

Sentencing corporations: the need for reform

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INTRODUCTION

The South African legal system recognises that both natural persons and legal persons (*eg* companies) may incur criminal liability.¹ If a natural person is convicted of an offence, various sentences may be imposed, depending, primarily, on the nature of the offence committed. These sentences range from a monetary fine to the restriction of liberty. Recently, new forms of sentences have been introduced in South Africa to punish natural persons (*eg* the non-custodial sentence of correctional supervision).² However, a corporate body, although it may be prosecuted and convicted of a crime, has, to a large extent, escaped being 'punished' by society. Having 'no soul to be damned and no

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¹In South Africa, criminal liability of corporations is governed by legislation. Section 332(1) of the Criminal Procedure Act 51 of 1977 provides for a derivative model of corporate criminal liability dependent on proof of misconduct of an individual, that is, a director or servant of the corporation where such an individual acted in the exercise of his/her powers, or in the performance of his/her duties, or in furthering the interests of the corporation. The section provides as follows: 'For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law – (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and (b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body in the exercise of his powers or in the performance of his duties as such director or servant, or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have performed (and with the same intent, if any) by that corporate body, or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.' For a critical analysis of this particular construction of corporate criminal liability, see Louise Jordaan 'New perspectives on the criminal liability of corporate bodies' *Criminal Justice in a new society – essays in honour of Solly Leeman*, *Acta Juridica* (2003) 48 and Michael Kidd 'Corporate liability for environmental offences' (2003) 18 *Public Law* 1. The present article is not concerned with the question whether corporations are capable of incurring criminal liability, or with the merits of the South African model of criminal liability. It assumes that legal entities such as corporations incur criminal liability and deals solely with the sentencing of corporations after conviction.

²Correctional supervision is a form of punishment which does not remove the offender from the community. Instead, it limits the freedom of the offender by way of house arrest and requires direct and free service to the community by some form of service. Its formal introduction into South African law occurred in 1991 by enactment of the Correctional Services and Supervision Matters Amendment Act 122 of 1991. See SS Terblanche *The guide to sentencing in South Africa* (1ed 1999) 327.

body to be kicked³ corporate bodies are traditionally seen to be most appropriately punished by the fine.⁴ South African law provides that if a corporate body is convicted of an offence, a court may not impose any punishment other than a fine.⁵

Criminal fines are of course advantageous from a practical perspective (notably, ease of administration and contribution towards enforcement costs). However, the effectiveness of a fine in deterring and preventing corporate bodies from engaging in criminal activities, has lately been questioned in other jurisdictions. Sentencing objectives have been redefined in these jurisdictions in order to respond more effectively to corporate, rather than individual, criminal behaviour. Moreover, new sentencing policies have been introduced which recognise that corporate crime often finds its origin in structural malfunctioning of the corporation. In the United States and, more recently, in European jurisdictions such as France and Spain, a broad range of sentences has been introduced in an attempt to combat more effectively crime committed at the corporate level. The most innovative of these is corporate probation which is aimed, primarily at organisational reform.

This article considers whether the limited means of punishing corporate bodies in South African law (*ie* solely by means of a fine) can be justified. The strengths and weaknesses of the sentence of a fine are then considered. Sentencing options available in other jurisdictions are evaluated. The conclusion reached is that exclusive reliance on the sentence of a fine is ineffective in achieving the various goals of punishment in the corporate context. The article suggests that the adoption in South Africa of new sentencing policies is necessary to address the growing problem of corporate crime. It will be argued that a more diversified sentencing strategy should be introduced, on which will provide the judiciary with greater discretion in punishing corporate offenders.

³See John C Coffee "No soul to damn: no body to kick": an unscandalized inquiry into the problem of corporate punishment' (1981) 79 *Michigan LR* 386, quoting Edward, First Baron Thurlow 1731-1806.

⁴James Gobert 'Controlling corporate criminality: penal sanctions and beyond' (1998) 2 *Web Journal of Current Legal Issues* (obtained from the internet at: webjeli.ncl.ac.uk/1998/issue2/gob). 1 at 3 explains that at the time when sanctions against individual offenders were limited to imprisonment and capital punishment, there was no corporate analogy available, with the result that the fine became the penalty of default.

⁵Section 332(2)(c) of the Criminal Procedure Act 51 of 1977 provides: '[I]f the said person as representing the corporate body, is convicted, the court convicting him shall not impose on him in his representative capacity, any punishment, whether direct or as an alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question, and such fine shall be payable by the corporate body...'. Again, s 332(2)(11) provides that s 332(2) 'shall be additional to and not in substitution for any other law which provides for the prosecution against corporate bodies ...'. It would seem from the wording of this provision (s 332(2)(11)) that specific statutes may provide for sentencing options other than a fine.

THE EFFECTIVENESS OF FINES IN PUNISHING CORPORATE OFFENDERS

Deterrence is often cited as the primary rationale when justifying the imposition of criminal sanctions for criminal corporate activity. Generally perceived as the only 'corporate analogue'⁶ of capital punishment, the fine (and a severe one) is used to deter. The argument that the fine is an effective deterrent for corporate crime is usually explained in terms of the so-called 'economic model' of corporate behaviour.⁷ It is suggested that, unlike individual persons who often commit crime as a result of emotional stimuli or other factors such as the intake of intoxicating substances, the corporate offender is a rational actor.⁸ Driven by profit, the corporate actor plans a course of action based on the calculation of potential costs and benefits. Because the greatest threat to a corporation is loss of profitability, the fine is the most effective punishment for corporate offenders. In other words, the fine hits the corporation where it hurts most – it decreases potential profits and is, therefore, the most effective way of deterring corporate crime. Ideas such as retribution and rehabilitation, although important considerations in punishing the individual offender, are less appropriate for justifying the punishment of a corporation. The liability of the corporation is of a derivative nature, based upon the acts and culpability of its human representatives. It cannot think and is therefore incapable of a blameworthy state of mind – a vital requirement for any punishment driven by the concern for retribution. The lack of human features also leads to the conclusion that the corporation is not susceptible to rehabilitation.⁹

Before considering the merit of these arguments (*ie* that considerations such as retribution and rehabilitation do not really apply in the field of corporate punishment) the deterrent value of the fine must be considered. Is the fine really an effective sentence for deterring and preventing corporations from engaging in criminal conduct? Most legal writers disagree, at least as far as the *exclusive* use of the fine is concerned.¹⁰ One of the main disadvantages of exclusive

⁶Gobert n 4 above at 3.

⁷See Christopher A Wray 'Corporate probation under the new organizational sentencing guidelines' (1992) 101 *Yale LJ* 2017 at 2019–2010 and Gary Slapper and Steve Tombs *Corporate Crime* 1ed (1999) 170 and 207–208 for a discussion of this theory.

⁸See also HL Packer *The limits of the criminal sanction* (1968) 356.

⁹See Brent Fisse and John Braithwaite 'The allocation of responsibility for corporate crime: individualism, collectivism and accountability' (1988) 11 *Sidney LR* 468 for an in-depth analysis of various of these (in their view, false) premises. See also the instructive analysis of Brent Fisse 'Reconstructing corporate criminal law: deterrence, retribution, fault and sanctions' (1983) 56 *Southern California LR* 1141.

¹⁰See Steven Box *Power, crime, and mystification* (1983) 71 ('... relying on this instrument [the fine] is crude, lacks imagination and does not achieve other goals desirable in the control and regulation of corporate crime'); Note 'Structural crime and institutional rehabilitation: a new approach to corporate sentencing' (1979) 89 *Yale LJ* 353 at 354 ('... fines fail to take account of the significant novel qualities of institutional crime, thereby frustrating the goals that corporate criminal liability is intended to serve'); Fisse and Braithwaite n 7 above at 499

reliance on fines is the so-called 'deterrence trap' theory advanced by Coffee.¹¹ He explains that economists generally agree that an actor who contemplates committing a crime will only be deterred if the 'expected punishment cost' of a proscribed action exceeds the expected gain. A fine should therefore be calculated in such a manner as to destroy any profit and a sum should be added based on the company's calculations that its offence will be detected and that a successful prosecution will follow. For example, if the expected profit that would be generated by the crime is R1 million and the risk of apprehension and successful prosecution is only 25%, the penalty would have to be raised to R4 million in order to make the expected punishment cost equal the expected gain.

However, if an appropriate fine is arrived at in terms of these criteria, it may frequently exceed the corporation's resources and drive it out of business.¹² This is what Coffee calls the 'deterrence trap' – a fine which is beyond the offender's ability to pay cannot achieve deterrence.¹³

The imposition of a severe fine may cripple small companies. But what is the potential deterrent value of a severe fine imposed on a large, successful company? It is an uncontested fact that it is the shareholders, employees and consumers who generally bear the burden of a fine imposed on a large corporate entity. Fisse¹⁴ explains that, through reduced dividends or lower share prices, the impact of fines are felt by shareholders rather than managers – and it is the

([t]he individualist belief that it is impossible to punish corporations effectively rests on the ground that corporations can be punished only by means of a fine or monetary penalty ... it seems short-sighted to suppose that more suitable forms of sanction cannot be devised'); Coffee n 3 above at 388 ('... fines imposed on convicted corporations have historically been insignificant'); SA Salzburg 'The control of criminal conduct in organisations' (1991) 71 *Boston University LR* 421 at 430 ('[f]ines imposed on corporations will not always ... have a deterrent impact on the actual organizational members who committed criminal acts'); Celia Wells *Corporations and criminal responsibility* 2ed (2001) 35 ('... the effectiveness of the fine as a deterrent ... is clearly open to question'); R Mays 'The criminal liability of corporations and Scots Law: learning the lessons of Anglo-American jurisprudence' (2000) 4 *Edinburgh LR* 46 at 62 ('[c]ontinued exclusive reliance on the fine as the method of sanctioning the errant corporation is conceptually flawed and unnecessarily restrictive') and Günter Heine 'Sanctions in the field of corporate criminal liability' in Albin Eser, Günter Heine and Barbara Huber (eds) *Criminal responsibility of legal and collective entities – International Colloquium Berlin* (1998) 237 at 244 ('... exclusive reliance on the fine is crude, and likely limited in its ability to achieve its goal to control and prevent corporate crime').

¹¹Note 3 above at 389.

¹²See Coffee n 3 above at 390: '... our ability to deter the corporation may be confounded by our inability to set an adequate punishment cost which does not exceed the corporation's resources'.

¹³Coffee n 3 above at 390 points that the 'deterrence trap' only comes into play in the context of corporate crime. In the case of individuals, this 'wealth ceiling' on the deterrent threat of fines causes no serious problems because the individual can still be deterred by a threat of imprisonment.

¹⁴See Brent Fisse 'Sentencing options against corporations' (1990) 1 *Criminal Law Forum* 211 at 228.

managers who are the decision makers and who exert control over corporate wrong-doing or risk taking. In a company of any size, the managers rarely hold the bulk of the corporate offender's shares.

The problem of 'spill-over' of fines to innocents such as workers and consumers is another unfortunate side-effect of fines.¹⁵ Employees' wages or jobs may be detrimentally affected and the consumer may be prejudiced by increased prices. Jefferson points out that the efficacy of fines is particularly problematic when a company has a monopoly, since it can pass on the whole of the fine to its customers without suffering any loss itself. In such instances, there may be a complete spill-over onto consumers.¹⁶ It may be argued, on the other hand, that spill-over is an inevitable consequence of punishment, also in the context of individual offenders. A fine or a sentence of imprisonment imposed on an individual offender also imposes financial and other burdens on his or her family and dependants. However, the valid point is made that, in the case of corporate offenders, there can be 'all spill-over [on innocents] and no punishment [of the corporate wrongdoer]'.¹⁷

It seems that exclusive reliance on the fine as the way to punish the corporate wrongdoer operates unjustly between small and large companies.¹⁸ The small company may be put out of business, while the large company is likely to absorb monetary sanctions and pass it on to others, be they consumers or customers.¹⁹ Furthermore, in the context of culpable homicide, it is extremely disturbing that the fine can be perceived as the cost for causing death.²⁰ In the case of individual offenders, monetary redress is often viewed as an inappropriate response to serious crime involving bodily harm. The corporate offender, although it may be stigmatised by a conviction, can always 'buy its way out', even where loss of life has occurred as a result of negligence in the

¹⁵Michael Jefferson 'Corporate criminal liability: the problem of sanctions' (2001) 65 *Journal of Criminal Law* 235 at 238–39.

¹⁶Note 15 at 239.

¹⁷See Gobert n 4 above at 5: 'In the **non-corporate context**, there are, inevitably, secondary consequences when a convicted offender is sent to prison. The family of the offender is likely to suffer psychologically and economically. Although these repercussions may be burdensome for family members who have themselves committed no crime, the spill-over is not part of a formal state policy but more of an incidental corollary to the punishment of the offender. In the **corporate context**, the danger is that there is all spill-over and no punishment'.

¹⁸See Louise Dunford and Ann Ridley 'No soul to be damned, no body to be kicked' [1]: responsibility, blame and corporate punishment' (1996) 24 *International Journal of the Sociology of Law* 1 at 11–12.

¹⁹Dunford and Ridley n 18 above at 12.

²⁰Fisse n 14 above at 220. See also Lawrence Friedman 'In defence of corporate criminal liability' (2000) 23 *Harvard Journal of Law and Public Policy* 833 at 858 who points out that fines may be perceived by corporation as well as the community as a cost to doing business and Gary Slapper 'Corporate punishment' (1994) 144 *New Law Journal* 29 at 29 adding that 'if caught, paying the fine will be seen by the offender simply as a form of taxation on crime'.

corporate environment. This state of affairs encourages a perception that corporate offences are not truly reprehensible and, where loss of life occurred, that it was an inadvertent 'accident' rather than a crime.²¹

A further and very significant criticism of the fine is that it provides no guarantee that disciplinary reform will be undertaken in the organisation. The managers, who are mainly interested in short-term profit-making, may respond by treating the fine as a mere business loss to be passed onto shareholders and consumers. Of course, managers may be brought to account by the shareholders and even replaced, but the fact remains that the company is not *compelled* to revise its defective organisational controls.²²

NEW SENTENCING STRATEGIES

As corporate crime became more frequent and the shortcomings of traditional fines became more and more apparent, an array of new sentencing options was proposed elsewhere. These include financial disincentives other than the traditional fine, remedial sanctions such as restitution and community service and preventive sanctions aimed at restraining entrepreneurial activity or achieving institutional reform (*eg* corporate probation). These new sentencing strategies are discussed in more detail below.

Alternative financial sanctions

In an attempt to overcome the problem of overspill, Coffee²³ proposes that when severe fines need to be imposed on corporations, they should be imposed not in cash, but in corporation's equity securities. This means that a so-called 'equity fine' should be imposed on a company in terms of which the offender company is ordered to issue new shares to a state victim compensation fund. Because the

²¹Wells n 10 above at 11 explains the perception that death caused in the corporate environment amounts to mere 'accidents': 'The assumptions we make about the role of criminal law are connected with our understanding of the world; an understanding increasingly mediated by technological knowledge and risk evaluations. The social construction of behaviour and events results from a complex interaction between a number of factors, including cultural predispositions, media representations, and legal rules, decisions, and pronouncements. Through the use of language different messages and meanings are communicated. "Mugging", ... "shoplifting" ... and "vandalism" are examples of the many colloquial terms in use for conveying the social meanings of behaviour; each has an equivalent legal term and definition. The social vocabulary for corporate harms is less well-developed. The word "accident" frequently appears: "accidents" at work; road "accidents". The legal impediments to prosecutions for manslaughter following negligent workplace deaths or other negligent deaths caused by corporate activity are reinforced by such construction. If the deaths are called "accidents" then they are less likely to be seen as potentially unlawful homicides'. As submitted above, the imposition of fines for crimes such as culpable homicide contributes to this public perception.

²²See Fisse n 14 above at 225.

²³Note 3 at 413. The shares should have an expected market value equal to the cash fine necessary to deter the offender.

shareholder wealth is diluted, the equity fine, arguably, encourages owners of companies (the shareholders) to exercise control over management. Moreover, employees and consumers are not punished in the process because no money is taken from the corporation's liquid assets. The punishment of an equity fine has the potential to be 'fine-tuned' in various ways, that is by legislative designation of the appropriate beneficiaries of the shares created (*eg* in the context of environmental offences or consumer-protection offences).²⁴ In jurisdictions that recognise class action, the equity fine has the added benefit that it may be a valuable way of effecting victim compensation.

Because managers and company directors are usually also stockholders (or have stock options), the idea here is that they will suffer personally as a result of the dilution of their own shareholdings. Equity fines, therefore, may be more effective in deterring executive officers from engaging in criminal activity. Moreover, faced with severe equity fines, other shareholders may be prompted to insist upon internal disciplinary action by management.²⁵ But still there is still no guarantee that the procedures or policies that encourage criminal conduct will be corrected by the introduction of the equity fine.²⁶

A monetary penalty that has become popular in recent years is the confiscation of assets that represent the proceeds of the crime committed by a person involved in criminal activities.²⁷ Although this remedy was originally limited to drug offences or offences related to organised crime, it has now been drastically expanded to cover other, if not all, types of offences. A conviction-based confiscation procedure is available against persons (individuals as well as corporate bodies) also in South Africa also.²⁸ Although the title of the relevant legislation is The Prevention of Organised Crime Act and acts relating to organised crime (*eg*, money laundering, racketeering and gang-related activities are criminalised in terms of this Act) the Supreme Court of Appeal held that 'the statute is designed to reach far beyond organised crime, money laundering and

²⁴See Fisse n 14 above at 230.

²⁵*Ibid.*

²⁶Fisse n 14 above at 232. *Cf* the views of Dunford and Ridley n 18 above at 12 who raise concern over the fact that shareholders are punished by equity fines although they might not have participated directly in the criminal conduct.

²⁷Guy Stessens *Money laundering – a new international law enforcement model* (2000) 3–4 explains that in the past, most criminal justice systems allowed offenders to enjoy the fruits of their crimes. The position changed in the post-Second World War era when legislators increasingly criminalised acts which often did not cause any direct harm to an identifiable victim (*eg*, commercial, fiscal or environmental offences). Given the absence of identifiable victims, the only legal instrument which could ensure that offenders were deprived of their illegal profits was the confiscations of the proceeds of crime.

²⁸See ch 5 s 18 of the Prevention of Organised Crime Act 121 of 1998.

criminal gang activities' and that it applies also to 'cases of individual wrongdoing'.²⁹

The proceeds of property confiscated in terms of this legislation are paid into a state fund called the Criminal Assets Recovery Accounts. These assets can be utilised to provide financial assistance to law enforcement agencies in the combating of crime and also to provide victims of crime with financial assistance.³⁰ South African courts have labelled the proceedings as civil and not as criminal in nature.³¹ Thus, although it follows upon a conviction and forms part of the sentencing stage of proceedings, this sanction is not viewed as a punishment.³²

Be that as it may, in the United States penal sanctions against corporations are taken one step further by providing for a kind of 'corporate death penalty' against criminal-purpose organisations, which means that a fine may be imposed sufficient to divest the organisation of all its assets.³³

Remedial sanctions

The growing concern for victims of crime and the idea of restorative justice have given rise to the imposition of remedial sentences such as restitution and community service. As long ago as 1979, it was suggested that restitution orders can be imposed more successfully against corporate offenders than individuals, because large corporations are in a much better financial position to pay significant amounts of restitution to victims.³⁴ Moreover, restitution orders

²⁹See *NDPP v Seevnyan* 2004 2 SACR 208 at 239 (SCA).

³⁰Sections 68 and 69 of the Prevention of Organised Crime Act n 28.

³¹In *NDPP v Philips* 2001 4 SA 60 (W) the court held that a confiscation order is not 'punishment'. See also *NDPP v Mohamed NO* 2002 4 SA 843 (CC).

³²This approach is criticised because it shields the proceedings against constitutional challenges based on infringement of due-process rights. See Jonathan Burchell and John Milton *Principles of Criminal Law* 3ed by Jonathan Burchell (2005) at 1012 who state that the view that confiscation orders do not qualify as punishment 'is wrong or, at least, a blanket exclusion of due process rights to confiscation of assets ... [which] requires qualification'. They argue that because it has since been recognised by the Supreme Court of Appeal in *NDPP v RO Cook Properties (Pty) Ltd* 2004 2 SACR 208 (SCA) that the remedial aspects of civil forfeiture (provided for under ch 6 of the POCA) do not exclude its penal aspects, it follows that criminal forfeiture must also have such a penal element. In *Welch v UK* (1995) 20 ECHR 247 the European Court of Human Rights held that confiscation of assets could be considered as punishment at least for the purpose of determining the question of retrospective operation of legislative provisions.

³³See the Federal Sentencing Guidelines (1991) par 8 C1.1 discussed by E M Wise 'Criminal liability of corporations - USA' in Hans de Doelder and Klaus Tiedemann *Criminal Liability of Corporations - XIV International Congress of Comparative Law* (1996) 383 at 396. In federal criminal proceedings, sanctions are governed by the Sentencing Reform Act of 1984 and the guidelines for sentencing organisations issued by the US Sentencing Commission 1991.

³⁴See Note 'Structural crime and institutional rehabilitation: a new approach to corporate sentencing' n 10 at 371.

would serve the purpose of disgorging the corporate offender of its illegally obtained gain.

In United States federal law, sentencing courts are mandated to order restitution for a wide range of offences in the case of identifiable victims of corporate crime.³⁵ The purposes of restitution orders are 'to remedy harm that has already occurred and to prevent future harm'.³⁶ Compensation of victims is prioritised by requiring that if both a fine and a restitution order are imposed on a convicted offender, 'any money paid by the defendant shall first be applied to satisfy the order of restitution'.³⁷ Restitution orders can also provide for deferred payments if a convicted organisation lacks the resources to make immediate restitution.³⁸ Restitution may be imposed as a condition of probation for offences for which such an order is not authorised. This may, *inter alia*, require the organisation to remedy the harm caused by the offence and to eliminate or reduce the risk that the offence will cause future harm³⁹ *eg* product recall for a food or drug violation or a clean-up order for an environmental violation.⁴⁰ The sentencing court may also require the organisation to create a trust fund sufficient to address expected harm as a result of the offence.⁴¹ It is provided further that remedial orders be coordinated with any administrative or civil actions taken by the appropriate governmental regulatory agency.

Apart from compensation of victims, Gruner points out that restitution may also serve other important reformatory goals. Because it promises predictable costs to offenders, it 'should encourage firm managers to internalize victim losses and shape crime prevention activities in the light of those losses' and would force managers 'to defend the misconduct before shareholders who... are most likely to suffer from restitution payments'.⁴²

A sentence of community service is available in South Africa only in respect of individual offenders. In the United States federal law and in Canada it may also be imposed as a condition of probation on corporations.⁴³ To ensure that the

³⁵See 2002 Federal Sentencing Guideline Manual ch 8 (Sentencing of Organisations) par 8B1.1 (b) obtained from the Internet at www.ussc.gov/2002guid/tabconchapt8.htm. In the introduction to ch 8 it is stated that '[t]he resources expended to remedy the harm [in terms of a restitution order] should not be viewed as punishment, but rather as a means of making victims whole for the harm caused'.

³⁶See the commentary to par 8B1.1 and 2.

³⁷Par 8B1.1(c).

³⁸Par 8B1.1 (d) and (e).

³⁹See the commentary to par 8.B.1.2(a).

⁴⁰See the commentary to par 8B1.2.

⁴¹Par 8B1.2(b).

⁴²Richard S Gruner 'Beyond fines: innovative corporate sentences under federal sentencing guidelines' (1993) 71 *Washington University LQ* 261 at 269–270.

⁴³See Daniel C Préfontaine 'Effective criminal sanctions against corporate entities: Canada' in Eser et al n 10 above 277 at 282.

sentence is meaningful and serves a reparative purpose, the United States Sentencing Guidelines require that community service be 'reasonably designed to repair the harm caused by the offense'.⁴⁴ For instance, a mere donation to a charitable institution would not be an appropriate condition of probation.⁴⁵ Moreover, courts are instructed to impose this sentence only when the corporate offender possesses the knowledge, facilities, or skills that uniquely qualify it to repair the harm caused by the offence. The idea behind the sentence is essentially that it must provide a means for corrective action directly related to the offence.

Community service is an attractive sentencing option where the fine the court wants to impose exceeds the financial ability of the corporation or where an equity fine is not possible (*eg* where the company is a limited company).⁴⁶ A possible advantage of this type of sentence is that it may increase individual accountability. Fisse points out that community service involves time and effort and that it may create the awareness that corporate crime is socially unacceptable.⁴⁷ To really change attitudes in the organisation, it should also involve corporate executives and not only low-level employees. Of course, such projects necessarily involve financial costs that may be passed on to consumers, but they offer numerous advantages compared with fines, for example avoidance of the deterrence trap; the benefit that the community derives from the services performed; possible reduction of spill-over onto innocent employees and the creation of new employment opportunities.⁴⁸

Preventive sanctions

Sanctions aimed at preventing future criminal conduct range from those intended to restrain business activities to sanctions mandating institutional reform. Examples of drastic sanctions are corporate dissolution; disqualification from government contracts and restraints on certain business activities. In European jurisdictions such as Spain⁴⁹ and France⁵⁰ the closing down of the

⁴⁴See par 8B1.3 of the Sentencing Guidelines n 35.

⁴⁵Gruner n 42 above at 295 explains that the critics of this practice (community service order of a donation to charitable institutions) argue that it imposes too little hardship on firms in relation to the seriousness of their crimes, and involves arbitrary assessments of the adequacy of the contribution levels. It also ignores the institutional limitations of sentencing courts that make them poorly qualified to select among countless charities and organisations.

⁴⁶See Gobert n 4 above at 6 who points out that shares cannot be issued in limited companies (as required for the imposition of equity fines).

⁴⁷Note 14 at 247–248.

⁴⁸*Ibid.*

⁴⁹Under s 129 of the Spanish Penal Code (Ley Orgánica 10/1995, BOE no 281), the court can order that the enterprise be closed down, or its premises for a limited period of time (five years maximum). The court can also liquidate the entity or suspend its operations for a limited period of time. See Silvina Bacigalupo "'Accessory Consequences'" applicable to legal entities under the Spanish Criminal Code of 1995' in Eser *et al* n 10 above at 255. The use in the Act of the terms 'accessory consequences' has given rise to controversy regarding the nature of

convicted company and/or its subsidiaries either temporarily or permanently may be ordered. In the United States, dissolution of a convicted corporation is also possible as a consequence of conviction, where a corporation continues to exceed or abuse the authority conferred upon it.⁵¹ Permanent or temporary disqualification from carrying on specific economic activities may be ordered by criminal courts in, for example, the Netherlands⁵² France⁵³ and Spain.⁵⁴ The convicted legal entity may also be placed under judicial supervision for a period not exceeding five years.⁵⁵ In France courts may furthermore prohibit corporations from tendering for public contracts⁵⁶ and order the publication in the press of the court decision.⁵⁷

A valuable sentencing option available against organisations in United States federal law and in Canada is corporate probation. Described briefly as 'a period during which a company must satisfy certain conditions and must keep the court apprised of its compliance',⁵⁸ this sentence is not viewed as a soft option (which is often the case with individual offenders) but a potent way of achieving deterrence, internal reform and ultimate rehabilitation of corporations.⁵⁹

these measures. However, it would seem that these measures amount to punishment in the criminal-law sense of the word (s 129(3) of the Act provides that '[t]he accessory consequences established in this article shall aim to prevent criminal activity and the effects of the criminal activity from continuing'). See Bacigalupo at 256.

⁵⁰Section 131–45 of the *Nouveau Code Pénal* 1994 provides for dissolution of the legal entity where it has deviated from its object in order to commit the unlawful conduct. For a detailed discussion of the sentencing options available against corporations in France, see Leonard Orland and Charles Cachera 'Corporate crime and punishment in France: criminal responsibility of legal entities (*Personnes Morales*) under the new French Criminal Code (*Nouveau Code Pénal*)' (1993) 11 *Connecticut Journal of International Law* 130.

⁵¹Wise n 33 above at 396 explains that whether dissolution of the corporation is possible as a consequence of conviction usually turns on the law of the state of incorporation. Section 6.04 of the Model Penal Code also provides for dissolution upon a finding that the board or a high managerial agent engaged in a persistent course of criminal conduct.

⁵²Provided for in terms of the Dutch Penal Code. See Hans de Doelder 'Criminal Liability of Corporations – Netherlands' in De Doelder & Tiedemann n 33 above 289 at 306.

⁵³See articles 138–28; 131–46 and 131–34 of the *Nouveau Code Penal* 1994 discussed by Orland and Cachera n 50 above at 130–131.

⁵⁴Article 29 of the Spanish Criminal Code 1995 discussed by Bacigalupo n 49 above at 253.

⁵⁵This may be ordered by courts in France and Spain. See Orland and Cachera n 50 above and Bacigalupo n 49 above.

⁵⁶Article 131–34 of the *Nouveau Code Penal*. For a discussion of these provisions, see Orland and Cachera n 50 above at 130.

⁵⁷Article 135–35 of the *Nouveau Code Penal*. The penalty is enforced at the expense of the convicted legal entity. This sanction is also available in the Netherlands. See De Doelder n 52 above at 306.

⁵⁸See Wray n 7 above at 2017.

⁵⁹See Richard S Gruner 'To let the punishment fit the organization: sanctioning corporate offenders through corporate probation' (1988) 16 *American Journal of Criminal Law* 1 for a discussion of the development of this criminal sanction in American federal law. The sentence was first applied to a legal entity as early as 1972 in *United States v Atlantic Richfield Co* 465 F 2d 58 (7th Cir 1972). In this case a company was ordered to establish anti-oil pollution measures within 45 days failing which the court would appoint and supervise a special Probation Officer with powers of a trustee. In 1984, the US Sentencing Reform Act

The sentence may be imposed where there is a need to ensure that another sanction will be fully implemented (eg a fine) or to ensure that steps will be taken within the organisation to reduce the likelihood of future criminal conduct.⁶⁰ As indicated above,⁶¹ a sentence of corporate probation may include conditions such as restitution or community service.⁶² An organisation may also be ordered to publicise the nature of the offence, the fact of conviction, the punishment imposed and the steps that will be taken to prevent recurrence of similar offences.⁶³

The most significant provisions, however, are those that mandate the imposition of probation as an independent sentence in order to effect institutional reform. Because these provisions may be useful guidelines once reform of corporate sentencing is undertaken in South Africa, they are discussed in more detail. It is provided that a period of probation shall be ordered⁶⁴

- where an organisation having 50 or more employees does not have an effective programme to prevent and detect violations of law;
- where the organisation within five years prior to sentencing engaged in similar misconduct;
- if an individual within high-level personnel of the organisation or the unit of the organisation within which the offence was committed participated in the misconduct underlying the offence and engaged in similar misconduct in the past five years;
- if such sentence is necessary to ensure that changes are made within the organisation to reduce the likelihood of future criminal conduct.

An 'effective programme'⁶⁵ requires that the organisation exercised due diligence in seeking to prevent and detect criminal conduct by its employees. 'Due diligence'⁶⁶ requires a rigorous check list that is that

1984 specifically provided for corporate probation as an independent sentence not requiring suspension of another sentence, eg a fine. The subsequent Federal Sentencing Guidelines 1991 governs the actual imposition of sentences on organisations and include extensive provisions on organisational probation (See the Federal Sentencing Guidelines Manual n 35 above ch 8 Part D (Organizational Probation)).

⁶⁰See the introductory commentary to ch 8 of the Sentencing Guidelines Manual note 32 above. Cf also the position in Canada discussed by Préfontaine in Eser *et al* n 43 above at 280.

⁶¹See the text to notes 39 and 43 above.

⁶²See para 8D1.1(a)(1) and (2) of the Federal Sentencing Guidelines n 35 above.

⁶³See par 8D1.3(b) of the guidelines n 35 above.

⁶⁴Par D1.1(3)–6) n 35 above.

⁶⁵See the commentary to par 8A1.2 n 35 above.

⁶⁶*Ibid.*

- the established compliance standards and procedures to be followed by its employees that are reasonably capable of reducing the prospects of crime;
- specific individuals within high-level personnel were assigned with responsibility to oversee compliance with such standards and procedures;
- due care has been exercised *not* to delegate authority to an individual who should have known had a propensity to engage in illegal activities;
- reasonable steps have been taken to achieve compliance with standards, *eg* monitoring and auditing systems to detect criminal conduct;
- channels for whistleblowers to report misconduct 'without fear of retribution'⁶⁷ were in place;
- disciplinary mechanisms against individuals responsible for offences or who failed to detect offences were used ;
- a response of 'all reasonable steps'⁶⁸ to any offences detected in order to prevent further violations of law, has been implemented.

Sentencing courts have a wide discretion to develop probative conditions matched to the corporate offenders and their specific crimes. These are, *inter alia*, that the corporation make periodic submissions to the court or a designated probation officer detailing the corporation's financial position and business operations, including an account of all revenue.⁶⁹ The court may also force the corporation to submit to regular or unannounced examinations of its books and records.⁷⁰ The guidelines provide that monitoring responsibility is delegated to probation officers or court-appointed experts paid for by the corporate probationer itself.⁷¹ Most significantly, the court may require the organisation to develop and submit a compliance programme and a schedule for its implementation.⁷² Further periodic reports may also be required concerning the programme's progress.

A sentence of probation imposed on corporations may be highly effective because corporate crime is often structural crime that is, crime that finds its origin in a structural malfunctioning of the corporation.⁷³ It has been suggested, for instance, that the corporate offender is not necessarily a rational, profit-maximising calculator but a complex entity in which subunits, auxiliary divisions and middle managers pursue their own sub-goals which do not

⁶⁷*Ibid.*

⁶⁸*Ibid.*

⁶⁹Par 8.D.1.4. This condition may be imposed to safeguard the corporation's ability to pay any deferred portion of an order of restitution, fine, or assessment.

⁷⁰*Ibid.*

⁷¹*Ibid.*

⁷²*Ibid.*

⁷³See Note 'Structural crime and institutional rehabilitation: a new approach to corporate sentencing' n 10 above at 358–359.

necessarily comply with the aims of the corporation as a whole.⁷⁴ For example, middle managers may circumvent environmental or product-safety standards in order to increase their units' productivity with a view to advancing their own careers.

Sceptics may question the implementation of a sentence of corporate probation in a jurisdiction such as South Africa where the control of serious crimes of violence (murder and rape) is, arguably, the priority. Problems which may be envisaged are, for example, lack of resources and courts' lack of technical expertise making it difficult for them to define probation conditions. However, probation imposed on corporations has many advantages over probation imposed on individual offenders. For instance, the order may be structured in a way that the burden and costs of enforcement and compliance monitoring are shifted from the state to the offender. This can be achieved by the court requiring that the corporation help investigate the offence committed, identify defective safety systems and/or crime-risk management structures and suggest the remedial and disciplinary measures that should be taken. Ultimately, monitoring of deviant corporate behaviour should be done by independent probation officers appointed by the court. There is no reason why retired people with the necessary expertise (*eg* retired auditors, financial managers and corporate attorneys) cannot perform these tasks.

CONCLUSION

The development of effective corporate criminal sanctions has been inhibited by the idea that corporations can only be punished by the sentence of a fine. In the United States and various jurisdictions in Europe, this premise, and the idea that deterrence is the only rationale for punishing offences committed by corporations, have both been challenged. This has resulted in the reconsideration and adaptation of the traditional rationales for punishing individual offenders, that is retribution, prevention and rehabilitation.⁷⁵ The

⁷⁴See the discussion of the so-called 'structural reform model' in Wray *n* above at 7 2019–2020. The model offers a different view on corporate punishment from the so-called 'economic model' of corporate behaviour. See the text at *n* 7 above for an explanation of this model.

⁷⁵An important contribution in this regard is that by Brent Fisse *n* 9 above. For instance, Fisse suggests (at 1169–1183) that the theory of retribution as applied to corporations differs from the principle of just desert applicable in individual criminal law. In his view, it is based instead on a 'justice of fairness theory' of retribution. Retributive justice as fairness requires corporations to be punished because of the *unfair advantage* that they would otherwise accumulate through corporate crime. Fisse explains this theory (at 1171) as follows: '[W]hen corporations commit offenses which go unpunished, a material unfair advantage accrues, namely, the accumulation of an excessively large pool of money, power and prestige for distribution to shareholders, personnel, consumers and other persons who will share in the allocation of corporate resources. The unfair advantage is not abstract, overindulgent corporate self-preference, but down-to-earth exploitative gain. If corporate resources are accumulated through violations of the law, then the beneficiaries of those accumulations gain

redefinition of these various rationales of punishment, as well as increasing recognition of the rights of victims of offences and the emerging idea of restorative justice have given rise to the development of new sentencing options for corporations: restitution, community service and corporate probation.

The availability of broader remedial and preventive sanctions (imposed independently or in conjunction with severe fines) and the threat of state intervention in the day-to-day running of a business have encouraged corporations in the United States to adopt law-compliance programmes.⁷⁶ The desired effect of promoting good corporate citizenship has therefore been achieved. Other spin-offs of a comprehensive sentencing regime have been an increased interest in the prosecution of corporate entities and the development of new policies by various regulatory agencies that provide companies with incentives to develop effective compliance programmes.⁷⁷

In South Africa, the conviction and sentencing of corporate bodies has been the exception rather than the rule. Prosecutors have focussed mainly on prosecuting individuals who have committed crimes in the corporate context. Fines imposed have generally been insignificant, and their deterrent value has been questioned.⁷⁸

This lack of interest can perhaps be ascribed to the archaic idea that a corporation has 'no soul to be damned and no body to be kicked'.⁷⁹ The time is ripe for the Law Commission to reconsider our substantive law on corporate criminal liability and develop new sentencing strategies that will deal with delinquent corporate behaviour. Otherwise, this country may attract a host of corporations whose activities would not be tolerated elsewhere.

them at society's expense. Thus, corporate retributivism is based on the need to avoid the injustice caused by unfair distribution of social resources to individual members of society.'

⁷⁶See Diana E Murphy 'The federal sentencing guidelines for organisations: a decade of promoting compliance and ethics' (2002) 87 *Iowa LR* 697 at 712.

⁷⁷Murphy n 76 above at 712–713.

⁷⁸See Alan Rycroft 'Corporate homicide' (2004) 17 *SACJ* 141 at 152–153 for a discussion of the insignificant fines levied in recent years for injuries and fatalities caused by the negligence of corporate employers. In light of the great number of accidents and workplace deaths in South Africa, he pleads (at 152) for a 'more vigorous intervention of the criminal law and creative sanctions'.

⁷⁹The words of Edward, First Baron Thurlow. See n 3 above.

Prostitution and the enforcement of morality

Sunette Lötter*

Introduction

It is an undeniable fact that law and morality overlap. The extent to which this should be tolerated has been debated extensively by distinguished legal philosophers. A more controversial question about the interrelation between law and morality is whether criminal law should be used to enforce a morality which reflects moral opinions concerning certain areas of social life. These areas normally include sexual behaviour, religious practices and drug use.¹ This controversial sub-question has led to an independent debate – the object of which was to find criteria that would justify the enforcement of morality by criminal law.

It could be argued that this debate has no relevance in a constitutional dispensation. However, in *S v Jordan*² the Constitutional Court came to the conclusion that ‘... although nearly all open and democratic societies condemn commercialised sex, they differ vastly in the way they regulate it. These are matters appropriately left to deliberation of the democratically elected bodies of each country’.³

In the course of this paper the enforcement of morality in a constitutional dispensation will be examined by analysing the views of the Constitutional Court on the prohibition of prostitution and the role of the legislature in dealing with social problems.

Historical perspectives on prostitution

Until 1988 South African law mirrored the ambivalent views of society on commercial sex. While prostitution, as such, did not constitute a crime, related activities did. Prostitution also did not constitute a crime in Roman and Roman Dutch law. A prostitute was branded as shameless but was never punished for plying her trade.⁴ Persons who exploited prostitutes were punished. A nurse who encouraged a young girl in her charge to become a prostitute had her mouth and throat filled with molten lead as punishment.⁵

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¹ David M Adams *Philosophical problems in the law* (2000) 194.

² 2002 6 SACR 642(CC).

³ *Id* at par 91.

⁴ P Gane (ed) *Voet J. The selective Voet; being the commentary on the pandects* (Paris ed 1829) and the supplement to that work by Johannes van der Linden, translated with explanatory notes and notes of all South African reported cases by Percival Gane (1955) Vol II 367.

⁵ *Ibid*.

The Wolfenden Committee⁶ held the view that it was not the task of criminal law to curb prostitution but rather to legislate against the external manifestations of prostitution. This view was shared by the South African legislature. The Immorality Act 23 of 1957 did not criminalise the act of prostitution but keeping a brothel,⁷ soliciting,⁸ procurement⁹ and living on the earnings of prostitution¹⁰ all constituted crimes.

The State President requested the President's Council in 1985 to advise him on the question whether the provisions of the Immorality Act 23 of 1957 were sufficient to curtail immoral acts. The Commission embraced the philosophy of the Wolfenden Committee that prostitution, as such, should not be criminalised and advised that strong action should be taken against the external manifestations of prostitution.¹¹ Their recommendations led to the promulgation of the Immorality Amendment Act 1988.¹² However, the Amendment Act of 1988 criminalised sex for reward, contrary to the recommendation of the Commission.¹³

The South African Law Commission (SALC)¹⁴ points out that the advent of democracy in 1994 appears to have led to a re-evaluation of the current approach (prohibition) to prostitution.¹⁵ A draft policy document, produced by the Gauteng Ministry of Safety and Security, recommends the decriminalisation of prostitution. Various non-governmental organisations have also come out in favour of the decriminalisation of prostitution. The current approach of prohibition was also evaluated by the Constitutional Court when the constitutionality of s 20(1)(aA) was challenged.

S v Jordan & Others 2002 (6) SA 642 (CC)

The applicants in the case were convicted in the Magistrate's Court of contravening the Sexual Offences Act 23 of 1957. Although the constitutionality of the provisions was challenged, the conviction was not resisted, as the Magistrate's Court does not have the power to declare statutes unconstitutional. The applicants appealed to the Pretoria High Court to have the provisions set aside. Spoelstra J held that s 20(1)(aA), which deals with sex for reward, was unconstitutional.¹⁶ The Constitutional Court was asked to confirm the declaration of invalidity of s 20(1)(aA) which reads as follows:

⁶Home Office, Scottish Home Department. *Wolfenden Report: Report of the Committee on Homosexual Offences and Prostitution* (1957) par 257.

⁷Section 2 of Act 23 of 1957.

⁸Section 19 of Act 23 of 1957.

⁹Section 10 of Act 23 of 1957.

¹⁰Section 20 of Act 23 of 1957.

¹¹Suid-Afrika: *Verslag van die Presidentsraad se ad hoc-Komitee oor die Ontugwet, 1957 (Wet No 23 van 1957)* PR1/1985 24–25.

¹²Act 2 of 1988.

¹³Section 20 (1) (aA) of the Sexual Offences Act 23 of 1957.

¹⁴Sexual offences: adult prostitution' *Issue Paper 19* Project 107. 12 July 2002.

¹⁵*Id* at 11.

¹⁶*S v Jordan* n 2 above.

Prostitution and the enforcement of morality

- (1) Any person who –
 (a) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; shall be guilty of an offence.

Ngcobo J, delivering the majority decision, came to the conclusion that s 20(1)(aA) was constitutional. He agreed with O'Regan and Sachs JJ's conclusion '... that the constitutional challenges based on human dignity, freedom of person, privacy and economic activity must fail. But the reasons that persuade me to conclude that the challenge based on the right to economic activity and the right to privacy must fail differ in both their scope and emphasis from those advanced in the joint judgment'.

O'Regan and Sachs JJ found s 20(1)(aA) inconsistent with the Constitution and, accordingly, invalid. However, the order was suspended for a period of 30 months. They concluded that the suspension of the order would give Parliament the opportunity to deliberate on the most effective way to deal with prostitution.

The views expressed by the Constitutional Court on the enforcement of morality are insightful. Ngcobo J remarked: 'The Legislature has the responsibility to combat social ills and where appropriate to use criminal sanctions. In doing so, it must act consistently with the Constitution.' He was of the opinion that to outlaw commercial sex is to pursue a legitimate constitutional purpose. He concluded that the courts are only concerned with the legality of legislation and reiterated that he dealt with the constitutionality of the legislation before the court, and not its desirability.¹⁷

O'Regan and Sachs JJ agreed that it is not for the court to interfere in the area of commercial sex which is the legitimate sphere of the legislature.¹⁸ Reference was made to the case of *Aldona Margorzata Jany*¹⁹ where the European Court remarked that as far as the immorality (of prostitution) was concerned, the court could not substitute its own assessment for that of the Legislature of the Member States. 'The issue is generally treated as one of governmental policy expressed through legislation rather than one of constitutional law to be determined by the courts.'²⁰

O'Regan and Sachs JJ observed that the question of commercial sex must not be looked at through the lens of certain popular conceptions of morality but through that of constitutional articulated values.²¹ They were of the opinion that a pluralist constitutional democracy may well be impartial in its dealings with people and groups but that it is not neutral in its value system. 'Our Constitution

¹⁷*Id* at par 31.

¹⁸*Id* at par 49.

¹⁹*Aldona Margorzata Jany AND Others v Staatssecretaris van Justitie* Case 268/99, 20 November 2001.

²⁰*S v Jordan* n 2 above at par 90.

²¹*Id* at par 111.

certainly does not debar the State from enforcing morality. Indeed, the Bill of Rights is nothing if not a document founded on deep civic morality.²² The limits to which the State may go to enforce morality are found in the text and spirit of the Constitution.

It is the task of the legislature to interpret the moral convictions of society in order to establish an objective value system in accordance with fundamental constitutional values.²³ This was also stated in *Prince*²⁴ where the court commented as follows:

In a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by criminal sanction. In doing so it must act consistently with the constitution, but if it does that, courts must enforce the laws whether they agree with them or not.²⁵

The opinion that it is the task of the legislature to determine public morality and not that of the Constitutional Court, has once again brought the question of enforcement of morality by criminal law to the fore.

Enforcement of morality

The criminal sanction is invoked to correct wrongs that society at large condemns as violations of moral decency.²⁶ The legitimacy of enforcing morality is normally questioned when moral opinions about areas of sexual behaviour, religious practices and drug use are enforced.²⁷

The debate on the enforcement of morality was for many years overshadowed by the jurisprudential interpretation of the Wolfenden Report by Hart and Devlin.²⁸ In 1859 Mill published *On Liberty* in which he expounded the view that the only reason for society to exercise power rightfully over any member of society against his will is to prevent harm to others.²⁹ The debate on the enforcement of morality was sparked anew when the report of the Wolfenden Committee was published in 1957 in England. The Committee investigated the legal response to prostitution and homosexuality in a legal system where Parliament was sovereign.

The notion expressed in the Report that there was a sphere of private morality which is not the law's business gave rise to a paper published by Lord Devlin

²²*Id* at par 110.

²³*Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) and the quotation by the German Federal Court as quoted by the court.

²⁴*Prince v President of the Law Society of the Cape of Good Hope* 2002 2 SA 794 (CC).

²⁵*Id* at par 108.

²⁶DAJ Richards *Sex, drugs, death and the law: an essay on human rights and overcriminalization* (1982) 15.

²⁷Adams n 1 above.

²⁸Richards n 26 above at 43.

²⁹JS Mill *On liberty* (1859) 73

on the enforcement of morality.³⁰ This paper initiated the well-published Hart-Devlin debate which echoed the earlier Mill-Stephens debate.

Devlin postulated the view that a shared morality is a condition for the existence of society.³¹ An established morality is as important to society as an established government. If a shared morality is not maintained, society will disintegrate. The content of legislation enforcing a shared morality should be determined by the man on the Clapham omnibus or the man in the jury box.³² As Richards points out, the objectivity sought by applying this method would result in the enforcement of existing custom which 'has nothing to do with the notions of moral impartiality and objectivity that are, or should be, of judicial concern in determining public morality'.³³

Hart responded to Devlin's views in an article 'The legal enforcement of morality'.³⁴ He distinguished between a critical and positive morality. Positive morality refers to the morality that exists at a given time whilst a critical morality refers to the values applied to evaluate the existing positive morality.³⁵ The fact that justification has to be tendered for the enforcement of morality indicates that *prima facie* objections exist.³⁶ Hart adopted paternalism to explain instances where conduct is punished solely for the reason that it is seen as being immoral.³⁷

The debate was joined by Dworkin who deemed it necessary to participate as a result of the Wolfenden Report, the public debate in England and a series of judgments on obscenity judgments of the Supreme Court of the United States³⁸ including *Memoirs v Massachusetts (Fanny Hill)*³⁹ and *Ginzberg v United States*.⁴⁰

Dworkin criticised Devlin's conclusion that every society has a right to preserve its own existence and is therefore entitled to use the sanction of the criminal law

³⁰This notion is severely criticised by Larry Backer. He asserts that the approach adopted by the Wolfenden Report was intended to create greater tolerance, but only succeeded in paving the way for lawmakers to condemn, through criminal law, conduct which does not suit them. He argues that this report has reserved all public space in the legal order for the dominant morality and left the 'private space' for conduct which offends dominant morality. (LC Backer 'Exposing the perversions of toleration: the decriminalisation of private sexual conduct, the Penal Code, and the oxymoron of liberal toleration' 1993 *Florida Law Review* 755 on 764.)

³¹P Devlin *The enforcement of morals* (1965) 1.

³²*Id* at 15. PR MacMillan *Censorship and public morality* (1986) points out that it may be possible for the Legislature to determine morality rationally, but not for the jury. Community standards are nowhere determined exclusively by the jury. (112).

³³Richards n 26 above at 44.

³⁴HLA Hart *Law, liberty and morality* (1963).

³⁵*Id* at 20.

³⁶*Ibid.*

³⁷*Id* at 32.

³⁸R Dworkin *Taking rights seriously* (1977) 240.

³⁹383 US 113 (1966).

⁴⁰383 US 463 (1966).

to enforce the moral conformity necessary for the existence. He concludes that Devlin believes that society is entitled to preserve itself without '... vouching for the morality that holds it together'.⁴¹ Dworkin argues that Devlin '... misunderstands what it is to disapprove on moral principle'.⁴² Moral conventional practices are more complex than Devlin understands them to be and therefore his perception of what is meant by the idea that criminal law should be derived from public morality is wrong.

Dworkin commences his argument by pointing out that the terms moral position and moral conviction function not only as terms of justification and criticism but also as description. Moral conviction is often used as justification for an act when the moral issues are vague or in dispute.⁴³ It is therefore important to give content to the term moral position. He contends that a moral position can be founded on prejudice, emotional reaction, rationalisation, parroting or moral conviction.⁴⁴ It would be difficult if not impossible to defend a moral position based on the first four reasons. A moral position founded on moral conviction can be defended, for instance when based on religious grounds. A moral position based on moral conviction should, however, not only satisfy on grounds of sincerity, but should also be consistent. A person who condemns homosexuality on religious grounds will have difficulty in convincing someone of the legitimacy of his moral position if he does not condemn fornication or adultery.⁴⁵

It is the task of the conscientious legislature to determine not only what the moral consensus of society is but also whether the consensus is based on moral conviction as opposed to prejudice, parroting, emotional reaction or rationalisation.⁴⁶

Richards argues that constitutional principles require that only those principles may be legally enforced which express the values of equal concern and respect for autonomous self-definition compatible with constitutional values. Any legally enforceable standards of conduct must rest on generally acceptable empirical standards and must not contravene the underlying values of the Constitution.⁴⁷ In terms of this argument, the content of legislation should be based on acceptable empirical standards while the legality of the legislation should be based on constitutional values.

⁴¹Devlin n 31 above at 243.

⁴²Dworkin n 38 above at 247.

⁴³*Id* at 248.

⁴⁴*Id* at 249–251.

⁴⁵*Id* at 251.

⁴⁶*Id* at 254–255.

⁴⁷Richards n 26 above at 49.

Van der Vyver's view⁴⁸ on the question whether government ought to enforce morality is based on the Cormonomic Idea. The role of the state is that of arbitrator of inter-individual conflicts in society. The promotion of moral values for the sake of morality alone does not fall within the scope of the state's functions.⁴⁹ Human behaviour is based on conviction and as morality is '... not a matter of compulsion backed by coercion', state-imposed constraint will deprive good conduct from its moral quality. If the state does intervene in prescribing immoral conduct, it would be from a position of arbitrator of social conflicts and not as custodian of morals.⁵⁰

The idea of the enforcement of morality is not reprehensible in itself. The Constitutional Court acknowledged that it is the task of the Legislature to enforce a public morality that fosters and reflects constitutional values. It was also adamant that its duty was to determine the legality of legislation and not to evaluate the content of the morality it tries to enforce. Even if the court does not agree with the morality that is being enforced, its function is restricted to determining the constitutionality of the chosen route.

It would appear that the enforcement of morality still lies in the hands of the legislature, albeit with the injunction that the enforced morality should be grounded in the text and values of the Constitution. It is submitted that the legislature should therefore have a duty to determine public consensus on public morality and to ensure that it is based on moral conviction.⁵¹ Legislation should not be founded on prejudice, emotional reaction, rationalisation or parroting but on general acceptable empirical standards. This approach would ensure that legislation would, once it had passed constitutional scrutiny, not only comply with constitutional values, but be a true reflection of public morality.

Legal models addressing prostitution

The Constitutional Court has clearly indicated that it is the duty of the legislature to enforce morality. The Court also indicated that the legislature has to choose the best approach to follow with regard to prostitution. The South African Law Commission (SALC) published an issue paper requesting the public to comment on workable legal solutions for the problems surrounding adult prostitution. Three legal options on the management of prostitution are set out in the paper.⁵² These options are criminalisation, legalisation and decriminalisation. The SALC points out that these terms have implications with regard to both legal provisions and social policies. Legalisation and

⁴⁸JD van der Vyver 'Law and morality' in Kahn (ed) *Fiat justitia/ essays in memory of Oliver Denys Schreiner* (1983) 364.

⁴⁹*Id* at 369.

⁵⁰*Ibid*.

⁵¹Dworkin n 38 above.

⁵²The response to the issue paper should be valuable in assisting the legislature in deciding which approach to follow about prostitution.

decriminalisation are problematic, as there are no official definitions of the concepts and they are very similar in meaning.⁵³

Criminalisation

Before 1988 only prostitution-related activities were criminalised, but the Immorality Amendment Act 2 of 1988 criminalised prostitution as such. A policy of total prohibition is presently followed in South Africa. Ngobo J observed that criminalisation is one of the options available to combat the social ills associated with commercialised sex. This is in keeping with the Constitution, as these measures are clearly intended to protect and improve the quality of life. It is not for the court to comment on the effectiveness of these measures.⁵⁴

O'Regan and Sachs JJ were of the opinion that it is not for the court to determine whether criminalisation leads to more crime, but that legislatures in open and democratic societies may agree or disagree as to their society's response to prostitution.⁵⁵ Societies may differ in their approach to prostitution, but the issue should be treated as one of '... governmental policy expressed through legislation rather than one of constitutional law to be determined by courts'.⁵⁶ As the issue is complex it should be left to be resolved by law-making bodies. However, at present the Government has chosen prohibition which is, despite inherent problems, a constitutionally permissible legislative choice.⁵⁷ It is clear that, although criminalisation may not be the most effective approach to prostitution, it is a constitutionally legitimate approach.

Aaron *et al* argue that the cost of the criminal sanction is high when the criminal sanction is applied to victimless crimes such as prostitution.⁵⁸ The enquiry into the cost of criminalising victimless crimes is pragmatic.⁵⁹ Criminalisation may:

- bring the law into disrepute and reduce its efficiency;
- obstruct law enforcement which can and often does result in selective law enforcement;
- result in diverting legal enforcement officers vitally needed to attack more serious crimes;
- foster criminal conduct on the part of the police (because of difficulties encountered in enforcing these laws, legal enforcement officers resort to abuse and illegal investigative methods);
- lead to corruption of law enforcement officers;
- promote a crime tariff as the person willing to run the risk of the criminal sanction imposed, becomes wealthy; and

⁵³'Sexual offences: adult prostitution' n 14 above at 186.

⁵⁴*S v Jordan* n 2 above at par 27.

⁵⁵*Id* at par 94.

⁵⁶*Id* at par 95.

⁵⁷*Id* at par 97.

⁵⁸DE Aaronson, CT Dienes & MC Musheno *Public policy and police discretion* (1984) 109.

⁵⁹*Id* at 114–116.

- promote criminality since once a person is branded a criminal, it is easy to fall back into criminality.⁶⁰

One of the serious arguments against overcriminalisation is the fact that questionable police methods are used to enforce the law. In the instance of victimless crimes, there is no complainant and seldom, if ever, witnesses. As far as commercial sex is concerned, police have to resort to entrapment. This is an investigation method which is immoral in itself. Immoral methods are thus being used to curb immoral practices!⁶¹

Decriminalisation

Decriminalisation has been defined as 'those processes by which the competence of the penal system to apply sanctions as a reaction to a certain form of conduct is withdrawn in respect of that conduct'.⁶² When conduct is decriminalised, the criminal sanction and, consequently, the penal sanction attached to the conduct is removed. This indicates that a person will not be prosecuted by the State for that conduct.

De iure decriminalisation should be distinguished from *de facto* decriminalisation. *De iure* decriminalisation is the result of formal legal action while *de facto* decriminalisation is the result of informal screening and diversionary programmes, initiated and controlled by police departments, prosecutors, courts, correctional institutions or two or more of these groups acting together.⁶³

The SALC indicates that the major implication of decriminalisation would be recognition of the prostitution industry as a legitimate form of work. Prostitution would therefore be subject to the regulatory measures applicable to any form of labour.⁶⁴ Sion is of the opinion that decriminalisation is an option whereby society accepts that prostitution cannot be solved by criminal law but seeks to protect public peace and order while simultaneously enabling the prostitute to operate in the least offensive way.⁶⁵

Legalisation

When conduct is legalised all legal sanctions are removed. Although legalisation and decriminalisation are frequently used as synonyms they are not synonymous. Grapendaal, Leeuw and Nelen⁶⁶ are of the opinion that both these concepts indicate the degree to which the criminal sanction has been removed. The central issue in both concepts is societal normalisation which consists of more than the removal of the criminal sanction. Legalisation cannot, therefore,

⁶⁰*Id* at 118–120.

⁶¹*Id* at 120.

⁶²The European Commission on Crime. Council of Europe 1980 *Report on Decriminalisation*.

⁶³Aaronson *et al* n 58 above at 153.

⁶⁴'Sexual offences: adult prostitution' n 14 above at 201.

⁶⁵AA Sion *Prostitution and the law* (1977) 52.

⁶⁶De Leuw & Marshall (eds) *Between prohibition and legislation. The Dutch experiment in drug policy* (1994).

be regarded as an indication of a higher level of acceptance.⁶⁷

The SALC describes legalisation '... as the tolerance of prostitution provided that it complies with certain narrowly defined circumscribed conditions'⁶⁸ and views it as a compromise position. The State accepts that prostitution cannot be eradicated, but decides that it would be in the best interest of all concerned to control the industry.⁶⁹

Legalisation is often associated with regulation. Regulation consists of many systems based on the same principles although they may differ fundamentally at times.⁷⁰ Legal measures applied to the regulation of prostitution include registration of prostitutes, whether compulsory or voluntary,⁷¹ zoning requirements, licensing of prostitution businesses and mandatory health testing.⁷² One of the main reasons for the failure of regulation as a policy to address prostitution is the failure to secure a complete list of all women practising prostitution. Many women practising prostitution therefore escape police administration.⁷³ It has also been argued that the prominence given to prostitution by regulation serves, psychologically, as an incitement to it.⁷⁴

All three of the approaches to prostitution have succeeded in addressing some of the problems inherent in it. However, not one of these approaches has succeeded in addressing prostitution successfully. As no approach provides a foolproof solution to the problems inherent in prostitution, the legislature will ultimately have to choose between a moral approach (prohibition or decriminalisation) or a utilitarian approach (legalisation and regulation). The responsible legislature would, as has been argued, base its decision on acceptable empirical standards based on moral conviction.

Conclusion

It is clear that a decision on matters of morality is (still) in the hands of the legislature.⁷⁵ The legislature will thus have the final responsibility in deciding the approach to be followed with respect to prostitution. As a decision on the correct approach to prostitution inevitably involves morality issues, the moral consensus will have to be assessed. The response to the issue paper distributed by the SALC should provide valuable insights into the views of society on prostitution. The option finally chosen will indicate whether the legislature can indeed be trusted to determine moral consensus and legislate accordingly.

⁶⁷*Id* at 235.

⁶⁸'Sexual offences: adult prostitution' n 14 above at 191.

⁶⁹*Id* at 92.

⁷⁰Sion n 65 above at 34.

⁷¹*Ibid*.

⁷²'Sexual offences: adult prostitution' n 14 above at 193–196.

⁷³Sion n 65 above at 36.

⁷⁴Flexner, as quoted by Sion n 65 above at 41.

⁷⁵On condition that the legislation passes constitutional scrutiny.

Die Strafvorschriften der Bundesrepublik Deutschland gegen den Nationalsozialismus

Penal codes of the Federal Republic of Germany against national socialism

*HC Friedrich-Christian Schroeder**

Abstract

In view of the fact that national socialism brought so much crime and suffering to Europe and specifically Germany, it was a matter of course that the new Federal Republic of Germany, which came about in 1949, would do everything in its power to prevent the re-emergence of national socialism.

On the other hand, the constitutional concept of national socialism stood in stark contrast against the constitutional order of the Federal Republic, as is the case in all democratic states, with the result that special legislation against national socialism, apart from the general constitutional protections, did not seem viable.

Nevertheless, there seemed to be a tendency to create ever more special regulations against national socialist leanings.

This article examines the establishment and history of these codes and problems encountered in implementing them.

Angesichts der schweren Untaten und des großen Leids, das der Nationalsozialismus über Europa und auch über Deutschland selbst gebracht hat, war es naheliegend, daß die 1949 gegründete Bundesrepublik Deutschland alles tat, um eine Wiederentstehung des Nationalsozialismus zu verhindern.

Auf der anderen Seite stand die Verfassungskonzeption des Nationalsozialismus in konträrem Gegensatz zu der Verfassungsordnung der Bundesrepublik Deutschland, wie aller demokratischen Staaten, so daß Sondervorschriften gegen den Nationalsozialismus neben dem allgemeinen Verfassungsschutz kaum erforderlich erschienen.

Dennoch entwickelte sich der Trend zur Schaffung von immer mehr Sondervorschriften gegen nationalsozialistische Bestrebungen.

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DIE ENTSTEHUNG DER VORSCHRIFTEN

Das (1.) Strafrechtsänderungsgesetz 1951

Nach der Niederlage Deutschlands 1945 und seiner Aufteilung in vier Besatzungszonen galt das deutsche Strafgesetzbuch von 1871 weiter; nur die nationalsozialistischen Änderungen und Einfügungen wurden vom Alliierten Kontrollrat aufgehoben. Aufgehoben wurden auch die alten Vorschriften über Hoch- und Landesverrat.¹ Nach ihrer Gründung erließ die Bundesrepublik Deutschland rudimentäre Vorschriften über den Schutz des Staatsgebiets und der verfassungsmäßigen Ordnung (Art. 143 Grundgesetz).

Nach einigen Anzeichen des Wiederauflebens von Rechtsradikalismus brachte die Sozialdemokratische Partei Deutschlands am 15.2.1950 den Entwurf eines „Gesetzes gegen die Feinde der Demokratie“ ein. Dieser Entwurf enthielt – neben Vorschriften gegen die gewaltsame Verfassungsänderung, gegen verfassungsfeindliche Verbindungen und gegen Terrorakte – Vorschriften gegen die Verletzung der Achtung vor Opfern der nationalsozialistischen Gewaltherrschaft und die Leugnung der Verwerflichkeit des Völkermords oder der Rassenverfolgung (§ 10).

Das (später sogenannte 1.) Strafrechtsänderungsgesetz von 1951 – die Bundesrepublik hatte das seit 1871 geltende Reichsstrafgesetzbuch, gereinigt von den durch den Nationalsozialismus eingeführten Änderungen, grundsätzlich beibehalten – beruhte auf der Konzeption, die Unabhängigkeit des Staates und wichtige Verfassungsgrundsätze nicht nur gegen Gewalt, sondern auch gegen sonstige Handlungen zu schützen (Abschnitt „Staatsgefährdung“). Unter Strafe gestellt waren das Unternehmen der Beseitigung oder Außergeltungsetzung von wichtigen Verfassungsgrundsätzen durch Mißbrauch oder Anmaßung von Hoheitsbefugnissen (§ 89), die Sabotage in einer solchen Absicht (§ 90) und der Nachrichtendienst in einer solchen Absicht (§ 92). Ebenfalls strafbar waren die Herstellung und Verbreitung von Schriften u.ä., durch deren Inhalt Bestrebungen herbeigeführt oder gefördert werden sollen, die darauf gerichtet sind, zur Unterdrückung der demokratischen Freiheit einen der Verfassungsgrundsätze zu beseitigen, außer Geltung zu setzen oder zu untergraben (§ 93). Schließlich war noch die Einwirkung auf Beamte, in der Absicht, ihre pflichtmäßige Bereitschaft zum Schutz der verfassungsmäßigen Ordnung zu untergraben, strafbar, soweit der Täter dadurch Bestrebungen diene, die gegen einen der Verfassungsgrundsätze gerichtet waren (§ 91). Geschützte Verfassungsgrundsätze waren nach § 88 Abs. 2:

- 1 das Recht des Volkes, die Staatsgewalt in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung auszuüben und die Volksvertretung in allgemeiner, unmittelbarer, freier, gleicher und geheimer Wahl zu wählen,

¹Dazu näher Schroeder *Der Schutz von Staat und Verfassung im Strafrecht* (1970), S. 176.

- 2 die Bindung der Gesetzgebung an die verfassungsgemäße Ordnung und die Bindung der vollziehenden Gewalt und der Rechtsprechung an Gesetz und Recht,
- 3 das Recht auf die verfassungsmäßige Bildung und Ausübung einer parlamentarischen Opposition,
- 4 die parlamentarische Verantwortlichkeit der Regierung,
- 5 die Unabhängigkeit der Gerichte,
- 6 der Ausschluß jeder Gewalt- und Willkürherrschaft.).

Diese Verfassungsgrundsätze waren weitgehend ein negatives Spiegelbild der nationalsozialistischen Herrschaft, allerdings auch der neu entstandenen kommunistischen Regime in der DDR und den mittel- und osteuropäischen Satellitenstaaten. Daß die Schutzrichtung gegen die kommunistische Gewaltherrschaft in der Folgezeit immer mehr in den Vordergrund trat, lag nicht an einer Verdrängung des Nationalsozialismus, sondern daran, daß in Mittelost- und Osteuropa laufend kommunistische Machtergreifungen erfolgten, während die Gefahr einer Wiederbelebung des Nationalsozialismus äußerst gering war.

Unter Strafe gestellt waren ferner die Gründung einer Vereinigung, deren Zwecke oder deren Tätigkeit sich gegen die verfassungsmäßige Ordnung oder gegen den Gedanken der Völkerverständigung richten, und die Förderung solcher Bestrebungen als Rädelsführer oder Hintermann (§ 90a).

Im Regierungsentwurf für das (Erste) Strafrechtsänderungsgesetz waren auch Vorschriften gegen die öffentliche Verwendung nationalsozialistischer Kennzeichen und gegen die Verächtlichmachung des Widerstands gegen die nationalsozialistische Gewaltherrschaft enthalten (Art. 2). Es ist bemerkenswert, daß diese Vorschriften nicht in das Strafgesetzbuch eingefügt werden sollten, da angenommen werden könne, daß sich diese zeitbedingten Strafvorschriften nicht für die Dauer als erforderlich erweisen würden.² Diese Vorschriften wurden jedoch nicht Gesetz; eine Vorschrift gegen die öffentliche Verwendung nationalsozialistischer Kennzeichen wurde erst in dem Versammlungsgesetz vom 24.7.1953 eingeführt (§ 4, mit Strafdrohung in § 28).

Das 6. Strafrechtsänderungsgesetz 1960

In der Weihnachtswahl 1959 kam es in Köln zu einer Schändung der Synagoge und des Gedenksteins der Opfer des Nationalsozialismus und bald darauf zu ähnlichen Vorkommnissen an vielen Orten des In- und Auslands.³ Diese Vorfälle lösten in mehreren europäischen Staaten Initiativen zu neuen Strafgesetzen und auch bei der Menschenrechtskommission der Vereinten Nationen einen entsprechenden Appell⁴ aus. In der Bundesrepublik Deutschland führten diese Vorkommnisse zu dem Sechsten Strafrechtsänderungsgesetz. Dieses

²Drucksachen des Deutschen Bundestages, 1. Wahlperiode, Nr. 1307, S. 50.

³S Weißbuch der Bundesregierung über die antisemitischen und nazistischen Vorfälle in der Zeit vom 25.12.1959 bis 28.1.1960.

⁴Schafheutle „Das sechste Strafrechtsänderungsgesetz“ *Juristenzeitung* 1960, S. 470ff.

überführte das Verbot der Verwendung von Kennzeichen einer ehemaligen nationalsozialistischen Organisation aus dem Versammlungsgesetz (s.o. 1) in das Strafgesetzbuch (§ 96a Abs. 1 Nr. 3). Wenn es dieses Verbot auch in den Rahmen der Verwendung von Kennzeichen von verbotenen Parteien und Vereinigungen stellte, so fand sich doch damit erstmals im deutschen Strafgesetzbuch eine Sondervorschrift gegen den Nationalsozialismus. Als Kennzeichen wurden in Abs. 2 „insbesondere Fahnen, Abzeichen, Uniformstücke, Parolen und Grußformen“ genannt. Von der Strafbarkeit ausgenommen wurde eine Verwendung im Rahmen der staatsbürgerlichen Aufklärung, der Abwehr verfassungswidriger Bestrebungen und ähnlicher Zwecke (Abs. 1 S. 2). Außerdem wurde der Angriff auf die Menschenwürde anderer durch Aufstachelung zum Haß gegen Teile der Bevölkerung, Aufforderung zu Gewalt- oder Willkürmaßnahmen gegen sie oder Beschimpfung, böswillige Verächtlichmachung oder Verleumdung unter Strafe gestellt (§ 130 StGB, neue Fassung). Die Vorschrift richtete sich vor allem gegen rassistische Angriffe, vermied jedoch eine entsprechende Formulierung, um nicht den Eindruck eines Sonderschutzes für die Juden zu erwecken.⁵ Schließlich wurde bei der Strafvorschrift gegen die Verunglimpfung des Andenkens Verstorbener das Erfordernis eines Strafantrages beseitigt, wenn der Verstorbene sein Leben als Opfer einer Gewalt- und Willkürherrschaft verloren hat und keine antragsberechtigten Angehörigen hinterlassen hat (§ 189 Abs. 3 StGB; seit 1974 § 194 Abs. 2 StGB). Diese Vorschrift berücksichtigte besonders die Tatsache, daß jüdische Familien vollständig umgebracht wurden, vermied aber ebenfalls eine Spezifizierung dieser Schutzvorrichtung.

Nach dem Zusammenbruch des Kommunismus stellte sich übrigens heraus, daß es sich bei den Schmieraktionen um eine Aktion des tschechischen Geheimdienstes zur Diskreditierung der Bundesrepublik gehandelt hatte.

Das 8. Strafrechtsänderungsgesetz 1968

Im Achten Strafrechtsänderungsgesetz von 1968 wurden die Organisationsdelikte auf das Verbotsprinzip umgestellt, d.h. die Tätigkeit für verfassungsfeindliche Vereinigungen wurde von einem vorherigen Verbot durch das Bundesverfassungsgericht oder einem sonstigen unanfechtbaren Verbot abhängig gemacht. Als „mittelbares Organisationsdelikt“ galt auch die Verbreitung verfassungsfeindlicher Schriften. Da diese nunmehr auf die Verbreitung von „Propagandamitteln“ verbotener Parteien und Vereinigungen umgestellt wurde, mußten Propagandamittel, die ihrem Inhalt nach dazu bestimmt sind, Bestrebungen einer ehemaligen nationalsozialistischen Organisation fortzusetzen, ausdrücklich genannt werden (§ 86 Abs. 1 Nr. 4, n.F.). Die schon in gleicher Weise unter Strafe gestellte Verwendung verfassungswidriger Kennzeichen (§ 96a) wurde – im wesentlichen gleichlautend – als § 86a neu formuliert.

⁵Schafheutle, aaO. S. 472.

Das 21. Strafrechtsänderungsgesetz 1985

Da sich die Einfuhr solcher Kennzeichen aus dem Ausland häufte, wurde durch das Einundzwanzigste Strafrechtsänderungsgesetz vom 13.6.1985 auch die Einfuhr, sowie auch die Herstellung und Vorrätighaltung, unter Strafe gestellt (§ 86a Abs. 1 Nr. 2 n.F.).

Inzwischen wollte man die Tatsache, daß einzelne unbelehrbare Personen die Vernichtung der Juden in Vernichtungslagern bestritten, nicht mehr hinnehmen. Diese Behauptungen gipfelten in der These, das Konzentrationslager Auschwitz mit seinen Vernichtungsaktionen sei eine Lüge. In der Gesetzgebungsdiskussion wurde diese Terminologie umgekehrt: die Leugnung der nationalsozialistischen Vernichtungsaktionen gegen die Juden wurde als „Auschwitz-Lüge“ bezeichnet.

Die Rechtsprechung behalf sich damit, daß sie die Tatsache, Opfer des nationalsozialistischen Völkermordes gewesen zu sein, als Bestandteil der Ehre der in der Bundesrepublik lebenden Juden ansah.⁶ Diese Auffassung war wenig überzeugend.⁷ Die SPD wollte das öffentliche Billigen, Leugnen oder Verharmlosen des nationalsozialistischen Völkermordes unter Strafe stellen.⁸ Die Einwände der CDU/CSU gingen vor allem dahin, daß im Zweiten Weltkrieg und vor allem nach seinem Ende auch gegen Deutsche massenhaft schreckliche Gewalttaten verübt wurden, und daß auch deren Leugnung oder Billigung unter Strafe gestellt werden sollte. In der Bundesrepublik werden gegen derartige Äußerungen alsbald die Vorwürfe der „Relativierung“ des nationalsozialistischen Völkermordes und der „Aufrechnungsmentalität“ erhoben; es müsse die „Einzigartigkeit“ des nationalsozialistischen Völkermordes hervorgehoben werden.⁹ Außerdem wurde das Tatbestandsmerkmal des „Verharmlosens“ für zu unbestimmt gehalten.¹⁰

Schließlich sah man davon ab, einen Sondertatbestand zu schaffen, und begnügte sich damit, bei der Beleidigung wie schon bisher bei der Verunglimpfung des Andenkens eines Verstorbenen (s.o. 2, allerdings nun mit Hervorhebung der nationalsozialistischen Gewaltherrschaft) das Erfordernis eines Strafantrags abzuschaffen, wenn der Verstorbene sein Leben als Opfer der nationalsozialistischen oder einer anderen Gewalt- und Willkürherrschaft verloren hat (§ 195 Abs. 1, 2). Dabei wurde allerdings noch die umständliche Regelung eingeführt, daß die Strafverfolgung zu unterbleiben hat, wenn ein Angehöriger widerspricht. Es handelt sich bei diesem Widerspruchsrecht gegen die Strafverfolgung um ein eigenartiges Gegenstück zu dem bekannten Institut des Antrags auf Strafverfolgung.

⁶Entscheidungen des Bundesgerichtshofs in Zivilsachen Bd. 75, S. 160ff.

⁷S. u.a. Herdegen, *Strafgesetzbuch – Leipziger Kommentar*, (11. Aufl. 1989) § 194, Rdn. 1.

⁸Entwurf eines 21. Strafrechtsänderungsgesetzes, Bundestags-Drucksachen 9/2090, 10/891.

⁹Wandres *Die Strafbarkeit des Auschwitz-Leugnens*, 2000, S. 112 Anm. 61.

¹⁰Bundestags-Drucksache 10/1286, S. 11f.

Direkte Strafbarkeit der Leugnung nationalsozialistischen Völkermords (1994)

Im Herbst 1991 hatte der Vorsitzende der „Nationaldemokratischen Partei Deutschlands“ Martin Deckert den Amerikaner Fred Leuchter, der behauptete, die fehlende Existenz von Gaskammern in Auschwitz wissenschaftlich nachgewiesen zu haben, zu einem Vortrag nach Deutschland eingeladen und diesen Vortrag simultan übersetzt. Seine Verurteilung zu einer Freiheitsstrafe von einem Jahr, ausgesetzt zur Bewährung, wegen Volksverhetzung, übler Nachrede, Verunglimpfung des Andenkens Verstorbener und Aufstachelung zum Rassenhaß wurde vom Bundesgerichtshof aufgehoben, da die Begründung des Urteils oberflächlich und lückenhaft sei.¹¹ Daraufhin erhob sich in den Medien ein Sturm der Empörung.¹² In das „Gesetz zur Änderung des Strafgesetzbuches, der Strafprozeßordnung und anderer Gesetze (Verbrechensbekämpfungsgesetz)“ vom 28.10.1994 wurde in letzter Minute noch eine Erweiterung des § 130 (Volksverhetzung) um folgenden Abs. 3 aufgenommen:

Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe wird bestraft, wer eine unter der Herrschaft des Nationalsozialismus begangene Handlung der in § 220a Abs. 1¹³ bezeichneten Art in einer Weise, die geeignet ist, den öffentlichen Frieden zu stören, öffentlich oder in einer Versammlung billigt, leugnet oder verharmlost.

Nunmehr war der Tatbestand der Leugnung oder Verharmlosung von Völkermordhandlungen auf den nationalsozialistischen Völkermord beschränkt.

Strafbarkeit der Rechtfertigung des Nationalsozialismus (2005)

Zur Erfüllung von Art. 6 Abs. 1 des Ersten Zusatzprotokolls zum Übereinkommen über Computerkriminalität betreffend die Kriminalisierung mittels Computersystemen begangener Handlungen rassistischer und fremdenfeindlicher Art sollte durch das Gesetz zur Änderung des Versammlungsgesetzes und des Strafgesetzbuches vom 24.3.2005 der Tatbestand des Auschwitzleugnens um die Modalität der „Rechtfertigung“ ergänzt werden. Diese Erweiterung wurde wegen neuer einschlägiger Beratungen der Europäischen Union zurückgestellt. Statt dessen wurde ein neuer Absatz 4 eingefügt: „Mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe wird bestraft, wer öffentlich oder in einer Versammlung den öffentlichen Frieden in einer die Würde der Opfer verletzenden Weise dadurch stört, daß er die nationalsozialistische Gewalt- und Willkürherrschaft billigt, verherrlicht oder rechtfertigt.“ Dabei soll es nach der Begründung des Gesetzes für das „Verherrlichen“ ausreichen, daß die nationalsozialistische Gewalt- und

¹¹Entscheidungen des Bundesgerichtshofs in Strafsachen – BGHSt -, Bd. 40, S. 97ff.

¹²Hiergegen scharf Bertram „Entrüstungstürme im Medienzeitalter der BGH und die ‚Auschwitzlüge‘“ *Neue Juristische Wochenschrift*, 1994, S. 2002ff.

¹³Strafvorschrift gegen den Völkermord, seit 26.6.2002 § 6 Völkerstrafgesetzbuch. Die umständliche Formulierung wurde gewählt, weil § 220a StGB zur Zeit der Begehung des nationalsozialistischen Völkermords noch nicht galt (Bundestags-Drucksache 12/8588, S. 8).

Willkürherrschaft in einen positiven Bewertungszusammenhang gestellt oder in der Schilderung der Unrechtshandlungen und ihrer Verantwortungsträger entsprechende positive Wertakzente gesetzt werden. Dies könne sich z.B. darin ausdrücken, daß ein Verantwortungsträger oder eine Symbolfigur des NS-Regimes angepriesen oder in besonderer Weise hervorgehoben werde.¹⁴ Die Problematik einer solchen vagen Vorschrift für die Meinungsfreiheit liegt auf der Hand.¹⁵ Man denke nur daran, daß der nationalsozialistische Rüstungsminister Albert Speer bis vor kurzem allgemein und selbst von hochrangigen Journalisten als positive Figur dargestellt und erst kürzlich durch einen Fernsehfilm als tief in Ausweisungen von Juden aus ihren Berliner Wohnungen verstrickt entlarvt wurde.

DIE RECHTSGÜTER DER TATBESTÄNDE

Verbreitung von Propagandamitteln

Das Rechtsgut dieser Vorschrift liegt angesichts der schweren Untaten des Nationalsozialismus auf der Hand: es sind die verfassungsmäßige Ordnung und in ihr eingeschlossene Demokratie und Rechtsstaatlichkeit und die Freiheit der Bevölkerung von Gewalt- und Willkürmaßnahmen.

Verwendung nationalsozialistischer Kennzeichen

Fragwürdiger ist das Rechtsgut schon bei dem Tatbestand der Verwendung nationalsozialistischer Kennzeichen. Sein Rechtsgut wurde nicht nur in der Abwehr nationalsozialistischer Bestrebungen, sondern auch in der Abwehr negativer Eindrücke im Ausland und damit des Ansehens der Bundesrepublik gesehen.¹⁶ Da die Vorschrift auch seltene, nur noch Insidern bekannte Kennzeichen erfaßt, gilt als Schutzzweck auch die Abwehr einer entsprechenden Gruppenbildung und eines Gemeinschaftsgefühls.¹⁷ Damit wird das Rechtsgut noch einmal vorverlagert: es besteht nicht mehr in der Schaffung einer verfassungsfeindlichen Gruppe, sondern in deren bloßer innerer Festigung. Nach *Fischer* spiegelt die Dämonisierung von Symbolen des Totalitarismus in absurder Weise ihre Überbewertung.¹⁸ Wichtiger erscheint das Rechtsgut der öffentlichen Scham über den Nationalsozialismus.

Die „Auschwitz-Lüge“

Vollends problematisch ist das Rechtsgut der Strafvorschrift gegen die Auschwitz-Lüge. Es handelt sich wohl um den ersten Fall, in dem eine

¹⁴Bundestags-Drucksache 15/5051, S. 11.

¹⁵Hierzu die Stellungnahmen der Sachverständigen in der öffentlichen Anhörung des Innenausschusses des Deutschen Bundestages am 7.3.2004 (Protokoll Nr. 15/56) sowie Poscher „Neue Rechtsgrundlagen gegen rechtsextremistische Versammlungen“ *Neue Juristische Wochenschrift*, 2005, S. 1316ff.

¹⁶S. z.B. BGHSt 25, 33, 130.

¹⁷BGHSt 47, 358.

¹⁸Tröndle/Fischer *Strafgesetzbuch und Nebengesetze*, (52. Aufl. 2004), § 86a Rdn. 2b.

historische Tatsache unter strafrechtlichen Schutz gestellt wurde.¹⁹ Man denkt zunächst an eine versteckte Bejahung und Billigung des nationalsozialistischen Massenmordes. Dies trifft aber nicht zu, denn dieser wird ja gerade gelehnt. Man verweist daher auf die mögliche Beeinflussung und Förderung der Bereitschaft junger Menschen zur unkritischen Akzeptierung neonazistischer Tendenzen.²⁰ Indessen wird bei Herausnahme des Völkermordes dem Nationalsozialismus ja gerade ein wesentlicher Teil seines Unrechtscharakters genommen. Man kann nicht einerseits die Konzentrationslager zum Wesensmerkmal des Nationalsozialismus erklären und andererseits die Leugnung der Konzentrationslager als Werbung für den Nationalsozialismus ansehen.²¹ Noch mehr gilt dies natürlich für den Versuch, in § 130 Abs. 4 StGB einen vorverlagerten Schutz, einen „Vorfeldschutz“ gegen Völkermordhandlungen zu sehen,²² ganz abgesehen von der extrem weiten Vorverlagerung, „Abstrahierung“ eines derartigen Rechtsgüterschutzes.

Unbestreitbar ist, daß die Leugnung eines früheren Schicksals, insbesondere einer Gewalttat, eine schwere seelische Belastung, eine Kränkung des Betroffenen darstellt. Dies zeigt sich beispielsweise auch, wenn die Polizei bei der Vernehmung eines Vergewaltigungsopfers die Vergewaltigung in Zweifel zieht.

Es erscheint aber nicht nötig, den Sinn der Vorschrift in einem Schutz der Ehre oder der Gefühle der Juden zu sehen. Vielmehr ist die Scham der Deutschen, insbesondere der jüngeren Generation, über die nationalsozialistischen Untaten so groß, daß eine der wenigen möglichen Formen der Buße in einer ständigen Erinnerung gesucht wird.

Billigung der nationalsozialistischen Gewalt- und Willkürherrschaft

Der Tatbestand bezeichnet als Rechtsgut den öffentlichen Frieden.²³ Vor diesem sehr allgemeinen und unscharfen Rechtsgut stehen aber die konkreteren der Würde der Opfer und der Billigung der nationalsozialistischen Gewalt- und Willkürherrschaft. Dem entsprechend hat der Bundesgerichtshof auch ausgeführt, daß das Billigen der nationalsozialistischen Völkermordhandlungen regelmäßig den öffentlichen Frieden gefährdet.²⁴ Ebenso hat der Gesetzgeber in

¹⁹Für die historische Wahrheit als Rechtsgut, Ostendorf „Im Streit: die strafrechtliche Verfolgung der ‚Auschwitzlüge‘“ *Neue Juristische Wochenschrift*, 1985, S. 1062ff.; Jahn *Strafrechtliche Mittel gegen Rechtsextremismus* 1998, S. 182; Ronald Dworkin *Tageszeitung* vom 17./18.6.1995, S. 13. Andere Autoren in Deutschland bezeichnen diese Auffassung als „für sich schon ‚polemisch‘“ (Frommel *Das Rechtsgut der Volksverhetzung – oder ein ‚Ablafhandel‘ in drei Akten, Zeitschrift „Kritische Justiz“* (1995) S. 402ff., 409). Vorsichtiger Wandres (Anm. 9), S. 241.

²⁰V Bubnoff, *StGB-Leipziger Kommentar* (11. Aufl. 1996) § 130 Rdn. 43.

²¹Gegen das Rechtsgut der freiheitlichen demokratischen Grundordnung aus systematischen Gründen (Erfordernis eines verfassungsgerichtlichen Verbots nach dem Grundgesetz) Stegbauer „Der Straftatbestand gegen die Auschwitzleugnung – eine Zwischenbilanz“ *Neue Zeitschrift für Strafrecht* 2000, S. 281ff., 283.

²²Wandres (Anm. 9), S. 222; Jahn (Anm. 19), S. 181.

²³So auch Bundestags-Drucksache 15/5051, S. 5.

²⁴BGHSt 47, 280.

der Begründung ausgeführt, daß das Billigen, Verherrlichen oder Rechtfertigen der die NS-Gewalt- und Willkürherrschaft kennzeichnenden Menschenrechtsverletzungen die Menschenwürde der Opfer in der Regel verletzt.²⁵ § 130 Abs. 4 StGB schützt daher – wie das Verbot der Billigung von schweren Straftaten (§ 140 StGB)²⁶ – die grundlegenden Wertauffassungen der Gemeinschaft.

PROBLEME DER ANWENDUNG DER STRAFVORSCHRIFTEN GEGEN DEN NATIONALSOZIALISMUS

Bei der Anwendung fast aller der genannten Vorschriften ergeben sich erhebliche Probleme.

- 1 Da kaum jemand offen die Bestrebungen einer ehemaligen nationalsozialistischen Organisation propagiert und die Verbreitung bloßen nationalsozialistischen Gedankenguts nicht ausreicht,²⁷ kommt § 86 Abs. 1 Nr. 4 StGB kaum zur Anwendung.
- 2 Bei § 86a (Verwenden von Kennzeichen ehemaliger nationalsozialistischer Organisationen) stellte sich zunächst das Problem der Verwendung nationalsozialistischer Kennzeichen zur Anprangerung anderer als nationalsozialistischem Denken verhaftet oder wenigstens nahestehend, insbesondere auf Plakaten und in Karikaturen. Der Bundesgerichtshof hat eine „tatbestandsmäßige Verwendung“ abgelehnt.²⁸ Im übrigen hat sich die Anwendung des Tatbestandes zu einem Räuber- und Gendarmenspiel entwickelt. Aufsässige Jugendliche verwenden immer speziellere, weniger bekannte „Kennzeichen“, z.B. Armdreiecke der Hitlerjugend und des Bundes Deutscher Mädchen für die verschiedenen „Gaue“.²⁹ Nach der Rechtsprechung des Bundesgerichtshofs soll es auf die Bekanntheit des Kennzeichens nicht ankommen.³⁰ Der Bundesgerichtshof hat dies mit folgenden drei Argumenten begründet: 1. § 86a sei ein abstraktes Gefährdungsdelikt. 2. Seine Aufgabe sei, auch die Verbreitung solcher Kennzeichen zu verhindern, die bei in- und ausländischen Beobachtern mit besonderer Sachkunde (!) den Eindruck hervorrufen könnten, in der Bundesrepublik Deutschland würden rechtsstaatswidrige Entwicklungen geduldet – hiermit wird dem Tatbestand ein völlig neues Rechtsgut beigegeben: das Ansehen der Bundesrepublik im Ausland.³¹
- 3 Schutzzweck des § 86a StGB sei auch die Unterbindung einer gruppeninternen Wirkung der Verwendung der Kennzeichen, nämlich der

²⁵Bundestags-Drucksache 15/5051, S. 5.

²⁶Schroeder *Die Straftaten gegen das Strafrecht* (1985) S. 7, Maurach/Schroeder/Maiwald, *Strafrecht. Besonderer Teil* (9. Aufl. 2005) § 102 Rdn. 2.

²⁷BGHSt 23, 64, 76.

²⁸BGHSt 25, 30, 128, 133.

²⁹Eingehende Darstellung bei Maurach/Schroeder/Maiwald *Strafrecht. Besonderer Teil, Teilband 2*, (9. Aufl. 2005) § 84 Rdn. 41.

³⁰BGHSt 47, 358.

³¹Hierzu Schroeder (Anm. 1), S. 408f.

Verfestigung gegenseitiger Bindungen Gleichgesinnter, denen der Symbolgehalt des Kennzeichens bekannt sei (hierzu o. II 2). Neuerdings werden T-Shirts mit dem Aufdruck „CONSDAPLE“ verbreitet. Dieser ist zwar sinnlos, enthält aber die Abkürzung „NSDAP“ für „Nationalsozialistische Deutsche Arbeiterpartei“.³² Die aufsässigen Jugendlichen narren die Polizei mit immer neuen geringfügigen Abwandlungen der Originalkennzeichen, insbesondere der Armdreiecke der Hitlerjugend. Aus diesem Grund hat der deutsche Gesetzgeber in dem schon erwähnten Verbrechensbekämpfungsgesetz von 1994 (s.o. I 5) die zusätzliche Alternative der Verwendung von „zum Verwechseln ähnlichen Kennzeichen“ eingefügt. Man kann sich leicht vorstellen, welche Auslegungsschwierigkeiten diese Alternative hervorruft. Für strafbar erklärt wurden der Hitlergruß unter Abspreizen von drei Fingern,³³ die Losung „Ruhm und Ehre der Waffen-SS“ wegen ihrer Ähnlichkeit zur Parole der Hitlerjugend „Blut und Ehre“.³⁴ Viele historische Symbole sind den nationalsozialistischen „zum Verwechseln ähnlich“, z.B. das Keltenkreuz³⁵ und die Odalrune, die außerdem mit dem Kopfwinkel auf Bundeswehruniformen identisch ist.³⁶

4 Da nur geistig gestörte Personen die massenhafte Tötung der Juden bestreiten können, kommt § 130 Abs. 3 StGB (s.o. I 5) nur in untypischen Randfällen zur Anwendung.

- a) Mehrfach wurden Strafverteidiger verurteilt, weil sie im Rahmen der Strafverteidigung Beweisanträge gestellt hatten, daß in Auschwitz keine Judenvernichtungen stattgefunden hätten.

Im ersten Fall hatte der Verteidiger des Vorsitzenden der „Nationaldemokratischen Partei Deutschlands“ Martin Deckert (s.o. I 5) folgenden Beweisantrag eingebracht:

„Es werden die Zeugen Bundespräsident Herzog, Bundestagspräsidentin Süßmuth, Präsidentin des Bundesverfassungsgerichts Limbach und Bundeskanzler Kohl zum Beweis der Tatsache benannt, daß es primär massive politische Interessen sind, welche dem Durchbruch der historischen Wahrheit im Zusammenhang mit dem Holocaust entgegenstehen, und zwar nicht einmal in erster Linie diejenigen der überlebenden Juden und derer Abkömmlinge oder gar des Staates Israel, sondern vor allem diejenigen unserer eigenen (deutschen) politischen Klasse, welche ihre einzigartige politische Unfähigkeit seit fast 50 Jahren

³²OLG Hamm *Neue Zeitschrift für Strafrecht, Rechtsprechungsreport* 2004, S. 12 (Strafbarkeit wegen noch fehlender Erkennbarkeit für Außenstehende abgelehnt).

³³Drucksachen des Deutschen Bundestages 12/4835, S. 23.

³⁴OLG Karlsruhe *Neue Juristische Wochenschrift* 2003, S. 1200.

³⁵Strafbarkeit daher abgelehnt vom Bundesgerichtshof, *Neue Zeitschrift für Strafrecht*, 1996, S. 81.

³⁶Strafbarkeit daher abgelehnt vom Bundesgerichtshof, *Neue Juristische Wochenschrift* 1999, S. 435f.

mit der 'Einzigartigkeit der deutschen Schuld' legitimiert und nicht in der Lage ist, zuzugeben, daß sie sich an der Nase herumführen und für dumm verkaufen läßt³⁷.

Nach der Auffassung des Bundesgerichtshofs sagt der Antrag aus, daß es nicht im geschichtlich anerkannten Umfang zu dem Massenmord an den Juden gekommen sei. Die Zahl der Opfer müsse in so erheblicher Weise nach unten korrigiert werden, daß es dem Angeklagten als angebracht erschienen sei, der Nachkriegspolitik „einzigartige Unfähigkeit“ zu bescheinigen. Dem „Durchbruch der Wahrheit“ hätten auch jüdische Interessengruppen entgegengewirkt. In der polemischen Gleichsetzung der vermeintlich „einzigartigen politischen Unfähigkeit“ deutscher Politik mit der „Einzigartigkeit der deutschen Schuld“ liege eine Verharmlosung der Verbrechen der NS-Zeit. Der Beweisantrag habe keinerlei Bezug zur Verteidigung gehabt und sei ein verteidigungsfremdes Verhalten gewesen.³⁸

- b) In Bayern wurde der Vorsitzende der Oberschlesischen Landsmannschaft zu 16.000 DM Geldstrafe verurteilt, weil er die Vertreibung der Deutschen aus den ehemaligen Ostgebieten als den „größten Holocaust aller Zeiten, der durch nichts, aber auch gar nichts an Grausamkeit zu überbieten ist“, bezeichnet hatte.³⁹

Der Vorsitzende des Landesverbands Thüringen des Bundes der Vertriebenen gab im November 2001 auf dem Verbandstag einen Rechenschaftsbericht. In einer Pressemappe enthielt der Rechenschaftsbericht folgende Passage: „Noch verhindern die Wolken einer bewußt betriebenen einseitigen Kollektivschuldzuweisung gegenüber unserer Volke den klaren Blick zur Beurteilung der Verbrechen in der jüngeren europäischen Geschichte und über die Kriegsschuld an den Kriegen des vergangenen Jahrhunderts. Dies wird sich bald verändern, da die Lügen über Katyn, über Jelowka, über die Opfer in Auschwitz und anderes nicht mehr länger zu halten sind“. Das Deckblatt des Rechenschaftsberichts enthielt den Vermerk „Sperrfrist: 9.11.2001, 9.30 Uhr. Es gilt das gesprochene Wort!“. Die Pressemappe wurde in fünf Exemplaren zur Verteilung bereitgehalten, aber nur zwei Reportern ausgehändigt. In der tatsächlichen Rede hatte der Redner die Worte „Lügen über die Opfer in Auschwitz“ in „Aussagen über die Opfer in Auschwitz“ abgeändert. Außerdem hatte er folgenden Zusatz gebracht: „In Auschwitz gab es offensichtlich keine 6 Millionen Opfer, sondern,

³⁷BGHSt 46, 36, 38.

³⁸Ähnlich BGHSt 47, 278.

³⁹Zeitung *Der Neue Tag* vom 17.07.2001 (

–Ist danach auch der o. II 3 zur Unterstützung der Strafvorschrift vorgebrachte Vergleich mit dem Zweifel an einer Vergewaltigung schon eine Verharmlosung des Holocaust!

wie ich in Polen erfahren habe, sind 930.000 nachgewiesen. Dabei geht es nicht um die Relativierung der Verbrechen, sondern um die geschichtliche Wahrheit. Sie kennen meine Einstellung, daß jedes Opfer eines Verbrechens eines zu viel ist“. Diese Worte wurden vom Bundesgerichtshof als „Verharmlosen“ des nationalsozialistischen Völkermords angesehen. Die Aussage gehe dahin, daß es nicht in dem geschichtlich anerkannten Umfang zu dem Massenmord in Auschwitz gekommen sei. Die Zahl der Opfer müsse vielmehr in so erheblicher Weise nach unten korrigiert werden, daß es in diesem Zusammenhang als angebracht erscheine, der bisherigen Geschichtsschreibung bewußt betriebene einseitige Kollektivschuldzuweisung gegenüber dem deutschen Volk und den Gebrauch von Lügen zu bescheinigen. Der Kontext der Rede zeige somit ein umfassendes Herunterspielen der Opferzahlen, nicht nur ein zahlenmäßiges Infragestellen im Randbereich der geschichtlich feststehenden Größenordnung. Die Abgabe der zwei Pressemappen sei ein „öffentliches Zugänglichmachen“; im übrigen sei hinsichtlich der fünf Mappen ein „Vorrätighalten zum Zwecke der Verbreitung“ gegeben.⁴⁰ Die erforderliche „Störung des öffentlichen Friedens“ sei gegeben, da ein Journalist den Redner in einem Bericht scharf angegriffen habe. Schließlich sei auch bedingter Vorsatz gegeben. In diesem Zusammenhang sei zu berücksichtigen, daß die Ausführungen über Katyn, Jedwabne und Auschwitz in dem Rechenschaftsbericht des Landesvorsitzenden eines Landesverbands des Bundes der Vertriebenen ersichtlich fehl am Platze gewesen seien.

- c) In einer Rede hatte der Präsident des Zentralrats der Juden in Deutschland, Spiegel, ausgeführt, seine Schwester sei im Alter von sieben Jahren „unbemerkt“ in Auschwitz vergast worden. Ein Zuhörer erklärte daraufhin, er sei selbst im Alter von 15 Jahren als Flakhelfer in der Nähe des Konzentrationslagers stationiert gewesen. Dort habe er nichts von der Vernichtung der Juden bemerkt; erst nach dem Krieg habe er von den Greueln erfahren. Diese Diskussionsäußerung wurde als Leugnung des Holocaust angezeigt und von der Staatsanwaltschaft beim Amtsgericht Düsseldorf angeklagt. Das Gericht sprach den Angeklagten zwar frei, hielt ihm aber vor, er habe „in gründlich mißglückter Ausdrucksweise völlig daneben gefaselt“.⁴¹

Diese Ausführungen zeigen, wie streng die Rechtsprechung der Bundesrepublik die genannte Vorschrift auslegt.

⁴⁰Urteil vom 22.12.2004, *Neue Juristische Wochenschrift* 2005, S. 689ff. Mit zustimmender Anmerkung Stegbauer *Zeitschrift Neue Justiz* 2005, S. 225f.

⁴¹*Frankfurter Allgemeine Zeitung* vom 13.11.2002, S. 4.

SCHLUBBEMERKUNG

Die Gefahr einer Wiederentstehung des Nationalsozialismus in Deutschland ist äußerst gering. Zwar gibt es Gruppen von Jugendlichen mit martialischem Auftritt und rechtsradikalem Gedankengut. Dabei handelt es sich jedoch um kleine Randgruppen. Außerdem umfaßt die rechtsradikale Ideologie jedenfalls nicht das schrecklichste Wesensmerkmal des Nationalsozialismus, den Völkermord. Als Rechtsgut der Vorschriften wird denn überwiegend auch der „öffentliche Frieden“ genannt. Ich selbst habe auf den Gesichtspunkt der öffentlichen Scham und Empörung hingewiesen. Es hat den Anschein, als ob die Ohnmacht, die Untaten des Nationalsozialismus rückgängig zu machen, zu einer scharfen Bekämpfung all dessen führt, was auch nur entfernt an den Nationalsozialismus erinnern könnte. Früher wurde bei abwesenden Majestätsverbrechern die Strafe in effigie, d.h. symbolisch am Bildnis des Täters, vollstreckt. Hieran fühlt man sich besonders bei der Strafverfolgung der Verwendung nationalsozialistischer Kennzeichen erinnert. Schon das Verbot im Rahmen allgemeiner Vorschriften gegen totalitäre Bestrebungen wird als Vertuschung und „Verharmlosung“ angesehen; hieraus erklärt sich der zunehmende Trend zu Sondervorschriften gegen nationalsozialistische Bestrebungen und Bekenntnisse.

Towards a regional labour standards agreement for Southern Africa: a lesson from NAFTA

Omphemetse Sibanda*

INTRODUCTION

This article proposes the possibility and desirability of the establishment of a regional labour standards (RLS) agreement for the Southern African region. In particular, it proposes that such an agreement could be established within the framework of the Southern African Development Community (SADC).¹ The proposal is based on the lessons learnt from the experiences of the North American Free Trade Agreement (NAFTA)² through its side labour agreement, the North American Agreement on Labor Cooperation (NAALC).³ The NAALC is a novel feature of NAFTA, which was adopted in September 1993, and came into force on January 1, 1994.⁴ The NAALC is a labour side agreement between Canada, Mexico and the United States of America (US).⁵ This is a unique labour regime by NAFTA members, in terms of which they seek to protect, promote and enforce basic workers' rights.

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¹The Southern African Development Community (SADC) was formed in 1992 as an integration organisation, transforming the then Southern African Development Co-ordination Council (SADCC) based on the Declaration and Treaty establishing the Southern African Development Community (SADC Treaty) signed on August 17, 1992 in Windhoek, Republic of Namibia and the Theme Document 'Towards Economic Integration'. Members of SADC include Angola; Botswana; Lesotho; Madagascar; Malawi; Mauritius; Mozambique; South Africa; Swaziland; Zambia; and Zimbabwe. Note that South Africa was not an original member of SADC, joining only in 1992. For more information on SADC see:

<http://www.itcilo.it/english/actrav/telearn/global/ilo/blok/sadec.htm> (accessed on 22/08/2005).

²North American Free Trade Agreement, US-Mexico-Canada 17 September 1993 (1993) 32 *International Legal Materials* 296. (hereafter NAFTA). For more on NAFTA see:

<http://www.itcilo.it/english/actrav/telearn/global/ilo/blok/nafta.htm> (accessed on 22/08/2005).

³North American Agreement on Labor Cooperation, US-Mexico-Canada (1993) 32 *International Legal Materials* 1499 [hereinafter NAALC]. See also:

<http://www.itcilo.it/english/actrav/telearn/global/ilo/blok/naalc.htm> (accessed on 22/08/2005).

⁴Note that similar initiatives can be found in the European Union. See E Petersmann 'Time for integrating human rights into the law of worldwide organizations - lessons from European integration law for global integration law' *Jean Monnet Working Paper* 7/01, at 10. For other approaches to transnational labour regulation see, generally K van Wezel Stone 'Labor and the global economy: four approaches to transnational labor regulation' (1995) 16 *Michigan Journal of International Law* 987.

⁵The NAALC did not come unopposed. The Mexican government strongly opposed enforcement tools that could be used to restrict trade or compromise Mexican sovereignty. See D Harold 'Observations on the implementation of the North American Agreement on Labor Cooperation: emerging issues and initial impacts on United States-Mexico labor relations' (1996) 11 *Journal of Borderland Studies* 769.

Although the results will not be instant, when they are combined with alternative measures similar to the NAFTA framework, SADC could make a real impact and achieve real success in reducing labour violations and in promoting and asserting labour standards in Southern Africa.

The discussions in this article should be considered against the backdrop of assertions that the linking of labour and trade concerns, commonly referred to as the 'social clause',⁶ in trade or economic agreements runs counter to their mainly economic objectives. The argument goes that labour and trade issues are diametrically opposed, and dealt with by two of the most recognisable international institutions, which are themselves diametrically, objectively, rationally and philosophically opposed, namely the International Labour Organization⁷ (ILO) and multilateral trade institutions such as the World Trade Organization (WTO).⁸ Interestingly, developing countries have been very much against the trade and labour link, particularly within the framework of trade agreements.⁹ Reasons cited include that such steps result into labour standards' 'race to the bottom'; protectionism and over-regulation of labour issues;¹⁰ and an intrusion in the sovereign right of nations to design their own labour environments.¹¹

SETTING THE SCENE: LABOUR RIGHTS AND STANDARDS IN SOUTHERN AFRICA

Labour rights and standards as international imperative

The global imperative is that governments and states should respect labour rights, freedoms and obligations not only as entrenched in their national

⁶The social clause calls for the linking of labour and trade issues. For more in-depth and illuminating discussions on the social clause see, generally, N Sanyal 'The social clause in trade treaties: implications for international firms' (2001) 29 *Journal of Business Ethics* 372; E Cappuyns 'Linking labor standards and trade sanctions: an analysis of their current relationship' (1998) 36 *Columbia Journal of Transnational Law* 659; L Compa & T Hinchliffe-Darricarreira 'Enforcing international labor rights through corporate codes of conduct' (1995) 33 *Columbia Journal of Transnational Law* 663.

⁷The International Labour Organization (ILO) is a specialised, independent agency of the United Nations (UN), based in Geneva, Switzerland, with 175 member countries represented by workers, employers and governments. The ILO was created in 1919 under the Treaty of Versailles as an important multilateral institution for the promotion of worker rights and freedoms, trade unions and constructive workplace relations between employers and workers. Note that the ILO became the agency of the UN only in 1946.

⁸The World Trade Organization (WTO) was established on April 15, 1994 in Morocco by the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) of 1994, as the main international trade regulatory institution.

⁹For example, see generally, P da Motta & MF Lengyel 'International trends on labor standards: where does the MERCOSUR fit in?' (2003), available at:

<http://www.latin.org.ar/pdfs/plenasia03> (accessed 20/09/2005) on the total rejection of the social clause by MERCOSUR countries.

¹⁰See the Ministerial Conference of the World Trade Organization (Singapore Ministerial Declaration), adopted 13 December 1996, reprinted in (1997) 36 *International Legal Materials* 218 (on argument by developing countries that labour standards within the WTO framework may be used for 'protectionist purposes').

¹¹See, generally, the Singapore Ministerial Declaration n 10 above.

constitutions and labour legislation, but also as contained or envisaged in appropriate international and regional instruments. Notable in this regard are labour rights and conditions regimes within the frameworks of the United Nations (UN) and its agencies, particularly the ILO. The ILO is the main international body playing a central role in setting appropriate labour standards, monitoring compliance therewith¹² and providing technical assistance to countries. In the ILO Declaration on Fundamental Principles and Rights at Work of 1988, ILO members renewed their commitment to acceptable international labour standards. ILO international labour standards initiatives have been augmented by other initiatives, such as the UN Global Compact initiative.¹³ The Global Compact seeks to encourage multinational corporations and large firms, through voluntary contract, to adhere to certain minimal labour standards.¹⁴

Notwithstanding their attractiveness and theoretical feasibility, and the recognition of trade unions and non-governmental organisations (NGOs), the provisions of these major international labour standards instruments remain largely ineffective in the struggle for global labour rights due, *inter alia*, to inadequate enforcement mechanisms.¹⁵ This has prompted a search for alternatives, including the more contentious initiatives relating to the enforcement of minimal labour standards through multinational and regional trade institutions such as NAFTA.¹⁶

The ongoing debate concerning issues of freedom of association and the relationship between labour and government in Zimbabwe highlights the plight

¹²The problem with the ILO labour regime is that the ILO has no enforcement power or other dissuasive means of forcing labour to comply with its own standards. See LA Compa 'The first NAFTA labor cases: a new international labor rights regime takes shape' (1995) 3 *US-Mexico Law Journal* 159, 160.

¹³For more on the Global Compact see, generally, the UN website <http://www.unglobalcompact.org/portal/default.asp> (accessed on 20/09/2005).

¹⁴The Global Compact set out 10 principles in the areas of human rights, labour, environment and anti-corruption. The labour principles, principles 3 to 6, are adopted from the ILO Declaration on Fundamental Principles and Rights at Work of 1988. These are the principles in support of freedom of association and the recognition of the right to collective bargaining; the abolition of compulsory or forced labour; the abolition of child labour; and the elimination of discrimination in employment.

¹⁵For a recent critical assessment of ILO supervisory and promotional systems and of other mechanisms to promote core labour standards worldwide, see, for example, the International Trade and Core Labor Standards, OECD 2000, at 43 *et seq.* In November 2000, the ILO's governing body concluded that the 1998 report and recommendations of the ILO's commission of inquiry on forced labour in Myanmar had not been implemented and therefore sanctions should take effect. However, the ILO lacks the powers to ensure that economic sanctions are effectively implemented.

¹⁶Other initiatives are extra-territorial initiatives such as the United States (US) Child Labor Deterrence Act, s 613, 103rd Cong. (1993). Note that the Child Labor Deterrence Act, otherwise known as the Harkins Bill, was never enacted. The Act was aimed at enabling the US to impose a ban on any import that has a child labour input. See K Basu 'Compacts, conventions, and codes: initiatives for higher international labor standards' (2001) 34 *Cornell International Law Journal* 487, 490-491.

of workers with regard to their labour rights and conditions in Southern Africa. Interestingly, on paper, Zimbabwe, like any other modern society such as South Africa with an established and world-recognised labour regime, has a number of laws on labour rights and conditions.¹⁷ Furthermore, labour rights find implicit regard in the Zimbabwean constitution.¹⁸ There is also labour-specific legislation, such as the Labour Relations Act of 1985, which entitles employees to membership of trade unions and workers' committees of their choice.¹⁹

In 1990 the Labour Relations Act was further reinforced through deregulation resulting from the Economic Structural Adjustment Programme (ESAP).²⁰ Other legislation governs issues such as the basic conditions of employment, and occupational health and safety.²¹ Zimbabwe, like many of the African countries, has ratified some of the global labour-promoting instruments, such as the ILO convention on core labour issues, the Right to Organize and Collective Protection of the Right to Organize Convention.²² Zimbabwe is also a party to a number of African Union (AU) and SADC protocols and agreements that enforce fundamental freedoms, which Zimbabwe observes and enforces.²³

However, the Zimbabwean laws and multinational obligations regarding labour suffer from a lack of promotion and implementation. Zimbabwean labour has also suffered restriction through government degenerative intervention into labour issues in terms of the Public Order and Security Act (POSA) of 2002. In particular, the POSA has been used to render the exercise of the right of workers to freedom of association impossible through the criminalisation of union marches and demonstrations.²⁴ The question, then, is what can be done to ensure that what is such an attractive labour regime on paper, and one that is almost akin to the South African labour regime, is observed and respected in practice?

Emergence of basic rights approach to economic agreements in Africa

I have mentioned that developing countries, some of which are African, have resisted labour rights considerations in economic agreements. However, several African regional and sub-regional economic treaties, such as the African

¹⁷See A Chitambo *Zimbabwe: Country Report*, at 19, available at <http://www.itcilo.it/actrav/english/calender/2003/A1-2903/work/country> (accessed on 23/08/2005).

¹⁸For example, s 11 of the Zimbabwean constitution purports to protect individuals' right to 'freedom of conscience, expression and of assembly and association'. See Chitambo n 17 above at 25.

¹⁹Labour Relations Act of 1985, article 4. See also Chitambo n 17 above at 25. By 30 August 2002 162,704 workers in Zimbabwe were unionised across some 39 labour unions, which are affiliated to the Zimbabwean Congress of Trade Unions. See Chitambo n 17 above at 19-20.

²⁰Chitambo n 17 above at 27.

²¹See Chitambo n 17 above at 25. The Economic Structural Adjustment Programme (ESAP) is a deregulation programme that empowered employers and unions to negotiate broadly on labour issues.

²²The Right to Organize and Collective Protection of the Right to Organize Convention No. 87 of 1948. See also Chitambo n 17 above at 24.

²³Chitambo n 17 above at 25.

²⁴See Chitambo n 17 above at 25.

Economic Community (AEC), the Economic Community of West African States (ECOWAS), and the Common Market for Eastern and Southern Africa (COMESA) 'make specific reference to human rights'.²⁵ The Southern African Development Community Treaty (SADC Treaty) commits members to human rights and constitutionalism.²⁶ African countries are also party to a number of bilateral trade arrangements that emphasise the need for a sound relationship between international trade and human rights, such as the Cotonou Agreement and the US African Growth and Opportunity Act (AGOA).²⁷ In the context of this article, this approach is important, since there is an undeniable link between labour rights and trade and development objectives. African problems such as lax labour rights and standards, and child labour²⁸ are human rights issues that are often directly and/or indirectly related to trade and other economic activities.²⁹ Perhaps I should state that even the human rights component of the New Partnership for Africa's Development (NEPAD) – Africa's grand multicomponent plan³⁰ – recognises the importance of the functional relationship between political and socioeconomic rights to Africa's growth and development initiatives.³¹

LABOUR RIGHTS AND STANDARDS IN THE NAFTA REGION

Academic hair splitting and political wrangling and debates aside, there is a clear historical connection between trade and labour issues in multilateral trade. Put differently, there is clear historical evidence of labour conditions and standards being given effect through economic arrangements such as NAFTA.³²

The establishment of the labour agreement

The NAFTA position with regard to labour rights and conditions is particularly interesting, as it transcends the continuing impasse over the social clause. NAFTA was originally not intended to address labour concerns specifically,³³

²⁵Musungu 'Economic integration and human rights in Africa: a comment on conceptual linkages' (2003) 3 *African Human Rights Law Journal* 88, 92.

²⁶Musungu as above.

²⁷See, generally, Musungu n 25 above at 93–95.

²⁸See O Sibanda 'South Africa's children in labour pains: is it not time to prescribe corporate social responsibility?' In Okpaluba (ed) *Law and the contemporary South African society* (2004) 97, 98.

²⁹The relationship between globalisation and human rights was demonstrated in the case of the Ogoni people (Communication No 155/96), which came before the African Commission on Human and Peoples' Rights. In this case multinational companies abused human rights, including the right to health and the right to a clean and safe environment as recognised in the African Charter on Human and Peoples' Rights.

³⁰See O Sibanda 'Integrating Africa into the World Trade Organization: constraints and challenges facing the African Union and the new partnership for Africa's development' (2004) 45 *Codicillus* 47, 42.

³¹See, generally, E Baimu 'Human rights in NEPAD and its implications for the African human rights system' (2002) 2 *African Human Rights Law Journal* 301.

³²For example, concerns relating to labour rights and conditions were integral to early General Agreement on Trade and Tariffs (GATT 1947) negotiations. See E Alben 'GATT and the fair wage: a historical perspective on the labor-trade link' (2001) 101 *Columbia Law Review* 1410.

³³JS Ruhnke 'The impact of NAFTA on labour arbitration in Mexico' (1995) 26 *Law and Policy in International Business* 217, 218.

yet it has emerged as the leading twenty-first century model of a trade regulatory institution seeking to address both economic and non-economic concerns. Compared with its counterparts, NAFTA is more than a free trade agreement. Its provisions extend beyond trade concerns, and it has highlighted the importance of labour issues and linkage aspects of labour rights to trade relations. This is clearly manifest in its preamble, in which NAFTA members resolve to 'create new employment opportunities and improve working conditions and living standards in their respective territories' and to 'protect, enhance and enforce basic workers' rights'. This resolve has been effected through the establishment of the NAALC.³⁴

Core labour obligations

The NAALC entrusts parties with a number of core obligations related to labour and the labour system. Included among these core obligations is for each party to 'promote compliance with and effectively enforce its labor law',³⁵ and to 'ensure that its labor laws and regulations provide for high labor standards'.³⁶ Furthermore, parties are enjoined to ensure that all those with a 'legally recognized interest under its law in a particular matter have an appropriate access to administrative, quasi-judicial or labor tribunals for the enforcement of the Party's labor law'.³⁷ This private right to action can be enforced at the institution of the NAALC through petitioning the national government, since only governments, and not private persons, may initiate the NAALC complaint process.³⁸

³⁴For in-depth writings on the NAALC, see, generally, RJ Adams and P Singh 'Early experience with NAFTA's labour side accord' (1997) 18 *Comparative Labor Law Journal* 161; S Anderson, J Cavanagh and D Ranney *NAFTA's first two years: the myths and the realities* - Institute for Policy Studies (1996); JF Otero 'The North American Agreement on Labor Cooperation: an analysis of its first year's implementation' (1995) 33 *Columbia Journal of Transnational Law* 639 (presenting a succinct overview of the NAALC and assessing its implementation in 1994); C Jefferson & J French 'NAFTA's labor side accord: a textual analysis' in *Labor and NAFTA: a briefing book?* (Conference on Labor and Free Trade, Duke University, Durham, NC: Aug. 25-27 1994) JL Levinson *NAFTA's labor agreement: lessons from the first three years* (Institute for Policy Studies and the International Labor Rights Fund, 12 November 1996); JF Perez-Lopez: I 'The promotion of international labor standards and NAFTA: retrospect and prospects' (1995) 10 *Connecticut Journal of International Law* 427; JF Perez-Lopez: II 'The labor dimension of NAFTA: reflections on the first year' (1995) 12 *Arizona Journal of International and Comparative Law* 473; JF Perez-Lopez: III 'Conflict and cooperation in US-Mexican labor relations: the North American Agreement on Labor Cooperation' (1996) 11 *Journal of Borderlands Studies* 43; LO Pomeroy 'The labor side agreement under the NAFTA: analysis of its failure to include strong enforcement provisions and recommendations for future labor agreement negotiated with developing countries' (1996) 29 *The George Washington Journal of International Law and Economics* 769.

³⁵See NAALC art 3(1).

³⁶See NAALC art 2.

³⁷NAALC art 4(1). See also NAALC art.4(2).

³⁸See EC Crandall 'Will NAFTA's North American Agreement on Labor Cooperation improve enforcement of Mexican labor laws?' (1994) 7 *Transnational Law* 165, 185. See also NAALC art 43 protecting parties affording persons a private right of action under its domestic laws against another party.

Another aspect relevant to the core obligations is that the NAALC lays a foundation for a common approach to the protection and promotion of North American labour rights without mandating the harmonisation of labour laws and standards. In what Compa describes as a 'hybrid approach' to a labour regime,³⁹ the NAALC on the one hand respects and preserves the sovereignty of national labour laws and conditions, and on the other hand allows national labour laws to be reviewed by National Administrative Offices (NAOs).⁴⁰ It recognises the right of each country to establish its own labour standards. Article 2 of NAALC provides as follows:

Affirming full respect for each Party's constitution and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.⁴¹

Specific NAALC objectives

Monitoring

The NAALC seeks to monitor the implementation of national labour laws and regulations in each member country.⁴² Parties are obliged to enforce their national labour laws.⁴³ This is a watchdog role of a tri-national Commission for Labor Cooperation (CLC).⁴⁴ The CLC is made up of a ministerial council (Council) and the International Coordination Secretariat (Secretariat).⁴⁵ The Council consists of each country's highest-ranking labour official or ministers,⁴⁶ and operates as the governing body of the CLC.⁴⁷ The Secretariat is composed of professionals from among the parties.⁴⁸ The function of the Secretariat is to

³⁹L Compa 'NAFTA's labor side accord: a three-year accounting' (1997) 3 *Law and Business Review of the Americas* 6, 7.

⁴⁰See EA Brill & SL Oratz 'Labor accord put to the test' (1994) 12 *National Law Journal* c20; L Compa n 39 above at 7; S Lowe 'The first American case under the North American Agreement for Labor Cooperation' (1997) 51 *University of Miami Law Review* 481, 489.

⁴¹In fact, art 42 of the NAALC stresses 'nothing in this Agreement shall be construed to empower a Party's authorities to undertake labor law enforcement activities in the territory of another'.

⁴²NAALC art 1, read with art 3.1.

⁴³NAALC art 3, read with art 4.2. See also Part 1 of the NAALC on the objectives of improving working conditions, promoting labour principles, exchanging information, co-operating in labor-related activities, furthering effective enforcement of labour laws and fostering transparency in labour law administration and Part 2 of the NAALC on giving each party the right to establish its own domestic labour standards qualified by a commitment to high labour standards. Each party shall promote adequate enforcement and guarantee due consideration to alleged violations of labour law.

⁴⁴NAALC art 8.1. See also B LaSala 'NAFTA and worker rights: an analysis of the labor side agreement accord after five years of operation and suggested improvement' (2001) 16 *The Labor Lawyer* 319, 321.

⁴⁵NAALC art 8.2. See also LaSala n 44 above at 321 n 15; Perez-Lopez:II n 34 above at 492.

⁴⁶See NAALC art 9. See also Perez-Lopez:II n 34 above at 492). Specific functions of the Council are stated and elaborated in art 10 and art. 11.

⁴⁷NAALC art 10.1.

⁴⁸See Adams and Sigh n 34 above at 165; See also Perez-Lopez:II n 34 above at 492; Perez-Lopez:III n 34 above at 40.

provide technical support to the Council.⁴⁹

The CLC is further assisted in its monitoring activities by NAOs, which are established in each of the three NAFTA countries.⁵⁰ The responsibility of NAOs is to gather and supply information on labour matters, and to provide a review mechanism for labour law issues in the territory of the other parties.⁵¹ NAOs also act as points of contact between labour ministries in Canada, Mexico and the United States, and with the CLC and the Secretariat.⁵² NAOs bring labour complaints to the attention of the CLC 'for resolution or dispute settlement' and provide 'publicly available information requested by the Secretariat for background reports or studies, another party's NAO, or an Evaluation Committee of Experts'.⁵³

Another important NAALC institution is the national advisory committee (NAC), which comprises members of the public, labour organisations and business,⁵⁴ and a governmental committee.⁵⁵ The purpose of the NAC is to advise governments on the implementation and further interpretation of the

⁴⁹See NAALC art 8.2. The Secretariat, amongst other things, reports on North American labour law and enforcement issues such as plant closings, labour practices in the apparel industry, and the employment of women. See generally NAALC art 13, read with art 14, for the functions of the Secretariat.

⁵⁰NAALC art 8.2 read with art 15. See Perez-Lopez:II n 34 above at 4923; Perez-Lopez:II n 34 above at 48. The US's NAO is established within the Bureau of International Labor Affairs, the Canadian NAO is established within the Labour Program of the Federal Department of Human Resources Development, and the Mexican NAO is established within the Secretariat of Labor and Social Welfare (Secretaria del Trabajo y Prevision Social). See JF Perez-Lopez 'Implementation of the North American Agreement on labor cooperation: a perspective from the signatory countries' (1995) 4 *NAFTA: Law and Business Review of the Americas* 3, 5 and 7. Note that the labour department of each of the NAFTA states has the freedom to define the role of its NAO. See NAALC art 16.1. However, the NAALC enjoins NAOs to act in consultation with each other. For example, in relation to proposed changes of procedures, policies or practices in relation to their respective labour laws, see NAALC art 21. The attractive part of this consultation process is that each NAALC government is 'entitled to participate in the consultation on notice to the other NAOs and the Secretariat'. See NAALC art 21.3. The NAO institution is apparently a compromise between on the one hand Mexican and Canadian opposition to the establishment of a 'supranational tribunal with enforcement powers' and on the other hand the 'insistence of the United States on some transnational review'. See KE Andrias 'Gender, work, and the NAFTA labor side agreement' (2003) 37 *University of San Francisco Law Review* 521, 546.

⁵¹See NAALC art 16.3. Note that the labour department of each of the NAFTA states has the freedom to define the role of its NAOs. See NAALC art 16.1. Further note that the NAALC enjoins NAOs to act in consultation with each other. For example, in relation to proposed changes of procedures, policies or practices in relation to their respective labour laws, see NAALC art 21. The attractive part of this consultation process is that each NAALC government is 'entitled to participate in the consultation on notice to the other NAOs and the Secretariat'. See NAALC art 21.3.

⁵²See Perez-Lopez:II n 34 above at 493. See also Perez-Lopez:III n 34 above at 48.

⁵³See Lowe n 39 above at 491. According to Compa n12 above at 159, the NAO is a 'unique institution' in that it is unparalleled and unprecedented, and 'has no counterpart ... under any other labor rights regime in Europe or elsewhere'.

⁵⁴NAALC art 17. See also Perez-Lopez:III n 34 above at 48.

⁵⁵NAALC art 18. See also Perez-Lopez:III n 34 above at 48.

NAALC.⁵⁶

Joint labour conditions and standards initiatives

The NAALC aims to provide resources for joint initiatives to promote better working conditions and labour practices and standards.⁵⁷ This is the chief responsibility of the Ministerial Council, assisted by the Secretariat.

Establishment of consultation and dispute resolution forums

The NAALC establishes a forum for consultations and dispute resolution in cases where domestic enforcement is inadequate or where there is a persistent non-enforcement of select labour standards.⁵⁸ The consultation may be between government's labour officials (ministerial consultation) or between NAOs. Important in this regard is that NGOs and citizens can be involved in the process by making submissions through their NAOs, which then review the merits of the submission and request consultations with the foreign NAO.⁵⁹

Should the matter remain unresolved even after the ministerial consultation, any party can request the establishment of a tri-national Evaluation Committee of Experts (ECE).⁶⁰ The ECE will analyse the matter and issue a report.⁶¹ An important aspect of the ECE is that its chairperson is selected from a roster of experts drawn up in consultation with the ILO.⁶²

NAALC core labour principles

The NAALC identifies 11 core labour principles,⁶³ which can be divided into three groups. The first group deals with industrial labour relations matters, and the remaining two groups deal with technical labour standards.⁶⁴ Matters that fall under the first group are freedom of association,⁶⁵ collective bargaining,⁶⁶ and the right to strike.⁶⁷ The consideration of matters in this group is the prerogative of the NAO, which acts on review capacity and ministerial consultation. Non-compliance with this category cannot be sanctioned by any

⁵⁶NAALC art 17.

⁵⁷See Part 3 of the NAALC, which establishes the Commission for Labor Cooperation (CLC) and NAO, and defines their structure, powers, and procedures, and Part 4 of the NAALC, which establishes the mechanisms for co-operation and evaluation.

⁵⁸NAALC art 27.1. See, generally, part 5 of the NAALC.

⁵⁹See NAALC art 27.3 read with art 34.

⁶⁰See NAALC art 23.1.

⁶¹See NAALC art 22.2 read with arts 25 and 26. See also Perez-Lopez:II n 34 above at 494–495; Perez-Lopez:III n 34 above at 49–50.

⁶²See NAALC art 24.1(b), read with art 45.

⁶³See Annex 1: Labour Principles.

⁶⁴See S Bazar 'Is the North American Agreement on Labor Cooperation working for women?' (1995) 25 *California Western International Law Journal* 425, 426.

⁶⁵Labour Principle 1.

⁶⁶Labour Principle 2.

⁶⁷Labour Principle 3.

penalty pursuant to article 22 of the NAALC.⁶⁸

The second group of labour principles deals with the prohibition of forced labour,⁶⁹ gender pay equity,⁷⁰ employment discrimination,⁷¹ compensation in the case of injury or illness⁷² and protection of migrant workers.⁷³ Like the first group, this category is subject to NAO review and ministerial consultations, without being arbitrated on and with no sanction by penalties. Unlike the first tier, issues in this category can be further evaluated by the ECE.

The third group deals with the prohibition of child labour,⁷⁴ minimum employment standards,⁷⁵ and occupational safety.⁷⁶ This group is treated differently from the others. In addition to NAO review, it is subject to ministerial consultations, expert evaluation and arbitration, and ultimately monetary penalties.⁷⁷

Note that labour relations matters and technical labour standards are treated and promoted differently from each other. To begin with, technical labour standards have more dispute resolution options than industrial relations matters.⁷⁸ Technical labour standards are subject to the full application of dispute settlement procedures under the NAALC.⁷⁹ The latter are restricted to dispute resolution procedures up to ministerial consultation.⁸⁰ It is stated that the reason for restricting industrial relations matters to ministerial consultation was 'to avoid interference in labor/management negotiations'.⁸¹

SUMMARY AND CONCLUSION

The ILO has no enforcement mechanism. The potential for the introduction of

⁶⁸According to Lowe n 40 above at 492, the lack of sanction for violations or denial of freedom of association, collective bargaining and the right to strike has 'spurred some of the most vehement criticism of NAALC'. In particular, it is argued that these are the more fundamental rights for labour and their non-enforcement 'effectively eviscerates any commitment NAALC has to a potent labor movement in any of the signatory countries'. The disparity of enforcement mechanisms amongst the labour principles has been justified under national sovereignty rights. See Pomeroy n 34) 793; Bazar n 64 above at 451. However, the disparity has been questioned. See, generally, Pomeroy n 34 above at 793–796; Bazar n 64 above at 452–454.

⁶⁹Labour Principle 4.

⁷⁰Labour Principle 8.

⁷¹Labour Principle 7.

⁷²Labour Principle 10.

⁷³Labour Principle 11.

⁷⁴Labour Principle 5.

⁷⁵Labour Principle 6.

⁷⁶Labour Principle 9.

⁷⁷See Bazar n 64 above at 430. See, generally, Crandall n 38 above at 189–192 discussing NAALC penalties – monetary penalties and suspension of tariff benefits.

⁷⁸See RW Kleinman & JM Shapiro 'NAFTA's proposed tri-lateral commissions on the environment and labour' (1994) 2 *US–Mexico Law Journal* 25, 28 (quoted in Bazar n 64 above at 426n16).

⁷⁹See Bazar n 64 above at 426.

⁸⁰See Bazar n 64 above at 426 and 431. See also, LaSala n 43 above at 323–324.

⁸¹See Bazar n 64 above at 452.

an enforcement mechanism at this international labour standards regulatory institution is doubtful. A novel alternative approach has been developed by NAFTA countries collectively to promote and protect labour rights and conditions through the NAALC. However, the NAALC does not mandate the harmonisation of national labour laws and regulations. In fact, the NAALC emphasises the sovereignty of national labour laws, and recognises the right of NAALC parties to develop and implement their own labour laws and regulation.

The idea behind the NAALC system is both attractive and impressive, despite the system's alleged weaknesses such as ineffective enforcement of labour conditions;⁸² a protracted and time-consuming dispute resolution system;⁸³ and the inadequate promotion of the rights of women workers.⁸⁴ In conclusion, the NAALC and similar initiatives set a good precedent for the promotion and protection of labour rights and conditions, and for labour-sensitive agreements. In the Southern African context, similar initiatives can be employed through the framework of SADC.

RECOMMENDATIONS

There is an undoubted need for the promotion and protection of the labour environment in the SADC region. It is therefore recommended that the SADC establish its RLS, or alternatively identifies the need to create a system of enforceable core RLS in the area. The setting up of such a system should generally not be problematic, given the declared objectives of SADC. SADC, for instance, has as one of its objectives the promotion of self-sustaining development on the basis of collective self-reliance and interdependence of its members. It also seeks to promote and maximise productive employment within the SADC region. These objectives, 'productive employment' in particular, which are to be achieved inter alia through the harmonisation of the policies of SADC members, may only be achieved through practical observance, protection and promotion of the labour environment in the region.

The SADC's RLS should have a meaningful and expedient system for the resolution of identified labour violations. It is submitted that this can be achieved by adopting a system similar to the dispute resolution approach of the WTO. The WTO dispute settlement system is attractive for several, including

⁸²See, generally, LaSala n 44 above at 319. See also M Fuentes 'The NAFTA Labor Side Accord in Mexico and its repercussions for workers' (1995) 10 *Connecticut Journal of International Law* 397.

⁸³See, generally, LaSala n 44 above at 319.

⁸⁴See, generally, HL Meils 'A lesson for NAFTA: Can the FTAA function as a tool for improvement in the lives of working women?' (2003) 78 *Indiana Law Journal* 877-897; Andrias n 50 above at; CT Barbieri 'Women workers in transition: the potential impact of the NAFTA Labor Side Agreement on women workers in Argentina and Chile' (1996) 17 *Comparative Labour Law Journal* 526; M Haussman 'Politics of convergence? The relationship of the North American Agreement on Labor Cooperation (NAALC) to national worker protections in Canada, the US and Mexico' (Suffolk University. Annual meeting of the American Political Science Association Washington, DC:28-31 August 1997.

the strict time frames it imposes for the resolution of disputes and its enforcement mechanisms.⁸⁵ The WTO carries the attribute of a quasi-judicial self-contained multilateral regime.⁸⁶

Matlosa correctly notes that regionalism and co-operation have become prominent features of African development, as evidenced in initiatives such as NEPAD.⁸⁷ However, we should not be oblivious of the difficulties and problems that may be encountered in RLS. Although not to be dealt with here, questions relating to issues such as national sovereignty as initially experienced under the NAALC, and issues relating to the nature and character of RLS for SADC may surface.

⁸⁵See, generally, *Understanding on rules governing the settlement of disputes*: Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization of 1994, (repr 1994) *International Legal Materials* 1144–1152.

⁸⁶See O Sibanda 'Human rights approach to WTO trade policy: another medium for the promotion of human rights in Africa' (2005) 5 *African Human Rights Law Journal*.

⁸⁷K Matlosa 'New regionalist impulses: implications of the new partnership for Africa's development (NEPAD) for regional cooperation in Southern Africa' (2003) 17 *Policy: Issues and Actors* at 10–11, available at: http://www.cps.org.za/cps_pdf/pia17_5.pdf (accessed on 17/08/2005).