

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

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

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

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

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

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

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

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



INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

⁵*Ibid.*

⁶1954 (1) SA 324 (AD).

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

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

⁹See *Mavela* 1990 (1) SACR 582 (AD).

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

¹¹*Jifa & Others* 1991 (2) SA 52 (E).

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

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

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

THE RELEVANT PROVISIONS OF THE CONSTITUTION

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

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

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

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

¹³1954 (1) SA 324 (AD).

right in question and,

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

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

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

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

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

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

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

THE POSITION IN OTHER ANGLO-AMERICAN JURISDICTIONS

Canada

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

In a landmark judgment in *R v Stinchcombe*¹⁵ in 1991 the Canadian Supreme Court mentions¹⁶ that disclosure of material by the Crown to the defence in Canada has, before that judgment, been taking place on a voluntary basis and the extent of the disclosure varied from province to province, from jurisdiction to jurisdiction and from prosecutor to prosecutor. This meant that the situation in Canada was similar to the South African position as it had applied before the coming into operation of the Constitution.

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

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

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

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

¹⁶On 3f-g.

¹⁷On 9.

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

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

As far as the nature of what should be disclosed is concerned, the court held²¹ that all relevant information must be disclosed even if the Crown does not intend to introduce it into evidence.

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

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

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

England

In the Devlin Report²⁴ which was published in 1976, it was stated that 'Until 30 years ago, no authority existed for the proposition that there was any duty [upon the prosecution to disclose any material to the defence] at all'.

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

¹⁸On 11.

¹⁹On 13.

²⁰On 13-14.

²¹On 14.

²²On 14.

²³On 15.

²⁴Report of the Departmental Committee on Evidence of Identification in Criminal Cases (1975-76 HC 338) (the 'Devlin Report') at par 5.1.

²⁵(1946) 31 Cr App R 146.

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

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

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

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

In 1981 the Philips Report³¹ stated that the actual policy regarding the disclosure of material to the defence varied from the Director of Public Prosecutions, the Metropolitan Police Solicitors and the Greater Manchester Police Solicitors.

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

(a) there are grounds for fearing that disclosing the statement might lead to

²⁶[1964] 2 All ER 610 at 618 .

²⁷[1979] 1 All ER 209.

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

²⁹(1989) 91 Cr App R 226.

³⁰(1955) 39 Cr App R 100.

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

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

- an attempt being made to persuade a witness to make a statement retracting his original one, to change his story, not to appear in court or otherwise to intimidate him;
- (b) the statement (*eg* from a relative or close friend of the accused) is believed to be wholly or partially untrue and might be of use in cross-examination if the witness should be called by the defence;
 - (c) the statement is favourable to the prosecution and believed to be substantially true but there are grounds for fearing that the witness, due to feelings of loyalty or fear, might give the defence solicitor a quite different, and false, story favourable to the defendant. If called as a defence witness upon the basis of this second account, the statement to the police can be of use in cross-examination;
 - (d) the statement is quite neutral or negative and there is no reason to doubt its truthfulness — *eg* 'I saw nothing of the fight' or 'He was not at home that afternoon.' There are however grounds to believe that the witness might change his story and give evidence for the defence — *eg* purporting to give an account of the fight, or an alibi. Here again, the statement can properly be withheld for use in cross-examination;
- (In cases (a) to (d) the name and address of the witness should normally be supplied.)
- (e) the statement is, to a greater or lesser extent, 'sensitive' and for this reason it is not in the public interest to disclose it. Examples of statements containing sensitive material are as follows:
 - (1) It deals with matters of national security or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those Services once his identity became known.
 - (2) It is by, or discloses the identity of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger.
 - (3) It is by, or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity became known.
 - (4) It contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect; or it discloses some unusual form of surveillance or method of detecting crime.
 - (5) It is supplied only on condition that the contents will not be disclosed, at least until a subpoena has been served upon the supplier — *eg* a bank official.
 - (6) It relates to other offences by, or serious allegations against, someone who is not an accused, or discloses previous convictions or other matter prejudicial to him.
 - (7) It contains details of private delicacy to the maker and/or might create risk of domestic strife.

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

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

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

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

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

According to O'Conner³⁵ the policy is that the defence should have the material in time to absorb, assess and use the material. However, it is commonplace to provide the material in the weeks before trial and often on the first day of the trial itself, which means that the policy is ignored. (It is to be pointed out that O'Conner himself is a practising Barrister in England.)

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

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

³⁵See above.

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

O'Conner³⁷ criticises the Guidelines because of the lack of any enforcement mechanism and mentions that in practice, the court will normally rely on assurances by the prosecutor that any material which was not disclosed, falls within the ambit of one of the exceptions mentioned in the Guidelines.

In the Maguire Seven appeal case³⁸ the court held that the guidelines extends to prosecution scientific expert witnesses. In other words, if such a witness is aware of anything that came to light during his investigation, analysis, etc, which is favourable to the defence, that information should be supplied to the defence.

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

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

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

³⁶See above.

³⁷Above at 113.

³⁸[1992] 2 All ER 433.

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

United States of America

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

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

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

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

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

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

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

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

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

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

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

- would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
- could reasonably be expected to endanger the life or physical safety of any individual'.

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

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

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

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

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

(1) Exemption 7(A):

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

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

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

³⁹789 F 2d 64.

⁴⁰Civil No K-82-008.

⁴¹437 US 214.

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

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

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

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

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

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

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

(2) Exemption 7(C):

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

⁴²813 F 2d 476.

⁴³856 F 2d 311.

⁴⁴703 F Supp 1004.

⁴⁵611 F 2d 1026.

⁴⁶710 F 2d 136.

⁴⁷881 F 2d 1097.

⁴⁸109 SCt 1468 (1989).

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

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

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

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

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

(3) Exemption 7(D):

This exemption includes a wider group of people than only those classified as informers.⁵⁴

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

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

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

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

⁴⁹740 F 2d 919.

⁵⁰658 F 2d 71.

⁵¹656 F 2d 856.

⁵²572 F 2d 998.

⁵³830 F 2d 346.

⁵⁴See Justice Dept Guide to FOIA by M Bridges and T Villager, New York 1992 on 131.

⁵⁵699 F Supp 960.

⁵⁶661 F 2d 623.

⁵⁷900 F 2d 333.

⁵⁸740 F 2d 919.

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

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

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

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

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

(4) Exemption 7(E):

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

(5) Exemption 7(F):

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

Disclosure of information in terms of the rules applicable to criminal procedure

In *Brady v Maryland*⁶⁷ the United States Supreme Court held as follows: 'The suppression by the prosecution of evidence favourable to an accused upon request violates due process where the evidence is material either to

⁵⁹880 F 2d 1448.

⁶⁰572 F 2d 998.

⁶¹830 F 2d 346.

⁶²722 F 2d 840.

⁶³Justice Dept Guide to FOIA by M Bridges and T Villager, New York 1992 on 140-1.

⁶⁴Ibid.

⁶⁵543 F Supp 48.

⁶⁶Justice Dept Guide to FOIA by M Bridges and T Villager, New York 1992 on 144-5.

⁶⁷373 US 83 (1963).

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

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

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

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

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

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

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

⁶⁹See previous note.

⁷⁰718 P 2d 407 (Wash, 1985).

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

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

⁷³See Rule 16(a)(1)(A).

⁷⁴Rule 16(a)(1)(B).

belong to the defendant'.⁷⁵

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

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

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

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

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

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

⁷⁵See Rule 16(a)(1)(C).

⁷⁶See Rule 16(a)(1)(D).

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

⁷⁸See Rule 16(b)(1).

⁷⁹See Rule 16(b)(2).

⁸⁰Rule 16(c).

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

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

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

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

New Zealand

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

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

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

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

⁸¹Rule 16(d)(1).

⁸²Rule 16(d)(2).

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

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

In this case an accused requested that he be provided with the witness statements contained in the police docket. The Commissioner of Police refused but was ordered by the Ombudsman to provide the documents. The court *a quo* overturned the ruling by the Ombudsman and the accused then appealed against that decision. The court of appeal held that once summary proceedings have commenced, the disclosure of evidence under the OIA would not be likely to prejudice the investigation of offences or the right to a fair trial. The court stated that exceptional circumstances may arise where there would be a real risk of such prejudice, but held that this did not apply in that particular case.

One of the judges who wrote separate judgments, McMullin J, placed specific emphasis on the danger of witness intimidation, but agreed that the appeal should succeed since the witnesses in this particular case were policemen and therefore unlikely to be intimidated (on 406). McMullin J warned against laying down a general rule as was done by the majority and preferred that each case be decided on its own merits.

The purpose with the request for the witness statements in that case was to prepare a defence. Since the case only dealt with a request for witness statements, no ruling was made concerning other documentation in the docket.

Australia

Before 1982 an accused person did not have a right to the production of statements of witnesses to be called by the Crown.⁸⁶

The Australian Freedom of Information Act, 1982 provides in s 33(1) that documents are exempt from disclosure where its disclosure would, or could reasonably be expected to:

- prejudice the conduct of an investigation of a breach, or possible breach, of the law, or a failure to comply with a law relating to taxation or to prejudice the enforcement or proper administration of the law in a particular instance;
- disclose or enable a person to ascertain the existence or identity of a confidential source of information or the non-existence of such a source in relation to the enforcement or administration of the law; or

⁸⁴[1985] 1 NZLR 578 (HC).

⁸⁵[1988] 1 NZLR 385 (CA).

⁸⁶See *R v Charlton* [1972] VR 758.

- endanger the life or physical safety of any person.

In terms of s 33(2) a document is exempt if its disclosure would, or could reasonably be expected to:

- prejudice the fair trial of a person or the impartial adjudication of a particular case;
- disclose lawful methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or
- prejudice the maintenance or enforcement of lawful methods for the protection of public safety.

Section 41 deals with documents which are exempted because they affect personal privacy by involving the 'unreasonable disclosure of personal information about any person or deceased person'.

Section 42 deals with documents which are exempted because they are subject to legal professional privilege.

Section 43 deals with documents which are exempted because they concern the business affairs of persons (trade secrets, etc).

Section 44 deals with documents which are exempted because they affect the national economy.

Despite the commencement of this Act, it was held in *Clarkson v Director of Public Prosecutions*⁸⁷ in 1992 that an appellant is not entitled on appeal to discovery of documents that were in the possession of the prosecution during the trial but were not revealed to the appellant.

In *Accident Compensation Commission v Croom*⁸⁸ it was held that section 3 of the Act requires the court to lean in favour of the disclosure of information when interpreting the Act.⁸⁹ The court also held that the Act refers to 'documents' that are exempted from disclosure and that, should access be requested to an entire file containing a number of documents, the state will have to prove, in respect of every document in such file which it wished not to disclose, that such document is covered by an exemption.⁹⁰ The court also interpreted the phrase 'prejudice to the proper administration of the law' as it appears in the exemption contained in sections 31 and 33, and held that the Act does not apply in those instances where the normal practices and procedures of the law allows a person access to documents in circumstances

⁸⁷[1990] VR 745.

⁸⁸[1991] 2 VR 322 at 323.

⁸⁹On 323.

⁹⁰On 324.

set out in such practices and procedures, because to hold otherwise, would prejudice such practices and procedures and therefore prejudice the proper administration of the law. Since such practices and procedures exist with regard to access by accused persons to information held by the state, it follows that the Act does not apply to those instances.

In *Sobb v Police Force of Victoria*⁹¹ the Supreme Court of Victoria considered the appeal of an accused person who was charged with burglary and theft and who, at his first appearance in the Children's Court, sought from the Victoria Police Force 'a full copy of ... [his] entire file relating to charges laid by ... [a certain police official]'. This request was made in terms of section 17(1) of the Act. The police refused the request on the basis that the file was exempt from disclosure in terms of sections 31(1)(a) and 33(1) of the Act. The refusal of the police was taken on review but the reviewing commissioner decided the review in favour of the police. The decision by the reviewing commissioner was then taken on review to a tribunal who confirmed it. This judgment deals with the appeal that was lodged by the accused against the decision of the tribunal. In deciding the appeal, Nathan J held that the judgment in the *Croom*-case⁹² was wrong in holding that the mere fact that the application of the Act to instances where existing rules of practice and procedure apply, would necessarily amount to a prejudice to the proper administration of the law. The court held that every instance where other rules of practice and procedure apply should be considered on its own merits to determine whether the application of the Act, despite the normal rules of practice and procedure, would prejudice the administration of the law in that instance. The court then went on to consider the merits of a request that the police disclose information, gathered during an investigation, to an accused person before the trial commences. The court took into account the fact that in this particular instance, the police had completed their investigation. Disclosure of documents contained in the file could therefore not be said to be dangerous in the sense that it may hamper the investigation. Nathan J accordingly concluded that in this particular instance there is no reason why the accused should not be granted access to the documents gathered by the police and therefore upheld the appeal.

Brooking J, in a separate but concurring judgment, considered the historical development of the rule against discovery by the accused in criminal cases and concluded from this that there are in actual fact no sound reasons why an accused person should not be entitled to access to the information gathered by the police during the investigation, provided that the documents are not privileged in themselves.⁹³

⁹¹(1994) 1 VR 41.

⁹²Supra.

⁹³On 41-51.

SOUTH AFRICAN COURT CASES AFTER THE COMING INTO OPERATION OF THE CONSTITUTION

Access to information contained in police dockets has probably been the dominant constitutional issue confronting our courts since the coming into operation of the Constitution. In total no less than eleven judgments have already been delivered on the question to what extent an accused is entitled to have access to information contained in police dockets.

The first case dealing with a constitutional issue that was reported in the South African Criminal Law Reports was the case of *Fani*⁹⁴. This case dealt with the question whether an accused person is entitled to access to all the information contained in the police docket. Judgment in this case was delivered by Jones J. No reference was made in the judgment to any foreign case law. The court simply considered the legal position with regard to this issue as it applied before the coming into operation of the Constitution. In this regard the court referred to the tendency among prosecutors to furnish less and less information to the defence. The court compared this position to that applicable in civil cases, where the tendency is towards more openness. The court concluded that too much information is withheld from the defence and that in a particular case this could mean that the accused is not sufficiently informed of the particulars of the charge against him to enable him to prepare his defence properly, which may result in his trial not being fair.

The court then held that copies of the following information should be made available to the defence before the accused is required to plead:

- statements by the accused as well as records of any instances where the accused had pointed out anything;
- relevant medical reports;
- reports or statements of a technical or specialist nature;
- relevant documents; such as financial statements and records of identification parades;
- a list of the witnesses the prosecution intends to call at the trial;
- a summary of the statements by state witnesses which is sufficiently detailed to reflect the material features of the testimony they will be able to give and which includes full particulars of any similar fact or character evidence that the state proposes to lead as well as the facts upon which an allegation of common purpose is made; and
- a list of the accused's previous convictions.

⁹⁴1994 (1) SACR 635 (E).

The court held that the above list is neither exhaustive nor definitive and that each case will have to be dealt with on its own merits.

The court then proceeded to consider the request by the defence to have access to the police docket. The court reviewed the common-law privileges attaching to statements by state witnesses and held that this privilege is not removed by virtue of the provisions of ss 23 and 25 of the Constitution.

In a further judgment dealing with this issue, Zietsman, JP, in *James*⁹⁵ considered an application that the state be ordered to hand to the defence a copy of the statement of each state witness. The court was invited to find that the *Fani*-case was wrongly decided in that it ordered the state to furnish only a summary of the statements of state witnesses to the defence. The court referred to the judgment in *Fani* and expressed doubt as to whether s 23 of the Constitution applies to criminal cases at all. It held that *Fani* was wrongly decided in so far as it required the state to furnish to the defence summaries of the statements of state witnesses. According to the court, if, as was held in *Fani*, the state still retains a privilege with regard to the statements of state witnesses, the defence cannot be said to be entitled to a summary of what a state witness will testify. Since the court agreed that the statements of state witnesses remains privileged despite the provisions of the Constitution, it held that the state need not furnish the defence with summaries thereof.

The court furthermore held that the list of previous convictions need also not, as required in *Fani*, be handed over to the defence. According to the court, everything which is handed over to the defence will presumably also be handed over to the court, with the result that the accused will be prejudiced if the court is aware of his previous convictions at the start of the trial.

The court agreed that the information referred to in the first five categories of information referred to in *Fami* (see previous page) should be handed to the defence. In a judgment delivered by Van Rooyen AJ, in *Smith & Another*,⁹⁶ an application was brought that the state be ordered to hand to the defence a copy of the statement of each state witness. In this case the state furnished to the defence a summary of the substantial facts. This summary was hopelessly inadequate to inform the accused of the allegations he has to answer. At the commencement of the trial the defence applied to the court to get copies of the statements of all witnesses the state intended to call. The state requested that it be given the opportunity to file an additional summary of facts.

The court held that despite the provisions of ss 23 and 25 of the Constitution, the state still has a privilege with regard to the statements of state witnesses,

⁹⁵1994 (2) SA 141 (E).

⁹⁶1994 (2) SA 116 (SE).

but that the court has a discretion to order that copies thereof be handed over to the defence where circumstances are such that the interests of justice require that it be so ordered.

In this case the court held that should the prosecutor be allowed time to file an additional summary of facts, the defence will be entitled to ask for a postponement to prepare itself to answer those allegations. Several witnesses were subpoenaed and were available at the court and a postponement would result in their time being wasted. The court accordingly ordered the state to furnish copies of the statements to the defence after the state had confirmed that no information that would disclose the identity of police informers or would prejudice the safety of the state was contained in the statements.

Another judgment which requires mentioning is that of Myburgh J in the case of *Kbala v Minister of Safety and Security*⁹⁷ in the Witwatersrand Local Division of the Supreme Court. In this case a suspect in an ongoing investigation instituted an action against the Minister of Safety and Security for unlawful arrest and detention. The plaintiff requested access to the police docket and relied on s 23 of the Constitution for this purpose. The request was refused by the defendant.

Myburgh J set out the position as far as discovery in criminal proceedings are concerned in Canada, the United States, England, Australia and New Zealand and then concluded that there can be no such thing as a blanket 'docket privilege' covering all information contained in the police docket.

The court held, however, that some information in the docket may be privileged. This includes information by means of which the identity of informers may be established, the identity of witnesses may be established where there is a real risk that they may be intimidated or be interfered with, or by means of which new techniques of police investigation may be revealed. The court rejected the idea that statements by state witnesses are per se privileged without any special circumstances making their disclosure inadvisable.

Since the court was unable to state whether there was any information in the police docket which was privileged, it ordered the defendant to file a supplementary discovery affidavit in which it lists the material with regard to which no privilege attaches and the material with regard to which privilege is claimed.

In the case of *Botha en Andere*⁹⁸ in the Witwatersrand Local Division the prosecution was ordered by Le Roux J to disclose to the defence statements

⁹⁷1994 (4) SA 218 (W).

⁹⁸1994 (4) SA 799 (W).

obtained from state witnesses. Furthermore it was held that the defence may consult with state witnesses, provided that the Attorney-General is informed of the intention to do so and is afforded the opportunity to attend the consultation and provided the state witness consents to the interview.

In the case of *Sefadi*⁹⁹ in Natal, Marnewick J, who delivered the judgment, held that the state privilege with regard to statements obtained from potential state witnesses, constitutes an unreasonable and unjustifiable limitation to the rights of an accused as set out in s 23 of the Constitution. A similar approach was adopted in the Cape in the judgment delivered by Marais J in *Nortje and Another v Attorney-General of the Cape and Another*.¹⁰⁰ In the latter case it was held that to withhold information from the defence in circumstances in which the defence can reasonably be said to require it in order to properly prepare for the trial, amounts to a negation of the essential content of the right of the accused to such information. See also *Majavu*,¹⁰¹ *Kboza en Andere*¹⁰² and *Phato v Attorney-General, Eastern Cape and Another; Commissioner of the SAPS v Attorney-General, Eastern Cape and Others*¹⁰³ where a similar approach was adopted.

In *Thobejane*¹⁰⁴ Marais J considered a request by the defence to have access to the entire police docket. In this case the Attorney-General had supplied the defence with a summary of facts and copies of statements made by the accused to the police, post mortem reports, photographs and notes relating to pointings out, as well as medical reports from medical examiners who had examined the accused. The court referred to a number of decisions by the Appellate Division in which it was clearly held that a docket privilege exists and stated that he was bound by these decisions. According to Marais J, the Constitution should have spelled out clearly that accused persons are entitled to access to police dockets, had that been the intention of the legislature. He concluded that the state has furnished sufficient information to the defence regarding the charges against the accused and refused to order the state to provide the statements of witnesses to the defence.

CONCLUSION

Perhaps the only conclusion that one can draw from the above, is that the position, as far as access to information contained in police dockets is concerned, is far from finalised in our law. In my view this matter should urgently be considered by the Constitutional Court so that finality can be reached.

⁹⁹1994 (2) SACR 667 (D).

¹⁰⁰1995 (1) SACR 446 (C).

¹⁰¹1994 (4) SA 268 (Ck).

¹⁰²1994 (2) SACR 611 (W).

¹⁰³1994 (2) SACR 734 (E).

¹⁰⁴1995 (1) SACR 329 (T).

From the exposition of the approaches followed in the judgments that have been delivered since the coming into operation of the Constitution, it is clear that the tendency is to require the state to provide more information to the defence than before. This was to be expected. Speaking from my own experience as counsel for the defence, individual public prosecutors sometimes even refuse to provide copies of documents that were created by the accused and were seized from him. It is clear that the withholding of copies of such documents can never be justified. Although I normally succeeded in obtaining such copies, this often only happened after long and heated arguments. This is totally unacceptable and should never be necessary. From discussions with other defence lawyers, it seems to have been their experience as well. It was therefore to be expected that defence lawyers would jump at the opportunity provided by the Constitution to force a more open approach on the prosecution and that their dilemma would find some sympathy with the courts.

However, having said this, the question must be asked whether our courts are not moving too fast and too far in trying to rectify the position.

There can be little doubt that an accused person requires a substantial amount of information to properly prepare his defence. It is furthermore difficult to see why an accused should be denied access to reports by forensic and other experts obtained during the course of the investigation. The same applies to documentary evidence such as bank statements, etc. The only question that may be raised is whether the accused should be furnished with copies of statements taken from potential state witnesses. To my mind, this question can only be answered after due consideration has been given to the circumstances prevailing in South Africa at the present time.

Until the elections in April last year, active campaigns were waged against the police. The police were portrayed as the protectors of the minority government and had to be neutralised in every possible way if liberation was to be achieved. To do this the police were discredited at every possible opportunity, sometimes rightly and sometimes wrongly. During the eighties this resulted in a situation where the police have been discredited to such an extent that they were no longer trusted by large sections of the community. These sections of the community no longer reported crimes to the police, but in stead policed their own areas, vigilante groups sprang up all over the country and kangaroo courts were utilised to punish offenders, sometimes brutally. Efforts by the police to change their methods of policing during those years did achieve some success, but unfortunately not enough. Even those members of the said sections of the community who were still prepared to assist the police in their efforts to combat crime, found themselves isolated from their communities and were persecuted for doing so. In the process several of them were assaulted or brutally murdered while the homes and belongings of others were destroyed because of their association with the police. By the end of the eighties, it became increasingly difficult to find members of those communities who were still prepared to assist the police. Apart from any other effect that this may have had, it definitely favoured criminal elements in those commun-

ities. As could be expected, criminal elements actively supported campaigns to discredit the police and actively participated in the intimidation of members of their communities that were prepared to assist the police.

Liberation was indeed eventually achieved and a full democracy established in South Africa in April 1994. Since then the long and slow process of establishing an effective and community orientated new South African Police Service has begun. Nobody should be misled into believing that this can be achieved overnight. Although the new government is now actively trying to improve the image of the police in all communities, one can expect the normalisation of police-community relations to take a long time. In recent times some encouraging reports of successes in this regard have been published. This, of course, does not suit criminal elements in the community. Better police-community relations increase the chances of them being identified and being prosecuted for their criminal acts. One may therefore expect them to fight even harder to prevent a normalisation in police-community relations and may expect to see even more brutal intimidation of persons assisting the police and more attacks on police persons. Recent reports about police persons that were assassinated in cold blood, confirm that this is already taking place. Even where better police-community relations are established, one may assume that these will at first be extremely fragile. Members of communities where intimidation was rife will still remember what happened to persons who assisted the police and will be loath to be the first to be seen to be co-operating with the police lest they become victims of the same fate. There can therefore be little doubt that any co-operation received from the community, however tenuous it may initially be, will have to be fostered to encourage further co-operation.

It is against this background that one has to view the developments surrounding the recent judgments on access to information contained in police dockets.

Of the countries considered, only Canada, New Zealand and Australia seem to require the prosecution to provide the defence with all statements obtained from potential state witnesses, unless there are reasonable grounds to believe that a particular witness will be intimidated. England allows the prosecution a very wide discretion to withhold copies of statements from witnesses. The United States specifically excludes witness statements from the documents that need to be disclosed to the defence. Both the United States and England are 'open and democratic societies based on freedom and equality', as are Canada, New Zealand and Australia. It therefore seems to be arguable that to withhold witness statements from the defence, is justifiable in at least some 'open and democratic societies based on freedom and equality'.

In the light of what has been said about police-community relations, an approach which would allow the defence access to witness statements, seems to be dangerous in the present day South Africa. If witnesses were to know that what they tell the police will be conveyed to the accused, the police will in many instances find it difficult to convince people to continue to assist them

in their investigations.

It is of course true that all the judgments recognised the state privilege to refuse to disclose information that would lead to the identification of informers or to refuse to disclose particulars of witnesses where there are legitimate fears that the witnesses will be subjected to intimidation. In practice this will offer little consolation. In many instances a public prosecutor or counsel for the state will find it impossible from the police docket to determine whether there are legitimate reasons to believe that an accused will interfere with witnesses or will intimidate them. To establish this will require a separate investigation focusing on this issue. Since there are normally not sufficient time to have such an investigation conducted before the decision to disclose or to refuse to disclose is taken, it is more likely than not that the state will be forced to disclose statements without it being in a position to evaluate properly whether legitimate fears of intimidation exist in a particular instance. It is clear that our Constitutional Court will require Solomonic wisdom in deciding this issue.

Germany: coming to terms with the past and the criminal justice system

BARBARA HUBER*

Sas Strauss came to the Max-Planck-Institute of Foreign and International Criminal Law in Freiburg, Germany in 1972. He had just gone through a painful period in his life and felt sad and vulnerable. Here in Freiburg and in the Institute he made new friends and regained his optimism, enjoying the pleasant city of Freiburg and the serene autumn landscape of the Black Forest. I was most fortunate to meet him then and to become one of his friends. From his study period in Freiburg developed strong ties between the Department of Criminal and Procedural Law of Unisa and the Max-Planck-Institute. He personally organised my first visit to the Department and other South African universities. At one stage he earnestly encouraged me to give the lecture without the support of the written text — I had not been aware that I was to participate in a conference at the University of the North and left the paper behind. His presence (never fear when Sas is near) and his confidence in the qualities of others have always been a motivation for renewed efforts. He has vigorously exhorted his colleagues to spend some time at the Institute in Freiburg. In every case these months abroad made an impact on the personal and academic development of young scholars, not only broadening their knowledge of criminal law and jurisprudence, but also widening their cultural horizons. His democratic attitude and his persistent endeavours for a better South Africa always made it easier for me to accept invitations to Unisa at a time when such visits were regarded with criticism, disdain or even contempt. To know this upright and sincere man, whose gentle and sensitive attitude is accompanied by a strong will and a profound sense of responsibility and duty, has always been a very special joy. Fortunately, over the years there were various opportunities to cultivate this relationship. I treasure them and hope and wish that more will follow in the future.

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Introduction

Many countries where, in the recent past, fundamental political change from a totalitarian regime to a democratic form of government has taken place, face the problematic question how to deal with the atrocities and human rights violations committed by members of the military or security forces at the behest of government organs or army commanders, by the judiciary, or by private individuals in the name of the totalitarian system. In Latin America,¹ more recently in Hawaii, in the Central and Eastern European States breaking away from Soviet power and, especially in Germany, the issue of whether to bring to justice officials who violated human rights or ordinary criminal law has been and still is a subject of serious debate.

Every such transition from one constitutional dispensation to another implies substantially changed criteria for the legitimation of state power. As a consequence the frame-work within which the state can limit the liberty of its citizens by imposing criminal sanctions is changed. We therefore see that such periods of transformation generally lead to reform activities in the field of criminal law, proving the great political sensibility of the criminal law and its specific relation to the constitutional organisation of the day. Examples of this can be found in Spain after the death of General Franco and in the Latin-American republics of Argentina, Chile and Uruguay after the fall or retirement of the military juntas in the mid-eighties. The reason for this close connection between state organisation and criminal law is to be found in the fact that the criminal law is by far the most effective means of the state to encroach on the liberty of its citizens. By observing the criminal law of a state a judgment can very often be formed whether the state is a democratic *Rechtsstaat* or not.

New democracies therefore face a double challenge: they must guarantee prospective (future) justice but at the same time have to deal retrospectively with the illegal acts committed by the state in the past. The later task can generally only be fulfilled by punishing the persons who are individually responsible for the deeds of the past. Thus, the criminal law, having served as an instrument of political suppression during the sway of the *Unrechtsstaat*, now fulfils the opposite political function during the transitional period to the *Rechtsstaat*. This new function consists in the state's demonstration of legal disapproval of the former *Unrechtsstaat*.

As will be seen, the rule of law/*rechtsstaatliche* criminal law and criminal procedure law reaches its limits sooner or later when facing the problems con-

¹As to the situation in Argentina, see M Sancinetti *Derechos Humanos en la Argentina Post Dictatorial* 1988; J Maier 'Die strafrechtliche Aufarbeitung von staatlich gesteuertem Unrecht in Argentinien' 1995 *ZStW* vol 107 143-156. For Hungary, see K Bárd 'Die strafrechtliche Aufarbeitung von staatlich gesteuertem Unrecht in Ungarn' 1995 *ZStW* 118-133; S Zimmermann 'Zum zweiten Verjährungsbeschluß des ungarischen Verfassungsgerichts' *Jahrbuch für Ostrecht* XXXV (1994) 293-300; F Nagy 'Zur Problematik der Verjährung in Ungarn' 1994 *ZStW* vol 106 880-889 (Auslandsrundschau). For Poland, see A Zoll 'Die strafrechtliche Aufarbeitung von staatlich gesteuertem Unrecht in Polen' 1995 *ZStW* 1334-142.

nected with this task. The reasons for this are to be found in its own principles. The principle of *nullum crimen sine lege* in its form of prohibition of retroactivity establishes certain difficulties regarding the disapproval of former illegal acts which the legal order of the *Unrechtsstaat* tolerated, if not even overtly approved of.² Practical problems are created by the great number of offences committed by the *Unrechtsstaat*. Investigation and trial of all these offences would choke the criminal justice system for many years to come.

This somewhat problematic use of the criminal law in dealing with illegal acts committed by states does not follow the same rules in all countries which are facing the task of coming to terms with their former political system.

The following contribution will focus on some of the multi-faceted problems which resulted from the unification of the German States in 1989. As in 1945, when the Nazi dictatorship collapsed, the assessment of the acts committed under the SED regime in the name of criminal justice, once more holds the attention.

Despite the maxim of the liberal rule-of-law state that the criminal law should keep clear of politics, the present trend favours the exact reverse. An apposite example is to be found in the *Report of the Enquête Commission of the German Parliament*.³ It is, the Commission points out, the primary duty of the state to identify unlawful acts and to prosecute them. The paper deals with those steps to be taken by prosecutorial agencies and how politicians should bring their influence to bear in order to realise this aim. The legitimacy of such political activity is based on 'the violated legal feelings (*Rechtsgefühl*) of the population of the former DDR who demand that offences committed under the SED regime should be investigated, processed and the offenders made accountable for their deeds.'⁴ The rule-of-law state/*Rechtsstaat* is made dependent on politics: a result diametrically opposed to that envisaged by the liberal state. With regard to the DDR's past, the state is expected to use the criminal law as an instrument to remedy 'hurt legal feelings'.⁵

The question now is, how can this be achieved and what legal problems have been caused by such demands?

²Compare Carl Schmitt *Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz "nullum crimen sine lege"* edited by H Quaritsch Berlin 1994.

³Bericht der Enquête-Kommission 'Aufarbeitung von Geschichte und Folgen der DDR' *BT-Drucksache* 12/7820 of 31 May 1994.

⁴See Bericht (fn 3) 101.

⁵See J Arnold 'Die 'Bewältigung' der DDR-Vergangenheit vor den Schranken des rechtsstaatlichen Strafrechts' in Institut für Kriminalwissenschaft Frankfurt a M (ed) *Vom unmöglichen Zustand des Strafrechts* Frankfurt 1995 283–312; PA Albrecht *Das Strafrecht auf dem Weg vom liberalen Rechtsstaat zum sozialen Interventionsstaat* KritV 1988 182 ff.

Legal problems

Scope of the clearing-up

All branches of the judiciary are required to solve conflicts which are part of the DDR heritage. Whether property questions have to be adjudicated or pension rights sorted out – to mention only a few examples – solutions have to be found to address the consequences of 40 years of an indifferent legal order. In the field of criminal law not only what is called government criminality keeps state prosecutors and courts busy⁶ but also the thousands of applications by victims whose demands for review of their convictions, for rehabilitation and compensation for the suffering inflicted on them. Many a hope pinned on damages or compensation has already been dashed. Evidence is hard to find to support accusations against the so-called *Schreibtischtäter* (desk offenders) of totalitarian regimes.⁷ A further, and more important factor is that courts are limited in their evaluation of DDR injustice under West German standards of law.⁸

⁶A national criminal law system is overburdened when facing the task of dealing with a totalitarian system. A few figures may give a more concrete impression of the extent of crime under review at the moment. The Berlin state prosecution office in a press statement of December 1994 gave notice that as a so-called focal prosecution office (*Schwerpunktstaatsanwaltschaft*) dealing exclusively with government crimes committed in the DDR, it has so far issued indictments in 130 cases. In 49 cases the court has not yet decided about the opening of the trial while in 81 cases the trial has been opened. The greatest number, namely 50 indictments relates to killings by shooting fugitives; 30 cases involve indictments of judges and state prosecutors for 'bending the law'. Not included in these statistics are indictments for spying against the Federal Republic of Germany though these offences are also Government offences when committed by officers of the DDR State Security Service. They have to be dealt with by the Federal State Prosecution Office, not by the state prosecutors' office of Berlin. As to this type of case, see the decision by the BGH against Markus Wolf, the former chief of the foreign intelligence department of the DDR.

⁷This is not only a German problem, it is the difficulty in many Eastern countries where attempts are undertaken to bring offenders of this class to trial: see for example the case against those men who were indicted of having ordered the murder of the Polish priest Jerzy Popieluszko. In 1985 four policemen who had abducted the priest were convicted and sentenced to lengthy terms of imprisonment for the killing. After the fall of the Communist regime in Poland two men operating behind the scene, General Z Platek and a high ranking official in the Interior Ministry, W Ciaston, stood trial. As superiors of the secret police members who actually perpetrated the murder, they created an atmosphere of hatred and violence intimating that reckless and even illegal violent acts against anti-communist activists would be 'received positively above'. Since there was no direct written order as to the murder, they were acquitted for lack of evidence. In other cases investigations against backstage instigators, including the generals of the military law junta like Jaruselski, also failed. They had had the opportunity to destroy all evidence against them.

⁸Meanwhile the former DDR Head of State and Party Leader Krenz, together with six high ranking former members of the polit-bureau, have been indicted for border killings. Their alleged offences include multiple manslaughters and attempted manslaughter by shootings and mines at the Wall, committed by omission. These persons knew of the shootings and did nothing to stop them. Proceedings against the former DDR Head of State Honecker and Prime Minister Stoph have been abandoned for health reasons. Honecker died in exile in Chile in 1994.

Criminal acts committed by former rulers, state officials and their subordinates or helpers can be listed and classified as follows:

- acts of violence at the former inner German border (the border separating the former West and East Germany); between 1949 to 1989 more than 200 persons have been killed by shooting, exploding mines and spring gun devices; more than 300 persons have been injured, most of them seriously. In addition, fugitives have been subjected to violence (by firing guns without taking aim) to induce them to abandon their plans of leaving the country.⁹
- judicial offences committed by giving either wrongful judgments or withholding an acquittal. This shows how the SED agencies used the criminal justice system to achieve their political aims. By this method not only were opponents voicing criticism disciplined or eliminated, but also people who intended to leave the country and their supporters were intimidated by ruthless persecution.¹⁰
- acts committed by the Ministry for State Security, in particular cases of kidnapping, false imprisonment or deprivation of liberty, assassination of opponents, telephone tapping or mail censoring, entering private homes, etc.
- economic crimes, in particular 'supply criminality' of functionaries and irregular trade practices of the commercial coordination agencies.
- falsification of election results.

The whole criminal justice administration itself (including the sentencing practice of DDR courts) was guided by political instructions and guidelines orally communicated to the judges.¹¹ In particular on those citizens who wanted to leave the country was conferred the extra-legal status of outcasts, a label carrying consequences far beyond the criminal process.¹²

The role of the criminal law

Can and should all these crimes be investigated and the offenders brought to justice? This fundamental question has been discussed by the general public as well as by academics in numerous monographs¹³ and articles.¹⁴ It is

⁹Over 1,200 cases of this kind have become known.

¹⁰See examples in J Limbach 'Vergangenheitsbewältigung durch die Justiz' 1993 *DtZ* Heft 3 66 ff.

¹¹The text of these instructions was kept secret. It was found accidentally in Berlin and Dresden in October 1990.

¹²For more details see *Limbach* (fn 9) 67.

¹³See, for example, W Odersky *Die Rolle des Strafrechts bei der Bewältigung politischen Unrechts* (Juristische Studiengesellschaft Karlsruhe Bd 204) Heidelberg 1992; U Battis, G Jakobs and E Jesse *Vergangenheitsbewältigung durch Recht. Drei Abhandlungen zu einem deutschen Problem* ed by J Isensee Berlin 1992; K Lüderssen *Der Staat geht unter — Das Unrecht bleibt? Regierungskriminalität in der ehemaligen DDR* Frankfurt 1992; 40 *Jahre SED Unrecht. Eine Herausforderung an*

common opinion that the criminal law *alone* can certainly not come to terms with the DDR past. Political rehabilitation is also required. The loss in legal culture during the 40 years of dictatorship, furthermore, can never be made good merely by the application of the criminal law.

Beyond such a general realisation of the situation, the administration of criminal justice cannot escape answering the basic question. Under the German law of procedure, state prosecution agencies would be under a general duty to prosecute if no legal exemptions exist and there are sufficient facts to support a reasonable suspicion (§ 152 (2) StPO). The central problem therefore is whether acts which were not punishable under the criminal law of the DDR can be prosecuted today by the Federal German public prosecution. What was legal yesterday, cannot be illegal today. The concept *nullum crimen sine lege* is a constitutional principle enshrined in Art. 103(2) of the Basic Law. Thus, acts can only be punished if the punishability was prescribed by law before the act was committed. The prohibition of retroactive laws belongs to the essence of the *Rechtsstaat* and is not open to negotiation.

The prosecution of former DDR offences is determined by the Treaty of Unification (*Einigungsvertrag*) which amended art 315 of the Act introducing the Penal Code (EGStGB). Since the citizens of the DDR were considered to be of German nationality the principle of protection (§ 7 StGB) refers to them as the 'passive and active personality principle'. This means that prosecution depends on whether the offence was punishable under the criminal laws of the DDR, being the territory where the act was committed.

The criminal law of the DDR

Under the Criminal Code of the DDR,¹⁵ which is based on the German *Reichstrafgesetzbuch*, acts like homicide, perversion of justice, deprivation of liberty and false imprisonment were punishable offenses. Furthermore, the citizens of the DDR knew that killing or depriving someone of his liberty were illegal acts prohibited by the Criminal Code. Consequently, the acts committed by border soldiers when firing and killing or wounding fugitives; by judges when abusing the law or sentencing disproportionately; by state security officials when kidnapping people; by functionaries when defrauding the population would have been punishable under the law of the DDR territory – unless certain legal reasons or principles could inhibit any efficient prosecution.

Three main reasons have been advanced as obstacles to dealing judicially with the violations committed by members of government agencies, border soldiers

den Rechtsstaat I Forum des Bundesministers der Justiz am 9.7.1991 in Bonn, München 1992.

¹⁴A bibliography listing articles to the early months of 1993 can be found in J Arnold 'Deutsche Einheit: Strafrechtliche Übergangsprobleme' in A Eser and B Huber (eds) *Strafrechtsentwicklung in Europa* 4 Landesberichte 1989–1992 Freiburg 1993 388–389.

¹⁵DDR-StGB of 12.1.1968.

and other individuals. These are (i) retroactivity with regard to limitation, (ii) reasons of justification, and (iii) the amnesty laws of the DDR. All three topics have caused widespread academic debate which cannot be dealt with in detail here.

Meanwhile several courts of first instance¹⁶ as well as the German Supreme Court have had the opportunity to deliver judgments in various cases of wall shootings (*Mauerschützen*).¹⁷ The former President of the DDR State Council (*Staatsratsvorsitzende*) Honecker was also indicted for 49 cases of shooting at the Wall. This attempt to put to charge the highest representative of the DDR Government (in addition to the soldiers who actually committed the killing and assault) failed in the end because the process was discontinued for reasons of the accused's ill health. The former Minister of Defence, his deputy and another member of the National Defence Council were not so lucky; they were convicted of manslaughter as principals or so called 'indirect actors' (*mittelbare Täter*) who acted *via* the real perpetrators.¹⁸

All these trials must be seen as political processes. The adjudication of individual acts must be seen against the background of the legality or illegality of a different political system and its system of constitutional values. In comparing and assessing individual acts, judicial value standards must be objective and thoroughly reasoned. Prosecution agencies and judges are in a difficult position: public opinion nourished and informed by the media about the hitherto unknown extent of human rights violations has high expectations as to 'deserved convictions' and possibilities of coming to terms with the past. Symptomatic of these expectations and the disappointment of many former DDR citizens after the first judgments were handed down is the phrase 'we hoped for justice but we got the *Rechtsstaat*.'¹⁹ But the principles and guarantees of a process governed by the rule of law and the principles of basic and human rights have to be observed in these trials as in all others.

For present purposes, it is impossible to discuss all the varieties of the Wall shooting cases²⁰ or all the legal problems emanating from them.²¹ I have to

¹⁶*Landgericht* (District Court) Berlin judgment of 20.1.1992 (*Gueffroy* case). NJ 1992, 269 ff; judgment of 5.2.1992 (*Schmidt* case) NStZ 1992, 492; judgment of 22.6.1992 (*Sievert* case, unpublished); judgment of 3.7.1992 (*Proksch* case, unpublished); all judgments of the District Court were appealed against to the Federal Supreme Court.

¹⁷BGH judgment of 3.11.1992 – NJW 1993 141 ff (*Schmidt* case); BGH judgment of 25.3.1993 – NJW 1993 192 ff; BGH judgment of 20.10.1993 – NJW 1994 267 ff.

¹⁸BGH judgment of 26.7.1994, 5 StR 167/94, JZ 1995, 45. See commentary to this highly significant judgment by Roxin, JZ 1995 49–52, on the figure of the 'indirect actor' or 'desk actor' who, as part or member of the power structure, is responsible as principal of the offenses committed by the border soldiers as fully responsible agents.

¹⁹See Bärbel Bohley *Die Zeit* 14 1992 44.

²⁰There are two groups of cases to be distinguished; several homicides were committed by soldiers overstepping the line which the *Grenzgesetz* (Border Act) drew for justified action in order to stop people leaving the country; such individual excesses cannot be justified at all. The other group is formed by cases in which the

restrict myself to the three reasons mentioned above which could cause an effective trial against the soldiers to go amiss.

Criminal law obstacles to establishing criminal responsibility

Problem no 1: Period of limitation for prosecutions (Prescription)

The homicide provisions in the DDR Code § 113 correspond to the West German basic version of § 212 StGB; the murder provision of § 112 corresponds to § 211 StGB. When applying former DDR criminal law to the offenses committed on the territory of that state, the whole body of the criminal law has to be considered.

This means that rules providing for limitation have to be taken into account. Unlike the common law, where there is generally a discretion to prosecute, under German law (where a statutory duty to prosecute is the point of departure) such prosecutions become void when the legally prescribed period of limitation has expired. It is an acknowledged principle that after a lapse of time a criminal act becomes a historical event and the necessity to prosecute becomes less urgent; the state has to take account of the time factor and personality changes in the offender. In addition, the evidential difficulties increase after some time passed.²²

Under DDR criminal law such limitation proscribing any prosecution took effect after 15 years in cases of manslaughter and after 25 years in cases of murder.²³ Several crimes of manslaughter committed in 1965 or 1970 would therefore be exempt from prosecution. The Unification Treaty expressly dealt with the question of limitation stating that 'so far as the limitation had not been completed on the day of merger of both states this position was considered to remain as such; the running of the period was stopped on that day.'²⁴ From this it could be concluded that in the case of crimes for which limitation periods were already completed under DDR rule prosecution was barred.

Except for a few judgments, this opinion met with fierce resistance by politicians²⁵ and academics.²⁶ There was soon to be consensus that 'crimes

soldiers kept within the bounds of what the *Grenzzgesetz* allowed them to do. For details see H Roggemann 'Zur Strafbarkeit der Mauerschützen' 1993 *DiZ* 10, 12 ff.

²¹Discussed by F Herzog 'Zur strafrechtlichen Verantwortlichkeit von Todesschützen an der innerdeutschen Grenze' 1993 *NJ* 1-4.

²²See for his principle H-H Jescheck *Lehrbuch des Strafrechts, Allgemeiner Teil* München 1988 § 86 I; Schönke-Schröder-Stree *Kommentar zum StGB* 1991 Vorbem §§ 78 Rdnr 3.

²³§ 82 I DDR-StGB.

²⁴*Einigungsvertrag* in connection with art 315a EGStGB.

²⁵*Beschluss der Justizministerkonferenz* 5/6.11.1991.

²⁶See bibliographical list in J Arnold (fn 14 above); bibliography in A Eser and J Arnold 'Strafrechtsprobleme im geeinten Deutschland: Die Strafrechtswissenschaft vor neuen Herausforderungen' in Eser, Kaiser & Weigend (eds) *Von totalitärem zu rechtsstaatlichem Strafrecht* Freiburg 1993 603, 648.

which were induced or approved by former rulers or members of government and were not prosecuted thus disregarding standards of the rule of law, are exempt from limitation.' By an act of Parliament it was expressly stated that the limitation was interrupted between October 1949 and October 1990 with regard to crimes which were not prosecuted by the DDR organs because of political or other reasons disregarding the essential principles of a liberal order under the rule of law.²⁷

It is quite obvious that this a politically motivated process. If the principles of retroactivity were taken seriously the result would be questionable in the extreme. Critical comments have been made by a number of academic writers formulating concern about this method of negating basic principles of rule of law.²⁸

However, the result is that offences can now be prosecuted without limitation.²⁹

Problem no 2: Reasons of justification

Acts of homicide and serious bodily injury committed by border soldiers in order to prevent persons from leaving the territory of the DDR without permission were legal under s 27 DDR *Grenzgesetz* of 1982. The Act³⁰ prescribed in detail the conditions for the use of weapons and the limits of such use. The soldiers were generally under the order first to call at the runaway, then to fire a warning shot followed by one aimed at the refugee. In any event they were obliged to prevent the flight, even by killing the person. When such a killing occurred the soldiers who fired the fatal shot was never reprimanded or prosecuted; on the contrary – he was rewarded and even

²⁷1. *Verjährungsgesetz* (BGBl, 1993 I p. 392), First Limitation Act 1993; it was followed by the 2. *Verjährungsgesetz* 1993 vom 27.9.1993 (BGBl I p. 1657), Second Limitation Act 1993.

²⁸See W Böttke 'Die Verfolgung von Regierungskriminalität der DDR nach dem Beitritt der neuen Länder' in E-J Lampe (ed) *Deutsche Wiedervereinigung: die Rechtseinheit. Arbeitskreis Strafrecht* Bd 2 Köln 1993 203 ff, 237; K Breymann 'Zur Auslegung der Verjährungsregelung in Art. 315a EGStGB' 1991 *NSZ* 463 ff; A Eser and J Arnold (fn 26 above); G Grünwald 'Zur Frage des Ruhens der Verjährung von DDR-Straftaten' 1992 *StrV* 333 ff. For further titles see Arnold (fn 5 above), notes 67 ff.

²⁹Compare, in contrast, the resolution of the Constitutional Court of the Hungarian Republic no 11/1992, holding that the law adopted during the 4 Nov 1991 session of Parliament concerning the right to prosecute serious criminal offenses committed between 21 Dec 1944 and 22 May 1990 that had not been prosecuted for political reasons is non-constitutional. The English translation of this resolution can be found in *Journal of Constitutional Law in Eastern and Central Europe* vol 1 129–157.

³⁰Before this Act was promulgated the shooting was regulated by regulations which referred to secret military rules; *DDR-Verordnung zum Schutze der Staatsgrenze der DDR* 19.3.1964; *DDR-Grenzordnung* 15.7.1972. Between 1966 and probably 1987 the border soldiers when taking their military position at the border were reminded of their duty 'not to allow the breaking/passing of the border in any direction, to track down any person who tries to violate the border, to arrest or to annihilate him/her, and to recognise provocative actions in time and to prevent any spreading of them on the territory of the DDR'.

accorded distinction.

The Federal Supreme Court when dealing with the question of justification under the *Grenzgesetz*³¹ delivered a complicated judgment arguing on several levels. Firstly, the court comes to the conclusion that the soldiers acted lawfully and within the scope of former DDR state practice when they shot at persons in order to prevent them from crossing the border. The ratio was found in the fact that illegal border-crossing under certain circumstances was a crime under § 213 of the DDR Penal Code. Under the prevailing practice in the DDR the prevention of illegal border-crossing was paramount to the protection of life or bodily integrity.

Secondly, the BGH subjects this finding to a further analysis or control measuring the reasons for justification against higher ranking legal principles. The court takes as its point of departure the fact that justification at the time of acting may be disregarded as violating higher ranking principles, when such reasons express an apparently serious violation of basic ideas of justice and humanity. The violation must be so grave that it controverts all legal convictions common to all peoples and relating to the value and dignity of the individual. As a guideline the BGH thus uses the so called *Radbruch* formula which holds that positive law when illegitimate or incorrect (*unrichtiges Recht*) has to defer to justice when the contradiction between law and justice becomes intolerable.³² The BGH perceives such an unbearable contradiction between law and justice by taking art. 12 (2) of the International Covenant for Civil and Political Rights of 19.12.1966 as a standard. This provision gives every person the right to leave any country, including his own. Though the DDR had never incorporated this Covenant into its law, it was legally bound by it because it had ratified the Covenant. The government violated art 12 by generally – not only in exceptional cases – preventing its citizens to leave the country. The DDR Government furthermore violated art 6 of the Covenant by arbitrarily taking the life of citizens who wanted to leave the country. Therefore, the justification derived from § 27 *DDR-Grenzgesetz* had been invalid from the beginning; the incapacitation was not justified under DDR law as it could have been applied if the criteria of the legal order of this state would have been used. Killing by shooting at persons at the border accordingly was unjustified and therefore illegal, even under DDR law.

Problem no 3: Retroactivity

Reaching (so far preliminary) conclusion, the Supreme Court is faced with the prohibition of retroactivity provided for by the Constitution.³³ Under the

³¹See judgments cited above fn 18.

³²G Radbruch 'Gesetzliches Unrecht und übergesetzliches Recht' 1946 *SJZ* 105 ff.

³³See art 103 (2) Basic Law and § 2 StGB. In addition art 7 of the European Convention of Human Rights provides that 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed', and art 115 (2) makes it clear that there can be no derogation from art 7.

principle of legality the law should state clearly and in advance the body of rules and exceptions under which an act is made punishable. Therefore, an act can only be punished if the punishability was already laid down by law at the time of the offence, no retroactive effect of a later law can be allowed. The West German Criminal Code which is now the only criminal law in the unified country also provides that more severe laws in relation to the former DDR-law shall not be applied, while milder laws have to be applied with relation to acts committed on the territory of the DDR. (This may be a German problem alone: in most other countries, where political change has taken place, the former criminal law continues to be in force).

When evaluating the former acts the Supreme Court – with regard to art 103 II Basic Law – was faced with the question which interpretation of the law at the time of the offence should prevail. If the shooting was seen as being illegal under DDR-law because there was no valid reason for justification (as the Supreme Court opines) though this was ordered by the State – then the principle of retroactivity does not inhibit conviction and punishment. Another result may be achieved if one takes as a standard for the evaluation of such acts the conditions (in terms of power) existing at the time. In particular, consideration of the effect of superior orders to negate the general right to life could lead to different conclusions. As the Supreme Court acknowledges, reasons of justification are not generally excluded from the protection offered by art 103 II GG. If an act was not illegal because of a then valid defence, it cannot be punished at a later stage, when such defence has been eliminated.³⁴ This would mean a change of law to the detriment of the accused.³⁵ The same is true for an interpretation of reasons of justification which have been acknowledged and practised at the time of the offence, but have controverted higher ranking norms.

Though the general discussion has not yet created a common prevailing opinion as to the post-facto relevance of former defences³⁶ the Supreme Court has assumed a position.³⁷ Arguing that the present judge is not bound by former interpretation when deciding whether the punishability had been laid down before the offence was committed, but can replace former state practice by a post-facto evaluation of his own – taking the DDR Constitution and the international obligations in relation to human rights as parameter – the Court came to the conclusion, that the former justification could not have been deduced from the law if it would have been interpreted in the right way then. Regarding the state practice in question as unlawful and unworthy of reliance *ex tunc*, the court saw no reason for protecting reliance on such practice.

³⁴See A Eser in *Schönke-Schröder* 24 ed § 2 margin no 3.

³⁵See G Jakobs *Strafrecht Allgemeiner Teil* 2 ed 1991 121.

³⁶Further literature at Eser in *Schönke-Schröder* (fn 34 above) margin no 8.

³⁷Judgment cited above fn 17 148.

As a result, the Supreme Court did not find a reason for the application of the prohibition of retroactivity because there has not been a reason for justification if only the law would have been correctly – that is pro human rights applied by the DDR courts.³⁸

By replacing former interpretation and state practice by its own opinion as to the correct interpretation of former DDR criminal concepts and practice the Supreme Court in the end was successful in its search for a solution to establish responsibility and punishability for system-related criminality (*Systemkriminalität*).

Espionage for the DDR

The question whether former DDR citizens who engaged in espionage for the DDR can now be tried and punished by German courts, is yet another problem to be considered in this context. In a recent decision,³⁹ the Federal Constitutional Court (which could not find a general rule in international law (*Völkerrecht*) proscribing the prosecution of agents of foreign states after the merger of one state with another) considered the constitutionally enshrined principle of proportionality and the prohibition of excessive action (*Übermaßverbot*) a bar to prosecution and trial. The Court held that persons who acted as spies from the territory of the DDR against the Federal Republic, or organised espionage would suffer disproportionately by prosecution and conviction as consequence of a change in the general political situation after the offence was committed. Considering the special character of the offence of espionage which is punishable when committed against the own state but legal, useful and worthy of protection when undertaken to its advantage, the Court stresses the fact that by the dissolution of the DDR the general protection offered by states to their spies has become nil. In addition, only by this unique act of merger the possibility for prosecution of spies by German agencies has become possible. Under these circumstances the offender group of agents are suffering a disproportionate encroachment on their rights, outweighing the interest of the Federal Republic in prosecuting such agent activities to such an extent that the interests of the agents take precedence.

The Federal Constitutional Court thus creates a new bar to prosecution directly from the Constitution. As this bar extends its effects on a whole group of otherwise guilty and punishable offenders, an amnesty for these people is brought in its train and all pending procedures against agents have to be discontinued.

The highly critical dissenting opinion clearly states that the use of the

³⁸The jurisprudence of the First Wall shooting case (*Mauerschützenurteil*) NJW 1993 141 was continued in the Second Wall shooting case decided by the Supreme Court on 25 March 1993 NJW 1993 1932. Further judgments along the same lines are BGH, NJW 1994 2708; BGH, NJW 1994 2703.

³⁹*Beschluß des BVerfG* of 15 May 1995 NJW 1995 1811–1823. The decision was not unanimous, three out of seven judges dissenting.

proportionality principle in this context serves the purpose to protect certain persons for reasons of equity (*Billigkeitsgründe*). By inferring such bar to prosecution directly from the Constitution, the court goes beyond its bounds and usurps legislative and political functions. Creating new law and the decision to grant an amnesty are functions vested in Parliament.

Conclusions

German courts are faced with the difficult task to fulfil political expectations directed at the punishment of formerly powerful persons as well as those who executed the will of such persons and committed offences under superior order. These latter persons assumed they acted lawfully: enforcing the Border Act and carrying out the orders they routinely received and noticing the positive reaction which followed such shootings. The legal structure supporting the functioning of does not easily allow of convicting and punishing these people. Basic constitutional principles shaping the criminal law and procedure militate against an all too easy way out of the problem. Limitation of time and prohibition of retroactivity are the obstacles in the examples of the wall shooting cases, retroactivity also plays a role in cases of obstructing the course of justice (*Rechtsbeugung*)⁴⁰ and falsification of election results.

The reasoning of the Supreme Court shows a revival of supra-positive law and accentuates the fragility of principles of the rule of law⁴¹ when situations turn out to be extraordinary. The principle of time limitation for prosecution was rescinded by Parliament, and so far the constitutionality of the *Verjährungsgesetz* has not been challenged in the Constitutional Court.⁴² The retroactivity prohibition was overruled by the Supreme Court.

The debate has not yet come to an end but it should not be overlooked that the general public seems to have tired of it. There is a state of helplessness in the face of so much diverging opinion. Many people are dissatisfied with the developments and the state of affairs: state prosecutors complain about the slow progress of trials in court, judges feel that current criminality is prosecuted insufficiently because so much time of the overburdened judicial personal is devoted to offences committed in the past. Very little has been

⁴⁰See § 336 StGB(west), § 244 StGB(DDR); BGHSt 40 30, 39; BGH NStZ 1994, 437 regarding the *Rechtsbeugung* by state prosecutors; see also K Letzguß *Festschrift für Helmrich* 1994 73ff; S Höchst 1992 JR 360; CF Schroeder 1993 NStZ 216; and in Lampe (ed) *Die Verfolgung von Regierungskriminalität der DDR nach der Wiedervereinigung* 1993 109, 113; Wassermann 1991 DRiZ 438. Regarding the *Waldbeim* cases see 1992 NStZ 137.

⁴¹W Naucke 'Über die Zerbrechlichkeit des rechtsstaatlichen Strafrechts' 1990 *KritV* 244 ff.

⁴²Whether an act which extends running time limitations is constitutionally correct depends from the scope of the prohibition of retroactivity in art 103 ss 2 GG. Majority opinion follows the decision of the Constitutional Court (BVerfGE 25, 268) stating that Parliament is not inhibited to change time limits with retroactive force. As to the problem see Eser in *Schönke-Schröder* (above fn 34) § 2, margin no 6 giving further opinions.

achieved during the four years since re-unification.⁴³

Again and again the idea of an *amnesty* is entering the political discussion, no longer a taboo. A leading force is the Social Democratic Party proposing an amnesty act or a finality act, but there is much disagreement, even discord among parties as well as in the judiciary and society in general.⁴⁴

An amnesty would exempt the greater number of espionage offences, denunciation, election falsification and other system-related acts as well as political crimes from prosecution. The limitation period for such middle and petty offences is running out in 1995 and 1997 respectively, if not extended. But it is not yet settled in detail which offences should be affected by such a *Schlußgesetz* (Finality Act). General agreement can only be achieved with regard to capital offences like murder, manslaughter (including attempts and aiding and abetting), torture in prisons and more serious political or system-related offences. However, it is difficult to draw the line between offences not worthy of punishment and those violations of human rights which must be prosecuted. But what about the judges and prosecutors who collaborated in imposing high sentences on persons intending to leave the country or outspoken critics of the state, the functionaries who ordered abductions and postal searches and who took bribes?

The victims probably would not understand. They are principally interested in knowing what happened and to see that not only the soldier on the border is convicted but also those high ranking persons who ordered and supported the shooting. This is not necessarily revenge, but the wish to see justice to be done. From the point of view and feeling of the Eastern population it is probably too early to draw a final curtain over the past. Whether an amnesty would bring social peace at this moment is an open question.

On a provisional basis it must be said that the attempt to come to terms with the criminal past of the former DDR has not been that successful. Few guilty people have been convicted, many problematic legal questions have arisen and not answered or if answers have been found they are not absolute. However, from this experience we can see that there are no general rules and no model how a *Rechtsstaat* can deal and has to deal with *pre-rechtsstaatlicher* criminality.

I think we should not overlook the statement by Max Weber that no ethic can

⁴³See figures above (fn. 6); see also *Der Spiegel* Nr 48/94: out of 5666 cases investigated by the Berlin special department of the Berlin state prosecution office 5495 had to be abandoned because of lack of evidence or negligible guilt. Only 171 cases were indicted.

⁴⁴See eg the interview given by the former judge of the Constitutional Court EG Mahrenholz *Spiegel* no 48/94 of 12.12.1994; R Wassermann *Die Welt* of 10.11.1994; Rupert Scholz (MdB/Member of Parliament) *Frankfurter Allgemeine Zeitung* of 23, January 1995; R v Weizsäcker (former President of the Federal Republic) *Der Spiegel* no 4/95 of 23, January 1995; R Herzog (present President of the FRG) Deutschlandradio Berlin on 30, December 1994; the Christian Democratic Union, the Social Democratic Party in the Eastern Länder are against such an act.

avoid the fact that in several cases positive results can only be achieved by the use of questionable and sometimes even dangerous means or taking into account the probability of evil side effects. The great question however is – and this cannot be derived from any ethical system – when and to what extent ethically good purpose sanctions ethically dangerous means and side effects.⁴⁵

⁴⁵Compare M Weber *Gesammelte politische Schriften* 4 ed 1980 551 ff. (cited in E Bacigalupo 'Das Strafrecht im Übergang von der Diktatur zur Demokratie: die Fälle Spanien und Argentinien' (unpublished conference paper).