Huldigingsbundel vir/Essays in honour of

SA Strauss

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Redakteur/Editor

JJ JOUBERT

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Voorwoord

Die ontstaan van hierdie bundel ter huldiging van Professor SA Strauss kan teruggevoer word na 'n ingewing wat Professor Jan H van Rooyen, hoof van die Departement Straf- en Prosesreg aan die Universiteit van Suid-Afrika, gekry het. Drie jaar later, vir sy vyf en sestigste jaar beplan, word hierdie versameling essays met groot genoentheid aan Sas Strauss aangebied.

Dank vir die middele wat die verskyning van die bundel en die funksie by die geleentheid van die oorhandiging daarvan moontlik gemaak het, word hiermee uitgespreek teenoor Professor Marinus Wiechers, Rektor van die Universiteit van Suid-Afrika; Professor Willi Hosten, Dekaan van die Fakulteit Regsgeleerdheid van hierdie universiteit asook die Publikasiekomitee van Unisa.

Die verskyning van die publikasie is aansienlik makliker gemaak deur die gewaardeerde bystand van Mev Mariki Rudolph van die Instituut vir Buitelandse Reg en Regsvergelyking van hierdie universiteit; Mev Phoebe van der Walt en mnr MC (Blackie) Swart, beide van Unisa uitgewers; die sekretaresses van die Departement Straf- en Prosesreg: Me Jo Haupt en Mevv Annemarie Sim en Ina Slot; asook Mej Izelle Jacobs van Onderrigtegnologie (Unisa).

'n Besondere dankbetuiging aan die bydraers (persone wat hulle doktorale studies met Professor SA Strauss as promotor voltooi het asook kollegas, plaaslik en in die buiteland) vir hulle moeite. Met hulle bydraes verleen hulle aan Professor Strauss erkenning wat soveel meer blywend sal wees as 'n paar gesproke woorde van erkentlikheid — hoe soetklinkend en hoe opreg ook al.

Redakteur
Universiteit van Suid-Afrika
September 1995

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Redakteursinleiding:
SA Strauss SC
BA (Stell) LLB (UOVS) LLD (Unisa) HLM (Unisa)

Hierdie bundel bydraes deur kollegas en doktorale studente in Suid-Afrika en ook die buiteland word in sy vyf en sestigste lewensjaar aan Professor Sybrand Albertus (Sas) Strauss opgedra deur die lede van die Departement Straf- en Prosesregvan die Universiteit van Suid-Afrika. Hy het hierdie departement oor 'n tydperk van vyf en dertig jaar met geesdrif en onderskeiding gedien en is, as Professor Emeritus, nog steeds 'n aktiewe en gewaardeerde lid.

Die inleidende paragrawe van die verskillende bydraes wat hierop volg, weerspieël die indrukke wat hulle skakeling met Sas Strauss by die betrokke vriende, kollegas en doktorale studente gelaat het. Sy kaliber as akademikus en regsgeleerde word aangeprys. Die leser leer ook dat 'n beduidende hoeveelheid mense Sas nie alleen as briljant of intellektueel beskou nie, maar ook as rustig, waardig, hoflik, taktvol, toeganklik, gemoedelik, opreg en wys. Sy sin vir humor, verantwoordelikheid en regverdigheid word met groot waardering genoem; so-ook sy objektiwiteit, integriteit, betrokkenheid en moed. Hy blyk vir meer as een die rolmodel en vaderfiguur te wees en sy vele talente (onder andere, as tekenaar en mediapersoonlikheid asook sy taalaanvoeling) word óf skugter genoem óf met oorgawe besing (afhanklik van die natuurlike gemoedsaard van die betrokke bydraer — en geen redakteur het die reg om hieraan te torring nie). Uit die openingspassasies van die bydraes in hierdie huldigingsbundel, kom die beeld van Sas Strauss as regsgeleerde, akademikus en mens dus reeds duidelik na vore. Die volgende aantekeninge verskaf bloot verdere feitelike aspekte; dit is nie 'n 'skets' nie: nie almal beskik oor Sas se vloeiende en gemaklike skryfstyl nie.[1]

Sas, seun van Ben en Anne Strauss, is gebore op 13 Maart 1930. Hy matrikuleer (eerste klas met drie onderskeidings) aan die Hoërskool, Boshof, OVS in 1947 en behaal 'n BA (Regte) aan die Universiteit van Stellenbosch in 1951 (onderskeidings in twee vakke) en LLB aan die Universiteit van die Oranje Vrystaat in 1953 (onderskeidings in verskeie vakke). Sy LLD (doktorale proefskrif *Toestemming tot benadeling as verweer in die strafreg en die deliktereg*) aan die Universiteit van Suid-Afrika volg in 1961, na afloop van nagraadse studie aan die Universiteite van Yale (VSA) en Heidelberg (Duitsland) as die houer van 'n aantal beurse (Unie-beurs, Yale-toekenning en 'n DAAD-beurs).

Tydens sy studentejare is hy lid van die verteenwoordigende studenterade van die Universiteit van Stellenbosch en die Universiteit van die Oranje Vrystaat asook visepresident van die Afrikaanse Studentebond (1953).

Hy voltooi sy leerkontrak as prokureur in 1954 en word as advokaat van die

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[1]Vergelyk sy biografiese essay in *Huldigingsbundel vir WA Joubert* 1988 1 ev.

Hooggeregshof van Suid-Afrika in 1955 toegelaat. In 1956 word hy aangestel as senior lektor aan die Universiteit van die Oranje-Vrystaat 1956. Na sy aanstelling as senior lektor aan die Universiteit van Suid-Afrika in 1960, word hy in dieselfde jaar tot professor in publiekreg aan hierdie universiteit bevorder. Hy is verantwoordelik vir die opstel van studiegidse en doseer van die volgende vakke: Strafreg; Strafprosesreg; Persreg (later tot Kommunikasiereg verdoop); Gevorderde Strafreg; Spesifieke Misdade; Geneeskundige Reg (hy het die leiding geneem by die instelling van laasgenoemde kursus aan die Universiteit van Suid-Afrika in 1976). Hy het ook opgetree as promotor vir 'n aantal suksesvolle doktorale- en meesterstudente (kyk die lys, hieronder).

Sas Strauss was hoof van die Departement Straf- en Prosesreg aan die Universiteit van Suid-Afrika van 1960 tot 1979). Hy het in 1965 as waarnemende dekaan van die Fakulteit Regsgeleerdheid opgetree. Deur die jare dien hy op verskillende komitees en besture: hy is verkies as lid van die Raad van die Wêreldvereniging vir Mediese Reg, met Ghent, België as sentrum; visepresident van die Wêreldvereniging vir Mediese Reg (1988–1994); voorsitter van die Suid-Afrikaanse Regsgeneeskundige Vereniging (1978–); lid van die Raad van die Universiteit van Suid-Afrika (1973–); lid van die Uitvoerende Komitee van die Raad van die Universiteit van Suid-Afrika (1973–); voorsitter van die Komitee vir Musiekeksamens van die Universiteit van Suid-Afrika (1974–94); voorsitter van die ad hoc-komitee vir die Personeeltugkode van die Universiteit van Suid-Afrika (1987); voorsitter van die ad hoc-komitee vir die Studentetugkode van die Universiteit van Suid-Afrika (1988); addisionele lid van die Suid-Afrikaanse Regskommissie vir die projek 'Die vrou en geslagsmisdade' (1984–5); lid van die Raad, International Centre for Medicine and Law van UNIBO (1986–); lid van die Raad van die Zuid-Afrikaanse Hospitaal (1972–); lid van die Raad op Chiropraktisyns, Homeopate en Verwante Gesondheidsdiensberoepe (1982–); voorsitter ad hoc-komiteevan die SA Mediese Vereniging re geneeskundige behandeling van gevangenes en aangehoudenes (1982–1983); lid van die Mediaraad (1983–); voorsitter SA Regstigting (1986–); lid van die Raad van Adcock Ingram Ltd (1985–); lid van die Suid-Afrikaanse Mediese Navorsingsraad korrek (1988–94); lewenslange erelid Mediese Vereniging van Suid-Afrika (1983–); medestigter van die International Centre of Medical Law (Haifa, Israel, 1979); ere-lewenslid van die SA Gesinsbeplanningsvereniging, ontvang in 1983 vir voortreflike diens aan die mediese beroep; lid van die beheerraad International Centre for Medicine and Law, Universiteit van die Noordweste; Lid van die Howard Kommissie van Ondersoek na Dobbelary (1992–3); lid van die Staatspresident se Kommissie van Ondersoek na Spesiale Projekte; voorsitter van die Kommissie van Ondersoek na die Regulering van Private Hospitale (1993); lid van die SA Mediaraad (1994–); lid van die SA Mediese Navorsingsraad (1988–1994); volle lid van die Suid-Afrikaanse Akademie vir Wetenskap en Kuns; voorsitter, Komitee van Ondersoek na Private Hospitale (1993) en lewenslange erelid van die SA Verpleegstersvereniging (1995).

'n DAAD-'Wiedereinladung' na Duitsland is in 1972 aan professor Strauss gerig. Hy was besoekende professor by die Universiteit van Natal (1971) en die Universiteit van Grahamstad (1976) en is van tyd tot tyd uitgenooi om

gastelesings te gee aan die volgende universiteite: Stellenbosch, Witwatersrand, Pretoria, Randse Afrikaanse, Medunsa, Potchefstroom, Oranje Vrystaat, Fort Hare, Port Elizabeth, Zoeloeland, Durban-Westville, Kaapstad, Göttingen, Hebreeuse Universiteit (Jerusalem) asook die Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg. Hy het voorts ook talle internasionel akademiese kongresse in Suid-Afrika en die buiteland (Ghent, Washington, Palo Alto, Heidelberg, Coimbra, Wene, Praag, Boppar en Jerusalem) bygewoon.

Professor Strauss is voorts mederedakteur van die internasionale tydskrif *Medicine and Law* (in Duitsland uitgegee sedert 1980); Advokaat van die Hooggeregshof, Senior Consultus van die Republiek van Suid-Afrika (1990–) en, les bes, Emeritus Professor in Regte, Universiteit van Suid-Afrika. Hy was in 1994 die ontvanger van 'n Erelisensiaat in Musiek van die Universiteit van Suid-Afrika vir dienste oor 'n tydperk van meer as twintig jaar aan die Departement Musiek van hierdie universiteit gelewer.

As die twee hoofimpulse wat hom gestimuleer het, noem professor Strauss sy ouerhuis en die invloed van professor WA Joubert, eertydse dekaan van die Fakulteit Regsgeleerdheid van die Universiteit van Suid-Afrika. Hy het groot waardering vir die huis vol liefde waarin hy opgegroei het, waar hy voortdurend aangemoedig is om te presteer (as deel van die na-oorlogse druk om jouself te bewys) en goeie, Christelike waardes na te streef. Ook sy skoolopleiding aan die hoërskool van Boshof was belangrik in sy vorming. Wat professor Joubert se invloed betref, is Sas oortuig dat sy akademiesse visioene en sy breëre lewensuitkyk (met die klem op die 'element van uitwaarts leef') regstreeks na die invloed van Willem Joubert terug te voer is.[2]

Die politiek en politiek-verwante aangeleenthede het altyd professor Strauss se belangstelling geprikkel. Hy het aanvanklik in 'n loopbaan in die joernalistiek belang gestel, en hierdie belangstelling is verder aangewakker deur vakansiewerk by *Die Burger* aan die einde van sy eerst universiteitsjaar. Die studentepolitiek het hom intens geïnteresseer. As lid van die Nasionale Jeugbond en redakteur van *Die Matie*, het hy sy oog op 'n politieke loopbaan gehad. Die belangstelling het egter mettertyd effens gekwyn (hy het reeds in die laat-vyftigers gevoel die Nasionale Party se beleid is te eng), alhoewel dit steeds in bepaalde aktiwiteite tot uiting gekom het: hy was medestigter van die Demokratiese Party en later nasionale voorsitter daarvan; betrokke by Verligte Aksie; een van die 21 akademici by die 'Grabouw-kleulingkongres'; stigterslid van die Nuwe Republiek-party; medestigter van Regslui vir Menseregte en 'n aktiewe lid van die Vereniging vir die Afskaffing van die Doodstraf.

Sas Strauss, die gesinsman, woon op 'n hoewe buite Pretoria met sy vrou, Susan (in die beeldende kunste opgelei en 'n groot liefhebber van inheemse flora, veral alwyne en varings). Hulle huis dien as (soms tydelike) tuiste vir die kinders, Rosanna, Ben, Marita en Sybrand — en die honde en katte. Sas

[2]Van gesprekke met Professor Willem Joubert (met die oog op die skryf van hierdie redakteursvoorwoord) vroeg in 1992, het ongelukkig nie veel tereg gekom nie weens sy oorlyde.

ontspan by voorkeur by sy gesin en familie.

Professor Strauss se liefhebberye en belangstellings strek verder as vakverwante kwessies. Hy versamel *africana* (veral dié wat met die Anglo-Boereoorlog verband hou) en is 'n geesdriftige amateur-sterrekundige. Hy het 'n groot liefde vir musiek. In die vroeë sestigs is hy deur Peter Hafter gevra om te help met Musiekteater. Hulle het 'n volledige *Xerxes* van Händel opgevoer en dié komponis bly sederdien sy gunsteling, gevolg deur Mozart en Beethoven. Sy belangrikste liefhebbery bly egter die geneeskundige reg, wat hy nog altyd as stokperdjie beskou het (nie as werk nie). Hy skryf graag daaroor met die klem op leesbaarheid en met 'terugvoering' van lesers altyd in gedagte.

Die pasgenoemde benadering hou dan ook verband met Sas se onmiddellike reaksie as hy gepols word oor sy 'gunsteling-afkeer/pet aversion'. Dié, verklaar hy, is arrogansie op alle vlakke in die samelewing. In die akademiese wêreld is dit daardie paar akademici wat glo dat hulle die wysheid in pag het: hy noem dit pedantiese, oordrewe geleerdskrywery en geleerdpratery. Dit het hy, weer eens, by Willem Joubert geleer — en ook by professor WMR (Mortie) Malherbe van Stellenbosch ('Jy behoort die reg so goed te kan verstaan dat jy dit aan jou tuinier kan verduidelik.')

Vir Sas Strauss was die uitstaande ervaring van sy lewe sy deelname aan die Departement Straf- en Prosesreg aan Unisa: die geleentheid om deel te hê aan die vorming van jongere kollegas en aan opbouende spanwerk. Dit gaan vir hom nie slegs om uitnemendheid nie, maar ook om positiewe mensemateriaal. Hy het dit veral geniet — en hy glo hy was baie gelukkig — om goeie doktorale studente te hê.

Gevra na wat sy boodskap aan jonger kollegas sou wees, het Sas sonder huiwering gesê: 'Strafreg, breed genome, is steeds een van die belangrikste instrumente in die maatskaplike wapenrusting. Afdwinging is slegs geslaagd as die strafreg realisties en regverdig is. Die strewe is dus nie slegs na wetenskaplike beoefening nie, maar die uitbou van 'n sosiaal-verantwoorde dissipline, veral in ons komplekse land, met sy ingewikkelde sosiale en etniese strukture. Gaan voort met hierdie moeilike taak; wees krities, maar gaan opbouend te werk. Onthou bowe-al dat jy nie die strafreg in 'n vakuum kan beoefen nie; jy moet maatskaplike realiteite voor oë hou. Jy kan jou nie in 'n kamer toesluit as jy wil hervorm op die gebied van die strafreg, die strafprosesreg en ander newegebiede van die reg nie — jy moet let op wat daar buite in die samelewing aangaan. Jy het die reg om te praktiseer: wees betrokke by die strafhowe, want dit is die spieël waarin die maatskappy gereflekteer word.'

Publikasies: professor SA Strauss

Boeke

Die perswese en die reg (1964) (in medewerking met MJ Strydom en JC van der Walt — tans bekend as *Mediareg* (4 uitg 1987))

Die Suid-Afrikaanse geneeskundige reg (1967) (in medewerking met MJ Strydom)

Doctor, patient and the law (1980) (tans in 3 uitg 1991)

Legal handbook for nurses and health personnel (1977) (tans in 7 uitg 1992)

Regshandboek vir verpleegkundiges en gesondheidspersoneel (1977) (tans in 6 uitg 1993)

Euthanasia (1978) (mede-redakteur met GC Oosthuizen en HA Shapiro)

Punishment: an introduction to principles (1981) (in medewerking met MA Rabie) (tans in 5 uitg 1994 in medewerking met MC Maré)

Genetics and society (1980) (mede-redakteur, met GC Oosthuizen en HA Shapiro)

Professional secrecy in South Africa (1983) (mede-redakteur, met GC Oosthuizen en HA Shapiro)

Attitudes to clinical experimentation in South Africa (1985) (mede-redakteur, met GC Oosthuizen en HA Shapiro)

Let's make it legal (1983) (in medewerking met Lionel Hodes en Carmen Nathan)

You in the small claims court (1985) (tans in 2 uitg 1990)

U in die hof vir klein eise (1986) (tans in 2 uitg 1991)

Wena enkantolo yamacala amancane emibango (1987) (vertaling in Zoeloe deur CT Msimang)

Huldigingsbundel vir WA Joubert (red 1988)

Kleiner boekies

Nuwe weë in die Suid-Afrikaanse strafprosesreg (1961)

Aspekte van die begrip 'toestemming' in die strafreg en die deliktereg (1963)

Die proefbuisbaba: toekomsskok of nuwe burger? (1982) (in medewerking met HJC Pieterse, JT de Jongh van Arkel en JV van der Merwe)

The duty of the doctor to attend to patients in urgent need of medical care (2nd annual Carmen Nathan Memorial Lecture, 1992)

Guidelines on Ethics for Medical Research (hersiene uitg 1993) (in medewerking met OW Prozesky *et al*)

The nurse and Aids: legal issues (1989) (2 uitg 1994)

Regsprobleme vir die verpleegkundige in verband met VIGS (1989) (2 uitg 1994)

Verslae

Report of the ad hoc committee of the Medical Association of South Africa on the medical care of prisoners and detainees (1983) (voorsitter)

Report: Committee of inquiry into the control of private hospitals (1993) (voorsitter)

Verslag: Komitee van ondersoek na die beheer van private hospitale (1993)

Bydraes tot ander outeurs se werke, huldigingsbundels en kongresbundels

'The juridical concept of intention' in *Intensie* (1964) 7

'Criminal procedure' in *Annual survey of South African law* 1969-1983

'Die vrou en die reg' in *Die vrou* (reds CP van der Merwe en CF Albertyn) (1971) 303

'Legislating on human tissue donation' in *The ethics of tissue transplantation* (red GC Oosthuizen) (1972) 73

'Must the doctor tell?' in *First Cancer Congress: proceedings* (1972) 216

'Basic values of the South African system of criminal procedure' in *Legal aid in South Africa* (1974, Univ van Natal) 177

'Abortion and the law in South Africa' in *The great debate: abortion in the South African context* (reds GC Oosthuizen *et al*) (1974) 125

'Vermoë van die beskuldigde om verrigtinge te begryp, geestesongesteldheid en strafregtelike toerekenbaarheid' in VG Hiemstra *Strafproses* (2 uitg 1977) 138

'Rescue, emergency treatment and the law' in *Disaster medicine* (reds AGMacMahon en M Jooste) (1979) 318

'Medical and health law' in *Social Welfare Law* (ed F Bosman) (1982) 511

'Geneeskundige en gesondheidsreg' in *Welsynsreg* (red F Bosman) (1982) 535

'Medical treatment of prisoners and the doctor's clinical independence' in *Recht und Ethik in der Medizin* (reds W Doerr *et al*) (1982) 49

'The right of the patient to refuse medical treatment' in *The Sanctity of Human Life* (red E Kahn) (1983) 18

'The "living will" and the "right to die"' in *The Sanctity of Human Life* (red E Kahn) (1983) 35

'Clinical independence of the doctor in the treatment of prisoners : a critical survey of our law' in *Fiat Iustitia — Essays in Memory of Oliver Deneys Schreiner* (red E Kahn) (1983) 329

'Medicine, dentistry, pharmacy, veterinary practice and other health professions' *The Law of South Africa* bd 17 (1983) (red WA Joubert) (in medewerking met DJ McQuoid-Mason) 135

'Euthanasia: a South African view' in *Euthanasia* (red A Carmi) (1984) 83

'Liability for so-called "mere omission" and the duty to rescue in South African law' in *Festschrift für Hans-Heinrich Jescheck* (1985) 515

'Employees with AIDS: some legal issues' in *Huldigingsbundel vir WA Joubert* (1988) 140

'The legal rights of the person with epilepsy: an introduction' in *Advances in epileptology* (reds J Manelis *et al*) (1989) 425

'Legal aspects of genetic manipulation' in *Genetic engineering in ethical perspective* (red J Hattingh) (1992) 63

Belangrikste artikels

'Opmerking oor toorn as faktor by die vasstelling van strafregtelike aanspreeklikheid' 1959 *THRHR* 14

'Oorsaaklikheid en daderskap: moord sonder veroorsaking' 1960 *THRHR* 95

'The development of the law of criminal procedure' 1960 *Acta Juridica* 157

'Ex Africa ... The murdered man who returned' 1962 *THRHR* 185

'Sabotasie: Artikel 21 van die Algemene Regswysigingswet, 1962' 1962 *THRHR* 231

'Neuere Entwicklung im Strafrecht von Südafrika' 1964 *Z f d ges Strafrechtsw* 143

'Toestemming deur 'n jeugdige' 1964 *THRHR* 116

'Bodily injury and the defence of consent' 1964 *SALJ* 179, 332

'The "sex-change" operation: two interesting decisions' 1967 *SALJ* 214

'The physician's liability for malpractice: a fair solution to the problem of proof?' 1967 *SALJ* 419

'Therapeutic abortion and the common law: the need for reform' 1968 *SALJ* 453; 1968 *SA MedJ* 710

'International trends in medical malpractice liability in the sixties: a cause for alarm' 1969 *Documenta Geigy* 5

'Transsexualism and the law' 1970 *CILSA* 348

'The law relating to organ and tissue transplantation' 1970 *SA MedJ* 803

'Regsaspekte van geestesversteurdheid' 1971 *THRHR* 1

'Psychiatric evidence, with special reference to cases of post-traumatic neurosis' 1972 *Forensic Science* 77

'Therapeutic abortion: two important judicial pronouncements' 1972 *SA MedJ* 275

'Some basic values in our system of criminal procedure' in *Misdaad, Straf en Hervorming* Okt 1973 26

'The jury in South Africa' 1973 *West Aust Law Rev* 133

'Transplantation menschlicher Organe und Gewebe : die neue südafrikanische Gesetzgebung' in 1973 *Z f d ges Strafrechtsw* 741

'Official re-registration of a male transsexual following medical treatment' 1974 *Forensic Science* 19

'Geestesongesteldheid in die strafreg: die voorgestelde nuwe reëling in die Strafproseswetsontwerp' 1974 *THRHR* 219

'Dood en die oomblik van dood: enkele regsbeskouinge' 1975 *SA Mediese Tydskrif* 976

'Some comments on the Abortion and Sterilisation Act 2 of 1975 after one year's operation: legal aspects' 1977 *SASK/SACC* 116

'Dronkbestuur en 'breathalyzer'-toetse: enkele regsprobleme' 1979 *SASK/SACC* 165

'Truth-telling in medicine: a legal perspective' 1983 *De Rebus* 66

'Artificial "donor" insemination: a South African court declares the child illegitimate' 1983 *MedLaw* 77

'Geneesheer, pasiënt en die reg: 'n delikate driehoek' 1987 *TSAR* 1

'Ethics and the law in South Africa' 1987 *SA J for Cont Med Educ* 21

'AIDS and South Africa — towards a comprehensive strategy' 1988 *SA Med J* 455, 461 (tesame met CB Ijsselmuiden *et al*)

'Legal aspects of medical treatment of prisoners and detainees' 1988 *MedLaw* 551

'Voluntary sterilisation for convenience: the case of the unwanted child' 1990 *Consultus* 93

'Legal questions surrounding hunger strikes by detainees and prisoners' 1991 *MedLaw* 211

'Legal liability for transmission of AIDS virus by means of blood transfusion' 1991 (3) *SA Practice Management* 16

'Legal liability for doctor-assisted suicide' 1991 (4) *SA Practice Management* 12

'The civil liability of a hospital for acts performed by doctors and nurses' 1992 (2) *SA Practice Management* 16

'Clause restraining doctor from practising in certain area: is it valid?' 1992 (4) *SA Practice Management* 6

'The doctor and the practice nurse — some legal and ethical aspects' 1993 *SA J for Cont Med Educ* 73

'The "right to die": two important decisions' 1993 *SACJ/SAS* 196

'The doctor with hepatitis B — some legal issues' 1994 *SA Med J* 575

'Sterilisasie van geestesonbevoegde persone' 1995 (1) *SA Practice Management* 10

Wetsontwerp
Die Wetsontwerp op Anatomiese Skenkings en Nadoodse Ondersoeke 1969 (wat in gewysigde vorm Wet 24 van 1970 geword het)

Doktorale en magisterstudente van Professor SA Strauss wat proefskrifte en verhandelings onder sy leiding aan die Universiteit van Suid-Afrika voltooi het:

Doktorale studente
M Blackbeard *Epilepsy — legal problems* 1994

AJ Middleton *Judicial considerations concerning the imposition of criminal punishment — a historical survey* 1984

D Pretorius *Surrogate motherhood: legal issues* 1991

JL Snyman *Die siviele opneming van geestesongesteldes — regte en regsbeskerming van die betrokkene* 1982

MA Rabie *Die deelnemingsleer in die strafreg* 1970

DP van der Merwe *Die leerstuk van verminderde strafbaarheid* 1981

FFW van Oosten *The doctrine of informed consent in medical law* 1990

CW van Wyk *Aspekte van die regsproblematiek rakende VIGS* 1991

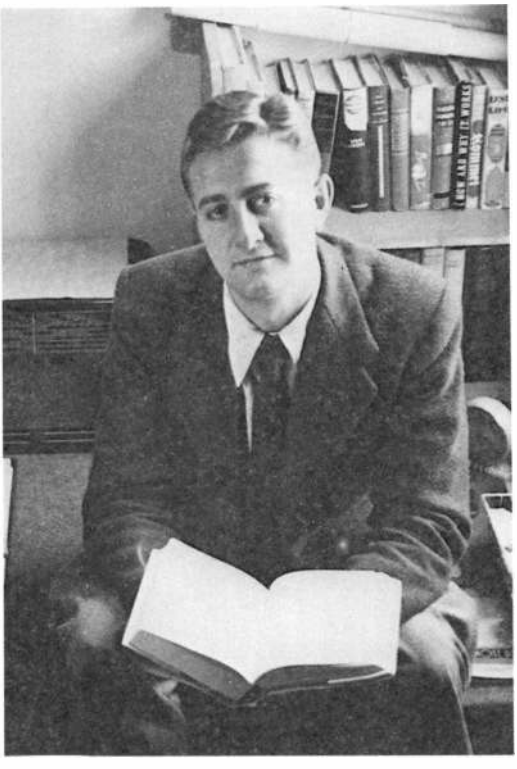
Magisterstudente
A de Klerk *Die reg van die pasiënt om insae te verkry in geneeskundige dokumentasie betreffende homself* 1987

M Smit *Regsaanspreeklikheid wat kan ontstaan vanweë 'n bloedoortapping* 1993

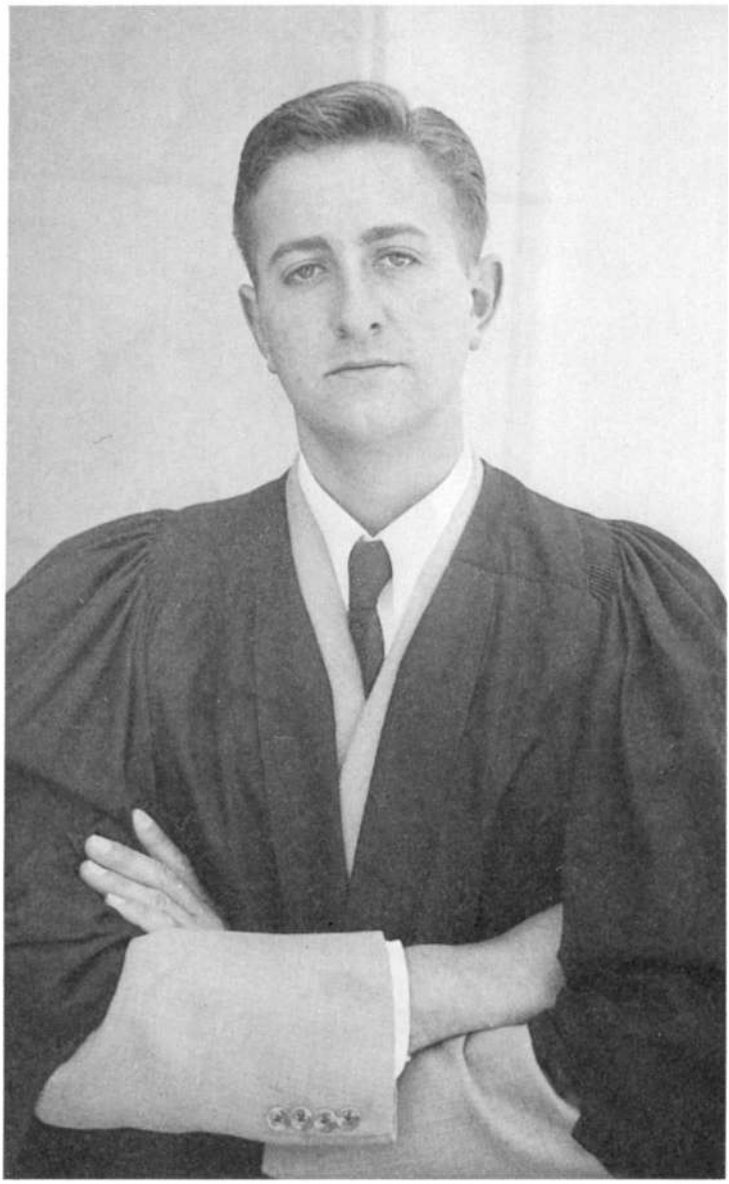
JL Snyman *Dronkenskap as verweer in die strafreg* 1977

Sas en sy tweelingsuster, Mariaan, op tweejarige ouderdom by hulle moeder, Anne Strauss

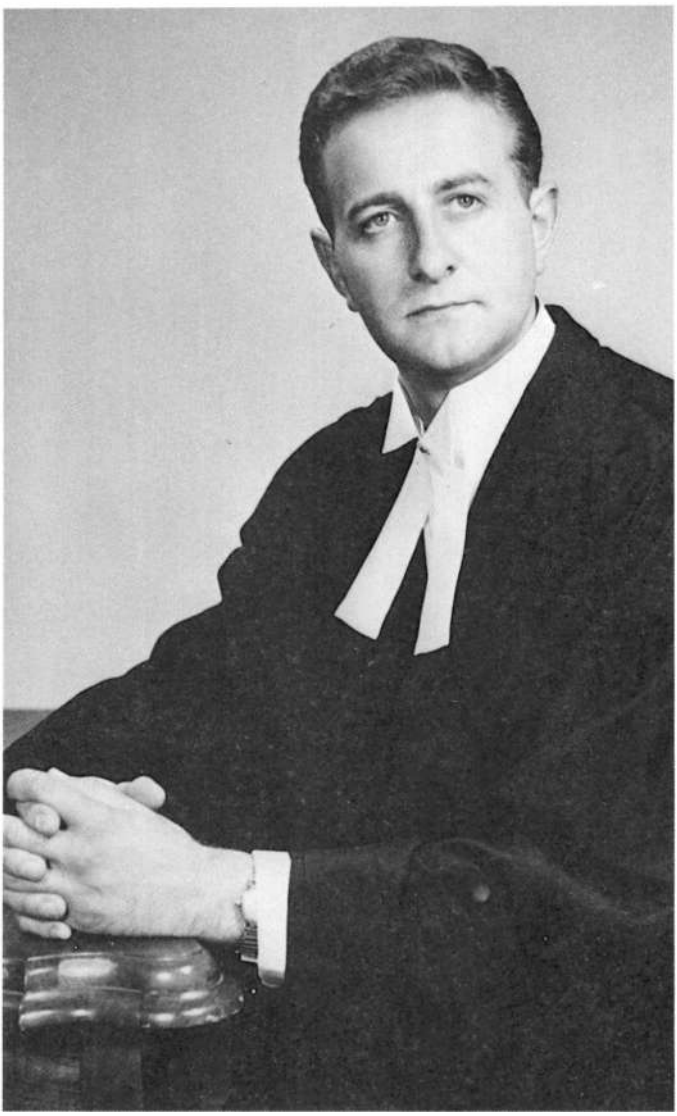
Sesde verjaarsdag



Studentedae op Stellenbosch



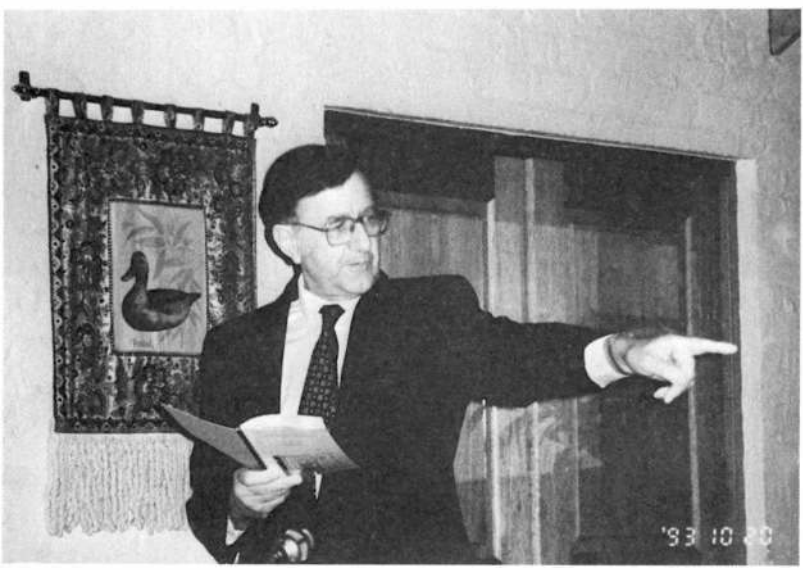
Student aan die Universiteit van Stellenbosch, 1951



Toegelaat as advokaat, 1955

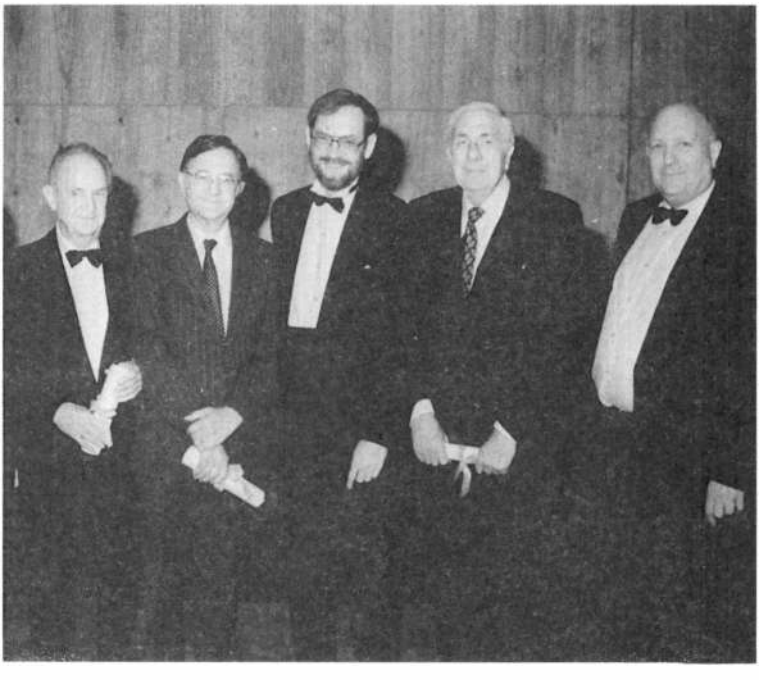
Hoof van die Departement Straf- en Prosesreg aan Unisa, laat sestigs

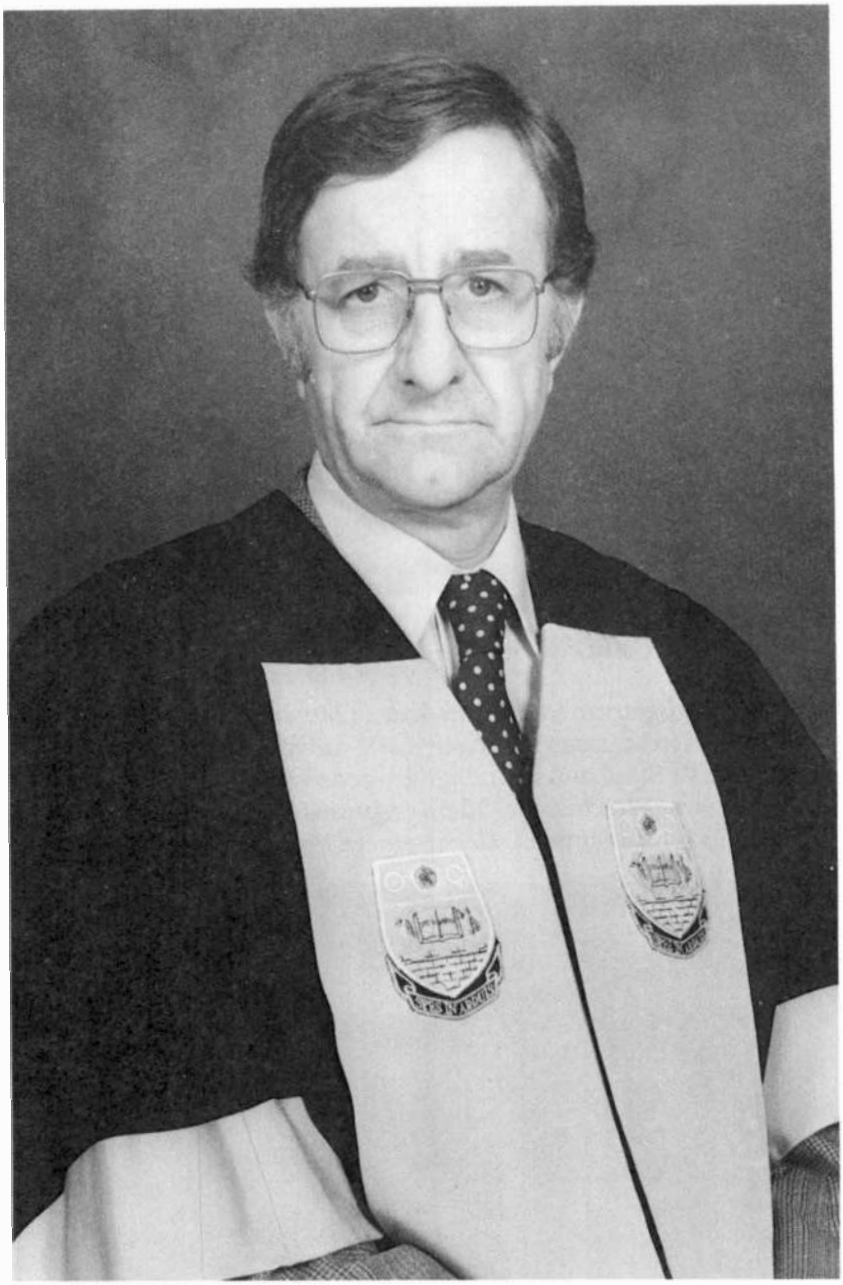
Sas Strauss, die redenaar



Redakteur van die *Codicillus*, met die redaksie - 1965

1994: Ontvanger van 'n *Erelisensiaat in Musiek* van die Universiteit van Suid-Afrika, saam met twee mede-ontvangers, prof Leo Quayle (links) en dr Stephanus Zondagh (tweede van regs), asook die Rektor, prof Marinus Wiechers (middel), en prof Hubert van der Spuy, Direkteur (Professioneel), Departement Musiek (regs)





Professor SA Strauss, lid van die Raad van die Universiteit van Suid-Afrika

'n Ope brief aan Sas Strauss

Beste Sas,

Soos jy sal onthou, het ons mekaar nie eintlik goed op Stellenbosch leer ken nie. Die vernaamste rede was dat jy verkies het om jou in 'n onbenullige koshuisie genaamd Wilgenhof, in plaas van die majestueuse Dagbreek tuis te maak.

Dinge het egter verander toe jy, in hedendaagse terminologie, in Bloemfontein 'n kandidaatprokureur geword het, en veral toe ons in 1955 twee onervare dosente aan die UOVS was. Dink maar aan die ure en ure van politieke bespreking en algemene filosofisering, baie keer in geselskap van Willem Joubert.

Maar daar was ook ligter oomblikke. 'n Gebeurtenis in Mei — ek dink 1955 — is my nog helder voor die gees, en moenie probeer ontken dat jy die opstoker was nie. Ons het saam met Willem en Hulda geluister na die radio-uitsending van die Intervarsity tussen Stellenbosch en UK. Ek dink Stellenbosch het 9 — 3 gewen. Na 'n glasie of wat van Willem se wyn, is sy kinders nader geroep en van instruksies voorsien. Hulda se koperghong is ook naby die telefoon neergesit. Jy skakel toe die liewe oom (professor) Jan Ross wat nou onlangs oorlede is. Die volgende word gesê en gebeur:

Sas:	'Is that professor Ross?'
Oom Jan:	'Yes.'
Sas:	'Professor Ross, this is the OK Pot of Gold Show. You are on the air and you can win a brand new Plymouth if you can answer a simple question. Audience, give him a big hand.' (Willem, Hulda, ek en die kinders klap geesdriftig.)
Oom Jan:	'What is the question?'
Sas:	'Professor Ross, what was the score in this afternoon's Intervarsity match between the Maties en the Ikeys?'
Oom Jan:	'I'm afraid I don't know.'
Sas:	'But take a guess, Professor Ross, take a guess. Audience, give him another big hand.' (Ons ander klap met volle oorgawe.)
Oom Jan:	'Well, say Maties 20, Ikeys 12.' (Hulda slaan hard op die ghong en die res van ons sug hard-op: aaaaahh!!)
Sas:	'Sorry, Professor Ross, you were wrong but as a consolation you've won a second-hand ice chest!'
Oom Jan:	'Thank you very much.'

Het ek jou ooit gesê dat kort voor die wintervakansie oom Jan my van sy wedervaringe met die OK 'Pot of Gold Show' vertel en dit vreemd gevind het

dat hy nog nie sy yskas ontvang het nie?

Jy het 'n wonderlike gawe gehad. Wanneer kollegas aan die universiteit nie hul huise tydens uitstedigheid alleen wou laat nie, is jy gevra om daarin te woon. Natuurlik het jy dan jou eie gaste na die 'ontruimde' huis uitgenooi. Een so 'n geleentheid was in Willem en Hulda se huis waar ons ons betreklik stemmig gedra het; miskien omdat die bestendige Kobie en Ina Coetzee (toe nog ongetroud) by was. Maar op 'n ander keer in 'n ander huis het een van jou gaste — nou 'n respektabele en erkende regsgeleerde asook skrywer van handboeke — so uitbundig geword dat hy 'n hele spul mure met bier bespuit het en ook nog 'n antieke bord van die huisvrou gebreek het. Wat jy omtrent die bord gedoen het, weet ek nie, maar jy het my vertel dat dit jou die ekwivalent van twee dae geneem het om die mure en meubels skoon te maak.

En dan was daar die geleentheid toe jy en Joos Hefer so effens jul verdriet 'verdrink' het. Ek het julle oudergewoonte die Saterdag so om en by 12 namiddag by die Capital Hotel gekry met tekens dat julle al ietwat vroeër daar aangekom het. Ons was mos van plan om navorsing aan die universiteite van Yale en Heidelberg te gaan doen. Omdat UOVS nie bereid was om aan jou 'n jaar se studieverlof toe te staan nie, moes jy oor daardie naweek besluit of jy sou bedank en of jy wel buiteland toe sou gaan.

Joos, weer, het met een of ander liefdesprobleem gesukkel — nie vir die eerste keer nie. Ewenwel, teen 2 namiddag het julle met so 'n bietjie hulp van my in jul woonstel in die gebou van die Vrystaat Klub beland. Toe ek loop, het jy gekniel voor jou bed gesit. Joos was sittende op sy bed met sy kop tussen sy hande. Nou, wat merkwaardig is, is dat toe ek twee uur later terugkom, ek julle altwee in presies dieselfde posisies aangetref het.

Jy het toe besluit om te bedank, en daarvoor sal ek jou altyd dankbaar wees. Want so het dit gekom dat ons op 9 Desember 1955 met die Winchester Castle uit Tafelbaai gevaar het. Die bootrit was nie merkwaardig nie, seker omdat 'n Nusas-toergroep aan boord was en daar min hubare dames onder die res van die passasiers was. Maar toe kom die opwinding van 'n week in London en daarna die bootrit met die Queen Mary na New York. (Toe my kinders oorsee gegaan het, was ek jammer dat hulle reeds 'n voorskou oor TV gehad het. Dit was veel opwindender, dink ek, om dinge vir die eerste keer self visueel waar te neem.)

En toe New York. Onthou jy nog dat toe ons deur 'n krioelende massa motors en mense per taxi na die busstasie gery het, jy gesê het: 'Maar magtig, dis dan amper soos Boshof met groot kerk.' (Almal weet seker dat jy op Boshof opgegroei het.)

In New Haven het ons, en 'n stuk of 6 ander studente, mos by die goeie mev. ? in 54 Trumbullstraat tuisgegaan. Al probleem was dat dit soms moeilik was om in ons kamers op die eerste (tweede?) verdieping te werk. Onthou jy dat sy 'n violis in die New Haven Symphony Orchestra was en twee Beagle honde gehad het, en dat wanneer sy viool geoefen het hulle op 'n nog hoër, en

deurdringende, noot saamgehuil het?

Ek is nie meer seker van die rede nie, maar mettertyd het ons vriendekring meer uit 'uitlanders' as uit Amerikaners bestaan. Toe ons vir 'n lang naweek in ons Pontiac na Montreal gery het, was 'n Pakistaner saam — sy naam het ek vergeet. En, natuurlik toe ons in Junie en Julie van noord na suid en oos na wes en terug 12 000 myl gery het, was dit in geselskap van die Franse Robert Heller wat nou nog ons vriend is. (Basil Wunsh, nou gesiene prokureur in Johannesburg, het ook vanaf New Haven tot in New Orleans saam-getoer.)

Dit is deesdae moeilik om te glo hoe ons destyds so stiptelik op die sente moes let. Onthou jy dat ons altyd net 'n dubbele slaapkamer gekry het, en dat die derde een van ons om die beurt op 'n lugmatras geslaap het? Iewers in Louisiana het die muskiete ons een nag letterlik opgevreet en omdat jy en ek die volgende dag bestuur het, het Robert goedgunstiglik aangebied om in Dallas (of was dit Houston?) 'n tweede nag op die matras te slaap. Praat van werp jou brood. Die matras het mos die nag begin lek.

Daar het soveel op die rit gebeur wat ek weer met jou wil deel, maar ek het nie genoeg skryfpapier nie. Maar lag jy nog so lekker as jy dink aan ons pogings om die Pontiac te verkoop voordat ons met die Maasdam na Rotterdam sou vaar? Elke handelaar was bereid om 'n Pontiac te koop, maar as hulle in die jaar 1956 hoor dat dit 'n 1949 model was, het hul geesdrif verflou. By die laaste handelaar het die gesprek min of meer so verloop:
'We've got a Pontiac for sale.'
'Which model?'
'1949.'
'My God, man, Moses had one.'

En net daar verkoop ons die Pontiac as 'scrap' vir 25 dollars en besluit om in New York in 'n restaurant 'n sappige biefstuk te bestel. (Om effens vooruit te loop, jy onthou seker hoe opgewonde ons was toe ons in Heidelberg 'Deutches Beefsteak' op die spyskaart van 'n pension gemerk het teen slegs vier mark — destyds, as ek dit reg het, was die ekwivalent van ons huidige rand 7 mark werd. Dit sou vir elke van ons die tweede biefstuk van 1956 wees. En watter ontnugtering toe frikkadelle vir ons voorgesit word.)

Die bootrit op die Maasdam was, in aansluiting by die liedjie: 'Ein rheinisches Mädchen, beim rheinischen Wein; das muss ja Himmel auf Erden sein'; inderdaad hemel op aarde. Dit het natuurlik niks te doen gehad nie met die feit dat van die 600 passasiers net 100 mans was.

In Rotterdam het wyle Robert Smit ons ingewag. Sy groot gestalte het bo-oor die ander mense op die kaai uitgetroon. In Amerika het ons vir Robert Heller tot siens gesê; in Holland by Robert Smit aangesluit. Ek glo nie dat ek jou al vertel het dat beide Roberts in 1977 my gaste by 'n restaurant in Parys, Frankryk, was nie. Robert Heller was na baie jare terug in Parys en Robert Smit was 'n ekonomiese getuie in arbitrasieverrigtinge wat ons in Parys gevoer het. Vir die eerste Robert het ek sedertdien al weer 'n hele paar keer ontmoet; vir

Robert Smit net eenmaal vlugtig voordat hy en sy vrou in November 1977 om onverklaarbare redes vermoor is toe hy 'n aspirant LV vir Springs was.

Toe volg ons reis van 'n maand of wat en strek dit vanaf Kopenhagen in die noorde na Rome in die suide. Onthou jy hoe ons in die boonste galery saam met grondboontjie-etende Italianers in die Terme di Caracalla na *Aïda* gekyk en geluister het; hoe ons 'n hele dag met reisgidse in die Forum Romanum rondgedwaal het, en hoe ons ons verkyk het aan die Michelangelo vroue-beelde, veral die *Aurora*, in Florence?

Net een keer het jou puntenerigheid met die sente 'n bietjie wrywing veroorsaak. Dit was toe ons op pad suid teen die aand se kant in Hildesheim van die trein afgeklim het om vir die nag slaapplek te soek. Oral was verblyf teen vyf mark beskikbaar, maar jy was obstinaat om nie meer as vier te betaal nie. Met swaar koffers in die hand moes ons toe oor baie kilometers herwaarts en derwaarts stap voordat jy jou doel bereik het.

En toe die 'alte' Heidelberg — 'Du Schöne, du Stadt an Ehren reich, am Neckar und am Rheine kommt keine Andere dir gleich.' Ons verblyf en navorsing daar was so idillies dat dit moeilik is om hoogtepunte uit te sonder. Maar jy onthou seker dat ons een aand na 'n uitvoering van die stadsorkes by 'n *Gaststätte* 'n bier gaan drink en aan dieselfde blink geskropte tafel as 'n Duitse ingenieur, sy vrou en hul gas gesit het. Hul name kan ek nie meer onthou nie, behalwe dié van die gas, dr Johan Gamrieth van Wenen, ook 'n ingenieur. Onthou jy hoe die egpaar ons teen ongeveer middernag na hul woonstel genooi het, en hoe ons grootogig na hul vertellinge geluister het? Hulle was albei luitenante in 'n Duitse duikboot wat gevange geneem was, in Amerika aangehou was, en ontsnap het — waarheen? Ewenwel, wat ons veral beïndruk het, was hul storie dat elke bemanningslid op die duikboot elke dag 'n bottel brandewyn gedrink het om sy vrese te bestry en by sy sinne te probeer bly. Na 'n hele paar glasies Neckarwyn het ons gasheer, sy vrou, jy en ek mos om 6 voormiddag saam met die doktor na die stasie gegaan om hom 'n goeie reis na Wenen toe te wens.

En dan was daar Lala. Sy was een van die ses of sewe Switserse meisies wat saam met ons in die pension van Frau Weber, derde verdieping, Frederich Siebert Anlage, Heidelberg, tuisgegaan het. Sy was een van die aantreklikste, maar terselfdertyd ook ongekunsteldste, jong dames wat ek tot toe teengekom het. En natuurlik het sy oë net vir jou gehad. Erken nou maar, Sas, jy was destyds dolverlief op haar. Maar 'n probleem het ontstaan. Ons het 'n kamer gedeel en uit liefde vir jou het sy elke oggend om 8 voormiddag in haar lang kamerjas in ons kamer vir ons ontbyt voorberei. Soos later geblyk het, het dit nie ons hospita, Frau Weber, aangestaan nie. Die gevolg was dat sy Lala se ouers in Switzerland gebel het en vertel het van die 'onkuise' optrede van hul dogter. 'n Dag of wat later het hulle vir Lala kom terughaal na Switzerland. *O tempora, o mores!*

En toe terug na Suid-Afrika in Februarie 1957. Ek onthou dat jy aangebied het

om 'n Duitse immigrant en sy pa in hul Volkswagen vanaf Kaapstad na Bloemfontein te bestuur. Snaaksgenoeg, was hulle nie beïndrukmet Kaapstad nie, maar soos jy my later vertel het, was hulle entoesiastiese reaksie met sonsopkoms oor die wuiwende rooigras van die Vrystaat (ons altwee se Heimat): 'Aber, das ist Afrika.'

Tuis was daar nie meer geleentheid vir veel ontspannende bedrywighede nie. Ons moes klasgee en hard werk aan ons doktorale proefskrifte. Tog was daar die geleentheid toe ons met behulp van Sam Pellisier — nou, dink ek, afgetrede prinsipaal van 'n skool op Sasolburg — 'n bandopname voorberei het wat later die aand met behulp van Willem Joubert se radio en sy luidspreker-ekstensie in sy sitkamer teruggespeel is. Daar was heelwat gaste en ek meen dat jy in Willem se huldigingsbundel — wat ek nou nie ter hand het nie — vertel het hoe die gaste vas geglo het aan die egtheid van die berigte dat oorlog oor 'n groot deel van die wêreld uitgebreek het. Ek dink egter nie jy het vertel wat vooraf gebeur het nie. Daar was destyds 'n versoekprogram, getitel die Hoekie vir die Eensames, en oor die bandopname-*cum*-radio is sewe plate gespeel met boodskappe. Elke boodskap was gerig aan een van Willem se gaste daardie aand en selfs voor die berigte oor oorlog 'oor die lug' gekom het, het nie een van die gaste vermoed dat dit 'n 'hoax' was nie.

Ek moet nog iets anders noem. Reeds in Amerika het ons politieke sienings begin verander. Tog snaaks dat Robert Heller destyds meer liberaal in sy denke was, en hoe in later jare ons die verligtes en hy meer konserwatief geword het. Ewenwel, onthou jy hoe ons in 1957–58 baie aande aan my ouerhuis politiek gesels en voorspel het dat ons binne 30 jaar 'n swart regering sou hê. (Ons tydsberekening was toe nie ver verkeerd nie.) Vir veral my ma was die gedagte egter onaanvaarbaar. Haar houding was beïnvloed deur die feit dat sy as 'n jong kind in die Bethulie-konsentrasiekamp was waar drie van haar broers en susters gesterf het, en dat pas nege jaar tevore 'ons' finaal van 'Britse tirannie' bevry was.

Die ommeswaai in politieke denke laat my aan iets anders dink. Jy onthou seker dat ons in New Haven van meet af baie goed oor die weg gekom het met B T Davis, 'n Amerikaanse neger wat assistent-bibliotekaris van Yale se regsbiblioteek was. Hy was ons baie behulpsaam en ons het dikwels met hom oor dit en dat gesels. Kort voor ons op ons vakansiereis uit New Haven weg is, nooi hy mos toe vir ons (en ek dink ook Basil Wunsh) om laatmiddag 'n skemerkelkie te kom drink in die huis waarin hy ('n oujongkêrel) en sy ma gewoon het. Jy het seker ook nie vergeet wat hy toe gesê het nie: dat hy met argwaan die twee blanke studente uit die land van apartheid ontmoet het, maar dat in al sy jare in die regsbiblioteek hy nog nie twee studente teengekom het wat so opreg — en nie bloot aangeplak — vriendelik teenoor hom was nie, en dat ons trouens die eerste blanke studente was wat hy na sy huis oorgenooi het.

Die jaar 1959 was ietwat van 'n waterskeiding wat ons persoonlike verhouding betref. Ek het mos voltyds aan die balie begin praktiseer en jy en Willem het

na Pretoria verhuis. Daarna het ons mekaar net dan en wan gesien: wanneer ek in die Transvaalse Provinsiale Afdeling opgetree het of jy in die Appèlhof met 'n spykertafel-appèl. Daar was wel die geleentheid toe ek, getrou aan 'n belofte, en pas voordat sy en ek verloof geraak het spesiaal vir Jean na Pretoria geneem het om vir jou, Hulda en Willem te ontmoet. Jare voor dit was die afspraak dat indien jy of ek dink ons het die regte vrou ontmoet, die ander sou reageer: positief 'uh", negatief 'uhuh". Daardie aand was daar drie luide 'uhs"! En nog jare later het ek sonder huiwering 'uh' gesê toe jy voor jul troue Susan aan my voorgestel het.

'n Paar maande gelede toe ek 'n vergadering van die Regskommissie in Pretoria bygewoon het, het jy my vir middagete by Unisa genooi. Ons het land en sand gesels en toe my dogters my later die middag vra hoe die ete verloop het, was my antwoord: 'Dit was asof meer as 30 jaar in 'n oogwenk weggeval het.'

Sas, jou formaat as juris is so goed bekend dat ek dit nie wil besing nie. Iemand anders sal dit ongetwyfeld in hierdie bundel doen. Ons persoonlike verhouding word egter ten beste deur 'n, vir my, merkwaardigheid geïllustreer. Ons was oorsee oor 'n tydperk van 14 maande elke dag in mekaar se geselskap, en tog was daar slegs twee geleenthede waarop ons 'n effense struweling gehad het. In die volksmond heet dit: dit wil gedoen wees. Die vernaamste redes vir hierdie fenomeen was jou rustige geaardheid en sin vir humor. Onthou jy nog dat toe ons Reno, Nevada, stilgehou het, 'n bedelaar wat klaarblyklik al sy geld op die dobbeltafels en -masjiene verloor het jou vir 'n dollar gevra het. Jy het woordeloos gewys na 'n yslike skeur in jou hemp wat jy vroeër die dag opgedoen het. Sy reaksie was: 'Sorry, pal, I can see you are also down and out.'

Min mense weet seker dat jy ook 'n tekenaar van formaat is. Voor ons oorsee is, het jy my ouers beloof om in 'n brief aan hulle van ons wedervaringe te vertel. Jy het jou belofte by wyse van 'n tekenbrief nagekom. My ma het dit soos 'n kleinood bewaar en later vir my gegee. Ek hoop die drukker kan dit aan die einde van my brief byvoeg. Uit jou tekenbrief straal jou sin vir humor ten beste.

En nou, Sas, voel ek effens aangedaan. 'n Man kom in sy lewe maar net 'n handjievol hegte vriende teen. Jy was — en is — een van myne, en ek hoop ek was een van joune. Daar is nie meer so baie jare voor ons nie, en dit mag nie weer gebeur dat ons vir lang tye nie bymekaar uitkom nie.

My liefde aan Susan. Nieteenstaande al jou deugde verwonder dit my nog steeds dat so 'n mooi, begaafde en veral innemende vrou bereid was om met 'n Boshoffer te trou!

Beste groete,

Hendrik*

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*Appèlregter HJO van Heerden, Appèlafdeling, Bloemfontein.

11 FEB. 1956. ①

GEAGTE MNR. EN MEV. VAN HEERDEN :

HIER SIT EK LANGSAAN IN MY KAMER IN 54 TRUMBULL STRAAT, NEW HAVEN CONNECTICUT

BESIG OM UITVOERING TE GEE AAN 'N BELOFTE WAT EK 'N TYD GELEDE AAN MEV. VAN HEERDEN GEMAAK HET.

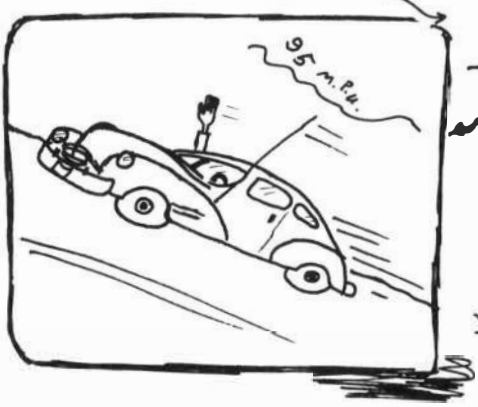
ONS BLY NOG BAIE LEKKER IN ONS HUIS. SAAM MET ONS IS NOG 'N KLOMAIE AANER STRAGNTE, WAARONDER :

GEORGE BAZOUKIS

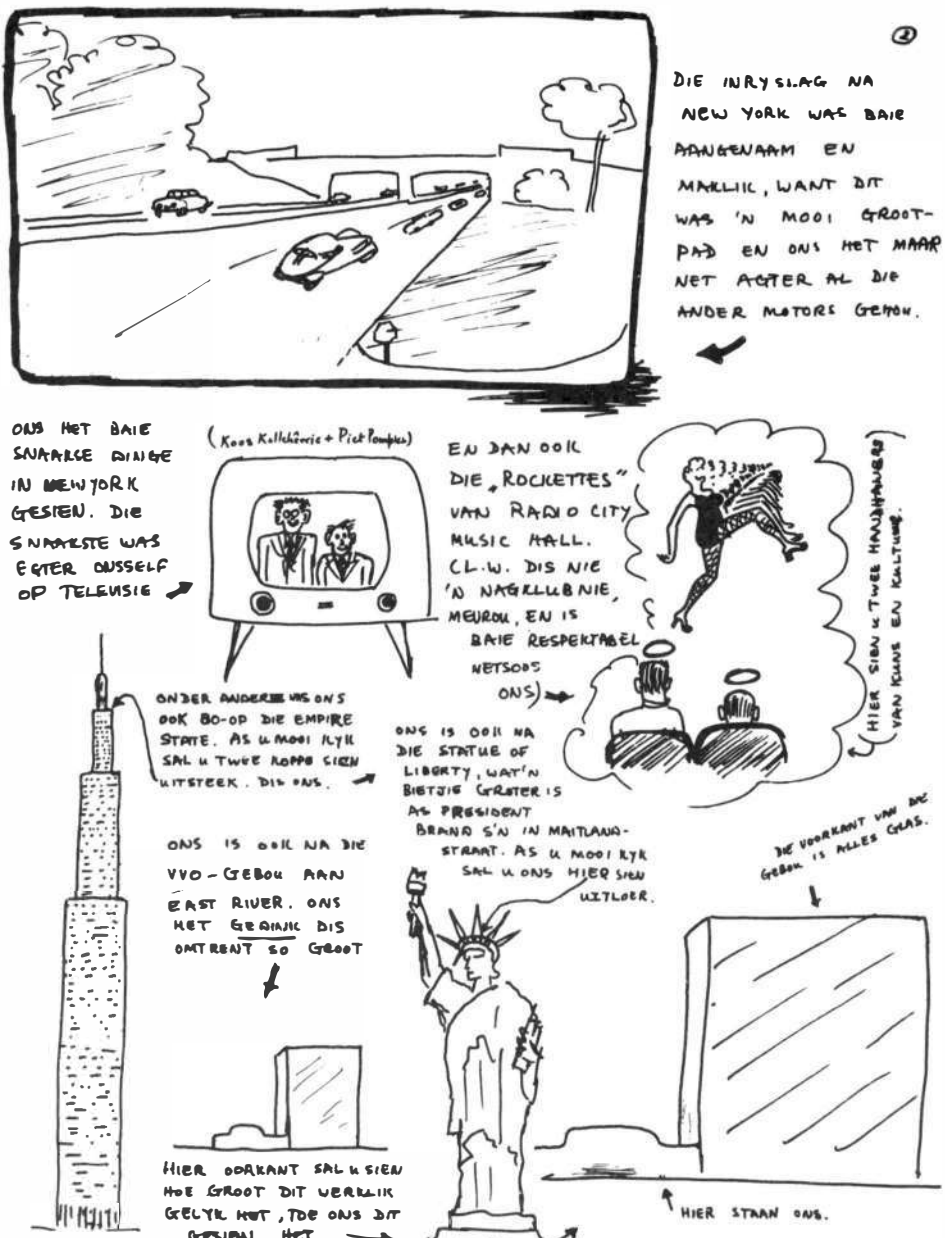
MAX WERNER

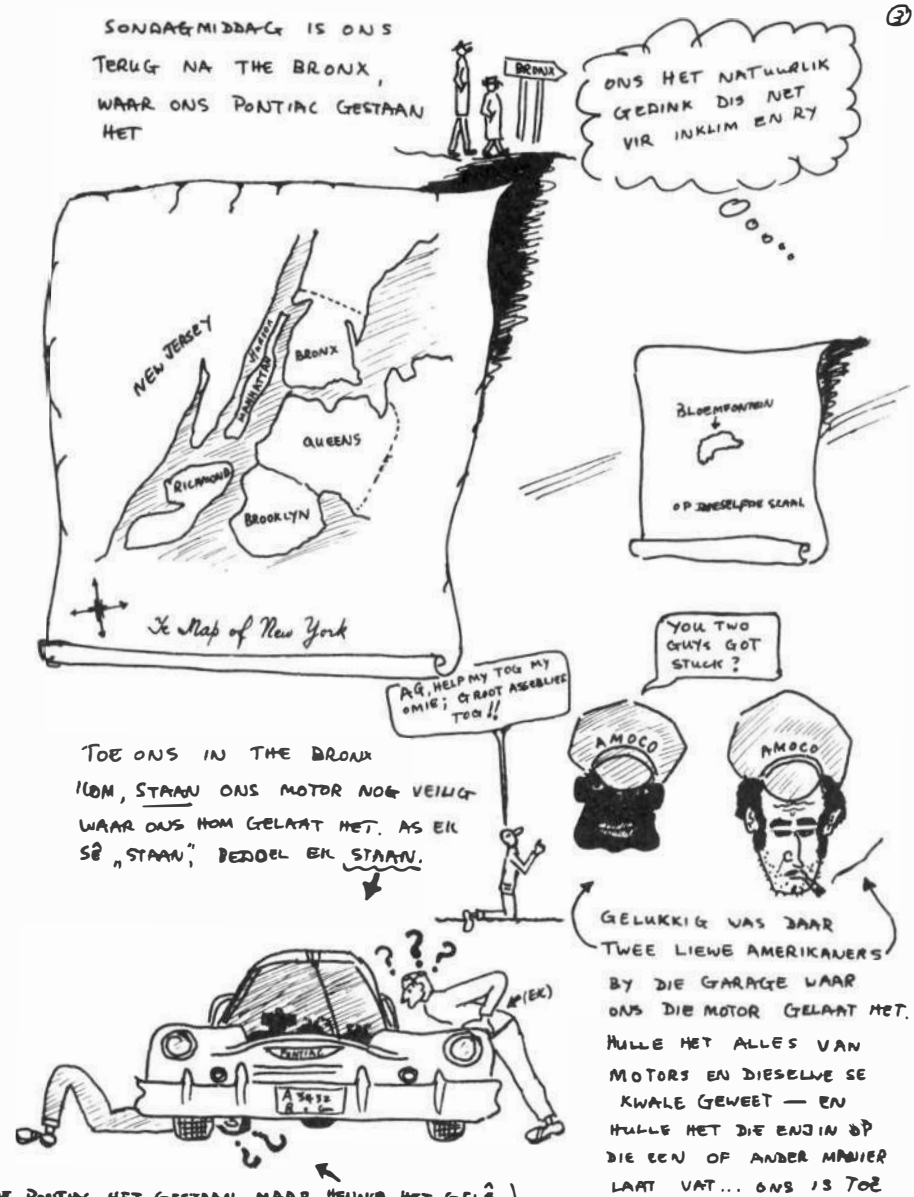
EUGENE LINETTE.

'N RUKKIE GELEDE IS ONS NA NEW YORK. (INGEVAL U NIE WEET WAAR DIT IS NIE — DIS 'N KLEIN DORPIE NET DAAR WAAR AMERIKA BEGIN)



DIT BRING MY BY ONS MOTOR WAT NET DIE MOOISTE MOTOR IS WAT DIE AMERIKANERS NOG OOIT OP WIELE GESIT HET


②
DIE INRYSLAG NA NEW YORK WAS BAIE AANGENAAM EN MAKLIK, WANT DIT WAS 'N MOOI GROOT-PAD EN ONS HET MAAR NET AGTER AL DIE ANDER MOTORS GEHOU.
ONS HET BAIE SNAAKSE DINGE IN NEW YORK GESIEN. DIE SNAAKSTE WAS EGTER OUSSELF OP TELEVISIE
(Koos Kalkhoewe + Piet Pompies)
EN DAN OOK DIE „ROCKETTES" VAN RADIO CITY MUSIC HALL. CL.W. DIS NIE 'N NAGKLUBNIE, MEUROU, EN IS BAIE RESPEKTABEL NETSOOS ONS)
(HIER SIEN U TWEE HANDSHAKERS VAN KUNS EN KULTUUR.)
ONDER ANDERE WAS ONS OOK BO-OP DIE EMPIRE STATE. AS U MOOI KYK SAL U TWEE KOPPE SIEN UITSTEEK. DIS ONS.
ONS IS OOK NA DIE STATUE OF LIBERTY, WAT'N BIETJIE GROTER IS AS PRESIDENT BRAND S'N IN MAITLAND-STRAAT. AS U MOOI KYK SAL U ONS HIER SIEN UITLOER.
ONS IS OOK NA DIE VVO-GEBOU AAN EAST RIVER. ONS HET GEKLIK DIS OMTRENT SO GROOT
DIE VOORKANT VAN DIE GEBOU IS ALLES GLAS.
HIER OORKANT SAL U SIEN HOE GROOT DIT WERKLIK GELYK HET, TOE ONS DIT GESIEN HET
HIER STAAN ONS.


SONDAGMIDDAG IS ONS TERUG NA THE BRONX, WAAR ONS PONTIAC GESTAAN HET
BRONX
ONS HET NATUURLIK GEDINK DIS NET VIR INKLIM EN RY
NEW JERSEY
BRONX
QUEENS
RICHMOND
BROOKLYN
A Map of New York
BLOEMFONTEIN
OP DIESELFDE SKAAL
AG, HELP MY TOG MY OMIE; GROOT ASSEBLIEF TOG!!
YOU TWO GUYS GOT STUCK ?
AMOCO
AMOCO
TOE ONS IN THE BRONX KOM, STAAN ONS MOTOR NOG VEILIG WAAR ONS HOM GELAAT HET. AS EK SÊ „STAAN", BEDOEL EK STAAN.
GELUKKIG WAS DAAR TWEE LIEWE AMERIKANERS BY DIE GARAGE WAAR ONS DIE MOTOR GELAAT HET. HULLE HET ALLES VAN MOTORS EN DIESELWE SE KWALE GEWEET — EN HULLE HET DIE ENJIN OP DIE EEN OF ANDER MANIER LAAT VAT... ONS IS TOE DAAR WEG VIR .....
(DIE PONTIAC HET GESTAAN, MAAR HENNIE HET GELÊ.)


'N AANGENAME, RUSTIGE TERUGREIS OP 'N STIL SONDAGMIDDAG VANAF NEW YORK NA NEW HAVEN....
GIT OUTTA NEW YORK, YOU BUMS — AND FAST!
W 163rd ST.
BEWARE: DEAD ALLEY
US 3
CONN 3A
BLOEDRIVIER WAS ERGER
THRUWAY FOR TRUCKS
W. 166th ST
BEWARE! SOFT SHOULDERS
NO PICNICKING
YOU'RE NOW ON YOUR WAY SOUTH
GAS
FIGHT POLIO
REGS... NEE, LINKS....
BOSTON HIGHWAY
NO PARK
BRUCKNER BOULEVARD - THE BRONX - NEW YORK CITY
167th
E 161st ST
YOU'RE NOW ENTERING
CONNECTI
CUL DE SAC
W. 165th
E. 160TH ST
Follow the overhead Railroad.
HOU, PONTIAC, HOU!
MOEDIGHOU BOERE!
W. 160th
E. 161st
STOP
MERGING TRAFFIC
WAARHEEN SUID-AFRIKA?
TOLL GATE AHEAD
TO PORTPORT
HUTCHINSON PARKWAY NORTH BOUND
QUO VADIS?
NO STOPPING
BAR BROETE. SAS.

The American grand jury: judicial empowerment of the South African population in general?

PEET M BEKKER*

I met Sas Strauss for the first time in 1967 when as a final year LLB student at the University of Pretoria I was appointed an assistant in the Faculty of Law of the University of South Africa. Unfortunately I did not have much personal contact with Sas then, as I was only a young assistant in another department (Commercial Law) and he was already a senior and highly respected professor of criminal law.

In 1968 I joined the Department of Justice as, firstly, a public prosecutor in the magistrates' court and thereafter as state advocate on the staff of the Attorney-General of the Transvaal. In that capacity I met Sas for the second time: he acted as an assessor in the (in)famous (for those days) murder trial of the State versus Sonjia Swanepoel and Frans Vontsteen, who were indicted with murdering Sonjia's husband, former Springbok athlete, François Swanepoel. The presiding judge was Mr Justice VG Hiemstra, who later became Chief Justice of the Bophuthatswana Supreme Court. (He was also for a period of ten years Chancellor of the University of South Africa.) The other assessor was dr Mosey Bliss QC, who acted as a judge on several occasions, who had been my advocate lecturer in civil procedure at the University of Pretoria in 1967 and who graduated with an LLD from the Rijks University at Leiden in 1933 with a doctoral dissertation entitled 'Belediging in die Suid-Afrikaanse Reg'. I was the junior state advocate with my senior André Erasmus, presently a judge of the Eastern Cape Division of the Supreme Court of South Africa. In one of the books that appeared after the trial the author described Sas as 'a brilliant young man with a grave politeness about him'.[1] Brilliance and politeness, however, are only two of the many qualities that this perpetual 'young man'

*BA (Law) LLB (Pretoria) LLD (Unisa). Professor of Law and formerly Head of the Department of Criminal and Procedural Law, University of South Africa.

[1]Peter du Preez *The Vontsteen Case* 48 (Howard Timmins Cape Town 1972). In the same book (p 14) Erasmus' J handling of the state case was prophetically described as 'masterfully, with the veteran's coolness and sureness of touch'. The case was reported: see *S v Vontsteen* 1972 4 SA 1 (T) and *S v Vontsteen* 1972 4 SA 551 (A).

possesses. The others are too many to mention in this brief walk down memory lane.[2]

In April 1977 I joined the Department of Criminal and Procedural Law at Unisa as an associate professor with Sas as its Head. He promised that when I completed my doctoral thesis[3] he would do all in his power to have me promoted to a chair. He kept his promise (as he always does): on 1 October 1977 I was promoted to my present position after completion of my thesis, with Sas as one of the examiners.

After nearly two decades as head of the Department, Sas stepped down. Many years later I succeeded his successor, prof AJ Middleton, in that position. In these reversed roles Sas was as polite a colleague as ever and it has been an exceptional honour and pleasure to have been a colleague and friend of this extra-ordinarily talented man (or rather 'person' in the present common parlance).

When I had to decide on the topic of this article I kept in mind our common love of, ***inter alia***, American scenery[4] and interest in the history of the American Indians (Native Americans)[5]. This article, therefore, had to be about something American. Thinking of Sas' involvement in the practice of law[6] (and my own, while we both have been employed full-time as law professors) I thought of the empowerment of those not actively involved in the practice of law: lay persons, for instance.

The first possibility in this regard that one has to consider is the possible re-introduction of the jury into the South African legal system. I shall deal briefly with that option below. There is, however, another institution in the judicial empowerment of lay people that may be considered. The topic that I selected: the American grand jury.

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[2]The belief is widely held that if he wanted those positions Sas could have been a Minister of State, ambassador, principal of a University and a judge of the Supreme Court, had he selected a career at the bar.

[3]'Die aksie weens seduksie' (The action for seduction) with Sas's own former promoter, prof WA Joubert, as my promoter.

[4]In 1993 I had the pleasure of visiting one of the most beautiful (to Sas and to me) places in the world: the unsurpassable monoliths of Monument Valley in the Navajo Tribal Park on the borders of Arizona and Utah.

[5]See *eg* my article 'The undefended accused/defendant: a brief overview of the development of the American, American Indian and South African positions' 1991 *CILSA* 151.

[6]It was not for nothing that at some stage of his career he was referred to as the 'pinball king'!

BRIEF REMARKS ON THE REINTRODUCTION OF THE JURY SYSTEM IN SOUTH AFRICA

The jury system in South Africa in civil trials was abolished in the Cape and Natal (the only provinces where there were such institutions) by s 3 of Act 11 of 1927 and in criminal matters by the Abolition of Juries Act 34 of 1969. Although these systems 'passed unwept, unhonoured and unsung',[7] the reintroduction of a jury system in civil matters has been proposed.[8] The main argument in favour of the jury is that it ensures the participation of citizens in the administration of justice.[9] In criminal trials in the lower courts (magistrates'/district and regional courts) the magistrate may summon to his assistance one or two persons (also lay persons) who in his opinion may be of assistance either at the trial of the case, or in the determination of a proper sentence, ie a community-based punishment.[10] This led to the suggestion that the above provision for lay assessors may be used in an adapted or modified jury system.[11]

A further reason advanced for the reintroduction of the jury system is to render our legal system more acceptable and relevant to the majority of the population.[12] The involvement of untrained members of the public in the legal domain should help adjust the public's negative views of all sectors of the legal profession as they become involved in the issues of the day, forced to weigh and address them during the course of the trial.[13] The idea is that such a system would enable magistrates to invite people of colour, in addition to whites, to sit with them on the bench.

The above idea, however, seems to have little prospect of viability, mainly for two reasons. First because, as far as decision making in terms of our legal system is concerned, it is not practicable for a professional functionary to function on exactly the same footing as complete laymen; and secondly because the utilisation of lay assessors would cause criminal trials to take at least twice as long to dispose of.[14]

A further possibility is then raised: a system similar to that of British lay magistrates. These magistrates are selected with the utmost care and they undergo basic training. They function on a part-time basis and follow a variety of callings or are retired. More than one — normally three — magistrates sit together. It is said that a better illustration of 'trial by peers' can hardly be

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[7]Hahlo and Kahn *South Africa — the development of its laws and constitution* (1960) 257.

[8]1988 *DR* 490.

[9]GP Paton *A textbook of jurisprudence* (3ed 1964) 550.

[10]Section 93*ter* of the Magistrates' Court Act 32 of 1944. See also an interview with the Minister of Justice, Dullah Omar 1994 *DR* 489 492.

[11]1992 *DR* 296.

[12]1991 *DR* 6.

[13]*Ibid* 7.

[14]April 1991 *Consultus* 3.

visualised.[15]

The present-day apologists for the jury system, in pleading for its reintroduction, argue that this will result in a democratisation of the judicial process. That will lead to the legitimisation of the judicial system in the eyes of the community and enable it to achieve a respected position as a dispenser of justice.[16]

It has been contended, however, that the real argument of the reintroductionists is not a legal or a moral or even a practical argument, but a political one and it depends largely on what one sees the role of the jury to be: is it a trier of fact, a buffer against unpopular laws or simply a means whereby society can be made to feel satisfied that it has a recognised interest, and a role to play, in the administration of justice?[17]

However, the majority of South African writers on the subject of the jury system, have serious reservations about its reintroduction, if not straightforward opposition thereto.

Hiemstra is critical of the rule which expects untrained people to make complicated decisions of fact.[18] It is also ironic that the champions of the jury wish to reintroduce it for the same reason that its opponents originally abolished it — because it alienated the man in the street from the judicial system as a result of acquittals and convictions contrary to the evidence and contrary to justice.[19]

For *Mullineux* the most serious argument against the jury system is the absence of a requirement that the jurors should give reasons for their findings.[20] Most, if not all, of the ills attributed to the jury system could be avoided if juries were required to give reasons for their findings, and if an appropriate right of appeal were granted to both sides in the case where the reasons are invalid or insufficient.[21]

Mullineux doubts whether this will be an entirely satisfactory solution of the problem. If the fears of experienced persons and those who have studied the

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[15]*Ibid* 5. See also 1993 *DR* 721.

[16]1993 *DR* 721. See also 1990 *DR* 507.

[17]John Baldwin and Michael McConville *Jury trials* (Clarendon Press 1979) 19, quoted *ibid*.

[18]*Suid-Afrikaanse Strafproses* 1 ed (1967) 128.

[19]See the article in 1916 *SALJ* 177.

[20]1993 *DR* 727.

[21]*Ibid*. I agree with Mullineux who has always found it incomprehensible that a patently correct verdict could be overturned on appeal because the judge, in summing up, failed to direct the jury in sufficiently clear terms as to the quantum of proof required. On the contrary a doubtful verdict preceded by a correct direction as to the quantum need not necessarily suffer the same fate. The obvious solution — according to Mullineux — to require from the jury reasons for judgment which would make the correctness of the verdict a matter for rational discussion instead of speculation — has for inexplicable reasons never been adopted — *ibid* 728 note 4.

deliberations of juries are anything to go by, the courts can expect a surfeit of appeals from improperly substantiated factual findings by juries.[22]

In 1992 the General Council of the Bar (the official mouthpiece of all practising advocates organised in bars) resolved that the reintroduction of a jury system in South Africa was neither feasible nor desirable.[23]

Experience in other countries, like the United States of America, has shown that it is fatal to pretend that racial or ethnical differences do not play a role in the courts.[24] It is quite conceivable and even distinctly probable that the jury system requires for its ideal working a basic homogeneity in the population.[25] It is difficult, therefore, for the jury system to operate satisfactorily in a multi-racial and heterogeneous community.[26]

It is doubtful, therefore, whether the jury system can be introduced again in South Africa with any measure of success, or whether it will achieve any of the aims that a restructured legal system seeks.[27] Mr Justice Tebbutt of the Provincial Division Cape of Good Hope, who presided over the last jury trial conducted in the Cape, is strongly against the re-introduction of the jury system, which he considers a retrogressive step.[28]

THE AMERICAN GRAND JURY

History of the grand jury[29]

The formal separation of the grand jury from the trial jury occurred in 1350 when the English Parliament passed a statute forbidding grand jurors from sitting on the trial juries of defendants they had indicted.[30] Thereafter, when one of the king's many travelling justices arrived to hear the disputes of a community, the sheriff would pick twelve men from the immediate surrounding community to serve as local jurors; he would then select an additional group of twenty-four men, usually knights, from a larger area to serve as an accusing body for the entire county. These twenty-four men, after eliminating one member to preclude the possibility of a deadlock, began investigating incidents throughout the county under the title of 'le graunde inquest', and

[22] 1993 *DR* 727, and see prof E Kahn 'Restore the jury? or 'reform?' reform? Aren't things bad enough already?' 1992 *SALJ* 87, especially from 105, and in note 161 on 109. See also MJD Wallis SC 'Some thoughts on juries' 1991 *Consultus* 112.

[23] See April 1992 *Consultus* 12.

[24] October 1992 *Consultus* 124.

[25] AJ McGregor 1931 *SALJ* 302.

[26] J Ashton Chubb 1956 *SALJ* 199. See also an interview with the Minister of Justice, Dullah Omar, 1994 *DR* 489 492.

[27] L Rood 'A return to the jury system?' 1990 *DR* 749 750.

[28] 1993 *DR* 555.

[29] See in general, Jon Van Dyke 'The grand jury: representative or elite?' 1976 *The Hastings LJ* 38–9. See also, David Crook 'Triers and the origin of the grand jury' *The Journal of Legal History* vol 12 1991 103.

[30] 25 Edw 3 c 3 (1350).

quickly took over the entire burden of filing indictments.[31]

The form of the grand jury was thus established at an early date, but over 300 years passed before the independence of the grand jury was finally recognised. In 1681, eleven years after the trial jury's independence had been established in *Bushell's* Case,[32] the grand jury of London refused to return an indictment against Stephen Colledge, who was accused of treason. After hearing the prosecutions' witnesses and questioning them in private, the grand jurors returned the bill presented by the prosecutor with the word 'ignoramus'[33] written on its back. The royal authorities then presented the same evidence before the Oxford grand jury which returned the indictment, apparently not sharing the politics of its counterpart in London.[34] The principle that a grand jury could stand between the king and the accused was nonetheless established and spread quickly throughout England as well as to the American Colonies.

Independent grand juries played an important role in the years before the American Revolution.[35] During the early debates in the Massachusetts Legislature over the ratification of the Constitution, before the Bill of Rights had been written and presented to the states, Abraham Holmes complained:

> (T)here is no provision made in the Constitution to prevent the attorney-general from filing information against any person, whether he is indicted by the grand jury or not; in consequence of which the most innocent person in the commonwealth may be taken by virtue of a warrant issued in consequence of such information ...[36]

Because of this fear, when the Bill of Rights was prepared, the protection of the grand jury was provided for in the proposed fifth amendment as a bulwark against governmental oppression, and was accepted as part of the Bill of Rights without debate.[37]

The fifth amendment to the US Constitution

The framers of the United States Constitution made the grand jury a part of the fifth amendment which provides, *inter alia*, as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...

The purpose of this constitutional provision was to protect the citizens

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[31]F Pollack and F Maitland *History of English law* (2ed 1898, reissued 1968) 646–70; 3 Reeves *History of the English law* (3 ed 1814) 133.

[32]124 Eng Rep 1006 (CP 1670).

[33]'We are ignorant' or 'we ignore it'.

[34]The trial of Stephen Colledge, at Oxford, for high treason, (1681) 8 How St Tr 550.

[35]For a discussion of the development of the grand jury in the American Colonies during the seventeenth and early eighteenth centuries, see Van Dyke and Wolinsky, *Quadra v Superior Court of San Francisco: a challenge to the composition of the San Francisco grand jury*, 1976 *The Hastings LJ* 565, 592–93.

[36]2 Elliot's Debates 110 (2 ed 1881).

[37]Jon Van Dyke 'The Grand Jury: representative or elite? 28 *The Hastings LJ* 39.

'against unfounded accusation, whether it comes from (the) government, or (is) prompted by partisan passion or private enmity'.[38]

In a presentment the grand jury initiates an investigation based on its own knowledge or on submitted evidence. An indictment differs from a presentment in that the government presents a written accusation to the grand jury.[39]

A person should, therefore, not be placed in jeopardy of a felony prosecution unless a body of citizens finds it probable that he committed the offence charged.[40]

However, the Supreme Court has held that the federal right to a grand jury indictment does not apply to the states. In *Hurtado v California*[41] the Court stated that an indictment by a grand jury was not necessary to due process of law under the Fourteenth Amendment. Today, the Fifth Amendment right to a grand jury remains among the few Bill of Rights' guarantees not applicable to the states. Nevertheless, several state constitutions provide that with certain limited exceptions, felonies shall be prosecuted solely on grand jury indictments.[42] Some states permit prosecution of felonies to be initiated by the filing of an information or indictment at the option of the prosecutor. Several states allow the use of the judicial inquest or 'one-man grand jury'.

Where prosecution of felonies may be initiated by information, several states require that some form of preliminary examination be employed to determine probable cause for prosecution thereby achieving much the same check on unfounded charges as is implicit in the requirement of a grand jury indictment.[43]

A California survey revealed that prosecutors found the grand jury procedure advantageous in the following instances:

(1) when the accused has evaded apprehension and the statute of limitations will soon bar an information requiring the presence of the accused;

(2) when the district attorney desires to avoid premature cross-examination of emotional or reluctant witnesses;

(3) where there is a great public interest in the case and the district attorney, for political reasons, desires to share responsibility for prosecution with the grand jury;

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[38]*Ex Parte Bain*, 121 US 1, 11 (1887).

[39]5 *The Founder's Constitution* 295 (P Kurlund and R Lerner, eds 1987) (citing 3 J Story, *Commentaries On The Constitution* § 1778 (1893)).

[40]Charles H Whitebread *Criminal procedure: an analysis of constitutional cases and concepts* (1980) 375.

[41]110 US 516, 4 S Ct 111 (1884).

[42]Whitebread *Criminal Procedure* 375.

[43]*Ibid* 376.

(4) when the investigative powers of the grand jury are useful, as in complex fraud cases or those involving corruption in public office; and

(5) when the district attorney believes that employing the grand jury would be speedier than using preliminary examination procedures, as in cases involving multiple defendants or offences.[44]

GRAND JURY PROCEDURE

Historically, a prosecutor will initiate a grand jury investigation when he has evidence of wrongdoing, no matter how slight.[45] The grand jury subsequently must assess whether probable cause exists to believe that a crime has been committed.[46] The prosecutor directs the grand jury investigation, determining which witnesses the grand jury will subpoena, selecting the documents or evidence presented and criminal charges pursued, explaining the law and instructing the grand jury on the burden of proof.[47] If probable cause is found, a grand jury may return an indictment but is not constitutionally required to do so. As was stated by Judge Wisdom:

> By refusing to indict, the grand jury has the unchallenged power to defend the innocent from government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty.[48]

If no indictment is returned, constituting a 'no bill', the prosecutor may, upon approval by an assistant attorney-general, resubmit the case to another grand jury.[49] Double jeopardy or collateral estoppel defenses do not apply to multiple grand jury proceedings.[50] Grand jury proceedings are conducted in secret, with only the jurors, prosecutor, witnesses, stenographer, recording device operator or interpreter present.[51]

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[44]Comment, The California Grand Jury — two current problems, 1964 *Calif L Rev* 116, 118.

[45]See *Blair v United States*, 250 US 273, 282 (1919) (prosecutor may initiate grand jury investigation on mere rumours and tips).

[46]See *United States v Calandra*, 414 US 338, 343 (1974) (grand jury proceeding is nonadversarial and does not serve to adjudicate guilt or innocence).

[47]See, eg, Campbell 'Eliminate the grand jury' 1973 *J Crim L and Criminology* 174, 177 (explaining prosecutor's role in conducting grand jury investigation). Moreover, the prosecutor, as the representative of the government, will instruct the jury as to the level of proof necessary to sustain an indictment.

[48]*United States v Cox* 342 US 167, 189–90 (5th Cir.).

[49]9 *United States Attorney's Manual* § 11.220 (1988). The manual recommends that such approval be withheld in the absence of additional or newly discovered evidence or a clear circumstance of a miscarriage of justice.

[50]*United States v Thompson* 251 US 407, 412–13 (1920) (grand jury has power to indict upon charge previously ignored by another grand jury).

[51]Fed R Crim P 6(d) See in general, Ron S Chun 'The right to grand jury indictment' 1989 *American Criminal Law Review* 1457. The rule of secrecy needs to be re-examined: William B Lytton 'Grand jury secrecy — time for a reevaluation' 1984 *The Journal of Criminal Law and Criminology* 1100. See, also, note 93 *infra*. The secret proceedings of grand juries are largely unreviewable. See Thomas P Sullivan and Robert D Nachman 'If it ain't broke, don't fix it: why the grand jury's accusatory

The grand jury is credited by observers and participants in the American criminal justice system with being one of the most effective tools in a prosecutor's arsenal.[52] Ironically, the contemporary function of the grand jury distorts its historical roots; the grand jury functions less to protect individual rights against arbitrary prosecution and more as effective aid for zealous law enforcement.[53] Despite the grand jury's history of independence, there is a recognised need for the prosecutor to direct its proceedings.[54]

In the recent past the grand jury has been criticized as no longer being an independent body, but simply a rubber stamp of the prosecutor.[55] The Supreme Court also has expressed some doubt concerning the independence of the grand jury:

> The grand jury may not always serve its historic role as a protection bulwark standing between the ordinary citizen and an overzealous prosecutor ...[56]

The grand jury remains one of the most effective methods in a criminal investigation for compelling the appearance of witnesses and the production of documents. An attorney is of the opinion that without the investigatory power of the grand jury, successful investigations of official corruption, large scale financial fraud, or organized crime would be dramatically reduced.[57]

The importance of the investigative role of the grand jury, however, must not be permitted to overshadow its role as an independent accusatory body. A balance must be maintained between the two roles. The key to the balance lies with the integrity and the professionalism of the prosecutor.[58]

The different functions of the grand jury may now be discussed.

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function should not be changed' 1984 *The Journal of Criminal Law and Criminology* 1047.

[52]See, eg, *United States v Cleary*, 265 F 2d 459, 461 (2d Cir) (grand jury conceived of as law enforcement agency: 360 US 936 (1959). With its power to subpoena witnesses and question them in secret, the grand jury provides a vital investigative instrument to the prosecutor.

[53]See *Branzburg v Hayes*, 408 US 665, 701–2 (1972) (investigatory power of grand jury is necessarily broad if its public responsibility is to be adequately discharged: *In re Grand Jury Proceedings*, 486 F 2d 85, 89–90 (3d Cir 1973) (for all practical purposes, federal grand jury is the investigatory and prosecutorial arm of the executive branch of government).

[54]See Sells Eng'g 463 US at 430 ('(A) modern grand jury would be much less effective without the assistance of the prosecutor's office and the investigative resources it commands'), referred to by Sarah A Gardner 'Confusion in the grand jury: a new standard for dismissal based on prosecutorial misconduct' 1989 *Brooklyn Law Review* 250.

[55]See *United States v Provenzano*, 440 F Supp 561, 564 (SDNY 1977); 8 *Moore's Federal Practice* § 6.02(1), 6–22 (rev 2 ed 1985).

[56]*United States v Dionisio*, 410 US 1, 17 (1973). See also Sarah A Gardner 'Confusion in the grand jury: a new standard for dismissal based on prosecutorial misconduct' 1989 *Brooklyn Law Rev* 249.

[57]Peter F Vaira 'The role of the prosecutor inside the grand jury room: where is the foul line?' *The Journal of Criminal Law and Criminology* Vol 75 Winter 1984 1129 1130.

[58]*Ibid.*

Types of grand juries

Grand juries serve three functions: a charging function (generally found in states east of the Mississippi River); an investigatory function (found throughout the United States); and a supervisory function (also found nationwide).[59]

The charging function of the grand jury

The role of the charging grand jury is to determine whether there is probable cause to proceed with the prosecution of a particular defendant. Since the prosecutor presents the evidence, the grand jury is sometimes merely a rubber stamp for the state. Unlike a trial, no one in a grand jury proceeding is obligated to produce evidence tending to undermine the prosecutor's case.[60] If the charging jury does hear evidence for the accused, however, it must base its decision on all the evidence taken.

In theory, one function of the grand jury is to act as a safeguard against unfounded charges. In this regard states apply two different standards for indictment: the probable cause standard and the *prima facie* case standard. Under the former the *quantum* of proof necessary for the return of an indictment is not as great as that necessary to convict.[61] Under the latter standard, the government must establish each element of the crime with the quantum of proof sufficient to make out a *prima facie* case at trial.[62]

The number of grand jurors whose concurrence is necessary to return an indictment, as well as the number of grand jurors on the panel, is set by statute, and varies greatly from jurisdiction to jurisdiction.[63] Under virtually all state statutes, however, a grand jury need not cease its investigation upon returning an indictment. Because this rule may be a source for abuse (given the grand jury's broad subpoena powers), courts have held that it is improper to utilise a grand jury for the sole or dominant purpose of preparing an already pending indictment for trial.[64] Even if a grand jury has been so utilised, however, most courts will do no more than chastise the prosecutor;

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[59]Whitebread *Criminal Procedure* 377. The following discussion about the functions, powers, rights and composition of the grand jury has been taken largely from Whitebread's work.

[60]*Loraine v United States*, 396 F 2d 335, 339 (9th Cir 1968) cert denied 393 US 933, 89 S Ct 292.

[61]*Ill Stat Ann* ch 38, § 112–4(d) (Smith-Hurd 1978 Supp); *Nev Rev Stat* § 172.155; *Wash Rev Code Ann* § 10.27.150 (1978 Supp).

[62]*Ark Stat Ann* § 43–920 (1977); *Cal Penal Code* § 939.8 (west 1970); *Iowa R Crim P* 4(3); *ND Cent Code* § 29–10 1–33 (1974) Repl Vol); *Or Rev Stat* § 132.190 (1977).

[63]Fed R Crim P 6 (sixteen to twenty-three grand jurors; twelve concurring for an indictment); N J Stat Ann § 2A:73–1 (West 1976) (not to exceed twenty-three grand jurors); NY Crim Proc Law §§ 190.05, 190.25 (McKinney 1971) (sixteen to twenty-three grand jurors, twelve concurring for an indictment); Tenn Code Ann §§ 40–1501, 40–1706 (1975 Repl Vol) (twelve grand jurors, all concurring for a true bill); Va Code Ann §§ 19.2–194, 19.2–202 (1975 Repl Vol) (five to seven grand jurors, four concurring for a true bill).

[64]See *United States v Dardi* 330 F 2d 316, 336 (2d Cir 1964) cert denied 379 US 845, 85 S Ct 50.

they will not dismiss the indictment unless the defendant can show prejudice.[65] One state, Missouri, does prohibit grand jury subpoena of a person after the return of an indictment, when that person is likely to be called as a defence witness.[66]

The investigatory function of the grand jury

Unlike the charging grand jury, the investigatory grand jury is not confined to acting upon a specific charge against a particular defendant. Rather, the determination of the identity of the accused and of probable cause to charge him is made at the culmination of the investigation. Thus, there is no formal charge submitted to the grand jury, and a prosecutor generally has no say as to the limits of the grand jury's investigation. Since it is assumed that grand jurors know of the commission of offenses before they begin hearing evidence, it has been held that prejudicial preindictment publicity is not grounds for quashing a subsequent indictment.[67]

The scope of the grand jury's investigation extends to all criminal offenses committed within the jurisdiction of the court which called it. Because of the extremely broad standards of relevancy applicable to such investigations, grand juries frequently pursue matters having only a peripheral relation to criminal offenses.[68] In addition, the grand jury inquiry is not circumscribed by the rules of evidence. Thus, the grand jury can engage in a 'fishing expedition' when exercising its investigatory power.[69]

The supervising function of the grand jury

Virtually every state vests in the grand jury a supervisory function, ranging from investigating conditions in county jails,[70] to perusing public records and recommending on matters of policy,[71] to investigating wilful and corrupt misconduct in public offices.[72] A major issue pertaining to this supervisory role involves the extent to which a grand jury may report on government operations — perhaps thereby reflecting discredit on public officers — without rendering any criminal charges. Most states require statutory authority for the issuance of such reports. They have set limits on the reporting power of grand juries by either (1) prohibiting such reports altogether;[73] (2) limiting reports

[65]See *United States v Star* 470 F 2d 1214, 1217 (9th Cir 1972).

[66]Mo Rev Stat § 540.160 (1978).

[67]*Silverthorne v United States* 400 F 2d 627 (9th Cir 1968).

[68]See *United States v Stone* 429 F 2d 138 (2d Cir 1970).

[69]See *Schwimmer v United States* 232 F 2d 855, 862–63 (8th Cir 1956), cert denied 352 US 833, 77 S Ct 48.

[70]Ohio Rev Code Ann § 2939.21 (page 1975).

[71]Ga Code Ann §§ 59–306; 309, 310 (1965).

[72]Ark Stat Ann § 43–907 (1977); Okl Stat Ann Tit 22, § 338 (West 1969); Utah Code Ann § 77–194 (1978 Repl Vol).

[73]La Crim Proc Code Ann art 444 (West 1967).

to proposals or recommendations for future action;[74] (3) limiting reference to public officials to cases where the official's conduct was intimately connected with the general condition investigated;[75] or (4) permitting only such reports as emanate from legitimate inquiry into criminal conduct or corrupt activity.[76]

Such limits are warranted, since the public will view reports as authoritative even though the censured official — not having been indicted — will not have had an opportunity to vindicate himself. Had an indictment been returned, the official would have been accorded a trial and a forum in which to clear his name. It is important to note in this regard that a grand jury which exceeds its statutory authority may not be privileged in a subsequent libel action.[77]

As a rule, a grand jury may not use a report as an alternative to an indictment, and any actual charges of criminal activity will be expunged from the report.[78] Although reports may be issued in conjunction with the return of indictments, they will often be expunged if a court feels the report will prove prejudicial to the trial. For example, the Ohio grand jury that investigated the events on the Kent State University campus in May 1970 indicted twenty-five persons for forty-three offenses. The grand jury also returned a report in which it recounted its interpretation of what occurred and made the finding that 'beyond doubt' the charged offenses had been committed. The federal district court, in *Hammond v Brown*,[79] ordered the report expunged on the grounds that the grand jury had exceeded its authority and that the report's continued existence in the court files would impair the defendant's right to fair trials.

It seems, therefore, that grand juries possess wide powers which would in South Africa be performed by the attorney-general, his staff and public prosecutors, the police and various other official bodies. It is my submission that despite all other considerations *pro* or *contra* the grand jury, this constitution's success in South Africa will depend mainly and perhaps exclusively on its composition in the light of the multi-cultural face of South Africa.

The powers of grand juries

The grand jury possesses several means of investigating crime, a fact which gives it a unique position in the criminal justice system and are of great help

[74]NY Crim Proc Law § 190.85 (McKinney (1971); Utah Code Ann § 77-19-12 (1978 Repl Vol).

[75]NJ Ct R 3-9.

[76]Cal Penal Code §§ 917, 923 (West 1970). See also *Monroe v Garrett* 17 Cal App 3d 280, 94 Cal Rptr 531 (1971).

[77]*Bennett v Stockwell* 197 Mich 50, 163 NW 482 (1917). See also *Ryon v Shaw* 77 So 2d 455 (Fla 1955).

[78]*In re Messano* 16 NJ 142, 106 A 2d 537 (1954); *State v Bramlett* 166 SC 323, 164 SE 873 (1932); *Ex parte Faulkner* 221 Ark 37, 251 SW 2d 822 (1952).

[79]323 F Supp 326 (ND Ohio) aff'd 450 F 2d 480 (6th Cir 1971).

to the prosecution.

Compelling witness attendance

In most federal and state jurisdictions, the prosecutor cannot compel the attendance of witnesses during the course of his own independent investigation. Once a grand jury has been convened, however, he acquires this power in order to make his presentation to the grand jury.[80] In addition, under the supervision of the court, the grand jury itself may summon or direct the prosecution to summon witnesses.[81] No showing of probable cause is required to subpoena a witness before the grand jury.[82]

A witness may be held in criminal or civil contempt for failing to obey a grand jury subpoena or for being unresponsive to questions asked him before the grand jury.[83]

Subpoenas duces tecum

Grand juries also have the power to issue subpoenas *duces tecum*. These subpoenas may be modified or quashed if they are overly broad or unreasonable. In *United States v Gurule*[84] the court identified three criteria for a valid grand jury subpoena *duces tecum*:

- The subpoena may command only the production of things relevant to the investigation;
- specification of things to be produced must be made with reasonable particularity; and
- production of records covering only a reasonable period of time may be required.[85]

Immunity grants

Another major power of the grand jury is the ability to have the appropriate authority grant a witness immunity from any subsequent prosecution based on the witness's testimony before the grand jury. Immunity is granted by the prosecutor or the court, depending on the jurisdiction. In the federal system, the immunity order is issued by the district court at the request of the prosecution.[86] Since in theory immunised testimony cannot be used against him, the witness may no longer invoke his Fifth Amendment privilege against self-

[80]Cal Penal Code § 939.2 (West 1970).

[81]*Ibid.*

[82]*Fraser v United States* 452 F 2d 616, 620–21 (7th Cir 1971).

[83]*Sbillitani v United States* 384 US 364, 86 S.Ct. 1531 (1966); *Piemonte v United States* 367 US 556, 81 S Ct 1720 (1961); 28 USCA § 1826.

[84]437 F 2d 239 (10th Cir 1970), cert denied 403 US 904, 91 S Ct 2202 (1971).

[85]437 F 2d 239, 241. Reform proponents of the grand jury note that subpoenas are, in effect, issued by the prosecutor in the name of the grand jury without the knowledge or consent of the grand jurors. See ME Hixson 'Bringing down the curtain on the absurd drama of entrances and exits-witness representation in the grand jury room' 1978 *The American Criminal Law Review* 307 308.

[86]18 USCA §§ 6000–6005.

incrimination in response to questions within the scope of the immunity.[87]

Immunity is of two types. 'Transactional' immunity absolutely bars the witness's future prosecution as to any transaction to which he has testified. 'Use and derivative use' immunity merely bars the use or derivative use of his own testimony in a prosecution against him.[88] If independent evidence of his crime is found, he may still be prosecuted. The Supreme Court upheld the constitutionality of use immunity in *Kastigar v United States*.[89]

The role of the court

The principal function of the court *vis-à-vis* the grand jury is to enforce the grand jury's subpoena, immunity, and contempt powers. The judge who calls the grand jury will usually charge its members on the nature and tradition of grand jury investigation, and may instruct them on points of law; however, he is not present during their sessions.[90]

Courts do not take an active role regarding the charging function of the grand jury. Generally, evidence will not be reviewed, and when it is, courts will allow an indictment to stand on the slightest *quantum* of legal evidence.[91] Courts will, however, take a more active role as to reports rendered by investigatory and special grand juries, expunging those portions of the report which exceed the grand jury's authority.

Secrecy of grand jury proceedings[92]

One of the major distinguishing features of the grand jury is that its sessions are conducted in secret. Grand jury secrecy appears to have arisen from the need to protect grand jurors from government intimidation and reprisal.[93] The modern justifications were articulated by the Supreme Court in *Pittsburg Plate Glass Co v United States*.[94]

- To prevent the accused from escaping before he is indicted and arrested or from tampering with the witnesses against him.
- To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted.
- To encourage the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings.[95]

In current practice, grand jury secrecy works to the advantage of the prosecutor. While the grand jury proceeding can serve as a thorough

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[87]Whitebread *Criminal Procedure* 382.

[88]See *In re Kilgo* 484 F 2d 1215, 1220 (4th Cir 1973).

[89]406 US 441, 92 S Ct 1653 (1972).

[90]Fed R Crim P 6(d); Cal Penal Code § 934 (West 1970); Va Code Ann § 19.2-199 (1975).

[91]See *State v Goldberg* 261 NC 181, 134 SE 2d 334 (1964) cert denied.

[92]See also, note 52 *supra* and Whitebread *Criminal Procedure* 383-4.

[93]Calkins *Grand Jury Secrecy*, 63 Mich L Rev 455, 456 (1965).

[94]350 US 395, 79 S Ct 1237 (1959).

[95]360 US 395, 405, 79 S Ct 1237, 1244.

discovery device for the prosecutor, the secrecy surrounding may deprive the defendant of a similar advantage since neither the defendant nor his counsel has an absolute right to be present during the grand jury session. In addition, in many jurisdictions secrecy is invoked to deny the defendant a transcript of the proceedings.[96]

Recognising this fact, some states have taken steps toward liberalising pretrial disclosure of grand jury testimony.[97]

Rights and rules applicable during the grand jury process

Aside from its secrecy, the grand jury session differs from the regular jury trial process in terms of the rights accorded the defendant and other witnesses. Under various rationales, the Supreme Court has held that an individual's privilege against self-incrimination, right to counsel, right to appear and confront witnesses, and his prerogative to exclude hearsay can all be circumscribed in varying degrees in the context of a grand jury proceeding.[98]

The prevailing rule is that a grand jury witness may not be accompanied by counsel during his interrogation by the grand jury. It applies whether he is merely an ordinary witness or has become the target of the investigation.[99] The reasons for this rule are as follows: (1) the grand jury is an investigation rather than a prosecution; (2) the counsel would disrupt the *ex parte* nature of the proceeding and cause delays; (3) the presence of counsel would breach the secrecy of the proceeding; and (4) the witness whose rights are abused has sufficient opportunity to exonerate himself at trial.[100]

Grand jury composition

The United States Supreme Court has repeated several times that the grand jury must be 'a body truly representative of the community'.[101] The romantic image of the grand jury is that of a body of citizens who gather together to investigate the crimes of the community. In fact, grand jurors all too often follow the prosecutor's lead completely and return indictments whenever the district attorney requests them to do so.[102] The grand jury has lately been

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[96]See *eg* Va Code Ann § 19.-2.212 (1975).

[97]See, in general, Whitebread *Criminal Procedure* 383–4.

[98]*Ibid* 384–89.

[99]*In re Groban*, 352 US 330, 333, 77 S Ct 510, 513 (1957).

[100]See Whitebread *Criminal Procedure* 388; and see in general Steele 'Right to counsel at the grand jury stage of criminal proceedings' 1971 *Mo L Rev* 193, 203; ME Hixson *ibid* note 86 at 315 *et seq*; Earl J Silbert 'Defense counsel in the grand jury — the answer to the white collar criminal's prayers' 1978 *The American Criminal Law Review* 293. In 1978, however, ten states had statutes or case law permitting counsel in the grand jury room under certain circumstances, *eg* to advise their clients of their rights: Mary Emma Hixson 'Bringing down the curtain on the absurd drama of entrances and exits — witness representation in the grand jury room' 1978 *The American Criminal Law Rev* 307 318.

[101]*Carter v Jury Commission* 396 US 320, 330 (1970); *Smith v Texas* 311 US 128, 130 (1940).

[102]See *eg* Morse 'A survey of the grand jury system' (pts 1–3), 1931 *Ore L Rev* 101, 217, 295 (1931).

criticised as no longer being an independent body, but simply a rubber stamp of the prosecution.[103]

The Supreme Court has also expressed some doubt concerning the independence of the grand jury:

> The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor.[104]

Grand jurors meet behind closed doors, are carefully guided by the prosecutor, and have almost unlimited power to demand evidence. State grand juries also have almost unlimited power to obtain information, to harass witnesses, and to indict, and they have sometimes abused this power. The potential for abuse is therefore great, and, according to Van Dyke, during the Nixon Administration a graphic demonstration of abuse was provided.[105]

Van Dyke submits that the only way to guarantee that grand jury abuses do not continue to occur is to ensure that membership on grand juries accurately reflects the composition of the population at large.[106] He is of the opinion that grand juries composed only of elite and influential citizens are particularly vulnerable to governmental abuse and that it is unlikely that such juries may be safely trusted to present the interests of less powerful groups in society.[107]

Van Dyke states that when the grand jury first became a body separate and distinct from the trial jury, those selected to serve as grand jurors were wealthier and of a higher social class than their trial jury counterparts because their jurisdiction was broader and their potential power was greater and that this tradition remains intact.[108]

Various justifications are given for this practice. Some commentators and judges have argued that because many grand juries perform both a watch-dog function (supervising governmental agencies) and an investigative function

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[103]*United States v Provenzano* 440 F Supp 561, 564 (SDNY 1977); 8 *Moore's Federal Practice* § 6.02(1), 6–22 (rev 2 ed 1985).

[104]*United States v Dionisio* 410 US 1, 17 (1973). See also, Peter F Vaira 'The role of the prosecutor inside the grand jury room: where is the foul line? 1984 *The Journal of Criminal Law and Criminology* 1129.

[105]Van Dyke 'The grand jury: representative or elite?' (1976) 37 *The Hastings LJ* 41–4 4. Secret inquisitions are dangerous things justly feared by free men everywhere. They are the breeding place for arbitrary misuse of official power: Michael E Deutsch 'The improper use of the federal grand jury: an instrument for the internment of political activists' 1984 *The Journal of Criminal Law and Criminology* 1984 1159. See, also, 1159 note 2 where it is stated that the grand jury has been an instrument of political internment against the Puerto Rican and Black liberation movements, whose opposition to the US government has an anti-colonial content similar to the liberation movements in Ireland and South Africa.

[106]A statement well known to present day politics in South Africa. See also Mark W Smith *'Ramseur v Beyer*: The third circuit upholds race-based treatment of prospective grand jurors' 1993 *Georgia Law Rev* Vol 27 1993 621.

[107]Van Dyke *op cit* 44.

[108]*Id.*

(probing into abuses of power) the grand jurors must be sophisticated and well educated; otherwise they could be fooled by the officials they are supposed to investigate.[109]

Another common justification given for the predominance of affluent and retired professionals in grand juries is that the time required of grand jurors is so great that only persons who are to some extent independently wealthy can perform the required task adequately.[110]

According to Van Dyke neither of these justifications are persuasive because both problems could be easily solved by modest increases in the expenditures for grand juries. He suggests that the pay of grand jurors should be raised and then makes the proposal that any problems created by grand jurors who have trouble understanding the economic intricacies of local government can be solved by permitting each grand jury to hire its own attorney and investigator to assist the grand jurors in conducting its investigations.[111]

In an interesting study Van Dyke found that in selecting grand juries the young, the poor and the non-whites are underrepresented because the selection is based on the voter registration list, which underrepresents these groups; because these lists are stored for four years at a time, thus discriminating against the most mobile of the population — ie the young, the poor and the non-white. Van Dyke submits that certain judges showed a readiness to excuse persons who differed slightly from the white, middle-class, middle-aged ideal if they presented even the slightest basis for being excused.[112]

In San Francisco a United States District Court Judge ruled that 'persistent underrepresentation' of non-whites and women was 'sufficiently substantial to establish a *prima facie* case of unconstitutional exclusion'.[113]

Van Dyke concludes by stating that grand juries have been given enormous power in the American legal system: the power to demand information from anybody,[114] the power to investigate anything, the power to indict any American. He states that this awesome power has been given to a body of citizens rather than to a panel of experts because they distrust bureaucracies and feel that persons in power tend to abuse that power. He feels that they are better protected by an anonymous group of citizens who cannot use their power to pursue any personal ambitions and who will drift back into society after their turn is over.

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[109]See *eg* Petersen 'The California grand jury system: a review and suggestions for reform' 1974 *Pac LJ* 1. See also *People v Hoiland* 22 Cal App 3d 530, 99 Cal Rptr 523, 529 (1971).

[110]See Van Dyke, *op cit*, 44–5.

[111]*Ibid* 45.

[112]Van Dyke *op cit* 45–62. Many federal grand juries do not represent the community, but instead represent only the most established and powerful sectors of society — *Ibid* 62.

[113]*Quadra v Superior Court* 403 F Supp 486 (ND Cal 1975). An earlier opinion in this case appears at 378 F Supp 605 (ND Cal 1974).

[114]Even the President of the United States: see *United States v Nixon* 418 US 683 (1974). See also *Branzburg v Hayes* 408 US 665 (1973).

Van Dyke is of the opinion that if the grand jury is once again to act as a bulwark against governmental tyranny, random selection systems to protect against all official manipulation of grand jury composition must be adopted and the responsibility of ensuring the true representativeness of the grand jury should be taken more seriously.[115]

CONCLUSION

Critics frequently blame the grand jury's failure on the passive, dependent role that the grand jury assumes when investigating criminal activity and pre-screening guilt.[116] Prosecutors direct the investigation. They determine who is subpoenaed, who are the targets and witnesses and what are the relevant charges. Moreover, they select, present and summarise the evidence and interpret the applicable laws. Some point to the fact that the grand jury is unable to conduct independent investigations inside the jury room and to sift through complex criminal statutes without relying on the prosecutor. Defence attorneys repeatedly complain of the lack of grand jury independence.[117]

The more cynical argue that the grand jury was never 'independent', shielding persons who shared the same political stances against governments who were unpopular to the grand jury and general populace.[118]

However, the grand jury remains one of the most effective methods in a criminal investigation for compelling the appearance of witnesses and the production of documents. Vairais of the opinion that without the investigatory power of the grand jury, successful investigations of official corruption, large scale financial fraud, or organised crime would be dramatically reduced.[119]

The importance of the investigative role of the grand jury, however, must not be permitted to overshadow its role as an independent accusatory body. A balance must be maintained between the two roles. The key to the balance lies with the integrity and the professionalism of the prosecutor.[120]

The grand jury remains an important institution in the democratic values of the American people. Special Prosecutor Leon Jaworski, in his July 1974 brief before the Supreme Court in *United States v Nixon*,[121] demanding President Nixon's tapes and defending the action of the grand jury in naming Nixon a co-conspirator, described the grand jury as 'this body of citizens, randomly

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[115]Van Dyke *op cit* 62. These arguments sound very similar to those used in defending the jury system.

[116]Note 'The grand jury as an investigatory body' 74 *Harv L Rev* 590 at 592, 596.

[117]See, eg, E Williams One Man's Freedom 168 (1964) (external pressures and mass-market prejudice prevent objective grand jury decision-making), quoted by Ron S Chun 'The Right to Grand Jury Indictment' 1989 *American Criminal Law Rev* 1457 1474.

[118]Ron S Chun *op cit* 1474.

[119]Peter F Vaira 'The role of the prosecutor in the grand jury room: where is the foul line? 1984 *The Journal of Criminal Law and Criminology* 1129 1130.

[120]*Ibid* 1130. Prosecutors have an ethical obligation to preserve the status of the grand jury as an independent legal body: *United States v Hogan* 712 F 2d 757, 759 (2d Cir 1983).

[121]418 U.S. 683 (1974).

selected, beholden neither to court nor to prosecutor, *trusted historically* to protect the individual against unwarranted government charges, but sworn to ferret out criminality by the exalted and powerful as well as by the humble and weak ...'.[122]

A place for the grand jury in the South African system?

'Trusted historically' in the quotation above is very important regarding the grand jury in the United States. This institution has for many decades been implanted in the American democratic, judicial system. It has not escaped strenuous criticism at times, though.

In South Africa the decision to prosecute and the prosecution itself has traditionally been left to the attorney-general and his staff.[123] Although an attorney-general is appointed by the State President,[124] in terms of the Attorney-general Act he is free from ministerial interference. On the whole, the courts are reluctant to comment on the discretion exercised by an attorney-general.[125] The office of the attorney-general has always been seen as non-political and that is why (at the time of writing this article),[126] the legal profession has been critical of the proposed new position of National Attorney-general, with a seat in Cabinet.[127]

It has been shown that one of the main objections to and problems of the grand jury is its composition thereof.[128] That is exactly one of the reasons why the reintroduction of the jury system is opposed in South Africa. To form a grand jury which will be acceptable to all in a multi-racial and heterogeneous South Africa will be practically impossible. The office of the attorney-general has *historically* been *trusted*[129] in South Africa in the decision to prosecute and the prosecution itself. The investigatory and supervisory functions of the grand jury have traditionally been exercised by other organs of state, viz, eg, the police and commissions of inquiry. Although much can be learnt from the principles concerning the grand jury the introduction thereof in South Africa in order to empower the population in general in the judicial process is not advocated.

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[122]*NY Times*, July 2, 1974, at 20, col 6, quoted by Van Dyke, *ibid*, 38. The grand jury was also in the past abused by the government and its agencies to subpoena attorneys in order to obtain information about a client: see Matthew Zwerling 'Federal grand juries v attorney independence and the attorney-client privilege' (1976) 27 *The Hastings LJ* 1263.

[123]Section 5 of the Attorney-General Act 92 of 1992.

[124]Section 2(1), Act 92 of 1992.

[125]Richings 1977 *SACC* 143 144.

[126]November 1994.

[127]See, eg, the reaction of the Society of State Advocates, reported in *Beeld* of 26 November 1994.

[128]See the discussion in the text next to notes 102 *et seq supra*.

[129]*Cf* note 123 *supra*.

Epilepsy and driver's licences*

M BLACKBEARD**

Vanaf 1989 het prof Strauss as my promotor opgetree by die skryf van my proefskrif getitel *Epilepsy — Legal problems* wat in 1994 voltooi is. Nie slegs was hy 'n uitmuntende promotor wat my op alle gebiede van die reg leiding gegee het nie, maar is hy steeds vir my 'n *mentor*. Sy wêreldwye ervaring, ondervinding en kennis is vir enige student en kollega goud werd. Dit is vir my 'n besondere groot eer om onder sy uitmuntende leiding my doktorale studies te kon voltooi.

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Introduction

The inability to drive a motor vehicle is for many persons with epilepsy a stumbling-block in the way of finding or retaining employment.[1] Needless to say, in daily life the motor vehicle plays an important role. Apart from enabling a person to follow a normal occupation, it is also a source of relaxation, and a prohibition to drive a motor vehicle can have a marked effect on a person's self-image and life style. To prohibit a person with epilepsy from driving a motor vehicle, can have a serious and far-reaching effect on his or her life.

On the other hand, it is a great risk to allow some persons with epilepsy to drive a motor vehicle, as the safety of other road users must also be considered. Only a moment's lack of concentration behind the wheel can cause an accident. We thus have to do with a risk-advantage situation. The risk a person's ability to drive has for other road users has to be weighed up against the advantage the driver's licence will have for the person with epilepsy. To create a balance between the two factors, various countries, for instance the Netherlands, require a two years' seizure-free period before a driver's licence may be issued to a person with epilepsy. Other countries, such as Austria, India and Japan, will not allow persons with epilepsy to drive at all. In the USA, it depends on the laws of each state whether a person with epilepsy may

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**BProc LLB (Pret) LLD (Unisa). Senior Lecturer in Law, Department of Private Law, University of South Africa.

[1]Goudsmit, Nieboer and Reicher *Psychiatrie en recht. Hoofdstukken uit de forensische psychiatrie* (1977) 365.

be issued a driver's licence.[2]

It has been determined that persons with epilepsy who have restricted licences, for instance to drive only to work, have committed more traffic offences and their accident percentages are higher than that of 'normal' drivers. This is not always due to the epileptic seizures, but also to the effect some of the medication has on their ability to concentrate. A problem that is often encountered is that the urge of persons with epilepsy to be independent and to drive is so strong that, even if the licence is refused, some of them would drive without a licence.[3]

The circumstances under which a person with epilepsy is allowed to obtain a driver's licence are discussed with reference to the USA, England and South Africa.

The USA

In the USA, each state has its own rules governing the eligibility of persons with medical conditions, to be issued with driver's licences. For persons with epilepsy the most common requirements are that they should have been seizure-free for a specific period, and an evaluation by a doctor, about their ability to drive safely, is required. Some states also require that the person with epilepsy must periodically submit medical reports for a specific period or for as long as he is licensed.[4]

The District of Colombia and 22 states require a one-year seizure-free period. In Alabama, for instance, a person with epilepsy may only obtain a driver's licence if a medical report is submitted stating that he has been seizure-free for twelve months. The Medical Advisory Board of The Department of Public Safety will then review the medical information. The person with epilepsy must, for ten years, from the date of the last seizure, submit annual medical reports. The physician who submits these reports, records, examinations, etc, to the Director of Public Safety has civil and criminal immunity for providing the reports, records, examinations, etc. However, no mention is made in the legislation of the physician's immunity from liability for damages arising out of an accident caused by a seizure.[5]

In seven states a licence may be issued in a shorter period than one year as an exception to the rule. Requirements for this include inter alia a documental report of seizures experienced at night-time only, a prolonged period of the aura, etc. In Maine, for instance, there is a requirement of a one-year-seizure-free period before the date of the application which may be reduced to six

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[2]Goudsmit, Nieboer and Reicher *op cit* 365.

[3]De Leede *Inleiding sociaal verzekeringsrecht* (1981) 182; Goudsmit, Nieboer and Reicher *op cit* 365.

[4]De Leede *op cit* 181, 197–201; Beresford 'Legal implications of epilepsy' 1988 *Epilepsia* 155.

[5]Alabama Code, tit 32, par 6–45, as referred to in Epilepsy Foundation of America *The legal rights of persons with epilepsy* (1985) 88, hereinafter referred to as EFA.

months on the recommendation of a neurologist. The medical information submitted is reviewed by the personnel of the Motor Vehicle Division, and difficult cases are referred to the Medical Advisory Committee.[6]

Thirteen states require a seizure-free period of less than one year, which can vary from three to six months. In Connecticut, for instance, the Motor Vehicle Department requires that a person with epilepsy must be seizure-free for at least three months to be eligible for a driver's licence. Persons who have been seizure-free for less than three months may also be considered on an individual basis, depending on the doctor's report. If the person has been seizure-free for less than three years, a so-called SR-22 (Financial Responsibility Certificate) should be filed, and the person will be placed on medical probation. Periodic medical reports should then be filed with the Department of Motor Vehicles, usually every six months. The physician submitting these reports may not be held liable for damages arising from an accident caused by a seizure. Civil claims may also not be instituted against the physician.[7]

Twelve states, Puerto Rico and the Virgin Islands, do not require any seizure-free period. These states usually require a doctor to state whether the person has the ability to drive carefully. Delaware, for instance, requires merely that a person with epilepsy must obtain certificates from two physicians, stating that their condition is under sufficient control to permit the safe operation of a motor vehicle. Such a certificate must be submitted annually. The Motor Vehicle's Division will review the medical information. A physician providing such a certificate is not exempted from civil liability for damage arising from an accident caused by a seizure.[8]

Three states require seizure-free periods of longer than one year, but they will all issue licences after a shorter period. In Pennsylvania, for instance, a person with epilepsy is not allowed to drive unless he has been seizure-free with or without medication for one year. An applicant between 16 and 18 years of age, who is applying for his first licence, must have been seizure-free with or without medication, for two years. In both instances the requirement of a seizure-free period may be waived upon the recommendation of the person's neurologist. Requirements are, however, that a strictly nocturnal pattern of seizures has been established over the previous three years, or that such a pattern has been established over the previous five years or that the person has a specific prolonged aura, accompanied by sufficient warning.[9] The medical information submitted is reviewed by the staff of the Department of Transportation and a medical consultant. The doctor who provides the medical information is exempted from civil or criminal liability for such

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[6] *Maine Rev Stat Ann*, tit 29 par 533, as referred to in EFA 210–211.

[7] *Connecticut Gen Stat* par 14–46(f) as referred to in EFA 125; Verbogt *Hoofdstukken over gezondheidsrecht* (1990) 203; Goudsmit, Nieboer and Reicher *op cit* 365; De Leede *op cit* 181.

[8] *Delaware Code Ann* tit 21 sub-para 2707 (9–7) 2717 as referred to in EFA 131; Verbogt *op cit* 203.

[9] *Pennsylvania Cons Stat* par 83 4 as referred to in EFA 344.

disclosure.[10]

Twenty-seven states will issue restricted licences for persons who do not comply with the main requirement for licensing in the state. The restrictions may include, inter alia, that the person may only drive during the day, to and from work or within a certain distance from his residence, or only in cases of emergency. If the ordinary licence requirements of the state are met, the restrictions are lifted. In Utah, for instance, a person with epilepsy must be seizure-free for at least three months prior to the date of application, whereafter a restricted licence may be issued. The restrictions may include that the person may only drive in certain areas, or certain times of the day. These restrictions are relaxed as the seizure-free period lengthens. After six months a person may drive a motor vehicle without any restrictions. Periodic submission of medical reports are required. Once the person has been seizure-free for a period of five years, and off medication for three years, he may obtain any type of licence.[11]

According to the policy of the United States Department of Transportation no person with an established medical history or clinical diagnosis of epilepsy, or with any other condition that possibly can cause loss of consciousness or any loss of ability to control the vehicle, may drive a commercial vehicle.[12] California and Hawaii apply the federal standards for licensing persons with epilepsy to drive trucks which disqualifies anyone with a history of seizures.[13]

Most states do not have any legislation compelling physicians to report to the Department of Motor Vehicles should a person with epilepsy consult them. A few states, however, do require this. In New Jersey, for instance, a physician must, within 24 hours of determining that a person 16 years of age or older has epilepsy, report this fact to the Department of Motor Vehicles. Failure to do so is punishable by a fine of 50 dollars.[14] In California physicians must immediately report to the local health officer individuals diagnosed as having 'a disorder characterised by lapses of consciousness'. It includes a person of 14 years of age or older who experienced a lapse of consciousness or an episode of marked confusion during the preceding three years on one or more occasions caused by any condition which may bring about recurrent lapses. The local health officer must report these individuals to the State Department of Health, which in turn reports to the Department of Motor Vehicles[15] In *Lopez v Hudgeons*[16] a physician who did not initially diagnose epilepsy, but

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[10]*Pennsylvania Vehicle Code* par 1518(A) as referred to in EFA 344.

[11]'Functional ability in driving: guidelines for physicians' published by the Utah Department of Public Safety, as referred to in EFA 388.

[12]Goudsmit, Nieboer and Reicher *op cit* 367.

[13]As respectively referred to in EFA 110 and 157.

[14]*New Jersey Rev Stat* par 34:3–10 4 as referred to in EFA 287.

[15]*California Health and Safety Code* par 410 as referred to in EFA 113.

[16]171 Cal Rptr 527 (1981) as referred to in EFA 113.

later treated the person for epilepsy, was found not liable for not reporting the epilepsy.

The requirement that physicians should report persons with epilepsy to the licensing authorities is opposed by certain medical groups and voluntary health organisations, partly on the basis of confidentiality of the physician-patient relationship. The physician should, however, warn patients with epilepsy not to drive if seizures are uncontrolled. Should it be necessary for the physician to inform the authorities that a patient with epilepsy is an unsafe driver, protection is provided to him in some states. Failure to warn or notify, may be the cause for legal action against the physician. Lastly, some states have prohibitions against driving if the medication a person is using is changed or discontinued.[17]

Spudis, Penry and Gibson[18] proposed a system of classification for the use in judging limitations of drivers with epilepsy, which includes a variable time interval from the last attack to the return to driving, based upon the predicted likelihood of recurrence according to their classification scheme. This may be as short as four months for isolated seizures associated with a transient disease.

In general, it appears that many states are moving away from a requirement of a fixed period of freedom from seizures prior to granting a driver's licence, to more individualised evaluations permitting shorter periods before licensing. According to Schmidt and Wilder[19] this will place an increased responsibility on physicians to evaluate whether the person with epilepsy will be able to drive safely. Further epidemiological studies are necessary to evaluate relative risks as more drivers are licensed through liberalised regulation and as drug management improves.

England

Until 1970 it was impossible for a person with epilepsy to obtain a driver's licence. New regulations, however, changed the position, and from 1970 to 1982 a person with epilepsy could obtain a licence if (a) he had been seizure-free for a period of three years, provided he would not be a potential danger to the public, should he drive, and (b) if for the past three years, he only had seizures during his sleep. The licence had to be renewed each year.[20]

Not only are attacks of unconsciousness due to epilepsy a possibility while driving, but so are drowsiness and sleep, which may be induced by anticonvulsant medication. The rate of accidents amongst licensed drivers with

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[17]Schmidt and Wilder 'Epilepsy and the law: a commentary from the US perspective' in Pedley and Meldrum (eds) *Recent advances in epilepsy* (1988) 254.

[18]'Driving impairment caused by episodic brain dysfunction: restrictions for epilepsy and syncopy' 1986 *Archives for Neurology* 558–564, hereinafter referred to as Spudis *et al.*

[19]*Op cit* 255.

[20]Vehicle and Driving Licences Act; Laidlaw and Laidlaw *Epilepsy explained* (1980) 75.

epilepsy is 1,3 to 2,0 times higher than their age-matched controls without epilepsy.[21] Due to a voluntary reporting system, it was possible to investigate 1 300 road accidents in Great Britain where damage was caused to property and/or persons due to loss of consciousness behind the wheel. Of these accidents, 38 per cent were due to grand mal seizures, and 12 per cent occurred during their first seizure. Of the persons who had an accident due to epilepsy, 70 per cent had not disclosed their epileptic conditions with regard to obtaining their drivers' licences.[22] The law relating to drivers' licences was amended with effect from the 21st of April 1982 and defined the conditions under which a patient with controlled epilepsy may and may not drive. Firstly, any seizure first experienced after the age of five years prevents a person from obtaining a heavy goods vehicle (HGV) licence, or a public service vehicle licence. Seizures first experienced after the age of five are also an absolute bar for becoming a commercial airline pilot. Secondly, any person who has an epileptic seizure may not drive until they have had two seizure-free years, either with or without anticonvulsant medication. Thirdly, if a person's seizures only occur during his sleep, he may drive, provided that he has had no daytime seizures within the last three years, either with or without anticonvulsant medication. Fourthly, should a person with epilepsy with a driver's licence have his medication changed or withdrawn, he should inform the Driving Licensing Authority. A period of six to twelve months of no driving should follow such a change. Lastly, there is a statutory requirement that the driver's licensing authorities must be informed should patients have any medical condition which might impair their capacity to drive.[23]

Section 92(1) of the Road Traffic Act (of 1988) now provides that an application for the granting of a licence must include a declaration by the applicant, in such form as the Secretary of State may require, stating whether he is suffering or has at any time (or, if a period is prescribed for the purpose of this subsection, has during that period) suffered from any relevant disability or any prospective disability. In terms of s 92(2), 'disability' includes disease, 'relevant disability' in relation to any person means any prescribed disability and any other disability likely to cause the driving of a vehicle by him in pursuance of a licence to be a source of danger to the public. 'Prospective disability' in relation to any person, means any other disability which (at the time of application for the granting of a licence or, as the case may be, the material time for the purpose of the provision in which the expression is used) is not of such a kind that it is a relevant disability, but by virtue of the intermittent or progressive nature of the disability or otherwise, may become a relevant disability in the course of time. A person with epilepsy will have to include a declaration in his application for a driver's licence that he is suffering or has suffered from epilepsy.

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[21]Fenwick 'Epilepsy and the law' in Pedley and Meldrum (eds) 249; Fritz 'Recommendations regarding driving after a single seizure' 1990 *SAMJ* 493.

[22]Taylor 'Epilepsy and driving' in Rose (ed) 533; Fenwick *op cit* 249.

[23]Fritz *op cit* 493; Fenwick *op cit* 249–250; s 92 of the Road Traffic Act.

If it appears from the applicant's declaration, or if on inquiry the Secretary of State is satisfied from other information, that the applicant is suffering from a relevant disability, the Secretary of State must, subject to the following provisions of this section, refuse to grant the licence (S 92(3)). Should the epilepsy of a person cause him to be a danger to the public if he should drive a motor vehicle, he will not be granted a driver's licence.

In terms of s 92(5) the Secretary of State must serve a notice in writing on that person and must include in the notice a description of the disability, where, as a result of a test of competency to drive, he is satisfied that the person who took the test, for instance a person with epilepsy, is suffering from a disability such that there is likely to be a danger to the public if he drives any vehicle, or if he drives a vehicle other than a vehicle of a particular construction or design.

A licence may be revoked if the Secretary of State is at any time satisfied on inquiry that a licence holder is suffering from a relevant disability or a prospective disability (S 93). The licence holder must forthwith notify the Secretary of State in writing of the nature and extent of his disability, if at any time during the period for which his licence remains in force, he becomes aware that he is suffering from a relevant or prospective disability which he has not previously disclosed to the Secretary of State, or that a relevant or prospective disability from which he has at any time suffered (and which has been previously so disclosed) has become more acute since the licence was granted. He is not required to notify the Secretary of State if the disability is one from which he has not previously suffered, and he has reasonable grounds for believing that the duration of the disability will not extend beyond the period of three months beginning with the date on which he first becomes aware that he suffers from it (S 94). A person with epilepsy will have to notify the Secretary of State should he develop epilepsy after qualifying for a driver's licence, or should his epilepsy deteriorate causing him to be a danger to other road users.

South Africa

In terms of s 18(1)(f)(i) of the Road Traffic Act (Act 29 of 1989) a person will be disqualified from obtaining or holding a learner's or a driver's licence, if he suffers inter alia from uncontrolled epilepsy or any form of mental illness to such an extent that it is necessary that he be detained, supervised, controlled and treated as a patient in terms of the Mental Health Act. A person with controlled epilepsy may accordingly obtain a licence.[24] But what is the difference between controlled epilepsy and uncontrolled epilepsy? The Act does not specify what is understood under uncontrolled epilepsy. One could, therefore, argue that a person with epilepsy is controlling his epilepsy if he previously had five seizures in one day, but now only has one seizure a day — he is now controlling it to remain only one seizure a day! It is submitted that this could never have been the intention of the legislature, but that 'con-

[24]Linde *'n Kliniese en elektroenkefalografiese vergelyking tussen Blank en Swart epileptici* (1982) PhD thesis UOFS 56.

trolled' epilepsy should be defined so as to include persons who have been seizure-free for a period of two years and longer, that no danger should then still exist to the public, and that in persons with nocturnal seizures only, the pattern must be established for three years to be considered as 'controlled' epilepsy, before a driver's licence may be issued.

Section 19(1) provides that no person may wilfully omit to disclose any disqualification to which he is subject to, in terms of s 18, for instance uncontrolled epilepsy, when applying for a learner's or driver's licence.

A provincial administrator may cancel or suspend a driver's licence if he is of the opinion that the holder is disqualified by virtue of any of the conditions described. He may request the holder to submit to an examination by a medical practitioner to determine his physical and mental fitness to drive a motor vehicle.[25] The courts are empowered to order endorsement, suspension or cancellation of a driver's licence when a person is convicted of an offence relating to the driving of a motor vehicle or failure to stop after or report an accident. This includes instances where the offence was due to the person's epilepsy.[26]

Bird[27] suggested that the legal prohibition to drive a motor vehicle should be couched in general terms as referring to any disease or disability which would or might interfere with a person's driving ability, without any particular disease or disorder being specified. It is submitted that this recommendation is too vague because any person with epilepsy, even controlled epilepsy, may then be unable to drive, as epilepsy is a disease which might recur at any stage and interfere with a person's driving ability. It is indeed necessary to refer expressly to epilepsy in the Act and to define 'controlled' epilepsy, as persons with uncontrolled epilepsy could at any stage have a seizure whilst driving and therefore endanger the lives of other people on the road.

According to Fritz (494) any doctor should instruct a patient who has experienced a first seizure not to drive for a period of six months. If an electro-encephalogram (EEG) or computed tomography (CT) is abnormal, he submits that a period of twelve months should elapse without driving.

Conclusion

In the USA, each state has its own regulations governing the eligibility of persons with epilepsy to obtain a driver's licence. Usually a person has to be seizure-free for a certain period of time which differs from less to more than a year. Some states even have no requirement of a seizure-free period. In other states a doctor's evaluation of the person's ability to safely drive a vehicle must accompany the application form, and should the application be successful, medical reports must periodically be handed in for a specified period or for as long as the person is licensed. Restricted licences may also be issued. A person with a history of epilepsy may not drive a commercial vehicle

[25] S 30; Strauss *Doctor, patient and the law* (1991) 144.
[26] S 55; Strauss *op cit* 144.
[27] 'Epilepsy and the law in South Africa' 1970 *SAMJ* 1093.

at all.

In England a person with epilepsy must be seizure-free for two years before he will be considered for licensing. Furthermore, he should not be a danger to the public if he drives, and a licence will also be considered if he has only had night seizures for the past three years. Persons who had a seizure for the first time after the age of three are not allowed to drive a public service vehicle or a heavy duty vehicle.

In South Africa a person cannot obtain a learner's or driver's licence if he suffers from uncontrolled epilepsy or any form of mental illness that causes him to be detained, supervised, controlled and treated as a patient in terms of the Mental Health Act. A person with epilepsy may not omit to disclose his epilepsy when applying for a licence.

South African legislation does not prescribe a specific seizure-free period as is the case in some states of the USA, England and the Netherlands. Although it seems as though this is a far more equitable way of determining whether a person with epilepsy in his specific circumstances qualifies for a driver's licence or not, it is unfair towards other road users whose lives may be endangered by the sudden seizure a person with epilepsy may experience. It is therefore submitted that a two-year seizure-free period should be recognised statutorily, for the protection of the community. The *Road Traffic Act* furthermore refers specifically to uncontrolled epilepsy. A person with controlled epilepsy may thus obtain a licence. It is, however, uncertain exactly what is understood under uncontrolled and controlled epilepsy. It could mean that a person with epilepsy who previously had five seizures on one day, but now sufficiently controls his epilepsy through medication and reduced it to only one seizure a day would qualify for a driver's licence, as his epilepsy may be said to be 'controlled'! However, this could not have been the intention of the legislature. It is submitted that 'controlled epilepsy' should be statutorily defined as to include a seizure-free period of two years, that the person with epilepsy should not be a danger to the public, and that with persons who experience only nocturnal seizures, a three-year period should be prescribed before they could qualify for a driver's licence. A person that experienced a seizure for the first time, should as a general rule be instructed by his doctor not to drive for a period of six months, and if the person's EEG or CT was abnormal, he should be instructed not to drive for a period of a year. It would be difficult to provide statutorily for this instruction, as it may be to the detriment of the doctor-patient relationship, and it would be difficult to police.

A provincial administrator may cancel or suspend a driver's licence (including that of a driver with epilepsy). The courts are empowered to order endorsement, suspension or cancellation of a driver's licence when a person is convicted of an offence relating to the driving of a motor vehicle or failure to stop after or report an accident. This includes instances where the offence was due to the person's epilepsy.[28]

[28]S 55; Strauss *op cit* 144.

On the rights of the foetus

A CARMI*

Definitions

Various definitions are used while discussing the doctors' and patients' duty of care towards the foetus during the pregnancy or even prior to conception.

Wrongful pregnancy; wrongful conception

This claim concerns a claim which is brought by the parents of a healthy but unwanted child, who was born in consequence of medical negligence (eg in performing sterilisation), for damages in respect of medical expenses involved in pregnancy, confinement and maintenance of the child.[1]

Wrongful birth

This claim concerns medical negligence, whether prior to conception[2] or after conception (*eg* a failure to appropriately advise the mother of the risk of birth defects of the potential child).[3] An action for wrongful birth is brought by the parents of an impaired child for the cost of the medical and other services required to treat their child's condition.[4]

Wrongful life

This claim for damages is brought by the disabled child. The essence of theclaim is violation of an alleged right not to be born with defects, which in certain circumstances amounts to a right not to be born at all.[5]

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*Professor of Medical Law, Haifa, Israel; President, World Association for Medical Law.

[1]LS Goldstein & MJ Zaremski *Medical and bospital negligence* (1992 Cumulative Supplement) 10:16; *Sherlock v Stillwater Clinic* 260 NW 169 (2ed 1977); *Cataford v Moreau* (3ed 1981) 114 DLR 585; *Emeb v Kensington AHA* [1948] 3 All ER 1044 (CA); SA Strauss *Doctor, patient and the law* (3ed 1991) 179, 197 (alternative definition: 175); Parents' right of claim for wrongful pregnancy has been acknowledged in many countries *eg* USA, Canada, England, Germany and Israel.

[2]*Schroeder v Perkel* 432 A 2d 834 (1981). A New Jersey appellate court ruled that a couple could sue a condom manufacturer for wrongful birth where the device was defective and caused the wife to become pregnant. (However, the husband and the wife acknowledged in this case that the twins born as a result of the defective condom were normal and healthy. One may wonder whether the court should not have defined the cause of action as wrongful conception); *JPM and BM v Schmid Laboratories Inc* 428 A 2d 515 (NJ Super Ct App Div 1981; EP Richards III, KC Rathbun *Law and the physician — a practical guide* (1993) 391; Goldstein & Zaremski *supra* n 1. Parents' right of claim for wrongful birth has been acknowledged in various countries *eg* USA, Canada, England and Israel, as well as in Germany; E Deutsch & HL Schreiber (eds) *Medical responsibility in Western Europe* (1985) 254.

[3]*Robak v United States* 658 F 2d 471 (1981).

[4]*Curlender v Bio-Science Laboratories* 165 Cal Rptr 477; A Barak *Judicial discretion* (1987) 462 463.

[5]Strauss *op cit* 197 (196: 'A more unfortunate term could hardly been invented').

The issue of wrongful life has been widely discussed in the Israeli *Zeitzoff* case.[6] A woman, before her marriage, requested genetic counselling, seeking to discover whether a certain hereditary disease known as 'Hunter' existing in her family, might affect her offspring in the future, because were this the case, she was determined not to bring (male) children into the world. The consultant doctor, as a result of negligence in performing the tests, or in the process of drawing conclusions from the tests, stated that no such risk existed. Based on this opinion the mother became pregnant and bore a son who suffered from the disease, which severely affected his physical and psychological development. A personal injury suit was brought inter alia in the name of the minor against the doctor and the institution at which she was employed.

The claim was dismissed by the District Court for two reasons: First, because 'this cause of action belongs to that type of claim which this court has neither the ability nor the power to establish, it being the function of the legislature to do so', and secondly, were the court 'to allow a cause of action against strangers only, the outcome would be that although we recognise the fact that the child was wronged, we could be freeing from responsibility those causing the wrong, that is the parents, and placing the responsibility for it upon strangers. This is an outcome against which the sense of justice rebels'. On the basis of this train of thought, the lower court decided to dismiss the minor's suit, hence the appeal in his name (Civil Appeal 540/82). Nonetheless, the learned judge declined to dismiss the claim of the parents in their own name, this forming the basis for the appeals of the doctor and the institution (civil appeal 518/82). The appeal in File 540/82 has been accepted by the Supreme Court, the appeal in File 518/82 has been dismissed, and the whole case has been returned to the lower court to be decided on the merits.[7]

Duty of care

The rule that a human being has to accept life as given to him by nature,[8] is replaced by a discussion concerning the doctor's duty of care towards the parents and the minor throughout the medical treatment. Parents are entitled to prevent the conception or birth of children suffering defects and to decide whether they want to have a child or not, and doctors owe a duty of care to parents to preserve that right.[9]

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[6]CA 518/82 *Dr Rina Zeitzoff, Beilinson Hospital and The Health Fund of the General Workers Union in Israel v Saul Katz, Shmuel Katz, Nvadia Katz and Miriam Zakai*; and CA 540/82 *Saul Katz, Shmuel Katz and Nvadia Katz v Dr Rina Zeitzoff, Beilinson Hospial and The Health Fund of the General Workers Union in Israel* 40(2) PD 85 (hereinafter *Zeitzoff* case).

[7]Y Levi 'The fetus' right to be born' 49(3) *Mikhtav Lebaver* 9; S Gluck 'The fetus' right to be born' 49(3) *Mikhtav lebaver* 10; Same 48(2) *Mikhtav lebaver* 3.

[8]D Giesen *International medical malpractice Law* (1988) 251.

[9]Giesen *op cit* at 87, 249; *Hartke v McKelway* 707 F 2d 1544 (DC Cir 1983); *James G v Caserta* 332 SE 2d 872 (W Va 1985); *Doiron v Orr* (1978) 86 DLR 3d 719; *Udale v Bloomsbury Area Health Authority* [1983] 2 All ER 521 (CA); Barak *op cit* at 112; A Grubb 'Failed sterilization: is a claim in contract or negligence a guarantee of success?' 1986 *Cambridge LJ* 197; A Grubb 'Failure of sterilization' 1985 *Cambridge LJ* 30.

In England, the doctor's duty towards a foetus is prescribed by law.[10]

One should not disregard the risk of imposing too heavy responsibility on the shoulders of the medical profession, as abortion may be improperly encouraged,[11] the risk that the family system may collapse if children are entitled to sue their parents, and the difficulty of deducting the value of pleasure which the parents derive from bringing up children from the general compensation for suffering and pain.[12]

A certain balance should be struck between conflicting interests. Sometimes the issue of abortion is not relevant.[13] Most of the parents' claims cover the costs of treatment and do not hurt or harm their children. And one should get to grips with the difficulty of evaluating damages rather than denying them.

There are more than 4000 human genetic diseases, 500 of them linked to a defect in a single gene. They include cystic fibrosis, sickle-cell anaemia, haemophilia and Tay-Sachs.[14] The imposition of a duty of care is justified in cases of negligent and incomplete genetic counselling.[15]

Negligent counselling comprises lack of full and comprehensive explanations,[16] failure to inform women over 35 of the risk of giving birth to a child afflicted with Down's Syndrome,[17] and the availability of amniocentesis tests,[18] failure to advice women of the possible adverse effects on the foetus of contracting rubella in the first trimester of pregnancy or of the correlation between the use of certain medicaments and birth defects in children.[19]

Negligent treatment comprises also failure to establish that the parents are

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[10]Congenital Disabilities (Civil Liability) Act 1976. Where a medical practitioner is treating a pregnant woman, he owes a duty of care to the unborn child. If, as a result of his negligent treatment, the child is born disabled, he may be liable to the child. If negligent treatment of either parent before conception causes a child to be born disabled the doctor may be liable to the child. Consideration should be taken with respect to two provisos. First, there is no liability in respect of an act prior to conception, if the parents were aware of and accepted the risk. Secondly, the doctor is not liable for harm to the child resulting from his treatment of the parent where such treatment accorded with the appropriate standard of care at the relevant time. RM Jackson & JL Powell *Professional negligence* (3ed 1992); JL Taylor (ed) *Medical malpractice* (1980).

[11]Levi *op cit* 9.

[12]Barak op cit 111.

[13]*Eg* negligent counselling prior to the conception.

[14]M Flight *Law, liability and ethics* (2ed 1993) 178.

[15]Giesen *op cit* 83; GJ Annas, LH Glantz & BF Katz *The rights of doctors, nurses and allied health professionals* (1981), 200.

[16]*Pratt v University of Minnesota Affiliated Hospital* 403 NW 2d 865 (Minn App 1987).

[17]Giesen *op cit* 249; *Becker v Schwartz* 413 NYS2d 895 (1978); *Berman v Allan* 404 A2d 8 (NJ 1979).

[18]Giesen op cit 249; *Gildiner v Thomas Jefferson University Hospital* 451 F Supp 692 (ED Pa 1978); *Alquijay v St Luke's Roosevelt Hospital* 483 NYS 2d 994 (1984).

[19]*Jacobs v Theimer* 519 SW2d 846 (Tex 1975); *Harbeson v Parke-Davis Inc* 656 P2d 483 (Wash 1983).

carriers of genetically-transmitted diseases,[20] or negligent sterilisation.[21] The genetic explanation must be correct[22] so that the parents' consent be valid.[23]

The imposition of responsibility on the genetic counsellors will raise various questions. For instance, a few test-tube babies were born with Down's Syndrome, and one may wonder whether the manipulation of genetic material in vitro or in vivo have caused chromosomal anomalies.[24] There may indeed be some potential for future claims once such procedures will become routine.[25]

Parents' claims

Do parents have a right to sue negligent doctors for bringing about the birth of a healthy child?

A Canadian court regarded such a claim as grotesque while dismissing it.[26] A few American courts adopted a similar attitude,[27] while others acknowledged such claims but limited the compensations to costs concerning the pregnancy and the birth only.[28]

Judges refused to adopt certain defence arguments. Thus, courts dismissed claims of defendants for mitigation of damages by having an abortion.[29] The argument of 'novus actus interveniens' was not accepted where the mother decided to refrain from abortion after the failure of a previous abortion.[30]

The grant of child-rearing costs in these cases suits the traditional tort law

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[20]*Naccash v Burger* 290 SE2d 825 (Va 1982).

[21]*Emeh v Kensington* AHA *op cit* 1044.

[22]Richards, K Rathbun *op cit* 394. A physician who does not offer genetic screening because he is opposed to abortion has a duty to refer the patient to another physician who can carry out the necessary counselling and testing.

[23]Richards & Rathbun *op cit* 397.

[24]I Kennedy 'Let the law take on the test tube' *The Times* 26 May 1984 6; 1981 *New England J Med* 1525.

[25]Giesen *op cit* 89–90.

[26]*Doiron v Orr* 719, 723; JE Bickenbach 'Damages for wrongful conception: *Doiron v Orr*' 1980 *UWOLR* 493–503; See *Cataford v Moreau* (1978) 7 *CCLT* 241 (Que SC).

[27]Supreme courts of Kansas and New York ruled that the birth of a healthy child does not reflect damage. The courts indicated the great importance which is attached by law and society to human life, and held the social and emotional aspects of raising children superior to economic difficulties: *Byrd v Wesley Med Ctr* 699 P2d 459 (Kan 1985); *O'Toole v Greenberg* 477 NE 2d 445 (NY 1985). On the other hand: *Macomber v Dillman* 8 Med Liab Rptr, 849 (Me 1986) where a doctor was found liable for negligent sterilisation which brought about the birth of a child. The doctor was obliged by the Supreme Court of Maine to cover the costs of the birth but not the expenses of upbringing of the child. A similar claim was dismissed by a court in Nevada: *Szekeres v Robinson* 715 P2d 1076 (Nev 1986).

[28]Giesen *op cit* 244. An appeal court in Pennsylvania awarded compensation to a woman who gave birth to a healthy child following a negligent treatment of her tubes by a doctor. The mother received also the expenses for bringing up her child: *Mason v Western Pennsylvania Hospital* 428 A 2d 1366 (Pn Super Ct 1981).

[29]*Emeh v Kensington AHA supra.*

[30]Giesen *op cit* 247.

principles.[31] However, a more sympathetic attitude is shown in cases of defective newborns, where mothers were compensated for suffering and pain, loss of earning, and even costs of bringing up their children.[32]

There are divergent judicial opinions concerning the question whether costs of raising healthy children should be awarded.[33] German courts award such costs[34] to mothers and even to fathers,[35] except in certain cases.[36] In New Zealand the courts acknowledge the mother's right to be compensated for pregnancy and birth, but not for raising the child.[37] Similar attitude is shown by American and Canadian courts.[38] South-African courts award compensation for raising the child,[39] while the majority of the American courts will regard the costs of child-rearing too speculative and remote.[40]

The value of life

The above mentioned issue encompasses questions of the very essence of life, and who has control over it, questions of belief and religion and the necessity and power to interfere with the acts of creation, questions of habits and outlook on life, questions of public welfare both in its wider and more narrow sense, questions of intrusion into the most intimate areas of family relationships, questions of the relationships between the generations and between parents and their children, and parents between themselves.[41]

The issue furthermore includes, *inter alia*, the question whether it is possible to compare a suffering existence with non-existence? Can it be said that an impaired life is worse than non-existence, or perhaps that life is always preferable to any alternative of non-existence? Can one complain about an act of negligence when that very same act, in addition to causing the plaintiff to be born disabled, also gives him life itself? Is the plaintiff who requests to be restored to the condition of non-existence (but also cutting off the branch on which his case is built), in such a position that if the prior condition is

[31] Giesen *op cit* 245.

[32] *Emeb v Kensington* AHA supra; Giesen *op cit* 244.

[33] Giesen *op cit* 246; AC Reichman 'Damages in tort for wrongful conception — who bears the cost of raising the child?' 1985 *Sydney LR* 568–90.

[34] Giesen *op cit* 246.

[35] Giesen *op cit* 247, 248: A physician whose negligence causes a woman to undergo pregnancy and childbirth against her will may also be liable for non-pecuniary damages on the basis of interference with life-processes and pain suffered at birth, even if the pregnancy is entirely normal.

[36] Giesen *op cit* 248.

[37] *XY v Accident Compensation* (1984) NZACR 777 (HC).

[38] *McNeal v United States* 689 F2d 1200 (4 Cir 1982); *Hartke v McKelway* 526 F Supp 97 (1) DC 1981); *Becker v Schwartz* 400 NYS 2d 119 (1977) modified, 46 NY 2d 401, 386 NE 2d 808, 413 NYS 2d 895: A physician failed to inform a woman over 35 of the increased risks in her age group of giving birth to a child afflicted with Down's Syndrome and the availability of the amniocentesis tests; *Paris v Checks* 400 NYS 2d 110 (1977); *Maggard v McKelvey* 627 SW 2d 44 (Ky Ct App 1981).

[39] Strauss *op cit* 197.

[40] Goldstein & Zaremski *op cit* 10:17.

[41] Barak *op cit* 108, while quoting Judge Zeiler.

restored and the damage disappears, the plaintiff himself will also disappear? Does man have a right not to be born? Is it possible to assess, in monetary terms, the suffering of a minor who claims that he would prefer not to have been born to life? Is it desirable to recognise the doctors' responsibility towards minors and their parents or might this just add to the number of unwanted abortions? Is it proper to recognise the minor's claim against his parents or might this harm the family establishment and one's right to decide whether or not to bear children? Are we to recognise responsibility for every disability or are we to differentiate between serious defects (for example brain damage or blindness) and 'legal' (for example, illegitimacy) or 'social' (for example, unfair discrimination) ones? And if we say that tort responsibility is to be recognised, whose function is it to create this responsibility? Is it preferable for the judicial system to establish responsibility in these situations through judicial lawmaking or is this function to be left to the legislature?[42]

'Life is dear, life is a present of God, a difficult life is preferable to no life', and other similar sentiments, create an axiom that cannot be shunned, according to which life is something known to us, which we understand, and usually take to be good. On the other hand, 'non-existence' involves a lack of life, and since life is considered to be something positive, we are not able to compare it with something unknown to us, and the only thing we are sure of is that it lacks life.[43]

An English court indicated that if difficulty in assessing damages is a bad reason for refusing the task, impossibility of assessing them is a good one:[44]

How can a court begin to evaluate non-existence? The undiscovered country from whose realm no traveller returns? No comparison is possible and therefore no damage can be established which a court could recognise. This goes to the root of the whole cause of action.

Judge D Levine added in the *Zeitzoff* case:[45]

> At first glance, someone who was privileged to see the sun rise and the blue of the sky, who has felt the intensity of the experience of life and has tasted its treasures, is in a position preferable to that of someone denied all this. In general, life itself has a certain exalted value, a certain sanctity. It is a privilege which should not be relinquished or destroyed, and he that received life

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[42]Barak *op cit* 109; Ben Porat *op cit* 89, 90.

[43]Barak *op cit* 116. Giesen op cit 250: The law is not equipped to make a comparison between life in an impaired state and non-existence. *Gleitman v Cosgrove* 227 A 2d 689 (1967) 692: 'This Court cannot weigh the value of life with impairments against the non-existence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.' *Turpin v Sortini* 643 P 2d 954 (1982) 961, 963: '... it is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born.'

[44]*McKay v Esser Area Health Authority* (1982) 2 All ER 771, 782 (CA) and at 787. (A claim for wrongful life contrary to public policy as a violation of the sanctity of human life).

[45]Judge D Levine in *Zeitzoff* case *supra* 125.

> should be happy.
>
> Judaism has adopted that view,[46] and has always elevated and exalted the great value of human life. Life is the holiest asset, and its protection overrides any other holiness. "Nothing overrides the protection of life, except idol worship and adultery and murder only".[47]

The same attitude has been adopted by the judiciary in the USA[48] and Germany.[49] However, the sanctity of the life principle does not always attain merit.[50] Some courts and legislatures have been willing to make the determination that nonexistence is preferable to life with disabilities. As evidence of this trend, living-will statutes have been enacted in many states allowing an individual to request that no extraordinary lifesaving methods be used to save that individual if recovery is beyond hope. In a more closely analogous situation, judicial decisions have allowed parents to decide when extraordinary life-sustaining measures should be removed from their injured child.[51]

Judge Ben-Porat adopted a similar attitude in the *Zeitzoff* case.[52]

The minor's claim for wrongful life

The discussions with regard to wrongful conception and wrongful life necessitate the consideration of the minor's right to claim.[53] A wrongful life action is brought by or on behalf of a defective child who alleges that, but for the defendant's negligent treatment or advice to his parents, the child would not have been born.[54]

In England[55], and in the USA[56] claims by the infants themselves for wrongful

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[46]Aboth chapter 5 29.

[47]Ketubot 19 1.

[48]*Berman v Allan*, 404 A2d 8 (NJ 1979) 12, 13: 'Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians.' *Becker v Schwartz* 386 NE 2d 807, 812, 1978: 'To recognize a right not to be born is to enter an area in which no one could find his way.' *Gleitman v Cosgrove supra* 711; *Elliott v Brown* 361 S2d 546 (1978) 548; *Dumer v St Michael's Hospital* 233 NW 2d 372 (1975) 379.

[49]Giesen *op cit* 89, quoting a decision of the German Supreme Federal Court: 'Man has to accept his life as it is given to him, and he has no right to its being prevented or destroyed.'

[50]'Life is so terrible; it would be better never to have been conceived. Yes, but who is so fortunate? Not one in a thousand'. Nozick Robert *Anarchy, state and utopia* (1974) 337.

[51]Goldstein & Zaremski *op cit* 10:18.

[52]Ben Porat *op cit* 96.

[53]Giesen *op cit* 84.

[54]Goldstein & Zaremski *op cit* 10:16. GJ Annas *Judging medicine* (1988) 103: 'The wrong actually being complained of is the failure to give accurate advice on which a child's parents can make a decision whether not being born would be preferable to being born deformed.'

[55]*McKay v Esser Area Health Authority supra*. Congenital Disabilities (Civil Liability) Act 1976.

life have been regarded with disfavour. Various reasons justify this kind of attitude. Some decisions hold that an unborn child has no existence apart from his mother, and that it therefore has no right of action for personal injuries inflicted upon it, prior to its birth, by the wrongful act of another.[57] Others argue that the foetus has no right of action because he is not regarded as a person,[58] or that life itself is a compensable injury.[59] They also warn that 'too careful' advice might be offered by genetic counsellors.[60]

On the other hand, there has been a trend recently, toward recognising such actions.[61]

It is, for example, perfectly consistent with amniocentesis followed by abortion: both actions argue that no life *is* preferable to life with certain physical or mental defects. Further, since many defective newborns will never have the mental or physical ability to commit suicide, and may not have parents or others who can provide for their well-being, permitting them to sue for damages suffered on their own behalf is both rational and humane.[62]

Concerning previous decisions, that there was no way to comprehend non-existence, thus making it impossible to calculate damages based on a comparison of non-existence to a defective existence, the fact is that we permit

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[56]G Surno, 'Tort liability for wrongfully causing one to be born' 1978 *ALR* 3d 15; *Speck v Finegold* 408 A2d 496 (1979); 439A 2d 110; Goldstein & Zaremski *op cit* 10:18; Richards & Rathbun *op cit* 391; H Teff 'The action for wrongful life in England and the United States' 1985 *ICLQ* 423–441; Foute 'Wrongful life: the right not to be born' 1980 *Tul L Rev* 480, 483–85.

[57]LJ Regan *Doctor and patient and the law* (3ed 1956) 57. *Drabbels v Skelly Oil Co* (Neb). 50 NW (2d) 229.

[58]*Miccolis v AMICA Mutual Ins Co* 587 A2d 67 (RI 1991).

[59]Goldstein & Zaremski op cit 10:18. Jackson & Powell ibid 453. *Berman v Allan* 404 A2d 8 (NJ 1978). *Phillips v United States* 508F Supp 537 (1980). *Gleitman v Cosgrove supra* 692. G Tedeschi, 'On tort liability for wrongful life' 1 1966 *Isr L Rev* 513. *McKay v Esser Area Health Authority supra* 790: 'The court then has to compare the state of the plaintiff with non-existence, of which the court can know nothing, this I regard as *an impossible task*.'

[60]Judge Goldberg in the *Zeitzoff* case *supra* 129.

[61]Goldstein & Zaremski *op cit* 10:18. *Park v Chassin* 80 App Div 2d60, 400 NYS 2d 110 (1977): Mrs Park, the plaintiff, gave birth to a baby who lived for five hours. The cause of death was a hereditary kidney disease that had a high probability that future children of this couple would be born with it. Immediately following the birth, the Parks entered genetic counselling with the intention of determining whether another child born to them would be at risk for the same disease. The defendant, Dr Chessin, stated that the chances were 'practically nil'. Mrs Parks gave birth to another baby born with kidney disease and who died shortly after birth. The Parks brought a cause of action against Dr Chessin, alleging that the defendant's advice was the proximate cause of the injury. The court held that there was a viable cause of action on behalf of an infant for wrongful life. Public policy consideration gives the parents a right not to have a child; the breach of this right may also be tortious to the fundamental right of a child to be born as a whole, functional human being. American courts even went so far as to allow recovery of damages in the case of pre-natal injury to a foetus where the foetus was not born alive, provided that it was viable at the time of the injury: *Chrisafogeorgis v Brandenburg* 55 Ill 2d 368, 304 NE2d 88 (1973). Strauss *op cit* 197. See *Amadio v Levin* 501 A 2d 10085 (Pa 1985).

[62]Annas *op cit* 101.

courts to make similar distinctions and measurements, for example, in wrongful death cases.[63] Further, imposition of the duty of the child may foster the societal objectives of genetic counselling and prenatal testing, and will discourage malpractice.[64] The issue of unwanted birth has become more and more relevant due to the ever-widening scope of legal duty in respect of the increasing range of foreseeable plaintiffs for an increasing variety of foreseeable damage.[65]

The *Zeitzoff* case

Judges Barak and Ben-Porat presented two systems of reasons which motivated them as well as judges D Levine and S Levine to acknowledge the minor's right of claim. Barak contends that the minor has a right, if he is born alive, to live without defect caused by medical malpractice. The damage caused by the malpractice and for which the doctor is responsible, is not the actual granting of life (since the minor has no right to non-life) but in granting a defective life. Therefore, in essence, this damage is established not by comparing defective life to non-life but in the comparison between a defective life and a non-defective life.[66]

Ben-Porat contends that the physician's duty of care exists also towards one who at the time of the negligent act did not yet exist and was not yet even conceived because expected damages should be avoided.[67]

The assessment of damages, owing to the very essence of damage, requires a comparison between the condition the plaintiff would be in were it not for the negligent act and his condition as a result of it. The only interpretation possible in this case is, in her opinion, a comparison between nonexistence (were it not for the negligence) and an impaired existence, the result of the negligence.

Ben-Porat contends that the physician who is responsible for the child's existence must compensate him in monetary terms, in such a manner as to minimise as much as possible the effect of his disability. She does not make a comparison between the defective child and a child born healthy and whole, but asks to maximize the existing potential, so that the child will function better, and suffer less, in his disabled condition.

On the other hand, the *partially disabled minor* will not have, in her opinion,

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[63] *Ibid* 102.

[64] Giesen *op cit* 89.

[65] *C v C* (1987) 1 All ER 1230 (QB, CA, HL); *Paton v Trustees of British Pregnancy Advisory Service* (1978) 2 All ER 987; WV Horton Rogers 'Legal implications of ineffective sterilization' 1985 *Legal Studies* 296–13; CR Symmons 'Policy factors in actions for wrongful birth' 1987 *MLR* 269–06; JH Scheid '*Benefits v Burdens*: the limitation of damages in wrongful birth' 1984–5 *J Fam L* 57–8; M Skolnick 'Expanding physicians' duties and patients' rights in wrongful life: *Harbeson v Parke-Davis Inc*' 1985 *Med & L* 283–8 (refs); Note 'Wrongful birth actions: the case against legislative curtailment' 1987 *Harv LR* 2017–4.

[66] Barak *op cit* 113, 115. See: *Dural v Seguin* (1974) 40 DLR 3d 666. Ben Porat *op cit* 104.

[67] Ben Porat *op cit* 102, 105.

any tort claim. He received, as a result of the counsellor's negligence, an almost full life. Recognition of the existence of damage to the minor in the described situation is contrary both to public policy and the principle of the sanctity of life. If the minor was born with a relatively slight physical disability, it is not to be said that compensational damage was caused as a result of the negligence since through this he received life.[68]

Judge D Levine adopted Ben-Porat's view, while Judge S Levine supported Barak's view.

Claims of minors versus parents

The question whether parents are responsible towards their foetus for negligently causing harm to him, arises in those legal systems which impose liability on genetic counsellors.

According to one view, withholding of necessary prenatal care, improper nutrition, exposure to mutagens and teratogens, or even exposure to the mother's defective intrauterine environment caused by her genotype could all result in an injured infant who might claim that his right to be born physically and mentally sound had been invaded.

The most fundamental objection is that there is no 'right to be born physically and mentally sound', and should not be. Such a 'right' could almost immediately turn into a duty on the part of potential parents and their care-takers to make sure no 'defective', different or 'abnormal' children are born.[69]

Authority

Due to the complexity of the present dilemma, one may wonder whether all these questions should be dealt with by the legislature or by the judiciary.

Four out of five judges in the Zeitzoff case preferred the judicial involvement. Judge Zeiler of the District Court stated that this course of action belongs to that category of claims which it is neither the function of nor in the power of the courts to establish, this task being the function of the legislature, if it is deemed fit and correct by it to grant a right to claim in such a course of action.

Judge Barak did not agree. The court put into use the old principle of negligence, which was applied to new factual circumstances. The present reform is limited and compact, and includes only an extension of the known

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[68] *Ibid* 97, 99, 104. See Giesen *op cit* 83; DE Carroll 'Parental liability for preconception negligence: do parents owe a legal duty to their potential children?' 1986 *Cal Western LR* 289–316. Annas *op cit* 106, refers to a hypothetical case in which the parents have been warned of the probability of having a handicapped child, and yet decided to go ahead with the pregnancy. In such a case the parents might be obliged to compensate their offspring for the pain and suffering which they have wrought upon the minors.

[69] Annas *op cit* 106. See *Zepeda v Zepeda* 190 NE 2d 849 858 (1963); Goldstein & Zaremski *ibid* 10:18; Judge S levine in *Zeitzoff* case *supra* 122; DE Carroll 'Parental liability for preconception negligence: do parents owe a legal duty to their potential children?' 1986 *Cal Western LR* 289–316; EF Collins, 'An overview and analysis: parental torts, preconception torts, wrongful life, wrongful death and wrongful birth: time for a new framework' 1984 *J Fam L* 677.

categories of responsibility. As the principle is already contained in the law of negligence itself, liability should be established according to the existing precedents.[70]

General

The modern legislation and judicial decisions in the field of medical law are important, interesting, exciting, and sometimes unexpected and surprising. This phenomenon does not reflect the ordinary, typical routine by which behavioural norms are crystallised.

The quick and complicated scientific and technological developments set up advantageous though risky situations, which were not anticipated and which need immediate response. The state authorities which are not ready to offer such a response prefer to leave the decision to the judiciary. However, the judiciary too is not prepared or trained in order to cope with these dilemmas, so that the establishment of new norms may be founded on personal views of individual judges, and found to be arbitrary. Sooner or later the state will have to set multi-disciplinary organs which will comprise of skill and training in order to collect and draw up the data to be used by the legislature or by the courts.

Meanwhile, one should commend the valuable contribution of a few researchers in the modern field of medical law. Their contribution is not only substantial for the collection of background materials for the decision-makers, but also as a source of recommendations for guidelines and norms.

Of course, some of these guidelines may fail in the course of time, because one cannot always anticipate the judicial response to new situations. The wrongful-life issue constitutes a classic illustration of this phenomenon.

In the USA courts initially held that doctors would not be found liable for negligence in such cases.[71] Later, the judicial outlook changed, and doctors were held liable in some cases.[72] George Annas, one of the leading proponents of patients' rights in the States, admitted in a later publication:

> My conclusion, in a previous column about the New York cases, that "the issue of wrongful life" is dead in the courts, now seems premature.[73]

In England, for many years it was held on policy grounds that a birth of a child could in no circumstances constitute a compensable damage, either to the

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[70]Goldberg *op cit* 127. Barak *op cit* 118–121. Ben Porat *op cit* 98. Note: On the state of the fetus in criminal law, see: Cr c (Tel Aviv) 480/85 *State of Israel v Dolberg* 1987 (2) PM 446. Flight *op cit* 182.

[71]Strauss *op cit* 175. *Shabeen v Knight* 11 D & C 2d 41, 1957.

[72]Strauss *op cit* 175.

[73]Annas *op cit* 102; B Kennedy 'The trend toward judicial recognition of wrongful life: dissenting view' 1983 *CULA LR* 473 494; Skegg 'Consent to medical procedures on minors' 1973 *MLR* 370 375.

parents or the child itself.[74]

In a later English decision, damages were awarded in respect of the birth of a child with congenital defects after a failed sterilisation, for the mother's pain and suffering during birth and subsequent sterilisation, the pain and suffering and loss of amenities by reason of the need to care for the child, the layette, the mother's loss of future earnings and the cost of maintaining the child.[75]

In the 1980 edition of his book *Doctor, patient and the law*, Prof SA Strauss, a prominent leader in the field of medical law, stated as follows:[76]

> It is questionable — to say the least — whether a South African court would be prepared to allow parents to sue for damages where a *normal child* is born in consequence of contraceptive failure, abortion failure or sterilization failure that is attributed to the negligence of a doctor. My guess would be that our courts will view the birth of a normal child, whatever the "pre-history" of the infant, as an event which would call for the popping of champagne corks, rather than for the issuing of a summons![77]

In the third revised edition of the same book, Prof Strauss was cautious, stating: 'It is still an open question whether our courts will uphold a claim for "wrongful life" in the narrow sense'.[78] Later decisions by South African courts justified that modification.[79]

These and other prominent researchers should, however, offer their opinion, guidelines and even legal forecast: their recommendations are of great value and constitute a fundamental component of modern medical law.

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[74]G Carter 'Legal responses and the right to compensation' 1976 *British Medical Bulletin* 89–94; P Cane *Atiyah's accidents, compensation and the law* (5ed 1993) 61; Giesen *op cit* 243; *Udale v Bloomsbury Area Health Authority* (1983) 2 All ER 522 (QBD).

[75]*Emeh v Kensington AHA supra* 1044; *Thake and Another v Maurice* (1986) 1 All ER 497 (CA).

[76]SA Strauss *Doctor, patient and the law* at 163.

[77]Strauss *op cit* 163: 'In my opinion there is no principle in South African law which would allow the parents to sue for damages in respect of the loss of a potential child, except for damage which the mother herself might have suffered to her own body in consequence of the injury. We do not recognize in our law anything comparable to a right of "ownership" of children. A person can only bring an action for damages resulting from the wrongful death of another, if he can prove that the wrongdoer by his deed has caused him (the plaintiff) pecuniary damage. Thus a child who is dependent can claim damages from the man who killed his father, but the father would only be entitled to claim in respect of the death of his child if he (the father) was financially dependent on the child. To put it in crude terms: I am entitled to claim damages from the man who wrongfully killed my dog, but I do not ordinarily have a claim for the killing of my child.'

[78]Strauss *op cit* (3ed 1991) 176: 'The principle that prenatal injury to a foetus which is subsequently born alive and as a child is defective on account of the injury, can lead to delictual liability on the part of the person who negligently injured the foetus, has been recognised both in American decisions and in South Africa. That there is a sound jurisprudential basis for these decisions cannot be denied. There is no reason why this principle should not be extended to injury *before* conception, provided that the requisite causal connection can be proved'.

[79]Strauss ibid 176, 197; *Behrmann and another v Klugman* 1988 WLD (unreported); *Edouard v Administrator of Natal* 1989 (2) SA 368 (D); *Administrator of Natal v Edouard* 1990 (3) SA 581 (A).

Medical experimentation: international rules and practice

ERWIN DEUTSCH*

Medical experimentation: definition and types of experiments

Definition

Experimentation has to be distinguished from treatment. Treatment is never to be regarded as experimental solely because doctor and patient are not sure about the success. Medical treatment concerns the person, a complex being, so that expectations cannot be absolute. The medical trial therefore is not the opposite of success, but has to be assessed in the light of standard treatment. Standard treatment is any medical measure that is commonly used by physicians and specialists in treating illness. In contrast, the trial or experimentation concerns a medical intervention that aims to lead to a new standard of treatment. Treatment here is used in the broadest sense: It is not just treatment in the narrow sense of the word, but encompasses diagnosis and preemptive matters as well, such as inoculation, disinfection, etc. Research, trial and experimentation are used to describe the same phenomenon. Treatment and trial may sometimes work together in the same medical measure. Sometimes they are of equal importance, sometimes it is necessary to know whether the emphasis is on treatment or experimentation.[1] There is still a question mark as to whether the principal investigator or the single investigator can undertake the trial only if he has some objective criteria or if he entertains the subjective belief that the trial will be of advantage to the patients and/or science. Probably there have to be a few objective criteria on the one hand and some kind of subjective belief in the superiority of the new method on the other. An old English case and a recent American one show the range of experimentation.

In *Slater v Baker & Stapleton*[2] the patient brought an action upon the case against a surgeon and an apothecary. They were employed to cure the broken leg of the plaintiff. The defendants broke and disunited the callous of the plaintiff's leg after it had set. The Court gave judgment for the plaintiff, recognising the possibility that the surgeon had wanted to try out a new

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*Professor of Law, University of Göttingen, Germany. Judge at the Court of Appeals; Member of the Ethics Committees of the Medical Schools of Hanover and Göttingen.

[1]German Supreme Court case BGHZ 20, 61, the court distinguished whether the medical measure aims at the restoration of the health of the patient or is directed more particularly to research purposes. The Report of the Cervical Cancer Inquiry (1988) seems to be ambivalent in this respect: On p 63 the question is merely 'whether it had a research component'. On p 69 suddenly 'the principal of primacy of aim' becomes important.

[2]95 English Reports 860 (1767).

medical instrument. However, it is not permitted to break an already broken, but set bone again without the consent of the patient.

The plaintiff in *Carmichael v Reitz*[3] had suffered pulmonary embolisms and thrombophlebitis after taking Enovid. During the proceedings another doctor, for purposes of proof, again tried Enovid on the patient. The same symptoms as before appeared. The patient now sued for damages. As far as the test was concerned the court gave judgment for the defendant company. The plaintiff had acted at her own peril.

Types of experimentation

We distinguish between two basic types of experiments: the therapeutical trial and the purely scientific research. Experimentation is therapeutical if it is used for the purpose of furthering the health of the experimental subject. The purely scientific experiment does not in any way improve the health of the experimental subject. As far as therapeutical research is concerned there is the distinct possibility to weigh the advantages against the risks for the patient concerned. With scientific experimentation it is very hard to compare the advantage for the public with the risk for the subject. Hence in this field minimal dangers only are accepted.

A controlled clinical trial is a medical undertaking, that is done with regard to a certain result and which is assessed with that in mind. Usually at least two groups of experimental subjects are formed: the test group and the control group. The test group gets the new treatment; the control group is receiving the standard therapy or, in minor matters, gets a placebo, which means that it is not treated at all. Placebo-controlled clinical trials are commonplace in matters of sleep disorders and pain-relief. In serious matters placebo-controlled experiments can be conducted only where there is no effective standard treatment. Sometimes there is more than just one test group. The trial is blind, if the patient or the experimental subject does not know whether he or she belongs to the test group or the control group. The research is double blind if the doctor, who is treating the patient, is in the dark as well. Sometimes even the principal investigator does not know who belongs to which group. We talk of crossover, if during the trial the subjects are moved from one group to the other. To get a statistically valid result it is usually necessary to randomise the patients or experimental subjects.

Randomisation is there to counteract artificial results. Randomisation particularly works to discourage persons with identical backgrounds to enter just one group. Usually randomisation follows special rules established by clinical statistics. The types of experimentation can be gathered by the following two cases.

Karp v Cooley[4]

The widow of a deceased patient sued the famous heart surgeon Cooley, who

[3] 17 Cal App 3d 958 (1971).
[4] 493 F 2d 408 (US Court of Appeals 1974).

had tried to save the critically ill patient after unsuccessful open-heart surgery. Cooley had removed the heart and installed a pump, previously used only on dogs, in its place. A few days later the artificial heart had been taken out and a transplant was made. Cooley had obtained the patient's written consent for this procedure. One day later the patient had died of renal failure. The Court gave judgement in favour of the defendant and it was decided that there had been no negligence on the part of the surgeon. Moreover, the patient had knowingly agreed to the use of an artificial heart.

Rice and Beri-Beri, Preliminary Report on an experiment conducted at the Kuala-Lumpur Lunatic asylum[5]

In a psychiatric institution in Kuala Lumpur the chief of service divided his inmates into two groups. One group was given uncured rice ant the other got white rice. Of the 120 inmates who lived on the cured rice 34 developed Beri-Beri and 18 died. The group that ate only uncured rice consisted of 123 patients. Only two developed Beri-Beri and could have developed it before becoming inmates of the asylum. The trial established once and for all that Beri-Beri is an illness resulting from vitamin deprivation.

Typical contents of a research protocol

A controlled clinical study is undertaken on the basis of a research protocol. The research protocol is itself based on the following statements: At the outset there is an outline of the standard of the science today, followed by the question raised by the research protocol, this itself followed by the result of a possible pilot study and finally the expected result. The research protocol then usually goes on to name the criteria for inclusion and exclusion of subjects and the whole system of selecting subjects. It is necessary to make a statement concerning the overall number of experiments subjects and the anticipated reasons for abandoning the trial early. If they are not expressly stated the study is assumed to be discontinued if one of the original elements has changed considerably. Moreover the overall setup of the study has to be disclosed. If it is a multi-centre study all the participation institutions and doctors have to be named. This is even more important if it is an international study. The information given to the subjects and their consent has to be documented. In a country such as Germany, compulsory accident insurance has to be taken out in the case of the testing of pharmaceuticals. In other countries the Government has to give its approval or at least be notified before the trial is started. Normally an ethics committee has to review the research protocol and to accept it or at least not to object against it. Often special rules for the termination of the study are adopted. In longer studies, especially in multi-centre or multi-national studies, a special committee is established with jurisdiction over the study as far as the prolongation or the termination of the study is concerned. The position of the principal investigators and the rights and obligations of the contributing investigators have to be determined. Most important is the part about the risks, benefits and expectations of the study.

[5]1907 *The Lancet* 1776 *ff.*

Here the work of the ethics committee starts. Even the consenting patient should not be put at an unreasonable risk that outweighs the possible benefits for himself or other patients. This is for instance the case if a chronically ill patient is to undergo a prolonged wash-out period before the trial starts or if in phase IV-studies the trial is undertaken for marketing purposes in the first place.

International legal and ethical instruments

The starting point: the Prussian directive of 1900

There are no international treaties concerning clinical trials. The development has not been going that way. Medical experimentation is regulated typically by instruments whose legal qualifications are sometimes in doubt. The development over the last century has been that experimentation is regulated mostly by national or international directives.[6] The first regulation on a national basis we know of was issued on 29 December 1900 in Berlin. The Prussian Minister of Health directed the university clinics to conduct experiments with patients only after having obtained their informed consent. Experimentation with incompetent patients or children were not allowed. All experimentation had to be approved by the heads of the department.[7] This directive was due mostly to a public scandal created by articles in illustrated papers of the time. These concerned, among others, trials in German university clinics at the end of the 19th century with patients in the final stages of venereal diseases, without obtaining their informed consent. Since the publication in the popular press found their counterparts in scientific journals there was no use denying them.[8] There is an interesting similarity between the first scandal concerning human experimentation at the turn of the century in Germany and the *Metro* article by Coney and Bunkle entitled 'An "Unfortunate Experiment" at National Women's' (June 1987). On both occasions publication in widely read illustrated papers forced the authorities to react. In Prussia there was no use denying therefore the directive came into being. In New Zealand the Cervical Cancer Inquiry was opened. Shortly after the publication of the *Metro* article Prime Minister Lange announced that there would be an immediate inquiry headed by a lay woman.[9]

The 10 points of Nuremberg

In 1947 an American military tribunal sitting in Nuremberg and composed of

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[6]As a result of the Cervical Cancer Inquiry in New Zealand, Sandra Coney has suggested 'the doctor's code, the Helsinki code, should be law' (*The unfortunate experiment* (1988) 258).

[7]Anweisung an die Vorsteher der Kliniken usw vom 29.12.1900 *Centralblatt der gesamten Unterrichtsverwaltung in Preußen* 1901 188f. *Cf* also Bar 'Medizinische Forschung und Strafrecht' *Festgabe Regelsberger* 1901 230.

[8]*C'v Vikanty Veressayev* (= V Smidovich): *The confessions of a physician* (1904) 332 *ff*; excerpts in Katz *Experimentation with human beings* (1972) 284 *ff*.

[9]Coney *The unfortunate experiment* (1988) 74. The reporter who had written the article went on to tell us 'I suggested Silvia Cartwright, an Auckland Family Court Judge'.

three state judges issued their verdict in the so-called *Medical Case*.[10] The judgment rested on 10 points which the court used to distinguish between lawful and unlawful experimentation. The 10 points obviously originated with the court, but in reality probably were for the greater part, formulated mostly by the medical adviser to the prosecution, Leo Alexander.[11] Unfortunately, because the 10 points were not discussed in open court some of them later seemed open to severe criticism. Therefore in the fifties an American committee proposed an amendment of no less than 5 of the 10 points of Nuremberg.

The Nuremberg Code followed the Anglo-American approach of affording precedence to the patient's will *vis-à-vis* his interests. Therefore it stated categorically that experimentation has to be performed with the informed consent of the experimental subject. Moreover the experimental subject has to give consent, a rule which seemed to rule out experimentations on mentally ill patients or children. Very valuable is the rule concerning the right of the patient have the experimentation discontinued at any time. Today the right to withdraw consent is no longer conditional on specific reasons as in the Nuremberg code and the experimental subject may withdraw at any time without furnishing reasons. There was also the equally valuable ban against experimentation that somehow could result in major injury or death of the experimental subject. Less fortunate was the basis of the 10 points of Nurembergmerely addressing purely scientific experimentation. One rule has even been described as bizarre.[12] It is No 5 allowing the experimentator to take a greater risk if he is participating in the study. Nowadays we know that particularly high risks are often run by the principal investigator only. If he steps in often there is more risk than the average experimental subject would tolerate. Nowadays the 10 points of Nuremberg seem to have been superseded by the two Helsinki Declarations issued by the World Medical Association.

United States v Rose[13]

Professor Rose had furnished doctors at concentration camps with typhus vaccines. At the concentration camp of Buchenwald two groups were treated. One group had been inoculated against the disease, the other was not. In all, there were 729 experimental subjects of which at least 154 died. If the inmates had been given information at all, they had been told that the experimentation was harmless and they would be given better rations. Professor Rose was

[10]*United States v Rose* Trials of war criminals before the Nuremberg Military Tribunals volume 1, 2 'The medical case' (1949). *Cf* Alexander 'Medical science under dictatorship' 1949 *New England Journal of Medicine* 43.

[11]Alexander, Methods and Processes for Investigation of Drugs 1970 *Annales of the New York Academy of Science* 344; Deutsch 'Die 10 Punkte von Nürnberg' *Festschrift für Wassermann* (1985) 69.

[12]Ladiner-Newman *Clinical investigation in medicine* (1963) 140 *f*. For criticism of the 10 points of Nuremberg see Moore 'Therapeutic innovation: ethical boundaries in the initial clinical trials of new drugs and surgical procedures' 1969 *Daedalus* 502, 515.

[13]*Trials of war criminals before the Nuremberg Military Tribunals* (1949) Vol 2 264.

convicted because of war crimes and crimes against humanity. Since he had openly criticised the experimentation this was taken as proof that he knew about the illegality of the procedure.

United States v Stanley[14]
In 1985 a sergeant in the American Army volunteered for a research programme to test the efficacy of protective clothing during chemical warfare. Without his knowledge he also became part of a programme in which LSD was administered, which led to hallucination and loss of memory. The experimental subject learnt of the second trial only in 1975. Though the courts clearly expressed disapproval of this secret experimentation his claim was dismissed because a member of the Army is not allowed to sue his employer.

Halushka v University of Saskatchewan[15]
Halushka was a student who, for a fee of $50, had agreed to act as a research subject at the university hospital. He had been told that a new pharmaceutical product was to be tried out on him and that a catheter would be inserted into a vein. He had signed away all responsibility of the university and the physicians. During the trial a new anaesthetic agent 'Fluoromar' was used and the catheter was even advanced towards his heart. For a short time the experimental subject suffered a complete cardiac arrest, but after 90 seconds open heart massage was applied and his heart started beating again. Halushka sued the university and doctors. The judge held that experimentation was justified only if there had been informed consent. The consent given was invalid because of the incomplete information concerning the new drug used and the catheter advanced to the heart. An experimental subject was entitled to at least the same information as that given to a patient.

Declaration of Helsinki (1962–1964)
In the first half of the sixties the World Medical Association issued the Declaration of Helsinki concerning biomedical research on human beings. The declaration was supposed to replace the Nuremberg code which had obvious shortcomings. At the same time the World Medical Association changed the emphasis from the freely given consent to the more paternalistic approach: that the advantages should outweigh risks. Informed consent then appears as the second requirement for medical research. In some cases of clinical research combined with professional care personal consent was not required, allowing therapeutic experimentation on unconscious patients.[16] It distinguishes between purely scientific research and therapeutical experimentation. In both cases a balance between advantage and risk on the one hand and informed consent on the other is required. This becomes evident in two cases, a German and an American one.

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[14]107 S Ct 3054 (1987).

[15]52 Western Weekly Reports 608 (Court of Appeals Saskatchewan 1965).

[16]The text of the 1964 Declaration of Helsinki concerning clinical research is reprinted in the Report of the Cervical Cancer Inquiry (1988) 132 *et seq.*

German Federal Supreme Court February 2, 1956, BGHZ 20, 61:
A German soldier had been treated at the Heidelberg University Hospital during the war because of an injury that had caused an aneurysm of the fumaroles. A few times an arteriography had been performed using Thorotrast. Despite an occasional warning in the late thirties that Thorotrast might have severe long-range side effects, the Greek chief of service decided to try it out on many soldiers to dispel the cloud hanging over Thorotrast. The soldier suffered cirrhosis of the liver. successfully sued Heidelberg University. The Court concluded that the arteriographies amounted to research, at most, since the health of the soldier was in no way furthered by doing more than one arteriography. Since the soldier had not been informed and had not given his consent to the experimental procedure, but nonetheless had been under military orders and could not have refused, he was awarded a substantial sum not as damages, but as compensation for having sacrificed his personal rights by acting as experimental subject while under command of the army.

Fiorintino v Wenger[17]
A fourteen-year-old boy underwent an operation to have a scoliotic condition corrected. The orthopaedic surgeon employed a method which he had developed himself five years ago and that had not been generally recognised. Up to that date 35 operations had been performed employing his method. One patient had died and four serious mishaps had occurred. The operation on the boy did not prove successful. The court gave judgment for the plaintiff. The surgeon had not informed the parents of the fact that a new and unorthodox method was being used and that there had been a particular risk.

Revised Declaration of Helsinki (1975–1989)
In 1975 the Helsinki Declaration on Biomedical Experimentation was totally revised by the World Medical Association in Tokyo. A group of Scandinavian doctors headed by Povl Riis from Copenhagen, had submitted a draft to the assembly in Tokyo. The so-called Revised Declaration of Helsinki of 1975 is the most modern international instrument to deal with medical research. It is universally accepted because it makes the necessary distinction between therapeutical research and purely scientific experimentation; it insists on a medically acceptable benefit-risk ratio; it requires the informed consent of the subject; it establishes ethical committees and finally it requires publishers of learned journals to assess the ethical propriety of medical research papers submitted. One of the hotly debated issues in Tokyo concerned the establishment and function of ethics committees. The draft had proposed that the committee should have the power to review, allow or deny the application. The European delegations on the other hand were successful in changing the role of the ethics committee from review to advice. The section concerning ethic committees now reads: 'The design and performance of each experimental procedure involving human subjects should be clearly formulated in an experimental protocol which should be transmitted to a

[17]227 N E 2d 296 (New York Court of Appeals 1967).

specially appointed independent committee for consideration, comment and guidance.'[18] The institution of ethics committees came into being mainly as a result of certain occurrences in the United States. One was the publication of the famous article by Beecher in 1966 concerning ethics in clinical research.[19] This paper proved that at least 12 research protocols out of a 100 clinical trials, documented in the very same journal, had been ethically questionable. Two other cases have helped to bring the human subject protection committees or institutional review board into being.

Hyman v Jewish Chronic Disease Hospital [20]

In 1963 the Sloane-Kettering Institute for Medical Research in New York approached the Jewish Chronic Disease Hospital in Brooklyn. The aim was a medical test to establish whether chronically ill patients had the same ability to reject foreign tissue as healthy persons. The test was unrelated to their normal therapeutic program. 22 chronic patients had live cancer cells injected. They had been asked whether they agreed to participate in a test that was to test their immune reaction. They did not know that it was a purely scientific experimentation and that live cancer cells were to be used. The court found that a director of the hospital corporation was entitled as a matter of law to an inspection of the records of the hospital to investigate into the propriety of experimentation on patients.

Syphilis in the deep South[21]

Since 1929 Salvarsan had been used in the southern states of the United States to treat syphilis. In 1932 a programme was launched by public health agencies that, for the next four decades, studied the results of untreated syphilis in contrast to medication. The patients in the study group did not receive Salvarsan or (later) Penicillin. The survivors instituted civil proceedings and were paid 10 million dollars by the Government in 1974. The function of the ethics committee is to safeguard the rights of the patient and/or experimental subject. In the second instance the committee should protect the researcher who sometimes violates the rights of the patient in his desire to establish a new treatment or to achieve a goal in scientific research. Finally, even the institution where the research is to be performed, should be protected by the deliberations of the ethics committee. At present it is still questioned how far an ethics committee is entitled to look into the scientific validity of the research protocol. Sometimes it is simply assumed that the committee has to review everything including the scientific design of the study.[22] Many ethics committees concern themselves mostly with ethical and legal questions. But it is generally agreed that an experimentation without scientific merit is also unethical. On the other hand an ethics committee should not act as a scientific committee and interfere if the research protocol is questionable only if there

[18]Revised Declaration of Helsinki I 2.

[19]Beecher 'Ethics and clinical research' 1966 *New England Journal of Medicine* 1354.

[20]206 N E 2d 338 (Court of Appeals, New York 1965).

[21]*Newsweek* (20.7.1981).

[22]As in the Report of the Cervical Cancer Inquiry (1988) 14.

could be other ways and means of achieving the results.

Medical experimentation: more or less

The medical treatment of today is based on experimentation of yesterday. To ensure the steady progress of medicine, it is necessary to undertake medical research on a broad range. Medical experimentation should be assisted and not unduly burdened. The latter would be the case if unnecessarily stringent rules would apply to medical experimentation. In biomedical research the role of the lawyer is mostly concerned with consent and procedure. I will therefore look into the conclusions and recommendations of the report of the Cervical Cancer Inquiry in New Zealand. The highly impressive report by Judge Silvia Cartwright invites discussion and dissent in three respects.[23]

(a) Findings and recommendations 5.b (ii) 'General information and therapeutic or non-therapeutic research should be offered to all patients whose permission is sought for inclusion in a trial. Their written consent must be sought on all occasions when interventions, clinical or non-therapeutic research is planned'. The unqualified language of the second sentence seems to preclude medical research on unconscious persons and the mentally ill. Especially with regard to research in the field of cardiovascular illnesses the wording should be qualified to allow clinical experimentation with assumed consent on unconscious persons. The Revised Declaration of Helsinki allows this type of clinical research in II.5: 'If the physician considers it essential not to obtain informed consent, the specific reasons for this proposal should be stated in the experimental protocol for transmission to the independent committee'.

(b) 'Written consent'. There is no legal precedent that the consent of the patient or experimental subject should be given in writing. On the other hand, a statute can specify that consent has to be given in writing. In the absence of a statute, written consent can help to establish evidence that the patient has agreed. In the daily practice of medical experimentation it has been shown, however, that a checklist given to the doctor and used by him in informing the patient verbally is at least as useful as a written consent form. In a conversation with the patient the physician can establish whether the patient really understands what the experimentation and its procedures are about. If the patient then still agrees, he may do so in writing, orally or just by taking part in the experimentation. All this means that consent is second in importance only to information. If the experimental subject, after having been informed, participates freely in the trial, there will be no delictual liability, even if the consent has not been given in writing.

(c) '... that lay representation on ethical committee approximate one half of the membership.' Ethics committees started out with the peer review system, where other doctors and researchers reviewed researched protocols. Now the community review model is preferred: researchers and physicians are joined

[23]Report of the Cervical Cancer Inquiry (1988) p 146 *et seq.*

by one, two or at the most three members not involved in research or treatment. To require that one half of the ethics committee be composed of laymen unnecessary in the extreme. Judge Cartwright refers to the modern trend towards increased lay participation in ethical assessment and mentions a recommendation in Australia according to which a woman, a man, a minister of religion, a lawyer and a medical graduate without research experience shall function as lay members of an ethics committee established by the medical research council. But what would be the task of these venirepersons? Research protocols are often lengthy and very technical. They sometimes venture into intricate statistics and are occasionally framed in a foreign language. It usually takes a researcher to understand a research protocol. Lay members may, after a period of adjustment, be able to understand the less complex research procedures. But to promote lay members from their watch-dog function to the role of overseer of scientific experimentation is hardly advisable. Lay members are there to guard against the danger of a 'closed shop' of scientists. It is of no use to give the lay members voting power to inhibit experimentation. Especially if the ethics committee has first to enquire whether the study is scientifically valid, as the Report states, the lay members are inexpedient. Let us not limit medical experimentation too much. Medical research today is the medical treatment of tomorrow.

The right of access by the defence to information contained in police dockets

TERTIUS GELDENHUYS*

Ek was bevoorreg om sedert 1981 as kollega saam met Professor SA Strauss, of Sas, soos hy algemeen bekend staan, te werk. Hierdie voorreg sou ek vir niks in die wêreld wou misloop nie.

Vir my is SAS die verpersoonliking van die begrip 'regsgeleerde'. Met sy kennis van 'n verstommend wye verskeidenheid vertakkinge van die reg en sy vermoë om tot die kern van 'n probleem deur te dring en die reg suiwer daarop toe te pas, dwing hy respek by ieder en elk af. Deur sy verskeie regspublikasies, openbare optredes, lesings en verskyning as regsverteenwoordiger en assessor in ons howe, het hy reeds 'n wesenlike bydrae tot die ontwikkeling van ons reg gelewer. Hierbenewens stel hy die voorbeeld deur steeds aktief student te bly en homself op hoogte te hou van nuwe ontwikkelinge in die reg. Voeg hierby sy sonderlinge vermoë om taal te beheers en 'n ander se verkeerde standpunt op so 'n taktiese wyse reg te stel dat die ander glo dat hy of sy self die oplossing gevind het, en die bestanddele is daar vir 'n regsgeleerde van formaat.

Natuurlik het sy vermoë oor die jare meegebring dat sy tyd nie sy eie was nie en dat hy tydig en ontydig deur ander om advies genader is. Ten spyte van die aansprake op sy tyd en die feit dat sy gesondheid ongetwyfeld daaronder gely het, het hy steeds toeganklik gebly en sy volle aandag gewy aan elkeen wat hom om advies genader het, hetsy dit 'n minister, 'n kollega, 'n student of 'n gewone lid van die publiek was wat om regsadvies aangeklop het. Die nastrewenswaardige voorbeeld wat hy hierdeur aan sy kollegas gestel het, het verseker dat hy vir my en baie ander van sy junior kollegas as rolmodel gedien het.

Vir my was dit ook 'n besondere belewenis om Sas die mens te leer ken. Juis omdat 'n mens bewus is van sy uitgebreide kennis en skerp insig, word jy diep getref deur sy nederigheid en welwillendheid. Telkens het hy met deernis en begrip op 'n

*BA LLB (Pret); LLD (Unisa). Professor of law, Department of Criminal and Procedural Law, University of South Africa.

vaderlike wyse raad gegee wat presies in die kol was en so gehelp om sy kollegas en vriende nie alleen as akademici nie, maar in besonder ook as mense, te slyp vir die eise van die akademie en die lewe in die algemeen.

As departementshoof het Sas ferm gelei, was hy toeganklik, deursigtig en demokraties en het hy die beginsels van deelnemende bestuur toegepas, lank voordat hierdie begrippe modewoorde geword het. Met sy fyn humorsin en gemoedelike geaardheid het hy dikwels gelaaide oomblikke ontlont en as kollega 'n reuse bydrae gelewer tot die aangename gees wat onder die lede van die Departement Straf- en Prosesreg heers. Hierdeur het SAS die toon aangegee vir dié wat hom sou opvolg.

Alhoewel die dag sal aanbreek dat Sas finaal die deur van sy kantoor sal toemaak en huistoe sal gaan vir 'n welverdiende rus, sal sy nalatenskap as regskrywer verseker dat hy oor baie jare nog 'n beduidende invloed op ons reg sal uitoefen, terwyl sy kollegas altyd met deernis aan 'n gewaardeerde kollega en vriend sal terugdink.

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INTRODUCTION

A police docket is a file containing information that is gathered during the course of an investigation of an alleged offence. This file (or docket) inter alia contains

- all the statements taken from persons who were able to provide information relating to the offence which is the object of the investigation,
- all the documents created or gathered in the course of the investigation,
- a diary of the steps taken by the investigating officer, and
- a description of the objects seized during the investigation.

Before 1954, only a limited amount of the information contained in a police docket was regarded as being privileged and could therefore properly be withheld from the defence. These included

- statements by informers,[1]
- any other information by means of which an informer could be identified,[2]

[1] See *Attorney-General v Bryant* (1864) 15 M & W 169 on 185.

[2] *Marks v Beyfus* (1890) 25 QBD, *Tranter v Attorney-General and the First Criminal Magistrate of Johannesburg* 1907 TS 415 on 423, Van Schalkwyk 1938 AD 543, *Marais v Lombard* 1958 (4) SA 224 (E), Rossouw 1973 (3) SA 608 (SWA).

- any information which discloses investigation techniques employed by the police,[3] and
- information, the disclosure of which would have been against public policy.[4] (The latter included information the disclosure of which would have been prejudicial to the security of the Republic or could have jeopardised the relations between the Republic and a foreign country.[5])

In 1954, the Appellate Division of the Supreme Court of South Africa in *Steyn*[6] extended privilege to statements made by state witnesses. The Appellate Division later on extended this privilege even further. In 1965 it extended the privilege to cover notes made by witnesses,[7] and in 1980 it held that this privilege also covers statements taken from persons by the police during the course of an investigation, even if the prosecution elects not to call such persons to testify at the trial.[8] Recently, in 1990, the Appellate Division extended the privilege to cover the notes concerning the investigation made by the investigating officer in the docket (*ie* in the investigation diary contained in the docket) as well as advice and instructions of the 'supervisory officer' in that diary.[9]

The effect of the aforementioned extensions of privilege to information which had previously not been privileged, was that courts started to refer to a so-called 'police-docket privilege'.[10] In practice (especially in magistrates' courts) this was interpreted by public prosecutors to mean that almost all the information contained in a police docket could be regarded as being covered by the privilege. Only a small number of exceptions applied. Records of identification parades and statements made by the accused were for instance regarded as not being privileged. Records of identification parades were said to be completed in the presence of the accused and his counsel and was therefore held not to be privileged.[11] Statements made by the accused were also not privileged, since s 335 of the Criminal Procedure Act provides that an accused person is entitled to a statement made by him. Apart from this, a rule of practice also developed in South Africa, namely that the prosecutor should not suppress evidence which is favourable to the accused.[12] This means that

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[3]Abelson 1933 TPD 227, Peake 1962 (4) SA 288 (C) and Soloni en Andere 1987 (4) SA 203 (NC).

[4]See *Minister van Justisie v Alexander* 1975 (4) SA 530 (A) on 544–545.

[5]*Ibid.*

[6]1954 (1) SA 324 (AD).

[7]See *Alexander & Others* 1965 (2) SA 796 (AD).

[8]See *B & Another* 1980 (2) SA 946 (AD).

[9]See Mavela 1990 (1) SACR 582 (AD).

[10]See *Patrick Mabuya Baleka & 21 Others* (unreported judgement NPD case no CC 482/85), *Ambrose Malaba v The Minister of Law and Order* (unreported judgement NPD case no 921/90), *Zweni v Minister of Law and Order* (1) 1991 (4) SA 166 (W), *Jonas v Minister of Law and Order* 1993 (2) SACR 692 (E) and *Mazele v Minister of Law and Order* 1994 (1) SACR 406 (E).

[11]*Jiza & Others* 1991 (2) SA 52 (E).

[12]See Van Dijkhorst and Mellet in LAWSA 14 par 250.

the prosecutor should inform the defence if a state witness may testify in favour of the accused and must make the witness available to the defence. This rule, however, did not require the state to furnish the defence with a copy of the witness's statement. This was regarded to remain privileged. Furthermore, in *Steyn*[13] the Appellate Division laid down a firm rule of practice in terms of which a public prosecutor is obliged to inform the court if a state witness should deviate in a material respect from the statement that he made to the state. This rule also required the state to furnish to the defence a copy of the witness' statement to use during the cross-examination of the witness.

Such was the position before the coming into operation of the Constitution of the Republic of South Africa, 200 of 1993. This meant that the State regarded itself justified to refuse to disclose to the defence any information contained in a police docket except in those few instances mentioned earlier. In practice state advocates and public prosecutors did in fact furnish copies of some additional documentation to the defence. The decision to furnish to the defence documents contained in the police docket was, however, regarded as falling in the discretion of the state advocate or public prosecutor responsible for the prosecution and, as is to be expected, different prosecutors exercised this in a different way.

THE RELEVANT PROVISIONS OF THE CONSTITUTION

Chapter 3 of the Constitution contains a charter of fundamental rights enforceable against the state. Sections 23 and 25 of the Constitution form part of the charter. Section 23 provides that every person has the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights. Section 25(3)(b) provides that every person has the right to a fair trial, which includes the right to be informed with sufficient particularity of the charge against him or her.

The question that now arises is to what extent the so-called police-docket privilege is affected by the above-mentioned provisions.

Before attempting to answer this question, it is necessary to point out that s 33(1) of the Constitution provides that the rights entrenched in chapter 3 may be limited by a law of general application, provided that such a limitation shall be permissible only to the extent that it is

- reasonable and
- justifiable in an open and democratic society based on
  - freedom and
  - equality and
- provided that the limitation does not negate the essential content of the

[13]1954 (1) SA 324 (AD).

right in question and,

- where the limitation applies to a right conferred by s 25, provided that the limitation is necessary.

As is clear from a reading of s 33(2), even a rule of common law may limit a right entrenched in chapter 3. An accused's right to a fair trial and to be informed in sufficient particularity of the charge against him or her, can not mean that he or she has to be informed of every bit of information uncovered or generated during the course of an investigation. In particular it can not mean that the accused must be informed of the identity of every informer used by the police to identify and apprehend him or her or the investigation techniques employed by the police. There can thus be little doubt that some limitation of an accused's right to information will be regarded as reasonable.[14] What limitations may be regarded as reasonable, will depend on the extent to which a particular limitation limits the particularity with which the accused is informed of the charge against him or her and the legal convictions of society at the moment when the reasonableness or otherwise of the limitation is considered. I will return to this later.

As far as the necessity of a limitation of a right conferred by section 25 is concerned, one will have to consider whether there are rights or interests which are of such importance that their protection need to be given preference to the protection of the accused's right to be informed with sufficient particularity of the charge against him or her. This will require a balancing of rights and interests and the answer in any particular case will depend on the legal convictions of society at that time.

In order to establish whether the limitations are justifiable in an open and democratic society based on freedom and equality, it is necessary to consider what the limitations are that are permitted in countries where such societies exist.

To determine this, one needs to focus on Anglo-American jurisdictions, since our law of criminal procedure is to a large extent based on the English law of criminal procedure. Other European systems will not be considered, because the system of criminal procedure followed on the Continent is of an inquisitorial nature whilst our system is accusatorial or adversary in nature. This difference not only influences the criminal trial itself but also the pre-trial procedure. On the Continent there is little need for rules governing disclosure in criminal cases, since the investigation is generally supervised by an investigating judge or magistrate who compiles the docket (and not the police or prosecution) and since the docket is finally given to the trial judge who conducts the trial from the information contained in the docket. Except for material which is secret (such as military secrets), the defence is generally provided access to the docket at all times and may even make representations concerning some of the material in the docket. No meaningful inferences can,

[14]See in this regard *R v Oakes* 26 DLR (4th) 200.

however, be drawn from the position on the Continent, because of the fundamental difference between their system of criminal procedure and ours.

THE POSITION IN OTHER ANGLO-AMERICAN JURISDICTIONS

Canada

In 1974 the Canadian Law Reform Commission published a Working Paper entitled 'Criminal Procedure Discovery' and in 1984 a report entitled 'Disclosure by the Prosecution'. In both the Working Paper as well as the report the said Commission recommended that legislative action be taken to regulate disclosure by the Crown by means of a comprehensive scheme. No such legislation has until now been adopted in Canada as a result of the Working Paper or Report.

In a landmark judgment in *R v Stinchcombe*[15] in 1991 the Canadian Supreme Court mentions[16] that disclosure of material by the Crown to the defence in Canada has, before that judgment, been taking place on a voluntary basis and the extent of the disclosure varied from province to province, from jurisdiction to jurisdiction and from prosecutor to prosecutor. This meant that the situation in Canada was similar to the South African position as it had applied before the coming into operation of the Constitution.

In this case the Crown refused to provide the defence with a statement which was favourable to the accused and was made by a potential witness. At the trial neither the Crown, nor the defence opted to call the witness from whom this statement had been taken. The defence applied for a court order to force the Crown to call the witness or to disclose the contents of his statement to the defence. The court refused to issue such an order. The accused was convicted and appealed against the decision not to order the Crown to disclose the statement to the defence.

The court held that s 7 of the Canadian Charter of Rights and Freedoms (in terms of which every person has the right to life, liberty and security of the person and not to be deprived thereof except *in accordance with the principles of fundamental justice* (my emphasis)) requires that an accused be given the opportunity to make full answer and defence. According to the court, the right of an accused to make full answer and defence will be impeded if full disclosure of all material is not made by the Crown to the defence.[17]

The court held that the duty to disclose is not absolute and that counsel for the Crown has a discretion in this regard. According to the court the Crown may exercise its discretion not to disclose where, for instance, the identity of informers need to be protected; where information is clearly irrelevant; and where early disclosure would impede the completion of the investigation or

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[15]68 CCC (3d) 1 by Sopinka J in the Canadian Supreme Court (judgment delivered on 7 November 1991).

[16]On 3f–g.

[17]On 9.

where events may require that the investigation be re-opened.[18] The general duty remains, however, to disclose all relevant information and the Crown will have to bring itself within an exception to this rule if it wishes that its decision not to disclose, be upheld. The discretion of counsel for the Crown is reviewable by the trial judge.

The court specifically stated that its decision relates only to so-called 'indictable offences' and not to 'summary conviction offences' but that some of its views may apply to such offences as well.[19] As far as timing is concerned, the court held that disclosure should take place before the accused is called upon to elect the mode of trial or to plead. It should be triggered by a request from the defence which may be made at any time after the charge.[20]

As far as the nature of what should be disclosed is concerned, the court held[21] that all relevant information must be disclosed even if the Crown does not intend to introduce it into evidence.

The court expressly held that witness statements should be produced. Where a statement has not been taken, notes made during the interview with the witness must be produced. Where no such notes exist, the defence must be provided with a summary of what the witness will testify.[22] This applies even if the Crown does not intend to call the witness.[23]

The court was satisfied that information should only be made available to the defence after the investigation has been completed or where the disclosure will not impede further investigation. No specific reference is made to a 'docket' or 'investigation file'. The information referred to by the court, is, however, information which, in South Africa, would normally be included in the docket.

Finally, it seems as if the court is of the opinion that the discretion to decide whether or not to disclose, is that of counsel for the Crown and not that of the police.

England

In the Devlin Report[24] which was published in 1976, it was stated that 'Until 30 years ago, no authority existed for the proposition that there was any duty [upon the prosecution to disclose any material to the defence] at all'.

In 1946 in *R v Bryant and Dickson*[25] it was held that, where the prosecution

[18]On 11.
[19]On 13.
[20]On 13–14.
[21]On 14.
[22]On 14.
[23]On 15.
[24]Report of the Departmental Committee on Evidence of Identification in Criminal Cases (1975–76 HC 338) (the 'Devlin Report') at par 5.1.
[25](1946) 31 Cr App R 146.

has taken a statement from a person who they know can give material evidence but decide not to call him as a witness, there was a duty on the prosecution to make that person available as a witness to the defence. In 1964 in *Dallison v Caffery*[26] the Queen's Bench extended this duty when the court held that a prosecutor must, if he knows of a credible witness who can attest as to material facts which tend to show the prisoner to be innocent, either call that witness or make his statement available to the defence. The court also went further and held that if the prosecutor knows of a witness who he does not accept as credible, he should tell the defence about him so that they can call him or her if they so wish.

In 1979 in *R v Leyland Magistrates, ex p Hawthorn*[27] the court held that a defendant's common-law right to a fair trial depends upon the observance by the prosecution, no less than the court, of the rules of natural justice. The court accordingly held that the defendant is plainly entitled (subject to statutory limitations on disclosure, and the possibility of public interest immunity) to be supplied with police evidence of all relevant interviews with him.[28]

In *R v Phillipson*[29] it was held that a prosecutor may not hold back incriminating documents until the cross-examination of the accused.

In *R v Collister and Warhurst*[30] it was held to be the duty of the prosecution to supply the defence with actual convictions of crime standing on the record of the prosecutor.

In 1981 the Philips Report[31] stated that the actual policy regarding the disclosure of material to the defence varied from the Director of Public Prosecutions, the Metropolitan Police Solicitors and the Greater Manchester Police Solicitors.

In the light of the Philips Report, the Attorney-General issued guidelines in December 1981 concerning the disclosure of information to the defence in cases to be tried on indictment.[32] These Guidelines basically required the prosecution to provide to the defence all material which is not used during committal proceedings if it has some bearing on the offence(s) charged and the surrounding circumstances of the case. The Guidelines provide for a discretion not to make disclosure of the statement of a state witness — at least until counsel has considered and advised on the matter — when
(a) there are grounds for fearing that disclosing the statement might lead to

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[26][1964] 2 All ER 610 at 618 .

[27][1979] 1 All ER 209.

[28]See also *R v Hennesey* (1978) 68 Cr App R 419 at 426 and *R v Lawson* (1989) 90 Cr App R 107.

[29](1989) 91 Cr App R 226.

[30](1955) 39 Cr App R 100.

[31]Royal Commission on Criminal Procedure (Cmnd 8092) (par 15).

[32]*Attorney-General's Guidelines* (1981).

an attempt being made to persuade a witness to make a statement retracting his original one, to change his story, not to appear in court or otherwise to intimidate him;

(b) the statement (*eg* from a relative or close friend of the accused) is believed to be wholly or partially untrue and might be of use in cross-examination if the witness should be called by the defence;

(c) the statement is favourable to the prosecution and believed to be substantially true but there are grounds for fearing that the witness, due to feelings of loyalty or fear, might give the defence solicitor a quite different, and false, story favourable to the defendant. If called as a defence witness upon the basis of this second account, the statement to the police can be of use in cross-examination;

(d) the statement is quite neutral or negative and there is no reason to doubt its truthfulness — *eg* 'I saw nothing of the fight' or 'He was not at home that afternoon.' There are however grounds to believe that the witness might change his story and give evidence for the defence — *eg* purporting to give an account of the fight, or an alibi. Here again, the statement can properly be withheld for use in cross-examination;

(In cases *(a)* to *(d)* the name and address of the witness should normally be supplied.)

(e) the statement is, to a greater or lesser extent, 'sensitive' and for this reason it is not in the public interest to disclose it. Examples of statements containing sensitive material are as follows:

(1) It deals with matters of national security or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those Services once his identity became known.

(2) It is by, or discloses the identity of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger.

(3) It is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known.

(4) It contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect; or it discloses some unusual form of surveillance or method of detecting crime.

(5) It is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier — *eg* a bank official.

(6) It relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matter prejudicial to him.

(7) It contains details of private delicacy to the maker and/or might create risk of domestic strife.

According to the Guidelines, if there is doubt as to whether unused material comes within any of the above-mentioned categories, such material should be submitted to counsel for advice either before or after committal. In deciding whether or not statements containing sensitive material should be disclosed,

the Guidelines require that a balance be struck between the degree of sensitivity and the extent to which the information might assist the defence.

If it is decided that there is a duty of disclosure but the information is too sensitive to permit the statement or document to be handed over in full, it is foreseen in the Guidelines that counsel and the investigating officer will be consulted to determine whether it would be safe to make some limited form of disclosure by means which would satisfy the legitimate interests of the defence.

The foregoing Guidelines are not rules of law and do not purport to be. However, in *R v Saunders and Others*[33] the court held that any defendant must be entitled to approach his trial on the basis that the prosecution will have complied with the Guidelines. The court accordingly held them to be the ground rules governing the trial in that case and held that a breach of the Guidelines could constitute a material irregularity in terms of s 2(1)(c) of the Criminal Appeal Act, 1968.

In *R v Ward*[34] Glidewell LJ, held that it is settled law that a failure by the prosecution to disclose relevant evidence at a trial, constitutes a material irregularity as referred to in s 2(1)(a) of the Criminal Appeal Act, 1968. The court held that it is the duty of the police to provide the Director of Public Prosecutions with all statements taken during the course of an investigation. The police is not entitled to decide whether or not to provide a statement to the Director. The purpose thereof is to enable the Director to decide who to call as witnesses and who not to call. It will also enable the Director or his counsel to decide to call a witness once it becomes clear during the course of the trial that his evidence is required, even though he may initially not have planned to call him. Once the Director or his counsel has decided not to call witnesses from whom statements have been taken, it is his duty to inform the defence of the names and addresses of those witnesses that he has decided not to call. Furthermore, the court held that once a witness testifies and deviates in a material respect from a statement previously made to the police or counsel for the Crown, counsel for the Crown is obliged to inform the court of the discrepancy and normally to provide the defence with a copy of the previous statement.

According to O'Conner[35] the policy is that the defence should have the material in time to absorb, assess and use the material. However, it is commonplace to provide the material in the weeks before trial and often on the first day of the trial itself, which means that the policy is ignored. (It is to be pointed out that O'Conner himself is a practising Barrister in England.)

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[33]Unreported judgment of the Central Criminal Court delivered on 29 August 1989, quoted by O'Conner P in Justice in Error (ed by C Walker and K Starmer) London 1993 on 108.

[34][1993] 2 All ER 577 (Court of Appeal, Criminal Division).

[35]See above.

In view of the wide definition of 'unused material' contained in the Guidelines, the court in *R v Saunders and Others*[36] held that the accused was entitled to see all preparatory notes and memoranda which lead to the making of witness statements.

O'Conner[37] criticises the Guidelines because of the lack of any enforcement mechanism and mentions that in practice, the court will normally rely on assurances by the prosecutor that any material which was not disclosed, falls within the ambit of one of the exceptions mentioned in the Guidelines.

In the Maguire Seven appeal case[38] the court held that the guidelines extends to prosecution scientific expert witnesses. In other words, if such a witness is aware of anything that came to light during his investigation, analysis, etc, which is favourable to the defence, that information should be supplied to the defence.

In 1992 the DPP issued to the police the 'Guinness Advice' on disclosure. This advice is not intended to replace or supplement the Guidelines of 1981. The 'Advice' informs the police of the Guidelines and requires them to preserve all evidential material that may eventually qualify as 'unused material' as provided for in the Guidelines. Furthermore, it lays down rules requiring the police to at least inform the prosecutor of all information gathered during the course of the investigation.

In conclusion, it is necessary to refer to the Criminal Justice Act of 1967. Section 9(1) of that Act provides that written statements will be admissible as evidence to the like extent as oral evidence to the like effect, provided certain conditions are met. The said conditions are contained in s 9(2). Section 9(2)(c) provides as follows: 'before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;'. There is a proviso to this section to the effect that the condition will not apply if the parties agree before or during the hearing that the statement shall be so tendered. Section 9(3)(c) provides further that if the statement refers to any other document as an exhibit, a copy of that document or information that would enable the party to inspect the document, must also be served as prescribed in s 9(2)(c).

Finally, mention needs also to be made of the Crown Court (Advance Notice of Expert Evidence) Rules, 1987 which came into force on 15 July 1987. These Rules enable the legal representative of the defendant in a Crown Court criminal case to require the prosecution by notice in writing to provide in respect of scientific evidence a copy of (or opportunity to inspect) 'the record of any observation, test, calculation or other procedure on which [any] finding or opinion is based' — see rule 3(1)(b).

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[36]See above.
[37]Above at 113.
[38][1992] 2 All ER 433.

From the foregoing it is quite clear that the defence is not entitled to disclosure by the prosecution of every statement obtained from a person who the prosecution intends to call as witness at the trial.

United States of America

The disclosure of information requested in terms of the Freedom of Information Act

In the USA the Freedom of Information Act (FOIA) generally provides that any person has a right, enforceable in court, of access to federal agency records except to the extent that such records (or portions thereof) are protected from disclosure by one of nine exemptions or by one of three special law enforcement record exclusions.

Exemption 1 applies to matters that are '(A) specifically authorised under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order'.

Exemption 2 applies to matters that are 'related solely to the internal personnel rules and practices of an agency'.

Exemption 3 applies to matters that are specifically exempted from disclosure by statute, provided that the statute does not leave a discretion to disclose to the agency concerned.

Exemption 4 applies to matters that are 'trade secrets and commercial or financial information obtained from a person and privileged or confidential'.

Exemption 5 applies to matters that are 'inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency'.

Exemption 6 applies to 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy'.

Exemption 7 applies to records or information compiled for law enforcement purposes, but 'only to the extent that the production of such law enforcement records or information

- could reasonably be expected to interfere with enforcement proceedings;
- would deprive a person of a fair trial or an impartial adjudication;
- could reasonably be expected to constitute an unwarranted invasion of personal privacy;
- could reasonably be expected to disclose the identity of a confidential source, including a State, local or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement

authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, could disclose information supplied by a confidential source;

- would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

- could reasonably be expected to endanger the life or physical safety of any individual'.

Exemption 8 applies to matters that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

Exemption 9 applies to 'geological and physical information and data, including maps concerning oil wells'.

The above-mentioned exemptions are discretionary and not mandatory. An agency may therefore decide to release records to a requester even though they fall into one of the categories exempted.

The fact that a portion of a document falls into an exempted category, does not mean that the complete document is thereby exempted. In such a case an agency is required to provide the requester with a reasonably segregable portion of the document after deletion of the portions which are exempt from disclosure.

The following cases have dealt with aspects of exemption 7 and are relevant:

(1) Exemption 7(A):
In *Crooker v Bureau of Alcohol, Tobacco & Firearms*[39] it was held that for this exemption to apply, the proceedings must be pending and disclosure must reasonably be expected to cause some articulable harm to such proceedings. This protection remains even when an investigation has terminated but the agency retains some oversight or some other continuing enforcement related responsibility.

In *Antonsen v Dept of Justice*[40] it was held that this exemption does not apply to a case where an accused has already been tried and convicted.

In *NLRB v Robbins Tire & Rubber Co*[41] the court held that interference need not be established on a document by document basis but may be determined generically based on the categorical types of records involved. According to

[39]789 F 2d 64.
[40]Civil No K–82–008.
[41]437 US 214.

the court this exemption may be relied upon whenever government's case would be harmed by the premature release of evidence or information.

In *Curran v Dept of Justice*[42] the court required an applicant to describe categories of documents in sufficient detail to allow judicial review of a refusal in terms of this exemption. A request for 'details regarding initial allegations received that led to the investigation; interviews with witnesses and subjects, and investigative reports to prosecuting attorneys' will, according to the court, suffice.

In *Aleyeska v EPA*[43] it was held that the government must, where disclosure of documents is refused because of a fear of witness intimidation, show that the possibility of witness intimidation exists, although it need not show that intimidation will certainly result. The exemption may be relied upon where government can show that employees who supplied information may be subject to potential reprisals which will deter them from providing further information. The court also held that a showing that the release of documents may result in the suppression or fabrication of evidence, justifies reliance on this exemption to refuse to disclose documents.

In *Crowell & Moring v Dept of Defense*[44] it was held that if government can show that disclosure would prevent the government from obtaining data in the future, a refusal in terms of this exemption will be justified.

In *Moorefield v Secret Service*[45] it was held that if disclosure may allow the target of an investigation to elude detection, the government may rely on this exemption to refuse to release documents.

In *JP Stevens & Co v Perry*[46] it was held to be sufficient for a refusal if it can be showed that release of documents will hamper agency's ability to control or shape an investigation.

In *North v Walsh*[47] The mere fact that defendants in related ongoing criminal proceedings might obtain documents through the FOIA that were ruled unavailable through discovery or at least before they could obtain them through discovery is insufficient alone to constitute interference with a law enforcement proceeding.

(2) Exemption 7(C):
This exemption requires a balancing of the relevant privacy and public interests. In *Dept of Justice v Reporter's Committee for Freedom of the Press*[48] it was held that the identity of the requester is irrelevant in consider-

[42]813 F 2d 476.
[43]856 F 2d 311.
[44]703 F Supp 1004.
[45]611 F 2d 1026.
[46]710 F 2d 136.
[47]881 F 2d 1097.
[48]109 SCt 1468 (1989).

ing his request, but that the requester must show some compelling public interest in disclosure to enable the court to balance the various interests. The mere fact that the information had at one time been public, does not preclude reliance on this exemption.

In *L & C Marine Transport Ltd v US*[49] it was held that the mere fact that an individual's name may be discovered by other means, does not limit the protection by this exemption. The names of witnesses, their home and business addresses and telephone numbers are properly covered by this exemption. (See also *Brown v FBI*[50] where such particulars of a witness that has testified against the requester were properly withheld.)

In *Fund for Const Governm v National Archives & Records Service*[51] (and several other cases) it was held that a court should allow the withholding of the identities of those investigated but not charged, unless exceptional interests militate in favour of disclosure.

In *Nix v US*[52] it was held that where disclosure of names of federal investigators may result in them being harassed, their names may be withheld.

In *Keys v Dept* of Justice[53] it was held that the government need not prove that disclosure will certainly lead to unwarranted invasion of privacy. It would be sufficient if there exists a reasonable possibility that this may occur.

(3) Exemption 7(D):
This exemption includes a wider group of people than only those classified as informers.[54]

In *Gula v Meese*[55] victims of crime were held also to be included.

In *Miller v Bell*[56] it was held that citizens who respond to enquiries from law enforcement agencies are also included.

In *Schmerler v FBI*[57] it was held that, with regard to this exemption, no balancing of interests takes place and possible harm need not be proven. The information furnished by the source is also irrelevant.

In *L & C Marine Transport Ltd v US*[58] it was held that even disclosure of information that would allow the linking of the source to specific source provided information, is exempted. In this case it was also held that even if the

[49]740 F 2d 919.
[50]658 F 2d 71.
[51]656 F 2d 856.
[52]572 F 2d 998.
[53]830 F 2d 346.
[54]See Justice Dept Guide to FOIA by M Bridges and T Villager, New York 1992 on 131.
[55]699 F Supp 960.
[56]661 F 2d 623.
[57]900 F 2d 333.
[58]740 F 2d 919.

source becomes known by other means, the protection still remains.

In *Irons v FBI*[59] it was held that all that is needed for reliance on this exemption is that the person giving information does so with the assurance that it would not be disclosed to others. The mere indication by a person that he is willing to testify does not mean that he looses protection.

The fact that a source has testified does not mean that he looses protection on other information supplied. Circumstances surrounding the creation of FBI records give rise to an implied assurance of confidentiality; any other interpretation will jeopardise the law enforcement agency's ability to obtain information.

In *Nix v US*[60] it was held that the circumstances surrounding the creation of FBI records give rise to an implied assurance of confidentiality; any other interpretation will jeopardise the law enforcement agency's ability to obtain information. (See also *Keys v Dept of Justice*.[61])

In *Londrigan v FBI*[62] it was held that confidentiality may be inferred where an agency demonstrates a well-documented policy of generally promising confidentiality to interviewees.

(4) Exemption 7(E):
It is not required that any possibility of harm or risk of circumvention of investigation be proved or that method be disclosed to the court in any detail.[63] The same applies to well-known techniques applied in a specific case and even manuals issued to law enforcement personnel.[64]

(5) Exemption 7(F):
In *Docal v Bennsinger*[65] it was held that this exemption is also intended to protect law enforcement personnel against physical attacks, threats, harassment and actual murders of undercover agents. This exemption may even be invoked to protect information regarding the building of dangerous devices that may be copied if known by others.[66]

Disclosure of information in terms of the rules applicable to criminal procedure
In *Brady v Maryland*[67] the United States Supreme Court held as follows: 'The suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to

[59]880 F 2d 1448.
[60]572 F 2d 998.
[61]830 F 2d 346.
[62]722 F 2d 840.
[63]Justice Dept Guide to FOIA by M Bridges and T Villager, New York 1992 on 140–1.
[64]Ibid.
[65]543 F Supp 48.
[66]Justice Dept Guide to FOIA by M Bridges and T Villager, New York 1992 on 144–5.
[67]373 US 83 (1963).

guilt or punishment, irrespective of the good or bad faith of the prosecution.'[68]

In *US v Bagley*[69] the court held further that evidence which can be used by the defence to impeach a state witness, should also be disclosed to the defence. This, however, has since been qualified. In *State of Washington v Mak*[70] the court refused to order the state to produce the 800 pages of an internal police inquiry on the basis that the defence had failed to show that the requested information was material to the defence. The court held that the mere possibility that an item of undisclosed information might have helped the defence or might have affected the outcome of the trial, does not establish materiality in the constitutional sense.

As far as the disclosure of internal police inquiries are concerned, the courts of different states have differing views on whether such information needs to be disclosed.[71]

In the USA there are Federal Rules of Criminal Procedure governing criminal proceedings in the courts of the United States. They are promulgated by the United States Supreme Court, reviewed, amended and approved by the Congress of the United States and have the force and effect of law. In most jurisdictions they are supplemented by local rules which detail that district's practice requirements and procedures. The Rules are prescribed under the authority of Acts of Congress.[72]

Rule 16 of the Rules deals with Discovery and Inspection. These Rules require that a statement made by a defendant must, upon the defendant's request, be made available to him or her for inspection, copying, or photographing. For the purposes of this Rule, statements include oral statements.[73]

The Rules also oblige the government to furnish to the defendant, upon his or her request, a copy of the defendant's prior criminal record.[74] Furthermore, upon request of the defendant, the government must 'permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or

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[68]See also *US v Bagley* 473 US 667 (1985) and *US v Agurs* 427 US 97 (1985) where this approach was confirmed.

[69]See previous note.

[70]718 P 2d 407 (Wash, 1985).

[71]See JJ Lacy 'Criminal discovery: Disclosure of Police Internal Affairs Division documents and police personnel files' 1992 *Georgia State Bar Journal* 34 *ff* for a discussion of this difference.

[72]See the Act of June 29, 1940, c.445, 18 USC former §687 now §3771, and the Act of November 21, 1941, c. 492, 18 USC former §689 now §§3771 and 3772.

[73]See Rule 16(a)(1)(A).

[74]Rule 16(a)(1)(B).

belong to the defendant'.[75]

In addition to the above, the government must, upon request of a defendant, 'permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial'.[76]

The Rules specifically mention that the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses is not authorised thereby.[77]

It is interesting to note that the Rules provide for a reciprocal duty on the defence, upon request by the government, to disclose material to the prosecution once a request for disclosure was made by the defendant. This duty to disclose applies to documents and tangible objects and the reports of examinations and tests conducted by the defence.[78]

Except as to scientific or medical reports, the Rules do not authorise the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.[79]

If, prior to or during a trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under the Rules, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material.[80]

Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief

[75]See Rule 16(a)(1)(C).

[76]See Rule 16(a)(1)(D).

[77]See Rule 16(a)(2). See however the exception made with regard to 18 US 3500 where the disclosure of statements favourable to the defence are mentioned.

[78]See Rule 16(b)(1).

[79]See Rule 16(b)(2).

[80]Rule 16(c).

following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.[81]

If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.[82]

Quick and Benson point out that in practice Rule 16 discovery is only intended to lay down the minimum requirements of what should be provided by the prosecution to the defence. In most cases, according to them, more information is furnished, but this is done after an agreement to this effect has been reached between the individual prosecutor and defence attorney in a particular case.[83]

It is clear from the above that the position in the United States is more favourable to the prosecution than is the case in Canada.

New Zealand

The position in New Zealand is regulated by the Official Information Act (OIA) of 1982. This Act regulates the access to official information and provides for information which is exempt from disclosure.

The relevant exemption clause is contained in s 6 of the Act. In terms of s 6 information is exempted if good reason exists to withhold it where disclosure would be likely to prejudice

- the security or defence of New Zealand or the international relations of the Government of New Zealand;

- the entrusting of information to the Government of New Zealand on a basis of confidence by
  - the government of any other country or any agency of such a government; or
  - any international organisation; or
  - the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial.

The exemption provided for in s 6(c) has already been interpreted by the New

[81]Rule 16(d)(1).

[82]Rule 16(d)(2).

[83]See the practice comments on the Rules by MG Hermann which was revised by AT Quick and DJ Benson in 1993 (see Federal Rules of Criminal Procedure (2ed) 1993.

Zealand courts in *Commissioner of Police v Ombudsman*[84] and in *Commissioner of Police v Ombudsman*[85] (the latter being an appeal against the decision in the first).

In this case an accused requested that he be provided with the witness statements contained in the police docket. The Commissioner of Police refused but was ordered by the Ombudsman to provide the documents. The court a quo overturned the ruling by the Ombudsman and the accused then appealed against that decision. The court of appeal held that once summary proceedings have commenced, the disclosure of evidence under the OIA would not be likely to prejudice the investigation of offences or the right to a fair trial. The court stated that exceptional circumstances may arise where there would be a real risk of such prejudice, but held that this did not apply in that particular case.

One of the judges who wrote separate judgments, McMullin J, placed specific emphasis on the danger of witness intimidation, but agreed that the appeal should succeed since the witnesses in this particular case were policemen and therefore unlikely to be intimidated (on 406). McMullin J warned against laying down a general rule as was done by the majority and preferred that each case be decided on its own merits.

The purpose with the request for the witness statements in that case was to prepare a defence. Since the case only dealt with a request for witness statements, no ruling was made concerning other documentation in the docket.

Australia

Before 1982 an accused person did not have a right to the production of statements of witnesses to be called by the Crown.[86]

The Australian Freedom of Information Act, 1982 provides in s 33(1) that documents are exempt from disclosure where its disclosure would, or could reasonably be expected to:

- prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure to comply with a law relating to taxation or to prejudice the enforcement or proper administration of the law in a particular instance;

- disclose or enable a person to ascertain the existence or identity of a confidential source of information or the non-existence of such a source in relation to the enforcement or administration of the law; or

[84] [1985] 1 NZLR 578 (HC).
[85] [1988] 1 NZLR 385 (CA).
[86] See *R v Charlton* [1972] VR 758.

- endanger the life or physical safety of any person.

In terms of s 33(2) a document is exempt if its disclosure would, or could reasonably be expected to:

- prejudice the fair trial of a person or the impartial adjudication of a particular case;

- disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

- prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

Section 41 deals with documents which are exempted because they affect personal privacy by involving the 'unreasonable disclosure of personal information about any person or deceased person'.

Section 42 deals with documents which are exempted because they are subject to legal professional privilege.

Section 43 deals with documents which are exempted because they concern the business affairs of persons (trade secrets, etc).

Section 44 deals with documents which are exempted because they affect the national economy.

Despite the commencement of this Act, it was held in *Clarkson v Director of Public Prosecutions*[87] in 1992 that an appellant is not entitled on appeal to discovery of documents that were in the possession of the prosecution during the trial but were not revealed to the appellant.

In *Accident Compensation Commission v Croom*[88] it was held that section 3 of the Act requires the court to lean in favour of the disclosure of information when interpreting the Act.[89] The court also held that the Act refers to 'documents' that are exempted from disclosure and that, should access be requested to an entire file containing a number of documents, the state will have to prove, in respect of every document in such file which it wished not to disclose, that such document is covered by an exemption.[90] The court also interpreted the phrase 'prejudice to the .... proper administration of the law' as it appears in the exemption contained in sections 31 and 33, and held that the Act does not apply in those instances where the normal practices and procedures of the law allows a person access to documents in circumstances

[87][1990] VR 745.
[88][1991] 2 VR 322 at 323.
[89]On 323.
[90]On 324.

set out in such practices and procedures, because to hold otherwise, would prejudice such practices and procedures and therefore prejudice the proper administration of the law. Since such practices and procedures exist with regard to access by accused persons to information held by the state, it follows that the Act does not apply to those instances.

In *Sobh v Police Force of Victoria*[91] the Supreme Court of Victoria considered the appeal of an accused person who was charged with burglary and theft and who, at his first appearance in the Children's Court, sought from the Victoria Police Force 'a full copy of ... [his] entire file relating to charges laid by ... [a certain police official'. This request was made in terms of section 17(1) of the Act. The police refused the request on the basis that the file was exempt from disclosure in terms of sections 31(1)(a) and 33(1) of the Act. The refusal of the police was taken on review but the reviewing commissioner decided the review in favour of the police. The decision by the reviewing commissioner was then taken on review to a tribunal who confirmed it. This judgment deals with the appeal that was lodged by the accused against the decision of the tribunal. In deciding the appeal, Nathan J held that the judgment in the *Croom*-case[92] was wrong in holding that the mere fact that the application of the Act to instances where existing rules of practice and procedure apply, would necessarily amount to a prejudice to the proper administration of the law. The court held that every instance where other rules of practice and procedure apply should be considered on its own merits to determine whether the application of the Act, despite the normal rules of practice and procedure, would prejudice the administration of the law in that instance. The court then went on to consider the merits of a request that the police disclose information, gathered during an investigation, to an accused person before the trial commences. The court took into account the fact that in this particular instance, the police had completed their investigation. Disclosure of documents contained in the file could therefore not be said to be dangerous in the sense that it may hamper the investigation. Nathan J accordingly concluded that in this particular instance there is no reason why the accused should not be granted access to the documents gathered by the police and therefore upheld the appeal.

Brooking J, in a separate but concurring judgment, considered the historical development of the rule against discovery by the accused in criminal cases and concluded from this that there are in actual fact no sound reasons why an accused person should not be entitled to access to the information gathered by the police during the investigation, provided that the documents are not privileged in themselves.[93]

[91](1994) 1 VR 41.
[92]Supra.
[93]On 41-51.

SOUTH AFRICAN COURT CASES AFTER THE COMING INTO OPERATION OF THE CONSTITUTION

Access to information contained in police dockets has probably been the dominant constitutional issue confronting our courts since the coming into operation of the Constitution. In total no less than eleven judgments have already been delivered on the question to what extent an accused is entitled to have access to information contained in police dockets.

The first case dealing with a constitutional issue that was reported in the South African Criminal Law Reports was the case of ***Fani***[94]. This case dealt with the question whether an accused person is entitled to access to all the information contained in the police docket. Judgment in this case was delivered by Jones J. No reference was made in the judgment to any foreign case law. The court simply considered the legal position with regard to this issue as it applied before the coming into operation of the Constitution. In this regard the court referred to the tendency among prosecutors to furnish less and less information to the defence. The court compared this position to that applicable in civil cases, where the tendency is towards more openness. The court concluded that too much information is withheld from the defence and that in a particular case this could mean that the accused is not sufficiently informed of the particulars of the charge against him to enable him to prepare his defence properly, which may result in his trial not being fair.

The court then held that copies of the following information should be made available to the defence before the accused is required to plead:

- statements by the accused as well as records of any instances where the accused had pointed out anything;
- relevant medical reports;
- reports or statements of a technical or specialist nature;
- relevant documents; such as financial statements and records of identification parades;
- a list of the witnesses the prosecution intends to call at the trial;
- a summary of the statements by state witnesses which is sufficiently detailed to reflect the material features of the testimony they will be able to give and which includes full particulars of any similar fact or character evidence that the state proposes to lead as well as the facts upon which an allegation of common purpose is made; and
- a list of the accused's previous convictions.

[94] 1994 (1) SACR 635 (E).

The court held that the above list is neither exhaustive nor definitive and that each case will have to be dealt with on its own merits.

The court then proceeded to consider the request by the defence to have access to the police docket. The court reviewed the common-law privileges attaching to statements by state witnesses and held that this privilege is not removed by virtue of the provisions of ss 23 and 25 of the Constitution.

In a further judgment dealing with this issue, Zietsman, JP, in *James*[95] considered an application that the state be ordered to hand to the defence a copy of the statement of each state witness. The court was invited to find that the *Fani*-case was wrongly decided in that it ordered the state to furnish only a summary of the statements of state witnesses to the defence. The court referred to the judgment in *Fani* and expressed doubt as to whether s 23 of the Constitution applies to criminal cases at all. It held that *Fani* was wrongly decided in so far as it required the state to furnish to the defence summaries of the statements of state witnesses. According to the court, if, as was held in *Fani*, the state still retains a privilege with regard to the statements of state witnesses, the defence cannot be said to be entitled to a summary of what a state witness will testify. Since the court agreed that the statements of state witnesses remains privileged despite the provisions of the Constitution, it held that the state need not furnish the defence with summaries thereof.

The court furthermore held that the list of previous convictions need also not, as required in *Fani*, be handed over to the defence. According to the court, everything which is handed over to the defence will presumably also be handed over to the court, with the result that the accused will be prejudiced if the court is aware of his previous convictions at the start of the trial.

The court agreed that the information referred to in the first five categories of information referred to in *Fami* (see previous page) should be handed to the defence. In a judgment delivered by Van Rooyen AJ, in *Smith & Another*,[96] an application was brought that the state be ordered to hand to the defence a copy of the statement of each state witness. In this case the state furnished to the defence a summary of the substantial facts. This summary was hopelessly inadequate to inform the accused of the allegations he has to answer. At the commencement of the trial the defence applied to the court to get copies of the statements of all witnesses the state intended to call. The state requested that it be given the opportunity to file an additional summary of facts.

The court held that despite the provisions of ss 23 and 25 of the Constitution, the state still has a privilege with regard to the statements of state witnesses,

[95] 1994 (2) SA 141 (E).
[96] 1994 (2) SA 116 (SE).

but that the court has a discretion to order that copies thereof be handed over to the defence where circumstances are such that the interests of justice require that it be so ordered.

In this case the court held that should the prosecutor be allowed time to file an additional summary of facts, the defence will be entitled to ask for a postponement to prepare itself to answer those allegations. Several witnesses were subpoenaed and were available at the court and a postponement would result in their time being wasted. The court accordingly ordered the state to furnish copies of the statements to the defence after the state had confirmed that no information that would disclose the identity of police informers or would prejudice the safety of the state was contained in the statements.

Another judgment which requires mentioning is that of Myburgh J in the case of *Khala v Minister of Safety and Security*[97] in the Witwatersrand Local Division of the Supreme Court. In this case a suspect in an ongoing investigation instituted an action against the Minister of Safety and Security for unlawful arrest and detention. The plaintiff requested access to the police docket and relied on s 23 of the Constitution for this purpose. The request was refused by the defendant.

Myburgh J set out the position as far as discovery in criminal proceedings are concerned in Canada, the United States, England, Australia and New Zealand and then concluded that there can be no such thing as a blanket 'docket privilege' covering all information contained in the police docket.

The court held, however, that some information in the docket may be privileged. This includes information by means of which the identity of informers may be established, the identity of witnesses may be established where there is a real risk that they may be intimidated or be interfered with, or by means of which new techniques of police investigation may be revealed. The court rejected the idea that statements by state witnesses are per se privileged without any special circumstances making their disclosure inadvisable.

Since the court was unable to state whether there was any information in the police docket which was privileged, it ordered the defendant to file a supplementary discovery affidavit in which it lists the material with regard to which no privilege attaches and the material with regard to which privilege is claimed.

In the case of *Botha en Andere*[98] in the Witwatersrand Local Division the prosecution was ordered by Le Roux J to disclose to the defence statements

[97] 1994 (4) SA 218 (W).
[98] 1994 (4) SA 799 (W).

obtained from state witnesses. Furthermore it was held that the defence may consult with state witnesses, provided that the Attorney-General is informed of the intention to do so and is afforded the opportunity to attend the consultation and provided the state witness consents to the interview.

In the case of *Sefadi*[99] in Natal, Marnewick J, who delivered the judgment, held that the state privilege with regard to statements obtained from potential state witnesses, constitutes an unreasonable and unjustifiable limitation to the rights of an accused as set out in s 23 of the Constitution. A similar approach was adopted in the Cape in the judgment delivered by Marais J in *Nortje and Another v Attorney-General of the Cape and Another.*[100] In the latter case it was held that to withhold information from the defence in circumstances in which the defence can reasonably be said to require it in order to properly prepare for the trial, amounts to a negation of the essential content of the right of the accused to such information. See also *Majavu,*[101] *Khoza en Andere*[102] and *Phato v Attorney-General, Eastern Cape and Another*; *Commissioner of the SAPS v Attorney-General, Eastern Cape and Others*[103] where a similar approach was adopted.

In *Thobejane*[104] Marais J considered a request by the defence to have access to the entire police docket. In this case the Attorney-General had supplied the defence with a summary of facts and copies of statements made by the accused to the police, post mortem reports, photographs and notes relating to pointings out, as well as medical reports from medical examiners who had examined the accused. The court referred to a number of decisions by the Appellate Division in which it was clearly held that a docket privilege exists and stated that he was bound by these decisions. According to Marais J, the Constitution should have spelled out clearly that accused persons are entitled to access to police dockets, had that been the intention of the legislature. He concluded that the state has furnished sufficient information to the defence regarding the charges against the accused and refused to order the state to provide the statements of witnesses to the defence.

CONCLUSION

Perhaps the only conclusion that one can draw from the above, is that the position, as far as access to information contained in police dockets is concerned, is far from finalised in our law. In my view this matter should urgently be considered by the Constitutional Court so that finality can be reached.

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[99] 1994 (2) SACR 667 (D).
[100] 1995 (1) SACR 446 (C).
[101] 1994 (4) SA 268 (Ck).
[102] 1994 (2) SACR 611 (W).
[103] 1994 (2) SACR 734 (E).
[104] 1995 (1) SACR 329 (T).

From the exposition of the approaches followed in the judgments that have been delivered since the coming into operation of the Constitution, it is clear that the tendency is to require the state to provide more information to the defence than before. This was to be expected. Speaking from my own experience as counsel for the defence, individual public prosecutors sometimes even refuse to provide copies of documents that were created by the accused and were seized from him. It is clear that the withholding of copies of such documents can never be justified. Although I normally succeeded in obtaining such copies, this often only happened after long and heated arguments. This is totally unacceptable and should never be necessary. From discussions with other defence lawyers, it seems to have been their experience as well. It was therefore to be expected that defence lawyers would jump at the opportunity provided by the Constitution to force a more open approach on the prosecution and that their dilemma would find some sympathy with the courts.

However, having said this, the question must be asked whether our courts are not moving too fast and too far in trying to rectify the position.

There can be little doubt that an accused person requires a substantial amount of information to properly prepare his defence. It is furthermore difficult to see why an accused should be denied access to reports by forensic and other experts obtained during the course of the investigation. The same applies to documentary evidence such as bank statements, etc. The only question that may be raised is whether the accused should be furnished with copies of statements taken from potential state witnesses. To my mind, this question can only be answered after due consideration has been given to the circumstances prevailing in South Africa at the present time.

Until the elections in April last year, active campaigns were waged against the police. The police were portrayed as the protectors of the minority government and had to be neutralised in every possible way if liberation was to be achieved. To do this the police were discredited at every possible opportunity, sometimes rightly and sometimes wrongly. During the eighties this resulted in a situation where the police have been discredited to such an extent that they were no longer trusted by large sections of the community. These sections of the community no longer reported crimes to the police, but in stead policed their own areas, vigilante groups sprang up all over the country and kangaroo courts were utilised to punish offenders, sometimes brutally. Efforts by the police to change their methods of policing during those years did achieve some success, but unfortunately not enough. Even those members of the said sections of the community who were still prepared to assist the police in their efforts to combat crime, found themselves isolated from their communities and were persecuted for doing so. In the process several of them were assaulted or brutally murdered while the homes and belongings of others were destroyed because of their association with the police. By the end of the eighties, it became increasingly difficult to find members of those communities who were still prepared to assist the police. Apart from any other effect that this may have had, it definitely favoured criminal elements in those commun-

ities. As could be expected, criminal elements actively supported campaigns to discredit the police and actively participated in the intimidation of members of their communities that were prepared to assist the police.

Liberation was indeed eventually achieved and a full democracy established in South Africa in April 1994. Since then the long and slow process of establishing an effective and community orientated new South African Police Service has begun. Nobody should be misled into believing that this can be achieved overnight. Although the new government is now actively trying to improve the image of the police in all communities, one can expect the normalisation of police-community relations to take a long time. In recent times some encouraging reports of successes in this regard have been published. This, of course, does not suit criminal elements in the community. Better police-community relations increase the chances of them being identified and being prosecuted for their criminal acts. One may therefore expect them to fight even harder to prevent a normalisation in police-community relations and may expect to see even more brutal intimidation of persons assisting the police and more attacks on police persons. Recent reports about police persons that were assassinated in cold blood, confirm that this is already taking place. Even where better police-community relations are established, one may assume that these will at first be extremely fragile. Members of communities where intimidation was rife will still remember what happened to persons who assisted the police and will be loath to be the first to be seen to be co-operating with the police lest they become victims of the same fate. There can therefore be little doubt that any co-operation received from the community, however tenuous it may initially be, will have to be fostered to encourage further co-operation.

It is against this background that one has to view the developments surrounding the recent judgments on access to information contained in police dockets.

Of the countries considered, only Canada, New Zealand and Australia seem to require the prosecution to provide the defence with all statements obtained from potential state witnesses, unless there are reasonable grounds to belief that a particular witness will be intimidated. England allows the prosecution a very wide discretion to withhold copies of statements from witnesses. The United States specifically excludes witness statements from the documents that need to be disclosed to the defence. Both the United States and England are 'open and democratic societies based on freedom and equality', as are Canada, New Zealand and Australia. It therefore seems to be arguable that to withhold witness statements from the defence, is justifiable in at least some 'open and democratic societies based on freedom and equality'.

In the light of what has been said about police-community relations, an approach which would allow the defence access to witness statements, seems to be dangerous in the present day South Africa. If witnesses were to know that what they tell the police will be conveyed to the accused, the police will in many instances find it difficult to convince people to continue to assist them

in their investigations.

It is of course true that all the judgments recognised the state privilege to refuse to disclose information that would lead to the identification of informers or to refuse to disclose particulars of witnesses where there are legitimate fears that the witnesses will be subjected to intimidation. In practice this will offer little consolation. In many instances a public prosecutor or counsel for the state will find it impossible from the police docket to determine whether there are legitimate reasons to believe that an accused will interfere with witnesses or will intimidate them. To establish this will require a separate investigation focusing on this issue. Since there are normally not sufficient time to have such an investigation conducted before the decision to disclose or to refuse to disclose is taken, it is more likely than not that the state will be forced to disclose statements without it being in a position to evaluate properly whether legitimate fears of intimidation exist in a particular instance. It is clear that our Constitutional Court will require Solomonic wisdom in deciding this issue.

Germany: coming to terms with the past and the criminal justice system

BARBARA HUBER*

Sas Strauss came to the Max-Planck-Institute of Foreign and International Criminal Law in Freiburg, Germany in 1972. He had just gone through a painful period in his life and felt sad and vulnerable. Here in Freiburg and in the Institute he made new friends and regained his optimism, enjoying the pleasant city of Freiburg and the serene autumn landscape of the Black Forest. I was most fortunate to meet him then and to become one of his friends. From his study period in Freiburg developed strong ties between the Department of Criminal and Procedural Law of Unisa and the Max-Planck-Institute. He personally organised my first visit to the Department and other South African universities. At one stage he earnestly encouraged me to give the lecture without the support of the written text — I had not been aware that I was to participate in a conference at the University of the North and left the paper behind. His presence (never fear when Sas is near) and his confidence in the qualities of others have always been a motivation for renewed efforts. He has vigorously exhorted his colleagues to spend some time at the Institute in Freiburg. In every case these months abroad made an impact on the personal and academic development of young scholars, not only broadening their knowledge of criminal law and jurisprudence, but also widening their cultural horizons. His democratic attitude and his persistent endeavours for a better South Africa always made it easier for me to accept invitations to Unisa at a time when such visits were regarded with criticism, disdain or even contempt. To know this upright and sincere man, whose gentle and sensitive attitude is accompanied by a strong will and a profound sense of responsibility and duty, has always been a very special joy. Fortunately, over the years there were various opportunities to cultivate this relationship. I treasure them and hope and wish that more will follow in the future.

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*Dr Iur. Senior research fellow, Max-Planck-Institute for Foreign and International Criminal Law, Freiburg, Germany.

Introduction

Many countries where, in the recent past, fundamental political change from a totalitarian regime to a democratic form of government has taken place, face the problematic question how to deal with the atrocities and human rights violations committed by members of the military or security forces at the behest of government organs or army commanders, by the judiciary, or by private individuals in the name of the totalitarian system. In Latin America,[1] more recently in Hawaii, in the Central and Eastern European States breaking away from Soviet power and, especially in Germany, the issue of whether to bring to justice officials who violated human rights or ordinary criminal law has been and still is a subject of serious debate.

Every such transition from one constitutional dispensation to another implies substantially changed criteria for the legitimation of state power. As a consequence the frame-work within which the state can limit the liberty of its citizens by imposing criminal sanctions is changed. We therefore see that such periods of transformation generally lead to reform activities in the field of criminal law, proving the great political sensibility of the criminal law and its specific relation to the constitutional organisation of the day. Examples of this can be found in Spain after the death of General Franco and in the Latin-American republics of Argentina, Chile and Uruguay after the fall or retirement of the military juntas in the mid-eighties. The reason for this close connection between state organisation and criminal law is to be found in the fact that the criminal law is by far the most effective means of the state to encroach on the liberty of its citizens. By observing the criminal law of a state a judgment can very often be formed whether the state is a democratic *Rechtsstaat* or not.

New democracies therefore face a double challenge: they must guarantee prospective (future) justice but at the same time have to deal retrospectively with the illegal acts committed by the state in the past. The later task can generally only be fulfilled by punishing the persons who are individually responsible for the deeds of the past. Thus, the criminal law, having served as an instrument of political suppression during the sway of the *Unrechtsstaat*, now fulfils the opposite political function during the transitional period to the *Rechtsstaat*. This new function consists in the state's demonstration of legal disapproval of the former *Unrechtsstaat*.

As will be seen, the rule of law/*rechtsstaatliche* criminal law and criminal procedure law reaches its limits sooner or later when facing the problems con-

[1] As to the situation in Argentina, see M Sancinetti *Derechos Humanos en la Argentina Post Dictatorial* 1988; J Maier 'Die strafrechtliche Aufarbeitung von staatlich gesteuertem Unrecht in Argentinien' 1995 *ZStW* vol 107 143–156. For Hungary, see K Bárd 'Die strafrechtliche Aufarbeitung von staatlich gesteuertem Unrecht in Ungarn' 1995 *ZStW* 118–133; S Zimmermann 'Zum zweiten Verjährungsbeschluß des ungarischen Verfassungsgerichts' *Jahrbuch für Ostrecht* XXXXV (1994) 293–300; F Nagy 'Zur Problematik der Verjährung in Ungarn' 1994 *ZStW* vol 106 880–889 (Auslandsrundschau). For Poland, see A Zoll 'Die strafrechtliche Aufarbeitung von staatlich gesteuertem Unrecht in Polen' 1995 *ZStW* 1334–142.

nected with this task. The reasons for this are to be found in its own principles. The principle of ***nullum crimen sine lege*** in its form of prohibition of retroactivity establishes certain difficulties regarding the disapproval of former illegal acts which the legal order of the *Unrechtsstaat* tolerated, if not even overtly approved of.[2] Practical problems are created by the great number of offences committed by the *Unrechtsstaat*. Investigation and trial of all these offences would choke the criminal justice system for many years to come.

This somewhat problematic use of the criminal law in dealing with illegal acts committed by states does not follow the same rules in all countries which are facing the task of coming to terms with their former political system.

The following contribution will focus on some of the multi-faceted problems which resulted from the unification of the German States in 1989. As in 1945, when the Nazi dictatorship collapsed, the assessment of the acts committed under the SED regime in the name of criminal justice, once more holds the attention.

Despite the maxim of the liberal rule-of-law state that the criminal law should keep clear of politics, the present trend favours the exact reverse. An apposite example is to be found in the *Report of the Enquête Commission of the German Parliament*.[3] It is, the Commission points out, the primary duty of the state to identify unlawful acts and to prosecute them. The paper deals with those steps to be taken by prosecutorial agencies and how politicians should bring their influence to bear in order to realise this aim. The legitimacy of such political activity is based on 'the violated legal feelings (*Rechtsgefühl*) of the population of the former DDR who demand that offences committed under the SED regime should be investigated, processed and the offenders made accountable for their deeds.'[4] The rule-of-law state/*Rechtsstaat* is made dependent on politics: a result diametrically opposed to that envisaged by the liberal state. With regard to the DDR's past, the state is expected to use the criminal law as an instrument to remedy 'hurt legal feelings'.[5]

The question now is, how can this be achieved and what legal problems have been caused by such demands?

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[2]Compare Carl Schmitt *Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz "nullum crimen sine lege"* edited by H Quaritsch Berlin 1994.

[3]Bericht der Enquête-Kommission 'Aufarbeitung von Geschichte und Folgen der DDR' *BT-Drucksache* 12/7820 of 31 May 1994.

[4]See Bericht (fn 3) 101.

[5]See J Arnold 'Die 'Bewältigung' der DDR-Vergangenheit vor den Schranken des rechtsstaatlichen Strafrechts' in Institut für Kriminalwissenschaft Frankfurt a M (ed) *Vom unmöglichen Zustand des Strafrechts* Frankfurt 1995 283–312; PA Albrecht *Das Strafrecht auf dem Weg vom liberalen Rechtsstaat zum sozialen Interventionsstaat* KritV 1988 182 *ff*.

Legal problems

Scope of the clearing-up

All branches of the judiciary are required to solve conflicts which are part of the DDR heritage. Whether property questions have to be adjudicated or pension rights sorted out – to mention only a few examples – solutions have to be found to address the consequences of 40 years of an indifferent legal order. In the field of criminal law not only what is called government criminality keeps state prosecutors and courts busy[6] but also the thousands of applications by victims whose demands for review of their convictions, for rehabilitation and compensation for the suffering inflicted on them. Many a hope pinned on damages or compensation has already been dashed. Evidence is hard to find to support accusations against the so-called *Schreibtischtäter* (desk offenders) of totalitarian regimes.[7] A further, and more important factor is that courts are limited in their evaluation of DDR injustice under West German standards of law.[8]

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[6] A national criminal law system is overburdened when facing the task of dealing with a totalitarian system. A few figures may give a more concrete impression of the extent of crime under review at the moment. The Berlin state prosecution office in a press statement of December 1994 gave notice that as a so-called focal prosecution office (*Schwerpunktstaatsanwaltschaft*) dealing exclusively with government crimes committed in the DDR, it has so far issued indictments in 130 cases. In 49 cases the court has not yet decided about the opening of the trial while in 81 cases the trial has been opened. The greatest number, namely 50 indictments relates to killings by shooting fugitives; 30 cases involve indictments of judges and state prosecutors for 'bending the law'. Not included in theses statistics are indictments for spying against the Federal Republic of Germany though these offences are also Government offences when committed by officers of the DDR State Security Service. They have to be dealt with by the Federal State Prosecution Office, not by the state prosecutors' office of Berlin. As to this type of case, see the decision by the BGH against Markus Wolf, the former chief of the foreign intelligence department of the DDR.

[7] This is not only a German problem, it is the difficulty in many Eastern countries where attempts are undertaken to bring offenders of this class to trial: see for example the case against those men who were indicted of having ordered the murder of the Polish priest Jerzy Popieluszko. In 1985 four policemen who had abducted the priest were convicted and sentenced to lengthy terms of imprisonment for the killing. After the fall of the Communist regime in Poland two men operating behind the scene, General Z Platek and a high ranking official in the Interior Ministry, W Ciaston, stood trial. As superiors of the secret police members who actually perpetrated the murder, they created an atmosphere of hatred and violence intimating that reckless and even illegal violent acts against anti-communist activists would be 'received positively above'. Since there was no direct written order as to the murder, they were acquitted for lack of evidence. In other cases investigations against backstage instigators, including the generals of the military law junta like Jaruselski, also failed. They had had the opportunity to destroy all evidence against them.

[8] Meanwhile the former DDR Head of State and Party Leader Krenz, together with six high ranking former members of the polit-bureau, have been indicted for border killings. Their alleged offences include multiple manslaughters and attempted manslaughter by shootings and mines at the Wall, committed by omission. These persons knew of the shootings and did nothing to stop them. Proceedings against the former DDR Head of State Honecker and Prime Minister Stoph have been abandoned for health reasons. Honecker died in exile in Chile in 1994.

Criminal acts committed by former rulers, state officials and their subordinates or helpers can be listed and classified as follows:

- acts of violence at the former inner German border (the border separating the former West and East Germany); between 1949 to 1989 more than 200 persons have been killed by shooting, exploding mines and spring gun devices; more than 300 persons have been injured, most of them seriously. In addition, fugitives have been subjected to violence (by firing guns without taking aim) to induce them to abandon their plans of leaving the country.[9]
- judicial offences committed by giving either wrongful judgments or withholding an acquittal. This shows how the SED agencies used the criminal justice system to achieve their political aims. By this method not only were opponents voicing criticism disciplined or eliminated, but also people who intended to leave the country and their supporters were intimidated by ruthless persecution.[10]
- acts committed by the Ministry for State Security, in particular cases of kidnapping, false imprisonment or deprivation of liberty, assassination of opponents, telephone tapping or mail censoring, entering private homes, etc.
- economic crimes, in particular 'supply criminality' of functionaries and irregular trade practices of the commercial coordination agencies.
- falsification of election results.

The whole criminal justice administration itself (including the sentencing practice of DDR courts) was guided by political instructions and guidelines *orally* communicated to the judges.[11] In particular on those citizens who wanted to leave the country was conferred the extra-legal status of outcasts, a label carrying consequences far beyond the criminal process.[12]

The role of the criminal law

Can and should all these crimes be investigated and the offenders brought to justice? This fundamental question has been discussed by the general public as well as by academics in numerous monographs[13] and articles.[14] It is

[9]Over 1,200 cases of this kind have become known.

[10]See examples in J Limbach 'Vergangenheitsbewältigung durch die Justiz' 1993 *DtZ* Heft 3 *66 ff.*

[11]The text of these instructions was kept secret. It was found accidentally in Berlin and Dresden in October 1990.

[12]For more details see *Limbach* (fn 9) 67.

[13]See, for example, W Odersky *Die Rolle des Strafrechts bei der Bewältigung politischen Unrechts* (Juristische Studiengesellschaft Karlsruhe Bd 204) Heidelberg 1992; U Battis, G Jakobs and E Jesse *Vergangenheitsbewältigung durch Recht. Drei Abhandlungen zu einem deutschen Problem* ed by J Isensee Berlin 1992; K Lüderssen *Der Staat geht unter — Das Unrecht bleibt? Regierungskriminalität in der ehemaligen DDR* Frankfurt 1992; *40 Jahre SED Unrecht. Eine Herausforderung an*

common opinion that the criminal law *alone* can certainly not come to terms with the DDR past. Political rehabilitation is also required. The loss in legal culture during the 40 years of dictatorship, furthermore, can never be made good merely by the application of the criminal law.

Beyond such a general realisation of the situation, the administration of criminal justice cannot escape answering the basic question. Under the German law of procedure, state prosecution agencies would be under a general duty to prosecute if no legal exemptions exist and there are sufficient facts to support a reasonable suspicion (§ 152 (2) StPO). The central problem therefore is whether acts which were not punishable under the criminal law of the DDR can be prosecuted today by the Federal German public prosecution. What was legal yesterday, cannot be illegal today. The concept ***nullum crimen sine lege*** is a constitutional principle enshrined in Art. 103(2) of the Basic Law. Thus, acts can only be punished if the punishability was prescribed by law before the act was committed. The prohibition of retroactive laws belongs to the essence of the *Rechtsstaat* and is not open to negotiation.

The prosecution of former DDR offences is determined by the Treaty of Unification (*Einigungsvertrag*) which amended art 315 of the Act introducing the Penal Code (EGStGB). Since the citizens of the DDR were considered to be of German nationality the principle of protection (§ 7 StGB) refers to them as the 'passive and active personality principle'. This means that prosecution depends on whether the offence was punishable under the criminal laws of the DDR, being the territory where the act was committed.

The criminal law of the DDR

Under the Criminal Code of the DDR,[15] which is based on the German *Reichstrafgesetzbuch*, acts like homicide, perversion of justice, deprivation of liberty and false imprisonment were punishable offenses. Furthermore, the citizens of the DDR knew that killing or depriving someone of his liberty were illegal acts prohibited by the Criminal Code. Consequently, the acts committed by border soldiers when firing and killing or wounding fugitives; by judges when abusing the law or sentencing disproportionally; by state security officials when kidnapping people; by functionaries when defrauding the population would have been punishable under the law of the DDR territory – unless certain legal reasons or principles could inhibit any efficient prosecution.

Three main reasons have been advanced as obstacles to dealing judicially with the violations committed by members of government agencies, border soldiers

den Rechtsstaat 1 Forum des Bundesministers der Justiz am 9.7.1991 in Bonn, München 1992.

[14]A bibliography listing articles to the early months of 1993 can be found in J Arnold 'Deutsche Einheit: Strafrechtliche Übergangsprobleme' in A Eser and B Huber (eds) *Strafrechtsentwicklung in Europa* 4 Landesberichte 1989–1992 Freiburg 1993 388–389.

[15]DDR-StGB of 12.1.1968.

and other individuals. These are (i) retroactivity with regard to limitation, (ii) reasons of justification, and (iii) the amnesty laws of the DDR. All three topics have caused widespread academic debate which cannot be dealt with in detail here.

Meanwhile several courts of first instance[16] as well as the German Supreme Court have had the opportunity to deliver judgments in various cases of wall shootings (*Mauerschützen*).[17] The former President of the DDR State Council (*Staatsratsvorsitzende*) Honecker was also indicted for 49 cases of shooting at the Wall. This attempt to put to charge the highest representative of the DDR Government (in addition to the soldiers who actually committed the killing and assault) failed in the end because the process was discontinued for reasons of the accused's ill health. The former Minister of Defence, his deputy and another member of the National Defence Council were not so lucky; they were convicted of manslaughter as principals or so called 'indirect actors' (*mittelbare Täter*) who acted *via* the real perpetrators.[18]

All these trials must be seen as political processes. The adjudication of individual acts must be seen against the background of the legality or illegality of a different political system and its system of constitutional values. In comparing and assessing individual acts, judicial value standards must be objective and thoroughly reasoned. Prosecution agencies and judges are in a difficult position: public opinion nourished and informed by the media about the hitherto unknown extent of human rights violations has high expectations as to 'deserved convictions' and possibilities of coming to terms with the past. Symptomatic of these expectations and the disappointment of many former DDR citizens after the first judgments were handed down is the phrase 'we hoped for justice but we got the *Rechtsstaat*.'[19] But the principles and guarantees of a process governed by the rule of law and the principles of basic and human rights have to be observed in these trials as in all others.

For present purposes, it is impossible to discuss all the varieties of the Wall shooting cases[20] or all the legal problems emanating from them.[21] I have to

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[16]*Landgericht* (District Court) Berlin judgment of 20.1.1992 (*Gueffroy* case). NJ 1992, 269 *ff*; judgment of 5.2.1992 (*Schmidt* case) NStZ 1992, 492; judgment of 22.6.1992 (*Sievert* case, unpublished); judgment of 3.7.1992 (*Proksch* case, unpublished); all judgments of the District Court were appealed against to the Federal Supreme Court.

[17]BGH judgment of 3.11.1992 – NJW 1993 141 *ff* (*Schmidt* case); BGH judgment of 25.3.1993 – NJW 1993 1992 *ff*; BGH judgment of 20.10.1993 – NJW 1994 267 *ff*.

[18]BGH judgment of 26.7.1994, 5 StR 167/94, JZ 1995, 45. See commentary to this highly significant judgment by Roxin, *JZ* 1995 49–52, on the figure of the 'indirect actor' or 'desk actor' who, as part or member of the power structure, is responsible as principal of the offenses committed by the border soldiers as fully responsible agents.

[19]See Bärbel Bohley *Die Zeit* 14 1992 44.

[20]There are two groups of cases to be distinguished; several homicides were committed by soldiers overstepping the line which the *Grenzgesetz* (Border Act) drew for justified action in order to stop people leaving the country; such individual excesses cannot be justified at all. The other group is formed by cases in which the

restrict myself to the three reasons mentioned above which could cause an effective trial against the soldiers to go amiss.

Criminal law obstacles to establishing criminal responsibility

Problem no 1: Period of limitation for prosecutions (Prescription)

The homicide provisions in the DDR Code § 113 correspond to the West German basic version of § 212 StGB; the murder provision of § 112 corresponds to § 211 StGB. When applying former DDR criminal law to the offenses committed on the territory of that state, the whole body of the criminal law has to be considered.

This means that rules providing for limitation have to be taken into account. Unlike the common law, where there is generally a discretion to prosecute, under German law (where a statutory duty to prosecute is the point of departure) such prosecutions become void when the legally prescribed period of limitation has expired. It is an acknowledged principle that after a lapse of time a criminal act becomes a historical event and the necessity to prosecute becomes less urgent; the state has to take account of the time factor and personality changes in the offender. In addition, the evidential difficulties increase after some time passed.[22]

Under DDR criminal law such limitation proscribing any prosecution took effect after 15 years in cases of manslaughter and after 25 years in cases of murder.[23] Several crimes of manslaughter committed in 1965 or 1970 would therefore be exempt from prosecution. The Unification Treaty expressly dealt with the question of limitation stating that 'so far as the limitation had not been completed on the day of merger of both states this position was considered to remain as such; the running of the period was stopped on that day.'[24] From this it could be concluded that in the case of crimes for which limitation periods were already completed under DDR rule prosecution was barred.

Except for a few judgments, this opinion met with fierce resistance by politicians[25] and academics.[26] There was soon to be consensus that 'crimes

soldiers kept within the bounds of what the *Grenzgesetz* allowed them to do. For details see H Roggemann 'Zur Strafbarkeit der Mauerschützen' 1993 *DtZ* 10, 12 *ff.*

[21]Discussed by F Herzog 'Zur strafrechtlichen Verantwortlichkeit von Todesschützen an der innerdeutschen Grenze' 1993 *NJ* 1–4.

[22]See for his principle H-H Jescheck *Lehrbuch des Strafrechts, Allgemeiner Teil* München 1988 § 86 I; Schönke-Schröder-Stree *Kommentar zum StGB* 1991 Vorbem §§ 78 Rdnr 3.

[23]§ 82 I DDR-StGB.

[24]*Einigungsvertrag* in connection with art 315a EGStGB.

[25]*Beschluss der Justizministerkonferenz* 5/6.11.1991.

[26]See bibliographical list in J Arnold (fn 14 above); bibliography in A Eser and J Arnold 'Strafrechtsprobleme im geeinten Deutschland: Die Strafrechtswissenschaft vor neuen Herausforderungen' in Eser, Kaiser & Weigend (eds) *Von totalitärem zu rechtsstaatlichem Strafrecht* Freiburg 1993 603, 648.

which were induced or approved by former rulers or members of government and were not prosecuted thus disregarding standards of the rule of law, are exempt from limitation.' By an act of Parliament it was expressly stated that the limitation was interrupted between October 1949 and October 1990 with regard to crimes which were not prosecuted by the DDR organs because of political or other reasons disregarding the essential principles of a liberal order under the rule of law.[27]

It is quite obvious that this a politically motivated process. If the principles of retroactivity were taken seriously the result would be questionable in the extreme. Critical comments have been made by a number of academic writers formulating concern about this method of negating basic principles of rule of law.[28]

However, the result is that offences can now be prosecuted without limitation.[29]

Problem no 2: Reasons of justification

Acts of homicide and serious bodily injury committed by border soldiers in order to prevent persons from leaving the territory of the DDR without permission were legal under s 27 DDR *Grenzgesetz* of 1982. The Act[30] prescribed in detail the conditions for the use of weapons and the limits of such use. The soldiers were generally under the order first to call at the runaway, then to fire a warning shot followed by one aimed at the refugee. In any event they were obliged to prevent the flight, even by killing the person. When such a killing occurred the soldiers who fired the fatal shot was never reprimanded or prosecuted; on the contrary – he was rewarded and even

[27] 1. *Verjährungsgesetz* (BGBI, 1993 I p. 392), First Limitation Act 1993; it was followed by the 2. Verjährungsgesetz 1993 vom 27.9.1993 (BGBI I p. 1657), Second Limitation Act 1993.

[28] See W Bottke 'Die Verfolgung von Regierungskriminalität der DDR nach dem Beitritt der neuen Länder' in E-J Lampe (ed) *Deutsche Wiedervereinigung: die Rechtseinheit. Arbeitskreis Strafrecht* Bd 2 KÖln 1993 203 *ff*, 237; K Breymann 'Zur Auslegung der Verjährungsregelung in Art. 315a EGStGB' 1991 *NStz* 463 *ff*: A Eser and J Arnold (fn 26 above); G Grünwald 'Zur Frage des Ruhens der Verjährung von DDR-Straftaten' 1992 *StrV* 333 *ff*. For further titles see Arnold (fn 5 above), notes 67 *ff*.

[29] Compare, in contrast, the resolution of the Constitutional Court of the Hungarian Republic no 11/1992, holding that the law adopted during the 4 Nov 1991 session of Parliament concerning the right to prosecute serious criminal offenses committed between 21 Dec 1944 and 22 May 1990 that had not been prosecuted for political reasons is non-constitutional. The English translation of this resolution can be found in *Journal of Constitutional Law in Eastern and Central Europe* vol 1 129–157.

[30] Before this Act was promulgated the shooting was regulated by regulations which referred to secret military rules; *DDR-Verordnung zum Schutze der Staatsgrenze der DDR* 19.3.1964; *DDR-Grenzordnung* 15.7.1972. Between 1966 and probably 1987 the border soldiers when taking their military position at the border were reminded of their duty 'not to allow the breaking/passing of the border in any direction, to track down any person who tries to violate the border, to arrest or to annihilate him/her, and to recognise provocative actions in time and to prevent any spreading of them on the territory of the DDR'.

accorded distinction.

The Federal Supreme Court when dealing with the question of justification under the *Grenzgesetz*[31] delivered a complicated judgment arguing on several levels. Firstly, the court comes to the conclusion that the soldiers acted lawfully and within the scope of former DDR state practice when they shot at persons in order to prevent them from crossing the border. The ratio was found in the fact that illegal border-crossing under certain circumstances was a crime under § 213 of the DDR Penal Code. Under the prevailing practice in the DDR the prevention of illegal border-crossing was paramount to the protection of life or bodily integrity.

Secondly, the BGH subjects this finding to a further analysis or control measuring the reasons for justification against higher ranking legal principles. The court takes as its point of departure the fact that justification at the time of acting may be disregarded as violating higher ranking principles, when such reasons express an apparently serious violation of basic ideas of justice and humanity. The violation must be so grave that it controverts all legal convictions common to all peoples and relating to the value and dignity of the individual. As a guideline the BGH thus uses the so called *Radbruch* formula which holds that positive law when illegitimate or incorrect (*unrichtiges Recht*) has to defer to justice when the contradiction between law and justice becomes intolerable.[32] The BGH perceives such an unbearable contradiction between law and justice by taking art. 12 (2) of the International Covenant for Civil and Political Rights of 19.12.1966 as a standard. This provision gives every person the right to leave any country, including his own. Though the DDR had never incorporated this Covenant into its law, it was legally bound by it because it had ratified the Covenant. The government violated art 12 by generally – not only in exceptional cases – preventing its citizens to leave the country. The DDR Government furthermore violated art 6 of the Covenant by arbitrarily taking the life of citizens who wanted to leave the country. Therefore, the justification derived from § 27 *DDR-Grenzgesetz* had been invalid from the beginning; the incapacitation was not justified under DDR law as it could have been applied if the criteria of the legal order of this state would have been used. Killing by shooting at persons at the border accordingly was unjustified and therefore illegal, even under DDR law.

Problem no 3: Retroactivity

Reaching (so far preliminary) conclusion, the Supreme Court is faced with the prohibition of retroactivity provided for by the Constitution.[33] Under the

[31]See judgments cited above fn 18.

[32]G Radbruch 'Gesetzliches Unrecht und übergesetzliches Recht' 1946 *SJZ* 105 *ff.*

[33]See art 103 (2) Basic Law and § 2 StGB. In addition art 7 of the European Convention of Human Rights provides that 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed', and art 115 (2) makes it clear that there can be no derogation from art 7.

principle of legality the law should state clearly and in advance the body of rules and exceptions under which an act is made punishable. Therefore, an act can only be punished if the punishability was already laid down by law at the time of the offence, no retroactive effect of a later law can be allowed. The West German Criminal Code which is now the only criminal law in the unified country also provides that more severe laws in relation to the former DDR-law shall not be applied, while milder laws have to be applied with relation to acts committed on the territory of the DDR. (This may be a German problem alone: in most other countries, where political change has taken place, the former criminal law continues to be in force).

When evaluating the former acts the Supreme Court – with regard to art 103 II Basic Law – was faced with the question which interpretation of the law at the time of the offence should prevail. If the shooting was seen as being illegal under DDR-law because there was no valid reason for justification (as the Supreme Court opines) though this was ordered by the State – then the principle of retroactivity does not inhibit conviction and punishment. Another result may be achieved if one takes as a standard for the evaluation of such acts the conditions (in terms of power) existing at the time. In particular, consideration of the effect of superior orders to negate the general right to life could lead to different conclusions. As the Supreme Court acknowledges, reasons of justification are not generally excluded from the protection offered by art 103 II GG. If an act was not illegal because of a then valid defence, it cannot be punished at a later stage, when such defence has been eliminated.[34] This would mean a change of law to the detriment of the accused.[35] The same is true for an interpretation of reasons of justification which have been acknowledged and practised at the time of the offence, but have controverted higher ranking norms.

Though the general discussion has not yet created a common prevailing opinion as to the post-facto relevance of former defences[36] the Supreme Court has assumed a position.[37] Arguing that the present judge is not bound by former interpretation when deciding whether the punishability had been laid down before the offence was committed, but can replace former state practice by a post-facto evaluation of his own – taking the DDR Constitution and the international obligations in relation to human rights as parameter – the Court came to the conclusion, that the former justification could not have been deduced from the law if it would haven been interpreted in the right way then. Regarding the state practice in question as unlawful and unworthy of reliance *ex tunc*, the court saw no reason for protecting reliance on such practice.

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[34]See A Eser in *Schönke-Schröder* 24 ed § 2 margin no 3.

[35]See G Jakobs *Strafrecht Allgemeiner Teil* 2 ed 1991 121.

[36]Further literature at Eser in *Schönke-Schröder* (fn 34 above) margin no 8.

[37]Judgment cited above fn 17 148.

As a result, the Supreme Court did not find a reason for the application of the prohibition of retroactivity because there has not been a reason for justification if only the law would have been correctly – that is pro human rights applied by the DDR courts.[38]

By replacing former interpretation and state practice by its own opinion as to the correct interpretation of former DDR criminal concepts and practice the Supreme Court in the end was successful in its search for a solution to establish responsibility and punishability for system-related criminality (*Systemkriminalität*).

Espionage for the DDR

The question whether former DDR citizens who engaged in espionage for the DDR can now be tried and punished by German courts, is yet another problem to be considered in this context. In a recent decision,[39] the Federal Constitutional Court (which could not find a general rule in international law (*Völkerrecht*) proscribing the prosecution of agents of foreign states after the merger of one state with another) considered the constitutionally enshrined principle of proportionality and the prohibition of excessive action (*Übermaßverbot*) a bar to prosecution and trial. The Court held that persons who acted as spies from the territory of the DDR against the Federal Republic, or organised espionage would suffer disproportionally by prosecution and conviction as consequence of a change in the general political situation after the offence was committed. Considering the special character of the offence of espionage which is punishable when committed against the own state but legal, useful and worthy of protection when undertaken to its advantage, the Court stresses the fact that by the dissolution of the DDR the general protection offered by states to their spies has become nil. In addition, only by this unique act of merger the possibility for prosecution of spies by German agencies has become possible. Under these circumstances the offender group of agents are suffering a disproportionate encroachment on their rights, outweighing the interest of the Federal Republic in prosecuting such agent activities to such an extent that the interests of the agents take precedence.

The Federal Constitutional Court thus creates a new bar to prosecution directly from the Constitution. As this bar extends its effects on a whole group of otherwise guilty and punishable offenders, an amnesty for these people is brought in its train and all pending procedures against agents have to be discontinued.

The highly critical dissenting opinion clearly states that the use of the

[38]The jurisprudence of the First Wall shooting case (*Mauerschützenurteil*) NJW 1993 141 was continued in the Second Wall shooting case decided by the Supreme Court on 25 March 1993 NJW 1993 1932. Further judgments along the same lines are BGH, NJW 1994 2708; BGH, NJW 1994 2703.

[39]*Beschluß des BVerfg* of 15 May 1995 NJW 1995 1811–1823. The decision was not unanimous, three out of seven judges dissenting.

proportionality principle in this context serves the purpose to protect certain persons for reasons of equity (*Billigkeitsgründe*). By inferring such bar to prosecution directly from the Constitution, the court goes beyond its bounds and usurps legislative and political functions. Creating new law and the decision to grant an amnesty are functions vested in Parliament.

Conclusions

German courts are faced with the difficult task to fulfil political expectations directed at the punishment of formerly powerful persons as well as those who executed the will of such persons and committed offences under superior order. These latter persons assumed they acted lawfully: enforcing the Border Act and carrying out the orders they routinely received and noticing the positive reaction which followed such shootings. The legal structure supporting the functioning of does not easily allow of convicting and punishing these people. Basic constitutional principles shaping the criminal law and procedure militate against an all too easy way out of the problem. Limitation of time and prohibition of retroactivity are the obstacles in the examples of the wall shooting cases, retroactivity also plays a role in cases of obstructing the course of justice (*Rechtsbeugung*)[40] and falsification of election results.

The reasoning of the Supreme Court shows a revival of supra-positive law and accentuates the fragility of principles of the rule of law[41] when situations turn out to be extraordinary. The principle of time limitation for prosecution was rescinded by Parliament, and so far the constitutionality of the *Verjährungsgesetz* has not been challenged in the Constitutional Court.[42] The retroactivity prohibition was overruled by the Supreme Court.

The debate has not yet come to an end but it should not be overlooked that the general public seems to have tired of it. There is a state of helplessness in the face of so much diverging opinion. Many people are dissatisfied with the developments and the state of affairs: state prosecutors complain about the slow progress of trials in court, judges feel that current criminality is prosecuted insufficiently because so much time of the overburdened judicial personal is devoted to offences committed in the past. Very little has been

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[40] See § 336 StGB(west), § 244 StGB(DDR); BGHSt 40 30, 39; BGH NStZ 1994, 437 regarding the *Rechtsbeugung* by state prosecutors; see also K Letzgus *Festschrift für Helmrich* 1994 73ff; S Höchst 1992 *JR* 360; CF Schroeder 1993 *NStZ* 216; and in Lampe (ed) *Die Verfolgung von Regierungskriminalität der DDR nach der Wiedervereinigung* 1993 109, 113; Wassermann 1991 *DRiZ* 438. Regarding the *Waldheim* cases see 1992 *NStZ* 137.

[41] W Naucke 'Über die Zerbrechlichkeit des rechtsstaatlichen Strafrechts' 1990 *KritV* 244 *ff*.

[42] Whether an act which extends running time limitations is constitutionally correct depends from the scope of the prohibition of retroactivity in art 103 ss 2 GG. Majority opinion follows the decision of the Constitutional Court (BVerfGE 25, 268) stating that Parliament is not inhibited to change time limits with retroactive force. As to the problem see Eser in *Schönke-Schröder* (above fn 34) § 2, margin no 6 giving further opinions.

achieved during the four years since re-unification.[43]

Again and again the idea of an *amnesty* is entering the political discussion, no longer a taboo. A leading force is the Social Democratic Party proposing an amnesty act or a finality act, but there is much disagreement, even discord among parties as well as in the judiciary and society in general.[44]

An amnesty would exempt the greater number of espionage offences, denunciation, election falsification and other system-related acts as well as political crimes from prosecution. The limitation period for such middle and petty offences is running out in 1995 and 1997 respectively, if not extended. But it is not yet settled in detail which offences should be affected by such a *Schlußgesetz* (Finality Act). General agreement can only be achieved with regard to capital offences like murder, manslaughter (including attempts and aiding and abetting), torture in prisons and more serious political or system-related offences. However, it is difficult to draw the line between offences not worthy of punishment and those violations of human rights which must be prosecuted. But what about the judges and prosecutors who collaborated in imposing high sentences on persons intending to leave the country or outspoken critics of the state, the functionaries who ordered abductions and postal searches and who took bribes?

The victims probably would not understand. They are principally interested in knowing what happened and to see that not only the soldier on the border is convicted but also those high ranking persons who ordered and supported the shooting. This is not necessarily revenge, but the wish to see justice to be done. From the point of view and feeling of the Eastern population it is probably too early to draw a final curtain over the past. Whether an amnesty would bring social peace at this moment is an open question.

On a provisional basis it must be said that the attempt to come to terms with the criminal past of the former DDR has not been that successful. Few guilty people have been convicted, many problematic legal questions have arisen and not answered or if answers have been found they are not absolute. However, from this experience we can see that there are no general rules and no model how a *Rechtsstaat* can deal and has to deal with pre-*rechtsstaatlicher* criminality.

I think we should not overlook the statement by Max Weber that no ethic can

[43]See figures above (fn. 6); see also *Der Spiegel* Nr 48/94: out of 5666 cases investigated by the Berlin special department of the Berlin state prosecution office 5495 had to be abandoned because of lack of evidence or negligible guilt. Only 171 cases were indicted.

[44]See eg the interview given by the former judge of the Constitutional Court EG Mahrenholz *Spiegel* no 48/94 of 12.12.1994; R Wassermann *Die Welt* of 10.11.1994; Rupert Scholz (MdB/Member of Parliament) *Frankfurter Allgemeine Zeitung* of 23, January 1995; R v Weizsäker (former President of the Federal Republic) *Der Spiegel* no 4/95 of 23, January 1995; R Herzog (present President of the FRG) Deutschlandradio Berlin on 30, December 1994; the Christian Democratic Union, the Social Democratic Party in the Eastern Länder are against such an act.

avoid the fact that in several cases positive results can only be achieved by the use of questionable and sometimes even dangerous means or taking into account the probability of evil side effects. The great question however is – and this cannot be derived from any ethical system – when and to what extent ethically good purpose sanctions ethically dangerous means and side effects.[45]

[45]Compare M Weber *Gesammelte politische Schriften* 4 ed 1980 551 *ff.* (cited in E Bacigalupo 'Das Strafrecht im Übergang von der Diktatur zur Demokratie: die Fälle Spanien und Argentinien' (unpublished conference paper).

The doctrine of common purpose in South African law

MC MARÉ*

Before I became a colleague of Professor SA Strauss in 1984, I had been well aware of his reputation as a formidable academic, law professor and trial advocate. Privileged to work with him in the years that followed, my respect and admiration for his work grew. His immense contribution to the development of criminal law and medical law in South Africa is well documented and well known. As a newcomer to Unisa, I was fortunate to start my academic career under his guidance and to observe his approach to teaching, the development of courses and academic management in general. In this regard he was a perfect role model and the example he set is one worth following.

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INTRODUCTION

The application of the doctrine common purpose, and in particular the proper legal foundation of the doctrine as well as the question whether an accused can be convicted of murder on the strength of this doctrine without having caused or contributed causally to the deceased's death, have been controversial issues for many years.[1] In the leading case of *S v Safatsa*[2] the Appellate Division emphasised the aspect of *active association* and also held that proof of causation is not a requirement for a conviction of murder in terms of the doctrine.

In this case the court stated that if a number of people have a common purpose to kill, the act of that participant to the common purpose who actually caused the death of the deceased is imputed to the other participants who actively associated themselves with the attainment of the common purpose. The participants who actively associated themselves with the

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*BIur et Art LLB (PUCHO) LLD (Unisa). Professor of law, Department of Criminal and Procedural Law, University of South Africa.

[1]JC de Wet & HL Swanepoel *Strafreg* (4ed 1985) by JC de Wet 192; SA Strauss 'Oorsaaklikheidsverband en daderskap: moord sonder veroorsaking' 1960 *THRHR* 95; FFW Van Oosten 'Deelneming aan gevolgsmisdade: (mede)daderskap of medepligtigheid' 1979 *De Jure* 45, 346; MM Oosthuizen 'Kousaliteit en 'common purpose' in die strafreg' 1985 *TSAR* 102; MA Rabie 'Medepligtigheid en ontbrekende kousaliteit by moord 1988' *SACJ* 35; Jonathan Burchell & John Milton *Principles of criminal law* (1991) 347.

[2]1988 (1) SA 868 (A).

common purpose to kill can thus be convicted of murder, provided they also had the necessary *mens rea* (culpability) in respect of the offence.[3]

The requirements for liability in terms of the doctrine of common purpose, as expounded and refined by our case-law, as well as the legal foundation of the doctrine, are examined in this article. The application of the doctrine is also considered against the background of the principle of legality and the fundamental rights guaranteed in Chapter 3 of the Constitution of the Republic Act.[4] The historical development of the law relating to participation is investigated with a view to the principle of legality[5] and to put the requirements of the doctrine of common purpose into perspective.

HISTORICAL DEVELOPMENT OF THE LAW RELATING TO PARTICIPATION IN SOUTH AFRICAN LAW

Roman law

In Roman law there was no general criterion or principle for the differentiation between various categories of participants or parties involved in the commission of a crime. However, most crimes were so widely defined that persons who instigated the offender to commit the crime, or who assisted him, in any event complied with the definition of the crime and were punishable to the same extent as the offender.[6]

Roman-Dutch law

Although no proper theory of participation developed in Roman-Dutch law, it is clear from the works of the Roman-Dutch writers that criminal liability was not restricted to persons who actually committed a crime. Damhouder stated that someone who rendered assistance or who gave advice or counselled the actual offender were punishable 'als den principael'.[7] Matthaeus also declared that persons who counselled the offender or who helped the offender to commit the crime were punishable.[8] Van Leeuwen expressly stated that 'Die een ander gelast, opmaakt, of raad en daad geeft om enige misdaad te bedrijven, is daar over so wel as den misdadiger self schuldig'.[9] According to Huber, helpers and counsellors were themselves guilty of the crime and punishable with the ordinary punishment prescribed for the offence,[10] while Moorman drew a distinction between helpers and counsellors and stated that each may be punished according to the circumstances of

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[3]On 901I.

[4]Act 200 of 1993.

[5]Compare the approach of Ackermann J in *S v Von Molendorff* 1987 (1) SA 135 (T).

[6]W Rein *Das Kriminalrecht der Römer* (1844) 185; T Mommsen *Römisches Strafrecht* (1899) 100; JC de Wet & HL Swanepoel *Strafreg* (4 ed) 1985 178.

[7]Joost de Damhouder *Practycke in criminele saken* (1660) Chapter 3.

[8]A Mattheus *De criminibus* (1672) *Prolegomena* 1 9, 1 10 and 1 11.

[9]S van Leeuwen *Het Rooms Hollands-Regt* (10 print 1732) 4 32 3.

[10]U Huber *Hedendaegse Rechtsgeleertheyt* (1742) 6 1 5, 6 1 14, 6 1 16.

each case.[11]

Matthaeus,[12] Damhouder,[13] Van der Linden[14] and Van der Keessel[15] were of the view that persons who aided the offender during the commission of the crime were liable to the same punishment as the person who committed the crime while persons who rendered assistance before the commission of the crime as well as persons who rendered assistance after the commission of the crime were liable to a lesser punishment than the offender.

As regards the liability for murder committed in a general fight involving a number of people, the view was held by most of the writers that if the participants agreed before the fight to kill the victim and they assisted each other during the fight, they were all punishable by death. If someone instigated the fight with the intention that the victim should be killed during the fight, that person was also punishable by death. If there was no prior agreement or instigation to kill the victim, only the person who actually inflicted the fatal wound was punishable by death. The others were liable to a lesser punishment. If several persons inflicted fatal wounds, they were all punishable by death, regardless of which wounds actually caused the death.[16] It therefore seems clear from this that all participants to the fight were not punished equally and it may even be argued that some form of causality was required before a participant could be held liable for the killing. On the other hand, it seems that the writers were more concerned with the measure of punishment of each of the participants and that they were not considering the requirements for liability.[17]

South African law

The law relating to participation in crime in South Africa developed on two separate foundations, namely (1) liability as perpetrators and accomplices and (2) liability in terms of the doctrine of common purpose.

Perpetrators and accomplices

In the 1906 case of *R v Peerkhan and Lalloo*[18] the Court (per Innes CJ) interpreted the common law relating to participation as follows:

> It (our law) calls a person who aids, abets, counsels or assists in a crime a

[11] J Moorman *Verhandelingen over de misdaden en derzelver straffen* (1779) 2 1 23.

[12] *Op cit Prolegomena* 1 11 and 48 18 4 19.

[13] *Loc cit.*

[14] J van der Linden *Rechtgeleerdheid, practical en koopmans handboek* (1806) 2 1 8.

[15] DG van der Keessel *Praelectiones ad Jus Criminale* also known as *Praelectiones in Libros XLVII et XLVIII Digestorum* (translated by B Beinart and P van Warmelo in 6 Volumes 1969–1981) Volume 1 29.

[16] Carpzovius B *Practica Nova Imperialis Saxonica Rerum Criminalium* (1752) 8–25, 19; Matthaeus *op cit* 48 3 20; Van Leeuwen *op cit* 4 34; Huber *op cit* 6 13 37; Voet *op cit* 48 8 7; Moorman *op cit* 2 1 23; Boehmer SF *Meditationes in Constitutionem Criminalem Carolinam* 48 2 & 48 3.

[17] *R v Mlooi* 1925 AD 131 135.

[18] 1906 TS 798 802.

> *socius criminis* — an accomplice or partner in crime. And being so, he is under Roman-Dutch law as guilty, and liable to as much punishment, as if he had been the actual perpetrator of the deed. Now it is clear that in our criminal courts men are convicted for being *socii criminis* without being specially charged in the indictment as such.

In a concurring judgment Wessels J stated:

> Our law is void of any technicality. It says that a person who assists at a crime is himself guilty of the crime.[19]

This judgment was criticised, *inter alia*, because the court failed to distinguish between perpetrators and accomplices and failed to spell out the requirements for liability for each of these various categories of offenders.[20]

This judgment also had important procedural implications, because it meant that an accomplice could be charged and convicted of the substantial crime (for example rape, selling unwrought gold or drugs, etc) as if he had been the perpetrator or the actual offender and a person charged as a perpetrator could be convicted even if it was proved that he had been an accomplice who merely aided, assisted or counselled the perpetrator. In subsequent cases it was pointed out that sufficient particulars of the conduct of the accomplice should be given in the indictment. In *R v M*,[21] for example, it was held that, on a charge of rape, it was nonsensical to allege in the indictment that the female accomplice had intercourse with the complainant and that the indictment should have read that the male accused had intercourse with the complainant without her consent and that the female accused assisted him to have such intercourse.

The judgment in *R v Peerkhan and Lalloo*[22] formed the basis of our law of participation for many years and was followed in numerous cases.[23] Approximately 74 years later, in *S v Williams*[24] the Appellate Division analysed the difference between perpetrators and accomplices and expounded the requirements for liability for each of these two categories of participants. In this judgment the court accepted the theory of participation developed by the academics De Wet & Swanepoel[25] and MA Rabie.[26] The court described a perpetrator as someone who complies with all the elements in the definition of the crime. Thus, where a number of people commit a crime together, each of them have to comply with the definition of the crime in order to qualify as a co-perpetrator. An accomplice, on the other hand, is not a

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[19]On 803.

[20]De Wet & Swanepoel *op cit* 189.

[21]1950 (4) SA 101 (T).

[22]*Supra*

[23]See, *inter alia*, *R v Jackelson* 1920 AD 486, *R v Longone* 1938 AD 532, *S v Moumbaris* 1974 (1) SA 681 (T).

[24]1980 (1) SA 60 (A) 63.

[25]In *Strafreg*, of which the first edition was published in 1948.

[26]*Die Deelnemingsleer in die strafreg* (LLD) Unisa (1969).

perpetrator because he lacks the *actus reus* (or does not comply with the definition of the proscription of the crime in question[27]). An accomplice is defined in this judgment as a person who consciously associates himself with the commission of the crime by the perpetrator or perpetrators by consciously giving assistance at the commission of the crime or consciously supplying the opportunity, the means or relevant information to the perpetrator which further the commission of the crime. The court further stated that the liability of the accomplice is of an accessory nature and that there can be no question of an accomplice without a perpetrator who has committed the crime.

In the course of the judgment in *S v Williams*[28] the court stated that there must be a causal connection between the conduct of an accomplice and the commission of the crime by the perpetrator or co-perpetrators.[29] Whatever the meaning of this rather ambiguous statement, it is generally accepted that it does not mean that there must be a causal connection between the conduct of the accomplice and the death of the deceased in a case of murder.[30] Of course, such a causal connection is required between the conduct of the *perpetrator* and the death of the deceased.

Despite the distinction drawn between perpetrators and accomplices in *S v Williams*[31], an accomplice is still convicted of the substantive crime. This is reflected in a number of cases decided after the *Williams* case. In *S v Khoza*[32] Botha AJA concluded that an *accomplice* was 'guilty of murder' and in *S v Kock*[33] the Appellate Division confirmed the death sentence imposed on an accused convicted of rape *as an accomplice*.[34] In the cases of *R v Gani*[35] and *S v Jonathan*[36] the court expressed the view that it made no difference to an accused's liability whether he was an (actual) accessory after the fact or *an accomplice* to the (actual) accessory after the fact.

This practice of the courts is also confirmed by the provisions of the Criminal Procedure Act.[37] Sections 256 and 257 of the Act make specific provision that an accused charged with any crime may in certain circumstances be convicted of an attempt or as an accessory after the fact (begunstiger), but nowhere in the Act is there any similar provision regarding a conviction as an accomplice.

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[27]For a discussion of the concept of the definition of the proscription, see Snyman CR *Criminal Law* (2ed 1989) 79.

[28]*Supra*.

[29]*Supra* 63E–F.

[30]*S v Khoza* 1982 (3) SA 1019 (A) 1019, 1054; Snyman op cit 269; PJ Visser & JP Vorster *Criminal Law through the Cases* (3 ed) 1990.

[31]*Supra*.

[32]*Supra* 1055.

[33]1988 (1) SA 37 (A).

[34]401–J.

[35]1957 (2) SA 212 (A).

[36]1987 (1) SA 633 (A).

[37]Act 51 of 1977.

It is clear that a conviction of 'guilty as an accomplice' or 'complicity' is not recognised as a separate offence in the Act.[38] An accused is liable to a conviction of the crime charged (or any crime of which he may legally be convicted) if he qualifies either as perpetrator or as accomplice as defined in the *William's* case.

The doctrine of common purpose

One of the first reported criminal cases in which a South African court formulated the doctrine of common purpose is the 1923 case of *R v Garnsworthy*[39] where the court made the following statement:

> Where two or more persons combine in an undertaking for an illegal purpose, each of them is liable for anything done by the other or others of the combination, in the furtherance of their object, if what was done was what they knew or ought to have known, would be a probable result of their endeavouring to achieve their object.

This *dictum* was followed and confirmed by the Appellate Division in, *inter alia*, *R v Duma*[40] and *R v Ndhlangisa*.[41]

This definition of the doctrine of common purpose was formulated in terms of the more objective approach to culpability, thus the reference to what the accused 'ought to have known, would be a probable result' of their conduct. However, it is now settled that an accused can only be convicted of murder in terms of the doctrine of common purpose if he had the intention (direct intention or *dolus eventualis*) to kill.[42] Holmes JA explained this principle as follows in *S v Malinga*:[43]

> Now the liability of a *socius criminis* is not vicarious but is based on his *mens rea*. The test is whether he foresaw (not merely ought to have foreseen) the possibility that his *socius* would commit the act in question in the prosecution of their common purpose.

In most reported cases before *S v Williams*[44] the courts applied the doctrine of common purpose to murder without considering whether there had to be a causal connection between the act of the accused and the death of the deceased.[45] The judgment in *Williams* focused the attention on the problem of causation and in numerous subsequent cases the Appellate Division

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[38]Academic opinion seems to favour the view that complicity should be a separate offence. See MA Rabie *Medepligtigheid en ontbrekende kousaliteit by moord* 1988 SACJ 35 46.

[39]1923 WLD 17.

[40]1945 AD 410 415.

[41]1946 AD 1101 1106.

[42]*R v Nsele* 1955 (2) SA 145 (A) 148; *R v Hercules* 1954 (3) SA 826 (AD); *R v Bergstedt* 1955 (4) SA 186.

[43]*S v Malinga* 1963 (1) SA 692 (A) on 694F–G.

[44]*Supra*.

[45]SA Strauss *Loc cit*; *R v Mgxwiti* 1954 (1) SA 370 (A); *R v Dladla* 1962 (1) SA 307 (A); *S v Nkombani* 1963 (4) SA 877 (A); *S v Bradbury* 1967 (1) SA 387 (A); *S v Madlala* 1969 (2) SA 637 (A);

expressed the view that proof of a causal link between the act of the participant and the death of the victim was *not* required in terms of the doctrine of common purpose.[46] In *S v Safatsa*[47] the court confirmed this view and overruled the cases where it had been intimidated that such a causal connection was required.[48]

FACTUAL SITUATIONS TO WHICH THE DOCTRINE IS APPLIED

The doctrine of common purpose is applied almost exclusively to murder and culpable homicide cases, as it solves the difficult factual question of proof of causation where a number of people are involved in a killing.[49]

Common purpose to kill

The cases of *R v Dladla*,[50] *S v Mgedezi*[51] and *S v Safatsa*[52] are examples of cases where the accused shared a common purpose to kill. The requirements of active association with the common purpose as well as intention to kill were laid down in the case of *Safatsa*.

The facts of the *Safatsa* case were as follows: A crowd of about one hundred people attacked the home of the deputy mayor of the town council of Lekoa outside his house in the town of Sharpville. The six accused were part of the crowd. Some of the accused threw stones at the deceased and some wrestled with him. Accused no 4 merely shouted that the deceased should be killed and slapped another person who objected to the actions of the crowd. Members of the crowd eventually threw petrol over the deceased and killed him by setting him alight. There was no evidence that any of the accused had contributed causally to the death of the deceased, but all were convicted of murder in terms of the doctrine of common purpose and were sentenced to death. These sentences were later commuted and the accused were freed after serving a number of years' imprisonment.

Common purpose and dolus eventualis in respect of death

In *S v Madlala*[53] the court stated that an accused will be guilty of murder, *inter alia*, if there is proof that he was a party to a common purpose to commit some other crime (such as assault, robbery or housebreaking), and he foresaw the possibility of one or any of the participants to the common purpose causing the death of someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred.

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[46] *S v Khoza, supra* 1015; *S v Daniëls* 1983 (3) SA 275 (A) 304, 323; *S v Nkwenja* 1985 (2) SA 560 573.

[47] *Supra*.

[48] Eg *S v Thomo* 1969 (1) SA 385 (A); *S v Maxaba* 1981 (1) SA 1148 (A).

[49] Snyman *op cit* 258.

[50] 1962 (1) SA 307 (A).

[51] 1989 (1) SA 687 (A).

[52] *Supra*.

[53] 1969 (2) SA 637 (A) 640.

This principle has been applied in numerous cases over the years.[54] In a minority judgment in *S v Nzo*[55] MT Steyn JA indicated that the doctrine of common purpose can only be applied where there had been a common purpose to commit murder. This judgment is against overwhelming authority that a common purpose to commit another crime and mere *dolus eventualis* in respect of death is sufficient. *S v Majosi*[56] is an example of a recent case where this principle was applied. X, together with four other persons, decided to rob a supermarket. One of the robbers borrowed a firearm for the occasion. At the supermarket X kept watch outside and the other four entered the supermarket. One of the robbers shot and killed an employee inside the supermarket. X fled with the robbers and shared in the spoils of the robbery. X, who neither handled the gun nor was present during the killing, was convicted of murder on the basis that he had foreseen the possibility that somebody might be shot and killed during the robbery and had reconciled himself with this possibility.

Common purpose and negligence in respect of death

In *S v Nkwenja*[57] it was held that if an accused was a party to a common purpose to commit a crime for which intention is required[58] (such as assault, robbery or housebreaking with the intention to commit a crime) and he ought reasonably have foreseen that someone might be killed in the execution of the crime, he is guilty of culpable homicide if someone is actually killed during the commission of the crime.

In the case of *Nkwenja* the two accused X and Y decided to rob the deceased Z who was sitting in a motorcar. Either X or Y (the court could not establish which one) pulled Z from the motorcar and assaulted him while the other pulled a second passenger from the car. Z died as a result of the assault. Z had very few external injuries and the court was not prepared to hold that X and Y had *dolus eventualis* in respect of the death. The court held, however, that they were negligent in respect of the death as they ought reasonably have foreseen that someone might be killed in the course of the robbery and convicted both of them of culpable homicide.

This principle has been confirmed in *S v Safatsa*,[59] *S v Kwadi*[60] and *S v Majosi*[61] In *Majosi* the court indicated that if the robber X, who had kept

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[54] *R v Morela* 1947 (3) SA 147 (A); *R v Nsele supra*; *S v Shaik* 1983 (4) SA 57 (A); *S v Talana* 1986 (3) SA 196 (A); *S v Beukes* 1988 (1) SA 511 (A); *S v Mbatha* 1987 (2) SA 272 (A); *S v Nzo* 1990 (3) SA 5 (A).

[55] *Supra*.

[56] 1991 (2) SACR 532 (A).

[57] 1985 (2) SA 560 (A).

[58] It is inherently impossible to have a common purpose to be negligent — *R v Tsosane* 1951 (3) SA 405 (O).

[59] *Supra* on 897 E.

[60] 1989 (3) SA 524 (NC).

[61] *Supra* on 537.

watch outside the supermarket did not have *dolus eventualis* in respect of the death of the deceased, but ought reasonably to have foreseen that someone might be killed in the course of the robbery, he would be guilty of culpable homicide. The statement of the court in *S v Van der Merwe*[62] that an accused can be convicted of culpable homicide in terms of the doctrine of common purpose only if he had actually taken part in the assault on the deceased, cannot therefor be accepted as correct.

In some older cases the doctrine was applied without proof of negligence on the part of the participant,[63] but this approach was rejected in *S v Bernardus*.[64] As it is only the act and not culpability that is imputed, the present approach to the application of the doctrine of common purpose in culpable homicide cases is similar to the application of the doctrine in cases where the accused had *dolus eventualis* in respect of the death of the victim.

REQUIREMENTS FOR LIABILITY

Common purpose

In *R v Garnsworthy*[65] the doctrine of common purpose was defined with reference to the common purpose to achieve a shared 'unlawful purpose'. It is, however, more correct to say that the participants must share a common purpose to a commit a *crime*.[66] In a case of murder the common purpose need not necessarily be to kill or to commit murder. As has been pointed out above, it is sufficient if the accused had a common purpose to commit some other crime and had *dolus eventualis* in respect of the death of the deceased.

In *S v Mgedezi*[67] it was held that the accused must have *consciously* shared the common purpose. It is not sufficient that two or more people independently or by coincidence had the same purpose. In other words, it was held that in order to be liable in terms of the doctrine the accused must have collaborated. In this case X, together with a number of other people, formed the common purpose to murder the inhabitants of a certain room in a mine hostel. The inhabitants of this room were attacked and four of them were murdered, but the body of one of the victims was found hundreds of metres from the room where the attack had taken place. The court refused to convict X of murder of this victim in terms of the doctrine of common purpose as it was held reasonably possible that the victim had fled from the room before he had been fatally wounded and that another unknown person, acting *independently* of X and his co-attackers, had killed him.

The fact that the accused must have consciously shared the common purpose does not mean that the accused must know each other's identity. It is

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[62] 1991 (1) SACR 150 (T).
[63] *R v Mkize* 1946 AD 197; *R v Geere* 1952 (2) SA 319 (A).
[64] 1965 (3) SA 287 (A).
[65] *Supra.*
[66] 6 *Lawsa* 118.
[67] *Supra.*

submitted that, like the so-called 'chain conspiracy', it is sufficient if the parties were aware of each other's existence without actually knowing each other.[68] Where there is a conspiracy to commit a crime, such conspiracy will also constitute a common purpose to commit the crime. This does not mean that the common purpose can only be formed by means of an agreement or a conspiracy. Though the common purpose may be expressly formed by means of a prior agreement,[69] it may also arise spontaneously without the participants even knowing each other beforehand.[70]

S v Mgedezi[71] it was also held that in the absence of a prior agreement to kill the victim, the accused must have been aware of the assault and must have had the intention to form a common purpose with those who committed the assault.

Active association

The requirement of active association[72] is of great importance, as it means that mere presence at the scene of the crime, even where the crime it tacitly approved, is not sufficient for liability.[73] In cases of murder and culpable homicide there must be active association with the conduct that actually caused the death of the deceased.[74] Active association with the common purpose replaces the element of causation and it can perhaps be regarded as the 'conduct element' of liability in terms of the doctrine.

***Mens rea* (culpability)**

Mens rea or culpability is not imputed in terms of the doctrine of common purpose.[75] To be convicted of murder each individual accused must have had intention (direct, indirect or *dolus eventualis*) to kill and to be convicted of culpable homicide each individual accused must have been negligent in respect of the death of the victim.[76]

Culpability plays a further important role, as it defines the scope of the common purpose and limits the ambit of liability in terms of the doctrine. It is generally accepted that an accused will only be guilty of those acts which fall within the scope of the common purpose.[77] In *S v Safatsa*[78] the argument on behalf of the accused that the setting alight of the deceased fell outside the

[68]Snyman *op cit* 296.
[69]*Cf S v Smith* 1984 (1) SA 583 (A).
[70]*Cf S v Safatsa, supra.*
[71]*Supra.*
[72]As required in *S v Safatsa, supra* and *S v Mgedezi, supra.*
[73]Snyman *op cit* 260.
[74]*S v Khumalo* 1991 (4) SA 310 (A).
[75]*S v Malinga, supra; S v Kwadi, supra.*
[76]*S v Mgedezi, supra.*
[77]*S v Robinson* 1968 (1) SA 666 (A).
[78]*Supra.*

ambit of the common purpose was rejected by the court, as it was held that the accused had the intention to kill and that the exact manner in which the deceased was to be killed, was not relevant to the achievement of the common purpose. In a case of murder the scope of the common purpose can only be determined with reference to actual foresight of an accused. Any deviation from what he had foreseen, should be dealt with in accordance with the law relating to mistake or error excluding intention. Thus, an error regarding the identity of the deceased or motive will not be relevant to scope of the common purpose, while an error regarding causation may, in terms of *S v Goosen*,[79] be relevant.[80] For example, if X forms a common purpose with others during an incident of mob violence to kill a person whom X believes is Y, and it later appears that it was really Z who was involved in the incident and who was killed, the killing of Z should still fall within the scope of the common purpose.[81] But if X formed a common purpose with Y to kill Z with his consent, and it later appears that Y killed Z without his consent, it may be argued that the manner in which the deceased was killed fell outside the scope of the common purpose.[82] In a case of culpable homicide, on the other hand, it seems as if the scope of the common purpose should be determined with reference to the negligence of the accused. In *Nkwenja*,[83] for example, the death of the victim was held reasonably to have been foreseeable and both the accused were convicted of culpable homicide in respect of his death, though only one of the accused had actually assaulted him.

Moment when common purpose must be present

Joining-in

In cases of murder and culpable homicide, the accused must have actively associated himself with the common purpose while the deceased was still alive and before the deceased had been fatally founded. The legal position of the latecomer or joiner-in, that is someone joined the common purpose to kill only after he had already been fatally wounded, was settled by the Appellate Division in *S v Motaung*.[84] In this case a crowd of people attacked and killed a woman. The accused joined in the attack, but the state could not prove beyond reasonable doubt that the deceased had not already been fatally wounded in the attack by the other participants before the accused joined in the attack. The court held that the doctrine of common purpose could not be applied and convicted the accused of attempted murder.

[79]1989 (4) SA 1013 (A).

[80]Snyman *op cit* 207–210; Burchell & Milton *op cit* 260.

[81]See the facts of *S v Nzo*, *supra*, discussed *infra*.

[82]*S v Robinson*, *supra*. For a critical discussion of this case, see MA Rabie 1969 *THRHR* 193.

[83]*Supra*.

[84]1990 (4) SA 485 (A).

Withdrawal

An accused who has joined in the attack can escape liability by withdrawing before the deceased is fatally wounded. In *S v Nzo*[85] X, Y and Z had a common purpose to commit acts of terrorism and sabotage in the eastern Cape. A certain mrs T became aware of their activities and threatened to tell the police about it. Z murdered mrs T without X and Y's knowledge and afterwards fled from the country. Y was convicted of murder on the basis that he had a common purpose with X and Z to commit terrorism and sabotage and foresaw the possibility that someone (the identity of the victim or victims was not relevant to the common purpose) might be killed in the execution of their plan. X, however, was arrested shortly before the murder took place, and he told the police everything he knew. The court held that he had in fact withdrawn from the common purpose before the murder took place and he was acquitted on the murder charge.

In *S v Singo*[86] the appellate Division clarified the principles relating to withdrawal from the common purpose where the common purpose did not arise by means of a prior agreement. The court (*per* Grosskopf JA) stated:

> If these two requirements (active association and intent) are necessary for the creation of liability on the grounds of common purpose, it would seem to follow that liability would only continue while both requirements remain satisfied or, conversely, that liability would cease when either requirement is no longer satisfied. From practical a point of view, however, it is difficult to imagine situations in which a participant would be able to escape liability on the grounds that he had ceased his active association with the offence while his intent to participate remained undiminished. One must postulate an initial active association to make him a participant in the common purpose in the first place. If he then desists actively participating whilst still retaining his intent to commit the substantive offence in conjunction with the others, the result would normally be that his initial actions would constitute a sufficient active association with the attainment of the common purpose to render him liable even for the conduct of others committed after he had desisted. This would cover the case,....., of a person who, tiring of the assault, lags behind or stands aside and allows others to take over. Clearly he would continue to be liable. However, where the participant not only desists from actively participating, but also abandons his intention to commit the offence, he can in principle not be liable for any acts committed by others after his change of heart. He no longer satisfies the requirements of liability on the grounds of common purpose.

The facts of this case were as follows: X was part of a mob that attacked the deceased with the common intention of killing her. X threw stones at the deceased, of which one hit her. X was then himself injured and he left the scene. The court held that the deceased had only been fatally injured after X had left the scene. The court also held that X had ended his active association when he had left the scene and that it was reasonably possible that he had also abandoned his intent to kill at that stage. X was accordingly convicted of attempted murder.

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[85] *Supra.*

[86] 1993 (1) SACR 226 (A) at 233C–G.

Presence at scene of crime

In *S v Mgedezi*[87] the court held that in the absence of a prior agreement, an accused can only be convicted of murder (and by implication of culpable homicide where negligence is involved) if he was present at the scene of the violence. In this case the accused had taken part in riots in a hostel and had threatened to kill the inhabitants of a certain room. The court held that they could only be convicted of murder in terms of the doctrine of common purpose if there was proof that they were actually present in the room when the attack on the inhabitants of the room took place.

It is submitted that there is no well-founded reason why presence at the scene of the violence should be required. In most or all of the reported cases of incidence of mob violence where the common purpose to kill had arisen spontaneously, the accused had been present during the assault, but this is not a sufficient reason to elevate presence to a requirement which has to be met before the doctrine can be applied. All that should be required, is that the accused must have actively associated himself with the acts of the group who caused the death and that he should have maintained the intention to kill. This view is supported by the case of *S v Singo*,[88] discussed in relation to the withdrawal from the common purpose.[89] The accused X in that case was acquitted of murder because he had abandoned his intention to kill when he left the scene, and it seems that he would have been convicted if there was proof that he did not abandon the intention to kill. Suppose that there was evidence that whilst going home, X had incited others to rush to the scene to assist in the killing of the victim. This would have been clear proof that he still had the intent to kill, and there seems to be no reason why he should then not have been convicted in terms of the doctrine of common purpose.

Presence is in terms of the judgment only required if there has been *no prior agreement*. It is submitted that this prior agreement need not be an agreement to kill. Presence at the scene is not required if there has been an agreement to commit another crime, such as robbery, and there has been *dolus eventualis* or negligence in respect of the death of someone in the execution of the robbery. In *S v Khundulu*[90] X and others formed a common purpose to rob the inhabitants of a certain house. X kept watch outside while his co-accused went into the house where they killed the inhabitants. X had *dolus eventualis* in respect of the deaths of the deceased. On the basis of the agreement to rob, the court rejected X's defence that he could not be convicted of murder because he had not been present during the murder on

[87] *Supra.*
[88] *Supra.*
[89] *Supra.*
[90] 1991 (1) SACR 470 (A).

the inhabitants. In *S v Majosi*[91] X had also been keeping watch outside the supermarket when the murder was committed inside, and the court did not even consider to acquit X because he had not been present at the killing. The view of Burchell and Milton[92] that there presence at the killing in *S v Nzo*[93] should have required 'as there was no prior agreement between the appellants to kill the deceased', therefore cannot be supported.

LEGAL FOUNDATION OF THE DOCTRINE

Introduction

Common purpose liability may include both perpetrator[94] and non-perpetrator liability. In murder and culpable homicide cases the perpetrators are those accused who unlawfully and either intentionally or negligently contributed causally to the deceased's death. Non-perpetrators, on the other hand, are those accused who did not contribute (or who were not proven to have contributed) causally to the deceased's death but who are in any event criminally liable in terms of the doctrine of common purpose. In *S v Safatsa*,[95] for example, all the accused were non-perpetrators as there was no evidence that any of them caused the deceased's death. It is only the legal foundation of non-perpetrators that need to be considered.

A person convicted in terms of the doctrine of common purpose is usually regarded as a perpetrator, as the acts of the other participants are imputed such a person.[96] The principle of imputation has been criticised, ***inter alia*** on the grounds that each person should only be criminally liable for his own acts and that the imputation of acts ignores the juristic distinction between perpetrators and accomplices.[97] Mandate or implied mandate as foundation has been criticised as being a contractual concept which cannot readily be applied to criminal law.[98] The view has also been expressed that the participants' act should be regarded as a 'unitary act' or 'collective act', but this view has been criticised as being contrary to the principle that in criminal law the act has to be voluntary human conduct.[99]

Strauss suggested in 1960 that persons who are convicted of murder in terms of the doctrine of common purpose without contributing causally to the deceased's death ought to be convicted *as accomplices*.[100] He argued that the conduct element of accomplice liability should not be regarded as causal

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[91] *Supra*.

[92] *Op cit* 345–346.

[93] *Supra*.

[94] Perpetrator as defined in *S v Williams*, *supra*.

[95] *Supra*.

[96] MA Rabie *Medepligtigheid en ontbrekende kousaliteit by moord* 1988 (1) *SACJ* 35; Snyman *op cit* 258; Burchell & Milton *op cit* 347.

[97] MA Rabie *Kousaliteit en 'common purpose' by moord* 1988 *SACJ* 234 238.

[98] NA Matzukis *The nature and scope of common purpose* 1988 *SACJ* 226 232.

[99] Strauss *loc cit*.

[100] *Loc cit*.

furthering, but that it should rather be defined as 'doing something with a view to bringing about the result' ('iets doen met die oog op die teweegbring van 'n gevolg'). This view influenced much of the subsequent debate on common purpose and participation in criminal law and numerous jurists support the view that non-causal furthering should be required for accomplice liability, that accomplice liability is possible in murder cases and that common purpose liability should be regarded as accomplice liability.[101]

As these questions have been extensively debated, the foundation of liability in terms of the doctrine of common purpose will be considered from a different angle. It is submitted that there is support in our case-law for the view that the common purpose liability of a non-perpetrator is of an *accessory nature*, as it must be linked to the conduct that complies with the definition of the crime, and that it should as such be regarded as a form of accessory or accomplice liability.

Case-law

In *Mgedezi*[102] it was held that in order to be liable in terms of the doctrine the accused must have consciously shared the common purpose with the participants and that it is not sufficient that two or more people independently from each other had the same purpose or intention. The accused must have had the *intention to collaborate* with other people in the execution of the plan. An unconnected identical purpose will thus be not sufficient for liability.

In *S v Khumalo*[103] is was pointed out that an accused must actively associate himself with *conduct which constitutes the offence* of which X is charged. X was part of crowd who gathered in front of Y's house and who threw stones at the house. There was no unanimity amongst the crowd about what they should do to Y. Some were of the view that Y should be killed while others were of the view that it served no purpose to kill Y. Y fled, but was later attacked and killed by a crowd who (with a few exceptions) were not the same persons who had formed the first crowd. X was not part of the second crowd and only arrived on the scene after Y was dead. As X didn't actively associate himself with the conduct of the second crowd, it was held that he could not be convicted of murder.

It appears from *S v Goosen*[104] that an accused must actively associate himself with not only conduct which constitutes the offence, but with conduct *committed with the culpability* required for the offence. In this case X and Y participated in a robbery. X foresaw the possibility that Z, the victim of the robbery, might be intentionally shot and killed by Y during the robbery and he reconciled himself with this possibility. However, what in fact happened was

[101] Visser & Vorster *op cit* 699.
[102] *Supra*.
[103] *Supra*.
[104] *Supra*.

that Y involuntary pulled the trigger, thus unintentionally causing the death of Z. Y was convicted of culpable homicide, and in a separate trial X was convicted of murder. On appeal the court held that X lacked intention to kill as the result occurred in a manner radically different from the way X had foreseen the causal sequence. Prior to this case, the courts have never regarded mistake as to the causal chain of events as a defence excluding intention.[105] The judgment in the *Goosen* case was criticised as being contrary to principle[106] and it was suggested that the 'discrepancy' of X being convicted of murder while Y was convicted of culpable homicide, prompted the court to find an acceptable reason to alter X's conviction to culpable homicide.[107]

There was no evidence that X in the *Goosen* case had contributed causally to the death and he could only have been convicted in terms of the doctrine of common purpose. It may be argued that the underlying reason why it did not seem fair that X should be convicted of murder while Y was convicted only of culpable homicide is because there was no perpetrator (in relation to the murder) who had intentionally caused the death. It was in other words contrary to the principle of strict accessoriness, according to which there can be no question of an accomplice without a perpetrator who has committed the crime,[108] to convict X of murder while Y, who had caused the death, was convicted of a lesser offence. If X had indeed contributed causally to the death, it would not have made any difference to his liability that Y had acted unintentionally, as liability as a perpetrator is not of an accessory nature. If, for example, X gave a gun to small child, telling him that it is a toy, and sent him to shoot someone else with the gun, X would be guilty of murder as a perpetrator and the fact that the child did not kill intentionally would be irrelevant to his guilt.

Conclusion

Although common purpose liability is generally regarded as perpetrator liability, it bears such a striking resemblance to accomplice liability that it should be regarded as such, if necessary even as a *sui generis* form of accomplice liability.

The conduct element of the non-perpetrator is *intentional active association* with the common purpose to commit the crime in question while the conduct of the accomplice is described as *intentional conscious association* with the commission of the crime. In *S v Williams* it was stated that an accomplice is a person who, *inter alia*, consciously gives assistance at the commission of the crime.[109] This is the same type of conduct often committed by the non-

[105] *S v Masilela* 1968 (2) SA 558 (A); *S v Daniëls* 1983 (3) SA 275 (A).
[106] CR Snyman *Dwaling aangaande die oorsaaklike verloop* 1991 *SACJ* 50.
[107] Visser & Vorster *op cit* 522.
[108] See *S v Williams*, *supra*.
[109] On 63.

perpetrator accused in common purpose cases.[110]

The cases referred to above[111] indicate that the liability of the non-perpetrator is of an accessory nature as it is required that the offence has to be committed by one or more of the participants to the common purpose. The non-perpetrator must also actively associate himself with the conduct which constitutes the offence. It seems that there can indeed be no liability in terms of the doctrine of common purpose without a perpetrator who has committed the crime. This is in accordance with the requirements of accomplice liability.[112]

As has been pointed out above,[113] the courts do not regard accomplice liability as a separate offence and an accused is liable to conviction of the substantive crime if he qualifies either as an accomplice or as a perpetrator. The accomplice is even liable to the same punishment as the perpetrator. This practice or procedure is also followed in the case of the doctrine of common purpose where the courts do not distinguish between perpetrators and non-perpetrators.

If the non-perpetrator in terms of the doctrine of common purpose is regarded as an accomplice, it would explain why an accused who has not committed the act which constitutes the offence can be convicted of the offence and it would bring common purpose liability in line with the liability of perpetrators and accomplices as set out in the *Williams* case.

COMMON PURPOSE AND THE PRINCIPLE OF LEGALITY

The principle of legality in relation to the common law is usually considered from the point of view of the power of our courts to create crimes, to extend the definitions of existing crimes or even to revive non-adopted common law crimes.[114] Although the courts have in the previous century indicated that they have the power to create crimes,[115] they have abandoned this view early in this century.[116] It is also now clear that the courts do not have the power to revive common law crimes which have not been adopted.[117] In a few limited instances the courts have extended the definitions of existing crimes, for example in the case the theft to include the theft of 'credit' by means of the manipulation of cheques and credit cards,[118] but in many other cases the courts have refused to extend the definitions of common law crimes to make provision for modern circumstances, leaving it to the legislature to

[110]For example in *S v Safatsa*, *supra*.
[111]Footnotes 102–108 and text.
[112]*S v Williams*, *supra*.
[113]See footnotes 31–38 and text.
[114]MA Rabie & SA Strauss *Punishment* (5ed 1994) 71; Snyman *op cit* 33.
[115]*R v Marais* (1888) 6 SC 367.
[116]*R v Robinson* 1911 CD 319; *R v M* 1915 CPD 334.
[117]*S v Solomon* 1973 (4) SA 644 (T).
[118]For example *S v Kotze* 1965 (1) SA 118 (A).

intervene.[119]

As regards the general principles of criminal law, it is generally accepted that the courts had to exercise a limited 'legislative' activity[120] as the old authorities did not discuss the general principles on a systematic basis and often contradicted each other.[121] Burchell & Milton[122] point out that the courts have created order out of the chaos of the Roman-Dutch law and strengthened it by introducing some detail of English law. The courts have also been influenced by German criminal-law theory, *inter alia* by accepting the subjective test to determine intention as well as by accepting the concept of *dolus eventualis*.[123]

Looking at the Roman-Dutch law on participation[124] it is clear that no proper theory of participation developed in Roman Dutch law. It must be accepted that participation in crime was one of the areas where some 'legislative' function by the courts was required to create a proper basis for liability. The Roman-Dutch law, as set out in the by the various authorities, was not sufficiently clear and concise to apply in the accusatorial criminal procedure system where the state had to prove beyond reasonable doubt that an accused was guilty of the offence charged.

The doctrine of common purpose was adopted from English law, but in view of the fact that our courts accepted the subjective approach to culpability, its application appears to be more acceptable than the present application of the doctrine in English law. In South African law, it is required for a conviction of murder that the participant should have had actual foresight of the possibility of *death* flowing from the execution of the common purpose (and not merely serious injury) and reconciled himself to this possibility.[125] In English law it is sufficient for a conviction of murder if the accused contemplated that one of the participants might kill or inflict serious injury in the execution of the joint plan.[126]

The distinction between perpetrators and accomplices as adopted *inter alia* in the *Williams* case, is a product of this century and was not recognised in Roman-Dutch law.[127]

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[119]For example *R v Sibiya* 1955 (4) SA 247 (A); *S v Von Molendorff*, *supra*.

[120]Rabie & Strauss *op cit* 71.

[121]Snyman *op cit* 12; De Wet & Swanepoel *op cit* 47.

[122]*Op cit* 23.

[123]Snyman *op cit* 15.

[124]See footnotes 7–17 and text.

[125]*S v Malinga*, *supra*; *S v Mini* 1963 (1) SA 692 (A); *S v Sigwabla* 1967 (4) SA 566 (A); *S v Madlala*, *supra*.

[126]J C Smith & Brian Hogan *Criminal Law* (7ed 1992). In the case of *Hui Chi-ming* [1992] 1 AC 34, [1991] All ER 897, PC it was held that contemplation of the possibility is enough; the act need not be authorised by the accomplice or participant in terms of the doctrine.

[127]See footnotes 18–38 and text.

Though neither the doctrine of common purpose nor the distinction between perpetrators and accessories can be regarded as pure Roman-Dutch law, both approaches have points of contact with the Roman-Dutch law. In Roman-Dutch law it was not only the actual perpetrator who was punishable. Persons who assisted the perpetrator during the commission of the crime were according to most writers punishable with the same punishment as the perpetrator. The liability of people involved in a general fight without a prior agreement to kill must be seen in context. The concept of culpability and in particular *dolus eventualis* was not fully developed in Roman-Dutch law, it not certain what the position would have been if the participants had joined the fight without a prior agreement to kill but foresaw the possibility that the victim might be killed in the fight and reconciled themselves with this possibility.

It is submitted that neither the distinction between perpetrators and accomplices nor the doctrine of common purpose is in conflict with the principle of legality. The courts adopted the principles during the formative years and both bases of liability have by now been well established for many years in South African criminal law practice.

COMMON PURPOSE AND FUNDAMENTAL RIGHTS

Chapter 3 of the Constitution of South Africa Act[128] contains a Bill of Fundamental rights. Section 7(1) of the Act provides that the Chapter binds all legislative and executive organs of state and section 7(2) provides that it applies to all law in force during the operation of the Act. The Bill of Fundamental rights therefore applies to all existing common law as well as all existing and future statutory provisions.

Section 25(3) of the Act contains the fundamental rights of accused persons. Section 25(3)(c) and (f) read as follows:

> Every accused person shall have the right to a fair trial, which shall include the right-
>
> (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
>
> (f) not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed, and not to be sentenced to a more severe punishment than that which was applicable when the offence was committed;

The principle of legality is now incorporated in section 25(3)(f), but as the doctrine of common purpose has now formed part of our law for many years, it can hardly be argued that a conviction in terms of the doctrine is a conviction 'in respect of any act or omission which was not an offence at the time it was committed'.[129]

The question remains whether there are any other grounds on which the

[128]Act 200 of 1993, which came into operation on 27 April 1994.
[129]See *supra*.

doctrine of common purpose can be held to violate the fundamental rights in Chapter 3.

The constitutional acceptability of aspects of the doctrine of common purpose as applied in Canada has been considered by the Canadian courts. In *R v Vaillancourt* (1987)[130] the court considered the provisions of section 230 of the Criminal Code which dealt with a form of 'felony-murder' and which allowed an accused to be convicted of murder in certain circumstances without proof that he knew or ought to have known that death was likely to result from the commission of the acts set out in the section. The court held that the section was drafted so as to eliminate the need for the Crown to prove *objective foreseeability* or that the accused ought to have known that death was likely to ensue. Such objective foreseeability was held to be an essential minimum element of murder. The court held that the section infringed the *presumption of innocence* in the Charter. Lamer J stated:

> ... what offends the presumption of innocence is the fact that an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence, and I do not think that it matters whether this results from the existence of a reverse onus or from the elimination of the need to prove an essential element.[131]

In *R v Martineau* (1990)[132] a majority of the court of the court held that a conviction of murder cannot be based on any *mens rea* less than *subjective foresight* of death. Subjective foresight was thus constitutionally required for a conviction of murder.

Section 21(2) of the Canadian Criminal Code deals with 'common intention' or 'common purpose' liability and provides, *inter alia*, that the participants to the common purpose are liable for the offences committed by others in the execution of the common purpose if they 'knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose'. In order to be liable as a party (accomplice) to murder, the accused must have intention regarding the death of the victim, and as subjective foresight is constitutionally the required form of *mens rea* for murder, section 21(2) is of no force and effect in so far as it makes provision for a conviction of murder on the basis of objective foreseeability.[133] The phrase 'or ought to have known' in section 21(2) has therefore no effect.[134]

The debate on the constitutional acceptability of common purpose liability centred on the *mens rea* requirement. The question whether a conviction of murder without proof of causation is constitutionally sound has never been raised in Canadian law. Section 21(2) provides that a person convicted in

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[130](1987) 60 CR (3d) 289 (SCC).
[131]*Supra* at 327.
[132](1990) 79 CR (3d) 129.
[133]R v Logan (1990), 58 C.C.C. (3d) 391.
[134]Martin's Annual Criminal Code (1994).

terms of the common intention rule is a 'party to that offence'. which clearly indicates that common purpose liability or common intention liability is not regarded as perpetrator liability.

In South Africa causation is not an essential element of common purpose liability and there does not appear to be any reason why causation should be required as a constitutional necessity. The accused convicted in terms of the doctrine of common purpose is in the same position as the accomplice in terms of the distinction between perpetrators and accomplices. The accomplice does not commit the act constituting the offence,[135] but is nevertheless convicted of the substantial crime and is liable to the same punishment as the perpetrator.[136] Furthermore, if common purpose liability is recognised as a form of accomplice liability,[137] causation would obviously not be a requirement at all.

CONCLUSION

The requirements for liability in terms of the doctrine of common purpose have been refined over the years by the courts. If these requirements are properly applied, very little criticism can be levelled against the application of the doctrine. The criminal liability of non-perpetrators in terms of the doctrine is of an accessory nature and ought to be recognised as accomplice liability or as a form of accomplice liability. The doctrine of common purpose is not in conflict with the principle of legality and does not violate an accused's constitutional right to be presumed innocent until proven guilty.

[135] *S v Williams*, *supra*.
[136] See footnote 18 and text, *supra*.
[137] See footnotes 100–101 and text, *supra*.

Trends in South African law

AJ MIDDLETON*

'The old order changeth, yielding place to new,'
(Alfred, Lord Tennyson *The Passing of Arthur*)

For those of us who have had the good fortune to be members of the Department of Criminal Law and Procedure at Unisa during the past twenty-five or thirty years, Sas Strauss has been a very important factor in our lives. Regardless of who has been the head of department, and there have been a number of us over the years, the father figure in the department has always been Sas. It is to him that we have looked for guidance and counsel in times of crisis. Many of us have also had the privilege of being his doctoral students. All of us have been able to bask in the reflected light of the great esteem in which he is held outside the department and university. But in the intimacy of the department we have known Sas not only as a paragon of intellectual and academic virtue, but also as a jovial friend and colleague, who, regardless of personal problems with which he may be plagued, always has time to share in our joys and woes. Those older members of the department who had the privilege of seeing Sas in court during the pin-ball saga of a decade or two ago can also testify to the fact that there is at least one academic who can hold his own in court with the best at the bar. I am grateful for the opportunity of having been associated with Sas Strauss over more than twenty-five years and wish him a very happy retirement.

This volume is dedicated to the honour of an eminent South African Jurist — Sas Strauss. It is not my place to attempt to evaluate the contribution which Sas has made to the development of South African law — others far more able than I will no doubt attempt that daunting feat. I will confine myself to a nostalgic consideration of the milieu in which the major part of his academic career took place and attempt to compare it with what awaits the new generation of legal academics.

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*BA LLB LLD (Unisa). Professor Emeritus, Department of Criminal and Procedural Law, University of South Africa.

If one looks back at the nature of work performed by the average legal academic over the past forty or forty-five years, I think that one can describe the era as the *analytical period* of South African law. It was also the period during which the Afrikaans legal literature came into its own and, at least initially, was responsible for the inception of the analytical approach. Before the inception of this period publishers appeared to doubt the viability of legal textbooks in the Afrikaans language and prominent Afrikaans-speaking writers such as Sir John Wessels, in the fields of contract law and legal history; Steyn G, in the field of succession; Van Zyl CH, in the field of civil procedure; and even that giant of Afrikaans literature, the great Toon van den Heever, (Aquilian liability) tended to write in English.

Legal textbooks in English were the order of the day. In 1949 Wille's *Principles of South African Law*, the standard student handbook on the law of persons, things, contracts and delicts, was in its third edition, while Wille and Millin's *Mercantile Law of South Africa* was already in its eleventh edition. The last word on the law of purchase and sale was to be found in Mackeurtan's *The Law of Sale of Goods in South Africa* and the standard works on evidence were May's *South African Cases and Statutes on Evidence* and Scoble's *The Law of Evidence in South Africa* and on delicts, McKerron's *The Law of Delict*. Maasdorp's encyclopedic set of volumes, the *Institutes of South African Law* could be consulted in respect of most aspects of private law and the final word on the material, procedural and evidential aspects of litigation in the criminal courts was to be found in Gardiner and Lansdown's *South African Criminal Law and Procedure*.

Although it is dangerous to generalise and there are certainly exceptions to the rule here and there, most of the above-mentioned works were merely of a descriptive nature, reflecting the law as it was to be found in the statutes and decisions of the courts. There was little evaluation or criticism of legal principles. The following extract from the preface to the sixth edition of Gardiner and Lansdown is indicative of the attitude of these writers:

> Following the precedent of the previous editions the authors have refrained from venturing upon criticism of the accuracy of the decisions of the superior courts of the Union. These decisions, and the courts themselves, have the profound respect of the legal profession as of the country generally. Moreover, although in many places it has been found useful to set forth briefly the views of Roman and Roman-Dutch authors, close and critical examination of conflicting opinions among them has been found unprofitable, confusing and superfluous. The practitioner and the student want to know what the law actually is, not what it might be if certain points of view were adopted, ...

This attitude was to change with the advent of the Afrikaans legal textbook.

To the best of my knowledge, the first Afrikaans legal textbook to be published by a major publisher, Butterworths, was De Wet and Yeats' *Kontraktereg en Handelsreg*, which appeared in 1946. It was followed in 1949 by De Wet and Swanepoel's first edition of *Strafreg*. With the appearance of these two books, more especially the latter, it was immediately apparent that the somewhat servile attitude towards the courts reflected, in the passage I have quoted from Gardiner and Lansdown, was, as far as the Afrikaans writers were concerned,

something of the past. Their fiercely critical attitude was greeted with shock and amazement in all the reviews. EM Burchell described the cutting analysis of De Wet and Swanepoel as 'the vivisection of our criminal law.'[1]

It is difficult to ascertain what exactly initiated this change of attitude. In his review of the first edition of *Strafreg* VerLoren van Themaat states[2] that the analytical approach was already being adopted and taught in the Afrikaans Universities before the appearance of De Wet and Swanepoel's *Strafreg*. It is also possible that the euphoria and triumph occasioned in 1948 by the change of government and the ascendency of Afrikanerdom had something to do with it. Whatever the cause, however, the fresh new critical approach was also reflected in the spate of Afrikaans textbooks which followed upon the heels of De Wet and Yeats and De Wet and Swanepoel and, once introduced, it proved to be contagious and was soon also to be found in the textbooks appearing in English. The approach adopted in Burchell & Hunt, (*South African Criminal Law and Procedure*, Vol I) the first of the series of volumes bearing the parenthetical title 'Formerly Gardiner and Lansdown' is, for example, (despite Burchell's initial reaction thereto!) much more akin to that followed by De Wet and Swanepoel than it is to the style of the old Gardiner and Lansdown.

As Afrikanerdom settled into the saddle of power and the stringency of the notorious security legislation and other manifestations of apartheid increased, the pendulum swung back again and what criticism there was forthcoming from the pens of English-speaking writers, such as the late Professor Barend van Niekerk. See, amongst many other critical articles from his erudite pen: 'Crime and Punishment Statistics' 1969 *Annual Survey of South African Law* 465; 'Class, Punishment and Rape in South Africa' 1976 *Natal University Law Review* 147; 'Mentioning the Unmentionable: Race as a Factor in Sentencing' 1979 *SACC* 151. Works from the following writers were no less critical: Professor John Dugard (See, for example, 'The Courts and Sec 6 of the Terrorism Act' 1970 *SALJ* 289; 'Judges, Academics and Unjust Laws: The Van Niekerk Contempt Case' 1972 *SALJ* 271; 'Sentencing in Political Offenses' 1984 *Lawyers for Human Rights* 87.) Professor AS Matthews (*Law, Order and Liberty in South Africa* 1971; *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society*, 1983); CF Forsyth *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950–1980* 1985); and E Cameron ('Judicial Endorsement of Apartheid Propaganda: An Enquiry into an Acute Case' 3 *South African Journal of Human Rights* 223). These are merely a smattering taken from the veritable torrent of critical literature from the pens of South African academics.

While the traditional school of legal writers was busy refining the basic concepts of, largely, the substantive law and analysing the decisions of the

[1] 1950 *SALJ* 303.
[2] 1951 *THRHR* 301.

courts in academic terms, and the Van Niekerk-Dugard-Matthews school was targeting the judiciary themselves and the system within which it functioned, things were happening outside the ivory tower and the court rooms.

The human and vehicle population of the country exploded; the crime rate soared to such an extent that the courts could hardly cope; the jails became overfull; the civil lawyers have just about priced themselves out of the market; the statutes have become so many that it is almost impossible to keep track of them; and, above all, the doctrine of human rights has overtaken us. In short, our system of law which was, largely, made by whites for whites, is gravely imperilled. If it is to survive at all, our legal system must be very swiftly adapted to cater for the hordes of people who, up till now, have had very little access to justice. The leisurely process of analysis and criticism of the substantiative law, on the one hand, and the virulent attacks on the powers that be that have been the order of the day for the past four decades, will, at least for the time being, have to give way to the resolution of the following burning issues, which are largely of a procedural nature:

- Somehow ways and means will have to be found of coping with the mass of cases which are swamping the criminal courts. Perhaps the solution lies in decriminalisation, (there is already legislation in this regard, but ways and means must be found to implement it;) perhaps in procedural innovations. Of particular importance in this regard is the appeal procedure. Despite the Hoexter Commission's attempts to alleviate the situation, the Appellate Division once again seems to be foundering under the weight of records which must be perused.

- The whole process of sentencing will have to be drastically revised. The recent amendments to the Correctional Services Act are, perhaps, a step in the right direction, but much must still be done in this field. The issue of capital punishment must also be resolved.[3] If the aids epidemic does reach the proportions that the experts predict, imprisonment might become completely obsolete.

- The relationship between the criminal law and labour law will also, in my view, require considerable attention. In the past (pre-Goldstone era), when there have been strikes and labour unrest the approach has generally been to charge the strikers with public violence and so restore order. In *S v Mlotshwa and Others*[4] Myburg AJ made the following observation:

> A court should be careful not to make inroads into the worker's right to lawfully make use of the age-old remedy of strike action by categorising conduct of the kind in question which occurs during a strike as public violence.

The problem does not only involve the question of public violence. For a strike to be successful, there must be a high degree of solidarity between the

[3]See the contribution by JH van Rooyen, *infra* — Ed.
[4]1989 4 SA 787 (W).

strikers. In order to ensure such solidarity fairly robust methods of persuasion are generally resorted to by the strikers — not only in South Africa but also elsewhere in the world. Where then does one draw the line between acceptable strike action and intimidation? How can one enforce the criminal law without frustrating the labour law? A solution must be found. Furthermore, and more especially in view of the fact that many strikes, stay-aways and similar demonstrations are non-labour related, how does one reconcile the strikers' rights of freedom of association and collective bargaining of the individual rights of non-strikers and the rights of employers? There are many decisions of the industrial court in this regard, but, in my opinion, they are *ad hoc* decisions dealing piecemeal with various aspects. The basic problem still begs a solution.

- Civil procedure will have to be drastically revised. The present procedure is so time consuming, cumbersome and expensive that at present only the very rich, to whom the question of costs is immaterial, and the very poor, who are entitled to legal aid, have access to justice in this field. The Small Claims Courts and Short Process Courts do not, especially as far as the black population is concerned, appear to be achieving the objectives for which they were instituted and, particularly in the townships, all sorts of alternative dispute resolution procedures, (some of which hardly comply with international standards of acceptability!) are being explored. If the organised legal profession does not rapidly get involved it might find itself becoming irrelevant.

- On a more mundane, but nonetheless vitally important level, efficient methods of data retrieval will have to be found to cope with the mass of legal material with which we have to deal daily. The mass of legal precedent is accumulating tremendously on a daily basis. A system based on precedent, such as is our current system, is worthless unless there are efficient means of retrieving those precedents.

- Finally, if the system is to survive at all, there will have to be free access to justice at all levels. This means not only access to justice by litigants, but also freer access to the professions by persons other than whites and, of course, far greater participation in the process of adjudication on the bench by persons other than whites.

This list is by no means comprehensive, but the items mentioned are, in my opinion, those which cry out for the most immediate attention and solving them will undoubtedly go a long way towards laying a platform for the solution of further problems. It is further also apparent that the problems mentioned are of such a diverse nature that there cannot be any single, simple solution to the problem. A concerted effort by various disciplines is required.

I commenced with a quotation of one line from Alfred Lord Tennyson's *The Passing of Arthur* which is undoubtedly true of South Africa today. May the following two lines be equally applicable:

> And God fulfils himself in many ways,
> Lest one good custom should corrupt the world.

Assisted reproduction: a fundamental right?

D PRETORIUS*

It is a privilege and pleasure to write an essay in honour of Professor SA Strauss. I came to know Professor Sas Strauss through correspondence in 1984. As a student temporarily living in Toronto, Canada and struggling with LLB studies through the University of South Africa, I wrote a letter to Professor Strauss requesting permission to do a LLB dissertation under his guidance on the topic of surrogate motherhood. This was only the beginning of what was to become one of the most enriching experiences of my life, culminating in a doctorate on the same subject under his expert guidance in 1991. As a student and later as a colleague, I have always had the greatest respect for his keen intelligence, objectivity and sense of justice and fairness. He has stimulated my awareness of the delicate balance between the medical professional, the patient and the law. It is from him that I have learned the careful weighing and balancing of the various interests involved upon entering the sacred field of motherhood and the law.

I cannot imagine the University of South Africa without Sas Strauss.

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INTRODUCTION

With the implementation of the Constitution of the Republic of South Africa 200 of 1993 (the Interim Constitution) on April 27, 1994, South Africa for the first time in its history boasts a supreme Constitution containing a justiciable bill of rights. In this new constitutional dispensation, South African lawyers will, for the first time, be faced with 'constitutional challenges' emanating from the bill of rights in the constitution. Where a statute or regulation is in direct conflict with the protection accorded to the rights contained in the bill of rights, the courts and in the case of parliamentary legislation, the

*BLC (Pret); LLB LLD (Unisa). Senior lecturer in Law, Department of Constitutional and Public International Law, University of South Africa.

Constitutional Court may declare the statute or regulation invalid.[1]

Firstly, the concepts 'rights' and 'procreation rights' are considered briefly. Secondly, the constitutionality of legislation currently in force, which directly or indirectly affects assisted reproductive rights are examined. Thirdly, rights which are protected in the bill of rights in Constitution of the Republic of South Africa 200 of 1993 (Interim Constitution) and which are innate to procreation rights are examined. The limitation clause (section 33) in the Constitution, which provides for the (legitimate) limitation of rights under clearly defined circumstances is examined. Particular attention is paid to the requirement that the limitation must be 'reasonable and justifiable in an open and democratic society based on freedom and equality.' In this regard the common law principles, the *boni mores* (public policy) and the best interest of the child will be considered as possible guidelines in determining which government interventions in private choices are justified.

Although this essay deals with the decision to have a child, it is submitted that most of the principles highlighted, are of equal importance to the abortion debate in which the right to privacy and equality feature prominently. Finally, a conclusion is reached regarding the present state of assisted procreation rights in South Africa.

'PROCREATION RIGHTS'

'Procreation rights' in the narrow sense of the word are grouped under the 'right to privacy' as decisions regarding procreation are of an exceptionally private nature and have traditionally been seen to be outside the sphere of legitimate government intrusion. If 'procreation rights' are used in the broad sense — meaning all decisions concerning the right either to have or not to have a child, equality issues may come into play, especially where one deals with the question whether procreation rights should be available to only a particular category of persons.

In understanding the concept 'procreation rights' it is necessary to consider the meaning and nature of a 'right.'

According to the doctrine of fundamental human rights, each human being has certain inalienable rights which may not be encroached upon by the state or its institutions, except to the extent that such encroachments are authorised by law. A right, it is said, accrues to a human being merely by him/her being human. It is not the same as a privilege, but is more in the nature of an entitlement which is capable of being enforced. With very few exceptions, rights are not absolute and have to be weighed and balanced against the public interest. I shall return to the balancing of rights in greater detail later.

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[1]Section 4(1) of the Interim Constitution provides that the Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force or effect to the extent of the inconsistency.

Procreation rights in the context of this essay are those rights involved in decisions whether to 'bear or beget a child' as recognised in the United States decision *Eisenstadt v Baird*.[2] The principle is referred to as procreative freedom, procreative choice or in the general sense of the word, human autonomy. It presupposes that a rational, competent adult is free to exercise his or her rights according to his or her own values. This principle of autonomy can be traced back to John Stuart Mill and his so-called 'harm to others' principle[3] which has also been the subject of countless debates[4] and which for the purpose of this discussion need not be explored further.

From the outset, it is necessary to distinguish between a decision not to procreate (negative decision) — as exercised in abortion or sterilisation — and a decision to procreate or to have a child (positive decision). In the United States the right to avoid reproduction by contraception and abortion is firmly established. Single or married women and adult or minor women have the right to terminate a pregnancy up to the viability stage and both men and women have equal rights in obtaining and using contraceptives.[5] Although the emphasis is on assisted reproduction throughout, one can hardly discuss procreation choices without at least referring to abortion as most of the prominent court cases on procreation autonomy, particularly in the United States of America, are abortion cases[6] or cases concerned with the right of

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[2]405 US 438 (1971).

[3]This proponent of autonomy, in his famous essay of 1859 defines it thus: '[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.' J Mill *On liberty* (1859) reprinted in J Areen, P King, S Goldberg & A Capron *Law, science and medicine* (1984) 356 cited by Patricia A Martin and Martin L Lagod 'The Human Preembryo, the Progenitors, and the State: Toward a Dynamic Theory of Status, Rights and Research Policy' 1990 *High Technology Law Journal* 5:2 257–311 274 n 145.

[4]For instance the famous Hart-Devlin debate over law and morals contained in HLA Hart *Law, liberty and morality* Oxford 1968 and Lord Devlin *The enforcement of morals* Oxford 1968.

[5]Robertson JA 'Decisional authority over embryos and control of IVF technology' 1988 *Jurimetrics* 28:3 285–301, 290 and the cases cited in n 12.

[6]*Roe v Wade* 410 US 113 (1973), *Planned Parenthood Ass'n v Danforth* 428 US 52 (1976), *Bellot v Baird* 443 US 622 (1979). See also the Supreme Court of Canada's decision, *Morgentaler, Smoling and Scott v the Queen* (1988) DLR (4th) 385.

access to contraceptive devices.[7]

In this essay only the decision to have a child by assisted conception,[8] and the constitutional rights involved are investigated.

Although the decision to have children is protected and respected in most countries either in a bill of rights or as a matter of policy, the question remains whether this protection should also be extended to those who rely on assisted reproductive technology to bear children. Legal literature indicates overwhelming support for an extension of the constitutional protection to couples utilising modern reproductive techniques with the assistance of physicians, gamete and embryo donors and in some instances surrogate mothers.[9] As severely conflicting interests are involved in the option of surrogacy, the discourse on whether to regulate or prohibit this procedure, is still ongoing.[10]

The courts in the United States of America have also addressed the question whether the protection accorded to the right to procreate should be limited to natural conception. The trial court in *In re Baby M*, the most prominent surrogacy case to date, stated that '[i]t must be reasoned that if one has a right to procreate coitally, then one has the right to reproduce non-coitally. If it is the reproduction that is protected, then the means of reproduction are also protected. The value and interests underlying the creation of family are the same by whatever means obtained'.[11] In the New Jersey Supreme Court it was merely stated that '[t]he right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination'.[12]

I support this view. There is no (rational) reason for protecting only those

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[7]*Eisenstadt v Baird* 405 US 438 (1972), *Griswold v Connecticut* 381 US 479 (1965). See also *Gillick v West Norfold & Wisbech Area Health Authority and Another* (1985) 2 All ER 402 (HL) on the provision of birth control advice to girls under the age of sixteen without parental consent.

[8]There are several techniques utilised in the field of assisted reproduction. The most important ones are artificial insemination, *in vitro* fertilisation, oocyte or sperm donation, embryo flushing and transfer, embryo donation, gamete intra-Fallopian transfer (GIFT), peritoneal oocyte and sperm transfer (POST). For a discussion of these procedures, see *Ethical considerations of the new reproductive technologies* by the Ethics Committee of the American Fertility Society 1986 32S–56S.

[9]Anne MacLean Massie 'Restricting surrogacy to married couples: a constitutional problem? the married-parent requirement in the Uniform Status of Children of Assisted Conception Act' 1991 *Hastings Constitutional Law Quarterly* 18:3 487–540 505; J A Robertson 'Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction' in L Gostin (ed) *Surrogate motherhood — politics and privacy* 1990 24–42.

[10]See in general D Pretorius *Surrogate motherhood a worldwide view of the issues* 1994 Thomas Publisher Springfield Illinois USA.

[11]*In re Baby M* 217 N J Super 313, 386, 525 A2d 1128 1164 (1987).

[12]*In re Baby M* 109 NJ 396 448 537 A2d 1227 1253 (1988).

who are able to procreate the natural way and not those who have to rely on assisted reproduction, as it would constitute discrimination against couples who experience infertility problems to do so. It may even be argued that such an approach constitutes discrimination against handicapped persons.[13]

In the next section statutes and regulations which, at present regulate or indirectly affect assisted reproduction (and surrogate motherhood) and which may be challenged as being unconstitutional on the grounds of undue infringements on privacy and equality rights are examined.

STATUTES AFFECTING ASSISTED CONCEPTION WHICH MAY BE DECLARED UNCONSTITUTIONAL SHOULD IT BE CHALLENGED IN COURT

The Human Tissue Act 65 of 1983 and the Human Tissue Act Regulations GN 1182 GG 10283 of 20-06-1986

The procedures of artificial insemination and ***in vitro*** fertilisation are lawful in South Africa, provided that the relevant sections of the Act and Regulations are complied with. Apart from the requirement that a medical practitioner who effects artificial insemination must be registered with the Director-General of National Health and Population Development and that the premises on which the procedure takes place must be officially approved, the regulations do not apply when the couple's own genetic material is utilised and donor gametes are not involved.[14]

Interestingly, the Human Tissue Act does not contain any references to the marital status of a person requesting assisted reproduction. The Act delegates the power to make regulations on artificial insemination and ***in vitro*** fertilisation to the Minister of National Health and Population Development.[15] The Regulations provide that artificial insemination may be effected only by a 'competent person'[16] on a married women with her husband's written consent[17]. It is inappropriate that this 'marriage requirement', which contains a limitation of a fundamental right (equality), is left to executive regulation. As De Ville[18] emphasises, it may not be left to the

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[13]Section 8(2) of the Interim Constitution protects persons with disabilities from unfair discrimination.

[14]Regulation 11.

[15]Section 37 (e)(iii) and (vii).

[16]The definition of 'competent person' in the regulations refers to section 23(2) of the Human Tissue Act which provided that only a medical practitioner or someone acting under his supervision may perform artificial inseminations. This section was however omitted by the Human Tissue Amendment Act 51 of 1989. Despite this omission, the regulations, nevertheless refer to 'medical practitioners' throughout.

[17]Reg 8.

[18]'Interpretation of the general limitation clause in the chapter on fundamental rights' 1994 *SA Public Law* 9:2 287–312 293–294. This is also the position in German law. Article 80(1) of the Basic Law requires that the content, purpose and extent of an authorisation to the executive to make regulations, must be set out in parliamentary (or state) legislation.

executive to determine by regulation the limits to be placed on a fundamental right as such delegation is not in accordancewith the principles of democracy. Democracy requires of parliamentary legislation to reflect transparency and accountability, which is often not the case with delegated legislation. Furthermore only democratically elected members of Parliament may legitimately make crucial policy decisions effecting fundamental rights in general and procreation rights in particular.

The Human Tissue Act excludes as donors of gametes minors[19] and anyone who has been declared a habitual criminal in terms of section 286 of the Criminal Procedure Act 51 of 1977[20] or who is mentally ill within the meaning of section 19 of the Mental Health Act 18 of 1973.[21] The exclusion of mentally ill persons and habitual criminals is obviously intended to prevent the birth of genetically handicapped children.

The Human Tissue Act[22] requires that gametes withdrawn from a living person may only be used for 'medical purposes.' The Regulations provide donors with a clear right of determination or decision making regarding their donations and reflect respect for the autonomy of individual donors as well as recipients. A donor can, for instance, decide on the population group and religion of the recipient.[23] The recipient of a donation may also express wishes regarding the population group and religion of the donor and any other wishes of the recipient concerning such donor.[24] The regulations place a duty on the medical practitioners performing the artificial insemination or *in vitro* fertilisation to ensure that the wishes of both the donor and the recipient are respected regarding the population and the religious group of the child to be procreated.[25]

Evaluation of the Human Tissue Act and Regulations

The Human Tissue Act requires that assisted reproduction procedures be performed only for 'medical purposes'. The intention is clearly that these procedures should not be utilised by persons experiencing no infertility problems. This section therefore precludes artificial insemination for mere convenience, for example a professional woman or ballerina who does not want pregnancy to interrupt her career and concludes a contract with a surrogate mother to carry a baby for her. The requirement 'for medical purposes' also precludes medical practitioners from artificially inseminating a single, healthy female for example in a lesbian relationship. As already pointed out, Regulation 8(1) is even more direct on the topic of single women

[19]Section 19(c)(ii).
[20]Section 17(c)(iii).
[21]Section 17(c)(i).
[22]Section 19.
[23]Reg 6(1)(a)(iv).
[24]Reg 10(1)(a)(v).
[25]Reg 9(e)(iii).

as they are entirely precluded from utilising assisted reproduction.

'Married' is defined in the regulations[26] as marriage by way of a contract which in terms of any Act or by customary law, constitutes a marriage' and 'husband, 'wife', 'spouse' or 'married couple' have corresponding meanings. The definition of married women therefore includes women married under customary law in South Africa. Whether marriage 'by way of contract' includes so-called 'common law marriages' or lesbian relationships is uncertain. What is clear is that an unmarried/single woman does not qualify for artificial insemination or ***in vitro*** fertilisation.

The marriage requirement could also have a detrimental effect on a widow who requests posthumous artificial insemination[27] with the husband's frozen sperm after his death as she is then no longer a 'married person'.

In the examples cited above the equality clause and the right to privacy protected in the Interim Constitution are at issue. Apart from the breach of the equality clause in the broad sense, specific grounds of discrimination can also be alleged. To establish such a breach on fundamental rights, one needs to analyse the limitation clause in section 33 of the Constitution, which is considered in more detail below.

The Children's Status Act 82 of 1987

This Act plays a prominent role in assisted reproduction as it regulates the status of artificially conceived children, who were, until 1987, considered illegitimate. It provides for the legitimacy of artificially conceived children, provided the married woman's husband has consented to the procedure.[28]

It is noteworthy that the Children's Status Act contains no provision about artificial insemination or the ***in vitro*** fertilisation of an unmarried woman. The legislature simply ignored this possibility. Although artificial insemination of unmarried women is prohibited, it is not unlikely that such instances could occur in practice. The child would be illegitimate under common law. Furthermore, if the birth mother is a surrogate mother who freely consents to adoption, there are no legal barriers preventing adoption by single persons, since they are permitted to do so in terms of the Child Care Act[29], provided they are competent enough to care for the child.[30]

The statutory provisions discussed, ***prima facie*** infringe on the right of women to be treated equally in their choices to utilise assisted reproduction as an

[26]Reg 1.

[27]For a discussion of posthumous artificial insemination see R Pretorius 'The right to life: issues in bioethics' WS Vorster (ed) Unisa 1988 70–85 75–76.

[28]Section 5(1)(a) and (b).

[29]Section 17(b) of the Child Care Act 74 of 1983 as amended by Act 86 of 1991.

[30]Section 18(4)(b).

option in childbearing. The question remains whether such an infringement constitutes 'unfair' discrimination in terms of the equality clause[31] in the Interim Constitution.

To determine the scope of the relevant procreation rights protected in Chapter 3 (bill of rights), each right must be evaluated individually.

PRIVACY

The right to privacy, as stated in the United States decision of *Eisenstadt v Baird*,[32] is 'the right of the individual — married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child'.

The decision to have or not to have children is by nature a very personal decision. In the last century, matters of a personal nature such as family planning and birth control were generally left alone by legislators and policy makers as these were considered 'private matters.' Exceptions to the general rule are some forms of indirect interference such as tax legislation.[33]

Advances in technology and especially modern birth technology have, however, in recent years forced many governments to become involved in 'private matters'. Several important committees and work groups have been appointed to study and report on assisted reproduction and related matters in the last decade. In several countries these reports have resulted in legislation regulating and in some instances, prohibiting some of the assisted reproduction procedures.[34] Legislative activity was particularly stimulated at the height of the abortion debate during the late sixties and early seventies when women lobbied for recognition of their reproductive rights and demanded legislative protection of their freedom to decide on contraception, conception and abortion.

Section 13 of our Interim Constitution provides:

> Every person shall have the right to his or her personal privacy which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

[31]Section 8.

[32]See n 7 *supra*.

[33]Another notable exception is China which allows for only one child per family. See S McLean 'The right to reproduce' in T Campbell *et al* (eds) *Human rights from rhetoric to reality* 1986 99–122 106.

[34]For a discussion, see Pretorius *Surrogate motherhood a worldwide view of the issues* 25–59.

The Constitution ***inter alia*** also protects life[35] and human dignity.[36] Unlike the Constitution of Namibia[37] there is no provision directed at the protection of the family and in particular 'the right to found a family.'

Unlike governments in most countries which have been reluctant to unnecessarily get involved in private matters, our government's record is unfortunately not entirely unblemished. A mere decade ago (1985) the Mixed Marriages Act 55 of 1949 prohibiting members of certain ethnic groups from marrying each other was still in effect. The Common law, in order to prevent the birth of physically and mentally handicapped children, also prohibits some persons, as a result of close blood relationships (consanguinity) to marry.[38]

Apart from statutory sanctioning of artificial insemination and ***in vitro*** fertilisation of married persons in the statutes discussed, the right to 'found a family' is respected in South Africa as a matter of policy. Persons are nevertheless urged to make responsible decisions in this regard.[39]

The respect for autonomy in procreation choices is echoed by the African National Congress's National Health Plan for South Africa.[40] In this statement, the ANC supports what they refer to as the 'decline of fertility', but also argues: 'The population policy should promote reproductive freedom of choice and women's rights to control their bodies. It should also recognise the human rights of individuals and couples freely and responsibly to decide the number and spacing of their children, and to have the information, education and means to do so.'

For the first time in a policy statement of this stature, is it acknowledged that individuals, and not only families may want to have children. This view is in stark contrast to the views reflected in the existing legislation, which may face increased scrutiny in the new constitutional dispensation.

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[35]Section 9 merely provides that '[E]very person shall have the right to life.' Abortion is therefore not directly addressed.

[36]Section 10 provides that '[E]very person shall have the right to respect for and protection of his or her dignity'.

[37]Article 14(1) of the Constitution of Namibia 2 of 1990 provides that '[M]en and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.'

[38]DSP Cronjé Barnard Cronjé Olivier *Die Suid-Afrikaanse persone- en familiereg* (3 ed 1994) 167.

[39]In *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) 376A, a failed sterilisation case, Thirion J refers to the State's family planning campaign with the aim of curbing population growth. He stressed that it is in the interest of society that the size of a family should not exceed the limit beyond which it would not be possible for it to maintain a reasonable standard of living.

[40]*A National Health Plan for South Africa* 1994 24.

Apart from legislation, the right to privacy and therefore the right to decide whether to have children or not, is furthermore protected as an independent personality right under Common law. included within the concept of *dignitas*.[41]

From the case law and policy statements discussed, it is clear that private decisions to have or not to have children are, as a general rule, respected and that most governments will not unduly interfere in such decisions apart from urging people to make responsible procreative choices. Their may, however be a shift in emphasis as to who is entitled to have children in society free from government interference in procreation choices.

EQUALITY

The equality clause in section 8 of the Constitution provides:

(1) Every person shall have the right to equality before the law and equal protection of the law.

(2) No person shall be *unfairly*[42] discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

In terms of section 8(4) *prima facie* proof of discrimination on the grounds specified in subsection 8(2) is presumed to be sufficient proof of unfair discrimination until the contrary is established. Thus if legislation presently in force is challenged on the grounds contained in section 8(2), the onus will be on the state to proof that such legislation is not discriminatory.

The first part of the equality clause provides a general or wide protection. It guarantees every person equality before the law. This is followed by a non-discrimination clause listing specific grounds on which (unfair) discrimination will not be permitted.

In essence, the purpose of the equality clause is not to prevent people from being treated differently, but rather to prevent unjustifiable and injudicious discrimination.

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[41]J Neethling, JM Potgieter & PJ Visser *Law of delict* 1990 293. Another personality right which features prominently in decisions to have or not have children or even the knowledge of infertility, is the right to personal feelings. J Neethling ***Persoonlikheidsreg*** (3 ed 1991) 30 campaigns for recognition of this right. He argues that: 'Afgesien van die eergevoel het die mens 'n ryke verskeidenheid ander geestelik-sedelike gevoelens of innerlike gewaarwordinge omtrent dinge soos liefde, geloof (godsdiens), sentiment en kuisheid. Omdat hy deur algemene beskawingsontwikkeling en kulturele vooruitgang al hoe meer bewus geword het van sy eie wese, betekenis en waarde, is sy gevoelslewe vir die individu van vandag innig kosbaar en heilig. Word sy gevoelslewe geminag, word die mens in sy diepste wese getref.'

[42]My emphasis.

The Canadian Charter of Rights, although very similar to ours, does not contain the requirement that a person may not be *unfairly* discriminated against. Cachalia *et al*[43] argue that his requirement may necessitate a (preliminary) examination into what constitutes unfair discrimination at this stage of the inquiry already, instead of at a later stage under the limitation clause (section 33).[44]

Surprisingly, social or marital status is not mentioned under specific grounds. This may be due to the fact that the grounds listed in Section 8(2) according to Cachalia *et al*[45] all relate to 'human characteristics that are either immutable (race, age, etc), or very difficult to change (sex, language, culture), or inherently part of the human personality (belief, religion, conscience) and subject very often to stereotyping and prejudice'.

Despite the absence of specific protection regarding marital status under specific grounds, I do not doubt that discrimination on the ground of marital status is protected under the general protection. This deduction is strengthened by the wording of Section 8(2): 'without derogating from the generality of this provision ...' which implicates that the writers of the Charter probably envisaged very wide protection under section 8, despite the awkward wording of that section.

Some of the questions which arise with regard to equality in procreation choices are: can procreation choices in the light of the constitution, be made available to a specified group of women, for example infertile married women or women of a certain age, racegroup/colour or social standing? Should males and females be treated equally with regard to procreation choices and should mentally deficient persons or persons who are carriers of hereditary defects be denied the right to have children?

Although these questions are of equal importance, I will confine this discussion to an evaluation of the constitutionality of limiting procreation rights to married women. This seemingly innocent question, when examined in detail, unleashes a myriad of legal, ethical, moral and religious dilemmas because of its personal nature. Issues of procreation, marriage, sexual preferences and child rearing are of necessity closely related to the personal values and beliefs of individuals as well as those of the society in general. These are not always easily determined in heterogeneous societies such as South Africa.

To complicate these issues further, our traditional views of the family and

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[43]*Fundamental rights in the New Constitution* 1994 29.

[44]See the reference to *R v Oakes* 1986 26 DLR (4th) 321 *infra* and the authorities cited in n 55.

[45]*Fundamental rights in the New Constitution* 27.

family life have undergone dramatic changes in the past decade or more.[46] Families in the modern sense of the word no longer necessarily consist of a heterosexual two-parent unit with or without children. In our society there are an increasing number of single-parent families, couples with different ethnic and cultural origins and backgrounds and homosexual couples. The first mentioned is often the result of divorce or simply of choice. In some instances the single-parents will subsequently find a companion which could result in a new 'blended' family unit.[47] The traditional family unit has thus undergone noticeable changes — a fact which should be recognised by legal systems.

In South Africa the traditional family unit has always been protected and promoted[48] and significant reliance placed on Judeo-Christian principles by the legislature[49] and courts alike.[50]

In the light of this distinct protection of the family unit, it is rather surprising that our bill of rights contains no direct protection of the family unit.

The denial of assisted procreation to unmarried persons in my view, undoubtedly constitutes discrimination in terms of the Interim Constitution. Should the single person also be in a homosexual or lesbian relationship, it may also be argued that she is discriminated against on the ground of sexual preference, which is specifically listed under the non-discrimination grounds in the equality clause. Is such discrimination justified in the light of the constitution as a whole?[51] This question must be examined in the light of the limitation clause of the Constitution.

THE LIMITATION CLAUSE IN THE CONSTITUTION[52]

As no right is by definition absolute, the Interim Constitution, like most other

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[46]See in general M Humphrey & H Humphrey *Families with a difference — varieties of surrogate motherhood* 1988 1–15.

[47]Ann MacLean Massie 'Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act' 1991 *Hastings Constitutional Law Quarterly* 18:3 487, 512 and the authorities cited in n 145.

[48]This is unfortunately only true of white family units as forced removals in apartheid era certainly had a severe effect on the family units of black and mixed race families.

[49]This is evident from the marriage requirement in assisted reproduction and the exclusion of married couples, utilising their own gametes (AIH), from the stringent procedures which apply to donors in terms of the Regulations. Single persons are, furthermore, entirely precluded from utilising assisted reproduction.

[50]See in this regard the dictum of Steyn in *V v R* 1979 (3) SA 1006 (T).

[51]Section 35(1) dealing with the Interpretation of the constitution, states that 'In interpreting the provisions of this Chapter (human rights), a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.'

[52]See in general J de Ville 'Interpretation of the general limitation clause in the chapter on fundamental rights' 1994 *SA Public Law* 9:2 287–312.

superior constitutions, contains a limitation clause.[53] This clause provides that the rights entrenched in Chapter 3 (bill of rights) may be limited by law of general application and provided that such limitation is reasonable and justifiable in an open and democratic society based on freedom and equality. The essential content of the right in question may also not be negated.

With regard to the limitation clause, it was stated by the Supreme Court of Canada in *R v Oakes*[54] that the legislative object must relate to the concerns that are pressing and substantial in a free and democratic society. Furthermore the means chosen must meet the conditions of a 'proportionality test'. The latter has three components, a rational connection with the objective, minimal impairment of the right or freedom in question and a proportionality between the effects of the limiting measures and the objective sought.[55]

The limitation clause in the Constitution will undoubtedly still be a source of investigation and interpretation by academics, judges and lawyers in the time ahead.

I will confine this discussion to the usability of two well-known common law guidelines, the *boni mores* and the best interest of the child in determining when the limitation of the rights inherent to assisted procreation is justified.

THE BONI MORES AS A GUIDELINE FOR GOVERNMENT INTERVENTION IN ASSISTED PROCREATION CHOICES

In examining common law guidelines to determine which limitations are justifiable and reasonable an attractive test may be found in the legal convictions of the community or *boni mores* as a test for wrongfulness in delict and criminal law.[56] In support of this test, it may be argued that our courts are familiar with the balancing of interest in determining the reasonableness of an act or omission (failure to act) in criminal law and law of delict. A cautionary note, must, however be added. Our courts, when utilising the *boni mores* test in the past, were hardly representative of an 'open and democratic society'. In the new constitutional dispensation, a more representative judiciary, reflecting the diversity of the South African population, particularly in the Constitutional Court, is envisaged. This court is faced with the daunting task of determining the prevailing *mores* of our multi-cultural and diverse society. It is in this court where the skeleton of the bill of rights will be clothed by the newly appointed judges of the

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[53]Section 33.

[54]1986 26 DLR (4th) 321.

[55]HB Mc Cullough 'Parliamentary Supremacy and a constitutional grid: the Canadian Charter of Rights' 1992 *International and Comparative Law Quarterly* 41 751–768 762; D Beatty *Talking heads and the supremes, the Canadian production of the constitutional review* Carswell 1990 24–26; WR Lederman 'Assessing competing values in the definition of charter rights and freedoms' in GA Beaudoin and E Ratushny *The Canadian Charter of Rights and Freedoms* (2 ed 1989) 127–163.

[56]Neethling, Potgieter & Visser *Law of delict* 31 *et seq*.

Constitutional Court, who will, undoubtedly individually and collectively contribute to an entirely new field of constitutional jurisprudence.

In my view the *boni mores* criterion, referred to in a multitude of cases in the past can, when applied with circumspection, be a useful guideline for the Constitutional Court in deciding when limitations in legislation are constitutional or not. The limitation clause should, however, never be reduced to a mere *boni mores* determination, as the requirement in section 33 is much more extensive. Cherished values in a democratic society such as freedom and equality should never be undervalued.[57]

Before the *boni mores* criterion is discussed in greater detail, the meaning of the *concept* should be considered briefly. The concept of the *boni mores* is known to be very wide, reflecting the juristic convictions of the community. It is founded on ethical, moral and social perceptions and differs from community to community, from country to country, and from time to time. The *boni mores* criterion has also been referred to as 'those deep seated convictions held generally by the community in the interest of the welfare of the community.'[58] Boberg[59] referring to the *boni mores* principle in the law of delict, considered it 'a value judgment based on considerations of morality and policy — a balancing of interests followed by the law's decision to protect one kind of interest against one kind of invasion and not another. The decision reflects our society's prevailing ideas of what is reasonable and proper, what conduct should be condemned and what should not'.

The *boni mores* or general reasonableness criterion has on numerous occasions in the past been utilised by our courts as a juridical yardstick which gives expression to the prevailing convictions of the community regarding right and wrong.[60] A good example of the application of the test is found in *O'Keefe v Argus Printing & Publishing Co*[61] where it was stated:

> Whether an act is to be placed amongst those that involve an insult, indignity, humiliation or vexation depends to a great extent upon the *modes of thought prevalent amongst any particular community or at any period of time, or upon those of different classes or grades of society*,[62] and the question must to a great extent therefore be left to the discretion of the court where an action on account of the alleged injury is brought.

In countries like South Africa with heterogeneous populations, it is often difficult to generalise about the precise content of the prevailing societal

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[57]See Constitutional Principles II and V in Schedule 4 of the Interim Constitution.
[58]Thirion J in *Edouard v Administrator Natal* 1989 (2) SA 368 (D) 377I.
[59]*The law of delict vol 1 Aquilian liability* Juta 1989 33.
[60]For a list of cases, see Neethling Potgieter & Visser *Law of delict* 31–32 n 17.
[61]1954 (3) SA 244 (C).
[62]My emphasis.

perceptions as no universal conception of what is 'reasonable and justifiable in an open and democratic society' exists. It must be determined in each country by its own courts with reference to its own society.

With regard to the discretion of the court, a prominent South African writer once observed that the legal conscience of the community is but a thin veil covering the naked truth that judges will apply their personal views in determining whether an act or omission is unreasonable in the view of society.[63] This entirely subjective determination could, to an extent, be counteracted by a more representative judiciary which, it is hoped, will be more in touch with the reality of the country.

BEST INTEREST OF THE CHILD AS A GUIDELINE FOR GOVERNMENT INTRUSION

Another common law guideline which may be valuable in determining whether restricting statutes on procreation rights are justifiable and reasonable, is the criterion of the best interest of the child.

The common law principle of the best interest of the child can be of particular importance in determining whether legislation regulating issues of a private nature (such as procreation choices), is justified.

The best interest of the child is considered not only in divorce and adoption proceedings but is also applied by the Supreme Court in its capacity as upper guardian of all minors in sensitive issues such as the termination of incidents of parental power (such as custody or support) and parental power in general.

As with the *boni mores* criterion, the best interest of the child is also a rather elusive concept.[64] Each case is usually considered on its merits and reliance is once again placed on the discretion of the judge presiding over the case and the prevailing views of society.

In the United States it has been argued that the 'fundamental right to bear or beget a child' can be governmentally regulated only by a narrowly tailored means employed in the service of a compelling state interest.[65] Does the harm to the potential child for instance outweigh the rights of the parents to procreate? Once again, the courts are faced with a balancing of interests. The trial court in the *Baby M* case, after determining that the commissioning couple in a surrogacy arrangement had a constitutionally protected right to

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[63]PQR Boberg 'The wrongfulness of an omission' 1975 *SALJ* 361.

[64]J Heaton *The meaning of the concept 'best interest of the child' as applied in adoption applications in South African Law* LLM Unisa 1988 8; Pretorius *Surrogate motherhood* 148–152.

[65]'While a state could regulate ... it could not ban or refuse to enforce such transactions altogether without compelling reasons.' *Baby M* 217 NJ Super at 386, 525 A2d at 1164.

procreate, stated that custody rights to the child must be determined by her best interest rather than by the constitutional rights of any of the adults involved.[66] The best interest of the child can therefore be a compelling state interest[67] justifying otherwise discriminatory legislation.[68]

CONCLUSION

The right to 'found a family' is not directly protected in South Africa although it is respected as a matter of policy. An argument can however be made out that such a right is protected under the right to privacy in the Interim Constitution.

From the issues discussed, it is furthermore clear that there is some discriminatory legislation operative in the field of assisted reproduction. The South African courts face a tremendous challenge in the time ahead. Apart from the abortion issue, the issues highlighted will be under particular scrutiny and judges will increasingly be faced with constitutional issues and the balancing of the rights of the individual against those of society. It is opportune to pave the way for free and open discussions of procreative choice issues by all interested parties — in particular those whose voices have been dampened in the past. These discussions are particularly urgent since the present Constitution is merely an interim one.[69] There is thus still time to alert the Constitutional Assembly[70] to the needs of the protection of specific (procreation) rights and the elimination of discriminatory statutes.

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[66]217 NJ Super 313 391 525 A.2d 1128 1167 (1987).

[67]See Ann MacLean Massie 'Restricting surrogacy to married couples: a constitutional problem? the married-Parent requirement in the Uniform Status of Cildren of assisted Conception Act' 1991 *Hastings Constitutional Law Quarterly* 18:3 487–540, 507 and n 116; A L Ellen 'Privacy Surrogacy and the *Baby M* Case' 1988 *The Georgetown Law Journal* 76:5 1759–1792 1772.

[68]Thus, it may be argued that it is justifiable to infringe on the rights of parents to procreate in the interests of children, by enacting legislation prohibiting commercial surrogacy arrangements.

[69]The final Constitution will be drafted within a two year period starting from the first sitting of the Constitutional Assembly.

[70]The National Assembly and the Senate sitting jointly will be the Constitution making body (section 68(1)).

Reflections on a general administrative appeals tribunal*

ANDRÉ RABIE**

Dit is 'n groot voorreg en eer om 'n bydrae te mag lewer tot die huldiging van my studieleier, mentor, kollega en vriend, Sas Strauss. Hy het die belangrikste bydrae gelewer tot my vorming as juris, veral op die gebied van regsnavorsing. Dit het hy gedoen deur volgehoue aanmoediging, bystand en veral deur die ideale voorbeeld wat hy gestel het.

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INTRODUCTION: JUDICIAL REVIEW AND APPEAL

Judicial review is applied by the courts to control the legality of administrative actions. But if an administrative body, in the lawful exercise of its discretion has arrived at a decision which, 'although not totally unreasonable, is one which is demonstrably less preferable in the circumstances than some other decision'[1] it is regarded as not being the business of judicial control through judicial review. In short, judicial review cannot be applied to control the 'wisdom' or 'merits' of an administrative decision.[2]

Although the distinction between legality and merits is not actually as rigid as the above remarks would seem to suggest[3] and is to some extent manipulable because courts themselves define the legal limits which are imposed upon discretionary power,[4] it is nevertheless maintained in principle. Courts have repeatedly disclaimed any right of intervention in the merits of administrative

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**BA LLB (Pret); LLD (Unisa). Professor of Law, University of Stellenbosch.

[1]Curtis 'A new constitutional settlement for Australia' 1981 *Federal Law Review* 1 2.

[2]The concept of merits is seldom defined. According to Brennan ('The purpose and scope of judicial review' in Taggart (ed) *Judicial review of administrative action in the 1980s. Problems and prospects* (1986) 18 30) the merits of a case are constituted by the facts and policies on which an administrative body acts, while Evans ('Administrative appeal or judicial review: a Canadian perspective' 1993 *Acta Juridica* 47 64) regards an appeal on the merits as one which requires the appeal body to determine whether the primary decision-maker found the facts and law correctly and to substitute its view on the proper exercise of any discretion.

[3]The dividing line has become somewhat blurred: Wade *Administrative law* (6ed 1988) 36–9.

[4]Craig *Administrative law* (3 ed 1994) ch 10; Baxter *Administrative law* (1984) 306.

decisions when such decisions are subject to judicial review.[5] Furthermore, courts' powers do not in principle extend beyond setting aside the decision in question: they do not step into the shoes of the administrative body in order to remake the decision.[6] These factors have been viewed as the fundamental shortcomings of judicial review.[7] Dissatisfied citizens have been expected to seek their remedies within the administrative-political processes of government. Since these remedies have also been found wanting,[8] the focus of attention has shifted to the potential of administrative appeals.

An administrative appeal is a process whereby the wisdom or merits of an administrative decision are reconsidered and redetermined another decision-maker at the request of an aggrieved person. The aim of this article is to explore the potential of a general administrative appeals tribunal (GAAT), as exemplified by the Australian Commonwealth Administrative Appeals Tribunal (AAT), against the background of administrative appeals generally.

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[5] *Sbidiack v Union Government (Minister of the Interior)* 1912 AD 642, 651-3; *Golden Arrow Bus Services v Central Road Transportation Board* 1948 (3) SA 918 (A) 926, *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A) 43H.

[6] Such a function is regarded as administrative in nature. Besides moving beyond their area of expertise, the courts would breach the doctrine of separation of powers if they should usurp the function which the empowering legislation entrusted to the administrative body concerned.

[7] For a more detailed discussion of the shortcomings of judicial review, see Rabie 'Aspects of administrative appeals to environmental courts and tribunals' 1995 *Stell LR* (November). The Australian Report of the Commonwealth Administrative Review Committee, known as the Kerr Report (Parliamentary Paper 114/1971 para 58 (cf also para 11) identified the fundamental issue as follows: 'The basic fault in the entire structure [of judicial review] is, however, that review cannot as a general rule, in the absence of special statutory provisions, be obtained 'on the merits' — and this is usually what the aggrieved citizen is seeking.'

The recommendation of the South African Law Commission's Report on investigations into the courts' powers of review of administrative acts (1992) Project 24, para 3.12.38, that the existing system of administrative appeal tribunals should be retained and that reform should be effected through an expansion of the grounds of judicial review fails to address these or the many other shortcomings of judicial review as a remedy to rectify administrative decisions deemed incorrect on their merits. (*Cf* also Govender 'Administrative appeals tribunals' 1993 *Acta Juridica* 76 87.) Even if the expansion of the grounds of review would encompass the unreasonableness of the administrative action in question, as the Law Commission's recommendations imply (cf clause 3(1)(f) of its proposed Bill) and the Constitution of the Republic of South Africa Act 200 of 1993 (s 24(d)) probably provides (see Mureinik 'A bridge to where? Introducing the interim bill of rights' 1994 *SAJHR* 31 38–43), this still falls far short of the powers of a GAAT.

[8] Important shortcomings of such remedies, mainly parliamentary control and internal review, have been found in the incapacity of Parliament or its members effectively to attend to individual challenges of administrative acts and the lack of independence of the body that conducts an internal review. Reform of parliamentary control through the establishment of an ombudsman has brought much relief, but an investigation by the ombudsman — in contrast to a direct appeal to a tribunal — is of a more paternalistic and surrogate nature and, besides, the ombudsman cannot remake the decision in question.

CATEGORIES OF APPEAL

Since the availability of all appeals is dependent upon a legislative basis, the nature and scope of any appeal are likewise determined by the legislation concerned. The following are some of the categories of appeal, representing a broad spectrum of potential jurisdiction, which may be distinguished:

- A comprehensive appeal on the merits which involves a *de novo* reconsideration of the matter as if there had not been a previous decision, with no restrictions on the material which the appeal body may consider and no restriction on the type of decision which that body may make. This kind of appeal, usually referred to in South Africa as a 'wide appeal', and in Australia as 'merits review', is explained as follows:

  > A right to a full merits review of a decision is the right of an applicant to put any relevant material whatsoever before a review body which has the power to substitute its own decision for that of the original decision-maker. The substitution may occur because, on the material before it, the review body:
  >
  > (a)comes to a different view of the facts from that taken by the original decision-maker;
  >
  > (b)considers that the law or policy should be applied in a different way to the decision; or
  >
  > (c)considers that there is a preferable way of exercising the statutory discretion'.[9]

  Such an appeal amounts in effect to substituting the appeal body for the original decision-maker. The latter's findings may be taken into account like any other relevant consideration, but the appeal body attaches no particular weight to such findings. This is the type of appeal powers applicable in respect of many South African administrative appeals to the Supreme Court and to a variety of administrative tribunals.[10] Australian administrative appeals tribunals also exercise such powers.

- A partial appeal on the merits where the scope of the appeal is confined in the sense that limitations are imposed on the material which the appeal body may consider in that only the material which served before the primary decision-maker may serve before the appeal body. Such a limitation would imply that more weight will be given to the primary decision-maker's fact-finding and exercise of discretion than would be the case if no limitations were imposed on the submission of fresh material. It nevertheless is a merits appeal in that a fresh decision on the merits may be made.

- An appeal along the same lines as that of the previous category in that restrictions are imposed on the material which the appeal body may consider, but where restrictions are imposed also on the type of decision which that body may make. In this regard three further categories may be

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[9]Report on review of appeals from administrative decisions Electoral and Administrative Review Commission of Queensland Vol I (1993), hereafter referred to as EARC Report para 2.67.

[10]See Rabie 'Administratiefregtelike appèlle' 1979 *De Jure* 128 129 *ff* and 141 *ff*.

distinguished:

(a) An examination of the primary decision in order to ascertain whether it was correct or reasonable on the material before it, without the power to make a fresh decision on the merits in substitution for the original decision, but with the power only to affirm or set aside that decision. Several such appeals are encountered in South African law.[11]

(b) A similar power to that referred to in (a) but with the additional power to refer the decision back to the primary decision-maker, accompanied by recommendations of the appeal body.

(c) A decision which involves the power to make recommendations only.[12]

- Whereas all the above appeals are aimed at the merits of the primary decision, another category of (severely restricted) appeal may be distinguished ie that relating not the merits but only to questions of law. Examples of such appeals exist in South African law.[13]

Appeals which are concerned with proving the primary decision-maker right or wrong may be termed judicial appeals, while a true administrative appeal involves an appeal body whose role it is to decide what decision it itself should make rather than what decision should have been made by the primary decision-maker.[14]

If the object of merits appeal is to arrive at the most preferable decision and not merely to prove the primary decision-maker right or wrong, it does not make sense to limit the appeal body to the evidence available to the primary decision-maker. In order to arrive at the most satisfactory decision, the appeal body should be able to take account of any relevant evidence. There are several reasons why a primary decision-maker will not have relied on all relevant evidence: 'This may happen because the fact-finding methods are deficient, the sheer volume and time for processing applications prevents any more than cursory fact-finding, or because applicants very often have not provided the full story. They may not have appreciated what factual material is relevant to and required for the decision. Also in many areas of decision-making, particularly in areas of volume decision-making, decisions are often made on the basis of information supplied in standard form documents'.[15] Another factor is that primary decision-makers often do not

[11]Rabie n 10 136 *ff*.

[12]One can hardly speak of an appeal in these circumstances. An example would be the Board of Investigation which the Minister of Environment Affairs must appoint in terms of the Environment Conservation Act 73 of 1989 to assist him in the evaluation of any appeal (s 15).

[13]Rabie n 10 139.

[14]*Cf* EARC Report n 9 para 5.51.

[15]EARC Report n 9 para 5.35.

possess adequate skills to test conflicting evidence and generally to ensure procedural fairness.

An appeal — even if it is aimed at a reconsideration of the merits — which would result in recommendations only, would be unsatisfactory for the following reasons:

- it would coincide with the functions of the ombudsman and, to some extent, with those of commissions of inquiry:
- no real external, independent control would be provided if the appeal body's findings are not binding;
- public faith in an appeal body cannot be established or maintained if it can make recommendations only, which recommendations may be rejected by the decision-maker.

If the appeal body should have the power to consider questions of law only, its function would be very similar to that of judicial review. This would not only render the body overly legalistic, but would result in unjustified duplication while the need of merits appeal would not be addressed. It would also be inappropriate to limit an administrative tribunal — which is not a court — to dealing only with questions of law.

APPEAL BODIES

As far as the appropriate appeal body is concerned, the following are some of the most important options that have been applied:

Courts of law

Supreme Court

The Supreme Court can be designated to hear appeals against specific decisions of administrative bodies. Some examples of such appeals exist in South Africa.[16]

Administrative Division of Supreme Court

An administrative division of the Supreme Court could be established as was done, for example, in New Zealand with the promulgation of the Judicature Amendment Act 1968, following on recommendations of the Public and Administrative Law Reform Committee in its First Report.[17]

Specialist courts

Specialist courts, equal in status to the Supreme Court, can be created to hear appeals against administrative actions related to particular fields. Australian

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[16]Rabie n 10 129 *ff*.

[17]Appeals from Administrative Tribunals (1968) paras 35–40. It was also recommended in 1982 by the Law Reform Commission of Western Australia (Report on Review of Administrative Decisions. Part I — Appeals Project 26 (1982). However, in 1992, the Royal Commission into Commercial Activities of Government and Other Matters in its Second Report recommended for Western Australia that a GAAT replace the proposed administrative law division of the Supreme Court.

examples of such a type of court are the Land and Environment Court of New South Wales[18] and the Environment, Resources and Development Court of South Australia.[19] A specialist court need not be created as a separate court, but can also be established as a division of an existing court. For instance, in Queensland, the Planning and Environment Court[20] has been established as a division of the District Court. The Labour Appeal Court[21] and the Land Claims Court[22] are South African examples of specialist courts.

Characteristics which favour courts as appropriate adjudicatory bodies are their established independence and prestige as well as their powers to enforce their decisions. However, the principal objections against conferring upon a court the power of reviewing administrative actions on their merits, are the following:

- The courts' legalistic approach is reflected inter alia in strict and formalistic procedural and evidentiary rules, rendering adjudication expensive, inflexible and time consuming and therefore relatively inaccessible to the average citizen.[23]
- It goes beyond the traditional function and expertise of the judiciary and obliges a court to exercise an administrative function for which it is not uniquely qualified.[24] This feature is particularly troublesome where the review of government policy is concerned: Should the courts be bound by government policy then they are subordinated to the executive and that is unacceptable. It would be equally unacceptable should they be empowered to reject such policy and to substitute their own policy.[25]
- It amounts to breaching the doctrine of the separation of powers and as a consequence the judiciary's reputation for impartiality may be compromised.[26]

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[18]Established by the Land and Environment Court Act 1979 (NSW).

[19]Established by the Environment, Resources and Development Court Act 1993 (SA).

[20]Established by Local Government (Planning and Environment) Act 1990 (Qld).

[21]The court is for certain purposes deemed to be a division of the Supreme Court in terms of the Labour Relations Act 28 of 1956 (s 17(21A)(d).

[22]Restitution of Land Rights Act 22 of 1994.

[23]These problems are sought to be overcome by the establishment of specialist courts, such as the New South Wales' Land and Environment Court, which do not rely upon the above strict rules.

[24]*Cf Publications Control Board v William Heinemann Ltd* 1965 (4) SA 137 (A) 156 G–H. Again, specialist courts usually are composed of a panel which reflects some degree of appropriate expertise.

[25]Taylor 'May judicial review become a backwater?' in Taggart (ed) n 2 153 170. Orr, in his minority view as regards the First Report of the Public and Administrative Law Reform Committee of New Zealand n 17 Appendix p 39, holds a similar view and contends that the courts' involvement in value judgments on policy matters will detract from their impartiality.

[26]The South African Law Commission n 7 para 3.12.35, suggests that a general right of appeal against administrative decisions, to the Supreme Court would in any case overload the court.

Administrative appeals tribunals

Specialist administrative appeals tribunals

The most common technique for accommodating appeals against administrative decisions has been to establish specialist administrative appeals tribunals (SAAT). The usual reasons for resorting to a tribunal as an adjudication mechanism are the speed, informality, cheapness, accessibility and expertise which it can provide. By and large such tribunals have been created at different times, in isolation, and *ad hoc* as a response to a particular problem, or set of problems, without any underlying principles or an integrated plan. Their structure and powers depend mainly on the particular inclinations of the bodies responsible for their introduction at the time. In fact, no rational or consistently applied criteria exist according to which it is decided whether a right of appeal should be introduced. In the result, no coherent system can be discerned, obscurity, untidiness and arbitrariness being features of the system, if such it can be called. Moreover, this piecemeal and patchwork approach has tended to favour the proliferation of ad hoc specialist tribunals. This, basically, is the position prevailing in South Africa[27] and the following remarks made in the report of the Public and Administrative Law Reform Committee of New Zealand[28] in respect of the position prevailing in 1968 seem apposite to South Africa: 'There is a bewildering variety of appeal rights (or lack of them), of types of appellate bodies, of constitutions, procedure and jurisdiction. The present complexity appears to have been unplanned, or possibly the result of different plans at different times.' A similar position prevailed in the UK before the promulgation of the tribunals and Inquiries Act 1958 and in Australia (at federal level) before the establishment of the AAT in 1975. Evans[29] submits that unless existing South African tribunals cannot satisfactorily be adapted to the new constitutional and administrative regimes, continued reliance should be placed on the familiar, functioning structure. The South African Law Commission[30] has also recommended that in principle, the present system of administrative appeals should be retained.

It is submitted that the manifestly obvious shortcomings of uncoordinated pluralism which this fragmented approach involves, detract substantially from any proposal to adhere to the status quo. Moreover, its main advantage, being the specialist nature of the tribunals involved, is not a unique feature and can be shared also by a GAAT. Further remarks concerning specialist and general tribunals follow shortly.

Supervisory council on specialist tribunals

A further variant on the theme is exemplified by the creation of a supervisory

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[27]Rabie n 10 146–8; Baxter n 4 266.

[28]n 17 Para 32(i).

[29]n 2 66–07.

[30]N 7 para 3.12.38.

body whose task it is to oversee the specialist tribunals in a consultative and advisory capacity, recommending inter alia the coordination and amalgamation of existing tribunals and the standardisation of procedures, where practicable. This is the model which obtains in the UK through the Council on Tribunals, established by the tribunals and Inquiries Act 1958 and consolidated in the tribunals and Inquiries Act 1971. Govender[31] seems to favour this option for South Africa.

It was noted by the Kerr Report[32] that the adoption of a similar approach to that of the UK 'would involve endorsement of the practice of having an ever growing body of specialist tribunals as the best system for the review on the merits of administrative decisions and adoption of the idea of setting up a supervisory council whose main task would be to review their constitution and working and to see that their procedures were fair and proper'.

However, concern has been expressed as regards the effectiveness of the British Council on Tribunals,[33] mainly on account thereof that it is ill equipped to fulfil its limited functions, and that it lacks a power base. It is a part-time body which operates on a shoestring budget.[34] The Council's weakness is demonstrated by its inability to achieve even the limited reforms which it has recommended. Its powers are only advisory and reliance must be placed upon the government for the implementation of its proposals - and it appears that too little attention is paid to its recommendations.[35] Furthermore, the Council has no statutory power to be consulted about the creation of new tribunals and therefore cannot effectively resist the trend towards further proliferation through the establishment of unnecessary new tribunals. Also, the Council is not empowered to survey those areas of decision-making which are currently not subject to appeal to a tribunal. This important task is accomplished in Australia by the Administrative Review Council.[36]

The British experience with a supervisory body which exercises advisory functions only is not inspiring. It might be argued that the shortcomings are due not so much to the institution as such but to its defective implementation. Nevertheless, the British experience indicates that a mere advisory body is unlikely to succeed in having the necessary reforms effected. The conclusion of the Law Reform Committee of South Australia[37] is that this option might at the most be useful as a first step, while a more comprehensive system is

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[31]N 7 87.

[32]N 7 para 279.

[33]See generally Harlow & Rawlings Law and Administration (1984, reprint 1988) ch 4; Wade n 3 920.

[34]Harlow & Rawlings n 33 167–9.

[35]*Cf* Administrative justice. Some necessary reforms. Report of the Committee of the JUSTICE — All Souls Review of the administrative law in the United Kingdom (1988) para 9.72.

[36]Section 51(1)(a) and (b) of the Administrative Appeals Tribunal Act 1975 (Cth).

[37]*Eighty-second Report relating to Administrative Appeals* (1984) p 15.

being implemented.

General administrative appeals tribunal

Finally, provision can be made for the establishment of a GAAT, along the lines of the Australian Commonwealth AAT. The creation of such a tribunal for South Africa is supported by Baxter,[38] Boulle, Harris and Hoexter[39] and Viljoen.[40] The South African Law Commission,[41] Evans[42] and Govender[43] argue against such a tribunal, mainly on the grounds that its establishment would not be cost-effective nor practicable, having regard to the much larger scope and volume of work performed by existing tribunals.[44]

General or specialist appeals tribunals: some comparative considerations

Before proceeding to a discussion of a GAAT, reference is made to some considerations which may be taken into account in assessing the respective advantages and disadvantages of SAATs and GAATs.[45] Ison[46] warns, however, that a universally valid conclusion should not be sought since the cogency of the relevant considerations is bound to vary from one subject area to another.

Expertise

One of the main reasons why appeals to administrative tribunals are favoured above appeals to courts of law, ie their expertise, has been relied upon to argue in favour of SAATs rather than a GAAT. It seems obvious, especially in complex, technical areas, that an appeal body should be constituted by experts who are able to grasp and evaluate the underlying issues. Moreover, it has been argued that it would make no sense and would be paradoxical if primary decision-making is specialised, but appeals are heard by a non-expert generalist body.[47]

On the other hand, Taylor[48] contends that the argument implying that specialists must be reviewed by even more specialized persons is an aberration and that it does not apply in the bureaucracy itself: internal appeals, for instance, finally end up on the desk of 'that ultimate generalist', the Minister.

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[38] n 4 267–72.

[39] *Constitutional and administrative law. Basic principles* (1989) 254.

[40] South African Law Commission Report n 7 para 3.12.32.

[41] N 7 para 3.12.27.

[42] N 2 66.

[43] N 7 87.

[44] These arguments were also raised by the Report of the Committee of the JUSTICE — All Souls Review n 35 para 9.77. For other, less persuasive, arguments see also the Report of the Committee on Administrative Tribunals and Enquiries, known as the Franks Report Cmnd 218/1957 paras 121-3 and the Report of the Public and Administrative Law Reform Committee of New Zealand n 17 paras 3–4.

[45] The discussion relies mainly on the EARC Report, n 9 paras 3.78–139.

[46] 'Appeals on the merits' 1992 *Osgoode Hall Law Journal* 139, 153.

[47] Ison 'The sovereignty of the judiciary' 1986 *Les Cahiers de Droit* 503, 508. This argument was also used by the Franks Report n 44 para 121 in its rejection of a GAAT.

[48] N 25 169.

Review by super-specialists may tend to compartmentalise issues and to reveal idiosyncrasies, preconceptions and biases acquired in the very exercise of their expertise. A generalist perspective, on the other hand, is more conducive to gaining a broader perspective on a problem. It is necessary to balance the need for expertise with the need for sensitivity to general values ie 'the ability to relate a particular administrative decision to larger societal and governmental concerns'.[49]

In any case, a GAAT need not be devoid of expertise. There are different ways of ensuring that appeals against specialist decisions are conducted by members of such a body who have the required expertise. This can be done, as in the AAT, through the establishment of sectoral divisions or through the appointment of specialist members even on a part-time basis, to the general tribunal who may then be allocated to hear appeals to which their expertise may relate.

Independence

SAATs seem to be more prone to the phenomenon of 'agency capture', ie the formation of symbiotic relationships between a control body and those subject to its control. Their independence may be threatened by their close attachment to line departments which impose subtle pressure through controls over the appointment of tribunal members and over budgets, as well as the provision or withholding of facilities and support services. For the members of a tribunal to be appointed by the very authority whose decisions are subject to adjudication by the tribunal inevitably undermines their independence, at least in the public's eye.

The immunity of a GAAT to these pressures is likely to be stronger by reason of its acknowledged stature and independence, its relationship with a central supervisory policy department (the Attorney-General's Department in the case of the AAT) and its closer association to the judiciary.

Status

It has been argued that a GAAT which provides access to the whole community is likely to have a more exalted stature than a group of SAATs. A related point is that a GAAT with greater stature and offering a greater variety and range of work will be more likely to attract a higher calibre of appointee than would a SAAT.

Procedure

Another major reason why administrative tribunals are favoured above courts of law has, ironically enough, served as the basis for criticism against a GAAT. In spite of legislative directives to the contrary, the AAT has been perceived as predominantly adversarial, formal and legalistic. Moreover, there is considerable pressure on a GAAT to adopt uniform procedures. A related

[49] EARC Report n 9 para 3.113. Super-specialisation may be particularly counter-productive in relation to cases such as those pertaining to the environment, in which a multi-disciplinary approach is required.

concern is the dominance of the process by lawyers. It has been argued that SAATs are less likely to be subsumed or overawed by mainstream legal culture. SAATs seem to display a superior capacity to tailor their procedures to the subject area in question in order to suit the sensitivities and requirements of their clientele.

However, there is no inherent reason why a GAAT should not be able to adopt a style of dispute resolution that is appropriate to the nature of the individual dispute. In fact, the AAT has achieved considerable success in this regard, especially through the improvement of pre-hearing conferences and through the use of mediation, and the training of its members. Moreover, the contribution which legal culture can make to achieving justice and fairness — important goals in an appeal process — is well recognized.

Access

A GAAT is more likely to have the resources to provide services to regional centres and rural and remote areas than are SAATs which review a relatively low volume of decisions.[50] A SAAT will almost invariably be obliged to settle in an important urban centre.

Speed

Expert familiarity may enable a SAAT to deal more rapidly with appeals. Also, a GAAT may find it difficult to operate at differing speeds in relation to different subjects. However, much depends on the subject area involved. For instance, if a particular case is one that involves overlaps between systems, Ison[51] feels that a GAAT may be able to deal with it more promptly.

Cost

It seems reasonable to assume that a rationalisation of services and the consolidation of resources, such as can be achieved through a GAAT, should result in the reduction of expenditure. However, Ison[52] again points out that a satisfactory assessment of this matter can be made only after an intensive and empirical study of the particular subject area involved 'and not by any attempt to develop and then extrapolate from any general principles for the design of appellate structures'.[53]

Comprehensiveness

A GAAT can serve as a vehicle to accommodate the expansion of appeal jurisdiction by having decisions previously not susceptible of merits review, subjected to its jurisdiction, as and when this is deemed appropriate. It thus provides a residuary tribunal for appeals against administrative decisions for which currently no SAATs exist. A countervailing approach would have to rely upon the establishment of yet more SAATs, if the decision in question cannot satisfactorily be incorporated in the jurisdiction of an existing SAAT.

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[50]EARC Report n 9 para 3.11.9.

[51]*The Administrative Appeals Tribunal of Australia* (1989) 66.

[52]N 51 67.

[53]See also EARC Report n 9 para 3.12503.132.

Another important factor is that the search for criteria to guide the selection of decisions suitable for merits review has been stimulated only with the establishment of a GAAT. Little or no effort has been made to search for such criteria where individual SAATs have been created.

THE AUSTRALIAN COMMONWEALTH ADMINISTRATIVE APPEALS TRIBUNAL

Introduction

The most innovative and far-reaching development in respect of a GAAT occurred in Australia. Following on the promulgation of the United Kingdom Tribunal and Inquiries Act 1958, the Administrative Review Committee was established in 1968 with one of its terms of reference having been to consider the desirability of introducing similar legislation in Australia. The investigation undertaken by this committee led to the Report of the Commonwealth Administrative Review Committee,[54] known as the Kerr Report, while further investigations by another committee resulted in the Final Report of the Committee on Administrative Discretions,[55] known as the Bland Report. These Reports[56] led to major administrative-law reforms at Federal level, collectively known as 'the new administrative law'.

The first component of these reforms is the Commonwealth Administrative Appeals Tribunal (the 'AAT' or the 'Tribunal'). The tribunal — for which there was no precedent in the common-law world — is entirely the creature of statute, the Administrative Appeals Tribunal Act 1975 (Cth) (AAT Act). Other statutes comprising the above reform package deal with the establishment of an Ombudsman,[57] the revamping of judicial review[58] and freedom of information,[59] besides the setting up of an Administrative Review Council.[60]

At State level, GAATs along the same lines as the Commonwealth AAT have been created in Victoria, by the Administrative Appeals Tribunal Act 1984 and the Australian Capital Territory, by the Administrative Appeals Tribunal Act 1989. These tribunals have also been designed to serve as mechanisms whereby the growth of SAATs can be limited and the scope of merits review expanded. Moreover, after a comprehensive survey, the Queensland Electoral and Administrative Review Commission has also proposed the creation of a new merits review body, to be called the Queensland Independent Commission for Administrative Review. This body is to replace most existing

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[54]Parliamentary Paper 114/1971, n 7.

[55]Parliamentary Paper 316/1973.

[56]A third report, the *Report of the Committee on Review of Prerogative Writ Procedures*, 1973 (the Ellicot Report) also addressed issues pertaining to administrative-law reform, but did not deal with administrative appeals.

[57]The Ombudsman Act 1976 (Cth).

[58]The Administrative Decisions (Judicial Review) Act 1977 (Cth).

[59]The Freedom of Information Act 1982 (Cth).

[60]By the Administrative Appeals Tribunal Act 1975 (Cth).

tribunals.[61] A similar conclusion was previously reached by the Law Reform Commission of New South Wales,[62] the Law Reform Committee of South Australia[63] and the Northern Territory Law Reform Committee.[64]

Administrative decisions subject to merits review

Jurisdiction

The AAT may review only such administrative decisions made in terms of Commonwealth legislation which are specifically rendered reviewable, either by the AAT Act or by the specific legislation which is the subject of the review. In other words, unlike the courts, it has no general supervisory role as regards the Commonwealth administration, although its powers in respect of decisions which it can review, substantially exceed the courts' power of judicial review. The AAT took over the jurisdiction of tribunals which it superseded, but most of its jurisdiction is novel and is gradually expanding. Whereas the schedule to the AAT Act initially contained only 25 statutes, there are currently approximately 250 statutes which confer jurisdiction on the AAT. This jurisdiction is broad and varied and includes areas such as social security, veterans entitlements, employees compensation, taxation, customs, deportation, civil aviation, freedom of information, bankruptcy, student assistance, corporations, export market development grants and environmental matters.[65] Although jurisdiction has been conferred on the tribunal under a large number of statutes, its overwhelming case load falls within only a few subject matters. More than 90 per cent of finalised applications during 1992-1993[66] related to employment and retirement benefits,[67] social welfare (social security and veterans' entitlements)[68] and taxation.[69]

Since the tribunal's jurisdiction relates to decisions, it is important to note that 'decision' is defined comprehensively in the AAT Act.[70]

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[61] N 9 ch 3.

[62] *Report on Appeals in Administration* LRC 16 (1973).

[63] *Eighty-Second Report, relating to Administrative Appeals* (1984).

[64] *Report on Appeals from Administrative Decisions* (1991).

[65] A full list of statues under which decisions may be made that are subject to review is contained in a schedule to the Annual Reports of the AAT.

[66] *Annual Report of the Administrative Appeals Tribunal 1992-93* Appendix 9.

[67] 17 per cent.

[68] 47 per cent.

[69] 30 per cent.

[70] Section 3(3). It includes the

- making, suspending, revoking or refusing to make an order or determination;
- giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
- issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- imposing a condition or restriction;
- making a declaration, demand or requirement;
- retaining, or refusing to deliver up, an article; and

In addition to the AAT's jurisdiction being limited to reviewing only those decisions which Parliament permits it to review, its jurisdiction may also be limited by the requirement in legislation of a mandatory internal review as a precondition. Moreover, the tribunal's jurisdiction is in general also limited by such legislative constraints as may have been imposed upon the primary decision-maker whose decision it reviews and in whose shoes it steps.

In accordance with the recommendations of both the Kerr Committee[71] and the Bland Committee,[72] the AAT was designed to stem the familiar tendency to establish specialist tribunals and to transfer jurisdiction from existing specialised tribunals to itself.[73] The fundamental purpose of the creation of the AAT was to centralise the review functions of these bodies in a single body with a view to providing effective and independent control by a unified body which could also ensure some degree of consistency of review standards.

A further aim was to create a vehicle for the extension of review powers: powers under existing and new legislation were to be scrutinised with a view to determining whether there should be appeals to the AAT against decisions made in the exercise of those powers. Jurisdiction was accordingly conferred on the AAT in areas where there had never been review on the merits.

Criteria to guide the selection of decisions suitable for merits review
An important question of justiciability which has received rather scant

- doing or refusing to do any other act or thing.

This definition embraces almost any administratively relevant activity that can be imagined. Moreover, the Federal Court has held that even though a decision purported to have been made in the exercise of statutory powers was in fact unauthorised by law, it was nevertheless a 'decision' within the meaning of the AAT Act which the tribunal was authorised to review. (*Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 *FLR* 338.)

The definition of 'decision' in the AAT Act cannot determine definitively the meaning of the word 'decision'; it has an ambulatory character and 'it must take its colour and content from the enactment which is the source of the decision itself'. (*Director-General of Social Services v Hales* (1983) 47 *ALR* 281 305–6.)

[71]N 7 para 280.

[72]N 55 para 123.

[73]This aim was achieved through the conferral on the AAT of compensation jurisdiction, formerly exercised by the Commonwealth Employees Compensation Tribunal, veterans jurisdiction, previously exercised by the Repatriation Review Tribunal and taxation jurisdiction, formerly exercised by the Taxation Boards of Review. It is ironic that since the creation of the AAt a new tendency towards the gradual proliferation of specialist tribunals at Commonwealth level — some of them admittedly involving two-tier review — has again been discernible. The following tribunals have thus been introduced: the Social Security Appeals Tribunal, the Student Assistance Review Tribunal, the Veterans Review Board, the National Native Titles Tribunal, the Securities Appeals Tribunal, Nursing Homes Review Panels, the Immigration Review Tribunal and the Refugee Review Tribunal.

attention in academic literature,[74] is the suitability of decisions for appeal, ie the factors or criteria which should be taken into account in considering which decisions should be subject to merits review (appeal).

The matter was raised by the Kerr Committee, which found it impossible itself to examine all the discretions conferred on administrative bodies — even if only at Commonwealth level — with a view to considering the desirability of subjecting their exercise to a right of appeal.[75] Resolving this matter will be a matter of government policy[76] but the Committee expected that the area in which it should be permitted would be large and that administrators themselves would appreciate the desirability and the advantages of such an extensive area.[77]

The Bland Committee did not propose any criteria which may assist in deciding which decisions should qualify for merits review, but merely listed some decisions which it deemed appropriate for such review.[78]

With the eventual enactment of the AAT Act a schedule was included which set out the administrative decisions subject to merits review. This schedule was based partly on the recommendations of the Bland Committee, but came into being as a result of a rather hurried and uncoordinated process.[79] Subsequent additions to the tribunal's jurisdiction have been made on a pragmatic basis, not in the AAT Act's schedule but rather in the legislation in terms of which the decision subject to review is made. The tribunal's jurisdiction thus is the result of a somewhat haphazard process, not supported by principles upon which the identification of those classes of decisions suitable for merits review should be made.

In accordance with the recommendations of the Kerr Committee,[80] the AAT Act,[81] commissioned the Administrative Review Council with the task of recommending which decisions should be the subject of merits review. The Council has accordingly been engaged in a process of developing guidelines for determining whether the exercise of a decision-making power is appropriate for external merits review.[82]

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[74]For useful contributions, see Ison n 46 144–5 O'Brien 'What decisions are suitable for review?' 1989 *Canberra Bulletin of Public Administration* 86, 91–2; Harris 'There's a new tribunal now'. Review of the merits and the general administrative appeal tribunal model' in Harris & Waye (eds) *Australian studies in administrative law* (1991) 181, 196–8.

[75]N 7 para 283.

[76]N 7 para 225.

[77]N 7 para 360.

[78]N 55 Appendices H and L.

[79]Curtis n 1 4.

[80]N 7 para 360.

[81]Section 51(1) (a) and (b).

[82]The Council's guidelines were initially published in its *Eighth Annual Report 1983–4* and thereafter updated in its *Eleventh Annual Report 1986–87*; the latest consolidated and updated version appears in the Council's *Seventeenth Annual Report 1992–93, ch 7.*

The other major contribution to the development of criteria to be used in selecting the types of decisions which are suitable for merits review, has been rendered by the Queensland Electoral and Administrative Review Commission.[83] Proceeding from the basis that not all decisions are appropriate for merits review,[84] the Commission emphasized the need for criteria: 'To avoid having decisions for merits review being selected at random, or based on the whim of agencies or as the result of lobbying of interest groups, it is essential that there be developed guidelines for selecting the types of decisions for merits review.'[85] The Commission recommended that the suggested criteria should not themselves be included in legislation to govern tribunal determinations as to which decisions are subject to review: rather, they should be used as guidelines to legislators in order to identify individual decisions which should be subject to merits review.[86] These decisions could then either

- be specified in each statute in terms of which the decision subject to review is made (as is the case with the commonwealth, Victorian and ACT AATs) or
- be incorporated in the statute which regulates and governs the appeal tribunal in question (as with the New South Wales Land and Environment Court Act 1979 (NSW) and as was initially the case with the AAT Act).

It is not possible within the confines of this article to discuss or even mention the variety of guidelines that have been proposed to determine the appropriateness of issues for merits review. Suffice it to state that they amount mainly to qualifications and exceptions to the basic or prima facie criterion that the administrative decision in question will, or is likely to, affect the interests of a person.

Tribunal composition

The composition of the tribunal is deliberately varied to cater for its diverse jurisdiction. It is comprised of a President (Judge of the Federal Court), Presidential Members (Judges of the Federal or Family Courts), Senior Members (persons who hold either legal or other special qualifications) and Members (persons who hold expertise or special skills within the areas of the tribunal's jurisdiction).

Hearings are conducted either by a one member or a three member tribunal. Three member tribunals are generally used to employ the expertise of members. In some cases the constitution of the tribunal is provided for in the enactment by virtue of which the decision under review was made.

In constituting the tribunal the following factors are taken into account

[83]EARC Report n 9 ch 6.
[84]N 9 paras 6.111–6.116.
[85]N 9 para 6.117.
[86]N 7 paras 6.9–6.37.

- the nature and circumstances of the case;
- the importance of the case to the parties and to the public;
- whether there are difficult or novel questions of law or fact involved;
- the availability of suitable members; and
- the status of the maker of the decision under review.

The Kerr Committee[87] had recommended that an officer of the governmental body responsible for administering the decision under review should also serve as a member of the tribunal. However, this recommendation was rejected by the Bland Committee[88] and was not followed in the AAT Act. This exclusion, according to Gardiner[89] is likely to result in the absence of intra-bureaucratic expertise in the AAT and the consequent loss of balance in according recognition to the administration's interests, but it does serve to strengthen the independent status of the tribunal.

The most controversial aspect of the composition of the AAT is the fact that judges serve on it. Apart from the question whether their involvement in adjudicating upon government policy and other politically sensitive or controversial matters, will reflect adversely on their prestige and impartiality,[90] the principal objection as far as the AAT is concerned is that a judicial involvement will lead to an over-judicialisation of the tribunal's proceedings. However, Harris[91] contends that judicial skills are indispensable for the satisfactory functioning of the tribunal. These skills are listed by him as the suppression of personal idiosyncrasy; the ability to analyse and to identify cognate principles; industry in the quest for principles; a capacity to reason analogically; highly-developed fact-finding and fact-evaluative skills, sifting the relevant from the irrelevant and making rational inferences.[92]

The AAT is internally arranged into three divisions ie

- a General Division, which includes matters pertaining to compensation, customs, social security and other subjects such as the environment;
- a Veterans' Division; and

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[87]N 7 para 292.

[88]N 55 para 148. The Committee argued that it would lead to an awkward situation if a junior officer were to be sitting in judgment of his or her superior and that it was questionable whether a member of the tribunal should adjudicate upon a decision of his or her own department: para 149.

[89]'Policy review reviewed: the pubescent state of the "new" administrative law' 1988 *Queensland University of Technology Law Journal* 123 137.

[90]Harris n 74 192–4.

[91]N 74 194–5.

[92]N 74 195 206.

- a Taxation Division.[93]

The creation of specialist divisions within the AAT is aimed at facilitating and entrenching the allocation of appropriate expertise amongst the tribunal membership to hear particular types of cases and the development of procedures which are suited to particular types of cases.[94] On the other hand, a divisional structure may inhibit the AAT's flexibility, especially as regards its geographical dispersion. Moreover, although a divisional structure may promote consistency of decision-making within a division, it may lead to a lack of coherency across divisions.[95]

Making an application

Proceedings in the tribunal are commenced by the lodgment of a written application which must identify the decision sought to be reviewed and must set out the reasons for the application.[96] There are no requirements as to the degree of particularity or precision with which the above application and reasons must be stated and there are no pleadings by which the issues are defined. Nor does the AAT Act provide guidance on the nature or grounds of review. Barring any legislative provision to the contrary, an applicant is not restricted to relying upon to issues which were before the original decision-maker or to the reasons stated by him in his application for review.[97]

Obligation of decision-maker

The administrative decision-maker is then notified of the dispute[98] and is obliged within 28 days after receiving notice of the application to lodge with the tribunal a statement setting out the findings on material questions of facts, together with the evidence or other material on which those findings were based and the reasons for his or her decision.[99] Such facts and reasons may also be obtained by anyone who is entitled to apply for review, irrespective of whether an application for review is in fact made.[100] The reasons must be complete and intelligible to a layman[101] and a discretion is conferred on the

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[93]The divisional structure originally contemplated by the AAT Act, ie a General Administrative Division, a Medical Appeals Division and a Valuation and Compensation Division, has not in fact operated.

[94]Disney 'The way ahead for tribunals?' in Creyke (ed) *Administrative tribunals: taking stock* (1992) 121 128.

[95]*Constitution of the Administrative Appeals Tribunal* Administrative Review Council Report no 29 (1987) paras 84 and 85.

[96]Section 29(1).

[97]*Re Greenham and Minister for the Capital Territory* (1979) 2 ALD 137; *Re Metherall and Minister for the Capital Territory* (1979) 2 ALD 246.

[98]Section 29(11).

[99]Section 37(1)(a). Provision is also made for further relevant documents to be submitted: ss 37(1)(b) and 37(2). *Cf* Tomasic & Fleming *Australian administrative law* (1991) 57–8 for situations where reasons need not be made available.

[100]Section 28(1).

[101]*Re Palmer and Minister for the Capital Territory* (No 2) (1979) 2 *ALD* 337.

tribunal to order elaboration of the reasons and supporting material lodged with it.[102] The administrative decision-maker may support his or her decision with reasons other than those upon which its decision was based at the time when the decision was made.[103]

The requirement to give reasons for decisions — which is encountered also in the AD(JR) Act 1977[104] — has been described as effecting a 'quiet revolution': 'The Act lowered a narrow bridge over the moat of executive silence ...'[105] The significance of the provisions which postulate the statement of reasons is reflected in the foundation which such reasons provide for the effective invocation of a right of appeal and in 'the psychological conditioning of administrators whose vigilance is likely to be increased by awareness that their reasoning is liable to be subject to critical scrutiny.[106]

Discontinuance and dismissal of applications

The following are among the circumstances in which an application may be dismissed:

- failure of a party to appear at the hearing;
- where an applicant notifies the tribunal that an application is discontinued or withdrawn;[107]
- where all parties to an application consent to dismissal;
- where an applicant fails within a reasonable time to proceed with an application or to comply with a direction by the tribunal; and
- where the tribunal is satisfied that an application is frivolous or vexatious.[108]

Conferences

When an application is made to the AAT, the President may direct that a conference of the parties and their representatives, if any, be held. This conference is presided over by a member or officer of the tribunal[109] and unless the parties otherwise agree, no disclosure of evidence and statements submitted at the conference may be made at the subsequent hearing before

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[102]Section 38.

[103]*Re Jeans and Secretary, Department of Housing and Construction* (1979) 2 *ALD* 337.

[104]Section 13.

[105]*Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666, 685-6.

[106]Peiris 'The Administrative Appeals Tribunal of Australia: the first decade' 1986 *Legal Studies* 303 319.

[107]*Re Queensland Nickel Management (Pty) Ltd and Great Barrier Reef Marine Park Authority* (1992) 16 AAR 319.

[108]*Cf* ss 42A and 42B.

[109]Section 34(1).

the tribunal.[110] Provision is also made for objections to the participation in the subsequent hearing of presiding members of the tribunal.[111] The effect of these provisions is that the parties' privacy is respected and since the contents of the conference may not become part of any later hearing process,[112] parties would presumably be more willing to participate fully in the conference.

The inherent flexibility of the entire process allows the person presiding at the conference to structure the conference according to the prevailing circumstances. Complex matters may require more than one conference. Pre-hearing conferences provide parties with an opportunity to resolve their disputes by methods which do not involve a public hearing. They can discuss the real issues face to face or even over the telephone. Good opportunities for negotiated settlements accordingly arise. Should the parties reach an agreement during a conference or, in fact, at any stage of a proceeding for review, such agreement may be given effect to by the tribunal, provided the agreement is within its powers.[113]

On the other hand, a conference can serve as a means of defining and clarifying issues in dispute, thereby ensuring that the essential elements of the dispute are identified and that the parties are ready to proceed to a hearing. Although the conference seems initially to have been conceived as a means of thus facilitating the hearing, the emphasis is now on its employment as a mechanism for reaching a settlement, thereby avoiding the necessity of a hearing.

Mediation

Following a successful pilot mediation programme, organised by a consultant, the necessary legislative framework was put in place in 1993. Thereby mediation was introduced as an optional alternative dispute resolution procedure, to be put before the parties at the preliminary conference.[114] The recommendations of the consultant's report were largely accommodated ie

- participation to be voluntary;
- the process to be confidential;
- selection of cases on the basis of suitability;
- suitable training and accreditation of Tribunal mediators; and

[110]Section 34(3).
[111]Section 34(4).
[112]Section 34(3).
[113]Section 42C.
[114]Section 34A.

- ongoing evaluation of the mediation process.[115]

If mediation is successful then either a discontinuance and dismissal of the application[116] will follow, or the tribunal may give effect to the terms of the mediated agreement without holding a hearing.[117]

Should the mediation fail, the matter will proceed to a hearing, but mediators are debarred from participating in any proceedings which they have mediated,[118] thereby protecting the confidentiality of the mediation process. Confidentiality is further protected by strict rules relating to the admissibility as evidence of anything said or done at a mediation.[119]

Some difficulties associated with mediation are that neither Tribunal members nor the parties or their representatives are generally trained in mediation[120] and that mediation is too much moulded in a legal culture.[121]

Hearing

Standing

Any person whose interests are affected by the decision concerned has standing to lodge an application to the tribunal.[122] Moreover, an organisation or association of persons, whether incorporated or not, is presumed to have interests that are affected by a decision if the decision relates to a matter included in the objects of the organisation or association.[123] This provision, nevertheless, does not apply in relation to a decision given before the organisation or association was formed or before its objects included the matter concerned.[124] This means that if an organisation that wishes to lodge an application, or to seek joinder[125] has amongst its objects a goal statement that is related to a reviewable decision, the organisation will have standing.

In order to qualify for standing it is not necessary for a person to be able to challenge the decision under review in a court of law, but the phrase 'affected interests' denotes 'interests which a person has other than as a member of the general public and other than as a person merely holding a belief that a

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[115]Mill 'Mediation of environmental disputes by the Administrative Appeals Tribunal' 1993 *Queensland Law Society Journal* 413 417.

[116]In term of s 42A.

[117]Section 34A(5) and (6).

[118]Section 34A(8).

[119]Section 34A(7).

[120]De Maria 'Mediation and adjudication: friends or foes at the Administrative Appeals Tribunal' 1991 *Federal Law Review* 276 278.

[121]De Maria n 120 283.

[122]Section 27(1).

[123]Section 27(2).

[124]Section 27(3).

[125]In terms of s 30(1A). The tribunal may, upon application by a party whose interests are affected by a decision, in its discretion effect the joinder of that party.

particular type of conduct should be prevented or a particular law observed'.[126] Decisions as to whether a person's interests are affected by an administrative decision are made by the tribunal, whose finding is final.[127]

Public access

Hearings are in public, except where the tribunal in its discretion orders otherwise[128] or where the legislation under which the primary decision is made requires a private hearing.

Representation

A party may appear in person or be represented by some other person who need not be a lawyer.[129]

Presentation of case

The tribunal must ensure that every party to the proceedings is given a reasonable opportunity to present his case, to inspect relevant documents and to make submissions in respect of such documents.[130] This statutory obligation embodies the core of the rules of natural justice, which the common law would in any event imply.[131]

Burden of persuasion

The AAT Act does not impose a burden of proof on the applicant to show that the administrator's decision was erroneous, nor is there an onus upon the administrator to prove that his decision was right.[132] This is also in keeping with the tribunal's investigative powers and with the AAT Act's provision that the tribunal is not bound by the rules of evidence,[133] to which the onus of proof belongs.

However, the Act in terms of which the decision under review was made may allocate a burden of persuasion. Where the tribunal, at the end of the case, is unpersuaded one way or the other, there will of necessity be a burden of persuasion to resolve which will probably be implied in the nature of the proceedings.[134] Such a burden 'is really no more than that 'as a matter of common sense' ... he who asserts, or he who seeks a result, must prove'.[135]

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[126]*Re Control Investment Pty Ltd and Australian Broadcasting Tribunal* (no 1) (1980) 3 *ALD* 74, 79.

[127]Section 31.

[128]Section 35.

[129]Section 32.

[130]Section 39.

[131]*Sullivan v Department of Transport* (1978) 20 ALR 323, 342.

[132]*Re Ladybird Children's Wear Pty Ltd and the Department of Business and Consumer Affairs* (1976) a *ALD* 1 5; *McDonald v Director-General of Social Security* (1984) 6 ALD 6 10–11.

[133]Section 33(1)(c).

[134]*Minister for Health v Thompson* (1985) 60 ALR 701, 712.

[135]*Re Holbrook and Australian Postal Commission* (1983) 5 ALN No 35 N47.

The standard of proof is on a balance of probabilities.[136]

Procedure and evidence

Procedure

The procedure of the tribunal is largely within its own discretion[137] and provision is made for the holding of a directions hearing and the giving of directions in relation to proceedings.[138]

Proceedings are to be conducted with as little formality and technicality and with as much expedition as the circumstances and any relevant legislative requirements permit.[139] A considerable degree of procedural flexibility and informality is permitted, leaving the AAT free to adapt its procedures to the circumstances of each case. This is also in line with the widely divergent jurisdiction conferred upon the tribunal. It is important to note that the relevant provision of the AAT Act does not demand an absence of formality and technicality. 'It is a balancing provision, directing a degree of formality and technicality which is appropriate in the particular case.'[140]

The experience of the tribunal has been that, given the wide variety of issues which arise for decision, there is no one level of formality or informality which is appropriate for all cases.[141] The tribunal in effect varies the degree of formality according to the approach adopted by the parties and the nature and importance of the issues involved. To some extent the parties are allowed themselves to establish the degree of formality with which a hearing will be conducted. For instance, less formal proceedings are usually adopted if the applicant is unrepresented.[142] The considerable degree of flexibility which the AAT Act allows has enabled the tribunal to explore new mechanisms for facilitating the expeditious and less costly resolution of disputes. Where circumstances permit, use has, for instance, been made of teleconference and telephone hearings.

Evidence

The tribunal is not bound by the rules of evidence; pleadings form no part of the tribunal's procedure[143] and it may inform itself on any matter in such

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[136]*Re Letts and Secretary to the Department of Social Security* (1984) 7 ALD 1,4; *Minister for Immigration and Ethnic Affairs v Pochi*: (1980) 4 ALD 139, 160.

[137]Section 33(1)(a).

[138]Sections 33(1A), (2), (2A) and (4).

[139]Section 33(1)(b). See generally Gill 'Formality and informality in the Administrative Appeals Tribunal' 1989 *Canberra Bulletin of Public Administration* 133.

[140]Balmford 'The life of the Administrative Appeals Tribunal — Logic or experience?' in Creyke (ed) n 94 50 64.

[141]*Re Hennessy and Secretary, Department of Social Security* (1985) 7 ALN N113, N117.

[142]Budgen 'Administrative law, tribunal review and the public benefit' in McMillan (ed) *Administrative law: does the public benefit?* (1992) 122 126.

[143]*Re Greenham* n 97.

manner as it considers appropriate,[144] subject to the requirement of 'substantial justice'.[145] Provision is made for allowing the participation of persons in directions hearings, conferences or mediation by telephone, closed-circuit television or other means of communication.[146] The AAT may summon any person to give evidence and to produce documents.[147] The tribunal thus may take an active part in directing or suggesting evidence to be called or even in calling evidence itself. In fact, where the evidence before the AAT is unsatisfactory, the tribunal has a responsibility to seek such further evidence which may be required to reach the right and proper decision.[148] The tribunal is free to take into account, not only material in existence at the date of the decision in dispute but not considered by the decision-maker, but also material which has come into existence since the date of that decision.[149]

Although the tribunal is not bound by the rules of evidence and regularly accepts evidence (eg hearsay) which is legally inadmissible, it will not be justified to rely upon evidence which has no rational probative force.[150] The tribunal still works within the broad framework of rules which have been developed in the context of courts of law, but such rules are applied with a flexible touch.[151] Nevertheless, the tribunal may itself choose the circumstances in which it may wish to depart from or resort to the rules of evidence.[152] That choice, it seems, will be determined, inter alia, by the subject matter of the review, whether or not the parties are legally represented and generally upon the form which the hearing assumes.[153] There is no restriction with regard to matters which may be addressed by the tribunal in the exercise of its jurisdiction.[154]

An adversarial or inquisitorial process?

(a) Introduction

An inquisitorial approach is characterised by an active role by the decision-maker in determining the course of evidence-gathering and in eliciting information. By way of contrast, an adversarial process relies upon the contending parties for the presentation of evidence and information, the decision-maker's role being limited to that of an umpire.

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[144]Section 33(1)(c).

[145]*Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 41.

[146]Section 35 A.

[147]Section 40.

[148]*Adamou v Director-General of Social Security* (1985) 7 ALN N203 N207.

[149]*Re Repatriation Commission and McCartney* (1986) 9 ALD 441 449.

[150]*Re Pochi* n 145 41.

[151]Kneebone 'The Administrative Appeals Tribunal as a fact-finding body' in McMillan (ed) n 142 400 401.

[152]Todd 'Administrative review procedure before the Administrative Appeals Tribunal — a fresh approach to dispute resolution Part II' 1981 *Federal Law Review* 95 106.

[153]See generally Todd n 152 95–107.

[154]*Re Kuswadarna and Minister for Immigration and Ethnic Affairs* (1981) 35 ALR 186.

An appeal tribunal belongs to the system of administration because it performs the same administrative function as the primary decision-maker. It may nevertheless also be viewed as part of a system of adjudication and accordingly of the machinery of justice.[155] This latter consideration has led to its having been dominated by lawyers and the judicial paradigm with its emphasis on an adversarial approach has exerted a dominant influence on proceedings. This has happened in spite of the AAT Act which contains several provisions which clearly provide for the application of inquisitorial techniques and of the Federal Court's instruction that the tribunal must at all times be ready to intervene in the proceedings before it.[156] It is also worth noting that the Bland Committee recommended that since the tribunal should function as part of the administrative process, the investigative or inquisitorial process would in most cases be more appropriate.[157] It accordingly also recommended that the chairmen of the tribunal, although legally qualified, should not be judges who would be addicted to the adversary process.[158]

Actually, inquisitorial and adversarial features are almost evenly represented in the provisions of the AAT Act,[159] but, as Allars[160] indicates, the Act gives little express guidance on how a clash between these different approaches should be resolved in the application of the provisions concerned. It is the task of the tribunal in individual cases to effect the appropriate balance between the adversarial and inquisitorial approaches. Since in most cases the applicant is legally represented, the balance would tend to favour an emphasis upon adversarial features.[161] In fact, the AAT process as it has developed has been described by Ison[162] as being 'almost indistinguishable from the adversary system in the ordinary courts'. Allars[163] nevertheless contends that a less adversarial procedure could be employed, at least at the stage of the preliminary conference. Since the tribunal's senior appointments come from the legal profession and legal representation of parties is the rule rather than the exception, it is almost unavoidable that a legalistic approach and mode of operation will be adopted. The judicial paradigm is reflected in the hearing process resembling a court process, although it is more simplified and informal. The procedure that is adopted is essentially adversarial and Tribunal reasons resemble regular judgments of the courts. Tribunals, although not

[155]According to the *Report of the Review of the Administrative Appeals Tribunal* Administrative Appeals Tribunal (1991) para 2.18 the AAT is a quasi-judicial body.

[156]*Re Kuswardana* n 154; *Minister for Health v Charvid Pty Ltd* (1986) 10 ALD 124.

[157]N 55 para 172(j).

[158]N 55 para 136.

[159]Allars 'Administrative law. Neutrality, the judicial paradigm and tribunal procedure' 1991 *Sydney Law Review* 377 410.

[160]Ibid.

[161]Allars n 159 411.

[162]N 51 16.

[163]N 159 411.

twins of the courts, have been described as siblings.[164] For all its potential advantages, the tribunal remains primarily adversarial in its operation.[165]

(b) Shortcomings of the adversarial process and advantages of an inquisitorial approach

- An adversarial process tends to reinforce the inequality of the parties, especially in the case of unrepresented applicants. Even if an individual is represented, there remains an inequality of resources since the administrative body has the full power of the State at its disposal.[166] An equitable result in terms of the adversarial system is ideally attainable only where the respective parties are on an equal footing and have the same access to resources.
- Adversariness is conducive of a confrontational atmosphere, where one party wins and the other loses.
- Adversarial procedures can confuse and intimidate witnesses and expose only such evidence that is confined to witnesses' responses to questions. Moreover, the demand is often made that the witness answer the question 'yes or no', with no explanation.[167]
- The administrative body involved in a dispute is not — or at least should not be regarded as — an adversary.[168] Since the tribunal aims at arriving at the correct or preferable decision, this should also be the concern of the administrative body whose decision is under review.[169]
- An adversarial procedure tends to be more prone to excessive formality and legalism, which, in turn may lead to delay, excessive cost and an over-technical approach.[170]
- One of the most serious disadvantages of a reliance upon adversarial techniques is that it has resulted in proper evidence concerning the public interest being neglected or not at all articulated; even worse, it has at times been deliberately suppressed.[171] An adversarial approach relies upon the skills and resources of the respective parties to provide the necessary evidence for the resolution of the dispute in question. However, there is no

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[164]Esparraga 'Procedure in the Administrative Appeals Tribunal' in McMillan (ed) n 142 396.

[165]Sandford 'Environmental dispute resolution in Tasmania: alternatives for appeals systems' 1990 *Environmental en Planning Law Journal* 19 21.

[166]Dwyer 'Overcoming the adversarial bias in tribunal procedures' (1991) 20 *Federal Law Review* 252 256–7.

[167]Dwyer n 166 260.

[168]*Cf McDonald v Director-General of Social Security* (1984) 6 ALD 6 19.

[169]Curtis 'Crossing the frontier between law and administration' 1989 *Canberra Bulletin of Public Administration* 55 57. He concludes (58) that so long as proceedings before the AAT appear as a confrontation between the appellant and the administrative body, the form of adversarial procedures will persist.

[170]Harris n 74 213–4.

[171]Whitmore 'Commentary' 1981 *Federal Law Review* 118.

guarantee that the public interest - which is fundamental in public law - will be articulated: the individual per definition does not represent the public interest and it cannot be assumed that the administrative body concerned will automatically and necessarily further the public interest. An inquisitorial process is more sensitive to such public interests that are poorly or not at all represented in an adversarial process.

- Flowing from the preceding point is the inadequate basis which an adversarial approach provides for a fully informed decision by the tribunal. An inquisitorial approach can be more accommodating to multiple interests, particularly to interests that are not represented by one of the parties to the adversarial process.[172] This is the more unsatisfactory since AAT decisions are supposed to provide guidance to administrative bodies generally and thus to lead to improved administrative decision-making: 'One erroneous decision by an administrative review body may affect many other people in a similar position. It seems inappropriate that such a result should follow from an inequality between adversaries in one matter.'[173] When the tribunal is obliged to rely almost entirely upon the respective parties for its informational base, weak representation by the parties would, as a 'transmissible disease' be reflected in the ultimate Tribunal decision.[174]

- The adoption of an inquisitorial approach can avoid the common adversarial phenomenon of partisan evidence, with experts for the opposing parties contradicting each other. Dwyer[175] contends that an expert appointed and paid by the tribunal would not only save expense but would also improve the quality of expert evidence.

- Delays brought about by adjournments during hearings in order to obtain additional evidence may be avoided if an investigative approach is followed, especially at preliminary conferences.[176] In any case, it has been suggested that even if an inquisitorial procedure should cause delay, such delay may lead to a better decision since additional relevant evidence would have been taken into account.[177]

- While an adversarial role is likened to umpiring a contest, an inquisitorial approach is more appropriate if the AAT is to play an investigative role aimed at an enquiry into the merits of a case. Although the AAT, in fulfilling an adjudicative function, in many ways resembles a court of law, its role is fundamentally administrative since its primary task is to inquire.[178]

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[172]Ison n 46 156.

[173]Dwyer n 166 259.

[174]De Maria 'The Administrative Appeals Tribunal in review: on remaining seated during the standing ovation' in McMillan (ed) n 142 96 101.

[175]N 166 263.

[176]Dwyer n 166 260.

[177]Dwyer n 166 261.

[178]*Ladic v Capital Territory Health Commission* (1982) 5 ALN 45, N60.

(c) Towards the adoption of an inquisitorial process

- Ample powers
  The AAT Act confers ample powers on the tribunal to adopt an inquisitorial approach. It has been shown above that the tribunal can determine its own procedure; it may inform itself on any matter in such manner as it considers appropriate; it is not bound by the rules of evidence; it may summon persons to give evidence and produce documents; it may require the lodging of additional material and it may direct the holding of a conference. The reluctance of the AAT to exercise its inquisitorial powers in order to fulfil its duty to fully inform itself has in fact led to criticism by the Federal Court.[179]

- Resources
  A significant factor which has inhibited the AAT from adopting a more investigatory approach is its lack of resources to do so: It is accordingly of decisive importance that adequate resources be made available to the tribunal in order to support the required inquisitorial infrastructure. For instance, the Kerr Committee[180] envisaged that the tribunal would be assisted by a small research staff. The value and contribution of the AAT can be satisfactorily determined only after it has been given the opportunity to make the most effective use of its inquisitorial powers.[181]

- Legal skills
  Since legal skills are associated with the adversarial system, it may be questioned whether lawyers have any role to play in a Tribunal which will employ an inquisitorial process.

  Although legal representation has been mainly responsible for the entrenchment of an adversarial process in the AAT and the suggestion has thus been made that an inquisitorial tribunal should be designed to operate without advocacy,[182] it has been claimed that it would be counter-productive to exclude altogether legal representatives from the process: legal and forensic skills, properly harnessed and regulated, may actually assist in the successful implementation of an inquisitorial process,[183] although special attention will have to be given to the unrepresented applicant.[184]

  Objections to the use of judges on the AAT because of their traditional orientation towards the familiar adversarial system have influenced Ison's

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[179]*Adamou n* 148.

[180]N 7 para 292.

[181]Osborne 'Inquisitorial procedure in the Administrative Appeals Tribunal — a comparative perspective?' 1982 *Federal Law Review* 150 181.

[182]Ison n 51 53, who feels, nevertheless, that lawyers should be allowed to participate.

[183]Harris n 74 214.

[184]Harris n 74 215.

contention[185] that experience in the adversary system should be a disqualification or at least be seen as a handicap in establishing the qualifications for membership of the tribunal. Harris[186] nevertheless contends that judges do have some experience of an inquisitorial approach through their participation in commissions of inquiry and that a reorientation towards an inquisitorial approach is not beyond their reach. Indeed, their skills and experience in ensuring procedural fairness, traditionally associated with the judiciary, and of significance also in an inquisitorial context, are important attributes, as are their skills and experience in fact-finding and in eliciting the validity or 'truth' of conflicting evidence. The latter, however, would have to be reoriented from a passive acceptance of evidentiary material supplied by the parties to an active gathering of evidence.

- Impartiality
  An important challenge for the AAT, if it were to rely more upon its inquisitorial powers, is the maintenance of impartiality, which is essential for the adjudicative role it must perform. Dwyer[187] suggests that if the tribunal adheres to the basic principles of natural justice and adequate resources are allocated to it, an inquisitorial approach would not militate against its impartiality.

- Natural justice
  Ensuring natural justice, or an even-handed proceeding, seems naturally to presuppose a hearing at which each party should have an equal opportunity to present its case. A hearing is commonly associated with an adversarial approach and the tribunal would be faced with the need to test the evidence and the submissions of the respective parties. The challenge for supporters of an inquisitorial process is to accommodate the above needs within that process.[188]

  It has been contended that the adoption of too great a degree of informality may positively inhibit the orderly conduct of a strongly contested case and that it may impede the proper presentation by the parties and consideration by the tribunal of the relevant issues.[189] In fact, the experience of the AAT has demonstrated that a degree of formality serves to confer, and not to detract from the equality of treatment to which applicants, particularly unrepresented applicants, are entitled.[190] After all, the tribunal is engaged in law-based decision-making which affects the rights of the parties

[185] N 51 19, 53.

[186] N 74 215–7. See generally Brennan 'Limits on the use of judges' 1978 *Federal Law Review* 1 *ff*.

[187] N 166 275.

[188] *Report of the Review of the Administrative Appeals Tribunal* n 155 paras 4.5–4.10.

[189] Hall 'Administrative review before the Administrative Appeals Tribunal — a fresh approach to dispute resolution Part II' 1981 *Federal Law Review* 71 93.

[190] *Re Hennessy and Secretary, Department of Social Security* n 141.

concerned. 'Principles of natural justice, equity between the parties, efficiency in the disposition of matters and a commitment to the testing of evidence so as to enable assessment of and a decision about the relative merits of each party's case before the tribunal dictate that there be certain formalities, procedures and legalities in any Tribunal process, particularly in the hearing process.'[191] The more informal the process becomes, the more difficult the challenge is to avoid compromising judicial fairness and detachment.[192]

- Intervention and inquisition
  Although an inquisitorial approach may be preferable and the AAT is in any case obliged to adopt an interventionist role, a warning has been sounded that '[t]here is ... a chasm between intervention and the adoption of 'inquisitorial' procedures if by that expression is meant anything like European systems having that quality'.[193] An interventionist role should not simply be equated with the wholesale transplantation of the European inquisitorial process.

Tribunal decisions

Powers and duties

The tribunal may exercise all the powers and discretions of the person who made the original decision and must either affirm, vary or set aside the decision under review. Where the decision is set aside, the tribunal may either substitute its own decision or remit the matter for reconsideration in accordance with its directions or recommendations.[194] However, the statute which confers jurisdiction on the AAT may restrict its powers. For instance, the tribunal's powers in terms of the Migration Act 1958 (Cth) are either to affirm the Minister's decision or to remit the matter for reconsideration in accordance with any recommendations of the tribunal; it has no power to set aside the Minister's decision.[195]

As far as its review powers are concerned, the tribunal is bound neither by the grounds upon which the applicant bases his or her case[196] nor by the reasons supplied by the primary decision-maker.[197]

Where the parties at a conference, during mediation or at any other stage of the proceedings, reached agreement as to the terms of a decision, the tribunal

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[191] *Report of the Review of the Administrative Appeals Tribunal* n 155 para 4.45.

[192] Balmford n 140 67.

[193] *Report of the Review of the Administrative Appeals Tribunal* n 155 para 4.22.

[194] Section 43(1).

[195] Section 66E(3). Other strategies whereby the tribunal's powers may be confined include the following: a provision in terms of which the tribunal may determine only whether the decision-maker acted on reasonable grounds or a provision authorising a Minister to certify that a particular decision not be subject to AAT review.

[196] *Re Greenham* n 143.

[197] *Re Jeans* n 103.

is obliged to make a decision in those terms, provided certain formal requirements have been met and the decision is within the powers of the tribunal.[198]

Following a hearing the AAT must give its decision in writing and must give reasons for this decision, either orally[199] or in writing.[200] The tribunal's written reasons must be accompanied by its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.[201]

A decision by the tribunal to vary a decision or to substitute it with its own decision is deemed to be a decision of the original decision-maker.[202]

Nature and grounds of review

The AAT Act is silent both as to the nature of the review and the grounds which would justify it. As will become apparent, the 'review' bears no similarity to judicial review and in fact constitutes an appeal in the fullest sense of the word. It would have been more accurate and in accordance with the title of the Act had the remedy been called an appeal rather than a review. The review relates to the following aspects of an administrative decision:

- its legality
- its factual correctness
- whether, in the exercise of a discretionary power, the preferable decision has been made.

It has been held that the AAT has an independent discretionary power to determine whether or not the decision subject to review was the 'correct or preferable' decision in the circumstances.[203] 'Correct' seems to refer to the legality and factual basis of the decision, while the 'preferable' decision would probably encompass those decisions where matters of discretion are involved.[204]

The tribunal - in contra distinction to a court of law — is primarily concerned with the merits of decision-making, although that process almost invariably involves some consideration of the legal framework which determines the decision subject to appeal. Although the AAT is authorised to pronounce upon

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[198]Section 42C.

[199]In which case written reasons may be requested by a party within a limited period: s 43 (2A).

[200]Section 43(2). See generally Smith 'The obligation of the Administrative Appeals Tribunal to give adequate reasons' 1992 *Public Law Review* 258 *ff.*

[201]Section 43 (2B).

[202]Section 43(6).

[203]*Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; ((1979) 24 ALR 577). In *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158, 161; ((1977) 15 ALR 696, 699–700) reference was made to the 'right or preferable decision'.

[204]Hall n 189 80.

the law,[205] its determinations in this respect have no final and binding effect, but amount, in effect to opinions.[206] It has been contended that the AAT should give some weight to the administration's interpretation of the law.[207]

The tribunal reconsiders the decision as if it had never been made. The process therefore resembles a de novo reconsideration rather than a traditional appeal. The tribunal thus essentially performs an administrative act. The AAT Act, however, offers little guidance on the criteria and rules which the tribunal is to apply in deciding whether or not the decision subject to appeal was the correct or preferable decision. Nevertheless, the tribunal is not at large in the exercise of its powers since it has to conform to the same legal constraints as those that apply to the administrative body whose decision is under review.[208]

Although it is often said that the tribunal steps into the shoes of the administrator,[209] such a view would compromise the notion that the tribunal has the power independently to determine for itself what the 'correct or preferable' decision is. The Federal Court in *Drake v Minister for Immigration and Ethnic Affairs*[210] pointed out that there is a fundamental difference between judicial and administrative review: 'In that [administrative] review, the tribunal is not restricted to consideration of the questions which are relevant to a judicial determination of whether a discretionary power allowed by statute has been validly exercised'. Except in a case where only one decision can lawfully be made, it is not ordinarily part of the function of a court either to determine what decision should be made in the exercise of an administrative discretion in a given case or, where a decision has been lawfully made in pursuance of a permissible policy, to adjudicate upon the merits of the decision or the propriety of the policy. That is primarily an administrative rather than a judicial function. It is the function which has been entrusted to the tribunal.

The question for the determination of the tribunal is not whether the decision which the decision-maker made was the correct or preferable one on the material before him. The question for the determination of the tribunal is whether that decision was the correct or preferable one on the material before the tribunal.'

The court emphasised[211] that it is not open to the tribunal merely to satisfy itself that the decision of the administrator was one which an administrator

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[205] *Drake* n 203 64.

[206] *Re Adams and The Tax Agents' Board* ((1976) 1 ALD 251).

[207] Bayne *Tribunals in the system of government* Papers on pariament no 10 (1990) 7–16.

[208] *Re Callaghan and Defence Force Retirement and Death Benefits Authority* (1978) 1 ALD 227; *Drake* n 203 69.

[209] Eg *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934 943.

[210] N 203 68.

[211] At 77.

acting reasonably might have made, because to do this would be to review the reasons for the decision rather than the decision itself: 'The duty of the tribunal is to satisfy itself whether a decision in respect of which an application for review is duly instituted is a decision which in its view, was objectively, the right one to be made. Merely to examine whether the administrator acted reasonably in relation to the facts, either as accepted by him or as found by the tribunal may not reveal this.'

The AAT's practice is to pay some attention to the decision under review and to its reasons, and to take account thereof as it does of any other relevant consideration. However, since it is obliged in terms of the AAT Act to come to its own view of the correct or preferable decision and to remake the decision in question, it should not give any weight to the findings of fact made by the primary decision-maker or to the latter's exercise of its discretion. Nevertheless, in cases where the facts serving before the tribunal do not differ materially from those considered by the primary decision-maker, Curtis[212] contends that it should be open to the tribunal to regard its function as being related to the reasonableness of the administrator's decision: 'The reviewing tribunal does not start with a clean sheet; it begins with the administrative decision under review.'[213]

Although the AAT functions as an extension of the administrative process and performs an administrative rather than a judicial act, it is also an adjudicative body, concerned with justice in respect of individual applicants. The adjudicative nature of its decision-making role is reflected in its membership, procedure and powers. The tribunal is accordingly required to act according to the requirements of natural justice.[214] This does not, however, mean that the tribunal is thereby exercising any part of the judicial power of the Commonwealth, by virtue of the Constitution; it makes no final determinations on the law and cannot enforce its own decisions.

Order of costs and damages

In general, the tribunal has no power to award costs and it cannot award damages. The Attorney-General may, nevertheless extend legal aid to an appellant.[215]

It has sometimes been argued that the tribunal should have the power to award costs, but this suggestion has been related only to successful applicants and not to instances where the administrative body was successful. Todd,[216] however, believes that if a case can be made out in favour of the award of costs, it should apply only in highly exceptional areas and then on a mutual basis. He concludes, nevertheless, that a general power to award costs 'would

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[212]N 1 14–15.

[213]N 1 15.

[214]*Pochi* n 105 671, 686. See, generally, on the tribunal's obligation to comply with the principles of natural justice, Tomasic & Fleming n 99 85–6.

[215]Section 69.

[216]N 152 109–10.

kill the tribunal for the ordinary citizen'.

In the Report of the Review of the Administrative Appeals Tribunal[217] it was proposed that the AAT Act and Regulations be amended to provide that in all cases in the tribunal costs be awarded against the respondent/applicant agency if the other party is successful.[218] The use of the AAT by large corporate clients is, however, causing a problem in this regard.[219] The Administrative Review Council, nevertheless, has on several occasions expressed its opposition to the principle of costs awards in the AAT, mainly on account thereof that applicants will thereby be deterred from seeking review and that it will render AAT proceedings more court-like and will lead to more formality.[220]

No binding precedent

Decisions of the tribunal do not constitute precedents like those of a court of law: '[W]hile consistency may properly be seen as an ingredient of justice, it does not constitute a hallmark of it ... Decision-makers may be consistently wrong and consistently unjust.'[221] There nevertheless is a need for consistency. This is so because parties should not be uncertain as to the prospects of successful review and the tribunal's decisions should serve to guide and improve the standard of administrative decision-making.[222] A possible strategy to improve consistency would be the institution of an internal monitoring system.[223]

Questions of law

Although the tribunal's rulings on questions of law are for constitutional reasons not conclusive and binding, they carry considerable persuasive authority, because however it is constituted, the tribunal always includes persons with legal expertise.

The AAT's findings on questions of law are subject to an appeal and to correction by the Federal Court.[224] A right of appeal is probably essential in order to provide for an authoritative judicial decision, especially where the

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[217]N 155.

[218]Para 10.13. A further proposal suggested that the tribunal should have a discretionary power to award costs to a party in circumstances where the tribunal considers that the behaviour of the other party in the conduct of the case merits such award: No 45, Appendix 9.

[219]Saunders 'Appeal or review. The experience of administrative appeals in Australia' 1993 *Acta Juridica* 88 101.

[220]Administrative Review Council *Sixteenth Annual Report 1991–92* 108. It also expressed some specific concerns about the proposal to make agencies pay the costs of every case the lose (108–9).

[221]*Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 34 ALR 639 647.

[222]O'Connor 'Future directions in Australian administrative law: the Administrative Appeals Tribunal' in McMillan (ed) n 142 194 199.

[223]EARC Report n 9 para 13.48.

[224]Sections 44(1) and 45(1). See, generally, Tomasic and Fleming n 99 132–40 and Sykes, Lanham and Tracey *General principles of administrative law* (3ed 1989) 364–71.

law is uncertain, but it tends to contribute to the over-judicialisation of the AAT. Ison[225] is of the opinion that 'the existence of this right of appeal may explain why decisions of the AAT are generally much too long, and why they are written in the style of reasons for judgment by an ordinary court'. Moreover, he points out that attempting to render a decision appeal-proof, while also intelligible to the parties may represent inconsistent goals.

Pearce[226] argues that an over-ready determination on appeal that a conclusion reached by the tribunal constitutes an error of law is a self-defeating practice: 'It undermines the confidence of the tribunal in its own decision-making capabilities. It also destroys the confidence of members of the public in the tribunal and indeed in the tribunal system itself. The independent tribunal system will collapse if applicants find themselves caught up in the snakes and ladders of court appeals. This will result in either the abandonment of the tribunal review system as a fruitless exercise, or the by-passing of the tribunals in favour of direct court action.'

Review of government policy

Introduction

The most controversial issue relating to the AAT, and one which has occupied the minds of judges, commentators and others, is its review of governmental policy.[227] The rationale for the adoption by the administration of a guiding policy has been stated in *Re Drake and Minister for Immigration and Ethnic Affairs* (no 2)[228] as follows: 'It can serve to focus attention on the purpose which the exercise of the discretion is calculated to achieve, and thereby to assist the Minister and others to see more clearly, in each case, the desirability of exercising the power in one way or another. Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process'.

Control over the influence of policy on administrative decision-making is exercised by the courts through the remedy of judicial review. However, such control is restricted and relates only to the following issues:

- the illegality of the policy in the sense of its being ultra vires the powers of

[225]N 51 13.

[226]'Judicial review of tribunal decisions — the need for restraint' 1981 *Federal Law Review* 167 173.

[227]The concept 'policy' reflects different meanings. See Sharpe *The Administrative Appeals Tribunal and policy review* (1986) 33–6.

[228](1979) 2 ALD 634, 640.

the administrative body;

- the inflexible application of policy; and
- acting under dictation.[229]

The tribunal may also exercise control over policy along these lines.[230] Since the review powers which have been conferred on the AAT are, however, fundamentally different and much more far-reaching than those of a court, encompassing as they do a determination whether the administrative decision in question was the correct or preferable one on the material before the tribunal, it should follow that the tribunal's power to review policy is more substantial. A question which arises is whether the AAT is bound to apply an established and lawful governmental policy, notwithstanding the fact that the application of such policy results in injustice to an individual. Actually, two factors are relevant to this question ie the substance of the policy concerned and its application in the instant case: do the AAT's powers enable it only to consider whether it is appropriate to apply a governmental policy in the particular circumstances, or to consider the extent to which the policy should be given weight in the decision concerned, or may it go further and reject such policy and even devise its own policy?

Recommendations of Reports

The Kerr Report[231] recommended that the proposed general administrative review tribunal should not have the power to review government policy applicable to the decision-concerned, but that it should be empowered to convey an opinion to the appropriate Minister that a particular policy as applied in the case in question is operating in an oppressive, discriminatory or otherwise unjust manner.

The Bland Report[232] took an even more conservative view and recommended that the proposed tribunal should not even be entitled to express opinions on government policy upon which a decision is based; it should do no more than identify such policy.

AAT Act and its interpretation

The issue of policy review is not expressly addressed in the AAT Act. It was therefore the task of the AAT and the Federal Court to grapple with this issue. In a landmark decision, delivered within two years after the establishment of the AAT, the Federal Court made it clear that the tribunal is not inhibited by the AAT Act from reviewing government policy. The proper approach to ministerial policy was stated in Drake[233] as follows: The policy upon which

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[229]See generally Pearce 'Courts, tribunals and government policy 1980 *Federal Law Review* 203 203–15.

[230]Sharpe n 227 50–6.

[231]N 7 para 299.

[232]N 55 para 172(g)(iii).

[233]N 203 69–70.

a decision has been based — provided of course that it is consistent with the empowering legislation[234] — is clearly a relevant factor in the determination of an application for review of that decision.[235] However, the tribunal is not, in the absence of specific statutory provision, entitled to abdicate its function of independently determining whether the decision was, on the material before the tribunal, the correct or preferable one in favour of a function of merely determining whether the decision conformed with whatever the relevant government policy might be.[236] Far from being bound by such policy (except where the policy is contained in legislation), the tribunal is obliged in terms of the AAT Act to determine for itself and independently whether the decision under review was the correct or preferable decision. Once it is accepted that the tribunal is obliged to determine independently whether or not the decision subject to review was the correct or preferable decision, and that it is not bound by government policy, it seems to follow that it may review the policy itself. Indeed, as Pearce[237] shows, it may be impossible to differentiate criticism of the decision from criticism of the policy since the decision may flow automatically from the policy.

Although the AAT steps into the shoes of the original decision-maker and the AAT Act[238] confers on the tribunal all the powers and discretions of such original decision-maker, considerable uncertainty surrounds the circumstances in which the tribunal's power independently to review policy will be affected by restraints which may be imposed on an original decision-maker.[239] Relevant considerations in determining this matter would be whether greater emphasis is placed on the independent nature of the tribunal's review powers or on its role as an extension of the administrative decision-making process.[240] However, if the tribunal's powers of review should be considered to be more extensive than those of the original decision-maker, the tribunal's role in improving the quality of administrative decision-making may be undermined.[241]

Prior to this decision of the Federal Court, the AAT itself had considered the weight that should be given to policy guidelines. It held in *Re Becker and Minister for Immigration and Ethnic Affairs*[242] that a hierarchical distinction should be drawn between policies made at the political level and

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[234]*Cf Re Drake (No 2)* n 228 640.

[235]*Cf* also *Steed v Minister for Immigration and Ethnic Affairs* (1981) 4 ALD 126 and Sharpe 'Acting under dictation and the Administrative Appeals Tribunal's policy — review powers — how thight is the fit?' 1985 *Federal Law Review* 109 110–4.

[236]See also *Re Lob and Minister for Immigration, Local Government and Ethnic Affairs* (1990) AAR 150.

[237]N 229 218.

[238]Section 43(1).

[239]Sharpe n 227 57–65; Sharpe n 235 114–22.

[240]Thompson & Paterson 'The Federal Administrative Appeals Tribunal and policy review: a re-assessment of the controversy' 1991 *Public Law Review* 243 252.

[241]*Sharpe* n 227 65.

[242]N 203 163.

those forged at the departmental level and between basic policies and policies which are intended to implement a basic policy: 'Different considerations may apply to the review of each kind of policy, and more substantial reasons may have to be shown why basic policies — which might frequently be forged at the political level — should be reviewed.' The fact that Parliament had scrutinised and approved policy was also considered to be an important indication of the weight to be accorded to the policy involved.

Notwithstanding the comprehensive powers conferred on the AAT by the AAT Act and the Federal Court's decision in Drake's case that the AAT was not only entitled to review policy guidelines and their application, but that it was obliged to do so, the AAT itself subsequently displayed considerable self-restraint, referred to by Peiris[243] as a 'spirit of qualified withdrawal', and indicated in *Re Drake* (No 2)[244] that although it was mindful of its liberty to apply or not to apply the policy in question or to adopt whatever policy it chooses, or no policy at all,[245] 'there are substantial reasons[246] which favour only cautious and sparing departures from Ministerial policy, particularly if parliament has in fact scrutinized and approved that policy'.[247] The tribunal will ordinarily apply a general policy devised by a minister 'unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case.'[248] The AAT has not taken it upon itself to devise its own policy or even to change government policy made at the political level, although it has occasionally declined to apply a policy.[249]

State legislation and reforms

While the Federal AAT Act is silent on the matter of policy review — and reliance had to be placed on Tribunal and court interpretations — the AAT Act of Victoria expressly regulates this issue: The Victorian Tribunal is obliged to apply a lawful statement of policy provided that the following conditions have been met:

- the Minister must have certified that the policy was in existence at the time of the decision concerned;
- the decision-maker's reasons must assert reliance on the policy; and

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[243]N 106 307.

[244]N 228 634.

[245]642.

[246]'The tribunal is not linked into the chain of responsibility from Minister to government to parliament, its membership is not appropriate for the formulation of broad policy and it is unsupported by a bureaucracy fitted to advise upon broad policy.' (644)

[247]644.

[248]645. See Thompson & Paterson n 240 252–4 for a discussion of the tribunal's internally imposed restraints.

[249]Eg *Re John Holman & Co Pty Ltd and Minister for Primary Industry* (1983) 5 ALN No 154; *Re Rendeuski and Australian Apple and Pear Corporation* (1987) 12 ALD 280.

- at the time when the decision was made, the policy must have been published in the Gazette or must have been known to the applicant.[250]

Some law reform agencies at state level have also addressed the question of policy review. In New South Wales a distinction was drawn between policies of the government and policies of other public authorities not linked with Parliament. It was recommended that the tribunal should be obliged to give effect to lawful government policy, but that it should merely have regard to a policy of a public authority, without being bound to give effect to it.[251] The Law Reform Committee of South Australia were equally divided on whether the New South Wales proposal should be adopted in South Australia.[252]

The EARC Report of Queensland recommended the enactment of a provision similar to the Victorian one, although it went further by blending it with a recommendation of the Kerr Committee:

- a statement of policy applicable to a particular administrative decision is to be tabled in Parliament in accordance with the applicable legislation and made available to the public; and
- the tribunal should be obliged to apply that policy to the extent that it is lawful, but should have the power to recommend to the appropriate Minister that he or she waive the application of the policy where it is satisfied that such application will result in injustice to a participant in the proceeding.

Arguments against the conferral of a power to review policy

The most important points of criticism against the AAT's power of reviewing policy are the following:[254]

- If a non-elected tribunal should be entitled to review policy developed at the highest political level, it would amount to a violation both of constitutional limits and democratic principles by a body that is not accountable and not 'linked into the chain of responsibility from Minister

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[250]Section 25(3).

[251]*Report of the Law Reform Commission on Appeals in Administration* LRC 16 (1973), clause 32(1) of the Bill accompanying the Report. The Commission, when explaining the recommendation, said: 'Government must be able, if authorized by law, to have the final say about the legislative aspects of any official action: it is responsible to Parliament for the action and it must be in a position to accept that responsibility. On the other hand, most public authorities are not directly linked with Parliament and their policies do not carry the weight of Government policies.' (159)

[252]Eighty-second *Report of the Law Reform Committee of South Australia to the Attorney-General relating to Administrative Appeals* (1984) 30–1. In the event of policy underlying a decision being reviewed, it was envisaged that the tribunal should be composed of members from a panel with expertise in public administration (but not any official of the Department whose decision is under review).

[253]N 9 paras 5.134–5.

[254]See generally Kirby 'Administrative law: beyond the frontier marked 'policy — lawyers keep out' 1981 *Federal Law Review* 121 145 *ff*. *Cf* also Harris n 198–9.

to government to parliament'.[255]

- A second problem, identified by Kirby,[256] is the unlikelihood — indeed, the undesirability — of public servants' refusing to comply with ministerial policy directives. Any disparity between the approach to policy taken by the AAT and administrators respectively, will serve to undermine the AAT's normative role in the improvement of primary decision-making. Moreover, he contends that it will not only lead to inconsistency in decision-making, but will stimulate appeals to the AAT aimed at 'the substitution for ministerial policy consistently and faithfully obeyed by officials, of a curial procedure in which such policy is 'taken into account' but independently and critically assessed before any decision is made as to whether or not to apply it in the particular case'. If the AAT is free to depart from policy while the administration is bound by such policy the inevitable resulting dualism may lead to confusion or, worse, would in effect make allowance for exceptions to government policy for those who appeal to the tribunal. There is also the further argument that since the tribunal stands in the shoes of a decision-maker,[257] it should likewise be bound by a policy which is binding upon the decision-maker whose decision is under review.[258]

- It has been shown[259] that the AAT Act does not specially provide for the appointment to the tribunal of administrators serving in the department whose decision is subject to review. Moreover, the AAT does not dispose over satisfactory resources to conduct adequate research into government policy matters. Since it is constituted as an adjudicative body, it lacks both the means and the expertise fully to comprehend the policy issues which it purports to review. Another factor is that the laying down of policy is essentially a political function, to be performed by the Minister who is responsible to Parliament for the policy he adopts, while the independence of the tribunal demands that it be apolitical.[260] Furthermore, the tribunal's procedures are adapted to resolving ad hoc disputes between the parties before it. These factors lead Kirby[261] to conclude that the AAT is singularly ill-equipped to perform an independent and wide-ranging review of government policy 'except in a superficial way and then only at the margins and in the circumstances presented by and illustrated in particular

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[255]*Re Drake* (No 2) n 228 644. *Cf* Kirby 'Effective review of administrative acts: the halmark of a free and fair society' 1989 *SAJHR* 321 334.

[256]N 254 147–9. It should be borne in mind, of course, that, in the absence of legislation to the contrary, policy guidelines cannot be entirely binding, even on the administration; it is a well-established legal rule that an administrative body may not submit to dictation by another and that it must itself exercise a discretion which has been conferred on it. See generally Sharpe n 235 110 *ff*.

[257]Section 43 of the AAT Act.

[258]*Cf* Curtis n 169 63.

[259]Para 4.3.

[260]*Re Drake (No 2)* n 228 644.

[261]N 254 150.

litigation.' Even if the tribunal should conclude that the consequences of applying a particular policy are unfair or unjust to the applicant, it is ill-equipped 'to determine whether those consequences may, nevertheless, have to be accepted as conducive to the general good'.[262] And what is in the public interest cannot be determined in the confines of adjudication of a particular case.[263]

- Since judges regularly serve on the AAT, concern has been expressed that their involvement in controversial matters of public policy may result in the diminution of judicial prestige and in potential damage to community confidence in the judiciary.[264]
- A further point of criticism, although raised by both Curtis[265] and Ison[266] in the context of the judiciary, is also relevant to administrative appeals tribunals: they contend that intelligent policy making cannot be undertaken by a tribunal whose interventions in a system are intermittent and haphazard, and even then, not of its own choice, but dependent upon the willingness and ability of applicants to challenge the decisions in question. Policy making often requires co-ordination with budgeting and with actions of other agencies. It is an on-going and long-term activity for which tribunals are not suitable.
- Taylor[267] suggests that the process of policy-making is highly unjusticiable and that if it should be reviewed, then this should be done by a body like an ombudsman, whose recommendations would not be binding.

Some responses to criticism against policy review

- The AAT is essential for the reason that the unrestrained exercise of discretion — manifested in the devising and application of policy — may lead to injustice in respect of an individual.
- The argument that democratic principles are violated by policy review can apply only to policy developed by the Cabinet or by a minister. It does not apply to policy forged at departmental level by unselected administrators. Moreover, Harris[268] points out that 'the chain of democratic responsibility for correcting administrative injustice — department, minister, parliament — has too many weak links to ensure the effective supervision of the exercise of power and its policy elements, especially policy formulated within the bureaucracy itself.'

In a strictly literal sense, even though its members are unselected, the AAT does not operate in an undemocratic fashion, since it was established by an

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[262]Curtis n 169 60. *Cf* also Curtis n 1 10.
[263]Ibid.
[264]Kirby n 254 151–3.
[265]N 1 10.
[266]N 47 508.
[267]N 74 199.
[268]N 74 199.

elected body ie Parliament. Moreover, Parliament can always abolish the tribunal or curtail its jurisdiction, either by removing altogether a particular policy matter from its power of review or by determining that its decisions are to be framed in the form of recommendations. Another strategy would be for the policy concerned to be promulgated in the legislation in question (or in regulations issued by virtue of that legislation).[269]

- The decisions of the AAT reveal that a great many cases involve little or no element of government policy.[270]
- Criticism of policy review has been raised almost exclusively with regard to the politically sensitive and controversial issue of deportations in terms of the Migration Act 1958 (Cth). In the great majority of instances in which policy is involved, it will not, according to Kirby,[271] give rise to such controversy and emotion. In any case, the tribunal has hitherto exercised its acknowledged function of policy review with considerable restraint and has on no occasion ventured to devise an entirely new and different policy. The tribunal has in effect adopted an incremental approach in refining policy, rather than that it has created its own policy. This approach is supported by Thompson and Paterson:[272] 'There is no reason why a body which is adequately equipped to review the merits of individual decisions, a function which requires it to consider what is the correct or preferable decision within the context of the applicable statutory framework, should not be able to assess a policy with a view to determining whether or not it operates to produce the correct or preferable decision in a particular case and, if not, how it can be refined so as to do so.' They then point out that the tribunal's track record demonstrates its capacity to undertake this function.
- While it would be unrealistic to expect the formulation of comprehensive policy in an adjudicative arena, 'it is not so preposterous to imagine an adjudicative rejection of policy as either factually ineffective to achieve its stated goals or as morally repugnant.'[273]
- The contention that confidence in the judiciary may be threatened on account of judges (as members of the AAT) becoming involved in controversial policy issues, is probably outweighed by the important advantages - referred to above[274] — which may be secured through the use of judicial skills. This was also the opinion expressed in the Kerr Report[275] in which it was pointed out that although there can be

[269]However, this would result in a rigid situation which was sought to be avoided by the very conferral of discretionary powers.

[270]Kirby n 254 145.

[271]Ibid.

[272]N 240 259.

[273]Aronson & Franklin *Review of administrative action* (1987) 232.

[274]Para 4.3.

[275]N 7 para 293.

controversy about decisions of judges in their judicial capacity, it has not undermined respect for the judiciary.

Degrees of control over policy

Different degrees of intensity may be distinguished as far as control over policy is concerned.

- The weakest degree - which in fact constitutes no control - is that suggested by the Bland Report,[276] namely that the tribunal should do no more than identify and apply the policy concerned.
- The next degree of control, recommended by the Kerr Report,[277] is the identification of policy, accompanied by the expression of an opinion, comments and even criticism.
- A further stage is reached if the tribunal is entitled to examine the policy and to submit recommendations which the administrative body in question is obliged to consider.
- The preceding degree of control can be strengthened if the administrative body concerned is obliged to give reasons in case it rejects the tribunal's recommendations.
- A yet more intensive degree of control can be established if the tribunal may refuse to apply a certain policy.
- Such control will be further intensified if the tribunal, in addition to rejecting a certain policy, is empowered to refine, reform or modify the policy concerned.
- The most extensive degree of control is reached if the tribunal is authorised to devise its own policy in substitution for that of the administrative body in question.

Towards a realistic role for the tribunal

The AAT performs an administrative function in that it can substitute its decision for that of the administrative body concerned. In the process it may, according to the Federal Court, examine, reject, reform and even substitute the policy upon which the administrative body relied.

Being an adjudicative body, citizens justifiably expect the tribunal to cure administrative injustice. The essential problem, as Harris[278] indicates, is to maintain an effective role for the tribunal in the review of decisions with a policy component 'while at the same time preserving its legitimacy as an essentially adjudicative body, given the paramount responsibility of the executive/administrative branch of government to formulate policy and carry

[276] N 55 para 172(g)(iii).
[277] N 7 para 299.
[278] N 74 208.

it into effect according to perceived political need.'

Both extremes of the degrees of control over policy, referred to above, would be unacceptable. Kirby[279] rightly rejects the recommendation of the Bland Report 'that the AAT should be reduced to a mute body completely unable to express opinions on government policy, silent in the face of injustice'. But even if the tribunal's role should be viewed as encompassing the criticism of policy and the making of recommendations, this would not go far enough. It will unreasonably frustrate applicants who are successful before the tribunal but find that its recommendations are not followed and it will adversely affect the status of the tribunal and its members.[280] On the other hand, the AAT would exceed the limits of its capacity and its legitimacy if it were to engage in attempts to formulate its own policy in the place of a government policy which it has rejected. It has neither the competence and resources nor the constitutional and democratic legitimacy to do so.

The AAT has in fact carved out for itself a practical approach to the review of government policy. In keeping with the approach by courts of law to similar problems arising in respect of judicial review of administrative actions, it seeks to balance the need for consistency (as exemplified in policy guidelines) with the potentially conflicting need for individual justice. Unlike the courts, however, the AAT has been given the role to review administrative decisions on their merits. A need is also identified for a 'proper constitutional relationship between the AAT and the executive in terms of the former not interfering inappropriately with the latter's pre-eminent responsibility for making and implementing lawful policy'.[281]

The AAT's approach accordingly acknowledges the role of policy guidelines in structuring discretionary powers because '[i]nconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice'.[282] However, it is conceivable that the application of policy guidelines — although established to aid consistency, and, thereby, ultimately general or distributive justice — may in an individual instance lead to an unjust result. This then is the occasion for the AAT to come to the aid of the individual by refusing to apply the policy 'for consistency is not preferable to justice.'[283]

Although the AAT's composition, powers and procedures seem to be unsuited to devising broad policy, it can nevertheless play a realistic and meaningful role in the incremental refinement and improvement of policy, by engaging in effect in a constructive dialogue with the bureaucracy. The tribunal's contribution would consist primarily in scrutinising individual applications of

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[279]N 254 147.
[280]Sharpe n 227 100.
[281]Harris n 74 209.
[282]*Re Drake (No 2)* n 228 639.
[283]*Re Drake (No 2)* n 228 645.

general policy guidelines, thereby bringing its unique adjudicative skills to bear in identifying shortcomings in such policy guidelines and leading to their fine-tuning by the bureaucracy. The AAT's power to review government policy, if exercised with the necessary caution and restraint, can have a beneficial influence on the policy concerned. The tribunal's reasoned judgements may lead officials and ministers towards modifying or even abandoning the policy in question. A symbiotic relationship may in the course of time develop between the tribunal and administrators, to the benefit of citizens and to the cause of justice.

It also seems sensible to distinguish, as the EARC Report does,[284] between policy determined by Cabinet or the responsible Minister and departmental policy in the form of agency guidelines. This approach is similar to that of the AAT in *Re Becker*[285] and *Re Drake*[286] (No 2) in which a distinction was drawn between ministerially determined policy and departmentally determined policy, with greater weight being accorded to the former.

On the whole, then, merits review of government policy has had the following beneficial consequences:

(a) the existence of a policy guideline, previously often shielded from the public, can now be revealed and exposed;

(b) the contents of policy may, after scrutiny, be clarified and even reformed, and

(c) review by the tribunal may ensure that the application of policy in a particular instance does not ensue without a satisfactory consideration of the circumstances of the individual case on its merits.

It is advisable for Parliament more clearly to delineate the AAT's role in the review and application of government policy. Should a satisfactory compromise agreement not be struck, the following reactions are foreseeable:[287] Parliament may enact legislation to overrule the effect of a decision by the AAT deemed unacceptable by the bureaucracy. Actually, reliance need not even be placed on amending parliamentary legislation every time the administration is dissatisfied with a Tribunal decision. A more subtle and more effective approach would be for Parliament to confer upon the Minister concerned a power to make policy through regulation. This would effectively shield such policy — now having the status of law — from the AAT's review and would oblige the tribunal to apply the policy in question. However, such a strategy would bring about the undesirable result that it removes discretions and replaces them with rigid rules. This would largely preclude decision-makers to take account of the complexity of the

[284] N 9 paras 5.94–6.
[285] N 203.
[286] N 228.
[287] *Cf* Kirby n 254 156.

circumstances of individual cases and would frustrate the AAT's normative role in guiding administrative decision-making.[288] Another, and perhaps more likely response is that Parliament may be disinclined to commit jurisdiction involving important policy questions to the AAT. It may also employ the less drastic device of allowing the AAT to make only recommendations in respect of the issue concerned.

Improved administrative decision-making

The ultimate aim of the AAT is that it should perform a normative function in respect of primary administrative decision-making, often far beyond the parameters of the instant case. This role flows naturally from the tribunal's function of remaking the decision subject to appeal, which renders it part of the chain of administrative decision-making. Two relevant aspects can be identified in this respect ie improving the administrative fidelity to the law and improving fact-finding by the administration.

Stimulating the administration's obedience to law

Owing to a vastly increased workload and the growth of legislation, an administrator is at risk of misconstruing the nature or extent of his or her powers. The AAT, appropriately infused with legal expertise, has predictably contributed towards administrative decision-making in accordance with the law. This normative role has been fulfilled mainly through clarifying the scope of administrative powers and duties by engaging in the interpretation of the relevant legislation.[289] While it is true that judicial review has always been available to control the legality of administrative actions, this remedy in principle results only in the setting aside of the erroneous decision and leaving to the administrative body concerned the reconsideration of the challenged decision without the court being able to replace it with the correct decision. The tribunal, on the other hand, is empowered, in addition to setting aside the erroneous decision, to make the correct or preferable decision.[290] Moreover, the tribunal is not, like a court, bound in the material to which it may refer in interpreting legislation and since reviews by the AAT are much cheaper its decisions are likely to be more frequent and more pervasive.

The AAT's decisions in this respect have led to improved administrative decision-making which has been of benefit not only to the immediate parties involved, but has resulted in the government departments involved taking appropriate steps to ensure that future decisions would abide by the law as expounded by the AAT.[291] Furthermore, the tribunal has on occasion pointed out the need for law reform.[292]

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[288]Bayne n 207 12.

[289]*Cf* generally Bayne n 207 4 *ff*; Kirby n 254 180–9.

[290]Brennan 'The future of public law in the Australian Administrative Appeals Tribunal' 1979 *Otago Law Review* 286 294.

[291]Thompson & Paterson 'Public benefit: the Administrative Appeals Tribunal' in Mc Millan (ed) n 142 81 85–8.

[292]Peiris n 106 316.

Improved fact-finding

Although the AAT is not bound by the rules of evidence and may inform itself in any matter in such manner as it considers appropriate, its judicial composition, as has been pointed out, has led to its adopting an essentially adversarial approach to fact-finding. This has been reinforced by its coercive evidence-gathering powers such as the power to compel the attendance of witnesses and their giving of evidence. Primary administrative decision-making bodies, by way of contrast, follow an inquisitorial and circumstantial process. They lack the tribunal's coercive powers and are obliged to rely upon their own initiative and resources in obtaining the relevant information.[293]

Not surprisingly, the AAT, assisted by its superior powers and approach, has frequently set aside administrative decisions on the basis of flawed fact-finding.[294] This the tribunal has done not on the basis that it drew a different inference from the facts as found by the administrative body, but because the tribunal determined that the factual situation was different from that found by the administrative body and that additional relevant material has come to light.[295] Given the incongruity of the two approaches to fact-finding, it seems that the AAT's supposed educative role in respect of primary decision-making is severely limited.[296] And even if the tribunal should follow an inquisitorially-oriented approach — more in keeping with the original decision-maker's techniques — it still has at its disposal the above-mentioned coercive evidence-gathering powers and skills in analysing factual material, over which the administrative body does not dispose. Moreover, the latter body is disadvantaged by inadequate mechanisms and skills for testing the evidence which it has gathered, if such evidence is conflicting or if its truth is challenged. A further problem is that since in many cases, as has been shown, the tribunal relies upon facts which did not serve before the primary decision-maker, it does not have the benefit of such decision-maker's views on those new facts.[297]

Another factor which may serve to inhibit the AAT's effectiveness in improving primary decision-making is that its involvement in administrative decision-making is often of an intermittent and haphazard nature. It would presumably be only a small minority of dissatisfied persons — and among them only those who are willing and able to launch an application to the AAT — who would approach the tribunal for relief. In other words, the AAT's involvement and experience in reviewing administrative decision-making will often necessarily be limited to a small and partial number of instances. A further consideration is that where primary decision-making is poor, a system of appeals may operate to the detriment of persons who acquiesce in primary

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[293]Brennan 'The anatomy of an administrative decision' 1980 *Sydney Law Review* 1 6.

[294]Kirby n 254 175–6.

[295]Brennan n 290 292; n 293 6–7; Peiris n 106 316–7.

[296]Harris n 74 204.

[297]Curtis n 1 5.

decisions, while favouring those who are willing and able to avail themselves of the appellate process.[298]

Another issue, raised by Ison,[299] is that the provision of merits review may even contribute towards the entrenchment of defective primary decision-making by creating the illusion of a solution. The notion of a de novo reconsideration of the matter in question may imply that the tribunal need not be concerned with the manner in which the initial decision was reached and it may not even consider the departmental file. Ison[300] concludes that 'the availability of an appeal cannot justify the retention of a system of primary adjudication that is not designed to achieve the right answer in the first place.' And where the basic defects of primary decision-making are inherent in the structure, the provision of an appeal may actually divert the attention away from the fundamental problem.[301]

It should be borne in mind that initial decisions are often made by a relatively junior official under pressure from an enormous volume of work. It would amount to setting up an artificial standard if the primary decision-maker were to be judged by the same high standard which prevails at the AAT level. In the end, the success of administrative decision-making and the degree of justice achieved by the system as a whole, will depend more on the quality of primary decision-making in the overwhelming number of cases than on the review of a small number of cases which receive special attention by the AAT: 'There may be a great deal more to achieve by improving the quality of decision-making at the grassroots processing level than by setting as the absolute priority a system of legally orientated review at the outer ends of the system which aims at perfection in an imperfect world.'[302]

Although care must accordingly be taken not to over-emphasise the potentially normative value of merits review, while overlooking the need of directly improving primary decision-making, it is reasonable to assume that adjudicative aspects of the AAT's fact-finding role, such as the holding of a proper hearing, should fulfil an educative role and serve as a model for administrators.[303] In fact, the major shortcoming of primary decision-making is that it is usually based on a bureaucratic model without the basic component of procedural due process.[304] Curtis[305] is of the opinion that administrative decision-making — with its emphasis on effectiveness, expertise and consistency — has under the influence of merits review become more judicialised. This implies more attention to procedural fairness, taking account

[298]Ison n 46 143.
[299]N 51 29–32.
[300]N 51 31.
[301]Ison n 46 141.
[302]Lanigan 'Comments' 1981 *Federal Law Review* 19 22.
[303]Harris n 74 205.
[304]Ison n 51 29.
[305]N 169 66.

of relevant matters and the giving of satisfactory reasons for decisions.[306] There is a good deal of evidence that the exposure of administrative reasoning to critical analysis has served to improve the standard of that reasoning.[307] In fact, the mere existence of an opportunity for merits review should lead to more responsible administrative decision-making. Furthermore, analysis by the tribunal of the exercise of discretionary powers has exposed many shortcomings and has led to improvements through clarification and refinement.[308] An optimum degree of benefit can be derived when bureaucrats view the tribunal not as a threat but as an aid to management.[309]

Since the gathering and finding of facts constitute labour intensive and costly tasks, a question which must be determined is whether the ensuing benefits associated with these functions justify the costs involved. According to Brennan[310] the costs may be justified where the decision involved is likely to affect the individual in a substantial way or where the decision has significant and widespread implications. In cases of lesser significance, however, one may have to be content with an abbreviated procedure.

CONCLUSION

In this article an attempt has been made to highlight some of the salient features of the Australian Commonwealth AAT, as the pioneering and perhaps the best studied GAAT. A meaningful analysis required a consideration of the categories of appeal, the different types of appeal bodies and considerations underlying the choice between a GAAT and SAATs.

The following is a summary of some of the more important general conclusions:

- Judicial review of administrative action, in contrast to appeal, does not amount to comprehensive control because it does not in principle encompass the wisdom or merits of the administrative decision in question, nor does it enable a court to remake the decision.
- Comprehensive control through an appeal should be aimed at arriving at the most preferable decision rather than at merely ascertaining whether the primary decision was right or wrong. Such control accordingly requires the provision of an administrative appeal which involves an appeal body whose role it is to decide — on the evidence before it — what decision it itself should make, rather than of a judicial appeal which relates to an appeal body whose role is restricted to examining the primary decision in order to

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[306]Volker 'The effect of administrative law reforms. Primary level decision-making' 1989 *Canberra Bulletin of Public Administration* 112.

[307]Curtis n 169 65.

[308]Ibid.

[309]Budgen n 142 124–5. Volker n 306 113 states that there are very few areas where administrators look over their shoulders and wonder whether their decisions will be overturned by a review body and take the 'soft option'.

[310]N 290 293.

ascertain whether it was correct on the evidence before the primary decision-maker.

- Administrative appeals tribunals are favoured above courts acting as appeal bodies, on account of their expertise, informality, flexibility, speed and cheapness. Moreover, courts would compromise their reputation for impartiality if they should be obliged to become involved in performing essentially administrative acts.
- A GAAT is preferable to the fragmented and haphazard structure presented by multiple SAATs.
- An inquisitorial process is preferable to an adversarial approach but then adequate resources should be made available to the appeal tribunal to effectively pursue an interventionist approach. The tribunal should take care to ensure the maintenance of impartiality and of natural justice.
- An appeal tribunal can play a meaningful role in the control over government policy, mainly through the incremental refinement and improvement of such policy. Such control should lie between the extremes of the tribunal being authorised merely to make recommendations, on the one hand, and, on the other hand, of devising its own policy in substitution of government policy. It is advisable that the legislature should clearly delineate the tribunal's powers in this regard.
- While an administrative appeals tribunal should regard the improvement in primary decision-making as a major goal, it should be realised
  - that its potentially normative role is restricted, mainly on account of the tribunal's superior powers and difference in approach to fact-finding as against that of the primary decision-maker, and because its involvement is often haphazard and only intermittent, and
  - that where the basic defects affecting primary decision-making are inherent in the structure, the provision of an appeal may divert attention away from the basic problem.

The above conclusions are, in a sense, abstract. A decision whether or not a GAAT should be established in South Africa should be based on a comprehensive cost-benefit analysis. Such an analysis is complicated by the fact that the costs are measured largely in financial terms,[311] while an assessment of the expected benefits rests mainly upon intangible factors that cannot readily be quantified. Also, estimates would depend upon uncertainties such as how wide an area will be covered by the tribunal, how extensive

[311]The AAT's total running costs for the year ended 30 June 1993 amounted to Australian $12 681 000, while its property operating expenses amounted to $5 834 000 (*Annual Report 1992–93* Administrative Appeals Tribunal (1993) ch 8). The EARC Report (n 9 Tables 15.2 and 15.5) estimates that $4 100 000 is required to establish its proposed general administrative appeals tribunal, while annual operating costs are estimated at $3 902 000.

administrative injustice and incompetence are and how much use will be made of the system by individuals.

Besides financial benefits accruing through the elimination or drastic reduction in number of existing SAATs and the avoidance of further proliferation of such tribunals, many other less tangible benefits may be associated with the establishment of a GAAT. Such a tribunal should enjoy an elevated status and greater independence and should be more effective in rendering the administration more open, responsive and accountable, besides inducing a greater respect for and adherence to the law. In turn, greater confidence in and acceptance of administrative decisions may be inspired, also in view of the general experience of the AAT that only about one third of applications received conclude with a decision partly or substantially in favour of the applicant. It would introduce a more streamlined and homogeneous administrative appeals system and would provide improved access to the system. It will stimulate the search for more uniform procedures thus facilitating their use. It would serve as a vehicle for the extension of appeals jurisdiction without requiring the establishment of further tribunals.

It seems that the political climate, with an emphasis on openness and accountability of the administration, is favourable to the establishment of a GAAT in South Africa. Although there are currently many other urgent socio-economic needs in the country, it may be argued — as does the EARC Report[312] — that it is not a matter of whether the State can afford to pay for an effective administrative appeals system, but rather whether it can afford not to. The Kerr Committee[313] opined that costs should not be regarded as a matter of over-riding importance. If the experience proves that there is a relatively small degree of administrative error requiring correction, the cost would be small. If, on the other hand, such error is widespread, the cost — even if considerable — must be met 'because it would be intolerable for citizens to have to bear the consequences of a high degree of administrative error affecting their rights'. And Corder[314] points out that since large-scale State intervention will be required in the implementation of the Reconstruction and Development Programme, a relatively far-reaching system of administrative control is imperative, regardless of the cost, if South Africans wish to live as responsible and free citizens in a participatory democracy. A GAAT can be phased in incrementally as its jurisdiction is expanded gradually in accordance with needs and with the State's capacity to accommodate them.

Once a decision has been reached to introduce a GAAT, the next issue which arises concerns the selection of decisions which should be subject to appeal. It has been shown that it is mainly in the context of a GAAT that criteria have been devised to guide such a selection, but that such criteria are still in the

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[312]N 9 para 15.95.

[313]N 7 para 370.

[314]*Empowerment and accountability. Towards administrative justice in a future South Africa* (1991) 44–5.

process of being developed. It is important that such criteria should not take on the form of general principles which are applicable in isolation of the subject area involved. The selection of decisions suitable for appeal should be based on appropriate empirical inquiry.[315]

A major difficulty, revealed through the principal criterion suggested to guide the selection of decisions appropriate for appeal, through the traditional locus standi requirement and through what has been regarded as a primary purpose of appeal and, in fact, of judicial review, is the emphasis on the protection of the individual against the State. Both administrative appeal and judicial review are geared primarily towards ascertaining whether the individual's interest has been sufficiently taken into account by the administrative body concerned and whether that body's decision reflects justice towards the individual.

Although it is the obligation — in fact, the very *raison d'être* — of the administrative body in question to advance the public interest, neither appeal nor review provides an assurance that the public interest has indeed been furthered. It is simplistic, as Baxter[316] indicates, to assume that the public interest is necessarily and automatically represented by the administrative body concerned merely because the latter has been established for this purpose. Another factor is that the public interest is not something which can be satisfactorily determined within the confines of a particular case. Moreover, the commonly applied adversarial techniques are not suited to this purpose.

A further reason why appeal and review are often inappropriate is that they seem to proceed from the tacit assumption that administrative bodies consist of enthusiastic officials who are carried away with excessive zeal in pursuing the public interest regardless of the extent to which they disregarded individual rights and interests.[317] However, as Ison[318] explains, '[t]he main problem in public administration is not the excess or abuse of power; it is inertia and under-achievement through the under-use of power; the failure to engage in the conscientious pursuit of public policy objectives.'

The public interest-dimension is one which is obscured and even ignored by a reliance upon the traditional remedies provided by appeal and review. A major challenge is to design a remedy by means of which an assurance may be obtained not only that the individual's interest has been satisfactorily balanced against the public interest but that the public interest has indeed been furthered.

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[315]Ison n 51 57–9.
[316]N 4 57.
[317]Ison n 47 505.
[318]*Ibid.*