

# **PROOF BEYOND A REASONABLE DOUBT**

by

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a thesis submitted to the Faculty of Law in fulfilment or  
partial fulfilment of the requirements for the degree of

**DOCTOR LEGUM**

in the Department of Criminal and Procedural Law

at the

**UNIVERSITY OF ZULULAND**

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**KWADLANGEZWA  
NOVEMBER 1998**

## PREFACE

The current thesis was started by my late colleague Professor E S Mchunu. When he passed away before he could complete it, I undertook at his funeral to complete it. This is what I have done. This, however, did not simply involve putting final touches to it, but a complete reworking of the thesis and even incorporating recent developments.

When I approached the Faculty of Law for purposes of registration of the project, the Faculty Board decided that it could not register the project in the name of Professor Mchunu but that it would be registered in my name and I would have to dedicate the thesis to Professor Mchunu. This is what I accepted and did.

I would like to express my gratitude and indebtedness to the following people who assisted in one way or another in the completion of the thesis. They are, however, not responsible for its defects:

Proff M G Erasmus and J R L Milton, promoter and co-promoter respectively for their constructive critique in the execution of this research;

Mrs Karen Adlam my personal secretary for the efficient and meticulous way she typed and retyped the manuscript;

Ms Thembi Msomi my personal assistant for assisting with securing some research material;

the library staff of the University of South Africa especially the law librarian Ms Karen Breckon for assisting with tracing certain references;

the inter-library loan staff of the University of Zululand library for helping with some research material;

to my family for the support and understanding during another ordeal which deprived them of more time with me; and

the Lord Almighty for the life, health and strength he bestowed to me to execute this project. To Him alone be the glory!

This thesis is dedicated to my late colleague  
and friend **Prof. E S Mchunu** who initiated it.

## SUMMARY

Proof beyond a reasonable doubt is the standard of proof that is applied in criminal cases. The burden of proving the guilt of the accused in this manner rests on the state, and does not shift to the accused. This is in contrast to the evidential burden which may shift to the accused to rebut a case against him or her. There have, however, been statutory exceptions where the burden shifted to the accused. But this has been changed by the Constitution.

The rule has ideological and philosophical underpinnings. Criminal law is an awe-inspiring aspect of the law the enforcement of which could lead to the deprivation of the liberty of a person. Personal liberty in Western society is a cherished value so that its deprivation should result if the state has proved beyond a reasonable doubt that the accused is guilty. This is often concretised in the saying that it is better for a hundred guilty persons to go free than that one innocent person be found guilty.

The rule that the state has to prove the guilt of the accused beyond a reasonable doubt originated from English law during the eighteenth century and it was aimed at protecting the individual against the abuse of state power. Although this is a long-standing rule, there has been no clear definition of this rule either in English law or South African law.

The duty to prove the guilt of the accused beyond a reasonable doubt extends to every element of the offence. There are instances where this may not be the case. These are cases where judicial notice is taken of certain facts or where there is strict liability and it is therefore not

necessary to prove the existence of mens rea especially in the form of intention. Although these do not completely dispense with the requirement of proving the guilt of the accused, they result in the reduction of this burden.

In a number of legislative enactments, in the past the burden of proof was shifted to the accused through the use of presumptions. Not all presumptions had this effect but only those where the accused was presumed guilty because of the existence of certain facts and had to prove his or her innocence beyond a reasonable doubt. This is called the reverse onus. The Constitutional Court decided that these were in conflict with the provisions of sections 25 and 35 of the interim and final Constitutions respectively which, inter alia, provide for the right to silence and the presumption of innocence. Consequently these have been declared invalid as being unconstitutional. In this way the Constitution has been interpreted to affirm the core democratic values of liberty, equality and human dignity.

Although the standard of proof beyond a reasonable doubt has been used, it has not been clearly defined. Proof beyond a reasonable doubt can be regarded as proof which should convince a reasonable fact finder after considering all the relevant evidence that the accused is guilty of the offence with which he is charged. This proof must be based on evidence and not merely on intuition or belief otherwise it is not a standard at all.

## OPSOMMING

Bewys bo redelike twyfel is die standaard van bewys wat in strafregtelike sake van toepassing is. Die las om die skuld van die beskuldigde op hierdie manier te bewys rus op die staat en skuif nie na die beskuldigde nie. Hierdie posisie verskil van die van die bewysregtelike las wat na die beskuldigde kan skuif sodat hy of sy in staat is om 'n saak teen hom of haar weer te lê. Daar was egter statutere uitsonderings waar die las na die beskuldigde geskuif het, maar die konstitusie het hierdie situasie verander.

Die reel het 'n ideologiese en filosofiese grondslag. Die strafreg is 'n skrikwekkende aspek van die reg en sy toepassing kan tot die verlies van die vryheid van die individu lei. Persoonlike vryheid in die Westerse samelewing is 'n kosbare waarde wat verloor moet word nadat die staat bo redelike twyfel bewys het dat die beskuldigde skuldig is. Hierdie siening word gekonkretiseer in 'n gesegde dat dit beter is vir 'n honderd skuldige persone om vry te gaan as om een onskuldige persoon skuldig te bevind.

Die reel dat die staat die skuld van die beskuldigde moet bewys het sy oorsprong in die agtiende eeu in die Engelse reg en was bedoel om die individu teen magmisbruik deur die staat te beskerm. Alhoewel hierdie reel taamlik gevestig is, is daar nog nie 'n bevredigende omskrywing van die begrip in sowel die Engelse as Suid-Afrikaanse reg nie.

Die plig om die skuld van die beskuldigde bo redelike twyfel te bewys, behels al die elemente van die misdaad. Daar mag uitsonderings wees, veral waar judisiele kennis geneem word van sekere

feite of waar skuldlose aanspreeklikheid van toepassing is en dit is derhalwe nie nodig om die teenwoordigheid van mens rea veral in die vorm van opset te bewys nie. Alhoewel hierdie gevalle nie die bewys van die beskuldigde se skuld onnodig maak nie, verminder hulle die las wat op die staat lê.

In 'n aantal wetgewende maatreels in die verlede is die las na die beskuldigde geskuif deur die gebruik van vermoedens. Dit is nie al die vermoedens wat hierdie gevolg het nie maar net daardie waar die beskuldigde as gevolg van die bestaan van sekere feite skuldig vermoed is en sy onskuld bo redelike twyfel moes bewys. Die Konstitusionele Hof het besluit dat hierdie gevalle teenstrydig is met die bepalings van artikels 25 en 35 van die interim en finale Konstitusies respektiewelik. Daar word bepaal dat 'n individu geregtig is, onder andere, op 'n vermoede dat hy onskuldig is of op die reg om stil te bly. Gevolglik is die vermoedens wat die las op 'n individu plaas nietig verklaar weens teenstrydigheid met die Konstitusie. In hierdie opsig is die Konstitusie uitgele om die kern demokratiese waardes van vryheid, gelykheid en menswaardigheid te bevestig.

Alhoewel die standaard van bewys bo redelike twyfel algemeen bekend is, is daar nog nie 'n duidelike omskrywing daarvan nie. Bewys bo redelike twyfel kan omskryf word as bewys wat 'n redelike persoon kan oortuig nadat hy al die relevante getuïenis oorweeg het dat die beskuldigde skuldig is aan die misdaad waarvan hy aangekla is. Hierdie bewys moet op getuïenis en nie net op intuisie of subjektiewe oortuiging gebaseer word nie. In daardie geval is dit glad nie 'n standaard nie.

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## CHAPTER 1

### PROOF BEYOND A REASONABLE DOUBT : A CONCEPTUAL ANALYSIS OF ITS IDEOLOGICAL AND PHILOSOPHICAL UNDERPINNINGS

#### 1.1 Introduction

As the Constitution of the Republic of South Africa is the supreme law of the country, any law or conduct that is inconsistent with it is invalid.<sup>1</sup> For this reason it will have a pervasive influence on the law of the country both public and private. This means that not only the constitutionalisation of the law but also the fundamental transformation thereof. Of particular significance is the Bill of Rights in chapter 2. This Bill of Rights which is regarded as the cornerstone of democracy, enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.<sup>2</sup> It applies to all law and is binding on the legislature, the executive, the judiciary and all organs of state.<sup>3</sup> The rights contained in the Bill of Rights are aimed at ensuring that people live a good life, so that peace and social stability can be facilitated. Peace and social stability are essential not only for continued human co-existence but also for people to find meaning in life.

One of the rights enshrined in the Bill of Rights is the right to a fair trial.<sup>4</sup> There are various ingredients of this right. Some of these are enumerated in the Bill of Rights while others are deemed to be part of it by virtue of the common law. One of those that are not expressly mentioned is that the accused is entitled to have the case against him or her proved beyond a reasonable doubt. This is part of the law of procedure and evidence.

The law of evidence forms part of the procedural machinery because it deals with proof of facts in court. Its main function is to determine facts admissible for proving the facts in issue. It also determines the method of adducing evidence, the rules for weighing the cogency of evidence, and the burden of proof to be discharged before a party can succeed. The law of evidence is sometimes so closely connected with practice and procedure that they are inseparable.<sup>5</sup>

Procedural and evidential rules are generally an honest endeavour at finding and protecting the truth.<sup>6</sup> Methods for doing this may, however, differ. Ideally justice requires the attainment of truth. This means that in a criminal trial the guilty must be convicted and the innocent acquitted. But, as Hahlo and Kahn point out:

“Truth is an elusive goddess, and judges, like other mortals, are not omniscient.

An accused person or a party to a civil law suit may fail to avail himself of the opportunity of stating his case or may state it badly; there may have been no witnesses to an occurrence or it may not be possible to find them, or, if witnesses do give evidence, they may be lying or mistaken”.<sup>7</sup>

Although truth is important, the cardinal rule is that truth should not be established by resort to improper means.<sup>8</sup> As already stated, the rules of evidence lay down which evidence is admissible and which is inadmissible. One of these rules is the rule against hearsay evidence. The other, which is fundamental to a fair trial, is that one cannot be compelled to answer a question if the answer would tend to incriminate one.<sup>9</sup> A further component of a fair trial is that every person is presumed to be innocent until the contrary is proved. The onus is on the one who makes an accusation or alleges facts to prove them in criminal cases beyond a

reasonable doubt.<sup>10</sup> The fundamental question is: what is meant by proof beyond a reasonable doubt? The purpose of this investigation is to answer this question. But before that is done, a brief exposition of its historical and ideological background is apposite. The reason for this is that the main principles of procedure and evidence are not products of scientific observation, but rather contain and “represent a system of values shaped by sometimes curious course of the political, sociological and cultural history of a people, country or sub-continent.”<sup>11</sup> Although a Bill of Rights is supposed to be a decisive break from the past, it is based on certain values that have been shaped by history. The whole idea of a Bill of Rights is that people should be treated as human beings. This is so because throughout history people have been subjected to inhuman treatment by those more powerful than them.

## 1.2 **The ideological basis of proof beyond a reasonable doubt**

In one of the great judgments of the twentieth century, the Supreme Court of the United States of America declared: “The history of liberty has largely been the history of observance of procedural safeguards”.<sup>12</sup> This implies means that procedural guarantees are aimed at safeguarding the freedom of the individual. Freedom has been regarded as so essential that all the other fundamental rights might as well be regarded as meaningless if a person’s freedom may be arbitrarily taken away.<sup>13</sup> Individual freedom has been described as “the freedom of every law-abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasions without let or hindrance from any other persons”. This freedom, however, does accommodate the “peace and good order of the country in which we live”.<sup>14</sup> For, as Lord Denning once put it, “the freedom of the just man is worth little to him if he can be preyed upon by the murderer or thief”.<sup>15</sup> For this reason society must have powers of arrest, to search or to

detain in order to deal with those who break the law. If they are properly used, these powers themselves are the safeguards of freedom. But if they are abused, they can lead to the atrophy of personal freedom.<sup>16</sup> Because of the centrality of personal freedom, it is absolutely crucial that when it is taken away, that must be done in a fair way; hence the requirements of fair trial procedures. The purpose of this is to strike a balance between individual freedom and protection against crime.

In the United States of America and Great Britain legal procedure is viewed in a very serious light as it is recognised as definitive of substantive rights. The reason for this concern is the early realisation among the common-law lawyers that it was no use being right if it was not possible for justice to be actually done.<sup>17</sup> For this reason, matters relating to the administration of justice, procedure, evidence and the execution of judgments have, for the common-law lawyers importance equal, or even superior, to substantive legal rules because, historically, their immediate pre-occupation was to re-establish peace rather than articulate a moral basis for the social order.<sup>18</sup> It was for this reason that Arthur van der Bilt, Chief Justice of the Supreme Court of the State of New Jersey once declared that: “there is no more important right in the law than the right to a fair trial, for without a fair trial all the rights vouchsafed by the substantive law are worthless”.<sup>19</sup>

Viewed in this light, procedural rights are at the very heart of justice.<sup>20</sup> In the words of Orfield: “Chief Justice Taft once stated that ‘our Anglo-Saxon ancestors hammered out their civil liberty by securing from their would-be royal oppressors not general declarations of principles of freedom like a French Constitution, but distinct and definite promises that certain rules, not of substantive law, but of adjective law should obtain’”.<sup>21</sup>

Scholars have spent a lot of time and effort commenting on procedural decisions by courts and developing structures and theories by means of which to explain, justify and criticise court decisions that impinge on procedure. Fellman has written convincingly and exhaustively on the importance of procedure in the judicial process.<sup>22</sup> According to Bassiouni, the principles, process and procedures of criminal law are important to every person as the liberty of each of us is dependent, directly or indirectly upon them.<sup>23</sup> The importance placed on procedure in Great Britain and the attention devoted to it has led to the criticism that the law seems directed to achieve procedural justice rather than substantive justice.<sup>24</sup> But Lord Denning has put this debate in perspective by declaring that “rights are no good unless you can enforce them”.<sup>25</sup> Van der Merwe was saying more or less the same thing when he declared that “it has often been said that substantive law might just as well not exist if there were to be no procedural machinery which could constantly translate or transform the rules of substantive law into court orders and actual executions”.<sup>26</sup>

Except for one or two textbooks, on procedure and evidence in South Africa, South African jurists have generally lagged behind their British and American counterparts in generating a body of comment to guide, instruct and to influence our courts and lawmakers on the theoretical and philosophical aspects of the law of procedure and in so doing to create an analytical structure to use as a source of reference in deciding cases and in articulating policy alternatives.<sup>27</sup> Our procedural jurisprudence is the poorer for it and some legislative excesses occurred in South African law in the past which could perhaps have been avoided had as much concern been evinced in South Africa by South African jurists about procedural safeguards as has traditionally been evinced in Britain and the United States of America. This omission was obviously influenced by the legal dispensation that we had.

South African jurists are, however, not alone in this neglect. Romanist lawyers generally have concentrated on substantive law and omitted to give much attention to adjective law as a matter, it is suggested, of philosophical choice.<sup>28</sup> However, it is suggested that “nothing behooves us so much, in these days of reconsideration of the fundamentals in criminal procedure, as to consult experience, in the shape of the history of that subject. In no part of the law’s framework are the scars of the past so deeply indented. No body of rules is so largely based on policies consciously adopted to safeguard against felt abuses. Nowhere in the law are the warnings of history more explicit and more valuable for our own generation”.<sup>29</sup>

A central concern of this investigation therefore is the anxiety over what has been the gradual, systematic whittling away of an accused person’s procedural rights and therefore the procedural aggrandizement of the state at the criminal trial causing the scales of justice to be tilted unacceptably against an accused and thus defeating or obstructing the basic justice of the criminal justice system in South Africa. The adoption of the Bill of Rights will obviously lead to the reversal of this.

The basic legal and philosophical tradition of the South African procedural justice system is the common law tradition. By the common law is meant the English common law although that assertion is obliquely disputed by some writers, for example, Atiyah<sup>30</sup> and David and Brierley<sup>31</sup> who say that our system is hybrid. Since our common law is not English common law, it seems that South Africa can only claim that it is a common-law country in so far as in its system of law, it employs the precedent system. The greater part of its public law has long since been cut adrift from any relationship with the English common law. The similarity between the two systems seems to be in judicial methodology rather than in ideological and contextual aspects.<sup>32</sup>

Jackson supports the view that our law is not of the common law tradition since we did not take over English law as we already had Roman-Dutch law in South Africa at the time of the conquest of the Cape.<sup>33</sup> Scarman, on the other hand, is of the view that when common law encountered South African law, common law chose to stand aloof.<sup>34</sup> However, notwithstanding these controversies, which to many people amount to nothing more than academic cant, South Africa insists on being a member of the western tradition. This is a claim that cannot be easily dismissed. The recent adoption of a Constitution that contains a Bill of Rights is ample evidence of this.

The western common law tradition has at its base, certain fundamental values which are expressed in the legal norms of societies which claim membership of that tradition. Such values are expressed in the totality of the legal systems involved and constitute the ideology of the legal systems concerned.

### 1.3 Concretization of the ideology

Competition and conflict are inevitable functions of human interaction. "And, given the observable nature of human behaviour, they will compete with violence, with deceit, with avarice and with callous disregard for others".<sup>35</sup> South Africa shares with the western world, the perception of the need to resolve conflict peacefully by means of the judicial process.<sup>36</sup>

The judicial process consists of all those procedures and actions which are aimed at and which culminate in the ventilation of the issues in a court of law by means of a procedure called a trial. "A trial is the most visible and dramatic event in the criminal process. The most formal and

sustained display of the majesty and authority of the law".<sup>37</sup> It is the most forceful and outwardly savage display of organised force imaginable. The display of weaponry and naked authority in court is unnerving.<sup>38</sup> Were the exercise of force to be the acknowledged purpose of the judicial proceedings, such proceedings would be but a caricature of the majesty and authority of law and would not have the effect that judicial proceedings normally should have on people, that is, awe and respect. The court could never effectively carry out its social control function if the procedure it adopted did not generate such awe and respect from the citizen. In the words of King:

Moreover, if the courts are to promote social justice then they must show they are themselves institutions where a person can expect a fair hearing. They must also be seen as places where a person who has been found guilty of a crime receives a just penalty, that is one that reflects the seriousness of the offence, his blameworthiness and the harm he has caused to his victims.<sup>39</sup>

As David and Brierly put it:

The concept that the accused must have a fair trial and that decisions can only be rendered upon completion of an established procedure embodying the rules of natural justice are central to English law - a law conceived, essentially, in the light of litigation and one more concerned with the administration of justice, or so it often seems to the continental jurist, than with justice itself.<sup>40</sup>

The ideology of the law of the west is opposed to arbitrary punishment.<sup>41</sup>

The western world has therefore incorporated into the judicial process the value of justice.<sup>42</sup> As Knox puts it “But under our system of justice, justice is so vital a part of the governmental idea that it can be said with no fear of successful contradiction that our type of government could not exist without it”.<sup>43</sup> Indeed, the civilised world posits the power of government in the area of crime repression on standards of decency, fair play and due process.<sup>44</sup> Nor is the adherence to such basic norms altruistic. Were the state to use unlawful means to repress crime, it would lose its legitimacy<sup>45</sup> and with such loss would also be lost the moral right to repress anti-social conduct. Consequently the western world requires that judicial proceedings be fair and just. The fairness and justice of the criminal justice system are regarded as the supreme ideal. For in the final analysis: “Justice, as an ideal, is the keystone of the arch of social control”.<sup>46</sup>

Within the ambit of the procedural law, which is the main field of this study, the accused is presumed innocent until proven guilty. These values find expression in the following well known rules:

(1) The presumption of innocence

Thus the presumption of the innocence of the accused until proven otherwise, is transformed into courtroom procedure in the Anglo-Saxon countries. Essential to it are the ancient basic safeguards inherent in that philosophy of the law safeguards which, to a greater or lesser degree, are fundamental to the notions of liberty and justice that pervade the political system of the liberal democratic west.<sup>47</sup>

- (2) The second rule is that the onus rests on the state to prove the guilt of the accused beyond a reasonable doubt.

It is the latter rule that this work seeks to examine against the background of concrete, social and political conditions in analogous political milieus in order to draw conclusions regarding the adherence of those societies to these values.

The second rule presupposes the existence of the following format:

- (a) a fair trial;
- (b) bifurcation of the trial actors into the state and the defence;
- (c) a burden imposed on the state to prove the accused's guilt; and
- (d) the proof tendered by the state to meet the standard of proof beyond a reasonable doubt.

Provided that the foregoing conditions are met, the conviction or acquittal of an accused person in a court of law will not incite outrage among the citizenry because the proceedings and therefore the result will be perceived as fair. If a normative rule were to be created which would cast an onus on the accused to prove his innocence of the crime charged, such a rule would be in conflict with the basic western values which underlie the criminal justice system of the west and would cause conflict in society. It was such considerations which caused the Founding Fathers of the American constitution to provide against a Bill of Attainder.<sup>48</sup> Thus, Brennan J decided in In re Winship<sup>49</sup>:

“Moreover use of the reasonable doubt standard is indispensable to command

the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offence without convincing a proper factfinder of his guilt with utmost certainty”.

But as long ago as 1928 Landsdown perceived certain deviations in South African law from the foregoing tried and trusted rule of evidential certitude before the imposition of criminal sanctions, when he wrote that:

In the main, the devices to this end fell into the categories of judicial notice, presumptions and prima facie proof, admissions, deviations from the general onus probandi principle and derogations from the strictness of the rule that only the best evidence shall be admitted to prove a fact.<sup>50</sup>

However, owing to the imprecision of authoritative and commentative authority, differential conceptualization of the various terms and institutions among the jurisdictions considered in this work as well as the unitary nature of the law of evidence, that is, unitary in the sense that the various aspects of the law of evidence mesh and interlock so intimately that it is not possible to separate for study, problem areas from the rest of the body of the law of evidence,<sup>51</sup> it is considered necessary to review the various terms and institutions and to focus on common meanings before conclusions may be drawn as to the adherence of South Africa to western

standards.

## 1.4 **Conceptualization of the instruments of proof**

### 1.4.1 **The burden of proof**

In the whole of the law of evidence very few concepts are more elusive of definition and comprehension, than evidence, proof and the compound concept of the burden of proof.<sup>52</sup> They have, however, established themselves so well and ingrained<sup>53</sup> themselves so deeply in the law of evidence that most books on the subject devote an inordinate amount of ink and space to them.

Thayer is generally credited with having evolved the first coherent theory of the burden of proof and is regarded as the seminal writer on the subject.<sup>54</sup> His influence has been immense in this field. Ambiguity and confusion of which Wigmore and McCormick<sup>55</sup> and most other writers complain of can be traced back to Thayer's work. The inability of writers to elucidate the meaning of "onus of proof" as well as its influence and role in the evidential process is attributable to their clinging to Thayer's conceptions and classifications and to the metaphor of the "burden". It is suggested that to reach a better understanding of the concept, one must break free of Thayer's influence and also from thinking in terms of the adversarial evidential determination of fact present in the metaphor of burdens to be "carried" by either party.<sup>56</sup> It is submitted that the 'burden' metaphorical thinking is the greatest single impediment to correct understanding of the role of the onus in the law of evidence.

Not unexpectedly there are differences of opinion about the meaning of the central and pivotal concept in this matter. The reason for that is that:

(T) here is an underlying disagreement on the very meaning and purpose of definition. Until this more fundamental problem is resolved, we can hardly expect agreement to emerge on the definition of particular legal concepts.<sup>57</sup>

#### 1.4.2 Evidence

Different writers define evidence in various ways. Greenleaf defines evidence thus:

The word evidence, in legal acceptance, includes all the means, by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.<sup>58</sup>

Phipson defines evidence as "... the facts, testimony and documents which may be legally adduced in order to determine the fact under inquiry".<sup>59</sup> In the 12th and 13th editions of the same work, evidence is defined as "... testimony, whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute".<sup>60</sup>

McCormick does not directly define the concept of evidence but he defines the law of evidence as "... the system of rules and standards by which the admission of proof at the trial of a lawsuit is regulated".<sup>61</sup>

Cross says of evidence:

“Judicial evidence consists of the testimony, hearsay, documents, things and facts which a court will accept as evidence of the facts in issue in a given case”.<sup>62</sup>

On evidence proper, Cross says:

“The evidence of a fact is that which tends to prove it - something which may satisfy an enquirer of the fact’s existence”.<sup>63</sup>

Wigmore defines evidence as:

“Any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or logic, on which the determination of the tribunal is to be asked”.<sup>64</sup>

Taylor defines evidence thus:

“The word evidence, considered in relation to law, includes all the legal means, exclusive of mere argument which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation”.<sup>65</sup>

Taylor's definition may be criticized for being descriptive instead of being definitive.<sup>66</sup> The effect of the inclusionary phrase in Taylor's definition is that it sweeps into the definition of evidence all types of evidentiary material, including hearsay, which strictly speaking is not evidence as it will not ordinarily be admissible in a court of law.

Furthermore the definition is silent on the role of the exclusionary rules of evidence in determining the admissibility of evidential material into the evidential pool established by the contending parties before the trier of fact from which the trier of fact may draw in order to resolve the *factual issue presented to him*. The definition omits the very essential attribute of evidence, namely, *receivability by the trier of fact*.

Nokes, after criticising most of the writers on evidence, declines to define evidence and merely contents himself with stating that "... it may be said that judicial evidence consists of (1) facts which are legally admissible and (2) the legal means of attempting to prove such facts".<sup>67</sup>

Black's Law Dictionary defines evidence as:

Any species of proof or probative matter, legally presented at the trial of an issue by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects, etc. for the purpose of inducing belief in the minds of the court or jury as to their contention. All the means by which any alleged matter of fact, the truth of which is submitted for investigation is established or disproved. Any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion of the existence or non-existence

of some matter of fact. That which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other.

That which tends to produce conviction in the mind as to existence of a fact.

The means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact.<sup>68</sup>

What becomes immediately apparent is the recurrence in all the descriptions of the concept of "means". Evidence is therefore an instrument to be used for a certain purpose. In ordinary life evidence means any instrument used to demonstrate the correctness of a factual assertion. Such instrument may be another factual assertion or may be something concrete, a fragment of reality, for example a knife used as an exhibit in a case of murder.

In law, evidence means any instrument which is used to persuade a trier of fact with regard to a certain disputed fact.<sup>69</sup> In other words evidence is a probative instrument and no more than that. By employing such means, a party to a proceeding establishes or disproves the contents of an assertion of fact. In other words, by evidence, a party establishes the existence of a fact asserted by him or establishes the non-existence of a fact alleged to exist by another party. When a party has established the existence or non existence of a fact, he has proved such existence or non-existence. Evidence is therefore the means of demonstrating the existence or non-existence of a fact in issue to a trier of fact.

All the foregoing definitions have this in common, namely, that they refer to evidence as a means or something which has a determined purpose. Only Cross' definition of judicial evidence does not contain a purposive element. The definition appears incorrect in that respect

because no court will admit any evidential material which does not tend to prove or disprove some fact in issue. Such evidential matter would be irrelevant. The tendency to prove or disprove some fact in issue in a case is an essential element of any material in order that it may qualify to be called "evidence". It is this quality that distinguishes and sets it apart from other similar materials. Cross' avoidance of the purposive element in evidence would seem to refer to those materials that the court would not ordinarily exclude.

Cross' definition is, however, the most accurate of the definitions if one accepts the view that evidence in any case is only that material which the court has accepted as such. According to this view, before such material is offered by the parties and is admitted by the court, the material is not evidence. However, this view is weakened by Cross' prospective definition of evidence. The definition envisages an assessment of the acceptability to a court of evidential material before the material is actually offered. According to the view under discussion, some of the material which Cross describes would not qualify as evidence. Cross' definition therefore suffers from an internal logical inconsistency.

It is submitted that Cross' definition of judicial evidence is incomplete and for that reason incorrect. Cross' definition of evidence of a fact as "... that which tends to prove it - something which may satisfy an enquirer of the fact's existence" is much nearer a correct definition of evidence since it embodies the purposive element. However, it is incomplete in that it suggests that evidence is led only to establish the existence of a fact, while evidence may also be led to establish the non-existence of a fact.

Phipson's definitions are interesting for their use of the word "testimony". According to Cross:

“Testimony is the assertion of a witness in Court, offered as evidence of the truth of that which is asserted”.<sup>70</sup> Testimony is therefore evidence of a certain kind or according to Black’s Law

Dictionary:

Testimony is evidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings and other sources.

Testimony is a particular kind of evidence that comes to a tribunal through live witnesses speaking under oath or affirmation in presence of tribunal, judicial or quasi judicial.<sup>71</sup>

Assuming the correctness of Cross’ and Black’s definition of “testimony”, Phipson’s definition of evidence would read as follows respectively:

Evidence is the assertion of a witness in Court, offered as evidence of the truth of that which is asserted, whether oral, documentary or real which may be legally received in order to prove or disprove some fact in dispute.

Alternatively, adopting Black’s definition, Phipson’s definition would read:

Evidence, is the evidence by a competent witness under oath or affirmation, as distinguished from evidence derived from writing and other sources, whether oral, documentary or real etc., ‘or’ evidence is a particular kind of evidence, that comes to a tribunal through live witness speaking under oath or affirmation in presence of tribunal, judicial or quasi-judicial, whether oral, documentary or

real.

Obviously such definitions are nonsensical, but they are unavoidable if one adopts the accepted meaning of testimony and substitutes it for testimony in Phipson's definition. Logically the linguistic value of the definition equals the defined term<sup>72</sup> and the sentence in which the defined term occurs ought to make sense after the defined term has been substituted by the definition because for the lawyer, "definition is an equation of verbal symbols".<sup>73</sup> The fact that Phipson's definition makes no sense after substitution of equivalent definitions of 'testimony' is an indication that there is a logical inconsistency in it.

What becomes apparent is that Phipson confuses three categories of evidence and lumps them under one category. Documentary evidence or real evidence can never be 'testimony' in the jurisprudence of the law of evidence.<sup>74</sup> Although, as Black observes, 'testimony' and 'evidence' in common parlance are synonymous,<sup>75</sup> Phipson should never have been guilty of such imprecision, knowing that the subject he was writing about was so terminologically confusing as Wigmore observed. Furthermore, Phipson should not have made himself guilty of circular definition. To define evidence in terms of testimony which itself is defined in terms of evidence is inexcusable for an author of the reputation of Phipson.

Had Phipson simply omitted the words "... whether oral, documentary or real..." from his definition, the definition would have been more logically tenable. However, it would have been incomplete in that it would have encompassed only one means of establishing facts or non existence of facts, that is, testimony.

The word “testimony” or “testify” has a colourful history. In ancient times when a man made a solemn oath, he had to place one hand over his testicles, his most precious part which was also the source of his seed. By this he indicated that he believed that he would become impotent if he lied. From this custom arose words such as “testify”, “testimony” and “testicles” which all derive from the Latin word “testis” which means a witness. All such “test” words including “protest”, “protestant” and “attest” are connected with “testicle”. For this reason some would even protest against the use of the name “testimony” in connection with a woman.<sup>76</sup>

Schmidt does not in so many words define evidence. However, he states that evidence: “- is die belangrikste middel waarmee bewys verskaf word”.<sup>77</sup> Schmidt then apparently inclusively defines evidence, stating that:

(I)n sy normale betekenis omvat dit al die inligting wat aan ‘n hof voorgele word, ten einde dit in staat te stel om ‘n feitelike geskilpunt te besleg, sodat sowel die skriftelike en mondelinge verklarings van getuies as die dokumente en voorwerpe wat vir besigtiging voorgele word, dek.<sup>78</sup>

It is submitted that Schmidt’s characterisation of evidence as information is not correct. Though he quotes Supreme Court authority for that proposition, it is suggested that his formulation is incorrect. He acknowledges that evidence includes real objects such as documents and other physical objects. Surely such objects constitute evidence if they are admitted in a court of law as such and they certainly are not information. Information, according to the self-same Oxford English Dictionary which Broome J P evidently relied on,

is defined as that of which one is apprised or told.<sup>79</sup> Information certainly does not include what one reads or personally sees or apprehends but both of them are evidence if properly admitted in a court of law. Information relates to the content of a verbal assertion. Evidence is therefore a wider concept than information.<sup>80</sup>

It is submitted that Schmidt would have been on much firmer definitional ground if he had simply defined evidence as the means by which proof is provided in a court of law. In fact Schmidt does correctly state an element of the ideal definition when he states that evidence is the "... belangrijkste middel waarmee bewys verskaf word".<sup>81</sup>

Schmidt's view though not a definition per se is important because it emphasizes what is considered to be a crucial definitional element, that is, the purposive element in the definition of evidence namely that evidence tends to prove one or other disputed fact.<sup>82</sup>

Hoffman & Zeffertt refuse to be drawn into the definitional controversy. They almost contemptuously dismiss the attempts at definition construction with the cavalier statement that:

(T)he construction of definitions is a game at which any number of writers can play, but it is not usually of much practical significance.<sup>83</sup>

The attitude is deplorable, it is submitted, because since law is a normative science, words are the warp and the woof of legal science. No human being can intuitively grasp the meaning of words unless agreed meanings are assigned to the words. To write a book, as Hoffman and Zeffertt do, in the blind faith that the readers will comprehend the conceptual value attached

to the words employed by them is, with respect, academic arrogance.

Engelbrecht et al prefer not to call the means by which a fact is proved in a court of law, evidence, but to call such means “bewysmateriaal”.<sup>84</sup> Why the means of proof should not be called evidence (*getuienis*) is not clear. The authors aver that evidence (*getuienis*) is “... maar ‘n onderafdeling van bewysmateriaal...”.<sup>85</sup> They call “bewysmateriaal” an umbrella concept which includes various forms of evidence. It is not clear, however, why they argue that evidence is a narrower concept which is encompassed by “bewysmateriaal”, since they do not define the concept nor do they attempt to show the logical structural relationship between the two concepts.

But their description of “bewysmateriaal” clearly shows that the concept fulfills the same logical structural function in the law of evidence as “evidence” and in fact the two terms ought to be regarded as synonymous. It is suggested that the authors’ reliance on Van Wyk’s article<sup>86</sup> for their view of the relationship between evidence and “bewysmateriaal” is misconceived. Van Wyk shows clearly that the word evidence is to be criticised as too wide only in cases which were decided under the provisions of the Criminal Procedure Act.<sup>87</sup> Van Wyk clearly confined his argument to conceptual issues arising within the four corners of the said statute. He clearly did not intend that his views should be translated to the whole law of evidence. It is well known in our law that a certain concept may acquire technical meaning in terms of a particular Act because such meaning is mandated by the statute or because the court interpretatively fixes such meaning.

On a proper reading of Van Wyk’s article it is submitted that “bewysmateriaal” is a co-ordinate

concept with “evidence” which Afrikaans speakers feel most at home with. As long as the equal conceptual relationship between the two terms is observed, no objection can be taken but certainly if evidence is relegated to a sub-division of “bewysmateriaal” then, with respect, the view is incorrect. One has therefore to disagree with Schmidt when he says that: “Getuienis is die bekendste vorm van bewysmateriaal...”<sup>88</sup> to the extent that and as far as that statement implies any conceptual subservience of “evidence” to “bewysmateriaal”. Schwikkard et al distinguishes between evidence (“getuienis”) and probative material (“bewysmateriaal”). They regard evidence as essentially encompassing oral statements made in court under oath or affirmation or warning, documents (documentary evidence) and other objects (real evidence) tendered and received in court.<sup>89</sup>

After reviewing most definitions of evidence, it is clear that no definition of the term evidence which does not contain Greenleaf’s definitional and definitive element “means” will be correct. It seems that attempts by authors to avoid Greenleaf’s terminology have led them to logical and linguistic pitfalls.

The definition of evidence adopted here is: evidence is any means, receivable in a court of law in terms of the rules of the law of evidence, establishing or demonstrating to a trier of fact the existence or non-existence of a fact which is an issue between parties.

### 1.4.3 Proof

McCormick avers that “proof” is an ambiguous word, used sometimes to mean evidence and sometimes used to describe a state of factual persuasion.<sup>90</sup>

Greenleaf as long ago as 1852 drew attention to the fact that proof was an effect of evidence but was not the medium by which truth was established,<sup>91</sup> that is, evidence. Taylor drew the same conclusion.<sup>92</sup>

According to Schmidt evidence and proof are not the same and must be kept separate. As he puts it,

“Bewys dui aan dat daar gronde is vir ‘n bevinding ten opsigte van ‘n feitlike geskilpunt. Dit beteken nie dat oortuiging van ‘n sekere graad by die hof gewerk word nie, want dit sou die begrip te subjektief stel. Dit is dus nie ‘n opwekking van die regbank se geloof, sekerheid of oortuiging wat bewys daarstel nie maar die voldoening aan sekere maatstawe wat die reg voorsien...<sup>93</sup>

Schmidt’s valiant attempt to state the problem of proof in general terms is to be commended. However, Schmidt’s formulation seems to ignore the fact that the decision whether the evidence offered satisfies the standards provided by law is a judgmental decision which to a great extent is personal to the trier of fact and therefore has an element of subjectivity about it. Proof cannot, but indicate the degree of conviction in the mind of the trier of fact.<sup>94</sup> For good or for worse, as long as people make decisions based on evidence, subjectivity can never be totally excluded. To acknowledge the possible role of subjectivity in the decision-making process is not to abuse the decision-making process by subjectifying it. It is to face up to the reality of factfinding. A fact is proved when the trier of fact judges it to be so proved by applying the requisite standard after analysing the evidence led in an attempt to prove such fact. It is only by analysing the available evidence that the trier of fact can decide whether there is, in

Schmidt's favourite phrase, sufficient grounds for acceptance by the factfinder, that the fact in issue is proved.

It may be taken as correct that, at this time, there is no controversy among jurists that proof is the ultimate persuasiveness of evidence. When we say that a fact is proved or not proved we mean that we are persuaded that the existence or non-existence of a disputed fact at some time in the past has been established by evidence. "Proof the end result - evidence the means to an end".<sup>95</sup>

#### 1.4.4 Burden of proof

According to Nokes the phrase "burden of proof" is a phrase which has been in use among English lawyers for centuries.<sup>96</sup> Nokes avers that although the phrase has such an ancient history of usage in English law, there is, however, little direct English authority on it because, as he alleges, "... the Courts are not usually concerned with a burden of proof 'in the air...'.<sup>97</sup>

There is generally agreement that the phrase "burden of proof" is in fact a translation of the Latin "onus probandi". The truth is that "burden of proof" is neither a translation of nor an interpretation of onus probandi but a corruption thereof.

It is also generally agreed that onus probandi is a term which was taken over from Roman law as were most of the terms and rules relating to the question of the onus of proof.<sup>98</sup> Thayer avers that the term had the same indiscriminated use in Roman law as it had as at the time of Thayer's writing in English common law.<sup>99</sup> But is it in fact so that the term onus probandi as

used in Roman law had an ambiguous meaning such as it acquired in English common law? It is submitted that the answer to this question is of vital importance as it will indicate the place of the principle of onus probandi in Roman law and also whether its adoption into and analogisation by English law was justified and whether the meaning assigned to it was a translation or an interpretation or a corruption and whether such translation or interpretation was correct. Answers to these questions may perhaps elucidate the confusion which exists in connection with the idea of the burden of proof.

The meaning of the principle of onus probandi is best understood by reference to the legal procedure which obtained in Roman times. Under the system which obtained in classical times the procedure was as follows:<sup>100</sup>

1. The praetor sent a formula to the judex.
2. The formula contained a summation of the plaintiff's claim called the intentio.
3. The formula also contained a summation of the defence called the exceptio.<sup>101</sup>
4. If the plaintiff chose to, he replied to the exceptio, and the reply would be included in the depositions. The reply was called replicatio.
5. If the defendant chose to reply to the plaintiff's replicatio he filed his duplicatio.
6. If the plaintiff wished to challenge the defendant's duplicatio, he filed a triplicatio.
7. Together with the depositions of the case, the praetor sent instructions to the judex to try the matter and to give a decision.
8. The terms of the formula were strictly observed by the judex as they constituted the pleadings in the case.<sup>102</sup>
9. Each of the praetor's various summations of the averments of the parties constituted a

case. Thus there were a number of cases within a single proceeding.

10. No denials were mentioned in the formula but each averment in each case was understood to be denied.<sup>103</sup>

The effect of the division of procedure into various stages in Roman law was that each stage represented a case wherein a party made an allegation against the other party. The other party denied an allegation raised in one stage of the proceedings automatically and raised any further issue by utilising the next stage of the proceedings. Logically, each party was the *allegor* or actor in the stage wherein he made an allegation of fact, that is, he was the 'plaintiff' in each 'case' within the proceeding wherein he made an allegation.

"Now under such a method, where there is presented at each stage of the trial only one clear and unchangeable affirmation and denial, the phrase *onus probandi* (and so the leading maxims about it) may have a very simple meaning. The proof, the burden or proving, belongs to the actor; it cannot shift and cannot belong to the *reus* whose function is not that of proving, but the purely negative one of repelling or baffling the adversary's attempts to prove".<sup>104</sup>

In perspective, *onus probandi* in Roman law was no more than a duty (burden if you will) to lead evidence. It was the duty of proving by each party the allegations made by that party in each of the stages of the trial as formulated in the formula. Thayer correctly translates the Latin. The use of the participle clearly indicates a process, that is, continuity. It does not indicate a destination or completion of a process such as "proof" does. The function of *onus probandi* in the classical formulary procedure was simply to impose a duty to present evidence. There is no indication that the *onus* cast was to persuade the trier of fact which is the end result

of the process of proving which is proof. Proving and proof are distinct and separate concepts as grammarians tell us. However, Thayer already wedded to the English Common Law meaning of the term betrays his Jekyll/Hyde intellectual split personality by equating the onus of proof with the onus probandi. Clearly if proof is the end result of evidence led and if proving is the process of leading evidence,<sup>105</sup> onus of proof as a translation or interpretation of onus probandi is inaccurate.

To answer the original question, it is submitted that Thayer is incorrect when he alleges that the term onus probandi had an ambiguous meaning in Latin. In fact research casts doubt on whether this principle found expression in Roman law.<sup>106</sup> It is submitted that its meaning was very clear in Latin. The meaning was obfuscated in English common law and ultimately English law corrupted the meaning thereof.

Whence in English common law came the expression 'onus of proof' cannot be determined with any degree of certitude. Undoubtedly "... the phrase and the things it stands for have a long descent".<sup>107</sup> According to Thayer the meaning of the phrase evolved during the formative period of evolution of the common law when the jury system evolved and there was consequently a bifurcation of the decision-making process with the judge having to instruct the jury on issues to be decided.<sup>108</sup> The jury usually consisted of lay persons to whom the subtleties of law were lost and thus arose the necessity of instruction of the jury by the judge otherwise a tribunal of laymen would have made a mess of matters.

It is submitted that the phrase 'burden of proof' was coined as a catchword to help the jury to discern what issues were at stake and who had to establish such disputed issues. The metaphor

of the burden was particularly graphic and apposite for it conjured in the jury's mind's eye, the party that had to establish a fact as carrying a load. "Ei qui affirmat non ei qui negat incumbit probatio" was a happy metaphor to indicate who had to begin the evidential process as well as to indicate who had to persuade the jury of the worth of his cause.

It is suggested, however, that the metaphors which had been coined as supplementary decision-making tools to assist the jury assumed a life of their own and developed into legal rules. Jurists therefore had to find ways of explaining them in their capacity as rules no longer as metaphors for in their new capacity they were binding and were capable of determining the factual outcome of a suit.

The metaphor of the burden of proof had particularly unhappy jurisprudential results as jurists found themselves having to explain the fact that though the plaintiff initiated proceedings and ordinarily had to give evidence first and persuade the jury, sometimes the defendant had to give evidence and persuade the jury. Evidential roles sometimes changed in practice. That stood the accepted metaphor of the burden carried by the one who alleged on its head. Thus the meaning of the burden of proof had to be refined and extended to mean:

- (a) The burden of persuading the jury to find for a party.
- (b) The burden of leading evidence to rebut evidence led by the other side.

The first burden was fixed upon the party that sought the court's aid and never varied. The second burden 'shifted' from party to party during the course of the proceedings. This was an unfortunate compounding of confusion. It certainly did not enhance the jury's understanding

of the issues then and now, and certainly is imperfectly understood by many practitioners of law. It is submitted that the confusion of meaning and the incorporation of the principle of 'onus of proof' happened as posited.

A more rational conception would have been to use the Roman formulary system as an analogy. Each pleading in which an allegation was made should be regarded as a case on its own. The various pleadings should be scrutinised as a whole and allegations compared and a decision made as to what issues are in dispute.<sup>109</sup>

To avoid the problem of who must give evidence first, the various documents should be considered consecutively starting from the first document filed. If, on a consideration of all the documents filed, any issue remains in dispute which is alleged in the first document, then the party whose case is embodied in the first document must begin leading evidence on that issue.

To avoid breaking up a single proceeding into a number of trials in which single issues are singly and independently tried, it would be very easy to fashion a rule that the party who begins will lead evidence on all issues in his 'cases'. The procedure would be simpler and much more rational and the language would be much simpler. The confusion caused by the metaphor of 'carrying a burden', 'discharging a burden' would be a thing of the past. The question asked by the fact finder would be: "Has the evidence led by A persuaded me beyond a reasonable doubt or on a balance of probabilities on issue A, B or C which he must establish?".

If a metaphor had to be used to describe the legal position of the parties in English law, the metaphor of the balance and scales would serve better to explain the position. The machinery

of legal resolution of conflict should be conceived as a scale. At the beginning of the trial the cups on the scale are empty and in equipoise. This means that there is no legal entitlement inter se. Each party is theoretically assigned a cup. The party that seeks to persuade the factfinder is permitted to fill his cup with all sorts of evidential material and legal rules that hopefully will help him to persuade the trial officer that he should be granted the relief that he seeks.

Should such materials and rules find credit in the mind of the factfinder they weigh down the party's cup overbalancing the other party's cup. To return to the state of equal balance, the other party is permitted, on his turn to throw into his cup all such materials as are available to him of the same nature as the first party's.<sup>110</sup>

If in the opinion of the factfinder the evidential cup of one party overbalances the other's cup after both parties have filled their cups, judgment is given in favour of that party, that is, in a criminal trial the accused is convicted or acquitted. If the cups are in equipoise the court refuses to give judgment for either party, that is, absolute acquittal is given or in a criminal case trial the court acquits the accused because it is in doubt.

However, though the writ<sup>111</sup> system developed under the common law, can be analogised with the legis actiones of Roman law with regard to formalism,<sup>112</sup> the common law never conceived the different stages of civil legal process as a number of cases in respect of which the duty of proving issues differed according to the allegations made at each stage. The common law conceived a controversy as one case consisting of various elements.

It is therefore submitted that onus probandi was an unsuitable concept to appropriate with a

view to explain adversarial evidential relationship between the parties to a suit in English common law. It is further submitted that onus probandi within the Roman law substantive and procedural milieu is fully understandable and clear. It does not mean the ‘burden of proof’, it means ‘the burden of proving’.

It was therefore unfortunate that English common law appropriated the concept and glossed over it an alien meaning because subsequent attempts to ascertain the meaning thereof while adhering to common law conceptions, merely created confusion. The foregoing is the suggestion of a linguistic purge as pleaded for by Hoffman.<sup>113</sup>

However, thinking in terms of the onus probandi or burden of proof theory as applied in English common law has become so deeply ingrained in the collective consciousness of lawyers that to purge it completely is perhaps beyond human endeavour. If we must retain the metaphor of burden of proof because we cannot uproot it, is there any way of so improving it that it ceases being a source of confusion?

#### 1.4.4.1 **Commentative response to the problem of analysis of the burden of proof**

In 1898, Thayer suggested three possible solutions, namely:

- (a) abandonment of the phrase ‘onus of proof’ altogether which is the view advocated herein;
- (b) fixing upon the phrase only one of two meanings attributed to it;
- (c) allowing the phrase to stand but understanding it to be indeterminate of meaning and

explained by the context in which it occurs and using more exact formulations if and when the need arises.<sup>114</sup>

Thayer recommended the third course.<sup>115</sup> How have our commentators reacted? The majority of commentators has retained the concept of the burden of proof. They have accepted that the term burden of proof encompasses two meanings and have sought to fashion such meanings with precision. Greenleaf defined the burden of proof as:<sup>116</sup>

- (a) the burden or duty of the actor or party who has the risk or affirmative of the issue of ultimately proving or establishing the issue or case;
- (b) the burden or duty of a party to go forward with evidence to establish a particular claim.

The distinction seems to rest on the meaning attached to 'claim' and 'issue'. Inasmuch as Greenleaf later asserts that the party who has to establish a claim can be the actor, the distinction becomes meaningless.<sup>117</sup>

Wigmore used the term to distinguish between:

- (a) the burden of persuasion that is of persuading the jury or judge. He called it the risk of non-persuasion.<sup>118</sup>
- (b) the duty of producing evidence to the judge.

Inasmuch as the burden of persuasion involves the production of evidence with which to persuade, it seems idle to talk of any distinction in meaning. If the thrust of the distinction is

at the effect of evidence on the trier of fact then in both instances the aim in adducing evidence is to persuade. There does not seem to be a valid distinction.

Phipson avers that the onus of proof is divided into:

- (a) a burden which is a matter of law and of pleading, of establishing a case;
- (b) burden of adducing evidence.

Phipson's distinction is weak in that both burdens involve the adduction of evidence. But Phipson shows very clearly that the second onus arises after evidence has been led and the party upon whom it rests runs the risk of judgment being entered against him if he adduces no evidence or further evidence, as a result of the evidence already led by the other party.<sup>119</sup>

McCormick divides the burden of proof into:

- (a) the burden of producing evidence, satisfactory to the judge of a particular fact in issue;
- (b) the burden of persuading the trier of fact that the alleged fact is true.<sup>120</sup>

McCormick seems, with respect, confused. The burden to produce evidence satisfactory to a judge who is a trier of fact, on a particular fact in issue does not seem different from the burden of persuading a trier of fact that an alleged fact is true.

Cross divides the onus of proof into:

- (a) the legal or persuasive burden which he defines as the burden borne by the party who will lose the issue unless he satisfies the tribunal of fact to the appropriate degree of conviction;
- (b) the evidential burden which he defines as the burden of producing sufficient evidence to raise a particular issue.<sup>121</sup>

In a very real sense, all parties in a suit run the risk of losing if they do not persuade the fact finder. If A accuses B of assault and B denies it, A runs the risk of losing if he does not persuade the fact finder that B assaulted him. In the same way B runs the risk of losing if he does not persuade the fact finder that he did not assault A. To define the legal or persuasive burden in terms of the risk of losing is not helpful as both parties run the risk of losing. The burden of persuasion runs both ways.

To define the so-called evidential burden as the burden to lead enough evidence to raise a particular issue is not helpful. The burden to give evidence arises as a result of the effect of evidence led by the other party which, if unchallenged, may entitle the other party to judgment. It may of course be that the party who is compelled to give evidence as a result of evidence given by the other party, wishes to raise an issue which is unique to his own case and by which he intends to persuade the court to grant judgment in his favour. This seems to be the sense Cross uses the phrase evidential burden. But this is no different from the so-called persuasive burden. It is submitted that the main function of the evidential burden is rebuttal of evidence given and should be defined along those lines.

Hoffman, following Cross, describes the burden of proof in the first instance in terms of “which

party will fail on a given issue if, after hearing all the evidence, the court is left in doubt”<sup>122</sup> and the evidential burden which he defines as a “... procedural device which enabled the judge to exercise control over the jury, ensures that the parties give their evidence in the most logical order and allows the trial to be shortened by dispensing with the evidence of one party if his opponent has adduced no evidence which could support a finding in his favour”.<sup>123</sup>

Hoffman’s description presents problems because, in practice, if a court finds itself in a doubt, having heard all the evidence, no party loses. In a civil case the court simply grants absolution and none of the parties loses and in a criminal case, the court declares itself in a reasonable doubt, and acquits the accused not because the court rejects the state’s version and accepts the defence version but because the parties are evidentially in equipoise and the court is required by law to acquit the accused. The state does not lose nor does the accused win. The description therefore of the onus in the first sense as a risk of failure if the court is left in doubt is not correct.

The definition of the onus of proof in the second sense in terms of a procedural device is untenable. The duty to lead evidence arises when the proceedings begin or upon a consideration of the facts in issue on the pleadings or after evidence has been led by the opponent which requires rebuttal failing which judgment might be given against the party who bears that duty if he fails to testify. That a party may be absolved from giving evidence is a result of his opponent’s failure to lead evidence which requires rebuttal or his opponent’s failure to raise the issues properly, not as a result of procedure.

Nokes being acutely aware of the pitfall of definition takes refuge in vacuity.<sup>124</sup> He describes

the burden of proof as:

- (a) the burden of proof of the issues;
- (b) the burden to adduce evidence of other facts.

However, Nokes further describes the obligation in sense (a) as the obligation of the party bearing the burden to prove a fact in issue, that is, to establish it when all the evidence is considered at the end of the case.<sup>125</sup> Nokes' definition is circuitous in so far as he defines a burden in terms of an obligation. However, his definition is valuable in that it focuses on the stage of the proceedings at which the assessment is made whether the party has established a disputed fact, that is, "... when all the evidence is considered at the end of the case".<sup>126</sup>

Nokes' definition of the burden in the second sense is to be criticised for it omits reference to the reason therefore and for the fact that it is misleading in that it asserts that a party has to lead evidence of other facts. A party does not have to adduce evidence of other facts to comply with the burden in the second sense. A party may simply deny facts alleged by the other party in the other party's burden imposing evidence and if the denial is accepted, the rebutting party would have discharged the burden.

Lord Denning, one of the luminaries of the English bench of the last generation has divided the burden of proof into (a) the legal or ultimate burden and (b) the provisional burden.<sup>127</sup> The criticism of Cross and Hoffman who follow this classification holds good of Lord Denning's classification.

According to May,<sup>128</sup> burden of proof means (a) the duty to persuade the tribunal of a fact and (b) the burden of adducing evidence. The classification follows Cross and must be criticized along the lines already indicated. However, May realises that the burden of proof as conceived in the second meaning is not a burden of proof.

Garrow and Willis refuse to follow the current formulation of two onera. According to them “... there are not two categories of proof - the establishing of a case which is a burden imposed by the law itself, and the adducing of evidence, sometimes wrongly called the evidential burden of proof...”.<sup>129</sup>

In South African law the issue of the onus and what it means has been definitely dealt with in Pillay v Krishna and Another<sup>130</sup> and South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd.<sup>131</sup> In Pillay v Krishna, Davis AJA divided the burden of proof into (a) the duty which is cast on a particular litigant in order to be successful, of finally satisfying the court that he is entitled to succeed and (b) the duty to adduce evidence to combat a prima facie case made by his opponent.

It is clear that the courts in South Africa have adopted the traditional bifurcation of the onus. However, the meaning ascribed to the second meaning of the onus is incomplete in so far as it does not reflect at what stage in the proceedings the duty arises and also because it omits to mention the fact that the burden to lead evidence comes into play not only to rebut evidence but it is also the duty to begin to lead evidence, that is, the duty to kick off first.

Garrow and Willis are undoubtedly correct in so far as the duty of adducing evidence is not to

be confused with the duty to persuade the trier of fact with regard to a particular alleged state of fact.

Tapper distinguishes clearly between the burden of proof and the burden of adducing evidence. According to him these are totally different.<sup>132</sup>

Undoubtedly Tapper's formulation with its complete separation of the two burdens and no reference to the possibility of referring to the burden to adduce evidence as the burden of proof, simplifies the conceptual and semantic role of the two burdens and makes the bifurcation of the two burdens and their role in the evidential process much more intelligible and logical.

Murphy breaks completely with the traditional approach.<sup>133</sup> He avers that it is "generally accepted that there are two burdens of proof...".<sup>134</sup> Murphy is correct when he avers that it is generally accepted that there are two burdens of proof. What is generally accepted as the literature reviewed herein shows is that two meanings are given to the burden of proof. However, Murphy's formulation is to be welcomed for, like Tapper's formulation, it simplifies the process of conceptualization and reduces the likelihood of confusion.

Heydon<sup>135</sup> follows the formulation that the expression "burden of proof" has two meanings. However, he realises that the second meaning is not burden of proof at all.<sup>136</sup> Carter's<sup>137</sup> views are similar to Heydon's.

Schmidt distinguishes between the burden of proof and the burden of rebuttal.<sup>138</sup> Schmidt's formulation is, with respect, the correct formulation inasmuch as it excludes any

misunderstanding as to what is meant. The burden of proof, according to Schmidt is clearly the duty to persuade the factfinder. The burden of rebuttal is clearly the duty to lead evidence in rebuttal wherever and whenever necessary. However, Schmidt's characterisation of the second burden, that is, the burden of rebuttal, is not complete for the second meaning of the onus of proof includes the element not only of rebuttal but also the element of the duty to begin to lead evidence if a party wishes to avoid the procedural consequence of his opponent being discharged because there is no evidence which calls for rebuttal. The second meaning can therefore not be a burden of rebuttal only. Schmidt is aware of this difficulty.<sup>139</sup> It is strange indeed why he does not address it.

From the foregoing, it is clear that if the phrase "onus of proof" has to be retained at all, then it must be given the two meanings it has traditionally been given. Each of the two meanings must be stated in descriptive, sensible language and not in meaningless shorthand. Further, the burden of proof according to the first meaning thereof must reflect the stage of proceedings during which it comes into play.<sup>140</sup>

It should now also be clear that, the second meaning of the term must reflect the fact that the second burden arises during the course of the proceedings in court or prior to the beginning of proceedings as a result of evidence led or submissions made by the adversary so that absent such evidence or submissions no evidential burden arises<sup>141</sup> and the other party is entitled to judgment.

It is therefore suggested that the following meanings of the onus of proof be adopted:

- (a) The duty to establish on a totality of evidence in the case enough of the facts in dispute to be entitled to the relief claimed.
- (b) The duty "... to produce sufficient evidence to make it a reasonable possibility that the tribunal of fact may decide the case in his favour"<sup>142</sup> or to rebut by evidence allegations made in evidence by the opponent<sup>143</sup> or admitted by the party upon whom the evidential burden is sought to be placed.

### 1.5 Allocation of the burden of proof

From the foregoing it is clear that the question of whether an onus has been discharged or not ultimately determines the result of a dispute in a court of law. "Die resultaat van 'n verhoor mag wentel om die vraag of 'n besondere gedingsparty hom van die bewyslas wat op hom rus, gekwyt het".<sup>144</sup>

Every legal proceeding pits opponents against each other. In a civil proceeding, persons (natural or juristic) are pitted against each other in their attempts to obtain redress. In a criminal trial the contest is between a person or persons against the state, which seeks to persuade the court to impose a sanction on the accused(s) for an alleged infraction of a normative rule. The criminal justice systems of the three jurisdictions under study in this work are all adversarial in conception.<sup>145</sup>

Since "... every criminal case is a contest between an individual defendant and the government",<sup>146</sup> the question of the onus of proof and who bears it may be a matter of monumental importance to a defendant, who, pitted against an all-powerful government,<sup>147</sup> has

to struggle to retain his liberty. With all the resources at its command, it would be a comparatively simple thing for the government to muster enough evidence to persuade the trier of fact in every case that it was entitled to relief and would obtain such relief in the form of a conviction of the accused. "... (S)ince inequality breeds injustice..."<sup>148</sup> the law endeavours to equalize the balance in the scales of justice. One of the means of equalizing the scales is the fair allocation of the burden of proof between the adversaries.

If the burden is so allocated that it falls on the party that is most likely to discharge it because in the nature of things it has the means and the resources to do so easily, then such allocation is not unfair. If the burden is allocated to the weaker party, who does not have the means to discharge the burden, then such allocation is obviously unfair.

How do the three systems under study approach the question of allocation of the burden of proof?

### 1.5.1 The burden in American law

In the words of Fellman:

"American law is deliberately weighted in favour of defendants accused of crime. It gives the accused very many assurances that he will be treated fairly. Indeed our law is generally described as a defendant's law, in contrast with other legal systems which emphasize the necessities of the prosecution and give priority to the interests of society in the apprehension and conviction of

criminals. We too are concerned with the suppression of crime but we are equally concerned with the necessities of justice and respect for man's dignity.<sup>149</sup>

To achieve these ends American law allocates the burden of proving the guilt of the accused person to the prosecutor and since the prosecutor is a government functionary, the burden is placed on the government.<sup>150</sup> Indeed the rule that the onus of proof rests on the government to prove the guilt of an accused person is one of the verities of American criminal jurisprudence which need no proof or substantiation. It is one of those basic legal principles which "... are deeply rooted in ancient common law doctrine..."<sup>151</sup>

As indicated above, the phrase "onus of proof" may bear two meanings. In what sense does American law use the phrase when it imposes the burden of proof on the state?

Klotter states that:

It is unconstitutional to shift the burden of proof of guilt or any element of the crime to the defendant in a criminal case. The defendant may be required to go forward with the evidence to show an affirmative defence such as alibi or insanity. But any instruction that tends to require the defendant to prove his innocence or instruction which relieves the prosecution of proving an element of the crime violates the due process requirement.<sup>152</sup>

Klotter and Meier<sup>153</sup> however state a bit confusingly that:

Where the pertinent information is much more readily available to the defendant than to the prosecution, the burden of going forward with the evidence may be shifted to him, provided this can be done without subjecting the accused to hardship or oppression.

In Morrison v California,<sup>154</sup> the two appellants, one a Caucasian (Morrison) and the other a Japanese (Doi) were charged under paragraph 9(a) of the Alien Land Law of California that they had feloniously conspired to place Doi in possession of agricultural land. Under the provision of that law, it was a criminal offence to conspire to place any alien who was ineligible for citizenship of the US in possession of agricultural land. The statute laid down that upon proof by the state of acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property or any interest therein and if the alienage or ineligibility to be a United States citizen was alleged by the state, the burden of proving citizenship or eligibility to citizenship of the United States would devolve on the accused. The court applied these evidential provisions in the process and accused were both convicted.

The accused appealed, basing their appeal on the ground that the clause imposing the duty on them to prove citizenship or eligibility to citizenship violated their constitutional rights to due process under the 14th Amendment of the United States Constitution. Their contention was overruled by two courts of appeal but they ultimately appealed to the Supreme Court. The court held inter alia:

The decisions are manifold that within the limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast

on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.<sup>155</sup>

On the facts, however, the court held that there was, under California law, no general prohibition against the use of land by aliens. Without an antecedent enquiry into the race of the occupier of land such occupation of land was not even suspicious.

The court found that the appellants had been denied due process of law. Morrison had been denied due process because he had been required to disprove a conspiracy.<sup>156</sup> Doi had been denied due process because there had been no evidence that Morrison had known that Doi was ineligible for US citizenship. Morrison could not have conspired with Doi without such knowledge and Doi could not have conspired with himself.<sup>157</sup>

In Sandstrom v Montana<sup>158</sup> the appellant had been charged for deliberate homicide under a Montana statute in that he had purposely or knowingly caused the death of the deceased. The intent of the accused was therefore a necessary element of the offence charged.<sup>159</sup> The accused did not deny that he had caused the death of the victim but alleged that he had not done so purposely or knowingly. He pleaded guilty to a lesser offence.

The court instructed the jury at the request of the prosecution that "... the law presumes that a

person intends the ordinary consequences of his voluntary acts”<sup>160</sup> over an objection by the appellant’s attorney that the effect of such an instruction was to shift the burden of proof on the issue of purpose or knowledge to the defence and that that was not permissible under the due process clause of the federal constitution. The accused was convicted and sentenced to a term of imprisonment of 100 years.

The accused appealed to the Supreme Court of Montana which affirmed. The accused then appealed to the Supreme Court of the United States. On appeal the appellant reiterated his constitutional argument. The respondent sought to counter it by arguing that the instruction only placed a burden of production of evidence on the appellant but did not shift the burden of persuasion with respect to any element of the offence charged.

The court held that the due process clause requires that the state prove every fact necessary to constitute the offence charged. The court held that under Montana law, proof that the homicide was committed purposely or knowingly was a fact necessary to constitute the crime of deliberate homicide. The court found that the instruction to the jury had had the effect of relieving the state of the burden of proof in respect of the appellant’s state of mind which was a constituent element of the offence charged. The court reversed the decision.

That some burden may be shifted to an accused person is undoubted as appears *ex facie* Cardozo J’s judgment. However, Cardozo makes it clear that such a burden must be to require the accused to repel what has been alleged by some excuse or explanation, that is, by evidence. Clearly that is the onus in the second meaning of the term, that is, the onus to rebut evidence which has been led.

Such a conclusion is consistent with Sandstrom v Montana<sup>161</sup> where the two-fold distinction between two onera, namely, a burden of production and a burden of persuasion was argued and was not disapproved by the court. In that case the burden of production is quite obviously the burden to rebut and the burden of persuasion was used in the sense of the burden to establish the disputed facts on a totality of the evidence, that is, the burden of persuasion.

If one reads Klotter and Klotter and Meier's burden of going forward with the evidence as the burden to rebut evidence, then very clearly the authors are correct in their statement of the law. What is not clear is what state conduct would amount to "... subjecting the accused to hardship or oppression",<sup>162</sup> if a state, through its legal provisions, sought to allocate the burden to rebut to the accused and on what basis state conduct would be judged to decide whether such conduct subjected the accused to hardship or oppression.

Cardozo J indicated that no general principle could be laid down. He opened the door for development stating that: "The list is not exhaustive. Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient".<sup>163</sup>

Would the court find state conduct that factually subjected the accused to hardship and oppression in a particular case by allocating the burden of rebuttal to him in an unreasonable or irrational manner, unlawful because of infraction of the constitutional mandate of due process or on some other ground? If so, what? These matters have not been conclusively dealt with by the Supreme Court and the law is still evolving.

However, it is clear that the constitutional mandate of due process hits any criminal provision which imposes on an accused person a burden of establishing his innocence either by compelling him to give evidence to establish facts or by compelling him to give evidence to deny alleged facts. This is so because such a proviso nullifies the presumption of innocence which is considered to be basic to a fair trial which is the constitutional right of every accused person in the United States. Such a proviso therefore runs counter to the due process clause of the 14th Amendment. The first sentence in the quotation from Klotter, quoted herein, refers to the burden of proof in the sense of establishing on a totality of the evidence the facts necessary to entitle the party to relief. The statement, read in that light is fully in accord with the decisions of the Supreme Court and is a correct statement of the law.

## 1.5.2 The burden in English law

English law is undoubtedly solicitous to the liberty of the individual. However, unlike American law that tenderness does not arise out of the provisions of a written constitution.

### 1.5.2.1 Different burdens

It is now agreed in English law that there are two different burdens which may be required to be discharged in a case. The legal burden (or burden of persuasion) ... is the obligation of a party to meet the requirements of a rule of law that a fact in issue be proved (or disproved) either by a preponderance of the evidence or beyond a reasonable doubt as the case may be.<sup>164</sup>

The other burden is the evidential burden which is "... the obligation to show, if called upon to

do so, that there is sufficient evidence to raise an issue as to the existence or non existence of a fact in issue...".<sup>165</sup>

### 1.5.2.2 **The duty to prove the guilt of the accused in English criminal law**

#### **Common law**

The general rule is that the duty rests on the state to prove all the elements of the offence,<sup>166</sup> with the exception of insanity. This means that in common law, the state bears both the onus of persuasion and the evidential onus on all issues relevant to the issue of guilty except insanity and other special defences.<sup>167</sup> However, the accused bears a persuasive onus of proof of insanity if that should be his defence.

Although the state bears the onus of persuasion:

It is not up to the Crown to adduce evidence about (or for the judge to mention in his charge to the jury) some excusing factor which is more than a simple denial of the elements of the crime charged unless it is properly raised (my underlining).<sup>168</sup>

If the defence wishes to raise some defence other than just a bare denial, then it must raise that defence in a suitable way either by cross examination of state witnesses or by calling witnesses.<sup>169</sup> Thus in respect of the matters referred to there is an evidential onus on the accused in common law.

## Statute law

The power of Parliament to make law that juxtaposes the burdens of proof is trite. Therefore as regards the statutory imposition of the persuasive burden on the accused, Elliott and Phipson state the law admirably that:

Sometimes a statute provides expressly that the burden of proving a particular fact shall be upon the accused or that on proof of certain facts, certain other facts shall be deemed to have happened unless the contrary is proved by him. Much depends on the precise statutory wording involved but it seems clear that if the accused is required to 'prove' anything, he is put under a persuasive burden, and if the jury are in doubt about the matter, he must fail.<sup>170</sup>

Examples of statutes that impose the persuasive burden on the accused are section 2 of the Prevention of Corruption Act 1913, section 30(2) of the Bills of Exchange Act 1882, section 57(3) of the Employment Protection (Consolidation) Act 1978.<sup>171</sup> Elliott and Phipson mention section 101 of the Magistrate's Courts Act 1980 which is a general proviso which governs all criminal prosecutions that are brought before the courts of magistrates. In terms of this section, if the accused relies "... for his defence on any exception, exemption, proviso or qualification..."<sup>172</sup> the burden of proving such exception is placed on the accused.

It is also clear that Parliament is at liberty at any time to pass laws that impose the evidential onus on an accused person.

### 1.5.3 South African law

#### Common Law

According to Schmidt the state bears the onus of proof on the basis of the fundamental rule that he who alleges must prove.<sup>173</sup> According to Schmidt: “Dit is slegs by wyse van hoe uitsondering dat die beskuldigde met die las opgesaal word”.<sup>174</sup> The reason for imposing the burden of proof on the state is the “... begeerte om die beskuldigde te beskerm weens die erns van die strafsanksie en die feit dat hy hom teen die sterk arm van die staat verset”.<sup>175</sup> It is assumed that the “las” is employed by Schmidt in both senses so that the accused cannot except by way of great exception be saddled with either the duty to persuade or the duty to begin or to rebut. In common law, virtually the only matter in respect of which the onus of proof rests on the accused in a criminal trial is the defence of insanity.<sup>176</sup> Moreover, the degree of proof required of an accused is the lower standard of proof on a balance of probabilities.

Another view is that the duty to prove the guilt of the accused arises from the so-called presumption of innocence. In R v Benjamin<sup>177</sup> the accused were convicted and sentenced upon conflicting and unsatisfactory evidence. The court held that: “In a criminal case there is a presumption of innocence in favour of the accused which must be rebutted”. Clearly the court regarded the presumption as an important rule of law which was applicable in favorem libertatis.

In R v Britz<sup>178</sup> the Appellate Division held that the presumption of innocence was a fundamental safeguard of the rights of the individual. However, since then, the presumption

of innocence was reduced to simply a rule of policy.<sup>179</sup> It is submitted that the reduction in status of the rule occurred in recognition of the fact that formerly there could be no fundamental laws in our system of government where the sovereignty of parliament was holy writ. The logic of the principle of parliamentary sovereignty was that all laws were subject to the will of parliament. One could therefore not talk of any rule as being a fundamental rule since there was no legal bar on parliament to change or abolish such rule. Thus in South African law parliament could make (and did make) grave inroads into the applicability of the rule relating to the imposition of the onus of proof (in both senses).<sup>180</sup>

In the new Constitution the presumption of innocence has been restored to a fundamental right as part of a broader right to a fair trial. This has meant that all legislation which altered the common-law rule has been regarded as invalid as being unconstitutional.

In the context of a constitution that protects fundamental rights, the duty of the state to prove the guilt of an accused beyond a reasonable doubt may be premised on the principle of equality. The state being in an unequal and more powerful position should be the one that bears the onus thus narrowing the gap of inequality between the state and the individual.

As a matter of policy the allocation of the burden of proof in common law has been effected in such a way that the likely more powerful adversary, the state, is saddled with the disadvantages of beginning, proving and satisfying the court that it is entitled to a verdict in its favour. The individual is therefore placed in an advantaged position vis-a-vis the state. The individual liberty is consequently protected against the overriding power of the state.

## **Statute law**

In South African law, with its tradition of parliamentary sovereignty no normative rule was sacrosanct. Parliament, in the exercise of its sovereign powers, could always interpose - to alter the rule or to abolish such rule. Thus in criminal cases, the legislature could impose the onus of proof on the accused; could impose the evidentiary onus and could even impose the standard of proof required to entitle the accused to an acquittal.<sup>181</sup> The legislature's activities in this connection form the subject of a separate chapter.

### **1.6 Conclusion**

There is no doubt that the Constitution of our country is based on western values, especially the fundamental rights contained in the Bill of Rights. As the Bill of Rights is binding on all organs of the state, legislative executive and judicial, it means that it overrides any law, rule or act that is inconsistent with the Bill of Rights. In applying the Bill of Rights it will therefore be necessary to explore the values on which the Bill of Rights is based. These values may be based on certain principles, but they are a product of history and may have been shaped or modified by certain historical events.

The Bill of Rights, as already stated, affirms the democratic values of human dignity, equality and freedom. Proof beyond a reasonable doubt is one of the methods aimed at ensuring a fair trial. A fair trial is aimed at protecting the freedom and dignity of the individual. This was not always so. Moreover, this approach may be in conflict with the customary law approach which tends to place more emphasis on law enforcement rather than procedural fairness. According

to the western idea, on which the Bill of Rights is based, individual freedom is so important that it has to be taken away only if it is abundantly clear that the accused is guilty of the offence with which he or she is charged.

FOOTNOTES

1. Section 2 of the Constitution of the Republic of South Africa Act 108 of 1996.
2. s7(1) of Act 108 of 1996.
3. s8(1) of the Constitution.
4. s35(3) of the Constitution.
5. Van der Merwe et al Evidence (1983) 4; Hoffman & Zeffert Evidence (1989) 4-5; Schmidt Bewysreg 2ed (1982); Van Loggerenberg “Die Aard en Funksie van die Burgerlike Prosesreg” 1986 Obiter 19-20.
6. Williams Proof of Guilt 3ed (1963) 37; Van der Merwe “Accusatorial and Inquisitorial Procedures and Restricted and Free Systems of Evidence” in Sanders (ed) Southern Africa in Need of Law Reform (1981) 141.
7. Hahlo & Kahn The South African Legal System and its Background (1973) 105ff.
8. Hahlo & Kahn *ibid*.
9. Jolowicz “Fundamental Guarantees in Civil Litigation : England in Cappelletti & Tallon (eds) Fundamental Guarantees of the Parties in Civil Litigation (1975) 164; Beinart “The Rule of Law” 1961 Acta Juridica 120; Van der Merwe et al 136ff; Hoffman & Zeffertt 195ff; Schwikkard et al Principles of Evidence (1997) 2.
10. Beinart 119; Van der Merwe et al 415,425; Hoffman & Zeffertt 195ff; Pillay v Krishna 1946 AD 946; Schwikkard et al 2.
11. Van der Merwe 141.
12. Mcnabb v United States, 318 US 332, 347 (1943).
13. Read “Human Rights Protection in Municipal Law” in Forsyth & Schiller (eds) Human Rights : The Cape Town Conference (1979) 168; Denning Freedom Under the Law (1949) 6; Brecht “European Federation - The Democratic Alternative” 1942 Harvard

Law Review 561.

14. Denning Freedom under the Law (1949) 5.
15. Denning *ibid.*
16. Denning 5-6.
17. David & Brierley Major Legal Systems in the World Today (1985) 354.
18. David & Brierley 24.
19. Van der Bilt "The Role of Procedure in the Protection of Freedom", University of Chicago, Conference on Freedom and the Law, Conf. Ser. No. 13, (1953) 68.
20. Frank Comparative Constitutional Process (1968) xxix-xxx.
21. Orfield Criminal Procedure from Arrest to Appeal (1972) xix.
22. Fellman The Defendant's Rights (1976) Chapter 1.
23. Bassiouni Criminal Law and its Processes : The Law of Public Order (1969) vii.
24. David & Brierley 356.
25. Denning Freedom under the Law (1949) 4.
26. Van der Merwe et al 4.
27. Didcott J attempted to fashion a rule of entitlement of an accused person to legal representation in S v Khanyile 1988 (3) SA 795; now this is regulated by 335 of the Constitution.
28. David and Brierley, 352-353.
29. Esmein History of Continental Criminal Procedure (1913) xxv.
30. Atiyah Law and Modern Society (1983) 44.
31. David and Brierley, 25.
32. Keeton The British Commonwealth : The Development of Its Laws and Constitutions (1955) 19; see also Hahlo and Kahn The Union of South Africa : The Development of

its Laws and Constitution (1960) 226, 237-282.

33. Jackson The Machinery of Justice in England (1959) 6 ed 15.
34. Scarman English Law - The New Dimension (1974) 10.
35. Rich Law and the Administration of Justice 2ed (1979) 5.
36. "A contested lawsuit is society's last line of defence in the indispensable effort to secure the peaceful settlement of social conflicts". Schiff Evidence in the Litigation Process (1993) vol. I 9.
37. Weinreb Denial of Justice (1977) 87.
38. Priestely quoted by Fellman 121.
39. King The Framework of Criminal Justice (1981)16.
40. David & Brierly 356.
41. McBarnett Conviction (1981) 11.
42. "For with us justice is the great end of Government" Fellman 3.
43. Knox Order in the Court (1943) 2.
44. Abraham The Judicial Process (1975)133.
45. "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, the existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example. Crime is contagious. If the Government becomes the law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the government may commit crimes in order to secure the conviction of a private criminal - would bring terrible

retribution". Per Justice Louis D Brandeis in Olmstead v United States 277 US 438 (1928) 485.

46. Leonard The Police, the Judiciary and the Criminal (1975) 3.
47. Abraham The Judicial Process 2ed (1968) 98.
48. Article 1(a) of the American Constitution; see also Pritchett Constitutional Civil Liberties 175, Fellman The Defendant's Rights 42-44.
49. In Re Winship 397 US 358 364.
50. Lansdown South African Liquor Law (1928) 235.
51. Curzon The Law of Evidence 2ed (1989) 7.
52. Wigmore A Treatise on the Anglo-American System of Evidence in Trials at Common Law vol 9 3ed (1940); Tapper and Cross 105; Van Wyk "Getuienis en Bewys: 'n Logiese Onderskeid" 1976 TSAR 255; McCormick 783.
53. "It relates to our way of trying a case, and has become from long usage so thoroughly a part of our system that it seems the only reasonable and natural method". McKelvey Handbook of the Law of Evidence 5ed 94.
54. Cross and Tapper Cross on Evidence 6ed (1985) 105.
55. "... that most nebulous concept in the Law of Evidence - the onus of proof" Paizes 1978 De Jure ac Legibus 26.
56. "Another complicating factor is the metaphor, 'now permanently embedded in the law' of speaking of proof as a burden that may be shifted in the course of a trial. This metaphor is frequently employed by the judges although they rarely use adjectives or descriptive phrase". Cross and Tapper Evidence 67.
57. Williams "The Definition of Crime" 1995 Current Legal Problems 108.
58. Greenleaf A Treatise on the Law of Evidence 6 ed (1852) vol. 1.

59. Phipson The Law of Evidence 2ed (1898) 1.
60. Buzzard Phipson on Evidence 12ed (1976) 2, 13ed 16.
61. McCormick.
62. Cross Evidence (1967) 1.
63. Cross 1.
64. Wigmore 1, 8.
65. Mathews Taylor on Evidence VI 14ed (1920) 1.
66. Williams "The Definition of Crime" 1955 Current Legal Problems 109.
67. Nokes An Introduction to Evidence 3ed (1962) 6.
68. Black's Law Dictionary 5ed (1979) 498.
69. Wills "Proof is the establishment of the material facts in issue by proper means to the satisfaction of the Court". "(E)vidence connotes the means by which the facts at issue are proved", Walker : Walker and Walker The English Legal System (1985) 559.
70. Cross Evidence 3; Donigan et al The Evidence Handbook 4ed (1980) 3.
71. Black's Law Dictionary 5ed 1324.
72. "When the meaning of a word is imperfectly known we often clarify it by substituting for this word another word or group of words the meaning of which is better apprehended. Everyone agrees that this process is aptly called definition". Williams 1955 8 Current Legal Problems 107 108.
73. Williams 108.
74. Carter 5.
75. Black's Law Dictionary 132.
76. Hendrickson The Encyclopaedia of Word and Phrase Origins 520.
77. Schmidt Bewysreg 3.

78. Schmidt 3.
79. Starr v Ramnath & Others 1954 (2) SA 249 253.
80. The Shorter Oxford English Dictionary.
81. See Muller's dictum in S v Mia 1962 (2) SA 718 at 720; see also S v Gokool 1965 (3) SA 461 474 B-C.
82. Schmidt 3.
83. Hoffman & Zeffertt 3ed 4.
84. Vonnisbundel oor die Bewysreg (1983) 1.
85. Engelbrecht et al recognise this, 1.
86. Van Wyk "Getuienis en Bewys : 'n Logiese Onderskeid" 1976 TSAR 255.
87. Van Wyk 256-257, Act 56 of 1955.
88. Schmidt 3.
89. Schwikkard et al 16.
90. McCormick 783.
91. Greenleaf vi 1; Donigan et al 3.
92. Taylor op cit vi 1.
93. Schmidt 2.
94. Hoffman & Zeffertt.
95. Donigan 3; "When the result of evidence is undoubting assent to the certainty of the event or proposition which is the subject-matter of the enquiry, such event is said to be proved", Willis 1.
96. Nokes 457. In support he quotes Hyndes Case (1591) 4 Co. Rep. 70b at 716 and R v Vaughan (1966) 13 st Tr 485 at 353.
97. Nokes 457.

98. Thayer A Preliminary Treatise on Evidence at the Common Law (1898) 354 & 364; Taylor, 273.
99. Thayer 387 1.
100. Thayer 364; Buckland A Textbook of Roman Law from Augustus to Justinian 3ed (1963) 651-656; see also Spiller A Manual of Roman Law (1986) 34-36.
101. Buckland 653. Buckland defined an exceptio as a defence which did not deny the prima facie validity of the claim, but alleged circumstances which nevertheless barred the claim. A simple defence of denial of the facts is not treated by Buckland. It is not clear whether a bare denial of the facts was admissible as a defence or not.
102. Buckland A Textbook of Roman Law from Augustus to Justinian 639-640.
103. Thayer 364. This statement by Thayer is unsupported by citation or reference. The correctness thereof is dubious.
104. Thayer 365.
105. May Criminal Evidence (1986) 44 realises the folly of referring to the evidential burden as a burden of proof precisely because of the distinction drawn in this work between proof i.e. persuasion and proving i.e. the process of persuading.
106. Thayer 365 alludes to “the leading Latin maxims about it” but cannot quote even one such maxim out of any reputable text. His statement is just a sweeping generalization. Buckland op cit the leading writer on the subject makes no mention of the onus probandi but merely avers that the burden of proof was on the plaintiff again citing no authority for this statement. 638.
107. Thayer 354.
108. Thayer 354.
109. This is the ascertainment of the subject of the dispute. See Wigmore op cit vol.I, 2.

110. See Gilmore Evidence (1973) 173.
111. Maitland and Montague A Sketch of English Legal History (1915) 99-101; Plucknett A Concise History of the Common Law (1956) 353-357; Pollock and Maitland A History of English Law (1923) vol II. 558 *et seq.*
112. Holdsworth A History of English Law (1923) vol. III 623-625; Pollock & Maitland A History of English Law 558-562.
113. Hoffman The South African Law of Evidence (1970) 346.
114. Thayer 385.
115. Thayer 386.
116. Greenleaf vol. 1 606.
117. Greenleaf 606.
118. Wigmore A Treatise on the Anglo-American System of Evidence in Trials at Common Law vol. 9 3ed (1940).
119. Buzzard Phipson on Evidence 12 ed (1976) 40.
120. McCormick 783-784.
121. Cross 68.
122. Hoffman 346.
123. Hoffman 348.
124. Nokes An Introduction to Evidence 3ed (1962) 469, "Nothing would be lost by abandoning many of the foregoing adjectives and descriptions".
125. Nokes 459.
126. *ibid.*
127. Bratty v Attorney General for Northern Ireland 1961 3 All ER 523-535.
128. *op cit* 40.

129. Willis Garrow & Willis' Principles of the Law of Evidence (1973) 23.
130. 1946 AD 946
131. 1977 (3) SA 534.
132. Tapper Cross & Wilkins - Outline of the Law of Evidence 6ed (1985) 27.
133. Murphy A Practical Approach to Evidence (1980) 26.
134. Murphy 66.
135. Heydon Evidence : Cases and Materials (1984) 13.
136. Heydon 13.
137. Carter Cases and Statutes on Evidence (1981) 26.
138. Schmidt 25, 30-31.
139. Schmidt 31.
140. Campbell & Waller Well and Truly Tried (1982) 272.
141. "It rests on the party who would fail if no evidence at all, or no more evidence, were given on either side - i.e., it rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom judgement would be given if no further evidence were adduced". Garrow and Willis 25.
142. Seabrooke Evidence in a Nutshell (1981) 61.
143. See Webb and Branco Holt/Landmark Law Summaries (1958) 40.
144. Van Rhyn and Van Rensburg "Die Bewyslas ten Aansien van die Buitensporigheid van 'n Strafbeding" 1977 THRHR 261.
145. Atiyah Law and Society 114.
146. Fellman The Defendant's Rights Today 4.
147. "In any event, the point to bear in mind is that modern government is very powerful.

Government is the chief repository of the enormous power of organized society. It follows that a criminal case is inherently an unequal contest, because the parties are of unequal strength". Fellman 4.

148. Fellman 4.
149. Fellman 3.
150. Fellman 1; Bassiouni 326; Klotter Criminal Law (1983) 13; Donigan et al 25; Klotter & Meier Evidence for Police (1971) 56.
151. Fellman 1.
152. Klotter 14.
153. Klotter & Meier 58.
154. 291 US 82 (1933).
155. Morrison v California 88-89.
156. *ibid.*
157. Obviously the onus of proving his defence in the sense of the obligation of establishing on a totality of evidence, that he had not conspired with Doi.
158. 442 US 510.
159. *idem* 520.
160. *idem* 513.
161. *idem* 515.
162. Morrison v California 89.
163. *idem* 91.
164. Cross & Tapper Cross on Evidence 6ed 107; see also Elliott Elliott & Phipson- Manual of the Law of Evidence 12ed (1980) 54-55; see also Curzon Law of Evidence 2ed (1989) 57.

165. Cross & Tapper 107; Curzon 57.
166. Woolmington's case; Elliott & Phipson 60-61; R v Lobell (1957) 1 QB 547 550.
167. "The general rule is that the party bearing the legal burden on an issue also bears the evidential burden", Cross & Tapper 111.
168. Elliot & Phipson 65.
169. Bullard v R (1957) AC 653 (self-defence) Mancini v Director of Public Prosecutions (1942). ACI (Provocation) R v Johnson (1961) 3 Aler 961 (alibi) R v Lobell (1957) 1 QB 547 (self-defence) R v Newcastle J J; ex parte Hurdle (1984) 1 ALER 770 (ex post facto imbibition of liquor) Bratty v Attorney-General for Northern Ireland (1963) 386 (sane automatism).
170. Elliott & Phipson 67.
171. Cross & Tapper 107; Curzon 57.
172. Cross & Tapper 107, Curzon 64-65.
173. Schmidt 55.
174. Schmidt 55.
175. Schmidt 55.
176. R v Ndlovu 1945 AD 369; R v Kennedy 1951 (4) SA 43 (A), R v Von Zell 1953 (3) SA 303 (A); Schmidt 61, Hoffman and Zeffertt 400; see also Schmidt 88 and footnote 9.
177. R v Benjamin 3 EDC 337 (EDC 1883-1884).
178. 1949 (3) SA 295.
179. Hoffman 399.
180. However the legal position has been drastically changed as a result of the coming into operation of the new Constitution section 2 Act 108 of 1996. The new Constitution introduces a Bill of Rights and is a fundamental law. The doctrine of Parliamentary

sovereignty has now been laid to rest.

181. Schmidt 88 footnote 9. As indicated above it is no longer so. However it is still too soon to evaluate the effect that the Bill of Rights is going to have on Parliament's powers regarding the allocation of burdens.

## CHAPTER 2

### PROOF BEYOND A REASONABLE DOUBT : THE ROLE AND MEANING THEREOF

#### 2.1 Introduction

Criminal law is society's means of suppressing anti-social behaviour among the members of the society and thus to ensure the continued well being and safety of the society. Society does so by allocating values to human actions and by imposing sanctions on miscreant behaviour.<sup>1</sup> For this reason it has been said: "in a democracy, law represents a people's attempt to achieve justice by agreeing on a set of behavioral norms and rules".<sup>2</sup> The might<sup>3</sup> of organised society is brought to bear on the miscreant individual through the police and security services of the society and the results are frequently devastating for the individual concerned.

To prevent a mistaken or unfair application of sanctions against innocent individuals, care must be taken to prevent such an eventuality.<sup>4</sup> Given the frailty of human judgment and the impossibility of determining individual culpability with mathematical certitude, society has evolved strategies of evidential demonstration of an individual's liability and his deserving of sanction which will as far as humanly possible, exclude innocent individuals from being caught up in the sanctionary process.

The judicial process, starting from the complaint and initial investigation of an alleged crime to the completion thereof in the acquittal or sentence of an accused is "... a search for

probabilities".<sup>5</sup> The search for probabilities is always bedevilled and made difficult and sidetracked by such human frailties as lies, prevarication, stupidity, lack of observation, mistake and the like.<sup>6</sup> "A maze of error must be anticipated in such a search. Mistakes will be made and in a civil case a mistaken judgment for the plaintiff is no worse than a mistaken judgment for the defendant. However, this is not the case in a criminal action. Society has judged that it is significantly worse for an innocent man to be found guilty of a crime than for a guilty man to go free. The consequences to the life, liberty and good name of the accused from an erroneous conviction of a crime are usually more serious than the effects of an erroneous judgment in a civil case".<sup>7</sup>

It was the US Supreme Court's awareness of these issues that influenced the court's decision that: "there is always in litigation a margin of error, representing error in fact finding, which both parties must take into account. Where one party has at stake an interest of transcending value - as a criminal defendant his liberty - this margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact finder of his guilt".<sup>8</sup>

Associate Justice Brennan's turn of phrase is especially felicitous. In a democratic state, there is one value that transforms and defines the quality of life of the citizen. It surely is transcendent in that its effects and influence upon the totality of events and incidents which we call a person's being are incalculable. Democratic society conceives liberty as the supreme

value. All other values, their ambits and contents are affected by this single value. Democratic society conceives deprivation of liberty as the supreme form of punishment. Thus men are sent to prison as punishment. They are not sent to prison to be punished.

Democratic society recognises the need in certain cases to punish supremely. However, democratic society, realising the truth in the adage, “there but for the grace of God go I” seeks the highest degree of moral certainty of guilt before he will countenance the imposition of the supreme democratic penalty.<sup>9</sup> The figure of proof beyond a reasonable doubt furnishes the standard which democratic society imposes in assessing the capacity of evidence to persuade the trier of fact of proof of guilt of a miscreant<sup>10</sup> and furnishes democratic society with the assurance and hope that those who are deprived of their liberty truly and justly deserve their desserts<sup>11</sup> and thus re-enforces democratic society’s respect for the law and its willingness to submit to it. This makes possible the tandem existence of freedom, security and law and order in a society, which is the supremely desired goal of any political system.<sup>12</sup>

## 2.2 What reasonable doubt means

That the state must prove the guilt of the accused beyond a reasonable doubt is now an established and even a fundamental cornerstone of the criminal processes of the countries that constitute the subject of this study. The rule is applied so frequently and accepted so widely that it, as Cross has remarked in another context, renders “... criticism rather pointless”.<sup>13</sup>

When one ventures into criticism or definition of the concept of reasonable doubt, one plunges into a thicket of thorns and briars. But jurists would have abdicated their calling of fashioning

intellectual and metaphysical structures to prod, tantalise and ultimately to instruct the human mind, if they stopped to pose and attempt to unravel seemingly intractable conundrums. Lawyers would have shamed their profession if they no longer sought to pull and stretch the meaning of words and the ambit of legal rules and principles. Thus an attempt must be made to define what reasonable doubt ought to be and what it ought to mean.

There is no other common-law jurisdiction in which the concept of reasonable doubt has exercised the minds of courts, academics and commentators more than the United States of America. The 1962 Permanent Edition of Words and Phrases, published by West Publishing Company devotes no less than 61 pages to an enumeration of the cases in which the concept has been discussed, described, applied and defined. In all no less than 640 cases are referred to in the various jurisdictions of the United States. The 9th Decadal Digest for the period between 1976-1981 lists no less than 285 cases.<sup>14</sup> Considering that these were decisions of the various appeal courts, it is clear that the reasonable doubt rule is being employed in a great number of cases and the courts of appeal are very busy fleshing out the concept and the limits of the rule. (However this makes the task of organising the material and of fashioning an authoritative definition well nigh impossible). One writer, throwing up his arms in despair wrote: "As one judge has said, it needs a skilful definer to make it plainer by multiplication of words, and as another has expressed it, the explanations themselves often need more explanation than the term explained".<sup>15</sup> However, judges are by training, practical people who are not given to constructing definitions as an intellectual exercise or to organise and fashion a general principle from a multiplicity of cases. Judges solve problems presented to them by the issues that are presented to them in court. Once they have solved the problems presented by a case, the case ceases to matter to them and they move on to some other case. Academic

disputation as to the doctrinal correctness of their decisions is not a part of the function of judging. One must therefore look to the commentators for guidance as to meaning while one must look to the judges for effect of the doctrine of proof beyond a reasonable doubt. Moreover, American judges are influenced by commentative authority.<sup>16</sup>

### 2.3 Review of American commentators

Reynolds states that the accused's guilt must be proved "affirmatively beyond a reasonable doubt".<sup>17</sup> He does not define terms and one is left to assume that at the time Reynolds wrote, the concept of reasonable doubt was reasonably precise or that there was an agreed meaning attached to it which made it unnecessary for a commentator to define it.

McCormick in his definitive work on Evidence in American Law eschews definition of the principle and cites with approval the Minnesota case of 1888 which inter alia held that: "The term 'reasonable doubt' is almost incapable of any definition which will add much to what the words themselves imply".<sup>18</sup> Wigmore also avoids definition of the concept but his justification is much sharper and his language is very emotive. One gets the impression that he realises that he is shirking his duty and his outburst is a defensive mechanism aimed at forestalling any criticism.<sup>19</sup> The argument advanced by Wigmore that the attempts at shaping a rational meaning of the principle of reasonable doubt because "... no one has yet invented or discovered a mode of measurement for the intensity of human belief"; is not convincing. It comes perilously close to an injunction against thought itself. The history of the western world is based on adventurous thought and the persistent and continuous exposure of the falsity of shibboleths by search for philosophical justification and their replacement by more rational and logically

justifiable concepts. The intellectual tools of solving an intellectual problem can only be developed if the problem itself is constantly studied and attempts made to solve it. Wigmore would interdict such attempts. It is suggested that the effect of such an interdict would elevate the principle of reasonable doubt into a shibboleth and in fact render it even more meaningless than it is.

Wigmore's solution would be decision by intuition on factual issues. But intuition is the most subjective and least reliable of all the human being's deliberative tools. As a matter of law, factual assessments flowing from intuition would be given legal effect and as a matter of law such intuitive assessments would be afforded the imprimatur of law in that they would be determinative of all factual issues presented by a suit. A worse scenario cannot be imagined. Dispute resolution by bias and prejudice can hardly be imagined to be the apex of legal development up to which western jurisprudence has been painfully building during the past centuries.

Wigmore seems to overlook two things:

- (1) That the fact finding process is at the very base of law.<sup>20</sup> If the purpose of law is to resolve disputes peacefully and justly, not only the normative rules of law must be just, but even more basic, the fact finding must be just. Only just rules applied to justly found facts can produce just resolution of conflict in society. Intuition can hardly find facts justly.
- (2) That the ideological basis of the American system is justice. The fact finder must be

constantly reminded of his democratic duty to render justice to his fellow citizen and that he must do so as a matter of legal obligation, not of intuitive whim.

Therefore reasonable doubt is a normative legal standard with which triers of fact must demonstrably comply because it is binding. The principle of legality commands that legal rules must be certain. The rule of proof beyond a reasonable doubt must be certain to the fact finder no less than to the defendant. Once it is certain, the fact finder, in applying it will be certain that he is carrying out his democratic and legal duty to render justice. The defendant will be certain that he has been rendered justice according to the law.

Wigmore and McCormick's works, authoritative as they are, have exercised a profound influence on American law.<sup>21</sup> A rational definition by McCormick and Wigmore could, if accepted, have standardised meaning and avoided the casuistic ad hoc application of the principle which of necessity creates confusion.

The influence of McCormick and Wigmore, especially Wigmore, has not always been felicitous. Goldstein accuses the United States Courts of Appeals of removing the figure of proof beyond a reasonable doubt from the legal test for sufficiency of evidence and avers that it was Wigmore and Thayer who began the process by decreeing that the presumption of innocence had no evidentiary significance.<sup>22</sup> The charge against Wigmore in this instance, it is submitted, is not well founded. In fairness to Wigmore and Thayer, while they decried the employment by the court of the presumption of innocence as evidence which formed the evidential matter which had to be evaluated in Coffin's case, they certainly did not advocate the removal of the "proof beyond reasonable doubt" rule from the legal test of the sufficiency of

evidence. Wigmore, it is submitted, may be criticised for his apparent disapproval of the principle of proof beyond a reasonable doubt.

Wigmore's influence can be discerned in the writings of some of the younger commentators who advance different reasons for their reluctance to define reasonable doubt more precisely. Bassiouni avers that "precise definition of 'reasonable doubt' is impossible because the word 'reasonable' reeks with subjectivity".<sup>23</sup> It is surely unusual for a legal scholar to declare a subject undiscussable in one sentence especially if a subject is so important. The fact that a subject reeks of subjectivity should even be more compelling reason why a scholar should study it and attempt to rationalise it. It is suggested that the fact that Bassiouni gives up so easily is attributable to Wigmore's dictum that a study of the concept and any attempt to fashion a definition must be abandoned. Bassiouni needs no second urging to do precisely that. Nesson considers that precise definition of proof beyond a reasonable doubt would undercut its function of legitimisation of imposition of criminal sanctions. According to Nesson, the very lack of clarity of the concept fosters a feeling of mutuality, of shared legal values among members of society. Society accepts jury verdicts because people feel that the verdict has been reached in a manner they approve of. To precisely define the concept would fracture this community of legal feeling and would lead to questioning of the fact-finding process and therefore the legitimacy of sanction imposition.<sup>24</sup> It is submitted that this is not correct. Without precise definition of the rules within which the decision maker must operate to reach a legally valid factual determination, the decision maker is virtually handed a *carte blanche* to employ legally and logically unacceptable criteria to reach a legal verdict. To demonstrate - in a jury trial two jurors think that the accused should be convicted because he wears white shoes, two jurors think he should be convicted because he has a beard, two jurors think that he should be

convicted because he is shifty eyed, one juror thinks that he should be convicted because he is black, one juror thinks he should be convicted because he looks guilty and four jurors think that the evidence against the accused is very strong and he should be convicted on the strength of that evidence.

Obviously the accused will be convicted but not on grounds that are defensible for only 33% of the jurors would convict the accused on rational grounds. Imprecision of definition may give socially acceptable results. All the jurors will agree that the accused be convicted. But is the decision rationally based? Does the fact that it is socially acceptable make it correct? Above all, is it of itself just and does it satisfy the imposition of criminal actions on the accused?

Clearly the solution lies not in sweeping the problem of imprecision and confusion under the carpet by elevating imprecision and confusion to a value. "Instructions which might allow juries to reach conclusions in the way described in this article are not lacking. It may be their disorganization and archaic language that cause the difficulty. Clearly it must be recognized that the jury brings part of its knowledge (information) with it to the trial; receives more at the hearing, and in a very real sense, creates still more during the hearing and in the jury room, by combining all this information and drawing from the combinations new knowledge which was logically there all the time, but was psychologically unknown to them until the combination was made and examined. This is what they ought to do, and instructions should require rather than prevent it. Instructions should perhaps be revised in these ways, because to say how they should read requires a communication analysis of what present instructions do and why".<sup>25</sup>

It is submitted that Ball is correct and the proper place to start is at fashioning the precise

meaning of what reasonable doubt means. It is submitted that Ball is further correct that "... what is needed first is a change in the attitude towards juridical truth, a change which channels intuition into the realization of what can be accomplished with the aid of modern statistical tools".<sup>26</sup>

It is clear that evaluative judgment does involve an element of subjectivity or intuition whose extent cannot be assessed objectively. But the role of intuition in the adjudicative evaluation of testimony must be limited if factual decisions are to be correct. The law ought to create a scale of values which permits for rational allocation of values to various components in the evidential milieu and thus ensure a rational factually correct decision because "... the primary end of adjudication is rectitude of decision...".<sup>27</sup> The concept of proof beyond a reasonable doubt, precisely defined, would provide such a scale.

Some American writers simply want to throw the problem to the jury itself by requiring the jury itself to decide what kind of doubt is reasonable for it in a particular factual situation.<sup>28</sup> This does not take the matter further as it does not solve the problem of the need for correct and therefore just factual decision making. Simply to instruct the jury to make so important a decision without normative guidelines, given the existence of a wide range of prejudices, biases and predilections in a society is a form of legal hara kiri.

It is submitted that a much more substantial charge against Wigmore is that his strictures against precise definition of 'proof beyond reasonable doubt' and his averment that the concept is not capable of precise definition<sup>29</sup> have encouraged a lackadaisical attitude in the courts on a matter<sup>30</sup> which is basic if the values held sacred by society are to be actualised. One finds

courts, trotting out facile excuses for their laziness such as: “The phrase ‘reasonable doubt’ is self defining, and hence need not be defined in instructions”. “In most cases it is better to leave the phrase ‘reasonable doubt’ undefined, save as the words carry their own definition”. “Instructions resulting in elaboration of ‘reasonable doubt’ is erroneous, since such term needs no definition”. “The term ‘reasonable doubt’ is so plain that an attempt to explain it would lead to confusion”. “The meaning of the phrase ‘reasonable doubt’ is obvious; and for the court to attempt to explain it to the jury is to ‘gild refined gold’ or add another ray into sunlight”. “As has been often said by this Court, the term ‘reasonable doubt’ best defines itself. All attempts at definition are likely to prove confusing and dangerous”. “It is difficult to define a reasonable doubt in any plainer terms than the words themselves impart. To attempt to define a reasonable doubt is like attempting to define a definition, and the better practice is not to attempt it”.

The foregoing is a representative sample of facile dicta of various courts in the United States which can be found in the Permanent Edition of Words and Phrases (vol. 36 510-511).

### **2.3.1 The role of the Supreme Court**

It is important to examine the role of the Supreme Court of the United States in this definitional controversy of the rule of proof beyond a reasonable doubt. This must be done because the Supreme Court is the ultimate interpreter of the law in the United States and its dicta are binding on the lower courts in the United States on certain national issues. The state of the law in the various courts in the United States therefore reflects the state of the law in the Supreme Court. The reasonable doubt doctrine is one of those national issues. As long ago as 1881<sup>31</sup> the Supreme Court accepted the evidential test that the accused’s guilt must be proved “... to

the exclusion of all reasonable doubt". One of the points taken as reversible error was that in charging the jury the court had incorrectly explained the meaning of reasonable doubt. The court, however, held that "attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury". Clearly the court was experiencing a difficulty in defining the concept to the jury. The court was not imposing a definitional interdict that Wigmore would later impose. What is more the court simply said that attempts to explain the meaning of the concept were "usually" not successful. The court did not say that it was not possible to define the concept.

An important case in which the court was faced with the problem of definition of reasonable doubt was Coffin's case.<sup>32</sup> In that case Chief Justice Shaw gave his celebrated instruction to the jury wherein he explained what a reasonable doubt was. The instruction to the jury was appealed to the Supreme Court. The court gave a very short judgment on the point contenting itself with the dictum that: a reasonable doubt was "... of necessity the condition of mind produced by the proof resulting from the evidence in the cause".<sup>33</sup> The Supreme Court gave no guidance as to the norms to be applied in evaluating the evidential material and in deciding whether a reasonable doubt existed after such evaluation. Chief Justice Shaw's attempt at definition was savaged by commentators.<sup>34</sup>

In Holt v United States<sup>35</sup> the jury after having been charged and having retired to consider its verdict, actually returned and asked the court to explain what a reasonable doubt was. The court gave what amounted to a full explanation to wit:

"A reasonable doubt is an actual doubt that you are conscious of after going

over in your mind the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any matter of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt, of which the defendant is entitled to have the benefit".<sup>36</sup>

However, the court did not explain how the doubt was to arise and what process of reasoning had to be followed by the jury to come to the conclusion that there was a doubt as to the accused's guilt or not. It is to be noted that all that was required is that there should be an "actual doubt" as obviously in contrast to a hypothetical one. The Supreme Court affirmed without itself defining what a reasonable doubt was.

The Supreme Court has since then consistently avoided being drawn into the controversy. It has, however, reiterated Miles's case with approval and gone on to add that a definition of "a doubt" creates confusion.<sup>37</sup> It did not, however, say that definition of a reasonable doubt would create confusion. It has always held that proof beyond reasonable doubt is the requisite standard of proof in a criminal case and has even held that it is a constitutional requisite in terms of the 14th Amendment of the US Constitution.<sup>38</sup>

In Winship's case, Associate Justice Brennan studiously and pointedly avoided even mentioning the definitional controversy. Associate Justice Harlan, in concurring, did refer to Wigmore's strictures.<sup>39</sup> From his remarks it was quite clear that guidance from the Supreme Court as to what reasonable doubt was, was called for.<sup>40</sup> However, Harlan J avoided the issue.

It seems that Wigmore's hand of influence can be observed in the Supreme Court's definitional sins of omission in this instance.

Reasonable doubt in the United States is now a formal constitutional requirement in criminal convictions but its content is undefined. The Supreme Court's failure to define it has reduced it to an incantation with emotional overtones but no intellectual content, which is relied upon by various actors in a courtroom drama in support of some or other claim and in expectation of a favourable decision.

#### **2.4 Proof beyond a reasonable doubt in English law**

In English law, the "phrase 'beyond a reasonable doubt' is the essential verbal formulation which has been devised by law to express the necessary standard of belief for criminal conviction".<sup>41</sup>

As in America the fundamental ratio for the rule that guilt must be established beyond a reasonable doubt is the concern for the liberty of the subject. Cross and Tapper state the principle correctly that "So long as the proportions do not become excessive, it is better that people who are probably guilty should go free than those whose innocence is reasonably possible should be convicted. The importance of the liberty of the subject also accounts for the applicability of the criminal standard in contempt of court cases".<sup>42</sup> The institutional role of the juristic figure of proof beyond a reasonable doubt therefore performs the equivalent legal role in Britain to the role it plays in the USA.

### 2.4.1 Review of the English commentators

The English definitional climate has been even less salubrious to “proof beyond a reasonable doubt” than the American climate. British writers and commentators have found it singularly difficult to define the meaning of the expression. Elliott is of the view that “‘Beyond all reasonable doubt’ is the time-honoured expression and it has always proved difficult to find other words to express what it means”.<sup>43</sup>

Phipson avoids the task of definition and states that: “It is submitted that it is better for a judge not to attempt to explain to a jury what is meant by ‘reasonable doubt’, unless they specifically ask for a direction on this point”.<sup>44</sup>

According to Murphy<sup>45</sup> attempts to elucidate the phrase are unhelpful or misleading.

Heydon makes no attempt to define the concept and resignedly states that: “It is not clear that attempts to improve on ‘beyond a reasonable doubt’ can hope to succeed”.<sup>46</sup> The criticism against this attitude is that it draws a red herring and avoids to grasp the definitional nettle by a conceptual sleight of hand. The problem posed is not of improving on the verbal formulation of the standard of proof, but it is one of elucidation thereof so that an accepted meaning may be assigned to it and application thereof be made easier. Furthermore, it is suggested that dubiety about the prospective success or otherwise of intellectual effort, should be no bar to such effort. The success of intellectual effort can be gauged only after the effort has been made and the impact of the result thereof assessed.

May<sup>47</sup> is of the view that: “The expression is therefore better left to speak for itself, undefined”. It is submitted that this is an unacceptable and facile excuse. No expression can be self-defining. Every linguistic expression is a compound of ideas and conceptions. In a discipline which lays down normative and enforceable rules such as law, the need to determine and lay down general meanings is irrefutable. Failure (or avoidance) to do so breeds confusion and uncertainty.

It is the duty of all those who are charged with the application, development and refinement of the law to evolve meaning to be assigned even to the seemingly most intractable legal concepts. This duty cannot be avoided by pleading that a conceptual problem is intractable.

It is submitted that a legal concept which is incapable of definition, is incapable of being reduced to conceptually cognisable and understandable terms. A concept which is not understandable has no value to legal science as it is a fundamental precept of law that the norms of the law must be capable of being understood. A concept which cannot be understood must be abolished as it is useless since it renders the legal norm in which it is used incapable of being understood.

No one has yet suggested that the concept of ‘proof beyond a reasonable doubt’ is useless in the sense suggested. On the contrary most writers assert its usefulness.<sup>48</sup> A meaning must therefore be attached to it. May’s submission must therefore be rejected.

The acknowledged definitive work on English Evidence<sup>49</sup> omits any reference to the problem of definition of the concept of “proof beyond a reasonable doubt”.<sup>50</sup> It is submitted that this

typically English understatement of a burning issue is to be deplored as it reflects an unwillingness or a lack of capability or will to give a lead on the issue on the part of very influential leaders of legal opinion.

Carter simply states that: "Elaborate attempts to explain to the jury what is meant by reasonable doubt are, however, generally to be avoided".<sup>51</sup> The problem with Carter's view is that in English law juries generally consist of laymen who have had no legal training.<sup>52</sup> The jury's function in a criminal trial is to decide issues of fact.<sup>53</sup> In a criminal jury trial only the jury may make a decision on factual issues.<sup>54</sup> If the jury is not fully informed as to what reasonable doubt means and if only a superficial explanation is given, what standards may a group of laymen be expected or required to apply in making a factual determination which may have serious consequences for the accused?<sup>55</sup>

Carter's view seems to be that the jury must be set adrift in a sea of conflicting evidential allegations without a reliable compass and yet be expected to reach the port of correct decision safely.<sup>56</sup>

Does such a course of action accord with "... what must surely be the citizen's most fundamental right, the right not to be convicted of a crime until he has been proved guilty of it beyond reasonable doubt"?.<sup>57</sup>

It is submitted that the answer is clearly negative. A decision against an accused person, based on the ignorance of the fact finder as to what is expected of him would surely conflict with the basic requirement of the English system of criminal justice that is fairness.<sup>58</sup> Carter's view

must therefore be rejected as untenable.

Nokes defines reasonable doubt as “... such a doubt as a reasonable man might have in his own serious affairs, and this excludes consideration of fanciful possibilities”.<sup>59</sup> Nokes’ formulation, abbreviated and non explanatory as it is, is submitted, is valuable in that it focuses on the fact that applying the test of reasonable doubt, an objective standard test must be applied. The question is not whether a doubt is reasonable to the subjective sensibilities of the individual fact finder, but whether it is generally reasonable to a great number of people. In other words, given the conflicting factual assertions in a case, would the ordinary person accept a particular set of assertions and would such a person be persuaded that such assertions reflect the truth of what in fact transpired? What is more, would the ordinary person be so persuaded that if an important interest of his was dependent on such persuasion such a person would act on such persuasion thus risking his own interest?

However, Nokes spoils the effect of his assertion by later stating that “... the nature of reasonable doubt cannot be expressed with precision...”.<sup>60</sup> The fact that he relies on Wigmore for this assertion simply compounds the problem.

According to Eggleston<sup>61</sup> “... the conclusion of a court as to past facts, having regard to the limitations on the search for truth, is much more likely to be a conclusion as to what probably happened than a conclusion as to what actually happened”. According to Eggleston therefore the problem of defining proof beyond a reasonable doubt is the problem of defining an acceptable level of probability which will prevent the punishment of too many innocent people and letting off too many guilty persons.<sup>62</sup> Eggleston, however, fails to define proof beyond a

reasonable doubt and merely states that: "The most that one can safely say is that the doubt the jury entertains must be a reasonable one and not merely a fanciful one".<sup>63</sup> Eggleston's avoidance of defining reasonable doubt seems to be based on his desire to avoid criticism.

Only Stone<sup>64</sup> attempts a conceptual analysis of the concept of proof beyond a reasonable doubt. According to him, the standard of proof beyond a reasonable doubt relates to the cumulative effect of the whole evidence adduced in the case and constitutes the basis on which a verdict of guilty may be grounded if the evidence as a whole complies with the standard.

According to Stone, the requisite standard is stated in terms of belief and not in probabilistic terms. Proof beyond a reasonable doubt transcends the mere acceptance of probability by the fact finder and requires that the fact finder be actually convinced of guilt. However, Stone points out that probability is inherent in the standard of proof beyond a reasonable doubt because the fact finder, in order to believe and be convinced beyond a reasonable doubt, must assess the logical consistency of factual assertions. It is in this context that a consideration of probabilities becomes necessary. However, a consideration of probabilities is a mere stage in the reasoning process. A mechanical comparison of probabilities, no matter how strongly it indicates guilt is not enough to justify such a finding.<sup>65</sup> There must be something more than just an enumeration of probabilities. Stone considers this element to be judgment. Judgment according to Stone seems to be the election, by the fact finder of one of two alternatives that is, am I convinced? Or am I not convinced?

It is submitted that Stone has made a commendable attempt at definition but his definition suffers because it would not be comprehensible to the ordinary juror.

### 2.4.2 The role of the courts

There are so many courts in the English legal system that it is difficult to comprehend the influence of the courts without a brief description of the basic structural and institutional divisions in English criminal law.

In English criminal law, there is a basic division of offences into (a) summary offences and (b) indictable offences. The English criminal court structure follows this distinction hence its importance.<sup>66</sup> Summary offences are less serious offences such as parking tickets and the like. Summary offences are tried by magistrate's courts.<sup>67</sup> An appeal on fact lies from the magistrate's court to the Crown court. No further appeal on the facts is permitted. An appeal on law lies from the Crown court (in cases which originated in the magistrate's court) to the Queen's Bench Divisional Court. Likewise an appeal on law lies from the magistrate's court to the Queen's Bench Divisional Court. A final appeal on law lies to the House of Lords.<sup>68</sup>

In the case of indictable offences the magistrate's court conducts a preliminary hearing of the matter and if there is a *prima facie* case against the accused the magistrate commits the accused for trial before the Crown court.<sup>69</sup> An appeal lies from a decision of the Crown court to the Court of Appeal and a final appeal therefrom lies to the House of Lords.<sup>70</sup>

From the foregoing, it is clear that in criminal matters, the House of Lords is the highest court. "There is no appeal from them to any higher body. They cannot be overruled. Nor can their decisions be impeached".<sup>71</sup> Decisions on points of law<sup>72</sup> of the House of Lords are binding on all courts in England.<sup>73</sup>

Decisions of the Court of Appeal are binding on itself and the lower courts including the divisional courts. Likewise decisions of the divisional court generally bind the lower courts although it has been asserted that the Crown court is not bound by the decisions of the divisional court.<sup>74</sup> English law therefore has a tiered, well structured system of precedents.<sup>75</sup>

Not unexpectedly, as in America, the controversy about the meaning to be assigned to the expression, “proof beyond a reasonable doubt”, has revolved around or emanated from the instructions given to juries by judges, when juries have had to deliberate.<sup>76</sup>

The leading case on the subject of the applicable standard of proof is Woolmington v Director of Public Prosecutions.<sup>77</sup> In that case the accused was charged with the murder of his wife. The accused admitted that he had caused her death but averred that his wife’s death had been the result of an accident. In his charge to the jury the presiding judge had stated: “The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner’s hands. They must satisfy you of that beyond a reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was pure accident”.<sup>78</sup> The judge’s charge seemed to cast a burden on the accused to establish lack of intent in order to reduce the conviction to one of culpable homicide or to establish facts which would legally justify or excuse altogether the admitted homicide.

The House of Lords held that it was for the prosecution to prove the guilt of the accused and that “Juries are always told that, if conviction there is to be, the prosecution must prove the case

beyond a reasonable doubt”.<sup>79</sup> It is to be noted that the court went no further than to state the general applicability of the standard but did not define it.

Ironically, the most famous attempt in English law to define the standard of proof beyond a reasonable doubt was made in a civil case<sup>80</sup> by Lord Denning, a judge who attained renown as a civil court judge not a criminal court judge.<sup>81</sup> According to Denning, proof beyond a reasonable doubt “... need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’, the case is proved beyond a reasonable doubt, but nothing short of that will suffice”.<sup>82</sup>

Though some writers<sup>83</sup> regard Lord Denning’s dictum as a definition of the standard of reasonable doubt, it is submitted that this is not so. Lord Denning’s dictum is nothing more than a description of the standard. Glanville Williams<sup>84</sup> shows clearly the difference between a definition and a description. A definition is an equation of verbal symbols the purpose of which is to clarify the meaning of a word which is not properly understood. A description “... on the other hand, is a statement about things or referents. It assumes that you know what thing you are talking about and it does not, as definition does, state or control the use of words”.

It is submitted that no description can be negatively couched. A description should describe the qualities of an object proposition - or in terms of the characteristics present in the object or

proposition. After all the purpose of description is to enable the perceiver to recognise the object or proposition by reference to the qualities enumerated in the description. Reference to the qualities of the object or proposition referred to in the definition permits the perceiver to identify the object among a number of objects for such qualities set it apart from other objects or propositions which do not possess the same qualities.

An object cannot be described in terms of qualities it does not possess for if the perceiver perceives the absence of the enumerated qualities in an object that will not necessarily mean that it is the object defined as there may be an infinite number of other objects which want the qualities mentioned in the definition.

To illustrate : elephants and giraffes cannot fly. To define elephants and giraffes as animals which do not fly and then to expect the perceiver to identify them among lions, tigers, buffalo etc. which all do not fly would be ludicrous. This, it is submitted , is precisely the effect of Lord Denning's dictum. Furthermore a description must reflect qualities of the object defined and not evaluations of effect. Lord Denning's assertion that the law would fail to protect the community if it admitted fanciful possibilities, cannot be regarded as part of a definitional component but must be regarded as a warning to triers of fact regarding the probable result of stretching probabilistic alternatives beyond logically acceptable limits. It has nothing to do with the inherent qualities of proof beyond a reasonable doubt.

Furthermore Lord Denning's expression of the standard in probabilistic terms is misleading and is not helpful. If "degree of probability" as used by Lord Denning means "degree of likelihood"<sup>85</sup> then it follows that "high degree of probability" as required by Lord Denning must

be quantified for how high is “high”? The impossibility of quantification<sup>86</sup> is tellingly demonstrated by Eggleston in the following words: “In a trial for murder in Victoria a few years ago, the jury asked the judge what degree of probability (in terms of percentages) they should require in order to convict for murder. The judge wisely and properly declined to tell them, saying that they had to be satisfied beyond a reasonable doubt and that he could give them no more precise direction. According to a member of the jury, some thought the standard should be set around 98 per cent and some thought it should be 100 per cent...”<sup>87</sup>

What is more, “[A] mere mechanical comparison of probabilities, however strongly this might point to guilt, would not be enough. The criterion is human, not mathematical. It is a judgment that facts are established”.<sup>88</sup>

It is submitted therefore that if Lord Denning’s formulation is dignified with the description of definition, then it must be rejected as unsatisfactory for, as Stone shows, the standard of proof beyond a reasonable doubt transcends a mere consideration of probabilities and embraces a judgment of certainty.

The meaning of proof beyond a reasonable doubt gave so much difficulty that Lord Goddard C J went so far as to disapprove the reiteration of the phrase of proof beyond a reasonable doubt in jury instructions in order to explain the incidence of the onus of proof.<sup>89</sup> The Court of Appeal in Kritz’s case, however, did not challenge the House of Lords explicitly. Though Lord Goddard disapproved of the employment of particular words, he adhered to the law as laid down by the House of Lords that proof had to be beyond a reasonable doubt.

However, “for a period from 1950 onwards, the Court of Criminal Appeal expressed a preference for the direction that ‘the jury should be satisfied so that they feel sure’ and this direction is often used”.<sup>90</sup>

Lord Goddard disapproved of the phrase “proof beyond a reasonable doubt because it was difficult to explain to juries... what does, and does not, constitute a reasonable doubt. He thought that no real guidance is afforded by saying it must not be a fanciful doubt, and to say it must be such a doubt as would make jurymen hesitate in their own affairs does not suggest any particular standard because one jurymen might hesitate where another would not do so”.<sup>91</sup>

In Fearnley's case, Lord Goddard approved a three-pronged formulation, each prong of which he considered would be sufficient individually to explain to a jury the standard of proof required. He said “one would be on safe ground if one said in a criminal case to a jury: ‘you must be satisfied beyond a reasonable doubt’ and one could also say, ‘you the jury must be completely satisfied’, or better still, ‘you must feel sure of the prisoner’s guilt’”.<sup>92</sup>

Lord Goddard’s determined efforts to lay down the law definitively on this aspect of the law have not proved successful for “... more than twenty five years after Lord Goddard’s remarks, problems are still being encountered with definitions of ‘reasonable doubt’”.<sup>93</sup>

Obviously, because the Appeal Court approved of “... three different ways of saying the same thing...”<sup>94</sup> confusion arose and judges sought to explain to juries what the standard in fact was and many cases consequently went on appeal against judges’ directions to the jury.<sup>95</sup>

In Yap Chuan Ching's case<sup>96</sup> after sequestration and deliberation, the jury returned to the court and requested further directions regarding the requisite standard of proof. The court explained the standard and sought to draw an analogy between the considerations to be taken into account by the jury in deciding the case and the considerations to be taken into consideration by anyone who wishes to take out a mortgage. The accused was convicted and then appealed on the basis that the jury had not been properly directed.

While the Appeal Court saw no impropriety in the use of the analogy, the court strongly cautioned against attempting to "... gloss upon what is meant by 'sure' or what is meant by 'reasonable doubt'".<sup>97</sup> The court interdicted courts from attempting to define the standard of proof stating that "we point out and emphasize that if judges stopped trying to define that which is impossible to define there would be fewer appeals. We hope there will not be any more for some considerable time".<sup>98</sup>

In English law therefore the requisite standard of proof to justify a conviction of the accused is "satisfaction beyond a reasonable doubt" or "complete satisfaction" or "feeling sure of the *guilt of the accused*".<sup>99</sup>

By law, no attempt is to be made to elucidate this standard.<sup>100</sup> However, the House of Lords has not expressed itself on the definitional controversy. Perhaps a proper case will arise which will afford the House of Lords the opportunity to settle this matter once and for all.

In South African law, the principle that the state must prove the guilt of the accused beyond a reasonable doubt has been elevated to the status of a ritual incantation.<sup>101</sup> So often is the refrain

sung in courts throughout the length and breadth of the Republic that one sometimes wonders whether it has not been reduced to the last refuge of scoundrels when they are faced with the inexorable approach of guilt.<sup>102</sup>

### 2.4.3 Review of the commentators

According to Lansdown and Campbell, “[T]he general principle in criminal cases is that the legal burden of proving the accused’s guilt rests upon the prosecution”.<sup>103</sup> Moreover, the state must prove the accused’s guilt beyond a reasonable doubt. All commentators who have written on the subject emphasize this view.<sup>104</sup>

Relatively little commentating work has been written in South African law about the exact meaning of the concept of “proof beyond a reasonable doubt”. Joubert avoids even an attempt at formulating what proof beyond a reasonable doubt means.<sup>105</sup>

Lansdown and Campbell aver that “What amounts to proof beyond a reasonable doubt is incapable of precise definition...”.<sup>106</sup> It is submitted that this view is untenable for the same reasons that have been advanced when the views of English commentators were reviewed. It is submitted that no definitional interdict ought to be imposed on the search for meaning. Such interdict would debase a valuable legal norm and jurisprudence, and indeed, legal practice would be the poorer for it.

According to Hoffman and Zeffertt “The degree of proof required by the criminal standard is probably easier to understand than to explain. The difficulty is that, as Wigmore has put it, ‘no

one has yet invented or discovered a mode of measurement for the intensity of human belief and there is therefore no way of giving an accurate description of a particular point on the scale of probability. To a large extent no explanation is necessary, because for judges and magistrates the standard of proof is a matter of experience and intuition rather than analysis".<sup>107</sup>

It is submitted that Hoffman and Zeffertt confuse probability and belief and seem to treat the two as interchangeable definitional variables whereas these concepts are each separate and distinct and operate at different levels of the evidential inquiry. As Stone has shown<sup>108</sup> belief transcends probability. No preponderance of probabilities, regarded as probabilities per se, may produce the requisite degree of conviction required by the criminal standard. Where fact A is an issue no amount of probability that fact A "probably occurred" will satisfy the criminal standard.<sup>109</sup> It would seem "that something more than evidence making guilt probable is necessary".<sup>110</sup> It is only if the fact finder is convinced by the evidence as a whole, including the probabilities, that the criminal standard is satisfied. Belief can therefore never be placed on the scale of probability. Belief is not an element of the evidential structure presented by an evidential dispute as probability is. Belief is an attitude of mind in the fact finder vis a vis the disputed fact induced by the cogency of the evidence and the probabilities that are revealed by the evidence.

While it is undoubtedly correct that no scale has been invented with which to measure the intensity of human belief, the attempt to normatively define and prescribe meaning to "proof beyond a reasonable doubt" is in fact an attempt to construct such a scale for the normative discipline of law.<sup>111</sup> Law is a normative human science the subject matter of which is not capable of instrumental measurement. It is idle and mischievous therefore to speak of inventing

an evaluative scale such as is used in the biological sciences to measure matter. Such a scale is impossible to invent for the simple reason that the matter to be weighed in respect of the discipline of law is not capable of being weighed in the manner indicated by Wigmore and endorsed by Hoffman and Zeffertt.

Since absolute certainty<sup>112</sup> in the sense of a demonstrable proof of the existence of the factual situation in issue is not capable of attainment, it is only if the fact finder knows that he must apply this or that norm in order to arrive at an acceptable level of conviction, that one can say at the end of the day that proof beyond a reasonable doubt has been attained. Definition of the norm/concept is therefore of supreme importance and any attempt to avoid it as Hoffman and Zeffertt do, is to be deprecated. Hoffman and Zefertt are to be criticized even more for reducing the process of judgment to intuition and experience.

The process of judging implies a rational assessment of factual data presented and the choice of alternatives guided by the dictates of reason. Intuition which postulates the perception of phenomena by the mind without the intervention of the logical and reasoning faculty can never, it is submitted, be a proper base for holding that facts are proven or not proven. Our whole system of evidence is rationally based. Why should we admit intuition together with all the illogicality and uncertainty attached to it and thus debase the fact finding process. Spiller has convincingly shown how the use of intuition can debase the judicial process by showing how Harding C J of Natal gave unsatisfactory judgments by relying on intuition and experience.<sup>113</sup>

Experience can hardly be considered to be a better basis for assessment of evidential cogency and for correctness of a decision based on acceptability of the level of conviction. Spiller, again

using Harding C J as an example of a fact finder who relied on experience, shows how untenable a base for rational fact finding experience is.<sup>114</sup> The fact that one is often called upon to make certain decisions is no guarantee that the decisions one makes will be unerringly correct. Without normative guidelines, the fact finder may repeatedly make the same mistake. Repetition of the mistake will not render the mistakes correct. Judgments based on factual findings which are made on the basis of intuition and experience are, as Spiller shows,<sup>115</sup> in the case of Harding C S, apt to be arbitrary, unprincipled, biased and contradictory because they are casuistically arrived at.

Thus one finds Hoffman and Zeffertt's argument unacceptable. Nor is the Hoffman and Zeffertt's argument convincing that it is not necessary to formulate a definition of proof beyond a reasonable doubt because since "...trial by jury has been abolished, the precise formulation of the criminal standard is no longer very important".<sup>116</sup>

While it is correct that juries are normally constituted of laymen who obviously need the guidance of professionals on matters of law,<sup>117</sup> it is by no means indisputable, that the professional jurist cadre can be trusted to use only experience and intuition to make rationally based, factually correct evidential choices. One has to disagree with Hoffman and Zeffertt that a precise formulation is no longer necessary. On the contrary, it is submitted that a precise formulation is very necessary because the factual choice is now made by one fact finder (in the ordinary case in the lower courts, 3 in the superior courts that is a judge sitting with two assessors). The margin of error is now concentrated on one person. The checks and balances of disputation and argument among jurors when a jury has been sequestered have been done away with. The probability of erroneous fact finding has been increased unmeasurably since

the single fact finder's views on the evidential material before him cannot be challenged during the process of decision making, that is during the process of evidential choice-making. It therefore becomes a matter of crucial importance for an accused person that the fact finder decide the matter rationally and correctly. In order to do so, the norm to be applied must be defined precisely for such definition indicates to the fact finder how he should interpret the factual data to arrive at a correct decision. The norm the fact finder must apply in making such a decision must be so defined that it is clear, certain and unconfusing.

Schmidt<sup>118</sup> also eschews a definition of the concept of proof beyond a reasonable doubt. But Schmidt points out an important point that must be kept in mind by anybody who tries to understand the concept of proof beyond a reasonable doubt or who attempts to define the concept, namely, that "Hier val die klem dus nie op die graad van waarskynlikheid nie, maar op die graad van twyfel". In other words the level of acceptability of conviction must be determined with reference to something outside the logical structural relationship posed by the probabilities revealed by the evidence.

Schmidt also does a valuable service in pointing out the adjectival ambiguity of "reasonable" in the compound concept of "reasonable doubt". He poses the question whether "reasonable" is a constant concept, that is, whether it bears a constant quantitatively equal evidential meaning in all circumstances. To highlight the logical difficulties posited by his enquiry, Schmidt poses the further questions "Is dit nie moontlik dat redelike twyfel ten aansien van 'n aanklag van moord bv nie redelike twyfel ten aansien van 'n aanklag wederegterlike parkeering sal wees nie? Wissel die standaard nie in 'n mate na gelang van die erns van die moontlike sanksies nie".<sup>119</sup>

## 2.5 The meaning of “proof beyond a reasonable doubt” in South African case law

Case law is the authoritative repository of law. No amount of legal controversy can be authoritatively settled unless it is settled by judicial decision. Judicial dicta are to be found in our case law, whether the cases in which they can be found are reported or not.

The Appellate Division has regularly expressed itself on the degree of proof that is required in criminal trials. In West Rand Estates Ltd v New Zealand Insurance Co. Ltd<sup>120</sup> the court came to the conclusion that in a civil case it was sufficient for a party to prove its case on a mere preponderance of probability whereas in a criminal case “... a much higher degree of assurance is required”.

In Cape Coast Exploration Ltd v Schotz and Another<sup>121</sup> the AD held in passing that “As Phipson puts it (6th ed p.10), civil cases may be proved by a preponderance of evidence, whilst criminal charges must be proved beyond a reasonable doubt”. In these cases the highest court did not attempt to lay down any guidelines on how triers of fact should approach the evidential matter presented in order to decide whether the requisite degree of conviction had been attained or not.

In Rex v Blom<sup>122</sup> the accused had been charged with murder. Strong circumstantial evidence had been led against him but he had failed to give evidence on his defence. His witness’s evidence, whose purport was to prove an alibi on behalf of the accused, was rejected by the court. The accused was convicted and sentenced.

On appeal the question of whether the evidence which had been led ought to have satisfied the court of the accused's guilt was exhaustively argued. The four appeal judges filed concurring judgments dismissing the appeal.

During the course of his judgment, Watermeyer J A observed that "I am aware that the phrase 'proof beyond reasonable doubt' is difficult, if not impossible to define because of the lack of standard by which to measure a degree of conviction..."<sup>123</sup>

It is to be noted that the judge of appeal is guilty of circuitous reasoning. It is submitted that proof beyond a reasonable doubt is the standard by which the evidence is judged in a criminal case to decide whether it attains the requisite degree of persuasiveness to justify a conviction of the accused.

To argue, as Watermeyer J A does, that it is impossible to define the standard because of a lack of a standard to measure human conviction is illogical. While it is correct that generally there is no standard with which to measure human conviction, that is not what is an issue. What is an issue in every court case is whether in law an acceptable degree of persuasiveness is attained by the evidence tendered. In that context there is no lack of a standard to measure human conviction for the purposes of establishing the acceptability of fact finding for legal purposes.

The standard exists.<sup>124</sup> It is the lack of definition of the standard which causes difficulties in deciding whether the evidence persuades to the requisite degree as set by the standard. In other words it is the lack of proper definition of the standard which makes it difficult for the fact finder to assess correctly the effect of evidence.

In Gates v Gates<sup>125</sup> the plaintiff sued the defendant for divorce. He succeeded in the court a quo. On appeal, the court of appeal assessed the evidence and came to the conclusion that the trial judge ought not to have been persuaded by the evidence led by the plaintiff. The court reversed the court a quo and ordered absolution from the instance.

In the course of his judgment, Watermeyer J A held that:

“Now in a civil case, the party on whom the burden of proof in the sense of what Wigmore calls the risk of non persuasion lies, is required to satisfy the court that the balance of probabilities is in his favour, but the law does not attempt to lay down a standard by which to measure the degree of certainty which must exist in the court’s mind in order to be satisfied. In criminal cases, doubtless, satisfaction beyond a reasonable doubt is required, but attempts to define with precision what is meant by that usually lead to confusion”.<sup>126</sup>

It is to be noted that the court discourages attempts to focus sharply on the meaning of the concept of proof beyond a reasonable doubt. It is significant that the court speaks through Watermeyer J A. The same judge of appeal had delivered the judgment in Blom’s case which has been criticised in this investigation as showing an insufficient grasp of the issues presented by the concept of proof beyond a reasonable doubt.

It is obvious, it is submitted, that Watermeyer J A confused the standard of proof and the effect of evidence. However, that is no ground for holding that the attempt to define the standard usually leads to confusion. The fact that Watermeyer J A was guilty of confusion ought not to

be an interdict upon others who are not similarly confused to try to fashion an acceptable definition of the standard.

In R v Boya<sup>127</sup> the accused had been convicted by a jury of murder. They did not note an appeal timeously. They brought an application for leave to appeal. After discussing the various criteria to be employed in deciding whether an application of the nature brought should succeed or not the court observed: “using the criterion which I have suggested, it seems to me that the Court of Appeal on reconsideration of this matter may very well feel that the identification of no. 2, John Boya, as the assailant which is crucial has not been established beyond reasonable doubt by the Crown. If that is so, the appeal will succeed. The recognized phrase ‘beyond a reasonable doubt’ is another expression which is susceptible of a variety of meanings and probably incapable of precise definition”.<sup>128</sup>

It is to be noted that in deciding that the phrase “beyond a reasonable doubt” was probably incapable of precise definition, De Villiers J P quoted with approval the definitional interdict of Lord Goddard<sup>129</sup> which has already been referred to herein. It must therefore be accepted that our courts frown upon any attempt to define the concept of proof beyond a reasonable doubt.<sup>130</sup>

As Malan, J A put it:

“It is obviously impossible to formulate the principle in language which will produce any measure of certainty and endeavours are made to afford more definite and reliable guidance to those engaged in the solution of tantalising problems by unravelling inferences from circumstantial evidence. The language employed in the more popular way of enunciating the principle does not appear

to offer much relief. It is no more precise than, and is exposed to the same dangers of misinterpretation and misapplication as, the form which at one time found almost universal favour and which has served the purpose so successfully for generations".<sup>131</sup>

Such definitional interdicts have caused South African courts to adopt what Lansdown and Campbell call a "common sense approach".<sup>132</sup> There is no uniformity as to meaning of proof beyond a reasonable doubt. Apparently the formulation that the guilt of the accused must be proved by "... competent evidence, which leaves no doubt to the reasonable, honest mind"<sup>133</sup> is regarded as a correct and sufficient statement of the law although with respect, it appears to state the principle too widely since in terms of our law, the duty of the state is not to prove the guilt of the accused beyond all doubt but only beyond a reasonable doubt. According to our law, a doubt may exist in the mind of the fact finder but so long as the doubt is not reasonable, the fact finder is entitled to convict the accused.<sup>134</sup>

The common sense approach of our courts is, it is submitted, best exemplified by the dictum of Malan, J A that "... there is no obligation upon the crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged".<sup>135</sup>

Malan's formulation may be criticised for placing the emphasis on the wrong element of the evidence assessing formula. The formulation emphasises the rational intellectual aspect of

evidential choice whereas at this level belief plays a much more significant role. It is submitted that the question to be asked by the fact finder when assessing the evidence is not whether a reasonable doubt exists as to whether the accused's guilt has been proved. The question the fact finder must ask himself is whether he is convinced beyond a reasonable doubt that the accused is guilty.

The distinction, it is submitted, is crucial to the evidence assessing process. It is submitted that the approach of Malan, J A assumes that the fact finder is provisionally satisfied that the guilt of the accused is established and then embarks on an intellectual mission to displace such conviction by looking for facts that displace such a conviction. The approach is improper, since, it is submitted, it is human nature to cleave to what we have accepted as true and to expect that a human being will voluntarily admit an error of belief and concede it to the benefit of another is to be impractical at the very least. Furthermore it would be relatively easy for the fact finder to find, quite bona fide, such doubt as he finds that is present, is not reasonable.

The correct procedure is for the fact finder to assess the totality of the evidence presented and then to ask himself whether he is satisfied beyond a reasonable doubt of the guilt of the accused. It is not enough for him simply to find that a reasonable doubt exists. He must find that he is convinced beyond such a reasonable doubt. If he is not so convinced, he must acquit. The fact finder must decide on the existence of a doubt before he makes the final determination that he is persuaded of the guilt of the accused, not after he has made a provisional finding that he is persuaded.

## 2.6 Conclusion

It is remarkable to note how, in all three systems under review, the concept of proof beyond a reasonable doubt has been an unruly horse that has refused to accept the bridle of formal definition. It is also remarkable that the response of commentators and courts to the skittishness of the concept has been similar. The commentators have avoided formulating a definition and the courts have interdicted attempts at definition. In all three legal systems, the fact finder is let loose on an uncharted sea of confusing conceptions and required to negotiate that sea as best as he can.

South African law has certainly followed the example of the two most important common-law jurisdictions in the world and can certainly not be accused of being remiss in this context. This, however, does not mean that an attempt should not be made to define this standard more precisely. To accept that a standard has to be used and then to say that standards should not be defined at all is to postulate a contradiction in terms. It borders on the arbitrary. To say there is a standard of proof beyond a reasonable doubt and in the same breath say it cannot be defined at all means that it is not a standard at all. It may simply mean that the decision is made on the subjective assessment of the factfinder. This begs the question whether it can therefore be said that the finding of guilty of an accused can be regarded as based on rationality.

FOOTNOTES

1. Klotter Criminal Law (1983) 2-3.
2. Sales 1.
3. Fellman The Defendant's Rights Today (1976) 4.
4. Fellman 4; see also Sales 115-117.
5. McCormick 798.
6. Sales 145-148; Nicholas "Credibility of Witnesses" 1985 SALJ 32 et seq..
7. McCormick 798; see Lord Mansfield dictum in McNally Tenderness Ought 535; see also Bassiouni, quoting 22 C J S Crim 581 (1961) that "The principle that a person is presumed innocent until proved guilty beyond a reasonable doubt is founded upon 'the first principles of justice and is intended not to protect the guilty but to prevent, so far as human agencies can, the conviction of an innocent person'; "One of the fundamental feelings of our society is that it is far more serious to convict an innocent man than to let a guilty man go free" Kaplan "Decision Theory and the Factfinding Process" 1967-68 Stanford Law Review 1065 1073.
8. Spenser v Randall, 357 US 513, 525-526
9. "It is the duty of the Government to establish his guilt beyond a reasonable doubt. This notion - basic in our law and rightly one of the boasts of a free society", thus thundered Frankfurter, J in dissent in Leland v Oregon, 353 US 790 802-803.
10. "The standard of proof defines the degree of persuasiveness which a case must attain before a court may convict a defendant..." Murphy & Barnard, 6.
11. "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which by long experience in the common-law tradition to some extent embodied in the Constitution, has crystallised into rules of evidence consistent with that

standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property". The US Supreme Court in Brinegar v United States, 338 US 160 174; "The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on fatal error". US Supreme Court In re Winship 397 US 357 363; "But by increasing the total of mistakes, it is supposed to decrease not only the proportion but the absolute number of one kind of mistake - 'conviction of the innocent". Ball "The Moment of Truth : Probability Theory and Standards of Proof" 1961 van der Bilt Law Review 807 816.

12. See Hallo & Kahn, South Africa 26-29.
13. Cross - Evidence 102.
14. Ninth Decimal Digest. Part I. 1976-1981, vol. 11, 959-970.
15. McCormick 800.
16. See Associate Justice Brennan's reliance on McCormick and Wigmore for the proposition that proof beyond reasonable doubt is now the accepted degree of proof required in criminal cases amongst the common law jurisdictions; see In re Winship 397 US 358 361.
17. Reynolds The Theory of the Law of Evidence as Established in the United States and the Conduct of the Examination of Witnesses. (1905).
18. McCormick 800.
19. "The effort to perpetuate and develop these elaborate unservicable definitions is a useless one, and serves today chiefly to aid the purposes of the tactician. It should be abandoned", Wigmore A Treatise on the Anglo American System of Evidence in Trials

at Common Law. 3 ed. vol. 9 319-320.

20. “To experienced lawyers it is commonplace that the outcome of a lawsuit - and hence the vindication of legal rights - depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied”, Spenser v Randall 357 US 513-520.
21. They are quoted with approval in cases in the lower courts and right up to the highest courts, see In re Winship which has already been referred to; “It has been quoted by Wigmore and therefore by some courts, with apparent approval”, Ball The Moment of Truth : Probability Theory and Standards of Proof. 807 824.
22. Goldstein, “The Grate and the Accused : Balance of Advantage in Criminal Procedure 60. Yale Law Journal 1149 1161.
23. Bassiouni Criminal Law and its Processes : The Law of Public Order, (1969) 327.
24. Nesson 92 Harvard Law Review 1187 1196-1197.
25. Ball The Moment of Truth : Probability Theory and Standards of Proof 829-830.
26. Ball 830.
27. Twining Legal Theory and Common Law (1986) 69.
28. Winter & Ralph 342.
29. “... and herein is given opportunity for much vain argument whether the strands of a cable or the links of a chain furnish the better simile for testing the measure of persuasion”, Wigmore 324.
30. The reduction of the risk of conviction and imposition of a sanction upon an innocent person; “... I view the requirement of proof beyond a reasonable doubt in a criminal

case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”, In re Winship supra 372; see also Coffin v United States 156 US 432 455-456.

31. Miles v United States 103 US 304 312.
32. Coffin v United States 156 US 432
33. Coffin’s case 460.
34. See Wigmore 322.
35. 218 US 245.
36. Idem 254.
37. Holland v United States 348 US 121 140.
38. In re Winship 364.
39. In re Winship 369.
40. “Instead, all the fact finder can acquire is a belief of what probably happened. The intensity of this belief - the degree to which the fact finder is convinced that a given act actually occurred - can, of course, vary. In this regard, a standard of proof represents an attempt to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication”, In re Winship 370.
41. Stone 355.
42. Cross & Tapper Cross on Evidence (1985) 142.
43. Elliott Phipson and Elliott : Manual of the Law of Evidence (1980) 71.
44. Howard Crane & Hochberg Phipson on Evidence 14ed (1990) 74-75.
45. Murphy A Practical Approach to Evidence. (1980). 77.
46. Heydon Evidence : Cases & Materials. (1984) 31.

47. May Criminal Evidence. (1986) 55.
48. For example see Carter, 59.
49. Cross on Evidence "In 1958 Rupert brought out Evidence, his major work. It broke new ground and became the standard work not merely in Britain, but throughout the English speaking commonwealth. It established those concerned with law reform. Many an English judge kept it by his side at court and some, not finding the answer in the book, would even ring Bear's Hill to consult Rupert. Probably no living author has been so often cited by English judges in his own lifetime"; Honore "Alfred Rupert Neale Cross" XXII in Crime, Proof and Punishment - Essays in memory of Sir Rupert Cross; Twining Legal Theory and Common Law. (1986) 69.
50. Cross and Tapper 143-148.
51. Carter 59.
52. Cross and Tapper 144.
53. In fact most people who are legally qualified and who presumably would be best able to make the informed factual choices necessary in judicial decisionmaking are either disqualified or exempted from jury service; see Smith, Kenneth and Keenan, Denis English Law 7ed (1982) 50-51; see Lord Kilbrandon's introduction to Stone's work VII; see also Carter, 4; see also Willis 20; Hampton "The most important factor is perhaps the trial by a jury of '12 people of average ignorance' or, at any rate, with no previous training for or experience in the function which they have to perform".
54. Walker Walker & Walker : The English Legal System (1985) 564.
55. May 23; Smith & Bailey The Modern English Legal System (1984) 604; Eddey The English Legal System. 3 ed. (1982) 32-34; Woolmington v Director of Public Prosecutions 1935 AC 462 480; Mancini v Director of Public Prosecutions 1942 AC

1 13.

56. “Adjudicative fact finding smacks then of being an historical investigation carried out by untrained investigators required to act upon non-expert sources of information presented by biased protagonists, these untrained investigators being required to reach a decision which will be final and binding, to so regardless of the adequacy of the evidence and to do so quickly”, Carter, 4.
57. Cross quoted by Hawkins, Proof Beyond a Reasonable Doubt 5.
58. Williams, The Proof of Guilt 3ed (1963) 4.
59. Nokes An Introduction to Evidence. 4 ed. (1961) 491.
60. Nokes 492.
61. Eggleston, Evidence, Proof and Probability. 2 ed. (1983) 33.
62. Eggleston 114-115.
63. Eggleston 116.
64. Stone 354-355
65. Stone 354.
66. Eddey 53; Kiralfy The English Legal System (1984) 11.
67. Hampton 2.
68. Eddey 58; see also Hampton, Criminal Procedure 3 ed. (1982) 381-398.
69. Eddey 59.
70. Eddey 64.
71. Eddey 63.
72. Lord Denning. The Closing Chapter (1983) 46.
73. Smith & Bailey 280.
74. Smith & Bailey 296; Smith, Law and the Legal System. (1979) 11.

75. Smith & Bailey 285.
76. Smith & Bailey 278-306; see Radcliffe & Cross. The English Legal System 6 ed (1977) 371; Smith 11-18, 33-41; Tapper Cross on Evidence 144; “Most reversals on appeal are for misdirection. Under our system, the judge must give a full direction to the jury on both the law and the facts, and he does so on the conclusion of the evidence, with little or no time to prepare his summing-up in written form. In a complicated case there is quite a possibility that the judge will make some error of commission or omission, and such an error will be seized on in an appeal. If the error is one that may have misled the jury, a conviction will be quashed...”. Glanville Williams 327; May 41.
77. 1935 AC 462.
78. Woolmington’s case 473.
79. idem 481.
80. Miller v Minister of Pensions 2 1947 A11 ER 372.
81. Jowell & McAuslan Lord Denning : The Judge and the Law (1984) 5-25; Robson & Watchman Justice, Lord Denning and the Constitution (1981) 1, 33.
82. Miller’s case 373.
83. May 55. Nokes 491.
84. Williams The Definition of Crime - Eight Current Legal Problems (1955) 107 108-109.
85. See Eggleston 8.
86. “As this case illustrates, it is impossible to specify any particular mathematical level of probability which must be achieved before a verdict of guilty can be returned in a criminal case”; Eggleston 114.
87. Eggleston 114.
88. Stone 354.

89. R v Kritz, 2 1949 A11 ER 406 410. “It is not the particular formula of words that matters. It is the effect of summing-up. If the jury are made to understand whether in one set of words or in another, that they must not return a verdict against a defendant unless they feel sure of his guilt and that the onus all the time is on the prosecution and not on the defence, then, whether the judge uses one form of language or whether he uses another is neither here nor there”.
90. Buzzard Phipson on Evidence. 61.
91. Cross & Tapper 144; Regina v Hepworth and Fearnley, 2 1955 QB 600 603.
92. idem 603.
93. May, 58; note May’s book was published in 1986 and states English law as at 1st January 1986.
94. Cross & Tapper 145.
95. “In the last two decades there have been numerous cases before this court, some of which have been successful, some of which have not, which have come here because judges have thought it helpful to a jury to comment on what the standard of proof is”, Lawton in R v Ching (1976) 63 Cr App R 7 (CA) quoted by Murphy & Beaumont. Evidence : Cases and Argument (1982) 95; see also Cross & Tapper 144-145.
96. R v Yap Chuan Ching (1976) 63 Cr App R7 (CA).
97. R v Yap Chuan Ching 10.
98. R v Yap Chuan Ching 11.
99. It is difficult to understand the ratio which lies behind Tapper and Cross’ allegation that “No precise formulae have been laid down with regard to the standard of proof required for the discharge of an evidential burden, as this is not a matter upon which it can ever be necessary for a judge to direct a jury, there is no reason why it should ever become

the subject of formulae”; Cross & Tapper at 140. In Chung’s case for example, the jury requested specific direction as to the requisite standard. Whilst no single precise formula has been laid down by the courts, it certainly is incorrect to aver that the formula has not been formulated because the need therefore can never arise. The need, it is submitted, arises daily whenever criminal courts sit; see Hampton, Criminal Procedure. 3ed (1982) 226 and footnote 8.

100. R v Yap Chuan Ching is a decision of the Second Highest Criminal Court. Therefore absent a judgment of the highest court, its judgments bind all other courts and constitute the law of England; see Duhawel and Smith Some Pillars of English Law (1959) 13.
101. 1936 SALJ 9 Lansdown & Campbell 909; Ex parte Minister of Justice In re v Bolon, 1941 AD 345 350.
102. R v Mlambo 1957 (4) SA 727 (AD) 737 F-G. As Hemstra J. has put it when discussing another cherished principle of law, “we acquit too many people who are not as noble as the principles behind which they shelter themselves” 80 SALR 190.
103. Lansdown & Campbell 909.
104. Joubert 340; Hoffman & Zeffertt 409; Schmidt 86; Snyman & Morkel 26; Schmidt “Die Bewyslas” 1964 THRHR 36; Bohm, Lothar & Taitz, “The DNA Fingerprint: A Revolutionary Forensic Identification Test” 1986 SALJ 662.
105. Joubert 340.
106. Lansdown and Campbell 909.
107. Hoffman & Zeffertt 409.
108. Stone 354-355.
109. Schmidt 88-89 shows conclusively how untenable statistical reference is when the question of proof is canvassed.

110. Watermeyer, J.A. in R v Blom, 1939 AD 188 204.
111. “Met die bewysmaatstawwe word getrag om oortuiging op sekerheid te meet. Die graad van oortuiging wat die getuienis wel, kan van geval tot geval wissel, oortuiging kan ‘n meerdere of ‘n mindere mate van twyfel insluit. Mens kry nou met ‘n maatstaf te doen wat die maksimum toelaatbare twyfel aandui, sodat die vereiste minimum graad van oortuiging daarvan afgelei kan word”, Schmidt, Bewyslas 420.
112. Lansdown & Campbell 909; Hoffman & Zeffertt 409.
113. Spiller 28.
114. Spiller 27-28.
115. Spiller 28.
116. Hoffman & Zeffertt 410. Juries were abolished in South Africa in terms of the Abolition of Juries Act 34 of 1969.
117. “Thought a trial, the judge is responsible for instructing the jury on various topics. These instructions may be divided into instructions that elucidate the respective roles of the judge and jury during the cause of the trial and instructions about the substantive law that will guide the jury in weighing the evidence and reaching a decision”, Sales 34-35.
118. Schmidt Bewysreg 86, 419.
119. Schmidt Bewysreg 87.
120. 1925 AD 245 262-163.
121. 1933 AD 56 75.
122. 1939 AD 188.
123. 205.
124. As Tindall JA shows in Bolon’s case, 352 “proof by a preponderance of probabilities”

is a test with which to assess the evidence in civil matters. By the same token “proof beyond a reasonable doubt” is the applicable test in criminal matters.

125. 1939 AD 150.
126. 154-155.
127. 1952 (3) SA 574.
128. 577 D-E.
129. R v Boya 577 F-H.
130. see R v Ramana 1952 (1) 397 AD 399 A-B.
131. R v Mlambo 1957 (4) SA 727 (AD) 737G-738A.
132. Lansdown and Campbell 909.
133. S v Britz 1963(1) 394(TPD) 397 F.
134. R v Bergstedt 1955(4) SA 186 (AD) where it was held that far fetched or trifling doubts need not be excluded obviously because such doubts would not be reasonable.
135. R v Mlambo 738 A-B.

## CHAPTER 3

### THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT: ITS HISTORICAL EVOLUTION

#### 3.1 Introduction

In common with many great principles of law which have exercised an incalculable influence on the development of law, the genesis of this great principle of the common law seems to be lost in the hazy mists of antiquity.

#### 3.2 The principle of proof beyond a reasonable doubt in English and American law

There is a healthy difference of opinion among commentators and writers on the origin of this principle. What writers seem to agree on is that the principle is of English common-law origin.<sup>1</sup> Even English criminal procedure required a jury of 'presentment' to identify wrong doers in the community. These then appeared as charged before the same jury. There was thus a presumption of guilt rather than innocence. It was perhaps because of this mindset that may have made it unnecessary to think of proof beyond reasonable doubt as being an issue in the trial.

Precursors of the rule may be found in various ideas and rules of great antiquity. Thayer traces the ancestry of the rule to the 4th century B.C.<sup>2</sup> However, Thayer is incorrect in equating the presumption of innocence with the reasonable doubt rule<sup>3</sup> for the presumption of innocence is a tactical rule aimed at the proper allocation of the onus probandi<sup>4</sup> at the trial in respect of issues

raised whereas the reasonable doubt rule is an evidence-evaluating rule aimed at prescribing the quality and quantity of evidence required to be adduced to enable the state to succeed.<sup>5</sup> Viewed in this light, the reasonable doubt rule was unknown in Roman law and the other sources that Thayer mentions. All that can be said for Thayer's assertions, it is submitted, is that the ideas expressed in the sources mentioned by him plus the absence of fairness of the criminal process and the savagery of sentences that were meted out to an accused's person in a court of law, highlighted the plight of an accused person in a court of law and induced the acceptance of the ameliorative reasonable-doubt doctrine when reform of the criminal process and criminal law finally came about.<sup>6</sup>

According to May<sup>7</sup> the principle first surfaced as a definite rule of law in McNally's book published in 1802.<sup>8</sup> According to McNally:

It may also, at this day, be considered as a rule of law, that, if the jury entertain a reasonable doubt upon the truth of the testimony of witnesses given upon the issue that they are sworn well and truly to try, they are bound in conscience to deliver the prisoner from the charge found against him in the indictment, by giving a verdict of not guilty.<sup>9</sup>

McNally averred that the principle was stated and fully adopted by the court in the treason trials that took place in London in 1794 and in Dublin in 1798.<sup>10</sup> Unfortunately McNally does not give a report of the London trials. He gives a short report of one Dublin Trial<sup>11</sup> and devotes a paragraph to another.<sup>12</sup>

In any event McNally incorrectly understated his case. He asserts that the dictum comes down from Sir Edward Coke in favorem vitae but quotes no authoritative dicta from the judgments and writings of Sir Edward Coke to support his assertion. McNally is then driven to infer the dictum from Sir Edward Coke's published dicta by implication.<sup>13</sup> It is submitted that this inference of authority by implication is shaky ground upon which to assert the authority of a legal rule even if the inference he makes is correct, and it is submitted that it is not.

McNally, it is submitted, is also incorrect in asserting that the dictum was applied in the trials of London and Dublin. He gives no account on the London trials. He gives a somewhat complete report of the Dublin case of the King v Patrick Finny held in Dublin in January 1789. In that case, McNally reports himself to have argued before the jury that if the jury had a doubt, not a reasonable doubt, it should acquit the accused. He reports himself as having gone on to argue in his florid extravagant manner that: "... doubt and acquittal might be considered synonymous terms".<sup>14</sup>

In his charge to the jury, Chamberlain J B R, reportedly stated:

... and if there be a doubt, I take it to be a clear maxim, founded in humanity as well as law, that you must acquit the prisoner.<sup>15</sup>

In the same case, Smith B concurred with Chamberlain J B R and went further:

... but I will go further, and say, if you have a doubt upon that question, if your minds be in a state of oscillation, you ought in that case to acquit the prisoner;

because to justify a verdict of conviction to yourselves and to your country, the evidence upon which you decide should be above exception, and not evidence upon which you entertain any doubt.<sup>16</sup>

Very clearly the judges in Finny's case respectively held that if there was 'a doubt' or 'any doubt' the jury ought to acquit. The mandate to acquit in case of doubt was a very wide one. McNally's introduction of the qualificative 'reasonable' qualified and restricted the mandate and on the face of it was not based on any available authority at the time.

In Bon's case, decided in Dublin in July 1798, Chamberlain J reiterated the law in the following terms:

However trite it may be, I must remind you of the principle founded in humanity that if you have any rational doubt, then, as fair and honourable men, you must acquit.<sup>17</sup>

It is to be noted that Chamberlain referred to the principle of 'rational doubt', as being trite, not the principle of 'reasonable doubt'.

It seems that at the time McNally wrote, the extremely wide mandate of unqualified 'doubt' or the impossibly wide mandate of 'any doubt' had been restricted to the logically manageable standard of 'rational doubt'. This seems to imply that the doubt had to be predicated on matters relevant and logically pertaining to the issues at stake in the trial. There had undoubtedly been a restriction of the mandate but there was certainly no requirement that the doubt should be

reasonable.<sup>18</sup>

*Reasonable and rational are not the same. They cannot be employed interchangeably. Rational as defined by Webster Third New International Dictionary means the proper employment of the processes of logic to arrive at a conclusion. Reasonable connotes a value judgment passed upon a conclusion. The conclusion might be irrational in the sense of its not being consonant with logic but reasonable in so far as it is in agreement with right thinking or right judgment.*

The expression does, however, appear in McNally's book. In the case of the King v Messenger, Appletree and Others,<sup>19</sup> decided in the Old Bailey, London on June 20th, (it is not clear in the report when this trial took place) the question arose whether the accused was a principal in the second degree (that is an accomplice) because he had incited rioters who were bent on committing treason. The question turned on the correct interpretation of the applicable statute. Lord Mansfield held that:

*Tenderness ought always to prevail in criminal cases so far at least as to take care that a man may not suffer otherwise than by due course of law; nor have any hardship done him, where the construction may admit of a reasonable doubt or difficulty.*<sup>20</sup>

As mentioned, the question pertained to an interpretation of a statute by a court and not on a finding of fact by a jury. The dictum seems therefore to be a rule of interpretation of statutes the purport of which seems to be that when a court entertains a doubt about the meaning of a statute, then it must adopt the meaning most favourable to the accused person. Certainly, it is submitted,

the court was not addressing itself to the necessary standard of conviction of a jury on evidence laid before it, before it could return a verdict of guilty against a defendant.

It is submitted that May misinterpreted McNally and failed to grasp the point of McNally's book. Even after reviewing the contemporaneous cases and noting that the judges in those cases referred to 'rationality', of doubt as the applicable standard, May continued to propound the view that McNally originated the concept of reasonable doubt and failed to show that McNally was wrong and that his views did not reflect the law of the day. Therefore Nokes is incorrect when he says that the rule requiring the state to prove the guilt of the accused beyond a reasonable doubt is 'a little older' than the 19th century.<sup>21</sup> Similarly, Wigmore is wrong in saying that the rule had its origins "... no earlier than the end of the 1700's...".<sup>22</sup> McCormick's view that "(T)he demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, but its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798"<sup>23</sup> can also not be accepted. It is submitted that in 1798 while a formula existed, the formula was certainly not 'beyond a reasonable doubt'. It is an oversimplification and a misreading of history to make such an allegation.

It is further to be observed that McNally's rule would seem to be directed at the effect that evidence has in the mind of the jury that evaluates such evidence. The rule casts no positive duty on the state to lead evidence of such quality and quantity that the desired state of mind in the jury is brought about.

According to Bassiouni,<sup>24</sup> the term 'reasonable doubt' was not employed until 1820 in the case of the King v Burdette.<sup>25</sup> The phrase that Bassiouni quotes, however, appears at page 898 and not

on page 904 of the report. However, Bassiouni is correct to the extent that the phrase 'reasonable doubt' appeared in a judgment of a court. As has been shown, the phrase had already been used by McNally in his commentary.

A far more important factor is the fact, it is submitted, that the phrase, in the context in which it was used in Burdette's case, did not constitute the ratio decidendi<sup>26</sup> of the case.

The facts in Burdette's case were that the defendant, Sir Francis Burdette had composed a letter of protest against the actions of the King's soldiers at the town of Manchester. The soldiers had apparently charged civilians and killed a number and wounded some including women. The letter expressed outrage at such actions and called for a meeting to protest and to demand justice. The letter was discovered and the baronet was charged with criminal libel. He defended himself but was convicted of the charge.

The baronet then made an application for a new trial. The issue was whether Sir Francis Burdette had been correctly tried, that is, whether the court that had tried him had had jurisdiction; whether the court had incorrectly charged the jury and whether the proved facts constituted the offence charged.

Sir Francis had not given evidence at the trial, so there was no question of comparing the relative evidential worth of two conflicting versions. It is submitted that the question of the standard of proof applied in the foregoing criminal trial whose verdict was being attacked was irrelevant. In fact the matter of the standard of proof required was not raised by the applicant.

The court also obviously never intended to lay down any precedent. Abbott, C.J. signified his intention thus:

“I have thought it right to premise these general observations, before I consider the particulars of the evidence in the present case...”<sup>27</sup>

Quite clearly the court’s remark about ‘reasonable doubt’ was intentionally and deliberately obiter.

It was left to Starkie in 1824 to adumbrate that in a criminal trial the guilt of the accused must be “... a moral certainty, to the exclusion of all reasonable doubt”.<sup>28</sup> Fifty years later May was scathing in his criticism of Starkie, accusing him of enlarging upon the ‘reasonable doubt’ rule without judicial authority.<sup>29</sup> May’s criticism was justified in as much as no court had then ever held that the guilt of an accused person must be a moral certainty. However, May was making the same mistake in 1876 as that which Starkie had made in 1824 in assuming without compelling authority that the courts were already applying the ‘reasonable doubt’ test in criminal proceedings in America. Starkie in 1824 had advanced no evidence of the acceptance and use by the courts of the test. May, could not, 50 years later, advance any evidence that 50 years earlier the courts ‘in America at least’ had been applying the test in 1824 when Starke wrote his treatise. There is no evidence to convince either way.

It must be remembered that the American courts took their cue from their English counterparts in matters of public law.<sup>30</sup> According to Cross it was in 1858 when the distinction between standards of proof in civil and criminal cases was drawn crisply.<sup>31</sup> Cross, however, does not say

that that was the first time that such a distinction was drawn in England. One is left in doubt when in fact the distinction started to be drawn and when in fact in the common law of the mother country, it became law that the state must prove the guilt of the accused beyond a reasonable doubt. The best Cross can do to enlighten us on the subject is to state that:

The general rule that the prosecution bears the burden of proving the accused's guilt beyond reasonable doubt came to be firmly established in the second half of the 19th century...<sup>32</sup>

Nokes agrees with Cross that the rule that the state should prove the guilt of the accused beyond a reasonable doubt became well established during the 19th century.<sup>33</sup> Nokes<sup>34</sup> avers that there was very little earlier authority, that is, earlier than 1865, that the state had to prove the guilt of the accused beyond a reasonable doubt.

As has been demonstrated, before 1865, the phrase "reasonable doubt" had surfaced at the beginning of the 19th century but had hardly solidified into a rule of law. Its meaning and its role in the evidential process were ambiguous.<sup>35</sup> It was only in 1865 that it appeared as a definite rule of law in a reported decision.<sup>36</sup>

In White's case, members of the crew of a ship, including the captain, were charged with scuttling the ship with intent to obtain some pecuniary advantage for themselves and others. The court stated that:

This case is reported entirely for the sake of this clear and decided declaration of

the real rule of law, as to the sufficiency of proof in criminal cases; and it deserves the more significance and importance, because at a very remarkable trial at a previous session of the court, the case of *R v Muller* at which Pollock, C B and Martin, B sat, and the former charged the jury, certain doctrines were laid down which would appear to involve a departure - or at all events great danger of a departure - from the old, safe, well established rule, which on this occasion Martin B, took care to lay down. So well established is it, indeed, that no judge would probably in plain terms dissent from or dispute it but of late years there has been observed a dissatisfaction with its practical results in some cases, and its tendency to secure acquittals in cases of capital crimes, and a disposition practically to get rid of it either by controverting its necessary corollaries or consequences, or by a somewhat too strained construction of it; or, on the other hand, by the substitution for it of a much looser rule.<sup>37</sup>

The rule that the court was referring to was the rule as stated by the court in the head note that:

In a criminal case the jury, in order to convict, ought to be satisfied that by the evidence, affirmatively, as a conviction created in their minds beyond all reasonable doubt that the guilt of the prisoner is established, and, if there is only an impression of probability, they ought to acquit him.<sup>38</sup>

From a careful reading of a judgment in White's case, the present writer is of the view that Martin B who delivered the judgment, was continuing an argument he had had with Pollock C B, in a previous case of Rex v Muller decided by the same court. Unfortunately the judgment

in Rex v Muller could not be traced and it seems that it is unreported. However Martin B's statement that White's case was being reported "... for the sake of this clear and decided declaration of the real rule of law..." is the clearest indication of a difference of opinion among the judges.

Martin B's judgment is clearly that there was a move among the judges to get rid of the rule or to water down its effect. According to him this move had begun after the 1844 case of Belaney which had been tried by Gurney B. According to Martin B the rule had been laid down by every judge from Hale to Gurney. This assertion must, however, be taken with a pinch of salt. Sir Matthew Hale, to whom Martin B is probably referring was a judge from 30 January 1653 to 21 February 1676.<sup>39</sup> No reference in any source can be traced of a case tried by Sir Matthew Hale in which the rule was applied nor can Martin B himself furnish any source for the assertion that the principle of proof beyond a reasonable doubt was applied by Sir Matthew Hale.<sup>40</sup>

No authority is available that shows that any other judge applied the principle except in the assertion of McNally which has already been referred to. It is strange indeed that Martin B makes no reference to McNally's book which must have been available to him<sup>41</sup> since it had been published in 1802 and since reference had been made in it to the principle of proof beyond a reasonable doubt. Martin B's assertion that Gurney B had applied the principle in Belaney's case is invidious because the quotation from that case which he provides clearly shows that Gurney B instructed the jury to convict only if there was conclusive proof and to acquit if they were in doubt. Martin B's assertions that the principle of proof beyond a reasonable doubt dated from Sir Matthew's time and was applied by every judge until 1844 therefore appear to be exaggerated and are more of an advocate's brief, advancing a particular version of an argument than an

impartial assessment of the facts.

Whatever the position may be, White's case is the first reported case where the court required as a matter of law that the jury must be satisfied beyond a reasonable doubt of the guilt of an accused person before a jury may legally convict a person of a crime. Furthermore although Nokes<sup>42</sup> avers that the rule has been restated by the House of Lords in Woolmington's case, it is submitted that in fact the Lords were laying down the rule authoritatively for the first time. May<sup>43</sup> is of much the same view except that he states that the House of Lords "firmly established" the rule in the Woolmington case. (In so far as the statement may be interpreted to mean that the rule was already being used but not generally accepted).

The authority for "any" or "all" reasonable doubt is ambiguous. In White's case, the headnote reads that the jury must be satisfied beyond "all" reasonable doubt but the judgment itself reflects that Martin B directed the jury to convict only if the accused's guilt was proved beyond "any" reasonable doubt.<sup>44</sup> However, it is submitted that nothing turns on "all" or "any". Both are absolutist terms that serve to express the weight of and elevate proof in criminal cases above a simple consideration of probabilities to the realm of moral conviction. In any event, when it came to lay down the law in Woolmington's case, the House of Lords only required that the accused's guilt be proved only beyond "reasonable doubt"<sup>45</sup> not beyond "all" or "any" reasonable doubt. The effect of this is, it is submitted, that the onus borne by the state, while heavier than that borne by the plaintiff in a civil matter, is not unreasonably heavy.

### 3.3 The rule in South African law

During the early days of colonisation in South Africa, most judges received training in English law, and it is obvious that such judges would apply English law as it applied in England. It seems that South African courts were slow to follow the example of English courts in applying the test of proof beyond a reasonable doubt. In Queen v Jakkals<sup>46</sup> decided on 7 June 1883, the accused was convicted by a magistrate of stock theft. On appeal, the version of the accused was adjudged not to be unreasonable. In the language of the day, it was held that to justify a conviction, the state's evidence "... must be reasonably inconsistent with a prisoner's innocence".<sup>47</sup>

In Queen v Benjamin<sup>48</sup> decided on 21 September 1883, the two appellants were charged with assault. They pleaded not guilty but were convicted and sentenced. The state evidence was contradictory but notwithstanding the contradictions, the magistrate had convicted the accused.

The court held on appeal:

... there should not be a conviction unless the crime charged has been clearly proved to have been committed by the accused. Where the evidence is not reasonably inconsistent with the prisoner's innocence, or where a reasonable doubt as to his guilt exists, there should be an acquittal.<sup>49</sup>

Thus the test was extended from "reasonable inconsistency with the accused's guilt" to include the presence of reasonable doubt.<sup>50</sup> However, the test was still not whether there was proof beyond a reasonable doubt but whether the fact finder's conviction on the evidence excluded a

reasonable doubt.

In Queen v Boo<sup>51</sup> it was held that:

Where the conflict of evidence in a criminal case is so great as to raise a considerable doubt, the prisoner ought to receive the benefit of such doubt.<sup>52</sup>

Unfortunately the decision could not be traced in Buchanan's Eastern District Court reports. The report as reflected in the Cape law journal is unfortunately too truncated and brief to give one a coherent picture of the case and its ratio decidendi. But in so far as it emphasises the quantum of doubt, instead of the quantum of proof, it seems not to reflect the law correctly even for those early days of South African legal development.

In Queen v Van Ryn and Another<sup>53</sup> decided on 2 December 1889 the appellant was charged with having contravened the Diamond Trade Act in that she and her lover had dealt illicitly in diamonds. There was evidence that she had handled the diamonds in question but there was not sufficient evidence to show that she had had knowledge that in the circumstances in which she handled the diamonds such handling constituted an offence. De Villiers held that there must be "a clear proof of every material fact necessary to sustain a conviction".<sup>54</sup> Thus it is clear that while the Eastern Cape Division applied a test which was similar to the modern test of proof beyond a reasonable doubt, the Supreme Court of the Cape of Good Hope was satisfied with "clear proof".

In R v Daniels,<sup>55</sup> the court reverted to the test of "reasonable inconsistency" with the accused's

innocence. In R v Swarts<sup>56</sup> the accused was charged with theft. The evidence was that the accused had taken a purse which belonged to somebody while the accused was moderately under the influence of liquor. The accused had put the purse in his pocket and had produced the purse, with the contents untouched, when he was called upon to do so. He was convicted by the magistrate but on appeal the conviction was set aside, the judge holding that:

... under all the circumstances there seems to me to be such a reasonable doubt in his favour that I think the magistrate should have given him the benefit of that doubt...

Again the court seems to emphasise the quantum of doubt and creates the impression that if there had been a lesser degree of doubt, even though it was reasonable, a conviction would have passed muster.

In R v Stuurman Botes<sup>57</sup> the accused was charged with theft of a sheep. The evidence against him consisted of spoor evidence. The accused's spoor was identified by a nine (9) year old witness. The magistrate convicted and sentenced the accused. On appeal the court held that on the facts there was a doubt and the accused ought to have been given the benefit of the doubt and acquitted. It is to be noted that the court speaks of a doubt simpliciter. The court makes no mention of the qualificative of "reasonable". Prima facie, therefore all manner of doubt, including unreasonable or far fetched doubt entitled an accused person to an acquittal in terms of this decision.

In R v Jellimen<sup>58</sup> decided on 26 May 1905, the appellant who was a hotel keeper was accused of

selling spirituous liquor to a black person in contravention of Proclamation 104 of 1903 which proscribed such supply. The state relied on the evidence of a single witness whose evidence was contradicted by the evidence of six or seven witnesses. The magistrate accepted the evidence of the single witness and convicted the appellant. On appeal the conviction was set aside by the supreme court of the Cape of Good Hope. According to the digest of supreme court cases of the Cape Colony published in the South African Law Journal in 1905<sup>59</sup> the ratio for the setting aside of the magistrate's judgment was that the Crown had not discharged its onus "... to prove its case beyond a reasonable doubt".<sup>60</sup>

It would appear that in the Cape Colony at least, the principle that the state must prove the guilt of the accused beyond a reasonable doubt had been accepted as law as early as 1905. However, the conclusion is debatable because the report of the case in the South African Law Journal is very brief and amounts to no more than a synopsis or precis of the actual judgment. The report in the Cape Times Reports is much more complete and much more convincing as the authentic record of the case. However, in the CTR version of the judgment in Jellimen's case, no reference is made to proof beyond a reasonable doubt. The nearest Buchanan A C J came to laying the standard of proof was when he stated that "... I think the magistrate would have acted with better discretion if he had acquitted the accused".<sup>61</sup>

It is submitted that although it seems that the court did not employ the test of proof beyond a reasonable doubt, the very fact that the commentator who wrote the commentary in the South African Law Journal appears to have thought that the court had used the phrase, indicates that the phrase had already found favour with the court and was in current use by 1905 in the Cape Colony.

In the Transvaal, it seems that by 1907 the principle that where there is a doubt the accused must be given the benefit thereof, was acknowledged as law. In O'Connor v Rex<sup>62</sup> decided on 24 June 1907, the appellant was accused before and convicted by the assistant resident magistrate of theft of a bicycle. The Crown's case rested on the evidence of a single witness whose testimony was contradicted on oath by the accused. On appeal a divided court reversed the decision. Innes C J and Smith J upheld the appeal. Curlewis J was of the view that the appeal should be dismissed. However, although he was in a minority Curlewis J's dissenting judgment is valuable in that it laid down that "...it is not as if the magistrate had lost sight of the principle of our law, that where there is doubt, the accused should get the benefit of it...".<sup>63</sup>

One must accept that in the Transvaal by 1907 it was law that if the trier of fact had a doubt, the benefit thereof had to be given to the accused. However, no standard was laid down as to how much doubt had to exist in the mind of the fact finder. Innes C J merely talked of a "doubt",<sup>64</sup> Smith J talked of a "... very grave doubt as to the guilt of the accused",<sup>65</sup> and Curlewis J talked of a "doubt" simpliciter. None of the judges was forthcoming as to the degree of doubt that was required in law to entitle an accused person to an acquittal.

No direct authority on the applicability of the rule of sufficiency of evidence in criminal matters before the advent of Union can be found in the case law of Natal and the Orange Free State. However, the consensus of academic opinion is that Natal followed the Cape's example because "The structure of the criminal courts and the systems of criminal procedure and evidence in Natal were modelled on those of the Cape".<sup>66</sup> According to Snyman and Morkel "Die geskiedenis en ontwikkeling van die strafprosesreg in die Transvaal het hom feitlik net so in die Vrystaat herhaal".<sup>67</sup>

With the coming of Union, the Union Act of 1909 created a well-defined and authoritatively structured system of courts. The appellate division, standing at the apex of the structure was effectively the highest court in South Africa. Since all decisions of the appellate division are binding<sup>68</sup> on all courts in South Africa, it follows that acceptance by the appellate division of the principle of proof beyond a reasonable doubt would automatically mean applicability of the principle in all courts in South Africa.

In Rex v Dube<sup>69</sup> the court declared itself unequivocally in favour of the reasonable doubt approach. In casu the accused was charged with murder. The evidence against her was circumstantial in character. According to Innes C J “The question for the trial court was whether, upon the evidence, there was a reasonable doubt of the prisoner’s guilt”.<sup>70</sup> Innes was of the view that such doubt existed. Maasdorp J A agreed with Innes C J. According to Maasdorp J A the “... Crown must conclusively prove the guilt of the accused”.<sup>71</sup> It therefore seems that according to Maasdorp J A “conclusive proof” was the applicable standard of proof. That standard was attained if the evidence excluded “reasonable doubt”. Solomon J A disagreed on the facts, holding that “... the evidence satisfies me beyond any reasonable doubt that the deceased was murdered”.<sup>72</sup> Clearly, although Solomon J A disagreed with Innes C J and Maasdorp J A on the facts of the particular case, he, however, considered that the applicable test was whether the evidence convinced the fact finder “... beyond any reasonable doubt”. De Villiers A J A put the issue presented by the case very succinctly that:

The question on this appeal is whether there is sufficient evidence of the murder of Nomhlwane by the accused. In other words, is there that amount of proof which ought to satisfy an unprejudiced mind beyond a reasonable doubt that she

killed her husband?<sup>73</sup>

De Villiers A J A answered the question positively and sided with Solomon J A on the facts of that particular case. He, however, also applied the test of proof beyond reasonable doubt. Juta A J A did not specifically lay down the test but it is clear what test he applied for he came to the conclusion that "... I cannot say that the evidence leaves any reasonable doubt in my mind as to the guilt of the appellant...".<sup>74</sup> He therefore sided with Solomon J A and De Villiers A J A on the facts. The appeal was dismissed and the judgment of the court a quo was confirmed. The appellate division's acceptance of the "... beyond reasonable doubt" test was subsequently echoed in various judgments of the appellate division and the lower courts.<sup>75</sup>

However, there seems to have developed a difference of opinion among the judges of the highest court in South Africa concerning the exact meaning of the test. In Blom's case<sup>76</sup> Stratford C J and Tindall J A stated the test as being proof "... without a reasonable doubt"<sup>77</sup> while Watermeyer J A and Centlivres A J A stated the test as proof "...beyond a reasonable doubt".<sup>78</sup> The linguistic point of difference may be very fine but the evidential significance of the difference is, it is submitted, substantial.

One must recognise that the two phrases do not have equal linguistic value. "Without a reasonable doubt" means, it is submitted, that the evidence must be so convincing that no reasonable doubt in the mind of the fact finder exists on the factual issues canvassed. The evidence must be of such a nature that it excludes a reasonable doubt in the mind of the fact finder.

“... Beyond a reasonable doubt”, on the other hand, seems to signify that a reasonable doubt may exist in the mind of the fact finder but the evidence presented is such that notwithstanding the existence of such doubt, the evidence permits the fact finder to find as a matter of moral certainty that the disputed facts exist notwithstanding the existence of such a “reasonable doubt”.

The employment by eminent judges of these phrases, it seems, signifies a difference of opinion as regards approaches to be adopted when assessing evidence. The phrase “without reasonable doubt”, signifies, it is submitted, an approach according to which, once a judge or fact finder had determined that a reasonable doubt exists, the fact finder must acquit the accused without further ado. The phrase “beyond a reasonable doubt” it is submitted, signifies that the determination of the existence or otherwise of a reasonable doubt in the mind of the fact finder is not the end of the enquiry. The fact finder must further consider the effect of the existence of such reasonable doubt on the fact finder’s credulity. If the fact finder is still morally satisfied that the fact in issue is proven notwithstanding the existence of such a doubt, the fact finder may justifiably find such a fact proven. In other words the fact finder may, according to the latter approach convict an accused person notwithstanding that a reasonable doubt exists, objectively speaking.

The first approach, it is submitted, is more in accord with that ideology of a system of criminal procedure which emphasises the liberty of the subject. The second approach, it is submitted, tends to lean to the paramountcy of the interest of the state in an evidential controversy.

The evidential ideological battle joined in Blom’s case was continued in Bolon’s case.<sup>79</sup> In Bolon’s case Tindall J A stated that:

For many years it has been usual, in South Africa as well as in English and American courts, to say that a criminal charge must be proved beyond a reasonable doubt...<sup>80</sup>

It is to be noted that Tindall J A carefully distanced himself from approval of the formulation of proof beyond a reasonable doubt by stating that “it has been usual” to “say” that a criminal charge must be proved beyond a reasonable doubt. In other words Tindall J A was doubting the binding nature of the test. In fact the appellate division had already decided that this was the correct test and Tindall J A had himself concurred in a judgment of de Wet J A in Macaba’s<sup>81</sup> case where the test was authoritatively laid down. How Tindall J A could treat previous decisions of the appellate division so lightly by reducing them to mere “... saying” is incomprehensible if one rejects the theory that he was implicitly rejecting Watermeyer J A’s formulation.

It is suggested that if Tindall J A approved of the formulation, one would expect that he would have stated the appellate division’s acceptance thereof in much more flattering terms inasmuch as he had participated in Blom’s and Macaba’s cases.

It is further noteworthy that Tindall J A singled out Watermeyer J A’s judgment in Blom’s<sup>82</sup> case and the same judge’s decision in Gates v Gates<sup>83</sup> as authority for the proposition that the guilt of the accused must be proved beyond a reasonable doubt. The purpose of such specific citation, it is submitted, was to draw attention to the incorrectness, in Tindall J A’s view, of the formulation of Watermeyer J A. Tindall points out the untenability of Watermeyer J A’s approach thus:

As the learned author points out, this persuasion or conviction in the mind of the court may have more than one degree of positiveness in order to justify action in the shape of a verdict for the party upon whom the burden rests. But the attempt to define these degrees of positiveness gives rise to great difficulties and many of the efforts of judges to give definitions of 'proof beyond a reasonable doubt' are (as Watermeyer pointed out in *Gates v Gates*) apt to lead to confusion.<sup>84</sup>

It is submitted that the foregoing passage is a veiled criticism of Watermeyer JA's approach. The degrees of positiveness that Tindall J A refers to derisively is the uncertainty which occurs when one tries to determine how far beyond the frontier of reasonable doubt one may stray and still legally justifiably find for the party on whom the onus rests. This conclusion, it is submitted, is supported by Tindall J A's reiteration of his exclusive test, first adumbrated in *Blom's* case. According to Tindall J A:

... the usual statement that, to justify conviction, the evidence must be such as to exclude every reasonable doubt of the guilt of the accused seems to me to indicate, as satisfactorily as possible the high degree of assurance that must be established by the evidence in the mind of the court in a criminal case.<sup>85</sup>

Thus according to Tindall J A the existence of a reasonable doubt cannot co-exist with guilt. Clearly Watermeyer J A's approach is such that reasonable doubt may co-exist with guilt depending on the fact finder's degree of willingness morally to go beyond the parameters of reasonable doubt to find in favour of the state.

That Tindall J A considered that Watermeyer J A's approach was incorrect was conclusively demonstrated, it is submitted, by Tindall J A's careful admonition that "As I have explained above, the expression 'proof beyond a reasonable doubt', when correctly applied ...".<sup>86</sup> Clearly he was of the view that some members of the court were misapplying or misunderstanding the concept. It is submitted that those who in his mind misapplied the concept were Watermeyer J A and his supporters on the court at that time.

The argument between Watermeyer J A and Tindall J A seems not to have been continued for in the next great case where the appellate division considered the standard of proof,<sup>87</sup> Tindall J A was not on the bench. One may safely assume that Watermeyer who was then chief justice had used his authority to allocate particular judges of appeal to hear particular appeals, to deny Tindall J A the opportunity to propound his view on the meaning and effect of proof beyond reasonable doubt.<sup>88</sup>

However, Davies A J A who gave the judgment of the court seems to have followed Tindall J A for he emphasised the existence of reasonable doubt *per se*<sup>89</sup> which entitled the accused to an acquittal not the degree of conviction beyond a reasonable doubt which would entitle the state to a conviction. Clearly therefore the emphasis was on the subject, not on the state. Tindall J A's ideological standpoint was vindicated. Significantly Watermeyer J A conferred with Davies A J A without filing any judgment of his own. The ideological battle therefore seems to have been won by Tindall J A. However, though he won the ideological battle, Tindall J A's triumph has not been translated into practice. Watermeyer J A's formulation has been adopted.

### 3.4 Reception and influence of the English common law on United States and South African law

The choice of the United States, Great Britain and South Africa for study was not a random one. It was dictated upon by considerations of history and intellectual and conceptual proximity among the legal systems involved. This proximity in content of law is attributable to the influence of the English law when both the United States and South Africa were colonies of Great Britain.<sup>90</sup>

The trade mark system of law which the English took with them whenever and wherever they extended or imposed their influence through colonisation was the common law of England.<sup>91</sup> Colonization of a territory, was according to Opolot<sup>92</sup> the direct method of spreading the common law. Indeed the English common law became so permanently grafted into American jurisprudence that: “utilized by most English speaking states, the common law is variously known also as English, Anglo-Saxon or Anglo-American law”.<sup>93</sup> The temptation is to regard the process of assimilation of English law into colonial condition as having been a smooth and painless one. But this is an illusion of history. It is necessary to delve into history to assess the functional relationship between the legal system of the colonial power and the legal institutions of the colony and also to assess the degree of influence the legal system of the mother country exerted on the fledgling colonial legal systems. Only by so doing, it is submitted, can one legitimately compare the response of the various systems of law under study to the problem posed in this work.

The great, unmistakable and distinguishing characteristic of common law is that it is unwritten

and uncodified and is encapsulated in the decisions of the courts. During the colonial period, common law applied throughout the realm in Britain and one may therefore say that there was judicial hegemony in England at the time.

### 3.4.1 Reception of English law in the United States of America

The distinguishing characteristic of American law during the early colonial period was the utilisation of charters and codes to settle the law of most of the colonies.<sup>94</sup> “The earliest settlers in many of the colonies made bodies of law, which from every indication, they considered a complete statement of the needful legal regulations. ... Not only did these codes innovate upon and depart from the models of common law, but, in matters not fixed by such codes, there was in the earliest times no reference to that system. They were left to the discretion of the Magistrates”.<sup>95</sup> No binding authority of English common law was recognised and no subsidiary<sup>96</sup> authority was conceded to the common law. The magistrates who administered the law, employed the codes to settle disputes but where no rule was available to settle a dispute, the magistrates “... administered a rude system of popular law and equity on the basis of the scriptures and their own ideas of right...”.<sup>97</sup>

However, because the colonists spoke English and ordered their affairs in a manner they were accustomed to in the mother country, they utilized some of the principles of English law in drafting their codes. However, this did not mean wholesale incorporation of the English common law into their codes nor did the utilisation of some of the general principles of English law confer binding authority on English common law. “This law, even when it coincided with English law, bound them because they had enacted it or established it by their own decisions, not because it

had been decided by English courts".<sup>98</sup>

New York colony was the decided exception to the general trend. From comparatively early during its existence, New York was continually under British influence. British common law was applied in New York and was binding from very early on.<sup>99</sup>

The prevailing judicial theory of transmission of English common law to America is stated by Story J as follows: "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their condition".<sup>100</sup>

It was only after the revolutionary war that pressures arose for the incorporation of English common law into the fabric of American law. "Indeed, after the revolution, American law became, in some ways, rather more than less English. This is no paradox. 'English' is a misleading term. Economic growth and social division of labour called for tools of law the puritan oligarch of 1630 had no need of and no use for. The law later needed was not to be found in the colonial past; so the country was forced to import it from abroad. Only England had a supply that American lawyers could use without translation or transformation".<sup>101</sup>

However, it is not possible to obtain a clear picture of how this incorporation was done as there is a glaring paucity of works that treat of legal history in the United States.<sup>102</sup> In fact Friedman's book was the first to be devoted entirely to legal history and its patchy treatment of the subject and propensity to be bogged down in needless detail reduced much of its effectiveness. The only

other book on legal history of the United States is Nelson's book but its usefulness is limited since it confines itself to the state of Massachusetts. Nelson himself admits the book's limited usefulness: "Since this study is one of a single state whose development was in many ways unique, broad conclusions about the legal history of the entire United States are of course unwarranted".<sup>103</sup>

However, certain conclusions can be drawn from what legal history of the United States was available at the time of writing, namely:

- (1) The colonists from the earliest times asserted the right to govern themselves.
- (2) From the earliest times, the colonists sought to reduce the power of the state and to limit the power of the state by creating and agreeing in each colony to a charter or a code. A tradition of adherence to and respect of a seminal legal document from which flowed rights, capacities and entitlements developed very early. This was to blossom finally in the adoption of the American Constitution in 1789 and the beginning of American constitutionalism which has fascinated the world to the present day.
- (3) The adoption of the common law of England after the adoption of the Constitution led to the infusion of the great values of the English common law into the fabric of American constitutionalism.
- (4) The need to interpret the Constitution to incorporate the values of English common law into the formal structure of American constitutional law led to the elevation of the

Supreme Court, as the head of the interpretative arm of government to the unchallenged position it occupies today by virtue of the doctrine of judicial supremacy which it developed to settle competing claims of government and the individual when the individual asserted his common law rights but based them on the written constitution, not on the common law.<sup>104</sup>

### 3.4.2 Reception of English common law in South Africa

In South Africa, the dictum of Lord Mansfield that: “The laws of a conquered country continue in force until they are altered by the conqueror” was applied.<sup>105</sup> The dictum meant that the applicability of a legal system at the time of the conquest of a territory by the British depended on the sufferance of the British. The British had all legal rights to change the prevailing system at will. The inhabitants of a conquered territory had no right to make laws to govern themselves.

South Africa was conquered twice by the British, in 1795 and in 1806 when the final conquest occurred in 1806: “The Cape Articles of Capitulation dated 18th January 1806 stipulated that the rights and privileges which the inhabitants therefore enjoyed should be preserved to them. Among those privileges the retention of their existing system of law was undoubtedly included”.<sup>106</sup> At the time of the second conquest of the Cape in 1806, the Roman-Dutch law was undoubtedly the law of the Cape.<sup>107</sup>

As a result of the political turmoil in the Cape during the middle years of the 19th century, many Cape colonists left the Cape and trekked into the interior where they established republics. These new political entities adopted Roman-Dutch law as their common law.<sup>108</sup>

However, “Despite the official retention of Roman-Dutch law as the law of South Africa, however, there was a general movement towards English law and institutions. The broad pattern was one that repeated itself in almost every country where as a result of British conquest a civilian system of governmental origin had to face the competition of English law and institutions. Government, administration and the judicial machinery were reshaped along English lines. English civil and criminal procedure were substantially taken over, while the English law of evidence was adopted in its entirety”.<sup>109</sup> English law has exercised remarkable influence on South African criminal procedure and evidence and the law in this connection remains basically English law.<sup>110</sup>

The anglicisation of Roman-Dutch law was accomplished in many cases by statute.<sup>111</sup> “Some English institutions marched into our law openly along the highway of legislative enactment, to the sound of the brass bands of royal commissions and public discussion”.<sup>112</sup> Changes were also brought about in the law by the gradual infusion of English values brought to bear by English personnel on the judicial processes through what Hahlo & Kahn call “... a kind of osmosis”.<sup>113</sup>

English law has, however, not successfully penetrated the South African legal system in all fields of law. Some aspects of Roman-Dutch law proved remarkably resistant to change.<sup>114</sup> The result was an unusual synthesis. Private law relations are governed by Roman-Dutch law, but public law is deeply influenced by English law.<sup>115</sup>

### 3.5 Conclusion

On a careful reading of the authorities, it seems reasonably clear that although South African

courts were initially slower than the courts of the United States of America and England, to accept the doctrine of proof beyond reasonable doubt, they were quick to systematise it and apply it as a matter of course in their courts once they had accepted it as authoritative. One first reads of the reasonable doubt test in Jellimen's case in 1883. By 1915, a mere 32 years later, in Dube's case the highest court in South Africa had already given its imprimatur to the principle.

FOOTNOTES

1. See for example Wigmore, vol. 9 317; McCormick, 5.
2. Thayer, James Bradley. A Preliminary Treatise on the Law of Evidence at the Common Law (1898) 558-559.
3. Thayer op cit 558. The matter is put in correct perspective by Thayer in Annexure B at 567-568. However, it is not very clear whether he has retreated from his position expounded in the main text.
4. Cross Evidence 102; Nokes 67; Wigmore 407.
5. Bassiouni 327. However it must be noted that the two rules complement each other. As Bassiouni puts it at 327 "... one is the mirror image of the other".
6. "When these rules began to take form and consistency the penal code of England was a fearfully bloody code. Death, without benefit of clergy was denounced against a multitude of misdoings which would now be considered, if offences at all, offences of comparatively trivial character. The consequences of conviction to the unfortunate prisoner were not only fearful, but they were irremediable", May, 651-652.
7. "Reasonable Doubt in Civil and Criminal Cases", 10 American Law Review, 642 656. McCormick attributes authorship of this article to May, but despite diligent search the present writer could not trace the article's author. Wigmore 320 cites the author as C J May.
8. McNally Rules of Evidence on Pleas of the Crown, (1802).
9. McNally vol. 1 2.
10. McNally 3.
11. McNally 4.
12. McNally 5-6.

13. McNally 2; “Sir Edward Coke, in favorem vitae, exhorts juries not to give their verdict against a prisoner, without plain, direct and manifest proof of his guilt, which implies, that where there is doubt, the consequence should be acquittal of the party on trial”. Sir Edward Coke never explicitly adopted the principle.
14. McNally 4.
15. McNally 5.
16. McNally 5.
17. McNally 6.
18. McNally vol. 2 527.
19. McNally 535.
20. See 1876 American Law Review 658.
21. Nokes An Introduction to Evidence 4ed (1967) 491.
22. Wigmore A Treatise on the Anglo-American System of Evidence in Trials at Common Law, vol. 1 3 ed (1981) 405.
23. Cleary McCormick’s Handbook of the Law of Evidence 2ed (1972) 799.
24. Bassiouni Criminal Law and its process : The Law of Public Order (1969) 326.
25. 4B & ALD 95, 106 Eng Reports 873 (1820).
26. And therefore the case is no authority for the proposition that it had controlling authority in Burdette’s case.
27. Burdette’s case 898.
28. Quoted by May 658; see Schmidt, Die Bewyslas, unpublished doctoral thesis of the UOFS (1959) 419-420.
29. May 658.
30. Rensch, The English Common Law in the Early American Colonies : Select Essays in

Anglo-American Legal History (1970) 367 415.

31. Cross, Evidence 3 ed (1967) 87.
32. However the matter is not as simple as that because in Cooper v Slade which Cross cites in support, the court did not make any comparison between standards of proof in civil and in criminal cases. All what the court did was to lay down that it was an elementary proposition "... that in civil cases the preponderance of probability may constitute sufficient ground for a verdict". Cooper v Slade (1858) 6 HL CAS 746 772.
33. Cross, The Golden Thread of the English Criminal Law (1976) 4.
34. Nokes 491.
35. idem 491 footnote 40.
36. Regina v White and Others (1865) 4F and F383 613.
37. White's case 383.
38. idem 383.
39. see Heward, Matthew Hale (1972) 48, 117.
40. Viscount Sankey shows very clearly in Woolmington's case 477-478 that in fact Sir Matthew Hale and the early cases were concerned with laying down the elements of offences and were not concerned with the question of the burden of proof. Furthermore it is highly unlikely that a sophisticated principle whose tenour was to affirm the liberty of the individual could have been applied in a criminal justice system which was essentially barbarously unfair to an accused person. See Holdsworth, A History of English Law vol. 6 (1924) 629-630. Heward 42-43. Furthermore a commission appointed to consider law reform under the chairmanship of Matthew Hale in fact recommended a stringent rule that if an accused person did not answer to a charge, he should be regarded as having pleaded guilty. It is hardly likely that Hale could have

applied a rule that would have ameliorated the condition of the accused; see Heward 36-43 especially p.43.

41. Since it had been published in 1802 and in which reference had been made to proof beyond reasonable doubt. See Nokes op cit 23.
42. Nokes 491.
43. May Criminal Evidence 41.
44. White's case 386-387.
45. Woolmington's case 481.
46. 1883 EDC 224.
47. idem 225.
48. 1883 EDC 337.
49. Benjamin's case 338.
50. It is to be noted that Benjamin's case cites Jakkal's case as authority for the first portion of the dictum but the second portion is clearly an addition of Buchanan J.
51. Cape Law Journal 1885 (2) 261.
52. 7 SC 123.
53. idem 125.
54. idem 125.
55. 1893 EDC 43.
56. 1903 CTR 638.
57. 1903 CTR 1005.
58. 1905 CTR 399.
59. 22 SALJ 419 426.
60. idem 426.

61. R v Jellimen 1905 CTR 399 401.
62. 1907 TS 531.
63. idem 534.
64. idem 532.
65. idem 533.
66. Dugard 28; see also Snyman & Morkel 10-11.
67. Snyman & Morkel 12; see also Dugard 32.
68. Hahlo & Kahn, South Africa 245-250.
69. 1915 AD 557.
70. idem 564.
71. idem 573.
72. idem 565.
73. idem 573-574.
74. idem 582.
75. Cape Coast Exploration Ltd v Scholtz and Another 1933 AD 56 75; R v Blom 1939 AD 188; R v Mpondo 1936 OPD 186 189; R v Macaba 1939 AD 66 70.
76. R v Blom 1939 AD 188.
77. R v Blom 1939 AD 188 196 and at 210.
78. Ibid 204-205, 210.
79. Ex parte Minister of Justice : In re Rex v Bolon 1941 AD 345.
80. Ibid 350.
81. 1939 AD 66 71.
82. Ibid 350.
83. 1939 AD 150.

84. 350.
85. idem 351.
86. idem 359.
87. R v Ndlovu 1945 AD 369.
88. Forsyth, C F In Danger for Their Talents (1985) 46-49. If the Chief Justice "... wishes to select judges who, he considers, would be likely to decide a particular case in a particular way, the opportunity exists for him to do just that" 49.
89. idem 386-387.
90. It was in 1783 that the United States shook off the yoke of colonialism at the conclusion of the Revolutionary War.
91. Holland & Schwarzenberger Law, Justice and Equity (1967) 102.
92. Opolot World Legal Traditions and Institutions (1981) 5.
93. Abraham, The Judicial Process (1968) 8.
94. Bodenheimer, An Introduction to the Anglo American Legal System (1980) 46; Rensch 53.
95. Rensch, English Common Law in the Early American Colonies (1970) 7 ; see also idem 57.
96. Rensch 7.
97. Rensch 19.
98. Bodenheimer 47; "On the other hand, the reception of English law into ceded or conquered territories as well as protectorates and trust territories was the result of specific legislation which might take the form of an order - in Council, an Act of the British Parliament or an enactment of the local legislature". Holland and Schwarzenberger 102.
99. Rensch 30.

100. Van Ness v Packard, 2 Peters 144 as quoted by Remsch 6.
101. Friedman, A History of American Law (1973) 29; see also Bodenheimer 47-48.
102. Friedman 9-11; Nelson, The Americanisation of Common Law (1975) 3.
103. Nelson *ibid* 3.
104. Devlin The Judge (1979) 7.
105. Quoted by Hahlo & Kahn - The South African legal System and its Background (1968) 575
106. R v Harrison and Dryburgh 1922 AD 320 330.
107. De Wet, "Die Romans-Hollandse Reg in Suid Afrika na 1806" 1958 THRHR 239.
108. Hahlo & Kahn 575-576.
109. Hahlo & Kahn 576.
110. Pugh, "Aspects of the Administration of Criminal Justice under the Law of South Africa" 1960 Acta Juridica 243.
111. Hahlo & Kahn 576-578.
112. Hahlo & Kahn 18.
113. Hahlo & Kahn 578. "The early legal training of so many of the judges and advocates, the case of reading English, the detailed reports of English decisions, the ready access and growing improvement of textbooks on English law, the familiarity of the profession with English, the legal structure, the nature and significance but not least, the influence of the Privy council, final court of appeal : all these factors encouraged the use of English legal rules as persuasive material where the Roman-Dutch books were silent, vague or contradictory".
114. Hahlo & Kahn 578.
115. Hahlo & Kahn 584-586.

## CHAPTER 4

### THE IDEOLOGY OF THE CRIMINAL PROCEDURE

#### 4.1 Introduction

Substantive criminal law normatively prescribes what conduct is proscribed and the sanctions attendant upon infraction of such normative rules. The criminal process or criminal procedure normatively prescribes how the normative rules of the criminal law are to be applied.<sup>1</sup> The criminal justice system therefore determines the process of criminal law enforcement from the first step to the last.

Formerly it used to be that the purpose of the criminal law was to punish. The criminal justice system of the time was geared to creating conditions conducive to easy guilt determination and speedy exaction of punishment. One may say that the period of the inquisition was such a period in which torture and death were the generally accepted means of proof and punishment respectively.<sup>2</sup>

The social evolution of people has given rise to the development of more humane rules of criminal law as well as more humane punishments. Clearly the torture chamber and the rack are no longer suitable as means of establishing guilt as, in the conception of our times, they are inhumane and barbaric.<sup>3</sup>

The problem of our times, however, is to justify not only the punishment that is inflicted upon

a miscreant after he has been convicted, but also the investigatory and guilt demonstrative procedures that are employed in order to arrive at the desired finding by the fact finder.

The answers depend on the ideological conceptions held by each person based on each person's conception of the meaning and purpose of social aggregates as well as individual conceptions of social power and the purposes for which the power of society may be legitimately employed.

The study of the ideological foundations of the law enforcement procedures focuses on issues far and beyond the immediate concerns of the criminal justice system. The conviction or acquittal of the accused, the acceptability or otherwise of the handling of the suspect, all for the purposes of such an enquiry relevant only in so far as they focus on the ultimate view of the process they exemplify. It may not matter so much whether one is convicted by a South African or American court for the decision may ultimately be correct. But it may matter that one is convicted or acquitted by South African or American procedures. The underlying ethos of the two systems may be diametrically opposed. Acceptance of one or other system will depend on the underlying philosophical values which the procedural rules exemplify.

It becomes necessary to look at the three systems of procedure that it is proposed to study theoretically. "One of the most fruitful ways of looking at the system as a whole is to compare its performance against theoretical models. If a particular model appeals, then adherence to the philosophy behind that model may well justify acceptance of action which, when seen in isolation, would be unlikely to be acceptable".<sup>4</sup>

## 4.2 Models of criminal procedure

The idea of constructing theoretical models of criminal procedure and then of using them to assess the functional acceptability of a criminal justice system was begun by Herbert Packer.<sup>5</sup>

It is necessary to employ the model methodology of Packer because of the dangers of individual subjectivity and cultural group subjectivity which King explains so well.<sup>6</sup> Both species of subjectivity would tend to distort perception of social phenomena and hence distort and warp conclusions and thus reduce the worth of the study.

Packer distinguishes between the due process and the crime control models of criminal procedure. The differences between these two models reflect the competing values which underlie each model.

The supreme value of the crime control model is the speedy apprehension of criminals, speedy determination of their guilt and speedy disposition of their cases. Repression of crime is emphasized by this model for, "unless crime is controlled, the rights of the law-abiding citizens will not be protected and the security of society will be diminished".<sup>7</sup> According to this model it is the criminal justice system which is the ultimate guarantor of social freedom and to achieve this end the criminal justice system must be efficient in apprehending suspects, screening detainees, determining guilt and disposing of those convicted. The crime control model would emphasize informal non-adjudicative fact finding. Only the really guilty must be taken to court. But in order to achieve this wide latitude must be given to the law enforcement agencies<sup>8</sup>, that is, the police and the prosecutor. Interrogation of the suspect by the police and

by the prosecutor will most probably yield the quickest result and the quickest disposition of a case and this will therefore be the most efficient and quickest method of repressing crime. The crime control model can be called “assembly line” justice.

The due process model rejects the premise of reliability of informal, non adjudicative fact finding by the law enforcement agencies. The due process model stresses the possibility of error in the fact finding process. People make mistakes because they observe poorly and information can also be coerced out of unwilling respondents. There is no guarantee that the facts found informally are correct. “Considerations of this kind all lead to a rejection of informal fact finding processes as definitive of factual guilt and to an insistence on formal, adjudicative, adversary fact finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him”.<sup>9</sup> Fairness and justice are the all important goals of the due process model. The due process model therefore incorporates into the formal pre courtroom and courtroom structures, formalities to be complied with by the state to ensure justice and fair play in the criminal justice system. The due process model is like an obstacle course, with the state being required to clear a number of obstacles before it can obtain a conviction against an individual.

The due process model regards the crime control model as dangerous to the rights of individuals as it subordinates individual rights to the crime repressive imperative. A government may therefore act tyrannically under the cloak of legitimacy of crime control.

King has formulated four further models of the criminal process.<sup>10</sup> According to King, a further

model is the medical model. This model seeks to do away with the central ideas of criminal law namely crime and punishment. According to this model people who commit antisocial acts are simply sick and such commission justifies society to intervene and to rehabilitate and cure such people of their antisocial tendencies so that they do not repeat their antisocial conduct.

A second model King postulates is the bureaucratic model. According to this model, a modern capitalistic state is based on a socio-economic system which is based on calculation and rationality. It therefore requires a rational system of justice whose workings can be rationally calculated. This means that a system of general rules, applicable to all and separate from any political influence must be created and all people without exception must submit to the rules, "... the bureaucratic objective is to process dependants according to standard procedures, a closed system of rules which operate independently of political considerations and regardless of who is in the dock".<sup>11</sup>

Another model King suggests is the status passage model. According to this model the function of the criminal process is to denounce the criminal publicly and to reduce his status in the community. According to this model "the reduction of social status of the offender results, according to this theoretical perspective, not only in the stigmatisation of the defendant as a person with a furnished moral character, but also in the enhancement of social cohesiveness among law-abiding members of the community by setting the defendant apart from the community and by emphasising the difference between him and law-abiding citizens".<sup>12</sup>

A further model which King upholds is the power model. This model conceives the criminal justice system as a means adopted by the ruling elites to perpetuate their domination of the other

classes in society. The courts are seen not as independent, impartial fact finders and appliers of generally applicable normative rules, but are seen as acting in concert with other social institutions to maintain and reproduce the dominance of a group.<sup>13</sup>

#### 4.2.1 Application of the models to the American criminal process

According to Hall, the ultimate ends of American criminal procedure are dual and conflicting. The criminal justice system must be so designed that it convicts the guilty.<sup>14</sup> This causes an inevitable dilemma because "... the easier it is made to prove guilt, the more difficult it becomes to establish innocence".<sup>15</sup> There is therefore an irreducible and irreconcilable conceptual conflict between the due process model and the crime control model in American law.

In American law, the criminal-justice system seeks to prevent and control crime as well as to protect the individual rights of citizens. The tradition of American constitutionalism is the limitation of governmental power. All officials must carry out their official acts strictly within the ambit of law conferring the right to perform such act. No official is accorded unlimited discretion and all acts are subject to review by the courts.

Crime control and prevention must therefore occur within set and properly demarcated rules.<sup>16</sup> The effect of such rules is further extended by the operation of the rights of the accused.<sup>17</sup> The due process revolution of the Warren court extended the scope of individual rights to areas that had never been considered before<sup>18</sup> further constricting the sphere of operation of law enforcement officers.

Despite strident criticism from some academics,<sup>19</sup> law enforcement officials and politicians, the due process model controls the criminal justice process in the United States.<sup>20</sup> The ethos of the criminal justice system in the United States has since the inception of the United States as a state been due process. In the words of Newman:

“Virtually every statement in the Bill of Rights and in later amendments to the constitution, relate directly to major aspects of our criminal justice process. Historically, a relatively high proportion of Appellate Court decisions, including decisions of the United States Supreme Court, apply constitutional restraints to uncontrolled crime control efforts. It is thus fundamental to our ideals and our system of government that higher allegiance to principles of individual liberty, fairness and due process of law must check and control law enforcement efforts, trial court functions, and correctional interventions. Improper methods of catching criminals, no matter how effective, must not threaten freedom of society at large”.<sup>21</sup> As Chief Justice Earl Warren put it “The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged”.<sup>22</sup>

To resolve the dilemma referred to earlier, American law has elected as a matter of policy and law to make it easier to establish innocence than to establish guilt.

#### **4.2.2 The attempt to undo the Warren court legacy**

The changes in criminal procedure mandated by the Warren court required “... wrenching

adjustments in law enforcement methods in every community in the land".<sup>23</sup> Although the Warren court's changes were motivated by high constitutional purposes and a concern for the rights of the accused, based on a philosophical ratio that an accused person is not a criminal but an individual entitled to all rights and immunities guaranteed by the Constitution<sup>24</sup> and that some such rights can only be constitutionally abridged pursuant to the fact of conviction, for a criminal offence, the effects thereof were not welcome among law enforcement officers. The reason for this was that at the time the Supreme Court was strengthening the rights of the accused, co-incidentally, there was an increase in crime in the United States.<sup>25</sup> The Supreme Court's solicitousness to the rights of accused persons became incongruous in a climate of increased criminality. The court's imposition of curbs on the power of law enforcement over accused persons could not be comprehended at a time when "... the United States had the most serious crime problem of any so-called advanced nation in the world".<sup>26</sup>

The dimensions of the growing crime problem created a deep-rooted fear of crime in America.

In the words of Kazenbauch:

"There is a genuine fear of crime. It is strongly felt by rural white America, by blue collar white America and those who live in the suburbs. It is irrelevant to their emotions that, as a group, they probably have the least to fear from a growing crime rate. Ironically, it is also felt by the majority of black Americans who live in the ghetto and do have reason to fear crime - but who are silenced to a degree by the racial overtones ascribed to appeals for law and order".<sup>27</sup>

Crime, during the last years of the Warren era became the number one item on the political

agenda, replacing "... communism as the hobgoblin of American politics".<sup>28</sup> Translated into political terms, the cry became "law and order". The slogan "... was a large part..."<sup>29</sup> of Richard Nixon's successful 1968 campaign for president.

A flood of criticism was directed at the court by politicians and other law enforcement officers that the decisions of the "... United States Supreme Court have imposed disabling restrictions on the investigative process and telescoped the opportunity for the police to make any appreciable gains in the approach to the problem of crime in this country"<sup>30</sup> and that such decisions "handcuffed"<sup>31</sup> the police.

The Supreme Court's decision which had unleashed such passions was Miranda v Arizona<sup>32</sup> and its four companion cases.<sup>33</sup> "As it turned out, Miranda was the high water-mark of the due process revolution, the ultimate expression of the judicial philosophy and technique that had characterised the Warren court on crime".<sup>34</sup>

The five cases taken together, embodied most of the abuses of the system of interrogation of suspects which had been in use for generations without demur from the Supreme Court, that is, prolonged questioning, failure to inform the accused of their rights, failure to obey local laws requiring prompt arrangement of the accused and taking advantage of the accused's isolation from friends, family and lawyers.<sup>35</sup>

Miranda was a truck driver in Arizona. He was accused of robbery, kidnapping and rape. After being interrogated for about two hours, he confessed. The confession was admitted at his trial as it was proved to have been made voluntarily.<sup>36</sup>

Miranda's case was not just a decision on the five cases which were before the court. In extending constitutional rights to the accused, the court had prior to Miranda caused so many procedural questions to arise that the court was forced "... to convene in a rulemaking session, not for the primary purpose of deciding an individual appeal, but to frame broad legislative codes to cover future police conduct".<sup>37</sup> Miranda's case was the rule-making session. The issue as stated by the court was: "The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence : the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime".<sup>38</sup>

The court then formulated and articulated the restraints.<sup>39</sup> The court firmly based its decision on the due process clause. The core basis of the court's decision was that, in terms of the Bill of Rights, "... law enforcement officials who charge an individual with a crime must bear the burden of proving without relying on the accused to provide the evidence of guilt".<sup>40</sup>

The Supreme Court's standard was revolutionary in its impact.<sup>41</sup> The law-enforcement agencies were so accustomed to using the accused to unearth evidence to convict him of a crime, and police procedures were so attuned to that end that the need to develop new procedures to comply with the Supreme Court's mandate was well-nigh unthinkable. "Limitations imposed upon the police by Supreme Court decisions enumerated in the preceding chapters operate with a cascading effect on the police clearance of criminal cases. With a reasonable opportunity for interrogation, police officers know that the arrest of one suspect may not only result in the clearance of the case under investigation, but in the clearance of a cluster of criminal cases".<sup>42</sup> The most important criticism directed at the Warren court in respect of the Warren court decision in Miranda was that it imposed legal shackles that impeded police effort and stalled

the investigative process<sup>43</sup> because it brought lawyers into the criminal proceedings too near the start. Quite obviously a lawyer will advise the accused not to make a statement and that will close doors to further investigation. This is what outraged the police.<sup>44</sup> That objection had already been addressed by Justice Goldberg in Escobedo's case: "... No system worth preserving should have to fear that if an accused is permitted to consult a lawyer, he will become aware of and exercise these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system".<sup>45</sup>

By the time the 1968 presidential election came around, 81% of the American people felt that law and order had broken down<sup>46</sup> and blamed the Warren court for it.<sup>47</sup> Reacting to the demand for law and order,<sup>48</sup> Richard Nixon pledged to strengthen the peace forces over the criminal forces, to fire the then Attorney General and to appoint conservatives to the Supreme Court<sup>49</sup>. Despite Hubert Humphrey's admonition that Nixon's public criticism of the court was irresponsible, Nixon continued as he read the public mood correctly that "... society has proved more fearful of police impotence than of police brutality".<sup>50</sup>

Nixon won the presidential election and true to his word, the tumour of the criminal justice was changed to favour the government. Attorney General John Mitchell who had been appointed by Nixon to replace Ramsey Clark, boasted to the International Convention of chiefs of police that: "I think that you will find that this administration is sympathetic to law enforcement and that, in areas of doubt, we tend to put our faith in the good intentions of the police, rather than to rely on the bad intentions of criminals".<sup>51</sup>

Again true to his word, President Nixon who had promised "... during his 1968 presidential campaign to appoint men to the Supreme Court who would be less receptive to the arguments of criminal defendants and more responsive to the reasoning of law enforcement officers"<sup>52</sup> during his tenure of the presidency appointed no less than 4 members of the Supreme Court including the chief justice.<sup>53</sup> All the appointees were conservative<sup>54</sup> rightist men, with strong philosophical antipathies against the rights of suspects. Thus inauspiciously, dawned the era of the Burger court.

The Burger court began when expectations were high that the egalitarian trend in favour of the suspect and the accused in the criminal justice system would be reversed because, as Leonard put it:

"... it is now six o'clock in the evolution of democratic society and time to rise to the challenge of new forms of tyranny and oppression that plague the American people on a menacing scale - the tyranny and oppression of crime and violence. The challenge calls for a new frame of reference in the development of constitutional law geared realistically to conditions that prevail in modern society. It is not too early to begin removing some of the legal shackles that impede the police effort and stall the investigation process; it is time to give this important arm of government at least a fair opportunity in carrying out its assigned function of protecting the foundations of a modern social order".<sup>55</sup>

The plea made by Leonard was a powerful one. It was for no less than a constitutional revolution and a reversal of the whole tradition of American constitutionalism. Whereas

American constitutionalism is based on the idea that society should exist to serve the individual and that governments were created to be the servants and not the masters of the people, Leonard's plea was for the recognition of society and government as possessing inherently separate interests from those of the citizen which were worthy of protection at the expense of individual rights.<sup>56</sup> Leonard's thesis was that the constitution, was outdated and could no longer cope with modern conditions. To interpret the language of 1787 and to try to implement 1787 concepts would not meet the urgent needs posed by a burgeoning crime rate. Leonard was therefore pleading for an interpretation of the constitution that would run counter to the existing constitutional tradition of preferring individual rights in close cases, without the calling of a national convention and the amendment of the constitution by the people by means of their inherent original constitution making powers. Leonard's plea was therefore for the use by the Supreme Court, of the established constitutional instrumentalities to overturn the constitution itself and effect a constitutional revolution the result of which would be the constitution of the state as master over the citizen.

#### **4.2.3 What was the Burger court's response to this invitation?**

According to Dorsen,<sup>57</sup> "The record of the Burger court on criminal justice issues, while regressive, is not totally negative. Warren court precedents have been limited, but rarely directly overruled; on a few occasions, the current court has re-affirmed constitutional principles. Overall, however, the record of the past fifteen years is discouraging. Individual rights - the hallmark of the constitutional decisions of the 1960's - have been subordinated to state interests of efficiency, order and conformity". The majority in the Burger court is generally viewed as state minded. It was much more willing to defer to state perceptions of

legality than the Warren court was. The Burger court's "... response to the constitutional problems of crime and law enforcement, differing as it has from the Warren court, seems attributable to a difference in perspective. The Burger majority has focused upon the overall systemic problem, viewing it from the top down; the Warren court viewed problems from the bottom-up, focusing upon the individual".<sup>58</sup>

#### **4.2.4 Burger courts techniques of reversal of Warren court decisions**

The most dangerous position to the rights of the accused that the Burger court has adopted is its acquiescence to the restriction of Federal Court jurisdiction in matters which affect federal constitutional rights. It was the Warren court's willingness to exercise wide jurisdiction in the area of constitutional rights which allowed many of the issues which resulted in landmark decisions, to reach the Supreme Court. The Warren court had for example permitted an accused to sue out a writ of habeas corpus in Federal Court even when he had not exhausted state remedies unless he deliberately bypassed remedial procedures still available to him at state level.

In Stone v Powell<sup>59</sup> the accused had applied for a writ of habeas corpus after they had been convicted for crimes according to state law. According to them evidence had been admitted at their trials which should have been suppressed because such evidence had been unlawfully obtained. The court held that where a state had provided an opportunity for full and fair litigation of a Fourth Amendment claim, a prisoner should not be granted habeas corpus relief by a federal court "This limitation on the exclusionary rule was justified in part on the theory that only constitutional violations that concern questions of guilt or innocence should be

grounds for habeas relief. It will not be surprising if the court extends this rationale to preclude review of violations of other constitutional provisions".<sup>60</sup>

In US v Calandra the Burger court "reversed another longstanding constitutional doctrine in the field of due process when it ruled ... that prosecutors might present to a grandjury evidence which police officers had collected illegally. The court also decided that the prosecutor might question a witness (the potential criminal defendant) about such evidence before the grand jury".<sup>61</sup>

#### 4.2.5 Distinguishing precedents

In certain areas, the Burger court did not reverse the decisions of the Warren court, but was "able to manipulate and redefine legal doctrinals and thereby restrict, limit and undercut these principles"<sup>62</sup> so that its decisions "... blunt the impact of rulings that had expanded individual liberties. Many decisions in this category concern criminal due process".<sup>63</sup>

Prior to 1967 there had been many misidentifications of accused persons because in some cases of suggestion to witnesses by law enforcement officers. In cases which turned on correct identification by the eye witnesses, identification procedures were of crucial importance. The Warren court in US v Wade<sup>64</sup> had held that the accused was entitled to have counsel present at a post-indictment identificatory lineup.

In Kirby v Illinois<sup>65</sup> the accused were identified by the complainant at the police station before they were charged. The court held that Wade's case applied only when adversarial proceedings

had begun not before. The investigatory stage of proceedings before the accused was charged was a stage before the proceedings became adversarial and so it was not necessary to have counsel present. "The court's formalistic, technical interpretation of the Sixth Amendment demonstrates that legal doctrine can easily be manipulated to undermine prior precedent without the necessity of overruling".<sup>66</sup>

United States v Ash<sup>67</sup> was another occasion when the Burger court narrowed the broad principle enunciated by the Warren court in Wade's case. In Ash's case the complainant had been robbed at gunpoint. An informer told FBI agents that he had discussed the robbery with the accused before it occurred. Acting on this information, the FBI agent showed the four witnesses certain photographs of negro male persons. One of those pictures was of the accused. The four witnesses could not positively identify the accused from the photographs. At the time the witnesses were shown the photographs the accused had not yet been arrested. When the prosecutor was preparing for trial, the prosecutor showed the same witnesses colour photographs one of which was the accused's. Three witnesses picked the accused's photograph. No attorney for the accused was present when the photographic identification parade was held.

The court distinguished Wade's case holding that no possibility arose that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary. The accused had not even been there when the photographic lineup was held. The accused's Sixth Amendment rights had not been affected.<sup>68</sup>

Miranda's case, the landmark decision on procedural due process was whittled away by the

Burger court. In Harris v New York<sup>69</sup> statements which had been obtained from the accused in violation of the Miranda mandate and which were admittedly not admissible in court as evidence were used to impeach the accused's credibility. The court permitted such use. The Supreme Court affirmed, holding that: "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defence, free from the risk of confrontation with prior inconsistent utterances".<sup>70</sup>

In Michigan v Tucker<sup>71</sup> the accused had been charged with rape. He had been interrogated after he had been informed of his Miranda rights save that he had not been told that counsel would be appointed for him if he desired the assistance of counsel. The accused told the investigation officers that he had been with one Henderson. However, when Henderson was interviewed by the investigation officers he gave an account which tended to incriminate the accused.

At the trial, the accused sought to exclude Henderson's evidence because he had given the police information about Henderson without being given his full constitutional rights in terms of Miranda. The motion was denied and he was convicted. The court of appeal affirmed. He sought habeas corpus in a federal court. The court granted it and the appeals court affirmed.

The Supreme Court reversed holding, inter alia, that the failure to comply with the mandate of Miranda by the police officers had not been in bad faith and that the failure to advise the accused of his Sixth Amendment right to counsel had no bearing on the reliability of Henderson's evidence.

As Dorsen<sup>72</sup> clearly shows, the acceptance of the good faith exception to the evidential

exclusionary rule which is applicable in normal circumstances, may have a severely detrimental effect on the rights of the accused and on procedural constitutional protections because deterrence of police misconduct will be diminished and the due process rights of the accused will be infringed by the police who will then have factually to prove that they acted in good faith albeit illegally and the evidence that was illegally obtained will be admitted. Perhaps the hope of Leonard has been realised by the Burger court that "perhaps we are approaching the threshold of a new trend in which the investigative process will be favoured with a revival of judicial encouragement".<sup>73</sup>

For this reason Furmston has the following to say:

"The court has freed police to conduct extensive searches of suspects arrested for mere traffic offences and it has ruled that even when evidence has been illegally severed by the police it may still be used in grand jury proceedings. It has brought to a halt the process of extending to the juvenile court those procedural requirements applicable in other criminal proceedings. It has ended the steady expansion of the law governing the right of confrontation. It has approved the warrantless use of bugged informers. It has in short, rather severely limited the emerging constitutional doctrines affecting criminal procedure and perhaps most notably in the Harris twins it has evidenced a desire to reverse the trend of Warren court decisions".<sup>74</sup>

Except for some retreat from the binding doctrines of the Warren court in the areas of illegal searches and seizures, arrests, jurisdiction, provision of legal aid for indigent defendants,

admissions and confessions, the great rights of the accused remain largely in place although there is a fear and anxiety in America that the erosion of constitutional rights begun under the Burger court will continue.

#### **4.2.6 Post Burger court perspectives in criminal justice**

In July 1986 the President of the United States announced that the chief justice of the United States, Warren Burger, would retire when a new chief justice was confirmed by the Senate. The president immediately nominated Justice Rehnquist for the post of chief justice and Antonin Scalia to fill the vacant seat on the Supreme Court of the United States. President Reagan, like President Nixon before him, was conservative in criminal justice matters and also favoured strict construction of the constitution. Justice Rehnquist was the most conservative and consistent member of the Supreme Court.

The nomination of Justice Rehnquist was assailed from every liberal quarter in the United States on the basis that he was not sensitive to minority rights, women's rights and so on. There was a fight when the nomination was considered by the Senate Judiciary Committee. Justice Rehnquist's nomination was approved but was sent to the full Senate for ratification.

It is well to recall the dictum of Baith, that law enforcement is ever at odds with civil liberty.<sup>75</sup>

As he further puts it, America must remember that:

“Enforcement of the law against those who violate it - that is against those who impair the freedom of others - entails power. But power is always dangerous.

It must be wielded by men; and men empowered to administer the law fall easily into the notion that they are empowered also to interpret and to shape it. Thus the power intended to prevent oppression by lawbreakers becomes, if not constrained and bounded, a means of oppressing the law abiding. Power, intended to preserve liberty may also imperil it".<sup>76</sup> It is well to take to heart the warning of Rudovsky: "It has been a historical commonplace for government officials and others to exploit the public's legitimate concerns about crime and criminal violence for partisan and political purposes. Fear of crime has been used to deflect consideration of other seemingly intractable social issues, to denigrate political, minority and ethnic movements and to justify regressive legislation and arbitrary police controls. The end results of these law and order campaigns usually has been enhancement of state power at the expense of individual rights, but virtually no reduction in crime".

Those that wield power assert that liberty may be assured only when there is order in society. They assert that without order, there can be no liberty for anyone. However, "the power to maintain order can be kept consonant with liberty and with justice - an essential component of liberty - only if it is governed by rules of procedure".<sup>77</sup>

It will be no good to America to hearken to hysterical demand for excision or restriction of rights of the criminal defendant at the expense of due process of law for, as Baith states,

"Due process - a legal concept which simply summarizes man's sense of fair play represents a distillation of Anglo-American experience in seeking to

administer law equitably. Justice is an interest of the society as a whole as well as of its individual members. For no society that does not maintain equal justice under law can survive, for very long, it will develop frictions certain to jar it asunder. The benefits of due process are conferred not out of sentimental regard for criminals but out of recognition that without these benefits accused persons cannot effectively defend themselves against the overwhelming power of the state - cannot play the role assigned to them in the accusatorial system which characterizes English and American justice".<sup>78</sup>

It was hoped by many that the Rehnquist Court would heed these sentiments as Baith said "... Justice Frankfurter was indulging in no overstatement when he said, 'The history of liberty has largely been the history of observance of procedural safeguards'.<sup>79</sup>

After all, liberty is but a compound of rights and entitlements. Rights themselves "... are grand and ambiguous abstractions enmeshed in an institutional matrix which gives them precise articulation and provides for their enforcement against the recalcitrant ... In a very real sense, all rights depend for their ultimate meaning and effect on an institutional structure to provide the individual with an Archimedes' lever to invoke them".<sup>80</sup> Procedural rights are such an Archimedes' lever. To restrict procedural rights now, will be a reversal of American history because, "... much of the history of criminal justice in the United States is, in the 20th century, a history of how these rights have been more and more elaborated and infused with more finely grained motions of what makes process fair."<sup>81</sup>

### 4.3 British responses to the violent society

For centuries, within the British constitutional system, the attitude of the British courts to the rights of the subject was reflected in Lord Denning's dictum that: "Whenever one of the Kings's judges takes his seat, there is one application which by long tradition has priority over all others. Counsel has but to say 'My Lord, I have an application which concerns the liberty of the subject' and forthwith the judge will put all other matters aside and hear it. This is, of course, only a matter of procedure, but the English law respecting the freedom of the individual has been built up from the procedure of the courts : and this simple instance of priority in point of time contains within it the fundamental principle that, where there is any conflict between the freedom of the individual and other rights or interests, then no matter how great or powerful those others may be, the freedom of the humblest citizen shall prevail over it".<sup>82</sup>

However, as Lord Denning pointed out in 1949, the concept of right was viewed in English law as having an important corollary of duty. "What matters in England is that each man should be free to develop his own personality to the full : and the only duties which should restrict this freedom are those which are necessary to enable everyone else to do the same. Whenever these interests are nicely balanced, the scale goes down on the side of freedom".<sup>83</sup>

Lord Denning's view was of course based on the then traditional perception of British society as an homogenous society wherein legal norms represented a general confluence of morality, where no questions were raised as to the legitimacy of law or the government's power to enforce it.<sup>84</sup> However, since the first world war, there was an influx of immigrants into Great Britain and the traditional homogeneity of British society was fractured<sup>85</sup> and with it the

traditional legal consensus.<sup>86</sup> By the 1980's there was a definite shift in the English position.<sup>87</sup> As Hall saw it: "We are now in the middle of a deep and decisive movement towards a more disciplinary, authoritarian kind of society. This shift has been in progress since the 1960's..."<sup>88</sup> There was in Great Britain a definite shift towards the restriction of the traditional British public law rights. This shift was attributable to the "... convergence of a criminal violence theme, originating in the mid sixties, and a political violence theme which developed a few years later".<sup>89</sup>

Although the British had been anxious about crime generally,<sup>90</sup> it was in August 1966 when three policeman were shot dead that British public opinion was galvanised in favour of the forces of law and order.<sup>91</sup> At about this time a movement of political revolutionary<sup>92</sup> fervour arose in Great Britain with significant minority groups challenging the traditional unity of the polity.<sup>93</sup> The rise of the Angry Brigade and the resort to terrorist acts caused the politically motivated, reactivative<sup>94</sup> acts of political malcontents to be perceived by the opinion forming media<sup>95</sup> as acts of criminality and this was then taken up by society in general. Thus by 1972 the two themes had merged and the ideology of the violent society evolved.

As had happened in the United States of America, "... the deeping anomie eventually began to find expression in the reassertion of the rule of law and the necessity of order in the face of impending chaos".<sup>96</sup> The ideological battle was fought primarily in the newspapers.<sup>97</sup> As had happened in America, the government was accused of being soft on criminals and calls were made for stiffer penalties and allegations were made that the police were hobbled by a variety<sup>98</sup> of rules which were weighted in favour of the accused.<sup>99</sup> The most famous or infamous expression of this view was the Dimbleby lecture of 3 November 1973<sup>100</sup> given by the then

commissioner of the Metropolitan Police, Sir Robert Mark.<sup>101</sup> The view has been expressed continuously since then.

The dilemma of English society was put thus by Alderson: "If the changes from an authoritarian to a libertarian society have largely been achieved, it has not been without cost; and crime and disorder have been part of that cost. If the libertarian society is now to transform itself into a society of new moral dimensions, it will not be done without cost either".<sup>102</sup> Obviously the price of law and order had to be a restriction of the public law rights of the citizen.

#### 4.4 The reaction of Parliament

Parliament responded to the calls for drastic action by passing the Criminal Justice Act of 1967. The Act did not introduce any startling innovations to the structural arrangements of the criminal process but it introduced huge increases in maximum penalties for certain offences, some being ten or twenty times the previous maximum fines.<sup>103</sup>

The turmoil in Great Britain in fact produced four significant additions to the law.<sup>104</sup> The most important institutional and structural changes in the criminal law have been brought about by the *Prevention of Terrorism (Temporary Provisions) Act 1974*. The Act was introduced as a temporary measure against terrorism reprisals in Mainland Britain of the IRA for the killing by British backed forces of 13 Catholics in London on 30 January 1972.<sup>105</sup> The 1974 Act was repealed and re-enacted by the similarly named act of 1976. The Act of 1976 was repealed and re-enacted by the identically named Act of 1984.

The Acts have been criticised because it is averred that they "... have destroyed safeguards for the liberty of the individual won over centuries by replacing legally defined and protected rights with arbitrary executive powers, they have violated the cardinal principles of the rule of law".<sup>106</sup>

The provisions of the Act are to be examined later under a different heading.

However, the evidential provisions of the criminal process have not been significantly tampered with. "More radical responses involving sweeping emergency legislation and modification of normal judicial procedures and processes are not normally justified in the democratic west".<sup>107</sup>

#### 4.5 The response of the courts

The courts have maintained their traditional low profile role of interpreting and applying the law.<sup>108</sup> There have been no significant changes in the criminal justice system as a result of court action because the English judges eschew involvement in issues which involve policy.<sup>109</sup>

#### 4.6 The institutional role of the trial as combat

The institutional role of the trial was adumbrated by Bok in the following words:

"In the whole history of law and order the longest step forward was taken by primitive man when, as if by common consent, the tribe sat down in a circle and allowed only one man to speak at a time. An accused who is shouted down has no rights whatsoever".<sup>110</sup>

Judge Bok's metaphor laid no claim to historicity but it drew attention to the fundamentals of civilised conflict resolution. The circle of men around a campfire which settled disputes among members of the tribe or band has gradually been refined over the centuries until the great institution of the court has emerged. The institution of the trial has developed apace and now holds unquestioned sway as the pre-eminent and to some people, the only peaceable means of resolving conflict which cannot be resolved by discussion and negotiation between members of a society claiming or disputing some satisfaction *inter se*. Yet one finds so much difference of opinion among people as regards the institutional character of a trial within a system of normatively allocated values, enforceable by state sanction.

When ancient people decided to form the circle, they simultaneously undertook to listen to verbal representations by the disputants and to render decisions dependent on such representations. It must have become apparent from the start that attempts would sometimes be made to mislead the circle into making incorrect determinations. Representations would be ambiguous and unclear to the circle and it would be necessary to clarify them. Very early on it would have been obvious that representations should carry weight when supported by the words of reliable people within the tribe. Who should then secure such people and arrange for them to be available when the men gathered to form the circle? These and other questions are still at the root of the disagreements among people regarding the institutional character and value of the trial. Basically the ancient question, as it is now, is the definition of roles in the trial process of the main actors, that is, the decision makers and the disputants.

Criminal procedure systems may be institutionally divided, according to the role of the main actors in the process into the accusatorial, inquisitorial and mixed systems of criminal

procedure.<sup>111</sup> The accusatorial system owes its origin in an alleged wrong and an accusation levelled at the wrongdoer and a demand made for satisfaction. The matter was then settled personally by the parties involved by combat. With the advent of judicial settlement, the symbolism of combat was retained. Combat was now restricted to verbal and intellectual weapons. An essential feature of combat is the presence of the disputants to dispute the issue. No combat is possible if the combatants or one of them is absent.

The parties contend from opposite legal poles each attempting to overcome the other's position by forensic skill. Because of this polar positioning in legal disputation in court the process is called adversarial. The inquisitorial process on the other hand is an integrated process wherein the actors co-operate with the decision maker and each other in coming to a decision resolving the dispute. The mixed system includes elements of both the accusatorial and the inquisitorial systems.

#### **4.6.1 The institutional role of the trial in America**

The American system of criminal justice is unquestionably accusatorial or adversarial.<sup>112</sup> The adversarial American system is normatively determined by legal rules that determine that the state bear the onus of proving the accused's guilt beyond a reasonable doubt and that ensures that the accused does not procedurally suffer any prejudice. In addition the judge is required to be impartial and to take no sides. In various amendments of the Constitution, namely, first, fourth, fifth, sixth, eighth and fourteenth amendments, the Constitution protects the individual rights of citizens and ensures that such rights may be abridged only after due procedures have been complied with.<sup>113</sup>

The adversary system has been adopted and holds sway in the United States because it is viewed as the system most likely to produce fair decisions.<sup>114</sup> The adversary system in America produces this effect by building into the criminal justice system three different safeguards:

- (a) It provides a forum for the testing of the creditworthiness of evidence through cross examination. As each party does his level best to discredit the evidence of his adversary, the evidence which is eventually accepted is likely to be reliable enough to ground a correct decision.<sup>115</sup>
- (b) The adversary system protects the integrity of the decision by introducing a system of checks and balances within the fact finding mechanism which minimises the risk of incorrect decision making through bias or corruption, for example, if a judge is unfair, the jury may ignore his instruction and return a fair verdict.
- (c) It permits the defence attorney, who represents the weakest of the parties involved in the process, the accused, to protect the rights of the accused by challenging the government at every turn and ensuring that all the procedures which ensure justice and fairness are observed.<sup>116</sup>

However, there is telling criticism against the adversary system as it obtains in America. In the words of Weinreb:

“Once the matter is placed in that perspective, much of what we now accept as

inevitable aspects of an adversary system loses its plausibility. There is no reason why committed, partisan advocacy of a position, including forceful presentation of inferences and arguments, for one side, need be attached to partisan presentation of the evidence. There is no reason why witnesses need always be assigned to the prosecution or defense and presented as part of the case for one side, or rather than as witnesses to an event. There is no reason why the information that a witness gives need be controlled by someone who is determined to avoid the disclosure of evidence favourable to the other side, however, relevant to the inquiry. There is no reason why an intense, searching examination of a witness's recollections to ensure their accuracy need regularly be accompanied by deliberately manipulative efforts to obscure or discredit his testimony; or why the duty to be a witness at a criminal trial should require submission to almost any abusive questioning tactic that an opposing lawyer may devise. There is no reason why rules of procedure designed to ensure a fair trial need systematically be distorted by lawyers into tactical ploys for which they were not intended. A criminal trial need not be from beginning to end an exercise in the tactics of persuasion rather than an effort to come as close as we can to finding out what happened."<sup>117</sup>

According to Weinreb the adversary system should be replaced by an inquisitorial system<sup>118</sup> very much alien to the traditional thinking of Americans.<sup>119</sup> No matter, as Weinreb points out, that the adversarial system is slow and expensive and subject to corruption so that the resultant decision is more often than not incorrect, the consensus of American opinion is that rather than an innocent man be convicted, it is better that society take the risk that guilty men may take

advantage of the rules that guarantee the liberty of the innocent man and also go free; and that the adversarial procedure is the best available procedure to achieve this end. As long as this perception remains current in America, Lloyd Weinreb's idea remains a cry in the wilderness.

Nagel is also critical of the adversary system because it is institutionally so structured that it does not achieve what it intends to achieve, that is, justice. "But the goal of an adversary proceeding, whatever the parties may hope or believe is not to find reality or justice. It is rather to outwit the opponent and to win".<sup>120</sup>

#### 4.6.2 The institutional role of the trial in England

According to Glanville Williams, the "... administration of criminal justice in England stands high in the opinion not only of Englishmen but of foreign observers".<sup>121</sup> As he further observes, they go so far as to consider that the English system of criminal justice is the best in the world.<sup>122</sup> Because the system has operated for many centuries without very significant conflicts arising, it has not been subject to close scrutiny or criticism. Furthermore, those who are involved in the criminal justice system have been suspicious and hostile to researchers so that research on the topic became very difficult.<sup>123</sup>

There is therefore an understandable paucity of English literature on the criminal justice system and how it works<sup>124</sup> and that is why reliance has been had on works which treat the subject from a sociological point of view. What research has been done has mainly been dogmatic<sup>125</sup>, reflecting the applicable law, rather than an attempt to construct a coherent, theoretical system. According to McConville and Baldwin: "There has in fact been a great deal, but most of it has

been limited in scope, fragmentary and essentially atheoretical".<sup>126</sup>

The ideological basis of the English system of criminal justice is the liberty of the subject.<sup>127</sup> English criminal law is hostile to the notion of punishment of the innocent.<sup>128</sup> "English legal and administrative procedures are specifically designed to guard against two broad errors : the conviction of any who are possibly innocent and the placing on trial of those against whom there is no real evidence".<sup>129</sup>

To achieve the ideological aim of the criminal justice system, the system has evolved the basic rule that a person is presumed innocent until he is proved guilty.<sup>130</sup> Translated into ideological terms, this rule posits that all citizens are entitled to their freedom unless and until they forfeit their entitlement to such freedom. They can only forfeit their freedom if they are proved to be guilty of an infraction of a legal norm which infraction is of sufficient gravity as to warrant such forfeiture. The institution, the function of which is to provide such proof and to legitimise such forfeiture of freedom by the subject is the trial. "The trial is where that process of proof is not only carried out but put on public display - where justice has not only to be done, but be seen to be done".<sup>131</sup>

The trial is further structured to give effect to the basic ideological values. The perception is that the evidential process must be made an evidential contest<sup>132</sup> with one side seeking to justify the forfeiture of freedom by the subject by proving the justificatory fact, that is, the crime. The other side seeks to justify the opposite, that is, the retention of freedom by the subject by preventing the proof of the justificatory fact.<sup>133</sup> The perception is that the struggle of the carefully structured evidential contest<sup>134</sup> will yield an acceptable reflection of the truth. "The

theoretical origins of the adversary system of attaining the truth by such means can be traced to the dialectical methods of the ancient Greek philosophers, who developed the view that the conflict alternative contentions provided the best way of conducting an enquiry".<sup>135</sup> It would enable the factfinder to make an informed choice of competing testimonial assertions and thus make a rational decision which is justifiable in terms of the result that will follow the factfinder's choice of assertions. Hence the evidential process has been bifurcated and become adversarial. The adversarial nature of the criminal trial in England as "... a contest between two contending parties is deeply ingrained in the common lawyer's make-up".<sup>136</sup>

A criticism of the English adversarial trial is that it in fact does not advance the ideological imperative of proving the guilt of the accused person. According to Jackson<sup>137</sup>, "... the court is not endeavouring to find out the whole of the facts to see if any criminal offence has been committed to ascertain whether the defendant was responsible for what happened". According to Atiyah the function of the trial is to resolve a dispute between two contesting parties rather than to conduct an investigation or to ascertain what the truth is.<sup>138</sup> McBarnett shows convincingly that advocacy in the trial process distorts and impedes truth-finding and therefore contradicts the ideological supposition that the trial ascertains truth.<sup>139</sup>

As he further puts it:

"The good advocate grasps at complex confused reality and constructs a simple clear-cut account of it. A case is thus very much an edited version. But it is not just edited into a minimal account - a microcosm of the indecent - it is an account edited with vested interests in mind. Hence the lawyer's approach 'that,

so far as possible, only that should be revealed which supports his case'. Far from being the whole truth and nothing but the truth' a case is a biased construct, manipulating and editing the raw materials of the witnesses' perceptions of an incident into not so much an exhaustively accurate version of what happened as one which is advantageous to one side".<sup>140</sup>

Quite clearly, the English adversarial system of trial procedure "... does not describe the actual behaviour of the various participants within it; and secondly, the model is ambiguous in its goals and ambivalent in its prescriptions and does not comprise a set of clear and certain rules, rights and responsibilities".<sup>141</sup> However, "... it must be remembered that rules and institutions are of far less importance than the mode and spirit in which they are administered".<sup>142</sup>

Viewed in that light, the English trial system has been an unqualified success in that it is perceived by the people as achieving the basic ideological imperative.

#### 4.7 **The function of the trial**

The trial plays a pivotal role in the conflict resolution of the criminal justice system.<sup>143</sup> Within the parameters of the institutional ideology of the criminal justice system, what function does the trial fulfil to advance the ideological aims of the criminal justice system?

Despite variations in conception of function among various commentators generally, it is agreed that a trial must be a rational resolution of the issues.<sup>144</sup>

According to Senna and Siegal, the functions of the trial are threefold, namely

- (a) to seek the truth;
- (b) to obtain justice for the individual brought before the tribunal; and
- (c) to maintain the integrity of the government's rule of law.

According to Knox, a trial is an attempt to arrive at the truth.<sup>145</sup>

Bok<sup>146</sup> defines a trial as the method by which facts are found, the law set to them and the resulting sanctions applied. According to Nagel the function of a trial is to offer the parties a legitimate channel for the expression of their hostility and thus act as a social stabilizer.<sup>147</sup>

The various definitions of the function of the trial represent the various conceptions of the trial which are current in American law. Senna and Segal's view is essentially a jurist's view that visualises the trial in terms of what the trial ought to do, that is, a pre-determined imperative.

Knox's definition is that of a judge who understands the theoretical ideologically predetermined function of the trial but whose practical experience teaches him that the ideological commitment to tribunal fact-finding is seldom fulfilled, and that the trial process is no more than an attempt to measure up to the ideological expectation.

Bok's definition reflects the realistic appraisal of the trial process of an experienced practitioner who views the trial process as conflict resolution without reference to the undemonstrable

quantity of proof.

Weinreb's remark that "... every aspect of the trial is distorted by the presentation of evidence exclusively through the prisms of the prosecution and the defence"<sup>148</sup> is persuasive that the truth seldom survives the evidential process<sup>149</sup> in an adversarial system of evidence tendering and challenging. Nagel's definition therefore seems much more to the point and much nearer to the correct functional position of the trial in the criminal justice system.

However, not to jeopardize the legitimacy of the trial as a means of settling disputes, it is necessary to perpetuate the myth that its decisions are predicated on truthful evidence, when indications are that the evidence may be less than truthful.

In England, although little has been written on the trial from the analytical point of view, it is clear from the criticism of the English trial by English writers that they recognise that it is not the function of the English trial to ascertain truth. It may therefore be accepted that the English trial, like its American counterpart has the function of resolving dispute<sup>150</sup> without necessarily referring to the truth or otherwise of testimonial assertions that constitute the testimonial controversy.

#### **4.8 The fair trial**

Fairness is an attribute of adjudication which is desired by most people. Fair adjudication is one which is characterized by honesty and justice. Fairness in the judicial sphere is absence of fraud, injustice, prejudice or favouritism from the decision making process of a court of law.

In the United States like in all countries of the world, the right of the government to repress crime by the creation of normative rules of behaviour and the creation of institutions to enforce such rules is conceded.<sup>151</sup> However, the basic public law ideology of the United States turns on the need to fix limits to the power of government. "...[N]evertheless, there are limits to the power which are as important as the power itself...".<sup>152</sup> The primary aim of the guilt determining and sanction imposing process is "... fairness and justice... designed to guarantee and protect individual rights without sacrificing society to the uncontrolled criminal element".<sup>153</sup>

In the United States the principal instrument for achieving fairness in the judicial process is the Bill of Rights to the Constitution. The fifth, sixth and fourteenth amendments specifically enshrine the accused's rights to a fair trial.<sup>154</sup>

The applicability and potency of the foregoing amendments to enforce fair procedures in criminal adjudication cannot be properly described without a description of the court system of the United States.<sup>155</sup>

The United States has a dual court system.<sup>156</sup> This results from the fact that governmental power in the United States is divided between the Federal National Government and the various local state governments. "The end result is fifty one separate court systems - one for the national government and fifty different ones in the states".<sup>157</sup> According to Aumann there are historical reasons for this division.<sup>158</sup>

Because of the division of power between the federal government and the states, each level of the two tiered division of power has created courts to enforce those laws created within its

competence. Federal courts enforce federal laws and state courts enforce state laws.<sup>159</sup> Both systems of courts have exclusive jurisdiction in matters pertaining to their competence in terms of the Constitution. There is therefore jurisdictional parallelism.

At the federal level, the court of original jurisdiction is the Federal District Court. An appeal lies to the Federal Appeals Court of the circuit involved and thence to these Supreme Court as the final court of appeal.<sup>160</sup>

Among the various states, the three tier organization found in the federal court system is not followed. Each state is at liberty to make its own institutional arrangements. The result is a bewildering variety of systems which defies description and categorization. However, Neubauer suggests a rational and useful classification. According to him state courts may be divided into four levels, that is, trial courts of limited jurisdiction, trial courts of general jurisdiction, intermediate appellate courts and courts of last resort.<sup>161</sup> Senna and Siegel follow the basic classification of Neubauer but assert a three-fold division into appellate, general and limited jurisdiction courts.<sup>162</sup> However, there are no significant differences of opinion among the authors as to the jurisdiction and functions of the various state courts and in fact Senna and Siegel further divide appeal courts into inter-mediate courts of appeal and courts of last resort.<sup>163</sup>

Although the federal courts and the state courts have exclusive jurisdiction in matters within their competence, “[T]he United States Constitution demands that every jurisdiction governed by it comply with certain constitutional requirements...”<sup>164</sup>

One of the most important constitutional requirements is a fair trial for any defendant/accused person, who is charged with a crime in the United States.<sup>165</sup>

#### 4.8.1 Due process

The Supreme Court, as the ultimate interpreter of constitutional language is therefore the ultimate determinant of what a fair trial is - whether the suit which raises the issue emanates from a federal jurisdiction or a state jurisdiction. The Supreme Court, since it interprets the Constitution and therefore gives meaning to rights which are enumerated in the Constitution is "... beyond question the great and ultimate defender of the basic freedoms of the American people".<sup>166</sup>

#### 4.8.2 What is a fair trial?

The dictionary definition of fairness alluded to earlier can hardly be regarded as sufficient as human institutions seldom adhere to absolutist definitions. Therefore the basic right of the accused is to have a fair trial within the cultural definition of fairness of the forum. Under the American Constitution this is called the right of due process of law or the equal protection of the laws, including a speedy and public trial by an impartial jury. Whatever the philosophical description of a fair trial maybe, it is in fact a pragmatic construct resting in considerable measure on legal fictions or perhaps unverified hypotheses.<sup>167</sup> There is experience, but little empirical evidence to justify this pragmatic approach and while it is the common notion that a trial has to determine reality and do justice, this is in the nature of a platonic ideal which is a goal or norm against which to measure the concept of a fair trial.<sup>168</sup>

Fairness of the complex of determinative procedures that we call a trial is a fluid concept the meaning of which has differed from time to time.<sup>169</sup>

“Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization ‘due process’ cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, ‘due process’ is compounded of history, reason, the past course of decisions and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process”.<sup>170</sup>

The constitutional law catchword for trial fairness is due process of law. Generally, in the constitutional context of present-day American constitutionalism<sup>171</sup> due process of law means the rights of an accused person most of which stem from the Bill of Rights.<sup>172</sup> However, Fellman sees due process of law as something more than the right of the accused. “Due process is not, primarily, the right of the accused. It is basically the community’s assurance that prosecutors, judges and juries will behave properly, within rules distilled from long centuries of concrete experience”.<sup>173</sup>

The phrase “due process of law” appears only twice in the United States Constitution, that is, in the Fifth and Sixth Amendments, yet its influence has reverberated throughout the criminal

justice system.

#### 4.8.3 Substantive and procedural due process

According to current practice in the United States, due process can be divided into substantive due process and procedural due process. Substantive due process seeks to determine the constitutional validity of legislation or executive fiat by assessing such legislation or executive ordinance's reconcilability with some constitutional provision as to subject matter. The court developed this test to regulate the impact of state economic and regulatory legislation. Procedural due process determines the constitutionality of manner of process in action taken by public officials, acting within their powers.<sup>174</sup> Substantive due process is of no relevance to this study as this study is concerned primarily with procedures the denouement of which finds expression in the conviction of the accused person. Procedural due process and how it came to be part of American law therefore merits further attention.

#### 4.8.4 The incorporation controversy

When the National Convention agreed on the text of the Constitution, the instrument contained no fundamental guarantees.<sup>175</sup> However, the recent history of usurpation of rights by the monarchy<sup>176</sup> and the suppression of the American colonists by the British Government<sup>177</sup> were still very vivid in the memory of the colonists. Some of the states were not willing to ratify the Constitution unless a Bill of Rights was added guaranteeing citizens certain rights that would not be capable of abridgment by the government.<sup>178</sup>

The consensus of American scholarly opinion is that the intention of the framers of the first eight articles of the Bill of Rights was that the Bill of Rights should be applicable only to the national government.<sup>179</sup> The effect of non-applicability of the Bill of Rights on the States "... resulted in abuses which have been rectified only with great difficulty, and remain even today the subject of court action".<sup>180</sup>

It was the opinion of some that the original constitution was lax in articulating and specifying individual rights and that it was necessary to specify the rights of citizens and enshrine them in the constitution so that the rights would be safe in the future against governmental abuse.<sup>181</sup> However, for the first seventy five years of the existence of the United States, the Bill of Rights did not apply to states. The only specific prohibitions which applied to states related to bills of attainder and retrospective legislation which were specifically prohibited by the constitution. States were therefore free to develop criminal law and procedure as they deemed fit.

#### **4.8.5 The extension of the Bill of Rights to the state**

In 1833 in the case of Barrow v Baltimore, the Supreme Court held in no uncertain terms that the Bill of Rights did not apply to the states.

In 1868 the Congress adopted the Fourteenth Amendment. The question which immediately arose was whether the Fourteenth Amendment which was clearly applicable to both states and the federal government incorporated by reference the Bill of Rights and extended its provisions to the states. The issue was first raised in the context of civil proceedings. The civil law controversy is irrelevant to this study but Abraham has written instructively on it.<sup>182</sup> The

Supreme Court has adopted a policy of selective incorporation of the Bill of Rights and rendered some of the provisions of the Bill of Rights applicable to the states by using the Fourteenth Amendment. But not all the provisions have been incorporated.<sup>183</sup>

The incorporation controversy in civil matters did affect the criminal justice system, at first, prejudicially. In *Hurtado v California*<sup>184</sup> the accused had been tried for murder on information prepared by the prosecutor after examination by a magistrate. No grand jury proceedings had been initiated nor did a grand jury return an indictment of murder. He had been convicted of murder and sentenced to death. The procedure adopted by the prosecutor was correct in terms of the Constitution of California. The accused objected to the legality of the proceedings and averred that the proceedings had infringed the Fifth and Fourteenth Amendments of the Constitution of the United States in that grand jury proceedings had not been effected and therefore the due process clause of the Fourteenth Amendment had not been applied.

The court rejected the accused's argument and held that "... the Fifth Amendment requirement of indictment by grand jury applied only to federal courts, and it was not covered by the due process clause of the Fourteenth Amendment. Since this amendment does not specifically say a state must provide a grand jury indictment, *Hurtado* was not deprived of any constitutional right and must therefore die on the gallows".<sup>185</sup> Harlan J, however, filed a ringing dissent.

From then on the court consistently held that the clauses of the original Bill of Rights (particularly the Fourth, Fifth, Sixth and Eighth Amendments) were binding only on the federal government. In so doing the court refused to use the due process clause of the Fourteenth Amendment to control state officials and courts in their treatment of accused persons.<sup>186</sup>

In Twining v New Jersey the Supreme Court further confirmed its unwillingness to come to the aid of an accused person who had been unfairly treated. In that case the accused were charged with exhibiting a false paper to an official which contained false information with the intention of deceiving the official about the true state in which their trust company was in.

The state of New Jersey, unlike most of the states at the time, permitted a judge, in making his charge to the jury to comment on the accused's choice not to give evidence. The two accused elected not to give evidence. The judge duly commented on their failure to give evidence when he charged the jury.

The appellants appealed on the ground that the New Jersey law compelled them to give evidence. Testimonial compulsion was unconstitutional and was a violation of the due process clause of the Fourteenth Amendment. The procedure prescribed by the New Jersey statute was also in conflict with the Fourteenth Amendment because protection against self incrimination was one of the privileges and immunities of United States citizens guaranteed by the Fourteenth Amendment.

The court rejected the contentions of the appellants holding that the Fourteenth Amendment did not apply to the states and that the privilege against self-incrimination was not a privilege and immunity of a citizen in terms of the Fourteen Amendment. Harlan J again dissented.

In Frank v Mangin<sup>187</sup> the accused was charged with murder. The deed unleashed such hatred against the accused that at his trial the jury and the judge were intimidated by the threatening atmosphere created by the sentiments against the accused. The accused was convicted and

sentenced to death. He made a number of motions and appeals all of which were unsuccessful. He finally made an application for habeas corpus on the ground that his trial had not complied with the due process requirements of the Fourteenth Amendment. The Federal District Court rejected his plea. On appeal to the Supreme Court, the court decided that the Fourteenth Amendment applied in cases where substantive rights were abridged and not where merely matters of form and procedure were affected. The court rejected the submission that mob intimidation of the grand jury had caused the accused's conviction and sentence. The court pointed out that that contention had already been rejected by the courts of Georgia. On the facts the court found that the accused had not been denied due process of law. According to Latham, the Supreme Court "... closed their eyes to the clear evidence that a mob, not a judge and jury had condemned Frank to death".<sup>188</sup>

This, however, was evidence of the Supreme Court's determination not to interfere with the states and state officials. Importantly, however, the court did hold that "... if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law".<sup>189</sup>

It did not take long for a case to arise to test the willingness of the court to apply the aforementioned dictum.

In Moore v Dempsey<sup>190</sup> a number of negroes were holding a meeting to evolve strategies to resist the actions of white landlords. The meeting was broken up by white people and disturbances resulted. A white person was killed. The white people started hunting negroes and shooting them and during that excitement, another white person was killed.

After the arrest of five negroes, a mob of white people marched on the jail where they were being held, intent on lynching them. The mob was dissuaded from this unlawful activity by a promise from a committee of seven which had been formed by the governor of the state, that if the mob refrained from taking the law into its own hands, then the committee of seven would see to it that the accused were executed. The committee then sought out negro witnesses and had them flogged until they agreed to incriminate the accused. A grand jury from which black people were excluded quickly brought an indictment of murder. Four days later the accused were brought to trial before a white jury from which black people had been excluded. The court and its precincts was filled with a threatening crowd that threatened serious consequences if the accused were not convicted. The attorney assigned to defend the accused was so intimidated that the trial was a farce and lasted 45 minutes. The jury considered its verdict for less than five minutes and then returned a verdict of guilty. The accused applied for a new trial basing their application on the foregoing facts. The courts refused the application and the Supreme Court affirmed.

However, two days before their execution the accused brought an application for habeas corpus. The Supreme Court of Arkansas dismissed the application on technical grounds. The accused then moved to the Supreme Court. The court granted the motion for habeas corpus, using the dictum in Frank v Mangum as the basis of its finding. There was a strong dissent from

McReynolds and Sutherland JJ, however. For the first time, the Supreme Court had held that where a trial is dominated by a mob so that the course of justice was interfered with, there was a departure from due process of law.<sup>191</sup> It is reasonable to assume that Holmes J predicated the judgment on the Fourteenth Amendment.

In 1932 in Powell v Alabama, there had been such haste in trying the accused for rape that the court had omitted to advise the accused to secure their own attorney or if they were not able to do so to assign counsel for them. The court held that the court's failure amounted to a denial of due process under the Fourteenth Amendment.

The effect of these two decisions and the decision in Brown v Mississippi where the use of a confession extracted by violence from the accused was held to have amounted to denial of due process, was to demoralise the ratio of the Hurtado case without formally repudiating the underlying thinking.<sup>192</sup>

In Palho v Connecticut<sup>193</sup> the accused had been charged for murder in the first degree, convicted for murder in the second degree and sentenced to life imprisonment. The state appealed and succeeded and the Supreme Court of Errors of Connecticut ordered a re-trial. When the accused was brought to trial a second time, he objected that he was being subjected to double jeopardy in conflict with the mandate of the Fourteenth Amendment.

Cardozo J rejected the argument that what was forbidden of the federal government in terms of the Fifth Amendment was now forbidden of the states in terms of the Fourteenth Amendment as the Fourteenth Amendment had incorporated the Fifth Amendment. In other words the

double jeopardy prohibition did not apply as the prosecution was a state prosecution. According to Cardozo the question to be asked to determine whether the due process clause in the Fourteenth Amendment was being infringed was “Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not evidence it? Does it violate those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?’”<sup>194</sup>

Cardozo’s answer was no and the judgment was affirmed. “Once again the Supreme Court had indicated that it would interfere in state trials only if they shocked the justices by their unfairness”.<sup>195</sup> One must agree with Latham<sup>196</sup> that to elevate a sense of shock at the unfairness of a case, to a principle upon which would turn a decision of the Supreme Court, instead of using the clear mandate of the Fourteenth Amendment incorporative as it is, was not a satisfactory way of judging nor was it assured of creating lasting principle articulating judgments.

The court’s refusal to incorporate the Bill of Rights in toto through the instrumentality of the incorporate clauses of the Fourteenth Amendment caused unevenness of decisions. It also caused an anomalous situation to arise in that the court could hold federal action to be violative of the Bill of Rights and declare such action void but uphold identical action as valid when taken by states.<sup>197</sup> In view of the fact that the great majority of cases are heard by state courts<sup>198</sup> the Supreme Court’s attitude in refusing to police the administration of justice by states was interpreted by many as lack of sympathy for the rights of the accused person.

Matters came to a head in Adamson v California.<sup>199</sup> The failure of the accused to give evidence

and the command thereon by the judge in his instructions to the jury were in issue. The court again refused to incorporate the Bill of Rights and affirmed the conviction and sentence. This time, however, Justice Black was outraged and set out his views in a lengthy dissent which "... remains the most celebrated analysis of the intention of the framers of Section 1"<sup>200</sup> (of the Fourteenth Amendment). According to him the intention of the framers was that the rest of the Bill of Rights should be applicable to the states. He was joined in dissent by three other justices.

#### 4.8.6 The victory of Harlan and Black JJ

Procedural due process was in the parlous state described above when Earl Warren was appointed chief justice of the United States by President Eisenhower in 1953.

"The Warren court defended the citizen's Bill of Rights Freedoms against the power of government and furthered the establishment of true equality under the law for persons of all races and in all economic circumstances. It also sought to extend guarantees that the agencies of government - in the individual states as well as at the federal level - would be held to high standards of fair procedure".<sup>201</sup>

Thus in Mapp v Ohio<sup>202</sup> state officers arrived at appellant's home and there broke in without warrant, searched and found certain pornographic materials. She was charged with possession thereof and convicted. The materials which she was convicted for possession of were discovered during the course of an illegal search. It was the law of the United States that

evidence obtained illegally by unreasonable searches and seizures is inadmissible in federal cases as such searches and seizures were violative of the Fourth Amendment.

The Supreme Court held that all evidence obtained in violation of the Fourth Amendment was inadmissible in a state court. Thus the court declared the Fourth Amendment enforceable against states. It was with some satisfaction that Black J wrote a concurring opinion. His dissents were finally becoming law and the dissents of Harlan J at the turn of the century were being vindicated.

With the decision in Malloy v Hogan<sup>203</sup> the incorporation theory was finally triumphant in criminal process when the judgment held: “we hold that the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment’s privilege against self-incrimination...”<sup>204</sup>

At long last, the court had “... taken much needed long delayed steps to provide equal justice for all persons”.<sup>205</sup> By extending the procedural safeguards under the Bill of Rights to the states, the Supreme Court has intended equal justice to all persons and equal standards are applied to all courts.<sup>206</sup> “The end result is symptomatic of the heightened emphasis in recent years on the security of the individual when pitted against the power of the state. In forging the procedural limitations of the due process clause the court has exercised a creative and dynamic role. Inherited doctrine had been modified and reshaped. New doctrines have been created. The fair trial concept has proved a potent instrument for prescribing minimum standards on a national scale for the protection of the accused. The national standard of justice has been elevated”.<sup>207</sup> Perhaps an incidental but far more important consequence of this “due process revolution” has been the advancement of constitutionalism in American life. When those who are in the nature

of things every day engaged in the administration of law in the remote interstates of the American hinterland,<sup>208</sup> know that they have to apply standards which must pass muster in Washington, on pain of reversal and criticism, a healthy respect for the rights of others grows and an appreciation and respect for the written word of the constitution is fostered among both the administrators and administrators of law. All governments and all officials are beholden to the terms of the constitution which they cannot change overnight. The citizens are therefore protected from the whims and caprices of the government of men. The constitution is a fixed beacon in the shifting sand of political horse riding which constitutes the ever constant reality of the American polity. No wonder that the American constitution is so respected among the American people.

#### 4.9 Fair trial procedure in English law

While in America the basic ideology of public law is to fix limits to the power of government,<sup>209</sup> in Great Britain, the basic ideology is to protect the citizen against the unlimited power of government.<sup>210</sup> “In order that right, and not might, should be the basis of society, the people must be under the rule of law...”<sup>211</sup>

In America this attempt has been made in the form of fixing the powers of government in a written document and giving government the authority to exercise only those powers. The Supreme Court has the authority to declare any legislative act invalid if it does not comply with the Constitution. The legislature has no authority in the United States to amend the common law since the Constitution does not grant it such authority. Thus rules of the common law have been imported and weaved into American constitutional law as the legislature could not amend

them.

The basic rule of English constitutional law is that the legislative arm of government is supreme.<sup>212</sup> This fundamental rule means that Parliament can make and unmake any law on whatever subject. It can even amend or abolish the common law.<sup>213</sup> All other lawmaking bodies in Great Britain receive their authority to make law from Parliament. The enactments of Parliament cannot be challenged in a British court of law.

The modus operandi which has been adopted in Great Britain to protect the citizen against the great powers of government is to grant certain rights to citizens piecemeal.<sup>214</sup> or to recognise certain rights as being grounded in common law.<sup>215</sup> It has already been remarked that under the British constitution there are no such things as 'guaranteed' rights - as there are in the United States constitution - expressly safeguarded in a document of peculiar sanctity. Since Parliament is all powerful, it may do anything by a simple act, and it may certainly deprive the individual of his rights - indeed, a Tudor Parliament once condescended to pass a special act to sanction the boiling to death of one Richard Rose, the Bishop of Rochester's cook (alleged to have been guilty of poisoning).

This being the case, the citizen must look for the protection of his rights, not to any constitutional document, but to the general rules of law enforced at any given time by the courts; his rights derive from the ordinary law of the land.

There are, however, certain basic rights which may be termed 'constitutional'. They are the right to personal liability, to property, to free speech assembly and association, and to equal

treatment.<sup>216</sup>

Citizens are able to exercise their rights and actualise the protection afforded them by law, by the use of writs.<sup>217</sup> Writs were originally instructions issued by the King and later by officials, instructing a judicial or administrative officer to perform some official act. These writs evolved into actions. In public law the writs evolved into prerogative orders. The main prerogative orders are the prohibition, mandams, declaration and injunction.<sup>218</sup> The ordinary courts<sup>219</sup> and the ordinary law of the land is applicable to all disputes, even those that arise in public law<sup>220</sup> unlike the position in continental systems of law where the separate courts and separate rules govern the settlement of disputes between the citizen and the authorities.<sup>221</sup> The citizen who is aggrieved by an act of an official may proceed by way of judicial review by means of which he challenges the legality of the official act. Judicial review "... is concerned not with the merits of the decision, but with its legality, and the courts' power of review is not based upon statute but upon an inherent jurisdiction within the superior courts".<sup>222</sup> Judicial review is therefore the means by which the High Court exercises its power of supervision over the lower courts and other bodies versed with adjudicative authority to ensure that they act properly and justly.<sup>223</sup> "In reviewing a particular decision the court is concerned to evaluate fairness".<sup>224</sup> Fairness is an essential attribute of a just system of justice as Lord Diplock put it.<sup>225</sup> Needless to say, the same considerations that the High Court applies in evaluating the proceedings of the lower courts are applicable to its own proceedings.

To determine the fairness of proceedings the courts have formulated the juristic figure of natural justice and fashioned rules to give effect to it. In American constitutional law, the Supreme Court has used the figure of "due process" found in the Fifth and Fourteenth Amendments and

fashioned therefrom rules of fair play. In British law the equivalent is found in the rules of natural justice, developed by the courts in their common law capacity as interpreters of law. “The rules of natural justice are minimum standards of fair decision making, imposed by the common law on persons or bodies who are under a duty to ‘act judicially’. They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable.”<sup>226</sup>

However, an essential and crucial difference between American and English law is to be found in the fact that in English law there is no substantive due process. Natural justice may, however, be used not as a standard for criticizing the content of legal rules, but to refer to the principles which must be followed in the application of rules, whatever their content, to particular cases. In this sense natural justice may be said to relate to formal as opposed to substantive justice.

However just the substance of a rule, injustice will occur unless the rule is applied impartially treating all cases alike and different cases differently.<sup>227</sup> One is tempted to ask whether the opposite applies with equal force to wit: However unjust the substance of the rule, justice will occur if the rule is applied impartially, treating like cases alike and different cases differently. Obviously it does not follow. This incongruous result is the result of a fundamental tension between the principle of legislative supremacy and the interpretative function of the court. If the court is bound to administer any act of Parliament, then the court is bound to enforce even a blatantly unfair parliamentary enactment because the court is bound to defer to Parliament.

Unlike its American counterpart the English court cannot declare an Act of Parliament void for substance.

A necessary consequence of the principle of legislative supremacy as applied in English law is the fact that the applicability of the rules of natural justice may be excluded by parliamentary legislation and a legislative provision no matter how unfair it is, must be applied by the court: "The limits of judicial review are determined by Parliament in the exercise of its sovereign power of legislation. Statutes can and often do confer unchallengeable powers upon persons or bodies".<sup>228</sup> According to Wade and Bradley: "The constitution lays emphasis on the virtues of the common law and the legislative supremacy of Parliament. It relies on the political process to secure that Parliament does not override the basic rights and liberties of the individual, nor remove from the courts the adjudication of disputes between the citizen and the state arising out of the exercise of public powers".<sup>229</sup>

However, though the legislature may purport to limit or exclude the rules of natural justice, the courts will come to such a conclusion with regret and reluctance.<sup>230</sup> There is a very strong presumption that the legislature does not intend to deny the citizen access to the courts.<sup>231</sup> Jurisdictional clauses<sup>232</sup> have fared poorly in English law.<sup>233</sup> Since as long ago as 1874 the English courts have held that even an express exclusion of an action is not effective against a manifest defect such as lack of jurisdiction or fraud on the part of the official concerned.<sup>234</sup>

British courts<sup>235</sup> have however been sympathetic to pre-clusive time clauses.<sup>236</sup> The effect of ouster clauses has also been legislatively reduced. In terms of section II (a) of the Tribunals and Inquiries Act 1958 and Section 14(I) of the Tribunals and Inquiries Act, 1971, no provision

passed before 1 August 1958 which seeks to exclude the supervisory powers of the High Court shall have effect. As Gordon points out, it seems that ex contrarius, ouster clauses passed after 1 August 1958 may have effect.<sup>237</sup> The passing of the Tribunal and Inquiries Act would appear to be a vindication of Wade and Bradley and Lord Denning's view that the one British instinct for liberty does work through the political process to balance rights with duties and to create the institutional machinery to curb the power of government.

FOOTNOTES

1. "It can be described, but only partially and inadequately, by referring to the rules of law that govern the apprehension, screening and trial of persons suspected of crime"  
Goldstein & Goldstein Law and Society (1971) 207.
2. Barth The Price of Liberty (1961) 27-28.
3. Barth 30.
4. White The Administration of Justice (1991) 110.
5. Packer The Limits of the Criminal Sanction (1968).
6. King The Framework of Criminal Justice (1981) 9-10.
7. Neubauer America's Courts and the Criminal Justice System (1984) 9-10; see also Packer "Two Models of the Criminal Process" as printed in Goldstein & Goldstein 215-216; see also in Cole (ed) Criminal Justice : Law and Politics 5ed (1988) 15-31.
8. Goldstein & Goldstein 220; "The contrasting crime control model replaces the judicial procedures with administrative procedures and formal processes with informal processes. Great trust is placed on informal fact-finding, that is, what the police know rather than what is admissible in a process of formal adjudication. The conclusions of the police as fact-finders are the principal determinants of guilt. Repression of criminal conduct is seen as the most important function of the criminal process. Criminal procedure becomes geared to the speedy processing of suspects and defendants. The obstacles of the due-process model disappear to be replaced by low-visibility administrative processing". White 114.
9. Goldstein & Goldstein 220-221.
10. King 12 et seq.
11. King 22.

12. King 24.
12. Goldstein & Goldstein 231.
13. King 27, "(T)his perspective sees the courts and the agents of criminal justice very much as part of state machinery, a machinery which is dominant by the interests of the ruling class. This does not mean that policemen, lawyers, magistrates, clerks and probation officers are all conspirators in a plot to maintain and perpetuate the dominance of the ruling class, but rather that the state creates the conditions by which through the pursuit of their apparent self-interests each of these groups help to advance the interests of the state and thus the dominant power elite".
14. Goldstein & Goldstein 231.
15. Goldstein & Goldstein 231.
16. "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from actual criminals themselves" per Warren in Spano v New York 360 US 315 320-321.
17. Neubauer 24 et seq.
18. Congressional Quarterly 1979 The Supreme Court and Individual Rights 11.
19. See for example Leonard The Police, the Judiciary and the Criminal (1975) 7-8.
20. Fellman The Defendant's Rights (1958) 1-10; Leonard 7; Neubauer 24 et seq.
21. Newman Introduction to Criminal Justice (1993) 3ed 33.
22. Coppedge v United States 369 US 438 449 (1962).
23. Graham The Self-Inflicted Wound (1970) VIII.

24. Dandistel et al Criminal Justice : Situations and Decisions (1979).
25. Harris The Self -inflicted Wound (1990) 4; Harris Justice (1970) 13; Katzenbach Introduction to the Fear of Crime (1969) 7; "During the period of the Warren court's most active criminal law reform - from 1960 to 1968 - the annual number of reported murders increased by 52 per cent; reported rape rose 84 per cent; robbery 144 per cent; aggravated assault 86 per cent. By the middle of the decade, the murder rate in the United States was twice that of our nearest competitor - Finland - and ranged from four to twelve times that of a dozen other 'advanced' countries, including Japan, Canada, England and Norway. For other violent crimes, the picture was about the same, or worse. Rape was twelve times as prevalent in the United States as in England and Wales; the robbery rate was nine times as great, and aggravated assault was twice as frequent". Harris Self-inflicted Wound 11; see also Lyons The Supreme Court and Individual Rights in Contemporary Society (1975) 230; "Between 1960 and 1973, the number of serious crimes reported to the federal bureau of investigation increased 158 per cent; forcible rape went up 199 per cent; robbery was up 256 per cent; auto theft rose 183 per cent; and crimes of violence tripled"; McKay Law, Crime and Community (1975) 59.
26. Harris 4.
27. Katzenbach 10-11.
28. Harris Self-inflicted Wound 11.
29. Harris Justice 13; also see Congressional Quarterly December 1979 The Supreme Court and Individual Rights 191; Lyons The Supreme Court and Individual Rights in Contemporary Society 267.
30. Leonard The Police, the Judiciary and the Criminal 166; Cole 221; Willard 16.

31. Katzenbach 9.
32. 384 US 436.
33. Harris Self-Inflicted Wound 155-156.
34. Harris 157.
35. Harris 156.
36. “Voluntariness had been the standard for judging the admissibility of confessions for so long that the idea of throwing out a voluntary admission rated among lawyers as the rankest of heresy”. Harris Self-Inflicted Wound (1966) 154.
37. Harris 155; Devlin The Judge (1979) 7.
38. Miranda’s case 439.
39. The purpose of these restraints was to protect individual liberty and to curb police powers.
40. Harris Self-Inflicted Wound 159.
41. “In many ways the Warren court produced racial departures from judicial tradition. The court addressed a plethora of burning social issues, including race relations and racial discrimination, freedom of speech, the rights of suspects before and during trial, limitations on the investigative powers of the police, the rights of the poor in obtaining counsel and financing defense investigations and appeals, and a host of related areas. Perhaps not by plan, but certainly by effect, the Warren court fundamentally altered the nature of American society”; Willard Criminal Justice on Trial (1976) 15.
42. Leonard 169; see also Cole Politics and the Administration of Justice (1973) 83.
43. Lyons 266.
44. Which was often a code word for white racist reaction against the civil rights campaign of the Negroes; see Lyons 230.

45. Lyons 267.
46. Leonard 181.
47. See Leonard 166-171.
48. Escopedo v Illinois 378 US 478 490 (1964).
49. Cressey Crime and Criminal Justice (1971) 82.
50. Harris 123.
51. "Much more disquieting than the lawlessness of the police in law enforcement is the readiness of the American people to close their eyes to this cutting of legal corners, or even actively to encourage it. Panicked by the incidence of crime, they have become impatient with the restraints of the 4th Amendment - impatient too, with occasional judicial insistence that the commands of the Constitution be obeyed by the police".  
Barth The Price of Liberty 16-17, quoted by Harris Justice 249.
52. Congressional Quarterly The Supreme Court and Individual Rights (1979) 191.
53. The Congressional Quarterly (1979) The Supreme Court and Individual Rights.
54. Lyons 267-268.
55. Leonard 180-181.
56. Barth 32.
57. Dorsen Our Endangered Rights (1984) 205-206. According to Lathan, however, the Burger court "... wasted no time in upsetting several important decisions of the Warren court". Latham American Justice on Trial (1972) 73.
58. Funston 330.
59. 428 US 465 (1976).
60. Dorsen op cit 210-211. The rule that the government must not be permitted to use evidence that is illegally obtained as a measure to control unlawful actions by law

enforcement officers has a long history dating from Weeks v US.

61. Lyons 279.
62. Dorsen 214.
63. Lyons 280.
64. 388 US 218 (1967).
65. 406 US 682 (1972).
66. Dorsen 215.
67. 413 US 300 (1973).
68. Ash's case 317.
69. 401 US 222 (1971).
70. Harris' case 226.
71. 417 US 433 (1974), according to Cole op cit 8 the Harris decision may be viewed as an attempt to undercut Miranda.
72. Dorsen 209-210.
73. Leonard 181.
74. Funston 330
75. Barth ibid 19.
76. Barth ibid 20.
77. Barth 25.
78. Barth ibid 31.
79. Barth ibid 26.
80. Dorsen 27.
81. Boyum & Mather Empirical Theories about Courts (1983) 41.
82. Denning Freedom under the Law (1949) 3-4; Hewitt, however, challenges the rhetoric

of Lord Denning by averring that judges in fact now want to grant postponement of applications for the writ of habeas corpus thus ensuring that the detainee remains in prison for a further period. Hewitt also points out that judges are apt to refuse such applications. Hewitt Abuse of Power (1982) 15.

83. Denning 5.
84. Hall Drifting into a Law and Order Society (1979) 3.
85. “The early sixties was time of rapid and large scale social change which produced strain and dislocation in numerous sections of British culture. Economic growth and a high level of employment, coupled with technological innovations, prompted changes in patterns of work, leisure and consumption; while the growth of welfare provision, the re-organization of housing, the influx of commonwealth immigrants etc. all contributed to a growing sense of uncertainty and ambiguity in the spheres of social and family relationships”. Law & Order News 83, 99; “We are an insular and conservative people, asked in one generation to become a tolerant multi-racial society, inequality of opportunity in jobs and housing does not make the change any easier. So the maintenance of order, particularly in the great cities, is now one of our most important duties”. Mark Policing a Perplexed Society (1977) 56-57; see also Mark In the Office of Chief Constable (1978) 144.
86. “It is true that most British people take the legal system under which they live, move and have their being very much for granted. They respect and support it, yet they are not curious about its structure and how it works. They look on the law as something that keeps the unruly in place and provides the popular press with a lot of its news, and they have no great thirst, so far, for fuller knowledge”, MacDermott Protection from Power (1957) 5.

87. "The idea that there is one morality, a consensus view, belongs to yesterday's society", Alderson Policing Freedom (1979) 151.
88. "In particular, the growing emergence of the "Law and Order' debate and the perceived war and crime would concentrate public attention on police effectiveness and the apparent inability of the authorities to turn the tide of the rising crime rate. Consequently a hardening of both public and police attitudes led to an acceptance of toughened police styles whether through increased availability of public order hardware, through a preparedness to push legal powers to the limits of illegality, or through toleration of outspoken chief police officers who did not see their independence as requiring silent and anonymous service outside the political arena". Baxter & Kaufman Police, the Constitution and the Community (1985) 38.
89. Chibnall Law and Order News (1977) 75.
90. Tables showing alarming increases in crime in the two decades from 1945 to 1965 can be seen at page 85 of Chibnall; Mark Policing a Perplexed Society 76-77; Alderson Law and Disorder 126; Baxter & Kauffmann 40.
91. Chibnall 85-88.
92. Chibnall 95.
93. Mark In the Office of Chief Constable 286.
94. Hewitt 108.
95. Hewitt 109.
96. Chibnall 93-94.
97. See Chibnall 93-141.
98. For the text of this lecture see Mark Policing a Perplexed Society 55-73.
99. Hewitt The Abuse of Power 7.

100. This view is strongly challenged by Hewitt 7-8.
101. Baxter & Kauffman 40-41.
102. Alderson Policing Freedom 151.
103. Schedule 3 of the Act; Whitaker The Police in Society (1979) 137.
104. Mainwaring-White The Policing Revolution (1983) 31-32, 38.
105. The Prevention of Terrorism Act 1974, the identically named Act of 1976, the same Act of 1984 and the Airports Act of 1974; see Wilkinson 111.
106. Scorer & Hewitt The Prevention of Terrorism Act : The Case for Repeal (1981) 6.
107. Wilkinson British Perspectives on Terrorism (1981) 189.
108. See the very thoughtful comments of Lord Devlin on the British view of the judicial function in Devlin The Judge (1979) 6-9.
109. Anderson Liberty, Law and Justice (1978) 37.
110. Bok "If we are to act like free men" Saturday Review of Literature, 13th February 1954 9.
111. Esmen A History of Continental Criminal Procedure (1913) 3; Williams The Proof of Guilt 3ed (1963) 29-30.
112. Bok Problems in Criminal Law (1955) 12; Neubauer America's Courts and the Criminal Justice System (1984) 21-22; Fellman The Defendant's Rights (1958) 1; Nagel The Rights of the Accused (1972) 61; Weinreb Denial of Justice (1977) 97-98, 103-115; Marvell Appellate Courts and Lawyers (1978) 24-27; Nagel The Rights of the Accused (1972) 249-250.
113. Senna & Siegel Introduction to Criminal Justice 2ed (1993) 16-170; Jackson Enforcing the Law (1972) 122.
114. Marvell 25; according to Sales 6, the adversarial system causes justice to "... emerge as

a balance between the opposing forces”.

115. Blumberg Criminal Justice 2ed (1974) 167.
116. Neubauer 22.
117. Weinreb 108-109.
118. Weinreb 117-146.
119. Weinreb’s system would in fact amount to no more than an appeal from the pre-trial investigation like in the Soviet system of procedure. “An observer of the Soviet legal system has called the Soviet trial ‘an appeal from the pre-trial investigation? In the Soviet Union, the ‘trial’ is simply a recapitulation of the data collected by the pre-trial investigator. Notions of a trial being a ‘tabula rasa’ and presumptions of innocence are wholly alien to Soviet notions of justice. How closely does ‘bureaucratic due process’ and its accompanying non-adversary system pose a discomfoting parallel to the Soviet system, wherein ‘the closer the investigation resembles the finished script the better...’”. Blumberg Criminal Justice 2ed 177.
120. Nagel 249.
121. Williams 102.
122. Williams 2.
123. McConville & Baldwin The Courts, Prosecution and Conviction (1981) 1, 19.
124. “In the United States, by contrast, generations of lawyers and social scientists have been active in inquiring into, and constructing theories about, all aspects of the criminal system”. McConville & Baldwin 1.
125. *idem* 2.
126. Hampton Criminal Procedure 3ed (1982) v-vi.
127. Hampton 1.

128. McConville & Baldwin 72; Williams 322-324.
129. McConville & Baldwin 72.
130. McBarnett Conviction (1981) 11.
131. McBarnett 11; "One attribute, about whose value different opinions are held, is openness. The British consider it to be essential; they say justice should not only be done but should be seen to be done, and the English system observes this precept in the spirit and in the letter" Devlin The Judge 58.
132. Atiyah Law and Modern Society (1969) 44-45.
133. Atiyah 85; "nor, indeed, need the defence say anything at all; the accused (or his lawyer) may, in effect say to the prosecution : prove your case if you can" Atiyah op cit 44-45.
134. Jackson Enforcing the Law (1972) 153, 156.
135. Stone Proof of Fact in Criminal Trials (1984) 104.
136. Atiyah 85.
137. Op cit 153.
138. Atiyah 44.
139. McBarnett 16-25.
140. McBarnett 17; see also Jackson 159.
141. McConville & Baldwin 156.
142. Williams 3.
143. Senna & Siegel Introduction to Criminal Justice 2ed (1981); Fellman The Defendant's Rights 85; Neubauer America's Courts and the Criminal Justice System 283.
144. "The aim of a trial is to recommend the facts of a past event so that the tribunal may then apply the law to those facts", Campbell & Waller Well and Truly Tried (1982).
145. Knox Order in the Court (1943) 13.

146. Bok Problems in Criminal Law (1955) 10.
147. Op cit 250.
148. Weinreb 102.
149. idem 99-103; “Very little of a search for truth survives this definition of the lawyer’s roles” Weinreb 103; Schiff Evidence in the Litigation Process 4ed (1993) v1 9.
150. “Adjudication is the principal and proper function of the courts...” James Introduction to English Law (ed) (1985) 60.
151. “The criminal law is the most basic part of any legal system. Preservation of order and control by the group of antisocial behaviour of individuals are primary needs of society and upon them are based all the protections and opportunities which society offers. The group must do what it can to state emphatically that certain acts are not only wrong but will incur sanctions from the group”, Roebuck The Background of the Common Law 2ed (1990).
152. Rosenblum & Castberg Cases on Constitutional Law (1973) 394.
153. Bassiouni 13; see also McAuslan & McEldownery Law, Legitimacy and the Constitution (1983) 65-66.
154. Senna & Siegel 162-168.
155. Fellman 41.
156. Neubauer 40; Abraham The Judiciary, The Supreme Court in the Governmental Process (1980) 3-20.
157. Kerper Introduction to the Criminal Justice System (1979) 208-210; Jacob Justice in America 149-150; Abraham The Judicial Process 138.
158. “Because of the weaknesses of the Articles of Confederation were only too apparent to the recently established states, they were ready to give much power to the central

government created by the constitution of 1789. They were reluctant to surrender their judicial systems, however, and were not all certain that their citizens could obtain equal justice in any court but their own. At the same time, the advocates of a strong central government were not sure that state courts would administer federal laws with an impartial mind. Accordingly, two complex and parallel systems of courts were created". Aumann The Instrumentalities of Justice : Their Forms, Functions and Limitations 42.

159. Jacob Justice in America (1980) 151-156.
160. Senna & Siegel 360-363; Neubauer 40-47; Kerper Introduction to the Criminal Justice System 211-215; It must be noted that most cases involving due process rights do not reach the supreme court via appeals. They reach the supreme court through the grant of writs certurari by the supreme court which is a review process whereby the supreme court as the supreme interpreter of the Constitution commands a lower court to submit the record of the case to it for consideration. See Kerper 212-213; See also Denning 66.
161. Neubauer 47-51.
162. Senna & Siegel 357.
163. Senna & Siegel 359.
164. Gillers 11.
165. Nagel The Rights of the Accused 237; "A mob-ruled trial, he said, was not a fair trial, and the fourteenth amendment guaranteed a fair trial to all"; Latham American Justice on Trial 54.
166. Abraham The Judiciary, the Supreme Court in the Governmental Process 47; according to McCloskey, the Supreme Court is the chief expounder of the mysteries of the American Constitution. McCloskey 9-10.

167. Pritchett ix.
168. Nagel 237.
169. Latham 49-72; "Due process is a living concept that embodies the idea of 'fair play' and substantive justice", Bassiouni 44.
170. Quoted by Pritchett 161.
171. "The United States Constitution plays a critical role in the criminal justice system", Senna & Nagel 160.
172. Neubauer 20.
173. Fellman 3-4.
174. Abraham 59.
175. George Constitutional Limitations on Evidence in Criminal Cases (1973) 2; "But in one of the most ironic chapters in supreme court history, these new powers and guarantees were for half a century wielded with much more effect to protect property than to protect persons". Congressional Quarterly December 1979 The Supreme Court and Individual Rights 5.
176. Stuckey Procedures in the Justice System (1980) 16.
177. Senna & Siegel 160; Stuckey 18.
178. "The federal constitution, adopted in 1790, was not able for its failure to prescribe procedural limitations that had become identified with the common law, a failure which contributed to the near defeat of ratification and which led to assurances that found fulfilment in the Bill of Rights adopted as a series of amendments shortly thereafter"; Kauper Frontiers of Constitutional Liberty (1956) 148; "It shall be remembered in this discussion that the Fifth Amendment, including the Due Process Clause, is a part of a

Bill of Rights adopted in response to a clamour of people that some of the original Constitution's grants of federal power were too broad and needed to be restricted", Blace A Constitutional Faith (1968) 30; see Schwartz The Great Rights of Mankind (1981) 119-159, 160. In fact the demand for a Bill of Rights was so great that George Washington, in his first Message to Congress as President had noted the widespread demand for such a Bill. See Schwartz 162.

179. Abraham Freedom and the Court 6ed (1994) 28; Senna & Siegel 160; Galloway The Supreme Court and the Rights of the Accused (1973) 3.
180. Senna & Siegel 160; George 3.
181. George 1.
182. Abraham Freedom and the Court 28-91; see also Bassiouni 316-320.
183. "But since 1925 it has been resolved on a piecemeal, gradualist, pragmatic basis in favour of the contention that many, if not all, of the enumerated rights must be applied to the states, although that enumeration remains incomplete and contentious" Abraham The Judiciary (1980) 66,80; "In particular, it refused to incorporate the Bill of Rights intact into the Fourteenth Amendment and looked at the facts of the particular case to see whether the totality of the circumstances suggested a denial of due process of law", George 3.
184. 110 US 576 (1833).
185. Latham 50.
186. Latham 48.
187. 237 US 309 (1914).
188. Latham 53. That the sentence of death was later commuted to life imprisonment by the Governor availed the accused nothing for after the committal of the death sentence, a

mob seized the accused and lynched him.

189. Frank v Mangum 1914 US 309 335.
190. 261 US 86.
191. “But, in his opinion, Justice Holmes said the defendants clearly had been denied life and liberty without due process of law. A mob-ruled trial, he said, was not a fair trial, and the Fourteenth Amendment guaranteed a fair trial to all”, Latham 54; Latham overstates somewhat, Holmes’ judgment as Holmes J never referred to the Fourteenth Amendment directly or to a fair trial.
192. Kauper 160.
193. Palco v Connecticut 302 US 319 (1937). Thus entered into judicial parlance, the Honour Roll theory of rights that is those that are protected because they are fundamental to ordered liberty and those that are not; see also Abraham The Judiciary 69-72.
194. at 328.
195. Latham 58.
196. Latham 58.
197. Latham 59.
198. “State courts process the vast majority of cases. The courts in a single medium-sized state handle more cases than the entire federal system”. Neubauer 47; “State courts have always, in total influence bulked layer than the federal. Not only do they possess the power to review the constitutionality of state and federal acts, and to interpret state and local statutes, but they possess the power and status of the English common law courts. In common parlance we might call them America’s courts of ‘general jurisdiction’”. Beth The Development of the American Constitution 1877-1917 216.

199. 332 US 46 (1947).
200. Abraham Freedom and the Court 36.
201. Lyons The Supreme Court and Individual Rights in Contemporary Society 7.
202. 367 US 643 655.
203. 378 US 1 (1963).
204. at 3.
205. Latham 64; “To many Americans, it appeared that the Warren court was finally closing the gap between the ideal of equality before the law and the realities of everyday police activity and criminal justice” Lyons 35.
206. See Abraham Freedom and the Court 59-91 on how the court has incorporated the Bill of Rights in individual cases. It is considered that a further description of further cases will not add anything to this study as incorporation finally became law in Mapp and Malloy.
207. Kauper 185.
208. “Without exception, several decisions have imposed on the states the requirement that they meet a federal standard; there is no room for variation based on local traditions and needs”. George 5; “Prior to 1961 each state had virtually gone its own way on criminal procedure, administering criminal justice with the degree of punctiliousness or muscle that suited the style of its people, and with little regard for the Constitution and courts of the United States”. Graham The Self-Inflicted Wound viii.
209. Keeton English Law : The Judicial Contribution 148-149; Griffiths persuasively argues the opposite. See Griffith The Politics of the Judiciary 193-195 especially at 199. His decision in R v Warner (1969) AC 256 seems to bear out Griffiths.

210. “Consequently rights in Britain are based on the negative concept that anything is lawful unless it is expressly forbidden by Act of Parliament or common law” Cortex Grant The NCCL Guide vii; Baxter & Koffman Police, The Constitution and the Community 42.
211. Denning The Changing Law 3.
212. Street & Brazier Constitutional and Administrative Law 5ed 75-76; Borrie Public Law 34-35; James Introduction to English Law 8; Yardley Introduction to British Constitutional Law 6ed 31-32; Wade & Bradley Constitutional and Administrative Law 10ed 64-66.
213. This is a very important power since parliament can, at a stroke, sweep away centuries of tradition and a legal fabric woven painstakingly and with deliberation.
214. Magna Carta see Thorne et al The Great Charter 3-42; see Roebuck 46; Habeas Corpus Act; see Wade & Bradley Constitutional and Administrative Law 10ed 491-496; Bill of Rights, Yardley 33; see also Street & Brazier 34-35 for an enumeration of various legislative acts which confer certain constitutional rights on citizens.
215. Wade & Bradley 16-17. The scope of English Constitutional law is therefore “... practically unlimited, for it must cover all aspects of the relationships between the individuals and authorities throughout the country” Yardley 3.
216. James 153-154.
217. Roebuck 50-59; Harding The Law Courts of Medieval England 24; Radcliffe & Cross The English Legal System 6ed 79-88; Guy The Cardinal’s Court 7-8; Milson Historical Foundations of the Common Law 2ed 34-35.
218. Craig 22-23, 461; Wade & Bradley 656-659.
219. According to Wade & Bradley 655, the reforms affected by the Supreme Court Act, 1981 have amounted to the creation of a specialised administrative court in Great

Britain.

220. James "... people aggrieved by unlawful acts of executive authorities may bring claims against them in much the same way as they may claim against private people and corporate bodies" 144; Gordon Judicial Review : Law and Procedure 4.
221. Craig Administrative Law 11.
222. Craig 22; Street & Brazier 28; Wade & Bradley 626-627. It must, however, be noted that in terms of section 31(1) of the Supreme Court Act 1981, these actions have been transformed into forms of relief and a single application procedure has been created to be utilized for all actions. However, the common law nature of the relief under the various actions is not affected in any way (section 29 (1) of the Supreme Court Act 1981).
223. Wade & Bradley 642.
224. Gordon 3.
225. "The fundamental human right is not to a legal system that is infallible but to one that is fair" Maharaj v Attorney-General of Trinidad and Tobago (1978) 1 WLR 902 at 911.
226. Street & Brazier Constitutional and Administrative Law 582.
227. Jackson Natural Justice 5.
228. James 150.
229. Wade & Bradley 670.
230. Gordon 27.
231. Denning The Changing Law 3.
232. "Ouster clauses are those sections of statutes that contain express provisions purporting unconditional exclusion of alternative remedies. Typical expressions are that a particular decision "shall be final" (finality clauses) 'shall have effect as if enacted in

this Act' (as if enacted clauses) and 'shall not be questioned' (shall not be questioned clauses) Gordon 28.

233. Wade & Bradley 670-671; Arisnic Ltd v Foreign Compensation Commission (1969) 2 AC 147.
234. Colonial Bank of Australasia v Willan (1874) 5 PC 417.
235. Smith v East Alloe Rural District Council (1956) AC 736; R v Secretary of State of the Environment (1977) QB 122.
236. These are clauses which purport to exclude judicial review after the lapse of a certain period. As Gordon (28-29) persuasively argues, there is no difference between a straight jurisdictional ouster clause and a preclusive time ouster clause and they ought to be treated alike.
237. The issue is open. However, Gordon (16) is of the view that ouster clauses passed after 1 August 1958 might not be valid and cites the decision in R v Preston Supplementary Benefits Appeal Tribunal ex p Moore (1975) 1 WLR 624 at 624 no support.

## CHAPTER 5

### THE DUTY TO PROVE EACH AND EVERY ELEMENT OF THE OFFENCE

#### 5.1 Introduction

It is well enough to say that the guilt of the accused must be proved beyond a reasonable doubt, but what are those facts or incidents which, if proved, comprise the guilt of the accused? Or is guilt a single incident or fact which, when proved, will eventually lead to the sanction of the accused?

Criminal law solves the problem for procedural law by dividing every crime into various elements. In South Africa, for example, the crime of theft is not committed unless there is a contrectatio, unlawfulness, mens rea and permanent deprivation of a thing. Ordinarily to obtain a conviction, the state would have to prove each of the foregoing elements beyond a reasonable doubt. No person may be convicted of an offence unless each element of such offence is proved beyond a reasonable doubt.<sup>1</sup>

Though the mandate looks easy on paper that the state must prove every element of the crime beyond a reasonable doubt, in practice it is often difficult so to prove. An element of an offence is often not just a singular, isolated event. Very often the element consists of a number of related incidents or facts and is often an aggregate of such facts or incidents. Under the definitional clause in the Abuse or Dependence-Producing Drugs and Rehabilitation Centres Act, for example, it is a very serious offence to deal in drugs. "Deal in" has an extended

meaning and the acts therein defined, singly or in aggregate constitute the elements of the crime. Obviously therefore in seeking to prove an element of a crime the state will have to establish a series of facts, some seemingly important and others trivial but which, when held together by the cohesiveness of logic, will constitute a rational persuasive logical entity. A question which arises is: What persuasive value is to be ascribed respectively to the important facts and to the trivial facts? Within the context of the process of persuasion, must both the important and the trivial facts be established beyond a reasonable doubt or is that test required only of the important facts? Answers to the foregoing questions affect the quantum of proof and therefore any decision in any criminal case whether the requisite standard of persuasion has been attained.

## 5.2 The law of the United States

In Davies v United States<sup>2</sup> the court held that not only is the prosecution required to prove every element necessary to constitute the crime<sup>3</sup> but to show “beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged”.<sup>4</sup> In drawing the distinction between an element of a crime and a fact necessary to constitute a crime, the court, it is submitted, indicates clearly that all facts no matter how trivial require to be proved beyond a reasonable doubt if they are necessary to constitute a crime. In Winship, the Supreme Court held that the requirement that the prosecution prove each and every element of a crime was mandated by the due process clause of the constitution.<sup>5</sup> However, Nesson<sup>6</sup> avers that the prosecution is required to prove every material element of a criminal offence beyond a reasonable doubt because the due process clause of the constitution requires that material elements of crimes be so proved. Nesson cites Mullaney v Wilbur<sup>7</sup> and In re Winship<sup>8</sup> in support of his stand. The impression

is created by Nesson that facts other than material elements can be proved by reference to some other standard of proof other than proof beyond a reasonable doubt. However, on a careful reading of the cases cited, one could find no evidence of the restriction imposed by Nesson, that is that the prosecution need apparently prove only the material elements of the crime beyond a reasonable doubt. In fact, the court, in In re Winship, specifically held:

Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

It is submitted that by re-iterating the language of Davis' case that the prosecution must prove every fact necessary to constitute an offence beyond a reasonable doubt, the court was clearly signalling that the constitutional mandate did not encompass only "material elements" as Nesson argues.

Mullaney v Wilbur refutes Nesson's arguments even more decisively. The facts in Wilbur were interesting. Wilbur was found guilty of murder by a jury in the state of Maine. An extra curial pre-trial statement by Wilbur was admitted on the record. According to that statement, which was not challenged in court, Wilbur had killed the deceased whilst he, Wilbur, was in a frenzy which had been provoked by the deceased making a homosexual advance to him, Wilbur.

According to the law of the state of Maine at the time, in the absence of justification or excuse all intentional or criminally reckless killings were regarded as felonious homicides. All

felonious homicides were punished like murder. The punishment for murder was life imprisonment unless the accused proved that the killing had occurred in the heat of passion caused by sudden provocation.<sup>10</sup> According to the law of Maine, an onus of proof therefore rested on the accused. If he failed to “discharge” that onus he was in danger of being sentenced to imprisonment for life.

The question which arose for decision was whether the imposition on the defendant of an onus of proof, albeit on a fair preponderance of the evidence, was in accord with the due process clause. The petitioners argued that the ratio in In re Winship should not be applicable to Wilbur’s case because in Winship’s case the facts which were in issue affected criminality of the act concerned, whereas those that were in issue in Wilbur affected only sentence. “In short, the petitioners would limit Winship to those facts which, if not proved, would wholly exonerate the defendant”.<sup>14</sup> In other words the petitioners argued, as Nesson does, that the constitutional protection of the due process clause should be extended only to material constitutive elements of the crime.

The court refused to follow the reasoning. The court held that the state of Maine had chosen to distinguish between those people who killed in the heat of anger and those who did not. Depending on this distinction was the treatment of the offenders in terms of the law of evidence. Instead of requiring the prosecution to establish beyond a reasonable doubt the *presence or absence of anger at the time of the commission of the offence*, the state of Maine had instead shifted the burden to the accused. “The result, in a case such as this one when the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous murder conviction”.<sup>12</sup> The court held that the procedure adopted by the state

of Maine had denied Wilbur due process of law as required by the due process clause. Nowhere did the court hold that the due process clause was applicable only to material elements of the crime charged.

The court did refer to the fact that Winship had referred to the substance of the issues in that case.<sup>13</sup> However, at that stage the court was referring to the sterile formalism of the arguments advanced by the petitioners. The court was not referring to the materiality or otherwise of any elements of a crime. The inference, it is submitted, can hardly be drawn that that is what the court intended to convey.

Lastly, Nesson's argument is contradicted by the per incuriam decision of the Supreme Court in Moore v United States.<sup>14</sup> In that case, hearsay evidence had been admitted and that taken together with other evidence had led to the conviction of the accused. The court rejected the argument that the admission of the hearsay evidence had been harmless because apparently it was immaterial as the defendant would have been convicted anyway on the other available evidence. The court held that the prosecution was required to prove every element of the offence charged beyond a reasonable doubt and the fact that hearsay evidence had been admitted and used to carry the burden was reversible error.

In American law therefore the elements of each crime as well as all facts and incidents that constitute elements must be established and proved by the prosecution beyond a reasonable doubt.

But if one element is not proved beyond a reasonable doubt, the person cannot be convicted of

the crime charged. Failure of those involved in the criminal justice process to gather and introduce sufficient evidence to meet this burden will result in an acquittal or at least in the reduction of a more serious crime to a less serious one.<sup>15</sup>

### 5.3 The rule in English law

The most authoritative commentators on English law state that the state bears the onus of proving all the elements of the offence charged. Cross and Tapper state the rule as follows:

The general rule is that the party bearing the legal burden on an issue also bears the evidential burden. This means that, in a criminal case, the prosecution must normally adduce evidence fit to be left to a jury of the essential ingredients of the offence charged.<sup>16</sup>

Garron and Willis<sup>17</sup> employ identical terminology. Phipson also refers to the prosecution bearing "... the burden of proving every ingredient of the offence..."<sup>18</sup>

Though Cross and Tapper and Garron and Willis and Phipson use the unhappy culinary symbolism of "ingredient" it is submitted that ingredient means no more and no less than an element, in the widely accepted terminology.

May avers that "(T)he prosecution must prove all the elements of the offence necessary to establish guilt".<sup>19</sup> Apparently the proposition is regarded as so notorious in English law that the aforementioned authors regard it as unnecessary to cite any supporting authority for it. This

is strange because the requirement does not have an ancient vintage at all.

In R v Dyson<sup>20</sup> the accused had assaulted his child in November 1906 and December 1907. He had been convicted for those assaults and jailed. When the child subsequently died the accused was charged with murder in March 1908. When the court summed up, the court directed that the jury could find the accused guilty of manslaughter if the death was caused by injuries of November 1906 accelerated by the injuries inflicted in December 1907. An appeal was noted on the basis that the direction to the jury was wrong. The court of criminal appeal came to the conclusion that the direction was wrong because the causal connection between the accused's act and the prejudicial consequences, had not been established sufficiently.<sup>21</sup> The court did not crisply state the ratio decidendi as herein stated but it is submitted that a fair reading of the judgment justifies the statement.<sup>22</sup>

In R v Deller<sup>23</sup> the accused was charged with fraud. It was alleged that he had effected an exchange of cars with another person by misrepresenting to the other person that a car the accused had in his possession was his and that it was free of all encumbrances, that there was no money owing on the car and that the accused was free to deal with the car. The state alleged that the accused had in fact alienated his car pocketed the price and then hired the car back from the new owner and that he had it in his possession pursuant to the contract of hire. He had no right to dispose of the vehicle. His representations that he was the owner were false.

The defence of the accused was that the transaction he had concluded was void and had no legal effect as it had not been registered as required by law. He therefore remained the owner of the car and all the representations he had made to the person with whom he was exchanging cars

were correct.

The accused had been convicted. An appeal had been noted on the ground of misdirection. The court of criminal appeal found that there had been a misdirection and quashed the conviction; holding that the direction of the jury ought to have indicated that the falsity of everyone of the accused's representations had to be proved. This judgment is not direct authority for the proposition that the state must prove all the elements of a charge. The judgment relates to all the representations made in the case under discussion. Those representations, if proved, would have constituted but a single element of the crime of fraud.

Halsbury<sup>24</sup> quotes the aforementioned cases as authority for the proposition that in a criminal trial the prosecution must prove the existence of all those elements constituting the offence. However, as has been shown, the cases are very ambiguous authority for the proposition as stated by Halsbury.

In Sweet v Parsley,<sup>25</sup> Lord Diplock mentioned in passing that:

Woolmington's case (48) affirmed the principle that the onus lies on the prosecution in a criminal trial to prove all elements of the offence with which the accused is charged.

However, it is submitted, no matter how exalted the forum was, the pronouncement was in passing and was definitely obiter.

The only judgment wherein the proposition was directly an issue was authoritatively stated in R v Edwards.<sup>26</sup> In that case, the accused had been charged and convicted of selling by retail intoxicating liquor without a licence. The state had proved the sale of intoxicating liquor but had not proved the absence of a licence. The accused was convicted. On appeal the accused argued that the onus was on the state to prove that he had no licence to sell intoxicating liquor. The court held that the fundamental rule of the English criminal law is that the prosecution must prove every element of the alleged offence.<sup>27</sup> The criminal court of appeal, however, held that the onus was on the accused to establish that he had a licence as an "... exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged".<sup>28</sup>

Bratty v A/G for N Ireland,<sup>29</sup> a decision of the House of Lords is arguably the highest authority for the proposition. In that case Lord Denning stated in passing that:

My Lords, I think the difficulty is to be resolved by remembering that, whilst the ultimate burden rests on the Crown of proving every element essential in the crime...<sup>30</sup>

However, the statement did not constitute the ratio decidendi. It was made merely in passing with a view to explaining the basis of Lord Denning's argument and must be regarded as obiter.

As has been shown, the rule of law that the state must prove each and every element of the crime charged had not been authoritatively adumbrated before 1974. That it was a fundamental rule of English law before it was so declared by the court of appeal is doubtful. It is submitted

that the court used the judicial legislative<sup>31</sup> sleight of hand which Jackson describes so well that:

The primary duty of a judge is, of course, to dispose of the case before him, and to do this he proceeds upon the supposition that the authoritative legal sources enable him to state the law. In form the judge then decides some rule from the accepted material; in reality he consciously or subconsciously invents a rule that appears to be not inconsistent with accepted doctrine, and announces that it is the law of England.<sup>32</sup>

#### 5.4 **The rule in South African law**

In South African law, the state's duty to prove each and every element of the crime charged is usually inferred from an application of a combination of two basic principles of the law of evidence namely, (a) he who alleges must prove what is alleged; and (b) an accused person is presumed innocent until he is proved guilty.<sup>33</sup>

The rule, that the state must prove all the elements of an offence, it is submitted, is but the obverse side of the two basic principles for if the state, as a matter of policy, is required to prove the guilt of the accused,<sup>34</sup> it follows that in order to be adjudged to have succeeded in proving such guilt, the state must satisfy the trier of fact that it has demonstrated the existence, at some time in the past, of the factual conditions which are defined by the legal norm that proscribes the causation or creation of such conditions.<sup>35</sup> To be adjudged to have demonstrated such factual conditions, the state must obviously prove all such facts and incidents as constitute and consist in such factual conditions.

On the other hand, if the accused is conclusively presumed innocent until proven guilty, the accused's social behavioural slate is conceived as lilly-white clean. Any unlawful behaviour is conceived as a black mark which smudges an otherwise clean, lilly-white slate. It is only when the slate is smudged to a certain socially unacceptable level that criminal sanctions are visited on the persons concerned. The elements of the offence are the various dark smudges which appear on the slate and which accumulate and constitute a large blotch of darkness against a background of white which is then visited with criminal sanctions. Obviously the duty to prove that such smudges have occurred must reside in the one who alleges that the white, clean slate has been soiled.

As in English law, most of the persuasive commentaries on the law of evidence adumbrate the rule that the state must prove all the elements of the offence charged. Lansdown and Campbell aver that "(T)he state must prove every element of the accused's guilt beyond a reasonable doubt..."<sup>36</sup>

Van der Merwe et al also echo Lansdown and Campbell that "The state bears the onus of proving every element of the accused's guilt beyond a reasonable doubt".<sup>37</sup> An element is an aggregate of factual strands or a simple factual strand with some logical common factor which logically unites them into a single logical entity. Several such aggregates, united by a higher logical bond gives rise to the factual condition which is normatively proscribed.

Lansdown and Campbell's and Van der Merwe et al's formulation is linguistically not a happy one. Guilt is a legal conclusion drawn by a judicial officer from a combination of proven facts and on an application of relevant normative rules thereupon in settling one or other dispute.

There can therefore hardly be any elements of guilt which have to be proved by the state because guilt is not a state of evidential fact. Guilt is a conclusion.

The state, it is submitted, is required to allege the existence of certain factual conditions which are allegedly proscribed by normative rules. The existence of such factual situations, that is, non-observance of proscription, constitutes an infringement of such normative rule(s). Upon proof of the existence of such factual situations, the state then invites the judicial officer to draw a legal conclusion of guilt, that is, that the applicable normative rule has been infringed by the proven conduct. What therefore the state needs to prove are the factual conditions which will enable it to request the court to draw an inference of guilt by applying the relevant normative rules of criminal law. Since factual situations do not consist of single strands of fact but more often than not consist in several interrelated aggregates of fact it is, it is submitted, proper to talk of elements. An element is an aggregate of factual strands or a simple factual strand with some logical common factor which logically unites them into a single logical entity. Several such aggregates, united by a higher logical bond give rise to the factual condition which is normatively proscribed.

According to Hofman & Zeffertt, it is a general rule of policy that "... the prosecution should ordinarily bear the onus on all issues".<sup>38</sup> Hoffman & Zeffertt's formulation, it is suggested with respect, is incorrect as it states the principle in terms that are too wide.

In a criminal trial there are usually countless points of controversy in issue between the state and the accused. Such points are the issues between the state and the accused. An issue therefore is a point in dispute.<sup>39</sup> However, not all points in dispute between the state and the

accused are always relevant to the determination of the guilt of the accused. Logically only those points in dispute between the accused and the state which are relevant to the determination of guilt of the accused should be proved by the state. The state therefore cannot be saddled with the onus to prove all issues. There must be, it is submitted, a restriction somewhere. The restriction, it is submitted, must be found in the requirement that the state must bear the onus of proof only with regard to the elements of the crime charged.

Joubert, it is submitted, correctly states the principle where he says that “The basic principle that he who avers must prove as well as the presumption of innocence, cast on the state the burden of proving every element of the crime...”<sup>40</sup>

The question which arises in South African law, as it arose in the law of England, is whether the principle that the state must prove all the elements of the crime forms part of South African law. It appears that the earliest decided case in South Africa is Rex v Ndlovu.<sup>41</sup>

In R v Ndlovu the accused was charged with murder. He was tried, convicted and sentenced by the Native High Court for murder. The state’s version of the facts was not clear. Save for the fact that the accused had caused the death of the deceased, the circumstances surrounding the causation of the death were not clear. On the facts as proven, the killing could have been intentional or merely culpably negligent.<sup>42</sup> The question which arose was whether the accused should be convicted of murder or culpable homicide. If the accused should be convicted of murder, the question arose as to on whom the onus to prove intent be placed. The accused’s reply to the factual allegation was a bare denial of any involvement with the deceased. The Native High Court had rejected the accused’s version in its entirety. According to Davis A J

A the question to be determined necessitated the determination of whether the decision in the English case of Woolmington<sup>43</sup>, which had been decided 10 years before, correctly reflected South African law of evidence on the onus of proof. It is beyond question that at the time of the handing down of the decision in Ndlovu's case, English decisions of evidence were binding precedents on South African courts.<sup>44</sup>

Prior to Woolmington's case it was accepted to be the law of England that once the crown had established the killing of a human being by the accused, the onus was shifted onto the accused to prove lack of intent. If he led no evidence to that effect or if the evidence he led was rejected, the accused would be convicted of murder.

Applying the rule to Ndlovu's case would unerringly have caused the court to confirm the conviction of Ndlovu as his evidence had been rejected by the Native High Court.

However, in Woolmington's case, the House of Lords had decided that:

... where intent is an ingredient of a crime there is no onus on the defendant to prove that the alleged act was accidental. Throughout the web of the English criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt... no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.<sup>45</sup>

Davies A J A therefore then analysed the old Roman-Dutch law authorities and previous decisions of the South African AD and came to the conclusion that those authorities were not inconsistent with the decision in Woolmington's case. The court then decided that Woolmington's case should be accepted by South African courts as correctly reflecting the law relating to the onus of proof in criminal cases.<sup>46</sup> Paraphrasing Woolmington's case, Davis A J A held that:

In all criminal cases it is for the Crown to establish the guilt of the accused, not for the accused to establish his innocence. The onus is on the crown to prove all averments necessary to establish his guilt.<sup>47</sup>

On the facts the court came to the conclusion that the evidence did not establish intent and therefore reversed the court a quo substituting therefore a conviction of culpable homicide.

The mandate that the onus rested on the crown to “prove all averments necessary to establish his guilt” clearly referred to the elements of the offence charged for “averments” are factual allegations which appear on the charge sheet. Such factual allegations reflect the elements of the offence charged against the accused. Only if the allegations are all proved to the satisfaction of the court can the court bring a verdict of guilt against the accused.

The next case in which the matter was authoritatively dealt with was R v Britz.<sup>48</sup> In that case the accused was awakened by his wife during the night. He heard the screams of a woman. He armed himself with a shotgun. On going outside, he saw a black male person assaulting another person, a female. The black male then stopped assaulting the female and ran towards the

accused. The black man turned and ran back when he was very near the accused. According to the accused he called upon the black person to stop running. The black person did not stop. The accused then fired a single shot from his shotgun. The shot struck the man in the back and killed him.

At the trial, before the TPD (presumably on a charge of murder, the report is not clear) the accused pleaded justifiable homicide in terms of section 44 of Act 33 of 1917.

Holding that it was for the accused to show, by a balance of probabilities, that the requirements of section 44 were satisfied, the court found that this had not been done and convicted the accused: though had it been held that the onus was on the crown to negative the existence of those requirements the accused would have been acquitted.<sup>49</sup>

The judge reserved for the decision of the Appellate Division the question of whether the onus rested on the accused to prove on a balance of probabilities that the requirements of section 44 of Act 31 of 1917 had been complied with in order to be entitled to an acquittal.

Schreiner J A found that the old authorities and decisions did not give guidance to the court in the matter.<sup>50</sup> But on a careful reading of the previous cases it is submitted that this is not so. As Schreiner J A himself observed,<sup>51</sup> the point had been decided in R v Hartzler.<sup>52</sup>

In that case, a black person had been shot and killed by a policeman after refusing to submit to an arrest under the pass laws. The policeman had been charged and convicted for assault with

intent to do grievous bodily harm. On appeal to the TPD the conviction had been reduced to one of common assault.

An application for leave to appeal against the judgment of the TPD was then made to the Appellate Division. The determinant issue was the prospect of success of the appeal to the Appellate Division if the Appellate Division were to grant the application. For the purposes of deciding the prospect of success the court had to examine the facts and to pronounce on the applicable law. The question of the onus of proof of justification in terms of section 41(1) does not, according to the report, appear to have been canvassed in argument.

However, Beyers J A clearly placed the onus on the person who seeks to rely on section 41(1) saying:

Art 44(1) stel egter, o.a. hierdie groot vereiste daar, nl., dat dit duidelik en afdoende bewys moet word, en wel deur die vredesbeampte of private persoon, dat die vlugtende of teenstandbiedende persoon niet kan worden gevangen genomen en belet te ontvluchten dan doordat zodanige bamba of private persoon de zo vluchtende of weerstandbiedende persoon doodt.<sup>53</sup>

It may very well be that Schreiner J A disapproved of the decision and wanted to distinguish the case as having been incorrectly decided. What, it is submitted, may have swayed Schreiner J A is the fact that the finding is not preceded by any reasoning. It does not appear that Beyers J A spent any time over the pronouncement. It seems that it was added as an after-thought. Beyers J A does not seem to have appreciated the consequences his pronouncement would have

on the evidential process. However, by the time Schreiner J A came to decide R v Britz, the great case of Woolmington<sup>54</sup> had been decided.

Relying<sup>55</sup> on the English case, the court held that "... the burden of proof in criminal cases rests on the crown throughout, save in cases of insanity and in cases where the effect of a statute is to place the burden on the accused",<sup>56</sup> and "So, where no question of statutory exception is involved, it may be doubted whether any 'matter of defence' except insanity should now be treated as putting an onus on the accused".<sup>57</sup>

However, the court held that in the circumstances of the case, the legislature had intended that where an accused sought the protection of section 44(I) of act 31 of 1917, the onus should be on the accused to prove on a balance of probabilities the existence of the circumstances specified in section 44(I).

Obviously Schreiner J A adjudged section 44(I) to be one of those exceptional cases where a statute cast a burden of proof on the accused. The court answered the reserved question in favour of the state and confirmed the conviction.

It is very curious to note that Schreiner J A in his general approach to the question of onus completely ignored the decision in R v Ndlovu. Ndlovu's case was an important case which had been decided less than 5 years before. It was referred to in argument but Schreiner J A referred to it very cursorily.<sup>58</sup>

Ndlovu's case had clearly and unequivocally laid down that the state bore the onus of proving

all averments made against an accused person. Assuming that the Appellate Division was bound to follow its own decision unless it was convinced that the prior decisions were wrong, why did Schreiner J A not reiterate the definite finding of the Appellate Division in Ndlovu's case that Woolmington's case correctly reflected the law regarding the onus? Why did Schreiner J A approach the matter as if he was faced with a novel situation when in fact he had a binding precedent to guide him?<sup>59</sup> Why did he "... doubt whether, 'any matter of defence except insanity should now be treated as putting an onus on the accused'" when the Appellate Division as a matter of law had already decided that no onus was cast on the accused?

It is to be noted that Schreiner J A, when discussing Woolmington's case carefully distanced himself from the decision. He avoided expressing himself on the correctness or the relative worth of the decision and contented himself with the terse non-committal statement that "The restatement of the law in Woolmington's case is that the burden of proof in criminal cases rests on the crown throughout, save in cases of insanity and in cases where the effect of a statute is to place a burden on the accused".<sup>60</sup> The statement of law was scrupulously correct, but it is the absence of a personal reflection on what is undoubtedly one of the great judgments which strikes one forcibly.

The reason, it is submitted, is that Schreiner J A was a state-minded judge in criminal matters. Kahn recounts the story of an advocate who told him (Kahn) that "It was almost impossible to persuade Schreiner that the crown had not proved its case, and he had told him so".<sup>61</sup> Schreiner's assertion in another context that "It may be better that ten guilty men escape rather than one innocent man is convicted, but it remains a serious evil when guilty men avoid the consequences of their crimes",<sup>62</sup> supports the assertion that Schreiner was a state-minded judge.

As Kahn points out, in substantive criminal law, Schreiner J A extended the scope of criminal law to situations not covered by normative criminal law, “to ensure that morally reprehensible acts do not escape punishment as falling outside the symmetrical net of the principles of the criminal law”.<sup>63</sup> It is submitted that it was therefore inevitable that in procedural law, Schreiner J A would lean in favour of the state.

The decisions in Woolmington and Ndlovu seriously reduced the capacity of the state to prove its case against an accused person. It is submitted that Schreiner J A disagreed with both judgments and in fact considered them wrong. In fact, it is submitted, the doubt he expressed in R v Britz was a doubt about the correctness of Woolmington and Ndlovu, not the correctness of previous decisions which held that the onus was borne by the accused in certain other matters other than insanity and cases of statutory imposition of the onus on the accused.

Schreiner’s view has not found favour with the courts. Ndlovu’s case has been approved in a long line of judgments of the Appellate Division as well as a decision of the lower courts.<sup>64</sup> In other cases the decision has been referred to without necessarily being determinative of the evidential issues. But the important point to note is that no decision has disapproved of Ndlovu’s case when the issue of the onus has fallen to be decided.

Schreiner J A’s view has been rejected, albeit, obiter by two appeal court judges. In Matlou v Makhubedu<sup>65</sup> the respondent on appeal sued the Minister of police for damages caused to him by a policeman. The respondent succeeded in the court a quo and the appellant appealed to the Appellate Division.

The question arose whether the appellant could rely on section 37(I) of Act 50 of 1955 to justify shooting the respondent on the back.<sup>66</sup>

Rumpff C J, by way of comparison of the legal position in criminal law with the legal position in civil law stated that “Die standput dat daar in ‘n geval soos hierdie in ‘n strafsak ‘n bewyslas op die beskuldigde rus, kan moontlik vandag nie meer aanvaar word nie nieteenstaande art 37 ‘n verregaande beskerming aan ‘n beskuldigde verleen”.<sup>67</sup> Jansen J A in the same case echoed Rumpff C J’s sentiments.<sup>68</sup>

Obviously the dicta are obiter because the matter being dealt with was a civil matter. However, it is submitted that if a suitable criminal case should present itself for decision the court will most probably overrule Schreiner’s view in explicit terms.

## 5.5 Conclusion

On balance, though there was initially some resistance in South Africa to the acceptance of the idea that the state must prove all the elements of the offence charged, it is now generally accepted that such an onus rests on the state.<sup>69</sup> South African law has unashamedly relied and drawn on English principles in this connection. Generally therefore, South African law has kept in line with English and American views on the subject.

Like English law, South African law does not, as American law does, distinguish between material and non-material elements of an offence. Whether elements are material or not the onus rests on the state to prove them as long as proof of such element is a *conditio sine qua non*

for the state to obtain a conviction.

FOOTNOTES

1. Klotter & Meier Criminal Evidence for Police (1971) 57.
2. Davies v United States 160 US 469.
3. Davies 487.
4. Davies 493.
5. However Robert Mosher disputes that the requirement is constitutionally based; see the comment in 1920-71 UCLA Law Review 1970-71 157 at 158-159.
6. Nesson 1188.
7. 421 US 684 (1975).
8. 397 US 358 (1965).
9. In re Winship 364.
10. Mullaney v Wilbur 691-692.
11. Mullaney v Wilbur 697.
12. Mullaney v Wilbur 701.
13. Mullaney v Wilbur 699.
14. 429 US 20 (1976).
15. Klotter Criminal Law (1983) 13.
16. Cross and Tapper 122.
17. Garron and Willis 25.
18. Phipson on Evidence 60.
19. May 40.
20. (1908) 1 Cr App Rep 13.
21. Causation is an element of English criminal liability "A person is not to be convicted

of a crime unless he has, by voluntary conduct, brought about those elements which by common law or statute constitute that crime". Halsbury's Laws of England, vol. II 3rd ed 12.

22. Halsbury agrees; see Halsbury vol. 1 13 note 3.
23. (1952) 36 Cr App Rep 184.
24. op cit 13.
25. (1969) 1 All ER 347 362-363.
26. (1974) 2 All ER 1085.
27. idem 1088 C-D.
28. idem 1095 A-B.
29. (1961) 3 All ER 523.
30. idem 534 I - 535 A.
31. James Introduction to English Law (1985) 11ed 19; see also Lord Denning - The Changing Law (1953) VII, 45; see also Abrahams Morality and the Law (1971) 151.
32. Jackson The Machinery of Justice in England (1959) 3ed 15.
33. Joubert 338; Lansdown & Campbell 909; Schmidt 158.
34. "As the legal burden of proof remains fundamentally upon the state, it cannot shift to the defence". Lansdown and Campbell 909.
35. Proof of guilt is after all, in most cases, a historical reconstruction of a factual situation which existed as a reality at some point in time before the setting into motion of the fact finding machinery avowed purpose of which is to determine the existence or otherwise of such factual situation.
36. Lansdown and Campbell 909.
37. Van der Merwe et al 418.

38. Hoffman & Zeffertt 399.
39. McDonald Chambers of Twentieth Century Dictionary 698.
40. Joubert vol. 9 338. Schmidt puts it even more succinctly and correctly that "... die bewyslas ten opsigte van feite wat bepaal of die beskuldigde skuldig is op die staat rus...". Schmidt 64.
41. 1945 AD 369; see Schmidt 64.
42. at 387.
43. Woolmington v Director of Public Prosecutions (1935) All ER 1.
44. Van der Merwe et al 19-27; Hoffman and Zeffertt 9; Lansdown and Campbell 720-721; Schmidt 13-20.
45. (1935) ALL ER 1 8.
46. at 385; see also 381.
47. at 386.
48. 1949 (3) SA 293 (A).
49. R v Britz 298.
50. "The answers to these two questions, which really amount to one, are not to be found in a close examination of the older authorities or the earlier decisions". R v Britz 298.
51. R v Britz 300.
52. 1933 AD 306.
53. 317.
54. Woolmington v Director of Public Prosecutions (1935) AC 462, 1935 ALL ER 1.
55. R v Britz 300.
56. R v Britz 300.
57. R v Britz 302.

58. R v Britz 300.
59. “The law relating to the onus of proof in criminal cases was laid down by this court in the case of Rex v Ndlovu (1945 AD 369) where the authorities, including the Roman-Dutch writers were exhaustively examined”. Rex v Kaukakani 1947 (2) SA 807, 818.
60. R v Britz 300.
61. Kahn-Fiat Justitia 28.
62. From time to time, state minded judges rail against this saying; see 1936 SALJ 10.
63. Kahn 71.
64. See Rex v Kaukakani 1947(2) SA 807 818 (AD); Rex v Bayat & Others 1947(4) 128 136 (N), Rex v Du Plessis 1950 (1) SA 297 303, Rex v Mkhize 1951(3); R v Vermeulen 1953 (4) SA 231 236 (T); R v Swanepoel 1954 (4) SA 31 36 (O); R v Stainer 1956(3) SA 498 500H-501A (RFC); R v Pethla 1956(4) SA 605 611 G (AD); R v Midzi 1958 (1) SA 170 171 G-H (SR); S v D 1963 (3) SA 263 266 B-C (EC); S v Qumbela 1966 (4) SA 356 366 G (AD); S v Trickett 1973 (3) SA 526 529H-530A (T); S v Ngwenya 1979 (2) SA 96 100 B (Ad); See also Schmidt, “Die Bewyslas” (1964) THRHR 42.
65. 1978 (1) SA 946 (AD).
66. Section 37 (1) of Act 56 of 1955 authorised the killing of somebody who fled or resisted arrest if there was no other means of subduing him.
67. Matlou v Makhubedu 956 A.
68. Ibid 962 D-E.
69. “Aangesien die bewyslas in die algemeen op die staat rus om al die elemente van die misdaad te bewys, moet die staat dan ook hierdie opset - met die komponent van wederregtelikheidbewussyn - bewys (De Blom saak supra te 532 E-H)” S v Ngwenya.

1979 (2) SA 96 100 B-C.

## CHAPTER 6

### STRICT LIABILITY

#### 6.1 Introduction

The development of the idea that criminal sanctions are to be visited upon any person only if that person commits the forbidden act with a guilty state of mind is one of the indices which are used to evaluate a legal system. The requirement of mens rea for the imposition of criminal sanctions is the distinguishing characteristic of a civilised system of law.<sup>1</sup>

However, proof of the existence of a guilty state of mind at the time of the commission of an act is sometimes very difficult to prove for what is in the mind of the accused at the time he commits an act which outwardly constitutes a criminal offence is usually known to himself only. Proof of mens rea may only be inferred from the overt conduct of the accused and conclusions are drawn from such conduct using ordinary human experience as a yardstick. Even then, in close cases, the decision is very hard to make.

The legislature, by way of policy determination, will often come to the help of the prosecution by defining the offence in such a way that mens rea is excluded from the definition of the criminal act. Such definitional exclusion may have the practical effect that mens rea is not a constituent element of such a crime and need not be proved or even alleged in the indictment where proof of the overt act alone leads unerringly to imposition of criminal sanctions.

## 6.2 Strict liability in the United States

As shown in the chapter wherein we discussed the requirement that the state must prove all the elements of a crime beyond a reasonable doubt, this is a constitutional mandate under the due process clause.

In the words of La Fave:

“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil... Crime, as a compound concept, generally constituted only from a concurrence of an evil-meaning with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the Common Law of Crimes, even if their enactments were silent on the subject, the courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offence that it required no statutory affirmation”.<sup>2</sup>

In the face of it therefore, any legislative enactment which omitted the mens rea requirement should be interpreted to include it and any enactment that specifically excludes mens rea should be declared unconstitutional as violative of the due process clause of the constitution.<sup>3</sup>

### 6.2.1 The United States Supreme Court and strict liability

In United States v Balint et al<sup>4</sup> the accused were charged with selling to each other certain drugs which was prohibited under the Narcotic Act of 1914. The accused objected to the indictment on the ground that the indictment failed to allege that the accused had sold the drugs knowing them to be such. The relevant statute did not make mens rea an element of the offence. The court of first instance sustained the objection and quashed the indictment. The court was clearly correct in so far as it was law then that mens rea must be read into a penal provision that omitted specific mention of it.

On appeal the Supreme Court held that “while the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and thus was followed in regard to statutory crimes even where the statutory definition did not in terms include it... there has been a modification of this view in respect to prosecutions under statutes the purpose of which would be obstructed by such a requirement”.<sup>5</sup> The court approved strict liability in regulatory measures the purpose of which was to achieve some social betterment other than punishment of crime per se. It held that whether a penal provision was such a regulatory measure, was a matter of statutory interpretation of the legislative intent to be declared in every case. The court further held that the provision of the Narcotic Act in issue was such a provision and reversed the decision of the court a quo.

In United States v Behrman<sup>6</sup> decided by the same court that decided Balint's case, but with three dissenters on procedural grounds, the court affirmed its stand that intent need not be an element of a statutory offence and if it was not so made, there was no need to allege intent in

the indictment.<sup>7</sup>

The leading decision on strict liability in the United States is Morissette v United States.<sup>8</sup> The accused had found what appeared to be abandoned “bomb” casings. He appropriated them and sold them. He was charged under a statute which lay down that “whoever embezzles, steals, purloins or knowingly converts” property belonging to the government would be guilty of a crime and would be punishable. The accused was charged but maintained his defence throughout that when he took the casings he thought they were res derelicta. The court convicted the accused.

On appeal, the court interpreted the relevant statute and found that it was not regulatory and that intent was an element of the offence charged. The facts did not disclose intent and the Supreme Court therefore reversed the decision.

The ratio adumbrated by the court in approving strict liability in certain cases was: “While such offences do not threaten the security of the state in the manner of treason, they may be regarded as offences against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently contributed. In this respect, whatever the intent of the violater, the injury is the same and the consequences are injurious or not according to fortuity”.<sup>9</sup>

Among such offences are for example traffic offences.

In United States v United States Gypsum Co. et al<sup>10</sup> several major manufacturers of gypsum board were indicted for a violation of the Anti-Turst Laws. It was alleged that the manufacturers engaged in a price fixing conspiracy by participating in price verification

practices. The Court held that the requirement of mens rea was the rule rather than the exception in Anglo-American jurisprudence.<sup>11</sup> The court emphasized that although strict liability offences were not unknown in America and did not always infringe constitutional requirements, they were generally disfavoured.<sup>12</sup> Employing the mandate in Morrisette's case, the court interpreted the Sherman Act, the applicable statute, and concluded that the Sherman Act required intent for any action to be criminal under the applicable provision.

In American law therefore strict liability is disfavoured. Even when a provision omits reference to mens rea, that is not enough to enable one to draw a conclusion that the provision imposes liability strictly. "Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement".<sup>13</sup>

### 6.2.2 Strict liability in English law

According to the first comprehensive and critical examination of the doctrine of mens rea in English statutory law, the doctrine of mens rea is the most important doctrine in the entire field of criminal law.<sup>14</sup>

The requirement of mens rea for criminal liability in England has been recognized under the common law for centuries.<sup>15</sup> So firmly is the idea of moral guilt embedded in the common law that as long ago as 1889, it was held: "It is, however, undoubtedly a principle of English criminal law, that ordinarily speaking a crime is not committed if the mind of the person doing the act in question be innocent".<sup>16</sup> In the same case it was even held that "the full definition of every crime contains expressly or by implication a proposition as to a state of mind".<sup>17</sup>

However, even as early as that, the court drew attention to the legal reality of strict liability.<sup>18</sup> The trickle of legislation which Tolson's case alluded to has become a flood<sup>19</sup> with the coming of the welfare state in Great Britain. In many statutes no mention is made of any requirement of mens rea in the prohibitory provision. The authority of Parliament to legislate in this manner is not in doubt.<sup>20</sup> The courts are left to interpret the provisions and to apply them. Since it is the function of the courts to interpret and execute the will of Parliament, the courts have at different times and with regard to different statutes reached conflicting conclusions<sup>21</sup>.

In certain statutes, the courts find that by omitting reference to mens rea, Parliament intended to create strict liability. Such conclusion ...”is confirmed by the fact that when the courts interpret the legislation in this way, Parliament (which in effect means the Government) frequently leaves the Act unamended”.<sup>22</sup>

In other cases, the courts find that a statute which omits reference to mens rea, must be interpreted by reference to the presumption of mens rea in statutory offences.<sup>23</sup> This conclusion “... is in turn confirmed by the fact that on the rare occasions when the courts do this Parliament never makes the legislation more severe, while when the courts do it Parliament frequently amends the legislation to allow a defence of absence of knowledge or absence of negligence”.<sup>24</sup>

Judges have, in interpreting such omissive statutes sometimes based their conclusions, not on the ipsissima verba of the statutes themselves but on “... broad social grounds, saying that the purpose of the legislation would be defeated if it were held necessary for the prosecution to prove mens rea”.<sup>25</sup> This has caused casuistry and such confusion in English Law “... that it is impossible to abstract any coherent principle on when this form of liability arises and when it

does not”.<sup>26</sup> Sometimes the courts jettison mens rea completely. Sometimes it is jettisoned when it would be difficult to prove “even when statutes create serious crimes and explicitly require a mental element, the courts may attach the mental element to something less than the full crime, unless the statutory words are strong enough to prevent this; in other words they may create crimes of half mens rea”.<sup>27</sup>

In English law, depending on the language used by the legislature, strict liability can be divided into a number of categories.<sup>28</sup>

(a) The “using” category

The word “use” has been employed by the British legislator in a wide variety of statutes. It is settled in law that if “using” is prohibited, an absolute liability is created.<sup>29</sup> Strict liability in this context means that the accused need not know that the thing he uses does or does not have the qualities prescribed or proscribed.<sup>30</sup> Strict liability in this context extends to the master for the acts of his servants but not to the acts of an independent contractor.

(b) Possessory prohibitions relating to drugs

The leading case in this connection is the decision of the House of Lords in the case of Warner v Metropolitan Police Commissioner.<sup>31</sup> In that case the accused was charged under section 1 of the Drugs (Prevention of Misuse) Act 1964 in that he had been found in possession of 20000 amphetamine tablets unlawfully in that he did not fall under any

of the exceptions provided for.

The evidence for the state established that a box containing the tablets had been found by the police in the accused's motor vehicle. The accused defence was that he had collected the box that morning and had not opened it and did not know what it contained.

The accused was convicted by the court a quo it being held that the relevant statute created strict liability. He appealed to the Court of Criminal Appeal but his appeal was dismissed. He then appealed to the House of Lords.

The question to be answered, as formulated by Lord Morris of Borth v Gest was "it was for the prosecution to prove that the prohibited substance was in the possession of the appellant... Did this involve that the prosecution had to establish not only that the appellant had the package in question but also had to establish positively that he knew that the contents of his package were tablets containing amphetamine sulphate? Stated otherwise, if the appellant says "I had the package and I knew that it had certain contents but I thought that the contents were bottles of scent, is the onus cast on the prosecution to prove that he knew that the contents were not bottles of scent but were prohibited substances?"<sup>32</sup>

The House of Lords held that the Act imposed strict liability for possession of drugs so that the knowledge or otherwise of the accused of the contents of the box was irrelevant. The fact that he was in control of the box was sufficient criticism.

(c) Possessory prohibitions relating to firearms

Strict liability has been extended to criminal liability under the Firearms Act, 1968. In terms of section 1(1)(a) of the Act it is an offence for anyone to have in his possession or to purchase or acquire a firearm without a certificate authorising him to do so. In terms of section 58(2) the provisions of the Act do not apply to an antique firearm.<sup>33</sup>

In R v Howells<sup>34</sup> the accused was charged under section 1(1)(a) for possessing what he thought was an antique revolver but which was in fact a fake, being a reproduction. The defence was one of absence of mens rea. He was convicted on appeal. The court held that section 1(1)(a) imposed strict liability and dismissed the appeal.

In R v Hussam<sup>35</sup> the accused was charged under section 1(1)(a) of the Act. His defence was that he thought the object which had been found in his possession was a toy. It was, however, sufficiently proved to be a functional firearm. He was convicted and his appeal was dismissed, the court holding inter alia that the offence created was an absolute one and proof of mens rea was not required.

(d) Attributive or situational strict liability

Generally, in law, mens rea unaccompanied by actus reus does not constitute an offence and is therefore not punishable.<sup>36</sup> According to Glanville Williams, possessory offences are the most prominent examples of situational strict liability.<sup>37</sup> Typically, when situational strict liability is imposed, an external act or result is proscribed and liability

is imposed on a person irrespective of the fact that he has not participated in the proscribed act or caused the proscribed result.<sup>38</sup>

The courts also sometimes interpret legal provisions which on the face of them do not impose situational liability, to so impose it. The example given by Glanville Williams is instructive.<sup>39</sup> In terms of section 163 of the Licensing Act of 1963 a person shall not, either himself or by his servant or agent commit certain acts. "The wording might perhaps have been understood by the MP's who passed it to apply only when the employer ordered the commission of the offence; but in fact it was doubtless intended to make the employer punishable also for the unauthorised act of his employee in the course of his employment; and this is how the courts interpret it. So here we have a situational offence masquerading as an ordinary offence by personal act".<sup>40</sup>

Glanville Williams deplores the rise of strict liability in English Law. In his opinion, mens rea ought to be a constituent element of any criminal offence. A standard of fault generally required for criminal liability ought to be laid down and where any statute does not specifically make reference to fault, the fault which is laid down must be interpretatively implied into such a provision.<sup>41</sup>

The overall impression created by the English courts is that they are over eager<sup>42</sup> to interpret regulatory statutes which may carry substantial sanctions, in favour of the state. "It is somewhat the same with statute interpretation. The courts cannot manufacture statutes as they manufacture precedents, but they can 'interpret' them. They can cut them down or expand them. Courts still pay lip-service to the ancient principle that in case of doubt a criminal statute

is to be 'strictly construed' in favour of the defendant; but the principle is rarely applied in practice, if there are social reasons for convicting".<sup>43</sup> They merely pay lip-service to the rule that mens rea is presumed to be required for every offence unless it is excluded in the clearest terms. Absolute liability renders a defence impossible. Far from the accused being forced to prove his innocence,<sup>44</sup> which is bad enough, the accused is prevented from defending himself.

The rise of strict liability in English law justifies the generalisation of Griffith and McBarnett that the concept of rule of law and the concept of justice geared to safeguard the citizen from the state are nothing more than mere rhetoric which is subverted in practice as a matter of routine and that the law cannot allocate equal rights in an unequal society.<sup>45</sup> The argument is very persuasive that the English courts "... appear to have lost sight of what many commentators see as the proper constitutional function of the courts as intermediaries between the individual and the coercive powers of the state when it comes to determining the scope of criminal law".<sup>46</sup>

### 6.2.3 Strict liability in South African law

#### 6.2.3.1 Common law offences

According to Burchell and Hunt, it is well established in South African law that except for two exceptions, mens rea is required for all common law offences.<sup>47</sup> It is significant to note that the general applicability of the requirement of fault is traceable in South African law to the judgment of the A D in Rex v Wallendorf and Others<sup>48</sup> and that Solomon J A predicated this requirement on the English case of R v Tolson<sup>49</sup>. But up to the decision itself there was no South African decision that laid down a general requirement of fault.<sup>50</sup> Solomon J A, it is

submitted, was overstating his case somewhat that mens rea was "... a recognized principle, not only of English criminal law, but also of our own law and practice...".<sup>51</sup>

It is submitted that mens rea became a general requirement for criminal liability in South African law as a result of Wallendorf's case. As in English law, the power of the South African parliament to amend the common law was in the past not in question. Parliament could therefore alter the common law at will and could constitute new criminal offences and impose strict liability with regard to such offences.<sup>52</sup> It is submitted that parliament could even validly exclude mens rea from common-law offences.

#### 6.2.3.2 **Statutory offences**

According to Burchell and Hunt<sup>53</sup> statutory offences, classified as to the requirement of mens rea fall into three categories, namely:

- (a) those where the legislature expressly requires mens rea ;
- (b) those for which the legislature expressly excludes mens rea ; and
- (c) those in respect of which the legislature is silent on mens rea.

It is submitted that the first two categories present no particular problems. Category (a) is in accord with the general ethos of the common law. Category (b) is in conflict with the ethos of criminal law.

The third category presents problems since the courts are required to make a choice. Did the

legislature, which has omitted to provide therefor expressly, intend to impose strict liability for infraction of a provision or not?

The general rule which is followed by South African courts in such circumstances is that "... *actus non facit reus nisi mens sit rea* and that in construing statutory prohibitions or injunctions, the legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable".<sup>54</sup>

It should be noted that although Botha J A quotes the authority of R v Wallendorf and Others and R v H as authority for the double-edged proposition that (a) *mens rea* is the general rule of criminal liability and (b) that in the interpretation of penal provisions, the legislature is presumed to have intended that *mens rea* should be a constituent element of a statutory offence unless there are convincing indications to the contrary, the said cases do not serve as authority for the second proposition.

Before the judgment in Arenstein's case there seems to have been no authority for the second proposition in South African law. However, no criticism should be levelled at the court for it seems that in laying down that, the interpretational presumption is applicable, the court was persuaded by considerations of *favor libertatis* and the presumption is applicable obviously in favour of the subject.

The presumption, it is submitted, was an importation from English law but a happy one for South African law. It has been generally used by the courts beneficently on behalf of the accused between 1964 and 1984. In no less than ninety cases which were reported, the court

decided that mens rea was a necessary ingredient<sup>55</sup> of the statutory offence involved. It was only in nine cases decided during the same period that the court decided that mens rea was not a constituent element of the statutory offence.

The general picture presented is that South African courts are reluctant to construe legislative enactments as absolute prohibitions.<sup>56</sup> This attitude was reinforced by the AD in S v De Blom<sup>57</sup> where the court held that “In laasgenoemde saak het hierdie hof herbevestig dat in ons reg die algemene reel geld dat actus non facit reum nisi mens sit rea en dat by die uitleg van ‘n strafbepaling vermoed word dat die wetgewer, by onstentenis van duidelike aanduidings tot die teendeel, nie bedoel het om skuldlose oortredings daarvan met straf te bedreig nie”.<sup>58</sup>

However, it must not be imagined that the attitude of the South African courts makes it overly easy for the accused person to escape criminal liability. It is generally accepted that in cases where the legislature does not expressly provide for mens rea but the court finds that mens rea is a requirement, mens rea may be of two forms, namely, culpa or dolus.<sup>59</sup> In cases where the court finds that the legislature impliedly imposed fault in the form of culpa, the onus of proof (in the sense of establishing it at the end of the evidential process, thus entitling the state to succeed) rests on the state.<sup>60</sup> Where the legislature does not expressly provide for dolus as the requisite form of fault but the court holds that it is required in respect of a particular statute, the incidence of the burden of proof of that element is a confusing jumble of conflicting decisions by our courts.

Until 1966, it was generally accepted that where the legislature did not specifically provide for mens rea (whether in the form of culpa or dolus) once the state established the unlawful act falls

within the purview of the provision concerned "... then it is incumbent on the accused to prove, on a balance of probabilities, that the contravention was accidental or innocent - in other words, the onus is upon the accused to negative mens rea".<sup>61</sup> Mens rea as conceived then included both dolus and culpa.<sup>62</sup>

In S v Qumbella,<sup>63</sup> Holmes, J A questioned the legal correctness of the rule that the onus of proof to establish lack of mens rea passed to the accused and held that in cases where the court held that mens rea in the form of culpa was a necessary element of a statutory offence, the burden of proving it rested on the state and never shifted to the accused.<sup>64</sup> Qumbella's case was therefore authority for the proposition that where culpa was required, the onus of proving it rested on the state. The decision, however, left open the question of the incidence of the onus in the cases where dolus was adjudged to be the requisite degree of fault.

Qumbella's case was undoubtedly an important decision that advanced the accused's rights and also affirmed the basic philosophical western legal conception that the state must prove all elements of the offence. However, a troubling question nags one: Was the decision correct? For this reason, Holmes, J A's decision merits further discussion.

In order to find that the onus of proving culpa rested on the state, Holmes, J A relied heavily on S v Jassat.<sup>65</sup> He relied very heavily on Steyn, C J's judgment at 425E. However, if one reads Steyn, C J's reasoning, the decision in S v Arenstein<sup>66</sup> established that once a citizen had received a notice in terms of section 10 (1) of the Suppression of Communism Act 44 of 1950, the citizen was required to exercise a high degree of circumspection and great care to ensure that he complied with such notice. According to Steyn C J, "It follows from this that in order

to obtain a conviction for non-compliance with such notice, the state must prove at least some degree of negligence on the part of the accused...".<sup>67</sup>

With due respect, this is clearly wrong. The fact that fault is adjudged to be a requirement for a statutory offence does not logically cast an onus of establishing it on the state especially when there is binding authority to the contrary. Without specifically overruling Wallendorf and R v H, Steyn C J's judgment could and should never be relied upon to usher in such a grave departure from settled judicial doctrine. Furthermore, Holmes J A was overstating his case when he stated that "nevertheless, the Chief Justice held unequivocally that the onus of proving this ingredient, in the form of culpa, was on the state...".<sup>68</sup> It is submitted that the Chief Justice was curiously and uncharacteristically diffident and could not muster even a single authority for his view. The inability of Steyn C J to muster any convincing supporting reasoning for his view or any authority to justify his view, for a judge who was famous for the breadth of his learning<sup>69</sup> and the trouble he took to justify his conclusions either by reference to authority or by the cogency of his logic and his lack of hesitation in disapproving or overruling previous AD decisions when he considered them wrong, it is submitted, justifies the view taken here that Steyn's dictum that the onus rested on the state to establish mens rea was by no means unequivocal, but was tentative taking into account that Rumpff J A, in the same case specifically disagreed with Steyn C J stating that "If the judgement in S v Arenstein, 1964 (1) SA 361 means that an accused who forgets to comply with an order to report is not guilty of the offence charged unless it is proved that he 'negligently' forgot to report, then I cannot, with respect, subscribe to it".<sup>70</sup> According to Rumpff J A, the mere forgetting to comply with an order issued under section 9(1) of Act 44 of 1950 was of itself negligent and disclosed the necessary mens rea. To require that the accused be shown to have negligently forgotten to

comply with the order, according to Rumpff J A was equal to requiring that it be proved that the accused was negligently negligent, which is patently absurd.

It is submitted that Holmes J A's reliance on Steyn C J's dictum in Jassat's case was misconceived for a more serious reason namely the dictum was obiter. It is submitted that it was obiter for two reasons:

- (a) The only question raised by the appeal was whether the appellant had culpably failed to report to the police.<sup>71</sup> The question of who had to establish mens rea or the absence thereof was not in issue at all. It was therefore unnecessary for the purposes of the judgment in Jassat's case for Steyn, C J to express himself at all on the question of the onus.
- (b) The law relating to the onus of proof in those cases where the legislature did not provide specifically for mens rea was clear and certain. Steyn, C J had not disapproved those judgments which embodied the courts' view on the law on the subject.

Qumbella's case unleashed a lot of uncertainty in our law.<sup>72</sup> Some courts continued to apply the generally accepted rule that an onus rested on the accused to rebut mens rea and other courts held that the onus rested on the state to prove culpa. However, the AD settled the question once and for all in S v Fouche.<sup>73</sup> Rumpff J A declared in Fouche's case that "Daar is egter o.a. betoog dat, wanneer die staat getuienis voorgele het dat die verbode handeling ooreenkomstig die statutere beskrywing gepleeg is, waar 'n bewyslas op die beskuldigde rus om op 'n oowrig van waarskynlikhede die afwesigheid van culpa te bewys. As die grondbeginsel in aanmerking

geneem word dat die Staat sy saak sonder redelike twyfel moet bewys, skyn dit vir my dat so 'n suggestie, (wat ook al vantevore in sake genoem en toegepas is) wesenlik 'n bewyslas op die beskuldigde plaas wat in stryd is met die genoemde beginsel. Daar behoort in hierdie geval nie 'n bewyslas op die beskuldigde geplaas word om op 'n oorwig van waarskynlikhede die afwesigheid van culpa te bewys nie".<sup>74</sup>

It is to be noted that the judgment in Fouche's case is very short - hardly three pages long. It is to be noted further that Rumpff, J A made no effort to analyse previous authoritative dicta although he referred in passing to Arenstein's case, Jassat's case, Qumbella's case and to Marais's case.<sup>75</sup>

It is submitted that Rumpff, J A deliberately refrained from analysing previous AD decisions because:

- (i) they would not have supported his conclusion that the imposition of proof of absence of culpa on the accused would be in conflict with the general principle that the state must prove its case beyond a reasonable doubt ;
- (ii) his conclusion in Fouche's case would be in conflict with his judgment in S v Jassat.<sup>76</sup>

The importance of Fouche's case, it is submitted, is that it specifically disapproves the imposition of an onus on the accused person to prove the absence of culpa and specifically and disapprovingly mentions that the rule had been applied in previous cases. Fouche's case therefore rendered all previous decisions that upheld an onus on the accused to prove absence

of culpa ineffective. However, Fouche's case, like Qumbella's case, shows no exhaustive inquiry into the sources or impressive principled argument in justification of the conclusion. It therefore left the lower courts in some uncertainty as to whether the rule had been jettisoned in cases where culpa was adjudged to be the requisite form of fault.<sup>77</sup> Clearly then, Rumpff J A's dictum was an expression of a personal opinion.

A further weakness of Qumbella's case as a precedent for the view that the onus to prove culpa rests on the state is that Holmes, J A was alone in the holding. His was a concurring judgment. His concurrence was for different reasons other than the reasons advanced by the two appeal judges that delivered the main judgment. Certainly Beyers and Botha J J A never considered Holmes J A's position specifically although Beyers J did state in passing that "the State must prove a guilty state of mind...".<sup>78</sup> That passage certainly seems to be stated as a general proposition and is not directed at the specific legal issues that Holmes J A discerned from the facts of the case. Though van Rhyn, A J relied on that passage in S v Williams & Andere<sup>79</sup>, it is submitted that the reliance is forced.

It is therefore submitted that though the reasoning of Holmes J A's judgment in Qumbella's case is admirable, the basic legal grounds thereof are suspect, and possibly do not support the result.

The imposition of the onus of proof on the state in cases where the legislature did not specifically provide for mens rea but where the court in interpreting the relevant provision, has held that intent is required, has occurred along the same questionable lines as in the case where the onus was interpretatively cast on the state in the case of culpa.

Holmes J A in Qumbella's case had left open the question of whether R v H had been correctly decided.<sup>80</sup> After the decisions in Qumbella and Fouche, the question remained open as to whether an onus rested on the accused to negative dolus. The issue was made difficult by the equivocal nature of the decisions in Qumbella and Fouche. In principle it should have been relatively easy for the Appellate Division to analogise the rule in Fouche's case and to extend it to cases where the courts held that intention was the requisite type of fault required in a statutory offence. However, previous AD decisions that approved and applied the rule proved a stumbling block.<sup>81</sup>

In some cases, the "rule" (that is the rule that the onus rested on the accused to prove absence of mens rea) "has been applied without question".<sup>82</sup> In others the rule has been followed reluctantly because the courts found that they were bound by the dicta in Wallendorf and R v H.<sup>83</sup> The reluctance of the courts to follow the rule was exemplified by Hiemstra J's dictum that "To say that mens rea is an element of the offence but that its presence will be presumed until the accused disproves it, defies the established common law principles of guilt".<sup>84</sup>

As a result of the court's reluctance, courts have frequently departed from the rule "... often unwittingly, it is true, and the onus of proof has been placed upon the prosecution to prove mens rea in the form of intention beyond a reasonable doubt".<sup>85</sup> In some cases the courts have suggested departures from the rule although careful to state that they had no authority to mandate such departure.<sup>86</sup>

Clearly there was a conflict of judicial opinion on the point.<sup>87</sup> In September 1973, the AD in S v Fouche<sup>88</sup> set a precedent of departure from the general rule by departing from it in cases

which involved culpa. Less than a month later, Hefer A J analogised the ruling and applied it to those cases where intention was required.<sup>89</sup> Hefer A J's judgment is to be criticized on a number of telling points. The most obvious point is that he being an acting judge and sitting alone, had no authority to discard binding precedents of the Appellate Division.<sup>90</sup>

The second criticism is that the ratio of Fouche's case applied to a totally different subject to that which was involved in Maritz's case to wit respectively culpa and dolus. The court in Fouche's case made no mention even cursory, of dolus. There is no indication on the face of Fouche's case that the court intended that the ratio in its judgment should be extended to cases that involved dolus. There was therefore insufficient precedential ground for Hefer A J to extend the ambit of the rule in Fouche's case to cases that involved dolus.

Thirdly, Hefer A J is incorrect when he states that the principles in Fouche's case were clearly enunciated. As mentioned previously, Fouche's case is very short and there is no authoritative and masterful analysis of principles and precedents and statement or restatement of principles. The judgment has a cursory air about it which gives the lie to Hefer A J's enthusiastic bombast. If anything, Holmes J A in Qumbella's case<sup>91</sup> stated the applicable principles better.

It was in the context of this confusing milieu that the AD weighed in with the decision in S v De Blom.<sup>92</sup> In De Blom's case the accused was charged under the exchange control regulations with the offence of taking a large sum of money and some jewels out of South Africa without a permit. Her defence was that she was unaware that she required a permit to take the money and jewels out of South Africa. The attitude of the state was the classic legal position that an onus rested on the accused to show the absence of mens rea.<sup>93</sup>

Rumpff C J stated that “In a case like the present one it must be accepted that, when the state has led evidence that the prohibited act has been committed, an inference can be drawn, depending on the circumstances, that the accused willingly and knowingly (that is with knowledge of the unlawfulness) committed the act. If the accused... wishes to rely on a defence that she did not know that her act was unlawful, her defence can succeed if it can be inferred from the evidence as a whole that there is a reasonable possibility that she did not know that her act was unlawful, ‘and further, when culpa only, and not dolus alone, is required as mens rea, that there is also a reasonable possibility that juridically she could not be blamed, that is that, having regard to all the circumstances, it is reasonably possible that she acted with the necessary circumspection in order to inform herself of what was required of her in connection with the question of whether or not permission was required to take money out. Should there be, on the evidence as a whole, that is including that the act was committed, a reasonable doubt whether the accused did in fact have mens rea, in the sense described above, the State would not have proved its case beyond a reasonable doubt’”.<sup>94</sup>

According to authoritative academic opinion the import of the foregoing was that the AD finally jettisoned the generally accepted rule in cases of implied intention.<sup>95</sup> It is submitted, however, that the issue is not as clear as all that. In the first place the judgment is generally vague on the crucial issue of distinguishing between implied culpa and implied dolus as they affect the incidence of the onus. Secondly the judgment omits to state in clear terms whether in the particular case, dolus or culpa was required.<sup>96</sup> Thirdly, the court omitted all reference to the long line of decided cases stretching from Wallendorf to Fouche. The court also failed to refer to Maritz and Naidoo’s cases which, it is submitted, was to be expected if it approved of them since “... it is sometimes helpful for the Appellate Division to indicate obiter its approval

of a proposition of law enunciated by the court below, for this provides assurance to lower tribunals".<sup>97</sup> By merely stating the general rule that if upon a consideration of the evidence as a whole there is a reasonable doubt that the accused committed the act with the requisite mens rea, then the state would have failed to prove the guilt of the accused beyond a reasonable doubt, the court avoided disapproving its previous decisions. Its failure to approve of or even to comment on Maritz and Naidoo's cases, it is submitted, was an indication that the court was not prepared to deviate from its previous decisions.<sup>98</sup>

It is a pity that Muller, J A in S v Gampel Brothers & Barnett (Pty) Ltd<sup>99</sup> being aware of the controversy which existed over the onus of proof of intention in statutory provisions<sup>100</sup> chose to avoid making a decision that would authoritatively clarify the position once and for all.<sup>101</sup>

The general proposition stated by the court and which has been fastened on by commentators and some courts as authority for the proposition that the onus to prove implied intention rests on the state, is capable of co-existence with the proposition that the duty to disprove intention rests on the accused for, if the accused proved that he did not have the requisite dolus, then the state has not proved that he did have the requisite intent and vice versa.<sup>102</sup>

The position, it is submitted, is that there is a difference of opinion with regard to the import of De Blom's case in the context of implied intention in statutory provisions. The OPD has unequivocally interpreted De Blom's case to be a clear mandate that the state must prove intention in cases of implied intention.<sup>103</sup> The TPD cleaves to the traditional view that the accused must negative dolus in cases of implied intention.<sup>104</sup> The Cape Provincial Division, correctly, it is submitted, holds the view that the question is an open one but that "... recent

trends certainly seem to favour the view that the onus remains on the State to prove the presence of mens rea".<sup>105</sup> The Natal Provincial Division is equivocal as Leon J did not elaborate on the import of Rumpff C J's dictum in De Blom's case.<sup>106</sup>

In the case of Amalgamated Beverage Industries Natal (Pty) Ltd v Durban City Council<sup>107</sup> the Appellate Division was reluctant to accept strict liability and inclined towards, requiring mens rea. In this case the appellant, a bottler and distributor of soft drinks, was convicted in a magistrate's court of contravening by-law 18(c) of the City of Durban Food By-Laws, which had been promulgated in terms of s197(1) of the Local Government Ordinance 21 of 1942 (N). The conviction was based on an admission at the appellant's trial that it had sold a bottle of carbonated mineral water which contained a bee to a supermarket in Durban. The magistrate found that by-law 18(c) imposed strict liability. This was confirmed on appeal to the Provincial Division. On further appeal the appellant contended that the court a quo had erred in concluding that by-law 18(c) imposed strict liability and that mens rea was not an element of the offence. The said by-law provided:

"No person who carries on any business involving the manufacture, preparation, storage, handling or distribution of food shall in connection with such business... cause or permit any article of food or drink which is not clean, wholesome, sound and free from any foreign object, disease, infection or contamination to be kept, stored, sold or exposed for sale or introduced into the city for purpose of sale".

Hefer JA, delivering the majority judgment, concluded that whether the absence of mens rea

constituted a defence to the charge depended on the nature of the prohibition. In the present case there was no indication of an intention to dispense with mens rea. The use of the words “cause or permit” were more consistent with the presence than with the absence of mens rea. Moreover, the scope and object of the legislation in question had to be viewed in its proper perspective. Although the fact that the prohibition in question regulated an activity involving potential danger to the public was an important consideration, it should not be overemphasised. Its true significance had to be judged in conjunction with other determinants like the ease with which liability could be evaded if mens rea were required. In the present case, the judge held, the prohibition would not be easily evaded if mens rea in the form of culpa were required. From the evidence it appeared that the appellant had been negligent because the filled and capped bottles of mineral water passed inspectors at the rate of six per second and any reasonable person ought to have foreseen that, at that speed, foreign objects might pass unnoticed.

In the case of S v Zuma<sup>108</sup> Kentridge A J was reluctant to pronounce upon whether the issue of strict liability as referred to in this case was in conflict with the provisions of section 25(3) of the interim Constitution. Strict liability has generally been criticised in that it derogates from the theories of punishment and on the basis that it is hard to conceive a case where mens rea, especially in the form of culpa, would be totally unnecessary.<sup>109</sup> For this reason, statutes which are not quite clear whether mens rea is required should be strictly construed to presume that mens rea is required.<sup>110</sup> If that be the case the onus still rests on the state to prove the existence of mens rea even in the form of culpa.

### 6.3 Conclusion

Without the refuge of a rigid constitution and the undoubted superiority of judicial dicta over policy dictates, which is part of the tradition of American constitutionalism, the South Africans have done a sterling job in the area of strict liability to restrict the ambit thereof and therefore to advance the common law rule of no liability without fault.

The South African courts have shown themselves to be more attuned with the general western conception of fault liability than the English courts which have proved too ready to give their imprimatur to legislative provisions which violate basic tenets of western conceptions of legality. Basing their attitude on the common law authorities, South African courts have resisted the tendency which permeates English law, to approve of the idea of liability without fault.

Though their authoritative bases are equivocal, they have even resisted the tendency to lighten the probative load that rests on the state by refusing to hold that the onus rests on the accused to prove the absence of mens rea.

In the area of strict liability therefore, South African courts have proved far in advance of English courts and are more in line with enlightened thinking in the field of criminal law than English courts.

FOOTNOTES

1. Snyman Criminal Law 2ed (1989) 40; J Burchell & J Milton Principles of Criminal Law (1991) 314.
2. See LaFave 135-136; see also Morisette v United States 342 US 246; see also United States v Balint 258 US 250 251-252.
3. Smith & Bailey The Modern English System (1984) 182.
4. 258 US 250 (1922).
5. Balin's case 251-252.
6. 258 US 280 (1922).
7. id 288.
8. 342 US 246 (1952).
9. Morisette 256.
10. United States v United States Gypsum Co. et al 438 US 422 (1978).
11. id 436.
12. id 437-438.
13. United States v United States Gypsum Co. et al 438.
14. Edwards Mens Rea In Statutory Offences (1955) XI.
15. Edwards XIII.
16. Turner Kenny's Outline of Criminal Law (1966) 7-17, 26; see also Fowler v Padget (1798) TR 509; see Smith & Hogan 80; "It is usually said that there were only two exceptions at common law to the rule requiring mens rea. These were public nuisance and criminal libel". Smith & Hogan 79; Howard 1-3.
17. R v Tolson (1898) 23 Q B D 168 171-172, also 181, also 193-194.
18. id 187.

19. *ibid.*
20. Williams Textbook of Criminal Law. 929.
21. “Although prima facie and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such subject matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of welfare, health or convenience and such bye-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the bye-law that the person committing it had bona fide made an accidental miscalculation or an erroneous measurement”; “But in the latter half of the nineteenth century, the policy of the legislature moved towards a more minute regulation of social life by the creation of many non indictable offences carrying a relatively light punishment, and defined in the statutes with greater exactitude than had formerly been the practice”; Turner 46.
22. Reg v Warner (1969) 2 AC 256 291 C.
23. As Howard 2 puts it “... this part of the law presents a picture of almost universal confusion”.
24. Williams 929.
25. Turner 46, 48-49; see also Smith & Hogan 91.
26. Williams 929.
27. Williams 933; R v Warner (1969) 2 AC 256, 279; R v Howells (1977) QB 614 626 F.
28. Williams 934.
29. Williams 930; R v Warner (1969) 2 AC 256 302-303.

30. Williams 937-938; see also Green v Burnett (1955) QB 78 94.
31. (1969) 2 AC 256; (1968) 2 All ER 356.
32. *idem* 285.
33. Williams 945 includes toy guns under the category of objects to which the provisions of the act do not apply.
34. (1977) QB 614.
35. (1981) IWL 416.
36. Turner 41.
37. Williams 951.
38. eg section 1(1) of the Prevention of Oil Pollution Act, 1971.
39. Williams 953.
40. Williams 953.
41. Williams 927.
42. Williams Textbook of Criminal Law 12.
43. McBarnett Conviction (1981) 109.
44. McBarnett 167.
45. McBarnett *ibid*.
46. Smith "Judicial Lawmaking in the Criminal Law" 1984 Law Quarterly Review 100.
47. Burchell & Hunt South African Criminal Law and Procedure (1983) vol. 1 64, 110-111;  
The possible exceptions according to the authors are the newspaper cases of contempt of court and where the doctrine of *versari in re illicita* was applied in SA.
48. 1920 AD 383.
49. at 394.
50. R v H 1944 AD 121.

51. at 394.
52. “A second qualification to the general rule that ‘actus non facit reus nisi mens sit rea’ is this, that the legislature may absolutely prohibit the doing of an act and constitute it an offence without reference to the state of mind of the offender, and regardless whether he had any intention of breaking the law or of otherwise doing a wrongful act”. R v Wallendorf & Others, 1920 AD 383-395; see S v Pretorius 1964 (1) SA 735 738 E-G; S v Qumbella 1966(4) SA 356 364 E-F; S v Sayed 1981(1) SA 982 986 C; S v Wandrag 1970 (3) SA 151 155 F.
53. Burchell & Hunt vol. 1 65.
54. S v Arenstein 1964 (1) SA 361 365 B-C.
55. see Annual Survey of South African Law 1965-1984.
56. S v Pretorius 1964(1) 735 739 C-D.
57. S v De Blom 1977 (3) SA 513 (A).
58. S v De Blom 1977 (3) SA 513 529.
59. S v Williams en Andere, 1968 (4) SA 81 83 G and S v De Blom 1977 (3) 513 528-529.
60. Burchell & Milton Criminal Law (1975); S v Jassat 1965(3) SA 423 425 C; S v Qumbella 1967 (4) SA 577 580 D-E.
61. Burchell and Milton “Criminal Law” 1974 Annual Survey of South African Law 337; see also R v Wallendorf 1920 AD 338; R v H 1944 AD 121; R v Ndlovu 1945 AD 369; R v Britz 1749(3) SA 293.
62. S v Arenstein 1964 (1) SA 361.
63. S v Qumbella 366 A.
64. At 365-366.
65. 1965 (3) SA 423.

66. 1964 (1) SA 361.
67. S v Jassat at 425 C.
68. Qumbella's case 366 E.
69. See Steyn CJ's examination of the authorities relevant to the doctrine of *versari in re illicita* in S v van der Mescht, 1962(1) 521 530-535; see also S v Bernadus 1965(3) SA 287 290-294.
70. See for example Steyn, C.J's critique of R v Matsepe and R v Wallendorf in S v van der Mescht 1962(1) 521 529-530, 534 G-H.
71. S v Jassat 426 A.
72. Rumpff JA seems to have been cleaving to Wallendorf's case and R v H. The effect of his view in practice, is that whilst acknowledging *mens rea* as a constituent element of the offence, it presumes *mens rea* and casts an onus on the accused to disprove it. See S v Arenstein 1963 (3) SA 243 at 245 G-H for a discussion of the effect of Rumpff JA's view.
73. 1968(4) SA 81 89C.
74. Burchell & Milton 1974 Annual Survey 337-338.
75. 1974(1) SA 96; See also Burchell, Milton & Burchell 227-228 and 93 at 227.
76. 101 F-G.
77. See Qumbella's case at 361 F-G for a judicial disapproval of Rumpff CJ's view that was expressed in S v Jassat.
78. "The view was expressed (at 89 G-H) that the Appellate Division had in the cases of Qumbella, *supra*, and S v Jassat 1965(3) SA 423 AD departed from R v H at least as far as *culpa* was concerned. It is difficult to say whether the Appellate Division has made such a departure" per Hiemstra J in S v Sibitane 1973(2) SA 593 594 F-G; See also S

v Vanmali and Another 1975(1) SA 17 22 A-B.

79. 1968 (4) SA 81.
80. “A first step towards reviewing and reconsidering R v H supra was taken in R v Qumbella 1966(4) SA 356 (AD) at 366B. But it did not go beyond a mere suggestion that the law should be reconsidered”; per Hiemstra J in S v Sibitane 1973 (2) 593 594 E-F; see also S v Sibitane 1973(2) SA 593 594 F-G; S v Vanmali & Another 1975(1) SA 17 22 A-B; S v Williams en Andere 1968(4) 81 89-90.
81. “Hoewel dit in casu oor culpa as skuldvereiste gegaan het, het die geleerde appelregter die beginsels so duidelik geformuleer, dat dit, mynis insiens, ook op dolus misdade van toepassing moet wees” per Hefer AJ S v Maritz 1974(1) SA 266 C-D.
82. Burchell, Milton & Burchell 231.
83. Burchell, Milton & Burchell 230; see also footnote 117 on the same page for the relevant decisions; see also 1974 Annual Survey of South African Law 337.
84. S v Sibitane 1973(2) SA 593 595 B; S v Vanmali & Another 1975(1) SA 17 22 C.
85. S v Sibitane 1973 (2) 593 594 C-D.
86. Burchell, Milton & Burchell 231, see also footnote 119 on the same page for the relevant decisions.
87. S v Williams en Andere 1968(4) SA 81; S v Naidoo 1974(4) 574 602 C.
88. 1974(1) SA 96.
89. S v Maritz 1974(4) SA 266 270 D-E; Burchell, Milton & Burchell 232.
90. Hahlo & Kahn. The South African Legal System and its Background 252; the decisions in point were Wallendorf and R v H.
91. 1966(4) 356 366A-B.
92. 1977(3) SA 513.

93. idem 532 D.
94. At 532 E-H, translation as quoted in 1977 Annual Survey of South African Law 417.
95. 1977 Annual Survey of South African Law 416; 1981 Annual Survey of South African Law 432.
96. S v Jadwat 1977(4) SA 815 826D
97. Hahlo & Kahn ibid 271.
98. One has to disagree with Friedman J that notwithstanding the failure to refer to contrary decisions of the AD, the courts decision was irreconcilable with the traditional view; see S v Sayed 1981(1) SA 982 989.
99. 1978(3) SA 772.
100. ibid 785-786.
101. He merely contented himself by stating that "In view of the fact that the question of onus was not fully argued before us, in the instant case, I do not wish to say anything further with regard thereto". 786 C.
102. 1977 Annual Survey of South African Law 416.
103. S v Moliapi 1977(4) SA 796-800-801.
104. S v Elkon 1981(4) SA 62-67. However it is submitted, the view of the TPD is weak because the judgment does not refer to De Blom's case.
105. S v Sayed 1981(1) 982 989 D.
106. S v Jadwat Bros (Pty) Ltd & Another 1977(4) SA 815 826 C-F.
107. 1994 (3) SA 170 (A).
108. 1995 (2) SA 642 (CC) - 1995 (4) BCLR 401 (SA).
109. Snyman 248.
110. Snyman 249.

**CHAPTER 7****JUDICIAL NOTICE****7.1 Introduction**

The Anglo-American system of justice regards any litigation or trial as a contest which must result in the declaration of a winning and a losing side.<sup>1</sup> When a case comes before the court, there is a presumption that the court is ignorant of the facts of the case.<sup>2</sup> A judge presumptively "... knows nothing about the existence of a controversy or about any disputable facts relevant thereto until the matter is properly brought to its attention".<sup>3</sup> In order to succeed, a party to a suit, be it criminal or civil, must not only prove the facts in issue but must also prove the facts relevant to the issue.<sup>4</sup> Thus each party introduces evidence which is carefully controlled and monitored to persuade the trier of facts that the facts upon which that party relies are correct.<sup>5</sup> However, a party does not have to lead evidence to prove those facts of which the court takes judicial notice.<sup>6</sup> Judicial notice therefore in certain circumstances assumes the place of evidence in the adjudicatory process.<sup>7</sup> More importantly, judicial notice relieves the party on whom the onus of proof rests to prove a fact in issue of such a duty. Thus in a criminal action the more disputed facts judicial notice is taken of, the less the state must prove in order to obtain a conviction and the more the risk of conviction increases against the subject.

It is important to observe how the issue of judicial notice is dealt with in American English and South African law.

## **7.2 Judicial notice in American law**

### **7.2.1 The ratio of judicial notice**

The rationale for judicial notice is the need to curtail proceedings and to reduce expense by reducing those matters that parties to a suit must prove.<sup>8</sup>

Judicial notice is simply a process whereby one party is relieved of the burden of producing evidence to prove a certain fact. The court accepts the fact as true without proof on the theory that the fact noticed is so well known that it would be superfluous and a waste of time to require proof of it. It is on this basis that judicial notice was once said to be restricted to those facts which were a matter of 'common knowledge' and which no reasonable person would dispute.<sup>9</sup>

According to Wigmore a further basis is that the facts judicially noticed are capable of unquestionable demonstration.<sup>10</sup>

### **7.2.2 Can rebutting evidence be led?**

Whether rebutting evidence can be led after judicial notice has been taken of a fact is one of the great unsettled debates of the American law of evidence.<sup>11</sup>

According to the one view, judicial notice merely relieves a party of the obligation to adduce evidence, not the obligation to persuade the fact finder. If judicial notice operates in favour of

the party, the party may confidently omit to lead evidence regarding the judicially noticed fact, without fear that the decision may go against him or her because of lack of evidence. It is, however, open to the party against whom the judicial notice of a fact operates, to adduce evidence to contradict the conclusion of fact which is sought to be induced by judicial notice. According to this view, therefore, judicial notice can, in American law, operate no more than to establish a prima facie case. This view of the role of judicial notice in the evidential process has been ably advanced by Wigmore and Davies.<sup>12</sup>

The other view is that once a fact in issue has been judicially noticed, it is no longer open to the party against whom the notice has operated to rebut the judicially noticed fact by evidence. Judicial notice according to this view is an evidential foreclosure on the issue involved. This view is expounded by McCormick and Morgan.<sup>13</sup>

It is not intended in this work to enter the fray on the side of either party save for making the general observation that the Morgan-McCormick thesis, attractive though it is on logical and conceptual grounds, goes against the grain of American constitutionalism. The very idea of due process was incorporated into the Bill of Rights in order to avoid the foreclosure of evidential controversies. Such foreclosure was considered by the founding fathers to be a danger to the rights of citizens. At the time of their adoption of the constitution, the founding fathers considered it intolerable for Americans to be told that they could not evidentially challenge any evidential matter on the basis that it had been judicially noticed. It is submitted that even today such a scenario would be intolerable for most Americans to be told that they could not evidentially challenge any evidential matter on the basis that it had been judicially noticed. Evidential foreclosure would simply offend against the American sense of justice.

Viewed against the jurisprudential milieu of American constitutionalism, Wigmore's view, while less logically and conceptually attractive, is, however, most in accord with American conceptions of fairness and justice. Wigmore moreover, has the support of important adherents in *Cardozo and Learned Hand*.<sup>14</sup>

Though Chadbourn is of the view that the Morgan-McCormick view is the more widely accepted,<sup>15</sup> it is submitted that its acceptance has not been translated into legal dicta by the tribunals that count most - the courts. Barnes's case which is much more recent than any decision of the lower courts which may be cited<sup>16</sup> in support of the Morgan-McCormick thesis reinforces the view that Wigmore's thesis is the more acceptable to the court. Barnes's case specifically decides that judicial notice merely relieves a party of the obligation to adduce evidence, not the obligation to persuade the factfinder. It is thereupon open to the party against whom judicial notice operates to adduce evidence to contradict the conclusion of fact which is sought to be induced by judicial notice.

It is clear therefore that in the United States, judicial notice is the process by which a court accepts certain alleged facts as correct without formal proof thereof, absolving the party who relies thereon of a duty to establish such facts if the other party leads no evidence to contradict the correctness of the judicially noticed facts.

It is also clear that though there is some uncertainty, it is reasonable to state that in the United States judicial notice does not prevent rebuttal of judicially noticed facts by further evidence.

### 7.2.3 Judicial notice at common law in the United States

Facts of which judicial notice can be taken in American law are those facts which are "... generally known with certainty by all the reasonably intelligent people in the community and facts capable of accurate and ready determination by resort to sources of indisputable accuracy".<sup>17</sup> Judicial notice is taken of what are called adjudicative facts, that is, facts about a certain event which help to explain who did what, when, where, how and with what motive and intent.<sup>18</sup> These are matters on which evidence must in normal circumstances be led to persuade the finder of fact. These matters are legion and classification and recapitulation thereof are unnecessary.<sup>19</sup>

In addition, there are facts which the court takes judicial notice of which are not adjudicative in nature. These are the so-called legislative facts. These are issues which arise when "... a judge is faced with the task of creating law, by deciding upon the constitutional validity of a statute, or the interpretation of a statute, or the extension or restriction of a common law rule, upon the grounds of policy, and the policy is thought to hinge upon social, economic, political or scientific facts".<sup>20</sup> The question which arises is to what extent may the court take judicial notice of such factors taking into account the fact that such facts are not normally notorious or capable of prompt and accurate ascertainment?

No definitive answer can at this stage be supplied. But the court, when faced with the need to make policy decisions in its interpretative role, certainly takes notice, perhaps impliedly, of such legislative facts. It does so as a matter of policy, not because of the fact that facts are notoriously known or capable of ascertainment.

It can, however, be stated that although in common law an American court may take judicial notice of certain facts, such judicial notice must not impinge on the provisions of the Constitution of the United States. If judicial notice were to be taken by a court of facts and if such taking of judicial notice of facts could be adjudged to be in conflict with the United States Constitution, it goes without saying that such taking of judicial notice of facts would be irregular and illegal and the proceedings in which such taking of judicial notice of facts were to be effected would be declared void and of no force and effect whatsoever.

#### **7.2.4 Judicial notice in statute law in the United States**

An important question which arises regarding judicial notice is the validity of legislative provisions that require the court to take judicial notice of certain facts notwithstanding the fact that such facts are not common knowledge and may very well be so obscure that most citizens are not aware of them.<sup>21</sup>

In the United States with its tradition of constitutionalism, such provisions must comply with the Constitution's Bill of Rights. If, for instance, a statute were to lay down that the court or jury must or may judicially take notice that a certain intent flows from the mere commission of a certain act, that provision would clearly fall foul of the due process clauses of the Bill of Rights of the American Constitution and would certainly be legally ineffectual.<sup>22</sup>

All legislation in the United States must comply with the Constitution of the United States.<sup>23</sup> Thus all facts which so far have been judicially noticed by the court on the authority of legislation have fallen within the Bill of Rights in the sense that the enabling legislation has not

been adjudged to be violative of the Constitution of the United States. There have been many such provisions but they have generally related to non-contentious matters which provoke no controversy. In fact judicial notice has been mandated by congress exclusively with respect to the seals of the various agencies of the government of the United States of America.<sup>24</sup>

### **7.3 Judicial notice in English law**

#### **7.3.1 Definition**

In English law judicial notice is the acceptance by a tribunal that a certain fact has been established to its satisfaction without formal evidence being led.<sup>25</sup> The judicial tribunal may judicially notice a fact pursuant to the common law or a statutory duty.<sup>26</sup>

#### **7.3.2 Rationale**

The rationale for judicial notice is that it expedites the hearing of cases and saves time.<sup>27</sup> It also promotes consistency in matters where factual determinations often have to be made<sup>28</sup> in the administration of law.

#### **7.3.3 The effect of judicial notice**

A question which arises, as it arises in American law, is what is the effect of judicial notice in English law? There is some obscurity and uncertainty about the effect of judicial notice in English law. The leading authors are unusually diffident about expressing an opinion. Cross

and Tapper say the following:

If the process of taking judicial notice and receiving evidence of a fact are essentially different, no evidence should be admissible in rebuttal of a fact which is judicially noticed. It appears that this is the case in spite of occasional remarks suggesting that taking judicial notice is merely the equivalent of prima facie proof of fact.<sup>29</sup>

According to Nokes:

There seems to be no clear English authority for the view that notice can be equated with prima facie evidence and therefore that notice can be rebutted by actual evidence.<sup>30</sup>

Only Heydon is dogmatic enough to state that “evidence is not admissible in rebuttal of facts judicially noticed”.<sup>31</sup> Heydon, however, cannot cite any authority for his view. Tapper takes a different view and avers that evidence in rebuttal can be led.<sup>32</sup> However, he also cites no authority for his view. It is submitted that the matter must be regarded as open in English law.

#### **7.3.4 Judicial notice at common law**

In common law, the fact finder may take judicial notice of “... matters so notorious as not to be capable of reasonable dispute”.<sup>33</sup> This rule is aimed at ensuring that the fact finder does not use facts known privately to himself to come to a decision which may unfairly favour one of the

parties to the suit.<sup>34</sup>

The fact finder has a discretion whether to take judicial notice of the matter or not.<sup>35</sup> The fact finder may even hear evidence in order to decide the issue of whether he may take judicial notice of a particular fact or not. However, the courts are cautious and sparing in their exercise of their discretion.<sup>36</sup> Matters of which courts have taken judicial notice have been various and legion.<sup>37</sup>

### **7.3.5 Judicial notice under statutory law**

As parliament is supreme, parliament may impose a duty on the court to take judicial notice of any fact.<sup>38</sup> Whether a statute imposes a mandatory duty on a court to take judicial notice of any fact or is merely permissive depends on the actual wording of the statute.<sup>39</sup>

Most of the statutes that have imposed the duty to take judicial notice of certain facts have done so in imperative terms and have directed judicial notice to be taken of official matters such as seals of state, for example, section 1 of the Evidence Act of 1845, and section 1 of the Treasury Solicitor Act of 1876,<sup>40</sup> require the courts to take judicial notice of official documents and certificates, signatures of judges and other officials when appended to official documents.

### **7.3.6 Effect of statutory judicial notice in Britain**

What is observable is that in Great Britain, although when statutorily imposed, judicial notice is mandatory, the subjects to which it relates are non-controversial subjects which cannot

prejudice or can only marginally prejudice the subject in any contest with the state. Further it is to be noted that though sometimes judicial notice of certain facts is mandated, the evidential worth of such mandatorily accepted evidence is not laid down. The fact finder may therefore allocate to the judicially noticed fact, such evidential weight as he considers it worth in the circumstances. The fact finding process is therefore not hindered or affected to any degree. Furthermore, statutes do not lay down whether mandatorily judicially noticed and admitted evidence may be rebutted by further evidence or not. It seems that the position is as open as in the case of facts judicially noticed under the common law but in practice it seems that statutorily mandatorily judicially noticed facts are, as a rule, not evidentially challenged and no rebutting evidence is or may be led.

#### **7.4 Judicial notice in South Africa**

Like the Anglo-American system, the South African system of justice regards a trial as an evidential contest, the probative conqueror being entitled to judgment or decision. To succeed, a party must adduce sufficient probative material to satisfy the trier of fact of his (the party's) entitlement to a judgment, that is, the party must adduce sufficient evidence to establish the facts upon which he relies for judgment.<sup>41</sup>

However, "no evidence is required to prove facts of which the courts take judicial notice...".<sup>42</sup> Obviously therefore in South African law, in certain circumstances, judicial notice takes the place of formal judicial proof, that is, evidence. Schmidt does not seem to be correct when he equates judicial notice with the process whereby "... a court takes into account a fact which has not been proved in evidence, and has not been formally admitted or presumed...".<sup>43</sup> The "taking

into account” of a fact is the logical process by which the trier of fact assesses the meaning, purport and weight of a fact duly proven by evidence in the light of other facts. Judicial notice is not a process. Judicial notice is the acceptance, without any evidence being led to establish it, that an assertion of fact is correct, that is, that an alleged fact has been established.<sup>44</sup>

#### **7.4.1 The rationale of judicial notice in South African law**

The law of South Africa on judicial notice has been heavily influenced by English law.<sup>45</sup> In South African law the rationale for the doctrine of judicial notice is that it is unnecessary to prove facts “... which are notorious and well established in the mind of every individual... it would clog and protract judicial proceedings and cause unnecessary public inconvenience”.<sup>46</sup> The rationale therefore seems to be grounded not on legal principle but on pragmatism and practical expediency<sup>47</sup> and is aimed at reducing the duration of trials and the inconveniences and costs occasioned by trials.

#### **7.4.2 Judicial notice at common law**

As at English law, the judge has a discretion.<sup>48</sup> The judge may either accede or disagree to notice a fact judicially when invited or exhorted to do so by any of the parties to a suit being tried by and before him.

However, unlike English judges, South African judges are not at all cautious and reluctant to notice facts judicially.<sup>49</sup> As Gardiner J, pointed out “The modern tendency is to increase the area of judicial cognizance”.<sup>50</sup> The Appellate Division repeated Gardiner J’s statement with apparent

approval in R v Tager in 1944.<sup>51</sup> The result is that the doctrine of judicial notice in South Africa:

is fairly flexible<sup>52</sup> and allows the court to take judicial notice of a multitude of facts or incidents which would normally require a plethora of evidence to establish.<sup>53</sup> The attitude of the South African courts is exemplified by the assertion by Homes J A that the judiciary must not be contained in an ivory tower without windows.<sup>54</sup> In South African law judicially noticed facts are so numerous that, "it is impossible to compile a list of facts which have been considered sufficiently notorious to be noticed without evidence".<sup>55</sup>

#### 7.4.2.1 **The problem of application**

A problem which presents itself as soon as one considers the doctrine of judicial notice in South African law is: Under what circumstances will the court judicially take notice of a fact?<sup>56</sup>

The answer to the question is important to a litigant who is preparing for trial for it influences his decision whether he must go to inconsiderable expense to secure the attendance of witnesses or not. It also influences the party either to persist in a suit or to withdraw if that party considers that the evidence the party has in its possession will not be sufficient to discharge the burden of proof (that is if judicial notice is not taken of some of the facts that the party must establish in order to succeed). It is also a matter of some importance to the trier of fact for it affects the correctness of the factual determination of the issues presented at the trial.

The problem of applicability of the doctrine of judicial notice and the pitfalls of application are demonstrated by the decision in *R v Tusini*.<sup>57</sup> In *Tusini's* case the accused were charged with murder, tried, convicted and sentenced to death. The deceased had been shot dead at night and, on the evidence, the light was weak at the time of the occurrence. Two witnesses had identified the two accused as the assailants. Identity was the issue and the question of opportunity of observation and therefore reliability of identifying evidence, arose.

The judge in the court a quo was satisfied that the witnesses had had a sufficient opportunity to observe the assailants and therefore accepted the evidence of identity of the identifying witness. The presiding judge justified his acceptance of the identifying evidence on the ground that "It is well known from the experience of this court that Natives can, and do, recognise people they know in comparative darkness which, for a European would make recognition quite impossible".<sup>58</sup> So though the light was bad according to European (*sic* white) standards, it was not so according to black standards as perceived by a white trier of fact. It was therefore easy for the judge to hold that the witnesses had correctly identified the accused. On appeal, the appeal court held that the judge had misdirected himself in taking judicial notice of the differential cognitive capacities of various ethnic groups. The appeal court reversed the decision.

It is virtually impossible to discern a general factual principle which underlies the application of the doctrine of the judicial notice in South African law. Facts of which judicial notice has been taken have been legion.<sup>59</sup> On the other hand in many instances the court has refused to take judicial notice of certain facts.<sup>60</sup>

Virtually the only general principle which can be discerned from the authoritative commentators and the decisions, is that the disputed fact or facts sought to be judicially noticed must be:

“... so welbekend of so onmiddelik en akkuraat vasstelbaar is dat dit onsinnig sou wees om van die partye te vereis dat hulle getuienis daaromtrent voorle.”<sup>61</sup>

It is to be noted that this statement of the law by Schmidt is not supported by authority but it has been referred to with approval by Steenkamp J.<sup>62</sup> Lansdown and Campbell repeat the same statement but cite Edmund Morgan and Steenberg's case as authority.<sup>63</sup>

#### 7.4.2.2      **The effect of judicial notice in South Africa**

As in the other legal systems which form the subject of this study, the problem arises as to the effect the judicial notice of a fact has on the adversarial system of presenting evidence. Does taking judicial notice of a fact conclusively establish the correctness of the factual assertion involved on behalf of the party relying on such judicial notice or is it still open to the other party to lead evidence to rebut the judicially noticed fact?

According to Lansdown and Campbell:

Evidence is inadmissible to controvert facts properly noticed; they have more than merely prima facie validity, being irrefutable.<sup>64</sup>

Lansdown and Campbell are therefore unabashed and explicit followers of the Morgan-McCormick line in this regard. It is to be noted that Lansdown and Campbell can cite as authority, only one English judgment of the court of the King's bench and Morgan.<sup>65</sup> They do not cite any decision of the Court of Appeal or the House of Lords which are higher courts than the court whose decision they quote. Their dogmatic statement is untenable in the light of plentiful English authorities for the proposition that the matter is still open in English law (as shown in a foregoing section of this work).

Schmidt does not say it explicitly but it appears that he favours the view that evidence cannot be led to rebut a judicially noticed fact. According to Schmidt, judicial notice of a fact ought to be taken only when "... die feit waarvan kennis geneem word, so seker dat weerligging haas ondenkbaar is".<sup>66</sup> According to Schmidt facts which are judicially noticed should be so notorious that if the need to rebut them arises, then that only serves to show that judicial notice of such facts was taken incorrectly. Schmidt's view, it seems, is not based on principle, but is pragmatic. It focuses on the conditions which ought to exist if judicial notice is to be taken of a fact but does not address the important question of principle regarding the evidence offering right of the party against whom a fact has been judicially noticed. Hoffman and Zeffertt support the Morgan-McCormick view<sup>67</sup> while van der Merwe et al are ambiguous.<sup>68</sup>

#### 7.4.2.3 **The doctrinal controversy in South African case law**

There is a paucity of authoritative decisions on the point in South African law.<sup>69</sup>

In R v Dumezweni<sup>70</sup> the Appellate Division had an opportunity to decide on this point. In that

case, the appellant was charged in the chief's court with the crime of insulting the chief of the appellant's tribe by leaving a meeting convened by the chief without the permission of the chief. The appellant had ignored a summons that had summoned him to the chief's court to answer the charge. He was convicted of the main charge and sentenced. The chief also fined him for contempt of court. The appellant appealed unsuccessfully to the native commissioner and hence to the Eastern Cape Division with like results.

On further appeal to the AD against the conviction on the main charge, it was argued that the commissioner had erred in taking judicial notice of the existence of the rule in Tembu law that it was an offence to insult a chief by leaving a meeting without the chief's permission.

The court held that:

Where there is a dispute as to the existence or nature of a law or custom, it would either not be well established or well known, or one of the parties would in honest or pretended ignorance or misunderstanding be contesting what is in fact well-established and well known. In the former case the native commissioner would have to hear evidence. In the latter he may, where the law or custom is clear, decide without hearing evidence, relying on his own knowledge, but in such a case it would be necessary, for purposes of the record, and in giving reasons in an appeal from his decision, to note the contentions of the parties and his reasons for not hearing the evidence. It would be open to a party aggrieved, to apply on appeal for the matter to be re-opened and evidence as to the law or custom to be heard.<sup>71</sup>

It is difficult to follow the logic of the chief justice. Questions arise in the mind of a reasonable man such as (a) how can the presiding officer determine that the dispute is caused by the fact that the fact sought to be judicially noticed is not well-known or established? (b) How can the presiding officer determine that the dispute is caused by honest ignorance or misunderstanding of the fact sought to be judicially noticed? (c) At what stage must the presiding officer make the determination? Must he hear evidence first to establish point (a) or (b) before he makes a determination? (d) If the presiding officer does not have to hear evidence to make a determination, is the presiding officer not making a prejudicial determination against one or other party without hearing the prejudicially affected party? (e) Where the rule sought to be judicially noticed is disputed, on what basis can a presiding officer find that “the law or custom is clear” and then take judicial notice thereof without hearing evidence to determine the clarity of the custom or law? (f) If the presiding officer is required to note the parties’ contentions, at what stage must the presiding officer take such notice? Before or after taking judicial notice? (g) If note of the parties’ contentions must be taken after judicial notice has been taken of the disputed fact, what would the purpose be of affording the parties an opportunity to address the court when a determination of that very issue has already been affected? (h) If the court must hear the parties’ representations before the court takes judicial notice of the disputed rule, why should the court not hear evidence as well? Surely there is no difference in procedural principle between hearing a party from the bar and hearing a party from the witness stand? (i) Why should a party who is aggrieved by the taking of judicial notice of a disputed rule be compelled to apply for a re-opening of the case on appeal and to apply for leave to lead further evidence as to the disputed fact? Moreover, why should the aggrieved party be subjected to the onerous and expensive task of convincing a court of appeal to permit it to re-open its case and to lead further evidence<sup>72</sup> when, by hearing evidence in casu, the court of first instance could compile

a complete record and an appeal could be taken on all points making it unnecessary to adopt the procedure suggested by the chief justice? (j) If the aggrieved party may lead evidence before another court to rebut the judicially noticed fact, why should that party not be able to lead such evidence before the court of first instance and by so doing perhaps avoid the expensive procedure suggested by the chief justice?

It is submitted that the logical contortions of the chief justice are traceable to his undeclared support for the Morgan-McCormick approach. The chief justice, however, realised that the acceptance of the premise that evidence cannot be led to rebut a judicially noticed fact, must logically lead to the untenable conclusion that the party against whom judicial notice of a disputed fact is taken is foreclosed and the fundamental rule of *audi alteram partem* is violated. Hence the chief justice suggests a *via media* which seeks to reconcile the logical attractiveness of the Morgan-McCormick approach with the demands of procedural justice. In so doing, it is submitted, he falls into a logical trap and has to resort to the Wigmore-Thayer thesis.

It is submitted that the resolution of the problem suggested by the chief justice is unsatisfactory for it imposes an unjustifiable and unnecessary burden on a party who must employ extraordinary, uncertain and expensive procedures in order to obtain a just resolution of a point which may be of great importance. It is, it is submitted, also contradictory in principle and effect because it evidentially forecloses the party who is aggrieved by the judicial notice of the fact only in the court of first instance and not in a court of appeal. It is therefore, it is submitted, wrong in principle, for surely what can evidentially be done in a court of appeal ought to be capable of being done in the court of first instance where the evidential record is compiled.

What Steyn C J attempts to do is to forge an uneasy marriage between the Thayer-Wigmore approach on the one hand and the Morgan-McCormick thesis on the other. The result is logically calamitous.

The logical objection to Steyn C J's decision is, it is submitted, supported by the decision in S v Ngidi.<sup>73</sup> In casu the appellant, a tribal black, was charged before the court of the chief with the offence of disobeying an order given to him by the chief. He was convicted and fined. He appealed to the court of the native commissioner which dismissed the appeal, holding that it was an offence in Bantu law to disobey a chief. On further appeal to the Natal Provincial Division, Miller J (as he was then) held that the appellant had never been given an opportunity before the commissioner to show that the commissioner's view of the rule of Bantu law was mistaken. The court set aside the decision of the commissioner and remitted the matter to the commissioner, "... for the purpose of enabling the appellant to be heard and, if so advised, to lead evidence as to the existence or otherwise of the law or custom of which judicial notice was taken".<sup>74</sup>

It is significant to note that the Natal court did not draw the two-fold distinction drawn by Steyn C J between cases where the fact sought to be judicially noticed is well established or well known and the case where one party is guilty of honest or pretended ignorance or misunderstanding of a well-known fact. The court simply emphasized the need to afford a party an opportunity to be heard: "... as to the existence or otherwise of the law or custom of which judicial notice was taken".<sup>75</sup>

It is to be noted that Kerr is critical of the judgment for in his view, it over emphasizes the

leading of evidence as the means by which a party may show that the taking of judicial notice in particular circumstances would be wrong.<sup>76</sup>

It is suggested that Kerr's criticism is misconceived. Kerr does not seem to take into account the practicalities of challenging a view held by a judicial officer in an actual trial. The leading of evidence, it is submitted, is the strongest possible means of mounting a challenge. The court therefore is not to be criticized for emphasizing it. The proof of a custom may be effected by the leading of expert evidence on the subject.<sup>77</sup>

It is submitted that the phraseology and tense adopted by the court are significant. The court did not adopt the phrase "... of which judicial notice was sought to be taken". If the court had intended to convey that the party ought to be given an opportunity to lead evidence to prove the existence or otherwise of the disputed rule before the court made a determination, the court, it is submitted, would have phrased its judgment in that manner or some other similar manner. However, by using the phrase "... was taken ..." it is submitted, that Miller J, who was a master of the English language, intended to convey that the aggrieved party ought to be given an opportunity to rebut a judicially noticed fact by and before the very same officer who has judicially noticed the disputed fact and at the very same proceedings where the judicial notice is effected, but after judicial notice has been taken and not at some other proceedings before an appellate tribunal.

It is submitted that the motive of the court is clearly manifested by the action it took after it concluded that the commissioner had acted erroneously. Instead of re-opening the case and hearing further evidence as Dumezweni's case clearly mandates, the court remitted the matter

to the same commissioner, instructing the commissioner to afford the appellant the opportunity to rebut the commissioner's judicial notice of the existence of the Bantu law rule which was in issue. This, it is submitted, is a clear acceptance of the Wigmore-Davies thesis and is a clear rejection by the Natal court of the Appellate Division's preference. The effect of judicial notice is, it is submitted, in terms of Ngidi's case, prima facie only and not conclusive as Dumezweni's case suggests.

Both judgments, it is submitted, are obscure and meaning must be ascertained from them with the greatest difficulty. For this reason they are ambiguous and can hardly be regarded as clear precedents on the point. However, if the meaning attributed to them in this thesis is correct, then it is clear that there is a difference of opinion on this point between two of South Africa's ablest jurists of the last generation.

A confusing judgment on this point is Gomes v Visser.<sup>78</sup> This was a civil matter involving claims for damages caused when two vehicles collided in a robot controlled intersection. Both parties claimed that when they entered the robot controlled intersection travelling at right angles to each other, the lights had been green, that is, they had been in their favour. The magistrate's court, unable to accept either party's version, had granted absolution on both the claim and counter-claim. On appeal the court held that:

... it is, in my view, proper for a court to take judicial notice of the fact that when the lights facing in one direction at a right angled inter-section are green those facing at right angles to them should be, are probably red.<sup>79</sup>

The court then seemed to equate judicial notice with a rebuttable presumption<sup>80</sup> and then held that:

... the probability that a set of traffic lights was functioning properly may in a particular case be outweighed by the credible testimony of a witness who swears that a light which should have been red was in fact green or it may be weakened or destroyed by technical evidence of possible or actual malfunction.<sup>81</sup>

Obviously in so far as this judgment equates judicial notice with a presumption, it is wrong. It is theoretically significant, however, in as much as it holds out the prospect of probable challenge to a judicially noticed fact.

Although the court subscribed to the Wigmore-Davies thesis the judgment does not seem to have addressed itself to the theoretical subtleties of R v Dumezweni and S v Ngidi. The two theoretically opposite judgments were not referred to and therefore the judgment, lacking any persuasive reasoning on the point as it is, cannot be given any precedential value and in fact it was rejected in S v Lange.<sup>82</sup> However, the judgment was approved in Van Vollenhoven v McAlpine.<sup>83</sup> In that judgment, however, Howard J, did not especially direct his mind to Dumezweni and Ngidi. It is therefore submitted that Van Vollenhoven's case suffers the same weakness as Gomes's case. S v Lund<sup>84</sup> also approved Gomes v Visser but Milne J P also did not address himself to the subtleties of R v Dumezweni and S v Ngidi.

The effect of this difference of opinion between Steyn C J and Miller J is that there is uncertainty in South African common law on the evidential effect of judicial notice. There is

also uncertainty about the evidential onus when judicial notice has been taken of a fact and therefore there is uncertainty about the ultimate onus when a fact which constitutes a significant element in the process of proof is judicially noticed.

#### 7.4.2.4 **A possible resolution**

A theoretical resolution or reconciliation of the difference of opinion which exists seems to be indicated in the little known case of S v Sihlani.<sup>85</sup>

In casu, the appellants were charged with and convicted of fighting in terms of an ancient law. The state case suggested that the two accused had fought over the affections of the wife of one of them. The wife of A (who gave evidence for the state) alleged that she was in love with B. She alleged that on the day of the incident she had a tryst with B. A discovered her and B in compromising circumstances. A then struck B with a stick to effect a catch as required by the tribal custom of ntlonze. B retaliated and the two men then fought apparently with sticks. A was badly injured. A confirmed his wife's story.

B denied the version of A and his wife. B's version was that A had assaulted him (B) for no apparent reason. The magistrate, who also acted as a Bantu affairs commissioner, relied on his knowledge of black customs which he had acquired during the course of his work as a commissioner. The magistrate considered that he had specialized knowledge of such customs and that he was entitled to use such specialized knowledge to resolve the issue before him.

The magistrate rejected the version that A had struck B to effect a catch in terms of the custom

of ntlonze. He therefore convicted both appellants. On appeal the court came to the conclusion that the magistrate had decided that he possessed specialized knowledge which enabled him to resolve issues presented before him.

Applying such knowledge, he held that 'catch' by custom, only entitled no. 2 to use force if he could not obtain proof of the catch (ntlonze) by seizing an article of no. 1's clothing. In the present case he held therefore that no. 2 had no right 'to go straight up to no. 1 and strike him and his action is not in accordance with that of a person intending to make a 'catch'.<sup>86</sup>

It is submitted that the judgment is weak in principle in that it equates the use by the presiding officer of facts known to him privately, with judicial notice. The two are as different as chalk is from cheese.<sup>87</sup> It is clear in our law that the use by the presiding officer of private information to decide an issue presented to him for decision is irregular.<sup>88</sup> Formally, it amounts to evidential descent into the arena by a presiding officer. Factually, it amounts to the addition of evidential weight to the scale of justice in favour of one party to the proceedings. At first blush, it appears that the court did not grasp the conceptual and legal differences between the two juristic figures, otherwise the court would have reversed the court a quo in respect of both accused because the court would unerringly have found the proceedings irregular.

However, on a closer examination of the judgment, the equation of the two concepts appears to have been deliberate. The court seems to have entertained sympathy for the cuckolded husband.<sup>89</sup> In addition to being cuckolded the husband had come out second best in the affray, sustaining nine open wounds on his head. Accused no. 1 had added injury to obvious insult by

assaulting the husband seriously. Obviously the court did not intend to let no. 1 escape with the insult to accused no. 2 as well as the violence perpetrated on accused no. 2.

If the court had maintained the distinction between judicial notice and the use by a presiding officer of facts known privately to him to decide an issue, the court would have had to set aside the proceedings as a whole and no. 1 would have got away scot free. The only means by which the court could maintain the conviction of accused no. 1 while setting aside the conviction of accused no. 2 was to equate the magistrate's act of using private knowledge against no. 2 with judicial notice and then to hold that the taking of judicial notice of facts which operated to the prejudice of the cuckolded husband in the circumstances was unjustified. In that way the conviction of the cuckolded, injured husband could be set aside while the conviction of the lover could be confirmed.

It is submitted that the use by the court of the two figures in the manner indicated, while resulting in a decision that one feels was just, was juridically untenable. The result, while fair, was incorrect.

It is not, however, the result of the trial that is important. The court's finding that "... even if a magistrate in these circumstances were entitled to take judicial notice of a Bantu custom it seems to me that he should not base an adverse finding against an accused person on his specialized knowledge, without first placing on record his intention to rely on such knowledge, thus enabling the accused to deal with the correctness or otherwise of the magistrate's view of the custom in issue. Unless the magistrate makes it clear that his views of a particular custom differ from those contended for by an accused, or that he proposed to take cognisance of a

custom which is adverse to the accused's case, there is a grave danger of prejudice to an accused who may be misled by the magistrate's silence into believing that it is not necessary for him to amplify or corroborate his own evidence relating to such custom. In other words it is essential, at the very least, that the accused should be aware that the magistrate intends to apply his specialised knowledge to the matter in issue...",<sup>90</sup> postulates, it is submitted, an acceptable theoretical framework within which one can do justice to the theoretical demands of the Morgan-McCormick thesis but at the same time to satisfy the demands of procedural justice and the Wigmore-Davies thesis.

In terms of the decision, the demands of procedural justice must receive priority and a party must not be foreclosed without being heard.<sup>91</sup> To this end, the fact finder must give notice to the party against whom judicial notice will operate, that he intends to take judicial notice of certain facts. This is to enable such a party to lead evidence to establish that judicial notice should not be taken of the proposed facts.

Procedurally, because of our adversarial system of justice, it would be difficult for a presiding officer to make such a determination because the *facta probanda* seldom crystalize on the pleadings but crystalize and solidify during the evidential process.

Thus since parties to a suit lead their evidence successively, it will ordinarily not be possible for the presiding officer to decide on the facts in issue before he has heard both sides of the story. How can the magistrate then inform the plaintiff or the state (who normally begins proceedings) that he intends to take judicial notice against him or it of certain facts, before he has heard the defendant's or accused's case?

It is suggested that the presiding officer should, after hearing the evidence of both sides, inform both sides that he is *prima facie* of the view that judicial notice should be taken of certain facts which are in issue or are relevant to the facts in issue. He should then invite both parties to lead evidence or to make representations from the bar to persuade the presiding officer to take or not to take judicial notice of such facts as the case may be.

When that issue is to be determined, the parties should be confined to the sole issue of persuading the court either to take judicial notice of facts or not to take judicial notice of certain facts. No other issue should be allowed to intrude. No party should be permitted to re-open its case and thereby lead further evidence on the other facts in issue other than those the magistrate proposes to take judicial notice of. A trial within a trial is a well-known procedure in our criminal justice system and would, it is suggested, not be too cumbersome and expensive.

As soon as each party has led evidence or made representations from the bar regarding the taking of judicial notice of certain facts by the court, the court ought then to deliver judgment on whether the court does or does not take judicial notice of certain facts in issue.

When the court decides to take judicial notice of certain facts in these circumstances, there can be no question of foreclosure. The rule of *audi alteram partem* has been observed. No party can reasonably complain that procedural justice has not been observed. The Wigmore-Davies critique cannot be levelled at this procedure and the Morgan-McCormick thesis becomes wholly justifiable and logical as no party should be permitted to lead further evidence or to argue further for the exclusion of judicial notice of certain facts in those circumstances.

### 7.4.3 **The practical effect of the South African judges' willingness to take judicial notice of certain facts**

From the many cases in which judicial notice has been taken of facts, no general principle can be discerned or inferred in what circumstances a court will take judicial notice of a fact.<sup>92</sup>

*Beyond the requirement that the trier of fact recognise that his personal store of information is not necessarily co-extensive with matters of everyday notoriety to reasonable men, general principles cannot be isolated, and examples may be multiplied without giving much illumination.*<sup>93</sup>

However, the plethora of decided cases and the various situations in which judicial notice has been taken of certain disputed facts, have the practical effect that the parties on whom the ultimate onus rested to prove the facts that were judicially noticed, had their onera considerably lightened. For example, in Vena v Port Elizabeth Divisional Council,<sup>94</sup> the plaintiff had to prove the nature of the explosive which had injured him. The plaintiff led no evidence to that effect. The judge stated that:

*I confess this portion of the case has given me some difficulty, bearing in mind that the onus of proof is on the plaintiff: and it is much to be regretted that the plaintiff did not call some further evidence as to the nature of the explosive used.*<sup>95</sup>

The court extricated itself from the difficulty of insufficient evidence on this crucial aspect of

the case by simply deciding that it was "... justified in taking cognizance of the fact that gelnignite is a dangerous explosive and requires to be handled with care".<sup>96</sup> Needless to say the judicially noticed facts supplied the missing link of entitlement to the plaintiff and judgment was given in his favour.

The cases also show that the court, especially the highest court, is willing to approve of the practice of taking judicial notice of facts to the prejudice of the accused in criminal matters.

In R v Refanis<sup>97</sup> the state had to prove that the work which was performed and which formed a significant element of the charge, was unskilled. The work concerned was brickmaking. No evidence was led by the state to prove that bricklaying was unskilled work. The court was prepared to take judicial notice that the work was unskilled labour. Had the court not taken judicial notice of that fact, the appeal would probably have succeeded. In the event the appeal failed.

In R v Van der Merwe<sup>98</sup> the accused was charged under section 48(1)(c) of Ordinance 15 of 1938 in that he had wrongfully and unlawfully driven a motor vehicle so fast that he had become a danger to the public. The court was not only prepared to take judicial notice of the fact that it was dangerous for a person to drive through a town at 50 to 60 miles per hour but was even prepared to sanction the use by a court of the court's own knowledge in deciding such a case.<sup>99</sup> The accused's appeal was, naturally, dismissed.

In R v Maduna<sup>100</sup> the appellant was charged with perjury in that he had, in a previous case, averred under oath that certain cattle had been branded. It was a crucial element of the state's

case whether a brand may fade so as to be rendered indiscernible. The court of first instance had taken judicial notice of the fact that a brand does not so fade that it becomes completely indiscernible. On appeal the authority of the magistrate to take judicial notice of that fact was argued. The court, however, reversed the conviction of the accused on some other ground.

It is clear from the report that if the appellant had relied on the irregularity of the magistrate taking judicial notice of some of the disputed facts, the appellant would not have succeeded.

In Christie v Rex<sup>101</sup> the accused was charged with having sold bags of mealies the weight of which exceeded 100 pounds. No evidence was led as to the weight of the various bags of mealies which appellant had admittedly sold to various customers save that the mealie bags which had been sold were full and not half full. No evidence was led that there were standard mealie bags which would normally contain 200 pounds of mealies. The accused had been convicted by a magistrate who had taken judicial notice of the fact that a bag of mealies weighed 200 pounds.

On appeal the court affirmed the conviction and sentence holding that: "The Magistrate took the view that he had judicial knowledge that a bag of mealies weighs 200 pounds. I take the same view. I have known all my life that the net weight of a bag of mealies is 200 pounds".<sup>102</sup>

The judgment has been criticised and Hoffman states that: "... even allowing for judicial discretion this must be a case which goes very near the line".<sup>103</sup> (sic of impropriety).

It is submitted that this was not a case of a court's taking judicial notice of certain disputed facts. This in fact was a case where the court used information known to the court to decide

a disputed issue. This is obviously improper and is an example of judicial discretion abused to favour a party who ought to fail. It is a good example of a court using judicial notice to irregular extremes.

The case of R v Morela<sup>104</sup> was different. In this case the appellant had been convicted and sentenced to death on a charge of murder. The appellant had not been identified as one of the persons who had been present when the deceased was shot or who participated in any way in the shooting of the deceased. However, certain fingerprints had been lifted from the house where the murder was committed. An expert had deposed that the fingerprints lifted from the house where the murder was committed were those of the appellant. The appellant had denied under oath that he had been at the house at the time the murder was committed. There was therefore no explanation for the presence of the accused's fingerprints on the scene of the crime if the court accepted that the fingerprints belonged to the accused and nobody else.

The trial court took judicial notice of the fact that no two fingerprints were exactly alike. The court therefore rejected the accused's denial that he had been present at the scene of the crime, convicted the accused and sentenced him to death. On appeal to the Appellate Division the Appellate Division approved the lower court's taking of judicial notice of the fact that no two persons have fingerprints which are exactly alike. This was clearly a crucial fact which the state had to prove in order to succeed. In the event, the Appellate Division's decision meant death for the appellant. The appellant was hanged.

In R v Sarang<sup>105</sup> the appellant was charged in the magistrate's court for unlawfully trading as a general dealer without a licence. The appellant had sold to traps certain goods including

condensed milk. He was convicted by the magistrate. On appeal, the argument was advanced that the appellant was entitled to sell the condensed milk under the provisions of the fresh produce dealer's licence which the appellant held. The court took judicial notice of the fact that condensed milk was preserved milk and not fresh milk which the appellant was entitled to sell under the terms of his fresh produce dealer's licence. The court therefore affirmed the decision of the magistrate's court.

It is clear from the report that without judicial notice being taken of the nature of condensed milk, the state would not have succeeded as the court would have been in a doubt as to the nature of the milk contained in a tin of condensed milk, that is whether it was fresh milk in which case the accused was entitled to sell it under the terms of his licence or not, in which case he was not entitled to sell it.

In Rex v African Canning Company (SWA) Limited & Others<sup>106</sup> the accused who were a duly incorporated company, a director of the company and the supervising manager were charged with and were convicted by a magistrate for possession of undersized crayfish in terms of regulations published under the Sealing and Fisheries Ordinance of 1949.

It was admitted by the accused that undersized crayfish were found on a jetty which was part of the factory of the accused. There was no evidence that the crayfish had been processed for the purposes of trade which was necessary to prove if the state were to succeed. By trade was meant: "... a series of activities designed to earn an income".<sup>107</sup> Instead of acquitting the accused, the court took judicial notice: "... of the fact that public companies in this territory are generally incorporated with the object of carrying on business with a view to making profit

from income”.<sup>108</sup> The court further took judicial notice of the fact that: “In this territory fishing is an important income producing industry...”.<sup>109</sup>

Needless to say the appeal was dismissed. Judicial notice played a very important role in the confirmation of the convictions and sentences as the court resorted to judicial notice to plug glaring lacunae in the state’s case.

In R v Masapha<sup>110</sup> the accused was charged with and convicted of possession of spirituous liquor in contravention of section 166 (M) of Act 30 of 1928. On appeal the point was taken that no evidence had been led to prove that the brandy which had been found in the possession of the accused was “intoxicating liquor” as contemplated in the operative section. The court would have none of it holding that “in ‘n land soos Suid Afrika, wat ‘n groot produsent van brandewyn is, kan dit tog seker nie gesê word dat dit nie alom bekend is dat brandewyn wel ‘n spiritus en sterk drank is nie”.<sup>111</sup> The court therefore took judicial notice of the composition of the substance and affirmed the conviction.

R v Bikitsha,<sup>112</sup> was a case where the accused was charged before and convicted by a magistrate of carrying on unlawful motor carrier transportation. On appeal the point was taken that insufficient evidence had been led to convict the accused in as much as the evidence had established that the accused had been apprehended: “on the national road in Zazulwana Location”.<sup>113</sup> The question which arose was whether a national road was a public road as required by the relevant legislation. The appeal court took judicial notice of the fact that national roads were public roads and that put paid to the appellant’s argument.

In R v Sewgoolam<sup>114</sup> the accused was charged with and convicted of failing to maintain a child whom he was obliged to maintain in terms of section 18(2) of Act 33 of 1960. He denied paternity. He was nonetheless convicted and he appealed to the supreme court.

The evidence of the complainant showed that she had been pregnant for 310 days. The court held that it was entitled to take judicial notice of the fact that the normal period of gestation of a human foetus ranges between 273 and 280 days.<sup>115</sup> On the accepted facts therefore, the appellant could not have been the father of the child. However, Henning J, without authority whatsoever laid down that: "Just as it is competent for the court to take notice of the normal period, so also may the court act upon its own knowledge that the period may be abnormal...".<sup>116</sup> The appellant's goose was then as good as cooked for the court then found that although the period of 310 days was abnormal, "there is no evidence that the child could not have been born 310 days after coitus".<sup>117</sup> The court then affirmed the conviction.

It is submitted that the decision is obviously wrong in principle for it is settled law that the court must decide issues on evidence presented and cannot use its own knowledge of the facts in issue to decide the matter. Furthermore the decision to take judicial notice of the period of human gestation rests on a very shaky foundation. The judge was constrained to rely on an implicit meaning attributed to a passage in Van der Linden's<sup>118</sup> book in his search for authority. It is submitted that such reliance on implicit meaning is forced. It is further submitted that the decision exemplifies the court's tendency to find against an accused person where judicial notice is relied on to prove facts in issue.

In S v Sambo<sup>119</sup> the accused was convicted of failing to maintain a child. Paternity was again

an issue. The court a quo convicted the accused. On appeal the court decided that: "I have no doubt that the decision in *Rex v Sewgoolam* 1961 (3) SA 78(N), is correct to the effect that the *period of gestation is so notorious that a court may take judicial notice thereof*".<sup>120</sup>

The decision is to be criticised for its failure to examine critically the basis of Sewgoolam's case before accepting the ratio of that decision. It is submitted that the decision in Sambo simply perpetuates an incorrect principle without examining the ratio thereof. However, criticism notwithstanding, the court found against the appellant.

Another case where the court incorrectly took judicial notice of a fact in issue is S v Bernardus.<sup>121</sup> The accused had thrown a kerie at another person. The tip of the kerie had penetrated the skull of the person at whom it had been thrown. The accused was convicted of culpable homicide, but the court reserved a question of law as to whether an accused person could be found guilty of culpable homicide if he unlawfully assaulted another and caused the other's death but in circumstances in which the accused could not reasonably have foreseen the death of his victim.

The chief justice, with whom two appeal judges agreed, held that the appellant could have had effective control over the manner in which and the exact locality upon which the kerie blow landed. As he put it: "Dit val nie te ontken nie dat 'n redelike persoon in die plek van die appellant sou besef het dat hy deur so 'n aanranding 'n ernstige verwonding kan veroorsaak, en dat hy sou voorsien het dat dit moontlik lewensgevaarlik sou kan wees".<sup>122</sup> Why the appellant should have foreseen that the throwing of the kerie could cause a serious wound and that such a wound could be life-threatening, was clearly a matter that needed to be addressed by evidence.

But the chief justice referred to no evidence on record from which such a finding could be made.

The concurring judgment of Rumpff J A sought to address that issue: “Aanvaar moet word dat die normale mens bewus is van die gewone verskynsel dat dit menslike liggaam (nes sy gees) vol teenstrydighede is... Daarom moet ‘n normale mens kan voorsien dat deur ‘n ligte aanranding ‘n ongewone en onverwagte dood kan intree”.<sup>123</sup>

It must be noted that no evidence was led which justified the foregoing findings of Steyn C J and Rumpff J A certainly made no attempt to justify such findings on any factual ground whatsoever. They could be justified only on the ground of judicial notice.

It was only Holmes J A, also in a concurring judgment, who drew the veil on judicial thinking in this case. According to Holmes J A the appellant was a rural black. Judicial notice could be taken of the fact that: “sticks of various kinds are part of the traditional way of life of rural Bantu, and from early youth the males learn to use them with some skill, for example, in games, in hunting and in fighting. In hunting, a stick is often thrown at the quarry, such as hares”.<sup>124</sup>

The result of the taking of judicial notice by the court of so many facts which were obviously in dispute, was that the court came almost inevitably to the conclusion that: “... when appellant threw this stick at the deceased with considerable force from a distance of about ten paces, he ought reasonably to have foreseen the possibility of it striking him and causing him serious injury”.<sup>125</sup>

It is obvious from the judgment that the taking of judicial notice of several crucial facts, formed an important element of the judicial process which culminated in the visitation of criminal sanctions on the appellant. It is submitted that though the judgments of Steyn C J and Rumpff J A do not explicitly refer to judicial notice, their arguments are undoubtedly premised on the unarticulated premise of judicial notice and that without the taking of judicial notice, the final result could not have been justified.

In Von Vollenhoven v McAlpine<sup>126</sup> the parties sued each other for damages caused when two vehicles collided in a robot-controlled intersection. The magistrate found that both parties had been equally negligent and found for each of the parties for 50% of each other's claim. The party who had been travelling from north to south and for whom the robot had allegedly been green noted an appeal. The court, quoting Gomes v Visser with approval, held that judicial notice may be taken that if lights facing in one direction were green then those facing at right angles would be red. However, on the facts, the court found that an independent witness supported the appellant's case decisively.<sup>127</sup> The decision therefore did not turn on judicial notice.

The case of S v Imene<sup>128</sup> was the one where the appellant appeared in the South West Africa Division of the Supreme Court on charges of contravention of section 3 read with section 1 of Act 83 of 1967 in that he had assisted people whom he had reason to believe were terrorists.

The appellant was an evangelist employed by the Ovambo-Kavango Lutheran Church for the district of Ondangwa. While at his mission among bushmen at Onyulaye, he was approached by a group of armed insurgents who solicited his help to obtain supplies. He wrote a letter in

the Ondangwa language to his superior, one Festus Ashipala, requesting certain items of clothing and the like for “manne in die bos”. Ashipala received the letter but he did not render any help.

At the trial of the appellant, the appellant admitted, and his admission was recorded as such, that he had written the letter to Ashipala. He also admitted to the contents of the letter as well as the correctness of the interpretation of the letter to Afrikaans.

A crucial question which arose was whether the appellant had reason to believe that the armed men who had solicited his help and whom he had agreed to help were terrorists as defined in the applicable act. “The state did not adduce any evidence on this important, indeed crucial aspect of the case”,<sup>129</sup> but relied on the court taking judicial notice of the fact that “manne in die bos” referred to terrorists. The state’s case rested on the submission that reference to “manne in die bos” by the appellant in his letter to Ashipala was sufficient evidence that the appellant knew that such persons were terrorists. The trial judge took judicial notice of the meaning of the phrase “manne in die bos” holding that: “In hierdie gebied is die begrip ‘terroriste’ en ‘manne in die bos’, in die samehang van die brief, sinoniem”.<sup>130</sup>

The Appellate Division, however, held that judicial notice of that fact had been improperly taken<sup>131</sup> holding that: “... the utmost caution must be exercised by a court before taking judicial notice of a vital or material factum probandum in a criminal case...”.<sup>132</sup> It further held that “manne in die bos” was to be understood to mean “... armed members of Swapo living in the bush”.<sup>133</sup> One would have thought that such a finding would have disposed of the appeal in favour of the appellant. However, the Appellate Division itself then proceeded to take judicial

notice of certain facts which had never been in issue in the court a quo, namely that:

Swapo is a political organisation - the South West Africa People's Organisation; it is at present very active within and without South West Africa; its manifest object is to establish its hegemony there in order to rule the country when it becomes independent; and some of its members are seeking to achieve that object, inter alia, by using violence, force, intimidation upon other inhabitants of the country.<sup>134</sup>

If one considers that a court may take judicial notice only of matters "... so notoriously or clearly established that evidence of their existence is unnecessary..."<sup>135</sup> it is submitted that on the facts of the case the matters that were judicially noticed by the Appellate Division were not of such a nature. Radically different views were held by commentators on the political condition of South West Africa.<sup>136</sup>

The effect of the Appellate Division's action was to ascribe to the appellant, without his ever being given the opportunity to admit or deny it, the giving of assistance to a political organisation which according to the judge of appeal, espoused aims and used methods that were quite unacceptable. As he further put it:

From those facts established by judicial notice it can be inferred that the group of Swapo members encountered by the appellant, because they were armed with firearms and were in the bush, must have been intent on using those weapons to commit acts likely to promote, by intimidation, the achievement by violence

or forceful means, or, at the very least, to cause serious bodily injuries to, or endanger the safety of any person who attempted to thwart or restrain them from doing so.<sup>137</sup>

It is significant to note that the Appellate Division set out to construct an evidential edifice purely on judicial notice without a tittle of hard evidence being heard to establish even a strand of that edifice.

The court seems to have lost sight of its own injunction that "... utmost caution must be exercised by a court before taking judicial notice of a vital or material factum probandum in a criminal case...".<sup>138</sup> It also seems to have lost sight of the dictum in Bhengu's case that: "The magistrate was clearly not entitled to take into account these facts, which it appears came to his knowledge in the cause of his administrative duties as Bantu Affairs Commissioner, without informing the accused or his representative of the information and of ascertaining whether the defence accepted them to be correct"<sup>139</sup> (my underlining).

The court went even further. From ex post facto created evidential material, created by the court on a comfortable armchair in Bloemfontein, the court then drew inferences which unerringly brought it to the conclusion that the persons who had sought out the appellant and requested his aid were terrorists.<sup>140</sup>

It is submitted that the effect of the Appellate Division's judgment was to pass a political judgment on Swapo and to visit criminal sanctions on the membership of Swapo or upon members of the public that helped members of Swapo. In this connection, the Appellate

Division, while ostensibly disapproving of the taking of judicial notice of facts on wide grounds, went on to broaden the grounds of judicial notice and in so doing achieved a political result which had not been in issue or even contemplated at the trial, that is, by the use of judicial notice the court put Swapo's political aims and methods in issue and declared them to be terroristic. This was done without giving Swapo a hearing. With all due respect this, it is submitted, was an improper use by the court of judicial notice. The prejudice to the accused is obvious.

The logical process employed by the court to achieve the result deserves comment. In the first place Swapo's involvement in the matter appears from a passage in the evidence the content of which is so clearly and manifestly hearsay that it should deserve no further comment.<sup>141</sup> Why the court decided that the penultimate sentence: "Dit is volgens ek hoor" refers only to the phrase "... hulle is mense wat vir die vryheid veg" is, by no means clear. It is not clear for instance, why the phrase should not be held to refer to the sentence: "Ek het vir die hof gesê, dat manne van die bos is Swapo - lede wat in Suidwes gebore is".

Secondly, the sentence appears at the end of a passage wherein the witness communicates a number of "facts" about Swapo and its operations. Clearly the witness is describing matters of which he has no personal knowledge. All the supposed factual assertions of the witness are clearly hearsay. The information obtained by the witness has been clearly obtained "volgens hoor". Why the court did not exclude such hearsay evidence in toto since the witness was not deposing as an expert witness is not clear. The effect of the admission of this bit of hearsay evidence is, however, clear. It enabled the court to hold that Swapo was involved in this particular case and then enabled the court to construct, by judicial notice, using Swapo's alleged

involvement in the incident as a foundation, the evidential edifice which it finally used to confirm the conviction of the accused.

Thirdly, the accused was not given any opportunity<sup>142</sup> to deny any involvement of the persons he set out to help with Swapo. No evidence was led to prove that such insurgents as the accused sought to help were Swapo members. But by connecting Swapo with terrorism and by labelling those persons the appellant had helped as Swapo insurgents, the court was able to confirm the conviction of the accused as well as to pass a political judgment on Swapo.

The decision leaves one with the uncomfortable feeling that the accused was treated less than fairly, taking into account how tenuous the evidential link was between the accused and Swapo insurgents and terrorists. It seems the accused was sacrificed to enable the court to pass a political judgment on Swapo. If it is indeed so, it was very unfair. One must, out of fairness, deprecate the passing of a judgment on an organisation without allowing it the opportunity to face its accusers. Declaration of the organisation as a terroristic organisation amounts to crucial proscription of the political process. The court, with due respect, was hardly the proper forum for such action.

The use of judicial notice in this case was untenable and was in conflict with cherished Western conceptions of law and justice. The willingness of the court to take judicial notice of important facts which the state had omitted to lead evidence on or of important facts the significance of which arose only on appeal, certainly reduced the onus of proof that rested on the state and thus commensurately increased the likelihood of conviction of an accused person. Judicial notice therefore lightened the state's burden of proof to the prejudice of the accused. The attitude of

the court seems to be reflected in the dictum that: “The court is entitled to take judicial notice of the fact, and once this is done, the crown case is complete”.<sup>143</sup> (my underlining)

The case of Bloem and Another v State President of the RSA<sup>144</sup> is clear evidence of the court’s tendency to take judicial notice in favour of the state. The case concerned an application for the release of Bloem and his wife who had been detained in terms of certain emergency regulations.

M T Steyn’s conspectual exposition of the circumstances of the detention of the Bloems and the taking of judicial notice thereof is clear statemindedness on the part of the judge.<sup>145</sup> Further criticism of M T Steyn’s judgment can hardly add anything to Cameron’s critique of that judgment.<sup>146</sup>

#### 7.4.4 **Contra indications**

Care must, however, be taken to keep in mind that though the general attitude of the court towards judicial notice can fairly, it is submitted, be described as in the previous paragraph, there have been significant exceptions. The taking of judicial notice of facts in favour of the state has been disapproved of in many cases. The Natal court, especially has been in the forefront of the movement to curb the wholesale taking of judicial notice of facts to the prejudice of the accused and has been remarkably perspicacious of the issue involved.<sup>147</sup>

In Rex v Tusini<sup>148</sup> the accused were charged with murder in the native high court. The question of identity was crucial. The killing of the deceased occurred at night. The court convicted the

accused and sentenced them to death, holding that: “It is well-known from the experience of this court that natives can, and do, recognise people they know in comparative darkness which, for a European, would make recognition quite impossible”<sup>149</sup> and that therefore the identifying witness had correctly identified the accused as murderers.

On appeal to the Appellate Division, the court held that the superior night vision of natives was not: “... a notorious fact as to justify the court taking judicial cognisance thereof”.<sup>150</sup> The court further struck a warning note that the doctrine of judicial notice was: “... still today confined within narrow limits”.<sup>151</sup>

In Rex v Sitimela<sup>152</sup> the accused was charged with illegal hunting. The evidence which incriminated the accused was of two witnesses one of whom said the footprints found at the scene of the crime were similar to those of the accused and the other averred that he had recognised the footprints as those of the accused. The accused was convicted on this evidence. On appeal the court reversed holding that the court a quo had not been entitled to take judicial notice of the native ability to identify the maker of spoor marks. The court obviously was of the view that the taking of judicial notice of the fact was: “... a grave misdirection on a material point”.<sup>153</sup>

In State v Soko<sup>154</sup> the magistrate took judicial notice of the fact that: “... fowls on a farm do not wander as other stock do...”.<sup>155</sup> Why this was an important fact in the case does not appear from the report. However, it obviously was because on appeal, the conviction of the accused of theft was confirmed but in respect of fewer fowls than the accused had originally been convicted for, apparently on the basis that the magistrate had not been entitled to take judicial notice of the

habits of fowls.<sup>156</sup>

The court in the case of S v M,<sup>157</sup> convicted an accused person on a charge of rape of a black woman, notwithstanding the fact that the complainant had not raised the alarm when she was being taken to the place where she alleged she had been raped. Evidence showed that she had more than one opportunity to raise the alarm. The failure of the complainant to raise the alarm would ordinarily have indicated that the complainant had given her consent to sexual intercourse. However, the court took judicial notice of the fact that black women often do submit to sexual intercourse even though they do not consent to it, when they are threatened.<sup>158</sup> The accused was convicted and sentenced. On appeal the court reversed the conviction holding that the magistrate had not been entitled to take judicial notice of the reaction of black women to threats of rape.

In Rex v Ngombe<sup>159</sup> the accused was charged with using threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace may have been occasioned in terms of section 10 of the Police Offences Act, Chapter 40. The accused had uttered certain words which the complainant objected to.

The incident happened in the foyer of the offices of a newspaper. It was necessary for the state to prove that the words were uttered in a public place. The state did not lead such evidence. The magistrate took judicial notice of certain facts relating to the foyer namely: (1) that the foyer was open daily as a public reading room; (2) that the public apparently had access to it and was apparently in the habit of resorting to it; and (3) that people simply walked in and read newspapers which were available to the public at large. On the basis of these judicially noticed

“facts”, the magistrate found as a fact that the foyer was the public place in terms of the applicable legislation. The court therefore convicted and fined the accused. On appeal, the court found that the magistrate had not been entitled to take judicial notice of the facts he had judicially noticed and upheld the appeal.

In S v Makhutla en 'n Ander<sup>160</sup> the accused were charged with robbery which had been committed in Lesotho. They were arrested and tried in Bloemfontein for the said robbery. At the beginning of the trial, the accused objected to the jurisdiction of the court on the ground that the court had no jurisdiction as the alleged offence had taken place in a foreign country. The court conceded the validity of the objection as far as the robbery was concerned but the court held that it could convict the accused on the lesser offence of theft as jurisdiction had been conferred on the court by the bringing of the stolen goods into the Orange Free State. The court convicted and sentenced the accused of theft.

On appeal, the court came to the conclusion that the court had no jurisdiction to hear cases involving offences committed outside the borders of South Africa except in cases where the South African parliament made laws with extra territorial application applicable only to citizens of the Republic. The court further held that judicial notice could not be taken that robbery was a crime in Lesotho. There should have been evidence to that effect. The court further held that the court could not take judicial notice of the fact that theft was an offence in Lesotho and that according to that system of law, theft was a continuous offence. There should have been evidence of the fact. In the circumstances neither robbery nor theft was proved against the accused. The appeal succeeded.<sup>161</sup>

In S v de Lange<sup>162</sup> the accused was charged with reckless or negligent driving. The allegation was that he had gone through a red robot and collided with a vehicle on the side of which the robot was green. The only evidence led was that of the complainant who had driven the vehicle with which the accused's vehicle had collided and a passenger who had been in the complainant's car at the time of the collision. Their evidence was to the effect that the robot had been green when the complainant's vehicle entered the robot controlled intersection. No evidence was led as to the state of the robot light on the other side of the intersection at the time the appellant entered the intersection. The question arose whether the light could have been green on the side of the complainant as well as on the accused's side at the same time. The magistrate convicted the accused having taken judicial notice that the robot lights could not be green on the opposite side of the robot at the same time. On appeal the court reversed the decision, holding that judicial notice could not be taken of the fact that when the light is green on one side of the robot controlled intersection then the light situated at right angles to the light is red.

In S v Ludick<sup>163</sup> the accused was charged, inter alia, with speeding. A gastometer had been used by the police officer to measure the speed of the accused's car as it went through a speed trap. The state was required to prove that the instrument was working correctly at the time of the incident and also to show how the instrument operated. The accused was convicted by the magistrate. On appeal the correctness of the reading of the gastometer was argued. The evidence tendered to prove the correctness of the reading of the gastometer was unconvincing. The state argued that the court should take judicial notice of the accuracy of a gastometer. Moll J disagreed, holding that:

... Sprekende vir myself dink ek nie dat ek deur die staat oortuig is dat die stadium reeds aangebreek het waar die howe geregtelike kennis van hierdie instrument, soos deur mnr Erasmus betoog, kan neem nie.<sup>164</sup>

The appeal succeeded.

In S v Botha<sup>165</sup> the accused was, inter alia, charged with exceeding a prescribed speed limit in terms of the petrol regulations then in force. The state did not lead evidence of what fuel the accused used to propel the vehicle he was driving at the time of the incident. The accused was nevertheless convicted.

On appeal the question of what fuel was used to propel the motor vehicle at the time of the incident was raised. When called upon to furnish reasons for his findings, the magistrate stated that he could take judicial notice of the fact that the vehicle concerned was propelled with petrol, diesel or gas.

The court held that the fact that a motor vehicle was propelled with petrol, diesel or gas was an important element of the charge, and that it was not a notorious fact that a motor vehicle is propelled with petrol, diesel or gas. Judicial notice could therefore not be taken of that fact. The state ought to have led evidence of that fact. The conviction was therefore set aside.

S v Hengst<sup>166</sup> was a case that involved the correctness of the reading of a speed trapping device called the "speed-guard". The magistrate had taken judicial notice of such correctness and convicted the accused. On appeal the court held that "... no South African court, in the absence

of legislative authority, is entitled to take judicial notice of the proper and adequate functioning of a speed-testing device such as gastometer or a speed-guard".<sup>167</sup>

In S v Koekemoer<sup>168</sup> the accused was convicted and sentenced for entering a black area without a permit in contravention of section 9 (9)(b) read with section 44 of Act 25 of 1945. The state omitted to lead evidence that showed precisely where the area the accused was alleged to have entered was and whether the provisions of Act 25 of 1945 were applicable to that area. The accused was convicted but cautioned and discharged. On appeal the court held that the magistrate ought not to have taken judicial notice that a certain area had been defined and set apart for black occupation in terms of the provisions of Act 25 of 1945. The appeal succeeded.

In S v Strydom<sup>169</sup> the accused was convicted of driving a motor vehicle while the concentration of alcohol in his blood was not less than 0,08%. The correctness of the results obtained by the technician who had come to the conclusion that the concentration of alcohol in the accused's blood was 0,21% was in issue. The evidence established that the technician had simply interpreted the results produced by a Perkin/Elmer chromatograph. The accused was convicted. On appeal the court held that judicial notice could not be taken of the accuracy of the Perkin/Elmer chromatograph. The appeal succeeded.

S v Steenberg<sup>170</sup> is the case where the accused was charged and convicted of illegally hunting protected game without a permit. It was alleged that the accused had shot 19 duikers. The accused was convicted by the magistrate. On appeal it was argued that only red duikers and not blue duikers were protected game in terms of the applicable legislation. Since the evidence did not disclose whether the duikers that had been shot were red or blue duikers no offence was

revealed. The court held that this was not a case in which the magistrate could take judicial notice of the fact that the duikers that had been shot were blue duikers. The appeal was therefore successful.

It is to be noted that the courts which had been reluctant to take judicial notice of facts easily have been the various provincial and local divisions. The Appellate Division has steadfastly approved the taking of judicial notice.

#### **7.4.5 Judicial notice under South African statutory law**

Although in South African law of the past parliament was supreme, and therefore what parliament willed was law, notwithstanding the potential that existed for short-cutting the judicial process by mandating judicial notice of certain facts, parliament acted with great restraint and refrained from such a course of action. The reason therefor, it is submitted, is to be discerned in the principle of *trias politica* which was embodied in the Constitution. The tradition of separation of powers is ingrained in the constitutional prescriptions of South Africa. A legislative order to a South African judge to decide a certain matter in a certain way would evoke outrage from the professional jurist cadre as an unwarranted interference with judicial independence which is conceived as a conditio sine qua non for the continued existence of liberty in South Africa.<sup>171</sup> The government had to tread warily to avoid a revolt among the professional jurist class. The taking of judicial notice by legislative fiat was therefore severely limited. There are few statutes that mandate the taking of judicial notice.

#### 7.4.5.1 Statutory judicial notice in criminal law in South Africa

In criminal matters, section 224 of Act 51 of 1977 provides for the taking of judicial notice of applicable laws in matters that are tried by the courts of South Africa. Section 224 provides that: “Judicial notice shall in criminal proceedings be taken of (a) any law or any matter published in a publication which purports to be the Gazette or the Official Gazette of any province or the territory (b) any law which purports to be published under the superintendence or authority of the government printer”.

The taking of judicial notice in these circumstances relates to the question of whether certain normative rules for human conduct have been authoritatively laid down or not and how proof of that fact is to be tendered. It does not relate to the question of whether or not the conduct alleged against the accused conforms or does not conform to the predetermined norm.

In terms of South African law the two great sources of enforceable normative rules are the common law and legislation.<sup>172</sup> Legislation consists of all legislative provisions<sup>173</sup> passed by all legislative organs irrespective of their legislative status, that is, irrespective of their place in the formal structure of legislative bodies and irrespective of the force and applicability of their enactments. As soon as an act of parliament or an ordinance is signed by the president and the premier respectively, it becomes binding law on the whole country or the province concerned. To facilitate proof of the law concerned, the signed original as well as copies in the official languages are sent to the registrar of the Appellate Division. The copies and the original instruments filed with the registrar of the Appellate Division can, however, not feasibly be consulted by the other courts to ascertain the current law.<sup>174</sup> Theoretically, it would be necessary

in every case that involved the application of a statutory position where the existence of such a provision was put in issue, to prove the applicable statutory provision. The original statutory instrument would have to be proved for the best evidence rule would apply. That would necessitate retrieval of the original documents from the registrar of the Appellate Division and their handing into court on every occasion. The process would be onerous expensive and futile.

Seen correctly against the background of the applicable legal rules which have been referred to herein, judicial notice in terms of section 224 of the Criminal Procedure Act means no more than that the court is required to ascertain and apply the law from sources from which it ordinarily would not be able to ascertain law in terms of the common law. It is submitted that judicial notice relates to the source of the law and not to the question of whether or not the conduct in issue conforms to the content of the law which is determined from such a source.

The view, it is submitted, is fortified by the fact that section 224 does not prescribe what the procedural effect of judicial notice shall be and what evidential value is to be attached to the judicially noticed fact in the factual situation where section 224 is applied. It is left to the trier of fact to determine those two issues.

Further support for this view is found in the wording of the statute. Section 224 (1) refers to a law published in a publication which purports to be a gazette or official gazette. In other words the section anticipates the possibility that some document or publication which could possibly not be a genuine or official gazette could be tendered in proof of the existence of a normative rule. It would obviously be nonsensical to hold that in those circumstances the court would still be required to take judicial notice of the existence of the normative rule contained

therein.

In a way, the ascertainment of the existence of predetermined normative rules is the first requirement for the success of a party that makes a charge of unlawful conduct against another party. It is only when a party establishes the existence of a normative rule that proscribes certain conduct that the party can claim relief if another infringes the normative rule to the first party's prejudice.

As has been argued in this thesis, judicial notice ought not to foreclose the party affected by judicial notice. Judicial notice ought merely to have a *prima facie* evidential effect. If judicial notice is viewed in that light, the effect of judicial notice in terms of section 224 of Act 51 of 1977 seems to be only to authorise the court to accept what is published in the secondary sources as a correct reflection of the law as reflected in the primary sources. It is always possible for the affected person to dispute the correctness of the normative rules which are taken judicial notice of in terms of section 224 in which case recourse must be had to the authoritative sources.<sup>175</sup> The statement by Hoffman and Zeffertt that "... a copy of the statute purporting to have been published under authority of the government printer is conclusive proof of its contents"<sup>176</sup> is with respect, not correct.

It is submitted therefore that it is by no means unfair for the legislature to require the court to take judicial notice of pre-existing legal norms by reference to secondary sources of such legal norms. Even if the McCormick-Morgan thesis were to be followed, as Hoffman and Zeffertt obviously do, the result would not be unfair to the accused because section 224 puts the accused on notice right from the onset that the existence of the applicable normative rule is to be

conclusively accepted by the court and that for the purposes of such proceedings as are brought against him, it will not be possible to challenge the reality of the validity of the legal norm concerned on the basis of technicality. It is then open to the person so charged to take such steps as he deems necessary to stop the proceedings and to proceed in another court for the declaration of such legal norm as invalid or pro non scripto as the case may be. The accused is forewarned and is not disadvantaged by having a fact which is in issue, that is, the existence of a normative rule, taken judicial notice of to his prejudice without any notice to him and without his having been given an opportunity to make representations on the existence or otherwise of the rule. Of course the question of whether an accused person is factually aware of the existence of section 244 affects the issue.

A question which arises is how even the secondary sources must be tendered so that the court may ascertain the existence of the normative rules therefrom. Is it necessary for the party that seeks to rely on a legal rule which has been published in the gazette or official gazette to produce it in court and to hand it in to form part of the record?

In interpreting a similar provision under Act 56 of 1955, the court held that it is not necessary to hand into court a copy of such a gazette or official gazette.<sup>177</sup> A copy of the gazette or official gazette may be admitted merely to facilitate judicial notice but such handing in is not required. Hoffman and Zeffertt have, as a result, been moved to state that: "It is not evidence, because evidence is unnecessary, but may be referred to by the court to facilitate judicial notice".<sup>178</sup>

It is submitted, respectfully, that the decision in Hoosen's case is not correct. In casu, the

appellant was charged with accommodating certain native persons other than in accordance with the provisions of Act 25 of 1945. In terms of section 9(1) of Act 25 of 1945, the governor-general was authorised to declare that in certain areas, all natives save those especially exempted, would be accommodated only in locations, native villages or hostels. The state did not lead evidence that the magisterial district of Durban had been declared, under section 9(1), to be an area within which natives had to be accommodated as prescribed. The accused was convicted and sentenced by the magistrate.

On appeal the point was taken that the proclamation of Durban in terms of section 9(1) of Act 25 of 1945 had not been proven because the public prosecutor had not laid down before the court a copy of the government gazette which contained such proclamation. Relying on the case of Attorney-General v Schoeman<sup>179</sup> the court rejected the argument, incorrectly, it is submitted.

Section 25(1) it is submitted, lays down a mandate to be followed by a court. It imposes on a court a directive and therefore defines the capacity of the court to recognise and to apply rules of law without the necessity of establishing their validity by evidence.

Section 25(2) lays down the procedure to be followed when the court seeks to exercise the authority granted to it in terms of section 25(1). Obviously if a court is to take judicial notice of statute law, the existence of a statute and the provisions thereof must be known to it. A copy of the gazette or official gazette or a copy of such law or notice or other matter purporting to be printed under the authority of the government printer is evidence of the existence and content of such law, notice or other matter.

Granted, section 25(2) does not unequivocally lay down that the public prosecutor must lay before the court the government gazette or official gazette or other matter, but it seems that this is necessary implication of the sub-section. For if the court, as it must, may take judicial notice of that which it knows, can it take judicial notice of what has not been brought to its attention or is the assumption that judicial officers read all government notices?

It seems that the court is not correct in asserting that section 25(1) intended "... to establish where the authoritative versions of statutes and government notices are to be found so that if there is any dispute as to the exact wording of a statute or notice that dispute can be resolved by referring to the text laid down as authoritative in sub-section 2".<sup>180</sup>

It is submitted that on a correct reading of sub-section 2, the sub-section does not lay down what the evidential effect of law which is judicially noticed shall be. The sub-section merely lays down that mere production of a copy of a government gazette, official gazette or other matter purporting to be printed under the authority of the government printer, shall be evidence of the contents of such law, notice or other matter. The section does not lay down that such a copy, on its being judicially admitted on to the record shall be an authoritative version of a statute, notice and so on which takes precedence over all other purported versions of such law. Nor, it is submitted, can such a meaning be inferred from the clear terms of the sub-section.

The judgment does not indicate reasons why the court interprets the sub-section to mean that the sub-section lays down the evidential status of competing sources of legislative enactments. The rationale for that interpretation seems to be a decision of the full bench of the Eastern Cape in Attorney-General v Schoeman.<sup>181</sup>

However, it is submitted, the judgment in Schoeman's case is not necessarily correct. That judgment does not lay down any rationale as to why the court regarded sub-section 2 as merely indicating: "... the sources of authoritative copies of legislative enactments".<sup>182</sup> It is therefore insufficient authority for the finding in S v Hoosen.

It is submitted that the purpose of section 25(2) was to ensure that the court took judicial notice of the correct laws and notices and that it did so in the presence of all parties to the suit so that no party could complain that justice was not seen to be done. It would cause great dissatisfaction to parties if a judicial officer simply stated that he took judicial notice of certain laws because they had been published in the government gazette and if he then left it at that.<sup>183</sup> The parties involved would not be aware whether the correct laws were taken judicial notice of and the parties would therefore not be certain that the correct normative rules were being employed to resolve the disputed issues.

The difficulties attendant upon taking judicial notice of laws without the parties involved having any role in the process were demonstrated in S v Di Stefano.<sup>184</sup> In casu the appellant was charged under section 180 bis of the Companies Act 46 of 1926 with failing to attend the first and second creditors' meetings. The appellant had not been informed of such meetings but the notices of the meetings had been published in the government gazette.

The accused was convicted. Among the points taken on appeal was the point that the magistrate, at the time he gave judgment, was unaware of the contents of the gazette in which the meetings of creditors had been advertised. Obviously the point was, could he have taken judicial notice of that which he was unaware of?

The court held that: "The law is that publication of a notice convening a creditor's meeting can be proved at any time in court merely by producing the Gazette containing the notice, and it is not necessary for it to be recorded that the Gazette has been produced and put in".<sup>185</sup>

However, according to the court: "As with any Act, the production of the relative Government Gazette is not necessary before judicial notice can be taken of what is contained therein".<sup>186</sup>

Clearly the import of the decision is that a court can take judicial notice of a fact it was not even aware of at the time the court gave judgment. But this is obviously ludicrous.

The court was therefore careful to modify the import of the judgment by carefully making a finding that the magistrate must have been aware that the creditors' meeting had been held, that is, he must have been aware that notice of the creditors' meeting had been published in the government gazette. Only by so doing could the court adhere to precedent and hold that it was not necessary to produce copies of the government gazette to prove the contents thereof.

The judgment is to be criticized for its inconsistency. One cannot, it is submitted, hold on the one hand that the contents of the government gazette may be proved by the production of the gazette and at the same time hold that it is unnecessary to produce a government gazette before judicial notice can be taken of the contents of the government gazette. It is submitted that the better course would have been to hold that production of a copy of the government gazette or notice was necessary in terms of section 25(2) but not formal handing in and incorporation into the record of proceedings. In that way the court would have ensured that a presiding officer before whom the contents of a government gazette was disputed was given sight of the disputed government gazette in order to enable him to make up his mind. The ordinary rules of the onus

of proof would also not be violated since the party upon whom rested the onus of proving the contents and the validity of the government gazette would bear that onus. Even if the McCormick-Morgan thesis were to be followed, the result would not be unfair as section 224 puts the accused on notice from the onset that the existence of the normative rule is conclusively accepted by the court and therefore for the purposes of such proceedings as are brought against him, it will not be possible to challenge the reality of the validity of the legal norm on the basis of a technicality. It would then be open to the person charged to take such steps as he deemed necessary to stop the proceedings and to proceed in another court for the declaration of such legal norm as invalid or pro non scripto as the case may be.

#### **7.4.5.2 Effect of statutory judicial notice in South Africa**

In criminal law in South Africa therefore, the impact of judicial notice by legislation, is very limited as it focuses only on the mode of ascertaining normative rules and hardly affects the criminal process to any appreciable extent.

### **7.5 Conclusion**

Judicial notice is a well known feature in our system of evidence. It does not relieve the state of the burden of proving the guilt of the accused. What it does is to lighten that burden because once judicial notice is taken, it may not be necessary for the state to prove that issue of which judicial notice has been taken.

FOOTNOTES

1. Friedenthal & Singer The Law of Evidence (1985) 258.
2. Donigan et al The Evidence Handbook (1975) 17; Schwikkard et al 329.
3. Morgan Basic Problems of Evidence (1961) vol 1 17.
4. Kennedy Trial Evidence (1935) 8; see also Heydon Evidence : Cases and Materials (1984) 481.
5. Cleary McCormick on Evidence (1972) 919; Van der Merwe et al Evidence (1983) 347.
6. Kennedy p.6.
7. Herrick Underhill's Criminal Evidence 6 ed (1976) vol.1 128; Schwikkard et al 330.
8. "The principle of judicial notice may be described as a judicial short cut, based upon convenience and expediency, operating to save time, trouble and expense otherwise lost in establishing facts already known and which do not admit of contradiction", Donigan 17.
9. State v Barnes 52 WIS 2d 82, 187 NW 2d 845, 847 (1971); see also Wood Practical Evidence (1886) 614.
10. Wigmore vol. 9 694.
11. Wigmore, vol. 9. 714-719; Cleary McCormick's Evidence 931-934 footnote 10.
12. Wigmore vol. 9 716.
13. Wigmore 716; McCormick 931-94 footnote 9.
14. See Associate Justice Cardozo's judgment in Ohio Bell Tel Co. v Public Utilities Comm of Ohio (1937) 301 US 292, 300. This is a judgment of the Supreme Court of the United States; see Judge Learned Hand's judgment in United States v Aluminium Company of America (1945) 148 F (2nd) 416, 446. This is a judgment of the United

States Court of Appeals, 2nd Circuit. It is a very influential court in the federal court structure.

15. Chadbourn - Wigmore vol. 9, 718-719.
16. See McCormick 932 for a list of all the cases.
17. Cleary McCormick's Evidence, 920.
18. Cleary 920; Maguire Cases and Materials on Evidence (1973) 12-31.
19. See Torcia Wharton's Criminal Evidence 13ed vol 1 (1972) 82-139.
20. Cleary McCormick's Evidence, 921.
21. "These facts, after all, tend to be less than indisputable ones and hence beyond the pale of judicial notice", Cleary McCormick's Evidence. 935.
22. See the discussion of the development of due process.
23. Cooley A Treatise on the Constitutional Limitations (1972) 21-25.
24. See General Index to the United States Code G to K 1986 ed 1053-1054.
25. Nokes 54; Tapper, Cross & Wilkins Outline of the Law of Evidence, 6 ed (1986) 45.
26. Nokes An Introduction to Evidence, 58; Heydon Evidence, 486-487.
27. Cross & Tapper 70; Heydon 484; Murphy A Practical Approach to Evidence (1980)
30. This is not too certain in view of the uncertainty about the evidential effect of judicial notice - see infra.
28. Cross & Tapper Cross on Evidence 70; R v Simpson (1983) 3. All ER 793 h-j; Elliott, Phipson & Elliott Manual of the Law of Evidence 36.
29. Cross & Tapper Cross on Evidence 68.
30. Nokes 56; it seems strange that uncertainty still exists as Nokes pointed out this uncertainty in 1958 see (1978) Law Quarterly Review 59 72.
31. Heydon 487.

32. Tapper Outline of the Law of Evidence 45.
33. Heydon 484.
34. Cross & Tapper 69-70; Tapper 45-46; Murphy 33.
35. Nokes 57; Elliot, Phipson & Elliott Manual of the Law of Evidence 31.
36. Cross & Tapper 71; Tapper 46.
37. Murphy 32; Heydon 485-486; Nokes 57, 63; Phipson 28-42.
38. Nokes 57.
39. Heydon 486; “There are many statutes permitting or compelling judicial notice...”; see also Nokes 1958 Law Quarterly Review 59-65.
40. See Phipson 33-34 for a comprehensive enumeration of the seals and the legislation involved.
41. “It is a well established principle that a court should decide a factual issue solely on the evidence placed before it”, Schmidt in Law of South Africa vol. 9 326; see also Schmidt Bewysreg 187.
42. Hoffman 3 ed 319; “In my view, a court is entitled to take judicial notice of a process as notorious and straight forward as weighing on a scale. No evidence was necessary to explain this process or to attest its reliability”, per Corbett J A in S v Mthimkhulu, 1975 (4) SA 759(A) 765 D-E.
43. Joubert Law of South Africa vol. 9 326.
44. Hoffman 2 ed 291.
45. The seminal SA decision of R v Tager 1944 AD 339 shows this influence clearly 343-345.
46. R v Majalu 1943 E D 259 261.
47. Lansdown & Campbell South African Criminal Law and Procedure vol. V 726.

48. Hoffman 321; see also Lansdown and Campbell 726.
49. See Corbett's approach in S v Mthimkhulu 1975 (4) SA 759-765. "Daar is 'n taamlik algemene beskouing dat die omvang van judisiele kennisname baie gering is. In der waarheid is dit nie so nie"; Schmidt, Bewysreg 191.
50. R v de Necker 1921 CPD 567 569.
51. 1944 AD 339 at 345 "It is true as pointed out by Gardiner J in Rex v de Necker (1921, CPD 567) and by Wigmore (supra), the modern tendency is rather to extend the range of matters of which judicial cognizance may be taken".
52. Hoffman & Zeffertt 321.
53. Hoffman & Zeffertt 321.
54. S v Bernadus 1965 (3) SA 287 306 H.
55. Hoffman & Zeffertt 321.
56. "... the problem of its proper application is the definition of where the hearing of evidence may fairly be regarded as superfluous", Lansdown & Campbell, 726.
57. 1953 (4) SA 406.
58. R v Tusini 411.
59. Schmidt in Law of South Africa vol. 9 326-327; see also Lansdown & Campbell 727.
60. Lansdown & Campbell, 727.
61. Schmidt Bewysreg, 187.
62. S v Steenberg 1973 (3) SA 513 515 F-H.
63. Lansdown & Campbell, 726.
64. Lansdown & Campbell, *ibid*
65. See footnote 32 at 726.
66. Schmidt 188.

67. Hoffman & Zeffertt (1988) 416.
68. Van der Merwe et al 349.
69. Schmidt Bewysreg 189.
70. 1961 (2) 751 (A)
71. R v Dumezweni 757 A-C.
72. Lansdown & Campbell 646.
73. 1969 (1) SA 411 (N).
74. S v Ngidi 414 H.
75. idem 414 H.
76. See Kerr "Consideration of Authorities when Rules of Law are Judicially Noticed" (1969) SALJ 286.
77. See van der Merwe et al, Evidence 105.
78. 1971 (1) SA 276.
79. idem 279 F-G.
80. idem 279 H.
81. idem 280.
82. 1972 (1) SA 139, 141 D.
83. 1976 (3) SA 579, 581 E-F.
84. 1987 (4) SA 548.
85. 1966 (3) SA 148(E) Bhengu v State 1966 (1) PH H 44 83.
86. 148 G-H.
87. See Law of South Africa vol. 9 326.
88. See Xulu & Others v State 1966 (1) PHH 96; cf Sweigers v State 1969 PH H HO 210; The State v Chau 1966 (2) PHH 435.

89. 149 G-H.
90. 149 D-E.
91. See Bhengu v State 1966 PHH 44 (86) for a confirmation of this view. See also S v Madondo 1966 PHH 221 - "I certainly did not intend to convey that the Magistrate should arrive at his own opinion of the value of the stock stolen or recovered as the result of his own observations and without any intimation to the accused of what those observations are".
92. "It is impossible to compile a list of facts which have been considered sufficiently notorious to be noticed without evidence". Hoffman 2 ed 292.
93. Lansdown & Campbell 726-727.
94. 1933 EDL 75.
95. 78-79.
96. 79.
97. 1929 OPD 195 202.
98. 1943 CPD 25.
99. See also R v Levitt 1933 CPD 411 where the court sanctioned the use by a magistrate of his knowledge of crucial issues in the state's case and the accused was convicted.
100. 1946 EDL 224.
101. 1946 NPD 780.
102. 781.
103. Hoffman & Zeffertt 2ed 293.
104. 1947 (3) SA 147.
105. 1947 (3) SA 618 626.
106. 1954 (1) SA 197.

107. 199 D.
108. 199 E-F.
109. 200 C.
110. 1958 (3) SA 480.
111. 482 B.
112. 1960 (4) SA 181.
113. 182 H.
114. 1961 (3) 79.
115. See R v Sewgoolan (supra) 80-81.
116. 81 A.
117. 83 A.
118. 80 G-H.
119. 1962 (4) SA 93.
120. 95 F.
121. 1965 (3) SA 287.
122. 300 E-F.
123. 304 D-E.
124. 306 H.
125. 306 H - 307 A.
126. 1976 (3) SA 579.
127. 581 H.
128. 1979 (2) SA 710.
129. 714 E.
130. 714 H.

131. 715 A.
132. 714 H.
133. 714 E. The finding was, however, not unanimous. Hofmeyer J A was of the view that the taking of judicial notice in the circumstances was proper, 720 H.
134. 715 H - 716 A.
135. R v Taper 1944 AD 339 343.
136. Moleah Namibia : The Struggle for Liberation (1983) 100-102; "SWAPO and PLAN are but the embodiment and expression of the Namibian people. To destroy them effectively, one will have to destroy the Namibian people which is oppressed and exploited, there shall always be resistance to such oppression and exploitation".  
Moleah - Preface.
137. 716 H.
138. 714 H.
139. 1966 (1) PH H 44-83.
140. 716 D.
141. 713 H.
142. Since the matter arose for the first time on appeal.
143. R v Adkins 1955 (4) SA 242, 246 D.
144. Bloem & Another v State President of the RSA 1986 (4) SA 1084.
145. 1067-1068, Davis - "Competing conceptions : Pro Executive or Pro Democratic - Judges Choose". 1987 SA Journal for Human Rights. 96; Davis "The Chief Justice and the Total Onslaught" 1987 SA Journal for Human Rights 229-230.
146. Cameron "Nude Monarchy : The Case of South African Judges". 1987 SA Journal for Human Rights. 340-341.

147. See S v Bhengu 1966 (1) PHH 44; S v Xulu 1966 (1) PHH 96; S v Mkhize 1966 (1) PHH 168; S v Masondo 1966 (1) PHH 221; S v Buthelezi 1959 (1) SA 191; S v Dlamini 1965 (1) SA 859; S v M 1965 (4) SA 577.
148. 1953 (4) SA 406.
149. 411 D-E.
150. 411.
151. The warning seems not to have been heeded in view of the attitude which was later adopted by the court.
152. 1962 (4) SA 60.
153. 61 H. The passage is a quotation from R v Tusini which the court obviously approved of.
154. 1963 (2) SA 248; see also S v Dlamini 1965 (1) SA 859.
155. 248 H.
156. The judgment is to be criticized for its brevity and lack of clarity on the issues which were presented for decision.
157. 1965 (4) 577.
158. Hoffman 2 ed 292. It is submitted that Hoffman is wrong when he suggests that "... the Magistrate declared it a fact generally known that Bantu women submit to rape without protest".
159. 1964 (3) SA 816.
160. 1968 (2) SA 768.
161. It is to be noted that the AD has declared this decision to be wrong; see S v Kruger 1989 (1) SA 785 (A) 793 G.
162. 1972 (1) SA 139; see also R v Davids 1961 (1) PH 07; R v Grobler 1966 (4) SA 292

- (T); R v Grandin 1970 (2) SA 621 (T) R v Siborane, 1969 (1) PH H (S) 3.
163. 1972 (1) SA 84.
164. 86 E-F.
165. 1975 (1) 650.
166. 1975 (2) SA 91.
167. 100 D-E.
168. 1978 (2) SA 405.
169. 1978 (4) SA 748.
170. 1979 (3) SA 513.
171. See the structures of Mr Justice Didcott - Sunday Tribune, October 1988, 16.
172. Hahlo & Kahn The South African Legal System and its Background 142-148; 214-216; 244-282.
173. See the definition in section 2 of the Interpretation Act, 33 of 1957.
174. Schmidt 202.
175. S v Hoosen 1962 (2) SA 340 (N) 341 (H); see Schmidt 202.
176. Hoffman & Zeffertt 326.
177. S v Hoosen 1963 (2) SA 340 341 G-H; S v Mbatha 1963 (4) SA 477; S v D Stefano 1977 (1) SA 770 773 D-G.
178. Hoffman & Zeffertt 326.
179. 1959 PHH 94.
180. 341 H.
181. 1959 PHH 94 196.
182. 197.
183. This seems to be the mandate of S v Hoosen and Attorney General v Schoeman.

184. 1977 (1) SA 770 C.

185. 773 D.

186. 774 B.

## CHAPTER 8

### PRESUMPTIONS

#### 8.1 Introduction

There are differences of opinion among various writers on evidence on the precise definition of presumptions.<sup>1</sup> However, there is sufficient agreement upon the effect<sup>2</sup> of presumptions to render exact definition unnecessary as the legal import of presumptions is not dependent on definition.

Generally, it is agreed that a presumption is an evidential device which is employed by the legislature to allocate certain evidential burdens among the actors in a suit, and to prescribe the evidential import of evidence in certain circumstances.<sup>3</sup> Presumptions are the gist of the mill of the evidential process because “presumptive and assumptive devices are among the most basic elements in the judicial process. They shape, define and alter how courts and juries reach decisions. They are part of the epistemology of judicial proceedings”.<sup>4</sup>

#### 8.2 Presumptions in American law

Since the criminal proceedings in American law are adversarial in nature, “... presumptions have the effect of aiding a party in the presentation of his case”.<sup>5</sup> In American law: “true presumptions deal with inferences drawn from a fact actually proved (the basic fact) to some other critical fact (the presumed fact). Typically the presumed fact is one on which the

prosecution bears the onus of persuasion. The presumption serves, however, to make this burden somewhat easier to carry".<sup>6</sup>

### 8.2.1 Classification of presumption in American law

Presumptions require to be classified in American law because legal consequences flow from such classification. Authors classify presumptions variously<sup>7</sup> but the most rationally acceptable classification in American law is the one adopted by Bewley<sup>8</sup> according to which presumptions may be classified according to their evidential effect, that is, presumptions can be permissive, mandatory or conclusive. The permissive presumption allows the trier of fact to find the presumed fact as established upon the proof of the basic fact if no contradicting evidence is led but does not impose a duty on the trier of fact to so find.

The mandatory presumption requires the trier of fact to find that the presumed fact is established by the proof of the basic fact unless contradicting evidence is led. A duty is imposed on the trier of fact to find compulsorily that the presumed fact exists which finding he would not necessarily make were he not directed to make it.

A conclusive presumption forecloses the argument on a certain issue no matter how much evidence is led in contradiction of the presumed state of affairs.<sup>9</sup> "In effect it is not a presumption at all because it establishes a substantive rule rendering the basic fact determinative and the presumed fact legally irrelevant".<sup>10</sup>

Presumptions may be classified as to whether they affect the burden of producing evidence, or

the burden of persuasion<sup>11</sup> or both. They may also be classified as to the quantum of evidence required to rebut them. Some evidence, believable evidence, substantial evidence, evidence to support a finding, or preponderant evidence, are all gradations of the quantum of evidence which, depending on the terms of the particular presumption may be required to rebut a presumption.

### 8.2.2 Application of presumptions in American law

The creation of presumptions is a matter of legislative choice since it falls within the sphere of legislative authority to make policy decisions regarding the desirability of repressing certain conduct as well as to determine the most efficient way of repressing such conduct. “The constitution’s relative lack of substantive restraints leaves a legislature free, within extremely broad limits, to choose its criteria for criminal conviction and punishment. It may establish a defence or withhold it, specify precise grades of crime or create broad categories with a wide range of possible sentences”.<sup>12</sup>

A state is also entitled to regulate procedures which govern the execution of its laws “... including the burden of producing evidence and the burden of persuasion unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental”.<sup>13</sup> However, the tremendous criminal definitional authority is tempered by the need to comply procedurally with the dictates of fundamental principles of justice as well as the obvious requirements of constitutionalism, that is, that the creation of offences and procedures to prosecute them must not be in conflict with any provision of the constitution of the United States.<sup>14</sup>

According to Mosher,<sup>15</sup> the use of presumptions in criminal statutes in the United States is vulnerable to attack on constitutional grounds on at least 4 grounds:

- (a) By laying down that a fact be presumed from another, the legislature may be violating some basic due process requirement that is some fundamental principle of justice.
- (b) By influencing or directing the jury in its decision making, the accused is deprived of his right under the 6th amendment to have the jury make an unbiased independent determination of his guilt.
- (c) If rebuttal of a presumption requires that the accused personally give evidence, it violates the accused's fifth amendment right against self-incrimination by putting him to a choice - either to present such evidence or to be convicted.<sup>16</sup>
- (d) An instruction to the jury explaining the presumption to the jury and the requirement that the accused present evidence to the jury in rebuttal is unconstitutional comment on the defendant's failure to testify.

According to Kadish et al a further ground for constitutional challenge is that "... to the extent that a presumption draws its validity either from specialized research or from intuitive judgments debated in the legislature but not made explicit in court, the accused is in effect denied his 6th amendment right to be confronted with his accusers".<sup>17</sup>

It has been said that in order to be valid, presumptions must pass the test of constitutionality.

The question which arises is what does the test of constitutionality comprise?

Peculiarly the problem of presumptive constitutionality did not first arise in the criminal context but arose in the civil context. The question first arose in Mobile, Jackson and Kansas City Railroad Company v Turnipseed, Administrator<sup>18</sup>. In that case the defendant was a railroad company. An employee of the company was killed when a truck was derailed and fell on him and crushed him. A dependant of the deceased person sued the railway company.

A provision in the law of Mississippi laid down that in actions against railway companies for damages caused to persons or property, proof of injury inflicted by the running of the locomotives or cars of such company would be prima facie evidence of lack of reasonable skill and care on the part of the servants of the company with reference to such injury. The defendant raised the issue that the provision was contrary to the general law of torts then prevailing that the plaintiff must prove both damage and negligence on the part of the defendant or his servant. Railway companies were being discriminated against and were being deprived of the equal protection of the laws under the 14th amendment or due process of law.

The court held that it was within the power of government to enact a rule of evidence stipulating that one fact shall constitute prima facie evidence of another.

That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact

from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not under the guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defence to the main fact thus presumed.<sup>19</sup>

Thus arose the rational-connection test of presumptive constitutionality in civil matters. However, it must be noted that the court did, obiter, indicate that the rational-connection test was applicable to criminal trials also.<sup>20</sup>

The first criminal case in which constitutional challenge was mounted against presumptions in the US Supreme Court was Yee Heun v US<sup>21</sup>. The accused was found busy trying to hide a quantity of opium. The importation of opium after 1 April 1909 was prohibited in terms of a congressional statute. The act provided that proof of possession of opium would be sufficient for conviction of the accused for illegal importation to the satisfaction of the jury. A further provision laid down that all opium found in the United States after 1 July 1913 would be presumed to have been imported after 1 April 1909. It placed the burden to rebut the presumption on the accused.

The court held that the presumptions challenged satisfied the rational-connection test and affirmed the decision. The decision was remarkable in that the court displayed no sense of appreciation of the constitutional issues raised and gave no reason why it applied a test which had been formulated for civil suits in a criminal case in which obviously, different considerations obviously applied. It seems inescapable that the court was not adequately sensitive to the fundamental differences between civil and criminal cases and the additional

constitutional problems which criminal cases posed.<sup>22</sup>

A fundamental shift occurred in Tot v United States.<sup>23</sup> In this case the accused was charged with illegal receipt of a firearm or ammunition which had been supplied or transported in interstate or foreign commerce. Mere possession of a firearm or ammunition was in terms of the applicable legislation presumptive evidence that such firearm or ammunition was shipped or transported or received contrary to the Act in question.

The Court held as follows:

The Congress has power to prescribe what evidence is to be received in the Courts of the United States. The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated: "The question is whether, in this instance, the act transgressed those limits."<sup>24</sup>

The court for the first time therefore approved of constitutional constraints on the power of government to prescribe evidential processes in courts of law but seemed to restrict constitutional challenge to the due process clauses of the fifth and fourteenth amendments. The test of the validity of such a presumption, the court said, was that there be a:

"... rational connection between the facts proved and the fact presumed... But

where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of the courts”.

Black and Douglas J J in their concurring opinion clearly show that constitutional challenge is not limited to the due process clauses only. According to them:

The procedural safeguards found in the Constitution and in the Bill of Rights, *Chambers v Florida*, 309 US 227, 237, stand as a constitutional barrier against thus obtaining a conviction, *ibid*, 235-238. These constitutional provisions contemplate that a jury must determine guilt or innocence in a public trial in which the defendant is confronted with the witnesses against him and in which he enjoys the assistance of counsel; and where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which turns to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance cannot be sustained.<sup>25</sup>

From the judgment it is clear that not all presumptions which pass the rational-connection test will be valid. Even before a presumption is subjected to the rational-connection test, it must be submitted to a constitutionality test because the constitution is the supreme law of the land.<sup>26</sup>

However, the conviction was set aside because the presumption failed the rational-connection

test. Black and Douglas J J were still a minority, otherwise the statute concerned would have failed on constitutional grounds.

The decision, however, left certain questions unanswered to wit (i) what presumptions, according to various classifications thereof, would meet the threshold constitutional standard? (ii) how strong must the connection be between the predicate fact and the presumed fact in order to meet the rational-connection test successfully?

In United States v Gainey<sup>27</sup> the defendant was charged with illegally operating a still. He had been found at a still site by federal and state officers. The presumption which was operative mandated that: "Whenever... the defendant is shown to have been at the site or place where and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without a jury)".<sup>28</sup>

The court of appeals held that the presumption was not rationally connected with the predicate fact and therefore invalid. The Supreme Court reversed the court of appeals holding that the presumption merely allowed the jury to draw an inference and nothing more. It was thus a rule of evidence which did not impinge on any constitutional right of the accused. It therefore passed the threshold test of constitutionality. The court also held that the presumption passed the rational-connection test because the inference permitted was rationally-connected to the predicate fact.

In Leary v United States<sup>29</sup> the accused drove from New York to Mexico with two of his children and two other adults. They were denied access into Mexico and returned to the US side of the border by United States officials. On the US side of the border, the accused's car was searched and some cannabis was found in the accused's car and in a purse which was in possession of the accused's daughter.

The accused was charged with three offences. He was acquitted on one count but convicted on the two other counts. On appeal the Supreme Court reversed the conviction of the accused on the count of failing to comply with the transfer tax provision of the Marijuana Tax Act on the basis that the said provisions violated the accused's fifth amendment privilege against self-incrimination. That decision is not relevant to this work but is noted for completeness.

The crucial question to be answered by the court in respect of the remaining charge was:

Whether the petitioner was denied due process by the application of the part of 21 U.S.C. section 176(a) which provides that a defendant's possession of marijuana shall be deemed sufficient evidence that the marijuana was illegally imported or brought into the United States, and that the defendant knew of the illegal importation or bringing in, unless the defendant explains his possession to the satisfaction of the jury.<sup>30</sup>

The court approved and applied the rational-connection test, holding that:

(T)he upshot of Tot, Garney and Romano is, we think, that a criminal statutory

presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the *presumed fact is more likely than not to flow from the proved fact on which it is made to depend.*<sup>31</sup>

The court then applied the test of the factual situation presented and concluded that there was no connection between the predicate fact and the presumed fact and declared that the offending provision was an unconstitutional infraction of the accused's right to due process of law.

In Turner v United States<sup>32</sup> narcotics agents stopped a car in which the accused was travelling. The accused threw away a packet which was retrieved and later examined and found to contain a mixture of sugar and cocaine. In the car was found a quantity of heroin. The accused was charged and convicted of knowingly receiving, concealing and facilitating the transportation and concealment of heroin and cocaine knowing that such heroin and cocaine had been illegally imported into the U.S. and also of knowingly purchasing, possessing dispensing and distributing heroin and cocaine not in or from the original stamped package. The court of appeals affirmed the conviction.

The court applied the rational-connection test, finding that the charges relating to heroin had been established since the inference sought to be drawn was rationally connected, on the facts of the case, with the predicate fact. The court affirmed the court of appeals in this aspect. However, with regard to cocaine, the court found the reverse on the facts and therefore the court reversed the court of appeals on this aspect.

“Rational connection” has been regarded as a useful screening test, but not a conclusive one.

This was acknowledged in County Court of Ulster County, New York, et al v Allen et al.<sup>33</sup>

*In relation to a mandatory presumption Stevens J giving judgment for the majority of the Supreme Court said that “since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt”.*

*What becomes abundantly clear from the decisions of the Supreme Court of the United States is that while the legislature has wide power to legislate, its power must be exercised subject to the Constitution.<sup>34</sup> The Constitution absolutely prevails. Any legal provision, passed by the legislature or by the executive, no matter under what guise it masquerades, is examined by the courts for substantial effect upon constitutional rights. If that effect is in conflict with a provision of the Constitution in the sense that it affects a constitutionally protected individual right, then the constitutional provision takes precedence and the right of the citizen involved is vindicated.*

That is why the law of the United States on presumptions is relatively simple. The testing of a presumptive provision is done by reference to one *suprema lex* and there is no need to go into semantic contortions either to sustain or to strike down an offending provision.

In sum: “The use of presumptions in the criminal law is already limited by constitutional principles. To allow a conclusive or mandatory presumption against a criminal defendant on an element of the crime would infringe his right to be free from a directed verdict for the prosecution. The jury must always be allowed to determine whether there is reasonable doubt

as to each element in a criminal case. A conclusive or mandatory presumption as to some element of the crime would have the effect of granting the prosecution a directed verdict on that element in violation of this principle. Thus with respect to elements of the crime, at most only *permissive presumptions* are allowed.

In the words of Bewley:

“A presumption that shifts to the defendant the burden of persuasion on an element of the crime may not be used in a criminal trial. The burden of persuasion must always rest on the prosecution; and therefore, the effect of a presumption against the defendant must be limited to shifting the burden of coming forward with the evidence. A corollary to this requirement would seem to be that the amount of evidence required to rebut the presumption ought to be only that amount which raises a reasonable doubt as to the existence of the presumed element. If more were required, the presumption would shift the burden of persuasion to the defendant. Consequently for any presumption to be *constitutional in the criminal context, it must be permissive and may not have the effect of shifting the burden*”.<sup>35</sup>

The foregoing, it is submitted, is a correct statement of American law pertaining to the use of presumptions save that it is not quite complete. The author should have added that in addition the presumption must pass the rational-connection test that is a presumption, in order to be valid, must be such that the presumed fact “... must follow as a logical consequence of the known or established facts”.<sup>36</sup>

### 8.3 English law

#### 8.3.1 *Definitional confusion*

The law relating to presumptions is a veritable welter of confusion in English law.<sup>37</sup> “Every writer of sufficient intelligence to appreciate the difficulties of the subject matter has approached the topic with a sense of hopelessness and has left it with a feeling of despair”.<sup>38</sup> Indeed Cross and Tapper are moved to aver that: “It would be unreasonable to expect anything approaching neat precision in this area of the law”.<sup>39</sup>

The confusion of presumption classification in an attempt to create order which exists in English law is most ably cleared up by Murphy<sup>40</sup> who shows clearly that the term “presumption” is often used to refer to four different legal situations, namely, (a) rules of law which provide that some fact shall be taken in all cases to be true without proof of any other primary fact, until the contrary is proved, for example the rule that all persons are presumed to be innocent until proved guilty. According to Nokes, these are not presumptions but rules of substantive law which have no place in the law of evidence.<sup>41</sup>

These are the so-called irrebuttable presumptions. Murphy asserts, correctly it is submitted, that an irrebuttable presumption is a contradictio in terminis; (b) rules of law which preclude the assertion of some necessary fact, without which cases of a certain sort cannot be maintained for example the rule that a child under the age of 7 is doli incapax; (c) inferences of common sense, which a tribunal of fact may, (purely as a question of fact), but need not draw, having regard to the recurrence or common incidence of certain items of circumstantial evidence; (d) the true

presumptions, in relation to which on proof of some primary fact or facts, the court will find proved a presumed fact, in the absence of evidence to the contrary.

### **8.3.2 Characteristics of true presumptions**

In English law, rebuttability is the distinguishing characteristic of the true presumption.<sup>42</sup> Presumptions are factual conclusions, which, by law, "... must be drawn if particular facts are established or particular circumstances exist, and there is no evidence to the contrary".<sup>43</sup>

### **8.3.3 Effects of true presumptions**

Obviously, if the foregoing description of the effect of a presumption in English law is correct, and it is submitted it is, then the operation of a presumption affects the incidence of the burden for it is quite obvious that there must be an allocation of the burden of establishing the primary fact upon which hinges the operation of the presumption as well as the proof of the ultimate fact which the presumption is aimed at helping to prove. Cross and Tapper show that the question of allocation of the burden is affected by the meaning attached to the burden as well as the source of the presumption, that is whether it is a common-law presumption or a statutory presumption.<sup>44</sup> This is a matter of crucial importance in English law.

### **8.3.4 Common law presumptions and their effects on English criminal law**

According to Cross and Tapper: "Although there is some older authority to the contrary it is hard to believe, since the decision in *Woolmington*, that an English court would be prepared

to apply a common law presumption so as to cast a legal burden upon the accused in a criminal case. It is rare for an evidential burden to operate against the accused".<sup>45</sup>

Since in English criminal law the prosecution bears both the legal and evidential burden (according to the meaning allocated by Cross and Tapper to the two burdens) to prove all the elements of the offence charged: "Proof of the basic facts of a common law presumption can cast nothing more than an evidential burden on to the accused and nothing less than a legal burden on to the prosecution".<sup>46</sup>

#### 8.3.4.1 **Effect of the evidential burden at common law**

A question which immediately arises is the quantum of proof that the accused must produce in order to discharge the evidential onus in common law.

There is some confusion among the commentators in English law on the subject as many of them do not make the distinction made by Cross & Tapper between presumptions arising from common law and those that arise from statute law. Writers also do not always make the clear distinction between the legal onus and the evidential onus. Thus Phipson makes no mention of the quantum of evidence required to be adduced by the accused in criminal cases where the accused bears the evidential onus by virtue of common law.<sup>47</sup> May<sup>48</sup> when discussing quantum of proof in those cases where the burden of proof is on the defence, makes no distinction between the evidential onus and the legal onus. So it is not clear whether the standard of a balance of probabilities which he asserts is applicable to both onera or whether it applies only to the persuasive onus (legal onus) only or to the evidential onus. Nokes is also ambiguous as

he does not indicate whether the burden he refers to is the legal burden or the evidential burden.<sup>49</sup>

Cross and Tapper, however, show very clearly<sup>50</sup> that there is a difference in the required quantum of evidence when the defence seeks to discharge an evidential onus and when it seeks to discharge a persuasive onus in criminal cases. According to them: “When the accused bears the evidential onus alone, it is only necessary for there to be such evidence as would, if believed and uncontradicted, induce a reasonable doubt in the mind of a reasonable jury as to whether his version might not be true...”.<sup>51</sup>

Cross and Tapper seem to be correct because of the decision in R v Schania and Abramovitch.<sup>52</sup> In that case the accused were charged with receiving stolen goods well knowing them to have been stolen. That the goods had in fact been stolen when acquired by the accused was not in dispute.

The court of criminal appeal held that the test to apply was whether the jury was satisfied: “... that the explanation given by the appellant might reasonably be true...” and that if they were so satisfied, the “... crown had not established beyond a reasonable doubt the guilt of the prisoners...”.<sup>53</sup>

In Bratty v Attorney-General for Northern Ireland<sup>54</sup> the accused was charged with murder. The defence advanced was insanity. During the course of the trial some evidence was led which suggested that the accused may have acted under automatism or may not have had the requisite intent at the time of the commission of the alleged offence. Clearly in terms of the common

law, both the evidential and legal (persuasive) onus in respect of insanity rested on the accused.<sup>55</sup> The court nisi prius left the issue of insanity to the jury but refused to leave the matter of automatism or lack of intent to the jury. The jury convicted the accused of murder. An appeal was noted against the court's refusal to leave the two matters mentioned to the jury. The court of criminal appeal confirmed. The matter was taken to the House of Lords.

The House of Lords considered the matter and declared:

A consideration of his evidence and of the other evidence in the case leads me to the view that it did not provide a proper foundation for a submission that (apart from any question of insanity) the actions of the appellant had been unconscious and involuntary. There was no sufficient evidence, fit to be left to a jury, on which a jury might conclude that the appellant had acted unconsciously and involuntarily or which might leave a jury in reasonable doubt whether this might be so.<sup>56</sup>

The test therefore was whether the evidence led could have raised a doubt in the mind of the jury.

In sum therefore, in common law the effect of presumptions in English law is almost identical to the effect of presumptions in American law. In both systems, a presumption which casts a persuasive burden is not countenanced except in cases where the defence of insanity is raised. The difference is that there is no requirement in English law that a presumption should be permissive and not mandatory.

### 8.3.5 Statutory presumptions in English criminal law

In view of the English doctrine of legislative supremacy, the legislative branch of government is entitled to create presumptions: "... new presumptions are created all the time by particular statutory provisions..."<sup>57</sup> The power of the legislature to create presumptions cannot be doubted in English law.<sup>58</sup>

The power of the legislature is unlimited. Therefore the legislature may make inroads into the settled rules of criminal law and evidence and thereby restrict<sup>59</sup> individual liberties at will. No challenge has ever been addressed to the power of the legislature to pass such provisions. The legislature has therefore, in England, passed many statutes which cast burdens of proof on the accused.<sup>60</sup> In this context, burden of proof connotes both the evidential and legal burden on certain issues for example section 1 of the Prevention of Crime Act, 1953. This provides that "any person who without lawful authority or reasonable excuse, the proof of which shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence...".

Clearly the duty to lead evidence that the accused had lawful authority or reasonable excuse as well as the duty to persuade the fact-finder that the accused had such authority or excuse fall on the accused since he is required to establish "proof" of such authority or excuse.<sup>61</sup>

Though the legislature does on occasion impose a legal burden on the accused, the legislature as a rule, however, does not impose the applicable standard of proof as where the burden is borne by the crown. Therefore, in R v Carr-Briant<sup>62</sup> where an onus was placed on the accused in terms of the Prevention of Corruption Act 1916, the King's bench held that: "We see no

reason why the rebuttable presumption created by the section should not be construed in the same manner as similar words in other statutes or similar presumptions at common law, for instance, the presumption of sanity in the case of an accused person who is setting up a defence of insanity”.<sup>63</sup> Since the applicable standard in defence of insanity was proof on a balance of probabilities<sup>64</sup> the court held that that was the applicable standard of proof required to discharge the legal onus in cases where the legal onus is created by statute.<sup>65</sup> The courts have since confirmed the decision in Carr-Briant’s case.<sup>66</sup>

A further question arises as regards the statutory imposition of the evidential burden on the accused. Again the statute normally simply imposes the burden but does not indicate the standard of proof required to discharge the onus. Cross and Tapper aver that: “Although there is little direct English authority on the point, it seems that where the accused bears an evidential, but not legal burden, he may discharge it by adducing evidence of a reasonable possibility of the existence of the defence”.<sup>67</sup> It is submitted that there would be little sense in applying any other standard because this is the standard of proof which is applied in cases where the common law imposes an evidential burden on the accused. There would be no logical justification for applying a different standard simply because the evidential burden is imposed by statute instead of the common law.

Troublesome questions have arisen in English law regarding the propriety of the imposition of the legal burden on an accused person. In contravention of the clear mandate of Woolmington v Director of Public Prosecution<sup>68</sup> there is a “... tendency in modern legislation to cast the persuasive burden of proving particular issues on the defendant...”.<sup>69</sup>

Some writers deplore the policy of imposing any burden on the accused. Glanville Williams avers: "There is no absolute need to place any evidential burdens on the defence..."<sup>70</sup> Dean,<sup>71</sup> being fully aware of the policies that lie behind the imposition of burdens on the accused,<sup>72</sup> is of the view that only the evidential burden should be placed on the accused in those circumstances where policy demands it. Phipson is of the view that only an evidential burden should be cast on the accused. It seems that Phipson considers it unfair to cast a persuasive burden on the accused because:

"As a rule the persuasive onus is cast upon the defendant upon the issues which determines whether the defendant's act was criminal, and which is therefore decisive of guilt or innocence".

According to Phipson, discharging the onus in those circumstances amounts to the establishment by the accused of his innocence.<sup>73</sup>

This is quite clearly an undercutting of the mandate in Woolmington's case.<sup>74</sup>

How have the judges reacted to this criticism? According to Cross and Tapper: "Even when there are no words dealing expressly with the burden of proof, a statute will frequently be construed so as to place an evidential, if not legal, burden on a particular issue on the accused".<sup>75</sup> In other words, Cross and Tapper are of the view that on this particular issue, the English courts are prepared to lean over backwards to interpret statutory provisions in favour of the state. It is submitted that Cross and Tapper are not correct. The decision they quote in support of their contention<sup>76</sup> does not support that contention. If anything, the decision affirms

the English courts' appreciation of the rights of the individual. It, however, also reflects the English courts' respect for the supremacy of parliament.<sup>77</sup>

At worst therefore, one may say that the English courts will, if a suitable occasion arises, enforce a legal presumption which casts an onus on the accused be it legal or evidential and thus undercut the basic rule of common law that the onus rests on the state to prove the case against the accused beyond a reasonable doubt. This result is attributable to the great respect that courts have for the legislative enactments of parliament.

#### **8.4 Presumptions in South African law**

##### **8.4.1 Introduction**

Although presumptions were used extensively in the South African criminal process, few writers attempted to settle definitively the definitional content of the term. Because of the change brought about by the new Constitution, it will be necessary to deal with the position before and after the adoption of the Constitution with the Bill of Rights.

##### **8.4.2 The classificatory and definitional controversy**

Various authors define the term variously although, it is submitted, there are certain elements constant in the various definitions.

Quoting McCormick's Handbook of the Law of Evidence, van der Merwe et al define a

presumption as: “a standardized practice, under which certain facts are held to call for uniform treatment with respect to their effect as proof of other facts”.<sup>78</sup> The definition is satisfactory in so far and to the extent that it focuses on the elemental role of the presumption in the process of reasoning. However, it is incomplete because it makes no reference to the legal nature of the presumption in the evidential system, that is, that the application of a presumption imposes a legal duty to reason in a certain way.

Schmidt has defined a presumption as “... ‘n voorlopige aanname wat die regter maak”.<sup>79</sup> The definition, while focusing correctly on the legal nature of the presumption, however, fails to focus correctly on the effect of a presumption. Not all presumptions have a provisional effect. Some of the so-called irrebuttable presumptions have a final effect in that once they are applied they foreclose the production of evidence on the point in issue. A judge cannot provisionally accept the content of such a presumption since its effect is final. If a judge accepts the logical directives of such a presumption, he must apply them to the exclusion of all other evidential matter which may factually compete with the contents of the accepted presumption. Moreover, not only a judge, but also any presiding officer presiding over a court of law, is entitled to employ presumptions to resolve factual issues presented to him for decision.

Perhaps realising the unsatisfactory nature of his definition Schmidt reviewed and refined his definition of a presumption. In his later work on evidence<sup>80</sup> Schmidt defines a presumption as “... ‘n aanname wat die hof maak omtrent ‘n feit wat nie regstreeks deur getuienis bewys word nie. Dit is derhalwe ‘n middel waarmee bewys verskaf word sonder dat getuienis gelewer is van die feit wat bewys word”. It is submitted that Schmidt’s latter definition though seeking to avoid the unsatisfactory features of the former, is itself unsatisfactory. The definition omits

to mention the compulsive nature of the “aannname”. But it is submitted that Schmidt’s definition is more acceptable than the other definitions since it correctly focusses on a presumption as a “means” of furnishing legal proof.

Lansdown and Campbell<sup>81</sup> categorise presumptions into various classes and then define each class of presumptions separately. According to them presumptions can be divided into presumptions of law and presumptions of fact. Presumptions of law are inferences “... of fact which the law requires a court to draw from a proved or assumed fact”.<sup>82</sup> Presumptions of fact are “... merely permissible inferences drawn from common concatenations of circumstantial evidence”.<sup>83</sup> A criticism which seems justifiable of the manner in which Lansdown and Campbell treat the subject of presumptions is that they do not analyse the concept critically and they do not show how presumptions may affect the all important facets of onus and quantum of evidence in a suit.

Hoffman and Zeffertt<sup>84</sup> basically follow the format adopted by Lansdown and Campbell. However, they divide presumptions into three categories, namely, irrebuttable presumptions of law, presumptions of fact and rebuttable presumptions of law. They define the various classes separately to wit: “An irrebuttable presumption of law is simply an ordinary rule of substantive law formulated to look like a rule of evidence”.<sup>85</sup> This definition is unacceptable because rules of evidence are rules of law in the sense that they are normative guidelines which compulsorily govern the proffering of the means of proof or control the effect of such means within the courtroom milieu. Rules of evidence, it is submitted, are as much rules of substantive law as any other rule of law for example the rule of substantive criminal law that one should not murder a human being has the same legal import as the rule that hearsay evidence cannot be

admitted to prove the guilt of a citizen in that both govern human action under different legal circumstances, but their infraction leads to a legal sanction.<sup>86</sup> It is further submitted that Hoffman & Zeffert's definition of an irrebuttable presumption in terms of the basic classification of legal rules into substantive and adjectival law rules is incorrect for it does not focus on the functional role of presumptions but on the formal categorisation of rules of law the function of which is no more than merely to act as an aid to understanding the various rules of law.<sup>87</sup> To elevate intellectual convenience, to the status of a definitional element is, it is submitted, insupportable.

Hoffman and Zeffertt further define rebuttable presumptions of law as rules "... of law compelling the provisional assumption of a fact."<sup>88</sup> The definition is open to criticism in that according to their categorisation of presumptions, irrebuttable presumptions are rules of substantive law. It is not clear in so far as the definition of rebuttable presumptions is concerned, whether rebuttable presumptions are rules of law which fall in the same category of law as irrebuttable presumptions. Are rules of law, rules of substantive law? If so, what is the basis of the distinction between the two categories in terms of Hoffman & Zeffertt's formulation? If not what is the difference?

A second criticism which may be levelled at this definition is that it seems to imply that presumptions may be applied in a vacuum, whereas presumptions always operate on the basis of certain proven facts and they always supply some missing evidential link thus facilitating the process of legal proof and thereby facilitating the decision-making process in a court of law by indicating the factual proposition to be accepted by the court when there are two or more competing factual propositions.

Hoffman and Zeffertt finally define a presumption of fact as "... a mere inference of probability which the court may draw on all the evidence it appears to be appropriate".<sup>89</sup> According to Hoffman and Zeffertt a presumption of fact is nothing but a factually permissible inference depending on the logic of and circumstances posed by each and every case. Hoffman and Zeffertt, however, correctly point out that our highest court has disapproved of the tendency to elevate these permissible factual inferences into rules of law,<sup>90</sup> by the simple conceptual stratagem of naming them "presumptions".

Hoffman and Zeffertt are alive to the fact that the so-called presumptions of fact are not presumptions.<sup>91</sup> Why they persist in maintaining this category is not clear even though they aver that they do so "... merely for the negative purpose of identifying them as such and establishing that they are not true presumptions or presumptions of law".<sup>92</sup> This category of presumptions does not deserve to exist in our legal terminology and to persist in maintaining it simply because some of the authoritative works on evidence emanating from the western common-law jurisdictions maintain it, is not correct, it is submitted.<sup>93</sup>

O'Dowd divides presumptions into presumptions of law and presumptions of fact.<sup>94</sup> O'Dowd, however, realises that the maintenance of a category of "presumptions of fact" is logically untenable.<sup>95</sup> The same criticism that has been levelled at Hoffman and Zeffertt may be levelled at O'Dowd for maintaining this category.

O'Dowd's definition of a legal presumption is worth noting, namely: "... a presumption is a rule of substantive law which lays down that if certain facts are proved, must under all circumstances be drawn, or must certain conclusions either be drawn unless they are disproved

by further evidence".<sup>96</sup>

According to O'Dowd therefore so-called rebuttable and irrebuttable presumptions are all rules of substantive law. This part of the definition is to be criticised for the same reasons advanced when criticising Hoffman and Zeffertt's definition of irrebuttable presumptions. In any event if the distinction between "substantive law" and "adjectival law" is maintained, then the definition is clearly wrong because the "presumption" that a child under the age of 7 years is *doli incapax* and therefore incapable of committing a criminal offence, is clearly different from the true presumption that *pater est quem nuptiae demonstrant*. Secondly to equate the two categories as rules of "substantive law" is clearly wrong because their effects are completely different. Thirdly the definition is to be criticised because it is illogical. In a court of law a conclusion cannot be drawn and then disproved. Once drawn, a conclusion embodies a proposition of fact accepted by the court as correct and upon which the court is prepared to base a factually determinative decision. The conclusion is drawn after all the available evidential matter, including presumptions, has been placed on the record. The effect of rebutting evidence is to prevent the drawing of a factual conclusion which would otherwise be drawn.<sup>97</sup> Rebutting evidence does not disprove a conclusion, it prevents the drawing of the conclusion. O'Dowd, it is submitted, is incorrect.

It is incorrect to speak of disproving a conclusion for a further reason. A conclusion is not evidence. A conclusion is the trier of fact's determination of what the disputed state of fact was at a given moment in the past. The determination is done by the trier of fact after listening to various assertions of fact pertaining to the disputed state of fact. The assertions of fact made by various witnesses to the disputed state of fact may be disproved, that is, demonstrated to be

incorrect by the proffering of more convincing assertions of fact which contain contrary averments.

A conclusion does not embody any evidential averment since the trier of fact is not a witness. It is therefore logically impossible to disprove a conclusion. Thus it is submitted, O'Dowd is incorrect when he avers that a conclusion may be disproved by evidence.

Joubert et al<sup>98</sup> define presumptions much more acceptably when they declare that "a presumption is a method of reasoning or a legal device whereby the existence of a fact is assumed".<sup>99</sup> However, even this definition, more acceptable than the others as it is, is not satisfactory in all respects, it is submitted. A "method of reasoning" is a logical device which is employed whenever the inference of certain facts is made from proven facts. Such devices logically provide a sufficient basis for the drawing of an inference and thus establish the logical integrity or validity of the conclusion. Such a device cannot be equated with a presumption, as Joubert et al seem to do. While the "... method of reasoning" and a presumption may have the same value in logic, they do not have the same effect in evidence. A presumption is a device which must or may be employed in the law of evidence in certain circumstances in order to arrive at a conclusion regarding disputed facts. Thus a presumption is something more than just a "method of reasoning".

Had Joubert et al simply omitted from their definition the words "... is a method of reasoning or ...", the result would have been the correct definition of a presumption that is "... a legal device whereby the existence of a fact is assumed". For that indeed, it is submitted, is a presumption.

Most South African authors do not express themselves on which of the three categories of presumption ought to be regarded as the true presumptions. Only Schmidt follows the English writers, declaring unequivocally that: “Die weelegbare regsvermoede, praesumptio iuris tantum of eenvoudig praesumptio iuris, is die egte vermoede as regsreel”.<sup>100</sup> In view of the criticism levelled at so-called irrebuttable presumptions and presumptions of fact by respected commentators<sup>101</sup> it is submitted that South African law in the past followed English law in regarding the rebuttable presumptions as the true presumptions.<sup>102</sup> Rebuttability was, in South African law, as it is in English law, the distinguishing characteristic of a presumption.

### 8.4.3 Effect of presumptions

In South African law, “... the usual effect of a presumption is either to assist one party in discharging an onus, or else to place an onus or duty to adduce evidence on his opponent”.<sup>103</sup>

Quite clearly therefore the application of presumption affects the “... incidence of the onus”<sup>104</sup> ... or creates “... an artificial duty to adduce evidence on certain issues...”.<sup>105</sup> In South African law, presumptions therefore affect the incidence of both the persuasive legal and evidential burdens. The effect of presumptions can be observed in both common law and statute law.<sup>106</sup>

#### 8.4.3.1 Common law presumptions and their effects on South African criminal law

As stated in the foregoing paragraph, in common law, presumptions affect the incidence of the burden of proof. As the expression “burden” has two possible meanings<sup>107</sup> a question which arises is: In South African common law, may a presumption impose both the persuasive as well

as the evidential burden? Hoffman and Zeffertt are not in doubt that a distinction can be drawn in common law between those presumptions that impose a persuasive burden and those that impose an evidential burden.<sup>108</sup>

#### 8.4.3.1.1 **The persuasive burden imposed by common law presumptions**

There seems to be a difference of opinion among some of our eminent commentators as regards the incidence of the persuasive burden as a result of the application of a presumption. According to Schmidt, in criminal proceedings, the state bears the onus of proof (persuasive burden) in all matters that the state must establish in order to obtain a conviction, save where a statute absolves the state of the duty to establish such facts or in cases where the accused relies on mental instability to escape criminal liability, in which cases the persuasive onus of proving madness rests on the accused.<sup>109</sup> Therefore according to Schmidt, in South African common law, no persuasive onus rests on the accused except in the one exception referred to. Joubert et al in another authoritative work agree with Schmidt.<sup>110</sup> According to this view of the law then, South African law is identical to the English common law. However, is this not too simplistic a view of South African law and an over broad generalization of Ndlovu's case?

The question is pertinent because there is another view which is advanced by Hoffman and Zeffertt namely that an onus of proof may be cast on an accused person by a common law presumption.<sup>111</sup>

In this connection "onus" is understood to be used by Hoffman and Zeffertt to mean the persuasive burden because that is how the authors themselves use the term.<sup>112</sup> According to

Hoffman and Zeffertt, in criminal matters the onus of proof of illegitimacy is cast on the husband as a result of the application of the principle of *pater est quem nuptiae demonstrant* and an onus of proof is cast upon the man who admits sexual intercourse with the mother but denies paternity of an illegitimate child.<sup>113</sup> Hoffman and Zeffertt cite supreme court authority<sup>114</sup> for their view, but it is submitted that their reliance on such authority for their view that an onus of proof rests on the husband is misconceived.

Although in Van der Merwe's case the court spoke about: "Die aard van die bewyslas wat op appellant in hierdie saak rus...",<sup>115</sup> it is clear that the court was not in fact referring to the nature of the onus of proof which rested on the husband but it was referring to the standard of persuasiveness that evidence led by the husband must attain in order that he may be adjudged to have rebutted the applicable presumption. On a careful reading of the relevant passage in the judgment it is abundantly clear that the "onus" referred to is nothing more than an onus to rebut, that is, an onus to lead evidence. The court persistently talks about "rebutting" an onus. It is submitted that the persuasive onus cannot be rebutted, it can only be discharged. The notion of rebuttal is strongly associated with the leading of counter evidence in a suit.<sup>116</sup> Clearly, it is submitted, the so-called "onus" referred to is not the persuasive onus but the evidential onus.<sup>117</sup>

In R v Isaacs,<sup>118</sup> the court held that the presumption of *pater est quem nuptiae demonstrant* placed an onus on the husband. The court went on to say that: "All that such a person has to do in order to shift such an onus is to satisfy the court, on a balance of probability, that his version is the correct one".

Scientifically, the burden of proof cannot shift because "... the onus of proof is fixed at the commencement of the trial once the issues have been determined and does not shift during the trial...".<sup>119</sup> Therefore the onus referred to in Isaac's case is the evidential onus, not the persuasive onus.

Quite clearly, it is submitted, Hoffman and Zeffertt make a mistake when they consider that a persuasive onus rests on the man. Their mistake is attributable to "... the inaccurate use of the word onus and to misconceptions flowing therefrom".<sup>120</sup>

A far more difficult issue to address is Hoffman and Zeffertt's assertion that the onus rests on the man to prove that he is not the father of an illegitimate child if he admits sexual intercourse with the child's mother. There is eminent authority for Hoffman and Zeffertt's assertion.<sup>121</sup> The onus that rests on the man was a creation of van den Heever J P in Pie's case. The decision has been consistently followed, but its correctness is to be doubted.

The rule saw the light of the day in MacDonald v Stander<sup>122</sup> a judgment of Van den Heever J when he was a judge of the high court of South West Africa. The judgment was taken on appeal to the AD and it is quoted fully in the 1935 AD judgment of the same name.

In MacDonald's case the defendant was sued for damages for seduction, lying-in-expenses and maintenance for the child. The defendant admitted intercourse with the woman but denied that she had been a virgin when he had had sex with her and that he was the father of her child. In the court a quo, Van den Heever J declared that: "Luidens ons regsvoorskifte, soos ek hulle verstaan, is dit dus onnodig om na te gaan of eiseres geloofwaardig is by die aanwysing van die

vader. Verweerder kan die regsgevolge van sy erkende byslaap ontduik slegs deur bewys van die onmoontlikheid daarvan dat die kind van hom ontvang is".<sup>123</sup> It is to be noted that at that stage no explicit onus was placed on the man by the learned judge. All what was required of the man was proof that it was impossible that the child was his.

It is to be noted that the Appellate Division decided the matter on the evidence and considered that it was unnecessary to go into the issue of credibility of the woman on which Van der Heever J had expended so much energy.<sup>124</sup> One gets the distinct impression that the Appellate Division was signalling to Van der Heever J that it was not impressed by his efforts. The Appellate Division chose to keep the matter open<sup>125</sup> but it did signify that: "Dus skyn hy te verskil van die mening uitgespreek in die gemelde reeks van beslissinge insover hulle ongeloofwaardigheid van die vrou in die deurslag laat gee".<sup>126</sup> It is submitted that this was a signal that although it chose to keep the matter open, the Appellate Division considered Van der Heever J's views incorrect.

In 1945 the Appellate Division weighed in with the decision in R v Ndlovu<sup>127</sup> which, following Woolmington's case, laid down that the onus was "... on the crown to prove all averments necessary to establish..."<sup>128</sup> the guilt of an accused person.

The highest court, having laid down that the only exception to the foregoing rule was the defence of insanity, one would have expected that all courts would have considered themselves bound by that judgment and would have followed it. But not Van der Heever J. In the case of R v Pie<sup>129</sup> he continued the argument that he had advanced in MacDonald's case. Not only did he singlehandedly create a presumption<sup>130</sup> against the man, but he imposed a persuasive onus

on the accused to establish his innocence.<sup>131</sup>

This judgment flew in the face of the ratio of Ndlovu's case and was, it is submitted, clearly wrong. In mitigation, it can be stated that Pie's case was a review judgment so the court did not have the benefit of adversarial argument which could perhaps have aired the issues more effectively. However, it is scarcely to be accepted that Van der Heever J was unaware of Ndlovu's case and its import in criminal law since the judgment in Ndlovu's case was already three years old.

Van der Heever J was a very influential judge. In R v Swanepoel<sup>132</sup> the accused was charged under section 16(2) of Act 31 of 1937 that he had failed to pay maintenance. He was convicted in the magistrate's court and he then appealed. On appeal the import of Ndlovu's case was specifically argued.<sup>133</sup> However, Horwitz J chose to follow Van der Heever, J<sup>134</sup> holding that an onus rested on the appellant who admitted intercourse with the complainant to show that he "... could not have been the father of the child so born".<sup>135</sup> The appeal failed as the court held that the appellant had failed to discharge the onus that rested on him.

In S v Jeggels<sup>136</sup> the court followed Pie's case declaring that: "The common law is very clear on this point".<sup>137</sup> The influence of R v Pie can be discerned in a series of cases of different divisions.<sup>138</sup>

It was against this background that the Appellate Division weighed in with the judgment of S v Swart.<sup>139</sup> The facts of the case were simple. The accused was charged with contravention of section 18(2) of Act 33 of 1960. The proviso was similar to the provisions of section 16(2) of

Act 31 of 1937.

Potgieter AJA, after referring to the various decisions then analysed the authorities in detail. Potgieter AJA held that a presumption of paternity is created by the admission of sexual congress. Although he did refer to the onus which rested on the man who admitted intercourse, the judge also stated for the guidance of litigants that: "Dit kan hy op verskeie maniere doen, byvoorbeeld, deur te bewys dat hy nie met die vrou gedurende die bevrugtingstydperk geslagsverkeer kon gevoer het nie omdat hy uitlandig was of om enige ander gegronde rede; of al het hy met haar gemeenskap gehad, maar kan bewys dat hy steriel was en haar bygevolg nie kon bevrug het nie; of dat by wyse van 'n bloedtoets dit bewys kan word dat hy nie die vader kan wees nie".<sup>140</sup>

It is submitted that Potgieter AJA's judgment was an attempt at clearing the air. It is to be noted that he was at pains to show the source of the presumption, that is, the admission of sexual intercourse. He did not try to justify the rule by reference to authority. The presumption, it is submitted, clearly was tacitly admitted to be a recent creation.

What is important is the meaning attached to the onus by the judge. The judge clearly suggests rebuttal<sup>141</sup> of presumed facts, not proof to the contrary of presumed facts. If the onus of proof is the onus of rebuttal, it follows, it is submitted, that the onus is nothing but an evidential onus.

The wording of the judgment as well as its apparent support of previous decisions which placed persuasive onus on the man, can, it is submitted, influence one to consider that the persuasive onus rests on the man who admits intercourse with the mother of an illegitimate child who

points at him, that he is not the father of such child. Authority seems to incline to the view. The better view therefore seems to be that a persuasive onus is cast on the man by his admission of intercourse.

Were it not for the unfortunate persuasive onus cast on the man who admits intercourse when accused of paternity by the mother of an illegitimate child, South African law relating to common law presumptions would be identical to English law. South African law therefore differs from English law in that two exceptions exist to the general rule whereas in English law there is only one.<sup>142</sup>

In the common law of all three systems, a legal provision which casts a persuasive burden on an accused person is not as a rule countenanced. By way of exception English law acknowledges an exception and South Africa acknowledges two. South African law has therefore not followed English and American law slavishly.

#### 8.4.3.1.2 **Quantum of evidence required to discharge the persuasive burden imposed by a presumption in common law**

It is generally agreed that the quantum of evidence which must be led by the accused in a criminal case to discharge a persuasive burden imposed on the accused is evidence which satisfies the trier of fact on a balance of probabilities.<sup>143</sup> According to Van der Merwe et al, the evidential burden arises as soon as the “evidence or a presumption of law or an inference creates the risk that a litigant may fail...”.<sup>144</sup>

The risk of failure arises when one side has, by evidence or by operation of a presumption, created a prima facie case.<sup>145</sup> In what circumstances it can be said that a prima facie case has been established is a matter which depends on the experience of the fact-finder. Except in cases of insanity and the admission of intercourse by a man, where a persuasive onus is cast on the accused, all other common-law presumptions cast only evidential onera on the accused.

#### **8.4.3.1.3 Quantum of evidence necessary to discharge the evidential burden imposed by a common law presumption**

The question of the quantum of evidence required to rebut a prima facie case created by a common-law presumption in a criminal case has apparently not been crisply decided. However, it seems reasonably clear that the evidence must be of such a nature that: "... there is a reasonable possibility that it may be substantially true".<sup>146</sup> This is the normal evidential standard that the evidence of an accused person must satisfy to entitle him to an acquittal. There is no reason to believe that there is any difference between an evidential onus created by the preponderance of evidence<sup>147</sup> and the evidential onus created by a common law presumption. If the onera created by the two factual situations are identical, then the quantum of evidence required to rebut must also be the same. In principle therefore the test should be the same.

#### **8.4.3.2 Statutory presumptions in South African law**

Legislative supremacy has been an undeniable constituent of the constitutional reality of South Africa. Nothing was exempt from the legislative competence of parliament. No legal principle was sacrosanct. The legislature could therefore at its pleasure make any inroads into

established law and procedure. The courts would sustain and enforce such inroad. Consequently the legislature could reverse what would otherwise be the ordinary incidence of the burden of proof by means of a statutory presumption.<sup>148</sup>

The South African statute book is positively replete with legislatively imposed presumptions.<sup>149</sup> However, statutory presumptions did not enjoy much study and analysis in South African legal writing because, it seems, the subject was regarded as one of simple statutory construction.<sup>150</sup>

In view of the extreme importance of presumptions in the adversarial process of proof tendering, an analysis of the various formulations adopted by the legislature in imposing evidential presumptions as well as their evidential effects must be undertaken. It is necessary to do so because it is a matter of vital importance "... to consider whether they place an onus or merely a duty to adduce evidence upon the party against whom the presumption operates".<sup>151</sup> As Williamson J has put it: "As anyone with experience of the workings of criminal law knows, the practical consequence of a statutory shift of onus from the State to an accused is to present such accused with an obstacle not only formidable but not infrequently well nigh insurmountable".<sup>152</sup> Owing to the changes brought about by the new Constitution, it will be necessary to analyse the effect of these on presumptions.

The legislature uses a number of well recognized verbal formulations. But the fact that similar or identical words are used in different statutes does not necessarily indicate that the meaning and effect are similar or identical.<sup>153</sup> Depending on the context and the policy of each statute in which a word or a phrase is used, a word or phrase may assume any meaning.

When the legislature imposes presumptions, it usually uses the following verbal formulations: “prima facie proof”, shall be “deemed”, “presumed”, “presumed until the contrary is proved”, “it is proved”, “unless and until the contrary is proved”, “he proves” and “in the absence of evidence to the contrary”.

#### 8.4.3.2.1 **Prima facie proof or prima facie evidence**

Numerous burden-imposing statutes adopt this formulation.<sup>154</sup> This formulation does not seem to have elicited much comment from legal writers regarding the propriety of using “proof” as the linguistic equivalent of “evidence”.<sup>155</sup> It is submitted that this linguistic usage is incorrect and displays a lamentable lack of concern for linguistic accuracy.

Moreover, it is difficult to understand why this usage should be persisted in as the supreme court has clearly distinguished between “proof” and “evidence”.<sup>156</sup> Evidence can never be “proof”. Evidence is one of the means of supplying proof of a disputed fact.<sup>157</sup> Proof is the end result of evidence<sup>158</sup> that is, the degree of conviction in the mind of the fact finder which is created by the force of the evidence tendered that a certain disputed state of fact transpired as alleged. The two concepts, as logical quantities, are not identical. They should never be used interchangeably, as such usage causes confusion.

Furthermore the term *prima facie* carries a notion of provisionalness within itself.<sup>159</sup> Evidence can never be provisional because once evidence is accepted, it forms part of the record and cannot be expunged unless the court specifically orders such expunction. Such evidence constitutes a final assertion of an alleged state of affairs. Evidence, it is submitted, can

consequently never be prima facie. It is the conviction that the evidence creates that may be provisional because if the fact finder has heard one side of a case presented to him, the evidence which has been tendered may create a certain view of the alleged state of affairs, but that view may be altered if the opposing side presents its own evidence for the evidence tendered may reduce or nullify the view created in the mind of the fact finder by the evidence of the side that tendered evidence first.

It is submitted therefore that if the intention to juxtapose evidential roles on certain issues is evidenced by the use of the concept of “prima facie evidence” or “prima facie proof”, the latter concept must always be used because it is the correct one.

#### 8.4.3.2.2 **The meaning of prima facie evidence or proof**

According to Hoffman and Zeffertt prima facie proof of a factum probandum means that: “... in the absence of some evidence to the contrary the fact in issue either may or must be taken to be proved”.<sup>160</sup> Schmidt agrees.<sup>161</sup> Clearly prima facie proof of the fact in issue by one party casts a duty on the other party to lead some evidence, failing which the fact finder may accept or must accept that the situation of fact contended for by the party that has led evidence is the correct factual situation, to be relied on by the fact finder in resolving the dispute between the parties.

The position as set out seems to be clear enough but the situation is complicated by Hoffman and Zeffertt’s apparent separation of “prima facie evidence”<sup>162</sup> from “prima facie proof”. Hoffman and Zeffertt assign two meanings to “prima facie evidence” that is “... evidence upon

which a reasonable man could find in favour of the party adducing it”<sup>163</sup> and “... evidence capable of being supplemented by inferences drawn from the opposing party’s failure to reply”.<sup>164</sup> A question which arises is whether “prima facie evidence” is something totally different from “prima facie proof” as evidenced by the two alleged meanings of the said phrase?

It is submitted that “prima facie evidence” as used by Hoffman and Zeffertt has the same conceptual value as “prima facie proof”. The confusion is created by the failure by Hoffman and Zeffertt to distinguish between “evidence” and “proof”. It is submitted that the two alleged meanings of “prima facie evidence” mean nothing more in essence, than just a restatement, albeit in separate conceptual strands, of the ordinary meaning of prima facie proof, that is, the capacity of evidence to satisfy the fact finder and the possibility of displacement of that conviction by subsequent evidence.

#### 8.4.3.2.3 **Prima facie proof and the supreme court**

As Hoffman and Zeffertt point out,<sup>165</sup> the phrase “prima facie proof” or “prima facie evidence” is in constant use in our judicial parlance. Virtually no thought is devoted to its meaning with the result that one sometimes encounters startling misconceptions of its meaning even among experienced practitioners. Our courts have, however, attempted to provide a lead in laying down its meaning with some precision.

The leading decision is ex parte The Minister of Justice in re Rex v Jacobson and Levy.<sup>166</sup> In 1928 the appellants had been convicted by a magistrate for making preferential dispositions in contravention of section 139(1) of Act 32 of 1916. They appealed to the Transvaal Provisional

Division. The TPD dismissed the appeal but in the course of its judgment, the TPD decided that if a statute imposed a burden of proof on an accused person, such an accused person need discharge that onus by making a prima facie case. Quite clearly such a burden could be no more than an evidential burden.

In 1931 the TPD came to an opposite conclusion regarding the nature of the onus which was imposed on the accused in terms of section 139(1) of Act 32 of 1916.<sup>167</sup> The court decided that the accused must prove his case beyond a reasonable doubt, that is, that there was a persuasive onus on the accused.

In order to achieve uniformity and certainty in law, the Minister of Justice stated a case in terms of section 388 of Act 31 of 1917 for the Appellate Division to decide finally on the issue. The Appellate Division was faced squarely with a need to interpret “prima facie”. Although the court was unanimous on the result, there were significant differences of interpretation between Wessels ACJ and Stratford JA. It is significant to note that Stratford JA’s judgment was concurred to by Roos JA and Hutton AJA whereas the ACJ’s judgment stood alone.

Wessels ACJ gave an uncharacteristically confusing judgment. His judgment, it is submitted, did not reflect the analytical ability one expects from a judge of such learning. According to Wessels ACJ the term “prima facie proof” could be used to mean that certain evidence could be led at a jury trial. According to him, the phrase could also be used to mean “... a case where there is a presumption of law in favour of the one party which (until rebutted) establishes his case...”.<sup>168</sup>

Quite clearly, it is submitted, this statement is incorrect as not all prima facie cases result from the application of presumptions. Nor is prima facie "... the equivalent of a presumption of law in favour of either plaintiff or defendant or of the crown or accused".<sup>169</sup> However, it was when the ACJ declared: "If this phrase 'prima facie evidence' is intended to convey that the insolvent need not fully prove that he had no intention to prefer: that it is enough if he brings evidence to show that he may not have had such intention, so as to raise a doubt in the mind of the court, then it is wrongly used"<sup>170</sup> that the rest of the court dissented from him. They did so obviously because the ACJ's remarks seemed to be general and not pertinent to the issue at hand, that is, the interpretation of section 139(1) of Act 32 of 1916. And if that interpretation received the imprimatur of the Appellate Division then a very high standard of proof would be mandatory in all cases even in those cases where no onus of proof was cast but only an evidential onus. Quite clearly the ACJ failed to distinguish between the two quite distinct onera.

Stratford JA, supported by the two other judges of appeal, drew attention to the lack of clarity in the ACJ's judgment, stating at the beginning of his judgment that: "... it is desirable to state clearly what that question was intended to be...".<sup>171</sup> He decided that: "Some burden of proof on the issues..."<sup>172</sup> was imposed on the accused. (It seems reasonably clear that the reference was to the particular facts of Rex v Jacobson & Levy).

That the judge chose to be ambiguous as to the exact burden imposed, that is whether the burden was an evidential one or a persuasive one is a vexing question. The impression is created, it is submitted, that the judge of appeal was not certain that the exact onus was a persuasive one as he later decided. Seen in that light, the judgment becomes a weak precedent. What seems strange is that the judge of appeal chose to decide the issue of the exact nature of

the onus placed on the accused by comparing the standards of persuasiveness of the evidence to be led by the accused in order to discharge the onus cast on him. According to the learned judge of appeal what had to be decided was whether the onus cast on the accused was to be discharged by the accused's leading of evidence which raised a doubt as to his intention or whether the accused had to prove affirmatively, beyond a reasonable doubt the absence of the intention to prefer.<sup>173</sup>

The analysis of Stratford J A clearly showed the difference between the evidential onus and the persuasive onus. The "affirmative proof beyond a reasonable doubt" test is a test of the persuasive onus and the "reasonable doubt" test relates to the evidential onus.

By deciding that in terms of section 139(1), Act 32 of 1916 an onus rested on the accused to prove affirmatively beyond a reasonable doubt the absence of an intention to prefer, the court signified in one stroke (a) the exact nature of the onus that is, the persuasive onus and (b) the standard of persuasiveness required of the evidence of the accused in order to discharge the onus in terms of the said act.

The court then proceeded to instruct the lower courts as to the meaning of prima facie. By emphasising the provisionality<sup>174</sup> of the factual conviction which may arise in the mind of the trier of fact as a result of evidence that establishes a fact prima facie, the court pointed out the logical untenableness of the application of the so called prima facie standard to evidence led by an accused when that evidence is assessed in conjunction with and in comparison with the state's evidence at the end of the evidence gathering process, that is, when both the accused's and the state's cases are closed. To speak of an accused establishing a prima facie case in those

circumstances is simply a misnomer and a misuse of words since at that stage no further evidence may be led. Thus, it is submitted, in the view of the court, the TPD's use of the phrase had been incorrect.

Though Stratford JA's judgment cleared the air somewhat, it also contained a logical inconsistency in that it confused prima facie proof and prima facie evidence as conceptual identities. Stratford JA's definition of prima facie proof has, however, stood the test of time and has repeatedly been approved by the courts.<sup>175</sup> Centlivres JA put it more felicitously when he stated that: "The words 'prima facie proof' seem to me to mean that, in the absence of credible evidence..."<sup>176</sup> thereby indicating that the evidence which is led must be evidence that is satisfactory not just any lying or otherwise unsatisfactory evidence.

#### 8.4.3.2.4 The evidential import of "prima facie proof"

Most commentators are ad idem that a prima facie provision imposes an evidential onus: "(evidential burden, burden of rebuttal; duty of adducing evidence)"<sup>177</sup> on the party against whom such a provision operates.<sup>178</sup> It is, however, necessary to refer to the guidance of the supreme court in view of some differences of opinion which have developed.

Again the leading case on this matter is Rex v Jacobson and Levy. As has been pointed out in the foregoing section, Stratford JA accepted that: "Some burden of proof"<sup>179</sup> lay on the accused and that in that particular case it was necessary to decide whether the burden was an evidential one or a persuasive one. However, on this aspect, Stratford JA was, it is submitted, not unequivocal. In his usual manner of deciding the issue indirectly by reference to the degree of

persuasiveness of evidence which must be led to discharge the “some burden”, Stratford JA decided that “it is not, however, in every case that the burden of proof can be discharged by giving less than complete proof...”.<sup>180</sup> Quite clearly, according to Stratford JA, the nature of the “some burden” cast upon a party by a prima facie proof of the disputed fact by the other party is defined by the degree of persuasiveness the evidence led by the first mentioned party must attain. According to Stratford JA, such evidence may amount to: “... less than complete proof on the issue...”.<sup>181</sup> Quite clearly therefore evidence to rebut the “some burden” must be complete proof of an issue although it may, in certain circumstances, be less than complete proof of an issue. It is submitted that this oblique reasoning by Stratford JA, unsatisfactory and disorganised as it is, points at the essential difference between an evidential onus and a persuasive onus. However, Rex v Jacobson and Levy, it is submitted, left the question whether prima facie proof of a disputed fact imposed an evidential burden or a persuasive one, open. Jacobsen & Levy’s case, it is submitted, cannot be accepted, as Schmidt does,<sup>182</sup> as direct authority for the proposition that a prima facie case imposes an evidential onus. To do so, is an undue extension of the authority of the case.

Rex v Abel<sup>183</sup> is another case where the meaning is disguised but from which authority can be gleaned that a prima facie provision casts no more than an evidential onus. According to Centlivres JA: “Where, however, there is other evidence... a court, in trying the accused, must take into consideration all the evidence produced and is not entitled to convict unless it is satisfied on the evidence as a whole that the Crown has discharged the onus which rests on it of proving the guilt of the accused beyond a reasonable doubt”.<sup>184</sup>

In terms of the foregoing ratio, prima facie proof of a disputed fact by the state requires the

accused only to lead such evidence as will cause the trier of fact, after considering both the evidence of the state and that of the defence as a whole, not to be satisfied that the state has proved its case beyond a reasonable doubt. The duty of the accused after the establishment of a prima facie case against him is, evidentially, to prevent a hardening of prima facie proof to proof beyond a reasonable doubt. To do so he must lead such evidence as to cause the trier of fact to be uncertain of the correctness of the facts assessed to constitute prima facie proof. He must therefore lead evidence to create a reasonable doubt in the mind of the court for a doubtful mind is not a mind that may convict because the mind must be convinced beyond a reasonable doubt. That, it is submitted, is clearly an evidential onus.

In Rex v Ismail<sup>185</sup> Shreiner JA, when dealing with a prima facie provision in a statutory enactment decided that: "But when the defence case has been closed, with or without the leading of evidence, what has to be decided is whether there is in the mind of the trier of fact any reasonable doubt...".<sup>186</sup> The court further decided that: "... prima facie proof of a sale of liquor by the accused does not place on him the burden of disproving that he sold liquor".<sup>187</sup> There has been no more explicit explanation of the onus placed on an accused by a prima facie provision and the quantum of evidence required to discharge it from the AD than that.<sup>188</sup> However, a fly was apparently introduced into the ointment by Steyn CJ in R v Chizah.<sup>189</sup> In that case the accused was charged in the native commissioner's court under section 12(1) of Act 25 of 1945 in that he, being a native who had not been born in the union or in South West Africa, had entered a proclaimed area without the necessary permission. The accused denied that he was a native and that he had not been born in the Union or in South West Africa. Evidence was called by the state of an inspector of natives who was employed by the city council of Cape Town who stated that the accused on his looks, was a native. Evidence was

also led that some documents had been found in the accused's possession one of which was a driver's licence issued in Bulawayo to Mubvumbi alias Jackson X, 14852 Makoni of 38, 7th street, Byo Location. A state witness who was himself a native, born in Southern Rhodesia also gave evidence that he knew the accused as Jackson Chiza and that the accused was a son of the witness's uncle. The accused denied most of the state's evidence, alleging that he was a coloured and that he had been born in Beaufort West and that his birth had been registered in Beaufort West. His birth certificate was, however, not produced in court. The native commissioner's court rejected the accused's version and convicted him. He appealed to the Cape Provincial Division. His appeal was dismissed and he then appealed to the appellate division.

The court decided that the birth certificate constituted an important element of the accused's case regarding his descent and place of birth,<sup>190</sup> because an onus of proof rested on him to show that the provisions of section 12(1) of Act 25 of 1945 did not apply to him. Obviously, such an onus was a persuasive one. His failure to produce his birth certificate had the consequence that he failed to rebut the onus that rested on him in terms of the definitional provisions of section 1 of Act 25 of 1945.

Quite obviously the issues presented by the case did not directly impinge on the vexed question of what standard of persuasiveness evidence led in response to prima facie proof of a disputed fact must attain in order to rebut the prima facie proof.

However, Steyn CJ, in what was an obiter dictum, also set out to discuss what would have been the effect of a birth certificate in terms of section 40(2) of Act 17 of 1923. (If the accused had

produced it at the trial). According to Steyn CJ: “Luidens art 40(2) geld ‘n behoorlik ondertekende sertifikaat in al geregeshowe as prima facie bewys van die besonderhede daarin vermeld. Dit beteken dat ‘n regtelike beampte die besonderhede as juis moet aanvaar totdat by oortuig is dat hy nie op hul kan staatmaak nie. Of so ‘n oortuiging geregverdig is, moet ahang van getuienis wat die inhoud van die sertifikaat weele of in twyfel trek”.<sup>191</sup>

One can only be “convinced” if one is persuaded. When one doubts, one is not convinced. Steyn CJ’s dictum therefore suggests that the prima facie provision in section 40(2) of the Act 17 of 1923 imposed a persuasive burden on whoever disputed the contents of a birth certificate in that the party must convince the court that the court could rely on the contents of the certificate. This is an obvious higher degree of proof than proof which simply creates a doubt. That interpretation of the duty that rests on a party as a result of prima facie provision, would as Schmidt points out, be a departure from the generally held view.<sup>192</sup>

Hoffman and Zeffertt<sup>193</sup> point out that it is doubtful that that is the interpretation Steyn CJ wished to convey. In the first place, Steyn CJ reiterated the provisionality of the acceptance of the evidence of the birth certificate to wit: “... aanvaar totdat hy oortuig is...”.<sup>194</sup> Provisionality is the one great distinguishing characteristic of the evidential burden.

Secondly, Steyn repeated the quantum test of the evidential onus, that is, “... ahang van die getuienis wat die inhoud van die sertifikaat weele of in twyfel trek”.<sup>195</sup> If evidence must create a doubt in order to rebut an onus, the onus rebutted must inevitably be evidential.

It is therefore submitted that the alleged departure of the AD in R v Chizah from its previous

authoritative dicta on the onus imposed by prima facie statutory provisions, was more apparent than real. Nothing was changed. The views of Schmidt and Hoffman and Zeffertt were unnecessarily alarmist. Moreover, it is submitted, the dictum of Steyn CJ could have been distinguished on the ground of its being obiter.<sup>196</sup>

In S v Mthiyane<sup>197</sup> the matter was put in correct perspective with Fannin J deciding that: “I... say again that proof of the facts referred to in that section amount to no more than prima facie proof of the sale of liquor by the appellant. It casts no onus of proof upon the accused...”<sup>198</sup> (my underlining).

#### 8.4.3.2.5      **The quantum of evidence necessary to discharge an evidential onus imposed by a prima facie statutory provision**

Although, as submitted in a previous paragraph, Abel’s case is not unequivocal authority, it may be gleaned therefrom that the evidential duty cast on the accused by a prima facie provision is discharged by the leading of: “... other credible evidence...”.<sup>199</sup> Such evidence, apparently, must cause the court not to be satisfied that the guilt of the accused has been proved beyond a reasonable doubt.

Rex v Ismail emphasizes the creation by the accused of a reasonable doubt in the mind of the trier of fact.<sup>200</sup> However, Ismail’s case is not, it is submitted, a strong precedent. Centlivres CJ refused to consider the meaning and import of “prima facie” on the grounds that there had been no argument on the point and on the further point that there had been no need for the state to rely on the “prima facie” provision in section 145(c) of Act 30 of 1928.<sup>201</sup> Van der Heever JA,

doubted the correctness of Schreiner JA's analysis of section 145 of Act 30 of 1928.<sup>202</sup>

The matter was therefore left open by a majority 2-1 in the Appellate Division. Schreiner JA's judgment stands unsupported in principle by Schreiner JA's colleagues. Virtually the only issue the three judges agreed on was the fact that the appeal should be dismissed. The lower courts, however, while being aware of the equivocal significance of R v Ismail as regards the meaning and effect of a "prima facie" provision, adopted, evidently ex libertatis hominis, the meaning inferred from R v Abels.<sup>203</sup>

#### 8.4.3.3.1 The "deeming" provisions

Very often the legislature premises a proviso thus "It shall be deemed...". The employment by the legislature of that formulation may have serious evidential effect for a party in a suit because the deeming provision normally relates to a prospective state of fact which may be in issue. This is so because of the effect a deeming provision may have.

#### 8.4.3.3.2 The legal meaning of "deem"

There is generally no serious dispute as to meaning of the word "deem". The dictum in Chotabhai v Union Government<sup>204</sup> that the concept: "... must be here taken in its general sense as meaning 'considered' or 'regarded...'" seems to be generally accepted.<sup>205</sup>

#### 8.4.3.3.3 The effect of a deeming provision

A deeming provision may be used by the legislature compulsorily to attribute certain qualities to certain objects or to prescribe correctness of certain states of fact. Used in this manner, a deeming provision has the effect that it denotes that “the persons or things to which it relates are to be considered to be what they really are not...”<sup>206</sup>

In those circumstances, a legal fiction is created.<sup>207</sup> The fiction so created operates in such a way that the fact finder is required to accept that a certain state of fact exists and the person against whom the mandate of acceptance by the fact finder operates is not “... toegelaat word om die objektiewe waarheid in stryd met die fiksie te bewys nie...”<sup>208</sup> Thus the party may have evidence to show that the fiction is incorrect and ought to be rejected by the court, but such party cannot lead such evidence because the deeming provision forecloses such party. The effect of the deeming provision is therefore akin to the effect of the so-called irrebuttable presumption.<sup>209</sup> The importance of this result is that where the legislature frequently resorts to the use of the deeming provisions, the evidential foreclosure referred to above operates to the prejudice of the citizen.

South Africa has frequently resorted to the deeming provision. These provisions mandate the acceptance by the court sometimes of important elements of certain statutory crimes without proof and therefore prevent the defence from disputing the existence of such elements and thus prevent the accused from winning his acquittal. An example of a deeming provision which is typical of a South African deeming provision is the one contained in section 57(3)(b) of Act 74 of 1982. In terms of section 57(1) it was an offence for anyone to convene a gathering after

such a gathering had been prohibited in terms of Section 46 of the said Act. The effect of the deeming provision in section 57(3) (b) is that if it is proved by evidence that the accused orally invited the public to assemble then it is no longer open to him to deny that he convened the gathering. Obviously “convening a gathering” is a very material element of the offence. It is possible that the accused could, as a defence, argue that his acts did not amount to convening of a gathering and could possibly lead evidence to show why his acts did not amount to convening a gathering. This course of action is denied the accused by legislative fiat. A system of criminal law that routinely resorts to this stratagem cannot be a system which respects the rights of the individual greatly because obviously it reduces the individual’s capacity to clear himself or herself.

As has been mentioned, South Africa frequently resorted to the deeming provision. The following is a list of deeming provisions which have been traced after an exhausted search through the statute book.

8.4.3.4.1      **Simple presumptive provisions** (that is, those provisions that do not link ‘presume’ with any modifying adverbial clause such as until the contrary is proved or unless the contrary is proved).

On the face of it, a presumptive provision which mandates or permits the trier of fact to “presume” that a certain state of fact (which may or may not be in dispute) is established, should not give any problem in linguistic interpretation or legal effectual interpretation. After all, “presumption” is nothing else but an abstract noun derived from the verb “presume”. Since the noun expresses the same idea as the verb from which it is derived (obviously there being

a difference in function because nouns and verbs perform different syntactical functions) it follows that the effect of either, ought in the final analysis, to be the same. The idea expressed ought to be the same. In comparable situations *mutatis mutandis*, “to presume” ought to have the linguistic value of a “presumption”.

Common-law presumptions impose an evidential burden which may be discharged by the accused by simply leading sufficient evidence to raise a doubt in the mind of the fact finder. It follows, that legislative provisions which mandate “presuming” of certain fact, must be interpreted by reference to the common law and in conformity therewith. Such provisions must be so interpreted that: “... so ver doenlik... dat sy bepalings met die bestaande reg ooreenstem, of so min moontlik daarvan afwyk. Vir ‘n verandering van die bestaande reg is ‘n duidelike bepaling of wetsduiding nodig.”<sup>210</sup> Therefore such provisions must be so interpreted as to have an identical legal effect as common law presumptions.

A question which arises is whether such provisions have been so interpreted by our courts. It is apparent that such enquiry poses fundamental questions such as: (1) is such a presumption rebuttable or not? (2) does it cast any onus on the accused? If so which onus? (3) what is the quantum of evidence that is necessary to discharge such onus?

#### 8.4.3.4.2 **Is a presumptive provision rebuttable?**

The standpoint taken in this work is that rebuttability is the distinguishing characteristic of the true presumption in South African common law. Logically statutory presumptions must as a general rule be held to be rebuttable, depending at all times on the clear intention of the

legislature as evidenced in the provision that is being interpreted by the court.<sup>211</sup> By and large this has been the approach of the court.<sup>212</sup>

It seems, however, that there may very well be a difference if the presumptive provision is couched in the passive voice that is, “it is presumed” or “it shall be presumed”. The leading case in this connection is S v De SA.<sup>213</sup>

In the De SA's case the court had to interpret the effect of the phrase “... shall be presumed to have permitted the playing of games of chance for stakes at such place”. The Cape Provincial Division had held that the presumption created by the said provision created an irrebuttable presumption against the accused. The conviction of the accused had therefore been sustained and the accused had appealed to the Appellate Division. The Appellate Division had sustained the Cape Provincial Division's finding of interpretative irrebuttability and dismissed the appeal.

It is to be noted, however, that the court emphasized that the finding of irrebutability applied to the interpretation of the phrase as it was employed in the particular statute<sup>214</sup> involved in this case. It certainly was not the intention of the court that the words were to be given the effect of irrebutability generally in whatever statute they may occur. In view of the prestige of the court, it was unlikely in the past that another court, especially a lower court, would easily deviate from the ratio of this decision when faced with the need to interpret a similar provision occurring in another statute. The decision therefore introduced an element of uncertainty in our law regarding the effect of simple presumptive provisions.

#### 8.4.3.4.3 What onus is cast by a simple presumptive provision?

Pursuant to the rule that a provision must be interpreted in conformity with the existing law, one would expect, ordinarily that the onus cast on an accused person by a presumptive provision must be an evidential one.

There is a paucity of reported cases where the onus cast by simple statutory presumptive provisions has been analysed.<sup>215</sup> However, there is little doubt that the onus cast on the accused is a persuasive one.<sup>216</sup> It is to be noted that this conclusion is drawn not from the explicit wording of the judgment referred to but from the test which is applicable when the assessment of the accused's evidence is undertaken. It is trite that the test of a balance of probabilities is the applicable test when an accused person is required to discharge a persuasive onus.

Furthermore, it is to be noted that the foregoing statement of the law relates to those cases where presumptive provisions are couched in the active voice and are held to create rebuttable presumptions.

The interpretation of simple presumptive provisions to cast a persuasive onus on the accused is to be regretted. It is trite law that a legal provision must be so interpreted: "... dat sy bepalings met die bestaande reg ooreenstem, of so min moontlik daarvan afwyk. Vir 'n verandering van die bestaande reg is 'n duidelike bepaling of wetsduiding nodig".<sup>217</sup>

The simple word "presume" is itself and by itself neutral of any burden casting nuances. The word ought therefore to be interpreted so as to have the effect of a common law presumption

that is, it ought to be interpreted so as to create a rebuttable presumption which is rebutted by the leading of evidence sufficient to create a doubt in the mind of the fact finder.

#### **8.4.3.4.4 The onus cast by passive simple presumptive provisions**

Presumptive provisions which are couched in the passive voice would appear to require different treatment. Since they create irrebuttable presumptions, the accused is foreclosed and is prevented from leading any rebutting evidence on the facts that are irrebuttably presumed. There is therefore no sense in talking about an onus cast on the accused. There is no onus because there is no possibility of rebuttal.

The simple presumptive provision, as interpreted in our law sometimes casts a persuasive onus on the accused and sometimes forecloses the accused. It is submitted that both results are aberrations in terms of the common law. The simple presumptive provision ought to cast no more than an evidential burden on the accused and what is more ought always to be rebuttable. Irrebuttability and a persuasive onus are against the basic ideology of our common law.

#### **8.4.3.4.5 The “contrary is proved” provisions**

Very often, the legislature mandates the court to regard as correct, that is to presume or deem a state of fact, unless or until the contrary is proved. In principle, one must expect that a provision which mandates a judicial officer to presume a disputed state of fact until the contrary is proved must be different in effect from one which mandates the judicial officer to presume the disputed state of fact unless the contrary is proved. By the same token a deeming provision

logically must also be so construed and what is more “presume” and “deem” are not linguistically identical.<sup>218</sup>

There must be a differential interpretation because, the negative hypothetical conjunction “unless” is quite different in effect from the time or prepositional conjunction “until”. In a sentence, “unless” has a conditional adverbial effect which modifies the foregoing predicate. Except if the condition imposed by the following adverbial clause is effectuated, the state of affairs posited by the predicate controls. While the prepositional “until” also has a modifying effect on the predicate, it, however, has a different linguistic import. Its meaning of “up to a time that” merely introduces a time scale within which the state of affairs posited by the predicate will remain extant.

It must therefore, it is submitted, be assumed that the legislature has good grounds for using the one formulation in the one statute, and the other formulation in another. It is clear that whatever formulation is adopted in a statute, somebody must prove some element which is contradictory of the element posited by the predicate.

Naturally the question of who must prove and to which degree arises. It is in an attempt to answer that question that a great many problems arise.

#### 8.4.3.5.1      **The “presumed unless the contrary is proved” provision determining meaning**

Despite an assiduous search through the law reports, it has not been possible to trace a single

decision wherein the conceptual meaning of “presumed unless the contrary is proved” has been authoritatively established. It seems that judges refrain from attempting such a thankless task. Their attitude seems to be encapsulated in the dictum of Cillie JP that: “It is difficult to interpret the final words of the sub-section, ‘... unless the contrary is proved’...”.<sup>219</sup>

It seems therefore that the judges have elected not to be drawn into conceptual and linguistic controversies since the legal import of the phrase is reasonably fixed. It is, however, submitted that the attitude is regrettable since no guidance is afforded by a reading of the law reports when one is faced with a problem of interpretation of the negative hypothetical conjunction and the prepositional conjunction when they are used in different sections, sometimes in the same Act.

It is suggested that it is wrong to interpret the phrase “unless the contrary is proved” in isolation of the rest of the passage in which it occurs. The phrase is normally adverbial and as such modifies the predicate “presume”. Its meaning must affect the meaning of the predicate and its own meaning must necessarily be affected by the predicate.

#### 8.4.3.5.2 **Legal effect of “presumed unless the contrary is proved”**

While the conceptual meaning has not been authoritatively determined, the effect of the phrase has been authoritatively laid down. According to Henochsberg J:

The term “unless the contrary is proved”, connotes an onus which is not discharged by evidence sufficient merely to raise a doubt in the mind of the court; while that high degree of proof which is basically demanded of the crown

in the requirement that it shall prove beyond a reasonable doubt is not demanded, there must however be such evidence as lends to the defence a balance of probabilities.<sup>220</sup>

A careful reading of the relevant decisions leads one to the conclusion that the courts speak of an “onus” which is cast on the accused person by the words, but the courts do not spell out in so many words whether the onus referred to is the onus of proof or the evidential onus. It is only by reference to the applicable standard of proof, that is, proof on a balance of probabilities which the courts repeatedly confirm to be the applicable standard, that one can determine the onus imposed is the true onus of proof, that is, the persuasive onus and not merely an evidential onus<sup>221</sup> for an evidential onus merely requires the accused to lead enough evidence to raise a doubt in the mind of the court.

It is to be noted that prior to the passing of the Criminal Procedure Act 51 of 1977, although the formulation “presumed unless the contrary is proved” was used extensively by the legislature, judicial comment on the meaning thereof was relatively scarce. But with the enactment of section 217 and section 219A of the said act, the meaning and/or effect of the words have received frequent attention from the court.

It is further to be noted that the courts did not set out to interpret the phrase but simply referred to previous authority that the phrase casts an onus of proof on an accused person.<sup>222</sup> The source of authority for the rule is the Appellate Division judgment in Exparte Minister of Justice - in re Rex v Jacobson & Levy.<sup>223</sup> It is worth noting that the words that required interpretation in Jacobson & Levy were “deemed... unless the contrary is proved”.

The effect of the deeming provision has been dealt with in this work. Quite clearly, it is suggested, in passing section 59(1) of Act 29 of 1926 the legislature had in mind the toughening of the law to make it difficult for an accused person to be acquitted where the accused dealt with property in such a way that there was an unlawful preference of creditors.

The legislature had not desired to achieve that end by enacting an evidential foreclosure which it could have done by enacting a simple deeming provision. The legislature had decided to strike a balance between a formula which operated in such a way that on proof of a certain jurisdictional threshold facts by the state a conviction followed automatically, and a formula which made it more difficult for the accused to secure an acquittal, but which still held out at least a possibility of an acquittal.

The legislature had therefore decided on the deeming provision coupling it with a modifying clause. Therefore instead of using the simple deeming provision, the legislature had added the qualificative negative hypothetical conjunction. The predicate "deem" was qualified and its ordinary import of foreclosure was modified to the extent that the qualificative imposed a persuasive onus of proof on the accused. The effect of such onus was that the accused was required to establish positively certain aspects of his defence and not merely to raise a doubt about the veracity of the state's case.<sup>224</sup> The purpose of the legislature was achieved by imposing a burden of proof, the satisfaction of which required a lower quantum of proof than the normal burden of proof in criminal cases. However, the very imposition of a burden of proof on the accused is, itself, gravely prejudicial to an accused person.

The phrase "unless the contrary is proved" was therefore not a word of art which had a constant,

settled meaning. It was simply a formula which was adopted by the legislature to reduce the rigour of a deeming provision. The phrase should not be interpreted in isolation to mean that it casts an onus of proof on the accused wherever it is used by the legislature in circumstances where some evidential duty is imposed on the accused.

The use by the courts and writers<sup>225</sup> of certain words and catch phrases as trigger words imposing burdens simply by their appearance in statutes is, it is submitted, an incorrect approach. All words and phrases must be interpreted in their context in each and every enactment. No word or phrase has a constant legal meaning.

It is difficult to understand why the passive phrase should be interpreted to cast an active burden on the accused. Surely “unless the contrary is proved” does not denote that any party is required to prove the contrary. It is true that the accused would, all things being equal, be the person who would be most interested in having the contrary proved. He would in ordinary circumstances strive to see that the contrary is proved. In an adversarial situation the accused can elicit evidence from his opponent’s witnesses and by means of such evidence, the contrary can be proved without the accused giving evidence or calling evidence. It is submitted that this was the intention of the legislature, that is, that if there is evidence, from whatever source, which establishes a fact contrary to a presumed fact, the presumed fact cannot stand. It is rebutted and evidentially reduced to nil. Such intention certainly is not effectuated by the adoption of an interpretation that casts an onus on the accused.

It is, however, submitted that it is correct to regard the phrase as casting a persuasive onus on an accused person only in those circumstances where the simple presumptive provision is

interpreted to have the effect of a deeming provision because its effect then is to ameliorate the drastic effect of foreclosure and to render the provision more in accord with the common law.

In those cases where the phrase modifies a simple presumptive provision which is interpreted as creating a rebuttable presumption, it is suggested that the position ought to be different. The phrase “unless the contrary is proved” is, it is suggested, neutral of burden imposing nuances. Its legal effect must therefore be determined by interpretational reference to the predicate that it modifies and to the circumstances, hermeneutical or otherwise, present and influencing meaning in each case. The attitude adopted in this research is that the word “presume” ought to create a statutory presumption the effect of which is identical to a common law presumption.

According to accepted canons of interpretation, the intention to alter the common law must be stated explicitly in the provision that is being interpreted or must be irresistibly inferred from the terms of the provision.<sup>226</sup>

It is therefore submitted that since the phrase “unless the contrary is proved” is neutral, it cannot, when coupled with the word “presume” result in a persuasive burden imposing provision, merely as a result of such coupling simpliciter. Since the court in every case is engaged in ascertaining the intention of the legislature, it may assume such a meaning, but it cannot, as a matter of generality assume such a meaning whenever the phrase is used by the legislature. Generally, it is submitted, the phrase should be interpreted in such a way that only an evidential onus is cast on the accused and not a persuasive one.

#### 8.4.3.6.1 **The “presumed until the contrary is proved” provision**

The linguistic difference between “presumed unless the contrary is proved” and “presumed until the contrary is proved” has already been referred to. Little purpose would be served by reiterating such differences here.

#### 8.4.3.6.2 **Determining the meaning of “presumed until the contrary is proved”**

This formulation is not often resorted to by the legislature. Consequently, the courts do not often get the opportunity to express themselves on the hermeneutics of the phrase. The phrase has been used in both section 32 of the Arms and Ammunition Act 28 of 1937 and section 40 of the Arms and Ammunition Act 75 of 1969 and the courts have expressed themselves on the two sections. It is therefore proposed to examine decisions pertaining to the interpretation of these sections because it seems that the courts will follow the example of such decisions when the matter comes to be decided under other statutes.

It is to be noted that first of all though the phrase “until the contrary is proved” is used in both sections the predicate it modifies under section 32 of the 1937 Act is “deem” and under section 40 of the 1969 Act the phrase modifies the predicate “presume”. Clearly therefore though the phraseology of both sections is similar, the change from “deem” to “presume” must have been deliberate and must have been intended to have some meaning or effect.

It is to be noted further, that in applying the sections the courts place emphasis on the phrase “until the contrary is proved”<sup>227</sup> and not on the compound phrase including the predicate which

it modifies. The interpretation of the phrase in a vacuum, separate from the predicate it modifies, is, it is submitted, apt to create an impression that the phrase on its own has a separate meaning, the legal effect of which is separate from the rest of the phrase in which it occurs and is liable to cause conceptual and interpretational difficulties.

On a proper reading of the judgments, however, it is clear, that the courts refrain from undertaking a textual examination of the provisions in issue. Although they pay lip service to determining the meaning of the phrase,<sup>228</sup> they nevertheless only propound the legal effect of the phrase and not the meaning thereof.

#### 8.4.3.6.3 **The legal effect of “presumed until the contrary is proved”**

It is suggested that there is some uncertainty in our law as to the legal effect of the phrase because there is a difference of opinion among the decisions. According to the majority of the decisions, the phrase casts an onus of proof, that is, a persuasive burden on the accused which can be discharged by the accused on a balance of probabilities.<sup>229</sup> There is, however, a minority view which holds that the onus cast is only evidential and may be discharged by evidence which only raises a doubt.<sup>230</sup>

#### 8.4.3.6.4 **Critical evaluation of the decisions**

In S v Ras the court was required to interpret section 147 of Ordinance 18 of 1957 where the phrase “presumed... until the contrary is proved” appeared. The court held that where the state led evidence that the road was a public road “the accused person will have to contradict that fact

if he wishes to be acquitted on the ground that the offence was not committed on a public road... There would be a slight difference in the degree of proof required. But if the section had wished only to deal with the degree of proof and not the burden of proof, it would no doubt have said so".<sup>231</sup>

It is so difficult to follow the reasoning of the court. Surely there is nothing in the section which indicates that the legislature intended to juxtapose the ordinary incidence of the onus of proof. No doubt the onus can be changed only if the legislature specifically lays that intention down or by necessary implication. Clearly therefore, the assumption that the legislature intended to juxtapose the onus of proof is untenable. The conclusion that the section did not intend to affect the degree of proof required, but the onus of proof itself, is not justified. It is suggested that S v Ras cannot be regarded as a persuasive decision regarding the effect of the "until the contrary is proved" provision.

In S v Mtshizana<sup>232</sup> the court had to decide on the effect of section 32 of Act 28 of 1937.

Relying, inter alia, on R v Schama & Abramovitch.<sup>233</sup> Wynne J decided that:

These authorities make it clear that our appellate division recognises the principles of R v Schama & Abramovich, supra, as affording the proper basis of adjudication upon the explanation tendered by the accused, and establish that there cannot validly be a conviction where the accused's explanation may reasonably be true.<sup>234</sup>

The court therefore unequivocally came to the conclusion that the onus cast was merely an

evidential one since the quantum of evidence required to entitle the accused to an acquittal was evidence which raised a doubt.

In S v Ramara the court came to the opposite conclusion, holding that the words “until the contrary is proved” cast an onus on the accused: “... to satisfy the court on a balance of probabilities that he was not the possessor of the arm”.<sup>235</sup> This conclusion was supported in S v Mhlongo.<sup>236</sup> Both decisions explicitly held that Mtshizana’s case had been wrongly decided. Hoffman and Zeffertt agree.<sup>237</sup>

It is suggested that while the judgment in Mtshizana is incorrect, the error of Mtshizana is to be preferred to the correctness of Ramara and Mhlongo both in result and in the reasoning employed to reach the result.

Mtshizana’s case is wrong because it obviously failed to follow the binding Appellate Division precedent of Ex parte Minister of Justice : In re Rex v Jacobson & Levy which was directly in point as both cases dealt with the legal import of the phrase “deemed until the contrary is proved”.

However, it is not clear from the report whether the court in Mtshizana deliberately ignored Jacobson & Levy’s case or not. There is no indication in the report that the court’s attention was drawn to the precedent. The omission, it seems, should be excused since the circumstances that gave rise to such omission do not appear from the report with sufficient clarity to persuade an interested observer that the court had flaunted precedent. The presumption that the court knows the law is a very difficult one to apply.

A second, less excusable fault is that the court appears to have interpreted a phrase which was not in issue in the case, that is “deemed ... unless the contrary is proved” whereas the phrase which had to be interpreted was “deemed ... until the contrary is proved”. However, this error seems not to have exercised the mind of the court in Ramara and Mhlongo. Criticism of the judgment, on this ground, cannot be taken too far in view of the fact that this ratio of criticism was not referred to in the opposing cases.

What is admirable in Mtshizana’s case, is the reference to most sources of authority on the subject to support the conclusion that the words that were being interpreted merely cast an evidential onus on the accused. The court went to great lengths to justify its finding.

It is submitted that such a conclusion is in accord with the basic ideology of our criminal justice system that no persuasive onus of proof is cast on the accused. It is submitted that it is always preferable for a court to err in favorem libertatis hominis.

On the other hand, the two decisions ranged against Mtshizana’s case refer to very little authority to support the conclusion reached. Ramara relies on a passage from a textbook<sup>238</sup> and Mhlongo cites no authority for the view propounded.

It is on the basis of the foregoing that it is submitted that there is a difference of opinion as to the legal effect of “deemed until the contrary is proved”. However, it is submitted that Mtshizana’s case is the more acceptable precedent and it is hoped that it will be followed in the future.

It is, however, suggested that the decisions which have been analysed are not in point in so far as the legal effect of “presumed until the contrary is proved” is concerned because they all referred to the interpretation of sections in which the phrase “deemed until the contrary is proved”, occurred and not to the interpretation of the phrase “presumed until the contrary is proved”.

A judgment which was directly in point was S v Nduku. The judgment is fully researched and is very persuasive. However, it is not above criticism, it is submitted. Firstly, Cloete J referred to R v Schama & Abramovich as the fons et origo of the interpretation of the words “in the absence of evidence to the contrary.”<sup>239</sup> Secondly, having criticised Mtshizana’s case for misapprehending the meaning of certain phrases which misapprehension had obviously led to an incorrect decision, Cloete J himself fell into the same trap. He relied on R v Jacobson & Levy<sup>240</sup> to justify his conclusion. However, that case had not involved an interpretation of the phrase Cloete J was called upon to interpret in Nduku. It is suggested that “deemed unless the contrary is proved” and “presumed until the contrary is proved” are disparate conceptual and legal entities. The meaning and legal effect attributed to them must be different. Seen in this light, Cloete J’s judgment is unsupported by authority and no reasons are advanced why Cloete J rejected the Mtshizana precedent which was in point and preferred to follow a precedent which was obviously distinguishable.

#### 8.4.3.7.1      **The “deemed unless the contrary is proved” provisions determining meaning**

As mentioned before, the conceptual meaning of “deem” is settled. However, the conceptual

import of “deemed unless the contrary is proved” does not seem to have exercised the mind of the court to any great extent. In some cases the courts seem to want to embark on the exercise but they seem to recoil from it.<sup>241</sup> The conceptual meaning thereof does therefore not seem to be settled.

#### 8.4.3.7.2 The legal effect of “deemed unless the contrary is proved”

According to Schmidt<sup>242</sup>

Daar is egter ook gevalle waar die uitleg van die bepaling aantoon dat die wetgewer bedoel het om die agbepaling die werking van ’n statutere vermoed te gee - en dit is veral wanneer hy verorden het dat A geag word B te wees ‘tensy die teendeel bewys word’.

It is correct that the decisions treat the “deemed until the contrary is proved” provision as a presumption.<sup>243</sup> It is to be noted, however, that the conclusion that the phrase creates a presumption is reached without a textual analysis of the legislation concerned. The intention of the legislature is not properly ascertained by bringing to bear on the relevant section all the applicable canons of interpretation. The phrase is simply given a legal effect which presupposes that it has a constant meaning.

This, it is suggested, is incorrect. As Schmidt indicates, a textual analysis is always required to determine the intention of the legislature for the incidence of the onus of proof is always a crucial issue in any proceeding. Therefore if there is an intention to juxtapose it, such intention

must be suitably exhibited. It is suggested that the phrase should not be interpreted to create a presumption. A presumption, in our common law always casts an evidential onus on the accused. Any provision in statute law which creates any evidential stratagem which imposes something more than the common law burden, ought not to be dignified with the appellation of “presumption” for it is nothing of the sort. Its effect is radically different from its common-law counter-part and it is clearly incorrect and a mistake to regard that quantity as equal to the common-law presumption.

It is to be noted that Schmidt refers to an intention of the legislature to give the phrase the effect of a “statutory presumption”. It is suggested that the impression created by Schmidt’s use of the phrase “statutory presumption” in tandem with the sentence: “Hierdie woorde dui onteenseglik op weelegbaarheid en op die feit dat die party wat weerlegging beoog, die bewyslas dra”<sup>244</sup> is that statutory presumptions always impose an onus of proof (that is burden of persuasion) whereas this is not always the case.<sup>245</sup> Sometimes such statutory presumption impose no more than the evidential onus.

Furthermore, Schmidt’s view as expressed in the passage quoted seems to be that the “onus to rebut” is the same as the “onus of proof”. The view which is advanced in this work is that the two are different. The onus to rebut is the evidential onus and the onus of proof is the onus to persuade. Notwithstanding such differences of interpretation of the onus, Schmidt is undeniably correct that our courts consider that the presumption created by the phrase casts an onus of proof on a balance of probabilities on the person against whom it operates.<sup>246</sup>

In view of the standpoint adopted here regarding the meaning and effect of Rex v Jacobson and

Levy,<sup>247</sup> it is suggested that the interpretation adopted by the courts does, to a degree, ameliorate the burden cast on an accused person and enhances the prospects of an acquittal. It is, however, still contended that this is not enough for it is difficult for an accused person to prove his innocence even where the onus cast is to be discharged only on a balance of probabilities. Moreover, this persuasive burden imposing interpretation of the phrase by the courts has been adopted by the courts without extensive or authoritative hermeneutical analysis of the phrase and for that reason, such interpretation is not satisfactory.

#### 8.4.3.8.1      **The “deemed until the contrary is proved” provision**

As in the case of the companion phrase “deemed unless the contrary is proved”, the courts have not embarked on a conceptual analysis of the phrase under discussion. It is suggested that no good purpose would be served by a further attempt at conceptual analysis of the phrase.

#### 8.4.3.8.2      **The legal effect of “deemed until the contrary is proved”**

Our decisions are virtually unanimous that the use of the phrase creates a presumption which imposes a persuasive onus which can only be discharged by the accused on a balance of probabilities.<sup>248</sup> It is suggested that the criticisms of the interpretation of the foregoing phrase are applicable. However, in S v Mabuya<sup>249</sup> Erasmus J seems to suggest that there are differences of opinion among the decisions as to the onus cast by the phrase. It is suggested however, that such probable conflict is more apparent than real.

The decisions quoted by Erasmus J relate to terms significantly different from the phrases under

this section.<sup>250</sup>

From the foregoing, while it is clear that the addition of the phrase under discussion to a simple deeming provision has an ameliorative evidential effect, frequent recourse to its use by the legislature will produce a legal system where the burden of proof is cast on the accused as a matter of statutory course.

#### 8.4.3.9.1      **The “absence of evidence to the contrary” provisions**

The leading case on the interpretation of this phrase is R v Epstein.<sup>251</sup> In this case the court sought to fix conceptual value to the phrase by comparing it with the phrase “absence of proof”. The elliptical phrase “in the ...” preceding “absence of proof” seems to have been assumed by the judge because if that were not so, the comparison would not have been proper as the quantities compared would have differed. According to Horwitz J the crucial difference between the two phrases was the difference between “evidence” and “proof”. According to Horwitz J:

“Generally as was contended on appellant’s behalf, evidence is the means by which the result - proof - is attained: the absence of evidence must result in the lack of proof, but the mere existence of evidence need not necessarily result in proof.”<sup>252</sup>

Evidence is therefore merely the means to establish a disputed state of affairs whereas proof is the established disputed state of affairs.

#### 8.4.3.9.2 **The legal effect of “absence of evidence to the contrary” provision**

According to Horwitz J the question to be decided in order to affix the meaning of the phrase was whether “in the absence of evidence” was synonymous with “absence of proof”.<sup>253</sup> According to Horwitz J the two phrases were not identical. The difference could be seen in their evidential effect. The effect of the phrase “absence of proof” was that it placed an onus on the accused which could not be discharged by the creation of a doubt. On the other hand “in the absence of evidence to the contrary” means that “... what is required of an accused person is something less than proof even by a preponderance of probability...”<sup>254</sup> The test applied is whether a reasonable doubt is created by the evidence of the accused.

It is therefore clear that the effect of the phrase according to Epstein’s case is identical to the effect of a common law presumption. This, it is suggested, is a welcome departure from the tendency to interpret so-called statutory presumptions so as to cast a persuasive burden on the accused.

#### 8.4.3.10.1 **The “unless and until the contrary is proved” provision**

It has been suggested that “unless” and “until” are disparate linguistic entities and that their legal effect is different.<sup>255</sup> Their effect when they are used in tandem with the trigger concepts of “presume” and “deem” has been analysed and it is clear that it is not possible to fix the meaning to be attributed to the compound concepts because the courts, which are the authoritative interpreters of legal texts, avoid textual hermeneutics. The problem is compounded by the fact that the phrase in question is very rare. In fact the legislation in which

it was traced has already been repealed and no decision could be traced where the phrase was analysed as used in those statutes.<sup>256</sup> It is suggested that the use of the co-ordinative conjunction “and” introduces an element of ambiguity in the meaning of the compound phrase because it seems to equate the hermeneutical value of the negative hypothetical conjunction with the hermeneutical value of the prepositional conjunction.<sup>257</sup> The suspensive conditional grammatical effect of the former surely is different from the resolute grammatical effect of the latter. However, if the phrase is to be interpreted literally, both suspensive and resolute effect must be attributed to the presumption created. Since the linguistic effect of the conjunctively coupled clauses is different, it follows that the coupling obfuscates conceptual clarity.

#### **8.4.3.10.2 The legal effect of the “unless and until the contrary is proved” provision**

It is suggested that the phrase does not have an effect which is different from the effect attributed to the various linguistic formulations that is, “deem unless the contrary is proved”, “presume unless the contrary is proved”. All that happens is that in one sentence, two successive persuasive burdens are imposed instead of the normal one.

#### **8.4.4 The accused’s presumptive onus to prove his defence beyond a reasonable doubt**

The general rule of the onus of proof has been often emphasized in this work. It has been shown that South African law and English law are slow to impose an onus of proof on the accused. Even when such an onus is held to be imposed legislatively, the onus may be discharged quantitatively on the very slight balance of probabilities scale. American law would

not countenance an onus of proof placed on an accused. American law would be horrified at an onus cast on the accused to prove any fact necessary for his defence beyond a reasonable doubt. While British law countenances an onus of proof placed on an accused, British law would be equally horrified at an onus cast on an accused to prove any fact beyond a reasonable doubt. Such an evidential requirement is considered to be the prerogative of the state.

The position in South African law was before 1966 generally analogous to the British position. However, in 1966 and 1967 the South African legislature passed certain laws which radically altered the position with regard to certain so-called political crimes. Section 3 of Act 62 of 1966 inserted section 12(1) *ter* into the Internal Security Act of 1950.<sup>258</sup> In terms of section 12(1) *ter* in any prosecution of any person for having committed an offence under section 11(b) *ter* of Act 44 of 1950, if it was proved that the accused had left the Republic in contravention of any provision of Act 34 of 1955, it would be presumed until the contrary was proved beyond a reasonable doubt that such accused had undergone or attempted, consented to or taken such steps to undergo proscribed training.

Section 3 of Act 24 of 1967 inserted section 12(3A) into Act 44 of 1950. In terms of section 12(3A) in any prosecution under section 11(I) of Act 44 of 1950, it was proved that the accused communicated with a "banned" person, it would be presumed that the accused had communicated with such banned person unless the contrary was proved beyond a reasonable doubt.

However, the real kingpin of the radical political criminalization provisions was section 2 of the Terrorism Act 83 of 1967. Section 2(1) created the offence of terrorism.<sup>259</sup> It was, however,

section 2(2) which raised the ire of procedural jurists.<sup>260</sup> What outraged jurists was not merely the fact that the substantive criminalising provisions were vague so that the citizen would be hard pressed to understand them,<sup>261</sup> but also the fact that an onus was placed on the citizen to prove beyond a reasonable doubt the lack of intent to commit terrorism if an ostensibly innocent act was proved against him.

#### **8.4.5 The approach of the Supreme Court**

The courts' approach was to recognise that the presumptive provisions of section 2(2) of the Terrorism Act constituted a radical alteration of the general rule of proof tendering<sup>262</sup> but nevertheless to regard the overall problem as one of interpretation of the statute. One searches in vain in the judgments for disapproval of such a radical departure from settled judicial doctrine. Although the courts tried to limit the wide scope of the substantive criminalising provisions,<sup>263</sup> the courts made no attempt to restrict the ambit of the evidential provisions of section 2(2).

#### **8.4.6 The demise of the presumptive provision in section 2 of the Terrorism Act**

Mercifully wise counsel prevailed in the corridors of power. Fifteen years after the offending provisions were enacted, the Internal Security Act<sup>264</sup> and the Terrorism Act<sup>265</sup> were repealed in toto except for a few formal matters, by Act 74 of 1982. The offending evidential provisions were re-enacted in substantially altered form in section 69 of Act 74 of 1982. It is significant that all presumptions in section 69 operate unless or until the contrary is proved. No mention is made of the accused having to prove any matter beyond a reasonable doubt.

#### 8.4.7 The effect of the Constitution

Section 35(3) (h) and (j) of the Constitution provides that everyone has a right to a fair trial which includes, *inter alia*, the right to be presumed innocent, to remain silent, and not to testify during the proceedings and not to be compelled to give self-incriminating evidence.

There is no doubt that the provisions of this section are in conflict with the presumption which shifts the onus of proof to the accused. There are already decided cases on this issue which were decided in terms of a similar provision in the interim Constitution. The leading case is that of S v Zuma and Others.<sup>266</sup> In this case the accused were charged with murder and robbery. At the trial, they pleaded not guilty, but they had each made a confession to a magistrate. They claimed that their confessions had not been made freely and voluntarily because they had been assaulted and threatened by policemen. The police on the other hand denied this. The accused, however, could not prove that they had not made their confessions freely and voluntarily. The case was referred to the Constitutional Court.

The court had to consider the validity or constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act<sup>267</sup> which stipulated that if a confession had been made to a magistrate and reduced to writing by him, or had been confirmed and reduced to writing in the presence of a magistrate, the confession would be presumed to have been made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto, unless the contrary was proved. This is called the reverse onus.

In considering the constitutionality of this proviso, Kentridge A J had to have recourse to

American and Canadian case law. He had to interpret these in the light of the provisions of section 25 of the interim Constitution of 1993 which was similar to the provisions of section 35 referred to above. He also had to consider the effect of the limitation clause in section 33 of the interim Constitution. It will not be necessary to refer to the American cases on the point because they have already been referred to above.

The judge considered the effect of the “rational connection” test which has been referred to in the Canadian courts in interpreting their Charter of Rights. The judge found the Canadian case law on the reverse onus provisions to be more helpful not because of their persuasive reasoning, but also because section 1 of the Charter has a limitation clause which is analogous to section 33 of the interim Constitution. This called for a two-stage approach, namely, whether there had been a violation of the guaranteed right and if so whether this was justified under the limitation clause. The single-stage approach of the US Constitution, the judge held, may require a more flexible approach to the construction of the fundamental rights whereas the two-stage approach may require a broader interpretation of the fundamental rights, qualified only at the second stage.

Among the Canadian cases Kentridge A J referred to R v Oakes<sup>268</sup> where the Supreme Court of Canada had to consider an Act of Parliament which provided that if a person was proved to be in unlawful possession of a narcotic he was presumed to be in possession of it for the purposes of trafficking unless he proved on the balance of probabilities the contrary. The presumption was held to be in conflict with the presumption of innocence guaranteed by section 11(d), of the Canadian Charter of Rights and Freedoms. In this regard Dickson C J C had to say that the presumption of innocence is aimed at protecting the fundamental liberty and human

dignity of any person accused by the state of criminal conduct. This was so because an individual charged with a criminal offence faced grave social and personal consequences such as potential loss of physical liberty, subjection to social stigma and ostracism from the community, and other social, psychological and economic harms. Owing to the gravity of these consequences, the presumption of innocence was regarded as being crucial as it ensured that until the state had proved the accused's guilt beyond all reasonable doubt, he or she is innocent. This was indispensable in a society committed to fairness and social justice.

If, on the other hand, the accused bore the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for him to be convicted in spite of the existence of a reasonable doubt. This would be the case if the accused led adequate evidence to raise a reasonable doubt on his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue. He held further that the "rational connection" test, although useful at the stage when the state sought to justify an infringement of a guaranteed right in terms of section 1 of the Charter, was not in itself an adequate protection for the constitutional presumption of innocence. This is so because although a basic fact may rationally tend to prove a presumed fact, it might not prove its existence beyond a reasonable doubt which could lead to an accused being convicted despite the presence of a reasonable doubt. This would in effect violate the presumption of innocence.

Another Canadian case to which Kentridge A J referred is R v Whyte<sup>269</sup> which related to a statute which created the offence of having care or control of a motor vehicle while one's ability to drive was affected by alcohol. In terms of this statute if it was proved that the accused occupied the driver's seat he was deemed to have the care and control of the vehicle unless he

proved that he did not enter the vehicle with the purpose of setting it in motion. This presumption was also held to violate the right of the presumption of innocence. The Supreme Court held that it was irrelevant that the presumption did not relate to an essential element in the offence. In the words of Dickson C J C:

“In the case at bar, the Attorney-General of Canada argued that since the intention to set the vehicle in motion is not an element of the offence, s237(1)(a) does not infringe the presumption of innocence. Counsel relied on the passage from Oakes where the accused was required to disprove an element of the offence.

The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the s11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.

The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused”.<sup>270</sup>

A further Canadian case that Kentridge A J referred to is that of R v Downey.<sup>271</sup> In this case the Canadian Supreme Court dealt with a statutory presumption that a person who lives with or is habitually in the company of prostitutes, is, in the absence of evidence to the contrary, committing an offence of “living on the avails (i.e. proceeds of another’s prostitution)”. This presumption was also held to violate the presumption of innocence, although it was held by a majority to be in all the circumstances a justified infringement. Cory J summarised the principles extracted from the authorities in seven propositions of which Kentridge A J quoted the first three:

- “I. The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.
  
- II. If by the provision of a statutory presumption, an accused is required to establish that is to say to prove or disprove, on a balance of probabilities, either an element of an offence or an excuse, then it contravenes s11(d). Such a provision would permit a conviction in spite of a reasonable doubt.
  
- III Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of an offence”.<sup>272</sup>

Kentridge A J further traced the development of the common-law rule placing the onus of proving the voluntariness of a confession on the prosecution from English legal history. This developed over three hundred years and was a reaction to the oppressive way in which

confessions were extracted by the court of the Star Chamber in the seventeenth century. Concomitant with this developed the privilege against self-incrimination and the right to silence. This ultimately found its way into South African law. After this survey Kentridge A J came to the conclusion that the common-law rule in regard to the burden of proving that a confession was voluntary was not a fortuitous one, but “an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey’s ‘golden thread’ - that is for the prosecution to prove the guilt of the accused beyond reasonable doubt (Woolmington’s case, supra). Reverse the burden of proof and all these rights are seriously compromised and undermined”. For this reason, the judge regarded the common-law rule on the burden of proof as being inherent in the rights mentioned in section 25(2) and (3)(c) and (d), and as forming part of the right to a fair trial. He further regarded this interpretation as promoting the values which underlie an open and democratic society and as being entirely consistent with the language of section 25. Consequently he declared section 217(1)(b)(ii) of the Criminal Procedure Act to be in violation of the provisions of the Constitution.

In coming to this conclusion the judge was quick to add that in this judgment he did not consider the meaning and scope of the right to silence during trial. He regarded it as unnecessary to consider whether section 217(1)(b)(ii) violates that right.

The judge further considered whether if the proviso in question violated the fundamental rights, it was not saved by section 33(1) of the interim Constitution. The judge was not prepared to regard the presumption as being saved by the limitation clause. He felt that rights interfered

with were fundamental to our concepts of justice and forensic fairness and have existed in our country for more than 150 years. A harsh result of the application of section 217(1)(b)(iii) is the possibility that an accused could be convicted despite the reasonable doubt of the court. The judge found no justification for this especially because it had not been shown that it is in practice impossible or unduly burdensome for the state to discharge its onus. On the contrary, this had been successfully done in a number of trials under the common-law rule. The reverse onus, according to the judge, could be attributed to the Botha Commission into criminal procedure and evidence.<sup>273</sup> According to this report the reverse onus was aimed at shortening or eliminating the extent of trials within a trial and at preventing accused who had made confessions freely and voluntarily from denying those confessions because of the influence of others. Kentridge A J did not regard these as sufficient justification for departing from the well-established common-law rule, and the consequent infringement of the fundamental rights in question. For this reason he concluded that section 217(1)(b)(iii) does not comply with the criteria laid down in section 33(1) of the interim Constitution. On the contrary it was in conflict with the Constitution.

In the case of Scagell and Others v Attorney-General Western Cape and Others<sup>274</sup> Mr Scagell and others were charged under section 6(1) of the Gambling Act 51 of 1965. This section, inter alia, stipulated that it is an offence to allow unlicensed gambling. The section also created a number of presumptions. Section 6(3) stipulated that if gambling equipment was found at a place, this would be evidence that the person in charge of the place allowed gambling there. Section 6(4) provided that if a policeman was prevented from going into a place, it would be presumed that the person in charge of the place permitted gambling to take place there. Section 6(5) stated that if the prosecution proved that there was gambling, it would be presumed that

the gambling game was played for stakes. In terms of section 6(6) anyone acting as a “porter, doorkeeper or servant” at a place where gambling took place would be deemed to be in control or in charge of such place.

Mr Scagell contended that these sections in the Gambling Act were unconstitutional because they assumed that the accused were guilty before the trial commenced. They consequently contended that the sections infringed the right to a fair trial, and especially the right to be presumed innocent and to remain silent.

O’Regan J decided that sections 6(3) and 6(4) of the Gambling Act were unconstitutional because they violated the right to a fair trial and the right to be presumed innocent. She said that section 6(4) infringed section 25(3) of the interim Constitution because instead of being presumed innocent, accused persons were presumed guilty. This implied that the prosecution did not have to prove that the accused allowed gambling, but the accused would have to prove that they had not permitted gambling. This had previously been found to be unconstitutional.

In the opinion of the judge section 6(3) did not presume that the accused was guilty, but it placed an evidential burden on the accused. It implied that the accused would have to give evidence to the court that they had not been gambling. O’Regan J found this to be in violation of the right to a fair trial. It meant a completely innocent person could be compelled to defend himself in court just because he had a pack of cards. Defending oneself in court, could be an inconvenience, expensive and bad for one’s reputation even if one is innocent.

The state argued that illegal gambling is bad for society. It, however, did not adduce any

evidence to prove that these sections of the Gambling Act were really needed by the police or the prosecution to investigate and to prosecute illegal gambling. For this reason O'Regan J concluded that it was not reasonable, justifiable or necessary in terms of the limitation clause, section 33 of the interim Constitution.

In the cases of S v Bhulwana; S v Gwadiso<sup>275</sup> the two cases were joined to come to the Constitutional Court. In both cases the accused were found guilty of possession. They were also found guilty of dealing although it was not proved. This was as a result of the application of the presumption that if a person has more than 115g of dagga in his possession, he can be presumed to be dealing.

Mr Bhulwana had been found with nearly a kilogram of dagga in his possession. He was convicted of dealing in dagga. On appeal the judge found that he would not have been found guilty of dealing had it not been for the presumption that he was dealing. In the case of Gwadiso, Gwadiso had been found with nearly half a kilogram of dagga. He was also found guilty of dealing. On appeal, the judge concluded that Mr Gwadiso would also not have been found guilty of dealing, if it were not for the presumption.

The presumption was contained in section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992 which stipulated that if a person was found in possession of more than 115 grams of dagga it would be presumed, unless the contrary was proved, that he was dealing in dagga and not merely in possession of it. This provision would be in conflict with section 25(3) of the 1993 Constitution which provided that every person had a right to a fair trial, which included the right to be presumed innocent and to remain silent during the trial.

O'Regan who gave the decision of the court, decided that the presumption in section 21(1)(a)(i) of the Drugs and Drug Trafficking Act was unconstitutional because it violated the accused's right to be presumed innocent. In coming to this conclusion the judge considered a number of factors. The judge felt that if the state wanted a situation where the accused must prove his innocence, the state must give good reasons.

The reasons which were advanced by the state in support of the presumption were, *inter alia*, that it is extremely important for the government to control the illegal drug trade; that a person who is found guilty of dealing can receive a heavier sentence than someone found guilty of possession only; and that the presumption facilitates the courts' conviction of people of drug dealing.

While O'Regan J conceded that illegal drugs posed a serious problem in society, she could not see how the presumption contributed to the solution of the problem. She pointed out that the maximum sentence for dealing is 25 years whereas for possession is 15 years. Fifteen years was *in the opinion of the judge, already a severe sentence, and it was unlikely that judges would sentence people to longer than 15 years where the presumption was used.* She also disagreed that the presumption assisted in obtaining convictions that the state could not otherwise get. A person first had to be convicted of possession before he could be convicted of dealing. For a person to be convicted of possession, the state has to prove it. Possession cannot be presumed.

For this reason the judge held that it is not logical to say that the presumption is necessary to convict drug offenders. While it might be necessary to secure a conviction for the more serious

offence of dealing, that is not sufficient to justify the violation of section 25. She also said that it was not logical to presume that a person found in possession of 115g of dagga is likely to be dealing in dagga. The quantity of 115 grams is an arbitrary figure and there is no reason why if a person is found with 115g should be considered a dealer, but not a person with 90g.

A similar decision was reached in a short judgment in S v Julies<sup>276</sup> where Mr Julies was caught with three mandrax tablets and was found guilty of both possession and dealing because of the presumption found in section 21(1)(a)(iii) of the Drugs and Drug Trafficking Act 140 of 1992 which provided that where a person was found in possession of an undesirable dependence-forming substance, it would be presumed that he was dealing in the substance. In the Constitutional Court it was argued that section 21(1)(a)(iii) was unconstitutional because it was in conflict with section 25(3)(c) of the 1993 Constitution which gave the accused the right to be presumed innocent and to remain silent during his trial. As the law compelled a person to prove that he was not dealing, that person's right to be presumed innocent and to remain silent was infringed.

Kriegler J concurred with the cases of Bhulwane and Gwadiso. He said that it makes no sense to assume that a person who is in possession of a drug, no matter how small the quantity, is assumed to be dealing in that drug.

In the case of S v Menissa<sup>277</sup> the accused had been charged in the magistrate's court with a contravention of section 5(b) of Act 140 of 1992 for dealing in 33 mandrax tablets, an undesirable dependence-producing substance, and alternatively for a contravention of section 4(b) of the Act for being in possession of the tablets. The magistrate found him guilty of

dealing because he mistakenly believed that the presumption contained in section 21(1)(a)(iii) of Act 140 of 1992 was still in the statute book. On review the court found this reliance to be misplaced as the section had previously been found by the Constitutional Court in the Julies case to be unconstitutional as being in conflict with section 25(3) (c) of the 1993 Constitution.

## 8.5 Conclusion

In the area of presumptions, it is clear that American law is decidedly hostile to presumptions. The constitutional mandate is incompatible with the use of presumptions. However, even in American law, the reality of evidential necessity is acknowledged and thus presumptions are accepted but only under the most stringent conditions. In American law, however, presumptions whether common-law presumptions or statutory law presumptions can never impose anything more than the evidential onus. American law therefore adheres very closely to the basic ideology of the criminal law of western jurisdictions that the accused is innocent until proven guilty and that the state, being the initiator of the inconvenience of the criminal process, must effectuate the criminal process by demonstrating the guilt of the accused.

English common law is not as hostile to presumptions as American law. However, the English common law is identical to American law because the onus cast by a presumption is evidential only. Statutory presumptions are, however, a different kettle of fish because English law recognises the authority of Parliament to impose a persuasive burden on the accused. The courts seem to be overzealous in approving and applying persuasive burden imposing statutory presumptions. This is a significant departure from the common law ideology already adverted to.

South African law has followed English common law so far as common law presumptions are concerned save that South African law admits one more exception to the general rule than English law. In the sphere of statutory presumptions South African law in the past also followed the English legal tradition of parliamentary supremacy. Statutory presumptions were created with gusto by Parliament and other subsidiary legislative organs. Statutory presumptions were interpreted so as to cast persuasive onera on the accused.

Because of the great number of statutory presumptions and their effect one often feels that the basic ideology of South African criminal law was turned around and that more often than not the accused had to establish his innocence in order to escape punishment.

The proof beyond a reasonable doubt presumptive provision operative against an accused person seems to have been an over-reaction of the security establishment to threatening political phenomena. As soon as the security establishment felt confident of its ability to manage the threatening phenomena, it jettisoned the infamous provisions which had damaged the reputation of South African law. It is submitted that over a period of about fifteen years, South Africa returned to the fold of the western tradition to the extent that it did away with provisions which seemed to call upon an accused person to prove his innocence beyond a reasonable doubt. This was taken a step further when a number of presumptions which shifted the onus to the accused were declared unconstitutional as being in conflict with section 25(3)(c) of the interim Constitution in that they violated the accused's right to be presumed innocent and to remain silent. This has effectively reverted the situation to where the state has to prove the guilt of the accused beyond a reasonable doubt.

FOOTNOTES

1. "There is no agreement among legal writers as to exactly what a presumption is or how it operates"; Ashford and Risinger 165; Kadisch et al 84-85.
2. Murphy A Practical Approach to Evidence (1980) 35; Heydon, Evidence (1984) 43; Tapper, Cross & Wilkins, Outline of the Law of Evidence 6 ed (1986) 39; Tapper & Cross, Cross on Evidence 131-132.
3. Morgan Evidence (1961) 15.
4. Ashford & Risinger "Presumptions, Assumptions and Due Process in Criminal Cases: A Theoretical Overview" 79 Yale Law Journal 165 208.
5. Donigan et al Evidence Handbook (1975) 22; Bewley "The Unconstitutionality of Statutory Criminal Presumptions" 1970 Stanford Law Review 341.
6. Kadish et al 85; Nesson "Reasonable Doubt and Permissive Inferences: The Value of Complexity" 1979 Harvard Law Review 1187.
7. "Indeed presumptions have defied most attempts to classify them coherently" Murphy 34.11.
8. Bewley 343.
9. Mosher, calls a conclusive presumption irrebuttable and incorrectly equates mandatory presumptions with conclusive presumptions; see Mosher "Statutory Criminal Presumptions: Reconciling the Practical with the Sacrosanct" UCLA Law Review 157 158 no. 6.
10. Kadish et al 86.
11. The stand taken in this work is that it is inelegant, incorrect and confusing to speak of burdens in the law of evidence but that since the nomenclature has become firmly established, for the sake of being comprehended, one must conform to its usage.

12. Underwood "The Thumb on the Scales of Justice : Burdens of Persuasion in Criminal Cases" 86 Yale Law Journal 1299; see also Tot v US 319 US 463 467 (1942).
13. per Brennan J, for the court in Spencer v Randall 357 US 513 523.
14. Insofar as constitutional limitations to the power of the legislature to formulate rules of evidence are conceded, this represents a restriction on Wigmore's view that such powers are unlimited; see Wigmore Treatise on the Anglo American System of Evidence in Trials at Common Law, 3ed 724-725.
15. Mosher 157 164.
16. As Kadish et al op. cit. 87 point out, a presumption which relates to the accused's state of mind creates an irresistible pressure on the accused to testify as evidence of the accused's state of mind is unlikely to be available from any other source other than the accused himself.
17. Kadish et al 87.
18. 219 US 35 (1910).
19. Turnipseed 43.
20. "If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases..." Turnipseed 43.
21. 268 US 168 (1925).
22. Mosher 163.
23. 319 US 463.
24. idem 467.
25. idem 473.
26. idem 473.
27. 380 US 63 (1964).

28. idem 64.
29. 395 US 6 (1969).
30. Leary's case 12. Morgan, Some Problems of Proof 76-77 therefore avers that: "Where a presumption comes into operation during the course of the trial, its effect is always at least to fix the burden of evidence upon the party who is denying the existence of the presumed fact".
31. Leary's case 36.
32. 396 US 398 (1970).
33. 442 US 140 (1979).
34. Cooley A Treatise on the Constitutional Limitations 28.
35. Bewley 343-344.
36. Donigan & Fisher The Evidence Handbook (.....)
37. see Heydon: Evidence 43-45.
38. Morgan, E M Presumptions (1937) 12 Washington Law Review and State Bar Journal 253.
39. Cross & Tapper 132.
40. Murphy 35.
41. see also Nokes 64.
42. Nokes 65.
43. Nokes 65.
44. Cross & Tapper 132-133.
45. Cross & Tapper 133-134.
46. Cross & Tapper, 135.
47. Buzzard 64.

48. May 60-61.
49. Nokes 492.
50. Cross & Tapper, 140.
51. Cross & Tapper, 140.
52. (1914) 11 CAR 45.
53. *idem* 49.
54. 1963 AC 486.
55. Phipson 54.
56. *Id* 418-419.
57. Tapper, Cross and Wilkins Outline of the Law of Evidence 43.
58. Mizel and Warren (1973) WLR 899 904.
59. R v John (1974) 2 ALL ER 561 565.
60. See Phipson *op. cit.* 51-52; May *op. cit.* 49; R v Warner (1969) 2 AC 280 A 302 B.
61. Williams, G (1977) NLJ 156.
62. (1943) KB 607.
63. *id.* 610.
64. Sodeman v R (1936) ALL ER 1138.
65. *id.* 612.
66. Islington London Borough Council v Panico (1973) WLR 1166-1168.
67. Cross & Tapper 111.
68. (1935) AC 462, (1935) ALL ER 1.
69. Phipson 53.
70. Williams, G (1977) 127 NLJ 156 158. Glanville Williams is fully aware of the policy considerations. See The Proof of Guilt 185.

71. Dean "Negative Averments and the Burden of Proof" (1966) Crim. LR 594.
72. id. 597.
73. Phipson 53.
74. Phipson 53.
75. Cross & Tapper 111.
76. R v John (1974) 2 ALL ER 561.
77. idem 566 A-J.
78. 371-372.
79. Schmidt THRHR 1963 269.
80. Schmidt Bewysreg 2ed 145.
81. 915-920.
82. idem 915.
83. idem 919.
84. 3rd edition 414.
85. 414.
86. see LAWSA Vol. 9 321.
87. Schmidt 6-7 and 7 footnote 6.
88. 417.
89. 415.
90. 416-417; Rex v Fourie, 1937 AD 31, 42, 44; S v De Bruyn, 1968 (4) SA 498 (A) 507,  
S v Snyman 1968 (2) SA 582 (A) 589, S v Sigwahla 1967 (4) SA 566 (A) 569 H,  
R v Sacco 1958 (2) SA 349 (N).
91. 416-417.

92. 417.
93. 414.
94. 106.
95. 106 “It is, however, preferable to use the term ‘presumption’ only for presumptions of law”.
96. *ibid.*
97. Schmidt, 1982 147.
98. LAWSA Vol. 9 321.
99. LAWSA Vol. 9 321.
100. Schmidt 1982 147.
101. Hoffman & Zeffertt (1981) 414-419, Schmidt (1982) 145-185, Lansdown & Campbell 915-920.
102. Hoffman & Zeffertt (1981) 414, See R v Michelson 1939 AD 10 14-15.
103. S v De SA 1982 (3) SA 952 (AD).
104. Hoffman & Zeffertt, (1982) 419.
105. Hoffman & Zeffertt, 419.
106. Hoffman & Zeffertt, 418.
107. Hoffman & Zeffertt, 385-386.
108. Hoffman & Zeffertt, 418.
109. Schmidt 2ed 56.
110. LAWSA vol. 9 338.
111. Evidence 418-419.
112. Hoffman & Zeffertt (1982) 418, 424.
113. Hoffman & Zeffertt 386.

114. Hoffman & Zeffertt 425.
115. R v van der Merwe 1952 (1) SA 647; R v Isaacs 1954 (1) SA 266.
116. Van der Merwe's case.
117. South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) 534 (A) 548 B.
118. 1954 (1) SA 266 270 A-B.
119. Hoffman & Zeffertt 386; South Cape Corporation Case 548 A.
120. South Cape Corporation case 546 C-D; Schmidt 57.
121. R v Pie 1948 (3) SA 1117(O); S v Swart 1965(3) SA 454 (A); Holloway v Stander 1969(3) SA 291(A) although this was a civil case.
122. 1935 AD 325.
123. MacDonald's case 350.
124. idem 335.
125. R v Swanepoel 1954 (1) SA 31 38 F.
126. MacDonald's case 335.
127. 1945 AD 369.
128. R v Ndlovu 386.
129. 1948 (3) SA 1117 (O).
130. S v Jeggels 1962(3) SA 704 706 F-G.
131. "Die bewyslas om die presumpsie van vaderskap te onsenu rus op die beskuldige" 1118.
132. 1954(4) SA 31.
133. 36 A-B.
134. 39 E.
135. 41 E.

136. 1962 (3) SA 704.
137. 706 D.
138. C v R 1956 (1) PHH4, S v Sambo 1962 (2) SA 93 (E), Quata v S 1964 (1) PHH 100.
139. 1965 (3) SA 454 (A).
140. 460 C-D.
141. I find support for this view in Jean Davids : Strict Liability in Paternity Cases? (1965) 82 SALJ 448 449.
142. R v Ndlovu 1945 AD 386-387. The matter has seemingly been settled by legislation. Section 1 of Act 82 of 1927 casts an onus on the man who admits intercourse. The onus, however, seems to be an evidential one. However, since the relevant phrases are capable of being interpreted to cast a persuasive onus on the man it is suggested that the common law remains unchanged.
143. Lawsa vol. 9 571 338, R v Von Zell 1953 (3) SA 303 (A) 310-311, Exparte Minister of Justice in Rex v Bolon 1941 AD 360-361, Schmidt Bewysreg 88.
144. Van der Merwe et al Evidence 426-427.
145. Hoffman & Zeffertt 402.
146. Rex v M 1946 AD 1023 1027.
147. Rex v Difford 1937 AD 370 373.
148. Hoffman & Zeffertt 402.
149. Hoffman & Zeffertt 402, Van der Merwe et al 380.
150. Hoffman & Zeffertt 440, S v De SA 1982 (3) SA 941 948 B-C.
151. Hoffman & Zeffertt 440, Van der Merwe et al 373.
152. S v Mpetha & Others 1982 (2) SA 406 408 B-C.
153. Hoffman & Zeffertt 440.

154. See addendum for some of the legislative provisions that contain this formulation.
155. Schmidt 95.
156. Schmidt 95; van der Merwe et al half heartedly suggest that the practice is wrong 33.
157. R v V 1958 (3) SA 474 (GW) 479 B-F, S v Nzuza 1963 (3) SA 361 (A) 634 G, S v Mohgelede 1968 (4) SA 335 (A) 337 H, R v Epstein 1951 (1) SA 278 (O) 284 B-C.
158. Ferreira (1979) 419, R v Epstein 284 B.
159. According to Ferreira (1979) 419, proof "... die doel is wat nagestreef word".
160. Hoffman & Zeffertt 441.
161. Schmidt 95, "The term prima facie case means that the party who had first adduced evidence has lead enough evidence upon which a reasonable man might find for him..."  
(My underlining) van der Merwe et al 429.
162. Schmidt 95; see also van der Merwe et al 386.
163. id 468.
164. id 468.
165. id 468.
166. 1931 AD 466.
167. Jacobson & Levy's case 469.
168. id 473.
169. id 473.
170. id 473.
171. id 478.
172. id 478.
173. id 478.
174. id 478-479.

175. Rex v Koen 1937 AD 211 213, Salmonas v Jacob 1939 AD 588 593, W v W 1976 (2) SA 308 (T) 315.
176. Rex v Abel, 1948 (1) SA 654 (A) 661.
177. Engelbrecht J - Bewyslas en Maatstawe June 1998 De Rebus 385.
178. Engelbrecht 388.
179. id 479.
180. id 479.
181. id 479.
182. 1948 (1) SA 654 (A).
183. R v Abel 661.
184. R v Abel 663.
185. 1952 (1) SA 204 (A) 209
186. 209 A.
187. 208 H.
188. see R v Jones 1956 (3) SA 208 (GWLD) 210 D-G.
189. 1960 (1) SA 435 (A); see Schmidt 69; Hoffman & Zeffertt 441-442.
190. 442 A.
191. 442 E-F.
192. Schmidt 69.
193. 442.
194. 442.
195. Chizah's case 442 F; see also Hoffman & Zeffertt 441.
196. S v Mthiyane 1969 (1) SA 243 (N), see also S v Matsaneng 1966 (1) SA 46 (OPD) 50 A-B; R v Jones 1956 (3) SA 208 (GWLD) 210 C-E.

197. 1969 (1) SA 243 (N).
198. 247 A.
199. 661.
200. 1952 (1) SA 204 (A) 209 A, 209 G.
201. 206 H.
202. 211 C-E.
203. see R v Jones 1956 (3) SA 208 (GWLD) 210 F-G.
204. 1911 AD 13.
205. S v Voigt 1965(2) SA 749 752G; Buren Uitgewers v Raad van Beheer oor Publikasies 1975 (1) SA 379 382 F.
206. Chotabhai 13.
207. Schmidt 68 n 6; R v van der Merwe 1960 (1) SA 565 568 A; although Vermooten A J remarks that "... every case of Legislature deeming must be dealt with in terms of the particular statute in which it occurs" S v Posel 488 D.
208. Schmidt 68 n 6.
209. Buren Uitgewers v Raad van Beheer oor Publikasies 1975 (1) SA 379 382 E; Law of SA 9 339; S v Posel 1977 (4) SA 476 489 A.
210. Steyn Die Uitleg van Wette 5ed (1981) 97.
211. "The most evident of these is that where the legislature, as in para (3), wished to prescribe that a state of affairs prevailing at a particular point of time must be regarded as irrebuttable in determining how a person is accepted it did so in clear and unequivocal terms. I have little doubt that had the legislature entertained a similar intention in regard to the presumption created in para (d) it would have expressed such intention in equally clear terms". Pitcher & Others v Secretary for the Interior 1968 (4)

- SA 238, 244 A.
212. R v Moore 1960 (4) SA 304 306 D; S v Mthiyane 1969 (1) SA 243 246 D-E.
213. 1982 (3) SA 941 (A).
214. *idem* 952 B-C.
215. R v Moore 1960 (4) SA 304 306 B-C.
216. S v Mthiyane 1969 (1) 243 246 E.
217. Uitleg vir Wette 97-99; see also footnote 105 at p.98; see also Stadsraad van Pretoria v Van Wyk 1973 (2) SA 779 (A) 784 C-E.
218. S v De SA 1982 (3) 941 (AD) 942 D.
219. S v F 1970 (2) SA 484 486 D.
220. S v Olivier 1959 (4) SA 145 (D) H-146A; see also S v Nene & Others (2) 1979 (2) SA 521 (D) 524 C-D; S v Nyembe 1982 (1) SA 835 (AD) 840 E-H; S v Yolelo 1981 (1) 1002 1009 F-G; S v Motlhabakwe en Andere 1985 (3) SA 188 (NK) 196 I-J; S v Mphahlele & Another 1982 (4) SA 505 (AD) 512 B-C.
221. Schmidt Bewysreg 538-539; R v De L'Etang & Another 1954 (4) SA 430 (N) 431 A; S v Lephatswa en Andere 1973 (2) SA 96 (O) 98 C-E; S v Bapela & Ano 1985 (1) 224 (CPD) 236 B-C; S v Khomo 1975 (2) SA 45 (T) 49 A-D.
222. "The position differs from that created when the statute provides that a presumption shall operate 'unless the contrary is proved'. The operative idea in these words is that proof has to be adduced, as opposed merely to the requirements, as in Epstein's case, that 'contrary evidence' could be adduced"; S v Nduku 1972 (1) SA 231 (ECD) 233 E-F.
223. see S v Nene (2) 523 H.
224. Which in normal circumstances would be all that he would be required to do so secure

his acquittal. Obviously that is a much easier thing to do than to establish a defence positively.

225. Hoffman & Zeffertt 443.
226. Casserly v Stubbs 1916 TPD 310 312; Cockran Interpretation of Statutes 140-141; Dhanabakeum v Subramanian and Another 1943 AD 160 167; Menell, Jack Hyman & Co. v Geldenhuys 1972 (1) SA 132 137 D-E.
227. S v Ramara 1965 (4) SA 472 (CPD) 473 G.
228. S v Nduku 1972 (1) SA 231 (ECD) 233 H; S v Mhlongo 1967 (4) SA 412 (N) 415 H - 416 D; R v Shangase 1953 SA 133 (N) 1340135.
229. Ramara 474 B; Nduku 233 H; Mhlongo 416 B; R v Vilbro & Another 1957 SA 223 (A) 227 H; Makhanya v Bailey NO 1980 (4) SA 713 (T) 716 E-F; S v Ras 1964 (4) SA 502 (T) 503 E-F; S v Natha & Another 1965 (4) SA 447 448 F.
230. S v Mtshizana 1965 (1) SA 413 (ECD).
231. S v Ras 503 E-F.
232. 1965 (1) SA 413 (ECD).
233. 1915 CAR 45.
234. S v Mtshizana 418 C-D.
235. 474 B.
236. 415 H - 416 D.
237. Hoffman & Zeffertt 443 N 19.
238. 474 A.
239. 233 A.
240. 233 F-G.
241. See for example S v Van Niekerk 1981 (3) SA 787 (T) 789-790 A.

242. 68.
243. S v Mkhize 1975 (1) SA 517 (A) 523 A; S v January 1975 (3) SA 324 (T) 330 A; S v Blauw 1972 (3) SA 83 (C) 85 A; S v Jeffreys 1973 (4) SA 629 (N) 630 E; S v Ndlovu 1982 (2) SA 202 (T) 204 B-C.
244. 68.
245. See R v Epstein 1951 (1) SA 278.
246. S v Mkhize 1975 (1) SA 517 (A) 523 C; Ex parte Minister of Justice In re Rex v Jacobson & Levy.
247. see the decision of Jacobsen & Levy.
248. R v Khumalo 1949 (1) SA 620 (A) 626; R v Radzilane 1950 (3) SA 795 (T) 796 D-H; S v Mhlongo 1967 (4) SA 412 (N) 413 D-F; S v Ngcobo 1965 (2) SA 728 (N) 732 G-H; S v Mnguni 1962 (3) SA 662 (N) 664 B; S v Bruhns 1983 (4) SA 580 (NC).
249. 1965 (4) SA 736 (O) 738 F-H.
250. In Epstein's case for example the phrase concerned was "in the absence of evidence to the contrary ... it shall be presumed". In Zulu's case the onus cast on an accused person to give a satisfactory account of his possession of goods reasonably suspected to be stolen, was in issue.
251. 1951 (1) SA 278 (O).
252. 284.
253. 284 B.
254. 285 B-C.
255. supra.
256. Section 11 of Act 33 of 1927, repealed by Section 38 of Act 41 of 1950. Section 30(1) of Act 18 of 1936, repealed by Section 26 of Act 42 of 1964.

257. How ambiguous the phrase is can be observed in the difficulty created by the similar phrase “unless or until”. See Moore v Minister of Co-operation and Development 1986 (1) SA 102 (A) 116 C.
258. Act 44 of 1950.
259. The provision has been severely criticised. A S Matthews has even called it: “... the statutory jumble of words that constitute the crime of terrorism”. Matthews, A S, *The Terrors of Terrorism*, SALJ 91 (1974) 381. A criticism of the substantive criminal provisions seems to fall outside the scope of this work.
260. “This trend has, however, been given considerable acceleration by section 3 of the Suppression of Communism Amendment Act, No. 24 of 1967, and section 2(2) of the Terrorism Act, No. 83 of 1967, both of which require the accused to establish his innocence beyond a reasonable doubt”. Davids, Jean - *Law of Evidence*. Annual Survey of South African Law 1967 377.
261. Mathews 381, S v Ffrench-Beytagh 1972 (3) SA 430 457E-458A, Mathews Freedom State Security and the Rule of Law 37, Matthews - *The Terrors of Terrorism* 382-3.
262. Ffrench-Beytagh’s case 457 F-G, S v Essach 1974 (1) SA 1 18 A-C, S v Cooper and Others 1976 (2) SA 875-876H-877B.
263. Matthews, Freedom, State Security and the Rule of Law 33-34, Mathews - *The Terrors of Terrorism* 387.
264. Act 44 of 1950.
265. Act 83 of 1967.
266. 1995(3) SACLR 1 (CC).
267. Act 51 of 1977.
268. (1986) 26 DLR (4th) 200.

269. (1988) 51 DLR (4th) 481.
270. at 493.
271. (1992) 90 DLR (4th) 449.
272. at 461.
273. RP78/1971.
274. 1996 (11) BCLR 1446 (CC).
275. 1966 (1) SA 388 (CC).
276. 1995(11) SACLR 19 (CC).
277. 1996 (4) SACLR 50(C); see also Osman and Another v Attorney-General Transvaal 1998 (2) BCLR 165 (T); S v Mumba 1997 (7) BCLR 966 (W); Nortje v Attorney-General of the Cape and Another 1995 (2) BCLR 236 (C).

## CHAPTER 9

### CONCLUSION

#### 9.1 Introduction

Law is undoubtedly an indispensable ingredient of organized society.<sup>1</sup> Its primary function is to facilitate social stability and harmony by curbing the antisocial conduct of human beings so that individuals with conflicting interests may co-exist peacefully. For people to achieve their full development, they have to live in society. Without law, society cannot exist, “for without rules of conduct there cannot be order, and without order there cannot be peace and progress”.<sup>2</sup>

Society has been defined as “a more or less self-sufficient association of persons who in their relations to one another recognize certain rules of conduct as binding and who for the most part act in accordance with them”.<sup>3</sup>

As to which came first, law or society, Hahlo and Kahn regard that question as meaningless as the old riddle of which came first, the hen or the egg. In their opinion the growth of society and law can be considered as the two sides of the same coin because an “organized society without law is a contradiction in terms”.<sup>4</sup>

#### 9.2 The role of law

The role of law in society has always been emphasized throughout the history of humankind

largely because of the ambivalent character of human nature. Plato once described the advantages of government under law in the following terms:

“Where the law is overruled or obsolete, I see destruction hanging over the community; where it is sovereign over the authorities and they its humble servants, I discern the presence of salvation and every blessing Heaven sends on a society”.<sup>5</sup>

Aristotle expressed similar sentiments as follows:

He who bids the law rule, may be deemed to bid God and reason alone rule, but he who bids man rule adds an element of the beast, and passion perverts the minds of rulers even when they are the best of men. The law is reason unaffected by desire”.<sup>6</sup>

In similarly extravagant language Hobbes said that where there is no law or authority, men “are in that condition which is called war, and such a war as of every man against every man... In such condition there is no place for Industry... and consequently no Culture of the Earth, no Navigation... no commodious building... no Knowledge of the face of the Earth; no account of Time, no Arts, no Letters, no Society, and which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short”.<sup>7</sup>

Although the above quoted passages contain important elements of the truth, they exaggerate somewhat. It has become abundantly clear that law is not simply “reason unaffected by desire”,

or “man’s salvation” descending from heaven above, but it is purely a human devise. Law as a concept is value neutral and can be used as a technique of ordering or pursuing a variety of contradictory social objectives. “It can be used to abridge or expand freedom of speech to build a capitalist, socialist, or communist society, or any of the hybrid ideologies that fall between these three. The only possible trace of a value-set implicit in this conception of law is the fact that it presupposes that the problems of society should be handled ‘according to law’ - that is, in an orderly manner, and according to pre-established procedures... Law itself being value-neutral, those values that particular groups desire to translate into law will have to be fought for and determined in the political arena. It is a struggle extrinsic to law as a technique of social ordering”.<sup>8</sup>

The statement by Hobbes is also somewhat misleading. It creates the impression that human beings are fundamentally anti-social and that “war of every man against every man” is the natural condition of people. It has been correctly suggested that the social instincts in human beings far outweigh the anti-social ones. In the words of Hart:

“Men are not devils dominated by a wish to exterminate each other, and the demonstration that given only the modest aim of survival, the basic rules of law and morals are necessities, must not be identified with the false view that men are predominantly selfish and have no disinterested interest in the survival and welfare of their fellows. But if men are not devils, neither are they angels; and the fact that they are a mean between these two extremes is something which makes a system of mutual forbearance both necessary and possible. With angels never tempted to harm others, rules requiring forbearances would not be

necessary. With devils prepared to destroy, reckless of the cost to themselves, they would be impossible. As things are, human altruism is limited in range and intermittent, and the tendencies to aggression are frequent enough to be fatal to social life if not controlled".<sup>9</sup>

The merit of Hobbes's statement, however, lies in its emphasis on law and order as the basis of human development.<sup>10</sup> Nevertheless it is not every law which is conducive to human development; it is a law of a particular kind that has this effect. Some laws have the direct opposite of human development. As Mathews once said: "Steve Biko lived in a society in which public order is maintained by law and yet his life, at its end, is well described by Hobbes' five adjectives".<sup>11</sup>

This demonstrates that what is needed is more than formal legal control to protect persons in society. It is for this reason that it has been said that a "theory which has nothing to say about the form in which laws are expressed and the procedures by which they are administered cannot offer such protection".<sup>12</sup>

Because of the less desirable aspect of human nature, law can be abused. It can be used as an instrument of oppression rather than of protection. This is because, as it has been suggested, "Rules, no matter of what kind they be, invariably seek to make themselves secure in the position they hold. Conspirators and those who desire to acquire a principality seek to overthrow the powers that be. The demand of people is for happiness and for liberty, and, if oppressed, for vengeance on their oppressors. Young men seek office and fame. Those who have no desire to have, be it position or property, and those who already have, seek to retain

what they have".<sup>13</sup>

### 9.3 The role of the criminal law

The criminal law in particular is that branch of the law which seeks to protect human beings against those who are a threat to their lives, property and freedom. Although this is the aim of this branch of the law, it is usually regarded as an awe-inspiring part of the law because it makes use of society's extreme legal sanction, namely, punishment.<sup>14</sup> Punishment amounts to a violation of the rights of the individual because it involves a deliberate infliction of pain and suffering on the individual or a deprivation of the individual's property or freedom".<sup>15</sup>

In a society that values human freedom, the deprivation of such freedom is resorted to in extreme cases and in a way that will ensure that justice is done. Justice will be done if the truly guilty are found guilty and the innocent are found not guilty. In order to reach this ideal, the law must provide for fair trial procedures. Fair trial procedures are emphasised in a legal system that is based on a "due process" model of criminal procedure as opposed to a law-enforcement type of procedure".<sup>16</sup>

### 9.4 The ideology of the criminal procedure

The criminal procedure therefore has an ideological and philosophical underpinning. It is not simply a set of value-neutral rules. It is also shaped by the historical and sociological development of a particular society. Our criminal procedure and evidence is based on English law. This branch of the law was influenced by the libertarian views of the eighteenth century

in English law. Some of these views entail the presumption of innocence, the right to silence and that the duty is on the state to prove the guilt of the accused beyond a reasonable doubt.<sup>17</sup> These developed as a reaction to abuses of power that took place at the time.

The rule that the state bears the onus of proving the guilt of the accused beyond a reasonable doubt was transplanted into South African law during the British occupation of the Cape and subsequently. While this rule was accepted in English and South African law as the standard of proof in criminal cases, it was never clearly defined and amounted to a mere judicial incantation which was used to justify a particular decision. Not only in English and South African law has this been the case, but also in American law where English law was also translocated.

### 9.5 Proof beyond a reasonable doubt and legislation

Although in the majority of criminal cases the courts accepted that the state bears the burden of proof which entails that it has to prove the guilt of the accused beyond a reasonable doubt, and this onus does not shift to the accused as opposed to the evidential onus, parliament increasingly provided for cases where the burden of proof could shift to the accused. This happened by way of a presumption where if a certain state of affairs existed, the accused would be presumed guilty until the contrary was proved. It would be incumbent on the accused to prove his innocence beyond a reasonable doubt.<sup>19</sup> This became known as the reverse onus.

This happened because of the doctrine of parliamentary sovereignty whereby parliament could amend or change any law and the courts could not challenge it. There is no doubt that this was

a departure from a rule that was regarded as fundamental at common law. This could also happen because there was no Bill of Rights which protected the fundamental rights of the individual.

The shifting of the onus happened mostly in cases of security legislation which was meant to reinforce the policy of apartheid.<sup>20</sup> There were other pieces of legislation where this was the case. The effect of this was to make it easy for the state to find the accused guilty of the crime with which he was charged especially where there was insufficient evidence. A further implication of this was to severely limit the liberty of the individual.

The proof beyond a reasonable doubt presumptive provision operative against an accused was apparently an over-reaction of the security establishment to threatening political phenomena of the time. As soon as the security establishment became more confident of its ability to handle the situation, it abandoned the infamous provisions which had damaged the reputation of the South African law.

In the absence of a Bill of Rights, however, the situation remained precarious. Moreover, there were other instances where the reverse onus was resorted to. This was in conflict with the general rule that the state bears the onus to prove the guilt of the accused beyond a reasonable doubt.

## 9.6 The effect of the Constitution

Both the interim and the final Constitutions sought to put an end to this by providing for a right

to a fair trial which includes, inter alia, the right to remain silent, the right to be presumed innocent until proved guilty and the right not to be compelled to make incriminating statements against oneself.

Starting with the Zuma case the Constitutional Court declared unconstitutional and therefore invalid instances where the onus of proof was vested in the accused to prove his innocence beyond a reasonable doubt. The effect of this has been to restore the position to what it was at common law before, where the state bore the burden of proving the guilt of the accused beyond a reasonable doubt. This effectively means that the state has to prove all the elements of the crime beyond a reasonable doubt and this burden does not shift to the accused.

Although there are still cases where it may be considered whether strict liability was imposed, these have not been interpreted to mean the shifting the onus of proof to the accused. The state still bears the onus of proving the guilt of the accused beyond a reasonable doubt.<sup>21</sup>

Similarly in cases where the court has to take judicial notice of certain facts, this does not imply that the state is relieved of the burden to prove the guilt of the accused. It may simply lighten the burden because once judicial notice has been taken, it may not be necessary for the state to prove that issue of which judicial notice has been taken.<sup>22</sup>

The effect of these developments has been to restore the common law position where the state had to prove beyond a reasonable doubt the guilt of the accused and where the liberty of the individual was secured. Apart from historical reasons, the rationale for the rule that the state has to bear the onus of proof is because the state is in a more powerful position. It has the

power and the means to provide the evidence to find the accused guilty. This is also in accordance with the principle of equality. In doing this the state has to follow fair trial procedures and should not resort to third degree methods. This is also in accord with human dignity. All these are aimed at protecting the liberty of the individual.

### **9.7 The rationale for the standard of proof**

That the state has to prove the guilt of the accused beyond a reasonable doubt is essential to ensure that only the truly guilty are convicted. If there is a doubt the accused must be given the benefit of the doubt and must be acquitted. The liberty of the individual is so fundamental that it can only be restricted after a conviction beyond a reasonable doubt. Reasonable doubt does not mean all doubt because if that were the case, where even fanciful doubt would be accommodated, it would result in the criminal justice system being discredited.

### **9.8 Defining proof beyond a reasonable doubt**

For this reason proof beyond a reasonable doubt can be defined as proof which should convince a reasonable fact finder after considering all the relevant evidence that the accused is guilty of the offence with which he is charged.

It is important to emphasize that this proof must be based on evidence and not on mere intuition or belief because even if the fact finder believes that the person has committed the offence, but if the belief is not supported by the evidence, the accused should be given the benefit of the doubt.

Providing an objective standard is aimed at preventing the state from acting arbitrarily in finding a person guilty and thereby abuse its power. The abuse of power is a perennial problem. It is for this reason that the state has to comply with this standard. The ultimate aim is the protection of the liberty of the individual. The rule of proof beyond a reasonable doubt is therefore compatible with the core values enshrined in the Constitution, namely, freedom, equality and human dignity.

FOOTNOTES

1. Fuller The Morality of Law (1964) 5-6.
2. Hahlo & Kahn The South African Legal System and its Background (1968) 26; Cardozo The Nature of the Judicial Process (1921) 66.
3. Rawls A Theory of Justice (1972) 4.
4. Hahlo & Kahn 28.
5. The Laws of Plato trans Taylor (1934) 99-100.
6. The Politics of Aristotle trans Jowett (1885) 1 102.
7. Leviathan ch xiii as cited by Hahlo & Kahn 27.
8. Ocran "Law, African Economic Development and Social Engineering : A Theoretical Nexus" 1971 Zambia Law Journal 23.
9. Hart The Concept of Law (1961) 191-192; see also Hahlo & Kahn 27.
10. Hahlo & Kahn 27.
11. Mathews Freedom State Security and the Rule of Law (1986) 2.
12. Mathews *ibid*.
13. Walker 118.
14. Rabie "Decriminalization of the Law-Ideal and Reality" in Sanders (ed) Southern Africa in Need of Law Reform (1981) 99; Rabie & Strauss Punishment : An Introduction to Principles 4ed (1985) 91-92.
15. Rabie & Strauss Punishment 6; Packer The Limits of the Criminal Sanction (1968) 21 et seq.
16. For a discussion of this see chapter 4.
17. See chapter 3.
18. See chapter 3.

19. On this see chapter 8.
20. A typical example of this is the Suppression of Terrorism Act of 1967.
21. See chapters 6 and 7.
22. See chapter 8.

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