



DISCUSSION PAPER 156

**REPEAL OF THE TRANSKEIAN PENAL CODE, 1983 (ACT 9 OF
1983)**

A SUB-PROJECT OF THE

**REVIEW OF COLONIAL AND APARTHEID LEGISLATION
(PROJECT 149)**

CLOSING DATE FOR COMMENTS

31 JULY 2022

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'It is rather odd that – 20 years into our constitutional democracy – we are left with a statute book cluttered by laws surviving from a bygone undemocratic era remembered for the oppression of people; the suppression of freedom; discrimination; division; attempts to break up our country; and military dictatorship. When these laws determine criminal liability, the situation looks even worse.'

(Justice Van der Westhuizen in *Khohliso v The State and Another* (2015), Constitutional Court)

About the South African Law Reform Commission

The South African Law Reform Commission (Commission) was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are:

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Professor Mpfariseni Budeli-Nemakonde
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The Secretary of the Commission is Mr Nelson Matibe. The Commission official assigned to this investigation is Fanyana Mdumbe. The Commission's offices are situated in Spooral Park Building, 2007 Lenchen Avenue South, Centurion, Pretoria.

The Commission has instituted an advisory committee for this inquiry in terms of section 7A(1)(b)(ii) of the abovementioned Act comprising of:

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Preface

This paper has been prepared to elicit comments, which would serve as basis for the South African Law Reform Commission's (Commission) further deliberations. It contains the Commission's preliminary findings and recommendations. The views, conclusions and recommendations which follow should not be regarded as the Commission's final views.

It is intended to provide interested parties with sufficient background information to enable them to place focused submissions before the Commission. A summary of the Commission's tentative recommendations whether the Transkeian Penal Code, 1983 (Act 9 of 1983), or any of its provisions, should be repealed or retained in the statute book appears on page (v).

The Commission will assume that respondents agree to the Commission quoting from, referring or attributing comments to the relevant respondents. Respondents who prefer to remain anonymous should mark their submissions 'Confidential'. The Commission will make every effort to protect such information. However, respondents should be aware that the Commission may be required in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000) to release information contained in representations submitted to it in relation to this inquiry.

Respondents are requested to respond as comprehensively as possible. Submissions may also include issues stakeholders consider relevant to this review but which are not covered in this discussion paper. The said written comment and representations must reach the Commission on or before **31 July 2022** at the address appearing on page (iii). Comments can be sent by post or fax. However, comments sent by email in electronic format are preferable.

Preliminary recommendations

1. The Transkeian Penal Code, 1983 (Act 9 of 1983), hereinafter referred to as 'the Code', which is central to this inquiry, is a relic of our past whose provenance can be traced to a Bill drafted as a code of English criminal law. The Code was intended to consolidate criminal law in the area formerly known as the Republic of Transkei. Although the Republic of Transkei has ceased to exist, the Code has been retained in the statute book by virtue of item 2 of Schedule 6 of the Constitution and continues to regulate criminal law alongside common law and a myriad of old-order and post-1994 legislation.
2. The South African Law Reform Commission (Commission) has painstakingly reviewed the Code, as part of its investigation aimed at weeding out unnecessary, obsolete and unconstitutional colonial and apartheid legislation, to establish definitely whether it is still necessary, relevant, efficacious or consistent with the Constitution; and whether its retention in the statute book is defensible, and if so, on what basis.
3. This preliminary study has found that:
 - (a) with a few exceptions, the rules, offences and defences contained in the Code overlap with or have counterparts in the common law or heterogeneous statutory framework applicable to the rest of the Republic, resulting in legal dualism and legal uncertainty; and that
 - (b) a handful of provisions of the Code have been:
 - (i) superseded by more recent legislation enacted by Parliament rendering these provisions of the Code nugatory and redundant at best or at worst impliedly repealed; or
 - (ii) regulate matters that traditionally, and in terms of the Constitution, fall exclusively within the domain of local government competence.¹

¹ Part B of Schedule 5 of the Constitution lists 'control of public nuisance' as a functional area of exclusive local government competence.

4. In view thereof, the Commission recommends that:

- (a) the Code be wholly repealed and replaced with the appropriate common-law and relevant statutes that are generally applicable in South Africa;²
- (b) the conduct proscribed by section 71(d) namely, resisting, inciting or encouraging, hindering or disturbing any chief, headman, stock-inspector, dipping foreman or officer of any municipality or local authority, in the execution of his or her duties, be transposed to the relevant national or provincial legislation or by-law;
- (c) various forms of nuisance regulated by sections 59(1), 65, 70, 72, 79 and 80(1) of the Code be transposed to the relevant by-laws of the municipalities where this legislation is applicable,³ if these are still deemed relevant.

² *Rand Bank Ltd v De Jager* 1982 (3) SA 418 (C).

³ Part B of Schedule 5 of the Constitution lists 'control of public nuisance' as a functional area of exclusive local government competence.

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CHAPTER 1:

BACKGROUND TO THE INVESTIGATION AND HISTORICAL OVERVIEW OF THE CODE

A Background to the investigation

1.1 In July 2005, the then Judge President of the Eastern Cape Division of the High Court, Honourable Mr Justice Somyalo, formally approached the Department of Justice and Constitutional Development (DOJCD) requesting it to consider repealing the Transkeian Penal Code, 1983 (Act 9 of 1983), hereinafter referred to as the 'Code'.⁴ In support of his proposal, he stated that the Code was a relic of the past; it was inconsistent with legislation in *pari materia* that is applicable to the rest of South Africa; and that it was probably unconstitutional. The Judge President also decried the fact that the Code was not readily available. The DOJCD referred the review of the Code to the South African Law Reform Commission (Commission or SALRC) which at the time was contemplating reviewing the entire pre-1994 statute book to identify redundant, obsolete laws and legislation inconsistent with the equality provision.

1.2 While preliminary assessment of the Code was undertaken, tentative proposals fashioned, and comments sought from the DOJCD as part of the aforementioned review, this inquiry went into hiatus. However, disgruntlement with the Code has once again resurfaced, in the context of the Commission's inquiry into colonial and apartheid era legislation.⁵ The Commission has received a submission⁶ urging it to recommend the expungement of the Code from the statute book on the basis that it is unattainable and the

⁴ The Code was published for general information (promulgated) in Government Gazette No. 9 of the Republic of Transkei on 24 February 1984.

⁵ The Commission has instituted a review of colonial and apartheid legislation (Project 149) as part of the initiative by Parliament to identify and recommend for amendment or repeal pre-1994 legislation that is inconsistent with the ethos and values contained in the Constitution.

⁶ On 3 May 2021, the Commission invited interested parties to make written comments in respect of pre-1994 legislation that is deemed inconsistent with the Constitution.

Republic of Transkei for which it was designed ceased to exist as a legal entity and 'independent' state more than two decades ago.⁷

1.3 These rumblings of discontent, coupled with uncertainty as to whether the Code had supplanted the common law;⁸ its possible violation of the right to equality;⁹ the fact that the retention of old-order legislation was supposed to be transient, to facilitate an orderly transition to a new constitutional order;¹⁰ the duty of the State to ensure that there is a uniform system of criminal law and that there are no parallel laws in different parts of the country regulating the same subject matter,¹¹ has prompted the Commission to reinstitute the review of the Code, as part of its investigation into the constitutionality of pre-1994 legislation.

⁷ Submission by Prof Derick A. Fay, Department of Anthropology, University of California, Riverside, USA (3 June 2021).

⁸ The Code's predecessor, the Native Territories Penal Code (Act 24 of 1886) expressly 'abrogated' the common law in the Transkei and the Crown had no discretion but to charge accused persons in terms of Act 24 of 1886 and not under the common law. See in this regard, *R v Mboxo* 1924 EDL 286, *R v Gomeni* 1945 EDL 58 and *S v Solo* 1979 (1) SA 928 EDL. Although the Code is silent in this regard, the courts in the Eastern Cape, for example in *S v Xolani Bhobhotyana* Case No. 63/04, have held that the National Prosecution Authority is obliged to frame criminal charges under the appropriate provision of the Code and not under common law. See For detailed discussion, see DS Koyana below in footnote 12.

⁹ The continued application of the Code creates an untenable situation. Whilst in the rest of the Republic a number of common law crimes have been modified by legislation, a large part of substantive criminal law has not been codified and specific crimes such as murder, assault, and theft are not statutorily defined and their requirements are still sought in the common law. In the area constituting the former Transkei, the Code takes precedence. This seems to fly in the face of the right to equality which presupposes uniform application of criminal law in the Republic. See Ake Frändberg 'Legal Equality' available at <http://www.scandinavianlaw.se/pdf/48-7.pdf>

¹⁰ In *S v Thunzi and Others* 2010 (10) BCLR 983 (CC), at para 25, the Constitutional Court held that:
'Item 2 of Schedule 6, like section 229, allows different legal orders to exist side by side until a process of rationalization has been carried out. It too requires that these laws be consistent with the Constitution. Item 2 of Schedule 6 serves the same purpose of ensuring an orderly transition, and it reflects the recognition that this process was not yet complete when the 1996 Constitution was enacted. It contemplates that old order laws will continue to operate until a uniform system has been established by national and provincial legislatures within their fields of competence.'

¹¹ The former National Director of Public Prosecutions, Mr Bulelani Ngcuka, issued a directive to authorities in the former Transkei that the TPC should no longer be applied because South Africa had become one country. He argued that the South African common law needed to be applied uniformly across the national territory. See Prof Digby Koyana as quoted by Kyla Hazell in 'Transkei Penal Code Can be Abolished' (6 March 2013).

B Brief history of the Code¹²

1.4 The origin of the Code can be traced to the report of the Native Laws' Commission which was appointed in 1880 to inquire into the customary law of indigenous African communities with a view to codify criminal law.¹³ This investigation culminated in the enactment of the Native Territories Penal Code, Act 24 of 1886 (NTPC) by the legislature of the Cape of Good Hope which not only has its provenance in English law,¹⁴ but produced a hybrid system of Roman-Dutch law, English law and customary law, and completely substituted the criminal law which had hitherto been regulated by a hotchpotch of rules derived from these systems of law.¹⁵ In addition, the NTPC applied to the Transkeian territories comprising of the Transkei, Griqualand East and the port and the territory of St John's River.¹⁶

1.5 In 1976, Transkei became an 'independent' state.¹⁷ However, all laws which were in operation in that territory immediately before the declaration of independence, including the

¹² For a comprehensive discussion of the history and influence of the Native Territories Penal Code of 1886 in South African law in general and its successor, the Transkei Penal Code of 1983, see Prof DS Koyana 'Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law' *Obiter* (2005) at 14 *et seq* and Digby Sghelo Koyana *The Influence of the Native Territories Penal Code on South African Criminal Law* (a thesis submitted for Doctor of Laws Degree at Unisa) (October 1988).

¹³ The mischief the antecedent of the Code sought to address was lack of uniformity as some magistrates applied customary criminal law which was very influential, while others continued to utilise Roman-Dutch criminal law. Whilst it was largely a product of English law, it incorporated elements of indigenous law. See Prof Digby Koyana as quoted by Kyla Hazell in 'Transkei Penal Code Can be Abolished' (6 March 2013).

¹⁴ The drafters of the NTPC had a copy of the Indictable Offences Bill which had been drafted by Judge Sir James Stephens as a code of English Criminal Law. The provisions of the NTPC were taken from this draft word for word. See Jonathan Burchell and John Milton *Principles of Criminal Law* Second Edition (1997) at 18. Koyana above at 18, refers to the far-reaching influence English criminal law had at the time through the enactment by African and Eastern countries under its rule of Codes, namely the Nigerian Penal Code, the Sudanese Penal Code, and the Indian Penal Code.

¹⁵ Section 2 of the NTPC stated:

'Every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof.'

¹⁶ For a comprehensive discussion of the Native Territories Penal Code of 1886 see "Proposed Transkeian Penal Code: The proposed Penal Code for the Transkeian Territories" *Cape Law Journal* 2 (1885) 143.

¹⁷ On 26 October 1976, the Republic of Transkei was declared a sovereign and 'independent' state in accordance with section 1 of the Status of Transkei Act 100 of 1976 and consisted of the districts of Bizana; Idutywa; Mount Frere; Tabankulu; Butterworth; Kentani; Mqanduli; Tsolo; Elliotdale; Libode; Ngqeleni; Tsomo; Engcobo; Lusikisiki; Nqamakwe; Umtata;

NTPC, became the laws of the new Republic of Transkei.¹⁸ As a result, the NTPC continued to apply in that territory until it was repealed by the Code in 1983. The purpose of the Code, as described in its preamble, was to provide an amended, revised and consolidated Code of criminal law for the Republic of Transkei. It also replaced the common law in that territory.¹⁹ In the Republic of South Africa, the NTPC was repealed in 1979 and the common law reinstated.²⁰

1.6 In 1994, the Constitution of the Republic of South Africa Act (interim Constitution)²¹ reunited South Africa as one sovereign, democratic, constitutional state by incorporating the former TBVC states and self-governing territories back into South Africa. Simultaneously, the myriad of laws that accorded the TBVC states 'independent' status were also repealed.²² However, other pre-democratic era laws, including the Code in the area formerly known as the Transkei, remained in force²³ to give the legislatures in the different spheres of

Flagstaff; Matatiele; Port St. Johns; Umzimkulu; Glen Grey; Mount Ayliff; Qumbu; Willowvale; Herschel; Mount Fletcher; St. Mark's; Xalanga and Mount Frere.

¹⁸ Section 60(1) of the Republic of Transkei Constitution Act 15 of 1976, read together with Schedule 9 of that Act.

¹⁹ Section 3(a) and (b) of the Code provide that:

- '(a) Any act or omission not provided for in this Code which constituted a crime or an offence under the common law applicable in Transkei on 25 October 1976 shall be deemed to be incorporated in this Code and shall be punishable accordingly.
- (b) Any defence to a criminal charge, not specifically provided for in this Code, and which formed part of the common law applicable in Transkei on 25 October 1976 shall be deemed to be incorporated in this Code and shall be taken cognizance of.'

²⁰ Pre-Union Statutes Laws Repeal Act 24 of 1979. Section 2 of this Act provided that: 'The common law rules, which by virtue of the Black Territories Penal Code of 1886 and the Transkeian Territories Penal Code Amendment Act 1898 of the Cape of Good Hope did not apply in any part of the Republic, shall as from the date of the commencement of this Act also apply in such part.'

²¹ The Constitution of the Republic of South Africa Act 200 of 1993.

²² Section 230 of the interim Constitution, read in conjunction with Schedule 7.

²³ Section 229 of the interim Constitution. Item 2 of Schedule 6 to the 1996 Constitution contains a similar provision. It provides:

'Continuation of existing law

- (1) All law that was in force when the new Constitution took effect, continues in force, subject to-
 - (a) any amendment or repeal; and
 - (b) consistency with the Constitution.
- (2) Old order legislation that continues in force in terms of subitem (1) –

government sufficient time to harmonise the laws.²⁴ Since the advent of the constitutional dispensation, the Code has been amended twice. First, by the Justice Laws Rationalisation Act²⁵ which repealed Part 9 of the Code (sections 95 -124 dealing with sexual offences and child care) in its entirety. And, secondly by the Criminal Law Amendment Act which removed provisions of the Code dealing with capital punishment.²⁶ An inference has been drawn from the retention of the Code that it would remain applicable to the exclusion of the common law until Parliament itself intervenes.²⁷

C Challenges posed by the continued application of the Code

1.7 Although we have already alluded to the challenges occasioned by the continued operation of the Code in para 1.3 above, the most glaring of these, the retention, or the perpetuation of legal pluralism (dual system of criminal law) in the area formerly called the Transkei merits further discussion.

1.8 In contrast to the NTPC which expressly excluded the invocation of the common law in the Transkei, a rule rigidly applied by the courts,²⁸ the Code did not contain such an injunction, giving rise to the question whether it is competent for the State to charge an accused person under the common law for an offence that is specifically provided for in the Code. In 1979, the court held that the Code was the applicable law and not the common

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- (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
 - (b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution." Section 229 of the 1993 Constitution contained a similar provision.'

²⁴ See footnote 10 above.

²⁵ Act 18 of 1996.

²⁶ Act 105 of 1997. This Act amended sections 49, 148, 153 and 155 of the Code.

²⁷ See Koyana 'Legal Pluralism in South Africa' above n 12 at 25.

²⁸ This rule was rigidly applied *R v Mboxo* 1924 EDL 286; *R v Gomeni* 1945 EDL 58 and *S v Solo* 1979 (1) SA 928 EDL.

law.²⁹ Dealing with this conundrum in *S v Xolani Bhobhotyana*,³⁰ the court, relying among others on *S v Solo*, held that despite the lack of a provision similar to section 2 of the NTPC:

‘Act 9 of 1983 deprives the State of any choice in regard to offences contained in those portions of Act 9 of 1983 which have not been repealed by Act 18 of 1996, and that it has no option but to charge an offender under the appropriate provisions of Act 9 of 1983 and not under the common law.’

1.9 To bolster its conclusion, the court further stated:

‘Although section 2 and 269 of Act 24 of 1886, are not restated in Act 9 of 1983, it is in my opinion that the effects of Act 24 of 1886, in so far as they concern this inquiry, are perpetuated in Act 9 of 1983. That this is so can be concluded from the fact that the repeal of Act 24 of 1886 by Act 9 of 1983 (Transkei) was not accompanied by a reinstatement of the common law, as was the case with its repeal by Act 24 of 1979. It is also, in my view, apparent from the preamble and section 3(A) of Act 9 of 1983 that the intention of the legislature, at the time of its passing the Act, was to codify the criminal law in Transkei.’

1.10 The continued application of the Code has created an untenable situation which, it has been argued, can only be resolved by Parliament.³¹ In the rest of the Republic, a large part of substantive criminal law has not been codified and specific crimes such as murder, assault and theft are not statutorily defined and their requirements are still sought in the common law.³² However, in the area formerly known as the Transkei as the court pointed ruled in *S v Bhobhotyana* referred to above, the National Prosecuting Authority is obliged to frame criminal charges under the Code. People in that part of the country are thus subjected to a different system of criminal law. This seems to fly in the face of the right to equality before the law which presupposes uniform application of criminal law in the Republic.³³ Another question arises from this state of affairs: could the continued application of the Code be defended despite the fact that it and other pre-1994 legislation, as the Constitutional Court pointed out in *S v Thunzi and Another*,³⁴ was retained to facilitate an orderly transition

²⁹ *S v Solo* 1979 (1) SA 928 (TkSC).

³⁰ Case No 63 of 2004.

³¹ See para 1.6 above.

³² A number of common law crimes have been modified by legislation, for example, rape.

³³ See Ake Frändberg ‘Legal Equality’ available at <http://www.scandinavianlaw.se/pdf/48-7.pdf> (accessed on 13 December 2021), argues persuasively that fundamental to the idea of equality is uniformity or equal treatment and that equality before the law is a matter of uniform application of the law.

³⁴ 2010 (10) BCLR 983 (CC)

to a new constitutional order?³⁵ This inquiry therefore seeks to ensure that there is certainty in this regard and that the State discharges its constitutional duty of ensuring that there is uniform system of criminal law in the Republic and not parallel laws in different parts of the country that regulate the same subject-matter.³⁶

D Methodology adopted by the SALRC to review the Code

1.11 The Code, last amended by Parliament in 1997 and 1998 respectively,³⁷ has been reviewed as part of the SALRC's inquiry into the necessity, relevance, efficacy and the desirability of legislative reform of pre-1994 legislation administered by the DOJCD. The overarching objective of this investigation is to weed the statute book of obsolete, unnecessary and unconstitutional legislation.

³⁵ *Id* at paras 25 and 65.

³⁶ In *S v Thunzi* case referred to above, these concerns were expressed thus by the Constitutional Court:

'Parliament has not established a uniform system of law governing the use of dangerous weapons. Instead, it has retained the former TBVC states' laws, and amended them to replicate the terms of the DWA (SA). The result is that different laws governing dangerous weapons have, for all apparent purposes, been deliberately retained by the legislature.

If the constitutional rationale for retaining old order legislation was limited and sought only to facilitate an orderly transition to a new constitutional order, then the question is whether the Constitution contemplates that old order legislation could serve any other purpose. More specifically, if the transitional provisions contemplated that the DWA (Tk) and its counterparts in Bophuthatswana, Venda and Ciskei would continue to exist only until Parliament establishes a uniform system of law governing the use of dangerous weapons, does it not follow that there is a *constitutional obligation* on Parliament to establish a uniform legislation on the use of the dangerous weapons? If the transitional provisions create such an obligation, is Parliament in breach of this obligation by failing to establish a uniform system of law governing the use of dangerous weapons? And, if so, what is the appropriate relief?

³⁷ Interestingly, in *S v Thunzi* referred to above, the Constitutional Court endorsed its earlier decision in *Weare and Another v Ndebele and Others* 2009 (1) SA 600 (CC), at para 36, where it held that the amendment of an old order, provincial ordinance by the post-1994 provincial legislature rendered the Ordinance, a provincial Act for the purposes of sections 167(5) and 172(2)(a) of the Constitution. This was so because the effect of the amendment was that the Ordinance became — an expression of the legislative will of the democratically-elected provincial legislature and was to be treated accordingly. However, it is doubtful in the light of the decision of that court in *Khohliso v The State and Another* 2015 (SACR) 319 (CC), whether the amendment of the Code by Parliament would have similar effect. In *Khohliso* the court held that the Transkei Decree No. 9 (Environmental Conservation) of 1992 was not an Act of Parliament or Provincial legislation and thus refused to the order of constitutional invalidity relating to it.

1.12 As will become apparent in ensuing discussion, the SALRC has painstakingly studied the provisions of the Code to establish whether:

- (a) the offences and rules of criminal liability contained therein overlap with common-law offences or offences contained in the heterogeneous legislative framework applicable to the rest of the Republic;
- (b) the provisions of the Code have been superseded by more recent legislation; and whether
- (c) in general, the provisions of the Code are consistent with the Constitution.

1.13 Where it has been found that there is a parallel law in the Republic (common law or statute law) that regulates a matter dealt with in the Code, the relevant provision of the Code is then recommended for repeal.

1.14 In instances where the Commission is of the view that a provision of the Code still serves a useful purpose and should thus be retained in the statute book, proposal about transposition of the relevant provision (offence or rule) to new or existing legislation is made.

E What impact would the repeal of the Code have in the administration of justice?

1.16 Even those who subtly commended the Code³⁸ who have, for example, highlighted that it embodied customary criminal law; sought to strengthen bridges between mixed communities of the Transkei; applied to all persons regardless of class; never outlawed customary practices of people; was preceded by extensive consultation with indigenous people in the Transkei; averted uncertainty in the administration of justice;³⁹ who also cautioned against declaring rules of one legal system unconstitutional to align them with the

³⁸ See in this regard, DS Koyana 'Legal Pluralism in South Africa: The Resilience of Transkei's Separate Legal Status in the Field of Criminal Law' *Obiter* (2005) 14 at 16.

³⁹ According to Prof Koyana, this uncertainty emanated from legal pluralism which was notable in the simultaneous and random application of customary criminal law and colonial criminal law. The coexistence of these two legal systems had the effect that the magistrates did not know which law to apply, while the people did not know which law to obey. *Ibid.*

rules of another legal system,⁴⁰ averred that there is no reason for it to remain practice.⁴¹ In other words, they also believe that the dual system of criminal law should not be perpetuated in the former Transkei. Moreover, because the Code has veered towards South African criminal law as a result of revisions over the years, diminishing the rationale for keeping the two systems separate.⁴²

1.17 Overall, there seems to be support for the repeal of the Code.⁴³ Experts in public law believe that the repeal of the Code would have no repercussions for the administration of justice in the Republic.⁴⁴ Critics of the Code who want it repealed in its entirety have pointed out that it is a mirror-image of a draft law that was rejected by English Parliament; it undermined and stifled local traditional courts and displaced customary law; and that it is hardly referred to by our courts. They further maintain that its repeal would have a symbolic and not legal value.⁴⁵ As stated above, Prof Koyana, who has written extensively on the Code and said its continued application is not problematic, supports its repeal.⁴⁶

⁴⁰ Prof Digby Koyana as quoted by Kyla Hazell in 'Transkei Penal Code Can be Abolished' (6 March 2013).

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Dr Delano van der Linde, a public law lecturer at the University of Stellenbosch; and Dr Tshepo Mosaka, a public law specialist at the University of Cape Town as quoted in opinion piece by Sipokazi Fokazi in *Sunday Times Daily* 'Outdated, Draconian, Sexist: Why Apartheid Laws are Facing the Chop' (17 May 2021).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Prof Digby Koyana as quoted by Kyla Hazell in 'Transkei Penal Code Can be Abolished' (6 March 2013).

CHAPTER 2:

ANCILLARY PROVISIONS OF THE CODE, GROUNDS OF JUSTIFICATION AND CRIMINAL LIABILITY

A Ancillary provisions

1 Application of the Code and definition section

2.1 Part 1 and 2 of the Code, comprising sections 1 to 8, contain ancillary provisions which provide, inter alia, that the Code applies to the Republic of Transkei; it was meant to be complete statement of the criminal law in that area and define the terms used therein.⁴⁷ It also seems that offences committed wholly outside the Transkei did not attract criminal liability under the Code.⁴⁸ The Commission deemed it unnecessary to review these supplementary provisions because if it is found that the substantive provisions of the Code no longer serve any useful purpose and that they should be repealed, these provisions would have to be repealed as well.

2 Repeal of laws provision

2.2 Although not quite supplementary provisions, section 185 of the Code, read together with the Schedule, deserve mention. First, these provisions repealed the Native Territories Penal Code of 1886 in its entirety. They also repealed in that part of country, laws that in

⁴⁷ Section 2 of the Code provides that: "This Code shall apply throughout the Transkei. Furthermore, sections 3(a) provides that "Any act or omission not provided for in this Code which constituted an offence under the common law applicable in Transkei on 25 October 1976 shall be deemed to be incorporated in this Code and shall be punishable accordingly." Section 3(b) provides that "Any defence to a criminal charge, not specifically provided for in this Code, and which formed part of the common law applicable in Transkei on 25 October 1976 shall be deemed to be incorporated in this Code and shall be taken cognizance of."

⁴⁸ Section 7 of the Code reads:

'When an act which, if wholly done within the jurisdiction of the court, would be an offence against the Code, is done partly within and partly outside the Transkei, every person who within the Transkei does any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the Transkei.'

the Republic have either been supplanted with new legislation or are under review, namely the Witchcraft Suppression Act 3 of 1957,⁴⁹ the Prevention of Corruption Act 6 of 1858,⁵⁰ the Trespass Act 6 of 1959, the Prohibition of Prostitution and Related Activities Act 5 of 1978⁵¹ and the Protection of Public Works Act 24 of 1978 in their entirety. It also abrogated the Possession of Dangerous Weapons Proclamation 257 of 1954.

B Grounds of justification and criminal liability

1 Claim of right

2.3 The *bona fide* claim of right, contained in section 9 of the Code,⁵² is a defence which negates the criminal intent necessary to sustain the offences relating to the appropriation of property, namely theft, removal for use and robbery. As the court explained in *Gonzales v Commonwealth of Virginia*,⁵³ a *bona fide* right of a claim is a sincere, although mistaken, good faith belief that one has some legal right to possess the property. Although this defence is not codified in South African law, the courts have always recognised that a person lacks the intention to steal if he or she believes that the property he or she is taking belongs to him or her.⁵⁴

The SALRC recommends that section 9(1) and (2) of the Code be repealed, and further submits that no *lacuna* would be created in the law as a result of such repeal as the courts have always recognised the defence of right of claim in relation to offences relating to property.

⁴⁹ The parallel legislation applicable to the rest of the Republic, the Witchcraft Suppression Act 3 of 1957 is the subject of review by the Commission. See, for example South African Law Reform Commission Project 135: *Review of Witchcraft Suppression Act 3 of 1957*, Discussion Paper (Jan 2016).

⁵⁰ See the Prevention and Combating of Corrupt Activities Act 12 of 2004.

⁵¹ The Commission recently finalised its report on adult prostitution.

⁵² Section 9 of the Code reads:

‘(1) No person shall be criminally liable in respect of an offence relating to property if the act or omission which constituted the offence was done in the exercise of a *bona fide* claim of right.

(2) The reasonableness or otherwise of the claim may, having regard to the surrounding facts, be evidence of the necessary *bona fides* or of *mala fides*.’

⁵³ Available at <http://www.courts.state.va.us/opinions/opncavtx/2834004.txt>

⁵⁴ See in this regard, *Ndlela* 1956 (2) SA 4 (N) and *Riekert* 1977 (3) SA 181 (T).

2 Necessity

2.4 The Code also recognises the legal defence of necessity.⁵⁵ A literal interpretation of this section suggests that this defence is not available to a person charged with murder or treason. In South African law the defence of necessity is also recognized and derives from the principles of the common law and it may be invoked either as a ground of justification or as a ground excluding criminal liability.⁵⁶ In contrast to the provisions of the Code, South African law does not distinguish between the different forms necessity may take. All that is required for an act to be justified on the grounds of necessity is that legal interests of the accused such as life, bodily integrity, or property must have been endangered; by a threat which had commenced or was imminent; which was not caused by the accused's own fault; it must have been necessary for the accused to avert the danger and the means used must have been reasonable in the circumstances.⁵⁷ The requirement contained in the Code that necessity may not be invoked if the threat will only be implemented at some time in the future is also recognized in South African law.

⁵⁵ Section 10 of the Code reads:

'No person shall be criminally liable for any offence other than treason or murder if the act was done or omitted in circumstances of necessity: Provided that-

(a) in the case of necessity arising from human agency-

- (i) the necessity arose from threats of harm, other than threats of future injury, to such person, his property or legal interest; and
- (ii) the threat or harm must have commenced or was imminent;
- (iii) the situation that such person found himself was not due to his own fault; and
- (iv) the commission of the said offence was necessary to avert the threat of harm; and
- (v) the means used in the commission of such offence were reasonable in the circumstances;
- (vi) where the act caused harm to an innocent third party such harm was done was not greater than the harm threatened or avoided; and
- (vii) such person ceased to act as soon as possible; or

(b) in the case of necessity arising from force of circumstances the provisions of subparagraph (iii), (iv), (v), (vi), and (vii) are satisfied.'

⁵⁶ CR Snyman *Criminal Law* (2008) 5th Ed at 117.

⁵⁷ For a comprehensive discussion of the requirements for a successful plea of necessity, see Snyman *Criminal Law* (2008) at 119-121.

2.5 The view that killing another person cannot be justified by necessity has its origins in English law.⁵⁸ Earlier decisions of the Appellate Division, now the Supreme Court of Appeal, also endorsed this view.⁵⁹ However, in *S v Goliath*⁶⁰ the judge of appeal stated that modern writers on American, English and Scottish law are doubtful about the correctness of the view that killing, particularly of an innocent person, cannot be justified by compulsion or necessity. He held that compulsion can constitute a complete defence to a charge of murder. It therefore seems that the Code is lagging behind in this regard.

The SALRC recommends that section 10 of the Code be repealed in its entirety as the defence of necessity is recognised under the common law which applies throughout the Republic.

3 Self-defence

2.6 The defence that a person who is the victim of an unlawful attack upon his or her person, property or the person or property of another may use force to repel such attack, contained in section 11 of the Code,⁶¹ is also recognised in South African law. Self-defence may be used to protect life, limb, property, personal freedom, sexual integrity, chastity and dignity. The view, contained in this section, that the defence of third parties is only lawful where there is a relationship in terms of which it is the defender's moral or legal duty to act in defence of the third party is not generally favoured by South African legal scholars.⁶²

The SALRC recommends that section 11 of the Code be repealed in its entirety because the common law private defence fulfils the same objective.

⁵⁸ Jonathan Burchell and John Milton *Principles of Criminal Law* (2005) 3rd Ed at 270.

⁵⁹ *R v Werner* 1947 (2) SA 828 (A); *S v Bradbury* 1967 (1) SA 387 (A).

⁶⁰ *S v Goliath* 1972 (3) SA 1 (A). In this case X was ordered by Z to hold Y tightly so that Z might stab and kill Y. X was unwilling throughout, but Z threatened to kill him if he refused to help him.

⁶¹ Section 11 of the Code reads:

'Subject to the express provisions of this Code or any other law, no person shall be criminally liable for the use of force in repelling an unlawful attack upon his person or property or the person or property of anyone whom it is his moral duty or legal duty to protect if the means he uses or the degree of force he employs in so doing are no more than is reasonably necessary in the circumstances.'

⁶² See Burchell and Milton at 235-6.

4 Force used in arrests

2.7 The Code contains an injunction and requires the court, in a case where force is used to effect arrest, to take into account the gravity of the offence and the circumstances prevailing at the time such offence was committed. Section 12 of the Code provides that:

'Where anyone is charged with a criminal offence arising out of the lawful arrest, attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested, the court shall in considering whether the means used were necessary, or the degree of force used was reasonable, for the apprehension of such person, have regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person.'

2.8 This section, therefore, does not deal with the question of who is authorised to effect an arrest, under what circumstances it may be carried out; and how arrest should be made. Instead, it lays down factors that a court must consider when it determines whether the conduct of an accused charged with using force to make an arrest was reasonable and proportional.

2.9 In the rest of the Republic, the use of force when effecting arrest is regulated by section 49 of the Criminal Procedure Act.⁶³ Before its amendment by the Judicial Matters

⁶³ Section 49 of the Criminal Procedure Act 51 of 1977 provides that:

'49 Use of force in effecting arrest

- (1) For the purposes of this section-
 - (a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect; and
 - (b) 'suspect' means any person in respect of whom an arrestor has or had a reasonable suspicion that such person is committing or has committed an offence.
- (2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor is justified in terms of this section in using deadly force that is intended or is likely to cause death or grievous bodily harm to a suspect, only if he or she believes on reasonable grounds-
 - (a) that the force is immediately necessary for the purposes of protecting the arrestor, any person lawfully assisting the arrestor or any other person from imminent or future death or grievous bodily harm;

Second Amendment Act,⁶⁴ which came into effect in 2003, section 49 of the Criminal Procedure Act distinguished between the use of deadly force and lesser, non-deadly force.⁶⁵ During the five-year interregnum, the Supreme Court of Appeal and the Constitutional Court embarked on a creative and thorough re-evaluation of section 49. In *Govender v Minister of Safety and Security*⁶⁶ the Supreme Court of Appeal read down the old section 49(1) in the light of the Constitution to require merely proportionality between the nature and degree of the force used and the seriousness of the offence committed or reasonably suspected of having been committed. The Supreme Court of Appeal, invoking the reasonableness test, highlighted that the nature and the degree of force used must be proportional to the threat posed by the fugitive to the safety and security of the police officers and others. Shortly after this decision, section 49(2) was considered by the Constitutional Court in *Ex Parte Minister of Safety and Security: In re S v Walters (S v Walters)*.⁶⁷ In this case, which was decided prior to the coming into operation of the Judicial Matters Second Amendment Act referred to above, the Constitutional Court declared section 49(2) of the Criminal Procedure Act unconstitutional on the basis that it infringed the rights to dignity, life and security of the person and could not be saved by the limitations provisions of the Constitution. The

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- (b) that there is a substantial risk that the suspect will cause imminent or future death or grievous bodily harm if the arrest is delayed; or
 - (c) that the offence for which the arrest is sought is in progress and is of a forcible and serious nature and involves the use of life threatening violence or a strong likelihood that it will cause grievous bodily harm.'

⁶⁴ Act 122 of 1998.

⁶⁵ Section 49 of the Criminal Procedure Act of 1977 read as follows:

- '(1) If any person authorized under this Act to arrest or to assist in arresting another, attempts to arrest such person and such person-
 - (a) resists the attempt and cannot be arrested without the use of force; or
 - (b) flees when it is clear that an attempt to arrest him is being made, or resists such attempt and flees,
 the person so authorized may, in order to effect the arrest, use such force as may in the circumstances be reasonably necessary to overcome the resistance or to prevent the person concerned from fleeing.
- (2) Where the person concerned is to be arrested for an offence referred to in Schedule 1 or is to be arrested on the ground that he is reasonably suspected of having committed such an offence, and the person authorized under this Act to arrest or to assist in arresting him cannot arrest him or prevent him from fleeing by other means than by killing him, the killing shall be deemed to be justifiable homicide."

⁶⁶ 2001 (4) SA 273 (SCA).

⁶⁷ 2002 (4) SA 613 (CC).

Constitutional Court further held that the approach adopted by the court in *Govender* applied equally to section 49(2) of the Criminal Procedure Act and expanded the narrow test of proportionality between the seriousness of the relevant offence and the force used to include a consideration of proportionality between the nature and degree of force used and the threat posed by the fugitive to the safety and security of police officers and, other individuals and society.

2.10 Although the current text of section 49 of the Criminal Procedure Act, like section 12 of the Code, specifically stipulates the proportionality and reasonableness criteria, the legislature enacted Criminal Procedure Amendment Act to substitute and align the provisions of section 49 with the criteria laid down by the Constitutional Court in *S v Walters* referred to above for comment.⁶⁸

Inevitably, section 49 of the Criminal Procedure Act has been amended, which amendment applies to the rest of the Republic. The SALRC therefore recommends that section 12 of the Code be repealed in its entirety. Section 2 of the Justice Laws Rationalisation Act 18 of 1996, read in conjunction with Schedule 1 to that Act, extended the application of the Criminal Procedure Act of 1977, including section 49(1) and (2) to the area formerly known as the Transkei. There would be no *lacuna* in the law if section 12 of the Code is repealed.

5 Immature age

2.11 The Code also deals with criminal capacity of children between the ages 0-7 years (*infantes*) and 8-14 years (*impubes*). It provides that children below the age of seven are not criminally liable at all, and that children under the age of 14 years are rebuttably presumed to lack criminal capacity.⁶⁹

⁶⁸ See section 49 of the Criminal Procedure Amendment Act 9 of 2012, published in the Government Gazette No 35714 of 25 September 2012.

⁶⁹ Section 13 of the Code provides that:

- (1) No person under the age of seven years shall be criminally liable for any act or omission.
- (2) No person under the age of fourteen years shall be criminally liable for any act or omission unless it is proved that at the time of doing the act or making the omission he had the capacity to know that his act was wrongful.'

2.12 Until 2010, the legal position in South Africa was regulated by the common law and mirrored the provisions of the Code set out above. However, the Child Justice Act,⁷⁰ which came into operation in April 2010, has changed the common law in this regard. Section 7 of the Child Justice Act provides that:

'7 Minimum age of criminal capacity

- (1) A child who commits an offence while under the age of 10 years does not have criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of section 9.
- (2) A child who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity in accordance with section 11.
- (3) The common law pertaining to the criminal capacity of children under the age of 14 years is hereby amended to the extent set out in this section.'

The court in *S v Bhobhotyana*⁷¹ left open the question whether the enactment of legislation dealing with the same subject-matter as that regulated by the Code would result in the repeal, by implication, of the relevant provisions of the Code. Clearly, the provisions of the Code and those contained in the Child Justice Act in respect of criminal liability of children are contradictory. In the light of the fact that section 13 of the Code and section 7 of the Child Justice Act are *in pari materia*, it may be presumed that the provisions of the Code have been repealed by section 7 of the Child Justice Act. However, to bring about legal certainty in respect of this area of the law, the SALRC recommends that section 13(1) and (2) of the Code be repealed.

6 Insanity

2.13 In terms of the Code, a person who suffers from mental illness cannot be held criminally liable.⁷² In the rest of the Republic, the defence of mental illness is

⁷⁰ Act 75 of 2008. NB! The age at which a child attains criminal capacity has been revised upwards by section 4 of the Child Justice Amendment Act 28 of 2019 which has replaced 10 years with 12 years wherever it appears in section 7 of the Child Justice Act. While the aforesaid amendment Act has been assented to, it has not yet come into operation.

⁷¹ The *State v Xolani Bhobhotyana* Case No 63/04 High Court (Transkei Division).

⁷² Section 14 provides that:

'(1) No person shall be criminally liable for an act or omission if at the time of doing the act or making the omission he was laboring under mental defect or disease of or affecting the mind to such an extent as to render him incapable of-

comprehensively regulated by section 78 of the Criminal Procedure Act.⁷³ South African law has, like section 14(4) of the Code, adopted the rule of English common law that every man is presumed to be sane and to possess sufficient degree of reason to be responsible for his crimes, until the contrary is proved.⁷⁴ The provisions of the Criminal Procedure Act are, to some extent, similar to the provision of the Code. However, there are differences between the two statutes which merit a brief comment. On the one hand, section 78 of the Criminal Procedure Act, unlike the Code,⁷⁵ makes no mention of a situation where a person is suffering from mental illness to such an extent that he or she is incapable of forming the necessary intention to constitute the crime or does not understand the nature of his or her act, in other words he or she does not know what he or she is doing. This is considered by some legal scholars to be a *lacuna*.⁷⁶ On the other hand, the Code contains a murky provision that insanity before or after the person has committed an act or omission may be evidence that such a person was in such a state of mind that he could not be held liable for any offence which such an act or omission might have constituted.⁷⁷ South African law is

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- (a) forming the necessary intention to constitute the crime; or
 - (b) appreciating the nature and quality of the act; or
 - (c) appreciating that the act was wrong;
 - (d) acting in accordance with an appreciation of the wrongfulness of his act; or
 - (e) resisting the impulse to do the act.'

⁷³ Section 78 of the Criminal Procedure Act 51 of 1977 provides:

'A person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from mental illness or mental defect which makes him or her incapable

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.'

⁷⁴ Section 78(1A) of the Criminal Procedure Act provides that:

'Every person is presumed not to suffer from a mental illness or mental defect so as not to be criminally responsible in terms of section 78 (1), until the contrary is proved on a balance of probabilities.'

⁷⁵ In addition to the psychological requirements that a person must lack the capacity to appreciate the wrongfulness of his act; or to act in accordance with the appreciation of the wrongfulness of his act, the Code also requires that the mental illness must have affected the person to such an extent as to render him incapable of forming the necessary intention to constitute the crime or appreciating the nature of his act.

⁷⁶ CR Snyman *Criminal Law* (2008) at 173.

⁷⁷ Section 14(3) of the Code.

clear in this regard; if a person was mental ill before and after the act but he committed it during a (*lucidum intervallum*) sane interval he or she would be held criminal responsible for the act. The most glaring difference between the two statutes is that the Criminal Procedure Act states what the court needs to do if it finds a person not guilty as a result of mental illness. It could direct that:

- the person be admitted in a psychiatric institution mentioned in the Mental Health Care Act;⁷⁸
- he or she be released subject to conditions; or
- he or she be released unconditionally.

The SALRC is satisfied that the provisions of section 78 of the Criminal Procedure Act deal adequately with the defence of mental illness and thus recommends that section 14(1)-(4) of the Code be repealed.⁷⁹

7 Intoxication

2.14 The commission of an offence by a person who is intoxicated constitutes an offence under the Code.⁸⁰ However, *involuntary* intoxication constitutes a complete defence on a charge of a crime committed during the intoxication.⁸¹

⁷⁸ Act 17 of 2002.

⁷⁹ As stated in other parts of this report, section 2 of the Justice Rationalisation of Laws Act 18 of 1996, read in conjunction with Schedule 1 of that Act, extended the application of the Criminal Procedure Act to the area formerly known as the Transkei.

⁸⁰ Section 15 of the Code provides that:

'(1) Subject to the provisions of subsection (2) a person shall be criminally liable and guilty of an offence in terms of this section for any act or omission which would constitute an offence but for the fact that at the time of such an act or omission such person is by reason of intoxication-

- (a) incapable of knowing the nature of the act; or
- (b) incapable of knowing that what he was doing is either wrong or contrary to law;
- (c) insane, temporary or otherwise,

and it shall be competent for the court to convict him of a contravention of this section notwithstanding the fact that he is charged with some other offence and not with the contravention of this section.'

⁸¹ Section 15(2) of the Code provides:

"In any case where the thing which causes the intoxication was administered without the knowledge or consent of the accused, proof of which shall be on the accused, and such

2.15 South African law on the effect of intoxication on criminal liability has had a chequered history. Early South African law, like Roman-Dutch law, did not recognise intoxication as a defence. In *R v Bourke* the court held:⁸²

‘To allow drunkenness to be pleaded as an excuse would lead to a state of affairs repulsive to the community... the regular drunkard would be more immune from punishment than a sober person.’

2.16 However, it was subsequently accepted by the courts that involuntary intoxication of a sufficient degree could excuse otherwise criminal conduct. The decision of the court in *S v Chretien*⁸³ eradicated the existing approach of the courts to voluntary intoxication. In this case Chief Justice Rumpff held that voluntary intoxication could be a complete defence to criminal liability with the result that it can affect criminal liability in the same way, and to the same extent as youth, insanity, involuntary intoxication and provocation.

2.17 The approach adopted by the court in *S v Chretien* created a concern that intoxicated persons might be placed beyond the reach of the criminal justice system. This in turn led to the enactment of the Criminal Law Amendment Act⁸⁴ which makes it an offence for any person who consumes any substance which impairs his faculties, knowing that such substance has that effect, who while his faculties are so impaired commits an act prohibited by law.⁸⁵ Section 2 of this Act makes the consumption of alcohol or use of substances that

intoxication has one or more of the effects mentioned in paragraphs (a), (b), or (c) of subsection (1), such fact shall provide a complete defence to the charge.”

⁸² 1916 TPD 303 (102).

⁸³ 1981 (1) SA 1097 (A).

⁸⁴ Act 1 of 1988.

⁸⁵ Section 1(1) and (2) of this Act provides:

‘1 Acts committed under influence of certain substances to be punishable

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

impair faculties an aggravating circumstance and not a mitigating circumstance.⁸⁶ However, this statutory crime of intoxication has been criticised for being too wide; for not making it clear whether the section applies to voluntary intoxication or involuntary intoxication as well; and for not covering a situation where intoxication results in the lack of intention or in a person being unable to perform a voluntary act.⁸⁷ Legal commentators have submitted that despite the absence of the word “voluntary” before the words “consumes or uses” this section should be limited to cases in which a person consumes alcohol or substance voluntarily.⁸⁸ They have also submitted that the absence of intention in this section means that the ordinary principles relating to the effect of mistake on liability applies and that a person who acts involuntary also lacks capacity, and that if this is the case, this section applies.⁸⁹

Despite the paucity of cases dealing with this piece of legislation and the interpretive difficulties occasioned by the manner in which its provisions are couched, it is submitted that the Criminal Law Amendment Act is not fatally defective, and that it is to a large extent similar to section 15 of the Code. The SALRC therefore recommends that section 15 of the Code be repealed. The Justice Laws Rationalisation Act also extended the application of Act 1 of 1988 to the area formerly known as the Transkei. The repeal of section 15 of the Code will therefore not leave a vacuum in the law.

8 Ignorance of the law

2.18 Section 16 of the Code provides that ignorance of the law is no excuse unless knowledge of the law is explicitly declared to be an element of the offence. South African

⁸⁶ Section 3 of this Act provides:

‘2 Commission of offence while faculties were impaired may be an aggravating circumstance

Whenever it is proved that the faculties of a person convicted of any offence were impaired by the consumption or use of a substance when he committed that offence, the court may, in determining an appropriate sentence to be imposed upon him in respect of that offence, regard as an aggravating circumstance the fact that his faculties were thus impaired.’

⁸⁷ See CR Snyman *Criminal Law* (2008) at 229-231.

⁸⁸ *Id* at 230.

⁸⁹ *Id* at 231.

law on this subject was similar until it was radically changed by the decision of the Appellate Division in *S v De Blom*.⁹⁰ In this case the Appellate Division stated:

'At this stage of our legal development it must be accepted that the cliché that "every person is presumed to know the law", has no ground for its existence and that the view that "ignorance of the law is no excuse" is not legally applicable in the light of the present-day concept of *mens rea* in our law.'

2.19 Although the decision has been criticised for not placing any limitations on the scope of the defence of ignorance of the law and for applying a purely subjective test, it was hailed for abolishing the untenable and illogical presumption that everybody knows the law. Furthermore, although it has been suggested that ignorance of the law or mistake of law should operate as a defence which excludes intention only if the ignorance or mistake is reasonable,⁹¹ the decision of the court in *De Blom* remains authoritative and binding in respect of the defence of ignorance of the law.

Undoubtedly, therefore, there is inconsistency between the law that applies to the rest of the Republic and section 16 of the Code, which applies only to the area formerly known as the Transkei. It is recommended that section 16 of the Code be repealed. This would render the common law developed by the courts and currently applicable in the rest of the Republic applicable to the former Transkei.

9 Immunity of judicial officers

2.20 The Code grants judges and other judicial officers complete immunity from criminal liability for anything done or committed in good faith in the exercise of their judicial functions, including acts that are *ultra vires*.⁹² The Code does not define the term "judicial officer". It should be stated right from the outset that in South African law, the notion of absolute immunity from civil or criminal liability is not known. As far as civil actions against judicial

⁹⁰ 1977 (3) SA 513 (A).

⁹¹ CR Snyman *Criminal Law* (2008) at 208.

⁹² Section 17 of the Code reads:

'Except as expressly provided by this Code, no judge or other judicial officer shall be criminally liable for anything he has done or omitted in good faith in the exercise of his judicial functions, *even if the act so done was in excess of his judicial authority* or if he was bound to do the act omitted.' (Emphasis added).

officers are concerned, our law was summarised as follows by the Supreme Court of Appeal in *Telematrix (Pty) Ltd v Advertising Standards Authority of SA*.⁹³

'Since the present case deals with the wrongfulness of a decision reached in a process that may properly be described as adjudicative, it will be useful to consider in more detail the immunity given to judicial officers against damages claim. Johannes Voet in his *Commentary on the Pandects* 5.1.58 said (Gane's translation somewhat adapted):

"But in our customs and those of many other nations it is rather rare for the judge to [bear the responsibility for the outcome] by ill judging. That is because the trite rule that he is not made liable by mere lack of knowledge or [lack of skill], but by fraud only, which is commonly difficult of proof. It would be a bad business with judges, especially lower judges who have no skill in law, if in so widespread a science of law and practice, such a variety of views, and such a crowd of cases which will not brook but sweep aside delay, they should be held personally liable to the risk of individual suits, when their unfair judgment springs not from fraud, but from mistake, lack of knowledge or [lack of skill]."

This statement reflects the current legal position.⁹⁴

2.21 In relation to judges, the common-law rules set out above that judges are not liable in a civil action for errors made in good faith have been augmented by the Judicial Service Commission Act,⁹⁵ read in conjunction with the Code of Judicial Conduct. The Judicial Service Commission Act places an obligation on the Chief Justice, in consultation with the Minister of Justice and Constitutional Development, to compile a Code of Judicial Conduct which will regulate the conduct of judges and to which judges must adhere.⁹⁶ Note 8C of the Code of Judicial Conduct, which gives guidance as to what is meant by fair trial in Rule 8,⁹⁷ is apposite and provides:

⁹³ 2006 (1) SA 461 (SCA).

⁹⁴ Paragraph 17 of the decision (footnotes omitted). The court further explained that the decisive policy underlying the immunity of the judiciary is the protection of its independence to enable it to adjudicate fearlessly. The court went further and explained that litigants are not entitled to a perfect process that is free from innocent errors and that the threat of an action for damages would unduly hamper the expeditious consideration and disposal of litigation. See paragraph 19 of the judgment.

⁹⁵ Act 9 of 1994.

⁹⁶ Section 12(1) of the Judicial Service Commission Act, read together with subsection (4).

⁹⁷ Rule 8 of the Code of Judicial Conduct reads:

'8. Fair trial

- (1) A judge resolves disputes by making findings of fact and applying the appropriate law in a fair hearing. This includes the duty to-

Since judges are fallible and can err in relation to fact or law, such errors are to be dealt with through (*sic*) the normal appeal and review procedures. Such errors, even if made by courts of final instance, cannot give rise to valid complaints. Complaints against judges that are related to the merits of a decision or procedural ruling are to be dismissed at the outset. Disenchantment about a judicial decision does not justify disciplinary proceedings. Section 15(2)(c) of the Act specifically provides that a complaint against a judge must be dismissed if it solely relates to the merits of a judgment or order.

2.22 The note above must be read in conjunction with the provisions of the Judicial Service Commission Act. This Act makes it clear that incapacity; gross incompetence; gross misconduct; breach of the Code of Judicial Conduct and conduct that is incompatible with or unbecoming of a person holding judicial office constitute a ground upon which a complaint may be lodged against a judge with the Judicial Conduct Committee.⁹⁸ Furthermore, once a valid complaint has been established, the following sanctions, among others, may be imposed on the judge: an apology, a reprimand, written warning, compensation, counselling, or any other corrective measure.⁹⁹

2.23 The argument that the notion of absolute immunity is not recognised in South African law is further bolstered by the court in *Telematrix (Pty) Ltd v Advertising Standards Authority of SA*¹⁰⁰ when it said:

The different judgments in *R v Kumalo and Others* are in this regard instructive. A chief, who had civil jurisdiction but did not have the necessary jurisdiction to impose corporal punishment, imposed it on the complainant for contempt of his court. The chief and some others were then criminally

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- (a) observe the letter and spirit of the *audi alteram partem* rule;
 - (b) remain manifestly impartial;
 - (c) give adequate reasons for any decision.
 - (2) In conducting judicial proceedings, a judge maintains order, acts in accordance with commonly accepted decorum, remains patient and courteous to legal practitioners, parties and the public, and requires them to act like wise.
 - (3) A judge manages legal proceedings in such a way as to expedite their conclusion as cost-effective as possible and does not shift the responsibility to hear and decide a matter to another judge.
 - (4) A judge does not exert undue influence in order to promote a settlement or obtain a concession from any party.'

⁹⁸ See in general, section 14 of the Judicial Service Commission Act.

⁹⁹ Section 17(8) of the Judicial Service Commission Act.

¹⁰⁰ See *Telematrix* decision above at paras 18 and 19.

charged with assault. Van den Heever JA thought that the chief was entitled to the indemnity mentioned by Voet and in addition quoted an 1886 judgment of Lord de Villiers holding that judicial officers are also not liable in damages in relation to administrative functions performed by them in good faith in the course of their duties. Hoexter JA, speaking on behalf of the majority, confirmed the conviction on the ground that the chief knew that he was acting outside the terms of his judicial authority. Schreiner JA also confirmed the conviction but on another ground, namely that the chief was personally instrumental in inflicting the punishment - his intervention did not stop at the judicial act. More of interest though is Schreiner JA's finding (concordant with that of Van den Heever JA) that the fact that the chief had exceeded his jurisdiction on its own would not have made him liable. This, I would suggest, in the ordinary course of things makes good sense because a wrong assumption of jurisdiction does not differ in kind from any other wrong decision.

The decisive policy underlying the immunity of the judiciary is the protection of its independence to enable it to adjudicate fearlessly. Litigants (like those depending on an administrative process) are not 'entitled to a perfect process, free from innocent (ie, non *mala fide*) errors'. The threat of an action for damages would 'unduly hamper the expeditious consideration and disposal' of litigation. In each and every case there is at least one disgruntled litigant. Although damages and the plaintiff are foreseeable, and although damages are not indeterminate in any particular case, the 'floodgate' argument (with all its holes) does find application."

The Code is therefore at odds with the law that obtains in the rest of the Republic in relation to the liability of judicial officers. The SALRC thus recommends that section 17 of the Code that grants complete immunity against criminal liability to judicial officers be repealed.

10 Mistake of fact

2.24 In terms of section 18 of the Code a mistake of fact is a complete defence.¹⁰¹ In South African law, this defence is also recognised. The court in *S v Fick*¹⁰² stated, without reference to the Code:

'For the defence of mistake of fact to be successfully raised, there must be a mistake in regard to the facts which, if true, would have entitled the *de cuius* to take all the steps which he did in fact take.'

¹⁰¹ Section 18 of the Code reads: 'Except in those cases where there is an express or implied provision of law to the contrary, conduct otherwise criminal is excused where it is done under the influence of an honest and reasonable belief in a state of facts which, if true, would have justified such conduct.'

¹⁰² 1970 (4) SA 510 (N).

Although, this defence is not codified in the rest of the Republic, it is recognised. The SALRC thus recommends that section 18 of the Code be repealed. The common-law defence of mistake of facts that is applicable in the rest of South Africa would now apply in the territory formerly known as the Transkei.

11 Misfortune or accident

2.25 Acts or omissions done by accident or misfortune, without any criminal intention do not constitute an offence.¹⁰³ Fault is an essential requirement of every crime and consists either of intention (*dolus*) or negligence (*culpa*). An accused is at fault where he or she intentionally commits unlawful conduct knowing it to be unlawful. Accident or misfortune is different from deliberate conduct in that it excludes intention in all its forms namely *dolus directus*, *dolus indirectus* and *dolus eventualis*. In all these forms of intention the accused must have foreseen that his conduct could bring about the unlawful consequence and reconciled himself to that possibility. Accidental conduct excludes intention.

Therefore, the SALRC recommends that section 19 be repealed as there is a body of law emanating from the courts in the Republic dealing with intention and defences that exclude fault.

12 Prevention of harm

2.26 Section 20(1) of the Code is a codification of the common-law defence of necessity. This view is based on the exposition of section 81 of the Indian Penal Code, which is similar to section 20(1) under consideration.¹⁰⁴ The comments made above, in respect of the defence of necessity, apply to this provision as well.

The recommendation made above in relation to section 10 of the Code, dealing with the defence of “necessity”, apply to section 21(1) of the Code, because it is another form of statutory codification of the defence of necessity.

¹⁰³ Section 19 of the Code.

¹⁰⁴ See *Codification, Macaulay and the Indian Penal Code: The Legacies and Challenges of Modern Criminal Law Reform* Wing Cheong Chan, Barry Wright, Stanley Yeo (ed) (2011) at 208.

2.27 Section 20(2) of the Code protects “everyone” from liability for performing with reasonable care and skill surgical operation upon any person for his benefit with such person’s consent or in the case of a minor with the consent of a parent or guardian of such minor.

2.28 The position in South African law, although it is not codified, is similar. An operation cannot lawfully be performed without the consent of the patient, or if he is not competent to give such consent, that of the person in authority over his person. Performing an operation without the consent of the person is only allowed where the operation is urgently necessary and cannot with due regard to the patient’s interest be delayed.¹⁰⁵ South African courts go further and require that for there to be a valid consent the surgeon has a duty to point out to the patient all the possible dangers likely to result from the operation.¹⁰⁶ Therefore the patient must fully appreciate the danger and consent to incur it. Failure to observe this requirement could result in the surgeon being convicted of assault and could attract liability for damages¹⁰⁷ and the common-law defence of *volenti non fit injuria* (to a willing person injury is not done) will not succeed.

The SALRC, therefore, recommends, in the light of the jurisprudence referred to above, which also clarifies what is meant by ‘consent’ in cases of surgical operations, that section 20(2) of the Code be repealed. ¹⁰⁸

¹⁰⁵ *Ex Parte Dixie* 1950 (4) SA 748 (W) 751.

¹⁰⁶ *Esterhuizen v Administrator, Transvaal* 1957 (3) SA 710 (T) 719.

¹⁰⁷ *Id* at 722.

¹⁰⁸ This recommendation also applies to section 20(3) of the Code which provides that: “No act or omission shall be an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person’s consent, if the circumstances are such that it is impossible for the person to signify consent, or if that person is incapable of giving consent and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit.

2.29 Section 20(4) of the Code outlaws assisting another to commit suicide and mercy killing (euthanasia).¹⁰⁹ In South African law too, a person who bring about the death of another person, with his or her consent, renders himself or herself guilty of murder.¹¹⁰

The SALRC recommends that section 20(4) of the Code be repealed as there is substantial case law developed by the courts dealing with criminal liability in the circumstances contemplated in section 20(4) of the Code.

2.30 Section 20(5) excludes from criminal liability acts causing harm, which are done in good faith for the benefit of a person under 12 years of age or a person of an unsound mind with the implied or express consent of the parent or guardian of such minor or imbecile.¹¹¹ However, it excludes from this protection the intentional causing of death or attempt to cause death; voluntary causing of grievous bodily harm; and abetment of an offence. Consent induced by means of duress is not consent for the purposes of this provision.¹¹²

2.31 As stated above in respect of section 20(2) of the Code, South African courts require that for there to be a valid consent the parent or guardian of the minor or person of unsound mind must be aware of the true material facts regarding the act to which he or she is consenting. Failure to do so could result in criminal liability. In respect of children below the age of 12 years, this Act has been superseded by the Children's Act, which provides, for example, that the parent or guardian or care-giver may consent to the surgical operation of

¹⁰⁹ It states: 'No person shall have a right to consent to the infliction of death upon himself, or of injury likely to cause death, unless it be an injury in the nature of a surgical operation upon himself and if such consent is given, it shall have no effect upon the criminal liability of any person by who such death may be caused.'

¹¹⁰ CR Snyman *Criminal Law* (2008) at 125.

¹¹¹ This provisions provides that:

'(5) Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, shall be an offence by reason of any harm which it may likely cause, or intended by the doer to cause or be known or be known by the doer to be likely to cause to that person: Provided-

(a) that this exception shall not extend to the intentional causing of death or any attempt to cause death;

(b) that this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the prevention of death or grievous bodily harm or the curing of any grievous disease or infirmity.'

¹¹² Section 20(5)(e) of the Code.

a child that is under 12 years of age or over that age but is of insufficient maturity or is unable to understand the risks, benefits, and social implications of the treatment.¹¹³

The SALRC recommends that section 20(5) be repealed in its entirety as our courts have developed common-law rules recognising circumstances where consent could be invoked as a ground of justification. Furthermore, the Children's Act contains elaborate protective measures relating to the health of children.

13 Person not to be punished twice for the same offence

2.32 The Code contains the defence that that no person shall be punished twice for the same offence.¹¹⁴ In South African law the defences of *autrefois convict* or *autrefois acquit* were common law rules. These common law rules have been elevated to the status of constitutional rights. Section 35(3)(m) of the Constitution provides that every accused person has a right to fair trial which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.

Therefore, the SALRC recommends that section 21 of the Code be repealed as the Constitution provides a guarantee that no one shall be convicted twice for the same offence.

14 Court officers justified in executing sentences

2.33 Section 22(1) of the Code provides that an officer of the court authorised to execute a lawful sentence and every member of the prison service and every person assisting such officer or member shall be justified in executing such sentence. Section 22(2) is wider in that it provides that every officer of any court duly authorised to execute lawful process of such court whether of a criminal or civil nature and everyone duly authorised to execute a lawful warrant issued by any court shall be justified in executing such process or warrant and every member of the prison service who is required to receive and detain any person shall be justified in receiving and detaining the person concerned.

2.34 Generally, if a person performs an act in an official capacity, his or her conduct, which would otherwise be unlawful, is justified, provided it is performed in the execution of

¹¹³ Section 129(4) of the Children's Act 38 of 2005.

¹¹⁴ Section 21 of the Code.

his or her duties.¹¹⁵ The Criminal Procedure Act does not contain a provision similar to the provisions referred to in the preceding paragraph. However it does empower police officials to execute court processes.¹¹⁶ Section 36(1) of the Supreme Court Act authorises the Sheriff to execute lawful processes of the courts.¹¹⁷

In South African law, an act which would otherwise be unlawful is justified if it is performed in the execution of official duties. On this score alone, the provisions of the Code referred to above could be repealed.

15 Obedience to superior orders

2. 35 Section 23(1) of the Code provides that every person who is bound by military or police law to obey lawful command of his superior officer, shall be justified in obeying any command given to him by his superior officer for the suppression of riot, unless such order is manifestly unlawful. Section 23(2) provides that it shall be a question of law whether such order is manifestly unlawful or not. Section 24(1) of the Code affords protection against

¹¹⁵ CR Snyman *Criminal Law* (2008) at 129.

¹¹⁶ Section 329 and 330 of the Criminal Procedure Act provide:

'329 Court process may be served or executed by police official

Any police official shall, subject to the rules of court, be as qualified to serve or execute any subpoena or summons or other document under this Act as if he had been appointed deputy sheriff or deputy messenger or other like officer of the court.

330 Transmission of court process by telegraph or similar communication

Any document, order or other court process which under this Act or the rules of court is required to be served or executed with reference to any person, may be transmitted by telegraph or similar written or printed communication, and a copy of such telegraph or communication, served or executed in the same manner as the relevant document, order or other court process is required to be served or executed, shall be of the same force and effect as if the document, order or other court process in question had itself been served or executed.'

¹¹⁷ Section 36 of the Supreme Court Act 59 of 1959 provides:

'36 Execution of process

(1) The sheriff or a deputy-sheriff shall execute all sentences, decrees, judgments, writs, summonses, rules, orders, warrants, commands and processes of the court directed to the sheriff and shall, subject to the rules made in terms of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), make return of the manner of execution thereof to the court and to the party at whose instance they were issued.'

criminal liability to a person obeying orders issued by a magistrate or a justice of the peace for the suppression of riot.¹¹⁸

2.36 The Police Service Act¹¹⁹ contains a provision similar to section 23(1) of the Code. The Defence Act goes a step further and makes it an offence to refuse to obey lawful orders.¹²⁰ Furthermore, the defence of obedience to orders is known in South African law too, as exemplified by the case of *S v Banda*.¹²¹ In contrast to the Code, the duty to obey lawful orders in the laws referred to above is not limited to cases involving riots.

The SALRC recommends that sections 23(1) and (2) and 24(1) and (2) be repealed as the injunctions and defence they contain is provided for in legislation enacted after the advent of our democracy and case law dealing with these matters.

16 *De minimis non curat lex*

2.37 *De minimis non curat lex* is a common-law rule that the law does not concern itself with trifles.¹²² This rule has been codified in section 25 of the Code. This defence is also

¹¹⁸ Section 24(1) of the Code reads:

‘Any person, whether subject to military or police law or not, acting in good faith in obedience to orders given by a magistrate or a justice of the peace for the suppression of a riot, shall be justified in obeying the orders so given, unless such orders are manifestly unlawful, and he shall be protected from criminal liability in using such force as he on reasonable and probable grounds believes to be necessary for carrying into effect such orders.’

¹¹⁹ Section 47 of the South African Police Service Act 68 of 1995 provides:

‘47 Obedience

- (1) Subject to subsection (2), a member shall obey any order or instruction given to him or her by a superior or a person who is competent to do so: Provided that a member shall not obey a patently unlawful order or instruction.
- (2) Where it is reasonable in the circumstances, a member may demand that an order or instruction referred to in subsection (1) be recorded in writing before obeying it.
- (3) A member may, after having obeyed an order or instruction referred to in subsection (1), demand that such an order or instruction be recorded in writing.’

¹²⁰ See section 106 of the Act 44 of 1957, which in terms of the First Schedule of the new Defence Act of 2002 is still in operation. Section 104(12) of the Defence Act of 2002 has the same effect as it provides that any person liable to render service in the Defence Force and refuses is guilty of an offence.

¹²¹ 1990 (3) SA 466 (BG).

¹²² Burchell *South African Criminal Law and Procedure* 3rd Ed (1997) at 150.

recognised in South African law, as demonstrated by the decision of the Appellate Division (as it then was) in the case of *S v Kgogong*.¹²³

It is therefore recommended that section 25 of the Code be repealed, in which event the common law rule referred to above would also apply to the area formerly known as the Transkei.

17 Accomplice

2.38 Section 26 of the Code provides:

‘Every person who knowingly aids or assists in, or counsels, the commission of any offence shall be guilty of that offence and on conviction liable to the same punishment as the principal offender.’

2.39 The liability of a person who furthers a crime committed by somebody else is also recognised in South African law. And, although the same punishment may be imposed on an accomplice as on the perpetrator,¹²⁴ the courts have discretion to impose a lighter or heavier sentence.¹²⁵

It is therefore recommended, in the light of the discussion above, that section 26 of the Code be repealed.

18 Common purpose

2.40 Section 27 of the Code codifies the doctrine of common purpose.¹²⁶ The essence of this doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, then the conduct of each of them in executing that purpose is imputed to the others. This doctrine has been applied in numerous cases by South African courts as well.

¹²³ 1980 (3) SA 600 (A).

¹²⁴ CR Snyman *Criminal Law* Sixth Edition (2014) at 270.

¹²⁵ CR Snyman *Criminal Law* (2008) 277-8.

¹²⁶ Section 27 of the Code reads:

‘If several persons form a common intention to prosecute any unlawful purpose and to assist each other therein, each of them shall be a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.’

It is therefore recommended that section 27 be repealed.

19 Counselling another to commit an offence

2.41 The provisions of section 28(1) and (2) of the Code do not create an offence but merely provide that a person who counsels or procures another to commit an offence shall be deemed to have counselled or procured another to commit an offence.¹²⁷ The SALRC is of the view that persons falling within the ambit of this section should be deemed as accomplices and that the recommendation above in relation to accomplices applies to section 28(1) and (2) of the Code as well.

The SALRC recommends that section 28(1) and (2) be repealed. Furthermore, it seems that the Riotous Assemblies Act discussed in the ensuing paragraph applies to the circumstances envisaged in this section.

20 Conspiracy

2.42 Section 29 of the Code provides that any person who has entered into an agreement with one or more persons to commit or to aid or procure the commission of a crime shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable. In South African law, conspiracy is regulated by section 18 of the Riotous Assemblies Act.¹²⁸ The application of this provision was extended to the former Transkei by the Justice Laws Rationalisation Act.

¹²⁷ Section 28 of the Code reads:

- '(1) When a person directly or indirectly counsels or procures any person to commit an offence and an offence is subsequently committed by the person so counselled or procured, it is immaterial whether the offence so committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided that the act or omission constituting the offence was or ought to have been known to be the probable consequence of carrying out the counsel
- (2) In either case the person who gave counsel or procured shall be deemed to have counselled or procured the other person to commit the offence actually committed by him.'

¹²⁸ Act 17 of 1956. The relevant provisions of this Act provide:

'18 Attempt, conspiracy and inducing another person to commit offence

- (1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

The SALRC therefore recommends that section 29 of the Code be repealed. No *lacuna* would be left in the law as a result of such repeal.

21 Offences by corporations, societies etc

2.43 Section 30 of the Code renders individuals at the helm of corporations and associations of persons liable for the crimes committed by such juristic persons.¹²⁹

2.44 Section 332(5) of the Criminal Procedure Act provides that:

When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.

2.45 The Constitutional Court in *S v Coetzee*¹³⁰ declared section 332(5) of the Criminal Procedure Act inconsistent with the Constitution and therefore invalid because it created a reverse onus which infringed the presumption of innocence contained in the Bill of Rights.

Although the constitutionality of section 30 of the Code is yet to be challenged, it is similarly unconstitutional, and has been rendered redundant by the decision of

(2) Any person who-

- (a) conspires with any other person to aid or procure the commission of or to commit; or
- (b) incites, instigates, commands, or procures any other person to commit,

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

¹²⁹ Section 30 of the Code provides:

'Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with or concerned or acting in control or management of the affairs or the activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or was about to be committed, and that he took all reasonable steps to prevent its commission.'

¹³⁰ 1997 (1) SACR 379 (CC) and 1997 (3) SA 527 (CC). Interestingly, section 332(5) of the Criminal Procedure Act still exist in the statute book in its pristine form.

the Constitutional Court in *S v Coetzee*, and is at variance with the law applicable to the rest of the Republic. The SALRC therefore recommends that this section be repealed.

22 Attempt to commit an offence

2.46 Section 31 of the Code provides that any person who attempts to commit an offence shall be guilty of an offence and liable on conviction to punishment as if he had actually committed such offence. Interpreted literally, this provision means that if an accused person tried to kill X by shooting him but missed, such a person must be charged with and be convicted of murder.

2.47 In contrast to this provision of the Code, the Criminal Procedure Act provides that if the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit that offence or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence.¹³¹

Clearly there is inconsistency between the law that applies to the rest of the Republic and the law that applies in the area formerly known as the Transkei in relation to the competent verdict on a charge of attempt to commit an offence. The SALRC therefore recommends that section 31 of the Code be repealed.

23 Punishment

2.48 The last provision of Part 3 of the Code codifies the rule that the court has discretion to impose appropriate punishment.¹³² South African courts have always had discretion when imposing punishment. Even in instances where legislation makes provision for minimum sentences to be imposed for certain crimes, the courts discretion is not taken away entirely.

¹³¹ Section 256 of the Criminal Procedure Act 51 of 1977.

¹³² Section 32 provides:

‘Unless otherwise provided the punishment which may be imposed by a court in respect of a contravention of any of the provisions of this Code shall be in the discretion of, and limited only by the jurisdiction of, that court.’

The existence of substantial and compelling circumstances justifies a deviation from the minimum sentence provided by the legislature.¹³³

2.49 It is therefore recommended that section 32 of the Code be repealed.

¹³³ For example, see section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997.

CHAPTER 3:

OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE

A Perjury

3.1 In South African law, the crimes of perjury and subornation of perjury, which are regulated by section 33 of the Code,¹³⁴ have long been recognised.¹³⁵ With regard to subornation of perjury, South African law became accustomed to using the English name for conduct which had been regarded in Roman-Dutch law as *crimen falsi* and required subornation, as opposed to incitement to perjury and attempted subornation. Legal commentators have observed that most cases of incitement to commit perjury have in practice been prosecuted as attempts to defeat or obstruct the course of justice and that there is substantial overlapping between the latter crime, subornation of perjury and incitement to commit perjury. They have further argued that our law would not be poorer without the independent crime of subornation.¹³⁶

¹³⁴ Section 33 of the Code provides:

- '(1) Any person who unlawfully, intentionally and upon oath, affirmation or admonition in the course of judicial proceedings before a competent court or tribunal makes a statement which he-
 - (a) knows to be false; or
 - (b) foresees may be false,
 shall be guilty of an offence of perjury.
- (2) For the purposes of subsection (1) it shall be immaterial-
 - (a) what forms and ceremony are used to in administering the oath or in otherwise binding the person giving the testimony to speak the truth, provided he assents to the forms and ceremonies used;
 - (b) whether the false testimony is given orally or in writing.
- (3) Any person who aids, abets, counsels, procures, or suborns another person to commit perjury shall be guilty of an offence of subordination of perjury.'

¹³⁵ The first case on subornation was heard in 1897 in *S v Meyer Yates* (1897) 4 Off Rep 134. And, in respect of perjury in *R v Korck* (1875) 6 Buch 6.

¹³⁶ See Milton South African Criminal Law and Procedure 3rd Ed (1996) at 152.

No adverse consequence would ensue if section 33 of the Code is repealed.

B False statement not made under oath

3.2 In South African law a false statement that is not made under oath and in the course of judicial proceedings does not constitute an offence. In contrast, section 38 of the Code reads:

'Any person who makes a statement as to any matter of fact, opinion or belief, which would amount to perjury if made on oath upon any occasion on which he is permitted by law to make any statement or declaration in lieu of an oath before any officer authorized by law to permit it to be made before him, shall be guilty of an offence and liable on conviction to the penalties provided for the offence of perjury.'

3.3 In determining the substance of this provision, recourse should be had to the decision of the Canadian Supreme Court in *The King v Orford*¹³⁷ where a similar provision contained in the Canadian Criminal Code was considered.¹³⁸ In that country false statements or declarations not on oath were not perjury. A provision was therefore enacted which made it an indictable offence to give a false statement, not under oath, to a person authorised by law to receive it.¹³⁹

3.4 Our law makes it an offence and punishes making false statement under oath, or in a form allowed to be substituted for an oath (solemn or attested declaration, affirmation, admonition to speak the truth, affidavit, certificate, and endorsement) in the course of judicial proceedings;¹⁴⁰ and the cognate offence of inducing another to make a false statement under oath. It would therefore seem that an offence similar to that contained in section 38 of the Code is not known in the Republic.

¹³⁷ [1943] SCR 103 — 1943-02-02

¹³⁸ Section 176 of the Criminal Code of Canada read:

'Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding.'

¹³⁹ *The King v Orford* 108.

¹⁴⁰ See sections 164(2); 212(4)(b) and (8)(c); 212 (11)(c); and 213(6) of the Criminal Procedure Act 51 of 1977. See also section 9 of the Commissioners of Oaths Act 16 of 1963.

Leaving aside the incomprehensibility of the language used in section 38 of the Code, which renders it nugatory, and on the basis of which the Commission recommends it should be repealed, the purport of section 38 of the Code seems to be to make it an offence to give false statement, not under oath, to a person authorised by law to receive it.

The question which arises, to which the Commission would appreciate receiving your input, is whether there is a need for a law which makes it an offence to give false statement or declaration to a person *authorised by law* to receive it. If so, what gaps would such a law address and how should such a law (or provision creating such an offence) be couched?

C Perjury by an interpreter

3.5 Section 34 of the Code addresses the question whether an interpreter can commit perjury. It makes it an offence for an interpreter to lie under oath.¹⁴¹ There is no equivalent provision in the current legislative framework applicable to the rest of the Republic. The view that seems to be favoured, at least by academics, is that an interpreter is required to take an oath and an interpreter who deliberately distorts the evidence he is translating commits perjury, for he expressly or impliedly misrepresents, under oath, that what he tells the court is what the witness said.¹⁴² Moreover, the interpreter could be charged with defeating the course of justice.

The common law offence of perjury is wide enough to cater for the conduct contemplated in section 34 of the Code. Whilst it appears that there is no need to enact a statutory provision dealing specifically with perjury committed by an interpreter, would the enactment of a provision similar to section 34 of the Code not promote legal certainty system in respect of this area of our law and instil a confidence in the legal?

¹⁴¹ Section 34 of the Code provides:

'Any person lawfully sworn as an interpreter in a judicial proceeding who willfully makes a statement material in the proceeding which he knows to be false, or does not believe it to be true shall be guilty of perjury.'

¹⁴² JRL Milton *South African Criminal Law and Procedure Vol II: Common Law Crimes* 3rd Edition (1996) at 143.

D Contradictory statements on oath

3.6 Section 35 of the Code provides that a person who has made a statement on oath whether in writing or orally and thereafter makes another statement which is in conflict with the first mentioned statement, shall be guilty of an offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true.¹⁴³

3.7 Section 319(3) of the Criminal Procedure Act of 1955¹⁴⁴ contains a similar provision. It is therefore recommended that section 35 of the Code be repealed. The Justice Laws Rationalisation Act extended the application of section 319(3) the Criminal Procedure Act to, among others, the former territory of the Transkei. This means that in the area formerly known as the Transkei both section 35 of the Code and section 319(3) of the Criminal Procedure Act exist side-by-side.

It is recommended that section 35 of the Code be repealed as there is a parallel legislation in the Republic that regulates this type of offence.

¹⁴³ Section 35 of the Code provides:

- '(1) If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such first-mentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements was false be convicted of such offence and punished with penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true.
- (2) At the trial of any person for an offence under this section, the record of a court or tribunal containing any statement made on oath or affirmation by the person charged shall be prima facie evidence of such statement.
- (3) A person shall be liable to be convicted of an offence under this section irrespective of whether any statement made by him before a court or tribunal was made in reply to a question which he was bound by law to answer, and any such statement shall be admissible in any proceeding under this section.'

¹⁴⁴ Act 56 of 1955, which reads:

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

The only issue, to which the Commission seeks input, is whether the words '*unless it is proved that when he made each statement he believed it to be true*' in section 319(3) of the Criminal Procedure Act of 1955 do not constitute reverse onus and fall foul of the Constitution in view of the Constitutional Court decision in *S v Coetzee* referred to above, where similar words used in section 245 of the Criminal Procedure Act of 1977 were held to contravene the right of an accused person to be presumed innocent.

E Fabricating evidence

3.8 Section 36 of the Code makes it an offence to fabricate evidence. In South African law as well, this crime is recognised. A good example of a case which involved the fabrication of evidence is *S v Mdakani*,¹⁴⁵ in which the accused concocted a chain of evidence including spurious documents implicating another in subversive activities and organisations. Fabricating evidence constitutes the crime of defeating or obstructing the course of justice.¹⁴⁶ This type of offence, although it is not codified, is known in South African law.

The SALRC thus recommends that section 36 of the Code be repealed.

F False statements under oath

3.9 Section 37 of the Code makes it an offence to make a false statement on oath or in any form permitted to be substituted for an oath which in judicial proceedings would amount to perjury.¹⁴⁷ Section 9 of the Justices of the Peace and Commissioners of Oath Act,¹⁴⁸ although worded slightly differently, contains a similar provision.¹⁴⁹

¹⁴⁵ 1963 (3) SA 311 (T) as quoted in Milton 3rd Ed at 119.

¹⁴⁶ Snyman *Criminal Law* (2008) at 340.

¹⁴⁷ Section 37 of the Code provides:

'Any person required or authorized by law to make a statement, with on oath or in any form permitted to be substituted for an oath, who makes a statement which would amount to perjury if made in a judicial proceeding, shall be deemed to be guilty of perjury, and liable on conviction to penalties provided for the offence of perjury.'

¹⁴⁸ Act 16 of 1963.

¹⁴⁹ Section 9 of this Act provides:

'9 Penalties for false statements in affidavits and certain other declarations

The SALRC thus recommends that section 37 of the Code be repealed.

G Removal or destruction of exhibit

3.10 Section 39 makes it an offence to remove, render ineligible or unidentifiable, destroy, any books, documents or thing of any kind that may be required in evidence in judicial proceedings with intent to prevent it from being used. South African law considers tampering with evidence which is to be used before a court as an interference with the course of justice and thus an offence.¹⁵⁰

The SALRC recommends that section 39 of the Code be repealed.

H False accusation, interfering with witnesses

3.11 Section 40 of the Code makes it an offence to falsely accuse another person of a crime; interfere with witnesses; and preventing the execution of a legal process.¹⁵¹ These offences all amount to the crime of defeating or obstructing the course of justice.

The SALRC therefore recommends that section 40 of the Code as the common law offence of obstructing or defeating the course of justice deals with the conduct contemplated in section 40 of the Code.

Any person who, in an affidavit, affirmation or solemn or attested declaration made before a person competent to administer an oath or affirmation or take the declaration in question, has made a false statement knowing it to be false, shall be guilty of an offence and liable upon conviction to the penalties prescribed by law for the offence of perjury.'

¹⁵⁰ Milton 3rd Ed at 119.

¹⁵¹ Section 40 of the Code provides:

'Any person who-

- (a) accuses any person falsely of any crime or does anything to obstruct, prevent, pervert, or defeat the course of justice; or
- (b) in order to obstruct the course of justice, dissuades by any means, or hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or
- (c) obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal

shall be guilty of an offence: Provided however that where the offence has caused the conviction and the execution of an innocent accused, such a person may be sentenced to death or to imprisonment for life.'

I Compounding

3.12 Section 41 of the Code expressly makes it an offence to solicit or receive a benefit in return for compounding or concealing a crime or withholding evidence.¹⁵² In South African law compounding is a common law offence. The continued existence of this offence has, however, been questioned by the courts.¹⁵³ Furthermore, this offence overlaps with offences created by the Prevention and Combating of Corrupt Activities Act.¹⁵⁴ Furthermore, certain statutes permit the compounding of certain offences.¹⁵⁵

3.13 Section 41(2) of the Code gives the court the authority to order the forfeiture of property that has changed hands in the commission of this offence or its value if such property cannot be found. In South African law punishment for the crime of compounding were left to the discretion of the courts. Imprisonment was possible but rarely resorted to. Small fines were usually imposed.¹⁵⁶ However, this has been changed by the Prevention and Combating of Corrupt Activities Act.¹⁵⁷

¹⁵² Section 41 provides:

- '(1) Any person who asks, receives or obtains, or agrees or attempts to receive or obtain, any property, or benefit of any kind for himself or any other person upon an agreement or understanding that he will compound or conceal an offence punishable under this Code with death or otherwise than by fine only, or withhold any evidence thereof, shall be guilty of an offence.
- (2) When any person is convicted of an offence under this section the court may, in addition to or in lieu of any other punishment which may be imposed, order the forfeiture to the State of any property which has passed in connection with the commission of the offence, or, if such property cannot be forfeited or cannot be found, of such sum as the court shall assess as the value of the property.
- (3) Payment of any sum ordered to be forfeited to the State in terms of subsection (2) may be enforced in the same manner and subject to the same incidents as in the case of payment of fine.'

¹⁵³ Van Dijkhorst J, as quoted in Milton 3rd Ed at 205, stated in *Bobat's Shoe-Box v Mohamed* 1993 (1) PH H24 (T):

'In my view there is no need for the crime of compounding. It has no Roman-Dutch antecedents; the application of the definition to the facts leads to anomalies, especially when reward is strictly circumscribed; its acceptance in Transvaal is doubtful; and the evil it is sought to prevent can be combated much more effectively by prosecutions for attempting to obstruct the administration of justice.'

¹⁵⁴ Act 12 of 2004.

¹⁵⁵ For example section 341 of the Criminal Procedure Act of 1977.

¹⁵⁶ See Milton at 216.

¹⁵⁷ See section 26 of the Prevention and Combating of Corrupt Activities Act.

The SALRC recommends that section 41 of the Code be repealed in its entirety as the evils it seeks to eradicate are comprehensively dealt with in the Prevention and Combating of Corrupt Activities Act and the perpetrator could alternatively be charged with defeating or obstructing the course of justice.

J Accessory after the fact

3.14 Section 42 of the Code codifies the offence of assisting the perpetrator evade justice.¹⁵⁸ Being an accessory after the fact has long been considered a crime in the Republic. It has been asked whether this crime is really necessary in our law as it overlaps with the offence of defeating the course of justice or attempting to do so.¹⁵⁹

It is therefore recommended that section 42 of the Code be repealed.

K Contempt of court

3.15 Section 43 of the Code criminalises various types of conduct which constitutes contempt of court.¹⁶⁰ In South African law, contempt of court is a generic crime

¹⁵⁸ This provision provides that:

‘Any person who, with a view to defeating the ends of justice, receives, comforts, or assists anyone who, to his knowledge, has committed an offence shall be guilty as an accessory after the fact to such offence.’

¹⁵⁹ Burchell *South African Criminal Law and Procedure* 3rd Ed 1997 Vol 1 at 334. See also CR Snyman *Criminal Law* (2008) at 281.

¹⁶⁰ This section reads:

‘(1) Any person who-

- (a) within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect in speech or manner, to or with reference to such proceeding or any person before whom such proceeding is being had or taken; or
- (b) having been called upon to give evidence in a judicial proceedings, fails to attend, or having attended refuses to be sworn or to make an affirmation or, having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document,, or remains in the room in which such proceeding is being had or taken, after he has been ordered to leave such room; or
- (c) causes an obstruction or disturbance in the course of a judicial proceeding; or
- (d) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding, or capable of prejudicing any person or

encompassing conduct in relation to the curial administration of justice which tends to undermine that system or inhibit citizens from availing themselves of it for the settlement of their disputes.¹⁶¹ Although some categories of the crime of contempt are still regulated by the common-law, for example, punishing witnesses for taking part in the proceedings,¹⁶² other manifestations of this offence are regulated by legislation.¹⁶³ The Superior Courts Act¹⁶⁴ empowers the Superior Courts to charge any person who commits contempt of court in *facie curiae* and *ex facie curiae* with contempt of court.¹⁶⁵ Furthermore, section 43 of the

against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken;

- (e) publishes a report of the evidence taken in any judicial proceeding in contravention of any order made by a court; or
- (f) endeavours wrongfully to interfere with or influence a witness in judicial proceeding, either before or after he has given evidence; or
- (g) unlawfully dismisses a servant because he has given evidence for or against a party in judicial proceeding; or
- (h) wrongfully retakes possession of land from any who has obtained possession by writ of court; or
- (i) commits any act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken,

shall be guilty of an offence.

- (2) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of the Supreme Court to punish for contempt of court."

¹⁶¹ Milton at 164.

¹⁶² *Id* at 188.

¹⁶³ See sections 54(4), 106 and 108 of the Magistrates Court Act 32 of 1944; section 48(1) of the Small Claims Court Act 61 of 1984; and section 9 of the Constitutional Court Complementary Act 13 of 1995.

¹⁶⁴ Act 10 of 2013.

¹⁶⁵ Section 41 of the Superior Courts Act 10 of 2013 provides:

'Court may order removal of certain persons

41. (1) Any person who, during the sitting of any Superior Court—

- (a) wilfully insults any member of the court or any officer of the court present at the sitting, or who wilfully hinders or obstructs any member of any Superior Court or any officer thereof in the exercise of his or her powers or the performance of his or her duties;
- (b) wilfully interrupts the proceedings of the court or otherwise misbehaves himself or herself in the place where the sitting of the court is held; or
- (c) does anything calculated improperly to influence any court in respect of any matter being or to be considered by the court,

Code only deals with contempt of court in relation to judicial proceedings. There is a myriad of statutes dealing with contempt of the various bodies and functionaries.¹⁶⁶

The SALRC recommends that section 43(1) and (2) be repealed.

L Giving false information to a public servant or the police

3.16 Section 44(1) of the Code makes it an offence to give false information to a public servant to induce such a servant to do or omit to do anything that such person ought not to do if the true state of facts were known to him or to use lawful power of such person to injure or annoy another person.

3.17 Depending on the circumstances, the type of conduct proscribed by this section could constitute obstruction and defeating the course of justice or perjury. In addition, in South African law, there are a myriad of statutes that make it an offence to give a public official false information and on the basis of which they act in a manner they would not have had they been provided with accurate information.¹⁶⁷

3.18 Section 44(2) makes it an offence to lay a false charge that someone has committed a crime.¹⁶⁸ In South African law, the decisions of the Appellate Division have swung like a pendulum between two approaches. In *R v Chipso*¹⁶⁹ the Appellate Division held that this offence was obsolete in South Africa. In *S v Sauerman*¹⁷⁰ the Appellate Division held that laying of false charge was not punishable as the crime of defeating or obstructing the

may, by order of the court, be removed and detained in custody until the rising of the court.

(2) Removal and detention in terms of subsection (1) does not preclude the prosecution in a court of law of the person concerned on a charge of contempt of court.'

¹⁶⁶ For example, contempt of the Water Tribunal (Act 36 of 1998); and contempt of Ombud for Financial Services (Act 37 of 2002).

¹⁶⁷ See, for example, section 38 of the Occupational Health and Safety Act 85 of 1993 and section 54(1)(d) of the Nursing Act 33 of 2005.

¹⁶⁸ This section reads:

'(2) Any person who makes a statement, whether verbally or in writing, to a member of the police force containing allegations that an offence has been or may have been committed, which he knows or believes to be false, shall be guilty of an offence.'

¹⁶⁹ 1953 (4) SA 573 (A).

¹⁷⁰ 1978 (3) SA 761 (A).

administration of justice. However, these decisions were overruled by the decision of the same court in *S v Mene*¹⁷¹ and laying a false charge with the police constitutes obstructing and defeating the course of justice.

The decision of the Appellate Division in *S v Mene* clearly overruled earlier decisions referred to above. In view thereof, it is recommended that section 44(1) and (2) of the Code be repealed.

M Fraud by public servant in discharge of his duties

3.19 Section 45 makes it an offence for any person employed in the public service who, in the discharge of his duties, commits fraud or breach of trust affecting the public. This section codifies two offences namely *fraud* and *breach of trust*. The first problem is that this provision does not define what constitutes fraud or breach of trust. The meaning of these terms can be discerned from decisions of the courts in other jurisdictions. To mount a successful prosecution in terms of this provision, it must be proved that a public official committed an act that is contrary to the duty imposed on him or her by law and has, as a result, acquired a personal benefit.¹⁷² In addition, the conduct of a public servant must have caused substantial harm to one or more of the three values: the integrity of the public servant, public confidence in the civil service, and the obligation to protect public interest.¹⁷³ The decisions of the courts in these jurisdictions also provide a few examples of conduct likely to attract punishment in terms of this section.¹⁷⁴ These examples show that this offence is akin to the offence of

¹⁷¹ 1988 (3) SA 641 (A).

¹⁷² *Perreault v. R.* - Decision of the Quebec Court of Appeal, 26 June 1992. - [1992] Canadian Criminal Cases, Volume 75 (3rd Series). - Pages 425-445, at page 442.

¹⁷³ See Dan Izenberg 'A Step Forward in Fighting Political Corruption' *The Jerusalem Post* (17 July 2010) available at <http://www.jpost.com/LandedPages/PrintArticle.aspx?id=181371>

¹⁷⁴ The first example comes from the decision of the Ontario Court of Appeal in *Regina v. Campbell*. - Decision of the Ontario Court of Appeal, 31 January 1967. - [1967] Canadian Criminal Cases, Volume 3. - Pages 250-258. In that case, the director of the Ontario Securities Commission, which regulates the main public stock exchange in Canada, was found to have made a concerted effort to prevent a company from being removed from the stock exchange. It was later discovered that he had a substantial financial interest in the company. In its decision, the Court of Appeal determined that the *Criminal Code* provision addressing breach of trust by a public officer is "wide enough to cover any breach of the appropriate standard of responsibility and conduct demanded of the accused by the nature of his office. The second example from the decision of the court in *R. v. Chrétien* decided by Quebec Court of Appeal, 18 April 1988. - [1988] Jurisprudence Express 88-684. - Pages 1-12. The employee in this case was responsible for awarding government contracts for road construction and maintenance, and for overseeing the work of the successful contractors. One contractor, who had obtained a contract to resurface the roads in the city, paved the

corruption, but remains an offence *sui generis*. Section 45 of the Code does not have a counterpart in South African law.

The Prevention and Combating of Corrupt Activities Act could be invoked in offences involving public servants. However, its scope is narrow as it applies only in circumstances where an offer is made and/or accepted. The conduct proscribed by section 45 of the Code constitutes '*misconduct*' in terms of the Public Service Act of 1994 for which an official could be dismissed from the public service.¹⁷⁵

Section 45 of the Code could be applied to a myriad of situations. The question arising from section 45 of the Code to which the Commission requests input is whether there is a need in South African law for an offence of 'breach of trust affecting the public by a person employed in public service'. If you believe there is a need for such an offence, what interests would such a crime protect?

N Disobedience of lawful orders, warrants or commands

3.20 Section 46 of the Code provides that any person who disobeys any order, warrant or command duly made, issued or given by a court, officer or person acting in a public capacity and duly authorised in that behalf commits an offence. In South African law, a number of legislative enactments deal with failure to comply with lawful orders issued by public office bearers. In the event that this section is repealed, these statutes and the

entrance to the government employee's home as a gift. There was no evidence that the city had paid for the job, nor was there proof that the accused had demanded the work in exchange for the contract. At trial, the employee was acquitted. However, on appeal, the Court of Appeal concluded that the first court misapplied the relevant test. The paved entrance was directly related to the resurfacing of the roads, which the employee was supposed to supervise. The acceptance of the gift was a breach of the appropriate standard of conduct expected of a public official. As a result, the Court of Appeal imposed a conviction and referred the matter back to the lower court to determine the appropriate punishment. The third example comes from Israel and involved "political appointments". See the article referred to in note 136 above.

¹⁷⁵ See section 20(c), (i), (p), (r) of the Public Service Act, 1994, read in conjunction with section 24(2)(v) thereof.

common-law offence of contempt of court would adequately deal with offences created by this section.¹⁷⁶

The SALRC therefore recommends that section 46 of the Code be repealed.

O Inciting defiance of lawful authority

3.21 Section 47 of the Code provides that:

Any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing calculated to bring into contempt, or to excite defiance of or disobedience to the lawful authority of a public officer or any class of public officers, shall be guilty of an offence.

3.22 First, this provision seems to be inconsistent with the constitutional rights to peacefully and unarmed, demonstrate and present petitions; freedom of expression and the right to a fair trial as it imposes a reverse onus on the accused person.¹⁷⁷ Besides, common-law offences of sedition, public violence, assault, arson, malicious injury to property could be used to hold instigators of violence accountable. Furthermore, any person who incites, instigates, or commands any person to commit an offence (in this case, public violence) commits an offence and may be liable to punishment to which a person convicted of actually committing that offence would be liable.¹⁷⁸ The provisions of the Riotous Assemblies Act are wide enough to cover conduct contemplated in section 47 of the Code.

The SALRC therefore recommends that section 47 of the Code be repealed. Furthermore, the repeal of this provision of the Code will not create a gap in the law as the common-law crimes of sedition, public violence, assault, malicious injury to property, arson and offence created by sections 17 and 18 of the Riotous Assemblies Act would deal adequately with the infraction contemplated in section

¹⁷⁶ See, for example, section 35 of the Superior Courts Act 10 of 2013; section 93(1) of the Electoral Act 73 of 1998; section 18(1)(i) of the Employment of Educators Act 76 of 1998.

¹⁷⁷ See *S v Coetzee* and discussion relating to reverse onuses in para 2.45 above.

¹⁷⁸ Section 17 and 18(2)(b) of the Riotous Assemblies Act 17 of 1956. Section 18(2)(b) of this Act was declared unconstitutional by the Constitutional Court in *Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and Another* 2021 (2) SA 1 (CC) to the extent that it criminalized the incitement of another to commit any offence. The Constitutional Court inserted the words 'serious' before the word 'offence' in this section.

47 of the Code. Moreover, the Riotous Assemblies Act was extended to the area formerly known as the Transkei by the Justice Laws Rationalisation Act of 1996.

P Destruction, alteration and defacement of statutory documents

3.23 Section 48(1) contains a general offence of destroying, mutilating defacing, altering, abandoning, or failure to preserve any statutory document. Section 48(2) makes it an offence to incite another person to destroy, mutilate or deface statutory document. Section 48(3) defines 'statutory document' as licence, permit, identity document, passport, travel document, record, or return, or certificate relating to employment and any record of or document establishing status, identity, qualifications, service, authorisation, eligibility, entitlement, made, granted, given, issued under and for the purpose of, and in any form prescribed by, any written law, and being of current effect, and includes any part thereof made, granted, or issued.

3.24 In the rest of the Republic, besides the common-law offences of fraud, forgery and uttering, there are laws which proscribe the type of conduct contemplated in section 48 of the Code, for example, the Identification Act¹⁷⁹ and the National Road Traffic Act,¹⁸⁰ and other statutes which makes it an offence to deface or alter statutory documents.¹⁸¹

The SALRC is of the view that the repeal of the provisions of the Code contained in section 48 would not leave South African law poorer as the common law and statutory offences referred to above would adequately deal with the conduct proscribed by the abovementioned section.

¹⁷⁹ Section 18 of the Identification Act 68 of 1997, inter alia, makes it an offence to imitate, alter, deface, mutilate identity cards; birth, death and marriage certificates, or record false information or fraudulently change particulars in the population register.

¹⁸⁰ See section 68 of the National Road Traffic Act 93 of 1996.

¹⁸¹ Section 38(1)(b) of the Road Transportation Act 74 of 1977; section 26 of the Air Services Licensing Act 115 of 1990; section 40(1)(g) of the Cross Border Road Transport Act 4 of 1998.

CHAPTER 4:

OFFENCES AGAINST THE STATE AND PUBLIC ORDER

A Treason, sedition and public violence

4.1 The Code codifies the offences of treason,¹⁸² preparation to wage war against Transkei,¹⁸³ misprision of treason,¹⁸⁴ sedition,¹⁸⁵ public violence and incitement to commit public violence.¹⁸⁶ It also makes it an offence to allow premises to be used for commission of an offence against the Republic of Transkei and public order.¹⁸⁷

¹⁸² Section 49 of the Code provides that:

'Any citizen of or person who owes allegiance to Transkei who-

- (a) bears arms against Transkei; or
- (b) has dealings with a foreign power in order to induce it to undertake hostilities against Transkei, or provide it with means therefor, either by facilitating the entrance of foreign forces into Transkeian territory, or by undermining the allegiance of the army, navy or air force, or by any other means whatsoever; or
- (c) delivers to a foreign power or to its agents, any Transkeian troops or territories, cities, towns, villages, fortifications, ammunitions, ships, aircraft, belong to Transkei; or
- (d) in time of war instigates soldiers, sailors, or airmen to enlist in the service of a foreign power, facilitate their doing so or enlists persons to service with a power which is at war with Transkei; or
- (e) in time of war has dealings with a foreign power or its agents in order to promote the actions of that power against Transkei,

shall be guilty of treason...'

¹⁸³ Section 50 of the Code.

¹⁸⁴ Section 51 makes it an offence to become an accessory after the fact of treason or failure to report to the police, President or to endeavor to prevent the commission of treason.

¹⁸⁵ Section 52 of the Code provides that:

'Any person who unlawfully gather together with a number of people with the intention of impairing the majesty or sovereignty of the State by defying or subverting the authority of its Government but without the intention of overthrowing or coercing the Government shall be guilty of an offence.'

¹⁸⁶ Sections 53 and 54 of the Code.

¹⁸⁷ Section 55(1) of the Code.

4.2 In 1994, South Africa became one sovereign State and the Republic of Transkei ceased to exist. Furthermore, the interim Constitution repealed the laws that accorded the Republic of Transkei independence namely the Transkei Constitution Act¹⁸⁸ and the Status of Transkei Act.¹⁸⁹ The provisions of the Code relating to treason, preparing to wage war, misprision of treason and sedition sought to protect the sovereignty of the Republic of Transkei and these provisions became redundant when South Africa became a unitary State in accordance with the provisions of the 1993 Constitution. The offences enumerated above can now only be committed against the Republic of South Africa.

Consequently, the SALRC recommends that these provisions of the Code be repealed on the ground that they have become redundant.

B Discrimination

4.3 Section 56(1) of the Code makes it an offence to treat with disdain or discriminate against anyone on the basis of nationality, race, tribe, place of origin, colour, or religious belief.¹⁹⁰ However, prosecution for this offence may be instituted only with the written consent of the Attorney-General.¹⁹¹ And, punishment for contravention of section 56(1) shall, as is the case with all offences created by the Code, be in the discretion of, and limited only by the jurisdiction of, the court.¹⁹² In contrast, discriminating against another person is not an offence in the Republic.¹⁹³ Although section 9 of the Constitution contains a comprehensive right to equality which is justiciable and the Promotion of Equality and

¹⁸⁸ Act 48 of 1963.

¹⁸⁹ Act 100 of 1976.

¹⁹⁰ This provision states: 'Any person who-

- (a) utters any words or publishes any writing expressing or showing hatred, ridicule or contempt for any person or group of persons; or
- (b) discriminates against or treats less favourably any person or groups of persons, because of his or their nationality, race, tribe, place of origin, colour or religious beliefs, shall be guilty of an offence.'

¹⁹¹ Section 56(2) of the Code.

¹⁹² See section 32 of the Code.

¹⁹³ However, section 28(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 provides that: 'If it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence.'

Prevention of Unfair Discrimination Act¹⁹⁴ empowers citizens to institute civil proceedings when their rights to equality have been infringed, there is discordance in the law.

To address this inconsistency, the Commission recommends that section 56 of the Code be repealed. The fundamental question arising from this provision of the Code, which seems to be supported by the Office of the High Commissioner for Human Rights (UN Human Rights),¹⁹⁵ is whether discrimination should be a criminal offence.

C Unlawful assemblies and demonstration

4.4 The first part of section 57 describes an unlawful assembly, gathering, demonstration or meeting.¹⁹⁶ Section 58 makes it an offence for any person to join or participate in the activities of an unlawful assembly or demonstration. This offence overlaps with other crimes that are regulated by statute or the common law in the Republic such as public violence, assault, sedition, incitement of public violence, intimidation and treason. It is therefore submitted that if the offence created by section 58 is abrogated, no lacunae

¹⁹⁴ Act 4 of 2000.

¹⁹⁵ The United Nations' *Model National Legislation for the Guidance of Governments in the Enactment of Further Legislation Against Racial Discrimination – Third Decade to Combat Racism and Racial Discrimination (1993-2003)* proposes, inter alia, that racial discrimination, acts of violence and incitement of racial violence, racist organisations and their activities, should be subject to prosecution and punished by imprisonment. See clauses 8 and 10 of this model law.

¹⁹⁶ This section reads:

- '(1) Any gathering, meeting, assembly or demonstration which in terms of this Code or any other law is unlawful, shall be an unlawful assembly or demonstration for the purposes of this Code.
- (2) Any assembly of five or more persons shall be unlawful if the common object of the persons comprising that assembly is
 - (a) to overawe by criminal force, or show of criminal force any officer of the Government or any public servant in the exercise of the lawful power of such civil servant;
 - (b) to resist the execution of any law, or any legal process; or
 - (c) by means of criminal force to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or
 - (d) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally bound to do.'

would arise as the common-law offences and statutory offences referred to above would adequately deal with the conduct contemplated in sections 57 and 58 of the Code.

The SALRC therefore recommends that sections 57 and 58 of the Code be repealed.

D Fighting

4.5 Engaging in a fight, whether in retreat or attack constitutes an offence.¹⁹⁷ A person found guilty of this offence could be sentenced to imprisonment for a period not exceeding three years, a fine not exceeding a thousand rand, whipping not exceeding twelve strokes, or both such fine and imprisonment or such imprisonment or whipping.¹⁹⁸

4.6 First, whipping is no longer a sentence that may be imposed by a court.¹⁹⁹ Secondly, this offence overlaps with common-law offences of assault, attempted assault, assault to do grievous bodily harm and intimidation. Thirdly, a cursory review of municipal by-laws has revealed that fighting is a form of nuisance that is normally regulated by the by-laws.²⁰⁰

4.7 The SALRC therefore recommends that section 59(1) and (2) of the Code be repealed and that the common-law offences referred to above be reinstated in the area formerly known as the Transkei. Furthermore, to the extent that the Constitution lists in Part B of Schedule 5 the 'control of public nuisance' as a local government matter, municipalities in the area where the Code applies should determine whether there is still a need for this type of offence and make necessary by-laws, if they have not already done so.

E Penalty for refusing lawful command to disperse

4.8 Section 60 of the Code makes it an offence for people to refuse to disperse after they have been ordered to do so by a magistrate, justice of the peace, headmen or other peace officer. Section 61 authorises the magistrate, justice of the peace or other peace

¹⁹⁷ Section 59(1) of the Code.

¹⁹⁸ Section 59(2)(i)-(iv) of the Code.

¹⁹⁹ See the Abolition of Corporal Punishment Act 33 of 1997. This Act deleted section 276(1)(g) of the Criminal Procedure Act 51 of 1977 which made provision for this form of punishment.

²⁰⁰ See, for example, eThekweni general by-laws at:

http://www.durban.gov.za/City_Government/City_Vision/bylaws/Pages/General_Bylaws.aspx

officer to use force to compel them to do so. Furthermore, this section makes it an offence to oppose, obstruct or inflict injuries on the magistrate, peace officer or person authorised by him to compel such dispersion. Section 62 indemnifies officials ordered to disperse the people assembled as mentioned in section 60.²⁰¹ Section 63 provides that if an offence is committed during an illegal gathering, every member of such assembly who knew that an offence could possibly be committed shall be guilty of an offence.

4.9 The Constitution guarantees, among others, the right, peacefully and unarmed, to assemble, to demonstrate, picket and present petitions.²⁰² In the rest of the Republic, the Regulation of Gatherings Act applies and regulates public gatherings and demonstrations.²⁰³ This Act accords the power to order people participating in a gathering to disperse to the police; to use force to effect such dispersal; and makes it a criminal offence to contravene or fail to obey such an order.²⁰⁴ The Safety Matters Rationalisation Act²⁰⁵ extended the application of the Regulation of Gatherings Act, inter alia, to territories formerly known as the TBVC states.²⁰⁶

4.10 Furthermore, where a criminal offence has been committed during a gathering, the provisions of section 49 of the Criminal Procedure Act of 1977 relating to the use of force to effect arrest could also be invoked.²⁰⁷ This provision has been amended in line with the

²⁰¹ Section 62 reads:

'If any person, assembled as mentioned in sections 59 and 60, is killed or hurt in the apprehension of such persons, or in the endeavor to apprehend or disperse them by reason of their resistance, every person ordering them to be apprehended or dispersed and every person executing such orders shall be indemnified against all proceedings of every kind in respect thereof, provided that such orders are not manifestly illegal.(sic).'

²⁰² Section 17 of the Constitution.

²⁰³ Act 205 of 1993.

²⁰⁴ Section 9(2)(a)-(d) and 12(1)(g) of the Regulation of Gatherings Act.

²⁰⁵ Act 90 of 1996.

²⁰⁶ Section 3 of the Safety Matters Rationalisation Act.

²⁰⁷ Section 49 of the Criminal Procedure Act 51 of 1977 reads:

'49 Use of force in effecting arrest

(1) For the purposes of this section-

- (a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect;
- (b) 'suspect' means any person in respect of whom an arrestor has a reasonable suspicion that such person is committing or has committed an offence; and

decision in *Govender v Minister of Safety and Security*²⁰⁸ and *Ex Parte Minister of Safety and Security: In re S v Walters*.²⁰⁹ Consequently, like section 12 of the Code, it specifically stipulates that the use of force must be reasonably necessary and proportional in the circumstances.

In view of the exposition of the law in the preceding paragraph, it is recommended that the sections of the Code referred to above be repealed.

F Provocation of breach of peace

4.11 Section 64 of the Code makes it an offence to use threatening, abusive or insulting words or behaviour with intent to provoke a breach of peace, or whereby a breach of peace may be occasioned, in any street, road, public place, shop, store, hall, sports field, or stadium or in any premises licensed for the sale of liquor. A person convicted of

(c) 'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing, but, in addition to the requirement that the force must be reasonably necessary and proportional in the circumstances, the arrestor may use deadly force only if-

(a) the suspect poses a threat of serious violence to the arrestor or any other person; or

(b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.'

²⁰⁸ 2001 (4) SA 273 (SCA). In this case, the Supreme Court of Appeal read down the old section 49(1) in the light of the Constitution to require merely proportionality between the nature and degree of the force used and the seriousness of the offence committed or reasonably suspected of having been committed. The Supreme Court of Appeal, invoking reasonableness test, highlighted that the nature and the degree of force used must be proportional to the threat posed by the fugitive to the safety and security of the police officers and others.

²⁰⁹ 2002 (4) SA 613 (CC). In this case, the Constitutional Court declared section 49(2) of the Criminal Procedure Act unconstitutional on the basis that it infringed the rights to dignity, life and security of the person and could not be saved by the limitations provisions of the Constitution. The Constitutional Court further held that the approach adopted by the court in *Govender* applied equally to section 49(2) of the Criminal Procedure Act and expanded the narrow test of proportionality between the seriousness of the relevant offence and the force used to include a consideration of proportionality between the nature and degree of forced used and the threat posed

contravening this provision could be ordered to pay a fine not exceeding R200.00 or to imprisonment for a period not exceeding two years.

4.12 Section 384 of the Criminal Procedure Act of 1955 regulates the breach of the peace in the rest of the Republic.²¹⁰ It differs from the Code in that it does not render provocative behaviour a criminal offence. Furthermore, it applies whether the conduct complained of took place in public or in private place. The application of this provision was extended to the area formerly known as the Transkei by the Justice Laws Rationalisation Act of 1996.

4.13 It is therefore recommended that section 64 of the Code be repealed. The SALRC is of the view that such repeal would not leave a *lacuna* in the law.

²¹⁰ Section 384 provides:

'384 Binding over of persons to keep the peace

- (1) Whenever a complaint on oath is made to a magistrate that any person is conducting himself violently towards, or is threatening injury to the person or property of another or that he has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault, then, whether such conduct occurred or such language was used or such threat was made in a public or private place, the magistrate may order such person to appear before him and if necessary may cause him to be arrested and brought before him, and thereupon the magistrate shall enquire into and determine upon such complaint and may place the parties or any witnesses thereat on oath and in his discretion may order the person against whom the complaint is made to give recognizances with or without sureties in an amount not exceeding R2 000 for a period not exceeding six months to keep the peace towards the complainant and refrain from doing or threatening injury to his person or property.
- (2) The magistrate may, upon any such enquiry, order the person against whom the complaint is made or the complainant to pay the costs of and incidental to the enquiry.
- (3) If any person after having been ordered to give recognizances under this section refuses or fails to do so the magistrate may order him to be committed to goal for a period not exceeding six months unless such security is sooner found.
- (4) If the conditions upon which the recognizances were given are not observed by the person who gave the same, the magistrate may declare the recognizances to be forfeited and any such declaration of forfeiture shall have the effect of a judgment in a civil action in the magistrate's court of the district.'

G Common nuisance

4.14 Section 65 of the Code creates a generic offence of common nuisance.²¹¹ In contrast to countries like Uganda,²¹² in South African law, the generic crime of common nuisance does not exist. However, a number of statutory provisions exist which regulate nuisance. In some areas, the crime of nuisance is comprehensively regulated by the by-laws.²¹³ This is in line with the Constitution which authorises municipalities to regulate, among others, matters relating to public nuisance.²¹⁴

4.15 It is therefore recommended that the offence created by section 65 of the Code be repealed. If it is still deemed necessary, that it be incorporated and dealt with in the relevant municipal by-laws.

H Spreading infectious diseases

4.16 Spreading infectious diseases is proscribed by section 66 of the Code.²¹⁵ South Africa does not have a statute containing a similar provision. However, as the SALRC

²¹¹ This section provides:

'Any person who performs any unlawful act or omits to discharge a legal duty which act or omission endangers the lives, safety or health of the public or any individual, or which causes annoyance or obstructs or causes inconvenience to the public in the exercise of common rights, shall be guilty of the offence of common nuisance.'

²¹² The Uganda Penal Code of 1950 provides:

'160. Common nuisance.

Any person who does an act not authorised by law or omits to discharge a legal duty and thereby causes any common injury, or danger or annoyance, or obstructs or causes inconvenience to the public in the exercise of common rights, commits the misdemeanour termed a common nuisance and is liable to imprisonment for one year.

It is immaterial that the act or omission complained of is convenient to a larger number of the public than it inconveniences, but the fact that it facilitates the lawful exercise of their rights by a part of the public may show that it is not a nuisance to any of the public.'

See: <https://www.refworld.org/docid/59ca2bf44.html> (accessed 18 January 2022).

²¹³ See for example the Bitou Municipality's By-law Relating to the Prevention of Public Nuisances and Public Nuisances Arising from Keeping Animals at <http://www.bitou.gov.za/pdfs/bylaw-publicnuisancesandanimals.pdf>

²¹⁴ Section 156(1)(a) of the Constitution, read in conjunction with Part B of Schedule 5.

²¹⁵ Section 66 provides:

'Any person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be guilty of an offence.'

indicated in its report on criminalising harmful HIV-related behaviour,²¹⁶ that the common-law offences such as murder, attempted murder, culpable homicide can be used to deal with the a person who intentionally spreads communicable disease. It also advised against creating a specific statutory offence of infecting someone with HIV.

4.17 It appears that common-law offences referred to above provide adequate protection against conduct proscribed by section 66 of the Code. It is therefore, recommended that section 66 of the Code be repealed.

I Adulteration of and selling noxious food and drink

4.18 Section 67 makes it an offence to adulterate food or drink with the intention of selling it or knowing that such food or drink is likely to be sold.²¹⁷ Section 68 makes it an offence to sell toxic food or drink.²¹⁸ Section 2 of the Foodstuffs, Cosmetics and Disinfectants Act²¹⁹ makes it an offence to sell, manufacture or import, among others, any foodstuff which contains or has been treated with a prohibited substance, the sale of which is prohibited by regulations, or which is contaminated, impure or decayed or is deemed in terms of any regulations to be harmful or injurious to human health.²²⁰

²¹⁶ See South African Law Reform Commission *Fifth Interim Report on Aspects of the Law Relating to HIV AIDS: The Need For Statutory Offence Aimed At Harmful HIV-Related Behaviour* (April 2001) at 99.

²¹⁷ Section 67 reads:

'Any person who adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such articles as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be guilty of an offence.'

²¹⁸ Section 68 provides:

'Any person who sells, or offers or expose for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be guilty of an offence.'

²¹⁹ Act 54 of 1972.

²²⁰ Section 2 of this Act provides:

'2 Prohibition of sale, manufacture or importation of certain articles

(1) Subject to the provisions of subsection (2) and section 6, any person shall be guilty of an offence-

(a) if he sells, or manufactures or imports for sale, any foodstuff, cosmetic or disinfectant-

(i) which contains or has been treated with a prohibited substance; or

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- (ii) which contains a particular substance in a greater measure than that permitted by regulation or has been treated with a substance containing a particular substance in a greater measure than that permitted by regulation; or
 - (iii) which does not comply with any standard of composition, strength, purity or quality prescribed by regulation for or in respect of it or any standard so prescribed for or in respect of any of its other attributes; or
 - (iv) the sale of which is prohibited by regulation; or
 - (b) if he sells, or manufactures or imports for sale, any foodstuff or cosmetic-
 - (i) which is contaminated, impure or decayed, or is, or is in terms of any regulation deemed to be, harmful or injurious to human health; or
 - (ii) which contains or has been treated with a contaminated, impure or decayed substance or a substance which is, or is in terms of any regulation deemed to be, harmful or injurious to human health; or
 - (c) if he sells, or manufactures or imports for sale, any foodstuff-
 - (i) which contains or has been treated with a substance not present in any such foodstuff when it is in a normal, pure and sound condition; or
 - (ii) to which any substance has been added so as to increase the mass or volume of such foodstuff with the object to deceive; or
 - (iii) from which any substance or ingredient has been abstracted, removed or omitted with the result that its nutritive value or other properties, in comparison with those of such a foodstuff in a normal, pure and sound condition, are diminished or otherwise detrimentally affected; or
 - (iv) which has been treated in such manner that its damaged or unsound condition or inferior quality is concealed whether entirely or partly.
- (2) The provisions of subsection (1) (c) shall not apply with reference to the sale, manufacture or importation of a foodstuff-
- (a) which contains or has been treated with a substance which is not harmful or injurious to human health and the addition or presence of which is necessary for the manufacture of such foodstuff as an article of commerce in a fit condition or form to be packed, stored, conveyed, used or consumed, and is not intended to deceive or mislead any buyer by increasing the mass or volume or concealing or lowering the quality of such foodstuff; or
 - (b) which contains, but in no greater measure than that permitted by regulation (if any), a foreign substance which is unavoidably present in such foodstuffs as a result of the process of its collection or manufacture; or
 - (c) from which a substance has been abstracted or removed, if such abstraction or removal is necessary for the manufacture of such foodstuff as an article of commerce in a fit condition or form to be packed, stored, conveyed, used or consumed, or has been effected in accordance with the provisions of the regulations.
- (3) For the purposes of subsection (1), 'manufactures' includes to treat any foodstuff, cosmetic or disinfectant in a manner which, or with a substance the presence of

In view of the fact that these two laws overlap, the Commission recommends that the relevant provisions of the Code (sections 67 and 68 of the Code) be repealed. The question that remains, to which the Commission requests comment, is whether this law (the Foodstuffs, Cosmetics and Disinfectants Act) automatically applies to the former TBVC states or whether the application thereof would need to be extended to these areas.

J Fouling public water

4.18 Section 69 makes it an offence to corrupt or foul the water of any public spring or reservoir. South Africa recently enacted the National Water Act.²²¹ This Act provides, amongst others, that it is an offence to unlawfully and intentionally or negligently commit any act or omission which pollutes or is likely to pollute a water resource or to commit any act or omission which detrimentally affects or is likely to affect a water resource.²²² These provisions of the National Water Act also apply to the area formerly known as the Transkei. It is thus recommended that section 69 of the Code be repealed.

K Protection of travelling public and prohibition of certain acts

4.19 In the rest of the Republic, the matters regulated by section 70 of the Code, namely leaving articles on roads calculated to endanger any animal or vehicle; throwing stones or similar missiles at traffic; leaving upon public road any vehicle, plough, harrow, or sledge without any animal harnessed thereto, unless in consequence of an accident; slaughter or skin any beast upon public road; set dog or other animal to attack or worry another person; damage or extinguish lamp or lamp post; play or bet in any street or other open public place, are matters that are often regulated in the by-laws.²²³ However, the conduct of people who deliberately set animals on other people is punishable under the common-law offences such

which, renders such foodstuff, cosmetic or disinfectant a prohibited article in terms of that subsection, and to add any substance to, or abstract, remove or omit any substance or ingredient from, any foodstuff, cosmetic or disinfectant with the result that such foodstuff, cosmetic or disinfectant becomes a prohibited article in terms of that subsection.'

²²¹ Act 36 of 1998.

²²² Section 151(i) and (j) of Act 36 of 1998.

²²³ See City of Johannesburg Metropolitan Municipality's Public Roads and Miscellaneous By-laws.

as assault and attempted murder. If the person was negligent, he or she could be convicted in terms of the Animal Matters Amendment Act.²²⁴ In the rest of the Republic throwing stones or missiles at people and traffic could, depending on the circumstances, constitutes common law offences of malicious injury to property, assault or assault with intent to do grievous bodily harm.

4.20 It is recommended that the offences created by section 70, with the exception of offences involving animals, be incorporated into the relevant by-laws of municipalities in the area where the Code applies.

L Miscellaneous offences relating to public safety

4.21 Section 71(a) of the Code makes it an offence to possess a housebreaking instrument. Section 40(1) of the Criminal Procedure Act of 1977 empowers a police official to arrest any person who has in his possession any implement of housebreaking or car-breaking as contemplated in section 82 of the General Law Third Amendment Act, 1993,²²⁵ and who is unable to account for such possession to the satisfaction of the peace officer. In light of this provision, it is recommended that section 71(a) of the Code be repealed.

²²⁴ Act 42 of 1993. Section 1 of this Act provides that:

'1 Directions in respect of injuries caused by animals

- (1) Any person as a result of whose negligence an animal causes injury to another person, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.
- (2) Whenever a person is convicted of an offence in terms of subsection (1), the court convicting him may in addition to any punishment imposed upon him in respect of that offence-
 - (a) make an order relating to the removal, custody, disposal or destruction of the animal concerned and the recovery of any costs incurred in connection therewith;
 - (b) declare the person convicted to be unfit, for a specified period, to own a certain kind of animal or an animal of a specific breed or to have it under his control or in his custody.
- (3) Subsection (2) shall mutatis mutandis apply if any person-
 - (a) as a result of whose negligence an animal causes the death of another person is found guilty of an offence with regard to such negligence;
 - (b) as a result of whose deliberate action an animal causes the death of or injury or damage to another person is found guilty of an offence with regard to such action.'

²²⁵ Act 129 of 1993.

4.22 Section 71(b) makes loitering an offence.²²⁶ Loitering is normally dealt with in the by-laws.²²⁷ If such an offence is deemed necessary, the Commission recommends that the municipalities in the area where the Code applies incorporate in their municipal by-laws a provision regulating loitering.

4.23 Section 71(c) makes it an offence to be found, without a valid or satisfactory reason, in possession of firearm, sword, bludgeon, battle axe, assegai, bush knife or other offensive weapon. In the rest of the Republic, possession of firearms is regulated by the Firearms Control Act.²²⁸ This Act prescribes conditions under which it is permissible to carry a firearm.²²⁹ It also creates a number of offences. The Firearms Control Act is also applicable in the area formerly known as the Transkei. Furthermore, the Dangerous Weapons Act²³⁰ makes it an offence to be in possession of a dangerous weapon other than a firearm²³¹ in circumstances which raise a reasonable suspicion that the person intends using it for an unlawful purpose.²³² It is therefore recommended that section 71(c) be repealed.

²²⁶ This is a form of inchoate and anticipatory offence which is intended to allow authorities to intervene at an earlier stage in order to deal with threatening conduct. See in this regard, Shannon Hooror 'Statutory Regulation of Housebreaking and Intrusion in South Africa – An Historical Perspective' *Fundamina* Vol 23, (November 2017).

²²⁷ See section 12 of the City of Johannesburg Public Roads and Miscellaneous By-laws referred to above.

²²⁸ Act 60 of 2000.

²²⁹ Section 84 provides:

'84 Carrying of firearm in public place

- (1) No person may carry a firearm in a public place unless the firearm is carried-
 - (a) in the case of a handgun-
 - (i) in a holster or similar holder designed, manufactured or adapted for the carrying of a handgun and attached to his or her person; or
 - (ii) in a rucksack or similar holder; or
 - (b) in the case of any other firearm, in a holder designed, manufactured or adapted for the carrying of the firearm.
- (2) A firearm contemplated in subsection (1) must be completely covered and the person carrying the firearm must be able to exercise effective control over such firearm.'

²³⁰ Act 15 of 2013.

²³¹ This Act defines a dangerous weapon as 'any object, other than a firearm, which is likely to cause serious bodily injury if it were used to commit assault.'

²³² Section 3(1) of the Dangerous Weapons Act.

4.24 Section 71(d) makes it an offence to hinder a policeman, chief, headman, sub-headman, stock inspector, dipping foreman, or officer of a municipality in the execution of his duty. Section 40(j) of the Criminal Procedure Act of 1977 empowers a police officer to arrest without a warrant any person who obstructs him or her in the performance of his duties. This implies that such conduct constitutes an offence. In respect of the other matters regulated by section 71(d) of the Code, the SALRC recommends that if deemed necessary they be transposed to relevant provincial, national legislation or municipal by-laws regulating these matters.²³³

4.25 Section 71(e) makes it an offence to discharge a firearm in any street without leave of the municipality or local authority, unless in the discharge of some duty or in obedience to some lawful command. Section 120(3)(b) of the Firearms Control Act of 2000 makes it an offence to discharge or otherwise handle a firearm in a manner likely to injure or endanger the safety or property of any person or with reckless regard for the safety or property of any person.

The SALRC recommends that section 71 of the Code be repealed in its entirety. However, in relation to section 71(d) it recommends that, if deemed necessary, this provision be transposed to the relevant national or provincial legislation dealing with traditional leadership, veterinary services or execution of local government functions which in terms of the Constitution are matters of concurrent national and provincial legislative competence.

²³³ Schedule 4 of the Constitution lists agriculture, animal control and diseases, and traditional leadership as a matter of concurrent legislative competence. In Part B of Schedules 4 and 5, it lists matters that fall within the mandate of municipalities and in respect of which they have the power to make by-laws. And, therefore, issues dealt with in section 71(d) of the Code must, if deemed necessary, be dealt with in the relevant national, provincial or municipal legislation. For example, the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 provides that

'51.(1) A person is guilty of an offence if that person –

- (a) purports to be a traditional leader in terms of this Act without having been recognised as contemplated in this Act;
- (b) wilfully obstructs the carrying out, performance or execution of any role, power, function or duty vested in, or allocated to, any traditional leader, any traditional council, the Provincial House, any Local House or the Commission as contemplated in this Act or any other law.'

M Minor nuisances

4.26 Section 72 of the Code lists a number of minor offences under the rubric minor nuisances. These offences are making noise, irritating animals, making fire in public places, dumping, destroying trees, public indecency. The list of offences contained in section 72 is not *numerus clausus* as this section also states that it is an offence to commit any nuisance in any street, or within view of any dwelling house, by which decency may be offended.²³⁴

4.27 The territory of Transkei consisted of a number of a number of districts.²³⁵ With the advent of the constitutional dispensation, these districts now fall under the jurisdiction of

²³⁴ Section 72 provides that any person who –

- '(a) wantonly or mischievously rings any public bell, or makes any noise or disturbance in the streets, throws stones, or other missiles, uses catapults, knocks at doors or rings any private bells, removes sign boards or other property from the premises of the owner or commits any mischief of a like nature; or
- (b) wantonly irritates any cattle, horses, or other animals whether attached to any vehicle or not, in any public street or place; or
- (c) makes a fire in any street, thoroughfare, or public place or lets off fireworks without leave of the municipal authority; or
- (d) rides a horse or drives a vehicle upon any sidewalk; or
- (e) throws any glass, filth, dirt, rubbish, empty tins or plastic containers or other offensive matter upon any public street, sidewalk, pavement, lane or public place, or in any other place than such as may have been appointed for that purpose by the local authority; or
- (f) cuts down, removes, destroys or injures any wood, tree, or shrub upon any commonage without special permission from the local authority; or
- (g) destroys, damages or injures any tree or shrub growing in or along any public street or place; or
- (h) urinates or defecates in any street, thoroughfare or public place; or
- (i) sings any obscene song or ballad, or writes or draws any indecent or obscene word, figure or representation in any public street or place; or
- (j) places any placard or other document, writing or painting on, or otherwise defaces any house, or building, wall, fence, lamp-post or gate, without the consent of the owner or occupier thereof; or
- (k) commits any nuisance in any street, or within view of any dwelling-house, whereby public decency may be offended,

shall be guilty of an offence.'

²³⁵ In terms of the Status of the Transkei Act 100 of 1976, these districts were Bizana; Idutywa; Mount Frere; Tabankulu; Butterworth; Kentani; Mqanduli; Tsolo; Elliotdale; Libode; Ngqeleni; Tsomo; Engcobo; Lusikisiki; Nqamakwe; Umtata; Flagstaff; Matatiele; Port St. Johns; Umzimkulu; Glen Grey; Mount Ayliff; Qumbu; Willowvale; Herschel; Mount Fletcher; St. Mark's; Xalanga and Mount Frere.

some of the six district municipalities currently in place in the Eastern Cape Province. The offences listed in section 72 of the Code are the types of offences that are usually regulated by the by-laws. The Commission recommends that these offences contained in section 72 of the Code be transposed into the relevant by-laws if they are still deemed relevant and necessary.

If these offences are still deemed necessary and the aforesaid by-laws have been enacted, the SALRC would recommend that section 72 be repealed in its entirety. If all or some of the municipalities have not yet enacted legislation dealing with these issues, the SALRC would recommend that saving provisions be included in the legislation repealing the Code to ensure that there is no vacuum in the law if these provisions of the Code are repealed.

N Neglect of persons in need of care

4.28 Section 73 of the Code makes it an offence to neglect a person in need of care. It states:

'Any person who has charge of any other person, unable either by reason of detention, age, sickness, infirmity, insanity, or any other cause, to provide himself with the necessaries of life, shall be under a legal duty to supply that person with the necessaries of life, and shall be criminally responsible for omitting without lawful excuse to perform it, if death is caused thereby, or if the life of such person is endangered, or his health impaired, or if any of these consequences are likely to occur, whether such charge is imposed on him by law, or if undertaken by him under any contract, or by reason of any unlawful act.'

4.29 In so far as this provision applies to correctional officials; officials and other people in charge of people suffering from mental illness; people in charge of children or old people, it has been superseded by more recent legislation such as the Maintenance Act,²³⁶ the Older

²³⁶ Act 99 of 1998. For example this Act provides that:

'31 Offences relating to maintenance orders

- (1) Subject to the provisions of subsection (2), any person who fails to make any particular payment in accordance with a maintenance order shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.
- (2) If the defence is raised in any prosecution for an offence under this section that any failure to pay maintenance in accordance with a maintenance order was due to lack of means on the part of the person charged, he or she shall not merely on the grounds of

such defence be entitled to an acquittal if it is proved that the failure was due to his or her unwillingness to work or misconduct.

- (3) If the name of a person stated in a maintenance order as the person against whom the maintenance order has been made corresponds substantially to the name of the particular person prosecuted for an offence under this section, any copy of the maintenance order certified as a true copy by a person who purports to be the registrar or clerk of the court or other officer having the custody of the records of the court in the Republic where the maintenance order was made, shall on its production be prima facie proof of the fact that the maintenance order was made against the person so prosecuted.
- (4) If a person has been convicted of an offence under this section, the maintenance officer may, notwithstanding anything to the contrary contained in any law, furnish that person's personal particulars to any business which has as its object the granting of credit or is involved in the credit rating of persons.'

Persons Act,²³⁷ the Children's Act,²³⁸ the Mental Health Care Act,²³⁹ and the Correctional Service Act.²⁴⁰ The SALRC therefore recommends that section 74 be repealed in its entirety.

²³⁷ Act 13 of 2006. It provides, for example, that:

'30 Prohibition of abuse of older persons and special measure to combat abuse of older persons

- (1) Any person who abuses an older person is guilty of an offence.
- (2) Any conduct or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress or is likely to cause harm or distress to an older person constitutes abuse of an older person.
- (3) For the purposes of subsection (2), 'abuse' includes physical, sexual, psychological and economic abuse and-
 - (a) 'physical abuse' means any act or threat of physical violence towards an older person;
 - (b) 'sexual abuse' means any conduct that violates the sexual integrity of an older person;
 - (c) 'psychological abuse' means any pattern of degrading or humiliating conduct towards an older person, including-
 - (i) repeated insults, ridicule or name calling;
 - (ii) repeated threats to cause emotional pain; and
 - (iii) repeated invasion of an older person's privacy, liberty, integrity or security;
 - (d) 'economic abuse' means-
 - (i) the deprivation of economic and financial resources to which an older person is entitled under any law;
 - (ii) the unreasonable deprivation of economic and financial resources which the older person requires out of necessity; or
 - (iii) the disposal of household effects or other property that belongs to the older person without the older person's consent.
- (4) If a court, after having convicted a person of any crime or offence, finds that the convicted person has abused an older person in the commission of such crime or offence, such finding must be regarded as an aggravating circumstance for sentencing purposes.'

²³⁸ Act 38 of 2005. Section 305 of this Act creates a myriad of offences in relation to children. For example, section 305(3) and (4) provide that:

- (3) A parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or care-giver or other person-
 - (a) abuses or deliberately neglects the child; or
 - (b) abandons the child.

O Avoidance of danger to others and duty to take care

4.30 People in charge of animate or inanimate thing or object are required to take reasonable precautions and use reasonable care to avoid danger. Failure to do so leads to criminal liability.²⁴¹ Failure to do an act, which a person undertook to do, and which endangers people's lives constitutes an offence.²⁴² It is clear that these provisions seek to

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- (4) A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance.'

²³⁹ Act 17 of 2002. Section 70 of this Act provides:

'70 Offences and penalties

- (1) Any person who-
- (a) misrepresents a fact in any application, report, record, certificate;
 - (b) obstructs or hinders any person in the performance of his or her functions;
 - (c) neglects, abuses or treats a mental health care user in any degrading manner or allows the user to be treated in that manner;
 - (d) assists or incites a mental health care user-
 - (i) to abscond from a health establishment at which he or she is admitted; or
 - (ii) not to comply with any care, treatment and rehabilitation plan or terms of a leave of absence or conditional discharge; or
 - (e) refuses to furnish information or provides false information to a member of the South African Police Service about the whereabouts of a mental health care user who has absconded or is deemed to have absconded,
- under this Act, is guilty of an offence.'
- (2) Any person who is found guilty of an offence under this Act is liable on conviction to a fine or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment."

²⁴⁰ Act 111 of 1998. This Act requires that inmates be provided with accommodation; adequate diet; means to keep his or her clothing, person, bedding, cell clean and tidy; given the opportunity to exercise; provided with health care services and contact with the community.

²⁴¹ Section 74 of the Code provides:

'Any person who has in his charge, or under his control, anything whatever whether animate or inanimate, or who erects, makes or maintains anything whatever which in the absence of any precaution or care, may endanger human life, shall be under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and shall be criminally responsible for the consequences of omitting without lawful excuse to take such precautions or to use such care.'

²⁴² Section 75 of the Code provides:

'Any person who undertakes to do any act, the omission to do which is or may be dangerous to life, shall be under a legal duty to do that act, and if he fails, without lawful excuse, to discharge that duty, he shall be guilty of an offence.'

punish acts which have been committed unintentionally. In other words, they render negligent conduct punishable. In the Republic, culpable homicide and certain forms of contempt of court are the only common law crimes requiring negligence. In respect of all the remaining common law crimes, intention is the form of culpability required. There could be numerous statutory crimes in which negligence is the form of culpability required.²⁴³ For the sake of uniformity it is recommended that these offences contained in the Code which require negligence as a form of *culpa* be repealed.

P Recommendations in respect of the provisions the Code discussed above

The SALRC recommends that sections 49-75 of the Code discussed in the preceding paragraphs be repealed. Furthermore, if the district municipalities in the area where the Code is still applicable deem it prudent that the crimes of fighting; common nuisance; loitering and minor nuisance be retained in the statute book, the SALRC recommends that these offences be incorporated into the relevant by laws or by-laws be enacted to deal with the conduct proscribed in sections 59(1), 65, 70, 71(b) 72 of the Code. To obviate leaving gaps in the legal framework, it further recommends that a saving provision similar to that contained in the Repeal of the Black Administration Act²⁴⁴ be included in the repealing Act to afford affected municipalities sufficient time to enact or amend the relevant by laws.

²⁴³ CR Snyman *Criminal Law* (2008) at 209.

²⁴⁴ Section 1(3) of the Repeal of the Black Administration Act 28 of 2005 provides, for example, that:

'(3) Sections 12 (1), (2), (3), (4) and (6) and 20 (1), (2), (3), (4), (5), (6) and (9) and the Third Schedule of the Act are hereby repealed on-

(a) 30 December 2012; or

(b) such date as national legislation to further regulate the matters dealt with in sections 12 (1), (2), (3), (4) and (6) and 20 (1), (2), (3), (4), (5), (6) and (9) and the Third Schedule of the Act is implemented,

whichever occurs first.'

CHAPTER 5:

OFFENCES RELATING TO RELIGION

A Coercion, damage to place of worship, interrupting religious sermon or burial, dissecting or harming a body of dead person

5.1 The Code devotes a whole chapter to offences relating to religion. It makes it an offence to coerce anyone to participate in or abstain from religious activities; to damage or destroy a place of worship or object held sacred; to disturb any congregation or religious ceremony; trespassing in the place of worship or in place of burial or causes disturbances to any persons assembled for the purpose of funeral ceremony; hinder a burial; dissect or harm a body of a dead person. It also makes it an offence to write or utter any words aimed wounding religious feelings of another. And, molesting, disturbing or misusing any preacher, teacher, or person lawfully facilitating at any religious gathering, assembly or congregation also constitutes an offence.²⁴⁵

1 Evaluation

5.2 It is doubtful whether there is still a need for these offences. The Constitution guarantees freedom of religion²⁴⁶ and the right of people to practice their religion and to form, join and maintain religious associations.²⁴⁷ Although, there is no statutory provision that proscribes by threat of criminal sanction coercing another to participate in religious activities, the Constitutional Court, in its interpretation of the right to freedom of religion, has made it clear that this right prohibits coercion and restraint of religious belief or practice.²⁴⁸

²⁴⁵ Section 76 -82 of the Code.

²⁴⁶ Section 15 of the Constitution.

²⁴⁷ Section 31 of the Constitution.

²⁴⁸ *Prince v President, Cape Law Society and Others* 2002 (2) SA 794 (CC) at para 38.

Furthermore, coercing someone to observe or to refrain from observing religious activities could amount to intimidation.²⁴⁹

5.3 Damaging a place of worship or any object held sacred constitutes the common-law offence of malicious injury to property. Entering a place of worship with the intention of interrupting the proceedings amounts to trespass as defined in the Trespass Act.²⁵⁰

²⁴⁹ In *Moyo and Another v Minister of Police and Others* 2020 (1) SACR 373 (CC) the Constitutional Court declared sections 1(1)(b) and 1(2) of the Intimidation Act 72 of 1982 unconstitutional for absolving the state from proving all the elements of a crime created by section 1(1) and impermissible infringement of the right to be presumed innocent, to remain silent and the right not to be compelled to give self-incriminating evidence as enshrined in the Constitution; and for casting the net of liability too wide and infringing the right to freedom of expression and adjacent political rights, respectively. However, section 1(1)(a) of the Intimidation Act, insulated from the constitutional challenge referred to above, is relevant to the provisions of the Code under review as it provides that:

'1 Prohibition of and penalties for certain forms of intimidation

- (1) Any person who-
- (a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint-
 - (i) assaults, injures or causes damage to any person; or
 - (ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or
 - (b) ...
 - (ii)

shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.'

²⁵⁰ Act 6 of 1959. Section 1 of this Act provides:

'1 Prohibition of entry or presence upon land and entry of or presence in buildings in certain circumstances

- (1) Any person who without the permission-
- (a) of the lawful occupier of any land or any building or part of a building; or
 - (b) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person,

enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.'

5.4 The crime of violating a corpse is well known in the Republic.²⁵¹ In addition, numerous municipal by-laws proscribe causing a nuisance or committing any offensive act in a cemetery.²⁵² Molestation of a preacher may amount to assault or *crimen iniuria* which consists in the unlawful, intentional and serious violation of the dignity or privacy of another.

2 Recommendations

The SALRC recommends that sections 76-82 of the Code be repealed. It further recommends that the offences of trespassing in a place of burial and hindering a burial ceremony, if deemed necessary by the municipalities in the area where the Code is still applicable, be incorporated into the relevant by-laws.

²⁵¹ See, for example, *S v Coetzee en Ander* 1993 (2) SACR 191 (T).

²⁵² See, for example, http://www.joburg-archive.co.za/bylaws/cemetery_by-laws.pdf

CHAPTER 6:

CRIMES AGAINST HUMAN LIFE AND PERSONAL SAFETY

A Murder, culpable homicide, assault and kidnapping

6.1 First, Part 8 of the Code creates numerous offences, namely murder;²⁵³ culpable homicide;²⁵⁴ assault;²⁵⁵ indecent assault;²⁵⁶ assault with intent to do grievous bodily harm²⁵⁷ and kidnapping.²⁵⁸ In the Republic, these offences are common-law crimes and are punishable.

²⁵³ Section 84 of the Code defines “murder” as follows:

‘Any person who, either as principal or as *socius criminis*, causes the death of another person by unlawfully and with intent doing any act-

- (a) with the object of causing the death of such other person, or
- (b) with any other object, foreseeing that such act will or might cause the death of a human being, and is reckless, and is reckless as to the consequences,

shall be guilty of an offence.’

²⁵⁴ Section 85 of the Code defines culpable homicide as follows:

‘Any person who unlawfully causes the death of any other person either negligently or intentionally but in circumstances of partial excuse shall be guilty of culpable homicide.’

²⁵⁵ Section 90 of the Code provides that:

‘Any person who unlawfully and intentionally-

- (a) applies any force to the person of another, or
- (b) inspires a belief in some other person that force is immediately to be applied to him,

shall be guilty of an offence of assault.”

²⁵⁶ Section 91 of the Code provides:

‘Any person who commits an assault in circumstances of physical indecency shall be guilty of the offence of indecent assault.’

²⁵⁷ Section 93 provides:

‘Any person who assaults another with the intention of doing him grievous bodily harm shall be guilty of the offence of assault with intent to do grievous bodily harm.’

²⁵⁸ Section 94 provides:

‘Any person who unlawfully and intentionally deprives-

- (a) any person of liberty of movement, or

B Abetment of suicide

6.2 In terms of the Code inciting another to commit suicide constitutes an offence.²⁵⁹ In *R v Nbakwa*²⁶⁰ it was held that the voluntary conduct of the person who commits suicide constitutes a *novus actus interveniens* which breaks the chain of causation and prevents a conviction for either murder or attempted murder.²⁶¹ However, in the Republic, the Supreme Court of Appeal has stated that whether a person who instigates, assists or puts another in a position to commit suicide commits an offence would depend on the facts of the particular case. The mere fact that the last act of the person committing suicide is such person's own, voluntary, non-criminal act does not necessarily mean that the other person cannot be guilty of any offence. Depending upon the factual circumstances the offence can be murder, attempted murder or culpable homicide.²⁶²

C Killing of a child

6.3 Offences such as murder and culpable homicide can only be committed against a living human being. This raises the question whether killing an unborn child is treated by the Code as abortion or as murder. In answering this question, the Code provides that a child becomes a human being when it has proceeded in a living state from the body of the mother and that the killing of such child is homicide when it dies after birth, in consequences of injuries caused before, during or after birth.²⁶³ Section 239(1) of the Criminal Procedure Act sums up the position that obtains in South African law as follows:

-
- (b) any person having the custody of any other person, of such custody shall be guilty of the offence of kidnapping.'

²⁵⁹ Section 86 of the Code provides:

'Any person who counsels or procures any other person to commit suicide, actually committed in consequence of such counseling or procurement, or aids or abets any person in the commission of suicide, shall be guilty of an offence and liable on conviction to imprisonment of to a fine, or to both a fine and imprisonment: Provided, however, that for abetment of suicide of a minor or insane or intoxicated person the term of such imprisonment may extend to the national life of the person convicted.'

²⁶⁰ 1956 (2) SA 557 (SR)

²⁶¹ See Milton Vol II at 354-5.

²⁶² *Ex Parte die Minister van Justisie: In Re S v Grotjohn* 1970 (2) SA 355 (A).

²⁶³ Section 83(2) of the Code states:

'A child becomes a human being within the meaning of the Code when it has completely proceeded in a living state from the body of the mother, whether in a case of suspended

'239 Evidence on charge of infanticide or concealment of birth

- (1) At criminal proceedings at which an accused is charged with the killing of a newly-born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.
- (2) At criminal proceedings at which an accused is charged with the concealment of the birth of a child, it shall not be necessary to prove whether the child died before or at or after birth.'

D Concealment of birth

6.4 The Code further, in section 87, makes the concealment of birth by secret disposition of the dead body of the child, whether the child died before, at or after its birth, an offence. In South African law, this crime is regulated by section 113 of the General Law Amendment Act.²⁶⁴

E Inducing a miscarriage

6.5 The Code further makes it an offence for any person who, when a woman is about to be delivered of a child, unlawfully prevents that child from being born alive by any act or omission of such nature that it would have caused the death of the child if it had been born alive.²⁶⁵

6.6 The offence above is *sui generis* in that it does not have a counterpart in South African law. However, the provisions of the Choice on Termination of Pregnancy Act²⁶⁶

respiration it has breathed or not, and whether it has an independent circulation or not, and whether the navel cord is severed or not, and the killing of such a child is homicide when it dies after birth in consequence of injuries caused by any person before during or after birth.'

²⁶⁴ Act 46 of 1935. This section reads:

'113 Concealment of birth of newly born child

- (1) Any person who, without a lawful burial order, disposes of the body of any newly born child with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.
- (2) A person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of.
- (3) The institution of a prosecution under this section must be authorised in writing.'

²⁶⁵ Section 88 of the Code.

²⁶⁶ Act 92 of 1996.

which sets out circumstances in, and conditions under, which the pregnancy of a woman may be terminated are wide enough to deal with the conduct proscribed by section 88 of the Code. The Choice on Termination of Pregnancy Act states unequivocally that the termination of a pregnancy may only take place with the informed consent of the pregnant woman.²⁶⁷ Furthermore, it states that any person who is not a medical practitioner or a certified midwife or nurse who performs termination of pregnancy; terminates a pregnancy or terminates a pregnancy at a facility not approved in terms of this Act, commits an offence.²⁶⁸

F Abortion

6.7 Section 89 of the Code makes it an offence to procure the abortion of a live foetus of a woman with intent to kill such foetus. As stated above, the termination of pregnancy is regulated by the 1996 Choice on Termination of Pregnancy Act, which creates a number of offences.²⁶⁹ If section 89 of the Code is repealed, there would no vacuum in the legislative framework as the provisions of the Termination of Pregnancy Act provides adequate regulatory framework.

²⁶⁷ Section 5 of the Act.

²⁶⁸ Section 10(1)(a), (b), (d) of the Act.

²⁶⁹ Section 10 of the Choice on Termination of Pregnancy Act 92 of 1996 provides:

'10 Offences and penalties

(1) Any person who-

- (a) is not a medical practitioner, or a registered midwife or registered nurse who has completed the prescribed training course, and who performs the termination of a pregnancy referred to in section 2 (1) (a);
- (b) is not a medical practitioner and who performs the termination of a pregnancy referred to in section 2 (1) (b) or (c);
- (c) prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy; or
- (d) terminates a pregnancy or allows the termination of a pregnancy at a facility not approved in terms of section 3 (1) or not contemplated in section 3 (3) (a),

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.'

G Recommendations in respect of the provisions of the Code discussed above

The SALRC recommends that sections 83- 94 of the Code, including the ancillary provisions contained in section 83(1) and (2) which define culpable homicide and provide a test to determine whether a child is a human being for the purpose of the Code, be repealed.

CHAPTER 7:

OFFENCES RELATING TO PROPERTY

A Arson

7.1 According to the Code, setting fire to any building or to any erection or structure whether fixed to the soil or not, or to any stack of vegetable produce or mineral or vegetable fuel or to any mine, ship or vessel or crop constitutes an offence of arson.²⁷⁰

7.2 In contrast to the common-law offence of arson which obtains in the Republic, and which can be committed only in respect of immovable property, the crime created by the Code is wider and covers setting fire on movable property as well. In the Republic, setting movable property on fire amounts to the crime of malicious injury to property.

B Killing of animals and damaging buildings

7.3 The Code also criminalises damaging property with intent to injure another;²⁷¹ killing or wounding an animal capable of being stolen;²⁷² breaking and damaging any building with intent to intimidate or annoy any person and discharging a firearm to alarm any person in any dwelling house constitute an offence.²⁷³

7.4 In the Republic, the first three offences listed above are punishable under the common law as malicious injury to property. In respect of the last offence, the Firearms Control Act makes it an offence to discharge or otherwise handle a firearm, an antique firearm or an airgun in a manner likely to injure or endanger the safety or property of any person or with reckless disregard for the safety or property of any person.²⁷⁴

²⁷⁰ Section 125 provides:

'Any person who willfully sets fire to any building whatever, or to any erection or structure whether fixed to the soil or not, or to any stack of vegetable produce, or of mineral or vegetable fuel, or to any mine, or to any ship or vessel, or to any crop whether standing or cut down shall be guilty of arson.'

²⁷¹ Section 126.

²⁷² Section 127.

²⁷³ Section 128.

²⁷⁴ Section 120(3)(b) of the Firearms Control Act 60 of 2000.

C Injury to public works

7.5 The Code creates a myriad of offences in respect of public works owned by the Government of Transkei, state department, tribal authority, municipality or statutory body designated as the owner thereof. Furthermore, the expression of "public works" is widely defined in the Code.²⁷⁵ It is an offence to wilfully or negligently damage, destroy, deface or disfigure any public works, hinder or interfere with the construction or alteration of any public works or inspection or maintenance of or repair to public works; and to attempt or cause, procure, aid or abet or incite any person to commit any of the offences referred to above.²⁷⁶ A person found guilty of committing any of the offences referred to above, could, in addition

²⁷⁵

Section 129 of the Code provides:

'public works' means any work (whether constructed or in the course of construction) of which Government of Transkei or any department of State or any tribal authority or municipality or any statutory body designated for the purposes of this definition by the President by proclamation in the Gazette is the owner and includes-

- (a) any building or structure;
- (b) any road, or section, diversion or temporary deviation thereof, including any roadway, motor bypass, sidewalk, traffic circle, centre island, kerbing, embankment, cutting, subway, culvert, sluic, drain, dam, fence, parapet, guard, bridge, ferry, causeway, ford, approach, milestone, sign-post, direction, warning and any other work or thing belonging to such road;
- (c) any dipping tank, spraying machine, or other device used for the cleansing of large or small stock, together with any pen, kraal, store, fence or other appurtenance pertaining thereto;
- (d) any fence, including any gate, grid, stile, or other appurtenance pertaining thereto;
- (e) any soil reclamation work or works undertaken to prevent soil erosion or to reclaim any eroded areas and includes any furrow, wall, weir, dam, wire barrage, pipe, stop cock, fence or any structure erected in connection with such work or works, and any trees, shrubs, grass, or other vegetation constructed or laid out for soil reclamation purposes;
- (f) any water work, including any canal, channel, well, reservoir, protecting wall, embankment, weir, dam, borehole, pumping installation, pipeline, sluice, gate, filter, sedimentation, tank, road, telephone line or other work constructed, erected or used for or in connection with the impounding, storage, passage, drainage, control or abstraction of water, or the development of water power (including the generation, transmission and supply of electricity) or the filtration or purification of water, sewage, effluent, or waste, or the protection of public streams against erosion or siltation, or flood control, or the protection of any water work or conservation of rain water, and any gauge post, measuring weir or similar appliance; and
- (g) any pound and any appurtenance pertaining thereto.'

²⁷⁶

Section 130(a),(b) and (c).

to any other punishment that may be imposed by the court, also be ordered to compensate the owner for such damage or loss as he may have caused.²⁷⁷

7.6 Furthermore, the Code imposes a duty on the head of the kraal; the chief or head;²⁷⁸ the owner or occupier of private land,²⁷⁹ to report damage to public works. Failure to do so constitutes an offence which upon conviction could lead to a fine not exceeding R500.00 or to imprisonment for a period not exceeding six months.²⁸⁰ It also bestows the power on the magistrate to ascertain the cause of damage to public work, blameworthiness, and amount of damages.²⁸¹

7.7 In the Republic, these offences are punishable, for example, in terms of the Criminal Matters Amendment Act,²⁸² Intimidation Act²⁸³ and the common law offence of malicious injury to property, incitement or attempt to commit this offence, and assault. In view of the fact that there are statutory and common-law offences that deal with the conduct proscribed by the Code, the Commission recommends that these provisions of the Code be repealed.

D Theft

1 Definition and different forms of theft

7.8 It is an offence of theft to unlawfully take or convert to the use of anyone other than the owner, anything capable of being stolen, with intent to deprive the owner thereof of his ownership or any person having special interest therein of such interest.²⁸⁴ It also creates the following specific crimes of theft: theft by agents; theft by holder of power of attorney; theft by co-owner; theft of money or property owned by or in custody of government or statutory bodies; and theft committed outside Transkei. It also creates the following offences

²⁷⁷ Section 131(1) and (2) of the Code.

²⁷⁸ Section 131(3)(a)(i).

²⁷⁹ Section 131(3)(a)(ii).

²⁸⁰ Section 131(4).

²⁸¹ Section 131(3)(c).

²⁸² Act 18 of 2015, which makes it an offence to damage, tamper with or destroy essential infrastructure, whether publicly or privately owned, relating to energy, transport, water, sanitation and communication. This offence carries imprisonment not exceeding 30 years or fine not exceeding R100 million.

²⁸³ Act 72 of 1982.

²⁸⁴ Section 132(1)(a).

which are related to the crime of theft: concealing or taking registers which is required by law to be kept for authenticating or recording the execution of any deed; concealing any document which is evidence of title to any land or any right or interest in any land; fraudulent disposal of any mortgaged goods without the consent of the mortgagee; unlawful appropriation of the use of another's property; obtaining goods from vessels; removal of boat from vessel; piracy; hijacking and air piracy; failure to give satisfactory account of possession of goods; receiving goods without having reasonable cause for believing that such goods are the property of the person from whom he receives them; and creating false spoor.²⁸⁵

2 Evaluation

7.9 It should be stated right from the outset that this definition uses archaic English law concepts and terminology that were abandoned by our courts in the 1970s, and that have been criticised by legal scholars for not accurately reflecting the common law.²⁸⁶ Furthermore, South African law recognises different forms of theft such as the removal of property of another; embezzlement; arrogation of possession; theft of credit, including unlawful appropriation of trust funds. In addition, the General Law Amendment Act²⁸⁷ makes it an offence to use the property of another without his or her consent. The crime of piracy is governed by the Defence Act.²⁸⁸ Receiving goods, other than stock or produce, without

²⁸⁵ Section 8 of the Code defines spoor as follows:

'Spoor' denotes a mark or impression on, or disturbance of any grass, herbage or wood on such ground, or any matter or substance left or found upon such ground, herbage, wood or fence, indicating that any person or persons or stock have passed along in any particular direction.

²⁸⁶ CR Snyman *Criminal Law* (2008) at 486.

²⁸⁷ Act 50 of 1956.

²⁸⁸ Act 42 of 2002 which provides that:

'4 Piracy

(1) For purposes of this Act, piracy is-

- (a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew, including the Master, or the passengers of a private ship or a private aircraft, and directed-
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;

reasonable cause for believing that such goods are the property of the person from whom he or she receives them or that such person has been duly authorised by the owner to deal with them, constitutes an offence.²⁸⁹ The question arises whether the crimes relating to spoor have not become obsolete.

E Other miscellaneous offences relating to property

7.10 The Code also codified offences of housebreaking; trespassing; robbery; extortion; procuring execution of deeds by threats; receiving stolen property; forgery; procuring execution of document by false pretences; passing false document which causes actual prejudice; sending false telegram with the intent that it be acted upon; falsifying warrants for money payable; falsification of register; making false statement concerning any matter required by law; personating any other person with intent to fraudulently obtain benefit; defrauding creditors; pretending to tell fortunes; obtaining a license, certificate or registration by false pretences; false declarations for passport, travel documents or permit to depart from Transkei; false certification as to good conduct, poverty or other circumstances so as to facilitate government or private consideration; fraudulent accounting or appropriation by directors or officers; fraudulent false accounting; making false statements or returns; conspiracy to defraud and criminal breach of trust.²⁹⁰

1 Evaluation

7.11 All the offences enumerated above are well known in South African law and punishable under the common-law or statute law. The common law offences of perjury;

-
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a ship or aircraft contemplated in subsection (1); and
 - (c) any act of inciting or of intentionally facilitating an act contemplated in paragraph (a) or (b).
 - (2) Any act of piracy committed by the crew of a warship or military aircraft, government ship or government aircraft which has mutinied and taken control of such ship or aircraft, must for purposes of this section be regarded as having been committed by the crew of a private ship or aircraft.'
 - (3) Any person who commits an act of piracy is guilty of an offence, which may be tried in any court in the Republic designated by the Director of Public Prosecutions and, upon conviction, is liable to a fine or to imprisonment for any period, including life imprisonment.'

²⁸⁹ Section 37(1) of the General Law Amendment Act 62 of 1955.

²⁹⁰ Sections 153-177 of the Code.

extortion; theft; fraud; forgery and uttering; theft by false pretences and the statutory crimes of intimidation and corruption would adequately deal with the conduct sought to be criminalised by these provisions of the Code should they be repealed. It should be added that some of the offences contained in the Code have been superseded by more recent legislation. For example, it is an offence to make false statements for the purposes of obtaining an identity card or a travel document²⁹¹ and numerous statutes make it an offence to impersonate another person.

F Recommendations

The SALRC recommends that sections 125-177 of the Code be repealed.

²⁹¹ Section 18 of the Identification Act 68 of 1997 and item 15 of the South African Passports And Travel Documents Regulations

CHAPTER 8:

MISCELLANEOUS OFFENCES

A Corruption, defamation, disclosure of official information, witchcraft, dangerous weapons and pointing a firearm

8.1 The Code also contain miscellaneous offences relating to corruption; defamation; disclosure and publication of official information; offences relating to witchcraft; carrying or using dangerous weapon; pointing a firearm or airgun at another person.²⁹²

1 Evaluation

8.2 The provisions of the Code relating to corruption have been superseded by the enactment of the Prevention and Combating of Corrupt Activities Act²⁹³ which deals comprehensively with the offence of corruption and offences related to the combating of corrupt activities.

8.3 In South African law a crime of criminal defamation is also recognised. However, in the light of the constitutional rights of freedom of expression and media freedom, there have been calls for the decriminalisation of defamation, probably because people are more likely to sue the defamer in civil courts and claim damages than prosecution of the offender in criminal courts.²⁹⁴

8.4 The protection of official information is currently regulated by the Protection of Information Act.²⁹⁵ This Act has been earmarked for repeal in the proposed Protection of State Information Bill (B6H-2010).

²⁹² Sections 178 – 184 of the Code.

²⁹³ Act 12 of 2004.

²⁹⁴ CR Snyman *Criminal Law* (2008) at 476.

²⁹⁵ Act 84 of 1982.

8.5 The Witchcraft Suppression Act²⁹⁶ currently regulates the suppression of witchcraft and similar practices. This Act is currently being reviewed by the SALRC.

8.6 In South Africa, the Dangerous Weapons Act²⁹⁷ prohibits possession of dangerous weapons. In contrast to the Justice Laws Rationalisation Act²⁹⁸ which neither repealed the parallel legislation in the former Transkei nor extended the application of the Dangerous Weapons Act 71 of 1968 to that area, the newly enacted Dangerous Weapons Act has repealed parallel legislation in the former TBVC states.²⁹⁹ It is therefore recommended that the parallel legislation in the former Transkei be repealed and the South African legislation be extended to that area.

8.7 Lastly, section 126 of the Firearms Control Act³⁰⁰ provides that it is a crime to point a firearm or an airgun whether or not it is loaded or capable of being discharged without a good reason to do so. These provisions have therefore superseded the provisions of the Code which make it an offence to point a firearm at a person.

2 Recommendations

The SALRC recommends that the provisions of the Code discussed above creating a myriad of offences relating to corruption, defamation, disclosure of official information, witchcraft, dangerous weapons and pointing a firearm be repealed.

²⁹⁶ Act 7 of 1953.

²⁹⁷ Act 15 of 2013.

²⁹⁸ Act 18 of 1996.

²⁹⁹ Section 4 of the Dangerous Weapons Act 15 of 2013 repealed the Dangerous Weapons Act 71 of 1968 promulgated by the former governments of Bophuthatswana, Venda, Ciskei and Transkei.

³⁰⁰ Act 60 of 2000.

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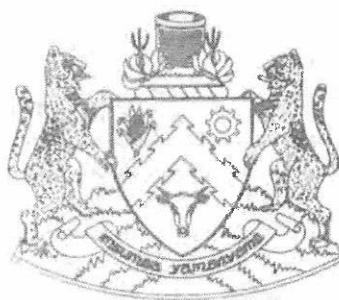
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ANNEXURE A

TRANSKEIAN PENAL CODE, ACT 9 OF 1983

REPUBLIC OF TRANSKEI

IRIPHABLIKI
YE TRANSKEI



REPABOLIKI
YA TRANSKEI

IGAZETHI YOBURHULUMENTE

LESEDINYANA LA MMUSO

GOVERNMENT GAZETTE

YERIPHABLIKI YE TRANSKEI
YEREPABOLIKI YA TRANSKEI

REPUBLIC OF TRANSKEI 25c

REPUBLIC OF S.A. 30c

OTHER COUNTRIES & OVERSEAS 35c

Umq.
Vol. 9
Buk.

24 FEBRUWARI 1984
24 FEBRUARY 1984

No. 9

ISAZISO SIKARHULUMENTE
No. 21

Ngukwenjenje kuyaziswa okokuba iPrezidanti iwuvumile lo Mthetho ulandelayo obhengezwa apha ukuze waziwe ngokubanzi.

IKhowudi yezoHlwayo yeTranskei, 1983 (uMthetho No. 9 wowe 1983).

GOVERNMENT NOTICE
No. 21

It is hereby notified that the President has assented to the following Act which is hereby published for general information.

Transkeian Penal Code, 1983 (Act No. 9 of 1983).

TRANSKEIAN PENAL CODE, 1983

ACT

(Xhosa and English texts signed by the President) (Assented to on 13 February 1984).

To establish a revised Code of criminal law for the Republic of Transkei.

Whereas it is desirable to amend and consolidate the criminal law applicable in the Republic of Transkei and to provide a revised Code of criminal law for the Republic of Transkei;

BE IT ENACTED by the President and the National Assembly of the Republic of Transkei, as follows:-

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PART I

APPLICATION OF CODE

- Short title and commencement of Code. 1. This Act shall be called the Transkeian Penal Code, 1983 (hereinafter referred to as the Code) and shall come into operation on a date to be fixed by the President by proclamation in the *Gazette*.
- Application of Code. 2. This Code shall apply throughout Transkei.
- Crimes, offences and defences not specifically provided for. 3.(a) Any act or omission not provided for in this Code which constituted a crime or offence under the common law applicable in Transkei on 25 October 1976 shall be deemed to be incorporated in this Code and shall be punishable accordingly.
- (b) Any defence to a criminal charge, not specifically provided for in this Code, and which formed part of the common law applicable in Transkei on 25 October 1976 shall be deemed to be incorporated in this Code and shall be taken cognizance of.
- Saving of certain laws. 4. In all matters not covered by this Code but regulated by special laws the courts shall adjudicate pursuant to the provisions of the said laws.
- Saving of trials in respect of crimes committed before commencement of Code. 5. Nothing in this Code shall affect -
- (a) the liability or trial of a person, or the punishment of a person under any sentence passed or to be passed, in respect of any act done or commenced before the date of commencement of this Code;
- (b) any power of the President to grant any pardon or to remit or commute the whole or any part or to respite the execution of any such sentence.
- Liability for crimes committed under other laws and continuation of pending proceedings. 6.(1) Except as hereinafter expressly provided, nothing in this Code shall affect -
- (a) the liability, trial or punishment of a person for an offence against any other law in force in Transkei created by proclamation, by-law, rule or regulation made under authority of any Act other than this Code; or
- (b) the liability of a person to be tried or punished under the provisions of any law in force in Transkei relating to the jurisdiction of the courts of Transkei for an offence in respect of an act done beyond the ordinary jurisdiction of such courts; or
- (c) the power of any court to punish a person for contempt of court; or
- (d) the written laws for the time being in force for the government of the police forces and defence forces of Transkei.

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(2) All criminal proceedings shall be instituted in the name of the Republic of Transkei and any criminal proceedings which have not been concluded before the commencement of this Code, or which although concluded may thereafter be reopened, shall be continued in all respects as if this Code had not come into operation.

Acts committed partly outside Transkei.

7. When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly outside Transkei, every person who within Transkei does any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within Transkei.

PART 2

INTERPRETATION OF WORDS AND EXPRESSIONS

Definitions.

8. In this Code, unless the context otherwise indicates -

"administrative area" bears the meaning assigned to that expression in section 1 of the Transkei Authorities Act, 1965 (Act 4 of 1965);

"aggravating circumstances" in relation to -

(a) housebreaking or attempted housebreaking with intent to commit an offence means -

(i) the possession of a dangerous weapon; or

(ii) the commission of an assault or a threat to commit an assault,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;

(b) robbery or attempted robbery, means -

(i) the wielding of a firearm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence;

"animal" means any living creature other than a human being;

"authorized affirmant" means a policeman or other peace officer, a stock inspector or a dipping foreman;

"cattle" and "stock" includes horses, mules, asses, bulls, cows, oxen, heifers, calves, sheep, goats, pigs, poultry, domesticated ostriches, domesticated game or the carcasses or any portion of the carcasses of any such stock;

"court" means a court established, constituted or held by or under any law;

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"chief" means a chief as defined in section 1 of the Transkei Authorities Act, 1965, and includes any duly appointed deputy of such chief;

"common intention" means the intention with which everyone of several persons participates in any criminal act in furtherance of the common intention of all and whenever an act which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act, with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention;

"dangerous harm" means harm endangering life;

"dangerous and offensive weapon" means any article made or adapted for use for causing injury to the person or intended by any person having it with him for use by him and includes a spear, assegai, sharpened pointed iron rod, axe, hatchet, bush-knife, club, knife with a blade exceeding nine centimetres in length and sharpened stick exceeding one metre in length;

"dipping foreman" means any person duly appointed as a dipping foreman for the purposes of the Animal Diseases and Parasites Act, 1956 (Act 13 of 1956);

"grievous bodily harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health, or which is likely to injure health or which extends to permanent disfigurement or to any permanent or serious injury to any internal or external organ, membrane, limb or sense;

"headman" means a headman as defined in section 1 of the Transkei Authorities Act, 1965;

"illegal" is applicable to anything which is an offence, or which is prohibited by law, or which furnishes grounds for a civil action;

"kraal" denotes any hut, house or enclosure occupied by any single family or member of a family, or any tribes with a recognized head known as "umninimzi";

"legally bound to do" denotes that which it is illegal to omit to do;

"life and death" denote the life or death of a human being unless the contrary appears from the context;

"magistrate" includes an additional magistrate, an acting additional magistrate, an assistant magistrate and an acting assistant magistrate;

"Minister" means the Minister of Justice;

"movable property" includes corporeal property of every description except land and things permanently attached to the earth or permanently fastened to anything which is attached to the earth;

"night" or "night-time" means the space of time between sunset and sunrise;

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"oath" and all expressions relating to "the taking of oaths" include all such affirmations and declarations as may by law be substituted for an oath, and the making of such affirmations and declarations;

"offence" means an act or omission punishable by law;

"peace officer" includes any magistrate or justice of the peace, a policeman and any chief or headman;

"policeman" means any member of a police force established by or under any law and includes any traffic officer appointed under section 3 of the Transkei Road Traffic Act, 1967 (Act 5 of 1967);

"produce" means the whole or any part of any skin, hide or horn of stock and any wool, mohair or ostrich-feathers as well as the agricultural and natural products resulting from labour and efforts in connection with tilling of soil;

"public" includes any part of the public or any community, and all individuals, whether citizens of Transkei or not, are members thereof;

"public place" or "public premises" includes any public way and any building, place or conveyance to which, for the time being, the public is entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or any sports gathering or an open court;

"public sale" means any sale effected -

- (a) at any public market;
- (b) by any shopkeeper during the hours when his shop may in terms of any law remain open for the transaction of business;
- (c) by a duly licensed auctioneer; or
- (d) in pursuance of an order of a competent court;

"public servant" means -

- (a) any officer as defined in section 1 of the Public Service Act, 1978 (Act 43 of 1978);
- (b) any employee as defined in the said section 1;
- (c) any person seconded to the public service by any other government, authority or body;
- (d) any person performing a duty in the service of the Government, or receiving any remuneration in any form from the Government for the performance of any public duty;

"public way" includes any highway, market place, square, street, bridge or other way which is lawfully used by the public;

"spoor" denotes any mark or impression on, or disturbance of, the surface of the ground, or any mark or impression on or disturbance of

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any grass, herbage or wood on such ground, or any matter or substance left or found upon such ground, herbage, wood or fence, indicating that any person or persons or stock have passed along in any particular direction;

“stock inspector” means any person duly appointed as a stock inspector for the purposes of the Animal Diseases and Parasites Act, 1956;

“sufficient fence” means any wire fence, wall or hedge through which no stock can pass without breaking it or any natural boundary through or across which no sheep will ordinarily pass;

“utter” includes using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with or act upon the thing in question;

“valuable security” includes any document which is the property of or in the lawful possession of any person and which is evidence of ownership of any property or of the right to recover or receive any property; and

“wound” means any incision or puncture which divides or pierces any membrane of the body.

PART 3

CRIMINAL LIABILITY AND PUNISHMENT

Claim of right.

9.(1) No person shall be criminally liable in respect of an offence relating to property if the act or omission which constituted the offence was done in the exercise of a *bona fide* claim of right.

(2) The reasonableness or otherwise of the claim may, having regard to the surrounding facts, be evidence of the necessary *bona fides* or of *mala fides*.

Necessity.

10. No person shall be criminally liable for any offence other than treason or murder if the act was done or omitted in circumstances of necessity: Provided that -

(a) in the case of necessity arising from human agency -

- (i) the necessity arose from threats of harm, other than threats of future injury, to such person, his property or legal interest; and
- (ii) the threat of harm must have commenced or was imminent; and
- (iii) the situation that such person found himself in was not due to his own fault; and
- (iv) the commission of the said offence was necessary to avert the threat of harm; and
- (v) the means used in the commission of such offence were reasonable in the circumstances; and

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(vi) where the act caused harm to an innocent third party such harm was not greater than the harm threatened or avoided; and

(vii) such person ceased the act as soon as possible; or

(b) in the case of necessity arising from force of circumstances the provisions of subparagraph (iii), (iv), (v), (vi) and (vii) of paragraph (a) are satisfied.

Self-defence.

11. Subject to the express provisions of this Code or any other law, no person shall be criminally liable for the use of force in repelling an unlawful attack upon his person or property or the person or property of anyone whom it is his moral duty or legal duty to protect if the means he uses or the degree of force he employs in so doing are no more than is reasonably necessary in the circumstances.

Force used in arrests.

12. Where anyone is charged with a criminal offence arising out of the lawful arrest, or attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested, the court shall in considering whether the means used were necessary, or the degree of force used was reasonable, for the apprehension of such person, have regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person.

Immature age.

13.(1) No person under the age of seven years shall be criminally liable for any act or omission.

(2) No person under the age of fourteen years shall be criminally liable for any act or omission unless it is proved that at the time of doing the act or making the omission he had capacity to know that his act was wrongful.

Insanity.

14.(1) No person shall be criminally liable for an act or omission if at the time of doing the act or making the omission he was labouring under mental defect or disease of or affecting the mind to such an extent as to render him incapable of -

(a) forming the necessary intention to constitute the crime; or

(b) appreciating the nature and quality of the act; or

(c) appreciating that the act was wrong; or

(d) acting in accordance with an appreciation of the wrongfulness of his act; or

(e) resisting an impulse to do the act.

(2) A person labouring under specific delusions but in other respects sane, shall not be acquitted on the ground of insanity, unless the delusions caused him to believe in the existence of some state of things which, if it existed would justify or excuse his act.

(3) Insanity before or after a person committed an act or made an omission and delusions, though only partial, may be evidence that such person was at the time of the commission of such act or making such omission in such a condition of mind that he could not be held liable for

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any offence which such act or omission might have constituted.

(4) Anyone committing an offence shall be presumed to be sane until the contrary is proved.

Intoxication.

15.(1) Subject to the provisions of subsection (2) a person shall be criminally liable and guilty of an offence in terms of this section for any act or omission which would constitute an offence but for the fact that at the time of such act or omission such person is by reason of intoxication-

- (a) incapable of knowing the nature of the act; or
- (b) incapable of knowing that what he is doing is either wrong or contrary to law; or
- (c) insane, temporarily or otherwise,

and it shall be competent for the court to convict him of a contravention of this section notwithstanding the fact that he is charged with some other offence and not with a contravention of this section.

(2) In any case where the thing which causes the intoxication was administered without the knowledge or consent of the accused, proof of which shall be on the accused, and such intoxication has one or more of the effects mentioned in paragraphs (a), (b) or (c) of subsection (1), such fact shall provide a complete defence to the charge.

(3) For the purposes of this section "intoxication" shall include a state produced by narcotics or drugs.

Ignorance of law.

16. Ignorance of the law shall not afford an excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence.

Judicial officers.

17. Except as expressly provided by this Code, no judge or other judicial officer shall be criminally liable for anything he has done or omitted in good faith in the exercise of his judicial functions, even if the act so done was in excess of his judicial authority or if he was bound to do the act omitted.

Mistake of fact.

18. Except in those cases where there is an express or implied provision of law to the contrary, conduct otherwise criminal is excused where it is done under the influence of an honest and reasonable belief in a state of facts which, if true, would have justified such conduct.

Misfortune or accident.

19. Nothing done shall be an offence if it is done by accident or misfortune, and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and attention.

Prevention of harm.

20.(1) Nothing done or omitted shall be an offence merely by reason of its being done or omitted with the knowledge that it is likely to cause harm, if it is done or omitted without any criminal intention to cause harm and in good faith for the purpose of preventing or avoiding other harm to persons or property.

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(2) Everyone is protected from criminal liability for performing with reasonable care and skill any surgical operation upon any person for his benefit with such person's consent, or, in the case of a minor, with the consent of a parent or the guardian of such minor: Provided that performing the operation was reasonable, having regard to the patient's condition at the time and to all the circumstances of the case.

(3) No act or omission shall be an offence by reason of any harm which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for the person to signify consent, or if that person is incapable of giving consent and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit.

(4) No person shall have a right to consent to the infliction of death upon himself, or of any injury likely to cause death, unless it be an injury in the nature of a surgical operation upon himself and if such consent is given, it shall have no effect upon the criminal liability of any person by whom such death may be caused.

(5) Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, shall be an offence by reason of any harm which it may cause, or intended by the doer to cause or be known by the doer to be likely to cause to that person: Provided -

- (a) that this exception shall not extend to the intentional causing of death or any attempt to cause death;
- (b) that this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the prevention of death or grievous harm or the curing of any grievous disease or infirmity;
- (c) that this exception shall not extend to the voluntary causing of grievous harm, or to attempting to cause grievous harm, unless it be done for the purpose of preventing death or grievous harm or the curing of any grievous disease or infirmity;
- (d) that this exception shall not extend to the abetment of any offence, to the commission of which offence it would not extend;
- (e) that a consent shall not be such a consent as is intended by any provision of this Code if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows or has reason to believe that the consent was given in consequence of such fear or misconception or, if the consent is given by such person who, from unsoundness of mind or intoxication is unable to understand the nature and consequence of that to which he gives his consent or, unless the contrary appears from the context, if the consent is given by a person who is under the age of twelve years.

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Person not to be punished twice for same offence.

21. No person shall be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.

Court officers justified in executing sentences.

22.(1) Every officer of any court authorized to execute a lawful sentence, every member of the Prisons' Service and every person lawfully assisting such officer or member (as the case may be), shall be justified in executing such sentence.

(2) Every officer of any court duly authorized to execute any lawful process of such court, whether of a civil or criminal nature, and everyone duly authorized to execute a lawful warrant issued by any court or justice of the peace, or other person having jurisdiction to issue such warrants, and every person lawfully assisting them respectively, shall be justified in executing such process or warrant respectively, and every member of the Prisons' Service who is required under such process or warrant respectively to receive and detain any person, shall be justified in receiving and detaining him.

(3) If a sentence is passed or process is issued by a court having jurisdiction under any circumstances to issue such warrant, the sentence passed or process or warrant issued shall be sufficient to justify the officer or person authorized to execute such warrant, and every member of the Prisons' Service and person lawfully assisting, although the court passing the sentence or issuing the process had not in the particular case authority to do so, or although the court or the person in the particular case had no jurisdiction to issue or exceeded its or his jurisdiction in issuing the warrant, or was, at the time when such sentence was passed or process or warrant issued, out of the district for which such person was entitled to act.

Obedience to superior orders.

23.(1) Every person who is bound by military or police law to obey the lawful command of his superior officer, shall be justified in obeying any command given him by his superior officer for the suppression of a riot, unless such order is manifestly unlawful.

(2) It shall be a question of law whether such order is manifestly unlawful or not.

Obedience to orders in suppression of riots.

24.(1) Any person, whether subject to military or police law or not, acting in good faith in obedience to orders given by a magistrate or a justice of the peace for the suppression of a riot, shall be justified in obeying the orders so given, unless such orders are manifestly unlawful, and he shall be protected from criminal liability in using such force as he on reasonable and probable grounds believes to be necessary for carrying into effect such orders.

(2) It shall be a question of law whether any particular order is manifestly unlawful or not.

De minimis non curat lex.

25. Nothing shall be an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

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- Accomplices.** 26. Every person who knowingly aids or assists in, or counsels, the commission of any offence shall be guilty of that offence and on conviction liable to the same punishment as the principal offender.
- Each joint offender to be party to all acts committed by each other in prosecution of common intention.** 27. If several persons form a common intention to prosecute any unlawful purpose and to assist each other therein, each of them shall be a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.
- Counselling another to commit an offence.** 28.(1) When a person directly or indirectly counsels or procures any person to commit an offence and an offence is subsequently committed by the person so counselled or procured, it is immaterial whether the offence so committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided that the act or omission constituting the offence was or ought to have been known to be a probable consequence of carrying out the counsel.
- (2) In either case the person who gave counsel or procured shall be deemed to have counselled or procured the other person to commit the offence actually committed by him.
- Conspiracy.** 29. Any person who has entered into an agreement with one or more persons to commit or to aid or procure the commission of a crime shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.
- Offences by corporations, societies, etc.** 30. Where an offence is committed by any company or other body corporate, or by any society, association or body of persons, every person charged with or concerned or acting in control or management of the affairs or activities of such company, body corporate, society, association or body of persons shall be guilty of that offence and liable to be punished accordingly, unless it is proved by such person that, through no act or omission on his part, he was not aware that the offence was being or was intended or was about to be committed, and that he took all reasonable steps to prevent its commission.
- Attempts.** 31. Any person who attempts to commit an offence shall be guilty of an offence and liable on conviction to punishment as if he had actually committed such offence.
- Punishments.** 32. Unless otherwise provided the punishment which may be imposed by a court in respect of a contravention of any provision of this Code shall be in the discretion of, and limited only by the jurisdiction of, that court.

PART 4

OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE

- Perjury.** 33.(1) Any person who unlawfully, intentionally and upon oath, affirmation or admonition in the course of judicial proceedings before a competent court or tribunal makes a statement which he -
- (a) knows to be false; or

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(b) foresees may be false,

shall be guilty of the offence of perjury.

(2) For the purposes of subsection (1) it shall be immaterial -

(a) what forms and ceremony are used in administering the oath or in otherwise binding the person giving the testimony to speak the truth, provided he assents to the forms and ceremonies so used;

(b) whether the false testimony is given orally or in writing .

(3) Any person who aids, abets, counsels, procures or suborns another person to commit perjury shall be guilty of the offence of subornation of perjury.

Perjury by interpreter.

34. Any person lawfully sworn as an interpreter in a judicial proceeding, who wilfully makes a statement material in the proceeding which he knows to be false, or does not believe to be true, shall be guilty of perjury.

Contradictory statements on oath.

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

(2) At the trial of any person for an offence under this section, the record of a court or tribunal containing any statement made on oath or affirmation by the person charged shall be *prima facie* evidence of such statement.

(3) A person shall be liable to be convicted of an offence under this section irrespective of whether any statement made by him before a court or tribunal was made in reply to a question which he was bound by law to answer, and any such statement shall be admissible in any proceeding under this section.

Fabricating evidence.

36. Any person who, with intent to mislead any court or person holding any judicial proceedings, fabricates or contrives evidence by any means other than perjury and subornation of perjury, or knowingly makes use of such fabricated evidence, shall be guilty of an offence.

False statements under oath.

37. Any person required or authorized by law to make a statement, either on oath or in any form permitted to be substituted for an oath, who makes a statement which would amount to perjury if made in a judicial proceeding, shall be deemed to be guilty of perjury, and liable on conviction to the penalties provided for the offence of perjury.

False declarations.

38. Any person who makes a statement as to any matter of fact, opinion or belief, which would amount to perjury if made on oath upon any occasion on which he is permitted by law to make any statement or declaration in lieu of an oath before any officer authorized by law to

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permit it to be made before him, shall be guilty of an offence and liable on conviction to the penalties provided for the offence of perjury.

Removal or destruction of possible exhibits.

39. Any person who, knowing that any book, document or thing of any kind whatsoever, is or may be required in evidence in a judicial proceeding, wilfully removes or destroys it or renders it illegible or unidentifiable, with intent thereby to prevent it from being used in evidence, shall be guilty of an offence.

Acts with intent to defeat course of justice.

40. Any person who -

- (a) accuses any person falsely of any crime or does anything to obstruct, prevent, pervert or defeat the course of justice; or
- (b) in order to obstruct the due course of justice, dissuades by any means, or hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or
- (c) obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal,

shall be guilty of an offence: Provided, however, that where the offence has caused the conviction and execution of an innocent accused, such person may be sentenced to death or to imprisonment for life.

Compounding.

41.(1) Any person who asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person upon any agreement or understanding that he will compound or conceal an offence punishable under this Code with death or otherwise than by a fine only, or withhold any evidence thereof, shall be guilty of an offence.

(2) When any person is convicted of an offence under this section the court may, in addition to or in lieu of any other punishment which may be imposed, order the forfeiture to the State of any property which has passed in connection with the commission of the offence, or, if such property cannot be forfeited or cannot be found, of such sum as the court shall assess as the value of the property.

(3) Payment of any sum ordered to be forfeited to the State in terms of subsection (2) may be enforced in the same manner and subject to the same incidents as in the case of the payment of a fine.

Accessory after the fact.

42. Any person who, with a view to defeating the ends of justice, receives, comforts or assists anyone who, to his knowledge, has committed an offence shall be guilty as an accessory after the fact to such offence.

Contempt of court.

43.(1) Any person who -

- (a) within the premises in which any judicial proceeding is being had or taken, or within the precincts of the same, shows disrespect in speech or manner, to or with reference to such proceeding or any person before whom such proceeding is being had or taken; or

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- (b) having been called upon to give evidence in a judicial proceeding, fails to attend, or having attended, refuses to be sworn or to make an affirmation or, having been sworn or affirmed, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being had or taken, after he has been ordered to leave such room; or
- (c) causes an obstruction or disturbance in the course of a judicial proceeding; or
- (d) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken;
- (e) publishes a report of the evidence taken in any judicial proceeding in contravention of any order made by a court; or
- (f) endeavours wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he has given evidence; or
- (g) unlawfully dismisses a servant because he has given evidence for or against a party to a judicial proceeding; or
- (h) wrongfully retakes possession of land from any person who has obtained possession by writ of court; or
- (i) commits any act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken,

shall be guilty of an offence.

(2) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of the Supreme Court to punish for contempt of court.

Giving false information to public servant or the police.

44.(1) Whoever gives to any person employed in the public service any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause such person employed in the public service -

- (a) to do or omit anything which such person employed in the public service ought not to do if the true state of facts respecting which such information is given were known to him; or
- (b) to use the lawful power of such person employed in the public service to the injury or annoyance of any person,

shall be guilty of an offence.

(2) Any person who makes a statement, whether verbally or in writing, to a member of the police force containing allegations that an offence has been or may have been committed, which he knows or believes to be false, shall be guilty of an offence.

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Fraud by public servant in discharge of his duties.

45. Any person employed in the public service who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, shall be guilty of an offence.

Disobedience of lawful orders, warrants or commands.

46. Any person who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorized in that behalf, shall be guilty of an offence.

Inciting defiance of lawful authority of public officers.

47. Any person who, without lawful excuse, the burden of proof whereof shall lie upon him, utters, prints or publishes any words, or does any act or thing calculated to bring into contempt, or to excite defiance of or disobedience to, the lawful authority of a public officer or any class of public officers, shall be guilty of an offence.

Alteration, destruction, defacement etc., of statutory documents.

48.(1) Any person who, knowingly and without lawful authority or excuse destroys, mutilates or defaces, alters, abandons or fails to preserve any statutory document, hereinafter defined, shall be guilty of an offence.

(2) Any person who, in any manner or by whatsoever means, instigates, expressly or by implication, any person or class of persons to destroy, mutilate, deface, alter, abandon or fail to preserve any statutory document or any class of statutory document, or who does any act with intent or knowing it to be likely that any person or class of persons will be instigated thereby to destroy, mutilate, deface, alter, abandon or fail to preserve any statutory document, shall be guilty of an offence.

(3) In this section "statutory document" means any licence, permit, identity document, passport, travel document, record or return or certificate of or relating to employment, and any other record of or document establishing status, identity, qualifications, service, authorisation, eligibility or entitlement, made, granted, given or issued under and for the purpose of, and in any form prescribed by, any written law, and being of current effect, and includes any part thereof made, granted, given or issued as aforesaid.

PART 5

OFFENCES AGAINST THE STATE AND PUBLIC ORDER

Treason.

49. Any citizen of or person who owes allegiance to Transkei who -

- (a) bears arms against Transkei; or
- (b) has dealings with a foreign power in order to induce it to undertake hostilities against Transkei, or provides it with means therefor, either by facilitating the entrance of foreign forces into Transkeian territory, or by undermining the allegiance of the army, navy or air force, or by any other means whatsoever; or
- (c) delivers to a foreign power or to its agents, any Transkeian troops or territories, cities, towns, villages, fortifications, ammunition, ships or aircraft belonging to Transkei; or

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- (d) in time of war instigates soldiers, sailors or airmen to enlist in the service of a foreign power, facilitates their doing so or enlists persons to service with a power which is at war with Transkei; or
- (e) in time of war has dealings with a foreign power or its agents in order to promote the actions of that power against Transkei,

shall be guilty of treason and liable on conviction to -

- (i) the death sentence, or
- (ii) imprisonment for life, or
- (iii) whipping, or
- (iv) a fine, or
- (v) any two or more of the penalties mentioned in subparagraphs (ii), (iii) and (iv).

Preparing to wage war.

50. Any person who collects men, arms or ammunition, or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against Transkei or the Government of Transkei, shall be guilty of an offence and liable on conviction to the penalties provided for treason.

Misprision of treason.

51. Any person who -

- (a) becomes an accessory after the fact to treason, or
- (b) knowing that any person intends to commit treason, does not give information thereof with all reasonable despatch to the President or a policeman, or use other reasonable endeavour to prevent the commission of the offence,

shall be guilty of the offence of misprision of treason and shall be liable on conviction to the penalties provided for treason.

Sedition.

52. Any person who unlawfully gathers together with a number of people with the intention of impairing the majesty or sovereignty of the State by defying or subverting the authority of its Government but without the intention of overthrowing or coercing the Government shall be guilty of an offence.

Public violence.

53. Any person who in concert with others commits any act or acts as to openly and publicly effect, or which are intended to so effect, a violent and forcible disturbance of the public peace and security or a forcible invasion of the rights of other people shall be guilty of an offence.

Acts or conduct which constitute an incitement to public violence.

54. Any person who, in any place whatever, acts or conducts himself in such a manner, or speaks or publishes such words, that it might reasonably be expected that the natural and probable consequence of his act, conduct, speech or publication would, under the circumstances, be the commission of public violence by members of the public generally or by persons in whose presence the act or conduct takes place or to whom the speech or publication is addressed, shall be guilty of incitement to public violence.

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Penalty for allowing property to be used in commission of offence under this Part.

55.(1) Any person who knowingly allows any premises or any other property whatsoever, situated in Transkei, to be used for the purposes of or in connection with any offence under this Part, shall be guilty of an offence.

(2) The court convicting any person of an offence under subsection (1) may declare the property in respect of which the offence was committed, or the rights of the convicted person to such property, to be forfeited to the State: Provided that such declaration shall not affect any rights which any person other than the convicted person may have to such property, if it is proved that he did not know that it was being or would be used in contravention of the said paragraph.

(3) The relevant provisions of the Criminal Procedure Act relating to the forfeiture of property to the State shall *mutatis mutandis* apply in respect of such forfeiture.

Discrimination.

56.(1) Any person who -

- (a) utters any words or publishes any writing expressing or showing hatred, ridicule or contempt for any person or group of persons; or
- (b) discriminates against or treats less favourably any person or group of persons,

because of his or their nationality, race, tribe, place of origin, colour or religious beliefs, shall be guilty of an offence.

(2) No prosecution for an offence under this section shall be instituted without the written consent of the Attorney-General.

Unlawful assemblies and demonstrations.

57.(1) Any gathering, meeting, assembly or demonstration which in terms of this Code or any other law is unlawful, shall be an unlawful assembly or demonstration for the purposes of this Code.

(2) An assembly of five or more persons shall be unlawful if the common object of the persons comprising that assembly is -

- (a) to overawe by criminal force, or show of criminal force, any officer of the Government or any public servant in the exercise of the lawful power of such public servant; or
- (b) to resist the execution of any law, or any legal process; or
- (c) by means of criminal force to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or
- (d) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Joining unlawful assemblies and demonstrations.

58.(1) Any person who, being aware of the facts which render any assembly or demonstration an unlawful assembly or demonstration, intentionally joins that assembly or demonstration, or continues in it, shall be guilty of an offence.

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(2) An assembly or demonstration which was not unlawful when it assembled or commenced, may subsequently become unlawful by virtue of the provisions of any law or a prohibition under any law.

Fighting.

59.(1) Any person who wrongfully or unlawfully fights, or takes part in a fight, or attempts to take part in a fight, whether in attack or retreat, shall be guilty of an offence.

(2) Notwithstanding anything to the contrary contained in any other law, magistrates' courts shall for the purposes of this section have jurisdiction to impose -

- (i) imprisonment for a period not exceeding three years; or
- (ii) a fine not exceeding three thousand rand or in default of payment to such period of imprisonment aforesaid; or
- (iii) a whipping not exceeding twelve strokes; or
- (iv) both such fine and such imprisonment or such imprisonment and such whipping, but not both a fine and whipping for the same offence.

Penalty for refusing lawful command to disperse.

60. Whenever any number of persons are assembled together from whose conduct a breach of the peace may be reasonably apprehended, or when two or more persons are fighting or taking part or attempting to take part in a fight, any magistrate, justice of the peace, chief, headman or other peace officer may command such persons to disperse, and on failure so to do such persons shall each be guilty of an offence.

Force to compel dispersal.

61. If after such command as is mentioned in section 60, the persons assembled fail to disperse, the magistrate, justice of the peace or other peace officer may use force to compel them to do so, and whoever by force wilfully and knowingly opposes, obstructs, hinders or hurts any such magistrate, justice of the peace or other peace officer or person authorized by him to compel such dispersion, shall be guilty of an offence.

Indemnification.

62. If any person, assembled as mentioned in sections 59 and 60, is killed or hurt in the apprehension of such persons, or in the endeavour to apprehend or disperse them by reason of their resistance, every person ordering them to be apprehended or dispersed and every person executing such orders shall be indemnified against all proceedings of every kind in respect thereof, provided that such orders are not manifestly illegal.

Collective responsibility.

63. If any offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew could possibly be committed in prosecution of that object, every person who at the time of committing that offence is a member of that assembly shall be guilty of that offence.

Provocation of breach of peace.

64. Any person who uses any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, in any street, road, public place, shop, store, hall, sports field or stadium, or in or upon any premises licensed for the sale of liquor shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding two months.

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Common nuisance.

65. Any person who performs any unlawful act or omits to discharge a legal duty which act or omission endangers the lives, safety or health of the public or any individual, or which causes annoyance or obstructs or causes inconvenience to the public in the exercise of common rights, shall be guilty of the offence of common nuisance.

Spreading infectious diseases.

66. Any person who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be guilty of an offence.

Adulteration of food and drink.

67. Any person who adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such articles as food or drink, or knowing it to be likely that the same will be sold as food or drink, shall be guilty of an offence.

Selling or exposing for sale noxious food and drink.

68. Any person who sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food and drink, knowing or having reason to believe that the same is noxious as food or drink, shall be guilty of an offence.

Fouling public water.

69. Any person who corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be guilty of an offence.

Protection of travelling public and prohibition of certain acts.

70.(1) No person shall -

- (a) leave upon any street, public road or thoroughfare, any rock, stone, timber, bricks or other article calculated to endanger any animal or vehicle ridden or driven thereon; or
- (b) throw stones or similar missiles or other dangerous objects at any horseriders or at any traffic of any description passing on public lanes, streets, roads or other thoroughfares; or
- (c) leave upon any public road, lane or public thoroughfare any vehicle, plough, harrow or sledge without any horse or animal harnessed thereto, unless in consequence of some accident having occurred; or
- (d) slaughter or skin any beast upon any public road, lane or thoroughfare, or leave any dead beast on any such road or thoroughfare; or
- (e) set or urge or permit any dog or other animal to attack or worry any person, horse or animal, or by ill-usage or negligence in driving any cattle cause damage or hurt to be done by such cattle; or
- (f) wilfully break or extinguish or damage any lamp or lamp-post; or

(g) play or bet in any street or other open and public place, at or with any dice table or instrument of gaming or game of chance.

(2)(a) Upon receipt by a magistrate of a complaint that any person whilst lawfully travelling within the area of jurisdiction of such magistrate, has been molested by having missiles thrown at him, or at any vehicle in which he may be travelling, or by having obstructions placed in his way or has been molested in any other manner and that the person or persons so molesting him cannot be identified, it shall be

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lawful for the magistrate, in the presence of the heads of the kraals adjacent to and surrounding the spot where the offence has occurred, summarily and without pleadings to inquire into the matter to fix responsibility for the offence on the heads of the kraals as may in his judgment be concerned; to impose a fine not exceeding R10 on each of such heads of kraals, and to assess the amount of any damage which may have been caused thereby.

(b) Should he deem it necessary the magistrate may require the complainant to produce a certificate from a competent authority setting forth the particulars of the injury suffered by him in his person or property, and whenever possible, the estimated cost of the same. The cost, if any, of such a certificate shall be borne, pro rata, by the kraal heads concerned in addition to any other award made under this Code.

(c) The fine so imposed and the amount of the damages so assessed may be recovered by levy against the movable property of the heads of the kraals on whom responsibility has been fixed, and the amount of any damage so recovered shall be paid over by the Messenger of the Court to the complainant.

(3) No driver, guard or conductor of a public vehicle for the conveyance of passengers shall wilfully delay on the road, use any abusive or insulting language to any passenger, or by reason of intoxication, negligence or other misconduct, endanger the safety or property of any passenger or other person, or demand or exact more than the proper fare due from any passenger.

(4) Any person who contravenes any provision of subsection (1), (2) or (3) shall be guilty of an offence.

Miscellaneous offences
relating to public safety.

71. Any person who -

- (a) has in his custody or possession without lawful excuse (the proof of which excuse shall be on such person) any pick-lock, key, crow-bar or other instrument of housebreaking; or
- (b) is found by night, without lawful excuse (the proof of which excuse shall be on such person) in or upon, or loitering in the neighbourhood of any dwelling-house, warehouse, stable, cellar or outhouse, or in or loitering in the neighbourhood of any enclosed yard, garden or area, or in any kraal, or in or on board any ship or other vessel when lying or being in any port, harbour or jetty; or
- (c) is found by night armed with any gun, pistol, revolver or firearm of any description, sword, bludgeon, battle-axe, assegai, bush-knife or other offensive weapon or instrument and who being thereto required is unable to give a valid and satisfactory reason for being so armed; or
- (d) shall resist, or incite or aid or encourage any person to resist, and any person who shall hinder or disturb any chief, policeman, headman, sub-headman, stock-inspector, dipping foreman or officer of any municipal or other local authority, in the execution of his duty; or
- (e) discharges a firearm in any street or thoroughfare without leave of the local authority, or unless in the discharge of some duty or

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in obedience to some lawful command,
shall be guilty of an offence.

Minor nuisances.

72. Any person who -

- (a) wantonly or mischievously rings any public bell, or makes any noise or disturbance in the streets, throws stones or other missiles, uses catapults, knocks at doors or rings any private bells, removes signboards or other property from the premises of the owner or commits any mischief of a like nature; or
- (b) wantonly irritates any cattle, horses or other animals whether attached to any vehicle or not, in any public street or place; or
- (c) makes a fire in any street, thoroughfare, or public place or lets off fireworks without leave of the local authority; or
- (d) rides a horse or drives a vehicle upon any sidewalk; or
- (e) throws any glass, filth, dirt, rubbish, empty tins or plastic containers or other offensive matter upon any public street, sidewalk, pavement, lane or public place, or in any other place than such as may have been appointed for that purpose by the local authority; or
- (f) cuts down, removes, destroys or injures any wood, tree or shrub upon any commonage without special permission from the local authority; or
- (g) destroys, damages or injures any tree or shrub growing in or along any public street, or in any public place; or
- (h) urinates or defecates in any street, thoroughfare or public place; or
- (i) sings any obscene song or ballad, or writes or draws any indecent or obscene word, figure or representation in any public street or place; or
- (j) places any placard or other document, writing or painting on, or otherwise defaces any house, or building, wall, fence, lamp-post or gate, without the consent of the owner or occupier thereof; or
- (k) commits any nuisance in any street, or within view of any dwelling-house, whereby public decency may be offended,

shall be guilty of an offence.

Neglect of persons in care.

73. Any person who has charge of any other person, unable either by reason of detention, age, sickness, infirmity, insanity or any other cause, to provide himself with the necessities of life, shall be under a legal duty to supply that person with the necessities of life, and shall be criminally responsible for omitting without lawful excuse to perform it, if death is caused thereby, or if the life of such person is endangered, or his health impaired, or if any of these consequences are likely to occur, whether such charge is imposed upon him by law, or if undertaken by him under any contract or by reason of any unlawful act.

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Avoidance of danger to others. 74. Any person who has in his charge, or under his control, anything whatever whether animate or inanimate, or who erects, makes or maintains anything whatever which in the absence of any precaution or care, may endanger human life, shall be under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and shall be criminally responsible for the consequences of omitting without lawful excuse to take such precautions or to use such care.

Duty to take care. 75. Any person who undertakes to do any act, the omission to do which is or may be dangerous to life, shall be under a legal duty to do that act, and if he fails, without lawful excuse, to discharge that duty, he shall be guilty of an offence.

PART 7

OFFENCES RELATING TO RELIGION

Compulsion. 76. Any person who unlawfully compels another person to perform a religious activity or to participate in a religious rite or to abstain from such activity or rite, shall be guilty of an offence.

Damaging or defiling place of worship. 77. Any person who destroys, damages or defiles any place of worship or any object which is held sacred by any class of persons with the intention of thereby insulting the religion of any class of persons or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be guilty of an offence.

Disturbing religious assembly. 78. Any person who causes disturbance to any assembly engaged in the performance of religious worship or religious ceremony, shall be guilty of an offence.

Trespassing with intent to injure religious feelings. 79. Any person who, with the intention of wounding the feelings of any person or of insulting the religion of any person or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or in any place of burial, or in any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the purpose of funeral ceremonies, shall be guilty of an offence.

Hindering burial or defiling dead bodies. 80.(1) Any person who unlawfully hinders the burial of the dead body of any person, or without lawful authority in that behalf disinters, dissects or harms the dead body of any person or, being under a duty to cause the dead body of any person to be buried, fails to perform such duty, shall be guilty of an offence.

(2) In this section "burial" means burial in earth, interment or any other form of sepulture, or the cremation or any other mode of disposal of a dead body and "buried" has a corresponding meaning.

Wounding religious feelings. 81. Any person who, with the deliberate intention of wounding the religious feelings of any other person, writes any word or any person who, with the like intention, utters any word or makes any sound in the hearing of any other person or makes any gesture or places any object in the sight of any other person, shall be guilty of an offence.

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Molestation of preacher or congregation.

82. Any person who in any way disturbs, molests or misuses any preacher, teacher or person lawfully officiating at any religious gathering, assembly or congregation, or any person there assembled, shall be guilty of an offence.

PART 8

CRIMES AGAINST HUMAN LIFE AND PERSONAL SAFETY

Homicide.

83.(1) Homicide is the killing of a human being by another directly or indirectly by any means whatsoever and whether by an act or omission.

(2) A child becomes a human being within the meaning of the Code when it has completely proceeded in a living state from the body of the mother, whether in a case of suspended respiration it has breathed or not, and whether it has an independent circulation or not, and whether the navel cord is severed or not, and the killing of such a child is homicide when it dies after birth in consequence of injuries caused by any person before, during or after birth.

(3) Homicide shall not be an offence unless it constitutes culpable homicide or murder.

Murder.

84. Any person who, either as principal or as *socius criminis*, causes the death of another person by unlawfully and with intent doing any act -

- (a) with the object of causing the death of such other person, or
- (b) with any other object, foreseeing that such act will or might cause the death of a human being, and is reckless as to the consequences,

shall be guilty of murder.

Culpable homicide.

85. Any person who unlawfully causes the death of any other person either negligently or intentionally but in circumstances of partial excuse shall be guilty of culpable homicide.

Abetment of suicide.

86. Any person who counsels or procures any person to commit suicide, actually committed in consequence of such counselling or procurement, or aids or abets any person in the commission of suicide, shall be guilty of an offence and liable on conviction to imprisonment or to a fine, or to both a fine and imprisonment: Provided, however, that for abetment of suicide of a minor or insane or intoxicated person the term of such imprisonment may extend to the natural life of the person convicted.

Concealment of birth.

87.(1) Any person who, when a woman is delivered of child, endeavours by any secret disposition of the dead body of the child, to conceal the birth, whether the child died before, at or after its birth, shall be guilty of an offence.

(2) Whenever any person disposes of the body of any child which was recently born, otherwise than under a lawful burial order, he shall be deemed to have disposed of such body with intent to conceal the fact of the child's birth unless it is proved that he had no such intent.

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(3) A person may be convicted under subsection (1) although it has not been proved that the child in question died before the body was disposed of.

Causing death of child by miscarriage.

88. Any person who, when a woman is about to be delivered of a child, unlawfully prevents that child from being born alive by any act or omission of such a nature that it would have caused the death of the child if it had been born alive, shall be guilty of an offence and liable on conviction to imprisonment: Provided that no one shall be guilty of an offence under this section who by means employed in good faith for the preservation of the life of the mother of the child, causes the death of any such child before, during or after its birth.

Procuring unlawful abortion.

89. Any person who unlawfully procures the abortion of a live foetus of a woman with intent to kill such foetus shall be guilty of an offence.

Assault.

90. Any person who unlawfully and intentionally -

(a) applies any force to the person of another, or

(b) inspires a belief in some other person that force is immediately to be applied to him,

shall be guilty of the offence of assault.

Indecent assault.

91. Any person who commits an assault in circumstances of physical indecency shall be guilty of the offence of indecent assault.

Assault with intent.

92. Any person who commits an assault in the course of or preceding the commission of another crime which is not completed may, without derogation from the law relating to attempt, be convicted of assault with intent to commit such crime.

Assault with intent to do grievous bodily harm.

93. Any person who assaults another with the intention of doing him grievous bodily harm shall be guilty of the offence of assault with intent to do grievous bodily harm.

Kidnapping.

94. Any person who unlawfully and intentionally deprives -

(a) any person of liberty of movement, or

(b) any person having the custody of any other person, of such custody,

shall be guilty of the offence of kidnapping.

PART 9

OFFENCES RELATING TO MORALITY, DECENCY AND CHILD CARE

Definitions.

95. In this Part, unless the context otherwise indicates -

“brothel” includes any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose;

“court” means the court before which the charge is brought;

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"house" includes a dwelling-house, building, room, outhouse, shed or tent or any part thereof;

"owner" includes any person who lets or sub-lets or permits the occupation of any house or place whether in his own right or that of another;

"place" includes any field, enclosure, space, vehicle or boat or any part thereof;

"police officer" means any member of any police force established by or under any law;

"unlawful carnal intercourse" means carnal intercourse otherwise than between husband and wife.

Rape.

96.(1) Any male person who has carnal knowledge of a female person -

- (a) against her will; or
- (b) without her consent; or
- (c) with her consent, when her consent has been obtained by putting her in fear of death or of bodily harm; or
- (d) with her consent when such male person knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; or
- (e) with or without her consent when she is under twelve years of age whether he believes her to be of such age or not,

shall be guilty of the crime of rape.

(2) This offence shall be complete upon penetration.

Rape of women.

97. Any woman who actively assists a male person to have carnal knowledge of a female under the circumstances set out in section 96 shall be guilty of the offence of rape.

Unnatural offences.

98.(1) Any person who has carnal intercourse against the order of nature with any man, woman or animal, shall be guilty of an offence.

(2) This offence shall be complete upon penetration.

Incest.

99.(1) Any person who has carnal connection with any other person whom he is prohibited by law to marry on account of consanguinity, affinity or adoptive relationship, shall be guilty of the offence of incest.

(2) This offence shall be complete upon penetration.

Public indecency.

100. Any person who unlawfully and publicly commits an act which tends to deprave the morals of others and which outrages the public's sense of decency and propriety, regard being had to customs and ceremonies then and there existing, shall be guilty of an offence.

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- Indecent exposure.* 101. Any person who indecently exposes his person or appears in any street or public thoroughfare without such articles of clothing as ordinary decency requires, regard being had to customs and ceremonies then and there existing, shall be guilty of an offence.
- Crimen injuria.* 102. Any person who unlawfully, intentionally and seriously impairs the dignity of another shall be guilty of an offence.
- Forced circumcision or "intonjane".* 103. Any person who by force or threats compels any person to submit against his or her will to the act of circumcision, or to take part in the ceremony called "intonjane", or whoever by force or threats compels any person, male or female, against his or her will to submit to any other like act or ceremony, shall be guilty of an offence.
- Aiding unlawful circumcision.* 104. Any person aiding or procuring the circumcision of any youth without the consent of his parents or the person having the lawful custody of such youth, shall be guilty of an offence.
- Intercourse by fraud.* 105. Any person who wilfully and by fraud causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief shall be guilty of an offence, and liable on conviction to imprisonment.
- Bigamy.* 106.(1) Any person who -
- (a) being a male person, has a spouse in a civil marriage living and goes through a civil marriage ceremony with any female person other than such spouse, or
 - (b) being a female person, has a spouse in a civil or customary marriage living and goes through a civil or customary marriage ceremony with any male person other than such spouse,
- shall, unless the marriage previously entered into by such person and such living spouse in either case has been annulled by a competent court, be guilty of the offence of bigamy.
- (2) In this section "civil marriage" and "customary marriage" mean "civil marriage" and "customary marriage" as respectively defined in the Marriage Act, 1978 (Act 21 of 1978).
- Keeping a brothel prohibited.* 107.(1) Any person who keeps a brothel shall be guilty of an offence.
- (2) The following persons shall for the purposes of subsection (1) be deemed to keep a brothel, namely -
- (a) any person who resides in a brothel unless he proves that he was ignorant of the character of the house or place;
 - (b) any person who manages or assists in the management of any brothel;
 - (c) any person who knowingly receives the whole or any share of any moneys taken in a brothel;
 - (d) any person who, being the tenant or occupier of any house or place, knowingly permits it to be used as a brothel;

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- (e) any person who, being the owner of any house or place, lets the same, or allows the same to be let or to continue to be let, with the knowledge that such house or place is being kept or used as a brothel;
- (f) any woman found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof;
- (g) any person whose wife keeps or resides in or manages or assists in the management of a brothel unless he proves that he was ignorant thereof or that he lives apart from her and did not receive the whole or any share of the moneys taken therein.

Onus of proof.

108. In prosecutions under this Part the onus of proving that a house or place is to be kept or used or is being kept or used as a brothel to the knowledge of the owner shall be on the prosecution: Provided that -

- (a) if it is established to the satisfaction of the court that, having regard to the locality and accommodation, the rent to be paid or paid for the house or place is exorbitant, the onus shall be on the accused to prove that he was ignorant that such house or place is to be kept or used or was kept or used as a brothel;
- (b) proof of written notice having been given to the owner by a policeman not below the rank of sergeant or by two householders living in the vicinity of the house or place that any house or place is being kept or used as a brothel, shall be *prima facie* proof of knowledge on his part.

Proceedings upon complaint by householders or police that a house or place is used as a brothel.

109.(1) If it appears to any magistrate on sworn information laid before him by not less than two householders of good repute that any house or place in the vicinity of the dwellings of such householders is being kept or used as a brothel or on similar information upon oath laid before him by any policeman not below the rank of sergeant, or by a welfare officer employed by the State, a local authority or a welfare organization registered under any law relating to the registration or control of welfare organizations, the magistrate may -

- (a) issue a warrant for the arrest of the person alleged to be the keeper of such brothel; or
- (b) issue a warrant authorizing any policeman not below the rank of sergeant-
 - (i) to enter at any time and within such period as shall be stated in such warrant, such house or place for the purpose of ascertaining the name and identity of the keeper of such house or place;
 - (ii) to interrogate, and to demand the name and address of any person found in or upon such house or place; and
 - (iii) to demand, search for and seize any account, book, receipt, paper, document or thing likely to afford evidence

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of the commission by any person of an offence under this Part.

(2) Any person found in or upon such house or place who, when called upon to do so by the policeman conducting the search, refuses to furnish his name and address or furnishes a name or address which is false in any material particular or refuses to disclose the name or identity of the keeper of such house or place or to produce any book, receipt, paper, document or thing which he has in his possession or custody or under his control, shall be liable on conviction to a fine not exceeding two hundred rand and in default of payment to imprisonment for a period not exceeding six months.

(3) The issue of a warrant under paragraph (b) of subsection (1) shall not in any way affect the power of the magistrate to issue at any time a warrant under paragraph (a) of subsection (1) or under any other law.

Contract of letting or hiring of house or place kept or used as brothel void.

110. Any contract in terms of which any house or place is let or hired, shall -

(a) if such place is let or hired for the purpose of keeping or using it as a brothel, be null and void; or

(b) if such house or place at any time after the conclusion of such contract becomes a brothel, be determined and become null and void with effect from the date on which it becomes a brothel: Provided that upon proof by the owner of his ignorance that such house or place was kept or used as a brothel he shall be entitled to recover the rent up to the date on which he became aware that such house or place was being so kept or used.

Summary ejectment when house or place is used as a brothel.

111. The owner of any house or place which a court has in any proceeding under this Code found to have been kept or used as a brothel shall be entitled to apply to the magistrate of the district in which such house or place is situated for the summary ejectment of any person who may have kept or used such house or place as a brothel and such magistrate may issue an order for the summary ejectment of such person.

Procurement.

112.(1)(a) Any person who being a parent or guardian of any person -

(i) procures or attempts to procure such person to have unlawful intercourse with any person other than the procurer; or

(ii) orders, permits or assists in any way in bringing about, or receives any consideration for, the defilement, seduction or prostitution of such female,

shall be guilty of an offence.

(b) For the purposes of this subsection, the term "guardian" includes any person who has in law or in fact the custody or control of the female.

(2) Any person who -

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- (a) procures or attempts to procure any female to have unlawful carnal intercourse with any person other than the procurer or in any way assists in bringing about such intercourse; or
- (b) inveigles or entices any female to a brothel for the purpose of unlawful carnal intercourse or prostitution or conceals in any such house or place any female so inveigled or enticed; or
- (c) procures or attempts to procure any person to become a common prostitute; or
- (d) procures or attempts to procure any person to become an inmate of a brothel; or
- (e) applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable any person other than the procurer to have unlawful carnal intercourse with such female,

shall be guilty of an offence.

Conspiracy to defile.

113. Any person who conspires with any other person to induce any female by any false pretence or other fraudulent means to allow any male to have unlawful carnal intercourse with her, shall be guilty of an offence.

Detention for purposes of unlawful carnal intercourse.

114.(1) Any person who takes or detains any female against her will-

- (a) to or in or upon any house or place with intent that she may be unlawfully carnally known by any male, whether a particular male or not; or
- (b) to or in a brothel,

shall be guilty of an offence.

(2) Where a female is in or upon any house or place for the purpose that she may be unlawfully carnally known by any male, whether a particular male or not, or in any brothel, she shall for the purposes of this section be deemed to have been taken thereto or to be detained therein against her will -

- (a) if she is under the age of sixteen years; or
- (b) if she, being of or above the age of sixteen years and under the age of twenty-one years, was taken or is detained against her will or against the will of her father or mother, or any person having the lawful care or charge of her.

(3) Any person shall be deemed to detain a female in or upon any house or place or in a brothel if, with intent to compel or induce her to remain in or upon such house or place or in such brothel, such person withholds from her any wearing apparel or other property to the possession of which she is entitled or which has been lent or supplied to her by such person for the purposes of prostitution, and any such female shall be justified in taking away such wearing apparel as is necessary to

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enable her to leave such house or place or brothel.

Abduction.

115.(1) Any person who unlawfully takes or detains or causes to be taken or detained any unmarried male or female under the age of twenty-one years out of the custody of his or her father or mother or guardian, with intent that such person or any other person, whether a particular person or not, may either marry or have carnal intercourse with such unmarried male or female, shall be guilty of an offence.

(2) For the purposes of this section the term "guardian" includes any person who has in law or in fact the custody or control of the unmarried male or female.

Sexual offences with girls under sixteen or boys under nineteen.

116.(1) Any male person who -

- (a) has or attempts to have unlawful carnal intercourse with a girl under the age of sixteen years; or
- (b) commits or attempts to commit with such girl or with a boy under the age of nineteen years an immoral or indecent act; or
- (c) solicits or entices such a female to the commission of any immoral or indecent act,

shall be guilty of an offence.

(2) It shall be a sufficient defence to any charge under this section if it shall be made to appear to the court -

- (a) that the girl at the time of the commission of the offence was a prostitute, that the person so charged was at the said time under the age of twenty-one years and that it is the first occasion on which he is so charged; or
- (b) that the person so charged was at the said time under the age of sixteen years if the offence was committed in respect of a girl; or
- (c) that the person so charged was at the said time under the age of nineteen years if the offence was committed in respect of a boy; or
- (d) that the girl or person in whose charge she was, deceived the person so charged into believing that she was over the age of sixteen years at the said time.

Sexual offences with female idiots or imbeciles.

117. Any person who -

- (a) has or attempts to have unlawful carnal intercourse with any female idiot or imbecile in circumstances which do not amount to rape; or
- (b) commits or attempts to commit with such female any immoral or indecent act; or
- (c) solicits or entices such a female to the commission of any immoral or indecent act,

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shall, if it be proved that such person knew that such female was an idiot or imbecile, be guilty of an offence.

Owner or occupier permitting on his premises the defilement of a female or any offence against this Part.

118. Any person who being the owner or occupier of any house or place or having or acting or assisting in the management or control thereof knowingly permits the use of such house or place for the purpose of any offence against any provisions of this Part, shall be guilty of an offence.

Use of drugs, etc., for purposes of defilement of females.

119. Any person who applies, administers to or causes to be taken by any female any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower her so as thereby to enable him to have carnal intercourse with her, shall be guilty of an offence.

Manufacture, sale or supply of article which is intended to be used to perform an unnatural sexual act.

120.(1) Any person who manufactures, sells or supplies any article which is intended to be used to perform an unnatural sex act, shall be guilty of an offence.

(2) For the purposes of subsection (1) "sell" includes to offer for sale, to keep for sale or to keep in a place where goods are sold, offered or kept for sale.

Enticing to commission of immoral acts.

121.(1) Any person who -

- (a) entices, solicits or importunes in any public place for immoral purposes; or
- (b) is or loiters in any thoroughfare or public place for the purpose of prostitution or solicitation; or
- (c) wilfully and openly exhibits himself or herself in an indecent dress or manner at any door or window or within view of any public street or place or in any place to which the public have access,

shall be guilty of an offence.

(2) Any person being or loitering in a thoroughfare or public place who by word or gesture forces his attentions upon any other person in an indecent or unbecoming manner to the annoyance of that other person, shall be deemed to be in such thoroughfare or public place or to be so loitering for the purpose of prostitution or solicitation.

Persons living on earnings of prostitution or committing or assisting in commission of indecent act.

122.(1) Any person who -

- (a) knowingly lives wholly or in part on the earnings of prostitution; or
- (b) in public commits any act of indecency with another person; or
- (c) in public or in private in any way assists in bringing about, or receives any consideration for, the commission by any person of any act of indecency with another person,

shall be guilty of an offence.

(2) If it is made to appear to a magistrate by information on oath that there is reason to suspect that any house is used by a female for

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purposes of prostitution and that any person residing in or frequenting the house is living wholly or in part on the earnings of the prostitute, the magistrate may issue a warrant authorizing any policeman not below the rank of sergeant to enter and search the house and to arrest that person.

Presumptions.

123.(1) Whenever in any prosecution under this Part the question in issue is whether any carnal intercourse between a male and a female was unlawful, such male and female shall be deemed to have been unmarried at the time of such intercourse unless the accused proves the contrary.

(2) Whenever in any prosecution under this Part a person is proved to reside in a brothel or to live with or to be habitually in the company of a prostitute and has no visible means of subsistence, such person shall, unless he or she has satisfied the court to the contrary, be deemed to be knowingly living wholly or in part on the earnings of prostitution.

Neglect of children.

124. Any person who unlawfully exposes or abandons any child under the age of seven years, or who being lawfully bound to take charge of such child, knowingly and without lawful excuse leaves it abandoned or exposed, whereby its life is or is likely to be endangered or its health is impaired, shall be guilty of an offence.

PART 10

OFFENCES RELATING TO PROPERTY

(a) Offences relating to injury to property generally

Arson.

125. Any person who wilfully sets fire to any building whatever, or to any erection or structure whether fixed to the soil or not, or to any stack of vegetable produce, or of mineral or vegetable fuel, or to any mine, or to any ship or vessel, or to any crop whether standing or cut down, shall be guilty of arson.

Unlawful injury to property.

126. Any person who unlawfully damages property with intent to injure another shall be guilty of an offence.

Unlawful killing of animals.

127. Any person who wilfully and unlawfully kills, maims or wounds any animal capable of being stolen, shall be guilty of an offence.

Damaging buildings with intent to alarm occupants.

128. Any person who with intent to intimidate or annoy any person, breaks or damages any building or portion thereof, or by the discharge of firearms or otherwise alarms or attempts to alarm any person in any dwelling, shall be guilty of an offence.

(b) Offences relating to injury to public works

Definitions.

129. In sections 130 and 131, unless the context otherwise indicates -

“magistrate” means the magistrate of the district in which the public works concerned are situate;

“owner”, in relation to public works, means the authority or body which is the owner or occupier of such works or in whose custody or under whose control such works are or who is responsible for the

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maintenance thereof;

"public works" means any work or works (whether constructed or in the course of construction) of which the Government of Transkei or any department of State or any tribal authority or municipality or any statutory body designated for the purposes of this definition by the President by proclamation in the *Gazette* is the owner and includes -

- (a) any building or structure;
- (b) any road or section, diversion or temporary deviation thereof, including any roadway, motor bypass, sidewalk, traffic circle, centre island, kerbing, embankment, cutting, subway, culvert, sluice, drain, dam, fence, parapet, guard, bridge, ferry, causeway, ford, approach, milestone, signpost, direction, warning and any other work or thing whatsoever forming part of, connected with or belonging to such road;
- (c) any dipping tank, spraying machine or other device used for the cleansing of large or small stock, together with any pen, kraal, store, fence or other work or apparatus pertaining thereto;
- (d) any fence, including any gate, grid, stile, or other appurtenance pertaining thereto;
- (e) any soil reclamation work or works undertaken to prevent soil erosion or to reclaim any eroded areas and includes any furrow, wall, weir, dam, wire barrage, pipe, stop cock, fence or any structure erected in connection with such work or works, and any trees, shrubs, grass or other vegetation constructed or laid out for soil reclamation purposes;
- (f) any water work, including any canal, channel, well, reservoir, protecting wall, embankment, weir, dam, borehole, pumping installation, pipeline, sluice, gate, filter, sedimentation tank, road, telephone line or other work constructed, erected or used for or in connection with the impounding, storage, passage, drainage, control or abstraction of water, or the development of water power (including the generation, transmission and supply of electricity) or the filtration or purification of water, sewage, effluent or waste, or the protection of public streams against erosion or siltation, or flood control, or the protection of any water work or irrigated land, or the use of water for any purpose or the conservation of rain water, and any gauge post, measuring weir or similar appliance; and
- (g) any pound and any appurtenance pertaining thereto.

Offences in relation to public works.

130. Any person who -

- (a) wilfully or negligently destroys, damages or defaces or disfigures any public works; or
- (b) without the authority of the owner of any public works, interferes with or hinders -

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- (i) the construction or alteration of such public works, or
- (ii) the inspection or maintenance of or repair to such public works by any person authorized thereto by the owner thereof; or
- (c) attempts or causes, procures, aids, abets, incites or employs any person to commit any act referred to in paragraph (a) or (b),

shall be guilty of an offence.

Recovery of damages.

131.(1) Any person who or whose employee (acting in the execution of his duties) in any manner, without the authority of the owner of any public works, causes any damage to such works or any part thereof, shall be liable to compensate such owner for such loss or damage as may have been caused by him or his employee.

(2) The court convicting any person under section 130 may, in addition to any penalty imposed on him under that section, order such person to compensate the owner concerned for such damage or loss as may have been caused by him and for the purposes of such order and the recovery of such compensation the relevant provisions of the Criminal Procedure Act shall apply *mutatis mutandis*.

(3)(a) Whenever any damage has been occasioned to any public works situate in an administrative area -

- (i) it shall be the duty of the head of the kraal, or person in charge of the kraal, situate nearest to the section of the public works which has been damaged, forthwith to report such damage to his chief or headman and the chief or headman receiving such report shall without delay report such damage to the police and to the magistrate; and
- (ii) the owner or occupier of private land adjoining any administrative area may, if such damage has been occasioned to a boundary fence between such private land and such administrative area, report to the police or to the magistrate:

Provided that any fence which forms the boundary between an administrative area and an area other than an administrative area shall be deemed to be works situate in an administrative area.

(b) Upon receipt of any report referred to in paragraph (a), the magistrate may, after consultation with the police, in the presence of the heads of such kraals as he may consider necessary, hold an inspection *in loco* and may thereafter, summarily and without pleadings, in the presence of such heads of kraals as he may consider necessary, hold an inquiry *in loco*, or at such other place as he may in his discretion determine, for the purpose of ascertaining the cause of such damage, and he may fix responsibility on the head or heads of the kraal or kraals, or such other individual or individuals as may in his judgment be concerned, and may assess the amount of damages: Provided that any order made under this provision shall not bar any prosecution under this Code.

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(c) If the circumstances are such that the magistrate is unable at such inquiry to determine the actual perpetrator or perpetrators, he may fix responsibility for the damage jointly on all the heads of kraals or on so many of them as he may determine, resident in the administrative area concerned.

(d) Any amount assessed under paragraph (b) may be recovered in the manner provided for in the Criminal Procedure Act, by levy against the movable property of the head or heads of the kraal or kraals, or such other individual or individuals on whom responsibility has been fixed, and any amount so recovered shall be paid over by the messenger of the court to the owner.

(4) Any head of a kraal or person in charge of a kraal, chief or headman who without reasonable cause fails to make the report required by subsection (3)(a) shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred rand or to imprisonment for a period not exceeding six months.

(c) Theft

Definition of theft.

132.(1)(a) Any person who unlawfully takes or converts to the use of anyone other than the owner, anything capable of being stolen, with intent to deprive the owner thereof of his ownership or any person having any special interest therein of such interest shall be guilty of theft.

(b) Theft is complete when the offender takes or moves anything capable of being stolen, or causes it to move or be moved, for the purpose of converting it, although such conversion be not completed.

(c) Theft is committed when the offender cuts, rips, or otherwise begins to cause to be movable anything part of or growing out of or attached to any immovable property with intent to steal it.

(2) Without derogation from the generality of the term, a person who takes or converts anything capable of being stolen shall be deemed to do so unlawfully if he does so with any of the following intents, that is to say -

- (a) an intent permanently to deprive the owner of the thing or special interest;
- (b) an intent to use the thing as a pledge of security;
- (c) an intent to part with it on condition as to its return which the person taking or converting it may be unable to perform;
- (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
- (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and

"special interest" includes any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

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(3) When a thing is converted it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it, and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing has been lost by the owner and found by a person who converts it, the conversion shall not be deemed to be unlawful if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) Any person who kills any living creature capable of being stolen with intent to steal the carcase, skin, plumage or any part of such creature, shall be guilty of theft.

Property capable of being stolen.

133.(1) Every corporeal inanimate thing whatever which is the property of any person, and which is movable, shall be capable of being stolen.

(2) Every corporeal inanimate thing which is the property of any person, and which is capable of being made movable, shall be capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it.

(3) Every tame animal, whether tame by nature or wild by nature and tamed, which is the property of anyone, shall be capable of being stolen.

(4) A wild animal which is usually kept in confinement and which is the property of any person or the State shall be capable of being stolen so long as it is in confinement, or if it escapes unaided, so long as it has not regained its natural liberty.

(5) A wild animal shall be deemed to be in confinement in a den, cage, sty, tank or other enclosure including a fenced nature reserve or is otherwise so placed that its owner can exercise effective control over it.

Theft by agents.

134. Any person who, having received any money, valuable security, or other thing whatsoever, on terms requiring him to account for or pay the same of the proceeds thereof to any other person, though not requiring him to deliver over in specie the identical money, valuable security, or other thing received, fraudulently converts to his own use or fraudulently omits to account for, or pay any part of the proceeds which he was required to account for or pay as aforesaid, shall be guilty of theft: Provided that if it be part of the said terms that the money or other thing received, or the proceeds thereof, shall form an item in a debtor and creditor account between the person receiving the same and the person to whom he is to account for or pay the same and that such last mentioned person shall rely only on the personal liability of the other as his debtor in respect thereof, the proper entry of any part of such proceeds in such account shall be deemed a sufficient account for the part of the proceeds so entered.

Theft by holder of power of attorney.

135. Any person who, being entrusted either solely or jointly with any other person, with any power of attorney, for the sale, mortgage, pledge or other disposition of any property, movable or immovable, whether

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capable of being stolen or not, fraudulently sells, mortgages, pledges or otherwise disposes of the same or any part thereof, or fraudulently converts the proceeds of any sale, mortgage, pledge or other disposition of such property, or any part of such proceeds, to some purpose other than that for which he was entrusted with such power of attorney, shall be guilty of theft.

Funds held under direction.

136. Any person who, having received, either solely or jointly with any other person, any money or valuable security, or any power of attorney for the sale of any stock or shares whatever, with the direction that such money, or any part thereof, or the proceeds or any part of the proceeds of such security or such stock or shares shall be applied to any purpose or paid to any person specified in such direction, in violation of good faith or contrary to such direction, fraudulently applies to any other purpose or pays to any other person, such proceeds or part thereof, shall be guilty of theft: Provided that where the person receiving such money, security or power of attorney and the person from whom he receives it, deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, this section shall not apply unless such direction is in writing.

Theft by co-owner.

137. When any person takes or converts anything capable of being stolen under such circumstances as would otherwise amount to theft, it is immaterial that he himself has a special property or interest therein, or that he himself is the owner of the thing taken or converted subject to some special property or interest of some other person therein, or that he is lessee of the thing, or that he himself is one of two or more joint owners of the thing, or that he is a director or officer of a corporation or company or society which is the owner thereof.

Theft of money or property owned by or in the custody of the Government or statutory bodies.

138. Any person who steals any money or any property which in terms of this Part is capable of being stolen and which is owned by, or is in the custody of, the Government of Transkei or any statutory body, shall be guilty of an offence.

Theft outside Transkei.

139. Any person who having obtained any property by any act committed outside Transkei which, if committed within Transkei would have amounted to theft, brings such property into Transkei, shall be guilty of theft.

(d) Offences allied to theft

Concealing registers.

140. Any person who unlawfully conceals or takes from its place of deposit any register which is authorized or required by law to be kept for authenticating or recording the execution of any deed or the title to any property, or for recording births, baptisms, marriages, deaths or burials, or a copy of any part of such register which is required by law to be sent to any public office, shall be guilty of an offence.

Concealing wills.

141. Any person who, with intent to defraud, conceals any testamentary instrument, whether the testator is living or dead, shall be guilty of an offence.

Concealing deeds.

142. Any person who, with intent to defraud, conceals the whole or any part of any document which is evidence of title to any land or of any right or interest in any land, shall be guilty of an offence.

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Fraudulent disposal of mortgaged goods.

143.(1) Any person who, being the mortgagor of mortgaged goods, removes or disposes of the goods without the consent of the mortgagee, and with intent to defraud, shall be guilty of an offence.

(2) In this section the term "mortgaged goods" means any corporeal movables which, while remaining in the possession of the mortgagor are subject, by virtue of the provisions of a written instrument, to any general or special mortgage.

Unlawful appropriation of the use of another's property.

144.(1) Any person who, without a *bona fide* claim of right and without the consent of the owner or the person having the control thereof, removes any property from the control of the owner or such person for use by himself or any other person without the consent of the owner or any other person competent to give such consent, whether or not he intends throughout to return the property to the owner or person from whose control he removes it, shall, unless it is proved that such person, at the time of the removal, had reasonable grounds for believing that the owner or such other person would have consented to such use if he had known about it, be guilty of an offence and the court convicting him may impose upon him any penalty which may lawfully be imposed for theft.

(2) Any person charged with theft may be found guilty of a contravention of subsection (1) if such be the facts proved.

Obtaining goods from vessels.

145. Any person who shall in any port knowingly purchase or take in exchange from any seaman or other person, not being the owner or master of any vessel, anything belonging to such vessel lying in such port, or any part of the cargo of such vessel or any stores or articles belonging to the same, shall be guilty of an offence: Provided that nothing herein contained shall prevent the trial of a person for any other crime of which, but for the passing of this Code, he would have been guilty.

Removing boat from vessel in port.

146. If any seaman belonging to any vessel lying in any port, or if any other person shall take away or remove from any such vessel any boat attached or belonging to the same without having obtained permission so to do from the master or some officer of the said vessel, such seaman or other person shall (although such taking or removal may not have been with intent to steal), be guilty of an offence.

Piracy.

147. Any person who, within the territorial waters of Transkei, destroys, attacks or takes any ship or takes any part of its tackle or cargo by acts of violence or by putting in fear shall be guilty of piracy and liable on conviction to imprisonment.

Hi-jacking and air piracy.

148.(1) Any person commits an offence who, whether in or out of Transkei, unlawfully or intentionally-

- (a) performs or threatens to perform an act of violence against a person on board an aircraft in service if that act is likely to endanger the safety of that aircraft;
- (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight;
- (c) places or causes to be placed on an aircraft in service by any means whatsoever a device or substance which is likely to

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destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight;

- (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of an aircraft in flight;
- (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in service;
- (f) obliges or attempts by means of threats to oblige the pilot of an aircraft in service to alter his course from that scheduled for that aircraft.

(2) For the purposes of this section an aircraft shall be deemed to be -

(a) in flight -

- (i) at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation or, if the aircraft makes a forced landing, until the moment when the competent authorities of the country in which the forced landing takes place, take over the responsibility for the aircraft and for the persons and property on board;

- (ii) during any period when it is on the surface of the sea or land but not within the territorial limits of any country;

(b) in service-

from the beginning of the preflight preparation of such aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing.

(3) Any person convicted of any offence under subsection (1) shall be liable on conviction to be sentenced to death or to such lesser sentence as the court may deem fit.

Failure to give satisfactory account of possession of goods.

149. Any person who -

- (a) is found in possession of; or
- (b) has been in possession of,

any goods of any description, other than stock or produce as defined in the Code, in circumstances which give rise, either at the time of the possession or at any time thereafter, to a reasonable suspicion that at the time of such possession the goods were stolen and who is unable at any time to give a satisfactory account of his possession shall be guilty of an offence.

Absence of reasonable cause for believing goods properly acquired.

150. Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in this Code, without having reasonable cause, proof of which shall be on such first mentioned person, for believing at the time of such acquisition or receipt that such

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goods are the property of the person from whom he receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence.

Creating false spoor.

151. Any person who fraudulently and with intent to injure another shall create any false spoor shall be guilty of an offence.

Procedure in spoor cases.

152. Whenever any claim is made against any person or persons in respect of a spoor traced to any kraal or locality, the magistrate of the district may upon the request of the owner of the animal or animals stolen, or of any person authorized by such owner, summarily and without pleading, but in the presence of the heads of the kraals upon whom responsibility is sought to be attached -

- (a) enquire into the circumstances of the case;
- (b) determine -
 - (i) the value of the animal or animals alleged to have been stolen;
 - (ii) the damage which the owner or owners shall have sustained by such loss; and
 - (iii) the cost of any search or other endeavour to recover the missing animal or animals; and
- (c) fix liability for the amounts mentioned in paragraph (b) and may give judgment accordingly in favour of the owner which shall then have the effect of a civil judgment.

(e) Housebreaking and similar offences

Breaking into premises.

153.(1) Any person who unlawfully breaks and enters any premises with intent to commit any offence, or breaks out of such premises either after committing an offence therein, or after having entered such premises to commit an offence shall be guilty of housebreaking with intent to commit such offence.

(2) For the purpose of this section -

- (a) "break" or "breaking" means the displacing of some obstruction, whether internal or external, which forms part of the premises so as to create a way into or out of such premises or portion thereof and shall include opening by unlocking, pulling, pushing, lifting or any other means whatever any door, window, shutter, cellar, flap or other thing intended to close, cover or secure any opening into the premises;
- (b) "premises" means any structure, whether movable or immovable, temporary or permanent, which are or might ordinarily be used for human habitation or for the storage, housing or conveyance of property of some kind.

(3) A person shall be deemed to enter a building as soon as any part of his body or any part of any instrument used by him is within the building.

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(4) A person who obtains entry into a building by means of any threat, trick or artifice used for that purpose, or by collusion with any person in the building, or who enters an aperture of the building left open for any purpose, but not intended to be ordinarily used as a means of entry, shall be deemed to have broken and entered the building.

(5) Any person charged with a contravention of this section may be found guilty of a contravention of section 154 if such be the facts proved.

(6) Any person who, with aggravating circumstances as defined in section 8 of this Code, commits housebreaking or attempted housebreaking with intent to commit an offence in contravention of this section shall be liable on conviction to be sentenced to death or to such lesser sentence as the court may deem fit.

Prohibition of entry or presence upon land and the entry of or presence in buildings in certain circumstances.

154.(1) Any person who without the permission -

- (a) of the lawful occupier of any land or any building or part of a building; or
- (b) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person,

enters or is upon such land or enters or is in such building or part of a building, shall be guilty of the offence of trespass unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.

(2) For the purposes of subsection (1) the expression "lawful occupier" in relation to a building or any part of a building does not include a servant of the lawful occupier of the land on which that building is situated.

(f) Robbery and extortion

Robbery.

155.(1) Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, shall be guilty of robbery.

(2) Any person who commits robbery or attempted robbery with aggravating circumstances as defined in section 8 of this Code shall be liable on conviction to be sentenced to death, or to such lesser sentence as the court may deem fit.

Extortion.

156. Any person who takes from another some advantage by intentionally and unlawfully subjecting such other person to pressure which induces him to submit to that taking shall be guilty of an offence.

Procuring execution of deeds by threats.

157. Any person who, with intent to defraud, and by means of any unlawful violence to, or restraint of, the person of another, or by means of any threat of violence or restraint to be used to the person of another, or by means of accusing or threatening to accuse any person of committing any offence or by offering or making any solicitation or threat to any person as an inducement to commit or permit the commission of any offence, compels or induces any person -

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- (a) to execute, make, accept, endorse, alter or destroy the whole or any part of any valuable security; or
- (b) to write any name or impress or affix any seal upon or to any paper or parchment, in order that it may be afterwards made or converted into or used or dealt with as a valuable security,

shall be guilty of an offence.

(g) Receiving stolen property

Receiving stolen property.

158.(1) Any person who unlawfully receives into his possession any property knowing it to have been stolen or dishonestly obtained, whether within or outside Transkei, shall be guilty of an offence.

(2) The act of receiving anything stolen or unlawfully obtained is complete as soon as the offender has, either exclusively or jointly with the thief or any other person, taken possession of or control over such thing, or aids in concealing or disposing of it.

(h) Forgery and uttering

Forgery.

159.(1) Any person who unlawfully makes, with intent to defraud, a false document which causes actual prejudice or which is potentially prejudicial to another shall be guilty of an offence.

(2) Making a false document includes-

- (a) altering a genuine document in any material part, or adding to it any false date, attestation or other thing which is material, or making any material alteration in it either by erasure, obliteration, removal or otherwise;

(b) signing a document-

- (i) in the name of any person without his authority whether such name is or is not the same as that of the person signing;
- (ii) in the name of any fictitious person alleged to exist, whether the fictitious person is or is not alleged to be of the same name as the person signing;
- (iii) in the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person; or
- (iv) in the name of a person personated by the person signing the document, provided that the effect of the instrument depends upon the identity between the person signing the document and the person whom he professes to be;

(c) obliterating, adding to or altering the crossing on a cheque.

(3) An intent to defraud is presumed to exist for the purposes of this section if it appears that at the time when the false document was made there was in existence a specified person ascertained or ascertainable capable of being defrauded thereby, and this presumption

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is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.

(4) It is not necessary that the fraudulent intention should appear on the face of the document, but it may be proved by external evidence.

(5) A forgery is complete-

- (a) as soon as the document is made, with such knowledge and intent aforesaid, though the offender may not have intended that any particular person should use or act upon it as genuine, or be induced by the belief that it is genuine, to do or refrain from doing anything;
- (b) although the false document may be incomplete, or may not purport to be such a document as would be binding in law, if it be so made and is such as to indicate that it was intended to be acted on as genuine.

Procuring execution of
document by false pretences.

160. Any person who, by means of any false and fraudulent representations as to the nature, contents, or operation of a document, procures another to sign or execute the document, shall be guilty of an offence.

Uttering.

161. Any person who passes off, unlawfully and with intent to defraud, a false document which causes actual prejudice or which is potentially prejudicial to another, shall be guilty of an offence.

Sending false telegram.

162. Any person who without lawful authority or excuse, the proof whereof shall be upon the person accused, causes or procures any telegram to be sent or delivered as being sent by the authority of any person knowing that it is not sent by such authority, with intent that such telegram should be acted on as being sent by that person's authority, shall be guilty of an offence.

Falsifying warrants for
money payable.

163. Any person who, being employed in the public service, knowingly and with intent to defraud makes out or delivers to any person a warrant for the payment of any money payable by public authority, for an amount greater or less than that to which the person on whose behalf the warrant is made out is entitled, shall be guilty of an offence.

Falsification of register.

164. Any person who, having the actual custody of any register or record kept by lawful authority, makes or knowingly permits any entry which in any material particular is to his knowledge false, to be made in the register or record, shall be guilty of an offence.

False statements for register.

165. Any person who knowingly and with intent to procure the same to be inserted in any register kept under any law makes any false statement concerning any matter required by law to be registered in any such register, shall be guilty of an offence.

Personation.

166. Any person who falsely and deceitfully personates any other person, with intent fraudulently to obtain any benefit to himself or any other person, shall be guilty of an offence.

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(i) Fraud and breach of trust

Fraud. 167. Any person who unlawfully, with intent to defraud, verbally or in writing or in any other manner makes a misrepresentation in respect of the existence or non-existence of any fact or state of affairs and thereby causes actual prejudice or potential prejudice to another, shall be guilty of an offence.

Defrauding creditors. 168. Any person who-

- (a) with intent to defraud his creditors or any of them, makes or causes to be made any gift, delivery or transfer of or any charge on his property; or
- (b) with intent to defraud his creditors or any of them, conceals, sells or removes any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him,

shall be guilty of an offence.

Pretending to tell fortunes, etc. 169. Any person who for gain or reward undertakes to tell fortunes or pretends from his skill or knowledge in any occult science to discover where or in what manner anything supposed to have been stolen or lost may be found, shall be guilty of an offence.

Obtaining licences, etc. by false pretences. 170. Any person who wilfully procures or attempts to procure for himself or any other person any registration, licence or certificate under any law, by false pretence, shall be guilty of an offence.

False declarations for passports, travel documents or permits to depart from Transkei. 171. Any person who makes a statement which is to his knowledge untrue for the purpose of procuring a passport, travel document, permit or other document required by law for the lawful departure from Transkei by any person, whether for himself or any other person, shall be guilty of an offence.

False certification by public officials. 172. Any person who, under the name of a public servant or public official, makes certification as to good conduct, poverty or other circumstances, so as to facilitate governmental or private consideration for such certified assistance, well knowing that the basis for the said certification is false in all or any respects, shall be guilty of an offence.

Fraudulent appropriation or accounting by directors or officers. 173. Any person who -

- (a) being a director, manager, public officer or member of any body corporate or public company, with intent to defraud, destroys, alters or mutilates any book, paper, writing or valuable security belonging to the body corporate or public company, or makes or concurs in making any false entry, or omits or concurs in omitting to enter any material particulars in any book of account; or
- (b) being a manager of any body corporate or public company, and as such receives or possesses himself of any of the property of such body corporate or public company, and with intent to defraud omits to make, or to cause and direct to be made, a full and true entry thereof in the books and accounts of such body corporate or public company,

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shall be guilty of an offence.

Fraudulent false accounting
by clerk.

174. Any person who being an officer, clerk or servant, or employed or acting in such capacity, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security, document or account, which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or with intent to defraud makes or concurs in making any false entry in, or omits or alters, or concurs in omitting or altering, any material particular from or in any such book, paper, writing, valuable security or account as aforesaid, shall be guilty of an offence.

Public officers making false
statements or returns.

175. Any person who being an officer, collector or receiver entrusted with the receipt, custody or management of any part of the public revenues, knowingly makes or renders any false statement or return of any money collected by him or entrusted to his care, or of any balance of any money in his hand, or under his control, shall be guilty of an offence.

Conspiracy to defraud.

176. Any person who conspires with any other person by deceit or falsehood, or other fraudulent means, to defraud the public, or to affect the public market, price of shares, merchandise, or anything else publicly sold, or who conspires by deceit and falsehood or other fraudulent means to defraud any person, ascertained or unascertained, whether such deceit or falsehood or other fraudulent means would or would not amount to a false pretence, shall be guilty of an offence.

Criminal breach of trust.

177. Any person who, being in any manner entrusted with property or with dominion over property, dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made concerning the discharge of such trust, or wilfully suffers any other person to do so, shall be guilty of an offence.

Prevention of corruption.

178.(1) Any person who -

- (a) being an agent, corruptly accepts or obtains or agrees to accept or attempts to obtain from any person, either for himself or for any other person, any gift or consideration as an inducement or reward for doing or omitting to do or for having done or omitted to do any act in relation to his principal's affairs or business, or for showing or refraining from showing favour or disfavour to any person in relation to his principal's affairs or business; or
- (b) corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to his principal's affairs or business; or
- (c) knowingly gives to any agent, or, being an agent, knowingly uses with intent to deceive his principal any receipt, account or other document, in respect of which the principal is interested and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead his principal,

shall be guilty of an offence.

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(2) For the purposes of subsection (1) -

"agent" includes any person employed by or acting for another, any trustee of an insolvent estate, the assignee of an estate assigned for the benefit of or with the consent of creditors, the liquidator of a company which is being wound up, any executor of the estate of a deceased person, the legal representative of any person who is of unsound mind or is a minor or is otherwise under disability, any person in the service of the State or any municipality, village management board or other local authority or any school board, or any company, society or voluntary association;

"consideration" includes valuable consideration of any kind;

"principal" includes any employer within the meaning of any law governing the relations of employers and employees and, in relation to any assignee, liquidator, executor or legal representative referred to in the definition of "agent", means the general body of creditors or shareholders or the heirs of persons represented by such legal representative, as the case may be.

Defamation.

179.(1) Any person who unlawfully and intentionally publishes matter concerning another which tends to seriously injure his reputation shall be guilty of an offence.

(2) The provisions of subsection (1) of this section extend to defamation of any company or association or group or collection of persons as such, or to any deceased person if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

(3) It shall not be defamation to impute anything which is true of any person, whether alive or deceased, or of any company or association or group or collection of persons as such, and in addition, if such imputation be for the public good or benefit. Whether it be for the public good or benefit is a question of fact.

(4) It shall be a further defence that the imputation was made either verbally or in writing or by visible representations on a privileged occasion which shall include -

- (a) proceedings in the National Assembly;
- (b) proceedings in any court of law;
- (c) communication made in good faith in the discharge of a public or official duty imposed upon the person making the communication;
- (d) communications made in good faith by a person in a matter in which he has an interest or in reference to which he has a duty to a person having a corresponding interest or duty.

Disclosure of official
information.

180.(1) Any person who, if he is employed in or seconded to the public service, without first having obtained the permission of the Minister or head of the department in which he is employed or to which he is seconded, discloses or uses otherwise than in the discharge of his duties, information gained by or conveyed to him through his employment, for

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any purpose which is prejudicial to the interests of the State, shall be guilty of an offence.

(2) If in any prosecution for a contravention of the provisions of subsection (1) it is proved that the accused has disclosed or used any information gained by or conveyed to him through his employment otherwise than in the discharge of his duties, it shall be presumed that such disclosure or use is prejudicial to the interests of the State, unless the contrary is proved.

Publication of official information.

181.(1) Any person who publishes in any manner any information concerning any department of State, or any Minister or officer thereof which he knows or has reason to believe to be information disclosed to him in contravention of section 180(1) shall, on demand of a commissioned officer of the Transkeian Police, disclose the manner in which, or the identity of any person from whom he obtained such information.

(2) Any person who fails to disclose the manner in which or the identity of any person from whom he obtained such information shall be guilty of an offence.

(3) If in any prosecution for a contravention of the provisions of subsection (2) it is proved that the accused has published any information referred to in subsection (1), it shall be presumed that such information had been disclosed to him in contravention of section 180(1), unless the contrary is proved.

Offences relating to the practice of witchcraft and similar offences.

182.(1) Any person who -

- (a) imputes to any other person the causing, by supernatural means, of any disease in or injury or damage to any person or thing, or who names or indicates any other person as a wizard; or
- (b) in circumstances indicating that he professes or pretends to use any supernatural power, witchcraft, sorcery, enchantment or conjuration, imputes the cause of death of, injury or grief to, disease in, damage to or disappearance of any person or thing to any other person; or
- (c) employs or solicits any witchdoctor, witchfinder or any other person to name or indicate any person as a wizard; or
- (d) professes a knowledge of witchcraft, or the use of charms, and advises any person how to bewitch, injure or damage any person or thing, or supplies any person with any pretended means of witchcraft; or
- (e) on the advice of any witchdoctor, witchfinder or other person or on the ground of any pretended knowledge of witchcraft, uses or causes to be put into operation any means or process which, in accordance with such advice or on his own belief, is calculated to injure or damage any person or thing; or
- (f) for gain pretends to exercise or use any supernatural power, witchcraft, sorcery, enchantment or conjuration,

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shall be guilty of an offence and liable on conviction -

(i) in the case of an offence referred to in paragraph (a) or (b) in consequence of which the person in respect of whom such offence was committed, has been killed, or where the accused has been proved to be by habit or repute a witchfinder, to imprisonment for a period not exceeding twenty years or to a whipping not exceeding ten strokes or to both such imprisonment and such whipping;

(ii) in the case of any other offence under this section, to such lesser sentence as the court may deem fit.

(2) Where any person in respect of whom an offence referred to in paragraph (a) or (b) of subsection (1) was committed, is killed, it shall be presumed, until the contrary is proved, that such person was killed in consequence of the commission of such offence.

Carrying or using dangerous weapons.

183.(1) Notwithstanding the provisions of any other law, any person who carries or uses beyond the boundaries of his erf, allotment or site upon which he resides any dangerous weapon unless -

(a) he is required by law or authorized in writing by a chief or magistrate to do so; or

(b) he is aged or infirm and such weapon is an ordinary walking stick; or

(c) he is able to prove upon a balance of probabilities that he at no time had any intention of using such weapon for any unlawful purpose,

shall be guilty of an offence.

(2) For the purpose of this section "dangerous weapon" means any object, other than a firearm, which is likely by its nature to cause serious bodily injury if it were used to commit an assault.

Pointing of firearm or airgun.

184. Any person who knowingly and without lawful cause points a firearm or an airgun or air pistol at any other person shall be guilty of an offence.

PART 12

GENERAL PROVISIONS

Repeal of laws.

185. The laws specified in the Schedule are hereby repealed to the extent indicated in the third column of the Schedule.

SCHEDULE
LAWS REPEALED

Number and year of law	Title	Extent of repeal
ACTS		
Act 24 of 1886	The Native Territories Penal Code	The whole
Act 46 of 1935	General Law Amendment Act, 1935	So much as is unrepealed
Act 62 of 1955	General Law Amendment Act, 1955	Sections 36 and 37
Act 50 of 1956	General Law Amendment Act, 1956	Section 1
Act 3 of 1957	Witchcraft Suppression Act, 1957	The whole
Act 6 of 1958	Prevention of Corruption Act, 1958	The whole
Act 6 of 1959	Trespass Act, 1959	The whole
Act 8 of 1964	General Law Amendment Act, 1964	Section 36
Act 50 of 1970	Witchcraft Suppression Amendment Act, 1970	The whole
Act 5 of 1978	Prohibition of Prostitution and Related Activities Act, 1978	The whole
Act 24 of 1978	Protection of Public Works Act, 1978	The whole
Act 8 of 1981	Criminal Law Amendment Act, 1981	The whole
Act 16 of 1981	General Law Amendment Act, 1981	Section 1
PROCLAMATIONS		
290 of 1928	Protection of Travelling Public	The whole
256 of 1934	Amendment of "The Native Territories Penal Code"	The whole
257 of 1954	Possession of Dangerous Weapons	The whole