

# Deciphering Dangerousness: A Critical Analysis of Section 286A and B of the *Criminal Procedure Act* 51 of 1977

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## Abstract

The violent nature of some crimes and the high crime rate in South Africa reflect the fact that some offenders constitute a real threat to the security of communities. It is understandable, therefore, that the state seeks to protect its citizens through preventive measures. Although South Africa has certain legal provisions on its statutory books, it seems that the declaration of persons as dangerous criminals is under-utilised. South African legislation dealing with the declaration of dangerous criminals can be improved by borrowing some traits of the Canadian legislation. Such features include the restriction of courts' discretion and the provision of concrete and more detailed guidelines on the nature of the offences for which the provision can be applied. The courts could also take into account the type of criminal history of the offender which would merit the declaration of a dangerous criminal. It is also important that the extent of the violence in an offence should be thoroughly defined in court. Courts need to balance their wide discretion on the matter with the provisions in the Act in order to protect the community against dangerous criminals.

## Keywords

Sentencing; dangerous criminal; indeterminate sentence; preventative detention; discretion; psychiatric enquiry; community safety; under-utilised.

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## 1 Introduction

More than two decades into South Africa's constitutional democracy the country is still besieged by high levels of crime.<sup>1</sup> Many of these crimes are committed with devastating brutality by repeat offenders.<sup>2</sup> Though the courts can impose heavy sentences in an attempt to deter these offenders and the correctional system is aimed at rehabilitating and reintegrating them back into society as law abiding citizens, there are unfortunately some who will continue to pose a serious threat to the safety and well-being of others. Such dangerous offenders pose a clear threat to a society intent on achieving peace and safety. The State is therefore obliged to address and prevent the possible menace that such offenders pose.

Prior to 1994 the death penalty was regarded as the ultimate punishment. Currently, however, life imprisonment (25 years imprisonment) is one of the most serious punishments that can be imposed by a court and is regarded as a substitute for the death penalty.<sup>3</sup> What many probably do not realise is that since 1 November 1993 there has been a provision in our law which permits a court to declare someone a dangerous criminal and to impose an indeterminate sentence.<sup>4</sup> The power of courts to make such a declaration and impose such a sentence is contained in section 286A and 286B of the *Criminal Procedure Act* 51 of 1977. This article considers whether these provisions can realistically be utilised as an effective crime prevention measure to deter the commission of heinous crimes in South Africa. An examination is undertaken to determine whether the phrase "dangerous criminal" is appropriately defined to furnish South African courts with

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<sup>1</sup> South Africa has one of the world's highest *pro rata* murder rates. 20 306 murders were committed in 2018. See Crime Stats South Africa 2018 <http://www.crimestatssa.com/national.php>. Also see Cohen "Risk Assessment" 255; Snyman *Criminal Law* 27.

<sup>2</sup> See NICRO 2014 <http://press.nicro.org.za/images/PDF/Public-Education-Paper-The-State-of-South-African-Prisons-2014.pdf> 19-21; Snyman *Criminal Law* 28.

<sup>3</sup> See *S v Makwanyane* 1995 3 SA 391 (CC). Also see *S v Bull*; *S v Chavulla* 2001 2 SACR 681 (SCA) para 15. Also see Snyman *Criminal Law* 26-29; Terblanche *Guide to Sentencing* 256.

<sup>4</sup> See Terblanche *Guide to Sentencing* 275.

sufficient guidelines to make such declarations. The wide discretion of courts to declare an offender a dangerous criminal is also analysed.

The discussion commences with an analysis of section 286A and 286B. This is to illustrate when these provisions may find application in practice. The possible reasons why these provisions appear not to be applied by the South African courts on a more frequent basis are explored. There seems to be a paucity of this type of order, despite the many cases in which the conduct of the offender is viewed to be extremely dangerous and the individual is regarded as someone who threatens and undermines the safety of society.<sup>5</sup>

This article also refers to the Canadian provision which deals with dangerous criminals and has survived constitutional scrutiny. Like South Africa, Canada has introduced preventative measures to protect the public against dangerous criminals. Seemingly some jurisdictions, like Canada, even have a clear definition of who may be classified as a dangerous criminal. Their law-makers have also developed a number of safeguards to review such declarations of dangerousness to circumvent the notion that for such a criminal the prison door is proverbially locked and the key thrown away. It is conceded that the prevalence and severity of crime in the two countries are diametrically different. Nevertheless, South Africa can learn from Canada. The *Constitution* compels South African courts to consider the laws of other countries should we need guidance or when there are issues that our courts and legislature grapple with. The principal objective of the comparison is to ascertain whether the Canadian jurisdiction can offer possible solutions to South Africa.

Below, however, some of the events which contributed to the passing of this law in South Africa are briefly discussed, as the historical context may assist in illuminating the purpose of the law and/or may reveal the reasons for its current limited application.

## **2 How section 286A and 286B became law**

In 1989 William Frederich van der Merwe offered a lift to two female hitchhikers. At some juncture of their journey he stopped and brutally raped both, and murdered one of them.<sup>6</sup> The surviving victim managed to escape

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<sup>5</sup> There are few reported cases that deal with declarations of dangerous criminals and despite our requests for statistics from the Department of Correctional Services, we have not received meaningful responses that may alter our perception about the limited application of the provision in practice.

<sup>6</sup> See Cohen "Risk Assessment" 255.

after she shot and fatally wounded Van der Merwe with his own gun.<sup>7</sup> The tragedy of what happened to the two women was exacerbated by the fact that Van der Merwe had previously been convicted and sentenced for sexual crimes against nine women.<sup>8</sup> In respect of the aforementioned crimes, the death sentence had been imposed upon him in 1971. He successfully appealed and his sentence was replaced with a 20-year term of imprisonment, of which he served only 15 years.<sup>9</sup> Van der Merwe was on parole at the time he attacked the two women.<sup>10</sup> This case and a slew of other equally chillingly and gruesome cases led to a public outcry in the 1980s.<sup>11</sup> Understandably the public and the State saw a need for individuals like Van der Merwe to be removed from society. Presumably, though the death penalty was still a legal sentencing option, a case like that of Van der Merwe demonstrated that an alternative measure or sentencing option was necessary to protect the public against extremely dangerous individuals.

In 1990 Justice Booysen and other experts led a commission titled: *The Inquiry into the Continued Inclusion of Psychopathy as a Certifiable Mental Illness and the Dealing with Psychopathy and other Violent Offenders*, widely known as the Booysen Commission.<sup>12</sup> The Booysen Commission's terms of reference included the investigation and making of recommendations regarding the handling and release of dangerous and violent offenders, and sex offenders in general.<sup>13</sup> As a result of the findings and recommendations of the Booysen Commission sections 286A and B were inserted into the *Criminal Procedure Act* by the *Criminal Matters Amendment Act* 116 of 1993 and came into operation on 1 November 1993.

The criminalisation of individuals who pose a serious danger to society and the community as a whole is a global dilemma which requires specific legislation to combat their acts. The sentencing of such individuals becomes paramount in the light of the need to protect the community. This form of detention may be referred to as preventative detention. Preventative detention includes the physical prevention or incapacitation of the offender from committing offences in the community.<sup>14</sup> The declaration of offenders as dangerous criminals is not unique to South Africa. In countries such as Denmark, Sweden, Canada and the United States of America similar

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<sup>7</sup> Van Der Merwe died in hospital seven days after the incident. See Cohen "Risk Assessment" 255.

<sup>8</sup> See Cohen "Risk Assessment" 255.

<sup>9</sup> He served his sentence at the Zonderwater Prison Complex in Cullinan. See Cohen "Risk Assessment" 255.

<sup>10</sup> See Cohen "Risk Assessment" 255.

<sup>11</sup> See Cohen "Risk Assessment" 265.

<sup>12</sup> Generally see Gen N 49 of GG 14517 of 15 January 1993.

<sup>13</sup> *S v Bull*; *S v Chavulla* 2001 2 SACR 681 (SCA) para 5; also see Cohen "Risk Assessment" 265; Du Toit *et al Commentary on the Criminal Procedure Act* 28-24C.

<sup>14</sup> Terblanche *Guide to Sentencing* 177.

legislative provisions are relied upon as a means of dealing with dangerous criminals.<sup>15</sup> In Canada and the United States of America these preventative detention provisions have passed constitutional muster.<sup>16</sup> In South Africa the provisions came under the scrutiny of the Supreme Court of Appeal (SCA) in *S v Bull; S v Chavulla* 2001 (2) SACR 681 (SCA). Though the provisions were found to be constitutionally sound it is contended here that there are still some major questions which ought to be answered in regard to this law. Although *Bull* is regarded as the landmark decision in terms of dangerous criminals it is also important to look at the most recent judgments dealing with the particular sentence. But first, a thorough examination of section 286A and 286B of the *Criminal Procedure Act* is warranted.

### 3 Analysing dangerousness for the purposes of section 286A and 286B

Section 286A of the *Criminal Procedure Act* provides for the declaration of an individual as a dangerous criminal.<sup>17</sup> This declaration is categorised as the imposition of an indeterminate sentence, as the duration of the sentence is not known at the time of the sentence.<sup>18</sup> This section is specifically directed at offenders who suffer from psychopathy and anti-social disorders.<sup>19</sup> Section 286A reads as follows:

#### 286A Declaration of certain persons as dangerous criminals

- (1) Subject to the provisions of subsections (2), (3) and (4), a superior court or a regional court which convicts a person of one or more offences, may, if it is satisfied that the said person represents a danger to the physical or mental well-being of other persons and that the community should be protected against him, declare him a dangerous criminal.
- (2)
  - (a) If it appears to a court referred to in subsection (1) or if it is alleged before such court that the accused is a dangerous criminal, the court may after conviction direct that the matter be enquired into and be reported on in accordance with the provisions of subsection (3).
  - (b) Before the court commits an accused for an enquiry in terms of subsection (3), the court shall inform such accused of its intention and explain to him the provisions of this section and of section 286B as well as the gravity of those provisions.
- (3)
  - (a) Where a court issues a direction under subsection (2)(a), the relevant enquiry shall be conducted and be reported on-

<sup>15</sup> *S v Bull; S v Chavulla* 2001 2 SACR 681 (SCA) para 6.

<sup>16</sup> *S v Bull; S v Chavulla* 2001 2 SACR 681 (SCA) para 6.

<sup>17</sup> Terblanche *Guide to Sentencing* 275.

<sup>18</sup> See Terblanche *Guide to Sentencing* 252, 275.

<sup>19</sup> Du Toit *et al Commentary on the Criminal Procedure Act* 28-24C.

- (i) by the medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by such medical superintendent at the request of the court; and
  - (ii) by a psychiatrist appointed by the accused if he so wishes.
- (b)
  - (i) The court may for the purposes of such enquiry commit the accused to a psychiatric hospital or other place designated by the court, for such periods, not exceeding 30 days at a time, as the court may from time to time determine, and if an accused is in custody when he is so committed, he shall, while he is so committed, be deemed to be in the lawful custody of the person or the authority in whose custody he was at the time of such committal.
  - (ii) When the period of committal is extended for the first time under subparagraph (i), such extension may be granted in the absence of the accused unless the accused or his legal representative requests otherwise.
- (c) The relevant report shall be in writing and shall be submitted in triplicate to the registrar or the clerk of the court, as the case may be, who shall make a copy thereof available to the prosecutor and the accused or his legal representative.
- (d) The report shall-
  - (i) include a description of the nature of the enquiry; and
  - (ii) include a finding as to the question whether the accused represents a danger to the physical or mental well-being of other persons.
- (e) If the persons conducting the enquiry are not unanimous in their finding under paragraph (d) (ii), such fact shall be mentioned in the report and each of such persons shall give his finding on the matter in question.

A cursory reading of these provisions gives rise to a number of questions. An in-depth discussion of all the issues is beyond the scope of this article and might detract from a comprehensive analysis of some of the main controversies which this article seeks to grapple with. For convenience the practical question of when this law applies will be dealt with first. This question inevitably demands an understanding of “dangerousness” in the context of the provision. Put plainly, it must be when an accused is dangerous enough to be legally declared as such. Also, does the provision provide sound mechanisms to ensure the proper and fair application of the law? Section 9(1) of the *Constitution of the Republic of South Africa, 1996* provides that everyone is equal before the law and has the right to equal

protection and benefit of the law. It is also important that the fair trial rights of every accused are protected.<sup>20</sup>

### 3.1 *When does section 286A apply?*

Section 286A(1) provides that a superior or a regional court which convicts a person can declare such a person a dangerous criminal if the court is satisfied that the person represents a danger to the physical or mental well-being of other persons or the community.<sup>21</sup> It is not immediately clear from the wording precisely when the provision is triggered. When can a court be satisfied that an offender is sufficiently dangerous for a declaration of this ilk to be applied? A perusal of the section reveals that the nature of the offence is an important issue that may be relevant to the question of when the section may be invoked. This matter will be discussed next.

#### 3.1.1 *The nature of the offence*

It may be inferred from the wording of the provision that it is not necessary for the accused to have been found guilty of any particular offence to convince the court of his "dangerousness".<sup>22</sup> Theoretically "any conviction would do", as was held in *S v Bull*; *S v Chavulla*.<sup>23</sup> Logically this is an untenable position as it could lead to the arbitrary application of the provision. Furthermore it may be argued that the reference to a "danger to the physical or mental well-being of persons and that the community should be protected against him" would also make the provision applicable to a myriad of offences and most offenders, given the scale and nature of crime in South Africa. From section 286A(1) alone it appears that the provision may be applied, depending on how the court views the person, and his conviction at the time does not necessarily play a major role in this regard. No onus needs to be satisfied, but the court *a quo* needs to be convinced that the offender poses a threat to the physical and mental well-being of persons and that the community needs protection from the offender.<sup>24</sup> Terblanche notes that "within the context of section 286A it is clear that the greater the risk and the greater the evil, the more likely the court will be to find the offender dangerous."<sup>25</sup> The court thus has a very broad discretion from the outset.

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<sup>20</sup> See generally s 35 of the *Constitution of the Republic of South Africa*, 1996.

<sup>21</sup> See Du Toit *et al Commentary on the Criminal Procedure Act 28-24C*; Kemp *et al Criminal Procedure Casebook* 526; Terblanche *Guide to Sentencing* 275; *S v Bull*; *S v Chavulla* 2001 2 SACR 681 (SCA) para 7.

<sup>22</sup> See Kemp *et al Criminal Procedure Casebook* 526; Cohen "Risk Assessment" 266.

<sup>23</sup> *S v Bull*; *S v Chavulla* 2001 2 SACR 681 (SCA) para 7; Cohen "Risk Assessment" 266.

<sup>24</sup> Du Toit *et al Commentary on the Criminal Procedure Act 28-24D*.

<sup>25</sup> Terblanche *Guide to Sentencing* 275.

The SCA in *Bull* held that a court must consider the following factors when determining whether or not an offender should be declared a dangerous criminal: the personal characteristics of the accused as revealed by the psychiatric report; the facts and circumstances of the case; the accused's history of violent behaviour; and the accused's previous convictions.<sup>26</sup> In *S v T* the Supreme Court of Appeal listed the following considerations for the imposition of the declaration as a dangerous criminal:

(1) the crime itself is not so serious as to warrant a sentence of life imprisonment, where (2) the convicted person represents a danger to the physical and mental well-being of other persons (3) sufficiently serious to warrant his detention for an indefinite period and where (4) there is a possibility that his condition may improve to such an extent that that would no longer be the case.<sup>27</sup>

Based on these factors it may be reasonably expected that persons such as serial killers and career gang members who persistently threaten the well-being of communities would at least be subjected to scrutiny in terms of this provision. This, however, appears not to be the case, despite the SCA's guidance regarding the determination of dangerousness. It is curious in a country where the public often writhes with fear of crime that preventative detention, a legal mechanism, is not used with regularity.<sup>28</sup> Arguably this may be attributed to the generic nature of the criteria provided by the SCA. Though the factors collectively denote that the provision is relevant to repeat offenders who have displayed a history of violence and who had previously been convicted on charges of a violent nature, courts still have a very broad discretion in declaring offenders to be dangerous criminals.<sup>29</sup> Questions such as the degree of violence and the seriousness and number of convictions still arise. Offenders are therefore not treated fairly, as some very dangerous criminals will escape the application of this provision, while others will feel the full impact thereof. Moreover, though the SCA has provided criteria to consider in determining an offender's "dangerousness", it can still not be readily predicted in which cases the provision will apply and in which not. Of much greater concern, however, is the fact that society cannot enjoy the complete benefit of preventative detention as a crime prevention measure.

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<sup>26</sup> The SCA added that when determining dangerousness a court must draw its own conclusions. See *S v Bull*; *S v Chavulla* 2001 2 SACR 681 (SCA) para 18.

<sup>27</sup> *S v T* 1997 1 SACR 496 (SCA) paras 499d-e.

<sup>28</sup> For a comprehensive discussion regarding preventative detention, generally see Elias 2009 *Colum Hum Rts L Rev* 99-234. Also see *S v Bull*; *S v Chavulla* 2001 2 SACR 681 (SCA) para 6.

<sup>29</sup> Du Toit *et al Commentary on the Criminal Procedure Act* 28-24C.



Next, though, it will be considered whether section 286A has inherent safeguards to ensure its proper application in cases where the courts do in fact decide to invoke it.

### **3.2 Are there sound safeguards to ensure the proper application of the section?**

Section 286A(2)(a) provides that if it appears to the court or if it is alleged before the court that the accused is a dangerous criminal the court "may" after conviction direct that the matter be enquired into.<sup>30</sup> The language of the subsection denotes that a court is not compelled to make such a direction even if it appears to the court that the offender is a danger or it is so alleged. This is problematic as it is not self-evident why a court would decide not to hold an enquiry where the offender appears to pose the type of danger against which the legislature seeks to protect the public. A court should at the least be required to provide reasons as to why such an enquiry will not be held. In the absence of such a requirement, it is possible for courts to ignore the provision even in cases where an offender poses a serious threat to individuals or communities. Arguably this discretion is overly broad and the potential for the unfair treatment of offenders is consequently enhanced. That being said, it is in the nature of our sentencing courts to apply a wide sentencing discretion in criminal cases.<sup>31</sup> It is important, however, for judges to apply this discretion fairly, especially when legislation dealing with dangerous criminality is applied, taking into account the long-term impact that such a form of imprisonment may have on the accused. Nevertheless, the fact that a court is not compelled to direct an enquiry into the dangerousness of the offender amounts to a possible violation of the accused's right to be treated equally before the law in terms of section 9(1) of the *Constitution*. It thus remains important to appoint experienced judges to hear cases where the offender has been alleged to have committed a serious crime.<sup>32</sup>

Despite the courts' broad discretion with regard to whether or not the provision should be invoked in the first place, and whether or not to make a declaration, section 286A(3)(a) provides that before a court can declare someone a dangerous criminal, such an offender will first have to be sent

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<sup>30</sup> See *S v Bull*; *S v Chavulla* 2001 2 SACR 681 (SCA) para 7.

<sup>31</sup> Terblanche *Guide to Sentencing* 131. For an analysis of the wide discretion in our courts see *S v Makwanyane* 1995 3 SA 391 (CC) para 54; *S v Dzukuda* 2000 2 SACR 443 (CC) para 35; *S v Moloj* 1987 1 SA 196 (A) paras 218H-I.

<sup>32</sup> See Terblanche *Guide to Sentencing* 129.

to a psychiatric hospital to be assessed.<sup>33</sup> The soundness of these procedural safeguards will be discussed below.

### 3.2.1 *The psychiatric enquiry as directed by the court*

Section 286A(2)(a) provides that if the court directs that an enquiry be conducted it should be conducted by a medical superintendent or a psychiatrist appointed by the court.<sup>34</sup> This is in all probability in recognition that courts and parole boards are not able to predict the future dangerousness of offenders upon release without the assistance of psychiatrists that specialise in criminal law cases.<sup>35</sup> On the face of it, this is a procedural safeguard that protects offenders from being declared dangerous exclusively at the discretion of the courts.<sup>36</sup> The psychiatrist's report should include a description of the nature of the inquiry and a finding whether or not the accused presents a danger to society.<sup>37</sup> If the psychiatrists are not unanimous in their findings about the potential dangerousness of the accused, then the parties who conducted the enquiry will be requested to present their findings in court.<sup>38</sup> The court is not obliged to accept the view and make a declaration that is consistent with the psychiatrist's report. This is evident from section 286A(4)(a), (b) and (c), which provides that the court "may" determine the matter based *inter alia* on a unanimous report or where the reports are not unanimous or are disputed, after hearing more evidence. Moreover in *S v Bull; S v Chavulla* it was held that even if the court finds that the accused poses a danger to the physical or mental well-being of others and that the community should be protected against the accused, the court is not obliged to make the declaration of dangerous criminality.<sup>39</sup> This affirms the broad discretion of the courts. It is as if the legislature intended this discretion to be wide.<sup>40</sup> That being said, the wide discretion of the courts is also visible in the imposition of sentences such as determinate imprisonment and life imprisonment.<sup>41</sup> No obligation arises for a court to impose the sentence of a declaration as a dangerous

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<sup>33</sup> See *S v Bull; S v Chavulla* 2001 2 SACR 681 (SCA) para 8; Cohen "Risk Assessment" 266; Terblanche *Guide to Sentencing* 276.

<sup>34</sup> Hereafter, the term medical superintendent and psychiatrist will be used interchangeably. His and her will also be used interchangeably.

<sup>35</sup> See generally, for example Stevens 2008 *De Jure*.

<sup>36</sup> See *S v Bull; S v Chavulla* 2001 2 SACR 681 (SCA) para 22.

<sup>37</sup> Section 286A(3)(d) of the *Criminal Procedure Act* 51 of 1977. Generally, also see Zabow and Cohen 1993 *Medicine and Law* 417-430.

<sup>38</sup> Section 286A(3)(e) of the *Criminal Procedure Act* 51 of 1977. Also see Kemp *et al Criminal Procedure Casebook* 527.

<sup>39</sup> *S v Bull; S v Chavulla* 2001 2 SACR 681 (SCA) para 7.

<sup>40</sup> Du Toit *et al Commentary on the Criminal Procedure Act* 28-24D.

<sup>41</sup> See *S v Makoula* 1978 4 SA 763 (SWA) 766G; *R v Swarts* 1953 4 SA 461 (A) 463B-C. Also see Du Toit *et al Commentary on the Criminal Procedure Act* 28-24D; Terblanche *Guide to Sentencing* 277.

offender on any convicted offender.<sup>42</sup> It is submitted that the wide discretion of the court should be carefully applied when imposing a sentence where an offender poses a serious threat to the community in terms of section 286A. The psychiatric reports fulfil an important ancillary role, as courts are not always in a position to determine "dangerousness" by themselves, as seen in the cases below.

In *S v Bull*; *S v Chavulla* the psychiatrists in both cases were not of the opinion that the accused would still pose a danger to society after a period of 10 years imprisonment.<sup>43</sup> Contrary to these reports the trial court judge imposed indeterminate sentences of 30 and 50 years respectively. These sentences were later criticised and replaced by the SCA. The SCA placed significant emphasis on the psychiatrists' reports as it replaced the indeterminate sentences with life imprisonment. This was appropriate in this specific case. The case may be viewed as a precedent for the position that an offender cannot be declared a dangerous criminal without psychiatric evidence to that effect.<sup>44</sup> It also suggests that sufficient weight ought to be given to psychiatrists' reports when making a determination as to the dangerousness of a person.<sup>45</sup> Similarly, in *S v Chimboza* (unreported, WCC case no SS61/2014, 29 April 2015), the evidence of the psychiatrist in relation to the question whether the offender posed a danger to the physical and mental well-being of other persons and the protection of the community was discussed.<sup>46</sup> In this case, the offender was convicted of a brutal murder in which he ate the heart of the deceased.<sup>47</sup> The psychiatrist expressed the opinion that:

[the] accused's apparently almost blemish free past and ability to successfully run his own business, together with the fact that the offence of which he was convicted appears to have been committed in a unique set of circumstances of uncontrolled jealousy in the context of a particular passionate obsession, support the plausibility of the expert findings that he scored low on rating scales for risk assessment and psychopathy.<sup>48</sup>

It was held by the Court that the accused could not be declared a dangerous criminal, and he was sentenced to a determinate imprisonment sentence of

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<sup>42</sup> Du Toit *et al Commentary on the Criminal Procedure Act* 28-24D.

<sup>43</sup> *S v Bull*; *S v Chavulla* 2001 2 SACR 681 (SCA) para 32.

<sup>44</sup> See Cohen "Risk Assessment" 266-267.

<sup>45</sup> Compare Petrunik 2002 *IJOTCC* 487, where it is stated that "[t]his finding of a high number of false positives following clinical predictions, which was repeated in similar studies in other states and other countries, effectively challenged the belief that mental health experts could validly and reliably assess which offenders were at greatest risk of reoffending."

<sup>46</sup> See Du Toit *et al Commentary on the Criminal Procedure Act* 28-24D.

<sup>47</sup> *S v Chimboza* (WCC) (unreported) case number SS61/2014 of 29 April 2015 para 33. Also see Du Toit *et al Commentary on the Criminal Procedure Act* 28-24D.

<sup>48</sup> *S v Chimboza* (WCC) (unreported) case number SS61/2014 of 29 April 2015 para 34.

18 years.<sup>49</sup> Courts thus have substantial leeway in deciding whether or not to apply the provision and to declare offenders dangerous criminals.

### 3.2.2 *The accused's own psychiatrist*

It is positive that the courts are obliged to inform the accused of their intention to invoke section 286A and to explain the gravity of the provisions. Section 286A(3)(a)(ii) furthermore permits the accused to appoint a psychiatrist if he wishes to do so. Ideally these provisions could assist an accused in preparing for the proceedings and ensuring that his rights are not unjustifiably encroached upon. Moreover, this may reduce the risk of mistakenly declaring an offender a dangerous criminal, as the offender would have a second expert opinion as to whether he should be declared a dangerous criminal. Unfortunately, many accused are unable to afford the costs of appointing a psychiatrist. This provision could be perceived as being advantageous to those who have the means to appoint a private psychiatrist. Though the legislator's intention may not have been to distinguish between the affluent and the indigent as everyone is equal before the law, the effect of the provision cannot be overlooked. It impels the State to consider a more equitable measure for offenders to gain second opinions as to whether they ought to be declared dangerous criminals or not. Dangerous offenders who require such assessments are thus at risk of not being assessed within 30 days, a matter that may jeopardise the constitutionality of the dangerous offender provision.

The Canadian position regarding experts differs from the South African. This will be discussed in greater detail later.

### 3.3 *Sentencing in terms of section 286B*

Once the court has declared an offender a dangerous criminal it must impose a sentence of indefinite imprisonment and determine a fixed term for reporting back to the court.<sup>50</sup> This means that the person declared a dangerous criminal must appear before the court on the expiration of the fixed term.<sup>51</sup> In effect, the judge may impose a very lengthy term of imprisonment. Arguably a judge who has reached a conclusion that the offender poses a serious threat to the physical and mental well-being of persons in society and that the accused is a repeat offender would be motivated to impose a long term of imprisonment. It is in essence his duty to impose the sentence so as to prevent future harm to the well-being of

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<sup>49</sup> Du Toit *et al Commentary on the Criminal Procedure Act* 28-24D.

<sup>50</sup> See Kemp *et al Criminal Procedure Casebook* 526; Cohen "Risk Assessment" 266; Du Toit *et al Commentary on the Criminal Procedure Act* 28-24F; Terblanche *Guide to Sentencing* 483.

<sup>51</sup> *S v Bashford* 2015 ZAGPPHC 146 (13 March 2015) para 2.

society. For example, in *S v Bashford* the trial court sentenced the offender and declared him a dangerous criminal in 1995, and the offender appeared again before the trial court only in 2015, when he was sentenced to three years correctional supervision.<sup>52</sup> The court's decision was based on the report by the psychiatrist, who stated that the offender was not a threat to the physical and mental well-being of any person and that he was no longer a danger to the community.<sup>53</sup>

However, the SCA's adjustment of the sentences in *S v Bull; S v Chavulla*,<sup>54</sup> namely replacing it with life imprisonment, has cast serious doubt on courts' willingness to consider the application of the dangerous criminal legislation in serious criminal cases. The SCA took cognisance of the extreme brutality shown by the offenders in these cases, yet proceeded to overturn the trial courts' decisions. This does not afford clear guidance to future courts as to when section 286A should be applied.

The SCA in *Bull; S v Chavulla* held that the courts are not obliged to apply section 286A even if it is found that the offender poses a danger to the physical and mental well-being of others, and the court has a discretion with regard to imposing the initial sentence, to save the provision from unconstitutionality.<sup>55</sup> The broad discretion as to the application of the provision in the first place and the indeterminate period for reappearing before the court negate the elements of reasonable predictability and uniformity in the application of the law. Such a provision may add to the sense of injustice and inequality in a society like South Africa where a large proportion of the citizenry do not have faith in the justice system.<sup>56</sup> All in all, the grave brutality with which the offenders committed these acts should surely have been one of the main requirements for the SCA to consider imposing dangerous offender sentences. This was not done as the inclination of the judges to rather impose life imprisonment outweighed the seriousness of the offences and the need to protect the community. The offenders in this case have served almost 25 years imprisonment. Only time will tell whether they have been rehabilitated and whether the sentences of life imprisonment have been justified.

It must furthermore be noted that an offender sentenced in terms of section 286B does have recourse to a re-evaluation of his sentence, in terms of

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<sup>52</sup> See *S v Bashford* 2015 ZAGPPHC 146 (13 March 2015) paras 1-2. In this case, the accused and the co-accused violently attacked and murdered the deceased over an extended time. See para 8.

<sup>53</sup> *S v Bashford* 2015 ZAGPPHC 146 (13 March 2015) para 2.

<sup>54</sup> See *S v Bull; S v Chavulla* 2001 2 SACR 681 (SCA) para 38.

<sup>55</sup> *S v Bull; S v Chavulla* 2001 2 SACR 681 (SCA) para 16. Also see Du Toit *et al Commentary on the Criminal Procedure Act* 28-24C.

<sup>56</sup> See for example, Kemp *et al Criminal Procedure Casebook* 529.

appeal. This was clearly evident in *Moetjie v S* where the appellant successfully appealed the reconsideration of his sentence by the trial court.<sup>57</sup> Also, in terms of section 286B(4) and (5) the court has the option to reconsider the indefinite sentence imposed previously. The court can (a) confirm the sentence of indefinite imprisonment; (b) convert the sentence into correctional supervision or (c) release the offender unconditionally. These procedural safeguards are essential to ensure that section 286A and B remains a legitimate sentencing option in the realm of South African criminal law.<sup>58</sup> In terms of parole, the Correctional Supervision and Parole Board, having considered the report in the case of any sentenced offender having been declared a dangerous criminal, may make a recommendation to the court on the granting of parole or the placement under correctional supervision.<sup>59</sup> Section 286B(4)(a) clearly indicates that "the court shall make no finding before it has considered a report of a parole board...". It is only when it comes to the reconsideration of the original sentence that the parole board comes into play, and then in a pre-emptive manner Terblanche notes that there is clearly no room for the granting of parole to an offender who has been declared a dangerous criminal, except for the intervention by the Parole Board as stipulated above.<sup>60</sup> This position is understandable, given that the introduction of this law was motivated by cases like *Van der Merwe*, where the perpetrator was on parole when he re-offended. The State's intention to protect society is thus clear: by preventing a dangerous offender from being granted parole the state protects society against the offender for an extended period.

#### 4 Canadian position

In this section of the article we consider the Canadian law applicable to dangerous criminals with a view to determining whether there are lessons and/or principles which may be borrowed for the purposes of addressing some or all of the flaws in the South African provision.<sup>61</sup> In *Bull; S v Chavulla*, which currently serves as one of the main sources of authority on declarations of dangerousness, the SCA referred to the Canadian law which deals with dangerous criminals. As mentioned earlier, the South African *Constitution* permits the consideration of law in other jurisdictions when interpreting domestic law.<sup>62</sup> In addition, it will become clear that the Canadian jurisprudence on declarations of dangerousness is much more

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<sup>57</sup> See *Moetjie v S* 2009 1 SACR 95 (T).

<sup>58</sup> See *S v Bull; S v Chavulla* 2001 2 SACR 681 (SCA) para 7.

<sup>59</sup> Section 75(1)(b) of the *Correctional Services Act* 111 of 2008.

<sup>60</sup> Terblanche *Guide to Sentencing* 483.

<sup>61</sup> For a comprehensive discussion of the development of the dangerous offender legislation in Canada, see Jackson 1997 *FSR* 256-261; Lafond 2005 *Dalhousie J Legal Stud* 3-7.

<sup>62</sup> See section 39(1)(c) of the *Constitution of the Republic of South Africa*, 1996.

developed and detailed than its South African counterpart.<sup>63</sup> The Canadian provision may therefore be instructive and enhance South African law.

#### 4.1 The offence

PART XXIV of the *Canadian Criminal Code* deals with the question of dangerous offenders. In section 752 of the Code, a very extensive list of offences (referred to as designated offences) is provided. Many of these offences have an element of violence and sexual violence. Section 752 defines a "serious personal injury" as:

- a) Any offence, other than high treason, treason, first degree murder or second degree murder, that carries a maximum sentence of 10 years or more and that involved the use or attempted use of violence, conduct that endangered or was likely to endanger another's life or safety, or was likely to inflict severe psychological damage (a violent offence); or
- b) Sexual assault (s271), sexual assault with a weapon, with threats to a third party, or causing bodily harm (s272), aggravated sexual assault (s273), or attempts to commit any of these offences.

At section 752.01 of the *Code* it is furthermore provided that if the prosecutor is of the opinion that an offence for which the offender is convicted is a:

... serious personal injury offence that is a designated offence and that the offender was convicted previously at least twice of a designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the prosecutor shall advise the court, as soon as feasible after the finding of guilt and in any event before sentence is imposed, whether the prosecutor intends to make an application under subsection 752.1(1).

Based on the above it appears that the Canadian courts would be in a much better position than South African courts to determine the applicability of this type of provision. Only offenders who have been convicted of a serious personal injury offence, as described above, and are awaiting sentencing may be the subject of a dangerous criminal application.<sup>64</sup> For example, in *R v Blanchard*, the court declared the accused a dangerous offender in terms of section 753(1)(a)(i) and (ii) and 753(d) of the *Canadian Criminal Code*.<sup>65</sup> The accused's criminal record included more than 10 violent offences,

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<sup>63</sup> The dangerous offender legislation is a firmly established concept in Canadian law. In *R v Lyons* 1987 2.SCR 309 the Supreme Court of Appeal of Canada held that the 1977 dangerous offender provisions, which have largely remained the same up until this day, were constitutional and did not violate the fundamental principles of Canadian law. Also see Jackson 1997 *FSR* 260; Stevens 2008 *De Jure* 345-346.

<sup>64</sup> Lafond 2005 *Dalhousie J Legal Stud* 4; *Public Safety Canada* 2009 <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2009-pcmg/2009-pcmg-eng.pdf> 7; Stevens 2008 *De Jure* 346.

<sup>65</sup> *R v Blanchard* 2018 ABQB 205 paras 3-4.

which included two sexual offences.<sup>66</sup> It was also held by the Court that he had been convicted of 237 offences while incarcerated.<sup>67</sup>

The extensive list of serious personal injury offences classified as designated offences together with the very specific requirements that an offender should have at least two prior convictions for such offences and have been sentenced to a minimum of two years for each offence compel the State to inform the court whether it will apply for an offender to be declared a dangerous criminal.<sup>68</sup> Arguably these requirements limit the scope of application of the provision and diminish the possibility of violating the offender's right to equality before the law. Put otherwise, the offender's right to a fair trial is guaranteed while at the same time the protection of the community from a dangerous offender is considered.

An offender under the *Canadian Criminal Code* is in a position to reflect on his past criminal behaviour (and record) and reasonably predict whether the provision may be invoked against him. The nature of the offence, the number of convictions and the previous sentences he has served will all be concrete indicators as to whether an application to be declared a dangerous criminal may even be considered.

#### **4.2 The assessment**

Section 752.1(1) of the *Canadian Criminal Code* provides that when the State applies and the court believes on reasonable grounds that the offender might be found to be a dangerous offender, the court shall before sentencing order that the offender be kept in custody for not more than 60 days to be assessed by experts.<sup>69</sup> The South African provision similarly provides that an offender should be detained for psychiatric assessment. The period for assessment in terms of the South African law is a maximum of 30 days only, however.<sup>70</sup> Furthermore the South African provision permits that this period for assessment may be extended in the absence of the offender unless the offender or his legal representative requests otherwise. The *Canadian Criminal Code* also permits an extension of the assessment

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<sup>66</sup> *R v Blanchard* 2018 ABQB 205 para 124.

<sup>67</sup> *R v Blanchard* 2018 ABQB 205 para 127.

<sup>68</sup> See Valiquet 2008 <https://lop.parl.ca/content/lop/ResearchPublications/prb0613-e.htm> 4. Also see Petrunik 2002 *IJOTCC* 488.

<sup>69</sup> See Lafond 2005 *Dalhousie J Legal Stud* 5; Ulrich 2016 <https://www.uvic.ca/law/assets/docs/crimlawpapers/Ulrich,%20Lara%20-%20Dangerous%20Offender%20Proceedings%20the%20Relevance%20of%20Gl%20adue%20and%20Possible%20Charter%20Challenges.pdf> 26; Valiquet 2008 <https://lop.parl.ca/content/lop/ResearchPublications/prb0613-e.htm> 3.

<sup>70</sup> Section 286A (3)(b)(i) of the *Criminal Procedure Act* 51 of 1977.



period, but it is explicitly specified that such an extension shall be granted only if there are reasonable grounds to do so.<sup>71</sup>

Apart from the minor differences in the period of assessments, there are differences in the reasons for the appointment of experts. Under the *Canadian Criminal Code* psychiatrists are appointed to conduct assessments for the court, although the parties may call on other experts to conduct assessments.<sup>72</sup> Previously the 1977 dangerous offender legislation required that assessments be done by two psychiatrists.<sup>73</sup> One psychiatrist would conduct an assessment for the defence, whilst the other would do so for the State.<sup>74</sup> In South Africa the courts appoint the expert. It may thus be reasonably assumed that the expert is appointed to assist the court. The South African provision, as mentioned earlier in this article, also allows the defence to appoint an expert, but it does not explicitly state that the State may do so too. This could result in an imbalance of powers between the State and the defence with regard to the submission of psychiatric evidence. Though there is nothing in the legislation which prohibits the State from appointing such experts, an overt effort at levelling the playing fields between the State and the defence in this regard is necessary.

### **4.3 Application for the declaration of a dangerous offender**

Apart from the above, there are other major differences between the Canadian and South African provisions regarding the application for the declaration of dangerousness. The *Canadian Criminal Code* offers more concrete criteria for a court to consider when making a declaration and provides more concrete guidance to sentencing in general than the South African provision. In Canada it seems that when the criteria are met, the court is obliged to declare an offender to be dangerous. This is evident from Section 753(1)(a) of the *Canadian Criminal Code*, which provides that after a report of the assessment is filed the Court “shall” find the offender a dangerous offender if it is satisfied that the offender has been convicted of a serious personal injury offence as described in section 752, and that the offender constitutes a threat to the life, safety or physical or mental well-

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<sup>71</sup> For a detailed discussion of the assessment process of dangerous offenders in Canada, see Ulrich 2016 <https://www.uvic.ca/law/assets/docs/crimlawpapers/Ulrich,%20Lara%20-%20Dangerous%20Offender%20Proceedings%20the%20Relevance%20of%20Gladue%20and%20Possible%20Charter%20Challenges.pdf> 26-34.

<sup>72</sup> Public Safety Canada 2009 <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2009-pcmg/2009-pcmg-eng.pdf> 21.

<sup>73</sup> See for example, Ulrich 2016 <https://www.uvic.ca/law/assets/docs/crimlawpapers/Ulrich,%20Lara%20-%20Dangerous%20Offender%20Proceedings%20the%20Relevance%20of%20Gladue%20and%20Possible%20Charter%20Challenges.pdf> 7.

<sup>74</sup> Public Safety Canada 2009 <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2009-pcmg/2009-pcmg-eng.pdf> 43.

being of other persons.<sup>75</sup> Thus it is clear that the Canadian provision is triggered only when an offender is convicted of an offence as specified in terms of the *Code*. In addition, a Canadian court must declare an offender a dangerous criminal when all the requirements are met.<sup>76</sup> Unlike the South African provision, there is no need to speculate as to whether the provision may be applicable to an offender.

As in the South African provision, the Canadian provision requires that the court must be of the view that the offender poses a threat *inter alia* to the mental and/or physical well-being of others.<sup>77</sup> Contrary to the South African provision, the *Canadian Criminal Code* offers guidance as to how a court may come to the conclusion that such a threat is posed by the offender. Section 753(1) stipulates that such a threat must be determined on the basis of evidence establishing:

- (a)
  - (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour,
  - (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his or her behaviour, or
  - (iii) any behaviour by the offender, associated with the offence for which he or she has been convicted, that is of such a brutal nature as to compel the conclusion that the offender's behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint; or
- (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury pain or other evil to other persons through failure in the future to control his or her sexual impulses.

<sup>75</sup> See Petrunik 2002 *IJOTCC* 497; Valiquet 2008 <https://lop.parl.ca/content/lop/ResearchPublications/prb0613-e.htm> 4; Stevens 2008 *De Jure* 346.

<sup>76</sup> See for example, Valiquet 2008 <https://lop.parl.ca/content/lop/ResearchPublications/prb0613-e.htm> 4.

<sup>77</sup> See Petrunik 2002 497; Valiquet 2008 <https://lop.parl.ca/content/lop/ResearchPublications/prb0613-e.htm> 3-4.

Though the above provision can hardly be regarded as an absolute panacea for the unfair application of the law, as the courts still have to interpret the provision and decide its applicability in every case, it may be argued that this provision offers greater guidance and predictability than the South African provision as to whether a declaration may be made or not. In brief, in Canada, offenders who have committed any of the designated offences as define in the provision and whose behaviour has been repetitive, aggressive, brutal and/or contrary to normal social standards and who appear to lack sufficient control over such behaviour ought to reasonably foresee that the provision will in all likelihood be applied to them. This assertion is supported by the following presumption in terms of section 753(1)(1.1) of the *Canadian Criminal Code*:

If the court is satisfied that the offence for which the offender is convicted is a primary designated offence for which it would be appropriate to impose a sentence of imprisonment of two years or more and that the offender was convicted previously at least twice of a primary designated offence and was sentenced to at least two years of imprisonment for each of those convictions, the conditions in paragraph (1)(a) or (b), as the case may be, are presumed to have been met unless the contrary is proved on a balance of probabilities.<sup>78</sup>

The clarity with which the presumption<sup>79</sup> is expressed leaves little scope for conjecture in respect of some repeat offenders. Offenders are made aware that if they repeatedly commit certain offences and if they have been found guilty on more than one occasion they are at risk of being deemed dangerous criminals and that they would furthermore bear the onus to prove that their conduct does not fall within the scope of the provision.<sup>80</sup> That being said, a reverse onus-style provision as illustrated above raises serious concerns about the constitutionality of such an onus. Such a reverse onus might not be in the best interests of the offender. The South African counterpart does not offer equal predictability, which in turn might place added pressure on the presiding officer to use a wide discretion. Apart from being permitted to appoint their own psychiatrist to perform an assessment, the South African provision does not afford offenders any real opportunity to prove that they are not deserving of a declaration of dangerousness. However, if the reports are challenged (by either the offender or the State) the court must hear evidence. Presumably such evidence would include testimony by the offender himself regarding the question of dangerousness.

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<sup>78</sup> Section 753.1(1) of the *Canadian Criminal Code* 16 of 1985.

<sup>79</sup> This presumption came into force on 2 July 2008. See Public Safety Canada 2009 <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2009-pcmg/2009-pcmg-eng.pdf> 8.

<sup>80</sup> See Valiquet 2008 <https://lop.parl.ca/content/lop/ResearchPublications/prb0613-e.htm> 1.

#### 4.4 Declaring a person to be a dangerous offender

Section 753.1(4) of the *Canadian Criminal Code* provides as follows:

If the court finds an offender to be a dangerous offender, it shall

- (a) impose a sentence of detention in a penitentiary for an indeterminate period;
- (b) impose a sentence for the offence for which the offender has been convicted — which must be a minimum punishment of imprisonment for a term of two years — and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
- (c) impose a sentence for the offence for which the offender has been convicted.

Unlike the South African provision, the *Canadian Criminal Code* places an obligation on the courts to impose one of the prescribed sentences above if the offender is found to be dangerous.<sup>81</sup> The process of making the determination as to whether an offender should be declared dangerous or not will therefore not be futile. The Canadian provision can thus be relied upon to protect certain individuals or the public at large if an offender presents a threat to the safety and well-being of others.<sup>82</sup> Both the South African and the Canadian law make provision for the dangerous criminal in order to specifically protect the community from dangerous offenders.<sup>83</sup> In *R v Steele* the Supreme Court of Canada emphasised that "[t]he primary rationale for both indeterminate detention and long-term supervision under Part XXIV is public protection. Both sentences advance the 'dominant purpose' of preventive detention".<sup>84</sup>

In terms of section 753(4.1) a sentence of indeterminate detention will be imposed upon a dangerous offender unless the court is satisfied that there is a "reasonable expectation" that the public can be protected against the offender by applying one of the sentence options in section 753.1(4)(b) or (c).<sup>85</sup> An "indeterminate sentence" is therefore regarded as a measure of last resort reserved for the most dangerous criminals. In Canada the National Parole Board of Canada, and not the courts, decides whether an offender will be released and under what conditions the offender's release

<sup>81</sup> See Stevens 2008 *De Jure* 347; Valiquet 2008 <https://lop.parl.ca/content/lop/ResearchPublications/prb0613-e.htm> 5-6.

<sup>82</sup> See Valiquet 2008 <https://lop.parl.ca/content/lop/ResearchPublications/prb0613-e.htm> 5.

<sup>83</sup> See *R v Johnson* 2003 SCC 46 para 19; *R v Steele* 2014 SCC 61 para 29; *R v Blanchard* 2018 ABQB 205 para 8.

<sup>84</sup> *R v Steele* 2014 SCC 61 para 29; *R v Blanchard* 2018 ABQB 205 paras 8; 11.

<sup>85</sup> Public Safety Canada 2009 <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2009-pcmg/2009-pcmg-eng.pdf> 9; Stevens 2008 *De Jure* 347.

may occur.<sup>86</sup> Debatably, parole boards may have insight into the prison context and the rehabilitation programmes available to prisoners. Such boards' work generally entails assessing the behaviour of prisoners and their readiness to reintegrate into society as law-abiding citizens. Further, an offender who serves an indeterminate sentence may apply for day parole four years from the date when he was detained, and the National Parole Board is required to review his case if the offender has served seven years in custody.<sup>87</sup> The National Parole Board must also do subsequent reviews at least every two years for the duration of an offender's detention.

In South Africa the standard has always been that "[s]uch decisions are left in the hands of the judiciary, not of the executive. The judiciary is, therefore, ideally placed to control the sentence of such an offender."<sup>88</sup> This position is clearly preferable in the light of the principle of the separation of powers. That being said, we continue to place a substantial burden on judges to determine whether offenders should be declared dangerous criminals. For the time being, it seems that it is a burden that will remain firmly with the judiciary. It is important that courts apply this sentence with firmness and an understanding of the requirements thereof in order to avoid any confusion related to its application. Many questions need to be addressed in the near future, as Terblanche rightly notes: "[i]ndeed, it is an open question whether a court that finds an offender dangerous in terms of section 286A retains its discretion to impose a different sentence."<sup>89</sup> It is hoped that the Legislature will address the shortcomings in the *Act*.

## 5 Conclusion and recommendations

In the context of the heinous nature of some crimes and the high crime rate in South Africa, it may be accepted that there are unfortunately some offenders who pose a real threat to the safety of communities. It is therefore reasonable for the State to intervene with measures such as preventative detention to protect the citizenry. Though South Africa does have such a measure on its statute books, it appears to be under-utilised. Surprisingly, it appears that the SCA is aware of the potential difficulties the courts may experience in applying these provisions. The SCA held that "[p]otential misapplication of a statutory provision is not the test for unconstitutionality in South Africa."<sup>90</sup> Whilst this is true, it may also be contended that the

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<sup>86</sup> Public Safety Canada 2009 <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2009-pcmg/2009-pcmg-eng.pdf> 9.

<sup>87</sup> Public Safety Canada 2009 <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/2009-pcmg/2009-pcmg-eng.pdf> 9. Also see Petrunik 2002 *IJOTCC* 497; Valiquet 2008 <https://lop.parl.ca/content/lop/ResearchPublications/prb0613-e.htm> 5.

<sup>88</sup> Terblanche *Guide to Sentencing* 280.

<sup>89</sup> Terblanche *Guide to Sentencing* 280.

<sup>90</sup> *S v Bull*; *S v Chavulla* 2001 2 SACR 681 (SCA) para 16.

provision does not only present challenges to the judiciary but also to accused persons, as well as to society. Every accused person has the right to be treated equally before the law. The unequal application of the provision means that some offenders, though they may be equally dangerous, will be treated more harshly than others. This may also mean that some communities may enjoy greater protection against offenders than other communities.

Notwithstanding the challenges presented by the South African law which deals with the declaration of dangerous criminals, we contend that it can be improved by borrowing some of the traits of the Canadian provision. Such traits include legislation which provide for the following: the limiting of courts' discretion insofar as they may decide whether or not to direct that an enquiry be held where it reasonably appears that the offender is dangerous as defined by the provision; providing the courts with concrete and more detailed guidelines as to the nature of the offences for which the provision is invoked; and affording the courts guidance as to the kind of criminal history that would merit the declaration of dangerous criminality. The number and nature of the convictions should be specified by legislation; the extent of the violence which must be present in the case before the court must be described; and finally courts ought to be compelled to make the declaration if all the requirements are met, unless they can reasonably justify not doing so.

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## List of Abbreviations

Colum Hum Rts L Rev	Columbia Human Rights Law Review
Dalhousie J Legal Stud	Dalhousie Journal of Legal Studies
FSR	Federal Sentencing Reporter
IJOTCC	International Journal of Offender Therapy and Comparative Criminology
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders
SCA	Supreme Court of Appeal