 above at 396 *in fin* – 397A; 400A to the effect that idiosyncrasies such as hot-headedness must be objectively assessed.

[61]At 325F–G. See also *S v P* 1972 3 SA 412 (A) at 416F–H (per Holmes JA); *S v V* 1979 2 SA 656 (A) at 665A–C.

[62]At 325G–H.

relevant to the subjective enquiry into intention.[63] Finally, the court pointed out that, *in casu*, far from negating intention to kill, provocation contributed to such intention.[64]

Toerekeningsvatbaarheid

Up to this point, the courts examined the matter of provocation (along with other possible grounds for a defence, such as intoxication) from the perspective of the possible exclusion of the element of intention. However, increasingly, the notion of '*toerekeningsvatbaarheid*' or criminal capacity was coming to the fore. Unknown in the sources of the South African common law, the notion was adopted from the Continental legal systems, more particularly the German law, but was largely confined to academic writings.[65] The notion received wider exposure in 1967 when it was subjected to thorough investigation in the so-called Rumpff Commission Report (or to give the report its full title: the *Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters*),[66] the recommendations of which gave rise to the provisions of s 78(1) of the Criminal Procedure Act,[67] which sets out the defence of mental illness. Moreover, in the same year, the Appellate Division (per Rumpff JA) held in *S v Mahlinza*[68] that the criminal capacity of the actor is an essential requirement in order to establish criminal liability.[69] It is now generally accepted that criminal capacity consists of two components: cognitive capacity and conative capacity. Cognitive capacity refers to the actor's intellectual abilities, such as the ability to perceive, to reason and to understand, and consists of the ability to distinguish between right and wrong.[70] A person who lacks cognitive capacity has inadequate insight into his or her behaviour,

[63] At 326G–H. It is notable that the court explicated the law relating to provocation in the context of the specific intent doctrine, which was still very much applicable at this stage. This approach is trenchantly – and correctly – criticised by JMT Labuschagne 'Vonnisbesprekings: *R v Camplin* [1978] 1 All ER 1236 (CA)' 1979 *De Jure* 379 at 381.

[64] At 327B–C. See also *S v Grove-Mitchell* 1975 3 SA 417 (A) at 423A. Both Van Rooyen n 57 above at 51 and Van der Merwe n 57 above at 196 question the failure of the court in *Mokonto* to interrogate more thoroughly the question of knowledge of unlawfulness on the part of the accused. These concerns foreshadow the groundbreaking case of *S v De Blom* 1977 3 SA 513 (A), where it was held that mistake of law could indeed negate fault. It was however confirmed (at 326H) that provocation could operate as a mitigating factor. In this regard, see also *S v Masondo* 1968 (2) PH H191 (N).

[65] C R Snyman 'Die verweer van nie-patologiese ontoerekeningsvatbaarheid in die strafreg' (1989) *TRW* 1. JC de Wet inevitably made a major contribution to the acceptance of 'toerekenings-vatbaarheid' into the academic mainstream through the systematisation of criminal law concepts in *De Wet & Swanepoel Strafreg* (see in particular: (1ed 1949); (2ed 1960)). DP van der Merwe 'Toerekeningsvatbaarheid v "specific intent" – die *Chretien*-beslissings' (1981) *Obiter* 142 at 145 notes that the 'specific intent' doctrine had to be developed by the courts as a result of the element of criminal capacity not being properly recognised.

[66] RP 69/1967. See Snyman n 65 above at 2, n 6 above at 18.

[67] Act 51 of 1977.

[68] 1967 2 SA 408 (A).

[69] At 414G–H. See also SA Strauss 'Geestesongesteldheid en die strafreg: Die voorgestelde nuwe reëling in die Strafproseswetsontwerp' 1974 *THRHR* 219 at 234.

[70] Rumpff Commission Report n 66 above at par 9.9. Insight or understanding presupposes intelligence (par 9.31.).

and consequently acts in an irresponsible manner.[71] Conative capacity refers to the actor's ability to control his or her behaviour, to set an aim and decide whether to pursue or reject it.[72] In particular the concept of self-control (or powers of resistance) was defined in the *Rumpff Commission Report* as

> ... a disposition of the perpetrator through which his insight into the unlawful nature of a particular act can restrain him from, and thus set up a counter-motive to, its execution. Self-control is simply the force which insight into the unlawfulness of the proposed act can exercise in that it constitutes a counter-motive. In normal non-criminal persons the idea of committing an unlawful act arouses aversion. Only where very strong motives are present to promote the execution of such an act, is a crime actually committed. But where insight into the unlawfulness of the act, even though present, arouses no aversion at all, so that such insight cannot operate as a counter-motive, there is no self-control.[73]

If either of the two capacities are lacking, the accused will not be found to have possessed criminal capacity at the time of acting, and consequently should not be held criminally liable for any unlawful act carried out in this condition.[74] It should, however, be noted that the law presumes that an accused is of sound mental health and is criminally responsible.[75] Whilst the test developed in the *Rumpff Commission Report*, which was subsequently included in s 78(1), relates to mental illness, there does not appear to be any reason for objection for extending this test to non-pathological incapacity (arising from intoxication and provocation, for example).[76] Indeed, it seems as if the courts have appropriated the s 78(1) test in evaluating non-pathological incapacity.[77]

Apart from cognitive and conative factors, a third type of mental function was identified by the Rumpff Commission, those of affective functions. Affective functions relate to a person's feelings or emotions.[78] The Commission clearly indicated that affective emotional disturbances as such ought not to exclude criminal responsibility,[79] in particular where the accused evidences 'insight and

[71] *Ibid* par 9.13.
[72] *Ibid* par 9.9. This notion entered South African law, in the context of mental illness, as early as 1899 in *R v Hay* 16 SC 290 at 301, where it was stated that courts of law 'are bound to recognise the existence of a form of mental disease which prevents the sufferer from controlling his conduct, and choosing between right and wrong, although he may have the mental capacity to distinguish between right and wrong...'. This dictum was further applied in *R v Westrich* n 26 above at 469; *S v Saaiman* 19674 SA 440 (A) at 441D–E; and *S v Makete* 1971 4 SA 214 (T) at 215D–E. See also *S v Hartyani* 1980 3 SA 613 (T) at 618H–619B.
[73] At par 9.33. This leg of the test has been described as 'weerstandskrag' in *S v Lesch* 1983 2 SA 814 (O) at 823H.
[74] Snyman n 65 above at 2.
[75] *S v Shivute* 1991 2 SACR 656 (Nm) at 660e.
[76] Snyman n 6 above at 20 notes that in Germany, Switzerland and Austria affective disturbances such as emotional breakdown, anger, fear or panic can exclude culpability. See also Van der Merwe n 65 above at 146.
[77] See, *eg*, *S v Smith* 1990 2 SACR 130 (A) at 134j–135a.
[78] Rumpff Commission Report n 66 above at par 9.9.
[79] At par 9.19.

volitional control' in his conduct.[80] However, where intense emotional disturbance serves to negate the accused's cognitive or conative capacity, then it can function to exclude criminal liability.[81]

It is crucially important to distinguish between the requirement of voluntary conduct and criminal capacity, and between criminal capacity and fault. First, as regards the distinction between voluntary conduct and criminal capacity, some debate has arisen as to which element of liability the court should test for first.[82] In distinguishing carefully between the elements, Jansen J in *R v Mkize*[83] held that in the absence of a voluntary act, 'there is no need to investigate the presence or absence of *mens rea* because it is necessarily excluded; nor is it necessary to investigate whether the person has criminal capacity'.[84] However, in *S v Mahlinza*[85] Rumpff JA (as he then was) found that the inquiry into capacity was of primary and decisive importance (*primêre en deurslaggewende belang*), and that where such an inquiry indicated a lack of capacity, there was no need to enquire further into fault or voluntariness of the accused's conduct.[86] As Van der Merwe cogently observes, this approach is difficult to reconcile with the precedence which he gave the 'act'-element in *S v Chretien*,[87] and that the *Mkize/Chretien* approach ought to be followed, in that the test for a voluntary act ought to precede any other inquiry, in order to avoid an overlap between the 'act' and 'capacity' elements.[88]

Second, there are similarly divergent views in respect of the distinction between criminal capacity and fault. Van der Merwe summarises the three positions as follows: (i) that the concepts are so independent that capacity remains a

[80] *Ibid*. See also par 9.25-9.26. Thus where cognitive and conative capacity are present, liability will not be excluded on the basis of intense emotion. P de Vos argues that the court in *S v Moses* 1996 2 SACR 701 (C) erred by effectively acquitting the accused on grounds of lack of affective control ('*S v Moses* 1996 2 SACR 701 (C) Criminal capacity, provocation and HIV' (1996) *SACJ* 354 at 357–8). However, this notion is not dealt with in Hlophe J's judgment, and the court clearly based its decisions on the accused's 'controls collapsing at the time of the killing' (714g), *ie* lack of conative capacity.

[81] *S v Van der Merwe* 1989 2 PH H51 (A); Louw n 2 above at 366, who concludes that '[d]ie affektiewe vermoë het dus *indirek* juridies relevant geword' (writer's emphasis).

[82] JM Burchell *Principles of criminal law* (3ed 2005) 183 states that in assessing voluntariness a two-stage inquiry applies: the first question is whether the accused is capable of controlling his or her conscious will (*Ie* an inquiry into criminal capacity), and once this question is answered in the affirmative, the second question is whether the conduct was in fact controlled by his or her conscious will. Snyman, in contrast, emphasises that the inquiry into criminal liability must follow a particular sequence, and that the question of capacity (which Snyman groups under 'culpability') only arises once the act (and, in terms of Snyman's scheme, compliance with the definitional elements, and unlawfulness) has been established (n 17 above at 32–38). De Wet n 10 above at 53 shares Snyman's approach.

[83] 1959 2 SA 260 (N).

[84] At 265E–F.

[85] Note 68 above.

[86] At 414H–415A.

[87] Van der Merwe n 65 above at 147.

[88] Ibid. AJ Middleton 'n Belangwekkende nuwe beslissing mbt dronkenskap in die strafreg: *Chretien* 1981 2 SA 1097 (A)' (1981) *SACC* 83 praises the approach adopted in *Chretien* for establishing a pure juridical and logical approach in respect of the concepts of the act and culpability, in that where there is no voluntary act, the enquiry into state of mind does not arise.

requirement in the case of no-fault liability; (ii) that the concepts are theoretically distinguishable, but are both constituent parts of the culpability element; and (iii) that the two concepts are practically indistinguishable in that the question whether the accused was capable of forming a particular intent is essentially the same inquiry as that into the presence of capacity.[89] Van der Merwe notes, approvingly, that the 'psychological' approach was applied in *Chretien* (*ie* approach (i)), thus regarding capacity and fault as separate elements.[90]

It is important in explicating the notion of criminal capacity (*toerekeningsvatbaarheid*) to clearly distinguish it from fault. In respect of criminal capacity, the inquiry is whether the accused is capable of 'something', and whether that 'something' actually existed is only ascertained in the inquiry into fault.[91]

Lastly, the significance of the *Rumpff Commission Report* on the development of the defence of non-pathological incapacity is readily apparent from the case law: from forming a crucial constituent of the well-reasoned judgment in *Lesch*,[92] to being cited in the judgment of Viljoen JA in *Campher*,[93] the first Appellate Division judgment to specifically endorse the defence. Viljoen JA's judgment was in turn cited in *Laubscher*,[94] which set out the test for non-pathological incapacity.[95]

The genesis of the defence of non-pathological incapacity based on provocation/emotional stress – the 1980s

Although the basis of the defence raised was intoxication, the case of *S v Chretien*[96] was fundamental to the genesis of the defence of non-pathological incapacity as a result of provocation or emotional stress.[97] Given that the *Rumpff Commission Report* provided the theoretical underpinnings for the incipient

[89] *Ibid* 148. Van der Merwe labels these approaches as 'psychological', 'mixed' and 'normative' respectively.

[90] *Ibid*. Capacity and intent are therefore not congruent notions in the criminal law – see Strauss n 69 above at 234; *S v Swanepoel* 1983 2 SA 434 (A) at 454F–G; *S v Adams* 1986 4 SA 882 (A) at 899C–D.

[91] CHJ Badenhorst 'Vrywillige dronkenskap as verweer teen aanspreeklikheid in die strafreg – 'n suiwer regswetenskaplike benadering' 1981 *SALJ* 148 at 151, who criticises the *Chretien* decision for some unclear phrasing in this regard.

[92] Note 73 above at 823F–824B.

[93] *S v Campher* 1987 2 SA 940 (A) at 951F–G, see also 954C–F for further reliance on the *Rumpff Commission Report*. Viljoen JA in turn cited the *Lesch* judgment (n 73 above) at 956E–957A.

[94] *S v Laubscher* 1988 2 SA 163 (A) at 167A–B, 167E.

[95] 166G–167A.

[96] Note 17 above. This case is discussed, with approval by Badenhorst n 91 above; and in '*S v Chretien* 1981 1 SA 1097 (A) – Vrywillige dronkenskap en strafregtelike aanspreeklikheid' (1981) *TSAR* 185.

[97] For discussion of an unreported case decided in 1981 – that of *S v Mundell* (C) – in which the court dealt with the defence of 'rage reaction' on the basis of negation of intent to kill, see JR du Plessis 'Rage reaction: a variation on the theme of provocation' (1983) *Speculum Juris* 74. In the Zimbabwean case of *S v Turk* 1979 4 SA 621 (ZR) at 623C–D it is clear that the court examined provocation as a defence which could negate intention, but did not address its possible impact on criminal capacity. Similarly, the treatment of the defence of provocation in Burchell, Milton and Burchell n 13 above at 306*ff* is solely focused on the question whether intention was negated.

defence of non-pathological incapacity, it was fitting that Rumpff CJ delivered the unanimous judgment of the Appellate Division in *Chretien*. It is particularly noteworthy that the court dealt sharply and decisively with two aspects: the Appellate Division decision in *S v Johnson*,[98] and the 'specific intent' rule. With regard to the former matter, the court regarded its decision in the *Johnson* case as *juridies onsuiwer*[99] for its policy-driven conviction of the accused, despite the court *a quo* in *Johnson* finding that the accused was acting mechanically at the time of the infliction of the fatal harm. In respect of the latter, the court rejected the notion of specific intent as contrary to South African law.[100] The court proceeded to apply a principled approach to the problem of voluntary intoxication, holding that intoxication could exclude liability by negating various elements of liability: the requirement that the act was voluntary;[101] the requirement that the accused had criminal capacity (*toerekeningsvatbaarheid*) at the time of acting;[102] and the requirement of fault in the form of intention (for crimes requiring intent).[103]

The court's wholesale acceptance of the principled approach to liability, such that an accused should not be subjected to punishment simply because he voluntarily got himself into a state where he could not act subject to the control of his will or did not have criminal capacity, was controversial. Not everyone agreed that the legal convictions of the community would tolerate this situation. Nevertheless, Rumpff CJ was very careful to qualify his judgment in two significant respects. Firstly, this approach necessarily excludes the person who makes use of alcohol in order to commit a crime.[104] Secondly, if in applying this approach courts were to accept too readily that an intoxicated person was not aware of what he was doing and was thus lacking criminal capacity, this would bring *regspraak* into *diskrediet*. In this regard, Rumpff CJ pointed out that any potential problem in adopting the principled approach lies not so much in the legal principle as such, but in the manner of its application.[105] Rumpff CJ proceeded to draw a distinction between diminished responsibility and lack of capacity, citing the statement of Hall[106] describing the state of intoxication

[98] 1969 2 SA 201 (A).

[99] 'Juridically impure' – n 17 above at 1103D.

[100] At 1104A: 'By 'n behoorlike toepassing van ons reg is daar geen plek vir die besondere benadering nie.'

[101] At 1104E–F, 1106E–F.

[102] At 1104H, 1106F–G.

[103] This was the effect of the judgment, in answering in the affirmative the question of law raised by the State : whether on the facts found proven by the court *a quo*, it was correctly held that the accused on a charge of attempted murder could not be convicted of common assault where the necessary intention for the offence charged had been influenced by the voluntary consumption of alcohol?

[104] At 1105G–H. This situation would be covered by the *actio libera in causa* rule, in terms of which the accused who uses his intoxicated body as an instrument to commit a crime incurs criminal liability – see Snyman n 17 above at 222–3; Burchell n 82 above at 182–3.

[105] At 1105H.

[106] J Hall *General principles of criminal law* (2ed 1960) 553–554 (at 1106A–B, where it is wrongly cited as 534), in turn cited in JC de Wet *De Wet & Swanepoel strafreg* (3ed 1975) 119n120.

characterised by 'a severe blunting of the capacity to understand the moral quality of the act atissue, combined with a drastic lapse of inhibition'. The position in South African law requires greater circumscription, according to Rumpff CJ:

> Eers ... wanneer 'n persoon, wat 'n gevolghandeling pleeg, so besope is dat hy nie besef nie dat wat hy doen ongeoorloof is, of dat sy inhibisies wesenlik verkrummel het, kan hy as ontoerekeningsvatbaar beskou word.[107]

Only in highly exceptional cases will it be found that the effect of the intoxication was such as to exclude the accused's capacity to know that what he is doing is unlawful, or such as to result in a fundamental disintegration of the accused's inhibitions, and consequently that the accused lacked capacity.[108] Amnesia on the part of the accused will not amount to a finding of incapacity without other credible evidence to this effect.[109]

Following the decision in *Chretien*, where the Appellate Division endorsed a radical shift from the predominance of policy concerns to those of principle in respect of intoxication, the question was whether the same approach would be adopted in relation to an area where there had always been a similar tension, that of provocation or emotional stress.[110] The development of the law in this regard did not take long. In the year after the *Chretien* decision was handed down, the Appellate Division, in dealing with the defence of necessity, stated that an accused could be rendered so fearful as a result of threats that he could lack criminal capacity;[111] a statement which clearly allows for a plea of provocation or emotional stress to exclude liability. However, before the implications of this *obiter* statement of the court could be teased out, the Appellate Division expressed itself in unequivocal terms on the point in *S v Van Vuuren*.[112] Faced with a defence of lack of *mens rea* based on provocation and intoxication, reliant on the principles set out in *Chretien*, the court (per Diemont AJA) stated:

> I am prepared to accept that an accused person should not be held criminally responsible for an unlawful act where his failure to comprehend what he is doing is attributable not to drink alone, but to a combination of drink and other facts such as provocation and severe mental or emotional stress. In principle there is no reason for limiting the enquiry to the case of the man too drunk to know what he is doing. Other factors which may contribute towards the conclusion that he failed to realise what was happening or to appreciate the

[107] At 1106B–C.
[108] See 1106C–E. The court reiterates the point that only on the basis of evidence which justifies the conclusion can there be a finding of non-pathological incapacity (at 1106F–G).
[109] At 1108C–D.
[110] Burchell n 17 above at 191 notes the possibility of provocation being treated in the same way as intoxication.
[111] *S v Bailey* 1982 3 SA 772 (A) at 796C–D: 'Dit is denkbaar dat hy so vreesbevange kan word dat hy nie behoorlik die gevolge van sy handelinge kan insien nie ofkan insien dat wat hy doen wederregtelik is nie; in 'n uiterse geval kan hy selfs ontoerekeningsvatbaar word.'
[112] 1983 2 SA 12 (A). In Zimbabwe the approach adopted in *Tenganyika* (n 37 above) still held sway – see *S v Nangani* n 37 above at 807H.

> unlawfulness of his act must obviously be taken into account in assessing his criminal liability.[113]

Once again, the court qualified its bold statement with a caveat that the critical question in each case is whether the conclusion is fully supported by the evidence.[114]

In the next case in which a defence of non-pathological incapacity based on provocation was raised, *S v Lesch*,[115] the court (per Hattingh AJ) carefully weighed up the proven facts, along with psychiatric evidence led on behalf of the accused, before confirming that none of the elements of liability had been excluded by the provocation, thus upholding the murder conviction. It is evident that the court adopted the same systematic approach as that in *Chretien*, establishing in turn the existence of the elements of voluntary conduct, criminal capacity and intention.[116] Ultimately the court held that the provocation experienced by the accused, far from eliminating intent to kill, contributed to the forming of this intent.[117] It is noteworthy that Hattingh AJ explicitly adopted the terminology of the *Rumpff Commission Report* in explicating the notion of criminal capacity (*toerekeningsvatbaarheid*) and its components, cognitive capacity and conative capacity.[118]

Given this development, it was perhaps inevitable that the defence of provocation or emotional stress would be successful at some point, and this occurred in the case of *S v Arnold*,[119] where the accused was charged with the murder of his wife. Psychiatric testimony was led on behalf of the accused to the effect that at the time of the shooting the accused's mind was so flooded with emotions that he may have acted subconsciously or may have lost the capacity to exercise control over his actions.[120] Thus both the voluntariness of the accused's conduct and his capacity were placed at issue. In the absence of any psychiatric evidence led on behalf of the State, the court (per Burger J), accepted the accused's version of events[121] and found him not guilty. In coming to this conclusion, the court cited the cases of *Chretien*, *Van Vuuren* and *Bailey*, concluding on the basis of the statements made in the latter two cases[122] that the defence of incapacity extends beyond factors such as youth, mental disorder and intoxication to 'extreme emotional distress'. A puzzling feature of this judgment is that

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[113] At 17G–H. Whilst, it is submitted, the meaning of this statement is clear, the descriptions of criminal capacity in the judgment (see, *eg* 18A, 22F–G) are somewhat less than precise.
[114] At 17H. *In casu* it was held that the accused's plea of lack of *mens rea* was not supported by the proven facts (see 22E–H), and consequently his conviction of murder and attempted murder was confirmed.
[115] Note 73 above.
[116] See 825F–826A.
[117] At 826A.
[118] At 823G–824B, where paras 9.30, 9.32 and 9.33 are referred to.
[119] 1985 3 SA 256 (C).
[120] At 263C–E.
[121] See 262B–I.
[122] The court at 263J–264C cited the *dicta* from the cases of *Bailey* n 111 above and *Van Vuuren* n 112 above which are quoted in the text above.

having found as a reasonable possibility that the accused was acting in a state of sane automatism at the time of the shooting,[123] the court then proceeded to hold that it was reasonably possible that the accused was lacking capacity at the time of the death of his wife.[124] Whilst the court was aware of the need to be cautious of accepting too readily that the accused lacked capacity,[125] it was held that the 'most unusual' facts in this case, in that the killing 'was at variance with the whole conduct of the accused both before and after' were indicative of uncontrolled conduct.[126]

The Appellate Division was required to grapple once again with the question of whether provocation or emotional stress could found a defence excluding liability, and if so how this defence should be delineated, in *S v Campher*.[127] This case is remarkable for the fact that the three judges all delivered differing judgments, resulting in separate majority findings on the facts and on the law. It appears that the appellant's case was rendered more difficult by the fact that her counsel in the court *a quo* failed to raise the possibility that her conative capacity may have been lacking at the time of the killing, and further by the failure of the defence counsel to adduce any expert psychiatric evidence.[128] Viljoen JA pointed out that given that the appellant had relied on an argument based on lack of self-control (albeit in an attempt to argue lack of intent)[129] this was in essence an argument of lack of conative capacity, and proceeded to deal with the matter on this basis. Significantly, Viljoen JA commented that the criteria developed in section 78 of the Criminal Procedure Act[130] were not restricted to incapacity related to mental illness, and thus they could be employed in assessing incapacity caused by non-pathological factors.[131] Viljoen JA further pointed out that the enquiry into capacity was a separate enquiry to that into intention, and must precede it – only once the accused has been found to have capacity would the court be required to assess intention.[132] In the absence of expert psychiatric evidence, it was incumbent on the court to determine of the appellant's state of mind. Viljoen JA concluded that the appellant lacked conative capacity at the time of the shooting, since she was

[123] At 263G–H.
[124] At 264D.
[125] The court, at 264G–H, cited the admonition at 1106F–G in *S v Chretien* n 17 above.
[126] At 264E–F. The court contrasted the facts of this case with the cases of *Lesch* n 73 above and *Van Vuuren* n 112 above, where, Burger J noted, 'the preceding and subsequent conduct was consistent with the killing'.
[127] Note 93 above.
[128] Arguments based on defence of *dignitas*, and on provocation, with a view to the appellant being found guilty of the lesser crime of culpable homicide, were raised on the appellant's behalf in the court *a quo*, and were the arguments raised on appeal (see 949C–E; 950I–951B). For a discussion of the operation of the justification ground of defence in relation to legal interests such as *dignitas*, see JMT Labuschagne 'Noodweer ten aansien van nie-fisiese persoonlikheidsgoedere' (1975) *De Jure* 59.
[129] The term used by the court is 'weerstandskrag'.
[130] Act 51 of 1977.
[131] At 954F. Viljoen JA had earlier raised these arguments in *S v Adams* n 90 above– see 900I–J; see application at 903C–D.
[132] At 955C–F.

unable to control or inhibit the urge to kill her abusive husband,[133] and that the appellant should be acquitted. Jacobs JA, having noted that appellant's counsel in the court *a quo* had failed to lead psychiatric evidence and had failed, on an interpretation of the appellant's evidence, to properly plead lack of capacity, held that this made it impossible to conclude that the appellant lacked capacity at the relevant time.[134] In any event, the learned judge concluded, the test for incapacity set out in section 78 only applies to cases where the accused's self-control was negated by pathological factors, which was not the case *in casu*,[135] and consequently the appeal against conviction should be dismissed.[136] Boshoff AJA agreed that on an examination of the facts the appellant was rightly convicted of murder.[137] However, the learned judge held further that the absence of criminal capacity was not limited to cases of mental illness, and could also apply to a temporary clouding of the mind (*tydelike verstandelike beneweling*).[138] Thus although the majority of the court found the appellant guilty of murder on the facts of the case, the majority statement on the law confirmed the existence of a defence based on non-pathological incapacity.[139]

The development of the defence of incapacity as a result of provocation or emotional stress took a significant step forward in the case of *S v Laubscher*.[140] In this case the Appellate Division finally produced a theoretical framework to add to the foundations that had been laid in the previous cases. Referring[141] to the work of Wiersma,[142] and Snyman,[143] along with dicta of Viljoen JA from *Campher*,[144] the court (per Joubert JA) set out the recognised psychological characteristics of criminal capacity as follows:

> Om toerekeningsvatbaar te wees, moet 'n dader se geestesvermoëns of psigiese gesteldheid sodanig wees dat hy regtens vir sy gedrag geblameer kan word. Die erkende psigologiese kenmerke van *toerekeningsvatbaarheid* is:
>
> 1.Die vermoë om tussen reg en verkeerd te onderskei. Die dader het die *onderskeidingsvermoë* om die regmatigheid of onregmatigheid van sy

[133] At 958I.
[134] At 960D–E.
[135] At 960E–962B.
[136] At 963H–I.
[137] At 965C–D.
[138] At 965H–966B. Boshoff AJA cites the cases of *Chretien* (intoxication, at 1106F–G) and *Bailey* (fear, at 796C–D) in this regard.
[139] The Supreme Court of Appeal in *Eadie* did not fully appreciate this point it seems. Having cited (n 5 above at par [24]) Viljoen JA's judgment at 956C which was relied upon by counsel for the appellant, the court referred to it as 'the minority judgment', and did not see fit to address it again.
[140] Note 94 above.
[141] At 167A–B.
[142] *Over Toerekeningsvatbaarheid* (1932) 29–32, which work is referred to at par 9.33 of the *Rumpff Commission Report* n 66 above, in explaining the concepts of 'self-control' and 'powers of resistance' in the context of conative capacity.
[143] CR Snyman *Strafreg* (2ed 1986) 172–5.
[144] Note 93 above at 955E–F, 956A–B.

> handeling in te sien. Met ander woorde, hy het die vermoë om te besef dat hy wederregtelik optree.
> 2.Die vermoë om ooreenkomstig daardie onderskeidingsvermoë te handel deurdat hy die *weerstandskrag* (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te weerstaan. Met ander woorde, hy het die vermoë tot vrye keuse om regmatig of onregmatig te handel, onderworpe aan sy wil.
>
> Ontbreek een van hierdie psigologiese kenmerke dan is die dader *ontoerekeningsvatbaar*, bv waar hy nie die onderskeidingsvermoë het om die ongeoorloofdheid van sy handeling te besef nie. Insgelyks is die dader ten spyte daarvan dat hy wel die onderskeidingsvermoë het tog ontoerekeningsvatbaar waar sy geestesvermoë sodanig is dat hy nie die weerstandskrag het nie.[145]

The recognition of this defence is further cemented by the first use of the term *'nie-patologiese ontoerekeningsvatbaarheid'* (non-pathological incapacity).[146] Al-though the court found that the appellant had the requisite criminal capacity at the time of acting, and that his murder conviction should therefore be confirmed,[147] the formulation of the defence in *Laubscher* remains the classic statement on the matter to this day.[148]

The refinement of the defence – the 1990s

After the decision in *Laubscher*, the future of the defence of non-pathological incapacity based on provocation or emotional stress seemed assured. However whilst the defence was raised on a number of occasions,[149] it had yet to meet with success in the Appellate Division. This situation changed with the case of *S v Wiid*, which once again involved an appeal against a murder conviction. The court (per Goldstone AJA) cited the formulation of the defence set out in *Laubscher*, in the course of finding on the basis of the evidence presented by appellant, including psychiatric evidence, that the State had failed to prove that the appellant had criminal capacity at the time of acting, and that she should therefore be acquitted.[150]

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[145]At 166G–167A (original emphasis).

[146]At 167F. Thus, it was definitively established by the court that the defence of non-pathological incapacity had an autonomous existence, and was not merely a matter of 'extend[ing] the defence of insanity to the sane' (JR du Plessis 'The extension of the ambit of ontoerekeningsvatbaarheid to the defence of provocation– a s trafregwetenskaplike development of doubtful practical value' (1987) 104 *SALJ* 539 at 540). Griesel J's approving reference to Du Plessis's comment (in *S v Eadie* 2001 2 SACR 172 (C) at 177f) is a revealing indication of the learned judge's discomfort with the notion of non-pathological incapacity.

[147]At 173A–C.

[148]The dictum in *Laubscher* n 94 above at 166F–167A was cited as a statement of the law relating to the defence of non-pathological incapacity in the only case in which the Appellate Division/Supreme Court of Appeal has upheld the defence, *S v Wiid* 1990 2 SACR 561 (A) at 563f–j.

[149]See, for example, *S v Calitz* 1990 2 SACR 119 (A), which explicitly followed the formulation of the legal position set out in *Laubscher* (n 94 above) at 126d–g; *S v Smith* n 77 above, which noted the acceptance of the defence in *Laubscher* (at 134h–i); and *S v Hutchinson* 1990 2 SACR 149 (D) at 157d–f.

[150]Note 148 above at 569g.

Since the case of *Wiid*, and prior to the case of *Eadie*, which will be discussed in detail below, the case law may be loosely categorised into three types: those cases where the focus was on issues relating to proof of the defence; those cases dealing with provocation or emotional stress where the defence did not exclude liability, but resulted in a finding of diminished responsibility; and those cases where the defence was successful, resulting in the accused being acquitted. The first two categories will be dealt with in this section, and the third in the next section, as the cases in this category serve as a precursor to the case of *S v Eadie*.[151]

Evidential aspects

Amnesia

A defence of non-pathological incapacity invariably involves a claim of amnesia.[152] However, the presence of amnesia can be attributed to a host of factors.[153] Amnesia *per se* is not relevant to the issue of culpability,[154] and partial amnesia following a stressful episode such as causing the death of another person is not diagnostically significant.[155] In *S v Pederson*[156] it was held that a distinction must be drawn between true absence of memory, which is indicative of uncontrolled conduct, and retrograde loss of memory, which is simply a means, employed by the psyche, of suppressing unpleasant memories.[157] The latter form of amnesia does not exclude criminal responsibility.[158]

Factual foundation

It has been held that mere loss of temper cannot simply be equated with loss of cognitive control.[159] In fact, the law presumes that an accused has the necessary criminal capacity, where there is no evidence of mental illness, even if the accused is angry and has consumed alcohol.[160] Whilst bearing the burden of proof of criminal capacity, the State is thus assisted by this presumption, in the

[151]Note 5 above .

[152]For a general discussion of the impact of amnesia on criminal liability, see SV Hoctor 'Amnesia and criminal responsibility' (2000) 13 *SACJ* 273.

[153]Poor recall of what had happened could be due to 'alcohol, to involuntary suppression of memory from the consciousness as a defence mechanism precipitated by extreme stressful events, or to malingering' – *S v Kensley* 1995 2 SACR 646 (A) at 653b–c.

[154]*S v Kalogoropoulos* 1993 2 SACR 12 (A) at 21g–h; *S v Ingram* 1995 2 SACR 1 (A) at 4e; *S v Kensley* n 153 above at 653e; *S v Gesualdo* 1997 2 SACR 68 (W) at 74c–d; *S v Pederson* 1998 2 SACR 383 (N) at 396g–h. In the context of an enquiry into automatism, it was held on the facts of *S v Cunningham* 1996 2 SACR 631 (A) at 638d–e) that there were 'any number of possible causes [of amnesia] and in the absence of other indicators its presence did not justify a diagnosis of automatism'.

[155]*S v Ingram* n 154 above at 4d. In *S v Els* 1993 2 SACR 723 (O) at 735d it was held that partial memory of events is inconsistent with a defence of non-pathological incapacity. See also *S v Eadie* n 5 above at par [44].

[156]Note 154.

[157]At 390f–h.

[158]*S v Van der Sandt* 1998 2 SACR 627 (W) at 638i–j .

[159]*Kok v S* [2001] 4 All SA 291 (A) at par [22]. The case is also reported at 2001 2 SACR 106 (SCA).

[160]*S v Shivute* n 75 above at 660e; *S v Kensley* n 153 above at 660b–c; *S v Pederson* n 154 above at 400b; *S v Van der Sandt* n 158 above at 635i–j .

same manner as where with regard to the question of automatism, the State is assisted

> by the natural inference that in the absence of exceptional circumstances a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily.[161]

In order to negate the presumption of capacity, an accused relying on a defence of incapacity resulting from non-pathological grounds such as provocation or emotional stress[162] 'is required in evidence to lay a factual foundation for it, sufficient at least to create a reasonable doubt on the point'.[163] Psychiatric evidence may be useful in establishing the factual foundation, but it is not indispensable.[164] The court retains the discretion, in relation to non-pathological incapacity, whether to refer an accused for psychiatric observation (as contemplated in s 79 of the Criminal Procedure Act[165]).[166] Ultimately, the final decision rests with the court to determine whether the accused had the requisite criminal capacity at the time of acting, having regard to the expert evidence and to all the facts of the case, including the accused's reliability as a witness and the nature of the accused's actions at the relevant time.[167] The court will approach the evidence on which a defence of non-pathological incapacity flowing from provocation or emotional stress is based with circumspection,[168] and such a defence must be subjected to close scrutiny by the court.[169] In particular, the

[161] *S v Cunningham* n 154 above at 635j–636a; *S v Eadie* n 5 above at par [2].

[162] As opposed to where pathological incapacity is pleaded, and the *onus of proof* rests on the accused.

[163] *S v Kalogoropoulos* n 154 above at 21i–j; *S v Eadie* n 5 above at par [2]. See also *S v Di Blasi* 1996 2 SACR 1 (A) at 7c; *S v Gesualdo* n 154 above 154 at 74f; *S v Van der Sandt* n 158 above at 636a–b; *S v Kali* [2000] 2 All SA 181 (Ck) at 202d–e. The dictum in *S v Kalogoropoulos* was also cited in *S v Potgieter* 1994 2 SACR 61 (A) at 72j–73a, although inappositely so, as the *Potgieter* case dealt with the defence of sane automatism, and thus all argument was directed to this defence rather than incapacity (see 84e–f). It is however clear that similar concerns direct the approach in respect of a plea of sane automatism – as Scott JA stated in *S v Cunningham* n 154 above 154 at 636a–b: 'Common sense dictates that before this inference [that the accused was acting voluntarily] will be disturbed a proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the alleged *actus reus* ...'.

[164] *S v Laubscher* n 94 above at 172 E–F; *S v Calitz* n 149 above at 127c; *S v Kalogoropoulos* n 154 above 154 at 21i; *S v Kok* 1998 2 SACR 532 (N) at 545j–546a; *S v Van der Sandt* n 158 above at 636g; *S v Eadie* n 146 above at 180e–g; *S v Volkman* 2005 2 SACR 402 (C) at par [11]–[13].

[165] Act 51 of 1977.

[166] Section 78(2) of the Criminal Procedure Act. See *S v Volkman* n 164 above at par [7]–[8].

[167] *S v Harris* 1965 2 SA 340 (A) at 365B–C; *S v Kalogoropoulos* n 154 above 154 at 21j–22a; *S v Ingram* n 154 above 154 at 4g–h; *S v Di Blasi* n 163 above at 7c–e; *S v McDonald* 2000 2 SACR 493 (N) at 501h–j; *S v Eadie* n 146 above at 180g–h; *Kok v S* n 159 above at par [22]; *S v Eadie* n 5 above at [2]. This applies equally to the situation where the issue is whether the accused acted voluntarily or in a state of automatism – *S v Cunningham* n 154 above 154 at 636b–c. That the court should be final arbiter of criminal responsibility accords with the fact that concepts such as 'criminal capacity' and 'automatism' are legal, and not psychiatric, concepts – see *S v Kensley* n 153 above at 652i–j.

[168] *S v Kensley* n 153 above at 658j; *S v Van der Sandt* n 158 above at 636b–c.

[169] *S v Goitsemang* 1997 2 SACR 99 (O) at 103i–104a; *S v Gesualdo* n 154 above 154 at 74g–h; *S v Eadie* n 5 above at [2]. In relation to the *Goitsemang* judgment, Pantazis (in 'Criminal Law' *Annual Survey of South African Law* 1997 610 at 615) suggests that the approach adopted is that

court will be exceedingly cautious in accepting the defence where the only basis for the defence is the *ipse dixit* of the accused.[170] It follows that the reliability and truthfulness of the alleged offender is a crucial consideration in assessing the validity of the factual foundation laid by the accused for the defence.[171] It has been held that the accused's own words that her or his conduct was uncontrolled in nature should be accepted, unless it can be said that such evidence 'cannot reasonably be true'.[172]

Diminished responsibility and mitigating circumstances

Where it is determined that as a result of provocation or emotional stress the accused's criminal capacity was affected at the time of the unlawful act, it has been held that a finding of diminished responsibility may follow.[173] Diminished responsibility is the diminished capacity to appreciate the wrongfulness of the particular act in question, or to act in accordance with an appreciation of its wrongfulness.[174] Verdicts of diminished responsibility have ensued where the court has found 'a prolonged period of sustained and mounting mental strain';[175] 'heightened tension', 'considerable stress', and 'extreme provocation';[176] '[a] state of intoxication and emotional stress...not conducive to totally rational thought and behaviour';[177] and '[an] immense amount of stress'.[178] Further, where an accused has been affected by provocation or emotional stress and the court has not specifically found capacity to be excluded or diminished, these factors have nevertheless been considered in mitigation of sentence, giving rise to a lesser punishment.[179] It has however been held that the promptness of the

non-pathological factors cannot negate criminal capacity, but this is not borne out by the acknowledgement at 104g that provocation or emotional stress could exclude criminal capacity. Similarly, a defence of sane automatism will be closely examined – *S v Potgieter* n 163 above at 73j–74b, cited in *S v Ingram* n 154 above 154 at 4j–5b.

[170] *S v Kensley* n 153 above at 658g–h. In *S v Gesualdo* n 154 above 154 at 74g–h, Borchers J comments that a court 'would be unlikely to find that such state [incapacity] may have existed only by virtue of the accused's *ipsissima verba*'.

[171] *S v Potgieter* n 163 above at 73b; *S v Di Blasi* n 163 above at 7f; *S v Kali* n 163 above at 202f–g; *S v Eadie* n 146 above at 180g–i.

[172] *S v Potgieter* n 163 above at 73d–i. Unfortunately this statement of the law is not a model of clarity – whilst discussing the issue in the context of automatism, the court then proceeds to cite cases such as *Kalogoropoulos*, *Mahlinza*, and *Wiid* which deal with an incapacity defence. However, as pointed out at 73e, this was the effective holding at 20a in the *Kalogoropoulos* judgment (n 154 above), which would thus constitute authority for the above proposition.

[173] *S v Laubscher* n 94 above at 168B–C; *S v Smith* n 77 above at 135f–g; *S v Shapiro* 1994 2 SACR 112 (A) at 120e–f; *S v Di Blasi* n 163 above at 6d; *S v Kok* n 164 above at 552b–c.

174 Cf s 78(7) of the Criminal Procedure Act, 51 of 1977; see *S v Shapiro* n 173 above at 123e–f; *S v Di Blasi* n 163 above at 7b–c.

[175] *S v Smith* n 77 above at 135f–g.

[176] *S v Shapiro* n 173 above at 121c–122b.

[177] *S v Ingram* n 154 above at 8h.

[178] *S v Kok* n 164 above at 553c.

[179] See, for example, *S v Meyer* 1981 3 SA 11 (A) at 17E–F, where the court identified 'jaloesie en provokasie' as causal factors in the accused's actions; *S v Els* n 155 above, where the accused's state of 'emosionele angs, bekommernis en benoudheid...as gevolg van...voortdurende aanrandings, drankgebruik en provokasie van die oorledene' was taken into account (at 735e–f); *S v Larsen* 1994 2 SACR 149 (A), where the accused was found to have been in a 'towering rage' as a result of jealousy, frustration and provocation when she killed the deceased (at 157d–e); *S v Aspeling* 1998 2 SACR 561 (C), where the accused's actions were held

offender's response to the provocative conduct of the victim is an essential characteristic of provocation as a mitigating factor – thus the retaliation is required to be immediate and to take place in the heat of the moment.[180] Furthermore, anger will only be held to mitigate punishment where the surge of emotion evoked thereby is justified in the eyes of the reasonable person.[181]

THE NEW (OR OLD?) FRONTIER – *S V EADIE*

Thus it is evident that by the mid-1990s the defence of non-pathological incapacity based on provocation or emotional stress was well-established in South African law. This development was in accordance with the psychological approach to liability, in recognizing that where any element of criminal liability is absent, for whatever reason, the accused should not be found guilty of the crime in question. On the other hand, it is clear that the defence was never intended to provide blanket exculpation for irate or distraught accused. On the contrary, the stringent nature of the process of establishing the defence, along with the courts' natural disinclination to hold that an accused had actually been incapacitated by such factors, arguably provides a sufficient safeguard against facile acquittals. There were, however, two[182] cases in particular which raised the old fears about a defence based on an inability to control intense emotion.

The cases that caused the trouble

In *Nursingh*,[183] the accused shot and killed his mother and maternal grandparents whilst, he claimed, in an emotional storm[184] arising from prolonged, continuous and at times severe physical, psychological and sexual abuse, predominantly at the hands of his mother. In the absence of any psychological evidence led by the prosecution to challenge the defence raised by the accused, the court (per Squires J) held that counsel for the accused had laid a factual foundation which at least established reasonable doubt as to whether the accused

to be 'an angry and frustrated reaction to continuous provocation' (at 574d–e). In *S v Mayekiso* 1990 2 SACR 238 (E) and *S v Mathola* 1991 2 SACR 402 (BA), it was acknowledged that the respective accused had murdered their new-born infants in a state of considerable emotional stress, and that this should be reflected in the sentences imposed.

[180] *S v Mandela* n 9 above at 665b.

[181] *Ibid* 665c–d.

[182] A third case over which a pall has been cast by the *Eadie* case (n 5 above at par [50]) is *S v Gesualdo* (n 154 above), where the accused killed a fellow Argentinean immigrant to South Africa in circumstances where their business and personal relationship had been soured by the acts of the deceased. The court held that the accused lacked conative capacity, and he was consequently acquitted on a charge of murder. This case has not been subjected to the same level of academic scrutiny as the other cases which will be discussed, which may be due at least in part to the fact that it did not have as high a profile (and thus the same level of media attention) as the other cases. It will also not be discussed in detail here.

[183] *S v Nursingh* 1995 2 SACR 331 (D).

[184] A psychiatrist testifying on behalf of the accused described his mental state at the time of the shooting as 'a separation of intellect and emotion, with temporary destruction of the intellect, a state in which, although the individual's actions may be goal-directed, he would be using no more intellect than a dog biting in a moment of response to provocation' (at 333d–e). A psychologist testifying for the defence described it as 'an acute catathemic crisis', resulting in 'an overwhelming of the normal psychic equilibrium by an all-consuming rage, resulting in the disruption and the displacement of logical thinking' manifesting itself in 'an explosion of aggressiveness that frequently leads to homicide' (at 333e–h).

had the necessary criminal capacity, and consequently acquitted the accused on all counts.[185]

This judgment has been the focus of some critical scrutiny. Burchell, whilst carefully avoiding any criticism of the judgment of Squires J, comments that

> ... one cannot help but feel a measure of disquiet about the conclusion that an intelligent person, albeit under a good deal of stress, can shoot his mother and grandfather by firing three bullets into their bodies and his grandmother by firing four bullets into her body, and escape criminal liability completely.[186]

Louw also points out his discomfort[187] with the court's acceptance of the psychiatric evidence that the killings could be regarded as 'one and the same eruption'.[188] Louw further criticises the judgment, for not providing 'sounder reasons' for its finding in that case and academic authority are not cited, and for its 'grammatical errors and legal imprecision'.[189] It is true that the judgment is not always a model of clear phrasing.[190] It is however submitted that at no point does Squires J incorrectly state the law.[191]

The case of *Moses*[192] arose out of the accused's killing of his homosexual lover, upon the deceased's revelation that he had AIDS, following unprotected intercourse between the accused and the deceased. The accused, who had a history of anger outbursts and violence, became enraged and successively attacked the deceased with an ornament, a small knife and a large knife. As in the *Nursingh* case, defence counsel led expert testimony regarding the accused's mental state at the time of the killing from a psychologist and a psychiatrist, who similarly concluded that due to the accused being in an annihilatory rage, he experienced a collapsing of controls, which resulted in him lacking the

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[185] At 339b–e.

[186] JM Burchell 'non-pathological incapacity – evaluation of psychiatric testimony' (1995) 8 *SACJ* 37 at 40–1. See also JM Burchell and JRL Milton *Principles of criminal law* (2ed 1997) 286. Burchell suggests that in order to provide safeguards that will prevent facile acquittals, the court should ensure that the prosecution should also lead psychiatric testimony where the defence has done so, which should ideally be heard after the factual issues of the case have been canvassed (at 41–2).

[187] R Louw '*S v Eadie*: Road rage, incapacity and legal confusion' (2001) 14 *SACJ* 206 at 213: 'With respect the analogy of the intellect required of a dog when biting to a human being accurately firing ten bullets is a strained one.' On this basis Louw argues that the case was wrongly decided (at 214).

[188] Note 183 above at 339c–d.

[189] Louw n 187 above at 209.

[190] For example (n 187 above at 208), Louw's criticism of the description of the test for capacity (n 183 above) at 332e–f (whether the accused 'had the mental ability or capacity to know what he was doing and whether what he was doing was wrongful') for not resembling the standard test is accurate. Other examples of lack of clarity may be found at 338g, where the court refers to the fact that 'the accused's mind was not functioning normally' (which could indicate involuntary conduct) and at 333b, where sane automatism is described as a 'similar situation' to non-pathological incapacity.

[191] It is clear throughout the judgment that the court is assessing (n 183 above at 332e–h) and indeed established (at 339b–c) the defence of lack of capacity. Louw's criticism (n 187 above at 208) that the court conflated capacity and intention must be viewed in this light.

[192] *S v Moses* n 80 above.

necessary capacity to be held liable for the fatal conduct.[193] Although the prosecution did in fact lead expert psychiatric evidence in this case, the court (per Hlophe J) dismissed it as unhelpful, while accepting the evidence of the defence experts.[194] Consequently, the accused was acquitted on the basis that he lacked criminal capacity at the time of the killing.[195]

De Vos has criticised this judgment for its implications and possible future consequences:

> ... there is a great danger that the non-pathological criminal incapacity defence will be abused by quick-tempered individuals who would claim that they lacked criminal capacity after being provoked. Volatile members of society could then be acquitted for acts committed in a (momentary) state of rage when the law should aim to punish those who fail to control their rages and infringe on the rights of others in the process.[196]

Louw echoes these sentiments,[197] arguing that the acquittal in *Moses* leaves us with a dangerous precedent, making killing permissible whenever someone flies into an 'annihilatory rage'.[198]

The judgment has also been criticised for allowing the defence to prevail in circumstances where, unlike in previous applications of the defence, the final provocative act was not 'the last straw in a long history of abuse'.[199] Further, the court's statement that the accused's self-control was 'significantly impaired'[200] has been criticised as ambiguous, in that it fails to indicate whether the accused experienced an absence of self-control, which would impact on his liability, or merely diminished self-control, which would affect sentence.[201]

S v Eadie

The judgment

The by now notorious facts of *Eadie* may be briefly summarised as follows. The accused was driving home with his family after an evening of merriment, when he encountered the deceased, who, it was later established, was similarly intoxicated. The deceased drove up behind the accused, with his lights on bright. When the accused allowed him to pass, the deceased slowed down considerably. When the accused passed the deceased, the deceased once again resumed his position directly behind the accused, still with his lights on bright. This pattern repeated itself a few times until the cars stopped at a set of traffic lights, and the

[193] At 708g–711a.
[194] At 712a–j.
[195] At 714g–h.
[196] De Vos n 80 above at 358.
[197] See Louw's criticism of the judgment n 187 above at 212–216.
[198] At 216.
[199] Louw n 187 above at 215; De Vos n 80 above at 358. The implication of this view is that the defence ought only to be available in circumstances where there has been a long period of emotional stress prior to the harmful conduct.
[200] Note 80 above at 714h–i.
[201] Louw n 187 above at 214–215; De Vos n 80 above at 359.

accused got out of his car and proceeded to beat the deceased to death with a hockey stick.

The case was first heard in the Cape High Court, where the accused pleaded not guilty to murder and defeating or obstructing the course of justice, raising the defence of non-pathological incapacity primarily arising from provocation, and ensuing road rage. Griesel J, following an assessment of the psychiatric evidence led by counsel, as well as the reliability of the accused as a witness, (correctly, it is submitted) convicted the accused of murder and attempting to defeat or obstruct the course of justice. It was held that the accused, in succumbing to road rage, 'did not "lose control"; he simply lost his temper'.[202] Thus, it was held that the accused's version that he was unable to control his actions at the critical time could not be accepted as reasonably possibly true in the light of the evidence before the court.[203] Significantly, in the course of his judgment, Griesel J indicated that the differentiation between automatism and capacity was a distinction without a difference:[204]

> There appears to be some confusion between the defence of temporary non-pathological criminal incapacity, on the one hand, and sane automatism, on the other. The academic writers...point out that they are in fact two distinct and separate defences. At the same time, however, it is clear that in many instances the defences of criminal incapacity and automatism coincide. This is so because a person who is deprived of self-control is both incapable of a voluntary act and at the same time lacks criminal capacity.

This judgment sparked some academic comment and criticism, notably for its conflation of the notions of automatism and incapacity.[205] Louw seized the opportunity to critically examine the cases of *Nursingh* and *Moses*, in the course of a plea for a 'reappraisal' of the test for incapacity. He argues that it is 'far from clear in our law when self-control is absent',[206] and consequently, since there is no actual distinction between automatism and lack of self control,[207] the second leg of the capacity inquiry should fall away, and capacity should be determined 'solely on the basis of whether a person is able to appreciate the difference between right and wrong'.[208]

[202] Note 146 above at 182i–j.
[203] At 184d–e.
[204] At 178a–b.
[205] See SV Hoctor 'Road rage and reasoning about responsibility' (2001) 14 *SACJ* 195; Louw n 187 above at 206.
[206] At 207.
[207] 'If the two were distinct, it would be possible to exercise conscious control over one's actions (the automatism test) while simultaneously lacking self-control (the incapacity test)' (at 211).
[208] *Ibid*. Louw argues that once an accused is shown to have cognitive capacity, he or she may then raise involuntariness as a defence (*ibid*).

The conviction was appealed to the Supreme Court of Appeal.[209] At the outset, Navsa JA set out his stall to investigate

> ... whether the boundaries of the defence in question have been inappropriately extended, particularly in decisions of Provincial or Local Divisions of the High Court, so as to negatively affect public confidence in the administration of justice.[210]

Thus, it is clear that the perspective of the court is a policy-based assessment of the legal rules governing non-pathological incapacity based on provocation or emotional stress. It is unfortunate that the formal adoption of this approach, however laudable the purpose underlying it, seems to have obscured and undermined the application of the existing legal rules. It is regrettable that the court did not simply state that the ambit of the defence of non-pathological incapacity was unacceptable, and that this necessitated a radical departure from the principles governing this area of the law, in order to bring it into line with the perceived community sentiment.[211] Such judicial frankness would be commendable, whatever the merits of the enterprise. Instead, in attempting and, it is submitted, ultimately failing, to marshal existing authority in its cause, the judgment ushers in significantly more confusion than that which it purports to counteract. The grave implications of the Supreme Court of Appeal fostering legal uncertainty are manifest.

There are a number of features of the judgment that bear highlighting. First, the court sets out to deal with its own previous decisions relating to non-pathological incapacity, 'in the quest for greater clarity and precision'.[212] However it proceeds to cite, as part of its reasoning, the cases of *Potgieter*,[213] *Cunningham*,[214] and *Henry*.[215] In each of these cases the defence in question was in fact sane automatism.[216] Furthermore, the terminological imprecision in two

[209]The judgment was handed down by Navsa JA, with Olivier JA and Streicher JA concurring. From this point, unless otherwise indicated, all references to paragraphs are references to this judgment.

[210]At par [3].

[211]Snyman n 6 above at 15 makes this point, adding that this would be the best argument for rejecting the defence of non-pathological incapacity.

[212]At par [29].

[213]Note 163, cited at par [36].

[214]Note n 154 above, cited at par [39].

[215]1999 2 SACR 13 (SCA), cited at par [38].

[216]Whilst non-pathological incapacity, curiously raised as 'irresistible impulse', a term both dated and inaccurate in relation to liability arising from a non-pathological cause, formally constituted an alternative defence in the *Potgieter* case (n 163 above at 72 f-g), this defence was never argued on appeal (84e), and it is clear that the court's judgment is entirely focused on the defence of automatism, as is evident from the discussion relating to matters of proof (73b–d, 73i–74b), the expert evidence led on behalf of both the appellant and the State (82c–84c), and Kumleben JA's concluding comment (on behalf of the court) on liability that he could not accept that the appellant had acted 'automatically' (84d). This is despite the fact that Kumleben JA saw fit to cite the cases of *Wiid* (n 148 above), and *Kalogoropoulos* (n 154 above) in particular in respect of the discussion on evidential matters (72h–73b, 73e–g). Burchell n 186 above at 38 also erroneously discusses the evidence adduced by the appellant in the context of non-pathological incapacity. With regard to *Cunningham*, the question of non-pathological incapacity does not arise at all, and the court deals specifically with the automatism defence (ultimately rejected on

further cases cited by the court, the cases of *Francis*[217] and *Kok*,[218] does not render either helpful authority.[219] It is significant, in the light of these difficulties, that the court baldly states that

> ... [i]t is clear from the decisions in the *Potgieter*, *Henry*, *Cunningham* and *Francis* cases that the defence [of non-pathological criminal incapacity] has been equated with the defence of automatism.[220]

As indicated, this statement is simply incorrect insofar as the first three decisions are concerned, and rather less than compelling in respect of the fourth. This difficulty is compounded where the court engages in a critique of the decisions of *Arnold*,[221] *Moses*[222] and *Gesualdo*,[223] and concludes that the approach 'adopted by this Court in the decisions discussed earlier' was not followed in these three cases.[224] It is evident that the problem which the court has with these three cases is that in each it is accepted that it is possible for a person to 'act consciously but at the same time not be able to act in accordance with one's

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the basis of a lack of factual foundation (n 154 above at 638j–639a)). In *Henry*, the court (per Scott JA) clearly and carefully distinguished the defence of non-pathological incapacity (which was not raised) from the defence of sane automatism, which was in issue (n 215 above at 19h–i). It follows that all subsequent references in *Eadie* to the *Henry* case as authority for the defence of non-pathological incapacity do not carry any weight (see *eg* paras [43], [45], [64]).

[217] 1999 2 SACR 650 (SCA), cited at par [40].

[218] Note 159 above cited at par [41].

[219] The case of *Francis* was cited by Griesel J in the court *a quo* (n 146 above at 178c–d) as authority for the indistinguishability of sane automatism and non-pathological incapacity, and in particular Schutz JA's simple equation of the concepts by placing the term 'sane automatism' in brackets after the term 'non-pathological criminal incapacity' (at par [1]), despite the clear indication that the plea related to whether '... he was unable to distinguish right from wrong or, if he could, that he was unable to control his actions' (*ibid*). Later (at par [25]) Schutz JA confirms that the issue under discussion is sane automatism, but despite this categorisation, in discussing the criminal liability of the appellant, the language is exclusively that of capacity: 'concerning his ability to appreciate the wrongfulness of his actions ...' (par [27]), '... he could control himself...[a]lthough his powers of self-control were substantially diminished, his actions show they were not lost ...' (par [30]). Perhaps it could be suggested that the court's treatment of the appellant's 'awareness of what he was doing' (par [26]) indicates that it did canvass the actual content of the notion of sane automatism. However, it is patently clear that the court confused and conflated the concepts of automatism and incapacity, and, crucially, did not do so in any thoughtful or rational way, as in the course of a reasoned comparison or equation of the concepts. Similarly, the case of *Kok* seems to equate these concepts without justifying this approach in its statement (at par [25]) that the appellant '... had the necessary criminal capacity and that the defence of so-called "sane automatism" had to be rejected', particularly since the appellant had pleaded that he 'lacked the necessary criminal capacity' (par [3]) and the judgment discusses the appellant's liability in the context of capacity, despite the defence of automatism being dealt with exclusively in the court *a quo* (n 164 above at 546d–e). Once capacity has been established, then automatism is naturally excluded, and so the judgment can be explained on this basis. However, it does not add any clarity to the matter at hand. For discussion of how the comments of the court in *Kok* may negatively impact upon legal development in relation to mental illness, see SV Hoctor '"Just a spoonful of sugar ...": glycaemia, insanity and automatism' (2001) 22 *Obiter* 241 at 254ff.

[220] At par [42].

[221] Note 119, discussed at par [46].

[222] Note 80 above, discussed at par [49].

[223] Note 154 above, discussed at par [50].

[224] At par [51].

appreciation of what is right and wrong',[225] as a result of provocation.[226] However, this approach is entirely consistent with the views expressed in the following cases cited by the court: *Van Vuuren*;[227] *Campher*;[228] *Laubscher*;[229] *Calitz*;[230] *Wiid*;[231] and *Kalogoropoulos*.[232] This begs the question – with which decisions of the Supreme Court of Appeal do the three censured decisions conflict? Bar one,[233] the remaining cases are those discussed earlier[234] which either relate to automatism rather than incapacity, or are somewhat conflicted and conflicting in their treatment of the notion of non-pathological incapacity. In any event, not one of the remaining decisions criticise the approach adopted in the three censured decisions. A final puzzle relates to the case of *Nursingh*.[235] The result in this case has been trenchantly criticised by writers such as Burchell and Milton,[236] and Louw,[237] and indeed Navsa JA acknowledges that the case leaves one 'with a sense of disquiet'.[238] Why then is the court prepared to accept the result (and the expert evidence) in this case, but reject the decisions (and relevant expert evidence) in the three censured decisions? Why is this case 'easier to explain'?[239] The judgment in *Eadie* does not enlighten the reader, beyond a statement that the combination of factors in *Nursingh* was 'extreme and unusual'.[240] It is submitted that by accepting that the accused in *Nursingh* was entitled to a defence, the court is applying an inconsistent criterion, which ultimately subverts the rationale of the decision in *Eadie*.[241]

[225] At par [46], referring to *Arnold*.

[226] 'In the *Moses* and *Gesualdo* cases we appear to have moved from the fundamental position that provocation is a mitigating factor to a position where it has become an exculpatory factor' (at par [51]). See n 345 below.

[227] Note 112 above, discussed at par [30].

[228] Note 93 above, discussed at par [31]. This was the view expressed by Viljoen JA and Boshoff AJA.

[229] Note 94 above, discussed at par [32].

[230] Note 149 above, discussed at par [33].

[231] Note 148 above, discussed at par [34].

[232] Note 154 above, discussed at par [35].

[233] The Appellate Division case of *S v Kensley* n 153 above, discussed at par [37]. Whilst it is clear that the court (per Van den Heever JA) accepted that the defence of non-pathological incapacity raised by the appellant existed in South African law (658e–g), which the State refuted *in casu* (660c), the court made some pertinent remarks relating to policy factors, which will be discussed nn 415–423 below.

[234] See the preceding discussion, notes 213–218.

[235] Note 183 above, discussed at par [47]–[48].

[236] Note 186 above at 286.

[237] Note 187 above at 208–9.

[238] At par [48].

[239] The phrase employed in par [49].

[240] At par [48]. This is essentially the same sentiment expressed by Burger J in *S v Arnold* n 119 above – see n126 – which case is trenchantly criticised in *Eadie*.

[241] The modified test for incapacity proposed by the court in *Eadie* will be discussed below. In terms of this test, the erstwhile subjective assessment of the element of conative capacity is replaced by the objective test for sane automatism, which means that an accused can only escape liability on the basis of non-pathological incapacity if his actions are involuntary. Given that the accused in *Nursingh* is described by Navsa JA (at par [48]) as having exhibited 'goal-directed actions' in respect of the multiple shooting, and that he was thus not acting automatically, he could not rely on the test formulated in *Eadie*, and ought to have been found criminally liable on an application of this test.

As noted, the disregard of existing precedent in *Eadie* is hard to explain.[242] One could speculate that this approach amounted to a sort of judicial ground-clearing for the theoretical edifice which was to follow. However, this begs the question why the court did not simply declare that the previous decisions dealing with the defence of non-pathological incapacity in terms of established practice were all mistaken?

Theoretical aspects

And so, to the theory. Having criticised the operation of the defence of non-pathological incapacity in the cases of *Arnold*, *Moses* and *Gesualdo* as misconceived, and out of line with existing authority, the court sets out its own view, which in essence is that there is no distinction between the notions of conative capacity and automatism. This view finds support in the testimony of the expert witnesses for the State, and in particular that of Dr Kaliski, whose scepticism about the existence of the defence of non-pathological incapacity leads to the conclusion that there is no distinction between this defence and sane automatism.[243] Further support is found in Louw's analysis of the defence, and in particular his statement that

> Logic ... dictates that we cannot draw a distinction between automatism and lack of self-control. If the two were distinct, it would be possible to exercise conscious control over one's actions (the automatism test) while simultaneously lacking self-control (the incapacity test).[244]

Navsa JA states the court's position in the clearest possible terms following the reference to Louw's argument:

> I agree with Ronald Louw that there is no distinction between sane automatism and non-pathological incapacity due to emotional stress and provocation.[245]

The plain corollary of this point of view is that it would have to be established that an accused was acting involuntarily in order for her defence of lack of conative capacity to prevail. The court does not shy away from this conclusion:

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[242] Almost inevitably one is drawn to the American realist assumption that judges work backwards, being liberated rather than inhibited by rules, since by resorting to rules judges are able to retroactively furnish their instincts with authority. See in particular the work of Frank *Law and the Modern Mind* (1949). See also Snyman n 6 above at 15.

[243] At par [14], where Kaliski's description of sane automatism is set out. Kaliski further describes the statement that someone 'lost control' as one which is used too loosely (par [15]). This view is shared by Lay, a psychologist who testified in support of the State's case (par [13]), who describes this expression as vague, too general, and not a clinical term. The need to ensure clarity of expression is underlined by the reference to the testimony of the expert witness for the defence, Dr, as negativing 'any suggestion of automatism' (par [21]), despite the earlier statement (at par [19]) that the 'essence of Jedaar's conclusions' was that the appellant's actions were 'involuntary'.

[244] Note 187 above at 210–211, noted at par [56] of the *Eadie* judgment. Louw states (at 211) that Burchell and Milton n 186 above at 105–6 'also argue that the two concepts are not distinct', but this appears to be unfounded.

[245] At par [57].

> It appears logical that when it has been shown that an accused has the ability to appreciate the difference between right and wrong, in order to escape liability, he would have to successfully raise involuntariness as a defence...In the present contest [sic] the two are flip sides of the same coin.[246]

The court acknowledges that this approach constitutes a fundamental reinterpretation of the formulation of the defence of non-pathological incapacity set out in *Laubscher*:

> It appears to me to be clear that Joubert JA was concerned to convey, in the second leg of the test set [out] in the *Laubscher* case, that the State has to prove that the acts which are the basis for the charges against an accused were consciously directed by him. Put differently, the acts must not have been involuntary.[247]

This approach, the court states, flows from the previous decisions of the Supreme Court of Appeal,[248] and on the basis of the decisions referred to by the court

> it is clear that in order for an accused to escape liability on the basis of non-pathological criminal incapacity he has to adduce evidence, in relation to the second leg of the test in *Laubscher's* case, from which an inference can be drawn that the act in question was not consciously directed, or put differently, that it was an involuntary act.[249]

Thus it follows that the dissenting view – that automatism and conative capacity are distinct concepts – is fundamentally flawed. Moreover, this view

> ... followed by an explanation that the former defence is based on a loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions, does violence to the fundamentals of any self-respecting system of law...[n]o self-respecting system of law can excuse persons from criminal liability on the basis that they succumbed to temptation.[250]

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[246] *Ibid.*

[247] At par [58]. The court further clarifies this statement later in the same paragraph by citing, from JM Burchell *South African criminal law and procedure* Vol I (General principles) (3ed 1997) 42, a list of synonyms used by South African courts for 'involuntary conduct': 'mechanical activity', 'unconsciousness', 'automatic activity', 'onwillekeurige handeling', 'involuntary lapse of consciousness'.

[248] Or Appellate Division. In par [57] the court avers that decisions of 'this Court' make it clear that there is no distinction between sane automatism and non-pathological incapacity, and that the equivalence between the concepts ('flip sides of the same coin') is founded on the 'judgments of this Court referred to earlier, as the highlighted parts of relevant *dicta* show'. In these decisions the court was required to determine whether the accused was 'truly disorientated – an indicator of temporary loss of cognitive control over one's actions and consequent involuntary behaviour' (par [44]). Earlier in the judgment (at par [43]) the court states that Dr Kaliski's view that automatism and non-pathological incapacity are equivalent, and that 'the only circumstance in which one could "lose control" is where one's cognitive functions are absent and consequently one's actions are unplanned and undirected' is consistent 'with the decisions of this Court'.

[249] At par [42].

[250] At par [60].

It is clear that the court envisaged a narrowing of the defence of non-pathological incapacity on grounds of policy. The stated objective of the judgment was to consider whether the boundaries of the defence had been inappropriately extended so as to negatively affect public confidence in the administration of justice,[251] and it is clear that this perspective is maintained throughout. Thus, in relation to the landmark case of *Chretien*,[252] which is foundational to the development of the defence of non-pathological incapacity, the court approvingly cites Burchell's comment that whilst sound in principle, the judgment 'might well have miscalculated the community's attitude to intoxication'.[253] It is evident that the court would apply similar criticism to the defence of non-pathological incapacity in the context of provocation or emotional stress from some of the sources cited in the judgment. First, the statement of the Appellate Division (per Van den Heever JA) in the case of *Kensley*:[254]

> Criminal law for purposes of conviction – sentence may well be a different matter – constitutes a set of norms applicable to sane adult members of society in general, not different norms depending upon the personality of the offender. Then virtue would be punished and indiscipline rewarded: the short-tempered man absolved for the lack of self-control required of his more restrained brother. As a matter of self-preservation society expects its members, even when under the influence of alcohol, to keep their emotions sufficiently in check to avoid harming others and the requirement is a realistic one since experience teaches that people normally do. Compare *S v Swanepoel* 1983 2 SA 434 (A) at 458A–D.

This dictum is cited by the court in *Eadie* as authority for the proposition that a court should assess an accused person's evidence about his state of mind by weighing it against his actions and the surrounding circumstances, and considering the evidence against human experience, societal interaction and societal norms.[255] Navsa JA states that whilst critics may describe this as 'principle yielding to policy',[256] this is an acceptable method for testing 'the veracity of an accused's evidence about his state of mind and as a necessary brake to prevent unwarranted extensions of the defence'.[257]

[251] At par [3].
[252] Note 17 above.
[253] At par [27], citing Burchell n 247 above at 188.
[254] Note 153 above at 658h–j, cited in par [37].
[255] At par [45]. Navsa JA notes that this approach was followed by Griesel J in the court *a quo* (n 146 above at 183h–i) when he stated: 'Hundreds of thousands of people daily find themselves in similar or worse situations, yet they do not go out clubbing fellow-motorists to death when their anger may be provoked.'
[256] At par [64]. This is the corrected wording of the judgment in the South African Criminal Law Reports, effected by the corrigenda in 2002 (2) (September) SACR, xiii.
[257] At par [64].

The reference to the *Swanepoel* case in the above dictum from *S v Kensley* in fact primarily consists of a quote from Snyman on why provocation could never be regarded as a complete defence.[258] In part it reads as follows:

> Die rede waarom provokasie nooit kan dien as 'n volkome verweer nie, hang saam met die oorweging dat van die mens verwag word om sy emosies in toom te hou, en dat opvlieënde en ongeduldige mense nie hierdie karakterskete mag aanvoer as verskoning vir kriminele gedrag nie. Indien hulle dit wel sou kon doen, sou dit beswaarlik 'n aansporing vir die res van die gemeenskap wees om hulle humeure te beteuel in die aangesig van versoeking.

Further, the court cites Burchell's comments regarding the policy concerns associated with provocation:[259]

> The general approach in most legal systems is that provocation does not excuse from criminal liability. People are expected to control their emotions. Furthermore, in many cases the response to the provocation is in the nature of a revenge for harm suffered. Since it is a fundamental principle of modern systems of criminal justice that vengeance for harm suffered must be sought through the public criminal process and not by personal self-help, the criminal law is precluded from admitting the provocation should be a justification for unlawful conduct.

It appears that the court is also concerned with the spectre of the defence being the convenient first resort of multiple accused.[260]

In the light of the approach set out above, it could be expected that the court would dispose of the second element of the test for capacity, the inquiry into conative capacity, as nugatory. However, Navsa JA insists that this inquiry should remain,[261] and that whilst it may be difficult to envisage a situation where a person is able to distinguish between right and wrong, but is unable to control her actions, this is 'notionally possible'.[262]

Analysis

The central tenets of the approach adopted by the Supreme Court of Appeal in *Eadie* may be briefly interrogated. First, the court insists that there is no difference between conative capacity and automatism. This is clear from the

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[258] *Strafreg* (1981) 158. In translation (in CR Snyman *Criminal law* (1984) 146): 'The reason why provocation can never be a complete defence is that the law expects people to keep their emotions in check; the fact that certain persons are quick-tempered and impatient is no excuse for their criminal behaviour. If it were otherwise, people would have little incentive to control their emotions in the face of insult or affront.'

[259] Note 247 above at 202, cited at par [51].

[260] At par [28] the court notes that the defence of non-pathological incapacity based on provocation or emotional stress 'has become a very popular defence', and at par [65] it comments further that '[i]t is predictable that accused persons will in numbers continue to persist that their cases meet the test for non-pathological criminal incapacity'.

[261] At par [57].

[262] At par [59].

unequivocal statement in the penultimate paragraph of the judgment to the effect that

'[i]t must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism'.[263]

The court relies for its conclusion on the expert evidence led by the State (and in particular the testimony of Dr Kaliski), along with the arguments of Louw. However, neither of these sources is entirely compelling. Dr Kaliski concedes that courts have accepted the defence of non-pathological incapacity in certain circumstances (such as 'stress, provocation and the disinhibiting effects of alcohol').[264] Despite his own severe scepticism about the defence, Kaliski further concedes that 'in the face of compelling facts' he may be prepared to concede the validity of such a defence.[265] Thus it follows that, in the right circumstances (in other words where the evidence supports it), even Kaliski accepts the possibility of a defence of non-pathological incapacity.

Placing reliance on Louw's views is also problematic for the court. Though the court is entirely correct in stating that Louw does not distinguish between lack of conative capacity and automatism,[266] the writer is nevertheless critical of the *Eadie* judgment in the Cape High Court, criticising the judgment for not properly distinguishing between automatism and incapacity, and for introducing an objective test for the provocation defence.[267] He further warns against objective factors intruding on the test for incapacity.[268] Louw's central thesis is that it is far from clear when 'self-control' is lacking,[269] and goes on to argue that in fact there is no real difference between conduct (voluntariness) and conative capacity, and that consequently the second leg of the capacity test should simply fall away.[270] It is on the basis of the perceived difficulty in

[263] At par [70].
[264] At par [16].
[265] *Ibid.*
[266] The relevant passage (discussed at par [56]) may be found at 210–211 of Louw's article n 187 above: 'Logic too dictates that we cannot draw a distinction between automatism and lack of self-control...If there is no distinction, then the second leg of the capacity inquiry should logically fall away...Capacity should then be determined solely on the basis of whether a person is able to appreciate the difference between right and wrong. Once an accused is shown to have capacity, the accused may then raise involuntariness as a defence.'
[267] Note 187 above at 207. Louw opines that this 'adds to the confusion' which he argues is a feature of the defence of non-pathological incapacity resulting from provocation and emotional stress. The court acknowledges this criticism, citing the relevant passage at par [55]. Louw's comment on the case is devoid of any consideration of the development of the defence, and focuses in its entirety on the cases of *Moses* and *Nursingh*, along with the *Eadie* judgment.
[268] Louw is at pains to emphasise that the capacity inquiry is subjective (n 187 above at 211 and 216), and proceeds to opine that the reassessment of this test (to incorporate objective factors) is not necessary (at 212).
[269] Note 187 above at 207. The unfortunate use of terminology, leading to such obfuscation, is evident in, *eg*, *S v Aspeling* n 179 above, where having decided that the appellant had not acted on the spur of the moment, but rather having had time to reflect (at 574d–e), the court proceeds to state that the inference is unavoidable that the appellant 'lost control of himself' (575f–g).
[270] Note 187 above at 211.

defining the issue of 'control' that Louw advances his solution, and thus any appropriation of his reasoning by the court needs to take this into account.

It is hardly surprising, given that the SCA referred extensively to his views, and adopted a central tenet of his argument, that in his note on the SCA judgment in *Eadie*,[271] Louw is laudatory, praising the judgment for 'tellingly exposing the fallacy of many loss-of-control defences'[272] and for bringing clarity to this area of the law.[273] Nevertheless, Louw criticises the judgment for not relinquishing the second leg of the capacity test.[274] Somewhat curiously, Louw also continues to criticise the court for adopting an objective test for provocation, based on policy.[275] It is an inevitable consequence of his point of departure that the same test should be employed for sane automatism (which is objectively assessed) and conative capacity that objective policy factors must intrude. Louw concludes that the effect of *Eadie* is to entirely exclude provocation as a defence.[276]

To its credit, the SCA sets out the difficulties that Louw has with the approach of the court *a quo*,[277] even though much of the criticism applies equally to its own judgment. However, this inevitably detracts from the value of Louw's arguments as authority for its approach. After all, unlike Louw, the court holds firm to the possibility of a defence based on provocation excluding capacity, which still consists of a two-stage inquiry into cognitive and conative capacity. The court further chooses not to address the internal inconsistencies of Louw's approach, quite possibly to avoid further undermining the authority of his views, but it is submitted that this oversight, whether deliberate or not, does not render the court's views any more convincing.

There being no difference between sane automatism and non-pathological incapacity, the accused must have acted involuntarily in order to rely on non-pathological incapacity as a defence.[278] In adopting this approach the court does

[271] R Louw '*S v Eadie*: The end of the road for the defence of provocation?' (2003) 16 *SACJ* 200.
[272] *Id* at at 202.
[273] *Id* at 206. This complimentary assertion does not sit well with Louw's criticism of the judgment however.
[274] *Id* at t 205. This criticism should be seen in the light of Louw's equation of the second leg of the capacity inquiry and the inquiry into voluntariness.
[275] *Id* at 206.
[276] *Id* at 204. Louw states that the approach in *Eadie* (involving the adoption of an objective test for capacity) is not the right solution.
[277] See paras [55] and [63].
[278] At par [57]. See Snyman n 6 above at 14, who derives the same conclusion from the court's comments. In the recently reported case of *S v Scholtz* 2006 2 SACR 442 (E), Froneman J interprets the court's comments at paras [57] and [58] as a warning against the tendency to interpret the two legs of the test as separate defences (444h–445b). With respect, such an interpretation is simply not tenable. These paragraphs in *Eadie* deal specifically with the purported overlap between sane automatism and lack of conative capacity. Unfortunately it seems that the court in *Scholtz* has also fallen victim to the same faulty reasoning evidenced in *Eadie*: after finding (at 445h) that the appellant acted consciously and voluntarily ('bewustelik en vrywillig' *ie* not in a state of *sane automatism*), the court concludes that in the absence of further evidence establishing a factual foundation to disturb such finding, the appellant's defence of *non-pathological incapacity* could not succeed (at 445h–i, my emphasis).

not always appear to interpret the term 'involuntary conduct' consistently,[279] yet if it is assumed that the words 'not conscious' and 'involuntary' are used as synonyms, rather than as distinct conditions, then it is evident that the dictum in *Laubscher* must be reinterpreted.[280] The difficulty with this process is that by reading the second leg of the *Laubscher* test as applying to involuntary conduct, one is simply subverting the clear meaning of the dictum. Joubert JA is plainly referring to the mental faculties (*geestesvermoëns*) or psychological condition (*psigiese gesteldheid*) of the accused when he sets out the psychological characteristics (*psigologiese kenmerke*) of criminal capacity: the capacity to distinguish between right and wrong, and the capacity to act in accordance with such distinction. It is submitted that there is no room for the argument that in this context the description of conative capacity as

> [d]ie vermoë om ooreenkomstig daardie onderskeidingsvermoë te handel deurdat hy die weerstandskrag (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te weerstaan ...

can refer to involuntary conduct, as opposed to capacity to control the urge to offend, subjectively assessed.[281]

What of the court's statement that the equivalence between sane automatism and non-pathological incapacity is founded on the previous decisions of 'this Court'? As indicated earlier, this assertion is not supported by previous

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[279]For example, in par [57] the court refers to a person who was unable to exercise control over his movements and acted as an automaton as a result of disintegration of the psyche as follows: 'his acts would then have been unconscious *and* involuntary' (court's emphasis). It is not clear how someone's acts could be unconscious and yet be voluntary, or involuntary and yet be conscious. Snyman's helpful analogy is pertinent: if X's conduct is involuntary, it means that 'X is not the "author" or creator of the act or omission; it means that it is not X who has acted, but rather that the event or occurrence is something *which happened to X*' (writer's emphasis) (n 17 above at 55). This throws into relief a further puzzling comment by the court, that 'the insistence that one should see an involuntary act unconnected to the mental element, in order to maintain a more scientific approach to the law, is with respect, an over-refinement' (par [58]). Once again, if the conduct in question is not voluntary, by definition the mind is non-functional. As Rumpff CJ stated in *Chretien* n 17 above at 1104F–G, in the context of intoxication: 'In die strafreg is 'n handeling alleen dan 'n handeling wanneer dit deur die gees beheer word. In die geval van die onwillekeurige spierbeweging van 'n papdronke is daar geen sweem van beheer nie en is dit dus nie eens nodig om oor skuld te filosofeer nie. Daar is net geen plek vir skuld nie. Ook toerekeningsvatbaarheid kom nie hier te sprake nie'.

[280]See paras [42] and [58], referring to the dictum at 166G–167A of *Laubscher* n 94 above, cited at par [32].

[281]For examples of the applications of the *Laubscher* dictum relating to 'toerekeningsvatbaarheid' see S v Van der Merwe n 81 above at 134–5; *S v Calitz* n 149 above at 126e–f; *S v Wiid* n 148 above at 563h–i; See further the discussion in the *Rumpff Commission Report* n 66 above at par 9 33 and Snyman n 17 above at 162. Thus, where the court seeks to consider whether 'in terms of our law a purely subjective test should be applied when the question of incapacity is raised', there is no indication in the relevant case law preceding *Eadie* (save perhaps *Kensley* – see n 153 above) that any other test could be determinative of this question. As has been pointed out elsewhere (Hoctor n 205 above at 202), there are instances of terminological imprecision in *Laubscher* (n 94 above) – see 171D, 173B – where the court uses the term '(on)willekeurig' ((in)voluntary) in circumstances where incapacity is being discussed. It is evident that no such carelessness has crept into the formulation of the test.

authority.[282] Further, it is noteworthy that the court, despite citing the case of *Chretien*,[283] fails to discuss this decision, and the exposition of the law set out therein,[284] which clearly demarcates the distinct nature of the concepts of automatism, capacity and fault.[285]

The court proceeds to argue that 'the unsatisfactory state of affairs' which allowed the accused in *Moses* to successfully rely on a defence of non-pathological incapacity based on provocation 'arose because of a misapplication and a misreading of the decisions of this Court'.[286] As regards the case law, the court states that in some instances courts have 'resorted to reasoning that is not consistent with the approach of the decisions of this Court', as a result of sympathy with the accused.[287] The court elaborates on its difficulty with the decisions in question:

> When an accused acts in an aggressive goal-directed and focused manner, spurred on by anger or some other emotion, whilst still able to appreciate the

[282]In par [57], Navsa JA refers to 'the highlighted parts of relevant *dicta*' in support of the statement that there is previous authority asserting the equivalence of the concepts. However, it is submitted that all the indicated 'highlighted parts' can be distinguished or explained: the passage from *Chretien* (n 17 above at par [26]) refers to evidential concerns; the inconsistency of the use of the highlighted term 'willekeurig' (voluntary) found at 173B of *Laubscher* (n 94 above, cited at par [32]) with the test at 166G–167A indicates (it is submitted) sloppiness rather than a proper equation of the concepts; similarly the use of the term 'willekeurig' at 569c–d of *Wiid* (n 148 above, cited at par [34]) in the light of the use of the *Laubscher dictum* setting out the test for criminal capacity, and the eventual finding of 'ontoerekeningsvatbaarheid' (569g) should not be regarded as a true equation of the concepts; the judgments in *Potgieter* (n 163 above, cited at par [36]), *Henry* (n 215 above, cited at par [38]) and *Cunningham* (n 154 above 154, cited at par [39]) dealt with automatism and not incapacity (see n216) and all references to 'willekeurig'/'voluntary' conduct should be interpreted accordingly; and the interchangeable discussion of the concepts in *Francis* testifies more to confusion than true equation of the concepts (see n219).

[283]At par [26].

[284]Despite acknowledging the difference between automatism and incapacity as set out in *Chretien* (n 17 above, at par [26]), the court fails to address this statement of the law.

[285]See 1104F–G, 1106E–G.

[286]At par [53], where the court, in apparent justification of this statement, refers to the following passage from Burchell, Milton and Burchell n 13 above at 274, cited at par [24], which clearly distinguishes between automatism and incapacity: '...it does not have to be shown that the accused's conduct was involuntary in the sense that it was automatic or purely reflexive, for then the accused would be exempt from criminal liability on the ground that his act was not one of which the criminal law takes cognisance, and the question of criminal capacity ("toerekeningsvatbaarheid") does not arise. The determining factor, it seems, is the question of self control – whether, in all the circumstances of the case...the accused *"could not resist or refrain from this act, or was unable to control himself to the extent of refraining from committing the act"*.' (court's emphasis). The court states (at par [53]), using the same terms which it highlighted, that the second leg of the test in *Laubscher's* case (n 94 above) 'is read to mean that one looks to see whether in all the circumstances of the case the accused could not resist or refrain from this act or was unable to control himself to the extent of refraining from committing the act'. The difficulty with this statement is simply that the writers were commenting on the law as at 31 December 1982, whilst the *Laubscher* decision was only handed down in 1988! The writers can thus hardly be criticised for 'misreading' this decision. In par [54] Snyman is cited as being culpable on charges of 'misapplication' and 'misreading' for his explanation of the distinction between absence of capacity and involuntary behaviour in *Criminal law* (3ed 1995) 151–2 (and not 152–3, as cited in par [54]).

[287]At par [61] – 'either because of the circumstances in which an offence has been committed, or because the deceased or victim of a violent attack was a particularly vile human being'.

> difference between right and wrong and while still able to direct and control his actions, it stretches credulity when he then claims, after assaulting or killing someone, that at some stage during the directed and planned manouevre [sic] he lost his ability to control his actions. Reduced to its essence it amounts to this: the accused is claiming that his uncontrolled act just happens to coincide with the demise of the person who prior to that act was the object of his anger, jealousy or hatred. As demonstrated courts have accepted such version of events from accused persons.[288]

If taken at face value, this statement appears to be saying that someone who acts with the necessary capacity, and then subsequently claims that he lacked capacity, should not be able to escape liability. This interpretation would however be so self-evidently true that it would scarcely merit mention,[289] and so inevitably one returns to the dictum for an alternative interpretation. Could it be that the court is trying to point out that the acceptance of such a defence is intrinsically problematic? If so, then the response is simply that, confronted with evidence, it is a court's duty and prerogative to evaluate such evidence, and draw conclusions from it. Thus it appears that the concerns raised relate to matters of evidence, rather than to substantive legal rules. Further support for this interpretation can be derived from the court's statement that 'the greater part of the problem lies in the misapplication of the test [for capacity]', including 'a too-ready acceptance of the accused's *ipse dixit* concerning his state of mind'.[290] Once again, it may simply be noted that a court, as final arbiter of fact, has the discretion whether to accept such evidence, and as to what weight should be attached to it. A final comment in this regard is that where an accused raises a defence based on loss of control due to provocation or emotional stress, in terms of the ordinary principles of antecedent liability the accused can still be held liable on grounds of his voluntary conduct and mental state prior to the actual causing of the harm. Thus the spectre of the court being cabined in respect of the assessment of liability by the accused's plea of non-pathological incapacity has no basis in reality, either in respect of the court's treatment of evidence, or in relation to the principles of liability.

The court thus rejects the view allowing a defence of non-pathological incapacity, distinct from automatism, and founded on such factors as 'loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions', as one which 'does violence to the

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[288] At par [61].

[289] The court perpetrates a similar misstatement at par [70], where it holds that '[t]he message that must reach society is that consciously giving in to one's anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law'. This plain meaning of this statement is however so obviously true that one wonders whether this is indeed what the court intended to say. One assumes that the court wished to reiterate the 'message' which forms the rationale of the judgment, such that persons not acting automatically cannot rely on lack of conative capacity as a defence. See Snyman n 6 above at 18.

[290] At par [64]. The court is responding here to Louw's suggestion (n 187 above at 212, cited at par [63]) that the problem with the test for capacity lies not in the subjective aspect of the test, but its application.

fundamentals of any self-respecting system of law'.[291] Despite the reference to 'fundamentals', it is clear that the court does not have in mind the principles foundational to criminal liability, but that instead it is issuing a judgment premised on policy considerations.[292] This is further elucidated by the court's point of departure:

> [I]t is with respect, absurd to postulate that succumbing to temptation may excuse one from criminal liability. One has free choice to succumb to or resist temptation. If one succumbs one must face the responsibility for the consequences.[293]

In response to this, two short comments. First, the policy decisions of the courts,[294] which shape and refashion the common law, 'must ... reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people'.[295] It is ultimately the responsibility of the judge to apply the common values and norms of the community in making his or her decision.[296] In doing so, the judge will often be required to 'perform a balancing act between two competing values, each in itself a worthy and desirable one'.[297] Corbett refers in this regard to the case of *Chretien*, where Rumpff CJ delivered 'a very important policy decision',[298] and where it was necessary to balance 'the need to punish criminal conduct versus the undesirability of penalising a person for conduct for which, owing to voluntary drunkenness, he was not responsible'.[299] It is evident that in *Eadie* it was incumbent on the court to effect a similar balance in relation to provocation or emotional stress. Whether the court arrived at a satisfactory balance (or even set out to do so, referring as it does to 'the message that must reach society'[300]) is indeed questionable – whilst concerns about crime control are indubitably valid, they should not simply be regarded as determinative. In respect of capital punishment, for example, the Constitutional Court did not merely reflexively adopt the majority community view favouring the death penalty.[301]

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[291] At par [60].

[292] Thus, the court refers to the possibility of being excused from liability as a result of 'being overcome by temptation' (and includes the refrain raised by a disgraced former national cricket captain: 'the devil made me do it') (*ibid*). The court later (at par [65]) refers to the need to 'maintain the confidence of the community in our system of justice', an evident policy concern.

[293] At par [60].

[294] Public policy was equated with the legal convictions of the community by Rumpff CJ in *S v Chretien* n 17 above at 1105F–G.

[295] MM Corbett 'Aspects of the role of policy in the evolution of our common law' (1987) 104 *SALJ* 52 at 67.

[296] 'It is these values and norms that the judge must apply in making his decision. And in doing so he must become "the living voice of the people"; he must "know us better than we know ourselves"; he must interpret society to itself' (*ibid*).

[297] *Ibid* 68.

[298] At 66, such that 'public policy...did not require a person to be punished merely because he had voluntarily reached a state in which he could not act juristically or was no longer criminally responsible'.

[299] At 68.

[300] At par [70].

[301] See *S v Makwanyane* 1995 2 SACR 1 (CC).

Second, the statement of the court reflects a misunderstanding of the nature of the defence of non-pathological incapacity. It is precisely where someone does *not* have 'free choice to succumb to or resist temptation' that the defence operates. Where a person is unable to resist the urge to act or to exercise self-control, then there is no capacity to act in accordance with the distinction between right and wrong, and indeed no capacity to choose whether or not to succumb to temptation.

Finally, despite its antipathy towards the notion of conative capacity, the court insists on retaining the two-stage form of the concept of criminal capacity, stating that it is 'notionally possible' albeit 'difficult to visualise' a situation where despite the presence of cognitive capacity, conative capacity is absent.[302] Indeed, despite the court's stated difficulty in conceptualising such a situation, the retention of the traditional test for incapacity by the court necessarily requires that such a situation may arise. By accepting that the current test can still prevail, despite being fundamentally reinterpreted, the court appears to be able to avoid the ticklish problem of overruling the considerable body of contrary precedent which has developed from the case of *Chretien* onwards. However, the solution offered by the court in *Eadie* to resolve the 'vexed question of automatism versus non-pathological criminal incapacity'[303] is in fact, it is submitted, no solution at all. This is because the purported retention of the second leg of the test is nothing of the sort, since the negation of the second leg is effected by a totally different defence, viz automatism, and thus the content of the notion of conative capacity, *ie* whether the accused was able to act in accordance with the distinction between right and wrong, is simply not assessed. Moreover, the subjective test for capacity is replaced by an objectively assessed criterion in the form of the test for sane automatism. If one accepts that the first stage of the inquiry into criminal liability involves the question whether there is an unlawful act (*actus reus*), and that any inquiry into whether there is a blameworthy state of mind is a futile quest until the presence of an unlawful act has been established, then it is clear that the same test – assessing voluntariness – will be employed twice: initially, to establish that the accused acted voluntarily (and that his conduct is thus legally relevant), and then once again, once cognitive capacity is established, in lieu of the test for conative capacity. In the result there is unnecessary duplication and confusion.

It is submitted, in the light of the above criticism, that the revised test for conative capacity, far from presenting a workable solution to any perceived problem with the notion of non-pathological incapacity, only confuses and complicates the legal position, and is thus most unwelcome. Nonetheless, some solace could be found in the fact that there is nevertheless recognition for a place for the defence of non-pathological incapacity, albeit that the defence is severely attenuated by the approach in *Eadie*. Unfortunately even this limited consolation falls away on a closer evaluation of the implications of the solution

[302] At par [59].
[303] At par [55].

proposed in *Eadie*. As Navsa JA has stressed, in terms of the approach in *Eadie*, 'an accused can only lack self-control [*ie* conative capacity] when he is acting in a state of automatism'.[304] However, where automatism is present, this by definition means that the accused's mind is not functioning, or (to use the synonym favoured by Navsa JA) that his acts are 'unconscious'. Hence, where automatism is established, not only would there be a lack of conative capacity (as suggested in the *Eadie* approach), but a total lack of any capacity at all.[305] The incorporation of the test for automatism into the test for capacity must mean that the entire test for capacity is defeated, and falls away. This conflation creates a further difficulty in application in that whilst the presence of automatism defeats the notion of capacity, lack of capacity does not necessarily mean that there is no voluntary conduct.[306] This begs the question, if the same test now applies to both automatism and incapacity, how does one distinguish between the two? Thus, the consequences of the application of the *Eadie* approach is the demise of the defence of non-pathological incapacity based on provocation or emotional stress. Liability will only be excluded where the provocation or emotional stress is of such a nature as to exclude the voluntariness of the accused's conduct.

The writers: Professors Burchell and Snyman

Both Professors Burchell and Snyman have commented at length on the *Eadie* judgment, and on the defence of non-pathological incapacity in general, and so it is very important to briefly consider their views at this juncture.

Burchell

Burchell has praised the judgment in *Eadie* as 'bold' and 'most encouraging' for its emphasis on the 'objective norms of behaviour as a barometer against which to test ... lack of criminal capacity'.[307] This perspective could be anticipated, as over the past two decades, Burchell has consistently argued for a reasonableness standard to be applied in relation to provocation. Thus in 1988 it was argued that 'everyone is capable of controlling his or her emotions even under severe provocation',[308] and that where a person's condition is under his control, the appropriate standard to assess whether criminal liability should follow is

[304] At par [70].

[305] If the accused is acting automatically, there is no question of her having the capacity to distinguish between right and wrong, and thus cognitive capacity cannot be present. As Dr Kaliski testified (at par [14]) in *Eadie*; '[w]hen one acts in this state one's cognitive functions are absent'. Louw's comment (n 187 above at 208) regarding the defences of automatism and incapacity is also apposite: '... either the two defences are distinct or they are the same: they cannot be both the same in some circumstances and distinct in others'.

[306] In the judgment of the court *a quo* (n 146 above at 178b, cited at par [22]), Griesel J evidently does not recognise this point when equating automatism and incapacity in the following terms: '..a person who is deprived of self-control is both incapable of a voluntary act and at the same time lacks criminal capacity'.

[307] JM Burchell 'Criminal justice at the crossroads' (2002) *SALJ* 579 at 587n44, 592n73.

[308] JM Burchell 'Heroes, poltroons and persons of reasonable fortitude – juristic perceptions on killing under compulsion' (1988) 1 *SACJ* 18 at 28.

'whether a reasonable man would have succumbed to the pressure'.[309] Burchell elaborates as follows:[310]

> This approach might also provide an antidote for the untenable, and yet arguably logical, conclusion reached in certain recent South African judgments that extreme provocation (or even emotional distress) can serve to exclude criminal capacity. Surely everyone is *capable* of restraining his or her emotions and so provocation should not be permitted to exclude criminal capacity? However, if provocation impairs the actual exercise of free will to such an extent that a reasonable person in the circumstances would not have been able to control his emotions, then the accused could be acquitted.

This approach was refined and slightly reformulated a few years later where, as an alternative to the 'problem' of provocation and emotional stress possibly leading to an acquittal on the grounds of non-pathological incapacity, it was suggested that a possible approach would be

> ... to accept that *in fact* provocation or emotional stress can exclude capacity in regard to *all* crimes (including murder) but *on grounds of policy* only provocation or emotional stress which would have induced a reasonable person to succumb to the pressure will excuse...in the interests of the security of the community, in cases of violence perpetrated under provocation or emotional stress, only reasonable lack of capacity for self control or reasonable loss of self control should excuse.[311]

Thus, in accordance with the approach in Anglo-American systems, Burchell advocates a 'normative evaluation of how a reasonable person would have acted under the same strain and stress'.[312] By 2001, he goes so far as to flirt with the adoption of the normative fault test, suggesting that legislation be enacted which would institute an objective assessment of conduct, allowing further for an objective assessment of intention in certain circumstances (including provocation or emotional stress), or for negligence to become the fault element in such circumstances.[313] The benefits of allowing a 'judicial value judgment' in dealing with violent conduct committed in these circumstances may, in the author's view,

> ... help to facilitate adherence to norms of reasonable behaviour implicit in the common law of South Africa, and other countries, and reflected in a Constitu-

[309] *Id* at 29.
[310] *Id* at 30 (writer's emphasis).
[311] Burchell and Milton n 8 above at 240 (writers' emphasis)..
[312] Note 186 above at 41.
[313] JM Burchell 'Unravelling compulsion draws provocation and intoxication into focus' 2001 *SACJ* 363 at 370. The normativist hat fits somewhat uneasily however, as is evident from the telling phrase that the suggested approach, allowing for a normative exception to the traditional subjective approach to capacity and intention, would not 'unduly impair' the overall integrity of the general principles of criminal liability (at 371). Any approach which 'impairs' the functioning of the principles of liability is immediately open to question. This approach further envisages a 'return to the pre-1977 position' (*ibid*). However it should be noted that an entirely subjective approach to provocation was established by the Appellate Division by 1971, in the *Mokonto* case.

> tional Bill of Rights that protects the life, physical integrity, dignity and freedom not only of persons accused of criminal conduct, but also of the victims of crime.[314]

In the context of these writings, along with the author's criticism of the 'obsession with subjectivity' which allows a person who commits a crime of violence whilst provoked, voluntarily intoxicated or suffering severe emotional stress, to be assessed against an 'exclusively subjective' concept of capacity and intention,[315] the author's enthusiasm for the judgment in *Eadie* is hardly surprising.

Moreover, it appears that Burchell's discussion of *Eadie* is primarily concerned with buttressing the judgment against any criticism by explaining away apparent inconsistencies. Although Burchell regards himself as 'critical of the apparent approach of the Supreme Court of Appeal in *Eadie* of eliding the voluntariness and conative inquiries',[316] such criticism is limited to describing this feature of the judgment as 'difficult'.[317]

Burchell identifies three possible interpretations of the *Eadie* judgment, which will be examined in turn. The first interpretation, which Burchell submits is the one 'most likely to find resonance in future courts' essentially posits that the judgment should not be seen as an attempt to change the law, but merely an endeavour to emphasise the need to take into account objective factors in the process of inferential reasoning by which the presence or absence of the subjective notion of capacity is assessed.[318] Burchell advances the view that the focus of the *Eadie* judgment is to issue a warning that 'in future the defence of non-pathological incapacity will be scrutinised most carefully',[319] and that the courts must not too readily accept the accused's evidence about her state of mind.[320] Anticipating the argument that *Eadie* has introduced an objective approach to capacity (which he deals with directly later), Burchell argues instead that what is at issue in the judgment is the process of drawing legitimate inferences of the presence or absence of subjectively assessed capacity from objective circumstances, which serves to 'rein in the application of the purely subjective concept of capacity':[321]

> The drawing of legitimate inferences (using objective criteria) helps to place the rule in its true perspective: Every person is presumed to act voluntarily and should control their emotions but, *in very special circumstances*, a person who succumbs to persistent emotional abuse might escape liability by leading

[314]Note 307 above at 592.
[315]Note 313 above at 369; n 307 above at 592.
[316]JM Burchell 'Preface' 2003 *Acta Juridica* xii.
[317]JM Burchell 'A provocative response to subjectivity in the criminal law' 2003 *Acta Juridica* 23 at 34; Burchell n 82 above at 436.
[318]Burchell n 317 above at 27; Burchell n 82 above at 430.
[319]Burchell n 317 above at 431; Burchell n 82 above at 431
[320]Burchell n 317 above at 28; Burchell n 82 above at 430 where par [64] is cited.
[321]Burchell n 317 above 317 at 31; Burchell n 82 above at 434.

> evidence of non-pathological incapacity or automatism, sufficient to raise a reasonable doubt as to the existence of criminal liability. This evidence would, however, have to be tested, at the outset, against the court's expectations drawn from experience.[322]

The use of inferential reasoning would further counteract the inherent dangers in accepting the *ipse dixit* of the accused, according to Burchell.[323]

Whilst it is tempting to adopt this interpretation of *Eadie* – the judgment could then be readily reconciled with the development that preceded it – it is submitted that ultimately this option is not open to the reader. The objectivity issue will be examined in detail below, but at this stage it might simply be noted that employing inferential reasoning is an uncontroversial standard practice in South African criminal law, where direct evidence of state of mind is lacking.[324] Given that these are well-established evidential principles, which have been applied for many years to the defence of provocation,[325] one may wonder why, if Burchell's suggestion is followed, the Supreme Court of Appeal should see fit to engage in a lengthy discourse on the matter? In the course of discussing this argument, Burchell makes two further points relating to scrutiny of evidence that should be noted: firstly, that it is implicit in the *Eadie* judgment that a distinction is drawn between instances of emotional stress that have built up over a long period and instances relating to a sudden flare-up flowing from provocation;[326] and secondly, that psychiatric or psychological evidence as to state of mind is 'notoriously unreliable' as it is based on the accused's *ipse dixit*.[327]

The second interpretation involves a redefinition of capacity, shifting the test for conative capacity from the subjective to the objective domain. Burchell concedes that it is a 'difficult feature' of the *Eadie* judgment that at times it

> seems to regard the second part of the capacity inquiry (*ie* the conative inquiry) as equivalent to the enquiry into voluntariness.[328]

[322]Burchell n 317 above at 33; Burchell n 82 above at 435 (author's emphasis). Burchell posits that whilst this process is not without its dangers, inferential reasoning might provide the best route for courts concerned to curb an 'unbridled' subjective test of capacity (n 317 above at 34; n 82 above at 435).

[323]Burchell n 317 above at 34; Burchell n 82 above at 436. Burchell refers to cases such *Henry* and *Kok* n 317 above at 30 (also n 82 above at 432) in explaining that this approach relates to the inherently objective process of proof, as opposed to the introduction of an objective test. Unfortunately, as noted above, these cases hardly provide a convincing basis for this argument.

[324]Indeed, Burchell eloquently says as much in the course of his discussion of inferential reasoning, n 317 above at 32; n 82 above at 434.

[325]In 1949, Schreiner JA held in *R v Thibani* (n 30 above) at 731 that provocation was to be regarded as a special kind of evidential material (see n33 for full citation).

[326]Burchell n 82 above at 432; (see also n 317 above at 29) where Burchell comments: 'naturally, a gradual disintegration of one's power of self-control is more condonable than a sudden loss of temper'. See Snyman n 65 above at 14, who draws the same distinction in the wake of the 1988 *Laubscher* decision (n 94 above).

[327]Burchell n 317 above at 34; Burchell n 82 above at 436. It is however notable that such evidence was strongly relied on in *Eadie*.

[328]Burchell n317 above at 34; Burchell n 82 above at 436.

Nevertheless, Burchell concludes that the court ultimately adopts the view that the conative inquiry has an independent reason for existence,[329] an approach of which he approves.[330] Burchell notes Navsa JA's conclusion that 'numerous' judgments prior to *Eadie* tend to elide the two defences,[331] as well as Navsa JA's statement agreeing with Louw that there is no distinction between the two defences with regard to provocation and emotional stress.[332] However, Burchell is at pains to stress that the agreement with Louw is limited in nature, in that it merely relates to the fact that where a person acts involuntarily, she will inevitably completely lack *mens rea*.[333] According to Burchell, it is only in this 'limited, and self-explanatory sense' that Navsa JA agrees with Louw.[334] Unfortunately, this is not borne out by the text that follows the stated agreement. Navsa JA states that to require that involuntariness would have to be successfully raised in order to escape liability once cognitive capacity has been established would be 'logical'.[335] It is on the next statement that Burchell's perception of the agreement (with Louw) being limited in nature rests:

> However, the result is the same if an accused's verified defence is that his psyche had disintegrated to such an extent that he was unable to exercise control over his movements and that he acted as an automaton – his acts would then have been unconscious *and* involuntary.[336]

Whatever else one can derive from this statement, this much seems clear: that havingpreviously stated that involuntariness would have to be successfully raised to rely onconative incapacity, the court states that 'the result would be the same' in relation to thedefence of automatism. Thus the inquiries are 'flip sides of the same coin' – same test (involuntariness), same result (acquittal only if, given a factual foundation forinvoluntariness, voluntary conduct is not proven by the State). This is entirely consistentwith Louw's view that the inquiries are equivalent. Whatever doubt remains that this is the court's approach in *Eadie*, is eradicated in the following paragraph, where it is unequivocally stated that, in relation to the second leg of the incapacity test set out in *Laubscher*, the State must prove that the accused's acts were 'consciously directed...the acts must

[329]Burchell cites in this regard the statement by Navsa JA at par [57], that he (Navsa JA) is 'not persuaded' that the second leg of the capacity inquiry should fall away (n 317 above at 34; n 82 above at 436), as well as the statement at par [59] that although difficult, it appears 'notionally possible' that one can retain cognitive capacity but lack conative capacity (n 317 above at 36; n 82 above at 438).

[330]Burchell n 317 above at 35 (also n 82 above at 436). Burchell submits that a distinction needs to be drawn between 'the capacity to act voluntarily or rationally' (conative capacity inquiry) and 'whether the accused actually did act voluntarily' (voluntariness inquiry).

[331]Although, as pointed out (at n216), this conclusion is questionable, given that the cases of *Potgieter*, *Henry* and *Cunningham* all deal exclusively with the defence of sane automatism.

[332]Burchell n 317 above at 35 (also n Burchell n 82 above at 437), referring to par [57].

[333]*Id* at 36; Burchell n 82 above at 437.

[334]*Ibid.*

[335]At par [57]. This statement follows on the assertion that the second leg of the *Laubscher* test should not fall away, which Burchell cites, along with the similar statement at par [59] that the absence of conative capacity where cognitive capacity has been established is 'notionally possible', in support of his interpretation (n 317 above at 36; n 82 above at 438).

[336]At par [57]. See Burchell n 317 above at 36; n 82 above at 438.

not have been involuntary'.[337] Given that the tests are indeed the same, the rationale for the retaining of the conative capacity inquiry becomes slim indeed.Burchell makes it clear, using the example of an eight-year-old child,[338] that his own view is that the two defences are indeed distinct,[339] and that there is thus a place for an inquiry into conative capacity, but notably he then proceeds to describe the condition of lack of conative capacity as not being able to 'reconcile the voluntariness of his conduct with its wrongfulness'.[340] Unfortunately, this formulation does not add clarity where one is seeking to distinguish involuntary conduct from incapacity. Further, Burchell adds that

> ... this inability of the child to control irrational acts might also be compatible with the conduct of the hypothetical reasonable child, in the same circumstances – an additional normative evaluation that, it is submitted, is implicit in the second part of the capacity formulation.[341]

Burchell then deals with the criticism levelled by Navsa JA at writers such as Snyman who support the distinction between the two defences,[342] highlighting the statement that to allow for someone who gives into temptation to be excused from criminal liability 'because he may have been so overcome by the temptation that he lost self control' constitutes 'a variation on the theme: "the devil made me do it"'. Burchell argues that it is clear from the words cited that Navsa JA's criticism is

> ... levelled more at the suggestion that a self-respecting system of law might allow an accused to offer as an excuse for his conduct "temptation" or the exhortations of the "devil", than at challenging the theoretical basis of the distinction...Surely, it is beyond question that the injunction of every system of criminal law must be to resist "temptation", or the "devil" (whoever this entity might be), and to adhere to civilised patterns of behaviour? It is the *criminal law* that sets the standards of normative behaviour that determine the line between innocent and guilty conduct – not the *devil*.[343]

Indeed this is so, but perhaps, after all, the devil is in the details. Navsa JA's statement must be interpreted in the light of the discussion that precedes it, and in the sentence immediately antecedent to that which is cited in part above, Navsa JA states plainly that the view that the defences of non-pathological incapacity and automatism are distinct,

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[337]At par [58].

[338]The child, who is poor and starving, takes a loaf of bread from a shop without paying for it. Whilst his conduct is voluntary, and he can distinguish between right and wrong, on this example the test for conative capacity 'might not be satisfied as the child may be so driven by hunger...[as to] not be capable of acting in accordance with the perceived wrongfulness of his conduct' (n 317 above at 36; n 82 above at 438).

[339]Burchell points out that a conflation of the two defences is 'too simplistic' (n 317 above at 36; n 82 above at 438).

[340]Note 317 above at 36; n 82 above at 438.

[341]Note 317 above at 36; n 82 above at 438. Burchell cites no authority for this interesting proposition, which arises in the context of the third of his possible interpretations of *Eadie* below.

[342]Note 317 at above 37 (also n 82 above at 438), referring to the text at par [60].

[343]Note 317 above at 37 (also n 82 above at 438), author's emphasis.

> followed by an explanation that the former defence is based on loss of control, due to an inability to restrain oneself, or an inability to resist temptation, or an inability to resist one's emotions, does violence to the fundamentals of any self-respecting system of law.[344]

It is hard to imagine a more forthright rejection of the distinction between the defences.

Burchell concludes his consideration of the second possible interpretation of *Eadie* by noting that a number of statements in Navsa JA's judgment 'seem to indicate a drastic curtailing, or even abolishing, of the defence of provocation',[345] in the light of the applicability of the first interpretation (such that the court was concerned with evidential rather than substantive matters) and the extreme unlikelihood that the court in *Eadie* would be unaware of the consequences of overruling existing precedent in favour of a drastic revision of the test of capacity.[346] Any such overruling of precedent would no doubt have a profound effect on South African criminal law, and the consequences that would result would be extraordinary in the extreme where the dismantling and *de facto* abolition of an entire defence occurred by implication. Yet, despite Burchell's valiant efforts to place this judgment in a workable context, the court in *Eadie* is very clear in its intentional rejection of the distinction between sane automatism and non-pathological incapacity, which is consistently upheld throughout the judgment.[347]

Burchell advances a third possible interpretation of *Eadie*, which may be summed up as follows:

> Was Navsa JA in *Eadie*, in fact, simply unearthing an objective aspect of the capacity inquiry, *which had always been implicit in the concept of capacity but not until now judicially acknowledged*?[348]

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[344]At par [60].

[345]Burchell refers (n 317 above 317 at 37–8; n 82 above at 439), without comment, to the astonishing statement of the court in par [51], that in the *Moses* and *Gesualdo* cases '... we appear to have moved from the fundamental position that provocation is a mitigating factor to a position where it has become an exculpatory factor', thus (conveniently) ignoring the entire development of the defence of non-pathological incapacity based on provocation or emotional stress prior to these cases.

[346]Note 317 above at 38 (also n 82 above at 439), where Burchell points out that established precedent would have to be revisited by implication, an approach with potentially grave consequences for the principle of legality by restricting the scope of the defence, and thus increasing the scope of criminality. Earlier, n 317 above at 31 (also n 82 above at 433), Burchell argues that the test of capacity remains subjective, otherwise the court would have to specifically overrule all of the provocation case law, including not only those cases where the defence of non-pathological incapacity succeeded, but also those where the defence failed, but the court acknowledged that in principle it was available.

[347]*Eg* the statement in the final paragraph of the judgment ([70]): 'It must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism'. It is submitted therefore that Burchell's statement (n 317 above at 31; n 82 above at 433) that Navsa JA 'acknowledged that it was not the principle that was at fault, merely its application' cannot be regarded as correct.

[348]Note 317 above at 39; see also Burchell n 82 above at 440, author's emphasis.

Thus Burchell postulates that the court in *Eadie* merely identified an essential, qualified objective aspect in an otherwise subjective test of capacity that had always been lurking there, but had hitherto not been fully recognised by the courts. Though an interesting argument, this 'interpretation' cannot be taken seriously as a rationale for the judgment in light of the fact that the court, by Burchell's admission, was oblivious of this alleged teasing out of such an as-yet-undiscovered objective aspect.[349] In essence, what Burchell is proposing is a new[350] test for conative capacity, comprising both a subjective and an objective criterion:

> If it is correct to regard the second leg of the capacity inquiry as "the capacity to act differently" then this inquiry must imply an evaluation of the accused's conduct against some other standard of conduct, extrinsic to the accused himself or herself. In other words, the test for capacity must have a normative or evaluative dimension, as well as the subjective aspect of determining the accused's conduct *in the circumstances* and against the standard of persons falling into a *particular grouping*.[351]

In adopting this test, Burchell envisages adopting a similar approach to that followed in English law,[352] and incorporating the German concept of 'excuse',[353] without entirely excluding the existing South African law which has been remedied by the adoption of a normative inquiry.[354] As indicated earlier, this approach is entirely consistent with the view that Burchell has held for some time regarding the necessity of an objective element in the test for non-pathological incapacity.[355]

Snyman

Snyman's approach to provocation has evidenced considerable development. Initially, citing the position that provocation does not exclude criminal capacity (*toerekeningsvatbaarheid*),[356] he predicted that the courts would not go as far as to allow provocation to operate as a complete defence,[357] as it would be regarded as relating to affective capacity,[358] rather than cognitive or conative capacity.

[349]Note 317 above at 43; n 82 above at 444–5.
[350]Burchell however suggests that the objective, normative dimension to the subjective test of capacity in South Africa was '*always implicit* in the test and not judicially invented' and that it merely required an observant court to 'identify the already *pre-existing* normative aspect of the test of capacity' (n 317 above At 47; n 317 above 82 at 448, author's emphasis).
[351]Note 317 above at 40; n 82 above at 441, author's emphasis.
[352]Burchell refers to the work of V Tadros 'The Characters of Excuse' (2001) 21(3) *Oxford Journal of Legal Studies* 495 in developing this argument, who works in this tradition.
[353]Note 317 above at 46; n 82 above at 447–8.
[354]*Ibid*. Burchell acknowledges n 317 above at 47n72 (also n 82 above 82 at 448n92) that he is choosing not to 'venture into the murky waters of determining the precise list of factors that are relevant to the "reasonableness" or "normative" inquiry'.
[355]S Pather 'Provocation: acquittals provoke a rethink' (2002) 15 *SACJ* 337, relying on Louw and Burchell, similarly favours a 'partial objective test' for capacity (at 352).
[356]Note 258 above (1981) 157; (1984) 145.
[357]*Ibid* (1981) 163; (1984) 151.
[358]*Ibid* (1981) 163n44; (1984) 151n44. Snyman refers to the *Rumpff Commission Report* n 66 above at par 9.19, where it was stated that a disturbance of the affective mental functions does not lead to incapacity.

Snyman further articulated policy concerns as to why provocation cannot be regarded as a complete defence – that everyone is expected to control his/her temper – and that any defence of provocation would result in people having little incentive to control their emotions.[359]

Writing in 1985,[360] in a note critical of the decision in *Arnold*,[361] Snyman reiterates his views that provocation (or emotional stress) should not be allowed to exclude capacity,[362] and that any such defence would amount to a disturbance in the affective functions excluding liability, which would run contrary to the *Rumpff Commission Report*.[363] Interestingly, Snyman finds support for his view in the writings of De Wet, the foremost protagonist of the notion of *toerekeningsvatbaarheid*).[364] Snyman argues that the policy grounds in support of provocation not being considered a complete defence to murder are 'strong and persuasive',[365] and that to allow such a defence would herald 'another victory for the subjective approach to criminal liability', which in turn raises the concern whether it is not becoming progressively easier 'for those who fall below the standards required by the law to contravene the law with impunity'.[366]

However, by the time the second edition of *Criminal Law* appeared in 1989, it is evident that Snyman's views towards the provocation defence had softened considerably. Snyman acknowledges that provocation[367] and emotional stress[368]

[359] *Ibid* (1981) 158; (1984) 146.
[360] CR Snyman 'Is there such a defence in our criminal law as "emotional stress"'? 1985 *SALJ* 240.
[361] At 243–4, Snyman argues that the accused in *Arnold* n 119 above, should not have been acquitted, but rather should have been held liable for culpable homicide on the basis of antecedent liability.
[362] At 245.
[363] At 249.
[364] *Ibid*. This is as good a place as any to briefly consider De Wet's views on provocation. In the first edition of *De Wet & Swanepoel Strafreg*, n 17 above at 81, De Wet states unequivocally that intense emotional upheaval does not, without more, exclude criminal capacity. Further, it is stated that it is expected of each person to control his urges and passions. However, De Wet then proceeds to state that if a person cannot restrain his urges and passions, he would then lack criminal capacity ('As hy sy drifte en hartstogte nie kan beteuel nie, dan, natuurlik, is hy nie toerekeningsvatbaar nie...'). This statement is in line with De Wet's championing of the psychological approach to criminal liability. Thus it is not significant *why* the accused lacks criminal capacity, but simply that this is so. It is not the urge or passion which serves to render the accused not blameworthy, but rather the fact that he lacked capacity, and therefore could not control his urges (*ibid*). Significantly, the quoted statement is absent from the later editions of *Strafreg*, and thus De Wet is (understandably, if paradoxically) regarded by writers such as Snyman as not supporting a defence based on provocation or emotional stress.
[365] Note 360 above at 248, where the following considerations are set out: that the law expects people to keep their emotions in check, that quick temper or emotional upheaval or impatience is no excuse for criminal conduct, that if such factors did amount to a defence people would have little incentive to control their conduct.
[366] Note 360 above at 250.
[367] *Criminal law* (2ed 1989) 188.
[368] At 195.

could exclude capacity[369] or intent[370] or serve as a mitigating factor.[371] Significantly, the paragraph expressing the policy concerns against provocation constituting a complete defence is excised in this edition, and instead Snyman emphasises that provocation is less morally reprehensible than intoxication, and thus ought to be regarded as a complete defence to liability, as intoxication can be.[372] Snyman further opines that fears of the defence of non-pathological incapacity being abused are unfounded, as the courts can be trusted to analyse the evidence carefully and to guard against any such abuse occurring.[373] He anticipates the establishing of a general defence of non-pathological incapacity which would incorporate provocation and emotional stress,[374] and stresses that provocation should not be viewed as a separate doctrine with its own rules, but rather as

> ... a set of facts to be judged in the light of the general requirements for criminal liability such as an act, unlawfulness, criminal capacity and *mens rea*.[375]

Snyman has consistently advocated these same views in both the third[376] and fourth[377] editions of *Criminal Law*: that the defence of non-pathological incapacity should be viewed as a general defence;[378] that the cause or description of the cause of incapacity is not significant, merely the fact thereof;[379] that the defence should not succeed easily;[380] that expert evidence is not essential for this defence;[381] that the 'general principles' approach is favoured for the defence over the 'separate doctrine' approach;[382] and that provocation or emotional

[369]At 189, 195. Snyman adds the proviso that a proper factual foundation should be laid for such a defence (at 189, 196). See also Snyman n 65 above at 13.
[370]Note 367 above at 190. However, it is pointed out that provocation could also serve to confirm the existence of intention (at 191).
[371]At 191.
[372]At 188.
[373]At 195. See also Snyman n 65 above at 13.
[374]Note 367 above at 195. Snyman states that such a defence would be in accordance with the emergence of a systematic approach to the general requirements of criminal liability (*ibid*). See also Snyman n 65 above at 12.
[375]Snyman cites the writings of Bergenthuin in this regard (at 188). At n 65 above at 11, Snyman states (sharing De Wet's view – see n 364 above) that with regard to this general defence the focus is not on the *cause* of the incapacity, but rather on whether the accused lacked capacity at the time of acting.
[376]The third edition was published in 1995.
[377]The fourth edition was published in 2002.
[378](1995) 152; (2002) 163.
[379](1995) 152; (2002) 164.
[380](1995) 154; (2002) 165. Once again Snyman emphasises that the courts can be trusted to carefully scrutinise the evidence ((1995) 154; (2002) 166).
[381](1995) 154; (2002) 166.
[382](1995) 222; (2002) 235. The 'general principles' approach simply involves an application of the ordinary principles of liability to the defence, whereas the 'separate doctrine' approach seeks to apply a distinct set of rules applicable only to provocation to the defence.

stress can exclude capacity,[383] exclude intent,[384] and serve as a mitigating factor.[385]

In his most recent writing on the subject, Snyman draws a distinction between two differing approaches to provocation:[386] the 'theoretical approach', which focuses solely on the state of mind of the accused, and the 'policy approach', which incorporates objective factors.[387] He states that the 'policy approach' held sway until about 1987 in South African law, when it was replaced by the theoretical approach.[388] It is clear that Snyman's own sympathies lie with the policy approach, and in this regard he praises the judgment in *Eadie* as a 'triumph' for the policy approach to provocation,[389] marking a turning point in the courts' emphasis on subjectivity, and possibly heralding

> ... a long-awaited reintroduction of more objective considerations, thereby ensuring a better balance between subjectivity and objectivity in the construction of criminal liability.[390]

This conclusion is not unexpected given Snyman's long-standing support of the normative approach to liability, as opposed to the prevailing psychological approach.[391] However, notwithstanding this ideological position, Snyman's work has always been characterised by a conscientious adherence to principle, and the above-mentioned systematic approach to liability.[392] Although he would have favoured a policy-based rejection of the defence of non-pathological incapacity,[393] and praises the movement towards a policy approach, Snyman is unable to countenance the fundamental theoretical errors that mar the *Eadie* judgment. He therefore engages in an excoriating critical analysis of Navsa JA's

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[383](1995) 224; (2002) 237. It may be noted that Snyman does not discuss the possibility of extreme provocation giving rise to a state of sane automatism in any of his publications discussing the defence of provocation. JG Bergenthuin 'Provokasie in die Suid-Afrikaanse strafreg' (1986) 98 *De Jure* at 267 specifically excludes the possibility of a defence of sane automatism based on provocation. However, if the 'general principles' approach is to apply, then it must be accepted that provocation can result in automatism. Moreover, *Arnold* is authority for this proposition, as indeed is *Eadie*.

[384](1995) 225; (2002) 237. Provocation may also serve to confirm the presence of intent ((1995) 226; (2002) 238).

[385](1995) 226; (2002) 239.

[386]Note 6 above at 12.

[387]Ibid. Snyman refers in particular to the '...important objective factor...that the law expects people to control their tempers; the ill-tempered should not be afforded the luxury of being treated on a different, more lenient footing; to do so would be tantamount to punishing those who exert themselves to control their behaviour when angered in that they are judged by a more stringent criterion than the ill-tempered'. He cites what he refers to as the eloquently formulated argument of Van den Heever JA in *S v Kensley* n 153 above at 658g–i in this regard.

[388]Note 6 above at 13.

[389]And, concomitantly, 'a defeat of the purely theoretical approach' to provocation (n 6 above at 14).

[390]Note 6 above at 22.

[391]Note 17 above at 150ff.

[392]It is somewhat paradoxical that despite his antipathy for what he terms the 'theoretical approach', Snyman has for some years been the foremost theoretician in South African criminal law.

[393]Note 6 above at 15.

judgment in *Eadie*.[394] His criticism of the conflation of the objective test for automatism and the subjective test for capacity in *Eadie* is incisive, caustic and, it is submitted, compelling.[395] Snyman concludes that despite the court's insistence that the defence of conative incapacity remains intact, the further existence of the defence borders on the theoretical, and may have a ripple effect on other topics within the general principles of criminal law.[396] Despite his unrelenting dissection of the legal flaws in the *Eadie* judgment, in order to accord with the policy approach Snyman feels constrained to welcome the selfsame judgment.[397]

CONCLUSION

If we are to take the words of the *Eadie* judgment at their face value, and it has been argued that there is no reason not to, then we must accept the consequences of Navsa JA's exhortation that 'it must now be clearly understood that an accused can only lack self-control when he is acting in a state of automatism'.[398] It is submitted that the decision of the SCA in *Eadie* is most unwelcome. Far from bringing clarity, as Louw argues, it distorts the clear principled approach developed and applied by the courts.

Louw's point of departure, which is accepted by the court in *Eadie* and finds support in the views of a number of psychiatrists and psychologists,[399] is that the notion of conative capacity and specifically the issue of 'loss of control' cannot be given effective content. On this basis it cannot be distinguished from sane automatism, and thus becomes a redundant and misleading concept, which is best dispensed with.

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[394]At 15: 'navsa JA's treatment of criminal-law theory is unimpressive and unconvincing. He distorts the rational, well-founded arguments underlying criminal-law theory to suit the conclusion he wanted to arrive at, namely that the operation of the defence of non-pathological incapacity should be terminated'.

[395]Snyman explains the difference between voluntary conduct and conative capacity (at 15), making use of examples to illustrate the difference between the concepts – whilst young children between seven and fourteen are able to act voluntarily, they are often found to lack conative capacity (at 16); voluntary conduct in the form of an omission cannot be equated with conative capacity (at 19). Conflation of these notions is incompatible with the provisions of s 78(1) of the Criminal Procedure Act 51 of 1977, as well as the provisions of s 1 of Act 1 of 1988 (at 16), and may lead to 'some of the keystone concepts of criminal liability losing their meaning', as the conduct requirement and capacity requirement would, following *Eadie*, merge into 'one vague, amorphous requirement' (at 17). Snyman further criticises the terminology used in the judgment (at 18), and the court's statement (at par [60]) that a 'loss of control' defence in the form of conative capacity 'does violence to the fundamentals of any self-respecting system of law', the latter criticism in the light of legal systems such as German, Swiss and Austrian law which have such a defence (at 19–20). See also CR Snyman *Criminal law case book* (3ed 2003) 137.

[396]At 22.

[397]'The judgment in *Eadie* marks a turning point in our courts' emphasis on subjectivity, and might herald a long-awaited reintroduction of more objective considerations, thereby ensuring a better balance between subjectivity and objectivity in the construction of criminal liability' (*ibid*).

[398]At par [70].

[399]For a recent example of an expert witness conflating the defences of sane automatism and non-pathological incapacity, see the unreported case of *S v Singh* (2005) (D) CC88/03, at 89.

The idea that the notion of conative capacity lacks content is however mistaken, and may be refuted by an examination of the relevant case law. In a number of cases, the courts define conative capacity in accordance with the formulation in s 78(1) of the Criminal Procedure Act,[400] that is, the ability to act in accordance with the distinction between right and wrong.[401] Numerous cases adopt Joubert JA's classic formulation of the notion in *Laubscher*,[402] which adds the corollary that this ability is premised on the fact that the actor has the capacity for self-control (*weerstandskrag (wilsbeheervermoë)*) such that he can resist the temptation to act unlawfully.[403] Joubert JA adds that another way of describing this capacity is that the actor has the ability to exercise a free choice to act lawfully or unlawfully.[404] It is this notion of capacity for self-control, or ability to exercise a free choice to act lawfully or not, derived from the *Rumpff Commission Report*,[405] that is at the heart of the description of conative capacity in numerous judgments. Whilst some judgments simply cite the dictum in *Laubscher*,[406] others employ the terminology of *weerstandskrag*,[407] others speak of *wilsbeheervermoë* (*of weerstands-vermoë)*,[408] while others make use of *die vermoë ... om ooreenkomstig daardie onderskeidingsvermoë te handel deur die versoeking om wederregtelik op te tree te weerstaan*.[409] Other judgments have phrased the description of conative capacity slightly differently, focusing on whether the accused had the capacity to exercise restraint or control over his actions.[410]

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[400] Act 51 of 1977.

[401] See, *eg*, *S v Lesch* n 73 above at 823B; *S v Campher* n 93 above at 966D–E; *S v Kalogoropoulos* n 154 above at 17c; *S v Els* n 155 above at 735c; *S v Shapiro* n 173 above at 123e–f; *S v Pederson* n 154 above at 397g, 399j–400a; *S v Kali* n 163 above at 204h. See also *S v Saaiman* n 72 above at 441D–E.

[402] 1661–J, cited at n 145 above.

[403] '... deurdat hy die weerstandskrag (wilsbeheervermoë) het om die versoeking om wederregtelik te handel, te weerstaan' (*ibid*). Navsa JA's comments at par [60] (cited at n250) are nothing less than a direct, if unstated, assault on this formulation.

[404] Note 94 above at 1661–J. The full expression is 'hy het die vermoë tot vrye keuse om regmatig of onregmatig te handel, onderworpe aan sy wil'. However, it is submitted that the concluding phrase 'onderworpe aan sy wil' ('subject to his will') is at best redundant, and if incorrectly regarded as making reference to the voluntariness requirement, may further be the source of some confusion. The statement is entirely clear in meaning, and does not require any further qualification – after all, if the accused's acts are not subject to his will, then he simply is not acting for the purposes of criminal liability.

[405] See n 73 , where par 9.33 is cited. Snyman has usefully reformulated the essence of the statement in the report (n 6 above at 15): '..the ability to set himself or herself a goal, to pursue it, and to resist impulses or desires to act in a manner contrary to what his or her insights into right and wrong reveal to him or her'.

[406] See, *eg*, *S v Wiid* n 148 above at 563f–j; *S v Van der Sandt* n 158 above at 635e–i.

[407] *S v Lesch* n 73 above at 823H; *S v Campher* n 93 above at 949H, 950H–I, 951F–G, 956B.

[408] S v Van der Merwe n 81 above.

[409] S v Calitz n 149 above at 128e–f.

[410] S v Ingram n 154 above at 4f, 7b–c, 8b–c. In *S v Van Vuuren* n 112 above at 17F–G the court cites the *Chretien* (n 17 above) dictum at 1106, where the enquiry is whether the accused's inhibitions had 'wesenlik verkrummel' ('essentially crumbled'); in *S v Adams* n 90 above at 903D the court held that the appellant's 'inhibitions were completely disintegrated'; in *S v Nursingh* the court held (n 183 above at 338h–i) that the accused's rage was 'irrational, unthinking and blind to all restraint'; and in *S v Moses* the court accepted the expert evidence that the accused's rage had 'collapsed his controls' (n 80 above at 709g–h) and impaired (see n201) his 'capacity to retain control' (710h–i). In *S v Campher* n 93 above at 957H–I, Viljoen JA refers

Thus, it is submitted, the judicial interpretation of the notion of conative capacity (and 'loss of control' in this context) is clear, and such authority is further buttressed by the views of the writers,[411] and even psychologists,[412] who give content to the notion. To adopt Ashworth's turn of phrase, in each case the court will have to decide whether the accused's behaviour during his or her loss of self-control is 'uncontrollable' (indicating a lack of choice and thus a lack of conative capacity) rather than merely 'uncontrolled' (indicating a choice to give vent to his or her passions or emotions).[413] Furthermore, it is submitted that any distinction between provocation or emotional stress as a source of the defence of non-pathological incapacity must relate to only evidential matters only, for in principle it does not matter what excludes capacity, but rather that capacity has been excluded, for the purposes of the defence.[414]

What then of the policy-based objections to provocation being a complete defence? Prior to *Eadie*, it seems that the strongest authority for a policy-based approach may be found in Van den Heever JA's statement in *Kensley*,[415] which appears to posit that the subjective lack of self-control flowing from provocation be assessed against a normative standard.[416] Stressing the need to keep one's emotions in check, Van den Heever JA indicates that the danger of a subjective assessment of the accused's capacity is that

> virtue would be punished and indiscipline rewarded: the short-tempered man absolved for the lack of self-control required of his more restrained brother.[417]

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to the appellant's defence as 'onweerstaanbare drang' ('irresistible urge or impulse'), which he elaborates on at 958I: '..die remmende effek teen of inhibering van die drang om die monster...te vernietig, heeltemal meegegee het' ('the braking effect against or inhibition of the urge to destroy the monster completely gave way'). A more generic loss of self-control is referred to in *S v Kalogoropoulos* n 154 above at 24a, 26a; and *S v Gesualdo* n 154 above at 75b, 77g. See also *S v Makete* n 72 above at 215D–E for an earlier formulation of conative capacity in these terms.

[411]See FFW van Oosten 'non-pathological criminal incapacity versus pathological criminal incapacity' 1993 *SACJ* 127 at 129; PA Carstens & J le Roux 'The defence of non-pathological incapacity with reference to the battered wife who kills her abusive husband' 2000 *SACJ* 180 at 181; Snyman n 6 above at 15; Burchell n 82 above at 425.

[412]See, *eg*, Dr Plomp in *S v Calitz* n 149 above at 125f–g, Mr Carr in *S v Gesualdo* n 154 above at 75a–b, and Professor Schlebusch in *S v McDonald* n 167 above at 499e–g. See also RP van der Merwe 'Sielkundige perspektiewe op tydelike nie-patologiese ontoerekeningsvatbaarheid' 1997 *Obiter* 138 at 139:

'Onder "weerstand" moet dus verstaan word die vermoë van die dader (sy selfbeheer of wilsbeheer) om op grond van sy insig in die verkeerdheid van 'n bepaalde handeling, die uitvoer van daardie handeling teen te werk. Ontbreek die nodige weerstand in die individu, dan beskik hy nie oor die vermoë, en is hy gevolglik nie in staat tot 'n vrye wilskeuse, 'n wilsbesluit of 'n wilshandeling teen die uitvoer van die daad nie.'

[413]See A Ashworth *Principles of criminal law* (3ed 1999) 236.

[414]See n364 and n379 for further support of this view.

[415]Note 153 above at 658h–j, cited at n254 .

[416]N Boister 'General principles of liability' 1995 *SACJ* 367 at 368. This is essentially the approach that Burchell sets out in his third 'interpretation' of *Eadie* (see n348-351), although not discussed in this context by the author. The discussion will proceed on the assumption that this interpretation of the dictum in *Kensley* is correct, although it is submitted that the context of the dictum should not be overlooked – see n 428 below.

[417]Note 153 above at 658h–i. See also Snyman n 360 above at 248, 251.

It should, however, be noted that there are difficulties with this argument, as the good-tempered person does not fall within the bounds of a test penalising unreasonable response to provocation.[418] As Christie points out, the real objection is to allow the bad-tempered man to use his bad temper as an excuse:

> But to refuse to allow this "may be in effect to inflict punishment not so much in respect of the particular act of deliberate malice, as of a want of habitual control over a mind naturally impetuous and ready to break forth on slight occasions". It would be as illogical as punishing a drunk man for his drunkenness by convicting him of murder ... .[419]

Further, it may be argued that the broadening of the defence of non-pathological incapacity is indeed a positive development on policy grounds. In the words of Milton:

> punishment is only properly inflicted when it is deserved; ... desert follows from individual blameworthiness; ... blameworthiness is a function of decisions made with a mature free will and a conscious awareness of wrongdoing. One who because of ... emotional turmoil is unable to distinguish right from wrong or control his actions accordingly, is not blameworthy and thus ought not to be punished.[420]

Milton notes that the preference for the principle-based or psychological approach to liability over the 'socially expedient doctrines that denied exculpatory effect' to such matters as ignorance of the law or voluntary intoxication reflects 'characteristic due process of law value'.[421] Moreover, it has

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[418] As MGA Christie states (*The criminal law of Scotland* (3ed 2001) Vol II par 25.33) in response to the statement that a subjective test for provocation may give rise to a situation where 'a bad-tempered man would be acquitted and a good-tempered man would be hanged': '[T]he good-tempered man will never need to invoke the plea of provocation, because he will never be provoked into killing anyone. If the good-tempered man *is* the reasonable man he will be provoked only by what would provoke the reasonable man, and so will never be hanged. The good-tempered man cannot be hanged on the objective test, and no man, good- or bad-tempered, can be hanged on the subjective test if he was in fact provoked so as to lose control. The good-tempered man cannot be affected by the extension of a rule of law which at its narrowest is sufficient to protect him'. See also Dugard n 55 above at 265–6 and the authorities cited there. As Schreiner JA stated in *R v Krull* n 43 above at 397A: 'I do not find it unreasonable that...a bad-tempered man should be acquitted while a good-tempered one should hang. The latter is no doubt a more satisfactory human, but the accused in a murder case is not being tried on his general merits or demerits'.

[419] Note 418 above at par 25.33, citing the Fourth Report of the Criminal Law Commissioners, xxxviii, Parl Papers, 1839, xix, Digest, Art. 43, n (i).

[420] JRL Milton 'Criminal law in South Africa 1976–1986' 1987 *Acta Juridica* 34 at 43. These remarks were made in the context of the cases of *Chretien* n 17 above and *Arnold* n 119 above.

[421] *Ibid*. Earlier (at 35), Milton distinguishes between the crime control model and the due process model as follows:
'The crime control model, in essence, has as its central value the effective, efficient prevention of crime. Its methods and techniques are structured and applied to this end, valuing efficiency above formality, speed above deliberation, results above means. The due process model, by contrast, in essence has as its central value the protection of the constitutionally recognised civil liberties and human rights of the citizenry. Its methods and techniques are thus structured as a system of checks designed to ensure that the citizen taken up in the process is not denied any constitutional right to which he is entitled under the law of the land. The due process model thus values reliability above efficiency, formality above speed, means above ends.'

been argued that provocation 'almost invariably entails no moral wrong in itself on the accused's part',[422] and indeed, Aristotle has argued that anger is a socially respected emotion which may, within limits, constitute a proper response to certain behaviour by others.[423]

It is submitted that the subjectively assessed defence of non-pathological incapacity based on provocation or emotional stress developed by the courts over a period of some three decades is not in need of amendment. Such difficulties as there are have arisen in relation to evidential matters and thus if amendment is required this is where the focus should be.[424] Even in *Eadie*, the court acknowledged the importance of a proper application of the legal rules,[425] although this did not prevent the court from trying to effect a change to the substantive law. It is significant that in the case on which much of the development of the defence of non-pathological incapacity is based, *Chretien*, Rumpff CJ was at pains to stress the importance of proper application of the law, and that any perceived problems with the defence of non-pathological incapacity based on voluntary intoxication lay with the application of the principle (that voluntary intoxication could be a complete defence), rather than with the principle itself.[426] Rumpff states that a court which too readily or easily accepted that an intoxicated person who, for example, rapes or attempts to rape a woman was not aware of what he was doing, and thus lacking criminal capacity and deserving of an acquittal, would quickly bring the law into disrepute.[427] Surely the same argument applies to a defence based on provocation or emotional stress? Navsa JA in *Eadie* stressed the too-ready acceptance of the accused's evidence as to his state of mind.[428] However, whilst no one would dispute that 'the courts must be careful to rely on sound evidence',[429] it

[422]Burchell and Hunt n 33 above at 241n17.
[423]*Nicomachean Ethics* Bk V 8, cited in Ashworth n 413 above at 237–8.
[424]This argument could certainly be raised in respect of the cases of *Arnold* (n 119 above) and *Nursingh* (n 183 above), where the State failed to lead any psychiatric evidence. The need to deal with evidentiary issues in the light of questionable acquittals is acknowledged in the second edition of *Principles of Criminal Law*, where (n 186 above at 287) Burchell and Milton propose some practical solutions to deal with the problems associated with the leading of expert evidence in cases relating to provocation or emotional stress. This discussion is however not carried forward into the third edition.
[425]At par [64].
[426]Note 17 above at 1105H.
[427]*Ibid.*
[428]At par [64]. It is noteworthy that the dictum in *Kensley* (n 153 above) at 658h–i, discussed at n 415 and accompanying text above, appears in the course of a discussion of evidential matters (such as the onus of proof (at 658f–g), the need for great caution where the only basis for the defence is the accused's *ipse dixit* (at 658g–h), and the need to subject the evidence on which a defence of non-pathological incapacity flowing from provocation or emotional stress is based to careful scrutiny (at 658j)) in the course of the court's evaluation of the evidence of the appellant's conduct. It is submitted that the references to normative factors, which appear in the midst of these cautionary remarks relating to evidentiary matters, and are not identified as being distinct from or unrelated to these remarks by Van den Heever JA, should be interpreted in this light. Thus these comments are perhaps rather less significant from a substantive criminal law perspective than might appear to be the case if they were excised from this context and examined at face value.
[429]At par [70].

is equally incumbent on the court to apply sound principles, and certainly, not to alter the principles in order to somehow resolve evidential difficulties.

It is axiomatic that irrespective of the expert psychiatric evidence that is led on behalf of the accused, it is the court that is the final arbiter of the accused's state of mind at the time of her unlawful act.[430] Thus a court should neither be carried away nor cowed by expert evidence,[431] but should simply see such testimony as one part of the evidence before it. As Kriegler J (as he then was) explained in relation to the enquiry into *mens rea* in *S v Makhubele*:[432]

> It is, of course, a subjective enquiry. What is to be investigated is the accused's state of mind at the time he inflicted the stabwound. That being the case, the accused's evidence of what was going on in his mind, what his thoughts were, what emotions he felt, what urges or impulses, is of vital importance. That evidence is to be evaluated in the context of the evidential material as a whole, the ultimate objective being to establish as best as one can, from fallible data and with imperfect knowledge of the functioning of human volition, what the accused's state of mind was at the time in question.

Certainly the process of inferential reasoning would play a crucial role in establishing state of mind. For example, it was held by Smalberger JA in *S v Ingram* that

> [t]he longer the time lapse before the shooting, the more complex the intervening actions, the less likely it becomes that the appellant acted out of control because of an inability to restrain himself.[433]

In the same vein, in *S v Van der Sandt* the court examined the evidence of the accused's conduct, and concluded that he had acted in a logical and purposeful manner.[434]

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[430]In *R v Harris* n 167 above at 365B-C, Ogilvie Thompson JA stated the following:'... in the ultimate analysis, the crucial issue of appellant's criminal responsibility for his actions at the relevant time is a matter to be determined, not by the psychiatrists, but by the Court itself. In determining that issue, the Court – initially the trial Court; and, on appeal, this Court – must of necessity have regard not only to the expert medical evidence but also to all the other facts of the case, including the reliability of appellant as a witness and the nature of his proved actions throughout the relevant period.'

[431]The recent case of *S v Engelbrecht* 2005 2 SACR 41 (W) at par [26] provides a useful summary of the principles applicable to the admissibility of such evidence: 'Firstly, the matter in respect of which the witness is called to give evidence should call for specialised skill and knowledge. Secondly, the witness must be a person with experience or skill to render her or him an expert in a particular subject. Thirdly, the guidance offered by the expert should be sufficiently relevant to the matter in issue to be determined by the Court. Fourth, the expertise of any witness should not be elevated to such heights that the Court's own capabilities and responsibilities are abrogated. Fifth, the opinion offered to the Court must be proved by admissible evidence, either facts within the personal knowledge of the expert or on the basis of facts proven by others. Sixth, the opinion of such a witness must not usurp the function of the Court'.

[432]1987 2 SA 541 (T) at 546F–G.

[433]Note 154 above at 7b–c.

[434]Note 158 above at 640i–j.

A final word on evidential matters: it is submitted that the confusion that has arisen in the *substantive* law regarding the distinction between sane automatism and non-pathological incapacity has its roots in the indiscriminate use of *evidential* dicta, which have tended to deal with the defences in the same terms.[435] Whilst the respective defences may well use similar evidential principles, it is important not to blur the crucial substantive distinction between the defences by undiscriminating citation of dicta relating to matters of proof. The fundamental distinction bears iteration in this context: in establishing the presence of automatism, the court resorts to an *objective* test focusing on the nature of the accused's conduct, whereas in relation to non-pathological incapacity the test is *subjective*, notwithstanding the invariable use of inferential reasoning to seek to establish the accused's *state of mind*.[436]

In the final analysis, the *Eadie* decision's equation of automatism and incapacity is extremely problematic. By blurring the fundamental distinction between objective and subjective elements of liability, the court has marched our law straight back into the past, where intention could be established on the basis of objective factors.[437] Moreover, as argued above, it has essentially abolished the defence of non-pathological incapacity.[438] Notwithstanding Navsa JA's assurance that the test for capacity retains both a cognitive and conative leg, the practical effects of the *Eadie* judgment militates against this.

Far from ushering in a constitutionally sensitive policy approach based on reasonableness,[439] the *Eadie* judgment subverts the foundational requirement that it is as autonomous moral agents[440] with an entitlement to freedom of action and the ability to exercise self-determination in their choice of actions that persons are assessed.[441] Thus any attempt to assess criminal liability without the

[435]See, *eg*, *S v Potgieter* n 163 above at 72h–73b, where although the judgment deals with sane automatism, sources relating to non-pathological incapacity (*S v Kalogoropoulos, S v Laubscher, S v Calitz, S v Wiid)* are cited. In *S v Cunningham* n 154 above at 635i, sources dealing with non-pathological incapacity (*S v Campher*) are cited, although the judgment deals with sane automatism. Likewise in *S v Henry* n 215 at 19j *(S v Kalogoropoulos, S v Kensley*). On the other hand, *eg*, dicta relating to proof of sane automatism in *S v Cunningham* are cited in the Cape case of *S v Eadie* n 146 above at 177h–j, and in *S v McDonald* n 167 above at 500d–e. Moreover, in *Eadie* (at par [2]) Navsa JA cited the cases of *Potgieter*, *Cunningham*, and *Francis* as authority for the evidential matters relating to the defence of 'temporary non-pathological criminal incapacity', despite the fact that these cases all deal with the defence of sane automatism. Contrast this with the eminently sound approach to evidential matters in the context of a defence of non-pathological incapacity in *S v Kalogoropoulos* n 154 above.

[436]And, as Lord Justice Bowen robustly asserted, 'the state of a man's mind is as much a fact as the state of his digestion' (*Edgington v Fitzmaurice* (1885) 29 Ch D 459, cited by Hart n 4 above at 188).

[437]See n 26 above and accompanying text . Further, the practical effect of the judgment is to further limit the legal options of a battered spouse or partner who kills her abuser, by excluding the one defence properly available to the accused in this situation.

[438]See n 305 above and accompanying text.

[439]See Burchell's comments n 82 above at 439–440.

[440]Ashworth n 413 above at 27 notes that '[o]ne of the fundamental concepts in the justification of criminal laws is the principle of individual autonomy – that each individual should be treated as responsible for his or her own behaviour'.

[441]SV Hoctor 'Dignity, criminal law and the Bill of Rights' 2004 *SALJ* 304 at 309.

subjectively assessed capacity to choose how to act is a clear infringement of the right to dignity, which is the constitutional basis of the principle of culpability.[442] As Kremnitzer states:

> Basic to constitutional law and criminal law is a shared image of human beings. It is a conception of human beings as "morally" autonomous, with the basic faculty to understand reality and distinguish right from wrong, able to contribute to developing social norms and to understand and internalize them, competent to decide how to act and capable of realizing that decision. This conception dictates the boundaries of the penal law and influences the principles of criminal responsibility, both qualitatively and quantitatively: A person who lacks such basic ability (lack of competence), or who, in a given situation, cannot refrain from acting (lack of control) is not subject to the criminal law.[443]

In the light of these concerns, it is submitted that an attempt to institute an objective test for conative capacity is susceptible to constitutional challenge for unjustifiably infringing the accused's rights to dignity[444] and freedom and security of the person.[445]

What then should be made of *Eadie*? Snyman has indicated his concern for the potential 'ripple effect' that the judgment might have,[446] and has sought to limit its application to factual scenarios involving provocation.[447] Whilst a clarificatory judgment from the Supreme Court of Appeal overruling *Eadie* would undoubtedly be the first prize, perhaps, in the absence of such a direct ruling, there is yet cause for optimism. It is hoped that a similar development will occur as with the case of *S v Goosen*,[448] where the Appellate Division held that a mistake as to the causal chain of events does exclude intention, where there is a material difference between the actual chain of events and the chain of events

[442]See also JMT Labuschagne 'Strafregtelike menseregte' 1987 *Tydskrif vir Regswetenskap* 215: 'Tog is daar twee strafregtelike reëls wat myns insiens tot die vlak van menseregte verhef behoort te word. Eerstens behoort 'n mens slegs gestraf te word vir handelinge (en lates) wat hy kan beheer. Tweedens behoort 'n mens slegs gestraf te word vir dit wat tot sy bewussyn herleibaar is. Dit skend die menslike individualiteit en waardigheid om hom te onderwerp aan die (sosiale) vernedering van bestraffing vir aangeleenthede waaroor hy nie beheer gehad het nie of waarvan hy nie bewus was nie.'

[443]M Kremnitzer 'Constitutional principles and criminal law' 1993 *Israel Law Review* 84. Hart n 4 above at 152 states that where the capacities for doing what the law requires and abstaining from what it forbids, and the fair opportunity to exercise these capacities, are absent, 'the moral protest is that it is morally wrong to punish because "he could not have helped it" or "he could not have done otherwise" or "he had no real choice"'.

[444]Section 10 of the 1996 Constitution.

[445]Section 12(1)(a) of the 1996 Constitution. VV Ramraj 'Freedom of the person and the principles of criminal fault' 2002 *SAJHR* 225 at 241 points out that retributive justice is rooted in a concept of the person as a responsible moral agent who, in normal circumstances, can freely choose to do wrong, and that it is precisely this free choice to do wrong which justifies the imposition of punishment.

[446]Note 6 above at 22.

[447]CR Snyman *Strafreg* (5ed 2006) 167.

[448]1989 4 SA 1013 (A).

envisaged by the accused.[449] In the subsequent cases of *S v Nair*[450] and *S v Lungile*[451] the Supreme Court of Appeal has simply (and tellingly) ignored the precedent in *Goosen* in finding the accused guilty of murder. The hope is thus that the courts will continue to build on the strong precedent pre-*Eadie* and that ultimately this judgment will become, in the evocative words of the great US Supreme Court judge Felix Frankfurter, 'a derelict on the waters of the law'.[452]

[449]For cogent criticism of the *Goosen* decision, with which I respectfully concur, see Snyman n 17 above at 193 5.
[450]1993 2 SACR 451 (A).
[451]1999 2 SACR 597 (SCA).
[452]*Lambert v California* 355 US 225 (1957) at 232.

Trafficking in human beings

Barbara Huber[*]

THE ACTUAL PROBLEM

Now and then e-mails appear on my screen, saying: 'We are Russian marriage agency. We are looking for business partner from Germany. You can earn some cash for the small help in one matter.' (Accepting this offer would probably make me a member of an organisation that trafficks in women.)

Organised crime in Europe takes many forms and involves a large variety of criminal activities, a number of European countries offering a diversity of cultural, economic, and social dispensations at divergent levels of development. Amongst the three main crime markets common to most countries, however, we find – next to fraud and other forms of economic crime, drug production and trafficking – the smuggling of persons and trafficking in human beings.[1] Unlike drug trafficking and economic crime, the trade in humans and the smuggling of persons have only recently been perceived as a key problem of organised crime. This is despite the fact that the Council of Europe has sounded the alarm for over ten years, and has drawn the attention of the member states and other international organisations to the vital need for cooperation in combating trafficking. The topic increasingly attracted the interest of researchers (mainly from interested groups lobbying for victims[2]) during the nineties.[3]

Nearly all countries in Europe are involved: the Eastern countries provide the trafficked persons, who are then exploited in the more affluent markets of Western societies. On the providing side are the networks in Albania, Bulgaria, Croatia, the Czech Republic, Latvia, Lithuania, Moldova, Romania, Slovakia, Macedonia, Turkey, and the Ukraine. The 'receiving countries' are Belgium, Finland, Germany Norway and Switzerland. One can also add Spain, Italy, and Great Britain to this list, because in these countries there is a great demand for sexual and other services offered by organised groups.[4] However, trafficked persons also come from sub-Saharan African countries, via northern Africa, to Italy and Spain; from Asian countries, through the Central Asian Republics, to Russia, and from there, via Ukraine, Slovakia, and the Czech Republic, to western Europe. Another route from Asia runs via Iran and Turkey along the

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[1]Council of Europe *Organised crime situation report 2004* Strasbourg 23 Dec 2004, 14.

[2]F Laczko, E Gozdziak, (eds) 'Data and research in human trafficking: global survey' 2005 *Special Issue of International Migration* 43.

[3]F Laczko 'Introduction' in: Laczko, Gozdziak n 2 above at 5*ff*.

[4]According to the observations of the Guardia Civil in Spain, the number of prostitutes working in the chains of brothels alongside the roads has doubled between 1999 and 2004; 98 per cent of the women originate from Romania, Russia, Nigeria, Ethiopia, Brazil, Colombia, and Venezuela. The turnover/returns achieved by this business are estimated at 40 million Euro per day. See *Frankfurter Allgemeine Zeitung* 22.09.2005.

classical Balkan route to western Europe while Latin American countries are the countries of origin for people who end up mainly in Spain or Portugal.[5] The thriving sex industry in Japan remains a lucrative destination for those who traffic women from Thailand, the Philippines, Colombia and Belarus.[6]

The factors that make migration possible are the fall of communism, ethnic and religious conflicts like the wars in the Balkans, the impoverishment of populations subjected to new market economics, political instability, the crisis of welfare systems and the general developments of the past fifteen years in central and eastern Europe which, in turn, have given a great boost to the trafficking of human beings in Europe. Albrecht points out that the opening of borders[7] and organised crime groups and their networks exert a lesser influence, because such groups only take advantage of the demand in the market.[8] Illegal immigration to western European countries is fuelled by the demand for work, safer social security systems and political stability. The sexual services market is considered a major force in encouraging trafficking, and the large majority of victims is found in the ever-expanding prostitution sector.

Although major trafficking takes place trans-nationally, domestic trafficking from rural to urban areas in many central and eastern European countries is on the increase owing to the growing demand for sexual services.[9]

What then is the dimension of the crime problem and the figures we have to confront when dealing with those who have been subjected to trafficking in Europe? There are no accurate statistical figures available to account for these modern slaves in the heart of Europe, a fact confirmed by the various police services, NGOs and various international organisations. Estimates put the number of women trafficked from eastern to western European countries at 200 000 to 500 000.[10] Global estimates of transferred women and children approach 700 000 to one million.[11] Other estimates involve one to two million females trafficked each year globally, for the purposes of forced labour, domestic servitude and sexual exploitation.[12] The number of children used for

[5]Www.interpol.org.
[6]In 2000 120 000 foreign women worked in Japan's sex industry, 75 000 of whom were being held against their will. The underground sex trade is described as being worth £43 billion; see *The Times* 11.10.2005.
[7]Another opinion, however, is that of V Musacchio 'Migration connected with trafficking in women and prostitution: an overview' (2004) 9 *German Law Journal* 5; see also L Brussa *Survey on prostitution, migration and traffic in women: history and current situation* Eur Consult Ass (1991).
[8]HJ Albrecht 'Trafficking in humans' (unpublished paper 2005) 13.
[9]Council of Europe n 1 above at 25.
[10]See Albrecht n 8 above at 13 for further references.
[11]US Department of State *Trafficking in persons Report 2001* Washington 2002; see also Albrecht n 8 above at 13.
[12]See Albrecht note 8 above at 13 for references.

commercial sexual exploitation is estimated at some 650 000.[13] UNICEF provides a figure of 1.2 million children trafficked every year for sexual and labour exploitation, illegal adoption, child soldiering and other forms of exploitation.[14] UNICEF estimates that in Indonesia alone 70 000 children are forced annually to deliver sexual services and the International Labour Organisation estimated that, in Vietnam, twenty per cent of all children are working in this field. Young boys from Cambodia are in demand as 'professional' beggars. The most recent trend is enforced marriages between women from Vietnam, Laos or Northern Thailand and Chinese men from rural China, where women are in the minority because of an official one-child policy and the abortion of female foetuses (a phenomenon deriving from the preference for male offspring).[15]

UNICEF's reaction also shows a growing awareness of the trafficking problem. In Africa, at least half of all countries report the existence of trafficking from and into other countries on the continent and also to Europe and Middle Eastern countries.[16]

What is certain is that most victims of trafficking activities are women and girls, including those under the age of eighteen.[17] Indeed, in some south-eastern European countries fifty per cent of victims are reportedly below the age of eighteen. Young women are enticed by offers of employment abroad as dancers, bar hostesses or au pairs and end up, sold and in debt, on the pavements of some foreign country. Even those who are aware that they are heading for prostitution have no idea of the violence involved and the working conditions they might encounter. When women are forced into other types of work, they have no residence or work permit and are thus totally dependent on their employers, administratively and financially while often having to endure inhumane conditions and constant intimidation as female domestic slaves.

[13] *Trafficking in women and girls: an international human rights violation* (Fact Sheet released by the Senior Coordinator for International Women's Issues, Department of State, 10 March 1998); see M Akullo 'Child trafficking:a Metropolitan Police Service perspective'(2005) 2 *SIAK Journal Zeitschrift für Polizeiwissenschaft und Polizeiliche Praxis* 24–37, presenting a feasible approach to the investigation of possible child trafficking cases.

[14] 'Oral report on the global challenge of child trafficking – background paper' UNICEF Executive Board, 1st regular session 2004.

[15] *Badische Zeitung* 17.1. 2005.

[16] For more details, see UNICEF Innocenti Research Centre *Media facts: trafficking in human beings, especially women and children in Africa* 23 April 2004.

[17] *Save the children* (2004); the regions of the Czech republic bordering Germany and Austria are an area of destination for children trafficked from other eastern European countries by organised crime networks and serving as prostitutes for clients from Austria, Germany and other European countries: see Bell/Pickar (2003). In Switzerland we find foreign children smuggled into the country for the purpose of drug trafficking, theft and prostitution as well as illegal adoption, see Council of Europe n 1 above at 24.

LEGAL FRAMEWORK – SUPRA-NATIONAL

We have seen that the problem is a global one: no region seems to have been successful at eradicating slavery. The phenomenon of modern slavery, which is inextricably linked with trafficking in human beings and illegal migration, has attracted the attention of the international community.[18] At the UN and in Europe it has been the subject of several instruments and other measures that focus increasingly on prevention, the human rights aspects of the problem, the harmonisation of national laws, stronger cooperation between investigating and prosecuting authorities and the creation of supplementary measures for the victims.

International instruments clearly differentiate between the two aspects of human trafficking between states: the trafficking of persons and the smuggling of migrants. While the latter (by which I mean the profit-motivated assistance of people seeking to illegally enter or stay in a country) is an offence against the state, trafficking of persons is the forced recruitment of emigrants (through trickery or false promises) for the sole purpose of economic or sexual exploitation. Trafficking is therefore seen as a crime against the personal integrity of the victim and is thus violation of his/her human rights.[19] This view is clearly reflected in the Rome Statute of 1998, where slavery is defined as a crime against humanity in article 7 section 2b which reads:

> Slavery is the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.

Sexual slavery is expressly mentioned amongst the crimes against humanity under article 7 section 1g. This differentiation between trafficking in human beings and smuggling is also a characteristic of international instruments.

United Nations

The *United Nations Convention on Trans-national Crime,* signed in Palermo/Italy in December 2000, deals with the subject of trafficking and the smuggling of persons in two additional Protocols[20] aimed at the prevention,

[18]Previous international instruments dealing with the problem of slavery, servitude and the slave trade were the 1926 Slavery Convention as amended by the 1953 Protocol, art 1(1); the 1948 Universal Declaration on Human Rights, art 4; the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and International Practices Similar to Slavery of 1959; Intern. Covenant on Civil and Political Rights of 1966 art 8; European Convention on Human Rights art 4; ILO Convention (no 29) Concerning Forced Labour of 1930 art 2(1); as to children see UN Convention on the Right of the Child art 32.

[19]This differentiation is generally accepted in academic literature: see K Summerer 'Das neue italienische Gesetz über Sklaverei und Menschenhandel' (2005) 4 *ZStW* (forthcoming).

[20]Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Trans-national Organized Crime, adopted by resolution A/RES/55/25 of 15 Nov 2000; Text: Doc A/55/383, in force since 25 Dec 2003. On 6 Nov 2005 it was signed by 117 countries and 94 parties. From Europe the following countries have signed it: Austria, Belgium, Czech Republic, Croatia,

suppression and punishing of trafficking, especially of women and children.[21] Besides provisions to improve cooperation amongst states in the field of prevention, exchange of data and information, and border control measures, the instruments also contain several provisions dealing with the protection of victims. This signals a considerable progress in the direction of a human rights policy regarding trafficking. Article 3 of the Protocol contains an internationally binding definition of trafficking, which provides that it shall signify the following:

> recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of position of vulnerability of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at minimum, the exploitation of prostitution, of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Europe

In Europe the level of activity has been stepped up recently – the work of the EU in tackling trafficking has been outlined by the 2002 Brussels Declaration.[22] There is an abundance of legislative initiatives, action plans, conference declarations, financial programmes[23] and national reaction to supranational obligations imposed by the European bodies. Initiatives to combat trafficking in persons were introduced in many papers. For example, the Hague Declaration of Ministers of 26 April 1997, asking for European Guidelines regarding the prevention and combatting of trafficking women for the purpose of sexual exploitation; the call of the European Council in Tampere in October 1999[24] and – most importantly – the Brussels Declaration of September 2002, demanding the extension of European and international collaboration, concrete measures,

Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Luxemburg, Malta, Netherlands, Norway, Poland, Moldova, Romania, Serbia & Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Macedonia, UK; but not all have ratified it, these are: Austria, Belgium, Bosnia-Herzegovina, Denmark, Estonia, France, Latvia, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Moldavia, Romania, Serbia & Montenegro, Slovakia, Slovenia, Spain, Sweden. Protocol against the smuggling of migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organized Crime, 2000.

[21]General Assembly Resolution 55/25, annex II; the UN Global Programme Against Trafficking in Human Beings contains three components: research and assessment, a data base on trafficking flows and a manual on promising practices, see Press Release SOC/CP/210 as of 11 March 1999.

[22]European Conference on Preventing and Combating Trafficking in Human Beings – Global Challenge for the 21st Century, Brussels 18–20 September 2002.

[23]Agis & Daphne *Programmes to support the development and evaluation of politics, practices and cooperation in the EU and with accession countries.*

[24]The conclusions of the Tampere European Council 1999 have been evaluated and further developed in the Hague Programme in November 2004. For details see COM (2004) 401, 2.6.2004.

standard practices and mechanisms for the prevention and repression of trafficking in persons. The new Constitution for the EU, signed by the heads of state of the twenty-five member states and three candidate countries on 29 October 2004 (but not yet ratified) explicitly addresses trafficking in human beings, and erects framework laws establishing measures in the area of combatting trafficking in persons (article III–168(2)(d).[25]

The main instrument at the European supra-national level is the *Council Framework Decision on Combatting Trafficking in Human Beings of July 19, 2002*.[26] The definitions that have been agreed at EU level include largely the same elements as the definition in the UN Protocol, which formed the basic framework for the European instrument. Like the UN, the EU distinguishes between trafficking in human beings on the one hand and facilitating illegal entry into a country (smuggling of migrants).[27] The EU definition is more precise, in that the Framework Decision is a legally binding instrument, forcing EU-member states to adapt their national legislation in order to comply with obligations at EU level in the area of the harmonisation of criminal law. Another difference is that the UN Protocols address trafficking and smuggling in a comprehensive way, covering aspects of protection, assistance, repatriation of victims as well as prevention, cooperation, information exchange, border measures and security documents. The EU instruments, however, are mainly acts of EU legislation in the areas of criminal law and criminal proceedings.

Another common feature of both instruments, the Protocol and the Framework Decision, is the clear distinction between trafficking and prostitution: they do not imply a specific positive or negative position regarding non-coerced adult prostitution. Further, neither the Protocol nor the EU Decision clarify what they consider exploitation of another person's labour or services for the purposes of the instruments. On the other hand, terms used in both instruments such as 'compulsory or forced labour or services' 'slavery', 'practices similar to slavery', 'servitude' are sufficiently described to distinguish them from 'ordinary' bad working conditions, where a person might be socially or economically exploited.

Under Article 3(I) of the Framework Decision, every member state must introduce provisions for the effective punishment of such offences, or the incitement, aiding or attempt to commit such offences. Furthermore, these offences carry a penalty of imprisonment with a maximum of not less than eight years, where the victim's life was endangered wilfully or by gross negligence, where the victim was a particularly vulnerable person, where serious violence

[25]Treaty establishing a Constitution for Europe as set out in Document CIG 87/2/04 p 29 October 2004. See in particular Arts II–5, III–168(2)(d), III–172(1).
[26]OJ L 203, 1.8.2002.
[27]Council Directive 2002/90/EC of 28 November 2002, (OJ L 328, 5.12.2002, p 17), and Council Framework decision of the same day on the strengthening of the penal framework to prevent such facilitation, (OJL 328, 5.12.2002, p 1).

was used, or where the offence was committed within the framework of a criminal organisation.

Closely connected with the Council Framework decision are other instruments, such as the Council Regulation of 20 October 2003 on initiatives to combat trafficking in human beings,[28] which calls on the MS to ratify and fully implement all international instruments and conventions against trafficking and proposes monitoring systems in order to provide data for better cooperation. In March 2003 the commission adopted its decision,[29] setting up a Consultative Experts Group on Trafficking in Human Beings, which is a further implementation of the Brussels Declaration. This so-called Brussels Declaration on Preventing and Combatting Trafficking in Human Beings was the result of an important conference convened on 18–20 September 2002 at the initiative of the European Commission and the International Organisation for Migration (IOM).[30] The need for a comprehensive European policy was pointed out – addressing the entire trafficking chain (countries of origin, transit and destination), all persons involved and all forms of exploitation, including sexual exploitation, child labour and begging.

Other milestones on combating trafficking in human beings are the Directive of 29 April 2004 on a temporary residence permit for victims of trafficking who cooperate with the authorities,[31] and the Framework Decision of 22 December 2003, on combating the sexual exploitation of children and child pornography; the decision covers criminal activities directly connected with trafficking in children.[32]

I cannot conclude my remarks on what is happening at the supra-national level without taking note of the most recent and comprehensive instrument in this field. In May 2005, after many years of preparation, the Council of Europe issued its Convention on Action against Trafficking in Human Beings.[33] Its strategy adopts a multi-disciplinary approach that incorporates prevention, protection of human rights of victims and prosecution of traffickers, whilst at the same time seeking to harmonise relevant national laws and ensure that these laws are applied uniformly and effectively. The added value provided by the CA Convention lies, firstly, in the affirmation that trafficking in human beings is a violation of human rights and violates human dignity and integrity. Greater

[28] *Official Journal* C 260 0f 29/10/2003 4–5.
[29] *Official Journal* L 79 of 26.3.2003 – Expert group in Trafficking in Human Beings.
[30] The conference brought together over 1000 representatives of the EU MS, candidate countries, neighbouring countries such as Russia, the Ukraine, as well as USA, Canada, China and several NGOs.
[31] Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261, 6.8.2004, 19,
[32] OJ L 13, 20.1.2004, 44.
[33] See Council of Europe Convention on action against trafficking in human beings, Explanatory Report, CM(2005)32 Addendum 2 final 3 May 2005 about the history of this legislation, §§ 11 *ff.*

protection is therefore needed for all victims. Secondly, the Convention's scope includes all forms of trafficking (national, trans-national, linked to or unconnected with organised crime, and for purposes of exploitation), in particular with a view to victim protection measures and international cooperation. The Convention is, therefore, wider in scope than the Palermo Protocol. Thirdly, the Convention sets up monitoring machinery to ensure that parties implement its provisions effectively.

As far as the definition of trafficking in human beings is concerned, the Convention closely follows the Palermo Protocol: in fact, article 4(a) of the Convention is identical to article 3(a) of the Protocol.

It is not within the scope of this article to deal with the details of criminal law provisions (chapter IV), the parts regulating the investigation, prosecution and procedural law (chapter V) or the measures to protect and promote the rights of victims (chapter III) and other issues of the Convention.[34]

LEGAL FRAMEWORK – NATIONAL

Experience has shown that putting legal instruments in place at a regional level greatly reinforces any action taken at the global level (Expl Report § 9); this is even more true at national level, because it is in the individual countries that offenders are investigated, tried, convicted, and punished. As mentioned earlier, approximation of criminal laws and some criminal procedures is the main purpose of the model instruments drawn up by the EU and the Council of Europe. Examples of new national laws against trafficking, formulated under the influence of the supra-national instruments, are the German and Italian Criminal Codes.

Germany

The government's most recent legislative proposal intends to apply international UN and EU instruments to German law, thereby creating a broader legal basis for the fight against the sexual exploitation of women and girls. German criminal law has already been reasonably successful in its aims, given the growing number of convictions in Germany for trafficking.

Trafficking in persons has been a crime under German criminal law since 1973[35] (§§ 180a III–IV, 181 StGB). In 1992, after the opening of the border, growing pressure from the media and various women organisations led to a thorough reform,[36] and to the creation of two separate offences of trafficking in persons and serious trafficking. In order to better protect foreign women and girls, the legislator reacted against the more sophisticated forms of trafficking by creating

[34]Prevention, cooperation, and other measures – Chap II; International cooperation and cooperation with civil society – Chap VI; Monitoring mechanisms – Chap VII; Relation with other international instruments – Chap VIII.
[35]4th Criminal law Reform Act of 1973.
[36]26th Criminal Law Amendment Act 1992.

more subtle offences and increasing the penalties. Previously, only the recruitment of women on a regular and profitable basis (*gewerbsmässig*) was punishable; today, a single case of forcing a woman into prostitution against her will is an offence when committed for profit. Recruiting women in a foreign country for prostitution was made an offence, even when they were already working as such at home. Recruitment under false promises *(eg* arranging a marriage or adoption) was also made a punishable act. New legislation will now consolidate the substantive provisions and facilitate their application by more lucid formulation. At the same time it was stressed that victims would receive more support and counselling when re-adjusting to a normal life in Germany or their home country

The actual reform of 2005 was caused by the obligation incurred by signing the additional Protocol to the Palermo Convention of 15.11.2001 and the signing of the Framework Decision of the Council of the EU of 19.7.2002 (both mentioned above).

The result of this reform is the new positioning of these offences in the structure of the Code. While, up to now, trafficking in persons has been an offence against sexual self-determination (focusing on the intent of bringing the trafficked person into prostitution), trafficking in persons has now been transferred into the realm of offences against personal freedom, thereby stressing the human rights aspect – with personal liberty as the legal interest now being protected. The new provisions of §§ 233 and 234 seek to afford protection of the victim against sexual and labour exploitation. Since slavery or slave-like circumstances are regarded as being less likely to occur in Germany, sexual exploitation takes a primary position in the new structure. By this arrangement the German legislature departs from priorities adopted in the supranational instruments.

Another departure from the supranational model is to be noted in the structure of the German provisions (*Tatbestände*), while in the Framework Decision the criminal acts constitute recruitment, transportation, reception, *etc*, under certain circumstances such as coercion, force or threat for the purpose of exploitation of that person's labour, *etc* (thus construing a 'purpose or intent offence' (*Absichtsdelikt*)). German law creates a 'success or result offence' requiring that the offender actually brings another person into prostitution or forces her to stay in this business. The earlier stages are punishable as an attempt (§ 232 (2), 233 (2)).

The other alternatives of article 3 of the Framework Decision are now covered by § 233 StGB, making it punishable to commit a person to slavery, serfdom/bondage or servitude as amortisation of debts (*Schuldknechtschaft*[37]); this was already covered by the former offence of kidnapping of a human being

[37]This is a dependent relationship in which a person abuses the debtor's working power for a considerable time for the purpose of repaying real or fictitious debts.

(*Menschenraub*). Another alternative of this offence, namely the introduction of a person to 'working relationships where the working conditions differ considerably from those enjoyed by other workers' is a German element and has no counterpart in the Framework Decision. Conscription to military service by a non-native country through force or threat is now punishable under § 234 StGB; enforced marriage is an example of § 240 StGB.

Penalties have also undergone some changes: for the basic offence of trafficking in human beings, imprisonment from six months up to ten years is provided for. Under special circumstances (if the victim is a child, the offender maltreated the victim and caused the risk of death; the offender is trafficking regularly or is member of a group) the minimum is one year's imprisonment.

Italy

Confronted with the fact of forced labour for the purposes of industry, coerced begging, an increase in the amortisation of debts, the trade in organs, and the buying and selling of children to cater for paedophilia, prostitution and pornography,[38] European jurisdictions have been compelled to review their laws in order to combat such practices.

Italy has reformed its slavery offences by law no 228 of 11 August 2003, because the former provisions in the *Codice Rocco* could no longer be applied satisfactorily, mainly because there was no officially and legally proscribed state of slavery as such. The Constitutional Court recognised the growing need for protection of exploited victims and offered protection against conditions of slavery, although such conditions were not legally recognised. Slavery *de iure* under article 600 was substituted by slavery *de facto* and was punished under article 603 CP.[39] The new law no 228/2003 on slavery and trafficking in human beings, completes the grand reform of measures for personal protection – that is, legislation against rape and sexual abuse (1996), against child pornography and against gaining from child prostitution (1998).

The new Act no 228 is characterised by a more precise description of new forms of exploitation that are generally connected with slavery and trafficking. The measure of punishment was extended in order to accentuate the reprehensible nature of the offence and the supreme value of the protected legal interest. Punishment is currently imprisonment in the range of eight to twenty years:

[38] According to IOM data, ten per cent to twenty per cent (2000 to 6000) of the 20 000 to 30 000 illegal female migrants who enter the sex industry in Italy each year are trafficked. In Greece research has shown that just over half the trafficked women are from Russia or Ukraine, while a third come from the Balkans and a small percentage from Asia and Africa. Trafficking to Belgium tends to be from Nigeria, China, Albania, Romania, Russia and Bulgaria. Most victims in Germany were from the former Soviet Union and elsewhere in eastern Europe. In France, according to the central anti-human-trafficking office, 12 000 to 15 000 people were engaged in prostitution in 2000. All the eastern European nationalities were involved. See Musacchio n 7 above at 88.

[39] For details and literature see Summerer n 19 above.

double that of Germany. An aggravating circumstance is the organised manner of commission (article 416). Legal persons can also be punished.

FINAL REMARKS

Criminal law is but one cog in the machinery required to combat these offences; the law has to be bolstered by other mechanisms, such as better cooperation and coordination at an international level, prevention by eliminating the root causes, awareness training, police and judicial cooperation and victim support. The long list of instruments, created by the European supra-national institutions is evidence of the growing significance attached to the problem of trafficking in women and children for sexual and economic exploitation.

I have attempted to describe but some of the normative developments in the European context – a wide-ranging topic with many more areas to explore. I have not touched upon the procedural aspects and difficulties connected with the investigation and prosecution of trafficking crimes against persons, the role of victims as witnesses and the possible incrimination of the customers in this field.

The legal wording of the Acts described in Criminal Codes as trafficking offences against persons seems fairly abstract; however, their unacceptable, morally reprehensible nature is revealed when observed in the context of criminal trials, television reports and films. The disregard that perpetrators of these crimes have for young lives by stigmatising and sometimes ruining them for life, for the sole purpose of sexual gratification, is difficult for the civilised, law-abiding citizen to comprehend. These criminals contribute to making an illegal trade profitable and obviously encourage the activities of organised crime.

An idealistic solution to this problem would be to wipe out the market by changing the sexual attitudes of the customers – an impossible task, alas. Equally illusionary would be the proposal to improve the economic and social situation in poor countries where even young children are driven to participate in prostitution and pornography by false promises of a better life in more affluent societies.

We have to therefore resort to the regular measures of traditional criminal legislation against trafficking. An increasing public awareness of human trafficking clearly shows a marked desire for retribution on the one hand, and victim protection on the other – both welcome harbingers of reform. However, criminal law may be a facile method of dealing with a complex issue. Criminalisation and the introduction of heavier penalties give a clear signal that governments have the instruments enabling them to react to situations where citizens are at risk.

However, besides criminal law and increased sanctions which, by themselves, are not sufficient to successfully fight against trafficking in human beings we need the following:

- preventive measures to be strengthened by enhancing public awareness, as well as education, and information of the targeted social group in the providing countries;
- the development and financial support of multi-disciplinary agencies and NGOs for the identification of exploitation of women and children and for appropriate support or treatment of the victims;
- encouraging the media to contribute constructively to a general awareness of trafficking and exploitation;
- the harmonisation of criminal laws, and global punishability of offences, whether they are committed on or outside the national territory;
- the effective international cooperation of investigating and prosecuting agencies; and
- to develop a system of protection and re-integration of the victims … and many more measures besides.

Sentencing corporations: the need for reform

Louise Jordaan[*]

INTRODUCTION

The South African legal system recognises that both natural persons and legal persons (*eg* companies) may incur criminal liability.[1] If a natural person is convicted of an offence, various sentences may be imposed, depending, primarily, on the nature of the offence committed. These sentences range from a monetary fine to the restriction of liberty. Recently, new forms of sentences have been introduced in South Africa to punish natural persons (*eg* the non-custodial sentence of correctional supervision).[2] However, a corporate body, although it may be prosecuted and convicted of a crime, has, to a large extent, escaped being 'punished' by society. Having 'no soul to be damned and no

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[1]In South Africa, criminal liability of corporations is governed by legislation. Section 332(1) of the Criminal Procedure Act 51 of 1977 provides for a derivative model of corporate criminal liability dependent on proof of misconduct of an individual, that is, a director or servant of the corporation where such an individual acted in the exercise of his/her powers, or in the performance of his/her duties, or in furthering the interests of the corporation. The section provides as follows: 'For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law – (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and (b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body in the exercise of his powers or in the performance of his duties as such director or servant, or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have performed (and with the same intent, if any) by that corporate body, or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.' For a critical analysis of this particular construction of corporate criminal liability, see Louise Jordaan 'New perspectives on the criminal liability of corporate bodies' *Criminal Justice in a new society – essays in honour of Solly Leeman.,Acta Juridica* (2003) 48 and Michael Kidd 'Corporate liability for environmental offences' (2003) 18 *Public Law* 1. The present article is not concerned with the question whether corporations are capable of incurring criminal liability, or with the merits of the South African model of criminal liability. It assumes that legal entities such as corporations incur criminal liability and deals solely with the sentencing of corporations after conviction.

[2]Correctional supervision is a form of punishment which does not remove the offender from the community. Instead, it limits the freedom of the offender by way of house arrest and requires direct and free service to the community by some form of service. Its formal introduction into South African law occurred in 1991 by enactment of the Correctional Services and Supervision Matters Amendment Act 122 of 1991. See SS Terblanche *The guide to sentencing in South Africa* (1ed 1999) 327.

body to be kicked'[3] corporate bodies are traditionally seen to be most appropriately punished by the fine.[4] South African law provides that if a corporate body is convicted of an offence, a court may not impose any punishment other than a fine.[5]

Criminal fines are of course advantageous from a practical perspective (notably, ease of administration and contribution towards enforcement costs). However, the effectiveness of a fine in deterring and preventing corporate bodies from engaging in criminal activities, has lately been questioned in other jurisdictions. Sentencing objectives have been redefined in these jurisdictions in order to respond more effectively to corporate, rather than individual, criminal behaviour. Moreover, new sentencing policies have been introduced which recognise that corporate crime often finds its origin in structural malfunctioning of the corporation. In the United States and, more recently, in European jurisdictions such as France and Spain, a broad range of sentences has been introduced in an attempt to combat more effectively crime committed at the corporate level. The most innovative of these is corporate probation which is aimed, primarily at organisational reform.

This article considers whether the limited means of punishing corporate bodies in South African law (*ie* solely by means of a fine) can be justified. The strengths and weaknesses of the sentence of a fine are then considered. Sentencing options available in other jurisdictions are evaluated. The conclusion reached is that exclusive reliance on the sentence of a fine is ineffective in achieving the various goals of punishment in the corporate context. The article suggests that the adoption in South Africa of new sentencing policies is necessary to address the growing problem of corporate crime. It will be argued that a more diversified sentencing strategy should be introduced, on which will provide the judiciary with greater discretion in punishing corporate offenders.

[3]See John C Coffee "'No soul to damn: no body to kick": an unscandalized inquiry into the problem of corporate punishment' (1981) 79 *Michigan LR* 386, quoting Edward, First Baron Thurlow 1731–1806.

[4]James Gobert 'Controlling corporate criminality: penal sanctions and beyond' (1998) 2 *Web Journal of Current Legal Issues* (obtained from the internet at: webjcli.ncl.ac.uk/1998/issue2/gob.) 1 at 3 explains that at the time when sanctions against individual offenders were limited to imprisonment and capital punishment, there was no corporate analogy available, with the result that the fine became the penalty of default.

[5]Section 332(2)(c) of the Criminal Procedure Act 51 of 1977 provides: '[I]f the said person as representing the corporate body, is convicted, the court convicting him shall not impose on him in his representative capacity, any punishment, whether direct or as an alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body...'. Again, s 332(2)(11) provides that s 332(2) 'shall be additional to and not in substitution for any other law which provides for the prosecution against corporate bodies ...'. It would seem from the wording of this provision (s 332(2)(11)) that specific statutes may provide for sentencing options other than a fine.

THE EFFECTIVENESS OF FINES IN PUNISHING CORPORATE OFFENDERS

Deterrence is often cited as the primary rationale when justifying the imposition of criminal sanctions for criminal corporate activity. Generally perceived as the only 'corporate analogue'[6] of capital punishment, the fine (and a severe one) is used to deter. The argument that the fine is an effective deterrent for corporate crime is usually explained in terms of the so-called 'economic model' of corporate behaviour.[7] It is suggested that, unlike individual persons who often commit crime as a result of emotional stimuli or other factors such as the intake of intoxicating substances, the corporate offender is a rational actor.[8] Driven by profit, the corporate actor plans a course of action based on the calculation of potential costs and benefits. Because the greatest threat to a corporation is loss of profitability, the fine is the most effective punishment for corporate offenders. In other word, the fine hits the corporation where it hurts most – it decreases potential profits and is, therefore, the most effective way of deterring corporate crime. Ideas such as retribution and rehabilitation, although important considerations in punishing the individual offender, are less appropriate for justifying the punishment of a corporation. The liability of the corporation is of a derivative nature, based upon the acts and culpability of its human representatives. It cannot think and is therefore is incapable of a blameworthy state of mind – a vital requirement for any punishment driven by the concern for retribution. The lack of human features also leads to the conclusion that the corporation is not susceptible to rehabilitation.[9]

Before considering the merit of these arguments (*ie* that considerations such as retribution and rehabilitation do not really apply in the field of corporate punishment) the deterrent value of the fine must be considered. Is the fine really an effective sentence for deterring and preventing corporations from engaging in criminal conduct? Most legal writers disagree, at least as far as the *exclusive* use of the fine is concerned.[10] One of the main disadvantages of exclusive

[6]Gobert n 4 above at 3.

[7]See Christopher A Wray 'Corporate probation under the new organizational sentencing guidelines'(1992) 101 *Yale LJ* 2017 at 2019 –2010 and Gary Slapper and Steve Tombs *Corporate Crime* 1ed (1999) 170 and 207–208 for a discussion of this theory.

[8]See also HL Packer *The limits of the criminal sanction* (1968) 356.

[9]See Brent Fisse and John Braithwaite 'The allocation of responsibility for corporate crime: individualism, collectivism and accountability' (1988) 11 *Sidney LR* 468 for an in-depth analysis of various of these (in their view, false) premises. See also the instructive analysis of Brent Fisse 'Reconstructing corporate criminal law: deterrence, retribution, fault and sanctions' (1983) 56 *Southern California LR* 1141.

[10]See Steven Box *Power, crime, and mystification* (1983) 71 ('... relying on this instrument [the fine] is crude, lacks imagination and does not achieve other goals desirable in the control and regulation of corporate crime'); Note 'Structural crime and institutional rehabilitation: a new approach to corporate sentencing' (1979) 89 *Yale LJ* 353 at 354 (' ... fines fail to take account of the significant novel qualities of institutional crime, thereby frustrating the goals that corporate criminal liability is intended to serve'); Fisse and Braithwaite n 7 above at 499

reliance on fines is the so-called 'deterrence trap' theory advanced by Coffee.[11] He explains that economists generally agree that an actor who contemplates committing a crime will only be deterred if the 'expected punishment cost' of a proscribed action exceeds the expected gain. A fine should therefore be calculated in such a manner as to destroy any profit and a sum should be added based on the company's calculations that its offence will be detected and that a successful prosecution will follow. For example, if the expected profit that would be generated by the crime is R1 million and the risk of apprehension and successful prosecution is only 25%, the penalty would have to be raised to R4 million in order to make the expected punishment cost equal the expected gain.

However, if an appropriate fine is arrived at in terms of these criteria, it may frequently exceed the corporation's resources and drive it out of business.[12] This is what Coffee calls the 'deterrence trap' – a fine which is beyond the offender's ability to pay cannot achieve deterrence.[13]

The imposition of a severe fine may cripple small companies. But what is the potential deterrent value of a severe fine imposed on a large, successful company? It is an uncontested fact that it is the shareholders, employees and consumers who generally bear the burden of a fine imposed on a large corporate entity. Fisse[14] explains that, through reduced dividends or lower share prices, the impact of fines are felt by shareholders rather than managers – and it is the

('[t]he individualist belief that it is impossible to punish corporations effectively rests on the ground that corporations can be punished only by means of a fine or monetary penalty ... it seems short-sighted to suppose that more suitable forms of sanction cannot be devised'); Coffee n 3 above at 388 (' ... fines imposed on convicted corporations have historically been insignificant'); SA Salzburg 'The control of criminal conduct in organisations' (1991) 71 *Boston University LR* 421 at 430 ('[f]ines imposed on corporations will not always ... have a deterrent impact on the actual organizational members who committed criminal acts'); Celia Wells *Corporations and criminal responsibility* 2ed (2001) 35 ('... the effectiveness of the fine as a deterrent ... is clearly open to question'); R Mays 'The criminal liability of corporations and Scots Law: learning the lessons of Anglo-American jurisprudence' (2000) 4 *Edinburgh LR* 46 at 62 ('[c]ontinued exclusive reliance on the fine as the method of sanctioning the errant corporation is conceptually flawed and unnecessarily restrictive') and Günter Heine 'Sanctions in the field of corporate criminal liability' in Albin Eser, Günter Heine and Barbara Huber (eds) *Criminal responsibility of legal and collective entities* – International Colloquium Berlin (1998) 237 at 244 ('... exclusive reliance on the fine is crude, and likely limited in its ability to achieve its goal to control and prevent corporate crime').

[11]Note 3 above at 389.

[12]See Coffee n 3 above at 390: '... our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources'.

[13]Coffee n 3 above at 390 points that the 'deterrence trap' only comes into play in the context of corporate crime. In the case of individuals, this 'wealth ceiling' on the deterrent threat of fines causes no serious problems because the individual can still be deterred by a threat of imprisonment.

[14]See Brent Fisse 'Sentencing options against corporations' (1990) 1 *Criminal Law Forum* 211 at 228.

managers who are the decision makers and who exert control over corporate wrong-doing or risk taking. In a company of any size, the managers rarely hold the bulk of the corporate offender's shares.

The problem of 'spill-over' of fines to innocents such as workers and consumers is another unfortunate side-effect of fines.[15] Employees' wages or jobs may be detrimentally affected and the consumer may be prejudiced by increased prices. Jefferson points out that the efficacy of fines is particularly problematic when a company has a monopoly, since it can pass on the whole of the fine to its customers without suffering any loss itself. In such instances, there may be a complete spill-over onto consumers.[16] It may be argued, on the other hand, that spill-over is an inevitable consequence of punishment, also in the context of individual offenders. A fine or a sentence of imprisonment imposed on an individual offender also imposes financial and other burdens on his or her family and dependants. However, the valid point is made that, in the case of corporate offenders, there can be 'all spill-over [on innocents] and no punishment [of the corporate wrongdoer]'.[17]

It seems that exclusive reliance on the fine as the way to punish the corporate wrongdoer operates unjustly between small and large companies.[18] The small company may be put out of business, while the large company is likely to absorb monetary sanctions and pass it on to others, be they consumers or customers.[19] Furthermore, in the context of culpable homicide, it is extremely disturbing that the fine can be perceived as the cost for causing death.[20] In the case of individual offenders, monetary redress is often viewed as an inappropriate response to serious crime involving bodily harm. The corporate offender, although it may be stigmatised by a conviction, can always 'buy its way out', even where loss of life has occurred as a result of negligence in the

[15]Michael Jefferson 'Corporate criminal liability: the problem of sanctions' (2001) 65 *Journal of Criminal Law* 235 at 238–39.
[16]Note 15 at 239.
[17]See Gobert n 4 above at 5: 'In the **non-corporate context**, there are, inevitably, secondary consequences when a convicted offender is sent to prison. The family of the offender is likely to suffer psychologically an economically. Although these repercussions may be burdensome for family members who have themselves committed no crime, the spill-over is not part of a formal state policy but more of an incidental corollary to the punishment of the offender. In the **corporate** context, the danger is that there is all spill-over and no punishment'.
[18]See Louise Dunford and Ann Ridley 'No soul to be damned, no body to be kicked' [1]: responsibility, blame and corporate punishment' (1996) 24 *International Journal of the Sociology of Law* 1 at 11–12.
[19]Dunford and Ridley n 18 above at 12.
[20]Fisse n 14 above at 220. See also Lawrence Friedman 'In defence of corporate criminal liability' (2000) 23 *Harvard Journal of Law and Public Policy* 833 at 858 who points out that fines may be perceived by corporation as well as the community as a cost to doing business and Gary Slapper 'Corporate punishment' (1994) 144 *New Law Journal* 29 at 29 adding that 'if caught, paying the fine will be seen by the offender simply as a form of taxation on crime'.

corporate environment. This state of affairs encourages a perception that corporate offences are not truly reprehensible and, where loss of life occurred, that it was an inadvertent 'accident' rather than a crime.[21]

A further and very significant criticism of the fine is that it provides no guarantee that disciplinary reform will be undertaken in the organisation. The managers, who are mainly interested in short-term profit-making, may respond by treating the fine as a mere business loss to be passed onto shareholders and consumers. Of course, managers may be brought to account by the shareholders and even replaced, but the fact remains that the company is not *compelled* to revise its defective organisational controls.[22]

NEW SENTENCING STRATEGIES

As corporate crime became more frequent and the shortcomings of traditional fines became more and more apparent, an array of new sentencing options was proposed elsewhere. These include financial disincentives other than the traditional fine, remedial sanctions such as restitution and community service and preventive sanctions aimed at restraining entrepreneurial activity or achieving institutional reform *(eg* corporate probation). These new sentencing strategies are discussed in more detail below.

Alternative financial sanctions

In an attempt to overcome the problem of overspill, Coffee[23] proposes that when severe fines need to be imposed on corporations, they should be imposed not in cash, but in corporation's equity securities. This means that a so-called 'equity fine' should be imposed on a company in terms of which the offender company is ordered to issue new shares to a state victim compensation fund. Because the

[21]Wells n 10 above at 11 explains the perception that death caused in the corporate environment amounts to mere 'accidents': 'The assumptions we make about the role of criminal law are connected with our understanding of the world; an understanding increasingly mediated by technological knowledge and risk evaluations. The social construction of behaviour and events results from a complex interaction between a number of factors, including cultural predispositions, media representations, and legal rules, decisions, and pronouncements. Through the use of language different messages and meanings are communicated. "Mugging", ... "shoplifting" ... and "vandalism"' are examples of the many colloquial terms in use for conveying the social meanings of behaviour; each has an equivalent legal term and definition. The social vocabulary for corporate harms is less well-developed. The word "accident" frequently appears: "accidents" at work; road "accidents". The legal impediments to prosecutions for manslaughter following negligent workplace deaths or other negligent deaths caused by corporate activity are reinforced by such construction. If the deaths are called "accidents" then they are less likely to be seen as potentially unlawful homicides ....'. As submitted above, the imposition of fines for crimes such as culpable homicide contributes to this public perception.

[22]See Fisse n 14 above at 225.

[23]Note 3 at 413. The shares should have an expected market value equal to the cash fine necessary to deter the offender.

shareholder wealth is diluted, the equity fine, arguably, encourages owners of companies (the shareholders) to exercise control over management. Moreover, employees and consumers are not punished in the process because no money is taken from the corporation's liquid assets. The punishment of an equity fine has the potential to be 'fine-tuned' in various ways, that is by legislative designation of the appropriate beneficiaries of the shares created (*eg* in the context of environmental offences or consumer-protection offences).[24] In jurisdictions that recognise class action, the equity fine has the added benefit that it may be a valuable way of effecting victim compensation.

Because managers and company directors are usually also stockholders (or have stock options), the idea here is that they will suffer personally as a result of the dilution of their own shareholdings. Equity fines, therefore, may be more effective in deterring executive officers from engaging in criminal activity. Moreover, faced with severe equity fines, other shareholders may be prompted to insist upon internal disciplinary action by management.[25] But still there is still no guarantee that the procedures or policies that encourage criminal conduct will be corrected by the introduction of the equity fine.[26]

A monetary penalty that has become popular in recent years is the confiscation of assets that represent the proceeds of the crime committed by a person involved in criminal activities.[27] Although this remedy was originally limited to drug offences or offences related to organised crime, it has now been drastically expanded to cover other, if not all, types of offences. A conviction-based confiscation procedure is available against persons (individuals as well as corporate bodies) also in South Africa also.[28] Although the title of the relevant legislation is The Prevention of Organised Crime Act and acts relating to organised crime (*eg*, money laundering, racketeering and gang-related activities are criminalised in terms of this Act) the Supreme Court of Appeal held that 'the statute is designed to reach far beyond organised crime, money laundering and

[24]See Fisse n 14 above at 230.
[25]*Ibid.*
[26]Fisse n 14 above at 232. *Cf* the views of Dunford and Ridley n 18 above at 12 who raise concern over the fact that shareholders are punished by equity fines although they might not have participated directly in the criminal conduct.
[27]Guy Stessens *Money laundering – a new international law enforcement model* (2000) 3–4 explains that in the past, most criminal justice systems allowed offenders to enjoy the fruits of their crimes. The position changed in the post-Second World War era when legislators increasingly criminalised acts which often did not cause any direct harm to an identifiable victim (eg, commercial, fiscal or environmental offences). Given the absence of identifiable victims, the only legal instrument which could ensure that offenders were deprived of their illegal profits was the confiscations of the proceeds of crime.
[28]See ch 5 s 18 of the Prevention of Organised Crime Act 121 of 1998.

criminal gang activities' and that it applies also to 'cases of individual wrong-doing'.[29]

The proceeds of property confiscated in terms of this legislation are paid into a state fund called the Criminal Assets Recovery Accounts. These assets can be utilised to provide financial assistance to law enforcement agencies in the combating of crime and also to provide victims of crime with financial assistance.[30] South African courts have labelled the proceedings as civil and not as criminal in nature .[31] Thus, although it follows upon a conviction and forms part of the sentencing stage of proceedings, this sanction is not viewed as a punishment.[32]

Be that as it may, in the United States penal sanctions against corporations are taken one step further by providing for a kind of 'corporate death penalty' against criminal-purpose organisations, which means that a fine may be imposed sufficient to divest the organisation of all its assets.[33]

Remedial sanctions

The growing concern for victims of crime and the idea of restorative justice have given rise to the imposition of remedial sentences such as restitution and community service. As long ago as 1979, it was suggested that restitution orders can be imposed more successfully against corporate offenders than individuals, because large corporations are in a much better financial position to pay significant amounts of restitution to victims.[34] Moreover, restitution orders

[29]See *NDPP v Seevnaryan* 2004 2 SACR 208 at 239 (SCA).

[30]Sections 68 and 69 of the Prevention of Organised Crime Act n 28.

[31]In *NDPP v Philips* 2001 4 SA 60 (W) the court held that a confiscation order is not 'punishment'. See also *NDPP v Mohamed NO* 2002 4 SA 843 (CC).

[32]This approach is criticised because it shields the proceedings against constitutional challenges based on infringement of due-process rights. See Jonathan Burchell and John Milton *Principles of Criminal Law* 3ed by Jonathan Burchell (2005) at 1012 who state that the view that confiscation orders do not qualify as punishment 'is wrong or, at least, a blanket exclusion of due process rights to confiscation of assets ... [which] requires qualification'. They argue that because it has since been recognised by the Supreme Court of Appeal in *NDPP v RO Cook Properties (Pty) Ltd)* 2004 2 SACR 208 (SCA) that the remedial aspects of civil forfeiture (provided for under ch 6 of the POCA) do not exclude its penal aspects, it follows that criminal forfeiture must also have such a penal element. In *Welch v UK* (1995) 20 ECHR 247 the European Court of Human Rights held that confiscation of assets could be considered as punishment at least for the purpose of determining the question of retrospective operation of legislative provisions.

[33]See the Federal Sentencing Guidelines (1991) par 8 C1.1 discussed by E M Wise 'Criminal liability of corporations – USA' in Hans de Doelder and Klaus Tiedemann *Criminal Liability of Corporations – XIV International Congress of Comparative Law* (1996) 383 at 396. In federal criminal proceedings, sanctions are governed by the Sentencing Reform Act of 1984 and the guidelines for sentencing organisations issued by the US Sentencing Commission 1991.

[34]See Note 'Structural crime and institutional rehabilitation: a new approach to corporate sentencing' n 10 at 371.

would serve the purpose of disgorging the corporate offender of its illegally obtained gain.

In United States federal law, sentencing courts are mandated to order restitution for a wide range of offences in the case of identifiable victims of corporate crime.[35] The purposes of restitution orders are 'to remedy harm that has already occurred and to prevent future harm'.[36] Compensation of victims is prioritised by requiring that if both a fine and a restitution order are imposed on a convicted offender, 'any money paid by the defendant shall first be applied to satisfy the order of restitution'.[37] Restitution orders can also provide for deferred payments if a convicted organisation lacks the resources to make immediate restitution.[38] Restitution may be imposed as a condition of probation for offences for which such an order is not authorised. This may, *inter alia*, require the organisation to remedy the harm caused by the offence and to eliminate or reduce the risk that the offence will cause future harm [39] *eg* product recall for a food or drug violation or a clean-up order for an environmental violation.[40] The sentencing court may also require the organisation to create a trust fund sufficient to address expected harm as a result of the offence.[41] It is provided further that remedial orders be coordinated with any administrative or civil actions taken by the appropriate governmenta regulatory agency.

Apart from compensation of victims, Gruner points out that restitution may also serve other important reformative goals. Because it promises predictable costs to offenders, it 'should encourage firm managers to internalize victim losses and shape crime prevention activities in the light of those losses' and would force managers 'to defend the misconduct before shareholders who... are most likely to suffer from restitution payments'.[42]

A sentence of community service is available in South Africa only in respect of individual offenders. In the United States federal law and in Canada it may also be imposed as a condition of probation on corporations.[43] To ensure that the

[35]See 2002 Federal Sentencing Guideline Manual ch 8 (Sentencing of Organisations) par 8B1.1 (b) obtained from the Internet at www.ussc.gov/2002guid/tabconchapt8.htm. In the introduction to ch 8 it is stated that ' [t]he resources expended to remedy the harm [in terms of a restitution order] should not be viewed as punishment, but rather as a means of making victims whole for the harm caused'.
[36]See the commentary to par 8B1.1 and 2.
[37]Par 8B1.1(c).
[38]Par 8B1.1 (d) and (e).
[39]See the commentary to par 8.B.1.2(a).
[40]See the commentary to par 8B1.2.
[41]Par 8B1.2(b).
[42]Richard S Gruner 'Beyond fines: innovative corporate sentences under federal sentencing guidelines' (1993) 71 *Washington University LQ* 261 at 269–270.
[43]See Daniel C Préfontaine 'Effective criminal sanctions against corporate entities: Canada' in Eser et al n 10 above 277 at 282.

sentence is meaningful and serves a reparative purpose, the United States Sentencing Guidelines require that community service be 'reasonably designed to repair the harm caused by the offense'.[44] For instance, a mere donation to a charitable institution would not be an appropriate condition of probation.[45] Moreover, courts are instructed to impose this sentence only when the corporate offender possesses the knowledge, facilities, or skills that uniquely qualify it to repair the harm caused by the offence. The idea behind the sentence is essentially that it must provide a means for corrective action directly related to the offence.

Community service is an attractive sentencing option where the fine the court wants to impose exceeds the financial ability of the corporation or where an equity fine is not possible (*eg* where the company is a limited company).[46] A possible advantage of this type of sentence is that it may increase individual accountability. Fisse points out that community service involves time and effort and that it may create the awareness that corporate crime is socially unacceptable.[47] To really change attitudes in the organisation, it should also involve corporate executives and not only low-level employees. Of course, such projects necessarily involve financial costs that may be passed on to consumers, but they offer numerous advantages compared with fines, for example avoidance of the deterrence trap; the benefit that the community derives from the services performed; possible reduction of spill-over onto innocent employees and the creation of new employment opportunities.[48]

Preventive sanctions

Sanctions aimed at preventing future criminal conduct range from those intended to restrain business activities to sanctions mandating institutional reform. Examples of drastic sanctions are corporate dissolution; disqualification from government contracts and restraints on certain business activities. In European jurisdictions such as Spain[49] and France[50] the closing down of the

[44]See par 8B1.3 of the Sentencing Guidelines n 35.

[45]Gruner n 42 above at 295 explains that the critics of this practice (community service order of a donation to charitable institutions) argue that it imposes too little hardship on firms in relation to the seriousness of their crimes, and involves arbitrary assessments of the adequacy of the contribution levels. It also ignores the institutional limitations of sentencing courts that make them poorly qualified to select among countless charities and organisations.

[46]See Gobert n 4 above at 6 who points out that shares cannot be issued in limited companies (as required for the imposition of equity fines).

[47]Note 14 at 247–248.

[48]*Ibid.*

[49]Under s 129 of the Spanish Penal Code (Ley Orgànica 10/1995, BOE no 281), the court can order that the enterprise be closed down, or its premises for a limited period of time (five years maximum). The court can also liquidate the entity or suspend its operations for a limited period of time. See Silvina Bacigalupo '"Accessory Consequences" applicable to legal entities under the Spanish Criminal Code of 1995' in Eser *et al* n 10 above at 255. The use in the Act of the terms 'accessory consequences' has given rise to controversy regarding the nature of

convicted company and/or its subsidiaries either temporarily or permanently may be ordered. In the United States, dissolution of a convicted corporation is also possible as a consequence of conviction, where a corporation continues to exceed or abuse the authority conferred upon it.[51] Permanent or temporary disqualification from carrying on specific economic activities may be ordered by criminal courts in, for example, the Netherlands[52] France[53] and Spain.[54] The convicted legal entity may also be placed under judicial supervision for a period not exceeding five years.[55] In France courts may furthermore prohibit corporations from tendering for public contracts[56] and order the publication in the press of the court decision.[57]

A valuable sentencing option available against organisations in United States federal law and in Canada is corporate probation. Described briefly as 'a period during which a company must satisfy certain conditions and must keep the court apprised of its compliance',[58] this sentence is not viewed as a soft option (which is often the case with individual offenders) but a potent way of to achieving deterrence, internal reform and ultimate rehabilitation of corporations.[59]

these measures. However, it would seem that these measures amount to punishment in the criminal-law sense of the word (s 129(3) of the Act provides that '[t]he accessory consequences established in this article shall aim to prevent criminal activity and the effects of the criminal activity from continuing'). See Bacigalupo at 256.

[50]Section 131–45 of the *Nouveau Code Pénal* 1994 provides for dissolution of the legal entity where it has deviated from its object in order to commit the unlawful conduct. For a detailed discussion of the sentencing options available against corporations in France, see Leonard Orland and Charles Cachera 'Corporate crime and punishment in France: criminal responsibility of legal entities (*Personnes Morales*) under the new French Criminal Code (*Nouveau Code Pénal*)' (1993) 11 *Connecticut Journal of International Law* 130.

[51]Wise n 33 above at 396 explains that whether dissolution of the corporation is possible as a consequence of conviction usually turns on the law of the state of incorporation. Section 6.04 of the Model Penal Code also provides for dissolution upon a finding that the board or a high managerial agent engaged in a persistent course of criminal conduct.

[52]Provided for in terms of the Dutch Penal Code. See Hans de Doelder 'Criminal Liability of Corporations – Netherlands' in De Doelder & Tiedemann n 33 above 289 at 306.

[53]See articles 138–28; 131–46 and 131–34 of the *Nouveau Code Penal* 1994 discussed by Orland and Cachera n 50 above at 130–131.

[54]Article 29 of the Spanish Criminal Code 1995 discussed by Bacigalupo n 49 above at 253.

[55]This may be ordered by courts in France and Spain. See Orland and Cachera n 50 above and Bacigalupo n 49 above.

[56]Article 131–34 of the *Nouveau Code Penal*. For a discussion of these provisions, see Orland and Cachera n 50 above at 130.

[57]Article 135–35 of the *Nouveau Code Penal*. The penalty is enforced at the expense of the convicted legal entity. This sanction is also available in the Netherlands. See De Doelder n 52 above at 306.

[58]See Wray n 7 above at 2017.

[59]See Richard S Gruner 'To let the punishment fit the organization: sanctioning corporate offenders through corporate probation' (1988) 16 *American Journal of Criminal Law* 1 for a discussion of the development of this criminal sanction in American federal law. The sentence was first applied to a legal entity as early as 1972 in *United States v Atlantic Richfield Co* 465 F 2d 58 (7th Cir 1972). In this case a company was ordered to establish anti-oil pollution measures within 45 days failing which the court would appoint and supervise a special Probation Officer with powers of a trustee. In 1984, the US Sentencing Reform Act

The sentence may be imposed where there is a need to ensure that another sanction will be fully implemented (*eg* a fine) or to ensure that steps will be taken within the organisation to reduce the likelihood of future criminal conduct.[60] As indicated above,[61] a sentence of corporate probation may include conditions such as restitution or community service.[62] An organisation may also be ordered to publicise the nature of the offence, the fact of conviction, the punishment imposed and the steps that will be taken to prevent recurrence of similar offences.[63]

The most significant provisions, however, are those that mandate the imposition of probation as an independent sentence in order to effect institutional reform. Because these provisions may be useful guidelines once reform of corporate sentencing is undertaken in South Africa, they are discussed in more detail. It is provided that a period of probation shall be ordered [64]

- where an organisation having 50 or more employees does not have an effective programme to prevent and detect violations of law;
- where the organisation within five years prior to sentencing engaged in similar misconduct;
- if an individual within high-level personnel of the organisation or the unit of the organisation within which the offence was committed participated in the misconduct underlying the offence and engaged in similar misconduct in the past five years;
- if such sentence is necessary to ensure that changes are made within the organisation to reduce the likelihood of future criminal conduct.

An 'effective programme'[65] requires that the organisation exercised due diligence in seeking to prevent and detect criminal conduct by its employees. 'Due diligence'[66] requires a rigorous check list that is that

1984 specifically provided for corporate probation as an independent sentence not requiring suspension of another sentence, *eg* a fine. The subsequent Federal Sentencing Guidelines 1991 governs the actual imposition of sentences on organisations and include extensive provisions on organisational probation (See the Federal Sentencing Guidelines Manual n 35 above ch 8 Part D (Organizational Probation).

[60]See the introductory commentary to ch 8 of the Sentencing Guidelines Manual note 32 above. *Cf* also the position in Canada discussed by Préfontaine in Eser *et al* n 43 above at 280.

[61]See the text to notes 39 and 43 above.

[62]See para 8D1.1(a)(1) and (2) of the Federal Sentencing Guidelines n 35 above.

[63]See par 8D1.3(b) of the guidelines n 35 above.

[64]Par D1.1(3)–6) n 35 above.

[65]See the commentary to par 8A1.2 n 35 above.

[66]*Ibid*.

- the established compliance standards and procedures to be followed by its employees that are reasonably capable of reducing the prospects of crime;
- specific individuals within high-level personnel were assigned with responsibility to oversee compliance with such standards and procedures;
- due care has been exercised *not* to delegate authority to an individual who should have known had a propensity to engage in illegal activities;
- reasonable steps have been taken to achieve compliance with standards, *eg* monitoring and auditing systems to detect criminal conduct;
- channels for whistleblowers to report misconduct 'without fear of retribution'[67] were in place;
- disciplinary mechanisms against individuals responsible for offences or who failed to detect offences were used ;
- a response of 'all reasonable steps'[68] to any offences detected in order to prevent further violations of law, has been implemented.

Sentencing courts have a wide discretion to develop probative conditions matched to the corporate offenders and their specific crimes. These are, *inter alia*, that the corporation make periodic submissions to the court or a designated probation officer detailing the corporation's financial position and business operations, including an account of all revenue.[69] The court may also force the corporation to submit to regular or unannounced examinations of its books and records.[70] The guidelines provide that monitoring responsibility is delegated to probation officers or court-appointed experts paid for by the corporate probationer itself.[71] Most significantly, the court may require the organisation to develop and submit a compliance programme and a schedule for its implementation.[72] Further periodic reports may also be required concerning the programme's progress.

A sentence of probation imposed on corporations may be highly effective because corporate crime is often structural crime that is, crime that finds its origin in a structural malfunctioning of the corporation.[73] It has been suggested, for instance, that the corporate offender is not necessarily a rational, profit-maximising calculator but a complex entity in which subunits, auxiliary divisions and middle managers pursue their own sub-goals which do not

[67] *Ibid.*
[68] *Ibid.*
[69] Par 8.D.1.4. This condition may be imposed to safeguard the corporation's ability to pay any deferred portion of an order of restitution, fine, or assessment.
[70] *Ibid.*
[71] *Ibid.*
[72] *Ibid.*
[73] See Note 'Structural crime and institutional rehabilitation: a new approach to corporate sentencing' n 10 above at 358–359.

necessarily comply with the aims of the corporation as a whole.[74] For example, middle managers may circumvent environmental or product-safety standards in order to increase their units' productivity with a view to advancing their own careers.

Sceptics may question the implementation of a sentence of corporate probation in a jurisdiction such as South Africa where the control of serious crimes of violence (murder and rape) is, arguably, the priority. Problems which may be envisaged are, for example, lack of resources and courts' lack of technical expertise making it difficult for them to define probation conditions. However, probation imposed on corporations has many advantages over probation imposed on individual offenders. For instance, the order may be structured in a way that the burden and costs of enforcement and compliance monitoring are shifted from the state to the offender. This can be achieved by the court requiring that the corporation help investigate the offence committed, identify defective safety systems and/or crime-risk management structures and suggest the remedial and disciplinary measures that should be taken. Ultimately, monitoring of deviant corporate behaviour should be done by independent probation officers appointed by the court. There is no reason why retired people with the necessary expertise (*eg* retired auditors, financial managers and corporate attorneys) cannot perform these tasks.

CONCLUSION

The development of effective corporate criminal sanctions has been inhibited by the idea that corporations can only be punished by the sentence of a fine. In the United States and various jurisdictions in Europe, this premise, and the idea that deterrence is the only rationale for punishing offences committed by corporations, have both been challenged. This has resulted in the reconsideration and adaptation of the traditional rationales for punishing individual offenders, that is retribution, prevention and rehabilitation.[75] The

[74]See the discussion of the so-called 'structural reform model' in Wray n above at 7 2019–2020. The model offers a different view on corporate punishment from the so-called 'economic model' of corporate behaviour. See the text at n 7 above for an explanation of this model.

[75]An important contribution in this regard is that by Brent Fisse n 9 above. For instance, Fisse suggests (at 1169–1183) that the theory of retribution as applied to corporations differs from the principle of just desert applicable in individual criminal law. In his view, it is based instead on a 'justice of fairness theory' of retribution. Retributive justice as fairness requires corporations to be punished because of the *unfair advantage* that they would otherwise accumulate through corporate crime. Fisse explains this theory (at 1171) as follows: '[W]hen corporations commit offenses which go unpunished, a material unfair advantage accrues, namely, the accumulation of an excessively large pool of money, power and prestige for distribution to shareholders, personnel, consumers and other persons who will share in the allocation of corporate resources. The unfair advantage is not abstract, overindulgent corporate self-preference, but down-to-earth exploitative gain. If corporate resources are accumulated through violations of the law, then the beneficiaries of those accumulations gain

redefinition of these various rationales of punishment, as well as increasing recognition of the rights of victims of offences and the emerging idea of restorative justice have given rise to the development of new sentencing options for corporations: restitution, community service and corporate probation.

The availability of broader remedial and preventive sanctions (imposed independently or in conjunction with severe fines) and the threat of state intervention in the day-to-day running of a business have encouraged corporations in the United States to adopt law-compliance programmes.[76] The desired effect of promoting good corporate citizenship has therefore been achieved. Other spin-offs of a comprehensive sentencing regime have been an increased interest in the prosecution of corporate entities and the development of new policies by various regulatory agencies that provide companies with incentives to develop effective compliance programmes.[77]

In South Africa, the conviction and sentencing of corporate bodies has been the exception rather than the rule. Prosecutors have focussed mainly on prosecuting individuals who have committed crimes in the corporate context. Fines imposed have generally been insignificant, and their deterrent value has been questioned.[78]

This lack of interest can perhaps be ascribed to the archaic idea that a corporation has 'no soul to be damned an no body to be kicked'.[79] The time is ripe for the Law Commission to reconsider our substantive law on corporate criminal liability and develop new sentencing strategies that will deal with delinquent corporate behaviour. Otherwise, this country may attract a host of corporations whose activities would not be tolerated elsewhere.

them at society's expense. Thus, corporate retributivism is based on the need to avoid the injustice caused by unfair distribution of social resources to individual members of society.'

[76]See Diana E Murphy 'The federal sentencing guidelines for organisations: a decade of promoting compliance and ethics' (2002) 87 *Iowa LR* 697 at 712.

[77]Murphy n 76 above at 712–713.

[78]See Alan Rycroft 'Corporate homicide'(2004) 17 *SACJ* 141 at 152–153 for a discussion of the insignificant fines levied in recent years for injuries and fatalities caused by the negligence of corporate employers. In light of the great number of accidents and workplace deaths in South Africa, he pleads (at 152) for a 'more vigorous intervention of the criminal law and creative sanctions'.

[79]The words of Edward, First Baron Thurlow. See n 3 above.

Prostitution and the enforcement of morality

Sunette Lötter[*]

Introduction

It is an undeniable fact that law and morality overlap. The extent to which this should be tolerated has been debated extensively by distinguished legal philosophers. A more controversial question about the interrelation between law and morality is whether criminal law should be used to enforce a morality which reflects moral opinions concerning certain areas of social life. These areas normally include sexual behaviour, religious practices and drug use.[1] This controversial sub-question has led to an independent debate – the object of which was to find criteria that would justify the enforcement of morality by criminal law.

It could be argued that this debate has no relevance in a constitutional dispensation. However, in *S v Jordan*[2] the Constitutional Court came to the conclusion that ' ... although nearly all open and democratic societies condemn commercialised sex, they differ vastly in the way they regulate it. These are matters appropriately left to deliberation of the democratically elected bodies of each country'.[3]

In the course of this paper the enforcement of morality in a constitutional dispensation will be examined by analysing the views of the Constitutional Court on the prohibition of prostitution and the role of the legislature in dealing with social problems.

Historical perspectives on prostitution

Until 1988 South African law mirrored the ambivalent views of society on commercial sex. While prostitution, as such, did not constitute a crime, related activities did. Prostitution also did not constitute a crime in Roman and Roman Dutch law. A prostitute was branded as shameless but was never punished for plying her trade.[4] Persons who exploited prostitutes were punished. A nurse who encouraged a young girl in her charge to become a prostitute had her mouth and throat filled with molten lead as punishment.[5]

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[1]David M Adams *Philosophical problems in the law* (2000) 194.
[2]2002 6 SACR 642(CC).
[3]*Id* at par 91.
[4]P Gane (ed) *Voet J. The selective Voet; being the commentary on the pandects* (Paris ed 1829) and the supplement to that work by Johannes van der Linden, translated with explanatory notes and notes of all South African reported cases by Percival Gane (1955) Vol II 367.
[5]*Ibid.*

The Wolfenden Committee[6] held the view that it was not the task of criminal law to curb prostitution but rather to legislate against the external manifestations of prostitution. This view was shared by the South African legislature. The Immorality Act 23 of 1957 did not criminalise the act of prostitution but keeping a brothel,[7] soliciting,[8] procurement[9] and living on the earnings of prostitution[10] all constituted crimes.

The State President requested the President's Council in 1985 to advise him on the question whether the provisions of the Immorality Act 23 of 1957 were sufficient to curtail immoral acts. The Commission embraced the philosophy of the Wolfenden Committee that prostitution, as such, should not be criminalised and advised that strong action should be taken against the external manifestations of prostitution.[11] Their recommendations led to the promulgation of the Immorality Amendment Act 1988.[12] However, the Amendment Act of 1988 criminalised sex for reward, contrary to the recommendation of the Commission.[13]

The South African Law Commission (SALC)[14] points out that the advent of democracy in 1994 appears to have led to a re-evaluation of the current approach (prohibition) to prostitution.[15] A draft policy document, produced by the Gauteng Ministry of Safety and Security, recommends the decriminalisation of prostitution. Various non-governmental organisations have also come out in favour of the decriminalisation of prostitution. The current approach of prohibition was also evaluated by the Constitutional Court when the constitutionality of s 20(1)(aA) was challenged.

***S v Jordan & Others* 2002 (6) SA 642 (CC)**

The applicants in the case were convicted in the Magistrate's Court of contravening the Sexual Offences Act 23 of 1957. Although the constitutionality of the provisions was challenged, the conviction was not resisted, as the Magistrate's Court does not have the power to declare statutes unconstitutional. The applicants appealed to the Pretoria High Court to have the provisions set aside. Spoelstra J held that s 20(1)(aA), which deals with sex for reward, was unconstitutional.[16] The Constitutional Court was asked to confirm the declaration of invalidity of s 20(1)(aA) which reads as follows:

[6]Home Office, Scottish Home Department. *Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution* (1957) par 257.
[7]Section 2 of Act 23 of 1957.
[8]Section 19 of Act 23 of 1957.
[9]Section 10 of Act 23 of 1957.
[10]Section 20 of Act 23 of 1957.
[11]Suid-Afrika: *Verslag van die Presidentsraad se ad hoc-Komitee oor die Ontugwet, 1957 (Wet No 23 van 1957)* PR1/1985 24–25.
[12]Act 2 of 1988.
[13]Section 20 (1) (aA) of the Sexual Offences Act 23 of 1957.
[14]'Sexual offences: adult prostitution' *Issue Paper 19* Project 107. 12 July 2002.
[15]*Id* at 11.
[16]*S v Jordan* n 2 above.

Prostitution and the enforcement of morality

(1) Any person who –

(a)has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; shall be guilty of an offence.

Ngcobo J, delivering the majority decision, came to the conclusion that s 20(1)(aA) was constitutional. He agreed with O'Regan and Sachs JJ's conclusion ' ... that the constitutional challenges based on human dignity, freedom of person, privacy and economic activity must fail. But the reasons that persuade me to conclude that the challenge based on the right to economic activity and the right to privacy must fail differ in both their scope and emphasis from those advanced in the joint judgment'.

O'Regan and Sachs JJ found s 20(1)(aA) inconsistent with the Constitution and, accordingly, invalid. However, the order was suspended for a period of 30 months. They concluded that the suspension of the order would give Parliament the opportunity to deliberate on the most effective way to deal with prostitution.

The views expressed by the Constitutional Court on the enforcement of morality are insightful. Ncgobo J remarked: 'The Legislature has the responsibility to combat social ills and where appropriate to use criminal sanctions. In doing so, it must act consistently with the Constitution.' He was of the opinion that to outlaw commercial sex is to pursue a legitimate constitutional purpose. He concluded that the courts are only concerned with the legality of legislation and reiterated that he dealt with the constitutionality of the legislation before the court, and not its desirability.[17]

O'Regan and Sachs JJ agreed that it is not for the court to interfere in the area of commercial sex which is the legitimate sphere of the legislature.[18] Reference was made to the case of *Aldona Margorzata Jany*[19] where the European Court remarked that as far as the immorality (of prostitution) was concerned, the court could not substitute its own assessment for that of the Legislature of the Member States.'The issue is generally treated as one of governmental policy expressed through legislation rather than one of constitutional law to be determined by the courts.'[20]

O'Regan and Sachs JJ observed that the question of commercial sex must not be looked at through the lens of certain popular conceptions of morality but through that of constitutional articulated values.[21] They were of the opinion that a pluralist constitutional democracy may well be impartial in its dealings with people and groups but that it is not neutral in its value system. 'Our Constitution

[17] *Id* at par 31.
[18] *Id* at par 49.
[19] *Aldona Malgorzata JaNY AND Others v Staatssecretaris van Justitie* Case 268/99, 20 November 2001.
[20] *S v Jordan* n 2 above at par 90.
[21] *Id* at par 111.

certainly does not debar the State from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep civic morality.'[22] The limits to which the State may go to enforce morality are found in the text and spirit of the Constitution.

It is the task of the legislature to interpret the moral convictions of society in order to establish an objective value system in accordance with fundamental constitutional values.[23] This was also stated in *Prince*[24] where the court commented as follows:

> In a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by criminal sanction. In doing so it must act consistently with the constitution, but if it does that, courts must enforce the laws whether they agree with them or not.[25]

The opinion that it is the task of the legislature to determine public morality and not that of the Constitutional Court, has once again brought the question of enforcement of morality by criminal law to the fore.

Enforcement of morality

The criminal sanction is invoked to correct wrongs that society at large condemns as violations of moral decency.[26] The legitimacy of enforcing morality is normally questioned when moral opinions about areas of sexual behaviour, religious practices and drug use are enforced.[27]

The debate on the enforcement of morality was for many years overshadowed by the jurisprudential interpretation of the Wolfenden Report by Hart and Devlin.[28] In 1859 Mill published *On Liberty* in which he expounded the view that the only reason for society to exercise power rightfully over any member of society against his will is to prevent harm to others.[29] The debate on the enforcement of morality was sparked anew when the report of the Wolfenden Committee was published in 1957 in England. The Committee investigated the legal response to prostitution and homosexuality in a legal system where Parliament was sovereign.

The notion expressed in the Report that there was a sphere of private morality which is not the law's business gave rise to a paper published by Lord Devlin

[22] *Id* at par 110.
[23] *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) and the quotation by the German Federal Court as quoted by the court.
[24] *Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC).
[25] *Id* at par 108.
[26] DAJ Richards *Sex, drugs, death and the law: an essay on human rights and overcriminalization* (1982) 15.
[27] Adams n 1 above.
[28] Richards n 26 above at 43.
[29] JS Mill *On liberty* (1859) 73

on the enforcement of morality.[30] This paper initiated the well-published Hart-Devlin debate which echoed the earlier Mill-Stephens debate.

Devlin postulated the view that a shared morality is a condition for the existence of society.[31] An established morality is as important to society as an established government. If a shared morality is not maintained, society will disintegrate. The content of legislation enforcing a shared morality should be determined by the man on the Clapham omnibus or the man in the jury box.[32] As Richards points out, the objectivity sought by applying this method would result in the enforcement of existing custom which 'has nothing to do with the notions of moral impartiality and objectivity that are, or should be, of judicial concern in determining public morality'.[33]

Hart responded to Devlin's views in an article 'The legal enforcement of morality'.[34] He distinguished between a critical and positive morality. Positive morality refers to the morality that exists at a given time whilst a critical morality refers to the values applied to evaluate the existing positive morality.[35] The fact that justification has to be tendered for the enforcement of morality indicates that *prima facie* objections exist.[36] Hart adopted paternalism to explain instances where conduct is punished solely for the reason that it is seen as being immoral.[37]

The debate was joined by Dworkin who deemed it necessary to participate as a result of the Wolfenden Report, the public debate in England and a series of judgments on obscenity judgments of the Supreme Court of the United States[38] including *Memoirs v Massachusetts (Fanny Hill)*[39] and *Ginzberg v United States*.[40]

Dworkin criticised Devlin's conclusion that every society has a right to preserve its own existence and is therefore entitled to use the sanction of the criminal law

[30]This notion is severely criticised by Larry Backer. He asserts that the approach adopted by the Wolfenden Report was intended to create greater tolerance, but only succeeded in paving the way for lawmakers to condemn, through criminal law, conduct which does not suit them. He argues that this report has reserved all public space in the legal order for the dominant morality and left the 'private space' for conduct which offends dominant morality. (LC Backer'Exposing the perversions of toleration: the decriminalisation of private sexual conduct, the Penal Code, and the oxymoron of liberal toleration' 1993 *Florida Law Review* 755 on 764.
[31]P Devlin *The enforcement of morals* (1965) 1.
[32]*Id* at 15. PR MacMillan *Censorship and public morality* (1986) points out that it may be possible *for* the Legislature to determine morality rationally, but not for the jury. Community standards are nowhere determined exclusively by the jury. (112).
[33]Richards n 26 above at 44.
[34]HLA Hart *Law, liberty and morality* (1963).
[35]*Id* at 20.
[36]*Ibid*.
[37]*Id* at 32.
[38]R Dworkin *Taking rights seriously* (1977) 240.
[39]383 US 113 (1966).
[40]383 US 463 (1966).

to enforce the moral conformity necessary for the existence. He concludes that Devlin believes that society is entitled to preserve itself without ' ... vouching for the morality that holds it together'.[41] Dworkin argues that Devlin ' ... misunderstands what it is to disapprove on moral principle'.[42] Moral conventional practices are more complex than Devlin understands them to be and therefore his perception of what is meant by the idea that criminal law should be derived from public morality is wrong.

Dworkin commences his argument by pointing out that the terms moral position and moral conviction function not only as terms of justification and criticism but also as description. Moral conviction is often used as justification for an act when the moral issues are vague or in dispute.[43] It is therefore important to give content to the term moral position. He contends that a moral position can be founded on prejudice, emotional reaction, rationalisation, parroting or moral conviction.[44] It would be difficult if not impossible to defend a moral position based on the first four reasons. A moral position founded on moral conviction can be defended, for instance when based on religious grounds. A moral position based on moral conviction should, however, not only satisfy on grounds of sincerity, but should also be consistent. A person who condemns homosexuality on religious grounds will have difficulty in convincing someone of the legitimacy of his moral position if he does not condemn fornication or adultery.[45]

It is the task of the conscientious legislature to determine not only what the moral consensus of society is but also whether the consensus is based on moral conviction as opposed to prejudice, parroting, emotional reaction or rationalisation.[46]

Richards argues that constitutional principles require that only those principles may be legally enforced which express the values of equal concern and respect for autonomous self-definition compatible with constitutional values. Any legally enforceable standards of conduct must rest on generally acceptable empirical standards and must not contravene the underlying values of the Constitution.[47] In terms of this argument, the content of legislation should be based on acceptable empirical standards while the legality of the legislation should be based on constitutional values.

[41] Devlin n 31 above at 243.
[42] Dworkin n 38 above at at 247.
[43] *Id* at 248.
[44] *Id* at 249–251.
[45] *Id* at 251.
[46] *Id* at 254–255.
[47] Richards n 26 above at 49.

Van der Vyver's view[48] on the question whether government ought to enforce morality is based on the Cormonomic Idea. The role of the state is that of arbitrator of inter-individual conflicts in society. The promotion of moral values for the sake of morality alone does not fall within the scope of the state's functions.[49] Human behaviour is based on conviction and as morality is ' ... not a matter of compulsion backed by coercion', state-imposed constraint will deprive good conduct from its moral quality. If the state does intervene in prescribing immoral conduct, it would be from a position of arbitrator of social conflicts and not as custodian of morals.[50]

The idea of the enforcement of morality is not reprehensible in itself. The Constitutional Court acknowledged that it is the task of the Legislature to enforce a public morality that fosters and reflects constitutional values. It was also adamant that its duty was to determine the legality of legislation and not to evaluate the content of the morality it tries to enforce. Even if the court does not agree with the morality that is being enforced, its function is restricted to determining the constitutionality of the chosen route.

It would appear that the enforcement of morality still lies in the hands of the legislature, albeit with the injunction that the enforced morality should be grounded in the text and values of the Constitution. It is submitted that the legislature should therefore have a duty to determine public consensus on public morality and to ensure that it is based on moral conviction.[51] Legislation should not be founded on prejudice, emotional reaction, rationalisation or parroting but on general acceptable empirical standards. This approach would ensure that legislation would, once it had passed constitutional scrutiny, not only comply with constitutional values, but be a true reflection of public morality.

Legal models addressing prostitution

The Constitutional Court has clearly indicated that it is the duty of the legislature to enforce morality. The Court also indicated that the legislature has to choose the best approach to follow with regard to prostitution. The South African Law Commission (SALC) published an issue paper requesting the public to comment on workable legal solutions for the problems surrounding adult prostitution. Three legal options on the management of prostitution are set out in the paper.[52] These options are criminalisation, legalisation and decriminalisation. The SALC points out that these terms have implications with regard to both legal provisions and social policies. Legalisation and

[48]JD van der Vyver 'Law and morality' in Kahn (ed) *Fiat justitia/ essays in memory of Oliver Denys Schreiner* (1983) 364.
[49]*Id* at 369.
[50]*Ibid.*
[51]Dworkin n 38 above.
[52]The response to the issue paper should be valuable in assisting the legislature in deciding which approach to follow about prostitution.

decriminalisation are problematic, as there are no official definitions of the concepts and they are very similar in meaning.[53]

Criminalisation

Before 1988 only prostitution-related activities were criminalised, but the Immorality Amendment Act 2 of 1988 criminalised prostitution as such. A policy of total prohibition is presently followed in South Africa. Ncgobo J observed that criminalisation is one of the options available to combat the social ills associated with commercialised sex. This is in keeping with the Constitution, as these measures are clearly intended to protect and improve the quality of life. It is not for the court to comment on the effectiveness of these measures.[54]

O'Regan and Sachs JJ were of the opinion that it is not for the court to determine whether criminalisation leads to more crime, but that legislatures in open and democratic societies may agree or disagree as to their society's response to prostitution.[55] Societies may differ in their approach to prostitution, but the issue should be treated as one of '... governmental policy expressed through legislation rather than one of constitutional law to be determined by courts'.[56] As the issue is complex it should be left to be resolved by law-making bodies. However, at present the Government has chosen prohibition which is, despite inherent problems, a constitutionally permissible legislative choice.[57] It is clear that, although criminalisation may not be the most effective approach to prostitution, it is a constitutionally legitimate approach.

Aaron *et al* argue that the cost of the criminal sanction is high when the criminal sanction is applied to victimless crimes such as prostitution.[58] The enquiry into the cost of criminalising victimless crimes is pragmatic.[59] Criminalisation may:

- bring the law into disrepute and reduce its efficiency;
- obstruct law enforcement which can and often does result in selective law enforcement;
- result in diverting legal enforcement officers vitally needed to attack more serious crimes;
- foster criminal conduct on the part of the police (because of difficulties encountered in enforcing these laws, legal enforcement officers resort to abuse and illegal investigative methods);
- lead to corruption of law enforcement officers;
- promote a crime tariff as the person willing to run the risk of the criminal sanction imposed, becomes wealthy; and

[53] 'Sexual offences: adult prostitution' n 14 above at 186.
[54] *S v Jordan* n 2 above at par 27.
[55] *Id* at par 94.
[56] *Id* at par 95.
[57] *Id* at par 97.
[58] DE Aaronson, CT Dienes & MC Musheno *Public policy and police discretion* (1984) 109.
[59] *Id* at 114–116.

- promote criminality since once a person is branded a criminal, it is easy to fall back into criminality. [60]

One of the serious arguments against overcriminalisation is the fact that questionable police methods are used to enforce the law. In the instance of victimless crimes, there is no complainant and seldom, if ever, witnesses. As far as commercial sex is concerned, police have to resort to entrapment. This is an investigation method which is immoral in itself. Immoral methods are thus being used to curb immoral practices![61]

Decriminalisation

Decriminalisation has been defined as 'those processes by which the competence of the penal system to apply sanctions as a reaction to a certain form of conduct is withdrawn in respect of that conduct'.[62] When conduct is decriminalised, the criminal sanction and, consequently, the penal sanction attached to the conduct is removed. This indicates that a person will not be prosecuted by the State for that conduct.

De iure decriminalisation should be distinguished from *de facto* decriminalisation. *De iure* decriminalisation is the result of formal legal action while *de facto* decriminalisation is the result of informal screening and diversionary programmes, initiated and controlled by police departments, prosecutors, courts, correctional institutions or two or more of these groups acting together.[63]

The SALC indicates that the major implication of decriminalisation would be recognition of the prostitution industry as a legitimate form of work. Prostitution would therefore be subject to the regulatory measures applicable to any form of labour.[64] Sion is of the opinion that decriminalisation is an option whereby society accepts that prostitution cannot be solved by criminal law but seeks to protect public peace and order while simultaneously enabling the prostitute to operate in the least offensive way.[65]

Legalisation

When conduct is legalised all legal sanctions are removed. Although legalisation and decriminalisation are frequently used as synonyms they are not synonymous. Grapendaal, Leeuw and Nelen[66] are of the opinion that both these concepts indicate the degree to which the criminal sanction has been removed. The central issue in both concepts is societal normalisation which consists of more than the removal of the criminal sanction. Legalisation cannot, therefore,

[60] *Id* at 118–120.
[61] *Id* at 120.
[62] The European Commission on Crime. Council of Europe 1980 *Report on Decriminalisation.*
[63] Aaronson *et al* n 58 above at 153.
[64] 'Sexual offences: adult prostitution' n 14 above at 201.
[65] AA Sion *Prostitution and the law* (1977) 52.
[66] De Leuw & Marshall (eds) *Between prohibition and legislation. The Dutch experiment in drug policy* (1994).

be regarded as an indication of a higher level of acceptance.[67]

The SALC describes legalisation ' ... as the tolerance of prostitution provided that it complies with certain narrowly defined circumscribed conditions'[68] and views it as a compromise position. The State accepts that prostitution cannot be eradicated, but decides that it would be in the best interest of all concerned to control the industry.[69]

Legalisation is often associated with regulation. Regulation consists of many systems based on the same principles although they may differ fundamentally at times.[70] Legal measures applied to the regulation of prostitution include registration of prostitutes, whether compulsory or voluntary,[71] zoning requirements, licensing of prostitution businesses and mandatory health testing.[72] One of the main reasons for the failure of regulation as a policy to address prostitution is the failure to secure a complete list of all women practising prostitution. Many women practising prostitution therefore escape police administration.[73] It has also been argued that the prominence given to prostitution by regulation serves, psychologically, as an incitement to it.[74]

All three of the approaches to prostitution have succeeded in addressing some of the problems inherent in it. However, not one of these approaches has succeeded in addressing prostitution successfully. As no approach provides a foolproof solution to the problems inherent in prostitution, the legislature will ultimately have to choose between a moral approach (prohibition or decriminalisation) or a utilitarian approach (legalisation and regulation). The responsible legislature would, as has been argued, base its decision on acceptable empirical standards based on moral conviction.

Conclusion

It is clear that a decision on matters of morality is (still) in the hands of the legislature.[75] The legislature will thus have the final responsibility in deciding the approach to be followed with respect to prostitution. As a decision on the correct approach to prostitution inevitably involves morality issues, the moral consensus will have to be assessed. The response to the issue paper distributed by the SALC should provide valuable insights into the views of society on prostitution. The option finally chosen will indicate whether the legislature can indeed be trusted to determine moral consensus and legislate accordingly.

[67] *Id* at 235.
[68] 'Sexual offences: adult prostitution' n 14 above at 191.
[69] *Id* at 92.
[70] Sion n 65 above at 34.
[71] *Ibid*.
[72] 'Sexual offences: adult prostitution' n 14 above at 193–196.
[73] Sion n 65 above at 36.
[74] Flexner, as quoted by Sion n 65 above at 41.
[75] On condition that the legislation passes constitutional scrutiny.

Die Strafvorschriften der Bundesrepublik Deutschland gegen den Nationalsozialismus

Penal codes of the Federal Republic of Germany against national socialism

HC Friedrich-Christian Schroeder[*]

Abstract

In view of the fact that national socialism brought so much crime and suffering to Europe and specifically Germany, it was a matter of course that the new Federal Republic of Germany, which came about in 1949, would do everything in its power to prevent the re-emergence of national socialism.

On the other hand, the constitutional concept of national socialism stood in stark contrast against the constitutional order of the Federal Republic, as is the case in all democratic states, with the result that special legislation against national socialism, apart from the general constitutional protections, did not seem viable.

Nevertheless, there seemed to be a tendency to create ever more special regulations against national socialist leanings.

This article examines the establishment and history of these codes and problems encountered in implementing them.

Angesichts der schweren Untaten und des großen Leids, das der Nationalsozialismus über Europa und auch über Deutschland selbst gebracht hat, war es naheliegend, daß die 1949 gegründete Bundesrepublik Deutschland alles tat, um eine Wiederentstehung des Nationalsozialismus zu verhindern.

Auf der anderen Seite stand die Verfassungskonzeption des Nationalsozialismus in konträrem Gegensatz zu der Verfassungsordnung der Bundesrepublik Deutschland, wie aller demokratischen Staaten, so daß Sondervorschriften gegen den Nationalsozialismus neben dem allgemeinen Verfassungsschutz kaum erforderlich erschienen.

Dennoch entwickelte sich der Trend zur Schaffung von immer mehr Sondervorschriften gegen nationalsozialistische Bestrebungen.

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DIE ENTSTEHUNG DER VORSCHRIFTEN

Das (1.) Strafrechtsänderungsgesetz 1951

Nach der Niederlage Deutschlands 1945 und seiner Aufteilung in vier Besatzungszonen galt das deutsche Strafgesetzbuch von 1871 weiter; nur die nationalsozialistischen Änderungen und Einfügungen wurden vom Alliierten Kontrollrat aufgehoben. Aufgehoben wurden auch die alten Vorschriften über Hoch- und Landesverrat.[1] Nach ihrer Gründung erließ die Bundesrepublik Deutschland rudimentäre Vorschriften über den Schutz des Staatsgebiets und der verfassungsmäßigen Ordnung (Art. 143 Grundgesetz).

Nach einigen Anzeichen des Wiederauflebens von Rechtsradikalismus brachte die Sozialdemokratische Partei Deutschlands am 15.2.1950 den Entwurf eines „Gesetzes gegen die Feinde der Demokratie" ein. Dieser Entwurf enthielt – neben Vorschriften gegen die gewaltsame Verfassungsänderung, gegen verfassungs- feindliche Verbindungen und gegen Terrorakte – Vorschriften gegen die Verletzung der Achtung vor Opfern der nationalsozialistischen Gewaltherrschaft und die Leugnung der Verwerflichkeit des Völkermords oder der Rassenverfolgung (§ 10).

Das (später sogenannte 1.) Strafrechtsänderungsgesetz von 1951 – die Bundesrepublik hatte das seit 1871 geltende Reichsstrafgesetzbuch, gereinigt von den durch den Nationalsozialismus eingeführten Änderungen, grundsätzlich beibehalten – beruhte auf der Konzeption, die Unabhängigkeit des Staates und wichtige Verfassungsgrundsätze nicht nur gegen Gewalt, sondern auch gegen sonstige Handlungen zu schützen (Abschnitt „Staatsgefährdung"). Unter Strafe gestellt waren das Unternehmen der Beseitigung oder Außergeltungsetzung von wichtigen Verfassungsgrundsätzen durch Mißbrauch oder Anmaßung von Hoheitsbefugnissen (§ 89), die Sabotage in einer solchen Absicht (§ 90) und der Nachrichtendienst in einer solchen Absicht (§ 92). Ebenfalls strafbar waren die Herstellung und Verbreitung von Schriften u.ä., durch deren Inhalt Bestrebungen herbeigeführt oder gefördert werden sollen, die darauf gerichtet sind, zur Unterdrückung der demokratischen Freiheit einen der Verfassungsgrundsätze zu beseitigen, außer Geltung zu setzen oder zu untergraben (§ 93). Schließlich war noch die Einwirkung auf Beamte, in der Absicht, ihre pflichtmäßige Bereitschaft zum Schutz der verfassungsmäßigen Ordnung zu untergraben, strafbar, soweit der Täter dadurch Bestrebungen diente, die gegen einen der Verfassungsgrundsätze gerichtet waren (§ 91). Geschützte Verfassungsgrundsätze waren nach § 88 Abs. 2:

> 1 das Recht des Volkes, die Staatsgewalt in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung auszuüben und die Volksvertretung in allgemeiner, unmittelbarer, freier, gleicher und geheimer Wahl zu wählen,

[1] Dazu näher Schroeder *Der Schutz von Staat und Verfassung im Strafrecht* (1970), S. 176.

2 die Bindung der Gesetzgebung an die verfassungsgemäße Ordnung und die Bindung der vollziehenden Gewalt und der Rechtsprechung an Gesetz und Recht,
3 das Recht auf die verfassungsmäßige Bildung und Ausübung einer parlamentarischen Opposition,
4 die parlamentarische Verantwortlichkeit der Regierung,
5 die Unabhängigkeit der Gerichte,
6 der Ausschluß jeder Gewalt- und Willkürherrschaft.).

Diese Verfassungsgrundsätze waren weitgehend ein negatives Spiegelbild der nationalsozialistischen Herrschaft, allerdings auch der neu entstandenen kommunistischen Regime in der DDR und den mittel- und osteuropäischen Satellitenstaaten. Daß die Schutzrichtung gegen die kommunistische Gewaltherrschaft in der Folgezeit immer mehr in den Vordergrund trat, lag nicht an einer Verdrängung des Nationalsozialismus, sondern daran, daß in Mittelost- und Osteuropa laufend kommunistische Machtergreifungen erfolgten, während die Gefahr einer Wiederbelebung des Nationalsozialismus äußerst gering war.

Unter Strafe gestellt waren ferner die Gründung einer Vereinigung, deren Zwecke oder deren Tätigkeit sich gegen die verfassungsmäßige Ordnung oder gegen den Gedanken der Völkerverständigung richten, und die Förderung solcher Bestrebungen als Rädelsführer oder Hintermann (§ 90a).

Im Regierungsentwurf für das (Erste) Strafrechtsänderungsgesetz waren auch Vorschriften gegen die öffentliche Verwendung nationalsozialistischer Kennzeichen und gegen die Verächtlichmachung des Widerstands gegen die nationalsozialistische Gewaltherrschaft enthalten (Art. 2). Es ist bemerkenswert, daß diese Vorschriften nicht in das Strafgesetzbuch eingefügt werden sollten, da angenommen werden könne, daß sich diese zeitbedingten Strafvorschriften nicht für die Dauer als erforderlich erweisen würden.[2] Diese Vorschriften wurden jedoch nicht Gesetz; eine Vorschrift gegen die öffentliche Verwendung nationalsozialistischer Kennzeichen wurde erst in dem Versammlungsgesetz vom 24.7.1953 eingeführt (§ 4, mit Strafdrohung in § 28).

Das 6. Strafrechtsänderungsgesetz 1960

In der Weihnachtsnacht 1959 kam es in Köln zu einer Schändung der Synagoge und des Gedenksteins der Opfer des Nationalsozialismus und bald darauf zu ähnlichen Vorkommnissen an vielen Orten des In- und Auslands.[3] Diese Vorfälle lösten in mehreren europäischen Staaten Initiativen zu neuen Strafgesetzen und auch bei der Menschenrechtskommission der Vereinten Nationen einen entsprechenden Appell[4] aus. In der Bundesrepublik Deutschland führten diese Vorkommnisse zu dem Sechsten Strafrechtsänderungsgesetz. Dieses

[2]Drucksachen des Deutschen Bundestages, 1. Wahlperiode, Nr. 1307, S. 50.
[3]S Weißbuch der Bundesregierung über die antisemitischen und nazistischen Vorfälle in der Zeit vom 25.12.1959 bis 28.1. 1960.
[4]Schafheutle „Das sechste Strafrechtsänderungsgesetz" *Juristenzeitung* 1960, S. 470ff.

überführte das Verbot der Verwendung von Kennzeichen einer ehemaligen nationalsozialistischen Organisation aus dem Versammlungsgesetz (s.o. 1) in das Strafgesetzbuch (§ 96a Abs. 1 Nr. 3). Wenn es dieses Verbot auch in den Rahmen der Verwendung von Kennzeichen von verbotenen Parteien und Vereinigungen stellte, so fand sich doch damit erstmals im deutschen Strafgesetzbuch eine Sondervorschrift gegen den Nationalsozialismus. Als Kennzeichen wurden in Abs. 2 „insbesondere Fahnen, Abzeichen, Uniformstücke, Parolen und Grußformen" genannt. Von der Strafbarkeit ausgenommen wurde eine Verwendung im Rahmen der staatsbürgerlichen Aufklärung, der Abwehr verfassungswidriger Bestrebungen und ähnlicher Zwecke (Abs. 1 S. 2). Außerdem wurde der Angriff auf die Menschenwürde anderer durch Aufstachelung zum Haß gegen Teile der Bevölkerung, Aufforderung zu Gewalt- oder Willkürmaßnahmen gegen sie oder Beschimpfung, böswillige Verächtlichmachung oder Verleumdung unter Strafe gestellt (§ 130 StGB, neue Fassung). Die Vorschrift richtete sich vor allem gegen rassistische Angriffe, vermied jedoch eine entsprechende Formulierung, um nicht den Eindruck eines Sonderschutzes für die Juden zu erwecken.[5] Schließlich wurde bei der Strafvorschrift gegen die Verunglimpfung des Andenkens Verstorbener das Erfordernis eines Strafantrages beseitigt, wenn der Verstorbene sein Leben als Opfer einer Gewalt- und Willkürherrschaft verloren hat und keine antragsberechtigten Angehörigen hinterlassen hat (§ 189 Abs. 3 StGB; seit 1974 § 194 Abs. 2 StGB). Diese Vorschrift berücksichtigte besonders die Tatsache, daß jüdische Familien vollständig umgebracht wurden, vermied aber ebenfalls eine Spezifizierung dieser Schutzvorrichtung.

Nach dem Zusammenbruch des Kommunismus stellte sich übrigens heraus, daß es sich bei den Schmieraktionen um eine Aktion des tschechischen Geheimdienstes zur Diskreditierung der Bundesrepublik gehandelt hatte.

Das 8. Strafrechtsänderungsgesetz 1968

Im Achten Strafrechtsänderungsgesetz von 1968 wurden die Organisationsdelikte auf das Verbotsprinzip umgestellt, d.h. die Tätigkeit für verfassungsfeindliche Vereinigungen wurde von einem vorherigen Verbot durch das Bundesverfassungsgericht oder einem sonstigen unanfechtbaren Verbot abhängig gemacht. Als „mittelbares Organisationsdelikt" galt auch die Verbreitung verfassungsfeindlicher Schriften. Da diese nunmehr auf die Verbreitung von „Propagandamitteln" verbotener Parteien und Vereinigungen umgestellt wurde, mußten Propagandamittel, die ihrem Inhalt nach dazu bestimmt sind, Bestrebungen einer ehemaligen nationalsozialistischen Organisation fortzusetzen, ausdrücklich genannt werden (§ 86 Abs. 1 Nr. 4, n.F.). Die schon in gleicher Weise unter Strafe gestellte Verwendung verfassungswidriger Kennzeichen (§ 96a) wurde – im wesentlichen gleichlautend – als § 86a neu formuliert.

[5]Schafheutle, aaO. S. 472.

Das 21. Strafrechtsänderungsgesetz 1985

Da sich die Einfuhr solcher Kennzeichen aus dem Ausland häufte, wurde durch das Einundzwanzigste Strafrechtsänderungsgesetz vom 13.6.1985 auch die Einfuhr, sowie auch die Herstellung und Vorrätighaltung, unter Strafe gestellt (§ 86a Abs. 1 Nr. 2 n.F.).

Inzwischen wollte man die Tatsache, daß einzelne unbelehrbare Personen die Vernichtung der Juden in Vernichtungslagern bestritten, nicht mehr hinnehmen. Diese Behauptungen gipfelten in der These, das Konzentrationslager Auschwitz mit seinen Vernichtungsaktionen sei eine Lüge. In der Gesetzgebungsdiskussion wurde diese Terminologie umgekehrt: die Leugnung der nationalsozialistischen Vernichtungsaktionen gegen die Juden wurde als „Auschwitz-Lüge" bezeichnet.

Die Rechtsprechung behalf sich damit, daß sie die Tatsache, Opfer des nationalsozialistischen Völkermordes gewesen zu sein, als Bestandteil der Ehre der in der Bundesrepublik lebenden Juden ansah.[6] Diese Auffassung war wenig überzeugend.[7] Die SPD wollte das öffentliche Billigen, Leugnen oder Verharmlosen des nationalsozialistischen Völkermordes unter Strafe stellen.[8] Die Einwände der CDU/CSU gingen vor allem dahin, daß im Zweiten Weltkrieg und vor allem nach seinem Ende auch gegen Deutsche massenhaft schreckliche Gewalttaten verübt wurden, und daß auch deren Leugnung oder Billigung unter Strafe gestellt werden sollte. In der Bundesrepublik werden gegen derartige Äußerungen alsbald die Vorwürfe der „Relativierung" des nationalsozialistischen Völkermords und der „Aufrechnungsmentalität" erhoben; es müsse die „Einzigartigkeit" des nationalsozialistischen Völkermords hervorgehoben werden.[9] Außerdem wurde das Tatbestandsmerkmal des „Verharmlosens" für zu unbestimmt gehalten.[10]

Schließlich sah man davon ab, einen Sondertatbestand zu schaffen, und begnügte sich damit, bei der Beleidigung wie schon bisher bei der Verunglimpfung des Andenkens eines Verstorbenen (s.o. 2, allerdings nun mit Hervorhebung der nationalsozialistischen Gewaltherrschaft) das Erfordernis eines Strafantrags abzuschaffen, wenn der Verstorbene sein Leben als Opfer der nationalsozialistischen oder einer anderen Gewalt- und Willkürherrschaft verloren hat (§ 195 Abs. 1, 2). Dabei wurde allerdings noch die umständliche Regelung eingeführt, daß die Strafverfolgung zu unterbleiben hat, wenn ein Angehöriger widerspricht. Es handelt sich bei diesem Widerspruchsrecht gegen die Strafverfolgung um ein eigenartiges Gegenstück zu dem bekannten Institut des Antrags auf Strafverfolgung.

[6]Entscheidungen des Bundesgerichtshofs in Zivilsachen Bd. 75, S. 160ff.
[7]S. u.a. Herdegen, *Strafgesetzbuch – Leipziger Kommentar*, (11Aufl 1989) § 194, Rdn. 1.
[8]Entwurf eines 21. Strafrechtsänderungsgesetzes, Bundestags-Drucksachen 9/2090, 10/891.
[9]Wandres *Die Strafbarkeit des Auschwitz-Leugnens*, 2000, S. 112 Anm. 61.
[10]Bundestags-Drucksache 10/1286, S. 11f.

Direkte Strafbarkeit der Leugnung nationalsozialistischen Völkermords (1994)

Im Herbst 1991 hatte der Vorsitzende der „Nationaldemokratischen Partei Deutschlands" Martin Deckert den Amerikaner Fred Leuchter, der behauptete, die fehlende Existenz von Gaskammern in Auschwitz wissenschaftlich nachgewiesen zu haben, zu einem Vortrag nach Deutschland eingeladen und diesen Vortrag simultan übersetzt. Seine Verurteilung zu einer Freiheitsstrafe von einem Jahr, ausgesetzt zur Bewährung, wegen Volksverhetzung, übler Nachrede, Verunglimpfung des Andenkens Verstorbener und Aufstachelung zum Rassenhaß wurde vom Bundesgerichtshof aufgehoben, da die Begründung des Urteils oberflächlich und lückenhaft sei.[11] Daraufhin erhob sich in den Medien ein Sturm der Empörung.[12] In das „Gesetz zur Änderung des Strafgesetzbuches, der Strafprozeßordnung und anderer Gesetze (Verbrechensbekämpfungsgesetz)" vom 28.10.1994 wurde in letzter Minute noch eine Erweiterung des § 130 (Volksverhetzung) um folgenden Abs. 3 aufgenommen:

> Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe wird bestraft, wer eine unter der Herrschaft des Nationalsozialismus begangene Handlung der in § 220a Abs. 1[13] bezeichneten Art in einer Weise, die geeignet ist, den öffentlichen Frieden zu stören, öffentlich oder in einer Versammlung billigt, leugnet oder verharmlost.

Nunmehr war der Tatbestand der Leugnung oder Verharmlosung von Völkermordhandlungen auf den nationalsozialistischen Völkermord beschränkt.

Strafbarkeit der Rechtfertigung des Nationalsozialismus (2005)

Zur Erfüllung von Art. 6 Abs. 1 des Ersten Zusatzprotokolls zum Übereinkommen über Computerkriminalität betreffend die Kriminalisierung mittels Computersystemen begangener Handlungen rassistischer und fremdenfeindlicher Art sollte durch das Gesetz zur Änderung des Versammlungsgesetzes und des Strafgesetzbuches vom 24.3.2005 der Tatbestand des Auschwitzleugnens um die Modalität der „Rechtfertigung" ergänzt werden. Diese Erweiterung wurde wegen neuer einschlägiger Beratungen der Europäischen Union zurückgestellt. Statt dessen wurde ein neuer Absatz 4 eingefügt: „Mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe wird bestraft, wer öffentlich oder in einer Versammlung den öffentlichen Frieden in einer die Würde der Opfer verletzenden Weise dadurch stört, daß er die nationalsozialistische Gewalt- und Willkürherrschaft billigt, verherrlicht oder rechtfertigt." Dabei soll es nach der Begründung des Gesetzes für das „Verherrlichen" ausreichen, daß die nationalsozialistische Gewalt- und

[11] Entscheidungen des Bundesgerichtshofs in Strafsachen – BGHSt -, Bd. 40, S. 97ff.
[12] Hiergegen scharf Bertram „Entrüstungsstürme im Medienzeitalter der BGH und die ‚Auschwitzlüge'" *Neue Juristische Wochenschrift*, 1994, S. 2002ff.
[13] Strafvorschrift gegen den Völkermord, seit 26.6.2002 § 6 Völkerstrafgesetzbuch. Die umständliche Formulierung wurde gewählt, weil § 220a StGB zur Zeit der Begehung des nationalsozialistischen Völkermords noch nicht galt (Bundestags-Drucksache 12/8588, S. 8).

Willkürherrschaft in einen positiven Bewertungszusammenhang gestellt oder in der Schilderung der Unrechtshandlungen und ihrer Verantwortungsträger entsprechende positive Wertakzente gesetzt werden. Dies könne sich z.B. darin ausdrücken, daß ein Verantwortungsträger oder eine Symbolfigur des NS-Regimes angepriesen oder in besonderer Weise hervorgehoben werde.[14] Die Problematik einer solchen vagen Vorschrift für die Meinungsfreiheit liegt auf der Hand.[15] Man denke nur daran, daß der nationalsozialistische Rüstungsminister Albert Speer bis vor kurzem allgemein und selbst von hochrangigen Journalisten als positive Figur dargestellt und erst kürzlich durch einen Fernsehfilm als tief in Ausweisungen von Juden aus ihren Berliner Wohnungen verstrickt entlarvt wurde.

DIE RECHTSGÜTER DER TATBESTÄNDE

Verbreitung von Propagandamitteln

Das Rechtsgut dieser Vorschrift liegt angesichts der schweren Untaten des Nationalsozialismus auf der Hand: es sind die verfassungsmäßige Ordnung und in ihr eingeschlossene Demokratie und Rechtsstaatlichkeit und die Freiheit der Bevölkerung von Gewalt- und Willkürmaßnahmen.

Verwendung nationalsozialistischer Kennzeichen

Fragwürdiger ist das Rechtsgut schon bei dem Tatbestand der Verwendung nationalsozialistischer Kennzeichen. Sein Rechtsgut wurde nicht nur in der Abwehr nationalsozialistischer Bestrebungen, sondern auch in der Abwehr negativer Eindrücke im Ausland und damit des Ansehens der Bundesrepublik gesehen.[16] Da die Vorschrift auch seltene, nur noch Insidern bekannte Kennzeichen erfaßt, gilt als Schutzzweck auch die Abwehr einer entsprechenden Gruppenbildung und eines Gemeinschaftsgefühls.[17] Damit wird das Rechtsgut noch einmal vorverlagert: es besteht nicht mehr in der Schaffung einer verfassungsfeindlichen Gruppe, sondern in deren bloßer innerer Festigung. Nach *Fischer* spiegelt die Dämonisierung von Symbolen des Totalitarismus in absurder Weise ihre Überbewertung.[18] Wichtiger erscheint das Rechtsgut der öffentlichen Scham über den Nationalsozialismus.

Die „Auschwitz-Lüge"

Vollends problematisch ist das Rechtsgut der Strafvorschrift gegen die Auschwitz-Lüge. Es handelt sich wohl um den ersten Fall, in dem eine

[14]Bundestags-Drucksache 15/5051, S. 11.
[15]Hierzu die Stellungnahmen der Sachverständigen in der öffentlichen Anhörung des Innenausschusses des Deutschen Bundestages am 7.3.2004 (Protokoll Nr. 15/56) sowie Poscher „Neue Rechtsgrundlagen gegen rechtsextremistische Versammlungen" *Neue Juristische Wochenschrift*, 2005, S. 1316ff.
[16]S. z.B. BGHSt 25, 33, 130.
[17]BGHSt 47, 358.
[18]Tröndle/Fischer *Strafgesetzbuch und Nebengesetze*, (52Aufl 2004), § 86a Rdn. 2b.

historische Tatsache unter strafrechtlichen Schutz gestellt wurde.[19] Man denkt zunächst an eine versteckte Bejahung und Billigung des nationalsozialistischen Massenmordes. Dies trifft aber nicht zu, denn dieser wird ja gerade geleugnet. Man verweist daher auf die mögliche Beeinflussung und Förderung der Bereitschaft junger Menschen zur unkritischen Akzeptierung neonazistischer Tendenzen.[20] Indessen wird bei Herausnahme des Völkermordes dem Nationalsozialismus ja gerade ein wesentlicher Teil seines Unrechtscharakters genommen. Man kann nicht einerseits die Konzentrationslager zum Wesensmerkmal des Nationalsozialismus erklären und andererseits die Leugnung der Konzentrationslager als Werbung für den Nationalsozialismus ansehen.[21] Noch mehr gilt dies natürlich für den Versuch, in § 130 Abs. 4 StGB einen vorverlagerten Schutz, einen „Vorfeldschutz" gegen Völkermordhandlungen zu sehen,[22] ganz abgesehen von der extrem weiten Vorverlagerung, „Abstrahierung" eines derartigen Rechtsgüterschutzes.

Unbestreitbar ist, daß die Leugnung eines früheren Schicksals, insbesondere einer Gewalttat, eine schwere seelische Belastung, eine Kränkung des Betroffenen darstellt. Dies zeigt sich beispielsweise auch, wenn die Polizei bei der Vernehmung eines Vergewaltigungsopfers die Vergewaltigung in Zweifel zieht.

Es erscheint aber nicht nötig, den Sinn der Vorschrift in einem Schutz der Ehre oder der Gefühle der Juden zu sehen. Vielmehr ist die Scham der Deutschen, insbesondere der jüngeren Generation, über die nationalsozialistischen Untaten so groß, daß eine der wenigen möglichen Formen der Buße in einer ständigen Erinnerung gesucht wird.

Billigung der nationalsozialistischen Gewalt- und Willkürherrschaft

Der Tatbestand bezeichnet als Rechtsgut den öffentlichen Frieden.[23] Vor diesem sehr allgemeinen und unscharfen Rechtsgut stehen aber die konkreteren der Würde der Opfer und der Billigung der nationalsozialistischen Gewalt- und Willkürherrschaft. Dem entsprechend hat der Bundesgerichtshof auch ausgeführt, daß das Billigen der nationalsozialistischen Völkermordhandlungen regelmäßig den öffentlichen Frieden gefährdet.[24] Ebenso hat der Gesetzgeber in

[19] Für die historische Wahrheit als Rechtsgut, Ostendorf „Im Streit: die strafrechtliche Verfolgung der ‚Auschwitzlüge" *Neue Juristische Wochenschrift*, 1985, S. 1062ff.; Jahn *Strafrechtliche Mittel gegen Rechtsextremismus* 1998, S. 182; Ronald Dworkin *Tageszeitung* vom 17./18.6.1995, S. 13. Andere Autoren in Deutschland bezeichnen diese Auffassung als „für sich schon „polemisch" (Frommel *Das Rechtsgut der Volksverhetzung – oder ein „Ablaßhandel" in drei Akten, Zeitschrift „Kritische Justiz"* (1995) S. 402ff., 409). Vorsichtiger Wandres (Anm. 9), S. 241.

[20] V Bubnoff, *StGB-Leipziger Kommentar* (11. Aufl. 1996) § 130 Rdn. 43.

[21] Gegen das Rechtsgut der freiheitlichen demokratischen Grundordnung aus systematischen Gründen (Erfordernis eines verfassungsgerichtlichen Verbots nach dem Grundgesetz) Stegbauer „Der Straftatbestand gegen die Auschwitzleugnung – eine Zwischenbilanz" *Neue Zeitschrift für Strafrecht* 2000, S. 281ff., 283.

[22] Wandres (Anm. 9), S. 222; Jahn (Anm. 19), S. 181.

[23] So auch Bundestags-Drucksache 15/5051, S. 5.

[24] BGHSt 47, 280.

der Begründung ausgeführt, daß das Billigen, Verherrlichen oder Rechtfertigen der die NS-Gewalt- und Willkürherrschaft kennzeichnenden Menschenrechtsverletzungen die Menschenwürde der Opfer in der Regel verletzt.[25] § 130 Abs. 4 StGB schützt daher – wie das Verbot der Billigung von schweren Straftaten (§ 140 StGB)[26] – die grundlegenden Wertauffassungen der Gemeinschaft.

PROBLEME DER ANWENDUNG DER STRAFVORSCHRIFTEN GEGEN DEN NATIONALSOZIALISMUS

Bei der Anwendung fast aller der genannten Vorschriften ergeben sich erhebliche Probleme.

1 Da kaum jemand offen die Bestrebungen einer ehemaligen nationalsozialistischen Organisation propagiert und die Verbreitung bloßen nationalsozialistischen Gedankenguts nicht ausreicht,[27] kommt § 86 Abs. 1 Nr. 4 StGB kaum zur Anwendung.

2 Bei § 86a (Verwenden von Kennzeichen ehemaliger nationalsozialistischer Organisationen) stellte sich zunächst das Problem der Verwendung nationalsozialistischer Kennzeichen zur Anprangerung anderer als nationalsozialistischem Denken verhaftet oder wenigstens nahestehend, insbesondere auf Plakaten und in Karikaturen. Der Bundesgerichtshof hat eine „tatbestandsmäßige Verwendung" abgelehnt.[28] Im übrigen hat sich die Anwendung des Tatbestandes zu einem Räuber- und Gendarmspiel entwickelt. Aufsässige Jugendliche verwenden immer speziellere, weniger bekannte „Kennzeichen", z.B. Armdreiecke der Hitlerjugend und des Bundes Deutscher Mädchen für die verschiedenen „Gaue".[29] Nach der Rechtsprechung des Bundesgerichtshofs soll es auf die Bekanntheit des Kennzeichens nicht ankommen.[30] Der Bundesgerichtshof hat dies mit folgenden drei Argumenten begründet: 1. § 86a sei ein abstraktes Gefährdungsdelikt. 2. Seine Aufgabe sei, auch die Verbreitung solcher Kennzeichen zu verhindern, die bei in- und ausländischen Beobachtern mit besonderer Sachkunde (!) den Eindruck hervorrufen könnten, in der Bundesrepublik Deutschland würden rechtsstaatswidrige Entwicklungen geduldet – hiermit wird dem Tatbestand ein völlig neues Rechtsgut beigemessen: das Ansehen der Bundesrepublik im Ausland.[31]

3 Schutzzweck des § 86a StGB sei auch die Unterbindung einer gruppeninternen Wirkung der Verwendung der Kennzeichen, nämlich der

[25]Bundestags-Drucksache 15/5051, S. 5.
[26]Schroeder *Die Straftaten gegen das Strafrecht* (1985) S. 7, Maurach/Schroeder /Maiwald, Strafrecht. Besonderer Teil (9Aufl. 2005) § 102 Rdn. 2.
[27]BGHSt 23, 64, 76.
[28]BGHSt 25, 30, 128, 133.
[29]Eingehende Darstellung bei Maurach/Schroeder/Maiwald *Strafrecht. Besonderer Teil, Teilband 2*, (9 Aufl. 2005) § 84 Rdn. 41.
[30]BGHSt 47, 358.
[31]Hierzu Schroeder (Anm. 1), S. 408f.

Verfestigung gegenseitiger Bindungen Gleichgesinnter, denen der Symbolgehalt des Kennzeichens bekannt sei (hierzu o. II 2). Neuerdings werden T-Shirts mit dem Aufdruck „CONSDAPLE" verbreitet. Dieser ist zwar sinnlos, enthält aber die Abkürzung „NSDAP" für „Nationalsozialistische Deutsche Arbeiterpartei".[32] Die aufsässigen Jugendlichen narren die Polizei mit immer neuen geringfügigen Abwandlungen der Originalkennzeichen, insbesondere der Armdreiecke der Hitlerjugend. Aus diesem Grund hat der deutsche Gesetzgeber in dem schon erwähnten Verbrechensbekämpfungsgesetz von 1994 (s.o. I 5) die zusätzliche Alternative der Verwendung von „zum Verwechseln ähnlichen Kennzeichen" eingefügt. Man kann sich leicht vorstellen, welche Auslegungsschwierigkeiten diese Alternative hervorruft. Für strafbar erklärt wurden der Hitlergruß unter Abspreizen von drei Fingern,[33] die Losung „Ruhm und Ehre der Waffen-SS" wegen ihrer Ähnlichkeit zur Parole der Hitlerjugend „Blut und Ehre".[34] Viele historische Symbole sind den nationalsozialistischen „zum Verwechseln ähnlich", z.B. das Keltenkreuz[35] und die Odalrune, die außerdem mit dem Kopfwinkel auf Bundeswehruniformen identisch ist.[36]

4 Da nur geistig gestörte Personen die massenhafte Tötung der Juden bestreiten können, kommt § 130 Abs. 3 StGB (s.o. I 5) nur in untypischen Randfällen zur Anwendung.

a) Mehrfach wurden Strafverteidiger verurteilt, weil sie im Rahmen der Strafverteidigung Beweisanträge gestellt hatten, daß in Auschwitz keine Judenvernichtungen stattgefunden hätten.

Im ersten Fall hatte der Verteidiger des Vorsitzenden der „National-demokratischen Partei Deutschlands" Martin Deckert (s.o. I 5) folgenden Beweisantrag eingebracht:

„Es werden die Zeugen Bundespräsident Herzog, Bundestagspräsidentin Süßmuth, Präsidentin des Bundesverfassungsgerichts Limbach und Bundeskanzler Kohl zum Beweis der Tatsache benannt, daß es primär massive politische Interessen sind, welche dem Durchbruch der historischen Wahrheit im Zusammenhang mit dem Holocaust entgegenstehen, und zwar nicht einmal in erster Linie diejenigen der überlebenden Juden und derer Abkömmlinge oder gar des Staates Israel, sondern vor allem diejenigen unserer eigenen (deutschen) politischen Klasse, welche ihre einzigartige politische Unfähigkeit seit fast 50 Jahren

[32]OLG Hamm *Neue Zeitschrift für Strafrecht, Rechtsprechungsreport* 2004, S. 12 (Strafbarkeit wegen noch fehlender Erkennbarkeit für Außenstehende abgelehnt).
[33]Drucksachen des Deutschen Bundestages 12/4835, S. 23.
[34]OLG Karlsruhe *Neue Juristische Wochenschrift* 2003, S. 1200.
[35]Strafbarkeit daher abgelehnt vom Bundesgerichtshof, *Neue Zeitschrift für Strafrecht*, 1996, S. 81.
[36]Strafbarkeit daher abgelehnt vom Bundesgerichtshof, *Neue Juristische Wochenschrift* 1999, S. 435f.

mit der 'Einzigartigkeit der deutschen Schuld' legitimiert und nicht in der Lage ist, zuzugeben, daß sie sich an der Nase herumführen und für dumm verkaufen läßt".[37]

Nach der Auffassung des Bundesgerichtshofs sagt der Antrag aus, daß es nicht im geschichtlich anerkannten Umfang zu dem Massenmord an den Juden gekommen sei. Die Zahl der Opfer müsse in so erheblicher Weise nach unten korrigiert werden, daß es dem Angeklagten als angebracht erschienen sei, der Nachkriegspolitik „einzigartige Unfähigkeit" zu bescheinigen. Dem „Durchbruch der Wahrheit" hätten auch jüdische Interessengruppen entgegengewirkt. In der polemischen Gleichsetzung der vermeintlich „einzigartigen politischen Unfähigkeit" deutscher Politik mit der „Einzigartigkeit der deutschen Schuld" liege eine Verharmlosung der Verbrechen der NS-Zeit. Der Beweisantrag habe keinerlei Bezug zur Verteidigung gehabt und sei ein verteidigungsfremdes Verhalten gewesen.[38]

b) In Bayern wurde der Vorsitzende der Oberschlesischen Landsmannschaft zu 16.000 DM Geldstrafe verurteilt, weil er die Vertreibung der Deutschen aus den ehemaligen Ostgebieten als den „größten Holocaust aller Zeiten, der durch nichts, aber auch gar nichts an Grausamkeit zu überbieten ist", bezeichnet hatte.[39]

Der Vorsitzende des Landesverbands Thüringen des Bundes der Vertriebenen gab im November 2001 auf dem Verbandstag einen Rechenschaftsbericht. In einer Pressemappe enthielt der Rechenschaftsbericht folgende Passage: „Noch verhindern die Wolken einer bewußt betriebenen einseitigen Kollektivschuldzuweisung gegenüber unserem Volke den klaren Blick zur Beurteilung der Verbrechen in der jüngeren europäischen Geschichte und über die Kriegsschuld an den Kriegen des vergangenen Jahrhunderts. Dies wird sich bald verändern, da die Lügen über Katyn, über Jebawke, über die Opfer in Auschwitz und anderes nicht mehr länger zu halten sind". Das Deckblatt des Rechenschaftsberichts enthielt den Vermerk „Sperrfrist: 9.11.2001, 9.30 Uhr. Es gilt das gesprochene Wort!". Die Pressemappe wurde in fünf Exemplaren zur Verteilung bereitgehalten, aber nur zwei Reportern ausgehändigt. In der tatsächlichen Rede hatte der Redner die Worte „Lügen über die Opfer in Auschwitz" in „Aussagen über die Opfer in Auschwitz" abgeändert. Außerdem hatte er folgenden Zusatz gebracht: „In Auschwitz gab es offensichtlich keine 6 Millionen Opfer, sondern,

[37]BGHSt 46, 36, 38.
[38]Ähnlich BGHSt 47, 278.
[39]Zeitung *Der Neue Tag* vom 17.07.2001 (
– Ist danach auch der o. II 3 zur Unterstützung der Strafvorschrift vorgebrachte Vergleich mit dem Zweifel an einer Vergewaltigung schon eine Verharmlosung des Holocaust!

wie ich in Polen erfahren habe, sind 930.000 nachgewiesen. Dabei geht es nicht um die Relativierung der Verbrechen, sondern um die geschichtliche Wahrheit. Sie kennen meine Einstellung, daß jedes Opfer eines Verbrechens eines zu viel ist". Diese Worte wurden vom Bundesgerichtshof als „Verharmlosen" des nationalsozialistischen Völkermords angesehen. Die Aussage gehe dahin, daß es nicht in dem geschichtlich anerkannten Umfang zu dem Massenmord in Auschwitz gekommen sei. Die Zahl der Opfer müsse vielmehr in so erheblicher Weise nach unten korrigiert werden, daß es in diesem Zusammenhang als angebracht erscheine, der bisherigen Geschichtsschreibung bewußt betriebene einseitige Kollektivschuldzuweisung gegenüber dem deutschen Volk und den Gebrauch von Lügen zu bescheinigen. Der Kontext der Rede zeige somit ein umfassendes Herunterspielen der Opferzahlen, nicht nur ein zahlenmäßiges Infragestellen im Randbereich der geschichtlich feststehenden Größenordnung. Die Abgabe der zwei Pressemappen sei ein „öffentliches Zugänglichmachen"; im übrigen sei hinsichtlich der fünf Mappen ein „Vorrätighalten zum Zwecke der Verbreitung" gegeben.[40] Die erforderliche „Störung des öffentlichen Friedens" sei gegeben, da ein Journalist den Redner in einem Bericht scharf angegriffen habe. Schließlich sei auch bedingter Vorsatz gegeben. In diesem Zusammenhang sei zu berücksichtigen, daß die Ausführungen über Katyn, Jedwabne und Auschwitz in dem Rechenschaftsbericht des Landesvorsitzenden eines Landesverbands des Bundes der Vertriebenen ersichtlich fehl am Platze gewesen seien.

c) In einer Rede hatte der Präsident des Zentralrats der Juden in Deutschland, Spiegel, ausgeführt, seine Schwester sei im Alter von sieben Jahren „unbemerkt" in Auschwitz vergast worden. Ein Zuhörer erklärte daraufhin, er sei selbst im Alter von 15 Jahren als Flakhelfer in der Nähe des Konzentrationslagers stationiert gewesen. Dort habe er nichts von der Vernichtung der Juden bemerkt; erst nach dem Krieg habe er von den Greueltaten erfahren. Diese Diskussionsäußerung wurde als Leugnung des Holocaust angezeigt und von der Staatsanwaltschaft beim Amtsgericht Düsseldorf angeklagt. Das Gericht sprach den Angeklagten zwar frei, hielt ihm aber vor, er habe „in gründlich mißglückter Ausdrucksweise völlig daneben gefaselt".[41]

Diese Ausführungen zeigen, wie streng die Rechtsprechung der Bundesrepublik die genannte Vorschrift auslegt.

[40] Urteil vom 22.12.2004, *Neue Juristische Wochenschrift* 2005, S. 689ff. Mit zustimmender Anmerkung Stegbauer Zeitschrift *Neue Justiz* 2005, S. 225f.
[41] *Frankfurter Allgemeine Zeitung* vom 13.11.2002, S. 4.

SCHLUßBEMERKUNG

Die Gefahr einer Wiederentstehung des Nationalsozialismus in Deutschland ist äußerst gering. Zwar gibt es Gruppen von Jugendlichen mit martialischem Auftritt und rechtsradikalem Gedankengut. Dabei handelt es sich jedoch um kleine Randgruppen. Außerdem umfaßt die rechtsradikale Ideologie jedenfalls nicht das schrecklichste Wesensmerkmal des Nationalsozialismus, den Völkermord. Als Rechtsgut der Vorschriften wird denn überwiegend auch der „öffentliche Frieden" genannt. Ich selbst habe auf den Gesichtspunkt der öffentlichen Scham und Empörung hingewiesen. Es hat den Anschein, als ob die Ohnmacht, die Untaten des Nationalsozialismus rückgängig zu machen, zu einer scharfen Bekämpfung all dessen führt, was auch nur entfernt an den Nationalsozialismus erinnern könnte. Früher wurde bei abwesenden Majestätsverbrechern die Strafe in effigie, d.h. symbolisch am Bildnis des Täters, vollstreckt. Hieran fühlt man sich besonders bei der Strafverfolgung der Verwendung nationalsozialistischer Kennzeichen erinnert. Schon das Verbot im Rahmen allgemeiner Vorschriften gegen totalitäre Bestrebungen wird als Vertuschung und „Verharmlosung" angesehen; hieraus erklärt sich der zunehmende Trend zu Sondervorschriften gegen nationalsozialistische Bestrebungen und Bekenntnisse.

Towards a regional labour standards agreement for Southern Africa: a lesson from NAFTA

*Omphemetse Sibanda**

INTRODUCTION

This article proposes the possibility and desirability of the establishment of a regional labour standards (RLS) agreement for the Southern African region. In particular, it proposes that such an agreement could be established within the framework of the Southern African Development Community (SADC).[1] The proposal is based on the lessons learnt from the experiences of the North American Free Trade Agreement (NAFTA)[2] through its side labour agreement, the North American Agreement on Labor Cooperation (NAALC).[3] The NAALC is a novel feature of NAFTA, which was adopted in September 1993, and came into force on January 1, 1994.[4] The NAALC is a labour side agreement between Canada, Mexico and the United States of America (US).[5] This is a unique labour regime by NAFTA members, in terms of which they seek to protect, promote and enforce basic workers' rights.

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[1]The Southern African Development Community (SADC) was formed in 1992 as an integration organisation, transforming the then Southern African Development Co-ordination Council (SADCC) based on the Declaration and Treaty establishing the Southern African Development Community (SADC Treaty) signed on August 17, 1992 in Windhoek, Republic of Namibia and the Theme Document 'Towards Economic Integration'. Members of SADC include Angola; Botswana; Lesotho; Madagascar; Malawi; Mauritius; Mozambique; South Africa; Swaziland; Zambia; and Zimbabwe. Note that South Africa was not an original member of SADC, joining only in 1992. For more information on SADC see: http://www.itcilo.it/english/actrav/telearn/global/ilo/blokit/sadec.htm (accessed on 22/08/2005).

[2]North American Free Trade Agreement, US–Mexico–Canada 17 September 1993 (1993) 32 *International Legal Materials* 296. (hereafter NAFTA). For more on NAFTA see: http://www.itcilo.it/english/actrav/telearn/global/ilo/blokit/nafta.htm (accessed on 22/08/2005).

[3]North American Agreement on Labor Cooperation, US–Mexico–Canada (1993) 32 *International Legal Materials* 1499 [hereinafter NAALC]. See also: http://www.itcilo.it/english/actrav/telearn/global/ilo/blokit/naalc.htm (accessed on 22/08/2005).

[4]Note that similar initiatives can be found in the European Union. See E Petersmann 'Time for integrating human rights into the law of worldwide organizations – lessons from European integration law for global integration law' *Jean Monnet Working Paper* 7/01, at 10. For other approaches to transnational labour regulation see, generally K van Wezel Stone 'Labor and the global economy: four approaches to transnational labor regulation' (1995) 16 Michigan *Journal of International Law* 987.

[5]The NAALC did not come unopposed. The Mexican government strongly opposed enforcement tools that could be used to restrict trade or compromise Mexican sovereignty. See D Harold 'Observations on the implementation of the North American Agreement on Labor Cooperation: emerging issues and initial impacts on United States–Mexico labor relations' (1996) 11 *Journal of Borderland Studies* 769.

Although the results will not be instant, when they are combined with alternative measures similar to the NAFTA framework, SADC could make a real impact and achieve real success in reducing labour violations and in promoting and asserting labour standards in Southern Africa.

The discussions in this article should be considered against the backdrop of assertions that the linking of labour and trade concerns, commonly referred to as the 'social clause',[6] in trade or economic agreements runs counter to their mainly economic objectives. The argument goes that labour and trade issues are diametrically opposed, and dealt with by two of the most recognisable international institutions, which are themselves diametrically, objectively, rationally and philosophically opposed, namely the International Labour Organization[7] (ILO) and multilateral trade institutions such as the World Trade Organization (WTO).[8] Interestingly, developing countries have been very much against the trade and labour link, particularly within the framework of trade agreements.[9] Reasons cited include that such steps result into labour standards' 'race to the bottom'; protectionism and over-regulation of labour issues;[10] and an intrusion in the sovereign right of nations to design their own labour environments.[11]

SETTING THE SCENE: LABOUR RIGHTS AND STANDARDS IN SOUTHERN AFRICA

Labour rights and standards as international imperative

The global imperative is that governments and states should respect labour rights, freedoms and obligations not only as entrenched in their national

[6]The social clause calls for the linking of labour and trade issues. For more in-depth and illuminating discussions on the social clause see, generally, N Sanyal 'The social clause in trade treaties: implications for international firms' (2001) 29 *Journal of Business Ethics* 372; E Cappuyns 'Linking labor standards and trade sanctions: an analysis of their current relationship' (1998) 36 *Columbia Journal of Transnational Law* 659; L Compa & T Hinchliffe-Darricarreira 'Enforcing international labor rights through corporate codes of conduct' (1995) 33 *Columbia Journal of Transnational Law* 663.

[7]The International Labour Organization (ILO) is a specialised, independent agency of the United Nations (UN), based in Geneva, Switzerland, with 175 member countries represented by workers, employers and governments. The ILO was created in 1919 under the Treaty of Versailles as an important multilateral institution for the promotion of worker rights and freedoms, trade unions and constructive workplace relations between employers and workers. Note that the ILO became the agency of the UN only in 1946.

[8]The World Trade Organization (WTO) was established on April 15, 1994 in Morocco by the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) of 1994, as the main international trade regulatory institution.

[9]For example, see generally, P da Motta & MF Lengyel 'International trends on labor standards: where does the MERCOSUR fit in?' (2003), available at: http://www.latn.org.ar/pdfs/plenasia03 (accessed 20/09/2005) on the total rejection of the social clause by MERCOSUR countries.

[10]See the Ministerial Conference of the World Trade Organization (Singapore Ministerial Declaration), adopted 13 December 1996, reprinted in (1997) 36 *International Legal Materials* 218 (on argument by developing countries that labour standards within the WTO framework may be used for 'protectionist purposes').

[11]See, generally, the Singapore Ministerial Declaration n 10 above.

constitutions and labour legislation, but also as contained or envisaged in appropriate international and regional instruments. Notable in this regard are labour rights and conditions regimes within the frameworks of the United Nations (UN) and its agencies, particularly the ILO. The ILO is the main international body playing a central role in setting appropriate labour standards, monitoring compliance therewith[12] and providing technical assistance to countries. In the ILO Declaration on Fundamental Principles and Rights at Work of 1988, ILO members renewed their commitment to acceptable international labour standards. ILO international labour standards initiatives have been augmented by other initiatives, such as the UN Global Compact initiative.[13] The Global Compact seeks to encourage multinational corporations and large firms, through voluntary contract, to adhere to certain minimal labour standards.[14]

Notwithstanding their attractiveness and theoretical feasibility, and the recognition of trade unions and non-governmental organisations (NGOs), the provisions of these major international labour standards instruments remain largely ineffective in the struggle for global labour rights due, *inter alia*, to inadequate enforcement mechanisms.[15] This has prompted a search for alternatives, including the more contentious initiatives relating to the enforcement of minimal labour standards through multinational and regional trade institutions such as NAFTA.[16]

The ongoing debate concerning issues of freedom of association and the relationship between labour and government in Zimbabwe highlights the plight

[12]The problem with the ILO labour regime is that the ILO has no enforcement power or other dissuasive means of forcing labour to comply with its own standards. See LA Compa 'The first NAFTA labor cases: a new international labor rights regime takes shape' (1995) 3 *US–Mexico Law Journal* 159, 160.

[13]For more on the Global Compact see, generally, the UN website http://www.unglobalcompact.org/portal/default.asp (accessed on 20/09/2005).

[14]The Global Compact set out 10 principles in the areas of human rights, labour, environment and anti-corruption. The labour principles, principles 3 to 6, are adopted from the ILO Declaration on Fundamental Principles and Rights at Work of 1988. These are the principles in support of freedom of association and the recognition of the right to collective bargaining; the abolition of compulsory or forced labour; the abolition of child labour; and the elimination of discrimination in employment.

[15]For a recent critical assessment of ILO supervisory and promotional systems and of other mechanisms to promote core labour standards worldwide, see, for example, the International Trade and Core Labor Standards, OECD 2000, at 43 *et seq.* In November 2000, the ILO's governing body concluded that the 1998 report and recommendations of the ILO's commission of inquiry on forced labour in Myanmar had not been implemented and therefore sanctions should take effect. However, the ILO lacks the powers to ensure that economic sanctions are effectively implemented.

[16]Other initiatives are extra-territorial initiatives such as the United States (US) Child Labor Deterrence Act, s 613, 103rd Cong. (1993). Note that the Child Labor Deterrence Act, otherwise known as the Harkins Bill, was never enacted. The Act was aimed at enabling the US to impose a ban on any import that has a child labour input. See K Basu 'Compacts, conventions, and codes: initiatives for higher international labor standards' (2001) 34 *Cornell International Law Journal* 487, 490–491.

of workers with regard to their labour rights and conditions in Southern Africa. Interestingly, on paper, Zimbabwe, like any other modern society such as South Africa with an established and world-recognised labour regime, has a number of laws on labour rights and conditions.[17] Furthermore, labour rights find implicit regard in the Zimbabwean constitution.[18] There is also labour-specific legislation, such as the Labour Relations Act of 1985, which entitles employees to membership of trade unions and workers' committees of their choice.[19]

In 1990 the Labour Relations Act was further reinforced through deregulation resulting from the Economic Structural Adjustment Programme (ESAP).[20] Other legislation governs issues such as the basic conditions of employment, and occupational health and safety.[21] Zimbabwe, like many of the African countries, has ratified some of the global labour-promoting instruments, such as the ILO convention on core labour issues, the Right to Organize and Collective Protection of the Right to Organize Convention.[22] Zimbabwe is also a party to a number of African Union (AU) and SADC protocols and agreements that enforce fundamental freedoms, which Zimbabwe observes and enforces.[23]

However, the Zimbabwean laws and multinational obligations regarding labour suffer from a lack of promotion and implementation. Zimbabwean labour has also suffered restriction through government degenerative intervention into labour issues in terms of the Public Order and Security Act (POSA) of 2002. In particular, the POSA has been used to render the exercise of the right of workers to freedom of association impossible through the criminalisation of union marches and demonstrations.[24] The question, then, is what can be done to ensure that what is such an attractive labour regime on paper, and one that is almost akin to the South African labour regime, is observed and respected in practice?

Emergence of basic rights approach to economic agreements in Africa

I have mentioned that developing countries, some of which are African, have resisted labour rights considerations in economic agreements. However, several African regional and sub-regional economic treaties, such as the African

[17]See A Chitambo *Zimbabwe: Country Report*, at 19, available at http://www.itcilo.it/actrav/english/calender/2003/A1–2903/work/country (accessed on 23/08/2005).

[18]For example, s 11 of the Zimbabwean constitution purports to protect individuals' right to 'freedom of conscience, expression and of assembly and association'. See Chitambo n 17 above at 25.

[19]Labour Relations Act of 1985, article 4. See also Chitambo n 17 above at 25. By 30 August 2002 162,704 workers in Zimbabwe were unionised across some 39 labour unions, which are affiliated to the Zimbabwean Congress of Trade Unions. See Chitambo n 17 above at 19–20.

[20]Chitambo n 17 above at 27.

[21]See Chitambo n 17 above at 25. The Economic Structural Adjustment Programme (ESAP) is a deregulation programme that empowered employers and unions to negotiate broadly on labour issues.

[22]The Right to Organize and Collective Protection of the Right to Organize Convention No. 87 of 1948. See also Chitambo n 17 above at 24.

[23]Chitambo n 17 above at 25.

[24]See Chitambo n 17 above at 25.

Economic Community (AEC), the Economic Community of West African States (ECOWAS), and the Common Market for Eastern and Southern Africa (COMESA) 'make specific reference to human rights'.[25] The Southern African Development Community Treaty (SADC Treaty) commits members to human rights and constitutionalism.[26] African countries are also party to a number of bilateral trade arrangements that emphasise the need for a sound relationship between international trade and human rights, such as the Cotonou Agreement and the US African Growth and Opportunity Act (AGOA).[27] In the context of this article, this approach is important, since there is an undeniable link between labour rights and trade and development objectives. African problems such as lax labour rights and standards, and child labour[28] are human rights issues that are often directly and/or indirectly related to trade and other economic activities.[29] Perhaps I should state that even the human rights component of the New Partnership for Africa's Development (NEPAD) – Africa's grand multicomponent plan[30] – recognises the importance of the functional relationship between political and socioeconomic rights to Africa's growth and development initiatives.[31]

LABOUR RIGHTS AND STANDARDS IN THE NAFTA REGION

Academic hair splitting and political wrangling and debates aside, there is a clear historical connection between trade and labour issues in multilateral trade. Put differently, there is clear historical evidence of labour conditions and standards being given effect through economic arrangements such as NAFTA.[32]

The establishment of the labour agreement

The NAFTA position with regard to labour rights and conditions is particularly interesting, as it transcends the continuing impasse over the social clause. NAFTA was originally not intended to address labour concerns specifically,[33]

[25]Musungu 'Economic integration and human rights in Africa: a comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal 88*, 92.
[26]Musungu as above.
[27]See, generally, Musungu n 25 above at 93–95.
[28]See O Sibanda 'South Africa's children in labour pains: is it not time to prescribe corporate social responsibility? In Okpaluba (ed) *Law and the contemporary South African society* (2004) 97, 98.
[29]The relationship between globalisation and human rights was demonstrated in the case of the Ogoni people (Communication No 155/96), which came before the African Commission on Human and Peoples' Rights. In this case multinational companies abused human rights, including the right to health and the right to a clean and safe environment as recognised in the African Charter on Human and Peoples' Rights.
[30]See O Sibanda 'Integrating Africa into the World Trade Organization: constraints and challenges facing the African Union and the new partnership for Africa's development' (2004) 45 *Codicillus* 47, 42.
[31]See, generally, E Baimu 'Human rights in NEPAD and its implications for the African human rights system' (2002) 2 *African Human Rights Law Journal* 301.
[32]For example, concerns relating to labour rights and conditions were integral to early General Agreement on Trade and Tariffs (GATT 1947) negotiations. See E Alben 'GATT and the fair wage: a historical perspective on the labor-trade link' (2001) 101 *Columbia Law Review* 1410.
[33]JS Ruhnke 'The impact of NAFTA on labour arbitration in Mexico' (1995) 26 *Law and Policy in International Business* 217, 218.

yet it has emerged as the leading twenty-first century model of a trade regulatory institution seeking to address both economic and non-economic concerns. Compared with its counterparts, NAFTA is more than a free trade agreement. Its provisions extend beyond trade concerns, and it has highlighted the importance of labour issues and linkage aspects of labour rights to trade relations. This is clearly manifest in its preamble, in which NAFTA members resolve to 'create new employment opportunities and improve working conditions and living standards in their respective territories' and to 'protect, enhance and enforce basic workers' rights'. This resolve has been effected through the establishment of the NAALC.[34]

Core labour obligations

The NAALC entrusts parties with a number of core obligations related to labour and the labour system. Included among these core obligations is for each party to 'promote compliance with and effectively enforce its labor law';[35] and to 'ensure that its labor laws and regulations provide for high labor standards'.[36] Furthermore, parties are enjoined to ensure that all those with a 'legally recognized interest under its law in a particular matter have an appropriate access to administrative, quasi-judicial or labor tribunals for the enforcement of the Party's labor law'.[37] This private right to action can be enforced at the institution of the NAALC through petitioning the national government, since only governments, and not private persons, may initiate the NAALC complaint process.[38]

[34]For in in-depth writings on the NAALC, see, generally, RJ Adams and P Singh 'Early experience with NAFTA's labour side accord' (1997) 18 *Comparative Labor Law Journal* 161; S Anderson, J Cavanagh and D Ranney *NAFTA's first two years: the myths and the realities* - Institute for Policy Studies (1996); JF Otero 'The North American Agreement on Labor Cooperation: an analysis of its first year's implementation' (1995) 33 *Columbia Journal of Transnational Law* 639 (presenting a succinct overview of the NAALC and assessing its implementation in 1994); C Jefferson & J French 'NAFTA's labor side accord: a textual analysis' in *Labor and NAFTA: a briefing book? (*Conference on Labor and Free Trade, Duke University, Durham, NC: Aug. 25–27 1994) JL Levinson *NAFTA's labor agreement: lessons from the first three years* (Institute for Policy Studies and the International Labor Rights Fund, 12 November 1996); JF Perez-Lopez:I 'The promotion of international labor standards and NAFTA: retrospect and prospects' (1995) 10 *Connecticut Journal of International Law* 427; JF Perez-Lopez:II 'The labor dimension of NAFTA: reflections on the first year' (1995) 12 *Arizona Journal of International and Comparative Law* 473; JF Perez-Lopez:III 'Conflict and cooperation in US-Mexican labor relations: the North American Agreement on Labor Cooperation' (1996) 11 *Journal of Borderlands Studies* 43; LO Pomeroy 'The labor side agreement under the NAFTA: analysis of its failure to include strong enforcement provisions and recommendations for future labor agreement negotiated with developing countries' (1996) 29 *The George Washington Journal of International Law and Economics* 769.

[35]See NAALC art 3(1).

[36]See NAALC art 2.

[37]NAALC art 4(1). See also NAALC art.4(2).

[38]See EC Crandall 'Will NAFTA's North American Agreement on Labor Cooperation improve enforcement of Mexican labor laws?' (1994) 7 *Transnational Law* 165, 185. See also NAALC art 43 protecting parties affording persons a private right of action under its domestic laws against another party.

Another aspect relevant to the core obligations is that the NAALC lays a foundation for a common approach to the protection and promotion of North American labour rights without mandating the harmonisation of labour laws and standards. In what Compa describes as a 'hybrid approach' to a labour regime,[39] the NAALC on the one hand respects and preserves the sovereignty of national labour laws and conditions, and on the other hand allows national labour laws to be reviewed by National Administrative Offices (NAOs).[40] It recognises the right of each country to establish its own labour standards. Article 2 of NAALC provides as follows:

> Affirming full respect for each Party's constitution and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify it labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.[41]

Specific NAALC objectives

Monitoring

The NAALC seeks to monitor the implementation of national labour laws and regulations in each member country.[42] Parties are obliged to enforce their national labour laws.[43] This is a watchdog role of a tri-national Commission for Labor Cooperation (CLC).[44] The CLC is made up of a ministerial council (Council) and the International Coordination Secretariat (Secretariat).[45] The Council consists of each country's highest-ranking labour official or ministers,[46] and operates as the governing body of the CLC.[47] The Secretariat is composed of professionals from among the parties.[48] The function of the Secretariat is to

[39]L Compa 'NAFTA's labor side accord: a three-year accounting' (1997) 3 *Law and Business Review of the Americas* 6, 7.

[40]See E A Brill & SL Oratz 'Labor accord put to the test' (1994) 12 *National Law Journal* c20; L Compa n 39 above at 7; S Lowe 'The first American case under the North American Agreement for Labor Cooperation' (1997) 51 *University of Miami Law Review* 481, 489.

[41]In fact, art 42 of the NAALC stresses 'nothing in this Agreement shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another'.

[42]NAALC art 1, read with art 3.1.

[43]NAALC art 3, read with art 4.2. See also Part 1 of the NAALC on the objectives of improving working conditions, promoting labour principles, exchanging information, co-operating in labor-related activities, furthering effective enforcement of labour laws and fostering transparency in labour law administration and Part 2 of the NAALC on giving each party the right to establish its own domestic labour standards qualified by a commitment to high labour standards. Each party shall promote adequate enforcement and guarantee due consideration to alleged violations of labour law.

[44]NAALC art 8.1. See also B LaSala 'NAFTA and worker rights: an analysis of the labor side agreement accord after five years of operation and suggested improvement' (2001) 16 *The Labor Lawyer* 319, 321.

[45]NAALC art 8.2. See also LaSala n 44 above at 321 n 15; Perez-Lopez:II n 34 above at 492.

[46]See NAALC art 9. See also Perez-Lopez:II n 34 above at 492) . Specific functions of the Council are stated and elaborated in art 10 and art. 11.

[47]NAALC art 10.1.

[48]See Adams and Sigh n 34 above at 165; See also Perez-Lopez:II n 34 above at 492; Perez-Lopez:III n 34 above at 40.

provide technical support to the Council.[49]

The CLC is further assisted in its monitoring activities by NAOs, which are established in each of the three NAFTA countries.[50] The responsibility of NAOs is to gather and supply information on labour matters, and to provide a review mechanism for labour law issues in the territory of the other parties.[51] NAOs also act as points of contact between labour ministries in Canada, Mexico and the United States, and with the CLC and the Secretariat.[52] NAOs bring labour complaints to the attention of the CLC 'for resolution or dispute settlement' and provide 'publicly available information requested by the Secretariat for background reports or studies, another party's NAO, or an Evaluation Committee of Experts'.[53]

Another important NAALC institution is the national advisory committee (NAC), which comprises members of the public, labour organisations and business,[54] and a governmental committee.[55] The purpose of the NAC is to advise governments on the implementation and further interpretation of the

[49]See NAALC art 8.2. The Secretariat, amongst other things, reports on North American labour law and enforcement issues such as plant closings, labour practices in the apparel industry, and the employment of women. See generally NAALC art 13, read with art 14, for the functions of the Secretariat.

[50]NAALC art 8.2 read with art 15. See Perez-Lopez:II n 34 above at 4923; Perez-Lopez:II n 34 above at 48. The US's NAO is established within the Bureau of International Labor Affairs, the Canadian NAO is established within the Labour Program of the Federal Department of Human Resources Development, and the Mexican NAO is established within the Secretariat of Labor and Social Welfare (Secretaria del Trabajo y Prevision Social). See JF Perez-Lopez 'Implementation of the North American Agreement on labor cooperation: a perspective from the signatory countries' (1995) 4 *NAFTA: Law and Business Review of the Americas* 3, 5 and 7. Note that the labour department of each of the NAFTA states has the freedom to define the role of its NAO. See NAALC art 16.1. However, the NAALC enjoins NAOs to act in consultation with each other. For example, in relation to proposed changes of procedures, policies or practices in relation to their respective labour laws, see NAALC art 21. The attractive part of this consultation process is that each NAALC government is 'entitled to participate in the consultation on notice to the other NAOs and the Secretariat'. See NAALC art 21.3. The NAO institution is apparently a compromise between on the one hand Mexican and Canadian opposition to the establishment of a 'supranational tribunal with enforcement powers' and on the other hand the 'insistence of the United States on some transnational review'. See KE Andrias 'Gender, work, and the NAFTA labor side agreement' (2003) 37 *University of San Francisco Law Review* 521, 546.

[51]See NAALC art 16.3. Note that the labour department of each of the NAFTA states has the freedom to define the role of its NAOs. See NAALC art 16.1. Further note that the NAALC enjoins NAOs to act in consultation with each other. For example, in relation to proposed changes of procedures, policies or practices in relation to their respective labour laws, see NAALC art 21. The attractive part of this consultation process is that each NAALC government is 'entitled to participate in the consultation on notice to the other NAOs and the Secretariat'. See NAALC art 21.3.

[52]See Perez-Lopez:II n 34 above at 493. See also Perez-Lopez:III n 34 above at 48.

[53]See Lowe n 39 above at 491. According to Compa n12 above at 159, the NAO is a 'unique institution' in that it is unparalleled and unprecedented, and 'has no counterpart ... under any other labor rights regime in Europe or elsewhere'.

[54]NAALC art 17. See also Perez-Lopez:III n 34 above at 48.

[55]NAALC art 18. See also Perez-Lopez:III n 34 above at 48.

NAALC.[56]

Joint labour conditions and standards initiatives
The NAALC aims to provide resources for joint initiatives to promote better working conditions and labour practices and standards.[57] This is the chief responsibility of the Ministerial Council, assisted by the Secretariat.

Establishment of consultation and dispute resolution forums
The NAALC establishes a forum for consultations and dispute resolution in cases where domestic enforcement is inadequate or where there is a persistent non-enforcement of select labour standards.[58] The consultation may be between government's labour officials (ministerial consultation) or between NAOs. Important in this regard is that NGOs and citizens can be involved in the process by making submissions through their NAOs, which then review the merits of the submission and request consultations with the foreign NAO.[59]

Should the matter remain unresolved even after the ministerial consultation, any party can request the establishment of a tri-national Evaluation Committee of Experts (ECE).[60] The ECE will analyse the matter and issue a report.[61] An important aspect of the ECE is that its chairperson is selected from a roster of experts drawn up in consultation with the ILO.[62]

NAALC core labour principles
The NAALC identifies 11 core labour principles,[63] which can be divided into three groups. The first group deals with industrial labour relations matters, and the remaining two groups deal with technical labour standards.[64] Matters that fall under the first group are freedom of association,[65] collective bargaining,[66] and the right to strike.[67] The consideration of matters in this group is the prerogative of the NAO, which acts on review capacity and ministerial consultation. Non-compliance with this category cannot be sanctioned by any

[56]NAALC art 17.
[57]See Part 3 of the NAALC, which establishes the Commission for Labor Cooperation (CLC) and NAO, and defines their structure, powers, and procedures, and Part 4 of the NAALC, hich establishes the mechanisms for co-operation and evaluation .
[58]NAALC art 27.1. See, generally, part 5 of the NAALC.
[59]See NAALC art 27.3 read with art 34.
[60]See NAALC art 23.1.
[61]See NAALC art 22.2 read with arts 25 and 26. See also Perez-Lopez:II n 34 above at 494--495; Perez-Lopez:III n 34 above at 49–50.
[62]See NAALC art 24.1(b), read with art 45.
[63]See Annex 1: Labour Principles.
[64]See S Bazar 'Is the North American Agreement on Labor Cooperation working for women?' (1995) 25 *Carlifornia Western International Law Journal* 425, 426.
[65]Labour Principle 1.
[66]Labour Principle 2.
[67]Labour Principle 3.

penalty pursuant to article 22 of the NAALC.[68]

The second group of labour principles deals with the prohibition of forced labour,[69] gender pay equity,[70] employment discrimination,[71] compensation in the case of injury or illness[72] and protection of migrant workers.[73] Like the first group, this category is subject to NAO review and ministerial consultations, without being arbitrated on and with no sanction by penalties. Unlike the first tier, issues in this category can be further evaluated by the ECE.

The third group deals with the prohibition of child labour,[74] minimum employment standards,[75] and occupational safety.[76] This group is treated differently from the others. In addition to NAO review, it is subject to ministerial consultations, expert evaluation and arbitration, and ultimately monetary penalties. [77]

Note that labour relations matters and technical labour standards are treated and promoted differently from each other. To begin with, technical labour standards have more dispute resolution options than industrial relations matters.[78] Technical labour standards are subject to the full application of dispute settlement procedures under the NAALC.[79] The latter are restricted to dispute resolution procedures up to ministerial consultation.[80] It is stated that the reason for restricting industrial relations matters to ministerial consultation was 'to avoid interference in labor/management negotiations'.[81]

SUMMARY AND CONCLUSION

The ILO has no enforcement mechanism. The potential for the introduction of

[68] According to Lowe n 40 above at 492, the lack of sanction for violations or denial of freedom of association, collective bargaining and the right to strike has 'spurred some of the most vehement criticism of NAALC'. In particular, it is argued that these are the more fundamental rights for labour and their non-enforcement 'effectively eviscerates any commitment NAALC has to a potent labor movement in any of the signatory countries'. The disparity of enforcement mechanisms amongst the labour principles has been justified under national sovereignty rights. See Pomeroy n 34) 793; Bazar n 64 above at 451. However, the disparity has been questioned. See, generally, Pomeroy n 34 above at 793–796; Bazar n 64 above at 452–454.

[69] Labour Principle 4.

[70] Labour Principle 8.

[71] Labour Principle 7.

[72] Labour Principle 10.

[73] Labour Principle 11.

[74] Labour Principle 5.

[75] Labour Principle 6.

[76] Labour Principle 9.

[77] See Bazar n 64 above at 430. See, generally, Crandall n 38 above at 189–192 discussing NAALC penalties – monetary penalties and suspension of tariff benefits.

[78] See RW Kleinman & JM Shapiro 'NAFTA's proposed tri-lateral commissions on the environment and labour' (1994) 2 *US–Mexico Law Journal* 25, 28 (quoted in Bazar n 64 above at 426n16).

[79] See Bazar n 64 above at 426.

[80] See Bazar n 64 above at 426 and 431. See also, LaSala n 43 above at 323–324.

[81] See Bazar n 64 above at 452.

an enforcement mechanism at this international labour standards regulatory institution is doubtful. A novel alternative approach has been developed by NAFTA countries collectively to promote and protect labour rights and conditions through the NAALC. However, the NAALC does not mandate the harmonisation of national labour laws and regulations. In fact, the NAALC emphasises the sovereignty of national labour laws, and recognises the right of NAALC parties to develop and implement their own labour laws and regulation.

The idea behind the NAALC system is both attractive and impressive, despite the system's alleged weaknesses such as ineffective enforcement of labour conditions;[82] a protracted and time-consuming dispute resolution system;[83] and the inadequate promotion of the rights of women workers.[84] In conclusion, the NAALC and similar initiatives set a good precedent for the promotion and protection of labour rights and conditions, and for labour-sensitive agreements. In the Southern African context, similar initiatives can be employed through the framework of SADC.

RECOMMENDATIONS

There is an undoubted need for the promotion and protection of the labour environment in the SADC region. It is therefore recommended that the SADC establish its RLS, or alternatively identifies the need to create a system of enforceable core RLS in the area. The setting up of such a system should generally not be problematic, given the declared objectives of SADC. SADC, for instance, has as one of its objectives the promotion of self-sustaining development on the basis of collective self-reliance and interdependence of its members. It also seeks to promote and maximise productive employment within the SADC region. These objectives, 'productive employment' in particular, which are to be achieved inter alia through the harmonisation of the policies of SADC members, may only be achieved through practical observance, protection and promotion of the labour environment in the region.

The SADC's RLS should have a meaningful and expedient system for the resolution of identified labour violations. It is submitted that this can be achieved by adopting a system similar to the dispute resolution approach of the WTO. The WTO dispute settlement system is attractive for several, including

[82]See, generally, LaSala n 44 above at 319. See also M Fuentes 'The NAFTA Labor Side Accord in Mexico and its repercussions for workers' (1995) 10 *Connecticut Journal of International Law* 397.

[83]See, generally, LaSala n 44 above at 319.

[84]See, generally, HL Meils 'A lesson for NAFTA: Can the FTAA function as a tool for improvement in the lives of working women?' (2003) 78 *Indiana Law Journal* 877–897; Andrias n 50 above at; CT Barbieri 'Women workers in transition: the potential impact of the NAFTA Labor Side Agreement on women workers in Argentina and Chile' (1996) 17 *Comparative Labour Law Journal* 526; M Haussman 'Politics of convergence? The relationship of the North American Agreement on Labor Cooperation (NAALC) to national worker protections in Canada, the US and Mexico' (Suffolk University. Annual meeting of the American Political Science Association Washington, DC:28–31 August 1997.

the strict time frames it imposes for the resolution of disputes and its enforcement mechanisms.[85] The WTO carries the attribute of a quasi-judicial self-contained multilateral regime.[86]

Matlosa correctly notes that regionalism and co-operation have become prominent features of African development, as evidenced in initiatives such as NEPAD.[87] However, we should not be oblivious of the difficulties and problems that may be encountered in RLS. Although not to be dealt with here, questions relating to issues such as national sovereignty as initially experienced under the NAALC, and issues relating to the nature and character of RLS for SADC may surface.

[85]See, generally, *Understanding on rules governing the settlement of disputes*: Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization of 1994, (repr 1994) *International Legal Materials* 1144–1152.

[86]See O Sibanda 'Human rights approach to WTO trade policy: another medium for the promotion of human rights in Africa' (2005) 5 *African Human Rights Law Journal*.

[87]K Matlosa 'New regionalist impulses: implications of the new partnership for Africa's development (NEPAD) for regional cooperation in Southern Africa' (2003) 17 *Policy: Issues and Actors* at 10–11, available at: http://.www.cps.org.za/cps_pdf/pia17_5.pdf (accessed on 17/08/2005).

Die Onafhanklike Klagtedirektoraat: 'n demokratiese waghond of polisie-skoothondjie?

Petro Swanepoel[*]

Abstract

This article examines the powers of the Independent Complaints Directorate (ICD) with regard to the maltreatment and deaths of persons as a result of police conduct, in order to determine the impartiality of a so-called 'watchdog' against abuse of power on the part of the police force (SAPD). The question whether the ICD is independent is measured against the powers and competencies of the ICD as an institutional establishment in a special relationship with the SAPD, in order to determine whether the ICD is sufficiently independent to serve its purpose.

INLEIDING

Twaalf jaar gelede, met die inwerkingtreding van die Interim Grondwet[1] en die totstandkoming van die demokratiese regstaat in Suid-Afrika, is 'n nuwe demokratiese bestel geskep waarin fundamentele menseregte verskans is. Die belangrike demokratiese beginsels van onder andere verantwoordbaarheid, deursigtigheid en beheer oor misbruik van mag het – wat die Suid-Afrikaanse Polisiediens (SAPD) betref – beslag gekry in statutêre vereistes. In hierdie artikel word die magte van die Onafhanklike Klagtedirektoraat (OKD) (ook ten opsigte van mishandeling van en sterftes van persone wat die gevolg is van polisieoptrede) ondersoek ten einde vas te stel of dit sodanig onafhanklik is dat dit as 'n waghond teen die misbruik van mag in die polisiemag kan dien. Die vraag of die OKD onafhanklik is, word ondersoek aan die hand van die omvang van die magte en bevoegdhede van die OKD as 'n institusionele instelling wat in 'n besondere verhouding met die SAPD staan: om sodoende te bepaal of die OKD institusioneel en infrastruktureel voldoende onafhanklik is om aan sy doel te beantwoord. In aansluiting hierby word ook gekyk of die liggaam verantwoordbaar en deursigtig is. Volgens Philip Stenning[2] kan die jare tagtigs vir Wes-Europa en Noord-Amerika beskou word as die dekade van verantwoordbaarheid (*accountability)*. Hy sien verantwoordbaarheid dan ook as geroepenheid om rekenskap te gee, 'n stel normatiewe voorskrifte '... about who should be required to give account, to whom, when, how and about what'.[3] Suid-Afrika het 'n geskiedenis van outokratiese regeringstyl en gevolglik is

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[1]Die Grondwet van die Republiek van Suid-Afrika, 200 van 1993 ('1993-Grondwet' of 'Interim Grondwet').

[2]P Stenning Voorwoord tot *Accountability for criminal justice: selected essays* (1995).

[3]I*d* 5.

hierdie begrippe inhoudsmatig onseker en die strekwydte en toepassing daarvan, veral in die SAPD, nie maklik aanvaarbaar nie. 'n Vergelyking met 'n analoë liggaam, die *Independent Police Complaints Commission* van die Verenigde Koninkryk van Brittanje, word gemaak ten einde die kwessies van onafhanklikheid, verantwoordbaarheid en die omvang van bevoegdhede in perspektief te plaas. Voorstelle om leemtes aan te spreek word ook gemaak.

DIE AANSTELLING EN WETGEWENDE MANDAAT VAN DIE OKD SEDERT SY INSTELLING

Die wetgewende mandaat voor 1996

Artikel 218(1)(a) van die 1993-Grondwet het bepaal dat die Nasionale Kommissaris van die Suid-Afrikaanse Polisiediens verantwoordelik sal wees vir 'die handhawing van 'n onpartydige, aanspreeklike, openlike en doeltreffende polisiediens'. Dit is tot op hede steeds 'n deel van die Nasionale Kommissaris se verantwoordelikhede.[4] Ten einde hierdie doelstelling te verwesenlik, vereis die 1993-Grondwet in a 222 dan ook dat daar wetgewing moet wees om voorsiening te maak vir 'n onafhanklike meganisme onder burgelike beheer, 'met die *oogmerk om te verseker* dat klagtes ten opsigte van misdrywe en wangedrag wat na bewering deur lede van die [polisie]Diens gepleeg is *op doeltreffende wyse* ondersoek word'.[5] Wetgewing wat vir so 'n liggaam voorsiening maak, is inderdaad verorden: in aa 50 tot 54 van hoofstuk 10 van die Wet op die Suid-Afrikaanse Polisiediens, 1995[6] (Polisiewet) word 'n Onafhanklike Klagtedirektoraat ingestel om onder leiding van 'n uitvoerende direkteur hierdie taak uit te voer. Die uitvoerende direkteur word deur die Minister vir Veiligheid en Sekuriteit ('die Minister') in oorleg met parlementêre komitees aangestel vir 'n verlengbare periode van vyf jaar.

Die wetgewende mandaat sedert 1996

Op die oog af skyn dit asof die finale Grondwet van 1996[7] 'n nuwe houding teen- oor die posisie van die OKD ingeneem het en die status en onafhanklikheid van die OKD ingeperk het deur die melding daarvan (soos in die 1993-Grondwet vervat) uit die 1996-Grondwet te verwyder. Hierdeur verloor die OKD na my mening dan sy status as 'n grondwetlike entiteit. In die 1996-Grondwet word die skepping van 'n onafhanklike klagtedirektoraat wel gemeld as 'n liggaam wat by wyse van nasionale wetgewing geskep moet word, maar die spesifieke oogmerk (soos in a 222 van die 1993-Grondwet vir hierdie liggaam gestel) word nie weer herhaal nie. Artikel 206(6) van die Grondwet

[4]Artikel 218(1) van die 1993-Grondwet is deur die finale Grondwet van 1996 behou met enkele wysigings soos ingevoeg in Aanhangsel D tot Skedule 6, item 24 van die finale Grondwet van 1996.

[5]Eie beklemtoning.

[6]Wet 68 van 1995, hierna as die 'Polisiewet' aangehaal.

[7]Die Grondwet van die Republiek van Suid-Afrika, 1996. Dit is vervat in Wet 108 van 1996 (hierna '1996-Grondwet' of die 'Grondwet', afwisselend). Die Engelse teks geniet voorkeur in geval van botsende bewoording – a 240 van die Grondwet. Die Grondwet maak wel voorsiening vir 'n enkele polisiediens wat deel uitmaak van die Republiek se sekuriteitsdienste.

bepaal slegs dat by ontvangs vanaf die provinsiale uitvoerende liggaam van 'n klagte rakende wangedrag deur 'n lid van die polisie of 'n misdryf wat deur 'n lid van die polisie gepleeg is, die klagte deur *'n onafhanklike klagtedirektoraat* ondersoek moet word. Dit is interessant dat die oordragsbepalings in Skedule 6 van die Grondwet nie artikel 222 van die 1993-Grondwet laat voortleef nie, wat tot gevolg het dat die bepalings van hierdie artikel sonder verdere regskrag is.[8] Die Grondwet se swye oor die feit dat daar reeds voorsiening gemaak is vir 'n onafhanklike klagtedirektoraat in nasionale wetgewing is opmerklik. Dit is wel so dat die Grondwet reeds aanvaar is[9] voordat die OKD op 1 April 1997 in werking gestel is, maar die skepping en werksaamhede van die OKD is reeds in 1995 saam met die hele Polisiewet goedgekeur: dié het in dieselfde jaar in werking getree. Die feit dat die OKD nou slegs in die Polisiewet geanker is, laat die idee ontstaan dat dit net 'n verlengstuk van die polisiediens is. Om te bepaal of hierdie hipotese geldig of billik is, word daar gekyk na die Britse direktoraat wat na klagtes oor polisielede omsien.

In 1998 is die OKD se mandaat ook uitgebrei om toesig te hou oor nakoming deur lede van die SAPD van die bepalings van die Wet op Gesinsgeweld[10] en toesighouding oor munisipale polisiedienste.

Die visie wat die OKD vir homself stel is dié van 'n 'getransformeerde polisiediens in ooreenstemming met die gees en doelstellings van die Grondwet', terwyl sy missie is 'om behoorlike polisieoptrede te promoveer'.[11] Hierdie is grootse en idealistiese doelstellings en of dit haalbaar is, gegewe die mandaat van die OKD, sal die toekoms leer.

VERANTWOORDBAARHEID EN ONAFHANKLIKHEID VAN DIE OKD

Politieke verantwoordelikheid vir die SAPD word deur die Minister vir Veiligheid en Sekuriteit, die premier van 'n provinsie en verskillende kabinets- en provinsiale komitees gedra.[12] Die beginsels van verantwoordbaarheid en deursigtigheid word spesifiek gevind in die volgende bepalings van die 1996-Grondwet: dat toesig oor die veiligheidsdienste gegee word aan veelpartykomitees van die parlement,[13] dat 'n burgerlike sekretariaat vir polisiedienste wat aan die kabinet verantwoording doen, ingestel moet word,[14]

[8] Item 24(1) van Skedule 6 tot die Grondwet.
[9] Die Grondwet is op 8 Mei 1996 goedgekeur en het aan die einde van 1996 in werking getree.
[10] Artikel 18 van Wet 116 van 1998.
[11] Sien die 1998/1999 jaarverslag van die OKD, verkrygbaar op http://www.info.gov.za/annualreport/1999/icd99.pdf (besoek: Augustus 2006). Die missie en visie-stellings word in elke jaarverslag bevestig (deur die herhaling daarvan) en dit verskyn ook in die OKD se strategiese beplanningsdokument van 2006-2009 (verkrygbaar by http://www.icd.gov.za/documents/2006/StragicPlan2006_2009.pdf.) (besoek: Augustus 2006).
[12] Artikel 206 van die Grondwet.
[13] Artikel 199(8) van die Grondwet.
[14] Hierdie liggaam moet kragtens a 208 van die 1996-Grondwet by wetgewing ingestel word en dit staan onder leiding van die kabinetslid wat met polisiëring belas is.

en dat nasionale[15] en provinsiale[16] kommissarisse wat onder beheer staan van die kabinetslid belas met polisiëring, aangestel moet word. Dit versterk ook die gedagte dat dit nie die grondwetskrywers se gedagte was om aan die OKD toesighoudende magte[17] te verleen het nie, maar slegs ondersoekmagte. Soos hieronder uitgewys word, is hierdie magte ook gebrekkig en nie gelykstaande aan die magte van ander ondersoekliggame nie.

Omdat die Polisiewet geskrywe is in die tydvak van die interim-grondwet, verleen die Polisiewet groter statuur aan die OKD as 'n polisietoesighoudende liggaam deur te vereis dat alle staatsorgane die bystand moet verleen wat rederlikerwys vereis mag word vir 'die beskerming van die onafhanklikheid, onpartydigheid, waardigheid en doeltreffendheid' van die OKD in die uitoefening van sy bevoeghede en werksaamhede.[18] Afgesien van my bedenkinge oor die grondwetlike status van die OKD, is hierdie 'n lofwaardige bepaling en sekerlik 'n vereiste vir enige onafhanklike liggaam ten einde effektief te funksioneer, geloofwaardigheid op te bou en te behou. Dit is ook fundamenteel in enige demokratiese regering wat op die *rule of law* gebaseer is, naamlik dat onafhanklikheid en onpartydigheid deur verantwoordbaarheid gebalanseer moet word.

In die Polisiewet skep die wetgewer dan ook 'n nasionale[19] en 'n provinsiale sekretariaat[20] vir veiligheid en sekuriteit, wat die Minister in die uitvoering van sy werksaamhede moet adviseer. Dit moet ook die werksaamhede verrig wat die Minister dienstig ag om burgerlike toesig oor die polisiediens te verseker[21] en om demokratiese verantwoordbaarheid en deursigtigheid in die SAPD te bevorder.[22] Die verhouding van die OKD met hierdie liggame is nie duidelik nie, hoewel dit hiërargies wil voorkom asof die OKD deur die sekretariate tot verantwoording geroep kan word uit hoofde van laasgenoemdes se bevoegdhede om te sorg vir effektiewe polisiëring. Politieke verantwoordbaarheid vir die sekretariate lê by die Minister omdat die sekretariate aan die Minister verslag oor die funksionering van die SAPD moet doen.[23] Mistry en Kiplin[24] het in 'n studie bevind dat die sekretariate nie in hul

[15]Artikel 207(2) van die Grondwet. Die oordragbepalings in skedule 6 item 24(1) van die 1996-Grondwet het die bepalings van aa 218 en 219 van die 1993-Grondwet, wat te make het met die verantwoordelikhede van die nasionale en provinsiale kommissarisse behou – hoewel natuurlik onderhewig aan enige wysiging daarvan.
[16]Artikel 207(4) van die Grondwet. Die premier van die provinsie besluit saam met die nasionale kommissaris wie die provinsiale kommissaris sal wees. In geval van meningsverskil moet die kabinetslid die besluit neem.
[17]Daar word in Engels na so 'n liggaam verwys as 'n *civilian oversight body*.
[18]Artikel 50(4) van die Polisiewet.
[19]Artikel 2(1)(a) van die Polisiewet.
[20]Artikel 2(1)(b) van die Polisiewet.
[21]Artikel 3(1)(b) van die Polisiewet.
[22]Artikel 3(1)(c) van die Polisiewet.
[23]Artikel 3(1)(g) tot (h) van die Polisiewet.
[24]ID Mistry & J Kiplin 'South Africa: strengthening civilian oversight over police in South Africa: the national and provincial secretariats for safety and security' Occasional Paper 91, September 2004 te http:www.iss.co.za/pubs/papers/91/Paper91.htm (besoek: Desember 2005).

doel as toesighouers oor die polisie slaag nie, weens 'n gebrek aan die toepassing van hul wetlike magte, ongestruktureerde verhoudings en 'n gebrek aan nasionale visie.[25]

Die Polisiewet bepaal dat die OKD onafhanklik van die SAPD funksioneer,[26] en dat die uitvoerende direkteur jaarliks aan die einde van 'n finansiële boekjaar skriftelik oor sy werksaamhede aan die Minster verslag sal doen.[27] Hierdie verslag word aan die Parlement voorgelê, hoewel die OKD nie direk aan die Parlement verantwoording doen of direkte toegang tot die Parlement het nie, want die finale verantwoordelikheid vir die OKD lê by die Minister. Die parlementêre komitees of die Minister kan die OKD tot verantwoording roep deur 'n verslag van die uitvoerende direkteur oor die aktiwiteite van die OKD aan te vra.[28] Die feit dat die OKD in die Polisiewet figureer en aan dieselfde minister as die SAPD verantwoording moet doen vir die aanstelling van personeel[29] en kundiges, en vir die verkryging van logistiese dienste met die Minister oorleg moet pleeg of selfs sy goedkeuring moet kry,[30] verbeter geensins die beeld van institusionele onafhanklikheid nie; dit dui wel op institusionele afhanklikheid. Dit is myns insiens so, ongeag of die bepaling dat geen staatsorgaan of werknemer of lid of enige ander persoon die uitvoerende direkteur of lid van die OKD in die uitoefening en verrigtinge van sy bevoegdhede mag hinder nie[31] die teendeel wil bewys. Dit manifesteer ook in die stremming tussen die Nasionale Polisiekommissaris en die OKD, omdat die Kommissaris die standpunt huldig dat daar geen rede is vir die bestaan van die OKD nie, aangesien polisielede nie gemonitor hoef te word nie en dat 'n stelsel van interne monitering vir die SAPD ingestel gaan word.[32]

Die kwalifikasies waaraan die uitvoerende direkteur moet voldoen om in die pos van uitvoerende direkteur aangestel te mag word, word nie in die wet vermeld nie. Hy kan dus 'n lid of vorige lid van die SAPD wees. Dit is ongelukkig dat daar geen bepaling in die Polisiewet is wat 'n beletsel plaas op die aanstelling van 'n uitvoerende direkteur wat binne 'n gegewe tydperk 'n lid van die SAPD was nie. Weens 'n sterk solidariteitsgevoel tussen polisielede sal hulle mekaar

[25] *Ibid* 1.
[26] Artikel 50(2) van die Polisiewet.
[27] Die laat indiening van jaarverslae en ander knelpunte (onder andere die algemene bestuur van die OKD) is 'n bron van bekommernis vir die Portefeulje Komitee vir Veiligheid en Sekuriteit, derhalwe is die herstrukturering van die OKD in 2005 voorgestel. Die wysigings is ten tye van die skrywe van die artikel nog nie geïmplementeer nie.
[28] Artikel 54 van die Polisiewet.
[29] Artikel 52 van die Polisiewet.
[30] Artikel 53(6)(h) van die Polisiewet.
[31] Artikel 50(3)(a) van die Polisiewet. Die opsetlike belemmering van die OKD is 'n strafbare misdryf – a 50(3)(b).
[32] Sien 'n verklaring uitgereik deur die OKD se segsman, Steve Mabona, op 18 Mei 2006 uitgereik: http://www.info.gov.za/speeches/2006/06051911151001.htm (besoek: September 2006).

beskerm waar 'n ander lid se beweerde wangedrag of oortreding ondersoek word.[33]

Wat die magte van die OKD betref, is dit belangrik om uit wys dat tensy die Minister spesifieke lede op versoek van die uitvoerende direkteur met die magte van die Polisiewet of 'n ander wet beklee, alle lede van die OKD nie outomaties die bevoegdhede van lede van die SAPD verkry nie.[34] Dit geld sekerlik nie in die geval van lede van die OKD wat reeds lede van die SAPD was en wat na die OKD gesekondeer is nie. Sowel die spesifiek-aangestelde lede, hierbo, asook gesekondeerde lede van die SAPD verkry magte of behou hulle magte van onder andere arrestasie, deursoeking en beslagneming. Hierdie lede is of word deur die SAPD met vuurwapens toegerus. Hoewel die Polisiewet dit nie vermeld nie, is daar sekerlik niks wat die Minister verhinder om die versoek te weier of om die magte te eniger tyd op te skort nie. Om uitgelewer te wees aan die besluite van die Minister, wat die OKD se magte betref, is 'n ernstige inkorting van ware onafhanklikheid en veroorsaak onsekerheid oor die afbakening van die omvang en perke van die OKD en sy lede se bevoedhede. Die beginsel van deursigtigheid vereis sekerlik dat die publiek mag weet welke magte benewens daardie magte wat spesifiek in die Polisiewet gespesifiseer is en wat hieronder bespreek word, die OKD in die algemeen en lede in die besonder het.

Die lede van die OKD en ook die uitvoerende direkteur is in diens van die staat en word volgens die Staatsdienswette[35] aangestel.[36] Dit dien nie die beeld van onafhanklikheid dat die wetgewer nie die lede van die OKD onthef het van die diensvoorwaardes van die staatsdienswette nie, ongeag of die werksaamhede van die OKD deur die Parlement befonds word en die OKD verantwoordelik is vir sy eie begroting.[37] Die feit dat die OKD laasgenoemde finansiële onafhanklikheid het, is 'n stap in die rigting van institusionele onafhanklikheid en verantwoording omdat die OKD aan die Parlement verslag moet doen oor die aanwending van hierdie fondse.

Die samestelling en werksaamhede van die *Independent Police Complaints Commission* (IPCC) in die Verenigde Koninkryk

Die IPCC vind sy wetlike mandaat in die *Police Reform Act 2002*.[38] Anders as die geval van die OKD bestaan die IPCC uit 'n voorsitter, wat deur die Koningin aangestel word, en 10 of meer ander lede wat deur die staatsekretaris

[33]Lustgarten L *The governance of the police* (1986) 154 en die gesag daar aangehaal.
[34]Artikel 53(3)(a) van die Polisiewet.
[35]Een van die belangrikste is Wet 103 van 1994.
[36]Artikel 52(1) en (2) van die Polisiewet.
[37]Artikel 52(3) en (4) van die Polisiewet.
[38]In *Part 2* van hoofstuk 30 van die *Police Reform Act 2002* beliggaam en gelees met *The Police(Complaints and Misconduct) Regulations 2004* wat op 1 April in werking getree het. Hierdie wet vervang die bepalings van die *Police Act 1996*.

aangestel word.[39] Slegs gekose lede van die vorige liggaam, die *Police Complaints Authority* wat deur die IPCC vervang is, is in die IPCC opgeneem.[40] Ten einde die onafhanklikheid van die IPCC te waarborg, mag die voorsitter van die IPCC of ander lede van die IPCC nie deel van die IPCC wees nie indien hy of sy 'n konstabel in enige deel van die Verenigde Koninkryk was of onder die beheer en toesig van 'n hoof-offisier[41] in Skotland of Noord-Ierland gestaan het. Verder mag hy/sy ook nie deel van die IPCC wees indien hy/sy 'n lid van die nasionale kriminele intelligensiediens of die nasionale misdaadafdeling was nie.[42] Die IPCC is nie in diens van die regering nie en geniet ook geen voorregte, status of immuniteit van die staat nie. Die IPCC moet aan die einde van 'n finansiële jaar 'n verslag van sy werksaamhede aan die staatsekretaris verskaf vir voorlegging aan die parlement en moet sy verslag ook, onder andere, aan elke ander polisiestasie en distrikskantoor stuur, sowel as aan die persone wat in die verslag genoem word.[43] Hierdie verpligting alleen plaas groot morele druk op elke polisieman en polisiestasie om nie in die verslag genoem te word nie en bevorder die beginsels van deursigtigheid en verantwoordbaarheid. Elke polisiestasie moet ook rekord hou van alle klagtes wat ontvang is, asook alle optredes na aanleiding van klagtes, ooreenkomstig die wyse van rekordhouding soos dit deur die IPCC voorgeskryf is.[44]

Elke polisiestasie moet aan die IPCC toegang verleen tot sy perseel sowel as toegang tot enige dokumente of ander artikels indien die kommissie dit verlang.[45] Dit is dan vir doeleindes van 'n ondersoek deur die IPCC, of om vas te stel of die maatreëls wat deur die polisie getref is ten opsigte van 'n klagte of aanmeldbare gedrag, doeltreffend en voldoende was. Die hoof van die polisiestasie moet 48 uur kennis vooraf in kennis gestel word van die voorgenome toegang.[46] Hierdie bepaling is aanvullend tot die gewone bevoegdhede van die IPCC, wat bestaan uit toegang, deursoeking en beslaglegging (en wat ook in ooreenstemming met die gebruiklike bevoegdhede van 'n funksionaris, bv 'n konstabel, is).[47] Daarbenewens kan die staatsekretaris met die goedkeuring van albei huise van die parlement die IPCC se ondersoekmagte versterk deur die magtiging van ondersoekmeganismes soos geheime intelligensiebronne en observasies wat op die regsonderdaan se regte inbreuk kan maak.[48]

[39]Artikel 9(2) van die *Police Reform Act 2002*.
[40]Item 5 van *The Independent Police Complaint Commission (Transitional Provisions) Order 2004*. Die Police Complaints Authority is deur die *Police and Criminal Evidence Act 1984* (a 83) ingestel en was 'n interne polisiestruktuur wat klagtes teen die polisie ondersoek het.
[41]Die pos is soortgelyk aan ons Kommissaris van Polisie.
[42]Artikel 9(3)(a)(b) en (e) van die *Police Reform Act 2002*.
[43]Artikel 11(6)-(11) van die *Police Reform Act 2002*.
[44]Regulasie 24 van die *The Police(Complaints and Misconduct) Regulations 2004*.
[45]Artikel 18(1) van die *Police Reform Act 2002*.
[46]Artikel 18(2)-(4) van die *Police Reform Act 2002*.
[47]Artikel 18(5) van die *Police Reform Act 2002*.
[48]Artikel 19(1) en (3) van die *Police Reform Act 2002*.

Die IPCC ondersoek alle klagtes waar lede van die publiek of persone wat namens ander optree oor die gedrag, stellings of nalate van 'n polisielid. Laasgenoemde omvat strafregtelike oortredings soos '*serious assault, serious sexual offence*, *serious corruption, a serious arrestable offence*' en misdrywe wat deur diskriminasie op grond van ras, geslag, geloof of ander status vererger is, asook optrede wat die instel van dissiplinêre verrigtinge sou regverdig.[49] Die IPCC beperk klagtes tot dié waar die getuienis toelaatbaar en redelik bewysbaar sou wees.[50] Die regulasies[51] aanvullend tot die *Police Reform Act 2002* beperk ondersoeke van onder andere klagtes wat ouer as 'n jaar is; of klagtes wat reeds die onderwerp van 'n ondersoek is; of ondersoeke wat prakties nie redelik gou afgehandel kan word nie; of klagtes wat kwelsugtig, herhalend of 'n misbruik van die proses sal wees. Op hierdie wyse beperk die IPCC sy werkslading en die aantal sake wat op ongefundeerde klagtes berus. In die lig van die aspek van deursigtigheid en verantwoordbaarheid is dit opvallend hoeveel bepalings daar in die gemelde wet en die bykomende regulasies is wat 'n verpligting op die IPCC plaas om kommunikasie en terugvoer aan die klaer of slagoffer rakende sy of haar klagte te voorsien en afskrifte van 'n ondersoek te verskaf. Die wet en die regulasies is opvallend so geformuleer dat ondersoekers, wat klagtes moet ondersoek wat gestaak is en hervat moet word of wat volg na afhandeling van 'n strafsaak, so gekies word dat enige beïnvloeding, korrupsie of intimidasie uitgeskakel word.[52]

Die publiek kan ook appèl by die IPCC aanteken ten opsigte van 'n versuim van 'n polisielid of polisiegesag om 'n klagte te prosesseer, of ten opsigte van die plaaslike resolusies, of ten opsigte van 'n ondersoek[53]

Uit bogenoemde blyk dit duidelik dat, afgesien daarvan dat die IPCC se tuiste in die *Police Reform Act 2004* is net soos dié van die OKD, eersgenoemde liggaam met veel groter magte, onafhanklikheid en statuur beklee is as die OKD en dat (hoewel ook 'n ondersoekliggaam) sy funksie veel eerder dié van 'n waghond-moniteringsliggaam is.

WERKSAAMHEDE EN BEVOEGDHEDE VAN DIE OKD

Die Polisiewet bepaal dat die hoofwerksaamheid van die OKD in a 222 van die 1993-Grondwet uiteengesit is. Omdat hierdie artikel verval het, het die breë oogmerk van 'n versekering vir die doeltreffende ondersoek van wangedrag verval en wetlik is die OKD slegs verplig om klagtes rakende sterftes in polisie-aanhouding of as gevolg van polisie-optrede te ondersoek. Die nasionale of provinsiale kommissaris moet die OKD in kennis stel van enige sterfte in polisie-aanhouding of sterftes as gevolg van polisie-optrede.[54] Enige ander

[49]Regulasie 2 van *The Police (Complaints and Misconduct) Regulations 2004.*
[50]Artikel 12(4)–(5) van die *Police Reform Act 2002.*
[51]Regulasie 3 van *The Police (Complaints and Misconduct) Regulations 2004.*
[52]Sien regulasies 16 en 17 gelees met regulasie 18 van bogenoemde regulasies.
[53]Regulasies 8,9,10 van *The Police(Complaints and Misconduct) Regulations 2004.*
[54]Artikel 53(8) van die Polisiewet.

klagte van wangedrag of misdadige optredes deur die polisie kan deur die OKD ondersoek word, maar so 'n ondersoek kan deur die uitvoerende direkteur stopgesit word.[55] Die uitvoerende direkteur mag klagtes wat nie met die gemelde gevalle van sterftes te make het nie, na die betrokke Kommissaris verwys,[56] of besluit om self 'n ondersoek in te stel of om dit na die vervolgingsgesag vir beslissing te verwys.[57] Die OKD het die bevoegdheid om die vordering van sodanige verwysde klagte te monitor en ook om enige verwysde, hangende of reeds afgehandelde klagte self te ondersoek. Die Polisiewet bepaal dat waar 'n hangende of verwysde ondersoek deur die OKD vanaf die kommissaris oorgeneem word, die verdere ondersoek in oorleg met die betrokke lid van die SAPD belas met die ondersoek, moet geskied.[58]

Is bogenoemde bepaling geskep ter wille van goeie betrekkinge tussen die SAPD en die OKD of bevraagteken dit die onafhanklikheid van die OKD deur aan die polisie die gesag te verleen om in te meng?

Bruce[59] van die Sentrum vir die Studie van Geweld en Versoening meen dat ongeveer 75 persent van die klagtes wat die OKD in die tydperk 1989 tot 2002 ontvang het, hoofsaaklik te make gehad het met klagtes van die publiek se ontevredenheid met die gehalte van polisiëring, en nie met die die polisie se misbruik van geweld nie. Uit die OKD se jaarverslag van 2004/2005[60] blyk dit dat van die 5 790 wangedrag-klagtes wat ontvang is, 44 persent (2 508 gevalle) met wangedrag te make het en 41 persent (812 gevalle) te make het met kriminele oortredings. Slegs 63 persent (314 gevalle) het te make met sterftes in polisie-aanhouding (wat ook selfmoorde deur gevangenes insluit) en ander sterftes wat die gevolg is van polisie-optrede. Volgens dié verslag is die polisie nie aanspreeklik vir 85 persent van sterftes in aanhouding of as gevolg van polisie-optrede nie.[61] Die getal sterftes in polisie-aanhouding wat die gevolg is van polisienalatigheid kom op 286 gevalle in 2004/2005 te staan. Die prentjie is minder rooskleurig as die verslag van die uitvoerende direkteur in aanmerking geneem word. Volgens die verslag het die OKD sodanige agterstand ten aansien van die afhandeling van sake wat ondersoek moet word, dat die agterstand die aantal nuwe sake oorskry.[62] Na bewering is daar tans 25 000 onafgehandelde

[55]Artikel 53(2)(a) en (c) gelees met a 53(6)(a) van die Polisiewet. Indien die uitvoerende direkteur besluit het om 'n klagte wat deur die Minister of die Uitvoerende raad verwys is deur die OKD te ondersoek, mag dit nie teruggetrek word nie.
[56]*Ibid.*
[57]Artikel 53(6)(e) van die Polisiewet.
[58]Artikel 53(6)(e)(i) van die Polisiewet.
[59]Bruce D 'Gripes or grievances? What the Independent Complaints Directorate statistics tell us (or not)' (2003) *SA Crime Quarterly* no 4.
[60]*Independent Complaints Directorate Annual Report* 2004/2005. RP 771/2005 op bl 6 van die uitvoerende direkteur, Adv Mac Kenzie se inleidende opsomming. Die jaarverslag vir 2005/2006 is by die skrywe van hierdie artikel nog nie gepubliseer nie.
[61]*Id* 7.
[62]*Id* 6.

sake wat nie in vorige jaarverslae aangemeld word nie.[63] In 2000 het Bruce[64] die stelling gemaak dat die gebruik van geweld deur die polisie verantwoordelik is vir meer as 70 persent van sterftes as gevolg van polisie-optrede en dat slegs persent van die sterftes die gevolg is van geweldstoepassing deur die polisie tydens die slagoffers se aanhouding. Die gebruik van vuurwapens deur die polisie, een van die kommerwekkendste faktore met betrekking tot sterftes as gevolg van polisie-optrede.[65] Daar is sekerlik 'n verbetering in die insidensie van misbruik van mag sedert die eerste werklike opnames in 1998,[66] 2002[67] en 2003, maar die OKD se missie en visie-stelling is tans nog onverwesenlik.

Ondersoeke en beperkings daarop

Klagtes oor wangedrag of swak diens wat deur die publiek, die vervolgingsgesag, politici, die OKD self of die polisie verwys of aangemeld word, word in vyf klasse ingedeel:

Klas I-klagtes verteenwoordig die groep beweerde klagtes rakende sterftes in polisie-aanhouding en beserings en sterftes as gevolg van polisie-optrede.

[63]Verslag aan die Portefeuljekomitee vir Veiligheid en Sekuriteit, *Budget Vote* 22, te http://www.pmg.org.za/docs/2005/060622icd.htm (besoek: Julie 2006).

[64]*Id* 3.

[65]Executive summary to the ICD Report on use of force and violence by SAPS' Mediaverklaring van 29 April 2003 op webwerf:http://www.icd.gov.za/media/2003/summary.htm, p 2 (besoek: Desember 2005).

[66]In 1997/1998 is 256 klagtes ontvang oor moorde wat na bewering deur die polisie gepleeg is, maar slegs 38 het tot skuldigbevindings gelei en slegs agt gevalle het suksesvolle dissiplinêre optrede tot gevolg gehad. Daar is 'n totaal van 518 gevalle aangemeld ten opsigte van sterftes wat polisie-optrede as oorsaak gehad het, terwyl 219 mense in polisie-aanhouding gesterf het, 'n totaal van 737 gevalle (G Newham *Transformation and the internal disciplinary system of the South African Police Service*. 'n Geleentheidsreferaat gelewer namens die Sentrum vir die studie vir Geweld en Rekonsiliasie in November 2000. Op webadres www.wits.ac.za/csvr/papers/papnwhm6.htm pp 19–20 (besoek: November 2004).

[67]Gedurende die finansiële jaar 2000/2001 (*Independent Complaint Directorate Annual Report* 2000/2001 6–9), is 5 225 gevalle aangemeld, waarvan 4 538 publieke klagtes was en 687 sterftes was wat plaasgevind as gevolg van polisiegeweld. Volgens die 2000/2001 Jaarverslag van die OKD was daar 'n toename van 0,8% in sterftes sedert die vorige jaar. Klagtes het van 4 380 in die vorige jaar toegeneem tot 5225. Verder is 554 gevalle van ernstige misdrywe gerapporteer, waarvan 365 gevalle van aanranding en poging tot moord aangemeld is; 27 gevalle van marteling; 23 gevalle van magsmisbruik; 18 gevalle van verkragting; drie gevalle van roof, ses sake van onbetaamlike aanrandings en vier gevalle van menseroof. Die res van die 554 gevalle verteenwoordig oortredings wat nie die fisiese integriteit van 'n ander persoon aangetas het nie. Sterftes wat die direkte gevolg is van vuurwapengebruik deur die polisie, het 430 gevalle beloop. Dié word soos volg saamgestel: 168 skietvoorvalle gedurende arrestasie, 155 gedurende die pleeg of ondersoek van die misdaad; en 13 as gevolg van ontsnapping. Daar was 36 sterftes as gevolg van ander opsetlike wapengebruik deur die polisie wat tot die dood gelei het, en 43 sterftes wat die gevolg was van nalatigheid of nalatige hantering van 'n vuurwapen deur die polisie. Altesaamvan 1 707 gevalle van wangedrag wat wissel van wangedrag wat wissel van seksuele teistering, verberging van getuienis tot dronkbestuur is aangemeld. Dit behels 'n styging van 2% sedert die die vorige finansiële jaar. In 2002 is 420 klagtes van buitengewone geweld deur die polisie aangeteken. Aaltesaam 3 348 klagtes is ontvang: 2 659 was publieke klagtes en 689 verteenwoordig sterftes in polisie-aanhouding of as gevolg van polisie-optrede. Daar was 'n 2% styging in die aantal gevalle van misbruik van mag (mediaverklaring uitgereik op 19 Januarie 2002 op www.icd.gov.za/media/2002/pofficers.htm (besoek: April 2004).

Laasgenoemde is meestal die gevolg van die gebruik van vuurwapens deur die polisie. Soos hierbo uitgewys is, is die OKD regtens verplig om hierdie klagtes te ondersoek. Nasionale en provinsiale kommissarisse moet sodanige sterftes aanmeld.

In die beginjare het die OKD se personeelkorps uit 65 ondersoekers landwyd in al die provinsiale en nasionale kantore bestaan. Tans is 166 ondersoekers in diens van die OKD en is 'n verdere 186 poste beskikbaar. Weens die voortdurende personeeltekorte moet die OKD die ander nie-verpligtende klagtes wat ontvang word, prioritiseer. In die 2001/2002 Jaarverslag van die OKD,[68] word aangetoon dat die OKD die hoogste prioriteit aan die volgende beweerde oortredings verleen:

- oortredings teen kinders, vroue, verkragtings en gesinsgeweld
- oortredings van moord, poging tot moord, marteling en mishandeling
- oortredings waar oormatige geweld gebruik is in die uitvoering van die polisie se pligte
- oortredings waar korrupsie (die verkoop of diefstal van polisie-dossiere in besonder) betrokke is.

Klas II-klagtes verteenwoordig dié gevalle wat deur die Minister van Veiligheid en Sekuriteit of die Provinsiale Uitvoerende Gesag na die OKD verwys word.

Klas III-klagtes is beweerde strafregtelike misdrywe van 'n ernstige aard wat gemeenregtelike en statutêre misdrywe misdrywe insluit, byvoorbeeld verkragting, intimidasie, ontvoering, korrupsie, aanranding, poging tot moord en deelname in sindikate en andere.

Klas IV-klagtes is beweerde oortredings van 'n nie-ernstige aard, en sluit wangedrag in.

Klas V-klagtes is daardie gevalle wat buite die werksaamhede van die OKD val. Dit is klagtes wat spruit uit die tydperk voordat die OKD in 1997 ontstaan het; klagtes wat ouer as 'n jaar is voordat dit gerapporteer word; klagtes wat te make het met swak of oneffektiewe dienslewering deur die SAPD en wat nie enige oortreding van die SAPD se Dissiplinêre Regulasies daarstel nie; en klagtes wat te make het met wangedrag van die SAPD en waar die klaer nie alle redelike stappe gedoen het om die klagte op bestuursvlak binne die SAPD op te los nie.[69]

[68] *Independent Complaints Directorate Annual Report* 2001/2002 PR 149/2002 www.icd.gov.za/reports p 31 (besoek: Augustus 2004). Sien ook veral die misdade vervat in die klas III-klagtes soos dit verskyn op die amptelike (maar baie verouderde) webadres: www.icd.gov.za/policies/complaint.htm.

[69] Die OKD se amptelike webwerf soos bygewerk op 3 Februarie 2000 http:www.icd.gov.za.policies/complaint.htm (besoek: September 2006).

Klas I-klagtes: die begrippe sterftes in polisie-aanhouding en sterftes as gevolg van polisie-optrede

Volgens Bruce[70] lei dié twee begrippe tot verwarring en gebruik die OKD die volgende benadering om dit te onderskei: In sommige gevalle het polisie-optrede wat die dood tot gevolg het plaasgevind vóórdat die persoon of verdagte in aanhouding geplaas is. Dit gebeur wel dat persone in aanhouding sterf, alhoewel die beserings vóór aanhouding plaasgevind het. Hierdie gevalle word steeds geklassifiseer as sterftes as gevolg van polisie-optrede. Sterftes wat in aanhouding voorkom, is daardie gevalle waar die beserings in aanhouding plaasgevind het. Dit sluit in selfmoord, dood as gevolg van natuurlike oorsake, aanrandings deur persone anders as die polisie en beserings wat deur die polisie veroorsaak is.

Klas III-klagtes: Die begrip marteling

Inleiding

Volgens die voormalige direkteur Madlala van die OKD, is klas III-klagtes, volgens die OKD se klassifikasiestelsel oortredings soos moord, marteling, gewapende roof, diefstal en korrupsie.[71] Die definisies van moord, roof en diefstal as omskrewe misdrywe is nie problematies nie en vereis nie verdere bespreking nie. Gespesialiseerde eenhede in die ICD sien sedert 2004 om na gevalle van korrupsie. Die definiëring van die begrip marteling verskaf egter probleme. Hoewel die begrip marteling vir die man op straat nie onduidelik is nie, is die regstegniese betekenis wat die aard en omvang daarvan omskryf, moeilik definieerbaar. Dit is nie 'n erkende strafbare misdryf in die Suid-Afrikaanse reg nie. In die internasionale reg is die breë definisie van marteling, soos in 1975 omsdkryf op die Verenigde Nasies se 'Convention against Torture', enige handeling waardeur *ernstige* pyn en lyding opsetlik deur 'n openbare amptenaar veroorsaak word by 'n persoon (die slagoffer van die marteling) met die doel om 'n verklaring of bekentenis van 'n persoon te verkry, óf as 'n straf vir 'n daad wat sodanige persoon gepleeg het of daarvan verdink word om te gepleeg het, óf om die slagoffer van die marteling of ander persone te intimideer.[72]

In die algemeen voldoen hierdie definisie aan die omskrywings van die meeste misdrywe wat gepleeg word teen die liggaamlike integriteit van 'n ander

[70]D Bruce'The prevention of police action and custody deaths', referaat gelewer op 14 April 2000 by 'n werkswinkel oor 'The prevention of deaths in police custody or as a result of police action' te Roodevallei Country Lodge, te www.csvr.org.za/papers/papbruc3.htm1-8 (besoek: November 2005).

[71]In 'n onderhoud met direkteur Styx Madlala, provinsiale hoof van die OKD. (Onderhoudvoerder anoniem, datum onbekend.) Beskikbaar op www.safety4all.co.za.icd.htm (besoek: Julie 2005).

[72]Artikel 1 van die *Convention against Torture and other Cruel, Inhuman or Degrading Punishment* (wat in 1987 in werking getree het), gelees met die *Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, aanvaar op 9 Desember 1975 en beskikbaar op http://www.hrweb.org/legal/cat.html.

persoon, hoewel geeneen van die definisies *die doel* waarvoor die pyn en lyding toegevoeg word (soos hierbo genoem is) as 'n vereiste stel nie.[73] Die uitdrukking 'ernstige pyn en lyding', soos die begrip 'ernstige liggaamlike leed' is ongedefinieer en vaag in die Suid-Afrikaanse reg.

Snyman[74] omskryf die begrip 'aanranding' in die Suid-Afrikaanse reg as die wederregtelike en opsetlike doen of late

> (a) wat tot gevolg het dat iemand anders se liggaamlike integriteit direk of indirek aangetas word; of
> (b) wat iemand anders laat glo dat so 'n aantasting van haar liggaamlike integriteit onmiddellik sal plaasvind.[75]

Snyman[76] voer aan dat die toediening van geweld direk of indirek kan plaasvind. Daar word ook nie vereis dat die slagoffer beseer hoef te wees nie of selfs van die aanranding bewus hoef te wees nie. 'n Vorm van onregstreekse of indirekte toevoeging van geweld word gemanifesteer waar X byvoorbeeld, vir Y dwing om iets te drink as 'n aantasting van haar liggaamlike integriteit.[77] So is die byt deur 'n hond, onder beheer van die polisie wat op die slagoffer losgelaat word, indirekte aanranding, soos blyk uit die feite in *S v Smith*.[78] (In hierdie geval van aanranding met die opset om ernstig te beseer het 'n groep polisiemanne hul honde op onwettige immigrante losgelaat as deel van 'n opleidingsprogram wat verfilm is en as bewysstuk voor die hof gedien het.) Die tweede alternatiewe been van Snyman se definisie het te make met die opsetlike opwekking van vrees vir onmiddellike geweld, sonder dat daar direk of indirekte fisiese impak op of aantasting van die slagoffer se liggaam was. Dit handel oor die inboeseming van vrees of 'n geloof by die slagoffer dat geweld onmiddellik toegevoeg gaan word, byvoorbeeld in die geval van die rig van 'n vuurwapen.[79] Dit gaan hier oor, onder andere, die subjektiewe geloof van die

[73]Snyman (5uitg 2006) 437 vn 32, verwys na die beoogde gekodifiseerde omskrywing van die misdaad *battery* in die Engelse reg, waar dié misdaad aan die hand van die veroorsaking van 'n bepaalde gevolg omskryf word, naamlik '*A person is guilty of an offence if he intentionally or recklessly causes injury to another*'. Hierdie veroorsaking van 'n bepaalde gevolg is meer in ooreenstemming met ons omskrywing van die misdryf aanranding as wat dit neig na die bereiking van 'n bepaalde gedefinieerde doelwit, soos in die bogenoemde definisie van marteling.

[74]*Id* 432. Die definisie van aanranding in hierdie uitgawe verskil van dié in die vorige uitgawes naamlik dat aanranding die 'wederregtelike en opsetlike regstreekse of onregstreekse toevoeging van geweld aan die liggaam van 'n ander persoon; of dreigemente van onmiddellike persoonlike geweld aan 'n ander onder omstandighede waarin die bedreigde [slagoffer] beweeg word om te glo dat die persoon wat dreig die opset en die vermoë het om sy dreigemente uit te voer'.

[75]Sien *R v Sibanyone* 1940 JS 40 (T) waar die hof bevind het dat dreigemente van fisiese geweldstoevoeging aanranding is. Die vereiste is egter dat dit 'n dreigement van onmiddellike persoonlike geweld moet wees en die bedreigde moes geglo het dat die aanrander in staat is om die dreigement uit te voer. Sien ook Snyman aw, 435 vn 2, en ander gesag daar aangehaal.

[76]Snyman aw 441.

[77]Snyman aw 434 en *S v A* 1993 1 SASV 600 (A).

[78]2003 2 SASV 135 (HHA).

[79]Snyman aw 435.

slagoffer wat selfs vergesog kan wees, en nie soseer of die aanrander werklik in staat was om sy dreigement uit te voer nie.[80]

Onder invloed van Engelse reg het sekere gekwalifiseerde vorms van aanranding ontstaan wat as selfstandige misdrywe in ons reg erken word, naamlik aanranding met die opset om ernstig te beseer, onsedelike aanranding en verkragting. Die opset-vereiste in elkeen van hierdie gekwalifiseerde vorms van aanranding verskil en daarom is dit nie maar net aanranding van 'n ernstiger aard nie.[81] Die vereistes van aanranding met die opset om ernstig te beseer is presies dieselfde as dié van aanranding hierbo vermeld, behalwe vir die verdere vereiste dat die opset moet wees om ernstige liggaamlike beserings of liggaamlike leed aan die persoon of 'n ander toe te voeg. Dit is nie nodig dat daar werklike beserings toegedien hoef te wees nie. Die opset om ernstig te beseer word afgelei uit die aard van die instrument of wapen gebruik, die plek of deel op die liggaam waarop die besering gemik is en die aard van die besering.[82] Die besering of leed hoef ook nie van 'n blywende aard of gevaarlik te wees nie, soos in die geval waar 'n slagoffer elektriese stroombaanskokke op sy liggaam toegedien word, of om sy arms te draai of om die slagoffer in die gesig te skop met 'n stewel.[83]

Die SAPD se Beleidsinstruksies[84] *met betrekking tot marteling*

Die SAPD se beleidvoorskrifte aan die polisie oor die voorkoming van marteling en die behandeling van persone in aanhouding wat in 1999 deur die polisie ingestel is en deel van die Nasionale Orders en Instruksies is, definieer marteling soos volg:

> **Torture** may include, but is not limited to, any cruel, inhuman or degrading treatment or punishment, as referred to in section 12(1)(e) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) or any act by which severe pain, suffering or humiliation, whether physical or mental, is intentionally inflicted on a person for purposes of obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating him or her or a third person, when such pain, suffering or humiliation is inflicted by or at the instigation of or with the consent or acquiescence of a member or any person acting under the authority or protection of the *[police] Service*.[85]

[80] Burchell & Milton *Principles of criminal law* (2005) 687.
[81] Snyman aw 433.
[82] *Id* 439.
[83] *Id* 439--440. Snyman verwys na die sake van *S v Madikane* 1990 1 SASV 377 (N); *S v Smith* 2003 2 SASV 377 (T).
[84] Die amptelike titel is *Policy on the Prevention of Torture and the Treatment of Persons in Custody of the South African Police Service*, verkrygbaar op die SAPD webblad www.saps.org.za/17-policy/tort.htm (besoek: Julie 2004).
[85] *Id*. Sien die woordomskrywingsgedeelte van die beleidsinstruksies.

Hierdie definisie is, met enkele onbelangrike wysigings, 'n herhaling van die definisie van marteling vervat in a 1 van die 1985 '*Covenant against Torture*' van die Verenigde Nasies.[86] Wat egter ten eerste opvallend en jammer is, is dat daar nie 'n duidelike onderskeid getref word tussen marteling en ander vorme van mishandeling nie. Marteling word as 'n kollektiewe term gebruik wat ander wrede, onmenslike of vernederende behandeling insluit. Omdat daar in die volkereg nie ligtelik 'n bevinding van marteling gemaak word nie, behalwe in uiters ernstige gevalle, sou dit myns insiens wys gewees het om ook marteling te onderskei van ander vorme van mishandeling soos vernedering en wrede of onmenslike behandeling. So 'n onderskeid sou die posisie in ooreenstemming met internasionale reg gebring het. Dit is nie seker of die definisie 'n *numerus clausus* van eindoelwitte gee nie, omdat die term marteling gekoppel is aan spesifieke doelwitte (naamlik die verkryging van 'n veklaring of bekentenis, straf of intimidasie) wat bereik moet word om as marteling getipeer te word. Sou dit so wees, word die toepassing daarvan erg begrens. Sekerlik kan daar gedink word aan ander einddoelwitte wat ook deur mishandelende gedrag daargestel kan word, soos rassisme en sadisme.

Die beleidsvoorskrif of instruksies vereis dat marteling *onmiddellik* aangemeld moet word – wat 'n sigbare verbetering is op die onspesifieke vereiste in die Polisiewet wat tot gevolg het dat dit te enige tyd aangemeld kan word. Die instruksies verbied alle lede van die polisiediens om enige persoon te martel, of iemand toe te laat om dit te doen of om die marteling van iemand deur 'n ander persoon toe te laat, en verbied ook enige poging of sameswering daartoe. Enige bevel om iemand te martel is onwettig en mag nie gehoorsaam word nie. Indien so 'n bevel gegee word, moet dit dadelik aan die stasiebevelvoerder of die areakommissaris gerapporteer word, wat dit dan moet ondersoek. Dit is die plig van 'n polisielid wat bewus is dat marteling plaasvind, om dadelik alle redelike stappe te doen om dit te beëindig en aan die stasiebevelvoerder te rapporteer. Indien die stasiebevelvoerder betrokke is by die pleging van die marteling, moet die streekskommissaris ingelig word. Hierdie senior lid, afhangende wie van die twee by die pleging van die mishandeling betrokke is, moet dit dadelik ondersoek.

Waar 'n persoon wat in polisie-aanhouding 'n klag van marteling teen 'n polisielid lê, moet dit dadelik aan die stasiekommissaris of area-kommissaris gerapporteer word. Dit staan die persoon vry om die klagte ook by die OKD aanhangig te maak. Die persoon in aanhouding moet ingelig word dat hy of sy die reg het om ook 'n klagte op 'n voorgskrewe vorm by die OKD te lê. 'n Inskrywing van sodanige klagte moet in die voorvalleboek by die polisiestasie gemaak word. Wanneer daar deur middel van 'n ondersoek vasgestel word dat die polisielid marteling gepleeg het of 'n medepligtige was in die pleging daarvan, moet 'n dissiplinêre verhoor teen die lid ingestel word.[87]

[86]Sien hierbo.
[87]Artikel 2(a) van die SAPD se Dissiplinêre Regulasies.

Marteling in sy verskeie gedaantes (bv aanhouding van 'n persoon om hom te dwing om te praat) het reeds skerp kritiek van die Hoogste Hof van Appèl (die destydse appèlafdeling) gekry, nié omdat dit as die misdryf van marteling getipeer en verwerp is nie, maar omdat die ondervragingsmetodes moreel gesproke onverdedigbaar was. So beskou die hof, in *Schermbrucker v Klindt NO,*[88] geestelik of liggaamlik uitputtende metodes van ondervraging as geestelike of liggaamlike aanranding. Die hof, in *Rossouw v Sachs,*[89] beskou die sogenaamde '*third degree* methods' of te wel derderangse metodes om 'n bekentenis uit te lok, eweneens as aanranding en derhalwe onaanvaarbaar. Die hof het hom soos volg uitgelaat:

> It may readily be postulated that Parliament can never have intended that the detainee should, in order to induce him to speak, be subjected to any form of assault, or that his health or resistance should be impaired by inadequate food, living conditions or the like. Equally, the interrogation expressly authorized by sec 17 [van die Algemene Regswysigingswet 37 van 1963] cannot ... be construed as in any way sanctioning what are commonly described as third degree methods.[90]

Die OKD se beskouing van marteling

Die OKD benader marteling, ooreenkomstig die huidige stand van die reg, as die pleging van die misdryf aanranding in al sy verskyningsvorms.[91]

Die wyse waarop marteling gepleeg word, voldoen in die algemeen aan die misdryf aanranding met die opset om erstig te beseer waar ernstige beserings toegedien is; of die misdrywe aanranding, poging tot moord of moord waar versmoring van die slagoffer met 'n rubberpyp of 'n stuk plastiek tot sy dood lei of elektriese skokke op die slagoffer se liggaam toegedien word of dreigemente dat die slagoffer gedood sal word, soos in die geval waar die sogenaamde helikoptermetode toegepas is.[92] Gevalle van strafbare manslag, poging tot moord, moord den die rig van 'n vuurwapen word dikwels by die OKD aangemeld.[93] Metodes wat hier gebruik word verskil, maar een van die skokkende illustrasie van die erns en omvang van polisie-optrede is die geval deur die direkteur van die OKD genoem: 'n verdagte, is onderwerp aan elektriese skokke op sy privaatdele, amper versmoor met 'n plastieksak oor sy kop en toe, volgens die helikoptermetode aan sy voete by 'n voertuig uitgehang. Daarna is die verdagte vanuit die bewegende voertuig gestamp en het hy

[88] 1964 4 SA 606 (A) op 612-613.
[89] 1964 2 SA 551 (A) by monde van A R Ogilvie Thompson AR, waarmee Steyn HR,Beyers, Botha en Wessels ARR saamgestem het.
[90] *Id* 561.
[91] McKenzie K D *Paper on prevention of police torture* (voordrag gelewer by 'n werkswinkel gehou te Kaapstad op 12 Februarie 2002) oor die opstel van 'n aksieplan om marteling en mishandeling in Afrika te voorkom. Op die webadres www.red.gov/za/documents/2002/torturepaper.htm 1--4. Dit is in ooreenstemming met die uitspraak in *Fose v Minster of Safety and Security* 1997 3 SA 786 (HHA).
[92] *Id* 1. Die persoon word aan sy bene vasgehou en by 'n bewegende voertuig uitgehang.
[93] *Id.*

ernstige breinbeserings opgedoen het.[94] Die betrokke polisielede is strafregtelik vervolg en 'n siviele eis is teen hulle ingestel en geskik.[95] In 'n ander geval is jeugdige verdagtes aan die polisievoertuig vasgemaak en moes hulle saam met die bewegende voertuig hardloop. Een van die jeugdiges het geval en gesterf toe hy onder die motor se wiele beland het.[96] Die gebeure het gevolg nadat die jeugdiges amper verdrink het toe hulle met 'n vuurwapen gedreig is dat hulle geskiet sou word as hulle nie hulle koppe onder die water van 'n dam waarin hulle moes staan, sou hou nie.

Die klagtes teen die polisielid wat enigeen van bogenoemde misdrywe gepleeg het, word nie as mishandeling ondersoek en vervolg nie; dit word as die erkende misdrywe ondersoek en aangekla omdat slegs daardie misdrywe, in teenstelling met marteling, selfstandige bestaansreg het.

STRUIKELBLOKKE IN DIE WEG VAN DIE OKD AS WARE TOESIGHOUDENDE LIGGAAM

Die OKD het slegs sekere beperkte wetlike bevoegdhede om oortredings van marteling en ander strafbare misdrywe te ondersoek, om verdagtes te deursoek en beslagleggings te maak, en om arrestasies uit te voer.[97] By afhandeling van die ondersoek word aanbevelings aan die Direkteur van Openbare Vervolgings of die Kommissaris van die Suid-Afrikaanse Polisiediens gemaak vir die instel van strafregtelike of dissiplinêre verrigtinge. Nie een van die liggame is verplig om die aanbevelings uit te voer nie. Die OKD is van mening dat sou daar 'n besondere misdryf van marteling deur die wetgewer geskep word, dit hulle taak sou vergemaklik omdat aanranding volgens die OKD se siening beperk is tot bewys van fisiese geweld en dit geestelike aftakeling en ander vorme van marteling ignoreer.[98] Hierdie siening is myns insiens verkeerd, omdat selfs geestelike aftakeling wat uit vrees as gevolg van mondelinge dreigemente ontstaan, ook aanranding daarstel indien al die ander elemente daarvan bewys kan word. Snyman dui aan dat die vraag nie is *hoe* die vrees ontstaan nie, maar *of* daar vrees by die slagoffer ingeboesem is[99] en of daar 'n vrees vir onmiddellik verwagte dreigende liggaamlike beserings bestaan.[100] Die rig van 'n vuurwapen,

[94] *Id.* Die verdagte slagoffer het meer as sestig dae in die hospitaal deurgebring en is as gevolg van die gebeure van ander afhanklik vir die bestuur van sy persoonlike en finansiële sake.
[95] *Id.* Die skadevergoedingeis is buite die hof vir R2,7 miljoen geskik.
[96] *Id.* Die polisielede is van strafbare manslag, aanranding en rig van 'n vuurwapen aangekla.
[97] Deursoekings en beslagleggings mag slegs op aansoek by 'n landdros gedoen word, maar hierdie magte is nie standaardmagte waarmee die OKD toegerus word nie – soos hierbo uitgewys is.
[98] *Id* 2.
[99] Snyman (3uitg 1995) 455 vn 25 verwys na JC Smith & B Hogan *Criminal law* (6uitg 1988), 377 wat die vraag vra: '*If the plaintiff turns a corner to be confronted by a motionless robber who, with a gun in his hands, commands: 'Hands-up', why would this not be assault?*'
[100] In Australië het Taylor R in *Barton v Armstrong* [1969] 2 NSWR 451 455, beslis dat die geweld in die toekoms op 'n onbepaalde tyd kan plaasvind: '*Threats which put a reasonable person in fear of physical violence have always been abhorrent to the law as an interference with personal freedom and integrity, and the right of a person to be free from the fear of insult. If the threat produces the fear or apprehension of physical violence, then I am of the*

hoewel 'n selfstandige oortreding, is eweneens 'n aanranding *per se,*[101] omdat dit vrees by die slagoffer inboesem dat sy of haar lewe in gevaar is. Dit staan egter vas: aanrandings deur die polisie op persone is '... *doubly objectionable as being the worst form of third degree*',[102] en iets wat uitgewis moet word. Ek stem derhalwe met die OKD saam dat die skep van 'n selfstandige misdryf naamlik marteling, die werk van die OKD sal vergemaklik omdat bewys daarvan makliker sal wees en die gedrag van die skuldige polisielid sal stigmatiseer. Hoewel die gemeenregtelike en statutêre misdrywe die omvang van oortredings van marteling genoegsaam dek, is ek van mening dat 'n selfstandige misdryf marteling 'n rol kan speel om die misbruik van mag te beperk.

Daar word egter aan die hand gedoen dat die definisie van marteling ooreenkomstig die strafreg verfyn moet word om nie 'n bevinding van marteling in elke geval van geringe aanranding in te sluit en te wettig nie. Hier word gedink aan die Amerikaanse model wat grade van 'n misdryf toelaat (soos *murder in the first degree*). Daar moet ruimte wees vir ander sekondêre vorme van mishandeling wat, sover dit die erns daarvan betref, nie as primêre marteling getipeer kan word nie. Die gebrek aan 'n wetlike verpligting op die polisie om alle tipes van mishandeling te rapporteer, veroorsaak 'n gebrek aan behoorlike en onafhanklike toesig deur die OKD. Die polisie is verplig om slegs sterftes in polisie-aanhouding of as gevolg van polisie-optredes onmiddellik te rapporteer. Ander strafregtelike vergrype deur polisielede kan intern deur die polisie ondersoek word sonder dat dit aan die die OKD gerapporteer word. Dit laat ruimte vir partydigheid en is ongesond in 'n demokratiese konstitusionele staat wat hom beywer vir deursigtigheid en verantwoordbaarheid.

Die polisie moet regtens verplig word om gevalle van marteling onmiddellik binne 12 uur aan toesighouers en aan die OKD te rapporteer. Versuim om dit te doen moet aan die nodige strafmaatreëls onderwerp word. Die vereiste dat dit alleenlik aan 'n lynfunksionaris gerapporteer word, is te wyd. Dit laat ruimte om effektiewe ondersoeke deur die OKD te ondermyn en getuienis verlore te laat raak, omdat mediese ondersoeke moontlik te laat uitgevoer word of getuies onopspoorbaar word.

Die personeeltekorte in die OKD moet aangespreek word. Geweld en vergrype deur die polisie toon 'n wissellende insidensie van hoog na laag en die rol van die OKD kan derhalwe nie slegs dié van 'n moniteringsliggaam wees nie, hoewel dit die ideaal is. Die funksie van die OKD is in hierdie stadium een wat grootliks konsentreer op die ondersoek van klagtes van geweld wat reeds begaan is. Daar is geweldige agterstande in ondersoeke. Daar moet dus genoeg

opinion that the law is breached, although the victim does not know when that physical violence may be affected.'

[101] *Brady v Schatzel* [1911] St R Qd 206.

[102] *R v Fouche and Another* 1958 2 SA 246 (E).

ondersoekers wees. Net die beste ondersoekers, met hoë morele integriteit en etiese standaarde en wat goed ingelig is oor menseregte of wat professionele ervaring as ondersoekers het, moet vir poste in die OKD gekeur word. Die keuringsproses moet ook met groter omsigtigheid benader word, sodat die vereistes van verteenwoordigende samestelling van die bevolking daarin weerspieël word. Voorts moet die demokratiese eis van verantwoordbaarheid teenoor die gemeenskap 'n plek in die aanstelling en verkiesingsproses van die lede van die OKD kry.

Die samewerking wat die OKD van die polisie kry, is nie altyd goed nie omdat die polisielede die OKD as 'n teenstander beskou. Waar die OKD polisieselle onaangekondig besoek, was dit hulle ervaring dat hoewel die stasiebevelvoerders die nodige samewerking verleen het, daar veral kritiek vanuit die geledere van die senior polisielede in bestuursposte geopper is.[103] Hoewel daar verskeie pogings op uitvoerende vlak tussen die polisie en die direkteur van die OKD was om vershoudinge te verbeter en samewerking wel verbeter het, is die verhoudinge steeds nie goed nie en die samewerking nie toereikend nie. Die polisie se houding teenoor die OKD is nie uniek nie; selfs in Europa word soorgelyke houdings waargeneem. Walpen,[104] hoof van die polisie van Switserland, het hom reeds in 1999 soos volg uitgespreek:

> The ideal of the founders of the CPT[105] of zero tolerance towards ill treatment by organs responsible for the application of the law, is still far from being reached in many countries, where law enforcement officials remain the main human rights violators Although respect for individual fundamental rights and police efficiency are not antagonistic, the CPT's missions sometimes arouse mistrust among the police, when in reality the members of this commission are also there in order to certify that the police carry out their duty with the utmost competence and responsibility.

AANBEVELING EN GEVOLGTREKKINGS

Om waarlik die rol van 'n onafhanklike waghond en bewaker teen misbruik van mag deur die polisie te kan wees, behoort die OKD 'n behoorlike afstand tussen homself en die SAPD te kan handhaaf : verantwoordbaarheid kan net in die geval van die OKD gewaarborg word indien die OKD volle onafhanklikheid geniet en die behoorlike gesag het om onafhanklik ondersoeke te doen waar dit nodig is. Myns insiens is die rol van die OKD tans nie regtens dié van 'n toesighouer nie en is daar ernstige gebreke in die institusionele onafhanklikheid van die OKD. Die onafhanklikheid van die OKD moet wetlik gevestig word en wetgewende bepalings wat tot 'n beeld van institusionele afhanklikheid bydra,

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[103] *Paper on prevention of police torture*, aw par 3.4.

[104] Walpen L in die voorwoord van *A visit by the CPT – What's it all about? 15 Questions and Answers for the police* 1999, geskryf deur die *Association for the Prevention of Torture* (CPT) in samewerking met die Raad van Europa binne die raamwerk van die Raad se program *Police and Human Rights* 1997-2000', in samewerking met die Europese Raad en die Switserse polisiediens. Verkrygbaar te http:// www.cpt.coe.fr (besoek: 2004).

[105] Dws 'Committee for the Prevention of Torture'.

moet gewysig word. Die aantal aangemelde klagtes wat teen die polisie aangemeld word, is skokkend hoog, veral in 'n konstitusionele staat met 'n polisiediens wat ten doel het om 'n diens aan die gemeenskap te lewer en menseregte te eerbiedig. Dit is gevolglik gebiedend noodsaaklik dat 'n liggaam soos die OKD bestaan. Om effektief en legitiem te kan wees, moet dit onafhanklikheid hê en tot verantwoording geroep kan word.

Die model vir 'n onafhanklike OKD wat op die model van die IPCC geskoei is, kan gebruik word om die posisie van die OKD te verbeter. Hierdie stelsel is na my mening geensins volmaak nie, omdat die IPCC in die Police Reform Act 2002 in die lewe geroep is. Daar is egter verskeie wigte en teenwigte ingebou wat die demokratiese ideale van verantwoorbaarheid en deursigtigheid ondersteun. Geen onafhanklike liggaam behoort sy mandaat in 'n ander Wet te probeer opspoor nie. Nogtans vertoon die IPCC meer legitiem en onafhanklik. Dié liggaam is ook met meer mag en bevoegdhede beklee as die OKD. Ander regstelsels behoort ook nagevors word, maar ruimte ontbreek om dit hier te doen.

Die personeelkorps van die OKD kan ontwikkel word ooreenkomstig die model van die Europese Komitee teen die Voorkoming van Marteling. Die komiteelede word oorhoofs aangestel uit 'n korps professionele mense, meestal regsgeleerdes en geneeshere. Hierdie liggaam bestaan uit persone wat deur die Europese Raad aangestel word uit die Ministerskomitee en is aangewys deur al die verdraglande wat die Europese Verdrag teen Marteling onderteken het. Hierdie verdragslande verteenwoordig bykans elke Europese staat insluitende die Verenigde Koninkryk, Duitsland, Nederland en Frankryk. Die liggaam se funksie is om persone in aanhouding en by polisiestasies te besoek, en om lêers en ander rekords in polisiestasies en gevangenisse na te gaan ten einde hulself te vergewis dat aangehoudenes nie onderwerp word aan marteling, mishandeling of oormatige geweld nie. Hulle rol behels dus meer pro-aktiewe voorkoming van marteling en mishandeling, as reaktief ten opsigte van klagtes van mishandeling, as reaktiewe optrede in reaksie op klagtes van mishandeling wat deur wetstoepassers gepleeg word. Dit is egter wel so dat onaanvaarbare polisie-optrede steeds in Europa aangetref word. Die Komitee se werksaamhede en missie is in 'n publikasie[106] met riglyne aan polisiestasies beskikbaar gestel. Dié publikasie bespreek 'n verskeidenheid aspekte, soos prosessuele en fundamentele veiligheidsmaatreëls wat aan die begin van 'n aangehoudende se aanhouding aan hom of haar bekend gemaak moet word. Hierby ingesluit is die vereiste maatreëls dat die aangehoudene kontak sal hê met 'n vriend of familielid,'n regsverteenwoordiger en 'n dokter. Ander veiligheidsmaatreëls sluit in: elektroniese opnames van ondervragings; die vasstelling van 'n gedragskode vir polisielede; die instel van 'n enkele omvattende gevangenisrekord waarin alle gegewens opgeteken moet word; en die instel van 'n nasionale onafhanklike liggaam wat klagtes van geweld of marteling in

[106] *Ibid.*

aanhouding sal hanteer. Die rigtinggewende beginsels van hierdie liggaam verdien melding en kan die credo van elke polisiebeampte wees:

- die verbod op mishandeling en marteling van persone wat van hulle vryheid ontneem is, is absoluut;
- mishandeling en marteling is teenstrydig met die beginsels van beskaafde gedrag, selfs al is die mishandeling van geringe aard;
- mishandeling en marteling is nie net alleen nadelig vir die slagoffer daarvan nie, maar ook vernederend vir die polisiebeampte of ander wetstoepasser wat dit uitoefen of toelaat dat dit gebeur;
- praktyke van mishandeling en marteling benadeel die staat waarin dit voorkom.[107] Hierby kan gevoeg word dat enige wangedrag deur die polisie, die beeld van die polisie benadeel en die legitimiteit van die polisiediens in gevaar stel. Yalden, Hoof-Kommissaris van die Kanadese Menseregte-kommissie stel dit soos volg:

> Policing is first and foremost a service to the public; the more it is at odds with the composition and values of the public, the less well it works.[108]

Die primêre doel van enige toesigliggaam behoort te wees om groter publieke deelname in wetstoepassing te bewerkstellig sodat die polisie aan die publiek verantwoordbaar kan wees. Hoe meer die OKD die belange van die polisiediens wil dien, hoe meer sal sy beeld dié van 'n skoothondjie wees. Ongelukkig is dit inderdaad die beeld van die OKD – weens wetlike beperkings en die ander faktore hierbo genoem.

[107] *Ibid.*

[108] D Eby, J Metcalfe, J Richardson & D Singhal *Towards more effective police oversight*, verslag namens die Pivot Legal Society, voorgelê aan die Vancouver Peace and Justice Committee, September 2004 2.

Art and science as fundamental right defences in South Africa

Kobus van Rooyen[*]

TRIBUTE

I am delighted to contribute this article in honour of Professor Kallie Snyman, an internationally recognised author on criminal law and presently the most often quoted author on the subject in South Africa. During my time of teaching criminal law at the University of Pretoria and as a fellow Humboldt Stipendiate, I have known Professor Snyman as both a colleague and a friend. In spite of his national and international achievements he has remained humble, a unique quality in someone who has experienced success so often, including that of being an accomplished musician.

Abstract

This contribution deals with a facet of constitutional criminal law: freedom of artistic creativity, with special reference to child pornography, the possession and creation of which is prohibited by the Films and Publications Act 1996, as amended. The aim is to provide an analysis of how the art defence has developed within this and related spheres.

FREEDOM OF EXPRESSION

Section 16 of the Constitution of the Republic of South Africa guarantees the right to freedom of expression and states that this includes freedom of artistic creativity, academic freedom and scientific research. Section 16(2) explicitly excludes from the protection of free speech propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. That section 16(2) is

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not the only limitation on freedom of expression is, however, clearly confirmed by O' Regan J in *Khumalo v Holomisa.*[1] The right to dignity in section 10 of the Constitution is held to include the other rights of personality, which would, under justifiable circumstances, place a further limitation on freedom of expression.[2]

> The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings shared by all people as well as the individual reputation of each person built on his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.

There is, in any case, a constant weighing of fundamental rights against each other, since the Constitutional Court ('CC') has emphasised that in the weighing of fundamental rights no right is *a priori* regarded as more important than other fundamental rights, even if it pertains to children.[3]

Artistic creativity (and one of its products: film[4] drama) and scientific research (and one of its products: the film documentary) has often challenged the boundaries as initially conservatively set for the visual medium, whether the medium be cinema, DVD, video or broadcasting. One of the most problematic fields is that of child pornography. This contribution will focus on this aspect of art, which includes film drama. Since the film documentary, as product of science, is closely related to drama, I will also deal with this facet of freedom of speech.

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[1]2002 5 SA 401 (CC) at par [27].

[2]In *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 4 SA 294(CC) at par [34] Langa DCJ (as he then was) states that further legislative limitations would be intrusive of s 16(2) and may only place restrictions on s 16(1) where they are shown to be reasonable in terms of s 36.

[3]See *De Reuck v Director of Public Prosecutions and Others WLD* 2004 1 SA 406 (CC) at par [55] where Langa DCJ (as he then was) states: 'In the High Court judgment, the view is expressed that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, and that s 28(2) of the Constitution 'trumps' other provisions of the Bill of Rights. I do not agree. This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36.' (footnote omitted)

[4]Which would include broadcasts.

Whilst the new Films and Publications Act 65 of 1996 directly exempted *bona fide* art, drama, literature and scientific publications, it did not exempt material which falls in the category of what would traditionally be regarded as child pornography. The Constitutional Court[5] has now included the art defence by way of reading it in to the definition of child pornography in section 1, read with section 27, of the Films and Publications Act 1996 ('FPA'). The Broadcasting Code[6] still excludes art as a defence in this case and will have to be amended in the light of the Constitutional Court's judgment in regard to the FPA.

When judging whether material amounts to art, which would include drama, it is important to bear in mind that freedom of expression as guaranteed in our Constitution, is the result of an arduous and century-old struggle against the tyranny of the state and often, the church. One only needs to page through *Censorship: 500 Years of Conflict*, which was published for the 1984 exhibition at the New York Public Library, to stare in shock at the gruesome deeds which were perpetrated by the church and state against those who dared to disagree with them during the preceding five centuries. One is struck by the burning at the stake of William Tyndale in the 16th century for his (unacceptable to the Catholic Church) translation of the Bible; the same treatment to Servet under the orders of Calvin for denying the Trinity; the imposition of prior restraint by Henry VIII and Elizabeth I (abolished in 1695); seditious libel in 18th century England which did not allow an accused to plead truth; the tyranny of Louis XIV and his ministers up to the King's death in 1715; the pre-revolution censorship in 18th century France against those who dared to differ from official doctrine and parthinking; the placing on the *Index Librorum* of some of the works of Copernicuspar, Galileo and Milton. The 1735 trial of the publisher John Peter Zenger, the editor of the *New York Weekly Journal*, at least introduced a new era in America for publishers. The jury's finding that he had not committed seditious libel; effectively put an end to common law seditious libel in the colonies.[7]

Art

Tom Stoppard, the well known British playwright, has one of his characters say in the often performed play, *Travesties* that 'the easiest way of knowing whether good has triumphed over evil is to examine the freedom of the artist'.[8] I agree. Art was so often, in the apartheid era, ignored as a significant value.

[5]*De Reuck v Director of Public Prosecutions, WLD and Others* 2004 1 SA 406 (CC).
[6]See: www.bccsa.co.za.
[7]See Lieberman *The enduring constitution* (1987) 217–9.
[8]Quoted by Yuri Zarakhovich in *Time* 26 September 26 2005 at 43.

When art accorded with traditional (often Euro-centric) values, there was almost never a problem.[9] But when art and drama (whether in drawings, paintings, plays or films) was used as a vehicle for political change, it was often down played or banned. The problem is, of course, to determine where art ends and child pornography or hate speech commences – as the German parcourts have so often had to decide upon, in the light of absolute protection which the *Grundgesetz* affords to art.[10] Special weight is afforded to the protection of dignity, the serious invasion of which negates or overrides art in hate speech cases.[11] The German approach has been adopted by the South African Broadcasting Complaints Commission.[12]

An area where art has often been controversial is where children are involved. The new Films and Publications Act had hardly been in operation when, in 1998, the Grahamstown Arts Festival led to a test of the new Board, which led to serious controversy. The 'Viscera' exhibition by Mark Hipper at the Festival was held by the Board and Review Board to have not amounted to child pornography when judged in context. The Deputy Minister of Home Affairs[13] differed and the clash was reported in the press. A 1999 task team, which advised the minister on the definition of child pornography in the original Act, found that the original section 27, which prohibits by way of criminal sanction

[9]I recall that when I was the chairperson of the Publications Appeal Board (1980–90) there was a complaint about a modern sculpture which was part of an exhibition on the 32nd floor of the Volkskas (now ABSA) building in Pretoria. The sculpture was that of a woman – the face was, however, in the form of a vagina (I saw a similar sculpture in the lobby of a hotel in Rome in 1988). Since Volkskas was not prepared to lodge a complaint itself, the Director of Publications was not prepared to exercise his discretion to refer the sculpture to the publications committee. His approach was obvious: this was an original sculpture of which no copies had been made and should be seen within its context as part of an exhibition. A painting of Walter Battiss also came before us for the confirmation of a possession ban. It included scenes of what may be described as fornication on Battiss's imaginary Fook Island. Since the painting was owned by Battiss himself and there was no plan to publish it, the Publications Appeal Board did not confirm the possession ban. When in 1975 one of the famous Hieronymus Bosch paintings was published on the cover of a musical record and it included, in typical Bosch style, a penis, the 1975 Board was quick to recognise its classic value and not confirm the ban on the distribution of the record. The same (very conservative) board, however, held copies of famous paintings by Ingres and Toulouse Lautrec to be indecent within the context of a popular magazine, since they included nude female figures. Such a decision would never be repeated after 1980.

[10]Compare Kulczak *Strafrechtliche Einbruchstellen in den Lebensbereich 'bildende Kunst'* (1993) at 233; Fischer *Die Strafrectliche Beurteilung von Werken der Kunst* (1996) 112; Beisel *Die Kunstfreiheitsgarantie des Grundgesetzes und ihre strafrecthlichen Grenzen* (1997).

[11]Compare *BVerGe* 67,213 at 228 – *Anachronistische Zug* judgment of the *Bundesverfassungsgericht*.

[12]*Human Rights Commission v SABC* 2003 1 BCLR 92 (BCCSA).

[13]Who had no jurisdiction on the matter since the final say lay with the board and the Review Board.

the possession of child pornography, was not sufficiently wide. Whilst the original section required that context must be taken into consideration when judging whether a visual presentation in films and publications amounts to child pornography, the task team argued that the reference to context provided a loophole for child pornographers. The original definition was, accordingly, repealed and substituted by what may only be regarded as an overbroad and vague definition, which could only be remedied by substantial reading in and reading down. By excluding context, the aim was clearly to negate the Review Board judgment on the Hipper exhibition; the Review Board having accentuated context in its judgment, which held the photographs not to have contravened the definition in the Act.

The *original* 1996 definition of child pornography was formulated by the 1994 Ministerial Task Group[14] and read as follows in Schedule 1 of the Act:

> A publication shall be classified as XX if, judged within context –
> (1) It contains a visual presentation, simulated or real of
> (a) a person who is, or is depicted as being, under the age of 18 years, participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity;

Schedule 5 exempted (and still exempts) certain categories:

> The XX or X18 classification shall not be applied in respect of a bona fide scientific, documentary, literary or, except in the case of Schedule 1(1)(a), an artistic publication, or any part of a publication which, judged within context, is of such a nature.

In the case of Films Schedule 6 provided as follows:

> A film shall be classified as XX if, judged within context, it contains a scene or scenes, simulated or real, of a person who is, or is depicted as being, under the age of 18 years, participating in, engaging in, or assisting another person to engage in sexual conduct or a lewd display of nudity;

Schedule 9 exempted (and still exempts) as follows:

[14]Its report was published by the Government Printer on 3rMarch 1995. Members of the Task Group were Prof Kobus van Rooyen SC (Chair), Prof Braam Coetzee, Prof AC Nkabinde, dr Brigalia Bam, Ms Fawzia Peer, Ms Lauren Jacobson, adv Willie Huma, Mr Piet Westrra, Prof Dan Morkel and adv Gilbert Marcus SC. The secretariat consisted of Mr A Tredoux and Mr T O'Neil.

> The XX or X18 classification shall not be applicable to a bona fide scientific, documentary, dramatic or, except in the case of Schedule 6(1), an artistic film or any part of a film which, judged within context, is of such a nature.

The definition of 'sexual conduct' was in Schedule 11.[15] It provided as follows:

> For the purposes of these Schedules "sexual conduct" means genitals in a state of stimulation or arousal; a lewd display of genitals; masturbation, sexual intercourse, which includes anal sexual intercourse; the fondling, or touching with any object, of genitals; a penetration of a vagina or anus with any object; oral genital contact; or oral anal contact.

The earlier first sub-items of Schedules 1 and 6 were repealed in 1999[16] and were substituted by a direct reference to 'child pornography'. Schedule 1(1)(a) after 1999 but before 2004[17] read[18] as follows:

> A publication shall be classified as XX if, judged within context – it contains a visual presentation, simulated or real, of child pornography.

Schedule 6 (1) after 1999 but before 2004[19] read as follows:

> A film shall be classified as XX if, judged within context, it contains a scene or scenes, simulated or real, of any of the following: child pornography... .

The exemptions in Schedules 5 and 9 were left intact. Whilst the *original* section 27(1) in the 1996 Act contained a direct reference to Schedule 1 read with Schedule 5 and Schedule 6 read with Schedule 9 (as well as Schedule 11), these references to the Schedules as well as context fell away in the 1999 replacing version. The reasonably precise definition of the 1994 Task Group of

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[15]Schedule 11 has now been repealed by the Films and Publications Amendment Act 2003 and the definition of 'sexual conduct' is to be found in s 1 of the Act.

[16]The Films and Publications Amendment Act 34 of 1999. The Broadcasting Code, however, still contains the original 1996 definition.

[17]It has been repealed by the Films and Publications Act 18 of 2004, the philosophy apparently being that this is a matter for criminal law and not for the Board.

[18]It now reads as follows after a further amendment in the Films and Publications Amendment Act 18 of 2004: ' child pornography includes any image, however created, or any description of a person, real or simulated, who is, or who is depicted or described as being, under the age of eighteen years – engaged in sexual conduct; participating in, or assisting another person to participate in, sexual conduct; or showing or describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, or in such a manner that it is capable of being used for the purposes of sexual exploitation.'

[19]See note 16 above.

child sex and nudity in Schedules 1 and 6 also fell away[20] and was replaced by a new a definition of child pornography, which read as follows:

> In this Act, unless the context otherwise indicates – child pornography includes any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children.

This definition is, to say the least, confusing. The Constitutional Court interpreted it in such a manner that it became understandable in the 2002 *De Reuck* matter, which I shall now discuss.

The De Reuck *matter*

Tascoe De Reuck, who had been a part-time television presenter and a film producer (acclaimed as a student at the Pretoria Technikon) commenced to investigate, in 1999, for purposes of the production of a television documentary, the illegitimate availability of child pornography on the Internet. He collected a large number of examples which he had printed out from Internet websites and which he often had to access after having had to (falsely) 'prove'[21] to website managers that he was a paedophile or that he had a sexual interest in child pornography. The police were alerted to his activities by an informer and obtained a search warrant from a magistrate in terms of section 27(3) of the Films and Publications Act 1996, after the permission of the Director of Public Prosecutions, Witwatersrand, was obtained. He and his landlord were both arrested and had to spend a night in police cells. The arrest was widely publicised. After a few months the charges against the landlord were withdrawn on the basis that he had been unaware that De Reuck was involved in this project and was in possession of the wide variety of photographs. De Reuck was charged in the Randburg Regional Court with the possession of these photographs. The matter was postponed so that he could test the constitutionality of section 27 of the Films and Publications Act, as amended in 1999.The argument before the Witwatersrand High Court and the Constitutional Court was that section 27 was overbroad since it unreasonably interfered with the right to artistic and scientific creativity, the latter including

[20]However, the Broadcasting Code still contains the original definition. The Code was published on 7 March 2003 and applies to broadcasts of licensed broadcasters. The FPA does not apply to broadcasts, except in so far as it prohibits broadcasts of material that are classified as XX and X18 by way of criminal sanction (s 26).

[21]This was the only way in which he could gain access.

the right to possess child pornography where a researcher, who would include a film producer, had such materials in his or her possession for purposes of *bona fide* research.

De Reuck's integrity as a *bona fide* film producer was never in dispute. The question was whether the Act permitted him to argue that the material was held with the intention to produce the said documentary. The court held that this was not a defence and that he should have obtained permission from the Executive of the Film and Publications Board in terms of section 22 of the Act. When, after the Constitutional hearings, he nevertheless had to stand trial. The Regional Court too, did not question the fact that he was a *bona fide* film producer and that he had possessed the materials for research purposes in order to produce a documentary. Since, however, the Constitutional Court had held that section 27 did not allow for such a defense, he could only refer to his research purpose in mitigation. The Regional Court took this into consideration when it imposed its sentence: one year imprisonment or a R24000 fine, half of which was suspended. De Reuck immediately paid the fine. A particularly critical article which then appeared in the newspaper *Beeld* was taken to the Press Ombudsman by his attorney, Barry Sim. The Ombudsman ruled that *Beeld* had to apologise to De Reuck that their article incorrectly implied that he was a paedophile and that he had belatedly altered his defence from that of having been a *bona fide* film producer to guilty. *Beeld* apparently did not understand that the Constitutional Court had held that the Films and Publications Act did not permit De Reuck to defend himself on the merits with reference to his profession and accordingly, had to plead guilty. His professional plea was, however, a mitigating circumstance.

A closer look at the De Reuck Constitutional case

The constitutionality of section 27 was first challenged before the Witwatersrand Local Division of the High Court. Epstein AJ held that since section 22 of the Films and Publications Act 1996 provided that the Executive Committee of the Films and Publications Board was empowered to grant an exemption to *bona fide* researchers and producers, the Act did provide for a mechanism and that an inbuilt defence of possession for bona fide purposes of research or production of a documentary was not available. Section 22 countered any unreasonableness which could result from a strict application of section 27. The argument that such an approach boiled down to censorship was rejected in the light of the high premium which must be placed on the interests of children.

The appeal to the Constitutional Court ('CC')[22] was dismissed. However, the reasoning differed substantially from that of the Witwatersrand Court. It was firstly accepted that the publication of child pornography, in spite of its offensive nature, was included in freedom of expression. However, once the CC had read down section 27 (substantially, it is submitted) and section 22 was taken into consideration, the section did not place an unreasonable limitation on freedom of expression and was not unconstitutional.

The definition of child pornography which came before the CC survived, but only after substantial reading down and reading in. For ease of reference I will repeat the definition in section 1 of the FPA, as amended in 1999 here:

> In this Act, unless the context otherwise indicates – child pornography, includes any image, real or simulated, however created, depicting a person who is or who is shown as being under the age of 18 years, engaged in sexual conduct or a display of genitals which amounts to sexual exploitation, or participating in, or assisting another person to engage in sexual conduct which amounts to sexual exploitation or degradation of children.

It was held by the CC that the definition, as part of section 27 of the FPA, fits into the general scheme of the Act. What would seem to have been individualisation in the 1999 Amendment Act of the definition as read with section 27 had now emerged, through interpretation, to be in conformity with the Schedules. The Schedules and section 27 were read in such a fashion that, what would seem to have been a clash, was now a unit. Furthermore, the CC, in effect, read down the definition so as to ensure that it was in accordance with the freedom to impart and to receive information facet of freedom of expression in section 16 of the Constitution.

The CC also defined child pornography in such a manner that the material must be judged within context (as in the Schedules); that visual material which, judged as a whole, has as its predominant objective purpose the stimulation of erotic feeling in its target audience is pornography. Any image which, judged as a whole, predominantly stimulates aesthetic feeling is thus not caught by the definition. The CC then delineated the four categories that are to be found in the definition and read in that it must be *explicit*: the image would not be child pornography unless it explicitly depicts: a child[23] engaged in sexual conduct; a

[22] *De Reuck v Director of Public Prosecutions WLD and Others* 2004 1 SA 406 (CC).
[23] Who would include a person older than eighteen simulating the role of a child (so-called virtual pornography).

child engaged in a display of genitals; a child participating in sexual conduct; or a child assisting another person to engage in sexual conduct for the purposes of stimulating sexual arousal in the target audience. The test is the objective one of the reasonable viewer, who would not necessarily be aroused himself or herself. 'Sexual conduct' is as defined in Schedule 11 of the Act.

It is submitted that since the court has, in effect, amended the *ipsissima verba* of the definition by reading in 'explicit' and further reading down, it would have been in the interests of justice for Parliament to have *replaced* the definition in the 2004 amending Act with the definition the court has, in effect, held to be the constitutionally justifiable definition. It would assist those who are involved in the detection of the crime, and those who apply the Act. Persons who seek to possess or import material for research, must obtain permission from the Executive of the Board in accordance with section 22. The court held that insofar as lawyers, police officers and judicial officers are concerned, their position would be covered by reading in a defence. Since this was not necessary for purposes of the matter before the court, the court did not undertake such reading in.

It is suggested that Parliament repeal the present definition (which was again amended in 2004) of child pornography and replace it with the following definition:

> "child pornography" means any image, real or simulated, however created, explicitly depicting a person who is or who is shown as being under the age of 18 years
> (a) engaged in or participating in sexual conduct;
> (b) engaged in a display of genitals; or
> (c) assisting another person to engage in sexual conduct which, judged within context, has as its predominant objective purpose the stimulation of sexual arousal, in contrast to aesthetic feeling, in its target audience and does not fall within the categories exempted in Schedules 5 or 9.

This proposal includes the exemptions contained in Schedules 5 and 9. The CC did not do so explicitly, but it is clear from its judgment that those exemptions would fall under aesthetic feelings. It would, accordingly, make good sense, if the definition simply included those exemptions. It is, with respect, remarkable how close the definition of the CC has come to the original definition as

formulated by the 1994 Task Group.[24] It is, however, a narrower definition than the original 1996 definition, since it requires sexual arousal, an aspect that emerged only in the original 1996 definition when it dealt with nudity ('lewd'). Parliament's 1999 intention, according to its debates, to make the definition stricter than the 1996 definition was constitutionally clearly not acceptable. The words 'sexual exploitation' and 'degrade' are left out by the CC. The words 'sexual exploitation' in the 1999 version, however, clearly influenced the CC in requiring sexual arousal and excluding aesthetic feelings.

Since the predominant purpose which stimulates aesthetic feelings is now stated to be exclusionary the CC has, in effect, also introduced art as an exemption in the case of child pornography. The contextual approach that the CC adopts, also excludes the so-called 'isolated passage' approach. The CC also states that scientific works (which would include documentaries) would hardly fall foul of the definition of child pornography as a result of the requirement that a visual portrayal must predominantly stimulate sexual arousal,[25] which a scientific work or a documentary would not do. It is submitted that by excluding material that predominantly and objectively gives rise to aesthetic feelings from the ambit of child pornography, the CC has introduced the art exemption for child pornography. This exemption was included by the 1994 Task Group but rejected by Parliament in 1996. Now it is, fortunately, back by way of interpretation.

Once material is regarded as *bona fide* art a court will, accordingly, not condemn material even if it includes what is traditionally regarded as child pornography. Support for this approach of the court is to be found in at least the USA, Canada and Germany.

A last word on the genesis of the definition of child pornography. In 2004 Parliament once again amended the definition of child pornography. It reads as follows:

> Child pornography includes any image, however created, or any description of a person, real or simulated, whom is, or who is depicted or described as being, under the age of 18 years – engaged in sexual conduct; participating in, or assisting another person to participate in, sexual conduct; or showing or

[24]The original version of s 27 provided as follows: 'A publication shall be classified as XX if, judged within context – (1) It contains a visual presentation, simulated or real of (a) a person who is, or is depicted as being, under the age of eighteen years, participating in, engaging in or assisting another person to engage in sexual conduct or a lewd display of nudity.'

[25]See par [41] of the judgment.

> describing the body, or parts of the body, of such a person in a manner or in circumstances which, within context, amounts to sexual exploitation, *or in such a manner that it is capable of being used for the purposes of sexual exploitation.*

Again, it is remarkable how close this definition has come to the original 1996 definition as formulated by the 1994 Task Group. Context is back and the forbidden conduct is described in more understandable language. Degradation has fortunately been omitted. 'Sexual exploitation' will be interpreted in the light of the *De Reuck* judgment, which has excluded material which predominantly gives rise to aesthetic feelings. This would include art. The last italicised words of the 2004 definition are, however, overbroad and not compatible with the Constitution. It places art, scientific studies, documentaries and any film in jeopardy: any part of such material is capable of being used for the purposes of sexual exploitation. And, of course, the reference to 'description' has re-introduced the ban on the possession of written material in this category. The original 1996 Act did not include the ban on possession of this type of material, but prohibited the distribution thereof. One would hope that when premises are searched that those who search would not revert to apartheid practices in regard to the written word: one should only watch the Nadine Gordimer film *City Lovers* to once again experience with shock the destruction which, at times, was caused by the police of those times, when searching a private library for what, at the time, was regarded as a risk to state security. In the *De Reuck* matter I was told that the police had questioned the landlord for twenty minutes about his possession of Nobel prize laureate JM Coetzee's *My Boyhood Memories*! I would strongly suggest that the written word should never be subjected to a *possession* ban; it opens up a person's whole library to search.

Art and child pornography in the USA, Canada, the UK and Germany

The art exemption, *inter alia*, applies in the United States, Canada, the UK and Germany.

For the United States, the Mapplethorpe trial in Cincinnati, Ohio illustrates the defence well. Here the art exemption was apparently ('apparently' since it was a jury trial and no reasons were given; yet the jury could only have acquitted the manager of the museum as a result of art) applied to an exhibition in an art museum of the works of the renowned photographer, Mapplethorpe.[26] It would

[26]Compare 1991 *Howard Law Journal* 339.

seem as if this conclusion conflicts with *New York v Ferber*,[27] but that case concerned distribution by way of selling in contrast to the adult limited exhibition in the Cincinnati Museum, where the Mapplethorpe collection was exhibited. In *Osborne v Ohio*[28] it was held that the 'proper purposes' exemption, contributed to the validity of the possession ban – 'proper purposes' being fully listed in the judgment and including art. The *narrow* construction of 'lewd' also excluded nudity, as such, of minors. The initial 1996 South African Act's inclusion of 'lewd' was clearly based on the approach of the US Supreme Court in these cases.[29]

Section 163(6) of the Canadian Criminal Code includes the art defence. The defence of public good, in section 163(7) is also available. The Canadian Supreme Court's judgement in *Her Majesty the Queen v Sharpe*[30] attached special weight to artistic merit. the court states that 'the defence must be construed broadly'.[31] The court rejects the approach in Ontario (*Attorney General) v Langer*[32] that a community standards qualification should be read into the defence.[33] For the United Kingdom the Protection of Children Act 1978 section 1 and the Criminal Justice Act 1988 section 160, apply to the offence of production, distribution and possession of indecent photographs of children. A legitimate reason would amount to a defence.[34]

As far as Germany is concerned, the *Strafgesetzbuch* §184(5) prohibits possession of pornographic material which has the abuse of children as subject.

[27]458 US 747 (1982).
[28]495 US 103 (1990) note 9.
[29]parThe Ministerial Task Group's Report (Government Printer 3 March 1995) pages 28 and 38-40. References in this report to the US Supreme Court judgments illustrate the point.
[30](2001) SCC 2 par [60].
[31]Paragraph [61].
[32](1995), 123 D.L.R. (4th) 289 (ONT. CT.) (GEN. DIV.).
[33]Compare paragraph [65] of the *Sharpe* judgment.
[34]Section 1 of the Protection of Children Act 1978 provides as follows: 'Indecent photographs of children(1)It is an offence for a person – (a) to take, or permit to be taken, or to make any indecent photograph or pseudo-photograph of a child; or (b) to distribute or show such indecent photographs or pseudo-photographs; or (c) to have in his possession such indecent photographs or pseudo-photographs, with a view to their being distributed or shown by himself or others; or (d)...(2)...(3)...(4) Where a person is charged with an offence under sub-section (1)(b) or (c) it shall be a defence for him to prove – (a) that he had a *legitimate reason* for distributing or showing the photographs or pseudo-photographs or (as the case may be) having them in his possession; or (b) that he had not himself seen the photographs or pseudo-photographs and did not know, nor had any cause to suspect them to be indecent.' Section 160 of the Criminal Justice Act 1988 as amended provides as follows: '(1) It is an offence for a person to have any indecent or pseudo-photograph of a child in his poss ession. (2) Where a person is charged with an offence under ss (1) above, it shall be a defence for him to prove – (a) that he had a *legitimate reason* for having the photographs or pseudo-photograph in his possession; or...'. (Emphasis added.)

It is, however, clear that the material must first also satisfy the requirement of pornography (between adults) as interpreted by the German courts over many years.[35] Scientific works are excluded from the term 'pornography' whilst, in the case of art, section 5 of the *Grundgesetz* protects art. Everything depends on the definition of art and the weighing up of art against children's rights.[36] *SGB* §184(6) in any case also protects possession for professional purposes.

By excluding *bona fide* art completely from the FPA 1996 insofar as child sex and lewd nudity is concerned, it is submitted that an unjustifiable limitation was placed on the fundamental right of artistic creativity and the right of the public to be informed by art in this sphere. The *De Reuck* judgment has, however, interpreted section 27 of the Act to exclude material which predominantly gives rise to aesthetic feelings. In this manner South Africa has thus given appropriate protection to art, even within this sensitive sphere. As indicated, art would, for example, be a defence in Canada, the United States and England. In Germany it would depend on the balancing of art against the protection of children. But, at least, art is a defence in principle in the said four countries even if Germany allows for a certain amount of balancing. Those countries, such as Ireland, New Zealand and Sweden, which provide for a legitimate purpose defence, would probably also allow for an art defence under the said category. However, our Constitutional Court has not interpreted the Films and Publications Act to permit a person to raise the defence that he or she is in possession of child pornography for purposes of art or scientific research. Permission must be obtained from the Executive of the Board in terms of section 22 of the FPA. In this sense, our system differs from the approach followed in the said countries.

Conclusion regarding art

In the case of the *De Reuck* judgment the CC has now made it clear that an art defence would also apply for South Africa. Art neutralises a finding that the material is child pornography, and also any other material defined as XX or X18 material in Schedules 1, 2, 6 and 7 of the FPA. In deciding what art is, I suggest that the requirement that it must be (objectively) *bona fide* is particularly significant.[37] Experts would, at times, have to assist the court or the Films and Publications Board or, on appeal, the Review Board. I suggest that the Canadian Supreme Court's approach to art should also be applied: here the court rejected the approach that a community standards qualification should be read into the

[35]Compare Tröndle & Fisher *Strafgesetzbuch* (1999) 1028–1029 and 1039– 1040.
[36]*Id* at 1033. Also compare Lackner & Kühl *Strafgesetzbuch* (1999) 897 also Schönke-Schröder *Strafgesetzbuch* (1997) 1369.
[37]See *Publications Control Board v Central News Agency* Ltd 1977 1 SA 717 (A).

defence. It also held that the term 'art' should be construed broadly. There is no automatic age limit on the distribution, which includes the exhibition, of a publication; for once it is held to be art, then section 28's automatic protection of children falls away. However, if a complaint in regard to a publication is lodged with the Board it may, depending on whether the material is harmful or disturbing to children, impose an age restriction on its distribution and accessibility in the case of an exhibition.[38] In the case of films which are screened or distributed in public, a classification by the Board is imperative and an age restriction will probably be imposed if the material is harmful or disturbing to children. Of course, the same principle will apply to drama and documentaries. The Broadcasting Code[39] also requires age restrictions and classification regarding films which are harmful or disturbing to children. Films with an age restriction of eighteen must be screened after the watershed, which commences at 21h00 for free-to-air television and at 20h00 for subscription television. An artist or producer who creates a documentary may include images which would otherwise be regarded as child pornography in his or her production. However, he or she is not permitted to be in possession of child pornography for that purpose, without the permission of the Executive of the Films and Publications Board.[40]

For purposes of research it might be useful to recount how the art, drama and documentary defences found their place in the Films and Publications Act 1996 – although not in the case of child pornography. When drafting the Act, I made an appointment with the world-renowned Floyd Abrams,[41] who practices in New York City. Professor Abrams was involved in the selection of a jury in Buffalo and my wife and I met with him there. In one of our interviews Professor Abrams categorically proposed that South Africa should 'exempt art' from the operation of the new Act. This would obviously also include drama, documentaries and scientific research. On my return to South Africa I convinced the Task Group to include the defence. I was successful in convincing the Portfolio Committee Home Affairs to include the art defence. However, they would not budge an inch when it came to child nudity and sex, even in the case of art. It is particularly gratifying that the Constitutional Court has now excluded art from the parameters of child pornography. It is submitted that this exclusion illustrates well how the Constitutional Court would ensure the protection of art

[38]See section 17 of the FPA.
[39]See the website of the BCCSA at: www.bccsa.co.za.
[40]See s 22 of the FPA.
[41]I met Floyd in New York in 1984, when I was a guest of the US State Department. Thereafter he was invited as a guest professor to the University of Pretoria on two occasions.

in section 16 of the Constitution, in spite of attempts by Parliament to exclude it. Art has, and should at times, portray the exploitative or even the degrading.

A forerunner of the art exemption is to be found in the passing of a book, which included studies of teenage girls by David Hamilton, the renowned photographer, by the Publications Appeal Board in 1986.[42] It is uncertain whether a similar work would not have fell foul of the 1999 amended section 27(1)'s possession ban before its interpretation by the CC. Would these studies possibly have amounted to sexual exploitation because of the sexually titillating, though artistically acceptable, poses of some of the nude girls? The Mapplethorpe photographs would, without doubt, fall under the pre-*De Reuck* section 27(1), in spite of the art defence which was successfully raised before the Cincinnati jury, obviously supported by the adult museum context. The same approach might possibly also have applied to the Mark Hipper exhibition in Grahamstown after the 1999 amendment to the FPA, which excluded reference to context. It would seem as if the 1999 amendment was, in fact, aimed at neutralising the Board's decision regarding the exhibition.[43] It was, rightly, held by the new Board and the Review Board on appeal to have not been in contravention of the 1996 Act's initial definition of child nudity in Schedule I of the Act.

Lastly, it is significant and, with respect, unfortunate that 'child pornography' has been removed from the XX Schedules by the Film and Publications Amendment Act 2004. Ironically, Schedules 5 and 9 still refer to the item that used to deal with child pornography: it is provided that the art exemption will not apply to what is now nothing more than a blank space in Schedules 1 and 6! It would, with respect, seem to have been unwise to remove child pornography from the XX category. All that the Act now provides is that 'subject to Schedules 5 and 9 the Board shall refer to the South African Police Service for prosecution any film or publication submitted to it in terms of this Act if it contains child pornography.' The role which the Board could have played in establishing legal certainty in a case where there is a doubt as to whether material amounts to child pornography, is now no longer possible. And what happens where child pornography cannot be connected to a person? What

[42]Case number 90/1986

[43]In fact, the 1999 committee referred to the Viscera exhibition in Grahamstown as illustrative of the difficulties which were encountered with the Act in its initial form. Fortunately, the CC has re-introduced context and one also finds it back in the 2004 definition of child pornography in s 1. It might be mentioned that if one studies the 1998 judgment of the Review Board in the Viscera matter, the Review Board had no problems in applying the Act and finding that contextually the material did not amount to child pornography!

would be the sense in sending the material to the police 'for prosecution'? Nevertheless, where such material is found in a documentary or a scientific work, the exemption in Schedules 5 and 9 would apply and the material would not be sent to the police.

Creation of child pornography

Section 27 of the FPA also prohibits the intentional creation of child pornography. In the case of art, drama or documentaries, the state would have to disprove the assertion by the accused producer that he or she was involved in the creation of a work of art or a drama or a documentary when drawing, filming or photographing a person under the age of eighteen in a manner which, on the face of it, fits the definition of child pornography but predominantly stimulates aesthetic feelings. An evidential onus would rest on the accused to show that she or he intended to create a work of bona fide art, drama or a documentary. For a conviction under section 14 of the Sexual Offences Act 1957 ('immoral or indecent act with a child under 19') the mere drawing or photographing of a child would not seem to amount to a contravention of the section in the light of the requirement of the Supreme Court of Appeal that the immorality or indecency must have a sexual connotation.[44] Of course, if the photographer or artist has organised the sexual act which he or she draws or photographs, the sexual aspect will be added. And of course, each case will have to be decided on its own facts. Where virtual[45] child pornography is created, (*eg* on a computer screen, it is suggested that it will be difficult to judge the product before it has been completed. At times, depending on the circumstances, the accused may be convicted of an attempt to create child pornography. However, he or she might be able to satisfy the evidential burden that what was attempted was predominantly aesthetic, judged objectively and within the context of the product as a whole.

Scientific research

A last word about the products of scientific research, which would include a film documentary. Schedules 5 and 9 of the Films and Publication Act 1996 exempt scientific works and documentaries from the ambit of XX and X18 material, as defined respectively in Schedules 1 and 6 and 2 and 7 of the Act.

[44] *S v Rautenbach* 2001 1 SACR 521(SCA).

[45] Which is also included in the definition of child pornography. Legislation prohibiting virtual child pornography has been held to be unconstitutional by the US Supreme Court – see *Ashcroft v Free Speech Coalition et al. 122 S.Ct. 1389(16 April 2002)*

Fortunately the Appellate Division of the Supreme Court has interpreted 'science' broadly in *Publications Control Board v Central News Agency Ltd.*[46] Our courts have not been called upon to interpret the term 'science' in section 16 of the Constitution. The Broadcasting Complaints Tribunal has, however, held that the words 'public interest' in the Code which it applies, would also protect a documentary on the plight of (identified) children whose custodian parent does not receive any or adequate maintenance in terms of a Court order.[47] The complaint that the children's privacy had been invaded upon, was dismissed on the basis that it was in the public interest to have identified these children. This conclusion was reached in spite of legislation which requires that the

[46]1977 1 SA 717 (A). De Villiers JA states as follows at 742–3: 'Having regard to the wide and extensive meaning of the word "science" it follows, in our opinion, that a scientific work may vary in quality, nature, treatment, learning and standard, depending upon numerous factors such as, for instance, the scope of the work, the complexity of the subject matter, the method of presentation, etc. An analysis of the text of "Naked Yoga", considered in the light of the undisputed evidence adduced, clearly establishes that Naked Yoga is a publication of a scientific nature, even though possibly of an elementary character, dealing conventionally with yoga – which is a recognised branch of science – except for the innovation that the postures (asanas) should preferably be done in the nude and in private ... aspects which are corroborative of the view that the photographs go no further than is required for the purpose of the innovation, are the following: All forty-six of them are of true yoga postures. The well-proportioned girls assuming the postures in the photographs are proficient exponents of the practice. Of the 46 photographs, 39 are taken from either the side or the back and only 7 from the front. On some of the 39 photographs taken from the side one or two breasts can be seen but on only three thereof is a very slight protuberance of pubic hair visible. On all but one of the photographs taken from the front, both breasts can be seen but pubic hair can only be seen on two of them and then only in part and mostly in shadow. The models – all with dead-pan faces – are not pictured in provocative, erotic or sensually stimulating positions. All of the said aspects indicate that a considerable amount of restraint was exercised by the author and that unbridled rein was not given to the exploitation of the female form. As against this it has been pointed out that in a few of the photographs breasts and buttocks are possibly unnecessarily high-lighted but in our view that may very likely have been accidentally and not intentionally achieved. Further aspects to which our attention has been drawn as indicative of an absence of bona fides are the considerable outlay in effort and money that probably accompanied the production of "Naked Yoga" and the fact that the two photographs on the front and back pages are not described as being of genuine asanas. As to the first we find it difficult to draw any adverse inference from it. The author would naturally want his innovation to be accepted as a high class publication with high class artistic photographs – which they undoubtedly are and he has certainly calculated, justifiably so, to achieve his object. As to the second it need merely be stated that there is no evidence that the photographs in question, may not also in fact represent genuine asanas. In any event these aspects are far outweighed by the aspects which point in the opposite direction. *In other words on a balance of probabilities the primary purpose of "Naked Yoga", in our view, is to propagate yoga, albeit with the innovation that it should be practised in the nude and in private, and not, as found by the court a quo, to disseminate photographs of the naked female in various yoga poses.*' (emphasis in italics added)

[47]Mr P and CHILDS v SABC (Case 43/2005). BCCSA website: www.bccsa.co.za.

permission of the Minister of Justice must be obtained for such identification.[48] The reasoning of the Tribunal was that it was authorised by the Broadcasting Code to decide whether an invasion of privacy was justified in the public interest, and that this was a case where such justification existed in the light of the endemic non-payment of maintenance by especially non-custodian fathers. The approach was that a documentary, even if made in a popular format, was a facet of science and that the wide meaning which the Appellate Division had attached to the word 'science' in 1977, supported this approach.

In Germany and the United States special weight has been attached to the right to scientific research. The German *Grundgesetz* guarantees in §5.3.1 freedom of scientific research. Particular weight is given to this right. The *Bundesverfassungsgericht*, for example, held that the academic curriculum at a University must be decided upon by a body within the University which has a majority of academics on it, in order to ensure that government representatives do not have the final say. In the case of decisions on research, academics were entitled to decide on these independently ('*Hochschulurteil*').[49] In the case of a book which denied the responsibility of the Germans for the Second World War, it was held that the restriction of the book to adults went against the guarantees of freedom of speech and freedom of scientific research (even if the conclusions it arrived at were untrue). The test is whether the work satisfies the aims of science, as broadly understood ('*Kriegsschuld-Buch*').[50] The *Bundesverfassungsgericht*, however, held a work in which the persecution of the Jews was denied, to be in contravention of the *Grundgesetz* ('*Auschwitz-Lüge*').[51]

A case that has a direct bearing on research is *Junger v William Daley, US Secretary of Commerce et al.*[52] The United States Court of Appeals set aside the

[48]Section 36 of the Maintenance Act 99 of 1998 provides as follows: 'Save as is otherwise provided in ss (3), no person shall publish in any manner whatsoever the name or address of any person under the age of 18 years who is or was involved in any proceedings at a maintenance enquiry or the name of his or her school or any other information likely to reveal the identity of that person.' Subsection (3) provides that an official of court or the Minister may grant permission. Section 12(2) of the Divorce Act 70 of 1979 provides for an inbuilt exception to the rule: 'The provisions of subsection (1) shall not apply with reference to the publication of particulars or information – a) for the purposes of the administration of justice;b) in a *bona fide* law report which does not form part of any other publication than a series of reports of the proceedings in courts of law; or c) *for the advancement of or use in a particular profession or science.*

[49]Compare *BverfGE* 35, 79–148 (1973).

[50]Compare *BverfGE* 90,1–22 (1994).

[51]Compare *BverfGE* 90, 241–255(1994).

[52]209 F3d 481.

decision of a district judge that permission had to be sought from the Department of Commerce before a professor could send his *encrypted* lectures to foreign students via the Internet. the Court of Appeals stated, per Chief Judge Boyce F Martin:

> The Supreme Court has explained that "all ideas having even the slightest redeeming social importance", including those concerning "the advancement of truth, science, morality, and arts" have the full protection of the First Amendment.

This would include symbolic speech, such as encrypted speech, according to the Court.

With reference to Supreme Court authority the court held that although an asserted governmental interest may be important, when the government defends restrictions on speech 'it must do more than simply "posit" the existence of the disease sought to be cured.'[53]

Hate speech in art, documentary and drama

I have not dealt with hate speech and other XX categories in the Films and Publications Act in this contribution. It is sufficient to say that where *bona fide* art, drama, scientific and documentary production in publication or film amounts to hate speech (relating to race, ethnicity, religion and gender) it is exempted by the FPA[54] and the Broadcasting Code.[55] Probably the *'bona fide'* requirement would, in any case, neutralise the 'advocacy of hatred' as required in Schedule 10. Producers must indeed, for example, be permitted to screen or broadcast the atrocities against the Jews during the Holocaust and also the hate which the Nazis spewed on them. Other categories in the XX class are also exempted when they form part of such *bona fide* materials.[56] Of course, the debate will be whether the material does fall within the category of *bona fide* art, drama, documentary or scientific publication or film.

CONCLUSION

The South African democratic dispensation is now slightly older than a decade. Freedom of speech has been held to lie at the heart of democracy. Offensive speech has been held to be part of freedom of speech, subject to the reasonable

[53]At 485.
[54]See Schedule 10 and s 29 of the FPA.
[55]Clause 17. See: www.bccsa.co.za.
[56]Bestiality, degradation and excessive violence in terms of Schedules 5 and 9 of the Act.

limits of section 36 of the Constitution. Art and science and their affiliates, drama and documentary, must at times convey the offensive so as to shock human beings into action, to let her or him weep about the plight of the poor, about the HIV/AIDS pandemic, about the abuse of children and women, about the sadness of the destitute. When Mapplethorpe or Hipper conveys his compassion for the sexually abused child in his abused child photography, when the teenagers Romeo and Juliet (who was almost fourteen) have rather explicit sex in one of the *latest* versions of the play,[57] when a bizarre sculpture of a woman[58] rebels against woman being regarded as nothing more than a sexual object, when the Jew, Shylock, decries the racism against Jews in Shakespeare's *The Merchant of Venice*,[59] when a black man dances on the grave of Dr Verwoerd[60] in the play *ID*,[61] when the television producer Jersild produces a two minute documentary item for Danish television on the Greenjackets' shocking racism,[62] when a Black school girl quotes the racially derogatory words used by a White mother of a school girl with whom she had had a quarrel and this is broadcast on the news,[63] this is essential to inform the public and to help heal wounds. Art, drama and documentary put freedom of speech to the test, a test which must be repeated as often as possible so as to ensure the future of a free society.

[57]Compare the judgment of the US Supreme Court in *Ashcroft v Free Speech Coalition et al. 122 S Ct 1389(16 April 2002)* at p 10–11.
[58]See note 9 above.
[59]Acted with great artistic ingenuity by Al Pacino in the 2004 film version.
[60]Regarded by most South Africans as the embodiment of apartheid.
[61]Compare *Herstigte Nasionale Party v SABC* (Broadcasting Complaints Tribunal) Case 42/2004. See: www. bccsa.co.za..
[62]European Court of Human Rights: *Jersild v Denmark* (36/1993/431/510); compare Johanessen 1995 *South African Journal of Human Rights* 123.
[63]*Williams and Others v SABC* (Broadcasting Complaints Tribunal) Case 54/2004. See: www.bccsa.co.za.