South African Law Reform Commission

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ISSUE PAPER 43

PROJECT 149

REVIEW OF COLONIAL AND APARTHEID ERA LEGISLATION

(Laws administered by the Department of Justice and Constitutional Development impacting on expressive rights)

CLOSING DATE FOR COMMENTS

15 JANUARY 2024

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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 era remembered for the oppression of people; the suppression of freedom; discrimination; division; attempts to break up our country; and military dictatorship… ”

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

ABOUT THE SOUTH AFRICAN LAW REFORM COMMISSION

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

The members of the Commission are:

Justice Narandran (Jody) Kollapen (Chairperson)
Professor Mpfariseni Budeli-Nemakonde
Advocate Johan de Waal SC
Professor Wesahl Domingo
Professor Karthigasen Govender
Mr Irvin Lawrence (Deputy Chairperson)
Advocate Tshepo Sibeko SC
Advocate JB Skosana (full-time member)

The Secretary of the Commission is Mr Nelson Matibe. The Commissioner designated to this project is Adv JB Skosana, and the official assigned is Fanyana Mdumbe. The Commission offices are situated in Spooral Park Building, 2007, Lenchen Avenue South, Centurion, Pretoria.

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

Advocate JB Skosana (Chairperson of the Committee and Commissioner designated)
Professor Shannon Hoctor (Project Leader)
Advocate Ishmael Semenya SC

Correspondence relating to this inquiry should be addressed to:
The Secretary
South African Law Reform Commission
Private Bag X668
Pretoria
0001

Telephone: (012) 622 6353
Fax: (012) 633 6321
Email: fmdumbe@justice.gov.za
Website: http://www.justice.gov.za/salrc/

PREFACE

The purpose of this issue paper is two-fold:

a) it is intended to announce the Commission's inquiry into the necessity, relevance, efficacy, constitutionality and the desirability of legislative reform, of pre-1994 legislation administered by the Department of Justice and Constitutional Development and thus to generate a conversation in relation thereto; and
b) most importantly, to elicit input (views, opinions, and options whether, and how, these laws should be changed) from interested parties which will serve as basis for further deliberations.

This issue paper thus invites you to make written submissions in this regard by no later than **15 January 2024**.

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". 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 issue paper.

In keeping with its enabling legislation and approach, the Commission intends to consult extensively during the course of this inquiry. In addition to a call for submissions it published in May 2021 and this issue paper, it plans to host workshops, seminars and roundtable discussions to explore the issues raised in this investigation. Thereafter, the Commission will publish a discussion paper setting out preliminary proposals, and draft legislation if deemed necessary. The aforesaid discussion paper will take the responses to this issue paper, and those generated through consultative processes referred to above, into account. On the strength of the responses to the discussion paper, a report will be prepared which will present the Commission's final

recommendations. The report will be submitted to the Minister of Justice and Correctional Services for consideration.

The respondents are requested to submit written comments to the Commission official assigned to this inquiry, Fanyana Mdumbe, by **15 January 2024** at the address/email appearing on page (iii) and (iv) above.

This document is also available on the Commission's website, the details of which appear on page (iv).

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CHAPTER 1: BACKGROUND

A Introduction

1.1 When South Africa became a constitutional democracy on 27 April 1994, old-order legislation in force hitherto was retained.[1] While this posed challenges,[2] it was deemed necessary to enable new structures and authorities to govern and services to continue; and to ensure an orderly transition.[3]

1.2 The continued existence of these laws and their invocation, particularly in criminal matters, has been criticised by policy and law-makers, academics, ordinary South Africans and the courts, including the Constitutional Court. This outcry has prompted Parliament to initiate a government-wide review of all pre-democratic era legislation to ensure they are compatible with the spirit and letter of the Constitution, effective, relevant, and necessary. This review forms part of that initiative.

B Scope of this inquiry

1.3 Judging from the submissions the Commission has received, it appears that laws allegedly inconsistent with the Constitution are pervasive, and affect all functional areas and spheres of government.[4] This review, however, relates only to legislation administered by the Department of Justice and Constitutional Development (DOJ&CD). As the laws for which the DOJ&CD is responsible are legion and cover a wide spectrum,[5] the Commission and the

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1 Section 229 of the 1993 Constitution and item 2(1)(a) and (b) of Schedule 6 of the Constitution of 1996. See also item 16(6) of Schedule 6 to the Constitution in respect of the rationalisation of legislation regulating the courts. Item 1 of this schedule defines "old-order legislation" as legislation enacted before the previous Constitution [1993 Constitution] took effect.

2 For a detailed discussion of these challenges, see Christo Botha *Statutory Interpretation-An Introduction for Students* Fifth Edition (2012) 29 et seq.

3 Ibid. See also Christo Botha *Statutory Interpretation* Third Edition (1998) 8.

4 Respondents to the Commission's call for submissions identified, for example, the Riotous Assemblies Act, 1956 (Act of 1956); the Decree No. 9 (Environmental Conservation) of 1992 of the Republic of Transkei; the Sexual Offences Act, 1957 (Act 23 of 1957); Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act, 1947 (Act 36 of 1947); and the Secret Services Act, 1978 (Act 56 of 1978) as laws that are inimical to the new constitutional order.

5 See https://www.justice.gov.za/legislation/acts/dojcd-acts-administered.pdf (accessed on 1 February 2023).

DOJ&CD have agreed to narrow down the scope of this inquiry to laws that adversely impact on the exercise of *expressive rights* contained in the Constitution.[6]

1.4 Consequently, consideration of laws falling within the mandate of other departments or spheres of government, including those deemed incompatible with expressive rights,[7] will be dealt with gradually as part of this project. The review of the regulatory framework applicable to public assemblies, including the Regulation of Gatherings Act,[8] the implementation of which is the responsibility of the Department of Police;[9] its effectiveness, inter alia, to curb violent protests and deter the destruction of infrastructure; and compatibility with the Constitution, is the subject of a concurrent Commission inquiry.

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6 The rights to freedom of religion, belief and opinion; expression; assembly; association; and political rights in sections 15-19 of the Constitution.

7 For example, section 22A of the Heraldry Act, 1962 (Act 18 of 1962) which makes treating the coat of arms contemptuously an offence is administered by the Department of Arts and Culture; the Intimidation Act, 1982 (Act 72 of 1982); the Regulation of Gatherings Act, 1993 (Act 205 of 1993); and the Control of Access to Public Premises and Vehicles Act, 1985 (Act 53 of 1985), which fall under the Department of Police; and the Referendums Act, 1983 (Act 108 of 1993) administered by the Department of Home Affairs.

8 Act 205 of 1993.

9 See https://www.saps.gov.za/resources_centre/acts/juta_acts.php (accessed 10 February 2023).

CHAPTER 2: EXPOSITION OF LAWS IMPACTING ADVERSELY ON EXPRESSIVE RIGHTS

A Introduction

2.1 The Commission has conducted a *preliminary* evaluation of DOJ&CD laws; considered the jurisprudence (academic comments and case law) emanating therefrom, particularly comments relating to the deficiencies in this legislative framework; and surveyed comparable foreign law. Legislation found wanting, in the sense that it falls short of constitutional standards and/or has become obsolete or redundant, seem to fall under one of the following categories:

a) pre and post-Union legislation that prohibits certain activities on Sundays;[10]
b) laws regulating the processes of investigatory bodies;[11] and
c) the regulatory framework relating to public order, public safety and security of the Republic;[12] and ancillary or related legislation.[13]

2.2 These laws, their purpose and the extent to which they are deemed incompatible with the Constitution are discussed in detail below.

Question

Are there other laws, or provisions in legislation, that have been omitted in this paper that are deficient or no longer necessary and that should be reviewed as part of this inquiry? Please indicate whether these laws should be repealed or amended.

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10 The Cape Province's Sunday Observance Ordinance, 1838 (Ordinance No. 1 of 22 March 1838) and the Lord's Day Observance Act, 1895 (Act 19 of 1895); Transvaal Sunday Law, 1896 (Act 28 of 1896); sections 4 and 5 of the Free State's Police Offences Ordinance, 1902 (Ordinance No. 21 of 1902); and the Prohibition of the Exhibition of Films on Sundays and Public Holidays Act, 1977 (Act 16 of 1977).

11 The Commissions Act, 1947 (Act 8 of 1947); Inquests Act, 1959 (Act 58 of 1959); the South African Law Reform Commission Act, 1973 (Act 19 of 1973); and the Prevention of Public Violence and Intimidation Act, 1991 (Act 139 of 1991).

12 The Riotous Assemblies Act, 1956 (Act 17 of 1956); Trespass Act, 1959 (Act 6 of 1959); section 44 of the General Law Further Amendment Act, 1962 (Act 93 of 1962); the Prohibition of Disguises Act, 1969 (Act 16 of 1969); section 25, 185 and 205 of the Criminal Procedure Act, 1977 (Act 51 of 1977); and the Protection of Information Act, 1982 (Act 84 of 1982).

13 The Indemnity Act, 1961 (Act 61 of 1961); and the Indemnity Act, 1977 (Act 13 of 1977).

B Sunday observance laws

1 Introduction

2.3 While a number of so-called "Sunday observance laws" have been repealed,[14] the following have been retained in the statute book:[15]

a) the Sunday Observance Ordinance, 1838 (Ordinance No. 1 of 22 March 1838) of the Cape of Good Hope;
b) the Lord's Day Observance Act, 1895 (Act 19 of 1895) of the Cape of Good Hope;
c) the Sunday Law, 1896 (Act 28 of 1896) of the Transvaal;
d) Section 21 of the Police Ordinance, 1902 (Ordinance No. 21 of 1902) of the Orange Free State;[16] and
e) the Prohibition of the Exhibition of Films on Sunday and Public Holidays Act, 1977 (Act 16 of 1977).

2.4 Broadly, these laws restrict economic activity and public entertainment on Sundays.

2 The aim of Sunday laws

2.5 With the exception of the Police Ordinance of 1902, which is silent on this aspect, the express purpose of these laws is to make provision for *due and better observance of the Lord's Day and Sabbath*.[17] In respect of the Prohibition of the Exhibition of Films on Sundays and Public Holidays Act, *to prohibit exhibition of films on Sundays and certain public holidays*.[18] While the words "Lords Day" and "Sabbath" are not defined, in the context of these laws they refer to "Sunday".[19]

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14 See Businesses Act 71 of 1991 and the General Law Third Amendment Act 129 of 1993.

15 The pre-1910 legislation referred to was expressly retained by the Pre-Union Statute Laws Revision Act 24 of 1979.

16 Only sections 4, 5, 21, and 26(1) of this Act were retained by Act 24 of 1979.

17 See preambles to Ordinance 22 of 1838, Law 28 of 1896; long title of Act 19 of 1895.

18 See the long title of the Prohibition of Films on Sundays and Public Holidays Act 16 of 1977. In terms of this legislation 'Sunday' includes any public holiday mentioned in the Second Schedule to the Public Holidays Act, 1952 (Act 5 of 1952). This Act was repealed by the Public Holidays Act 36 of 1994 and therefore the aforementioned provision should be read as reference to the 1994 Act.

19 These laws formed part of a gamut of laws that restrained business on Sundays. See JD Van der Vyver (revised by Joan Church) 'Religion' in *The Law of South Africa First Reissue* 23 Volume 23 (2003) 163 para 257.

2.6 While provision is made for a few exceptions,[20] these laws prohibit certain activities on Sundays including discharging a firearm, conducting business, public entertainment,[21] and the exhibition of films.[22] Contravention of these prohibitions is a punishable offence. In certain instances, articles used in the commission of the offence may be seized and disposed of[23] and the portion of the fine, goods forfeited or proceeds thereof could, in appropriate circumstances, be awarded to the informant.[24] The prohibition of exhibition of films on Sundays in Act 16 of 1977 extends to public holidays.[25]

2.7 Other significant features of these laws are that the amount of the fine payable for infractions is expressed in *pound sterling*; and authorities bestowed with the power to ensure compliance, *landdrosts and field cornets*, could demand people to disperse or to be admitted free of charge to a performance where consent has been granted.[26] Lastly, the laws referred to in the Prohibition of the Exhibition of Films on Sundays and Public Holidays Act have either been repealed or superseded by more recent legislation. These elements, on their own, raise the question whether these laws should not be repealed on grounds of redundancy and obsolescence.

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20 For instance, supplying Her Majesty naval ships and military forces; selling medicines; supplying food by a hotel; rendering of public service; mining operations; performance of sacred music; vocal and musical performance where admission is free and which is not of an indecent character or calculated to bring ridicule, contempt or disrespect upon religion or morality; and exhibition of films with the consent of local authorities. See in this regard, sections 3, 4 of the Sunday Observance Ordinance of 1838; 3 of the Lord's Day Observance Act of 1895; 2(c), (d), 4, 5, 7 of the Sunday Law of 1896; 21 of the Police Ordinance, 1902; and section 2(1)-(2) of the Prohibition of the Exhibition of Films on Sundays and Public Holidays Act 16 of 1977.

21 Sections 2, 5 and 6 of the Sunday Observance Ordinance of 1838; 1(a)-(e); 2(a)-(d); 6 and 7 of the Sunday Law, 1896; and 21 of the Police Ordinance, 1902.

22 Section 2 of the Prohibition of the Exhibition of Films on Sundays and Public Holidays Act of 1977. This prohibition, when it is read in conjunction with section 12(1) of the Interpretation Act, 1957 (Act 33 of 1957) and Public Holidays Act, 1994 (Act 36 of 1994), applies to Youth Day, Human Rights Day, Freedom Day Workers' Day among others.

23 Sections 3 and 8 of the Sunday Law of 1896.

24 Section 10 of the Sunday Law of 1896.

25 Section 1 of Act 16 of 1977 provides that 'Sunday' includes any public holiday mentioned in the Second Schedule to the Public Holidays Act 5 of 1952. In terms of section 12(1) of the Interpretation Act, 1957 (Act 33 of 1957) reference to Act 5 of 1952 must be interpreted as reference to the Holidays Act of 1994.

26 Sections 8 of the Sunday Law of 1896 and 6 of the Lord's Day Observance Act of 1895.

2.8 From this brief exposition, the following questions arise:

a) whether these laws were intended to provide a common pause day, and thus have a secular character; or to compel observance of the Christian Sabbath, in which event they have a religious objective;

b) in view of the constitutional, social and economic changes that have taken place since 1994, whether they are still useful or have become obsolete or redundant; and

c) most importantly for our purposes, whether these laws are consistent with the Constitution, and in particular section 15 thereof. [27]

3 Criticism levelled at these laws

2.9 The former government endorsed Christianity.[28] Van der Vyver explains this preference as follows:

> …the *Christian bias* of certain branches of statutory law, was also evidenced by a series of *Sunday observance laws* covering a wide range of regulative and prescriptive measures.[29]

2.10 Besides Sunday laws, commentators[30] were also concerned that legislation regulating public holidays did not treat all faiths even-handedly.[31] Although the legislature

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[27] Section 15 of the Constitution provides that:

'Freedom of religion, belief and opinion

(1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

(2) Religious observances may be conducted at state or state-aided institutions, provided that-

(a) those observances follow rules made by the appropriate public authorities;

(b) they are conducted on an equitable basis; and

(c) attendance at them is free and voluntary.

(3) (a) This section does not prevent legislation recognising-

(i) marriages concluded under any tradition, or a system of religious, personal or family law; or

(ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

(b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.'

[28] See exposition of Justices O'Regan and Sachs in *S v Lawrence, S v Negal, S v Solberg* 1997 (2) SACR 540 (CC) paras 123 and 149.

[29] Van der Vyver 'Religion' in Joubert (ed) *The Law of South Africa Vol 23* (1985) quoted by Sachs J in *S v Lawrence* para 149.

has substituted the old holidays Act,[32] the new Act[33] has been slated for maintaining the *status quo*.[34] Unfortunately, the latter falls outside the purview of this inquiry.

2.11 Recently, members of Parliament questioned the relevance of the Prohibition of the Exhibition of Films on Sundays and Public Holidays Act and recommended it be repealed.[35]

2.12 Legal commentators[36] have warned that any law that chooses Sunday as a rest day would raise the constitutional issue of unfair discrimination on grounds of religion; that the state should not legislate in this regard; and argued that the Labour Relations Act of 1995[37] which, among other things, gives relief to religiously observant workers whose faith require them to observe dress requirements and religious holidays, adequately tackles the issue of Sunday work and has superseded these laws.

4 Constitutional Court decision in *S v Lawrence*

2.13 In *S v Lawrence*,[38] which concerned the constitutionality of provisions in the Liquor Act[39] prohibiting the sale of alcohol on "closed days" – defined as Sundays, Christmas Day and Good Friday[40] - one of the appellants relied on the decision of the Canadian Supreme Court in *R v Big M Drug Mart Ltd*[41] to bolster her argument that "closed day" had a religious purpose; sought to induce submission to a sectarian Christian conception of the proper observance of Christian Sabbath and holidays; and was inconsistent with the right to

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30 See Gerrit Pienaar 'Freedom of Association in the United States and South Africa' *CILSA* (1993) 147 163.

31 The Holidays Act, 1952 (Act 5 of 1952) only recognised Christian holidays – Good Friday, Easter Mondays and Christmas Day as public holidays.

32 Act 5 of 1952 was replaced in October 1994 by the Public Holidays Act 36 of 1994.

33 Public Holidays Act 36 of 1994.

34 See Iain Currie and Johan de Waal *The Bill of Rights Handbook* Fifth Edition (2005) 351.

35 *Hansard* 22 November 2016 91 et seq.

36 See Ian Currie and De Waal 350-351.

37 Act 66 of 1995.

38 *S v Lawrence; S v Negal; S v Solberg* 1997 (2) SACR 540 (CC).

39 Act 27 of 1989.

40 This law, however, permitted alcohol to be sold by restaurants and hotel and by holder of an on-consumption licence.

41 (1985) 13 CRR 64.

freedom of religion of those persons who did not hold such beliefs or wished to adhere to them.[42]

2.14 The Canadian courts had previously found, a view confirmed in *R v Big M Drug Mart Ltd*,[43] that the object of the Lord's Day Act which, like the Sunday laws, prohibited work or commercial activity on Sundays, *was to compel the observance of the Christian Sabbath*.[44] Chaskalson P, writing for the majority, made the following comments about the Canadian Lord's Day Act:

a) Firstly, that its name and provisions proclaimed its purpose.[45]

b) Secondly, he aligned himself with the reasoning of the court in *R v Big M Drug Mart* case, and held that he:

> …would have no difficulty in holding that a law which compels sabbatical observance of the Christian Sabbath offends against religious freedom of those who do not hold such beliefs:
>
> > If I am a Jew or a Sabbatarian or a Muslim, the practice of my religion at least implies my right to work on a Sunday if I wish…any law purely religious in purpose, which denies me that right, must surely infringe my religious freedom.

c) Thirdly, and most importantly, he conceded that the Canadian Lord's Day Act had a purely religious purpose and was designed to compel adherence to Christian Sabbath.[46]

2.15 Sachs J too, in his minority concurring judgment, observed that:

> …the closed days are a small part of a statute designed to control the sale of liquor *and not, as in Big M Drug Mart case, a central aspect of a statute primarily intended to compel religious observance*.[47]

2.16 The provisions of the Sunday Observance Ordinance of 1838, the Lord's Day Observance Act of 1895, the Sunday Law of 1896, section 21 of the Police Ordinance of 1902, and the Prohibition of the Exhibition of Films on Sunday and Public Holidays Act of 1977 are materially similar in their scope and effect to the Canadian Lord's Day Act and in

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42 *S v Lawrence* paras 83-86.

43 The Canadian Supreme Court stated in this regard:

'A finding that the Lord's Day Act has a secular purpose is, on the authorities, simply not possible. Its religious purpose, in compelling sabbatical observance, has been long-established and consistently maintained by the Courts of this country.' Id 88.

44 Id para 88. (Emphasis added).

45 Ibid.

46 Id para 90, 92 and 104 read with footnote 83.

47 Id para 172. (Emphasis added).

determining the purpose, relevance and constitutionality of these laws, the views of the Justices of the Constitutional Court and comparable foreign law[48] referred to above are instructive.

Question

On the basis of the exposition above, in particular the Constitutional Court's views on the meaning and purpose of the right to freedom of religion and comparable Canadian legislation; and the fact that "Sunday laws" under consideration seem to have become obsolete and redundant as a result of constitutional, social and economic changes, the Commission is inclined to recommend that they be repealed. **The Commission would appreciate receiving your views in this regard**.

C Laws regulating the workings of investigatory bodies

1 Commissions Act 8 of 1947

2.17 The power to appoint a commission of inquiry is a constitutional power that can only be exercised by the President or a Premier of a province.[49] Unless it is established by a specific statute and its powers and functions are stipulated therein,[50] the workings of commissions of inquiry tasked with investigating *a matter of public concern* are regulated by the Commissions Act of 1947 and the regulations issued under this Act specifying, inter alia, the manner in which it will discharge its mandate.[51]

2.18 The regulations issued to date to enable commissions to operate varied[52] and became *spent* or *expired* upon the completion of the work by the Commission to which they

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48 Section 39(1)(c) of the Constitution *allows* consideration of foreign law when interpreting the Bill of Rights.

49 Section 84(2)(f) and 127(2)(e) of the Constitution. For a detailed discussion of this section, see *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2001 (1) SA 1 (CC).

50 See the Prevention of Public Violence and Intimidation Act, 1991 (Act 139 of 1991) and the South African Law Reform Commission Act, 1973 (Act 19 of 1973). The latter Act incorporates the provisions of the Commissions Act by reference.

51 Section 1(1)(a) and (b) of the Commissions Act give the President the power to declare the provisions of this or any other law applicable to a commission of inquiry; and to make regulations in relation thereto. In terms of section 1(2), the aforesaid regulations may stipulate penalties for the contravention thereof.

52 Bell Dewar & Hall *Kelsey Stuart's Newspaperman's Guide to the Law* Fifth Edition (1990) 117.

relate, which obviates their consideration in this paper. In contrast, the Commissions Act has already been found to be in need of updating.[53] The fact that it contains a reverse onus provision;[54] makes no provision for the exercise of power to appoint a commission of inquiry by a Premier of a province; and still contains section 1(1)(b)(iii) which is considered below, implies that it falls short of constitutional standards.

2.19 Section 1(1)(b)(iii) referred to above empowers the President to make regulations:

> which he may deem necessary or expedient to prevent the commission or a member of the commission from being insulted, disparaged or belittled, or *to prevent the proceedings or findings of the commission from being prejudiced, influenced or anticipated.*

2.20 This section has been incorporated into regulations of commissions of inquiry verbatim, accompanied by a threat of prosecution if contravened.[55] Criminal prosecutions (litigation) relating to these regulations, most of which emanated from the publication of an article by the press before the commission had finalised its work,[56] have, however, centred on the meaning of the words "*prejudicing, influencing or anticipating the proceedings or findings of the commission*." The courts have held that:

- these laws, being penal provisions that interfered with freedom of speech, they must be interpreted restrictively[57] to mean *actual* prejudice, influence or anticipation[58] or *an actual and not a possible finding* the commission might make;[59]
- in order to prove the offence, the prosecution must prove that the conduct complained of actually, and not likely, prejudiced, influenced or anticipated the proceedings or findings of the Commission;[60]

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53 Sections 1(1), 2, 3(1), and 5 make reference to functionaries and institutions that no longer exist and use archaic language. See in this regard, the South African Law Reform Commission *Discussion Paper 129: Project 25 Statutory Law Revision-Legislation Administered by the Department of Justice and Constitutional Development* (29 February 2012).

54 Section 6(1) of the Commissions Act.

55 Bell Dewar & Hall 117. See also regulations contravened in cases below.

56 See *Erasmus and Others NNO v SA Associated Newspapers Ltd and Others* 1979 (3) SA 447 (W); and *S v Sparks NO and Others* 1980 (3) SA 952 (T).

57 *S v Sparks* 957 and 958; and *Government of the Republic of South Africa v 'Sunday Times' Newspaper and Another* 1995 (2) SA 221 (T) 227.

58 *S v Sparks* 958.

59 Ibid. To remove any doubt, the court held that anticipating findings meant publishing them in advance of the Commission doing so itself or stating in advance what the findings will actually be; and anticipating proceedings meant publishing or stating in advance what form the proceedings will take, what witnesses will give evidence and what questions they will be asked in advance. Id 959.

- have stressed that the *sub judice* rule and the common-law offence of contempt of court do not apply to commissions of inquiry and that commissions should not be equated with courts of law, even if they are presided over by judges;[61]
- the applicant must satisfy the court about the contents of the publication which it seeks to restrain, it must be in possession of the matter about to be published;[62] and that
- while there may well be circumstances that justify prior restraint, factual basis for them must be provided.[63]

2.21 This approach seems to place a hurdle to the successful prosecution of contravention of regulations that spring from section 1(1)(b)(iii) of the Commissions Act.[64] Moreover, to the extent that these injunctions, as the courts have confirmed, prohibit *predictions* (in public) of the actual findings of a commission, it ought to be asked whether they are consistent with the Constitution,[65] particularly the rights to freedom of opinion[66] and expression.[67] However, this provision has remained unaltered in the statute book.

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60 Id 958 and 959.

61 *Erasmus and Others NNO v SA Associated Newspaper* 456; and *S v Sparks* 960. For an in-depth discussion of the overlap between commissions of inquiry and judicial processes; and consequences of findings and recommendations of commissions, see Hoole Grant "Reconceiving Commission of Inquiry as Plural and Participatory Institutions: A Critical Reflection on *Magidiwana*" Constitutional Court Review Vol 8 (2016) 221.

62 *Erasmus and Others NNO v SA Associated Newspapers Ltd and Others* 453-454; *S v Sparks* 959-960.

63 *'Sunday Times' Newspaper* case 229.

64 In *S v Sparks* 959-960, counsel for the state argued that this approach deprived the said regulations of any effectiveness; and that the state would have to wait for very long periods until such time as it had actually made its findings. In *Erasmus and Others NNO v SA Associated Newspapers Ltd and Others* 454 the court held that the applicant, in order to prove the unlawfulness of the act not yet committed, must satisfy the court about the contents of the publication which it seeks to restrain.

65 See *Erasmus and Others NNO v SA Associated Newspapers Ltd* 452; and *S v Sparks* 959. In the latter case 960, the court observed:

'It is not the intention of the Legislature to stop public discussion of a matter of public importance simply because a commission is sitting. Even in the case of Court proceedings legitimate discussion of matters of public interest which are the subject of the Court proceedings is not suspended.

Freedom of speech should, even in a case of contempt proceedings, not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.

> 'Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.''

66 See note 27 above.

67 Section 16 of the Constitution provides:

Question

Should section 1(1)(b)(iii) of the Commissions Act be retained, amended or repealed? If you propose it be amended, how would you formulate such amendment?

2 Inquests Act 58 of 1959

2.22 The apartheid government imposed immense restrictions on the media to conceal its repressive activities.[68] One of the laws flagged by the United Nations in the 1980s for imposing such restrictions was the Inquests Act of 1959, particularly section 20(4).[69] This provision still exists in the statute book in its pristine form. It provides:

> Any person who prejudices, influences or anticipates the proceedings or findings at an inquest shall be guilty of an offence and liable on conviction to a fine not exceeding R2 000 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.

2.23 An inquest investigates and establishes facts.[70] It is therefore in a position similar to that of a commission of inquiry, but not a court of law.[71] Therefore, the views expressed above in the context of section 1(1)(b) of the Commissions Act, in particular that *sub judice* rule does not apply to these bodies, apply here as well.

In view of the arguments above and the constitutional rights to freedom of opinion and expression, which includes freedom of the press and other media, the question arises

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'Freedom of expression
(1) Everyone has the right to freedom of expression, which includes-
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extend to-
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

68 United Nations Centre Against Apartheid *Restrictions Imposed on the Media in South Africa Since 21 July 1987* United Nations (September 1987) 3. Another aspect of this law that has received attention was its use by the apartheid regime to cover-up real causes of death of activists and its ineffectiveness in holding perpetrators accountable. See in this regard, Sipho Mabena "Timol was Pushed to his Death, Judge Rules" *TimesLive* (2017-10-13); The re-opened inquest into the death of Ahmed Essop Timol [2017] ZAGPPHC 652 (12 October 2017); and George Bizos *No One to Blame? In Pursuit of Justice in South Africa* (1998).

69 United Nations Centre Against Apartheid *Restrictions Imposed on the Media* 7.

70 Bell Dewar & Hall Kelsey Stuart's Newspaperman's Guide to the Law Fifth Edition (1990) 120.

71 Ibid.

whether this provision is still relevant, and most importantly, whether it passes the constitutional muster and should thus be retained in the statute book. **The Commission would appreciate receiving your views in this regard.**

3 South African Law Reform Commission Act 19 of 1973

2.24 This Act established the South African Law Reform Commission – an entity tasked with reviewing and improving South African law on a regular basis. It stipulates how the Commission is constituted, its powers, and functions. Firstly, absent from this framework is a provision that provides for the determination of procedures and processes of the Commission.[72] As far as the reports relating to the work of the Commission are concerned, this Act provides that *annual reports* of the Commission – reports relating to its activities during the year - must be tabled in Parliament; and that reports on *specific law reform projects* undertaken by the Commission must be submitted to the Minister of Justice for consideration.[73]

2.25 Noticeably, absent from this framework is a provision relating to the publication of commission reports. Although they are invariably published,[74] there is no statutory obligation on the Commission itself or the Minister of Justice to publish reports of the Commission. It is therefore not clear whether it is the Commission or the Department that must publish such reports; whether the Commission must seek prior approval before doing so; and in what circumstances government could prohibit the publication of a Commission report and for how long such restraint should last. In certain instances, there have been delays between the submission of a report to government and its publication. Whilst government is the most important stakeholder in the law reform enterprise, the Commission's project-specific reports

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[72] Similar laws, for example, section 5 of the Judicial Services Commission Act 9 of 1994, empower the Minister to determine the Commission procedure by notice in the Gazette.

[73] Section 7 of the South African Law Reform Commission Act provides:

'Reports of Commission

(1) The Commission shall prepare a full report in regard to any matter investigated by it and shall submit such report together with draft legislation, if any, prepared by it, to the Minister for consideration.

(2) The Commission shall within five months of the end of a financial year of the Department of Justice and Constitutional Development submit to the Minister a report on all its activities during that financial year.

(3) The report referred to in subsection (2) shall be laid upon the Table in Parliament within fourteen days after it was submitted to the Minister, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session. '

[74] Post-1996 annual reports and project-specific reports are available on the Commission website.

serve other purposes: they generate debate, are peer reviewed, cited by academics and the courts,[75] promote the understanding of the law and its operation,[76] foster transparency and accountability and could lead to greater appreciation of the commission's work,[77] and thus animate the right to freedom of expression, in particular the right to receive information.[78]

2.26 In contrast, in other jurisdictions all commission reports, and not just annual reports, are tabled in Parliament by the functionary responsible for the commission (Minister or Attorney-General).[79] New Zealand has taken this responsibility a step further. The New Zealand Law Commission Act of 1985 *places an obligation on the Commission to publish its reports*. Section 16 of this Act provides in this regard:

> 16 Reports
>
> (1) The Commission—
>
> (a) shall submit to the responsible Minister, and any relevant portfolio Minister, every report prepared by it on any aspect of the law of New Zealand; and
>
> (b) shall publish every report submitted to the responsible Minister, and any relevant portfolio Minister, pursuant to paragraph (a) of this subsection.
>
> (2) Where the Commission furnishes to the responsible Minister a report prepared by it on any aspect of the law of New Zealand, the responsible Minister shall lay a copy of that report before Parliament as soon as practicable after the receipt of that report by the Minister.

Questions

Should the South African Law Reform Commission Act be amended to:

a) include a provision similar to section 16(1) of the New Zealand Law

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75 The Commonwealth Secretariat – Commonwealth Association of Law Reform Agencies *Changing the Law: A Practical Guide to Law Reform* (2017) 160 et seq.

76 William H. Hurlburt, Q.C. *Law Reform Commissions in the United Kingdom, Australia and Canada* (1986) 401.

77 The Commonwealth Secretariat – Commonwealth Association of Law Reform Agencies Changing the Law: A Practical Guide 160.

78 Section 16 of the Constitution.

79 See for example, sections 3(2) and (3) of the Law Commissions Act 1965 (England and Wales); 3(2) and (3) Law Reform Commission Act of 2012 (Kenya); 16(2) of the Law Commission Act 1985 (New Zealand) and 24 of the Law Commission, Canada. The Commonwealth Secretariat – Commonwealth Association of Law Reform Agencies *Changing the Law: A Practical Guide to Law Reform* (2017)169. According to Kate Warner 'Institutional Architecture' in Brian Opeskin and David Weibrot (eds) *The Promise of Law Reform* (2005) 69 in other jurisdictions there may be a short period in which reports are subject to parliamentary privilege and prohibited from disclosure.

Commission Act 1985 referred to above?

b) empower the Minister to determine Commission procedure by notice in the Gazette?

4 Prevention of Public Violence and Intimidation Act 139 of 1991

2.27 The Prevention of Public Violence and Intimidation Act established a commission of inquiry under the chairmanship of Judge Goldstone to look into the nature and causes of public violence in South Africa and propose solutions. Some of the proposals emanating from the work of this commission were codified in the Regulation of Gatherings Act of 1993.[80]

2.28 In terms of this Act, members of this commission - the chairperson and four other members of the Goldstone Commission - were appointed for three years.[81] It submitted its final report in October 1994[82] after the conclusion of the inquiry as enjoined by this Act.[83] In contrast, for example, to the South African Law Reform Commission Act[84] and the Special Investigating Units and Special Tribunal Act,[85] it is difficult to infer from the provisions of the Prevention of Public Violence and Intimidation Act, as some have,[86] that it (the law itself) was intended *to endure indefinitely* or that the Commission it established was meant to be *a permanent structure*.

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80 Act 205 of 1993, which is administered by the Department of Police.

81 Section 3(2) of the Act.

82 See the *Truth and Reconciliation Commission of South Africa Report Volume One* (October 1998) 508. In total, this commission submitted 45 reports comprising interim and final reports.

83 Section 10 of this Act provides:

'10 Duties and powers of Commission after conclusion of inquiry

(1) The Commission shall after completion of an inquiry prepare a report for submission to the State President and may at any time before the completion of the inquiry submit an interim report to the State President in respect of any matter which in its opinion should urgently be brought to the attention of the State President.'

84 Section 5(1) of the South African Law Reform Commission Act provides that:

'In order to achieve its objects the Commission shall *from time to time* draw up programmes in which the various matters which in its opinion require consideration are included in order of preference, and shall submit such programmes to the Minister for approval.' (Emphasis added).

85 Section 2(1) of Act 74 of 1996 provides that:

'The President may, *whenever* he or she deems it necessary… establish a Special Investigating Unit in order to investigate the matter concerned; or refer the matter to an existing Special Investigating Unit for investigation…' (Emphasis added).

86 Paul Hjul 'Restricting Freedom of Speech or Regulating Gatherings' *De Jure* (2013) 451 458.

Question

Has this Act not become *spent* and *redundant* as a result of the accomplishment of the purpose for which it was enacted, namely the submission of numerous reports by the Goldstone Commission, one of which culminated in the enactment of the Regulation of Gatherings Act?

D Public order legislation

1 Riotous Assemblies Act 17 of 1956

(a) Historical overview

2.29 The Riotous Assemblies Act (RAA) is a re-enactment[87] of its 1914 antecedent.[88] It was a measure designed to counter threats to the state and inevitably made serious inroads into citizens' rights to associate and assemble and authorised the use of force.[89] The Constitutional Court has referred to it as legislation of apartheid extraction with a dark past and constitutionally suspect salutation.[90] Although emaciated by reforms to security legislation in the 1980s, sections 16-18 of this Act remain in the statute book.[91] While located in public assembly legislation, these sections deal mainly with inchoate crimes, namely attempt, conspiracy, and incitement.

(b) Analysis of the provisions of the RAA

(i) The long title

2.30 The long title of this Act reads:

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87 Susan Flint 'The Use of Police Force in Dispersing Gatherings' *SA Publiekreg/Public Law* Vol 1 Issue 2 (1986) 155 et seq. See also AS Mathews *Law, Order and Liberty in South Africa* (1971) 191.

88 Riotous Assemblies and Criminal Law Amendment Act 27 of 1914.

89 Susan Flint 156-158. According to Qhuba Dlamini 'Mass Action and the Law: Can South Africa do without the Regulation of Gatherings Act?' African Journal of Rhetoric 86 95 this Act was used to ban peaceful protests.

90 *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (1) SACR 387 (CC) para 4.

91 In 1979, the government appointed a commission to inquire into and report on the necessity, fairness and efficacy of the internal security legislation under the chairmanship of Judge Rabie. Among other things, its work resulted in the enactment of the Internal Security Act 74 of 1982 which repealed all the provisions of the RAA with the exception of sections 16-18.

> To consolidate laws relating to riotous assemblies and the prohibition of the endangering of feelings of hostility between Europeans and non-European inhabitants of the Republic and matters incidental thereto, and the laws relating to certain offences.

2.31 It has been argued that there is nothing inherently undesirable in criminalising the incitement of racial hostility.[92] However, the Commission has inferred from this long title that express purpose of the RAA was to suppress political resistance and to manage interaction between race groups in line with apartheid objectives. It concluded that it was inappropriate that terms so deeply rooted in the racist apartheid state should still appear in legislation, even if by way of reference.[93] It recommend that this Act, and the Riotous Assemblies Amendment Act of 1974,[94] be repealed.

2.32 Justice Majiedt in *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another*[95] described this long title as "vile, symbolic of the iniquitous apartheid regime and utterly indefensible in our constitutional dispensation." He added that its retention is inexplicable and most unfortunate. [96]

In view of the preceding discussion, the Commission is inclined to recommend that the long title of the RAA be repealed.

(ii) Section 16: handling of explosives

2.33 Section 16(1) and (2) empower the President to prescribe, by means of a proclamation and regulations, how explosives should be handled and renders the contravention of the said regulation and proclamation a punishable offence.[97]

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92 Anthony Mathews *Freedom, State Security and the Rule of Law: Dilemmas of the Apartheid Society* (1986) 60.

93 South African Law Reform Commission *Discussion Paper 129 Project 25: Statutory Law Revision – Legislation Administered by the Department of Justice and Constitutional Development* (October 2011) 164 *et seq*.

94 Act 30 of 1974.

95 2021 (1) SACR 387 (CC).

96 Id paras 81 and 120.

97 This provision provides:

> '**16 Special precautions in the interest of public safety as regards explosives**
>
> (1) Whenever the State President deems it necessary to take special precautions to maintain public order or to protect life and property he may, by proclamation in the Gazette, prohibit for such period as he may think fit the transportation of explosives from any one place to any other place in the Republic, except under such safeguards and conditions as are prescribed by regulation, and may make regulations, to be in force for such limited period as he may think fit, as to the transportation of explosives to and from particular areas, or as to the storage, removal, possession or use of explosives within any particular area by all persons or by persons of specified occupations or callings, and may limit or

2.34 The abovementioned provision has been repealed by section 34 of the Explosives Act of 2003,[98] the commencement of which is yet to be proclaimed. Therefore, section 16 will remain in place until section 34 comes into operation.[99]

(iii) Section 17: incitement of public violence

2.35 Section 17 of the RAA reads:

> **17 Acts or conduct which constitute an incitement to public violence**
> A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences 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 took place or to whom the speech or publication was addressed.

2.36 In contrast to sections 16 and 18 of the RAA, this provision neither creates an offence,[100] nor prescribes punishment for its contravention. It takes it for granted that there is a common-law offence of *incitement of public violence,* and locates any conduct that fits the description contained therein within that common-law offence.

2.37 However, it alters the common law in the following respects. Firstly, it dispenses with the requirement that there should be actual communication between the inciter and the incitee.[101] Consequently, a person could be guilty of incitement to public violence even if his words are not heard by his audience.[102] Secondly, the specific intent to incite public violence

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vary the conditions of any licences or permits held or to be issued under the Explosives Act, 1956 (Act 26 of 1956), or the regulations made thereunder.

(2) Any person who contravenes or fails to comply with the provisions of any proclamation or regulation issued under subsection (1) shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding five years or to both such a fine and such imprisonment.'

98 Act 15 of 2003.

99 See section 11 of the Interpretation Act 33 of 1957.

100 JRL Milton *South African Criminal Law and Procedure Vol II Common-law Crimes* Third Edition (1996) 94 argues that a person should not be charged with the contravention of section 17 but with the crime of incitement to public violence in that he, within the meaning of section 17, committed certain acts the consequence of which is the commission of public violence by members of the public.

101 Id 93.

102 Ibid.

is not a requirement.[103] All that is required is that the natural and probable consequence of the accused's conduct must lead to public violence. Furthermore, it is immaterial whether the accused's audience acted accordingly.[104]

(aa) Interplay with other laws

2.38 This provision exists alongside the common-law offence of incitement of public violence and section 18(2)(b) of the RAA which prohibits, inter alia, incitement to commit a common-law offence.[105] Section 18(2)(b) and the provision under consideration, it seems, traverse the same terrain.

Questions

a) Is there still a need for section 17, particularly in view of the existence of the common-law offence of incitement of violence and section 18(2)(b) of the RAA?

b) Furthermore, is this provision constitutional and consistent with the right to freedom of expression?

(iv) Section 18: attempt, conspiracy and incitement

(aa) Attempt

2.39 Section 18(1) of the RAA provides:

> 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.

2.40 Attempts to commit common-law crimes are punishable in terms of common law.[106] This provision puts beyond any doubt that an attempt to commit a statutory offence is also punishable.[107] Moreover, it encompasses provincial legislation and municipal by-laws.[108] There is a view, however, that attempts to commit statutory offences ought, according to

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103 AS Mathews *Law, Order and Liberty in South Africa* 196.

104 JRL Milton 93.

105 See footnote below.

106 CR Snyman *Criminal Law* Sixth Edition (2014) 276.

107 Jonathan Burchell *Principles of Criminal Law* Third Edition (2005) 622.

108 See Snyman 276 footnote 2.

general principles, also to be punishable in terms of the common law,[109] which raises questions about the necessity of this provision.

2.41 In practice, lesser punishment is usually imposed for attempt than for the completed crime.[110]

2.42 This provision is silent on whether voluntary withdrawal from a criminal act after the commencement of consummation but before the completion of the crime constitutes a defence to a charge in terms of this provision, particularly where withdrawal precedes the infliction of harm. It has been argued, contrary to our courts' approach, that voluntary withdrawal should be decriminalised.[111] In other jurisdictions, voluntary withdrawal before the completion of the crime is treated as a defence.[112]

2.43 In contrast to German law,[113] a person may be guilty of attempt in the United Kingdom even though the facts are such that the commission of the offence is impossible.[114] Additionally, attempt to commit conspiracy is not an offence in the United Kingdom.[115] Provisions of the German Criminal Code (GCC) relating to attempt may be instructive. The GCC expressly provides that an attempt to commit an offence *may* be punished more

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109 Ibid. Jonathan Burchell above 623 footnote 21 provides that: 'since the rule that attempts are punishable stems from the common law, an attempt to contravene any *penal legislation* attracts liability (except, of course, where liability for attempt is excluded, expressly or impliedly, by the statute in question).' (Emphasis added).

110 Snyman 286.

111 Id 284-285.

112 Snyman 285 footnote 55 refers to section 24 of the German Penal Code, section 45 of the Penal Code of Netherlands, section 121-5 of the French Penal Code section 51 of the Penal Code of Belgium, section 21 and 22 of Penal Code of Switzerland, and section 16 of the Penal Code of Austria, in this regard.

113 Section 23 of the German Criminal Code provides:

'Liability for attempt

(1) Any attempt to commit a felony entails criminal liability; this applies to attempted misdemeanours only if expressly so provided by law.

(2) An attempt may be punished more leniently than the completed offence (section 49(1)).

(3) If the offender due to gross ignorance fails to realise that the attempt could under no circumstances have led to the completion of the offence due to the nature of its object or the means by which it was to be committed, the court may order a discharge, or mitigate the sentence as it sees fit (section 49(2)).'

114 Section 1(2) of the Criminal Attempts Act 1981 (United Kingdom) provides '(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.'

115 Section 1(4) of the Criminal Attempts Act (United Kingdom).

leniently than a completed offence.[116] Furthermore, it states that a voluntary withdrawal is a defence.[117]

Questions

a) Is section 18(1) of the RAA necessary?

b) If it is, should it be amended, for example, to make provision for the defence of voluntary withdrawal?

c) Are there other issues relating to attempt to commit a statutory offence that, in your view, require legislative intervention?

(bb) Conspiracy

2.44 Section 18(2)(a) of this Act provides:

> Any person who-
> (a) conspires with any other person to aid or procure the commission of or 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.'

2.45 With the exception of treason, conspiring to commit an offence is not a crime under South African common law.[118] Section 18(2)(a) was intended to cure this lacuna in the law.[119] This provision prohibits an *agreement* between two or more people to commit, aid or procure the commission of a crime. As soon as there is an agreement, the crime of conspiracy is complete and abandonment of the scheme, its implementation or lack thereof,

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116 Section 23(2) of the German Criminal Code.

117 Section 24 of the German Criminal Code reads:

'Withdrawal

(1) A person who of his own volition gives up the further execution of the offence or prevents its completion shall not be liable for the attempt. If the offence is not completed regardless of his actions, that person shall not be liable if he has made a voluntary and earnest effort to prevent the completion of the offence.

(2) If more than one person participate in the offence, the person who voluntarily prevents its completion shall not be liable for the attempt. His voluntary and earnest effort to prevent the completion of the offence shall suffice for exemption from liability, if the offence is not completed regardless of his actions or is committed independently of his earlier contribution to the offence.'

118 *S v Basson* 2007 (1) SACR 566 (CC) para 205.

119 Id para 207.

is no defence.[120] In contrast to the Roman-Dutch law (common law), which did not penalise a mere agreement without some act being done in pursuance thereof,[121] no outward manifestation of the offence is necessary.[122] This provision has been invoked in conspiracies relating to exchange control regulations;[123] Immorality Act;[124] and to murder people in South Africa,[125] neighbouring countries and abroad;[126] terrorism;[127] and kidnapping.[128] The definition in section 18(2)(a) is wide enough to cover conspiracy to commit any crime.[129] A few drawbacks of this crime have also been highlighted, for example, that its boundaries are vague and punishment can be used to suppress political dissent and to curb freedom of expression.[130]

2.46 With regard to punishment, the conspirator is usually punished more leniently that the actual perpetrator[131] mainly because conspiracy does not usually result in the same harmful consequences as the commission of the main crime.[132]

2.47 Commentators have pointed out that this provision, like section 18(2)(b) which deals with incitement, does not distinguish between the situation where the crime is committed in pursuance of the conspiracy and where it is not. They opined that conspiracy should be limited to the latter for if the crime is committed, a conspirator who incited, or took part in, its commission is liable for the crime itself and should be so charged.[133] This offence intersects with the common-purpose rule which provides a more vigorous sanction against group

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120 Snyman 289. See also *S v Basson* para 209.

121 JM Burchell *South African Criminal Law and Procedure Volume I General Principles of Criminal Law* (1997) 367.

122 Jonathan Burchell 653.

123 *S v Bergmann* 1977 (3) SA 589 (A).

124 *S v M* 1971 (1) SA 207 (T) and *R v S and Another* 1960 (2) SA 446 (T).

125 *S v Libazi and Another* 2010 (2) SACR 233 (SCA).

126 *S v Basson* above.

127 *S v Moumbaris and Others* 1974 (1) SA 681 (T)

128 *S v Fraser* 2005 (1) SACR 455 (SCA).

129 *S v Ngobese* 2019 (1) SACR 575 (GJ).

130 Jonathan Burchell 652.

131 Id 657 footnote 45.

132 Snyman 289.

133 Snyman 287 and Jonathan Burchell 653.

criminal activity, as a result it is rarely used in South Africa.[134] The overlap between conspiracy and common purpose requires further elucidation. Conspiracy is complete as soon as there is an agreement. Whereas, common purpose is a means of imputing liability to someone for the commission of a crime. The benefit of conspiracy liability is that is allows law enforcement officials to intervene as soon as there is an agreement to commit an offence. The parties do not have to proceed any further with the plan to be held liable. On the other hand, to be held liable by way of common purpose, the crime actually has to be committed. One form of common purpose liability is an agreement to offend. So where there has been prior agreement for common purpose, there will have been an earlier conspiracy to commit crime. The distinction remains, however, that if the police make an arrest immediately after the agreement or conspiracy to commit an offence, then the accused will be charged with conspiracy; but where the crime is actually committed, after the original agreement, then the accused is charged with the crime in question and not merely conspiracy to commit the crime.

2.48 In *S v Basson* the question was whether section 18(2)(a) applied to criminal conspiracies to commit serious offences beyond the borders of South Africa, which the Constitutional Court answered in the affirmative.[135]

2.49 In other jurisdictions too, conspiracy is a serious offence regulated by legislation. In these countries, unlike in South Africa, withdrawal from conspiracy is a defence;[136] failure to report conspiracy is itself a punishable offence;[137] and certain categories of people are exempt from criminal liability, for example spouses, people who lack criminal capacity, and the conspirator if he or she is the intended victim of the offence.[138]

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134 Jonathan Burchell 652.

135 See *S v Basson* paras 188 et seq and 263; and *S v Frederiksen* 2018 (1) SACR 29 (FB).

136 For example, section 31 of the German Penal Code provides that:

'Section 31

Withdrawal from conspiracy

(1) A person shall not be liable under section 30 if he voluntarily 1. gives up the attempt to induce another to commit a felony and averts any existing danger that the other may commit the offence; 2. after having declared his willingness to commit a felony, gives up his plan; or 3. after having agreed to commit a felony or accepted the offer of another to commit a felony prevents the commission of the offence.

(2) If the offence is not completed regardless of his actions or if it is committed independently of his previous conduct, his voluntary and earnest effort to prevent the completion of the offence shall suffice for exemption from liability.'

137 Section 135 of the Criminal Code of Netherlands.

138 Section 2 of the Criminal Law 1977 (United Kingdom).

Questions

a) If the common-law doctrine of common purpose traverses, with minor nuances, the same terrain as section 18(2)(a), should the crime of conspiracy in this provision be retained?

b) Should voluntary withdrawal from conspiracy constitute a defence?

c) Should failure to report conspiracy itself constitute an offence?

d) What other issues relating to the offence of conspiracy to commit a crime, in your view, require legislative intervention?

(cc) Incitement

2.50 Section 18(2)(b) of the RAA reads:

> Any person who 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 actually committing that offence would be liable.

2.51 Incitement is a crime both under common law and in terms of section 18(2)(b).[139] According to Justice Majiedt in *Economic Freedom Fighters v Minister of Justice and Correctional Services*, the RAA codified the common-law offence of incitement.[140] Section 18(2)(b) prohibits reaching out and seeking to influence the mind of another towards the commission of a crime, whether the incitee is amenable or not.[141] Consequently, there must be communication, verbally or by conduct, which must reach the mind of the incitee. If it does not, then there is an attempted incitement.[142] Furthermore, a person should be charged with this offence if incitement has been unsuccessful.

2.52 The rationale for the existence of this offence is to empower authorities to maintain law and order; to thwart the commission of a crime at an early stage before harm is done;

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139 See Jonathan Burchell *Principles of Criminal Law* Third Edition 642 and cases cited therein.

140 2021 (1) SACR 387 (CC) para 88.

141 Jonathan Burchell 642.

142 Id 642-3.

and to prevent group criminality.[143] And, while located in what it described as a law of "apartheid extraction" which was the "regime's backlash against the momentous adoption of the Freedom Charter", the Constitutional Court has stated that section 18(2)(b) serves a legitimate government purpose, particularly in its fight against crime.[144]

Constitutionality of section 18(2)(b)

2.53 In *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another*, section 18(2)(b) was challenged on the basis that it was too broad, in that it criminalises incitement of others to commit *"any offence"*, and on the ground that it infringed the right to freedom of expression in section 16 of the Constitution.[145]

2.54 First, the court dealt with the meaning of the right to freedom of expression.[146] It stated that this right:[147]

- is the lifeblood of democracy, it keeps it vibrant, stable and peaceful;
- provides a virtual exhaust pipe through which venomous of toxicities may be let out to help citizens calm down, heal, focus and move on;
- ensures accountability;
- it is an essential and constitutive feature of our democratic society;[148]

and that subsection (2) thereof:

- empowers government to prohibit, through legislation, incitement to cause war, violence and hatred;

and that:

- the prohibition of activities and expressions that pose a real and substantial threat to constitutional values and order itself is permissible.

2.55 Turning its attention to section 18(2)(b), the court held that criminalisation of incitement to commit "any offence" constituted a limitation of protected expression.[149]

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143 Snyman 290 and Burchell 642.

144 See *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services* paras 4, 41, 51, 66, 82-84 and 119.

145 *Economic Freedom Fighters v Minister of Justice and Correctional Services* para 30.

146 See note 68 above.

147 Id paras 1, 2 and 30-33. See also paras 42-45.

148 Id para 95.

149 Id para 34. Justice Majiedt, writing for the minority, came to similar conclusion. See para 90.

Assessing whether this provision could be saved under section 36 of the Constitution,[150] the court held that it could not,[151] because it extended to minor offences or offences that threaten no serious harm or danger either to individuals, society or public order or the economy.[152] This law, the court further explained, failed to differentiate between serious and lesser, yet not trivial, offences; had the potential to inhibit free expression; and thus prevented all expression in the form of incitement or advocacy.[153] The court concluded that "any offence" is unquestionably overbroad and its inhibition of free expression markedly disproportionate to its conceivable benefits to society.[154] It circumscribed this offence by inserting the word "serious" between "any" and "offence" in section 18(2)(b).[155] This is, as the court emphasised, an interim remedy that could and should, particularly because of its practical challenges,[156] be further refined or changed by Parliament.[157] The court gave Parliament two years to remedy the defect.[158]

2.56 The minority decision underscored that:

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150 Section 36 of the Constitution reads:

'Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

151 The court observed that the state failed to provide reasonable grounds to justify overbreadth of this provision. See in this regard, *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services* para 53-55.

152 Id para 51. In respect of the requirement of seriousness, see para 42 and 46-51.

153 Id para 56.

154 Id para 61.

155 Id para 68.

156 The court conceded that: '…what is serious to some may not necessarily be serous to others. There is therefore an element of fluidity in relation to which offences are then to be understood as envisaged by 'any serious offence.' This raises the question: what is the meaning of 'serious' and how is 'serious' to be measured or determined?' Id para 69.

157 For pointers that could be used in the interim, see para 69-71.

158 This period expired on 27 November 2022.

a) incitement is a crime practically in every legal system; and that in contrast to the United States where speech is only punishable if it is directed at inciting or producing imminent lawless action, in other jurisdictions, seriousness, imminent violence or harmfulness are not prerequisites for criminal liability;[159] and that

b) the remedy, to include the element of seriousness in the offence of incitement, would lead to considerable uncertainty, could cause some injustice, ushers in the real risk of vagueness, and appeared to be a usurpation of law-making function of the legislature and may narrow the policy choices available to the legislature.[160]

2.57 The Canadian Criminal Code defines "serious offence" as an indictable offence under the Code or another Act of Parliament for which the maximum punishment is imprisonment for five years or more or another offence prescribed by the regulations.[161] In the United Kingdom, the Serious Crimes Act 2007 contains a list of serious offences, which includes inchoate crimes of attempt, conspiracy and conspiring and encouraging or assisting in the commission of an offence.[162]

Questions

a) If incitement is also a crime under the South African common law, is section 18(2)(b) of the RAA necessary? The Commission would appreciate receiving your views in this regard.

b) Furthermore, what would be the consequences of repealing this provision in its entirety from the statute book?

c) If the statutory crime of incitement is retained, which acts or conduct should it proscribe? Can you suggest a formulation more accurate than "serious offence"?

d) What other aspects of incitement or the law relating to incitement, require reform or legislative intervention?

(dd) Sanction prescribed by section 18(1) and (2) and its constitutionality

2.58 Section 18(1) and (2) stipulate that a person convicted of conspiracy or incitement is *"liable…to the punishment to which a person convicted of actually committing that offence*

159 Per Majiedt J paras 106-118.

160 Id paras 149-153.

161 Section 467.1 of the Canadian Criminal Code.

162 Schedule 1 of the Serious Crimes Act 2007 lists the following as serious offences in England and Wales: drug trafficking; people trafficking; arms trafficking; prostitution and child sex; armed robbery; money laundering; fraud; offences relating to public revenue; corruption and bribery; counterfeiting; blackmail; intellectual property crimes; environment related offences; and inchoate crimes.

would be liable." However, in practice the courts have always exercised discretion when determining the appropriate punishment and in most cases impose a lighter sentence.[163] This approach has been reaffirmed by the Constitutional Court, following the declaration of constitutional invalidity of part of section 18(2)(b) that deals with sanction by the High Court.[164] The Constitutional Court held in this regard:

> The word 'liable' does not connote inescapability, compulsion or absence of judicial discretion. Its ordinary meaning is that the inciter is susceptible to the same punishment or might have the same punishment visited upon him or her as the actual perpetrator.[165]

2 Trespass Act 6 of 1959

2.59 The Trespass Act has been earmarked for repeal in the Unlawful Entering on Premises Bill recently introduced by the Department of Justice in Parliament and will thus not be considered further in this paper.

3 Indemnity Acts of 1961 and 1977

(a) Indemnity Act 61 of 1961

2.60 The Indemnity Act of 1961 has two sections. Section 2 contains the short title. Section 1 has four subsections which indemnify the apartheid government, its officers and all other persons acting under its authority, in respect of acts done, orders given or information provided in good faith for the prevention or suppression of internal disorder, the maintenance or restoration of good order, public safety and essential services, or the preservation of life or property.

2.61 The origins of this law can be traced to a promise made by the Minister of Justice in the aftermath of the Sharpeville massacre in March 1961, in which he undertook, following civil claims for damages, to promulgate legislation to indemnify government and its officials

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163 See, for example, *S v Bergmann*, *S v M*, and *R v S* referred to above.

164 The High Court in *Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and Another* 2019 (2) SACR 297 (GP) considered, of its own accord, the meaning of section 18(2)(b) dealing with sanction and declared it unconstitutional on the basis that it compels the court to impose same sentence on the person inciting others to commit a crime as on the person who actually committed the crime.

165 See *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* above paras 25-29.

retrospectively against claims resulting from actions taken during demonstration.[166] This Act provides immunity against civil claims and criminal liability.[167]

2.62 The Truth and Reconciliation Commission classified this law as security legislation.[168]

2.63 This Act was superseded by the Promotion of National Unity and Reconciliation Act of 1995[169] which, inter alia, made provision for the granting of amnesty to persons who make full disclosure of all facts relating to gross violation of human rights between 1 March 1960 and 8 October 1990. The 1995 legislation, neither repealed the Indemnity Acts of 1961 and 1977 alluded to below, nor expressly recognised indemnity or immunity granted by them.[170]

(b) Indemnity Act 13 of 1977

2.64 The Indemnity Act of 1977, like the Indemnity Act of 1961, gave immunity to the former government and its officials from civil and criminal proceedings for acts committed on or after 16 June 1976.

Questions

In view of their provenance and purpose, to shield perpetrators of human rights violations, and legislative developments and reforms, the following questions arise:

a) are these laws still relevant and constitutional, particularly in view of our constitutional commitment to equality; and

b) were they not displaced (impliedly repealed) by the Promotion of National Unity and Reconciliation Act which deals with the same subject-matter?

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166 Truth and Reconciliation Commission of South Africa Report Volume One (29 October 1998) 458-459.

167 Section 1(1) of the Indemnity Act of 1961.

168 Truth and Reconciliation Commission report above 449 and 458-459.

169 Act 34 of 1995.

170 In contrast, section 48 of the Promotion of National Unity and Reconciliation Act provides:

'Acts repealed

(1) The Indemnity Act, 1990 (Act 35 of 1990), the Indemnity Amendment Act, 1992 (Act 124 of 1992), and the Further Indemnity Act, 1992 (Act 151 of 1992), are hereby repealed.

(2) Any indemnity granted under the provisions of the Indemnity Act, 1990, the Indemnity Amendment Act, 1992, or the Further Indemnity Act, 1992, shall remain in force notwithstanding the repeal of those Acts.

(3) Any temporary immunity or indemnity granted under an Act repealed in terms of subsection (1) shall remain in force for a period of 12 months after the date referred to in section 7 (3) notwithstanding the repeal of that Act.'

4 Prohibition of Disguises Act 16 of 1969

(a) Overview of the provisions and purpose of this Act

2.65 The Prohibition of Disguises Act is a general Act that prohibits the concealment of identity in public places.[171] Its roots can be traced back to colonial times and it was intended to consolidate splintered and varying provincial laws.[172] It has four sections,[173] the most important of which is section 1, which provides:

> 1 Penalties for being in disguise in suspicious circumstances
>
> (1) Any person found disguised in any manner whatsoever and whether effectively or not, in circumstances from which it may reasonably be inferred that such person has the intention of committing or inciting, encouraging or aiding any other person to commit, some offence or other, shall, unless he proves that when so found he had no such intention, 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 six months or to both such fine and such imprisonment.
>
> (2) In any prosecution for a contravention of subsection (1) it shall not be necessary to allege or prove that the circumstances in which the accused was found, gave rise to an inference that he had the intention of committing or inciting, encouraging or aiding any other person to commit, any particular offence.

2.66 It has been averred that this Act serves a useful purpose of enabling law enforcement officers to intervene at an early stage in the criminal process, before more serious crime, intended by the accused, is committed. [174]

(b) Concerns about this legislation

2.67 There was a concern that this Act targeted people engaging in the practice of transvestism.[175] Of course, the right to equality, in particular section 9(3), adequately

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171 The Regulation of Gatherings Act 205 of 1993, administered by the Department of Police, prohibits disguises in the context of public assemblies or public. Section 8(7) thereof provides: 'No person shall at any gathering or demonstration wear a disguise or mask or any other apparel or item which obscures his facial features and prevents his identification.'

172 For examples of colonial and post-Union legislation dealing with the same subject-matter, see Shannon Hoctor 'The Offence of Being Found in Disguise in Suspicious Circumstances' *Obiter* (2013) 316.

173 Section 2 is a repeal provision (provides that laws in the schedule have been repealed); section 3 was repealed in 1996; and section 4 contains the short title (the name of this Act).

174 Shannon Hoctor above 319-321.

addresses this matter. Secondly, the words "*unless he proves that when so found he had no such intention*" in section 1 quoted above shifts the burden of proof to the accused and is thus a typical reverse onus provision. Thus once the state has established that the accused was found in circumstances from which an intention to commit a crime may reasonably be inferred, it is incumbent upon him or her to prove that he had no such intention. The Constitutional Court has, in a number of cases,[176] declared onus provisions unconstitutional on the basis that they infringe the constitutional right of the accused to be presumed innocent.[177] However, it has been argued that given the important function it serves, this provision should not be repealed, but should be replaced with an evidentiary burden.[178] Section 1(2) further relieves the state of proving crucial elements of this offence.

(c) International best practice

2.68 New Zealand, Canada and the United Kingdom have laws criminalising the use of disguises.[179] In these jurisdictions, it is incumbent upon the state to establish that the accused had intention to commit a crime. In Canada, for example, the court quashed a conviction where it was established that the accused was wearing a handkerchief over his face, but proof of intent to commit crime was lacking. The United Kingdom's Criminal Justice and Public Order Act does not per se prohibit the wearing of masks, but empowers the police to require any person to remove any disguise which he or she believes that person is wearing wholly or mainly for the purpose of concealing his identity. Failure to abide with the police instruction constitutes an offence.[180] The Canadian Criminal Code also provides that every person who takes part in a riot while wearing a mask or other disguise to conceal their identity is guilty of an offence and liable to five years imprisonment; and that every person who commits an offence of unlawful assembly while wearing a mask is equally guilty of an offence and liable to the same punishment.

Questions

a) Should section 1(1) of the Prohibition of Disguises Act be amended to remove the

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175 Ibid.

176 See *S v Zuma* 1995 (2) SA 642 (CC); *S v Bhulwana* 1996 (1) SA 388 (CC); *S v Coetzee* 1997 (3) SA 527 (CC); *S v Manamela* 2000 (1) SACR 414 (CC).

177 Section 35(3)(h) of the Constitution.

178 Shannon Hoctor above 319.

179 See section 233(1)(b) of the Crimes Act (New Zealand); section 351 of the Criminal Code (Canada); and section 60 of the Criminal Justice and Public Order Act 1994 (United Kingdom).

180 See in regard, Shannon Hoctor 321.

	reverse onus provision?
b)	Would any unintended consequences flow from the repealing of section 1(2) in its entirety?
c)	Should section 1(2) be amended to expressly require the state to allege and prove that the accused intended to commit an offence?
d)	Do you agree that the reverse onus provision in 1(1) serves an important purpose and that it should be replaced with an evidentiary burden? How would you amend it?
e)	What other aspects relating to the use of masks require legislative reform?

5 Criminal Procedure Act 51 of 1977

2.69 The Commission, in collaboration with the DOJ&CD, has embarked on the review of the criminal justice system which encompasses the complete overhaul of the Criminal Procedure Act (CPA). Nevertheless, we highlight hereunder provisions in this Act that are deemed problematic in the context of this investigation.

(a) Section 25

(i) Overview of section 25

2.70 Section 25 of the CPA authorises police officers to enter premises (with or without a warrant) for the purpose of conducting an investigation, to search the premises or any person and seize any article, if there are reasonable grounds for believing that the *internal security of the Republic* or the *maintenance of law and order* is likely to be endangered by or in consequence of any *meeting* which is being held or will be held.[181]

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[181] This provision reads:

'25 Power of police to enter premises in connection with State security or any offence

(1) If it appears to a magistrate or justice from information on oath that there are reasonable grounds for believing-

(a) that the internal security of the Republic or the maintenance of law and order is likely to be endangered by or in consequence of any meeting which is being held or is to be held in or upon any premises within his area of jurisdiction; or

(b) that an offence has been or is being or is likely to be committed or that preparations or arrangements for the commission of any offence are being or are likely to be made in or upon any premises within his area of jurisdiction,

he may issue a warrant authorizing a police official to enter the premises in question at any reasonable time for the purpose-

(ii) Origins of section 25

2.71 The origins of this provision can be traced to a decision in *Wolpe v Officer Commanding South African Police, Johannesburg*[182] where the court held that if there was a suspicion that a disturbance of public order would occur or seditious speeches made as a result of, or at, a meeting, the police are entitled to attend such meeting in order to prevent such an occurrence, even if the meeting was private. The court suggested that the legislature should define the powers and duties of the police in connection with the combating of what the state considered to be dangerous, which led to the inclusion of section 25 in the CPA.[183]

(iii) Criticism

2.72 This section has been slated, inter alia,[184] on the basis that:

- it confers wide powers on the police and sets no legal boundaries within which the discretion it bestows may be exercised, and thus leaves ample room for the abuse of power;[185]

(i) of carrying out such investigations and of taking such steps as such police official may consider necessary for the preservation of the internal security of the Republic or for the maintenance of law and order or for the prevention of any offence;

(ii) of searching the premises or any person in or upon the premises for any article referred to in section 20 which such police official on reasonable grounds suspects to be in or upon or at the premises or upon such person; and

(iii) of seizing any such article.

(1A) Notwithstanding any other law, an application for a warrant under this section in respect of the offences listed in section 21 (1A) (a) to (d) may be made to any magistrate or justice, irrespective of whether or not the place of execution of the warrant, or the place where the alleged crime has been committed falls within the jurisdiction of such magistrate or justice.

(2) A warrant under subsection (1) may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.

(3) A police official may without warrant act under subparagraphs (i), (ii) and (iii) of subsection (1) if he on reasonable grounds believes-

(a) that a warrant will be issued to him under paragraph (a) or (b) of subsection (1) if he applies for such warrant; and

(b) that the delay in obtaining such warrant would defeat the object thereof.'

182 1955 (2) SA 87 (W).

183 For discussion of this case, see JJ Joubert (ed) *Criminal Procedure Handbook* 195.

184 Another conundrum, to which the definition of 'premises' offers no assistance, is whether the Act authorises entry into another's building for reconnaissance purposes. See in this regard, Anthony Mathews *Freedom State Security and the Rule of Law: Dilemmas of the Apartheid Society* (1986) 188.

- to the extent that a warrant required in terms of this provision may be issued by a justice of the peace, which includes officers of the South African Police Service (SAPS), it means that the police are self-authorising in respect of warrants;[186]
- the powers it gives may be invoked in respect of *private premises* if there is reasonable apprehension that internal security or law and order is likely to be threatened by a meeting in the premises;[187]
- the expressions "internal security" and "law and order" used therein have no clear meaning and are made more obscure by the breadth and vagueness of South African internal security legislation;[188] and
- the powers it confers invade the rights of the citizens too broadly and deeply.[189]

2.73 A few cases involving the seizure of articles of a political nature by the police corroborate that these powers in general, and section 25(1) in particular, were used to stifle the exercise of political rights.[190] It has been suggested that legislative reforms narrowing the CPA may be necessary to curtail the powers in section 25.[191]

Questions

a) Are the powers of search and seizure contained in section 25 of the CPA still necessary, particularly in view of the right to privacy and expressive rights enshrined in the Constitution?

b) If it serves a useful purpose and should be retained, how could it be circumscribed so that its interference with the rights of citizens is mitigated?

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185 JJ Joubert above 196. See also Anthony Mathews *Freedom, Security and the Rule of Law: Dilemmas of the Apartheid Society* (1986) 187.

186 Anthony Mathews above 186. The First Schedule of the Justices of Peace and Commissioners of Oath Act 16 of 1963 provides that ex officio justices of the peace includes a Commissioned Officer of the South African Police Services.

187 Anthony Mathews above 187.

188 Ibid.

189 Ibid.

190 See in this regard, *Ndabeni v Minister of Law and Order* 1984 (3) SA 500 (D); and *Control Magistrate, Durban v Azanian Peoples Organisation* 1986 (3) SA 394 (A).

191 Anthony Mathews 188.

(b) Section 185

(i) Overview of section 185 of the CPA

2.74 Section 185 of the CPA authorises the Attorney-General (Director of Public Prosecutions)[192] to cause to be detained a person likely to give evidence on behalf of the state in a matter relating, among others, to public violence or offence in terms of the Intimidation Act of 1982; or incitement, conspiracy or attempt to commit the above-mentioned offences. This power may be exercised if the personal safety of the said witness is in danger, or he or she may abscond, be tempered with or intimidated; or if such arrest would be in the interest of justice.[193] The matter is dealt with by a judge in chambers and his or her decision is final and the publication of information relating to the proceedings under this section is completely prohibited.[194]

2.75 Such a witness may be detained *incommunicado* unless the DPP determines otherwise;[195] and for a period of six months after his or her arrest or until the conclusion of the trial.[196] The DPP also has powers to order the detention of the said witness for a period not exceeding 72 hours before he or she approaches a judges in chambers and to determine the place where the said witness will be detained.[197]

(ii) Origins

2.76 The section under consideration mirrors, word for word, its predecessor in the CPA of 1955[198] which was specifically enacted to empower the Attorney-General to order the arrest of persons likely to give material evidence in respect of certain political and common-law offences[199] and thus formed part of detention laws.[200]

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192 See *S v Basson* 2007 (1) SACR 566 (CC) para 198.

193 Section 185(1)(a)(i) and (ii) of the CPA.

194 Section 185(2)(b) and 185(9)(b) of the CPA.

195 Section 185(5) of the CPA.

196 Section 185(4)(a) and (b) of the CPA.

197 Section 185(1)(b) and (3) of the CPA.

198 Section 215bis of the Criminal Procedure Act 56 of 1955.

199 John Dugard *Human Rights and the South African Legal Order* (1977) 114.

200 AS Mathews *Law, Order and Liberty in South Africa* (1971) 134.

2.77 Prior to the enactment of these provisions, the state was averse to providing information about detained persons and deemed legislation necessary in this regard.[201] Section 185(9) of the CPA gives effect to that policy.

(iii) Criticism

2.78 This provision, like its predecessor and all other detention laws of the 1960s, has been berated on the grounds that:

- it curtails individual's personal freedom and in turn all other rights including political rights, freedom of expression and association;[202]
- the information on the basis of which the DPP initiates the process outlined above does not have to be under oath;
- it traverses the same terrain covered by the Witness Protection Act of 1998;[203] and operates alongside statutory provisions empowering the prosecutor or accused person to subpoena witnesses and to have them arrested if they fail to appear in court on the date specified in the summons;[204]
- it is at variance with the threshold set by the Constitution and the CPA itself for the detention of persons before they appear in court, albeit in relation to accused persons,[205]which is 48 hours;
- this provision is at variance with the constitutional values of transparency and openness and with the notion of open justice which seeks to enhance accountability, deter misconduct by members of the court, and promote the right of the public to be informed;[206] and that
- it stifles the right of the press to report accurately on legal proceedings and administration of justice.[207]

2.79 The Commission too expressed concern about the constitutionality of some of the provisions of section 185[208] and concluded that:

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201 John Dugard 119.

202 AS Mathews 134.

203 Act 112 of 1998.

204 See sections 179, 184 and 188 of the CPA.

205 Sections 35(1)(d) of the Constitution and 50 of the CPA.

206 JJ Joubert (ed) *Criminal Procedure Handbook* Thirteen Edition (2019) 345 et seq.

207 Ibid.

208 South African Law Reform Commission *Project 101: The Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing Report* (May 2001) 78.

> Section 185 is a prima facie infringement of the right not to be detained without trial and its overbreadth makes it highly unlikely that it will meet the requirements of the limitation clause.[209]

2.80 However, it did not recommend the repeal of this section in its entirety, but the deletion of section 185(1)(a)(ii) and 2(a)(ii); that the words "seventy-two hours" in subsection (1)(b) be replaced with "48 hours"; the insertion of the words in subsection (2)(b) "the decision of a **judge to refuse an application** under paragraph (a) shall be final", and the deletion of subsection (5).[210]

Questions

a) Is section 185 of the CPA still necessary, and is it constitutional?

b) What, if any, would be the unintended consequences if this provision was repealed?

c) If you believe it contravenes the Constitution, what amendments would be necessary to salvage it?

(c) Section 205

(i) Overview of section 205

2.81 The protection of journalistic freedom is one of the cornerstones of press freedom.[211] However, South Africa still has, in its statute book, instruments that may be invoked to compel journalists to disclose their sources. Section 205 of the CPA is one such measure.[212] Subsection (1) of this section provides:

> Judge, regional court magistrate or magistrate may take evidence as to alleged offence
>
> (1) A judge of a High Court, a regional court magistrate or a magistrate may, subject to the provisions of subsection (4) and section 15 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002, upon the request of a Director of Public Prosecutions or a public prosecutor authorized thereto

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209 Id 77.

210 Id 78-79.

211 Iain Currie and Johan de Waal 'Chapter Sixteen: Expression' in *The Bill of Rights Handbook* Fifth Edition (2005) 365.

212 Another law that could be susceptible to such use is section 6 of the Commissions Act 8 of 1947 which makes provision for the subpoena of witnesses. In *Munusamy v Hefer* 2004 (5) SA 112 (O) it was argued that the protection of free expression required the issuing of a subpoena against a journalist only as a measure of last resort. However, the court concluded that this matter was not at issue. See in this regard, Currie and De Waal 365.

> in writing by the Director of Public Prosecutions, require the attendance before him or her or any other judge, regional court magistrate or magistrate, for examination by the Director of Public Prosecutions or the public prosecutor authorized thereto in writing by the Director of Public Prosecutions, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed: Provided that if such person furnishes that information to the satisfaction of the Director of Public Prosecutions or public prosecutor concerned prior to the date on which he or she is required to appear before a judge, regional court magistrate or magistrate, he or she shall be under no further obligation to appear before a judge, regional court magistrate or magistrate.

2.82 Furthermore, all questions put to a witness in terms of this section must be answered unless the witness has a just excuse for failing to answer.[213] Failure to answer questions carries a threat of imprisonment, especially if the matter relates, inter alia, to the maintenance of law and order.[214]

(ii) Purpose of section 205

2.83 This section is designed to compel a person to reveal his knowledge of an alleged crime[215] and it has been invoked against journalists.[216] It has featured in recent cases, the most important of which being *S v Cornelissen*[217] and *Nel v Le Roux*.[218] In the latter case, the Constitutional Court did not invalidate this section, instead it stated:

> If the answer to any question put to an examinee would infringe or threaten to infringe any of the examinee's rights, this would constitute a just excuse for the purpose of s 189(1) for refusing to answer the question unless the s 189(1) compulsion to answer the question would, in the circumstances, constitute a limitation of such right which is justified in terms of the Constitution.[219]

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213 Section 205(2) of the CPA.

214 Section 205(4) of the CPA.

215 JJ Joubert (ed) 183.

216 For example, the United Nations cited the case of the Cape Times reporter who, following the killing of seven guerrillas by police officers in Gugulethu, a journalist was subpoenaed under this provision to give names and addresses of three witnesses whose account of the event he published. See in this regard, United Nations Centre Against Apartheid *Restrictions Imposed on the Media in South Africa Since 21 July 1987* United Nations (September 1987) 12-13.

217 1994 (2) SACR 41 (W).

218 1996 (3) SA 562 (CC).

219 Id para 7.

2.84 This decision is understood to mean that when a journalist refuses to answer a question put at a section 205 inquiry, the presiding officer must take into account the fact that compelling the evidence may infringe the right to press freedom.[220]

Question

This provision raises the question whether journalistic privilege merits protection in our law. In other words, should this provision be amended to exclude disclosure of journalistic sources and information obtained from them?

6 General Law Further Amendment Act 93 of 1962

2.85 This law not only amended various laws, but also prescribed in section 44, the only provision in the Act administered by the DOJ&CD,[221] penalties for the defacement or disfigurement of property. To that end, it prescribes an additional penalty of six months for the defacement of movable or immovable property belonging to the State or private person; empowers the court to impose a fine equal to the cost or estimated cost of restoring the property or an additional period of 12 months in default of payment thereof; and requires that any amount recovered be paid over to the owner of the defaced or disfigured property.[222]

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220 Iain Currie and Johan de Waal 366.

221 See https://www.justice.gov.za/legislation/acts/dojcd-acts-administered.pdf

222 The aforesaid provision reads:

'44 Penalties for defacement or disfigurement of property

(1) Notwithstanding anything to the contrary in any other law contained, any person who commits an offence by placing any placard, poster, writing, word, letter, sign, symbol, drawing or other mark on any property, whether movable or immovable, of any other person or of the State, and thereby defaces or disfigures such property, shall be liable on conviction to imprisonment for a period not exceeding six months in lieu of or in addition to any other penalty which may be imposed in respect of such an offence.

(2) If the court imposing upon a person over the age of eighteen years any penalty in respect of an offence referred to in subsection (1), is satisfied that the property concerned belongs to some particular person or to the State and if the owner of such property does not apply under the provisions of the Criminal Procedure Act, 1977 (Act 51 of 1977) for compensation, the court shall, in addition to such penalty sentence the convicted person to a fine equal to the cost or estimated cost of restoration of such property less any such cost which may have been paid to such owner or imprisonment for a period not exceeding twelve months in default of payment of the fine and the convicted person shall serve such additional sentence of imprisonment after the expiration of any other sentence of imprisonment imposed upon him in respect of such offence except where the operation of such other sentence has been suspended in which case he shall commence to serve the additional sentence forthwith.

2.86 The fact that this provision was promulgated at the time when an epidemic of political slogans broke out and is considered a political offence,[223] may be indicative of its purpose, namely to stifle the exercise of political rights and freedom of expression. It renders punishable offences which, because of their trivial nature, do not constitute an offence under common law, for example graffiti.[224] Furthermore, it has been slated on the basis that it dispenses with the requirement of culpability and the gravity of the disfigurement is irrelevant.[225] The common-law crime of malicious injury to property covers this conduct.

Question

Is section 44(1)-(4) of the General Law Further Amendment Act 93 of 1962 still relevant and necessary?

(3) Such fine may be recovered in the manner provided in section 288 of the said Act and any amount recovered shall be paid to the owner of the property defaced or disfigured.

(4) Notwithstanding anything to the contrary in any other law contained, a magistrate's court other than the court of a regional division shall have jurisdiction to impose summarily any sentence in respect of an offence referred to in subsection (1) which the court of a regional division may impose.'

223 See in this regard, AS Mathews *Law, Order and Liberty in South Africa* (1971) 220.

224 Gerhard Van Rooyen 'Graffiti: Is the Writing on the Wall?' *South African Journal of Criminal Justice* No.2 (2001) 238.

225 AS Mathews above.

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S v Bergmann 1977 (3) SA 589 (A)

S v Bhulwana 1996 (1) SA 388 (CC)

S v Coetzee 1997 (3) SA 527 (CC)

S v Cornelissen 1994 (2) SACR 41 (W)

S v Fraser 2005 (1) SACR 455 (SCA)

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S v Moumbaris and Others 1974 (1) SA 681 (T)

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S v Sparks NO and Others 1980 (3) SA 952 (T)

S v Zuma 1995 (2) SA 642 (CC)

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LEGISLATION

Constitution of the Republic of South Africa, 1996

Commissions Act, 1947 (Act 8 of 1947)

Constitution of the Republic of South Africa, 1993 (Act 200 of 1993)

Criminal Procedure Act, 1977 (Act 51 of 1977)

General Law Further Amendment Act, 1962 (Act 93 of 1962)

Indemnity Act, 1961 (Act 61 of 1961)

Indemnity Act, 1977 (Act 13 of 1977)

Inquests Act, 1959 (Act 58 of 1959)

Lord's Day Observance Act, 1895 (Act 19 of 1895): Cape Province

Police Offences Ordinance, 1902 (Ordinance No. 21 of 1902): Free State

Prevention of Public Violence and Intimidation Act, 1991 (Act 139 of 1991)

Prohibition of Disguises Act, 1969 (Act 16 of 1969)

Prohibition of the Exhibition of Films on Sundays and Public Holidays Act, 1977 (Act 16 of 1977)

Protection of Information Act, 1982 (Act 84 of 1982)

Riotous Assemblies Act, 1956 (Act 17 of 1956)

South African Law Reform Commission Act, 1973 (Act 19 of 1973)

Sunday Law, 1896 (Act 28 of 1896): Transvaal

Sunday Observance Ordinance, 1838 (Ordinance No. 1 of 22 March 1838): Cape Province

Trespass Act, 1959 (Act 6 of 1959)