Establishing the Applicable Form of Fault, Its Constitutionality and Appropriateness for the Offences in South Africa's Anti-Terrorism Legislation

Khulekani Khumalo
LLB LLM PhD
Senior Lecturer, University of KwaZulu-Natal Pietermaritzburg, South Africa
Attorney of the High Court of South Africa
*https://orcid.org/*0000-0002-7129-7177

SUMMARY

As required of all common-law and statutory crimes, the offences in South Africa's anti-terrorism legislation, the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (as amended), incorporate, among other basic elements of crimes, the fault or *mens rea* requirement. However, what is unclear in respect of some offences is the form of fault (whether intention or negligence) that is applicable and whether that form of fault is appropriate and constitutional. This article therefore aims to establish the envisaged form of fault for the offences in the anti-terrorism legislation, and whether that fault standard is appropriate and can withstand constitutional scrutiny. After all, it is trite that a constitutional challenge against a statutory offence may succeed if the legislature has dispensed with the requirement of fault or has enacted a fault standard that is inappropriate in light of the seriousness of the offence and the stigma and punishment that follow once a person has been convicted.

KEYWORDS: fault or *mens rea,* intention or *dolus,* negligence or *culpa,* Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004, anti-terrorism, South Africa

1 INTRODUCTION

A requirement that is common to all common-law and statutory offences is that these must incorporate the fault or *mens rea* requirement, among other general requirements of crimes. This is in keeping with the trite rule that "[c]riminal liability requires the performance of a voluntary, unlawful act

https://doi.org/10.17159/hesd6168

(*actus reus*), contemporaneously with a blameworthy state of mind (*mens rea*)",[1] and that blameworthiness is the accepted basis for one's rights to be "infringed by the punitive and stigmatising consequences of a guilty verdict".[2] The following extract, also from Hoctor, is instructive:

> "Unless the finding of liability is based on the offender's control over his actions (capacity) and choice so to act (intent), which factors underpin blameworthiness, the infringement of the right to dignity that follows conviction is unjustifiable. At the same time, a guilty verdict equally resonates with the right to dignity by treating the offender as a responsible human agent, rendered blameworthy by virtue of the factors of control and choice."[3]

The Constitutional Court in *S v Coetzee*,[4] per the concurring judgment of O'Regan J, recognised that the legislature is afforded leeway in determining the form of fault for the statutory offences it has created.[5] Here lies the recognition that the legislature, in making a statutory prohibition, exercises a choice between fault in the form of intention or negligence. However, the legislature's choice would be legally assailable, in the words of O'Regan J, when the legislature "has clearly abandoned any requirement of culpability, or when it has established a level of culpability manifestly inappropriate to the unlawful conduct or potential sentence".[6]

Establishing whether the legislature's intention was to make fault an element of a particular statutory offence, and/or which form the fault requirement takes in a statutory prohibition (whether intention or negligence), can be derived from considerations such as

> "the language or context of the prohibition, the scope and object of the statute, the nature and extent of the penalty, and the ease with which the prohibition or injunction could be evaded if reliance could be placed on the absence of *mens rea*".[7]

From the wording of the offences in South Africa's anti-terrorism legislation, the Protection of Constitutional Democracy Against Terrorist and Related Activities Act[8] (POCDATARA), it is not difficult to ascertain that the

---

1 Hoctor "Sharpening the Subjective Element of Criminal Liability" 2023 18 *SACJ* 462 464.

2 Hoctor 2023 *SACJ* 474.

3 *Ibid*. Similar sentiments are also expressed in Kemp, Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 4ed (2022) 19–20, and in Hoctor *Snyman's Criminal Law* 7ed (2020) 128–129.

4 1997 (1) SACR 379 (CC).

5 *S v Coetzee supra* par 177. The point is also emphasised in Ramraj "Freedom of the Person and the Principles of Criminal Fault" 2002 18 *SAJHR* 225 239. See also Kemp *et al Criminal Law* 254.

6 *S v Coetzee supra* par 177.

7 *R v H* 1944 AD 121 126. The considerations advanced in this judgment have been accepted with approval in subsequent cases such as that of *S v Arenstein* 1964 (1) SA 361 (AD) 365C–D and *S v Naidoo* 1974 (4) SA 574 (N) 591H–592A. For the recent endorsement of these considerations, see Badul, Strode, Bhamjee and Ramdhin "Using Common Law and Statutory Offences to Address Obstetric Violence in South Africa" 2024 17 *South African Journal of Bioethics and Law* 113 115; and Kemp *et al Criminal Law* 255.

8 33 of 2004. This Act was recently amended by the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Act 23 of 2022. All references are to the Act as amended.

legislature incorporates the fault requirement in the offences it has created. However, what needs to be established is the form of fault that is applicable to these offences, and whether this form of fault is appropriate and constitutional. This is the exercise undertaken in this article.

It must be mentioned that the forthcoming analysis of the form of fault likely envisaged in the POCDATARA offences did take into account the contents of the Preamble, long title and discussion paper preceding POCDATARA, but these did not prove helpful.[9] As a result, these do not play much of a role in determining the envisaged form of fault. The analysis thus proceeds using other considerations that will become clear below.

The starting point of this article is an analysis of which POCDATARA offences are envisaged to have fault in the form of intention, and whether intention is an appropriate and constitutional form of fault for those offences. This is followed by an analysis of which offences might be envisaged to have fault in the form of negligence, and whether negligence is an appropriate and constitutional form of fault for the offences to which it might be applicable.

2 ESTABLISHING THE APPLICABLE FORM OF FAULT, ITS CONSTITUTIONALITY AND APPROPRIATENESS

2 1 Intention

Several offences in POCDATARA are arguably envisaged to incorporate fault in the form of intention. In no particular order, these include: the section 5 offence relating to explosive or other lethal devices; the offences in section 6(1) and (2) relating to hijacking, destroying or endangering the safety of a fixed platform; the section 7 offence relating to taking a hostage; the section 8 offence relating to causing harm to internationally protected persons; the section 9 offence relating to hijacking an aircraft; and the offences in section 10(1), (3) and (5) relating to hijacking a ship or endangering the safety of maritime navigation. The wording of these offences points to the criminalisation of certain intentionally committed acts and, consistent with the quote below, intention is clearly reflected in the wording as the required form of fault:

[9] The discussion documents preceding the passing of POCDATARA do not reveal the thinking behind the fault requirements of the offences created (see South African Law Commission Discussion Paper 92 (project 105) *Review of Security Legislation (Terrorism: Section 54 of the Internal Security Act 1982 (Act No. 74 of 1982))* (2000)). The same applies in respect of the Preamble, as it states generally that POCDATARA "gives effect to SA's obligations under various international law instruments relating to the suppression of terrorism, by creating the offence of terrorism and extending the jurisdiction of South African courts over these offences" (Dugard, Du Plessis, Maluwa and Tladi *Dugard's International Law – A South African Perspective* 5ed (2018) 238–239). Also, although many of the POCDATARA offences are based on various treaties, it is noteworthy that those treaties do not go as far as to specify the required fault (South Africa has in fact defined the offence of terrorism more widely than in the international instruments being implemented (Dugard *et al Dugard's International Law* 240)). The fact that there is no universal definition of terrorism also does not help clarify the acceptable form of fault.

> "The degree of blameworthiness required for a culpable violation of a statutory prohibition or injunction must in the first place be sought in the language used by the lawgiver. The requirement of intentional wrongdoing is usually indicated by such words as 'wilfully', 'intentionally' or 'maliciously', and in the absence of any words expressly indicating the particular mental state required, the degree of *mens rea* must depend on that foresight or care which the statute in the circumstances demands."[10]

The other offences in respect of which fault could also take the form of intention are those in sections 3(4) and (5), 4A, 12(2) and 14 of POCDATARA.[11] Notably, the wording of these offences does not allude to any specific form of fault. In the absence of indications to the contrary, subjective fault or intention is presumed in respect of these offences.[12] For the offences in sections 3(4) and 4A, the presumption of subjective fault is strengthened if one considers that the offences appear to be capable of being committed only with intention. To expand on this, the section 3(4) offence of giving or receiving training while being aware that such training is connected to terrorism can conceivably be committed only if such training is given or received intentionally. Put differently, such training cannot be given or received unintentionally and yet be claimed to have been given or received with awareness that it is connected to terrorism. Furthermore, as the section 4A offence criminalises direct or indirect attempts to leave the Republic to commit terrorism elsewhere and at the behest of a terrorist group, it is difficult to imagine a direct or indirect attempt being committed unintentionally. Although intention is, as indicated already, presumed in respect of the offences in sections 3(5), 12(2) and 14, the wording and the nature of these offences would appear not to limit the fault requirement to intention alone. This point is explored further in the discussion under heading 2 2 below.

Intention should also be embraced as the form of fault envisaged for those offences that have the fault requirement captured in the phrase "knows or ought reasonably to have known or suspected". These are the section 3(1) and (2) offences of providing assistance to those who are engaged in or are likely to engage in a terrorist activity, the section 4 offence of financing terrorism, the section 11 offence of harbouring terrorists, and the section 13(1)(*b*) and (*c*) offences relating to creating terrorism hoaxes. The basis for the deduction that intention is applicable in respect of these offences is the use of the word "knows",[13] as acting with knowledge is generally associated with acting with intention. Another reason for inferring

---

10 *S v Arenstein supra* 366.

11 Respectively, these are the offences of providing and receiving training in relation to terrorism; of forming, supporting or becoming a member of a terrorist entity; of attempting to leave the Republic of South Africa for the purpose of committing terrorism elsewhere at the behest of a terrorist group; of failing to report the suspicion or awareness of persons who intend to commit, or who have committed, terrorism; and of threatening, attempting, conspiring and/or inducing others to commit terrorism and related activity.

12 The presumption that *dolus* (not *culpa*) is an essential element of *mens rea* is enunciated in *S v Naidoo supra* 575B–C and 596A–B, for the reasons that the court states at 596C–E. See also Kemp *et al Criminal Law* 255.

13 See Roach "A Comparison of South African and Canadian Anti-Terrorism Legislation" 2005 18(2) *SACJ* 127 141–143.

that intention is the applicable form of fault is that the definition of "knowledge" in section 1(6) recognises both actual and constructive knowledge,[14] and this captures intention in the forms of *dolus directus* and *dolus eventualis*. The form of fault which the words "ought reasonably to have known or suspected" is likely to give rise to is addressed in the discussion under heading 2 2 below.

The offence of terrorism, provided for in section 2 read with section 1(1)(xxv) of POCDATARA, could also embrace intention as the requisite fault due to the provision in section 1(1)(xxv)(*b*) that a terrorist act referred to in section 1(1)(xxv)(a) must be "intended, or by its nature and context, … reasonably be regarded as being intended" to achieve the aims set out in paragraph (*b*)(i)–(iv)[15] of section 1(1)(xxv). The requirement of intention is clear from the phrase quoted above.[16]

The principle that intention can take any of the recognised forms[17] where it constitutes the required fault[18] applies to the above-mentioned offences, except those in respect of which the legislature, upon interpretation of the offence(s) concerned, may be deemed as directing otherwise.[19] In the context of the POCDATARA offences, the reading that the legislature prefers only *dolus directus* in respect of some offences could draw authoritative support from the case of *Minister of Law and Order v Pavlicevic*,[20] which interpreted the provisions of the Internal Security Act[21] – South Africa's then anti-terrorism legislation before it was replaced by POCDATARA. In this case, Corbett CJ, upon interpreting the offence of subversion in terms of section 54(2) of the Internal Security Act, expressed the view that the offence:

> "consist[s] essentially of two elements: (i) conduct falling within one or other of the categories listed in paras (a)–(k) inclusive – 'the conduct element' – and (ii) an accompanying intent to achieve any of the objects specified in paras (a)–(d) inclusive of s 54(1) – 'the mental element'. The coincidence of

---

14 In s 1(6)(*a*), it is stated that, for purposes of POCDATARA, a person has knowledge of a fact if they have actual knowledge of that fact. A provision highlighting the sufficiency of constructive knowledge of a fact follows in s 1(6)(*b*), where it is once again stated that, for the purposes of POCDATARA, a person has knowledge of a fact if the court is satisfied that "the person believes that there is a reasonable possibility of the existence of that fact" and "he or she fails to obtain information to confirm the existence of that fact".

15 These aims are summed up as follows in Kemp *et al Criminal Law* 683: "to threaten the unity and territorial integrity of South Africa; intimidate or terrorise the public or a segment of the public; or unduly compel, force or coerce a person, an organization, a government or the general public, whether the public, the person, the organization or the government is inside or outside South Africa".

16 Whether it is possible that negligence also suffices for the terrorism offence is discussed at length under heading 2 2 below.

17 For a description and further discussion on each of the forms of intention, see Burchell, Schwikkard and Mosaka *Burchell's Principles of Criminal Law* 6ed (2025) 54 & 295–326; Hoctor *Snyman's Criminal Law* 160–161; and Kemp *et al Criminal Law* 224–236.

18 Kemp *et al Criminal Law* 225–226; Hoctor *Snyman's Criminal Law* 160.

19 Note that the legislature may prescribe a particular form of intention if it so desires (Kemp *et al Criminal Law* 226).

20 1989 (3) SA 679 (A).

21 74 of 1982.

> both elements is obviously essential for the commission of the crime of subversion."[22]

Of relevance for present purposes, the court held:

> "One is here not dealing with the concept of *mens rea*, which is a necessary ingredient of common law crimes and of most statutory offences, but with an expressly prescribed element in a statutory offence. And the wording of the section, in my view, clearly excludes the idea of some sort of *dolus eventualis*. It decrees that the offence is only committed if the person concerned did one of the listed acts 'with intent to achieve' any of a number of specified objects."[23]

According to the court, this was a reading that was permitted by the language of the statute; it was also the least onerous interpretation, and was appropriate particularly in light of the severe penalties that were prescribed (which could reach 20 to 25 years).[24] The same reading is adopted in the subsequent apartheid-era case of sabotage,[25] where the offence of sabotage in section 54(3) of the Internal Security Act also required the commission of certain specified acts with a particular intention. Pertinently, the court in *Minister of Law and Order v Pavlicevic* added:

> "Some support for my conclusion concerning *dolus eventualis* may, I think, be derived by way of analogy from a series of cases in which it has been held, with reference to s 29(1) of the Black Administration Act 38 of 1927, which penalises conduct 'with intent to promote any feelings of hostility between Bantu and Europeans' … , that for the State to succeed in a prosecution under this section it is not sufficient to show that an accused possessed a constructive intention (i.e. *dolus eventualis*); the State has to prove the actual intention of promoting such hostility (see *S v Singh and Another* 1975 (1) SA 330 (N) at 335C, and the cases there cited; see also *S v Mbiline and Another* J 1978 (3) SA 131 (E) at 134C 135A)."[26]

The offences in sections 5, 6(2), 7 and 9 of POCDATARA[27] require an intentional commission of certain stated acts with/for the purpose of achieving certain specified consequences or harms. That the wording of these offences must exclude *dolus eventualis* and restrict intention to *dolus directus* is based not only on the authority of the *Pavlicevic* case, but also on the basis that it seems impossible to reconcile the stated acts may merely be foreseen but at the same time be claimed to be committed for a particular stated purpose. Only directly intended acts can be associated with being committed for a particular purpose.

---

22 *Minister of Law and Order v Pavlicevic supra* 689B–C.

23 *Minister of Law and Order v Pavlicevic supra* 689E–F.

24 *Minister of Law and Order v Pavlicevic supra* 689G–H.

25 *S v Nel* 1989 (4) SA 845 (A).

26 *Minister of Law and Order v Pavlicevic supra* 689I–690A.

27 Respectively, these are the offences of delivering, placing or detonating explosives for terrorism-related purposes; of destroying or endangering a fixed platform for the purpose of intimidating a population or of compelling an organisation or government to act or not to act; of taking a hostage for the purpose of compelling a third party to act or not to act as a condition for the release of the hostage; and of hijacking an aircraft for several stated purposes.

Similarly, the section 13(1)(*a*) offence[28] (which provides that "[a]ny person who, with the intention of inducing in a person anywhere in the world a false belief that an offence under sections 2, 3 and 5 to 10 will be committed, is guilty of an offence") also requires (despite the rather inaccurate drafting) the commission of an act with an intention to induce the envisaged false belief. This provision too invites the interpretation that an act so committed must be directly intended to achieve the specified result.

Apart from the challenge of having to establish through interpretation that intention (in any of its recognised forms or in a specified form) is envisaged to be the applicable form of fault, the offences that have fault in the form of intention do not give rise to any controversy, and consequently no constitutionality question arises because of this requirement. Ultimately, there is no doubt that intention is appropriate for the offences that adopt it as the fault requirement.

2 2 Negligence

The POCDATARA also has offences where negligence[29] could be the applicable form of fault. One of these is the offence of terrorism. In terms of section 2 of POCDATARA, "[a]ny person who engages in a terrorist activity is guilty of the offence of terrorism". The concept of "terrorist activity" is defined in section 1(1)(xxv) of POCDATARA, notably with the fault requirement in section 1(1)(xxv)(*b*) being that a terrorist activity listed in section 1(1)(xxv)(*a*) be "intended, or by its nature and context, … reasonably be regarded as being intended" to achieve certain stated aims.[30] Intention is undoubtedly envisaged in this provision, capturing the fault requirement.[31] The only difficulty is whether the wording "by its nature and context, can reasonably be regarded as being intended" incorporates negligence as another recognised form of fault, and whether negligence is an appropriate and constitutional form of fault for the offence of terrorism, characterised by a severe prescribed sentence and a broad list of terrorist acts contained in section 1(1)(xxv)(*a*). These issues are addressed under headings 2 2 1 and 2 2 2, respectively.

The issue of the envisaged form of fault also arises in the context of the offences that have fault captured in the phrase "knows or ought reasonably to have known or suspected".[32] While there may seemingly be no dispute that intention is recognised as the form of fault that is applicable to these offences, the question remains as to whether negligence is also applicable and whether negligence is an appropriate and constitutionally sound form of

---

28 S 13 of POCDATARA criminalises the creation of terrorism hoaxes.

29 For a discussion on negligence as a form of fault, see, generally, Kemp *et al Criminal Law* 239–248; Hoctor *Snyman's Criminal Law* 182–192; Burchell *et al Principles of Criminal Law* 362–380 and 383–386.

30 For these aims, see fn 15 above.

31 See the discussion under heading 2 1 above.

32 As highlighted under heading 2 1 above, this is the phrase that captures the fault requirement in respect of the offences in ss 3(1) and (2), 4, 11 and 13(1)(*b*) and (*c*) of POCDATARA.

fault for these offences. This issue is also addressed under headings 2 2 1 and 2 2 2, respectively.

Lastly, having established under heading 2 1 above that intention is the requisite fault for the offences in sections 3(4) and (5), 4A, 12(2) and 14 of POCDATARA,[33] and that the offences in sections 3(4) and 4A are seemingly capable of being committed only with intention, the question that was deferred to this section is whether negligence could also appropriately be the form of fault that applies to the offences in sections 3(5), 12(2) and 14. This is addressed under headings 2 2 1 and 2 2 2 below.

2 2 1 Is negligence a form of fault recognised in POCDATARA offences*?*

In *S v Naidoo*, the point is made that in circumstances such as the present, one is searching for "the clearest indications in the Act justifying the extension of criminal liability (by regarding *culpa* as sufficient)."[34] Another emerging point is that "[t]he degree of blameworthiness required for a culpable violation of a statutory prohibition or injunction must in the first place be sought in the language used by the lawgiver".[35] Roach has led the charge against reading the phrase in section 1(1)(xxv)(*b*) – "by its nature and context, can reasonably be regarded as being intended" – as signalling that negligence is the applicable form of fault.[36] His arguments, premised on various indications and readings that negligence could not have been the envisaged form of fault, are summarised elsewhere by the present author as follows:

> "The undesirability of negligence-based fault has led one Professor Kent Roach to suggest that s 1(1)(xxv)*(b)* be read as requiring only intention and not negligence. In justifying this suggestion, Roach highlights a presumption of subjective fault in criminal statutes, and that where the legislature envisages the negligence-based fault in the POCDATARA, it does so through the use of the phrase 'ought reasonably to have known or suspected'. Therefore, only the stated phrase captures negligence as the form of fault. On this understanding, no other similarly worded phrase(s) in the POCDATARA can be read as signalling that negligence is the fault standard. Also, according to Roach, the words 'can reasonably be regarded as being intended' allude to intention in the form of *dolus eventualis*." (footnotes omitted)[37]

The present author countered Roach's arguments by stating:

> "Prudent as the above suggestion might sound, there is, however, a possibility of a finding that the language and the contextual scheme of the POCDATARA embraces either intention or negligence as the requisite fault. The words 'which is intended' could cover intention in all its forms, and the words 'by its nature and context, can reasonably be regarded as being intended' would be rendered redundant if these are also interpreted as referring to intention in the

---

33 For a description of what the offences in these sections prohibit, see fn 11 above.

34 *S v Naidoo supra* 596H–597A. See also Burchell *et al Principles of Criminal Law* 385.

35 *Ibid*.

36 Roach 2005 *SACJ* 135–137.

37 Khumalo "The Problem With the Removal of the Motive Requirement From the Offence of Terrorism – A Short Commentary" 2023 *African Security Review* 289 290.

> form of *dolus eventualis*, hence the conclusion that negligence could be envisaged by these words. Furthermore, in the other instances where the legislature desired fault in the form of intention only, it unambiguously stated so without the complication of additional wording. This creates the impression that negligence might have been intended by the additional wording in s 1(1)(xxv)*(b)*. Also, since the fault requirement in the offences in section 4, 11 and 13(1)*(b)* is captured by the words 'knows or ought reasonably to have known or suspected', these words are open to being interpreted as referring to either intention or negligence. Therefore, there are clearly other instances in the POCDATARA where either intention or negligence is the envisaged fault, and the same may extend to section 1(1)(xxv)*(b)*. It remains to be seen which of these contrasting readings will be preferred by the courts." (footnotes omitted)[38]

This article reiterates that the language of section 1(1)(xxxv)(*b*) permits the reading of the fault requirement for the terrorism offence as incorporating negligence. In respect of whether the phrase "knows or ought reasonably to have known or suspected" also incorporates negligence, there is seemingly no dispute, as even Roach concedes that these are the words used in POCDATARA whenever the aim is to recognise negligence as a sufficient form of fault.[39] Regarding the offences in sections 3(5), 12(2) and 14, the wording may not be alluding to a specific form of fault, but the nature and scope of these offences does not seem to preclude the negligent commission thereof.[40] The same can also be said about the nature and scope of the terrorism offence and of all the offences that have fault captured in the phrase "knows or ought reasonably to have known or suspected".

The case for negligence being the requisite fault for all the above offences is further strengthened if it is inferred that the lawmaker, by creating these offences and by including the prescribed penalties that are applicable upon conviction of perpetrators,[41] intended to communicate its expectation that citizens should take a high degree of care and circumspection in relation to such offences. This point is enunciated in *S v Arenstein* when the court states:

> "There is no general rule in regard to the degree of *mens rea* required for the violation of a statutory prohibition or injunction, and it is clear that 'negligence may constitute sufficient proof of *mens rea* even in cases where negligence is not the gist of the offence charged, if there was a duty on the part of the person charged to be circumspect'."[42]

Having set out the above principle, the court, referring to the case it was dealing with, added:

> "Compliance with a notice is enforced by very severe penalties which, while it may be an indication, on the one hand, that innocent violations thereof were

---

38 Khumalo 2023 *ASR* 291.

39 Roach 2005 *SACJ* 137.

40 Burchell *et al* (*Principles of Criminal Law* 385) serves as authority for relying on the nature and scope of a statutory offence as a further indication of the recognition of negligence as the applicable form of fault.

41 See s 18 of POCDATARA, which prescribes mostly fines and imprisonment as penalties.

42 *S v Arenstein supra* 366C, citing *R v H supra* 130.

> not intended to be punishable, is also an indication, on the other hand, that the exercise of great care to ensure compliance is demanded by the lawgiver."[43]

Given the foregoing, it is arguable that, on the authority of the cases of *S v Arenstein* and *R v H*, the fact that severe sentences are prescribed is not always an indication of the requirement of subjective fault[44] but is sometimes an indication of the requirement of a great degree of circumspection and care on the part of citizens to not commit acts that could be captured by the prohibitions in place. Accordingly, it is arguable that section 1(1)*(xxv)(b)* requires great care to be taken so as not to risk that one's commission of the acts in section 1(1)*(xxv)(a)* – which acts can be committed by "any means or method" – be construed ("in whole or in part, directly or indirectly") to have been committed for any of the stated purposes, therefore amounting to terrorism. From section 3(1) and (2)'s criminalisation of the various ways of providing assistance to those who are engaged, or are likely to engage, in terrorist activity, it is reasonable to deduce that a high standard of care is required to avoid being caught within the net of liability of such provision. The same applies to the section 4 offence of financing terrorism, as such financing can be done in a number of ways, "directly or indirectly, in whole or in part".

The section 3(5) offence may be read as calling for the taking of great care to ensure that, in establishing, supporting or becoming a member of an entity, the entity is not engaged in or planning to engage in terrorist activity. Taking great care can also be argued to be expected so as not to fall foul of the duty to report the suspicion or awareness of persons who intend to commit, or who have committed, terrorism; as failure in such duty contravenes section 12(2) of POCDATARA. One also has to be circumspect in avoiding one's conduct being construed as a threat, attempt, conspiracy or inducement to commit terrorism and related activity – all of which are criminalised in terms of section 14 of POCDATARA.

The section 11 offence of harbouring or concealing terrorists can also be argued to invite a high standard of care, considering that criminalisation follows if a person "knows, or ought reasonably to have known or suspected" that a person being harboured or concealed is effectively a terrorist. The section 13(1)(*b*) and (*c*) offence not only uses language that clearly alludes to negligently creating a terrorism hoax of the kind specified in the prohibitions, but also invites a high degree of care and circumspection since a terrorism hoax could be constituted by the communication of any information, "directly or indirectly", which a person "knows, or ought reasonably to have known or suspected, or believes to be false".

---

43 *S v Arenstein supra* 366H.

44 The position in South African law is generally to regard the severity of the sentences prescribed for certain offences as being a justification for preferring a reading of subjective fault in respect of those offences. This principle is generally upheld in case law (see *S v Naidoo supra*; and *Minister of Law and Order v Pavlicevic supra*. See also Hoctor 2023 *SACJ* 465). The discussion under heading 2 1 above has explored the totality of the considerations (including the sentencing factor) that would tip the scale in favour of recognising intention as the fault requirement for some POCDATARA offences.

For the sake of completeness, it should be added that falling short of the degree of care and circumspection demanded by the legislature means failing to live up to the standard of a reasonable person, therefore satisfying the test for negligence. In conclusion, in light of all the above considerations, it is submitted that negligence does qualify as the form of fault required for some of the POCDATARA offences. Whether negligence passes constitutional muster and is thus appropriate as a form of fault for the offences to which it applies, is addressed in the next section.

2 2 2 Is negligence a constitutional and appropriate form of fault for POCDATARA offences?

The constitutionality and, ultimately, the appropriateness of having negligence as the requisite fault for some of the offences in POCDATARA could be questioned on the following grounds or principles:[45] a) that only subjective fault is required for certain offences owing to their stigma and the extent of punishment;[46] b) that those who intentionally cause harm should be punished more severely than those who cause harm unintentionally;[47] and c) that the right not to be deprived of freedom arbitrarily or without just cause[48] is said to have a substantive component such that it is violated if a person is imprisoned for negligence and the reason for which the State is depriving an individual of their liberty is insufficient.[49]

In beginning to address the constitutionality and appropriateness issue, it must be highlighted that, following the amendments introduced by the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Act[50] (the Amendment Act), it has been compellingly argued that only subjective fault (and not objective fault or negligence) should fulfil the fault requirement for the offence of terrorism in section 2 of POCDATARA.[51] In other words, negligence is unlikely to pass constitutional muster and is therefore inappropriate as a form of fault specifically for the terrorism offence.

To elaborate on the above point, in the era up to the December 2023 amendment of POCDATARA, it was possible to argue that the inclusion of negligence as the fault requirement for the terrorism offence was not only envisaged in the wording of the provision establishing fault but was also constitutional and therefore appropriate for the following reasons. First, the negligence-based fault standard could at the time be viewed as reinforcing the legislature's desire for a high standard of care when engaging in activities that could amount to terrorism.[52] Secondly, and perhaps most

---

45 See Roach 2005 *SACJ* 142–143.

46 Emphasis here is on the requirement of fair labelling in criminal law.

47 This point highlights the requirement of proportionality in punishment so imposed.

48 This right is enunciated in s 12 of the Constitution of the Republic of South Africa, 1996.

49 See Powell "Anti-Terrorism Measures in Africa, the Middle East and Argentina" in Ramraj, Hor and Roach (eds) *Global Anti-Terrorism Law and Policy* (2005) 570.

50 23 of 2022.

51 Khumalo 2023 *ASR* 289-292.

52 On the requirement for a high standard of care and circumspection, see heading 2 2 1.

importantly, there were two possible safeguards against the low-fault threshold in the form of negligence. The one safeguard was the requirement in section 16 of POCDATARA that the National Director of Public Prosecutions (NDPP) must issue written authorisation for the charge of terrorism to be levelled against a particular individual.[53] Alongside this safeguard was a further requirement of the erstwhile section 1(1)(*xxv*)(*c*) that the person accused of terrorism be shown to have had a political, religious, ideological or philosophical motive. The motive requirement arguably distinguished intentional or negligent engagement in various terrorist activities from other offences.[54]

Since the motive requirement is now repealed by section 1(*r*) of the Amendment Act, this effectively means that the main safeguard is no longer in place, and this resuscitates and strengthens the constitutionality concerns about negligence and renders negligence-based fault inappropriate for the terrorism offence.[55] Unfortunately, the issuance by the NDPP of written authority to prosecute cannot be a sufficient and meaningful safeguard on its own, as it depends on the NDPP's discretion and how it is exercised.

The next issue becomes whether negligence-based fault fails to pass constitutional muster and is therefore inappropriate for the offences other than terrorism. Several points can be made in support of negligence-based fault being constitutional and appropriate for offences other than the terrorism offence. To begin with, if negligence is understood as reinforcing the legislature's desire for a high standard of care, especially when engaging in activities that could be related to or connected with terrorism, then it (negligence) can be accepted as an appropriate fault standard for offences other than terrorism. Negligence-based fault also does not seem to violate the right not to be arbitrarily deprived of freedom (section 12 of the Constitution), as there is a legitimate reason for including it – namely, to communicate that individuals have to be careful not to find themselves inadvertently engaging in prohibited conduct.

Furthermore, people who negligently engage in offences other than the terrorism offence cannot complain of being unfairly labelled, stigmatised and punished, as they would be convicted and punished for deeds that share a link or connection with terrorism, but are not terrorism itself. Therefore, to the extent that these individuals would not be labelled as terrorists, the stigma or label that would follow their conviction would be appropriate and fair. Also, the punishment would have to take into account the distinction between negligent and intentional offenders. The following statement of the court in *S v Naidoo* confirms this: "Obviously, if a court finds [that] *culpa* has been established, but not *dolus*, it may, in a suitable case, be a ground for imposing a less severe sentence."[56]

---

53 This requirement is still in place even after the 2023 amendment, although some slight variation has now been introduced. For a discussion on this requirement and what is generally hoped to be achieved by introducing it, see the judgment of Seriti JA in *S v Bogaards* [2012] 1 All SA 376 (SCA) par 45–54.

54 Roach 2005 *SACJ* 138; Kemp *et al Criminal Law* 684.

55 See further Khumalo 2023 *ASR* 289-292.

56 *S v Naidoo supra* 600D.

3 CONCLUSION

The examination of the forms of fault or *mens rea* required for the offences in POCDATARA has revealed that, for some offences, the legislative wording, properly interpreted, sets intention as the envisaged form of fault. This form of fault is typically accepted as the appropriate form of fault for criminal offences, and there is a very strong presumption in favour of preferring it and of its constitutionality. For some of the offences that specify intention as the requisite form of fault, intention can be in any of the recognised forms. However, there is a notable exception in respect of the offences where the wording invites the interpretation that only a specific form of intention, usually direct intention, is applicable to those offences.

Just as the legislature can, through the interpretation of legislative wording, be argued to have opted for fault in the form of intention, it can also include negligence in the form of fault required for some of the offences in POCDATARA. The inclusion of negligence can also be deduced from the wording of the applicable prohibitions, as well as from the nature and scope of the offences. The possibility of drawing an inference that the legislature, in creating certain offences, expected citizens to take a high degree of care and circumspection, is also a significant indication that negligence constitutes the requisite form of fault.

Although there is enough to sustain negligence as being an envisaged form of fault for some offences in POCDATARA, this article has established that, for an offence such as that of terrorism, negligence has proved to be an inappropriate form of fault and would most likely not pass constitutional muster if challenged. However, for offences other than terrorism, the appropriateness of negligence as an envisaged form of fault can be defended and may be constitutionally sound.