Enkele gedagtes oor die kodifikasie van die Suid-Afrikaanse strafreg

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Dit is vir my 'n groot eer om 'n bydrae te skryf vir 'n huldigingsbundel ter ere van professor SA Strauss. My verbintenis met die Universiteit van Suid-Afrika is so nou gekoppel met my verbintenis met professor Strauss dat dit vir my moeilik is om my voor te stel dat ek kan voortgaan met my werk in die Departement Straf- en Prosesreg aan hierdie universiteit sonder dat hy ook in die departement is. My aanstelling as professor by hierdie universiteit het ek aan hom te danke. Die voorbeeld wat hy gestel het, nie net as destydse hoof van hierdie departement nie maar ook in die skryf van studiemateriaal, diens aan die universiteit, die regswese in Suid-Afrika asook ons land se gemeenskap in die algemeen, het 'n onuitwisbare indruk gemaak op almal wat die voorreg gehad het om onder en saam met hom te kon gewerk het. Saam met ander kollegas wens ek hom 'n rustiger tydperk in die toekoms toe; mag die lewe vir hom 'n bietjie gemakliker wees as die sekere koorsagtige dae in die verlede toe hy, in 'n desperate poging om sy werk verrig te kry, letterlik moes vlug, boeke onder die arm, uit sy kantoor en weg van die telefoon, na die verskuilde hoekies in die regsbiblioteek, om die mense wat hom opsoek om hulp en raad — van ongelukkige huisvrouens, regspraktisyns wat in die moeilikheid beland het, koerant- en televisiejoernaliste tot by regters — te ontvlug.

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Inleiding

Die Suid-Afrikaanse strafreg openbaar 'n unieke eienskap in vergelyking met die strafreg in ander lande deurdat dit nie gekodifiseer is nie. Suid-Afrika is een van die weinige lande wat nog nie oor 'n strafkode beskik nie. Voorbeelde van die weinige lande of jurisdiksies waar die strafreg nog nie gekodifiseer is nie is Engeland en enkele Australiese state. Dit is egter opmerklik dat, ofskoon die strafreg in hierdie jurisdiksies nog nie as 'n samehangende sisteem in 'n wet opgeteken is nie, die grootste deel van die materiële strafreg reeds in afsonderlike wette uiteengesit is, met die gevolg dat 'n mens tog kan praat van

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'n gedeeltelike kodifikasie wat al reeds in hierdie jurisdiksies plaasgevind het. So iets het natuurlik nog nie in Suid-Afrika plaasgevind nie.

Alhoewel daar in ons land 'n groot getal misdade bestaan wat in wetgewing uiteengesit is, word byna al die bekende misdade in ons reg, sowel as die meeste reëls met betrekking tot die algemene leerstukke, deur die gemenereg gereël. Die enigste reëls met betrekking tot die algemene beginsels van die strafreg wat reeds in wetgewing vervat is, is die toets om die toerekeningsvatbaarheid van mense wat na bewering geestesongesteld is, vas te stel,[1] die reëls met betrekking tot die strafregtelike aanspreeklikheid van regspersone[2] en laastens die regsbepalings wat sameswering en uitlokking strafbaar stel.[3]

Dit is verder opmerklik dat daar in die lande of jurisdiksies in die vorige paragraaf gemeld sterk pogings aangewend word om die strafreg wel te kodifiseer: die Law Commission in Engeland het reeds met groot moeite 'n gedetailleerde konsepstrafkode opgestel tesame met 'n verklarende kommentaar,[4] terwyl die Criminal Law Officers Committee in Australië besig is om 'n modelstrafkode op te stel en reeds 'n finale konsep van die reëls met betrekking tot die algemene beginsels van die strafreg voltooi het.[5] In Kanada, waar die strafreg lank reeds gekodifiseer is, het die Law Reform Commission van daardie land 'n heeltemal nuwe en vereenvoudigde konsepstrafkode tesame met 'n kommentaar opgetrek.[6] Hierdie drie konsepkodes is van groot belang uit 'n regsvergelykende oogpunt vir iemand wat belangstel om vir Suid-Afrika ook 'n konsepstrafkode op te stel, want hulle weerspieël onteenseglik die jongste opvattinge in verband met strafregtelike aanspreeklikheid — ten minste in die Anglo-Amerikaanse reg.

In die bespreking wat volg sal kortliks gelet word op die belangrikste voor- en nadele van kodifikasie. Die doel van hierdie artikel is egter nie in die eerste plek om al die argumente in verband met hierdie debatspunt — aspekte waarvan al so dikwels in die verlede bespreek is [7] — net eenvoudig te herhaal

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[1] A 78(1) van die Strafproseswet 51 van 1977.

[2] A 322 van die Strafproseswet 51 van 1977.

[3] A 18(2) van die Wet op Oproerige Byeenkomste 17 van 1956.

[4] The Law Commission A Criminal Code for England and Wales Law Com No 177 (1989). In die voetnotas wat volg sal na die belangrike 'Introduction' tot hierdie kode verwys word as 'Law Com No 177' en na die ontwerpkode self as die 'Engelse ontwerpkode'.

[5] Criminal Law Officers Committee of the Standing Committee of Attorneys-General Model Criminal Code Chapter 2 General Principles of Criminal Responsibility (1992) In die voetnotas wat volg sal na hierdie publikasie verwys word as die 'Australiese model-strafkode'.

[6] Law Reform Commission of Canada Report. Recodifying Criminal Law (1986). In die voetnotas wat volg sal na hierdie publikasie verwys word as die 'nuwe Kanadese konsepstrafkode'.

[7] Sien bv JC de Wet 'Gemene reg of wetgewing?' 1948 *THRHR* 1; HR Hahlo '... And save us from codification' 1960 *SALJ* 432; JC de Wet 'Kodifikasie van die reg in Suid-Afrika?' 1961 *THRHR* 152; WJ Hosten 'Kodifikasie in Suid-Afrika — 'n heroorweging' in SA Strauss (red) *Huldigingsbundel vir WA Joubert* (1988) 59. In hierdie publikasies is die klem hoofsaaklik op die privaatreg, ofskoon baie van die

nie. My persoonlike standpunt, wat ek kortliks sal motiveer, is dat ons strafreg gekodifiseer behoort te word. In die bespreking wat volg sal ek, naas die redes vir kodifikasie, ook kortliks verwys na die inhoud en styl van 'n kodifikasie, en ook twee voorbeelde verskaf van hoe bepalings wat in 'n kodifikasie opgeneem kan word, kan lyk. Die bespreking is egter beperk tot die kodifikasie van ons *strafreg*; die wenslikheid van die kodifikasie van ander gebiede van die reg — veral die privaatreg — sal nie ter sprake kom nie.

Wenslikheid van kodifikasie van die strafreg

Die belangrikste argument ten gunste van kodifikasie van die strafreg is ongetwyfeld die legaliteitsbeginsel, en meer bepaald daardie aspek van die beginsel wat vereis dat die inhoud van die strafreg relatief maklik naspeurbaar behoort te wees vir die gewone burger, sodat hy kan weet watter gedrag misdadig is, en hy gevolglik vooraf kan weet hoe om op te tree sodat hy nie die norme van die strafreg oortree nie.[8] Die reëls van die strafreg is in die eerste instansie gerig tot die gewone burger, die 'man of vrou op die straat', en nie slegs tot regsgeleerdes nie.[9] Die ideaal is dat die breë beginsels en reëls van die strafreg so *toeganklik* moontlik moet wees vir almal in die samelewing. In Amerika word dikwels na hierdie basiese beginsel verwys as 'the principle of due notice or fair warning'. Hierdie beginsel is veral belangrik indien 'n mens in gedagte hou dat die reëls van die strafreg sowel 'n *afskrikkende* as 'n sekere *opvoedkundige* funksie behoort te vervul.[10] Van al die verskillende vertakkings van die reg moet die strafreg sekerlik beskou word as die vertakking wat die belangrikste van almal is om te kodifiseer. Dit is 'n besondere openbare en sigbare deel van die reg, en, soos een bron dit stel, 'the most direct expression of the relationship between a state and its citizens'.[11] Verder moet in gedagte gehou word dat die werk van die strafhowe die afgelope stuk of twee dekades geweldig toegeneem het. Verreweg die meeste verhore in die land is

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argumente wat geopper word ook op die strafreg betrekking kan hê. Vir 'n pleidooi vir die kodifikasie spesifiek van die strafreg, sien DS Koyana 'Reflections on the criminal law of a new South Africa' 1991 SALJ 730.

[8] Omtrent die legaliteitsbeginsel in die algemeen, sien CR Snyman *Strafreg* (3 uitg 1992) 33-49; J Burchell en J Milton *Principles of criminal law* (1991) 54-63; JMT Labuschagne 'Die sekerheidsbasis van die strafreg' 1988 SAS 52.

[9] 'Law, especially criminal law, is made for the citizen, not the lawyer. Too often lawyers ignore this simple fact' — Law Reform Commission of Canada *Towards a codification of Canadian criminal law* (1986) para 1.59; M Goode 'Codification of the Australian criminal law' 1992 *Criminal Law Journal* 5 at 7, 9.

[10] Law Reform Commission of Canada *supra* n 9 para 1.62 65; 3.22; Goode *supra* n 9 11; ATH Smith 'Codification of the criminal law. The case for a code' (1986) *Criminal Law Review* 285 291 beweer dat 'the common law is, in its stewardship of the criminal law, inherently inimical to the principle of legality. It fails, or can fail, to give due notice and fair warning to those who are subject to it'. Die rede hiervoor, volgens die skrywer, is dat '[the common law] is relatively inaccessible, incomprehensible, inconsistent and uncertain ... [I]t is retrospective in its operation, undemocratic in its formulation and systematically uncertain, and ... is permanently subject to manipulation by the courts' (*ibid*).

[11] Law Com No 177 *supra* n 4 para 2.2.5. Vir 'n soortgelyke mening sien ook Herbert Wechsler 'The challenge of a model penal code' 1951–1952 *Harvard Law Review* 1097 1098.

strafverhore. 'n Steeds groeiende getal polisiebeamptes en sekuriteitspersoneel het die taak om van dag tot dag die reëls van die strafreg af te dwing of te administreer. Diegene wat belas is met die afdwinging van hierdie reëls behoort redelik maklik te kan naslaan wat die inhoud van die strafreg is.[12] Kodifikasie kan in 'n sekere sin beskryf word as 'n 'demokratisering' van die strafreg omdat dit die inhoud daarvan maklik toeganklik maak vir almal in die samelewing.[13]

'n Verdere argument ten gunste van kodifikasie is dat dit die wetgewer die geleentheid bied om die strafreg op 'n samehangende manier uiteen te sit, om die reëls daarvan te sistematiseer en om teenstrydighede wat mag bestaan uit die weg te ruim.[14] Kodifikasie skep 'n vaste uitgangspunt by die vasstelling van die inhoud van die strafreg.[15] Dit verteenwoordig 'n amptelike en gesaghebbende uiteensetting van die gedragreëls waaraan 'n burger moet voldoen ten einde die strafsanksies te ontwyk.

'n Belangrike argument teen kodifikasie is dat die howe die bevoegdheid om die reg te verander of aan te pas by veranderde omstandighede mag verloor: kodifikasie mag — so word geredeneer — lei tot 'n inbreukmaking op die soepelheid van die reg en 'n gevolglike 'verstarring' van die reg.[16] Dit is bekend dat die appèlafdeling van die hooggeregshof in die loop van rofweg die afgelope drie of vier dekades in verskeie beslissings die strafreg in ons land in nuwe rigtings gestuur het. 'n Mens hoef maar net te dink aan beslissings soos dié in *Chretien*,[17] wat 'n heeltemal nuwe bedeling in verband met die uitwerking van dronkenskap op aanspreeklikheid ingelei het, *Campher*[18] en *Wiid*,[19] wat 'n heeltemal nuwe verweer genaamd 'nie-patologiese ontoerekeningsvatbaarheid' in ons reg ingevoer het, en *De Blom*,[20] waarin regsdwaling vir die eerste keer in ons reg as 'n verweer wat opset uitsluit, erken is. As ons strafreg gekodifiseer was, is dit meer as twyfelagtig of die appèlafdeling in staat sou gewees het om koersveranderinge soos hierdie aan te bring.

Die antwoord op bogemelde argument is dat 'n kode altyd gewysig kan word

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[12]Grainne de Burca en Simon Gardner 'The codification of the criminal law' 1990 *Oxford Journal of Legal Studies* 560 562; Goode *supra* n 9 7; FJ Remington 'The future of the substantive criminal law codification movement — theoretical and practical concerns' 1988 *Rutgers Law Journal* 867 868.

[13]Vgl Goode *supra* n 9 8:'The criminal law should be easy to discover, easy to understand, cheap to buy, and democratically made and amended.'

[14]Scarman 'Codification and judge-made law: a problem of coexistence' 1967 *Indiana Law Journal* 355 366–7; Herbert L Packer 'The Model Penal Code and beyond' 1963 63 *Columbia Law Review* 594, wat van mening is dat die 'dominant tone' van die Amerikaanse Model Penal Code 'one of principled pragmatism' is; Francis Bennion 'The technique of codification' 1986 *Columbia Law Review* 295 297.

[15]Smith *supra* n 10 289.

[16]Law Com No 177 *supra* n 4 para 2.16; Smith *supra* n 10 294.

[17]1981 (1) SA 1097 (A).

[18]1987 (1) SA 940 (A).

[19]1990 (1) SASV 561 (A).

[20]1977 (3) SA 513 (A).

ten einde nuwe opvattinge omtrent strafregtelike aanspreeklikheid te weerspieël.[21] Trouens, uit 'n beleidsoogpunt is dit verkieslik dat die parlement, as die verkose versameling van afgevaardigdes van die land se bevolking, na behoorlike ondersoek en bespreking die reg wysig, en dat dit nie aan die howe oorgelaat word om die reg te wysig of om nuwe reg te skep nie.[22] *Iudicis est ius dicere sed non dare*. Om die reg by veranderde omstandighede aan te pas is 'n taak wat liewer aan die wetgewer oorgelaat behoort te word. Veral 'n uitbreiding van aanspreeklikheid deur die howe by wyse van analogie behoort so ver as moontlik vermy te word.[23] Wat meer is, howe se bevoegdheid om leemtes in die reg te identifiseer en die leemtes te vul of 'n regstelling te maak, is beperk: hulle moet wag totdat 'n geskikte feitestel voor hulle dien voordat hulle in 'n posisie is om in te gryp.[24] Die wetgewer, daarenteen, is vry om in te gryp wanneer hy wil. 'n Hof het in elk geval geen bevoegdheid om nuwe misdade te skep of om die toepassingsgebied van bestaande misdade uit te brei nie.[25]

Kodifikasie sal nie tot gevolg hê dat die howe blote rubberstempels word in 'n proses waarin hulle slegs meganies die inhoud van 'n strafkode toepas nie. Die howe sal voortgaan om 'n kreatiewe rol te speel deurdat hulle die bepalings van die kode sal moet uitlê.[26] In hierdie verband is dit baie belangrik om in gedagte te hou dat 'n behoorlik opgestelde kode nie 'n gedetailleerde uiteensetting van iedere en elke reël van die strafreg tot in die fynste besonderhede bevat nie. Die detail moet deur die howe uitgepluis word.[27] 'n Kode behoort slegs die leidende beginsels te bevat, en nie daarna te streef om elke moontlike feitestel wat mag opduik, te reël nie.

Suid-Afrika bevind hom in 'n tydperk van sy geskiedenis waarin daar groot

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[21] Law Com No 177 *supra* n 4 para 2.17; Scarman *supra* n 14 367.

[22] Law Reform Commission of Canada *supra* n 9 para 1.42, 48; Smith *supra* n 10 294.

[23] R v Oberholzer 1941 OPD 48 60; S v Smith 1973 (3) SA 945 (O).

[24] Law Com No 177 *supra* n 4 para 2.11; Scarman *supra* n 14 366, waar die skrywer die volgende stelling van Lord Devlin aanhaal: 'The trouble about judicial law reform was never, as it is with Parliament, lack of time but lack of opportunity ... the delay before a point of principle reaches the House of Lords may be so long as to outdistance by ten times or more the parliamentary process.'; Goode *supra* n 9 15: 'The judicial process places the considerable expense and burden of initiating change on those who lack resources: criminal litigants. A great deal depends on the random accidents of litigation. The judicial process is constrained by criteria of relevance unrelated to the merits of litigation, designed to conserve judicial resources rather than reform the law.'

[25] *R v Roginson* 1911 CPD 319; *R v M* 1915 CPD 334; *S v Solomon* 1973 (4) SA 644 (C); *S v Von Molendorff* 1987 (1) SA 135 (T); Snyman *supra* n 8 40-41.

[26] Scarman *supra* n 14 362-3: 'There is nothing surprising in the continuing importance of the judge in a codified system. However carefully drafted, into whatever detail it goes, a code is likely in places to fall into the error of ambiguity and is bound to contain some omissions. If it be ambiguous, yet the judge's decision must be certain; if it fails to cover the case under consideration, yet the judge must make a decision. The cry "*non possumus*" is simply not open to a judge.' Sien ook Law Com No 177 *supra* n 4 para 2.19; Law Reform Commission of Canada *supra* n 9 para 1.45.

[27] Law Reform Commission of Canada *supra* n 9 para 1.44, 49.

veranderinge op politieke, grondwetlike en maatskaplike terrein plaasvind. Verandering is orals is die lug — ook op die juridiese terrein, waar 'n handves van fundamentele regte in die nuwe oorgangsgrondwet[28] beloof om 'n nuwe, opwindende fase in ons regsontwikkeling in te lui. Met al hierdie veranderinge en ontwikkelinge wat plaasvind in gedagte, is dit miskien juis nou 'n goeie geleentheid om 'n mens af te vra of die tyd nie dalk ryp word vir Suid-Afrika om sy strafreg te kodifiseer nie.

Din inhoud van 'n strafkode

Onder hierdie hoof word die aandag gevestig op enkele vereistes waaraan 'n goeie strafkode behoort te voldoen.

Eerstens behoort daar so ver as moontlik onderskei te word tussen aangeleenthede van 'n prosesregtelike of bewysregtelik belang en aangeleenthede wat deel vorm van die materiële strafreg.[29] Soos bekend is die Suid-Afrikaanse strafprosesreg reeds gekodifiseer in die Strafproseswet 51 van 1977. In die Engelse reg en ander regsisteme wat sterk deur die Engelse reg beïnvloed is, is daar 'n tendens om nie baie skerp tussen die materiële reg en die prosesreg te onderskei nie, terwyl daar in die regsisteme op die Europese vasteland weer redelik skerp tussen hierdie twee gebiede onderskei word. Die skepping van vermoedens vertroebel die onderskeid en behoort liefs vermy te word.[30]

'n Strafkode behoort vervolgens, naas 'n uiteensetting van die reëls van aanspreeklikheid en 'n omskrywing van die afsonderlike misdade, ook die strawwe wat vir elke misdaad opgelê kan word, te spesifiseer. Meer bepaald behoort die maksimumstraf wat vir elke afsonderlike misdaad opgelê kan word, gespesifiseer te word; daar behoort verkieslik nie verpligte minimumstrawwe voorgeskryf te word nie. In die meeste strafkodes verskyn die straf in dieselfde artikel as dié waarin die omskrywing van die betrokke misdaad gegee word. Dit is egter ook moontlik om die voorbeeld van die nuwe Engelse konsepstrafkode te volg en die strawwe in 'n afsonderlike bylae in 'n tabel te plaas.

Daar bestaan 'n baie groot aantal misdade in ons reg wat nie gemeenregtelike misdade is nie maar in wette geformuleer is. Die vraag ontstaan of al hierdie misdade nou oorgeskuif behoort te word na die strafkode. Dit sal 'n onbegonne taak wees om iedere en elke misdaad in ons reg wat deur die wetgewer geskep is, in 'n strafkode te inkorporeer. Daar is eenvoudig te veel sulke misdade. (Die wanaanwending van die strafsanksie in Suid-Afrika deur 'n wetgewer wat van mening skyn te wees dat haas elke verbod wat in 'n wet

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[28]Grondwet van die Republiek van Suid-Afrika 200 van 1993. Die Fundamentele Regte verskyn in artikels 7–35 van die wet.

[29]Law Com No 177 *supra* n 4 para 3.42; Law Reform Commission of Canada *supra* n 10 para 1.64.

[30]Sien Law Reform Commission of Canada *supra* n 6 3, waar die opstellers van die nuwe Kanadese konsep-strafkode die kode wat hulle opgestel het soos volg beskryf: 'It is drafted in a straightforward manner, with a minimum of technical terms, avoiding complex sentence structure and excess detail ... [I]t avoids deeming provisions, piggybacking and other indirect forms of expression ... .'

geskep word deur die skepping van 'n ooreenstemmende misdaad gerugsteun moet word, en die gevolglike 'inflasie' van statutêre misdade in ons reg, is tereg al gekritiseer.)[31] Indien 'n misdaad in 'n wet geskep in 'n noue verband staan met 'n onderwerp wat nie in hoofsaak 'n strafregtelike aangeleentheid is nie, behoort so 'n misdaad nie in die kode opgeneem te word nie. 'n Mens dink hier byvoorbeeld aan die misdade in verband met insolvensie en maatskappye geskep in die wette wat met hierdie twee aangeleenthede in verband staan. Daar sal natuurlik baie misdade wees wat grensgevalle is en ten opsigte waarvan dit moeilik sal wees om te besluit of hulle in die kode opgeneem moet word of nie.

Wat van verkeersmisdade (soos 'dronk bestuur') en misdade in verband met verdowingsmiddels? Na my mening kwalifiseer nie een van hierdie twee groepe misdade vir opname in 'n strafkode nie. Die omskrywings van verkeersmisdade vorm deel van 'n omvattende reëling in 'n wet (die Padverkeerswet 29 van 1989) wat padverkeer reguleer en 'n groot aantal administratiewe maatreëls (soos lisensiëring) bevat waarmee dit verband hou. Misdade in verband met verdowingsmiddels, soos besit en handeldryf in verdowingsmiddels, vorm eweneens deel van 'n omvattende wet (die Wet op Dwelmmiddels en Dwelmsmokkelary 140 van 1992) waarvan dit liefs nie geskei behoort te word nie. Dit is in elk geval opvallend dat strafkodes in ander lande as 'n reël nie omskrywings bevat van misdade wat in hierdie twee kategorieë val nie.

Aan die ander kant is daar sekere bestaande statutêre misdade wat wel kwalifiseer vir opname in 'n strafkode op grond van oorwegings soos hulle belangrikheid, hulle wye toepassingsgebied of hulle noue verband met bestaande gemeenregtelike misdade. Voorbeelde van sulke misdade is die misdaad geskep in artikel 319(3) van die 'ou' Strafproseswet 56 van 1955 (die aflê van teenstrydige verklarings in twee verskillende eedsverklarings — 'n misdaad wat soms 'statutêre meineed' genoem word); korrupsie (ter oortreding van die Wet op Korrupsie 94 van 1992); bykans al die misdade geskep in die Wet op Seksuele Misdrywe 23 van 1957; en die misdade geskep in artikel 1(1) van die Algemene Regswysigingswet 50 van 1956 (verwydering van goedere vir gebruik — statutêre *furtum usus* en artikels 36 en 37 van die Algemene Regswysigingswet 62 van 1955 (versuim om besit van vermoedelik gesteelde goed te verduidelik en die verkryging van gesteelde goed sonder redelike gronde).

Terwyl die vraag watter misdade by 'n kode ingesluit behoort te word hier bespreek word, kan ook kortliks aandag gegee word aan die vraag watter gemeenregtelike misdade, indien enige, maar uitgesluit kan word van 'n kodifikasie. 'Misdade' wat na my mening maar uitgesluit kan word omdat hulle in werklikheid nie meer in ons reg bestaan nie, is *crimen laesae majestatis* ('n 'variasie' van hoogverraad wat in onbruik geraak het) en *crimen laesae venerationis* (belediging van die staatshoof — 'n ou misdaad wat onversoenbaar is met 'n demokratiese staatsvorm). Onder die hoof 'onnatuurlike

[31] André Rabie 'Error iuris: principle, policy and punishment' 1994 *SAS* 93 98.

geslagsmisdaad' is daar ook 'n aantal vorms van seksuele gedrag wat, ofskoon dit ingevolge die gemenereg strafbaar is, in ons moderne geëmansipeerde samelewing nie meer as misdadig beskou word nie en dus nie kwalifiseer vir opname in 'n strafkode nie.

Daar is 'n sekere aantal gemeenregtelike misdade wat, ofskoon daar algemeen aangeneem word dat hulle nog bestaan, baie selde in die howe ter sprake kom as misdade waarvan beskuldigdes aangekla is of waaraan hulle dalk skuldig bevind kan word. Kodifikasie bied 'n uitstekende geleentheid vir die wetgewer om te besluit of die misdade in hierdie groep nog bestaan. Voorbeelde van sulke misdade is die toediening van gif of ander skadelike stowwe (sodanige gedrag kan altyd as aanranding of poging to moord bestraf word), grafskending, lykskending, die blootstelling van 'n jong kind (*crimen expositionis infantis*) en selfs diefstal deur middel van valse voorwendsels.

Kodifikasie bied ook 'n uitstekende geleentheid aan die wetgewer (hopelik op advies van kundige regsgeleerdes) om ontslae te raak van 'n reeks onbevredigende aspekte in bestaande gemeenregtelike misdade. Sonder om voor te gee dat die lys volledig is, word die aandag hier slegs op sekere aspekte van sommige van hierdie misdade gevestig: die te wye toepassingsgebied van hoogverraad; die vraag of geweld 'n vereiste is vir sedisie; die vraag of 'n objektief valse verklaring 'n vereiste is vir 'n skuldigbevinding aan meineed; die presiese beskrywing van aanranding deur middel van 'n dreigement; die vraag of die handeling by onsedelike aanranding objektief onsedelik moet wees; die vraag of die inbreukmaking op iemand se *dignitas* by *crimen iniuria* en die skending van iemand se reputasie by strafregtelike laster van 'n ernstige aard moet wees; die ongeoorloofde gelykskakeling van menseroof en kinderdiefstal; die onbevredigende omskrywing van 'statutêre *furtum usus*' in artikel 1(1) van die Algemene Regswysigingswet 50 van 1956; en 'n hele reeks probleme in verband met diefstal en die misdaad huisbraak met die doel om 'n misdaad te pleeg. Die wye misdaad diefstal soos dit in die Romeins-Hollandse reg bekend is, behoort na my mening onderverdeel te word in 'n reeks misdade wat enger omskryf is. Gedrag soos verduistering en 'besitsaanmatiging' (*furtum possessionis*) behoort nie deel te vorm van die diefstalbegrip nie. Die pleeg van diefstal en selfs bedrog deur middel van die onregmatige manipulasie van kredietkaarte of outomatiese tellermasjiene behoort as afsonderlike misdade in die kode gereël te word. Die misdaad huisbraak is so kunsmatig dat selfs die howe al te kenne gegee het dat die Suid-Afrikaanse regskommissie die misdaad se omskrywing behoort te heroorweeg.[32]

Wat die algemene beginsels van aanspreeklikheid betref, moet in gedagte gehou word dat dit nie nodig is om elke denkbare onderwerp — regverdigingsgrond, skulduitsluitingsgrond asook ander verwere — in die kode te inkorporeer nie. Baie teenstaanders van kodifikasie se beswaar daarteen mag gebaseer wees op twyfel aangaande die vraag of dit hoegenaamd moontlik is

[32] *S v Ngobeza* 1992 (1) SASV 610 (T). Sien ook CR Snyman 'Reforming the law relating to housebreaking' 1993 *SAS* 38.

om die breë, abstrakte algemene beginsels van aanspreeklikheid presies in 'n kode te formuleer. Hierdie twyfel is na my mening ongegrond. As 'n mens na veral strafkodes op die Europese vasteland kyk, is dit opmerklik dat slegs enkele algemene verwere in die kodes opgeneem is. As 'n reël swyg die kodes meestal oor onderwerpe soos die vereiste van 'n willekeurige handeling (en hierdie vereiste se spieëlbeeld, naamlik die verweer van 'outomatisme'), kousaliteit, aanspreeklikheid vir 'n late, die verweer van onmoontlikheid, die inhoud van die opset- en nalatigheidsbegrippe, en die toerekeningsvatbaarheidsbegrip — om maar slegs enkeles te noem. Daar behoort 'n bepaling in die begin van die kode te wees wat dit duidelik stel dat die verwere wat 'n beskuldigde kan opper nie beperk is tot die verwere gemeld in die kode nie. Dit sal verseker dat dit 'n hof vrystaan om enige (ongeskrewe) verweer te oorweeg of te erken. Die dogmatiek wat die akademici 'ontwerp' het om die algemene aanspreeklikheidsvoorvereistes wetenskaplik uiteen te sit, verskyn nie in kodes nie. Begrippe soos 'handeling', 'wederregtelikheid' en 'skuld' word as 'n reël nie in die kodes uiteengesit nie. 'n Strafkode behoort immers so ver as moontlik vir iemand wat 'n leek op regsgebied is, verstaanbaar te wees.

Voorbeelde van formulerings

As 'n voorbeeld van die toepassing van die bogemelde riglyne word 'n formulering van 'n bepaling in 'n kode waarin die bekende regverdigingsgrond noodweer omskryf word, hier gegee. So 'n voorskrif kan soos volg lui:

> Iemand wat geweld gebruik om 'n wederregtelike aanval wat reeds begin het of onmiddellik dreigend is op sy of iemand anders se lewe, liggaamlike integriteit, eiendom of 'n ander belang wat na die oordeel van die hof beskerm behoort te word, af te weer, tree nie wederregtelik op nie, mits die afweerhandeling noodsaaklik is om die belang wat bedreig word, te beskerm, dit gerig is teen die aanvaller, en nie skadeliker is as wat nodig is om die aanval af te weer nie.

Daar word aan die hand gedoen dat dit nie nodig is om, wat noodweer betref, enigiets verder by te voeg nie. Dit is eenvoudig die taak van 'n hof om die fynere besonderhede wat in 'n gegewe saak ter sprake mag kom, uit te pluis. Dit is natuurlik eweneens die taak van die hof om die algemene, abstrakte formulering toe te pas op 'n konkrete feitestel.

Die Suid-Afrikaanse reg het (danksy die baanbrekerswerk van professor J C de Wet) die basiese onderskeid wat in die regstelsels op die Europese vasteland tussen wederregtelikheid en skuld getrek word, aanvaar. Om hierdie rede is die bepalings in strafkodes of ontwerpstrafkodes in Anglo-Amerikaanse regstelsels wat handel oor wat ons in ons reg regverdigingsgronde sou noem, nie van veel hulp vir iemand wat na voorbeelde van die formulerings van sodanige regverdigingsgronde soek nie. Dit is veral die geval by noodweer. Hierdie 'verweer', soos ons dit ken, is nie bekend in die Anglo-Amerikaanse strafregsisteme nie. In laasgenoemde sisteme word in plaas daarvan gewoonlik onderskei tussen selfverdediging, verdediging van 'n ander en verdediging van

eiendom.[33] Ten einde voorbeelde te vind van bepalings wat handel oor noodweer soos ons dit in Suid-Afrika ken, kan 'n mens met vrug die bepalings oor hierdie onderwerp in die strafkodes op die Vasteland raadpleeg.[34] Die formulering van noodweer in die Suid-Afrikaanse reg wat hierbo gegee is, is in 'n mate geskoei op die formulerings in die bogemelde Vastelandse kodes.

Nog een ander voorbeeld van 'n formulering in 'n strafkode vir Suid-Afrika kan gegee word. 'n Algemene bepaling omtrent die strafbaarheid van poging om 'n misdaad te pleeg kan soos volg lui:

(1) Iemand is skuldig aan poging om 'n misdaad te pleeg indien hy wederregtelik en met die opset om daardie misdaad te pleeg 'n handeling verrig of versuim om 'n handeling te verrig en sodanige gedrag nie slegs 'n voorbereiding tot die pleeg van die misdaad is nie maar neerkom op minstens die begin van die uitvoering van die misdaad wat hy in gedagte het.

(2) Iemand is skuldig aan poging om 'n misdaad te pleeg al
(a)is die pleeg van die misdaad onmoontlik, indien dit moontlik sou gewees het in die feitlike omstandighede wat volgens sy voorstelling bestaan of op die tersaaklike tyd sal bestaan;
(b) tree hy vrywillig terug van die misdaadpleging nadat sy gedrag reeds die stadium bereik het dat dit neerkom op minstens die begin van die uitvoering van die misdaad wat hy in gedagte gehad het.

Dit is nie nodig om enigiets meer omtrent poging om 'n misdaad te pleeg in die kode te plaas nie. Subartikel (1) sit die algemene reël in verband met poging (en veral sogenaamde geskorste poging) uiteen soos neergelê in beslissings soos *Schoombie*[35] en *Du Plessis*.[36] 'n Mens kan die beginsel in hierdie artikel neergelê dalk selfs nog meer kernagtig stel, deur naamlik die vereiste dat die gedrag nie meer bloot 'n voorbereiding vir die pleeg van die misdaad te wees nie, uit te laat, en net te vereis dat dit moet neerkom op 'n uitvoeringshandeling. Dit kan in baie gevalle natuurlik moeilik wees om te besluit of sekere optrede 'n voorbereidings- dan wel 'n uitvoeringshandeling is, maar dit is die taak van 'n hof om die algemene beginsel op konkrete feitestelle toe te pas.

Subartikel 2(a) beskryf die reël in verband met ondeugdelike poging, soos neergelê in *Davies*,[37] asook die uitsondering op hierdie reël. Subartikel 2(b) beskryf die reël in verband met vrywillige terugtrede, soos neergelê in

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[33]Sien bv a 44 en 45 van die Engelse ontwerpkode *supra* n 4; a 3.03, 3.04 en 3.05 van die Amerikaanse Model penal code; a 313 van die Australiese model-strafkode *supra* n 5 en a 3(10),(11) en (12) van die nuwe Kanadese konsep-strafkode *supra* n 6.

[34]Nuttige voorbeelde word gevind in artikels 41 van die Nederlandse, 32 van die Duitse, 3 van die Oostenrykse, 33 van die Switserse en 52 van die Italiaanse strafkodes.

[35]1945 AD 541.

[36]1981 (3) SA 382 (A).

[37]1956 (2) SA 52 (A).

Hlatwayo[38] en *Du Plessis*.[39]

Die styl van 'n strafkode

Wanneer besluit word om 'n sekere onderwerp in 'n kode op te neem, hoef 'n mens nie iedere en elke faset van die betrokke onderwerp in die formulering te inkorporeer nie. Slegs die hooftrekke van die onderwerp hoef gemeld te word. Regsgeleerdes debatteer dikwels oor 'n klein besondere onderafdeling van 'n onderwerp; dit is nie nodig om al hierdie detail uit te spel wanneer die betrokke aangeleentheid in 'n kode geformuleer word nie. 'n Kode verskaf derhalwe nie antwoorde tot op die fynste besonderhede van elke onderwerp nie.[40]

In hierdie verband moet daarop gewys word dat die Suid-Afrikaanse wetgewer daarvoor lief is om in die bepalings in wetgewing te streef na uitvoerigheid, dit wil sê om 'n aangeleentheid in soveel detail uiteen te sit dat daar so min as moontlik vir 'n hof oorbly om oor te besluit.[41] Hierdie styl van opstel van wetgewing is die gevolg van die invloed van die Engelse reg asook van die positivistiese regsbeskouing: die 'reg' word hiervolgens beskou as 'n bevel van die owerheid (die parlement) en die howe speel in hoofsaak 'n passiewe rol; hulle is veronderstel om slegs op meganiese wyse die reëls wat die wetgewer geskep het, toe te pas, en om veral nie waarde-oordele uit te spreek nie. Hierdie benadering tot die formulering van wetgewing moet na my mening afgewys word. Die invoering van 'n handves van menseregte in Suid-Afrika[42] bring in elk geval mee dat die howe 'n veel meer skeppende rol sal moet vervul as in die verlede, en geroepe sal wees om veel meer waardeoordele uit te spreek.

Die bogemelde Engelsregtelike benadering verskil aanmerklik van die benadering op die Europese vasteland, waar die regter veel meer aktief is en die wetgewer geneig is om veel kernagtiger te formuleer.[43] Wanneer Suid-Afrika wel eendag sover kom om sy eie strafkode op te stel, kan maar net

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[38]1933 TPD 441.

[39]*Supra*.

[40]Law Com No 177 *supra* n 4 para 3.39; Scarman *supra* n 14 363-4; Law Reform Commission of Canada *supra* n 9 para 1.44: 'Codification does not mean that the entire body of law must be set down in the finest detail. The task would be impossible by its very nature, since no one can foresee all the particular applications of the law ... In a sense, the notion of a "complete" code is mythical, absurd and utopian ... The purpose [of codification] is achieved if it expresses in clear terms the general rules and the basic, distinctive principles for both judges and lawyers.'

[41]Law Reform Commission of Canada *supra* n 9 para 1.49: 'In the purest British tradition, a statute should spell out everything down to the smallest detail. Its criteria of excellence are meticulousness and precision. Hence, the rule often becomes complex, and one can lose sight of it in the profusion of detail.' Sien ook Hosten *supra* n 7 73: 'Daar was ten alle tye al protes teen die taktiek en styl van ons wetgewers, byvoorbeeld die buitensporige nabootsing van die Engelse modelle en die omslagtige, woordryke en ingewikkelde styl.'

[42]*Supra* n 28.

[43]Hosten *supra* n 7 73.

gehoop word dat die Vastelandse benadering sal seëvier. Dit is opmerlik dat die Law Commission in Engeland in die konsepstrafkode wat vir Engeland opgestel is, bewustelik daarna gestrewe het om lang, ingewikkelde formulerings te vermy en in plaas daarvan 'n bondiger styl te volg. Dieselfde helder, bondige styl word ook gevind in die nuwe Australiese Model Criminal Code asook in die nuwe Kanadese konsepstrafkode.

In navolging van hierdie moderner styl kan by die toekomstige opstel van 'n strafkode vir Suid-Afrika gerus ook maar afgesien word van die irriterende tegniek om artikels of subartikels altyd 'onderworpe aan ...' ander bepalings te maak, of om die konstruksie 'met dien verstande dat ...' te gebruik. Die intelligente leser sal en behoort te besef dat hy nie slegs byvoorbeeld 'n enkele subartikel behoort te lees ten einde agter te kom wat die reg aangaande 'n bepaalde onderwerp is nie, maar dat hy ook die ander subartikels van die betrokke artikel moet raadpleeg. Die substansie van 'n bepaling behoort nie verlore te gaan in 'n moeras van voorbehoudsbepalings of uitsonderings nie.

Distance teaching of law students in the new South Africa, with specific reference to possible changes at (the University of South Africa)

DANA VAN DER MERWE*

Hierdie bydrae word opgedra aan Sas Strauss, my promotor, kollega, vriend en metgesel op die radiogolwe met die program 'Wat sê die Reg?' As 'n persoon wat byna sy hele akademiese loopbaan daaraan gewy het om Unisa te bring tot waar hy is, sal hy miskien belangstel in hierdie poging om te probeer formuleer waarheen Unisa nou op pad is (of behoort te wees), met onderrig vir die 'nuwe Suid-Afrika'. Vir doeleindes van wyer verspreiding word die res van hierdie bydrae in Engels geskryf. Nog 'n rede vir die 'rooitaal' is dat sommige van hierdie 'hoë tegnologie'-uitdrukkings moeilik vertaalbaar is!

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Background

Unisa is one of the largest universities in the world, with one of the best libraries and a dramatically increasing number of students. Why change a winning game? Why should Unisa attempt to bring about (possibly expensive) changes? If it is was good enough for dad, should it not be good enough for me?

There are two compelling reasons for change. In the first place, South Africa's circumstances have changed dramatically. Owing to the Republic's former isolation from the rest of the world, Unisa had almost had a monopoly as far as distance education in South Africa was concerned. Now we are competing internationally against the likes of the British Open University and Athabasca University in Canada. Our methods and media are being compared with the best in the world. There is also an education crisis in South Africa, with the possibility of Unisa playing a central role in bringing the light of learning to thousands of disadvantaged black students. SAIDE (South African Institute for Distance Education) has brought some overseas consultants to this country and some of them have cast a jaundiced eye over Unisa's activities.

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In the second place, the pace of the computer revolution has never slackened and many new products, such as 'hypertext' and 'multimedia', may change our whole concept of distance education dramatically. In harness with the computer revolution, a 'telecommunications revolution' has also taken place, which has made possible such teaching aids as video-conferencing and the Internet.

Concepts

Before getting into the meat of this essay it would only be fair to the reader to indicate in which sense some frequently used terms will be used.

In their work *Education at a Distance*[1] Garrison and Shale distinguishes between 'learning' and 'education' on the basis that the latter is characterised by interaction between the student and a teacher:

> For our purposes we will use "learning" as a generic term to refer to all of what we come to know, consciously and unconsciously, by whatever means. A part of that will have come to us through education, that process which is characterized by the interaction of a teacher and a student.[2]

This definition raises some interesting points, namely whether interaction between the student and a computer running an educational programme will qualify as 'education' in the above sense. Garrison apparently feels that it does, because in a further essay in the same work[3], he lauds computers for their 'interactive instructional capabilities'. A further question, closer to home, is whether the correspondence 'education' which is still Unisa's mainstay, would qualify as education in the above sense.

In the same essay, Garrison distinguishes between correspondence study as 'the first generation of distance *education*[4] technology'. He further categorises telecommunications in distance education as 'a new generation in designing the educational transaction' (apparently the 'second generation' and finally classifies computer-based technology as the third generation of distance education.[5] Together with Shale, he prefers speaking of 'education at a distance'[6] since this emphasises the educational aspect and not simply the distance. Over-emphasis on the latter aspect tends to make people concentrate on the media, instead of on the end goal, namely that the recipient should be educated.

Garrison does rate some of the media, however. With correspondence study, he criticises 'the infrequent, inefficient and akward' communication between educator and student. Television, which was extensively used by the British

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1 DR Garrison and D Shale (eds) Robert E Krieger Publishing Co Malabar, Florida (1990).

2 *Op cit* 30.

3 *Op cit* 47.

4 My emphasis.

5 *Op cit* 45.

6 *Op cit* 31.

Open University at first, he describes as 'mass media'. With later technologies, which enable better two-way communication, there has been a 'de-massifying' of the media, which makes them more interactive and individualised. His favourites seem to be interactive video-conferencing, and computers, both in the on-line[7] and off-line[8] modes.

In his doctoral thesis, entitled "n Didaktiese Model vir die Gebruik van Rekenaartegnologie in Afstandonderwys"[9], PHR (Henry) van Zyl warns against the use of computers simply because 'they are there':

> Die gevolg is dat gesonde didaktiese beginsels en modelle nie die onderbou vorm waarop die RGO-program gebou word nie. Dit gaan dus meer om die tegnologie ter wille van die tegnologie, of ter wille van die feit dat dit die onderrig opkikker, of die lewe vir die dosent meer draaglik maak.[10]

Van Zyl argues persuasively that technology be harnessed as part of a didactic model for the whole of Unisa.

As Garrison does, Van Zyl also makes some conceptual distinctions. He distinguishes 'onderrig' (which may be translated as 'teaching') from 'onderwys' (translated as 'education'). 'Onderrig' is the old so-called 'factory model' where the process of teaching is centralised and mass-produced, as Henry Ford did with automobiles during the first part of this century. The model is strongly behavioristic in that success is always measured at the hand of a test performance by the student where his behaviour is measured against a prescribed norm, which determines both the success of the student and his teacher. Van Zyl contrasts this with 'onderwys', which has the aim of independent learning by the student, with the ultimate goal of imparting creative problem-solving abilities to the student. This education has to be individualized, since no two students are alike. In this respect, distance education has a great advantage over conventional education, since the former is much easier to individualise.

Van Zyl, again, as Garrison does, rates the media used, this time specifically in the Unisa context. He is critical of the almost exclusive use of the printed word as medium and points out that the alternative of the spoken word is available in the form of audio- and videocassettes, radio and television. He then specifically distinguishes those media which are interactive, such as the telephone, alone or in conference mode, videoconferencing and computer conferencing, or face to face contact, during personal interviews, group visits and discussion classes.[11] (Personally, I consider personal contact to be a vital

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[7] This simply means it is connected to a network, by means of which one 'server' can supply the same message to many 'terminals'.

[8] Correspondingly, this means that the computer is not connected to a network, but may have the advantage of a local store of knowledge, for instance that supplied by a CD-ROM (Compact Disc Read Only Memory) drive, built in, or connected, to the computer.

[9] Unisa, October 1992.

[10] *Op cit* 133.

[11] *Op cit* 29.

adjunct to techologically-based education, in accordance with the motto 'high tech, high touch'.)

One of Van Zyl's final recommendations is for a new unit at Unisa for 'elektroniese onderwysvoorsiening' (the supply of electronic education). He also requires two main duties to be carried out by Unisa lecturing staff. In the first place, integrated multimedia course material has to be produced and in the second place, sufficient contact has to be maintained with the students. The latter may also be carried out by making use of electronic media such as video conferencing, electronic bulletin boards, etc.

It is difficult to directly superimpose Van Zyl's model upon that of Garrison, except that both of them uses the phrase 'education' to describe the desired process to be striven for, and that both of them require a degree of interaction and individualisation in this process.

The desired outcome of a legal education at Unisa

Perhaps one should stand the process on its head. If one could identify what the ideal outcome of a 'legal education' should be, one might be able to tailor the curriculum accordingly. This point is also made by JH (Roshnie)Maharaj in a recent article entitled 'The Role of the Law School in Practical Legal Training'[12] She notes, approvingly, the suggestion by instructional designers that educational design should be 'top-down'. In other words, one should do a needs assessment, from that design the curriculum goals, and from that again design the instructional objectives. In carrying out the needs assessment, one should try to find a consensus between 'the broader community affected: the public, and the performers (that is, the lawyers), the educators, and the students.'

Maharaj goes on to point out that there is a 'gap' in legal education between academy and practice and that the public are often treated as guinea pigs by beginner lawyers, learning the practical component of their profession by trial and error. This is because the educational roles are divided at the moment and 'legal education is conducted mostly in distinct stages: academic (university), vocational/practical (profession), and post-admission continuing legal education.' She then proceeds to make some very useful suggestions as to the integration of the academic and the practical components, to which I will refer again later on.

To return to the 'desired outcome' — what does the product look like which should ideally be delivered by a legal education? Maharaj lists several desired attributes of the beginner lawyer, of which my personal favourite is the one that every lawyer needs a basic knowledge base 'which will enable her to define a problem into categories for research purposes and for decisionmaking as to factual and legal issues needing proof and argument.' In addition, the lawyer needs to be able to find (specific) legal information

[12] (1984) 111 *SALJ* 328 *ff*.

'because law teachers cannot cover everything their students will need to know in practice, in terms of subject-matter, and because the field is so vast that it cannot be remembered anyway.'

In other words, our students need a basic knowledge base, some kind of ability to categorise and/or systematise, as well as the ability to find relevant information. The latter ability may seem to be stricly for academics, but I am of the opinion that a practicing lawyer operates in the same way (although his source of information might be a colleague, a golf pal who is highly placed in government or even his deeds typist, and not the library, as it is for most academics.)

Is our present law faculty geared towards delivering the above outcomes?

From hard personal experience, I have found that imparting even the basic knowledge base is very hard if a student does not share the vocabulary or even the language which is used to convey this information. In the first place the student finds it very hard to grasp concepts expressed in strange terminology and, even if he has grasped these, to express himself and prove this grasp to others. Although we could simplify the language of our study guides to some extent, the student still needs to be empowered to handle real life one day (where language is not always simplified), and I should therefore like to add a basic 'legal language literacy' module to the study package.

Although everybody agrees that a lawyer needs to reason in a logical fashion, hard personal experience has also taught me that not all law students are able, for instance, to follow syllogisms,[13] recognize false analogies, or use the *reductio ad absurdum* effectively. The study guide for the Law of Evidence, at Unisa, contains the following phrases, for instance:

> Stated in general terms, one fact is relevant to another when a logical connection exists between them.

(If a student does not fully grasp the meaning of 'logical connection', he therefore also fails to grasp one of the basic principles of evidence, namely relevance.)

and

> ...(W)here a criminal judgment is inadmissible in subsequent civil proceedings. It seems illogical, because the standard of proof is higher in a criminal trial.

(This statement should serve as an excellent test to verify whether a particular student has a grasp of logic, and if he does not yet have it, it should serve equally well as a mechanism to explain it to him.)

I should therefore like to add a module in 'legal logic' to the study package, illustrated, of course, with legal applications.

Close to my heart is the requirement that we should teach students how to

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[13] Plato is a man. All men are mortal. Therefore Plato is mortal.

find information for themselves. This includes teaching them how to make use of modern retrieval techniques such as computer databases, catalogues, abstracts etc., many of which are today available either on-line of off-line.[14] I am of the opinion that a lawyer who is not able to handle these modern sources of information competently, will soon be at a disadvantage against another lawyer who is able to do so. Yet we do very little to impart these skills during the course of a law degree. A post-graduate course on the researching of CD-ROM databases was mooted at Unisa a couple of years ago, but withered upon a lack of understanding. Interpersonal skills towards the obtaining of relevant information from persons, (interviewing a prospective witness productively, for instance) should also be integrated into the course. Here video and other modern media, could be used to good effect.

How do we learn?

In a recent work, *The way they learn*,[15] Cynthia Ulrich Tobias emphasises the fact that everyone does not have the same learning style, and that learners should therefore not all be approached in the same manner. (This fits in rather well with distance education, which is more amenable to an individualised approach than conventional education.)

Basing her approach on the work done by the American psychologist, Anthony F Gregorc, she explains that there are two different ways in which people take in information and that because of these two styles of perception, namely *concrete* perception, and *abstract* perception, students have different learning *styles*.[16] The group in which concrete perception is dominant, prefer taking in information by means of their five senses, namely sight, smell, touch, taste and hearing. (This group should therefore be happier in a face to face situation with their lecturer, would prefer doing an oral examination to a written one, would prefer group work to studying alone at home, and so forth.) The second group, in which abstract perception is dominant, has a greater ability to visualize in the abstract, to conceive ideas and to believe in concepts which they can never really see, or feel. (This group should therefore be much happier studying in the present Unisa context, where most knowledge is conveyed impersonally by means of printed study guides, to be used by individual students, studying alone at home. In actual fact, however, even part of this group is dependent on visual cues which are only obtained by interacting with other persons, where they can 'read between the lines', note body language, and so on).

According to Gregorc, once the information has been taken in, one may again differentiate between two groups, according to the way in which each group *orders* or *systematises* what they they have been exposed to.[17] The group

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[14] See footnotes 7 and 8 above for a brief explanation of these concepts.

[15] Focus on the Family Publishers, Colorado Springs, (1994).

[16] *Op cit* 14–15.

[17] *Op cit* 16.

which prefers to use *sequential* ordering, organises the information in a linear,[18] step-by-step, logical fashion. (This is the method we have inherited from the Greeks and Romans and upon which our Western science has been built. It is difficult for some sequential thinkers to take non-sequential, or random, thinkers at all seriously, because the latter are categorised as being 'unscientific'). The second group prefers to use *random* ordering, which means that their minds organise in larger chunks of meaning, and out of sequence, experimenting with something for fit in one place after the other, without first reducing possible poor fits by clinically logical elimination. (This is a method more popular outside the mainstream of Western thought, and makes one more sympathetic to black claims that most of our South African universities are Euro-centric).

If one now takes all of Gregorc's groupings and systematise the four different combinations, we find that each person has an individual learning *style*, which may be categorised as follows.

The first combination is the 'concrete sequential' (CS)[19], whom Tobias describes with adjectives such as 'hardworking, conventional, accurate, stable, dependable, consistent, factual, organised'. The second is the 'abstract sequential' (AS), described as 'analytic, objective, knowledgeable, thorough, structured, logical, deliberate, systematic.' The third combination, the 'abstract random' (AR), is seen as 'sensitive, compassionate, perceptive, imaginative, idealistic, sentimental, spontaneous, flexible' and the fourth combination, the 'concrete random' (CR), who is 'quick, intuitive, curious, realistic, creative, innovative, instinctive, adventurous.'[20]

When one looks at the learning preferences of these four different styles, one realises that many learning problems may have been the result of teachers and educators not having individualised sufficiently in the past. In fact, the whole trend has been towards centralising and standardising everything (even education) in the name of efficiency.[21] Let us take a brief look at the needs, likes and dislikes of the different styles.

For instance, according to Tobias, a CS prefers working systematically, looking closely at detail, knowing exactly what is expected and establishing routine ways of doing things. He hates working in groups (interesting to bear in mind during discussion classes!), working with abstract ideas, demands to 'use your imagination' and questions with no right or wrong answers (he should

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[18] Following one line of thought, sequentially, from beginning to end.

[19] Coming to knowledge in a more concrete fashion, as explained above, and then organising that knowledge in a sequential fashion.

[20] Tobias *op cit* 19.

[21] Van Zyl (and others) refer to the 'factory model' of education, but I think the person who has most penetratingly exposed this 'centralize everything' as part of the 'Second Wave' way of thinking has been Alvin Toffler, in his work *The Third Wave* (Pan Books 1980). The 'Third Wave' represents the electronic, 'high tech' revolution, superseding the industrial 'Second Wave', which in turn superseded the rural 'First Wave', where all influence was based on the ownership of land.

therefore do well with most multiple choice questions.)

The AS, on the other hand, is very appreciative of logical reasoning, needs a teacher who is well informed on the subject and likes living in the world of abstract ideas (sounds like the academic ideal!) What they do not enjoy, is not having enough time to deal with a subject thoroughly (again a problem to handle during discussion classes), expressing their emotions, being diplomatic when convincing someone else of their point of view and not monopolizing a conversation about a subject that interests them.

Students of the AR style prefer personalising learning (therefore seemingly not being ideal candidates for distance education), work preferably with very broad, general principles, participate enthusiastically in projects which they believe in, and they often decide with the heart and not with the head. They dislike having to compete[22], giving exact, minute detail, accepting even positive, well-meant criticism (not ideal for the Socratic method, therefore), and focussing exclusively on one thing at a time. (Group discussions and personal contact is therefore a much greater need for this learning style than for the others).

Finally, the CR often uses insight and instinct to solve problems, prefers using real-life experiences to learn and often try out something for themselves, rather than taking your word for it. (The latter two characteristics of this style could be an advantage for practitioners studying at a distance, since some of the academic knowledge gained can immediately be tried out in practice.) CR's hate routine, having to keep or complete formal reports, showing exactly how they came to an answer, and having no options.

How do we remember?

Whereas Gregorc's styles show how our minds work, Tobias explains another model, illustrating how we remember information. According to this, some people memorise better when hearing and repeating the information (the *Auditory modality)*. Others prefers associations with things they see — either concretely in the shape of flash cards, for instance, or abstractly, by visualising (the *Visual Modality).* Finally there is a group who remember best when the act of memorisation is carried out in conjunction with bodily movement (the *Kinesthetic modality).*

This classification is not in contrast to Gregorc's mind styles, but should be used in conjunction with it. When working with real live people it makes the classificatory net finer, and therefore more useful. When working with AR people (who prefer group work, remember?), who are also of an Auditory

[22] A surprising discovery for me at the former Unibo (now University of the North West), was that students hated having their marks put up on the notice board, unless anonimity was guaranteed, by simply using the student number in lieu of the name.

memory modality, it might be useful to use 'rap'[23] to make some concepts stick in the mind.

It might also be useful to target this modality with audio tapes and radio broadcasts, in addition to the printed study guides. Telephone conferencing should also be more successful with this group than with some of the others.

The Visual Modality, on the other hand, seem to be ideally receptive to video-based teaching material (of which there still is a woeful scarcity at Unisa at present)[24] These students would probably also be more interested in video-conferencing, than would some of the other modalities. Outside of Unisa, a few institutes, claiming to improve memory skills, are doing quite well at present by encouraging their student to associate concepts with visualised pictures. This method would obviously be more successful with students who are strong in this particular memorising modality (the visual modality).

It may be hard for some AS academics to take the Kinesthetic Modality seriously, but it has proven to be quite effective in some Bible courses, where hand and body movement help to fix certain concepts in the mind. I have also heard a very convincing argument that theatre and dance performances should be funded and/or subsidised by universities to a greater extent than at present, since this is 'research' in a much more direct sense than by publication, for instance. The speaker used the example of the Yoruba tribe in Nigeria, where the making of mask to be used in the dancing, the pre-dance rituals and then the dance itself, form part of an intricate process of communication and getting to know oneself.

How do we understand?

Tobias explains this by making use of a model of the American psychological researcher, Herman Witkin, who was called in by the US Air Force to determine why some fully trained pilots, flying by instruments, would emerge from a fog bank flying upside down!

After some testing, Witkin distinguished two groups. The first contains people who are more independent of having an external field of vision, which he termed *analytical*, since they were able to break down information into its component parts and to focus on detail. The second group consists of people who are more field dependent, or *global*, in that they needed their external field of vision in order to orientate themselves.

It was also found, even when grasping fields other than instrument flying, that the *analytical* group were more disposed to seeing the constituent parts that make up the big picture, because they felt that one had to understand the parts in order to understand the whole. The *global* group on the other hand,

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[23] A rythmical recitation, conveying a story or message, especially popular among black youth.

[24] Partially relieved by a Unisa-made video illustrating a typical court case, which is at present quite popular with students of the Department of Criminal Law and Procedure.

felt that the first group could not see the wood for the trees, opining that there was no point in clarifying a detail if one could not see where it fits into the big picture.

This division obviously also has implications for individualising the education of students. What works for the detail person would probably bore the 'global' out of his skull! Conversely, the detail person would probably question the conclusions of the 'global', because of his fuzzier focus on detail. The model again partially overlaps with that of Gregorc, with the analytical group probably approximating the sequential group (CS and AS) more closely, and the globals being closer to the random group (AR and CR).

Implications for Unisa.

In order to see if Gregorc's theories could be utilized at Unisa, I decided to try and delve a bit deeper into his credentials and philosophy. I found valuable information in this regard in his own work *Styles — Beyond the Basics*[25] He explains the concrete/abstract and sequential/random distinctions as follows:

> I found that human beings use two perceptual (spatial) fields for importing and exporting data. These are the concrete (physical) space and abstract (metaphysical) space. I also realised that we order events and facts in a sequential (step-by-step or branchlike) manner and in a random (web-like, multi-tiered, spiral manner. I further came to realize that individuals report more comfort, challenge, and fulfillment when in conditions that provide a particular space and ordering environment).

Surely this is a worthwhile goal that should be striven for. How is it to be carried out at Unisa, specifically? At the present moment, our written, linear study guides and little personal contact with students probably suits the AS learning style best. The logical way in which the guides are structured would reinforce this. Yet, the quotation above provides a clue as to how we may also appeal to the more random style of thinking. When Gregorc speaks of ordering facts in a 'web-like,[26] multi-tiered, spiral' manner, the possibility of using 'hypertext' leaps to mind. (Please do not stop reading at this juncture, since I will endeavour to explain 'hypertext' in the next paragraph.)

'Text' simply means text in the conventional sense, 'hyper' means 'above' in its Greek sense. Basically it comes down to the fact that you can leave the normal linear reading of a text, and at the stroke of a computer 'hot key', jump 'above', to another (related) text, or even to a picture, a map or even a videoclip.[27] The second piece of text provides for further jumps to still other (related) texts, or one may return to the first text and quietly continue reading in a linear fashion, until the next opportunity for a hypertext jump presents

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[25] Gabriel Systems Inc Massachusetts 1985.

[26] It is significant that the hypertext way of accessing the Internet is by means of the 'World-wide Web' (WWW). This is one of the few cases where the acronym takes longer to pronounce than the full term, therefore computer scientists (who will not be deprived of their acronyms), sometimes speak of W^3!

[27] Since the latter three are not, strictly speaking, forms of text, one should rather speak of 'hypermedia', than 'hypertext'.

itself. The possibility of 'jumping' is usually indicated by one or more words on a page being in a different font, or colour, when compared to the rest of the text. One simply places the computer cursor on one of these special words and presses the appropriate key (with a mouse pointing device it is even easier.) If one gets 'lost in hyperspace' it is usually possible to return to the original starting point by simply using the 'Escape' key (rather aptly named in this instance!) In this way, one may start off with a legal article, jump to the full text of one of the decided cases referred to in the article, leap to a legal dictionary to make sure of the exact meaning of one the phrases used in the case and then 'escape' back to the original article and continue reading, a wiser (and better informed) man.

It is clear that the above procedure is only really feasible on a computer, although efforts have been made in books with 'programmed instruction' to accomplish the same purpose by means of footnotes or instructions/options to 'now go to page 15'. It is also clear, however, that this option should suit the AR and CR learners much better, since they can 'browse' at will, being led by the thread of similarity, rather than the treadmill of contiguity. I fully realise that not all Unisa students have access to computers, but the 'hypertext' and 'hypermedia' considerations should perhaps influence Unisa planners to, at least, strive for greater opportunities of access to computers by students. As I have mentioned above, Henry van Zyl has already mooted the possibility of a 'high tech' electronic education centre. Unisa has got the Sunnyside campus (and sufficient accomodation for temporary visitors on it) to consider the 'winter school' option, which might allow students, whose learning styles crave an alternative approach to learning, to visit such a centre and use the computers to be installed there. In the words of the old adage: 'If the mountain will not come to Mahomet, then Mahomet must go to the mountain.'

The preparation and fitting of such a centre will be expensive, to be sure, but I gain the impression that many computer (and other) firms will welcome the opportunity to invest money in the education of South Africa's youth, provided that it really works. If Gregorc is correct (and I think that he is at least on the right track, by individualising education), it should work. I am also predicating quite a large amount of hard work on the part of Unisa lecturers to make their work available in some alternative formats, for instance, in hypertext. Seeing that there is a major rewrite of study guides taking place at Unisa at the moment, anyway, these new considerations may as well be taken into account too.

Should this whole Sunnyside centre be set up just to give AR and CR students a chance to use hypertext? I think not. When dealing with the AR students above, I mentioned that they liked 'personalising' learning. When dealing with the CR students, I mentioned that they preferred 'finding out for themselves' and learning from real-life situations. On the present Sunnyside campus we already have the training centre of the Association of Law Societies (representing the attorneys' profession). Surely it should not be impossible to integrate some of the 'winter school' Unisa students into the activities of the

training centre? This would also provide a good opportunity for closer liaison with (and perhaps even funding from) the attorneys' profession. On the old Van der Walt street campus of Unisa (presently used by Vista University), we have the Unisa Legal Aid Centre. Surely it should not be impossible to integrate some of the 'winter school' attendees activities with those of the Legal Aid Centre? This might also provide a (partial) answer to the pleas of Roshnie Maharaj (quoted above) for a greater integration between academy and practice during the preparation of lawyers for their profession.

To return to computers. At the moment, most Unisa computers are internally connected by means of a LAN (Local Area Network), which is mainly utilised for administrative purposes. This LAN is linked to a world-wide network which enables access to the Internet. The Internet is itself an international network, mostly frequented by academics, where information is exchanged, accessed, and downloaded[28]. Recently, however, there has been talk of using the Internet for teaching purposes! In the first place, therefore, Unisa students visiting the electronic education centre on the Sunnyside campus will have the opportunity to look up relevant legal information on the network-linked computers there. In the second place, they will have the opportunity to be taught over the network, possibly even by international experts.

This gives us the opportunity to spare a thought for those many students who will not be able to make it to the Sunnyside campus. The beauty of a network is that anything which can be made available on a computer at one point, may also be made available on a computer at another point of the network. If Unisa could 'decentralise', even to the extent of only making a few supervised computers available at other centres, many of the benefits available at the electronic education centre on the Sunnyside campus would also be distributable to the other centres. Here I am thinking of possible co-operation with universities and technikons in the rest of the country, with colleges like the Police Academy in Graaff-Reinet (with which Unisa already has formal links) and so forth.

As might have been gathered above, I am a great believer in the adage 'high tech, high touch'. This means that there should be real human beings available at the computers, to do some 'hand-holding', to help to overcome technophobia and to provide feedback as to successes and weak points in the course material. Also, most importantly, to provide in the needs of the CS and CR (and even AR) learners who prefer learning by means of a human interface. On the Sunnyside campus this should not be a problem, with so many administrative and academic personnel available on the Muckleneuk campus, just across the road. At the 'decentralised' centres, Unisa will have to appoint 'tutors' to help provide the human touch. These tutors should not be scaled-down 'lecturers', but rather 'facilitators', who can help the students use the media effectively, organise discussion groups, answer basic and recurrent questions and route other questions to the proper authority on the main

[28] Saved to one's own computer.

campus. The advantage of using properly structured, modular, course material is that one can get by with a lower degree of specialised knowledge on the part of the 'tutor'.

Conclusion

What are the chances of success for these innovations at Unisa? If this question is interpreted to mean, 'will they be implemented?', I not only hope, but believe, that they will, even if not exactly in the form set out here. Unisa cannot afford to sit still, in these times, on these resources, in this specific country. Alvin Toffler, the futurologist and author of works such as *Future Shock*, *The Third Wave* and *Powershift*, visited South Africa during 1994 and had this to say on the prospects for the country: 'There has to be some connection between the media, computers and education'

and:

> If South Africa could find a way to crack this education problem, it could become one of the richest countries in the world. And South Africa just might have the right environment and technological background to come up with the solution.

If the question is interpreted to mean 'will they be successful in terms of better and more effective education?', I am, again, cautiously optimistic. I do not believe that computers, by themselves, are the panacaea for education which some 'techno-freaks' believe them to be. In fact, Gregorc himself seems feel that they would only appeal to the sequential type of student and that the machines do not have enough interactivity:

> The teacher who substitutes an instrument's and package's power for his own when dealing with a learner is behaving in a dehumanizing manner. Instruments and packaged prescriptions have no conscience or responsiveness in them.[29]

He is correct, of course. Computers and telecommunication equipment are simply tools, with which no university should ever attempt to eliminate human teachers. These tools can, however, accomplish a more effective use of that scarce resource — a human teacher, lecturer or professor. I disagree with the statement that computer-aided education would only appeal to the sequential type of student. It should be borne in mind that Gregorc's book was published in 1985, ten years ago at the time of writing this article. During this period, the concept of 'multimedia' has made computers much more attractive to the random type of student.

(I promise that 'multimedia' will be the last technical concept that I am going to try and explain in this article.) Originally it literally meant using 'more than one medium' in education. Van Zyl apparently uses it in this original sense, when he agrees with some quoted sources that computers, by themselves, are not sufficient and that they have to be supported by the 'traditional written

[29] *Op cit* 162.

word and other appropriate media'.[30] In the computer world, however, a 'multimedia computer' has come into being. This beast usually boasts a CD-ROM drive (faithful to my recent promise, I am not even going to try and explain that concept), a sound card, sound speakers, and often a videocard, which enables one to see video (and even television) on the computer monitor. It should be clear that this could be quite attractive to a more random type of student.

I have pleaded in this article that education be individualised, since students have different learning styles, some of which I have tried to illustrate. Even according to Gregorc, this does not mean that every student has to be tested first and then put on a certain educational track:

> I then recommend that teachers provide a rich environment for students. That is, they provide many paths to the goal. Let the learner decide for himself how to reach the goal.[31]

This seems to dovetail with a recommendation which Van Zyl also makes:

> Die feit dat RGO alleen nie vir alle leerders geskik is nie, dui dus daarop dat 'n totale multimedia elektroniese pakket aan studente voorsien moet word. Daaruit kan studente dan kies om slegs sekere komponente, of die hele pakket te ontvang.

If this development (or something similar) can start happening at Unisa, I believe that this institution has a future. If not, I would like to leave with the following quotation:

> There is at least one point in the history of any company when you have to change dramatically to rise to the next performance level. Miss that moment and you start to decline. (Andrew Gore).

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[30] Van Zyl, *op cit* 150.

[31] Gregorc *op cit* 151.

HIV infection, blood tests and informed consent*

FFW VAN OOSTEN**

This article is dedicated to Sas Strauss as a much appreciated friend, promoter, confidant, adviser, colleague, fellow traveller and sharer of several common interests. The topic of the article befits the occasion in more ways than one: first, Sas's numerous and valuable contributions on the issues of consent and HIV to South African law in general and medical law in particular are a matter of record; secondly, it was my privilege to do a doctoral thesis on informed consent under his promotorship.

o o o

1 INTRODUCTION

The topic under discussion, HIV infection, blood tests[1] and informed consent, involves at least three pertinent and distinct basic factual situations and corresponding medico-legal questions:

a A, a doctor, takes a blood sample from B, a patient, with B's consent. Must A inform B of a proposed HIV test where A decides upon such test either before, during or after the taking of the blood sample? In more technical terms, is informing the patient of an HIV test a requisite for his or her effective consent to the taking of a blood sample and/or performing an HIV test?

b A, a doctor, receives a laboratory test result which reveals that a patient, B, is HIV positive or HIV negative. Must A inform B accordingly? In other words, is there a duty incumbent upon the doctor to inform a patient who

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[1]Milk and urine samples can also be used to detect HIV infection: see R Laufs & A Laufs 'AIDS und Arztrecht' 1987 *NJW* 2257 2263; C van Wyk AIDS: Some Medico-Legal Aspects 1991 *Med Law* 139 146. However, since procuring a milk or urine sample does not involve a medical procedure, the principles applicable to HIV milk and urine tests will coincide with those applicable to HIV blood tests only to a limited extent, notably the principles discussed under 3 *infra*; *cf* n 50 and 85 *infra*.

has been tested for an HIV infection of the outcome of the test?

c A, a doctor, administers treatment to or performs an operation upon B, a patient, which exposes B to the risk or danger of HIV infection. Must A inform B of such risk or danger? More particularly, is informing a patient, whose consent to a proposed medical intervention is sought, of the risk or danger of HIV infection during the intervention a requisite for effective consent thereto?

The present article examines these questions in terms of a variety of factual situations and considerations that come into play and with reference to medico-ethical codes of conduct, case law and legal opinion in Germany and South Africa. The topic is expounded and discussed against the backdrop of the fundamental principles of the doctrine of informed consent and the doctor's duty of disclosure.

2 THE DOCTRINE OF INFORMED CONSENT

The relevant and pertinent fundamental tenets of the so-called doctrine of informed consent, for purposes of the present exposition and discussion, may briefly be summarised[2] as follows:

a Since, generally speaking, the patient is, within the context of undergoing or refusing a medical intervention, master of his or her own life and body, the ultimate decision whether or not to subject himself or herself to a medical intervention lies with the patient and not with the doctor. Indeed, to allow doctors to perform medical interventions against their patients' will or without their consent on the basis of the doctor-knows-best and the patient's-best-interest criteria, would be tantamount to practising medical paternalism at the expense of patient autonomy.

b Hence, lawful medical interventions require, in the absence of overriding grounds of justification, such as *negotiorum gestio* or necessity, statutory authority[3] and perhaps even authorisation by the court,[4] the effective consent of the patient.

c Since effective consent is ordinarily out of the question unless the patient knows and appreciates what it is that he or she consents to, the duty will usually be incumbent upon the doctor, as an expert, to furnish the patient, as a person, with appropriate information to establish the requisite knowledge and appreciation and, hence, consent to the proposed

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[2]For full details and copious references to authorities, see FFW van Oosten *The doctrine of informed consent in medical law* (1991) *passim*.

[3]See within the context of HIV tests VGH München 1988 *NJW* 2318, discussed by O Seewald 'Zu den Voraussetzungen der Seuchenbekämpfung durch Blutuntersuchung und Zwangsinformation' 1988 *NJW* 2921 and HU Gallwas 'Gefahrenerforschung und HIV-Verdacht' 1989 *NJW* 1516; SA Strauss 'Legal issues concerning AIDS an outline' 1988(1) *SAPM* 13; CW van Wyk *Aspekte van die regsproblematiek rakende VIGS* (LLD thesis 1991 UNISA) 259 *ff*.

[4]*Cf* within the context of compulsory HIV tests for prisoners *S v Mabachi* 1993 (2) SACR 36 (Z) 46 *ff*.

intervention.

d The purpose and function commonly attributed to the informed consent requisite are (i) to ensure the patient's right to self-determination and freedom of choice; and (ii) to encourage rational decision-making by enabling the patient to weigh and balance the benefits and disadvantages of the proposed intervention in order to come to a rational and enlightened choice whether to undergo or refuse it.

e This means that the doctor is under a duty to give the patient a general idea, in broad terms and in person's language, of the nature, scope, administration, importance, consequences, risks, dangers, benefits, disadvantages and prognosis of, as well as the alternatives to, the proposed intervention. More particularly, all serious and typical risks and dangers should be disclosed, but not unusual or remote risks and dangers, unless they are serious or the patient makes enquiries about them. At the same time, although the manner of disclosure is essentially a matter of medical discretion, doctors are expected to refrain from causing patients anxiety and distress by unnecessary disclosure of adverse diagnoses, and from scaring or frightening patients from submitting to medically indicated interventions by unnecessary disclosure of their adverse consequences.

f Failure by the doctor to procure the patient's informed consent to a medical intervention may constitute a violation of the patient's bodily integrity, a violation of the patient's autonomy/privacy, damage to the patient's physical or mental health or breach of a term of the contract between the parties, and may accordingly result in the doctor being held liable for criminal and/or civil assault, criminal and/or civil injury to personality, delictual negligence or breach of contract, as the case may be, or in the doctor being unable to recover his or her professional fee. What is more, liability for assault and injury to personality may be incurred even if the medical intervention was administered with due care and skill and eventually proves to have been beneficial to the patient.

g Whether or not disclosure of the diagnosis is obligatory, is a moot point, but it is conceivable that diagnosis disclosure is imperative where (i) it may affect the patient's decision whether or not to submit to the proposed intervention; (ii) it is an express or implied term of the contract between doctor and patient; or (iii) it is essential for therapy.

h An extended duty of disclosure is commonly recognised where (i) the patient asks questions, in which case there is a duty incumbent upon the doctor to respond both fully and truthfully to the patient's enquiries; and (ii) the patient refuses an indicated diagnostic or therapeutic intervention, in which case the doctor is under a duty to prevail upon the patient the necessity or urgency of such intervention.

i No duty of disclosure would appear to exist where (i) the patient is already in possession of the requisite information; (ii) the patient expressly or

impliedly waives his or her right to information;[5] (iii) the defence of a so-called therapeutic necessity[6] or contra-indication, in terms of which the harm caused by disclosure would be greater than the harm caused by non-disclosure,[7] is applicable; or (iv) disclosure is, in the circumstances, physically impossible.

j Without sacrificing the cardinal principles of patient self-determination and the doctor's duty of disclosure, an attempt should be made by the parties to reconcile, insofar as is possible, the doctor's ethical duty to heal and the patient's legal right to information. This can be achieved by employing the so-called shared decision-making and therapeutic alliance models, which strive towards eliminating doctor-patient conflict and distrust and towards promoting trust and confidence between the parties by means of mutual communication and cooperation.

Disclosure in terms of the informed consent requisite is known as self-determination disclosure and must be distinguished[8] from so-called therapeutic disclosure which signifies information that renders the medical intervention possible and provides the necessary preparation and support for it and which, therefore, serves the purposes of therapy.[9]

3 HIV INFECTION AND INFORMED CONSENT

3 1 Preliminary remarks

Before turning to the specifics of each of the three questions under dis-

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[5]Which is, of course, in principle irreconcilable with the knowledge-and-appreciation requisite of effective consent, but to force unwanted information upon a patient would also constitute a violation of his or her freedom of choice.

[6]On the terminology see FFW van Oosten 'The so-called "therapeutic privilege" or "contra-indication": its nature and role in non-disclosure cases' 1991 *Med Law* 31 34 *ff*.

[7]*Eg* in terminal cancer or emphysema cases, provided there is a real conflict between the doctor's duty to inform and his or her duty to heal.

[8]Although the two may, and in certain circumstances will, overlap; *cf* 3 1 *infra*.

[9]See Van Oosten *Informed consent* 296 *ff* 439–440. The implication of this distinction is that the phrase 'duty of disclosure' has a wider meaning than the phrase 'informed consent'. 'Informed consent' usually includes a duty of disclosure but a 'duty of disclosure' does not necessarily relate to informed consent. This is further borne out by the fact that doctors may, depending upon the circumstances, be under a duty to disclose the fact that the patient is HIV infected to sex partners (*cf Gemeinsame Hinweise und Empfehlungen der Bundesärztekammer und der Deutschen Krankenhausgesellschaft zur HIV-Infektion* (hereafter *BäK & DKG*) (1988) 15; Medical Association of South Africa *Guidelines for the Management of HIV/AIDS* (hereafter MASA) (1992) 10; South African Medical and Dental Council *The Management of Patients with HIV Infection or AIDS* (Revised Guidelines) (hereafter SAMDC) (1992) 8; BGH 1991 *NJW* 1948, discussed by E Deutsch 1991 *NJW* 1937) and health care workers (*cf* BäK & DKG VII and 17 ff; College of Medicine of South Africa Management of HIV-positive Patients (Policy Statement) (hereafter CMSA) 1991 *SAMJ* 688 689; MASA 9–10; SAMDC 10; StA Aachen 1989 *DRiZ* 20 21; *Jansen van Vuuren v Kruger* 1993 (4) SA 842 (A)), or in terms of a statutory duty (as opposed to statutory authority), a court order, a disciplinary hearing or an emergency situation. The scope of the present article is restricted to the duties of self-determination disclosure and therapeutic disclosure.

cussion, two aspects concerning the interrelation between the three questions on the one hand and the foregoing remarks on informed consent on the other need to be canvassed:

a Both self-determination disclosure and therapeutic disclosure appear to be relevant to all the questions under discussion:

   i Informing the patient of the proposed HIV test will not only primarily protect his or her autonomy but may also, should the patient turn out to be HIV infected, serve the secondary purpose of therapy.

   ii Informing the patient of an HIV diagnosis will not only primarily serve the purpose of his or her therapy, but may also contribute towards an autonomous decision on subsequent medically indicated interventions and conduct as a secondary consequence.

   iii Informing patients of the danger of HIV infection during medical interventions will enable them to make an enlightened choice either to undergo or forego the proposed intervention on the one hand, and to weigh and balance the risk of HIV infection against the necessity and urgency of, and alternatives to, the proposed intervention on the other, and may thus, at one and the same time, serve the purposes of patient autonomy and patient therapy.

b The risks and dangers inherent in HIV infection seem to be relevant to all the questions under discussion. Although HIV infection, within the context of medical interventions, is hardly likely ever to become the norm, even in health care systems which leave much to be desired, it is common knowledge that HIV infection is never less than potentially lethal. Generally speaking, therefore, HIV infection falls within the ambit of the risks and dangers that patients who consider subjecting themselves to medical interventions should, in terms of the informed consent requisite, be apprised of.[10] Analogous reasoning[11] would seem to justify the conclusion that at least a potentially HIV infected patient[12] and a tested HIV infected patient[13] should likewise, under ordinary circumstances, be informed thereof.

3 2 Informed consent to blood tests and/or HIV tests

As regards the issue of informed consent to blood tests for HIV infection, the factual and legal possibilities may be divided into three broad categories:

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[10]Case c, referred to *supra*; *cf* W Weissauer 'Bluttransfusion und AIDS — mediko-legale Aspekte' 1987 *MedR* 272 273; CW van Wyk 'VIGS en bloedoortappings: enkele regsaspekte' 1992 *De Jure* 23 29–30 37; the text to n 136 and 137 *infra*.

[11]*Cf* the doctor's contractual and delictual duty of care.

[12]Case a, referred to *supra*; *contra* SA Strauss 'Must a patient be informed that a blood sample will be tested for HIV?' 1989 (1) *SAPM* 6–7: see 3 2 4 a *infra*.

[13]Case b, referred to *supra*.

a The patient grants his or her (informed)[14] consent to an HIV test before or during the taking of the blood sample by the doctor. The viewpoint that this is what is required for a lawful HIV test enjoys substantial *de lege lata*, *de lege ferenda* and medico-ethical support. Probably the most controversial issues here are whether or not the defences of implied consent and therapeutic necessity are applicable, and whether the legal interest violated by a failure to procure the patient's (informed) consent is the patient's physical integrity or his or her autonomy/privacy or both.

b The doctor decides to have the patient's blood tested for HIV infection, and subsequently takes a blood sample with the patient's informed consent to the procedure and its inherent risks and dangers, but without the patient's (informed) consent to the HIV test. The viewpoint that this is sufficient for a lawful HIV test enjoys considerable *de lege ferenda* support. However, whether or not such conduct by the doctor qualifies as a violation of the patient's personality rights, as opposed to a violation of his or her bodily integrity, is somewhat contentious.

c The doctor decides to have the patient's blood tested for HIV infection subsequent to having taken a blood sample from the patient. The legal debate in this case centres on the legal interest violated by such conduct.

Moreover, a differentiation may be made in these three situations between three purposes[15] for which the HIV test are performed:

i Where the HIV test is performed for the benefit of the patient. This will, for example, be the case where AZT treatment may be administered successfully and urgent action is indicated,[16] where AIDS dementia is suspected and a blood sample is diagnostically important,[17] where the patient suffers anxiety and distress for fear of HIV infection and where the patient stands to gain something (employment or insurance) from a negative test result, to mention but a few.

ii Where the HIV test is performed for the benefit of others. This will be the case where the patient poses a potential source of infection for other persons, for example an embryo or fetus, medical practitioners,

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[14]For an explanation of '(informed)' in this context see 3 2 1 *infra*.

[15]Since HIV tests for purposes of gathering scientific data are neither in the interests of the patient nor for the benefit of others, they fall outside the scope of the present article. Suffice it to say there appears to be unanimity among authorities that lawful HIV tests for purposes of gathering scientific data require the patient's informed consent: G Solbach & T Solbach 'Zur Frage der Strafbarkeit einer Venenpunktion zum Zwecke einer "routinemässigen" Untersuchung auf "AIDS"' 1987 *JA* 298 300; Laufs & Laufs 1987 *NJW* 2263; H Janker 'Heimliche HIV-Antikörpertests — Strafbare Körperverletzung?' 1987 *NJW* 2897 2900; H Herzog 'Die rechtliche Problematik von AIDS in der Praxis des niedergelassenen Arztes' 1988 *MedR* 289 290; FP Michel 'Schmerzensgeldanspruch nach heimlichem AIDS-Test?' 1988 *NJW* 2271 2277; J Langkeit 'Ärztrechtliche Probleme im Zusammenhang mit AIDS-Tests' 1990 *Jura* 452 454; Van Wyk *Aspekte van VIGS* 156 *ff*.

[16]*Cf* Langkeit 1990 *Jura* 458 n 74; Van Wyk 1991 *Med Law* 144.

[17]*Cf* Van Wyk 1991 *Med Law* 144.

other health care workers, sex partners, fellow patients, fellow employees, blood recipients, relatives, colleagues and clients.[18]

iii Where the HIV test is performed for the benefit of both the patient and others. This will be the case where elements of both i and ii are present.

A combination and integration of the aforementioned possibilities and purposes form the framework within which the often divergent and sometimes conflicting medico-ethical, *de lege lata* and *de lege ferenda* solutions to the problems under discussion are expounded and evaluated.

3 2 1 HIV test in patient's interest with (informed) consent

Depending upon the nature of the contract or communication between doctor and patient, the issue of HIV tests and informed consent is, to some extent, either problematic or unproblematic:

a Relatively unproblematic cases[19] of HIV tests and informed consent are the following:

i Where the patient specifically asks the doctor for a comprehensive medical check-up because of a health complaint or as a precautionary measure. Here the patient's tacit consent[20] will, in terms of the contract between the parties, cover all tests, including an HIV test, that are medically indicated.[21]

ii Where the patient specifically asks the doctor to determine the cause of a disease that presents symptoms of an unspecific nature or symptoms which are difficult to diagnose, but which point to the possibility of an HIV infection. Here the patient's tacit consent will, again, in terms of the contract between the parties, cover all medically indicated tests,

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[18]Van Wyk *Aspekte van VIGS* 161 n 191 also mentions laboratory technicians and undertakers.

[19]See also HIV tests for purposes of gathering scientific data, referred to in n 15 *supra*.

[20]*Ie* tacit consent to serological tests, but express consent to the procedure involved.

[21]BäK & DKG IV(2) and 13, in terms of the implied consent and therapeutic privilege defences and on the basis (a) that the requisite medical report would be incomplete without reference to the patient's HIV status; (b) that '[a]uch in den Ausnahmefällen, in denen von einer stillschweigenden Einwilligung des Patienten in den HIV-Test ausgegangen werden kann, ist ein behutsam und schonend geführtes Aufklärungsgespräch dennoch sinnvoll' (IV(2)); and (c) that the reasons for non-disclosure are properly documented; WH Eberbach 'Heimliche AIDS-Tests' 1987 *NJW* 1470; Laufs & Laufs 1987 *NJW* 2263; G Solbach & T Solbach 1988 *JA* 114 115; *cf* T Brandes 'AIDS: Test und Einwilligung' 1987 *VersR* 747 748; Herzog 1988 *MedR* 290; E Deutsch 'Rechtsprobleme von AIDS: HIV-Test — Infektion — Behandlung — Versicherung 1988 *VersR* 533 535; *cf*, however, E Buchborn 'Ärztliche Erfahrungen und rechtliche Fragen bei AIDS' 1987 *MedR* 260 263, who requires disclosure of an HIV test to a healthy patient who asks the doctor for a comprehensive medical check-up; *contra* Langkeit 1990 *Jura* 454.

including an HIV test.[22]

iii Where the patient specifically asks the doctor for an HIV test. Here the performance of an HIV test is an express term of the diagnosis contract between the parties and, hence, covered by the patient's express consent. Moreover, since the initiative for conducting an HIV test comes from the patient, the patient's consent will not be dependent upon the doctor informing him or her of such test. Indeed, the patient's request to perform an HIV test renders the doctor's duty to inform the patient of such test non-existent.

iv Where the patient specifically asks the doctor whether or not an HIV test is intended. Here the patient must be told the truth.[23]

As regards cases i and ii, however, the proviso has been advocated that if the doctor senses or expects reservations on the patient's part about a possible HIV test or if the doctor entertains doubt about consent on the patient's part to an intended HIV test, he or she is under a duty to consult or question the patient about the matter.[24]

Moreover, cases i, ii and iii highlight the correlation between informing a patient of an HIV test on the one hand and express or tacit consent to such test on the other. In contradistinction to the impression gleaned from the court cases and legal literature, express consent to an HIV test does not necessarily imply informing the patient of such test, nor does tacit consent to an HIV test necessarily imply not informing the patient of such test. Case iii clearly illustrates an instance of express uninformed consent to an HIV test, while cases i and ii clearly illustrate instances of tacit uninformed[25] consent to an HIV test. However, it goes without saying that the patient's oral or written consent may also and will often be preceded by informing the patient of an HIV test (express informed consent). Likewise, informing

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[22]BäK & DKG IV(2) and 13, again in terms of the defences of implied consent and therapeutic privilege; M Bruns 'AIDS, Alltag und Recht' 1987 *MDR* 353 355; A Laufs & H Narr 'AIDS — Antworten auf Rechtsfragen aus der Praxis' 1987 *MedR* 282: 'Der Arzt ist als Folge der Übernahme der Behandlung nicht nur dazu berechtigt, sondern auch dazu verpflichtet, alle medizinisch indizierten diagnostischen Massnahmen zu ergreifen'; Eberbach 1987 *NJW* 1470; Laufs & Laufs 1987 *NJW* 2263; Solbach & Solbach 1988 *JA* 115; Herzog 1988 *MedR* 290; Langkeit 1990 *Jura* 454; *cf* Buchborn 1987 *MedR* 263; Brandes 1987 *VersR* 748; Deutsch 1988 *VersR* 535. The notion that so-called high risk groups, such as drug addicts, homosexuals and prostitutes (to which, incidentally, haemophiliacs, bisexuals, the sexually promiscuous and blood recipients may be added) are AIDS suspects and therefore need not be informed of an HIV test is rejected by Langkeit 1990 *Jura* 454; see also FP Michel 'Forum: Aids-Test ohne Einwilligung — Körperverletzung oder Strafbarkeitslücke?' 1988 *JuS* 8 12; *cf*, however, Laufs & Narr 1987 *MedR* 282. In this context it may be observed that in Africa AIDS is predominantly a heterosexual disease.

[23]*Cf* Deutsch 1988 *VersR* 535; Van Wyk 1991 *Med Law* 145.

[24]Laufs & Laufs 1987 *NJW* 2263.

[25]Which does not necessarily mean lack of knowledge and appreciation of the possibility of an HIV test, for the patient may be an expert himself or herself or may have acquired knowledge and appreciation elsewhere.

the patient of an HIV test can be followed by conduct intimating consent[26] thereto (tacit informed consent). Thus although consent will of necessity be express or tacit and informed or uninformed, the distinction between express and tacit consent on the one hand and informed and uninformed consent on the other should not be obscured by creating the impression that express consent and informed consent are synonymous or that tacit consent and uninformed consent are synonymous.

b Largely problematic are cases of HIV tests and informed consent in which a specific request by the patient to perform serological tests or an enquiry by the patient about an HIV test is lacking. Authority for the view that a lawful HIV test in these circumstances requires the patient's informed consent has its origin in medico-ethical codes of conduct, case law and legal opinion. The point of departure is that since the taking of a blood sample from a patient constitutes a medical intervention and, hence, *prima facie* a violation of the patient's physical integrity, the patient's informed consent is usually required to render the taking of the blood sample lawful.[27] Where the blood sample is taken for purposes of an HIV test, this means that the patient must both be informed thereof and consent thereto, and that a failure by the doctor to procure the patient's informed consent to an HIV test may render him or her liable for criminal and/or civil assault.[28]

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[26]Such as subsequently allowing the taking of a blood sample without explicitly consenting either orally or in writing.

[27]StA beim KG 1987 *NJW* 1495 1496, discussed by Sonnen BR 1987 *JA* 461–462; StA Mainz 1987 *NJW* 2946 2947; Laufs & Laufs 1987 *NJW* 2263; Janker 1987 *NJW* 2899–2900; Brandes 1987 *VersR* 748; Herzog 1988 *MedR* 290; Van Wyk 1991 *Med Law* 143 145.

[28](*Rechtswidrige Körperverletzung*): BäK & DKG IV(1), adding: (a) 'Bei der Aufklärung sollte der Situation des Patienten und der möglichen Tragweite des Testergebnisses Rechnung getragen werden'; and (b) that informed consent to HIV tests must be properly documented but that information and consent forms will not serve as a substitute for a doctor-patient conversation (12–13); MASA 6 7 8; SAMDC 3 7–8, adding (a) that poster displays to inform patients of possible HIV tests must be supplemented by a verbal discussion between doctor and patient; and (b) that the patient must also be informed of the purpose of the HIV test, its advantages and disadvantages, the doctor's reasons for wanting the information, the influence of the test result on the patient's treatment, any alteration of the patient's medical protocol by the information and the psychological impact of an HIV diagnosis; 'AIDS Consortium Charter of Rights on AIDS and HIV' 3.1 1993 *SAJHR* 162, except in the case of unlinked, anonymous epidemiological screening programmes; StA beim KG 1987 *NJW* 1495 1496: 'Jeder ärztliche, zu Heilzwecken vorgenommene Eingriff bedarf einer besonderen Rechtfertigung um die ... sonst vorliegende Rechtswidrigkeit der Integrität des Körpers berührenden Massnahme auszuschliessen. Gerechfertigt wird der Eingriff u.a. durch die Einwilligung des Patienten ... die in der Regel ausdrücklich oder stillschweigend zu erklären ist ... Diese Grundsätze gelten auch für Blutentnahmen ... wobei es keinen Unterschied macht, ob die zum Zwecke einer allgemeinen — routinemässigen — oder einer differentialdiagnostischen Untersuchung vorgenommen werden. Die Einwilligung wird ihrem Umfang nach nicht allein vom Inhalt des Heilbehandlungsvertrages bestimmt. Sie setzt vielmehr grundsätzlich eine ärztliche Aufklärung über Art und Zweck der Untersuchung voraus'; StA Mainz 1987 *NJW* 2946–2947 (criticised by Solbach & Solbach 1988 *JA* 115), which, however, deviates from the principles enunciated in the foregoing quotation in two important respects, namely (a) by requiring *express*

The reasons advanced for this view, which incidentally fails to differentiate between informed consent to the taking of a blood sample and informed consent to an HIV test, are the following:

i Although the taking of a blood sample for purposes of serological tests, inclusive of an HIV test, without informing the patient of the intended HIV test, will constitute no more than a relatively minor violation[29] of the patient's bodily integrity, the very nature and consequences of an HIV test render it a matter of the utmost importance for the patient.[30] Factors such as the public awareness; the social and professional opprobrium, isolation, distrust and prejudice; the impact upon privacy; the anxiety and distress; the personality changes; the possibility of suicide; the incurability of AIDS; and the fatal consequences associated with an HIV diagnosis, negative the contention that HIV tests are routine and covered by the notion of tacit consent.[31] This argument is, how-

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information about and consent to HIV tests; and (b) by declaring the requisite of informed consent to HIV tests inapplicable to medically indicated *routine* tests which do not entail drastic consequences for the patient's physical integrity and lifestyle; Sonnen 1987 *JA* 462; Bruns 1987 *MDR* 355: 'Die allgemeine Zustimmung eines Patienten in eine Untersuchung und Blutentnahme deckt einen zusätzlichen HIV-Antikörpertest grundsätzlich nicht mit ab'; Buchborn 1987 *MedR* 263; Eberbach WH 'AIDS und Strafrecht' 1987 *MedR* 267 271-272; Brandes 1987 *VersR* 748; Herzog 1988 *MedR* 290; GJ Knobel 'Medicolegal issues in caring for people with HIV infection' 1988 *SAMJ* 150 151; J Burchell 'AIDS and the law — II' 1990 *BML* 255, except where the patient has AIDS dementia; Langkeit 1990 *Jura* 453; E Cameron 'Human rights, racism and AIDS: the new discrimination' 1993 *SAJHR* 22 24; M Figueira 'AIDS, the Namibian Constitution and human rights' 1993 *SAJHR* 30 31-32; *cf* CMSA 1991 *SAMJ* 689; AG Mölln 1989 *NJW* 775 776; Laufs & Narr 1987 *MedR* 282 and Laufs & Laufs 1987 *NJW* 2263, who regard an HIV test without the patient's informed consent as a violation of his or her personality rights, more particularly his or her freedom of choice (*informatielle Selbstbestimmungsrecht*); JL Taitz 'Testing for HIV infection without the surgical patient's consent' 1993 *CME* 79 *ff*.

[29] StA Mainz 1987 *NJW* 2946 2947, in which the court conceded that an HIV test 'unterscheidet sich in nichts von sonstigen Venenpunktionen. Das Blut für den Aids-Test wird durch einen einheitlichen Eingriff zusammen mit dem Blut gewonnen, das für die Durchführung einer routinemässigen bzw auch differentialdiagnostischen Zwecken dienenden Blutuntersuchung erforderlich ist'; StA Aachen 1989 *DRiZ* 20; *contra* Sonnen 1987 *JA* 461. *Cf* further AG Mölln 1989 *NJW* 775 776 and AG Göttingen 1989 *NJW* 776 777, in which it was held that since performing a secret HIV test on a blood sample voluntarily taken from the patient constitutes a minor infringement of his personality rights, the patient could not succeed in an action for sentimental damages (*Schmerzensgeld*) which requires a serious violation of personality rights; see also Michel 1988 *NJW* 2271 *ff*, who points out that this applies irrespective of whether the outcome of the HIV test is positive or negative, but who is critical of the *de lege lata* position (2277); *contra* Langkeit 1990 *Jura* 453 *ff*, who rejects these decisions on the basis that the violation of physical integrity was in the circumstances neither trivial, nor was the violation of personality rights undeserving of sentimental damages.

[30] 4 BäK & DKG 12; StA Mainz 1987 *NJW* 2946 2947; Sonnen 1987 *JA* 462; Langkeit 1990 *Jura* 453; *cf* Eberbach 1987 *NJW* 1471; Laufs & Laufs 1987 *NJW* 2263.

[31] StA Mainz 1987 *NJW* 2946 2947, with reference to medical respect for the patient's freedom of choice within the context of his or her personality rights: '[Der Patient] allein muss abwägen und entscheiden können, ob er sich überhaupt einer Blutentnahme zum Zwecke eines Aids-Testes stellen soll'; Bruns 1987 *MDR* 355; Langkeit 1990 *Jura* 453 ff: 'Angesichts alle [die] Auswirkungen, die *zumindest*

ever, not quite convincing:

aa Without losing sight of the causal nexus that may[32] exist between an HIV test and an HIV diagnosis, the majority of the factors enumerated appear to relate to the latter rather than to the former. In terms of the considerations mentioned, therefore, the problem, strictly speaking, seems to be whether or not an HIV *diagnosis* rather than whether or not an HIV *test* should be disclosed to the patient.

bb Barring such factors as the very real social and professional opprobrium, isolation, distrust and prejudice, and the impact upon privacy, these considerations are equally applicable to other incurable and terminal illnesses. It would therefore appear to be society's response to the AIDS disease and the ideological pursuits of afflicted groups rather than the medical implications of AIDS which sets it apart from other incurable and terminal illnesses.

cc Preferential treatment of HIV tests as opposed to other serological tests, defeats the object of normalising and destigmatising AIDS. In fact, it is worth noting that the logical concomitant of informed consent to HIV tests, namely an equally strong plea for informed consent as a requisite for other serological tests, particularly where they also relate to serious, incurable, terminal and contagious diseases, is conspicuously absent in the present context.

dd It is expressly admitted that the taking of a blood sample involves a minor physical intervention and it is tacitly conceded that serological tests other than HIV tests need not be disclosed to the patient for his or her effective consent to the taking of a blood sample. Yet the subsequent performance of an HIV test intended at the time of taking the blood sample is sufficiently serious to justify legal liability for assault. This raises the question whether the assault perpetrated by way of a secret HIV test is serious or trivial and, accordingly, whether a heavy penalty should be imposed and/or substantial damages awarded or a light sentence and/or nominal damages. Regarding the assault as trivial would fly in the face of the supposed serious nature and consequences of an HIV test. Regarding the assault as serious would fly in the face of the supposed trivial nature of the physical intervention. If the assault is

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potentiell und durchaus *vorhersbebar* mit dem Aids-Test verbunden sind, ist ... zu fordern, dass der Patient über einen beabsichtigten Aids-Test aufgeklärt wird und seine ausdrückliche Einwilligung in die Durchführung des Tests erteilt' (453); *cf* Knobel 1988 *SAMJ* 151; *contra* Solbach & Solbach 1988 *JA* 115. It is interesting to note that in StA beim KG 1987 *NJW* 1495 1496 the court referred to factors such as personality changes, the danger of suicide, the incurability of AIDS and the fatal consequences associated with an HIV diagnosis to substantiate its finding that the defences of therapeutic privilege and implied consent were applicable.

[32]Bearing in mind a negative outcome and false negatives.

considered to be serious *because* it involves a secret *HIV* test this would, again, amount to preferential treatment of HIV tests at the expense of normalising and destigmatising AIDS. If the assault is considered to be trivial because of the minor physical intervention involved, this could diminish the legal sanction for and promote the medical practice of performing secret HIV tests. Whatever the stance taken, coupling secret HIV tests to the notion of legal liability for assault, generally speaking, makes little sense.

ii Since an HIV diagnosis will not enable the doctor to administer life-saving treatment, the patient should have the right to refuse an HIV test.[33] The validity of this argument is also not above suspicion:

aa It is dependent upon all other laboratory tests conducted in ascertaining the presence or absence of all other incurable and terminal diseases also requiring the patient's informed consent. Otherwise it is not an underlying principle but the name and nature of the disease in question that determine whether or not the disclosure of a laboratory test is obligatory.

bb As stated, it ignores the interests of others whose health and lives may depend upon the performance and outcome of a medically indicated HIV test. The patient may sometimes, but will often not, be the only person affected by the performance and outcome of an HIV test.

iii Insisting upon informed consent to HIV tests will promote the patient's trust and confidence and encourage patients to report for HIV tests.[34] The trust-and-confidence part of the argument will, again, only be valid if the same can be said to apply to all other laboratory tests conducted in ascertaining the presence or absence of all other incurable and terminal diseases. Similarly, the encourage-to-report part of the argument will only be valid if the same can be said of all other dangerous and infectious diseases.

Apart from the ethical and legal recognition of the general principle requiring patients' informed consent to HIV tests, an obligation on the doctor to inform the patient of an HIV test has also been advocated in the following specific circumstances:

a Where the patient is depressed and expresses the fear that he or she may have AIDS.[35]

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[33]*Cf* StA beim KG 1987 *NJW* 1495 1496; StA Mainz 1987 *NJW* 2946 2947; Sonnen 1987 *JA* 461; Bruns 1987 *MDR* 355; Van Wyk 1991 *Med Law* 146; *contra* Solbach & Solbach 1988 *JA* 116.

[34]Eberbach 1987 *MedR* 271; *cf* StA Mainz 1987 *NJW* 2946 2947; Laufs & Laufs 1987 *NJW* 2263; Van Wyk 1991 *Med Law* 146; *contra* G Solbach & T Solbach 'Zur Frage der Aufklärung der Patienten bei Blutentnahmen (AIDS)' 1988 *MedR* 241–242.

[35]Strauss 1989(1) *SAPM* 7.

b Where the patient pertinently refuses a medically indicated HIV test. Although such refusal must be respected,[36] the doctor is expected to prevail upon the patient the necessity of performing such test.[37] If the patient persists in his or her refusal, the doctor should advise the patient to seek a second opinion.[38] Where the patient's continued refusal renders medically indicated diagnosis and treatment impossible or endangers health care workers, the doctor may[39] refuse further to attend to the patient.[40]

It must be pointed out, however, that while the German courts have been fairly consistent[41] in their adherence to the fundamental principle that an HIV test requires the patient's informed consent, their decisions on the defences to the general rule are conflicting in some respects and unanimous in others. On the one hand, some cases have pertinently recognised implied consent[42] and therapeutic privilege[43] as defences to the taking of a blood sample for purposes of an HIV test without the patient's express consent,[44] while others have explicitly rejected these defences.[45] On the other hand, lack of fault on the doctor's part has, in the initial decisions requiring the patient's informed consent to an HIV test, consistently resulted in his acquittal on charges of assault where the doctor, on account of the prevailing legal uncertainty and medical controversy, honestly and mistakenly believed the taking of a blood sample without informing the patient of the intended HIV

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[36]StA Aachen 1989 *DRiZ* 20 21; Laufs & Laufs 1987 *NJW* 2263; Brandes 1987 *VersR* 748; Solbach & Solbach 1988 *JA* 116.

[37]Laufs & Laufs 1987 *NJW* 2263; Herzog 1988 *MedR* 290.

[38]Van Wyk 1991 *Med Law* 146.

[39]After having dealt with the case in a spirit of compassion and understanding and after having made every effort to avoid an impasse: Van Wyk 1991 *Med Law* 146; *cf* CMSA 1991 *SAMJ* 689.

[40]BäK & DKG IV(3) and 13–14; CMSA 1991 *SAMJ* 689; Solbach & Solbach 1987 *JA* 300; Laufs & Narr 1987 *MedR* 282; Laufs & Laufs 1987 *NJW* 2263; R Simon-Weidner 'AIDS-Test im Krankenhaus und in der ärztlichen Praxis' 1988 *ArztlR* 151 153; Langkeit 1990 *Jura* 454; *cf* Deutsch 1988 *VersR* 536. In the present context, the following statements by MASA are difficult to reconcile: 'The policy of "no test, no operation" is seen to be coercive, and nullifies freedom of consent' (7) and: 'If the patient is unwilling to consent to a simple investigation necessary for accurate diagnosis, the doctor is free to terminate the relationship' (8).

[41]The exception being StA Aachen 1989 *DRiZ* 20 21.

[42]*Mutmassliche Einwilligung*.

[43]Also referred to as an *ärztliches Fürsorgeprinzip* or *Schonungsgrundsatz*.

[44]StA beim KG 1987 *NJW* 1495 1496, in which the accused was acquitted on a charge of assault on the basis of, *inter alia* these two defences; see also BäK & DKG IV(2) and 13; Brandes 1987 *VersR* 748, who regards implied consent as a defence to an HIV test where the patient consults the doctor about a complaint and consents to the taking of a blood sample for purposes of therapy; Deutsch 1988 *VersR* 535; *contra* Eberbach 1987 *MedR* 272, on the facts of the case.

[45]StA Mainz 1987 *NJW* 2946, in which the court, while rejecting the decision in StA beim KG 1987 *NJW* 1495 in this regard, held that (a) the therapeutic privilege defence was inapplicable because of an absence of the requisite conflict of interests which characterises the defence; and (b) the implied consent defence was inapplicable because the patient was, at the time of the taking of the blood sample, capable of consenting to an HIV test (2946); see also Sonnen 1987 *JA* 462; Solbach & Solbach 1988 *JA* 115; Van Wyk *Aspekte van VIGS* 148 n 38.

test to be lawful.[46] However, the pertinent recognition of informed consent as a requisite for lawful HIV tests by these initial decisions, renders a successful future mistake of law defence on the same basis difficult[47] to imagine.

3 2 2 HIV test for the benefit of others with (informed) consent

There is considerable support for the view that an HIV test carried out for the benefit of others requires[48] the patient's informed consent[49] for the following reasons: (a) Others, and not the patient, will benefit from the proposed HIV test;[50] (b) appropriate precautionary measures[51] against HIV infection may be taken in the health care setting;[52] and (c) HIV tests are not completely reliable.[53]

Moreover, the opinion has been expressed that a fraudulent HIV test performed for the benefit of the doctor or health care workers may result in the doctor being convicted of assault on the basis that a fraudulent failure to inform the patient of the HIV test vitiates his or her consent thereto[54] in the following circumstances: (a) Where the doctor fraudulently takes a blood sample solely for purposes of an HIV test while treating the patient for another

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[46]StA beim KG 1987 *NJW* 1495 1495–1496, StA Mainz 1987 *NJW* 2946 2947–2948 and StA Aachen 1989 *DRiZ* 20 21-22, in which the accused were acquitted on the basis of (in StA beim KG and StA Aachen, *inter alia*) unavoidable error; see also Sonnen 1987 *JA* 462; Eberbach 1987 *MedR* 272.

[47]*Cf*, however, StA Aachen 1989 *DRiZ* 20 21.

[48]In the absence of situations in which necessity will operate as a defence, such as where hospital personnel are exposed to the risk of HIV infection and an HIV test (eg prior to an operation or subsequent to body fluid contact with the patient) is the only way of averting the danger: Van Wyk *Aspekte van VIGS* 161 *ff*; *cf*, however, Eberbach 1987 *NJW* 1472, Janker 1987 *NJW* 2902–2903 and Herzog 1988 *MedR* 291, who are sceptical about the application of the necessity defence in this context; *contra* Langkeit 1990 *Jura* 454, who denies the application of the necessity defence in this context.

[49]Eberbach 1987 *MedR* 271-272; Laufs & Narr 1987 *MedR* 282; Laufs & Laufs 1987 *NJW* 2263; Janker 1987 *NJW* 2902; Michel 1988 *JuS* 12; Herzog 1988 *MedR* 291; Langkeit 1990 *Jura* 454; *cf* Van Wyk 1991 *Med Law* 147.

[50]Laufs & Narr 1987 *MedR* 282; Eberbach 1987 *NJW* 1471, since the HIV test does not serve the purposes of patient therapy; Laufs & Laufs 1987 *NJW* 2263, since the HIV test is not based upon the patient's wishes and the symptoms presented, adding that the same applies where the patient is a blood donor or a milk donor; Janker 1987 *NJW* 2902, in the absence of a medical indication or ground of justification; Langkeit 1990 *Jura* 454; *cf* Michel 1988 *NJW* 2273; Van Wyk 1991 *Med Law* 147.

[51]For detailed lists of precautionary measures see CMSA 1991 *SAMJ* 689–690; MASA 13 *ff*; SAMDC 6 13 *ff*; *cf* n 48 *supra*.

[52]Eberbach 1987 *NJW* 1472; Janker 1987 *NJW* 2902–2903; Michel 1988 *JuS* 12; Herzog 1988 *MedR* 291; Langkeit 1990 *Jura* 454; *cf* Van Wyk 1991 *Med Law* 147; *cf*, however, Bruns 1987 *MDR* 355.

[53]Especially during the so-called 'window period': *cf* Michel 1988 *NJW* 2273; Van Wyk 1991 *Med Law* 147.

[54]See also Laufs & Laufs 1987 *NJW* 2263; Herzog 1988 *MedR* 291; Deutsch 1988 *VersR* 535.

disease;[55] and (b) where the doctor fraudulently makes use of a blood sample, the taking of which was medically indicated, to perform an additional HIV test.[56]

3 2 3 HIV test for patient's and others' benefit with (informed) consent
Obviously and logically, supporters of the view that an HIV test in the patient's interest requires his or her informed consent, will also require the patient's informed consent for an HIV test for the benefit of others and, hence, also for an HIV test for the benefit of both the patient and others. This will apply irrespective of whether the legal interest violated by an HIV test without the patient's informed consent is considered to be his or her physical integrity or his or her personality rights or both.

3 2 4 HIV test in patient's interest without (informed) consent
There is substantial *de lege ferenda*, as opposed to *de lege lata* and medico-ethical, authority for the view that the patient's informed consent is not a requisite for a lawful HIV test. The reasons[57] advanced for this view are the following:

a Doctors are required to inform their patients of the general nature of the proposed medical procedure and of any substantial risks or dangers attached to it. The medical procedure in question is the taking of a blood sample for medically indicated serological tests[58] which involves no substantial risks or dangers.[59] Hence, only the taking of a blood sample requires the patient's informed consent, which means that the patient need not be informed of a proposed HIV test.[60] Since in the circumstances

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[55]Eberbach 1987 *NJW* 1471; Michel 1988 *JuS* 11–12, on the basis that a medical indication for the HIV test is lacking.

[56]Eberbach 1987 *NJW* 1471: The doctor's liability for criminal assault rests on the assumption that the patient's consent to the taking of the blood sample and the HIV test is indivisible; however, should the patient's consent be regarded as divisible and, consequently, the taking of the blood sample as lawful (justified by the patient's consent) and the performance of the HIV test as unlawful (because of the doctor's fraud), an action for the violation of the patient's freedom of choice will lie (1471–1472); *cf* Herzog 1988 *MedR* 291.

[57]Which sometimes overlap to some extent.

[58]StA Aachen 1989 *DRiZ* 20 21; Janker 1987 *NJW* 2900; Michel 1988 *JuS* 10; *cf* Solbach & Solbach 1988 *JA* 115 116; Van Wyk 1991 *Med Law* 145; BE Leech 'The right of the HIV-positive patient to medical care' 1993 *SAJHR* 39 66–67.

[59]Since the pain and risks or dangers associated with the taking of a blood sample are currently common knowledge, merely informing the patient of the fact that a blood sample will be taken from him or her will suffice for purposes of effective consent to the procedure: Solbach & Solbach 1987 *JA* 299–300; Van Wyk *Aspekte van VIGS* 146.

[60]StA Aachen 1989 *DRiZ* 20–21: 'Bei Blutentnahmen, die bei einer ärztlichen Behandlung zu diagnostischen oder therapeutischen Zwecken dienen sollen, ist ein Arzt nicht gehalten, über die Einzelheiten der Untersuchung aufzuklären ... [Es bedarf einer besonderen Aufklärung hinsichtlich eines neben zahlreichen anderen Laboruntersuchungen beabsichtigten HIV-Tests nicht, wenn dieser medizinisch indiziert und ein entgegenstehender Wille des Patienten nicht erklärt ist' (21); Solbach & Solbach 1987 *JA* 298 *ff*; Janker 1987 *NJW* 2900; Simon-Weidner 1988

under discussion the procedure of taking a blood sample involves a voluntary physical intervention with the patient's knowledge and appreciation, this argument has considerable substance[61] when answering the question whether or not a violation of the patient's bodily integrity has occurred where a secret and intended HIV test is subsequently carried out. However, since a physical intervention is not essential[62] for a violation of the patient's privacy or freedom of choice, this argument has little substance when answering the question whether or not a secret and intended HIV test constitutes a violation of the patient's personality rights.

b Doctors routinely take blood samples without informing their patients of all or any conditions for which they are to be tested and the same principle should prevail in cases of intended HIV tests.[63] The doctor, in his or her discretion, decides which serological tests are necessary in accordance with the symptoms presented.[64] This argument clearly rests on the assumption that HIV tests are routine, which they are currently not.[65]

c Where the doctor decides upon an HIV test *after* having taken a blood sample from the patient, the patient's consent to the taking of the blood sample is not thereby vitiated. To regard the patient's consent to the taking of the blood sample as being vitiated where the doctor decides upon an HIV test *before* taking a blood sample from the patient is tantamount to a *contradictio in terminis*.[66] Although this argument loses sight of the fact that in the latter situation, as opposed to the former, the doctor had the opportunity to procure the patient's consent to the HIV test before taking

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ArztzR 152; Michel 1988 *JuS* 9 10; HH Lesch 'Die strafrechtliche Einwilligung beim HIV-Antikörpertest an Minderjährigen' 1989 *NJW* 2309 2311–2312; Strauss 1989(1) *SAPM* 6–7; Van Wyk *Aspekte van VIGS* 147, unless the patient wishes to refuse an HIV test, in which case he or she should inform the doctor accordingly; Leech 1993 *SAJHR* 67, who emphasises the element of mutual trust and honesty between doctor and patient.

[61]Unless, of course, the patient made his consent to the physical intervention conditional upon being informed of the nature of the serological tests intended or upon the non-performance of certain serological tests.

[62]Although, of course, a physical intervention may be part and parcel of a violation of personality rights.

[63]StA Aachen 1989 *DRiZ* 20 21; Solbach & Solbach 1987 *JA* 299; Janker 1987 *NJW* 2900: 'Für [den Patienten] ist ... nicht entscheidend, was später mit dem Blut geschieht, sondern allein massgeblich ob jetzt eine Blutentnahme erforderlich ist oder nicht'; Simon-Weidner 1988 *ArztzR* 152; Michel 1988 *JuS* 10–11, who denies an absence of objectively effective consent to the taking of a blood sample even where the patient subjectively proceeded from the assumption that no HIV test would be performed; Strauss 1989(1) *SAPM* 7; Van Wyk *Aspekte van VIGS* 515–516; Leech 1993 *SAJHR* 66; *contra* Langkeit 1990 *Jura* 453 n 18.

[64]StA Aachen 1989 *DRiZ* 20 21; Solbach & Solbach 1987 *JA* 299; Michel 1988 *JuS* 10; Leech 1993 *SAJHR* 67; *cf* Simon-Weidner 1988 *ArztzR* 152.

[65]See also Eberbach 1987 *MedR* 272, who sees the solution to the problem of secret HIV tests in HIV tests eventually becoming routine; Van Wyk 1991 *Med Law* 144 146.

[66]Michel 1988 *JuS* 9–10, particularly where the doctor fails to perform the intended HIV test: 'mit dem Abschluss der Blutentnahme [ist] der Eingriff in die körperliche Unversehrtheit beendet.'

the blood sample, it does bring to the fore that, if anything, it is the patient's personality rights rather than his or her bodily integrity which are violated by secret HIV tests.

d The indicated and requisite medical procedure to determine the diagnosis of the patient's complaint is, in terms of the contract to treat the patient, not a matter of patient self-determination, but one of medical responsibility. Hence, a blood sample may be taken from the patient without informing him or her of an intended HIV test.[67] The weakness of this argument lies in the fact that it opens the door to diagnostic surgery without the patient's informed consent.

e Reasonable patients need not be informed about the nature and scope of all intended laboratory tests because such information is irrelevant to the procedure and risk or danger of taking a blood sample.[68] Should the individual patient want to know more about the proposed tests, he or she is free to ask questions about them.[69] This argument (i) proceeds from the assumption that the only legal interest concerned in determining the lawfulness or unlawfulness of secret HIV tests is the patient's physical integrity; (ii) fails to substantiate its claim relating to the information needs of reasonable patients in respect of serological tests with supporting empirical data; and (iii) appears to adopt as its standard of disclosure a completely objective reasonable patient (that is the reasonable patient *in abstracto*) rather than the more correct[70] subjectively qualified reasonable patient in the individual patient's position (that is the reasonable patient *in concreto*).

f What ordinary patients want to know, when they consult doctors, is the state of health they are in. Consent to the taking of a blood sample and medically indicated[71] serological tests to determine the patient's state of health will therefore usually imply consent to an HIV test.[72] In fact, a failure by the doctor to perform all the necessary serological tests to arrive at a correct diagnosis and treatment may attract legal liability for negli-

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[67]Solbach & Solbach 1988 *MedR* 242, who emphasise the doctor's responsibility towards the patient and a relationship of trust and confidence between the parties.

[68]StA Aachen 1989 *DRiZ* 20 21; Solbach & Solbach 1987 *JA* 300; Janker 1987 *NJW* 2900; Lesch 1989 *NJW* 2312: 'Information über Art und Umfang der vorgesehenen Laboratoruntersuchungen gehören weder zur Verlaufserklärung noch im eigentlichen Sinne zur Risikoaufklärung.'

[69]Solbach & Solbach 1987 *JA* 300.

[70]See Van Oosten *Informed consent* 429 *ff*.

[71]*Eg* by symptoms pointing to HIV infection: Van Wyk 1991 *Med Law* 145; *cf* Michel 1988 *NJW* 2271–2272 2277, who concedes, however, that in the absence of a medical indication, the taking of a blood sample for purposes of an HIV test may, as an exception to rule, constitute criminal assault; *contra* Strauss 1989(1) *SAPM* 7: '[I]t makes no difference to the consent issue whether or not the doctor actually suspects AIDS.'

[72]Deutsch 1988 *VersR* 535.

gence.[73] Should the individual patient express the wish to be informed of an HIV test, however, the doctor is under a duty to inform him or her accordingly.[74] Again, there is no effort to substantiate this argument by supporting empirical data on the wishes of ordinary patients and no indication that the ordinary patient refers to the ordinary patient in the individual patient's position.

g Prudent patients would wish to know whether or not they are HIV infected. Being aware of the infection will enable them to take appropriate steps to protect their own interests and to avoid spreading the infection.[75] Besides apparently adopting the completely objective prudent patient standard of disclosure, this argument tends to overlook the fact that the individual patient can be *encouraged* but not *forced* to make a rational and enlightened decision.[76]

h Doctors should refrain from unnecessarily scaring or frightening their patients by disclosing a suspicion of HIV infection, since this may cause harm to sensitive patients.[77] Indeed, it would hardly be commendable beside manners for a doctor who suspects incurable cancer in a patient to inform the patient at the very first consultation that he or she will be examined for cancer and the same can be said to hold true for a suspicion of HIV infection.[78] Except for its wide formulation, which does not cater for circumstances where disclosure of a cancer examination or an HIV test might be required, indicated or appropriate at the very first consultation, this argument has the merit of exposing the demerits of merciless disclosure. It highlights the conflict of interests that may in given circumstances arise between causing harm of one kind (damage to the patient's physical and/or mental health) by disclosure of an HIV test and causing harm of another kind (violation of patient autonomy and/or privacy) by non-disclosure of an HIV test.

i The doctor's duty to inform the patient of an HIV test becomes operative not at the time of taking a blood sample from the patient, but once an HIV

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[73]StA Aachen 1989 *DRiZ* 20 21; Simon-Weidner 1988 *ArztzR* 152; *cf* Solbach & Solbach 1988 *MedR* 241.

[74]Deutsch 1988 *VersR* 535.

[75]Simon-Weidner 1988 *ArztzR* 153; G Solbach & T Solbach 'Zur Frage der Regelung ärztlicher Verantwortung durch Verwaltungsanordnungen' 1989 *MedR* 225 226, who point out that it is, for therapeutic reasons, also important for the doctor to know whether or not the individual patient is HIV infected; *contra* Langkeit 1990 *Jura* 458.

[76]See Van Oosten *Informed consent* 438–439; *cf* n 116 and 126 *infra*.

[77]Laufs & Narr 1987 *MedR* 282 and Laufs & Laufs 1987 *NJW* 2263, in respect of 'ungesicherte, unsichere, nicht erwiesene oder unbestätigte Verdachtsdiagnosen'; Solbach & Solbach 1988 *MedR* 241; *cf* Simon-Weidner 1988 *ArztzR* 152; Deutsch 1988 *VersR* 535; Leech 1993 *SAJHR* 67.

[78]Strauss 1989(1) *SAPM* 7; *cf* Lesch 1989 *NJW* 2311.

test has rendered a positive result.[79] The problem with this argument is that it confuses and identifies two separate and distinct issues with one another, to wit (i) the doctor's duty to inform the patient of an *intended* HIV test; and (ii) the doctor's duty to inform the patient of the *outcome* of an HIV test.

j It is not the HIV test but an HIV diagnosis which spells grave consequences for the patient.[80] Apart from failing, again, to differentiate between the obligation to disclose an intended HIV test and the obligation to disclose the outcome of an HIV test, this argument tends to ignore (i) the relationship of cause and effect between an HIV test and an HIV diagnosis; (ii) the psychological impact of the inevitable time lapse between the two on the patient; and (iii) the duty of the doctor to disclose the outcome of a secret HIV test.[81]

k AIDS should be destigmatised and normalised in the eyes of the world. It should be dealt with on the same footing as other serious, incurable, terminal and contagious diseases, the fear and diagnosis of which also cause pain and suffering.[82] This is probably the strongest argument in support of HIV tests becoming routine wherever medically indicated.

Some authorities take the matter further and regard consent to the taking of a blood sample as legally effective for purposes of criminal assault even where the doctor fraudulently makes use of a blood sample,[83] the taking of which is medically indicated, to perform an HIV test after having given the patient the assurance that no HIV test will be carried out or after having been pertinently refused permission to carry out an HIV test. The stance taken is that real consent to the HIV test will be vitiated only where the doctor misleads or deceives the patient about a material element of the proposed intervention, such as the nature of the medical intervention (the taking of a blood sample) or the nature of the legal right involved (bodily integrity).[84]

Moreover, it is interesting to note that some of the authorities who are of the opinion that the taking of a blood sample[85] without informing the patient of an intended HIV test does not amount to a violation of the patient's bodily integrity, do concede that such conduct may be tantamount to a violation of

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[79]Janker 1987 *NJW* 2900 2901; Lesch 1989 *NJW* 2311; Leech 1993 *SAJHR* 66–67; *cf* Michel 1988 *JuS* 10.

[80]Solbach & Solbach 1988 *JA* 115; *cf* Janker 1987 *NJW* 2900.

[81]On which see 3 3 f *infra*.

[82]*Cf* Van Wyk 1991 *Med Law* 145; Solbach & Solbach 1987 *JA* 300.

[83]Lesch 1989 *NJW* 2312: 'Die Enttäuschung erfolgt hier nicht wegen des Eingriffs in die Körperintegrität, sondern wegen des Umgangs mit der Sache Blut.'

[84]Janker 1987 *NJW* 2901–2902; Michel 1988 *JuS* 11–12; *cf* Van Wyk 1991 *Med Law* 145–146.

[85]Or a urine sample: Van Wyk 1991 *Med Law* 146; this will presumably also include a milk sample.

the patient's personality rights,[86] such as his or her freedom of choice or right to privacy.[87] However, this view is sometimes alleged to be somewhat problematic because:

a A violation of personality rights will be dependent upon the existence, at the time the HIV test was carried out, of an HIV infection in the patient.[88]

b The harmful consequences, such as social and professional ostracism which may result from an HIV test, will usually not be attributable to the doctor,[89] but to the disease itself and society's response to it.[90]

c The cause of the patient's troubles is the HIV infection, not the HIV diagnosis which would in any event sooner or later have come to the patient's attention.[91]

These problems appear to be more imaginary than real: The *cause* of the impairment of the patient's privacy or freedom of choice within the present context is the *performance* of a secret HIV test, rather than the *outcome* (and more particularly a positive outcome) of a secret HIV test and society's *response* to it, which are *consequences* of an HIV test. Besides, an impairment of the patient's privacy or freedom of choice by means of a secret HIV test is quite conceivable where the test (as opposed to the taking of a blood sample) is performed against his or her express wishes, and a negative outcome shows the patient not to have been HIV infected at the time the test was carried out.

3 2 5 HIV test for the benefit of others without (informed) consent

There is some support for the view that since there is no risk or danger inherent in the blood test itself, there is no need to inform the patient of an

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[86] *Cf* the distinction drawn by Deutsch 1988 *VersR* 534 in this context between informed consent to (a) the medical procedure as such; (b) its inherent risks and dangers; and (c) an *Ausforschung* into the *Persönlichkeitssphäre*.

[87] (*Intimsphäre des Patienten*): Janker 1987 *NJW* 2898 2900; Michel 1988 *JuS* 10 12–13, who points out that the erroneous emphasis on the patient's physical integrity as the protected legal interest in cases of secret HIV tests obscures the patient's freedom of choice as the real legal interest deserving of criminal and civil law protection; Lesch 1989 *NJW* 2311 2312; Van Wyk *Aspekte van VIGS* 155 516; *cf* Eberbach 1987 *NJW* 1471; Leech 1993 *SAJHR* 67, where the HIV test was not medically indicated; *cf*, however, StA Aachen 1989 *DRiZ* 20 22, in which the accused was, because of an absence of unlawfulness, (also, apart from assault,) not convicted of *Beleidigung*; Solbach & Solbach 1987 *JA* 299; Langkeit 1990 *Jura* 455 *ff*, who expresses the opinion that an HIV test without the patient's informed consent not only constitutes a violation of the patient's bodily integrity, but also a violation of his or her personality rights (freedom of choice and right to privacy) and a professional error (*ärztlicher Behandlungsfehler*).

[88] Van Wyk 1991 *Med Law* 147.

[89] Provided the doctor does not breach his or her duty of confidentiality towards the patient: Van Wyk 1991 *Med Law* 147.

[90] Van Wyk 1991 *Med Law* 147; *cf* Eberbach 1987 *NJW* 1471.

[91] Van Wyk 1991 *Med Law* 147; *cf* Eberbach 1987 *NJW* 1471.

HIV test even where such test is performed for the benefit of others.[92]

3 2 6 HIV test for patient's and others' benefit without (informed) consent

Obviously and logically, supporters of the view that an HIV test for the benefit of others does not require the patient's informed consent, will also not require the patient's informed consent for an HIV test in his or her own interest and, hence, also not for an HIV test for the benefit of both the patient and others.[93] Of course, this will only apply where an HIV test for the benefit of others without the patient's informed consent is considered to be neither an infringement of bodily integrity nor an infringement of personality rights. Where an HIV test performed in the patient's interest or for the benefit of others without the patient's informed consent is considered to be a violation of his or her personality rights, but not a violation of his or her physical integrity, the position will be the same, *mutatis mutandis*, as in paragraph 3 2 3.

3 2 7 Subsequent decision to perform HIV test in patient's interest

Where the doctor decides to perform a secret HIV test in the patient's interest[94] subsequent to having taken a blood sample with the patient's consent, no legal liability for assault will attach because the requisite consent to the violation of physical integrity (the taking of a blood sample) has been granted prior[95] to the decision to perform the HIV test.[96] Nevertheless such conduct will constitute a violation of the patient's personality rights and may, therefore, result in legal liability on that basis.[97]

3 2 8 Subsequent decision to perform HIV test for the benefit of others

Where the doctor decides upon a secret HIV test for his or her own benefit subsequent to having taken a blood sample with the patient's consent, the view taken is, again, that a conviction for assault is out of the question, but

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[92]Solbach & Solbach 1988 *JA* 116, who emphasise the anxiety and distress suffered by health care workers who have to attend to patients without knowing whether or not they are HIV infected (115); Strauss 1989(1) *SAPM* 6, by endorsing the view that '[a] positive result may produce *grave social consequences*, but there is no risk of grave physical consequences in the blood test as such' (emphasis supplied); *cf* StA Aachen 1989 *DRiZ* 20 21.

[93]Leech 1993 *SAJHR* 67 takes the view that involuntary HIV tests may be performed in the obstetrical and surgical contexts if in the interests of both the patient and the doctor.

[94]*Eg* for therapeutic purposes: Janker 1987 *NJW* 2899.

[95]*Dolus subsequens* being insufficient for criminal liability: Eberbach 1987 *NJW* 1471; Janker 1987 *NJW* 2899; Michel 1988 *JuS* 9; Van Wyk 1991 *Med Law* 146.

[96]Janker 1987 *NJW* 2899 2901; Michel 1988 *JuS* 9; Herzog 1988 *MedR* 291; Lesch 1989 *NJW* 2312; Langkeit 1990 *Jura* 456; *cf* Van Wyk 1991 *Med Law* 146.

[97]Herzog 1988 *MedR* 291; Langkeit 1990 *Jura* 456, irrespective of whether the outcome of the HIV test is positive or negative.

that an action for an infringement of personality rights will lie.[98]

3 2 9 Subsequent decision to perform HIV test for the patient's and others' benefit

Obviously and logically, where the doctor decides to perform a secret HIV test for the benefit of both the patient and others, the position would be the same, *mutatis mutandis*, as in paragraphs 3 2 7 and 3 2 8.

3 2 10 Mixed cases and the benefit criterion

Thus far the opinions discussed were to the effect either that an HIV test performed for the benefit of the patient and/or others requires the patient's informed consent or that it does not. However, the intricacies and subtleties of the criterion whose interest is served by an HIV test become apparent in the mixed view cases where one considers performing an HIV test in the patient's interest without his or her informed consent as permissible but requires the patient's informed consent for performing an HIV test for the benefit of others.[99] Since one and the same act of taking a blood sample and/or performing an HIV test may be done for the benefit of both the patient and others, the question arises whether such a mixed view would treat such test as lawful or unlawful for purposes of a violation of the patient's bodily integrity and/or personality rights.

If, on the one hand, consent were to be regarded as divisible,[100] one could argue that the patient's tacit consent covers an HIV test in his or her own interest, but not an HIV test for the benefit of others. However, this would lead to the *contradictio in terminis* that one and the same taking of a blood sample and/or performance of an HIV test could at one and the same time, for purposes of a violation of one and the same legal interest, be both lawful and unlawful. If, on the other hand, consent were to be regarded as indivisible, the question arises how one decides whether the doctor's conduct was lawful or unlawful. Here one could argue that the lawfulness or unlawfulness of the doctor's conduct may be determined by looking at the primary and secondary interest served by the HIV test. If the HIV test were to be performed primarily

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[98]Eberbach 1987 *NJW* 1471, who points out that the courts may, however, refuse to award sentimental damages in these circumstances (*cf* n 29 *supra*) and thus contribute to doctors claiming that they decided on an HIV test only after having taken a blood sample from the patient, and to patients' being 'zwar nicht de jure rechtlos, aber de facto schutzlos'; Michel 1988 *JuS* 9; *cf* Laufs & Laufs 1987 *NJW* 2263, who point out that where a subsequent HIV test is performed without the patient's consent, the doctor would be under a contractual duty of care to inform the patient of an HIV diagnosis: 'dem Patient geschähe, was ihm ohne seinen audrücklich oder schlüssig erklärten Willen gerade nicht widerfahren durfte'; Herzog 1988 *MedR* 291.

[99]The converse mixed view where one considers performing an HIV test for the benefit of others without the patient's consent as permissible but requires the patient's informed consent to performing an HIV test in his or her own interest, is unlikely to muster support, unless the circumstances are out of the ordinary, eg where the patient is deceased and an HIV test would benefit others.

[100]*Cf* n 56 *supra*.

in the patient's interest, it would be lawful, whereas if the HIV test were to be performed primarily for the benefit of others, it would be unlawful. However, this approach leaves unsolved those cases in which no primary and secondary interests can be identified.

In short, while the criterion whose interest is served may sometimes be a useful guideline in dealing with the issue of secret HIV tests, it certainly is not without its problems.

3 3 The duty to disclose the outcome of an HIV test to the patient

A duty on the doctor to inform the patient of the outcome[101] of an HIV test[102] has been recognised[103] in the following instances:

a Where the patient specifically requests the performance of an HIV test[104] or the disclosure of an HIV diagnosis. Here the doctor's obligation to disclose the test result arises from the contract[105] entered into by the parties.[106]

b Where the doctor has undertaken to treat the patient and treatment requires disclosure[107] of an HIV diagnosis. Here the doctor's obligation to disclose the test result arises from the contract to treat[108] the patient.[109]

c Where no mention has been made of an HIV test by either the doctor or the patient. Here the doctor's obligation to disclose the diagnosis is based on a so-called legal duty to rescue, the necessity of counselling[110] the patient

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[101]It hardly needs any mention that a negligently erroneous diagnosis or a negligent failure to disclose an HIV diagnosis may render the doctor legally liable for consequent damages suffered by the patient and/or others: SA Strauss *Doctor, patient and the law* (1991) 307; Van Wyk *Aspekte van VIGS* 365 *ff* 368–369 521.

[102]Regardless of whether the outcome is positive or negative: Laufs & Laufs 1987 *NJW* 2264; SA Strauss 'Testing for AIDS: consent issues' 1990(4) *SAPM* 13 15; Van Wyk *Aspekte van VIGS* 363–364, particularly to accommodate false positive and false negative tests and the window period.

[103]See also BäK & DKG V(1), which stipulates that (a) such duty must be performed by a medical practitioner and not by other health care workers; (b) a doctor-patient conversation cannot be substituted by information and consent forms; and (c) '[d]ie Aufklärung muss in einer für den Patienten behutsamen and verständlichen Weise erfolgen'; E Deutsch 'Aids und Blutspende' 1985 *NJW* 2746; M Teichner 'Nochmals: AIDS und Blutspende' 1986 *NJW* 761; Buchborn 1987 *MedR* 263; Solbach & Solbach 1988 *JA* 115; R Simon-Weidner 1989 *ArztR* 178 179; *cf* SAMDC 8; Laufs & Laufs 1987 *NJW* 2263 2264; Janker 1987 *NJW* 2900–2901; Burchell 1990 *BMJ* 255 and Leech 1993 *SAJHR* 67, who make mention of a *right* on the patient's part to, as opposed to a *duty* on the doctor's part of, disclosure of the outcome of an HIV test.

[104]*Eg* for purposes of a second opinion: Deutsch E 1988 *NJW* 2306 2307.

[105]*Diagnosevertrag*.

[106]Deutsch 1988 *NJW* 2307; Strauss 1989(1) *SAPM* 7; Van Wyk *Aspekte van VIGS* 361.

[107]'Mit der gebotenen Schonung': Deutsch 1988 *NJW* 2307.

[108]*Behandlungsvertrag*.

[109]Deutsch 1988 *NJW* 2307; Langkeit 1990 *Jura* 458.

[110]*Beratungspflicht*.

and the protection of both the patient's and society's interests.[111]

d Where the patient is likely to refuse essential and important medical treatment if an HIV diagnosis is withheld.[112]

e Where the HIV test was performed with the patient's express or tacit consent. Here the doctor is under a duty to disclose the test result, regardless of whether the outcome is positive or negative.[113]

f Where the HIV test was performed without the patient's consent.[114] However, a difference of opinion exists as to what should be disclosed to the patient. One view is that the doctor is obliged to inform the patient of the HIV diagnosis itself.[115] Another view is that the doctor is merely obliged to inform the patient that an unlawful test was *performed*, and that the doctor's duty to disclose the test *result* is dependent upon the patient's wish to be informed accordingly, regardless of whether the outcome is positive or negative.[116]

g Where a routine HIV test is performed as in the case of compulsory statutory procedures[117] or blood,[118] tissue, gametes or milk donations.[119]

h Where the patient is a pregnant woman.[120] Here the patient should be informed of the risk of HIV infection to the child to be born, of the danger to her health posed by the continuation of the pregnancy and of the alternative option of a therapeutic or eugenic abortion.[121]

Whether or not non-disclosure by the doctor to the patient of an HIV diagnosis may in given circumstances[122] be justified by therapeutic necessity

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[111]Strauss 1989(1) *SAPM* 7; Van Wyk 1991 *Med Law* 147.

[112]Deutsch 1988 *NJW* 2307.

[113]Langkeit 1990 *Jura* 458.

[114]Laufs & Laufs 1987 *NJW* 2263 (*cf* n 98 *supra*); Langkeit 1990 *Jura* 458–459; Strauss 1990(4) *SAPM* 15; Van Wyk *Aspekte van VIGS* 362 521, who takes the view that the same applies where the HIV test was performed against the patient's wishes.

[115]Van Wyk *Aspekte van VIGS* 362 521.

[116]Langkeit 1990 *Jura* 458–459, on the basis that forcing unwanted information upon the patient would be irreconcilable with his or her right to self-determination and that this option is the lesser of two evils for the doctor; *cf* MASA 9.

[117]Strauss 1990(4) *SAPM* 13.

[118]SA Strauss 'Legal liability for transfusion of AIDS virus by means of blood transfusion' 1991(3) *SAPM* 16 18; Van Wyk *Aspekte van VIGS* 208–209.

[119]Van Wyk *Aspekte van VIGS* 197 208–209.

[120]See also Deutsch 1985 *NJW* 2746.

[121]WH Eberbach 'Juristische Probleme der HTLV-III-Infektion (AIDS)' 1986 *JR* 230 233 234; Laufs & Laufs 1987 *NJW* 2264; Solbach & Solbach 1989 *MedR* 226; Van Wyk 1991 *Med Law* 147–148. Section 3(1)(a), (b) and (c) of the South African Abortion and Sterilisation Act 2 of 1975 and paragraph 218a(1)2 and (2)1 of the German *Strafgesetzbuch* specifically cater for lawful therapeutic abortion to protect the life and physical and mental health of the pregnant woman and the physical and mental health of the child to be born.

[122]'Die umfassende Aufklärung sollte der Regelfall sein': BäK & DKG 15.

or contra-indication, is a matter on which opinions differ.[123] On the one hand there is authority for the view that there is a duty incumbent upon doctors to avoid causing psychological harm to their patients by unnecessary disclosure of HIV diagnoses.[124] Breach of this duty may result in legal liability on the basis of a professional error.[125] On the other hand there is authority for the view that non-disclosure of an HIV diagnosis where disclosure would cause the patient anxiety or distress cannot, on account of the serious threat posed by AIDS to both the patient and others, be justified by the defence of therapeutic necessity or contra-indication.[126] The patient should be informed of an HIV diagnosis for purposes of taking possible prophylactic measures; changing his or her lifestyle; following a healthy diet; leading a responsible life; organising his or her personal affairs timeously; devising ways and means to avoid spreading the disease; and dealing with the deterioration of his or her mental health as the disease progresses.[127] Nevertheless, the doctor should, without making the disease seem better or worse, attempt to alleviate the anxiety and distress the patient experiences when confronted with the prospect of suffering and death, physical and mental deterioration and social and professional ostracism, and should carefully assess the patient's reactions and take precautionary measures, particularly where a possibility of suicide or depression exists.[128]

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[123] *Cf* BäK & DKG V(2), which stipulates that a medical practitioner who considers withholding an HIV diagnosis from the patient on psychological grounds, must bear in mind that doing so may result in further HIV infections (see also 15).

[124] Irrespective of whether the diagnosis is correct or erroneous: see OLG Köln 1988 *NJW* 2306.

[125] OLG Köln 1988 *NJW* 2306, endorsed by Deutsch 1988 *NJW* 2307 and Simon-Weidner 1989 *ArztzR* 179, but criticised by S Setsevits 'Schadenersatzpflicht des Arztes wegen Mitteilung einer nicht endgültig gesicherten HIV-Infektion an den Patienten' 1989 *MedR* 95–96.

[126] Teichner 1986 *NJW* 761: 'Bei einer Abwägung zwischen den Interessen des betreffenden infizierten Patienten und der von ihm ausgehenden Infektionsgefahr überwiegt das Interesse am Schutz einer Vielzahl Dritter gegenüber dem Interesse des einzelnen Patienten'; Buchborn 1987 *MedR* 263–264, who concedes, however, that, generally, the patient's *Informationsrecht* should not, in cases of waiver, be turned into an *Informationszwang* except, perhaps, where the patient was a blood recipient and the blood donor subsequently turns out to have been HIV infected, because of a lack of opportunity to ask the patient, prior to the HIV test, whether or not he or she wishes to be informed of the test result; Laufs & Laufs 1987 *NJW* 2264; Langkeit 1990 *Jura* 458–459; Van Wyk *Aspekte van VIGS* 361 *ff* 521; *cf* VGH München 1988 *NJW* 2318 2319–2320; Strauss *Doctor, patient and the law* 16–17, who advocates a duty to disclose an HIV diagnosis even where the patient has expressed the wish not to be informed, on the basis that 'the interest of other members of society who might be infected by the patient ... must certainly outweigh the patient's desire not to receive bad news'.

[127] Laufs & Laufs 1987 *NJW* 2264; Langkeit 1990 *Jura* 458 *ff*, emphasising that the individual patient's wishes and not the prudent patient's decisions should prevail when it comes to taking appropriate measures in respect of the HIV infection; Van Wyk *Aspekte van VIGS* 363.

[128] Teichner 1986 *NJW* 761; Laufs & Laufs 1987 *NJW* 2264, who reject written and telephonic communication and insist on 'persönliche und umsichtig schonende Aussprache'; Strauss 1988(1) *SAPM* 13; *cf* VGH München 1988 *NJW* 2318 2320; Langkeit 1990 *Jura* 458–459.

3 4 The duty to inform patients of the risk or danger of HIV infection through medical interventions

A patient may be exposed to the risk or danger of HIV infection through medical intervention in a variety of ways, the most important of which are (a) where the doctor or health care worker in charge of the patient is HIV infected;[129] and (b) where the medical intervention involves the implantation of human organs or tissue or the infusion of body fluids which are HIV infected into the patient, as in the case of organ and tissue transplantation,[130] artificial fertilisation[131] and blood transfusions.[132]

Within the context of blood transfusions, there is authority for the view that where use is made of donor blood, there is a duty incumbent upon doctors to inform patients, prior to the proposed medical intervention, of the risk or danger of HIV infection during a blood transfusion in all those cases where the possibility of a blood transfusion, either before, during or after the operation, merits serious consideration by the doctor. The risk or danger of HIV infection during blood transfusions cannot be regarded as common knowledge which need not be imparted to the patient.[133] In addition, the doctor is under a duty to inform the patient of the alternative of an autologous blood donation, where this is medically possible, instead of a heterologous blood donation,[134] as well as of the benefits and disadvantages of the former as compared to the latter.[135]

Moreover, there is authority for the view that doctors are under a duty to inform patients of the danger of HIV infection in blood transfusion cases on

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[129] *Cf* SA Strauss 'Gesondheidswerkers wat HIV-positief is' 1989(2) *SAPM* 6, who suggests that although an HIV infected health care worker is probably under a moral duty to inform the patient accordingly even if the risk or danger of transmission is very small, it is unlikely that a corresponding legal duty exists, provided the health care worker takes reasonable steps to prevent transmission from occurring; Van Wyk *Aspekte van VIGS* 280 *ff* 378–379, who submits that HIV infected doctors should either refrain from participating in surgical interventions or from practising gynaecology or inform their patients of their HIV status (378).

[130] Since time is usually of the essence in organ transplantation cases and since it may be difficult if not impossible to perform adequate HIV tests, the patient should be informed of the risk or danger of HIV infection through organ transplantation: CW van Wyk 'VIGS en die reg: 'n verkenning' 1988 *THRHR* 317 332.

[131] Strauss 1988(1) *SAPM* 13 rejects a duty to disclose the danger of HIV transmission in artificial fertilisation cases on account of the risk being statistically highly insignificant where adequate HIV tests have been performed.

[132] A blood transfusion as such, or a blood transfusion associated with an operation (pre-operative, intra-operative or post-operative blood transfusion). *Cf* the recent widely published French and German blood bank scandals in which numerous patients had apparently received HIV infected blood because of insufficient precautionary measures taken to ensure that only HIV free blood is donated to blood recipients.

[133] BGH 1992 *NJW* 743–744, endorsed by Deutsch E 1992 *JZ* 423 and Giesen D 1993 *JR* 21 22.

[134] BGH 1992 *NJW* 743 744; Deutsch 1992 *JZ* 423, who adds that the patient should also be informed of the option of making use of the blood of a nominated donor, eg a relative; *cf* Giesen 1993 *JR* 22.

[135] BGH 1992 *NJW* 743 744.

the basis that, although the risk of HIV infection may be fairly remote,[136] the consequences of HIV infection will be extremely serious.[137] Legal liability based on negligence in blood transfusion cases may be avoided by (a) properly informing the patient of the danger of HIV infection;[138] (b) taking the necessary care in testing the blood used for HIV infection; and (c) obtaining the patient's consent to the blood transfusion.[139] Another way of achieving the same result would be by requiring the patient to sign a waiver of a delictual action for damages arising from a blood transfusion, because this will apprise him or her of the risk of HIV infection and, hence, serve a dual purpose.[140]

4 CONCLUSION

4 1 Informed consent to blood tests and/or HIV tests

It is to some extent surprising and to some extent befitting that the most intensely debated and hotly controversial question of the three under discussion is the first: Surprising because (a) the more 'special' the status granted to potential and actual AIDS victims, the less 'normal' society's response to their predicament is likely to be; and (b) it will ultimately be the HIV diagnosis rather than the HIV test which will expose the patient to individual pain and suffering and to society's by and large adverse reaction. Befitting because (a) it admits of no doubt that the information rendered by an HIV test[141] is, at least in case of a positive result, by nature sensitive and private and a source of potential harm to the patient; and (b) it can, therefore, hardly be denied that appropriate measures for proper protection of the patient against invasions of his or her privacy through secret HIV tests merit at least serious consideration.

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[136]The marked increase in HIV infections in South Africa will probably have the effect of increasing the risk or danger of HIV infection during blood transfusions: Van Wyk 1992 *De Jure* 29.

[137]M Teichner 'Aufklärung über das Transfusionsrisiko LAV/HTLV-III-Infektion?' 1986 *ArztR* 201 *ff*, on the basis that the risk or danger of HIV infection is typical (*contra* Simon-Weidner R 1986 *ArztR* 204–205) albeit improbable, and that informing the patient is imperative even where the proposed operation and/or blood transfusion is necessary to save his or her life; Weissauer 1987 *MedR* 273, unless the blood transfusion is urgently necessary and the patient is incapable of consenting to it, in which case, depending upon the degree of urgency, tacit consent may be assumed (see also Eberbach 1986 *JR* 234); Van Wyk 1992 *De Jure* 29–30; *cf* BGH 1992 *NJW* 743 744; *contra* Strauss 1988(1) *SAPM* 13 (see n 131 *supra* for the reason given).

[138]This may place a heavy burden on the patient who is to undergo an operation with its attendant dangers, plus the dangers inherent in anaesthesia, plus secondary risks, such as a blood transfusion during the operation and an HIV infection (see also Simon-Weidner 1986 *ArztR* 204; *cf* Teichner 1986 *ArztR* 202); perhaps the most feasible solution to the problem lies in simply mentioning the possibility of secondary risks, and leaving it to the patient to enquire about the details: Weissauer 1987 *MedR* 273.

[139]Van Wyk 1992 *De Jure* 30.

[140]Strauss 1991(3) *SAPM* 18; Van Wyk 1992 *De Jure* 30.

[141]Incidentally, the same applies to medical procedures such as genome analyses: *cf* D Sternberg-Lieben 'Strafbarkeit eigenmächtiger Genomanalyse' 1990 *GA* 289; E Deutsch 'Medizinische Ethik und Genomanalyse' 1994 *VersR* 1.

Clearly the most important and polemic question under the present heading is whether or not an HIV test may be performed without informing the patient thereof. From the diversity of situations and considerations that come into play when the issue of informed consent to the taking of a blood sample and/or an HIV test arises, it is more or less evident that this question cannot be answered with a simple yes or no. Bearing in mind the critical comments offered above and the variety of situations and considerations identified, the following guidelines[142] are suggested as a solution to the present problem:

a Where the patient expressly consents to an HIV test before, during or after the taking of a blood sample, no problem arises and the performance of the test can be considered lawful. (Incidentally, this means that the distinction between HIV tests intended prior to and subsequent to the taking of a blood sample falls by the wayside, and that, hence, it matters not whether the substance tested is blood, semen, milk, urine or any other substance.)

b Where the patient expressly refuses an HIV test before, during of after the taking of a blood sample, the performance of the test would clearly be against his or her will and, in the absence of a ground of justification, unlawful.[143]

c Where the patient neither expressly consents to nor expressly refuses an HIV test before, during or after the taking of a blood sample, the performance of the test should be regarded as justified by tacit consent provided it is (i) medically indicated; and (ii) in the patient's interest.[144] As with other serological tests which are a matter of medical discretion, the patient need not be informed of an HIV test unless there is a clear indication to the contrary, such as (i) the patient enquiring about the nature of the serological test intended or asking whether or not an HIV test is intended; or (ii) the doctor having reason to believe that the patient would prefer to be informed of the nature of the serological tests intended or of an intended HIV test. This will open the door to medically indicated HIV tests in the patient's interest becoming routine, while at the same time catering for the individual patient's need and wish to be informed of such test and saddling the doctor (as part and parcel of the therapeutic alliance model) with a duty to inform the individual patient if in doubt about his or her consent to such test. It will also pave the way for destigmatising and normalising HIV tests in the eyes of the world. Moreover, routine HIV tests, where medically indicated and in the patient's interest, would effectively dispose of the thorny issue whether or not therapeutic necessity or contra-indication may operate as a defence in cases of non-disclosure of an HIV *test*. The real issue would then be whether or not non-disclosure of an HIV *diagnosis* may be justified by the therapeutic necessity or contra-indication defence.

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[142]Which, incidentally, are also relevant to genome analyses.

[143]*Cf* MASA 6 8.

[144]*Cf* Leech 1993 *SAJHR* 66–67.

d Where the intended HIV test is performed for the benefit of others, the patient's consent to such test should be considered effective only if he or she was informed thereof before, during or after the taking of a blood sample. In emergency cases, the defence of necessity[145] can be invoked to justify HIV tests for the benefit of others without the patient's consent. Of course, whether or not the necessity defence will avail the doctor, will depend upon the facts of the case (of which a medical indication for an HIV test will be an essential element), as well as upon all the requirements of the defence being satisfied. Moreover, taking HIV tests for the benefit of others without the patient's informed consent out of the arena of tacit consent and placing it in the arena of the necessity defence should not only ensure that such conduct was really necessary in the circumstances but also that the patient's interests are adequately protected. (Incidentally, this means that for purposes of informed consent to HIV tests the distinction between the parties deriving benefit from the HIV test falls by the wayside, and that the prickly pear of the divisibility or indivisibility of consent to an HIV test which is intended for the benefit of both the patient and others is disposed of.)

e Where an HIV test is performed against the patient's will, in the sense that he or she either expressly refused it, or enquired about it but was given the assurance that it was not to be or was led to believe that it was medically indicated and/or in his or her own interest, the doctor may be held criminally and/or civilly liable for fraud and/or a violation of the patient's personality rights.[146]

f Where an HIV test is performed without the patient's express or tacit consent and without a fraudulent misrepresentation, the doctor may be held criminally and/or civilly liable for a violation of the patient's personality rights. Provided the patient gave his or her informed consent to the medical procedure whereby a blood sample is taken and its attendant risks and dangers, no liability for assault should lie. Not only does the assault option as a solution to the problem of secret HIV tests confuse and identify informed consent to an HIV test with informed consent to the taking of a blood sample, but it is also fraught with contradictions and inconsistencies. Since secret HIV tests affect information about the patient of a highly sensitive and private nature rather than information about the nature, risks and dangers of taking a blood sample, the personality rights option is not only more suited to accommodate the problem of unlawful HIV tests, but also fits in well with the notion that no distinction should be drawn (i) between cases where an HIV test was intended prior to and subsequent to

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[145]On which see generally FFW van Oosten 'The legal liability of doctors and hospitals for medical malpractice' 1991(7) *SAMJ* 23 25 and within the context of HIV tests Van Wyk *Aspekte van VIGS* 161 *ff*; Taitz 1993 *CME* 80 ff; *cf* CMSA 1991 *SAMJ* 689; MASA 7 *ff*; SAMDC 8–9.

[146]Of which the right to privacy is recognised as a specific legal interest in both Germany and South Africa, and freedom of choice is recognised as a specific legal interest in Germany but not in South Africa.

the taking of a blood sample; and (ii) between whether the substance used for an HIV test is blood, milk, urine or any other substance.

4 2 The duty to disclose the outcome of an HIV test to the patient

Since the disclosure of an HIV diagnosis and its implications and consequences to the patient will usually be of paramount importance to his or her own interest and especially to the interests of others, it is submitted that non-disclosure of an HIV diagnosis should be very much the exception to the rule. Since the doctor will, where medically and legally permissible or obligatory, ordinarily be in no position to warn all potential victims who may come into contact with an innocent HIV infected patient, it is imperative that the patient be informed of an HIV diagnosis and the risks and dangers it presents to others. One such exception that comes to mind is where in terms of the therapeutic necessity or contra-indication defence the harm done by disclosure of an HIV diagnosis would not only be greater than the harm done by non-disclosure, but where the patient in the particular circumstances also presents no risk or danger of HIV infection to others. To mention but one example: Where the reasonable possibility exists that the life or health of a depressive and suicidal patient who practises sexual abstinence and presents no threat of infection to health care workers may be seriously jeopardised by the disclosure of an HIV diagnosis. Here non-disclosure would both serve the patient's own interests and not threaten the interests of others. Whether or not the therapeutic necessity defence will find its application where the patient in these circumstances enquires about the diagnosis or concluded a diagnosis contract with the doctor, involves the moot point whether or not a lie may be justified in circumstances of necessity. A possible solution to this difficult problem[147] would be that, notwithstanding the patient's enquiries or a diagnosis contract, a lie may be justified by circumstances of necessity where the patient does not insist upon disclosure of the HIV diagnosis. Should the patient insist upon full and truthful information in terms of his or her enquiries or a diagnosis contract, however, disclosure of the HIV diagnosis is indicated and any harm suffered by the patient as a consequence may be attributed to a voluntary assumption of the risk of harm by the patient.

More important than the question *whether* an HIV diagnosis should be disclosed, is the question *how* an HIV diagnosis should be disclosed. The answer to this question is furnished by the ordinary principle that the manner of disclosure is essentially a matter of medical discretion, provided the doctor refrains from causing the patient unnecessary anxiety and distress,[148] and bearing in mind the therapeutic alliance model.

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[147]For a discussion of the problem see Van Oosten 1991 *Med Law* 36–37 38–39.

[148]On legal liability for over-information see FFW van Oosten 'The doctor's duty of disclosure and excessive information liability' 1992 *Med Law* 633 634 *ff*.

4 3 The duty to inform patients of the risk or danger of HIV infection through medical interventions

The obligation of the doctor to inform the patient of the risk or danger of an HIV infection through a medical intervention can simply be dealt with in terms of the ordinary principles of informed consent, particularly in terms of the disclosure dictates relating to the risks and dangers of, as well as the alternatives to, the medical intervention in question.