Legality of Professional Mixed Martial Arts in South Africa

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SUMMARY

Senator John McCain may have been on point when he described mixed martial arts (MMA) as "human cock-fighting" in its formative years in the early 1990s in the United States of America (US). Those early MMA contests were no-holds-barred brutal affairs, fought between bloodied combatants of all shapes, sizes and combat styles, in a metal cage. Like bare-knuckle prize-fighting during the 18th and 19th centuries, this new form of combat sport closely resembled a glorified street fight. The sheer brutality of these spectacles ultimately led to the banning of MMA across the US. Realising that MMA's future depended on governmental sanction and regulation, its organisers actively sought out such sanction and regulation. Although MMA is now legal in all US states, its regulation in both the United Kingdom (UK) and South Africa has lagged behind, raising uncertainty about its legality in these jurisdictions. This uncertainty has been exacerbated by the absence of legislative intervention and judicial scrutiny regarding MMA in both the UK and South Africa. There is, furthermore, a dearth of academic literature addressing this legal lacuna. This study endeavours to bridge that gap by examining the legality of MMA in South Africa. In so doing, guidance is sought from the manner in which the English courts have approached boxing and other activities that entail consensual bodily harm, such as sadomasochism.

1 INTRODUCTION

Mixed martial arts (MMA), sometimes also referred to as cage fighting, can broadly be described as follows:

> "a form of combat that allows moves from a variety of blood sports, including boxing, kickboxing, wrestling, muay thai, and jujitsu – hence the name mixed

> martial arts. Fighters strike each other with punches, kicks, knees and elbows, and try to choke opponents and break, dislocate, or otherwise damage arms, legs and joints … [T]he winner is declared when a fighter is knocked unconscious or submits by 'tapping out', or the referee stops the contest or names a winner on points. Mixed martial arts are governed by rules, and acts such as eye gouging, biting, blows to the groin, and hair pulling are forbidden. However, the unrelenting nature of the striking makes MMA, in contrast with boxing, more closely resemble a street fight."[1]

No other sport in the modern day has attracted as much legal, political and public attention (albeit for the wrong reasons) than MMA when it first made its appearance in the United States of America (US) in the early 1990s.[2] So vociferous was the initial opposition to MMA that a prominent US politician, Senator John McCain, described it as "human cock-fighting" in his impassioned pleas to the various state legislatures in the US to ban MMA in their respective states. Although that campaign ultimately succeeded in getting MMA banned across the US, those bans were later lifted after the organisers of MMA undertook a concerted effort to change MMA's image from a no-holds-barred brawl to a properly regulated combat sport under state control.

Although MMA is now legal in all US states following legislative intervention, its legality in both the UK and South Africa remains uncertain in the absence of similar legislative intervention or judicial scrutiny. This legal uncertainty is not ideal since MMA's legality has important implications for its participants, both from a criminal-law and civil-law perspective.[3] It also raises the question whether there is a duty on the South African legislature in a constitutional democracy to intervene and regulate MMA as a practice that embodies the mutual infliction of consensual bodily harm, or whether MMA

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1 Dixon "A Moral Critique of Mixed Martial Arts" 2015 *Public Affairs Quarterly* 365. In South Africa, MMA has become closely associated in the public mind with the Extreme Fighting Championship (EFC) and the Ultimate Fighting Championship (UFC), the dominant MMA promotions nationally and internationally respectively.

2 The initial controversy surrounding MMA was sparked by its sparse rules, the lack of weight divisions and the free style of fighting permitted, which resulted in a brutal and bloody spectacle closely resembling a street fight. The fact that these fights were contested in steel cages reminiscent of the structures used to control dangerous entities such as violent criminals or wild animals, further contributed to MMA's early reputation as a violent and barbaric sport. See Channon "'The Man in the Middle': Mixed Martial Arts Referees and the Production and Management of Socially Desirable Risk" 2022 *Qualitative Research in Sport, Exercise and Health* 744 747.

3 The legality of MMA in South Africa could be called into question in the following three possible scenarios: (i) a combatant and/or any other participant in an MMA bout (e.g., the promoter) might be criminally prosecuted for participating in the bout, which would call into question the legality of MMA in terms of South African criminal law; (ii) a combatant or his dependants (in the event of his death) might sue his opponent and/or other participants (e.g., the promoter) for compensation for the injuries or death suffered by him in an MMA bout, in which event the legality of MMA would be called into question in relation to possible defences such as *ex turpi causa non oritur actio* and/or *in pari delicto*; or (iii) the National Prosecuting Authority (NPA) or the Department of Sports, Arts and Culture (Department), for example, might wish to seek a declaration from the High Court as to the legality of MMA in terms of the South African criminal law. (These scenarios are modelled on the corresponding English-law scenarios referred to in Gunn and Ormerod "The Legality of Boxing" 1995 *Legal Studies* 181 185–186).

should instead be left to regulate itself on the basis of interactions between consenting adults.[4]

This article critically examines the legality of MMA in South Africa and in doing so, draws analogies with the legality of professional boxing[5] and other consensual-harm practices (such as sadomasochism)[6] in terms of prevailing laws and jurisprudence in South Africa and the UK.[7]

Although the legality of MMA has a potential bearing on both the criminal and civil liability of its participants, the latter aspect falls outside the scope of this article. The scope of this article is subject to the following further delimitations: a) this study focuses specifically on professional MMA; b) this study does not cover other forms of unarmed combat sport, save for professional boxing, but then only to the extent required for purposes of drawing analogies for use in this study; c) the bodily harm contemplated in this study is bodily harm suffered by a combatant during a specific MMA bout, and does not include bodily harm suffered from the long-term effects of MMA participation such as chronic traumatic encephalopathy (CTE), also known as punch-drunk syndrome, or adverse health effects caused by the transmission of communicable diseases, such as human immunodeficiency virus (HIV) during an MMA bout; and d) the role of *volenti non fit iniuria* in MMA is examined in the narrow context of whether the combatants in an MMA bout may legally consent to the infliction of bodily harm.[8]

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4 Soni *The End of the Rope: The Criminal Law's Perspective Regarding Acts of Consensual Sexual Violence Between Adult Partners Within the South African, English and Canadian Legal Frameworks* (LLM dissertation, University of KwaZulu-Natal) 2018 abstract iv–v.

5 A comparative study of the corresponding legal position of professional boxing in South Africa provides little assistance to this study since professional boxing has been legalised by the South African legislature from a relatively early stage (viz. 1923), which has obviated the need for any academic or judicial scrutiny regarding its legality. In contrast, the legality of professional boxing has been the subject of much academic and judicial scrutiny in the UK, which provides a useful analogy for purposes of this study.

6 Although not a sport, sadomasochism nevertheless shares an important legal feature with MMA, namely that they both entail the infliction of consensual bodily harm. As strange as it may seem at first blush, sadomasochism therefore provides a useful analogy for purposes of this study.

7 The reasons for selecting the UK as the comparative jurisdiction for this study are primarily twofold: (i) first, South African law, particularly its common law, shares much in common with English law owing to South Africa's English heritage. English law accordingly provides a useful legal resource when addressing any *lacuna* found to exist in South African law, particularly from a criminal-law and delictual perspective; and (ii) secondly, although the legality of MMA in the UK itself remains uncertain, in that it has not yet not been judicially considered nor subjected to legislative intervention, the English courts have on several occasions considered the legality of boxing and other activities such as sadomasochism, which, like MMA, entail the infliction of consensual bodily harm. These English judicial precedents provide an invaluable legal resource from which analogies can be drawn for purposes of this study. Although MMA originated in the US, which currently remains the epicentre of MMA activity globally, MMA has been legalised in most US states pursuant to legislative intervention. The US therefore does not provide a suitable comparative basis for purposes of this study.

8 The study does not embark on a wider discourse into the general nature and effect of *volenti non fit iniuria* within sport generally, the details of which have already been well researched and documented in various earlier legal studies and publications. Notable among these legal publications are Cornelius "The Expendables: Do Sports People Really Assume the Risk of Injury? (Part one)" 2015 *Global Sports Law and Taxation Reports 8*; Cornelius "The Expendables: Do Sports People Really Assume the Risk of Injury? (Part

2 CONSENT TO BODILY HARM

It is generally accepted that society tolerates, to some extent, rough and potentially injurious contact sports because of the benefits that society and the participants derive from engaging in sport generally.[9] In this regard, the participants' consent is generally deemed effective and their conduct, which would otherwise constitute criminal behaviour, is condoned by society.[10]

There are, however, limits to society's willingness to tolerate such conduct and there is accordingly a point beyond which the participants' consent to bodily harm is disregarded and their conduct is regarded as unlawful. The relevant case law reveals the courts' difficulty in determining those limits based largely on public-policy considerations. In the determination of what may and may not be consented to by participants in competitive contact sports, value can be derived from the approach that the courts have taken in relation to other practices that entail consensual bodily harm, such as sadomasochism.[11]

An individual who knowingly and voluntarily consents to the infliction of bodily harm to themselves has taken the conscious decision that some other benefit, whatever it may be, is more important to them than their own physical well-being.[12] Thus, whenever the State, as the institutional embodiment of society, chooses not to recognise that individual's consent to the infliction of bodily harm to themselves, the State, through its laws (whether statutory laws or common law), is effectively restricting that individual's personal freedom.[13] While personal freedom is a fundamental right in a modern democracy, it is generally accepted that public-policy considerations may in certain circumstances require the State to adopt a paternalistic role[14] and impose an appropriate restriction on the personal freedom of its subjects, either generally or for specific classes.[15]

Generally, most forms of conduct that cause bodily harm to a person (other than *bona fide* medical procedures) are not considered beneficial, and thus the legal issue is at what point, in the absence of sufficient benefits, does the State's interest in preventing bodily harm outweigh the consenting party's personal freedom of choice, rendering their consent to the bodily harm ineffective and the perpetrator's associated conduct unlawful.[16]

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two)" 2016 *Global Sports Law and Taxation Reports 6*; and Neethling and Potgieter *Law of Delict* (2020) 128–129.

9 Farrugia "Consent Defence: Sports Violence, Sadomasochism, and the Criminal Law" 1996 *Auckland UL Rev* 472.

10 Farrugia 1996 *Auckland UL Rev* 472.

11 *Ibid*.

12 Farrugia 1996 *Auckland UL Rev* 473.

13 *Ibid*.

14 In short, legal paternalism advocates using the criminal law to protect individuals from harming themselves. See Allen "Consent and Assault" 1994 *Journal of Criminal Law* 183; Kell "Social Disutility and the Law of Consent" 1994 *Oxford Journal of Legal Studies* 121 133; Gendall "The Sport of Boxing: Freedom Versus Social Constraint" 1997 *Waikato Law Review* 71 75–76.

15 Farrugia 1996 *Auckland UL Rev* 473.

16 Farrugia 1996 *Auckland UL Rev* 474.

Prior to examining the role of consent as a ground of justification for the infliction of bodily harm in South African criminal law, it is worth examining the comparative legal position in the UK, where consent to bodily harm has undergone extensive judicial scrutiny, particularly within the contexts of boxing and sadomasochism.

2 1 Consent to bodily harm in English criminal law

Since the 1890s, a tacit understanding appears to have developed between the English criminal-justice system and the boxing fraternity, the effect of which is that boxing has seldom *directly* attracted the attention of the criminal courts.[17] That understanding has been grounded in the notion that boxing with gloves, conducted in accordance with the Queensberry Rules,[18] is less dangerous and disorderly, and hence more socially acceptable than its predecessor –, bare-knuckle prize fighting.[19]

In the limited number of instances in which boxing has been *indirectly* considered by the English criminal courts during the Queensberry-Rules era,[20] *dicta* (albeit, *obiter dicta*) from those reported cases indicate that boxing has been granted a *sui generis* immunity from the ordinary English criminal law – primarily on account of its commendable transformation pursuant to the introduction of the Queensberry Rules, as well as the societal need to promote sport generally, and the consent given by the participating boxers.[21]

In the earliest of the aforementioned cases (*Coney*), the court's acceptance of the lawfulness of boxing in its transformed format (that is, in what it referred to as "boxing with gloves in the ordinary way")[22] was, however, explicitly qualified on the basis that the blows struck should "not [be] likely, nor intended to cause bodily harm".[23] It is submitted that this latter qualification renders the court's acceptance of the lawfulness of boxing of

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17 Anderson "The Right to a Fair Fight: Sporting Lessons on Consensual Harm" 2014 *New Criminal Law Review* 55 56.

18 The codification of the rules of gloved boxing within the Queensberry Rules in 1867, signalled the start of the gradual phasing out of bare-knuckle prize fighting, which ultimately ended in the late 1890s. The Queensberry Rules thus, in effect, ushered in the modern era of professional boxing as we know it today. See Anderson 2014 *New Criminal Law Review* 56.

19 Anderson 2014 *New Criminal Law Review* 56.

20 The four pivotal cases in this regard (in chronological order) are: *R v Coney* [1882] 8 QBD 534 (*Coney*); *R v Donovan* [1934] 2 KB 498 (*Donovan*); *Attorney General's Reference (No 6 of 1980)* [1981] QB 715 (*AG Reference*); and *R v Brown* [1993] 2 WLR 556 (*Brown*). With regard to these cases, Brayne *et al* point out: "[F]rustratingly, none of these cases [save for *Coney*] actually concerned boxing, which means that the judges were making non-binding statements about the law, having heard no evidence or argument relating to boxing itself ... Yet these are the cases generally considered to prove that boxing cannot be a criminal offence." See Brayne, Sargeant and Brayne "Could Boxing Be Banned? A Legal and Epidemiological Perspective" 1998 *BMJ* 1813 1814.

21 Anderson 2014 *New Criminal Law Review* 56–57.

22 Although not explicitly stated, it can be assumed that the court was referring to boxing conducted in accordance with the Queensberry Rules, which, significantly, introduced the wearing of gloves.

23 *Coney supra* 539.

little relevance to modern-day competitive boxing (either in the professional or amateur format) since it is common cause that modern-day competitive boxing's "ultimate goal is to inflict a concussive head injury upon an opponent or at least cause sufficient damage to render an opponent incapable of further self-defence".[24] The nature of modern-day competitive boxing thus stands in stark contrast to the form of boxing that the court in *Coney* considered to be lawful owing to the participants' consent.[25] On the contrary, it is submitted that modern-day competitive boxing, particularly professional boxing,[26] falls squarely within the ambit of the aforementioned qualification imposed by the court in *Coney*, which is ironic since *Coney* continues to be recognised as authority in English law for the exemption of professional boxing from the ordinary criminal law.[27] This anomaly has accordingly prompted some legal commentators to refer to this exemption as a *sui generis* form of immunity that the English courts have granted to professional boxing.[28]

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[24] Beran "The Law(s) of the Rings: Boxing and the Law" 2009 16 *Journal of Law and Medicine* 684. Gendall (1997 *Waikato Law Review* 77) describes this situation as follows: "Modern professional boxing and its participants are a world away from what has been described in the early cases as amicable demonstrations of the skill of sparring. The pressures from promoters, spectators, the media and others involved in boxing today are to see action, excitement and overwhelming knockouts."

[25] If one considers the manner in which the judges in the *Coney* case described the form of "gloved boxing" that they considered acceptable in order for consent to apply, it is submitted that what they were contemplating was not competitive professional boxing (or for that matter, even competitive amateur boxing), but boxing more akin to sparring or exhibition boxing as we know it today. In the separate judgments that they delivered in the *Coney* case, Hawkins J and Stephen J in fact go so far as to refer to it explicitly as "amicable spar[ring] with gloves" and "sparring with gloves", respectively. Cave J, in his separate judgment, refers to it as "boxing in the ordinary course", without defining what he means by the qualifying phrase, "in the ordinary course". In all these instances, it is submitted that the judges had in mind a form of boxing that was amicable, and that did not pose a risk of serious injury to the combatants.

[26] Although the risk of injury or even death exists in both amateur and professional boxing, the risk is higher in professional boxing because of its higher intensity and the greater number of rounds contested in a professional boxing bout. In amateur boxing bouts, referees also tend to stop bouts more quickly to prevent further bodily harm to a stricken boxer, than is the case in a professional boxing bout. See Ramsden *The Legal Liability of the Various Role Players in Professional Boxing for an Injury or Death Suffered by a Boxer During a Professional Boxing Bout Held in South Africa* (LLM dissertation, University of Pretoria) 2021 20.

[27] It is submitted that, at best, the *Coney* case can serve as authority for the lawfulness of amicable sparring (for example, between team mates in a boxing gym) or exhibition boxing undertaken for the sole purpose of displaying the boxers' respective boxing skills in a non-competitive context (for example, an exhibition boxing match between two boxing champions to raise funds for charity), provided that in both the aforesaid instances the boxing does not exceed the acceptable limits as cautioned by Hawkins J. in his following *dictum* in the *Coney* case: "if two men, pretending to engage in an amicable spar with gloves, really have for their object the intention to beat each other until one of them be exhausted and subdued by force, and so engage in a conflict likely to end in a breach of the peace, each is liable to be prosecuted for an assault".

[28] Anderson 2014 *New Criminal Law Review* 56–57, citing Foley "Boxing, the Common Law and Non-Fatal Offences Against the Person Act 1997" 2002 *Irish Crim LJ* 15 16. In this regard, Foley remarks as follows: "Despite [that the infliction of harm in boxing is always intentional], boxing has been considered legal in several English court decisions …, which appear to place boxing in a 'special position', without offering a reasoned understanding of its legality or otherwise within the framework of the law of assault."

Fifty-two years after *Coney*, the English Criminal Court of Appeal in *Donovan*, after considering the legal implications of consensual bodily harm in the English criminal law, concluded:

> "[A]s a general rule, although it is a rule to which there are *well-established exceptions*, it is unlawful to beat another person with such degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial."[29]

The court went on to state that the aforementioned "well-established exceptions" included so-called "manly diversions"[30] and "rough and undisciplined sport or play, where there is no anger and no intention to cause bodily harm."[31] Save for confirming that there were these so-called "well-established exceptions" to the general rule regarding consent to bodily harm and describing (in broad and generic terms) the two types of activity that would fall within those exceptions, it is submitted that *Donovan* never took the legal discussion regarding consent to bodily harm in the context of boxing any further than had earlier been discussed in *Coney*.[32]

A century after the *Coney* case, the English Court of Appeal in *AG Reference* was called upon to consider at what point public interest requires a court to deviate from the proposition that ordinarily an act consented to will not constitute an assault.[33] The court held that "it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason".[34] In this regard, the court stated that "most fights will be unlawful regardless of consent", but emphasised that its statement in this regard was not intended to cast doubt upon "the accepted legality of *properly conducted games and sports*", which the court said was justified on the basis of public interest.

The aforementioned *dictum* in the *AG Reference* case is often referred to as authority for the acceptance by the English criminal courts that a sport such as competitive boxing, if "properly conducted", can, despite the fact that it promotes direct, intentional harm by and against both participants,[35] be

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29 *Donovan* case *supra* 507.

30 *Donovan* case *supra* 508. The court described these as friendly contests (such as wrestling), in which bodily harm (despite being a possibility) was not the motive on either side and that the contests were intended "to give strength, skill and activity, and may fit people for defence, public as well as personal in time of need".

31 *Donovan* case *supra* 508.

32 Common to both types of activities that the court said would fall within the "well-established exceptions" to the general rule on consent to bodily harm, is the absence of motive or intent to cause bodily harm. It is submitted that modern-day competitive boxing (particularly professional boxing) would accordingly fall outside the ambit of those activities since its "ultimate goal is to inflict a concussive head injury upon an opponent or at least cause sufficient damage to render an opponent incapable of further self-defence". See Beran 2009 *Journal of Law and Medicine* 684.

33 *AG Reference* case *supra* 718.

34 *AG Reference* case *supra* 719.

35 "[T]here are certain sports, such as boxing, in which the use of violence is intentional and indeed constitutes the chief means of prosecuting the activity. To claim that when Mike Tyson throws a punch at his opponent, he is not intending to cause him harm is peculiar, to say the least" (Athanassoulis "The Role of Consent in Sado-Masochistic Practices" 2002 *Res Publica* 141 149).

lawful on the ground of public interest.[36] The court in *AG Reference* did not, however, explain why a sport such as competitive boxing would, if properly conducted, be in the public interest and accordingly not an assault.[37]

The *AG Reference* decision was followed 10 years later by the House of Lords decision in *Brown*, which is currently still the leading English-law precedent on the general application of consent to bodily harm in the English criminal law.[38] The appeal to the House of Lords (now the Supreme Court)[39] related to the following point of law of general public importance:

> "Where A wounds or assaults B occasioning him actual bodily harm in the course of a sado-masochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 or section 47 of the Offences Against the Person Act 1861?"[40]

After considering the aforementioned point in law, the court in *Brown* concluded that

> "consent of the victim is no answer to anyone charged with the latter offence [i.e., assault occasioning actual bodily harm] or with a contravention of section 20 [i.e., assault occasioning grievous bodily harm] unless the circumstances fall within one of the well-known exceptions such as organised sporting contests and games."[41]

The parameters of this latter exception were, however, unfortunately left poorly defined by the court.[42]

Further judicial views on the legality of boxing in terms of the English criminal law have been expressed (albeit *obiter dicta*) in some more recent reported judgments. In this regard, the court in *R v Barnes*[43] identified public policy as the rationale for why boxing, despite the fact that its participants

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36 Anderson 2014 *New Criminal Law Review* 66. It is submitted that the *AG Reference* case for the first time opened the judicial door for consent to be recognised as a defence in *competitive* boxing.

37 Anderson (2014 *New Criminal Law Review* 68) expresses the view that the public interest is based "largely on the health benefits of participation in sport". Gunn *et al* (1995 *Legal Studies* 198) on the other hand, after considering all the arguments for and against professional boxing being in the public interest, conclude that professional boxing is not in the public interest.

38 Austin "An Assessment of the Legality of Mixed Martial Arts in the United Kingdom" (undated) https://www.academia.edu/12323728/An_assessment_of_the_legality_of_Mixed_Martial_Arts_in_the_United_Kingdom? (accessed 2023-06-06) 1; James *Sports Law* (2017) 154.

39 In October 2009, the Supreme Court replaced the Appellate Committee of the House of Lords as the highest court in the UK. See UK Supreme Court "The Court and Legal System" (undated) https://www.supremecourt.uk/about-the-court.html (accessed 2022-09-17).

40 *Brown* case *supra* 559.

41 *Brown* case *supra* 573. While these particular exceptions to the general rule on the limitations of consent in the criminal law were referred to by the court as being the "well known exceptions", the court indicated that they were not the only exceptions and that other exceptions could be added if there was "good reason" to do so. However, after further deliberation, the court found no good reason for adding sadomasochistic acts to the list of exceptions.

42 Anderson 2014 *New Criminal Law Review* 67. This failure to adequately define same is akin to the court's failure in the *AG Reference* case to define what it dubbed "properly conducted games and sports".

43 [2005] 1 WLR 910 (*Barnes*).

intend to hurt each other, is "ordinarily considered a lawful sport, whereas [its predecessor] prize fighting is not".[44] The court did, not, however, elaborate on why it could be said that boxing was justified by public policy.

The question whether consent provides a defence to an assault causing bodily harm came up again for consideration in the UK in two more recent cases, both of which were cited with approval in the *Brown* case.[45] One of these cases was heard in the Court of Appeal of England and Wales, namely *R v BM*,[46] while the other was heard in the Irish Supreme Court, namely *The Director of Public Prosecutions v Brown*.[47] Both these cases make an important contribution to the jurisprudence regarding the role of consent in English criminal law generally, including its role in relation to boxing specifically.

Although the court in the *BM* case acknowledged that boxing was "undoubtedly lawful when *organised properly as a sport* (but not otherwise)", the court referred with approval to Lord Mustill's *dictum* in *Brown* in which he stated that it was an impossible task "trying to arrive at an intellectually satisfying account of the apparent immunity of professional boxing from criminal process".[48] In a dissenting judgment in *Irish Brown*, McKechnie J too grappled with the jurisprudential rationale for boxing's immunity from the criminal law, ultimately concluding as follows: "Perhaps Lord Mustill [in *Brown*][49] is right: he simply posits that boxing is by now so well-entrenched in our sporting and cultural psyche as to occupy an anomalous position in our law".[50]

Anderson says that it is a futile exercise to endeavour to rationalise the legality of boxing in the context of the exceptions to the general threshold of consent in assault, and states that boxing's status should instead be

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44 *Barnes* case *supra* 914.

45 Donnellan "The Limits of the Defence of Consent: *R v Brown* and Its Continued Application" (31 July 2019) https://criminaljusticeinireland.wordpress.com/2019/07/31/the-limits-of-the-defence-of-consent-r-v-brown-and-its-continued-application/ (accessed 2023-01-22).

46 [2018] EWCA Crim 560 (*BM* case). The *BM* case related to so-called body modification, which in this instance entailed the removal of an ear and nipple and the splitting of the tongue of three customers of a tattoo and piercing parlour owned by the appellant. The customers had each consented to the relevant procedure, which in each instance was performed by the appellant without anaesthetic. While tattooing and piercing is permissible in the UK in terms of specific legislation, no similar legislation exists in respect of body modification. The appellant, who had been charged and convicted of three counts of wounding with intent to do grievous bodily harm, contrary to s 18 of the Offences Against the Persons Act 1861, unsuccessfully appealed to the Court of Appeal on the ground that consensual body modification should be exempted from the criminal law in the same way that surgical procedures and boxing were exempted from the criminal law.

47 [2018] IESC 67 (*Irish Brown*). The *Irish Brown* case related to an appeal by a prisoner who had been convicted of assaulting a fellow prisoner contrary to s 3 of the Non-Fatal Offences Against the Person Act 1997. The appellant claimed that he had been asked by the fellow prisoner to attack him so that he could be transferred to another prison. The appellant argued that s 3 assault (which is silent on the defence of consent) was predicated upon s 2 assault (which explicitly permits the defence of consent), and accordingly the defence of consent should also apply in respect of s 3 assault.

48 *BM* case *supra* par 38.

49 *Brown supra* 592.

50 *Irish Brown supra* par 83.

regarded as *sui generis.*[51] The majority judgment in the *Brown* case similarly side-stepped having to provide a properly reasoned legal basis for boxing's immunity from the criminal law by simply stating that "rightfully or wrongly the courts [have] accepted that boxing is a lawful activity".[52]

Although this study generally concurs with Anderson's aforementioned view that the legality of professional boxing in the UK today should be regarded as *sui generis*, it is submitted that an alternative argument could be advanced that the legality of professional boxing can be attributed to it falling within the category of exemption which the court in *AG Reference* dubbed "*properly conducted games and sports*"[53] or "*organised sporting contests and games*", as that category was dubbed by the court in *Brown*.[54] This alternative argument appears to find support in the Court of Appeal's recent *dictum* in the *BM* case that "boxing [is], undoubtedly lawful when *organised properly as a sport* (but not otherwise)".[55] Although the Court of Appeal in the *BM* case did not elaborate on what was required in order for professional boxing to meet the standard of being "organised properly as a sport", it is submitted that the well-established and organised manner in which the British Boxing Board of Control (BBBC) (the universally accepted governing body of professional boxing in the UK) currently regulates professional boxing in the UK, stands it in good stead to be adjudged as having met the aforesaid standard, particularly if one has regard to the thorough medical-safety measures that the BBBC currently enforces to control and contain injuries and death in professional boxing in the UK.[56] Although McKechnie J in the *Irish Brown* case[57] expressed the view that he did consider this particular line of reasoning compelling, he did so in an *obiter dictum* and therefore his view in this regard would not be binding on the Court of Appeal, if and when it is called upon to consider *directly* the legality of professional boxing.

As in the case of professional boxing, MMA in the UK is also not currently regulated in terms of legislation.[58] However, unlike professional boxing whose legality in the UK has been confirmed by the English courts (albeit in the form of *obiter dicta*), the legality of MMA in the UK has as yet neither been scrutinised nor confirmed by the English courts, and as such its legality

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51 Anderson 2014 *New Criminal Law Review* 72–73.

52 *Brown supra* 561.

53 *AG Reference supra* 719; Anderson 2014 *New Criminal Law Review* 68.

54 *Brown supra* 573. While referring to fighting sports generally, James (*Sports Law* 156) contends that for a fighting sport to be considered a lawful activity it needs to be "well-organised" or "properly conducted".

55 *BM* case *supra* par 38.

56 The Law Commission "Consent and Offences against the Person" (LCCP No 134, 1994) https://www.lawcom.gov.uk/app/uploads/2016/08/No.134-Criminal-Law-Consent-and-Offences-Against-the-Person-A-Consultation-Paper.pdf (accessed 2022-09-18) 27–28.

57 *Irish Brown supra* par 83.

58 It is thus the judiciary who must determine the legality of individual actions within these sports, with no guidance from the legislature. See Nelson "When, Where and Why Does the State Intervene in Sport? A Contemporary Perspective" 2005 *Sports Law and Governance Journal* 1 4. Although MMA in the UK has been brought within the ambit of the Licensing Act 2003, which in essence regulates event safety and crowd behaviour, that does not have a direct bearing on MMA's legality *per se*, nor the manner in which it is regulated as a combat sport in the UK.

in the UK remains uncertain. On the contrary, MMA's legality in the UK may even be considered questionable, if one accepts the view (as this study does) that the immunity from criminal law extended to boxing in the UK by the English courts is *sui generis* and specific to boxing.[59] If that be the case, it is unlikely that MMA in the UK can justifiably claim *ipso facto* to be entitled to the same immunity from the criminal law as boxing, particularly since MMA is perceived (rightly or wrongly) to be more violent and potentially more harmful than boxing, and also does not have the benefit of "well-planted, social and historical roots" like those of boxing in the UK.[60]

What remains then for MMA to do in order to confirm its legality in the UK is to endeavour to bring itself within the parameters of the so-called well-established exemptions to the general rule on consent in the criminal law, particularly the category that has been dubbed "properly conducted games and sports" by the court in the *AG Reference* case[61] and as "organised sporting contests and games" by the court in *Brown*.[62] However, as matters currently stand with regard to the unregulated and uncoordinated manner in which MMA is currently being conducted in the UK, it is submitted that it is likely to be a challenging task for MMA to do so successfully. Although the English courts have not defined the criteria for a sporting activity to qualify for these exemption categories, it is submitted that what would be required, at the very least, is a properly constituted and universally accepted regulatory authority for the sporting code in question. It is further submitted that in the case of a sporting code that is inherently dangerous, with a high risk to its participants of serious bodily injury or even death, there also need

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59 Anderson 2014 *New Criminal Law Review* 75. The uniqueness of boxing's aforesaid immunity also resonates in Lord Mustill's dictum in *Brown supra* 592, where he remarked that boxing's immunity from the ordinary criminal law needs to be regarded "as being another *special situation* which for the time being *stands outside the ordinary law of violence because society chooses to tolerate it*''. On that basis, there is no legal justification for *ipso facto* extending boxing's immunity from the criminal law to MMA as well, a view that is shared by Foley 2002 *Irish Crim LJ* 27, where he states that "they [being, what he refers to as 'Full Contact Karate, Ultimate Fighting etc'] cannot claim legality by analogy with boxing".

60 King "A Ban on Mixed Martial Arts Would Miss the Point. The Debate in the Aftermath of Joao Carvalho's Death Is Based on a False Premise" (2016) https://www.irishtimes.com/opinion/a-ban-on-mixed-martial-arts-would-miss-the-point-1.2611080 (accessed 2022-09-20).

61 Lord Lane (*AG Reference supra* 719) stated that "properly conducted games and sports" are exempt from the normal operation of the law of assault because it is accepted as being needed in the public interest to keep and encourage such activities. Although Lord Lane provides no further explanation in this regard, he also places no restrictions on the types of games and sports that could qualify for this exemption. See Austin https://www.academia.edu/12323728/An_assessment_of_the_legality_of_Mixed_Martial_Arts_in_the_United_Kingdom? 1. It is accordingly submitted that it is theoretically possible for MMA also to qualify for this exemption, provided it can demonstrate that it is factually "properly conducted" and therefore deserving of the same exemption from the criminal law currently afforded to professional boxing in the UK.

62 Similarly, in *Brown supra* 573, Lord Jauncey, while referring to the exemption category that he dubbed "organised sporting contests and games", did not provide any further explanation nor did he put any restrictions on the types of sporting games to which this exemption applies. It is accordingly submitted that it is therefore theoretically possible for MMA also to qualify for this exemption, provided it can demonstrate that it is factually an "organised" sport.

to be properly enforceable contest rules and medical-safety measures to effectively control and contain that risk.

2 2 Consent to bodily harm in South African criminal law

As mentioned at the outset of this study, the South African legislature to date has failed to declare MMA to be either lawful or unlawful, and nor have the courts pronounced upon its legality in terms of the common law. Thus, in order to determine the legality of MMA in South Africa, one needs to examine the general legal principles of South African criminal law, both from a constitutional and common-law perspective. In doing so, the approach of the English criminal courts to the role of consent in boxing and sadomasochism, both of which, like MMA, entail the infliction of consensual bodily harm, provides an invaluable analogy from a comparative-law perspective.

The enquiry regarding the legality of MMA in South Africa needs, at the outset, to be determined with reference to the principle of legality – also known as the *nullum crimen sine lege* principle, which literally translated means "no crime without a law".[63] In this regard, the enquiry needs to determine whether the conduct of the combatants in an MMA bout constitutes the type of conduct that is currently recognised by South African law (statutory or common law) as a crime. In doing so, it is evident that the general nature of the combatants' conduct during an MMA bout (that is, intentionally inflicting bodily harm on each other by means of punching, kicking, choking and similar) complies *ex facie* with the definitional elements[64] of various established common-law crimes, most notably assault and assault with the intent to do grievous bodily harm (assault GBH), and also the common-law crimes of culpable homicide and murder, in the event that a combatant's conduct causes their opponent's death as a consequence of bodily harm inflicted during an MMA bout.[65] Owing to the reciprocal nature of combatants' conduct in an MMA bout (that is, each of them being both a giver and receiver of physical aggression), if a prosecution were to be instituted for a charge of assault or assault GBH (or an attempt to commit

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63 The principle of legality is central to the rule of law under the Constitution of the Republic of South Africa 1996 (*Constitution*). See *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2006 (2) SACR 319 (CC) (*Veldman*); *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC) (*Masiya*) 37; Hoctor *Snyman's Criminal Law* (2020) 31; Mnguni and Muller "The Principle of Legality in Constitutional Matters With Reference to *Masiya v Director of Public Prosecutions* 2007 (5) SA 30 (CC)" 2009 *Law, Democracy & Development* 112 113.

64 According to Hoctor (*Snyman's Criminal Law* 26), the "definitional elements" of a crime are "the concise description of the type of conduct proscribed by the law and the circumstances in which it must take place in order to constitute [that specific] crime". It, however, excludes the general requirements that apply to all crimes, most notably the requirements of unlawfulness and culpability (i.e., fault, either in the form of intent or negligence). So, for example, in respect of assault, its definitional elements comprise applying or threatening to apply force to the person of another. However, for such conduct to constitute assault, it must also be done intentionally and unlawfully.

65 In a criminal prosecution, these crimes would normally be cited in the charge sheet in the alternative, depending on the particular circumstances of the case.

those offences), both combatants involved in the MMA bout in question would need to be prosecuted.[66] Furthermore, the conduct of the other role players (for example, the promoter and officials) is likely to render them liable for ancillary crimes, such as incitement and conspiracy, or perhaps even criminally liable for the aforementioned principal crimes, either on the basis of being accomplices to those crimes or being co-perpetrators in terms of the doctrine of common purpose.[67]

Notwithstanding that the combatants' conduct in an MMA bout may comply with all the definitional elements of the aforementioned common-law crimes, their conduct will not attract criminal liability unless it is also found to be both *unlawful* and *culpable* in the circumstances.[68] In this regard, the defences of *consent* and *putative consent*[69] play a pivotal role since if either of these defences is successfully raised by an accused it will have the effect of negating the element of unlawfulness or culpability, as the case may be, and thereby exonerate the accused from liability in respect of those crimes.

The role of consent as a ground of justification in South African criminal law (as well as in the South African law of delict) is often broadly expressed in terms of the maxim *volenti non fit injuria,* which literally translated means that a willing person is not wronged (*volenti* maxim).[70] The requirements of the *volenti* maxim in South African criminal law are, in essence, the victim's full knowledge and appreciation of the harm, coupled with their voluntary consent thereto.[71] While these requirements are determined subjectively, there is, in addition, an important external requirement that invalidates the victim's consent if that to which they have consented is regarded as unreasonable in terms of the prevailing *boni mores*.[72] While the former requirements of the *volenti* defence are determined subjectively with

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66 *Coney supra* 554.

67 Hoctor *Snyman's Criminal Law* 224–237.

68 Hoctor *Snyman's Criminal Law* 79.

69 Consent has a bearing on the element of unlawfulness, whereas putative consent has a bearing on the element of culpability. In this study, only the former defence will be considered in further detail.

70 There are two forms of consent to injury in South African law, namely (i) consent to injury; and (2) consent to the risk of injury (sometimes also referred to as voluntary assumption of risk). In the former instance, the victim consents to a specific and guaranteed bodily harm (for example, to being punched by his opponent in an MMA bout), while in the latter instance, the victim consents to the assumption of the risk that an injury may occur (for example, that his opponent's punch in an MMA bout may cause him brain trauma). In the former instance, any harm caused by the perpetrator that deviates from the specific injury consented to will not be covered by the victim's consent (*Burger v Administrateur, Kaap* 1990 (1) SA 483 (C)), while in the latter instance, if the injury is caused outside the general scope of the activity consented to (or in sports-law parlance, outside the accepted limits and rules of the game), the consent will cease to provide a defence to the perpetrator (*Roux v Hattingh* 2012 (6) SA 428 (SCA) par 41–42). The *volenti* maxim is used as a common concept to describe both the aforementioned forms of consent. See Neethling and Potgieter *Law of Delict* 129. In this study, the term *volenti* is used in the generic sense, unless the context indicates otherwise.

71 Parmanand "The Consenting Plaintiff and the Boni Mores: The Proper Perspective" 1986 *JS Afr L* 338 340.

72 Parmanand 1986 *JS Afr L* 340; Burchell *Principles of Criminal Law* (2013) 207; Hoctor *Snyman's Criminal Law* 104.

reference to the particular victim's state of mind at the relevant point in time, the *boni mores* requirement is determined objectively, *ex post facto*.[73]

The debate regarding the validity of a victim's consent to a crime that infringes their bodily integrity (the so-called "consensual bodily harm" scenario) is ultimately a jurisprudential debate concerning, on the one hand, the philosophy of individualism (also referred to as individual human autonomy),[74] with which the *volenti* maxim has come to be associated, and on the other hand, the role of the aforementioned *boni mores* in limiting the individual's freedom of choice with regard to what bodily harm they may and may not consent to.[75]

The *boni mores* criterion in South African law, both from a criminal-law and delict perspective, has been described variously by the judiciary and legal commentators using different descriptors, as pointed out by Parmanand in the extract below:

> "The *boni mores* has been described as 'the prevailing conceptions in a particular community at a given time, or the legal convictions of the community.'[76] It is also true that the *boni mores* often purports to be an extension of that which is considered proper by right thinking members of the community.[77] The criterion itself has been regarded as one touching upon reasonableness,[78] the legal convictions of the community[79] or public policy."[80]

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[73] For purposes of this study, only the *boni mores* requirement of the *volenti* defence will be examined in further detail since, unlike in the case of the other requirements of the *volenti* defence (which are all subjectively determined), the *boni mores* requirement is determined objectively and, as such, the outcome of that enquiry will therefore apply generally to all MMA bouts in South Africa. Furthermore, if the conduct of the combatants *inter se* is considered unlawful in terms of the *boni mores*, it then follows by necessary implication that MMA *per se* will be an unlawful activity in terms of South African criminal law.

[74] Arnold "Vagueness, Autonomy and R v Brown" 2015 *University of South Australia Law Review* 103.

[75] Parmanand 1986 *JS Afr L* 338. Hoctor (*Snyman's Criminal Law* 104) describes the role of the *boni mores* in relation to consent in crimes such as assault, as follows: "As far as this … group of crimes is concerned, it should be borne in mind that, unlike the law of delict, which in principle protects individual rights or interests, criminal law protects the public interest too; the state or community has an interest in the prosecution and punishment of all crimes, even those committed against an individual. The result is that, as far as criminal law is concerned, an individual's consent to impairment of her interests is not always recognised by the law … *It is difficult to pinpoint the dividing line between harm to which one may and harm to which one may not consent. The criterion to be applied in this respect is the general criterion of unlawfulness, namely the community's perceptions of justice or public policy."* Hoctor (at 103) points out, however, that there is a category of crimes in respect of which consent by the injured party is never recognised as a defence, such as murder.

[76] Parmanand 1986 *JS Afr L* 342, citing Van der Walt *Delict: Principles and Cases* (1979) 22; Van Wyk *Die Boni Mores as Toetssteen vir Toelaatbaarheid in die Bewysreg (doctoral thesis, University of the Free State)* 1983 1–40.

[77] Parmanand 1986 *JS Afr L* 342.

[78] *Ibid*, citing *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) 111–112. The *boni mores* was also described in these terms in *Clark v Hurst* 1992 (4) SA 630 (D) 787.

[79] Parmanand 1986 *JS Afr L* 342, citing *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597. It was also described in these terms in *Clark v Hurst supra* 787 and in *S v Fourie* 2001 (2) SACR 674 (C).

[80] Parmanand 1986 *JS Afr L* 342, citing *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977 (3) SA 394 (A) 402–403.

Snyman is of the view that most descriptions used in relation to the determination of unlawfulness, including *inter alia* descriptors like "the *boni mores*", "the community's perception of justice" and "the legal convictions of society" are reconcilable and therefore "whether one speaks of the one or the other is a matter of a choice of words rather than the description of conflicting viewpoints".[81] Snyman submits that "the most acceptable viewpoint is the one according to which unlawfulness consists in conduct which is contrary to the community's perception of justice or with the legal convictions of society".[82] For the purposes of this study, the *boni mores* and legal convictions of society are used interchangeably as descriptors in the determination of unlawfulness.

When applying the *boni mores* test to the *volenti* defence in order to determine the lawfulness of combatants' conduct in an MMA bout from a criminal-law perspective, there is no existing South African judicial precedent that relates directly (or indirectly) to MMA, or for that matter to any other combat sports, that can be used for this purpose. It is accordingly necessary to draw analogies with: a) how South African criminal courts have applied the *boni mores* test in relation to the *volenti* defence in respect of other types of conduct involving consensual bodily harm;[83] and b) how the English courts[84] have applied the defence of consent in criminal matters relating to boxing and other activities that involve consensual bodily harm, such as sadomasochism.[85]

3 ANALOGIES WITH OTHER FORMS OF CONSENSUAL BODILY HARM IN SOUTH AFRICA

In *Sikunyana*,[86] the appellants, described as herbalists or witch doctors, were charged with assault GBH for burning the complainant on the head and body with hot coals in a ritual to remove an apparent evil spirit from her body. The appellants contended that the complainant's consent to their conduct negated any criminal liability that might otherwise have attached to

81 Hoctor *Snyman's Criminal Law* 81.

82 *Ibid*. In this regard, Snyman cites *inter alia Clark v Hurst supra* 652–653.

83 Since consent in the context of legitimate medical treatment and procedures has developed its own unique body of jurisprudence, for purposes of this study comparative analogies will rather be sought in case law and legal commentaries that relate to other forms of conduct that involve consensual bodily harm, to the extent that these exist.

84 In this regard, the UK is preferable as a comparative basis to the US since UK laws applicable to combat sports are rooted primarily in the English common law, which bears a close similarity to the common law applicable to MMA in South Africa. Unlike professional boxing in South Africa, there is no statutory law governing MMA in South Africa, hence the application of South African common law to legal issues pertaining to MMA.

85 As to whether reliance can be placed on the *Coney* case and other English-law cases discussed earlier in this chapter, the answer is found in the following *dictum* in *S v Collett* 1978 (3) SA 206 (RA) (*Collett*) 627: "Our law relating to assault is based on the English law, and to quote the words of Kotze JA in *R v Jolly* and Others 1923 AD 176 at 184: 'We can, therefore, have no hesitation in following the principles of English jurisprudence in regard to the question of assault.'" It is submitted that this principle will also apply in respect of the other common-law crimes in question, namely assault GBH, culpable homicide and murder.

86 *S v Sikunyana* 1961 4 All SA 59 (E) (*Sikunyana*).

it. The court rejected the complainant's consent as a ground of justification for the appellants' harmful conduct, for the reason *inter alia* that "[a] highly dangerous practice superstitiously designed to secure the exorcism of an evil spirit cannot be rendered lawful by the consent of the afflicted person".[87] In this finding, the court appears to have rejected *volenti* as a ground of justification for two main reasons, namely: a) the highly dangerous nature of the practice causing the bodily harm in question; and b) the superstitious nature of the relevant practice, which rendered its purpose questionable.[88]

In the course of its judgment, the court in *Sikunyana* cited with approval the following passage from Gardiner and Lansdown,[89] which explains when the consent of the victim of an assault can be raised as a valid defence by the perpetrator in a criminal trial:

> "The maxim *volenti non fit injuria* has, however, limited application in criminal law, and it may be said generally that, apart from medical operations, from those sexual affairs in which consent prevents any incidence of criminal liability, and from those *bodily contests which, by reason of the absence of any likelihood of anything more than mere trifling injury resulting, and of the absence from the minds of the contestants of any intention to cause harm, are not inimical to the interests of society,* no person can be excused on a charge of assault where actual injury is done, merely upon proof that the victim consented to the infliction of the injury."[90]

It is submitted that the "bodily contests" referred to by the court in the aforesaid passage, will, based on the manner in which they have been described therein, cover, for example, what the court in the *Coney* case referred to as "sparring with gloves" (that is, a friendly encounter intended to test the combatants' respective boxing skills rather than cause harm), but would not, on the other hand, cover competitive combat sports such as professional boxing and MMA, in which the combatants intend to cause each other bodily harm – a far cry from the "mere trifling injury" contemplated by the court in *Sikunyana*. Furthermore, although the purpose of competitive professional boxing and MMA (namely, to provide a livelihood for the combatants) is far less questionable than the purpose of the particular conduct that was before the court in *Sikunyana*, it is nevertheless also a "highly dangerous practice", which can cause serious bodily harm or even death to combatants and could thus face similar rebuke from a court. It is submitted, however, that such a rebuke may be averted if the court were persuaded that the medical-safety measures in place during a properly regulated MMA bout were sufficient to control and contain the risk of serious bodily harm arising in an MMA bout. This aspect is considered in further detail later in this study in relation to the need for MMA to be properly regulated in South Africa.

In the *Collett* case, a case in which the court held that the infliction of corporal punishment by a master on his servant, notwithstanding the

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87 *Sikunyana supra* 63.

88 To use the corresponding terminology of the English courts in decisions such as *Brown* (*supra* 578), it could be said that the harm was inflicted "without good reason". In this regard, Lord Lowry in *Brown* (*supra* 578) stated: "for one person to inflict any injury on another *without good reason* is an evil in itself (*malum in se*) and contrary to public policy."

89 Gardiner and Lansdown *South African Criminal Law and Procedure* 6ed Vol II (1957) 1577.

90 *Sikunyana supra* 61.

servant's consent, was clearly contrary to public policy and *bonos mores*.[91] The court held in an *obiter dictum* that harm caused in so-called "lawful sporting contests" was an exception to the rule that consent is no defence to an assault that is likely or intended to cause bodily harm. Although the court did not define what was meant by "lawful sporting contests", the court was seemingly referring to the types of conduct that *Donovan*[92] (an earlier English case to which the court in *Collett* referred with approval) had held were well-established exceptions to the aforesaid general rule, namely: a) activities referred to as "manly diversions" that were intended to give strength, skill and activity, and fit people for public or personal defence, which although "capable of causing bodily harm … that bodily harm is *not* the motive on either side"; and b) "rough and undisciplined sport or play, where there is *no* anger and *no* intention to cause bodily harm".

It is submitted that MMA is unlikely to qualify for the so-called "lawful sporting contests" exception referred to by the court in *Collett*, owing to the fact that it is the intention of the combatants in an MMA bout to cause bodily harm to each other. For the same reason, it is submitted that MMA is also unlikely to qualify for the so-called "bodily contests" exemption referred to by the court in the *Sikunyana* case*,* particularly since the injuries normally associated with an MMA bout are by no means merely "trifling" injuries, as alluded to by the court. Thus, if MMA is to be exempt from the general rule that an act likely or intended to cause bodily harm is an unlawful act, the exemption will need to be sought on the basis of the general public-policy test, which both *Collett* and *Sikunyana* confirmed was the primary test to be used for that purpose. In the application of this latter test, *Sikunyana* makes it clear that there needs to be "good reason" for the harmful conduct in question, particularly where such conduct is highly dangerous. Whether the fact that MMA is undertaken for the purpose of earning a livelihood will suffice as "good reason" for the harm caused in an MMA bout remains to be judicially tested.

Save for *Sikunyana* and *Collett*, there is a dearth of other judicial precedents in South Africa to provide guidance on the types of conduct that the *boni mores* consider lawful if consented to, and those that are not considered lawful, even if consented to. One accordingly needs to seek further guidance (by way of analogy) from the English-law precedents pertaining to consensual bodily harm, as discussed earlier in this study.

4 ANALOGIES WITH THE UK'S JUDICIAL APPROACH TO CONSENSUAL BODILY HARM

When applying the *boni mores* test in relation to the *volenti* enquiry in a criminal matter involving combatants in an MMA bout, our courts are permitted to take cognisance of the approach that the English courts have taken in similar situations involving consensual bodily harm.[93]

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91 *Collett supra* 628.

92 *Donovan supra* 508–509.

93 The relevant English cases are discussed earlier in this study.

If, however, one accepts the view (as this study does) that the immunity from the criminal law extended by the judiciary to boxing in the UK is specific to boxing or even *sui generis,* then the relevant English case law pertaining to the role of consent in boxing should be approached with caution when seeking to draw analogies for the current enquiry in respect of the legality of MMA in South Africa.

As pointed out, the exemptions granted by the English courts to so-called "manly diversions" and other similar "rough and undisciplined sport or play",[94] also have little or no relevance to the conduct of combatants in an MMA bout since those exemptions are premised on there being no motive or intent on the part of participants to cause each other bodily harm, which is clearly not the case in an MMA bout.

It is accordingly proposed that if and when a South African court is called upon to apply the *boni mores* test to determine the lawfulness of combatants' conduct in an MMA bout, the court should do so in the context of what the English courts have referred to as "properly conducted games and sports"[95] or "organised sporting contests and games".[96] Since the English courts have not explicitly distinguished the one from the other and nor are there apparent reasons for doing so, it is submitted that these two exemption categories are, for all intents and purposes, synonymous. In the ensuing discussion, only the former exemption category (namely, "properly conducted games and sports") will be referred to for purposes of expediency.

If the South African courts were to adopt the aforementioned approach to the *boni mores* enquiry, they would in effect be developing the common law (as they are empowered to do in terms of the Constitution)[97] by providing a judicial guideline to distinguish between those sports that public policy regards as socially acceptable and those sports that it does not.[98]

Although the English courts have provided no judicial guidelines or criteria for determining what constitutes "properly conducted games and sports", save for indicating that their exemption from the criminal law is based on public policy,[99] it is submitted that what is required, at the very least, is for these sports to have a properly constituted and universally accepted regulatory body, coupled with enforceable contest rules and medical-safety measures so as properly to control and contain the risk of injury and death inherent in the sport, particularly in combat sports such as MMA that have a relatively high risk of serious bodily injury or even death. As the concept of "properly conducted games and sports" evolves through South African case

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94 *Donovan supra* 508–509.

95 See *AG Reference supra* 719.

96 See *Brown supra* 573.

97 S 173 of the Constitution provides: "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, *and to develop the common law*, taking into account the interests of justice." (emphasis added).

98 Although the Supreme Court of Appeal in *Roux v Hattingh supra* par 42 held that "public policy regards the game of rugby as socially acceptable", it unfortunately did not explain on what factual or legal basis it had arrived at that conclusion.

99 *Barnes supra* 913–914.

law over time, these guidelines or criteria can be further developed and refined by the courts into an acceptable set of guidelines or criteria that align with the prevailing *boni mores* in South Africa.

If the common law is developed by our courts along the lines proposed above, it is submitted that the Supreme Court of Appeal's *dictum* below, pertaining to rugby, could in due course also apply to MMA if it were to become properly conducted in terms of its organisational structure, contest rules and safety measures:

> "Since public policy regards the game of rugby as socially acceptable, *despite* the likelihood of serious injury inherent in the very nature of the game, it seems to me that conduct causing even serious injury cannot be regarded as wrongful if it falls within the rules of the game."[100]

However, as matters currently stand with regard to MMA – being a self-regulated sport in South Africa, without legally enforceable contest rules or medical-safety measures[101] – it is submitted that it will be difficult to argue that MMA is currently a "properly conducted sport" that "public policy accepts as socially acceptable", as it does in respect of rugby. It is submitted that these shortcomings could be overcome if MMA were instead to become state-regulated in terms of its own bespoke legislation, akin to what currently exists in respect of professional boxing in South Africa. A regulatory system of that nature would, as in the case of professional boxing, provide for legally enforceable contest rules and for medical-safety measures that properly control and contain the risk of injury and death in MMA bouts. A statutory body of that nature would also be subject to ultimate oversight from both the Minister of Sports, Arts and Culture and the parliamentary sub-committee on sports, arts and culture, and its financial affairs would also be subject to scrutiny pursuant to the provisions of the Public Finance Management Act.[102] In other words, MMA and the administration thereof would come under direct public scrutiny, both in terms of its regulation and accountability, as is currently the case with professional boxing in South Africa. It is submitted that these proposed changes would place MMA in good stead to be regarded by the South African judiciary as a "properly conducted sport" that "public policy accepts as socially acceptable" (akin to how the court viewed rugby in *Roux*), notwithstanding the likelihood of serious bodily injury or even death arising in an MMA contest.

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100 *Roux v Hattingh supra* par 42. Although the Supreme Court of Appeal did not explain on what basis it can be said that "[P]ublic policy regards the game of rugby as socially acceptable", it is submitted that if the court had applied the proposed test of "properly conducted sporting contests and games" to rugby, then rugby's social acceptance could have been justified on the basis of its well-organised regulatory system, contest rules and medical-safety measures.

101 The disadvantages of self-regulation are that adherence to contest rules and safety measures is largely voluntary and the regulatory landscape is also open to potentially competing regulatory bodies, each with their own contest rules, safety measures and general standards. Transparency and accountability are also not as rigorous in self-regulation as they are in regulation by the State.

102 1 of 1999.

Furthermore, in a society in which violence is prevalent in so many facets and forms on a daily basis,[103] it is submitted that the prevailing *boni mores* in South Africa are unlikely to be offended by the violent nature of MMA as a combat sport, particularly since it is perceived to take place in a regulated environment (albeit currently a self-regulated environment) with medical-safety measures in place and also provides a much-needed source of income for combatants in an economy that is plagued by high levels of unemployment. The fact that local MMA tournaments are transparently conducted at reputable public establishments, and are usually televised by a mainstream television network, lends further credibility to the public image of MMA, thereby increasing the likelihood of its being regarded as socially acceptable the prevailing South African *boni mores.* Unlike in the case of MMA in its formative years in the US, MMA in South Africa has received no political, public or media criticism to date.

In addition, many of South Africa's well-entrenched cultural practices involve various forms of violence and bodily harm, and continue to be widely practised, with apparent social acceptance, notwithstanding that the introduction of the Bill of Rights has rendered many of these cultural practices *prima facie* unconstitutional. In this regard, one need look no further than traditional cultural practices such as ritual male circumcision and stick fighting, which are closely entwined with manhood and the display of masculinity, and which, despite the associated risks of serious bodily harm (or even death) are still common practices in modern-day South African society, particularly in the rural areas.

Even within the formal sporting sector, South African society is accepting of professional boxing[104] and other full contact sports such as rugby[105] that entail significant levels of physical contact, often culminating in serious bodily injury or even death in the case of professional boxing. In rugby, concussions have become a common occurrence, so too the sight of bloodied players being patched up on the field by medical attendants or being sent to the so-called "blood bin". South African rugby commentators are often heard lauding the Springboks' physical domination of their opponents during international rugby matches.[106]

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[103] The current high level of crime in South Africa has prompted certain commentators to refer to South Africa as having "a 'culture of violence' – a society which endorses and accepts violence as an acceptable and legitimate means to resolve problems and achieve goals" (Hamber "Have No Doubt It Is Fear in the Land. An Exploration of the Continuing Cycles of Violence in South Africa" 2000 *Southern African Journal of Child and Adolescent Mental Health* 5 10, citing Vogelman and Simpson "Current Violence in South Africa"1990 *Sunday Star Review* 17).

[104] This is evident from the fact that it has been legalised by the South African legislature since 1923, with the advent of the 1923 Boxing Act. It is also a highly popular sport in South Africa.

[105] That public policy in South Africa regards the game of rugby as socially acceptable despite the likelihood of serious injury occurring during a game of rugby is well illustrated in the following *dictum* of the Supreme Court of Appeal in *Roux v Hattingh supra* par 42: "Since public policy regards the game of rugby as socially acceptable, *despite the likelihood of serious injury inherent in the very nature of the game*, it seems to me that conduct causing even serious injury cannot be regarded as wrongful if it falls within the rules of the game."

[106] Rugby is a popular South African sport, the national team of which is known as the Springboks.

For these reasons, it is submitted that the *boni mores* requirement of the *volenti* defence is unlikely to pose an insurmountable obstacle to *volenti* serving as a ground of justification for the conduct of combatants in an MMA bout if they were to be prosecuted for criminal offences such as assault or assault GBH – provided that their conduct and any ensuing bodily harm falls within the broad parameters set by the Supreme Court of Appeal in *Roux* for the *volenti* defence to apply within a sporting context.[107]

However, even if a court were to find that the *boni mores* do not condone the combatants' conduct in an MMA bout, thereby rendering their conduct unlawful for purposes of common-law crimes such as assault and assault GBH, it may nevertheless be open to the combatants either to raise the defence of putative consent as possible vitiation of the element of *mens rea* in respect of those crimes, or to challenge the constitutionality of those offences insofar as they pertain to MMA *per se*, on the grounds that they infringe the combatants' constitutional rights to *inter alia* dignity and economic freedom.

5 CONCLUSION

Thus, while the conduct of the combatants in an MMA bout complies *prima facie* with all the definitional elements of the relevant common-law crimes, their conduct may nevertheless be condoned, either on the basis of *volenti* or putative consent, or failing these, on the grounds that those common-law offences are unconstitutional in relation to the combatants in that they infringe their constitutional rights to *inter alia* dignity and economic freedom. Any of the aforementioned grounds would ultimately have the effect of decriminalising combatants' conduct in an MMA bout, which in turn would effectively legalise MMA as a sporting and economic activity in South Africa.

However, until a South African court finally rules on these legal issues, or the legislature clarifies MMA's legal position, the legality of MMA in South Africa remains uncertain and its participants accordingly remain at risk of being prosecuted for a range of criminal-law offences.

[107] The parameters of *volenti* set by *Roux* exclude bodily harm caused by conduct that constitutes a "flagrant contravention of the rules" (*Roux v Hattingh supra* par 41–42).