

# The doctrine of common purpose in South African law

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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.<sup>1</sup> In the leading case of *S v Safatsa*<sup>2</sup> 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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<sup>1</sup>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 gevolgsisdade: (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.

<sup>2</sup>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.<sup>3</sup>

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.<sup>4</sup> The historical development of the law relating to participation is investigated with a view to the principle of legality<sup>5</sup> 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.<sup>6</sup>

### 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'.<sup>7</sup> Matthaeus also declared that persons who counselled the offender or who helped the offender to commit the crime were punishable.<sup>8</sup> 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'.<sup>9</sup> According to Huber, helpers and counsellors were themselves guilty of the crime and punishable with the ordinary punishment prescribed for the offence,<sup>10</sup> while Moorman drew a distinction between helpers and counsellors and stated that each may be punished according to the circumstances of

<sup>3</sup>On 9011.

<sup>4</sup>Act 200 of 1993.

<sup>5</sup>Compare the approach of Ackermann J in *S v Von Molendorff* 1987 (1) SA 135 (T).

<sup>6</sup>W Rein *Das Kriminalrecht der Römer* (1844) 185; T Mommsen *Römisches Strafrecht* (1899) 100; JC de Wet & HL Swanepeel *Strafreg* (4 ed) 1985 178.

<sup>7</sup>Joost de Damhouder *Practycke in criminele saken* (1660) Chapter 3.

<sup>8</sup>A Mattheus *De criminibus* (1672) *Prolegomena* 1 9, 1 10 and 1 11.

<sup>9</sup>S van Leeuwen *Het Rooms Hollands-Regt* (10 print 1732) 4 32 3.

<sup>10</sup>U Huber *Hedendaegse Rechtsgeleertbeyt* (1742) 6 1 5, 6 1 14, 6 1 16.



each case.<sup>11</sup>

Matthaeus,<sup>12</sup> Damhouder,<sup>13</sup> Van der Linden<sup>14</sup> and Van der Keessel<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

### 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 Peerkban and Lalloo*<sup>18</sup> 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

<sup>11</sup>J Moorman *Verhandelingen over de misdaden en der zelve straffen* (1779) 2 1 23.

<sup>12</sup>*Op cit Prolegomena* 1 11 and 48 18 4 19.

<sup>13</sup>*Loc cit.*

<sup>14</sup>J van der Linden *Rechtgeleerdheid, practical en koopmans bandboek* (1806) 2 1 8.

<sup>15</sup>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.

<sup>16</sup>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.

<sup>17</sup>*R v Mlooi* 1925 AD 131 135.

<sup>18</sup>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.<sup>19</sup>

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.<sup>20</sup>

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*,<sup>21</sup> 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*<sup>22</sup> formed the basis of our law of participation for many years and was followed in numerous cases.<sup>23</sup> Approximately 74 years later, in *S v Williams*<sup>24</sup> 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<sup>25</sup> and MA Rabie.<sup>26</sup> 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

<sup>19</sup>On 803.

<sup>20</sup>De Wet & Swanepoel *op cit* 189.

<sup>21</sup>1950 (4) SA 101 (T).

<sup>22</sup>*Supra*

<sup>23</sup>See, *inter alia*, *R v Jackelson* 1920 AD 486, *R v Longone* 1938 AD 532, *S v Moumbaris* 1974 (1) SA 681 (T).

<sup>24</sup>1980 (1) SA 60 (A) 63.

<sup>25</sup>In *Strafreg*, of which the first edition was published in 1948.

<sup>26</sup>*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<sup>27</sup>). 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*<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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*<sup>31</sup>, 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 Kboza*<sup>32</sup> Botha AJA concluded that an *accomplice* was 'guilty of murder' and in *S v Kock*<sup>33</sup> the Appellate Division confirmed the death sentence imposed on an accused convicted of rape *as an accomplice*.<sup>34</sup> In the cases of *R v Gani*<sup>35</sup> and *S v Jonathan*<sup>36</sup> 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.<sup>37</sup> 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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<sup>27</sup>For a discussion of the concept of the definition of the proscription, see Snyman *CR Criminal Law* (2ed 1989) 79.

<sup>28</sup>*Supra*.

<sup>29</sup>*Supra* 63E-F.

<sup>30</sup>*S v Kboza* 1982 (3) SA 1019 (A) 1019, 1054; Snyman *op cit* 269; PJ Visser & JP Vorster *Criminal Law through the Cases* (3 ed) 1990.

<sup>31</sup>*Supra*.

<sup>32</sup>*Supra* 1055.

<sup>33</sup>1988 (1) SA 37 (A).

<sup>34</sup>40I-J.

<sup>35</sup>1957 (2) SA 212 (A).

<sup>36</sup>1987 (1) SA 633 (A).

<sup>37</sup>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.<sup>38</sup> 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*<sup>39</sup> 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*<sup>40</sup> and *R v Ndblansisa*.<sup>41</sup>

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.<sup>42</sup> Holmes JA explained this principle as follows in *S v Malinga*:<sup>43</sup>

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*<sup>44</sup> 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.<sup>45</sup> The judgment in *Williams* focused the attention on the problem of causation and in numerous subsequent cases the Appellate Division

<sup>38</sup>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.

<sup>39</sup>1923 WLD 17.

<sup>40</sup>1945 AD 410 415.

<sup>41</sup>1946 AD 1101 1106.

<sup>42</sup>*R v Nsele* 1955 (2) SA 145 (A) 148; *R v Hercules* 1954 (3) SA 826 (AD); *R v Bergstedt* 1955 (4) SA 186.

<sup>43</sup>*S v Malinga* 1963 (1) SA 692 (A) on 694F-G.

<sup>44</sup>*Supra*.

<sup>45</sup>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.<sup>46</sup> In *S v Safatsa*<sup>47</sup> the court confirmed this view and overruled the cases where it had been intimated that such a causal connection was required.<sup>48</sup>

#### 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.<sup>49</sup>

#### Common purpose to kill

The cases of *R v Dladla*,<sup>50</sup> *S v Mgedezi*<sup>51</sup> and *S v Safatsa*<sup>52</sup> 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*<sup>53</sup> 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.

<sup>46</sup>*S v Kboza*, *supra* 1015; *S v Daniëls* 1983 (3) SA 275 (A) 304, 323; *S v Nkwenja* 1985 (2) SA 560 573.

<sup>47</sup>*Supra*.

<sup>48</sup>Eg *S v Thomo* 1969 (1) SA 385 (A); *S v Maxaba* 1981 (1) SA 1148 (A).

<sup>49</sup>*Snyman op cit* 258.

<sup>50</sup>1962 (1) SA 307 (A).

<sup>51</sup>1989 (1) SA 687 (A).

<sup>52</sup>*Supra*.

<sup>53</sup>1969 (2) SA 637 (A) 640.

This principle has been applied in numerous cases over the years.<sup>54</sup> In a minority judgment in *S v Nzo*<sup>55</sup> 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*<sup>56</sup> 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*<sup>57</sup> it was held that if an accused was a party to a common purpose to commit a crime for which intention is required<sup>58</sup> (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*,<sup>59</sup> *S v Kwadi*<sup>60</sup> and *S v Majosi*.<sup>61</sup> In *Majosi* the court indicated that if the robber X, who had kept

<sup>54</sup>*R v Morela* 1947 (3) SA 147 (A); *R v Nsele supra*; *S v Sbaik* 1983 (4) SA 57 (A); *S v Talana* 1986 (3) SA 196 (A); *S v Beukes* 1988 (1) SA 511 (A); *S v Mbatba* 1987 (2) SA 272 (A); *S v Nzo* 1990 (3) SA 5 (A).

<sup>55</sup>*Supra*.

<sup>56</sup>1991 (2) SACR 532 (A).

<sup>57</sup>1985 (2) SA 560 (A).

<sup>58</sup>It is inherently impossible to have a common purpose to be negligent — *R v Tsosane* 1951 (3) SA 405 (O).

<sup>59</sup>*Supra* on 897 E.

<sup>60</sup>1989 (3) SA 524 (NC).

<sup>61</sup>*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*<sup>62</sup> 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,<sup>63</sup> but this approach was rejected in *S v Bernardus*.<sup>64</sup> 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*<sup>65</sup> 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*.<sup>66</sup> 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*<sup>67</sup> 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

<sup>62</sup>1991 (1) SACR 150 (T).

<sup>63</sup>*R v Mkize* 1946 AD 197; *R v Geere* 1952 (2) SA 319 (A).

<sup>64</sup>1965 (3) SA 287 (A).

<sup>65</sup>*Supra*.

<sup>66</sup>*Lawsa* 118.

<sup>67</sup>*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.<sup>68</sup> 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,<sup>69</sup> it may also arise spontaneously without the participants even knowing each other beforehand.<sup>70</sup>

*S v Mgedezi*<sup>71</sup> 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<sup>72</sup> 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.<sup>73</sup> In cases of murder and culpable homicide there must be active association with the conduct that actually caused the death of the deceased.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup> In *S v Safatsa*<sup>78</sup> the argument on behalf of the accused that the setting alight of the deceased fell outside the

<sup>68</sup>Snyman *op cit* 296.

<sup>69</sup>*Cf S v Smith* 1984 (1) SA 583 (A).

<sup>70</sup>*Cf S v Safatsa*, *supra*.

<sup>71</sup>*Supra*.

<sup>72</sup>As required in *S v Safatsa*, *supra* and *S v Mgedezi*, *supra*.

<sup>73</sup>Snyman *op cit* 260.

<sup>74</sup>*S v Khumalo* 1991 (4) SA 310 (A).

<sup>75</sup>*S v Malinga*, *supra*; *S v Kwadi*, *supra*.

<sup>76</sup>*S v Mgedezi*, *supra*.

<sup>77</sup>*S v Robinson* 1968 (1) SA 666 (A).

<sup>78</sup>*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*,<sup>79</sup> be relevant.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> 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*,<sup>83</sup> 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 wounded. The legal position of the latecomer or joiner-in, that is someone who joined the common purpose to kill only after he had already been fatally wounded, was settled by the Appellate Division in *S v Motaung*.<sup>84</sup> 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.

<sup>79</sup>1989 (4) SA 1013 (A).

<sup>80</sup>*Snyman op cit* 207-210; Burchell & Milton *op cit* 260.

<sup>81</sup>See the facts of *S v Nzo*, *supra*, discussed *infra*.

<sup>82</sup>*S v Robinson*, *supra*. For a critical discussion of this case, see MA Rabie 1969 *THRHR* 193.

<sup>83</sup>*Supra*.

<sup>84</sup>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*<sup>85</sup> 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*<sup>86</sup> 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.

<sup>85</sup>*Supra*.

<sup>86</sup>1993 (1) SACR 226 (A) at 233C-G.



### Presence at scene of crime

In *S v Mgedezi*<sup>87</sup> 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*,<sup>88</sup> discussed in relation to the withdrawal from the common purpose.<sup>89</sup> 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 Kbundulu*<sup>90</sup> 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

<sup>87</sup>*Supra.*

<sup>88</sup>*Supra.*

<sup>89</sup>*Supra.*

<sup>90</sup>1991 (1) SACR 470 (A).

the inhabitants. In *S v Majosi*<sup>91</sup> 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<sup>92</sup> that their presence at the killing in *S v Nzo*<sup>93</sup> 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<sup>94</sup> 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*,<sup>95</sup> 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.<sup>96</sup> 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.<sup>97</sup> Mandate or implied mandate as foundation has been criticised as being a contractual concept which cannot readily be applied to criminal law.<sup>98</sup> 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.<sup>99</sup>

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*.<sup>100</sup> He argued that the conduct element of accomplice liability should not be regarded as causal

<sup>91</sup>*Supra*.

<sup>92</sup>*Op cit* 345-346.

<sup>93</sup>*Supra*.

<sup>94</sup>Perpetrator as defined in *S v Williams*, *supra*.

<sup>95</sup>*Supra*.

<sup>96</sup>MA Rabie *Medepligtigheid en ontbrekende kousaliteit by moord* 1988 (1) SACJ 35; Snyman *op cit* 258; Burchell & Milton *op cit* 347.

<sup>97</sup>MA Rabie *Kousaliteit en 'common purpose' by moord* 1988 SACJ 234 238.

<sup>98</sup>NA Matzukis *The nature and scope of common purpose* 1988 SACJ 226 232.

<sup>99</sup>Strauss *loc cit*.

<sup>100</sup>*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.<sup>101</sup>

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*<sup>102</sup> 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*<sup>103</sup> it 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*<sup>104</sup> 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

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<sup>101</sup>Visser & Vorster *op cit* 699.

<sup>102</sup>*Supra*.

<sup>103</sup>*Supra*.

<sup>104</sup>*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.<sup>105</sup> The judgment in the *Goosen* case was criticised as being contrary to principle<sup>106</sup> 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.<sup>107</sup>

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,<sup>108</sup> 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.<sup>109</sup> This is the same type of conduct often committed by the non-

<sup>105</sup>*S v Masilela* 1968 (2) SA 558 (A); *S v Daniëls* 1983 (3) SA 275 (A).

<sup>106</sup>CR Snyman *Dwaling aangaande die oorsaaklike verloop* 1991 SACJ 50.

<sup>107</sup>Visser & Vorster *op cit* 522.

<sup>108</sup>See *S v Williams*, *supra*.

<sup>109</sup>On 63.



perpetrator accused in common purpose cases.<sup>110</sup>

The cases referred to above<sup>111</sup> 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.<sup>112</sup>

As has been pointed out above,<sup>113</sup> 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.<sup>114</sup> Although the courts have in the previous century indicated that they have the power to create crimes,<sup>115</sup> they have abandoned this view early in this century.<sup>116</sup> It is also now clear that the courts do not have the power to revive common law crimes which have not been adopted.<sup>117</sup> 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,<sup>118</sup> 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

<sup>110</sup>For example in *S v Safatsa, supra*.

<sup>111</sup>Footnotes 102-108 and text.

<sup>112</sup>*S v Williams, supra*.

<sup>113</sup>See footnotes 31-38 and text.

<sup>114</sup>MA Rabie & SA Strauss *Punishment* (5ed 1994) 71; Snyman *op cit* 33.

<sup>115</sup>*R v Marais* (1888) 6 SC 367.

<sup>116</sup>*R v Robinson* 1911 CD 319; *R v M* 1915 CPD 334.

<sup>117</sup>*S v Solomon* 1973 (4) SA 644 (T).

<sup>118</sup>For example *S v Kotze* 1965 (1) SA 118 (A).

intervene.<sup>119</sup>

As regards the general principles of criminal law, it is generally accepted that the courts had to exercise a limited 'legislative' activity<sup>120</sup> as the old authorities did not discuss the general principles on a systematic basis and often contradicted each other.<sup>121</sup> Burchell & Milton<sup>122</sup> 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*.<sup>123</sup>

Looking at the Roman-Dutch law on participation<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup>

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.<sup>127</sup>

<sup>119</sup>For example *R v Sibiyi* 1955 (4) SA 247 (A); *S v Von Molendorff*, *supra*.

<sup>120</sup>Rabie & Strauss *op cit* 71.

<sup>121</sup>Snyman *op cit* 12; De Wet & Swanepoel *op cit* 47.

<sup>122</sup>*Op cit* 23.

<sup>123</sup>Snyman *op cit* 15.

<sup>124</sup>See footnotes 7–17 and text.

<sup>125</sup>*S v Malinga*, *supra*; *S v Mini* 1963 (1) SA 692 (A); *S v Sigwabla* 1967 (4) SA 566 (A); *S v Madlala*, *supra*.

<sup>126</sup>J C Smith & Brian Hogan *Criminal Law* (7ed 1992). In the case of *Hui Cbi-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.

<sup>127</sup>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<sup>128</sup> 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'.<sup>129</sup>

The question remains whether there are any other grounds on which the

<sup>128</sup>Act 200 of 1993, which came into operation on 27 April 1994.

<sup>129</sup>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)<sup>130</sup> 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.<sup>131</sup>

In *R v Martineau* (1990)<sup>132</sup> 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.<sup>133</sup> The phrase 'or ought to have known' in section 21(2) has therefore no effect.<sup>134</sup>

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

<sup>130</sup>(1987) 60 CR (3d) 289 (SCC).

<sup>131</sup>*Supra* at 327.

<sup>132</sup>(1990) 79 CR (3d) 129.

<sup>133</sup>*R v Logan* (1990), 58 C.C.C. (3d) 391.

<sup>134</sup>*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,<sup>135</sup> but is nevertheless convicted of the substantial crime and is liable to the same punishment as the perpetrator.<sup>136</sup> Furthermore, if common purpose liability is recognised as a form of accomplice liability,<sup>137</sup> 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.

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<sup>135</sup>*S v Williams, supra.*

<sup>136</sup>See footnote 18 and text, *supra.*

<sup>137</sup>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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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.'<sup>1</sup>

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<sup>2</sup> 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 ascendancy 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

<sup>1</sup>1950 *SALJ* 303.

<sup>2</sup>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 substantive 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.<sup>3</sup> 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*<sup>4</sup> 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

<sup>3</sup>See the contribution by JH van Rooyen, *infra* — Ed.

<sup>4</sup>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

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Constitutional Court may declare the statute or regulation invalid.<sup>1</sup>

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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<sup>1</sup>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*.<sup>2</sup> 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<sup>3</sup> which has also been the subject of countless debates<sup>4</sup> 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.<sup>5</sup> 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<sup>6</sup> or cases concerned with the right of

<sup>2</sup>405 US 438 (1971).

<sup>3</sup>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.

<sup>4</sup>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.

<sup>5</sup>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.

<sup>6</sup>*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.<sup>7</sup>

In this essay only the decision to have a child by assisted conception,<sup>8</sup> 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.<sup>9</sup> As severely conflicting interests are involved in the option of surrogacy, the discourse on whether to regulate or prohibit this procedure, is still ongoing.<sup>10</sup>

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'.<sup>11</sup> 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'.<sup>12</sup>

I support this view. There is no (rational) reason for protecting only those

<sup>7</sup>*Eisenstadt v Baird* 405 US 438 (1972), *Griswold v Connecticut* 381 US 479 (1965). See also *Gillick v West Norfolk & 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.

<sup>8</sup>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.

<sup>9</sup>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.

<sup>10</sup>See in general D Pretorius *Surrogate motherhood a worldwide view of the issues* 1994 Thomas Publisher Springfield Illinois USA.

<sup>11</sup>*In re Baby M* 217 N J Super 313, 386, 525 A2d 1128 1164 (1987).

<sup>12</sup>*In re Baby M* 109 N J 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.<sup>13</sup>

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.<sup>14</sup>

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.<sup>15</sup> The Regulations provide that artificial insemination may be effected only by a 'competent person'<sup>16</sup> on a married women with her husband's written consent<sup>17</sup>. It is inappropriate that this 'marriage requirement', which contains a limitation of a fundamental right (equality), is left to executive regulation. As De Ville<sup>18</sup> emphasises, it may not be left to the

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<sup>13</sup>Section 8(2) of the Interim Constitution protects persons with disabilities from unfair discrimination.

<sup>14</sup>Regulation 11.

<sup>15</sup>Section 37 (e)(iii) and (vii).

<sup>16</sup>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.

<sup>17</sup>Reg 8.

<sup>18</sup>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 accordance with 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<sup>19</sup> and anyone who has been declared a habitual criminal in terms of section 286 of the Criminal Procedure Act 51 of 1977<sup>20</sup> or who is mentally ill within the meaning of section 19 of the Mental Health Act 18 of 1973.<sup>21</sup> The exclusion of mentally ill persons and habitual criminals is obviously intended to prevent the birth of genetically handicapped children.

The Human Tissue Act<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup>

#### *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

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<sup>19</sup>Section 19(c)(ii).

<sup>20</sup>Section 17(c)(iii).

<sup>21</sup>Section 17(c)(i).

<sup>22</sup>Section 19.

<sup>23</sup>Reg 6(1)(a)(iv).

<sup>24</sup>Reg 10(1)(a)(v).

<sup>25</sup>Reg 9(c)(iii).



as they are entirely precluded from utilising assisted reproduction.

'Married' is defined in the regulations<sup>26</sup> 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<sup>27</sup> 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.<sup>28</sup>

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<sup>29</sup>, provided they are competent enough to care for the child.<sup>30</sup>

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

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<sup>26</sup>Reg 1.

<sup>27</sup>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.

<sup>28</sup>Section 5(1)(a) and (b).

<sup>29</sup>Section 17(b) of the Child Care Act 74 of 1983 as amended by Act 86 of 1991.

<sup>30</sup>Section 18(4)(b).

option in childbearing. The question remains whether such an infringement constitutes 'unfair' discrimination in terms of the equality clause<sup>31</sup> 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*,<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> 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.

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<sup>31</sup>Section 8.

<sup>32</sup>See n 7 *supra*.

<sup>33</sup>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.

<sup>34</sup>For a discussion, see Pretorius *Surrogate motherhood a worldwide view of the issues* 25-59.



The Constitution *inter alia* also protects life<sup>35</sup> and human dignity.<sup>36</sup> Unlike the Constitution of Namibia<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup>

The respect for autonomy in procreation choices is echoed by the African National Congress's National Health Plan for South Africa.<sup>40</sup> 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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<sup>35</sup>Section 9 merely provides that '[E]very person shall have the right to life.' Abortion is therefore not directly addressed.

<sup>36</sup>Section 10 provides that '[E]very person shall have the right to respect for and protection of his or her dignity'.

<sup>37</sup>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.'

<sup>38</sup>DSP Cronjé Barnard Cronjé Olivier *Die Suid-Afrikaanse persone- en familiereg* (3 ed 1994) 167.

<sup>39</sup>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.

<sup>40</sup>*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*.<sup>41</sup>

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*<sup>42</sup> 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.

<sup>41</sup>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 (godsdienst), 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.'

<sup>42</sup>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*<sup>43</sup> 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).<sup>44</sup>

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*<sup>45</sup> 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, race group/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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<sup>43</sup>*Fundamental rights in the New Constitution* 1994 29.

<sup>44</sup>See the reference to *R v Oakes* 1986 26 DLR (4th) 321 *infra* and the authorities cited in n 55.

<sup>45</sup>*Fundamental rights in the New Constitution* 27.

family life have undergone dramatic changes in the past decade or more.<sup>46</sup> 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.<sup>47</sup> 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<sup>48</sup> and significant reliance placed on Judeo-Christian principles by the legislature<sup>49</sup> and courts alike.<sup>50</sup>

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?<sup>51</sup> This question must be examined in the light of the limitation clause of the Constitution.

#### THE LIMITATION CLAUSE IN THE CONSTITUTION<sup>52</sup>

As no right is by definition absolute, the Interim Constitution, like most other

<sup>46</sup>See in general M Humphrey & H Humphrey *Families with a difference — varieties of surrogate motherhood* 1988 1–15.

<sup>47</sup>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.

<sup>48</sup>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.

<sup>49</sup>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.

<sup>50</sup>See in this regard the dictum of Steyn in *V v R* 1979 (3) SA 1006 (T).

<sup>51</sup>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.'

<sup>52</sup>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.<sup>53</sup> 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*<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup> 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

<sup>53</sup>Section 33.

<sup>54</sup>1986 26 DLR (4th) 321.

<sup>55</sup>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 beads 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.

<sup>56</sup>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.<sup>57</sup>

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.'<sup>58</sup> Boberg<sup>59</sup> 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.<sup>60</sup> A good example of the application of the test is found in *O'Keefe v Argus Printing & Publishing Co*<sup>61</sup> 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*,<sup>62</sup> 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

<sup>57</sup>See Constitutional Principles II and V in Schedule 4 of the Interim Constitution.

<sup>58</sup>Thirion J in *Edouard v Administrator Natal* 1989 (2) SA 368 (D) 3771.

<sup>59</sup>*The law of delict vol 1 Aquilian liability* Juta 1989 33.

<sup>60</sup>For a list of cases, see Neethling Potgieter & Visser *Law of delict* 31–32 n 17.

<sup>61</sup>1954 (3) SA 244 (C).

<sup>62</sup>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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> 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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<sup>63</sup>PQR Boberg 'The wrongfulness of an omission' 1975 *SALJ* 361.

<sup>64</sup>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.

<sup>65</sup>'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.<sup>66</sup> The best interest of the child can therefore be a compelling state interest<sup>67</sup> justifying otherwise discriminatory legislation.<sup>68</sup>

## 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.<sup>69</sup> There is thus still time to alert the Constitutional Assembly<sup>70</sup> to the needs of the protection of specific (procreation) rights and the elimination of discriminatory statutes.

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<sup>66</sup>217 NJ Super 313 391 525 A.2d 1128 1167 (1987).

<sup>67</sup>See 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* 18:3 487-540, 507 and n 116; A L Ellen 'Privacy Surrogacy and the *Baby M* Case' 1988 *The Georgetown Law Journal* 76:5 1759-1792 1772.

<sup>68</sup>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.

<sup>69</sup>The final Constitution will be drafted within a two year period starting from the first sitting of the Constitutional Assembly.

<sup>70</sup>The National Assembly and the Senate sitting jointly will be the Constitution making body (section 68(1)).