‘Common Purpose’: The Crowd and the Public

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Abstract The legal doctrine of ‘common purpose’ in South African criminal law considers all parties liable who have been in implicit or explicit agreement to commit an unlawful act, and associated with each other for that purpose, even if the consequential act has been carried out by one of them. It relieves the prosecution of proving the causal link between the conduct of an individual member of a group acting in common purpose, and the ultimate consequence caused by the action of the group as a whole. The National Prosecuting Authority’s controversial and vociferously challenged decision (initially upheld, then withdrawn at the beginning of September 2012) to charge 270 demonstrators at Lonmin Platinum Mine in Marikana with the murders of 34 colleagues under the ‘common purpose’ doctrine, implying liability by association or agreement, raises the question as to the constitution and characteristics of the crowd and of the public, respectively. This article outlines the history of the application of the common purpose rule in South Africa, to then examine ‘common purpose’ within the philosophical parameters of group psychology and collective intentionality. It argues for methodological individualism within a psychoanalytic theorisation of group dynamics, and a non-summative approach to collective intentionality, in addressing some problems in the conceptualisation of group formation.

Keywords Collective action · Common purpose · Complicity · Group psychology · Implied mandate · Imputation of liability · Individual psychology · Intention

The decision by South Africa's National Prosecution Authority (NPA)[1] to charge 270 arrested miners who had been demonstrating at Lonmin Platinum Mine in Marikana with the murders of 34 colleagues who had been shot by the police on 16 August 2012, was met with a public outcry at the time. Reports and commentary in the South African news media called it 'impetuous', 'absurd', 'outrageous', 'irrational', 'farcical', 'foolish', and 'shame[ful]' (Devenish 2012); 'bizarre and shocking' and 'without merit' (Grant 2012).

Announcing the decision, the NPA had invoked the criminal law provision of 'common purpose', which considers all parties criminally liable who have been in implicit or explicit agreement or complicity, to commit an unlawful act, and associated with each other for that purpose, even if the consequential act has been carried out by one of them. The implicit or explicit agreement is considered tantamount to a common intention, on the grounds of which each member of the group is being held responsible for the actions of any other member of the group executing the plan or purpose or intention.

What marked the common purpose rule, applied by the NPA, out for particular notoriety (see Devenish 2012; see also de Vos 2012, p. 2) was the fact that it includes the re-bound effect that the commission of that unlawful act would have on the alleged perpetrators themselves (see Grant 2012).

But, as Advocate James Grant pointed out, 'there is nothing strange or outrageous about this decision – it is defensible – at least, in principle' (Grant 2012). What had been denounced in the public outrage over the incident that has become known as the 'Marikana massacre' as the application of apartheid-era criminal justice and policing protecting the interests of the white minority (see Jay Surju; qtd. in Chothia 2012) can, in fact, be shown to have wider range. 'Common purpose' was invoked to secure convictions carrying death sentences in the high profile cases of Solomon Mahlangu (1979), the Sharpeville Six (1984–1988), the Queenstown Six (1985–1990), the Upington Fourteen (1989), and in the South African Railway and Harbour Workers' Union (SARHWU) Trial (1987–1989), typically in contexts of mounting social and political unrest approximating civil war[2] in South Africa during the late 1970s and 1980s, associated with industrial disputes, political demonstrations, consumer boycotts, attacks by and defence against vigilante groups, identification of alleged police informers and collaborators, and funerals of residents killed by the police (Colman 1991, p. 1071).[3] Yet the common purpose rule can be said neither to have

[1] The NPA was established by the Constitution of the Republic of South Africa in 1996, with powers to institute criminal proceedings on behalf of the state.

[2] In an interview with the press in 1987, Chief Justice Rabie characterised the situation in the country as 'pretty near that of a civil war', commenting, 'it is naive to think that you can quell it by bringing people to court' (*Sunday Star*, 3 May 1987; qtd. in Parker 1996, p. 78, n. 3).

[3] In the period between September 1984 and May 1987, '37000 outbreaks of unrest' were recorded, 'in which 2000 people were killed, 7000 injured and 16000 buildings either damaged or destroyed' (de Kock 1988; cited in Parker 1996, p. 78, n. 2). The vast increase in the number of executions in South Africa in the late 1970s and 1980s is associated with such heightened levels of political unrest during that period. 'From a base of about 40 executions per annum in the early 1970s, the numbers rose steadily, exceeding 100 per annum by the late 1970s and reaching a peak of 164 in 1987' (Colman 1991, p. 1071—citing T. Allen-Mills' article 'Killing behind Botha's clemency', in *The Independent* of 25 November 1988, p. 10).

been ‘created’ nor ‘instituted’ by apartheid (as Mandy de Waal (2012a) would have it).

The common purpose rule predates apartheid regimes by 64 years, and it has also been applied in post-apartheid common law litigation (albeit with important developments in accordance with Section 39(2) of the 1996 Constitution). It was ‘imported’ into South Africa from English case law,[4] notably the Native Territories’ Penal Code (Act 24 of 1886). Ch. IV, Section 78 of this Act provides:

> If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been, known to be a probable consequence of the prosecution of such common purpose. (1886, p. 2135)

The common purpose rule was first cited by the Appellate Division in 1917 in a civil action for damages (*McKenzie* v. *Van der Merwe*), which highlighted the assumption of implied mandate—implying a mandate derived from the circumstances (Rabie 1971, p. 230). It was re-invoked in 1923, in the conviction of a group of striking miners who had launched an armed assault on a Brakpan mine, on charges of causing the death (without necessarily intending to do so, but by imputation to all participants of the action of one or several that caused the death(s), and hence culpability) of eight persons defending the mine (*R* v. *Garnsworthy & others*) (Parker 1996, p. 82; see also Rabie 1971, p. 230). Two subsequent cases (one in 1928, *R* v. *Ngcobo*, and another one in 1942, *R* v. *Matsitwane*) were adjudicated in terms of complicity stated synonymously with those of the common purpose rule (Parker 1996, p. 83). The first crowd common purpose case to reach the Appellate Division was that of *Rex* v. *Duma* in 1944. In this case, Judge Tindall’s verdict introduced the requirement of implied authorisation as evidence of complicity, but without requiring any prior agreement. In other words, it permitted evidence of spontaneous common purpose, expanding the notion of mandate to pertain to cases where the ‘mandatory’ (so designated) is unaware of the ‘mandator’s’ (so designated) very existence [see Judge Schreiner’s remarks on *R* v. *Mtembu* (1950) cited in Parker 1996, p. 87], and giving the court latitude close to arbitrariness. Peter Parker spells out the enormous consequences of this innovation in law:

> first, it encouraged courts to muddy the distinction between the hindsight enjoyed by a judge and the foresight available to the accused…. criminality in a crowd hinges on the vantage point of the alleged participant. Those in a large group rarely know what others are doing or want to happen. In retrospect, it is easy for a court so minded to declare that everyone knew that what did happen was going to happen, or if it is minded the other way, that no evidence exists to show that an accused did other than respond individually and independently

[4] It was paradigmatically defined and applied in the case of *Macklin, Murphy, & Others* of 1838, on the grounds ‘that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by them all’ (qtd. in Rabie 1971, p. 228).

> to what was taking place. Judge Tindall's novelty gave courts much greater liberty to hold that an assembly of people clearly had a common purpose, if that is what judges wanted to find. (Parker 1996, p. 86)

It is instructive to consider the date of this judgement—1944—which is well before the first government of the National Party took office. However, what did take place in the aftermath of this landmark judgment, was the elevation of the common purpose rule to doctrinal status, without developing a theory fitting its use (Parker 1996, pp. 86, 87).

Notwithstanding the doctrinal status bestowed on it, vagueness and arbitrariness continued to beset the application of the common purpose rule. The requirement of establishing causation in a murder case—the question as to whether each group member's conduct was causally connected with the victim's death—was replaced with the principle of imputation of liability on the basis of an implied (also referred to as 'fictitious') mandate (Rabie 1971, p. 237); or with 'knowing association with the common purpose', which became primary in establishing intention, similarly without a corresponding theory, and similarly shrouded in ambiguity as it describes simultaneously 'the criminal act (*actus reus*), the mental state (*mens rea*), and the different tests that apply to each' (Parker 1996, p. 95; see also Rabie 1971, p. 236).[5] The difficulties in evidence—i.e. in proving causality between the actions of a participant and the results—were resolved by ignoring substantial elements of the crimes concerned (Rabie 1971, pp. 238–239). It was not specified whether 'knowing association with the common purpose' meant association by prior or spontaneous agreement, by participation, or simply by commingling; whether it designated an act of association, or a quality of intention (Parker 1996, p. 95). It dispensed with the requirement of demonstrating explicit mandate, focusing instead on the presence of the accused at the crime scene, and his/her overtly expressed intentional, thus 'active', association with the commission of the crime (without the onus of proving participation in the crime) (Parker 1996, p. 96). [This was the basis of the controversial ruling in the Sharpeville Six trial—'the South African trial that shocked the world' (Diar 1990; see also Parker 1996, pp. 98, 101)].

While the application of the common purpose rule can be shown to have become subject to the security needs of the apartheid state, corrupting the values of the rule of law (Parker 1996, p. 102) in the process, I have also tried to show, contrary to some of the arguments adduced in motivating opposition to the initial ruling against the Marikana miners, that the common purpose rule cannot simply be referred to the machinations of the apartheid state.

If we do not wish to attribute ignorance or short historical memory to those voicing opprobrium with regard to the initial ruling against the Marikana miners, we would need to investigate other possible sources of such emphatically expressed indignation at the invocation of common purpose.

Here, murky waters yield rich pickings.

[5] This is contrary to the principles that the mental element and its test should be kept separate from the criminal act and its test, and that both of them should be kept separate from the test of participation (Parker 1996, p. 95).

'Common purpose' is imputed both to secure convictions and to give evidence in mitigation/extenuation, in the first case to establish, in the second case to disestablish individual liability. This becomes particularly clear in the shift that I had indicated in criteria adduced in the adjudication of unlawful acts committed in the context of group or crowd mobilisation, from explicit or implied mandate, authorisation, and prior agreement, to 'active association' and spontaneous action with common intent. The same criteria—namely active association and spontaneous action with common purpose—could be used to demonstrate criminal liability or, alternatively, diminished responsibility due to extenuating circumstances related to the dynamics of crowd psychology as described by early social psychologists, criminologists, and sociologists from the end of the 19th century onwards.[6] Expert evidence in mitigation of sentence was first admitted in South African courts in the trial of the Sharpeville Six in 1985, and then again in the trial of *S.* v. *Motaung and Others* in 1987, in the SARHWU trial in 1988, and in the retrial of the Queenstown Six in 1989.

While expert evidence led in defence of the Sharpeville Six conceded 'highly aggressive impulses directed to the common objective' that would incur criminal liability in terms of the common purpose rule, it focused on diminished individual responsibility due to diminished individual intention under the influence of the crowd as extenuating circumstance.

While this evidence failed to procure a mitigation of sentence, and no precedent could be invoked where considerations of crowd psychology had been admitted as extenuating circumstances, the case itself provided a precedent for the admission of expert evidence on crowd psychology in defence in subsequent trials—a development heralded by one of the experts consulted in the cases tried under the common purpose rule during the late 1980s as 'an important legal breakthrough and a significant development in the history of applied social psychology' (Colman 1991, p. 1071). It could arguably be seen partly in the context of heightened international attention generated by the controversial judgement in the Sharpeville Six trial, and partly in response to the growing realisation, at the end of the 1980s, that 'people in crowds do not act with a single intention, that even aggressive actions such as stone throwing may not be indications of a shared purpose to kill but individual, atomized acts unrelated to those of the murderers' (Colman 1991, p. 98). The promulgation of the Criminal Law Amendment Act in 1990, which shifted the onus to prove the existence of extenuating circumstances in murder cases from the defence to the prosecution which, from then onwards, has to '*disprove*, "beyond reasonable doubt" the existence of mitigating factors' (Colman 1991, p. 1078), attests to this growing realisation of the difficulties of imputing collective intention.

In reiterating the factors of de-individuation, suggestibility, conformity and obedience pressures (Colman 1991, pp. 1073, 1076), the expert witnesses called to give evidence for the defence cited some the most socially and conceptually conservative accounts of crowd psychology characterising collective action in terms

[6] Freud outlines the impact of revolutions on the characterisations of group psychology: 'The characteristics of revolutionary groups, and especially those of the great French Revolution, have unmistakably influenced [Sighele's, Le Bon's and others'] descriptions' (Freud [1921] 1985, p. 111).

of the spectre of the 'unruly crowd'[7]—variously used synonymously with racialised[8] notions of 'the criminal classes', the '*lumpenproletariat*', the *déclassé* 'riff-raff'—as irrational, volatile, uncontrollable mob engaging in gratuitous violence of rioting, marauding, burning, looting and killing.[9] The racialising descriptions still reverberate in the culturalist argument brought in defence of the eight members of the SARHWU charged with murder: a social anthropologist then from the Randse Afrikaanse Universiteit, JC 'Boet' Kotzé, testified as an 'expert' 'about the "collective consciousness" that is characteristic of traditional African cultures and that may have made the defendants especially vulnerable to group pressures' (Colman 1991, p. 1073); the same argument was adduced in testimony brought in the course of the extenuation proceedings in the retrial of the Queenstown Six (Colman 1991, p. 1075).

Sigmund Freud's *Massenpsychologie und Ich-Analyse* (1921) was one of the first attempts to provide a critical counter to such castings of the 'unruly mob'—even as he went along, for a stretch, with the analyses of his predecessors in crowd psychology. Freud's partial counter-argument was followed much later by writings on popular movements by historians, sociologists, and social anthropologists. The critical accounts of collective action rendered by social historians allow for the possibility of a 'moral economy of the crowd', pitted against the denigration of popular protests as actions of 'mobs' and the denial of legitimate historical agency to the socially marginalised.

However, the moral rehabilitation of the crowd does not resolve all the dilemmas of accounting for collective intention-in-action. A common intention can be both the ground for unlawful action, and for concerted action towards attaining a common good. This was registered as early as 1766, in a series of observations to which Immanuel Kant was moved, on the raving responses coming close to mass hysteria, elicited by self-styled itinerant prophet Immanuel Swedenborg preaching to mass audiences across Western European regions in the 1760s. In a polemic against the mystic (whom he calls the 'goat prophet' 'spirit seer'), Kant ambivalently describes both mass phenomena and supreme moral feelings in terms of 'forces that move us

[7] Le Bon sums up his characterisation of groups: 'We see, then, that the disappearance of the conscious personality, the predominance of the unconscious personality, the turning by means of suggestion and contagion of feelings and ideas in an identical direction, the tendency to immediately transform the suggested ideas into acts; these, we see, are the principal characteristics of the individual forming part of a group. He is no longer himself, but has become an automaton who has ceased to be guided by his will' (Le Bon [1895] 1920: 35; qtd. in Freud [1921] 1985, p. 103).

[8] This emerges from reading Le Bon's treatise on *The Psychology of Peoples* (1894) in which he elaborates a classificatory racial psychology. He compares the 'group mind' to 'the mental life of primitive people' (qtd. in Freud [1921] 1985, p. 110). His division of 'peoples' into 'primitive', 'inferior', 'average', and 'superior' 'races' hinges on a list of criteria including the perceived capacity (or incapacity) for reasoning, discipline, will to power, perseverance, self-control, morality, and respect for the rule of law.

[9] Tarde and Le Bon, intent on discrediting mass uprisings by pathologising the crowd, refer crowd phenomena to the concatenation of hypnosis and suggestion, under the assumption that hypnosis is indicated only in the case of pathology, and that only pathological conditions would respond to hypnosis. 'The result of this association between crowds and the organic hysteric model of social influence was essentially an a priori disqualification of crowds and the struggles and revolts (such as the Commune) they represented at this particular point' (Apfelbaum and McGuire 1986, p. 44).

which have their origin in a will outside of us'. He explains: 'A secret power makes us simultaneously direct our attention towards the well-being of others, and towards the arbitrary will of others' (Kant [1766] 1976, p. 29). It is one and the same power that makes us dependent on the will of others, and causes us to act in unison with other reasonable beings; one and the same power is the source of both suggestibility, contagion, dependence, fascination, bondage, and of achievements for the good of all of the highest ethical standards (see also Kant [1793] 1974, [para 29] pp. 194, 198–199, 202). This observation finds a close correspondence in the ambivalence with which Freud explains and assesses the moral capacity and status of groups:

> In order to make a correct judgement upon the morals of groups, one must take into consideration the fact that when individuals come together in a group all their individual inhibitions fall away and all the cruel, brutal and destructive instincts, which lie dormant in individuals as relics of a primitive epoch, are stirred up to find free gratification. But under the influence of suggestion groups are also capable of high achievements in the shape of abnegation, unselfishness, and devotion to an ideal. While with isolated individuals personal interest is almost the only motive force, with groups it is very rarely prominent. It is possible to speak of an individual having his moral standards raised by a group. Whereas the intellectual capacity of a group is always far below that of an individual, its ethical conduct may rise as high above his as it may sink deep below it. (Freud [1921] 1985, p. 106)

The uncanny coexistence of reason and its other in human collective capacity lives on. As if echoing Kant's confoundment, 'common purpose' is imputed to both group phenomena and to the public, which are pitted against each other in the adjudication of crimes in which a common intention is said to have been the ground for unlawful action. Finding features distinguishing the public from the crowd presents a critical challenge if we consider their overriding common denominator—namely human collectivities mobilised for public action in public spaces and drawing on repertoires and rituals of public culture (see Tambiah 1996, p. 32).

The question may arise as to why we do not treat both cases in terms of their common denominator—human collective action. Human actions can be distinguished from phenomena in nature, because they belong to a class of events which have reasons for causes. In the case of goal-directed human action, reasons and propositional attitudes can act in the place of 'causes'. The criterion for rational action relies on the accord of action with beliefs (in the broadest sense) concerning the form of an action appropriate to achieve a particular goal. Correspondingly, reason-explanations for actions involve categories such as intentions, attitudes, emotions, wishes, motives, values and goals. Beliefs, wishes, motives are—to all intents and purposes—causes of the actions for which they are reasons.

This would presuppose—as the imputation of liability on the basis of implied mandate does—that collective intentional behaviour is an extension or mirror of, or modelled on, individual conscious behaviour. However, the rational explanation of the link between reasons and actions could—in the ideal case—be predicated only on individual agents of an action and extended at most to a collection of individuals who happen to perform the same act. A collectivity with common purpose,

however, cannot be modelled on the individual intentions of people who happen to embark on the same act. Collective intentionality is distinct from individual intentions. The question arises as to what delimits a collective action in common from an act of a number of individuals in the same purpose.

This is certainly the question that legal adjudication of common purpose would have to face: it has to demonstrate the distinction between a collection of individuals with the same purpose, and a gathering with a common purpose, and, if the case arises, the transformation of the former into the latter. It has to, in other words, presume that collective intentional behaviour is distinct from individual intentional behaviour, that the group's propositional attitude 'we intend' motivating concerted action is distinct from a series or summation of individuals' propositional attitudes 'I – intends' that happen to converge on the same goal (see Searle 1990, p. 402). In the case of a convergence of individual intentions, Searle explains, 'each person has an intention which he or she could express without reference to the others, even in a case where each has mutual knowledge of the intentions of the others'. In the case of a collective intention, the individual intentions 'I-intends' are derived from (while not being caused by) the collective 'we-intend' and imply the notion of co-operation (Searle 1990, pp. 403, 406). Individual and collective intentions are irreducible to each other: 'We-intentions [which require the notion of co-operation to achieve a common goal] cannot be analyzed into sets of I-intentions, even I-intentions supplemented with beliefs, including mutual beliefs, about the intentions of other members of a group' (Searle 1990, p. 405).

Still, 'collective intention' remains difficult to establish logically.

This difficulty animates John Searle's famous article of the same title, appearing at more or less the same time as the social-psychological evidence in mitigation of sentence on grounds of 'de-individuation' in 'crowds' was first admitted in the great South African trials of the late 1980s. It is worth quoting Searle's elegant formulation stating his thesis at length:

> collective intentional behaviour is a primitive phenomenon which cannot be analyzed as just the summation of individual intentional behaviour; and collective intentions expressed in the form 'we intend to do such-and-such', and, 'we are doing such-and-such' are also primitive phenomena and cannot be analyzed in terms of individual intentions expressed in the form 'I intend to do such-and-such' or 'I am doing such-and-such'…. The presupposition is: All intentionality, whether collective or individual, requires a preintentional Background of mental capacities which are not themselves representational. (Searle 1990, p. 401)

This is a startling finding for a number of reasons, which I would like to unpack here. Without referring to Freud's 'Group Psychology' (1921), Searle's contribution works from the same supposition: the peculiar and irreducible nature of collective intentionality, distinct from individual intentions, which yet does not command its own separate categorisation in terms of 'social instinct', 'group mind' (Freud [1921] 1985, p. 96; Searle 1990, p. 404), or 'collective unconscious' (Searle 1990, p. 404). The collective cannot be modelled on the individual, as it exceeds the sum of its

parts. There is something that is activated in groups that members of the group do not experience individually in isolation.

Moreover, and most importantly for Freud, studies of groups reveal the nature of the primary social tie. From William McDougall, Freud derives the notion that 'before the members of a random crowd of people can constitute something like a group in the psychological sense, a condition has to be fulfilled: these individuals must have something in common with one another, a common interest in an object, a similar emotional bias in some situation or other, and (…) "some degree of reciprocal influence"' (Freud [1921] 1985, p. 112). Along with McDougall, Freud refers to this 'reciprocal influence' as 'primitive sympathetic response' (McDougall 1920, p. 25; qtd. in Freud [1921] 1985, p. 112). This is what Searle also seems to be alluding to in referring intentional behaviour to a 'primitive', 'pre-intentional' background.

However, this is where the paths of Freud and his predecessors diverge, and where Searle's could be seen to end up on the side of Freud's predecessors. And with that divergence of paths, the plot thickens. Let me revisit Searle's presupposition quoted earlier: 'all intentionality, whether collective or individual, requires a preintentional Background of mental capacities which are not themselves representational' (Searle 1990, p. 401). 'Mental capacities which are not themselves representational', by Searle's own definition, refer to mental capacities which do not themselves cause the physical effect.[10] This seems to indicate the possibility that reasons and causes for actions do not necessarily co-incide, that there is a mental cause that is not a reason for what it causes. Davidson elaborates this possibility for the case of a single agent. It can occur in the failure, within a single person, of consistency in the pattern of beliefs/attitudes/emotions/intentions, and actions (as for instance in wishful thinking, acting contrary to one's own best judgement, self-deception, believing something that one holds to be discredited by the weight of evidence, etc.) (Davidson 1982, p. 290). This happens when cause and effect occur in different systems of the mind (in psychoanalysis this would be the divided psychic apparatus), which entails the possibility that one element can operate on another in a non-rational causality.

However, Searle does not elaborate this possibility hinted at in his own presupposition implicating 'mental capacities that are not themselves representational'—a possibility that Davidson had indicated earlier in explaining apparent 'Paradoxes of Irrationality' (1982). Instead, in elaborating the 'preintentional background' of mental capacities to posit 'we-intentions' as 'a primitive form of intentionality', he constructs a parallelism between 'we-intentions' and 'we-pre-intentions'. He expresses this parallelism in the supposition 'that the capacity to engage in collective behaviour requires something like a pre-intentional sense of "the other" as an actual or potential agent like oneself in cooperative activities'

[10] Searle states the structure of intentionality for singular actions as follows: 'The mental component both represents and causes the physical component, and because the form of causation is intentional causation, the mental causes the physical by way of representing it' (Searle 1990, p. 408). Based on the structure thus outlined, my reasoning is: if there is a class of mental capacities that are not themselves representational (as Searle indicates in his presupposition—1990, p. 401), they cannot act as causes of a physical effect.

(Searle 1990, p. 413). In a simplified expression, we could re-state this supposition as 'collective intentionality presupposes collective pre-intentionality'.

In construing 'non-representational' mental capacities which simultaneously form a 'pre-intentional background' correlative to collective intentionality, Searle seems to give credibility to precisely those accounts of (non-psychological) crowd psychology which Freud relies on and quotes at length, but from which he sharply distinguishes his own 'Group Psychology and the Analysis of the Ego'. They encompass the early non-psychological accounts of so-called social psychology which frequently construe a parallelism between psychic and social processes, especially when talking of collectively expressed will, emotion, thought, common consciousness or interest.[11]

For Freud, the picture is infinitely more complex. He weaves an intricate web between individual and group, individual psychology and group psychology that tends to invert the trajectories of the early social psychologists: '… the entire "difference" of psychoanalysis with respect to social psychology lay in its claim to ground the collective in the individual (in the love of individuals) whereas Le Bon, Tarde, or McDougall established it at the outset in a collective-being (hypnotic suggestibility) that came before any individuality' (Borch-Jacobsen 1989, p. 233).[12] For Freud, the fault-lines do not run between individual and group psychology, but between individual and group within individual psychology itself. This is what motivates Freud to look at group psychology in the terms of individual psychology. The social bond is a psychic bond, as this bond is complete within each individual. Social unity is of a psychological nature.[13]

Nevertheless, there is something that is activated in groups that members of the group do not experience individually in isolation. And it is with this interest that Freud turns to the writings of Le Bon, McDougall, Tarde, and Trotter.

In three introductory sections Freud provides a literature survey on the work of his predecessors on crowds, most of which meet his own views on the subject. However, he sees their analyses restricted to a social (pre-individual, pre-subjective) psychology that equates archaic sociality with archaic psychology. While Freud recognises 'the archaic heritage of the human mind' in the manifestations of an unrepressed unconscious in group phenomena, he insists, against Le Bon, on an

[11] It is in crowd psychology that sociology found one of its lines of descent. In the words of Gabriel Tarde, '[h]ypnotism is the experimental junction point of psychology and sociology; it shows us the most simplified psychic life which can be conceived of under the form of the most elementary social relation' ([1890] 1895; qtd. in Apfelbaum and McGuire 1986, p. 44).

[12] On this aspect, if not on the psychoanalytic theorisation of groups, Christopher Kutz's analysis of 'Complicity' would concur. Against collectivist approaches, which 'fail to provide a satisfying model of accountability, through which individuals can understand the normative significance of their collective acts affecting others', he pits a theory 'in which individual agents remain the subjects of accountability, but the objects of their accountability can include collective harms' (Kutz 2000, p. 114).

[13] Hans Kelsen, in his reflections on Freud's *Group Psychology*, explains: 'Strictly speaking, it is incorrect to talk of a bond "between" individuals; if society is a psychic phenomenon then this bond which we call society is complete within each individual. To assert that A is connected with B is merely hypostatising an entirely individual relation erroneously transposed into the external physical world' (Kelsen 1924, p. 6).

unconscious repressed that is instrumental in explaining group psychology on the basis of individual psychology (Freud [1921] 1985, p. 101, n. 1).

Freud claims his own contribution to group psychology in identifying the principle of group cohesion beyond the hypnosis, suggestibility, mania, lack of inhibition, bondage, contagion, fascination adduced by his predecessors.: '… the mutual tie between members of a group is in the nature of an identification …, based upon an important emotional common quality…' (Freud [1921] 1985, p. 137). The horizontal and vertical integration of groups relies on Freud's definition of the group as 'a number of individuals who have put one and the same object in the place of their ego ideal and have consequently identified themselves with one another in their ego'. The bond is identificatory. Group members have put an object in the place of their ego ideal, with the ego-ideal constituting a model to which the subject attempts to conform (Laplanche and Pontalis 1988, p. 144).[14]

Freud is concerned to raise the moral standards and standing of groups. To that end, he postulates 'equip[ping] the group with the attributes of individuals' (Freud [1921] 1985, p. 114). In the base group, ego and ego-ideal have been fused, 'so that the person, in a mood of triumph and self-satisfaction, disturbed by no self-criticism, can enjoy the abolition of his inhibitions, his feelings of consideration for others, and his self-reproaches' (Freud [1921] 1985, p. 165).

The condition that would limit such 'base' group behaviour lies in the separation of ego and ego-ideal. The ego-ideal would have to be split off from the ego and enter into conflict with it in taking up a critical attitude towards the ego, generating self-observation and moral conscience. This conflict is the chief influence in repression (Freud [1921] 1985, p. 165) in the individual, which Freud wants to establish in groups in order to equip them with a high standard of ethical achievement (Freud [1921] 1985, p. 115).

Thus, Freud wants to establish group psychology within individual psychology, within which the history of the group finds its culmination; and he wants to establish within group psychology the primacy of the figure of leadership, of the ego ideal in a critical function, of identification (as opposed to contagion, hypnosis, fascination, bondage, enactment), and of repression. These psychological elements are more broadly, in the political terrain, also the elements that would keep violence at bay. As conditions for political subjectivity, they are pivotal for a democratic order that seeks to rule citizens 'through their freedoms, their choices and their solidarities, rather than despite these' (Rose 1998, p. 117).

A psychoanalytically informed political theorist would acknowledge the precious and precarious nature of such an achievement, knowing that the ego, that thin basis for autonomy, judgement, and rational action, is not the master of the house, but the slave to three harsh masters—the id, the super-ego and the external world.[15] Strengthening its function in the cause of democratic citizenship would require producing subjects in the position that democratic citizenship itself enjoins. It would

[14] This brief explication of Freud's 'Group Psychology' recoups the elaborations stated in Kistner (2004, pp. 306–307).

[15] In Freud's formulation, '[the ego is] a poor creature owing service to three masters and consequently menaced by three dangers: from the external world, from the libido of the id, and from the severity of the super-ego' (Freud [1923] 1984, p. 397).

interpellate its citizen subjects by opening a field of possibility of rational action—a causal relation between wish/intention and action—for them, and positing that possibility as a model soliciting and sustaining identification. Such identification would allow for structured group formation in which co-operative action can be made sense of in individualistic but non-reductive terms (see Kutz 2000, p. 15), creating a link between a theory of collective accountability and a theory of individual accountability grounding public deliberation and action in common purpose.

How, then, can we make sense of the post-apartheid affirmation of the constitutionality of the common purpose rule (see Burchell and Milton [1991] 2005, p. 155)? Why does the new constitutional order not rest content with referring collective action in pursuit of unlawful purposes to general principles of criminal liability? Commentators on South African Criminal Law and Procedure (Burchell [1970] 2008) take these questions further, sharpening them within the context of post-apartheid constitutionality:

> Should fundamental principles of *individual* justice, which include proof of the causal element in consequence crimes, be made to bend to accommodate evidential difficulties? Does the common-purpose rule, which relieves the prosecution of proving the causal element in consequence crimes, not compromise the fundamental presumption of innocence, lead to unequal treatment of offenders, conflict with fundamental notions of justice and fairness, and so become unconstitutional? (Burchell [1970] 2008, p. 311; my emphasis)

Some changes in post-apartheid applications of the common purpose rule can be adduced in response to this question. There has ostensibly been a shift in its application, from 'political' to 'criminal' cases, highlighting individual liability in criminal offences committed in 'common purpose'.

In a sense, then, post-apartheid adjudication of 'common cause' cases is consistent with attempts to strengthen the psychic correlates of reflexive citizenship. A juridical turning point can be said to have been reached with the appeal case of *S v Mgedezi* 1989 (1) SA 687 (A) at 75I–706C, in which no proof of prior agreement, and no causal connection to the killing could be established. In that case, additional criteria were laid down that had to be satisfied before the principle of imputation could be applied to establish common purpose liability: among others, presence of the accused at the scene of violence, awareness of the assault, intention to make common cause, performing an act in association with others with the intention to kill, requisite *mens rea*, foreseeability of the death of the victim. An appeal case in 2012 was won on the basis of these requirements set out in *S v Mgedezi* 1989. In *Toya-Lee van Wyk v State*, Judge of Appeal R Pillay urged that '… care needs to be taken to avoid lightly inferring an association with a group activity from the mere presence of the person who is sought to be held criminally liable for the actions of some of the others in the group' [*Toya-Lee van Wyk v State* 575/11 [2012] ZACSA 47 (28 March 2013)].

Thus, post-apartheid jurisdiction clearly limits the application of the common purpose rule in cases where there is no prior agreement, express or implied, to

commit a crime.[16] Consistent with this limitation is a Constitutional Court judgement in the case of *Thebus and Another* v *The State* (2003), which adjudicated an appeal against a Supreme Court of Appeal Judgment in a case of the killing, in crossfire, of a child, and the wounding of two other persons, in the course of a confrontation between a vigilante group and a reputed drug dealer in Ocean View, Cape Town, in 1998.

What is interesting about this appeal case is the fact that it spans the transition between the apartheid criminal justice system, most spectacularly evident in the prominent trials of the late 1980s, and the post-apartheid constitutional dispensation based on individual human rights enshrined in the Bill of Rights. While the common purpose rule was retained in common law, the challenge brought by the appellants in the case of *Thebus and Another* v *The State* was, among other things, to develop this provision, 'so as to bring it in line with the constitutional rights to dignity, freedom and security of the person and the right to be presumed innocent' [South Africa—Constitutional Court 2003, p. 2 (section 9)].

With the grounding of the common purpose rule in the Bill of Rights, the scenario evinced in the prominent late apartheid-era cases tried under the common purpose rule, in which expert evidence on crowd psychology was admitted for consideration of mitigation of sentence due to extenuating circumstances, is highly unlikely in common law cases under the 1996 Constitution, dampening the excitement of the social psychologist who discovered a wider public role, greater importance, enhanced scope, and diversification of his client base with the high profile trials of the late 1980s (Colman 1991, pp. 1071, 1078).

Still, the relation of the state and institutions to the modes and mechanisms of group formation—unstructured and structured—and their distinction and delimitation poses a vexing problem for political theory and law-making. This problem, I would submit, is what underlies the affirmation of the constitutionality of the common purpose rule in post-apartheid South Africa for reasons that have not been fully taken account of and addressed in post-apartheid constitutionalism and jurisdiction.

Figuring out what this underlying reason may be, I would like to return to Freud's 'Group Psychology and the Analysis of the Ego' ([1921] 1985), reading it this time not in debate with his predecessors in 'crowd/mass psychology', but in debate with his successor in political theory, jurisprudence, and constitutional law, Hans Kelsen. Reviewing Freud's 'Group Theory' in an article entitled 'The Conception of the State and Social Psychology', published in the *International Journal of Psycho-Analysis* in January 1924, Kelsen is intent, against mainstream psychology and empirical sociology of the time, to irreducibly distinguish the state from social groups. The state is not one kind of associative interaction among many others; and its sociological unity does not coincide with its legal unity (Kelsen 1924, pp. 3–4; see also p. 20). A psychological account of group formation would tendentially eclipse the role of the state, when 'psychic reciprocity' within a group seems so

[16] Acknowledging the 'evidentiary pitfalls' of the criterion of 'active association' that loomed so controversially over the apartheid-era cases tried under the 'common purpose' rule, Moseneke J made the proof of 'active association' more onerous [see South Africa—Constitutional Court 2003, p. 10 (section 45)].

much more compelling, powerful, and intense by comparison with those linking it to others outside the group, and by comparison with legal membership of one and the same state (Kelsen 1924, p. 5). Conflating and confounding psychological, sociological, and legal accounts of the ties that bind, and basing an understanding of the state on a 'sociological theory of psychic interaction' would risk, Kelsen warns, 'inevitably fall[ing] headlong into a bottomless pit of economic, religious and national antagonisms' (Kelsen 1924, p. 5). 'The tenor of Freud's argument', in Kelsen's reading, would go towards conceptualising the state as a phenomenon of group psychology (Kelsen 1924, p. 11)—which is precisely what Kelsen questions and inveighs against (Kelsen 1924, p. 14).[17]

In a reconstitutive critique of and rejoinder to Freud, Kelsen moots the idea of a double inscription of the subject, with distinct dual relationships, linking it, on the one hand, to the state as '[legal] guiding idea' (Kelsen 1924, p. 23) and its institutions as a more organised, stable framework for interactions and, on the other hand, to identifications and reciprocal interactions within primal, less structured, fluctuating, wavering, transient groups (Kelsen 1924, pp. 19, 20; also p. 26). It is the former, in Kelsen's reading of Freud, that '[secondarily] procures for the group those features that were characteristic of the individual', 'equip[ing] the group with the attributes of the individual' (Freud [1921] 1985, p. 114; Kelsen 1924, p. 21). In characterising the more enduring nature of the state and its institutions providing more organised frameworks for interactions, Kelsen adds his own distinctive criteria: 'a consciousness of an order regulating their relationships, that is to say, a system of norms' (Kelsen 1924, p. 20).[18]

Thus, we may, along the lines of Kelsen's argument, make a case for the retention and even constitutional affirmation of the common purpose rule, considering that the state of a constitutional democracy would have to establish its principle of cohesion on a basis different and distinct from that of primary group formation, and may be justified in juridically limiting the formation and reach of such group action.

However, the invocation of the common purpose rule in the National Prosecuting Authority's controversial decision (initially upheld, then withdrawn at the beginning

[17] With that stance, Kelsen limits Freud's account of Group Psychology to the domain of individual psychology (Kelsen 1924: 32). This is open to challenge, as Balibar points out, for casting the law as a self-supporting '*a priori* synthesis of obligation and coercion' is premised on authority, guilt, punishment and morality, thus implicating another, prior, ground of the encounter between the juridico-political and the psychoanalytic theory (Balibar n.d., 2014, pp. 7, 8, 9, 18). Balibar thus elaborates the relation between ties within primal groups and ties to secondary guiding ideas of state and institutions, via the hinge between the psychic and the socio-cultural-political that is the *modus operandi et efficiendi* of the Freudian agency of the superego. At the crux of this mediation lies a 'disidentification', reversing the relation between the 'self' of the subject and 'we' of the group, interpellating subjects into individuals, whereby each subject is rendered '"responsible" for an offence that is his own' (Balibar n.d., 2014, pp. 19–20). Individualising social relations mediated by guilt, in Balibar's reading of Freud's Group Psychology, constitutes the '"judicial moment" of subjection' (Balibar n.d., 2014, p. 24).

[18] It is with the instantiation of more stable, permanent, organised political formations that, for Kelsen, the validity of psychological investigation of groups falls away; moreover, he sees a contradiction in applying the latter to the former (Kelsen 1924, p. 22). For a critical assessment of this argument, see Balibar n.d., 2014, in n. 17.

of September 2012) to charge 270 demonstrators at Lonmin Platinum Mine in Marikana with the murders of 34 colleagues does not fall under this demonstration of the justifiability of the common purpose rule in post-apartheid constitutionality.

In the unprotected strike of the Lonmin platinum miners that was the context of 'the Marikana massacre', it has been established by independent investigators on the basis of video footage, testimony, and close investigation of the events around 12 August 2012, that striking miners walking towards the informal settlement in which many of them lived, were shot at, and 34 of them killed, by police gunfire. The imputation of common purpose liability that sparked the public outcry mentioned at the beginning of this article, was clearly motivated by a move to criminalise the unprotected strike action, on account of which the general secretary of the National Union of Mineworkers (NUM) and some cabinet ministers had reportedly called for the deployment of armed forces of the state a few days before (Alexander 2013, pp. 608, 613). Lonmin 'lobbied government to treat the workers' actions as criminal, rather than an industrial dispute …' (Alexander 2013, p. 608). This casting of the dispute resonated in the media briefing of 2 September 2012, by Advocate Johan Smit, Director of Public Prosecution for the North West Province, who took the final decision to charge 270 Marikana miners with the murder and attempted murder of their colleagues. Attempting to justify his decision, he referred to the 1999 criminal case of *S v Lungile and Another*, which he described as follows:

> During the course of policing intervention in an armed robbery in progress, there is an exchange of gunfire between a policeman and a robber, and the bullet discharged by the policeman kills an innocent bystander, the fact that the policeman was acting lawfully when he discharged the fatal shot does not avail the robber … (de Waal 2012b)

Extrapolating from this case to the case of the Marikana miners, Smit explained: 'Now, the evidence of this case [is] precisely the same. … You have evidence of a group of people who arm themselves to attack the police.' (de Waal 2012b)

However, there was no demonstrable attack on the police. The 'common purpose' in participating in an unprotected strike was equated with common purpose liability to commit a crime. The corresponding charges, issued and dropped between the end of August and the beginning of September 2012, demonstrate not so much a reversion to apartheid-style criminal justice *tout court*; nor do they call into question the validity, in principle, of post-apartheid applications of the common purpose rule. What they do demonstrate forcefully and disconcertingly, though, is the subordination of common law, developed post-apartheid in line with constitutional values, to social deterrence, undermining such values in the attempt to bring politically motivated action under provisions of criminal law. 'Since criminal law is not designed to deal with political disaffection, it is critically important for courts to uphold the highest standards…' (Parker 1996, p. 102); for upon such standards rests the distinction between the violence of emerging constituent power, structural violence, and criminal violence.

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