BESTIALITY: THE PARADOX OF THE "PARAGON OF ANIMALS"

S v M 2004 1 BCLR 97 (O)*

1 Introduction

The South African Constitution (Act 108 of 1996) represents an emphatic break with a past characterized by denial of human dignity, and commits our society to a transition to a new society characterized by a commitment to recognizing the value of human beings (O'Regan J in *Bernstein v Bester* 1996 4 BCLR 449 (CC) par 148). Freedom has come. However, in a democratic society freedom can never be absolute:

> "It must be exercised with due regard to the legitimate interests of other members of the society, and the countervailing claims of other constitutional values" (Chaskalson "Human Dignity as a Foundational Value of Our Constitutional Order" 2000 *SAJHR* 193 202).

What are we then to make of conduct which evokes disgust in others? Is the limitation of autonomy consequent upon criminalization of such conduct acceptable on constitutional grounds? Should the state be entitled to enforce prohibitions founded upon moral judgements? These issues arose for decision in the context of the crime of bestiality in the case of *S v M* (2004 1 BCLR 97 (O)).

2 Judgment

This matter came before the High Court by way of special review in terms of section 304A of Act 51 of 1977 after the accused was found guilty of the crime of bestiality in the Magistrate's Court of Heilbron. Prior to sentencing, the magistrate referred the matter, being of the opinion that the crime of bestiality was in all probability irreconcilable with the provisions of the Constitution. The court *a quo* was persuaded by the views of Professor Snyman in this regard. Given that there was eyewitness testimony as to the conduct in question, and that the accused's claim of amnesia was dismissed by the court, the result of the review turned solely on the constitutionality of the crime.

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* Also reported at 2004 3 SA 680 (O); 2004 1 SACR 228 (O). The reference to the human being as the "paragon of animals" comes from the well-known soliloquy in Shakespeare's *Hamlet* (Act ii, Scene II).

Having cited the relevant passage in Snyman (set out below under 5), as well as the views of other writers, the court (per Wright J), drew a distinction between decriminalisation, which it held was a function of the legislature, and unconstitutionality, which is a matter for the judiciary to determine (par [9]). The court proceeded to set out the relevant tests for constitutionality (par [7]) that have been developed in the jurisprudence of the Constitutional Court in the cases of *Ex parte Minister of Safety and Security: In re S v Walters* (2002 4 SA 613 (CC) par [26]-[27]) and *S v Thebus* (2003 2 SACR 319 (CC) par [28]-[29]).

The three alleged unjustified contraventions of the accused's rights under the 1996 Constitution are contained in section 9(3) (which prohibits discrimination based on sexual orientation); section 12(1) (the right not to be deprived of one's freedom arbitrarily or without sound reasons); and section 14 (the right to privacy).

In examining the matter of the contravention of section 9(3), the court adopted the approach set out in *Harksen v Lane NO* (1998 1 SA 300 (CC) par [54] followed in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) par [17], hereafter *NCGLE*). It was pointed out that there was a fundamental difference between the proscribed activity discussed in the *NCGLE* case, which was consensual, and bestiality, where there cannot be any question of consent on the part of the animal (par [14]). Moreover, the court noted the distinction between the public attitude to consensual sexual intercourse between same-sex persons and the overwhelmingly negative attitude to the idea of intercourse between man and animal. The court held that whilst societal disapproval is not in itself decisive, it is incumbent upon the courts to give weight to such considerations (par [15]). Given the fact that the animal could not consent to intercourse, and the almost universal revulsion for inter-species intercourse, the court concluded that despite any possible discrimination arising out of the criminalization of such conduct such proscription has "a rational connection to a legitimate governmental purpose", and would therefore be justified in terms of the limitations clause (s 36 of the Constitution).

As regards the right contained in section 12(1) of the Constitution, the court examined the jurisprudence in point, and concluded that although the offence no doubt restricted the freedom of a person, it could not be said that such restriction was arbitrary or without "just cause" (as required in order for the right to be unjustifiably contravened) for the reasons raised in relation to section 9(3) – that the conduct in question was *contra bonos mores*, and that the animal could not consent. The court held that even though bestiality appeared to be a rare practice, and had little direct impact on society, the limitation of the right was justified (par [22]).

In respect of the alleged infringement of the right to privacy, the court referred to the judgment of Sachs J in the *NCGLE* case (par [118]), where it

was stated that the concept of privacy should not be seen to grant "blanket libertarian permission" for private sexual conduct, citing "cross species sex" as an example of conduct which is typically criminalized with the "privacy interest [being] overcome because of the perceived harm". Wright J concluded that the repugnance with which the crime is regarded by society justifies the limitation of a person's right to privacy in terms of section 36 of the Constitution (par [23]).

In conclusion, as regards the constitutional challenge, the court dealt with Snyman's criticism of a paternalistic approach on the part of the State, resulting in criminalization of bestiality (as reflected in Heher J's comments in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 102 (W) 127d-f – see discussion below under 6), as being out of line with the Constitution. The court stated that neither the apparently low incidence of the crime nor the fact that it typically occurs in private impact on the issue of constitutionality, and that the criminalization of bestiality was (at least currently) consistent with the spirit of the Bill of Rights. Therefore, the crime could not be found to be unconstitutional on the grounds that it infringed section 9(3), section 12 or section 14 of the Constitution (par [25]).

The court then proceeded to address some remarks to the issue of the decriminalization of bestiality, along with the associated matter of the possible use of provisions proscribing cruelty to animals in place of the bestiality crime. It was concluded that the crime still had a role to play, and that though it may be logical to deal with this conduct in the context of legislation preventing cruelty to animals (Act 71 of 1962), this was not expressly sought to be achieved, nor indeed, achievable, in terms of the existing provisions. The question of animal rights was explicitly not dealt with.

The crime not being found to be unconstitutional, the court did not disturb the verdict of the court *a quo*, and referred the matter back for sentencing.

3 History of the crime

There appears to be no indication of any crime prohibiting intercourse between human and animal in Roman law (Labuschagne "Decriminalisasie van Homo- en Soöfilie" 1986 11 *Journal for Juridical Science* 167 168; De Wet *De Wet & Swanepoel Strafreg* 4ed (1985) 282). However, in the Roman-Dutch law, under the influence of Canon law (see *eg* the Biblical texts Exodus 22:19, Leviticus 18:23 and 20:15-16), a person who obtained sexual gratification in a manner considered to be contrary to the order of nature was met with criminal sanctions. The crime was called *sodomie*, *venus monstrosa* or *onkuysheyd tegens de Natuur* and it was divided into three categories: self-masturbation, unnatural sexual acts between one human being and another (not just between persons of the same sex) and bestiality (*S v K* [1997] 4 All SA 129 (C) 135 and references there to Damhouder *Practyke van Civil & Criminele Saken* (1656) 527; Huber

Praelectiones ad D 48.5 nn 12 & 13; Van Leeuwen *Censura Forensis*, 1.5.28.7-9; Van der Keessel *Praelectiones in Libros* XLVII et XLVIII *Digestorum ad* D 48.5.29; Van der Linden *Koopmanshandboek* 2.7.7; De Wet & Swanepoel 283; Labuschagne 1986 *JJS* 167; Milton *South African Criminal Law and Procedure* Vol II: Common-law Crimes 3ed (1996) 231). Following Biblical precedent (Leviticus 20:15-16), bestiality was visited with capital punishment, most often by public burning of both the offender and the animal (although apparently courts had the discretion to hand down more kindly (!) death sentences – see *Q v Taleke* 1886 4 EDC 180 181-2).

English law followed a similar developmental pattern, with the first statute prohibiting "the detestable and abominable vice of buggery" relating to "mankind or beast", being that of Henry VIII in 1533, following the king's assumption of ecclesiastical courts' control over sexual mores (see Parker "Is a Duck an Animal? An Exploration of Bestiality as a Crime" 1986 *Criminal Justice History* 95 101-104 for a discussion of the development of the crime in England). Indeed, until its recent legislative reformulation in the Sexual Offences Act 2003, the crime of buggery retained its common law meaning of anal intercourse by a man with another person, or anal or vaginal intercourse by a man or woman with an animal, under the head of "unnatural offences" (see generally Smith *Smith & Hogan Criminal Law* 8ed (1996) 492ff), thus entrenching the original religious disapprobation of non-procreative forms of sexual intercourse. This association of anal intercourse between humans and sexual acts involving animals also persisted in Canadian law until the 1985 revision of the Criminal Code (see generally Gigeroff "The Evolution of Canadian Legislation with respect to Homosexuality, Pedophilia and Exhibitionism" 1965-6 *Criminal Law Quarterly* 445 446ff).

4 South African law

In South African law the Roman Dutch crime of *venus monstrosa* was split into three separate crimes: sodomy, bestiality and a residual group of proscribed "unnatural" sexual acts punished as an "unnatural" sexual offence" (Milton 231). As with English law, each of these crimes censured these particular non-procreative forms of sexual activity as deviant or "unnatural". Our focus shall henceforth solely be on bestiality per se, although the conduct involved can probably also be punished as an "unnatural" sexual offence (Skeen "Criminal Law" in Joubert (ed) LAWSA Vol 6 (first reissue) (1996) par 231; and *R v Le Fleur* 1927 1 PH H87).

There is little information regarding the specific contents of the crime in both common law or in judicial precedent (Labuschagne 1986 *JJS* 179). In fact, very few reported bestiality cases exist, both in South Africa and in Common Law jurisdictions (Parker 1986 *Criminal Justice History* 96).

The crime of bestiality has been described as unlawful intentional sexual relations between a human being and an animal (Snyman *Criminal Law* 4ed (2002) 360; and Burchell and Milton *Principles of Criminal Law* 2ed (1997) 638). It is accepted that the crime could be committed by both males and females, although in all the reported cases the perpetrator was a male (LAWSA par 231). The animal may also be either male or female (Snyman 361; and see also the Canadian case of *R v Triller* 55 CCC (2d) 411 (B.C.Co.Ct.)). The crime is not limited to particular species (Milton 232; in England the crime was held to extend to domestic fowl in *R v Brown* (1889) 24 QBD 357), but where the physical structure of the animal concerned does not allow for penetration, the accused may nonetheless be convicted on the basis of attempt. The animal must be alive, as intentional penetration of a carcass would amount to an "unnatural" sexual offence.

Penetration is regarded as an element of the crime, although the case law has been somewhat equivocal on what should be penetrated (Labuschagne 1986 *JJS* 179). There is however unanimity amongst the writers that the crime can be committed by penetration either *per anum* or *per vaginam* (LAWSA par 231; Snyman 361; and Milton 231) whether the penetration is perpetrated by, or accepted by, the accused. This is also the case in the analogous English law crime (s 69 of the Sexual Offences Act of 2003) and in Canada (s 160 of the Canadian Criminal Code; and *R v Ruvinsky* 1998 WL 1724579 (Ont. Prov. Div) par 39), but not in Minnesota (*S v Bonynge* 450 N.W. 2d 331). Emission of semen is not essential for a conviction (Snyman 360; and Milton 231). The offence can only be committed intentionally (LAWSA par 231).

Conduct which does not involve penetration may be punished under the head of "unnatural sexual offences" (LAWSA par 229 and 232). As regards conduct which falls short of penetration, the accused may be held liable for an attempt to commit the crime of bestiality (Milton 231; Snyman 361; and *R v M* 1961 1 SA 534 (T)). In various cases the accused was discharged due to a lack of evidence of penetration since at the time of apprehension the accused's conduct merely amounted to acts of preparation and thus did not constitute an attempt (*R v S* 1945 1 PH H44 (T); *R v M* 1961 1 SA 534 (T); *R v Sechsa* 1945 J.S. No3 cited in *R v M supra* 625D-E;, *R v G* 1959 2 PH H344 (O); and *S v Lesele* [2002] JOL 9730 (T)). It appears that the accused in the above cases were somewhat lucky to have been held not yet to have commenced the consummation (see Milton 232 fn 21), however the paucity of convictions for the completed crime illustrates the evidentiary difficulties involved, as it is unlikely (in view of the nature of the crime) that there will be an eyewitness to the consummation of the crime (LAWSA par 231 fn 7. Even where eyewitnesses have been present, courts have struggled to establish that the crime has been completed – see *Nkani v R* 1909 NHC 3).

An accused can be found guilty as an accomplice to bestiality (see the English case of *R v Bourne* 1952 36 Cr. App. R. 125, which was followed in

the Zimbabwean case of *S v P* [1999] JOL 5214 (ZH)). Where (as in *R v Bourne supra*) a person is forced to participate in bestiality, the unlawfulness of the conduct would be negated by duress (Burchell and Milton 638).

Although the traditional sentence for bestiality was death, Barry J in *Q v Taleke* (1886 4 E.C.D. 180 183) found that it was the practice of the courts at that time not to punish this offence by death. Burchell and Milton (638) state that the punishment for this offence is imprisonment, but this will not necessarily be the case. The factors that the South African courts take into account during sentencing are the same as for all other offences: the personal attributes of the accused, the nature and seriousness of the crime and the interests of society (*S v P* 1980 3 SA 782 (NC) 783B-C). In this case the court reiterated that the repulsiveness of the crime and the disapproval of society should be balanced with the accused (who had no previous convictions for bestiality) and his apparent standard of civilization. In addition, it was held, the crime took place in an isolated place, and occurred infrequently. The court changed the sentence of nine months imprisonment to a suspended sentence. A similar approach was adopted in the Zimbabwean case of *S v C* (1988 2 SA 398 (ZH)), where the court on review reduced the prison sentence handed down by the court *a quo* to six months with labour, of which three months were suspended for a period. The court drew upon the factors listed in the case of *S v Chitima* (G-S-285-81) in reformulating the punishment in this case: (i) the prevalence of the offence; (ii) the character and motivation of the accused; (iii) whether others were affronted or corrupted by the offence; and (iv) whether any injury was caused to the animal. In the context of these factors, the court in *S v C* (*supra*) cited the following reasons in reducing the sentence of the accused: (i) he was a first offender; (ii) the offence was not prevalent; (iii) the animal was not injured; and (iv) the accused believed that he was alone when he committed the crime.

5 Comments on constitutionality

Counsel for the accused (in *M*) relied heavily on the following views of Snyman (*Strafreg* 4ed 370) in arguing for the unconstitutionality of the crime of bestiality (the identical English passage from Snyman *Criminal Law* 4ed 361 is cited here):

> "The crime's existence may be incompatible with the provisions of the Bill of Rights, for the following reasons: *First*, since there is no convincing reason for the crime's existence, it is arguable that the punishment of this type of conduct amounts to a violation of the provisions of section 12(1)(a) of the Constitution, which provides *inter alia* that everyone has the right not to be deprived of freedom arbitrarily or without just cause. *Secondly*, the punishment of this type of conduct may be a violation of the provisions of section 9(3) of the Constitution inasmuch as there may be discrimination against a person on the ground of his or her "sexual orientation". *Thirdly*, provided the conduct does not take place in public, punishment of this type of conduct may amount to a violation of a person's right to privacy, which is provided for in section 14 of the Constitution."

The same views are expressed by Maré ("Criminal Law and the Bill of Rights" in *Bill of Rights Compendium* 2A8.3), whilst Milton (230 fn 3) suggests that section 9(3) may have application. These views were not followed by the court however.

It is submitted that the enquiry into constitutionality can further be clarified by reference to the right to dignity, contained in section 10 of the Constitution. As has been discussed elsewhere (Hoctor "Dignity, Criminal Law and the Bill of Rights" 2004 *SALJ* 304), the recognition of dignity is foundational to any order founded on human rights, and indeed "[a]s an abstract value, common to the core values of our Constitution, dignity informs the content of all the concrete rights …" (Chaskalson 2000 *SAJHR* 204).

The right to freedom and security of the person (s 12(1) of the Constitution) should be understood in the context of the fundamental commitment to dignity expressed in section 10 (*Coetzee v Government of Republic of South Africa* 1995 4 SA 631 (CC) par [43]; *Ferreira v Levin NO* 1996 1 SA 984 (CC) par 47-51; and *Bernstein v Bester NO* 1996 4 BCLR 449 (CC) par 148). Freedom and dignity, though distinct constitutional values, are inextricably linked (Ackermann J in the *Ferreira* case par 49) and consequently a limitation of a person's freedom concomitantly limits her right to dignity. Snyman argues (citing Labuschagne 1986 *JJS* 167) that since there is no convincing rationale for the crime's existence, punishment of cross-species sex amounts to a violation of section 12(1) as it is arbitrary and without "just cause". Whilst the court in *M* rejected this challenge, it bears further mention that "just cause" should (it is submitted) be interpreted as "in accordance with the basic tenets of the legal system" (De Waal, Currie and Erasmus *Bill of Rights Handbook* 4ed (2001) 252; and see also O' Regan J in the *Bernstein* case par 146). The definition of the crime of bestiality is intelligible and provides fair notice of what is prohibited, and thus, in accordance with section 35(3)(a) of the Constitution, informs the accused of the charge with sufficient detail to answer it, in so doing not limiting the accused's right to a fair trial. The issue of whether there is a lack of a cogent rationale, and if so, whether this should lead to decriminalization of bestiality will be dealt with below (under 6).

There is a fundamental relationship between the right to equality (s 9 of the Constitution) and the right to dignity, in that since every person possesses human dignity in equal measure, everyone must be treated as equally worthy of respect. It follows that unfair discrimination is a denial of a person's dignity (*Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) par 31; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 41; *NCGLE* case par 120; and *Hoffman v South African Airways* 2001 1 SA 1 (CC) par 27). The right to dignity is also intrinsic to the right to privacy (s 14 of the Constitution), particularly in the context of sexuality:

> "Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without

> interference from the outside community. The way we give expression to our sexuality is at the core of this area of private intimacy" (*NCGLE* case par 32).

Given the close relationship between the right to dignity and each of the rights allegedly infringed by the crime of bestiality, it should follow that if the crime is indeed unconstitutional, the right to dignity would also be limited. However it is submitted that this is not the case. Whilst the breadth of the concept of dignity makes it hard to capture in precise terms, at least it is clear that the constitutional protection of dignity requires us to acknowledge the value and worth of persons (*NCGLE* case par 28), and thus to treat each person with respect. The substantive criminal law gives effect to this principle by according persons the status of autonomous moral agents with an entitlement to freedom of action and the ability to exercise self-determination in their choice of actions (for further discussion see Hoctor 2004 *SALJ* 308-9). Dignity and autonomy, while closely related, are not equivalent notions. Dignity as a basic value underlies autonomy, which in turn is an important component of such values as dignity and self-respect (Hoctor 2004 *SALJ* 308-9). Autonomy may be said to involve the following psychological characteristics:

> "[T]he ability of the person to be the true author of her or his own decisions, to be such that the actions that emanate from those decisions can be accurately ascribed to the person rather than to external forces or internal compulsion" (Christman "Autonomy" in Gray (ed) *The Philosophy of Law – An Encyclopedia* (1999) Vol I: 72).

An agent who is unable to freely exercise such choice due to an uncontrollable compulsion (for instance) cannot be said to act autonomously (*cf* Meyer "Dignity, Rights and Self-Control" 1989 *Ethics* 520 who argues that those who lack the capacity for self-control cannot be said to possess dignity).

It is instructive to advert to the philosophy of Kant, whose ideas have been enormously influential on Western legal thinking, in particular with regard to the notions of autonomy and dignity (Fletcher "Human Dignity as a Constitutional Value" 1984 22 *University of Western Ontario Law Review* 171). Kantian dignity and autonomy cannot be identified with doing whatever one pleases, whatever one's impulses, natural or socialized, prompt one to do. Instead Kantian autonomy requires something like a tenable, sustainable, principled, generalizable choice (Scruton *Kant* (1982) 64-5). Human dignity is inextricably linked to choosing to do what is rational and good (Korsgaard "Aristotle and Kant on the Source of Value" 1986 *Ethics* 486 499f).

However, it has been held that bestiality infringes dignity.

> "Undoubtedly there are some acts which are so repugnant to and in conflict with human dignity as to amount to a perversion of the natural order. Bestiality is an obvious example." (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 102 (W) 127; almost identical formulation in *Banana v S* [2000] JOL 7136 (ZS) 32).

Choosing to partake in cross-species sexual intercourse, can therefore not be regarded as a choice which upholds human dignity. This becomes even more evident if the nature of zoophilia is considered. In psychiatric terms zoophilia is classified as one of the paraphilias. A paraphilia is defined as:

> "[An] erotosexual condition of being recurrently responsive to, and obsessively dependent on, an unusual or unacceptable, perceptual or in fantasy, in order to have a state of erotic arousal initiated or maintained, and in order to achieve or facilitate orgasm" (the definition of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), cited in Carstens "Paraphilia in South African Criminal Case Law" 2002 119 *SALJ* 603 604).

According to Kaplan and Sadock ((eds) *Comprehensive Textbook of Psychiatry* 4ed (1985) 1074), in zoophilia, the animal functions as "a substitute, degraded object, serving both to express contempt for and to encourage sexual activity, which is viewed literally as bestial". Moreover, sexual relations with animals may, in circumstances of rigid sexual convention in society or situations of isolation, be an outgrowth of availability or convenience (Kaplan and Sadock 1073). It is clear that the practice of cross-species sexual intercourse demeans human sexuality and degrades the participant. Thus the voluntary choice of the actor to engage in such conduct does not merit legal protection, and on the grounds of the perceived harm associated with such conduct, it may be criminalized. The prevention of such sexual activity may be regarded as a legitimate governmental aim and the effective prohibition thereof a compelling social purpose, and as Sachs J has stated:

> "The law may continue to proscribe what is acceptable and what is unacceptable even in relation to sexual expression and even in the sanctum of the home, and may, within justifiable limits, penalise what is harmful and regulate what is offensive." (*NCGLE* case par 119).

Whatever limitation of rights results from the crime of bestiality may consequently be regarded as justifiable in terms of s36 of the Constitution.

6 Comments on criminalization

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998 2 SACR 102 (W) 127d-f), Heher J (as he then was) describes bestiality as a perversion of the natural order (see above quote) in the context of a discussion of "unnatural offences", concluding that

> "[i]t seems to me that the State has (or can justify the existence of) a responsibility to its citizens to prevent any individual or group from descending to the level of the beast (literally or figuratively). Unrestrained licence has always been the mark of a society in decay."

Snyman's comments on this *dictum* (in *Strafreg* 4ed 370) are raised in *M* (the identical English passage from *Criminal Law* 4ed 361 fn 56 is cited here):

> "It is submitted that this view is unacceptable. It is not the task of the state to act *vis-à-vis* its citizens like a father teaching moral lessons to his children. Such a paternalistic view of the state's role in society is in conflict with the whole spirit of the Bill of Rights. Bestiality is almost always committed out of the public eye; its incidence is low; and there is no or little demonstrable harm to society. What little harm there might be may be punished in terms of the provisions relating to the crime of cruelty to animals."

Whilst the court in *M* discusses these comments in the light of the constitutionality of bestiality, it is clear that the principal issue to be dealt with in this regard is the role of the state in criminalizing conduct on the basis of paternalism or legal moralism. In short, the question which arises is one of the fundamental problems of criminal law doctrine: when (if ever) may the state criminalize conduct which has little or no harmful effect on others?

Our view is that given the immense power that the state wields through the blunt instrument that is the criminal law, and the protection of the autonomy of the individual through the Bill of Rights, the basic orientation regarding criminalization ought to be minimalist (see Simester and Sullivan *Criminal Law: Theory and Doctrine* (2001) 9-10; and Ashworth *Principles of Criminal Law* 3ed (1999) 32-37). The "harm principle", originally postulated by Mill, in essence articulates that the state is justified in criminalizing any conduct that causes harm to others or creates an unacceptable risk of harm to others (Ashworth 32). Feinberg has further developed the principle to include a further justification for criminalization: that it is necessary to prevent hurt or offence to persons. However, strict adherents to the "harm principle", such as Feinberg, have consistently rejected legal paternalism (the principle that the state may use coercion against a person to further that person's own interests – Simester and Sullivan 9) and legal moralism (defined by Feinberg (in its usual manifestation) as justifying the prohibition of conduct on the ground that it is inherently immoral, even though it causes neither harm nor offence to the actor or to others – *Offense to Others* (1985) xiii) as sufficient reasons for criminalization. A number of criminal law writers who are opposed to using the criminal law to enforce morality admit the legitimacy of paternalism, but paternalistic arguments for criminalization may well conceal a moral rationale (Simester and Sullivan 9). The "harm principle" in its pristine form requires clear and tangible harm to the rights of others before the state can intrude into private life.

The "harm principle" has however been regarded as too simple in its focus on one criterion alone – harm to others – as a ground for interfering with liberty whereas, as even Mill's supporters (such as Hart) acknowledge, there are in fact various grounds for such interference. Raz has provided an alternative interpretation of the harm principle (*The Morality of Freedom* (1986) 420ff), where he has postulated that although it may be right to pursue certain moral ideals so as to provide the condition for the exercise of autonomy, the use of coercion to achieve this is circumscribed. Nevertheless, such coercion may be justifiable in certain circumstances. Wilson sums up

the approach of other writers who, whilst defending society's right to protect itself from moral harms, insist on minimal state coercion, as follows:

> "With this minimalist slant the scope of the criminal law's incursions into the purely moral domain is restricted to the promotion of social cohesion where, alongside the protection of key interests, the values concerned … are so far a part of society's cultural identity that flouting such values would seriously rupture the common sense understandings that allow the individual to make sense of and thus inhabit and sustain the networks of relationships by which a given society is constituted" (*Central Issues in Criminal Theory* (2002) 35).

Thus the "harm principle" is not the sole justification for criminal prohibition of conduct. In the recent case in the Supreme Court of Canada (*R v Malmo-Levine*; and *R v Caine* 179 CCC (3d) 417 (SCC)), the majority of the court, in upholding the criminalization of the possession of cannabis, expressly held that the state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the "harm principle"), or that causes harm only to the accused (par 115). Gonthier and Binnie JJ specifically cite bestiality in this regard as an example of a crime that rests on its offensiveness to deeply held social values rather than to the "harm principle" (par 117. Milton 230 states that the criminalization of bestiality is attributable to "the disgust felt by others for this type of sexual activity").

In the light of these arguments, and the fact that bestiality has for millennia been regarded as a "social taboo" (*R v Ruvinsky* 1998 WL 1724579 Ont.Prov.Div. par 25), with an aversion to human sex or attempted sex with animals being regarded as "one of the cornerstones of public morality" (see the Broadcasting Complaints Commission case of *Van Rooy v SABC 5FM* [2003] JOL 10482 (T) 3), it is submitted that a cogent case has yet to be made out for the decriminalization of bestiality. Moreover, it is submitted that even on an application of the minimalist approach to criminalization there is scope for penalizing bestiality, given the violation of human dignity inherent in such conduct.

Two further issues are worthy of mention. First, Snyman's suggestion that the crime should simply be subsumed under the statutory proscription of cruelty to animals (a view which has been shared by some members of the UK Law Commission (Rook and Ward *Sexual Offences* (1990) 5.20), as well as writers such as Maré (2A8.3)) and Milton (230) should be noted. There may certainly be a degree of overlap between some acts of bestiality and the statutory offence of cruelty to animals (see *eg S v P* [1999] JOL 5214 (ZH)), but as pointed out in *M* (par [27]), the statutory prohibition in section 2(1)(a) of the Animals Protection Act 71 of 1962 does not specifically mention cross-species sex, and may not include all such acts in its present formulation. Moreover, the rationale for bestiality, it is submitted, does not consist in preventing cruelty to animals so much as reflecting the "profound abhorrence" which society feels for such behaviour (Stevenson, Davies and Gunn *Blackstone's Guide to the Sexual Offences Act 2003* (2004) 142).

Furthermore, any attempt to link the criminality of bestiality to the issue of animal rights is premature. (The court in *M* wisely avoids this option in our opinion). As Glazewski points out, the recognition of animal rights was left out of the Bill of Rights despite vigorous campaigning by animal rights groups, and is a matter to be addressed in the long-term (*Environmental Law in South Africa* (2000) 423-5). It is however submitted that the court does not add any clarity to the rationale for the offence by its reference to the lack of consent on the part of animals, as this simply begs the metaphysical question about the nature of non-human consent. Besides, we kill and eat animals without ever obtaining their consent, and this is not regarded as illegal (Stevenson, Davies and Gunn 141).

A second matter which arises out of the discussion on criminalization relates to whether the practice of bestiality ought rather to be regarded as a disease which requires treatment, than a crime resulting in punishment (Labuschagne 1986 *JJS* 185; Milton 230; and Hogan "On Modernising the Law of Sexual Offences" in Glazebrook (ed) *Reshaping the Criminal Law* (1978) 174 187 are of the view that bestiality should be decriminalized on this basis). This raises the issue of whether the accused was indeed suffering from a mental illness which resulted in compulsive behaviour which excluded capacity (*ie* the paraphilia of zoophilia), or whether pathological incapacity did not apply. A related inquiry relates to dangerousness. There is a view that someone who engages in this kind of behaviour may later become a threat to other people (Stevenson, Davies and Gunn 142; and *S v C* 1988 2 SA 398 (ZH) 401G). If this is so, then the criminalization of bestiality would indeed fall within the narrow compass of Mill's "harm principle".

7 Conclusion

It is submitted that the court in *M* correctly resisted the plea to declare bestiality unconstitutional or to support its decriminalization. With regard to the issue of constitutionality it has been argued that, in addition to the findings in *M*, the crime infringes on the individual's autonomy. The pursuit of autonomy requires the state to, *inter alia*, put in place laws which protect people from the consequences of their own vulnerability (Wilson 39). In response to the objection that this amounts to enforcing morality, it should be pointed out that the Constitution does not prevent the State from enforcing morality. As Sachs J has stated (in par [136] of the *NCGLE* case):

> "Indeed, the Bill of Rights is nothing if not a document founded on deep political morality. What is central to the character and functioning of the State, however, is that the dictates of the morality which it enforces, and the limits to which it may go, are to be found in the text and spirit of the Constitution itself."

With regard to criminalization, whilst authors such as Snyman, Labuschagne and Milton have pressed for the decriminalization of bestiality,

it bears iteration that (as held in *M*), this approach should not prevail. It is submitted that the views of Wilson (35) ought to be endorsed when he states:

> "Liberal society arguably needs protection from forms of life which pose a threat to its continued survival. Accordingly it should have the right to pursue what it determines as a morally correct path and to ensure that path is adhered to by the use of criminal sanction, if necessary. Is it not appropriate for the state to provide true moral leadership in a world in which everything appears possible? As long as the state treats all citizens with 'equal concern and respect' by ensuring that the key ingredients in what is generally considered to be a good and worthwhile life are available to all, it arguably still has a role to play in upholding such residual ethical imperatives."

The rationale for the retention of bestiality as a crime would appear to be founded upon a mixture of paternalistic and moral concerns, but it is submitted, on the basis of the above discussion, that such justification remains valid. (It may be noted that by decrying the paternalistic approach whilst denying that bestiality causes any significant harm, Snyman's argument is somewhat contradictory. The very fact that the state acts paternalistically is indicative of the presence of some harm, albeit only to the actor.)

What of the argument that zoophilic actions amount to profoundly disturbed behaviour, requiring treatment rather than punishment? As Carstens (2002 *SALJ* 617) indicates, the mental illness defence, culminating in a special verdict and institutionalization, would be the appropriate verdict where the accused lacks either cognitive or conative capacity as a result of the paraphilia. The accused may then receive the necessary treatment for his or her condition. Where the impact of the zoophilia on the accused's capacity is not substantial, or where the accused is simply motivated by his libido, then liability for the crime may follow. The courts however retain a discretion with regard to sentence, and it is submitted that in this regard the object of the sentence for bestiality should be to avoid as far as possible any recurrence of the offence (*R v Higson* (*The Times* 21 January 1984)).

Ultimately, despite changing mores in other areas of society, it is submitted (in accordance with Wright J's judgment in *M*) that bestiality retains the stigma that has been associated with it for millennia. The degradation and infringement of autonomy and human sexuality that accompanies the practice of cross-species sex, along with the associated profound disapproval of society as a whole, constitutes a powerful motivation for the continued criminalization of such conduct.

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