Advanced Criminal Law

only study guide for LCR4IIT

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DEPARTMENT OF CRIMINAL AND PROCEDURAL LAW

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CONTENTS

INTRODUCTION

Welcome to the course: Advanced Criminal Law. We trust that you will enjoy your study of this course. It is important to read this introduction before you begin your studies.

This course consists of *capita selecta* (a selection of topics) in criminal law. The study guide is therefore divided into four main parts, each part comprising a number of study units. The first two parts deal with a selection of topics of the general principles of criminal law. The last two parts deal with a selection of specific crimes.

This is an **advanced** course. In this course we have selected a number of topics that we regard as important because they often crop up in practice and, more to the point, because you need specialised information about these topics. If you do not have specialised knowledge of these topics, you may find yourself, one day, either being unable to prove your case (if you are a prosecutor), or being unable to defend your client (if you are an attorney).

The *recommended* book for this course is the latest edition of Snyman *Strafreg*, Snyman *Criminal Law 5th ed (2008). This work is also useful for additional reading.*

At the end of the course you will write an examination. The purpose of your study should not only be to pass the examination, but also to be able to apply your knowledge to situations that you may encounter in your legal practice.

We wish you every success in your studies.

PART 1

The principle of legality

STUDY UNIT 1

THE PRINCIPLE OF LEGALITY

1.1 Background

In its broadest sense the principle of legality can be described as a mechanism to ensure that the state, its organs and its officials do not consider themselves above the law in the exercise of their functions, but remain subject to it. The principle of legality finds application in many fields of the law, including constitutional law, administrative law and criminal procedure. In the discussion which follows we limit ourselves to the application of the principle of legality in the field of **criminal law** where this principle is also known as the *nullum crimen sine lege* principle — no crime without a legal rule.

1.2 Rationale

The powers of the modern state have been expanded to such an extent that today, more than ever, it has become essential to protect the freedom of the individual. The principle of legality plays an important role in this regard.

In criminal law the principle fulfils the important task of preventing the arbitrary punishment of legal subjects by state officials, and of ensuring that the establishment of criminal liability and the passing of sentence concur with clear and existing rules of law.

In other words, the principle of legality ensures that justice is done to the accused.

The basis of the principle of legality is the policy consideration that the rules of law prohibiting punishable conduct must be as clear and precise as possible so that legal subjects may know in advance how to behave in order to avoid making themselves guilty of the commission of a crime.

In American literature this idea is often referred to as "the principle of fair warning". For example, if it is possible for the legislature to create a crime with retrospective effect and consequently for a court to find someone guilty of a crime even though the type of act he committed was not punishable at the time

of its commission, an injustice is done, since the accused is punished for behaviour that he could not have identified as punishable before its commission. In the same way, it is difficult or even impossible for a legal subject to know in advance precisely what kind of conduct is punishable if the penalty clauses creating crimes are vague or their content problematic, or if a court has the power to decide for itself whether a certain type of conduct that had previously gone unpunished should in fact be punished.

1.3 Historical background

The principle of legality in criminal law was recognised in neither Roman law nor Roman-Dutch law, as described by the Roman-Dutch writers. In both these systems the existence of *crimina extraordinaria* was recognised, in terms of which behaviour could be punished that had not previously been outlined or recognised as a crime.

The principle of legality is a product of the era of the ''Enlightenment''. The Enlightenment refers to the ideas of a group of thinkers in the seventeenth and especially the eighteenth century in Europe who rebelled against the obscurities of the Middle Ages and the excessive power of royalty, the aristocracy and the Church. They strove for a society based on rational thought, political freedom, the rights and dignity of the individual (humanism), and the replacement of the arbitrary exercise of power by kings and other rulers by a universal natural law based on rational principles of justice. Philosophers such as Hume and Locke in England, Voltaire and Rousseau in France, and Kant and Wolff in Germany were some of the movement's most influential figures.

The ideas of what became known as the Age of Enlightenment were a direct cause of the French Revolution of 1789. As in other parts of Europe, prerevolutionary France was characterised by the arbitrary punishment of subjects by royal officials. One of the ideals of the revolution was the abolition of this arbitrary punishment, which could best be achieved through the codification of the criminal law so that all citizens could know precisely what conduct was punishable. Section 8 of the famous French Declaration of the Rights of Man of 1789 stated that no one could be punished except in terms of a law that had been passed and promulgated before the deed was committed. This provision was incorporated into the new French constitution of 1791 as well as into the *Code Pénal* (the French criminal code that contained a codification of the French criminal law) of 1810.

In the course of the nineteenth century, the principle of legality was incorporated in most of the codifications of the criminal law that evolved in Europe, such as the German penal code of 1871. In the twentieth century, the principle of legality was incorporated in the Universal Declaration of Human Rights by the General Assembly of the United Nations in 1948. Section 11(2) of this Declaration reads as follows:

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

The principle was also incorporated in section 7 of the European Convention on Human Rights in 1950.

1.4 Definition

The principle of legality in criminal law can be defined as follows:

> An accused person may not be found guilty of a crime and sentenced unless the type of conduct with which he or she is charged
>
> (1) has been recognised by the law of the land as a crime
> (2) before the conduct took place; and
> (3) in clear terms; and
> (4) the particular conduct of the accused can be brought under the definition of the crime without interpreting the words or concepts in the definition too widely, and
> (5) after conviction the imposition of punishment also complies with the above-mentioned four principles.

From the definition it is clear that the principle of legality in criminal law embodies the following five rules or principles:

- A court may find an accused guilty of a crime only if the kind of act performed by him is recognised by the law as a crime — in other words, a court itself may not create a crime (the ***ius acceptum*** principle).
- A court may find an accused guilty of a crime only if the kind of act performed by him was already recognised as a crime at the time of its commission (the ***ius praevium*** principle).
- Crimes should not be formulated vaguely (the ***ius certum*** principle).
- A court must interpret the definition of a crime narrowly rather than broadly (the ***ius strictum*** principle).
- After an accused has been found guilty, the above-mentioned four principles must also be applied *mutatis mutandis* when it comes to **imposing a sentence;** this means that the applicable sentence (regarding both form and extent) must already have been determined in reasonably clear terms by the law at the time of the commission of the crime, that a court must interpret the words defining the punishment narrowly rather than widely, and that a court is not free to impose any sentence other than the one legally authorised (the *nulla poena sine lege* principle, which can be further abbreviated to the *nulla poena* principle).

In the discussion which follows, each of these five principles is analysed in greater depth. For the sake of convenience they are sometimes referred to by their concise Latin descriptions as provided above.

For the sake of completeness, we should mention that it is possible to formulate further applications of the general principle in addition to the five mentioned above. For example, Glanville Williams *Criminal Law* 2 ed (1961) 582–586 mentions the rule that, should legal subjects wish to consult legal sources to establish what behaviour is punishable, these sources should be

accessible to them. Without a doubt, this rule can be viewed as an application of the general principle of legality. However, since it has never given rise to any noteworthy problems in the practical administration of justice, it will not be discussed further here.

Another possible application of the general principle is that the **language** in which a crime or rules relating to criminal liability are formulated ought to be as **understandable** as possible for ordinary people. If the language or formulation is so complicated or contains so many foreign terms or expressions that ordinary people are unable to understand it (or can attach a meaning to it only with great difficulty), the ideals underlying the principle of legality are similarly undermined. Thus if one were to define the crime of theft as a *contrectatio fraudulosa* committed with *animus furandi* in respect of a movable, corporeal property *in commercio* (a definition which is by no means foreign to some of our legal authorities), one would be offering a definition of one of the best-known crimes in our law which the ordinary person would be unable to understand.

1.5 Examples of the application of the principle of legality

There is a direct relationship between the principle of legality and the theory of general deterrence relating to punishment: one cannot deter someone from the commission of an act if the law does not recognise it as a crime at the time of its commission, or if once an act **has been** committed, the law allows a court to declare this kind of act a crime and then to punish it, although prior to its commission it was not punishable. There is also a connection between the principle of legality and the theory of retribution: the idea of "just reward" is central to the theory of retribution, but there can only be "just reward" if, already at the time of its commission, the law regarded the act as constituting a crime.

There is also a connection between the principle of legality and a democratic form of government: one of the reasons why a judge should not be empowered to create crimes himself or to extend the field of application of existing crimes, is that parliament, as the assembly of the community's elected representatives, is best fitted to decide (after examination and discussion) what acts ought to be punishable according to the general will of the people. Naturally, this relationship between legality and a democratic form of government implies that there must be a parliament representing the **entire** population as well as regular (not a one-off!), free (from intimidation!) and fair elections to ensure that the representatives in parliament genuinely reflect the (sometimes changing) will of the people.

The overriding idea in the case of the rule of law is that the state or government, including the judicial organ of the state, is **subordinate** to the law.

1.6 Other legal systems and the principle of legality

1.6.1 Western Europe

On the European continent the criminal law of every country is codified and the principle of legality is generally honoured throughout, being reflected in either the criminal code or the constitution of the country concerned. See, for example, sections 1 and 2 of the Italian and section 1 of the Belgian, Swiss, Dutch, Austrian and German penal codes. For example, section 1 of the German penal code provides that an act is punishable only if a statute, enacted prior to the commission of the act, has declared such an act to be punishable. Section 103 II of the German constitution contains a similar provision.

1.6.2 English law

The English approach to the principle of legality differed from that of the Continent. For almost two centuries, until 1641, the Court of the Star Chamber had far-reaching jurisdiction to punish conduct which was not a crime according to any statute or rule of common law. Crimes first punished in this way by the Star Chamber included perjury, defamation and ''unlawful assembly''. When the Star Chamber was abolished in 1641, the King's (Queen's) Bench Division appropriated the power to create crimes, because the court regarded itself as *custos morum*, the guardian of morals. This court was, for example, responsible for the creation of such crimes as blasphemy, forgery, sedition, conspiracy, incitement and attempt. By the nineteenth century, however, the King's Bench no longer created any new crimes.

However, writers on English law hold that the power to create crimes, which the English courts had until about 1800, should not be criticised, but in fact welcomed. Until then the British parliament had often been inactive, and sometimes even powerless, while it was important that the crimes which the courts had created should exist, *inter alia* because those crimes were recognised in other countries as well (Glanville Williams 593–594; Burchell & Hunt 56). It appears that by 1884 the English courts had accepted that they were no longer *custodes morum*. In that year, in *Price* [1884] 12 QBD 247, the Queen's Bench refused to find the accused guilty of a new crime known as ''burning a corpse'', even though such behaviour was probably immoral.

However, in the twentieth century the English courts once again arrogated to themselves the power to create new crimes in certain highly controversial cases. In *Manley* [1933] 1 KB 529, the accused laid a false charge with the police that she had been robbed, thus causing the police to conduct an unnecessary investigation, in the course of which innocent people came under suspicion. She was found guilty of something which had never been recognised as a crime before, namely ''effecting a public mischief''.

In *Shaw v Director of Public Prosecutions* [1961] 2 All ER 446 (HL), the accused compiled and published a book entitled *Ladies Directory*, containing the names and addresses of prostitutes, in some cases with photographs of

naked women and an indication (in code) of their practices. He was charged with a new, vaguely defined crime, namely "conspiracy to corrupt public morals", and was found guilty thereof in a majority ruling of the House of Lords. In his decision Lord Simmonds declared openly (452) that the court had "a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare".

The decisions in *Manley* and *Shaw* were severely criticised by writers on English law.

In *Knuller Ltd v Director of Public Prosecutions* [1972] 2 All ER 898 (HL), the House of Lords was invited to overrule *Shaw* but refused to do so. In this case the court held that, although the *Sexual Offences Act* of 1967 decriminalised private homosexual behaviour between consenting males above the age of 21, agreements encouraging such behaviour were nevertheless punishable as "conspiracies to corrupt public morals". However, the decision contains an important limitation to the principle followed in *Shaw*: all of the Lords emphasised that they did **not** accept that the courts had a general or residual power to create new crimes or to extend existing crimes to make punishable conduct which hitherto had not been punishable. However, "conspiracy to corrupt public morals" remains a crime.

1.6.3 The United States of America

The principle of legality is honoured in the USA. Sections 1.9 and 10 of the American Constitution of 1789 forbid both the federal government and individual states to create laws with retrospective effect. Furthermore, the "due process" provisions contained in the Fifth and Fourteenth Amendments of the Constitution are interpreted in such a way that portions of statutory provisions of both the federal government and individual states can be declared null and void if they are too vague. This is known as the "void-for-vagueness doctrine" which was formulated as follows in the authoritative decision of *Conally v General construction Co* 269 US 385, 391 (1926):

> The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties ... . A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning ... violates the first essential of due process of law.

The "due process" provisions provide that no person may be deprived of "life, liberty, or property, without due process of law". In *Lazetta v New Jersey* 306 US 451, 453 (1939), the court held that "no one may be required at peril of his life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids". Broad and vague statutes have also been declared void because they are susceptible to arbitrary and discriminatory enforcement and because it is uncertain to what extent, if any, they infringe upon first amendment (human) rights (La Fave & Scott *Criminal law* 2nd ed (1986) 94 ff).

Furthermore, the principle of strict construction of criminal statutes is generally accepted and applied (eg *McBoyle v United States* 283 US 24, 27 (1931)), as well as the principle that a court may not create a crime. The latter principle is contained in section 1.05(1) of the influential *Model Penal code*. Criminal law is almost completely codified in all the states of the USA.

1.6.4 Canadian Law

The Canadian Charter of Rights and Freedoms, section 11(g), provides that any person charged with an offence has the right ''not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations''.

Vague criminal provisions may be declared unconstitutional on the grounds that they are in conflict with the principle of fundamental justice, guaranteed by section 7 of the charter. In the Canadian case *R v Nova Scotia Pharmaceutical Society* (1992), 74 C.C.C. (3rd) 289, 93 D.L.R. (4th) 36, 43 C.P.R. (3d) 1 (S.C.C.), it was held that vagueness as a fundamental principle of justice was based on the requirements of fair notice to the citizen and the limitation on law enforcement discretion. The concept of fair notice includes a formal aspect, namely knowledge of the contents of the statute, and a substantive content, namely an understanding that certain conduct constitutes a crime. The concept of limitation on law enforcement discretion is based on the principle that a law must not be so devoid of precision in its content that a conviction will automatically flow from a decision to prosecute. In addition, a vague statutory criminal provision might fail to meet the requirement of being ''prescribed by law'' in terms of section 1 of the Charter, as it is uncertain to what extent it limits the fundamental rights and freedoms of people.

ACTIVITY

(1) Name and define the five rules embodied in the principle of legality.

(2) Explain the application of the principle of legality to (i) the theories of punishment and (ii) a democratic form of government.

(3) Do the English courts have a general power to extend existing crimes to make punishable conduct which had not been punishable?

(4) Explain the power of the courts in the United States and in Canada in respect of vaguely described statutory crimes.

FEEDBACK

(1) The five rules embodied in the principle of legality are discussed under 1.4.

(2) See the discussion under 1.5.

(3) No. See the case of *Knuller v Director of Public Prosecutions* discussed in 1.6.2.

(4) See the discussion under 1.6.3 and 1.6.4.

STUDY UNIT 2

THE PRINCIPLE OF LEGALITY *(continued)*

2.1 Introduction

Before the (interim) Constitution of the Republic of South Africa, Act 200 of 1993, came into operation on 27 April 1994, the "old" South African parliament was sovereign and no court in South Africa could declare any of its statutes invalid. Parliament could create both vaguely defined crimes and crimes with retrospective effect, and it did in fact do so, as will be illustrated later.

The South African courts, however, recognised the principle of legality to a greater or lesser extent during the second half of the previous century. The manner in which they applied and developed the principle in our case law will be discussed below.

2.2 Development of the principle of legality in South Africa

The principle of legality was incorporated for the first time into our statutory law in section 25(3)(f) of the 1993 Constitution. The 1993 Constitution was replaced by the Constitution of the Republic of South Africa, Act 108 of 1996. The principle of legality is now contained in section 35(3)(1) and (n) of the latter Act. Section 35 forms part of chapter 2 of the Constitution, which contains the Bill of Rights. The Bill of Rights applies to all law, and it binds the legislature, the executive, the judiciary and all organs of state (sect 8(1)). This means that a court may declare any legislation or rule of law which is in conflict with the Bill of Rights null and void.

Section 35(3) provides that **every accused person has a right to a fair trial**, and paragraph (1) of this subsection states that this right includes the **right not to be convicted of an act or omission that was not an offence under either national or international law at the time it was committed or omitted**. A further paragraph in this subsection, namely paragraph (n), contains a provision which likewise applies to the principle of legality. According to

paragraph (n), **the right to a fair trial includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing**. In the discussion below these paragraphs in sections 35(3) will be explained.

It is clear that section 35(3)(l) incorporates the *ius praevium* principle. By implication the section also incorporates the *ius acceptum* principle: if a court is not entitled to convict an accused of a crime if, at the time when the accused committed the relevant act, the law did not recognise such an act as a crime *(ius praevium)*, it follows by necessary implication that a court is not entitled to create a crime *(ius acceptum)*.

Section 35(3)(n) relates to the *nulla poena sine lege* principle, that is, the application of the principle of legality to punishment. Section 35(3)(l) and (n) contains no express provisions relating to the *ius certum* and *ius strictum* principles, but it is possible that the Constitutional Court will interpret the provisions of this section in such a way that they cover also these aspects of the principle of legality.

As far as South African law is concerned, it must be borne in mind that our criminal law is for the most part uncodified. Many of the most important crimes, as well as most of the general principles of liability, are derived from common law and are therefore not contained in legislation. This does not mean that the principle of legality cannot be upheld, since a large body of authoritative decisions lay down the requirements for each common-law crime as well as the general principles of liability. In fact, South Africa's extended system of precedents in case law provides for greater detail on the rules of criminal law than the concise definitions found in criminal codes, although it may be conceded that in an uncodified system, a lay person cannot acquaint himself with the most important principles relating to criminal law as easily or as quickly as he might in a codified system.

2.3 Application of the principle of legality in South African law

We are now going to discuss the various rules embodied in the principle of legality as identified above and which are referred to by their concise Latin descriptions.

2.3.1 The *ius acceptum* principle

The *ius acceptum* principle implies that a court may not find a person guilty of a crime unless the type of conduct he or she performed is recognised by the law as a crime. In other words, a court itself may not create new crimes.

The court is bound by "the law as we have received it to date", that is, the *ius acceptum*. In South Africa *ius acceptum* must be understood to denote not only the common law but also existing statutory law.

2.3.1.1 Common-law crimes

Certain types of conduct might be wrong from a moral or religious point of view, but might nevertheless not be prohibited by law. Even if they are prohibited by law, this does not necessarily mean that they are crimes: they might give rise to civil-law liability eg breach of contract or make the authorities take certain steps in terms of administrative law. Not **all** transgressions of the law constitute crimes. Only when specific conduct is declared **a crime** by law (and here we mean either statutory or common law) is there a possibility of criminal-law liability. Consequently, a court is not empowered to punish conduct simply because it "deserves" to be punished according to the judge's conception of morality, religion or even politics.

However, in the nineteenth century it did sometimes happen that a South African court disregarded this principle. An example of such a case is

> *Marais* 6 SC 367. In 1888, De Villiers CJ found the accused, who had exposed himself in public, guilty of a crime called "public indecency" despite the fact that no such crime was known in our common law or punishable in terms of any legislation then in force. In so doing, he assumed the role of a guardian of the morals *(custos morum)*, a role also claimed by the English judges. He tried to justify this by citing Voet 47 11 2, where Voet mentions the *crimina extraordinaria*.

This decision must be evaluated against its legal-historical background: during the nineteenth century there were still considerable gaps in our criminal law, and the courts were still sifting through the sometimes vague and contradictory common-law sources in an effort to determine what kind of conduct should be punishable and under what heading. In a certain sense these were the formative years of criminal law as we know it today. However, these formative years are now something of the past, and the above-mentioned consideration, which might have justified the *Marais* decision, no longer applies to cases coming before the courts today.

In the following cases the courts refused to create new crimes:

- In *Robinson* 1911 CPD 319, the Cape court refused to find the accused, who had shown indecent photographs to various women and had offered them money to lift up their dresses, guilty of a "crime" called "attempting to corrupt the chastity of maidens", because no such crime existed in the law of that time.
- In *M* 1915, CPD 334 Kotze J said: "We do not possess the power of creating offences upon the ground that in our opinion, they are contrary to good morals."
- In *Solomon* 1973 (4) SA 644 (C), the accused was charged with a crime called "conflagration" on the ground that he had negligently set fire to a field and in so doing had threatened the safety of a number of people. There was no authority indicating that our courts had recognised the existence of such a crime in the past. Furthermore, conflagration was not considered a (separate) crime in common law, but rather a more serious form of arson. (The recognised crimes that could have been committed in such a case were arson or malicious injury to property.)

  The court was invited to recognise the existence of "conflagration" as a separate crime because (according to the argument advanced by the state) it

would be better to distinguish between a fire endangering a single person and one endangering a great number of people. The court held that, although it might be profitable to draw such a distinction, it had to apply the common-law provisions as accepted by the courts and that there was therefore no such offence as "conflagration" in our law.

It must be accepted that the "list" of common-law crimes has now been closed: the only way in which new crimes can be created is by legislation. Even if it were to be discovered that, according to the old common-law writers, a certain type of conduct was punishable under a certain heading, but it appeared that prosecutions for the commission of such a "crime" were thus far unknown in our law, we believe that a court should not recognise the existence of such a crime. In other words, it should not be possible for a court to "revive" forms of punishable conduct that have become obsolete, as it were. If there is uncertainty in this regard, it should be left to the legislature to formulate the relevant prohibited conduct and make it punishable, if it so wishes.

However, the statement that the courts are not the custodians of the morals must be qualified:

There are certain fields of criminal law where a court is empowered or even bound to consider the community's attitude to the *boni mores*. The term *boni mores* (literally "good morals") refers to the legal convictions of society (and not their moral values).

The following are examples where the court took cognisance of the legal convictions of society: the general criterion for unlawfulness (*I* 1976 (1) SA 781 (RA) 788); and related to this, the limits within which consent may operate as a ground of justification (*Collett* 1978 (3) SA 206 (RA) 209); and in the case of *crimen iniuria*, the question whether an infringement of a person's right to privacy amounts to the commission of a crime (*A* 1971 (2) SA 293 (T)); as well as the question whether the infringement of a person's *dignitas* is serious enough to qualify as the commission of the crime (*Jana* 1981 (1) SA 671 (T) 676).

2.3.1.2 Statutory crimes

(a) Acts of parliament

If parliament wishes to create a crime, an Act purporting to create such a crime will best comply with the principle of legality if it expressly declares

(1) that the particular type of conduct is a crime, and

(2) what punishment a court must impose if it finds a person guilty of the commission of such a crime.

However, sometimes it is not very clear from the wording of the Act whether a section or provision of the Act has indeed created a crime or not. In such a case, the function of the principle of legality is the following: a court should only assume that a new crime has been created if it appears unambiguously

from the wording of the Act that a crime has in fact been created. If the Act does not expressly state that a particular type of conduct is a crime, the court should be slow to hold that a crime has in fact been created. This consideration or rule corresponds to the presumption in the interpretation of statutes that a provision in an Act which is ambiguous must be interpreted in favour of the accused (*Hanid* 1950 (2) SA 592 (T)).

In this regard it is feasible to distinguish between legal norms, criminal norms and criminal sanctions that may be created in an Act.

(1) **A legal norm** in an Act is merely a rule of law, the infringement of which is not a crime.

(2) A **criminal norm** is a provision in an Act stating clearly that certain conduct constitutes a crime.

(3) A **criminal sanction** is a provision in an Act prescribing what punishment a court must impose once a person has been found guilty of the particular crime.

The difference is illustrated by the following example. A statutory prohibition can be stated in one of the following three ways:

(1) You may not travel on a train without a ticket.

(2) You may not travel on a train without a ticket, and anybody contravening this provision shall be guilty of a criminal offence.

(3) You may not travel on a train without a ticket, and anybody contravening this provision shall be guilty of an offence and punishable with imprisonment for a maximum period of three months or a maximum fine of R1 000, or both such imprisonment and fine (cf *Letoani* and *Landman infra*).

Provision (1) contains a simple prohibition that constitutes a legal norm, but not a norm in which a crime is created. Although nonfulfilment of the regulation may well lead to administrative action (such as putting the passenger off at the next stop) it does not contain a criminal norm. Without strong and convincing indications to the contrary, a court will not hold that such a regulation has created a crime (*Bethlehem Municipality* 1941 OPD 230).

Provision (2) does contain a criminal norm, because of the words "shall be guilty of an offence". However, it does not contain a criminal sanction because there is no mention of the punishment that should be imposed.

Provision (3) contains both a criminal norm and a criminal sanction. The criminal sanction is contained in the words "and be punishable with imprisonment for a maximum period of three months or a maximum fine of R1 000, or both such imprisonment and fine."

Norm but no sanction

If a statutory provision creates a criminal **norm** only, but remains silent on the criminal **sanction**, as in provision (2) above, the punishment is simply at the court's discretion, that is, the court itself can decide what punishment to impose (Milton & Cowling *SA Criminal Law and Procedure vol III* 2 ed (1988) sv "Introduction Statutory Offences" 13).

sanction but no norm

In the unlikely event of a statutory provision containing a criminal **sanction**, but not a criminal **norm**, the court will in all probability decide that the legislature undoubtedly intended to create a crime, and will assume that a crime was indeed created (*Fredericks* 1923 TPD 350, 353; *Milton & Cowling* 11).

The South African courts have not always strictly observed the above-mentioned principles. In *Forlee* 1917 TPD 52, the court had to interpret a Transvaal Act of 1909 which forbade the purchase of opium. However, the Act had not laid down that contravention of the prohibition constituted a crime. The Act of 1909 was a re-enactment of an earlier statutory provision in which the purchase of opium was expressly declared a crime. It was held that, when the Act of 1909 was promulgated, the legislature had indeed had the intention of declaring the purchase of opium a crime, but that the criminal norm had probably been omitted inadvertently. According to the court, the prohibition would have been effective only if it had been reinforced by a criminal norm. For these reasons it was accepted that a crime had been created. The court also relied on a principle which it formulated as follows, "that the doing of an act which is expressly forbidden by the legislature upon grounds of public policy constitutes an indictable offence, even though no penalty be attached".

The decision in this case was criticised sharply by De Wet and Swanepoel 46–47, and in our opinion rightly so. If the legislature inadvertently omits the criminal norm, then the legislature itself should correct the error. It should not be left to the court to speculate on what the legislature wished to do and then to create a criminal norm. In any event, the principle quoted is formulated too broadly: ordinary legal norms can also be created by means of express prohibitions and can be based "upon grounds of public policy", but this still does not transform such legal norms into criminal norms.

In *Letoani* 1950 (3) SA 669 (O) and *Landman* 1960 (1) SA 269 (N) — two cases in which almost identical legislation had to be interpreted — it was held that a provision in an Act prohibiting people from travelling by train without a ticket did not create a crime, since it appeared from a study of the Act as a whole that it was only the subsequent refusal of the "free traveller" to make a special payment for the journey which constituted the crime.

In *La Grange* 1991 (1) SACR 276 (C), the accused was charged with a contravention of section 10(1) of the Child Care Act 74 of 1983, which provides that no person may perform certain acts with certain children. However, the Act does not contain a criminal norm declaring a contravention of section 10(1) a crime. The court held that this provision did not create a crime and that a contravention of the section could at most give rise to a civil suit.

Blanket penalty clause

Sometimes an Act contains a large number of prescriptions and directions, followed by a "blanket penalty clause" which reads that nonfulfilment of any of the provisions of the Act is a crime. The problem with such an Act is that it is sometimes obvious that certain provisions in the Act are purely administrative instructions and that it could not have been the legislature's intention to make noncompliance with such provisions punishable. This raises the question of how one is to decide which provisions were in fact

intended to be fortified with a criminal sanction and which were not. In *Bethlehem Municipality* 1941 OPD 227, the court had to deal with this type of legislation (in this case it was actually a provincial ordinance). A section in the ordinance imposed a duty on the municipality to submit its books, accounts and documents to an auditor, while another section contained a "blanket penalty clause". In this case, the municipality failed to submit its books and accounts to an auditor. The question was whether the municipality had committed a crime.

The yardstick applied by the court was to assume that the legislature had intended an omission on the part of an official to comply with a provision to result only in disciplinary action against the official, unless the legislature had declared **in the most unambiguous language** that such failure constituted a crime.

We submit that the legislature's very use of a "blanket penalty clause" in an Act undermines the principle of legality.

(b) Subordinate legislation

We next consider the effect of the *ius acceptum* rule on subordinate legislation. By subordinate legislation we mean regulations or other provisions promulgated not by parliament, but by a subordinate legislature such as a municipality, minister or official who is authorised by a specific Act to promulgate regulations on specific matters. The Act that authorises a subordinate person or body to promulgate regulations is known as the "enabling Act".

Before one may assume that the subordinate legislature has created a crime, the following three requirements must be fulfilled:

(1) **The enabling statute must invest the subordinate legislative body with the power to create crimes.** A consistent application of the requirement of legality demands that the enabling statute should **expressly** grant the power to create crimes to the subordinate legislative body. If such power has not been granted expressly it should not be assumed that the subordinate legislature has the power to create crimes. In our opinion, the correct view was adopted in *Maqano and Madumo* 1924 TPD 129 141, where Krause J said: "(W)here an authority has power to make rules or regulations and the enabling statute does not also empower such authority to impose penalties for non-observance of such rules, then no criminal offence is committed by anyone who contravenes such regulations, whatever administrative or other disabilities may result from their non-observance."

Unfortunately, this point of view is not universally accepted in our law, chiefly because it has not been recognised that the principles of criminal law must necessarily influence the rules of interpretation and administrative law in this regard. Nevertheless, we submit that it would be more in accordance with the principle of legality to require that the enabling Act should expressly invest the subordinate body with the power to create offences.

(2) **The subordinate body should indeed have created a crime.** If (eg the municipality) it is the intention of the subordinate legislature (eg. the munisipality) that someone be held criminally liable because of the infringement of a certain provision, that intention must be stated unequivocally, in other words, the provision should contain a criminal norm.

(3) The provision should not be *ultra vires* **(beyond the power extended to the subordinate body).**

If the material content of the subordinate provision goes beyond the subject matter which the subordinate legislature is authorised to legislate, the subordinate provision is *ultra vires* and invalid. If, for example, the enabling act authorised the subordinate body to enact regulations concerning road traffic, the subordinate body's provisions will be *ultra vires* if they deal with health or education.

If the subordinate legislation is wide and vaguely formulated, it may very well extend beyond the power conferred on the subordinate body. In *Goncalves* 1975 (2) SA 51 (T), the court considered the validity of a government notice promulgated in terms of the (now revoked) Gambling Act 51 of 1965. The Act authorised the subordinate body to prohibit certain gambling devices, but the government notice, purporting to prohibit pintables, was phrased so widely that it also included recognised games of skill such as billiards and ping-pong. The government notice was declared *ultra vires* for being too wide.

The correct approach to be followed to ascertain whether a subordinate provision is *ultra vires* in respect of the enabling Act was set out as follows in *Goncalves supra*:

- All the possible **meanings of the subordinate provision** must first be determined by examining the language, context and background.
- After that, the **empowering provision** must be examined to determine the degree to which the above meanings (or some of them) fall within its ambit.
- It is the duty of the court to interpret a subordinate provision to be valid rather than invalid. However, this rule only applies where there are at least two interpretations, one of which retains validity while the other becomes invalid (the court will then rather assign the meaning which maintains the validity of the provision).

Note that subordinate legislation may also be declared invalid in terms of the Rules of administrative law and interpretation of statutes.

2.3.2 The *ius praevium* principle

The principle of legality implies that no-one should be found guilty of a crime unless his or her conduct was recognised by law as a crime **at the moment it took place**. It follows that the creation of a crime with retrospective effect (ie the *ex post facto* creation of crimes) is inconsistent with the principle of legality. This application of the principle of legality is known as the *ius praevium* rule.

The *ius praevium* principle is contained in section 35(3)(1) of the Constitution (Act 108 of 1996). The section provides that **every accused person has a right to a fair trial, which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted**. This means that any legislation by any legislative body which creates a crime with retrospective effect is null and void.

Before the *ius praevium* principle was incorporated for the first time in the 1993 Constitution (the forerunner of the 1996 Constitution), the South African parliament was free to create a crime with retrospective effect. A case in point is the Terrorism Act 83 of 1967, which created a new crime called "terrorism". According to section 9(1) of this Act (which was promulgated in 1967), the provisions of the Act applied retrospectively as from 1962. In *Tuhadeleni* 1969 (1) SA 153 (A), the accused were found guilty of this crime despite the fact that the crime did not exist when they had committed their acts. (They were taken into custody on 26 August 1966 in Ovamboland, Namibia. However, their acts were of such a nature that they could have led to convictions of well-known and existing crimes such as high treason, sedition, assault and attempted murder.)

2.3.3 The *ius certum* principle

Even if the *ius acceptum* and the *ius praevium* principles (discussed above) are complied with, the principle of legality can still be undermined by the creation of criminal norms which are formulated vaguely or unclearly. If the formulation of a crime is obscure or vague, it is difficult for the subject to understand exactly what is expected of him or her. At issue here is the *ius certum* principle.

An extreme example of an excessively widely formulated criminal prohibition would read as follows: "Anyone who commits an act which is harmful to the community commits a crime."

Before the Constitution of the Republic of South Africa, Act 200 of 1993 (subsequently replaced by the Constitution of 1996) came into effect, the South African courts did not have the power to declare an unclear criminal provision in an Act of parliament null and void. The only possibility a court had in a case of a vague criminal provision was to interpret such provision strictly (see the discussion below of the *ius strictum* function of the principle of legality).

The 1996 Constitution does not expressly provide that vague criminal provisions contained in legislation may be declared null and void. In a number of cases, however, the courts have considered whether statutory as well as common-law crimes were unconstitutional on the grounds of vagueness.

2.3.3.1 Common law

In *Friedman (1)* 1996 (1) SACR 181 (W), the accused was charged with fraud. The defence argued that the rule in regard to fraud, in terms of which the prejudice (flowing from the misrepresentation) need be neither actual nor

patrimonial, was unconstitutional on the ground of vagueness. The court rejected the argument, stating as follows: "The present definition of fraud is wide, but that does not make it difficult, much less impossible, to ascertain the type of conduct which falls within it." It is noteworthy that nowhere in the judgment did the court call into question the principle that rules of common law might be declared null and void on the ground of vagueness.

Examples of rules of common law or of definitions of common-law crimes which come to mind in this regard are

- that part of the definition of high treason stating that **any act committed with the intention of endangering the security of the state** amounts to high treason
- that part of the definition of the common-law crime of public indecency stating that the crime may be committed through **any conduct in public which tends to deprave the morals of others, or which outrages the public's sense of decency**

However, it is impossible to comply with the *ius certum* principle in every respect. It is impossible in any legal system — even one which best upholds the principle of legality — to formulate legal rules in general and criminal provisions in particular so precisely and concretely that there will never be any difference of opinion about their interpretation and application. It is precisely for this reason that the principle of legality can literally never be fully complied with in any legal system. The legislature must necessarily make use of general concepts in order to express itself.

2.3.3.2 Statutory crimes

(a) Acts of Parliament

In *Lavhengwa* 1996 (2) SACR 453 (W), the accused was charged with a statutory form of contempt of court *in facie curiae* in contravention of section 108(1) of the Magistrates' Court Act 32 of 1944, in that he *(inter alia)* misbehaved himself in court. In terms of section 108(1), the crime is committed *inter alia* by a person "who misbehaves himself in the place where the Court is held". The accused was an attorney who defended a client in a criminal case and who in the course of the trial refused to obey an interlocutory order made by the presiding magistrate. The question was whether the provisions of section 35(3)(a) of the Constitution had been complied with.

The court (Claassen J) held that the right created in section 35(3)(a) implied that the charge itself had to be clear and unambiguous. This, according to the court, would only be the case if the nature of the crime with which the accused was charged was sufficiently clear and unambiguous to comply with the constitutional right to be sufficiently informed of the charge as set out.

Section 35(3)(1) of the Constitution stipulates that every accused person has a right to a fair trial, which includes the right **to be informed of the charge in sufficient detail to be able to answer it.**

The court has applied this provision to the section in question. In deciding

whether the definition of a crime is too vague to comply with the provisions of the Constitution, it must be kept in mind that

(1) absolute certainty is not required; reasonable certainty is sufficient (*Pretoria Timber Co (Ltd)* 1950 (3) SA 163 (A) 176)

(2) in deciding whether there is reasonable certainty, the court approaches the relevant definition of the crime on the basis that the definition is directed at ordinary intelligent people who are capable of thinking for themselves, and not at foolish or capricious people

The court was of the opinion that once a magistrate had indicated what he regarded as misbehaviour and had informed the accused, the misbehaviour would have been sufficiently defined. The accused would therefore know what the charge against him was.

Consequently the court held that the crime with which the accused was charged was not formulated so vaguely as to be in conflict with the provisions of the Constitution. The accused was accordingly convicted of the crime.

Although the constitution 1996 does not refer expressly to the *ius certum* there can be little doubt that crimes created in any legislation may be declared null and void on the ground of vagueness:

- Section 35(3) provides that every accused **has the right to a fair trial**, which includes a number of specific rights set out in paragraphs (a)–(o) of the section. In *S v Zuma* 1995 (2) SA 642 (CC); 1995 (l) BCLR 401 (SA); 1995 (1) SACR 568 (CC), the court held, with reference to the similar provision in section 25 of the interim Constitution Act 200 of 1993, that the right to a fair trial was broader than the list of specific rights set out in the section. It is submitted that the right to a fair trial includes the right to be properly informed as to what constitutes a crime and what does not constitute a crime. This refers to the principle of fair warning.
- The "void-for-vagueness" rule may also be based on section 12(1)(a) of the Constitution, which provides that everyone has the right to freedom and security of the person, which includes the right **not to be deprived of freedom arbitrarily or without just cause**. As was pointed out, one of the objections to vague statutes is that they are susceptible to arbitrary and discriminatory enforcement.
- It is arguable that if a criminal norm in legislation is vague and uncertain, the *ius acceptum* principle is not complied with: it is unacceptable that the act or omission in question in fact constituted an offence prior to the court's interpretation of the legislation, and the crime is therefore effectively created *ex post facto* by the court. Vague criminal provisions enable courts in effect to create crimes within the wide and vague general provision.
- The operation of the *ius certum* principle in our law may also be based on the provisions of section 35(3)(a) of the Constitution, which provides that every accused person has a right to a fair trial, including the right to be informed of the charge in sufficient detail to be able to answer it *(Lavhengwa supra)*.

The Bill of Rights applies to all law, which implies that statutory as well as

common-law criminal provisions may be subject to the ''void-for-vagueness'' rule (see *Friedman supra*).

(b) Subordinate legislation

A court is competent to declare subordinate legislation null and void on the ground of vagueness or uncertainty.

> *Lasker* 1991 (1) SA 558 (C): A harbour regulation, in terms of which an official could order any person to leave a harbour, was declared null and void because it was uncertain what was meant by the term ''harbour''.

Feetham JP expressed the principle as follows in *Shapiro* 1935 NPD 155 159:

> Statutes do not empower the authorities to make regulations so uncertain that people will not know how to comply with them or whether they are subject to them or not. So if a regulation is found to be void for uncertainty, that is one way of arriving at the conclusion that it is ultra vires.

In *Jopp* 1949 (4) SA 11 (N) 12–14, the court declared that

> the court must ... ask itself whether the by-law or regulation ... indicates with reasonable certainty to those who are bound by it, the act which is enjoined or prohibited. If it does, it is good; if it does not, it is bad; ... the test is whether a reasonably precise meaning is ascertainable.

Note that only **reasonable** clarity is required; absolute certainty in the sense that in all circumstances one will know precisely how to apply the provision is not required.

2.3.3.3 Can the *ius certum* principle be fully complied with?

One can distinguish between descriptive and normative components of the definition of the crime, something which is often done by German writers. A descriptive component contains a description of a relatively concrete concept such as a ''motor-vehicle'', ''a girl under the age of 12 years'' or a ''tree''. Normative components, on the other hand, must still be **analysed and interpreted** by the legal subject or judge in order to ascertain whether they are applicable in a specific case — think for example of requirements such as ''the violation of dignity'' (in *crimen iniuria* and contempt of court), ''potential prejudice'' (in fraud), ''appropriation'' (in theft) and ''possession'' (eg, cases of possession of drugs). It is clear that the more descriptive components a definition of a crime contains, the easier it is for the individual and the court to establish exactly what conduct is being prohibited. On the other hand, the inclusion of normative components increases the degree of uncertainty about the criminal norm, but it is impossible for the legislature to avoid the inclusion of normative components. (Moreover, uncertainty can arise even in respect of the precise meaning of the descriptive components in the definition of a crime.) The requirement of negligence in the definition of culpable homicide is a good example of a normative component of the definition of the crime: the precise determination of negligence depends on the facts of each case.

2.3.4 The *ius strictum* principle

The fourth application of the principle of legality is to be found in the *ius strictum* rule. Even if the above-mentioned three aspects of the requirement of legality — *ius acceptum*, *ius praevium* and *ius certum* — are complied with, the general principle can nevertheless be undermined if a court is free to interpret the words or concepts contained in the definition of the crime widely, or to extend the application thereof by analogous interpretation.

2.3.4.1 Common-law crimes

The rule that provisions which create crimes or describe criminal conduct should be interpreted strictly rather than broadly also applies to common-law crimes. A court is not free to extend the definition or field of application of a common-law crime by means of a wide interpretation of the existing requirements for the crime. Therefore, if there is uncertainty about the scope of one of the elements of a common-law crime, the court should interpret the definition of that particular element strictly. The court may be unsure whether, according to our old common-law sources, a specific kind of conduct can be brought under a particular recognised common-law crime. (There are often differences of opinion among our common-law writers.) A consistent application of the principle of legality implies that, in such cases, a court must accept that the conduct does not fall under the definition of such a crime. It is for the legislature to declare (if it so wishes) that such conduct amounts to the commission of a particular crime (or to the commission of a new statutory crime). We will consider two examples which illustrate this aspect of the principle of legality.

The following two cases serve as examples where the court interpreted common law crimes strictly:

> Before 1955 it was uncertain whether the unlawful use of another's property (*furtum usus*, ie temporary use of someone else's property without his consent) amounted to the commission of the common-law crime of theft. The common-law writers do not expound very clearly on this aspect. In *Sibiya* 1955 (4) SA 247 (A), the Appellate Division ruled conclusively that such conduct did **not** amount to theft. Schreiner JA, who delivered the majority decision, made the following observations (256–7):
>
> > There should if possible be a high degree of rigidity in the definition of crimes; the more precise the definition the better. It should not be left to Judges to decide whether a particular act was done with evil intent or furtively, defining those expressions as best they can to meet the case before them. Without wishing in the least to detract from the importance of elasticity or capacity for growth in wide areas of our legal field, I do not think that the definition of crime is such an area. If there are acts similar to theft which should be punished, the Legislature must intervene. As was said by SMITH, J, in *Fortuin's* case [(1883) 1 AC 290] at 298, it is not for the Courts to create new crimes; nor is it for the Courts to give an extended definition to a crime in order to provide a new protection for property, even if modern conditions indicate that in some instances such protection might be desirable.

(As a matter of interest, shortly after the *Sibiya* decision, the legislature intervened and created a new statutory offence in section 1(1) of the General Law Amendment Act 50 of 1956, which made a particular form of *furtum usus* punishable.)

A second example of the application of this aspect of the principle of legality can be found in certain judgments dealing with the common-law crime of extortion:

> In some extortion cases the question arose of whether the advantage which the perpetrator sought to obtain need necessarily be of a financial or patrimonial nature. There have been conflicting decisions on the question of whether the advantage in the crime of extortion should be limited to a patrimonial advantage. In *Von Molendorff* 1987 (1) SA 135 (T), the question once again came before the court. The court held that the field of application of this crime should be restricted to cases in which the advantage sought by the perpetrator was money, goods or some other patrimonial advantage. However, what is of particular importance is that the court (per Ackermann J) based its conclusion, namely that the old sources must be interpreted restrictively, on an express reliance on the principle of legality.

(As a matter of interest, shortly thereafter, in *Ex parte Minister van Justisie: in re S v J and S v Von Molendorff* 1989 (4) SA 1028 (A), the Appellate Division ruled that extortion should be limited to cases in which the advantage was of a patrimonial nature. Note that, in 1992, the legislature enacted sect 1 of the General Law Amendment Act 139 of 1992 which provides that it shall be sufficient on a charge of extortion to prove that any advantage was extorted, whether or not such advantage was of a patrimonial nature.)

It would be wrong to infer from the above discussion of decisions relating to theft and extortion that if at any time a person is charged with a common-law offence and the facts of the case do not clearly correspond with those of any examples of the offence quoted by the common-law authorities, the accused should, therefore, be acquitted. The principle of legality does not mean that a court should so slavishly adhere to the letter of the old sources of the law that common-law crimes are deprived of playing a meaningful role in our modern society — one which in many respects differs fundamentally from the society of centuries ago when our common-law writers lived. We wish to refer to only two instances where the South African courts were prepared to regard certain types of conduct as amounting to the commission of common-law crimes, in spite of the fact that the common-law writers did not cite the commission of these acts as examples of the crimes in question.

theft of credit

> First, it is well known that the courts broadened the field of application of theft by deviating from the common-law rule that only corporeal, movable property belonging to someone else can be stolen. For instance, when someone who occupies a position of trust (such as a trustee) receives funds or cheques which he must invest or otherwise apply to the advantage of somebody else, and in violation of his duties deposits such funds or cheques into his own bank account, he is committing theft. What he actually steals is not someone else's corporeal, movable property, but purely an ''abstract sum of money'' or ''credit'' — which is, moreover, ''credit'' in respect of which (from a technical point of view) he has a right of disposal. See, for example,

Verwey 1968 (4) SA 682 (A) 687; *Kotze* 1965 (1) SA 118 (A) and, in general, Snyman 484–488.

defeating or obstructing the course of justice

A second example can be found in *Burger* 1975 (2) SA 601 (C). Here the court had to decide to what extent it was prepared to extend or adapt the field of application of the common-law crime known as defeating or obstructing the course of justice, in order to adapt it to present-day circumstances. In this case, the accused, while driving his motor car, ran over and killed a pedestrian. Immediately afterwards he made a false statement to the police in which he alleged that his car had been stolen. His intention was to divert police suspicion away from himself in order to evade a charge of culpable homicide. The crime of defeating or obstructing the course of justice is derived from the *lex Cornelia de falsis*, which dates from 81 BC. It deals with the making of a false statement but, as the court pointed out in its investigation into the common-law sources, laying a false criminal charge with the police is not specifically mentioned anywhere. Centuries ago, when our common-law authorities were writing their texts, an organised police force such as we know it today did not exist. Nevertheless, the majority of the court found that, despite a lack of direct common-law authority, the accused's behaviour amounted to the commission of a crime.

One possible aid in establishing whether a court would be prepared to "extend" or "adapt" the field of application of a common-law crime would be to consider whether one was concerned with situations or phenomena peculiar to our modern society, but which were unknown to earlier societies. Here one thinks of modern technology such as electronic computers which are used to transfer credit (this plays a role in the theft of money), and a modern, organised police force incorporating many functions (which played a role in the decision of *Burger supra*). It would appear that, in a case where these factors are present, a court would indeed be prepared to give a wide interpretation to the provisions of the common law or to "stretch" them, as it were, in order to meet the demands of the present day.

On the other hand, where one is dealing with situations which could just as easily have occurred centuries ago, such as the unlawful appropriation of the use of another's property (cf *Sibiya supra*) or exercising pressure on somebody else in order to obtain an advantage which is not patrimonial (cf *Von Molendorff supra*), it appears that the courts (justifiably) would not be prepared to extend the existing field of application of the crime.

Since the principle of legality is now incorporated in the Constitution, it is unlikely that the courts will readily extend the application of crimes in future. Those instances where the application of crimes has already been extended in decisions of our courts are, in our view, entrenched in our criminal law, and it is highly unlikely that a court will reverse its position and, for example, hold that an accused who stole money in the form of "credit" cannot be convicted of theft as it was not an act constituting an offence at the time the "credit" was stolen.

2.3.4.2 Statutory provisions

There is a well-known rule in the interpretation of statutes, namely that crime-creating provisions in Acts of parliament and in subordinate legislation must

be interpreted strictly (*Sachs* 1953 (1) SA 392 (A) 399–400; *Stassen* 1965 (4) SA 131 (T) 134). Sometimes this method of interpretation is referred to as interpretation *in favorem libertatis*. The underlying idea is not that the Act should be interpreted to weigh against the state and in favour of the accused, but only that **where doubt exists about the interpretation of a criminal provision**, the accused should be given the benefit of the doubt.

In applying the *ius strictum* principle, one has to establish whether the legislature's intention appears clearly and unambiguously from the provision. If the intention of the legislature is clear and unambiguous, the court cannot interpret a provision more strictly in order to change the effect of the provision. This would be the case where a party who is dissatisfied with the result of a provision would apply for a strict interpretation to minimise the effect of the provision. ''It cannot be applied in order to vary the plain and clear language of the legislature ... and induce us to give an interpretation at variance with the obvious intention'' (*Moss v Sissons and McKenzie* 1907 EDC 156 167). Only if it appears that the provision is ambiguous, would there be room for a strict interpretation. The provision is ambiguous if it is capable of being interpreted in two different yet acceptable ways, one of which favours the accused and the other not. However, the ambiguity must not be artificial or far-fetched.

2.3.4.3 Prohibition on extension by analogy

The *ius strictum* principle implies further that a court is not authorised to extend a crime's field of application by means of analogy to the detriment of the accused. This rule applies just as much to statutory crimes as to common-law crimes.

In private law, the extension of legal principles by analogy is permissible within certain limits. A classical example is the *Lex Aquilia* in Roman law which, by means of analogy, has been extended to cover certain situations which do not fall within the letter of the law. Thus, over a period of time, the *Lex Aquilia* has evolved as one of the most important sources of our law of delict.

However, in the area of criminal law, extension of a **criminal norm** by analogy is not permitted. It was stated in *Oberholzer* 1941 OPD 48 60 that ''in the interpretation of a penal provision it is not competent for the court to extend the meaning of words so as to cover crimes of an equal atrocity or of a kindred character''.

A good example of a case in which the court refused to extend the area of application of a criminal norm by means of analogy is *Smith* 1973 (3) SA 945 (O). In this case, the accused was charged with having been in possession of indecent **photographic** material, in contravention of certain provisions of the now repealed Act 37 of 1967. However, it appeared that the pictures in his possession were **photostatic** reproductions. The court refused to extend the provisions of the Act, and the accused was acquitted.

Although it is not permissible to extend the description of punishable conduct by means of analogy, there is no objection in criminal law to the extension of **defences** by analogy. Thus, for example, the Appellate Division in *Chretien*

1981 (1) SA 1097 (A) held that the defence of a lack of criminal capacity should not be limited to cases of mental illness and youth, but should also be extended to apply to certain cases of intoxication. In *Masiya* the Constitutional Court extended the definition of rape to include anal penetration. However, the court refused to convict the accused of rape as anal penetration was not an element of the crime when he committed the crime.

2.3.5 The principle of legality in punishment

In the discussion so far, we dealt with the application of the principle of legality to the creation, validity, formulation and interpretation of **crimes** or **definitions of crimes**. When dealing with the imposition of punishment, the *ius acceptum*, *ius praevium*, *ius certum* and *ius strictum* principles are equally applicable. The application of the principle of legality to punishment (as opposed to the existence of the crime itself) is often expressed by the maxim *nulla poena sine lege* — no penalty without a statutory provision or legal rules.

2.3.5.1 The *ius acceptum* principle

The application of the *ius acceptum* principle to punishment is as follows: in the same way as a court cannot find anyone guilty of a crime unless his or her conduct is recognised by statutory or common law as a crime, it cannot impose a punishment unless the punishment, in respect of both its nature and extent, is recognised or prescribed by statutory or common law.

The Criminal Procedure Act 51 of 1971 contains provisions which prescribe which **kind** of punishment (eg imprisonment) may be imposed for which crime. In the case of statutory crimes, the maximum penalty which can be imposed for each crime is usually specifically set out. If the legislature creates a crime, it should, in order to comply with the principle of legality, state the punishment for the crime. This limits the possibility of an unusual, cruel or arbitrary punishment being imposed. If the legislature creates an offence but omits to specify the punishment, then the punishment is in the discretion of the court. (In the case of common-law crimes, the punishment is, subject to a few reservations, in any event completely in the discretion of the court.)

The principle of legality does not imply that the legislature should determine beforehand precisely what penalty should be imposed in what circumstances. This would unduly restrict the court's discretion to consider a wide range of factors about the individual accused, the circumstances surrounding the commission of the particular crime and the interests of society (*Matseare* 1978 (2) SA 931 (T) 932–933). For the same reasons it is also inadvisable for the legislature to prescribe minimum penalties.

The constitutionality of the minimum sentences prescribed in sections 51, 52 and 53 of the Criminal Procedure Act 51 of 1977 (*inter alia* minimum life imprisonment sentences for rape, murder and robbery committed under certain circumstances) was considered in *Jansen* 1999 (2) SACR 369 (C) and *Swartz* 1999 (2) SACR 380 (C). The court held that mandatory minimum sentences could infringe upon the fundamental right against cruel, inhuman

and degrading punishment in contravention of section 12(1)(e) of the Constitution SA 1996. However, these sentences were not *per se* unconstitutional, as the Act allows a lesser sentence where substantial and compelling circumstances exist. A sentence imposed in an individual case may be tested constitutionally and may be found to be so disproportionate to the gravity of the offence as to constitute a cruel and degrading punishment in the particular case.

2.3.5.2 The *ius praevium* principle

The application of the *ius praevium* principle to punishment is as follows: if the punishment to be imposed for a certain crime is increased, it must not be applied to the detriment of an accused who had committed the crime before the punishment was increased. This principle is incorporated in section 35(3)(n) of the Constitution, Act 108 of 1996, which provides that the right to a fair trial includes the right **to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing**.

In *Mazibuko* 1958 (4) SA 353 (A), the accused committed robbery on 18 November 1957. On that date, the court did not have the power to impose the death penalty for robbery, but on 21 February 1958 legislation came into operation which gave the court the power to do so. On 14 May 1958, the accused was found guilty of robbery and, in terms of the new legislation, the trial court imposed the death sentence. On appeal it was held that the trial court had not been empowered to impose the death penalty since the penalty had not been a competent form of punishment **on the date on which the crime had been committed**.

The presumptions against the retrospective effect of new legislation are not applicable in cases where the legislature has **reduced** the penalty. This exception is based on the fact that provisions in an Act which favour the subject do in fact have retrospective effect (Steyn 95). In *Sillas* 1959 (4) SA 305 (A) 308, the Appellate Division declared that the *ratio decidendi* of the judgment in *Mazibuko (supra)* was not that the punishment must always correspond to the punishment which could have been imposed according to the law applicable at the time of the commission of the crime. Such a rule would lead to the unacceptable conclusion that even if an amending Act prescribed a more lenient maximum punishment, the previous, heavier punishment could be imposed should the legislature not expressly or by necessary implication declare that the more lenient punishment be imposed in such cases. The rule at issue in *Mazibuko* applies only to an Act which increases the punishment.

If the law relating to punishment is amended statutorily after an accused has been sentenced by a court, but before his appeal has been heard, the position is *mutatis mutandis* the same: the court of appeal may not impose a new, **heavier** punishment which the new Act authorises, but may apply a new Act which prescribes a **lesser** punishment and, in so doing, may lessen the punishment on appeal. (See *Prokureur-generaal*, *Noord-Kaap v Hart* 1990 (1) SA 49 (A); *Dreyer* 1990 (2) SACR 445 (A).)

2.3.5.3 The *ius certum* principle

The application of the *ius certum* principle to punishment is that the legislature should not express itself vaguely or obscurely when creating and describing punishment. Furthermore, a court may not extend by analogy the provision which prescribes the punishment to cases which the legislature could not have had in mind.

2.3.5.4 The *ius strictum* principle

The *ius strictum* principle implies that a provision in legislation which creates and prescribes punishment must be interpreted strictly if that provision is ambiguous. Section 84 of the Correctional Services Act 8 of 1959, which describes the sentences of correctional supervision, for example, appears to give a wide and broad discretion to the correctional services authorities to determine how the sentence should be served. In the case of *R* 1993 (1) SA 467 (A), this provision was interpreted strictly by the court when it held that it was for the sentencing court to determine the content of the sentence and for the correctional services authorities to carry out the court's directives.

ACTIVITY

(1) X pesters the municipality to remove his refuse twice a week. When the municipality do not comply with his request, he moves into the reception area of the municipality's offices and refuses to leave. He is charged with the contravention of a municipal by-law, namely that he is creating a nuisance in a public area. Discuss the application of the *ius acceptum* rule to the by-law.

(2) X committed a crime on 24 June 2002 and is convicted of the crime on 6 December 2002. A law was passed on 10 August 2002, decreasing the prescribed punishment for the crime. The court imposes the sentence which applied on 24 June 2002. Advise X of his rights.

(3) What would the position be if the law passed in August had increased the prescribed punishment?

FEEDBACK

(1) It is important to determine whether the subordinate legislature has indeed created a crime or has acted *ultra vires*. Three requirements have to be fulfilled in this regard. If the provision is vague, as in the example, it may extend beyond the power of the subordinate legislature. See the discussion under 2.3.1.2b.

(2) X will be punished with the less severe punishment because the punishment has been diminished since he committed the crime. See the discussion under 2.3.5.2.

(3) X will be punished in terms of the prescribed punishment on 24 June 2002. See the discussion under 2.3.5.2.

STUDY UNIT 3

MENTAL ABNORMALITY AS A DEFENCE IN CRIMINAL LAW

3.1 Introduction

Criminal capacity is an indispensable prerequisite for criminal liability in any offence (*Mahlinza* 1967 (1) SA 408 (A) 414–415), whether fault be required in the form of intent or negligence, or whether no fault be required for the particular crime by reason of the doctrine of strict liability. Before the question can be asked whether the accused had a specific form of fault, it must be established that he had criminal capacity at the time of the commission of the act (cf De Wet & Swanepoel *Strafreg* 103; *Mahlinza supra*; *Rumpff Report* 12.26).

If a person lacked criminal capacity at the time of his or her conduct, he or she is not criminally liable, and it is then unnecessary to investigate whether he or she acted with intent or negligence. In the past, criminal capacity was sometimes regarded as part of the element of fault. It is, however, clear that the courts today regard criminal capacity as a separate, independent element of a crime.

In *Adams* 1986 (4) SA 882 (A), Viljoen JA confirmed that a definite distinction had to be drawn between criminal capacity and intent *(mens rea)*, and that criminal capacity was a prerequisite for criminal liability. The court also

suggested that there was no reason why a distinction should be drawn between criminal irresponsibility or criminal incapacity caused by insanity, and criminal irresponsibility flowing from any other cause. (We shall return to this important observation in study unit 4.)

> Criminal capacity can be described as the mental ability to appreciate the wrongfulness of one's act or omission and the ability to act in accordance with such appreciation.

3.1.1 Determinism and indeterminism

The question of criminal capacity prompts several fundamental problems of a philosophical kind. The question about the presence or absence of criminal capacity presupposes that a person has a choice and is able to decide to act voluntarily. However, the fundamental question is: Does a person have a free will? The answer to this question also impacts on the question of the purpose of criminal law.

There are two approaches to the freedom of the human will: determinism and indeterminism.

human's destiny already decided

In terms of **determinism**, the fate of human beings is determined by factors beyond their control. The individual's destiny is already decided for him, as it were; he cannot decide it himself. In a criminal-law context this means that the individual's psychological constitution determines whether he or she will be a criminal or not (5.28); and, as some authorities hold, one's psychological constitution is simply the inevitable product of the cells of one's body. What one is, or is going to be, is therefore already determined in the protoplasm. A modern school of thought, known as sociobiology, teaches that social behaviour is determined by the human genes.

According to the most extreme deterministic point of view, there is no sense in punishment. In the criminal we have a sick person, and sick people should be medically treated and not punished. Crime is simply symptomatic of an illness. All criminals are sick people (1.23), in other words, only sick people commit crimes. We do not punish a man because he has measles or scarlet fever. How then can we dare to punish a man whose mind is sick or who is mentally abnormal? Criminal law therefore has no purpose. Let's put it aside! Some adherents of determinism even refuse to use the term "criminal law", replacing it with the expression "social defence". They would like to see prisons converted into hospitals for the mentally deranged.

human will is free

Indeterminism, on the other hand, is the doctrine which proceeds from the premise that the human will is essentially free; it is not incontrovertibly predestined to any particular line of conduct.

According to this approach is it believed that all human beings have the ability to choose freely between different courses of action. Human beings can therefore justifiably be held responsible for their actions and can be called to account in a criminal court. It follows that people will only be held criminally liable if their actions are determined by their own free will. Persons who lack

criminal capacity as a result of mental illness (or some other factors) cannot be held criminally liable.

3.1.2 Historical background

Before 1977, the legal position on incapacity or nonresponsibility was governed by common law and (briefly summarised) was as follows:

> A person was regarded as criminally nonresponsible if it appeared that, on account of disease of the mind or mental defect,
>
> (1) he was prevented from knowing the nature and quality of his conduct, or that it was wrong; or
>
> (2) he was the subject of an irresistible impulse which prevented him from controlling his conduct.

3.2 Criteria for criminal incapacity

3.2.1 Introduction

The criteria for the determination of criminal incapacity or nonresponsibility were the main subject of the investigation by the Rumpff Commission. The Commission focused on several aspects before recommending a new criterion.

The bracketed references in this chapter are to the paragraphs of the *Rumpff Commission's Report* of 1967, produced by the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (published as RP 69/1967). This report represents an in-depth investigation into the principles relating to the criminal capacity of mentally ill or defective persons. It resulted in significant law reforms in South Africa, which are embodied in sections 77, 78 and 79 of the Criminal Procedure Act 51 of 1977.

3.3 Criteria for criminal capacity

3.3.1 Criminal capacity as a legal concept

Crime is a legal concept and not merely a term used to diagnose socially abnormal or harmful behaviour. As a legal concept, crime includes not only the concept of criminal capacity as part of the element of culpability but also the act definitional elements, and unlawfulness. The fact that criminal capacity forms part of the elements of a crime means that the absence thereof cannot be viewed as a purely medical matter, as psychiatrists are wont to do.

It cannot be denied that mental disease, its causes, its classification and its cure fall within the ambit of medical science. However, mental disease is also of the greatest relevance to the administration of law and in particular criminal law. Law deals with what human conduct ought to be (the *sollen* of the German philosophers, as opposed to a study of what is — the *sein* — which is the realm

of natural science). It is the task of the law to define the social norms to which men are bound, and it is the task of the courts to decide whether or not specific conduct conformed to these norms (9.48; 1.30). Criminal capacity is therefore a legal concept and a question which must be decided by a court of law (4.40; 4.43; 5.28). In doing so, the court must obviously be guided by psychiatrists and psychologists since they are the experts in the field of the *sein* of human behaviour.

A practical problem confronting the courts in assessing criminal capacity is that judges are sometimes called upon to make a choice between the opposing views advanced by experts (4.67; 4.73). This is nothing unusual, however. In adjudicating upon both criminal and civil matters, courts are often faced with controversial expert views on such questions as the cause of death, whether or not an accused was intoxicated, paternity, or whether or not a machine was defective. In such situations the court must make a rational choice as best it can. In doing so it is aided by the rules defining the **onus** of proof. The dilemma of having to choose between opposing expert views is sometimes avoided, because the factual basis upon which a particular opinion rests is unacceptable to the court.

3.3.2 Criteria

Having determined that criminal capacity is a legal concept, the existence of which should be determined by the court, the question of which criterion to apply is raised. The criteria applied by psychiatrists are unacceptable because the approach of psychiatry to criminal capacity is different from that of the law. Modern psychiatry, which is a therapeutic (curative) science, does not even employ the term ''insanity'' used by lawyers (9.73; 9.74). Psychiatrists use ''mental abnormality'' as a general term to cover all forms of mental disease, mental deficiency and personality disorders. ''Mental disease'' or ''disease of the mind'' is used in a narrower sense (7.2). Various types of mental disease are identified by special names, but some apparently defy any classification other than ''indeterminate types'' (7.3). (''Nervous disorder'', it must be noted, is a medical concept completely different from ''mental disease''.) There is still a good deal of controversy amongst psychiatrists on the classification and terminology of mental diseases.

The 1843 M'Naghten rules, which essentially reduced the test for incapacity to the ability to distinguish between right and wrong, were an oversimplification of the matter and are therefore unsuitable as criteria.

Although the ''irresistible impulse'' doctrine, by which the ''right and wrong'' test was amplified in South Africa and some American jurisdictions, is more sophisticated, it has also been rejected by psychiatrists as being far too narrow (7.18). Perhaps The American *Durham* (1954) test has come the closest to acceptance by psychiatrists, but one can rightly ask whether it is in fact a **legal** criterion (7.19). (*Durham* essentially ruled that the accused was blameless if the crime was the product of mental disease or defect. Although initially hailed as a breakthrough, the test did not find much favour with the American courts in the long run.)

In later decisions, the test for criminal nonresponsibility was narrowed. In a few states, the insanity defence was abolished altogether by new legislation, which means that an accused could not be acquitted on the ground that he or she was suffering from mental illness but must be convicted and then treated as a mental patient. (See Slovenko R "The Continuing Saga of the Insanity Defence" in *Essays in Honor of Dean Paul K Ryu* (1988) 46 at 60.)

As indicated by the Rumpff Commission, we now acknowledge that a legal criterion should be based on modern psychology which views personality as an integrated concept. One cannot divide personality into different parts. Although various aspects of human personality can be distinguished, they constitute an integrated whole and cannot be separated when one is dealing with an individual case.

These aspects are the **cognitive** (relating to perception and intellect (9.13)), the **affective** (relating to the emotions (9.17)) and the **conative** (relating to will (9.20 et seq)) aspects. Any legal criterion which does not provide for consideration of all three cannot properly be described as scientific.

3.4 Criminal incapacity in consequence of mental illness or mental defect

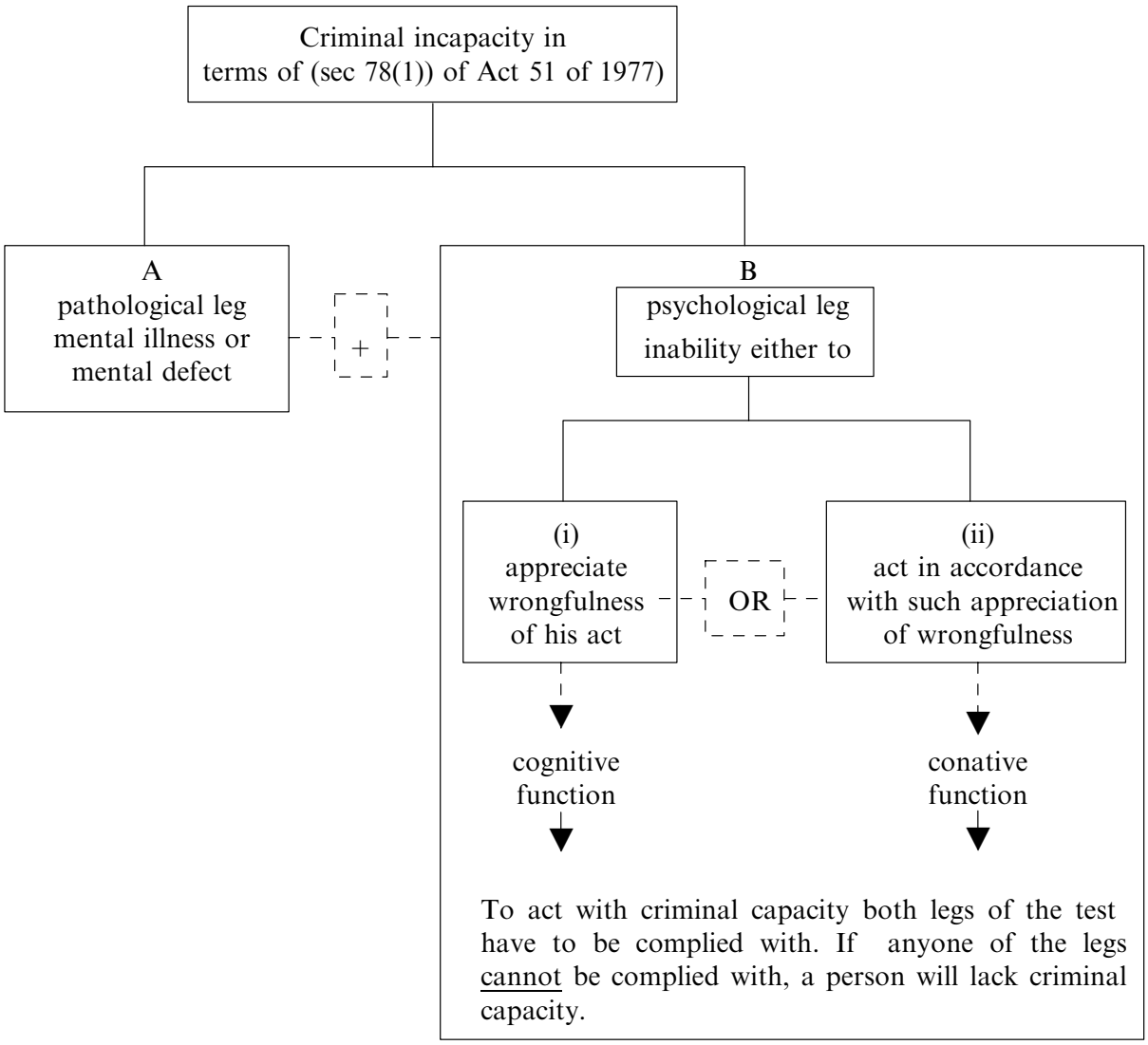
Section 78(1) of the Criminal Procedure Act 51 of 1977, as amended by the Criminal Matters Amendment Act 68 of 1998, provides as follows:

> A person who commits an act or makes an omission which constitutes an offence, and who at the time of such commission or omission suffers from a mental illness or mental defect which makes him or her incapable —
>
> (a) of appreciating the wrongfulness of his or her act or omission; or
>
> (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,
>
> shall not be criminally responsible for such act or omission.

3.4.1 Analysis of section 78(1)

The test discussed in this section has two legs, which are indicated in the diagram below in the two blocks marked "A" and "B". The first block (A) comprises the *pathological* leg (or biological leg, as it is sometimes called) of the test. The second one (marked B) comprises the *psychological* leg of the test.

The test described in section 78(1) to determine whether an accused lacked criminal capacity embodies a *mixed* test, in the sense that both a person's pathological condition (see block A) and the psychological factors (see block, B) are taken into account. In the determination of criminal capacity the question is not merely whether the accused was mentally ill, but whether his mental illness resulted in the impairment of certain mental abilities. His mental abilities are considered in block B of the test. The accused must comply with both the pathological and the psychological leg of the test in order to succeed with a defence in terms of sec 78.



3.4.1.1 First requirement: mental illness or defect

In terms of the first leg of the test in sect 78, it must first be established that the accused was suffering from a mental illness or a mental defect at the time of the act.

(a) Mental illness

''Mental illness'' and ''mental defect'' — the terms used in section 78(1) of the Act — are not defined in the Act.

Whether mental illness or defect was present or not is therefore exclusively a question of medical and psychiatric evidence.

It is impossible, and dangerous as well, for a court to try and seek a general symptom by which a mental disorder can be recognised (*Mahlinza* 1967 (1) SA 408 (A) 417).

Although ''mental illness'' is defined in section 1 of the Mental Health Act 18 of 1973, the definition was designed for the purposes of that Act. Hence it does not follow that a mentally ill person in terms of that Act will invariably lack criminal capacity. Certifiability in terms of that Act is not the same as a finding of criminal incapacity (*Mnyanda* 1976 (2) SA 751 (A)).

The Mental Health Care Act 17 of 2002 has replaced the Mental Health Act of 1973. The Mental Health Care Act defines **mental illness** as "... a positive diagnoses of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnoses." This definition was likewise drafted for the purposes of the Mental Health Care Act and is therefore not suitable for determining criminal capacity. People certified under that Act may or may not lack criminal capacity. For the purposes of criminal capacity, the diagnoses must be made in accordance with the procedure prescribed in section 79 of the Criminal Procedure Act 51 of 1977.

(b) Mental illness and mental defect

Exactly where the dividing line between "mental illness" and "mental defect" lies is a matter of expert psychiatric evidence. According to Kruger *Mental Health Law in South Africa* 1980 184, a mental illness "is an illness of the mind"; a mental defect, on the other hand, "is popularly regarded as something with which a person is born: a congenital defect in his mental make-up".

(c) Degrees of severity of mental illness

A finding of mental illness does not invariably lead to the conclusion that the accused lacked criminal capacity at the time of committing the act in question. Mental illness may vary considerably, and the degree of severity or intensity at any particular stage will determine the ultimate finding of absence of criminal capacity as a result of mental illness.

One of the most serious — and common — forms of mental illness is schizophrenia (a brain disorder which is wrongly regarded by the general public as a "split personality"). The manifestation of schizophrenia may range from relatively mild negative symptoms, such as social withdrawal and apathy, to severe positive symptoms in the form of delusions or hallucinations. Typically the person with positive symptoms may hear "voices", and in extreme cases he may be overwhelmed by "voices" ordering him to do such things as killing someone.

Tsafendas, the man who killed a former prime minister, Dr Verwoerd, in 1966 suffered from a delusion of a huge tapeworm dwelling in his bowels which influenced his behaviour. He described the tapeworm variously as a devil, a dragon or a snake, and told psychiatrists that he would not have killed the prime minister had he not had the tapeworm. (He was found by the court to be unfit to be tried.) (On schizophrenia in general, see SA Strauss, 1996 *CILSA* 282.)

Many forms of mental illness are treatable today, particularly because of the development of new and highly effective drugs. Even a percentage of persons with severe, positive symptoms of schizophrenia can be controlled fairly well, provided they take the prescribed medicines regularly, and they can live almost normal lives. Failure to take the medicine ("noncompliance") may result in relapses which in turn may drastically affect the patient's criminal capacity.

(d) Mental illness: a pathological condition

"Mental illness" refers to a pathological (sick) disturbance of the mental faculties of the accused (*Mahlinza supra* 418; *Rumpff Report* 9.4), and not simply to a temporary mental aberration in a normal individual which is not attributable to mental abnormality or which is due exclusively to external stimuli such as brain concussion, the use of alcohol, drugs or medicines, or which results from provocation.

An example of temporary mental aberration which is not attributable to mental abnormality is the following:

Stellmacher 1983 (2) SA 181 (SWA): The accused had been on a strict diet in order to reduce his weight. Having had no food for an entire day, and after hard physical labour on his farm, he went to a bar in the late afternoon and drank brandy. He had a pistol with him.As a result of a blinding reflection from the setting sun in his eyes through an empty bottle, he went "blank" and only regained his senses when he woke up in bed the next morning. It transpired that he had shot and killed another customer in the bar the night before. According to medical evidence, excessive consumption of alcohol could cause temporary brain dysfunction in a healthy individual as a result of hypoglycaemia (shortage of blood sugar). The court held that that did not constitute mental illness, but found the accused not guilty since it had caused him to act automatically in a state of amnesia. (Note that had the act been committed after Act 1 of 1988 came into force, Stellmacher would have been criminally liable. We discuss the Act below.)

Mental illness must also be distinguished from conditions which give rise to "sane" automatism or involuntary conduct. (This form of automatism is discussed below.)

The fact that the mental condition of the accused could have deviated to a certain degree from what is normal is not proof of a state of illness (*Harris* 1965 (2) SA 340 (A) 360). "Intelligent people also sometimes think and do foolish things, more particularly when emotions are aroused" (Steyn CJ in *Harris* 1965 (2) SA 340 (A) 358). It is likewise inadvisable to interpret an inclination to violence in the accused as being in itself an indication of mental illness (cf CJR Dugard *SALJ* 1967 134).

(e) Origin of mental illness need not lie in the mind

It is not necessary to prove that the origin of the accused's mental illness or defect lies in his or her mind. It could just as well be organic, for example arteriosclerosis (hardening of the arteries) (cf the English case of *Kemp* (1957) 1 OB 339; (1956) 3 All ER 249, cited with approval in *Mahlinza supra* 418). Functional (as distinguished from temporary or alcohol-induced) hypoglycaemia (low blood sugar) can likewise occasion mental illness (cf *Bezuidenhout* 1964 (2) SA 651 (A)), as can a traumatic head injury sustained in an assault, for example. In *Leeuw* 1980 (3) SA 815 (A) the accused developed epilepsy following injury in a road accident.

A simple brain injury, on the other hand, which causes a temporary interruption in the flow of blood to the brain and loss of consciousness, does

not constitute mental illness (cf the submission in *Kemp supra* 253F); such a condition could cause automatism, which means that in law the accused did not act at all (see further below).

(f) Mental illness need not be permanent

It need not be proved that the mental illness is of a permanent nature (*Mahlinza supra* 417) or that it is incurable (*Kemp supra* 253).

The illness of the accused must have existed at the time of the conduct. As we have indicated above, a person who suffers from mental illness and commits an unlawful act during a *lucidum intervallum* can in fact be found to have had criminal capacity at the time of the act. This would be so even where a court had previously held that the person was mentally ill (*Steyn* 1963 (1) SA 797 (W)).

(g) Alcohol- or drug-induced brain damage

Although, as we have said, mental aberration resulting from of the use of alcohol does not constitute mental illness, the consumption of alcohol, especially if it is chronic, can cause a condition which is clearly diagnosable as mental illness, for example delirium tremens (cf *Bourke* 1916 TPD 303, 307; *Holliday* 1924 AD 250). (Delirium tremens is an acute condition characterised by hallucinations and a state of terror, popularly known as the ''blue devils''.) The same applies with regard to drugs and medicines which might cause irreparable brain damage.

(h) Psychopathy

Prior to 1993, the definition of ''mental illness'' in the Mental Health Act 1973 included ''psychopathic disorder''. This Act was amended in 1993, following a recommendation by the Booysen Commission the year before, through deletion of the reference to ''psychopathic disorder''. (The full name of this commission was the Commission of Inquiry into the Continued Inclusion of Psychopathy as a Certifiable Mental Illness and the Handling of Psychopathic and other Violent Offenders.)

Irrespective of what the Mental Health Act in its original version or its predecessor had to say, our courts have held the view over almost half a century that, in criminal law, psychopathy in itself does not amount to a mental defect or illness which constitutes criminal incapacity (cf *Kennedy supra; Von Zell* 1953 (3) SA 303 (A); *Roberts* 1957 (4) SA 265 (A); *Mnyanda* 1976 (2) SA 751 (A)).

3.4.1.2 Second requirement: mental illness or defect must have had a certain effect on the accused

In terms of the second part of the test for mental illness in terms of S 78, it must be established that the mental illness or defect from which the accused

was suffering at the time of the commission of the act had a specific effect on him or her.

It is insufficient for the accused to prove that he was mentally ill or defective at the time of the act in question. He must also show that the effect of his condition was such that he was incapable either of

(1) appreciating the wrongfulness of his act, or

(2) acting in accordance with an appreciation of the wrongfulness of his act.

These criteria are based on the view that criminal law is retributive (*Rumpff Report*, 1.22 *et seq*) and that these two psychological factors make human beings responsible for their voluntary acts, namely their capacity to distinguish between what is right and wrong, and the manifestation of free will of which they are capable (*Rumpff Report* 9.30; 9.91). Whatever the psychiatric diagnosis of a specific case, the answer to one of these criteria must be in the affirmative before a finding that the accused lacked criminal capacity can be returned.

The criteria apply alternatively. Even where it is found that the accused appreciated the wrongfulness of his act in spite of his mental disease, he will be acquitted if he tenders proof that, on account of his illness, he was incapable of acting in accordance with this appreciation.

(a) First leg of test: Inability to appreciate wrongfulness

Criterion (a) confirms certain elements of the old common-law criterion which was derived from the M'Naghten rules, in particular the "right or wrong" test. It is possible that a person does not know what he is doing physically on account of mental illness or defect. This would be the case, for example, where someone is mentally so defective that although he thinks he is nursing a child, he is in fact killing it. This type of case is clearly covered by criterion (a), since an incapacity to appreciate what he is doing obviously precludes any appreciation of the wrongfulness of his act. The inability to appreciate the wrongfulness of the act is known as the cognitive aspect of the test.

The wording of section 78(1) does not indicate whether the wrongfulness refers to juridical wrongfulness (unlawfulness) or merely to moral wrongfulness (cf MCJ Olmesdahl 1968 *SALJ* 276).

In accordance with the view that awareness of unlawfulness is a requirement in crimes which require intent, it could possibly be argued that "wrongfulness" should here be interpreted as "unlawfulness".

In the determination of criminal capacity, however, the issue turns on the perpetrator's general sense of ethical responsibility as regards his act rather than on the projection of his mental attitude specifically towards the unlawfulness of his act, which is laid down as a requirement for intent. Criminal capacity and intent are not congruent concepts in criminal law. Criminal capacity, as we have already noted, is an indispensable requirement for criminal liability.

Besides, if "wrongfulness" in criterion (a) were strictly interpreted as

"unlawfulness", this criterion could not be applied where the perpetrator, despite his derangement, was aware that his conduct was unlawful but suffered the delusion, precisely because of his illness, that a moral or God-given duty rested on him to perform the act. (See the court's remark in *US v Freeman* 257 F 2d 606 (1966), cited in the *Rumpff Report* 7.20. See also R Petersen & C Steytler 1972 *Responsa Meridiana* 175.) Therefore it is suggested that "wrongfulness" should be interpreted here as "juridically and morally wrong".

"Morally wrong" in this context means "in conflict with the usual moral attitudes of reasonable people", as acknowledged in the Australian judgment *Stapleton* (1952) 8 CLR 358. In our opinion, Petersen and Steytler 182 *et seq* go too far by proposing an entirely subjective test, namely, "whether as a result of mental illness the accused was incapable of knowing that his act was wrong according to his own conception of moral right and wrong". Our objection is that the criterion would then become entirely arbitrary. To be treated as imputable, the perpetrator's judgment of the wrongfulness of his act must at least be in accordance with generally valid attitudes that prevail in the community.

The question whether "wrongfulness" refers to unlawfulness or not, is undecided in our case law. There is a suggestion in *Harris* 1965 (2) SA 340 (A) 366 that "wrongfulness" indicates unlawfulness, but Petersen and Steytler 176 n 9 show convincingly that such a deduction would be untenable.

According to Burchell and Hunt 268, the use in the Act, in criterion (a), of the word "appreciation" as opposed to the word "knowledge", which was derived from the M'Naghten rules and was used in the previous test, confirms the view that the wrongfulness of the act by reason of *dolus eventualis* is not sufficient; factual knowledge is required as well as "deliberate judgment" or "participation".

(b) Second leg of test: Inability to act in accordance with appreciation of wrongfulness

Criterion (b) entirely replaced the common-law formulation "irresistible impulse".

In order to succeed with the alternative defence in criterion (b), the accused therefore need not show that his deed was the result of a violent urge which was impulsive and flared up suddenly. It will suffice if he proves that, owing to mental illness or defect at the time of commission of the act, he was incapable of controlling his will. Such lack of self-control can be the result of a gradual process of personality disintegration. He could therefore distinguish between right and wrong, but could not act accordingly. The inability to act in accordance with the appreciation of wrongfulness is known as the conative aspect of the test for criminal incapacity.

It must be pointed out that, although criterion (b) is formulated far more widely than the common-law criterion, the circumstances in which "irresistible impulse" was formerly recognised as a defence would still constitute a defence in terms of criterion (b). Judgments such as *Smit* 1906 TS 783, *Westrich* 1927 CPD 455 and *Koortz* 1953 (1) SA 371 (A) are therefore still valid precedents for

a verdict of nonimputability. On the other hand, judgments in which the defence of irresistible impulse was rejected — for example *Smit* 1950 (4) SA 165 (O), *Von Zell*, 1953 (3) SA 303 (A), *Roberts* 1957 (4) SA 265 (A) — must be treated with caution.

The broader scope of the new test is well illustrated by *Kavin* 1977 (2) SA 731 (W). The accused, an attorney who had embezzled a large sum of money which landed him in grave financial difficulties, shot and killed his wife and two children, and attempted to kill a third child as well, all of whom he dearly loved. The apparent motive for the shootings was that, after he had committed suicide, they would all be reunited in Heaven.

In the course of the trial on charges of murder and attempted murder, psychiatric evidence was adduced that, at the time of the deeds, the accused had been suffering from mental disease diagnosed as a severe reactive depression superimposed on a type of personality disorder displaying immature and unreflective behaviour. The panel of psychiatrists concluded that, although it could not be said that the accused had been unable to appreciate the wrongfulness of his conduct, he had, on account of his mental illness, been unable to act in accordance with such appreciation at the time of the commission of the murders.

In his judgment, Irving Steyn J pointed out that, according to the psychiatric evidence, there was a gradual disintegration of the personality of the accused, as opposed to irresistible impulse. The accused could not possibly succeed with the defence of irresistible impulse, the judge ruled. According to the evidence, the accused had to move from bedroom to bedroom to carry out his evil intentions. Before the deed had been completed, he was confronted by his sister and gave her a false explanation of the gunshots which had disturbed her sleep. At one stage the accused had left the scene of the crime, the bedrooms, and gone to another floor of the house, where the kitchen was situated, to fetch a bread knife.

There could be no question of an impulsive act, the judge held. It had been a slow and deliberate course of conduct. The new criterion, however, was broad enough to cover the nonimpulsive conduct of the accused, if such conduct resulted from a mental illness. The court held that, because of the inability of the accused to act in accordance with his appreciation of the wrongfulness of the act, the accused was not guilty. He was, however, declared a State patient.

In order to successfully raise criterion (b) as a defence, the accused must only prove that he was at the time of the act, in the specific circumstances of his case, incapable of acting in accordance with an appreciation of the wrongfulness of his act. The test is subjective. It would be wrong to raise the question of whether a reasonable man would have had such a capacity in such circumstances. Likewise, it would be pointless to put the hypothetical question whether the accused would in fact have acted in accordance with an appreciation of the wrongfulness of his act had a policeman been at his elbow at the time (cf Burchell & Hunt 259 n 196).

3.4.2 Evidence

As mentioned above, criminal incapacity in consequence of a mental illness must be proved by expert evidence. The court dare not, simply on the ground of its own observations, arrive at a verdict that the accused lacked criminal capacity. Mandatory provisions apply to the medical or psychiatric examination of the accused, where it appears to the court that he lacks criminal capacity owing to mental illness or defect.

Where expert witnesses give conflicting opinions, the court must to the best of its ability make a choice between the different points of view. Where the evidence submitted for the prosecution conflicts with the evidence for the defence, the court is naturally entitled to consider that the burden of proving criminal incapacity rests on the accused (cf *Harris* 1965 (2) SA 340 (A) 365 and see below). Note, however, that the official report of the enquiry under section 79 is, strictly speaking, not evidence for either the prosecution or the defence, and should therefore be treated by the court as independent evidence.

The court is not obliged to accept any psychiatric evidence as conclusive proof. If it is found that the evidence concerning facts upon which the psychiatric opinion (or opinions) is (or are) based is not credible evidence, the court is fully entitled to refuse to accept a psychiatric diagnosis (see *Kennedy* 1951 (4) SA 431 (A), *Von Zell* 1953 (3) SA 303 (A) 311, *Harris* 1965 (2) SA 340 (A) 365 and cf *Rumpff Report* 4.40). The court will also be guided by the consideration that, in spite of alleged criminal incapacity at the time of the act, the evidence shows conclusively that the accused evidently acted rationally; this is a strong indication that he knew what he was doing at that time (*Harris supra* 360).

Psychiatric evidence is worthless unless it relates to the facts of a specific case. (*Mngomezulu* 1972 (1) SA 797 (A) 799A; *Du Preez* 1972 (2) SA 519 (SWA)).

3.4.3 Burden of proof

In advancing the defence of criminal incapacity on account of mental illness, the burden of proof on a preponderance of probabilities lies with the accused (see *Kaukakani* 1947 (2) SA 807 (A), *Kennedy* 1951 (4) SA 431 (A), *Mahlinza* 1967 (1) SA 408 (A)).

In other words, there is a presumption of sanity. This presumption of sanity has been codified in section 78(1A) of the Criminal Procedure Act 51 of 1977, which provides that every person is presumed not to be suffering from a mental illness or mental defect so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities. Section 78(1B) provides that, whenever the ''criminal responsibility'' (by which is meant the criminal capacity) of an accused is in issue, the burden of proof with reference to the criminal responsibility (read: ''criminal capacity'') shall be on the party who raises the issue. This means that if the accused raises the defence of mental illness, the burden of proving that he or she suffered from mental illness at the time of the commission of the unlawful act rests upon the accused. If the prosecution alleges that the accused lacked criminal capacity due to mental illness, the burden of proving this rests on the prosecution.

The principle that the onus of proof in these cases rests with the defence has often been criticised by jurists who maintain that a person with mental illness should be the last person to be saddled with the burden of proof. Those who maintain that the principle is correct, however, argue that the legal system can function properly only if it proceeds from the premise that all members of society are sane.

It is conceivable that the constitutionality of the present rule, according to which the accused bears the burden of proving his or her insanity, may one day be challenged on the basis that it violates the presumption of innocence. In the Canadian case of *Chauk* (1991) 1 CRR (2d) 1 (SCC), the majority of the court held that the presumption of sanity and the reverse onus of proof were a reasonable limitation upon the accused's right to be presumed to be innocent.

3.4.4 Special verdict

If the defence of mental illness is successful, the court must find the accused (X in the discussion which follows) not guilty by reason of mental illness or mental defect, as the case may be (s 78(6)). The court then has a discretion (in terms of s 78(6)) to issue one of the following orders:

(1) that X be **detained and treated in** one of the **institutions** mentioned in the Mental Health Act 18 of 1973, until the hospital board of such institution discharges him or her

(2) that X be treated as an **outpatient** in such an institution until the superintendent of that institution decides that he or she no longer needs treatment

(3) that X be **released on certain conditions**

(4) that X be **released unconditionally**

An example of a case in which the court might decide to release X unconditionally is where the evidence shows that, although X might have suffered from mental illness at the time of committing the wrongful act, he or she had regained complete mental normality at the time of the trial. (This happened in *McBride* 1979 (4) SA 313 (W).)

However, if

(1) X has been charged with **murder** or

(2) with **culpable homicide** or

(3) with **rape** or

(4) with another charge involving **serious violence**; or

(5) if the court considers it to be **necessary in the public interest,**

there is an important further option available to the court: it may direct that X be **detained in a psychiatric hospital or a prison** until a judge in chambers (in other words upon the strength of written statements or affidavits placed before the judge, without evidence necessarily being led in open court) makes a decision in terms of section 29 of the Mental Health Act 18 of 1973 as to

whether he or she should be released, and if so, whether the release should be unconditional or subject to certain conditions.

3.4.5 Appeal

There is no appeal against a finding of not guilty on account of mental illness if the **accused** raised the defence of criminal incapacity. However, if criminal incapacity is raised by the prosecution or by the court *suo motu*, and a finding of not guilty follows, the accused will be able to appeal. (For the *ratio* of this exception, see *Rumpff Report*, 10.95 to 10.101.)

3.4.6 The effect of mental conditions not satisfying the test described in S 78

(a) General

Mental abnormality, which is not of such a serious degree as to justify a finding that the accused (completely) lacked criminal capacity, can nevertheless have diminished criminal capacity as a consequence, which can be a mitigating circumstance. This was reaffirmed in section 78(7), which provides as follows:

> If the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or mental defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.

Prior to 1992, the imposition of the death sentence was mandatory for murder unless the court found that there were extenuating circumstances, in which event it had the discretion to impose another sentence. At that time, extenuating circumstances, including a finding of diminished responsibility, could literally be a life-and-death issue for the accused. In 1992 a statutory amendment removed the element of compulsoriness, and in 1995 capital punishment was abolished when the Constitutional Court ruled that it was unconstitutional.

The pronouncements of our courts, vital as they were at the time, in regard to the decision of whether or not the death sentence was to be imposed, have not become irrelevant since the abolition of capital punishment. Today a finding of extenuating circumstances, for example because of diminished criminal capacity, may have a material effect on the term of imprisonment imposed by a court. Accordingly we shall now discuss the findings of our courts briefly.

(b) Psychopathy

Our courts hold the view that the mere fact that an accused is clinically

regarded as a psychopath does not constitute a ground for diminished criminal capacity (*Mnyanda* 1976 (2) SA 751 (A) 764F, 766G).

> What, then, is a psychopath? A psychopathic personality can be defined as the type of person in whom an emotional immaturity and instability exists, which, from an early age, manifests itself in an inability to adapt to accepted moral and social norms (cf *Kennedy* 1951 (4) SA 431 (A), 434; *Nell* 1968 (2) SA 576 (O) 579; *Rumpff Report* 8.18 *et seq*. See also JP Roux *Die Psigopaat* (1975) 14 *et seq*).

Only when it is found in respect of a specific crime that the psychopathic disorder is of such a degree that the person's power of controlling his will was weakened to such an extent that, in terms of a moral assessment, he was less blameworthy than he would have been had he not had such a weakened power of control, a finding of diminished responsibility can be made (*Mnyanda* 766H).

Each case must therefore be judged on its own merits on the basis of all the circumstances. In several cases where psychopaths were found guilty of murder, the courts refused to find that there were extenuating circumstances. Examples are: *Von Zell* (2) 1953 (4) SA 522 (A); *Roberts* 1957 (4) SA 265 (A); *Nell* 1968 (2) SA 576 (A) 579; *De Bruyn* 1976 (1) SA 496 (A); *Mnyanda, supra*.

In *Lehnberg* 1975 (4) SA 553 (A) 559, Rumpff CJ declared that psychopathy as an extenuating circumstance should be treated with great circumspection ''omdat dit anders maklik sou wees om daardeur die leerstuk van determinisme by die agterdeur in ons strafreg in te bring'' (''since it would otherwise enable the doctrine of determinism to slip into our criminal law through the back door'' — our translation). On the other hand, the court held that it was possible that a psychopath in certain cases would not be able to offer the same resistance as an absolutely normal person would, and in such cases the accused's weakness could properly be taken into consideration as an extenuating circumstance (*Lehnberg* 559H).

In other cases psychopathy together with other factors led to a finding of extenuating circumstances. Thus psychopathy, in conjunction with drug addiction and the fact that the accused had been subject to a severe emotional conflict at the time of the commission of the act, was taken into account in mitigation of sentence in *Webb* (2) 1971 (2) SA 343 (T). So, too, the fact that the accused was a juvenile, together with his psychopathic tendencies led to a finding of extenuating circumstances in *J* 1975 (3) SA 146 (O) and *Lehnberg*. (But see on the other hand *Du Toit* 1976 (1) SA 176 (W).)

In *Pieterse* 1982 (3) SA 678 (A), Rumpff CJ said that when a court considered whether or not there was mitigation, it would have particular regard to the degree of psychopathy, the nature of the crime and the circumstances in which it had been committed. In the Chief Justice's opinion, the fact that a psychopath was insensitive towards others did not really distinguish him from other persons. However, if he had powerful urges which, on account of his mental state, were less controllable than those of a normal person, a court could regard it as a mitigating circumstance.

In *Kosztur* 1988 (3) SA 926 (A), the court confirmed the rule that a psychopathic condition was not in itself necessarily an extenuating circumstance in the case of murder. It was also stated that, because of the variable effect of psychopathy, the court had to be careful in its assessment of the effect of that condition upon the moral blameworthiness of the accused. In this case the psychopathic condition of the accused was not regarded as extenuating where it was clear from the evidence that the accused had not killed the deceased impulsively but had acted rationally throughout the execution of a preconceived plan — just as any normal person would have done — and had killed the deceased because she had recognised him, and neither his background, his psychopathic condition, nor any drugs he might previously have taken had played any role in the commission of the offence.

In *Bosman* 1990 (1) SACR 306 (A), the court likewise held that the psychopathic personality defect of the accused did not make his conduct less blameworthy where the accused was fully criminally responsible and his conduct showed signs of cold deliberation.

(c) Other medical/psychological conditions

The issue of diminished criminal capacity was raised in several cases not involving psychopathy. We mention some examples.

mental defect

In *Sibiya* 1984 (1) SA 91 (A), the court held that the mere fact of the existence of some degree of mental defect resulting in diminished responsibility would not invariably support a conclusion that there were extenuating circumstances. A trial court was likely to find extenuating circumstances only where the accused's mental defect appeared to be substantial and related to the commission of the crime in question. In this case, the accused, a 24-year-old man, had committed a series of senseless crimes of violence within the space of little more than a fortnight, including various assaults, murder and rape. According to a psychiatrist, he was a person who suffered from a persistent disorder or disability of the mind which induced abnormally aggressive or seriously irresponsible conduct in him. On appeal against the death sentence imposed by the trial court, the Appellate Division found that there were extenuating circumstances.

immature personality

In *Smith* 1984 (1) SA 583 (A), the fact that a woman who had murdered her husband by engaging the services of an assassin (who was to be paid R10 000) had an immature personality and was suffering from focal epilepsy was taken into consideration in extenuation of sentence, together with other factors such as coercion by members of her family and sustained provocation by the deceased. A specialist neurologist testified that the accused's immature personality, coupled with the effects of focal epilepsy, could have made her more susceptible to influence by others. (No extenuating circumstances were found to be present in regard to the assassin himself.)

inability to resist urges

In *M* 1985 (1) SA 1 (A), the court held that when an accused was unable to resist his urges to the same extent as a normal person, owing to a mental condition which was not a mental illness or defect (in this case an inadequate personality with a dependence on alcohol), a finding of extenuating

circumstances was justified. In this case a 25-year-old man had raped a 7-year-old girl and an 8-year-old girl on several occasions.

3.4.7 Discharge of a state patient

The discharge of state patients (ie patients committed to an institution or a psychiatric hospital or a prison) is regulated by the provisions of section 29 of the Mental Health Act 18 of 1973 as amended.

This section sets out a fairly complicated procedure for determining whether a state patient should be released. What follows is a summary of the provisions of this section.

Section 29 allows any of the following persons to initiate an application to a judge in chambers for an order for the release of a state patient:

(1) the official *curator at litem* (ie the director of public prosecutions)

(2) the superintendent of the institution where the state patient is detained

(3) the medical practitioner in whose care the state patient is

(4) the state patient himself or herself

(5) a relative of the state patient

(6) any other person or body on behalf of the state patient

After hearing the application and the response of the official *curator ad litem*, the judge may issue any of the following orders:

(1) that the state patient be discharged unconditionally

(2) that the state patient be discharged conditionally

(3) that he or she cease to be treated as a state patient

(4) that he or she continue to be detained as a state patient

(5) that the state patient be detained under civil detention in terms of chapter 3 of the Mental Health Act

Section 29 also contains a mechanism for dealing with repeated and undeserving applications by authorising the judge to reject an application if a similar application has been rejected within the past twelve months.

3.4.8 Criminal capacity and intention

Criminal capacity and intention *(dolus)* are two different concepts. In determining whether an accused had intention, one must ascertain what knowledge he had. In determining whether he had capacity, the question is not what knowledge he had, but what his mental abilities were, in other words, whether he had the *capability* of appreciating the wrongfulness of his act and of acting in accordance with such an appreciation.

More particularly, it is important not to confuse the question relating to the

accused's awareness of unlawfulness (which forms part of intention or *dolus*) with the question relating to the accused's capacity. Awareness of unlawfulness deals with the accused's knowledge or awareness of the unlawfulness of his act. Capacity, on the other hand, deals with the accused's *ability* to appreciate the unlawfulness of his conduct and of conducting himself in accordance with such an appreciation. It is therefore wrong to allege "that the accused had capacity because he knew that what he was doing, was wrong".

ACTIVITY

(1) Discuss the psychological leg of the test for criminal incapacity in terms of sect 78 of the Criminal Procedure Act 1977.

(2) X is charged with murder and relies on the defence set out in section 78 of the Criminal Procedure Act 1977. Discuss the burden of proof when this defence is raised. In your answer you must also indicate whether the present position will pass constitutional scrutiny.

(3) X is charged with murder. Evidence is presented to the effect that X is a psychopath. Discuss what effect his condition will have on his criminal liability.

FEEDBACK

(1) You have to give the definition for mental illness. See 3.2.5. Point out that the second part of the test is the psychological leg of the test. Discuss the two legs of the test. See 3.3.1.2.

(2) See discussion under 3.3.3.

(3) See discussion under 3.3.6(b)

STUDY UNIT 4

CRIMINAL INCAPACITY ON GROUNDS OTHER THAN MENTAL ILLNESS OR DEFECT

4.1 Introduction

The provisions of section 78 of the Criminal Procedure Act 51 of 1977 deal only with criminal incapacity due to a mental illness or mental defect. Should an accused be criminally nonresponsible on any other grounds, the court may not direct that the accused be detained as a state patient (sect 78(6)).

Naturally, mental illness or mental defect is not the only ground on which an accused may lack criminal capacity. It is, for example, an established fact that an accused may lack criminal capacity owing to youth or intoxication and, as we will see later in this discussion, the courts hold the view that there may even be further grounds on which an accused may be held to lack criminal capacity.

4.2 Intoxication

4.2.1 Involuntary intoxication

Involuntary intoxication occurs where the intoxication is induced without the accused's conscious or free intervention. For instance, if someone secretly puts a sedative or alcohol in the accused's coffee or forces the accused to drink alcohol, as a result of which he becomes intoxicated, it is a case of involuntary intoxication. Involuntary intoxication is a complete defence on a charge of any crime committed while the accused was in the state of such intoxication (*Hartyani* 1980 (3) SA 613 (T)). However, this discussion deals only with voluntary intoxication as a defence.

4.2.2 Voluntary intoxication

In *Chretien* 1979 (4) SA 871 (D) the facts were as follows:

> Chretien attended a party at a house where, together with other party-goers, he had consumed a lot of liquor. He got into his kombi and drove off. He made a U-turn and drove into a number of people standing in the street. One of them was killed and five were injured. On a charge of murder he was convicted of culpable homicide. (Since he lacked the intention, because of his intoxication, to apply force to the people standing in the street, he was acquitted of assault and attempted murder as far as the five injured persons were concerned.)
>
> The State appealed against the finding of the court *a quo* on the grounds that the law had been interpreted incorrectly.

In *Chretien* 1981 (1) SA 1097 (A), the appeal court held that voluntary intoxication might be a complete defence in the following circumstances:

(1) if the accused, as a result of intoxication, cannot act voluntarily, there will be no act in law and the accused will not be guilty as a result of these involuntary actions
(2) if the intoxication results in the accused acting without criminal capacity, he will be acquitted
(3) if intention is excluded as a result of intoxication, the accused will be acquitted unless he can be convicted of a lesser crime where negligence is the required form of culpability

4.2.3 Criminal Law Amendment Act 1 of 1988

The decision in *Chretien* was partially undone by the provisions of section 1 of the Criminal Law Amendment Act 1 of 1988. This section reads:

> 1. (1) Any person who consumes or uses any substance which impairs his faculties to appreciate the wrongfulness of his acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who while such faculties are thus impaired commits any act prohibited by law under any penalty, but is not criminally liable because his faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty, which may be imposed in respect of the commission of that act.
>
> 1. (2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.

It is beyond dispute that section 1(1) refers to situations where the accused lacks **criminal capacity** as a result of intoxication. If, for example, the accused is charged with assault, but it appears that he was so intoxicated at the time of the assault that he lacked criminal capacity, he cannot in terms of the *Chretien* decision be convicted of assault, but must be convicted of contravening this section.

Is the section also applicable to cases where the accused was unable to perform a **voluntary act** as a result of intoxication? Although the section does not refer to this type of situation, we submit that the section does, in fact, apply to it, for the following reasons: First, if a person is not even able to perform a voluntary act, it follows that he also lacks criminal capacity; and, as has been explained above, if he lacks criminal capacity, the section does apply. Secondly, intoxication resulting in inability to perform a voluntary act is a more severe form of intoxication than intoxication resulting in lack of criminal capacity. If the legislature intended to cover the latter situation, it is inconceivable that it could have intended that an accused falling in the former category, which covers a more serious form of intoxication, should escape liability.

In *Ingram* 1999 (2) SACR 127 (WLD), the court confirmed this view, and held that for a conviction in terms of section 1(1) it did not matter whether the accused was without criminal capacity (ie, unable to appreciate the wrongfulness of his acts or to act in accordance with that appreciation) or whether he was acting as an ''automaton''. The court stated that the first case was clearly covered by the section, as was the second case, because the accused would in that event *ex hypothesi* lack criminal capacity.

It is clear that the section does not apply to intoxication which excluded the accused's **intention.** This means that, in such a case, the accused must, in terms of *Chretien*, be found not guilty of the crime with which he is charged and that he will also escape being convicted of contravening this section. The fact that the legislature does not refer to intoxication excluding intention is rather unusual: In *Chretien*, for example, the accused was found not guilty of attempted murder because he had been so drunk that he had lacked the intention to murder. It would likewise have been impossible to convict him of contravening this section (assuming that the Act was already in operation at that time). It therefore does not seem as if the legislature has succeeded in ''blocking'' all the ''escape routes'' afforded an accused in *Chretien*.

Effect of intoxication	**Main charge murder**	**Section 1 of Act 1 of 1988**
1. Excludes voluntary act	Not guilty	Guilty of contravention of this section
2. Excludes criminal capacity	Not guilty	Guilty of contravention of this section
3. Excludes intention*	Not guilty	Not guilty

* In example 3 the accused can be guilty of capable homocide because of his negligence (a reasonable man would not have consumed too much liquor).

''voluntarily''

It is not expressly required in section 1(1) that the liquor or substance should have been consumed ''voluntarily''. The question is whether an accused can be convicted of contravening the section if, for instance, he or she is forced to consume the liquor or drug. Despite the fact that the word ''voluntarily'' does not appear before the words ''consumes or uses'', we submit that, considering the background and aim of the enactment as well as the unacceptable consequences which would flow from an alternative interpretation, the section

should be limited to cases in which the accused had **voluntarily** consumed the liquor or "substance". This was also the court's approach in *Jafta* 1991 (1) SACR 523 (C).

positive act/omission

A further question which arises is whether the phrase "... commits any act prohibited by law ..." in section 1(1) means that the section is only applicable if the accused has committed a positive act (as opposed to an omission).

The section is not clear on this point. On the one hand it may be argued that, if the legislature had intended the section to cover acts **and omissions,** it would have said so (see *SACJ* 1988 274, 278). On the other hand it may be argued that, in the legal sense of the word, an act includes an omission, and that it is not necessary to mention an omission specifically. We support the latter viewpoint.

seperate offence

It is important to note that the section creates a separate offence and that a person who complies with the requirements laid down in this section must be convicted of a contravention of this section and **not** of the offence with which he was originally charged (*Pienaar* 1990 (2) SACR 19 (T)).

Where it has been proved that the accused had consumed a considerable amount of intoxicating liquor, the burden of proof rests on the State to show that, in spite of his condition, he had criminal capacity in respect of the offence charged.

burden of proof

Where doubt exists whether an accused had criminal capacity or not, owing to the intake of a substance, he or she must be given the benefit of the doubt and be acquitted of the offence with which he or she is being charged. However, this does not mean that the accused will necessarily be guilty of a contravention of section 1(1). In order to be convicted of a contravention of section 1(1), the State will have to prove beyond a reasonable doubt that the accused was in fact not criminally responsible as a result of the intake of the substance. If the State does not succeed in proving this, the accused may not be convicted of a contravention of section 1(1) (*Mbele* 1991 (1) SA 307(W)). This is the only offence where criminal incapacity is an element of the crime.

4.3 Nonpathological criminal incapacity

A new defence has developed during the eighties as a result of decisions made in our courts, namely a general defence of criminal incapacity, unaccountability or criminal incapacity which is not linked exclusively to mental illness, intoxication or youthfulness.

The basis for this defence is to be found in the two general criteria for criminal incapacity recommended by the Rumpff Commission in respect of mental illness or defect, which were incorporated in section 78(1) of the Criminal Procedure Act of 1977. The courts began to apply these criteria to situations *not* involving mental illness or defect at all.

The defence may be defined as follows:

> A person who commits an act or omission which constitutes an offence, and who at the time of such commission or omission, due to

any condition **excluding a mental illness or mental defect, voluntary intoxication or youthfulness,** is incapable

(1) of appreciating the wrongfulness of his or her act or omission, or

(2) of acting in accordance with such with an appreciation of the wrongfulness of his or her act or omission

lacks criminal capacity and is not criminally liable for such act or omission.

Mental illness is excluded, because that refers to pathological criminal incapacity in terms of section 78(1) of the Criminal Procedure Act 71 of 1955. Voluntary intoxication is excluded because of the provisions of section 1 of Act 1 of 1988. Youthfulness is excluded because the courts apply a different test to determine whether a child lacked criminal capacity. The courts (incorrectly) merely ask whether the child was aware of the fact that he or she was doing wrong.

Nonpathological criminal incapacity may be attributed to such factors as emotional exhaustion, fear, shock, stress or provocation. This defence has developed through our case law and is a good example of lawmaking.

4.3.1 Development of the defence

In *Lesch* 1983 (1) SA 814 (O), the accused, who was charged with murder, alleged that he had experienced such a fit of anger as a result of the deceased's provocation that he had not been criminally responsible at the time of the act and that he should therefore be acquitted. The Orange Free State Court took the view that, if the evidence proved that the accused had not been criminally responsible as a result of provocation, he would have to be acquitted. However, on the facts it was held that he had subjectively had the capability to distinguish between right and wrong and to direct his acts accordingly, and secondly that he had actually had the intention to kill.

In *Van Vuuren* 1983 (1) SA 12 (A), the Appellate Division likewise rejected the accused's defence of provocation on the facts. Diemont AJA nevertheless remarked *obiter* that a person could be held to lack criminal capacity if his condition had been caused by a combination of drink and other factors such as provocation and severe mental and emotional stress, and that there was in principle no reason for limiting the enquiry (into criminal responsibility) to the case of a man who was too drunk to know what he was doing (at 17G–H).

In *Arnold* 1985 (3) SA 256 (C) it was held that a defence of "severe emotional distress" could be raised successfully.

The court held that, as a result of the emotional distress under which he had laboured, he had acted unconsciously at the time of firing the shot and that he had therefore not performed "an act in the legal sense" (in other words, had acted in a state of automatism — see below). He was therefore acquitted.

In *Wiid* 1990 (1) SACR 561 (A), the Appellate Division accepted a defence of nonpathological incapacity and acquitted the accused. The accused in this case

was a woman who had shot and killed her husband shortly after he had seriously assaulted her. The court confirmed that where the defence of temporary nonpathological incapacity was raised, the onus rested with the State to rebut it, but also held that a foundation should be laid in the evidence for the raising of the defence.

The judgment in the *Wiid* case was applied in *Kalogoropoulos* 1993 (1) SACR 12 (A). The court pointed out that in the case of nonpathological criminal incapacity, psychiatric evidence was not as indispensable as it was when criminal capacity was sought to be attributed to pathological causes. The accused must, however, lay an actual foundation for the defence, sufficient at least to create reasonable doubt on the point.

However, the judgment in *Eadie* 2002 (1) SACR 663 (SCA) has amended the position with regard to the defence of nonpathological criminal incapacity.

In this case the Supreme Court of Appeal delivered a judgment which raises doubt about the existence of this defence in our law.

The facts were the following: The accused drove home with his family in the early hours of the morning. The deceased, who was driving behind the accused, flashed his headlights, overtook the accused and then drove very slowly in front of him. The accused overtook the deceased, upon which the deceased followed the accused at a short distance, flashed his headlights and once again overtook him only to drive very slowly in front of him. The accused overtook the deceased and stopped at the traffic lights with the deceased stopping right behind him. The accused took a hockey stick from his car, went to the car of the deceased and hit him over the head with the stick. The accused pulled the deceased out of the car and assaulted him repeatedly. The deceased died as a result of multiple fractures of the facial bones and skull.

The deceased raised a defence of nonpathological criminal incapacity resulting from a combination of severe emotional stress, provocation and a measure of intoxication. On appeal it was conceded that at the time of the incident the accused had been able to distinguish between right and wrong, but unable to act in accordance with that appreciation.

The court rejected the defence of the accused on the facts, and he was convicted of murder.

The court criticised previous judgments where the test had been applied. According to the court, there was no difference between sane automatism and nonpathological criminal incapacity as a result of emotional stress and provocation. The second leg of the psychological test for nonpathological criminal incapacity, namely that a person should be able to act in accordance with his appreciation of wrongfulness or should be able to resist temptation, was the same as the requirement of sane automatism that the act should be involuntary. Someone who relied on the fact that he or she was unable to act in accordance with his or her appreciation of wrongfulness, therefore acted involuntarily and should rely on a defence of sane automatism.

It is not clear whether this defence has been abolished *in toto*. However, it is clear that the defence can no longer be relied upon in instances where the lack

of criminal incapacity can be ascribed to emotional stress or provocation. Only time will tell whether the defence still exists and what its field of application is.

4.3.2 Criminal incapacity and involuntary conduct

The inability to act in accordance with an appreciation of the wrongfulness of the act (in other words, absence of the conative mental function) must not be confused with the inability of a person to subject his bodily movements to his will or intellect.

Involuntary conduct deals with the question of whether the wrongdoer has committed an act in the criminal-law sense of the word. It means that the wrongdoer has acted involuntarily and that there was no act or conduct as these terms are understood in criminal law. An example in this respect is where someone walks in his sleep. The crucial question here is whether the wrongdoer is capable of controlling his physical (or motor) movements through his will.

Criminal incapacity, on the other hand, has nothing to do with the question of whether the wrongdoer has acted or not, but forms part of the test to determine capacity. Here the wrongdoer does have the power to subject his bodily movements to his will, but what he is not capable of doing, is to properly resist the temptation to commit a crime.

In short, criminal capacity refers to the absence of the mental power of resistance which a normal person has, whereas involuntary conduct means that the power or ability physically to control one's bodily movements is lacking.

Both refers to an absence of mental power but automatism refers to an inability to act and in the case of criminal incapacity to an inability to distinguish between right and wrong or to act in accordance with this insight.

4.4 Automatism and amnesia

As already noted above, there are mental conditions which, in terms of the present section, would not amount to mental illness or defect, yet constitute a complete defence.

"Sane" automatism or involuntary conduct is an example of such a state. Sometimes mention is also made in this context of "blackout" or amnesia (loss of memory) (see *Du Plessis* 1950 (1) SA 297 (O), where this defence was successfully raised). It must be noted, however, that mere inability to remember what took place does not constitute a defence (*Piccione* 1967 (2) SA 334 (N); *Johnson* 1970 (2) SA 405 (R)).

A nonpathological condition, such as shock, concussion or the unconscious consumption of a sedative, can indeed occasion involuntary conduct with an accompanying loss of memory (cf *Trickett* 1973 (3) SA 526 (T) 531). In such a case the conduct of the accused is not regarded as an act in criminal law and he must be acquitted, however serious the consequences of his act might have been (cf *Schoonwinkel* 1953 (3) SA 136 (C); *Dhlamini* 1955 (1) SA 120 (T); *Botha* 1959 (1) SA 574 (O); *Ahmed* 1959 (3) SA 776 (W); *Trickett supra*). An act

is required for criminal liability. If a person did not act voluntarily, he cannot be criminally liable.

He does not comply with one of the elements of the crime. Automatism can be the result of sane automatism or ''insane automatism. (mental illness). If the automatism is due to mental illness — ''insane'' automatism — sect 78(1) of the Criminal Procedure Act will be applicable, and a special finding of not guilty owing to mental illness (or defect) will have to be returned.

''Sane automatism refers to automatism which excludes a voluntory act. In *Cunningham* 1996 (1) SACR 631 (A) 635–636 as well as in *Henry* 1999 (1) SACR 13 (SAC) 19–20 the Supreme Court of Appeal avoided the expression ''sane automatism'', and in stead spoke of ''automatism not attributable to mental pathology'' (by ''mental pathology'' is meant ''mental illness''). In the *Henry* case the court also used the expression ''psychogenic automatism'' to refer to ''sane automatism'' (ie automatism excluding voluntary conduct).

> In *Henry supra* the accused shot and killed his ex-wife and ex-mother-in-law in a fit of rage. His defence was that he had acted in a state of automatism. The Supreme Court of Appeal summarised the most important legal principles applicable to a defence of absence of voluntary conduct (''automatism'' or ''sane automatism'' or ''psychogenic automatism'' or ''automatism not attributable to mental pathology'').
>
> - According to the court, a voluntary act is an essential element of criminal liability.
> - Where the commission of such an act is put in issue on the ground that the absence of voluntariness was attributable to a cause other than mental pathology (ie mental illness), the *onus* is on the State to establish this element (the commissioning of the act) beyond reasonable doubt.
> - The State is, however, assisted by the natural inference that, in the absence of exceptional circumstances, a sane person who engages in conduct which would ordinarily give rise to criminal liability does so consciously and voluntarily.
> - A proper basis must be laid which is sufficiently cogent and compelling to raise a reasonable doubt as to the voluntary nature of the act and, if involuntary, that this was attributable to some cause other than mental pathology.
> - The accused must advance medical or other evidence from which the court can infer that his conduct was not voluntary.
> - A defence of this nature must be carefully scrutinised. The *ipse dixit* of the accused (ie the accused's own word) that he acted involuntarily is of course not necessarily sufficient for the defence of automatism to succeed. Neither is evidence of a mere loss of temper sufficient to warrant an inference of automatic behaviour.
> - The court stressed the importance of differentiating carefully between loss of consciousness due to mental illness and loss of consciousness due to involuntary conduct. Expert evidence of a psychiatric nature will be of much assistance to the court in pointing to factors which may be consistent, or inconsistent as the case may be, with involuntary conduct which is nonpathological.

The court stated that ''[w]hile it would appear from the evidence to be generally accepted that automatism results in amnesia, it follows that the

converse is not true. In other words, amnesia is not necessarily indicative of automatism.

4.4.1 Automatism and "antecedent" liability

In a crime such as culpable homicide, automatism at the moment of the actual killing, due to for example the voluntary consumption of alcohol, will not constitute a defence if the principle of antecedent (or preceding) liability is applicable. Antecedent liability refers to the situation where an accused, when he was still capable of a voluntary act and had criminal capacity, made himself guilty of improper conduct (eg the abuse of alcohol) and so put himself in a situation which culminated in the commission of the crime (*Johnson* 1969 (1) SA 201 (A)).

Antecedent liability may also be based on such factors as daydreaming, sleepiness, extreme exhaustion or the use of a sedative.

The driver of a vehicle who falls into a state of automatism as the result of exhaustion can nevertheless be found guilty of a charge of negligent driving (*Trickett* 1973 (3) SA 526 (T) 531–2).

As we have intimated above, extreme intoxication that leads to automatism will, in respect of a formally defined crime consisting only of an act irrespective of its consequences, or a form of criminal liability based solely on an act (such as attempted murder), operate as a complete defence, subject to the provisions relating to statutory intoxication — see Act 1 of 1988.

In materially defined offences or consequence crimes, ie where the crime consists in the causing of a result, this is not necessarily the case. On this point, *Johnson* was in our opinion not overruled by *Chretien*. Let us take the case of a person who, when still criminally responsible, begins consuming alcohol. The circumstances are such that it is later found that he was negligent in respect of the death of a human being, which death was caused by him in his drunken state. He cannot escape liability, even if his final causal act was committed when he was acting involuntarily. This is a typical example of antecedent liability.

An example: A school-bus driver, X, leaves his bus full of merry children parked outside an hotel in order to have a couple of "quick ones" in the bar. In due course he becomes hopelessly drunk, but he still manages to reach the bus, start the engine and drive a short distance. As a result of his excessive drinking, the bus overturns whilst X performs a final involuntary motion (by simply collapsing in a drunken stupor behind the steering wheel). Several children die in the accident. X can be held criminally liable by application of the ordinary principles of criminal liability. His negligence lies in the fact that he (voluntarily) started drinking in the circumstances.

4.4.2 Burden of proof

Great care must be exercised in determining precisely what condition the accused was suffering from, so that the burden of proof is not side-tracked by

terminology. In the case of automatism caused by a mental disorder or defect, for example epilepsy (sometimes called ''insane'' automatism), the burden of proof rests on the accused in terms of the general rule for mental illness. Automatism can however be a momentary phenomenon in an otherwise mentally normal person, as in the case of a person who has a brain tumour (*Charlson* [1955] 1 All ER 859) or is acting in a dream (*Dhlamini* 1955 (1) SA 120 (T)) — known as ''sane'' automatism. Here the State must prove beyond reasonable doubt that the accused knew what he was doing and acted with the necessary intent (*Ahmed* 1959 (3) SA 776 (W); *Botha* 1959 (1) SA 547 (O); *Trickett* 1973 (3) SA 526 (T) 530).

Where the burden of proof rests on the accused, the ordinary principle applies that he need only discharge it on a preponderance of probabilities (*Koortz* 1953 (1) SA 371 (A) 380, *Mahlinza* 1967 (1) SA 408 (A) 419).

ACTIVITY

(1) Distinguish between criminal incapacity and involuntary conduct.

(2) X has been tormented and abused by Y, her husband, for many years. One day Y humiliates X in front of her colleagues at the office. X grabs the paper knife and stabs Y to death. X is charged with murder. X admits that she has killed Y, but relies on a defence of nonpathological criminal incapacity. Discuss whether X will succeed with her defence.

FEEDBACK

(1) See discussion under 4.3.2.

(2) Discuss the defence of nonpathological criminal incapacity. Your answer must include a reference to *Eadie* and the effect of the decision on the defence. See discussion under 4.3.1.

PART 2

Specific crimes

STUDY UNIT 5

CONTEMPT OF COURT

5.1 Contempt of court: history of contempt of court

Roman and Roman-Dutch law

The crime of contempt of court is based on the principle that interference with the administration of justice is not tolerated. In Roman and Roman-Dutch law the courts punished certain forms of conduct which would today be regarded as contempt of court. Voet, for example, names the following conduct as punishable on the grounds that it is contempt of court: bribing or attempting to bribe a judge (Voet 2 2 1); disobeying a judicial order (Voet 2 3); disobeying a summons (Voet 2 11 16, 15); insulting a court messenger (Voet 5 1 62); insulting the judge (Voet 49 2 1, 12); attacking or insulting the judge *in facie curiae* (Voet 5 1 2). However, a single comprehensive crime of contempt of court never developed in Roman-Dutch law.

English law

The South African courts punished contempt, summarily or otherwise, from as early on as 1866. Our law relating to contempt of court has been very much influenced by English law, but we have not adopted English law completely.

balance between administration of justice and individual's rights

The crime of contempt of court serves to protect the dignity, reputation and authority of the courts, but it also imposes restraints on freedom of speech and the press. A balance has to be struck between the proper administration of justice and the rights of individuals and the press to express themselves freely.

The functions of the courts are the administration of justice and the settlement of disputes between parties, including disputes between the state as prosecuting authority and an accused person. It is an essential element of justice that a court should come to a decision on the evidence before it and that there should be no external factors influencing the court's decision.

5.2 What constitutes contempt of court?

Contempt of court may manifest itself in a variety of forms, and can in a sense be subdivided into a number of "sub-offences", which often have requirements of their own that are not reflected in an inclusive definition. If one keeps the purpose of the crime in mind, namely to protect the dignity, reputation and authority of the courts, a general definition will read as follows:

> Contempt of court consists in:
>
> (1) the unlawful and intentional violation of the dignity, repute or authority of
>
> (a) a judicial officer in his judicial capacity, or
> (b) a judicial body; or
>
> (2) the unlawful and intentional interference with the administration of justice in a matter pending before a judicial body.

The first important fact to remember is that contempt of court can be committed **inside** court, which is always referred to as contempt *in facie curiae* (literally translated as "in the face of the court") or **outside** court, namely contempt *ex facie curiae*. This is a very important division, because it is this division that has resulted in the creation of a few sub-offences where the conduct is committed outside court. A further distinction is made within the category of contempt *ex facie curiae*, namely contempt *ex facie curiae* (which refers to pending cases) and contempt *ex facie curiae* (which does not refer to pending cases). We are first going to discuss contempt of court *in facie curiae*.

5.3 Contempt of court *in facie curiae*

5.3.1 Contempt

No clear definition exists of what conduct or words would impinge on the administration of justice, although the following conduct has, in the past, been punished as contempt of court *in facie curiae*:

- shouting at witnesses while cross-examining them (*Benson* 1914 AD 357);
- a lawyer conducting a case while under the influence of liquor (*Duffey v Munnik* 1957 (4) SA 390 (T));
- continually changing one's seat and talking in court (*Nxane* 1975 (4) SA 433 (O));

- grabbing a court document and tearing it up (*Mongwe* 1974 (3) SA 326 (T)); and
- shouting in court, swearing or laughing at the magistrate (*Ntsane* 1982 (3) SA 467 (T); *Poswa* 1986 (1) SA 215 (NC));
- entering the court carrying posters, shouting slogans and making defiant statements (*Senyane* 1993 (1) SACR 643 (O)).

It is clear, however, that conduct can only constitute contempt of court if it is directed at a judicial officer or judicial body.

Who or what constitutes a judicial officer or a judicial body? This question was pondered upon and answered in the following cases:

- In *Tromp* 1966 (1) SA 646 (N) it was decided that contempt of court is not committed if the executive branch of government or its servants are attacked unless the criticism at the same time denotes disrespect for the courts.
- In *Sachs* 1932 TPD 201 204 it was held that the following statement did not amount to contempt, as the criticism was levelled against the police and not the court: ''... there is no justice in these courts ... M was convicted on a damnable pack of lies manufactured by the police. This is what they call justice in this country''.
- In *Gibson* 1979 (4) SA 115 (T) Gibson, in a newspaper article, attacked *pro deo* counsel as being inadequate for political trials. The court held that this did not constitute contempt as the statement was not capable of being regarded as calculated or likely to interfere with the administration of justice by prohibiting counsel from undertaking *pro deo* defences.
- In *Robberts* 1959 (3) SA 706 (A)), it was held that an attack on the dignity or reputation of a judicial officer in his personal or private capacity does not constitute contempt. The crime consists in contempt of the judicial officer as a judicial officer; not as a person. Similarly, attacks on the administrative functions of the judicial officer (such as the administration in the magistrate's office or clerical matters) do not constitute contempt of court.

The term ''judicial body'' includes supreme courts and magistrates' courts and it does not matter whether the court exercises criminal or civil jurisdiction. An attack on the courts or judges or magistrates **generally** suffices; the attack need not be directed at any particular judicial body.

5.3.2 Unlawfulness

Unlawfulness may be excluded by the following:

- Fair comment

Fair, moderate and legitimate criticism of the outcome of a case, of a judicial officer or of the administration of justice in general does not amount to contempt of court. The administration of justice is not a ''cloistered virtue'' (*Ambard v Attorney-General of Trinidad* [1936] 1 All ER 704 (PC)), and public debate on matters relating to the law and the administration of justice is necessary and vital in a democratic society.

public interest

Criticism of any judicial act or determination as being contrary to the law or the public good does not necessarily constitute contempt of court. However, it is not easy to draw the line between scandalous comment, constituting contempt of court, and legitimate criticism. In *Van Niekerk* 1972 (3), 711 (A) the court applied the *public interest* as the criterion. In this case Van Niekerk, a law professor, delivered a speech at a meeting to protest against the provisions of the Terrorism Act 83 of 1967, and especially against the provisions relating to detention for interrogation without trial. Van Niekerk criticised, *inter alia*, what he considered to be reprehensible inaction on the part of lawyers (including judges) regarding those provisions, referring to the viewpoint that the function of a judge is to apply the law and not to criticise it, as a "facile excuse for abject inactivity".

The court held that this part of the speech did not amount to contempt of court, even though some of the words used by Van Niekerk bordered upon the deliberately offensive. The court (*per* Ogilvie Thompson JA) pointed out that, because the true basis of punishment for contempt lies in the interest of the public (as distinct from the protection of any particular judge or judges), genuine criticism, even if somewhat emphatically or unhappily expressed, should only be regarded as contempt of court if the public interest clearly so requires.

- Recusal of judicial officer

A litigant (or his or her representative) is entitled to apply for the recusal of the judicial officer in appropriate circumstances. This will not amount to contempt of court provided the application is made

(1) in the honest belief in the truth of the allegations regarding the judge,

(2) with respect, and

(3) without any insulting conduct.

The conduct will not be unlawful, even though similar statements made on other occasions may be unlawful (*Silber* 1952 (2) SA 475 (A)).

- Privilege

Privilege may exclude the unlawfulness of certain statements. Privileged statements include statements by members of parliament made in parliament (s 58 and 71 of the Constitution of the Republic of South Africa 108 of 1996) and statements by judges sitting on appeal or review from proceedings in lower courts.

- Obviously unlawful command

A person may not disobey a court order merely because the order has been wrongly made. The person must obey the order and subsequently seek redress by means of appeal or review. However, if the court *mala fide* has issued an obviously unlawful command, it is unlikely that the refusal to comply with such an order would be unlawful.

5.3.3 Intention

With the exception of the so-called "newspaper cases", the crime can only be committed intentionally. The newspaper cases will be discussed when we look at contempt of court *ex facie curiae*.

Dolus eventualis is sufficient. The accused must, at the very least, have foreseen that his or her words or conduct could be insulting and reconciled him- or herself to this possibility (*Pillay* 1990 (2) SACR 410 (CkA); *Van Niekerk* 1970 (3) SA 655 (T)).

A mistake regarding a material element of the crime (including unlawfulness) will negate the intention to commit the crime. Thus, in *Botha v Dreyer* (1880) 1 EDC 74, Dreyer was acquitted on the grounds that he had *bona fide* misinterpreted the court order which he disobeyed.

Intention will also be absent if the conduct is a result of forgetfulness, ignorance, absentmindedness, inadvertence or excitement. For example, in *Khupelo* 1961 (1) PH H92 (E), Khupelo after acquittal on another charge, walked out of the court triumphantly singing a hymn and in *Rocke* (1884) 4 EDC 274, Rocke jumped to his feet and answered with a shout when his case was called. Both were acquitted on charges of contempt of court.

motive irrelevant

The motive with which the act was committed is irrelevant. In *Silber*, *supra*, Silber (an experienced attorney) applied for the magistrate's recusal on the grounds that his persistent rulings against the defence had shown that he was biased. The court held that, even though he had been endeavouring to further his client's case and "had not consciously worked out a plan to insult the magistrate", he had *dolus eventualis* in relation to the contempt, and he was therefore convicted.

5.3.4 Power to summarily convict and punish

magistrate's court

A *magistrate's court* has, in terms of section 108 of the Magistrates' Courts Act 32 of 1944, the power summarily to convict and punish contempt *in facie curiae*. For example, in *Poswa*, *supra*, an advocate appearing on behalf of an accused person in a criminal trial conducted himself in a contemptuous manner while defending his client, whereupon the magistrate summarily convicted and sentenced him for the contempt of court.

High court

The *High Court*, on the other hand, has the power to invoke the summary process for any kind of contempt. In *Harber*, *in re S v Baleka* 1986 (4) SA 214 (T), the Supreme Court invoked this power summarily to convict and punish, for contempt of court, a newspaper editor and reporter who had published potentially prejudicial comments on a criminal trial pending before that court.

Trivial contempt should be ignored, and the accused should be afforded the opportunity to advance reasons why he/she should not be convicted or, where appropriate, to apologise or withdraw his/her remarks (*Tobias* 1966 (1) SA 656 (N)).

The power summarily to convict and punish for contempt is essential for a court to uphold its dignity and authority, especially while hearing a case. The

courts have, however, emphasised that this power is an extremely drastic measure, which should not be resorted to lightly and which should be used with care and circumspection *(Benson, supra; Silber, supra)*.

The question arises whether the punishment of contempt *in facie curiae* is compatible with the Bill of Rights in the Constitution.

In *Lavhenga* 1996 (2) SACR 453 (W), Claassen J examined this question thoroughly and came to the following conclusions:

flow of court proceedings

(1) There is a definite need in both the Supreme and the Magistrates' courts for the power to punish contemptuous conduct summarily. Such a power is necessary to prevent the flow of court proceedings from being undermined. Thus, if a magistrate issues an interlocutory order (such as an order that certain questions put to a witness are inadmissible) but the legal practitioner appearing before him refuses to accept the order, it is necessary for the magistrate to have the power to act summarily against the legal practitioner. If there was a rule that the magistrate must first refer the matter to the Director of Public Prosecutions, it would undermine the flow of court proceedings. There may, however, be cases in which it would not be advisable for the magistrate to use the summary proceeding, and in which it would be advisable first to refer the matter to the Director of Public Prosecutions. Everything depends on the particular facts of the case.

magistrate both witness, prosecutor and judge

(2) As far as the argument that in these types of cases the magistrate is both witness, prosecutor and judge is concerned, the court held that the magistrate's power to act summarily against an alleged offender *in facie curiae* does infringe upon the alleged offender's right to equal protection and benefit of the law (set out in s 9(1)), but that this infringement of the right is reasonable and justifiable in an open and democratic society in terms of the limitation clause (s 36(1)).

right to be informed of charge

(3) The summary procedure is not a violation of an accused's right (as set out in s 35(3)(a)) to be informed of the charge with sufficient detail to answer it, *inter alia,* because in practice the accused usually knows very well what his alleged misconduct is, and also because the limitation clause (s 36(1)) justifies the infringement of this right.

presumption of innocence

(4) The summary procedure does not infringe on the accused's right (as set out in s 35(3)(h)) to be presumed innocent and to remain silent because, *inter alia,* no onus is placed upon the accused, and also because the limitation clause justifies the infringement of this right.

right to legal representation

(5) The summary procedure does not necessarily violate the accused's right (set out in s 35(3)(f)) to the services of a legal practitioner because, *inter alia,* it depends on the circumstances of each case whether it is practical and affordable for the state to afford him or

her the services of a legal practitioner. (In the case presently under discussion the accused was himself a qualified attorney.)

5.4 Contempt of court *ex facie curiae* with reference to pending judicial proceedings

Although the classic example of this sub-offence is commenting on pending cases, the following conduct was also punished as contempt of court *ex facie curiae* with reference to pending cases:

- interfering with the witnesses, the judicial officer or other officers of court (*Keyser* 1951 (1) SA 512 (A));
- insulting the court by publishing false allegations of bias with reference to a pending case;
- failure to attend a court hearing after being summoned as an accused or witness.

5.4.1 Potentially prejudicial publications

It is contempt of court to publish information or comment concerning pending *(sub iudice)* judicial proceedings, which has the tendency to prejudice the outcome of the proceedings.

publication

The publication may be either by the written or spoken word in the press or other media, including a film or the theatre.

pending judicial proceedings

Proceedings are *sub iudice* or pending from the moment they have commenced, whether this has taken place by arrest, summons or warning to appear up to the time the case has been finally disposed of, which includes the final possible appeal (see Van Staden, *supra*). A case is therefore *sub iudice* even before the trial has started in court.

The publication of information before a case is *sub iudice* (eg during the police investigation before any arrest is made) and which may prejudice its eventual outcome, is not contempt of court, but may constitute the crime of defeating or obstructing (or attempting to defeat or obstruct) the course of justice.

tendency to prejudice the outcome of the proceedings

All that is necessary is that the publication should tend to prejudice or interfere with the administration of justice in the pending case. This test, also called the *''tendency test''*, is not concerned with whether the court was influenced by, or the trial prejudiced by, the publication, but rather with whether they might have been so influenced or prejudiced. The fact that there was no risk that the conduct might have influenced the judge is consequently irrelevant.

- In *Van Niekerk* 1972 (3) SA 711 (A) (also discussed in 3.1.4.1) Van Niekerk, in his protest speech against the Terrorism Act 83 of 1967, exhorted all judges to ''deny creditworthiness'' of witnesses who had previously been detained under the Act. At the time, a much publicised prosecution under the Act was proceeding and Van Niekerk had personally invited counsel appearing in the trial to attend the protest meeting. The court held

  (1) that Van Niekerk's remarks were made with reference to the specific trial;

(2) that for a judge to ''deny creditworthiness'' to evidence irrespective of its intrinsic merit would be grossly improper; and

(3) that Van Niekerk had intended his remarks to be acted upon.

Van Niekerk was convicted of contempt of court despite the fact that, under no circumstances, would the trial court have been influenced by his remarks.

real risk test

In *Harber* 1988 (3) SA 396 (A) it was argued that the court should reject the ''tendency test'' and rather apply the ''real risk test'' of English law. In terms of the *''real risk test''* the publication will only constitute contempt of court if there was a **real risk** that it would interfere with the administration of justice. The court refused to adopt the ''real risk'' test and confirmed the ''tendency test''. Whether the ''tendency test'' will survive in view of the fundamental right of freedom of expression ensconced in section 16 of the Constitution of the Republic of South Africa Act 108 of 1996 remains to be seen.

improperly tend to interfere

- In *Harber, supra* the court also pointed out that it is implicit in the test that the conduct should *improperly tend to interfere* with pending proceedings. A discussion in a law journal of legal issues decided in a case on appeal, or even a factual discussion in a scientific journal, would generally not constitute contempt of court.

5.4.2 Unlawfulness

It is not unlawful to publish comment on a matter of vital public interest which happens to be *sub iudice*. (The *sub iudice* rule is discussed below under Contempt *ex facie curiae* with reference to pending judicial proceeding further on.) For example, during the very time the Constitutional Court was considering the constitutionality of the death penalty in 1995, intense debate on this issue continued in various law journals and in the media.

Factual accounts of crimes and even the observations of eye-witnesses are also often published in cases of great public interest. It would, however, be contempt of court to publish an article stating that a person not yet tried and convicted is, in fact, guilty of the crime.

5.4.3 Fault

In *Van Staden* 1973 (1) SA 70 (SWA), Van Staden published an article calling on the public to support a petition for clemency for a convicted person. Unknown to him, an appeal was pending against the sentence. Although he objectively interfered with a case which was *sub iudice*, he was acquitted because he did not foresee that the case would be *sub iudice* and therefore had no intention to commit the crime.

Intention is not always required for contempt of court in terms of the *sub iudice* rule. Where an editor of a newspaper or another branch of the media is charged with contempt of court because of the publication in the newspaper

(or other media, as the case may be) of a matter which is potentially prejudicial to a court case which is *sub iudice*, **negligence** is a sufficient form of fault *(Harber, supra)*. This rule may also apply to the owner, publisher, printer and distributor of the newspaper, although, in the *Harber* case, this question was left unanswered.

In *Harber*, *supra* Van Heerden JA stated that there are sound policy considerations why at least the editor of a newspaper should be liable for contempt if he has acted intentionally or negligently. The reason is that the press is so powerful, influences public opinion to such an extent and is in such a unique position to disseminate matter which may tend to influence the administration of justice, that it can validly be required to exercise due care to avoid publication of such matter.

5.4.4 Is punishing commentary on pending judicial proceedings constitutional?

The question arises whether the present rule according to which the publication of potentially prejudicial commentary on pending judicial proceedings is punishable is compatible with the provisions of the Bill of Rights in the Constitution. In particular, the question is whether the present rule is compatible with the provisions of section 16(1) of the Constitution, in terms of which everyone has the right to freedom of expression, which includes freedom of the press and other media, as well as freedom to receive or impart information or ideas.

We are of the opinion that the existence of this form of contempt of court is not unconstitutional. Although the rule does infringe on the right created in section 16(1), we believe that the infringement is reasonable and justifiable in an open and democratic society, as provided in the limitation clause (s 36(1)). (Support for this proposition may be found in Maré in *Bill of Rights Compendium 2A–33*; Hunt *SA Criminal law and procedure*, vol II, *Common-law crimes*, 3d ed (1996) by Milton 182; Snyman *Criminal law* 4th ed:329–331.)

The whole concept of a ''fair trial'' presupposes a trial in which the court decides on the issues before it on the basis of the evidence placed before it, and not on the basis of statements or opinions in the media. Generally speaking, before the case has been finally disposed of by the courts, the media therefore ought not to have the right to publish information on the case which would have a real influence on its outcome, but which was not produced as evidence to the court hearing the case. ''Trial by newspaper'' is and remains a real danger to a fair and impartial disposal of an issue in the judicial process.

Having decided that this form of contempt is not unconstitutional, the further question arises: Is the test that is presently applied in our law, to determine whether the publication of information about a pending trial is potentially prejudicial to the outcome of the case, satisfactory?

Snyman, (Snyman 330 and *Strafreg* 4th ed:(1999) 336–337) is of the opinion that this test ought to be narrower. Instead of asking whether the gist of the publication can influence the outcome of the case, the question ought to be

whether there is a **real risk** (as opposed to a mere possibility) that the administration of justice would be prejudiced by the particular statement. According to Snyman, such a test would better recognise the right to freedom of speech and of the press, while still protecting the courts from being unduly influenced by revelations or comment concerning a pending case.

5.5 Contempt *ex facie curiae* that does not refer to pending proceedings

Although scandalising the court is the classic example of this sub-offence, the following conduct has also been punished as contempt of court *ex facie curiae* that does not refer to pending cases:

- Simulating the court process. It is contempt of court to send to a debtor, for the purpose of obtaining payment of debt, a document which is not a legal document emanating from a court of law, but which is calculated to mislead the debtor into thinking that it is.
- It is similarly contempt for a person to hold himself out as an officer of the court, such as an attorney, advocate or sheriff (*Incorporated Law Society v Sand* 1910 TPD 1295).
- Punishing persons who were witnesses in past cases. It is arguable that it is contempt to endeavour to threaten or punish a witness, counsel, judge or magistrate for his part in concluded proceedings, just as it is contempt to threaten the witness with reference to pending proceedings.
- Obstructing court officials. It is common-law contempt to obstruct court officials such as deputy-sheriffs and messengers of the court in the execution of their duties, because the dignity and authority of the court is thereby violated.
- Disobeying court orders. A person who fails to comply with an order of court commits the offence of contempt of court. It does not matter whether the order has been made in a criminal or civil case. If the order has been made in a civil case, it is sometimes referred to as "civil contempt", but it belongs to the species of criminal offence of contempt of court and is not merely a civil matter.

5.5.1 Scandalising the court

Contempt in this form is committed by the publication of allegations calculated to bring judges, magistrates or the administration of justice through the courts generally into contempt, or to unjustly cast suspicion on the administration of justice.

This type of contempt can be committed by

- scurrilously abusing a judge, magistrate of the judiciary as a whole; or
- imputing bias, partiality or improper motives to a judge, magistrate or the courts in their administration of justice.

the capacity of the person as a judge or magistrate

Scurrilous abuse constitutes contempt where the publication or words reflect upon the capacity of the person as a judge or magistrate and where such publication or words tend to bring the administration of justice into disrepute. Examples of scurrilous abuse are the following: in *Gray* [1900] 2 QB 36, 40 a judge was described as an "impudent little man in horsehair", "a microcosm of conceit and empty-headedness"; in *Mans* 1950 (1) SA 602 (C), X called a magistrate a "kaalgat jakkals" and in *Tobias* 1966 (1) SA 656 (N), X called a magistrate a "bastard".

Imputations of partiality

Imputations of partiality may constitute contempt regardless of the nature of the language used. In *Van Niekerk* 1970 (3) SA 655 (T), Van Niekerk (the same law professor referred to above in *Van Niekerk* 1972 (3) SA 711 (A)) published an article in 1969 in a law journal in which he stated that a large number of advocates believed that all the judges in South Africa consciously and deliberately imposed the death penalty in a biased way and on a racial basis, and that a so-called non-European was more likely to receive the death penalty than a white person. The court held that this statement in itself constituted a gross imputation on the honour and impartiality of judges and might have been contempt of court, but acquitted X for lack of intent to commit the crime. In *Torch Printing and Publishing Co (Pty) Ltd* 1956 (1) SA 815 (C) imputations of racial bias on the part of judges were also held to amount to contempt of court.

5.5.2 Unlawfulness

The defence of fair comment is most likely to be raised where the charge refers to contempt by scandalising the court. Criticism and debate about the proceedings in court and the administration of justice in general are essential to maintain the public's respect for the court and to give effect to the right to freedom of expression in section 16 of the Constitution. Criticism and debate must, however, be conducted in a fair and moderate manner.

5.5.3 Punishing "scandalising the court" may be incompatible with the Constitution

The question arises whether contempt of court in the form of scandalising the court ought still to be punishable in the light of the provisions of the Bill of Rights in the present Constitution. Section 16(1) of the Constitution provides that everyone has the right to freedom of expression, which includes the freedom of the press and other media and the freedom to receive or impart information or ideas.

> In *Mamabolo* 2001 1 SACR 686 (C), the Constitutional Court came to the conclusion that the judiciary has to have the trust of the public in order to function properly. There must be a special safeguard to protect the judiciary against vilification. The Court was of the opinion that the right to freedom of expression is not an unqualified right and does not rank above all other fundamental rights. The limitation is a justifiable limit in view of the importance of protecting the administration of justice, more particularly, the public interest in maintaining the

integrity of the judiciary. To decide whether, in a particular case, the crime was committed, the question is whether his words or conduct was, objectively speaking, likely to result in the administration of justice being brought into disrepute (par 45 of the judgement as discussed by Snyman, Criminal law, 4th ed:332–333; see also discussion by Burchell on 955).

This judgement is criticised by Snyman and Burchell, who point out that the description of this type of contempt is particularly vague, and that to punish it would therefore impinge upon the principle of legality. Expressions such as ''scurrilous abuse'' and ''scandalous'' are emotionally charged. The individual judge is, of course, free to institute a civil action for defamation if he feels that he has been unjustifiably defamed. (See Snyman *Criminal law* 4th ed:333–334 and Burchell 954.)

ACTIVITY

Mandla is a reporter at a local newspaper. One morning the court reporter calls in sick and the editor sends Mandla to cover the court reporter's patch. Mandla attends a fascinating corruption case. The case is set down for a week and Mandla attends on the third day. He writes an article on the case and speculates on the outcome of the case and on the credibility of the witness who gave evidence on that particular day. One of the articles for the next day's edition suddenly folds and Mandla's article is published at the last minute without the editor's knowledge.

(a) Does Mandla commit contempt of court? If he does, which form of contempt of court?

(b) Does the editor commit any crime?

FEEDBACK

(a) Mandla commits contempt of court *ex facie curiae* with reference to pending judicial proceedings. See 5.4 above.

(b) The editor commits contempt of court *ex facie curiae* with reference to pending judicial proceedings. See 5.4 above, especially the section about fault.

STUDY UNIT 6

DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE AND THE CRIME OF PERJURY

6.1 What constitutes defeating or obstructing the course of justice?

The interesting fact about this crime is that it appears as if two independent offences have been created. The conduct constituting this crime can consist of either defeating or obstructing the course of justice. However, defeating or obstructing is a single offence. This is borne out by the fact that the verdict is normally ''guilty of defeating or obstructing''.

This offence is defined is as follows:

> Defeating or obstructing the course of justice consists in unlawfully and intentionally engaging in conduct which defeats or obstructs the course of justice.

The definition seems to be a rather pointless repetition of words which does not take the matter any further, unless "defeat" and "obstruct" are explained. These terms have been interpreted as follows:

defeating

Defeating means that justice has, in fact, been defeated or has not been done. This will be the case where an innocent person has been convicted or a guilty person acquitted or where, in a civil case, an order has been made which would not have been made otherwise.

obstructing

Obstructing, on the other hand, means that the process of justice has been delayed or made more difficult. This will be the case where the trial has to be delayed or postponed or where the police or prosecuting authorities have to waste time and energy investigating the wrong charge or the wrong person.

course of justice

The course of justice means the judicial administration of justice in civil or criminal proceedings. If quasi-judicial or administrative proceedings are defeated or obstructed, the crime is not committed. In *Bazzard* 1992 (1) SACR 302 (NC), the court defined the course of justice as that process which is destined to lead to a court case dealing with an actual or alleged dispute between two or more parties (including the state and accused persons).

6.2 The act

Defeating or obstructing the course of justice is a material offence. This means that any act may constitute the offence if the result is that the course of justice is defeated or obstructed. It is therefore not possible to give a general guideline to indicate which conduct will constitute defeating or obstructing the course of justice. However, categories of types of conduct which may constitute this offence have crystallised through case law. These categories are

- conduct which interferes with the judicial officer; the respective parties to the case, witnesses or evidence;
- conduct by witnesses or prospective witnesses;
- conduct by suspects or accused persons;
- laying a false criminal charge;
- omission.

6.2.1 Interfering with the judicial officer, parties, witnesses or evidence

Examples of this type of conduct include the following:

- soliciting a complainant, by unlawful means, to withdraw a charge (*Du Toit* 1974 (4) SA 679 (T))

- soliciting a prosecutor, by unlawful means, not to prosecute (*Burger* 1975 (2) SA 601 (C))
- improperly influencing a party to a civil case (*Pokan* 1945 CPD 169 171)
- unlawfully releasing a prisoner *(Burger, supra)*
- interfering with a witness by unlawfully inducing (or attempting to induce) that witness [evidence]
- tampering with documents or exhibits in a case (eg *Bekker* 1956 (2) SA 279 (A) where Bekker removed documents from the police docket)
- fabricating false *evidence* (eg *Mdakani* 1964 (3) SA 311 (T) where Madikani fabricated a chain of false evidence including false documents implicating Y in subversive conduct)

6.2.2 Conduct by witnesses or prospective witnesses

Examples of this type of conduct include the following:

- giving false evidence in court (*Port Shepstone Investments* 1950 (4) SA 629 (A))
- refusing to give evidence (*Gabriel* (1908) 29 NLR 750)
- giving false information to the police (*Neethling* 1965 (2) SA 165 (O))
- absconding so as not to be able to give evidence (*Gabriel* 1(1908) 20 NCR 750)

In all these instances it is immaterial whether the witness has been subpoenaed or not.

A witness or prospective witness who demands money for payment for absconding (or not absconding) or for giving false or even true evidence, commits (or attempts to commit) the crime of defeating or obstructing the course of justice (*Cowan* 1903 TS 798).

assisting the police

Except in those few cases where there is a legal duty to act positively, it is not unlawful to refuse to assist the police in the investigation of a crime, irrespective of whether such a refusal may defeat or obstruct the course of justice. A witness or potential witness who refuses to give any information to the police does not normally commit the crime of defeating or obstructing the course of justice, but may be subpoenaed in terms of section 205 of the Criminal Procedure Act 51 of 1977 to give information to a court. On the other hand, if a potential witness intentionally gives false information to the police, this may well constitute the crime *(Binta, supra; Neethling, supra)*. (The constitutionality of section 205 may well be challenged at some future time.)

6.2.3 Conduct by suspects or accused persons

A suspect or an arrested or accused person has the right to remain silent and any refusal by such a person to give information to the police does not constitute the offence. (Note that the right to silence is given express recognition in s 35 of the Constitution.) Even a false statement by such a person, intended to mislead the police, does not constitute the offence.

ACTIVITY

The following are examples where the court had to decide whether the conduct of the suspect or accused constituted obstructing or defeating the course of justice. See if you agree with the court.

(1) In *Nzimande* 1969 (2) PH H227 (NC), the murder suspect denied ever having known the deceased when questioned by the police. He lied.

(2) In *Cassimjee* 1989 (3) SA 729 (N), the police investigated the possibility of a charge of reckless or negligent driving being laid against Cassimjee. In the course of the investigation he falsely told the police that someone else was the driver of the vehicle at the time of the collision.

(3) In *Binta* 1993 (2) SACR 553 (C) the accused refused to submit to the taking of a blood sample.

FEEDBACK

The court held the following

(1) Van den Heever J explained the rule as follows: ''Judging linguistically, the murder suspect who falsely denies ever having known the deceased when questioned by the police obstructs the course of justice, since he causes delay in the truth ultimately be known. I would be startled to learn, even if he lied deliberately in the hope of escaping prosecution, that in law he could be convicted of obstructing the course of justice on the strength of this conduct.''

(2) The court held that Cassimjee had not committed the crime of defeating or obstructing the course of justice.

(3) A person who refuses to submit to the taking of a blood sample envisaged by section 37 of the Criminal Procedure Act 51 of 1955 (eg during the investigation of a possible drunken driving charge) does not commit the offence of defeating or obstructing the course of justice (*Binta*, *supra*; *Kiti* 1994 (1) SACR 14 (E)). Ackerman J stated that there is no fundamental difference in principle between the case of a person refusing to answer questions put by the police in an investigation and the case of the police wishing to obtain a blood sample. If the person uses force to prevent the district surgeon from taking the blood sample, he may be guilty of assault, but the Act does not oblige the person to submit to the taking of the sample or provide that it is a punishable offence if he does not do so *(Kiti, supra)*.

6.2.4 Laying a false criminal charge

The court held that defeating or obstructing was committed in the following two instances. See if you can work out why.

- In *Burger* the accused killed a pedestrian in a hit-and-run accident. In an effort to avoid prosecution, he reported to the police that his vehicle had been stolen (before the accident) and the police spent some time investigating the alleged ''theft'' of the vehicle. Burger was subsequently convicted of obstructing the course of justice.
- In *Mene* 1988 (3) SA 641 (A), the accused, three policemen, shot and killed two youths and wounded four others in the grounds of a certain school. The accused later reported that their vehicle had been attacked and damaged by a group of youths and that they had shot the youths when they tried to arrest them. However, the accused had damaged the vehicle themselves and the story of an attack by the youths was false. They were convicted of attempting to defeat or obstruct the course of justice.

It appears from the cases of *Burger* and *Mene* that the laying of a false charge constitutes the crime of defeating or obstructing the course of justice, even if the person laying the false charge is a suspect or an accused person who has laid the charge in an effort to avoid prosecution on another charge.

This seems to be contrary to the earlier statement that a suspect or accused person normally does not commit the crime of defeating or obstructing the course of justice by lying to the police or even falsely implicating another in the crime of which he is suspected or accused *(Nzimande, supra; Cassimjee, supra)*. However, an accused or suspect can indeed commit the crime of obstructing or defeating the course of justice under the following circumstances:

- If the accused or suspect lays the false charge before he or she is regarded as a suspect on another charge and in anticipation of a possible police investigation against him or her;
- if the false charge relates to a crime which has not been committed; and
- if it is done with the intention of having an innocent person land in trouble, or to obscure another crime which has been committed (by him- or herself) (*Bazzard, supra*).

In the following set of facts, the court held that no offence had been committed:

> Bazzard called the police, told them falsely that he was holding a woman hostage and demanded a sum of money for the release of the ''hostage''. The police spent a considerable amount of time investigating the kidnapping before they realised that no kidnapping had been committed. Bazzard was acquitted on a charge of defeating or obstructing the course of justice. The court held that
>
> (1) the mere wasting of the police's time does not constitute the offence; and
> (2) by falsely implicating himself in a crime which had not been committed, X did not interfere with the course of justice *(Bazzard, supra)*.

Warning an on-coming motorist of a speed trap will constitute defeating or obstructing if the driver has reason to believe that the approaching vehicle is exceeding the speed limit or that the driver of this vehicle intends to exceed the speed limit (*Perera* 1978 (3) SA 523 (T)).

It is not a requirement that the act be committed with regard to a pending case. It is enough if the accused has subjectively foreseen that his or her conduct may lead to a prosecution or an investigation by the police.

6.2.5 Defeating or obstructing by omission

As is the case with numerous other common-law crimes, the crime of defeating or obstructing the course of justice can be committed either by a positive act or by an omission *(Binta, supra)*. An omission will be sufficient where there is a legal duty to act positively on the part of the accused. The question whether there has been such a legal duty must be determined in accordance with the ordinary general principles of criminal law. A legal duty to act positively may arise whenever the circumstances of the case are of such a nature that the legal convictions of society demand that the omission ought to be unlawful (see *Minister van Polisie v Ewels* 1975 (3) SA 590 (A)).

> In *Gaba* 1981 (3) SA 745 (O) X, a detective, was aware of the fact that his colleagues were searching for a gangster known as ''Godfather''. X knew ''Godfather'', and he failed to inform his colleagues that a certain suspect they were interrogating was in fact ''Godfather''. As a result of his omission to inform, ''Godfather'' was released and only rearrested at a later stage. The court held that X had a legal duty to act positively to inform his colleagues that the suspect was ''Godfather'' and he was accordingly convicted of attempting to defeat or obstruct the course of justice.

6.2.6 Intention

The accused must intend to defeat or obstruct the course of justice. *Dolus eventualis* will be sufficient.

6.2.7 Attempt

In the majority of cases it would be difficult to prove that the course of justice had, in fact, been defeated or obstructed. If a potential witness intentionally supplies the police with false information which is immediately disbelieved and not acted upon, he neither defeats nor obstructs the course of justice, but he may be charged with an attempt to defeat or obstruct the course of justice. For this reason it is preferable to charge an accused only with an attempt to commit the crime.

> ''Attempting to defeat or obstruct the course of justice'' is defined by Snyman as ''unlawfully doing any act in furtherance of an intention to defeat or obstruct the course of justice''. On a charge of attempting to defeat or obstruct the course of justice the ultimate result of the proceedings interfered with or the fact that the prosecution in this case would in any event have failed, is immaterial.

6.3 Perjury: the history of perjury

Burchell (959) points out that the function of the crime is to protect the integrity of the judicial administration of justice by ensuring that the witness should speak the truth. In ancient law the witness was only punished if the false testimony caused injury to others. In Roman law the perjurer in a murder trial was executed, but in other trials was left to the devices of the deity who had been invoked. Perjury has been punished since early times in South African law and has largely been influenced by English law.

6.4 What constitutes perjury?

Perjury consists in the unlawful and intentional making of a false statement in the course of judicial proceedings when such a statement is material to any issue in the proceedings by a person who has either: taken the oath or made an affirmation to speak the truth; or who has been admonished by someone competent to administer or accept the oath, affirmation or admonition.

6.5 The statement

The statement constituting perjury may be made either orally or in writing in the form of an affidavit (*Beukman* 1950 (4) SA 261 (O)).

6.5.1 False statement

The false statement may be express or implied, which means that the prosecution may rely on an innuendo in the words to prove that the statement is false. In *Vallabh* 1911 NPD 9, 12, for example, it was held that the words of a witness, ''I have already stated what I heard'', implied that he had heard nothing more. If an innuendo is relied upon, the inference sought to be drawn from the words

- must be a necessary inference; and
- must appear from the statement itself and not from extraneous statements or affidavits.

In English law it is sufficient that the person making the statement subjectively believes the statement to be false. This type of subjective falsity means that the witness can be convicted of perjury in relation to a perfectly true statement, provided he/she believes the statement to be false. Although the South African courts have never decided whether objective falsity or subjective falsity is required for perjury, we support Snyman's view that objective falsity should be required. Cases where the truth is told by a witness who intends to lie may be punished as attempted perjury or attempting to defeat or obstruct the course of justice.

6.5.2 Material to any issue

The false statement must be material to any issue to be decided in the

proceedings during which such false statement is made. This requirement is of little practical value, since the concept of materiality is very widely defined by the courts. To be material the statement does not have to cause actual defeating of, or even interference with, the course of justice. It is enough that it was relevant to one of the issues before court, whether it be guilt, sentence or credibility. In terms of section 101(1) of the Criminal Procedure Act, it is not necessary for the state to allege or prove the materiality of the statement. The witness may, however, still prove that his/her statement was immaterial.

6.5.3 In the course of judicial proceedings

Perjury can be committed only if the statement is made in the course of a judicial proceeding. The judicial proceeding may be either of a criminal or civil nature and, in our view, this includes inquests and preparatory examinations. In *Beukman, supra* the court (per Smit AJ) stated that

"... the term 'judicial proceedings' is not confined to proceedings in a court of law, yet it must refer to proceedings in which rights are legally determined and liability imposed by a competent authority upon a consideration of facts and circumstances placed before it".

The following will qualify as statements made during judicial proceedings:

- Statements made during proceedings by statutory bodies which are vested with the statutory power to "determine rights and impose duties", such as disciplinary inquiries by the SA Medical and Dental Council conducted in terms of section 41 of the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974.
- A statement not actually made during trial may be regarded as having been made "in the course of judicial proceedings"

  (1) if the law permits it to be used as evidence at a judicial proceeding, and

  (2) if such use is contemplated as a possibility by the maker of the statement at the time when the statement is made.

- Statements made in an affidavit to be used in a civil application and statements made in an affidavit to be used as evidence in terms of section 212 of the Criminal Procedure Act (eg relating to the concentration of alcohol in a sample of blood taken from an accused) will qualify. False statements made in such affidavits may lead to a conviction of perjury even if those affidavits are never handed in during the proceedings for which they were drawn up.

The following will not qualify as statements made during judicial proceedings:

- False statements made during the proceedings of an administrative tribunal will not constitute perjury. For example, a meeting of creditors held in terms of the Insolvency Act 24 of 1936 is not a judicial proceeding (*Carse* 1967 (2) SA 659 (C)). Furthermore, if the false statement is made before a "tribunal" which is not a court of law, no perjury is committed, for example where a "witness" gives false "evidence" before a so-called people's court or bundu court.

- Affidavits made to the police in the course of their investigation into an alleged crime, or statements made on oath in which a false criminal charge is laid, are not made in the course of judicial proceedings and cannot form the basis of a charge of perjury.

For only perjury to be committed, it is uncertain whether judicial proceedings have to take place before a court having jurisdiction. Snyman is of the view that lack of jurisdiction, be it territorial or as regards the subject matter, is no defence against a charge of perjury.

In terms of section 102(2) of the Criminal Procedure Act it is unnecessary, in a charge of perjury, to allege the jurisdiction of the court or to state the nature of the authority of the court.

6.5.4 On oath, affirmation or admonition

Perjury is committed only if the false statement is made on oath or in a form allowed by law to be substituted for an oath, namely an affirmation in the place of an oath, or an admonition to speak the truth in the case of certain classes of persons, such as young children. (See ss 162–164 of the Criminal Procedure Act 71 of 1955.)

Persons who for any reason object to the taking of the oath, or who do not consider the oath binding on their conscience, or who have no religious belief, are required to affirm that they will tell the truth.

Persons who by reason of their youth or education or for any other reason do not understand the nature and import of the oath are admonished to tell the truth.

The official who administers the oath or admonition, or who accepts the affirmation, must be competent to do so.

6.6 Unlawfulness

If a person is coerced into giving false evidence, he/she may conceivably rely on necessity as a ground of justification.

A person charged with a crime who, in his or her defence, gives false evidence under oath in an attempt to avoid a conviction, commits perjury. It is, however, unusual to charge a person with perjury in these circumstances (*Malianga* 1962 (3) SA 940 (SR)).

It is no defence if the person who made the false statement admitted shortly afterwards that it was false and then told the truth (*Nga* 1911 EDL 162 165)).

6.7 Intention

Perjury can only be committed intentionally. The person must know, or at least foresee the possibility, that his/her statement may be false and nevertheless make the statement, not caring whether it is true or false *(ie*

dolus eventualis). He/she must also be aware of the fact that he/she is under oath, affirmation or admonition and that his/her statement is made in the course of judicial proceedings.

6.8 Statutory perjury

6.8.1 What constitutes statutory perjury?

If a witness gives evidence in judicial proceedings which is in conflict with a previous statement made under oath to the police or any party involved in the proceedings, it does not follow that a charge of common-law perjury against such a witness will succeed. This is because the state would have to prove, *inter alia*, that the statement was not only made during court proceedings, but also that it was false (and not merely in conflict with a previous statement). To overcome this difficulty, the crime contained in section 319(3) of the ''old'' Criminal Procedure Act 56 of 1955, a section which has not been repealed by the ''new'' Criminal Procedure Act 51 of 1977, was created. This crime is known as statutory perjury and is committed when two conflicting statements are made under oath.

> The formal definition of this crime reads as follows:
>
> If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such first-mentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true (s 319(3) *supra*).

6.8.2 Two conflicting statements under oath

The statements, which may be in writing or oral, must be made under two different oaths on two different occasions.

- If, in a court case, a witness resumes his/her evidence which he/she commenced giving before an adjournment, and is warned by the judicial officer that he/she is still under oath, his/her evidence after the adjournment is not evidence under another or a different oath, as contemplated by the section.
- Neither of the two statements need be made in judicial proceedings. If both statements were, for example, made to the police during the investigation of a crime (or of different crimes), they would qualify for the purposes of the section.
- Although the section refers only to statements under oath, statements made under affirmation are also included, since section 2 of the Interpretation Act 33 of 1959 provides that the word ''oath'' includes an affirmation.

- The oath (or affirmation) must be properly administered by a person having the legal authority to do so.
- The statements must be in conflict with each other. In *Ramdas* 1994 (2) SACR 37 (A) the Appellate Division held that the two statements must be mutually destructive and that they must not be capable of reconciliation.

6.8.3 Onus on accused

When the state has proved that a person has made two conflicting statements under two oaths, a conviction can only be avoided by proving (on a balance of probabilities) that he or she believed that he or she was speaking the truth when making each of the statements. The test is subjective, and the belief need not have been reasonable.

Is the fact that the onus lies on the accused constitutional?

According to the present wording of this section, the state need not prove that, at the time of making both statements, the accused knew that the statements were false. The state is, in other words, relieved of the onus of having to prove intention on the part of the accused. The onus is placed on the accused to prove the absence of intention, that is, to prove that at the time of making the statements, he/she believed that what he/she was saying was the truth.

We are of the opinion that the placing of the onus on the accused is unconstitutional, since it is incompatible with section 35(3)(h) of the Constitution, which grants an accused the right to be presumed innocent. It would appear that section 319(3) created a so-called "reverse onus", which cannot be justified in terms of the limitation clause in section 36(1) of the Constitution.

This, however, does not mean that the whole crime created in section 319(3) is unconstitutional. It only means that the normal rule relating to the onus of proof in criminal matters should also apply to prosecutions under section 319(3). This means that the onus is on the state to prove the necessary intention on the part of the accused. If the state has advanced evidence that the accused had made two conflicting statements, the court may, depending upon the facts of the case, make the *prima facie* deduction that, when making at least one of the statements, the accused realised that what he/she was saying was untrue.

6.8.4 Difference between common-law perjury and statutory perjury

The following differences are to be found between common-law perjury and statutory perjury:

- In common-law perjury only one statement is relevant, whereas in statutory perjury there must be two statements.
- Common-law perjury can be committed only in the course of legal proceedings, whereas in statutory perjury it is not a requirement that the statements must be made in the course of legal proceedings.

- Intention must be proved by the state in the case of common-law perjury, whereas the accused bears the burden of proving the absence of intention in the case of statutory perjury.

6.9 Overlapping

All the crimes against the administration of justice which are discussed above may overlap to a certain extent under specific circumstances:

- Defeating or obstructing the course of justice may overlap in a considerable number of offences, such as contempt of court (which is regarded as a species of the present crime (*Afrikaanse Pers-Publikasie (Edms) Bpk v Mbeki* 1964 (4) SA 618 (A) 628–629), perjury, fraud, forgery, extortion, obstructing the police in the course of their duties and being an accessory after the fact.
- Defeating or obstructing the course of justice can be committed by improperly seeking to influence the judiciary by exhorting them not to give credence to certain types of evidence, contrary to their duties (*Van Niekerk* 1972 (3) SA 711 725–726). This conduct overlaps with the crime of contempt of court.
- Perjury may overlap with contempt of court, defeating or obstructing the course of justice (or an attempt to commit this crime), fraud, statutory perjury in contravention of section 319(3) of Act 56 of 1955 and statutory perjury in contravention of section 9 of Act 16 of 1963.

ACTIVITY

(1) John Smith grades diamonds at a diamond mine. He steals diamonds.

Discuss whether John committed the crime of defeating or obstructing the course of justice in the following instances:

(a) He goes to the police and claims that someone broke in at the mine and stole the diamonds. He lays a charge of housebreaking with the intent to steal, a charge which the police start to investigate.

(b) The police suspect that John stole the diamonds and question him about the theft. He claims that someone broke in and stole the diamonds.

(2) Explain what is meant by ''in the course of judicial proceedings'' in the context of the crime of perjury.

(3) When will two statements under oath be in conflict?

FEEDBACK

(1) Here you need to define what is meant by defeating or obstructing the course of justice.

- Discuss the cases of *Burger, Mene and Bazzard*. John commits the crime of obstructing or defeating the course of justice.
- Lying to the police does not normally mean a suspect or an accused person commits the crime (Nzimande).

(2) See the discussion above in 6.5.3.

(3) See the discussion above in 6.8.2.

STUDY UNIT 7

CORRUPTION

7.1 Introduction: general and specific crimes of corruption

(This study unit is based on Snyman's discussion of the Act.)

Corruption was known as bribery in the common law. It was a crime that could be committed by civil servants only. A separate crime was created by the Act on the Prevention of Corruption 6 of 1958 in order to punish persons who were not civil servants. Both these crimes had been abolished and replaced by the Corruption Act 92 of 1994 which created one general crime of corruption only. The 1992 Act was replaced by The Prevention and Combating of Corrupt Activities Act 12 of 2004 which you now have to study. In promulgating this act, South Africa endeavours to fulfil its obligations in terms of international accords.

In terms of the 1994 legislation one general crime of corruption was created. The new Act creates a general crime of corruption and crimes relating to corrupt activities. These specific crimes relates to activities committed by specific persons.

The most important difference between the 1994 Act and the 2004 Act is the

fact that a person should offer gratification to any other person in order to influence that person to act in a specific manner in **future**. Snyman finds this limitation strange in view of the fact that gratification may be offered for an activity that was performed in the past, an acceptable legal principle. (Snyman *Strafreg* (4th ed) 2006 384, see in general Snyman 382–384).

7.2 The general crime of corruption: definition in the Act

Section 3 of the Act contains the formulation of the general offence of corruption. The section provides as follows:

> ''Any person who directly of indirectly —
>
> (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
>
> (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person;
>
> in order to act, personally or by influencing another person so to act, in a manner —
>
> (i) that amounts to the —
>
> (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
>
> (bb) misuse or selling of information or material acquired in the course of the
>
> exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
>
> (ii) that amounts to —
>
> (aa) the abuse of a position of authority;
>
> (bb) the breach of trust; or
>
> (cc) the violation of a legal duty or a set of rules;
>
> (iii) designed to achieve an unjustified result; or
>
> (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything;
>
> is guilty of the offence of corruption.''

If one simplifies this definition by provisionally cutting out the conjunctive words or phrases, the main sentence of the definition quoted above reads as summarised in the box:

"Anyone that

(a) accepts any gratification from any other person, or
(b) gives any gratification to any other person,

in order to act in a manner that amounts to the illegal exercise of any duties, is guilty of the offence of corruption.

Both parties

Corruption is committed if one party gives gratification to another party and the other party accepts it as inducement to act in a certain way. *Both parties* — the giver and the accepter — commit corruption.

giver, accepter

The expression "corruption by a giver" refers to the conduct of the *giver,* and "corruption committed by an accepter" refers to the conduct of the party who *accepted* it. In the discussion of the crime that follows, the party who gives the gratification is referred to as the giver and the party who accepts the gratification is referred to as the *accepter*.

In principle, corruption committed by the giver is only a mirror image of corruption committed by the receiver. In order to avoid duplication, in the discussion that follows, the emphasis will be on the corruption committed by the receiver. In our discussion of this form of the crime, the different requirements of the elements of the crime will be identified and explained.

In view of the fact that corruption can be committted in many ways, one should distinguish between corruption by the giver who encourages the receiver to act in a certain manner by giving the gratification and corruption by the receiver who receives the gratification to act in a specific manner. It could be argued that "active corruption" takes place when the gratification is given and "passive corruption" when the gratification is received. (Snyman 385).

When you study the Act you must keep in mind that "give" includes agreement by the giver to give the gratification to the accepter, or an offer of gratification by the giver. "Receive" on the other hand includes agreement by the accepter to accept the gratification or an offer from the accepter to accept such gratification.

7.3 General crime of corruption: the crime committed by the accepter

7.3.1 Elements of the crime

The elements of the general crime of corruption by the accepter are the following:

(1) the acceptance by the accepter (the element of an act)

(2) of gratification

(3) in order to act in a certain way (the inducement)

(4) unlawfulness

(5) intention

Each of these elements will now be discussed.

7.3.2 The acceptance (element of an act)

agrees, offers

The word ''accept'' includes a number of other acts that are not normally regarded as synonyms of ''accept''. The legislature employs two ways to broaden the meaning of ''accept''. In section 3(3), the Act provides that this element will also be satisfied if the accepter agrees to accept gratification or if he/she offers to receive gratification.

It follows from this provision that, in this crime, no distinction is made between the main crime, on the one hand, and conspiracy or incitement to commit the main crime, on the other hand.

The Act provides (in s 2(3)(a)) that the words or expressions ''accept'', ''agree to accept'' and ''offer to accept'' as used in the Act also have the following broader meanings:

(1) to demand, ask for, seek, request, solicit, receive or obtain gratification

(2) to agree to perform the acts named under (1)

(3) to offer to perform the acts named under (1)

The following considerations do not afford the accepter a defence:

(1) The fact that the accepter did not accept the gratification ''directly'', but only ''indirectly'' (s 3). He/she does not have to accept the gratification personally. The fact that the accepter makes use of a middle man to accept the gratification affords him/her no defence.

(2) It is irrelevant whether the gratification was accepted for the accepter's own benefit or for the benefit of someone else (s 3(a) and (b)).

(3) The fact that the accepter did not in actual fact later perform the act which the giver had induced him/her to perform (s 25(c)). If the gratification had been accepted, but the entire evil scheme was exposed and the accepter arrested by the police before he/she could fulfil his/her part of the agreement he/she is nevertheless guilty of the crime.

(4) The fact that the corrupt activity between the accepter and giver was unsuccessful. This consideration also does not afford the giver a defence.

(5) For the purpose of liability, it is irrelevant that the state or the private enterprise concerned with the transaction did not suffer prejudice as a result of the accepter or the giver's conduct.

(6) The fact that the accepter accepted the gratification but that he/she, in actual fact, did not have the power or right to do what the giver wished her to do, affords neither a defence (s 25(a)).

7.3.2.1 The gratification

"Gratification" has a very broad meaning in terms of the Act. It is clear that "gratification" is not limited to tangible or patrimonial benefits. It is suggested that the word "gratification", as used in the Act, is wide enough to include information and even sexual favours (see *W* 1991 (2) SACR 642 (T)).

In terms of the definition in the Act, "gratification" includes the following:

(1) money

(2) a gift

(3) a loan

(4) property

(5) the avoidance of a loss

(6) the avoidance of a penalty (such as a fine)

(7) employment, a contract of employment or services

(8) any forbearance to demand any money

(9) any "favour or advantage of any description"

(10) any right or privilege

7.3.2.2 The element of inducement

"in order to act ... in a manner"

The accepter must accept the gratification in order to act in a certain manner. In other words, he/she must have a certain aim or motive in mind when he or she accepts the gratification.

The aims apply in the alternative. It is sufficient for the state to prove that the accepter had only one of these aims in mind when he/she accepted the gratification.

The legislature lists a number of aims in considerable detail. Below follows an abbreviated version of these aims:

(1) In order to act in a manner that amounts to the illegal, dishonest, unauthorised, incomplete, or biased ... exercise of any powers, duties or functions arising out of a legal obligation.

(2) In order to act in a manner which amounts to the misuse or selling of information acquired in the course of the exercise of any duties arising out of a legal obligation.

(3) In order to act in a manner which amounts to the abuse of a position of authority, the violation of a legal duty or a breach of trust.

(4) In order to act in a manner designed to achieve an unjustified result.

(5) In order to act in a manner that amounts to any other improper inducement to do or not to do anything.

It is clear that these aims are defined broadly and that they cover a very wide field. The fourth aim (to act in a manner to achieve an unjustified result) is formulated so broadly that it includes almost all the other aims.

The legislature explicitly provides that an "act" also includes an omission (s 2(4)).

7.3.2.3 Unlawfulness

The element of unlawfulness is not expressly provided for in the definition of the crime, but must nevertheless be read into it. Unlawfulness, or rather, the requirement that the act should be "unjustified", is a requirement or element of all crimes. The general meaning of "unlawful" is "against the good morals or the legal convictions of society". It implies that the accepter's conduct must not be covered by a ground of justification. The following are examples of conduct which, ostensibly, fall within the ambit of the definitional elements of corruption, but which are, nevertheless, not unlawful:

(1) If the accepter acted under compulsion, unlawfulness would be excluded.

(2) A person used as police trap also does not act unlawfully if he/she agrees to receive gratification from another person in order to trap that person into committing corruption (*Ernst* 1963 (3) SA 666 (T) 668A–B; *Ganie* 1967 4 SA 203 (N)).

(3) It is suggested that certain officials or employees, such as porters or waiters, do not act unlawfully when they receive small amounts of money from the public as "tips" for services which they performed satisfactorily. Such conduct is socially adequate; it is not against the good morals or legal convictions of the community.

(4) The same applies to the receiving of gifts of a reasonable proportion by employees on occasions such as weddings or retirement or completion of a "round number" (say, for instance, 20 years) of work. (A "golden handshake" which may involve a substantial amount of money may, however, depending on the circumstances, be another case.)

7.3.2.4 Intention

As far as the form of culpability required for this crime is concerned, it is clear that intention, and not negligence, is required. Words or expressions such as the following used in the section suppose the requirement of intention: "accept", "agree", "offer", "inducement", "in order to ..." and "designed".

According to general principles, intention always includes a certain knowledge, namely knowledge of the nature of the act, the presence of the definitional elements and the unlawfulness. Intention does not only include actual knowledge, but also intention in the form of *dolus eventualis*.

The Act contains a provision which expressly applies the principle of *dolus eventualis* to this crime. Section 2(1) provides that, for the purposes of the Act, a person is regarded as having knowledge of a fact not only if he or she has actual knowledge of a fact, but also if the court is satisfied that the person believes that there is a reasonable possibility of the existence of that fact and that the person failed to obtain information to confirm the existence of that fact.

This provision is merely an application of the general rule that intention in respect of a circumstance (as opposed to a consequence) can also exist in the form of *dolus eventualis*; more specifically, that ''wilful blindness'' amounts to knowledge of a fact and, accordingly, intention. These principles have previously been accepted in our case law. (See *Meyers* 1948 1 SA 375 (A) 382; *Bougarde* 1954 2 SA 5 (C) 7–9.)

no defence

The fact that the accepter accepted the gratification without intending to perform the act which she/he was induced to perform affords the accepter *no defence* (s 25(b)).

In terms of earlier legal principles applicable to corruption the fact that no evidence could be produced to prove that the giver had the intention to influence the accepter to act in a certain manner affords the accepter no defence. The accepter will commit corruption as long as he/she believes that he/she is being bribed. Snyman argues that this rule should also be applicable to the new legislation (Snyman 394).

7.4 Accessory to or after the crime; Attempt, conspiracy and inducing another person to commit the crime

Accessory to and after the crime is punishable in terms of sec 20 of the Act. Snyman (394) finds this unnecessary as instances of acccessory to and after the crime can be dealt with in terms of common law principles.

Attempt, conspiracy and inducing another person to commit a crime is punishable in terms of sec 21 of the Act. Snyman finds this unnecessary as well, as he is of the opinion that these instances are included in the general common-law principles (395).

7.5 Penalties

Any person who is convicted of the general crime of corruption may be sentenced as follows:

High court

(1) If he/she is sentenced by a *High Court*, an unlimited fine or ''imprisonment up to a period of imprisonment for life'' (s 26(1)(a)(i)). In terms of the provisions of section 1(1)(b) of the Adjustment of Fines Act 101 of 1991, imprisonment and a fine may be imposed.

regional court

(2) If he/she is sentenced by a *regional court*, a sentence of an unlimited fine or imprisonment of a period not exceeding 18 years (s 26(1)(a)(ii)). If the provisions of section 1(1)(a) of the Adjustment of Fines Act 101 of 1991 is taken into account, the maximum fine that may be imposed by a regional court is 18 × R20 000 = R360 000. In terms of the provisions of section 1(1)(b) of the same Act, a fine and a sentence of imprisonment may be imposed.

magistrate's court

(3) If he/she is sentenced by a *magistrate's court*, an unlimited fine or imprisonment of a period not exceeding five years (s 26(1)(a)(iii)). If the

provisions of the Adjustment of Fines Act 101 of 1991 are taken into account, the maximum fine that may be imposed by a magistrate's court is 5 × R20 000 = R100 000. In terms of the provisions of section 1(1)(b) of the same Act, a fine and a sentence of imprisonment may be imposed.

In addition to any fine a court as mentioned above may impose, a court may also impose a fine equal to five times the value of the gratification involved in the offence (s 26(3)).

7.6 General crime of corruption: corruption by the giver

mirror image

Corruption by the accepter discussed above deals with acceptance by the accepter of gratification given by the giver. Conversely, corruption committed by the giver deals with the giving, by the giver, of gratification to the accepter. Corruption committed by the giver is only a mirror image of corruption committed by the accepter and it is therefore unnecessary to repeat all the rules already discussed above.

Unless indicated otherwise, all the principles applicable to corruption committed by the accepter are also *mutatis mutandis* (in other words, by replacing the word "accept" with the word "give" in each instance) applicable to corruption committed by the giver. It is more or less just in the requirement of the Act that corruption by the giver is structured differently as in corruption by the accepter.

7.6.1 The elements of the crime

The elements of the general crime of corruption are the following:

(1) the giving by the giver to the accepter (the requirement of an act)

(2) of gratification

(3) in order to induce the accepter to act in a certain manner (the element of inducement)

(4) unlawfulness

(5) intention

7.6.2 The giving of the gratification

The act consists of the giver giving gratification to the accepter. The word "gives" has a technical meaning because, apart from "give" as in the ordinary meaning of the word, other acts are included which are not normally regarded as synonyms of the word "give". The legislature uses two ways to broaden the meaning of "give":

(1) The Act provides (in s 3(b)) that certain conduct by the giver preceding the

giving of the gratification, namely, to merely agree to give gratification or to offer to give it, also satisfies the requirement of an act.

(2) The Act provides (in s 3(b)) that the words "give or agree or offer to give any gratification", as used in the Act, also have the following broader meanings:

- to promise, lend, grant, confer or procure the gratification
- to agree to lend, grant, confer or procure the gratification
- to offer to lend, grant, confer or procure such gratification

It is not a requirement for the offence committed by the giver that he/she should have succeeded with his/her plan of action. Therefore, considerations such as the following afford him/her no defence:

- the fact that the accepter, although she/she perhaps gave the impression that he/she would accept the offer, in actual fact had had no intention of doing what X had asked her to do (s 25(b))
- the fact that the accepter did not do what the giver requested him/her to do (s 25 (c))
- the fact that the accepter did not have the power to do that which he/she was requested to do (s 25(a))
- the fact that the accepter rejected the giver's offer
- the fact that the accepter agreed but thereafter changed his/her mind
- the fact that the accepter found it impossible to do that which he/she had undertaken to do

7.6.3 The gratification

This requirement is the same as the corresponding requirement for corruption committed by the accepter and has already been set out above in the discussion on that form of corruption.

7.6.4 In order to act in a certain manner (the element of inducement)

This requirement is the same as the corresponding requirement for corruption committed by the accepter. The wording of the section dealing with this element of corruption committed by the giver is not very lucid, but it is nevertheless clear that the legislature intended to say: "[a]nyone who ... gives any gratification ... in order to *induce the accepter to* act ... in a manner that ...". The words printed in italics, which express the meaning of the provision more clearly, do not appear in the text of the section, but are implied.

7.6.5 Unlawfulness

This requirement is the same as the corresponding requirement for corruption committed by the accepter, and has already been discussed above.

7.6.6 Intention

This requirement is the same as the corresponding requirement for corruption committed by the accepter and has already been discussed above.

7.7 Penalties

The penalty prescribed for the commission of corruption by the accepter is the same as those prescribed for corruption by the giver. These penalties are discussed above.

7.8 Corruption relating to specific persons

From section 4, ''corrupt activities relating to specific persons'' are criminalised. As already mentioned, it is impossible to discuss in detail each of the specific offences created from section 4 onwards. Considerable parts of the definitions of these crimes — in particular the ''element of inducement'', that is, the part of the definition that starts with the words ''in order to act ... in a manner'' is worded exactly the same as the general crime of corruption in section 3 (which we have already discussed in some detail above). We will just give you a brief overview of some of these specific offences.

(1) *Corruption relating to public officials.* Section 4 creates an offence limited to corruption of public officials. ''Public officials'' is defined exhaustively in section 1. A typical example of such an official is a state official.

(2) *Corruption in relation to agents.* Section 6 creates an offence limited to corruption of agents. Corruption committed by business people in the private sector is criminalised in this section.

(3) Corruption in relation to members of the legislative authority. See section 7.

(4) *Corruption in relation to judicial officers.* Section 8 creates a crime limited to the corruption of judicial officers. The expression ''judicial officer'' is defined in section 1 and includes judges and magistrates. The conduct which the judicial officer is induced to perform is also further defined in section 8(2).

(5) *Corruption relating to members of the prosecuting authority*. Section 9 creates an offence limited to corruption of the members of the prosecuting authority. The act that the accepter is induced to perform is further defined.

(6) *Receiving or offering of unauthorised gratification by a party to an employment relationship*. Section 10 creates an offence which is limited to corruption committed in an employment relationship. If an employer, for instance, accept gratification as inducement to promote one of his employees, he can be charged with a contravention of this section.

(7) *Corruption relating to procuring of tenders.* Section 13 creates an offence limited to corruption committed in order to procure a tender.

(8) *Corruption relating to sporting events*. Section 15 creates an offence limited to corruption committed in the context of sporting events. Someone who accepts or gives money in order to undermine the integrity of any sporting event contravenes this section. The word ''sporting event'' is further defined in section 1.

ACTIVITY

In the following scenarios, decide if Sam commits corruption and, if he does, what specific form of corruption:

(1) Sam gives Anne, the prosecutor in a criminal case, money in order to persuade her to destroy or hide the docket in which the particulars of the prosecution's case is contained so that the docket can be reported missing and the prosecution will consequently be unsuccessful.

(2) In order to persuade Anne to accept Sam's tender, Sam gives an amount of money to Anne, whose task it is to decide to whom a tender should be awarded.

(3) Sam, who bets money on the outcome of sporting events, gives money to Anne, who is a sportswoman or a referee, in order to persuade Anne to manipulate the game in such a way that the match has a certain outcome.

FEEDBACK

The following offences have been committed:

(1) Sam contravenes section 9 of the Act. The type of conduct criminalised under this heading can overlap with the common-law offence of defeating or obstructing the course of justice.

(2) Sam contravenes section 13 of the Act.

(3) Sam contravenes section 15 of the Act.

7.9 Failure to report corrupt acts

a person in a position of authority

Section 34 creates a significant crime. This crime consists of a failure by *a person in a position of authority* who knows, or who ought reasonably to have known, that certain crimes named in the Act have been committed, to report an offence created in the Act to a police officer.

Subsection (4) includes a long list of persons who are regarded as people holding a position of authority. It includes any partner in a partnership and any person who is responsible for the overall management and control of the business of an employer.

form of culpability

The *form of culpability* required is either intention or negligence (as a result of the use of the words ''who knows or ought reasonably to have known''). In interpreting the word ''knows'' the expanded meaning given to the word

"knowledge" in section 2 should be kept in mind: apart from actual knowledge, it also includes the case where a person believed that a fact existed, but then failed to obtain information to confirm the existence of that fact ("wilful blindness").

7.10 Extraterritorial jurisdiction

Section 35 provides that, if the act alleged to constitute an offence under the Act occurred outside the Republic, a court in the Republic shall have jurisdiction in respect of that offence. It is irrelevant whether the act with which the accused is charged amounts to an offence in the country in which it was committed.

citizen of the Republic

However, the accused must be a citizen of the Republic or ordinarily resident in the Republic, or must have been arrested in the Republic or should be a company incorporated or registered in the Republic or any body of persons in the Republic. If, therefore, a South African sportswoman participates in a sporting event in Japan and tries to influence the outcome of the match because a gambler offers her a sum of money to act in this manner, she can be charged in South Africa with one of the offences created in this Act.

ACTIVITY

Sam gives the judge in a certain case money or offers him/her money in order to persuade her to give a judgement in favour of his son. Does Sam commit corruption?

FEEDBACK

The accepter (the judge) is expected to conduct the case in such a way that it would amount to her, the judge, not giving a judgement according to objective evaluation on the merits of the facts before the court. Sam will commit corruption as a giver. If someone corrupts a judicial officer, the conduct can also be punished as contempt of court. You had to discuss the requirements for the general crime of corruption committed by the giver. You also had to indicate whether or not a specific form of corruption was committed.

STUDY UNIT 8

THEFT: GENERAL PRINCIPLES

8.1 Historical overview

In Roman law *furtum* (theft) was a wide concept that included various forms of patrimonial damage. The best-known definition of *furtum* is that of Paul, one of the writers of Roman law, contained in D 27 2 1 3 (the D refers to the *Digesta*), which reads as follows: *furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus possessionisve*. This may be translated freely as follows: "Theft is the fraudulent handling of a thing with the intention of deriving a benefit, either from the thing itself, or from its use, or from its possession." The text embodies the principal elements of *furtum* and may be used as a starting point in determining the meaning and content of the concept of theft.

Contrectatio was the term used to describe the act, and generally meant some physical handling of the property, which almost invariably involved at least touching it. The property stolen had to be a movable, corporeal object *in commercio* (available in commerce, or capable of being owned by somebody). The term *fraudulosa* referred to unlawfulness and intention. *Contrectatio* had to take place without the consent of the person legally entitled to possession of the property.

The requirement that the crime be committed intentionally was often expressed by the words *animus furandi*. An intention to derive a benefit or an advantage *(lucri faciendi gratia)* was an indispensable requirement (D 19 5 14 2; D 47 2 52 13). This limited the wide concept of *contrectatio* to a certain extent, and was essential in distinguishing theft from the mere causing of damage to another's property *(damnum iniuria datum)*.

In his definition Paul referred to three kinds of furtum: *furtum rei, furtum usus and furtum possessionis*.

- *Furtum rei* included the taking and removal of another's property from his possession (this is the most common and best-known way of committing theft), and the embezzlement of Y's property already in the perpetrator's (X's) lawful possession.
- *Furtum usus* was the unauthorised temporary use of another's property already in the thief's possession
- *Furtum possessionis* was when the thief took away his own property from another's lawful possession.

As far as Roman-Dutch law is concerned, most writers simply adopted Paul's definition in D 47 2 1 3 without any change.

(The works referred to in the discussion of this crime, and which may be consulted as general background reading, are the following: Snyman, CR *Criminal Law* 4 ed (2002) ch XIX A; Hunt, PMA *South African Criminal Law and Procedure*, vol II; Milton, JRL *Common-Law Crimes* 3ed (1996); ch 26; De Wet & 38; Swanepoel *Strafreg* 4ed (1985), ch 14; and Burchell J *Principles of Criminal Law* (2005) 3rd ed.)

8.2 What constitutes theft?

This definition of theft covers, in general terms, the most important requirements for the crime as it developed in Roman-Dutch law.

> A person commits theft if he or she unlawfully and intentionally appropriates movable, corporeal property which
>
> (1) belongs to, and is in the possession of, another
> (2) belongs to another, but is in the perpetrator's own possession
> (3) belongs to the perpetrator, but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession
>
> provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property of such property.

"the unauthorised appropriation of trust funds"

However, our courts have developed another form of this crime, the requirements of which differ from the general requirements for the crime as set out in the definition. This form of the crime can be described as "*the unauthorised appropriation of trust funds*". If the last mentioned form of the crime were also to be incorporated in an all-encompassing definition, such a

definition would be so long that it would hardly qualify as a definition (in the sense of a concise summary of the requirements for the crime). For this practical reason we have not attempted to give a definition of the crime, a definition which also incorporates the definition of the unauthorised appropriation of trust funds.

8.2.1 The three models of theft

Although we will be using the abovementioned definition of theft in our discussion, you will find, when you consult the case law and other South African legal literature on theft, that the crime is defined in different ways and that different expressions and concepts are used to describe its elements. This is because different models are used when describing theft.

We can distinguish three models. These three models can be described as the classical model, the former English-law model and the appropriation concept model. To a certain extent, these models reflect the development and history of South African law. The classical model originated in Roman law and the former English-law model is a legacy of the days when South Africa was a British colony. The confusion which is often encountered in our legal literature in connection with the description of theft can be attributed to the fact that judges and authors do not always use the same model when they describe the crime.

We will give a short description of each of these models and also point out why the model is unacceptable or acceptable, as the case may be.

8.2.1.1 The classical model

If one follows the classical model, in the Roman-law texts, the emphasis is placed on the description and analysis of the crime; the concepts relating to theft were first formulated more than two thousand years ago. (Generally speaking, the Roman-Dutch authors simply adopted these concepts without making any changes.) The adherents of the classical model are unwilling to depart from these Roman-law terms and concepts.

According to this model, the requirement of an act in theft is always described as a *contrectatio*, the requirements of unlawfulness and awareness of unlawfulness as *fraudolosa,* and the intention requirement as *animus furandi*. Adherents of this model also argue that these Latin expressions cannot be translated directly into, for example, English, without losing their original meaning.

We believe that this model has become obsolete as a way of describing the crime. Although the exposition of the crime in the Roman-law texts formed the basis for the later developments which the crime underwent and should therefore not simply be ignored, we believe that it is incorrect, in today's world, to cling to this two thousand-year-old Latin terminology. Whether the Romans themselves had a very clear idea of what the precise meaning of expressions such as *contrectatio* and *fraudulosa* was is more than doubtful.

However, the most obvious criticism of this classical model is the fact that this model is unable to express the fundamental concepts relating to the crime in language which is understandable to an ordinary person. Crimes ought to be defined in language that is understandable to everybody in society — this is, after all, one of the most important implications of the principle of legality. If expressions such as *contrectatio*, *fraudulosa* and *animus furandi* do have specific meanings, it ought to be possible to express such meanings in modern terminology.

Snyman 448–449 argues that the very fact that judges or authors who persist in using these Latin terms are not prepared to translate them into modern language proves that these terms have no fixed, specific meaning, and are therefore unsuitable as a basis for a systematic description of the crime.

8.2.1.2 The former English-law model

English law has had a strong influence on South African law. The definitions of theft in the Larcency Acts of 1861 and 1916 in England found their way into the old Transkeian Penal Code of 1886. They were then taken over, with certain adaptations, by the South African authors Gardiner and Landsdown in their influential work on criminal law early in the 20th century. The courts in turn readily accepted Gardiner and Lansdown's definition as correct (*Von Elling* 1945 AD 234 236; *Sibiya* 1955 (4) SA 247 (A) 250–251; *Kotze* 1965 (A) SA 118 (A) 125), and English law thus found its way into South African law.

If one follows this model, the conduct and the property requirements are described as "takes or converts to his use anything capable of being stolen", and the unlawfulness and culpability requirements are thrown together in the expression "fraudulently and without claim of right made in good faith". In earlier times the courts used these expressions quite often.

The objections to this model are the following:

- The expressions, derived from the former English law, which were often used in this model, are not a true reflection of the principles of theft in our common law.
- The definition of theft used in this model does not distinguish clearly between the act, the description of the prohibition (ie the "definitional elements of the crime"), unlawfulness and culpability. This is why the definition of theft in former English law is not really compatible with the basic general concepts underlying criminal liability, such as unlawfulness and culpability.
- In 1968, English law itself turned its back on this model by replacing the old offences relating to theft which had existed up until then (eg "larcency" and "embezzlement") with a new crime called "theft". In the definition of this new crime, the old expressions were discarded and replaced with a new definition, the key element of which is "dishonest appropriation". As a result, English law has now adopted the appropriation concept model (which we will discuss next).

8.2.1.3 The appropriation concept model

According to this model, the crucial requirements of the crime are simply described with the aid of the concept of appropriation. The requirement of an act is described as an act of appropriation and the additional intention required for a conviction of the crime as an intention to appropriate. This model is applied in the legal systems on the European Continent and, to a large extent, has also been applied in English law since 1968. We will discuss this model in detail in the following two study units.

We believe that, of the three models discussed here, this one is the most satisfactory, for the following reasons:

- The word "appropriation" is readily understandable to a lay person (unlike the latinism *contrectatio*).
- The concept of appropriation can be systematically analysed.
- The concept is flexible enough to encompass all the different ways in which the crime can be committed according to our common-law sources.
- The courts themselves often use the word "appropriation".
- The concept is perfectly reconcilable with what our courts regard as constituting theft.
- As will be explained below, an application of this concept enables one to differentiate properly between perpetrator, accomplice and accessory after the fact — something that cannot be said of the other two models.

8.3 Different forms of theft

In South African law, theft can be committed in various ways.

These forms can be explained as follows:

(1) **The removal of property**

Here the thief takes and removes the owner's property which is in the owner's (or a person other than the owner) possession and appropriates it. This is the form of theft that comes closest to a lay person's view of what theft entails. This form of theft is reflected in (1) in the definition of theft above (see 6.2.1).

(2) **Embezzlement**

Here the thief appropriates property which, although it belongs to the owner, happens to be in the thief's possession at the time he (or she) appropriates it. This form of theft is reflected in (2) in the definition of theft above. Because theft in our law includes cases of embezzlement, it is not correct to describe theft in our law in terms of the **removal** of another's property; in cases of embezzlement, the thief does not remove property from another's possession — instead, he or she already has it in his or her own possession.

(3) **Arrogation of possession**

Here the thief takes his or her own property out of the possession of the person who has a particular right to its possession which prevails against

him or her as the owner (eg by virtue of a lien or a pledge). In a certain sense, the thief "steals" his or her own property.

(4) **Theft of credit, including the unauthorised appropriation of trust funds**

In this form of theft, money in the form of credit is stolen. In most instances the money or credit is **entrusted** to the thief with instructions to use the money in a certain way. Contrary to the terms under which the money or credit is entrusted to him, he applies it for other purposes — usually for his own benefit.

What makes theft in the form of the unauthorised appropriation of trust funds so different from the other forms of theft is that here the thief commits theft even though (1) what the thief steals is not corporeal property; and (2) what the thief steals does not belong to another, but to himself (or herself). This form of theft deviates to such an extent from the ordinary principles of theft that it cannot be covered by the definition of the crime given above without radically extending the ordinary meaning of the words.

8.4 Four elements of theft

There are four key requirements which must be met before a person can be convicted of theft in any of its forms. These four requirements are the following:

- an **act of appropriation**
- in respect of **certain kind of property**
- which is committed **unlawfully**
- and **intentionally** (which includes an **intention to appropriate**)

We are first going to discuss the four basic requirements of theft. These requirements form the blueprint to an understanding of theft. When you understand the blueprint, you will have no difficulty in understanding and distinguishing between the different forms of theft.

8.4.1 The act of appropriation

In Roman and Roman-Dutch law the act required for the commission of theft was described as a *contrectatio*. As we saw above, *contrectatio* originally meant the handling or touching of a thing. Our courts still use the term *contrectatio* as a description of the act, but it is clear that our law has long since reached the stage where a thing can be stolen without necessarily being touched or physically handled. The following example illustrates this point:

If Susan chases the chickens of John, her neighbour, off John's property and onto her own without even touching them, she will be committing theft without having touched the chickens once. Also, in the case of theft of money in the form of credit (which will be discussed below), there is seldom any physical contact with any specific banknotes or coins.

Contrectatio might have been a satisfactory criterion a few centuries ago when the economy was still relatively primitive and primarily based on agriculture.

In today's world, however, with its much more complicated economic structure, it is far better to use the more abstract concept of appropriation to describe the act of theft than to use the term *contrectatio*. Although the term ''appropriation'' may not have been used by our common-law authorities, it nonetheless describes precisely what, in practice, our courts understand by the term *contrectatio* or the act of stealing. In *Boesak* 2000 (1) SACR 633 (SCA) the Supreme Court of Appeals acknowledged ''appropriation'' as part of the definition of theft.

> The act of appropriation
>
> In the case of theft in the form of the removal of property, the act of appropriation consists in any act in respect of property whereby the thief
>
> (1) deprives the lawful owner or possessor of his property; and
> (2) himself exercises the rights of an owner in respect of the property (*Tau* 1962 (2) SACR 97 (T) 102*a–b*).

In other words, the thief behaves as if the thief were the owner or person entitled to the property, whereas he or she is not, and in so doing the thief exercises control over the property in the place of the person having a right to it.

The act of appropriation therefore consists of two elements:

- a **negative element,** which consists in the thief **excluding the owner** from his/her property; and
- a **positive element,** which consists in the thief's actual **exercising the rights of an owner** in respect of the property in the place of the real owner.

Please note that if only the principle contained in the positive element has been complied with, but not also the principle contained in the negative element, there is no completed act of appropriation.

ACTIVITY

Explain whether theft is committed in the following situations:

(1) Sipho falsely points out to Mpho a certain property as belonging to him (Sipho) whereas, in fact, it belongs to Tiro. Sipho ''sells'' the thing to Mpho, but his fraudulant conduct is discovered before Sipho is able to remove the thing.

(2) Peter, who wants to steal Adam's motor car, is apprehended while he is still tampering with the electrical wiring below the steering column, although he, Peter, has not yet succeeded in starting the car.

FEEDBACK

Neither Sipho nor Peter commits theft:

(1) In this set of facts the real owner, Tiro, has not yet been excluded

from the control over his property, and therefore there has been no compliance with the principle contained in the negative component of the appropriation requirement, although the principle contained in the positive component has been complied with. In other words, Tiro has never been **excluded** from his property.

(2) Peter will not be convicted of completed theft if he was apprehended before he could succeed in depriving Adam of his thing, although he was already in the process of committing acts indicating that he had arrogated to himself the rights of an owner over the thing (*Tau* 1996 (2) SACR 97 (T)).

We cannot, therefore, agree with the view propounded by Hunt (608) and in *M* 1982 (1) SA 309 (O) 321C–D that all that is required for theft is an assumption of control over the thing, even though Y is not deprived of his/her control over the thing. If this is all that is required to constitute an act of theft, it would be impossible to distinguish between attempted and completed theft. In the example cited in the previous paragraph of Peter being apprehended in Adam's motor car, although Peter has already "assumed" control of the car, it is nevertheless clear that he is not guilty of completed theft, but only of attempted theft.

A good illustration of these principles may by found in the judgement in *Tau* 1996 (2) SACR 97 (T). Tau worked in a smelting house in a goldmine. He carried a piece of raw gold, dropped it on the floor, and then kicked it underneath a steel plate. The security measures at the smelting house were almost foolproof, and a security officer watched all Tau's movements. Immediately after Tau had kicked the raw gold under the steel plate, the security officer went to him and asked Tau what he was doing. In response, Tau answered that he was only planning something and that the officer should forgive him. The inference is that he planned first to hide the raw gold under the steel plate and then, at a later stage, when there was nobody in the smelting house, to remove it and take it for himself.

Tau was found not guilty of theft, for the following reasons:

His conduct did not amount to an act of appropriation because he had not succeeded in depriving the goldmine, that is, the owner of the raw gold, of its control of the raw gold.

The fact that Tau had arrogated to himself the control over the property and at some stage in a certain sense in fact exercised control over it, does not mean that he had committed theft, because his actions did not go as far as excluding the mining company from its control over the property.

The court considered the question whether Tau should not, perhaps, be convicted of attempted theft. However, the court finally decided that he should not be convicted of attempted theft, since, on an application of the principles relating to liability for attempt, his actions only amounted to acts of preparation and did not yet qualify as acts of execution.

The fact that appropriation consists of the two abovementioned components does not mean that the act of appropriation necessarily consists of two separate events. It only means that one cannot assume that there was a

completed act of appropriation unless the thief's exercising of the rights of an owner over the property has also led to the owner being actually deprived of his or her property.

In the vast majority of instances of theft, the owner's exclusion from his property and the thief's exercising of the rights of an owner takes place by means of a single act. However, in exceptional cases the negative component of the appropriation may be separated from the positive component, as when the thief throws objects off a moving train and picks them up later. If the thief is apprehended after throwing the goods off the train but before collecting them from the ground, he or she can, at most, be convicted of attempted theft.

> In *Taurusirara* 1942 SR 12, X was required to unpack cardboard boxes containing cigarettes and to put the empty boxes in another place. He failed to empty one of the boxes completely and placed it in the area reserved for empty boxes while it still contained a number of cigarettes. He was trapped before he could remove the cigarettes from the cardboard box. He was found guilty of attempted theft.
>
> In this case, *Taurusira's* conduct amounted to an exclusion of the owner from his property (ie the principle contained in the negative component of the act of appropriation was complied with), but he never succeeded in himself exercising the rights of an owner over the property. (In other words, there was no compliance with the principle contained in the positive component of the act of appropriation.)

8.4.2 Property capable of being stolen

Theft can be committed only in respect of certain types of property (or things). However, as we will point out, there are certain exceptions to this rule. To qualify as property capable of being stolen, the property must comply with the following requirements:

8.4.2.1 The property must be movable

The property must, firstly, be *movable* (D 47 1 1 8; Voet 27 3 4; Matthaeus 47 1 1 8). An example of immovable property is a farm. One cannot, therefore, steal part of a farm by moving its beacons or fences. (Unlawfully moving the beacons or fences of a farm may constitute a criminal offence other than theft.) If part of an immovable property is separated from the whole, it qualifies as something that can be stolen; examples here are mealie-cobs separated from mealie-plants (*Skenke* 1916 EDL 225) and trees cut down to be used as firewood (*Williams* 7 HCG 247).

8.4.2.2 The property must be corporeal

Secondly, the property must be *corporeal*, that is, an independent part of corporeal nature. One cannot, therefore, steal either an idea (*Cheeseborough* 1948 (3) SA 746 (T)), or "board and lodging" (*Renaud* 1922 CPD 322). From

this it follows that claims or rights cannot be stolen, and that mere breach of contract cannot amount to theft (*Matlare* 1965 (3) SA 326 (C)).

Exceptions to the rule:

furtum possessionis

(1) An owner may steal his or her own thing from a possessor (*furtum possessionis*, or the arrogation of possession). But is it really the thing itself that is stolen here? While it is true that here the act is directed at a corporeal thing, what is infringed is the possessor's right of retention, which is a right and not a thing.

theft of credit

(2) Theft of credit, and under this heading especially the unauthorised appropriation of trust funds, the courts have long recognised that when money is stolen by the manipulation of cheques, banking accounts, funds, false entries, and so forth, it is not corporeal things such as specific banknotes or coins that are stolen but something incorporeal, namely "credit". (See eg *Kotze* 1965 (1) SA 118 (A) 123; *Graham* 1975 (3) SA 569 (A) 576.)

shares

(3) Shares as opposed to share certificates. In *Harper* 1981 (2) SA 638 (D) 666 it was held that shares (as opposed to share certificates) could be stolen. The court stated that the idea that only corporeal property could be stolen was the result of the rule of Roman law, where there had to be some physical handling *(contrectatio)* of the property, and added that, given that the courts had moved away from the requirement of a physical handling, the reason for saying that there can be no theft of an incorporeal object in any circumstances would seem to have fallen away. In our view, the decision ought to be restricted to cases of unauthorised appropriation of money or credit. These cases will be dealt with more fully below.

electricity

(4) In *Mintoor* 1996 (1) SACR 514 (C) it was held that *electricity* cannot be stolen. The court based its decision on, *inter alia*, the consideration that electricity is not a specific physical thing but rather a state of tension or a movement of molecules. It is a form of energy. Although a cyclist holding onto the back of a moving truck can be said to "appropriate" the energy of the truck, he or she does not commit theft. Although X does not commit theft, X can be convicted for a contravention of section 27(2) of the Electricity Act 41 of 1987, which provides that any person who "abstracts, branches off or diverts any electric current" commits an offence and shall be liable on conviction to the penalties which may be imposed for theft.

8.4.2.3 The property must form part of commerce ("*in commercio*")

Next, the property must be *in commercio*, that is, available in commerce or capable of forming part of commerce. Property is available in commerce if it is capable of being sold, exchanged or pledged, or generally of being privately owned. The following types of property are **not** capable of forming part of commercial dealings and are therefore not susceptible to theft:

Exceptions to the rule:

res communes

(1) *Res communes*, that is, property belonging to everybody, such as the air, and the water in the ocean or in a public stream (*Laubscher* 1948 (2) PH H46 (C)). Compressed air, nitrogen and the water in a municipal storage dam that have been "brought under control" have a commercial value and can, accordingly, in our opinion, be stolen.

res derelictae

(2) *Res derelictae*, that is, property abandoned by its owners with the intention of ridding themselves of it (*Madito* 1970 (2) SA 534 (C); *Rantsane* 1973 (4) SA 380 (O)). Property which a person has merely lost, such as money which has fallen out of a person's pocket, is not a *res derelicta*, because such a person did not have the intention of getting rid of it. It can normally be accepted that articles thrown out by householders in garbage containers or dumped onto rubbish heaps are *res derelictae*.

res nullius

(3) *Res nullius*, that is, property belonging to nobody although it can be the subject of private ownership (eg wild animals or birds). In *Mnomiya* 1970 (1) SA 66 (N) 68 it was held that the honey from wild bees cannot be stolen.

However, if such animals or birds have been reduced to private possession by capture, such as birds in a cage or animals in a zoo, they can be stolen (*Sevula* 1924 TPD 609; *S* 1994 (1) SACR 464 (T) — in this case Sevula removed three snakes from the Johannesburg zoo).

In terms of section 2 of the Game Theft Act 105 of 1991, a property owner who keeps game on his (or her) property, and who encloses his property in a way prescribed in the Act, retains ownership of the game on his property, even though such game escape from his property.

8.4.2.4 The property must belong to somebody else

In principle the property must *belong to somebody else*. One cannot, therefore, steal one's own property.

Exceptions to this rule are found in the following forms of the crime:

- arrogation of possession (*furtum possessionis*) (see 6.2.8.2 par 3 on the previous page)
- the unauthorised appropriation of trust funds

This will become clear in the discussion below of these forms of theft.

- If the property belongs to two or more joint owners, one of these joint owners can steal from the other(s) (*MacLeay* 1912 NPD 162).

8.4.3 Unlawfulness

The unlawfulness of the appropriation may be excluded by grounds of justification such as spontaneous agency, necessity or consent.

spontaneous agency

An example of a situation where the taking of another's thing may be justified by *spontaneous agency* (unauthorised administration or *negotiorum gestio*) is the following: while my neighbour is away on leave, his house is threatened by flood waters. I take his furniture and store it in my house until he returns.

necessity

An example of a situation where the taking of another's thing may be justified by *necessity* is where, during a famine John, who is on the verge of dying from hunger, takes food from Ben, who happens to have plenty.

consent

However, in practice *consent* is by far the most important ground of justification for the appropriation of property. The appropriation is not unlawful where the owner consents to the taking of the property. The operation of consent as a ground of justification in the case of theft is subject to the following principles:

- Consent operates as a ground of justification even though the thief may be unaware that the owner had given consent — D 47 2 48 3; Matthaeus 47 1 1.
- Where the owner, as part of a pre-arranged plan to trap the thief, fails to prevent the thief from gaining possession of the property, although the owner knows of his or her plans, there has been no valid consent to the taking. The owner has merely allowed it to take place in order to trap the thief. There is thus no consent in trapping cases — *Ex parte Minister of Justice: in re R v Maserow* 1942 AD 164; *Sawitz* 1962 (3) SA 687 (T).
- Where the owner hands over the owner's property because he or she is threatened with personal violence if he or she refuses, there is similarly no consent and the taking amounts to theft and robbery — *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh* 1959 (1) SA 234 (A).
- There is no valid consent if the "consent" was obtained as a result of fraud or false pretences — *Ex parte Minister of Justice: in re R v Gesa; R v De Jongh supra; Heyns* 1978 (3) SA 151 (NC).

8.4.4 The requirement of intent

It is firmly established that the form of culpability required for theft is intention. In other words, the crime can never be committed negligently. According to the general principles of intention, the intention (and, more particularly, the thief's knowledge) must relate to all the requirements or elements of the crime. The three key elements of the theft other than the requirement of intent: the act of appropriation, the property requirement and the requirement of unlawfulness have all been discussed above. In the discussion which follows, the intention in respect of each of these three elements shall be discussed separately.

Chronologically one ought first to discuss the intention in respect of the act, but because this aspect of the requirement of intention is characterised by some unusual features and therefore requires a more lengthy explanation, the discussion of this will be postponed till after a discussion of the intention in respect of the property and unlawfulness requirements.

8.4.4.1 Intention in respect of the property

This aspect of the requirement of intention means that the thief must know that the thing that he or she is taking or at which his or her conduct is directed is a movable corporeal property which is available in commerce and which belongs to somebody else. Or the thief must know (in cases of theft in the form of the arrogation of possession) that the thing belongs to him (or her), but in respect of which somebody else has a right of possession which prevails against the thief's right of possession. If the thief believes that his or her action is directed at a *res nullius* or a *res derelicta*, whereas the particular piece of property is, in fact, not a *res nullius* or a *res derelicta*, he or she lacks the intention to steal and cannot be convicted of theft.

> In *Rantsane* 1973 (4) SA 380 (O), for example, Rantsane removed a mattress cover from a refuse bin in a military camp. His conviction of theft was set aside on appeal since it appeared that he was under the impression that the owner had thrown it away and that it was thus a *res derelicta*.

If the thief believes that the property he is taking belongs not to another, but to himself (or herself), the thief likewise lacks the intention to steal — *Riekert* 1977 (3) SA 181 (T) 183.

8.4.4.2 Intention in respect of unlawfulness

The requirement that the intention must also relate to the unlawfulness requirement means that the thief must know that his or her conduct is unlawful, that is, that the owner has not, or would not have, consented to the removal of the property — *Herholdt* 1957 (3) SA 236 (A) 257.

ACTIVITY

Decide whether theft was committed in the following scenarios:

- Slabbert was invited for a drink at Christmas. On arriving at his host's home, he found no one there and helped himself to some drink. Slabbert was charged with theft of the alcohol, since it appeared that the host had, in fact, not consented to his taking the drink.
- Strautsman, a sharecropper, removed a door and a window from the house he was renting under the impression that he was entitled to do so because he himself had built the door and window into the house.

FEEDBACK

Theft was not committed in either of these scenarios. Slabbert was found not guilty of theft, and although the court did not say so explicitly, the reason for his acquittal was lack of awareness of unlawfulness, because X thought that his host would not object if he helped himself to drink. In other words, he did not have the intention to act unlawfully (*Slabbert* 1941 EDL 109).

Strautsman was found not guilty of theft (*Strautsman* 5 CLJ 243). A person lacks intention to steal if, although he or she knows that the owner has not or would not consent, the person thinks that he or she has a right to take the thing. These instances are generally referred to as ''claim of right'' cases (*De Ruiter* 1957 (3) SA 361 (A); *Latham* 1980 (1) SA 723 (ZRA)). Here the person is mistaken about the rules of private law.

8.4.4.3 Intention in respect of the act

ACTIVITY

Theft is not committed in one of the following instances. Can you think why not?

- Gino maliciously conceals Barto's property so that he, Barto, cannot find it.
- Susan temporarily uses Pete's property without his permission, but then returns it.
- George takes Dan's property without his permission and keeps it as a pledge in order to bring pressure to bear upon Dan to repay a debt he owes George.
- Derrick damages Dylan's property or sets fire to it.

Although the ''thief'' knew that he or she had handled or performed some or other kind of act in respect of the property, theft is not committed in any of these instances. (See *Engelbrecht* 1966 (1) SA 210 (C), *Sibiya* 1955 (4) SA 247 (A), *Van Coller* 1970 (1) SA 417 (A).) This is because the intention required for theft is not present.

All authorities agree that intention in respect of the act does not consist merely in the thief's knowledge or awareness that he or she is, generally speaking, ''performing some or other kind of act'' in respect of the property. An awareness by the thief that he or she is handling the property or exercising control over it is not sufficient, even if such awareness is accompanied by knowledge that the property belongs to somebody else and that such other person has not consented to the handling of the property. Some further intention, apart from that mentioned above, is required.

8.4.4.4 Three possibilities for additional intention required for theft

The additional intention which (as explained above) must be required for theft refers to the objective which the thief aims to achieve by means of his or her act. Intention in respect of the act relates to the thief's will (the conative element of intention) and not the thief's knowledge of existing facts (the cognitive element of intention).

In the past there was a difference of opinion about what this additional intention referred to above entails. Even today there is still some uncertainty

surrounding this issue. If one examines the legal sources, it appears that, as far as the content of this intention is concerned, there are three possibilities:

(1) Roman and Roman-Dutch law required that the thief should have had the intention of deriving some **advantage or benefit** from his dealing with the property. As we will point out below, this additional intention is no longer required today in our law.

(2) There is the requirement in Anglo-American law that the thief must have had the intention **permanently to deprive the owner** or lawful possessor of the property. Although, as we will explain, this requirement does form part of our law, it is questionable whether such a formulation adequately describes the additional intention which ought to be required.

(3) One may simply require an **intention to appropriate** the property.

To some extent these three possibilities overlap.

In our opinion, it is the intention to appropriate which is the correct intention to require in this respect. However, before the intention to appropriate is discussed, the other two alternative ways of requiring an additional intention as mentioned above are the first alternatives that need to be considered.

8.4.4.5 Evaluating the three possibilities for additional intention

(1) Deriving a benefit

Roman and Roman-Dutch law attempted to distinguish theft from acts not amounting to theft by requiring that the thief should have had an intention of deriving a benefit (*lucrum*) from his dealing with the property. In Paul's definition of *furtum*, this requirement is expressed by the words *lucri faciendi gratia*.

Under the influence of English law, the common-law requirement of *lucrum* was abandoned at an early stage in the development of the crime in South Africa (*Maswana* 1909 EDC 352 355; *Laforte* 1922 CPD 476 499; *Kinsella* 1961 (3) SA 519 (C) 526). English law required an intention permanently to deprive the owner of his or her property.

Because the old *lucrum* requirement no longer forms part of our law, it follows that a generous motive on the part of the thief, such as a wish to distribute the stolen goods amongst the poor, does not exclude the intention to steal (*Kinsella* supra 526). The *lucrum* or advantage referred to in this old requirement is simply the converse of the disadvantage or prejudice suffered by the owner: because an intention to derive a benefit is no longer required in our law, it follows that no intention to prejudice the victim is required (*Makwanazi* 1969 (2) 248 (N)).

In *Kinsella*, *supra*, perhaps the leading case in which the *lucrum* requirement was rejected, Kinsella was a major in the defence force. He took property belonging to the defence force without the permission of the force and sold it, not to take the proceeds of the sale for himself, but to use the proceeds towards providing for facilities for the residents of the military camp, of which he was also a resident. (One of the things he wanted to do was build a swimming pool.) Despite his aims, however, he was convicted of theft.

(2) Intention permanently to deprive the owner

The courts have long held that an intention permanently to deprive the owner of his or her property is a requirement for theft. This was (as still is) a requirement of English law which found its way into South African law via section 176 of the old Transkeian Penal Code of 1886.

We are of the opinion that the requirement of an intention permanently to deprive the owner of his property does not succeed in satisfactorily demarcating theft from acts which do not amount to theft. In particular, this requirement does not succeed in distinguishing adequately between theft and cases of injury to property.

Although, as we will explain, theft and injury (damage) to property do sometimes overlap, and although even an application of the requirement of intention to appropriate cannot prevent such overlapping, there are nevertheless instances where the aspect of damage or destruction in the thief's act is far more evident than the aspect of appropriation or theft. In these cases, he or she should not be convicted of theft, but of injury to property.

The following examples prove this point:

- Stephen is visiting his neighbour Marcus against whom he harbours a grudge. Out of spite, Stephen snatches up a glass vase belonging to Marcus and throws it out of the window onto the verandah, where it shatters into pieces.
- David drives Tom's cattle over a precipice, causing them to be killed, without performing any further act in respect of the cattle.

There are, in fact, certain cases in which the courts (correctly, it is submitted) have refused to convict the accused of theft despite the fact that the accused did, in fact, have the intention of permanently depriving the owner of his or her property.

Merely killing another's livestock or merely destroying another's property is not theft, but injury to property (
Kula 1955 (1) PH H66 (O); *Dlomo* 1957 (2) PH H184 (E)).

- In *Blum* 1960 (2) SA 497 (E), Blum seized his neighbour's dogs who were trespassing on his property and causing damage. Shortly thereafter the dogs jumped from the neighbour's truck [ie Blum's truck — our explanation] and Blum failed to go looking for them. The dogs disappeared. The court held that Blum had not committed theft by allowing the dogs to disappear. In this case Blum had the intention of permanently depriving the owner of his dogs. The only explanation for Blum's acquittal must be that the court tacitly assumed that, apart from having the intention permanently to deprive the owner, Blum also had to have an intention to appropriate.
- In cases such as *Lessing* 1907 EDC 220, *Hendricks* 1938 CPD 456 and *Engelbrecht* 1966 (1) SA 210 (C), the thief simply threw the owner's possession away because he was angry with the owner and was found not guilty of theft despite the fact that he had clearly had the intention permanently to deprive the owner of his property.

These cases are completely reconcilable with the requirement that X should have the intention to appropriate the property.

(3) Intention to appropriate

It is submitted that the additional intention that must be required for theft is the intention to appropriate. This intention best describes the mental state which is characteristic of a thief. Such a description of the intention requirement is completely reconcilable with our case law; the courts regularly use the expressions "appropriate" and "intention to appropriate" in the descriptions of the crime. By requiring, in the description of the act, an act of appropriation and, in the description of the intention, an intention to appropriate, there is a logical connection between the requirements of an act and that of intention, in that the one is but the mirror image of the other.

What we said above about the act of appropriation applies *mutatis mutandis* to the intention to appropriate.

The act of appropriation presupposes both

(1) a removal of the property or an exclusion of the owner from his or her property (negative component); and
(2) the thief's exercising of the rights of an owner (positive component).

The intention to appropriate encompasses both

(1) the intention of depriving the owner of his or her control over the property (negative component); and
(2) the thief's intention of exercising the rights of an owner over the property himself (or herself), instead of the owner (positive component).

The intention of depriving the owner of his or her property (negative component) is, however, further qualified in an important respect, namely that the thief must intend **permanently to deprive the owner of his or her property.** Only then does the thief have the intention to appropriate the property. Where a person intends to deprive the owner of the owner's property only temporarily, such person at all times respects and recognises the owner's ownership or rights in respect of the property. This is contrary to the very essence of appropriation. The usual meaning of "appropriate" is "to make something your own"; this, however, cannot be said to happen where the thief intends presently to restore the property to the owner substantially intact.

This aspect of the concept of intention to appropriate has an important practical result, namely that to use property temporarily with the intention of restoring it to the owner (*furtum usus*) does not amount to appropriation and therefore does not constitute theft. This is in complete harmony with the law applied in the courts, which requires an intention permanently to deprive the owner of his or her property (*Sibiya* 1955 (4) SA 247 (A)). **The meaning of "intention to appropriate" is therefore wide enough to include an intention permanently to deprive Y of his or her property.**

Where the thief takes the owner's property without the owner's consent, not in order to deal with it as if the thief were the full owner, but merely to keep it as a pledge or security in order to bring pressure to bear upon the owner to repay a debt which he or she owes the "thief", the thief does not commit theft: he or she remains willing to restore the thing to the owner as soon as the owner has paid his or her debt, and therefore has no intention of unlawfully appropriating it.

The leading case in this respect is *Van Coller* 1970 (1) SA 417 (A). In this case Van Coller, a medical practitioner in Botswana, unlawfully took possession of four microscopes belonging to the Botswana government. Van Coller intended returning the microscopes once certain criminal charges against him were withdrawn by the Botswana authorities. The court held that his intent could not be reconciled with the intent to terminate the owner's enjoyment of his thing — in other words, totally deprive him of the benefit of his property. Van Coller was accordingly acquitted of theft.

ACTIVITY

(1) Mpho is invited to a luncheon party at a five-star hotel. When he arrives at the hotel he is directed to the wrong dining-room. Patrick, a multi-millionaire, will be hosting a private party in that particular dining-room. Mpho is the only person in the room, but thinks he is early for the luncheon party. He is hungry and helps himself to caviar, salmon and lobster. He also drinks some Dom Perignon. Patrick arrives and is furious with Mpho. Patrick lays a charge of theft against Mpho. Is Mpho guilty of theft? Substantiate your answer.

(2) Aggie asks Margaret to look after her computer while Aggie is overseas. Margaret agrees, but her flat is small and the computer becomes a nuisance. She lends the computer to Anne, her colleague, who wants to do work at home. Anne tells Margaret the computer is out of date and asks if she can donate it to her son's school. Margaret agrees and the school sends her a thank-you note. Aggie returns after six months and wants her computer back. Margaret tells her that it has been donated to the school. Aggie lays a charge of theft against Margaret. Is Margaret guilty of theft?

FEEDBACK

(1) Mpho will not be guilty of theft. Mpho is under the impression that he is at the venue for the luncheon party to which he has been invited. As he is an invited guest, he believes he is entitled to take some of the food set out on the tables. He does not have the intention to steal as he does not have intention in respect of unlawfulness. See the discussion above under 8.4.4.2.

(2) Margaret will be guilty of theft. When Margaret lends the computer to Anne she is not excluding Aggie from her property,

although her act complies with the positive element of the act of appropriation. She exercises the right of an owner in respect of the computer; but she is not complying with the negative element of the intention to appropriate. However, when she agrees that the computer can be donated to the school, she complies with both the positive and negative elements of the act of appropriation. It is also clear that her intention was to exercise the rights of an owner (she donated the computer to the school) and to deprive Y permanently of her control over the computer. See the discussion above under 8.4.4.5, specifically the discussion under (3).

STUDY UNIT 9

THEFT: CONTINUED

9.1 Removal of property

In the previous study unit we considered the four general requirements which apply to all forms of theft. We shall now proceed to consider the particular forms of theft one by one.

The first and most obvious form of theft is the removal of a thing. Here the thief removes property belonging to the owner which is in the owner's or somebody else's possession from the owner's or the other person's possession and appropriates it.

We are not going to discuss the property requirement, the unlawfulness requirement and the intention requirement for this specific form of theft, since the principles relating to these three requirements which we discussed in study unit 8 under 8.4.1.2, 8.4.1.3 and 8.4.1.4 apply without any qualification to this form of the crime.

Only the requirement of the act deserves further elucidation. As in all forms of theft, here the act also consists of an appropriation of the property. In this

form of theft, the appropriation must be accompanied by a **removal** of the property from somebody else's possession. Let us briefly discuss the removal requirement.

9.1.1 The boundary between attempted and completed acts of appropriation

Whether or not the thief removed a thing from another person's control is a factual question. It is not important whether the thief had touched, handled or performed any physical act in respect of the property; nor is the distance it has been removed from where it had originally been kept. The decisive criterion is whether the thief succeeded in gaining control over the property.

The thief will gain control over a thing which was not previously in his or her own possession or control only if the thief can exclude the owner's control over the thing. Since the thief and the owner have conflicting claims to the property, they cannot both simultaneously exercise control over it (*Dladla* 1965 (3) SA 146 (T) 148H); the precise moment at which the owner loses control and the thief gains it is a question of fact.

ACTIVITY

Decide whether Andrew should be convicted of theft or completed theft:

Andrew takes Belinda's computer and carries it away, but is apprehended shortly afterwards, before he can succeed in conveying the computer to the precise locality he had in mind.

Andrew will be guilty of completed theft because Belinda lost control of her computer. It does not matter that he has not reached the precise locality he had in mind.

The test to distinguish between completed and attempted theft is the same as the test to distinguish between a completed and an uncompleted act of appropriation: **the question is always whether, at the time the thief was apprehended with the property, the owner had already lost control of the property and the thief had gained control of it in the owner's place.** The answer to this question depends upon the particular circumstances of every case, such as the nature of the property, the way in which a person normally exercises control over such type of property, and the distance between the places where the property was taken and where the thief was caught with it.

9.1.2 Theft from a self-service shop ("shoplifting")

Barnard takes goods from a shelf in a self-service shop and conceals them in his clothing, intending to steal them, but is apprehended before he passes through the check-out point. Has Barnard committed completed theft?

The courts usually accept that he has committed completed theft (*M* 1982 (1) SA 309 (O); *Dlamini* 1984 (3) SA 196 (N)).

The reason for convicting the client of completed theft seems to be the

following: although the owners of self-service shops usually take steps to ensure that clients do not surreptitiously remove articles without paying for them, it is practically impossible to keep an eye on all clients at all times. If somebody, intending to steal, has concealed an article in or under his or her clothing in a self-service shop and is apprehended before he or she can pass through the check-out point, that person's apprehension is, to a certain extent, the result of chance: the security officer who apprehended him or her might, for example, have been performing his or her duties in another part of the shop, in which case the client would have succeeded in escaping with the article without paying.

For this reason it cannot be said that, in practical terms, the shopowner exercised full and effective control over everything in the shop. Furthermore, there is merit in the argument that the moment the client concealed the article in his or her clothing, it ceased to be visible to the shop owner and that, for precisely this reason, the shop owner ceased to exercise control over the article from that moment.

Viewed in this light, the decisions in which the client was convicted of completed theft cannot be faulted. It is submitted, however, that if the client is apprehended in a shop or business where the security measures (eg television surveillance of all shelves) are so tight that it is practically impossible for the client to remove articles without being caught, the client commits only attempted theft, because in such circumstances the owner retains control over everything on the premises at all times even though the client may have placed an article in his or her trouser pocket temporarily. (This view was endorsed in *Tau* 1996 (2) SACR 97 (T) 102i–j.)

9.2 Embezzlement

> The thief commits theft in the form of embezzlement (sometimes also called "theft by conversion") if he appropriates another's property which is already in his possession.

The property requirement and the requirements of unlawfulness and intention in the case of this form of theft need not be discussed, since the principles relating to these requirements which are discussed in study unit 8 under 8.4.1.2, 8.4.1.3 and 8.4.1.4 apply without qualification to this form of theft. Only the requirement of an act of appropriation needs further explanation.

positive component only

The possessor of the property commits theft as soon as he or she commits an act of appropriation in respect of the property with the necessary intention to appropriate. In cases of embezzlement, the thief already has possession of the property. The owner is excluded from his or her property, and therefore the negative component has already been complied with. The act of appropriation consists in the case of embezzlement, *only* of a *positive component*, that is, the actual exercising of the rights of an owner over the property.

In principle it is immaterial whether the thief came into possession of the property because it was entrusted to him or her or whether it came into the thief's possession by chance (eg where somebody else's animal walked onto his or her land).

ACTIVITY

Read the following set of facts and consider what your verdict would have been if you were the judge.

Van den Berg borrowed a car from a friend in order to take a quick drive out to his farm and back. He was supposed to return the car to the friend in about an hour and a half's time. Instead, he drove to another town where he pledged the car to another person as security for a loan. He never repaid the loan. He also told that person that it was his car.

The court held that, from his conduct, the inference could be drawn that he had appropriated the car for himself, and he was convicted of theft. By pledging the car Van den Berg had, according to the court, arrogated to himself the power which is vested in an owner. If, at the time of pledging the article, the thief has no intention of paying his debt, thereby regaining possession of the article and being able to return it to its true owner, it is easy to deduce that he appropriated it (*Van den Berg* 1979 (3) SA 1029 (NC)).

If, however, the thief intends paying the debt and believes that he or she will be in a financial position to do so, it cannot be concluded that he or she appropriated the article, because his or her act then amounts to the mere temporary use of somebody else's thing — conduct which does not constitute theft.

Certain acts, such as branding cattle (eg in *Siboya* 1919 EDL 41) or pledging somebody else's article to another person, do not necessarily amount to acts of appropriation on X's part, but are normally regarded as strong indications of the commission of such an act.

If the person innocently comes into possession of another's article and thereafter finds out that it is, in fact, a stolen article he or she commits theft if, after such discovery, he or she sells the article or commits some other act of appropriation in respect of it (*Markins Motors (Pty) Ltd* 1958 (4) SA 686 (N)).

A person who finds property which somebody else has lost and then appropriates it may also be guilty of theft. This is especially so if the owner or lawful possessor can easily be traced, as when the owner's name and address appear on the lost property (*Luther* 1962 (3) SA 506 (A); *Randen* 1981 (2) SA 325 (ZA)).

If Selinah buys an article from John on instalments (''hire purchase'') and, in terms of the agreement, John remains owner of the article until Selinah has paid the last instalment, it follows that Selinah is not the owner of the article she possesses. If, before the last instalment is paid, Selinah disposes of the property without John's consent, she may be convicted of theft (*Van Heerden* 1984 (1) SA 667 (A)).

9.3 Arrogation of possession *(furtum possessionis)*

In these cases the owner steals his own thing by removing it from the possession of a person who has a right to possess it (such as a pledgee or somebody who has a lien over the property to secure payment of a debt) which legally prevails over his (the owner's) own right of possession.

In *Roberts* 1936 (1) PH H2 (GW), for example, Roberts took his car to a garage for repairs. The garage had the usual lien over the car until such time as the account for the repairs had been paid. Roberts removed his car from the garage without permission. He was convicted of theft.

In *Janoo* 1959 (3) SA 107 (A), Janoo, the owner of a carton of soft goods which he had ordered by post, removed the carton from the station without the permission of the railway authorities. He was entitled to receive the goods only against signature of a receipt and a certificate of indemnification. His intention in removing the goods was to claim afterwards for their loss from the railways. He was found guilty of theft.

9.4 Theft of credit, including the unauthorised appropriation of trust funds

We now come to the fourth form of theft, namely theft of money in the form of credit. This is a particular way in which money is stolen. No one will deny that money can be stolen, and where someone unlawfully and intentionally takes cash (notes or coins) from the owner's possession and appropriates it for himself or herself, there is usually no difficulty in holding that such a person has committed theft. The person can be held liable for theft by simply applying the general principles applicable to this crime. Notes and coins are, after all, corporeal property, and in this set of facts the thief is not the owner of the notes and coins.

The most obvious meaning of ''money'' is notes and coins. However, ''money'' may also have a less obvious and more abstract meaning, namely ''credit''. By ''credit'' we normally mean a right to claim money from a bank, because the bank is the owner of the money it holds, whereas the bank's client only has a legal claim against it. In modern business usage, cash is in fact seldom used.

Money generally changes ''hands'' by means of cheques, negotiable instruments, the use of credit cards, credit or debit entries in books, or registration in the electronic ''memory'' of a computer. In these cases one can hardly consider the money in issue to be tangible, corporeal property. It can instead be described as ''an economic asset'', ''an abstract sum of money'', ''a unit representing buying power'' or (the term which we prefer) ''credit''. Theft of money in the form of credit ''evolved'' in our case law.

One of the most important ways in which this form of theft can be committed is the unauthorised appropriation by a person of funds entrusted to him or her.

Theft of credit is not limited to the unauthorised appropriation of trust funds; theft of credit can be also be committed if the credit has not been entrusted to the person.

9.4.1 Theft of credit not held in trust

Before we consider theft of credit entrusted to someone, we first consider the cases in which a person commits theft by appropriating credit which has not been entrusted to him or her.

Assume that Ben opens a cheque account at a bank and that he deposits R500 into the account. The bank then becomes the owner of the R500. Ben only acquires a right to claim the money from the bank. If the bank issues a cheque book to Ben, and Ben writes out a cheque of R100 in favour of Sam and hands the cheque over to Sam, it means that Ben instructs the bank to pay Sam R100 upon presentation of the cheque to the bank, and to diminish his (Ben's) claim of R500 against the bank by R100.

If Tom intercepts the cheque and, without any authorisation, deposits the cheque into his or her own account, and the bank pays the R100 into Tom's account, what is stolen by Tom is, in fact, Ben's right to claim R100 from the bank. Tom commits theft of the R100 despite the fact that the R100 is not a corporeal thing (tangible coins or notes), but merely a right to claim from the bank — something which (like all rights) is incorporeal.

In our opinion Tom also commits theft of credit if he unlawfully comes into possession of Sam's credit card, discovers the secret number (the "PIN" number) that Sam has to use in order to draw cash from an automatic teller machine, and then uses Sam's credit card and secret number to draw cash for himself from an automatic teller machine (*Botha* 1990 SACJ 231 236). (If Tom uses Sam's credit card, which he has unlawfully obtained, in a shop to buy himself goods, Tom will usually be charged with fraud, because he has made a misrepresentation to the shop owner that the credit card belongs to him.)

9.4.2 Theft of money held in trust

Theft of money held in trust takes place if money or credit has been entrusted to a person to be applied by him or her for a certain purpose and, contrary to the conditions in terms of which the funds have been entrusted to that person, he or she then applies the funds for another purpose — mostly for his or her own benefit. What makes this form of theft unique is that here theft is committed despite the fact that what is stolen is:

(1) not corporal property; and
(2) does not belong to another but often belongs to the recipient himself (or herself).

This form of theft is so far removed from other forms of the crime that it cannot be accommodated under the general definition of theft given above, without radically extending the ordinary meaning of the words in the definition. For this reason there is much to be said for the view that here one is not dealing with theft as it originally developed in Roman-Dutch law, but with another, separate crime.

Nevertheless it is important to bear in mind that, in practice, somebody who has committed an act falling within the ambit of this form of the crime is charged with **theft**, and not with a crime under a different name, and that if the prosecution is successful, he or she will be convicted of **theft**.

9.4.2.1 Theft of cash held in trust

Before we discuss theft of credit, we shall first consider how the present form of theft can be committed in respect of cash, that is, corporeal coins or notes.

ACTIVITY

> Let us assume that Linda gives Anne an amount of cash with instructions to use it to pay Linda's debt to Linda's creditor. Anne receives the money but, instead of paying Linda's creditor with it, she spends it on a holiday for herself. Does Anne commit theft? Has the cash not became her own when she combined it with her own cash?

In terms of the principles of private law, Anne became the owner of the cash she received when she combined it with her money. Nevertheless, she commits theft of the money if she uses it to her own advantage.

In these types of cases the rule that one cannot steal one's own property is no bar to a conviction. According to our courts, the recipient received the money "in trust", because he or she was not free to dispose of it as he or she wished. The recipient had to apply the money for the owner's benefit who, according to the courts, has "a special interest or property" in the money (*Manuel* 1953 (4) SA 523 (A) 526H; *Scoulides* 1956 (2) 388 (A) 394G–H; *Kotze* 1965 (1) SA 118 (A) 125–126; *Graham* 1975 (3) SA 569 (A) 577E–F). The recipient's conduct is not merely a breach of contract, giving the owner the right to institute a civil action for the repayment of the money, but also constitutes a crime.

The same principles are applied if a client buys something in a shop and gives the shopkeeper an amount of cash which is more than the price of the item purchased. The shopkeeper now has to give the client change, but then intentionally gives him or her less than he should, or fails to give the client any change at all. The money paid to the client by the shopkeeper is regarded as money given "in trust". The shopkeeper is under an obligation to return the correct amount of change to the client. An intentional omission to do so amounts to the theft of the money the shopkeeper has to pay back.

> In *Scoulides* 1956 (2) SA 388 (A) 394 Schreiner JA explained this principle as follows: ''In a case like the present the purchaser hands over the banknotes, not in order to make the seller unconditionally the owner

thereof, but only in order to make him the owner if and when the goods and right change are tendered.''

There is, in any event, a second reason why, in this type of case, the recipient commits theft of the change: his conduct amounts to the dishonest accounting of money entrusted to him. (It will be pointed out below that the mere dishonest accounting of trust money can in itself constitute theft.)

9.4.2.2 Theft of credit held in trust

The two sets of facts considered above dealt with theft of cash (coins or notes), that is, money in the most obvious sense of the word. We next look at how theft can be committed through the unauthorised appropriation, not of cash, but of credit.

ACTIVITY

Caz makes out a cheque in Bill's favour. Sue is a widow whose mental faculties are diminishing fast because of old age, and Bill has undertaken to administer Sue's financial affairs. As trustee of Sue's estate, it is Bill's duty to receive all funds due to Sue and then to deposit them in a banking account on her behalf or to invest them for her at a favourable interest rate. Although the cheque has been made out to Bill, the funds which the cheque represent are due to Sue. (The only reason the cheque has not been made out in Sue's favour and handed over to her is the fact that her financial affairs are now handled by Bill.)

Bill receives the cheque but, in violation of his duties as a trustee, he deposits the cheque into his own account in order to extinguish his own private debt. In the present set of facts Bill himself is the owner of the funds (or more technically: the claim against the bank) which the cheque represents.

Does Bill commit theft?

According to our courts, Bill commits theft (*Milne and Erleigh* (7) 1951 (1) SA 791 (A) 866C; *Manuel* 1953 (4) SA 523 (A) 526; *Kotze* 1965 (1) SA 118 (A) 124; SA 29 (A) 42; *Graham 1975* (3) SA 569 (A) 576; *Visagie* 1991 (1) SA 177 (A) 182–183).

If a trustee (such as Bill in the above example) applies the funds entrusted to him or her differently from the way in which he or she is supposed to apply them, the trustee commits theft, and the recognition of such conduct as theft amounts to a broadening of the traditional principles governing the crime. This is evident from the fact that it is the trustee who is the holder of the account; it is he or she who has a legal claim against the bank. The trustee is contractually bound to administer a sum of money on behalf of somebody else for a specific purpose, but breaches the terms of the contract by disposing of the money for his or her own benefit. The complainant usually no longer has any ownership in the money. In *Boesak* 2000 (1) SACR 663 (SCA) the

Supreme Court of Appeals held that, by using the money for a different purpose, the donor is deprived of his control over the money.

This, in fact, is a situation where the breach of contract amounts to theft. What the trustee is stealing is neither a concrete movable corporeal thing (such as notes and coins) nor credit, that is, a legal claim which somebody else has against the bank and which he or she, the trustee, then disposes of in breach of his or her obligation. It is, after all, the trustee himself who has the legal claim against the bank. What he or she in fact steals is an abstract sum of money which he or she is bound by contract to administer or dispose of on behalf of his or her client for a specific purpose, but which he or she then disposes of for his or her own benefit, in breach of the obligation (Loubser 1978 *De Iure* 86 89; Hunt 63).

Although this extension of the ambit of the crime has been criticised (De Wet & Swanepoel 325 ff; Coetzee 1970 *THRHR* 369), it is now firmly established that money in the form of credit can be stolen, and people are regularly convicted of such theft. What is important, according to the courts, is the economic effect of the trustee's conduct (eg the reduction of the donor's bank credit).

It is submitted that this broadening of the concept of theft in cases of theft of money is fully justifiable. In so far as it does not accord with the principles of our common law, this departure from the original common law is necessary in the light of the particular requirements of modern times. The socioeconomic climate of the twentieth century differs radically from that of the Roman era or the times in which our common-law writers lived. The difference between tangible cash and intangible credit is no longer as important as it was a few centuries ago.

If money or credit is entrusted to X to be applied by him for a certain purpose, but he applies it for a different purpose, there are two possible defences on which he can rely to escape being convicted of theft.

- First defence: the existence of a liquid fund

Where the trustee holds money in trust on someone's behalf, or receives money from a person with instructions that it be used for a specific purpose, and he or she uses the money for a different purpose, the trustee does not commit theft if, at the time, he or she uses the money he or she has at his or her disposal a liquid fund large enough to enable him/her to repay, if necessary, the money which is supposed to accrue to the donor (but which he has used for a different purpose) (*Wessels* 1933 TPD 313; *Visagie* 1991 (1) SA 177 (A) 184). The reason for this is that "the very essence of a trust is the absence of risk" (*Incorporated Law Society v Visse* 1958 (4) SA 115 (T) 118).

> A liquid fund is a fund from which money can be withdrawn without delay. An agreement with a bank that the bank will allow an overdraft constitutes such a "liquid fund" (*Wessels*, *supra* 315).

In *Visagie, supra* the Appellate Division doubted *obiter* whether the existence of a liquid fund will always offer a trustee a defence. According to the court, this will depend on the circumstances of each case. However, the court

admitted that the existence of such a fund will always be strong evidence that the trustee lacked the intention to appropriate the funds entrusted to him (or her).

- Second defence: money received as part of a debtor-creditor relationship

A distinction is drawn between money held in trust for somebody, and money held by an agent or debtor by virtue of a debtor-creditor relationship. The distinction is derived from section 183 of the old Transkeian Penal Code of 1886, which the South African courts have followed (*Reynecke* 1972 (4) SA 366 (T)). This distinction is very important in cases in which somebody, such as an agent, receives money from another.

Where a recipient of money holds money for another **in trust** as an agent, the squandering of the money by the agent will amount to theft, unless, as already pointed out, the agent has a liquid fund of at least equivalent proportions from which to draw. However, where the agent receives the money as part of a debtor-creditor relationship (the money was lent to the agent), and he or she spends the money for a purpose which differs from the purpose for which the money was originally given to him or her, the agent does not commit theft. In such a case it is assumed that the person who handed over the money, or on whose behalf it is held, relies upon the agent's creditworthiness and personal responsibility. If the agent spends the money he or she does not commit theft, provided the agent duly enters the debt on the account which he or she must render to the creditor.

debtor-creditor money

Whether the money is held in trust or under a debtor-creditor relationship is a question of fact which, in practice, may be very difficult to answer. The answer to this question depends upon the intention of the parties when they enter the agreement. However, the parties seldom consciously consider this difference when entering an agreement. Burchell 802 states: ''The basic question which has to be asked is: did the person entitled (Y) visualize and expressly or impliedly authorize that X should use the money without retaining an equivalent liquid fund? If the answer is yes, it is *debtor-creditor money*; if no, it is 'trust' money.''

Some examples from our case law of money considered by the courts to be held in trust are the following:

- money handed over to an attorney (*Fraser* 1928 AD 484)
- money handed over to an auctioneer (*Le Roux* 1959 (1) S A 808 (T))
- money handed over to a liquidator under the Farmers' Assistance Act 48 of 1935 (*Reynecke* 1972 (4) SA 366 (T))
- money handed over to an agent with instructions to be used for a very specific purpose (*Fouche* 1958 (3) SA 767 (T))

Some examples of money held in terms of a debtor-creditor relationship as opposed to money held in trust, are the following:

- money received by a bank from a client (*Kearny* 1964 (2) SA 495 (A) 502–503)
- money received by a broker (*McPherson* 1972 (2) SA 348 (E))

9.4.3 The dishonest accounting of trust funds, or failure to account

If money is entrusted to a person and he or she intentionally omits to account for what he or she does with the money, or intentionally gives a false account of what he or she did with the money, that person commits theft, provided the circumstances are such that the inference may be drawn that he or she appropriated the money for himself (or herself) (s 183 of the Old Transkeian Penal Code, followed by the South African courts in, *inter alia*, *Golding* 13 SC 210). In such a case the fact that he had a liquid fund at his disposal does not offer him a defence.

9.4.4 Appropriation of overpayments

Assume that, at the end of a month, an employer erroneously pays his employee two cheques instead of one, resulting in the employee receiving twice the salary he is entitled to. If the employee, aware of the mistake, deposits the double salary in his banking account and spends the money which he knows is not due to him, then, according to our case law, he or she commits theft.

It cannot be suggested that the employer has merely trusted the employee's creditworthiness and has merely created a creditor-debtor relationship for the simple reason that such a relationship is not created by mistake. It must be accepted that an implied relationship of trust has been created and that the money has been received under a certain condition, namely, that it should be returned to the employer. In any event, even if one accepts that the overpayment has resulted in a debtor-creditor relationship, the employee still commits theft since he or she omits to account properly for the money he or she has received.

> In *Graham* 1975 (3) SA 679 (A), Graham was the managing director of a company which received a cheque for more than R37 000. The amount was not owing. Graham knew this, but nonetheless allowed the cheque to be paid into the company's bank account, and used the money to settle the company's debts. The company was financially unsound and its bank account was overdrawn. He was convicted of theft.

9.4.5 The unlawful "temporary" use of money

ACTIVITY

> Will Fred commit theft in the following set of facts:
>
> Assume Fred has to give Karabo R50 urgently. Fred discovers that he does not have his wallet with him in his office. However, he knows that Pat, who works in the office next to him, has a R50 note in the top drawer of her desk. He goes to Pat's office, makes sure that she is not there, opens the drawer of her desk and removes the R50 without her consent. He then gives the R50 to Karabo. Assume that he has always had the intention to give Pat another R50 note, and that, in fact, he does so. Would he have committed the crime of theft of the R50?

The courts' answer to this question would be ''yes'', for the following reasons: According to the courts, money is a *res fungibilis*, that is, a thing that is consumed by use although it may be replaced by another similar type of thing.

The same rule applies if a person removes money belonging to someone else without his or her consent with the intention of later replacing it with other money of the same value (*Milne and Erleigh* (7) 1959 (1) SA 791 (A) 865; *Herholdt* 1957 (3) SA 236 (A) 257).

This rule applied by the courts may, however, be criticised. Firstly, the *res fungibilis* exception to the rule that the unlawful temporary use of a thing is not theft leads to inequitable results. Secondly, the courts' view that the unlawful temporary use of money constitutes theft is irreconcilable with the courts' own view that, in the case of theft of money, what is appropriated should not be viewed as corporeal notes or coins but as ''an abstract sum of money'' or ''a unit representing buying power'' (''credit''). If the person at all times intends to pay back an equal amount of money, he or she does not have the intention of permanently depriving the owner of the money's value (Loubser 1978 *De Iure* 86 91).

9.5 Unlawful temporary use of a thing is not theft

The expression ''unlawful temporary use of a thing'' describes the situation where the accused takes the owner's property without the owner's permission with the intention of using it temporarily and then returning it to the owner in substantially the same condition. As pointed out above, such conduct was regarded as a form of *furtum* (theft) in Roman and Roman-Dutch law. It was known as *furtum usus*. This expression means ''theft of the use of a thing'', since it is not the thing itself, but only its use which is ''stolen''.

In cases of *furtum usus* the accused does not intend to deprive the owner of his or her property permanently. The intention is to utilise it temporarily. If one applies the English-law criterion of ''intention permanently to deprive the owner'' (an intention which, as was seen above, is included in the intention to appropriate) one is forced to conclude that *furtum usus* falls outside the ambit of theft. This is precisely what was decided by our courts which, since the previous century, have followed English law regarding this aspect of theft. The leading case in this respect is *Sibiya* 1955 (4) SA 247 (A), in which the Appellate Division finally held that *furtum usus* is not a form of theft.

> In *Sibiya*, two employees at a garage in Durban ''borrowed'' a car parked in the garage without the permission of the owner to use it for a ''joy ride''. They intended to return it to the garage. However, before they could return the car, the car overturned. The police arrested them at the scene of the accident. The Appellate Division held that they had not committed theft.

Following the Sibiya judgement, the legislature attempted to fill the gap left in our law by this judgement, and in section 1 of the General Law Amendment Act 50 of 1956, created a new crime. This crime will be discussed under a separate heading below.

There are two qualifications to the rule that the temporary use of a thing is not theft. These two qualifications are the following:

abandons it, not caring

(1) If a person uses another's property temporarily and thereafter *abandons it, not caring* whether the owner will ever get it back, it is assumed in practice that he or she has committed theft. In *Laforte* 1922 CPD 487, for example, Laforte removed the owner's car from his garage without his permission. He went for a drive in the car intending to return it, but on the return journey collided with a lamppost. Without notifying anyone, and regardless of whether or not the car was returned to the owner, Laforte abandoned the vehicle at the scene of the accident. He was found guilty of theft. It is submitted that in situations such as these the intention permanently to deprive the owner is present in the form of *dolus eventualis*.

It would not be correct to say that, in all cases when a car was taken and abandoned after use, that the intention was necessarily to deprive the owner permanently of the car. Whether or not the thief has this intention depends upon the facts of each case, such as the place where he or she leaves the car and the condition of the car at the time of the abandonment.

ACTIVITY

Decide, after having read the facts of the following case, whether the accused are guilty of the charge:

> In *Vilakazi* 1999 (2) SACR 397 (N) the question was whether, in the following circumstances, Vilakazi had the intention permanently to deprive the owner of a certain truck. Vilakazi, together with a number of other members of a gang, decided to rob a vehicle belonging to a security company and transporting a huge amount of money. In order to execute their plan, they first stopped a large truck by threatening the driver with heavy weapons. They then parked the truck diagonally at the side of the road in such a way that it would form a buffer when the security vehicle with the money passed by. If the latter vehicle refused to stop, it would then crash into the parked truck.
>
> Vilakazi and his companions then waited by the roadside for the security vehicle to appear. However, another vehicle appeared, passed them, made a U turn, and then drove up and down the road a number of times. Vilakazi and the other members of the gang then decided to call off the proposed ambush of the security vehicle, because they feared that the police would soon appear on the scene.
>
> Vilakazi and the other members of the gang were charged with, *inter alia*, robbery of the truck. (Bear in mind that, as will be explained later, robbery is a qualified form of theft, and that, in order to secure a conviction of robbery, all the requirements necessary for a conviction of theft must be proved.)

The court held that the accused and his companions did have the intention permanently to deprive the owner of the truck. They foresaw the real possibility that, if they attempted to stop the security vehicle, this vehicle might force its way through the roadblock, thereby veering into the parked truck, and thereby damaging it irreparably or destroying it. The accused and his companions were reckless in

respect of this possibility. The intention permanently to deprive the owner of his truck was therefore present in the form of *dolus eventualis*.

The fact that the truck was, in fact, never lost and that its owner regained possession of it does not afford the accused a defence, since it is not required for theft that the person who is entitled to the property should permanently lose his property. All that is required is that the accused should have the intention permanently to deprive the owner of the property.

res fungibiles

(2) If X removes and uses *res fungibiles* (ie articles which are consumed by use, but which can be replaced by other similar articles [eg a case of tomatoes, a bag of coal or a can of oil]) belonging to Y without Y's permission, it is no defence for X to allege that he intended to replace the article with a different but **similar** one. This rule can lead to seemingly unfair results as illustrated by the following examples:

- In *Koekemoer* 1959 (1) PH H31 (O), Koekemoer, a police constable, acted as a Good Samaritan towards a motorist whose car had run out of petrol. He transferred about three gallons of petrol (about 15 litres), which was the property of the state, from the police vehicle (which he was driving at the time) into the motorist's car, and later, with money provided by the motorist, put three gallons of petrol back into the police vehicle. He was nevertheless convicted of theft.
- In *Shaw* 1960 (1) PH H184 (GW), the accused removed certain sacks of coal and wood belonging to his employer. He later replaced these with similar sacks of coal and wood. He was nonetheless convicted of theft.

Where a person appropriates the thing solely for his own convenience and later replaces it, as in Shaw, a conviction of theft would appear to be justified. In the case of trifling appropriations the principle of *de minimis non curat lex* would apply.

Koekemoer could, in our view, have claimed in justification that his act, which was performed in the interests of another, was socially adequate. The question of social adequacy has enjoyed scant attention in South Africa, but is recognised by legal scholars. We are here concerned with an act which, although it is *prima facie* in violation of a right would, on account of its social desirability, be encouraged rather than discouraged. In our view, a Good Samaritan like Koekemoer who has caused the state no injury through his act ought not to be punished with a criminal sanction.

9.6 Removal of property for use

(For more on this crime generally, consult Snyman CR *Criminal Law* 4 ed (2002) 500–506; De Wet & Swanepoel *Strafreg* 4th edition (1985) 337–342; Milton JRL and Cowling MG *South African Criminal Law and Procedure* vol III Statutory Crimes (1997) J4-3 ff.)

It was pointed out above that the Appellate Division held in *Sibiya* 1955 (4) SA 247 (A) that *furtum usus*, that is, the temporary use of property without consent, is no longer regarded as a form of theft in our law. In an obvious

attempt to make such conduct punishable, section 1(1) of the General Law Amendment Act 50 of 1956 was enacted. It reads as follows:

(1) Any person who, without a *bona fide* claim of right and without the consent of the owner or the person having control thereof, removes any property from the control of the owner or such person with intent to use it for his own purposes without the consent of the owner or any other person competent to give such consent, whether or not he intends throughout to return the property to the owner or person from whose control he removes it, shall, unless it is proved that such person, at the time of the removal, had reasonable grounds for believing that the owner or such other person would have consented to such use if he had known about it, be guilty of an offence and the court convicting him may impose upon him any penalty which may lawfully be imposed for theft.

(2) Any person charged with theft may be found guilty of a contravention of subsection (1) if such be the facts proved.

9.6.1 Discussion of the crime

There has been much criticism of the formulation of this crime. According to the long title of the Act, its aim is, *inter alia*, "to declare the unlawful appropriation of the use of another's property an offence". As we hope to show in the discussion of the crime which follows, the legislature did not succeed in its aim of punishing this type of conduct.

In common law, *furtum usus* could be committed in two ways, namely:

- **extra-contractual borrowing,** that is, where the accused takes and removes the owner's property which is in the accused's possession without consent and uses it temporarily (ie uses it with intent to return it after use); and
- **extra-contractual use,** that is where the accused, who is already in lawful possession of the property because it has, for example, been entrusted to him/her, uses the property temporarily without the owner's consent.

If the legislature wanted to restore the common law, it succeeded only partially in its goal, as will be pointed out below.

As far as **extra-contractual borrowing** is concerned, the subsection only indirectly succeeds in covering such conduct: what the subsection punishes is not the unauthorised use of another's property, but the removal of another's property in order to use it without consent. The emphasis is not on the use, but on the removal. If the accused removes property in order to use it without consent but, in fact, never uses it, he nevertheless contravenes the subsection.

As far as **extra-contractual use** is concerned, it is difficult for the state to prove that the unauthorised use of property by somebody already in possession of it amounts to a contravention of the subsection, because, as will be pointed out below, in many cases in which the accused is in control of property, the control is of such a nature that use of the property cannot be said to involve a removal from another's control, since he or she already has control of the property.

We will now discuss each of the elements of the crime identified above.

9.6.1.1 Removal of property from owner's control

removal

As already pointed out, what the subsection punishes is not the unauthorised use of another's property (as was the case in common law), but the removal of another's property in order to use it without consent. The emphasis is not on the use, but on the *removal* (*Dunya* 1961 3 SA 644 (O); *Motiwane* 1974 4 SA 683 (NC); *Schwartz* 1980 4 SA 588 (T) 592). If the accused removes property in order to use it without consent but, in fact, never uses it, he or she nevertheless contravenes the subsection. On the other hand, if the accused uses the owner's computer or television set throughout the year without the owner's consent, but without ever removing it from where it is placed, the accused does not contravene the subsection. This state of affairs is difficult to reconcile with the legislature's declared aim as expressed in the long title of the Act, namely, "to declare the unlawful appropriation of the use of another's property an offence".

property

Although the word *"property"* is not defined in the legislation, it is clear from the history and purpose of the provision that the word must be confined to property capable of being stolen, that is movable, corporeal articles which form part of commercial life.

control

The word "*control*" used by the legislature plays a very important role in the construction of the crime. What is punishable is not the removal for use of property which is in another's possession, but such removal which is in another's control.

A person can have control over an article even if it is not in his or her presence. If Sam parks his car in the street and goes to work in his office some distance away, he does not lose control over his car merely because his office is a number of street blocks away from his car. Although the words "possession" and "control" do not have the same meaning, they are nevertheless closely related in meaning. The meaning of "control" is not far removed from the meaning of "possession", and this is the reason why most cases of extra-contractual use (ie the use of a thing by somebody who is already in possession of the property) falls outside the ambit of the provision.

There may be cases where somebody who can be said to have some type of control over the property may contravene the subsection. This is where the person does not have full control over the property, but only partial control over it, such as where the person is only a depository, that is, where he or she merely has the detention of the property. The following are illustrations of this principle:

If Lyn leaves her coat for a few hours in the care of a depository at an airport while she does something else, the person who has the "control" over the coat has no right to wear it himself.

> To ascertain whether a person in whose care property has been placed contravenes the subsection when he uses the property for his own private purposes depends upon the circumstances of each case, including the nature of the property, the way it is usually utilised and especially the terms under which the owner has placed it in another's hands (*Rheeder* 2000 (2) SACR 558 (SCA) 564*b–e*).

- Thus, in *Seeiso* 1958 (2) SA 231 (GW) it was held that Seeiso contravened the provision in the following circumstances: the owner of a car delivered it to Seeiso to have the seating of the car upholstered. The owner locked the steering wheel and took the key of the car with him. The accused then broke the lock of the steering wheel, started the car by meddling with the ignition wiring of the car and then drove the car. It was held that the terms of the agreement between Seeiso and the owner were not such that he obtained the ''control'' (as this word is used in the subsection) of the car.
- Again, in *Rheeder* 2000 (2) SACR 558 (SCA) X, who was a police officer in charge of storage premises where stolen motor vehicles found by the police were stored until they could be handed back to their lawful owners, used some of the vehicles for private purposes, such as using one of the vehicles for a wedding car and going on a trip to the Kruger National Park. He was convicted under the subsection, the Supreme Court of Appeal holding that the word ''control'' as used in the subsection should be strictly interpreted as meaning not mere physical possession, but complete control, that is, physical possession together with the legitimate final discretion as to its use (''liggaamlike besit met gepaardgaande geoorloofde seggenskap oor die voertuig''). According to the court, Rheeder had control over the vehicle in a restricted administrative capacity only. In other words, Rheeder could not decide how the vehicles should be used. By narrowing the meaning of the word ''control'' as used in the subsection, the Supreme Court of Appeal in this case made it easier for the state to obtain a conviction in cases of extra-contractual use.

Cases resembling extra-contractual borrowing (ie where X removes property which is in somebody else's possession in order to use it) are easier to accommodate within the ambit of the provision. Once again, it is important to bear in mind that it is immaterial whether X in fact uses the property. The mere removal of the property with the required intention is sufficient to render X guilty (assuming, of course, that the other requirements for liability have also been proved).

9.6.1.2 Unlawfulness (absence of consent)

One of the most important reasons for the (unnecessary) complicated structure of the crime is the curious double way in which consent must be absent. The subsection is not contravened if the owner's property is removed without his or her consent in order to use it. It is only contravened if

- it is removed without the owner's consent; and
- in order to use it without his/her consent.

If the property is removed without consent but with the intention of using it with consent, the person removing it will not be guilty. Neither will he or she be guilty if he or she removes it with consent but intends to use it later without consent. Thus, if Pat takes Sal's computer without her consent, but intends to phone her later to ask her consent, she is not guilty.

9.6.1.3 Intent

The crime created in the subsection is a crime of double intent. The intent must be

- firstly, to remove the property
- secondly, to use it for his own purposes without consent
- intent to remove

The intent requirement is described in a very unsatisfactory way by the legislature. The first aspect of the requirement mentioned above, namely the intent to remove, is not mentioned at all. However, in the light of the history and background of this statutory crime, one must assume that a mere negligent removal cannot sustain a conviction.

The person must be aware that it is a movable, corporeal thing that he or she is removing. The person must also know that the owner or the person having control of the thing has not consented to the removal. This aspect of the intent requirement is implied by the old-fashioned expression used by the legislature: ''without a *bona fide* claim of right''.

- Intent to use property without consent

The second component of the intent requirement is the intent to do something with the property, namely, to use it for his or her own purposes without consent. Once again, the clumsy formulation leads to certain consequences which are difficult to reconcile with the broad intent of the legislature (expressed in the long title of the Act) to punish the unlawful appropriation of the use of another's property. The state must prove that the property was removed without consent, but also that the person intended to use it without consent. Thus if the person removes the property without consent, but with the intention of using it with consent, he or she is not guilty. Neither is the person guilty if he or she removes with consent but intends to use it later without consent. On the other hand, if the person removes property with intent to use it without consent but in fact never uses it, he contravenes the subsection. The wording of the subsection makes it clear that an intention to return the property after use to its lawful possessor, does not afford him any defence.

As far as the meaning of the word ''use'' is concerned, it must be borne in mind that merely keeping property in one's possession is not the same as using it (*Mtshali* 1960 (4) SA 252 (N)). To ''use'' a thing implies that a person deals with it in such a way that it still exists afterwards. If the property is used in such a way that it is, in fact, consumed, this amounts to appropriation of the property and thus to theft (eg where another's battery is used until it goes flat).

9.7 Theft a continuing crime

Theft is a continuing crime; there are no accessories after the fact.

The rules relating to participation and accessories after the fact in respect of

theft are highly unsatisfactory. The reason for this is, first, the disregard shown for the concept of appropriation (this was especially true in earlier cases) and, secondly, the incorporation into our law of the rule that theft is a continuing crime *(delictum continuum)*.

The rule that theft is a continuing crime means that the theft continues to be committed as long as the stolen property remains in the possession of the thief or somebody who has participated in the theft or somebody who acts on behalf of such a person (*Attia* 1937 TPD 102 106; *Von Elling* 1946 AD 234 246). This rule was unknown in our common law and was introduced into our law in 1876 by Lord De Villiers in *Philander Jacobs* (1876 Buch 171). Since then this rule has been regularly applied in our case law (eg *Kruger* 1989 (1) SA 785 (793C–E)).

The rule has the following two important effects:

jurisdiction

(1) The first is of a procedural nature: if X steals the property in an area falling outside the territorial *jurisdiction* of the court, he is nonetheless guilty of theft and may be tried and convicted if he is found in possession of the stolen property within the court's territory (*Makhutla* 1968 (2) 768 (O)); since the crime continues as long as he possesses the property, his possession of the property while inside the court's territory means that he commits the offence inside the territory over which the court has jurisdiction and that the court can therefore try him for theft committed inside its jurisdiction.

no accessory after the fact

(2) The second effect of the rule is that, generally speaking, our law draws no distinction between perpetrators and accessories after the fact. An accessory after the fact is somebody who, at some time after the original crime has already been completed, helps the original perpetrator to escape liability for his deed. Since theft is a continuing crime, the person who, after the thief has taken possession of the property and while he is still in possession of it, assists the thief to conceal the property, does not qualify as an *accessory after the fact*, because his assistance is rendered at a time when the original crime (theft) is still uncompleted. The person rendering the assistance is therefore guilty of theft, and not merely of being an accessory after the fact.

Apart from theft being a continuing crime, another reason why, as a rule, a person cannot be convicted of being an accessory after the fact to theft is the fact that somebody who, after the commission of the original theft, helps the thief to conceal the property, also has the intention of permanently depriving the owner. The fact is that, especially in the earlier cases, the courts were so blinded by the requirements of an intention permanently to deprive the owner that they did not require any intention to appropriate the property. If one assumes that an intention to appropriate is required for theft, it is indeed possible to differentiate between, on the one hand, the person who intentionally appropriated the property and, on the other, the person who, without entertaining any intention to appropriate, thereafter assists the person who originally appropriated the property by merely temporarily looking after the property or concealing it.

One of the very few instances where, in terms of the rules applied by the courts,

it would, by way of exception, indeed be possible to be guilty of being an accessory after the fact to theft is where the person assists the original thief, at a stage after he has already got rid of the stolen property, by concealing the thief himself from the police or by assisting him to escape. Since the thief is no longer in possession of the stolen property at the time that assistance is rendered, the ''continuous'' crime of theft is not committed and therefore the assistance does, according to general principles, render him or her guilty as an accessory after the fact.

If the person agrees with the actual thief, before the theft is committed, that after the property is taken he or she will receive it (perhaps at a price) and in fact does so, then he or she is, in any event, according to general principles not merely an accessory after the fact but, in fact, a co-perpetrator (*Von Elling* 1945 AD 234 240–241). In this case the person's act does not commence only once the thief has obtained the property, but already before he or she has committed his or her act. If, on the other hand, a person has innocently come into possession of property but discovers afterwards that it is stolen and then commits an act of appropriation in respect of the property, he or she commits an independent act of theft (*Attia* 1937 TPD 102 105–106; *Kumbe* 1962 (3) SA 197 (N) 19).

9.8 No difference between perpetrators and accomplices in theft

Just as the courts generally do not differentiate between perpetrators and accessories after the fact when it comes to theft, neither do they differentiate between perpetrators and accomplices in the case of this crime. The reason for this unfortunate equation of the two groups of participants can, once again, be traced to the courts' disregard of the importance of the requirement that there must be an act of appropriation and a/n intention to appropriate. If one ignores the appropriation concept model for this crime, applying (as the courts did) only the classical and former English-law model for the crime, it is not possible to distinguish between perpetrators and accomplices.

> Assume that Ken carries a box of Pam's wine out of Pam's house and later drinks all the wine himself. As a favour to his friend Ken, Red only gives him advice on how to get hold of the wine (or merely stands guard while Ken removes the wine), but never receives the wine himself. If one adopts the appropriation concept model, it is easy to draw a distinction between a perpetrator and an accomplice in this set of facts: Ken is a perpetrator because he appropriated the wine, but Red is only an accomplice because he neither committed an act of appropriation nor had an intention to appropriate, although he intentionally gave Ken advice or assisted him. The mere rendering of assistance to facilitate another's act of appropriation does not, in itself, constitute an act of appropriation.

''Appropriation'' means ''to make something your own''. If, as in the above hypothetical set of facts, Red only assists Ken to ''make the wine Ken's'', it cannot be said that Red had also appropriated the wine — that is, ''made it his own''. If, on the other hand, one does not apply the appropriation concept model but requires only a *contrectatio* committed with the intention of

permanently depriving the owner of the thing, the two categories of participants (perpetrators and accomplices) merge: Red must then be regarded as a perpetrator too, since his conduct and intention, like that of Ken, also comply with these requirements (cf De Wet & Swanepoel 357).

The unjustified equation of perpetrator, accomplice and accessory after the fact described above must be regretted. In other crimes, a distinction is drawn between these three groups of persons, and there is no reason why theft should be an exception. The confusion in our case law on this issue can be traced directly to the courts' adoption of the wrong model for the definition of the crime.

ACTIVITY

(1) Pam takes a bottle of perfume from a shelf in a shop and conceals it in her handbag, intending to steal it. However, before she passes through the check-out point, she is apprehended by the security guard.

(a) Is Pam guilty of attempted or completed theft?

(b) Will it make a difference to your answer if it transpires at the hearing that the security measures at the particular shop were so tight that it was practically impossible to remove anything without being caught?

(2) Bob is an attorney who manages the trust of his late sister's two minor children. When he receives a cheque on behalf of the children, he takes the cheque and pays his (Bob's) child's school fees with the proceeds of the cheque. He replaces the cheque with his own personal postdated cheque. He knows that when the cheque will be tendered his salary will have been paid into his account. Bob is charged with theft. He relies on the defence that he had a liquid fund, in the form of his personal cheque at his disposal, when he took the money.

FEEDBACK

Will he succeed with his defence?

(1) (a) Pam will be guilty of completed theft. The shop owner does not have complete control over the goods in his shop. The moment X concealed the perfume, the shop owner lost control over the perfume. See the discussion above under 9.1.

(b) Pam will be guilty of attempted theft only if the security measures were so tight that it was impossible for her not to be caught. See the discussion above under 9.1.

(2) Bob commits theft of credit entrusted to him. See the discussion under 9.4.2.2. His defence will not succeed. A liquid fund is a fund from which money can be withdrawn without delay. X had a personal post-dated cheque at his disposal, which does not qualify as a liquid fund. See the discussion above under 9.4.2.2.

STUDY UNIT 10

ROBBERY

10.1 What constitutes robbery?
10.2 Violence

- 10.2.1 Threats of violence
- 10.2.2 The causal link between the violence (or threats thereof) and the acquisition of the property
- 10.2.3 "Bag-snatching cases"
- 10.2.4 The property need not be on the victim's person or in his presence

10.3 Receiving stolen property

- 10.3.1 Stolen property
- 10.3.2 Unlawfulness
- 10.3.3 Receiving of property
- 10.3.4 Fault

10.4 Failure to give account of possession of goods suspected of being stolen (contravention of s 36 of Act 62 of 1959)

- 10.4.1 What constitutes failure to give account of goods suspected of being stolen?
- 10.4.2 Discussion of the crime
  - 10.4.2.1 Goods
  - 10.4.2.2 Suspicion
- 10.4.3 Satisfactory account
- 10.4.4 Crime not unconstitutional

10.5 Receiving stolen property without reasonable cause (in contravention of s 37 of Act 62 of 1959)

- 10.5.1 What constitutes receiving stolen property without reasonable cause?
- 10.5.2 Discussion of the crime

10.6 Fraud

- 10.6.1 What constitutes fraud?
- 10.6.2 The misrepresentation
- 10.6.3 The prejudice
  - 10.6.3.1 Potential prejudice
  - 10.6.3.2 Prejudice may either be of a patrimonial or nonpatrimonial nature
- 10.6.4 Unlawfulness
- 10.6.5 Fault
  - 10.6.5.1 Intention to deceive and intention to defraud

10.1 What constitutes robbery?

(On this crime generally, see Snyman CR *Criminal Law* 3 ed (1995) 475–478; Hunt PMA *South African Criminal Law and Procedure* vol II, Milton JRL *Common-law Crimes* 3ed (1996) ch 31; De Wet & Swanepoel *Strafreg* 4 ed (1985) 373–378.; Burchell J *Principles of Criminal Law 3rd ed* (2005) 817–845.)

Robbery or *rapina* was regarded in common law as an aggravated form of theft, namely, by means of violence. Today it is regarded as a separate crime, distinct from theft, although all the requirements for theft apply to robbery too. The following requirements are the same as in theft: only movable corporeal property *in commercio* can form the object of robbery. The owner must not, of course, have consented to the taking, and the robber must have known that consent was lacking.

It is customary to describe the crime briefly as ''theft by violence''. Though incomplete, such a description does reflect the essence of the crime.

> Robbery is the theft of property by unlawfully and intentionally using
> (1) violence to take the property from another, or
> (2) threats of violence to induce another to submit to the taking of the property

10.2 Violence

As is apparent from the definition of the crime, robbery can be committed in two ways: by violence or by threats of violence.

As far as the actual application of violence is concerned, the violence must be directed at the person of the victim, that is, against his or her physical integrity (*Pachai* 1962 (4) SA 246 (T) 249). The violence may be slight, and the victim need not necessarily be injured. If the victim is injured, and the property taken from him or her while he or she is physically incapacitated, robbery is likewise committed, provided, at the time of the assault, the robber already intended to take the property (*Mokoena* 1975 (4) SA 295 (O); *L* 1982 (2) SA 768 (ZH)).

10.2.1 Threats of violence

Robbery is committed even though there is no actual violence against the victim: a threat of physical harm to the victim if he or she does not hand over the property is sufficient (*Ex parte Minister of Justice: in re R v Gesa, R v de Jongh* 1959 (1) SA 234 (A); *Benjamin* 1980 (1) SA 950 (A) 958–959)). In such a case the victim simply submits to the taking of the property out of fear. In other words, he or she need not necessarily be physically incapacitated.

As far as can be ascertained, the courts have not yet spelt out specifically what the nature of the threats should be to lead to a conviction of robbery. We submit (and see also Hunt 653) that only a threat which would serve as a basis for a conviction of assault will qualify as a threat for the purposes of robbery. This means that the threat must comply with the following requirements:

physical violence

(1) The threat must be one of *physical violence*. A threat, not of physical violence, but only of damage to the victim's possessions or to his or her reputation is therefore insufficient to serve as a basis for a conviction of robbery, although such conduct may amount to extortion.

immediate violence

(2) The threat must be one of *immediate violence*; thus a threat to use violence one day in the future is insufficient.

violence against the victim himself/herself

(3) The threat must be one of physical *violence against the victim himself/herself*. A threat of violence against another (such as Y's wife or child) is therefore insufficient.

express or implied

The threat of violence may be *express or implied*.

ACTIVITY

If Syd, dressed like a robber, waylays Tonya and Phillip in a shop's office, orders Phillip to hand over money and assaults Tonya to prevent her from escaping, will Syd's conduct constitute robbery?

The assault must be viewed as an implied threat by Syd to do physical harm to Phillip if he does not hand over the money (*MacDonald* 1980 (2) SA 939 (A)). We submit that the test to determine whether the victim's will is overcome by fear is subjective: it ought not to be a defence to aver that a reasonable person would not have succumbed to the threats (Hunt 684).

10.2.2 The causal link between the violence (or threats thereof) and the acquisition of the property

causal link

There must be a *causal link* between the violence or threats of violence, on the one hand, and the acquisition of the property, on the other. If the property is required not as a result of the violence (or threats thereof), but as a result of some other consideration or event, robbery is not committed.

The following two decisions illustrate this rule:

- In *Pachai* 1962 (4) SA 246 (T) the accused made telephone calls to a shopkeeper, in the course of which he threatened him. The shopkeeper reported the calls to the police, who then set a trap for the accused in the shop. The accused entered the shop, demanded money and cigarettes from the shopkeeper, and aimed a pistol at him. At that stage the police were hiding in the shop and immediately after the money and property had been handed over, the accused was arrested. The court held that the property had not been handed over **as a result of the accused's** threats, but in the course of a pre-arranged plan, together with the police, to secure his arrest. As a result he was not convicted of robbery, although he was convicted of attempted robbery.
- In *Matjeke* 1980 (4) SA 267 (B) Matjeke advanced upon his victim with a panga and attempted to stab him. The victim threw his jacket at him in an attempt to obstruct his vision and thus to enable him (the victim) to escape. The accused thereupon ceased his assault upon him, but refused to return his jacket. The court held that Matjeke did not rob the victim of his jacket, but was guilty of two other crimes, namely assault and theft.

ACTIVITY

Decide if robbery is committed in the following two scenarios:

- Syd steals property from Phillip and, after completion of the theft, uses violence to retain the property (ie to prevent Phillip from regaining his property), or to prevent the police (or somebody else) from apprehending him.
- Syd assaults Phillip and, after knocking him unconscious, discovers for the first time Phillip's watch lying on the road and then hits upon the idea of taking it and, in fact, does so.

He does not commit robbery, but he does commit the two separate offences of theft and assault (*Malinga* 1962 (3) SA 589 (T); *Marais* 1969 (4) SA 532 (NC)).

He may be convicted of the two separate crimes of theft and assault (*John* 1956 (3) SA 20 (SR); *Ngoyo* 1959 (2) SA 461 (T)).

violence need not precede the taking of property

Normally the violence or threat thereof precedes the taking of the property. However, in *Yolelo* 1981 (1) SA 1002 (A) the Appellate Division held that there is no absolute rule to the effect that the violence should precede the taking of the property. If there is such a close link between the theft and the violence that they may be regarded as connecting components of one and the same course of action, robbery may, according to this decision, be committed, even though the *violence does not precede the taking of the property*.

In this case Yolelo was stealing certain goods from a home. The owner surprised him, catching him in the act in her home. He assaulted her and incapacitated her by gagging her with a napkin, tying her arms and locking her up in the bathroom. Yolelo then continued to search the home for money and firearms. If one considers the facts in this case, it is, however, difficult to believe that the assault upon the owner took place only after Yolelo had already completed the theft (ie completed his taking of the property).

10.2.3 "Bag-snatching cases"

Previously the courts held that, if the perpetrator snatches the victim's handbag out of her hands or from her body in a sudden and unexpected movement (with no resistance from her, because it happened unexpectedly), he or she is not guilty of robbery but merely of theft (eg *Mokete 1*963 (1) SA 223 (O)). In *Mogala* 1978 (2) SA 412 (A) 415–416, Rumpff CJ in an *obiter dictum* questioned the correctness of this rule: he pointed out that, in this type of case, the accused knows very well that he can gain possession of the handbag if he simply snatches it from the woman in a quick and unexpected movement.

- In *Sithole* 1981 (1) SA 1186 (N), the victim was carrying her handbag under her arm when Sithole approached her from behind, snatched the handbag and ran away with it. The Natal court agreed with the views of Rumpff CJ and held that he had committed robbery. The court stated that in this type of case the grabbing of the bag amounts to robbery if he intentionally uses violence to overcome the hold which the victim has on the handbag for the purpose of ordinarily carrying or holding it, or if the perpetrator intentionally uses force to prevent or forestall such resistance which she would ordinarily offer to the taking if she were aware of his intentions. *Sithole's* case was followed in other divisions of the Supreme Court (*Mofokeng* 1982 (4) SA 147 (T); *Witbooi* 1984 (1) SA 242 (C)).

If the victim does offer resistance, because, for example, she clings to her handbag while the accused drags her along, there is, of course, no difficulty in holding that he has exercised violence and that he has committed robbery (*Hlatswayo* 1980 (3) SA 425 (O)).

- In *Gqalowe* 1990 (2) SACR 172 (E) the accused walked past the victim, who was approaching the accused from his front, and saw a banking bag sticking out of the victim's pocket. As he passed the victim, he snatched the banking bag from the pocket and ran away with it. Gqalowe was convicted only of theft, because the court held that there had been no violence "against the person of the victim".
- This case was followed in *M* 1996 (2) SACR 132 (T), in which the accused snatched a cellular phone which was attached to a belt with a plastic clip, and ran off with it. No resistance was offered, because all he felt was somebody jerking his belt and then discovered that his cellular phone was gone. The accused was convicted of theft only, because the court was of the opinion that the violence, however slight, had to be directed at the victim's body before he could be convicted of robbery, and that this had not happened in this case.

A possible explanation of why the accused was convicted of theft only in *Gqalowe* and *M*, whereas in *Sithole* the accused was convicted of robbery, is that, in the two first-mentioned cases, the article was not in the victim's **grip** (under the arm or in her hand), whereas in Sithole's case it was indeed in the victim's grip.

- In *Mati* 2002 (1) SACR 323 (C), the accused had snatched the cell phone without using violence, because he caught the owner by surprise. He was convicted of theft.

10.2.4 The property need not be on the victim's person or in his presence

The property need not be taken from the person of the victim or in his presence. The lapse of time between the violence and the taking, as well as the distance between the place where the violence occurred and the place of taking, is only of evidential value in deciding whether the violence and the taking formed part of the same continuous transaction, and whether there was a causal link between the violence and the taking (*Dhlamini* 1975 (2) SA 524 (D)).

> In *Ex parte Minister van Justisie: in re S v Seekoei* 1984 (4) SA 690 (A) the Appellate Division confirmed the rule that the property need not be taken in the presence of the victim. In this case the victim was attacked and forced to hand the accused the keys of her shop which was two kilometres away. He then tied her to a pole, using barbed wire, and drove her car to the shop, where he stole money and other property. The Appellate Division held that the accused should have been convicted of robbery: the fact that he did not take the property in the victim's presence afforded him no defence.

10.3 Receiving stolen property

(For more on this crime generally, see Snyman CR *Criminal Law* 4th ed (2002) 510–512; Hunt PMA *South African Criminal Law and Procedure* vol II, Milton JRL *Common-law Crimes*, 3rd ed (1996), ch 32; De Wet & Swanepoel *Strafreg* 4th ed (1985) (by De Wet JC 344–360.)

The crime discussed here is known as ''receiving stolen property knowing it to be stolen''. Because of its long name it will, for the sake of convenience, be referred to below simply as ''receiving''.

This crime corresponds largely to the crime known as *heling* in Roman-Dutch law, and even today receiving is sometimes loosely referred to as *heling*. In our law, however, no one is charged with *heling*; the crime is known as receiving. The crime of ''receiving'', as we know it today, was unknown in common law (although it closely resembles *heling*), and was developed by the Cape courts in the nineteenth century under the influence of English law.

> A person commits the crime of receiving stolen property knowing it to be stolen if he unlawfully and intentionally receives into his possession property knowing, at the time he does so, that it has been stolen.

coincides with theft

A peculiarity of this crime is that it *coincides with theft*. A person who commits this crime is simultaneously an accessory after the fact to theft. As emerged from the discussion above of theft, all accessories after the fact to theft are treated in our law as thieves (ie perpetrators), particularly because of the rule that theft is a continuing crime. Thus, although all ''receivers'' may be charged with theft, the general practice is to charge them with the more specific crime of receiving. Such a charge better acquaints the accused with the allegations against him or her than a charge of theft only.

A further possible reason for receiving being treated as a separate crime in our law is that the conduct of a receiver is often far more reprehensible than that of the actual thief. It is a well-known fact that receivers are often the motivating force or "brains" behind the actual theft.

10.3.1 Stolen property

The property received must be stolen property. It is stolen if it is obtained by theft, robbery, housebreaking with intent to steal and theft or theft by false pretences (Vilakazi 1959 (4) SA 700 (N)). The crime can be committed only in respect of property capable of being stolen, that is, movable corporeal property *in commercio*.

10.3.2 Unlawfulness

The receiving must be unlawful. If the receiver receives the property with the consent of the owner or with the intention of returning it to the owner or handing it over to the police, the receiver does not commit the crime (*Ex parte Minister of Justice: in re R v Maserow* 1942 AD 164). In *Sawitz* 1962 (3) SA 687 (T) the police recovered the stolen property and handed it to the thief with the request that he give it to another person, so that the police could trap this person in the act of "receiving". This was done, and the receiver was convicted of receiving. His defence that the police consented to the receiving was rejected.

10.3.3 Receiving of property

The crime does not consist in being in possession of stolen goods, but in receiving such goods (*Chicani* 1921 EDL 123). The concept of "receiving" presupposes an act of taking into possession. The receiver need not, however, handle the property. Constructive delivery, that is, delivery which may be established from the surrounding circumstances, is sufficient. Mere negotiation between the thief and the receiver, even including a physical inspection of the goods by the receiver, is not sufficient to render the last-mentioned guilty of receiving (*Croucamp* 1949 (1) SA 377 (A)). The possession gained by the receiver need not necessarily amount to juridical possession in the sense that he or she intends to keep the property as his or her own; the crime is committed even where he or she only keeps the property temporarily for another (*Von Elling* 1945 AD 234 251).

10.3.4 Fault

The fault requirement in respect of the crime comprises

(1) knowledge by the receiver that he or she is receiving the goods into his or her possession; this implies an awareness on the receiver's part that the receiver has custody and control over the property; and

(2) an appreciation by the receiver of the fact that the goods are stolen.

Dolus eventualis suffices (*Patz* 1946 AD 845, 857), that is, it is sufficient that the receiver was aware of the possibility that the property might be stolen and, despite this, decided to receive it. It is submitted that it is this principle which the courts apply in stating that the mental element is satisfied where the receiver has a strong suspicion that the goods are stolen, and he or she wilfully refrains from making enquiries in order to avoid confirmation of his or her suspicions (*Patel* 1964 (2) SA 34 (FC)).

At the moment when he or she receives the goods the receiver must know that they are stolen. If the receiver only discovers this subsequently and then appropriates the goods (eg by selling or consuming them), the receiver will be guilty of independent theft (*Attia* 1937 TPD 102).

10.4 Failure to give account of possession of goods suspected of being stolen (contravention of s 36 of Act 62 of 1959)

(For more on this crime generally, see Snyman CR *Criminal Law* 4 ed (2002) 513–517.)

10.4.1 What constitutes failure to give account of goods suspected of being stolen?

In practice it is often very difficult for the prosecution to prove all the requirements for the crime of receiving stolen property knowing it to be stolen. More particularly, it is often very difficult to prove that a person in whose possession stolen property was found knew that it was stolen. Furthermore, the identification of the owner or person entitled to the property is one of the most important prerequisites for a successful prosecution for theft. If the state cannot identify the person from whom the property was stolen, it is impossible to prove that the property was taken from the owner or possessor without his or her consent.

In order further to combat theft, the legislature created two crimes in sections 36 and 37 of the General Law Amendment Act 62 of 1955 which punish the possession and receiving, respectively, of stolen goods or goods suspected of being stolen. We shall first consider section 36.

Section 36 provides that a person who is found in possession of goods (other than stock or produce under the Stock Theft Act) in regard to which a reasonable suspicion exists that they have been stolen, and who is unable to give a satisfactory account of such possession, is guilty of a crime and, on conviction, punishable with the penalties applicable to theft.

10.4.2 Discussion of the crime

This section must be interpreted strictly, that is, in cases of doubt, the section must be interpreted in the accused's favour (*Ismail* 1958 (1) SA 206 (A)).

10.4.2.1 Goods

The section does not apply to cash which cannot be identified (*Monyane* 1960 (3) SA 20 (T); *Boshoff* 1962 (3) SA 175 (N)). If this were not so, an unbearable responsibility would rest on retailers and commercial banks, and cash flow would be seriously disrupted. Money which can be identified, for example, because it is marked or contained in a specific receptacle, can be stolen, as was the case in *Mohapie* 1969 (4) SA 446 (C), where the object of the charge was an American $100 bill.

goods must have been directly under the person's control

The goods must have been directly under the person's control when he or she was caught. If the goods were previously under his or her control, or if he or she merely exercised indirect control over them by means of a representative, the person cannot be convicted — (*Hassen* 1956 (4) SA 41 (N), *Ndou* 1959 (1) SA 504 (T)), the person need not necessarily possess the goods *animo domini* — (*Nader* 1963 (1) SA 843 (O) 846). *Animo domini* means "with the intention to possess the goods as an owner", that is, to keep and use the goods as an owner.

10.4.2.2 Suspicion

suspicion must be reasonable

The suspicion held by the person trapping the accused must be reasonable. This means that the state must prove not only the existence of a suspicion, but also the facts which existed at that stage, and an indication of the reasonableness of the suspicion — Hunt 1957 (2) SA 403 (N).

suspicion should arise at substantially the same time as that at which the goods are found in possession

> *Reddy* 1962 (2) SA 343 (N). In this case a detective found pills in the boot of a car under Reddy's control. He took the accused and the pills to the police station, and only after questioning him did he suspect that the pills had been stolen. It was held that the fact that the suspicion arose only after he had found the pills in Reddy's possession was no bar to a conviction.

The suspicion may arise before the person is discovered to be in possession of the goods and, if this is the case, the suspicion must, however, still exist at the time of such discovery — *Naidoo* 1970 (1) SA 358 (A).

10.4.3 Satisfactory account

The duty resting on the person to furnish a satisfactory account of his possession need not be met at the time of his arrest; if he provides a satisfactory explanation in court, he will be acquitted — (*Armugan* 1956 (4) SA 43 (N); *Malakeng* 1956 (4) SA 662 (T)). The explanation must be such that, could it reasonably be believed, it would provide a satisfactory explanation for the possession of the goods, in the sense that, regard being had to the aims of the Act — namely the prevention of theft — the possession was *bona fide* and innocent — *Nader* 1963 (1) SA 843 (O).

If an explanation of possession is furnished at the time of his or her arrest which differs materially from the explanation given in court, the court may conclude that a satisfactory account of possession has not been furnished — (*Kane* 1963 (3) SA 404 (T) 406–7). If he or she wishes to avoid conviction, account of the possession must be given at some or other stage.

10.4.4 Crime not unconstitutional

On the question of whether or not the provisions of this section are compatible with the Constitution, the Constitutional Court held in *Osman v Attorney-General, Transvaal* 1998 (2) SACR 493 (CC) that these provisions are not incompatible with the Constitution.

The court held that the section does not violate any of the following rights enshrined in section 35 of the Constitution:

- the right to remain silent (s 35(1)(a));
- the right not to be compelled to make any confession or admission that could be used in evidence against him or her (s 35(1)(c); and
- the right to be presumed innocent (s 35(3)(h).

The court held that section 36 neither compelled an arrested or detained person to do anything, nor constituted pressure being applied on such person to make a statement. Such persons had a choice as to whether or not to provide an explanation for the possession of the goods. They retained the right to furnish an explanation at the trial if no explanation had previously been given.

inability and not the failure

It is the inability and not the failure or unwillingness to give a satisfactory account of possession that constituted the offence in section 36. The inability to give a satisfactory account of possession is an element of the offence, and the burden of proving this element rests on the state.

The consequences of a failure by the accused to give evidence depended on the strength of the state case. If the prosecution failed to discharge its onus, the accused was entitled to be acquitted. If the case was strong enough to warrant a conviction in the absence of any countervailing evidence by or on behalf of the accused, the accused could not be heard to say that a conviction in such circumstances infringes upon his or her rights to silence.

10.5 Receiving stolen property without reasonable cause (in contravention of s 37 of Act 62 of 1959)

10.5.1 What constitutes receiving stolen property without reasonable cause?

Section 37(1) of the General Law Amendment Act 62 of 1955 was amended by the Judicial Matters Act 62 of 2000 and reads as follows:

> ''(a) Any person who in any manner, otherwise than at a public sale, acquires or receives into his or her possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959, without having reasonable cause for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he or she receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence

and liable on conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.

(b) In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause.''

The wording of this section was changed after the Constitutional Court had pronounced on the constitutionality of the section.

In *Manamela* 2000 (3) SA1 (CC) the Constitutional Court considered the question whether the provisions of section 37(1) are compatible with the Constitution. The court unanimously found as follows:

- First, that the provisions of section 37(1) infringed upon the right to silence (provided for in s 35(3)(h) of the Constitution), but that this infringement was justifiable in terms of the limitation clause in section 36 of the Constitution. The reason why it was justifiable is that, in most cases, the state has no information on the circumstances in which the accused acquired the stolen goods. There is, according to the court, nothing inherently unreasonable or unduly intrusive in requiring the accused to show that it was reasonable of him to believe that the transaction was honest.
- Secondly, that, in creating a reverse onus, the provisions of section 37(1) infringed upon the presumption of innocence (provided for in s 35(3)(h) of the Constitution). The question was whether this infringement could be justified in terms of the limitation clause.
- The majority of the court (eight of the ten judges who heard the case) found that the provisions of section 37(1) could not be justified, for the following reason: the subsection was not limited to the receipt of motor cars or other items where persons could be expected to keep records. Instead, it caught in its net millions of people, frequently poor and semi-literate, who bought household necessities from door-to-door vendors. They, and not the professional receivers, were the people most vulnerable to incorrect conviction resulting from the application of the reverse onus. (A minority judgement of two judges found that the reverse onus created in the subsection was in fact justifiable and therefore constitutional.)
- However, the majority decision did not go so far as to declare the whole section 37(1) unconstitutional. The state and society as a whole has a vital interest in combating the evil of the unlawful receipt of stolen property. It is for parliament to rephrase the subsection in such a way that its provisions are not unconstitutional. However, the court was aware of the fact that it may take time for parliament to change the wording of the subsection, and to prevent an unacceptable vacuum from existing in the interim period before parliament can change the wording, the court decided to make use of its powers in terms of the Constitution to read words into the legislation, so as to replace the invalid reverse onus.

The Constitutional court accordingly ordered that

(1) the phrase ''proof of which shall be on such first-mentioned person'' in the present section is declared to be inconsistent with the Constitution and therefore invalid

(2) section 37(1) should be read so as to have the following words as a last sentence: ''In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause''.

evidential presumption

The effect of this ''reading in'' of words into the subsection is that the Constitutional Court has created an *evidential presumption*. A burden is placed upon possessors of stolen property to create a reasonable doubt in the mind of the court as to whether they had reasonable cause to believe that the person who disposed of the property was entitled to do so. If an accused does not create such a reasonable doubt, the court will assume that he or she did not have reasonable cause.

This amendment is contained in the Judicial Matters Act 62 of 2000 (see 10.4.1 above).

10.5.2 Discussion of the crime

To satisfy the requirement that the receiver must ''acquire or receive the goods into his possession'', it is sufficient if the receiver acquires the *detentio* or physical control over the goods. The fact that he or she exercises control for the benefit of somebody else is irrelevant for the purposes of section 37 — (*Moller* 1990 (3) SA 876 (A)). In this case the Appellate Division overruled the earlier Transvaal decision in *Mtolo* 1963 (3) 676 (T) to the effect that the section is contravened only if the receiver acquired the goods for himself or herself. The court rejected the argument raised in *Mtolo* that all porters at a station or at a hotel or all servants in a house who are in charge of articles which they must look after will fall under the terms of the section if its ambit is not restricted. The court stated that, in the ordinary course of events, such persons will always have a reasonable belief that the goods are not stolen.

The person who acquired or received the goods must have reasonable grounds for believing what is set out in the section. It is not sufficient that he had a *bona fide* belief that he acquired the goods lawfully, for the test is not subjective but objective: this means that it must be clear to the court that the reasonable person under the same circumstances would also have believed that the goods were obtained lawfully as set out in the section — *Ghoor* 1969 (2) SA 555 (A); *Mkhize* 1980 (4) SA 36 (N).

Note that, in terms of Act 23 of 1955, a second-hand dealer is required to maintain a full register of his transactions.

10.6 Fraud

(For more on this crime generally, see Snyman CR *Criminal Law* 4 ed (2002) 520–529; De Wet & Swanepoel *Strafreg* 4 ed (1985) (by De Wet JC) 382–407; Hunt PMA *South African Criminal Law and Procedure* vol II Common-law Crimes 3 ed (1996) (by Milton JRL) ch 34.)

10.6.1 What constitutes fraud?

To understand why fraud covers such a wide field in our law it is necessary to refer briefly to its origin in our common law. The crime of fraud, as we know it today, is derived from two different Roman law crimes, namely (1) *stellionatus* and (2) the series of crimes known as the *crimina falsi*.

Stellionatus was the criminal-law equivalent of the private-law *delict dolus*, and originated from the *actio de dolo* in private law (D 47 20 3 1). This involved an intentional misrepresentation resulting in harm to others.

Crimina falsi was a collective term for a series of crimes committed by forgery, the majority of which originated in the *Lex Cornelia de falsis*. These crimes were never united under a single crime of forgery. Examples of *crimina falsi* include: the forgery of a will (D 48 10 2), the falsification of weights and measures (D 48 10 32 1), and perjury (D 48 10 1 and 2).

The most important difference between *stellionatus* and *crimina falsi* is that in the case of the former, actual patrimonial damage to a person was apparently required, while no such requirement was set for the latter. In the case of *crimina falsi*, it was sufficient if the distortion of the truth was potentially prejudicial.

Our Roman-Dutch authors did not clearly differentiate between *stellionatus* and *crimina falsi*.

From the beginning of the twentieth century, the distinction between these two crimes has become blurred in our courts, and the courts have combined them to form a new crime known as fraud — *Moolchund* (1902) 23 NLR 76; *Jolosa* 1903 TS 694. In fact, a charge of fraud has, on occasion, been referred to as a charge of "falsity" in our law. The importance of this amalgamation, or the assimilation of *crimina falsi* into fraud, is that today fraud can be committed even where there is no evidence of patrimonial loss. Potential prejudice, even that of a non-patrimonial nature, is sufficient. We return to this below.

We can define fraud therefore as follows:

> Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial.

The elements of the crime are the following: a misrepresentation, prejudice, unlawfulness and intent.

10.6.2 The misrepresentation

The very first requirement for fraud is that there must be a misrepresentation.

> A "misrepresentation" is understood to be a deception by means of a falsehood. The perpetrator must represent to the complainant that a fact or set of facts exist which, in fact, do not exist.

speech or writing

The misrepresentation is usually made in *speech or writing*, but it may also take the form of conduct; for example, nodding one's head as a way of signifying consent — *Larkins* 1934 AD 91.

In the following case the court held that a misrepresentation can also be made electronically:

> in *Van den Berg* 1991 (1) SACR 104 (T), Van den Berg unlawfully credited her husband's bank account with the amount of R800. The court held that she had made a misrepresentation to the bank by means of the computer terminal. The court stated that her conduct did not differ from that of a clerk who, with intent to deceive, makes a false entry with a pen into the books of the bank.

express or implicit

The misrepresentation may either be express or implicit.

In the ordinary course of events, somebody who buys goods on credit implicitly represents that, at the time of purchase, he or she is willing to pay for them or intends to pay for them in the future, and that the person believes that he or she will have sufficient funds to meet his or her commitments. If, at the time of the purchase, he or she in fact has no such intention or belief, that person is misrepresenting the state of his or her mind — *Persotam* 1938 AD 92.

> In *Hochfelder* 1947 (3) SA 580 (T), Hochfelder signed the visitors' book at a hotel. After staying in the hotel for a few days, he disappeared without settling his account. On appeal the court held that he had neither by word nor by conduct falsely professed that he was able to pay for the accommodation. The same conclusion was arrived at on substantially similar facts in, *inter alia, Blake* 1961 (1) PH H57 (C) and *Hutson* 1964 (1) PH H16 (O). These decisions were criticised, in our opinion correctly, in 1961 *SALJ* 378, on the grounds that, when Hochfelder signed the register, he implied that he was willing and able to pay for his accommodation.

omissio

The misrepresentation can also be made by way of an *omissio*. This is the case if the perpetrator fails to disclose material facts and such failure leads to the complainant's acting to his or her prejudice. Generally speaking, an intentional failure to disclose a fact will constitute a misrepresentation if there is a legal duty on the perpetrator to disclose that particular fact.

> In *Larkins, supra* money was lent to Larkins on the 24th August on the strength of Larkins's statement that his salary for the month would be deposited in his banking account on 30 August. Larkins failed to mention that, prior to 24 August, he had ceded his entire salary for the month to somebody else. Because of this omission he was convicted of fraud.

A legal duty may also arise from the relationship of trust existing between a company director and the company: a director must, in terms of section 234 of the Companies Act 61 of 1973, declare to the other directors of the company any interest he may have in a contract entered into by the company. Failure to do this may amount to misrepresentation and fraud — *Heller* (2) 1964 (1) SA 534 (W) 536–538.

> In *Harper* 1981 (2) SA 638 (D), Harper was convicted of fraud in the following circumstances: in order to induce the complainant to lend him money, he expressed to him his honest belief that he had

adequate security for a loan. He was accordingly lent the money. Subsequently Harper discovered that his security was no longer safe. The complainant still thought that it was, and Harper knew that he was under this impression. He nevertheless allowed a year to pass without informing the complainant of the changed circumstances. At the end of the year he went insolvent and the complainant could not recover his money.

The court stated that Harper was under a legal duty to inform the complainant of the changed circumstances relating to the security. His intentional omission to do this constituted a misrepresentation. According to the court, Harper's first statement to the complainant had ''lulled [Y] into a false sense of security and involved the risk of harm''.

false promise

It is sometimes stated that the misrepresentation must refer to an existing state of affairs or to some past event, and that a misrepresentation with regard to a future event is insufficient since it amounts to a promise, and a mere false promise does not amount to fraud (*Blythe* 1916 TPD 449; *Feinberg* 1956 (1) SA 734 (O) 736).

This contention is, however, misleading, because a person who promises to do something at some future stage, implies, when making the promise, that he or she intends fulfilling it. If this is not in fact the person's intention, he or she is guilty of a falsehood regarding an existing state of affairs, namely, his or her state of mind, in that the person implies that he or she now (at the time of the making of the statement) has a certain thought or attitude which he or she in fact does not have. A typical example of this is the *Persotam* case mentioned above.

cheques

An important consequence of the above is the rule which has developed that a person writing out a *cheque* and handing it to another is generally deemed to have implied that, at that stage, the person believes there are sufficient funds in his or her banking account to cover payment of the cheque when it is presented to the bank.

In *Deetlefs* 1953 (1) SA 418 (A), for example, Deetlefs gave a postdated cheque in payment for a lorry. He claimed that, although there were insufficient funds in his account to cover the cheque when he gave it, he was a speculator and funds regularly flowed ''in and out'' of his account, and that on the date reflected on the cheque there would be sufficient funds to cover payment. On the given date there were in fact no funds. He was convicted of fraud.

The crime is complete the moment the misrepresentation is made. It makes no difference whether or not the representee reacts to the misrepresentation, or if he or she does react, how he or she reacts. Neither does it matter whether the fraudulent scheme is successful or not (*Isaacs* 1968 (2) SA 187 (D) 191; *Campbell* 1991 (1) SACR 503 (Nm)).

10.6.3 The prejudice

Misrepresentation must result in some sort of harm to another. For the purposes of this crime the harm is referred to as prejudice. The prejudice may be either actual or potential.

In many instances of fraud actual prejudice is suffered. For example, the perpetrator falsely represents that the painting he or she is selling is an original work of a famous painter and therefore worth a great amount of money whereas, it is, in fact, merely a copy of the original and worth very little (if any) money.

ACTIVITY

Syd insures with an insurance company all articles belonging to him against theft. He subsequently claims an amount of money from the insurance company on the grounds that certain articles belonging to him have been stolen. His allegation that the articles have been stolen is, however, false.

(a) The company pays him the money he claims.

(b) The company discovers that not all articles were stolen and refused to pay Syd the amount of his claim.

Does Syd commit fraud in both instances?

If the insurance company pays Syd the money he claims, the company will have suffered actual prejudice. If the company discovers that the articles concerned have, in fact, not been stolen and that his claim is therefore false and refuses to pay him the amount of his claim, he can nevertheless be convicted of fraud. This is because, although the company has not suffered any actual prejudice, his misrepresentation is potentially prejudicial.

Actual prejudice is, however, not required; mere potential prejudice is sufficient to warrant a conviction. Neither is it required that the prejudice be of a patrimonial nature. We shall now examine these last two propositions in more detail.

10.6.3.1 Potential prejudice

Potential prejudice is a concept that is frequently used regarding fraud and of which the exact meaning is not clear. Generally, potential prejudice means that the misrepresentation, looked at objectively, involved some risk of prejudice. In this respect the courts often use expressions such as "calculated to prejudice" or "likely to prejudice".

It would have been easy if the question whether there was potential risk could be answered by the answer "Yes, there is a risk of prejudice." Unfortunately, "risk of prejudice" does not take the matter much further. When will the risk be sufficient to be potential? We are now going to look at all the auxiliary tests that have been developed over the years by the courts to determine potential prejudice.

The requirement of potential prejudice means:

- A possibility of prejudice and not a probability (*Heine* 1956 (3) S A 604 (A) 622). This means what is required is that prejudice **can** be, not **will** be, caused.
- A real possibility and not a remote or fanciful possibility (*Kruger* 1961 (4) SA 816 (A) 832).
- That the prejudice need not be suffered by the representee, but also by a third party, or even the state or the community in general (*Myeza* 1985 (4) SA 30 (T) 32C).
- That it is not relevant that the representee was not, in fact, misled by the misrepresentation, but that the potential to lead to prejudice is important. The crime is completed once the misrepresentation is made. This is illustrated by the following set of facts:

ACTIVITY

Decide whether potential prejudice exists in the following set of facts:

In *Dyonta* 1935 AD 52, Dyonta attempted to sell glass stones as diamonds to a buyer who knew that the glass stones were not diamonds. He was charged with fraud.

Dyonta was convicted despite that fact that the buyer was not misled, since the ''representation that the stones were diamonds was capable in the ordinary course of deceiving a person with no knowledge of diamonds and, that being so, the misrepresentation was calculated to prejudice ...'' It follows that fraud can even be committed if the misrepresentation was made to a police trap who knew very well that the misrepresentation was untrue (*Swarts* 1961 (4) SA 589 (GW)).

- That the existence of potential prejudice must be judged in terms of the facts existing when the misrepresentation was made. The fact that the complainant would possibly have suffered the loss in any event in the end is not necessarily relevant — *(Kruger, supra)*.
- It is unnecessary to require a causal connection between the misrepresentation and the prejudice. Even where there is no causal connection, there may still be fraud, provided the misrepresentation holds the potential for prejudice. After all, a successful misrepresentation is not required for fraud.

ACTIVITY

Apply the last mentioned principle to the following sets of facts and decide whether potential risk existed:

(1) In *Kruse* 1946 AD 524 Kruse obtained two rings from the representee on approval. As security he gave him a cheque which was dishonoured by the bank. It appeared that the representee would possibly have given the rings even had no cheque been given as security.

(2) In *Rautenbach* 1990 (2) SACR 195 (N) the facts were as follows: Rautenbach bought an item in a shop and, as payment for it, wrote out a cheque and handed it to the shopkeeper. On the inside of the cheque book which the bank had issued to the

accused, the bank declared that it guaranteed payment of cheques written out for an amount not exceeding R200. The amount of the cheque which he wrote out and handed to the shopkeeper did not exceed R200. However, when he wrote out the cheque, he no longer had any funds in his cheque account — it was in fact overdrawn — and Rautenbach knew this.

In *Kruse, supra* the Appellate Division held that it makes no difference.

> "If the false representation is of such a nature as, in the ordinary course of things, to be likely to prejudice the complainant, the accused cannot successfully contend that the crime of fraud is not established because the Crown has failed to prove that the false representation induced the complainant to part with his property."

In *Rautenbach, supra* the court found that Rautenbach had not committed fraud. According to the court, it was not possible to construe an implied misrepresentation by him that there were sufficient funds in his account to meet the cheque. The court further held that, even if such a misrepresentation could be construed, it had not been proved that the shopkeeper had been moved by this misrepresentation to accept the cheque. According to the court, the possibility could not be excluded that the shopkeeper had decided to accept the cheque as a result of the bank guarantee.

We believe that this decision may be criticised. Rautenbach had impliedly represented that he had authority from the bank, and that he was entitled to write out the cheque, or at least that he believed that he was entitled to write out the cheque, whereas he well knew that he was not entitled to do so. It may well be that the shopkeeper did not suffer any prejudice (harm), but, as pointed out above, it is not a requirement for fraud that the prejudice should be suffered by the representee himself (or herself); it is sufficient that some other party suffers it. In this case the bank suffered the actual or potential prejudice.

Furthermore, it is, in our opinion, irrelevant whether the shopkeeper accepted the cheque as a result of Rautenbach's misrepresentation or whether he did so as a result of the bank guarantee, since a causal connection between the misrepresentation and the prejudice is not required in the case of fraud. It is sufficient that the misrepresentation be potentially prejudicial — which, in our opinion, was indeed the case here.

- Will fraud be committed where a loan is received on the strength of a misrepresentation by the perpetrator to the representee regarding the purpose of the loan. The following activity illustrates the principle.

ACTIVITY

Syd asks Anne for a loan and tells her that he needs the money to register at the university for a course. Anne gives Syd the money. However, Syd does not register at the university, but uses the money to buy a new DVD player. Does Syd commit fraud?

Syd commits fraud for the following reason: as a result of the misrepresentation, Anne's actual possession of the money or article which she lent Syd has been transformed into a mere right to reclaim the money or article back from Syd. There is prejudice or potential prejudice for Anne in that, instead of actual possession of the money or article, she now only has a claim against Syd. (It goes without saying that a mere claim to an article is less advantageous than the actual possession of the thing.)

This principle was endorsed by the Appellate Division in *Huijzers* 1988 (2) SA 503 (A).

> In this case Huijzers operated a transport business. Over a period of time he frequently borrowed money from the three complainants, and each time falsely represented that the money would be used for the buying and overhauling of a piece of equipment or a vehicle, which would subsequently be sold at a profit. He told the complainants that they would be refunded their money with a percentage of the profit. Huijzers, however, never had the intention to use the money for the proposed purpose, and he actually used part of the money to keep his transport business afloat and the remainder for the repayment of earlier advances made by the complainants. He continued to ''roll'' the money in this way until he was injured in a road accident and his conduct came to light.
>
> On appeal it was argued on Huijzer's behalf that he was not guilty of fraud because he had concluded loan transactions with the complainants which were based on his misrepresentations, and that the prejudice they had suffered was that the loans were not repaid. According to this argument, he had always had the intention to repay the loans and he believed that he would be able to do so.

ownership of the money for a purely personal right as creditor

> However, the Appellate Division followed the reasoning in the Rhodesian case of *Reggis* 1972 (2) SA 670 (R), in which it was decided that if the representee had been misled as to the reason why the perpetrator wanted to borrow the money, he had suffered prejudice because, due to the misrepresentation, he had exchanged his ownership of the money for a purely personal right as creditor. The court pointed out that, in the present case, the complainants had suffered prejudice because they had exchanged money for risky claims, and that the prejudice materialised at the stage when the money was handed over. The fact that Huijzers had believed that the complainants would eventually get their money back does not detract from the fact that they had suffered potential prejudice.

10.6.3.2 Prejudice may either be of a patrimonial or nonpatrimonial nature

The prejudice is mostly of a patrimonial (or, as it is sometimes stated, proprietary) nature, but it may also be nonpatrimonial in nature.

> Prejudice may be described as patrimonial (proprietal) if it has to do with a person's material possessions — in other words, if it consists in money, or something which can be converted into money.

The following are a few examples of fraud involving nonpatrimonial prejudice:

- writing an examination for another — at the very least, this holds potential prejudice for the education authorities (*Thabetha* 1948 (3) SA 218 (T))
- submitting a forged driver's licence to a prosecutor during the trial of a traffic offender (*Jass* 1965 (3) SA 248 (E))
- making false entries in a register reflecting the sale of liquor — this prejudices the state in its control of the sale of liquor *(Heyne, supra)*
- laying a false charge with, or making a false statement to the police (*Van Biljon* 1965 (3) SA 314 (T))

ACTIVITY

The Appellate Division had to decide whether fraud had been committed in the following instance. What do you think? Had fraud been committed?

> In *Tshoba* 1989 (3) SA 393 (A), the police arrested Tshoba on suspicion of having committed a certain crime. After his arrest he produced a false passport to the police. The name on this passport differed from his real name. The question was whether fraud had been committed. Given that it was clear that a misrepresentation had been made, the question was whether there was prejudice.

If you said that there was no prejudice, the court would agree with you. The court held that, although there had been a misrepresentation, it had not been proved that there was any prejudice. According to the court there had not even been potential prejudice.

If you said there was prejudice, we would agree with you. We believe that the correctness of this judgement is open to criticism. In our opinion, to show a false passport to the police or any other government body is at least potentially prejudicial to the state. It is difficult to see how the state's interests in exercising control over who is inside the country's borders, or who is entering the country, could in any way be less important than the state's interest in keeping control over the sale or liquor. This latter interest (ie in keeping control over the sale of liquor), as we have already pointed out, was held by the same court in *Heyne* 1956 (3) SA 604 (A) to be sufficiently important to be protected by the crime of fraud, in the sense that somebody who makes a false entry in the registers relating to the sale of liquor, commits fraud.

10.6.4 Unlawfulness

Compulsion or obedience to orders may conceivably operate as grounds of justification. The fact that Y is aware of the falsehood is no defence, as we have seen above. As any fraudulent misrepresentation is obviously unlawful, unlawfulness does not play an important role in this crime.

10.6.5 Fault

The form of fault in this crime is intention. According to general principles of criminal law the intention must relate to the misrepresentation, the prejudice and the unlawfulness requirement.

Intention in respect of the misrepresentation means that the perpetrator must know, or at least foresee the possibility, that the representation he or she is making to the complainant is false, but nevertheless proceed to make it.

Intention in respect of the requirement of prejudice means that the perpetrator must know, or at least foresee the possibility, that the complainant or some other party may suffer actual or potential prejudice as a result of his or her misrepresentation but nevertheless proceed to make it (*Bougarde* 1954 (2) SA 5 (C)).

Intention in respect of the unlawfulness requirement means that the perpetrator must know, or at least foresee the possibility, that his conduct is unlawful (ie that it is not covered by a ground of justification), but nevertheless decide to proceed.

Note that the previous three statements have been worded in such a manner that *dolus eventualis* is incorporated in the intention described. (The words "or at least foresee the possibility but decides to proceed" refer to *dolus eventualis*.)

We submit that the rules applied by the courts regarding intention mean that the required intention may also be present in the form of *dolus eventualis* — in other words, that it is sufficient if the perpetrator foresees the possibility that his or her statement may be false, but nevertheless proceeds to make the statement. (See *Meyers* 1948 (1) SA 375 (A) 382; *Hepker* 1973 (1) SA 472 (W) 477E–F.) However, mere negligence can never be equated with intention (*Van Niekerk* 1981 (3) SA 787 (T) 793F–G).

10.6.5.1 Intention to deceive and intention to defraud

> The courts recognise a distinction between an intention to deceive and an intention to defraud.
>
> The intention to deceive means an intention to make somebody believe that something which is, in fact, false, is true. An intention to defraud means the intention to induce somebody to embark on a course of action prejudicial to himself or herself as a result of the misrepresentation.

The intention to deceive is the intention relating to the misrepresentation, whereas the intention to defraud is the intention relating to both the misrepresentation and the prejudice. Intention to defraud is required for fraud.

> If Syd merely tells Anne a lie but does not believe that, as a result of the lie, Anne will proceed on a particular course of action to her prejudice, he lacks the intention required for fraud (*Lin Yuun Chen* 1908 TS 634; *Harvey* 1956 (1) SA 461 (T) 464G). The intention to defraud includes the intention to deceive, but the opposite is not the case (Bell 1963 (2) SA 335 (N) 337).

10.6.6 Attempt

Since potential prejudice is sufficient to constitute fraud, the view has long been held that there can be no such crime as attempted fraud since, even if the misrepresentation is not believed, or even if Y does not act on the strength of the representation, potential prejudice is present and, consequently, fraud is committed (*Nay* 1934 TPD 52; *Moshesh* 1948 (1) SA 681 (O); *Smith* 1952 (2) PH H105 (O)). However, in *Heyne* 1956 (3) SA 604 (A) the Appellate Division held that attempted fraud is indeed possible. This will arise in a case where the misrepresentation has been made, but has not yet come to the representee's attention, as, for example, where a letter containing a misrepresentation is lost in the post or is intercepted.

ACTIVITY

Read the following case and decide whether fraud or attempted fraud was committed:

In *Francis* 1981 (1) SA 230 (ZA), Francis buried some jewels in his friend's garden. He then insured the jewels against theft with an insurance company. At a later date he informed the company falsely that the jewels had been stolen from his motor car and claimed the value of the jewels in money. The insurance company required proof that his motor car had been burgled. Francis then broke the lock of his motor car with a screwdriver to create the impression that his motor car had been burgled. However, his fraudulent conduct was discovered before he had filled in the claim form.

Francis was found guilty of attempted fraud. If he had completed the claim form and had handed it to the insurance company, he would have been guilty of fraud. He was caught before he could make a misrepresentation to the insurance company in the claim form. The court held that there had been no question of potential prejudice when he contacted the company in the first instance.

10.6.7 Possible criticism of wide definition

Professor De Wet (in De Wet & Swanepoel 388 ff) has sharply criticised certain aspects of this crime, among them the rules relating to prejudice in terms of which the prejudice need not be either actual or patrimonial. According to him, ''prejudice'' may acquire, or may already have acquired, such a broad meaning that ''prejudice'' may or might already have become a mere fiction. He has also argued that the contents of this requirement are too vague, that the field of application of the crime is too broad, and that prejudice ought to be confined to actual patrimonial prejudice.

However, it seems unlikely that the courts will restrict the prejudice requirement as advocated by De Wet. In *Friedman* (1) 1996 (1) SACR 181 (W), the accused was charged with fraud. The defence invited the court to find that the rule in the case of fraud in terms of which the prejudice need not be either actual or patrimonial is, because of, *inter alia*, its vagueness, in conflict with the Constitution, and more particularly the Bill of Rights enshrined

therein, and that the court should therefore hold that these principles no longer form part of our law. However, the court (per Cloete J) rejected the argument, stating as follows:

"The present definition of fraud is wide, but that does not make it difficult, much less impossible, to ascertain the type of conduct which falls within it ... I do not find the breadth of the common-law definition of fraud repugnant to the provisions of the Constitution to which counsel has referred. I find nothing objectionable in the approach which punishes fraud not because of the actual harm it causes, but because of the possibility of harm or prejudice inherent in the misrepresentation."

10.7 Theft by false pretences

10.7.1 What constitutes theft by false pretences?

This crime can be regarded as a form of both theft and fraud. If the perpetrator commits this crime, the following happens: firstly, he or she commits fraud in that he or she makes a misrepresentation to the representee, and secondly, as a result of the misrepresentation, the representee "voluntarily" hands over to him or her a movable, corporeal article; thirdly the perpetrator appropriates this article. In short, here one has a situation in which the perpetrator first commits fraud and thereafter theft.

> For example, Syd falsely represents to housewife Anne that he repairs and services television sets, and that her husband has asked him to fetch their television set for servicing. On the strength of this misrepresentation, Anne allows Syd to remove the set from their home. He disappears with it and appropriates it for himself. Syd therefore uses a misrepresentation to obtain Anne's consent to his taking of the article; he thus forestalls the possibility of Anne's offering resistance to his taking of the article.

A person commits theft by false pretences if he or she unlawfully and intentionally obtains movable, corporeal property belonging to another with the consent of the person from whom he or she obtains it, such consent being given as a result of a misrepresentation by the person committing the offence, and appropriates it.

> The elements of the crime are the following: a misrepresentation by the perpetrator to the representee; real prejudice suffered by the representee, in that he or she parts with his or her property in favour of the perpetrator; a causal connection between the misrepresentation and the prejudice; an appropriation of the property by the perpetrator; unlawfulness; and intention.

10.7.2 General discussion of the crime

Cases such as the abovementioned situation are treated, in our law, as theft because it is assumed that, although the representee has ostensibly consented

to the perpetrator's taking of the property, in the eyes of the law, "consent" is not regarded as valid consent, because it has been obtained by means of fraud or misrepresentation (*Ex parte Minister of Justice: in re R v Gesa; R v De Jong* 1959 (1) SA 234 (A)).

Strictly speaking, the crime of theft by false pretences is unnecessary, since, in every case in which the perpetrator is convicted of theft by false pretences, he or she might just as well have been convicted of fraud. The crime therefore completely overlaps with fraud. If the crime of theft by false pretences were to disappear, criminal law would be none the poorer, since it would always be possible to charge the perpetrator with fraud on the same set of facts and (assuming the evidence proves the commission of the crime) to convict him or her of this crime. (In *Stevenson* 1976 (1) SA 636 (T) 637 Hiemstra J declared that the Attorney-General of the then Transvaal had informed him that he never allowed anybody to be charged with this crime.)

Note, however, that although every case of theft by false pretences includes fraud, the converse is not also the case: every case of fraud does not necessarily include theft by false pretences, since the perpetrator can commit fraud without obtaining and appropriating a movable, corporeal article, thereby causing actual patrimonial prejudice (harm) (as when he or she writes an examination in another person's place, thereby misrepresenting to the examination authorities that he or she is the other person).

10.8 Extortion

(For more on this crime generally, see Snyman CR *Criminal Law* 4 ed (2002) 386–389; De Wet & Swanepoel *Strafreg* 4 ed (1985) (by De Wet JC) 379–384; Hunt PMA *South African Criminal Law and Procedure* vol II Common-law Crimes 3 ed (1996) (by Milton JRL) ch 33.)

10.8.1 What constitutes extortion?

> Extortion is committed when a person unlawfully and intentionally obtains some advantage, which may be of either a patrimonial or a non-patrimonial nature, from another, by subjecting the last-mentioned to pressure which induces him to hand over the advantage.

The elements of the crime are the following: the acquisition of an advantage, an application of pressure, a causal connection (between the violence and the acquisition); unlawfulness; and intention.

10.8.2 Application of pressure

The perpetrator must acquire the advantage by exerting some form of pressure on the victim to which the victim submits. The pressure may take the form of:

- threats, such as defamation (*Ngquandu* 1939 EDL 213), dismissal from his employment (*Farndon* 1937 EDL 180), or arrest and prosecution (*Lutge*

1947 (2) SA 490 (N); *Sigonga* 1951 (1) SA 266 (E); *Lepheana* 1956 (1) SA 337 (A));

- the inspiring of fear; or
- intimidation.

harm to a third person

Where there is a threat of physical injury to the victim himself (or herself), extortion and robbery overlap (*Ex Parte Minister of Justice: In re R v Gesa, R v De Jongh* 1959 (1) SA 234 (A) 240). Even a threat couched in negative terms is sufficient (eg where the perpetrator threatens not to return something he borrowed *(Ngquandu supra)*). The threat may also take the form of *harm to a third person,* as in *Lepheana supra,* where the threat was of prosecution of Y's wife.

expressly or by implication

The threat can be made *expressly or by implication*. A policeman who suggests to a person he has arrested that the payment of a sum of money can ensure his release, implies that non-payment will mean continued detention (*K* 1956 (2) SA 217 (T)).

10.8.3 The benefit

patrimonial

Before 1989 there were conflicting decisions on the question of whether the advantage should be restricted to something of a patrimonial or financial nature. "*Patrimonial*" in this connection means "money or something which can be converted into money or expressed in terms of economic value".

> An example of a benefit which is of a non-patrimonial nature is the kind of ''benefit'' which the perpetrator intended to acquire in *J* 1980 (4) SA 113 (EC): here, the accused threatened his girlfriend that he would show nude photos of her to her parents if she did not consent to sexual intercourse with him. The ''benefit'' which he tried to acquire in this case was sexual gratification. (He was convicted of attempted extortion since the court was of the opinion that the benefit in the case of extortion should not be restricted to a patrimonial benefit.)

However, in 1989 the Appellate Division in *Ex parte Minister van Justisie: in re S v Von Molendorff* 1989 (4) SA 1028 (A) held that the crime should be restricted to instances where the advantage was of a patrimonial nature. The legislature was obviously not satisfied with this decision and, in section 1 of the General Law Amendment Act 139 of 1992, created the following provision, which can be regarded as the final word on this issue:

At criminal proceedings at which an accused is charged with extortion it shall, with respect to the object of the extortion, be sufficient to prove that any advantage was extorted, whether or not such advantage was of a patrimonial nature.

The crime is not completed until the benefit has been handed over to X (*Mtitara* 1962 (2) SA 266 (E)).

10.8.4 Causal link

We have seen that, in the case of robbery, there must be a causal link between the violence concerned and the obtaining of the property. In the same way, in the case of extortion, there must be a causal link between the threats or intimidation and the perpetrator's acquisition of the advantage — *Mahomed* 1929 AD 58. If the victim hands over the advantage not as a result of the threat or intimidation but for some other reason (eg because he or she has arranged for the perpetrator to be trapped by the police), only attempted extortion is committed — *Lazarus* 1922 CPD 293.

10.8.5 Unlawfulness

The pressure or intimidation must have been exerted unlawfully. This does not, however, imply that, if the victim is threatened with something which the perpetrator is entitled or empowered to do, the threat can never be sufficient for extortion. The correct approach advocated by the courts is to note the way in which the pressure is exerted and what was intended thereby. Although it is perfectly in order for a policeman to inform a person that the policeman intends prosecuting him or her, it is both irregular and wrongful for the policeman to state that he or she will prosecute the person unless he or she pays the policeman a sum of money *(Lutge supra, Lepheana supra)*.

10.8.6 Intention

The form of culpability required in the case of this crime is intention. The perpetrator must intend the perpetrator's words or conduct to operate as a threat, and he or she must intend to gain some advantage. The motive is totally irrelevant.

10.8.7 Extortion and robbery

We have already stated that the Appellate Division has indicated that extortion and robbery may overlap; in other words, that one and the same act may amount to both robbery and extortion. This is the case where a corporeal movable thing is obtained through a threat of physical injury to the victim. Apart from this one instance, robbery and extortion cannot overlap since the two crimes differ in the following respects:

(1) The property forming the object of robbery is limited to such property as is capable of being stolen, that is movable, corporeal property *in commercio,* or (as was pointed out in the discussion of theft) at least a patrimonial benefit such as credit. In the case of extortion, any benefit (patrimonial or otherwise) can be acquired.

(2) In the case of robbery, the thing must be removed simultaneously with or immediately after the threat. Extortion, on the other hand, is committed

even if the threat is made long before the benefit is handed over to the perpetrator.

(3) In the case of robbery, the violence or threat of violence must be directed at the person of the victim. In the case of extortion, the threat or intimidation may be directed at something else — for example, the victim's good name or his or her possessions, or the person, good name or possessions of some third party.

ACTIVITY

(1) Syd, who trades in illicit diamonds, is approached by Phillip, who wants to buy diamonds. Syd agrees to the transaction but decides to give Phillip zirconias instead of diamonds because he thinks that Phillip will not know the difference. Syd is unaware of the fact that Phillip is a police trap. Syd hands the ''diamonds'' over to Phillip but before the money is handed over, the trap is sprung.

Can Syd be convicted of fraud?

(2) Bill overhears a cellphone conversation in which Dan, a professional jockey, arranges with an unknown person that he will rein his horse in during a certain race in order to lose the race. Bill approaches Dan and tells him that he will not report the conversation to Dan's superiors, but that, in return, Dan must provide him with information on the races in which he is competing. Dan complies with his request.

FEEDBACK

Is Bill guilty of extortion?

(1) Syd is guilty of fraud. There was a misrepresentation in that he misrepresented to Phillip that what he was handing over was diamonds, whereas it was, in fact, zirconias. If he had the intention to defraud, it is immaterial whether Phillip was defrauded or not. Although the trap had been sprung before the diamonds had been paid for, the state could have been prejudiced. The requirement of potential prejudice has been complied with. See the discussion above under 10.6.3.1.

(2) Yes, Bill is guilty of extortion. He is applying pressure by threatening to expose Dan to his superiors. It does not matter that the advantage sought by Bill is nonpatrimonial (ie information), since section 1 of Act 139 of 1992 provides that the advantage could also be of a nonpatrimonial nature. See the discussion above under 10.8.2 and 10.8.3.