

CRIMINALISATION OF THE VIOLATION OF A GRAVE AND THE VIOLATION OF A DEAD BODY

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SUMMARY

The history and functioning of the common law crimes of violating a grave and violating a dead body are discussed in the context of their continued role in modern South African society. It is submitted that these crimes remain both useful and a significant indicator of the *boni mores*, and indeed that the rationale for their continued existence has been bolstered by the infusion of constitutional values into criminal law jurisprudence.

1 INTRODUCTION

The common law crimes of violation of a dead body (“lykskending”) and violation of a grave (“grafskending”) have attracted perhaps as much attention in South African legal academic literature¹ as in our courts.² The crimes have a long history,³ and seem to have their origins in Praetorian edicts as well as various imperial *constitutiones*. They were recognised in

¹ See Snyman *Criminal Law* 4ed (2002) 366-367. See Hctor and Knoetze “Violating a Grave – Of Reverence and Resting Places” 2001 *Obiter* 171ff for a comprehensive survey of the preceding literature.

² See discussion of cases below.

³ The *Digest* devotes a whole title to the crime of *De Sepulchro Violatio*, and it seems in Roman times that violation of tombs may have been relatively commonplace, given the number of permutations of the crime considered in the title. Although such occurrences are less frequent today, there have been a number of recent examples in South Africa. A modern day analogue to the dwelling in tombs that Ulpian includes as part of *sepulchri violatio* (see D 47.12.3) is provided by an SABC news report on the building of informal dwellings in graveyards in East London in March 2001 (cited in Hctor and Knoetze 2001 *Obiter* 179-180). As for violation of a corpse, in August 2005, the Cape Argus reported allegations of necrophilia and amputation and theft of a foot at the Salt River Mortuary, Cape Town (“Mortuary Sex Horror Shocks Health Officials” 04-08-2005 *Cape Argus* 1). In the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2006, s 13 criminalises the intentional and unlawful commission of a sexual act with a human corpse.

the Roman-Dutch law, which we have on the authority of Voet⁴ and Matthaëus,⁵ amongst others. Their continued existence in our modern law was confirmed in *R v Letoka*⁶ in the case of violation of a grave, and *S v Coetzee*⁷ in the case of violation of a corpse.

In many, if not most, cases, at least part of the content of these crimes overlaps with the definitions of other common law and statutory crimes.⁸ Is there a need then for a general form of these crimes? And if so, what is the underlying basis therefor? This article examines the old authorities, relevant case law and the academic literature in the search for an answer to these questions.

2 DEFINITIONS

Milton defines the crime of violating a grave as “unlawfully and intentionally disturbing the grave of a human being”.⁹ Snyman, in *Criminal Law*, offers a slightly different emphasis in his definition: “unlawfully and intentionally damaging a human grave”.¹⁰

As for violating a corpse, Milton defines the crime as “unlawful and intentional physical violation of a dead human body”.¹¹ Snyman’s definition is “unlawfully and intentionally violating a corpse”.¹²

3 SPECIFIC ELEMENTS OF THE CRIMES

The grounds for regarding these acts as unlawful, and hence their criminalisation, are examined in some detail in paragraph 3.1 below.

3.1 Unlawfulness

According to Milton, the otherwise unlawful violation of a grave can be justified on the basis of coercion, that is, necessity, and statutory or judicial authority. Furthermore, trivial acts of disturbance, such as clambering over a grave, may be excused on the basis of *de minimis non curat lex*.¹³ With respect to violation of a corpse, the defences of necessity and statutory authority (for example, Chapter Eight of the National Health Act 61 of 2003) both rule out the unlawfulness of conduct otherwise satisfying the definition.

⁴ Voet *Commentarius ad Pandectas* (1707) 47.12 (see Gane’s translation of this work, *Commentary on the Pandects* (1957)).

⁵ Matthaëus *De Criminibus ad Lib. XLVII et XLVIII Dig. Commentarius* (1644) 47.6 (see the translation of this work by Hewett and Stoop *On Crimes* Vol II (1993)).

⁶ 1947 3 SA 713 (O). Note also *R v Goosen* 1906 (unreported) (C).

⁷ 1993 2 SACR 191 (T). See also *R v Kunene and Mazibuko* 1918 JS 321 (NNHC).

⁸ Milton *South African Criminal Law and Procedure, Volume 2: Common Law Crimes* 3ed (1996) 283-284 and 286.

⁹ Milton 286.

¹⁰ Snyman 366.

¹¹ Milton 283.

¹² Snyman 367.

¹³ Milton 289.

Furthermore, any actions performed on dead bodies by undertakers and medical doctors that are sanctioned by the *boni mores* of the community are lawful.¹⁴

3 2 Disturbing or damaging a human grave

There has been some debate about what constitutes “disturbing a human grave”. In both Roman and Roman-Dutch law, the act included disturbing or damaging not only the immediate area in which a corpse lay, but also the outside part of a tomb, including any statuary,¹⁵ as well as removal of human remains and buried possessions.¹⁶ In order for a grave or tomb to be the subject of the crime, it must contain or stand over a corpse.¹⁷ However, Milton suggests that the ultimate disintegration of a corpse does not alter the status of the space in which it was interred from that of grave.¹⁸ It may be submitted that even the interment in ground of an urn containing a dead person’s ashes is sufficient to turn that ground, along with any tombstone over it, into a grave.¹⁹

De Vos has argued that in modern South African law, the scope of the crime should be limited to just the disturbance of human remains and any closely related objects such as the coffin and burial ornaments.²⁰ Milton disputes this argument on two grounds. First, including damage or disturbance to the outside of a tomb or gravestone in the definition is consistent with what Milton considers to be the modern “gist of the crime” as an affront to public decency.²¹ Second, Milton states that the prevailing legal position set out in recent case law embraces the full content of the crime’s definition in Roman and Roman-Dutch law.²²

3 3 Violation of a dead human body

What constitutes violation of a dead body is somewhat less well defined in Roman and Roman-Dutch Law. With reference to the Dutch legal writers, Gardiner and Lansdown suggest the crime entailed “interference with, or offer of indignity to, an unburied dead body”.²³ Milton is uncertain as to whether the violation is restricted to unburied bodies.²⁴ However, he points favourably to De Vos’ assertion that there is a need to extend the application to buried bodies, because otherwise it would be possible for an individual to

¹⁴ Milton 284-285.

¹⁵ D 47.12.2.3; Voet 47.12.2.3; and Matthaëus 47.6.1.2.3.

¹⁶ D 47.12.3.7; D 47.12.11; Voet 47.12.2; and Matthaëus 47.6.1.2.7.

¹⁷ Matthaëus 47.6.1.1; and Milton 289.

¹⁸ Milton 289.

¹⁹ Hoctor and Knoetze 2001 *Obiter* 179.

²⁰ De Vos “Grafskending” 1952 *SALJ* 304: “grafskending beperk moet word tot die verstering van die doodsbeendere, en voorwerpe wat saam daarmee begrawe is, en innig daarmee verbonde is, soos byvoorbeeld versiersels en die doodkis”.

²¹ Milton 286 and 288.

²² Milton 288-289.

²³ Gardiner and Lansdown *South African Criminal Law and Procedure Vol 2* 5ed (1946) 1156.

²⁴ Milton 285.

unintentionally disturb a grave, but then intentionally damage the exposed corpse, without such conduct falling within the definition of a crime.²⁵

From the case law it is clear that the act of physical violation includes cutting or dismembering the corpse, and any indecent act on the body (for example, necrophilia).²⁶

Milton endorses Klopper's argument that the unlawful taking of a corpse cannot constitute theft (because ownership cannot be acquired over a corpse) but rather violation of the corpse.²⁷

As far as the state of the body is concerned, Milton cites the American case *Ohio v Glass*²⁸ as authority for the proposition that the corpse must be recognisably human for a crime to be committed.²⁹

3 4 Intention

Intention in these crimes follows the usual form. In the case of violation of a grave, the offender must either know or at least foresee the possibility that his conduct amounts to disturbance of a human grave.³⁰ Ulpian states: "he alone is to be punished for this, who deliberately violates a tomb; if he lack evil intent the edict has no place".³¹

Similarly, in the case of violating a corpse, the accused must be aware or foresee that his conduct entails the unlawful violation of a human corpse.³² Milton indicates that mistake is a ground for excusing fault in this case, for example where dissection of a body is performed in the mistaken belief that consent thereto had been granted.³³ However, *dolus eventualis* can obtain where persons perform dissections without complying with the relevant legal formalities, because they take a somewhat *laissez faire* attitude to the latter, as was the case in *S v Coetzee*.³⁴

4 BASIS FOR UNLAWFULNESS

4 1 Roman law

The basis of the crime *sepulchri violatio* in Roman law seems to be that graves were classified as *res religiosae* (forming part of the category of sacred things, *res divini juris*) and that causing damage to these or their

²⁵ *Ibid.* See De Vos 1952 SALJ 306.

²⁶ Milton 284, citing *S v Coetzee supra* and *S v W* 1976 1 SA 1 (A).

²⁷ Milton 285; and Klopper "Diefstal van 'n Lyk?" 1970 THRHR 46.

²⁸ 52 ALR 3d 694.

²⁹ Milton 285.

³⁰ Milton 289. Snyman 366 fn 1.

³¹ D 47.12.3.

³² Milton 285.

³³ *Ibid.*

³⁴ *S v Coetzee supra* 197h.

contents was a heinous act, giving rise to *infamia*.³⁵ Conversely, the graves of enemies were fair game, having in the words of the learned jurist Paul “no religious significance for us”.³⁶ The fact that enemies’ graves were fair game points also to the prohibition conferring protection on the cultural values and religious beliefs of Roman society, rather than simply arising from a general superstitious fear of the dead. Violation of a grave also grounded a punitive delictual action, the *actio sepulchri violati*,³⁷ which formed part of the class of popular actions (*actiones populares privatae*) in Roman law.³⁸ This action could be brought by any person against the defiler.³⁹

It seems that violation of a corpse was classed as part of *sepulchri violatio*. Ulpian, in discussing *sepulchri violatio*, referred to a response given to a petition on such a matter by the emperor Severus who stated that “provincial governors are to take severe action against those who despoil corpses (*cadavera spoliant*), especially if they do so with armed force”.⁴⁰ Paul stated that “those guilty of violating tombs, if they remove the bodies or scatter the bones, will suffer the supreme penalty ...”⁴¹

However, beyond this it appears that there were related *injuriae* that applied to effective violation of corpses and tombs where the conduct did not constitute damage to sacred things. Voet and Matthaeus, with reference to the *Digest*, indicate that where a corpse was unlawfully interred in a tomb, so that the tomb and its contents were not “rendered hallowed” and thus could not be violated in the sense of *sepulchri violatio*, wrongful removal of the corpse nevertheless constituted a criminal *injuria*.⁴² Furthermore, per Voet and Matthaeus, where merely an insult was directed at a statue on a tomb, such as pelting it with stones, the grave was not violated, but the conduct constituted an *injuria*.⁴³

There was also a public interest dimension to the prohibition on violating tombs and corpses. In the *Digest*, the learned jurist Macer comments: “The offence of violating a tomb can be said to come under the *lex Julia de vi publica*,⁴⁴ falling within that part of the statute wherein it is provided that nothing shall be done to prevent a person being buried and entombed; for one who violates a tomb does prevent the occupant from being entombed.”⁴⁵ Although the primary justification for criminalisation of such conduct was the desecration of sacred objects, it is clear that the crime embraced sentiments of public decency and order, as well as respect for the dead.

³⁵ Matthaeus 47.6.1.1; and De Vos 1952 *SALJ* 302-303; D 47.12.1. *Infamia* “was a penalty, entailing certain civil disabilities, which was attached to a variety of forms of disgraceful conduct” – Nicholas *An Introduction to Roman Law* (1962) 217.

³⁶ D 47.12.4.

³⁷ D 47.12.1, 3.

³⁸ D 47.12.3.12 (*Haec actio popularis est*). See *Gillespie v Toplis* 1951 1 SA 290 (C) 295.

³⁹ D 47.12.3.3; and D 47.12.6.

⁴⁰ D 47.12.3.7.

⁴¹ D 47.12.11.

⁴² Voet 47.12.3; and Matthaeus 47.6.1.5.

⁴³ Voet 47.12.3; and Matthaeus 47.6.1.3.

⁴⁴ A law against public disorder. See Voet 47.12.2.

⁴⁵ D 47.12.8.

4 2 Roman-Dutch law

It seems that the latter criteria were sufficient justification for the crime of violating a grave to find its way into Roman-Dutch law, despite the abrogation of *res religiosae* (as part of *res divini juris*) as a concept in Roman-Dutch property law. With regard to the latter, Grotius noted:

“[E]nde onder God toe-behoortig wierden by die Romeinen ghehouden ... de graven der dooden ... doch alles wel ingezien zijnde zalmen bevinden dat alle die zaken den menschen toe-behooren”.⁴⁶

Voet does not take the absence of *res religiosae* in Roman-Dutch law into account when discussing violation of graves. In fact there is some uncertainty as to whether Voet abandoned the concept of *res religiosae*.⁴⁷ However, it is clear from his discussion of the relevant title in the *Digest* that violation of graves remained unlawful in Roman-Dutch law. Although citing Groenewegen, he pointed out that the penalties were discretionary.⁴⁸ Matthaeus, in setting out the nature of the offence, also ignored the demise of *res religiosae*, but right at the end of his commentary on the title, he rejected the possibility that the crime had been abrogated, despite the fact that in his day “bodies are interred in public cemeteries and not in private burial grounds”.⁴⁹

Nevertheless, as a (seemingly) contemporary justification for the crime’s existence, Matthaeus declared that “it is in the public interest that corpses do not lie unburied and that those which have been buried are not subjected to the injuries and vexations of the living”, echoing the subtext of the Roman offence mentioned above.⁵⁰ Similarly, there is evidence that Voet did not see violation of graves as dependent on the graves being *res religiosae*. In discussing the *injuriae* applicable to insults to the dead, he notes the essential similarity between these and the retributive action for violation of a tomb,⁵¹ going so far as to call the latter “a kind of action of injury”.⁵² Although De Villiers points out that Voet was incorrect in this regard, as the *actio sepulchri violati* was a popular action,⁵³ it is clear that Voet considered violation of a tomb to constitute a type of *injuria*, an act that was *contra bonos mores*.

A number of other Dutch authors also indicated retention of violation of a grave as a crime, including Van Leeuwen, Moorman and Damhouder.⁵⁴ De

⁴⁶ Grotius *Inleiding tot de Hollandsche Rechtsgeleerdheid* (1767). See translation by Lee *The Jurisprudence of Holland Vol 2* (1926) 1.15.

⁴⁷ Voet 11.7.4, 5. See De Villiers CJ’s comments in this regard in *Cape Town and Districts Waterworks Company Ltd v Executors of Elders* (1890) 8 SC 9 11.

⁴⁸ Voet 47.12.3.

⁴⁹ Matthaeus 47.6.2.8.

⁵⁰ Matthaeus 47.6.1.4.

⁵¹ Voet 11.1.

⁵² De Villiers *The Roman and Roman-Dutch Law of Injuries* (1899) 63 (discussing Voet 47.10.5).

⁵³ De Villiers 66.

⁵⁴ Milton 287.

Vos attributes the retention of the crime in Roman-Dutch law to two factors: the strong continuing influence of the Roman tradition; and the piety of the upright Dutch citizenry which would have led them to consider violation of graves and corpses as a type of atrocity.⁵⁵

De Vos' assessment is probably particularly apt with regard to the crime of violating a corpse in Roman-Dutch law. According to Labuschagne, the "mishandeling" of a corpse was a crime in Germanic law.⁵⁶ It is distinctly possible that the Roman crime was simply subsumed into an existing prohibition in Dutch law, or at least was readily adopted to punish violations of an existing *mos*. Milton cites the writers Carpzovius, Moorman, Matthaeus and Pothier as authority for the crime forming part of Roman-Dutch law.⁵⁷ Furthermore, together with violation of a tomb, Voet considered violation of a corpse to be a form of *injuria* and hence contrary to the good morals of the community.⁵⁸ However, the corpses of the executed could be used for dissection. Matthaeus strongly rejected arguments justifying removal of corpses from graves for the purposes of dissection on the basis of public interest, because he felt that the availability of executed criminals' cadavers was sufficient to satisfy such scientific needs.⁵⁹

4 3 South African case law

4 3 1 Violation of a grave

Prior to *R v Letoka*⁶⁰ there was some uncertainty as to whether the crime formed part of South African law, although a conviction had been secured in an unreported case, *R v Goosen*.⁶¹ In the old Cape decision, *Cape Town and Districts Waterworks Company Ltd vs Executors of Elders*,⁶² De Villiers CJ declared that "Roman law prohibiting the desecration of (the) graves ... remains", but this statement was *obiter*. Subsequently, in *Eshowe Local Board v Hall*,⁶³ in upholding an appeal against a claim for damages, the Natal Provincial Division found that the appellant's employee had acted outside the scope of his employment in exhuming a corpse, because this constituted a criminal act. Although counsel for the appellant argued that the employee had committed the crime of violating the grave, the act of exhumation also contravened a municipal by-law.⁶⁴ Unfortunately, in reaching its decision, the court neglected to indicate the precise basis on

⁵⁵ De Vos 303: "[O]mdat die piëteitsgevoel van fatsoenlike mense dit as 'n gruweldaad beskou het dat grafte beskadig of lyke verstoor word".

⁵⁶ Labuschagne "Menseregte Na die Dood? Opmerkinge Oor Lyk- en Grafskending" 1991 *De Jure* 144.

⁵⁷ Milton 283.

⁵⁸ De Villiers 62 (Voet 47.10.5).

⁵⁹ Matthaeus 47.6.1.7.

⁶⁰ *Supra*.

⁶¹ Gardiner and Lansdown 1156.

⁶² *Supra*.

⁶³ 1923 NPD 233.

⁶⁴ *Eshowe Local Board v Hall supra* 234-235.

which it found the employee's conduct criminal. Secondly, as the corpse had initially been buried in the wrong grave without the owner's consent, it is probable that the crime (and cause of action) took the form of an *injuria*.⁶⁵ Thus, in the edition of Gardiner and Lansdown immediately preceding *Letoka*,⁶⁶ the authors merely noted, as justification for the crime's retention, that "there is an absence of any proof of disuse amounting to abrogation".⁶⁷ In *Letoka*⁶⁸ the accused had been convicted in the magistrate's court of violating the graves of one Van Niekerk and another unspecified individual. On appeal, he raised the defence that it had not been shown that any of the corpses had been removed. Van Den Heever J (Fischer JP and Horwitz AJ concurring) dismissed this defence, because after (a somewhat cursory) examination of the historical law dealing with the crime of violating a grave, he concluded that while removal of remains was a common form of the crime,⁶⁹ it was sufficient simply for the accused to desecrate the grave for criminal liability to follow.⁷⁰ Thus the requirement that the corpse or pieces thereof be removed in order to constitute the crime was held to be superfluous ("oortollig").⁷¹

Although it appears from prosecuting counsel's heads of argument that he argued against the appeal on this point with reference to a number of Roman-Dutch and South African legal authorities,⁷² the learned judge relied only on the Roman law and Matthaëus' discussion of the crime as the ultimate basis for his decision,⁷³ simply accepting that the crime had passed through to modern South African law from Roman-Dutch law. In a sense this was problematic because, as noted above, it is not entirely clear from Matthaëus' writings that the crime of violating a grave in Roman-Dutch law is conceptually independent of graves being *res religiosae*. However, it had already been established many years earlier, in the *Elders'* case,⁷⁴ that the majority view among the Dutch writers was that *res religiosae* did not form part of Roman-Dutch law, and thus were not part of the Cape Colony's law.⁷⁵ By implication, this decision pointed strongly to *res religiosae* not forming part of South Africa's law, in which case, despite the decision in *Letoka*,⁷⁶ there still remained some doubt whether the crime had a basis in our law.

The following year, in *R v Sephuma*,⁷⁷ the Transvaal Provincial Division implicitly accepted the decision in *Letoka*⁷⁸ in passing sentence on a grave-

⁶⁵ See Gane "Annotations" in Voet *Commentary on the Pandects* (1957) 265.

⁶⁶ *Supra*.

⁶⁷ Gardiner and Lansdown 1155.

⁶⁸ *Supra*.

⁶⁹ *R v Letoka supra* 716.

⁷⁰ *R v Letoka supra* 716: "Hy wat 'n graf of die plek waar 'n lyk ter aarde bestel is, skend, is reeds skuldig."

⁷¹ *Ibid*.

⁷² *R v Letoka supra* 714.

⁷³ *R v Letoka supra* 715-716.

⁷⁴ *Supra*.

⁷⁵ *Cape Town and Districts Waterworks Company Ltd v Executors of Elders supra* 11-12.

⁷⁶ *Supra*.

⁷⁷ 1948 3 SA 982 (T).

⁷⁸ *Supra*.

digger, who shortly after burying a 15-month old child, broke open the coffin and chopped off a portion of the corpse's face. Price J, in justifying a relatively severe sentence, stated that the accused's conduct:

"[W]as a gross outrage to the feelings and sensibilities of the relatives of the child. He must be punished accordingly and made to understand that decent people look upon this sort of conduct with horror and detestation."⁷⁹

This *dictum* subsequently appears to have found broad acceptance with criminal law writers as an underlying basis for the crime, as the reader will see below.

Shortly thereafter, though, in the Cape case *Dibley v Furter*,⁸⁰ which concerned a claim for rescission of the contract of sale of a farm on which a substantial number of graves were situated, it was argued by counsel for the respondent that "the violation of graves is no longer a crime because the *actio sepulchri violati* is inextricably bound up with the idea that graves are *res religiosae*, which is no longer applicable in our law" and that the decisions in *Sephuma*⁸¹ and *Letoka*⁸² were as a result incorrect.⁸³ Specifically, counsel attacked the somewhat scanty authority on which Van Den Heever J based his judgment in *Letoka*.⁸⁴ In his judgment, Van Zyl J declined to apply his mind fully to this question as its resolution was inessential to his ultimate ruling, but indicated that in his opinion the offence existed, and in particular "it would be an offence to cultivate over ... identifiable graves".⁸⁵ As evidence of almost all the graves had been removed from the farm, though, the learned judge indicated that the definition of the crime would nevertheless exclude even the intentional performance of agricultural activities on the land in question (presumably because no damage would be done to tombstones and buried human remains), and thus the material usefulness of the land was not impaired.⁸⁶

Perhaps the most interesting case on violation of a grave is *Gillespie v Toplis*,⁸⁷ which was heard by the High Court shortly before *Dibley v Furter*.⁸⁸ *In casu* the plaintiff sought a delictual remedy for violation of his mother's grave by a Mrs Parkes, who in the interim had passed away.⁸⁹ There was no dispute over the acceptance of the crime in our law.⁹⁰ As the injuring party had passed away, relief for infringement of *dignitas* under the *actio injuriarum* was unavailable to the plaintiff.⁹¹ Counsel for the plaintiff therefore argued for damages under the Aquilian action, on the basis that in its

⁷⁹ *R v Sephuma supra* 983.

⁸⁰ 1951 4 SA 73 (C)

⁸¹ *Supra*.

⁸² *Supra*.

⁸³ *Dibley v Furter supra* 74-75.

⁸⁴ *Supra*. See *Dibley v Furter supra* 83.

⁸⁵ *Dibley v Furter supra* 84.

⁸⁶ *Dibley v Furter supra* 83.

⁸⁷ *Supra*.

⁸⁸ *Supra*.

⁸⁹ *Gillespie v Toplis supra* 293.

⁹⁰ *Gillespie v Toplis supra* 292.

⁹¹ *Gillespie v Toplis supra* 293 and 297.

extended form it encompassed the *actio sepulchri violati*, the delictual analogue of the crime of violating a grave.⁹² De Villiers JP, in examining this question in some detail, pointed out that per Ulpian, the Aquilian action did not apply to violation of a tomb.⁹³ He noted further that the *actio sepulchri violati* had passed out of our law as a civil remedy, along with the rest of the class of popular actions (*actiones populares privatae*),⁹⁴ a point recognised by the old Appellate Division in *Director of Education, Transvaal v McCagie*.⁹⁵ In the latter, it was held that “(t)he *popularis actio* of Roman Law is not recognised in our procedure. It became obsolete in Holland more than two centuries ago”.⁹⁶

Although, the passing of the civil action does not necessarily imply that the criminal component of *sepulchri violatio* passed away, it does raise a question as to the extent to which the crime of violating a grave in our law is in fact grounded in the old crime of *sepulchri violatio*. De Villiers JP suggested by way of *obiter* that, had Parkes been alive, “it may very well be that the plaintiff would have had an action based on the *actio injuriarum* for damage to his personal feelings or dignity”.⁹⁷ By necessary implication this means that the act of violating a grave can in certain circumstances constitute *crimen injuria* – the unlawful and intentional impairing of the *dignitas* of another person⁹⁸ – which is consistent with Voet’s comments, noted above.

Crimen injuria almost passed out of existence from our law in the nineteenth century, probably due to the influence of English law,⁹⁹ and is a shadow of its Roman-Dutch form. The crime has been used primarily to punish private acts of indecency,¹⁰⁰ which cannot be punished under the English law-inspired crime of public indecency (introduced in the Cape case *R v Marais*¹⁰¹). Our courts, since acknowledging the continued existence of the crime in *R v Umfaan*,¹⁰² have sought to limit its application, punishing only serious violations of *dignitas* in the context of the contemporary *boni mores*, rather than relying on the *injuria*e identified in Roman-Dutch law.¹⁰³

It is submitted that the decision in *Sephuma*,¹⁰⁴ at least, could easily have been justified on the basis of serious infringement of the *dignitas* of the child’s relatives. In fact, were it not for Price J’s somewhat brief comment on the sentence imposed in *Letoka*,¹⁰⁵ the wording of his judgment (“gross

⁹² *Gillespie v Toplis supra* 292 and 295.

⁹³ *Gillespie v Toplis supra* 292 and 295.

⁹⁴ *Gillespie v Toplis supra* 296.

⁹⁵ 1918 AD 616.

⁹⁶ *Gillespie v Toplis supra* 296.

⁹⁷ *Gillespie v Toplis supra* 297.

⁹⁸ Milton 492.

⁹⁹ Milton 498.

¹⁰⁰ Burchell *Principles of Criminal Law* 3ed (2005) 750.

¹⁰¹ (1889) 6 SC 367. See Burchell 875-876; and Snyman 359.

¹⁰² 1908 TS 62.

¹⁰³ Milton 499.

¹⁰⁴ *R v Sephuma supra*.

¹⁰⁵ *R v Letoka supra*.

outrage to the feelings and sensibilities of the relatives of the child¹⁰⁶) would point to conviction on the basis of *crimen injuria*.

4 3 2 Violation of a corpse

Violation of an unburied corpse was recognised as a crime in our law in the Natal Native High Court case, *R v Kunene and Mazibuko*,¹⁰⁷ which took place in 1918. The accused were convicted of “spoliation or violation of a dead body” for removing portions of the body of a drowned person for medicinal purposes.¹⁰⁸ However, many years passed before the crime once again drew the attention of the courts, although it was considered still to be in existence by Gardiner and Lansdown in 1946.¹⁰⁹ In 1968, in *R v Munyama*,¹¹⁰ the Rhodesian Appellate Division indicated its support for the continued existence of the crime, albeit by way of *obiter dictum*. Four years later, in *S v Misheck*,¹¹¹ the Rhodesian High Court convicted the accused of this crime, placing reliance on the decision in *Kunene and Mazibuko*, the *dictum* in *Munyama*, Gardiner and Lansdown’s treatment, and the writings of Van der Keesel and Voet on the subject.¹¹² The accused had assisted in hiding a corpse in a farm dam.¹¹³

In South Africa, however, there was a wait of 75 years for a second case dealing with the crime, until *S v Coetzee*¹¹⁴ in 1993. The latter provided concrete confirmation of the crime’s continued existence in South African law. Coetzee, an undertaker, had removed the heart and lungs from a deceased mineworker’s cadaver pursuant to the provisions of the Occupational Diseases in Mines and Works Act 78 of 1973, without fully complying with the requirements set out in the relevant section of the Act.¹¹⁵ In the magistrate’s court, she and the co-accused (her husband, who had assisted in the removal) were convicted of the crime of violating a corpse.¹¹⁶

On appeal, the Transvaal Provincial Division of the Supreme Court upheld the conviction. In his judgment, Roos J (Heyns J concurring) accepted the definition of the crime set out by Milton in the second (1982) edition of *South African Criminal Law and Procedure* and cited a number of other contemporary authorities who shared the opinion that the crime existed in our law.¹¹⁷ In considering the sentence merited by the crime, the learned judge echoed Price J’s *dictum* in *Sephuma*,¹¹⁸ stating that:

¹⁰⁶ *R v Sephuma supra* 983.

¹⁰⁷ *Supra*.

¹⁰⁸ Milton 284.

¹⁰⁹ Gardiner and Lansdown 1156.

¹¹⁰ 1968 3 SA 113 (RA).

¹¹¹ 1972 3 SA 131 (R).

¹¹² *S v Misheck supra* 132.

¹¹³ *Ibid*.

¹¹⁴ *Supra*.

¹¹⁵ *S v Coetzee supra* 193.

¹¹⁶ *Ibid*.

¹¹⁷ *S v Coetzee supra* 193-194.

¹¹⁸ *Supra*.

“n lyk feitlik as iets heiligs beskou moet word. Daarmee stem ek saam. Selfs primitiewe volkere het die hoogste respek vir dooies en hulle grafte.”¹¹⁹

4 4 Rationale for the crimes in modern South African law

From the above, it is clear that violation of a grave and violation of a (unburied) corpse are regarded by our courts as constituting crimes in our modern law. However, the relevant judgments have not examined the rationale for the crimes particularly closely. It seems that, rightly or wrongly, the courts have chosen simply to recognise the continued existence of the relevant elements of *sepulchri violatio* in order to satisfy what they perceive as a need to criminalise such conduct (reflecting implicit application of the *boni mores* criterion). Unsurprisingly, then, some of the judgments have hinted at elements of *injuria* in the crimes. This lack of clarity means that in order to establish a firm basis for the crimes in our modern law, it is necessary to look beyond the courts' decisions.

4 4 1 Rationale for the crime of violating a corpse

In justifying the criminalisation of the act of violating a corpse, Milton states: “The sanctity of human life and the respect for the dignity and integrity of the person compound to create a sense of respect for the bodily remains of dead persons.”¹²⁰ Labuschagne, commenting on a similar crime in modern German law, notes that the protected interest is the deep respect and value accorded to a person's life that survives beyond their death.¹²¹ He suggests further that implicit in the *boni mores* of the community is the recognition that respect for those rights associated with individual autonomy survive death.¹²² While at the time of Labuschagne's article (1991), this was perhaps no more than a theory, it is submitted that with the coming into effect of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), there can be little doubt that such recognition now forms part of the *boni mores* of South African society.

Wilkinson, in discussing the possibility of granting posthumous legal interests to the dead, identifies two obstacles thereto. First, the dead are unaware of any conduct that, were they alive, would constitute an invasion of their interests; and second, they lack legal personality.¹²³ Wilkinson points out, however, that the consensus in moral philosophy rejects subjective awareness as a criterion for wrongfulness.¹²⁴ Wilkinson concedes that the

¹¹⁹ *S v Coetzee supra* 197.

¹²⁰ Milton 283.

¹²¹ Labuschagne 1991 *De Jure* 147-148: “Die beskermde regsgoed is die algemene piëteitsgevoel en die waardigheid van die mens wat na sy dood voortbestaan”.

¹²² Labuschagne 1991 *De Jure* 150.

¹²³ Wilkinson “Last Rights: The Ethics of Research on the Dead” 2002 19(1) *Journal of Applied Philosophy* 33-34.

¹²⁴ *Ibid.* There is some indication too, in our law, that subjective awareness of an insult to *dignitas* is not a requirement for wrongfulness (Burchell 749).

second obstacle is somewhat more difficult to surmount, but suggests that the living prior to their death have an interest in how they are remembered. Thus conduct that damages such memory infringes the rights of the living person that was.¹²⁵

Section 10 of the Constitution states that “Everyone has an inherent dignity and the right to have their dignity respected and protected.” In *S v Makwanyane*,¹²⁶ O’Regan J commented that:

“Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern.”¹²⁷

Chaskalson P (as he then was), in the same case, added in his judgment that:

“The rights to life and dignity are the most important of all human rights ... By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.”¹²⁸

It is clear from the learned judges’ comments that the protection of human dignity is fundamental to the normative framework of our law, and hence to the content of the *boni mores* concept.

The preamble to the Constitution contemplates dignity as a state that can persist beyond death, in the memory of a society, declaring:

“We, the people of South Africa ... Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country ...”

Although a corpse has no legal personality in our law, to contend that protection of a person’s dignity is extinguished by the mere fact of death is to diminish the content of the right, and to undermine the normative framework embodied in the Constitution. Although the dead are incapable of enforcing their right to dignity (and in a technical legal sense, of possessing it), it is submitted that society as a whole has an interest in the preservation of dead persons’ dignity and the State a role as custodian of this right. Criminalising the act of violation of a corpse (or a grave, for that matter) can thus be justified on the basis of this need to recognise the possibility of injury to a deceased person’s dignity. It is submitted that the effect of criminalisation in so far as this purpose is concerned, is to clothe a charge of *crimen injuria* in a manner that is compatible with our law’s present conception of legal personality.

The right to dignity (together with the right to privacy¹²⁹ and thus collectively, the concept of *dignitas*) underpins the right to bodily and

¹²⁵ Wilkinson 2002 *Journal of Applied Philosophy* 33-34.

¹²⁶ 1995 3 SA 391 (CC).

¹²⁷ *S v Makwanyane supra* par 328.

¹²⁸ *S v Makwanyane supra* par 144.

¹²⁹ S 14 of the Constitution provides: “Everyone has the right to privacy ...”

psychological integrity, which is enshrined in section 12(2) of the Constitution. Section 12(2) provides that:

“Everyone has the right to bodily and psychological integrity, which includes the right ... (b) to security and control over their body; and (c) not to be subjected to medical and scientific experiments without their informed consent.”

By the same reasoning, bodily integrity is clearly an interest that should be protected beyond death.

In some cases, these interests can be constrained by law with a rational purpose that balances them with other interests, in terms of section 36(1) of the Constitution. For example, per section 66 of the National Health Act 61 of 2003, performing a post-mortem to ascertain cause of death does not require the prior consent of the deceased or the consent of a surviving relative. However, where cause of death is known, consent is required for the post-mortem.

4 4 2 *Rationale for the crime of violating a grave*

There is also broad consensus among criminal law writers on the need for criminalizing of the act of violating a grave. Milton draws on the dictum in *Sephuma*¹³⁰ to explain this need: “the gist of the crime is the affront to public decency and the distress experienced by the deceased’s relatives”.¹³¹ As noted earlier, De Vos explains the crime’s adoption in Roman-Dutch law in terms of the community viewing such conduct as indecent, as an atrocity.¹³² Snyman echoes both Milton and De Vos, attributing the crime’s existence to “the affront to the family or friends of the deceased or the community’s feelings of decency”.¹³³ Milton and De Vos also indicate that part of the distress caused by such conduct is attributable to the religious significance accorded to burials and human remains.¹³⁴ As was submitted earlier, where surviving relatives learn of the act, and suffer serious infringement of their *dignitas*, the offensive act would seem to fall under the present definition of *crimen injuria*. The opinions cited above are in broad accordance with this view, but also clearly indicate that the crime of violating a grave extends beyond an *injuria* to surviving relatives.

The attaching of religious and cultural significance to funeral rites and burial sites exists outside the Roman and Roman-Dutch traditions, and is common to most cultures.¹³⁵ The importance of such customs in traditional African religious belief in South Africa should be emphasized.¹³⁶ Thus it may be submitted that the crime’s rationale in South Africa is the “respect for the

¹³⁰ Supra.

¹³¹ Milton 286.

¹³² De Vos 1952 *SALJ* 303.

¹³³ Snyman 366.

¹³⁴ Milton 286. See also De Vos 1952 *SALJ* 303.

¹³⁵ Hoctor and Knoetze 2001 *Obiter* 173.

¹³⁶ Hoctor and Knoetze 2001 *Obiter* 173-176.

sanctity of graves which is found in all sectors of the diverse South African community” which is “ingrained in the *boni mores* of the community”.¹³⁷

From a constitutional perspective, the survival of the right to dignity beyond death (or at least society’s interest in protecting the dignity of the dead) also grounds the crime. However, the Constitution provides additional rationales for criminalising violation of graves. Section 15(1) of the Constitution protects the right to freedom of religion and belief. It is submitted that in many cases violation of graves (even quite superficially) infringes enjoyment of this right, by the deceased person’s co-religionists.¹³⁸ Similarly, and with more generality, section 31(1)(a) provides that:

“Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practice their religion and use their language.”

Even where there are different sets of religious beliefs within a particular cultural group, it is submitted that the constitutional protection of cultural values would extend to the group’s burial practices, provided they carry cultural significance.¹³⁹ It is further submitted that it is reasonable to presume that cultural significance and thus a cultural interest deserving protection, is attached to each and every grave.

Section 39(2) of the Constitution provides:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

Referring to this provision, in *Carmichele v Minister of Safety and Security*¹⁴⁰ the Constitutional Court stated:

“[T]here can be no question that the obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights is an obligation which falls on all of our courts including this court.”¹⁴¹

The court went on to cite with approval the *dictum* of Iacobucci J in the Canadian case *R v Salituro*.¹⁴²

“Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared ... The

¹³⁷ *Ibid.*

¹³⁸ Violation of a corpse, too could infringe this right, where the integrity of the corpse at time of burial carries religious significance. For discussion of this principle in American law, see Renteln “The Rights of the Dead: Autopsies and Corpse Mismanagement in Multicultural Societies” 2001 100(4) *South Atlantic Quarterly* 1005-1027.

¹³⁹ Likewise, enjoyment of this right could be infringed when a corpse was violated. See Renteln 2001 100(4) *South Atlantic Quarterly* 1005-1027.

¹⁴⁰ 2001 4 SA 938 (CC).

¹⁴¹ *Carmichele v Minister of Safety and Security* par 34. In par 36 of this judgment, the court stated further: “We would add, too, that this duty upon judges arises in respect both of the civil and criminal law, whether or not the parties in any particular case request the Court to develop the common law under s 39(2).”

¹⁴² (1992) 8 CRR (2d) 173.

Judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.”¹⁴³

There can be no doubt then that the provisions of our common law, with its especially rich natural law tradition, can be adapted to meet the contemporary *boni mores* embodied in the Constitution. Hence, there can be little doubt that there is a firm basis for the crimes of violating a grave and violating a corpse in our law, despite the ambiguity in our case law.

5 SEPULCHRI VIOLATIO, CRIMEN INJURIA AND THE RIGHTS OF THE DEAD

One final issue deserves consideration. Although it is submitted that protection of certain rights or interests posthumously is *implicitly* recognised in the provisions of the Constitution, and surely must form part of current South African law, the *explicit* recognition of dead persons' rights may in fact have some place in the Roman-Dutch legal tradition.

Voet devotes a whole section of his commentary on the title on *injuriae* in the *Digest*,¹⁴⁴ to *injuriae* committed against the dead.¹⁴⁵ He has the following to say on the subject:

“Not only upon the living but, in a measure, also upon the dead may an indignity be inflicted, for, though these last are removed from the sphere of human affairs, there may still abide fresh in the memory of men of standing and honour the good name of persons who are deceased, and amongst the descendants of those who are no more(,) an agreeable remembrance of their virtues....If such a remembrance therefore suffers detraction or aspersion or is torn to shreds, the deceased, as it were, himself suffers an injury.”¹⁴⁶

The learned writer therefore indicates that personality rights persist beyond death because elements of the deceased's personality persist in the memory of others, perhaps for several generations, and as a result posthumous *injuriae* are possible.

Although the above may seem to refer primarily to infringement of *fama* (but is also surely applicable to *dignitas*), he continues:

“Nay more, it is undoubtable law that real injuries (*injuriae reales*) may be inflicted upon the dead, for instance when a corpse suffers detention, or a funeral is interfered with, or the bones of a person who is buried in a place devoted to interment for all time are cast out, or stones are thrown at a statue placed on a monument or in some other spot in honour of a deceased person.”¹⁴⁷

Voet indicates that the action accrues either to the deceased person's estate, if the *injuria* occurs prior to adiation, or to the heir if it occurs after

¹⁴³ *Carmichele v Minister of Safety and Security supra* par 36.

¹⁴⁴ D 47.10.

¹⁴⁵ Voet 47.10.5.

¹⁴⁶ De Villiers 62 (discussing Voet 47.10.5).

¹⁴⁷ *Ibid.*

adiation.¹⁴⁸ Although Voet notes that the heir can obtain the action in their own name, this is not dependent on the insult to the deceased being also a direct insult to the heir as a blood relative; it applies equally to “heirs who are strangers”.¹⁴⁹ The basis for the action in their case is that

“[B]y entering upon the inheritance a connection has begun to be established between themselves and the deceased of such a nature that it becomes a matter of concern to themselves that the deceased should not be injured.”¹⁵⁰

This type of *injuria* can thus be classified as an *injuria per consequentias* - an *injuria* which affects a particular person directly, that is regarded in law as automatically affecting a second person closely related to the first indirectly.¹⁵¹ Three such relationships grounded the action in Roman law – those between wife and husband, child and father, and testator and heir.¹⁵²

Joubert explains the *injuria per consequentias* in terms of a direct injury to the honour of the family:

“Die grond van die aksie is om te voorkom dat die tweede persoon [vader] verdag raak weens gebrek aan familietrou en piëties ... Om dieselfde rede kom aan die erfgenaam 'n aksie toe ... Volgens Romeinse opvatting word die erfgenaam immers deur aanvaarding van die erfenis 'n soort familielid van die erflater.”¹⁵³

On this basis, Neethling suggests it is questionable whether the concept of *injuria per consequentias* should have a place in our modern law, because it does not require that husband, father or heir suffer any actual personality infringement.¹⁵⁴ He endorses the dictum of Coetzee J in *Meyer v Van Niekerk*¹⁵⁵ that “in die moderne regsdenke daar weinig ruimte bestaan vir *injuriae per consequentias* of enige uitbreiding daarvan”.¹⁵⁶

Injuria per consequentias, however, was not simply about automatic attribution of injuries. The concept must be understood in the context of the Roman law of persons, in which wives and children lacked full legal personality. According to Nicholas, the family (*patria potestas*) was the legal unit in Roman society, rather than its individual members, and its legal capacity vested in its head, the *paterfamilias*, “the only full person known to the law”.¹⁵⁷ The *paterfamilias* had “unfettered power of life and death” over his children¹⁵⁸ and in the time of the Roman Republic, his wife too.¹⁵⁹ He was

¹⁴⁸ *Ibid.*

¹⁴⁹ De Villiers 63.

¹⁵⁰ De Villiers 64.

¹⁵¹ Neethling, Potgieter and Visser *Law of Delict* 4ed (2001) 327.

¹⁵² *Ibid.*

¹⁵³ Cited in Neethling *Persoonlikheidsreg* 4ed (1998) 77.

¹⁵⁴ *Ibid.*

¹⁵⁵ 1976 1 SA 252 (T).

¹⁵⁶ Neethling 77.

¹⁵⁷ Nicholas 65.

¹⁵⁸ *Ibid.*

¹⁵⁹ Nicholas 80-82. In the time of the empire, the wife was not considered part of the husband's *potestas*.

also the only member of the *potestas* with the capacity to own property.¹⁶⁰ Thus, it is not surprising that Roman law granted the *paterfamilias* an action for injuries done to members of his family. Similarly, De Villiers notes that in Roman law, “the existence of the personality of the deceased was considered to be, as it were, continued in the persona of the *hereditas jacens*,¹⁶¹ and after adiation, in the person of the heir”.¹⁶²

Clearly, given our modern law of persons, there is little or no role for the concept of *injuria per consequentias* in so far as *injuriae* to wives and children are concerned. However, as our law does not confer legal capacity on the dead, it is submitted that there is a valid purpose for retaining or adapting the action, as a means of providing some sort of delictual remedy for violation of a deceased person’s personality rights where appropriate. This is not, however, the path our courts have taken.

The only South African case law that appears to have a direct bearing on posthumous personality rights is *Spendiff v East London Daily Dispatch Ltd*,¹⁶³ which entailed an action for posthumous defamation brought by the widow and sons of the deceased. The court stated *obiter* with regard to the son of a defamed person that “under our law he has no right of action unless he himself was directly referred to and the false statement concerning his father was therefore an actual attack upon himself”.¹⁶⁴ Burchell notes that the dictum provides authority for the proposition in our law that “no action by living heirs or relatives will lie for an injury to reputation of a dead person unless an injury is also committed against the heirs and relatives personally”.¹⁶⁵

Burchell points out that one of the problems with establishing defamation of the dead is the lack of evidence in the absence of the deceased person’s testimony.¹⁶⁶ This is also a problem with establishing infringement of *dignitas*, because in addition to objectively establishing infringement of *dignitas* by way of the *boni mores* criterion, a further requirement set out by the former Appellate Division in *Delange v Costa*¹⁶⁷ is that the “plaintiff’s self-esteem must have been actually impaired”.¹⁶⁸ Furthermore, without evidence of subjective harm, it is difficult to see on what basis, if any, monetary damages could be measured. In the case of defamation, Burchell suggests that an apology might constitute an acceptable form of satisfaction.¹⁶⁹ Perhaps, for infringement of *dignitas*, the injurious party could be obliged to act positively to restore the deceased person’s dignity, perhaps by facilitating

¹⁶⁰ Nicolas 65.

¹⁶¹ The deceased’s estate.

¹⁶² De Villiers 65.

¹⁶³ 1929 EDL 113.

¹⁶⁴ *Spendiff v East London Daily Dispatch Ltd supra* 131.

¹⁶⁵ Burchell *The Law of Defamation in South Africa* (1985) 136-137.

¹⁶⁶ Burchell 138.

¹⁶⁷ 1989 2 SA 857 (A).

¹⁶⁸ *De Lange v Costa supra* 862; and see Burchell *Principles of Criminal Law* 749.

¹⁶⁹ Burchell *The Law of Defamation in South Africa* 141. This however would require restoration of the *amende honorable* variant of the *actio injuriarum*, which has fallen into disuse (Neethling, Potgieter and Visser 15).

burial or reburial, and the holding of a mass or memorial service or cleansing ritual, as the case may be.

However, with regard to a civil action for posthumous defamation, Burchell concedes that it is difficult to see how this could be implemented in our modern law except through the use of statute to define a practical, functional remedy, given the way in which the *actio injuriarum* has developed.¹⁷⁰ Much the same can be said of the posthumous infringement of *dignitas*. Burchell points out, however, that as the criminal sanction for defamation simply has the object of protecting society from harmful or injurious conduct by punishing it, many of the obstacles presented by a civil action fall away.¹⁷¹ He states that it “would be in keeping with the attitude of the Roman-Dutch law to include defamation of the dead under the criminal law of defamation”.¹⁷² However, the criminalisation of defamation *per se* may be unconstitutional given the right to freedom of expression enshrined in section 16 of the Constitution.¹⁷³ Furthermore, criminalising the defamation of the dead may especially impact on society’s interest in the historical record, which given the fragmentary nature of historical evidence, will always contain conflicting, inaccurate and defamatory accounts.¹⁷⁴

Criminalisation of serious infringements of *dignitas* in the form of *crimen injuria*, on the other hand, has acquired added justification under the Constitution, given the rights to dignity and privacy enshrined in the Bill of Rights. As was submitted earlier, it is implicit in the Constitution that society has an interest in protecting the dignity of the dead. In view of section 39(2) of the Constitution and the principle established in *Carmichele*, there seems little reason why the act of violating a grave or a corpse should not, following the Roman-Dutch tradition, be *explicitly* regarded as an *injuria* to the deceased (and not just the deceased’s relatives) in our criminal law, and be *directly* punished as *crimen injuria*.

Following violation of their grave or corpse, the manner in which a person (and their personality) is remembered undergoes a detrimental change. There is a departure from the way in which they would have wished to be remembered after death, and from the way in which a reasonable person alive today would wish to be remembered after death. By creating a clear link between the nature of the harm and the punishment required by society and meted out by the State, it is submitted that the purpose of such punishment is better achieved than if the punishment occurs pursuant to the less specific definitions of the present crimes of violating a grave and violating a corpse.

In the criminal law, at least, there is also authority for the proposition that the victim whose *dignitas* is infringed need not be subjectively aware of it. In

¹⁷⁰ Burchell *The Law of Defamation in South Africa* 140.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.* Burchell cites the example of (West) Germany, where “disparagement of the memory of a dead person is punishable with imprisonment of up to two years or by a fine” (138).

¹⁷³ Burchell *Principles of Criminal Law* 741.

¹⁷⁴ Burchell *The Law of Defamation in South Africa* 137 and 139.

R v Holliday,¹⁷⁵ though the victim was completely unaware of the offensive conduct, the court nevertheless convicted the accused, ruling that “knowledge was not essential” and “(t)he gist of the present offence is the impairment of the complainant’s rights of personality”.¹⁷⁶

There must, however, be a *caveat* to the recognition of posthumous personality rights – whether explicit or implicit. In order for memory of a personality to be violated, there must be some way of identifying the person to whom the memory is attached. Thus, it is submitted, there can be no infringement of *dignitas* where a person was interred in an unmarked grave, or under any other circumstances where it is impossible to make a link between personality and grave. However, the fact that a corpse interred in a grave may have completely decomposed should be irrelevant to the issue, provided the grave can be identified as that of a particular deceased person.

This should not mean, however, that violation of unidentifiable graves (or unidentifiable unburied corpses) should not be criminally punishable. It is merely submitted that in such cases, the crime cannot take the form of an *injuria* giving posthumous recognition to personality rights. Thus the rationale for the crimes should recognise that it is also the sanctity of graves as a religious and cultural concept that is “ingrained in the *boni mores* of the community”.¹⁷⁷

If, as has been submitted, the concept of *injuria* (whether recognised explicitly or implicitly) has the potential to encompass most elements of the crimes of violating a grave and violating a corpse, then the ingrained respect (as discussed above) for graves and burial rituals – as objects of reverence in themselves – which forms part of public morality, is the residual element of the crimes that comes down to our law from *sepulchri violatio*. It is the modern analogue to the concept of *res religiosae*, now fortified by the provisions of the Constitution.

6 CONCLUSION

There can be little doubt of the support for retention of the crimes of violating a grave and violating a corpse in our case law and legal literature. Although the relevant criminal acts overlap in certain circumstances with the definitions of other crimes (such as theft, malicious injury to property, and has been argued in this paper, even the current definition of *crimen injuria*), the crimes as defined nevertheless contain certain unique elements.

It has been argued that in their modern form, the crimes’ primary unique content is the criminalisation of an implied *injuria* to a deceased person’s *dignitas*, that would not otherwise be recognised (or at least has not yet been recognised) in our law. In this sense, the crimes’ definitions extend Constitutional protection of the right to dignity (and privacy) to the deceased, and can be justified on the basis that the Constitution requires the common

¹⁷⁵ 1927 CPD 395.

¹⁷⁶ *R v Holliday supra* 401-402; and see also Burchell *Principles of Criminal Law* 749.

¹⁷⁷ See Hctor and Knoetze 2001 *Obiter* 179.

law to be developed to give effect to the Bill of Rights. It is submitted, however, that there is a basis in our common law tradition for explicit protection of a deceased person's *dignitas* under the ambit of *crimen injuria*. Whether or not our courts choose, in the future, to resuscitate and adapt these aspects of the common law tradition remains to be seen.

Furthermore, the crimes' definitions also retain elements of the Roman veneration for graves as sacred objects. Even prior to the advent of explicit Constitutional protection for religious and cultural practices, it is clear from judgments of the courts and the relevant legal literature that the consensus view was that the contemporary *boni mores* of the community encompassed considerable respect for graves and burial rituals, so that violation of graves or corpses was regarded as *contra bonos mores*, as an affront to public decency. This normative position has now been strengthened by the Bill of Rights.

Though both crimes have passed from Roman law through to our modern law in somewhat ambiguous fashion, so that until fairly recently, genuine doubts could be raised as to their continued existence and the legal basis thereof, these have been laid to rest. If anything, the relevance of these crimes in South African law has increased substantially, given contemporary South African society's emphasis on the protection and indeed celebration of human dignity and cultural diversity.