

**A CRITICAL DISCUSSION OF SECTION 1(1) OF THE CRIMINAL LAW  
AMENDMENT ACT 1 OF 1988**

**By**

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**Title of Thesis: "A CRITICAL DISCUSSION OF SECTION 1(1) OF  
THE CRIMINAL LAW AMENDMENT ACT".**

**Summary:**

A brief analysis of South African Law relating to intoxication as a defence prior to 1988 is given. This is followed by an in-depth discussion and evaluation of the statutory crime created by section 1(1) of the Criminal Law Amendment Act 1 of 1988. Various points of criticism against the wording of section 1(1) as well as the problems with regard to its application in practice are set out. In conclusion a draft for a new, more effective wording for section 1(1) is given.

**Key terms:**

Intoxication; Criminal capacity; Culpability; Mens rea; Specific intent; Versari doctrine; Statutory intoxication; Intention; Voluntary conduct; Fault; Alcoholic substances; Drugs – effect of.

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A. **Introduction**

The question whether intoxication should constitute an absolute defence to a criminal charge is one that was, and still is, very controversial in modern South African legal policy. A juridically pure approach within the existing framework of criminal law principles requires that intoxication could in the proper factual circumstances constitute an absolute defence to a criminal charge. Whether such a logical legal outcome is satisfactory from a social policy point of view, is, however, not just an academic legal question.

The very existence of a legal principle is dependent on whether the needs of the community are effectively served by the particular legal principle. Section 1(1) of the Criminal Law Amendment Act 1 of 1988 is in fact an example of where the interests of the public has taken precedence over a purely academically correct approach.

Certain legal writers are severely critical of the offence referred to as statutory intoxication which was created by section 1(1). An example is De Wet who is not in favour of any type of statutory offence with regard to intoxication and regards this type of offence as a direct application of the versari in re illicita doctrine<sup>1</sup>.

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<sup>1</sup> De Wet and Swanepoel Strafreg 4<sup>th</sup> ed by De Wet JC (1985) 121.

In S v Chretien<sup>2</sup> the Appellate Division in fact endorsed this view of De Wet, but the public outcry forced or persuaded the legislature to intervene. The legislature allowed policy considerations to protect the interests of the community, thereby sacrificing basic principles of criminal law. It was deemed unacceptable that a person who has taken so much intoxicating liquor should be allowed to escape liability for his actions, while a sober person, in his full senses, would indeed be held liable for the same actions. The socially unacceptable phenomenon of drinking oneself into a stupor would, in fact, be to the advantage of the perpetrator.

The decision in Chretien was criticised from various quarters. Less than three years after the decision, Bophuthaswana created a statutory offence, specifically with the aim of countering the abovementioned decision.<sup>3</sup> In 1982 already the Minister of Justice of South Africa gave the South African Law Commission instructions to research this particular matter. The offence created by section 1(1), commonly referred to as statutory intoxication, is a result of the Law Commission's research, and was widely welcomed from nearly all quarters of society.

This history of the defence of intoxication can be compared to that of Germany, where there was also initially an acceptance of the juridically pure

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<sup>2</sup> 1981 (1) SA 1097 (A).

<sup>3</sup> See s 1 of the Criminal Law Amendment Act 14 of 1984 of Bophuthaswana which reads as follows:

1(1) Any person who, after having intentionally or negligently consumed intoxicating liquor or any drug having a narcotic effect, performs or omits to perform an act of which the performance or omission or result would have rendered him liable in respect of any offence for which intent is the requisite form of mens rea, had it not been for the fact that he was under the influence of alcohol or such drug at the relevant time, shall be guilty of an offence..

approach under the influence of the legal academics but where the legislature also intervened to rectify an unsatisfactory social policy position.<sup>4</sup>

It is of utmost importance to maintain sound principles, especially in criminal law, but legal scientific studies should never be a goal in themselves. The interests of the community, the very reason for the existence of legal studies, should always be the aim to which all research is directed.

Although the provisions of section 1(1) were widely welcomed, it very soon became apparent that the legislature had created an imperfect statutory crime that covered only certain aspects of criminal liability which may be effected by intoxication. It appears that Parliament's views with regard to the wording of the section were given preference over that of legal academics and three years of research by the Law Commission.

The whole purpose of the Act was to accommodate the sense of justice of society in respect of the judicial treatment of intoxicated persons for their actions which were committed while they were so intoxicated.<sup>5</sup> The legislature rightly deviated from a pure jurisprudential approach but regrettably provided a section which according to certain legal writers is

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<sup>4</sup> S E Farran "Offences Committed under Intoxication : A comparative Survey and proposals for Reform" 1984 *SACC* 113. Section 323(a)(1) of the German Penal Code of 1871 as amended, provides for the punishment by a fine or imprisonment up to five years, of "anybody who negligently or intentionally becomes intoxicated with alcoholic beverage or other intoxicating substance ... if he commits an illegal act in this intoxicated condition for which he cannot be punished because, due to his intoxication, he cannot be held criminally liable for the actual crime," (Translation as it appears in Farran op cit).

<sup>5</sup> A Paizes "Intoxication through the Looking Glass" 1988 *SALJ* 777.

unworkable, illogical and inconsistent.<sup>6</sup> With this section the legislature has attempted, but only with a reasonable amount of success, to prevent intoxicated persons from escaping liability, which is obviously an improvement of the situation after Chretien.<sup>7</sup> While there is room for improvement, the existence of section 1(1) cannot and should not be questioned.

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<sup>6</sup> Paizes *op cit* (supra n 5) 777.

<sup>7</sup> *Supra* n 2.



## **B. The Law Relating to Intoxication as a defence before 1998.**

### **i) The Law before Chretien.**

Legal systems based on the nulla poena sine culpa<sup>8</sup> principle seek to punish only deliberate and negligent forms of criminal conduct<sup>9</sup> and there is a reluctance to allow intoxication to lead to the acquittal of an accused.

The law before the Chretien decision displayed this abovementioned reluctance. Before 1988 there was no law that specifically dealt with the subject of drunkenness so the courts merely looked at the ordinary principles of criminal law, whose rules in fact produced very clear guidelines.<sup>10</sup>

Roman-Dutch law did not recognise voluntary intoxication as a defence and as a general rule nor did South African law. This was as a result of the importance of public policy as was clearly indicated in R. v. Bourke.<sup>11</sup>

The consumption of alcohol may have many effects on an individual. It may affect a person's ability to control his muscular movements or his ability to

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<sup>8</sup> No punishment without fault.

<sup>9</sup> Farran op cit (supra n 4) 109.

<sup>10</sup> V Singh "The Development of Judicial Interpretation of Intoxication as a Defence in Criminal Law" 1987 *TLJ* 108.

<sup>11</sup> 1916 TPD 303. In this case Wessels J. said that "to allow drunkenness to be pleaded as an excuse would lead to a state of affairs repulsive to the community .... The regular drunkard would be more immune from punishment than the sober person."

appreciate the nature and consequences of his conduct as well as its wrongfulness. He may, as a result of the intoxication, not be able to distinguish between right and wrong, or he may lack the ability to resist the temptation to do wrong. He may become impulsive and confident, and all these factors have an effect on criminal liability. Intoxication can affect the individual's capacity to act in the legal sense; he could be in a state of automatism. If the person did in fact "legally" act, intoxication may prevent him from appreciating the wrongfulness of his conduct or acting in accordance with such appreciation. Intoxication may exclude the intention for a specific crime or serve as a ground to be taken into account for the purposes of sentence.<sup>12</sup>

A clear distinction must be drawn between voluntary and involuntary intoxication. In the case of involuntary intoxication, the intoxication took place with a person's conscious and free intervention, and this is a complete defence on any criminal charge.<sup>13</sup> This is not only the case in South African law but also in most other countries, including England.<sup>14</sup>

There are three circumstances in which voluntary intoxication can occur. Firstly, an actio libera in causa is the situation where the perpetrator does not have the courage to commit a crime, but drinks to gain the necessary

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<sup>12</sup> C R Snyman Criminal Law 3<sup>rd</sup> ed (1995) 208.

<sup>13</sup> S v Innes Grant 1949 1 SA 753 (A); S v Johnson 1969 1 SA 201 (A); S v Els 1972 4 SA 696 (T); S v Gardiner 1974 4 SA 304 (R).

<sup>14</sup> R v Kingston (1994) 3 All ER 353 (HL).

courage, knowing that he will be able to commit the crime once intoxicated. It is fairly clear that in this instance, intoxication is no defence whatsoever.<sup>15</sup>

Secondly, the chronic use of alcohol may lead to certain forms of mental illness such as delirium tremens, to name but one example. Here the ordinary principles of criminal law relating to mental illness apply and the accused should be found not guilty of a crime, but will be committed to a psychiatric hospital or prison for an undetermined period, in terms of sections 77, 78 and 79 of the Criminal Procedure Act 51 of 1977.

The remaining cases of voluntary intoxication are relevant to this discussion. With regard to them there are two opposing schools of thought, namely the “unyielding” and the “lenient” approaches.<sup>16</sup> These two approaches may better be described as a social or moral approach in contrast to a jurisprudentially correct approach.

The unyielding or social approach holds that it is not in the interests of the community that a person who is sober when he commits a crime be punished, while a person who commits the same criminal act while he is under the influence of intoxicating liquor is excused.

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<sup>15</sup> S v Ndhlovu 1965 (4) SA 692 (A); S v Baartman 1983 4 SA 393 (NC).

<sup>16</sup> Snyman op cit (n 12) 210.

In S v S<sup>17</sup> (decided in 1961) the Natal Provincial Division held that the ability to discern between right and wrong was not relevant where the defence of intoxication was raised, but relevant only to the defence of insanity, and that the onus of proof to negative mens rea was on the accused.

Carey J stated “.... voluntary drunkenness in itself is no defence ....”. This case is a clear example of the unyielding approach. The biggest danger of this approach is, however, that it is moving into the realm of the much criticised versari doctrine, in terms of which a person is automatically held criminally liable for all the consequences which flow from his illegal act.<sup>18</sup> The Appellate Division has specifically excluded this doctrine from South African law.<sup>19</sup>

The lenient or jurisprudential approach holds that if the ordinary principles of liability are applied to the actions of an intoxicated person there may be circumstances in which such person would escape criminal liability completely on the basis that his intoxication precluded him from performing a voluntary act or that he lacked either criminal capacity or the intention required for a conviction.

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<sup>17</sup> 1961 (4) SA 792 (N).

<sup>18</sup> Singh op cit (supra n 10) 110.

<sup>19</sup> S van der Mescht 1962 (1) SA 521 (AD) and S v Bernardus 1965 (3) SA 287 (A).

In the period before Chretien<sup>20</sup> the approach changed between the two opposing schools of thought. According to common law writers<sup>21</sup> voluntary intoxication could never be a defence to a criminal charge, but as the years proceeded, the courts attempted to adopt a stance between the unyielding and lenient approach by following the English "specific intent" rule. According to this rule, a distinction must be drawn between crimes which require "specific intent", and those that do not - in other words, those that merely require an "ordinary intent."<sup>22</sup> In crimes requiring "specific intent" voluntary intoxication would negate the "specific intent", but the accused could be found guilty of a less serious offence which merely required an "ordinary intent". An example is that a murder conviction could be "reduced" to one of culpable homicide. In crimes not requiring "specific intent", voluntary intoxication was no defence whatsoever, but could merely be regarded as a mitigating factor for the purposes of sentence.<sup>23</sup>

The criticism against the "specific intent" theory and the Johnson<sup>24</sup> case is the difficulty of determining which crimes require a "specific intent" and which do not. Many critics (Singh in particular) state also that the Johnson case is incompatible with the general principle of our law that a voluntary act is required for criminal responsibility and that the judgement amounts to an

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<sup>20</sup> Supra n 2.

<sup>21</sup> Matthaeus Prol. 2 14; Voet 47 10 I; Moorman Inl 2 25-31; Van der Linden 2 1 5; Damhouder 59 7.

<sup>22</sup> Snyman op cit (n 12) 211; Singh op cit (n 10) 112; See also J Burchell and J Milton Principles of Criminal Law 2<sup>nd</sup> ed (1997) 262 and EM Burchell and PMA Hunt South African Criminal Law and Procedure Vol 1 General Principles of Criminal Law 3<sup>rd</sup> ed by JM Burchell (1997) 184.

<sup>23</sup> S v Johnson 1969 (1) SA 201 (A).

<sup>24</sup> Johnson supra (n 22).

application of the versari doctrine.<sup>25</sup> It is therefore clear that the law applied by the courts prior to Chretien was the subject of criticism. The whole concept was, however, clarified in the Chretien<sup>26</sup> case.

## ii) **The Chretien Decision**

The facts of the Chretien case were that a particular person (X) attended a party where he and other persons consumed large quantities of liquor. Later that night he left in his motor vehicle and drove into other partygoers who were standing in the street. One person was killed and five were injured. On the charge of murder, X was convicted of culpable homicide, as he had expected the people to move out of his way, and thus had no intent to take the life of a person. Because of this lack of intention, he could also not be found guilty on the five charges of attempted murder. The Appellate Division held that X did not even have the intention to commit common assault with regard to the five injured people.<sup>27</sup>

The specific legal points which were clarified by Rumpff C.J. in this decision, are firstly that the "specific intent" theory in connection with intoxication is

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<sup>25</sup> Singh op cit (supra n 10) 112.

<sup>26</sup> Supra n 2.

<sup>27</sup> Chretien supra (n 2) 1103B - C.

unacceptable and should be rejected.<sup>28</sup> Intoxication is thus capable of excluding even "ordinary intent". Secondly, if a person is so under the influence that his muscular movements are involuntary, there can be no act in the legal sense by the perpetrator and he cannot be found guilty of any crime, even though his condition may be attributed to voluntary intoxication<sup>29</sup>. Thirdly, a person may be under the influence to such a degree that he completely lacks criminal capacity. This will, however, only occur in exceptional circumstances, namely where the person is no longer aware that what he is doing is wrong.<sup>30</sup> It was emphasised by Rumpff C.J. that the decision that a perpetrator did not act voluntarily or was not criminally responsible or that he lacked the required intention, was not one to be taken lightly.<sup>31</sup>

Because of the rejection of the "specific intent" theory, all uncertainty with regard to intoxication as a defence had been removed and it could now be regarded as a complete defence on any criminal charge. After the decision, intoxication could have any one of the following four effects.<sup>32</sup>

- a) It may prevent a person from acting in the legal sense of the word.
- b) If he could in fact perform a voluntary act, the intoxication may exclude his criminal capacity.

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<sup>28</sup> Chretien supra (n 2) 1103H.

<sup>29</sup> Chretien supra (n 2) 1104E-F

<sup>30</sup> Chretien supra (n 2) 1106F.

<sup>31</sup> Chretien supra (n 2) 1106F - G.

<sup>32</sup> Snyman op cit (supra n 12) 213. Cf also Burchell and Milton op cit (supra n 22) 264 and also Burchell and Hunt op cit (supra n 22) 187.

- c) If a person could perform a voluntary act and also had criminal capacity, the intoxication might have the result that he lacked the intention required for the crime with which he is charged.
- d) If found guilty of a crime, the extent of a person's intoxication may serve as a ground for the mitigation of punishment.

Clarity had thus been obtained from the Appellate Division and intoxication firmly entrenched as a complete defence. The jurisprudentially correct approach had been unequivocally accepted.

### iii) **The Aftermath and Criticism of Chretien**

Public opinion with regard to the judgement was not favourable. This necessitated the then Minister of Justice to task the South African Law Commission to investigate the whole question of intoxication as a defence to a criminal charge. Their report<sup>33</sup> specifically dealt with offences committed under the influence of liquor or drugs. After a thorough study of the whole matter they recommended that although very few cases occur in practice where an accused is completely acquitted by reason of intoxication, and that when they do occur they are limited to crimes requiring intent, legislative intervention was required.

The Commission submitted the following draft bill:<sup>34</sup>

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<sup>33</sup> South African Law Commission "Offences Committed Under the Influence of Liquor or Drugs" Project 49 1986.

<sup>34</sup> South African Law Commission "Offences committed under the influence of Liquor or drugs" 1986 Project 49 Report 118.



- 1(1) Any person who voluntarily consumes liquor or any drug or substance which affects his mental faculties, knowing that such liquor, drug or substance, has that effect and who while his mental faculties are thus affected, commits an act for which he would have been criminally liable had his mental faculties not been thus affected, shall be guilty of an offence and shall be liable on conviction to any punishment, except the death penalty, which could have been imposed on him had he been held criminally liable for such act.
- (2) If, in a prosecution on a charge of any offence, it is found that the accused is not criminally liable for the offence charged, owing to the fact that his mental faculties had been affected by liquor or any drug or any other substance, the accused may be found guilty of the offence in subsection (1) if the evidence proves such offence.

In the second reading debate of the Criminal Law Amendment Bill in the various Houses of Parliament, all parties agreed with the views of the commission that legislative intervention was necessary and that a policy, approach was more preferable to the jurisprudentially correct approach applied by Rumpff C.J. in the Chretien case<sup>35</sup>.

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<sup>35</sup> Hansard *Second Reading Debates of Parliament*, 1988 Vol. Column 875-1200.

The Chretien decision created legal certainty but also justice and fairness to the individual. Support for the Chretien approach should not only be based on the fact that it conforms to the general principles of criminal law but also on the fact that it protects individuals from the far-reaching consequences of the criminal law system. Schreiner ACJ stated in R v Krull:<sup>36</sup> “In any system of criminal law, the problem is likely to arise of how best to reconcile the importance of enforcing proper standards, regarded objectively, with the importance of treating the individual fairly.”

The best wishes of an individual are not always in the interests of society. The criminal law system continuously balances these contrasting interests, and the Chretien<sup>37</sup> judgement clearly swung the pendulum too far towards the interests of the individual. It is submitted that even to a legal purist there has to be repulsion to the idea of an intoxicated person escaping liability while a sober person must be punished. While Chretien cannot be faulted on grounds of logic or conformity with general principles, the judgement definitely miscalculated the community's attitude to intoxication.<sup>38</sup>

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<sup>36</sup> 1959 (3) SA 392 (A) 396 F-G. See also Burchell and Milton *op cit* (*supra* n 22) 276.

<sup>37</sup> *Supra* n 2.

<sup>38</sup> J. Burchell “Intoxication after Chretien – Parliament intervenes” 1988 *SACJ* 274.

**C. Legislation – Parliament intervenes**

**i) Section 1(1).<sup>39</sup>**

The section reads as follows:

1(1) Any person who consumes or uses any substance which impairs his faculties to appreciate the wrongfulness of his acts or to act in accordance with that appreciation, while knowing that such substance has that effect, and who, while such faculties are thus impaired, commits any act prohibited by law under any penalty, but is not criminally liable because his faculties were impaired as aforesaid, shall be guilty of an offence and shall be liable on conviction to the penalty, except the death penalty, which may be imposed in respect of the commission of that act.

1(2) If in any prosecution for any offence it is found that the accused is not criminally liable for the offence charged on account of the fact that his faculties referred to in subsection (1) were impaired by the consumption or use of any substance, such accused may be found guilty of a contravention of subsection (1), if the evidence proves the commission of such contravention.

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<sup>39</sup> Section 1(1) of the Criminal Law Amend Act 1 of 1988.

ii) **Desirability of a statutory crime**

The harshest criticism against section 1 is the very fact that it even exists, irrespective of its wording, and that the section amounts to a statutory form of versari.<sup>40</sup> The fact that any deviation by the legislature from the Chretien decision would entail a departure from a jurisprudentially pure scientific approach also evoked severe criticism from many legal academics. Snyman does not agree with this criticism of section 1(1) and explains his opinion with the following examples. If a person loosens the nuts of the wheels of his bicycle, he cannot complain if he later falls as a result of a wheel coming off while he is in motion. Snyman also uses the argument of a person who loosens his car's brake cable. He cannot complain if he is later involved in a collision. The same principle dictates that if a person voluntarily starts drinking, he ought not to complain if, in his intoxicated state, he commits a crime. A sober person has powers of resistance which enable him to overcome temptation to commit a crime. In consuming large amounts of alcohol, a person knowingly destroys this resistance as the person in the example who loosened his car's brake cable, and thus has no grounds for complaining if he is held accountable for his actions.<sup>41</sup>

The legislature's attempt to balance public policy, which requires that the law should protect society from harmful conduct, with the ideal that the law should

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<sup>40</sup> Snyman op cit (supra n 12) 216.

<sup>41</sup> Snyman's views were quoted with approval in S v Maki 1994 2 SACR 414 (EC). Compare also the sentiments expressed in S v Pieterse 1994 2 SACR 434 (C).

always ensure justice and fairness to an individual, is understandable and desirable. It is submitted that although this statutory offence does move into the realm of the versari rule, it is not a direct application of it, and like all legal rules does not operate in a vacuum but in a social order with practical needs.<sup>42</sup>

**iii) Subdivision of requirements for a section 1(1) conviction**

Various different writers, for example Paizes,<sup>43</sup> Burchell<sup>44</sup> and Snyman<sup>45</sup> have expounded the requirements for a conviction of the crime created in section 1(1). Snyman's views were substantially endorsed in S v D<sup>46</sup>, so they will be explained here.

Snyman divides these requirements into two groups. The first group refers to the circumstances surrounding the consumption of the liquor and the second group to the circumstances surrounding the commission of the "prohibited" act.

The first group requirements are:

- a) The consumption or use by X of .....
- b) "any substance" .....
- c) which impairs his faculties (as described in the section)
- d) while knowing that such substance has that effect.

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<sup>42</sup> C R Snyman "Aanspreeklikheid vir wandade gepleeg in dronkenskap : Bophuthatswana neem die leiding – Strafreghwysigingswet 14 van 1984 (Bophuthatswana)" 1985 *SACC* 70.

<sup>43</sup> Op cit (supra n 5) 779.

<sup>44</sup> Op cit (supra n 22) 275. See also Burchell and Milton op cit (supra n 22) 266 and Burchell and Hunt op cit (supra n 22) 188.

<sup>45</sup> Op cit (n 12) 217.

<sup>46</sup> 1995 2 *SACR* 502 (C) 513.

The second group of requirements are:

- a) the commission by X of an act prohibited by the criminal law
- b) while his faculties are thus impaired and
- c) who is not criminally liable for the substantive crime because his “faculties were impaired as aforesaid”.

Both groups of requirements must be present for a conviction under section 1(1).<sup>47</sup>

The trial court in S v Mphungatje<sup>48</sup> asked the court of review to lay down specific guidelines for the application of section 1(1). The reviewing court, however, decided that this was not desirable and deemed it more appropriate that case law should be afforded the opportunity to develop on the basis of the solution of particular problems. In S v Lange<sup>49</sup> the court did in fact set out the requirements for a conviction. They are:

- a) the consumption or use of an intoxicating substance by the accused;
- b) the impairment of his faculties;
- c) the accused’s knowledge of its effect;
- d) the commission of an act prohibited by law whilst his faculties were so impaired; and
- e) that the accused is not criminally liable of any substantive offence because his faculties were so impaired.

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<sup>47</sup> Snyman op cit (n 12) 217.

<sup>48</sup> 1989 (4) SA 139 (O)

<sup>49</sup> 1991 (1) SA 307 (W).

The court in S v Hutchinson<sup>50</sup> also set out a list of requirements for conviction which substantially coincided with the views of Snyman<sup>51</sup> and the court in the Lange<sup>52</sup> case. It thus appears that there are not problems with regard to the interpretation of the particular statute but merely - as will later become clear - to its application in practice.

iv) **Elements of the offence**

(a) **"Substance"**

To briefly analyse subsection (1), one would have to begin with a definition of "substance". A "substance" may be defined as any particular kind of matter.<sup>53</sup> When trying to determine which substances the legislature was referring to, one would have to look at the result or effect that a substance has on a person. According to the wording of section 1(1) any substance which impairs a person's faculties to appreciate the wrongfulness of his acts or to act in accordance with such appreciation, would qualify as a substance to which the legislature was referring to when he created section 1. In practice this would imply alcoholic drinks, various drugs and/or various forms of medication. The nature of the substance or its specific effect is not what is important. The drug may even be a suppressant with a calming effect. What is important, however, is that the substance must

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<sup>50</sup> 1990 (1) SASV 149 (D).

<sup>51</sup> Op cit (n 12) 217.

<sup>52</sup> Supra (n 49).

<sup>53</sup> A S Hornsby Oxford Advanced Dictionary 20<sup>th</sup> ed (1982) 862.

cause the person to be incapable of appreciating the wrongfulness of his actions or to act in accordance with such appreciation. The person must “consume or use” such substance. “Consume” may be defined as “eat or drink; use up; get to the end of”.<sup>54</sup> “Use” may be defined as: “using or being used”.<sup>55</sup> The substance may thus be taken in any manner, whether it be by mouth or by injection or by inhalation.

b) Criminal capacity

The substance must affect the criminal capacity of the person consuming it. Criminal capacity consists of cognitive and conative legs, both being psychological components. A person’s power to differentiate and/or his powers of resistance may be affected by the consumption of a substance, and if any one of the two is affected, the person does not have criminal capacity. For many years, there was, besides mental illness and youth, no general defence of criminal incapacity in our law. However, since the decisions in S v Arnold<sup>56</sup>, S v Campher<sup>57</sup> and S v Laubscher<sup>58</sup> there is now a defence which is described by the courts as “non-pathological criminal incapacity”. This defence is broad enough to cover cases in which criminal capacity is excluded by intoxication.<sup>59</sup> Various authorities have made it clear that

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<sup>54</sup> Hornsby op cit (n 53) 183.

<sup>55</sup> Hornsby op cit (n 53) 947.

<sup>56</sup> 1985 (3) SA 256 (C).

<sup>57</sup> 1987 (1) SA 940 (A).

<sup>58</sup> 1988 (1) SA 172 (A).

<sup>59</sup> C R Snyman “Die verweer van nie-patologiese ontoerekeningsvatbaarheid in die strafreg” July 1989 *TRW* 1.



this defence is one of law and not one of psychology.<sup>60</sup> Rumpff C J ruled in the Chretien case that criminal capacity may be lacking where a person is so drunk that he cannot appreciate what he is doing, or cannot appreciate the wrongfulness of his act or that his inhibitions have substantially crumbled.<sup>61</sup> Section 1(1) statutorily confirms the existence of criminal incapacity as a result of intoxication, as it is a requirement for a conviction of the crime created in section 1(1). The wording of the test for criminal liability is included in the definition of the crime in section 1(1), and thus forms an integral part of the requirements for a conviction of the offence created by section 1(1).

A more difficult problem is how the court will actually decide whether a person lacks criminal capacity due to non-pathological factors such as intoxication. Rumpff C J stated in Chretien that this was not a finding that should easily be made by a court. There must be clear evidence of the fact and a difference should be drawn between an ordinary inebriated person and one who is so drunk that he lacks criminal capacity.<sup>62</sup> The accused must merely lay a basis for the defence and then the state will have to prove the person's criminal capacity.<sup>63</sup>

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<sup>60</sup> S v Gesualdo 1997 (2) SACR 68 (W).

<sup>61</sup> Chretien supra (n 2) 1106 F.

<sup>62</sup> Chretien supra (n 2) 1106F - G. See also S v Pienaar 1990 (2) SACR 18 (T).

<sup>63</sup> S v Wiid 1990 (1) SACR 560 (A); S v Campher supra (n 57) 966 H - I.

No psychiatric evidence is necessary for this defence to succeed<sup>64</sup>. Section 1(1) requires the court to find that the accused lacked criminal capacity and in S v Kensley<sup>65</sup> Van den Heever JA suggests an objective test in that an accused's lack of control should be tested against the assumed capacity of the rest of the members of society to control themselves in such situations. An objective test may, however, not be the most appropriate way to test criminal capacity, which is a subjective enquiry.<sup>66</sup> The mere testimony of the accused may be sufficient to enable the court to make the finding that a person lacks criminal capacity.<sup>67</sup>

c) Knowledge

The accused should know that the substance will have the effect of impairing his faculties. From the wording of the statute it appears as if direct knowledge is required, but it is submitted that if a person foresees the possibility of the substance affecting his faculties and reconciles himself with this possibility, it will be sufficient for a conviction under section 1(1). With well-known narcotic substances such as alcohol or cannabis, the court's finding should not be difficult, but with less well-known substances, such as medication prescribed by a medical doctor, the statute requires that the court must be convinced that the person had knowledge of the effect of the substance. It is

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<sup>64</sup> Snyman op cit (supra n 12) 174.

<sup>65</sup> 1995 (1) SACR 646 (A).

<sup>66</sup> N Boister "General Principles of Liability" 1995 SACJ 368.

<sup>67</sup> Kensley supra (n 65).

submitted that the state need not prove that the accused specifically knew that the specific substance would affect him specifically. A general knowledge or understanding that the intake of the substance might impair his faculties, is sufficient.<sup>68</sup>

d) Act

The accused has to act and the act should constitute the act required for a conviction of any crime besides the fact that the perpetrator lacked criminal responsibility. Section 1(1) cannot exist independently of the substantive or original crime with which the accused was charged. Snyman refers to section 1(1) as a parasite which cannot exist without the crime of which the accused would have been found guilty if his faculties were not impaired by a particular substance.<sup>69</sup> If a person would have been entitled to an acquittal on the “original” crime because he acted in private defence or in an emergency situation, he is also entitled to be acquitted of section 1(1) as the requirements for a conviction on the “original” charge would have not been met.<sup>70</sup> The accused’s faculties must be impaired at the time when he commits the prohibited act.<sup>71</sup> The section does not refer directly to omissions as its former Bophuthatswana counterpart but it may be argued that as in all other substantive crimes the “act” refers to a physical act or an

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<sup>68</sup> Lange supra (n 49). See also Burchell and Hunt op cit (supra n 22) 191.

<sup>69</sup> Snyman op cit (n 12) 220.

<sup>70</sup> S v Bazzard 1992 (1) SACR 302 (NC).

<sup>71</sup> S v Mbele 1991 (1) SA 307 (W).

omission. However, dealing with a statutory crime one would have expected the legislature to specifically include omissions within the scope of the conduct it wishes to criminalise, if it had been its intention to do so. It is thus not clear whether omissions will be included under the scope of the section or not.

**D. Evaluation and Criticism of Section 1(1)**

**i) Creation of a separate crime**

The crime of which the accused is found guilty is of a contravention of section 1(1). This is a separate and independent crime to the “original” charge put to the accused. The legislature tried to avoid applying the versari in re illicita doctrine by creating a separate statutory offence.

The courts have not always been consistent in their treating section 1(1) as a separate offence. In S v Oliphant<sup>72</sup> the court continually referred to the “eintlike” or “werklike” offence which the accused committed. Although mere mention of the offence which was initially put to the accused cannot be criticised, there is in fact no “werklike misdryf” of which the accused is convicted, except the contravention of section 1(1).

This view is confirmed in S. v Pienaar<sup>73</sup> and S v Riddels<sup>74</sup> . In S v Oliphant<sup>75</sup> the court suspended the sentence for a conviction of section 1(1) on condition that the accused was not again convicted of the charge with which he was initially charged. This is in fact not recognising the independence of section

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<sup>72</sup> 1989 (4) SA. 169 (O)

<sup>73</sup> 1990 (2) SASV 18 (T).

<sup>74</sup> 1991 (2) SASV 529 (O).

<sup>75</sup> *Supra* (n 72).

1(1) as an independent and separate offence.<sup>76</sup> In the Riddels<sup>77</sup> case it was clearly stated that if the accused was found not guilty on the “main “ charge, any suspended sentence should only be on condition that the accused be not found guilty of contravening section 1(1) for a particular period again. More recent cases have, however, contradicted this approach.<sup>78</sup> In these cases it was decided that there should be a reference to an “original” charge in the conditions of a suspended sentence imposed after a conviction of section 1(1). It is submitted that this is in fact the correct approach and it does not threaten the existence of section 1(1) as a separate and independent crime. It is in the interests of an accused that the conditions of suspension of a sentence be not too wide. There must also be a causal connection between the prohibited act performed by the accused and the prohibited act that could bring into operation the suspended sentence.

ii) **Voluntary/Involuntary Intoxication**

The wording of section 1(1) is not clear in all respects. The legislature did not state whether section 1(1) should be applied only to cases of voluntary intoxication or only cases of involuntary intoxication or both. The application of the section is thus in the discretion of the courts. It is submitted, however, that it was the intention of the legislature to limit the application of section 1(1) to cases where the accused voluntarily consumed the substance.<sup>79</sup>

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<sup>76</sup> Pienaar supra (n 62); Riddels supra (n 74).

<sup>77</sup> Supra (n 74).

<sup>78</sup> Maki supra (n 41); Pieteron supra (n 41); D supra (n 46).

<sup>79</sup> Snyman op cit (n 12) 217; Paizes op cit (supra n 5) 782. Burchell and Hunt op cit (supra n 22) 189.

According to the common law, an involuntarily intoxicated accused is dealt with in terms of the general principles of the criminal law.<sup>80</sup> Thus, if an accused who involuntarily became intoxicated cannot act, has no criminal capacity or no mens rea, he will escape liability. There is no indication that the legislature intended to change this position.

In section 1(1) the legislature uses the phrase “while knowing that such substance has that effect.” This could be interpreted to mean that the legislature did not intend to include cases of involuntary intoxication. Knowledge of the effect of the intoxicating substance is made the central concern.<sup>81</sup> It would also not be in the interests of justice that the position of an involuntarily intoxicated wrongdoer be worsened by a conviction under section 1(1). If a person was ignorant of the fact that he was consuming a substance, it would seem harsh to treat him in the same manner as a wild drunkard on a drinking spree. Ignorance is, however, not the only criterion for voluntariness. Force or duress may be the reason for the consumption or use of an intoxicating substance.

It is a general rule that only voluntary acts attract criminal liability<sup>82</sup>. Where the consumption of a substance is a specific element of the offence, one could only attach blame to a person who voluntarily consumed or used the substance. If a person knows a particular substance will impair his faculties,

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<sup>80</sup> S v Hartyani 1980 (3) SA 613 (T). See also R v Innes Grant supra (n 13).

<sup>81</sup> Paizes op cit (supra n 5) 783.

<sup>82</sup> S v Mkize 1959 (2) SA 260 (N); S v Ahmed 1959 (3) SA 776 (W); S v Goliath 1972 (3) SA 1 (A); S v Ncube 1978 (1) SA 1178 (R).

but does not know that he is consuming the substance or is forced to take the substance, he should not be convicted of contravening section 1(1).

**iii) Consequence crimes**

Most crimes, for example assault and rape, require a specific act. Assault requires the application or threat of force to another, and rape an act of sexual intercourse. Other crimes, however, such as murder or culpable homicide, are centred around the consequences of an act. Here the crux is not whether the act of a person is prohibited or unlawful, but whether an act brought about an unlawful consequence. This consequence is usually the result of an unlawful act, but this is not always the case. To once again use an example we refer to a situation sketched by Paizes.<sup>83</sup> If hypothetically X puts liquid weed killer in an empty bottle, this is no unlawful act. Where this act leads to the death of Y and it was reasonably foreseeable that a person could mistake the weedkiller for cooldrink, X will be guilty of culpable homicide. If X were intoxicated at the time of putting the weedkiller into the bottle, to the degree that he lacked criminal capacity, he could not be found guilty of culpable homicide, nor could he be found guilty of contravening section 1(1), because he did not perform any act prohibited by law. This does not seem to be in accordance with the wishes or demands of the community, because, once again, an intoxicated person would be in a better position than a sober one who committed or performed the same act.

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<sup>83</sup> Op cit (supra n 5) 787.



One can only assume that it was also not the intention of the legislature, although this is not apparent from the wording of section 1(1). In all fairness to the legislature, it is probably impossible to draft a piece of legislation that is perfect in all respects and can deal with any fringe or borderline case or any theoretical possibilities. The legislature has to deal with the main policy thrust of the legal problem and cannot cater for all possible rarities that may arise.

iv) **Intoxication excluding capacity**

The wording of section 1(1) specifically refers to an accused's lack of criminal capacity. The section refers to the ability of a person to appreciate the wrongfulness of his acts or to act in accordance with that appreciation. The exact wording used by the legislature comprises both the cognitive and conative components of the test to determine criminal capacity. Whether a person may be convicted of contravening section 1(1) if the impairment of his faculties results not in total criminal incapacity, but only in the absence of intention or the ability to perform a voluntary act is open to interpretation and debate. With regard to intoxication that excludes criminal capacity, the position is very clear. The absence of criminal capacity is an element of the offence created by section 1(1).

The Chretien<sup>84</sup> case clearly states that intoxication may be an absolute defence on three possible grounds, namely a lack of criminal capacity, exclusion of intention or the prevention of performing a voluntary act. Section 1(1) will undoubtedly apply when the consumption or use of a substance results in a lack of criminal capacity. It will, however, also have to be proven that the lack of capacity was directly a result of the intoxication.<sup>85</sup>

v) **Intoxication excluding intention**

It may be assumed that a person cannot be found guilty of contravening section 1(1) where the consumption or use of the substance leads to a lack of intention.<sup>86</sup>

If the legislature wanted to include such cases, it could and should have specifically done so. The use of the word “faculties” at various points in subsections (1) and (2) further reinforces this assumption, because “faculties” are directly related to a person’s criminal capacity. The subjective knowledge required for intent is not even hinted at in the legislation. If this interpretation, which would greatly reduce the application of section 1(1), is accepted, the whole process of the creation of a statutory offence would, to a large degree, have been futile. An example may be the Chretien case, the very reason for the existence of section 1(1). In this case, the accused did have criminal

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<sup>84</sup> *Supra* (n2).

<sup>85</sup> *Burchell and Hunt op cit* (*supra* n 22) 191.

<sup>86</sup> *Snyman op cit* (n 12) 218. See also *Burchell and Milton op cit* (*supra* n 22) 267; *Burchell and Hunt op cit* (*supra* n 22) 189.

capacity, but was acquitted of attempted murder because he lacked the intention to kill. The accused will thus also escape liability of a conviction of the section 1(1) offence because his intoxication simply led to a lack of intention and not to a lack of criminal capacity. The cure to the problem would not solve the problem for which it was created. The whole exercise of Parliament would have been futile, unless a court could specifically find that the intoxication excluded the accused's criminal capacity.

It should be mentioned that when one ventures into the field of interpretation of statutes, the intention of the legislature has to be taken into account by the court. The intention of the legislature in this case was to comply with the boni mores of society. The legislature deviated from a juridically correct approach to satisfy the demands of the community. The preamble to Act 1 of 1988, of which the Afrikaans version was signed, states "om sekere handelingte verrig deur persone wie se geestesvermoens deur inname of gebruik van sekere stowwe aangetas is, strafbaar te maak; en om voorsiening te maak, vir aangeleenthede wat daarmee in verband staan." One must assume that the legislature erred in not including a lack of intention under the scope of section 1(1).

It is a general rule of interpretation of statutes that when a statute creates any crime, a strict interpretation of the statute is required. Prejudice to an accused can be great, so interpretation should always be in favour of the

accused in grey areas. Looking at the wording of section 1(1) as adopted by Parliament, intoxication excluding intention is not within the scope of section 1(1) and in facts similar to the Chretien case the accused will still escape all liability.

**vi) Intoxication excluding a voluntary act**

Although the same argument submitted with regard to intoxication excluding intention as discussed above, may be brought to an exclusion of the ability to act, the problem in this instance is rather more self-explanatory. The degree of intoxication required for a state of automatism is surely a far more intense form than the degree of intoxication where a person no longer has criminal capacity. It can thus be assumed that the legislature intended to cover this scenario and would not want to exclude the more serious form of intoxication.<sup>87</sup>

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<sup>87</sup> Burchell and Milton *op cit* (supra n 22) 267; Burchell and Hunt *op cit* (supra n 22) 190.

**E. DIFFICULTIES RELATING TO THE APPLICATION OF SECTION 1(1)**

The burden of proving every single element of a crime beyond all reasonable doubt, rests upon the state and this includes all the elements of the statutory crime created by section 1(1). In the normal course of events, the state will be in the process of proving all the elements of the substantive or original crime with which the accused was charged and that includes the requirement that the accused should have acted with the necessary criminal capacity. The state would fervently seek evidence and argue strenuously that the court should indeed find that the accused had criminal capacity at the time of the commission of the act. If, however, the court found that there is a mere reasonable possibility that the accused did in fact lack criminal capacity, the accused would be acquitted on the main charge and the prosecution seeking a conviction under section 1(1) would be forced to make a dramatic volte face.<sup>88</sup> The state would now have to prove beyond all reasonable doubt that the accused consumed or used an intoxicating substance which he knew would impair his faculties and which did impair his faculties at the time he committed the prohibited act. This total about face would be very awkward for the state and according to Paizes, mildly amusing to the legal academic. The stringent test of proving beyond all reasonable doubt the lack of criminal capacity as required by the Mbele<sup>89</sup> case makes the section extremely difficult to prove.

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<sup>88</sup> Paizes op cit (supra n 5) 780.

<sup>89</sup> Supra (n 71).

The Mbele<sup>90</sup> case provides a good example of the difficulties surrounding the application of section 1(1). In this case the accused was charged with theft but the magistrate found that, due to being under the influence of intoxicating liquor, the accused lacked criminal capacity. The accused was accordingly convicted of contravening section 1 of the Criminal Law Amendment Act. On review it was held that if there was uncertainty as to whether the accused's faculties were impaired to the necessary degree he should not be found guilty of contravening section 1(1). The state should actually prove that the accused's faculties were impaired at the time when he performed the act. In this case the court of review decided that there was uncertainty as to the accused's state of intoxication, so the conviction and sentence of the magistrates' court were set aside.

Snyman wrote a lengthy commentary on this judgement which will be briefly mentioned.<sup>91</sup> He reiterates that Flemming J set aside the conviction because there was uncertainty regarding the accused's state of intoxication. He states that Flemming J was never in favour of section 1(1) and regards it as a statutory form of versari in re illicita. This obviously must have influenced his interpretation of the section. Snyman feels that the creating of the offence was, in fact, necessary, but that it should have its application limited to violent crimes. The fact that the magistrate's verdict of guilty was set aside implies, according to Snyman, that if a person is acquitted because he was so drunk

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<sup>90</sup> *Supra* (n 76).

<sup>91</sup> C R Snyman "n Koel ontvangs vir statutere dronkenskap" 1991 *TSAR* 504.

that there is reasonable doubt as to his criminal capacity, he cannot automatically be found guilty of contravening section 1(1). The state would have to prove beyond a reasonable doubt that the accused lacked capacity and Rumpff C J in the Chretien<sup>92</sup> case held that the court would only find this in most exceptional circumstances. This combined with Flemming J's strict interpretation of the section, will make section 1(1) practically impossible to use in the future.

Procedurally the state will also face the problem that when the court gives judgement with regard to the criminal capacity of the accused, all the evidence of the state would already have been led. The state would just have asked the court to find that the accused does have criminal capacity but if this is not decided by the court, the state on the same evidence has to ask the court to find beyond all reasonable doubt that the accused lacked criminal capacity. Even if the court granted an application for the re-opening of the state case, all the witnesses the state had at its disposal would have already been called and they no doubt would have testified that the accused was not severely under the influence of intoxicating liquor. The possibility of the state discharging its onus of proof does not seem very likely.

Further problems are created by the fact that, contrary to the recommendations of the Law Commission, Parliament inserted the phrase "but is not criminally liable because his faculties were impaired as aforesaid".

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<sup>92</sup> Supra (n2).

It appears that this phrase in fact adds a new element to the offence created in section 1(1). The state has the near impossible burden of proving, not only that the accused is not criminally liable, but also beyond any reasonable doubt that the impairment of his faculties in the manner described in the subsection is the cause of the non-liability.<sup>93</sup> The state has to prove that the accused is not criminally liable while the use of the phrase “but has not been convicted of an offence “ by the legislature would have greatly facilitated the task of the state. If an accused is acquitted by the court, it does not automatically mean that he was not liable. Non-conviction does not necessarily imply non-liability proven beyond all reasonable doubt.

As mentioned above, the state’s whole approach is strangely inverted: after seeking to establish liability it now has to prove non-liability. So if an intoxicated person is in the grey area where neither his liability or non-liability can be established on the very stringent criminal law standard of proof, he will escape all liability.<sup>94</sup> The twilight zone of the semi-drunk offers asylum, as here there would always be reasonable doubt.<sup>95</sup> Beyond all this even if the state succeeds in proving the accused’s non-liability, it still has to prove the causal connection between the impairment of the accused’s faculties and his non-liability.<sup>96</sup>

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<sup>93</sup> Paizes op cit (supra n 5) 780.

<sup>94</sup> Paizes op cit (supra n 5) 781.

<sup>95</sup> Paizes op cit (supra n 5) 781.

<sup>96</sup> Paizes op cit (supra n 5) 782.



The state has to prove that the accused would, in fact, be criminally liable, were it not for the impairment of his faculties by the consumption or use of the substance involved. This problem concerning causation could easily have been avoided by Parliament merely adopting the phrase "has not been convicted of some other offence, because it has been found by the court that his faculties were impaired" and not the phrase "but is not criminally liable".<sup>97</sup>

Section 1(2) makes a conviction of contravening section 1(1) a competent verdict on any charge. It is advisable that an unrepresented accused is warned before any evidence is led about any competent verdicts of which he may be convicted. However, in certain case law, criticism was leveled against the state for putting section 1(1) as an alternative charge.<sup>98</sup> The rationale of the criticism was that the contravention of section 1(1) is automatically a competent verdict and that it should not have been put to the accused as an alternative.<sup>99</sup> It therefore appears that where there is evidence that intoxicating liquor played a role in the facts before the court, the court must at the first possible opportunity explain the implications of section 1(1) as a competent verdict to the accused.

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<sup>97</sup> Paizes op cit (supra n 5) 782.

<sup>98</sup> Mphangatje supra (n 48).

<sup>99</sup> S E van der Merwe "Skuldig maar ontoerekeningsvatbaar Dronk" 1990 Stell. LR 101.

With regard to a similar amendment Act<sup>100</sup> it was stated on review in R v Eck<sup>101</sup> that the crime created was a new crime and not well-known as is the case with section 1(1). The court then stated that this was even more reason why its implications and the fact that it is a competent verdict should be clearly explained to an unrepresented accused. It was surely the legislature's intention that the fact that a contravention of section 1(1) is a competent verdict to any charge, should primarily be a convenience arrangement and not a procedural trap for the ignorant.

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<sup>100</sup> General Law Amendment Act 50 of 1956.

<sup>101</sup> 1958 (2) SA 182 (O).

## F. CONCLUSION

Section 1(1) is the fulfilment of Parliament's democratic duty to create laws which comply with the boni mores and demands of the community. It has a right of existence and no criticism should be levelled for the departure from the purely jurisprudential approach.

It is submitted, however, that the legislature erred in the wording of section 1(1). In its current form it finds little application in practice. Paizes calls the provision unworkable, illogical and inconsistent.<sup>102</sup> Section 1(1) does not provide a remedy for the problem for which it was created. The lacuna surrounding "intoxication excluding intention" and the difficulty of proving the element of no criminal capacity beyond all reasonable doubt, makes one agree with the very strong views of Paizes.<sup>103</sup>

The solution then is to perfect section 1(1) into a piece of legislation that avoids as far as possible the points of criticism mentioned above, satisfies the needs of the community, and is effective in covering all circumstances for which it was created. This would again require legislative intervention and the views of the following writers should be given serious consideration.

Van der Merwe<sup>104</sup> suggests the following example for a Section 1(1) type offence.

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<sup>102</sup> Op cit (n 5) 777.

<sup>103</sup> Compare also the views expressed in Burchell and Hunt op cit (supra n 22) 200.

<sup>104</sup> NJ van der Merwe "Compendium" 1996 Justice College 125.

- "1(1) A person, who unlawfully and intentionally or negligently causes himself, through the intake of alcoholic or some other intoxicating drug, to become so intoxicated as to lack criminal responsibility or to reach the stage where his criminal responsibility is diminished and in that condition creates a danger to the property or interests of another, shall be guilty of an offence and upon conviction be liable to a sentence of .....
- (2) For the purposes of subsection (1) a person who has caused himself to reach a condition where he lacks criminal responsibility or such criminal responsibility is diminished, is deemed to have created a danger to the property or interests of another, unless the contrary is proven".

Professor R C Whiting also has submitted a draft for section 1(1).<sup>105</sup> It reads as follows:

- "1(1) Any person who unlawfully –
- (a) causes the death of another person; or
  - (b) applies force to the person of another; or
  - (c) threatens another with the immediate application of force to his person;
- or
- (d) causes damage to the property of another person, shall be guilty of an offence.
- (2) The fact that a person was under the influence of intoxicating liquor or drugs shall be disregarded in determining his liability for an offence under

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<sup>105</sup> Submitted to the South African Law Commission as public opinion when preparing the draft legislation for Project 49.

subsection (1). Provided that no person shall be convicted of an offence under subsection (1) if there is evidence from which it appears as a reasonable possibility that he was under the influence of intoxicating liquor or drugs in circumstances in which his intoxication could not have been avoided by the exercise of reasonable care on his part.

- (3) No person shall be convicted of contravening paragraph (a) of subsection (1) unless the court is satisfied that a reasonable person, unaffected by intoxicating liquor or drugs (but otherwise in the position of the accused), would have foreseen that his conduct might unlawfully cause the death of the deceased.
- (4) No person shall be convicted of contravening paragraph (b) or (d) of subsection (1) unless the court is satisfied that, disregarding any evidence that he was under the influence of intoxicating liquor or drugs, the only reasonable inference from the evidence would be that he foresaw that his conduct might constitute or result in the unlawful application of force to the person of the other person concerned, as the case may be.”

Hand in hand with this proposal was Whiting’s recommended amendment to the Criminal Procedure Act, so that:

- (i) a verdict of guilty of contravening section 1(1)(a) would be competent on a charge of murder or culpable homicide;

- (ii) a verdict of guilty of contravening section 1(1)(b) or (c) would be competent on a charge of common assault or on any charge on which a verdict of guilty of common assault would be competent;
- (iii) a verdict of guilty of contravening section 1(1)(d) would be competent on a charge of malicious injury to property.

Professor Snyman agrees with Whiting that the application of a section 1(1) type offence should be limited to crimes of a violent nature as this would be in accordance with the wishes of the community.<sup>106</sup> The draft given by Whiting is, however, long, involved and cumbersome and would probably cause more confusion to unrepresented accused. Van der Merwe's draft once again does not seem to cover the area of where intoxication excludes intention.

In Canada a similar provision dealing with cases involving intoxication has been enacted. Section 33.1 of the Canadian Criminal Code<sup>107</sup> reads as follows:

- “(1) It is not a defence to an offence referred to in ss(3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in ss(2).
- (2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognised in Canadian society and is thereby criminally at fault, where the person, while in a state of self-induced

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<sup>106</sup> Snyman op cit (n 12) 216.

<sup>107</sup> Enacted by SC, 1995, c 32.

intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

- (3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.”

Professor Snyman also submits a draft for an amended section 1(1) type offence.<sup>108</sup>

This reads as follows:

“Any person who voluntarily consumes or uses any substance which impairs his ability

- (a) to perform a voluntary act; or
- (b) to appreciate the wrongfulness of his acts or to act in accordance with that appreciation,

while knowing that the substance has that effect, and who, while such abilities are thus impaired engaged in conduct which is proscribed by law under any penalty, but who cannot be convicted of the offence because of a reasonable doubt as to whether he had the aforesaid abilities, is guilty of an offence and is liable on conviction to the penalty, except the death penalty, which may be imposed in respect of the commission of that act or omission.”

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<sup>108</sup> CR Snyman A Draft Criminal Code for South Africa with a commentary (1995) 11 (s 3.12).

The Transkeian Penal Code of 1983 also has a section 1(1) type offence which is worded as follows:<sup>109</sup>

“15(1) Subject to the provisions of subsection (2) a person shall be criminally liable and guilty of an offence in terms of this section for any act or omission which would constitute an offence but for the fact that at the time of such act or omission such person is by reason of intoxication –

- (a) incapable of knowing the nature of the act; or
- (b) incapable of knowing that what he is doing is either wrong or contrary to law; or
- (c) insane, temporarily or otherwise,

and it shall be competent for the court to convict him of a contravention of this section notwithstanding the fact that he is charged with some other offence and not with a contravention of this section.”

Taking into account all these drafts listed above, an amended section 1(1), in order to be effective, needs to deal with the following five main points of criticism:

- (a) it must determine whether the substance must be taken voluntarily or not;
- (b) its application should be restricted to crimes of a violent nature;
- (c) it must effectively deal with cases where intoxication excludes intention;

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<sup>109</sup> S 15(1) of Act 9 of 1983 (Transkei).



- (d) it must provide a solution that is workable in practice to deal with the requirement set out in the Mbele<sup>110</sup> case that the state must prove lack of criminal liability beyond all reasonable doubt;
- (e) the section should specifically include omissions within its scope.

The following is suggested as a possible working draft for consideration when trying to formulate a section 1(1) type offence which will most effectively deal with these points of criticism.

“Anybody who voluntarily consumes or uses any substance which has an effect on his mental faculties, knowledge or intention, while he knew or should have known that the particular substance could or does have such an effect, and while being so effected engages in conduct which constitutes a crime, of which violence is an element, but who cannot be convicted of such crime because of a reasonable doubt whether he at the time of the conduct

- (a) had the ability to appreciate the wrongfulness of his actions, or to act in accordance with such appreciation of wrongfulness; or
- (b) had the necessary intention required for a conviction of the particular crime,

is guilty of a crime and on conviction liable to the punishment of .....

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<sup>110</sup> Supra (n 71).

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