

LEGAL PLURALISM IN SOUTH AFRICA: THE RESILIENCE OF TRANSKEI'S SEPARATE LEGAL STATUS IN THE FIELD OF CRIMINAL LAW

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SUMMARY

The Transkei Penal Code was enacted by the parliament of the Cape of Good Hope as Act 24 of 1886. It was part of the mechanisms devised for governance of the area between the Kei River in the west and the Mtamvuma river on the Natal border, and to which the name Transkei was given. It was drawn up by lawyers trained in English law and it therefore watered down the influence of Roman-Dutch law in the Transkei region of South Africa.

The code exerted enormous influence on South African law itself. As a result the judges of the Supreme Court of South Africa (as it then was) in numerous cases heard in different parts of South Africa, repeatedly said that the South African law on a point in issue was as laid down in the Transkei Penal Code. The power of the Penal Code continued to be evident in Appellate Division decisions as recently as 1988.

When Transkei became independent (in 1976) she revised the code and passed the Transkei Penal Code Act 9 of 1983. More than ten years after the re-incorporation of Transkei into the new South Africa this Code remains of full force and effect. In 2004 an effort by the National Directorate of Public Prosecutions to have criminal charges in Transkei framed under the common law and no longer under the Code, was thwarted by the Transkei High Court which ruled that only an Act of Parliament could alter the position.

1 INTRODUCTION

The Transkeian territories were annexed to the Cape Colony by the British authorities as far back as 1879. Despite the governance of Transkei as part of the Union of South Africa from the time of Union in 1910 until Transkei's formal independence in 1976 and its re-incorporation into South Africa upon the advent of the new democratic South Africa in 1994, Transkei's legal system has nevertheless retained a separate identity from that of South Africa in some important areas. In this article the separate legal identity will be illustrated with reference to criminal law.¹

¹ The separate identity is discernible in other fields such as constitutional and private law.

2 TRANSKEI AND ITS PEOPLE

The Transkeian territories comprise the area between the Kei river in the west and the Mtamvuna river on the KwaZulu-Natal border in the east. That stretch of territory lies between the Indian Ocean in the south, and the Queenstown/ Ugie/Maclear districts in the north. It is made up of what Saunders² describes as not one tribe but several nations each with its own legal systems, political organisation and military structure. He says:

“When the Cape’s first responsible ministry decided in 1873 that the self-governing colony should expand across the Kei there were a considerable number of important independent African states within what was in 1910 to become United South Africa; by 1894 Pondoland was the only such state in that area to have survived. The independent states were Fingoland annexed in 1879, Griqualand East (the Bacas) annexed in 1879, Western Pondoland annexed in 1884, Thembuland annexed in 1885, Gcalekaland (Xhosa proper) annexed in 1885, Bomvanaland annexed in 1885, Xesibe annexed in 1886, Rhode annexed in 1887 and Eastern Pondoland annexed in 1894.”

Even the most conservative will be prepared to agree that these were the principalities or counties of Transkei along the same lines as is indicated by De Wet³ in respect of similar entities that existed in Germany and Holland. Despite differences in language, customs and traditions, history has bound these people as one political entity as they together became part of the Union of South Africa in 1910, the self-governing Transkei in 1963, the independent Transkei in 1976, and the Transkei that was re-incorporated into South Africa in 1994.⁴

3 THE REASONS FOR THE RESILIENCE OF TRANSKEI’S CRIMINAL LAW

Apart from constitutional developments, a factor that gave the people of Transkei a unified legal identity was the codification of Transkei criminal law. That codification was embodied in the Transkei Penal Code of 1886,⁵ passed by the Parliament of the Cape of Good Hope. It is that codification which led to the difference between South African and Transkeian criminal law.

A code is a powerful legal document. The American writer, Clarke, describes a code as “a complete enactment, a substitute for all the former law”.⁶ Allott states that a code is “a handy and authoritative guide to the

² “The Annexation of the Transkei” in Saunders and Derricourt (eds) *In Beyond the Cape Frontier* (1974) 185.

³ “Kodifikasie van die Reg in Suid-Afrika?” 1961 *THRHR* 152.

⁴ The name Transkei refers to the area across the Kei, the territories were that before Union in 1910, and they will be that for ever. Some people, being overly cautious not to offend the new dispensation by appearing to adhere to pre-1994 political descriptions of areas, refer to the area as “former” Transkei. It would be correct to say “former Republic of Transkei”. The same applies to Ciskei.

⁵ Act 24 of 1886.

⁶ Clarke *The Science of Law Making* (1982) 280.

applicable law ... (it) makes the law simpler and more accessible and in the circumstances of Africa, more portable".⁷

The 1886 code came about as a result of recommendations made by the Cape Government Commission of 1883 on "Native Laws and Customs". That Commission had been directed by the Imperial authorities in London to consult with the indigenous people. As a result the Secretary of State for the colonies wrote and said that authorities were:

"[N]ot only entitled but bound to satisfy themselves that the laws under which the native districts will be administered are such as they can approve."⁸

Upon such consultation being made by the Commission the traditional leaders and their followers expressed no objections whatsoever to the introduction of a penal code. All they insisted upon was that their customs such as *lobolo*, circumcision and *intonjane*, a custom for bringing girls to adulthood parallel to circumcision, should not be outlawed.⁹ These customs were indeed never outlawed. This would certainly have pleased respondents like Maki of Idutywa who, when replying to commissioners' questions "on behalf of heathen headmen and natives" had said that the customs "are part of our creation and enjoyment of life".¹⁰ Representations by some whites and the minority westernized blacks for the customs to be outlawed were therefore defeated. The Penal Code was thus founded on the solid rock of consultation with the indigenous people of Transkei.

An important reason for the birth of the Penal Code and the legal pluralism that it introduced to South African criminal law was that it was aimed at averting a different legal pluralism that was threatening to cause chaos and confusion in the administration of justice in the vast Transkeian hinterland. This pluralism was notable in the simultaneous and random application of customary criminal law and colonial criminal law.¹¹ The customary criminal law was so well established and systematically applied by the traditional leaders that it had actually found its way to being applied by the white magistrates in the various Magistrates' Courts of the approximately 26 Transkeian districts. On the other hand, the immediate consequence of annexation was that Transkei inevitably fell within the pale of colonial law, and the penetration of Roman-Dutch law into the practice in

⁷ Allott "Colloquium on African Law" 1963 7(2) *Journal of African Law* 76. It is noteworthy that in Western Europe codes have successfully been enacted in various countries. They date back to the codes of Lycurgus and Solon in Greece, the work of Justinian in Rome, and the French Napoleon Code.

⁸ See Kerr "The Cape Government Commission on Native Laws and Customs (1883)" 1986 *Transkei Law Journal* 18.

⁹ See Appendix C to the Cape Government Commissions' report at 152.

¹⁰ *Ibid.*

¹¹ In the vast area of the Western Cape the application of colonial Roman-Dutch criminal law met with no difficulty because there were no large numbers of indigenous people practising a distinct legal system of criminal law. In the Western parts of the Eastern Cape, namely British Kaffraria/Ciskei, there was quite a concentration of black people practising customary law. However, this area was incorporated into the Cape Colony's political, legal and administrative system. See Saunders 193. The Cape Governor, Sir Benjamin D'urban, concluded a series of treaties with the Chiefs regarding the law to be applied and the result was the abolition of customary criminal law. See Mqoke "The History and Application of Indigenous Law in the Ciskei" 1986 *Transkei Law Journal* 66.

the courts was unavoidable. The result of the co-existence of the two legal systems was that “the magistrates did not know which law to apply, while the people on the other hand did not know which law they had to obey”.¹² The Commission elaborated:

“Some Magistrates inform us that they administer the Kaffir law; others that they administer the Colonial law, some that they apply the Kaffir mode of procedure by calling to the aid of assessors, and allowing the examination of prisoners, others that they adopt the colonial mode of procedure; some that they apply Kaffir law and procedure in some cases, and the Colonial law and procedure in others. All are agreed that a criminal code is desirable in order to give certainty to the law that they are called upon to administer ...”¹³

After serious consideration and consultation which included useful input from the three chief magistrates of Transkei, namely Transkei proper, Thembuland and Griqualand East, it was agreed to produce a document which reflected the search for a *modus vivendi*, an instrument that created or strengthened bridges between the mixed communities of the new Transkei. Thus the new code was made applicable to all persons regardless of class or colour.¹⁴ Furthermore, it reflected the unavoidable influence of English law in an English-dominated territory.¹⁵ It also distinctly reflects the penetration of Roman-Dutch law despite Transkei having been overwhelmed by the protagonists of English law.¹⁶ Likewise it reflected the impact of customary criminal law.¹⁷

In all the circumstances set out above, the 1883 Commission discharged its obligations to the people of the mixed community of Transkei at that time with the resolve, open-mindedness and success with which the framers of the new South African Constitution carried out their task. Fortunately the strongly-expressed views of those who were insisting on this code being a code of pure customary criminal law were minority views. Had it been otherwise, the history of South African criminal law would have been deprived of the enriching of the Transkei Penal Code. Furthermore, the code of customary criminal law would not have had the same endurance and resilience as the Transkei Penal Code, and it would in all probability have

¹² Thus noted the 1883 Commission: s 35 of the report.

¹³ *Ibid.*

¹⁴ There was also a strong recommendation that it be translated into Xhosa “(so as) to enable those who are subject to the laws to know them”. See the commission’s report 21. Had this recommendation been accepted, Transkei would have thus taken the great step of making Xhosa an official language long before the advent of Transkei’s independence in 1976 and the new South African Constitution in 1993 when Xhosa did at last get recognition as an official language.

¹⁵ *Eg*, s 14 of the Code reflecting the English law of bigamy, and s 13 which reflects the English law of homicide – no one is criminally responsible for the killing of another unless the death takes place within a year of the cause of death. South African law has no statutory limitation on this question.

¹⁶ *Eg*, s 4 of the draft Penal Code declared theft to be a *delictum continuum*, a Roman-Dutch law rule that is not found in English law.

¹⁷ *Eg*, s 17 of the Code which enacts the customary law of assault – that magistrates should, as does the chief upon receiving a fine following a conviction, award a portion thereof to the injured person. The Supreme Court actually insisted on magistrates correctly implementing the provisions of s 17. See *R v Sinayile* 1910 EDL 58, *R v Nqweniso* 1910 EDL 68; and *R v Zhalenkomo* 1911 EDL 387.

become obsolete.

It is submitted that the creation of a “national outlook” for the criminal law of the Transkeian Territories was a contributory factor to the staying power of the Penal Code. There is a good reason why the British authorities would have easily conditioned themselves to allowing the growth of an overall separate status for Transkei. Being an annexed territory with a vibrant population and a distinguishing feature like its indomitable customary law, much attractive to white settlement because of its rich soil, a beautiful coastline and friendly climate, the authorities indeed viewed Transkei as a British colony in its own right. It will be remembered that at the time of annexation English criminal law established itself in different disguises throughout Africa and Eastern Countries in the form of codes – the Nigerian Penal Code, the Sudanese Penal Code, the Indian Penal Code – all named after the countries in which they were meant to apply.

4 DOMINANCE OF TRANSKEI CODE OVER SOUTH AFRICAN CRIMINAL LAW

4 1 Period of full-scale dominance: 1920-1949

A fascinating development was the replacement of the Roman-Dutch law principles by the Code's provisions in important areas of the law. The reason for this unexpected, but far-reaching influence of the Transkei Penal Code on South African criminal law, is not far to seek. When Union was formed in 1910 Transkei became part of South Africa, and it is South African judges themselves who administered and interpreted the Code. They then readily regarded it as part of South African law. The difficulty facing the judges, not only in the Eastern Cape Division of which Transkei was judicially part, but throughout South Africa, was made more acute by the emergence of the eminent work of Gardiner and Lansdown in 1917.¹⁸ The authors would, as part of the text and not even as annexures, append the relevant sections of the Code to the discussion of the corresponding aspects of the general law of the country. When problems arose which neither the common law nor the statute law could solve, the judges and practitioners simply relied on the Code.

The influence that the Transkei Penal Code exerted on South African criminal law will be demonstrated by means of a few examples.

*4 1 1 The doctrine of common purpose*¹⁹

The early application of the Transkei Penal Code outside the Transkei Territories is seen in the case of *R v Taylor*.²⁰ Some 200 students of the Lovedale Missionary Institution near Alice went on strike and smashed windows, wrecked the power station, dining hall and bookstall. Others stoned and injured the principal and committed several acts of vandalism

¹⁸ Gardiner and Lansdown *South African Criminal Law and Procedure* (1917).

¹⁹ S 78 of the Code.

²⁰ 1920 EDL 318.

and thuggery.

The students were charged with public violence, malicious injury to property, arson and assault with intent to do grievous bodily harm. Hutton J said:

“Then it is argued that the accused have not all been satisfactorily identified as having taken part in the rioting. In considering this point it must of course be borne in mind that it is not necessary for the Crown to prove that each one of the accused had committed some overt act constituting the offence. For in the circumstances of the present case the Crown is entitled to rely on the doctrine of common purpose, the common law and definition of which has never been more clearly stated than in Sec. 78 of Act 24 of 1886 (the Transkeian Penal Code), in the following terms ...”²¹

The stage was thus set for a full-scale application of the doctrine of common purpose outside the area of applicability of the Transkei Penal Code. The first such case was *R v Garnsworthy*,²² in which Dove-Wilson JP declared:

“Now the law upon this is quite clear. Where two or more persons combine in an undertaking for an illegal purpose, each of them is liable for anything done by the other or others ...”

However, the judge did not refer to any authority in support of the statement that the law is “quite clear” on the point. The doctrine of common purpose was thereafter applied in several cases in murder trials where it was not possible to determine who dealt the lethal blow.²³

4 1 2 *Provocation*²⁴

In this area of the law the influence of the Transkei Penal Code was also significant. For a long time the judges accepted that provocation was a circumstance which served to reduce murder to culpable homicide. That approach was directly influenced by the provisions of section 141 of the Code.

In their sixth edition which appeared in 1957, Gardiner and Lansdown²⁵ quote this section in full and then declare: “This section may be regarded as expressing what is the common law of South Africa on the subject of provocation – see *R v Buthelezi* 1925 AD 160.” A perusal of *Buthelezi's* case,²⁶ however, shows that the proposition that this section is a true reflection of South African law is based on the authority of only Gardiner and Lansdown. It follows that the authors expressed the view in their first edition which appeared in 1917, six years before *Buthelezi's* case was decided.

²¹ *Ibid.*

²² 1923 WLD 17.

²³ *Eg.* *R v Morela* 1947 3 SA 147 (A); *R v Sikepe* 1946 AD 745; *R v Ndhlangisa* 1946 AD 1101; *R v Ncube & Koza* 1950 2 PH 211 (A); *R v Matsiwane* 1942 AD 213; *S v Nkomo* 1966 1 SA 831 (A); *R v Kubuse* 1945 AD 189; *Gaillard v S* 1966 1 PH H 74 (A); *S v Dambalaza* 1964 2 SA 783 (A); and *R v Ngcobo* 1928 AD 732.

²⁴ 141 of the Code.

²⁵ Vol 2 1555.

²⁶ *R v Buthelezi* 1925 AD 162.

Be that as it may, it was in *R v Buthelezi*²⁷ that this approach for the first time received the *imprimatur* of the Appellate Division. In that case, which emanated from the Natal Native High Court, a constable had grounds for suspecting that his wife had misconducted herself with another man during his absence from home, and stabbed her with a long knife, causing her to bleed to death within a few minutes. Solomon JA said that as to the question of intention to kill, no hard and fast rule could be laid down. The question was one of fact to be deduced from the circumstances of the particular case under investigation.²⁸ This, of course, is in accordance with section 14. However, the judge went further to place the matter beyond all doubt and said:

“Our law on the subject is, as pointed out by Gardiner and Lansdown in their treatise on criminal law, well expressed in section 141 of the Transkeian Penal Code of 1886 ... It would be difficult, I think, to improve upon that statement of the law, which may be regarded as correctly laying down our law upon this subject.”²⁹

In a concurring judgment, Kotze JA reiterated these sentiments:

“The contention in the present case ... is that provocation was of a nature to reduce the crime committed by the applicant to manslaughter ... Now, although the Transkeian Code applies merely to the Native Territories beyond the Kei, it has frequently been resorted to with approval by our courts. I think the provisions of section 141, to which I have referred, correctly state the law.”³⁰

The stage was then set for a full-scale application of section 141 of the Transkeian Penal Code in South African courts. In *R v Attwood*³¹ the accused had been convicted of murder by a jury in the Pretoria Criminal Sessions and the question arose as to whether the presiding judge had accurately explained the law in regard to provocation as a defence to a charge of murder. Watermeyer CJ reviewed the old authorities such as Carpozovius, Matthaeus, Moorman and Huber and then said:

“It is however, unnecessary for the purpose of this case to examine in any detail the principles which they lay down, because in *R v Buthelezi* (1925 AD 160) this court adopted the provisions of section 141 of the Transkei Penal Code as a correct statement of our law.”³²

He gave leave to appeal in respect of the killing of Genis who, he found, had indulged in wrongful conduct immediately before the shooting, of such a nature as to deprive an ordinary man of his power of self-control.

In a dissenting judgment Tindall JA said it was unfortunate that the judge *a quo* had expressed himself:

“[I]n these inaccurate terms he could have stated the law simply by quoting the exposition of the law in section 141 of the Cape Act 24 of 1886 (set out in

²⁷ *Supra* 160.

²⁸ *Supra* 162.

²⁹ *Ibid.*

³⁰ *Supra* 170.

³¹ 1946 AD 331.

³² *Supra* 339.

volume 2 of Gardiner and Lansdown). This exposition of the law relating to provocation was held by this court in *Rex v Buthelezi* (1925 AD 160) to express correctly our law in regard to this defence.³³

The Penal Code provisions were followed in several other cases.³⁴

4 1 3 *Compulsion/necessity*

Section 29 of the Transkei Penal Code followed the English law doctrine of self-sacrifice as against self-preservation. This doctrine was followed in the South African case of *R v Werner*³⁵ where Watermeyer CJ declared his unqualified reliance on the Transkei Code's section 29. The case was applied in *R v Mneke*.³⁶

4 1 4 *Liability of children*³⁷

The legal certainty provided by the Transkei Penal Code in relation to the liability of children is evident when one considers the crime of rape. Section 159 provides that a boy below the age of 14 is conclusively presumed to be incapable of committing rape and, *semble*, sodomy and bestiality. The English law was similar on the point.³⁸ In Roman-Dutch law there was a difference of opinion among jurists.³⁹ South African law followed the English law and the Transkei Penal Code of 1886.

4 1 5 *Inchoate crimes*

The law relating to the inchoate crime of attempt is fraught with difficulty. Prominent among them is the difficulty of determining whether a subjective or an objective approach should be adopted in establishing where preparation ends and where consummation begins. This problem plagues the jurisprudence of several legal systems, including South Africa, and the result has been a lack of harmony in the decisions of our courts.⁴⁰

In the midst of this state of uncertainty the Transkei Penal Code constantly offered itself as a ready and clear-cut measure which assisted judges in application of the law. Of the cases mentioned above, *R v Seane*⁴¹ is a leading example of such application. In the case Curlewis JP had this to say:

"But after all, however, reprehensible or immoral the act may be the Courts have only to deal with the question whether the act with which an accused is charged is a crime or not. If there is no other provision in our law under which the accused can be dealt with, then of course it may be necessary for the

³³ *Supra* 344.

³⁴ *Eg, R v Blokland* 1946 AD 940; *R v Tshabalala* 1946 AD 106; and *R v Reccia* 1946 EDL 1.

³⁵ 1947 2 SA 828 (A).

³⁶ 1961 2 SA 240 (N).

³⁷ S 159.

³⁸ See *R v Williams* (1893) QB 320.

³⁹ See Gardiner and Lansdown Vol 2 6ed 1622.

⁴⁰ See *eg, R v Seane* 1924 TPD 668; and *R v Parker & Allen* 1917 AD 552.

⁴¹ *Supra* 683.

legislature to introduce some provision resembling section 83 of the Transkei Penal Code – ie the law as laid down in the Cape Act No 24 of 1886.”

This lament by Curlewis JP is insurmountable evidence of the dominant position enjoyed by the Transkei Penal Code over South African criminal law during the era concerned.⁴²

4 1 6 *The Code's influence outside South Africa*

The Transkei Penal Code was such a persuasive document that lawyers in the High Commission Territories (like Botswana) looked to it for solutions when difficulties arose.⁴³ In several instances the courts in Zimbabwe followed the South African courts in accepting the Code as correctly reflecting the common law.⁴⁴

4 2 **Partial termination of the Code's influence: 1949-1982**

The termination of the Code's influence on South African criminal law was attempted, with a measure of success, by De Wet and Swanepoel as from 1949.⁴⁵ Opening the debate on the effects of section 141 of the Code on South African law with reference to provocation, the authors observe that the South African practice was itself established under the influence of English law,⁴⁶ and that this was considerably facilitated by the existence of section 141 of the Transkei Penal Code.⁴⁷ They then protest that in *R v Buthelezi*⁴⁸ this “cumbersome and confused bit of legislation” was described as a correct representation of South African law, and the statement was accepted in subsequent decisions of the Court of Appeal. The authors then boldly reject this whole approach: “Dat art 141 ons reg op hierdie punt korrek weergee, is net nie waar nie.”⁴⁹

In all their four editions, the onslaught by De Wet and Swanepoel on the ravages of the Penal Code on South African criminal law was systematic

⁴² The distinct impact of the Transkei Penal Code is evident in other areas of criminal law eg theft (*R v Golding* (1896) 13 SC 210, *R v Monakali* 1937 EDL 248, *R v Theunissen* 1907 ORC 118); robbery (*Minister of Justice in re R v Gesa*; *R v de Jongh* 1959 1 SA 234 (A) where Schreiner ACJ recalled *R v Buthelezi* 1925 AD and referred to the Transkei Penal Code as “a guide to our law”, *R v Valachia* 1945 AD 826); and assault with intent to murder (*R v Jolly* 1920 AD 176).

⁴³ See eg, *Bagwasi and Luono v Rex* HCTLR 1926-1953 38.

⁴⁴ Eg, *R v Harlen* 1964 4 SA 44 (SR); *R v Damascus* 1965 4 SA 589 (SR); and *S v Potgieter* 1979 4 SA 64 (ZRA).

⁴⁵ See De Wet and Swanepoel *Die Suid-Afrikaanse Strafreë* 1ed (1949); 2ed (1960); 3ed (1975); and 4ed by De Wet (1985).

⁴⁶ De Wet and Swanepoel (1949) 41.

⁴⁷ De Wet and Swanepoel (1949) 120-121.

⁴⁸ *Supra*.

⁴⁹ Translated it means that “it is simply not true that s 141 correctly reflects our law on this point”.

and relentless.⁵⁰ As a result it was bound to yield changes to the law. Such change was evidenced by the law relating to the common purpose doctrine⁵¹ (where the common purpose doctrine and its objective approach was specifically departed from) and the law relating to necessity.⁵² The voice of reason raised by the authors also received support from jurists.⁵³

4 3 Resurgence of the Code's influence: 1982

The courts were unable to wean themselves permanently from the strong grip of the Transkei Penal Code. Before the lapse of a long time the Code's influence made itself felt through the Appellate Division in *S v Khoza*.⁵⁴ This case halted the march of the courts away from the doctrine of common purpose, and opened the way for a similar approach in other cases. It was followed by the case of the "Sharpeville Six" in *S v Safatsa*⁵⁵ where the Appellate Division resurrected the common purpose doctrine in unequivocal terms, thereby proving once again the staying power of section 78 of the Transkei Penal Code.⁵⁶

5 JUDICIAL SUPPORT FOR THE CONTINUED APPLICATION OF THE 1886 AND THE 1983 TRANSKEI PENAL CODES

The judges of the High Court of South Africa have consistently lent their unqualified support for the continued application of the 1886 Code whenever circumstances arose which were militating against such application. This strengthened the Code's dominance as indicated above.

It is quite understandable that public prosecutors transferred to Transkeian towns from neighbouring South African cities or towns like Port Elizabeth, Queenstown and MacLear and accustomed to framing criminal charges under the common law, would do similarly when in Transkei. Magistrates similarly transferred would in good faith proceed to try and acquit or convict as though the case before them was not in the area of strict application of the Transkei Penal Code. This happened in *R v Mboxo*,⁵⁷ a case that emanated from the Tsolo District of Transkei. There Van der Riet J stated that the provisions of sections 2 and 269 of the Penal Code deprive

⁵⁰ With reference to *R v Carelse and Kay* 1920 CPD 471 the authors complain that the theft took place in Cape Town but that "under the influence of this code the same law became effective in the whole union" (translation supplied).

⁵¹ *S v Nkombani* 1963 4 SA 877 (A); *S v Madlala* 1969 2 SA 637 (A); and *S v Maxaba* 1981 1 SA 1148 (A).

⁵² *R v Hercules* 1954 3 SA 832; and *S v Goliath* 1972 3 SA 1 (A).

⁵³ Eg, Rabie "The Doctrine of Common Purpose" 1971 SALJ 417.

⁵⁴ 1982 3 SA 1019 (A) 1047 where the conviction was supported by Botha AJA purely on the basis of common purpose.

⁵⁵ 1988 1 SA 868 (A).

⁵⁶ Notably, the new Transkei Penal Code Act 9 of 1983, through its s 27, has taken over verbatim the provisions of s 28 of the 1886 Code, and has thus smoothed South African criminal law's path on its hasty return to the doctrine of common purpose with its objective test contra the Roman-Dutch law's subjective test.

⁵⁷ 1924 EDL 286.

the crown of any choice to charge an accused at common law with an offence for which punishment provisions are made in the Code “whatever might be the position in other parts of the union”.⁵⁸ The *Mboxo* case was followed in *R v Gomeni*.⁵⁹

As from 26 October 1976, the former Ciskei districts of Herschel and Glen Grey were added to the 26 Transkeian districts to make 28 districts for the new Republic of Transkei. This was in terms of the Transkei Constitution Act.⁶⁰ The *proviso* to section 60(1) of this Act extended the application of the provisions of the Transkei Penal Code Act 24 of 1886 to those two districts. It was against this background that the case of *S v Solo*⁶¹ arose in the Glen Grey district. Munnik CJ held that the Transkei Penal Code and no longer the common law was the law applicable in the mentioned districts. The finding was of much benefit to the accused because his sentence of six months imprisonment under the common law was incompetent and had to be altered so as to give him the option of a fine as provided by section 243 of the Transkei Penal Code in relation to his conviction of malicious injury to property.

Likewise in *R v Zonele*⁶² it was held that as the appellants had been convicted of robbery of a European trader under section 211 of the Transkei Penal Code, South Africa’s Act 56 of 1955 dealing with punishment in special situations of “aggravated circumstances” did not apply to the exclusion of the punishment provisions of sections 2 and 211 of the Transkei Penal Code which provided for imprisonment up to seven years. The death sentence imposed in terms of Act 56 of 1955 was therefore set aside in favour of the seven year term of imprisonment. In *S v Sikweza*⁶³ the appellate division drew attention to the difference in the test of liability between South African law and the Code on a charge of murder. It altered a conviction of murder which was based on the common law test to one of culpable homicide based on the Penal Code test, and substituted the death sentence with one of eight years imprisonment. “The code, being statutory, [had to] prevail in the territory for which it was enacted.”⁶⁴

Since the re-incorporation of Transkei into South Africa in 1994 there have been ill-informed rumblings to the effect that the statutes of the Transkei National Assembly (as it then was) should be relegated to mere history and the statutes and the common law of South Africa should automatically apply in Transkei. Against this background the Transkei Division case of *S v Xolani Bhobhotyana*⁶⁵ arose. The judgment shows that the office of the National Director of Public Prosecutions called upon its Transkei office to discontinue framing charges under the Transkei Penal Code⁶⁶ and to frame all charges under the common law. Bhobhotyana was accordingly charged with murder,

⁵⁸ See *R v Mboxo supra* 289.

⁵⁹ 1945 EDL 58, a theft case from Tabankulu.

⁶⁰ 15 of 1976.

⁶¹ 1979 1 SA 928 (TkSC).

⁶² 1959 3 SA 319 (A) a case from the Mqanduli District of Transkei.

⁶³ 1974 4 SA 734 (A).

⁶⁴ Per Holmes JA, *S v Sikweza supra* 736.

⁶⁵ Case no 63 of 2004, as yet unreported.

⁶⁶ 9 of 1983.

robbery with aggravating circumstances, housebreaking and theft, firstly under the common law and alternatively under the Transkei Penal Code.

In its judgment the court recalled the cases *R v Mboxo*,⁶⁷ *R v Gomeni*⁶⁸ and *S v Solo*.⁶⁹ It then pointed out that the Justice Laws Rationalisation Act⁷⁰ had repealed only part 9 of the Transkei Penal Code⁷¹ which dealt with sexual offences. The reasonable conclusion was that the legislature had intended the remainder of Act 9 of 1983 to apply throughout Transkei. Bearing in mind section 241(2) of the Constitution⁷² re the continuation of laws, the Transkei Penal Code Act would remain applicable to the exclusion of the common law until Parliament itself intervened.

⁶⁷ *Supra.*

⁶⁸ *Supra.*

⁶⁹ *Supra.*

⁷⁰ 18 of 1996.

⁷¹ Act 9 of 1983.

⁷² 108 of 1996.