

SOCIETAS ET IURISPRUDENTIA

Medzinárodný internetový vedecký časopis zameraný na právne otázky v interdisciplinárnych súvislostiach

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Editoriál k jarnej edícii SOCIETAS ET IURISPRUDENTIA 2024

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V mene celej redakčnej rady a redakcie časopisu SOCIETAS ET IU-RISPRUDENTIA

s úctou,

Jana Koprlová

Trnava 31, marec 2024

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Editorial for Spring Edition of the SOCIETAS ET IURISPRUDENTIA 2024

Dear readers and friends,

let me introduce the first issue of the twelfth volume of SOCIETAS ET IU-RISPRUDENTIA, an international scientific online journal for the study of legal issues in the interdisciplinary context.

The journal SOCIETAS ET IURISPRUDENTIA is issued under the auspices of the Faculty of Law of the Trnava University in Trnava, Slovakia, and it thematically focuses mainly on socially relevant interdisciplinary relations connected with issues of public law and private law at the national, transnational and international levels, while accepting and publishing exclusively original, hitherto unpublished contributions. Its aim is to provide a stimulating and inspirational platform for scientific and society-wide beneficial solutions to current legal issues and their communication at the level of primarily legal experts, but also the interested general public in the context of their broadest interdisciplinary social relations, in like manner at the national, regional and international levels.

The journal is issued in an electronic on-line version four times a year, regularly on March 31st, June 30th, September 30th and December 31st, and it offers a platform for publication of contributions in the form of separate papers and scientific studies as well as scientific studies in cycles, essays on current social topics or events, reviews on publications related to the main orientation of the journal and also information or reports connected with the inherent mission of the journal.

The website of the journal SOCIETAS ET IURISPRUDENTIA offers the reading public information in the common graphical user interface as well as in the blind-friendly interface designed for visually handicapped readers, both parallel in the Slovak as well as English languages. In both languages the journal's editorial office provides also feedback communication through its own e-mail address. At the same time, the website of the journal offers readers due to the use of dynamic responsive web design accession and browsing by using any equipment that allows transmission of information via the global Internet network.

The current, first issue of the twelfth volume of the journal SOCIETAS ET IURISPRUDENTIA offers a total of three separate scientific studies. The very first study offers readers a very comprehensive and detailed



view of the key and extremely topical issues of legal regulation aimed at enforcing the rule of law in South Africa. The following study brings a jurisprudential analysis of the right to life and dignity from the South African perspective. The final study presents systematic and thorough analysis of the concepts of the objective aspect of homicide and culpable bodily harm from the point of view of the Slovak legal system.

In relation to the release of the first issue of the twelfth volume of the journal SOCIETAS ET IURISPRUDENTIA we are pleased to inform all its readers, contributors as well as fans that the journal has been registered in the Directory of Open Access Journals (DOAJ) as well as in international scientific databases Crossref, ERIH PLUS and Index Copernicus International and applied for registration in other international scientific databases. At the same time, we would like to inform that till the date of the new issue, the journal's websites had recorded a total of 152 countries of visits (in alphabetical order):

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On the occasion of launching the first issue of the twelfth volume of the journal, I would be delighted to sincerely thank all the contributors who have contributed in it actively and have shared with the readers their knowledge, experience or extraordinary views on legal issues as well as the top management of the Faculty of Law of the Trnava University in Trnava, all friends, colleagues, employees of the Faculty of Law, the rector's administration at the Trnava University in Trnava for all support and suggestive advices and, finally, also the members of journal's editorial board and the editorial team.

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I believe that the journal SOCIETAS ET IURISPRUDENTIA provides a stimulating and inspirational platform for communication both on the professional level and the level of the civic society as well as for scientific



and society-wide beneficial solutions to current legal issues in context of their broadest interdisciplinary social relations, in like manner at national, regional and international levels.

On behalf of the entire editorial board and editorial office of the journal SOCIETAS ET IURISPRUDENTIA,

Yours faithfully,

Jana Koprlová

Trnava, Slovakia, March 31st, 2024



Between Commissions of Enquiry and Direct Prosecution: Quo Vadis, South Africa?

Siphokazi Qikani Paul S. Masumbe

Abstract: South Africa has had its fair share of allegations of corrupt activities within the public sector. Consequently, numerous commissions of enquiries have been established to investigate matters of public interest. The most recent is the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (hereinafter the "Zondo Commission") established in 2018 with investigative powers. R1 billion later, the Commission completed and compiled its findings in 2022/23 which contained a plethora of evidence. Despite the enormous evidence gathered by the Commission as with other Commissions before it, prosecution and conviction have been minimal. However, some of the Commission's findings have been challenged or subjected to judicial review. The huge costs of these commissions, the sluggish nature of prosecution and convictions, and the high ratio of challenges to their findings invite the question of their effectiveness and necessity. Against this backdrop, the article argues that the government needs to redirect the resources it invests in these commissions of enquiry into strengthening the existing investigating institutions and the prosecuting authority. It is argued that the ultimate effect of any investigation into any wrongdoing should be the vindication of those who have been wronged and the restoration of what has been lost. This can be best achieved when the country has a capacitated prosecuting authority, that can thoroughly investigate and an independent judiciary which is the ultimate guardian of South Africa's constitutional democracy. It is hoped that this paper will contribute to the advocacy for the strengthening of institutions that are designed to uphold the rule of law in South Africa.

Key Words: Rule of Law; Commission of Enquiry; Prosecuting Authority; Institutional Independence; Political Interference; Judiciary; South Africa.



Introduction

The Constitution of the Republic of South Africa¹ embraces a government that is characterised by checks and balances, an incident of separation of powers between the different actors of government. Central to the South African constitutional system is the rule of law as envisaged in the founding provisions of the Constitution.² Some of the dictates of the rule of law and constitutional supremacy are the prevention of arbitrary exercise of state power and the demand that all government actions must conform to the Constitution.³ Governance in the Republic is trilateral in nature and is divided between the legislature, the executive and the judiciary, and the Constitution envisages a government that ensures accountability. responsiveness and openness.4 The legislative authority is vested in parliament.⁵ The executive authority is vested in the President and the cabinet.⁶ Judicial authority is vested in courts and their decisions are binding to all persons or organs of state to which they apply. The President is both the Head of State and the Executive⁸ and, consequently, he is vested with a wide range of powers that are central to the governance of the Republic. These powers, among other things, include the appointment of the commissions of enquiries (the commissions).9 The functions of these commissions are generally administrative in nature even though they are usually headed by members of the judiciary, in that theirs is to investigate and make recommendations.

Commissions of enquiries are established in terms of the Commissions Act¹⁰ for the purpose of investigating matters of public concern and for gathering information that is deemed necessary for policy formula-

¹ See *Constitution of the Republic of South Africa* [1996] (hereinafter referred to as the "Constitution").

² The Founding provisions [of the Constitution] are in Chapter 1 and section 1 provides, among other things that "the Republic of South Africa is one, sovereign, democratic state founded on the following values: [...] (c) supremacy of the Constitution and the rule of law".

³ See section 1(c) read with section 2 of the Constitution.

⁴ See section 1(d) of the Constitution.

⁵ See section 42 of the Constitution states that Parliament consists of the National Assembly and the National Council of Provinces. Section 44 of the Constitution provides for National Legislative Authority.

⁶ See section 85 of the Constitution provides for the executive authority of the Republic.

⁷ See section 165 of the Constitution provides for Judicial Authority.

⁸ See section 85(1) of the Constitution.

⁹ See section 84(2)(f) of the Constitution.

¹⁰ See Commissions Act No. 8 [1947].



tion.¹¹ These commissions have become the most pursued tool by the government to respond to an imminent crisis. The period between February to November 2018, the President of the Country appointed no less than four commissions of inquiry: the Zondo Commission, the Nugent Commission into tax administration and governance by the South African Revenue Service; the Mpati Commission into allegations of impropriety regarding the Public Investment Corporation and the Mokgoro Enquiry into the fitness of the deputy National Director of Public Prosecutions, Nomgcobo Jiba, and the special director of public prosecutions, Lawrence Mrwebi, to hold office.¹²

The National Prosecuting Authority¹³ has the power to prosecute crimes and derives its constitutional mandate from section 179 of the Constitution. It is placed in Chapter 8 of the Constitution which entrenches the mandates of the judiciary and the entire administration of justice in South Africa.¹⁴

- "(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of –
- (a) National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
- (b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
- (2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."15

¹¹ See Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, para 2.

¹² See PETÉ, S. A. Commissions of Inquiry as a Response to Crisis: The Role of the Jali Commission in Creating Public Awareness of Corruption (Part 1). *Obiter* [online]. 2020, vol. 41, no. 4, p. 905 [cit. 2023-12-08]. ISSN 2709-555X. Available at: https://doi.org/10.17159/obiter.v41i4.10493.

¹³ See National Prosecuting Authority (NPA) and section 179 of the Constitution.

¹⁴ See KOHN, L. The National Prosecuting Authority as Part of South Africa's Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. *Constitutional Court Review* [online]. 2022, vol. 12, no. 1, p. 48 [cit. 2023-12-08]. ISSN 2521-5183. Available at: https://doi.org/10.2989/ccr.2022.0001.

¹⁵ See section 179(1)(a), (b) and (2) of the Constitution.



Pursuant to the demands of section 179 of the Constitution, the National Prosecuting Authority Act¹⁶ was enacted. Among other things, the Act purports to ensure that the prosecuting authority exercises its functions without fear, favour, or prejudice.¹⁷

Courts, as the judicial authority of the Republic, are constitutionally obligated to interpret and apply the law impartially, without fear or prejudice subject only to the law and the Constitution. No person or organ of the state shall interfere with the functions of the judiciary. Organs of state must at all costs protect the independence and dignity of the courts. Decisions and orders issued by courts are binding to all persons or organs of state to which they apply.

The Zondo Commission was established on the 8^{th} of February 2018 by the President in terms of section 1 of the Commissions Act 8 of 1947 read with see section 84(2)(f) of the Constitution for the purpose of investigating the alleged state capture, corruption and fraud in the public sector including organs of state.

"The purpose of the Commission was to investigate allegations of state capture and malfeasance. Guided by the report of the public protector, the Commission was to inquire into, make findings, report on and make a recommendation concerning whether and to what extent and by whom attempts were made through any form of inducement of any gain whatsoever nature to influence members of the national executive office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of any boards of state owned enterprises (SOE's)."²²

¹⁶ See National Prosecuting Authority Act No. 32 [1998] (hereinafter referred to as the "National Prosecuting Authority Act").

¹⁷ See the preamble of the National Prosecuting Authority Act.

¹⁸ See section 165(2) of the Constitution.

¹⁹ See section 165(3) of the Constitution.

²⁰ See section 165 of the constitution provides for Judicial Authority.

²¹ See PETÉ, S. A. Commissions of Inquiry as a Response to Crisis: The Role of the Jali Commission in Creating Public Awareness of Corruption (Part 1). *Obiter* [online]. 2020, vol. 41, no. 4, p. 905 [cit. 2023-12-08]. ISSN 2709-555X. Available at: https://doi.org/10.17159/obiter.v41i4.10493.

²² See Case of Korabie v. Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State and Others [2022-09-20]. Judgement of the High Court of South Africa, 2022, 9946/2022, para 2.



The Zondo Commission was conducted openly and live on television, as a result, it aroused public interest. The commission concluded its work and compiled a six-part report with each part containing numerous volumes of information.²³ Many hoped it would culminate in the prosecution of the alleged perpetrators and the reversal of benefits that were unduly obtained by those who perpetuated acts of fraud and corruption. This, unfortunately, has not been the case so far. At best, the commission makes recommendations for, among other things, further investigation, and possible prosecution. However, these recommendations may or may not be accepted or acted upon.²⁴ The uncertainty in the actualization of justice from the findings of the Zondo Commissions and others before it, engages the curiosity of this paper.

In satisfying such curiosity this paper will be divided into six parts with the first part being the introduction. The second part discusses and analyses the effectiveness of the commissions of enquiries. This is followed by an assessment of the prosecuting authority and the subsequent checks and balances implicit in the National Prosecuting Authority. This is then followed by an assessment of the investigative directorates as a means of strengthening the institution of the National Prosecuting Authority. The paper concludes with recommendations through which the Prosecuting Authority of the state can be reinforced. This includes the strengthening and preservation of the integrity of the National Prosecuting Authority.

²³ See Commissions Act (8/1947): Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State [1947]. Government Gazette of the Republic of South Africa, 2018, No. 41436; and ZONDO, R. M. M. Judicial Commission of Inquiry into State Capture Report. In: *The Presidency* [online]. 2022 [cit. 2023-12-08]. Available at: https://www.thepresidency.gov.za/judicial-commissioninquiry-state-capture-report.

²⁴ See Case of Korabie v. Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State and Others [2022-09-20]. Judgement of the High Court of South Africa, 2022, 9946/2022, para 50, Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, para 4, see also Case of President of the Republic of South Africa and Others v. South African Rugby Football Union and Others [1999-09-10]. Judgement of the Constitutional Court of South Africa, 1999, CCT 16/98, para 146.



1 The effectiveness of the commissions of enquiry

South Africa is a Republic of laws, where the Constitution is supreme; an infringement of its law is a direct attack on the rule of law which is one of the underlying values of the Constitution.²⁵ The Constitutional Court shared this assertion when it was called upon to intervene when the then-president was resisting the summonses issued in terms of section 3 of the Commissions Act. President Zuma was summoned as a witness and required to give his version of events upon being implicated in the allegations of corruption and fraud by other witnesses who gave evidence in the Zondo Commission.

"These terms of reference place the former President at the centre of the investigation. They seek to establish whether he abdicated his constitutional power to appoint Cabinet members to a private family and whether he had acted unlawfully. [...] Sight must not be lost of the fact that it was he who was the subject of the investigation and who drew up the terms of reference that placed him at the heart of the investigation." ²⁶

The Constitutional Court ordered that the former President must attend the Commission and give evidence as he does not enjoy the right to silence as a witness.²⁷ The Court held that it is vested with wide remedial powers when deciding constitutional matters in terms of section 172(1)(b) of the Constitution and deemed it just and equitable to issue such as an order.²⁸ This case may have been the beginning of more challenges to come and the questioning of the legitimacy of the Zondo Commission, at the hands of the same office bearer who established it and drew its terms of reference.

²⁵ See Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, para 87.

²⁶ See Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, paras 21 and 22.

²⁷ See Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, para 90.

²⁸ See Case of Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v. Zuma [2021-01-28]. Judgement of the Constitutional Court of South Africa, 2021, CCT 295/20, paras 110 and 111.



The commission continued with its mandate, concluded and handed the last report in June 2022.²⁹ The reports revealed a systematic entrenchment of widespread corruption, where corrupt elites took control of the key institutions of the country. This power abuse was characterised by strategic appointments of certain individuals who were complicit in the corruption and dismissals or harassment of the individuals who resisted the corrupt activities that occurred in the key institutions of the country.³⁰ The Zondo Commission report provides examples of such appointments, for example the appointments of Tom Movane to the South African Revenue Service (SARS), various appointments to the National Prosecuting Authority (NPA), and to various boards of directors at State-Owned Enterprises (SOEs).31 Some of the alleged appointments to the National Prosecuting Authority were a subject of judicial review which escalated all the way to the Constitutional Court. In Mncwabe v. President of the Republic of South Africa and Others; Matheniwa v. President of the Republic of South Africa and Others, 32 the Constitutional Court was approached by aggrieved applicants who wanted the Court to review and set aside President Ramaphosa's decisions to fill some vacancies in the National Prosecuting Authority. These applicants among other things. were contesting the appointees of the President to the NPA, as they were convinced that the former president had appointed them but resigned before announcing such an appointment publicly.

"During the early part of 2018, prior to his resignation from office, former President Zuma took steps to appoint five senior National Prosecuting Authority members as either DPPs or Special DPPs in various National Prosecuting Authority offices. The ap-

²⁹ See MOSALA, I. Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State: Media Statement. In: *Commission of Inquiry into Allegations of State Capture* [online]. 2022-06-18 [cit. 2023-12-08]. Available at: https://www.statecapture.org.za/site/files/announcements/658.

³⁰ See SINGH, K. and T. PILLAY. What to Do with the Offenders? Unpacking South Africa's State Capture Amnesty Debate. *New Agenda* [online]. 2022, vol. 86, no. 1, p. 21 [cit. 2023-12-08]. ISSN 1607-2820. Available at: https://www.ajol.info/index.php/na/article/view/252783.

³¹ See SINGH, K. and T. PILLAY. What to Do with the Offenders? Unpacking South Africa's State Capture Amnesty Debate. *New Agenda* [online]. 2022, vol. 86, no. 1, p. 21 [cit. 2023-12-08]. ISSN 1607-2820. Available at: https://www.ajol.info/index.php/na/article/view/252783.

³² See Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22.



pointments were recorded in official Presidential Minutes, all dated 1 February 2018. The news appears to have reached certain appointees, but, [...], not directly through former President Zuma or his office. The appointments were not announced to the public. On 14 February 2018, former President Zuma resigned from office and President Ramaphosa assumed office. [...] During March 2019, [...], President Ramaphosa decided to revoke, amongst others, these two appointments."³³

The alleged appointments had reached the aggrieved parties through unsolicited advice from the then National Director of Public Prosecutions (NDPP), Mr Shaun Abrahams.³⁴ It is worth noting that Mr Abraham's own appointment was also under judicial review and was subsequently declared invalid by the Constitutional Court in Nxasana v. Corruption Watch NPC and Others³⁵ in August 2018. The premature notification to the alleged appointees to the NPA by Mr Abrahams was held to be invalid for the lack of the *functus officio* doctrine, which would have a binding effect on President Ramaphosa as the Successor of the former president.³⁶ This is but one of the illustrations of malicious efforts to control key state institutions by certain individuals. The Zondo Commission concluded its chapter, made evidence available to the public and made recommendations. However, such information's rigour and effectiveness leave much to be desired as the country hopelessly awaits justice. The implementation of some of the Zondo Commission recommendations seems to be very sluggish. This may be attributed to the fact that the existing anticorruption strategies in South Africa are inadequate and therefore exten-

³³ See Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22, paras 6 and 7.

³⁴ See Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22, paras 13 to 16.

³⁵ See Case of Nxasana v. Corruption Watch NPC and Others [2018-08-13]. Judgement of the Constitutional Court of South Africa, 2018, CCT 13/18, para 93. See also Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22, para 14.

³⁶ See Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22, paras 66, 67, 75, 95, 118, 128 and 129.



sive and urgent reforms are necessary.³⁷ It is rather unfortunate that the government does not seem to be registering progress that would culminate in justice being served against those who profited from the abuse of power and state capture.³⁸

2 Prosecution

The prosecution of crimes in the Republic is done by the National Prosecuting Authority (NPA) in terms of section 179 of the Constitution and the National Prosecuting Authority Act.³⁹ The Act gives effect to the Constitution which demands that "there is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament" and which shall discharge its mandate without fear, favour or prejudice.⁴⁰ "The National Prosecuting Authority (NPA) is a special constitutional body that exercises significant public powers in South Africa's democracy but does not fit comfortably within either the judicial or the executive branch of state."⁴¹ South Africans were optimistic that after the findings of the Zondo Commission, the NPA would have registered some successes in holding those who perpetuated activities of state capture responsible. This, however, is yet to be witnessed.

Lauren Kohn, writing for the 2022 Constitutional Court Review, proposes what she terms an "urgent need for a comprehensive, constitutionally informed redress mechanism" to remedy the effects of state capture

³⁷ See PIENAAR, G. and N. BOHLER-MULLER. Implementation of the State Capture Commission Recommendations: An Institutional Perspective on Ethics and Accountability. *New Agenda* [online]. 2023, vol. 90, no. 1, p. 11 [cit. 2023-12-08]. ISSN 1607-2820. Available at: https://www.ajol.info/index.php/na/article/view/257373, see also Post Zondo – The Future of Democracy Colloquium. In: *HSRC – Human Sciences Research Council* [online]. 2023 [cit. 2023-12-08]. Available at: https://hsrc.ac.za/post-zondo-the-future-of-democracy-colloquium/.

³⁸ See PIENAAR, G. and N. BOHLER-MULLER. Implementation of the State Capture Commission Recommendations: An Institutional Perspective on Ethics and Accountability. *New Agenda* [online]. 2023, vol. 90, no. 1, pp. 11-20 [cit. 2023-12-08]. ISSN 1607-2820. Available at: https://www.ajol.info/index.php/na/article/view/257373.

³⁹ See the National Prosecuting Authority Act. These prosecution powers are conferred in terms of section 179(1) of the Constitution read with section 2 of the National Prosecuting Authority Act.

⁴⁰ See section 179(1)(a) and (4) of the Constitution.

⁴¹ See KOHN, L. The National Prosecuting Authority as Part of South Africa's Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. *Constitutional Court Review* [online]. 2022, vol. 12, no. 1, p. 1 [cit. 2023-12-08]. ISSN 2521-5183. Available at: https://doi.org/10.2989/ccr.2022.0001.



in South Africa. 42 This redress mechanism includes a possible establishment of a "fourth branch of state" that would promote accountability and openness as envisaged in the founding provisions of the Constitution.⁴³ She envisages political reforms, such as an amendment to the National Prosecuting Authority Act, that would create non-trial resolutions (NTRs).⁴⁴ This would require significant forms of backing, including civil society backing, political backing and ultimately constitutional amendment as South Africa is still "in a phase of responsive and 'experimental constitutionalism'."45 The NTRs are acclaimed as the best administrative international practices that are an alternative to long criminal trial processes and will assist in recovering fraudulently obtained benefits from corrupt individuals. These NTRs may include deferred trial agreements and would advance accountability for corrupt activities such the state capture. 46 Proposals and ideas such as these are good ways to begin the legislative journey toward an effective prosecution of crimes in the country.

⁴² See KOHN, L. The National Prosecuting Authority as Part of South Africa's Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. *Constitutional Court Review* [online]. 2022, vol. 12, no. 1, p. 3 [cit. 2023-12-08]. ISSN 2521-5183. Available at: https://doi.org/10.2989/ccr.2022.0001.

⁴³ See section 1(d) of the Constitution.

⁴⁴ See KOHN, L. The National Prosecuting Authority as Part of South Africa's Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. *Constitutional Court Review* [online]. 2022, vol. 12, no. 1, p. 1 [cit. 2023-12-08]. ISSN 2521-5183. Available at: https://doi.org/10.2989/ccr.2022.0001.

⁴⁵ See KOHN, L. The National Prosecuting Authority as Part of South Africa's Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. *Constitutional Court Review* [online]. 2022, vol. 12, no. 1, pp. 11-12 [cit. 2023-12-08]. ISSN 2521-5183. Available at: https://doi.org/10.2989/ccr.2022.0001.

^{46 &}quot;For a general definition that covers the expanse of the DPA (as a broad species of nontrial resolution) in the American context see, for example, F. Mazzacuva 'Justifications and Purposes of Negotiated Justice for Corporate Offenders and Non-Prosecution Agreements in the UK and US Systems of Criminal Justice' (2014) 78 Journal of Criminal Law 249, 250: A DPA is a deal between the government and a target corporation [or entity, including a state entity], whereby the former agrees to dismiss a criminal charge, after a given period of time, if the latter fulfils its obligations, which might be, for example: to cooperate with public authorities in their investigations of culpable individuals; to accept its responsibility by acknowledging the acts of its employees; to undertake internal reforms including the introduction of effective compliance programmes and independent monitors; punitive measures (such as penalties, restitution and surrender of ill-gotten financial gains), etc." See KOHN, L. The National Prosecuting Authority as Part of South Africa's Integrity and Accountability Branch and the Related Case for an Anti-Corruption Redress System. Constitutional Court Review [online]. 2022, vol. 12, no. 1, p. 9 [cit. 2023-12-08]. ISSN 2521-5183. Available at: https://doi.org/10.2989/ccr.2022.0001.



The prosecution of crimes in South Africa currently depends on the efficacy of the National Prosecuting Authority, functioning alongside an independent judiciary. For an effective prosecution of crimes, such as those perpetuated under state capture, the NPA must be well-capacitated, strengthened and afforded the institutional integrity it deserves. The role of the National Prosecuting Authority is immense, and it is incumbent upon South Africans to ensure effective mechanisms that guarantee accountability whilst protecting the independence of this institution.⁴⁷ Section 20 of the National Prosecuting Authority Act confers authority on the NPA to institute and conduct prosecution of crimes on behalf of the state. Section 30 further provides that members of the prosecuting authority must exercise their duties without fear, favour or prejudice and no organ of state or any person shall improperly interfere with or obstruct the functioning of this institution.⁴⁸ Notwithstanding these legislative and constitutional promises, interference, and various challenges to the functioning of the NPA have to an extent compromised the integrity of this institution.49

The current status of the NPA exposes it to interference in its functions and compromises its independence and institutional integrity. This may be due to the fact that its national head, the National Director of Public Prosecution (NDPP) is appointed by the President⁵⁰ and power is given to the cabinet minister responsible for the administration of justice to exercise final responsibility over that National Prosecuting of Authority.⁵¹ The status quo is detrimental to the mandate of the NPA and therefore, a fourth branch of government in the form of a National Prosecuting

⁴⁷ See OMAR, J. The NPA's Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 3 [cit. 2023-12-08]. ISSN 2522-6800. Available at: https://doi.org/10.25159/2522-6800/7343.

⁴⁸ See OMAR, J. The NPA's Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 7 [cit. 2023-12-08]. ISSN 2522-6800. Available at: https://doi.org/10.25159/2522-6800/7343, see also section 179 of the Constitution.

⁴⁹ See Case of Mncwabe v. President of the Republic of South Africa and Others; Mathenjwa v. President of the Republic of South Africa and Others [2023-08-24]. Judgement of the Constitutional Court of South Africa, 2023, CCT 102/22; CCT 120/22; and Case of Nxasana v. Corruption Watch NPC and Others [2018-08-13]. Judgement of the Constitutional Court of South Africa, 2018, CCT 13/18.

⁵⁰ "There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of (a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive." See section 179(1)(a) of the Constitution.

⁵¹ See section 179(6) of the Constitution.



Authority that is free from executive control is warranted; a branch that will report directly to parliament through its independent head. This would ensure its functional independence and integrity. This may be the best time to consider the necessary amendments to some parts of section 179 of the Constitution and subsequently to the National Prosecuting Authority Act so as to guarantee an independent prosecuting authority; one that is free of encroachment from members of the executive arm of state.

3 The National Prosecuting Authority with checks and balances

The doctrine of separation of powers with checks and balances is implicit in our constitutional structure. It divides power between the legislature, the executive, and the judiciary. All these three institutions have a clear mandate and independence, subject to the necessary checks and balances. The legislative and executive powers are infused in terms of section 91 of the Constitution, in that members of the executive must be elected from the legislature and no more than two outside the legislature.⁵² These two arms of state are political and interdependent in nature. The third arm, on the other hand, which is the judiciary is an independent non-political institution that must perform its functions impartially without fear, favour or prejudice, subject only to the law and the Constitution.⁵³ This is the Constitutional guarantee for the independence of the judicial authority, subject to some checks and balances entailed in the appointments, security of tenure and removal of judicial officers in terms of the Constitution.⁵⁴ No person or organ of state shall interfere with its functioning,⁵⁵ judicial decisions are final and bind all those to whom they apply. 56 The Chief Justice is an independent head of this third arm of government and is responsible for all judicial functions of the Republic.⁵⁷

The institutional independence of the judiciary culminates in the functional independence of this vital branch of government. This is necessary, for the functional independence and integrity of the National Prosecuting Authority. A fourth branch of government designated for the NPA is long overdue. The phrase that "the prosecuting authority exercis-

⁵² See section 91 of the Constitution.

⁵³ See section 165(2) of the Constitution.

⁵⁴ See sections 174 and 175 which provide for the appointment of judges, section 176 provides for the term of office and remuneration of judges and section 177 provides for removal of judges.

⁵⁵ See section 165(3) of the Constitution.

⁵⁶ See section 165(5) of the Constitution.

⁵⁷ See section 165(6) of the Constitution.



es its functions without fear, favour or prejudice", echoed in both section 179 of the Constitution and section 32 of the National Prosecuting Authority Act is not supported by proper institutional independence assuring mechanisms. This is because of the so-called "inward approach" towards the independence of the NPA, in that the people who prosecute must exercise this function independently and according to their code of conduct. This renders the institutional independence of the NPA possible only if an individual prosecutor acts with integrity.⁵⁸ The current status quo does not guarantee the independence and functional integrity of the NPA that South Africa needs to effectively prosecute crime without fear, favour or prejudice as envisaged in the Constitution.⁵⁹

It has been noted that the NPA's role is quasi-judicial, in that they decide which matters must come to court and this requires the level of independence that is granted to the judiciary as the third arm of state. Therefore, internal accountability measures through the NDPP's office are necessary for an effective implementation of checks and balances that would curtail arbitrary exercise of power within the NPA.⁶⁰ The current

⁵⁸ See OMAR, J. The NPA's Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 9 [cit. 2023-12-08]. ISSN 2522-6800. Available at: https://doi.org/10.25159/2522-6800/7343.

^{59 &}quot;The Court, in re: Certification of the Constitution of the RSA, 1996, had an opportunity to evaluate whether the NPA was sufficiently independent. The challenge brought before the Court was whether the presidential power to appoint the NDPP impacted negatively on institutional independence and infringed the doctrine of separation of powers. The Court was, however, satisfied that the appointment of the NDPP by the President did not compromise the doctrine of separation of powers. The Court found that section 179(4) was tantamount to a 'constitutional guarantee of independence'. Furthermore, the Court noted that the NPA was not part of the judiciary and therefore a strict separation of powers was not required to ensure institutional independence. I argue that a duty to act 'without fear, favour and prejudice' was confused with structural independence. The Court overstated the duty to act without 'fear, favour or prejudice' as signifying the intention to create an independent institution." See OMAR, J. The NPA's Limited Independence and How to Mitigate Political Interference in High-Profile Cases. Southern African Public Law [online]. 2020, vol. 35, no. 2, p. 9 [cit. 2023-12-08]. ISSN 2522-6800. Available at: https://doi.org/10.25159/2522-6800/7343.

^{60 &}quot;In Democratic Alliance v. President of the Republic of South Africa and Others, the Court confirmed that the Constitution requires the NPA to act independently from the executive and that, as such, the NDPP must be viewed as a 'non-political chief executive officer directly appointed by the President'. The office of the NDPP must be 'non-political' and 'non-partisan' and its role is closely related to the function of the judiciary. Yet it lacks the independence clearly provided to the judiciary. Section 165(2) of the Constitution provides that '[t]he courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.' In my view, a failure to mandate structural independence for the NPA has an impact on individual



constitutional arrangement, as far as it relates to the exercise of power by the minister responsible for the administration of justice, compromises the institutional independence and integrity of the NPA.⁶¹ The political arms of government should not have influence, either directly or indirectly, on the decision-making of the National Prosecuting Authority. This is so because "the independence in prosecutorial discretion stems from the fact that the decision should be made based on pure legal criteria".⁶² It is only the will of law that can be applied fairly and to everyone.⁶³

"Thus, there are structural problems, including those related to appointment, removal, ministerial interference, and budgetary constraints, that may allow for political interference in the proper functioning of the NPA. This political interference has manifested in the alleged lack of willingness to prosecute apartheid crimes and the NPA's seeming inertia in prosecuting offences associated with state capture." 64

The National Prosecuting Authority needs structural strengthening through unequivocal legislative mechanisms that will guarantee its independence from political interference.

The status quo at the National Prosecuting Authority leaves a lot to be desired. This is more so with regards to the prosecution of state capture cases as the country is yet to witness such prosecutions. One of the prominent figures accused of state capture crimes Mr Matshela Koko's

prosecutors' ability to perform their functions professionally." See OMAR, J. The NPA's Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 11 [cit. 2023-12-08]. ISSN 2522-6800. Available at: https://doi.org/10.25159/2522-6800/7343.

⁶¹ See OMAR, J. The NPA's Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 17 [cit. 2023-12-08]. ISSN 2522-6800. Available at: https://doi.org/10.25159/2522-6800/7343, see also *Case of Pikoli v. President of the Republic of South Africa and Others* [2009-08-11]. Judgement of the High Court of South Africa, 2009, 8550/09.

⁶² See OMAR, J. The NPA's Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 18 [cit. 2023-12-08]. ISSN 2522-6800. Available at: https://doi.org/10.25159/2522-6800/7343.

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- ⁶⁴ See OMAR, J. The NPA's Limited Independence and How to Mitigate Political Interference in High-Profile Cases. *Southern African Public Law* [online]. 2020, vol. 35, no. 2, p. 20 [cit. 2023-12-08]. ISSN 2522-6800. Available at: https://doi.org/10.25159/2522-6800/7343.



case was struck off from the roll due to unreasonable delays.⁶⁵ This shows how sluggish the nature of these prosecutions has been so far.

4 Investigative Directorates

Section 7 of the National Prosecuting Authority Act provides for the establishment of investigative directorates for the investigation of certain categories of crimes.⁶⁶ The mandate of this section has, however, been tried and tested in South Africa with very disappointing outcomes. From this mandate, the Office for Serious Economic Offences as well as the Investigating Directorate of Serious Economic Offences were established as investigative units within the NPA but due to excessive red tape, they were not much of a success.⁶⁷ Due to this, the National Prosecuting Authority Amendment Act 61 of 2000 was promulgated and established the Directorate of Special Operations, famously known as "the Scorpions".⁶⁸ The Scorpions were hard at work, however, they faced a lot of criticism.

⁶⁵ "Former Eskom interim CEO Matshela Koko, his family and others accused of corruption are breathing a little easier after the Kusile corruption case was struck off the roll, but the National Prosecuting Authority could reinstate charges." See HAWKER, D. NPA's Bungled Matshela Koko Kusile Corruption Case Sounds Alarm Bells over Directorate's Preparedness to Prosecute. In: *Daily Maverick* [online]. 2023-11-25 [cit. 2023-12-08]. Available at: https://www.dailymaverick.co.za/article/2023-11-25-npas-bungled-matshela-koko-kusile-corruption-case-sounds-alarm-bells-over-directorates-preparedness-to-prosecute/.

⁶⁶ See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 118. ISSN 1012-8093.

⁶⁷ See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 119. ISSN 1012-8093.

^{68 &}quot;The Directorate of Special Operations was established in terms of section 7 and 43a of the National Prosecuting Authority Act, read with section 2 of the National Prosecuting Authority Amendment Act 61 of 2000. In terms of section 7 of the National Prosecuting Authority Act, the Directorate was given the power to "investigate, gather, keep and analyse information, institute criminal proceedings related to offences committed in an organised fashion and categories of offences determined by the State President by proclamation". Furthermore, the Directorate had the powers to investigate and carry out any functions incidental to "investigations, gather, keep and analyse information and where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings". In terms of section 30 of the National Prosecuting Authority Act, read with section 14 of the National Prosecuting Authority Amendment Act, the special investigators of the Directorate had the powers as provided for in the Criminal Procedure Act 51 of 1977." See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 119. ISSN 1012-8093.



They were, among other things, criticised for allegedly exceeding their mandate, and political interference in their work and were subjected to investigations. The ultimate investigation was the Khampepe Commission of Inquiry in 2005 which was appointed to investigate, amongst others, the mandate and location of the Directorate of Special Operations.⁶⁹ The Khampepe Commission found, among other things that the Scorpions were constitutional and properly located, however, they exceeded their mandate with the collection of intelligence and there was a lack of oversight over their operations.⁷⁰ In 2008 the Scorpions were dissolved and incorporated into the South African Police Service (SAPS).⁷¹

The incorporation of the Scorpions into the South African Police Service marked a significant departure from locating investigative directorates within the National Prosecuting Authority to SAPS. After the dissolution of the Scorpions, the Directorate for Priority Crime Investigation (DPCI) famously known as the "Hawks" was established in 2009.⁷² In *Glenister v. President of the Republic of South Africa and Others*,⁷³ the Constitutional Court declared legislation that created the Hawks unconstitutional to the extent that it failed to establish the independence of the Hawks. This lack of independence offends the constitutional require-

⁶⁹ See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 121. ISSN 1012-8093, see also KANYEGIRIRE, A. Investigating the Investigators: A Summary of the Khampepe Commission of Inquiry. *SA Crime Quarterly* [online]. 2008, no. 24, pp. 35-40 [cit. 2023-12-08]. ISSN 2413-3108. Available at: https://doi.org/10.17159/2413-3108/2008/v0i24a953.

⁷⁰ See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 122. ISSN 1012-8093.

⁷¹ See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 125. ISSN 1012-8093.

^{72 &}quot;This was done in terms of the National Prosecuting Authority Amendment Bill of 2008 as well as the South African Police Service Amendment Bill of 2008." See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. Acta Criminologica. 2012, vol. 2012, no. 1, p. 125. ISSN 1012-8093.

⁷³ See Case of Glenister v. President of the Republic of South Africa and Others [2011-03-17]. Judgement of the Constitutional Court of South Africa, 2011, CCT 48/10 (hereinafter referred to as "Glenister") cited in MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. Acta Criminologica. 2012, vol. 2012, no. 1, p. 125. ISSN 1012-8093.



ments and renders the Hawks vulnerable to political interference.⁷⁴ The legislature needs to go back to the drawing board and amend the Constitution and the National Prosecuting Authority Act to enable an investigative directorate that is properly located within the NPA and given powers to investigate, collect and analyse intelligence and prosecute crimes independently, without fear, favour, or prejudice.

Conclusions

The South African constitutional democracy needs protection now more than ever before. This will be best achieved through the strengthening of the state institutions that are responsible for upholding the rule of law of the Republic. The National Prosecuting Authority is one such institution and is at the heart of protecting our democracy. The country was headed to the correct path when the scorpions were established but a lot can be learnt from its shortcomings to create a directorate of the same nature with properly defined parameters and oversight. There is a great need for a multidisciplinary prosecutor-orientated investigation that is properly housed within the NPA that would successfully prosecute crimes of such magnitude as those identified in the state capture investigation.

The country has put an emphasis on the commissions of enquiry for far too long and, these commissions, at best, serve as sources of public awareness about matters that infringe on public interests, such as the state capture and corrupt activities that have been taking place in the county. The over-dependence on commissions of enquiry has proven detrimental to our constitutional democracy as the general public seems to be losing hope in the current crime-fighting mechanisms. South Africans need to see justice being done; there needs to be prosecution of crimes such as those perpetuated under the auspice of state capture. This duty lies in the hands of a capable prosecuting authority that will diligently investigate, institute prosecution, and successfully prosecute such crimes.

The judiciary, as the "ultimate guardian of the Constitution",⁷⁵ needs to work alongside a functional prosecuting authority in order for it to de-

⁷⁴ See MONTESH, M. and J. BERNING. A Need for a Single Anti-Corruption Agency in South Africa: A Comparative Study. *Acta Criminologica*. 2012, vol. 2012, no. 1, p. 125. ISSN 1012-8093.

⁷⁵ See *Case of Doctors for Life International v. Speaker of the National Assembly and Others* [2006-08-17]. Judgement of the Constitutional Court of South Africa, 2006, CCT 12/05, para 38.



liver justice to the people. It may be easy for the NPA to charge or institute criminal proceedings but to successfully prosecute them is a tough mountain to climb when such cases have been poorly investigated. This is often the case in matters of state capture, people are arraigned in court, but their cases are eventually struck off from the roll for flimsy reasons.

The writers are of the view that South Africa needs a prosecutororientated investigation as was the case during the times of the scorpions. The best way to achieve this is to amend the National Prosecuting Authority Act to establish an investigative directorate that would be placed within the NPA with clearly defined powers and limitations. This may be attributed to the need for "multi-disciplinary structures, that is, having prosecutors, intelligence operatives or analysts as well as investigators in a team" as envisaged by the Khampepe Commission of Enquiry.⁷⁶ An arrangement such as this would be better placed in a unique fourth branch of government in the form of the National Prosecuting Authority which is headed by the National Directorate of Public Prosecution and reports directly to Parliament. This would guarantee institutional independence for the NPA and exempt it from unwarranted political interference that the prosecuting authority is currently subjected to. The writers do not take away the important work that the Hawks are doing within the South African Police Service, however, their efforts cannot be adequate for the rampant corrupt activities that have been exposed in the Zondo Commission. This inadequacy may also be owing to the lack of political independence as was pointed out by the Constitutional Court in Glenister. Hence the need for a carefully legislated investigative directorate within the NPA is a necessity for justice to prevail amid critical cases such as those contained in the state capture report.

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⁷⁶ See KANYEGIRIRE, A. Investigating the Investigators: A Summary of the Khampepe Commission of Inquiry. *SA Crime Quarterly* [online]. 2008, no. 24, p. 39 [cit. 2023-12-08]. ISSN 2413-3108. Available at: https://doi.org/10.17159/2413-3108/2008/v0i24a953.



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Jurisprudential Analysis of the Right to Life and Dignity: A South African Perspective

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Abstract: The purpose of the study is to analyse the jurisprudence of the right to life and dignity as fundamentally protected rights in a South African perspective since the dawn of democracy and Constitution of 1996 hereafter referred to as the Constitution. This paper argues that South Africa as a state in applying the Bill of Rights and the Constitution might have encroached or applied laws that may have compromised justice in so far as the impact from the decisions of the courts are concerned. This paper will therefore examine how the courts have interpreted the law and the protection of the non derogable rights of life and dignity post constitutional democracy. The democratic government has a duty to reverse apartheid policies that stemmed from colonial laws. Apartheid laws segregated people and rights were clustered, and selectively applied along racial lines with a tiny majority of European-Africans as sole beneficiaries of rights while the African majority wallow in rightlessness. The authors will examine how the state interprets these fundamental principles of the constitution since the dawn of democracy. The authors hope that the arguments presented in this paper would assist in understanding the moral justification of the decisions in human rights cases in South Africa as the courts battle their way into the realisation of especially non derogable rights as set out in the Bill of Rights.

Key Words: Jurisprudence; Human Dignity; Equality; Constitution; Democracy; Bill of Rights; South Africa.

Introduction

"But freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough



just to open the gates of opportunity. All our citizens must have the ability to walk through those gates." Lyndon B. Johnson, *To Fulfill These Rights*, Commencement Address at Howard University, 1965.

This paper will attempt to answer the question as to how the courts have applied the constitutional elements of life and dignity and attempt further to weave such interpretation while focusing on the philosophical underpinnings of South Africa's understanding and application of these fundamental concepts.

This research goes further to suggest damages that ought to accrue to people who at some stage experienced the gruesome acts since the Constitution of 1996 came into existence where courts evoked the principle of life and dignity. Apartheid system was very brutal. Human rights issues only mattered when they adversely affected whites. Courts were run by the South African Constitutional system which was based on the doctrine of parliamentary sovereignty where parliament was supreme to all laws and above all arms of the state. There was no democratic rule. When people stood firmly against human rights violations, the State reacted against the masses, 169 people were killed and 180 injured by police gunfire. In justifying this, this paper will investigate the following incidences post-apartheid and how the courts have grappled with the issues and thus building the jurisprudence protecting life and dignity.

The Constitutional Court delivered a judgement in the case of *S v. Makwanyane and Another* (hereinafter referred to as the "Makwanyane")³ where Makwanyane challenged the constitutionality of the capital punishment in the constitutional dispensation. The Constitutional Court ruled in favour of Makwanyane in that the punishment was cruel and degrading violating the Bill of Rights which respects human dignity and against cruelty. The court decided in favour of Makwanyane due to the new constitutional order which rejected laws that brutalised and diminished respect for human life.⁴ In *President of the Republic of South Africa*

¹ Sharpeville Massacre on the 21 March 1960 occurred because of unarmed blacks who marched against apartheid policies especially the pass laws.

² See FRANKEL, Ph. H. *An Ordinary Atrocity: Sharpeville and Its Massacre*. 1st ed. New Haven: Yale University Press, 2001. 263 p. ISBN 0-300-09178-8.

³ Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94.

⁴ Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 391.



and Another v. Hugo⁵ where Mr Hugo challenged the then President Mandela after signing a Presidential Act which provided a special remission of sentences which was granted to certain categories of prisoners who were mothers with minor children under the age of 12 years. Section 82(1)(k) of the Interim Constitution empowered the President to exercise his rights and pardon mothers with children under the 12 years of age.6 Hugo had a son under the age of 12 years. He decided to challenge the decision on the basis that it discriminated him and his son and cited section 8(1) of the Interim Constitution⁷ and his son according to section 8(2).8 Mr Hugo sought an order declaring the presidential Act unconstitutional and directing the 1st Appellant to correct it in accordance with Interim Constitution. Goldstone I noted that the presidential pardon was not to an individual to correct a miscarriage of justice but to a group to confer an advantage upon them as an act of mercy at a time of historical significance. Our contention is that the mercy should have been applied across the board especially since for the first time in a long time, the South African judicial decisions on constitutional matters were being decided based on new constitutional order. The decision that males play a secondary role somehow discriminated Hugo who at the time was the only surviving parent to the child. Though the constitutional court's decision to pardon mothers was not intended to discriminate, the criteria could have been more open to all persons to give heed to the equality clause in section 8(1) of the Interim Constitution.

In *Harksen v. Lane NO and Others*⁹ where Ms Harksen was insolvent and challenged the constitutionality of certain provisions of the Insolvency Act¹⁰ citing discrimination. Harksen maintained that the provisions¹¹

⁵ Case of President of the Republic of South Africa and Another v. Hugo [1997-04-18]. Judgement of the Constitutional Court of South Africa, 1997, CCT 11/96.

⁶ Case of President of the Republic of South Africa and Another v. Hugo [1997-04-18]. Judgement of the Constitutional Court of South Africa, 1997, CCT 11/96, para 2.

⁷ "Every person shall have the right to equality before the law [...]" *Interim Constitution of the Republic of South Africa Act No. 200* [1993] (hereinafter referred to as the "Interim Constitution"), para 3, section 8(1).

No person shall be unfairly discriminated against directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular, race, gender, sex, ethnic, or social origin, colour, sexual orientation, conscience, belief, culture or language.

⁹ Case of Harksen v. Lane NO and Others [1997-10-07]. Judgement of the Constitutional Court of South Africa, 1997, CCT 9/97.

¹⁰ Insolvency Act No. 24 [1936], section 20(1).

¹¹ Insolvency Act No. 24 [1936], para 8.



unfairly discriminated against insolvent individuals treating them differently from the solvent persons, violating the equality clause which prohibits discrimination on various grounds. ¹² In this case the Court found that the Insolvency Act indeed differentiated between insolvent persons and the solvent. However, the Court held that the differentiation in the end did not amount to unfair discrimination. The court's rationale was premised on a legitimate purpose which aimed at protecting the interests of creditors only and thereby maintaining the integrity financial systems. Despite the court's decision refuting the discrimination, we argue that Harksen's arguments were valid in that the court when referring to the solvent spouse considered it a female. Essentially, the Court wore blinkers in that the category of the property that was acquired by the solvent spouse during marriage referred to section 22 of the Matrimonial Property Act 88 of 1984 and therefore the differentiation is in our view discriminatory on one or more grounds listed in section 9 such as sex.

Similarly, in the case of Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others¹³ the Court decided that section 417 of the Companies Act¹⁴ was unconstitutional and invalid as it forced a person to be summoned to an enquiry to testify and produce documents despite such persons seeking to evoke the privilege against self-incrimination. This section together with section 25(3) of the Constitution violated a person's right to a just and equitable terms of payment to all affected persons. A confirmation of the right to dignity was affirmed by the Constitutional Court in Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others¹⁵ when a couple challenged the constitutionality of section 25(9)(b) of the Aliens Controls Act¹⁶ which provided that a foreign spouse of a South African citizen who wished to secure an immigration permit must be in possession

¹² Constitution of the Republic of South Africa Act No. 108 [1996] (hereinafter referred to as the "Constitution"), section 9 protects people on various grounds, race, gender, sex, ethnic, or social origin, colour, sexual orientation, conscience, belief, culture or language.

¹³ Case of Ferreira v. Levin NO and Others; Vryenhoek and Others v. Powell NO and Others [1995-12-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 5/95, para 28.

¹⁴ Companies Act No. 61 [1973].

¹⁵ Case of Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others [2000-06-07]. Judgement of the Constitutional Court of South Africa, 2000, CCT 35/99, paras 2 and 4.

¹⁶ Aliens Control Act No. 96 [1991].



of a valid temporary residence permit failing which the spouse would have to leave outside South Africa or the South African spouse would have to leave South Africa and accompany the foreign spouse in order to avoid separation or family break up. The applicants challenged its constitutionality and the constitutional Court ruled in favour of the applicants and stated that the provision violated the applicants right to dignity and that the provision was inconsistent with the Constitution.

The Constitutional Court held in Carmichele v. Minister of Safety and *Security* (hereinafter referred to as the "Carmichele")¹⁷ that the State was obliged to protect the human dignity after the applicant stake a claim against the State for delictual liability damages arising from the unlawful omissions by the officers of the state. The applicant was brutally attacked by a man who was awaiting trial for attempted rape. The Constitutional Court found that the state had an obligation in terms section 39(2) in conjunction with section 10 of the Constitution and further that the state is obligated by the Constitution and international law to protect the dignity and security of women and in the circumstances, the police recommendation for the assailant's release could amount to wrongful conduct giving rise to liability. 18 In Freedom of Religion South Africa v. Minister of *Justice and Constitutional Development and Others*¹⁹ the Constitutional Court held that the child had a right to be treated with dignity and protected from any harm or maltreatment.²⁰ The court ruled against chastisement and that it was unconstitutional as it purports violence and abuse, and it is inconsistent with the values which the Constitution and the bill of Rights represent.

By championing to overcome pre-democratic struggles, people anticipate a society that is free of violence or other forms of indignity. The transition into the democratic South Africa that is inclusive of the freedom of all races, transparent in nature, without discrimination and unjust laws, was widely welcomed by the greater society within South Africa

¹⁷ Case of Carmichele v. Minister of Safety and Security [2001-08-16]. Judgement of the Constitutional Court of South Africa, 2001, CCT 48/00.

¹⁸ Case of Carmichele v. Minister of Safety and Security [2001-08-16]. Judgement of the Constitutional Court of South Africa, 2001, CCT 48/00, para 35.

¹⁹ Case of Freedom of Religion South Africa v. Minister of Justice and Constitutional Development and Others [2019-09-18]. Judgement of the Constitutional Court of South Africa, 2019, CCT 320/17.

²⁰ Case of Freedom of Religion South Africa v. Minister of Justice and Constitutional Development and Others [2019-09-18]. Judgement of the Constitutional Court of South Africa, 2019, CCT 320/17, para 43; and section 28(1)(d) of the Constitution.



and beyond its borders. A society that embraces *Ubuntu* and its values as stated in chapter 2 of the Constitution of the Republic of South Africa.

However, the grand expectation of a discrimination and inequality free society developed cracks overtime as injustice and equality rare their ugly heads again and again. One way or the other, the State violates the fundamental rights of the very people it sought to protect. The State ought to play a pertinent role in applying the principles that are aimed at restoring the human dignity and preserving the fundamental right to life enshrined in the Constitution. What we see as a practice is a total opposite of our expectations of a democratic South Africa where clearly the state or its officials fail to protect the people. The case of *Carmichele* is one of many.²¹ In this case the victim was brutally attacked by a convicted rapist who had been let loose by the state albeit the state was warned of the anticipated danger the perpetrator could cause. *Carmichele* would mark the unfolding of the state's incapacity to realise the non derogable rights to life and dignity.

1 South African Courts and the Human Rights imperatives

South African Courts are empowered by the Bill of Rights and the Constitution to heal the scars of the past and help build a liberated society. Amongst its many roles is to enforce law against all human rights violations directed to society and the members of the public.

In Ex Parte Minister of Safety and Security and Others: In Re S v. Walters and Another, ²² Kriegler J made a point about the nature of law in our democratic dispensation. After referring with approval to an observation made by the United States Supreme Court and by Langa J in Makwanyane²³ that the government is the "potent, omnipresent teacher" and that for "good or for ill, it teaches the whole people by its example". ²⁴ Kriegler J stated:

²¹ See *Case of Carmichele v. Minister of Safety and Security* [2001-08-16]. Judgement of the Constitutional Court of South Africa, 2001, CCT 48/00.

²² Case of Ex Parte Minister of Safety and Security and Others: In Re S v. Walters and Another [2002-05-21]. Judgement of the Constitutional Court of South Africa, 2002, CCT 28/01, para 6.

²³ In paragraph 222, Langa J had written: "Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For Good or for worse, the State is a role model for our society."

²⁴ Case of Olmstead v. United States [1928-06-04]. Opinion of the Supreme Court of the United States, 1928, 277 U.S. 438, p. 485.



"We have a history of violence – personal, political and institutional. Our country is still disfigured by violence, not only in the dramatic form of murder, rape and robbery but more mundanely in our homes and on our roads. This is inconsistent with the ideals proclaimed by the Constitution. The State is called upon to set an example of measured, rational, reasonable and proportionate responses to antisocial conduct and should never be seen to condone, let alone to promote, excessive violence against transgressors. Its role in our violent society is rather to demonstrate that we are serious about the human rights the Constitution guarantees for everyone, even suspected criminals. An enactment that authorises police officers in the performance of their public duties to use force where it may not be necessary or reasonably proportionate is therefore both socially undesirable and constitutionally impermissible." ²⁵

The new democratic order brought hope to the masses. It was expected that the new government of National Unity would be an explicit transformation: the notion that the South African state and society would change fundamentally if South Africa was to move away from racism, autocracy, poverty, and inequality that characterised the apartheid era. Courts would treat every human being with dignity and honour embracing every person's constitutional rights. One of the court's role and mandate, amongst many others is to make sure of the acceleration of democracy, advancement, and enforcement of the Constitution. Kriegler J believes that role of promoting a culture of respect for human life and dignity lies with the state. He took the view that:

"Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new

²⁵ Case of Ex Parte Minister of Safety and Security and Others: In Re S v. Walters and Another [2002-05-21]. Judgement of the Constitutional Court of South Africa, 2002, CCT 28/01, para 47.

²⁶ Reflections on Democracy and Human Rights: A Decade of the South African Constitution (Act 108 of 1996) [online]. 1st ed. Johannesburg: South African Human Rights Commission, 2006. 203 p. [cit. 2024-02-29]. ISBN 0-620-36364-9. Available at: https://www.sahrc.org. za/home/21/files/Reports/Reflection%20of%20democracy%20and%20human%20righ ts 10%20year%20review %20200.pdf.

²⁷ Legislative and Other Mandate. In: *The South African Judiciary* [online]. 2024 [cit. 2024-02-29]. Available at: https://www.judiciary.org.za/index.php/ocj/legislative-and-other-mandate.



context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society. A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead. In acting out this role, the State not only preaches respect for the law and that the killing must stop, but it demonstrates in the best way possible, by example, society's own regard for human life and dignity by refusing to destroy that of the criminal. Those who are inclined to kill need to be told why it is wrong. The reason surely must be the principle that the value of human life is inestimable, and it is a value which the State must uphold by example as well."²⁸

Brandeis I was quoted as saying:

"Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."²⁹

The State is compelled to preserve human life consequent to their deeds, law does not allow retribution. Brennan J in *Furman v. Georgia*³⁰ expresses these sentiments:

"[...] even the vilest criminal remains a human being possessed of common human dignity."³¹

Section 7(2) of the 1996 Constitution bears similar view with Kantian philosophy and ruling on rights and their reciprocal duties. Fletcher reflected that Human dignity shall be inviolable and concluded that: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." 32

²⁸ Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 222.

²⁹ Brandies J was quoted in a dissenting opinion in *Case of Olmstead v. United States* [1928-06-04]. Opinion of the Supreme Court of the United States, 1928, 277 U.S. 438.

³⁰ Case of Furman v. Georgia [1972-06-29]. Opinion of the Supreme Court of the United States, 1972, 408 U.S. 238, pp. 290-291 (Brennan | concurring).

³¹ Case of Furman v. Georgia [1972-06-29]. Opinion of the Supreme Court of the United States, 1972, 408 U.S. 238, p. 273.

³² FLETCHER, G. P. Human Dignity as a Constitutional Value. *University of Western Ontario Law Review*. 1984, vol. 22, no. 2, p. 178. ISSN 0703-900X.



This order by the Constitution was also confirmed in the case of *Carmichele v. Minister of Safety and Security*³³ regarding parallel operations of the Bill of Rights. Human dignity as one of the founding values of the Constitution is reflected in many judgments like that of *Makwanyane* among others, including when Chief Justice Chaskalson said:

"The affirmation of [inherent] human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the Second World War." ³⁴

In the same token, Kantian ruling puts an emphasis but not only on human dignity alone. The ruling also encompasses the inviolable inherent and intrinsic worth³⁵ or values of everyone. Kantian ruling suggests that the worth of a person has no price, admits of no substitute, cannot be traded off for anything in the world.³⁶

Ackermann J elucidates Kant's philosophy with respect to "intrinsic worth" and he quotes:

"On the highest level, dignity is a quality of worth or excellence, and when used in the compound term 'human dignity,' it suggests all that for Kant is inherent in the human 'personhood' of every human being." ³⁷

Similarly, Judge Sachs affirms the idea in Sv. Lawrence:

³³ Case of Carmichele v. Minister of Safety and Security [2001-08-16]. Judgement of the Constitutional Court of South Africa, 2001, CCT 48/00.

³⁴ CHASKALSON, A. The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order. *South African Journal on Human Rights* [online]. 2000, vol. 16, no. 2, pp. 193-205 [cit. 2024-02-29]. ISSN 1996-2126. Available at: https://doi.org/10.1080/02587203.2000.11827594.

³⁵ Human dignity and human worth are interchangeable expressions according to Kantian philosophy. Hence, the reference "intrinsic and worth".

³⁶ WALDRON, J. The Dignity of Groups. Acta Juridica. 2008, vol. 2008, no. 1, pp. 66-90. ISSN 0065-1346.

³⁷ ACKERMANN, L. W. H. The Legal Nature of the South African Constitutional Revolution. New Zealand Law Review. 2004, no. 4, pp. 633-679. ISSN 1173-5864; and KLAAREN, J. The Constitutionalist Concept of Justice L Ackermann: Evolution by Revolution. In: N. BOHLER-MULLER, M. COSSER and G. PIENAAR, eds. Making the Road by Walking: The Evolution of the South African Constitution [online]. 1st ed. Pretoria: Pretoria University Law Press (PULP), 2018, pp. 27-43 [cit. 2024-02-29]. ISBN 978-1-920538-75-0. Available at: https://www.pulp.up.ac.za/images/pulp/books/legal_dialogues/making_the_road_by_walking/Chapter%202%20Making%20the%20Road.pdf.

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"Indeed, there is a core to the individual conscience so intrinsic to the dignity of the human personality that it is difficult to imagine any factors whatsoever that could justify its being penetrated by the state." 38

Former Chief Justice Pius Langa links the appreciation of the Individual's dignity's respect for his community:

"Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement." ³⁹

Equitably, the Constitutional Court in National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others (hereinafter referred to as the "National Coalition for Gay and Lesbian Equality")40 confirmed the interrelatedness between dignity and equality when it found that the criminal offence of sodomy did not only unfairly discriminate against gay men, however, in addition, LGBT males face disproportionate and discriminatory treatment. This unfair discrimination was destructive to their dignity, since it stigmatised them as criminals plainly because they seek to engage in sexual conduct which is part of their experience as human being.⁴¹ This direct act of discrimination is amongst the grounds listed as a right under section 9(3) of the Constitution. Section 9(4) of the Constitution states clearly that no person may unfairly be discriminate directly or indirectly against anyone one or more grounds as listed in section 9(3). It continues that Legislation must prevent and prohibit unfair discrimination. In this landmark judgement, the court found that criminalisation of sodomy violated gay men's right to equality as it unfairly discriminated against them on those grounds listed in the equality clause, sexual orientation. The court emphasised that the right to

³⁸ Case of S v. Lawrence [1997-10-06]. Judgement of the Constitutional Court of South Africa, 1997, CCT 38/96, para 168.

³⁹ Case of MEC for Education: KwaZulu-Natal and Others v. Pillay [2007-10-05]. Judgement of the Constitutional Court of South Africa, 2007, CCT 51/06, para 53.

⁴⁰ Case of National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others [1998-10-09]. Judgement of the Constitutional Court of South Africa, 1998, CCT 11/98.

⁴¹ Case of National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others [1998-10-09]. Judgement of the Constitutional Court of South Africa, 1998, CCT 11/98, para 28.



dignity was a cornerstone of our Constitution⁴² which played a part in equality analysis, and therefore, the criminalisation of sodomy successfully takes away from gay men their dignity and self-worth by labelling them deviant for acts which formed a great part of their identity, and which were committed in private. Consequently, the court found the crime not only as a breach of equality but also as a breach of dignity and privacy. Sachs J acutely describes the connection between dignity and equality:

"At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group. [...] To penalise people for being what they are is profoundly disrespectful of the human personality and violatory of equality."

Pre-constitutional era was an anti-black racist era characterised by laws with no regard to human rights. Hence O'Regan J agreed with Chaskalson J in that the death penalty constituted a violation of section 11(2) of the Constitution of the Republic which could not be saved by the section 36 limitation clause. The judge held further that the punishment also violated the rights to human life and human dignity.⁴⁴ O'Regan J referred to the right to life as being "antecedent" to all other rights in the Constitution, as without life no other rights could be exercised. She advanced this view describing her interpretation of the content to the right to life.

"It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. [...] The right to life, thus understood, incorporates the right to dignity. So the rights to human dignity and life

⁴² Case of National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others [1998-10-09]. Judgement of the Constitutional Court of South Africa, 1998, CCT 11/98, para 20.

⁴³ Case of National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others [1998-10-09]. Judgement of the Constitutional Court of South Africa, 1998, CCT 11/98, para 129.

⁴⁴ Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 318.

⁴⁵ Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 326.



are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity." $^{\rm 46}$

She stated that respect for dignity is especially important given South Africa's history of a "denial of a common humanity".⁴⁷ She confirms the nature of dignity as being inherent in all human beings, thus rejecting outrightly the argument that criminals relinquish their right to be treated with dignity upon committing a crime.⁴⁸ O'Regan J concluded that the death penalty was a breach of the rights to life and dignity. Not only that but she also described the process in gruesome detail and found it to be a breach of dignity. She argued that dignity was infringed during the time spent on death row awaiting execution.⁴⁹ After carefully looking at the limitation clause under section 36 of the Constitution. O'Regan J emphasised that:

Death penalty was an unjustifiable infringement of the rights in section 11(2) which says that "No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment", section 9, equality clause, 9(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(2) Equality includes the full and equal enjoyment of all rights and freedoms, 9(3) which clearly states the specified grounds of prohibited discrimination and section 10, human dignity "Everyone has inherent dignity and the right to have their dignity respected and protected".⁵⁰

In *Makwanyane* the Constitutional Court dealt with the distinction of an issue which saw the court heavily criticised on its decision. In a minority judgement O'Regan and Sachs JJ clenched on the view that a prosti-

⁴⁶ Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 326.

⁴⁷ Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 329.

⁴⁸ Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 331.

⁴⁹ Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 336.

⁵⁰ Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 327 which is the interpretation sections 9 and 10 of the Constitution. Look at this footnote, it doesn't read nice.



tute's dignity was reduced due to her conduct that commercialises her as a commodity due to a law which criminalises the conduct of the prostitute and not that of her client. Criminalising the act of prostitution was unfair since it excluded the patronage to the services. They are quoted:

"The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished [...] by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body."51

In this instance, the Court used the immanent dignity measure to help protect dignity in painful and unexpected situations, as well as to put an end to treating condemned people as objects to be legally punished. The Bill of Rights is clear on the rights of all human beings and the courts are empowered to enforce the rights imposed on natural and juristic persons by the Constitution. In *Makwanyane* the Court held that from this the third respondent has failed to accord the applicant the dignity inherently forthcoming to him.⁵²

2 Protection of Victims of Crime and administration of justice

Before the commencement of the constitutional state, the greater population had no rights to be protected. Black people were subjected to all kinds of humiliation and torture. The transition that was initiated by the Constitution of the Republic presented opportunities for the recognition of the wrongs and the correction of apartheid disparities. The new systems nullified the laws that discriminated people on grounds of race, sex, or their origin. The right to human dignity and equality is guaranteed under the new constitutional order and the Bill of Rights.

The State protects life by preventing murders and where life has been taken, punishing a perpetrator is a must. The State is obligated to deploy the police to prevent crime and not to end people's lives.⁵³ The

⁵¹Case of S v. Jordan and Others [2002-10-09]. Judgement of the Constitutional Court of South Africa, 2002, CCT 31/01, para 74.

⁵² Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa, 1995, CCT 3/94, para 26 (Chaskalson J).

⁵³ South African Police Service Act No. 68 [1995], see also Case of Rail Commuters Action Group and Others v. Transnet Ltd t/a Metrorail and Others [2004-11-26]. Judgement of the Constitutional Court of South Africa, 2004, CCT 56/03.



Marikana killings therefore reflects an absence of clarity within the South African Police Service on questions of principle regarding the use of force. The case of *Sivuka & 328 Others v. Ramaphosa and Others*⁵⁴ reveals the lack of clarity for the SAPS. In his judgement delivered on 30 June 2022 Van Jooste J elucidated that the police tactical response unit shot and killed 34 striking workers and seriously wounded and arrested many others who were part of the peaceful gathering on public land at Marikana. While this was a peaceful gathering as allowed by the Gatherings Act⁵⁵ as well as section 17 of the Constitution, police shot and killed unarmed workers leaving many of them wounded. South African citizens anticipated a more protective government through state police in the democratic era. However, to the contrary, they are not sure if that is the case since the Sharpeville massacre especially considering the Marikana tragedy in 2012.

It is very clear that the principles governing SAPS members caused the unfortunate incident at Marikana. Indeed, this research echo the words by Council for the Advancement of the South African Constitution that (hereinafter referred to as the "CASAC"),⁵⁶ "the South African government has also tended to use 'talking tough on crime' in response to calls by citizens for 'something to be done about crime' or the complaint that 'in South Africa, criminals have more rights than their victims'."⁵⁷ Ackerman J has explained that, in the constitutional scheme of the new South Africa, human dignity itself is not conferred, but rather accepted categorically as an attribute of humankind.⁵⁸ However, certain constraints on people like the Marikana miners' strike as deeply inconsistent or dissonant with the respect they are due. O'Regan J asserts:

"The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human be-

⁵⁴ Case of Sivuka & 328 Others v. Ramaphosa and Others [2022-06-30]. Judgement of the High Court of South Africa, 2022, 36879/2015.

⁵⁵ Gatherings Act No. 205 [1993].

⁵⁶ Council for the Advancement of the South African Constitution (CASAC).

⁵⁷ Submission by CASAC to the Marikana Commission of Inquiry: The Role of the South African Police Service in the Marikana Massacre on 16 August 2012 [online]. 1st ed. Cape Town: Council for the Advancement of the South African Constitution, 2013, p. 7 [cit. 2024-02-29]. Available at: http://www.casac.org.za/wp-content/uploads/2016/11/CASAC-submission-to-Marikana-Commission.pdf.

⁵⁸ ACKERMANN, L. W. H. The Legal Nature of the South African Constitutional Revolution. New Zealand Law Review. 2004, no. 4, pp. 643-647. ISSN 1173-5864.



ings: human beings are entitled to be treated as worthy of respect and concern." 59

Ackerman J concurring in *National Coalition for Gay and Lesbian Equality* said:

"Dignity is a difficult concept to capture in precise terms. At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society." 60

Marikana tragedy explicitly illustrate the underlying relational concept of human dignity at work. The decision in the Minister of Health and Others v. Treatment Action Campaign and Others (hereinafter referred to as the "Treatment Action Campaign")61 confirmed the significance of one's dignity when the state was asked to provide a relatively cheap or affordable anti-retroviral drug (Nevirapine)⁶² to citizens afflicted by the pandemic. The manufacturers of the treatment, Nevirapine had offered to make it available to the South African government free of charge for a period of five years. The treatment was for the purposes of reducing the risk of mother-to child transmission of HIV.⁶³ In the case of *Ngomane and* Others v. City of Johannesburg Metropolitan Municipality and Another⁶⁴ for example, the court dealt with the destruction and confiscation of the property of a group of homeless people living under the bridge in the city of Johannesburg. After it was found that the removal and destruction of their personal effects was an arbitrary deprivation of their right to privacy as per section 14(c) of the Constitution, which included the right not to have the property seized, the Court ordered compensation. The Court

⁵⁹ Case of S v. Makwanyane and Another [1995-06-06]. Judgement of the Constitutional Court of South Africa. 1995. CCT 3/94. para 328.

⁶⁰ Case of National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others [1998-10-09]. Judgement of the Constitutional Court of South Africa, 1998, CCT 11/98, para 28.

⁶¹ Case of Minister of Health and Others v. Treatment Action Campaign and Others (No. 2) [2002-07-05], Judgement of the Constitutional Court of South Africa, 2002, CCT 8/02.

⁶² Case of Minister of Health and Others v. Treatment Action Campaign and Others (No. 2) [2002-07-05]. Judgement of the Constitutional Court of South Africa, 2002, CCT 8/02, para 19, read with paras 71 and 80.

⁶³ Case of Minister of Health and Others v. Treatment Action Campaign and Others (No. 2) [2002-07-05]. Judgement of the Constitutional Court of South Africa, 2002, CCT 8/02, para 19, read with paras 71 and 80.

⁶⁴ Case of Ngomane and Others v. City of Johannesburg Metropolitan Municipality and Another [2019-04-03]. Judgement of the Supreme Court of Appeal of South Africa, 2019, 734/ 2017.



ruled that the City of Johannesburg could have used other appropriate remedies at its disposal to assist in the applicant's desperate circumstances in an effort not to deter his human dignity. The conduct of the City of Johannesburg was unconstitutional. Equally, in Mr. Qolani case, 65 the Court directed the City of Cape Town to return all building materials seized by the Anti-Land Invasion Unit (ALIU) between the period of 1 May 2020 till the 25 August 2020 which was the date when the order was granted. Article 22 of the Universal Declaration echoes:

"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

In an *orbiter dictum* Zondo J (as he then was)⁶⁷ repeat this principle when he wrote a dissenting judgment in the case of *Malan v. City of Cape Town*:

"Having a home is very important to the dignity of any person."68

The State has that compelling duty to take rational decision and provide reasonable steps to allow the lessee to correct a breach in lease agreement before applying for an eviction order. Similarly, Constitution⁶⁹ approved that socio-economic rights can be protected by courts even though they may not fully be conditional on legislation. In the case of *Government of the Republic of South Africa and Others v. Grootboom and Others* (hereinafter referred to as the "Grootboom"),⁷⁰ the Court elucidated specifically that for the state to be reasonable, it must be directed at protecting applicant's human dignity:

⁶⁵ Naked Man Eviction Case: Officers Cleared of Misconduct Charges, Court Hears. In: News24 [online]. 2021-10-13 [cit. 2024-02-29]. Available at: https://www.news24.com/news24/southafrica/news/naked-man-eviction-case-officers-cleared-of-misconduct-charges-court-hears-20211013.

⁶⁶ Universal Declaration of Human Rights [1948-12-10].

⁶⁷ Case of Malan v. City of Cape Town [2014-09-18]. Judgement of the Constitutional Court of South Africa, 2014, CCT 143/13.

⁶⁸ Case of Malan v. City of Cape Town [2014-09-18]. Judgement of the Constitutional Court of South Africa, 2014. CCT 143/13, para 127.

⁶⁹ Rights include access to land (section 25 of the Constitution), housing (section 26), health care, food, water, social security (section 27) and education (section 29).

⁷⁰ Case of Government of the Republic of South Africa and Others v. Grootboom and Others [2000-10-04]. Judgement of the Constitutional Court of South Africa, 2000, CCT 11/00.



"It is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings."

The above jurisprudential onslaught notwithstanding, the philosophical driver underpinning the right to life and dignity in South Africa remains the principle of *Ubuntu* which is translated to mean "I am what I am because of who we all are", it simply implies humanity to others. *Ubuntu* was expressly referred to in the 1993 Interim Constitution but not in the 1996 Constitution. However, *Ubuntu* is implied in the 1996 Constitution by its frequent reference to human dignity and forms part of the emerging South African and African jurisprudence.

Conclusions

In review of its efforts, this paper highlighted the drive by the judicial system in South Africa to realise the fundamental ambition of the Constitution of 1996 by advancing the non-derogable rights to life and human dignity post-apartheid. While judiciary's effort has registered its own controversy and its stride is a work in progress and is still going to be for time, the totality of its ambition in consonance with other branches of government is to help heal the wounds of more than three centuries of human indignity of the African majority from colonialism, apartheid, and serious economic and social dispossession.

Violations of the right to life and human dignity poses a danger to the very Constitution and the rule of law we ought to respect and protect in post-apartheid South Africa. The philosophy that underpins the right to life and dignity in South Africa is rooted in the deeper understanding that human dignity cannot be distinguished from human existence and that

⁷¹ Case of Government of the Republic of South Africa and Others v. Grootboom and Others [2000-10-04]. Judgement of the Constitutional Court of South Africa, 2000, CCT 11/00, para 83.



such inalienable right rest on the soul of every mortal regardless of their race, culture, and national origin (*Ubuntu*).

The landmark cases discussed above from *Carmichele, National Coalition for Gay and Lesbian Equality, Makwanyane, Treatment Action Campaign* to *Grootboom* and others cited in this paper, it is evident that the judiciary has helped situate the right to life and human dignity at the center of human rights jurisprudence in South Africa as the struggle continue to realise most of the rights encapsulated in the Bill of Rights steeped in the African philosophy of *Ubuntu*.

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Analýza pojmov objektívnej stránky usmrtenia a kulpózneho ublíženia na zdraví¹

Analysis of the Concepts of the Objective Aspect of Homicide and Culpable Bodily Harm

Erik Ploth Stanislav Mihálik

Abstract: In the paper, the authors focus on the analysis of the objective aspect of the crime of homicide and culpable bodily harm with an emphasis on the caused consequence. In addition to the traditional approaches to the interpretation of relevant concepts, they focus their attention on interpretative problems occurring in application practice, while also pointing out possible ways of solving them. Finally, special attention is paid to the process of imputation of special qualifying terms (circumstances conditioning the application of a higher penalty rate), the authors point out the need to avoid application duality in the process of imputation of these features, i.e. to proceed in accordance with the substantive line of the ne bis in idem principle.

Key Words: Criminal Law; Offences against Life and Health; Homicide; Culpable Bodily Harm; Health Worker; lege artis Procedure; the Slovak Republic.

Abstrakt: Autori sa v príspevku zameriavajú na analýzu objektívnej stránky trestného činu usmrtenia a kulpózneho ublíženia na zdraví s dôrazom na spôsobený následok. Okrem tradičných prístupov k výkladu relevantných pojmov sústreďujú svoju pozornosť na výkladové problémy vyskytujúce sa v aplikačnej praxi, pričom poukazujú aj na možné spôsoby ich riešenia. Napokon je osobitným spôsobom venovaná pozornosť procesu pričítavania osobitných kvalifikačných pojmov (okolnostiam podmieňujúcim použitie vyššej trestnej sadzby), autori poukazujú na potrebu vyhýbania sa aplikačnej dualite v procese pričítavania týchto znakov, teda na postup v súlade s hmotnoprávnou líniou zásady ne bis in idem.

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¹ Táto práca bola podporená Agentúrou na podporu výskumu a vývoja na základe Zmluvy č. APVV-19-0102 "Efektívnosť prípravného konania – skúmanie, hodnotenie, kritériá a vplyv legislatívnych zmien", zodpovedný riešiteľ prof. JUDr. Jozef Čentéš, PhD.



Kľúčové slová: Trestné právo; trestné činy proti životu a zdraviu; usmrtenie; kulpózne ublíženie na zdraví; zdravotnícky pracovník; postup lege artis; Slovenská republika.

Úvod

Problematika trestných činov proti životu a zdraviu predstavuje v podmienkach trestného práva jednu z najprepracovanejších tém, či už hovoríme o línii doktrinálnej alebo línii aplikačnej, a i napriek tomu, že by sa uvedená oblasť poznania mohla javiť ako nemenná a vedecky vyčerpaná, nie je tomu tak. Ako naznačuje predkladaný príspevok, osobitnú a prakticky neustálu pozornosť je potrebné venovať menovite objektívnej stránke predmetnej skupiny trestných činov, s dôrazom na spôsobený následok. Vychádzame totiž z faktu, že v danom prípade disponuje relevanciou nielen poznávanie vývoja biologických javov (čím je v zmysle medicínskych poznatkov ovplyvnený napríklad i postup, ktorý je vnímaný ako *lege artis*), ale aj vlastné preklápanie medicínskych poznatkov do oblasti práva. Osobitnou otázkou potom je, ako naznačujeme v predkladanom príspevku, či by malo právo (s dôrazom na trestné právo) medicínske poznatky a pojmológiu preberať alebo funkčne modifikovať. Úlohu v konečnom dôsledku zohráva aj postavenie trestného práva ako prostriedku ultima ratio.

Príspevok nadväzuje na článok jedného zo spoluautorov, v ktorom analyzoval znaky skutkovej podstaty trestného činu usmrtenia podľa § 149 a ublíženia na zdraví podľa § 157 a § 158 zákona č. 300/2005 Z.z. Trestný zákon v znení neskorších predpisov (ďalej len "Trestný zákon"), príznačných pre oblasť zdravotníctva – pri nesprávne poskytnutej zdravotnej starostlivosti.²

1 Objektívna stránka trestného činu usmrtenia a kulpózneho ublíženia na zdraví s dôrazom na pojmológiu viažucu sa na následok

V prvom rade sa zameriame na pojmy vymedzujúce následok predmetných trestných činov. Hoci Trestný zákon obsahuje legálnu definíciu *smrti*, ktorá je následkom aj v prípade prečinu usmrtenia, k výkladu pojmu smrť existuje polemika z dôvodu jeho neprecíznosti. Jeho vyjadrenie

² PLOTH, E. Analýza znakov skutkovej podstaty trestného činu usmrtenia a kulpózneho ublíženia na zdraví. *Comenius odborný blog* [online]. 2024-03-05 [cit. 2024-03-06]. ISSN 2644-5581. Dostupné na: https://comeniusblog.flaw.uniba.sk/2024/03/05/analyza-zna-kov-skutkovej-podstaty-trestneho-cinu-usmrtenia-a-kulpozneho-ublizenia-na-zdravi/.



v Trestnom zákone je "biologická smrť mozgu (cerebrálna smrť)."³ Menej dôležité nenáležité začlenenie definície smrti do výkladu osobitných kvalifikačných pojmov v druhom diele piatej hlavy všeobecnej časti Trestného zákona je len málo významnou nepresnosťou, ktorá "neberie výkladu pojmu smrť jeho všeobecný výkladový charakter pre celý Trestný zákon."4 Ide o termín vyskytujúci sa v mnohých základných skutkových podstatách, nepoužíva sa iba ako kvalifikačný pojem, preto by bolo jeho zaradenie vhodnejšie do prvého dielu príslušnej hlavy Trestného zákona – všeobecné pojmy.⁵ Významnou je však jeho obsahová náplň. Kým zákonodarca definoval smrť zloženým výrazom "biologická smrť mozgu", súdne lekárstvo takýto pojem nepozná a rozlišuje medzi smrťou biologickou a mozgovou smrťou ako určitými etapami, respektíve kategóriami smrti. Pri mozgovej smrti dochádza k nezvratnému poškodeniu mozgu, vyhasnutiu všetkých jeho funkcií, pričom pri biologickej smrti, po vymiznutí prejavov izolovaného prežívania orgánov, sa hovorí o tzv. totálnej smrti (začína sa rozvoj posmrtných zmien).6 Hoci ide o trvalé a nezvratné situácie (na rozdiel od klinickej smrti, ktorú za smrť podľa Trestného zákona nemožno považovať), rozdiely medzi nimi sú evidentné a nemožno ich zlučovať. Pri doslovnej aplikácii by mohol byť za súčasnej právnej úpravy vyslovený absurdný záver, že pre naplnenie znaku smrti "by bol potrebný biologický rozvrat vnútorných štruktúr mozgu."8 Definíciu smrti preto možno považovať za zmätočnú a nekonzistentnú s poznatkami medicíny. pričom by mohla vyústiť aj do kontroverzných trestnoprávnych polemík.⁹ Hoci v aplikačnej praxi nie je zaznamenaný výkladový problém,

³ § 142 odsek 2 Trestného zákona.

⁴ E. Burda v BURDA, E., J. ČENTÉŠ, J. KOLESÁR, J. ZÁHORA, et al. Trestný zákon: Všeobecná časť: Komentár: I. diel. 1. vyd. Praha: C. H. Beck, 2010, s. 1071. ISBN 978-80-7400-324-0.

⁵ E. Burda v BURDA, E., J. ČENTÉŠ, J. KOLESÁR, J. ZÁHORA, et al. Trestný zákon: Všeobecná časť: Komentár: I. diel. 1. vyd. Praha: C. H. Beck, 2010, s. 1071. ISBN 978-80-7400-324-0.

⁶ DOGOŠI, M. a S. NEČAS. Soudní lékařství. 1. vyd. Bratislava; Žilina: Bratislavská vysoká škola práva; Poradca podnikateľa, 2008, s. 11-12. ISBN 978-80-89363-15-5.

⁷ Stav klinickej smrti, kedy môže byť obnovená činnosť krvného obehu alebo dýchania, nie je smrťou v zmysle následku predpokladaného Trestným zákonom, avšak môžu sa s ňou spájať trestnoprávne konotácie, napríklad s ohľadom na pokus trestného činu vraždy alebo úkladnej vraždy.

⁸ LACIAKOVÁ, L. a N. MORAVANSKÝ. Definícia smrti v Trestnom zákone a význam konzistencie medicínskych pojmov v trestnom práve. In: V. MARKOVÁ, ed. Aktuálne otázky trestného práva v teórii a praxi. 1. vyd. Bratislava: Akadémia Policajného zboru v Bratislave, Katedra trestného práva, 2016, s. 174. ISBN 978-80-8054-682-3.

⁹ Lucia Laciaková s Norbertom Moravanským uvádzajú ako príklad situáciu v súvislosti s transplantáciou orgánu od zomrelého darcu, pričom by nedošlo k biologickej smrti mozgu, polemizujú o naplnení conditio sine qua non – smrťou osoby, a s tým súvisiacim



vymedzenie smrti by bolo vhodné *pro futuro* z hľadiska precíznosti právneho predpisu prepracovať a zosúladiť s medicínskou terminológiou.

Následky trestného činu ublíženia na zdraví sa líšia vo forme závažnosti spôsobenej ujmy na zdraví - § 157 ťažká ujma na zdraví a § 158 ublíženie na zdraví (Trestný zákon). Pri posudzovaní, o aký následok trestného činu ide, je nevyhnutné, aby lekár v lekárskej správe, prípadne v závislosti od zložitosti prípadu znalec v znaleckom posudku, eventuálne v odbornom vyjadrení, čo najpresnejšie popísal spôsobené zranenie a jeho vplyv na spôsob života poškodeného a následky zranenia. ¹⁰ *Ujma na* zdraví, hoci sa v skutkovej podstate týchto trestných činov doslovne neuvádza, s vyjadrenými následkami priamo súvisí. Rozumie sa ňou "akékoľvek poškodenie zdravia iného, "11 teda ide o najširší pojem, ktorý v sebe zahŕňa spôsobenie ťažkej ujmy na zdraví, ublíženia na zdraví a iného poškodenia zdravia, ktoré nedosahuje intenzitu ublíženia na zdraví. Zároveň by však nemalo ísť o také poškodenie, ktoré je iba nepatrné a prechodné. 12 Ak osoba spôsobí inej osobe ujmu na zdraví v tom najmenej závažnom ponímaní (kedy nedosahuje intenzitu ublíženia na zdraví), nejde o trestný čin, no tento pojem sa v niekoľkých prípadoch vyskytuje ako znak skutkovej podstaty trestného činu. ¹³ *Ublížením na zdraví* je "poškodenie zdravia iného, ktoré si objektívne vyžiadalo lekárske vyšetrenie. ošetrenie alebo liečenie, počas ktorého bol nie iba na krátky čas sťažený obvyklý spôsob života poškodeného. "14 Legálnu definíciu možno rozdeliť na tri časti, pričom:

 a) poškodením zdravia iného rozumieme negatívny zásah do zdravotného stavu iného;

trestným činom neoprávneného odoberania orgánov, tkanív a buniek podľa § 159 Trestného zákona. Bližšie pozri LACIAKOVÁ, L. a N. MORAVANSKÝ. Definícia smrti v Trestnom zákone a význam konzistencie medicínskych pojmov v trestnom práve. In: V. MARKOVÁ, ed. *Aktuálne otázky trestného práva v teórii a praxi.* 1. vyd. Bratislava: Akadémia Policajného zboru v Bratislave, Katedra trestného práva, 2016, s. 175. ISBN 978-80-8054-682-3.

¹⁰ KÁDEK, P. Trestné právo v zdravotníctve. 3. dopln. a aktualiz. vyd. Bratislava: Wolters Kluwer, 2018, s. 68. ISBN 978-80-8168-920-8.

^{11 § 123} odsek 1 Trestného zákona.

¹² MENCEROVÁ, I. Ublíženie na zdraví – nesúlad názvu trestného činu a obsahu skutkových podstát. In: M. VRÁBLOVÁ, ed. *Trestnoprávne súvislosti ochrany života a zdravia*. 1. vyd. Praha: Leges. 2018. s. 117. ISBN 978-80-7502-313-1.

¹³ Napríklad pri trestnom čine neposkytnutia pomoci podľa § 178 Trestného zákona, brania rukojemníka podľa § 185 Trestného zákona, vydieračského únosu podľa § 186 Trestného zákona či teroru podľa § 314 Trestného zákona.

^{14 § 123} odsek 2 Trestného zákona.



- b) toto poškodenie vyvolalo potrebu lekárskej intervencie, ktorá nebola podnietená iba subjektívnym pocitom poškodeného, ale bola nevyhnutná pri zachovaní postupu lege artis; a napokon
- c) sťaženie obvyklého spôsobu života nie iba na krátky čas, ktorého vyjadrenie je bližšie obsiahnuté najmä v ustálenej rozhodovacej praxi, je ako obdobie najmenej 7 dní. ¹⁵ Uvedený časový údaj však nie je absolútny a nemenný; pri aplikácii je dôležité zvážiť všetky okolnosti poruchy zdravia a skutočnosť, ako narušila život poškodeného. ¹⁶ Pre posúdenie naplnenia znaku ublíženia na zdraví je však irelevantné, ak poškodený vykonával prácu z vlastného rozhodnutia napriek zraneniu, a nie je ani nevyhnutné, aby bol poškodený aj skutočne práceneschopný, ¹⁷ vzhľadom na zamestnania, pri ktorých pohyb nie je potrebný, prípadne pri práci z domu. ¹⁸

Ťažkú ujmu na zdraví definuje § 123 odsek 3 Trestného zákona ako vážnu poruchu zdravia alebo vážne ochorenie, ktorou je:

- a) zmrzačenie nemenný chorobný stav, značná zmena časti tela (tvarová alebo funkčná). V prípadoch amputácií časti tela možno hovoriť o zmrzačení pri amputácii aspoň zápästia ruky a pri dolných končatinách v súvislosti s amputáciou nad členkom;¹⁹
- b) *strata alebo podstatné zníženie pracovnej spôsobilosti* trvalý chorobný stav, pracovná nespôsobilosť o viac ako 50 %;²⁰
- c) ochromenie údu trvalá neschopnosť, prípadne znížená schopnosť hybnosti končatiny (dolnej či hornej), pričom nestačí iba zníženie hybnosti niekoľkých prstov. Teória nie je vzhľadom na judikatúru²¹ zjednotená v otázke poruchy zdravia spočívajúcej vo vyradení ruky v zápästí,²² či toto možno považovať za ochromenie údu, no takú si-

¹⁵ Stanovisko Nejvyššího soudu Československé socialistické republiky ze dne 31. 10. 1985, sp. zn. Tpjf 24/85; R 16/1986.

¹⁶ I. Mencerová a L. Tobiášová v MENCEROVÁ, I., M. KAČÁNI, J. KLÁTIK, M. KRNÁČ, L. TO-BIÁŠOVÁ, Y. TURAYOVÁ a M. VALENT. Trestné právo hmotné: Osobitná časť. 2. aktualiz. a preprac. vyd. Šamorín: Heuréka, 2018, s. 52. ISBN 978-80-8173-057-3.

¹⁷ Uznesenie Najvyššieho súdu Slovenskej republiky zo dňa 15. 6. 2017, sp. zn. 5Tdo/30/2017.

¹⁸ A. Beleš a L. Kurilovská v STRÉMY, T., L. KURILOVSKÁ, et al. *Trestný zákon: Komentár: Zväzok I.* 1. vyd. Praha: Wolters Kluwer, 2022, s. 692. ISBN 978-80-7676-429-3.

¹⁹ Rozsudok Krajského súdu v Košiciach zo dňa 3. 10. 2019, sp. zn. 7To/89/2019.

²⁰ Stanovisko Nejvyššího soudu Československé socialistické republiky ze dne 2. 7. 1965, sp. zn. Pls 5/65; R II/1965.

²¹ Stanovisko Nejvyššího soudu Československé socialistické republiky ze dne 2. 7. 1965, sp. zn. Pls 5/65; R II/1965.

²² Porovnaj E. Burda v BURDA, E., J. ČENTÉŠ, J. KOLESÁR, J. ZÁHORA, et al. *Trestný zákon: Všeobecná časť: Komentár: I. diel.* 1. vyd. Praha: C. H. Beck, 2010, s. 791. ISBN 978-80-



- tuáciu bude možné posúdiť ako zníženie pracovnej spôsobilosti, preto znak ťažkej ujmy na zdraví bude aj pri obdobných prípadoch pravdepodobne naplnený;
- d) strata alebo podstatné oslabenie funkcie zmyslového ústrojenstva poškodenie orgánov zraku, sluchu, hmatu, čuchu alebo chuti;
- e) poškodenie dôležitého orgánu vznik nebezpečenstva pre život osoby alebo iného zásadného dlhodobého následku zapríčineného poruchou telesného orgánu (prípadne viacerých telesných orgánov) významného charakteru, napríklad pomliaždenie mozgu, poranenie srdca, pečene, obličiek, a tak ďalej;
- f) zohyzdenie estetická zmena na tele poškodeného dôvodiaca sťaženie jeho spoločenského uplatnenia, najmä jazvy v tvárovej oblasti či deformita nosa, ucha. O zohyzdenie ide, aj keď je poškodenie možné odstrániť (napríklad plastickou operáciou), no, na druhej strane, nemôže ísť o vady ľahko odstrániteľné jednoduchým zákrokom (strata niekoľkých zubov):²³
- g) vyvolanie potratu alebo usmrtenie plodu konaním páchateľa dôjde k ukončeniu gravidity ženy v rozpore so zákonom. Tento pojem však nebude naplnený pri kvalifikovaných skutkových podstatách trestných činov nedovoleného prerušenia tehotenstva podľa § 150 odsek 3, § 151 odsek 2 písmeno a) a § 152 odsek 4 Trestného zákona, vzhľadom na jeho obsiahnutie v základnej skutkovej podstate daných ustanovení;
- h) mučivé útrapy stav neznesiteľnej bolesti. Môže ísť o dlhšie trvajúcu znesiteľnú bolesť, alebo síce len o krátku dobu trvajúcu, ale bolesť neznesiteľnú.²4 Zaradiť sem možno napríklad spôsobovanie bolesti horiacou cigaretou, elektrickými šokmi či nadmieru hlasným zvukom.²5 Pri posúdení, či ide o mučivé útrapy alebo o menej závažné bolesti sprevádzajúce poškodenie zdravia, je nutné brať na zreteľ pomery poškodeného;²6

^{7400-324-0;} a KÁDEK, P. *Trestné právo v zdravotníctve*. 3. dopln. a aktualiz. vyd. Bratislava: Wolters Kluwer, 2018, s. 70. ISBN 978-80-8168-920-8.

²³ E. Burda v BURDA, E., J. ČENTÉŠ, J. KOLESÁR, J. ZÁHORA, et al. *Trestný zákon: Všeobecná časť: Komentár: I. diel.* 1. vyd. Praha: C. H. Beck, 2010, s. 793. ISBN 978-80-7400-324-0.

²⁴ Stanovisko Nejvyššího soudu České socialistické republiky ze dne 18. 8. 1972, sp. zn. 5 To 18/72; R 31/1973.

²⁵ O. Samaš v SAMAŠ, O., H. STIFFEL a P. TOMAN. *Trestný zákon: Stručný komentár*. 1. vyd. Bratislava: Iura Edition, 2006, s. 259. ISBN 80-8078-078-1.

²⁶ A. Beleš a L. Kurilovská v STRÉMY, T., L. KURILOVSKÁ, et al. *Trestný zákon: Komentár: Zväzok I.* 1. vyd. Praha: Wolters Kluwer, 2022, s. 699. ISBN 978-80-7676-429-3.



porucha zdravia trvajúca dlhší čas – jediný pojem z definičných znai) kov ťažkej ujmy na zdraví, ktorý Trestný zákon výslovne uvádza: "... porucha, ktorá si objektívne vyžiadala liečenie, prípadne aj pracovnú neschopnosť, v trvaní najmenej štyridsaťdva kalendárnych dní, počas ktorých závažne ovplyvňovala obvyklý spôsob života poškodeného."27 Definícia pripomína vymedzenie ublíženia na zdraví vyššie, avšak musí pri ňom dôjsť k "závažnému ovplyvneniu" života poškodeného. na rozdiel od jeho "sťaženia" pri ublížení na zdraví. Najmarkantnejším rozdielom je zákonné vymedzenie doby, po ktorú má byť poškodený na spôsobe života obmedzený - najmenej 42 dní (kalendárnych), ktoré taktiež vyplývajú z ustálenej judikatúry, ²⁸ no, na rozdiel od ublíženia na zdraví, zákonodarca sa rozhodol túto dobu zakomponovať priamo do zákonného ustanovenia. Rovnako ako pri ublížení na zdraví môže byť poškodený aj práceneschopný, pričom nejde o nevyhnutnú podmienku, aj vzhľadom na formuláciu "prípadne aj pracovnú neschopnosť". Ako poruchu zdravia trvajúcu dlhší čas možno posudzovať i ostatné vyššie vymedzené poruchy zdravia, ktorých následky, spočiatku sa javiace ako trvalé, bolo možné odstrániť liečbou, rehabilitáciou, a podobne.

Už zo základného načrtnutia jednotlivých pojmov ťažkej ujmy, uvedeného vyššie, jasne vyplýva, že jednotlivé pojmy sa môžu v mnohých prípadoch prekrývať či splývať, najmä pri spôsobení početnejších zranení. Za takýchto okolností je podľa ustálenej judikatúry potrebné charakterizovať tie najpodstatnejšie, najväčšej závažnosti, pričom na ostatné sa len poukáže. Pri určovaní škodlivého následku je tiež vzhľadom na jednotlivé pojmy nevyhnutné prihliadať na osobu poškodeného, vek, predchádzajúce zranenia či životný štýl a prácu, pretože nie všetky znaky vplývajú na rôzne osoby rovnako.

2 K osobitným kvalifikačným pojmom

Závažnejší spôsob konania a chránená osoba sú pojmy kvalifikovaných skutkových podstát v druhých odsekoch (§ 149 a § 157 Trestného záko-

^{27 § 123} odsek 4 Trestného zákona.

²⁸ Rozhodnutí Nejvyššího soudu Československé socialistické republiky ze dne 18. 10. 1968, sp. zn. 7 Tz 64/68; R 18/1969.

²⁹ Stanovisko Nejvyššího soudu Československé socialistické republiky ze dne 2. 7. 1965, sp. zn. Pls 5/65; R II/1965.

³⁰ Nemožno porovnávať spôsobenie rovnakého následku za rôznych okolností, napríklad spôsobenie jazvy na tele modelky v porovnaní so spôsobením jazvy vrhačovi nožov, ktorý už trebárs aj niekoľko jaziev na tvári vzhľadom na svoje povolanie má.



na). Ide o osobitné kvalifikačné pojmy v zmysle § 138 a § 139 Trestného zákona. Pre úsek zdravotníctva je významné priblížiť iba závažnejší spôsob konania podľa § 138 písmeno h) Trestného zákona – "porušením dôležitej povinnosti vyplývajúcej z páchateľovho zamestnania, postavenia alebo funkcie alebo uloženej mu podľa zákona." Každé zlyhanie zdravotníka, ktorým bude spôsobená smrť alebo ťažká ujma na zdraví, za predpokladu preukázania zavinenia, bude posudzované v kvalifikovanej skutkovej podstate vzhľadom na citované ustanovenie. V prípade zdravotníckeho pracovníka – zamestnanca zdravotníckeho zariadenia bude naplnenie kvalifikačného pojmu bez výkladových problémov, nakoľko pri porušení postupu lege artis pôide o porušenie dôležitej povinnosti vyplývajúcej z jeho zamestnania. Uvedený znak nápadne pripomína tiež objektívnu stránku ublíženia na zdraví podľa § 158 Trestného zákona, avšak predmetné ustanovenie je doplnené o pojem "povolanie". To je širší pojem ako zamestnanie, pričom zahŕňa "aktivity, ktoré sú zdrojom obživy a ktoré nie sú vykonávané v postavení zamestnanca. "31 Možno sem zaradiť aj výkon advokácie, lekársku činnosť či iné podnikateľské aktivity. Zdravotnícky pracovník, pokiaľ by vykonával lekárske povolanie inak ako v zamestnaneckom vzťahu (či už ako fyzická osoba - podnikateľ alebo prostredníctvom na to zriadenej obchodnej spoločnosti), by teda nespadal do kvalifikačného pojmu podľa § 138 písmeno h) Trestného zákona -"porušením dôležitej povinnosti vyplývajúcej z jeho zamestnania." Títo zdravotnícki pracovníci sú však v zmysle § 4 zákona č. 578/2004 Z.z. o poskytovateľoch zdravotnej starostlivosti, zdravotníckych pracovníkoch, stavovských organizáciách v zdravotníctve a o zmene a doplnení niektorých zákonov v znení neskorších predpisov poskytovateľmi zdravotnej starostlivosti, preto sa na nich vzťahuje zákonná povinnosť poskytnúť zdravotnú starostlivosť správne.32 Vzhľadom na uvedené, aj zdravotníci bez zamestnaneckého vzťahu naplnia kvalifikačný pojem závažnejším spôsobom konania, nakoľko v prípadoch zavinenej ujmy na zdraví dôjde k porušeniu ich povinností vyplývajúcich zo zákona.

Vo vzťahu k pojmu *chránená osoba* je potrebné uviesť, že tento pojem je obvyklý pri úmyselných trestných činoch. Vo vzťahu ku kulpóz-

³¹ E. Burda v BURDA, E., J. ČENTÉŠ, J. KOLESÁR, J. ZÁHORA, et al. Trestný zákon: Osobitná časť: Komentár: II. diel. 1. vvd. Praha: C. H. Beck. 2011. s. 153. ISBN 978-80-7400-394-3.

³² § 4 odsek 3 prvá veta Zákona č. 576/2004 Z.z. o zdravotnej starostlivosti, službách súvisiacich s poskytovaním zdravotnej starostlivosti a o zmene a doplnení niektorých zákonov v znení neskorších predpisov: "Poskytovateľ je povinný poskytovať zdravotnú starostlivosť správne."



nym trestným činom by musel byť skutok spáchaný spôsobom, že páchateľ zanedbá takú osobitnú povinnosť, ktorá sa špeciálne viaže na chránenú osobu (napríklad pri zanedbaní rodičovských práv dôjde k spôsobeniu ťažkej ujmy na zdraví ich maloletého dieťaťa).³³ Kvalifikačný pojem však nebude vždy naplnený na úseku zdravotníctva. Možno sa stotožniť s názorom, že v prípade zanedbania zdravotnej starostlivosti nebude konanie lekára postihované s kvalifikáciou "na chránenej osobe", pretože povinnosti súvisiace s výkonom lekárskei činnosti sa vzťahujú všeobecne na všetkých ľudí, nielen na ochranu zdravia chorých, a preto nebude daný súvis so stavom či vekom chránenej osoby.³⁴ Na druhej strane možno v praxi badať nedodržiavanie uvedenej teórie a porušovanie i zásady ne bis in idem (v hmotnoprávnom ponímaní), keď v dôsledku lekárovho nesprávneho postupu došlo k vnútromaternicovému úmrtiu plodu poškodenej a jeho konanie bolo kvalifikované ako prečin ublíženia na zdraví podľa § 157 odsek 1. odsek 2 písmeno a), písmeno b) Trestného zákona s poukazom na § 138 písmeno h) a § 139 odsek 1 písmeno b) Trestného zákona.³⁵ Pri kvalifikácii došlo k pochybeniu, keď došlo k dvojitému pričítaniu – spôsobenie ťažkej ujmy na zdraví v zmysle § 123 odsek 3 písmeno g) Trestného zákona – vyvolanie potratu alebo usmrtenie plodu, a zároveň spáchanie skutku na chránenej osobe podľa § 139 odsek 1 písmeno b) – na tehotnej žene. Správna kvalifikácia mala preto znieť: prečin ublíženia na zdraví podľa § 157 odsek 1. odsek 2 písmeno a) Trestného zákona s poukazom na § 138 písmeno h) Trestného zákona.

Zvyšné rozoberané pojmy sú obsiahnuté v ďalších odsekoch trestného činu usmrtenia podľa § 149 Trestného zákona. Tieto pojmy sa zväčša spájajú s trestnou činnosťou na úseku cestnej premávky, no nie sú vylúčené ani iné oblasti, vrátane úseku zdravotníctva. V treťom odseku je to hrubé porušenie predpisov o bezpečnosti práce alebo dopravy alebo hygienických predpisov. Porušenie predpisov predpokladá aj kvalifikačný pojem závažnejší spôsob konania podľa § 138 písmeno h) Trestného zákona vymedzený vyššie. Základným rozdielom medzi nimi je, že v prípade § 149 odsek 3 Trestného zákona sa vyžaduje hrubé porušenie predpisov, teda musí ísť o závažnejší spôsob porušenia vyplývajúcich povinností,

³³ E. Burda v BURDA, E., J. ČENTÉŠ, J. KOLESÁR, J. ZÁHORA, et al. *Trestný zákon: Všeobecná časť: Komentár: I. diel.* 1. vyd. Praha: C. H. Beck, 2010, s. 1060. ISBN 978-80-7400-324-0.

E. Burda v BURDA, E., J. ČENTÉŠ, J. KOLESÁR, J. ZÁHORA, et al. Trestný zákon: Všeobecná časť: Komentár: I. diel. 1. vyd. Praha: C. H. Beck, 2010, s. 1060. ISBN 978-80-7400-324-0.
 Uznesenie Okresného súdu Košice II zo dňa 10. 2. 2023, sp. zn. 5T/44/2021.



než ako predpokladá § 138 písmeno h) Trestného zákona.³⁶ Zároveň musí ísť o porušenie predpisov v špecifických sférach, ktoré sú v ustanovení uvedené.³⁷ Okrem toho sa objektívna stránka prečinu usmrtenia podľa § 149 odsek 1, odsek 2 písmeno a) s poukazom na § 138 písmeno h) Trestného zákona a prečinu usmrtenia podľa § 149 odsek 1, odsek 3 Trestného zákona rozlišuje v tom, že v druhom prípade sa vyžaduje spôsobenie smrti dvom alebo viacerým osobám.³⁸ Konanie v štvrtom a piatom odseku sa vyznačuje výkonom činnosti v súvislosti s páchateľovým zamestnaním, povolaním, postavením alebo funkciou alebo páchateľom ako vodičom dopravného prostriedku, čo v mnohom opäť odkazuje na § 138 písmeno h) Trestného zákona, pričom sa žiada doplniť, že vodičom dopravného prostriedku sa rozumie vodič prostriedku cestnej premávky. koľajovej, vzdušnej, lodnej či inej premávky, ktorý je určený na prepravu osôb.39 V danom prípade (opäť v komparácii s § 138 písmeno h) Trestného zákona) sa však vyžaduje stav vylučujúci spôsobilosť privodený vplyvom návykovej látky (z hľadiska aplikačného či už absolútny alebo relatívny) ako ďalšia súčasť objektívnej stránky posledných dvoch odsekov trestného činu usmrtenia. Všeobecne možno hovoriť o okolnostiach znemožňujúcich bezpečný výkon určitej činnosti, pričom môže dôjsť k ohrozeniu života, zdravia alebo majetku. 40 Tento stav musí byť vyvolaný požitím návykovej látky, napríklad alkoholu, omamných, psychotropných či iných látok spôsobilých nepriaznivo ovplyvniť psychiku človeka, jeho ovládacie alebo rozpoznávacie schopnosti, alebo sociálne správanie.⁴¹ Preto sem nebude možné zaradiť napríklad nikotín, vzhľadom na skutočnosť, že tento síce môže vyvolávať u ľudí závislosť, no iným spôsobom nevie ovplyvniť psychiku človeka, a teda nemožno tu hovoriť o návykovej látke v zmysle zákonnej definície. 42 Pri určovaní stavu vylučujúceho spô-

³⁶ E. Burda v BURDA, E., J. ČENTÉŠ, J. KOLESÁR, J. ZÁHORA, et al. *Trestný zákon: Osobitná časť: Komentár: II. diel.* 1. vyd. Praha: C. H. Beck, 2011, s. 80. ISBN 978-80-7400-394-3.

³⁷ K demonštratívnemu výpočtu predpisov porovnaj E. Burda v BURDA, E., J. ČENTÉŠ, J. KO-LESÁR, J. ZÁHORA, et al. *Trestný zákon: Osobitná časť: Komentár: II. diel.* 1. vyd. Praha: C. H. Beck, 2011, s. 77-80. ISBN 978-80-7400-394-3.

 $^{^{38}}$ Pojem viaceré osoby má v zmysle § 127 odsek 12 Trestného zákona legálne zakotvenie, pričom sa ním rozumejú najmenej tri osoby.

³⁹ L. Kurilovská a L. Szabo v STRÉMY, T., L. KURILOVSKÁ, et al. *Trestný zákon: Komentár: Zväzok II*. 1. vyd. Praha: Wolters Kluwer, 2022, s. 55. ISBN 978-80-7676-534-4.

⁴⁰ M. Prokeinová v BURDA, E., J. ČENTÉŠ, J. KOLESÁR, J. ZÁHORA, et al. *Trestný zákon: Osobitná časť: Komentár: II. diel.* 1. vyd. Praha: C. H. Beck, 2011, s. 930. ISBN 978-80-7400-394-3.

^{41 § 130} odsek 5 Trestného zákona.

⁴² E. Burda v BURDA, E., J. ČENTÉŠ, J. KOLESÁR, J. ZÁHORA, et al. *Trestný zákon: Všeobecná časť: Komentár: I. diel.* 1. vyd. Praha: C. H. Beck, 2010, s. 968. ISBN 978-80-7400-324-0.



sobilosť po požití alkoholu sa vychádza z ustálenej judikatúry, podľa ktorej sa vyžaduje hladina alkoholu v krvi aspoň 1 g/kg (1 ‰). V teórii trestného práva sa možno stretnúť s úvahami, že táto hodnota sa rovná 0,4762 mg/l etanolu vo vydychovanom vzduchu, pričom Peter Kováč a Eva Kresl upozorňujú, že toto predstavuje nepochopenie vzťahu medzi jednotlivými koncentráciami, pretože na uvedený prepočet môže vplývať viacero faktorov, ako sú ochorenia, fyzická aktivita, a podobne. 43 Zároveň ie potrebné uviesť, že hoci je hladina jedného promile v praxi akceptovaná, nemožno vylúčiť, že aj nižšia hladina alkoholu v krvi môže jednotlivcov priviesť do stavu vylučujúceho spôsobilosť viesť motorové vozidlo. a tým založiť trestnú zodpovednosť, 44 t.j. relatívny stav vylučujúci spôsobilosť. V takom prípade by sa však vyžadovalo znalecké posúdenie danej skutočnosti. To je nevyhnutné aj pri iných návykových látkach ako alkohole. Kým v Českej republike Najvyšší súd Českej republiky v roku 2020 judikoval najnižšie koncentrácie THC, metamfetamínu, amfetamínu, MDMA, MDA, kokaínu a morfínu pre ustálenie stavu vylučujúceho spôsobilosť, 45 toto nemôže byť aplikovateľné v aplikačnej praxi orgánov Slovenskej republiky a je nevyhnutné znalecké skúmanie. 46

Záver

Z hľadiska záverov predkladaného príspevku možno poukázať hneď na niekoľko okolností. Vo vzťahu k záveru všeobecnému možno v prvom rade nesporne konštatovať, že výkladový aparát Trestného zákona (osobitne v prípade pojmov, ktorých legálna definícia nie je v Trestnom zákone obsiahnutá) je prvkom dynamickým, podliehajúcim zmenám. V oblasti trestných činov proti životu a zdraviu to platí špeciálne (s ohľadom na vnímanie konceptu postupu *lege artis*). Prípustný posun vo výklade jednotlivých pojmov je potom spôsobený nielen vývojom prostredníctvom prístupov aplikačnej praxe, ale aj výrazným blanketovým charakterom Trestného zákona.

Osobitné závery rozvedieme minimálne v dvoch rovinách. Tou prvou je občasná terminologická neprecíznosť ustanovení Trestného zákona,

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⁴³ P. Kováč a E. Kresl v STRÉMY, T., L. KURILOVSKÁ, et al. *Trestný zákon: Komentár: Zväzok II*. 1. vvd. Praha: Wolters Kluwer, 2022, s. 864. ISBN 978-80-7676-534-4.

⁴⁴ Rozhodnutí Nejvyššího soudu Československé socialistické republiky ze dne 22. 12. 1984, sp. zn. Plsf 2/84; R 12/1985.

⁴⁵ Rozhodnutí Nejvyššího soudu České republiky ze dne 21. 10. 2020, sp. zn. Tpjn 300/2020; R 2/2020.

⁴⁶ Uznesenie Krajského súdu v Trenčíne zo dňa 8. 8. 2022, sp. zn. 2To/43/2022.



pričom ako príklad sme pracovali s pojmom "biologická smrť mozgu". Hoci ide o pojem zaužívaný (z hľadiska trestnoprávnej terminológie), predstavuje nezmysel s ohľadom na medicínske poznatky. Reálny dopad je však ten, že takto nastavený terminologický aparát by nás mohol priviesť k záverom v rovine *ad absurdum*, čo, pochopiteľne, nespadá do rozsahu funkcií trestného práva.

Druhou líniou príspevku, s ohľadom na špecifické závery, je pohľad na kvalifikačné znaky viažuce sa na pre nás predmetné trestné činy. Okrem základného výkladu naviazaného napríklad na pričítavanie pojmu chránená osoba je potrebné upriamiť pozornosť na popis vylúčenia kvalifikačného rámca niektorých z okolností podmieňujúcich použitie vyššej trestnej sadzby, a to s ohľadom na § 38 ods. 1 Trestného zákona. Na uvedené poukazujeme osobitne s ohľadom na časté nerešpektovanie tejto zásady v podmienkach slovenskej aplikačnej praxe.

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Zákon č. 578/2004 Z.z. o poskytovateľoch zdravotnej starostlivosti, zdravotníckych pracovníkoch, stavovských organizáciách v zdravotníctve a o zmene a doplnení niektorých zákonov v znení neskorších predpisov.

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Yours faithfully,

Team SOCIETAS ET IURISPRUDENTIA



Etický kódex

Článok I. Všeobecné ustanovenia

Medzinárodný internetový vedecký časopis SOCIETAS ET IURISPRU-DENTIA (ďalej len "časopis") vydáva Právnická fakulta Trnavskej univerzity v Trnave a tematicky sa zameriava najmä na spoločensky významné prierezové súvislosti otázok verejného práva a súkromného práva na národnej, nadnárodnej, ako aj medzinárodnej úrovni. Jeho cieľom je poskytovať podnetnú a inšpiratívnu platformu pre vedecké a celospoločensky prínosné riešenia aktuálnych právnych otázok a ich komunikáciu na úrovni najmä odbornej právnickej, ale aj zainteresovanej širokej občianskej verejnosti v kontexte ich najširších interdisciplinárnych spoločenských súvislostí, a to nielen na národnej, ale aj na regionálnej a medzinárodnej úrovni.

Redakcia časopisu sídli v priestoroch Právnickej fakulty Trnavskej univerzity v Trnave na Kollárovej ulici č. 10 v Trnave.

Časopis má charakter vedeckého recenzovaného časopisu, ktorý vychádza v on-line elektronickej podobe pravidelne štyrikrát ročne na oficiálnej webovej stránke časopisu https://sei.iuridica.truni.sk. Publikovanie textov príspevkov sa uskutočňuje v dvojjazyčnej slovensko-anglickej štandardizovanej hlavičkovej šablóne časopisu, a to súčasne v podobe kompletných verzií jednotlivých čísiel, ako i samostatných autorských separátov uverejnených v zodpovedajúcich rubrikách na webovej stránke časopisu.

Časopis ponúka podnetnú a inšpiratívnu platformu pre komunikáciu na úrovni odbornej právnickej aj občianskej verejnosti, a rovnako aj pre vedecké a celospoločensky prínosné riešenia aktuálnych otázok z oblastí najmä verejného práva a súkromného práva.

Webová stránka časopisu ponúka čitateľskej verejnosti informácie v bežnom grafickom rozhraní, a súbežne aj v grafickom rozhraní Blind Friendly pre slabozrakých čitateľov paralelne v slovenskom a anglickom jazyku. V uvedených jazykoch zabezpečuje redakcia časopisu aj spätnú komunikáciu.

Článok II. Zodpovednosť a publikácia príspevkov

Časopis prijíma a publikuje výhradne iba pôvodné, doposiaľ nepublikované príspevky, ktoré sú vlastným dielom autorov, ktorí ich na uverejne-



nie v časopise predkladajú. Autori príspevkov vedecky či pedagogicky pôsobia v zodpovedajúcich oblastiach zamerania časopisu a majú ukončené zodpovedajúce akademické vzdelanie na úrovni minimálne druhého stupňa vysokoškolského štúdia.

V súlade s vyššie uvedeným ustanovením sa automaticky so zodpovedajúcim odôvodnením zamietajú príspevky už preukázateľne publikované, ako aj príspevky, ktoré napĺňajú skutkovú podstatu plagiátu či neoprávneného, respektíve nezákonného zásahu do autorského práva podľa autorského zákona v platnom znení.

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Zodpovednosť za dodržanie všetkých nevyhnutných predpokladov a požiadaviek kladených na príspevky publikované v časopise nesú odborní garanti z radov členov redakčnej rady a redakčného okruhu časopisu zodpovedajúci za konkrétne prierezové sekcie vo vzťahu k vedeckej stránke príspevkov, hlavný redaktor vo vzťahu k formálnej stránke príspevkov a výkonný redaktor vo vzťahu k uplatneniu metodologických, analytických a štatistických otázok v príspevkoch.

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Článok III. Recenzné konanie

Posudzovanie zaradenia príspevkov na publikáciu v časopise sa uskutočňuje nezávisle a nestranne na základe obojstranne anonymného recenzného konania zaisťovaného členmi redakčnej rady časopisu a v odôvodnených prípadoch tiež uznávanými odborníkmi pôsobiacimi v zodpovedajúcich oblastiach.

Na recenzné konanie môžu byť odovzdané len príspevky obsahujúce všetky povinné súčasti v súlade s predpísanou štruktúrou príspevku. Pred odovzdaním príspevkov na recenzné konanie sa formálne preveruje pôvodnosť textov kontrolami náhodne vybraných reťazcov textov príspevkov prostredníctvom internetových vyhľadávačov.

Zápis o výsledkoch recenzného konania sa vykonáva a archivuje na štandardizovaných formulároch.

Súhrnnú informáciu o výsledku recenzného konania, spolu s usmernením ohľadom ďalšieho postupu, obdržia predkladatelia príspevkov prostredníctvom e-mailovej odpovede bezodkladne po doručení vyhotovených recenzných posudkov redakcii časopisu a záverečnom posúdení výsledkov recenzného konania redakčnou radou.

Príspevky sa so zodpovedajúcim písomným odôvodnením automaticky zamietajú v prípadoch, pokiaľ:

- autor príspevku preukázateľne nemá ukončené úplné vysokoškolské vzdelanie, t.j. vysokoškolské vzdelanie druhého stupňa;
- ➡ príspevok preukázateľne nezodpovedá minimálnym štandardom a štandardným kritériám vedeckej etiky, ktoré sa kladú a sú všeobecne vedeckou verejnosťou a vedeckou obcou uznávané vo vzťahu k príspevkom danej kategórie (štúdie, eseje, recenzie publikácií, informácie alebo správy), či už z hľadiska rozsahu, náplne, metodologických východísk, použitej metodológie, a podobne, ako aj z hľadiska správneho, úplného a vedecky korektného uvádzania všetkých použitých bibliografických odkazov podľa platnej citačnej normy ISO 690.

Článok IV. Vyhlásenie o pristúpení ku kódexom a zásadám publikačnej etiky Komisie pre publikačnú etiku

Časopis v plnej miere uplatňuje a dodržiava kódexy a zásady publikačnej etiky Komisie pre publikačnú etiku (Committee on Publication Ethics (COPE)) zverejnené na webovej stránke Komisie pre publikačnú etiku



https://publicationethics.org/. Uvedené zásady a pravidlá publikačnej etiky sú záväzné pre autorov príspevkov, redakčnú radu časopisu, redaktorov a redakciu časopisu, recenzentov príspevkov, ako aj vydavateľa časopisu.

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Redaktori a redakčná rada časopisu aktívne vyvíjajú všetko úsilie smerujúce k predchádzaniu, a rovnako aj ku eliminácii rizika vzniku akýchkoľvek prípadov vedecky a publikačne neetického a akademicky nečestného konania všetkých participujúcich subjektov.

V prípade, že sa redaktori, redakčná rada alebo vydavateľ časopisu dozvedia o akomkoľvek prejave vedecky a publikačne neetických a akademicky nečestných výskumných praktík uplatnených v súvislosti s predloženým alebo už v časopise publikovaným príspevkom, redaktori alebo vydavateľ sa budú pri riešení a náprave zisteného skutkového stavu riadiť pokynmi Komisie pre publikačnú etiku (COPE) https://publicationethics.org/guidance, a to v súlade s prijatými zásadami a odporúčaniami platnými pre nasledovné oblasti:

- Odhalenia vedeckých a publikačne neetických alebo akademicky nečestných výskumných praktík a ich riešenie https://publicationethics.org/misconduct
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Článok V. Nezávislosť a nestrannosť

Časopis je nezávislým a nestranným medzinárodným vedeckým internetovým periodikom.

Článok VI. Rozhodný právny poriadok

Časopis a všetky s ním súvisiace právne skutočnosti a právne úkony sa riadia právnym poriadkom Slovenskej republiky.

Trnava 31. december 2013



Code of Ethics

Article I. General Provisions

International scientific online journal SOCIETAS ET IURISPRUDENTIA (hereinafter only "journal") is published by the Faculty of Law at Trnava University in Trnava, and it thematically focuses mainly on social relevant interdisciplinary relations on the issues of public law and private law at the national, transnational and international levels. Its aim is to provide a stimulating and inspirational platform for scientific and society-wide beneficial solutions to current legal issues and their communication at the level of primarily legal experts, but also the interested general public in the context of their broadest interdisciplinary social relations, in like manner at the national, regional and international levels.

The journal's editorial office resides in premises of the Faculty of Law at Trnava University in Trnava in Kollárova Street No. 10 in Trnava, Slovakia.

The journal has the nature of a scientific peer-reviewed journal, which is issued in an electronic on-line version regularly four times a year on the official website of the journal https://sei.iuridica.truni.sk/ international-scientific-journal/. Publication of the contribution texts will be provided exclusively in the bilingual Slovak-English standardized letterhead template of the journal, synchronously in the form of complete versions of individual journal numbers as well as in the form of single authors' contributions. Publication process follows in corresponding sections on the journal's official website.

The journal provides a stimulating and inspirational platform for communication both on the professional legal level and the level of the civic society, as well as for scientific and society-wide beneficial solutions to current issues mainly in the areas of public law and private law.

The website of the journal offers the reading public contributions in the common graphical user interface as well as in the blind-friendly interface, both parallel in the Slovak and the English languages. In all those languages the journal's editorial office provides also feedback communication.



Article II. Responsibility and Publication of Contributions

The journal accepts and publishes exclusively only original, hitherto unpublished contributions written as the own work by authors those are submitting the contributions for publication in the journal. Contributors are scientifically or pedagogically engaged in areas corresponding with the main orientation of the journal and they have completed adequate academic qualification, at least the second degree of academic education.

In accordance with the foregoing provision shall be automatically with the adequate justification rejected contributions those have been provably already published as well as contributions those constitute the merits of plagiarism or of unauthorized, respectively illegal interference with the copyright under the protection of the Copyright Act in force.

Information for authors published on the journal's website is binding. Contributions are accepted in the English, Slovak and Czech languages. Favouring the English language in contributions is welcome.

Responsibility for compliance with all prerequisites and requirements laid on contributions published in the journal have special supervisors within the journal's editorial board responsible for specific interdisciplinary sections in relation to the scientific aspects of contributions, editor in chief in relation to the formal aspects of contributions and executive editor in relation to the application of methodological, analytical and statistical questions in contributions.

Publication of contributions in the journal is realized exclusively without any contributor's claim for author's fee (royalty). Also, the processes of receiving, reviewing and publishing of contributions in the journal are carried out exclusively free of charge. Submission of contributions for publication understands the editorial office of the journal as a manifestation of the will of the authors, through which the authors all at once knowingly and voluntarily:

- express their own agreement with publication of submitted contribution in the journal;
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Accepted can be only texts submitted for publication sent by their authors/co-authors directly and with their written permission for publi-



cation; text submissions sent mediated through non-authors or non-coauthors of a submitted text delivered to the editorial office of the journal cannot be accepted for the following review procedure due to the absence of the author's/co-authors' consent.

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Reviewing the contributions for publication in the journal follows with a mutually anonymous (double-blind) review procedure realized independently and impartially by members of journal's editorial board and in well-founded cases also by recognized experts working in corresponding areas.

Only contributions containing all mandatory parts in accordance with the prescribed structure of the contribution may be submitted for review procedure. Before the contributions are submitted for review procedure, the originality of the texts is formally checked by checking randomly selected strings of the texts of the contributions through the Internet search engines.

Report on results of the review procedure is made and archived on standardized forms.

Comprehensive information on results of the review procedure, together with guidance on how to proceed with submitted contributions, will contribution's submitters receive through an e-mail answer immediately after receiving the reviewers' written opinions by the journal's editorial office and final judging the results of the review procedure by the editorial board.

Contributions will be with adequate written justification automatically rejected in cases, if:

- the contributor hasn't provably completed the entire university education, i.e. the academic qualification of the second degree;
- contribution provably doesn't comply with the minimum standards and standard criteria of scientific ethics, which are imposed and generally respected by the scientific public and scientific community in relation to contributions of the given category (studies, essays, reviews on publications, information or reports), whether in terms of extent, content, methodological assumptions, applied methodology and similarly, or in terms of a proper, complete and scientifically cor-



rect indicating all the bibliographic references according to current citation standard ISO 690.

Article IV. Declaration of Accession to Codes and Principles of Publication Ethics of the Committee on Publication Ethics

The journal fully exercises and observes codes and principles of publication ethics of the Committee on Publication Ethics (COPE) published on the website of the Committee on Publication Ethics https://publication-ethics.org/. Listed principles and guidelines of publication ethics are binding for contributors, journal's editorial board, journal's editors and editorial office, contribution reviewers as well as journal's publisher.

The journal rejects and strictly condemns any scientific and publishing unethical and academically dishonest practices, which include, among others, plagiarism, manipulation of citations or falsification, alteration, selective omission and fabrication of data and sources.

The editors and the Editorial Board of the journal actively make every effort to prevent as well as to eliminate the risk of any cases of scientifically and publicationally unethical and academically dishonest behaviour of all participating subjects.

In the event that the editors, the Editorial Board or the publisher of the journal are made aware of any manifestation of scientifically and publicationally unethical and academically dishonest research practices applied in connection with a submitted or already published paper in the journal, the editors or the publisher will follow the Committee on Publication Ethics's (COPE) guidance https://publicationethics.org/guidance in dealing with and correcting the revealed state of affairs, in accordance with the accepted principles and recommendations applicable to the following areas:

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Article V. Independence and Impartiality

The journal is an independent and impartial international scientific online journal.

Article VI. Determining Law

The journal and all the related legal facts and legal actions are governed by the law of the Slovak Republic.

Trnava, Slovakia, December 31st, 2013



SOCIETAS ET IURISPRUDENTIA

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