

**THE INFLUENCE OF THE NATIVE TERRITORIES  
PENAL CODE ON SOUTH AFRICAN CRIMINAL LAW**

by

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SUMMARY

The Native Territories Penal Code (NTPC) was passed by the Parliament of the Cape of Good Hope in 1886. It was part of the administrative machinery of the Cape colonial authorities for the Xhosa speaking people who occupied the area between the Great Kei and the Mtamvuna Rivers. However, it became the criminal code applicable to all people living in the Transkeian Territories regardless of race or colour. The Code was enacted following the recommendations of the Cape Government Commission on Native Laws and Customs (1883).

Quite unexpectedly this Code exerted a great deal of influence on South African criminal law especially after union was formed in 1910. This was because the code was a document readily available to judges and magistrates in South Africa, and when a difficult question of law arose it was all very easy to say that the South Africa law on the point was as laid down in a particular section of the Code. In this way the Code also assisted in the importation of English law into South African law. Text book writers like Gardiner and Lansdown also contributed to the influence of the NTPC on South African criminal law.

As time went on, however, South African jurists saw the mistake of the NTPC being recorded as a correct reflection of South African law in particular areas and set out to correct the position. Prominent among these are De Wet & Swanepoel and P.M.A. Hunt. They achieved a great measure of success in watering down the influence of NTPC on South Africa law, although it cannot be said that they eradicated it.

So strong was the influence of this Code that it was felt even as far away as Rhodesia and Bechuanaland (as they then were).

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TABLE OF CONTENTS

	<u>PAGE NO.</u>
<u>CHAPTER ONE:</u> <u>IN LIMINE</u>	1
1.1                    Status Quaestionis	1
1.2                    Brief Review of the Literature	4
1.3                    Method	9
1.4                    Presentation	10
 <u>CHAPTER TWO</u> <u>THE CODIFICATION OF CRIMINAL LAW</u>	 12
2.1                    Meaning and Basis of a Code	12
2.2                    Codification in South Africa and Transkei	14
2.2.1                Codification in South Africa	14
2.2.2                Codification in Transkei	18
2.2.2.1             Transkei in Context of Africa	18
2.2.2.2             The Birth of the Transkei Penal Code	26
 <u>CHAPTER THREE</u> <u>INTERACTION OF LEGAL SYSTEMS</u>	 50
3.1                    The Impact of English Law on South African Law	50
3.2                    The Impact of English Law on the Transkei Penal Code	54
3.3                    The Impact of Roman-Dutch Law (South African Law) on the Transkei Penal Code	59
3.4                    The Impact of Indigenous Law and Related Practices on the Code	62
3.4.1                Impact on the 1883 Commission	62
3.4.2                Assault	65
3.4.3                Witchcraft	68
3.4.3.1             Introduction	68
3.4.3.2             The 1883 Commission	69
3.4.3.3             Belief in witchcraft as an extenuating circumstance	72
3.4.4                Circumcision	78
3.4.5                The Spoor Law	81
3.4.5.1             The Spoor Law in Customary law	81
3.4.5.2             The Spoor law in the Code of 1886	85

<u>CHAPTER FOUR:</u>	<u>UNLAWFULNESS</u>	87
4.1	Compulsion or Necessity	87
4.1.1	Introduction	87
4.1.2	English Law and the 1886 Code	88
4.1.3	The Defence of Necessity in South African Law	90
4.2	Obedience to Orders	108
4.3	Consent	108
<u>CHAPTER FIVE:</u>	<u>MENS REA</u>	112
5.1	The Liability of Children	112
5.2	Intoxication	119
5.3	Provocation	123
<u>CHAPTER SIX</u>	<u>PARTICIPATION AND ACCESSORIES</u>	
	<u>AFTER THE FACT</u>	154
6.1	The Doctrine of Common Purpose	154
6.1.1	The Impact of Section 78	154
6.1.2	Partial Departure from the Doctrine of Common Purpose	162
6.1.3	The Return to the Doctrine of Common Purpose	167
6.1.4	Objections to the Doctrine of Common Purpose	170
6.2	Accessories After the Fact	175
<u>CHAPTER SEVEN:</u>	<u>THE INCHOATE CRIMES</u>	183
7.1	Attempt	183
7.2	Conspiracy	188
7.3	Incitement	189

<u>CHAPTER EIGHT</u>	CRIMES AGAINST PROPERTY	193
8.1	Theft	193
8.1.1	Resistance to Code's influence	193
8.1.2	Acceptance of Code's Influence	195
8.1.2.1	Theft of Trust Moneys	195
8.1.2.2	Stealing from a Bank Account	203
8.1.2.3	Delictum Continuum	206
8.1.3	The Significance of Section 180 - 182	209
8.2	Arson	211
8.3	Robbery	218
8.3.1	English Law and the 1886 Code	218
8.3.2	The influence of the Transkei Penal Code	218
8.3.3	Partial Departure from the Grip of the Transkei Penal Code	225
<u>CHAPTER NINE</u>	FRAUD, EXTORTION AND FORGERY AND UTTERING	228
9.1	Fraud	228
9.2	Extortion	231
9.3	Forgery and Uttering	241
9.3.1	Forgery	241
9.3.1.1	Definition of Forgery	241
9.3.1.2	Meaning Document	244
9.3.2	Uttering	244
<u>CHAPTER TEN</u>	RAPE, ASSAULT AND MURDER	249
10.1	Rape	249
10.1.1	Introduction	249
10.1.2	Who can Commit Rape	249
10.1.3	The Requirement of Consent	250
10.2	Assault	252
10.2.1	The Impact of Section 155	252
10.2.2	Objections to the Code's influence	254
10.3	Murder	256
10.3.1	The Provisions of Section 140 of the Transkei Penal Code	256
10.3.1.1	Impact of Section 140 (b)	257
10.3.1.2	Impact of Section 140 (c)	258

10.3.1.3	Termination of the Influence of Section 140 (c)	258
10.3.2	The Impact of Section 134	260
10.4	Suicide	262
<u>CHAPTER ELEVEN</u> POSITIO QUAESTIONIS		264
11.1	The Successes and Failures of the Transkei Penal Code	264
11.1.1	Introduction	264
11.1.2	Assault	265
11.1.3	Theft	267
11.1.4	Rape	269
11.1.5	Arson	271
11.1.6	Intoxication	272
11.1.7	Incest	273
11.1.8	Suicide	274
11.1.9	Bigamy	274
11.1.10	The Doctrine of Common Purpose	275
11.2	The role of the courts	278
11.2.1	<u>Iudicis est ius dicere non dare</u>	278
11.2.2	<u>Decisis stare et quieta non movere</u>	281
11.2.3	Code Mistaken for Indigenous Law	281
11.3	The role of the writers	283
11.4	Concluding Remarks	285

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<u>TABLE OF CASES</u>	<u>PAGES</u>
Attorney-General Transvaal v Additional Magistrate for Johannesburg 1924 AD 421	112
Bagwasi and Louno v Rex. HCTLR 1926 - 1953	1,8
Bosch v R 1904 TS 55	103
Fellner v Minister of Interior 1954 (4) SA 523 (A)	15,143
Gaillard en Andere v S 1966 (1) PH.H. 74 (A)	157
Gagela v Gangca 21 EDC 351	67
Hardy v Motor Insurers Bureau (1964) 2 QB 745 CA	151
Harris and Others v Minister of Interior and Another 1952 (2) SA 428 (A)	15,143
Lebitsa Nkhaude V Samson Mafunda 3 NAC 266	86
Maklin, Murphy and Others 1839 2 Lewen 225 16 ER 1136	154
McDonald Ltd v Radin NO and the Potchefstroom Dairies and Industries Company Ltd 1915 AD 454	215
McKenzie v an der Merwe 1917 AD 41	155,173
Mfcketo v Madondile 1 NAC 130	67
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Mutual and Federal Insurance Co. v Oudtshoorn Munici- pality 1985 (1) SA 419	13
Nkambula v Linda 1951 (1) SA 377 (A)	275
Nkau Majara v The Queen 1954 AC 235 PC	176,177,179
Nkwana v Nonqaba 1 NAC 79 (1904)	65
Notaris v Rex 1903 TS 484	232,236
Nqakulisa and 9 Others v Magwetyana 4 NAC (1918) 341	85
Queen v Mbalo (1892) 10 Juta 380	85
R v Abrahams 1918 CPD 590	253
R v Adams 3 EDC 216	104
R v Albert (1895) 12 SC 272	103
R v Alpheus Dlamini (Swaziland 1980) unreported	205
R v Attia 1937 TPD 102	60,206
R v Attwood 1946 AD 331	5,125,126
R v Banda 1953 (2) SA 781	210

R v Bergstedt 1955 (4) SA 186 (A)	161
R v Blockland 1946 AD 1944	5,126
R v Bulani 1938 EDL 205	119,120
R v Bureke 1960 (1) SA 49 (FSC)	140,141
R v Buthelezi 1925 AD 160	5,123,124,125,126,128,130,220
R v C 1952 (4) SA 117 (O)	251
R v Canestra 1951 (2) SA 317 (A)	100
R v Carelse and Kay 1920 CPD 471	209
R v Chansie 1925 OPD 74	103
R v Chipesa 1964 (4) SA 472 (SRAD)	95
R v Collins 19 EDC 163	195
R v Damascus 1965 (4) SA 589 (SR)	90,91,95
R v Davies 1956 (3) SA 52 (A)	185,186
R v Davies 1928 AD 165	229
R v Dhlamini 1943 TPD 20	244,245
R v Dudley & Stephens 1884 14 QBD	89
R v Duma and Another 1945 AD 410	158,172,173
R v Du Randt and Another 1954 (1) SA 313 (A)	158,160
R v Dzwaka 1950 (3) SA 870 (E)	60,207,208
R v Edwards (1943) 1 Cox 32	223
R v Enslin (1885) Buch AC 69	213,216
R v Essop Mohamed and Others 1940 (1) PH.H. 23 (W)	159
R v Farquharson 1925 EDL 50	200
R v Farndon 1937 EDL 180	233
R v Freestone 1913 TPD 758	183
R v G 1938 AD 251	234
R v Gani 1957 (2) SA 212 (A)	179,180,181
R v Geerie and Others 1952 (2) SA 319 (A)	159,160
R v Golding (1896) 13 SC 210	196,197,199,200,203
R v Gqobo 1918 EDL 75	233
R v Gransworthy and Others 1923 WLD 17	156,158,163
R v Harlen 1964 (4) SA 44 SR	200,202
R v Harlow & Another 1955 (3) SA 259 (T)	194
R v Hercules 1954 (3) SA 382 (A)	92
R v Hoffman, R v Sachs & Hoffman (1906) Buch AC 342	214
(1906) Buch AC 342	214
R v Huebsch 1953 (2) SA 561 (A)	160
R v Jacobs 4 HC 236	223
R v Jansen 1959 (1) SA 777 (C)	238
R v Jolly and Others 1920 AD 176	254

R v Jones and Moore 1926 AD 350	229
R v Jongani 1937 AD	177,178
R v K 1956 (3) SA 353 (A)	114,115
R v Kaffir 1923 CPD 261	115
R v Kenene 1946 EDL 18	117
R v Khuzwayo 1949 (3) SA 761 (A)	258,259
R v Koale 1950 (3) SA 705 (O)	103,104
R v Kondora 1953 SA 216 (SR)	115
R v Koning 1953 (3) SA 220 (O)	92
R v Krull 1959 (3) SA 392 (A)	134,138,139,140
R v Kubusc and Others 1945 AD 189	157
R v Leballo 1954 (2) SA 657 (O)	244,245
R v Lebohang Nothane 1974 L.L.R. 64	146
R v Lepheane 1956 (1) SA 377 (A)	236
R v Letsoela 1942 OPD 99	244,245
R v Longone 1938 AD 523	160,161
R v M 1957 (2) SA 73 (E)	274
R v M and Others 1978 (3) SA 557 (T'kei SC)	117
R v Maarman (1886) 5 EDC	183
R v Mabena 1967 (3) SA 525 (SR)	259
R v Mabula 1927 AD 159	216
R v Mahwahwa 1956 (1) SA 250 (SR)	115
R v Makhethang Setai 1980 (2) LLR 359	147
R v Maninjwa 1919 EDL 196	246
R v Marvos 1921 AD 19	214,215,218
R v Matimba 1944 AD 23	235,236
R v Matshaba 1961 (3) SA 78 (T)	223
R v Mathews 1950 (3) SA 671 (N)	256
R v Matsitswane and Another 1924 AD 213	157
R v Mazunga 1938 SR 11	223
R v McCarthy 1954 (2) QB 105	151
R v McLean 1918 TPD 94	244
R v Medley 1951 (4) SA 241 (C)	103,104
R v Mfombo 1937 EDL 166	246
R v Mkize 1951 (3) SA 28 (A)	160
R v Mlooi and Others 1925 AD 131	177

R v Mneke 1961 (2) SA 240 (W)	92
R v Mofokeng 1941 OPD 233	103
R v Mohamed 1928 AD 58	233
R v Mohamed Rahman 1929 SR 17	251
R v Mokhlyane 1946 OPD 140	103
R v Molomo 1959 LLR 64	147
R v Monakali 1937 EDL 248	196, 201, 202
R v Morela 1947 (3) SA 147 (A)	157
R v Mosenane 1943 OPD 222	103
R v Motaung 1942 OPD 233	103
R v Moteto 1943 OPD 55	245
R v Mtsi 1908 EDL 24	85
R v Munango 1956 (1) SA 438 (SWA)	177
R v N 1955 (2) SA 647 (T)	236
R v Nbakwa 1956 (2) SA 557 (SR)	262
R v Neube & Koza 1950 (2) PH. II. 211 (A)	157
R v Ndhlangisa & Another 1946 AD 1101	157
R v Ndhlovu 1921 AD 485	189
R v Ngeobo 1928 AD 732	157
R v Ngqadu 1939 EDL 213	234
R v Nkosana 1942 EDL 81	228, 231
R v Nobele 1941 EDL 171	282
R v Nqweniso 1910 EDL 68	67
R v Nsele 1955 (2) SA 145 (A)	157, 160
R v Parker & Allen 1917 AD 552	183
R v Peizee 1916 SR 13	214
R v Peverett 1940 AD 213	252
R v Qubula 1907 EDL 289	85
R v Reccia 1946 EDL 1	1, 126
R v Satsisky 1915 CPD 547	200, 201, 202
R v Seane and Another 1924 TPD 668	53, 184, 185, 186
R v Sharpe 1903 TS 868	187
R v Shezi 1948 (2) SA 119 (A)	159, 160
R v Sigonga 1951 (1) SA 266 (E)	236
R v Sikhepe and Others 1946 AD 745	157
R v Smith 17 SC 561	108
R v Smith 84 JP 67	244
R v Sinayile 1910 EDL 58	67
R v Somaru 1956 PH. II. 105 (N)	223
R v Sophy 1961 R & N 358	256

R v Soyokomashe and Others 1956 (2) SA 142 (EDL)	216
R v Swart 12 SC 421 (1895)	195
R v Tailor and Others 1920 EDL 318	155, 156
R v Tanganyika 1958 (3) SA 9(FSC)	138, 139, 140, 141, 144
R v Thabatha 1946 PH. II. 160 (0)	223
R v Thabiso Legoetso 1971 - 73 LLR 44	145
R v Theunissen 1907 (ORC) 118	199
R v Thibani 1949 (4) SA 720 (A)	5, 127, 135, 138, 139
R v Tshabalala 1946 AD 106	126
R v Tshemese 1918 EDL 128	262
R v Tsholoba and Others 1960 (1) SA 764 (0)	197
R v Tsutso 1962 (2) SA 666 (SR)	115
R v Vallachia and Another 1945 AD 826	1, 220, 257
R v van Rensburg 1943 TPD 436	178
R v Vilakazi 1933 TPD 198	244
R v Villiers 1903 ORC 1	108
R v von Elling 1945 AD 234	60, 175, 178, 194, 204, 206, 208
R v Werner 1947 (2) SA 828 (A)	91
R v Xalisile 1939 EDL 189	233, 234
R v Xhalenkomo 1911 EDL 387	67
R v Zoncle and Others 1959 (3) SA 319 (A)	61
S v Adams 1979 (4) SA 793 (T)	100
S v Adams, S v Werner 1981 (1) SA 187	101
S.v Arnold 1985 (3) SA 256 (C)	133
S v Bailey 1982 (3) SA 772 (A)	144
S v Banur Investments (Pty) Ltd and Another 1970 (3) SA 767 (A)	243
S v Botha 1970 (1) SA 688 (0)	203
S v Bradbury 1967 (1) SA 387 (A)	96, 98, 106, 159
S v Campher 1987 (1) SA 940 (A)	133
S v Chretien 1981 (1) SA 1097 (A)	122, 272, 274
S v Coetzee 1974 (3) SA 571 (T)	174
S v Dambalaza and Others 1964 (2) SA 783 A	157
S v Dawidow TPD May 1968 (unreported)	109
S v Dé Bellocq TPD May 1968 (unreported)	109, 110, 111
S v Dreyer 1967 (4) 614 (E)	241, 242, 243
S v Francis 1981 (1) SA 230 (ZAD)	229, 230
S v George en Andere 1966 (4) SA 10 (GWL.D)	197
S v Gokool 1965 (3) SA 461 (N)	236

S v Goliath 1972 (3) SA 1 (A)	93
S v Gordon 1962 (4) SA 727 (N)	262
S v Grotjohn 1970 (2) SA 355 (A)	262
S v Gumede 1983 (3) SA 803 T'kei AD	164
S v Hartmann 1975 (3) SA 532 (C)	109,110,111
S v Howard 1972 (3) SA 277 (R)	141
S v J 1980 (4) SA 113 (E)	239,240
S v Jeremy (1895) 12 Cape Law Journal	249,251
S v Johnson 1969 (1) SA 201 (A)	121,272
S v Joubert 4 ORC 188	219
S v Katiyo 1981 (3) SA 34 ZAD	243
S v Kearney 1964 (2) SA 495 (A)	204
S v Kgoyane 1982 (2) SA 133	226
S v Khoza 1982 (3) SA 1019 (A)	167,168,178,180
S v Kibi 1978 (4) SA 173 (E)	98
S v Kotze 1965 (1) SA 118 (A)	194,204
S v Laubscher 1988 (1) SA 163 (A)	133
S v Lesch 1983 (1) SA 814 (O)	142
S v M 1974 (4) SA 564 (BSC)	115
S v Madlala 1969 (2) SA 637 (A)	162
S v Maizela (1) PH. H. 180 (C)	226
S v Makhalanyane 1980 (3) SA 426 (O)	226
S v Malinga and Others 1963 (1) SA 692 (A)	159
S v Mangootywa 1982 (T) (unreported)	226
S v Mangondo 1963 (4) SA 160 (A)	131
S v Manikinyeka and Others 1981 (4) SA 194 (ZAD)	208
S v Marx 1962 (1) SA 848 (N)	254,256
S v Maserow 1942 AD 164	178
S v Mavhungu 1981 (1) SA 56 (A)	259
S v Maxaba en Andere 1981 (1) SA 1148 (A)	163,166
S v Miya and Others 1966 (4) SA 274 (N)	254
S v Mkhuzeni Ntozimpi T'kei AD 1984 (unreported)	170,171,172
S v Mnguni 1963 (3) SA 268 (E)	159
S v Mntonintshi 1970 (2) SA 443 (E)	236
S v Mofokeng 1982 (2) SA 147 (T)	226
S v Mogala 1978 (2) SA 412 (A)	225
S v Mokete 1963 (3) SA 223 (O)	224
S v Mokonto 1971 (2) SA 319 (A)	5,131,134,135,136,137,138,139
S v Moloto 1982 (1) SA 844 (A)	226

S v Motau 1963 (2) SA 521 (T)	216
S v Motaung 1953 (4) SA 35 (O)	216
S v Mtinkulu 1971 (4) 141 (T)	226
S v Mtshiza 1970 (3) SA 747 (A)	259
S v Munyani 1972 (1) SA 411 (RAD)	233, 240
S v Nangani 1982 (3) SA 800 (ZS)	141, 142
S v Nkombani and Another 1963 (4) SA 877 (A)	162, 259
S v Nkomo and Another 1966 (1) SA 831 (A)	157
S v Nkosiyane 1966 (4) SA 655 (A)	190, 192
S v Palmos 1979 (2) SA 82 (A)	185
S v Potgieter 1977 (3) SA 291 (O)	240
S v Potgieter 1979 (4) SA 64 (ZRAD)	242, 243
S v Pretorius 1975 (2) SA 85 (SWA)	99
S v Rossi - Conti 1971 (2) SA 62 (RAD)	181
S v Ryneckce 1972 (4) SA 366 (T)	203
S v Safatsa and Others 1988 (1) SA 868 (A)	4, 169, 174, 277
S v Shaban 1965 (4) SA 646 (W)	229
S v Sihlahla and Others T'kei AD 1986 (unreported)	164, 165
S v Sikhunyana and Others 1961 (3) SA 550 (E)	254
S v Sithole 1981 (1) SA 1186 (N)	225, 226
S v S v Solomon 1973 (4) SA 644 (C)	217
S v Thembinkosi Tefu and Others T'kei AD 1982 (unreported)	75
S v Thenkwa 1970 (3) SA 529 (A)	174
S v Thomo and Others 1969 (1) SA 385 (A)	162
S v Tissen 1979 (4) SA 293 (T)	259
S v Tshitshi and Others T'kei SC 1988 (unreported)	74
S v Tum-Tum Lele T'kei SC 1984 (unreported)	134
S v van Niekerk 1980 (1) SA 594 (O)	246
S v Vela Bambi T'kei SC 1986 (unreported)	77
S v Velumurugen 1985 (2) SA 437 D & CLD	178
S v von Mollendorf and Another 1987 (1) SA 135 (T)	232, 239, 240
S v W 1976 (1) SA 1 (A)	186
S v Werner 1980 (2) SA 313 (W)	100
S v Williams en n Ander 1970 (2) SA 654 (A)	159
S v Witbooi 1984 (1) SA 242 (C)	226
Saliwa v Minister of Native Affairs 1956 (2) SA 310 (A)	43
Seccombe v Attorney General 1919 TPD 270	244
Siduntsa v Rex 1912 EDL 431	202
Tessener v S 1962 (2) PH. H. 256 (A)	159
Umhluzi v The Messenger of the Court, Tsomo-Cape Law Journal (1890) 180	86
Zanghuza v Monelo and Others 3 NAC 30	67

CITATION OF CASES

HCTLR: High Commission Territories Law Reports

- 1 NAC: Reports of the Transkeian Territories Native Appeal Court (1894 - 1909)
- 2 NAC: Reports of the Transkeian Territories Native Appeal Court (1910 - 1911)
- 3 NAC: Reports of the Transkeian Territories Native Appeal Court (1912 - 1917)
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NAC: (C & O) : Reports of the Cape and Orange Free State Native Appeal Court (1929 - 1948)

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NAC (S) : Reports of the Southern Native Appeal Court (1948 - 1962)

NAC (C): Reports of the Central Native Appeal Court (1948 - 1962)

NAC (NE): Reports of the North-Eastern Native Appeal Court (1948 - 62)

BAC (S): Reports of the Southern Bantu Appeal Court (1963 - 76)

BAC (C): Reports of the Central Bantu Appeal Court (1963 - 76)

BAC (N-E) : Reports of the North-Eastern Bantu Appeal Court (1963 - 76)

NHC : Reports of the Natal native High Court 1899 - 1929)

TABLE OF STATUTES

SOUTH AFRICA

Black Administration Act 38 of 1927  
Criminal Law Amendment Act of 1908 Transvaal  
Criminal Law Amendment Act of 1909 Natal  
Criminal Law Amendment Act 1 of 1988  
Criminal Procedure Act of 1917  
Criminal Procedure Act 56 of 1955  
Criminal Procedure Act 51 of 1977  
General Law Amendment Act 76 of 1962  
Immorality Act 23 of 1957  
Law of Evidence and the Criminal Procedure Act Amendment Act 103 of 1987.  
Natal Code of Zulu Law, 1878  
Natal Code of Zulu Law, 1891  
Native Territories Penal Code Act 24 of 1886, Cape  
Ordinance 18 of 1938, Cape  
Ordinance 26 of 1904, Transvaal  
Pre-Union Law Revision Act 26 of 1970  
Pre-Union Law Revision Act 43 of 1977  
Prisons Act 8 of 1957  
Proclamation No. R151 of 1987 : Code of Zulu Law  
Republic of South Africa Constitution Act 32 of 1961  
Riotous Assemblies Act 17 of 1956  
Witchcraft Suppression Act 3 of 1957

TRANSKEI

Criminal Procedure Act 13 of 1983  
General Law Amendment Act 27 of 1977  
Penal Code Act 9 of 1983  
Regional Authority Courts Act 13 of 1982.

OTHER COUNTRIES

Botswana Penal Code 1964 (Law 2 of 1964)  
Criminal Justice Act of 1925 (British)  
Criminal Law Amendment Act of 1885 (British)  
Criminal Law (Homicide Amendment) Proclamation 42 of 1959 (Lesotho)  
KwaZulu Act 6 of 1981  
Larceny Act of 1916 (British)  
Supreme Court Act 28 of 1981 (Zimbabwe)  
Theft Act of 1968 (British)



CHAPTER ONE  
IN LIMINE

1.1. STATUS QUAESTIONIS

The aim of this study is to investigate the significance of the Native Territories Penal Code, more especially its influence on South African Criminal law. This inquiry has been prompted primarily by statements of the judges of the Supreme Court of South Africa, in certain cases heard in South Africa, to the effect that in given instances the South African law is as laid down in the Code.<sup>2</sup> Similar statements were made by judges in Rhodesia (as it then was) about the relevance of this code to the criminal law of that country.<sup>3</sup> It would appear that the Native Territories Penal Code was such a persuasive document that even lawyers in the High Commission Territories looked to it for solutions when difficulties arose.<sup>4</sup>

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1 Act 24 of 1886 (Cape)

2 See for example. R v Valachia & Ano. 1945 AD 826 R v Reccia 1946 EDL 1.

3 R v Harlen 1964 (4) SA 44 (SR)

4 See Bagwasi and Louno v Rex HCTLR 1926 - 1953 at 38

It is not difficult to see why judges and lawyers in various parts of Southern Africa should from time to time have looked to the Penal Code of the Transkeian Territories as a guide for the solution of problems that arose. It will be remembered that when the Union of South Africa came into being this Code was the only comprehensive criminal statute in the Southern African region. When the Union was formed Transkei became part of South Africa, and South African judges themselves handled and administered and interpreted the Code, and it is not difficult to understand why they should readily have regarded it as part of South African law. In this regard the problem facing the judges not only in the Eastern Cape, of which Transkei was judicially part and parcel, but throughout South Africa was made more acute by the emergence in 1931 of the eminent work of Gardiner & Lansdown on South African Criminal Law and Procedure. In his thesis entitled "Judicial considerations on the imposition of punishment: A historic study" (unpublished) Professor A J Middleton rightly points out that the learned authors would, as part of the text and not even as an annexure, append the relevant sections of the code to the discussion of the corresponding aspects of the general law of the country.<sup>1</sup> Where problems arose which neither the common law nor the statute law could solve, the judges and practitioners simply relied on the Code which, in the words of Middleton,

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1 See page 574

was "constantly at (their) elbows."<sup>1</sup>

Closely related to my already stated aim in attempting this study, it is essential to bear in mind that this Penal Code was enacted by Western lawyers and meant to be applicable, for the most part at any rate, to a non-westernised African community which had always had its life governed by the indigenous criminal law. This factor would no doubt have exercised the minds of those who drafted the code.<sup>2</sup> It immediately becomes important to investigate the extent to which they took this into consideration, for in so doing they were faced with the problem of the interaction between the indigenous law and the received Western law. This therefore brings to the fore the question of the distinction between the Western concepts of criminal law and procedure and their development and the indigenous concepts of criminal law and procedure. A related question is how far, if at all, did the code go in effecting a reconciliation between these two different approaches.

It is known that in 1976 Transkei became independent of South Africa and seven years later she passed the Transkei Penal Code Act.<sup>3</sup> It seems to be important to inquire into the extent to which the provisions of the 1886 code have been retained as well as the

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1 Op cit 582

2 See generally chapter 2.2.2.2 infra

3 Act No. 9 of 1983

extent to which they have been discarded. This will be an acid test of the strength and resilience of the 1886 code. Likewise it is intended to investigate to the extent to which South African law has recommended itself to the legislative authority of a state which has attained its independence from South Africa after a period of sixty six years. It will be found that there are definite departures from the 1886 code while in some areas the original provisions have regrettably been retained especially in controversial areas like the common purpose doctrine.<sup>1</sup>

## 1.2 BRIEF REVIEW OF THE LITERATURE

There is no major work that has hitherto been undertaken in this field. Nevertheless, the influence of the 1886 Code of South African law has from time to time been spelt out by scholars. In many instances this influence was not dealt with in isolation. It was treated as one of several factors which demonstrated the influence of English law on South African law. For instance in his article entitled "Some reflections on our criminal law", Pain<sup>2</sup> discusses at some length the influence of English law on South African law. He refers to the Transkei Penal Code merely in passing - a matter of two lines under the subheading "the non-European and the Criminal law" in an article that covers over twenty pages.

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1 c.f, however, S vSafatsa & Others 1988 (1) SA 868 (A) for the resurgence of this doctrine in South Africa.

2. Acta Juridica 1960 at 289

In a thesis entitled "Die Leerstuk van verminderde strafbaarheid"<sup>1</sup> D.P. van der Merwe pays definite, albeit little, attention to the influence of the Transkei Penal Code on South African law. He points out, rather inaccurately in my view, that, following the code, drunkenness was accepted by the courts as a factor for reducing a conviction from assault with intent to do grievous bodily harm, to one of assault common.<sup>2</sup> He also deals, again in passing, with the famous section 141 which led the courts to accept provocation as being sufficient to reduce murder to culpable homicide.<sup>3</sup> The author otherwise does not express any personal views on the matter. A comprehensive exposition of the influence of the Transkei Penal Code on South African law is to be found in the thesis of Middleton. There, for the first time, we find a systematic treatment of the various fields in which the influence of the code is discernible. The treatment is not exhaustive, but the learned author discusses eight important areas: the versari doctrine, the common purpose doctrine, provocation, ignorance of the law and claim of right, the criminal liability of children, acting upon the orders of another, the concept attempt and the liability of accessories after the fact. Judged against other performances it must be admitted that the treatment here accorded to the code is most generous,

1 LLD Unisa 1980

2 See page 217. Vide 5.2

3 See pages 240-248 of van der Merwe's work, where the Butelezi, Attwood, Blokland, Thibani, and Mokonto cases are also discussed.

and the ten page commentary is sufficient to attract the curiosity of any academic who has particular interest in legal developments in Transkei and to inspire further research in the field.

As far as the writers of the leading textbooks on South African law are concerned, it appears that at the beginning the tendency was to regard the Transkei Penal Code as correctly reflecting the South African Law. I refer here to Gardiner & Lansdown. As a result the influence of the Transkei Penal Code on South African law was accelerated. The turning point in the correlation that had existed over sixty years between the Penal Code and South African Criminal law came after the emergence in 1949 of an eminent publication by Professors J.C. de Wet and H.L. Swanepoel entitled: Die Suid-Afrikaanse Strafbreg. These authors took a line totally different from that of Gardiner & Lansdown and the effect of their approach was to water-down the influence of the Transkei Penal Code on South African Law. They dealt with the Code mainly in respect of each of the various specific offences, and in each case they showed, sometimes with signs of emotion, how it had in the past been regarded

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1 First edition 1949. Second edition 1960. Third edition 1975. Forth edition 1985.

as correctly reflecting the South African law. Thus with reference to provocation in relation to the law of homicide they describe the code as "hierdie omslagtige en verwarde stukkie wetgewing" - "this<sup>1</sup> cumbersome and confused bit of legislation (!)". Otherwise the learned authors did not at all concern themselves with the overall significance of the Code.<sup>2</sup>

<sup>3</sup>  
Hunt deals with the code in much the same way as De Wet & Swanepoel. Admittedly he is highly scientific in his analysis of the code and those of its provisions with which he deals, but again this analysis is confined to those sections of South African law to which it is relevant. The learned author is quite critical of the Code's influence on South African law. For example he speaks of it as "preserving, like ugly fossils, several unsatisfactory and illogical ideas".<sup>4</sup>

<sup>5</sup>  
A more recent textbook is Snyman's Criminal Law. The author's treatment of the Code is, to say the least, merely cursory. It is significant that he refers to the Code as having been passed for operation in Transkei and adjacent areas. This seems to indicate how little attention the author has devoted to an understanding

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1 2ed at 120 c.f. 4ed 133

2 The reaction of the authors to the Code was of course part of a general objection to the importation of English law into South African law.

3 South African Criminal Law & Procedure Vol.2, 2ed by J.R. Milton

4 Op cit 246. The remarks made in footnote 2 supra apply here.

5 This is a very straightforward translation of the author's work which appeared in Afrikaans in 1981 and is preferred by many students. (2nd edition 1986).

of the Code. However there is the consolatory reflection<sup>1</sup> that he is not the only perpetrator of such errors. Apart from that the learned author makes the point that the Code "in later years" exerted a great deal of influence on South African law as expounded by the Courts and gives section 141 (provocation) and section 179 (theft) as examples.<sup>2</sup> When discussing provocation he sufficiently indicates the impact of section 141<sup>3</sup> and when discussing theft the impact of the Code is presented rather mildly and in passing.<sup>4</sup> In his 10 page article "Die invloed van die Engelese en die Duitse reg op die Suid - Afrikaanse strafreg"<sup>5</sup> the author's discussion of the Code is limited to less than a page.

At the end of the day it transpires that the role played by the Native Territories' Penal Code has not yet been examined in detail. It is my object in the pages that follow to give it the attention it deserves.

### 1.3 METHOD

Initially I proposed to discuss the twenty chapters of the Code (two hundred and seventy sections) consecuti-

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- 1 See statement of Huggard CJ in Bagwasi and Louno v Rex HCILR 1926 - 1953
  - 2 See page 10
  - 3 See pages 147 - 149
  - 4 See at page 439
  - 5 De Iure vol. I 1981 page 68

vely, and in so doing indicate the sections which had an influence on South African law and lay the necessary emphasis on them. I would likewise have stated that other sections, as I came across them, did not have an influence on South African law. However I decided against this method as I felt that it would make my thesis very long. Certainly, a lot of time and space would have been spent on irrelevant material. I therefore finally decided to discuss general principles and specific offences with particular reference to areas in which the Code did have or could reasonably have been expected to have an influence. This must not at all be taken to mean that I have therefore been able to deal exhaustively with those areas in which the Code had an influence. The point is that a random discussion of each and every section of the Code would have done more harm especially from the point of view of relevance.

My research has been confined mainly to case law, textbook writers, and periodicals. Thus I have departed from the method I employed during my research for the degree of Master of Laws where I conducted some interviews as part of the research<sup>1</sup>. Furthermore as the study is partly of a historical nature I have<sup>2</sup> to depend also on historical works where relevant.

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- 1 See Customary Law in a Changing Society, Juta 1980 at pages 64 to 66
  - 2 eg. Theal: Records of the Cape Colony

Finally, I have felt constrained to adopt, as much as possible, a comparative method. In this regard the impact of customary law and related practices on the Code will be highlighted. When one recalls that topics such as witchcraft have exercised the minds of the South African legislature just about as much as they exercised the minds of the commissioners who drafted the Code, the relevance of this method of approach becomes undoubtable. The inclusion of the chapter on the interaction of legal systems has to be seen against this background.<sup>1</sup>

#### PRESENTATION

The study will consist of eleven chapters, the first three being of an introductory nature. Apart from what has been said above, chapter two will deal with the whole question of the codification of criminal law in South Africa in particular and Africa in general, thus placing the birth of the Transkei Penal Code in perspective. In chapter three I shall deal with the question of the interaction of legal systems. English law had itself an influence on South African Law, while indigenous law was a factor to be reckoned with at the advent of received Western law in Southern Africa. This chapter should therefore be important for showing that the influence of the Code on South African criminal law took place in the context of the

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1 Vide chapter three

general tendency of legal systems to take friendly cognisance of each other once the battles between the conqueror and the indigenous peoples are over.

The rest of the study will consist of four chapters on the general principles of criminal responsibility and three chapters on several topics relating to specific offences. In these chapters the main aspects of the influence of the Code on South African criminal law will be demonstrated. In chapter 11 I shall then consider the successes and failures of the Code as well as the extent to which the courts and the textbook writers promoted or terminated, as the case might be, the influence of the Code on South African criminal law.

CHAPTER TWO

THE CODIFICATION OF CRIMINAL LAW

2.1 MEANING AND BASIS OF A CODE

According to the American writer R Floyd Clarke<sup>1</sup> a code is a complete enactment, a substitute for all the former law.<sup>2</sup> In his article entitled "Colloquium on African Law"<sup>3</sup> Allott takes an interesting look at the whole question of codification of laws. He raises the question: "What is a Code?" But he seems to attempt no straight and clear definition as such, and the most that one gets is the explanation that English law is uncodified, that law in the common law African countries is uncodified, that a distinction that has been made between codification and consolidation has not been useful!<sup>4</sup> The learned author however does indicate that " a code is a handy and authoritative guide ... to the applicable law ... (it) makes the law simpler and more accessible and in the circumstances of Africa, more portable".<sup>5</sup>

It is certainly worthwhile to recall that the idea of codification of laws is not new. In Western Europe codes have been enacted and all along the way they have been successful. In Greece there were the codes

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1 The Science of Law and Law making : Fred B Rothmans & Co., Littleton, Colorado, 1982

2 See at page 280

3 1963 Journal of African Law Vol. 7 No. 2 p.75ff

4 See especially at 76

5 Ibid

of Lycurgus and Solon. In Rome there was the mighty work of Justinian which superseded for ordinary use many written commentaries on the law. In Prussia there was the code of Frederick the Great. In France was the Napoleon Code, and it has even been affirmed that the maritime and commercial Ordinances of Louis XIV of 1673 and 1681 not only put an end to a vast extent of litigation in the different maritime provinces of France, but also furnished rules so clear and so equitable that they were adopted as the basis of much of the maritime law of England and other countries.<sup>1</sup>

It is perhaps worth recalling that Hammurabi was one of the forerunners in the field of codification and there followed the Germanic Codes. It would appear that there is a distinct difference between the Germanic Codes and the Native Territories Penal Code on the one hand and the modern European Codes on the other. While the former sought to bring together the gap between an indigenous system and a dominant "imported" system of law and thus create new law, the latter seek to simplify and bring certainty to the existing law in a country. Had codification taken place in South Africa different reasons would have come into the picture for that country, inter alia the preservation of Roman Dutch Law as well as the making of a fresh start politically with the conversion of South Africa into a Republic.<sup>2</sup>

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1 See The Golden Age of American Law ed Charles M Haar p.255 George Braziller Inc. New York 1965. Among the "other countries" referred to by the learned author one must include South Africa, Transkei and all the Roman Dutch Law countries of Southern Africa. This was made clear in Mutual and Federal Insurance v Oudtshoorn Municipality 1985 (1) SA 419 where (at page 427) Joubert J noted the reliance of Voet on the Edict of Louis XIV of 1681

2 See 2.2.1 infra

It is indeed interesting to note that no people which has since departed from the era of unwritten law and taken to codification has ever regretted it and opted out of it. As D D Field correctly points out<sup>1</sup> even where the written law has been imposed upon a conquered people, to whom it must have been at first distasteful for that reason, it has held its place even after the foreign domination has departed. The Republic of Transkei is certainly a case in point. Despite the overwhelming influence of South African law on Transkei, inevitable because of South Africa's relationship with Transkei over a long period dating back from 1910, the idea of forsaking the Transkei Territories Penal Code never recommended itself to the Transkeians. Looking specially at African countries, Allott<sup>2</sup> notes that existing laws usually lack any adequate general law covering principles of interpretation of statutes and choice of law in internal conflicts. There arises, therefore, a need for a preliminary code or law which could be ideally called the Application of Laws Act.

## 2.2. CODIFICATION IN SOUTH AFRICA AND TRANSKEI

### 2.2.1 Codification in South Africa

South Africa, taking after England, is a living example of a country in which there is a triumph of judge-made law. In both countries the judges have a fairly wide latitude when they interpret statutes. They

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1 "Reasons for codification" in: The life of the law ed John Honnold, The Free Press of Glencoe 1964.

2 Ibid

overrule or distinguish precedents although of course the discretion of the judges is fettered to a large extent by the law governing the interpretation of statutes.

The reasons for the triumph of judge-made law in England and South Africa are exactly the same. They have been listed with particular reference to England by Glanville Williams<sup>2</sup> as follows:

- a) Parliament is industrious in multiplying offences very inartistically drawn but is very slow to remedy clear absurdities and deficiencies in the law as they come to light.
- b) Both Government and Parliament are inadequate to meet all the demands made upon them.
- c) In England there is no criminal code superceding protean rules of common law.

It has been contended that codification is good because it is the best way of ensuring that all those who are required to obey the laws have an opportunity to know what they are. "These laws are now sealed in books, and the lawyers object to the opening of these books. They can be opened by codification and only by codification ... writing... in a book of such dimensions and in such language that all can

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1 See e.g. Harris & Others v Minister of Interior & Another 1952 (2) SA 428 (A). See also Fellner v Minister of Interior 1954 (4) SA 523 (A).

2 Textbook of Criminal Law p.7

read and comprehend it."<sup>1</sup> Of course the matter is not quite as simple as the learned author puts it. The successful consultation of a statute presupposes an extensive knowledge of the law of interpretation. This may involve the consultation of a number of divergent statutes and a reconciliation of the provisions contained therein and that is no easy task for judge and lawyer alike. However it is clearly easier for the public to consult a modern statute than it is for him to consult a variety of more obscure sources. For this reason I am in support of the contention that codification is good.

It is not surprising that in South Africa the question of codification has been a subject of debate among jurists, some being in favour, others being against it. As early as 1930 Sir John Wessels<sup>2</sup> spoke at length expressing concern about the future of Roman Dutch Law in South Africa.<sup>3</sup> He saw codification as a very viable instrument for the preservation of Roman Dutch Law. The law is "buried in Latin folios" and if there is no reason to codify the English law which, it is said, is readily found, the same just cannot be said of Roman Dutch Law. He concludes: "Without a code my fears for Roman Dutch law are great, mainly because dreary and

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1 D Field: "Reasons for Codification" in : The life of the Law ed John Honnold, The Free Press of Glencoe 1964.

2 Judge President of the Transvaal Provincial Division

3 1920 SALJ Vol. 37 p.265

pedantic schoolmasters and professors have conspired to rob Latin of its vitality as a language and converted it into an examination engine for torturing growing boys and girls."<sup>1</sup> Thereafter several South African jurists came out strongly in favour of codification. Prominent among these were Gie<sup>2</sup> and du Plessis.<sup>3</sup> Hamman<sup>4</sup> and Roberts<sup>5</sup> also lent considerable support to the idea of codification.

There are also jurists who came out strongly against codification in South Africa. These include de Wet and Hahlo.<sup>5</sup> Hahlo contended that codification does not necessarily bring about legal certainty, and it succeeded in France, Holland and Germany simply because of the diversity of laws and it was the only practical way of bringing about unity. The overall picture is that those who oppose codification say it would be about just as bad as the disease it sets out to cure, at least as far as South Africa is concerned, and the whole exercise would therefore be a futile one. However the reasons given as making codification good for France, Germany and Holland should apply equally if one looks at South Africa in its real context with Xhosas, Zulus, Whites, Coloureds, Indians, Sothos, etc.

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1 At 385. It is also averred that the requirement of Latin is used as a means of limiting entry to legal practice.

2 THRHR (Vol. 8) 1944 at 201.

3 THRHR (Vol.18) 1955 at 257. He made the point that a fresh start was to be made politically with the conversion of South Africa into a Republic and it would be fitting to make a break with the past in the field of law by codifying the law.

4 Kroniek : Kodifikasie van die reg in Suid-Afrika? 1961  
THRHR 152 5 Ibid 6 Ibid

At this juncture it is perhaps fitting to reflect briefly on the most recent version of the Natal Code of Zulu Law<sup>1</sup> This legislation ofcourse applies specifically to the Zulu ethnic group in Natal, although the act constantly refers to blacks instead of Zulus. Like its predecessor<sup>2</sup> it has a few sections which are devoted to offences and a general penalty.<sup>3</sup> Quite strangely in my view, the code makes the seduction of an unmarried girl one of the offences, punishable by the general fine of R200.00 or six months' imprisonment.<sup>4</sup> This is a drastic departure from customary law and it has no parallel even in the received western law.

#### 2.2.2 Codification in Transkei

##### 2.2.2.1. Transkei in the Context of Africa

In order to realise how fitting it was that the Transkei Penal Code of 1886 should have come into existence, one has first to understand Transkei in the context of Africa. It is an inevitable result of colonisation that one sovereign is replaced by another and the law of the Colonists assumes dominance and becomes "the law of the land". It has been rightly pointed out by Mittlebeeler<sup>5</sup> that when a political power from outside assumes dominance over an indigenous population decisions have to be made regarding systems of social control. In Zimbabwe, for instance, African courts were as from 1891, prohibited

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1 Proclamation no R151 of 1987.

2 Law 19 of 1891 (Natal)

3 Sections 115 - 118

4 See Section 115 (e)

5 African custom and Western law 1976 at 9.

from imposing any sanctions whatsoever and chiefs who violated that prohibition and were caught found themselves charged with extortion.<sup>1</sup> African criminal law deriving from Roman Dutch jurisprudence and enactments of the legislature superseded the African law of crimes and reached out to all persons except certain statutory provisions which, in later years, found application in South Africa on a racial basis. There were a few exceptions like Nigeria where the customary judicial authorities were allowed to prescribe the ultimate penalty for serious offences.

In the Ciskei Sir Benjamin D'Urban, Cape Governor, concluded a series of treaties or peace agreements with the Chiefs of various tribes occupying the territory between the Keiskamma and the Great Kei Rivers in 1835. A salient aspect of those treaties was the introduction of Roman Dutch law in the field of criminal law, and the abolition of customary criminal law.<sup>2</sup>

Be all that as it may, the fact of the matter is that throughout Africa English criminal law appears in different disguises and these disguises are all in the form of codes. The codes are named after the countries to which they apply. The force and power of English law

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1 See Mittlebeer: Ibid 205

2 See Mqeke: The History of Recognition and Application of indigenous law in the Ciskei. Transkei Law Journal 1986 at page 77

in the English-speaking territories north of the Zambesi has grown from strength to strength because unlike Southern Africa, the strong voice of Roman Dutch law is not heard in those areas. In penal codes certain offences such as treason and piracy are defined merely by reference to the law "for the time being in force" in England.<sup>1</sup> The result is that the laws of those countries change automatically when the law in England changes, a danger to which the Transkei Territories Penal Code of 1886 was never exposed.

The provisions for the interpretation of several of these codes also demonstrate the force and power of English law in the countries concerned. Section 4 of the Penal Code of Tanganyika (as it then was) provided: "This code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed so far as is consistent with their context, and except as may be otherwise provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith". In Uganda, Kenya, Zanzibar, the Gambia and Northern Rhodesia and Nyasaland (as they then were) provisions in terms identical to this were to be found.<sup>2</sup> The result is that even if the various codes are amended here and there by

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1 Read op cit p.7

2 Read : ibid

the respective governments, English decisions would be and no doubt are even now piously quoted in the courts, and a close eye is likewise kept on developments in English law.

I now consider the position in Southern Africa, a region in which legal development has been made more fascinating by the predominance of Roman Dutch Law as the basic law. Here one is faced with three parallel streams of legal philosophy : the indigenous law, the Roman Dutch law and the English law. The latter found its way into the region through two main doors : the British occupations of 1795 and 1806 and the Transkei Territories Penal Code. Over the many years of co-existence these legal systems have exerted influence on each other in one way or another.<sup>1</sup>

The only areas in which codification has taken place in this whole region are Transkei, Natal and Botswana. The Botswana Penal Code<sup>2</sup> is by far the youngest of the Codes. It is essentially of English orientation and was enacted by the legislature of the Bechuanaland Protectorate shortly before independence. The code abrogated Roman Dutch Law by stipulating that the unwritten substantive criminal law in force in the colony of the Cape of

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1 As to the influence of English rules on Roman Dutch law and vice versa see Reid : "Criminal Law in the Africa of Today and Tomorrow" : Journal of African Law Volume 7 (1963) pages 1 and 14 respectively. For the influence of Roman Dutch Law rules on Customary Law see Koyana : Customary Law in a Changing Society pp 26 and 75.

2 Law No. 2 of 1964

Good Hope on 10 June 1891 shall no longer be of force in the Territory.<sup>1</sup> It further lays down that the rules of construction of the Code shall be those of English law.<sup>2</sup> The code further uses the familiar English expression of manslaughter, malice aforethought etc.

The Natal Code of Zulu law is unique in that it includes both criminal law and private law. The first code was proclaimed in 1878 and applied to the Natal of that time: the area between the Umzimkulu and Tugela Rivers. In 1887 the operation of this code was extended to Zululand, this being the area between the Tugela River and the then Portuguese Territory of Mozambique. The second code was contained in the schedule to Law 19 of 1891 and it replaced the 1878 code in Natal only, and thus two codes remained in operation, one in Natal and one in Zululand. The first Code was repealed in 1929 and by Proclamation No.168 of 1932 a new schedule to the law 19 of 1891 was substituted. The operation of the new code was extended to Zululand so that there remained one code in operation. It is now known as the Natal Code of Zulu law. More recently the KwaZulu legislature has passed a new act dealing with the code of Zulu law,<sup>3</sup> operative in KwaZulu only, so that there are now two codes of Zulu law. The latest development in this regard is the passing of Proclamation No. R151 of 1987 being the new Natal Code of Zulu law.<sup>4</sup>

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1 Section 2

2 Section 4

3 KwaZulu Act No.6 of 1981. KwaZulu Government notice No.47 of 1982; replaced by KwaZulu Act on the Code of Zulu law, No.16 of 1985; KwaZulu Government notice 105 of 1986.

4 See 2.2.1 supra

The aim of the Natal Code of Zulu law was "to have some uniform system of civil jurisdiction right throughout the country" because there was "considerable variety in the practice of magistrates in different districts, and indeed, in the custom of the Natives themselves, occupying different districts in Natal..."<sup>1</sup>

The oldest criminal code in Southern Africa, and indeed the oldest type of criminal Code of English law origin in the whole of the African continent, is the Transkei Territories Penal Code of 1886. As indicated above<sup>2</sup> it is essential that one looks at Transkei not in isolation but in the context of Colonial Africa as a whole and that is why it was necessary to look closely at the question of the codification of laws in African countries. Up to the middle of the nineteenth century the people of Transkei lived as totally independent chiefdoms with their own legal system and constitutional and social organisation in the area between the Kei and Mtamvuma Rivers, between Lesotho and the South-East coast of Africa bordering the Indian ocean.<sup>3</sup> This independence was enjoyed despite the arrival of the white people in South Africa in 1652. It was for the first time in 1854 that Sir George Grey, a senior British Civil Servant who was Governor and High Commissioner of the

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1 Per Mr Justice Beaumont, quoted by A J Kerr in "The Reception and Codification of Systems of Law in Southern Africa": Journal of African Law (vol 2) 1958 p.92

2 See page 16

3 See Saunders : "The Annexation of the Transkei" in Beyond the Cape Frontier ed. Saunders and Derricourt: Longman at p.185

Cape Province, urged that this area should be brought under British rule.<sup>1</sup> But nothing happened until the granting of responsible government to the Cape Colony when the British took positive steps to bring Transkei under British rule. This was effected by a series of annexations which took place during the period 1879 to 1894.<sup>2</sup>

The annexation took a period of about 20 years because the Cape Government was dealing not with one tribe but with several nations each with its own legal system and political organisation and military structure. Thus Saunders says: "When the Cape's first responsible ministry decided in 1873 that the self-governing colony should expand across the Kei there were a considerable number of important independent African states within what was in 1910 to become United South Africa; by 1894 Pondoland was the only such state in that area to have survived."<sup>3</sup> The independent states were Fingoland annexed in 1879, Griqualand East (the Bacas) annexed in 1879, Western Pondoland annexed in 1884, Thembuland annexed in 1885, Gcalekaland (Xhosas proper) annexed in 1885, Bomvanaland annexed in 1885, Xesibe annexed in 1886, Rhode annexed in 1887 and Eastern Pondoland annexed in 1894.<sup>4</sup>

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1 op cit

2 Ibid

3 Ibid 186

4 Ibid

A significant consequence of the annexation of Transkei was its retention of a separate status. The various Territories were not incorporated into the Cape's political legal and administrative systems as had been done with the Ciskei (British Kaffraria) in 1866. They were governed in a distinct way. Saunders explains that the basic reason for this special status was that "the great bulk of the Transkeian population was black and these blacks lived not on white farms but on their own land". The interminable delay in the annexation of Pondoland was due to fear by the Imperial Government. "It feared that the Mpondo might resist with arms any attempt to end their independence and that a Mpondo war might set the rest of the Transkei aflame". There were yet more fears: "The white governing class came to fear that the Africans of the Transkei, instead of becoming 'civilised' by being brought within the colony, might barbarise the Colony." Yet another consequence of colonisation was that the various independent nations of Transkei were given the vague and nebulous appellation "Territories" and the Kings of the Pondo, the Xhosa and the Thembu nations were demoted to the title of Paramount Chiefs - obviously because there could be no three or four bulls in the same kraal. The king could only be the one at Buckingham Palace in London and that was that.

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1 op cit 193

2 Ibid

3 Ibid 195

Be all that as it may, the point is that there existed several distinct nations that were brought together for the first time under one administration. If anyone feels that Saunders is overly liberal or generous in regarding them as nations then even the most conservative among us will at least be prepared to say that these were the principalities of Transkei, or if one likes, these were the counties of Transkei, just like those principalities and counties that were in Western Europe. So if, as urged by De Wet,<sup>1</sup> it was desirable that codification should take place in Germany and Holland, the same applied here. All the more so here, in view of the fact that there was also the white population, as well as the inevitable emergence of a coloured population which takes place automatically when Black and White live together. A code that would cater for all the people of the new Transkei was plainly desirable.<sup>2</sup>

#### 2.2.2.2 The Birth of the Transkei Penal Code

The birth of the code for the Transkeian Territories was closely linked to the colonisation process. It was as part of that process that various facets of life of the colonised were looked into and changes introduced so as to facilitate understanding and peaceful coexistence between the colonists and the colonised.

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1 1961 THRHR 152

2 For a "statement of the Transkeian system of Administration up to the time of Union" see W J G Mears : A study in Native Administration: The Transkeian Territories 1894 - 1943. (Doctoral Thesis, Unisa, 1947. unpublished) The author mentions the Code, albeit in passing, as one of twelve leading features of the Transkeian system of administration.

In this regard the role of the missionaries in the spheres of religion and education is well known. In the field of law it was at first attempted to modify the indigenous law.

The first attempts were made by Sir Benjamin D'Urban, Cape Governor. This was in the area between the Keiskamma and the Great Kei Rivers, when the settlers had clashed with the Xhosas in the Frontier War of 1835 in the course of the Xhosas' steady but certain moves to the west. It would appear that a simple code was then contemplated for this area, but the British reversed the policy initiated by Sir Benjamin D'Urban and receded from the conquered territory, the area east of the Great Fish River.<sup>1</sup> The authorities relied on the missionaries during the ten years following the Frontier War of 1835, to proceed with the education and conversion of the people so as to create a climate for the introduction of changes in the legal system. Having achieved a measure of stability with the Xhosas that side of the Kei, the colonial authorities took time to deliberate on the major question presented by the Xhosa-speaking people across the Kei, a large population made up of several tribes, each under its own chief, with Kings (so called Paramount Chiefs) in the larger areas of Pondoland, Thembuland and Gcalekaland, and in each case with a well established and vibrant legal system

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1 See Report & Proceedings of the Government Commission on Native Laws and Customs. Government Printer Cape Town 1883 at page 15.

catering sufficiently for the needs of the people. The task ahead was not an easy one and they thus gave the missionaries, and traders and magistrates a period of thirty years within which to assume positions all over Transkei and proceed with the spade work in the task of acclimatising the people to the western way of living.<sup>1</sup> The missionaries have indeed played a very prominent role in the shaping of events in Colonial Africa as a whole. It is noteworthy that the missionaries from England, for example, were the agents of powerful political groups in England, representing the industrial and mercantile class.<sup>2</sup>

The leader of the groups and founder of the London Missionary Society was Wilberforce, who is reported to have once said: "Christianity ... teaches the poor to be diligent, humble, patient and obedient and to accept their lowly position in life. It makes the inequalities between themselves and the rich less galling because under the influence of religious instruction, they endure the injustices of this world with the hope of a reward in the next".<sup>3</sup> The missionaries have been blamed for having facilitated the conquest and dispossession

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1 In the meantime the process of westernisation under direct rule was gaining momentum in the Ciskei area and this is how the gap between these two areas began.

2 See W M Tsotsi: From Chattel to Wage Slavery. Lesotho Printing & Publishing Co. 1981 at p.31.

3 G R Mellor : British Imperial Trusteeship, quoted by W M Tsotsi op cit. ibid.

of Africans and advancing the interests of imperialism while posing as the friend of the African. In this regard Dr Phillip, a superintendent of the London Missionary Society, is recorded as having said : "while our missionaries are everywhere scattering the seeds of civilisation... they are extending British interests, British influences and the British Empire. Wherever the missionary places his standard among a savage tribe, their prejudices against the Colonial Government give way, their dependence upon the colony is increased by the creation of artificial wants... Industry trade and agriculture spring up".<sup>1</sup>

The missionaries met with much success in Transkei. By 1879 the time was seen to be ripe for the Colonial authorities to march in and annex the Transkeian Territories to the Cape and thus to Great Britain. This process was relatively peaceful but there were skirmishes whereby the colonial authorities had to make a show of strength and break the grip of the traditional rulers. For instance in Gcalekaland the Xhosa king Hintsa was summarily arrested and a ransom of 50 000 cattle was demanded. He tried to escape and was shot dead by the British soldiers on the banks of the Nqabara River in the Willowvale District of Transkei.<sup>2</sup> "Then followed the wholesale

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1 See W M Tsotsi op. cit 31

2 See W M Tsotsi : op. cit at p.33

expropriation of the land of the Xhosa by the Colonial administration. These events make this period one of the darkest in the history of the black man in South Africa".<sup>1</sup> By the time colonisation began the impact of the missionaries had become so telling that a prominent member of the Cape Parliament felt that the converted class could pose a threat to white interests. That was none other than Cecil Rhodes who while piloting the Glen Grey Bill through the Cape Parliament, declared:

"I have travelled through the Transkei and have found some excellent establishments where the natives are taught Latin and Greek. They are turning out Kaffir parsons, most excellent individuals, but the thing is overdone ... There are Kaffir parsons everywhere - these institutions are turning them out by the dozen. They are turning out a dangerous class. They are excellent so long as the supply is limited, but the country is over-stocked with them. These people will not go back and work and that is why I say that the regulations of these industrial schools should be framed by the Government; otherwise these Kaffir parsons would develop into agitators against the Government..."<sup>2</sup>

As soon as annexation took place, the people of Transkei were automatically brought within the pale of Colonial

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1 op. cit. ibid

2 W M Tsotsi, op.cit. 113, quoting Vindex: Cecil Rhodes - Political Life and Speeches 1881 - 1900 Chafman and Hall Limited London 900 p.382.

law. Roman-Dutch law penetrated Transkei, and the question of codifying the law in Transkeian Territories immediately occupied the minds of the authorities. This was quite contrary to what happened in the conquered area of the Ciskei. On the 24th January 1880 a Ministerial Minute signed by Mr Sprigg, Prime Minister of the Cape Colony, read as follows:

"With respect to the laws to be administered in the annexed territories, in the opinion of the ministers it is expedient in the interests of the natives that the Colonial laws should be modified... and ministers will be prepared to submit a special code for approval of the Colonial legislature"

The sequel to this was a minute from the Colonial office in London under the signature of Sir Hicks Beach to the Governor of the Cape Colony, Sir Bartle Frere, dated 24th March 1880. In that minute ministers were called upon to submit a special code which was "indispensible for the Government of the Native Territories."

Everything had now to be done at once and on the 6th July 1880 the Parliament of the Cape of Good Hope passed a motion calling upon the Governor to appoint a commission to look into the following questions:

1. Native laws and customs.
2. Land tenure.
3. The advisability of introducing some system of local self-government in the Native Territories.

On the 15th September 1880 the Governor then appointed the Commission. The members were notably all whites, being:

1. Sir Jacob Dirk Barry, Chairman, then recently appointed as first Judge President of the Eastern Districts Courts;
2. The Hon. Charles Brownlee
3. Mr William Burchanan Chalmers
4. The Rev. James Stewart
5. Mr Walter Earvest Stanford
6. The Hon. Thomas Upington
7. Mr Jonathan Ayliff
8. Dr William Bisset Berry
9. Mr Emile Samuel Rolland
10. Advocate Richard Solomon.

The commission undertook its task with much enthusiasm, and enquired into the laws which were already being administered by the resident magistrates. They examined witnesses of an expert nature and sent out numerous circulars to people who were in a position to give useful information on the points at issue. Enquiring as it was on the wide topic of "Native Laws and Customs" it would have been

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1 For biographical information about the members of the Commission see A.J. Kerr's article, *Transkei Law Journal* 1986 p.11 at p.18 f.f.

strange if the commissioners had not seen fit to consult the indigenous population. That consultation had also been insisted upon by the Imperial authorities for in February 1880 the British Secretary of State for the Colonies wrote and said that the authorities were:

"not only entitled but bound to satisfy themselves that the laws under which the native districts will be administered are such as they can approve"<sup>1</sup>.

The crucial question is the nature and extent of the consultation of the people with special reference to the contemplated code.

The Commissioners took the wise step of consulting all classes of the indigenous people, i.e. those who had acquired education and a measure of westernisation, as well as those who had not become detribalised and still responded positively to customary law. The outcome was not surprising. The former group responded in a manner which reflected their enchantment with their newly acquired Christian faith and western way of life, while the latter's responses were, on the whole, indicative of their committment to customary law and the solutions that it offered to problems in contrast with the received western

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1 See Saunders: The annexation of the Transkeian Territories, quoted by A.J. Kerr in his article "The Cape Government commission on Native Laws and Customs (1883)". Transkei Law Journal 1986 page 18.

law. A few examples will suffice.

In the first category there was the Reverend Gway Tyamazshe of Ciskeian origin but ministering to the Congregational Church in Kimberley at the time. Responding to the questions of the commissioners, he came out strongly against circumcision, intonjane and ukulobola custom which he said, should be "put down" by moral teaching.<sup>1</sup> He referred to polygamy and lobola custom as "evils" which the Government should abate and remove by refusing them recognition.<sup>2</sup>

In the second category there were traditional leaders and their followers consulted simultaneously with westernised and semi-westernised Transkeians in the Idutywa district. One Maki,<sup>3</sup> "on behalf of the heathen headmen and natives present", said in answer to the question on circumcision and intonjane :

" The customs of circumcision and intonjane are very ancient among us, and hitherto we have always practised them. We wish to say that we are being killed in reference to these customs, as we are being prevented from practising them. We ask you what we ever did to the Government that these customs of ours should be interfered with as they are at present."<sup>4</sup>

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1 See Appendix C, pages 152 - replies to general circular. See discussion on intonjane and circumcision at 3.4.4

2 Ibid 153. By striking contrast the Rev. W. Beste Lutheran Minister at Stutterheim was at least prepared to say that the lobola custom was a good institution although he was also unduly critical of it.

3 See page 464

4 Ibid

One Tanti rose to say that what had just been said was "in the hearts of everyone here", but no sooner had he said so than Smith Poswa, "on behalf of the Christian Natives", stood up and said:

" These are customs to which we object. All these customs and dances are to us abominable. We the children of the Government, must abide by the laws<sup>1</sup> of the Government".

To this Maki retorted that the customs are "part of our creation and enjoyment of life".

As far as the relevant subject of customary law in general and criminal law in particular is concerned, the findings of the Commission were, broadly speaking, that many of the existing laws and customs were inter-woven with the social conditions and ordinary institutions of the population. That finding was of course as it should have been, and had it been otherwise then the people of Transkei would have been a strange exception to all humanity.

The necessity for a code was attested to by the three chief magistrates of Transkei, namely the Chief Magistrates of Transkei proper, Thembuland and Griqualand East, although the Commissioners recorded that they differed on the actual nature that the code should assume. Positive reactions

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1 Ibid

were also made by Sir Theophilus Shepstone in Natal, the Resident magistrates in the various districts, and most of the missionaries who were by that time firmly established in various parts of Transkei.

As against a civil code, a criminal code was urgent in Transkei for two reasons, namely that the magistrates for their part did not know which law to apply while the people on the other hand did not know which law they had to obey. The issue was between the Colonial criminal law and the customary criminal law. In this regard the commission reported as follows:

" Some Magistrates inform us that they administer the Kafir law; others that they administer the Colonial law, some that they apply the Kafir mode of procedure by calling to the aid of assessors, and allowing the examination of prisoners, others that they adopt the colonial mode of procedure; some that they apply Kafir law and procedure in some cases, and the Colonial law and procedure in others. All are agreed that a criminal code is desirable in order to give certainty to the law that they are called upon to administer....."<sup>1</sup>

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<sup>1</sup> See section 35 of the Commission's report.

As to the actual rock on which this code was to be firmly based, great differences of opinion manifested themselves. Brownlee, later acting Chief Magistrate, urged that the code should be based on colonial law with modifications here and there.<sup>1</sup> Blyth contended that the code should be framed entirely upon colonial law and special provisions should be merely added relating to the spoor law and to witchcraft.<sup>2</sup> Elliot said the code should out-and-out be based on customary criminal law.<sup>3</sup>

The difficulty with Elliot's recommendation was of course that customary law had some but not very detailed provisions of criminal law. This was recognised by the Commission which made the crucial point that the customary law distinction between crimes and delicts was built upon the theory that all members of the tribe belonged to the chief.<sup>4</sup> Any injury to any member of the tribe was an injury to the Chief. Injury to property only gave rise to claims of compensation by the owner of the property. And fraudulent misappropriation of property was looked upon as only giving rise to a civil remedy. As a natural consequence the parties could, by mutual arrangement, settle what would be serious crimes in terms of western law.<sup>5</sup> The Commission concluded as follows:

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1 Ibid 21  
2 Ibid  
3 Ibid  
4 Ibid 22  
5 Ibid

"If, therefore, we had discovered among the natives a complete system of Criminal Law,<sup>1</sup> we should not have hesitated to adopt it."

The lack of any detailed provisions of customary criminal law had been pointed out already some years before the Commission was instituted by Colonel Maclean who had in fact compiled a Compendium of Kafir Laws and Customs.<sup>2</sup> The Commission had recourse to Colonel Maclean's compilation and summarised it in their Appendix B.<sup>3</sup>

Objections to the idea of colonial law being the basis of the code were strong and varied. Firstly, colonial law itself was uncodified, so it would be necessary to go to the old authorities. Some of these were in Latin and were scattered in many volumes. Also, many punishments known to Roman-Dutch law were too cruel to be enforced, so it was argued.<sup>4</sup> Roman-Dutch law gave no maximum penalties, and the discretion of the judge was a decisive factor. This meant that there would be no uniformity in the sentencing process.<sup>5</sup> Likewise some Roman-Dutch law offences were unknown to indigenous law while by the same token some indigenous law offences like witchcraft were unknown to Roman-Dutch law.<sup>6</sup> Another important objection was

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1 Ibid

2 J Slater, Grahamstown 1906; Frank Cass & Co. Ltd, 1968; first published 1858

3 See Appendix B p.17 relating to criminal law

4 Ibid

5 Ibid

also made regarding procedure, whereby it was contended that the western law of procedure should not be preferred to the customary law of procedure as the latter recommend itself better for the constituency in question. "The adoption of the colonial criminal law in its entirety would perpetuate these evils and it is chiefly<sup>1</sup> to avoid them that we have suggested a penal code." The final resolution was therefore that the code would adopt the principles of the existing<sup>2</sup> colonial law but try by all means to remedy its defects.

That the birth of the Transkei Penal Code was accompanied by much pain is evident from the uncompromising stance adopted by Commissioner Ayliff. He was so unbending that he went to the length of filing a minority report<sup>3</sup> which was dated at Grahamstown on 29th December 1882. In it he made the point that the whole report and draft code were largely the product of the President, Sir J D Barry's "facile pen"<sup>4</sup>. He also said that what the draft code represented was actually everything that English lawyers had for a long time been clamouring for for England herself; all in vain. The Cape would soon codify and they would now find the work already done for them.<sup>5</sup> This was an experiment and it should rather be tried in the colony first before

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1 Ibid

2 Ibid

3 See pp. 45 - 50 of the Report

4 Burchell & Hunt : South African Criminal Law & Procedure Vol. 1p.26, record this complaint.

5 Quite a misjudgment of the issue of the time to come because the Cape never codified!

it was essayed "among these suspicious and exitable people who form the population of our dependencies."<sup>1</sup> The people were very conservative and regarded suspiciously any new proposals brought by the government. This therefore meant that the code might be rejected by the people, and the whole exercise would be a futile one!

All these inaccurate forecasts and insinuations of suspicion apart, Mr Ayliff made out a strong case against a special "hybrid" code and in favour<sup>2</sup> of a code of customary criminal law out and out. The "Kafir law" did exist after all he urged, so why not codify it? The power of the chiefs was subject to checks and balances, and councillors maintained an equipoise between the authority of the chiefs and the rights of the tribesmen.<sup>3</sup> Lawsuits were conducted under the supervision of the chiefs assisted by their councillors "as decorously as any I have seen in<sup>4</sup> our courts, and disturbances are not tolerated". The President should therefore have used his skill to bring about what had really been wanted by the colonial office in London, namely " a code of Native Law". He said that the path would have been easy because the various magistrates in the districts were actually busy administering customary criminal law<sup>5</sup>

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1 Commission's Report : Ibid. Strangely enough, Mr Ayliff was in a committee of four - the Chairman, Upington, Stanford and himself - which drafted the Native Territories Penal Code, a draft which was enacted with very few changes as Act No.24 of 1886 (Cape).

2 Ibid

3 Ibid

4 Ibid

5 c.f quotation at page 34 supra.

and were carrying out their task with much skill and success, so why complicate issues by designing a special code? "These are some of the considerations that have induced me to decline the responsibility of commending that this admirable specimen of high class law should be applied to a state of native society just emerging from barbarism."<sup>1</sup>

Quite ironically in view of present day circumstances, the British Government in those days gave full recognition to the sovereignty of the Transkei Chiefdoms or Principalities and entered into formal international treaties with them. When the code was being drafted a clear endeavour was made to give effect to those treaty obligations e.g. the treaty entered into by the Cape Governor, Sir Peregrine Maitland, with Paramount Chief Faku of Pondoland in 1844 whereby the colonial authorities bound themselves to punish refugee thieves who had escaped from Pondoland after committing crimes there.<sup>2</sup> It was felt that without such legislation the treaties would be of no effect. Section 3 of the Draft Penal Code gave effect to the treaty. It made everyone liable to punishment under the code for an act or omission of which he was guilty under any Native Chief by virtue of the treaty entered

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1 Ibid

2 See section 3 of the Draft Penal Code.

into between such chief and the Governor of the Cape. This draft section was enacted word for word by the Parliament of the Cape of Good Hope as section 3 of the Penal Code.

The Code was truly a search for a modus vivendi. A feature of it which demonstrated beyond doubt the sincerity of the commission and the authorities in seeking to use it as an instrument for creating and/or strengthening bridges between the mixed communities of the new Transkei was that it was made applicable to all persons regardless of class or colour - a horizon which could not at all have been reached by the codification of indigenous criminal law in Transkei.

The draft Penal Code made interesting suggestions regarding punishment. Provision was made for the imposition of the death sentence which, however, could be commuted to a life sentence by the Governor. The commissioners also reasoned that the effect of the death sentence is short-lived and for that reason murder was an offence punishable by a fine in indigenous law. They therefore recommended transportation to a different part of the country as a punishment which would be an effective deterrent to the crime of murder. This is commonly known as banishment and although the Cape Parliament did not accept the recommendation, the measure is often used to-date administratively

by the authorities in dealing with those regarded as political agitators.<sup>1</sup> It appears that this form of punishment was not previously unknown in Transkei because the commission recorded that "it inspires great terror in the natives."<sup>2</sup> It was certainly used<sup>3</sup> in the Sudan in respect of offences relating to witchcraft.

It is interesting to note the position among the Tswana in this connection. Even there the punishment of restriction to a distant part of the realm was common.<sup>4</sup> Another form of punishment was destruction of the culprit's dwellings and everything in them by fire.<sup>5</sup> A culprit could also be bound and dragged from the village, clubbed to death on the back of the head, and left to the vultures and hyenas.<sup>6</sup> For a mere imputation of witchcraft there was also the punishment of cutting off the culprit's tongue.<sup>7</sup> In the face of these alternatives it is submitted that banishment was unnecessary as a form of punishment.

The noble intentions of the Commission for the establishment of a sound Transkeian judicial system became more clear when they recommended the establishment of a High Court. This Court was to be presided over

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1 See e.g. Saliwa v Minister of Native Affairs 1956 (2) SA 310 (A)

2 Ibid 23

3 Vasilev: The Law of Homicide in the Sudan p.142 ff.

4 See Indigenous Criminal Law in Bophuthatswana p 50 ed A.C.Myburgh J.L. van Schaik 1980

5 Op cit 50

6 Op cit 100

7 Myburgh : Papers on Indigenous Law in Southern Africa at page 41 J.L. Van Schaik 1985

by an official called "The Recorder of the Native Territories", having jurisdiction concurrent with that of the Cape Supreme Court. It would follow the Rules of Procedure applicable in the latter Court.<sup>1</sup> It is a matter of great regret that this idea was not taken up by the Cape Parliament. Legal development was greatly thwarted in the field of criminal law which had to be seen as a matter for the Supreme Court of the Cape until 1910, and for the Supreme Court of South Africa as represented by the Eastern Districts Local Division of the Supreme Court of South Africa after 1910. By contrast, the Transkei Native Appeal Court was established at that time already in respect of civil cases. It was established in 1894 and was simply termed the "Native Appeal Court". The law reports of this Court were compiled by officials acting on the advise of the Chief Magistrate and the Assistant Chief Magistrate.<sup>2</sup> The Law Reports of the Native Appeal Court of Transkei were maintained as such until the Black Administration Act<sup>3</sup> was passed. Those reports are an important source of legal reference.

Another interesting feature of the Draft Penal Code was the use of illustrations. The commission explained

that the aim of these illustrations, which method

1 See Section 264 of the Draft Penal Code

2 See, for example, preface to volume one of the Native Appeal Court Reports (1894 - 1909) containing as many as 253 cases where "B.H." acknowledges invaluable advice given to him (and his team) by A H Stanford, Chief Magistrate and W T Brownlee Assistant Chief Magistrate in the preparation of the reports. The reports were compiled at the Chief Magistrates' office, Umtata.

3 Act 38 of 1927

4 Ibid 23

they had copied from the Indian Penal Code, was to facilitate understanding of the law. The effect of these illustrations is that each definition of an offence is followed by a case or cases which illustrate the intention of the legislature. The Draft Penal Code was full of such illustrations and however helpful they might be, they did make the code look clumsy and cumbersome. Thus Section 4 of the Draft Penal Code laid down that theft would be regarded as a delictum continuum, a continuous offence. This might not mean much to the layman, and the illustration which followed in italics immediately below the section read as follows in order to clarify:

Illustration:

A stole from B cattle in Kimberley and brought them with him to Transkei. He was in possession of them until he was apprehended. A is subject to punishment under this code.

It transpires, however, that the idea of the illustration did not meet with the approval of the Cape Legislature and its legal draughtsmen, and those numerous illustrations on the draft formed no part of the final statute<sup>1</sup>. Yet the Barry Commission had taken the trouble to place on record the good reason given by the Indian Law Commission for including these illustrations, a reason which by inference had motivated this commission

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1 Act 24 of 1886

to employ them. That reason was the Indian Commission's wish to prevent the courts from usurping the power of making law by construing it - construction should come from the legislature and not from the judge they said!

It is submitted that the Cape Parliament acted wisely by rejecting the idea of the illustrations. The examples would have led to interpretation problems. The cases coming before the courts would not all be "on all fours" with the examples in the Code. There would, therefore, always be the necessity for the judge and jury of those days to exercise a discretion. Furthermore, it is submitted that the rules against analogous interpretation - Unius inclusio est alterius exclusio - would have been affected by the examples. The use of illustrations could therefore constitute the greatest real threat to that body of law known as judge-made law.

The commissioners suggested a mode of revision for the code, with a view to rectifying defects or omissions.<sup>1</sup> The suggestion was that magistrates should report problems to the Government from time to time as they came across them in their day-to-day application of the code.<sup>2</sup> The result is that indeed the code was amended from time to time over the years and

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1 See at page 21

2 Ibid 21

the danger of the code becoming a monument of stagnation was averted. The commission also recorded that it had been asked to make suggestions regarding a civil code but they confessed that they thought that would be a very arduous task and they saw fit not to undertake it.<sup>1</sup>

The commission took very much into account the interests of those who were going to be affected by the code. Proof of this is seen in its recommendation that the code should be translated into Xhosa (so as) to enable those who are subject to the laws to know them."<sup>2</sup> The Xhosa version could be learnt from the missionaries and the educated natives. Had this recommendation been accepted, this could well have been the beginning of the recognition of Xhosa as an official language in Transkei. However the Cape Parliament did not implement the recommendation, quite regrettably in the writer's view. The Sudanese Penal Code was translated into the vernacular only in 1964 and that would have been after Transkei's example.

It is submitted that the commission acted wisely in rejecting the idea of an out-and-out codification of indigenous law and the received Western law. The code would have remained largely an isolated entity in the legal fabric of the new Southern Africa.

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1 Ibid

2 Ibid

Of course had the commission entirely turned its back to indigenous criminal law they would have been unrealistic. However to pretend that English Law and Roman-Dutch law were of no relevance to Transkei would have been an exercise in self-deception.

When the Penal Code Bill was passed in the 1886 Cape Parliamentary session it contained 270 clauses. (From time to time some clauses were repealed). The Bill received a wide measure of support from the members of Parliament, albeit for different reasons.<sup>1</sup> Some supported it because it was based on colonial law, others because it applied to all people east of the Kei River regardless of race and others because it was a measure of differentiation!<sup>2</sup> In the result the Transkei Penal Code came into force on 1 January 1887.<sup>3</sup>

It is submitted that without an examination of the nature and extent of the interaction of the three legal systems that existed at the time when the Transkei Penal Code came to being, this study would be incomplete. For in that case the impression would perhaps be created that the great influence which the Transkei Penal Code exerted on South African law was "a bolt from the blue." But in fact that influence itself took place

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1 C C Saunders. The Annexation of the Transkeian Territories Government Printer, Pretoria 1978

2 Op cit 128

3 See W.D Hammond - Tooke : Command or consensus: The Development of Transkeian Local Government. David Philip. Cape town 1975. The only point that the learned author makes about the Code, apart from the date it came into force, is that it provided, *inter alia* for the payment of fines in cattle, grain or other produce in lieu of cash, at the discretion of the judges.

in the context of the general tendency of legal systems to take friendly cognisance of each other once fate juxtaposes them.

INTERACTION OF LEGAL SYSTEMS

3.1 THE IMPACT OF ENGLISH LAW ON SOUTH AFRICAN LAW

Drafted as it was by South African jurists, it is understandable that the Transkei Penal Code could to a large extent have been a codified restatement of the criminal common law of South Africa. I shall try to demonstrate, however, that the Transkei Penal Code, itself an English-law orientated document, exerted a great deal of influence on South African law. In so doing it merely became one of several forces which were responsible for the importation of English law notions into South African law. In order to understand the influence of the Transkei Penal Code on South African law, we must therefore first understand the English law influence on South African law to which it was largely complimentary in its effects.

During the period 1652 to 1795 Roman-Dutch Law took root in South Africa, when the early life of the legal system at the Cape bore a distinctly Dutch stamp because the inhabitants were of Dutch origin. In 1795 British forces occupied the Cape and in 1814 the Cape was formally ceded to Great Britain. Now it is an established rule of International law that in conquered territories the existing law of the inhabitants shall continue to be in force until it

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is expressly replaced. The law of the conqueror does not therefore automatically substitute the law of the conquered. Furthermore, Article 8 of the capitulation stated that the burgers would continue to enjoy the rights that they previously enjoyed. This certainly included the legal system.

However, the English conqueror soon evinced a settled determination to import English law into South Africa. Thus Viscount Goderich is on record as saying in a letter written in August 1827 to General Bourke, Governor of the Cape : "I am fully prepared to admit the propriety and importance of gradually assimilating the law of the Colony to the Law of England. The judges of the Supreme Court will be more competent than any other local authorities to consider by what steps this change could be most conveniently introduced. It will be their duty as opportunity may offer to transmit to yourself the Drafts of such laws as they may think best adapted for the amendment of the Civil and Criminal Code. In the execution of this task it should be their constant aim to adhere as far as practicable to the spirit of the Law of England".<sup>2</sup>

In the field of Criminal Procedure the anglicisation process was accelerated by the report of the commissioners

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1 See Hosten, Edwards, Nathan & Bosman p.601

2 See Burchell and Hunt p.21

Bigge and Colebrooke to Earl Bathurst who said in so many words that the system of criminal procedure at the Cape should be more closely assimilated to that of England.<sup>1</sup>

It is therefore not surprising that already by 1908 the lone voice of Wessels<sup>2</sup> protested: "The history of Roman-Dutch law has been sadly neglected in South Africa, so that the ideas which prevail in the profession as to the origin and development of the Roman-Dutch law are very crude.<sup>3</sup> The learned author went on: "English law has exerted a very strong influence upon the law of South Africa, and that influence is steadily growing stronger in every department of law. In some respects the introduction of English law into South Africa has been slow and insidious,<sup>4</sup> in other respects it has been rapid and overwhelming". He then lashed out at "lazy and ignorant draughtsmen" who had copied passages from English statutes and incorporated them into South African legislation without giving thought to the implications of such action as far as Roman-Dutch law was concerned, regard being had to the difference between the common law of the two countries.

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1 See : Theal : Records of the Cape Colony vol. xxxiii p.87 ff.

2 Judge of the Supreme Court of the Transvaal Republic as it then was.

3 See Wessels : History of the Roman Dutch Law page 3. African Book Company LTD. Grahamstown 1908

4 Ibid

Twelve years later there was apparently no sign of improvement and the learned judge President of the Transvaal Provincial Division (as he then already was) used the occasion of a lecture he presented in Pretoria to reiterate the view he had expressed in 1908 about the need for properly trained legal draughtsmen. He showed great concern for the survival of Roman-Dutch law and was now urging codification as a means that would guarantee the preservation of Roman-Dutch law. In his paper which is aptly entitled "The Future of Roman-Dutch law in South Africa"<sup>1</sup> the learned Judge President concludes that if a code is established in South Africa, "we will embody in it the Roman-Dutch law as it is found in Grotius, Voet and the other great Dutch jurists."<sup>2</sup>

Despite this timely warning by Sir John Wessels, the agencies for the reception of English law into South Africa had gone very far with their work and the growth of the influence of English law had become irreversible.

In the field of criminal law it is in R v Seane & Another<sup>3</sup> that we get a clear indication of the manner in which the English law continued to exert its influence on South African law. In that case, as in numerous others, the Attorney-General presented before the court the full history of the decisions of the English courts on the point at issue. This was duly appreciated

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1 See 1920 SALJ Vol. 37 p.265

2 At p.283

3 1924 TPD 668 at pp 675 - 676

by the presiding judge who in turn discussed those cases especially the leading one of Reg v Ring which seemed to have brought English Law into line with American Law on the question of attempting to commit the impossible. The learned judge then observed: "The decision in Reg v Ring has been referred to in several judgments of the courts of South Africa, and with tacit, if not express, approval; the correctness of the decision does not appear to have been questioned or urged."<sup>1</sup>

Tindall J was clear in his mind that the convictions in the case under review were bad "but a difficulty is caused by the English case of Regina v Ring. If a case on all fours with Reg v Ring has been decided in our courts it would have been necessary to decided in this case whether Ring's case can be distinguished in principle."<sup>2</sup>

### 3.2 The Impact of English Law on the Transkei Penal Code

When one looks generally at the Transkei Penal Code, one finds from some sections that there is as it were, a "foreign element" about the code, a clear indication that the code was based on existing legislation.<sup>3</sup> This is seen in sections like 101 and 102 relating to seamen, ships' stores and ships' boats, which indicates legislation for countries in which shipping was far advanced. Accordingly I am in full agreement

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1 At p.675 - 676

2 At 684

3 See Annexure A

with the assertion that the great majority of sections of the Transkei Penal Code was lifted word for word from the Indictable Offences Bill which had been drafted by Sir James Stephen as a code of English Criminal Law and introduced in the House of Commons in 1872.<sup>1</sup>

The impact of English law rules on the Code is seen in the provisions relating to bigamy whereby a spouse is absolved from liability if at the time of the subsequent marriage the first partner has been "continually absent from such person for the space of seven years and shall not have been heard of by such person as being alive within that time."<sup>2</sup> On the contrary Roman-Dutch law lays down no fixed period, and in order to give an order of presumption of death the court merely takes into account the surrounding circumstances at the time the person was last seen, such as where he was last seen swimming in troubled waters, his state of health, etc. The rule of customary law, on the other hand, is that where the husband is away from the wife for an inordinately long period, the latter can issue summons and state the length of time that he has been away at an unknown address without any news of him or her being heard, and allege abandonment which, of course, is a ground for dissolution of a customary marriage. There is no fixed time

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1 Burchell and Hunt vol 1 p.39, also referred to by Kerr: Transkei Law Journal 1986 p.30

2 Section 168

limit and to arrive at a conclusion whether the case is or is not one of abandonment each matter is looked at on its own merits.<sup>1</sup> Not surprisingly, the Indian Code also contains the seven year rule of English Law.<sup>2</sup>

In the field of homicide the English Law provides that "if the death does not ensue until after the expiration of a year and a day from the date when the injury was inflicted, it is an irrebuttable presumption of law that the death is attributable to some other cause, and the person who inflicted the injury is not punishable for either murder or manslaughter".<sup>3</sup>

The Transkeian Territories Penal Code followed the English Law and laid down that no one is criminally responsible for the killing of another unless the death takes place within a year of the cause of death.<sup>4</sup> This is the same as the law in New South Wales where the year and a day rule applies. Commenting on this Roulston<sup>5</sup> opines that the rule originated in the earlier uncertainties of medical science when after the lapse of such a period of time the cause of death could not be shown with any degree of exactitude. "In the light of modern medical knowledge it may be questioned

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- 1 See Koyana : Customary Law in a Changing Society at p.34
  - 2 Section 494 of the Indian Penal Code
  - 3 Halsbury : Criminal Law Section 1352
  - 4 Section 136 of Act 24 of 1886
  - 5 Introduction to Criminal Law in New South Wales : Butterworth 1975

whether the rule has any utility in the present day, although in the only relatively modern decision, Dyson<sup>1</sup> 1908 2 KB 454, it was held that the rule still applies." In South African law on the other hand there is no statutory provision on this question.

So astute was the Barry Commission in the execution of its mandate that it even reached the often overlooked conclusion that the customary law of procedure recommends itself better than does the received English procedural law here in Southern Africa. It said: "The Western law of procedure also offends the native conception of justice by failing to exhaust every source of information including the examination of the accused or persons who are able to throw light upon the subject matter under investigation."<sup>2</sup> This was a veiled rejection of the hearsay rule, the exclusionary rules as well as the "hands off" treatment accorded to an accused person by the rule that his innocence is presumed until the contrary has been proved. It often led to the acquittal of an accused person at the close of the state case when it was said that there was no prima facie case against him. This was so even in numerous circumstances where, had the accused been interrogated and thus made to take an active part in the trial which might not have come about but for his own wrongful act, he would have assisted the cause

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1 Page 72 para. 406

2 Ibid 23

of justice by admitting his guilt and explaining fully the commission of the wrongful act by him and all the surrounding circumstances. This continued adherence to the English orientated rules of procedure and evidence instead of the customary law rules has not been left unchallenged.<sup>1</sup> But the well-motivated recommendations of the Commission fell on deaf ears as far as this important matter is concerned and when the legislation was finally passed<sup>2</sup> the implementation of these particular recommendations was nowhere to be seen. Instead of the Commission's (draft) section 276 which took these matters into account the Cape Parliament in its wisdom merely passed a chapter dealing with procedure and jurisdiction. This chapter was complimentary to the English spirit of criminal procedure at the Cape and did not represent a swing even towards the Roman-Dutch law.

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1 See Koyana : Customary Law in a Changing Society  
Juta 1980 at pages 136 - 138

2 Act 24 of 1886

3.3 The Impact of Roman-Dutch Law (South African Law)  
on the Transkei Penal Code.

The Transkei Penal Code was drafted by English speaking lawyers and the Bill was piloted in a Parliament of English speaking members. The legally trained among them were under the influence of English law. In short, the code came into being at a time when the anglicisation process was well on its way in the Cape. It is therefore to be expected that the impact of Roman-Dutch law on the new code would not be nearly as much as the impact of English law. The very institutions were English-orientated - the courts of Landdrost and Heemraden never saw the light of day in the Transkeian Territories. And in the debating chambers of those who were drafting the code, Roman-Dutch law was at a distinct disadvantage if one looks at some of the conclusions that were reached for not introducing it into the Territories.

All that notwithstanding the strong voice of Roman-Dutch law was still able to make itself felt in the distant Transkei Territories that were overwhelmed by the protagonists of the English law approach. The commission said that it would adopt the general principles of the "existing" colonial law but remedy the "defects". There is evidence of such adoption of Roman-Dutch law principles in Section 4 of the draft Penal Code. By that section the commission

declared theft to be a delictum continuum, "thus following the Roman-Dutch law and departing from English law. English Courts have refused to treat the thief as continuing the theft at whatever spot he takes the property to."<sup>1</sup> The position remained unchanged in Transkei and South Africa throughout the years.<sup>2</sup> The only contrary view that emerged is that of de Wet and Swanepoel who say that the concept of theft as a continuous offence merely creates confusion.<sup>3</sup>

An interesting provision of the final act was section 269 which provided that crimes and offences not specially provided for in the Code would be tried as if committed in the colony and the laws and punishments applicable to such cases would be those in force in the colony. This provision certainly opened the door for the application of colonial law outside the Code and unmodified, in the Territories. Experience has shown that even as recently as the 1960's and the 1970's, prosecutors were wont to frame their charges under the Code and, quite often, alternatively, for the same offence under the common law as allowed by the section.

The formation of the Union in 1910, with Transkei being made part of South Africa, also created a suitable climate for the influence of Roman-Dutch law in Transkei. The noble idea of the creation of a High Court for criminal

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1 See at page 24

2 See R v Dzwaka 1950 (3) SA 870 (E); See R v Attia 1937 TPD 102; R v von Elling 1945 AD 234

3 Suid-Afrikaanse Strafreg 2 ed 367 c.f. 4 ed 349 et. seq.

cases in Transkei had been ignored by the Cape Parliament.<sup>1</sup> Criminal appeals from the twenty-eight Transkeian Districts thus lay to the Eastern Districts Local Division of the Supreme Court of South Africa seated at Grahamstown<sup>2</sup> and from there further to the Appellate Division in Bloemfontein. It was only human for the judges to act under the influence of the common law of South Africa and its interpretation in previous decisions when dealing with appeals from Transkeian Districts involving the Code.<sup>3</sup>

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1 See 2.2.2.2 supra

2 Later named the Eastern Cape Division

3 See, for example, R v Zonele and Others 1959

(3) SA 319 (A), where the automatic extension of Union legislation to Transkei was discussed.

### 3.4 The Impact of Indigenous Law Practices on the Code

#### 3.4.1 Impact on the 1883 Commission

Judging by the commission's rejection of Mr Ayliff's strongly worded recommendations for an outright codification of the indigenous criminal law, one would be led to think that the commissioners had not understood it well enough or were not sufficiently impressed with it to be prepared to let it play any significant role. On the contrary, however, that law created such a positive impression on the minds of commissioners that they were prepared to let it play quite an important role in the proposed code. At the outset the commission reported positively on the characteristics of customary law namely that although it is unwritten, its principles and practice are widely understood, being founded mainly on customary precedent, embodying the decisions of chiefs and councillors of olden days, handed down by oral tradition and treasured in the memories of the people.<sup>1</sup> This law took cognisance of certain crimes and offences. The system was created by and adopted to the conditions of "a primitive, barbaric life, and in some respects not unlike that which prevailed among our Saxon ancestors in the early days of civilisation".<sup>2</sup> The commission then declared the result of their enquiry to have

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1 See at p.12 of the Commission's Report

2 Ibid

demonstrated clearly that much of the existing customary law was so interwoven with the social conditions and ordinary institutions of the people that "any premature or violent attempt to break them down or sweep them away would be mischievous and dangerous in the highest degree ....(and) .....defeating the object in view..." It would be inexpedient to wholly supersede the "native system" by applying the colonial law in its entirety, and the commission had directed its attention to the subject of suggesting and drafting a special code which, for the present, "would leave such of their customary laws as are not opposed to universal principles of morality and humanity substantially unaltered, and at the same time secure a uniform and equitable administration of justice in accordance with civilised usage and practice."<sup>1</sup> Some members of the commission were of the view that by defining indigenous criminal law it would be perpetuated, and the laws of growth should therefore be applied to operate so as to gradually extinguish it. This would thus be obliterating the customary law through a policy of gradual strangulation or suffocation. This was certainly the extreme opposite of the view taken by Mr Ayliff favouring an actual codification of the customary criminal law. The voice of the middle-man carried the day and the final view of the commission was also against the "strangulation"

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1 Ibid p.20.

and "suffocation". It was accordingly decided to introduce a brief statement of the customary criminal law in regard to offences as notes to several chapters and sections of the code, "not for enactment but for purposes of comparison." This recommendation was consistent with yet another major finding of the commission, namely that to a large extent the customary criminal law "could be defined by definitions from the colonial law. We have thought that in legislating for natives we should not innovate unless innovation was a necessity ... to sweep away ancient native usages would be to deprive the law of the strong support which sympathy with national feeling always creates."<sup>1</sup> Finally the commission emphasised that if they had discovered a "complete" system of criminal law in the Territories, they would not have hesitated to adopt it. It is submitted here that the incompleteness existed more in the eyes of the commissioners whose base lay in a different legal system than in the reality of the indigenous setting of which the commissioners were aware. The fact of the matter is that the existing system made provision for most contingencies even before the advent of the Code.

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1 Ibid 21

### 3.4.2 Assault

Before the advent of received Western Law each person was regarded as the "child of the chief" (Umntana wenkosi). Consequently an injury to the individual was regarded as a crime and was punishable by the chief. The overriding principle was that a man cannot eat his own blood. That this principle was accepted by the Courts from the outset is born out by the case of Nkwana v Nonqanaba<sup>1</sup> where Stanford P declared: "according to native custom as in force in the Thembu and Gcaleka Government, the person of each individual of a tribe was the property of the chief and any injury to the person or character of such individual was an offence against the chief punishable as a crime by fine. The chief of grace could award a portion of the fine to the injured person who, however, had no right of civil action for damages."

The corresponding position in India is described by Retanalal and Dhiraljal<sup>2</sup> who say: "The germs of criminal jurisprudence came into existence in India from the time of Manu. In the category of crimes Manu has recognized assault, theft, robbery, false evidence, slander, criminal breach of trust, cheating, adultery and rape. The king protected his subjects and the subjects in return owed him

1 1 NAC 79 (1904) Mqanduli

2 The Indian Penal Code

allegiance and paid him revenue. The king administered justice himself, and, if busy, the matter was entrusted to a Judge. If a criminal was fined, the fine went to the king's treasury, and was not given as a compensation to the injured party."<sup>1</sup> The position obtaining in the Transkeian Territories should therefore be seen in the wider context of traditionalist societies throughout the world.

It is interesting to see how Transkeian law has developed in this connection. It will be noted that section 17 of the Transkei Penal Code made it possible for magistrates trying criminal cases to give liberal compensation to the complainants out of the fines payable as sentences by convicted persons. It is clear that this section was enacted in response to the prevailing legal position and was an entrenchment thereof. It therefore became a regular feature in assault cases that a magistrate would sentence an accused person to pay a fine of say R40,00 and order that R20,00 thereof should be paid to the victim as would do the "chief of grace".

It was not an easy matter for the white magistrates to grasp the customary law aspect of section 17 and in several cases they acted in the spirit of the common law and sentenced convicted persons

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1 See page 1 24th edition by Bipinchandra and Manharlal.

to pay a fine of say R20,00 or 40 days, together with a compensatory fine of say R20,00 payable to complainant. In those cases that went on appeal the court had no hesitation in returning the records to the magistrates concerned for a correct application of Section 17.<sup>1</sup>

It is interesting to see how section 17 of the code gradually fell into disuse. The victims of assaults soon realised that in civil claims for damages for assault under the common law the matter was looked at anew, and some proceeded to sue for and obtain damages regardless of what they had been awarded by the Magistrates at the close of the criminal trials.<sup>2</sup>

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1 See for example R v Sinayile - 1910 EDL 58, R v Nqweniso - 1910 EDL 68, R v Xhalemkomo 1911 EDL 387

2 See, for example, Gagela v Ganca 21EDC 351; Mfeketo v Madondile 1NAC 130; Zanghuza v Monelo and others 3 NAC 30

### 3.4.3 Witchcraft

#### 3.4.3.1 Introduction

It has for all times been the effort of legislators in various parts of the world to suppress witchcraft. In England witchcraft was once so rife that it was made a capital offence. The last execution for witchcraft was in 1776 in England and in 1772 in Scotland.<sup>1</sup>

As far as Africa is concerned, witchcraft is still rife in many parts of the continent from Cape to Cairo. For instance, the problem hitherto exercises the minds of jurists in the Sudan where, according to a leading Sudanese lawyer, people are even now still soaked in witchcraft and imbued with a firm belief in evil spirits.<sup>2</sup> The Sudanese Penal Code lays down the severest penalties and differences of opinion on what the real answer to the problem is are endless. Earlier the tendency in the Sudan was to adopt the line of leniency but lately, the penalties have been made so severe as to include even the death sentence.<sup>3</sup>

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1 See Jowitt (Earl), The dictionary of English Law: London 1959. 1665

2 See Vasdev : The Law of Homicide in the Sudan : at 42. Butterworths (London) 1978.

3 op cit. 148

### 3.4.3.2 The 1883 Commission

Of all the problems that confronted the 1883 commission, witchcraft was easily one of the most vexing.<sup>1</sup> In the height of their admiration for the main characteristics of customary criminal law including its sources and its precedent system, they could not help noting that mixed with the system were a number of "pernicious and degrading usages and superstitious beliefs, as well as a course of judicial procedure in cases of the alleged offence of sorcery or witchcraft utterly subversive to justice and repugnant to the general principles of humanity."<sup>2</sup> The commission was determined to recommend that the Penal Code should be applicable to all persons irrespective of class or colour. From the evidence they had collected they were also satisfied of the desirability of making stringent provisions for the suppression of the practice of witchcraft which had earned the sympathy of not even a single member of the black community to say nothing of the whites. The question that immediately faced the commission was: how does one make the Code applicable to all irrespective of race, colour or class if one is going to provide for

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1 As appears from Kerr's article on the 1883 commission in the 1986 Transkei Law Journal (p.30) the commissioners responsible for the provisions on witchcraft were Barry and Stanford.

2 At page 17 of the Report

the suppression of witchcraft which is prevalent only among the members of a specific race or class? The answer to this was rather astounding : If thieves exist only among natives, you would be constrained to pass legislation directed at them with a view to suppressing theft among them! The next argument that was raised was that the spoor law was after all and in any event also legislation for a class, and this was answered by those who objected to the class legislation in the form of the suppression of witchcraft, with the further argument that the spoor law was "different" because it brought about communal responsibility! However, in the final analysis the view in favour of firm proposals for the suppression of witchcraft got the upper hand and the Cape Parliament also did not hesitate to accept these proposals. It would have indeed been regrettable if the opposite view had prevailed. Plausible as is the caution that was exercised against introducing class legislation, the blame that the government of the day would have had to accept for turning a blind eye to such a state of affairs is immeasurable.

It is not surprising that Chapter 11 of the 1886 Code was devoted to the suppression of witchcraft. Section 171 prohibited the imputation of witchcraft, whereby a person names or indicates another to be a wizard or a witch - umthakathi, igqwira. The

maximum penalty was forty shillings (approximately R4,00). Where such imputation was made by a witch-doctor the maximum penalty was two years imprisonment or a fine or flogging or any two or all three of these.<sup>1</sup> Section 173 made it an offence punishable by a fine of five pounds to employ a witch-doctor to name a person as a wizard or witch. Section 174 laid down a maximum penalty of up to twelve months imprisonment with the option of a fine for witch-doctors who professed knowledge of witchcraft and supplied advice on how to bewitch or injure persons or property or cattle, or supplied by witchcraft material with intent that injury be caused thereby. Finally in terms of Section 175, those who used witch-medicines with the intention of injuring any person or property were liable to periods of imprisonment of up to twelve months, with the option of a fine.

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<sup>1</sup> Section 172

3.4.3.3 Belief in Witchcraft as an Extenuating circumstance

The necessity of recognising a belief in witchcraft as a mitigating circumstance in the general African context is well illustrated by the judicial experience in the Sudan. Witchcraft is rife in the Sudan. Earlier the tendency there was to adopt the line of leniency. In Sudan Government v Killo Buti and another<sup>1</sup> decided in 1928 the Acting Chief Justice declared: "I think these witchcraft cases are difficult. Backward people are, of course, in deadly fear of wizardry, and I submit that it is impossible to apply Penal Code standards to offences where that fear plays so great a part, or to educate or deter the people by means of severe punishment." But as time went on the sympathy of the bench seemed to be exhausted as a result of the continued deaths and in 1943 C G Davies, in Government v Bath Met said: "There is, nevertheless, an under-current of influence on the mind of the killer of the activities of a "spirit" of witchcraft of some sort. It is vague. It seems to lead nowhere but it is there. Can one say that, with these supersitition-haunted people, its influence was sufficiently active and real to justify the modification of the age old law of a life for a life?"<sup>2</sup> This "hardline" approach continued to be the preponderant judicial view and in Sudan Government v Thumba Tia decided

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1 See Vasdev: op cit p.144

2 Vasdev : op cit p.150

in 1949 Maclagan C J remarked : "He may think he was justified and many of his fellow Nuba may think so too, but in the eyes of the law what he did was very wrong".<sup>1</sup> As in numerous similar cases the accused was found guilty of murder, the victims being in all cases Kujurs or witch-doctors who were killed under the belief that they were responsible for causing the death or deaths in the family of the accused. Quite often the convicted persons are sentenced to death.

When the accused kills the deceased under the belief that the deceased has bewitched him, the courts in the Sudan adopt the same approach as where a Kujur has been killed. The Acting Governor declared as early as 1928 : "I should have recommended that the sentence be reduced... my reason being that sorcery is to these savages a very real and fearsome thing, and when they believe a case to have occurred, age long custom makes them kill the suspected person. I do not recommend a lighter sentence as it is our duty to impress on these people that such killings are not looked upon lightly by the Government".<sup>2</sup> As recently as 1961 Abu Ranat C J said in Sudan Government v Muyang Lohuyuk : "Whatever effect such a belief would have on the accused it would not constitute a defence for murder".<sup>3</sup>

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1 Ibid

2 Ibid 145

3 Ibid 144

In the Republic of South Africa the courts have consistently taken the view that intentional killing because of beliefs in witchcraft is murder but the beliefs have been taken into account as extenuating circumstances and the judges have therefore always used their discretion in favour of the accused and have avoided execution. This is in terms of the Criminal Procedure Act<sup>1</sup> which provides that if the Court, on convicting a person of murder is of opinion that there are extenuating circumstances it may impose any sentence.

In Transkei the position was the same as in South Africa by reason of the provisions of Section 330 of the Criminal Procedure Act.<sup>2</sup> However in 1977 Section 330 was amended by the General Law Amendment Act<sup>3</sup> which precluded the Court from accepting a belief in witchcraft as an extenuating circumstance, as had been practice prior to the amendment.

There has of late been a spate of executions following convictions in witchcraft cases.<sup>4</sup> These executions are accompanied by mounting rumblings among members of the legal profession who are unanimous in their view that the time has come for the legislation to be changed so that the beliefs in witchcraft can be accepted as extenuating circumstances.

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1 Section 277 of Act 51 of 1977

2 Act No. 56 of 1955

3 Act 27 of 1977 (Transkei)

4 E.g. S v Tshitshi & 4 others (unreported), all sentenced to death on 7th March 1988

A crucial test of how far courts could go in adhering to the strict letter of the provisions of the General Law Amendment Act<sup>1</sup> was presented as recently as 1982 by a case that came to the supreme court from the Gatyana District (formerly Willowvale)<sup>2</sup>. Apart from the medical evidence which related to the wounds inflicted upon the deceased, the only witness was the young son of the deceased. He told the Court that appellant No. 9 came to call his mother to the subheadman. When she refused to go, she was grabbed by the appellants and assaulted by them with sticks and bushknives. Later a knife was forced into his hand and he was, on threat of death, compelled to stab his mother.

According to this boy, his mother was called upon to go to the subheadman because she had said that the boys were going to die. There were also very brief confessions by the appellants, one of which only said : "I think I killed my enemy". That was appellant No. 12. Several others added that they killed her because she was going to kill them. In the court a quo Davies J said of No. 12 : "We consider that it is fair to assume that he also, by inference, claims to have acted because of a threat against his life by the deceased". In respect of all the appellants : "The motive with which they acted does not tend to show in any way that they acted

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1 Act 27 of 1977

2 S v Thembinkosi Tefu and 11 others case No. 178 of 1982 : unreported

from inner vice. In fact the contrary appears to be the case.. more precisely, we find that the fact that the accused are teenagers and did not act from the inner vice is an extenuating circumstance". The fact that they had also acted as members of a group, the older and more stronger minded more than likely having influenced the younger ones, was also taken as an extenuating circumstance. They were all sentenced to life imprisonment because "the Legislature has shown that it takes a very serious view of killings motivated by a belief in witchcraft".

When the matter came before the Appellate Division Van Reenen C J said:

"It is clear that the conclusion that such extenuation existed could only have resulted from the assumption made that the Appellants killed the deceased in their fear of her witchcraft. If this were not so, the vicious attack upon the deceased could only have been born from inherent vice in the Appellants.

"Youth is generally accepted as a fact upon which a finding of extenuation may be based, unless the Court comes to the conclusion that the issue was the result of inner vice. In considering this aspect, the motive behind the deed must be of great importance and it can hardly be said that a common belief, however contrary to the official view, is an indication of inner vice"<sup>1</sup>. The Chief Justice then

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1 Transkei A.D. decision, unreported

reasoned that a life sentence was too severe in the circumstances and a sentence of 15 years imprisonment was substituted in respect of all except the apparent ringleader who was given a sentence of 20 years imprisonment.

In S v Vela Bambi,<sup>1</sup> Lombard J accepted as an extenuating circumstance the fact that the deceased, an old lady, had walked from her homestead to that of the accused in broad day-light stood in front of him and his mother, took off her dresses and, when naked, declared; "I am responsible for your long illness, you will never be able to go to work or to raise a family". At night on the same day the accused had gone to deceased's hut and hacked her to death. He was sentenced to 20 years imprisonment. The core of the defence of course was inspiration of fear and the threats contained in deceased's statement, on which the court relied as extenuating circumstances.

In the final analysis, therefore, Transkei has become, probably unwittingly, the same as the Sudan in its attitude to the question of punishment for witchcraft. Representations are ceaselessly being made for a repeal of Act 27 of 1977 and it is hoped that the authorities will eventually respond positively.

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1 Decided at Butterworth Circuit Court - August 1986 (unreported)

#### 3.4.4 Circumcision

Those charged with the difficult task of drafting the Code were also faced with problems relating to circumcision for boys and the intonjane ceremony which indicates the attainment of mature age by girls. While these educational customs were not declared unlawful, the Code penalised those who forced or aided or procured the enforcement of circumcision or intonjane.<sup>1</sup> It also penalised whoever aided or procured the circumcision of any youth without the consent of his parent or the person having the lawful custody of such youth.<sup>2</sup> These provisions were retained in the Penal Code Act No.9 of 1983.<sup>3</sup>

Those who have practised law in the courts in Transkei and South Africa over the last twenty years will agree that the enforcement of circumcision and intonjane have not been in issue in the courts throughout this period. However these practices may well have been rife in Transkei during the last century thereby justifying the enactment of section 153 of the original act. Contrary to the position in Transkei, in Kenya there is the customary practice of forced circumcision for girls and it is still rife in that country. (Among the Xhosa-speaking peoples girls are not circumcised.)

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1 Section 153

2 Section 154. For a full discussion of these two education customs see Koyana: Customary Law in a Changing Society p.60 cf Hammond-Tooke: Bhaca Society pp. 79-82

3 As Section 103 & 104

In an article entitled "A plunge into the dark world of custom"<sup>1</sup> John Warral commends Kenya's President Daniel Moi for the bold step of placing a general ban on the customary practice of female circumcision. "He took the step in anger after the deaths of fourteen young girls after being forcibly circumcised by village midwives who take on themselves the practice with the authority of village elders. Often they are armed with primitive knives, or even old razor blades not suspected of even being remotely aseptic. Girls bleed to death and often midwives are afraid to take them to hospital".<sup>2</sup> John Warral indicates that many years ago missionaries tried without success to ban it, and that it is still practised among the Kikuyu, the Masaai and many other tribes, while the Luo tribe practises neither male nor female circumcision.

The evil of forced circumcision for girls is that where a case has not gone well there are other painful complications quite apart from the ultimate one of bleeding to death. These include shock which can in itself be fatal, dispareunia (painful intercourse) as well as scarring which can cause extreme child-birth problems. And according to John Warral<sup>3</sup> the custom is practised in more than

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1 See Daily Dispatch 20th September 1985

2 Ibid

3 Ibid

26 African countries and also in the Middle East, and it is estimated that more than 25 million women have under-gone circumcision in those countries.

It is self-evident that Kenya and these numerous countries in which this custom is still practised did not have the benefit of an enactment such as section 153 of the Penal Code of 1886. This is clear from the fact that on banning the practise, President Moi "forced" the police to charge with murder those who carried out the fatal operations, and yet one would imagine that this should have been the legal position from the advent of western civilization and government during the last century.

At the same time it must be conceded that various efforts must have been made over the last one hundred years to curb this practice but without the success that has been achieved in Transkei.

Indeed there is even a measure of resistance which accounts for the staying power of the custom.

This is brought out by John Warral<sup>1</sup> when he says: "The campaign against female circumcision is an extremely sensitive one, and many advanced African women believe it must be left to Africa to solve the problem, not hindered by western feminists and liberals who campaign hysterically against a problem they know nothing about". In all the circumstances it is submitted that the success of section 153 of the NTPC is remarkable.

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1 Ibid

3.4.5 The Spoor Law

3.4.5.1 The Spoor Law in Customary Law

The spoor system played an important part in customary criminal law among the Xhosa. Although it enjoyed prominence in its own right, it of course was a manifestation of the substantive customary law principle of collective liability. It gained distinction it is submitted, because it was employed in relation to the very sensitive field of stock theft in the criminal law.

It is clear that the spoor system was employed generally among the Xhosa not only when they were still all in Transkei but also by those who later settled in Ciskei. In 1878 a group of peasant farmers from the Idutywa District gave evidence before the Government Commission on Native laws and customs as follows:

Is the spoor law practised among you? Yes.  
Are you satisfied with it? Yes, because no man would say he is on the side of the thief and refuse to follow the spoor.<sup>1</sup>

Before the same Commission G C Brisley, a leading member of the community, gave evidence in respect of the East Griqualand area and said that the spoor law was a custom having the force of law

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1 Minutes of evidence page 510

" among the Kafirs ... but not among the Griquas.<sup>1</sup>"  
The practical application of the spoor law was quite interesting when stock was lost and its "spoor" followed. When such spoor was traced to within a short distance of a homestead, say 500 or 600 yards, the occupants thereof were informed of the spoor and they were obliged to assist in passing it on beyond their own homestead for a similar distance whereupon they could then be released from the tracing party. If anyone refused to assist he was considered to be the guilty party and the charge of stock theft was laid against him. However, it is not at all necessary that the actual thief be identified or even known. A case had to be established against a homestead, and the onus was on the head thereof to show what had happened to the stock after it had reached the area which is under his care.<sup>2</sup>

There were practical difficulties in the operation of the spoor law and these were realised by the commission. It therefore went so far as to consider the advisability or otherwise of abolishing the spoor law in which case it would have formed no part of the code. This appears from the evidence that was given by Brownlee, Chief Magistrate at the office of the chief Magistrate of Griqualand East at Kokstad. In wet weather the tracing process was quite easy, but otherwise it could be lengthy and frustrating because other animals

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1 Op cit

2 Commission's report, appendix B on page 18

would cross the spoor of the stolen one and this would lead to protracted arguments. "Nevertheless I think we cannot abandon the system of holding communities or individuals responsible for stolen property already traced to them though the property may not be found"<sup>1</sup>

Initially the authorities saw it as their duty to discourage the spoor law as part of the process of eliminating "backward" practices among the Xhosas.<sup>2</sup> Brownlee himself complained that the system of collective responsibility was on the wane in consequence of magistrates adopting colonial law and requiring more proof against a man than the mere tracing of stolen property to his neighbourhood. The result had been that stock and other thefts had greatly increased. Among the Ciskei Xhosa the spoor system was dealt an even more severe blow by the rapid process of detribalisation that followed military conquest. Thus J Liefeldt, special magistrate of Cathcart sitting with Chief Sandile and Anja of the Gaiikas, declared: "(The spoor law is) on the wane only in so far as we have discountenanced it. Whenever Kafir law has been suspended the results are that stock thefts are vastly increased, conviction being difficult."<sup>3</sup> J.M. Stevenson, Inspector of Native Locations in the King Williamstown District, expressed himself in similar terms.<sup>4</sup> Rev. B.L. Key at St. Augustine's Mission

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1 At page 60

2 Ibid

3 Op cit 126

4 Ibid

in the Tsolo - Qumbu area (Pondomiseland) also complained of the decline of the spoor system which decline was caused by it being "in opposition to European ideas of justice" and said he regarded<sup>1</sup> it as a most important means of protection to property. However the impact of this indigenous practice was of far reaching significance when the chips were down and the representations in favour of its retention were successful.

The spoor law was employed by the Griquas along similar lines in the olden days, but by the time they were ruled by Adam Kok it had gone out of use.<sup>2</sup> Yet among the Sotho if a spoor is traced to a village and some trace of the stolen property is found at the village but the thief cannot be discovered then the village is held responsible and is liable to pay a fine. This appears to be something midway between the received western law rule requiring proof beyond a reasonable doubt and the rule of indigenous law that "there is no smoke without a fire."<sup>3</sup>

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1 Ibid 185

2 Brisley: op cit 514

2 op cit appendix B at p.22

3 See Koyana's Customary Law in a Changing Society p.129. Significantly, the rule among the Basuto is that stray cattle are kept by the finder until claimed. They are however, immediately reported to the principal chief. There is no advertisement about the cattle, and when they have been unclaimed for a long time they become the property of the principal chief!

### 3.4.5.2 The Spoor Law in the Code of 1886

Owing largely to the weight of evidence and recommendation in favour of the retention of the spoor law, the drafters of the code saw fit to make the spoor law a part of the Transkei Penal Code. The relevant provisions were contained in section 200, 201 and 202 of the code.<sup>1</sup>

It will be observed that the provisions of the code relating to the spoor law contain a mixture of civil law and criminal law. As to the criminal law aspects thereof there is the interesting case of R v Mtsi.<sup>2</sup> In that case the accused pleaded guilty to the theft of a goat. The only evidence against him was that the spoor of the thieves had been traced to his homestead. The defence proved that he had driven the thieves away from his home and had not partaken of the meat. It was held on review that the plea of guilty was made under the influence of "native custom" as to the spoor law and the conviction and sentence were quashed. This decision was similar to R v Qubula where the admission and offer to pay for four goats were made in similar circumstances.<sup>3</sup>

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1 See appendix A

2 1908 EDL 24

3 1907 EDL 289. See also Queen v Mbalu (1892) discussed in 10 Juta 380

Because of the civil law provisions of the code there came before the courts several civil cases relating to the spoor law.<sup>1</sup>

The impact of the Transkei Penal code on South African law with reference to the spoor law is immediately seen in Act 41 of 1898.<sup>2</sup> This influence is recognised by Brookes<sup>3</sup> who demonstrates accordingly by quoting<sup>4</sup> the whole of the section of the cape statute in question. The difference is indeed very slight between this and section 200 of the Transkei Penal Code. The learned author addresses the question that to the westerner provisions like these probably savour of injustice. To that he replies: "It is a mistake to read our own legal and ethical ideals into the minds of other people."<sup>5</sup>

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1 See, for example, Umhluzi v The Messenger of the Magistrate's Court, Tsomo, discussed in the Cape Law Journal 1890 page 180; Nqakiswa and nine others v Magwetyana 4 NAC (1918) p.341; Lebitsa Nkhuade v Samson Mafunda 3 NAC 266 (Mt Fletcher). The last case reflects the extension of the application of the spoor law to ordinary articles quite apart from livestock - a good example of Judge-made law.

2 Section 1

3 The History of Native Policy in South Africa from 1830 to the Present Day. Nasionale Pers Beperk, Cape Town 1924

4 See at page 188

5 Op cit 190

CHAPTER FOUR

UNLAWFULNESS<sup>1</sup>

4.1 COMPULSION/NECESSITY

4.1.1 Introduction

At the outset it must be pointed out that the defence of necessity is a facet of the defence of compulsion.<sup>2</sup> The distinguishing feature is that in the case of the former the dilemma situation is brought about by a human agency while in the latter case it is brought about by the force of surrounding circumstances. In the result the two defences have been treated as being governed by the same rules.

The question as to whether compulsion is a defence to a charge of murder is fraught with much difficulty. The difficulty arises from the fact that there are two parallel schools of thought regarding the matter. Both schools appear to be reasonable and it is thus difficult for jurists at any given time to reject the one school and permanently adhere to the doctrines of the other. This has naturally led to considerable uncertainty on the law relating to compulsion. In both schools the prominent feature is the assessment of the relative value of human life.

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1 As to the material content of unlawfulness see Snyman: Criminal Law p.68.

2 Thus Snyman (Criminal Law p.86) says that necessity may arise from compulsion or inevitable evil.

On the one hand it is the principle of self-preservation which places the life of the accused person higher than that of the deceased and consequently excuses his conduct in killing him. Cranville Williams<sup>1</sup> refers to Kant, Bentham, Austin and Holmes who propound the doctrine of self-preservation. It is certainly a plausible doctrine, and there can be no doubt that the average man in the street would be favourably disposed to it, and compulsion would therefore stand as a complete defence to murder. At first, however, this doctrine did not recommend itself with any success in Transkei and South Africa.

On the other hand there has always been the question of a balancing of the interests of the innocent deceased with the preservation of the life of the accused who was subjected to compulsion. It has then been boldly suggested that the accused person should sacrifice his own life rather than take or assist in taking the life of an innocent person. In this connection it is noteworthy that Grotius himself did not recognise the principle that one may lawfully kill another person merely for self-preservation.<sup>2</sup>

#### 4.1.2 English Law and the 1886 Code

In English law it has been held that necessity is no defence to murder. In this connection the leading

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1 Criminal Law p.738

2 Grotius : De iure 2.2.8

case of R v Dudley & Stephens<sup>1</sup> assumes relevance. There the accused, along with a third man called Brooks and a seventeen year old boy called Parker were cast adrift in an open boat after their yacht went down in a storm 1 600 miles from the Cape of Good Hope. On the twentieth day after the shipwreck, when they had been for eight days without food and for six without water, the accused killed the boy. The latter did not consent to their act, but did not offer any resistance, being already too ill to do so. The accused and Brooks fed on the flesh and blood of the boy until they were picked up four days later. Giving the judgment of the Court Lord Coleridge C J said "... this is clear, that the prisoners put to death a weak and unoffending boy upon the chance of perserving their own lives by feeding upon his flesh and blood after he was killed, and with the certainty of depriving him of any possible chance of survival .....To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life..... We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy"<sup>2</sup>. Sir J F Stephen<sup>3</sup> upholds the same view. The position

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1 1884 14 QBD

2 The accused - called Defendants in English Law - were sentenced to death. This sentence was afterward commuted to six months' imprisonment.

3 A History of the Criminal Law of England (1886) Vol 11 p.107

is the same in the United States of America.

In the light of what has been said above, it is not surprising that the idea of self-sacrifice should have been predominant in the minds of those who drafted the 1886 Code for the Transkeian Territories as they then were. Section 29 thereof shows signs of that.<sup>2</sup>

#### 4.1.3 The defence of necessity in South African Law

In present day South African Law, an act will be justified on the ground of necessity in the following instances:

##### (a) A legal interest endangered

According to Burchell and Hunt, danger of death or serious bodily injury may justify an act done in circumstances of necessity, and "despite occasional reluctance to go beyond this, it is clear that fear of injury to the person and a threat of damage to property will also suffice".<sup>3</sup> As to the "occasional reluctance to go beyond this" the learned author is referring, as shown in his footnote, to section 29 of the Transkei Penal Code as well as the Zimbabwe case of R v Damascus 1965 (4) SA 589 (SR). This case shows once again, significantly as recently as 1965, the impact of the Transkei Penal Code of 1886 on South African law with special reference to Gardiner and Lansdown, and on Zimbabwe via

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1 Jerome Hall : General Principles of Criminal Law : 2 ed p 438

2 See Appendix A

3 Vol 1 p.338 Juta 1983

Gardiner and Lansdown. For it is the first part of section 29 that limits the matter to compulsion by threats of immediate death or grievous bodily harm. Gardiner and Lansdown say the same thing save for saying "serious" instead of "grievous".<sup>1</sup> The approving reference to the said code comes as no surprise.<sup>2</sup> In the Damascus case McDonald J appreciated that the limitations to immediate death or serious bodily harm were controversial, and acknowledged the firm view of Glanville Williams to the effect that threats against property should also be included. In this case the threat was that the huts of the accused would be set alight. The learned judge however decided that the limitation to death or serious bodily harm should be accepted as correctly reflecting the law.<sup>3</sup> In R v Werner<sup>4</sup> Watermeyer C J declined to define the limits within which the plea of compulsion or necessity would exclude criminal conduct. He went further than Gardiner and Lansdown who say "save probably in murder"<sup>5</sup> and said: "I am inclined to the view that the killing of an innocent person is never legally justifiable by compulsion or necessity". As if this was not sufficient indication of the influence of section 29 of the Transkel

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1 See Vol 1 6ed p.108

2 See at p.109

3 See at p. 603

4 1947 (2) SA 828 (A)

5 op cit 108

Penal Code the learned Chief Justice went on to say :  
"The Native Territories Penal Code Act 24 of 1886  
contains the following provision: ....." - and  
he quoted the whole of section 29 with provisos  
as part of his judgment and without any comment whatsoever<sup>1</sup>  
beyond that. This case was applied in R v Mneke  
where the Court said that in the light of the authorities  
the law does not countenance a plea of compulsion  
in the case of murder but again said that even if  
such killing was legally justifiable the fear in  
casu was not a justification.

By 1953 there were judicial pronouncements which  
indicated a departure from the stringency of the  
rule as laid down in section 29 of the Transkei Code  
and as followed by earlier cases. Thus in R v Koning<sup>2</sup>  
the accused deemed that it was necessary to shoot  
the deceased (convict) to prevent him from escaping.  
A verdict of guilty of culpable homicide was returned.  
The court did say here that the shooting of an escaping  
convict was also tantamount to self-defence.

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In the following year Van Den Heever J A said that  
the law recognises "a hybrid or middle situation  
where there is an intention to kill, but where that  
intention is not entirely but to some extent excusable".

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1 1961 (2) SA 240 (N)

2 1953 (3) SA 220

3 In R v Hercules 1954 (3) SA 832

The Court held that in such cases a verdict of culpable homicide should be returned. The learned judge relied on the general principle laid down by Voet that whereas fear of death is no complete excuse, it operates in mitigation of punishment. He also had regard to Matthaeus<sup>1</sup> who lays down the general principle that while a good man must be prepared to be crucified rather than agree to commit a crime, he, however, is not liable to the normal penalty for that crime since he did not do so with unqualified intent but partim voluntaria, partim involuntaria. This "middle situation" applies to a killing in circumstances of compulsion:

- (a) in which the accused was compelled by threats of immediate death or serious injury to himself or to those whom he was legally obliged to protect or
- (b) where the killing was not immoderately disproportionate to the harm threatened to the accused. Where such killing is immoderately disproportionate to the threatened harm, a verdict of murder would then be justified.

It was in 1972 that South African law came out fully in support of compulsion as a defence to a charge of murder. In S v Goliath<sup>2</sup> Rumpff J A held that

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1 Proleg 1.13

2 1972 (3) SA 1 (A)

on a charge of murder compulsion can constitute a complete defence. As to when a compulsion will afford a ground of acquittal on the ground of compulsion will depend, however, on the particular circumstances of each case and the whole factual complex would have to be carefully examined and adjudicated upon with the greatest care. The learned judge paid due attention to the large volume of English and South African precedent that had given supremacy to the doctrine of sacrifice and overcame the difficulties thus placed in his way in an admirable manner. As far as the Dudley case is concerned, he said that Lord Coleridge had been carried by a wave of emotion when he relied on the pre-Christian and Christian teachings in support of the doctrine of sacrifice.

The move away by the Appellate Division of South Africa from the doctrine of sacrifice and in favour of self-preservation is all the more welcome because of the absurd results which can flow from the exclusion of murder from the defence of necessity. Take the case of a person who, under compulsion, kills one innocent person in order to save the lives of, say eight others. Such person must still be found guilty of murder. Take also the case of a person who, under compulsion, kills an innocent person whose death

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is, in any event, inevitable. Such person must still be found guilty of murder.

(b) Threat Commenced or Imminent

According to Burchell & Hunt<sup>1</sup> the threat of harm must have commenced or must be imminent and it will not avail the accused if the threat is only to be implemented at some time in the future. This is in sharp contest with the view of Glanville Williams : that the defence ought not to be limited to threats compelling in their effect and should always be considered as possibly founding a defence.<sup>2</sup> In this regard the two Zimbabwe cases of Damascus<sup>3</sup> and R v Chipesa<sup>4</sup> were decided in accordance with the South African law as stated by Burchell and Hunt, and they all follow Section 29 of the Transkei Penal Code of 1886. The Penal Code is in accordance with the traditional view which requires an objective approach. This in turn, is in accordance with the view that necessity is a defence which excludes the unlawfulness of the offender's conduct.

(c) Threat Not Caused By Accused's Fault

The Second part of Section 29 of the Transkei Penal Code of 1886 is the central pivot of the

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1 op cit 340

2 Ibid

3 1965 (4) SA 598 (SR)

4 1964 (4) SA 472 (SRAD)

requirement that the threat will be executed and, more pertinently, that the accused was not a party to any association or conspiracy, the being party to which rendered him subject to such compulsion. The leading case in this connection is S v Bradbury.<sup>1</sup> In that case a junior member of a dangerous gang of criminals had reluctantly played a minor role in the planned murder of an erstwhile benefactor of his, being influenced thereto by fear of reprisals of a serious nature being perpetrated by the gang on himself or his family should he refuse. The two assessors constituting the majority of the trial court had found extenuating circumstances to exist, but the trial judge had nevertheless, in exercising his discretion, imposed the death sentence. In his reasons for dissenting from the assessors he said that the accused had exaggerated his fears and furthermore had ample and repeated opportunities to escape or to seek protection.

On appeal Steyn C J was ad idem with the judge in the court a quo and stated that a murderer who shrinks from inflicting death on a benefactor by his own hand and performs a lesser part, leaving the act of killing to a fellow murderer would not on that account be less blameworthy

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1 1967 (1) SA 387 (A)

for the part he does perform, even if also that part is performed with distaste. The influence of fear had to be weighed against the need for a deterrent to that kind of gangsterdom. The trial judge's discretion to impose the death sentence thus stood as having been judicially exercised. Van Blerk J A concurred. Holmes J A dissented, and reasoned that a sentence of imprisonment for 20 years was appropriate.

There is much merit in the down-to-earth approach adopted by Holmes J A. The Utopian approach of the majority of the court is manifest in their support of the judge a quo who virtually sets standards which the average man cannot uphold. The view that the threat must not have been caused by the accused's own fault is firmly propounded by Burchell & Hunt.<sup>2</sup> The learned authors obviously have no quarrel, therefore, with the second part of section 29. Indeed they quote this second part with implicit approval in the course of their discussion of this requirement. On the other hand Snyman does not share the view that the threat must not have been caused by the accused's own fault, and urges that the<sub>3</sub> matter must rather be regarded as being controversial. The learned author acknowledges that the view

1 See p. 406 - 408

2 op cit 340

3 See footnote 169 at page 340

is held in Bradbury's case but he argues that the statement was an obiter dictum, the point at issue in the case having been extenuating circumstance not Bradbury's liability for murder. There is some merit in this contention. He further acknowledges that S v Kibi<sup>1</sup> is a direct authority for the proposition. In that case Howie A J acknowledged the controversy on the question, but raised the interesting point that the onus rests on the state to exclude the operation of compulsion. It would be illogical of our criminal law to grant the defence of necessity where the imperilling factor is lawful action, in this case making a (false) statement, the necessity being (lawful) detention and fear of continued, indefinite detention and interrogation. He therefore held that the requirement (my underlining) that the threat to the accused was not caused by his own fault had not been fulfilled.

Snyman<sup>2</sup> further acknowledges that Burchell and Hunt support this view, as well as does the American model Penal Code.<sup>3</sup> Strangely enough, the learned author is silent on section 29 of the Transkei Penal Code.

The author bases his contrary opinion on the example if, because of X's carelessness, his baby swallows an overdose of medicine, X should

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1 1978 (4) S.A. 173 (E)

2 See Criminal Law p.83

3 See footnote 25 at p.88

still be allowed (and will in fact be allowed) to exceed the speed limit while rushing the baby to the hospital instead of resigning himself to the child dying. This example stems from the case of S v Pretorius<sup>1</sup> where the act committed out of necessity was aimed at protecting X's child. He therefore says two acts: the creation of the danger and the rescue from it, should be kept apart, for "to project the reprehensibility of the former on to the latter is strongly reminiscent of the discarded doctrine of versari in re illicita." <sup>2</sup> I respectfully submit that the conflict of views on this question is more apparent than real, but if it is not, had the learned author considered section 29 of the Transkei Penal Code he might well have expressed himself differently. An overdose of medicine to a child is casus fortuitus - matter of mere misfortune, and has no relation to being party to an association or conspiracy. In those circumstances the giving of an overdose is not a res illicita (an unlawful conduct) in which X engages himself (versatur) and that is why the court in the Pretorius<sup>3</sup> case correctly set aside the conviction of Pretorius who had been in a speed trap when rushing the child to hospital.

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1 1975 (2) SA 85 (SWA) 90

2 At page 89

3 Supra

(d) Necessary for the Accused to Avert the Danger

It is clear from section 29 of the Transkei Penal Code that it must have been necessary for the accused to avert the danger. All that is required under this element, say Burchell and Hunt,<sup>1</sup> is that the harm would not probably have followed if the accused had not acted as he did. The question that arises is : does the harm have to be inevitable and irreparable? It is submitted that it does not have to be. The Penal Code makes the position reasonably clear when it merely speaks of threats of harm which the person under compulsion believes will be executed. Now in S v Adams<sup>2</sup> King J found the accused (Indian) guilty of contravening the Group Areas Act when he moved to a white area pleading necessity because of acute shortage of housing. The other group Areas Act case is S v Werner.<sup>3</sup> Le Roux J recalled R v Canestra 1951 (2) SA 317 AD where it was said that the defence of necessity must be confined within the strictest and narrowest limits but if an accused is compelled only by economic necessity to contravene a regulation that is not a form of necessity that the law recognises. The learned judge therefore ruled that a state

1 Op.cit

2 1979 (4) SA 793 (T)

3 1980 (2) SA 313 (W)

of necessity is a situation in which an accused finds himself where there is no alternative in order to prevent irreparable damage (onberoeplike skade) as far as he or his family is concerned.<sup>1</sup> These two Group Areas cases came together before the Appellate Division in 1981<sup>2</sup> and there Rumpff CJ said that there was no evidence of an absolute shortage of houses and the state of necessity could not therefore be invoked. It is submitted that had the appeals been allowed the defence would indeed have been stretched too far especially having regard to the provisions of section 29 of the Transkei Penal Code. The accused should certainly flee if the harm can reasonably be avoided by flight.

To sum up the foregoing, one can say that the Transkei Penal Code fell strongly under the influence of English law in the field of necessity. Gardiner and Lansdown served as a vehicle for the acceptance of the code's influence in South African law, and the courts both in South Africa and Zimbabwe followed the view that compulsion or necessity cannot legally justify the killing of an innocent<sup>3</sup> person. The turning point came with the Goliath case, a development which was much to be welcomed.

1 See at 329

2 S v Adams, S v Werner 1981 (1) SA 187 (A)

3 Supra

Despite the somewhat half hearted difference of opinion expressed by Snyman, one can also say that to a large extent the provisions of the code in this respect also found acceptability among writers such as Burchell and Hunt.

(e) Marital Coercion

Until as recently as 1925 English law upheld and enforced the rule that a wife who committed certain classes of crimes in the presence of her husband was presumed to have committed them under his coercion unless the contrary was proved. The wife was therefore legally excused for her actions. Burchell & Hunt state that this rule was received in South African law.<sup>1</sup> While English law and South African law were still under the grip of this rule, the Transkei Penal code took the lead in 1886 and specifically excluded the rule so that it never formed part of the received criminal law of Transkei. It had never formed part of the customary criminal law and that position obtains to date. The express exclusion of this rule by section 29 of the Penal Code is acknowledged by Burchell and Hunt<sup>2</sup> as well as Gardiner & Lansdown.<sup>3</sup> It was only in 1925 that English law abolished this rule by legislation.<sup>4</sup>

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1 Op cit 350 footnote 249

2 Ibid

3 Op cit 111

4 S.47 of the Criminal Justice Act of 1925

At some stage South African law followed the lead of the Transkei Penal code, but it is not quite clear whether that was before or after the change in England was effected in 1925. At the beginning Lord de Villiers, who was famous for importing the principles of English law into South African law declared in R v Albert<sup>1</sup> : "I am not prepared to adopt the English rule that a wife who commits an offence in the presence of her husband must be presumed to have acted under coercion.<sup>2</sup> In Bosch v R,<sup>3</sup> a few years later, the judgment of Lord de Villiers was followed in the Transvaal. Significantly Gardiner and Lansdown<sup>4</sup> mention these cases simultaneously with section 29 of Act 24 of 1886 when making the point that the rule has been discarded in South African law.

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On the other hand Snyman says this presumption was applied "in some early South African cases" - and quotes R v Chansie 1925 OPD 74, R v Mofokeng 1941 OPD 233, R v Motaung 1942 OPD 233, R v Mosenane 1943 OPD 222, and R v Mokhlyane 1946 OPD 140. He then refers to R v Koale 1950 (3) SA 705 (O) 711 and R v Medley 1951 (4) SA 241 (C) as authority for the view that the

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1 (1895) 12SC 272

2 See page 274

3 1904 TS. 55

4 Op cit 111

5 Op cit 94

rule is no longer part of our law. Burchell and Hunt also state that the Koale and Medley cases were the turning point as far as South African law is concerned.

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A close reading of R v Koale shows the far-reaching nature of the controversy and confusion on this question. For in that case Horwitz J discovers Barry J P as saying in Rex v Adams (3 EDC 216) that the English law presumption is consistent with the principles of Roman Dutch law based on the civil law.<sup>2</sup> This view is apparently based on Mascardus who says "Etiam in poenalibus locum habere ut mulier seducta praesumatur a viro..."<sup>3</sup>

For his part, however, the learned Judge sees no wisdom in delving deep into the Roman Dutch Law or the civil law in order to find a solution to the problem "in view of the totally different social and political status of the modern woman from that of the Roman wife."<sup>4</sup> He observes that the servility of the modern wife towards her husband cannot be taken for granted, and recalls Plutarch's remarks in "The life of Cato the censor" when he says, through Themistocles.

"The Athenians govern the Greeks, I govern the Athenians; you my wife, govern me."

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1 1950 (3) SA 705(0)

2 See at p.708

3 Ibid

4 Ibid

He concludes that although in some cases the wife may stand in fear of physical violence from her husband should she disobey his behest, where the spouses are "cultured, civilised and advanced, mentally and morally, that fear is virtually non-existent.<sup>1</sup> The presumption should therefore not be applied indiscriminately to all married women and in each case the question of coercion should be decided in accordance with the established facts if real and substantial justice is to be ensured. It is submitted that the degree of civilisation has nothing to do with the legal sphere. Regrettably, Burchell & Hunt appear to endorse the view that the degree of civilisation of the parties should have a role to play in the determination of liability. Yet I make bold to say that in various customary communities situated in remote rural areas where there are no schools and which are in all ways divorced from western civilisation there are countless instances where men are renowned for being under the apron strings of their wives and this is expressed by the derogatory term that the wife "generally pulls the husband along by the nose" (uthiwe nqo ngempumlo). Such women rule their husbands as did Plutarch's wife and in fact some chiefs also fall into this misfortune so that as much as Madame Plutarch

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1 page 711

ruled Athens and Greece, that much do these "uncultured, uncivilised and backward" women also rule their husbands' subjects.

The conclusion at which one must arrive is therefore that in the field of mental coercion the Penal Code took a line different from the English law and excluded the presumption while South African law followed English law. However the code would not allow itself to be ignored for all time and it did exert some influence on South African law. That influence was of short duration and was soon terminated. It is submitted that there was and there is little justification for the presumptions.

The second part of section 29 certainly exerted a discernible influence on South African law. The echoes of the 1886 code and of South African law as laid down in the Bradbury case<sup>1</sup> are heard in the Transkei Penal Code Act of 1983<sup>2</sup> section 10 (a) (iii) whereof contains the proviso that in the case of necessity arising from human agency the situation that the person pleading necessity found himself in must not have been due to his own fault. This still leaves the scales heavily loaded against an appellant who will again and again be told that he should have escaped. This is in effect a reflection

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1 Supra

2 Act No.9 of 1983

of the versari in re illicita doctrine. The overall picture, however is that the new Code has been drawn in a manner reflecting the advantage gained from legal developments and court decisions in South Africa over the century.

#### 4.2 Obedience To Orders

Section 59 and 60 of the Transkei Penal Code<sup>1</sup> deal with obedience to orders, and South African law is well in harmony with these provisions. Gardiner and Lansdown<sup>2</sup> state that a soldier is not criminally responsible for acts of violence done under the orders of his officer if such orders are not manifestly illegal, and they quote the leading case of R v Smith 17 S.C. 561 and Section 60 of the Transkei Penal code as authority for the view. Burchell and Hunt<sup>3</sup> also refer to Smith's case as well as R v Villiers 1903 ORC 1, followed by a footnote: "The same principle appears in sections 59 and 60 of the Transkei Penal Code, in cases of obedience to orders for the suppression of a riot."<sup>4</sup>

#### 4.3 Consent

Consent is dealt with in Sections 73, 74, 75 and 76 of the Transkei Penal Code.<sup>5</sup> The harmony between the Code and South African Law on the question of consent is apparent from Gardiner & Lansdown who refer specifically to Sections 73-76 as part of the text.<sup>6</sup> Likewise Burchell & Hunt<sup>7</sup> reiterate the rule that a person's consent to being killed cannot purge the homicide of its unlawfulness. In this connection they recall section 76,<sup>8</sup> and after Gardiner and Lansdown,<sup>9</sup> give the valid reason

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1 See Appendix A

2 See vol 1 6ed 118

3 Op cit 357

4 See footnote 306

5 See Appendix A

6 See vol 1 6ed 118

7 Op cit 370

8 See footnote 429 on page 370

9 Ibid

for this rule namely that it is beyond the power of an individual person to consent to being killed, the state having as it does an interest in the preservation of human life.

It now remains for us to consider cases of euthanasia.<sup>1</sup>

The leading cases in this regard are S v Hartmann,<sup>2</sup> S v De Bellocq<sup>3</sup> and S v Dawidow.<sup>4</sup> These cases are discussed by Andrian Rall in a unique article entitled :<sup>5</sup> The Doctor's dilemma: Relieve suffering or prolong life? The learned author defines euthanasia as the ending as painlessly as possible of the life of a person who is fatally ill and suffering from pain.<sup>6</sup>

In the Hartmann case the killing of the 87 year old man by his doctor (own son) was with his consent. He was very ill indeed. He had been suffering from cancer for many years and the disease had spread to various parts of his body. He was plainly incurable, completely bedridden and suffering severe pain which necessitated the most potent pain-killing drugs. His son injected him with a dose of penthol sufficient to kill him. In line with section 76 of the Transkei Penal Code, the Court found Hartmann guilty of murder. Rall is unhappy about this and feels that euthanasia

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1 The word is derived from the Greek eu meaning good, and thanatos meaning death. It is defined as gentle and easy death, bringing about this, especially in the case of incurable and painful disease.

2 1975 (3) SA 532 (c)

3 TPD May 1968, unreported

4 TPD May 1968, unreported

5 (1977) 94 SALJ 40 c.f. Strauss: (1964) 81 SALJ 179

6 Op cit p.42

as defined by him should be justified, and this should be done without the law having to be altered by legislation or the creation of new defences. The court should bring this about by simply applying the criterion of boni mores. He concedes, however, that it will take a very long time before the courts will consider that the boni mores of South African Law permit them to legalise euthanasia. Let us suppose that the deceased in the Hartmann case did not consent and Dr Hartmann was charged under the Transkei Penal Code. Could he have successfully raised the defence offered by section 74? It is clear from the decision in the Hartmann case that the requirement of "the benefit of the complainant" would not be met and the accused's case would in fact be even less arguable than the Hartmann one.

In the Bellocq case the child was an idiot, and was certain to die of the disease that caused it to be an idiot within a short time. The parent, a former medical student, killed the child by drowning it. De wet J P said "The law does not allow any person to be killed whether that person is an imbecile or is very ill. The killing of such person is an unlawful

act and it amounts to murder". Rall is as critical of the De Bellocq decision as he is of the Hartmann one. He complains that the murder conviction is a perpetual stigma and a doctor can get struck off the roll as happened with Dr Hartmann.

It is noteworthy that de Wet & Swanepoel,<sup>1</sup> when dealing with negotiorum gestio (saakwaarneming) refer expressly to section 74 of the NTPC. It is submitted that section 74 is a statutory recognition of the Roman-Dutch concept of negotiorum gestio, and thus once again the impact<sup>2</sup> of Roman-Dutch law on the NTPC is demonstrated.

It can be safely concluded that in the fields of consent and obedience to orders the Transkei Penal Code exerted a distinct influence on South African law. Neither the courts nor the textbook writers made even the slightest effort to resist this influence.

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1 Die Suid-Afrikaanse Strafbeg, 4 ed 97

2 cf 3.3 supra

CHAPTER 5

MENS REA

5.1 THE LIABILITY OF CHILDREN

The liability of children is dealt with in Section 25 of the Transkei Penal Code. Among the Roman-Dutch writers there is a great deal of dispute as to the age at which a child is doli incapax. In this connection Burchell and Hunt<sup>2</sup> say "the formulation, hallowed by frequent use in the judgements of our courts, that there is a conclusive presumption that such a child (i.e. a child under seven years) is doli incapax is not strictly accurate...." Among the judgements of courts referred to, the Appellate Division case of Attorney General, Transvaal v Additional Magistrate for Johannesburg<sup>3</sup> is but one, in which Kotze J A stated the South African law as being that a child under the age of seven years is conclusively held to be doli incapax. The learned judge of appeal went on to say that this presumption is itself rebuttable in respect of children seven to fourteen years of age on proof of a malicious mind on the part of the child in accordance with the maxim of the canonists

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1 See appendix A

2 South African Criminal Law & Procedure vol.1 242

3 1924 AD 421

malitia supplet aetatem. It emerges from this judgement that in the Netherlands the age of ten years is taken instead of seven, and this is in accordance with the rule of the civil law and of majority of the commentators (my own underlining). Below that age, say the majority, there can be no capacity whatsoever on the part of a child to commit a crime. It is clear therefore that the rule laid down in section 25 of the code is not derived from Roman-Dutch law.

Likewise the English law takes a different line from the Transkei Penal code on this question. Smith and Hogan state: "Even though there may be the clearest evidence that the child caused an actus reus with mens rea, he cannot be convicted once it appears that he had not, at the time he did the act, attained the age of ten. Nor is this a mere procedural bar...."<sup>1</sup>

This position obtained only after 1933, when the age was raised by statute from 7 to 8 and later from 8 to 10 by statute in 1963.<sup>2</sup> Before these statutory increases that operative age was seven, but the law

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1 Criminal Law : Butterworths 1965 p.79'

2 Burchell and Hunt op cit 241 footnote 43

was the same as that propounded by the majority of the Dutch commentators, namely that the maxim malitia supplet aetatem (malice supplements the age) applied. It is therefore clear that the Transkei Penal code is not based on English law in this regard as malice is a relevant feature therein.

The rule that the presumption is rebuttable in respect of children between the ages of seven and fourteen was applied in R v K<sup>1</sup> and the maxim malitia supplet aetatem was upheld. Now at that time the presumption that every person is presumed to intend the reasonable and probable consequences of his act was applicable in South African law, and the question that Centlivres C J had to decide was whether this presumption automatically outweighed the presumption that a child of this age group is doli incapax. He ruled that it did not, and the crown had to show affirmatively that the child knew what the reasonable and probable consequences of his act would be. In this case the point was also made that the presumption of doli incapax weakens with the advance of the child's age towards fourteen although of course the onus still rests on<sup>2</sup> the crown to prove that the child is doli incapax.

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1 1956 (3) SA 353 (A)

2 Per Centlivres C J at 385

The Supreme Court of Bophuthatswana has also accepted the presumptions regarding the liability of children. In S v M<sup>1</sup> Hiemstra C J applied R v K<sup>2</sup> regarding the rule that the presumption weakens with the advance of the child's age towards 14. In casu the boy was 13 years of age. Furthermore, the learned Chief Justice applied the case of R v Kaffir 1923 CPD 261 and reiterated that criminal capacity is more readily accepted in regard to theft than in regard to a lesser known statutory offence. The rules applied by the Supreme Court of Bophuthatswana are quite in harmony with the spirit of section 25 of the Transkei Penal Code.

The court in Zimbabwe has dealt with the presumption in relation to statutory offence and has repeatedly said that it is undesirable for youths of about 13 years of age to be presecuted for statutory offences which might often be no more that boyish pranks. In R v Mahwahwa<sup>3</sup> Beadle J (as he then was) repeated what he had said in the previous case of R v Kondora 1953 SR 216 about the undesirability of presecutions in these circumstances. The findings in these cases are in accordance with section 25 of the Transkei Penal Code.<sup>4</sup>

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1 1974 (4) SA 564 (BSC)

2 Supra

3 1956 (1) SA 250 (SR)

4 For a Zimbabwe case in which the court may perhaps have taken the presumption too far and ignored the maxim malitia supplet aetatem see R v Tsutso 1962 (2) SA 666 SR.

The legal certainty provided by the Transkei Penal Code in relation to the liability of children is to be seen even in connection with the crime of rape. In terms of section 159 a boy below the age of 14 is conclusively presumed to be incapable of committing rape and semble, of sodomy and bestiality. It would appear that the English law was similar on this point. In Roman-Dutch law there was once again a difference of opinion among the jurists. This is clear from Gardiner & Lansdown.<sup>2</sup> South African law has followed the English law and, by necessary implication, the Transkei Penal Code of 1886.<sup>3</sup>

<sup>4</sup>  
Snyman re-iterates the rebuttable and irrebuttable presumptions exactly as laid down in the Transkei Penal Code.<sup>5</sup> However he criticises the test laid down by the courts viz. whether the child knew what it was doing was wrong, and calls it "a gross simplification of the test for criminal responsibility".<sup>6</sup> The learned author draws attention to and upholds the cognitive and the conative aspects of the test for criminal responsibility. The learned author goes on to acknowledge indirectly but quite plainly the influence of the Transkei Penal Code on South African law in this regard when he says that section 25 of the code embodies a test for the liability of children

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1 See R v Williams (1893) I.Q.8. 320, quoted by Gardiner & Lansdown op. cit. 86

2 See Vol. 2 6ed 1622

3 Gardiner & Lansdown op. cit. ibid

4 Criminal law

5 At page 131

6 Ibid

"very similar to that of South African law". He further acknowledges that R v Kenene<sup>1</sup> does in fact reflect that influence.<sup>2</sup>

The Transkeian legislature abolished the 14 year rule in 1983<sup>3</sup> and in the light of objections to it by scholars like Snyman<sup>4</sup> it was to be expected that South Africa would follow suit. That was achieved by the Law of Evidence and the Criminal Procedure Amendment Act 1987 which provides thus:

"no presumption or rule of law to the effect that such a boy is incapable of sexual intercourse shall come into operation".<sup>5</sup>

This development has understandably been welcomed by Professor Milton.<sup>6</sup> He says the amendment brings the law of rape into line with the general principles governing the liability of children, because the youth of the offender will be relevant only if it establishes a lack of criminal capacity. The author rejoices at the overthrow of the Justinian rule and its English connection.

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1 1946 EDL 18

2 See also R v M & others 1978 (3) SA557 (TKSC). This is a Transkeian case in which Rose-Innes J of South Africa, seconded to the Transkei Supreme Court, dealt with section 25 and said that it embodies the common law, meaning of course the common law of South Africa.

3 Section 96 of Act 9 of 1983

4 Supra

5 Section 1 of Act 103 of 1987

6 Law Reform: The demise of the impunity of pre-pubescent rapists. South African Journal of Criminal Justice (SACJ) 1988:1

It is now clear that infants are exempt from criminal liability because they are incapable of mens rea. But are their acts themselves regarded as unlawful? The view of Burchell and Hunt is categorically that they are not to be so regarded.<sup>1</sup> This view is strongly criticised by Strauss.<sup>2</sup> He says this is based upon the outdated notion that the precepts of law are directed only to responsible human beings and yet the law directs its norms to all people, and in effect the insane (and infants) can act contrary to the law, with punishment being excluded by the application of the principle of nulla poena sine culpa.

To sum up the position, it can be said that there was a great deal of uncertainty as regards the law relating to the liability of children. The Transkei Penal Code took a line different from both the Roman-Dutch law and the English law and by providing certainty on this question, was able to exert influence in South Africa, Zimbabwe and more recently, even Bophuthatswana. The new Transkei Penal Code<sup>3</sup> improves on the wording of the old section 25 and effectively substitutes rules of substantive law for the old evidentiary presumptions.

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1 See at pp. 181 and 186

2 87 SALJ 1970 at page 476

3 Act no.9 of 1983

5.2 Intoxication

Section 28 of the Transkei Penal Code deals with intoxication. At one stage these provisions promised to exert a direct and somewhat applauded influence on South African law. This came via R v Bulani.<sup>1</sup> In that case Lansdown J P said:

"Where to establish any charge it is necessary to prove that the conduct complained of was accompanied by any particular intention, the fact that the accused was intoxicated at the time is relevant to the question whether he did have the intention. That is a provision of the common law as well as a provision of section 28 of the Transkeian Territories Penal Code act 24 of 1886."<sup>2</sup>

In his concurring judgment Gane J made a more satisfactory exposition of the matter. He said:

" I agree that if the drinking was not such as to cause intoxication, sec. 28 of the Native Territories Penal Code would not come into operation."<sup>3</sup>

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1 1938 EDL 205

2 Page 209

3 Page 210

The fact of the matter is that Bulani is a Transkeian case from the Engcobo district and section 28 of the Code was therefore applicable. The two judges were certainly aware of this, and what could probably cloud issues was the formulation of Lansdown J P when he, rather unnecessarily, brought the South African common law into the picture. It seems to be this formulation that led D.P. van der Merwe<sup>1</sup> to assert the view that section 28 of the Code exerted direct influence on South African law. He says:

"R v Bulani toon die invloed wat die sogenaamde N.T.P.C. verorden vir die Transkei ook in ander dele van Suid-Afrika gehad het, met betrekking tot toerekeningsvatbaarheid"

Obviously taking Bulani to be a South African case, the learned author then logically sees the specific reference of Gane J to section 28 as showing beyond doubt the impact of the Code on South African law.

In effect, therefore, no direct influence of section 28 on South African law was ever alluded to by the judges of the Supreme Court of South Africa. It is significant that Gardiner and Lansdown, who took the slightest available opportunity to lean on the

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1 Unpublished Thesis: Die Leerstuk van verminderde strafbaarheid, LLD Unisa 1980. c.f. 1.2 supra

relevant section of the Code and applaud it as representing the South African law on the point have nothing whatsoever to say about section 28 which deals with intoxication. Hunt<sup>1</sup> is very vigilant regarding the influence of the Transkei Penal Code and hastens to point out whenever he feels that it is making inroads into South African law.<sup>2</sup> When dealing with intoxication Hunt must be seen as adequate proof that it has not projected itself in any significant manner. It is true, however, that section 28 has overtones of the doctrine versanti in re illicita omnia imputantur quae ex delicto sequuntur. It makes a person

"...liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated..."

This doctrine became part of the South African law of intoxication and the Appellate Division expressed awareness of this in S v Johnson.<sup>3</sup>

The overall position is therefore that the Transkei Penal Code failed to exert any noticeable influence on South African law. A suggestion that it did was the result of an oversight on the part of the court and the jurist concerned. The new Transkei Penal

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1 South African Criminal Law and Procedure vol.2

2 See especially discussions on assault : 10.2.2. infra, where he comes out very strongly against the Code's influence.

3 1969 (1) SA 201 (A). c.f. J R du Plessis: Dronkenskap as verweer-Tydskrif vir Hedendaagse Romeins - Hollands - Reg 1944 at 104

Code<sup>1</sup> takes no cognisance of recent developments in South African case law and abides by the old principles. These recent developments centre around the well-known case of S v Chretien.<sup>2</sup> In the light of that case the South African legislature has passed section 1 of the Criminal Law Amendment Act of 1988.<sup>3</sup>

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1 Section 15 of Act 9 of 1983

2 1981 (1) SA 1097 (A)

3 Act No. 1 of 1988

### 5.3 Provocation

This subject is dealt with in Section 141 of the Transkei Penal Code.<sup>1</sup> Initially South African law accepted that provocation was a circumstance which served to reduce murder to culpable homicide. This approach was plainly influenced by the provisions of this section.

In their sixth edition which appeared in 1957, Gardiner and Lansdown<sup>2</sup> quote this section in full and then declare; "This section may be regarded as expressing what is the common law of South Africa on the subject of provocation - see R v Buthelezi 1925 A.D 160". A perusal of Buthelezi's case, however,<sup>3</sup> shows that the proposition that this section is a true reflection of South African Law is based on the authority of Gardiner & Lansdown. It follows therefore that the learned authors expressed the view in their first edition which appeared in 1919 six years before Buthelezi's case was decided.

Be all that as it may, it was in R v Buthelezi<sup>4</sup> that this approach for the first time received the imprimatur of the Appellate Division. In that case, which came from the Natal Native High Court, a constable had grounds for suspecting that his wife had misconducted

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1 See appendix A

2 Vol 2 page 1555

3 At page 162

4 1925 AD 160

herself with another man during his absence from home, and stabbed her with a long knife, causing her to bleed to death within a few minutes. Solomon JA said that on the question of what provocation would be sufficient to justify a court in coming to the conclusion that there was no intention to kill, no hard and fast rule can be laid down. The question was one of fact to be deduced from the circumstances of the particular case under investigation.<sup>1</sup> This of course is in accordance with section 140. However the learned judge went further to place matters beyond all doubt and said: "Our law on the subject is, as pointed out by Gardiner and Lansdown in their treatise on criminal law, well expressed in section 141 of the Transkeian Penal Code of 1886... It would be difficult, I think, to improve upon that statement of the law, which may be regarded as correctly laying down our law upon this subject".<sup>2</sup>

In a concurring judgement, Kotze J A reiterated these sentiments<sup>3</sup> as follows: "The contention in the present case... is that provocation was of a nature to reduce the crime committed by the applicant to manslaughter... Now, although the Transkeian Code applies merely to the Native Territories beyond the Kei, it has frequently been resorted to with approval by our

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1 At page 162

2 Ibid

3 At page 170

courts. I think the provisions of section 141, to which I have referred, correctly state the law."

The stage was then set for a full-scale application of section 141 of the Transkeian Penal Code in the South African courts. In R v Attwood<sup>1</sup> the accused had been convicted of murder by a jury in the Pretoria Criminal Sessions and the question arose as to whether the presiding judge had accurately or adequately explained the law in regard to provocation as a defence to a charge of murder.

Watermeyer CJ reviewed the old authorities such as Carpzovius, Matthaëus, Moorman, and Huber and then said: "It is however, unnecessary for the purpose of this case to examine in any detail the principles which they lay down, because in R v Buthelezi (1925 AD 160) this court adopted the provisions of section 141 of the Transkei Penal code as a correct statement of our law".<sup>2</sup> He gave leave to appeal in respect of the killing of Genis who, he found, had indulged in wrongful conduct immediately before the shooting, of such a nature as to deprive an ordinary man of his power of self-control.

In a dissenting judgement Tindall JA said it was unfortunate that the learned judge a quo had expressed himself "in these inaccurate terms. He could have

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1 1946 AD 331

2 At page 339

stated the law simply by quoting the exposition of the law in section 141 of the Cape Act 24 of 1886 (Set out in volume 2 of Gardiner and Lansdown). This exposition of the law relating to provocation was held by this court in Rex v Buthelezi (1925 AD 160) to express correctly our law in regard to this defence".<sup>1</sup>

<sup>2</sup>  
In R v Blokland Davis A J A repeated the statement that it was unnecessary to consider the old Roman and Roman-Dutch authorities in the subject of the killing by a husband of his wife's paramour, or of the wife taken in adultery. He went back to Rex v Buthelezi and section 141 as setting out the law correctly. He reiterated the sentiments of Watermeyer CJ in R v Attwood.<sup>3</sup> The Blockland case emanated from the Aliwal North Circuit Local Division.

<sup>4</sup>  
In a case that came from Standerton, Transvaal Watermeyer CJ<sup>5</sup> reiterated the sentiments he had expressed in Rex v Attwood. And in R v Reccia<sup>6</sup> the familiar formula " I always understood that section 141 of the Native Territories Penal code correctly stated the common law" was employed in a case heard at the Aliwal North

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1 At page 344

2 1946 AD 940

3 Supra see at 944

4 R v Tshabalala 1946 AD 106

5 At 1062

6 1946 EDL page 1

Circuit Local Division. For killing deceased allegedly because he said "You were better in using human balls than wooden bowls" the verdict was one of guilty of culpable homicide instead of murder with or without extenuating circumstances.<sup>1</sup>

The first signs of apparent suspicion that the line followed on this question was probably not correct appeared in 1949 in a case that had originated from Winburg, Orange Free State.<sup>2</sup> There Schreiner JA saw the need for a distinction being drawn between English law and South African Law on the question, but he still remained overwhelmed by the preponderant judicial view that section 141 formed part of South African Law. He said<sup>3</sup> "In contrast to the English approach our law while it has accepted the provision of section 141 as substantially a correct treatment of the subject, regards the whole question rather as one of fact than as controlled by legal rules". Significantly the learned Judge preferred to regard provocation as "a special kind of material from which, in association with the rest of the evidence, the decision must be reached whether or not the Crown has proved the intent as well as the act beyond reasonable doubt."<sup>4</sup>

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1 See page 3

2 R v Thibani 1949 (4) 720 AD

3 At 730-731

4 Ibid

The turning point came after the emergence of an eminent publication by Professors J C de Wet and H L Swanepoel entitled: Die Suid-Afrikaanse Strafre<sup>1</sup>g. Commenting on the Transkeian Penal Code generally, the learned authors point out that in actual fact the code was not inspired by the Roman-Dutch law, but chiefly by the draft of an English legal work on criminal law, compiled in 1879. Nowhere in their work do they follow the courts and refer to the code as the Transkeian Penal code. They consistently apply the official name "Native Territories Penal code" and refer to it by its abbreviation N.T.P.C.

Opening the debate on the effects of section 141 of the Code on South African Law, the learned authors observe that the South African practice was itself established under the influence of English law,<sup>2</sup> and that this was considerably facilitated by the existence of the Section 141 of Transkei Penal code.<sup>3</sup> They then protest and say that in R v Buthelezi,<sup>4</sup> this "cumbersome and confused bit of legislation" was described as a correct representation of South African Law, and the statement was accepted in subsequent decisions of the Court of Appeal. The learned authors then boldly reject this whole approach: " Dat art

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1 See footnote 2 on page 7 supra

2 1 ed p.41

3 Ibid pp 120-121

4 Supra

141 ons reg op hierdie punt korrek weergee, is net nie waar nie".<sup>1</sup> They then engage in an illuminating discussion which includes a review of the cases in which it was held by the courts that Section 141 correctly reflects South African law. They thereupon address the question as to what the real position is or should be in South African law. They observe that the state of the judicature does not permit a clear answer and the position is extremely confused since no distinction is made between anger which must be considered as a factor in making deductions from a man's conduct in view of his attitude, and anger as a circumstance mitigating punishment after conviction.

However, they take the view that the position should be stated as follows:

- (a) that, insomuch as anger is taken into account when making deductions concerning a person's attitude from his conduct, it does not matter whether the anger was justified or reasonable, or was aroused by impermissible conduct;
- (b) that, notwithstanding what "anger" might signify for the purpose of making deductions, anger (if justified) serves to mitigate punishment;
- (c) that circumstances as viewed by the accused are to be considered in deciding whether anger was justified, and that the permissibility or impermissibility of the act which caused

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1 Ibid. "It is simply not true that Section 141 correctly reflects our law at this point"

(c) cont.

anger is irrelevant;

(d) that section 141 should not be adhered to in parts of the country where it has not intrinsic validity, and

(e) that the view that anger (or rather provocation) "reduces" murder to homicide is native to English law and relates to the definitions of murder and manslaughter in that legal system.

I am in full agreement with the conclusions reached by the authors. In spite of what I say elsewhere in this chapter about the forces that combined to strengthen the position of English law and certain outdated concepts in South African criminal law, I fail to understand how it could have for so long escaped the notice of jurists that it was wrong to take a section of a statute that was specially designed for a particular area in order to meet certain conditions alleged to be prevailing in that area and declare it applicable in South Africa, for which it was never meant.

The ideas expressed by de Wet and Swanepoel were so welcomed in South African legal circles that they seemed to be the voice of reason for which they had long been waiting. According to Snyman<sup>1</sup> the first cracks in the Buthelezi approach appeared in 1949 in

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R v Thibani. In that case the appellate division described the role and the significance of provocation correctly by stating that evidence of provocation was merely factual material that had to be taken into account in deciding the question of intention to kill. Provocation was thus not a matter governed by mechanical rules as suggested by section 141 but merely an aid in determining an accused person's state of mind at the crucial moment. However in this case the appellate division still held that provocation reduced the crime from murder to culpable homicide, but the provoking act here was lawful and not wrongful as required in section 141. Snyman states that this decision helped "to loosen the grip which section 141 had on our law".<sup>2</sup>

Then came S v Mangondo.<sup>3</sup> The court indicated that, since the test of criminal intention is now subjective, and since the earlier cases of provocation applied a degree of objectivity, it may be necessary to consider afresh the whole question of provocation.

In an appeal from the Zululand and North Coast Circuit Local Division<sup>4</sup> the Appellate Division was again faced with the question as to whether by reason of section 141 of the Transkei Penal Code it should not return

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1 1949 (4) SA 720 (A)

2 Page 148.

3 1963 (4) SA 160 (A)

4 S v Mokonto 1971 (2) SA 319 (A)

a verdict of culpable homicide instead of murder because of provocation. In this case the deceased, a middle-aged female resident of the Ingwavuma district, was confronted by appellant who said: "I have come to face you, let us go and divine ...." She refused to go and he smote her with a cane-knife saying: "You are eating people..."

The appellant, a young Zulu man in his twenties, told the court: that he killed her because she was a witch and on that day she said he would not see the setting of the sun. After a review the authorities Holmes JA summed up the position as follows:

1. Section 141 of the Transkeian Penal code should be confined to the territory for which it was passed.
2. In crimes of which a specific intention is an element, the question of the existence of such intention is a subjective one, namely, what was going on in the mind of the accused.
3. Provocation, inter alia, is relevant to the question of the existence of such intention.
4. Provocation, subjectively considered, is also relevant to extenuation or mitigation.

The learned judge of Appeal confirmed the verdict of guilty of murder with extenuating circumstances as well as the sentence of five years imprisonment.

The most recent and probably most interesting case in relation to provocation is S v Arnold.<sup>1</sup> An act of provocation by deceased (wife) at a time when accused (husband) was emotionally extremely upset by several prior events relevant to the problems of husband and wife led to the fatal shooting of the deceased by the accused. Burger J held that on the facts the State, because of accused's severe emotional stress, had not proved that he had acted consciously. The state had also not proved that, if the accused had acted consciously, he could appreciate the wrongfulness of his act or if he did, that he was able to act in accordance with such appreciation. If this was a case of provocation without the other relevant features then of course one could hasten to say that this case goes even further than the Transkei Penal Code in making provocation a ground for justification.

It thus took the Appellate division more than forty years before it changed its direction on the relevance of section 141 of the Transkei Penal code to South African Common Law. In allowing what would be murder to become culpable homicide because of sudden provocation section 141 shows an inherent weakness. In many instances the provocation, far from negating an intention to kill, actually causes it. This was

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1 1985 (3) SA 256 (C). See also S v Campher 1987 (1) SA 940 (A); S v Laubscher 1988 (1) SA 163 (A)

realised in R v Krull<sup>1</sup> and S v Mokonto<sup>2</sup>, where the court said that far from negating intention to kill provocation contributed to such intention. There was therefore no room for a verdict of culpable homicide.

The judges of the Supreme Court of Transkei appeared to be painfully aware of the weaknesses discovered in section 141 of the code. They then endeavoured to secure a result which met the justice of a particular case by placing a strict interpretation on the provision that the wrongful act should be of such a nature as to be sufficient to deprive any ordinary person<sup>3</sup> of the power of self-control. In S v Tum-Tum Lele, a witchcraft case from the Xhora (Elliotdale) district in which the provocative words were fairly similar to those in the Mkonto<sup>4</sup> case, Van Collier J reiterated the provisions of section 141 whereby murder can be reduced to culpable homicide, but held that the provocation was not of such a nature as to be sufficient to deprive an ordinary person of the power of self-control. A verdict of guilty of murder with extenuating circumstances was therefore returned and the accused was sentenced

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1 1959 (3) SA 392 (A)

2 Supra

3 Heard in the Umtata Criminal Sessions in 1982, unreported

4 Supra

to ten years imprisonment.<sup>1</sup>

There is an important element of section 141 which de Wet to Swanepoel do not appear to deal with, viz. the requirement that the offender should have acted "on the sudden, and before there has been time for his passion to cool". In this connection Gardiner & Lansdown<sup>2</sup> state one of the requisites for a plea of provocation as being that the act of the accused must have supervened immediately upon the provocation and must have been the natural reaction to it. In terms of this requirement the benefit of the doctrine is excluded where the violence of the accused did not immediately follow upon the provocation and as a natural reaction to it but took place after his heated blood had had time to cool.<sup>3</sup> This is in line with the verba ipsissima of section 141. Furthermore the learned authors discuss the Thibani<sup>4</sup> case, and thereupon set out, again as part of the text the provisions of section 141. In the next line they then declare that this section may be regarded as expressing the common law of South Africa on the

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1 The extenuating circumstances arose not from the accused's belief in witchcraft but from the deceased's statement that she had indeed been responsible for the accused's illness which had lasted for several years and was still going to continue for many more years. Admittedly this provocation was not as sharp as the threat in Mkonto's case where deceased said: "You will not see the setting of the sun today". For that reason I feel the apparent disparity in sentences in the two cases is justified.

2 6 ed Vol 1 p.103

3 At page 104

4 Supra

subject of provocation<sup>1</sup> thus being absolutely unmindful of the real significance of the case as demonstrated above. The authors also uphold the objective test as shown by their repeated reference to the "reasonable man".<sup>2</sup>

Snyman<sup>3</sup> pays attention to the question of "cooling off" between the provocation and the attack. Whether or not there was a "cooling of" period between the provocation and the attack is not a question asked to determine in mechanical fashion whether a crime is murder or culpable homicide, but is merely a factor which is to be considered with others to determine whether or not there was intention to kill. This observation is relevant to section 141 which indeed suggests a determination in mechanical fashion whether a crime is murder or culpable homicide.

Otherwise Snyman appreciates the powerful influence of the Transkei Penal Code on South African law in the field of provocation. He refers to the position before Mokonto's<sup>4</sup> case as being "the previous law" which was simply to apply section 141 of the code. He makes the valid criticism that the section did not set out to lay down a test to determine whether an accused had intent to murder, but merely presupposed

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1 Page 102

2 Page 103

3 Criminal Law page 149

4 Supra

the intention when it talks of homicide "which would otherwise be murder". "The purpose of the section was therefore to make sure that persons who in fact had the intention to murder would not be convicted of murder."<sup>1</sup> The learned author points out that the significance of Mokonto's case is that the test is no longer how the ordinary or reasonable person would have reacted to the provocation, but how the particular accused, given his own personal characteristics such as a quick temper, jealousy, superstition etc, in fact reacted. Thus the objective test carried by section 141 was rightly discarded, because the test for mens rea is clearly a subjective one.

Turning to what one may now call "the present law" the learned author does not see the influence of the Transkei Penal Code as having been necessarily wiped out. His fears remain with reference to the requirement that the person must have lost his power of self-control as a result of the provocation. The author laments the prospect of this requirement's survival, stating that it is an English law requirement which is unnecessary and confusing in the context of South African Law.

Burchell & Hunt also acknowledge the tremendous influence that was exerted by section 141 of the Transkei Penal Code on the South African law relating to provocation.

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1 Page 147

They categorise the section 141 approach as reflected in Buthelezi and the cases that followed suit as the traditional view and the approach adopted for the first time by Schreiner J A in the Thibani<sup>1</sup> case as the new approach. They quite rightly point out that this approach derives strong support from the movement towards a subjective test of provocation in crimes requiring intention.<sup>2</sup> The objective test is clear in section 141 which requires an act or insult sufficient to deprive any ordinary person of the power of self-control. The authors uphold the view that Mokonto's case was the final step in the direction of a subjective test for provocation, following R v Krull.<sup>3</sup>

The subjective test began to gain wide-ranging acclaim among South African jurists. J van Z. Steyn sharply criticised the Federal Supreme Court for its decision in R v Tanganyika<sup>4</sup> and said that it contained a frontal assault on the basic tenets of South African Criminal law.<sup>5</sup> The assault on the objective test was some times without mercy. One jurist said of Gardiner & Lansdown that they evoke a dreary picture of the legendary commuter in his grey flannel suit and grey felt hat on his ten cent bus ride through the traffic jams. "He is not easily roused even after a pint at the local pub ... he is the ...bonus paterfamilias

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1 Supra

2 See pages 307 and 308, and footnote 652 on page 308

3 1959 (3) SA 392 (A)

4 1958 (3) SA 9 (F.Sc.) 5 1958 SALJ 383

and one may only marvel ...that this paragon of virtue gives way to provocation at all". The writer - Dugard - wrote the article under the title "Provocation: No more rides on the Sea Point Bus"<sup>1</sup> and after showing that the Transkei Penal Code and the Appellate Division were as much to blame as Gardiner & Lansdown, he rejoices and says "Gradually our courts have lost respect for the reasonable man"<sup>2</sup> and then discusses the Krull and Dlodlo cases.

In 1972 Mokonto's case was immediately hailed by Barend van Niekerk as constituting an important milestone<sup>3</sup> in the evolution of the law on provocation. In the same year N J Van der Merwe heartily welcome Holmes JA's dismissal of provocation in section 141 as being "not in harmony with the subjective approach of modern judicial thinking in this country."<sup>4</sup>

Rather strangely in the light of what is said above the courts in Zimbabwe have tenaciously clung on to the objective test. At first it was the Federal Supreme court of Rhodesia in the famous case of R v Tenganyika<sup>5</sup> that, like Gardiner & Lansdown, ignored the new road opened by the Thibani case. Fredgold CJ specifically rejected the rule laid down in Thibani, that provocation was a special kind of material from

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1 1966 S A LJ 261

2 Ibid

3 1972 SALJ 169

4 THRHR 1972, 193 at 195

5 1958 (3) SA 9 (F. Sc.)

which, in association with the rest of the evidence, proof of the presence or absence of intent was to be found.<sup>1</sup> He then praised the Transkei Penal Code as "correctly stating the modern Roman-Dutch law of provocation as a defence to a charge of murder. The relevant portion of that section reads as follows..." and the section was re-written. Logically, the learned Chief Justice then praised the objective test. In cases where provocation fell to be considered, the reaction of the accused to that provocation must be judged by an external standard. No account must be taken of his personal idiosyncrasies, or of the fact that he was drunk, or in any other way abnormal<sup>2</sup> and that provocation was sufficient law to reduce murder to culpable homicide.

Only a year after Tenganyika, the important case of Krull was decided by Schreiner J A. And then the following year, 1960, the Federal Supreme Court was again faced with provocation as a defence. That was in R v Bureke.<sup>3</sup> In this case Briggs F J mentioned section 141 and although he did not praise it openly, he did not say what was wrong with it, and he also made a vain attempt to show that there was no real conflict between Tenganyika and Krull.<sup>4</sup> Beadle A J C concurred in this judgement. Thereafter the Zimbabwe Court, now standing on its own, drifted further and

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1 See at page 11

2 Page 9

3 1960 (1) SA 49 (F. SC)

4 Page 51

further away from the healthy influences of the new generation in South Africa, and sank deep into the abyss of the objective test. Thus in S v Howard<sup>1</sup> the court mentioned only Dlodlo among the South Africa cases, and then supported "the trend of Rhodesian decisions" which had followed Tenganyika unlike the South African decisions.<sup>2</sup> The learned judge then fearlessly revived the discontinued "rides on the Sea Point Bus" and painted an illuminating post-1970 picture of the reasonable man. This is in sharp contrast with Dugard's view that "in this age of advances in psychology and man's knowledge of mental diseases the search for the reasonable man has become absurd".<sup>3</sup>

To date the Zimbabwe court is still caught in the conflict that Tenganyika caused between the South African and Zimbabwe approaches. As recently as 1982 Fieldsend C J acknowledged the differing approaches.<sup>4</sup> The court was not bound by the decisions that had followed Tenganyika (i.e. Bureke in 1960, Mahajye in 1965) "but unless there is a good reason for departing from them we would not want to give a new direction to the law at this stage".<sup>5</sup> The learned Chief Justice favoured the approach enunciated as a matter of principle and expediency. The objective approach was open

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1 1972 (3) SA 277 (R)

2 See at page 230

3 1966 SALJ 261 at 266

4 S v Nangani 1982 (3) SA 800 (ZS)

5 See at page 806

to criticism but "in its favour is that it recognises that criminal laws must take into account the realities of human reaction to situations of stress."<sup>1</sup> There could be no more eloquent advocacy for section 141 of the Transkei Penal Code and at that point it was only logical for the Chief Justice to conclude: "...I see no insuperable objection to allowing provocation to operate to reduce murder to culpable homicide..." At that time the Orange Free State Provincial Division was unshakeably applying the subjective test and holding that provocation did not exclude the intent to murder but had rather contributed to it.<sup>2</sup>

I fail to understand the firm adherence of the Zimbabwe court to the objective test despite the overwhelming weight of judicial reasoning. The rule decisis stare et qujeta non movere is well known but, although<sup>3</sup> Fieldsend C J disputes this in Nangani's case, it is respectfully submitted that good cause did exist at that stage for departing from precedent and giving new direction to the law in Zimbabwe. For although law must be stable it does not stand still and it is for the judges to oil the wheels and facilitate movement when the time comes. A rigid application of the stare decisis rule is a feature of English law and that is understandable because England has the

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1 At 807

2 S v Lesch 1983 (1) SA 814 (0)

3 Supra

House of Lords which regarded itself as being absolutely bound by its previous decisions. There is nothing in Roman-Dutch law to justify that practice, and as a result the Appellate Division in South Africa has been prepared to depart from its own previous<sup>1</sup> decisions. In Harris v Minister of the Interior Centlivres C J said there was nothing binding the court from changing its previous decisions and concluded that the court was bound to consider any reason that might be advanced to show that its previous decision was wrong.<sup>2</sup> This standpoint was reiterated more firmly by the learned Chief Justice two years later in Fellner v Minister of Interior.<sup>3</sup> Now Zimbabwe is known to follow Roman-Dutch law and not English law. Yet what is more surprising is that Fieldsend C J relied on Practice Direction (precedent)<sup>4</sup> for refusing "to give a new direction to the law". On careful examination one finds that the Practice Direction was laid down by the learned Chief Justice himself. He said "...particularly in a changing society, it is essential for the Court to have some flexibility so as not to restrict unduly its power to develop the law in proper cases to meet changing conditions ...". He also mentioned section 24 (2) of the Supreme Court Act 28 of 1981 (Zimbabwe) which provides: "The Supreme Court shall

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1 1952 (2) SA 428 (A)

2 See at 452 - 454

3 1954 (4) SA 524 (A)

4 1981 (4) SA 981 (There is no case reported here, but merely a direction on practice by the Chief Justice)

not be bound by any of its own judgements, rulings or opinions nor by those of any of its predecessors".

It must be admitted that South African legal thinking has not remained unanimous in the rejection of the objective test espoused by the Transkei Penal Code. For instance the Tenganyika approach was much favoured by E M Burchell in an article entitled "Provocation: Subjective or objective?"<sup>1</sup> He urged the acceptance<sup>2</sup> of the views of the Federal Supreme Court in Tenganyika so as to end once and for all "the apparent confusion" in our case law. The learned author also had much praise for section 141 of the Transkei Penal code and had no quarrel with its whole-hearted acceptance in Buthelezi; Attwood etc. Dean<sup>3</sup> joined the bandwagon and argued that the Court should always have the power of distinguishing between complete justification and partial justification of an intentional act. Likewise in S v Bailey<sup>4</sup> a normative and thus more objective approach is favoured. Perhaps this in itself is not unhealthy and helps to maintain a balance which prevents the subjectivists from going to extremes. For instance de Wet & Swanepoel say "die geoorlooftheid of ongeoorlooftheid van die toornwekkende daad nie ter sake is nie"<sup>5</sup>. This would appear to reflect the sometimes exaggerated aversion of the learned

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1 1958 SALJ 246

2 Supra

3 1964 Responsa Meridiana 36

4 1982 (3) SA 772 (A)

5 "It really does not matter whether the act which caused the anger is wrongful or not"

authors towards the versari in re illicita doctrine, an aversion which was not shared by the Roman-Dutch writers. The over-all picture therefore is that the objective test of the Transkei Penal Code is a hard nut to crack.

Even in Lesotho the influence of the Transkei Penal Code was felt. In that country matters of criminal law are generally dealt with under common law (Roman-Dutch law with traces of English common law) but certain aspects of criminal law are governed by statute, and provocation is one of them. The position is governed by the Criminal Law (Homicide amendment) proclamation of 1959.<sup>1</sup> In terms thereof a person who pleads provocation must do the act which causes death "in the heat of passion caused by sudden provocation ...before there is time for his passion to cool".<sup>2</sup> This wording is similar to that of section 141 of the Transkei Penal Code.

Not surprisingly, therefore, when applying the provisions of the Proclamation the courts in Lesotho are guided to adopt the objective test. In R v Thabiso Lefoetso 1971 - 73 L.L.R.<sup>3</sup> this test was applied. The accused was charged with the murder of a married woman who had been his lover. The accused went to meet her at

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1 Proclamation 42 of 1959

2 Section 3 (1) (b) of Proclamation 42 of 1959

3 Discussed by Kiwanuka in 1986 Vol 2 Lesotho Law Journal p.61. C.f footnote 5 p.147 infra

her home as arranged but she arrived only after he had had to wait for a long time. He asked her where she had been and instead of answering properly and even apologising she sang a song which means "I get tired when a man keeps on asking me where I have been - leave me alone..." He then assaulted her: a scuffle followed and he stabbed her in the chest and killed her. He pleaded provocation and the court held that the teasing song was not of sufficiently insulting signification to raise the heat of passion contemplated in section 3 (1) of Proclamation 42 of 1959 in the mind of any reasonable person of the accused's community. (My emphasis). Likewise in witchcraft cases the Lesotho courts treat the issue of provocation from the point of view of an ordinary rural Mosotho who believes in and fears the powers of those who practice witchcraft.<sup>1</sup>

It will be observed that the Lesotho proclamation was passed just at the time when the sleeping giant of South African law was beginning to flex its muscle and to liberate itself from the three quarter - century grip of the Transkei Penal Code, as shown by the Thibani and Krull cases which were decided in 1949 and 1959 respectively. The Lesotho courts respond very positively to the judgements of the Supreme Court of South Africa, just as do the courts of other

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1 See e.g. the judgement of Mapetala C J in R v Lebohang Nathane 1974 LLR 64. C.f footnote 5 p.147 infra

Roman-Dutch law countries in Southern Africa, and the Proclamation will therefore in my submission hinder a smooth transition from the Transkei Penal Code approach and the objective test to the subjective test in Lesotho. Thus in R v Makhetang Setai<sup>1</sup> Cotran J found the accused guilty of murder with extenuating circumstances and made it clear that he was following the new approach appearing in the South African cases. He made no reference whatsoever to the Proclamation, and employed such terms as "the specific intent to kill". And yet in R v Molomo (2)<sup>2</sup> the learned chief justice said: "Killing in the heat of passion which reduces murder to culpable homicide is available only to a husband finding his wife in flagrante delicto, not to a lover finding his lover talking to another man". Lesotho may therefore be deprived of legal certainty for a long time to come on this daily-bread subject. Fortunately, however, the objective test has begun to be subjected to harsh criticism in Lesotho. Kiwanuka in his article entitled "The plea of Provocation in Lesotho"<sup>3</sup> makes a strong plea for the repeal of the 1959 proclamation as a step towards the abolition of the objective test so that "the judges in this country (may) follow their South African brethren".<sup>4</sup>

Unlike the Transkei Penal Code and the Lesotho Proclamation, the Sudanese Penal Code prescribes a purely

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1 1980 (2) L.L.R. 359

2 1959 L.L.R. 64

3 Lesotho Law Journal Vol.2 1986 p.45

4 See at page 66

subjective test<sup>1</sup> and seems to leave no room for the introduction of the criteria of a reasonable man. It says: "Culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident."<sup>2</sup> It is thus broad enough to take into account the mental and physical characteristics and abnormalities of the accused person, and cuts across the traditionalist view that the law is not concerned with the idiosyncrasies of finicky individuals.

Even the Sudan soon had to learn, however, that the objective test is not so easily put off. The courts simply failed to distance themselves from this ubiquitous test and this kind of statement was soon made: "Where the accused travelled a mile before he killed, the provocation would no longer be sudden because there had been sufficient time and opportunity to a reasonable man for reason to resume its seat and for the blood to cool."<sup>3</sup> In the result there is a great deal of confusion in the Sudan as the courts apply:

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- 1 Introduced by the British administration into different parts of the Sudan in 1899, and amended from time to time until 1974 - first Arabic edition
  - 2 Section 2491 of the Sudan Penal Code, discussed by Vasddev in The Law of Homicide in the Sudan page 222
  - 3 Sudan Government v Adam El Bushra (1959) A C 151 51, in Vasdev op cit 212

- a) a purely subjective test in terms of the Code
- b) the test of a reasonable man
- c) the test of a reasonable man of the same locality as the accused<sup>1</sup>

In applying the subjective test the courts have confined themselves to the question as to whether the fatal wound sustained by the deceased was caused by the accused while smarting under a provocation so recent and so strong that the accused might not be considered at the moment the master of his understanding.<sup>2</sup> The test of a reasonable man of the same locality is applied not only in the Sudan but also elsewhere in Africa. It is expressly provided for in the Penal Codes of East African countries such as Tanzania, Zambia and Malawi, which actually define an ordinary man as "an ordinary person of the community to which the accused belongs"<sup>3</sup>. In India the courts say that the reasonable man is the normal man of the same class or community to which the accused belongs<sup>4</sup>. In the Sudan Abu Rannat C J said in Sudan Government v El Baleilla and others (1958) SLJR 12 that the reasonable man referred to in the text books is the man who normally leads such a life in the locality and is of the same standard as others. "The real test is whether an ordinary Arab of the standard of the accused

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1 See Vasdev op cit 222

2 Vasdev op cit 223

3 Vasdev op cit 229 footnote 21

4 See e.g. Ghulam Mustata Ghano quoted by Vasdev at page 229

would be provoked or not."<sup>1</sup> This test is entrenched in India and has been noticed in Australia as well where, in applying the law to the numerous social groups and aboriginal tribes respectively, the law of provocation has been modified so as to be made appropriate to the relevant community.<sup>2</sup> To all this Vasdev<sup>3</sup> protests and says the danger is that "you give each and every locality its own reasonable man and the law will become the subject matter of ridicule."<sup>4</sup> This protest is relevant to Southern Africa where this locality test has also been applied.<sup>5</sup>

Where and when was this famous man born? He seems to have made his first appearance in England in 1857 in the case of R v Kirkham before which date the standard was subjective.<sup>6</sup> From there he flew to various parts of the world where he made many friends and stood his ground against mighty opponents.

There is certainly a difference between the terms average or ordinary man and reasonable man which are applied rather liberally to mean the same thing, as if they are synonymous. Since this "man" now seems to be endowed with everlasting life it is better at least to endeavour to describe and identify him accurately.

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1 Ibid

2 Ibid

3 Ibid 231

4 Ibid

5 See e.g. R v Thabiso Lefoetso 1971-73 L.L.R. (Lesotho)  
See p.143 supra

6 Op cit 224

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In R v McCarthy. Lord Goddard C J said: "No court has ever given, nor do we think can ever give a definition of what constitutes a reasonable or average man. That must be left to the good sense of the jury."

Ten years later Pearson L J was quite committal and helpful about the matter and said: "Normally in legal mythology the reasonable man is an idealised average man, behaving always as the average man behaves in his good moment. The average man may have his bad moments when, for no sufficient reason, he loses his temper or suffers from panic, or when he becomes careless or when he is stupid or biased or hasty in his judgements. The reasonable man, as normally understood, has no such bad moments".<sup>2</sup> A good tempered man will hardly ever lose his temper, and a reasonable man will not have bad moments, and it is therefore all the more appropriate for the reasonable man to be divorced from the ordinary or average man. Consistent as it is with the idea of loss of self-control, it is plainly preferable to stick to the term ordinary for this man of ours and discard reasonable.

If the life of this "man" is not everlasting, then it must at least be conceded that he has lived far longer than many jurists thought he would and his life span is now a matter of uncertainty. At times

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1 (1954) 2 Q B 105 at 112

2 Hardy v Motor Insurers Bureau (1964) 2 QB 745

there has been rejoicing bordering on celebration that he was approaching his way out of the legal world.<sup>1</sup> At other times there has been an impatient outcry bordering on protest at his continued and almost insolent involvement in legal circles.<sup>2</sup> And more recently it has been realised that he is still there and, with apparent despair as to the prospect of forcing him out of circulation, it has been thought that he could be persuaded to accept retirement so that he can rest quietly in the parks of Clapham, Cape Town and Harare, and near the stock-kraals in Lethabaneng in Lesotho and Xolobe and Tabase in Transkei.<sup>3</sup> However the rejoicing was premature, the protests were in vain, and the thinking was wishful.

The inevitable conclusion, therefore, is that section 141 of the Transkei Penal Code is one of the sections that demonstrate the influence of the code. That influence was felt even in Zimbabwe and Lesotho.

Resistance to the Code's influence was led by de Wet and Swanepoel and the courts responded positively to the lead taken by the learned authors. However the influence of the code could not be completely wiped out and this was realised and regretted by the more recent writers. It seems to me that one

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1 E.g. Dugard: 1966 SALJ 261; Van Niekerk, 1972 SALJ 169; Van der Merwe; THR - HR 1972; 193

2 E.g. Vasdev: The Law of Homicide in the Sudan page 231

3 Kiwanuka: The Plea of Provocation in Lesotho: Lesotho Law Journal Vol. 2 1986 45 at 66

of the main reasons for the staying power of the Code in this regard is that the objective test which the Code upholds dates back from earlier times and is well established not only in Africa but in other parts of the world. Looking back at Transkei it is significant that the 1983 Penal Code Act omits the cumbersome provisions of the original legislation, and in its brief definition of homicide in section 85 it no longer deals with provocation as such.

CHAPTER 6

PARTICIPATION AND ACCESSORIES AFTER THE FACT

6.1 THE DOCTRINE OF COMMON PURPOSE

6.1.1 The Impact of Section 78

The doctrine of common purpose is of English case law origin. Its earliest appearance is traceable to the case of Macklin, Murphy and others (1839) 2 Lewin 225 16 ER 1136 where Alderson B stated:

"It is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all."

When common purpose is lacking, the conduct of each participant is then judged separately in order to determine his criminal liability.

According to Rabie the common purpose principle was introduced to South Africa via the Transkei Penal Code's section 78.<sup>1</sup> This provision is in line with the old doctrine that a person is presumed to know the reasonable and probable consequences of his act.

For some unknown reason the Code would appear to overstress the common purpose principle.<sup>3</sup> It implicitly embodies the well known rule of criminal law: qui facit per alium facit per se. In 1917 the doctrine of common purpose made a strange appearance in a

1 1971 SALJ 227 at 229

2 See Appendix A

3 See section 5 (e), appendix A

<sup>1</sup>  
civil case. This action was brought by the plaintiff, a farmer in the Orange Free State, to recover certain stock taken and damages for injury done to his farm by the defendant (also a farmer) while in rebellion in concert with others, against the King and Government of the Union. It was held that the mere fact of being in rebellion did not render defendant liable for the acts of every other rebel unless he had instigated or authorised those acts. In a dissenting judgement Maasdorp JA said that "they are all liable for such acts of any of their associates as fell within the scope of the objects of the rebellion."<sup>2</sup>

An instance of the early application of the Transkeian Penal Code is R v Taylor and Others.<sup>3</sup> In that case 200 students of the Lovedale Missionary Institution resolved to "strike" because of the substitution of bread with mealie meal in it for wheaten bread. Some then smashed windows, wrecked the power station and the dining hall and the bookstall. They also armed themselves with sticks and some threw stones at and injured the principal Dr MacVicar and others. Others went to the grain store and set it on fire and burnt it. After these events all the various groups assembled at the "Black hill" and spent the night there.

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1 McKenzie v van der Merwe 1917 AD 41

2 At page 65

3 1920 EDL 318

At the trial that followed, the students were charged with public violence, malicious injury to property, arson and assault with intent to do grievous bodily harm. Hutton J said: <sup>1</sup>

"Then it is argued that the accused have not all been satisfactorily identified as having taken part in the rioting.

In considering this point it must of course be borne in mind that it is not necessary for the Crown to prove that each one of the accused had committed some overt act constituting the offence. For in the circumstances of the present case the Crown is entitled to rely on the doctrine of common purpose, the common law definition of which has never been more clearly stated than in Sec. 78 of Act 24 of 1886 (the Transkeian Penal Code), in the following terms...."

The stage was thus set for a full-scale application of the doctrine of common purpose outside the area of applicability of the Transkei Penal Code. The first such case was R .v Garnsworthy and Others,<sup>2</sup> Dove Wilson J P declared:

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1 At page 323

2 1923 WLD 17

"now the law upon this matter is quite clear  
Where two or more persons combine in an under-  
taking for an illegal purpose, each one  
of them is liable for anything done by the  
other or others..."

However, the learned judge did not refer to any authority in support of the statement that the law is "quite clear" on the point. The doctrine of common purpose was thereafter applied in several cases in murder trials where it was not possible to determine who dealt the lethal blow.<sup>1</sup>

The courts however, went further - quite strangely in my view - and applied the doctrine even to persons who did not deliver the lethal blow, despite it being established who in fact delivered such blow. Thus in R v Nsele<sup>2</sup> two men, the appellant and a companion, entered a fruit store in Chaka's Kraal, Natal, with a fixed determination to steal money, the appellant's companion being armed with a pistol. It was established that the companion shot the store-owner and the point at issue was whether the appellant was also guilty of murder. The appeal was dismissed by the Appellate Division which confirmed the conviction of murder in terms of the doctrine of common purpose.

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1 E.g. R v Morela 1947 (3) SA 147 (A), R v Sikepe & Others 1946 AD 745, R v Ndhalangisa and Ano 1946 AD 1101, R v Ncube & Roza 1950 (2) PH H 211 (A), R v MaEsiTwane & Ano 1942 AD 213, S v Nkomo & Ano 1966 (1) SA 831 (A), R v Kubuse & Others 1945 AD 189, Gaillard and Andere v S 1966 (1) PH H 74 (A), S v Dambalaza and Others 1964 (2) SA 783 (A); R v Ngcobo 1928 AD 732

2 1955 (2) SA 145 (A)

Schreiner JA criticised R v Garnesworthy and Others for its emphasis on "knew or ought to have known" and "naturally or ought naturally to know would be the obvious and probable result of what they were doing" and relied on the fact that the appellant plainly knew that his companion had a revolver. Rererring to R v Garnsworthy & Others, R v Duma and Another, R v Ndlenzisa and Another and R v Longone, Van der Heever Jn laid down the true basis of the guilt of a socius criminis as being his own mens area, not mere vicarious liability, "stupidity, lack of foresight, negligence - which may consist in non intellegere quod omnes intellegent - cannot in my minde be a substitute for the intent, actual or constructive, which is requisite to support a charge of murder."

Likewise in R v Du Randt and Another<sup>1</sup> the appellant, previously convicted by Van Blerk J in Bethlehem, Orange Free State, knew that his companion had an open knife in his hand and "must have realised" that the safety of both of them depended on their success in overpowering the deceased. When he was examined by the District Surgeon three days later, bruises were found on him which "were consistent with his having taken part in the struggle". His explanation of the bruises was disbelieved by the trial court.

In Transkei itself the doctrine received consideration by O'Hagan J at the Kokstad Circuit Local Division in a case that emanated from the Bizana District<sup>1</sup> where the learned judge said that if as the result of an assault committed by one participant in a fight a man is killed, not only is that participant guilty of culpable homicide but all his co-fighters are equally guilty with him. The court looked at "certain cases which bear upon this question" and one such case was R v Geere and others.<sup>2</sup> There Schreiner JA accepted the doctrine of common purpose as being fully applicable in South African Law. He argued that the use of the word "purpose" in the expression "common purpose" should not suggest that, for common purpose to apply, the death of the deceased must have been the result aimed at. In line with section 78 of the Transkei Code he went on: "So, in the case of culpable homicide, it is enough to make all responsible for the death, that there was a common purpose to do the unlawful act or acts which cause the death, without the elements of contemplation of the death and recklessness which would make them guilty of murder"<sup>3</sup> This case is significant for having embraced the doctrine versanti in re illicita omnia imputantur quae ex delicto sequuntur. This line of reasoning was adopted in several other cases.<sup>4</sup>

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1 S v Ngumi 1963 (3) SA 268 (E)

2 1952 (2) SA 319 A

3 At page 323

4 E.g. R v Essom Mohamed & Others 1940 (1) PH H23 (W), R v Shezi 1948 (2) SA 119 (A), Tesson v S 1962 (2) PH H 256 (A), S v Malinga & Others 1963 (1) SA 692(A) S v Bradbury & Another 1967 (1) SA 387 (A), S v Williams en 'n ander 1970 (2) SA 654 (A)

Regarding the element of intent in the application of the doctrine of common purpose to murder it would appear that originally this element was obscured by a partially objective formulation which was clumsy and unscientific.<sup>1</sup> Such formulation is implicit in section 78 of the Transkei Penal code and is to be found in R v Garnsworthy:

"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."<sup>2</sup>

This formulation was applied in many cases but was eventually rejected by the Appellate Division.<sup>3</sup> Apparently the Roman and Roman-Dutch law regarded intention as a subjective concept, and the objective intention was adopted by the courts when they accepted the English law presumption, conspicuous as it is in the Transkei Penal Code of 1886, that a man intends<sup>4</sup> the reasonable and probable consequences of his act.

In several cases the formulation of intent was thus taken directly from the doctrine of common purpose as formulated in section 78 of the Transkei Penal

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1 See Rabie: 1971 SALJ 227 at 223

2 Supra (at p.19)

3 Burchell and Hunt: South Africa Criminal and Procedure, Vol. 1 p.120 Juta 1970. The learned authors cite R v Longone 1938 AD 532 R v Duma 1945 AD and R v Shezi 1948 (2) SA 119 (A) as being the pre-1950 cases in which the objective approach was adopted, and R v Mkize 1951 (3) SA 28 (A), R v Huebsch 1953 (2) S A 561 (A). R v du Randt 1954 (1) SA 313 (A), R v Hercules 1954 (3) SA 826 (A), as representing the swing towards the subjective test, culminating in its adoption in R v Nsele 1955 (2) SA 145 (A).

4 See Burchell and Hunt: *ibid*, footnote 36

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Code. The result was that the culpability of participants in terms of the doctrine of common purpose turned out to depend on "Whether the result produced by the perpetrator of the act falls within the mandate and is not concerned with the means by which the result is produced."<sup>2</sup> In R v Bergstedt<sup>3</sup> Schreiner AJC insisted that the knowledge of the presence of a firearm was of decisive importance in determining whether the result, the killing of a human being, fell within the mandate of the participants. An even more graphic illustration of the formulation of intent as taken directly from section 78 of the Transkei Penal Code is R v Longone.<sup>4</sup> In that case the appellant, an adult male, provided one Chikokonya with poison to enable him to poison his own wife. Instead of Chikokonya's wife, the poison was taken by Makachi who then died. Longone was found guilty of murder by the trial court. However the Appellate Division upheld Longone's appeal on the ground that he had no intent in regard to Makachi's death. Watermeyer CJ said that the action which resulted in Makachi's death was not assented to or authorised by the appellant, the true test for whose liability was not a possibility but reasonable probability which should have been foreseen.

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1 Rabie: *ibid* 234

2 R v Shezi & Others 1948 (2) SA 119 (A) at 128

3 1955 (4) SA 186 (A)

4 1938 AD 532

6.1.2 Partial Departure from the Doctrine of Common Purpose

A swing away from the doctrine of common purpose<sup>1</sup> became noticeable in S v Nkombani and Another. Six years later in S v Thomo and Others<sup>2</sup> matters seemed to improve even more. Wessels JA said: "if an accused person, intending to kill the deceased, stabbed him, thereby inflicting injuries which, together with mortal injuries already inflicted by some other person, cause death he is guilty of murder by virtue of his own acts and state of mind."

The learned judge<sup>3</sup> expressly refused to endorse Schreiner JA's theory of ratification. The state had failed to prove the necessary causal nexus between the acts of accused No.4 and the death, and the accused was consequently only found guilty of attempted murder. It is clear that the court was not enthusiastic about the doctrine of common purpose and it would have been interesting had the learned judge cared to say more about it.

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Shortly thereafter there came S v Madlala. Holmes JA said that an accused may be convicted of murder if the killing was unlawful and there was proof inter alia, that he was a party to a common purpose

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1 1963 (4) SA 877 (A)

2 1969 (1) SA 385 A

3 At page 400

4 1969 (2) SA 637 (A)

to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fatal consequence, and it occurred. This formulation was welcomed by Hugo as showing increasing recognition and correct enunciation of the previously much maligned form of mens rea known as dolus eventualis.<sup>2</sup> The learned author went on and hailed both the Thomo and Madlala decisions as having "gone a long way in curing a position in our criminal law which has for many years suffered from an overdose of sophistic reasoning and severely twisted principles...regardless of the fact that the doctrine of common purpose still looms large in the back-ground, the Appellate Division has in these two decisions gone a long way towards restoring 'causation' in murder to its rightful place." S v Maxaba en Andere<sup>3</sup> is also very important for its clear departure from the doctrine of common purpose. There it was held that mere presence at or acquiescence in the commission of an offence is not sufficient.

If A is a party to a common purpose to rob, knows that his companion is armed with a firearm, shows no surprise or shock or any other emotion when

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1 1969 SALJ 391 at 396

2 Contra R v Geere and Others 1952 (2) SA 319 (A) where, instead of the doctrine versanti in re illicita omnia imutantur quae ex delicto sequuntur was applied

3 1981 (1) SA 1148 (A)

deceased is shot, cuts the telephone wires, takes money from the till and later on shares in the proceeds of the robbery, is he guilty of murder without extenuating circumstances? In the more recent case of S v Gumede 1983 (3) SA 803 (TKEI AD) the Transkei Appellate Division, per van Coller AJA, held accordingly. But in S v Sihlahla and Others<sup>1</sup> popularly known as "the Scriven case" the Transkei Appellate Division took a somewhat different and more encouraging approach. The deceased (Scriven) had married across the colour line and lived with his wife - appellant no.3, at Butterworth. Then Elizabeth Scriven was charged, together with Sihlahla and Mankyayi, for conspiring, from 11th to 19th April 1986, to murder her husband and secondly with the murder itself. It was alleged that first appellant had a love affair with Elizabeth, and had slept with her in the Scriven house when Scriven was absent. It was further alleged by the first appellant himself that he had come with second appellant to kill Scriven with the full knowledge of and after concerted preparations with Elizabeth. One Anna gave evidence of having been a go-between in the procuring of poison to kill Scriven. On the night of the murder Elizabeth's own conduct was very strange and unsatisfactory as disclosed by her own evidence. She was present in the house

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1 Case No. 37 of 1986 TKEI AD (unreported)

when the murder took place but did not cause "havoc" of any kind. After the murder she told neighbours that she did not know the murderers of her husband at all and yet in truth, it turned out, she knew them very well. She told the same lie to the Police. She claimed that she had told these lies because she had been threatened with being killed if she had revealed the identity of the murderers. Incidentally she had also switched off the lights shortly after the murderer had directed it and had no satisfactory explanation for this act.<sup>1</sup>

All this notwithstanding, the Court stated that the case of murder against third appellant had been established "upon a balance of probabilities only, and not beyond reasonable doubt" - more particularly because first appellant and two female witnesses, Ann and Julia, were found to have exaggerated or "lied in their attempts to implicate third appellant" (i.e. Elizabeth). The fact that she had falsely told the Police that first and second appellants were both masked to such an extent that she could not indicate whether they were black, white or coloured did not matter so much -

"it may well be that when it (the murder) happened, it was not at variance with her wishes and that she was content to be a passive bystander."

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1 This fact is on the record though it does not appear in the judgment

The court then referred to S v Maxaba and Others 1981 (1) SA 1148 AD at 1157C about "mere knowledge" and "mere presence".<sup>1</sup> The convictions of first and third appellants for conspiracy were set aside, first and second appellants had their death sentences for murder confirmed but the appeal of third appellant against conviction and sentence to death on the murder charge was allowed. She was found guilty of being merely an accessory after the fact to the murder of Scriven and was sentenced to only 3 years imprisonment.

It is thus evident that the doctrine of common purpose is no holy cow and the courts both in South Africa and Transkei can easily abandon it once and for all. Regrettably however they soon returned to it rather than abandon it.

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1 See page 160 above

6.1.3 The Return to the Doctrine of Common Purpose

However, the South African courts clearly found it difficult to wean themselves for all time from the umbrella of the Transkei Penal Code and the doctrine appears to have come back in full force in S v Khoza.<sup>1</sup> This was an appeal from a conviction of murder in the Circuit Local Division where it appeared that the appellant, the deceased and two co-accused had, after a drinking party at which they had consumed liquor, left in the deceased's car for the homestead of one of the co-accused (who had been acquitted by the trial court). While the deceased had been repairing the car, which had broken down en route, he was attacked by the other co-accused and stabbed twice. The appellant then struck the deceased twice with a cane and thereafter the co-accused again assaulted the deceased. The corpse of the deceased was then put in the car by the other co-accused who set the car alight with the result that the body of the deceased was incinerated. The Court, in considering the appeal, determined the liability of the appellant on the basis that the other co-accused might, as a reasonable possibility, have fatally injured the deceased with a cane and that there was no proof of what effect the two blows with the cane had had on the deceased.

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1 1982 (3) SA 1019 (A)

An outstanding feature of this case is the very great difference of opinion between the judges of appeal regarding the role of accused no.4. Some confirmed the conviction of murder, others said it was a case of attempted murder while others saw it as a case of assault common. The whole conflict centred around the applicability of the doctrine of common purpose.

Botha AJA supported the conviction of murder purely on the basis of the doctrine of common purpose.<sup>1</sup> The view of Corbett JA<sup>2</sup> was similar to that of Botha AJA but differed only in degree in that he considered the case to be one of attempted murder. He reasoned that the appellant had joined the attack with the intention of associating himself therewith and of assisting accused No. 2 "to some extent". The sentence proposed by him was four years imprisonment as against the nine years imposed by the trial court and confirmed by Botha AJA. The view that the correct verdict was one of assault common for which a sentence of only four months imprisonment should be imposed was taken by Holmes AJA<sup>3</sup> and fortunately for the appellant, that view received the support of Hoexter AJA<sup>4</sup> who dismissed the "common purpose" idea and drew attention to the drunken state of appellant and deceased. Taking everything into consideration it can be concluded that this case halted the march of the courts away from the doctrine of common purpose. Then came the

1 See at page 1047 ff

3 At page 1040 ff.

2 At page 1026 ff.

4 At page 1044 ff.

case of the famous 'Sharpville Six'<sup>1</sup>. In this case the Appellate Division in South Africa resurrected the common purpose doctrine in unequivocal terms, thereby proving once again the resilience of section 78 of the Transkei Penal Code.

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1 S v Safatsa & Others 1988 (1) SA 868 (A)

6.1.4 Objections to the Doctrine of Common Purpose

When crimes have been committed in circumstances which make it possible to invoke the doctrine of common purpose it seems that it can quite often be an easy matter to identify roles in group offences and the law should insist on such identification. This is said against the background of a case decided in May 1984<sup>1</sup> which case illustrates more graphically the extent to which the application of the doctrine can be stretched, with results which in my submission are unsatisfactory. The trial court on convicting the accused of murder said:

"...it is quite clear that the deceased was attacked seriously with extremely dangerous weapons in the nature of axes or bush knives or something of that nature, and even if you yourself did not possess such a weapon at an earlier stage, there is the chance that you obtained such a weapon, and even if you did not, you took part in the assault at a time when you must have appreciated how seriously the deceased was being assaulted by others".  
(my emphasis)

To this finding of the Trial Court the argument was raised on appeal that at most, the finding of the Court amounted to this, that the appellant was "somehow involved" in the killing of the deceased

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1 S v Mkhuzeni Ntozimbi, Transkei AD, 8 May 1984, Case No.172/82 unreported

but had no evidence of:

- (a) the actual nature of his involvement in the commission of the offence;
- (b) the weapon used by him;
- (c) the brutality of his attack and the fatality of any blows he may have inflicted;
- (d) his persistence in going ahead with the killing at a time when, perhaps, other members of the party had desisted.

The Appellate Division (Transkei) arrived at the following conclusion:

"The Appellant did insist that deceased should come out but did not threaten him and in fact, whether honestly or not, assured him that he would not be harmed. There is no evidence whether the appellant actively participated in removing the deceased from the hut and in assaulting him or to what extent or at which stage. On the evidence it cannot be rejected that some of his companions could have been mainly or entirely responsible for inflicting injuries which caused his death. Several offences were being committed simultaneously inside and outside the hut and it cannot be said who was participating at any one time in respect of any particular offence. Appellant's conviction is based on the doctrine of common purpose because

he was the first to ask the deceased to come outside, directed attention to him when he knew that violence prevailed, shots were being fired and tempers were inflamed. He must have appreciated the danger in which his attitude was placing the deceased. Moreover the appellant and his companions acted jointly and supported and assisted each other in the acts of lawlessness." <sup>1</sup>

The courts in South Africa have attempted to trace the doctrine of common purpose to Roman Dutch law. <sup>2</sup> Rabie <sup>3</sup> however discourages these attempts and argues that although the statements by the old authors display a similarity with the principle of common purpose, the important difference is that according to Roman Dutch Law the actions of the participants are not imputed to one another. Furthermore, he strongly objects to the continued application of the doctrine of common purpose on the ground that "the participants cannot be regarded as co-perpetrators (mededaders) where they do not fulfil all the requirements of the definition <sup>4</sup> of the crime.

He further objects to it on the ground that it is based on the principle of imputability, and in order to do this the English Law appeals to the mandate basis: that the participants

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1 The sentence of the Trial Court was reduced from 25 years to 15 years - equal to the sentences of co-accused who had made confessions and had thus been readily convicted of attempted murder

2 See e.g. R v Duma Another. 1945 AD 410

3 See page 417

4 Ibid

have given each other a mandate in regard to the killing. Of course an actual mandate can never be proved and the courts, as in McKenzie v Van der Merwe<sup>1</sup> and R v Duma and Another<sup>2</sup> make the best of a bad job and say that such mandate is implied. Finally, Rabie objects on the ground that although the participants have a common purpose only in regard to the commission of crime X, they are held liable on the basis of this common purpose for crime Y, the commission of which was only foreseen as a possibility. Thus in most cases the common purpose is theft but each one is guilty of murder if the victim dies at the hand of the one who does the shooting. The doctrine of common purpose is also severely criticised by de Wet and Swanepoel<sup>3</sup>. It is likewise criticised by Snyman<sup>4</sup>. He regards it as being unacceptable because it is irreconcilable with the general principles of criminal law and unnecessary because the liability of different persons can be determined by applying the accepted general principles.

Furthermore, the emphasis on the common purpose led to a disregard or considerable watering down of the requirement of causation in murder. The learned author decries the application of the doctrine to the crime of culpable homicide in which the mens rea required is negligence and not intention,

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1 1917 AD 41

2 1945 AD 410

3 Die Suid-Afrikaanse Strafbeg 4 ed (1985 ) pp192 ff

4 Criminal Law pp 212 - 213. Butterworths 1983

stating that this is possible only by having recourse to the versari doctrine.<sup>1</sup> He argues, quite rightly in my view, that even if the doctrine of common purpose is applied, it can never be applicable to crimes of negligence such as culpable homicide, for the reason that it is impossible to intend to be negligent. In this connection the learned author recalls S v Thenkwa<sup>2</sup> and S v Coetzee.<sup>3</sup> There it was held that if a number of persons are together charged with culpable homicide it must be determined whether each one's conduct, considered individually, stands in a casual relationship to the death, and whether each one, considered individually, was negligent in respect of the death.

To sum up, it must be accepted that section 78 of the Penal Code exerted a great deal of influence on South African law. That the doctrine of common purpose is not universally accepted appears from the partial departure from it by the courts as well as the strong objections raised against it by several writers. However the indications are that the doctrine will retain its influence for a long time to come inspite of all protestations.<sup>4</sup> The 1983 Penal Code of Transkei has, through its section 27 already taken the lead in entrenching the doctrine of common purpose. That section takes over verbatim the provisions of section 78 of the 1886 Code.

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1 At 215

2 1970 (3) SA 529 (A)

3 1974 (3) SA 571 (T)

4 See Sv Safatsa and Others 1988 (1) SA 86 (A). See 6.1.3 Supra.

6.2 Accessories After The Fact

This subject is dealt with in Section 81 of the Transkei Penal Code.<sup>1</sup>

The term "accessory after the fact" is of English Law origin and is unknown to Roman - Dutch Law.<sup>2</sup> In this respect the Transkei Penal Code once more played its role as a gateway for the reception of English Law into South African Law. Thus Gardiner & Lansdown<sup>3</sup> make the point that the term has been adopted in South African practice and motivate by reference, first among others, to section 81 of the Transkei Penal Code. The English law definition of this crime is similar to the first part of the Transkei Penal Code except that it has "maintains"<sup>4</sup> in addition to "receives, comforts or assists".

The question that arises is : what is the nature and extent of the reception of this term in South African Law? The Appellate Division has for a long time refrained from stating exactly what constitutes an accessory after the fact in South African Law. In R v von Elling<sup>5</sup> Watermeyer CJ conceded as much and said that apart from the old English common law idea expressed in section 81 of the Transkei Penal Code, he had not found any other South African definition of the term, and he did not hesitate to adopt the definition.

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1 See Appendix A

2 Gardiner & Lansdown Vol.1 6 ed 153;  
Burchell & Hunt vol. 1 2ed 439

3 Op cit, ibid.

4 Ibid

5 1945 AD 234

A leading case in which the wider definition of the term came up for close scrutiny is Nkau Majara v The Queen 1954 AC 235 PC. This was an appeal from the High court of Basutoland (as it then was) to the Judicial Committee of the Privy Council. The Privy Council had to apply Roman-Dutch Law because Lesotho was a Roman-Dutch Law country. It ruled that although under English law a necessary element of the offence is assistance to the principal offender by a physical act and not merely by omitting to do something, the term does not bear the same meaning in South Africa. There it is sufficient to establish that the assistance was given to the principal offender in circumstances in which it would appear that the giver "associated" himself in the broad sense of the word with the offence committed. This then is the wider definition of the term. In this case of Nkau Majara, a headman who was under a legal duty to effect an arrest had refrained from arresting murderers on his arrival at the scene of a ritual murder. He subsequently failed to report the murder and to give prompt assistance to the police, and he also gave the murderers an opportunity to escape from justice. By these omissions he had plainly associated himself with the murder. The view of the Privy Council in this regard was echoed by Gardiner & Lansdown.<sup>1</sup>

Our courts hastened to associate themselves with the dictum in Nkau Majara<sup>1</sup>. In Munango's case the appellant, a clerk in the Government service, had remained passive and had failed to report money shortages which he had noticed when he took over control from a colleague who had gone away on leave. Burchell & Hunt have no quarrel with this line of reasoning and cite quite a few cases to support it.<sup>2</sup> Prominent among these is R v Jongani 1937 AD where it was regarded as sufficient for a conviction as an accessory after the fact to murder when the accused expressed approval after being told that a cyclist had been stabbed and took possession of the deceased's personal belongings. This whole approach is of course contrary to the spirit of section 81 of the Transkei Penal Code which requires assistance of an offender in order to enable him to escape and is therefore a narrower definition of the term.

This narrower definition likewise gained a great deal of support in South African legal circles and thus showed again the enduring influence of the Transkei Penal Code. In R v Mlooi & Others<sup>3</sup> the Appellate Division did not pay any heed to the wider definition, and laid emphasis on the requirement of assisting an offender in order that

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1 See e.g. R v Munango 1956 (1) SA 438 (SWA)

2 Op cit 441

3 1925 AD 131

he may escape from justice.<sup>1</sup> The same emphasis was also laid in several other cases.<sup>2</sup> More recently this line of approach has been reiterated by the Appellate Division in S v Khoza.<sup>3</sup>

Among the authorities Snyman strongly supports the narrower definition. The learned author criticises the decision in R v Jongani as being incorrect, giving as it does too wide an interpretation to the concept of accessory after the fact. Legal uncertainty on this question remains a reality and in some instances the Appellate Division has actually declined to say whether it gives preference to the wider or to the narrower definition. For in R v Von Elling<sup>4</sup> Watermeyer CJ said: "... it is unnecessary for me to decide whether the term accessory after the fact, when used in our criminal law, bears the meaning given to it in the Native Territories Penal Code or a wider meaning..."<sup>5</sup>

The indications are that for a long time to come some judges will adhere to the wider meaning while others will prefer the narrower meaning. For despite Snyman's view that the narrower definition reflects the preponderant judicial<sup>6</sup> opinion, the more recent case of S v Velumurugen suggests at

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1 See at page 142

2 E.g. R v Maserow 1942 AD 164 at 173; R v Van Rensburg 1943 TPD 436 at 441

3 1982 (3) SA 1019 (A)

4 Criminal Law p.221

5 1945 AD 234

6 1985 (2) SA 437 D & CLD

least that the wider definition still enjoys a great deal of respect. In that case the court referred to Nkau Majara<sup>1</sup> with approval.

There is nothing in section 81 which says that the person assisted should be the actual perpetrator and indeed he could be another accomplice. The case of R v Gani<sup>2</sup> therefore merits consideration. It was held that although, on a charge of murder, it may not be known which one or more of the accused committed the murder, each one of them, if he co-operated with the others in desposing of the body knowing that the deceased had been murdered, can be found guilty of being an accessory after the fact. This underlines the fact that the crime of being an accessory after the fact is distinct from the principal crime and not part of it. One who murders another is not therefore an accessory after the fact if he himself hides the body. In the result there is in all indictments for murder an implied alternative charge of being an accessory after the fact to the main charge, and an accused can thus not rightly be acquitted of both charges merely because it is not clear which of the two crimes he actually committed.<sup>3</sup> It is all very well if emphasis is laid on the aspect of an implied alternative charge,

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1 Supra

2 1957 (2) SA 212 (A)

3 See especially at page 220

and it is submitted that this aspect does not in any way conflict with section 81.

The problem with the Gani<sup>1</sup> case is that the three accused were tried and acquitted of the murder, and there remained no actual perpetrator. To whose murder could anyone of them then be found guilty as an accessory after the fact? That notwithstanding, the crown successfully appealed on a question of law reserved, and it was ordered that the accused be charged for the crime of being accessories after the fact. This was the unanimous verdict of Schreiner JA, Fagan CJ, and Beyers and van Blerk JJA. The judgement has been the subject of much criticism. Thus Burchell<sup>2</sup> highlights the fact that there was no actual perpetrator to whose murder any of the three accused could be found guilty as an accessory after the fact. It is indeed absurd and contrary to the tenor of section 81 that there should be laid a charge of being an accessory after the fact out and out without an indictment charging the principal crime. That is contradictory to the rule that there is an implied alternative charge of being an accessory after the fact. This rule came out clearly in S v Khoza 1982 (3) SA 1019 at 1040. In the former situation a plea of autrefois acquit<sup>3</sup> will be defeated. The

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1 Supra

2 (1971) 88 SALJ 292

3 See Burchell & Hunt op cit 441 footnote 263

Gani decision was further criticised by Lewis JA in the Zimbabwe case of S v Rossi-Conti<sup>1</sup>. The reasoning of Schreiner JA was described as losing sight of the fact<sup>2</sup> that there is a presumption of innocence in criminal law. There is merit in this criticism, but the alternative that faced the Appellate Division was that all three accused would escape criminal liability altogether and that did not accord with the court's sense of justice as it had been proved beyond doubt that the murder<sup>3</sup> had been committed by one or other of the three accused.

That the Appellate Division should have departed from general principles in order to solve a legal problem is an alarming novelty.

<sup>4</sup>  
Snyman has raised the question as to whether it is really necessary to have the crime of being an accessory after the fact in South African law. The learned author points out that once the narrower definition of this crime is accepted, it is completely overlapped by the crime of defeating or obstructing the course of justice. It may take a long time before this view point becomes law, if ever.

It has thus been demonstrated that South African legal thinking remains strongly divided on whether

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1 1971 (2) SA 62 (RAD)

2 At page 65

3 See Burchell (supra) at page 294

4 Criminal Law page 224

to follow the wider or narrower definititon of the term "accessories after the fact". The adherents of the narrower definition testify to the strong influence of the Transkei Penal Code on South African law.

To the important point raised by Snyman in the previous paragraph the 1983 Transkei Penal Code has already responded positively. It has gone a step further than the narrow definition and has inserted the concept of defeating the ends of justice into it.<sup>1</sup> In this regard the Transkei Penal code has once more taken a lead and demonstrated clarity and certainty where the jurisprudence of South Africa is in the midst of controversy. In this field the continued influence of even the new Transkei Penal Code on South African Law now appears to be guaranteed.

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1 See Section 42 of Act No 9 of 1983.

## CHAPTER SEVEN

THE INCHOATE CRIMES7.1 ATTEMPT

There are certain basic problems in relation to attempt. Prominent among them are the difficulties in determining whether an objective or a subjective approach should be followed in determining where preparation ends and consumation begins. This problem exists in several legal systems and the jurisprudence of South Africa is no exception. The crucial question is the relevance of section 83 of the Transkei Penal Code of 1886 to South African Law in the field of attempt.<sup>1</sup> That section defines attempt. It is couched in very wide terms and it raises the important question of criminal liability for attempting to commit a crime which is physically incapable of commission.

The question came several times before the courts in South Africa and the earlier decisions thereof were not at all harmonious. The objective approach was adopted and the courts applied the test of absolute or relative impossibility. In some cases the accused persons were found not guilty of the attempt because of the impossibility.<sup>2</sup> In other cases the accused were found guilty despite the impossibility.<sup>3</sup>

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1 See appendix A

2 R v Maarmen (1886) 5 EDC where the cash box broken into was empty; R v Seane & Another 1924 TPD 668 where the gold which the accused tried to sell was brass.

3 R v Freestone 1913 TPD 758 where the complainant was in fact not pregnant; R v Parker & Allen 1917 AD 552 where the diamonds sought to be sold were in fact pieces of glass.

The courts reasoned that if the crime attempted was absolutely impossible of commission guilt could not follow, but if it was only relatively impossible an accused person could still be found guilty of an attempt to commit it.<sup>1</sup> It is self-evident that the adoption of the objective approach led to difficulties and was largely, if not wholly, responsible for the lack of harmony in the decisions of the South African courts.

In the midst of this state of uncertainty the Transkei Penal Code constantly offered itself as a ready and clear-cut measure which could make the task of the judge much easier than it was. Of the cases mentioned above, R v Seane is a leading example of this. In that case Curlewis JP had this to say:<sup>2</sup> "But after all, however, reprehensible or immoral the act may be the Courts have only to deal with the question whether the act with which an accused is charged is a crime or not. If there is no other provision in our law under which the accused can be dealt with, then of course it may be necessary for the legislature to introduce some provision resembling section 83 of the Transkei Penal Code - i.e. the law as laid down in the Cape Act No.24 of 1886."

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1 See discussion by Burchell & Hunt; South African Criminal Law and Procedure vol. 1 page 461

2 At page 683

Thus the South African Court is heard to lament the fact that the Code cannot be applied as such in South Africa.

The objective test continued to be employed for the next thirty years after Seane's case and as a result the state of uncertainty continued. It was in R v Davies<sup>1</sup> that the Appellate Division resolved the impasse and ruled that an accused can be found guilty of an attempt to commit a crime which is physically incapable of commission, as long as he is not labouring under the mistaken belief - the mistake of law that what he thought was a crime was not in fact a crime, for example an attempt to commit adultery thinking it is a crime when in fact it is not. In so doing Schreiner JA did three significant things:

- (a) He impliedly found fault with the TPD in Seane's case for saying that what it did about the Transkei Penal code instead of quietly applying it and he overruled the case.
- (b) He applied section 83 of the Code without saying so in so many words.
- (c) He rejected the objective approach with its test of absolute and relative impossibility.

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1 1956 (3) SA 52 (A)

In a concurring judgement Reynolds JA reiterated the view that Seane's case had been wrongly decided. He said nothing about the relevance or otherwise of the Transkei Penal code and thus, by implication, accepted that it was a correct reflection of South African law on the point. This decision thereafter reflected the South African law and was applied in S v W<sup>1</sup>. In that case the question was whether a person who had intercourse with a dead female while under the delusion that she was alive, under circumstances which would otherwise have amounted to rape, was guilty of attempted rape. Jansen JA following the Davies case<sup>2</sup> found that the question fell to be answered in the affirmative. In the later case of S v Palmos<sup>3</sup> the Court departed from the line taken in Davies and W<sup>4</sup> and thus from the Penal Code line and opted for the objective approach taken in R v Seane and Another<sup>5</sup>. Gardiner and Lansdown after discussing the controversy between the subjective and the objective approach are not reticent about their appreciation of the significance of the Transkei Penal Code and its contribution to legal certainty. They state that in the Transkeian Territories the question is settled (my emphasis) by section 83 of the act 24 of 1886 and proceed to quote the section in full.<sup>6</sup>

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1 1976 (1) SA 1 (A)

2 Supra

3 1979 (2) SA 82 (A)

4 Supra

5 Supra

6 6 ed vol 1 p.140

Section 82 of the Transkei Penal Code describes an attempt to commit an offence as an act done or omitted with intent to commit that act, forming part of a series of acts or omission which would have constituted that offence if such series of acts or omission had not been interrupted either by the voluntary determination of the offender not to commit the offence or some other cause. The influence of this definition is seen in the decision of Bristowe J in R v Sharpe 1903 TS 868 at 875. This influence is recognised by Burchell & Hunt.<sup>1</sup> The authors also demonstrate the similarity between this section and the English law as reflected by Stephen in his digest of the Criminal Law.<sup>2</sup>

It is quite evident from the foregoing that in the field of attempt the Transkei Penal Code of 1886 exerted a distinct influence on South African law. So much was this influence that a South African judge expressed the wish that legislation similar to this be introduced in South Africa. The weakness of the Penal code of 1886, however, lay in the fact that it embraced the objective test in this regard. As time went on the courts in South Africa discovered this weakness and discarded the objective test in favour of a subjective test. The 1983 Penal Code via its section 31, has followed this development and discarded the controversial section 83 of the old Code with its objective test.

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1 Vol. 1 page 457 footnote 61

2 Ibid

7.2 Conspiracy

Conspiracy is a very early stage in the commission of the crime. It requires an agreement between two or more persons that a crime should be committed. In English law there is the fiction that husband and wife are one for the purposes of this crime and therefore neither can be guilty of conspiring with each other.<sup>1</sup> But if husband and wife and a third party agree to commit a crime then all three are conspirators.<sup>2</sup>

Under the Transkei Penal Code of 1886 conspiracy to do certain acts is forbidden.<sup>3</sup> Transvaal law of 1892 made provision against conspiring to win money or articles by illegal game. There is no relationship between this and the provisions of the Transkei Penal Code. Later on in South Africa several acts were passed to penalise conspiracy in different directions.<sup>4</sup> The Transkei Penal Code's provisions have no bearing on these aspects of legislation which in themselves have no bearing on each other. The only statute that appears to be all embracing is the Riotous Assemblies Act<sup>5</sup> which forms the broad basis of liability for conspiracy. It lays down that any person who conspires with any other person to aid or procure the commission of or to commit any offence whether at common law

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1 See Burchell & Hunt Vol. 1 page 486

2 Op cit ibid

3 See Appendix A Sections 86, 111, 112 and 245.

4 E.g. the Prisons Act No.8 of 1957, relating to the escape of prisoners, the General Law amendment act no.76 of 1962 relating to conspiracy in general, and the Immorality Act No.23 of 1957

5 Act No. 17 of 1956

or against a statute or statutory regulation shall be guilty of an offence and be punishable as though the offence had actually been committed.

The fiction of English law whereby husband and wife are one for purposes of conspiracy never recommended itself to Transkeian and South African law. It would have been interesting to see how the jurisprudence of South Africa would have responded had the fiction become part of the Transkei Penal Code of 1886. In the field of conspiracy, therefore, there appears to be no influence exerted by the code on South African law.

### 7.3 Incitement

There has been a controversy on the question whether a mere incitement to commit a crime was punishable at common law. In 1921 the Appellate Division settled the matter in the affirmative when it ruled that it is a crime at common law to incite another to commit an offence even though nothing be done by the person incited in the furtherance of its<sup>1</sup> commission. The matter was put beyond doubt, both in respect of common law and statutory offences, by Act 17 of 1956.<sup>2</sup> In the Transkeian Penal Code of 1886 there was provision against incitement. Under the Code any incitement to commit any offence

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1 R v Ndhlovu 1921 AD 485

2 Section 18 (2) (b)

was punishable by a term of imprisonment, the option to give a fine in deserving cases was given to the courts.<sup>1</sup> Here the legal position was therefore clear from the beginning.

The leading South African case of incitement emanated from Transkei, namely S v Nkosiyane.<sup>2</sup> The Appellants were charged with the crime of incitement in terms of Act 17 of 1956.<sup>3</sup> In this case the law relating to incitement was fully laid out by Holmes JA when he confirmed the verdict of Jennet JP of the Eastern Cape Division. The incitement was aimed at the political assassination of the Transkei Chief Minister K.D. Matanzima, as he then was. The learned Judge of Appeal said that an inciter is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person towards the commission of a crime.

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1 Section 246

2 1966 (4) SA 655 (A)

3 Section 18 (2) (b)

Where the intended influence does not reach the mind of the prospective incitee, the crime may be of attempted incitement, e.g. where an inflammatory letter is sent but goes astray. It is the conduct and intention of the inciter which is vitally in issue. There may be, depending on the circumstances, an incitement irrespective of responsiveness, real or feigned, or the unresponsiveness of the person sought to be influenced.<sup>1</sup>

This case illustrates that the statutory law gained prominence over the common law in relation to incitement in South Africa. It does not illustrate harmony between the Transkei Penal Code and South African statutory law in the field of incitement, although the charge in this case was drawn under the one statute read with the other. The Transkei Penal Code did not go into any details about the nature and meaning of the crime of incitement - it merely provided punishment for incitement.<sup>2</sup> Sections 140 and 144 do not deal with incitement as such but actually deal with murder and punishment for murder respectively. That is their only relevance to the Nkosiyane case.

The only reasonable conclusion therefore, is that the code did not give much room for inter-action

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1 Those who had been "incited" were police agents who had pretended to favour the opposition Democratic Party and had readily agreed to suggestions that they undertake the killing of the Chief Minister for reward.

2 Section 246

between it and South African law in the field of incitement. Strangely enough the 1983 Penal Code does not make any provisions against incitement. The Marginal note to section 47 of the act says "inciting defiance of lawful authority of public officers" and at first sight one gains the impression that it covers incitement to a limited extent. But this is not so - the section does not deal with incitement as such.

It is section 54 that provided against incitement but that is specifically against incitement to public violence only. Such incitement can be by speech, conduct or publication. It is hard to see why incitement was not dealt with in a broad sense especially after the experience of the Nkosiyan case and related ones from South Africa. In the result the 1886 Code made no contribution to legal development in South Africa in the field of incitement and the 1983 Penal Code equally lacks resourcefulness.

CHAPTER EIGHT

CRIMES AGAINST PROPERTY

8.1 THEFT

8.1.1 Resistance to Code's Influence

Theft is defined at some length<sup>1</sup> in Section 179 of the Transkei Penal code. This definition was taken verbatim from Section 246, Stephen's Code,<sup>2</sup> thereby establishing once more the English law influence on the Transkei Code. The definition was then substantially taken over by Gardiner and Lansdown when it first appeared in 1919,<sup>3</sup> and this found its way into South African Law. The definition strongly resembles that contained in Section 1 of the English Larceny Act of 1916 which reads:

"A person steals who, without the consent of the owner, fraudulently and without claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof<sup>4</sup>. This definition does not expressly include furtum usus as does section 179.

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1 See Appendix A

2 Hunt: South African Criminal Law and Procedure Vol.2 page 565: Juta 1970

3 See page 1082

4 See Snyman Page 425: ironically, the Larceny Act of 1916 ceased to apply in England in 1968 when the Theft Act of 1968 was passed. A new crime, theft, was created to replace the old crimes of larceny, embezzlement and fraudulent conversion.

It was approved in several cases. Thus in R v von Elling<sup>1</sup> Watermeyer CJ spoke of "the ordinarily accepted definition of the crime of theft which I take from Gardiner & Lansdown." In R v Harlow & Aho<sup>2</sup> Nesor J said<sup>3</sup> "the definition of theft, according to Gardiner & Lansdown, which has been accepted for years past, is that..". The definition continued to be cited with approval even in the following decade.<sup>4</sup>

Despite the strategic position which the Transkei Penal Code occupied enabling it to play its role in the process of bringing English law into South Africa, the South African law however, did not fall too readily under the influence of it and English law in the field of theft.<sup>5</sup>

The vigilance of the Courts against the powerful Transkeian Code cum English law is demonstrated by the following passage by Schreiner ACJ in the case Minister of Justice re: R v Gesa; R v De Jongh<sup>6</sup> : "it is not correct to say that our law's treatment of both types of fraudulent acquisition of another's goods - the larceny by a trick type and the obtaining by false pretences owes its origin

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1 1945 AD 234 at 236

2 1955 (3) SA 259 T

3 At page 263

4 See e.g. S v Kotze 1965 (1) SA 118 (A) at 125

5 See Hunt loc.cit. for details of important respects in which the South African courts did not follow English law.

6 1959 (1) SA 234

to English practice. On the contrary in 1895 in R v Swart, 12 SC 421, De Villiers CJ stated that our law differs from the English law and has always treated facts covered by the English crime of obtaining by false pretences as theft."

Ten years later in R v Collins 19 EDC 163, Kotze JP said that theft in South African law has a much wider scope than the corresponding term in English law and that here the crime of theft is wide enough to include the obtaining of goods by false pretences. It was true that the name of the English crime of obtaining by means of false pretence might well have suggested the use of the expression "theft by false pretences" as in the Transkeian Penal code, sections 191 to 193, but South African law had successfully resisted any tendency that there may have been to confine theft within the narrow limits of larceny. The learned judge went further and stated categorically that the Transkeian Code may not in a particular instance accurately represent the law of South Africa.

### 8.1.2 Acceptance of Code's Influence

#### 8.1.2.1 Theft of Trust Moneys

The theft of trust moneys is provided for in section 183 of the Transkei Penal code which deals with theft by an agent. The significant aspects of

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1 See Appendix A

the lengthy section are:

1. The requirement to account for or pay money or the proceeds thereof to another person, such not necessarily being in specie the identical money. Such money is generally (and perhaps loosely) understood as trust money.
2. The debtor and creditor relationship envisaged by the section and the proper entry requirement that goes with such relationship.

The distinction between trust money and debtor-creditor money therefore assumes vital importance. The obvious reason is that if the latter relationship is proved the consequences for an accused person are prima facie serious.

In R v Golding<sup>1</sup> the accused was charged with the crime of theft at the Circuit Court in Oudtshoorn, in that he had received and taken into his possession certain money which he was required to pay to Schmolle but failed to do so and instead appropriated and converted that money to his own use. He was a collector-salesman for Singer Company and it was in that capacity that he received moneys due to be accounted for to his principals. On trial he was found guilty of theft but a point of law was reserved for argument before the Supreme Court namely: did the evidence substantiate the crime of theft?

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1 (1896) 13 SC 210. See also R v Monakali 1937 EDL 248.

When the matter came before the Supreme Court de Villiers CJ dealt with the matter having regard to the Transkeian Penal Code as if it was a South African statute. He said:

" I have always regarded the 183rd section of the Native Territories' Penal code as fairly stating the law of the colony proper in regard to thefts by agents. If the terms of the agent's employment are that he is to be an ordinary debtor in respect of moneys received on behalf of the principal, and that the personal liability only of the debtor is to be relied upon, then the appropriation by him of moneys so received does not amount to theft, provided that they are properly entered in the debtor and creditor <sup>1</sup> account rendered by him to the principal."

This decision was later to be criticised by de Wet & Swanepoel who say that the verdict given by Lord De Villiers is unsatisfactory "in every respect". Despite the charge sheet which avers that the money was stolen from the payers concerned, and despite the emphasis on this aspect by the attorney for the defence, Lord De Villiers gives

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1 At 215. See also R v Tsholoba and others 1960(1) SA 764 (O); S v George en Andere 1966 (4) SA 10 (C&LD) where the Code's provisions were embraced.

2 Op cit 326 c.f. E.M. Burchell : Is it theft? SALJ 1955 page 38

a verdict as if Golding had been accused of stealing the money from the S company. It was unnecessary to bring in Section 183 of the NTPC. Golding stole no money from the people concerned, since they no longer were the owners thereof. If the charge had read that Golding had stolen the money from the S company, the question would have arisen whether Golding or the company was the owner of the money. But this question was not relevant. Reference to Section 183 of the NTPC was therefore unnecessary. What is more, it is false to aver that: "I have always regarded the 183rd section of the Native Territories Penal code as fairly stating the law of the Colony proper in regard to thefts by agents", and to then give a verdict on that basis. Section 183 certainly does not reflect Roman-Dutch law, they conclude.

The learned authors clearly identify the gravamen of their objection to section 183, namely that in-so-far as the section covers the appropriation of something with which one has been entrusted, and of which the right of ownership vests in someone else, there is no conflict with Roman-Dutch Law, "but this section goes further and includes as theft also the application for personal benefit of a thing which has perhaps even been transferred to one in ownership to be used for certain purposes."<sup>1</sup>

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1 At page 343

However, the judgement opened the way for the full-scale application of the Transkei Penal code in South Africa in cases involving the theft of moneys by agents. As early as 1907 the impact of section 183 was felt as far afield as the Orange River Colony (as it then was) in the case of R v Theunissen.<sup>1</sup> There, both the crown and the defence appear to have been completely poor in ammunition and each side relied solely on R v Golding<sup>2</sup> in support of the viewpoint that it contended. The crown specifically mentioned "the Penal Code for the Transkei, section 183."<sup>3</sup> The judgement of Maasdorp CJ was as follows:

"The money was handed to the accused for the purpose of settling two accounts, and not merely to obtain two cheques. The evidence of his statement in June to the effect that he had settled the accounts cuts away the ground from the argument that he might have overlooked the matter. The accused was merely the duct for the passing of the money - either this was to have taken place by way of cheque or otherwise - and the fact that he did not do so is evidence of theft. There is no doubt about the law, in view especially of section 183 of the Penal code for the Transkei, which, as he says, may be taken as fairly stating the law of the colony proper in regard to thefts by agents." This judgment is also criticised by de Wet and Swanepoel.<sup>4</sup>

1 1907 ORC 118

2 Supra

3 Page 118.

4 See footnote 2 on page 7 supra

In R v Satsky<sup>1</sup> the court, per De Villiers AJ, recalled the statement in Golding's case<sup>2</sup> about the Transkei Code stating the law of the Colony proper, adding "with this view of the law the court entirely agrees."

The learned acting judge then went on to quote section 183 in full so as to illustrate the point he was making. In R v Farquharson,<sup>3</sup> a case from Fort Beaufort outside Transkei, section 183 was again quoted in full and embraced as being applicable, regard being had to the previous decisions discussed above.

The impact of section 183 was felt even as far afield as Zimbabwe. For in R v Harlen<sup>4</sup> Beadle CJ stated;

"In all the counts the charge of theft arose from what is commonly known as misappropriation by an agent. The accused's company acted as an agent to collect moneys for principals, and the indictment alleges that the accused's company misappropriated these moneys. The law applying to charges of theft such as these is now well settled and may be found in section 183 of the Transkei Penal code."<sup>5</sup>

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1 1915 CPD 574

2 Supra

3 1925 EDL 50

4 1964 (4) SA 44 (SR)

5 At 45

The learned Chief Justice<sup>1</sup> further mentioned "the Transkeian Code" three times<sup>1</sup> in circumstances suggesting that it was a statute applicable in Zimbabwe. In so doing he simultaneously applied the Satsisky and Monakali cases.<sup>2</sup>

Although it might at first sight be thought that a finding that the money was not held in trust but was merely a debtor-creditor item should terminate the trial in favour of an accused person, it is in fact not so. Several decisions, which are based on section 183 of the Transkeian Penal code, show that the accused will be guilty of theft if, with intent to steal, he omitted to pay and omitted to enter or improperly entered the debt in his account with his creditor. Of course the state must still prove a fraudulent omission to enter or a fraudulent entry, otherwise there can be no conviction.<sup>3</sup>

<sup>4</sup>  
In R v Satsisky the court said:

"It may, therefore, be taken as law that an agent standing in the position of ordinary debtor to his principal commits theft if he receives any money which he not only fails to pay over to his principal, but fails to enter in the debtor and creditor account which he renders to his principal, if the omission to enter it in the account is fraudulent.

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1 On pages 46 & 47

2 Supra

3 See Hunt op cit (1982) 636

4 Supra

The three elements must all be present, viz., the omission<sup>1</sup> to pay, the omission to enter, and the fraudulent intention."

These sentiments were quoted with approval in R v Monakall<sup>2</sup>. This was a Transkeian case which arose from the district of Centane. The accused, the principal of Tutura Mission School, received monies from the sale of school books from numerous persons but failed to hand over the said monies to the Rev. T B Soga, the Manager of the School, but converted the monies to his own use in contravention of section 183 of the Penal Code. The guilt of the accused was based on his omission to pay, there being no actual account stated between the principal and the manager, on which an omission to enter could be based.

In R v Harlem<sup>3</sup> the Court reiterated this standpoint and indicated that such legal position was clear "not only from the Transkeian<sup>4</sup> Code, but also from the<sup>5</sup> decision in R v Satsky." And in Siduntsa v Rex the appellant was charged and convicted of theft in terms of section 199 of the Code by the Magistrate of Ngqeleni, Transkei. When the matter came before the Supreme court in Grahamstown, the presiding judge rightly drew attention to the fact

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1 At page 579  
2 1937 EDL 248  
3 Suora  
4 At page 46  
5 1912 EDL 431

that the charge should have been in terms of section 183, but <sup>1</sup> rather unexpectedly found shelter in R v Golding for stating that the section had always been regarded as fairly stating the law of the Colony proper in regard to theft by agents.<sup>2</sup>

The Transkei Penal code distinction between trust money and debtor-creditor money has been applied in numerous other cases in South Africa, even though the judgements may not have referred particularly to section 183.<sup>3</sup> In S v Botha<sup>4</sup> it was held that the appropriation for his own use of articles by the secretary was theft from his principal even if the articles never became the property of his principal and in S v Rynecke<sup>5</sup> the view was expressed that today it may not be necessary, strictly speaking, on a charge of theft of trust money, to allege in the indictment who is the person invested with the "special property interest" in the money stolen. The judgement in the Reynecke case was confirmed by the Appellate Division as appears from the editor's note.

#### 8.1.2.2 Stealing from a Bank Account

It is orthodox banking law that if a person deposits money in his banking account, the bank owes the money and the relationship between the bank and

1 Supra

2 See page 434

3 Hunt: op cit (1982) 634 footnote 317

4 1970 (1) SA 688 (O)

5 1972 (4) SA 366 (T)

the customer is one of debtor and creditor. The bank however, remains under an obligation to honour<sup>1</sup> cheques validly drawn by the customer.

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In S v Kotze it was held that the misuse of funds by persons who are in a position of trust in relation thereto can, in appropriate circumstances, be theft, even if those funds are irregularly drawn out of someone else's banking account. In that case, his principal had placed the accused in full control of his bank account, but his mandate was restricted to the drawing or causing to be drawn of cheques for the purposes of his principal's business and the accused had drawn and issued a cheque in settlement of his private debt. The Court held that the fact that the money was in his principal's bank account was no insurmountable obstacle to a finding that he had stolen that money which was still the property of or in the lawful possession of his principal, because although the principal was not the owner of the money in his banking account he was nevertheless a person with 'a special property or interest therein'. In so finding, Ogilvie Thompson JA recalled with approval the Transkei Penal Code definition of theft as enunciated by Gardiner and Lansdown and upheld by Watermeyer CJ in R v Von Elling.<sup>3</sup> He invoked the trusteeship concept and decided that the funds in the bank fell within the ambit of

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1 See S v Kearney 1964 (2) SA 495 (A) at 502

2 1965 (1) SA 118 (A)

3 See page 125

the concept of funds held in trust. And since the funds were trust moneys the beneficiary was invested with a special property or interest.

The interaction between banking and criminal law principles arose recently in the Swaziland case of Rex v Alpheus Dlamini.<sup>1</sup> The accused was a teller at Barclays Bank. There was a shortage of R5 000 in his cash. In order to cover that up and avoid dismissal, he withdrew R5 000 from a savings account of one Alvit Dlamini and paid it to the bank to make good the shortage. That withdrawal was immediately discovered and the bank refunded Alvit's account and the parties were back to square one with the accused being liable to the bank for the original shortage of R5 000.

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In an illuminating review of this case Takirambude argues strenuously that the conviction of the accused was not warranted if one took into account "the existing criminal law and banking principles."<sup>3</sup>

He also contends that the accused should not have been convicted on any basis whatsoever. In this connection it is interesting to note that Nathan CJ observed that there was no ground for ordering repayment to the bank as the theft was from Alvit Dlamini's account and not from the bank - he merely

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1 Crim TS 70/80 High Court of Swaziland (unreported)

2 Head of the Department of Law, University of Botswana

3 See XV CILSA 1982 page 215

sentenced him to R500,00 or one year's imprisonment and that was all.

### 8.1.2.3 Delictum Continuum

Section 190 of the Transkei Penal code provides that everyone who, having obtained any property by any act which if done in these territories would have amounted to theft, brings such property into these territories, shall be guilty of theft. This therefore means that the Code makes theft a continuous offence - a delictum continuum. Now although, as it appears on the face of it, the provision applies only to thefts committed outside the territories it is submitted that in practice it applies even to thefts committed inside them.

The South African law became the same on the point: "Theft... is a continuous offence so that if property is stolen outside the Republic and brought into the<sup>1</sup> Republic by the thief he may be tried in the Republic."

In R v Von Elling<sup>2</sup> Tindall J A affirmed his own dicta in R v Attia<sup>3</sup> and said: " The meaning of the statement that theft is " a continuing offence" means no more than that theft continues as long as the stolen property is in the possession of the thief or some person acting on behalf or even,

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1 Swift: Criminal Procedure 2 ed Butterworths 1969, Snyman & Morkel: Strafproses reg p.48 Juta 1985

2 1945 AD 234

3 1937 TPD 102

possibly, in the interest of the original thief or party to the theft." Swift<sup>1</sup> merely states that the position that theft is a continuing offence is an exception to the common law principle that a Provincial or Local Division of the Supreme Court of South Africa will have jurisdiction in respect of offences committed within it, or, in other words, that all statutory crimes are local.

In R v Dzwaka & Another<sup>2</sup> the accused were charged before the magistrate at Mt Fletcher, Transkei, with the theft of cattle from Basutholand and introducing same into Mt Fletcher. Reynolds J invoked the provisions of Section 190 of the code and held that it was unnecessary to prove that theft was a crime according to the law of Basutholand. This is understandable. But the concurring judgement of Jennett J is interesting. He says: "According to the law prevailing in the Transkeian Territories the accused's act of taking in Basutholand constituted a theft of stock. Even if section 190 of Act 24 of 1886 did not exist that theft, if it was a theft according to the law of Basutholand, which was 'continued' in the Union by the accused's possession there of the stolen property was a theft of stock." The learned judge further said that the doctrine of theft being a "continuing offence" is well established in South African Criminal Law, and

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1 Op cit See also Snyman & Morkel p.54 ff  
2 1950 (3) SA 870 EDLD

relied on R v Von Elling 1945 AD 234.<sup>1</sup> Snyman<sup>2</sup> reiterates the doctrine that theft is a continuous offence and also mentions the much criticised rule that as far as theft is concerned there are no accomplices or accessories after the fact. Commenting on R v Dzwaka & Another<sup>3</sup> de Wet & Swanepoel object to the whole idea of theft being regarded as a continuous offence and state: "(t)ot tyd en wyl ingesien word dat die opvatting oor diefstal as sogenaamde voortdurende misdaad slegs verwarring skep, sal helting as besondere soort diefstal nie klaarheid in ons regspraak verkry nie."<sup>4</sup> (Until such times as it is appreciated that the view that theft is a continuing offence merely creates confusion, receiving stolen property as a particular form of theft will gain no clarity in our law).

The doctrine of theft being a continuous offence also received attention in Zimbabwe.<sup>5</sup> Fieldsend CJ described the doctrine as being common to English law and modern Roman-Dutch law. (My underlining). The learned Chief Justice expressed doubts about the full significance of the doctrine and taking other relevant factors into account, acquitted the accused in the case.

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1 At page 876

2 Criminal Law page 44

3 Supra

4 Op cit 2nd ed p. 368

5 S v Manikinyeka and Others 1981 (4) SA 194 (ZAD)

It is quite evident from what has been said above that in this respect the Transkei Penal Code of 1886 once more fulfilled its role as a vehicle for the importation of English law principles into South African law. In this regard the statement by Fieldsend<sup>1</sup> is relevant. The new Transkei Penal code retains the provisions of section 190 of Act 24 of 1886.

8.1.3. The Significance of Sections 180 - 182<sup>2</sup>

The important point that arises from these provisions is that theft is completed as soon as one takes the thing, moves it or allows it to be moved. In this connection the case R v Carelse and Kay<sup>3</sup> is noteworthy for its demonstration of the influence of the Transkei Penal Code on South African law. In that case Carelse removed a tin of petrol from a store-room and placed it elsewhere in the building i.e. where empty tins were usually put away. The intention was that Kay would return later and pour the petrol into his car's petrol tank. However, Carelse's actions were observed and reported to the owner of the garage. The petrol was taken back and stored before Kay could take it. Although it was argued that this was a case of attempt, the judge did not give a straight answer in this regard. Here it was found that theft is completed

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1 Supra

2 See appendix A

3 1920 CPD 471

as soon the thing has been moved with a view to taking it away later, "that is, converted, and therefore there was a contrectatio fraudulosa."

The mere fact that the petrol had been returned to the place from where it was originally removed "cannot remove the fraudulent intention, in other words, the intent to steal, which was manifested by the circumstances." Commenting on this decision de Wet and Swanepoel<sup>1</sup> record that the action took place in Cape Town where the N.T.P.C. did not apply but "onder invloed van hierdie kode word nou dieselfde reg vir die hele Unie verkondig" (Under the influence of this code the same law became effective in the whole Union).

That this principle was adopted throughout South Africa is also clear from R v Banda.<sup>2</sup> In that case an employee of the Durban Corporation was stopped by the watchman at the gates leading to the workers' compound en route from a Power Station where certain wire belonging to the corporation was used. He had some wire under his coat and the watchman had him charged with theft, of which he was convicted and sentenced. The Natal Provincial Division confirmed the conviction and sentence of theft and said that on the evidence as given by the watchman the only reasonable inference that could be drawn

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1 Op cit 2ed 320 ff. The authors stress the Code's influence  
2 1953 (2) SA 781

was that the wire so found belonged to the Durban Corporation and was being removed from the corporation premises by the appellant. (my underlining).

Nowhere did the court consider the question of attempt to steal the copper wire. On the question as to when theft is completed, the influence of the code on South African law is beyond doubt. The Transkei Penal Code Act of 1983 is similar to the 1886 Code.<sup>1</sup>

## 8.2 Arson

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According to Gardiner & Lansdown arson is committed by any person who wilfully and with intent to injure or defraud another sets fire to and sets on fire any immovable structure of the nature of a house. This is in accordance with the views of the later writers such as Van der Linden 2-4-7 who says that arson is committed by those who, with the purpose of injuring another, set fire to buildings or other immovable goods - "gebouwen of andere onroerende goedere" whereby the property takes fire and damage is caused. On the other hand the Transkei Penal Code's definition of arson departed from the common law definition and was based on the views of the earlier writers who saw arson as relevant to both movables and immovables.<sup>3</sup> For instance Kersteman in his Wordenboek defined arsonists

<sup>1</sup> See Section 132 of Act 9 of 1983.

<sup>2</sup> 6 ed volume 2 page 1779

<sup>3</sup> S 236, appendix A

(branstichters) as those punishable delinquents who wilfully and with intention to injure someone set fire to houses, mills, stables, barns, ships and boats. A noteworthy departure from at least the early English law, in both the Code and the writers' definition is the total lack of reference to the ownership of the property.

In 1908 the Criminal Law Amendment Act was passed in the Transvaal.<sup>2</sup> It referred, in relation to arson,<sup>3</sup> to any building or structure thereby departing from the common law meaning of arson which confines it to immovable structure and bringing the Transvaal law into line with the provision of the Transkei Penal Code by extending the meaning of arson to include movable structures. A similar move was taken by Natal the following year via the Criminal Law Amendment Act of 1909 which defined arson so as to include "all kinds incendium, of whatever nature the property in respect of which the offence is committed may be." Following the lead of the Transkei Penal Code, therefore, the law of South Africa was gradually changing to make the crime of arson relevant to movables as well. It may be mentioned that English law has<sup>4</sup> always regarded arson as being relevant to immovables. Not unexpectedly

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1 See Gardiner & Lansdown op cit 1780

2 Act No.16 of 1908

3 Section 8

4 See Hunt: South African Criminal Law & Procedure  
vol 2 766-767 Juta

the lack of uniformity to be seen in the works of the Roman-Dutch writers and the statutes was reflected in the case law. At the Cape there were cases which reflected a difference of opinion on the question as to whether the term arson meant the same as the Dutch word brandstichting (and the Latin word incendium), and more particularly whether arson related to movables in addition to immovable property.

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In R v Enslin Lord de Villiers followed the view of Van der Linden that arson is relevant only to immovable property. "The facts show a malicious burning of the barley stacks of another, and the legal and descriptive appellation of such an offence is certainly not arson."<sup>2</sup> The learned Chief Justice made it clear that the prisoner should have been charged with malicious injury to property.<sup>3</sup> He refused to identify arson with brandstichting. In a dissenting judgement Barry JP was not satisfied that the word arson, borrowed as it was from English law, could be given such an extensive meaning as incendium of Roman law. Arson in England meant the malicious setting of fire to an immovable which a haystack was not. The term arson therefore had been misapplied to the facts set forth in the indictment.<sup>4</sup>

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1 (1885) Buch A.C. 69

2 At page 70

3 Ibid

4 When the accused was later charged with malicious injury to property the Chief Justice dismissed a plea of autrefois acquit as he had not been in jeopardy in the first instance - see at page 119.

The Transkei Penal Code was passed in the following year. Thereafter came the case of Rex v Hoffman, Rex v Saachs & Hoffman.<sup>1</sup> However it is significant that the learned Chief Justice no longer distinguished between the wider (Roman-Dutch law) and the narrower (English law) meanings implicit in brandstichting and arson respectively, which he treated as synonyms. Ten years later the view expressed in the Transkei Penal Code, that arson relates to both movable and immovables, appeared to have gained momentum at the Cape although no legislation was passed similar to that passed in the Transvaal and Natal. Thus in R v Peizee<sup>2</sup> Hopley J declared: "The term 'arson' all through my life and probably for generations before that, has been adopted and used, and I think it includes all that was intended by the Dutch word 'brandstichting' and by the Latin word 'incendium'."

The controversy had now reached its climax and the time was ripe for the Appellate Division to play its role in establishing uniformity in South African Law. That court took a decisive stand in the matter in R v Mavros.<sup>3</sup> The appellant had been convicted in the High Court of Southern Rhodesia (as it then was) for the crime of arson in that he had wrongfully and maliciously set on fire his own store with intent to burn it and defraud an

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1 (1906) 2 Buch A.C. 342

2 1916 SR. 13

3 1921 A.D. 19

insurance company of the money for which he had insured the store and foods therein contained. Innes CJ went into the question of the earlier writers and thereupon identified himself fully with the decision in R v Palzee:<sup>1</sup>

"In every translation which I have been able to consult I find that the offence of brandstichting is described as arson, and I do not know how else it would have been possible to describe it."<sup>2</sup>

Van der Linden's definition was accepted as correct and the view that arson can be committed only in respect of immovables became entrenched.

From the time that the Mavros case was decided it became clear that the influence of the Transkei Penal Code was going to be terminated. In a number of cases there were charges of arson where huts or other such informally constructed dwelling structures for blacks had been set on fire. In each case the point was raised that the hut or similarly constructed structure was not proved to be immovable regard being had to the requirements for fixtures to be accepted as immovable.<sup>3</sup> Convictions for arson were accordingly not secured where it had not been proved beyond reasonable doubt that these huts

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1 Supra

2 At page 24

3 See in this regard McDonald Ltd v Radin N.O and the Potchefstroom Dairies and Industries Co. Ltd 1915 AD 454

and other structures were immovable. R v Mabula<sup>1</sup> was the first such case, and the principles laid<sup>2</sup> down therein were followed by the Provincial Divisions.

In R v Soqokomashe<sup>3</sup> the appellants had set fire to a rondavel classroom (hut) in the Peddie District. They had pleaded guilty but were nevertheless acquitted on appeal because the accidental burning<sup>4</sup> of the hut had not been excluded by the evidence.<sup>5</sup> And in S v Motau en 'n Ander<sup>6</sup> the conviction of arson was substituted by one of malicious injury to property. In all these cases the absence of the influence of the Transkei Penal Code in terms of which the burning of these structures would have been regarded as arson was conspicuous.

By 1979 the Transkei Penal Code was completely out of the way in the field of arson and Hunt<sup>7</sup> defined arson as "unlawfully setting an immovable structure

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1 1927 AD 159

2 See R v Motaung 1953 (4) SA 35 (O), R v Soqokomashe and others 1956 (2) SA 142 EDLD and S v Motau 1963 (2) SA 521 (T). See also discussion: Koyana: Customary Law in a Changing Society p.67

3 1956 (2) SA 142 EDLD

4 This illustrates once more the absurdity of a rigid adherence to the accusatorial system as now a man who pleads guilty is nevertheless set free on a technicality - something which can no longer happen after the Criminal Procedure Act of 1977 in South Africa and the Criminal Procedure Act of 1983 in Transkei.

5 1963 (2) SA 521 (T)

6 C.f. the second case of R v Enslin (1885) Buch A.C. 69

7 Op cit 768

on fire with intent to injure another." Hunt also criticised the Gardiner & Lansdown definition of arson and said:

- (1) "wilfully" has English law over tones;
- (2) "sets fire to" is not and can hardly be an element separate from "sets on fire";
- (3) "in the nature of a house" is misleading because a common connotation of 'house' is a dwelling house, yet arson can surely be committed in respect of buildings used solely for storing property.

The last remaining traces of the influence of the Transkei Penal code on South African law in this field were wiped out in 1970 when the Transvaal and Natal statutory provisions<sup>2</sup> were repealed by the Pre-Union Statute Law Revision Act.<sup>3</sup> In S v Solomon<sup>4</sup> the court simply stated that both Roman and Roman-Dutch law recognised the offence was limited to certain property such as buildings.

To sum up, there was a lack of uniformity in the works of the Roman-Dutch writers and, later on, the statutes, in relation to arson. The Transkei Penal Code favoured the view that arson can be committed even in respect of movables and this view, harmonious as it was with that of some of the writers, made an impact on the case law until

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1 Ibid

2 Supra

3 Act No.26 1970

4 1973 (4) SA 644 (C)

1921 when R v Mavros<sup>1</sup> was decided. Thereafter the contrary view that arson can only be committed in respect of immovables prevailed and the spirit of the Transkei Penal Code was wiped out. The new Transkei Penal Code<sup>2</sup> practically adheres to the 1886 definition of arson and the law relating to arson in Transkei is decidedly different from the South African law.

### 8.3 Robbery

#### 8.3.1 English Law and the 1886 Code

The definition of robbery is contained in Section 211 of the Transkei Penal Code.<sup>3</sup> This definition was taken over by Gardiner and Lansdown in their first edition in 1919,<sup>4</sup> except that they slightly expanded on the section 211 definition. Section 211 was for its part copied directly from section 288 of the English Draft Code of 1879.<sup>5</sup>

#### 8.3.2 The Influence of the Transkei Penal Code

The South African Law was once again very inadequate in this regard and had to resort to borrowing. This inadequacy is realised by Hunt when he says:

"The Courts in South Africa found it helpful to use the wealth of English and American case authority to clothe the somewhat bare bones<sup>6</sup> of our old authorities."

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1 Supra

2 Act No. 9 of 1983

3 See Appendix A

4 See page 1118

5 See HUNT: South African Criminal Law and Procedure Vol. 2 page 679. Juta 1982

6 South African Criminal Law and Procedure Vol.2 page 679 Juta 1982

While thus recognising the resort to English and American case authority, the learned author appears to have overlooked the resort to the Transkei Penal code which, it is submitted, became quite conspicuous as time went on. Earlier on the Orange Free State Court in State v Joubert<sup>1</sup> said it was of opinion that

" actual and physical force is indeed necessary to constitute the crime of robbery"

The ' actual violence' specified in the Transkei Penal Code is noticeable here, but it is submitted that although this does not by all means necessarily exclude the "threats of violence" in the Penal Code - a threat is in itself actual and physical and is pregnant with violence - one cannot safely claim the influence of the Transkei Penal code in this instance.

Fifty years after the Joubert<sup>2</sup> case the Transkei Penal Code made a loud and clear reminder about its role in the South African law of robbery. For in Minister of Justice: in re R v Gesa; R v de Jongh<sup>3</sup> Schreiner ACJ admitted that there was "very little" in South African case law dealing with the question whether robbery covers handing over under threat (my emphasis) and he admitted resort

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1 4 OR 188

2 Supra

3 1959 (1) SA 234 (A)

to Russel (English author) on Crimes 10th ed Vol.2 and Bishop (American author), Criminal law 8th ed paras 1164, 1169. He then indicated that the Transkei Penal Code was to the same effect, and re-stated the Code's definition of robbery as laid down in section 211. The learned judge then recalled R v Buthelezi 1925 AD 160 at 170 and even showed more faith in the relevance of the Transkei Penal Code than had done his predecessor brothers when he said:

"it has frequently been resorted to with approval by our courts as a guide to our law."

the first part being a direct quotation by him from Kotze JA in the Buthelezi case and the second and underlined part being his own addition. He further recalled with approval the statement of Greenberg JA in R v Vallachia and Another 1945 AD 826 that the Code

"has not infrequently been found to have incorporated in its provisions the correct view of what our law is!"

Accordingly, the learned judge ruled that the law was wrongly decided by the Provincial Divisions in the two cases and that where A threatened B with personal violence in order to get possession of a thing belonging to B and B handed it over

rather than run the risk of bodily injury, A was guilty of robbery and, it followed also of theft.<sup>1</sup>

More recently robbery in South African law has been defined by Hunt as follows:

"Robbery consists in the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from another."<sup>2</sup> This definition shows that the influence of the Transkei Penal code of 1886 on South African law has become ineradicable.

The modifications made by the Transkeian Legislature to the Transkei Law of robbery via the Transkei Penal Code of 1983<sup>3</sup> are interesting and certainly not surprising. Section 155 (1) emphasises the use of actual violence or threats thereof as being the gravamen of the offence. This therefore is nothing new as far as general principles are concerned, and the Code therefore merely replaces the old code and occupies its seat and continues in a straight line with the functions of the old code vis-a-vis South African law.

Strangely enough, however, the courts in South Africa have seen fit to depart from the principles laid down in the Transkei Penal Code and endorsed

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1 See at page 241

2 Volume 2 second ed 1982 page 680

3 Act No.9 of 1983

by Hunt<sup>1</sup> and have tended to create new law. This is with special reference to bag snatching. The question is: does the law permit a situation where there could be a conviction of robbery where a conviction of even common assault could not<sup>2</sup> be competent? A discussion of the relevant case law now follows:

In this kind of case what is quite clear is fraudulosa contrectio and there can be no dispute that the crime of theft is committed. Quite understandably therefore, the courts initially held that where a bag is snatched in a sudden and unexpected movement with no resistance from the victim who is least expecting the occurrence, the conviction should be one of theft and not robbery.

This view point was most lucidly set out in Minister of Justice : in re R v Gesa; R v De Jongh<sup>3</sup> where Schreiner ACJ made this important dictum:

"If violence is only used as a direct step towards gaining possession of the thing desired in order to separate it from the victim's person this is not robbery. For robbery the violence must aim at reducing the victim to impotence or submission. The victim need not be physically incapacitated. It is enough if his will is over-

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1 Op cit., ibid

2 This question was for the first time raised by Middleton in SACC/SASK 1981. 85. See page 222 infra.

3 Supra

borne by fear, so that the villain can safely take possession of the goods"<sup>1</sup>

The learned judge referred to Gardiner & Lansdown 6 ed 707 to support this important statement. A perusal of Gardiner and Lansdown shows that this important dictum was not a bolt from the blue but was the scientific expression of the well considered views of several Jurists made over a period of many years, inter alia:

1. R v Edwards (1943), 1 cox 32, where the accused, in cutting the string of a basket which he proposed to steal, unintentionally wounded the hand of a woman who was holding it.
2. R v Jacobs 4 HC 236, R v Mazunga 1938 SR 11, R v Thabata 1946 P.H., H 160 (O), R v Somaru, 1956 P.H. H. 105 (N) where it was held that in a case of bag snatching, without any evidence of violence or putting in fear, the conviction should be theft, not robbery.

In view of these developments which reached a climax with the decision in Minister of Justice: in re R v Gesa, R v De Jongh<sup>2</sup> it was logical that even during the 1960's the path of reason should continue to be followed in the law relating to robbery. In R v Matshaba<sup>3</sup> the Transvaal Division reiterated

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1 Page 239  
2 Supra  
3 1961 (3) SA 78 (T)

that bag-snatching is an offence which cannot be regarded as robbery - the taking must be accompanied by violence intentionally used to overcome or prevent the resistance of the owner or by threats of injury to his person, property or reputation. In S v Mokete<sup>1</sup> the accused had been convicted of robbery. The evidence showed that the complainant had stood in a hut, that he was leaning with his arm on an organ, that the accused had blown out the candle in the hut and in the dark had snatched a wristlet watch from the arm of complainant, breaking the strap. On review it was held that the evidence had proved the crime of theft, not robbery. The celebrated dictum of Schreiner ACJ<sup>2</sup> was recalled. By now there was therefore complete unanimity on this question, for even the writers de Wet and Swanepoel had already come in and given their blessings to the attitude adopted by the courts through the century and, by implication to section 211 of the Transkei Penal Code. These were their words:

"Ons howe neem, na ons mening tereg, die houding in dat dit nie roof is nie, maar gewone diefstal indien 'n saak skielik uit die besit van iemand gegryp word en, voordat hy weerstand kan bied, daarmee weggehardloop word".<sup>3</sup>

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1 1963 (1) SA 223 (O)

2 Supra

3 Die Suid-Afrikaanse Strafreë, 2 ed 397 cf 4ed 376. See also Rabie & Strauss: Punishment 4ed 346 Lex Patria 1985. They share this view.

8.3.3 Partial Departure from the Grip of the Transkei

Penal Code

In the light of the foregoing it comes as a surprise that Rumpff CJ should have criticised the dictum of Schreiner ACJ in the case Minister of Justice: in re: Gesa and de Jongh,<sup>1</sup> albeit in an obiter dictum.

That was in S v Mogala<sup>2</sup> and this seems to have opened the way to a new approach to "bag snatching" cases, Such new approach heralded:

1. a departure from the strict tenor of the definition<sup>3</sup> of robbery by Hunt, which definition, on the question of the significance of a mere threat, is supported by Snyman.<sup>4</sup>
2. a partial departure from the grip of the Transkei Penal Codes of 1886 and 1983

<sup>5</sup>  
The Mogala case was soon followed by S v Sithole 1981 (1) SA 1186 (N) and in that case the court agreed with the views of Rumpff CJ. This was a plain bag snatching case and having due regard to the previous wealth of authorities and case law in the matter and the new approach introduced obiter by Rumpff CJ the Natal Court, per Thiron J, went out of its way to "take a fresh look at the principles governing the crime of robbery".<sup>6</sup> The

1 Supra  
2 1978 (2) SA 412 (A)  
3 Supra  
4 Criminal Law page 444  
5 Supra  
6 See at 1187

sum total of the "fresh look" was that for handbag snatching to amount to robbery "it is sufficient if the culprit intentionally uses force in order to overcome the hold which the victim has on the bag ... or if the culprit intentionally uses force to prevent or forestal resistance which he thinks might be offered to the taking if the victim were to be aware of his intentions." The judgement terminates, at least partially, the influence of the Transkei Penal Code. The Transvaal Division followed Sithole in S v Mofeking<sup>1</sup> and S v Mangcotywa<sup>2</sup>. Middleton undertakes an interesting review of the Sithole case. He rightly points out that the penalties for theft<sup>3</sup> are adequate for any case of bag snatching. Argument that the evil of bag snatching has lately assumed alarming proportions therefore carries no weight.

Otherwise the Transkei Penal Code's provision that mere threats made in order to compel submissiveness are sufficient to secure a conviction of robbery continues to enjoy recognition. This is clear from S v Makhalanyane<sup>4</sup> S v Moloto<sup>5</sup> and S v Kgoyane<sup>6</sup>

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1 1982 (2) SA 147 (T)

2 Unreported. Delivered on 1 December 1982. Contra the Cape Court in S v Witbooi 1984 (1) SA 242 (C)

3 See his article: Bag snatching - assaultless robbery? SACC/SASK 1981. 85 at page 87 cf S v Maizela (1) PH H 180 (C) and S v Mtimkulu 1971 (4) SA 141 (T)

4 1980 (3) SA 426 (O)

5 1982 (1) SA 844 where the aspect of threats was positively emphasised by Rumpff C.J.

6 1982 SA 133 (J), where Minister of Justice: in Re R v Gesa, R v De Jongh 1959 (1) SA 234 (A) was remembered

The conclusion can therefore be made, that the Transkei Penal code of 1886 exerted a distinct influence on the South African law relating to robbery. A partial departure from that influence was noticeable in relation to bag snatching cases, but there seems to be no justification<sup>1</sup> for such departure as appears from the view of Middleton.

Section 155 (2) of the Transkei Penal Code Act of 1983<sup>2</sup> makes a drastic departure from the provisions of section 211 of the 1886 code in that for the first time, death is introduced as a competent penalty for robbery. The idea is obviously to bring Transkeian law into line with South African law in this respect as far as the penalty is concerned.

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1 Supra

2 Act No. 9 of 1983

FRAUD, FORGERY, UTTERING AND EXTORTION

9.1 FRAUD

In the Transkei Penal Code various aspects of fraud<sup>1</sup> are dealt with under various sections. There is positive proof of some influence of the Transkei Penal Code's provisions on South African Law in the early days. This however appears to begin and end with the Orange Free State. In that province Section 1 of Ordinance 22 of 1905 relating to the falsifying of accounts by clerks or servants was exactly the same as Section 205 of the Transkei Penal Code. The only difference in the lengthy provisions is the absence of the word "wilfully" before "with intent to defraud" in the Transkei Penal Code.

The scope of the admittedly cumbersome provisions of the Transkei Penal Code and its relevance to the essential elements of the crime of fraud is well demonstrated by the case of R v Nkosana<sup>2</sup>, a case which emanated from the Engcobo District. It emerged from the case that the fraud contemplated by the legislature in Section 196 was of a far wider nature than that denoted by the word in its technical sense in South African common law, and was intended to embrace all cheating or deceit with intent to defraud which was not clearly accompanied by a misrepresentation of fact by word or conduct, but

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1 See Appendix A sections 189 - 210

2 1942 EDL 81

which results in someone parting with money or granting credit to the cheater or the deceiver.

That notwithstanding, it was held by Lansdown J that the essential element of intent to defraud still attached to the fraud contemplated by Section 196. The appeal succeeded precisely because in the charges preferred there was no clear implication of the essential allegation of intent to defraud. The appeal therefore succeeded and the convictions and sentences were set aside. Gane J concurred.

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Gardiner and Lansdown define fraud as : " A wilful perversion of the truth made with intent to deceive and resulting in actual or potential prejudice to another." Their definition was accepted and employed by the courts for a long time.<sup>2</sup> When his turn came Hunt departed from the Gardiner and Lansdown definition and said: " Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another."<sup>3</sup>

He complained that the word wilful had English law overtones. In this connection the Transkei Penal code was more South Africa inclined than the Orange Free State which had this word in its ordinance. Furthermore, "perversion of the truth" was victorian and meant nothing more than misrepresentation. And thirdly "intent to deceive"

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1 6 ed vol 2 at 1743

2 See e.g. R v Jones and More 1926 A.D. 350 at 352, R v Davies 1928 A.D. 165 at 170; S v Shaban 1965 (4) S A 646 (W) at 649 and S v Francis 1981 (1) SA 230 (ZA) 231

3 See volume 2 at page 714

did not go far enough - intent to defraud was necessary. Here one sees harmony between the Code, the Orange Free State ordinance and the Hunt definition. De Wet and Swanepoel<sup>1</sup> omit any reference to potential prejudice, and restrict prejudice only to that of a proprietary nature. Snyman<sup>2</sup> later defined fraud as:

" the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another."

The four elements of the crime are thus the misrepresentation or distortion of the truth, the prejudice, the unlawfulness and the intention. In connection with these elements some matters arising from recent decisions relating to fraud are noteworthy. In S v Francis<sup>3</sup> it was held following several South African cases, that a conviction for fraud is competent once a misrepresentation is made with the requisite intent, regardless of whether or not there has been actual prejudice, provided there was potential prejudice.

It is thus evident here that the Transkei Penal Code of 1886 embraced a wider meaning of fraud while the South African law embraced a narrower meaning thereof. The little influence that the Code's provisions had on South African law are seen in the Orange Free State's Ordinance No.22 of 1905 relating to fraud and the matter ends there.

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1 4 ed 389

2 Criminal Law page 456

3 1981 (1) SA 230 (ZAD)

The Transkei Penal Code Act deals with fraud and breach of trust in eleven different sections.<sup>1</sup>

There are some interesting points arising from this legislation. First, the idea of several sections covering all contingencies in the sphere of cheating and deceit is self-evident. This means that the Transkeian Legislature has seen fit to retain the approach of the Cape Parliament in 1886 as far as fraud is concerned. Secondly, as if to put matters beyond doubt, Section 167 is couched in terms which indicate that the Legislature clings resolutely to a meaning of fraud wider than that given to it by the common law.

At the end of the day, therefore, it becomes clear that the wider meaning of fraud remains as ever before a prominent feature of the Transkei Penal Code. The effort of the Judges of the Supreme Court to introduce a narrow interpretation of fraud in section 196 has been unsuccessful.<sup>2</sup>

## 9.2 Extortion

According to Gardiner and Lansdown : " a person is guilty of the crime of extortion who, from improper motives and by inspiring fear in the mind of another, demands from and compels the latter to render some advantage which is not due."<sup>3</sup>

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1 See sections 1 - 11 of Act No.9 of 1983

2 R v Nkosana Supra

3 6 ed 1709

This definition is not quite in harmony with the provisions<sup>1</sup> of the Transkei Penal Code of 1886. Prominent in the Gardiner and Lansdown definition is the concept of an advantage "which is not due" which concept is plainly wrong because even if an advantage is due it would not be right that such advantage should be allowed to be rendered under compulsion, thereby allowing one to take the law into one's own hands. This criticism is aptly made by<sup>2</sup> Hunt.

Be that as it may, there is nothing to suggest that the common law was not adequate to deal with the problem of extortion and yet in the Transvaal and Orange Free State statutory provisions were made for the punishment of extortion which supplemented the common law. The Transvaal provisions were contained in section 12 - 17 of Ordinance No.26 of 1904 and the Orange Free State provisions in section 5 of Act 8 of 1908. They were practically identical and it is clear from them that the Transvaal and Orange Free State did not escape the influence of the Transkei Penal Code especially having regard to the similarity of the provisions.

In some of the cases that followed the concept of "an advantage which is not due" was not highlighted, and the courts seemed to simply consider whether or not the complainant had yielded to illegitimate pressure exerted by the accused. In Notaris v R<sup>3</sup> the accused an employee of the Greek consulate in Johannesburg,

1 See Appendix A, section 214 c.f. S v von Molendorff & Another 1987 (1) SA 135 (T)

2 South African Criminal Law and Procedure vol. 2 (1970) page 653  
Footnote 28

3 1903 TS 484

had accepted bribes from persons who wanted permits to enter the country. It was held per Innes CJ that because of the absence of pressure of any kind the correct indictment could not be extortion. It was emphasised that illegal pressure was an essential element of the offence. Any suggestion that the Notaris case upholds the concept of "an advantage which is not due" would be incorrect, and yet Stratford CJ does exactly that in R v Mohamed<sup>1</sup> and others would blindly follow him.<sup>2</sup> In R v Farndon<sup>3</sup> this test was clearly employed.<sup>4</sup> This was a case from Port Elizabeth. In R v Xalasilé<sup>5</sup> Gardiner AJ was faced with an extortion case from the Umtata District. The accused had been convicted of extortion by obtaining from complainant money on threat of arrest if he failed to pay. According to the evidence the complainant youth arrived from work on the mines and slept with the accused and had intercourse with her. In the morning she demanded payment. He objected and she thereupon threatened him with arrest, and he then promptly paid. There is no mention of the charge having been in terms of the Transkei Penal Code and it is clear that the accused was charged under the common law "as though the offence had been committed in the colony" as indeed permitted<sup>6</sup> by section 269 of the Transkei Penal Code of 1886. In its judgement the court re-stated the Gardiner and Lansdown definition but departed from it. The demands for payment which was due were illegal and could therefore not be countenanced. The conviction therefore stood.

1 1928 AD 58 at 67

2 See also Hunt op cit 653 footnote 28 and S v Munyani 1972 SA 411 (RAD)

3 B37 EDL 180

4 See at page 187, See also R v Gqobo 1918 EDL 75 (Transkei case)

5 1939 EDL 189

6 See Appendix A

R.v Ngqandu<sup>1</sup> is similar to Xalasilile.<sup>2</sup> The magistrate of Umtata convicted Nobomvu Manto and two other prostitutes for attempted extortion in that they threatened not to allow three youths to take away their luggage from their (women's) house after a night's consorting unless the sum of 30 shillings was paid in each case. And in R v G<sup>3</sup> the point at issue was extortion by demanding £200.00 from another under threat of disclosing his immoral conduct at a preparatory examination. The old authorities were reviewed and the definition of some of them translated but nowhere did the concept of "an advantage which was not due" surface, neither did de Villiers JA mention it at any time during the course of delivering his judgement.<sup>4</sup>

On the other hand the emphasis on extortion being committed when money or property which is not due has been taken or sought to be taken was laid by the courts. The Appellate Division did so in R v Mahomed.<sup>5</sup> It also did so in R v Matimba<sup>6</sup> Tindall JA clearly followed the Gardiner and Lansdown definition as shown by the phrases "conscious impropriety of conduct" followed by:

"if the accused demands what he knows is not due, or he represents that he has authority to order payment when he knows that he has no such authority, the element of impropriety is present."

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1 1939 DL 213

2 Supra

3 1938 AD 251

4 For instance Matthaeus 477 defined concessio as being "nothing else than to inspire fear with the object of extorting money or some other thing" - nihil aliud quam terror injectus pecuniae vel rei alicuius extorquendae gratia

5 1929 AD 58 at 67

6 1944 AD 23

R v Matimba<sup>1</sup> is important for giving an indication of the possible origins as well as the real nature of the parting of the ways between the Gardiner and Lansdown approach on the one hand, and the Transkei Penal Code, Transvaal - Orange Free State approach on the other hand, the latter backed as far as possible by the Eastern Districts Local Division. In this case a Headman from Southern Rhodesia ( as it then was) imposed a fine on someone for the killing of game. There was no express threat but the pressure lay in the pretence of authority. The result in my view is the same. The accused himself pleaded guilty. The court assumed in favour of the crown that the accused represented that he had authority to fix and impose fines for the killing of Kudu. But the Headman was acquitted because the evidence did not establish beyond reasonable doubt that the accused knew that he was acting improperly<sup>2</sup> "the evidence contains no investigation of the question whether natives, living under the conditions under which the accused and the other natives here concerned live, recognise a distinction between a payment of compensation and a payment exacted as a fine."<sup>3</sup>

The emphasis of the statutes, on the other hand, lies on the illegitimate pressure, hence the girls in the two Umtata cases were convicted although they knew and the complainants knew and the court itself knew that the payment sought was "due ", the law being simply

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1 1944 AD 23

2 See at 33

3 Page 32

bent on eliminating illegitimate pressure as a means of achieving goals.

For a long time after Matimba the case law drifted more and more towards the Gardiner and Lansdown <sup>1</sup> definition on the question of extortion. In R v Sigonga Jennett J said that if the fear is not inspired unlawfully, then the crime of <sup>2</sup> extortion has not been committed. Four years later in R v N <sup>3</sup> Ramsbottom J sharply criticised the judgement of Jennet J as being inconsistent with the decisions of the Appellate Division and the authorities. In the following year R v Lepheane <sup>4</sup> approved R v N <sup>5</sup> thereby making bigger the difference between the Eastern Districts and the Transvaal courts. The Appellate Division upheld the emphasis on the extortion of something that is not "due", and overruled the decision of Jennet J in R v Sigonga.

<sup>6</sup> In S v Gokool the court stood firmly by the Gardiner and Lansdown <sup>7</sup> definition, approved Notaris v Rex, <sup>8</sup> R v N and <sup>9</sup> R v Lepheana. In the course of doing so the Natal court gave wholehearted approval to the formulations "conscious impropriety" and "advantage which is not due". By this time even the Eastern Districts Local Division could not maintain its original stand-point and had yielded to the pressure implicit in the preponderant <sup>10</sup> judicial formulations on extortion. Thus in S v Mntonintshi a Headman in the Tsole District, Transkei, informed four complainants that

if	they	desired	their	lands	to
1	1951 (1) SA 266 (E)		2	1955 (2) SA 647 (T)	
2	1955 (2) SA 647 (T)		3	1956 (1) SA 377 (A)	
4	Supra		5	Supra	
6	1965 (3) SA 461 (N)		7	Supra	
8	Supra		9	Supra	
10	1970 (2) SA 443 (E)				

be ploughed (in terms of a contract between the Transkei Government and the farmers who thereafter pay the Government for ploughing) they should first make certain payments to him. In one case it had to be R2,00 and another a bottle of brandy and in the remaining two, a fowl each. Three of them paid accordingly and their lands were promptly ploughed. In confirming the convictions by the Magistrate, Tsolo, Jennet JP said all that was necessary to constitute the crime of extortion was that there should be illegitimate pressure which caused the victim to part with money or other thing which was not due. The learned Judge quoted Gardiner and Lansdown but did not even mention the Transkei Penal Code, a Code which by this time was being used exclusively in Transkeian cases wherever circumstances permitted. In this way the Eastern Cape Division found itself being party to the watering down if not complete termination of the influence of the Transkei Penal Code in South Africa as far as extortion was concerned. This is much to be regretted in view of the fact that the judges of the Eastern Cape Division of the Supreme Court were themselves sitting regularly at circuits at Butterworth and Umtata, Transkei at that time as long before. They were fully aware of the identity which Transkei was establishing, especially at that time which was only three years before the formal establishment of the Transkei High Court. For that matter they were themselves to play a leading role in the establishment of this new court and clothing it in its distinctive colours.

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As early as 1959 there were pronouncements by jurists which amounted to open rumblings against the line that was taken by Gardiner and Lansdown and followed by the Courts on extortion. Burchell, discussing extortion, said that the decision in R v Jansen 1959 (1) SA 777 (C) emphasising the concept of "not due" had gone too far as far as that aspect was concerned. The most important element of the crime was the illegitimate pressure and there was thus no need to go further. "The submission is therefore, that it is immaterial whether the advantage obtained was due or not except in those cases where the pressure was not per se illegitimate."<sup>1</sup>

When P M A Hunt<sup>2</sup> came on the scene in 1970 that which had gradually become the established order in the field of extortion began to change and yield place to a new approach. The learned author realised the ineffectiveness which had long characterised the Transvaal and Orange Free State provisions. This ineffectiveness was, in my submission, brought about by the ascendancy of the Gardiner and Lansdown formulation which had also blunted all the sharp edges of the Transkei Penal Code. Hunt therefore contended that the provisions could well be repealed. He argued that the common law was adequate and the provisions which contained technical requirements foreign to the common law could only increase an accused person's prospects of acquittal.<sup>3</sup> These provisions were indeed duly repealed by the pre-Union Law Revision Act.<sup>4</sup> The second important suggestion that the learned author made related to his definition of extortion

1 1959 SALJ 260 at 262

2 B.A (Hons), LLB (Natal) LL.M. (Rand) Advocate of the Supreme Court of South Africa and member of the Natal Bar

3 See footnote 86 on page 695

4 Act No.43 of 1977

which reads:

" Extortion consists in taking from another some advantage by intentionally and unlawfully subjecting him to pressure which induces him to submit to the taking."<sup>1</sup>

This was a calculated departure from the Gardiner and Lansdown formulation. This learned author said, quite rightly in my view, that the Gardiner and Lansdown definition omits the element of intention.<sup>2</sup> He also criticised the concept of an advantage which is not due. None of the old authorities had ever said that the advantage must be "not due", he argued.<sup>3</sup> The author was either modest about the great move he had taken in drawing attention to the wrong formulation that was dominating the courts or simply mistaken about its real significance. He said:

" I have departed from the Gardiner and Lansdown formulae in most instances precisely because they do not accurately or comprehensively reflect what goes on in the courts."<sup>4</sup>

But in reality, certainly as far as extortion is concerned the courts began to depart from the Gardiner and Lansdown formula and adopt his own.<sup>5</sup> Thus in S v J Smalberger J repeated Hunt's definition with approval. There seemed to be no logical reason to distinguish between the situation where the pressure was applied to secure an advantage of pecuniary or proprietary nature, or

1 At page 652

2 See footnote 28 page 653

3 See footnote 74 on 658

4 Preface page 5 c.f. de Wet and Swanepoel: Strafreg 4ed page 379

5 1980 (4) SA 113 (E) c.f. S v von Mollendorff 1987 (1) SA 135 (T)

some other subjective advantage.

It is submitted that the new trend of thought and formulation, departing clearly as they do from the Gardiner and Lansdown approach, actually go back, in large measure, to the vicinity of the Transkei Penal Code of 1886. True enough the wording of the Code is itself characteristically clumsy and haphazard, but what is significant for this enquiry is that section 214 relates to "whoever with intent to extort or gain anything from any person..."

This is in line with Hunt's definition and with the dictum of Smalberger J:

"the graveman of the offence of extortion is the <sup>1</sup>  
use of threats or intimidation to obtain a benefit."

It therefore came as no surprise when Hunt's definition was taken over word for word in the Transkei Penal code of 1983.<sup>2</sup>

To conclude, it can be said that the Transkei Penal code of 1886 exerted an influence on the Transvaal and Orange Free State legislation relating to extortion, thereby causing those provisions to drift away from the common law. A long period of uncertainty followed, with the courts sometimes following the common law and at other times following the statutory provisions of the Transkei Penal Code and the Orange Free State and the Transvaal.

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1 S v J page 166. c.f. S v Mnyani 1972 (1) SA 411 (R.A.D); S v Potgieter 1977 (3) SA 291 (O) S v Von Mollendorff & Another 1987 (1)SA 135(T)

2 Section 156 of Act No.9 of 1983

When Hunt came onto the scene he successfully influenced both the repeal of the Provincial legislation and the improvement of the common law definition of extortion as previously given by Gardiner and Lansdown. The Transkei Legislature promptly took advantage of these improvements by adopting the Hunt definition word for word.<sup>1</sup>

### 9.3 Forgery and Uttering

#### 9.3.1 Forgery

As regards forgery there is incontrovertible evidence of the influence of the Transkei Penal code of 1886 on South African law. This influence is testified to by Gardiner and Lansdown<sup>2</sup> and is also seen in the case law. It has also been more recently acknowledged by Hunt and Snyman.

##### 9.3.1.1 Definition of Forgery

The Code gave a long definition of forgery which contained unsatisfactory explanations.<sup>3</sup> It emanated from section 315 of Stephen's Indictable Offences Bill.<sup>4</sup> Gardiner and Lansdown do not hesitate to indicate that this definition adequately represents the common law of South Africa, and in this regard they rely openly on section 221 and 222.<sup>5</sup>

The courts made no effort to riggle out of the influence of the Transkei Penal code in this regard. In the leading Transkeian case of S v Dreyer,<sup>6</sup> in which the

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1 See section 156 of Act No.9 of 1983

2 See below

3 See Section 221 and 222

4 See Hunt op cit 743

5 See pp 1748 - 1749

6 1967 (4) SA 614 (E)

the accused was charged under the Code, Addleson J referred with approval to Gardiner & Lansdown "where it is also noted that the relevant provisions of Act 24 of 1886 substantially represented the common law"<sup>1</sup>. More recently, Hunt has defined forgery discreetly as: "unlawfully making, with intent to defraud, a false document which causes actual prejudice or which is potentially prejudicial to another."<sup>2</sup>

This definition is in line with the dictum of Addleson J in S v Dreyer<sup>3</sup> viz that it is not possible to divorce the definition of forgery from that of a false document. The considerable influence of the Code in respect of forgery is noticeable from the fact that the learned author mentions it repeatedly throughout his discussion.<sup>4</sup> The author also merely reframes the wording of the code rather than substantially detracting from it. It is submitted that he has made no effort to terminate the influence of the Code as far as this crime is concerned.

The Transkei Penal Code has once more succeeded in spreading its tentacles as far afield as Zimbabwe.<sup>5</sup> In S v Potgieter it was repeatedly mentioned with approval in its own right and with reference to the Dreyer<sup>6</sup> case which was applied.<sup>7</sup> Davies JA was satisfied that the common law of Zimbabwe is as stated by Hunt

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1 At 618

2 Op cit 744

3 Supra

4 See especially at page 748 where it referred not less than five times

5 1979 (4) SA 64 (ZRA)

6 Supra

7 Now Judge of Appeal of the Supreme Court of Transkei

and Gardiner and Lansdown, " and accords substantially with the provisions of the Transkeian Penal Code"<sup>1</sup>. The learned Judge mentioned a general lack of decided cases in England and South Africa on the matter and the absence of authority contrary to Addleson J's findings in the Dreyer case.<sup>2</sup> As in several other instances the Transkei Penal Code and now even a case arising directly from it, has been ready at hand to fill up the lacuna.

In 1981 the Zimbabwe Court in the case of S v Katiyo<sup>3</sup> accepted the findings of Davies JA in the Potgieter case. Fieldsend CJ recalled the Code when discussing S v Dreyer.<sup>4</sup> The Dreyer case, he said directly concerned as it was with forgery under the Transkei Penal code, stated what "is recognised as the law in South Africa and in this country"<sup>5</sup>. The learned Chief Justice referred to the South African case of S v Banur Investments (Pty) and Another 1970 (3) SA 767 (A) and the Zimbabwean case of S v Potgieter.<sup>6</sup>

Hunt's improved definition of forgery has been adopted by the Transkei Penal Code Act.<sup>7</sup> The new Penal Code will therefore continue the function of its predecessor obviously for a long time to come.

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1 At page 66  
2 Supra  
3 1981 (3) SA 34 (ZAD)  
4 Supra  
5 Page 35  
6 Supra  
7 Act No.9 of 1983

### 9.3.1.2 Meaning of Document

Apart from the influence of the Code with reference to the definition in general, there is a distinct connection regarding the meaning of the word document. In section 219 of the Transkei Penal Code of 1886 a document, for the purpose of forgery, is defined as "any substance on which is impressed and described by means of letters, figures or marks, any matter which is intended to be or may be used in a court of justice, or otherwise, as evidence of such matter."

Wessels J gave much the same definition of "document" when he held that a book was a "document" in Seccombe v Attorney General.<sup>1</sup>

The wider meaning of document as contained in the Transkei Penal Code was thus introduced into South African law.<sup>2</sup> The acceptance of this wider meaning was consistent with the much earlier decision in R v Smith<sup>3</sup> where it was held that intent to defraud may be inferred even though the forged instrument is used to obtain something to which the accused is legally entitled. But whenever there was no proof of prejudice, actual or potential, (the materiality of the Transkei Penal Code) the courts consistently acquitted the accused persons.<sup>4</sup>

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1 1919 TPD 270

2 See also R v Letsoela 1942 OPD 99; R v Dlamini 1943 TDP 20, and R v Leballo 1954 (2) SA 657 (C)

3 84 J P 67

4 See R v Mclean 1918 TPD 94; R v Vilakazi 1933 TPD 198; R v Dlamini 1943 TPD 20

De Wet and Swanepoel prefer a narrow definition which restricts the meaning of document to written documents which embody legal transactions or can be effective as evidence of legal transactions.<sup>1</sup> Hunt<sup>2</sup> rejects this narrower meaning of document, and argues that if it were to be accepted then several cases in which the wider meaning was accepted would fall to have been wrongly decided e.g. R v Letsoela 1942 OPD 99, R v Dhlamini 1943 TPD 20, R v Motete 1943 OPD 55, and R v Leballo 1954 (2) SA 657 (O). Furthermore, "it is in the public interest to treat falsification of documents such as testimonials as forgery and not as non-criminal." The limitation would lead to technicality and fine distinction, the author argues.

Snyman<sup>3</sup> acknowledges the influence that the Code has on the South African Courts in this regard.<sup>4</sup> Furthermore he looks at the old authorities and makes out a strong case in favour of the wider definition.<sup>5</sup> This effectively counters De Wet and Swanepoel's reliance on Roman Law as a basis for promoting the narrower definition. Section 219 of the Transkei Penal code thus retains the upper hand in a remarkable way both in respect of the courts and the recent authorities.

### 9.3.2 Uttering

When it comes to the crime of uttering the developments are also interesting. Section 226 of the Transkei

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1 3ed 1975 505

2 Vol 2 2ed 1982 at page 787-788

3 Criminal Law

4 See at page 465 cum footnote 10 where he actually repeats verbatim the "broader definition" of document given by the code

5 Page 465 ff.

Penal Code of 1886 deals with the use of forged documents and refers to someone who uses or acts upon or causes or attempts to cause any person to use or act upon it as if it were genuine. Such person became liable to the same punishment as if he had forged that document. It does therefore appear that the requirement of prejudice is here dispensed with. This view is subscribed to by Hutton J in R v Maninjwa<sup>1</sup> although he did not commit himself to a decision on the question.

The South African law took over from the English law<sup>2</sup> the rule that uttering is a crime distinct from forgery. As a result the English definition accurately reflects<sup>3</sup> the South African law.<sup>4</sup> The definition given by Hunt is that the crime of uttering consists in putting off, unlawfully and with intent to defraud, a false document which causes actual prejudice or which is potentially prejudicial to another.

The difference between forgery and uttering lies in the passing off - the communication of the document to another. The Transkei Penal Code explains the matter more fully as it indicates that the document is meant to be used or acted upon as if it was genuine.

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1 1919 EDL 196 at 198. See also R v Mfombo 1937 EDL 166  
2 See S v Joubert 1961 (4) SA 196; (O) S v Niekerk 1980 (1) SA 594 (O), see also Hunt op cit 752 footnote 111  
3 Hunt ibid  
4 Loc cit

Commenting on forgery and uttering, B. D. van Niekerk reiterates that they are derived from English law but omits to highlight the role of the Transkei Penal Code in the process of South Africanisation of these crimes<sup>1</sup>. Obviously having in mind the frequent overlapping that occurs regarding forgery and uttering on the one hand and fraud on the other, he advocates their scrapping in view of the wide nature of fraud. If they are to be retained the desirability of retaining the requirement of prejudice actual or potential should be realised. In this respect the learned author's thinking is consonant with the Transkei Penal Code which does not pay serious attention to this requirement. But that is not all. The learned author also favours the wider definition of document as against the narrow one. In this way he supports the Transkei Penal Code approach and the case law and the authorities. This is sufficiently clear from the few words he says about the matter: "suffice it to say that rather more than fewer documents should be protected."<sup>2</sup> He relies on Van der Linden: Koopman's Handbook 2.6.4.

It is thus clear from the above exposition that the Transkei Penal Code of 1886 exerted a distinct influence on South African law in the fields of forgery and uttering. In the field of uttering the wider definition contained in the code was embraced by the courts

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1 Vol 87 1971 SALJ 26

2 See at page 30

and the authorities and none of them ever made an effort to depart from it. In terms of the Transkei Penal Code of 1983<sup>1</sup> uttering becomes an offence in its own right and the definition thereof is exactly the same as that given by Hunt<sup>2</sup> save that the Transkeian Code uses the words "passes off" instead of "putting off".

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1 Act No.9 of 1983

2 Op cit

CHAPTER TEN

RAPE, ASSAULT, MURDER AND SUICIDE

10.1 RAPE

10.1.1 Introduction

In the field of rape there is again conclusive evidence of the influence of the Transkei Penal Code on South African law. Contrary to what the position was with fraud, South African Law was not adequate and had to borrow from elsewhere. It could not avoid English law and one very reliable means that South African law had for the importation of English law was the Transkei Penal Code. When the cargo landed in Cape Town it was taken to the various parts of South Africa by Gardiner and Lansdown. Section 159 of the 1886 Code defines rape - and this definition embraces the so - called<sup>2</sup> 14 year rule. Gardiner and Lansdown's definition<sup>3</sup> also embraced this rule.

10.1.2 Who Can Commit Rape?

As appears above the Transkei Penal code laid down that a boy below the age of 14 years was conclusively deemed to be incapable of committing rape. The Transkei Penal code was passed some nine years before the first reported case in South African law on this question.<sup>4</sup> South African Law followed the Code, and in so doing departed from the view of Matthaeus Proleg 2.4 and

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1 See Appendix A  
2 See 10.1.2 *infra*  
3 Vol 2 6 ed page 1622  
4 S v Jeremy (1895) 12 Cape LJ 231

Carpzovious 1.43.58 - that upon proof that a boy under 14 had reached puberty he could be convicted of rape.

The 14 year rule has at last been discarded as a result of recent legislation in South Africa.<sup>1</sup> This development has been welcomed by South African legal scholars.<sup>2</sup>

### 10.1.3 The Requirement of Consent

Section 159<sup>3</sup> of the 1886 Code contains a proviso relating to consent. The courts, both in South Africa and Rhodesia as it then was, fell under the influence of this section. The problem is highlighted by cases where a woman consents to intercourse thinking that the man in question is her husband. Apparently the point is obscure in Roman and Roman Dutch Law. In English Law there was for a long time a conflict of decisions on the question. The dilemma was resolved by the Criminal Law Amendment Act of 1885 which provided

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1 Section 1 of the Law of Evidence and the Criminal Procedure Act Amendment Act 103 of 1987 provides: "no presumption or rule of law to the effect that such a boy is incapable of sexual intercourse shall come into operation".

2 See discussion under 10.1.3 infra.

3 See Appendix A

for the affirmative of the proposition. Gardiner and Lansdown state: "connection after assent obtained by such personation is safe in the Transkei Territories under Act 24 of 1886 Section 159, and this is also the rule of South African common law - see R v C 1952 (4) SA 117 (0)". But in their 5th edition published before R v C was decided in 1952 the learned authors already asserted that this was the rule of South African Law and the decision in R v C was influenced by that assertion.

In R v Mahomed Rahaman<sup>2</sup> the court referred to Section 159 of the NTPC with approval. This constitutes more evidence of the influence of the Code far away in Zimbabwe. This part of Section 159 is criticized by De Wet Swanepoel<sup>3</sup> who indicate that according to English Law authorities such as Cross & Jones as well as Halsbury permission obtained by means of intimidation or a trick such as the personation, of the woman's husband or by fraud affecting the transaction is not permission and the subsequent sexual intercourse is in fact rape. This criticism appears to me to be reasonable.

It seems clear, therefore, that the Transkei Penal Code exercised a definite influence on South African law in this field. I find it strange that this should have happened in view of a matter which arose in the first case in which the courts in South Africa followed the code.<sup>4</sup> The court said that in many cases involving blacks in South Africa there was the inherent difficulty of establishing age. That would surely have been a good reason for rejecting the 14 year rule and

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1 South African Criminal Law and Procedure 6 ed vol 2 (1951) P.1624

2 1929 SR 17

3 Op cit 479

4 S v Jeremy, Supra

adhering to the view of Matthaeus Proleg 2.4 and Carpozvius 1.43.58 which view runs contrary to the presumption. This view is indeed sound and it caters for the uncertainties and surprises that abound in life.

The Transkei Penal Code Act of 1983 steers completely clear of the 14 year rule. This development is welcome.

## 10.2 Assault

### 10.2.1 The Impact of Section 155

The code's definition of assault is to be found in section 155 thereof.<sup>1</sup> This definition was introduced into South African Law when it was adopted by Gardiner and Lansdown.<sup>2</sup> The only difference between theirs and the Code's definition is that they add the words "and unlawfully" after intentionally.

<sup>3</sup>  
Gardiner and Lansdown further state that the English law on the subject of assault has been adopted in South Africa except that the term battery has been discarded and the superfluous distinction between it and assault has been abandoned. The learned authors further state that what constitutes the crime of assault in either system (i.e. English and South African) "is well epitomised in section 155 of the Transkeian Territories Penal Code, act 24 of 1886".<sup>4</sup> The Code therefore once again appears at the forefront as a vehicle for the smooth introduction of English Law into South African Law.

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1 See Appendix A  
2 6 ed Vol. 2 page 570  
3 Ibid  
4 Ibid

For a long time the relationship between section 155 of the Transkei Penal code and South African law was a cordial one. As early as 1918 the element of the Transkeian Code's concept of assault by threats where the complainant had reasonable grounds for apprehension was applied. Then followed Gardiner and Lansdown's definition in their first edition which came out in 1919. The cordial nature of this relationship reached its climax when a case of assault with intent to murder came before the Appellate Division in 1920.<sup>2</sup> Innes said " The definition of assault in South African practice as given by Gardiner and Lansdown (vol 2 page 1020) is as follows....The definition is substantially taken from the Transkeian Penal Code. It commended itself to the trial court, and would appear to be satisfactory for all practical purposes."<sup>3</sup> In a concurring judgement Kotze JA said that a comprehensive definition of an assault was to be found in Article 155 of Act 24 of 1886, commonly known as the Transkeian Code. That definition of an assault had been generally accepted in the South African Courts he said.<sup>4</sup>

Because of the precedent system it is well to be expected that in subsequent assault cases the courts in South Africa would follow the definition set out by Gardiner and Lansdown and the approach adopted by the Appellate Division in R v Jolly.<sup>5</sup> In so doing the provisions

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1 See R v Abrahams 1918 CPD 590

2 R v Jolly and Others, 1920 AD 176

3 At page 179

4 See at page 184

5 Supra

of section 155 of the Transkeian Penal Code would naturally<sup>1</sup> be echoed. In a case from the Libode district, Transkei, the learned Judge applied the Gardiner & Lansdown definition and Jolly's case and did not even mention the Transkei<sup>2</sup> Penal Code. Commenting on this case P M A Hunt classes this case as a South African case and seems not to be aware that the Gardiner and Lansdown definition is quite appropriate to it by reason of it being a Transkeian case if not for any other reason. However, in the Natal case of S v Marx<sup>3</sup> the learned Judge President reiterated the Gardiner & Lansdown definition and acknowledged that it was substantially taken from the Transkeian Penal<sup>4</sup> Code.

#### 10.2.2 Objections to the Code's Influence

The Transkeian definition thus commands an enormous amount of respect in the South African cases and this gives Hunt much cause for concern. He admits as much, and undertakes a lengthy discussion of the English law, which discussion he says is necessary to water-down<sup>5</sup> this respect. He therefore criticises the Gardiner and Lansdown definition at some length and in so doing<sup>6</sup> he criticises the Transkei Code's definition.

Hunt's definition of assault is as follows:

"Assault consists in unlawfully and intentionally:

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1 S v Sikanyana and Others 1961 (3) SA 550 (E)

2 South African Criminal Law and Procedure Vol. 2 2nd edition by J R Milton page 468

3 1962 (1) SA 848 (N)

4 See also S v Miya and Others 1966 (4) SA 274 (N) where section 155 was once more relied on

5 Op cit page 479

6 See page 468. See also de Wet and Swanepoel 4 ed 236

(1) applying force to the person of another (2) inspiring a belief in that other that force is immediately to be applied to him"<sup>1</sup>. This definition is a great improvement on that of the Code and Gardiner and Lansdown,

The essential elements are therefore (1) the unlawfulness, (2) the intention and (3) the applying of force or inspiring apprehension thereof. As to the third element, the learned author insists that although in English law there could not be an assault by words only and that is how the Transkei Penal code came to specify "acts or gestures" - it is ridiculous to exclude words. He also objects to the words "upon reasonable grounds"<sup>1</sup> because in criminal law liability rests on intention and it is therefore absurd to require the reasonable apprehension of an assault. He then finally says:

"It is accordingly not unfair to conclude by commenting that the Transkeian Code preserves, like ugly fossils, several unsatisfactory and illogical ideas which were inaccurate even in 1886 and which have since been largely rejected by the legal system whence they came".<sup>2</sup>

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Snyman defines assault as consisting in :

- (a) "applying force, directly or indirectly, to the person of another or
- (b) threatening another with immediate personal violence in circumstances which lead the threatened person to believe that the other intends and has the power to carry out that threat".

The emphasis is therefore on the fear inspired not so much the ability to execute the threat as suggested by Gardiner & Lansdown and the Transkei Penal Code of 1886.<sup>1</sup>

To sum up the position here, one can say that the Transkei Penal Code exerted indisputable influence on South African law.<sup>2</sup> The authors Hunt and de Wet and Swanepoel later tried to terminate this influence and they achieved a great measure of success in their efforts. In my view this success was facilitated by the fact that the 1886 code never took over holus-bolus the English law relating to assault. That overall success is brought to a climax by the 1983 Transkei Penal Code's definition of assault which is similar to that of Hunt and different from that of the 1886 Code.

### 10.3 Murder

#### 10.3.1 The Provisions of Section 140 of the Transkei Penal Code<sup>3</sup>

From this section there emerges further evidence of the influence of the Transkei Penal Code of 1886 on South African law in relation to murder. The relevant subsections are (b) and (c) of section 140.

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1 On the question of personal exertion of force by the assailant see S v Marx 1962 (1) SA 848 (N), R v Sophy 1961 R & N 358 R v Mathews 1950 (3) SA 671 (N)

2 See de Wet & Swanepoel 4 ed 238 for the influence on the 1917 and 1955 Criminal Procedure Acts.

3 See Appendix A

10.3.1.1 The Impact of Section 140 (b)

The provisions of this section were applied in a case that went to the Appellate Division as an appeal from the Witwatersrand Local Division.<sup>1</sup> After referring to the old authorities such as Moorman and Carpzovius on the question of murder, Greenberg JA says; "It is interesting to see that section 140 of the Transkeian Penal Code (Act 24 of 1886), which has not infrequently been found to have incorporated in its provisions the correct view of what our law is, provides that culpable homicide becomes murder in a number of cases, one of which is that if the offender means to cause the person killed any bodily injury, which is known to the offender to be likely to cause death, and if the offender, whether he does or does not mean to cause death, is reckless whether death ensues or not. It will be seen that in that code it is necessary that the accused should know that the injury he inflicts is likely to cause death... We may, I think, conclude from these authorities that the crime of murder will at all events have been committed if it be proved, by necessary inference from all the circumstances, that the accused killed the deceased by an act which they must have known to be of such a dangerous character that death would be likely to result therefrom, and were reckless whether it did or not."<sup>2</sup>

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1 R v Valachia & Another 1945 AD 826 c.f. page 1 supra

2 Page 479

10.3.1.2 The Impact of Section 140 (c)

As far as sub-section (c) is concerned there arises the important question of aberratio ictus - the going astray of the blow - and the section plainly means that cases of aberratio ictus are murder. This is not good law because a person's intention to kill ought to relate to the very person killed. Even as recently as 1949 the Appellate Division of South Africa, basing its findings on Roman-Dutch authorities, took a line similar to the provisions of sub-section (c) of the Transkei Penal Code. In an appeal that came from the Natal Native High Court<sup>1</sup> van der Heever JA did not hesitate to confirm the death penalty where the person killed was not the person intended.<sup>2</sup> He further held that the realisation of the murderous intent upon the wrong victim was not a mitigating factor. Centlivres JA and Hoexter JA concurred in this judgement.

10.3.1.3 Termination of the Influence of Section 140 (c)

The subject subsequently received the careful attention of de Wet and Swanepoel.<sup>3</sup> The learned authors departed emphatically from the view that in cases of aberratio ictus a verdict of murder is competent. Also informative is their detailed discussion of the related yet separate question of error in objecto.

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1 R v Khuzwayo 1949 (3) SA 761 (A)

2 See page 770

3 Op cit 2ed 134 ff.

In the Zimbabwean case of R v Mabena the accused was charged with murdering the deceased. He pleaded not guilty, saying that he had not been fighting with him but with one Ranga Mpofo, and that he did not remember seeing the deceased at the time. It was therefore a case of aberratio ictus. When it became clear what had happened in the semi-darkness accused expressed regret, saying he had not intended to injure deceased.

In the course of his judgement Young J took into account the dicta made in R v Kuzwayo which he said were of high persuasive value and had been referred to with apparent approval as recently as 1963, but expressed his full agreement with the argument raised by de Wet and Swanepoel in their work<sup>4</sup>. In his summing up of the law of aberratio ictus the influence of section 140 (c) was effectively terminated<sup>5</sup>. The termination of the code's influence became irreversible<sup>6</sup> when the Transkei Penal Code Act was passed.

It is thus clear that initially sections 140 (b) and (c) of the code made a distinct impact on South African law, but in relation to sub-section (c) the intervention of de Wet and Swanepoel brought about a termination<sup>7</sup> of the influence. The Transkei Penal Code of 1983 promptly discarded the provisions of

1 1967 (3) SA 525 (SR)

2 Supra

3 In S v Nkombani 1963 (4) SA 877 (A)

4 At page 129 ff

5 C.f. S v Mtshiza 1970 (3) SA 747 (A); S v Tissen 1979 (4) SA 293 (T); S v Mavhungu 1981 (1) SA 56 (A)

6 Act No 9 of 1983

7 Act No. 9 of 1983

the old code. It followed the new path indicated by de Wet and Swanepoel and echoed by the courts.

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### 10.3.2 The Impact of Section 134

The Transkei Penal code has also registered a positive influence on South African law via its section 134 which is concerned with the important question: who is a "person" for purposes of murder? Where a child has been murdered, it thus becomes essential that it should have been born alive, and the test for live birth is that the child should have breathed.<sup>2</sup> This is according to English law, which further requires that the infant must be wholly born, the killing of a child that is partly within and partly outside its mother's body being therefore not murder.<sup>3</sup> There appears to be little or no Roman-Dutch authority on this subject, and there is likewise a scarcity of South African case law thereon. This provided an excellent opportunity for the Transkei Penal Code to once again take the stage and display its resourcefulness. And then here, as in other instances, Gardiner and Lansdown shower praise upon the Code for its eminent role. The authors say:

"Where Roman-Dutch authorities are silent or obscure on a point of criminal law, the Cape courts have often referred, as a guide, to the Transkeian Penal Code,

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1 See appendix A

2 Gardiner and Lansdown 6 ed Vol. 2, page 1538

3 Op cit, ibid

Act 24, 1886 (C). Upon the question under discussion, therefore, the following provision contained in section 134 is of importance..." - and the authors quote section 134 verbatim as part of the text.<sup>1</sup>

As time went on the South African Legislature saw fit to follow the Transkeian example and specify its wishes by statute in this regard. This was done by section 306 of the Criminal Procedure Act of 1917 which provided as follows:

"On the trial of a person charged with murder. or culpable homicide of a newly born child, such child shall be deemed to have been born if it is proved to have breathed, whether or not it has an independent circulation and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother."

The South African statute therefore gave prominence to the "breathing" test and departed from the Code's and English law's requirement of complete separation from the mother while still in a living state.<sup>2</sup> Of course the section relates to procedure and not to

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1 See at page 1538

2 See also the successors section 272 of the Criminal Procedure Act No. 56 of 1955 and section 239 (1) of the Criminal Procedure Act 51 of 1977

substantive law and its wording is ambiguous.

Here again, therefore, the 1886 code, with the help of Gardiner and Lawsdown, exercised positive influence on South African law. This influence was only slightly departed from by the Criminal Procedure Act of 1917 and its successors.

10.4

SUICIDE

For murder to be committed the victim must be "another person." It follows therefore that suicide cannot be murder, neither is it any crime at all.<sup>1</sup> But what is the position about attempted suicide?<sup>2</sup> The Transkei Penal Code of 1886 specifically made attempted suicide a crime. The only reported case on attempted suicide is R v Tshemese 1918 EDL. That was a case in which the charge was in terms of section 147 and the Magistrate of Mount Frere had correctly accepted that attempted suicide was a crime. However, the accused was acquitted on review because there was a distinct doubt<sup>3</sup> as to the sanity of the accused. In R v Peverett the court did not have to go into the question whether attempted suicide is or is not a crime in Roman-Dutch Law.<sup>4</sup> In R v Nbakwa the Rhodesian court (as it then was) reiterated that suicide was not a crime in Rhodesia. Beadle J then went on to say that even if it had been a crime in Roman-Dutch law it must have become abrogated by disuse because there had been no prosecutions for it in South Africa for such a long time. Incitement

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1 See S v Gordon 1962 (4) SA 727 (N), S v Grotjohn 1970 (2) SA 355 (A)

2 Section 147

3 1940 AD 213

4 1956 (2) SA 557 (SR)

to commit suicide was thus also not a crime . In a subsequent case it was reiterated that suicide was not a crime.<sup>1</sup> In all these cases there was no mention of Section 147 of the Transkei Penal Code and the supporting case of R v Tshemese.<sup>2</sup> In the result one must accept that the codes provisions failed to exert any influence on South African law in the field of suicide.

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1 S v Gordon 1962 (4) SA 727 (N)

2 Supra

CHAPTER ELEVEN

POSITIO QUAESTIONIS

11.1 THE SUCCESSES AND FAILURES OF THE TRANSKEI PENAL CODE

11.1.1 Introduction

When, on 9th July 1886, Act 24 of 1886 was passed "to provide for a Penal code for the Transkeian Territories" because it was seen "desirable to provide a Penal code for the Transkei Territories"<sup>1</sup> it was seen fit to give it the compromise name of "Native Territories Penal Code" instead of the name that suggested itself from the preamble itself. It is unique for having achieved what was least expected of it. For while it was described as a statute for a native society just emerging from barbarism, it performed very well and became an important factor both in South African and Rhodesian criminal law where it exercised a great deal of lasting influence. The areas in which this influence was distinct have been indicated as clearly as possible above. But the code also failed dismally to make an impact where it could and should have done so. This is particularly so in respect, for example, of incest, suicide and intoxication. Likewise some of the successes it made remain a matter of regret because they entrench doctrines which are to the writer's mind unfortunate. The extent to which the courts relied on the Transkei Penal Code constitutes

1 See preamble

the greater bulk of evidence of the extent of its influence.

It must not at all be thought that the Transkei Penal Code once establishing itself as a force to be reckoned with in Southern Africa, merely concerned itself with the importation of English law. Those who drafted it saw themselves as being free to take what seemed worth taking from Roman-Dutch law and Roman law as well, and the code was thus successful in importing aspects of these legal systems into Transkeian and South African jurisprudence.

#### 11.1.2 Assault

When considering the success of the Transkei Penal code of 1886 one is immediately reminded of the bold step taken by the Commission with reference to reparation and compensation for injuries sustained especially in assault cases which, regrettably, remain in abundance to date. They departed from both English law which allowed no civil claim for damages for a felony and customary law which had the same prohibition based on the adage: "no man can eat his own blood." They said they thought that in this regard the people would accept a change and they came up with a firm recommendation which became section 17 of the Code. This was an experiment and it proved to be a resounding success.<sup>1</sup>

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<sup>1</sup> See discussion at 3. 4.2 supra

The reasons for the success of this experiment are not far to seek although at first sight they may be obscure. It is submitted that customary law had in the first place created a legal fiction by saying that no man can eat his own blood. This fiction readily found acceptance because of the sacral character of the legal institutions of the African people, as against the purely secular character of Western law. The belief could thus well have been widespread, that if one "ate one's blood" the ancestors would not take kindly to it and one might then be visited by disaster. This fiction, however, had a flaw in that it did not entirely abolish an aggrieved party's rights to compensation. It created a spes, and always left him in a state of hope, the hope that a chief of grace might give him a portion of the damages. Although it was sometimes frustrated the hope was sometimes fulfilled and for that reason it was bound to keep on lingering in the minds of the whole community.

The initiative of the commissioners in bringing about section 17 of the Code was the first step towards ending a chapter of uncertainty in favour of the injured party. This could not but be welcomed by any community and that is why sooner than later the litigants wrested the initiative even from

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"the magistrates of grace" a la section 17 and instituted action themselves. Here the Penal Code was therefore successful in bringing about harmony between the customary law and the received western law along the peaceful and good-neighbourly lines which the commission had envisaged when they rejected a speedy and inconsiderate overthrow of the customary law. The commission therefore had a specific ambition as to how the criminal law of Transkei could and should develop in an evolutionary as against a revolutionary manner. What is more important they devised a formula for the fulfilment of those ambitions and that formula worked and succeeded with mathematical precision.

### 11.1.3 Theft

In the field of theft one finds a clear illustration of how the Transkei Penal Code became a vehicle for the importation of Roman Dutch law as well as English Law concepts into South African law. In this regard the provisions of Sections 180 to 182 of the Code are noteworthy.<sup>1</sup> Commenting on these provisions De Wet and Swanepoel say:

"The NTPC contains a strange mixture of English law and Roman-Dutch law concepts. Appropriation is not required, but the intention to deprive the owner or other holder of such rights, does represent a requirement. On the other hand, again, certain

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<sup>1</sup> See 8.1.3 supra

actions of attempt are regarded as theft - this, again, is of Roman origin."<sup>1</sup>

That the Transkei Penal Code also served as a vehicle for the importation of Roman Law rules into South African law appears from the case of R v Carelse and Kay<sup>2</sup>. De Wet and Swanepoel register their objection to the importation of the Roman Law rule into South African Law. The authors voice their disagreement with the findings of the court and go on to say:

" The 'intent to steal' - whatever it may signify - is just as essential for attempt as for completed theft. To aver that theft is complete because there was an 'intent to steal', or appeared to be such an intent, provides no answer to the distinction<sup>3</sup> between attempt to steal and the completed theft."

<sup>4</sup>  
The New Transkei Penal Code does not do anything to remove the Roman Law features of the old code in our criminal law. The following provisions are noteworthy in this regard:

Section 132 (1)

- (b) Theft is complete when the offender takes or moves anything capable of being stolen, or causes it to move or be moved, for the purpose of converting it, although such conversion be not completed.

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<sup>1</sup> 2ed 321 cf 4ed 307

<sup>2</sup> 1920 CPD 471. See discussion under 8.1.3 supra.

<sup>3</sup> 4ed 311 ff. The code's influence is emphasised!

<sup>4</sup> Act No.9 of 1983

- (c) Theft is committed when the offender cuts, rips or otherwise begins to cause to be movable anything part of or growing out of or attached to any immovable property with intent to steal it.
- (d) Any person who kills any living creature capable of being stolen with intent to steal the carcass, skin, plumage or any part of such creature, shall be guilty of theft.

#### 11.1.4 Rape

When the Transkei Penal Code laid down that a boy below the age of 14 years was conclusively deemed to be incapable of committing rape<sup>1</sup> it followed Roman Law and English law.<sup>2</sup> Among the Roman Dutch writers there was a difference of opinion on the question.<sup>3</sup> The curious circumstances under which South African law simply followed the Penal Code have been indicated above.<sup>4</sup> It is submitted that as early as 1895 when S v Jeremy was decided South African law should have found its way clear to discarding the Justinian view cum section 159 of the Transkei Penal Code, and followed the view of Matthaëus and Carpzovious which allows a boy under 14 to be convicted of rape upon proof that he had reached the age of puberty.<sup>5</sup> Strangely enough

1 See 10.1.2 supra

2 Hunt 403

3 Gardiner and Lansdown vol.2.6 ed page 1622

4 10.1.2 supra

5 See discussion under 10.1.2 supra

the court let go the golden opportunity of setting a precedent which would have diluted the English Law influence in South Africa and also caused doubts as to the adviseability of continued adherence to the 14 year rule both in Transkei and South Africa. In both countries the difficulty of assessing the ages of illiterate accused is still encountered by the courts despite the lapse of a century.

The success achieved by the 1886 code in simply dragging the 14 year rule into South African law is mind boggling bearing in mind that the rule is on the face of it unreasonable and not in accordance with day to day human experience. In the light of this and of the views of Snyman against the 14 year rule the move<sup>1</sup> taken by the Transkei Legislature can only be welcomed. The 14 year rule was abolished<sup>2</sup> in 1983. Since then any male person who has carnal knowledge of a female person against her will<sup>3</sup> or without her consent is guilty of the crime of rape. This finally awards supremacy to Mathaeus and Carpzovious. In the meantime the drive of Snyman and others of the same school of thought has gained momentum and South African law has followed Transkei's lead as it did when the path of Justinian was still most alluring to the courts exactly a century ago. The 14 year rule was abolished by legislation in 1987.<sup>5</sup>

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1 See 5.1 supra

2 Act No.9 of 1983

3 Section 96

4 Supra

5 See discussion 5.1 and 10.1.2 supra

11.1.5 Arson

As far as arson is concerned it is noteworthy that the Transkei Penal Code departed from the English law and the South African common law definition and aligned itself with the views of the earlier Roman-Dutch law writers - that arson is relevant to both movables and immovables. The Code achieved indisputable success in enticing the Transvaal and Natal away from the common law view - point until better counsel prevailed. The termination of the Codes influence in this regard only began in earnest with R v Mavros 1921 AD 19.

It will be remembered that problems arose on the question as to whether a hut, which of course is the traditional structure of black communities, is movable or immovable in law. These problems arose in the course of the argument as to whether setting fire to a hut or similarly constructed structure was arson.<sup>2</sup> It is significant that although they saw fit to include mines, ships or vessels in the definition of arson, things which played no role whatsoever in the lives of Transkeians but had in fact been relevant to the Hollanders, the drafters of the Code failed to make specific mention of a hut. Arson is to-date the subject of many criminal charges in black communities because one simply strikes one stick of matches and disappears

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<sup>1</sup> See chapter 8.2

<sup>2</sup> See chapter 8.2 and cases discussed

in the darkness of the night leaving a hut on fire. The guidance of the Code in this regard would certainly have been helpful and much mentioned in the cases that later arose and still arise so frequently both in Transkei and South Africa.

11.1.6 Intoxication

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As indicated above Section 28 of the Penal Code did not project itself on South African law as notably as it could have done. Certainly it did not make a strong impression on Gardiner and Lansdown who would no doubt have hoisted its flag sky high had it made such an impression. As a result Hunt had no cause to offer any objections regarding Section 28. It remains no mystery that both authors should have been remarkably silent about R v Bulani.<sup>2</sup> The extent to which that case reflects the direct influence of Section 28 on South African law is so little, if at all, that it could safely be ignored.

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The Chretien decision certainly represents an indication by South African law that it was not in any way under the grip of Section 28 which was at best only indirectly reflected in the Johnson<sup>4</sup> decision. The indications are however that even that remote or indirect impact of Section 28 will remain in evidence for a long time to come because

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1 See 5.2

2 1938 E.D.L 205. See also comment on D.P. Van der Merwe's thesis at 1.1 and criticism of his interpretation of R v Bulani 5.2 supra

3 See discussion at 5.2 supra

4 *ibid*

the Chretien decision caused an uproar in legal circles. J.R. du Plessis<sup>1</sup> complained and said:  
"one vainly searches for the reason in recognised sources or authority ...it is not clear why the law as contained in Johnson and which had already<sup>2</sup> existed for many years... had to be changed."

#### 11.1.7 Incest

As far as this aspect is concerned the remarks made about Gardiner and Lansdown as well as Hunt in relation to intoxication apply. In South African law one of the prohibited degrees is collaterals<sup>3</sup> up to the fourth degree of relationship, yet under the Code the prohibition extends only to the third<sup>4</sup> degree of relationship.<sup>5</sup> The 1983 Code abandons the position originally adopted and widens the scope so as to cover "any person whom he is prohibited by law to marry an account<sup>6</sup> of consanguinity, affinity or adoptive relationship."

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1 THRHR 1984 (4) at page 98

2 See also Hlemstra, THR-HR Vol. 44 No.4 1981 where he says that the acquittal of Chretien does not accord with one's sense of justice.C.f. however Act No. 1 of 1988. See 5.2 supra.

3 See R v M 1957 (2) SA 73 (E)

4 See Section 233

5 Act No. 9 of 1983

6 Section 99

11.1.8 Suicide

As indicated above<sup>1</sup> the Transkei Penal Code of 1886<sup>2</sup> specifically made attempted suicide a crime, and this provision was accepted and applied by the Eastern Districts Local Division of the Supreme Court of South Africa in the Transkeian case of R v Tshemese.<sup>3</sup> In later cases, however, the Supreme Courts of South Africa and Rhodesia did not uphold the view that suicide was a crime, neither did they make any mention of section 147 of the Transkei Penal Code nor of the case of R v Tshemese.<sup>4</sup>

Given the advantage of the specific provisions of Section 147 strengthened as they were by a case decided in the Eastern Districts court of South Africa as early as 1918 one would have expected the Code to have made some definite inroads into South African law in this regard. Regrettably however, this turned out not to be the case.

11.1.9 Bigamy

Bigamy is certainly one of the areas in which the Transkei Penal Code failed to exert an influence on South African law.<sup>5</sup> In this regard Section 168 of the Code is relevant. The main provisions of this section are similar to the English law

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1 See 10.4  
2 Section 147  
3 1918 EDL at. 128.  
4 Supra  
5 See 3.2 supra

and the South African law remained unswayed. As far as the provisos are concerned, however, it is the second proviso that has an influence, not on South African criminal law but on the interpretation of the law as applied to customary unions in South Africa.<sup>1</sup> The outcome of the resistance to the Code's influence in this regard is noteworthy.<sup>2</sup> When Transkei revised the code the new legislation adopted the South African law approach to the matter. This development is relevant to the interaction of legal systems.<sup>3</sup>

#### 11.1.10 The Doctrine of Common Purpose

The Transkei Penal Code achieved tremendous success<sup>4</sup> as far as this doctrine is concerned. It successfully narrowed the gap between an accomplice and an accessory. In S v Williams en 'n Ander<sup>5</sup> the Appellate Division satisfactorily analysed this difference. It made the crucial point that an accomplice is one who

1 The first proviso exempts a person who marries when his or her spouse has been away for seven years. The second proviso looks specifically at Transkeians whose lives are governed by customary law and exempts those whose subsisting previous marriages were entered into according to customary law. This has a bearing on the question of the recognition of the customary marriage and it is noteworthy that after union was formed in 1910 the spirit of this second proviso was extended to the whole of South Africa by sections 22 (1) and (7) of Act 38 of 1927. The case of Nkambula v Linda 1951 (1) SA 377 (A) which emanated from the Transvaal affords an illustration of this.

2 Penal Code Act No.9 of 1983, section 106

3 C.f Chapter 3 supra

4 See chapter 6.1 supra

5 1980 (1) SA 60 (A)

consciously associates himself with the commission of the offence in assisting in the commission of the offence in affording the actual perpetrator the opportunity, information or means which facilitate the commission of the offence. On the contrary<sup>1</sup> as was held in S v Maxaba en Andere, mere presence at or acquiescence in the commission of the offence is not sufficient.

The doctrine of common purpose is a concept developed in law in order to predicate liability on persons other than the actual perpetrator(s) of the crime. It is therefore a harsh doctrine and it is submitted that every care should be taken to ensure that its application is not stretched too far as can so easily happen. Young people, especially in the rural areas, are by their nature gregarious, and the excitement of younger and immature fellows going about in the company of their bigger brothers, carrying the weapons they carry, singing the songs they sing and generally doing all the things they do even when they have not got down to realising why those things are to be done is all too often alluring. The doctrine of common purpose is also, I submit, alien to customary law, in which the sophistry of imputation could not by any stretch of imagination be accommodated and an effort is always made to identify the respective roles of the participants and to allocate liability accordingly.

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1 1981 (1) SA 1184 (A). See also 6.1.4. supra

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As previously pointed out the Transkei Penal Code Act of 1983<sup>2</sup> takes over verbatim the provisions of section 78 of the 1886 Code.<sup>3</sup> This demonstrates in no small measure the resilience and staying power of the doctrine of common purpose. This switches the clock back and is much to be regretted.<sup>4</sup> I would like to observe, with Hugo that the existence of a common purpose is no philosopher's stone which renders liable all who come into contact with it. For indeed mere purpose, however common can never by itself create liability and should thus never be allowed to do so. It is hoped that the important dictum of Viljoen JA made during the era of the move away from the doctrine of common purpose by the courts in South Africa in S v Maxaba en Andere<sup>5</sup> will remain a constant reminder about the dire need for identification of individuals' roles in criminal cases. He said: "There is no magic spell contained in the so called doctrine of 'common purpose'. Where there is participation in a crime then each one of the participants must satisfy all the requirements of the relevant definition of the crime before he can be convicted as an accomplice. Murder is a consequence crime (gevolgsmisdaad). If the State wishes to prove common purpose, then it must prove, not that each participant had the necessary intention to kill the victim, but also that his part therein contributed, actually or psychically to the cause of death."<sup>6</sup>

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1 6.1.4 supra

2 Act no.9 of 1983

3 Section 27

4 1969 SALJ 391 at 396

5 1981 (1) SA 1148 (A) see also 6.1 supra

6 c.f., however, S v Safatsa and Others 1988 (1) SA 868(A)

## 11.2 THE ROLE OF THE COURTS

### 11.2.1 IUDICIS EST IUS DICERE NON DARE

Reference has been made to the fact that the Courts sometimes<sup>1</sup> infringed the rule iudicis est ius dicere non dare. When they infringed this rule the courts quite often hampered the Penal Code in its forward march and cut its journeys shorter than they could have been. An illustration drawn from the law relating to fraud will suffice.

Sometimes the legislature of the Cape colony deliberately gave a wider meaning to particular crimes than did the common law, the aim being to move away from the numerous technicalities afforded by the common law system and the accusatorial system of criminal procedure which often led to a guilty man being acquitted. The judges of the Supreme Court of South Africa to which all appeals from the Transkeian Magistrates' Courts lay realised this tendency whenever it occurred, but they still side-stepped the intention of the Legislature and in effect proceeded in terms of the common law. A clear example is to be found in R v Nkosana.<sup>2</sup> In that case Gane J, concurring with his brother Lansdown J.P, noted that section 196 had been little used in Transkeian prosecutions, probably:

"because our common law crime of falsity or fraud,  
which is also a crime in the Native Territories in

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1 See for example 3,4,5,3 - the case law relating to the spoor law.  
2 1942 EDL 81. see discussion at 9.1 supra

virtue (Sic!) of section 269 of Act 24 of 1886 is found so conveniently wide as to cover almost all cases of this class ..."<sup>1</sup>

The learned judge then went on to reiterate Lansdown J P's view that the aim of the Legislature was to cast the net so wide in Transkei as to cover cases of deceit or cheating which would not be covered by the common law. As a result the man who sold worthless roots at a high price "to natives who are always ready to pay well for what they regard as medicine"<sup>2</sup> would possibly offend against the section. The learned judge then said:

" I hazard this suggestion because I think the frames of the Native Territories Penal Code were probably influenced by English models and precedents, and used the word "fraud" in a wider sense....."<sup>3</sup>

Here we see a clear example of the infringement of the rule iudicis est ius dicere non dare. What does it matter if the Legislature was influenced by English models since after all South African law has still itself in so many instances responded positively to the influence of English law? What is more, the Legislature has been proved in some instances to have followed Roman-Dutch law and not English law, for example in the law relating to arson. The Legislature was consciously taking advantage of its unique position of being able to draw at will from the two legal systems and present an amalgam which would meet all situations that could arise in the new Transkeian situation. They had the privilege to create a new mould and it is much to be regretted

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1 At pages 87 - 88

2 At page 87

3 Ibid

that judges should have done what they did, effectively and rather deliberately frustrating the Legislature's noble intentions. Fortunately the Transkei National Assembly stood firmly on the path of its predecessor, the Cape Parliament. It insisted on exercising its right of picking and choosing at will from the precedents that lay before it, and thus refused to be swayed to the narrower meaning of fraud as preferred by the courts and the authorities, old and new.

It must be stated in conclusion that the common law was found to be adequate in the sphere of fraud and there was therefore no need to borrow ideas from the Transkei Penal Code. Because of the advantageous position that they occupied the judges sought to water down the provisions of the Code and to give prominence to the common law approach but the Transkeian Legislature has been unbending. It is certain that the judges can no longer say that they hazard the suggestion of the wider meaning of fraud - this is the law of Transkei and falls to be stated as it is. This brings out once more the fundamental difference between the law of South Africa and the law of Transkei, which differences are now understood and correctly expressed by South African jurists seconded to the Supreme Court of Transkei. This is a healthy sign.<sup>1</sup>

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1 See, for example, address by the Attorney-General on the occasion of the opening of the Transkei Legal year in February 1987 (unpublished) where the differences are high lighted.

11.2.2 DECISIS STARE ET QUIETA NON MOVERE

In other instances the South African courts drifted away from the precedent system<sup>1</sup> with the result that the onward march of the Transkei Penal Code was dealt serious blows and brought to an abrupt stop. This is to be seen in relation to robbery.<sup>2</sup> The deviation from the famous dictum of Schreiner A C J in Minister of Justice in re R v Gesa; R v de Jongh which dictum had been upheld in many judgements and by de Wet and Swanepoel<sup>3</sup> is a case in point. That deviation began with the obiter dictum of Rumpff C.J. in S v Mogala<sup>4</sup> with reference to bag-snatching cases. In their favour therefore, it can be said that the courts did not blindly carry around and promote the onward march of the Transkei Penal Code wherever they came across its "spoor." This observation applies with equal force to the infringement made to the rule iudicis est ius dicere non dare.<sup>5</sup>

11.2.3 CODE MISTAKEN FOR INDIGENOUS LAW

The interpretation of the Transkei Penal Code by the judges was certainly not an easy matter and sometimes the courts proceeded in a manner which, it is submitted, reflected a mistaking of the Code for indigenous law. This comes out clearly when one looks at the law relating to theft by a spouse. In terms of section 187

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1 see 8.3.3. supra  
2 see discussion 8.3.3 supra  
3 ibid  
4 1978 (2) SA 412 (A)  
5 11.2.1 supra

of the 1886 code: ;

"no husband shall be convicted of stealing, during cohabitation, the property of his wife; and no wife shall be convicted of stealing, during cohabitation, the property of her husband; but whilst they are living apart from each other, either shall be guilty of theft if he or she fraudulently takes or converts anything which is by law the property of the other in a manner which in any other person would amount to theft."

In R v Nobele<sup>1</sup> the accused was convicted of theft of wheat belonging to her husband. The parties lived in the district of Albert which falls far outside the Transkei Territories and were married in terms of customary law. The learned judge said: While the case of Rex v Ramdahl 1915 NPD 565 supports the view that a wife married in community of property may be convicted of theft of property wholly in the administration of her husband, I point out that in the Native Territories "no wife shall be convicted of stealing during cohabitation the property of her husband; see Act 24 of 1886 section 187. I think that though Albert is not in the Native Territories, this case may well be treated in the spirit of the statute just quoted."<sup>2</sup>

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1 1941 E.L. 171

2 at 172

11.3 THE ROLE OF THE WRITERS

The part played by Gardiner and Lansdown in promoting the Transkei Penal Code has been demonstrated in the preceding chapters. But it is perhaps fair to leave the much criticised authors with the consolatory reflection that they were not the only perpetrators of this "error". The difference may have been merely one of degree. One of the criticisms laid at the door of the learned authors is that they would quite often deal with the Code as part of the text and not even by way of footnotes. But if one is constrained to mention the Code very often in the text or by way of footnotes, then its power and influence remain equally evident. In this regard, therefore, Burchell and Hunt may well be open to criticism fairly similar to that earned by Gardiner and Lansdown.<sup>1</sup> The same can safely be said of de Wet and Swanepoel who raise an objection in several instances where the courts say that the South African law is as laid down in the Code.

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1 See, for example, Burchell and Hunt: South African Criminal Law and Procedure vol. 1 2 ed p 306-311 where "The Transkeian Penal Code" is mentioned at pages 306, 307, 309 and 311 (text) and at pages 306, 308, 310 and 311 (footnotes). Likewise Hunt: South African Criminal Law and procedure vol 2 1 ed mention "The Transkeian provision", "The Transkeian Penal Code", "The Transkeian Code", and "The Transkei definition" on each of pages 438 to 442.

In any event Hunt<sup>1</sup> is also found dealing with the Code as part of the text and thereby giving it much prominence. This is noticeable with perjury in respect of which section 106, 107, 108 and 109 are quoted in full on two consecutive pages<sup>2</sup> without comment. Likewise with reference to treason sections 85, 86, 87 and 88 of the Transkei Penal code are reproduced in two consecutive pages as "statutory forms of treason" and again, with no comment beyond indicating that the said sections are to be read with section 3 of the Republic of South Africa constitution Act.<sup>3</sup> In any event when one gives a lot of space to the Code in one's work, whether one is accepting or rejecting or merely watering down its influence, the result is the same namely to demonstrate the nature and extent of the Code's influence on South African law. The difference is ideological and the more it surfaces the more clearly the influence of the Code comes out. Furthermore when one looks at the table of statutes the amount of space taken by Act 24 of 1886 goes to show the importance of this statute in South African criminal law no matter how one really went about the task of dealing with it in the course of the work.<sup>4</sup> Admittedly, however, the difference in ideological approach between these authors is a great one and that cannot be overlooked.

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1 Vol 2 1970

2 See pages 134 and 135

3 Act no 32 of 1961

4 See Hunt at page XXIV

11.4

CONCLUDING REMARKS

It has been noted above that the commission quite advisedly consulted a wide cross-section of the indigenous population regarding the intended code and did not confine itself to white opinion.<sup>1</sup> It is obvious that the Commission had a difficult task trying to find the course that would be "the lesser evil" to all the groups that had expressed themselves so strongly on each of the points that were placed in issue, the groups being the whites, the westernised and semi-westernised group, and the traditionalist group adhering strictly to customary law. Taking the sensitive aspect of forced circumcision and intonjane<sup>2</sup> as examples, it would appear that the commission sometimes took "the middle line". It is submitted that had they opted for an outright termination of these practices the code might have satisfied only a handful of people and thus given rise to a great deal of dissatisfaction, and perhaps even ending up in complete failure. Indeed the failure of Cape rule in Transkei for all the period up to about 1880 was caused by the fact that European law had been applied too rapidly and unimaginatively.<sup>3</sup> The second matter affects the law relating to trespass. Until the nineteenth century

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.1 see 3.4.4. supra  
2 see 3.4.4. supra  
3 see Kerr: The Cape Government Commission on Native Laws and Customs. Transkei Law Journal 1986.

land was all used for grazing purposes, and it was only in the latter half of that century that people began to depend on agriculture for their subsistence.<sup>1</sup> Trespass or injury done to cultivated land was, at the beginning not actionable.<sup>2</sup> For that reason, it may be asserted, there was no developed action on trespass. In this connection Brownlee had this to say:

"The reason assigned ... is that, all having cattle and gardens, all are alike liable to trespass or to be trespassed on; things being thus equal, law suits are of no avail".<sup>3</sup>

Kerr<sup>4</sup> says this explanation is not convincing. He contends that the better view of looking at the matter is that there was the extra-judicial remedy of retaliation whereby women who had charge of the cultivated lands had a right, flowing from custom immemorial to drive cattle thus trespassing into the fields of their owners, the result being that trespasses became less frequent. Against this background it is interesting to note that the Transkei Penal Code of 1886 kept away from what could be an area of difficulty if not controversy, and merely provided for the defence of movable property against a trespasser. Everyone who was in peaceable possession of any movable property or thing was justified in resisting or taking such

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1 Kerr: Customary Law of Immovable Property and of Succession 2 ed page 63  
2 Mc Lean: Compendium of Kafir Laws and Customs: pg 117  
3 Mc Lean: op cit 117  
4 op cit 64

property or thing by any trespasser as long as he did not do grievous bodily harm to the trespassers<sup>1</sup>. This obviously had nothing to do with the trespass of stock on cultivated land. As if to admit that the legislature was having difficulty with the question of trespass, the Transkei Penal Code Act of 1983<sup>2</sup> still did not do anything about the trespass of stock on cultivated land, but neither did it re-enact the provisions of Section 64 of the 1886 Code. It faced the reality that trespass in reality is committed on immovable property, but it brought in the novel idea of punishing those who, with the intention of wounding the feelings of any person or with the knowledge that the feelings of any person are likely to be insulted thereby, commit any trespass in any place of worship or in any place of burial or in any place set aside for the performance of funeral rites.<sup>3</sup> Under the rule that South African law remained operative on attainment of independence in 1976 until specifically repealed, it therefore appears the South African statutory law (e.g. Cape Ordinance No. 18 of 1938 on trespass) remains operative in Transkei - this is the only way the lacuna can be filled and protection given to the now sizeable farming community of Transkei.

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1 Section 64  
2 Act no. 9 of 1983  
3 See section 79

A further point worth looking at is the effect of the introduction of the Penal Code on the role of the chiefs in the administration of justice. It is well known that originally the chief personally played an important role in the administration of justice especially regard being had to the basic principle that every person was "the child of the chief" and he was actually the<sup>1</sup> judicial officer in all civil as well as criminal cases. As soon as Magistrates were introduced as judicial officers, they posed a threat to the continued exercise of judicial powers by the chiefs, but their role was introduced gradually without the intention of bringing the activities of the chiefs to an abrupt end. When the Penal Code was introduced one could well fear that the risk of the exercise of judicial powers by the chiefs being gradually reduced to a point of being terminated became real. This could be especially so since the option for customary criminal law had been ruled out in favour of the received western law which only the white magistrates could handle. Yet it was never so and despite the all embracing nature of the code the chiefs have been able to continue to exercise a wide measure of criminal jurisdiction. Their position in this regard was strengthened by the Black Administration Act,<sup>2</sup> which applied throughout South Africa and this included Transkei until 1976. It gave not only chiefs but also headmen authority to try any offence at common law or under customary law as well as statutory offences except offences referred to in the third schedule.<sup>3</sup>

1 See 3.4.2 supra, and McLean: Compendium of Kafir Laws and Customs summarised by the 1883 Commission in its report at Appendix B, page 17.

2 Act No. 38 of 1927

3 See section 20. As to the post-1963 Transkeian statutes in respect of which the chiefs and headmen enjoy criminal jurisdiction - See T.C. Mabaso: "The functioning of the Chiefs and Headmen's Courts" in: The Judicial Process in the Customary Courts p.246 ed Koyana- University of Transkei - 1983.

In Transkei the criminal jurisdiction of chiefs was re-inforced by the Regional Authority Courts Act.<sup>1</sup> This act greatly elevated both the civil and criminal jurisdiction of the Paramount Chiefs and heads of Regional Authorities as they were for the first time enabled to "enjoy in all respects the same powers, authorities and functions as those of a magistrate's court established in terms of the Magistrates Courts Act, 1944, as amended."<sup>2</sup> The large volume of cases disposed of by the customary courts is hardly ever<sup>3</sup> realised until one goes to the districts and sees for oneself.

It can therefore be said that in 1886 Transkei received a weapon which she was to use for the suppression of crime. That was the Native Territories Penal Code, popularly referred to as the Transkeian Territories Penal Code or the Transkei Penal Code Act 24 of 1886 (Cape). The country was small in size and had a population of easily less than one million people at the time, such population being all rural, peasant and traditionalist

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1 Act No. 13 of 1982

2 Section 3. It must be observed that although the chiefs and headmen having jurisdiction in terms of Act 38 of 1927 range between two and ten in each of the twenty eight districts of Transkei depending on the size of the district and number of Tribal Authorities (for Umtata and Mqanduli and Ngqamakwe there are ten and eight and two courts of chiefs and headmen respectively) the whole country is divided into nine regions so at most there can be only nine officers having civil and criminal jurisdiction in terms of the Regional Authority Courts Act.

3 For statistics see Koyana: The Judicial Process in the Customary Courts pp 48-182; University of Transkei 1983.

in nature. (True enough a white settlement was growing). It owed allegiance to the chiefs, and criminal cases were heard and disposed of in the customary courts in accordance with customary law. It was therefore possible that this weapon might not be very extensively used, regard being had to the fact that numerous provisions of the act took into account the conditions prevailing in England, Holland and even Ancient Rome. In this connection one may recall the remarks of Mr Ayliff, one of the commissioners charged with the task of drawing up the code. In a minority report he refused to recommend "an admirable specimen of high class law for a state of native society only just emerging from barbarism." Transkei can be said to have lent the weapon to her needy neighbour South Africa when she came to being as such in 1910. That neighbour tested the weapon through the length and breadth of her big country with its large population and during the process Transkei carefully observed the "ups and downs" experienced by the weapon during this long testing period. What Transkei gained from this exercise has been alluded to by reference to the 1983 Penal Code, but a few more examples which readily come to mind may be given. The provisions of the 1886 Penal Code on witchcraft influenced the legislation of the Provinces. In 1957 the Witchcraft Suppression Act improved and consolidated the South African Statutory law on witchcraft. The new Transkei Penal Code<sup>1</sup> virtually re-enacts the provisions of the 1957 Witchcraft Suppression

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1 Act No.9 of 1983

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Act of South Africa. The 1983 code has also abandoned the one year rule relating to homicide thereby departing from the 1886 code and the English law and following South African law.<sup>2</sup> It can thus be said that when Transkei passed the 1983 version of the Code she was able to reap the benefits of her generosity without which developments regarding the application and interpretation of the 1886 code would have been slow and unexciting.

That the 1886 Code was a success is beyond doubt.<sup>3</sup> This has been more recently acknowledged by Kerr. It is submitted that the enormous influence that the Code exerted on South African law is the greatest indication of its success, for which success the tireless efforts of the commission should never be forgotten.

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1 Section 182 (1) (a) to (f)

2 See discussion at 3.2 supra. Likewise the distinct shift towards a more inquisitorial form of procedure in the 1983 Code is in line with the South African Criminal Procedure Act of 1977

3 Transkei Law Journal 1986 at page 30

No. 24--1886.]

[July 9, 1886.

## ACT

To Provide for a Penal Code for the Transkeian Territories.

WHEREAS it is desirable to provide a Penal Code for the Transkeian Territories as the same are hereinafter in this Act defined: Be it therefore enacted by the Governor of the Cape of Good Hope, with the advice and consent of the Legislative Council and the House of Assembly thereof, as follows:—

Preamble.

## TITLE I.

## CHAPTER I.

## PRELIMINARY.

*Short Title and Operation of Code.*

1. This Act shall be called "The Native Territories Penal Code," and shall take effect on and from the first day of January, 1887, throughout the whole of the territories known as The Transkei (including Gcalekaland), Griqualand East, Tembuland (including Emigrant Tembuland, and Bomvanaland), and the port and territory of St. John's River, which are hereby styled the "Transkeian Territories." The said port and territory of Saint John's River shall for the purposes of this Code form part of the Chief Magistracy of Tembuland.

Short title and operation of Code.

*Offenders liable under the Code.*

2. Every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be found guilty within the said territories on or after the said first day of January, 1887, and every person who shall be charged or chargeable on or after that day with any offence committed before such day shall be liable to be tried and punished by the Courts hereinafter established in the same manner as if this Act had not been passed.

Offenders liable under the Code.

*Criminals from Extra-Colonial Native Territories.*

3. Every person shall be subject to trial and punishment under this Code for every act or omission of which he shall be guilty on or after the said first day of January, 1887, within the territory of any Native chief, and which act or omission is punishable within the Colony of the Cape of Good Hope or its dependencies, by virtue of any treaty or engagement heretofore entered into, or which may hereafter be made, between such Native chief and the Governor of the Colony of the Cape of Good Hope.

Criminal fugitives from Extra-Colonial Native Territories.

No. 24—1886.

*Offence committed when and where Offender has Property in possession or control.*

Offence committed when and where offender has property in possession or control.

4. Every offence consisting in unlawful taking or obtaining or appropriating property, or in knowingly receiving property so taken, obtained, or appropriated, or in forging any document, or in using any forged document, is committed as long as, and at every place where, the offender has the property or document so unlawfully dealt with in his possession or under his control, whether the original offence was committed within the territories to which the Code applies, or without.

*Interpretation of terms.*

Interpretation of terms.

5. In this Act the following words and expressions are used in the following senses, unless a different intention appears from the context:

(a) The pronoun "he" and its derivatives are used of any person, whether male or female. Words importing the singular include the plural, and words importing the plural include the singular number. The word "man" denotes a male human being of any age. The word "woman" denotes a female human being of any age. The word "person" includes any person or association or body of persons, whether incorporated or not. The word "public" includes any class of the public or any community. The word "Government" denotes the person or persons authorized by law to administer executive government in any part of the said territory. The word "Court" denotes a judge who is empowered by law to act judicially alone, or a body of judges empowered by law to act judicially as a body when such judge or body of judges is acting judicially. The word "Judge" denotes every person who is empowered by law to give, in any legal proceeding, criminal or civil, a definitive judgment, or a judgment which if not appealed against would be definitive, or a judgment which, if confirmed by some other authority, would be definitive; or who is one of a body of persons empowered by the law to give such a judgment.

(b) The word "public servant" denotes a person falling under any one of the following descriptions, namely:—  
 (1). Every servant of the Queen. (2). Every commissioned officer of the military or naval force of the Queen. (3). Every judge. (4). Every officer of a Court of Justice whose duty it is to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or take charge or dispose of any property, or to execute any judicial process, or to administer any

oath, or interpret or preserve order in the Court. (5). Every juryman or assessor assisting a Court of Justice. (6). Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement. (7). Every officer of Government whose duty it is as such officer to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience. (8). Every officer in the service or pay of the Government, or remunerated by fees or commission for performance of any public duty.

- (c) The words "movable property" include corporeal property of every description except land and things attached to the earth or permanently fastened to anything which is attached to the earth.
- (d) In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done, extend also to illegal omissions. The word "act" denotes as well a series of acts as a single act. The word "omission" denotes as well a series of omissions as a single omission; and an offence may be committed partly by an act and partly by an illegal omission.
- (e) When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone. Whenever an act which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act, with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.
- (f) Whenever an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence, by doing any one of those acts, either singly or jointly with any other person, commits that offence. When several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.
- (g) The word "offence" denotes anything made punishable by this Code. The word "illegal" is applicable to anything which is an offence, or which is prohibited by law, or which furnishes grounds for a civil action; and a person is said to be "legally bound to do" whatever it is illegal in him to omit. The word "injury" denotes any harm whatever illegally caused to any person in mind, reputation, or property.

No. 24—1886.

- (h) The words "life" and "death" denote the life or death of a human being unless the contrary appears from the context. The word "animal" denotes any living creature other than a human being. The words "year and month" denote a calendar year and month. The word "section" denotes a portion of a chapter of this Code distinguished by prefixed numerals.
- (i) "Oath" and all expressions relating to "the taking of oaths" include all such affirmations and declarations as may by law be substituted for an oath, and the making of such affirmations and declarations.
- (j) Nothing is said to be done or believed "in good faith" which is done or believed without due care and attention.
- (k) The word "kraal" denotes any hut, houses, or enclosure occupied by any single family, or member of a family, or any aboriginal tribe, or any collection of huts, houses, or enclosures, occupied by several families of any aboriginal tribes, with a recognized head known as *ummininzi*.
- (l) The word "spoor" denotes any mark or impression on, or disturbance of, the surface of any ground, or any mark or impression on or disturbance of any grass, herbage, or wood on such ground, or any matter or substance left or found upon such ground, grass, herbage, or wood, indicating that any person or persons or any cattle have passed along in any particular direction.
- (m) The word "cattle" shall comprise horses, mules, asses, horned cattle, sheep, goats, or ostriches.

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CHAPTER II.

PUNISHMENTS.

- Punishments. 6. The following punishments may be inflicted under this Act:
- Death.
  - Imprisonment with or without hard labour, and with or without spare diet.
  - Flogging and whipping.
  - Detention in a reformatory institution.
  - Fine.
  - Putting under recognizances.

*Punishment of Death.*

- Punishment of death. 7. The punishment of death shall be awarded for murder, and shall in all cases, where the circumstances will admit of it, be carried into effect within the gaols and in the manner prescribed by Act No. 3 of 1869: provided, however, that the omission to comply

with any provision of the said Act shall not make the execution of the judgment of death illegal, in any case where such execution would otherwise be or have been legal. The punishment of death shall be inflicted by hanging the offender by the neck until he is dead: Provided always that no sentence of death shall be carried into effect without the warrant of the Governor authorizing the same.

No. 21-1886.

*Commutation of Punishment of Death.*

8. In any case in which sentence of death shall have been passed, the Governor for the time being may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

Commutation of punishment of death

*Imprisonment.*

9. The punishment of imprisonment consists in the detention of the offender in prison, and in his subjection to the discipline appointed for prisoners, during the period expressed in the sentence. Imprisonment shall be with or without hard labour or with or without spare diet. If it is with hard labour, the sentence shall so direct. No prisoner shall be sentenced to or suffer solitary confinement for any part of the term of his imprisonment, except the same may be unavoidable or necessary for the purpose of carrying out any sentence of spare diet. No female shall be sentenced to hard labour on any road, street, or public place. No offender sentenced to imprisonment with hard labour for any period exceeding three months shall be sentenced to spare diet, except for offences against the discipline of the gaol or other place at which he may be lawfully confined or employed; and in regard to the infliction of spare diet, the Courts in their sentences shall observe and conform to such regulations and restrictions as shall from time to time be deemed necessary, to prevent injurious consequences, and be by the Governor prescribed for the guidance of such Courts; and shall in their sentences fix the particular days or times during which the offender shall be subject to spare diet.

Imprisonment.

No person shall be put to hard labour during any period he may undergo spare diet.

When any person shall be sentenced to imprisonment, it shall be lawful for the Governor to order, from time to time, the removal of such person during the period prescribed for his imprisonment, from any gaol in which he is confined to any other gaol or place of imprisonment within the territories to which this Code applies or within the Colony of the Cape of Good Hope.

*Flogging and Whipping.*

10. Flogging shall consist of the infliction on a male person, who shall have attained the age of sixteen years, of a number of strokes, not exceeding at any one time fifty, with an instrument specified by the Court, and in default of such specification, with such instrument as the Governor shall direct.

Flogging and whipping.

No. 24—1886.

Whipping shall consist of the infliction on a male person, who shall not have attained the age of sixteen years, of a number of strokes or cuts, not exceeding at one time twenty-five, with a cane or rod, which last correction shall be administered by such person in such private place as the Court shall appoint, and in case the father or reputed father shall in person express a desire to correct such offender himself in the manner adjudged by the Court, it shall be lawful for the Court to permit him to do so in the presence of any suitable person selected by the Court to witness the infliction of such correction. Should the age of any such offender be unknown it shall be lawful for the Court before which he shall be tried to judge of the offender's age by his appearance, or according to such other materials for forming a judgment upon the subject as shall exist; and no error which shall be *bonâ fide* made by any Court in judging of the age of any such offender shall vitiate or affect the sentence by which such offender shall be sentenced to receive, and shall have received, any such correction as aforesaid.

In each case, whether of whipping or flogging, the Court shall in its sentence specify the number of strokes to be inflicted. No flogging or whipping shall take place after the expiration of six months from the passing of the sentence. The period of imprisonment is to be calculated from the date on which such sentence is passed: Provided, however, that the period during which the sentence may be suspended, pending appeal, is not to be reckoned in calculating the term of imprisonment if the appeal be rejected.

No female shall be liable to be flogged or whipped.

*Offenders under 16 years may be whipped in lieu of imprisonment.*

Offenders under 16 years may be whipped in lieu of imprisonment.

11. Any male, whose age shall not exceed sixteen years, convicted of any offence punishable with imprisonment in the first instance, may, in lieu of such imprisonment, receive a whipping; and wherever an offence in this Code is punishable with flogging, any male whose age shall not exceed sixteen years may be sentenced to a whipping in addition to any term of imprisonment, with or without hard labour, but shall not be flogged.

*Reformatories.*

Reformatories.

12. Upon the conviction of any person under the age of sixteen years, and whenever reformatory institutions for the reception and custody of youthful criminals are established within any of the territories to which this Code applies, the Court shall have all the powers conferred by the Reformatory Institutions Act of 1879.

*Fines.*

Fines.

13. Where no sum is expressed to which a fine may extend, the amount of fine to which an offender is liable is unlimited, but shall not be excessive.

14. Where the Court has power to fine without imprisonment, the Court may, if it thinks fit, direct that the person sentenced to fine be imprisoned, with or without hard labour, until the fine be paid: Provided that the Court may, at its discretion, suspend such imprisonment in such terms as it thinks fit, or may limit the period of such imprisonment: Provided also that in no such case shall anyone be imprisoned for non-payment of a fine for more than one year.

15. Where the Court has power to fine and imprison, the term for which the Court may direct the offender to be imprisoned in default of payment of a fine shall not in any case exceed the maximum term of imprisonment fixed for the offence; and where such fine is given in addition to any term of imprisonment which the Court may have the power to impose, the term of imprisonment in default of payment of the fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence; and in such case this last term of imprisonment shall take effect from and after the termination of the imprisonment which may have been awarded in addition to fine.

*Portion of Fines may be paid to Persons assisting in bringing Offenders to justice.*

16. The Courts empowered to pass sentence on any persons for any offence under this Code may order and direct that a portion of any fine imposed by the Court shall be paid to the person or persons on whose information the conviction of any offender may have been obtained, or who materially assisted in bringing such offender to justice.

Portion of fines may be paid to persons assisting in bringing offenders to justice.

*Fines to be levied in restitution of, or as compensation for, Property stolen or injured.*

17. Any Court empowered to pass sentence under the provisions of this Code on any person for any offence may, in passing such sentences, include therein, under the punishment of fine, a sufficient amount to cover reasonable compensation for loss, costs, damages, or injury caused by the offence for which the offender shall have been convicted; such fine, if not paid, to be levied on the movable property of the said offender, under and by virtue of a warrant under the hand of the Judge or Magistrate imposing such fine, together with the costs of levy; and out of such fine aforesaid, when paid or levied, it shall be competent for the Judge or Magistrate to direct payment to be made to the person injured for such reasonable compensation as aforesaid; and any balance shall be paid into the Public Treasury: Provided that any Magistrate may suspend the levying of any fine imposed as above until the record of the proceedings in the case shall have been reviewed by the Chief Magistrate of the territory who shall be empowered to reduce or disallow the same, as shall seem to him to be most in accordance with real and substantial justice.

Fines to be levied in restitution of, or as compensation for property stolen or injured.

No. 24—1886.

*Fines recoverable in Money, Stock, Grain, or other Produce.*Fines recoverable  
in money, stock, or  
grain.

18. All fines which may be imposed under this Code may be imposed, paid or recovered in money, or in cattle, or in grain, or other produce of the soil, at the discretion of the Judge or Magistrate who shall determine the number of cattle or quantity of grain or other produce of the soil to be paid in lieu of money.

*Discharge without Verdict.*Discharge without  
verdict.

19. In any case in which the Court considers that the offence deserves no more than a nominal punishment, the Court may in its discretion direct the discharge of the accused, and such discharge shall have all the effects of an acquittal.

*Placing under Recognizances.*Placing under recog-  
nizances.

20. Every one who under any provision of this Code is convicted of any offence, for which he is liable to be sentenced to imprisonment, may in addition to any term of imprisonment or instead of any punishment hereby authorized, be required to enter into his own recognizances or to find sureties or both for such amount and for such time as the Court by which he is tried considers reasonable, that he shall keep the peace and be of good behaviour. Every one required to find sureties as aforesaid shall be liable, if the Court thinks fit, to be imprisoned till he find such sureties: Provided the Court may in its discretion suspend such last mentioned imprisonment on such terms as it thinks fit, or may limit the period of such imprisonment: Provided also that no one shall be imprisoned for not finding sureties for more than one year, exclusive of any other period for which he may be imprisoned by the sentence of the Court.

*Sentences may be cumulative.*Sentences may be  
cumulative.

21. When an offender is convicted of more offences than one before the same Court, at the same sitting, or when any offender undergoing punishment for one offence is convicted of another, the sentences passed upon him for his several offences shall take effect one after the other, or after the expiration of the punishment which he is undergoing at the time of his last conviction.

*Limit of punishment of offence made up of several offences.*Limit of punish-  
ment of offence made  
up of several offences

22. When anything which is an offence is made up of parts, any of which part is itself an offence, defendant shall not be punishable with a punishment for more than one of such offences, unless it be so expressly provided.

*Punishment of Person guilty of several offences.*Punishment of per-  
son guilty of several  
offences.

23. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided; if the same punishment is not provided for all.

## CHAPTER III.

No. 24—1856.

JUSTIFICATION AND EXCUSE FOR ACTS WHICH  
WOULD OTHERWISE BE OFFENCES.*Common Law Principles.*

24. All rules and principles of the law in force in the Cape Colony which render any circumstance a justification or excuse for any act or a defence to any charge, shall be in force and be applicable to any defence to a charge under this Code, except in so far as they are thereby altered or are inconsistent therewith. The matters hereby provided for are declared and enacted to be justifications and excuses for all charges to which they apply.

Common Law principles.

*Children exempted.*

25. No one whose age does not exceed seven years shall be convicted of any offence.

Children exempted.

No one whose age exceeds seven and does not exceed fourteen years, shall be convicted of any offence, unless it appear that at the time he committed the offence he had sufficient intelligence to know the nature and consequences of his conduct, or to appreciate that it was wrong.

*Insanity.*

26. If it be proved that a person who has committed an offence was, at the time he committed it, insane, so as not to be responsible for that offence, he shall not therefore be simply acquitted, but he shall be found not guilty on the ground of insanity, and in such case the Court before which such trial shall take place shall order such person to be kept in strict custody in such gaol, lunatic asylum, or other place of confinement either in the said territories or in the Cape Colony, and in such manner as to the Court shall seem fit, until the pleasure of the Governor shall be known, and the Governor may thereupon give such order for the safe custody of such person in such place, in such manner, and for such time as to the Governor shall seem fit.

Insanity.

To establish a defence on that ground it must be proved that the offender was at the time he committed the act labouring under natural imbecility or disease of or affecting the mind to such an extent as to render him incapable of appreciating the nature and quality of the act or that the act was wrong. A person labouring under specific delusions but in other respects sane, shall not be found guilty on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which if it existed, would justify or excuse this act: Provided that insanity before or after the time he committed the act, and insane delusions though only partial, may be evidence that the offender was at the time that he committed the act in such a condition of

No. 24—1886.

mind as to entitle him to be found not guilty on the ground of insanity.

Everyone committing an offence shall be presumed to be sane until the contrary is proved.

*Intoxication.*

Intoxication.

27. Nothing is an offence which is done by a person who, at the time of doing it, is by reason of intoxication incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

28. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will: Provided, however, that if the existence of a specific intention is essential to the commission of a crime the fact that an offender was drunk when he did the act which if coupled with that intention would constitute such crime shall be taken into account by the Judge or Magistrate in deciding whether he had that intention.

*Compulsion.*

Compulsion.

29. Compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of an offence, shall be an excuse for the commission of any offence other than high treason, murder, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson: Provided that the person under compulsion believes that such threat will be executed: Provided also that he was not a party to any association or conspiracy, the being party to which rendered him subject to such compulsion. No presumption shall be made that a married woman committing an offence in the presence of her husband does so under compulsion.

*Ignorance of Law.*

Ignorance of Law.

30. The fact that an offender is ignorant of the law is not an excuse for any offence committed by him; but nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law, believes himself to be justified by law in doing it.

*Act of Judicial Officer.*

Act of Judge.

31. Nothing is an offence which is done by a Judge, or any other judicial officer, when acting judicially in the exercise of any power which is or which in good faith he believes to be given him by law.

No. 24—1895.

*Execution of Lawful Sentence.*

32. Every officer of any Court authorized to execute a lawful sentence, and every gaoler, and every person lawfully assisting such officer or gaoler, is justified in executing such sentence.

Execution of lawful sentence.

*Execution of lawful Process and Warrants.*

33. Every officer of any Court duly authorized to execute any lawful process of such Court, whether of a civil or criminal nature, and every one duly authorized to execute a lawful warrant issued by any Court or Justice of the Peace, or other person having jurisdiction to issue such warrants, and every person lawfully assisting them respectively, is justified in executing such process or warrant respectively, and every gaoler who is required under such process or warrant respectively to receive and detain any person, is justified in receiving and detaining him.

Execution of lawful process and warrants.

*Execution of erroneous Sentence or Process.*

34. If a sentence is passed or process issued by a Court having jurisdiction under any circumstances to issue such warrant, the sentence passed or process or warrant issued shall be sufficient to justify the officer or person authorized to execute such warrant, and every gaoler and person lawfully assisting, although the Court passing the sentence or issuing the process had not in the particular case authority to do so, or although the Court or the person in the particular case had no jurisdiction to issue or exceeded its or his jurisdiction in issuing the warrant, or was, at the time when such sentence was passed or process or warrant issued, out of the district for which such person was entitled to act.

Execution of erroneous sentence or process.

*Effect of Sentence or Process without jurisdiction.*

35. Every officer, gaoler, or person executing any process, sentence, or warrant, and every person lawfully assisting such officer, gaoler, or person, shall be protected from criminal responsibility, if he acts in good faith under the belief that the sentence or process was that of a Court having, or that the warrant was that of a Court, Justice of the Peace, or other person having authority to issue warrants, and if it be proved that the person passing the sentence, or issuing the process acted as such a Court, under colour of having some appointment or commission lawfully authorizing him to act as such Court, or that the person issuing the warrant acted as a Justice of the Peace or other person having such authority, although in fact such appointment did not exist or had expired, or although in fact the Court or the person passing the sentence or issuing the process was not the Court or the person authorized by the commission to act, or the person issuing the warrant was not duly authorized so to act.

Effect of sentence or process without jurisdiction.

*Arresting the wrong Person.*

36. Every one duly authorized to execute a warrant to arrest, who thereupon arrests a person, believing in good faith and on

Arresting the wrong person.

No. 21—1886.

reasonable and probable grounds that he is the person named in the warrant, shall be protected from criminal responsibility to the same extent, and subject to the same provisions, as if the person arrested had been the person named in the warrant. Every one called on to assist the person making such arrest, and believing that the person in whose arrest he is called on to assist is the person for whose arrest the warrant is issued, and every gaoler who is required to receive and detain such person shall be protected to the same extent, and subject to the same provisions, as if the arrested person had been the person named in the warrant.

*Effect of irregular Warrant or Process.*

Effect of irregular  
warrant or process.

37. Every one acting under a warrant or process which is bad in law on account of some defect in substance or in form apparent on the face of it, if he in good faith and without culpable ignorance or negligence believed that the warrant or process was good in law, shall be protected from criminal responsibility to the same extent, and subject to the same provisions, as if the warrant was good in law, and ignorance of the law shall in this case be an excuse: Provided that it shall be a question of law whether the facts of which there is evidence may or may not constitute culpable ignorance or negligence in his so believing the warrant or process to be good in law.

*Arrest by Peace Officer in case of major offence.*

Arrest by peace  
officer in case of ma-  
jor offence.

38. Every peace officer who on reasonable and probable grounds believes that one of the offences as to which it is provided in this Code that the offender may be arrested without warrant has been committed, whether it has been committed or not, and who on reasonable and probable grounds believes that any person has committed that offence, is justified in arresting such person without warrant whether such person is guilty or not.

*Persons assisting Peace Officer arresting in case of major offence.*

Persons assisting  
peace officer arrest-  
ing in case of major  
offence.

39. Every one called upon to assist a peace officer in the arrest of a person suspected of having committed any such offence as last aforesaid, is justified in arresting if he knows that the person calling on him to assist him is a peace officer and does not know that there is no reasonable ground for the suspicion.

*Arrest of person found committing major offence.*

Arrest of person  
found committing  
major offence.

40. Every one is justified in arresting without warrant any person whom he finds committing any offence as to which it is provided by this Code that the offender may be arrested when found committing.

*Arrest after commission of major offence.*

Arrest after com-  
mission of major  
offence.

41. If any offence as to which it is provided in this Code that the offender may be arrested without warrant has been committed,

any one who on reasonable and probable grounds believes that any person is guilty of that offence is justified in arresting him without warrant, whether such person is guilty or not.

*Arrest of Persons believed to be committing major offence.*

42. Every one is protected from criminal responsibility for arresting without warrant any person whom he on reasonable and probable grounds believes he finds committing any offence as to which it is provided by this Code that offenders may be arrested without warrant.

Arrest of persons believed to be committing major offence at night.

*Arrest by Peace Officer of Person found committing any offence.*

43. Every peace officer is justified in arresting without warrant any person whom he finds committing any offence against this Code.

Arrest by peace officer of person found committing any offence.

*Arrest of Person found committing any offence at night.*

44. Every one is justified in arresting without warrant any person whom he finds committing in the night time any offence against this Code.

Arrest of person found committing or about to commit any offence at night.

45. Every peace officer is justified in arresting without warrant any person whom he finds lying or loitering in any kraal, enclosure, cattle yard, premises, or other place during the night, and whom he has good cause to suspect of having committed or being about to commit any offence for which an offender may be arrested without warrant.

Arrest of persons lying or loitering in any kraal, &c.

*Arrest during flight.*

46. Every one is protected from criminal responsibility for arresting without warrant any person whom he on reasonable and probable grounds believes to have committed an offence against this Code and to be escaping from and to be pursued by those whom on reasonable and probable grounds he believes to have lawful authority to arrest that person for such offence.

Arrest during flight.

*What force may be used in executing Process or in Arrest.*

47. Every one is justified or protected from criminal responsibility in executing any sentence, warrant or process, or in making an arrest, and every one lawfully assisting him is justified and protected from criminal responsibility as the case may be, in using such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, process or warrant can be executed or the arrest effected by reasonable means in a less violent manner.

What force may be used in executing process or in arrest.

*Duty of Persons arresting.*

48. It is the duty of every one executing any process or warrant to have it with him and to produce it if required.

Duty of persons arresting.

It is the duty of every one arresting another, whether with or without warrant, to give notice where practicable of the process or warrant under which he acts, or of the cause of the arrest.

No. 21—1885.

A failure to fulfil either of the two duties last mentioned shall not of itself deprive the person executing the process or warrant or his assistants, or the person arresting of protection from criminal responsibility, but shall be relevant to the enquiry whether the process or warrant might not have been executed or the arrest effected by reasonable means in a less violent manner.

*Peace Officer preventing Escape from Arrest for major offence.*

Peace officer preventing escape from arrest for major offence.

49. Every peace officer proceeding lawfully to arrest with or without warrant any person for any offence as to which it is provided in this Code that the offender may be arrested without warrant, and every one lawfully assisting in such arrest is justified, if the person to be arrested takes flight to avoid arrest, in using such force as may be necessary to prevent his escape by such flight unless such escape can be prevented by reasonable means in a less violent manner.

*Private Person preventing Escape from Arrest from major offence.*

Private person preventing escape from arrest for major offence.

50. Every private person proceeding lawfully to arrest without warrant any person for any offence as to which it is provided in this Code that the offender may be arrested without warrant, is justified, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner.

*Preventing Escape from Arrest in other cases.*

Preventing escape from arrest in other cases.

51. Every one proceeding lawfully to arrest any person for any cause other than such offence as in the last section mentioned is justified, if the person to be arrested takes to flight to avoid arrest in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner.

*Preventing Escape or Rescue after Arrest for major offences.*

Preventing escape or rescue after arrest for major offences.

52. Every one who has lawfully arrested any person for any offence as to which it is provided in this Code that the offender may be arrested without warrant, is protected from criminal responsibility in using such force in order to prevent the rescue or escape of the person arrested, as he believes on reasonable grounds to be necessary for that purpose.

*Preventing Escape or Rescue after Arrest in other cases.*

Preventing escape or rescue after arrest in other cases.

53. Every one who has lawfully arrested any person for any cause other than one of the offences as to which it is provided in this Code that the offender may be arrested without warrant, is protected from criminal responsibility in using such force in order to prevent his escape or rescue as he believes on reasonable grounds to be necessary for that purpose.

*Homicide of Persons flying and resisting to be justifiable.*

No. 24—1886.

54. If any officer of the law or private person authorized and required to arrest, or assist in arresting, any person who has committed, or who is on reasonable grounds suspected to have committed, any murder, culpable homicide, rape, robbery, or assault with intent to commit any of those crimes, or in which a dangerous wound is given, arson, housebreaking with intent to commit any crime, or theft of any cattle, sheep, or goats, or any other crime of equal degree of guilt with any of the crimes aforesaid, or desertion or attempted desertion from a gaol or convict station, shall attempt to make such arrest, and the person so attempted to be arrested shall fly or resist, and cannot be apprehended and prevented from escaping by other means than by such officer or private person killing the person so flying or resisting, such homicide shall be deemed in law to be justifiable homicide.

Homicide of persons flying and resisting to be justifiable.

*Suppression of Breach of the Peace.*

55. Every one who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal of such breach of the peace, and may detain any person committing or about to join in or renew such breach of the peace, in order to give him into the custody of a peace officer: Provided that the person interfering uses no more force than is reasonably necessary for preventing the continuance or renewal of such breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of such breach of the peace.

Suppression of breach of the peace.

56. Every peace officer who witnesses a breach of the peace, and every person lawfully assisting him, is justified in arresting any one whom he finds committing such breach of the peace, or whom he on reasonable and probable grounds believes to be about to join in or renew such breach of the peace.

57. Every peace officer is justified in receiving into custody any person given into his charge as having been a party to a breach of the peace, by one who has, or whom such peace officer upon reasonable and probable grounds believes to have, witnessed such breach of the peace.

*Suppression of Riot by Magistrates, &c.*

58. Every Justice of the Peace is justified in using and ordering to be used, and every peace officer is justified in using, such force as he in good faith and on reasonable and probable grounds believes to be necessary to suppress a riot, and as is not disproportioned to the danger which he on reasonable and probable grounds believes to be apprehended from the continuance of the riot.

Suppression of riot by magistrates, &c.

*Suppression of Riot by Persons acting under lawful orders.*

59. Every one, whether subject to military or police law or not, acting in good faith in obedience to orders given by a Justice of the Peace for the suppression of a riot, is justified in obeying the

Suppression of riot by persons acting under lawful orders.

No. 24—1886.

orders so given, unless such orders are manifestly unlawful; and he is protected from criminal responsibility in using such force as he on reasonable and probable grounds believes to be necessary for carrying into effect such orders.

It shall be a question of law whether any particular order is manifestly unlawful or not.

*Protection of Persons subject to Military Law.*

Protection of persons subject to military law.

60. Every one who is bound by military or police law to obey the lawful command of his superior officer, is justified in obeying any command given him by his superior officer for the suppression of a riot, unless such order is manifestly unlawful.

It shall be a question of law whether such order is manifestly unlawful or not.

*Prevention of major offences.*

Prevention of major offences.

61. Every one is justified in using such force as may be reasonably necessary in order to prevent the commission of any offence for which if committed the offender might be arrested without warrant, and the commission of which would be likely to cause immediate and serious injury to the person or property of any one; or in order to prevent any act being done which he upon reasonable grounds believes would, if committed, amount to any of such offences.

*Self-defence against unprovoked Assault.*

Self-defence against unprovoked assault.

62. Every one unlawfully assaulted, not having provoked such assault, is justified in repelling force by force, if the force he uses is not meant to cause death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence.

*Self-defence against provoked Assault.*

Self-defence against provoked assault.

63. Every one who has without provocation assaulted another, or has provoked an assault from that other, may nevertheless justify force, subsequent to such assault, if he uses such force under reasonable apprehension of death, or grievous bodily harm from the violence of the party first assaulted or provoked, and in the belief on reasonable grounds that it is necessary for his own preservation from death or grievous bodily harm: Provided that he did not commence the assault with intent to do grievous bodily harm, and did not endeavour, at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm: Provided, also, that before such necessity arose he declined further conflict, and quitted or retreated from it as far as was practicable.

Provocation within the meaning of this and the last preceding section may be given by blows, or words.

*Defence of Movable Property against Trespasser.*

Defence of movable property against trespasser.

64. Every one who is in peaceable possession of any movable property or thing, and every one lawfully assisting him, is justified

in resisting the taking of such property or thing by any trespasser, or in retaking it from such trespasser, if in either case he does not do grievous bodily harm to such trespasser: and if, after any one having peaceable possession as aforesaid has laid hands upon any such property or thing, such trespasser persists in attempting to keep it, or to take it from the possessor, or from any one lawfully assisting him, the trespasser shall be deemed to commit an assault without justification or provocation.

No. 24—1886.

*Defence of Movable Property by one having claim of right.*

65. Every one who is in peaceable possession of any movable property or thing under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending such possession, even against a person entitled by law to the possession of such property or thing, if he does not do grievous bodily harm to such person; and if the person so entitled by law to the possession thereof attempts to take it from or otherwise assaults the possessor, or any one acting under his authority, such assault shall be deemed to be without justification or provocation.

Defence of movable property by one having claim of right

*Defence of Movable Property by Person not having claim of right.*

66. Every one who is in peaceable possession of any movable property or thing, but neither claims right thereto nor acts under the authority of a person claiming right thereto, is neither justified nor protected from criminal responsibility for defending his possession against a person entitled by law to the possession of such property or thing; and if the person so entitled attempts to retake any such thing, and the possessor resists and the person entitled thereto thereupon assaults the possessor, such assault shall be deemed to have been provoked, although the possessor may not have assaulted the person entitled by law to the possession.

Defence of movable property by person not having claim of right.

*Defence of House or Kraal.*

67. Every one who is in peaceable possession of a dwelling-house, or other building or kraal, and every one lawfully assisting him, or acting by his authority, is justified in using such force as is necessary to prevent the forcible breaking and entering of that dwelling-house, building or kraal either by night or day, by any person with the intent to commit any indictable offence therein.

Defence of house or kraal.

*Defence of Dwelling-house or Kraal at night.*

68. Every one who is in peaceable possession of a dwelling-house, or other building or kraal, and every one lawfully assisting him or acting by his authority, is justified in using such force as is necessary to prevent the forcible breaking and entering of that dwelling-house, building or kraal by night by any person, if he believes on reasonable and probable grounds that such breaking and entering is attempted with the intent to commit any indictable offence therein.

Defence of dwelling-house or kraal at night.

No. 24—1886.

*Defence of Immovable Property.*Defence of im-  
movable property.

69. Every one who is in peaceable possession of any house, or other building, kraal, or land, or other immovable properties, and every one lawfully assisting him or acting by his authority, is justified in using force to prevent any person from trespassing on such property, or to remove him therefrom, if he does not do grievous bodily harm to such trespasser; and if such trespasser resists such attempt to prevent his entry or, to remove him, such trespasser shall be deemed to commit an assault without justification or provocation.

*Assertion of right to House or Land.*Assertion of right  
to house or land.

70. Every one is justified in peaceably entering in the day time to take possession of any house, or other building, kraal, or land, to the possession of which he or some other person under whose authority he acts is lawfully entitled.

71. If any person, not having or acting under the authority of one having peaceable possession of any such house, building, kraal, or land, with a claim of right assaults any one peaceably entering as aforesaid for the purpose of making him desist from such entry, such assault shall be deemed to be without justification or provocation.

72. If any person having peaceable possession of such house, building, kraal, or land, with a claim of right or any person acting by his authority, assaults any one entering as aforesaid for the purpose of making him desist from such entry, such assault shall be deemed to be provoked by the person entering.

*Surgical Operations.*Surgical oper-  
ations.

73. Every one is protected from criminal responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit, with such person's consent, if in a fit state to give such consent, or, in the case of a minor, with the consent of the parents or guardians of such minor: Provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.

*Act done in good faith for the benefit of a Person without consent.*Act done in good  
faith for the benefit  
of a person without  
consent.

74. Nothing is an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit.

*Excess.*

Excess.

75. Every one authorized by law to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.

*Consent to Death.*

No. 24—1886.

Consent to death.

76. No one has a right to consent to the infliction of death upon himself, or of any injury likely to cause death, unless it be an injury in the nature of a surgical operation upon himself; and if such consent is given, it shall have no effect upon the criminal responsibility of any person by whom such death may be caused.

*CHAPTER IV.*

## OF PARTIES TO THE COMMISSION OF OFFENCES.

*Parties to Offences.*

77. Every one is a party to and guilty of an offence who

Parties to offences.

- (a) Actually commits the offence, or does or omits any act, the doing or omission of which forms part of the offence, or
- (b) Aids or abets any person in the actual commission of the offence, or in any such act or omission as aforesaid; or
- (c) Directly or indirectly counsels or procures any person to commit the offence, or to do or omit any such act as aforesaid.

78. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been, known to be a probable consequence of the prosecution of such common purpose.

*Offence committed other than the Offence intended.*

79. Every one who counsels or persuades another to be a party to an offence of which that other is afterwards guilty, is a party to that offence, although it may be committed in a way different from that which was counselled or suggested.

Offence committed other than the offence intended.

80. Every one who counsels or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew, or ought to have known, to be likely to be committed in consequence of such counselling or procuring.

*Accessory after the fact defined.*

81. An accessory after the fact to an offence is one who receives, comforts, or assists any one who has been a party to such offence, in order to enable him to escape, knowing him to have been a party thereto: Provided that no married woman whose husband has been a party to an offence, shall become an accessory after the fact by receiving, comforting, or assisting her husband, or by receiving,

Accessory after the fact defined.

No. 24—1886.

comforting, or assisting, in his presence and by his authority, any other person who has been a party to such offence, in order to enable her husband or such other person to escape.

*Attempts to commit Offences.*

Attempts to commit offences.

82. An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence if such series of acts or omissions had not been interrupted either by the voluntary determination of the offender not to commit the offence or by some other cause.

83. Every one who, believing that a certain state of facts exists, does or attempts an act the doing or omitting of which would, if that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was by reason of the non-existence of that state of facts at the time of the act or omission impossible.

84. The question whether an act done or omitted with intent to commit an offence, is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

TITLE II.

CHAPTER V.

OFFENCES AGAINST THE PUBLIC ORDER.

*High Treason, or waging or attempting to wage War against the Queen.*

High treason, or waging or attempting to wage war against the Queen.

85. Whoever wages war against the Queen, or attempts to wage such war, or abets the waging of such war, may be punished with death, or with imprisonment for a term which may extend to his natural life, with or without hard labour, and with or without fine, and with or without flogging or whipping, or with any two or more of such punishments.

*Conspiracy against the Queen or Government of the Territories.*

Conspiracy against the Queen or Government of the Territories.

86. Whoever within or without the said Transkeian territories conspires to commit any of the offences punishable by the last section, or to deprive the Queen of her sovereignty in the said territories, or any of Her Majesty's dominions, or conspires to overawe by means of criminal force, the Queen in her government of the said territories or dominions, shall be punished with imprisonment with or without hard labour for a term which may extend to fifteen years, to which fine may be added, or with fine only, or with flogging or whipping, or with any two or more of such punishments.

*Collecting Arms with the intention of waging War.*

No. 21—1956.

87. Whoever collects men, arms, or ammunition, or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Queen, shall be punishable as in the last section is provided.

Collecting arms with the intention of waging war.

*Concealing with intent to facilitate a design to wage War.*

88. Whoever by any act or by any illegal omission conceals the existence of a design to wage war against the Queen, knowing that it may be likely that he may by such concealment facilitate the waging of such war, shall be punishable as in the eighty-sixth section of this Code is provided.

Concealing with intent to facilitate a design to wage war.

*Waging War against Allies.*

89. Any British subject who wages war against the Government of any power in South Africa in alliance or at peace with the Queen, or attempts to wage such war or abets the waging of such war, shall be also punishable as in the said eighty-sixth section is provided.

Waging war against allies.

*Abetting Mutiny and Desertion or attempting to seduce a Soldier or Policeman from his duty.*

90. Whoever by instigation, conspiracy, or aid, abets the committing of mutiny, or desertion by any person in the military or police service of the Queen, or attempts to seduce any such person from his allegiance or duty, shall be punished with imprisonment with or without hard labour for a term which may extend to seven years, to which fine may be added, or with fine only.

Abetting mutiny and desertion or attempting to seduce a soldier or policeman from his duty.

## CHAPTER VI.

## OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

*Unlawful Assemblies.*

91. An assembly of five or more persons is designated an "unlawful assembly," if the common object of the persons comprising that assembly is:

Unlawful assembly.

- (1) To overawe, by criminal force, or show of criminal force, any officer of the Government or any public servant in the exercise of the lawful power of such public servant, or
- (2) To resist the execution of any law, or any legal process.

*Being member of unlawful Assembly.*

92. Whoever being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

Being member of unlawful assembly.

No. 14—1886.

*Punishment.*

Punishment.

93. Every member of an unlawful assembly shall be liable to be imprisoned, with or without hard labour, for a term which may extend to one year, to which a fine may be added.

*Fighting in a public place an Affray.*

Fighting in a public place an affray.

94. When two or more persons by fighting at any gathering at any kraal or after such gathering away from any kraal or in a public place, disturb the public peace, they are said to commit an affray, and shall be punished with a fine not exceeding five pounds, or in default of payment with imprisonment, with or without hard labour for a term which may extend to three months.

*Dispersing an Assembly after an Affray has begun.*

Dispersing assembly after an affray has begun.

95. Whenever any five or more persons are assembled together, from whose conduct a breach of the peace may be reasonably apprehended, or when any affray has actually begun, any Justice of the Peace or other peace officer may command such persons to disperse, and on failure so to do they shall each be liable to a fine not exceeding five pounds, and in default of payment to imprisonment, with or without hard labour, for a term which may extend to three months.

*Obstructing or assaulting Magistrates.*

Obstructing or assaulting magistrates

96. If after such command as is mentioned in the last preceding section, five or more persons fail to disperse, the Justice of the Peace or other peace officer may use force to compel them so to do, and whoever by force wilfully and knowingly opposes, obstructs, hinders or hurts any such Justice of the Peace or other peace officer or persons authorized by him to compel such dispersion, shall be punished with imprisonment, with or without hard labour, for a term which may extend to one year, or with fine, or both.

*Indemnity of Persons authorized to disperse Assembly.*

Indemnity of persons authorized to disperse assembly.

97. If any person, assembled as in the last two preceding sections mentioned, is killed or hurt in the apprehension of such persons, or in the endeavour to apprehend or disperse them by reason of their resistance, every person ordering them to be apprehended or dispersed and every person executing such orders shall be indemnified against all proceedings of every kind in respect thereof.

*Liability of Members of unlawful Assembly.*

Liability of members of unlawful assembly.

98. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing that offence is a member of that assembly is guilty of that offence.

*Punishment for drunken, riotous and indecent conduct.*

No. 24—1886.

99. Any person drunk in any street, road, lane, or public place, or in or near any shop, store, hotel or canteen, and any person guilty of any riotous or indecent behaviour in any such place as aforesaid, or in any police office or police station-house, shall be punished with a fine not exceeding two pounds, and in default of payment, with imprisonment, with or without hard labour, and with or without spare diet for any period not exceeding fourteen days; and in case of a second or subsequent conviction, shall be punished with a fine not exceeding five pounds, or in default of payment with imprisonment with or without hard labour and with or without spare diet for any period not exceeding thirty days, unless the fine in any case be sooner paid.

Punishment for drunken, riotous and indecent conduct.

*For threats, abusive language, &c.*

100. Any person who shall use any threatening, abusive, or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, in any street, road, public place, or licensed public-house, shall be punished with a fine not exceeding three pounds, or with imprisonment with or without hard labour, and with or without spare diet, for any term not exceeding thirty days, unless such penalty be sooner paid, and such person may further be required to find sureties to keep the peace for such period not exceeding three months, as the Court before which such person is tried may deem necessary.

For threats, abusive language, &c.

*For accepting from Seamen and others Ships' Stores, &c.*

101. Every person who shall, in any port knowingly purchase or take in exchange from any seaman or other person, not being the owner or master of any vessel, anything belonging to such vessel lying in such port, or any part of the cargo of any such vessel, or any stores or articles belonging to the same, shall be punished with a fine not exceeding ten pounds, or with imprisonment with or without hard labour for any term not exceeding three months, but nothing herein contained shall prevent the trial of such person for any other crime of which but for the passing of this Code he would have been guilty.

For accepting from seamen and others ships' stores, &c.

*For Seamen and others removing Ships' Boats.*

102. If any seaman belonging to any vessel lying in any port, or if any other person shall take away or remove from any such vessel any boat attached or belonging to the same without having obtained permission so to do from the master or some officer of the said vessel, such seaman or other person shall (although such taking or removal may not have been with intent to steal), be punished with a fine not exceeding ten pounds, or with imprisonment with or without hard labour for any term not exceeding three months.

For seamen and others removing ship's boats.

No. 24 - 1886.

## TITLE III.

## CHAPTER VII.

## OFFENCES AGAINST THE ADMINISTRATION OF JUSTICE.

*Judicial Corruption.*

Judicial Corruption. 103. Whoever, holding any judicial office, corruptly accepts, or obtains, or agrees to accept, or attempts to obtain for himself or any other person any money or valuable consideration, office, place, or employment whatever, on account of anything already done or omitted, or to be afterwards done or omitted by him in his judicial capacity, or corruptly gives to any person holding any judicial office, or to any other person, any money or valuable consideration, office, or place of employment, whatever, on account of such act or omission as aforesaid, shall be punished with imprisonment, with or without hard labour, for a term which may extend to five years, or fine, or both.

*Corruption of Public Officers.*

Corruption of Public Officers.

104. Whoever, being a Justice of the Peace, or public officer appointed in any capacity for the prosecution or detection or punishment of offenders, or whoever, being an interpreter in any Court of Justice, corruptly accepts, or obtains, or agrees to accept, or attempts to obtain for himself or any other person, any money, valuable consideration, office, or place whatever, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any offence, or to protect from detection or punishment any person having committed, or intending to commit any such offence, or corruptly gives or offers to any such officer as aforesaid, with any such intent as aforesaid, shall be punished with imprisonment, with or without hard labour, for a term which may extend to three years, or fine, or both.

*Threatening any Person in order to induce him to refrain from applying for legal protection.*

Threatening any person in order to induce him to refrain from applying for legal protection.

105. Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist from making a legal application for protection against any injury to any Magistrate or other public officer or servant legally empowered as such to give such protection or to cause such protection to be given, shall be punished with a fine not exceeding ten pounds, and in default of payment thereof, with imprisonment with or without hard labour for a term which may extend to three months.

*Perjury and Subornation of Perjury.*

Perjury and subornation of perjury.

106. Perjury is an assertion as to a matter of fact, opinion, belief or knowledge made by a witness in a judicial proceeding as

part of his evidence, either upon oath, or in any form allowed by law to be substituted for an oath, whether such evidence is given in open Court or by affidavit or otherwise, such assertion being known to such a witness to be false.

Every person is a witness within the meaning of this section who actually gives his evidence upon oath, or in such form as aforesaid, whether he was competent to be a witness or not. Subornation of perjury is counselling any person to commit any perjury which is actually committed.

107. Whoever is guilty of perjury, or subornation of perjury, shall be punished with imprisonment for a term which may extend to seven years, or fine, or flogging or whipping, or any two of such punishments; and if an innocent person be convicted and executed in consequence of any false evidence, the person who gives or counsels such evidence shall be punished with imprisonment, with or without hard labour, for a term which may extend to the term of his natural life, or with such term of imprisonment and flogging or whipping.

*False Statement on Oath.*

108. Whoever being required or authorized by law to make a statement, either on oath or in any form permitted to be substituted for an oath, thereupon makes a statement which would amount to perjury if made in a judicial proceeding, shall be deemed to be guilty of perjury, and punished accordingly.

False statement on oath.

*False Declaration.*

109. Whoever makes a statement as to any matter of fact, opinion, or belief, which would amount to perjury if made on oath upon any occasion on which he is permitted by law to make any statement or declaration in lieu of an oath before any officer authorized by law to permit it to be made before him, shall be punished in the same manner as if he had committed the crime of perjury.

False declaration.

*Fabricating Evidence.*

110. Whoever, with intent to mislead any Court of Justice or person holding any such judicial proceeding as aforesaid, fabricates or contrives evidence by any means other than perjury and subornation of perjury, shall be punished with imprisonment, with or without hard labour, for a term of not exceeding seven years, or with fine, or both.

Fabricating evidence.

*Conspiring to bring False Accusations.*

111. Whoever conspires with any person to prosecute any one for any offence, knowing such other person to be innocent thereof, shall be liable upon conviction to be punished with imprisonment, with or without hard labour, for a term which may extend to seven years, or flogging or whipping, or with fine, or any two or more of such punishments: Provided, however, that where such

Conspiring to bring false accusations.

No. 24—1886.

innocent accused is convicted and executed, such conspirator may be punished with death, or imprisonment with or without hard labour, for a period which may extend to the term of his natural life.

*Conspiring to defeat Justice.*

Conspiring to defeat justice.

112. Whoever conspires with any person to obstruct, prevent, or defeat the course of justice, or who wilfully attempts in any way, not otherwise criminal, to obstruct, prevent, pervert or defeat the course of justice or the administration of the law, shall be punished as in the last section provided.

*Bribery or Corruption of Witnesses, Jurors, Assessors, or Interpreters.*

Bribery or corruption of witnesses, jurors, assessors, or interpreters.

113. Every one shall be liable to the punishment provided in section 104 of this Code who (a) dissuades or attempts to dissuade any person by threats, bribes, or other corrupt means, from giving evidence in any cause or matter, civil or criminal; or (b) influences or attempts to influence by threats or bribes or other corrupt means any jurymen, assessor, or interpreter in his conduct as such, whether such jurymen, assessor, or interpreter has been sworn or not; (c) or accepts any such bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as jurymen, assessor, or interpreter.

CHAPTER VIII.

ESCAPES AND RESCUES.

Escapes and rescues

114. Whoever by force or violence breaks any gaol or prison with intent to set at liberty himself or any other person lawfully confined therein on any criminal charge, shall be punished with imprisonment, with or without hard labour, for a term which may extend to two years.

115. Whoever, being convicted of any offence, escapes from gaol or prison, or from any lawful custody in which he may be under such conviction, or attempts or conspires to make his escape from such custody, shall be punished with imprisonment, with or without hard labour, for a term which may extend to two years, or flogging or whipping.

116. Whoever, being in lawful custody on any criminal charge, escapes from such custody, shall be liable to imprisonment, with or without hard labour, for a term which may extend to one year, or fine, or both.

117. Whoever rescues any prisoner, or assists any prisoner in escaping or attempting to escape from lawful custody, whether in gaol or prison or not, or being a gaoler or other officer having the lawful custody of such prisoner, voluntarily and intentionally permits him to escape, or aids him in escaping or attempting to

escape, shall be punished with imprisonment, with or without hard labour, for a term which may extend to two years, or fine, or both.

118. Whoever, by failing to perform any legal duty, permits a person in his lawful custody on a criminal charge to escape therefrom, shall be punished with imprisonment for a term which may extend to six months, or fine, or both.

119. It shall be lawful for the Governor to make such rules and regulations for the several gaols and prisons of the territories to which this Code applies, and for the discipline therein, as shall to him seem expedient, and thereby to impose any punishment for the breach of such regulation, under a penalty of imprisonment, with or without hard labour, or with or without spare diet, or flogging, or whipping: Provided that in no case shall any unconvicted person be sentenced to flogging or whipping.

## TITLE IV.

### CHAPTER IX.

#### OFFENCES AGAINST RELIGION, MORALITY, DECENCY, AND THE PUBLIC HEALTH.

##### *Disturbing a Religious Assembly.*

120. Whoever wilfully and without lawful justification or excuse, the proof whereof shall be on him, disquiets or disturbs any meeting, assembly, or congregation of persons lawfully assembled for religious worship, and whoever in any way disturbs, molests, or misuses any preacher, teacher, or person lawfully officiating at such meeting, assembly, or congregation, or any persons there assembled, shall be punished with a fine not exceeding ten pounds sterling, and in default of payment with imprisonment, with or without hard labour, for a term which may extend to three months, unless such fine be sooner paid.

Disturbing a religious assembly.

##### *Unnatural Offences.*

121. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment, with or without hard labour, for a term which may extend to ten years, or with flogging, or whipping, or fine, or with any two or more of the said punishments. This offence is complete upon penetration.

Unnatural offences.

122. Whoever attempts to have carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment, with or without hard labour, for a term which may extend to five years, or flogging, or whipping, or fine, or to any two or more of such punishments.

No. 24—1896.

*Incest.*

Incest.

123. Incest is the carnal connection of persons related by consanguinity within the third degree.

Incest shall be punished with imprisonment, with or without hard labour, for a term which may extend to seven years, or with flogging, or fine, or any two or more of these punishments combined.

*Indecent Acts.*

Indecent acts.

124. Whoever commits any nuisance in any street or public place, or in view of any dwelling-house whereby public decency may be offended, shall be punished with a fine not exceeding two pounds, and in default of payment thereof with imprisonment with or without hard labour for a term which may extend to one month, unless such fine be sooner paid.

*Insufficient Clothing in Towns and other Public Places.*

Insufficient clothing in towns and other public places.

125. Whoever indecently exposes his person or appears in any street or public thoroughfare without such articles of clothing as decency requires shall be punished with a fine not exceeding two pounds, and in default of payment with imprisonment for a term which may extend to one month, unless such fine be sooner paid.

*Burial, Disinterment, or Indignity to Human Remains.*

Burial, disinterment, or indignity to human remains.

126. Whoever neglects to perform any legal duty, either imposed upon him by law, or undertaken by him, with reference to the burial of any dead human body or human remains, or without lawful authority disinters a dead body, or improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not, shall be liable to a fine of twenty pounds, or in default of payment, to imprisonment with or without hard labour for a term which may extend to six months, unless such fine be sooner paid.

*Common Nuisances.*

Common nuisances.

127. Whoever is guilty of an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, or health of the public, or which occasions injury to the person of any individual, may be convicted and punished with a fine not exceeding twenty pounds, and in default of payment thereof with imprisonment, with or without hard labour, for a term which may extend to six months, unless such fine be sooner paid.

*General Police Provisions.*

General Police provisions.

128. Any person guilty of any of the following acts or offences shall, upon conviction in respect of each act or offence, be punished with a fine not exceeding five pounds, or in default of payment be imprisoned, with or without hard labour, for a period not exceeding three months, unless such fine be sooner paid :

- (1) Any driver of any vehicle injuring any person or property by negligence or driving on the wrong side of the road. ✓ No. 23-188C.
- (2) Any driver of any vehicle being away from his horse or cattle so as to be unable to have the full control of them. ✓
- (3) Driving any vehicle or riding any animal, and when meeting any other vehicle or animal being ridden not keeping on the left or near side of the road or street, or when passing any other vehicle or animal going in the same direction, not going or passing or not allowing any person desirous so to do to pass when practicable on the right or off side of such other vehicle or animal being ridden.
- (4) Leaving upon any street, public road or thoroughfare, any stone, timber, bricks, or other thing, calculated to damage or endanger any animal or vehicle ridden or driven thereon.
- (5) Any driver or guard of a public vehicle for the conveyance of passengers wilfully delaying on the road, using any abusive or insulting language to any passenger, or by reason of intoxication, negligence, or other misconduct, endangering the safety or property of any passenger or other person, or demanding or exacting more than the proper fare due from any passenger.
- (6) Leaving upon any public road or thoroughfare any vehicle, plough or harrow without any horse or animal harnessed thereto, unless in consequence of some accident having occurred.
- (7) Having any timber, iron, or boards laid across any vehicle going along any public road so that either end projects more than two feet beyond the wheels or sides of such vehicle.
- (8) Slaughtering or skinning any beast upon any public road or thoroughfare, or leaving any dead beast on any such road or thoroughfare.
- (9) Setting or urging or permitting any dog or other animal to attack or worry any person, horse or other animal, or by ill-usage or negligence in driving any cattle causing any damage or hurt to be done by such cattle.
- (10) Wilfully breaking any pane of glass in any building.
- (11) Wilfully breaking or extinguishing or injuring any lamp, or damaging any lamp-post.
- (12) Wilfully trespassing in any place, and neglecting or refusing to leave such place after being warned to do so by the owner or occupier, or any person authorized by or on behalf of the owner or occupier.
- (13) Playing or betting in any street or other open and public place, at or with any table or instrument of gaming or pretended game of chance.

No. 21—1886.

129. Any person guilty of any of the following acts or offences shall upon conviction in respect of each act or offence be punished with a fine not exceeding twenty pounds, or in default of payment be imprisoned with or without hard labour, for a period not exceeding six months, unless such fine be sooner paid, or either to such penalty or such imprisonment, that is to say :

- (1) Any person having in his custody or possession without lawful excuse (the proof of which excuse shall be on such person) any pick-lock, key, crow, or other implement of housebreaking.
- (2) Any person found by night, having his face blackened or wearing felt or other slippers, or being dressed or otherwise disguised with a criminal intent.
- (3) Any person found by night, without lawful excuse (the proof of which excuse shall be on such person) in or upon, or loitering in the neighbourhood of any dwelling-house, warehouse, coach-house, stable, cellar, or out-house, or in or loitering in the neighbourhood of any enclosed yard, garden, or area, or in any kraal, or in or on board any ship or other vessel when lying or being in any port, harbour, or place in these territories.
- (4) Any person found by night armed with any gun, pistol, sword, bludgeon, or other offensive weapon or instrument with a criminal intent, and who being thereto required shall not assign a valid and satisfactory reason for being so armed.
- (5) Any person who shall resist, or incite, or aid, or encourage any person to resist, and any person who shall hinder or disturb any constable, policeman, or officer of any local authority in the execution of his duty.

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TITLE V.

CHAPTER X.

OFFENCES AGAINST THE PERSON.

*Duties tending to the Preservation of Life.*

*Duty to provide Necessaries.*

Duties tending to the preservation of life.

Duty to provide necessaries.

130. Whoever has charge of any other person, unable either by reason of detention, age sickness, insanity, or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting without lawful excuse to perform it, if death is caused thereby; or if the life of such person is endangered, or his health permanently injured, whether such charge is imposed upon him by law, or if undertaken by him under any contract, or by reason of any unlawful act.

*Duty of Persons doing dangerous acts.*

No. 24--1886.

131. Every one who undertakes, except in cases of necessity, to administer surgical or medical treatment, or to do any other lawful act, the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill, care, and caution in doing any such act, and is criminally responsible for omitting to discharge that duty, if death is caused thereby.

Duty of persons doing dangerous acts.

*Duty of Persons in charge of dangerous things.*

132. Every one who has in his charge, or under his control, anything whatever, whether animate or inanimate, or who erects, makes, or maintains anything whatever which, in the absence, of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting without lawful excuse to take such precautions or to use such care.

Duty of persons in charge of dangerous things.

*Duty to avoid omissions dangerous to Life.*

133. Every one who undertakes to do any act, the omission to do which is or may be dangerous to life, is under a legal duty to do that act, and is criminally responsible for the consequences of omitting, without lawful excuse, to discharge that duty.

Duty to avoid omissions dangerous to life.

*Homicide defined.*

134. Homicide is the killing of a human being by another directly or indirectly by any means whatsoever.

Homicide defined.

A child becomes a human being within the meaning of this Code, when it has completely proceeded in a living state from the body of its mother, whether in a case of suspended respiration, it has breathed or not, and whether it has an independent circulation or not, and whether the navel string is severed or not; and the killing of such a child is homicide when it dies after birth in consequence of injuries received before, during, or after birth.

*Culpable Homicide.*

135. Homicide is culpable when it consists in the killing of any person either by an unlawful act or by a culpable omission to perform or observe any legal duty, or by both combined, or by causing a person by threats or fear of violence, or by deception, to do an act which causes that person's death, or by wilfully frightening a child or sick person.

Culpable homicide.

Homicide which is not culpable is not an offence.

*Death must be within a year.*

136. No one is criminally responsible for the killing of another unless the death take place within a year of the cause of death. The period of a year shall be reckoned inclusive of the day on

Death must be within a year.

No. 24—1866.

which the last unlawful act contributing to the cause of death took place. Where the cause of death is an omission to fulfil a legal duty, the period shall be reckoned inclusive of the day on which such omission ceased. Where death is in part caused by an unlawful act and in part by an omission, the period shall be reckoned inclusive of the day on which the last unlawful act took place or the omission ceased, whichever happened first.

*Acceleration of Death.*

Acceleration of death.

137. Every one who by an act or omission of a legal duty causes the death of another shall be deemed to kill that person, although the effect of the bodily injury caused to such other person be merely to accelerate his death, while labouring under some disorder or disease arising from some other cause.

*Causing Death which might have been prevented.*

Causing death which might have been prevented.

138. Every one who by an act or omission of a legal duty causes the death of another shall be deemed to kill that person, although death from that cause might have been prevented by resorting to proper means.

139. Every one who causes a bodily injury to any person from which death results shall be deemed to kill that person, although the immediate cause of such death be treatment applied in good faith for the purpose of cure, even if such treatment was improper: Provided that if the injury was not in itself of a dangerous character, and the improper treatment was the cause of death, that shall be a defence to a charge of murder or culpable homicide.

*Murder, &c.*

Murder, &amp;c.

140. Culpable homicide becomes murder in the following cases:

- (a) If the offender means to cause the death of the person killed.
- (b) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and if the offender, whether he does or does not mean to cause death, is reckless whether death ensues or not.
- (c) If the offender means to cause death or such bodily injury as aforesaid to one person, so that if that person be killed the offender would be guilty of murder, and by accident or mistake the offender kills another person, though he does not mean to hurt the person killed.
- (d) If the offender for any unlawful object does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

*Provocation.*

No. 24—1896.

Provocation.

141. Homicide which would otherwise be murder may be reduced to culpable homicide if the person who causes death does so in the heat of passion occasioned by sudden provocation.

Any wrongful act or insult of such a nature as to be sufficient to deprive any ordinary person of the power of self-control may be provocation, if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

Whether any particular wrongful act or insult, whatever may be its nature, amounts to provocation, and whether the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact: Provided that no one shall be deemed to give provocation to another only by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person: Provided also that an arrest shall not necessarily reduce the offence from murder to culpable homicide because the arrest was illegal, but if the illegality was known to the offender, it may be evidence of provocation.

*Punishment for Murder, &c.*

142. Every one who commits murder shall, upon conviction thereof, be sentenced to death.

Punishment for murder, &amp;c.

143. Every one who attempts to commit murder shall be punished with imprisonment, with or without hard labour, for a term which may extend to twenty years, fine, or flogging or whipping, or with any two or more of such punishments.

144. Whoever

(a) Conspires or agrees with any person to murder or to cause or procure the murder of any other person, whether the person intended to be murdered is a subject of Her Majesty or not, or is within Her Majesty's dominions or not: or

(b) Counsels or attempts to procure any person to murder any other person, although such person is not murdered in consequence of such counselling or attempted procurement, whether the person whose murder is counselled or attempted to be procured is a subject of Her Majesty or not, or is within Her Majesty's dominions or not:

shall be punished with imprisonment, with or without hard labour, for a term which may extend to twenty years, or with fine, or flogging or whipping, or any two or more of such punishments.

*Accessory after the fact to Murder.*

145. Whoever is an accessory after the fact to murder shall be punished with imprisonment, with or without hard labour, for a term which may extend to ten years, or fine, or both.

Accessory after the fact to murder.

No. 24—1856.

*Punishment of Culpable Homicide.*

Punishment of culpable homicide.

146. Every one who commits culpable homicide shall be punished with imprisonment, with or without hard labour, for a term which may extend to twenty years, or with fine, or with flogging or whipping, or any two or more of such punishments.

*Aiding and abetting Suicide.*

Aiding and abetting suicide.

147. Whoever counsels or procures any person to commit suicide, actually committed in consequence of such counselling or procurement, or whoever aids or abets any person in the commission of suicide, shall be punished with imprisonment, with or without hard labour, for a term which may extend to ten years, or with fine, or both: Provided, however, that for abetment of suicide of a minor or insane or intoxicated person the term of such imprisonment may extend to his natural life.

*Attempting Suicide.*

Attempting suicide.

148. Every one who attempts to commit suicide shall be punished with imprisonment, with or without hard labour, for a term which may extend to one year, or with fine or both.

*Concealment of Child-birth.*

Concealment of child-birth.

149. Whoever disposes of the dead body of any child in any manner, with intent to conceal the fact of its birth, whether the child died before, during, or after birth, shall be punished with imprisonment, with or without hard labour, for a term which may extend to five years, or with fine, or both.

*Bodily injuries and acts causing danger to the Person.*

Bodily injuries and acts causing danger to the person.

150. Whoever with intent to maim, disfigure, disable or do grievous bodily harm to any one, or, to resist or prevent the lawful apprehension or detention of any one, unlawfully wounds or does actual grievous bodily harm to any person, shall be punished with imprisonment, with or without hard labour, for a term which may extend to ten years, or with fine, or with flogging or whipping, or any two or more of such punishments.

The following kinds of hurt only are designated "grievous" bodily harm, viz.:—1, Emasculation; 2, permanent privation of the sight of an eye; 3, permanent privation of the hearing of an ear; 4, privation of any member or joint; 5, destruction or impairing of the powers of any member or joint; 6, permanent disfiguration of the head or face; 7, fracture or dislocation of a bone; 8, any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

*Administering Poison so as to endanger Life.*

Administering poison so as to endanger life.

151. Whoever, knowingly and with intent to injure, aggrieve, or annoy any person administers, or causes to be administered to, or be taken by such person, any poison, or other noxious or

destructive thing, whereby the life of any person is endangered or grievous bodily harm is caused to any person, shall be punished with imprisonment, with or without hard labour, for a term which may extend to seven years, or with fine, or with flogging or whipping, or any two or more of such punishments.

*Administering Poison with intent.*

152. Whoever knowingly and with intent to injure, aggrieve, or annoy any person, administers to, or causes to be administered to, or be taken by such person, any poison or other destructive or noxious thing, although no injury may be caused thereby, shall be punished with imprisonment with or without hard labour for a term which may extend to one year or with flogging or whipping, or any two or more of such punishments.

Administering poison with intent.

*Forcing or aiding, or procuring the enforcement of Circumcision or Intonjane.*

153. Whoever by force or threats compels any person to submit against his or her will to the act of circumcision, or to take part in the ceremony named *intonjane*, or whoever by force or threats compels any person, male or female, against his or her will, to submit to any other like act or ceremony, shall be punished with fine, and in default of payment, with imprisonment, with or without hard labour, for a term which may extend to one year.

Forcing or aiding, or procuring the enforcement of circumcision or intonjane.

*Circumcision without consent.*

154. Any person aiding or procuring the circumcision of any youth without the consent of his parent or the person having the lawful custody of such youth, shall be guilty of an assault, and shall be punished as in the last preceding section mentioned.

Circumcision without consent.

*Assault defined.*

155. An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has or causes the other to believe upon reasonable grounds that he has the present ability to effect his purpose.

Assault defined.

*Indecent Assault.*

156. Whoever indecently assaults any female shall be punished with imprisonment, with or without hard labour, for a term which may extend to two years, or with fine or with flogging, or whipping, or any two or more of such punishments.

Indecent assault.

*Assaults on Peace Officers, and to resist Apprehension.*

157. Whoever

(a) Assaults any person with intent to commit an offence, or to resist or prevent the lawful apprehension or detention of himself, or of any other person for any offence, or to rescue any person from lawful custody;

Assaults on peace officers, and to resist apprehension.

No. 24—1886.

- (b) Assaults, resists, or wilfully obstructs any peace officer in the execution of his duty, or any person acting in aid of such officer; or
- (c) Assaults, resists, or unlawfully obstructs any person in the lawful execution of any process against any lands or goods, or with intent to rescue any goods, taken under such process, or taken under any lawful distress;
- shall be punished with imprisonment, with or without hard labour, for a term which may extend to two years, or with fine, or both.

*Common Assaults.*

Common assaults. 158. Whoever commits a common assault shall be punished with imprisonment, with or without hard labour, for a term which may extend to one year, or with fine or both.

*Rape.*

Rape. 159. Rape is the act of a man having carnal knowledge without the consent of a woman who is not his wife: Provided that nothing shall be deemed to be consent which is either extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by falsely and fraudulently misrepresenting the nature and quality of the act. This offence shall be complete upon penetration.

A boy under fourteen years of age shall be conclusively presumed to be incapable of having carnal knowledge of a woman within the meaning of this section.

Whoever commits rape shall be punished with imprisonment, with or without hard labour, for a term which may extend to twenty years, or with flogging or whipping or with fine or any two or more of such punishments.

*Attempt to Rape.*

Attempt to rape. 160. Whoever attempts to commit a rape shall be punished with imprisonment, with or without hard labour, for a term which may extend to seven years, or with flogging, or fine, or whipping, or any two or more of such punishments:

*Carnally knowing Children.*

Carnally knowing children.

161. Whoever carnally knows any girl under the age of twelve years, whether he believes her to be of or above that age or not, and whether she consents or not, shall be imprisoned, with or without hard labour, for a term which may extend to twenty years, or with or without flogging or whipping or fine, or any two or more of such punishments.

162. Whoever attempts carnally to know any girl under the age of twelve years, whether he believes her to be of such age or not, shall be punished with imprisonment with or without hard labour, for a term which may extend to two years, or with fine, or with flogging or whipping, or any two or more of the said punishments.

*Age of Children.*

No. 24—1836.

Age of children.

163. It shall be lawful for the Court or Jury by whom the accused is tried to judge from the appearance of the girl in question in such prosecution, and also, if the Court thinks fit from the opinions duly given in evidence of persons skilled in ascertaining the age of such girls, and from any other evidence that may be adduced on the subject, whether the girl was under the age of twelve years at the time the offence was committed or not.

*Causing Death of Child by means of Miscarriage.*

164. Whoever causes the death of any living child, which has not proceeded in a living state from the body of its mother, in such a manner that he would have been guilty of murder if such child had been fully born, shall be punished with imprisonment with or without hard labour for a term which may extend to seven years or with fine or both: Provided that no one shall be guilty of an offence under this section who by means employed in good faith for the preservation of the life of the mother of the child, causes the death of any such child before or during or after its birth.

Causing of miscarriage.

*Procuring Miscarriage.*

165. Whoever, with the intent to procure miscarriage of any woman, whether she be or be not with child, unlawfully administers to, or causes to be taken by her, any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, shall be punished with imprisonment with or without hard labour, for a term which may extend to five years, or fine or both: Provided that such woman herself shall not be indictable under this section.

Procuring miscarriage.

*Woman procuring her own Miscarriage.*

166. Whoever unlawfully administers or permits to be administered to herself, any poison or other noxious thing, or unlawfully uses or permits to be used on herself any instrument with intent to procure her own miscarriage, shall be punished with imprisonment with or without hard labour, for a term which may extend to two years, or fine, or both.

Woman procuring her own miscarriage.

*Supplying means of procuring Abortion.*

167. Whoever unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child, shall be punished with imprisonment, with or without hard labour, for a period which may extend to one year, or fine or both.

Supplying means of procuring abortion.

*Bigamy.*

168. Whoever, having a husband or wife living, marries in any case in which such marriage is and shall be void by reason of its

Bigamy.

No. 24—1886.

taking place during the lifetime of such husband or wife, shall be punished with imprisonment, with or without hard labour, for a term which may extend to five years, or with fine or both: Provided, however, that this section shall not extend to any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction, or to any person who contracts a marriage during the life of such husband or wife, if such husband or wife at the time of the subsequent marriage shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time: Provided that the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts, so far as the same is within his or her knowledge: Provided, further, that this section shall not extend to any person whose previous marriage with a husband or wife living was entered into according to Native custom, whether the same was registered or not.

*Stealing or abducting Children under fourteen years of age.*

Stealing or abducting children under fourteen years of age.

169. Whoever with intent to deprive any parent or guardian or other person having the lawful care or charge of any child under the age of fourteen, unlawfully leads or takes away or decoys or entices away or detains any such child, or receives or harbours any such child, knowing it to have been dealt with as aforesaid, shall be punished with imprisonment, with or without hard labour, for a term which may extend to five years, or fine, or both: Provided that nothing herein shall extend to any one who gets or takes possession of any child, claiming in good faith a right to the possession of the child.

*Abandoning or exposing Children.*

Abandoning or exposing children.

170. Whoever unlawfully exposes or abandons any child under the age of seven years, or who, being lawfully bound to take charge of any such child, knowingly and without lawful excuse leaves it abandoned or exposed, whereby its life is endangered or its health is permanently injured, shall be punished with imprisonment, with or without hard labour, for a term which may extend to three years, or with fine, or both.

CHAPTER XI.

PRETENDED WITCHCRAFT.

*Imputations of Witchcraft.*

Imputations of witchcraft.

171. Whoever imputes to any other the use of non-natural means in causing any disease in any person or animal, or in causing any injury to any person or property, that is to say, whoever names or indicates another to be a wizard or witch

(*umtakati*) shall be punished with a fine not exceeding forty shillings sterling, or in default of payment with imprisonment, with or without hard labour, for fourteen days unless such fine be sooner paid.

172. Whoever having named or indicated any person as wizard or witch, shall be proved to be by habit and repute a witch-doctor or witch-finder (*isanusi*) shall be punished with imprisonment, with or without hard labour, for a term which may extend to two years, or with fine, or flogging, or any two or more of such punishments.

*Employing a Witch-doctor.*

173. Whoever employs or solicits any witch-doctor or witch-finder (*isanusi*) to name or indicate any person as wizard or witch (*umtakati*) shall be punished with a fine not exceeding five pounds, and in default of payment to imprisonment, with or without hard labour, for a term which may extend to two months unless such fine be sooner paid.

Employing a  
witch-doctor.

*Witch-doctors supplying Advice or Witchcraft Materials with intent to injure.*

174. Any person professing to a knowledge of so-called witchcraft, or the use of charms, who shall advise any person applying to him how to bewitch or injure persons, property, or cattle, or who shall supply any person with the pretended means of witchcraft, shall be punished with imprisonment, with or without hard labour, for a term not exceeding twelve months, or with fine.

Witch-doctors  
supplying advice or  
witchcraft materials  
with intent to injure.

*Persons using Witch Medicine with intent to injure.*

175. Whoever, on the advice of a witch-doctor, or of his pretended knowledge of so-called witchcraft, shall, with intent to injure, use, or cause to be put into operation, such means or processes as he believes are calculated to injure any person or property, shall be punished by imprisonment, with or without hard labour, for a period not exceeding twelve months, or with fine.

Persons using witch  
medicine with intent  
to injure.

## TITLE VI.

### CHAPTER XII.

#### THEFTS AND SIMILAR OFFENCES.

*Inanimate things, fixed or movable, capable of being stolen.*

176. Every inanimate thing whatever, which is the property of any person, and which either is or may be made movable, shall be capable of being stolen, as soon as it becomes movable, although it be made movable in order to steal it.

Inanimate things,  
fixed or movable,  
capable of being  
stolen.

*Animals capable of being stolen.*

177. All tame living creatures, whether tame by nature or wild by nature and tamed, shall be capable of being stolen.

Animals capable of  
being stolen.

No. 24—1835.

178. All wild living creatures, wild by nature, shall, if kept in a state of confinement, be capable of being stolen so long as they remain in confinement, or are being actually pursued after escaping therefrom, but no longer. Wild creatures in the enjoyment of their natural liberty shall not be capable of being stolen when living; nor shall the taking of their dead bodies by or by orders of the person who killed them—before they are reduced into actual possession by the owner or occupier of the land on which they die, be deemed theft. Everything produced by, or forming part of, any living creature capable of being stolen, shall be capable of being stolen: Provided always that nothing in this section contained shall in any way affect or interfere with the provisions of Act 9 of 1869, "For the better protection of Bees," which last-mentioned Act shall be and remain in force as law throughout these territories: and provided, further, that Act 12 of 1870, "For the better preservation of Wild Ostriches," as amended by Act 15 of 1875, or "The Wild Ostriches Act of 1875," shall also have the effect of law within these territories: Provided, further, that the Act 24 of 1875, or "The Domesticated Ostriches Act of 1875," shall have the effect of law within the said territories.

Acts 9 of 1869, 12 of 1870, 15 of 1875, 24 of 1875 to be in force in these territories.

#### *Definition of Theft.*

Definition of theft.

179. Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person anything or the use of anything capable of being stolen, with intent to deprive the owner thereof or to deprive any person having any special property or interest therein of such property or interest. It is immaterial whether the thing converted was taken by the thief for the purpose of the conversion or whether it was at the time of the conversion in the lawful possession of the thief: Provided that if any servant, contrary to the orders of his master, takes from his possession any food for the purpose of giving the same to any horse or other animal belonging to or in the possession of his master, the servant so offending shall not by reason thereof be deemed guilty of theft.

180. Theft is complete when the offender takes or moves anything capable of being stolen, or causes it to move or to be moved, for the purpose of fraudulently converting it, although such conversion be not completed.

181. Theft is committed when the offender cuts, rips, or otherwise begins to cause to be movable anything part of or growing out of or attached to any real property with intent to steal it.

#### *Theft of Animals.*

Theft of animals.

182. Every one commits theft who kills any living creature capable of being stolen with intent to steal the carcase, skin, plumage, or any part of such creature.

*Theft by Agent.*

No. 21—1855.

Theft by agent.

183. Every one commits theft who, having received any money, valuable security, or other thing whatsoever, on terms requiring him to account for or pay the same or the proceeds thereof to any other person, though not requiring him to deliver over in specie the identical money, valuable security, or other thing received, fraudulently converts to his own use or fraudulently omits to account for the same, or to account for or pay any part of the proceeds which he was required to account for or pay as aforesaid: Provided that if it be part of the said terms that the money or other thing received, or the proceeds thereof, shall form an item in a debtor and creditor account between the person receiving the same and the person to whom he is to account for or pay the same, and that such last-mentioned person shall rely only on the personal liability of the other as his debtor in respect thereof, the proper entry of any part of such proceeds in such account shall be deemed a sufficient accounting for the part of the proceeds so entered.

*Theft by Person holding Power of Attorney.*

184. Every one commits theft who, being entrusted either solely or jointly with any other, person, with any power of attorney, for the sale, mortgage, pledge, or other disposition of any property, movable or immovable, whether capable of being stolen or not, fraudulently sells, mortgages, pledges, or otherwise disposes of the same or any part thereof; or fraudulently converts the proceeds of any sale, mortgage, pledge or other disposition of such property, or any part of such proceeds, to some purpose other than that for which he was entrusted with such power of attorney.

Theft by person holding power of attorney.

*Theft by misappropriating proceeds held under direction.*

185. Every one commits theft who, having received, either solely or jointly with any other person, any money or valuable security, or any power of attorney for the sale of any stock or shares whatever, with the direction that such money, or any part thereof, or the proceeds or any part of the proceeds of such security or such stock or shares shall be applied to any purpose or paid to any person specified in such direction, in violation of good faith and contrary to such direction, fraudulently applies to any other purpose or pays to any other person, such proceeds or part thereof: Provided that where the person receiving such money, security, or power of attorney, and the person from whom he receives it, deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, this section shall not apply, unless such direction is in writing.

Theft by misappropriating proceeds held under direction.

*Theft by Co-owner.*

186. Theft may be committed by the owner of anything capable of being stolen, against a person having a special property or interest

Theft by co-owner.

No. 24--1886.

therein, or by a person having a special property or interest therein against the owner thereof, or by one of several joint owners, tenants in common, or partners of or in any such thing, against the other person interested therein, or by the directors, public officers, or members of a public company or body corporate against such public company or body corporate.

*Husband and Wife.*

Husband and wife.

187. No husband shall be convicted of stealing, during cohabitation, the property of his wife; and no wife shall be convicted of stealing, during cohabitation, the property of her husband; but whilst they are living apart from each other, either shall be guilty of theft if he or she fraudulently takes or converts anything which is by law the property of the other in a manner which in any other person would amount to theft.

188. Every one commits theft who, whilst a husband and wife are living together, knowingly (a) assists either of them in dealing fraudulently with anything which is the property of the other, in a manner which would amount to theft if they were not married; or (b) receives from either of them anything the property of the other, obtained from that other by such fraudulent dealings as aforesaid.

*Obliterating Documents Fraudulently.*

Obliterating documents fraudulently.

189. Every one who destroys, cancels, conceals, or obliterates any document for any fraudulent purpose, shall be punished as if he had stolen that document.

*Theft outside of the Territories.*

Theft outside of the territories.

190. Every one who having obtained any property by any act which if done in these territories would have amounted to theft, brings such property into these territories, shall be guilty of theft.

*Theft by False Pretences.*

Theft by false pretences.

191. A false pretence is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

192. Every one shall be guilty of theft by false pretences, and shall be liable, upon conviction thereof, to the penalties provided for the crime of theft, who by any false pretence obtains with intent to defraud, either directly or through the medium of any contract obtained by such false pretence, anything capable or the use of anything capable of being stolen, or who with intent to defraud or injure any person by any false pretence, causes or induces any person to execute, make, accept, endorse, or destroy the whole or any part of valuable security, or to impress or affix any name or seal on any paper or parchment, in order that it may afterwards be made or converted into or used or dealt with as a valuable security.

193. Every one who by any false pretence causes or procures anything capable of being stolen to be delivered to any other person than himself with intent to defraud, obtains, that thing by a false pretence within the meaning of this section, and shall be punishable with the penalties provided for the crime of theft.

No. 21—1886.

*Theft of Ostrich Feathers, Hides, Skins, Wool, Mohair, &c.*

194. All and singular the provisions of the Acts No. 32 of 1883, No. 19 of 1884 and No. 13 of 1885 shall be in force in the Transkeian Territories.

Theft of Ostrich Feathers, Hides, Skins, Wool, Mohair, &c.

*Wrongful possession of and Illicit Dealing in Diamonds.*

195. All and singular the provisions of every law which shall, at the time of the taking effect of this Code, be in force in any part of this Colony other than Griqualand West, in regard to the wrongful possession of and illicit dealing in diamonds and other precious stones, shall be in force in the Transkeian Territories.

Wrongful possession of and illicit dealing in diamonds.

*Obtaining Value or Credit by Fraud.*

196. Whoever obtains any money or things, or who in incurring any debt or liability, obtains credit by means of any fraud, though not amounting to a false pretence as hereinbefore defined, may be punished with imprisonment, with or without hard labour, for a term which may extend to one year, or fine, or both.

Obtaining value or credit by fraud.

*Punishments for certain Thefts.*

197. Whoever steals any testamentary instrument, post letter bag, post letter, postal packet, or anything from such post letter bag, post letter, or postal packet, or who being a clerk or servant, or being employed in the capacity or for the purpose of a clerk or servant, steals anything belonging to or in the possession of his master or employer, or being employed in the public service of Her Majesty, or in the service of any public department, or public body, or being employed as a constable, steals anything in his possession by virtue of his employment, shall be punished with imprisonment, with or without hard labour, for a period which may extend to a term of seven years, or fine, or both; and, in case of subsequent conviction, with imprisonment, with or without hard labour, which may extend to a term of ten years, or fine, or both.

Punishments for certain thefts.

*Punishments for Cattle Thefts.*

198. Whoever steals anything from the person of another, or from any dwelling-house, or steals any horse, ass, mule, sheep, horned cattle, goat, or domesticated ostrich, or the feathers thereof, or who wilfully kills any such animal, with intent to steal the carcase, or any part thereof may, upon conviction, be punished with imprisonment, with or without hard labour, for a term which may extend to five years, or fine, or both; and in case of

Punishments for cattle thefts.

No. 21—1886.

subsequent conviction, with imprisonment, with or without hard labour, for a term which may extend to seven years, or flogging or whipping, or fine, or any two of such punishments.

*Punishment for Thefts otherwise not provided for.*

Punishment for thefts otherwise not provided for.

199. Whoever steals anything for the stealing of which no punishment is hereinbefore provided, shall be punished with imprisonment with or without hard labour, for a term which may extend to three years, or fine or both, and in case of a subsequent conviction with imprisonment, with or without hard labour, for a term which may extend to five years, or fine, with flogging or whipping, or any two or more of such punishments.

*Responsibility for value of Stolen Property under Spoor Law.*

Responsibility for value of stolen property under Spoor Law.

200. When the spoor of any stolen animals is traced to any kraal or locality responsibility in respect of the value of such stolen animals shall be determined as is hereinafter provided; that is to say:

(A) When such spoor originates and terminates within the limits of a magisterial district or tribal area, then—

1. The head of any kraal (*umninimzi*) shall be responsible for the value and damages of any stolen animals the spoor of which is traced to such kraal, when corroborative evidence is forthcoming to the satisfaction of the Resident Magistrate that the theft in question was committed by some person belonging to such kraal.

2. The owner of any stolen animals the spoor of which has become lost or obliterated, has a right of search for any traces of such animal in any hut, kraal, enclosure or lands in that neighbourhood; and any person refusing to permit such search is responsible for the value of the animal stolen, with damages.

3. When the owner of any stolen animals is on the spoor of such animal, it shall be lawful for such owner to demand from the persons living in the neighbourhood all reasonable assistance in following up such spoor, and whoever neglects or refuses to give such assistance, and by such neglect or refusal causes the loss or obliteration of such spoor, or whoever by wilful obstruction or malice causes the loss or obliteration of such spoor, is liable for the value of the animal stolen with damages.

(B) When the spoor originates in one magisterial district or tribal area and passes into and terminates in another magisterial district or tribal area, then—

1. When such spoor is traced to any kraal or kraals, the owners (*abaninimzi*) shall be held responsible for the value of the animal stolen, and upon the order of the Resident Magistrate of the district, shall forthwith pay such value into Court for the benefit of the owner.

Repealed  
by act 41 of 1959

2. When such spoor cannot be traced to any specific kraal or kraals, but is lost, or becomes obliterated on any lands, then the responsibility for the value of such stolen animal shall devolve upon the heads (*abaninimizi*) of the kraals adjacent to and surrounding the spot where such spoor has been lost or obliterated; and for the purpose of compensating the owner of such stolen animal, it shall be lawful for the Resident Magistrate so to fix such responsibility by an assessment not exceeding two head of cattle (or their money value), to be by such Magistrate levied on each kraal, to make up the whole value, or as near as possible the whole value, of the stolen animal or animals.
3. Whenever a spoor is traced to, or within, the confines of any locality occupied by any kraal or kraals, or to or within any area occupied by any community or section of a tribe, if the persons occupying such kraal or kraals or locality, or constituting such community or such section of a tribe, without lawful excuse, neglect or refuse to receive to take over and follow up such spoor, they are responsible for the value of the stolen animal whose spoor shall have been so traced, and are to be compelled to make good such value to the owner in like manner as is provided for with reference to "lost spoor" cases in the preceding sub-section.

*Creating False Spoor.*

201. Whoever fraudulently and with intent to injure another shall create any spoor, shall be punished with fine not exceeding fifty pounds sterling, and in default of payment with imprisonment with or without hard labour for a term which may extend to twelve months.

Creating false spoor.

*Mode of procedure in Spoor Cases.*

202. It shall be lawful for the Resident Magistrate of any district, whenever any claim is made against any person or persons in respect of the spoor traced to any kraal or locality, upon request of the owner of the animal or animals stolen, or of any person authorized by such owner, to inquire summarily and without pleading, but in the presence of the heads of the kraals upon whom responsibility is sought to be attached, into the circumstances of the case, and the value of the animal or animals alleged to have been stolen, together with the damage which the owner or owners shall have sustained by the loss, or by the cost of search or other endeavour to recover the same, and may give judgment in favour of such owner as hereinbefore provided.

Mode of procedure in spoor cases.

No. 24—1886.

## CHAPTER XIII.

## FRAUD AND BREACH OF TRUST.

*Fraudulent Accounting by Directors.*

203. Whoever being a director, manager, public officer, or member of any body corporate or public company, with intent to defraud, destroys, alters, mutilates any book, paper, writing, or valuable security belonging to the body corporate or public company, or makes or concurs in making any false entry, or omits or concurs in omitting to enter any material particular in any book of account or other document, or being a director, public officer, or manager of any body corporate or public company, as such receives or possesses himself of any of the property of such body corporate or public company, and with intent to defraud omits to make, or to cause and direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company, shall be liable, upon conviction, to imprisonment with or without hard labour, for a term which may extend to five years, or fine, or both.

*False Statements by Directors.*

204. Whoever being a promoter, director, public officer, or manager of any body corporate or public company, either existing or intended to be formed, makes, circulates, or publishes any prospectus, statement, or account which he knows to be false in any material particular, with intent to induce persons, whether ascertained or not, to become shareholders, or partners, or with intent to deceive or defraud the members, shareholders, or creditors, or any of them, whether ascertained or not, of such body corporate or public company, or with intent to induce any person to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be liable to the punishment in the preceding section provided.

*Falsifying Accounts by Clerks and Servants.*

205. Whoever being an officer, clerk, or servant, or employed or acting in such capacity, and with intent to defraud, destroys, alters, mutilates, or falsifies any book, paper, writing, valuable security, document, or account, which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or with intent to defraud makes or concurs in making any false entry in, or omits or alters, or concurs in omitting or altering, any material particular from or in any such book, paper, writing, valuable security, or account as aforesaid, shall be punished with imprisonment, with or without hard labour, for a term which may extend to five years, or with or without hard labour, or fine or both.

*Public Officers making False Statements and Returns.*

No. 24—1886.

206. Whoever, being an officer, collector, or receiver entrusted with the receipt, custody, or management of any part of the public revenues, knowingly makes or renders any false statement or return of any money collected by him or entrusted to his care, or of any balance of money in his hand, or under his control, shall be punished with imprisonment, with or without hard labour, for a term which may extend to one year, or fine, or both.

Public Officers making false statements and returns.

*Conspiracy to Defraud.*

207. Whoever conspires with any other person by deceit or falsehood, or other fraudulent means, to defraud the public, or to affect the public market, price of shares, merchandize, or anything else publicly sold, or who conspires by deceit and falsehood or other fraudulent means, to defraud any person, ascertained or unascertained, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretence, as hereinbefore defined, shall be punished with imprisonment, with or without hard labour, for a term which may extend to two years, or to fine, or to both; and whoever after a previous conviction for any offence involving dishonesty, commits an offence under this section, may be sentenced to a term of imprisonment, with or without hard labour, which may extend to five years, or fine, or both.

Conspiracy to defraud.

*Unlawful Gaming and Betting.*

208. Whoever wins or endeavours to win from any other person to himself or to any other any money or valuable thing by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other games, or in bearing a part in the stakes, wages, or adventures, or in betting on the size or hands of the players, or in wagering on the event of any sport, pastime, or exercise, shall be punished with imprisonment, with or without hard labour, for a term which may extend to six months, or fine or both. The offence is complete although the thing won has not been paid or delivered.

Unlawful gaming and betting.

*Criminal Breach of Trust.*

209. Whoever being in any manner entrusted with property or with dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person to do so, shall be guilty of a criminal breach of trust, and upon conviction shall be punished with imprisonment for a term which may extend to three years, or with fine, or both.

Criminal breach of trust.

No. 21—1896.

Fraudulent dispo-  
sition of property.*Fraudulent Disposition of Property.*

210. Whoever dishonestly or fraudulently removes, converts, or delivers to any person, or causes to be transferred to any person without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent the distribution of that property according to law, or among his creditors or the creditors of any other person, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

## CHAPTER XIV.

## ROBBERY AND EXTORTION.

*Definition of Robbery, and its Punishment.*Definition of Rob-  
bery and its punish-  
ment.

211. Robbery is theft accompanied with actual violence or threats of violence to any person or property, intentionally used to extort the property stolen, or to prevent or overcome resistance to its being stolen, and shall be punished with imprisonment with or without hard labour for a term which may extend to seven years, or flogging or whipping, or any two of these punishments.

212. Everyone who assaults any person with intent to rob him shall be punished as in the last section provided.

213. Whoever with menaces demands from any person, either for himself or for any other person, anything capable of being stolen with intent to steal it, shall be punished with imprisonment, with or without hard labour, for a term which may extend to two years or with fine or both.

214. Whoever with intent to extort or gain anything from any person: (a) accuses or threatens to accuse either that person or any other person, whether the person accused or threatened with accusation is guilty or not, of any offence punishable by law; or (b) threatens that any person shall be so accused by any other person; (c) or without lawful excuse sends, delivers, utters, or directly or indirectly causes to be received by any person any document containing any such accusation or threat as aforesaid, knowing the contents thereof; (d) or by any of the means aforesaid, compels or attempts to compel any person to execute, make, accept, endorse, alter, or destroy the whole or any part of any valuable security, shall be punished with imprisonment with or without hard labour, for a term that may extend to two years, or with fine, or with both such punishments.

*Housebreaking.*

Housebreaking.

215. Whoever breaks and enters a building with intent to commit any offence therein, or breaks out of such building either after committing such offence therein, or after having entered it to

commit an offence, shall be punished with imprisonment, with or without hard labour, for a term which may extend to five years, or fine, or both.

No. 21—1886.

*Receiving Property stolen or dishonestly obtained.*

216. Whoever receives anything obtained by any offence punishable under any law in force for the time being, knowing that thing to have been stolen or dishonestly obtained, or who receives in these territories anything obtained elsewhere than in these territories by any act which if done in these territories would have been an offence punishable under this or any other law in force for the time being, knowing such things to have been stolen or dishonestly obtained, shall be punished for a first offence with imprisonment, with or without hard labour, for a term which may extend to three years, or fine, or both; and after a previous conviction of any offence involving dishonesty, shall be punished with imprisonment, with or without hard labour, for a term which may extend to five years, or fine, or both.

Receiving property stolen or dishonestly obtained.

*When receiving is complete.*

217. The act of receiving anything stolen or unlawfully obtained is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, possession of or control over such thing, or aids in concealing or disposing of it.

When receiving is complete.

*Corruptly taking Reward.*

218. Whoever corruptly takes reward, or bargains for any reward, directly or indirectly, on consideration that he will help any person to recover anything obtained by any offence punishable under this or any other law in force, shall, unless he shall have used all due diligence to cause the offender to be brought to trial for the same, be punished with imprisonment, with or without hard labour, for a term which may extend to three years, or fine, or both.

Corruptly taking reward.

## CHAPTER XV.

### FORGERY AND PERSONATION.

*Definition of Document.*

219. A document is any substance on which is expressed and described by means of letters, figures, or marks, any matter which is intended to be or may be used in a Court of Justice, or otherwise, as evidence of such matter.

Definition of document.

*False Document defined.*

220. A false document means

(a) A document, the whole or some material part of which purports to be made by or on behalf of any person who

False document defined.

No. 24—1886.

did not make or authorize the making thereof; or which, though made by or by the authority of the person who purports to make it, is falsely dated as to time or place of making, where either is material; or

- (b) A document which is made in the name of an existing person, either by that person or by his authority, with a fraudulent intent that the document should pass as being made by some person, real or fictitious, other than the person who makes or authorizes it.

It is not necessary that the fraudulent intention should appear on the face of the document, but it may be proved by external evidence.

*Forgery defined.*

Forgery defined.

221. Forgery is the making of a false document, knowing it to be false, with the intention that it shall in any way be used or acted upon as genuine whether within Her Majesty's dominions or not. Making a false document includes altering a genuine document in any material part, and adding to it any false date, attestation, or other thing which is material, or making any material alteration in it either by erasure, obliteration, removal, or otherwise.

*Forgery when complete.*

Forgery when complete.

222. A forgery is complete as soon as the document is made, with such knowledge and intent as aforesaid, though the offender may not have intended that any particular person should use or act upon it as genuine, or be induced by the belief that it is genuine to do or refrain from doing anything. Forgery is complete although the false document may be incomplete, or may not purport to be such a document as would be binding in law, if it be so made and is such as to indicate that it was intended to be acted on as genuine.

*Punishment for Forgery.*

Punishment for forgery.

223. Whoever is convicted of the crime of forgery shall be punished with imprisonment, with or without hard labour, for a term which may extend to seven years, or fine, or both.

*Sending False Telegram.*

Sending false telegram.

224. Whoever shall without lawful authority or excuse (the proof whereof shall be upon the person accused) cause or procure any telegram to be sent or delivered as being sent by the authority of any person, knowing that it is not sent by such authority, with the intent that such telegram should be acted on as being sent by that person's authority, shall be punished with imprisonment, with or without hard labour, for a term which may extend to six months, or fine, or both.

*Procuring Execution of Document by False Evidence.*

No 24—1896.

225. Whoever, with intention to defraud, procures the execution of any document by any person by falsely pretending that the contents thereof are different from what they really are, shall be punished with imprisonment, with or without hard labour, for a term which may extend to two years, or fine, or both.

Procuring execution of document by false evidence.

*Using Forged Documents.*

226. Whoever, knowing a document to be forged, fraudulently uses or acts upon it or causes or attempts to cause any person to use or act upon it as if it were genuine, shall, upon conviction, be liable to the same punishment as if he had forged that document. It is immaterial whether the document was forged in these territories or elsewhere.

Using forged documents.

*Personation.*

227. Whoever falsely and deceitfully personates any one, with intent fraudulently to obtain any benefit to himself or any other person, shall be imprisoned, with or without hard labour, for a term which may extend to two years, or fine, or both.

Personation.

## CHAPTER XVI.

## COINING.

228. Coin is metal used for the time being as money, and stamped and issued by authority of some State or Sovereign Power in order to be so used. Coin stamped and issued by authority of the Queen or any Government in the Queen's dominions, is the Queen's coin.

Coining.

229. Whoever counterfeits or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment, with or without hard labour, for a term which may extend to ten years, or fine, or both.

230. Whoever

- (a) Makes or begins to make any counterfeit gold, silver, or copper coin; or
- (b) Gilds or silvers any counterfeit coin; or
- (c) Gilds, silvers, files, or alters any silver or copper coin, with intent to make it resemble or pass for gold or silver coin; or imports, receives, or has in his possession, any counterfeit gold, silver or copper coin, knowing such coin to be counterfeit, and with intent to utter it, or whoever utters any counterfeit coin, knowing it to be counterfeit, or has in his possession any stamps, dies or other instruments generally used for the purpose of counterfeiting coin.

No. 24—1886.

(d) With intent to defraud, utters pieces of gold, silver, or copper as Queen's coins, which are coins not Queen's coin, or any medal or piece of metal, or mixed metal being of less value than the Queen's coin, as and for which it is uttered,  
shall be punished with imprisonment, with or without hard labour, for a term which may extend to ten years, or fine, or both.

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CHAPTER XVII.

OFFENCES RELATING TO WEIGHTS AND MEASURES.

*Standard Weights and Measures.*

Standard weights  
and measures.

231. The standard weights and measures required by law to be used in the Colony of the Cape of Good Hope, as provided for by Act No. 11 of 1858, shall be the standard weights and measures to be used in the territories to which this Code applies, and all the provisions of that Act as well as of Act No. 15 of 1876 shall be of force and effect in the said territories.

*Fraudulent use of False Instruments for Weighing.*

Fraudulent use of  
false instruments for  
weighing.

232. Whoever fraudulently uses any instrument for weighing which he knows to be false, shall be punished with imprisonment, with or without hard labour, for a term which may extend to one year or with fine, or both.

*Fraudulent use of False Weight or Measure.*

Fraudulent use of  
false weight or mea-  
sure.

233. Whoever fraudulently uses any false weight, or measures of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment, with or without hard labour, for a term which may extend to one year or with fine, or both.

*Being in possession of False Weights or Measures.*

Being in possession  
of false weights or  
measures.

234. Whoever is in possession of any instrument for weighing, or of any weight or of any measure of length or capacity, which he knows to be false, and intending that the same may be fraudulently used, shall be punished with imprisonment, with or without hard labour, for a term which may extend to one year, or with fine, or both.

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CHAPTER XVIII.

MISCHIEF AND ARSON.

*Mischief.*

Mischief.

235. Every one who causes any event by an act which he knew would probably cause it, being reckless whether such event happened or not, shall be deemed to cause it wilfully for the purposes of this

part of this Code. Nothing shall be an offence under any provision contained in this part, unless it is done without legal justification or excuse, and without colour of right: Provided that where the offence consists in an injury to anything in which the offender has an interest, the existence of such interest, if partial, shall not prevent his act being an offence, if done with an intention to defraud.

No. 24—1886.

*Arson, and Attempted Arson.*

236. Whoever wilfully sets fire to any building whatever, or to any erection or structure whatever fixed to the soil, whether such building, erection or structure is completed or not, or to any stock of vegetable produce, or of mineral or vegetable fuel, or to any mine, or to any ship or vessel, or to any crop, whether standing or cut down, shall be guilty of arson, and may be punished with imprisonment, with or without hard labour, for a term which may extend to fourteen years, or with or without flogging or whipping, or fine, or any two or more of such punishments.

Arson, and attempted Arson.

237. Whoever wilfully attempts to set fire to anything mentioned in the last preceding section, shall be punished with imprisonment, with or without hard labour, for a term which may extend to seven years, and with or without fine, or both.

*Damage by Explosive Substances.*

238. Whoever wilfully places or throws any gunpowder or other explosive substance in, into, upon, under, against, or near any building, ship, road, or public place, or thoroughfare, so as to endanger person or property, shall be punished as provided for the crime of arson.

Damage by Explosive Substances.

*Damage to Public Works.*

239. Whoever wilfully breaks down, cuts down, or otherwise damages or destroys any public works, shall be punished with imprisonment, with or without hard labour, for a period which may extend to three years, or fine, or both.

Damage to Public Works.

*Unlawful Killing of Animals, &c.*

240. Whoever unlawfully and wilfully kills, poisons, or wounds, any horse, ass, mule, horned cattle, sheep, ostrich, goat, or other domesticated animal, shall be punished with fine, and in default of payment, with imprisonment, with or without hard labour, for a period which may extend to one year.

Unlawfully killing of animals, &amp;c.

*Damage to Telegraph.*

241. Whoever wilfully injures or removes anything whatever forming part of or used in or about any electric or magnetic telegraph or in the working thereof, or prevents or obstructs in any manner whatever the sending, conveyance, or delivery by any such telegraph of any message or communication, shall be punished with imprisonment, with or without hard labour, for a period which may extend to three years, or fine, or both.

Damage to Telegraph.

No. 21—1886.

*Damage to Tolls.*

Damage to Tolls.

242. Whoever unlawfully and wilfully throws down, levels, or otherwise destroys, in whole or in part, any toll-gate, or any toll-bar or chain, or fence belonging thereto, set up to prevent passengers from passing by without paying toll, directed by law, shall be punished with fine, and in default of payment with imprisonment, with or without hard labour, for a term which may extend to six months.

*Other Damage.*

Other damage.

243. Whoever wilfully commits upon any property whatever, any wilful damage, or injury, not otherwise provided for, shall be punished with fine, and in default of payment with imprisonment with or without hard labour, for a term which may extend to three months.

## TITLE VI.

## CHAPTER XIX.

## THREATS, CONSPIRACY, ATTEMPTS, ACCESSORIES, &amp;c.

Threats, Con-  
spiracy, Attempts,  
Accessories, &c.

244. Whoever with intent to intimidate or annoy any person, breaks or injures any building or portion thereof, or by the discharge of firearms or otherwise alarms or attempts to alarm any person in any dwelling, shall be punished with imprisonment, with or without hard labour, for a term which may extend to six months, or with fine or both.

Conspiring to pre-  
vent levying of or  
collection of taxes.

245. Whoever conspires with any other person by force or intimidation to prevent the levying or collection of any taxes, authorized by law, shall be liable to imprisonment, with or without hard labour, for a term which may extend to one year, or fine, or both.

Inciting or at-  
tempting to commit  
offences.

246. Whoever attempts in any case, not hereinbefore by this Code provided, to commit any offence, or who incites or attempts to incite any one to commit an offence punishable by this Code, shall be liable to imprisonment for a term not exceeding one-half of the longest term, to which a person committing the offence attempted to be committed, or incited to, may be sentenced under this Code: Provided that the power to fine or in default of payment to imprison, shall exist in all such cases.

Punishment for  
accessories.

247. Whoever, in any case where no express provision is made for the punishment of an accessory, is an accessory after the fact, to any offence punishable under this Code, he shall be liable to imprisonment for a term not exceeding half of the longest term for which the offence to which he is accessory is punishable under this Code: Provided that the power to fine, or in default of payment to imprison, shall exist in all such cases.

## TITLE VII.

No. 24-1886.

## CHAPTER XX.

## JURISDICTION AND PROCEDURE.

*Courts of Resident Magistrates.*

248. The Courts of Resident Magistrates already established in the Transkeian Territories shall be until otherwise provided Courts of Resident Magistrates, and it shall be lawful for the Governor, by any proclamation to be by him from time to time issued for that purpose, to erect, constitute, and establish Courts of Resident Magistrates within the Transkeian Territories, to be held for and within such districts respectively as the said Governor shall think fit to create, which Courts shall be holden before such persons as shall respectively be appointed to be Resident Magistrates of such districts.

Courts of Resident Magistrates.

*Trial by Resident Magistrates.*

249. Whenever in any of the cases in which jurisdiction is hereby given to any Court of Resident Magistrate, the Magistrate shall consider that any person charged with any crime or offence, whether he has pleaded guilty to the same or not, ought to receive a more serious punishment than such Magistrate is competent to adjudge, he may, at his discretion, commit the accused person for trial before any Court having jurisdiction to impose such greater punishment, or the Special Court hereafter provided for and established.

Resident Magistrate may commit accused person for trial.

*Jurisdiction and Special Court.*

250. The Courts of Resident Magistrate shall have jurisdiction in all cases wherein a person may be accused of any crime or offence, except crimes or offences punishable under the following chapters and sections of this Code, viz. :

Jurisdiction.

- (a) Title II, Chap. V, Offences against the Public Order, sections eighty-five to ninety inclusive.
- (b) Title III, Chap. VII, Offences against the Administration of Justice, sections one hundred and three and one hundred and four.
- (c) Title V, Chap. X, Murder :

Provided, however, that no Resident Magistrate shall, in any case, have jurisdiction or authority to pass and pronounce upon any offender under this Code, any sentence greater or heavier than imprisonment; with or without hard labour, for any period not exceeding one year, or imprisonment with spare diet and with or without hard labour for any period not exceeding three months, or corporal punishment in any number of lashes not exceeding twenty-five: Provided, also, that no offender

No. 24—1886.

sentenced under this Code to imprisonment with hard labour for any period exceeding three months shall be sentenced to spare diet, except for offences against the discipline of the gaol or other place at which he may be lawfully confined or employed: Provided, further, that in regard to the infliction of spare diet under this Code the Courts of Resident Magistrates shall in their sentences observe and conform to such regulations and restrictions as shall from time to time be deemed necessary to prevent injurious consequences and be by the Governor prescribed for the guidance of such Court, and such Courts shall in their sentences fix, in accordance with such regulations and restrictions, the particular days or times during which the offender shall be subject to spare diet.

*Trial by Special Court.*

Trial by Special Court.

251. Unless and until provision shall be made for the establishment in the said territories of a superior Court of Record the offences excepted in the last section and any offences under this Code the trial of which shall be remitted thereto, shall be tried by a Special Court consisting of the Chief Magistrate and two Resident Magistrates, having jurisdiction within his Chief Magistracy, who shall from time to time as occasion shall require be thereto summoned by such Chief Magistrate, and the judgment and sentence of the majority of such Chief Magistrate and Resident Magistrates shall be the judgment and sentence of such Court.

Sittings of the Special Court.

252. Such Special Court shall, from time to time as often as may be necessary, be summoned by the Chief Magistrate to assemble and sit for the trial of offences under this Code, and every order convening any sitting of the said Court shall specify the time and place of such sitting and the names of the Resident Magistrates who shall be thereto summoned: Provided, however, that the Chief Magistrate may, after the making thereof, alter or vary such order in respect of the time or place at which such Court shall assemble and sit, or in respect of the Resident Magistrates who shall be summoned to sit as members of such Court.

Adjournments.

253. The Special Court, when assembled, may adjourn from time to time as to it may seem fit.

Form of procedure to be same as in Resident Magistrates' Courts.

254. Until otherwise ordered by any rules to be made in pursuance of the provisions of this Code, the form and manner of procedure in the Special Court shall be according to the laws and rules for the time being regulating the practice and procedure in the Courts of Resident Magistrates in the Colony of the Cape of Good Hope.

Issuing of process.

255. The process of the said Court for compelling the appearance of any person accused to answer the charge, and of any persons as witnesses, may be signed and issued by any Magistrate by whom

the accused has been remanded or committed, or by the clerk of any such Magistrate, or by the clerk of the Chief Magistrate or of the Special Court.

256. All charges for offences cognizable by the Special Court shall, in the first instance, be brought before a Resident Magistrate having jurisdiction in the district wherein the offence has been committed, and such Magistrate shall

- 1) If the case be within his jurisdiction, either try and dispose of the same to the extent of his jurisdiction, or after preliminary examination remit it for trial to the Special Court;
- (2) If the case be not within his jurisdiction, after preliminary examination, remit it for trial to the Special Court.

257. The Governor may from time to time establish general rules and orders for regulating the practice and form of procedure in cases pending before the Special Court, in addition to or instead of the laws regulating the practice and procedure in the Courts of Resident Magistrates in the Colony of the Cape of Good Hope.

*Removal of Trial or Stay of Proceedings.*

258. Whenever any proceedings under this Code shall have been commenced in the Court of any Resident Magistrate, or shall have been remitted to the Special Court in manner provided in this Code, and it shall appear to the Attorney-General of the Cape of Good Hope, that substantial justice may be better attained by staying proceedings or removing the case for trial to the Supreme Court, the Eastern Districts Court, or any Circuit Court, it shall be lawful for him to order such stay of proceedings or such removal or both.

*Review of Sentence by Chief Magistrate.*

259. When, and as often as any Court of Resident Magistrates shall sentence any person upon conviction to be imprisoned for any period exceeding one month, or to pay any fine exceeding five pounds sterling, or to receive any number of lashes or cuts exceeding twelve, such sentence shall be subject to the review of the Chief Magistrate of that territory, in like manner as provided by section 47 of Act 20 of 1856: Provided that every record of the proceedings in such case shall be forwarded to the said Chief Magistrate, instead of to the Registrar of the Supreme Court.

*Pleadings and Proceedings.*

260. The Courts aforesaid shall be respectively Courts of Record, and the pleadings and proceedings of the said Courts in criminal cases shall be carried on, and the sentences, decrees, judgments, and orders thereof pronounced and declared in open Court and not otherwise: and the several pleadings and proceedings of the said Courts shall be in the English language, which shall be interpreted into such language as is best understood by prisoners not understanding

No. 24-1856.

Preliminary Examination to be held by Magistrate.

Governor may from time to time frame Rules regulating procedure in Courts of Resident Magistrates.

Removal of trial or stay of proceedings.

Review of sentence by Chief Magistrate.

Pleadings and proceedings.

No. 24—1886.

English; and the witnesses for and against any accused person or persons shall deliver their evidence, *viva voce*, in the presence of the prisoner, and in open Court.

*Juries.*

Juries.

261. Nothing contained in this Code shall have the effect of depriving the Governor of the power at any time to direct that within any district of the said territories, the law of the Colony of the Cape of Good Hope, relating to the qualification, summoning, and functions of persons serving upon petit juries shall be in force.

*Native Assessors.*

Native Assessors.

262. In any case in which any Resident Magistrate shall deem it desirable, he shall be at liberty to call to his assistance any such number of assessors not exceeding five, who shall be chosen by him from the principal Chiefs, Councillors, Headmen, and others, whose names shall be placed upon a list to be framed by him for that purpose, after the taking effect of this Act, and thereafter annually, to aid him in the hearing of any trial with a view to the advantages derivable from their observations, and particularly in the examination of witnesses. The opinion of such assessors shall be given separately and discussed, and if any of the assessors or the Magistrate shall desire it, the opinion of the assessors shall be recorded in writing, and form part of the proceedings to be forwarded for review; but the finding of the Court shall be vested exclusively in the Magistrate. In like manner the Special Court hereinbefore provided for shall be at liberty to call to its assistance a like number of assessors to be taken from any list framed as aforesaid within the territory within which the Chief Magistrate residing in such Court shall have jurisdiction.

*Evidence and Examination of Accused.*

Evidence and examination of accused.

263. In any proceeding under this Code the accused person and his wife, or husband, as the case may be, may, if such person thinks fit, be called, sworn, examined, and cross-examined as an ordinary witness in the case.

*Enrolment of Legal Practitioners.*

Enrolment of legal practitioners.

264. No person shall be enrolled to practise in any Court of the said territories unless such person shall be an advocate or attorney, duly admitted as such by some competent Colonial Court

*Other matters of Procedure and Process.*

Other matters of procedure and process.

265. In all other matters of procedure and process in respect of crimes and offences brought before the Courts of Resident Magistrate for trial, until otherwise ordered, the powers of Resident Magistrates, and the rules, orders, and regulations of Courts of Resident Magistrate, respectively, in the said territories shall, *mutatis mutandis*, and as far as the circumstances of the country will admit, be the same as those from time to time in existence

as to the Resident Magistrates and Courts of Resident Magistrate in the Colony of the Cape of Good Hope, under the provisions of the Ordinance No. 40 of 1828, and Act 20 of 1856, with amendments thereof.

No. 24--1886.

*Authority of Officers of the Law.*

266. Every Justice of the Peace, Field-cornet, police constable, or other officer of the law within the said territories, is empowered to exercise all and singular the powers and authorities by law conferred upon such persons within the Colony of the Cape of Good Hope.

Authority of officers of the law.

*Power to make Rules.*

267. Subject to the provisions of this Code the Governor may at any time make such rules as shall be deemed expedient and proper with respect to the qualifications, appointment, form of summoning, challenging, and service of assessors; and generally for the amendment and better regulation of any matters relating to the practice, procedure, and process in the trial of crimes and offences in the several Courts established and provided for by this Code.

Power to make rules.

*Appeals.*

268. In every case in which judgment has been given and sentence passed under the provisions of this Code it shall be lawful for the convicted person or persons to appeal therefrom to the Supreme Court, the Eastern Districts Court, or any Circuit Court having jurisdiction.

Appeals.

*Crimes and Offences not specially provided for in this Code.*

269. In case any person shall be accused of the commission within the said territories of any Act which if committed in this Colony would constitute a crime or offence, but not hereinbefore in this Code provided for as a crime or offence, such person may be tried, and if convicted, sentenced for the same by the aforesaid Resident Magistrate or the said Special Court, as the case may be, as if such crime or offence had been committed in this Colony, and the laws and punishments applicable to such case shall be those which shall, for the time being, be in force in this Colony.

Crimes and offences not specially provided for in this Code.

*Repeal of repugnant or inconsistent Laws.*

270. So much of any Ordinance, Act, Law or Proclamation having the force of law as may be repugnant to or inconsistent with this Code is hereby repealed.

Repeal of repugnant or inconsistent laws.