

INTRODUCTION

Traditional authorities and its structures suffered severely under colonialism. However, they were never totally destroyed and eventually the colonial powers used them. The colonial authorities realized that they could not maintain law and order in all the outskirts of the colonies. They also recognized the value of the system in existence when they colonized Africa. Rather than rooting out the traditional structures, including customary law and customary courts, the colonial powers acknowledged both the customary structure and its legal system. It goes without saying that they also used it for their own purposes.¹

Consequently, customary law and the customary legal system was part of the Namibian legal system both during the period of German colonization and South African occupation. While the African colonial powers, and in the case of Namibia, in particular Germany and England, recognized customary law,² it was never fully integrated in the mainline legal system. Its application was confined to special courts, while the common law courts only took *ad hoc* notice of it.

Customary law was officially recognized and applied in Namibia by the South African authorities in 1928 by the Native Administration Proclamation, 15 of 1928. It created so-called commissioners court gave them a discretion to apply indigenous law. [section 9(1)] – with the usual repugnancy proviso. (see below). It did, however not provide for a hierarchy of legal systems. After a period of confusion the South African Supreme Court of Appeal ruled that in exercising this discretion neither common law nor customary law is *prima facie*.³

This limited application of customary law was further restricted by the so-called *repugnancy proviso*. The proviso, applied in virtually all African colonies, made it possible to prevent enforcement of customary law if it was contrary to natural justice or threatened the social order. However, Bennett⁴ comments that it had a more notorious function: to prevent the enforcement of customary law that offend western norms and standards. Hinz⁵ points to the inherent discriminating element of the repugnancy proviso in that it always worked in favor of general law as *a one way street to out rule customary law* whenever a conflict occurred between the two systems.

¹ Bennett (xxxx) emphasizes the fact that the missionaries and colonial officials rather than the indigenous communities were made the official interpreters of the system. Hinz (xxxx), referring to Wood and Others V Ondagwa Tribal Authority and Another 1975 (2) SA AD 294, writes extensively on the way in which the South African authorities abused the system.

² For a detailed history of the recognition of customary law in South Africa (and subsequently applied in Namibia – then known as South West Africa) see Bennett: 1995, 18ff. For the application of customary law in Namibia under German colonial government and under South African occupation see Hinz 2002, 101ff. and 41 ff and Olivier 1961.

³ Ex parte Minister of Native Affairs: in re Yako versus Beyi 1948 (1) SA 3883 (A). For the application of customary law in Namibia under German colonial government and under South African occupation see Hinz 2002, 101ff. and 41 ff and Olivier 1961.

⁴ 1995:60

⁵ 2002, 137

The Namibian Constitution recognizes common law and customary law on equal footing.⁶ However, in practice not much attention was given to customary law until November 2003, when the Community Courts Act⁷ came into operation and repealed pre-independent legislation.

For all practical reasons customary law has operated on the fringes in the villages without a major influence on the common law or the post-independence jurisprudence in Namibia. The legal profession operating in the common law courts preferred to see customary law and customary courts as a simplified form of civil litigation available to grassroots communities who, due to financial constraints, their remoteness from the big centers and their lack of understanding western legal systems, do not have access to the civil courts.⁸

For the community court litigators the consolation prize of being allowed to run their own legal system without too much interference from the main stream, was not always satisfactory. For one, they did not have access to the state machinery to enforce the judgments of customary courts⁹.

And the legal fraternity were never too impressed with the customary courts either. There is a general feeling amongst both the legal fraternity and the community that the judgments are too harsh.¹⁰ And when a customary court makes a ruling while a criminal case is pending in the common law courts, families often refuse to comply with the judgment until the accused has been convicted in the criminal court.¹¹

The Constitutional dispensation affected customary law, and consequently the operation of customary courts, in a severe way. Like all other laws and the common law, customary law has to comply with the Constitution.

Women rights organizations and human rights NGO's are generally of the opinion that the democratic, human rights dispensation will be the end for customary law and consequently, customary courts. A recent article in the Gender xxxxxx refers to a South African Constitutional Court judgment on primogeniture as another blow for customary law.¹² Similarly, the reported case law in Namibia dealt in a negative way with customary law¹³ and customary courts.¹⁴ Hinz¹⁵ after analyzing the possible constitutionality of customary law, points out that while certain customary law customs will not survive, several others are not contravening the Namibian constitution.

Many traditional authorities feel that the democratic post-colonial dispensation did not bring them and the traditional structures into the main stream of

⁶ Art 141. See also Hinz, MO

⁷ Act XXX of 2003

⁸ Interview with the Prosecutor-General, 13 July 2004.

⁹ Discussions with traditional leaders, in Katima Mulilo and Keetmanshoop: 2004.

¹⁰ The Prosecutor-General mentioned the example of a customary rule that a stolen cattle must be remunerated by seven pieces of cattle. Interview, supra.

¹¹ Ibid.

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power. On the contrary, they have lost the big financial contributions of the former South African government desperately looking for allies in Namibia. While their authority over their people and their courts are acknowledged by the Constitution, they often express the concern that the Constitution has a negative effect on their work in the communities.¹⁶ The negative attitude of traditional leaders against the Constitution is fairly widespread, not only when it comes to the administration of customary law, but also in general sense.¹⁷ There is also a general dismay in the fact that the government does not fund the traditional authorities, and especially traditional courts, adequately.¹⁸

Consequently, despite the fact that the Constitution placed customary law on par with Namibian common law,¹⁹ if anything, customary law and its structures lost ground and the two legal systems moved further apart.

CUSTOMARY LAW IN POST INDEPENDENT NAMIBIA

Customary law (and to an extent even traditional authorities and chiefs) were not always evaluated positively by the people in pre-independent Namibia. Since the authorities (in this case the administrator) had the power to recognize traditional leaders, a recognition with substantial financial benefits, the leaders were not popular with the people, let alone the liberation movement.²⁰

However, Swapo, then a liberation movement, later the first political party to gain power in an independent Namibia, was always in favor of recognizing and even extending the powers of traditional leaders, customary law and customary courts. Hinz²¹ points out that the exiled leaders took cognizance of the positive attitudes of post-independent Africa towards customary law. As early as 1986 the United Nations Institute of Namibia in Lusaka suggested that the status of customary courts should be uplifted in an independent Namibia.²²

It therefore came as no surprise when the mothers and fathers of the Namibian nation made special provision for customary law in the Constitution of an independent Namibia. The Namibian Constitution not only recognizes customary law, but also places it on equal footing with common law and other laws. (Articles 61 (1) and (2)).

It goes without saying that in terms of Art 61, the court and the legal fraternity at large have the right and duty to interpret customary law in the light of the constitution. Interpretation principles must be developed, using the

¹⁶ XXXXX The leaders were, among other things, unhappy that corporal punishment by organs of the State has been ruled unconstitutional in **Ex Parte Attorney-General: In Re Corporal Punishment by organs of the State xxx**. They were also unhappy with the fact that legal practitioners can no longer be kept out of Community Courts.

¹⁷ Comment of traditional leaders in Katima Mulilo, Oshakati and Keetmanshoop: 2004.

¹⁸ Ibid.

¹⁹ Article xxx. See also Hinz: 19xx

²⁰ See Wood and Others v Ondagwa Tribal Authority and Another 1975 (2) SA AD 294. The enmity between the Swapo party and the traditional authorities of the 1970's forms the basis of the conflict in this case. The case is also a good example of how the traditional authorities and courts were abused to further the cause of the South African occupying forces.

²¹ 2002, p. 11.

²² 1986, p. 963, quoted in Hinz, ibid.

Constitution and its values as sources, suitable to the particularities of customary law, rather than extra legal sources.

The founders of the Namibian constitution undoubtedly wanted to place customary law on the same footing as common law.²³ Activists for more recognition of customary law has agitated for a more pro-active approach by the government to integrate these two systems into a post independent legal system that will remove the inequalities of the past.²⁴ The ambitious programme of the ministry of justice to codify Namibian law, is just one of the strategies to bring indigenous law into the mainstream.²⁵

The fundamental interpretive issues when two sometimes very different (and even contradictory) legal philosophies are integrated into one legal system have received little attention in the first thirteen post-independent years.

Does a conviction in the one allow for a plea of *autrefois* convict in the other? The Namibian fathers and mothers, while prohibits double jeopardy, did not deal with the complicated relationship of two very different legal systems operation parallel.

In practice the important and controversial issue of conflict of laws ended in the high court for an authoritative constitutional interpretation.

It is well known (though officially ignored) that rape cases are heard by customary courts. the end it remains to the prosecutor in the common law court to make the difficult decision to prosecute or not after a conviction and sentence in the indigenous court.

Take the following not so fictitious scenario. The prosecutor in the regional court receives a rape docket with a strong prima facie case against a middle-aged man from a traditional communal area. The victim is a niece of the accused (his sister's twelve year old daughter).

On the day of the trial the accused (on bail) arrives in the same car at the courthouse with the complainant, her parents and the chief of the area. The convoy visits the prosecutors office and the chief informs him that the accused has already been convicted a punished in a traditional court. He has paid the parents two cows and an ox and agreed to take care of the girl for the rest of her life (parents nod in agreement). The complainant agrees and refuses to speak with the prosecutor in private or to open her mouth in court.

²³ I use the word common law in a broad sense to include the corpus of Namibian law at the time of independence. Technically both common law and customary law can be changed by statutory law.

²⁴ See for example the unpublished speech of the then minister of justice, Dr. N Tjiriange at the Joint conference of prosecutors and magistrates, Windhoek, November 1998. See also the opening of the new minister of justice, Dr. Albert Kavana, at the joint meeting of southern and east African law reform commissions, 18 August 2003.

²⁵ This is, however a long-term project and extremely expensive. Experts in criminal law like Prof. C Snyman of the University of South Africa has made valuable contributions, but the programme is still in an infant stage.

The prosecutor, pressured by public opinion, and recent anti-rape legislation prescribing a minimum sentence of five years for crime like this, takes a hopeless case to court.

THE HIGH COURT

The High Court of Namibia seems to give an extremely narrow interpretation to the application of indigenous law in common law courts. In the State versus Jonas Hepute²⁶ the court, without following the Pack-case, limited the application of customary law in terms of the Constitution to traditional courts. Further, the court content that only customary rules that have attained the status of a customary rule of law, is recognized in terms of the Constitution. With such a narrow interpretation of the constitutional recognition of customary law, it is difficult to understand how the court expect post independent customary law to develop.

While the High Court took a more positive attitude in *S v Sipula*,²⁷ the judgment is nevertheless not liberated from ascribing a secondary position to customary law. The accused, a tribal policeman, was found guilty of assault with the intent to do grievous bodily harm after executing an order of a tribal court which had imposed a sentence of corporal punishment.

The Court set the judgment and sentence aside on other points and were not obliged to make a ruling on the question whether *Ex Parte Attorney General, Namibia: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC), - founding corporal punishment by state organs unconstitutional - was binding on traditional authorities and traditional courts.

The Court nevertheless discussed the issue. While the Court stated that the mentioned case did not necessarily declare corporal punishment in native and customary law unconstitutional (it is not clear that traditional courts or traditional authorities are organs of the state), the Court, without deciding, assumed that the case was indeed binding on traditional courts and traditional authorities. Thus, while Hinz sees the customary law as a lower court in terms of the Constitution, the High Court per Justice O Linn, while sympathetic towards the court, it nevertheless questions the court as being a part of the judiciary.

In *S v Haulondjamba* 1993 NR 103 (HC) the accused was found guilty in the Magistrates Court of attempted rape and sentenced to a fine of R1 000,00 or 12 months imprisonment. The same Court then made a sentence imposed by a tribal court part of the sentence by adding "Two heads of cattle or R800 to be paid to the complainant".

The High Court found that it is an irregularity to make a decision of a tribal court part of a sentence of a magistrate's court. The State recognizes tribal judgments and will not interfere as long as they comply with the principles of natural justice. *However, tribal judgments stand on its own.* Criminal procedure is a different leg of the judicial system and cannot enforce judgments of the

²⁶ Unreported case of the High Court, delivered on 13 June 2001.

²⁷ 1994 NR 41 (HC)

tribal courts by making the tribal judgments part of a criminal judgment in a Magistrates Court.

While the High Court cannot be criticized with its interpretation of the law, one cannot but sympathize with the magistrate, who assists the customary court in executing its judgment. Without the assistance of the State apparatus, the customary courts remains incapable of enforcing its judgment. Consequently, the honorable cause of Constitutional Assembly to merge two legal streams on the basis of equality into a new legal systems came to naught.

THE COMMUNITY COURTS ACT

The Community Courts Act was signed into law in November 2003 after almost ten years of research and consultation. The Act is an attempt to order traditional courts and to bring it into the mainstream. It deals significantly with most of the issues the traditional leaders have with the new democratic political dispensation.

The Act makes provision for the registration of community courts by registered traditional authorities, the appointment of judges and other officials, appeal procedures to the Magistrates Court and the enforcement of judgments.

Although the Act was promulgated and signed by the President – and several traditional authorities have applied to establish Community Courts, none has been registered at the time of writing this article July 2004).

Hinz argues that in terms of the Constitution, community courts should be seen as lower courts on par with magistrate's courts.²⁸ The legislator has, however, in the Community Courts Act, given the magistrate's court appeal jurisdiction over community courts (Section xx). Hinz is nevertheless convinced that the Act will bring customary law and its organs into the mainstream of judicial operations.²⁹

The effect of the Act and its success in bringing customary law on par with the common law and community courts with common law courts, will only become clear once the Act comes in full operation, and appeal cases run its full course to the High and Supreme Courts of Namibia.

The question of the constitutionality of aspects of customary law and its implementation by the officers will undoubtedly become a main focal point of Namibian jurisprudence for several years to come. The role of the chief as an "absentee judge" with a final say in judgments, the issue of "relevant" evidence vis-à-vis the community court tradition to allow witnesses to "tell their story" and the conflicts of law, are but a few aspects that the competent courts will weigh in the light of the Constitution.

²⁸ Hinz xxx

²⁹ Hinz expressed this position in several lectures, among others at the NIPP workshop in Caprivi,.,xxxx.

In this article I wish to concentrate on one aspect: the validity of the plea of *autrefois* in the common law courts when a case has previously been settled in a community court, and vice versa.

There are no reported cases of pleas of *autrefois* succeeded in the criminal courts by people who have been earlier been tried in a community court. This does not mean that earlier judgments in community courts never played a role in the criminal courts. The influence of the community court judgments was much more subtle.³⁰ Once the relationship between the two legs of the judiciary is arranged in a formal manner, the plea will challenge the framework of this relationship.

THE PLEA OF AUTREFOIS IN THE COMMON LAW COURTS

The so-called plea of **autrefois convict** or **autrefois acquit** are recognized in the **Constitution of the Republic of South Africa, [Art.35(3)(m) of Act 108 of 1996]**, as part of the Bill of Fundamental Human Rights.

The Article reads as follows:

35(3) Every accused has a right to a fair trial, which includes right

...

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been acquitted or convicted.

The pleas of **autrefois convict** and **autrefois acquit** did not enter the contrary,

it has a long history in South African Law.

The pleas form part of the South African common law. It is also recognized by the **Criminal Procedure Act, Act 51 of 1977** (and its predecessors). Yet, the new constitutional dispensation supported by a Bill of Fundamental Human Rights, changed the legal scenery drastically. Therefore one can expect that the important aspect of special pleas will not be left untouched.

2. HISTORICAL BACKGROUND

Jordaan (1997:124) points out that the pleas were first introduced to South Africa in the colonial courts towards the end of the nineteenth century, relying exclusively on English law. In the **Criminal Procedure Act, Act 13 of 1917**, section 157 and 162 allowed for a plea that an accused has already been acquitted for an offence with which he is charged.

Only in 1933 in **R Manasewitz (1933 AD 165)** the Appellate division linked the plea with the Roman Dutch *exceptio res judicatae*.

In the early South African cases where pleas **autrefois convict** and **acquit** were entered, the Courts had an extremely narrow approach towards the prejudice of an accused.

³⁰ Any prosecutor who has prosecuted in the Regional Court for more than a month have been confronted with a rape victim, her parents and the accused arriving in the same car, waving the community court judgment before her/his nose. If the prosecutor refuses to withdraw the case, he/she is confronted in court with sealed lips, not only that of the complainant, but the whole community.

To understand the development of the doctrine in South Africa, it is necessary to trace its roots in England.

2.1. THE AUTREFOIS PLEAS IN ENGLISH LAW

Initially the spectre of the doctrine of *autrefois acquit* was so narrow

the plea was not valid where the conviction was based on a legal error. It was further only available if the life of the accused was in danger. (Jordaan 1997: 29).

By the sixteenth century the doctrine was firmly settled in English law. (Ibid: 30). Friedland (1969: 12) points out that the application was all but fair to the accused. The judges of the seventeenth century often discharged juries to give prosecutors an opportunity to present a stronger case. The practice that the discharge of the jury does not allow for a plea of *autrefois*, is still operating in England and Wales: (Jordaan 1997: 32)

In *The King versus Vandercomb and Abbot* (1796), quoted in Jordaan (1997: 35ff.), the court formulated the so-called “**same evidence**” test.

The court rejected a plea of *autrefois acquit* and as justification, formulated the “**same evidence**” test.

(U)nless the first indictment was such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. (Quoted in ibid: 36)

Friedland (1969: 98ff.) points out that the test can jeopardize both the defence and prosecution unreasonably. Under the test competent verdict can be tried after a conviction.

If, on the other hand an accused is convicted of the competent verdict in the first trial, he/she can rely on the plea of *autrefois convict* should the prosecution take him/her to task on the principle verdict.

The weakness of the test becomes evident when one considers the “**Intervening death**” cases, i.e. where an accused is charged with assault or attempted murder initially and the victim dies. Under the *Vandercomb* test he/she cannot be tried for murder.

Since 1835 in the *Dann case* (Jordaan 1997: 40) the English courts applied another test, the so-called “**in peril**” test. The test boils down to the fact that an accused cannot be tried a second time if he was “in peril” to be convicted of the same convicted in the first trial for the offense in the indictment of the second, had been convicted in the first trial for the offense in the indictment of the second, had been charged correctly, he was “**in peril**” of conviction.

See *Rex versus Barron* (1914) quoted in Jordaan (1997: 40).

The pleas of *autrefois acquit* and *convict* always had a restrictive application in English law. Only in 1964 did the House of Lords systematically lay down all the prerequisites for a successful plea of *autrefois convict* or *acquit* in the authoritative case of *Connelly versus DPP* (1964) AC 1254 at 1305 ff.

Two important aspects excluded the plea of **autrefois** in English law:

The conviction or acquittal must have been on the merits of the case; and

If the conviction or acquittal was the result of a defective indictment, the State is free to charge the accused again.

Since the United Kingdom is not a constitutional democracy (it has no written constitution), the emphasis on human rights did not play the same role in the English legal system as it did in constitutional democracies such as Canada and the United States. We shall come back to this point.

2.2 AUTREFOIS IN SOUTH AFRICA

Jordaan (1997: 124) points out that the pleas were first introduced to

South Africa in the colonial courts towards the end of the nineteenth century, relying exclusively on English law. In the **Criminal Procedure Act, Act 13 of 1917**, section 157 and 162 allowed for a plea that an accused has already been acquitted for an offence with which he is charged.

Initially the Courts considered **autrefois convict** or **autrefois acquit** to be identical with the Roman Dutch expression *exceptio res iudicatae*. (**R v Manasewitz** 1993 AD 165 op 168) (See also Schmidt, [1982] on 580).

2.2.1 Prejudice to the Accused

In the early South African cases where pleas **autrefois** were

entered, the Courts following the English example, has an extremely narrow approach towards the prejudice of an accused.

2.2.1.1 Defective charge sheet

In cases where the accused were acquitted due to defective charge sheets and tried for a second time after the correction of the charge sheets, the Court disallowed pleas of **autrefois acquit** (See **R v Twalatunga, (1903) 20 SC 425**, **R v Koegelenberg 1924 TPD 594** and **R v Bekker 1926 CPD 410**).

Although the prerequisite of a good indictment for a successful plea of **autrefois acquit** is still part of the English law, it has become irrelevant almost in South Africa. The **Criminal Procedure Act, Act 51 of 1977**, (and its predecessor) gives the Prosecution and the Court extensive powers to amend a defective indictment.

2.2.1.2 Jeopardy to Accused (Judgement on Merit)

Apart from a good charge sheet, the Courts also required that an accused must have been **in jeopardy**

and that his conviction or acquittal must have been on **the merits** of the case. (See **R versus Bekker 1926 CPD 410**).

The **Bekker case** illustrates the limited scope of a plea of **autrefois acquit** back in the 1920's. The trial Magistrate acquitted an accused who was charged for selling liquor after 6pm under an old Cape Act of 1885. Since the charge sheet did not allege that liquor was sold after 6pm. The Court acquitted the accused, stating that no crime is alleged. The Court of Appeal found that the accused was indeed in jeopardy. The Court also disagreed with the trial Magistrate and found that although the charge sheet was defective, it nevertheless alleged a crime.

However, in discussing what **on merit** means, the Court stated that the fact that an accused is annoyed twice, or that he has previously been in danger, is not the real foundation or root of the plea. The *maxim meme debet bis vexari* is the real root. Since the first trial did not allege a crime, the accused was **accordingly** discharged.

The Courts sees in the word **accordingly** that the accused was not discharged on merit and therefore a plea of **autrefois convict cannot succeed**.

This early strict approach was followed in a string of cases until the 1960's. [**R versus Kaplan 1927 EDL 178**, **R versus Manasewitz supra**, and finally confirmed by the Appellate Division in **R versus Long 1958 (1) SA (A) 115**]. Although the new Criminal Procedure Act, Act 56 of 1955 did not bring a substantial change in the wording of the **autrefois**-sections (sections 169), the sixties brought a new conscience.

In **S v Vorster 1961 (4) SA 863 (O)** the accused was acquitted on a charge of drunken driving in the first trial. During the trial it appeared that the registration number of the accused's car was wrong in the indictment. The prosecutor requested that the indictment be changed.

When the magistrate refused the application, the prosecutor asked for a postponement, and when that failed, he withdrew the case. Consequently, the accused was found not guilty and discharged. The accused was then charged for the same offence in a new trial and pleaded **autrefois acquit**. The court allowed the plea.

The Court maintained that the accused was in jeopardy at the first trial.

The most significant aspect of the **Vorster case** is probably the fact that the court maintained the plea of **autrefois** despite the fact that guilt or innocence was not at stake in the first trial. This is not only a deviation from the **Bekker case** and the string of cases

following the latter, but also a deviation from the standard "in peril" test of the English law.

The paradigm switch that took place in the **Vorster case** passed almost unnoticed. The principle of the **Vorster case** to prevent the State for getting a second chance to present evidence which was available at the trial, was taken further in **The State versus Mthetwa 1970 (2) SA 310 (N)**.

In this case the Court found that failure by the State to lead evidence amounts to acquittal **on merit**.

Jordaan (1997:138) points out that while the **Vorster case** differs from the then English law that was traditionally followed by the South African Courts, it is similar to a development in Canada was undoubtedly linked with the codification of the Canadian law and the development of the country as a constitutional democracy with an enshrined Bill of Human Rights.

2.2.1.3 Interpretation of "the same offence"

Although the South African courts also followed the conservative English approach in answering what the "same offence" means, if they understood from the outset that the elements to be proved rather than the specific name of the offence is the essence to the test. Thus, it will be impossible to charge an accused a second time for a competent verdict of the crime in the first indictment.

The early test as described in The case **R v Kerr 1907 21 EDC** used the following definition to determine the relationship between the first and the second cases:

... whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first indictment.

Already in the **Manasewitz case** the court pointed out that reasonableness and fairness forms the basis of the special pleas of **autrefois**. The Court also pointed out that the term same offence should not be interpreted technically, but in terms of substance.

This led the way for **State versus Davidson 1964 (1) SA 192 (T)** – also in the early sixties – the Court pointed out that the special plea of **autrefois** does not require absolute similarity. More important, this case also pointed out that the Court needs to look at the actions described in the charge sheet rather than the elements of the crime.

In **S v Ndou 1971 (1) SA 668 (A)** the Appellate Division followed the wider scope of **Manasewitz** and the liberal test. It also confirmed that the charges does not have to be identical, but only substantially the same for a plea of **autrefois** to succeed.

In the **Ndou case** the accused were initially charged with a contravention of section 11 (C), alternatively section 11 (a) of the Suppression of Communism Act. The State stayed the prosecution after a time and the accused were acquitted.

They were later charged with a contravention of section 2(1) of the Terrorism Act. The State's submission that the accused were not in jeopardy of being convicted of section 2(1) of the Terrorism Act at the first trial, were rejected by the Court a quo and the court of appeal. Although the second charge is not a competent verdict of the first, the accused were in jeopardy of a verdict based on the same facts.

In **O'Neill versus SAR & H 1958 (3) SA 269**, the court speaks of "**real equivalence**". However, the courts were not always consistent in applying the rule. If the first indictment did not contain a crime, an accused can be charged again. [**The State versus Makhutla 1969 (2) SA 490 (O)**]

In **The State versus Makoko 1984 (2) SA 620** the accused, a convict serving a sentence, was charge, convicted and sentenced twice for possession of cannabis, once under the Prisons Act and once in a Magistrates Court under section 2 (b) of the Dependence Producing Substances Act. The second conviction was confirmed on appeal.

Hiemstra (1993: 262) criticizes the case severely. The fact that the accused was a prisoner, was not an element of the crime. Therefore it is not a relevant fact to determine if the crimes are essentially the same.

Du Toit (15-4) argues that the word **offence** should be interpreted to include not only the same offence, but also an offence substantially identical.

In **State versus Khoza nad Another 1989 (3) SA 60 (T)** the Court rejected a plea of **autrefois convict** where an accused was first convicted of public violence and later charged with murder for the same acts. Since the elements of the crimes are not the same, the test laid down in **Kerr** and confirmed in **Ndou**, determined that the plea had to be rejected, which the court did. The Court nevertheless used its inherent jurisdiction to struck the case from the role – a strong indication that the Court felt that the present situation is still prejudicial to the accused.

Although The South African courts maintained a conservative approach, since the sixties it moved away

from the rigid English approach. The direction, as in the question of merit, was towards acknowledging the right of the accused.

THE CANADIAN EXAMPLE

In Canada the doctrine of **autrefois** is known as principles of double jeopardy (Friedland 1981 – 1982, quoted in Jordaan 1997: 70 f.). Section 11 (h) of the Canadian Charter of Rights and Freedoms, which is part of the Constitution Act of 1982, protects accused against double jeopardy.

In the respect of the moment when jeopardy attaches, the Canadian Courts interpreted the charter liberally. It found the common law rule that the acquittal based on a defective charge sheet is not an acquittal based on merit, to be inconsistent with the extensive powers of the court to amend defective indictments (ibid:71).

In the case of **Regina versus Riddle** (quoted in Jordaan 1997: 72) the issue of acquittal on merit was dealt with. The accused was acquitted after the State failed to present evidence. The accused was charged again and the accused pleaded **autrefois acquit**. His plea was upheld and the State appealed.

The Supreme Court rejected the appeal and stated that the term “*on the merits*” dated back to situations and provisions in English law of the nineteenth century which is no longer applicable. The court concluded that with a reference to **Haynes versus Davis** that an accused is entitled to an acquittal if he was in peril, and afterwards acquitted either by a verdict of jury or by a ruling on a point of law without the case going on trial. (ibid: 74)

Consequently, the court concluded that an accused is in jeopardy from the moment he has pleaded to a charge before a judge with jurisdiction. (ibid: 75f.).

The **Riddle case** was confirmed in the case in **Petersen versus the Queen**. Finally the principle was also confirmed in **Regina versus Moore (1988)** (quoted in Jordaan 1997:77 ff.). The Court reversed the old rule that conviction because of a defective charge sheet is not a conviction on merit. The Supreme Court made the following ruling:

In **Conway versus the Queen** (1989) the Supreme Court held that a stay of proceedings because of abuse of process – even if the State is not guilty of prosecutorial misconduct – prevents the State to try the accused a second time. (quoted in Jordaan 1997: 82).

It is clear from the development in Canada, that a Bill of Rights does not always lead to more rights for an accused. However, in the case of the issue of the double jeopardy principle, the Canadian Supreme Court opted for a liberal interpretation that gives full credence to the intention of a Human Rights Charter.

3. THE EFFECT OF A CONSTITUTIONAL DISPENSATION ON INTERPRETATION

The new legal dispensation that came about in South Africa with the acceptance first of the interim Constitution brought with it a new emphasis on rights. It even lead to methods of interpretation.

Curren and Kruger compared pre-1994 South African Appellate Division cases where specific legislation was interpreted in the light of human right issues with similar Namibian High and Supreme Court cases.

In both **The State versus Marwane, 1982 (3) SA 717 Ad** and **Chikane versus Cabinet for the Territory of South West Africa, 1990 (1) SA 349 A** the Court took a rigid approach by looking primarily to the meaning of the legislator at the legal interpretation surrounding the issues.

In the **Chikane case** the applicants (respondents in the Appeal case) attacked Section 9 of Act 33 of 1985 (South West Africa) on the grounds that it is incompatible with the **Declaration of Fundamental Freedoms**. While the Declaration embodied a fundamental rule against discrimination, section 9 differentiated between two categories of people.

The Court made the issue a legal one by asking if the classification is reasonable. On the question if section 9 is unconstitutional since it excluded the *audi alteram partem* rule, the Court again begins with the intention of the legislation. It also works as a point of departure with the rule *ut res magis valeatquam pereat* – the legislator is presumed to have made a valid and effective provision.

The approach of the Court was extremely legalistic. On the question if section 9 is unconstitutional since it excluded the *audi alteram partem* rule, the Court again begins with the intention of the legislation. It also works as a point of departure with the rule *ut res magis valeatquam pereat* – the legislator is presumed to have made a valid and effective provision.

From the outset the High and Supreme Courts of an independent Namibia took a radical different approach in the interpretation of constitutional issues. (See **Namibia National Student's Organisation and Other versus Speaker of the National Assembly for South West Africa 1990 (1) SA 617 SWA**, **Mwandingi versus Minister of Defence, Namibia, 1991 (1) SA 851 (NM)**).

In **Ex Parte Attorney-Attorney-General, Namibia: in re Corporal Punishment by Organs of State 1991 (3) SA 76 Nm SC**, the Court was confronted with the question if corporal punishment by an organ of the State is in conflict with chapter 3 of the Constitution, more particularly art 8 thereof.

The Court, unlike the Chinake-case, did not begin with the facts of the case, but the context of the Constitution. The constitution and its texts, the Court states, must be interpreted in the light of the aspirations and values of the new nation that the Constitution seeks to articulate. The Court made the following comment on the Constitution:

It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law. Practices and values which are inconsistent with or which might subvert this commitment are vigorously rejected.

For this reason colonialism as well as “the practices and ideology of apartheid from which the majority of the people of Namibia have suffered for so long” is firmly rejected.

Lawyers for Human Rights (Associations of Law Societies of the RSA, 1997, 67 ff) points to several aspects where the interpretation of a Constitution with a Declaration of Human Rights differs from the interpretation of other laws. Although the literal meaning of the word is important, constitutional questions do not usually arise from passages in a constitution

where the literal meaning poses no problem. Where problems occur, the Courts should opt for:

1. A Purposive or “value orientated” interpretation of the society.
2. Generous Interpretation
The basic tenet of generous interpretation recognizes the need for a broader, less legalistic interpretation of a Constitution than usually permitted in a parliamentary democracy.
3. Historical Interpretation
This model would mean in South Africa that both the former apartheid system, the drafting history (including the negotiations leading to the Constitution) cannot be ignored when interpreting rights
4. Contextual Interpretation
Not only the history and context, but also other constitutional provisions, especially provisions of the Bill of Rights, should be taken into account. Lawyers for Human Rights (1997: p. 74) point out that not individual clauses, but the whole Constitution is supreme and should therefore be read in context.

4. The State Versus Makwanyane 1995 (7) BCLR 793 CC

It is clear from paragraph 2 above that some South African courts have already followed broader interpretation of the rights of the accused since the **Vorster case**. Although the extremely rigid English approach was still followed after 1960, other cases did follow the Canadian courts in respect of a liberal approach to the time when an accused is in jeopardy.

The wording of the Constitution also indicates that the drafters wanted to give individuals wide protection against subsequent prosecutions derived from one set of facts. The right not to be tried for a second time for an **offence in respect of an act or omission for which that person has previously been either acquitted or convicted**, forms an integral and important part of the right to a fair trial.

Although the general rule of **autrefois acquit** and **convict** has been part of the South African law for at least a century, and although South African Courts have been inclined to follow the more liberal constitutional approach of Canada vis-à-vis the conservative English approach, the South African Constitutional era will undoubtedly give wider protection to an acquitted or convicted accused.

Let us look at the different prerequisites for the pleas of **autrefois acquit** and **convict** and its implications in the light of the constitution.

4.1 A Good Charge Sheet

As we have already seen, this aspect is of little significance since the courts have wide discretions to correct defective charge sheets. It can however, still happen that a court refuses to change a charge sheet (mostly because it will jeopardize an accused in his defense. In such cases a plea of **autrefois** will not not succeed under the pre-constitutional rules.

However, if the South African courts follows the approach of the Namibian courts, they will first and foremost look at the spirit of the Constitution and the values that the Constitution intends to protect.

If it is the intention of the Constitution not to give the State an unfair and unbalanced advantage, it seems logic that if the courts of the first trial rejected an application to change the charge sheet, the prosecution should not have the right to have annihilate the decision of the court with a new trial.

The Canadian decision of **Regina versus Moore (1988)**, has also set an example as to how to deal with defective charge sheets at the **autrefois** special pleas. Since it is also a Constitutional principle to take note of practices in other jurisdictions, and since the decisions of the Canadian Supreme Court has already played an important role in South African Constitutional cases, the chances are good that the constitutional Court (and other competent courts) will in future deviate from the rigid English application on this point.

Further, the suggested interpreting models for constitutional interpretation supports a liberal interpretation in favour of the accused. One can accept that in future those rare cases where the court of the first trial refused to have a charge sheet changed, the Constitution will not allow a rejection of the special plea of **autrefois acquit**.

Thus, although there has as yet not been a test case to determine the effect of the Constitution on the protection of an accused who has previously been acquitted because of a defective charge sheet, should such issue come up again, provide for a plea of **autrefois acquit** in such instance.

4.2 Judgement based on merit

As we have already seen, the Canadian Supreme Court rejected this English prerequisite in a string of cases beginning with **Regina versus Riddle** (quoted in Jordaan 1997: 72). We have already seen that the **Vorster case** did not follow the strict English principle that the accused must have been "in peril" at the first trial to succeed with a special plea of **autrefois acquit** or **convict** (Jordaan 1997: 138), but applied the principles of Canada, a Constitutional jurisdiction. This liberal interpretation was further extended in **The State versus Mthetwa (2) SA 310 (N)**. Thus, even before the constitutional era the South African Courts followed the Canadian Supreme Court in its deviation from the English law.

In the recent case of **State versus McIntyre 1997 (2) SACLR 333 (T)** the Court pointed out that the words **an act or omission**, of art. 35 (3), which did not appear in the 1993 interim Constitution, extended the protection against double jeopardy, since the emphasis is on the act of the accused rather than definition of the crime.

If this statement is applied to the issue of judgment based on merit, one can say that the word **offence** would have been suitable if the fathers of the Constitution only wanted to confirm the then *status quo*.

What has been said about the example of the Canadian Supreme Court in (4.1) above, applies *mutates mutandis* to this issue.

4.3 The Same Offence

In **State versus McIntyre 1997 (2) SACLR 333 (T)** the Court had its first opportunity to consider the effect of the Constitution, and the Constitutional era. In this case the accused were acquitted of assault with the intent to do grievous bodily harm. However, on the night of the assault the assaulted person died and the accused were charged a second time, this time for murder. The trial court rejected the plea of **autrefois convict**.

On review (in the middle of the case) the court affirmed the plea, although assault with the intent to do grievous bodily harm and murder are not the same and the elements that need to be proved differ. Yet, the Court pointed out that not the elements of the crimes, but the acts of the accused needs to be investigated.

If the Court wanted to convict the accused in the second case, it had to begin by asking if the accused assaulted the deceased, a question answered in the negative in the first case. The Court pointed out that the words **an act or omission**, of art. 35(3), which did not appear in the 1993 interim Constitution, extended the protection against double jeopardy, since the emphasis is on the act of the accused rather than the definition of the crime.

Thus, in the *Mcintyre* case, the right of the accused not to be tried a second time for the same offence, was extended. This widening of the application, was the logical next development after the *Davidson* case, but also a consequence of the protection against double jeopardy in the Constitution.

5. Conclusion

Although the *Mcintyre* case is as yet the only test of the effect of the Constitution on the special pleas of **autrefois acquit** and **autrefois convict**, it laid foundation for further liberalization of the pleas. Since the emphasis of the Constitution is undoubtedly the protection of rights not previously protected (especially those rights listed in the Declaration of Human Rights), the protection clauses is likely to be interpreted in a broad way.

The tendency to break away from the rigid, conservative English system, which started even in the days of parliamentary sovereignty, is likely to go on. The more liberal Constitutional approach of Canada, and to a lesser extent, the United States, is likely to develop further and give more protections to an accused who has already stood trial. We can expect to see a constant moving away from the previous era (See The Honourable Chief Justice Mahomed in **The State versus Makwanyane 1995 (7) BCLR 793 CC** on the break that the Constitutional era had with the past.

One can expect the generous method of interpretation when it comes to rights that were either denied or not fully applied in the era of parliamentary sovereignty. Add to the fact that the most prominent aspect of the Constitution, is the Declaration of Human Rights.

The **Mcintyre case** has set the pace with the question of **same offences**. The direction that they took, will soon be followed in future cases.

Autrefois in the Act

The principle to prevent double jeopardy is clearly imbedded in the Act. Section 24 states that no one who has paid a claim in one court, will not be liable for the same claim based on the same fact in another.

However, the Act is silent when it comes to criminal liability after action has been taken in the community court. It seems as if the drafters of the Act took it for granted that community courts and its predecessors are civil courts with no criminal jurisdiction.

The presumption that customary law is part of private law and that the community courts only deal with civil litigation, is obviously the legal force behind the limited application of section 24. In this framework of thinking, community courts are civil courts where damages of an applicant forms the ground for litigation.³¹

If this presumption is correct, the common law courts will not be affected in any way by the introduction of the Community Courts Act. Both will be allowed to proceed with the administration of justice in its own sphere without any challenges and even less influence from the other.

Similarly, the common law civil courts will hardly be affected. After all, the claims for damages in civil courts are based on actions of a total different nature than the claims for damages in the community courts – breach of contractual liability, labour and road accidents, etc. In community courts the litigation is almost exclusively based on a criminal offence. While many criminal cases in common law courts also have a civil side to it, them majority of civil litigation are not based on criminal offenses.

Further, scholars have constantly pointed to the fact that customary law is a total form and expression of law than the legal system of Western liberal democracies. For one, the system is not so much based on the interest of the individual, but the interest of the community. Consequently, there is not a clear division between criminal and civil law.

The customary law system stands much closer to what is today called restorative justice than to the Western expression of justice as restitution and revenge. In a restorative judicial system the aim is not so much compensating damages to an individual or punishing an offender. Rather it aims at restoring the whole community.

In the process of restoring the damages within the society, customary law never pays damages just to compensate. The damages also fulfill a community task. Therefore, it is not strange in the community courts to involve the families of both the aggrieved and the offender.

Since the two systems are so different, common law practitioners often confuse the compensation in the judgments of the community courts with civil procedure. Therefore, they find the compensation extreme and outrageous.³² However, the compensation in customary law contains elements of punishment and restoration.

Mediation/arbitration

³¹ Lecture by the Minister of Justice, Ondangwa

³² The Prosecutor-General (see footnote 3 above) referred me to the customary laws in Okakarara where compensation for stock theft is compensated seven times the numer of stock stolen.

The South African legislators during the time of the occupation of Namibia and later the South West Africa Legislative Assembly, understood something of the complicated relationship between civil and criminal in customary law. The now repealed ordinances that regulated customary courts gave them both civil and criminal jurisdiction. While some of the more serious criminal offences were excluded from their jurisdiction,³³ it was clear that the courts were not considered to be only civil courts.

Consequently, if the Act defines the jurisdiction of the court to *hear and determine any matter relating to a claim for compensation, restitution or any other claim recognized by customary law*, it clearly does not exclude the former jurisdiction of customary courts to trial criminal cases.

³³ See