The transformation of the reasonable person test in South African law.

by

MAKUMYA M'MEMBE

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SUMMARY OF DISSERTATION

Since the first democratic elections in 1994, South Africa has been in a legal, political, and economic transitional phase characterised by ever-changing value systems and conceptions of foundational principles like morals, values, and ethics.[1] These changes unavoidably affect the law and have seen certain legal rules and norms that may have previously been acceptable become obsolete. This dissertation proposes that the reasonable person test is one of the legal concepts facing this fate.

The reasonable person test is a central figure in the South African criminal law and the law of delict.[2] The reasonable person test can be defined as a legal fiction created by judges, that aims to standardise the application of the law by referring to a hypothetical person who demonstrates the 'average' judgment or skill expected and exhibited by the society within which it is being applied.[3] The reasonable person test asserts that the average member of society possesses certain attributes including, but not limited to, risk aversion, sound judgment, and a sense of self-preservation.[4] The test is positioned as predominantly objective and individual characteristics like intelligence, strength, maturity, temperament as well as cultural and racial norms and predispositions are not given consideration.[5] Additionally, the reasonable person test seeks to take into account both the practicalities of what 'ordinary' people do and what the judges believe they should do.

The reasonable person test was originally constructed in an objective fashion.[6] However, as part of South Africa's transition, underpinned by the values enshrined in the constitution, the South African legal system has expressed a commitment to pursuit of substantive equality

[1] R Harshe 'Understanding Transition towards Post-Apartheid South Africa' (1993) 28 *Economic and Political Weekly* 1980.
[2] R Ahmed 'The Standard of the Reasonable Person in Determining Negligence – Comparative Conclusions' *PER / PELJ* 2021 3 .
[3] F Motley 'What is the Reasonable Person Test?' https://www.prosperlaw.com.au/post/what-is-the-reasonable-person-test (accessed on 19 March 2022).
[4] *Ibid.*
[5] A Peerani 'The Reasonable Person' https://www.lawnow.org/the-reasonable-person/ (accessed on 19 March 2022).
[6] R Ahmed 'The Standard of the Reasonable Person in Determining Negligence – Comparative Conclusions' *PER / PELJ* 2021 12.

and justice.[7] This creates a direct conflict in the application of the reasonable person test as it is currently constructed. This conflict is owed to the fact that one of the major assertions of substantive equality is that the law cannot simply treat an entire population as like when significant and persistent structural obstacles inform the decision making processes of individuals and effectively prevent entire segments of a population from competing for success on even remotely equal terms.[8]

This dissertation highlights and problematises the 'reasonable person' test that has been used to establish the benchmark of acceptable conduct in various areas of the South African legal system and show its ill-suitability as a standard for behaviour in a seemingly post-colonial and post-1994 South Africa.

This dissertation asserts that the reasonable person test is ill-fitted for post-colonial and post-1994 South Africa for three main reasons. Firstly, the reasonable person test was introduced into the South African legal system as a result of colonial conquest. Because of this process of colonial conquest, the standards set by the test are based on Western conceptions of reasonableness and are therefore inherently colonial. The western conceptions were further upheld by the apartheid-era legal system. Secondly, the reasonable person test in its current construction faces many definitional challenges, including the varying understandings of "reasonableness". An objective approach to ascertain "reasonable" behaviour is problematic in the post-colonial and post-apartheid South African context because of the imperative to achieve subjective equality and substantive justice. The reasonable person test also has problematic interactions with the different facets of human life; thus making the test difficult to apply in the context of equal access and representation. Lastly, the application of the test is proven to have adverse theoretical and material effects on the people it fails to include within its definition of reasonable.

As an answer to the problems stated above, this dissertation concludes by proposing a move away from a hegemonic conception of the reasonable person test. I propose that this should

[7] E Christiansen 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race and Justice* 576.
[8] P Stancil 'Substantive Equality and Procedural Justice' (2017) 4 *Iowa Law Review* 1637.

be replaced by a transformed construction of the test that fully understands and recognises its inadequacies due to its colonial and apartheid histories. Additionally, as a means to create a version of the test that can function in a more subjective fashion, a drawing from diverse perspectives and alternative standards as well as a consideration for context and intersectionality is proposed.

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CHAPTER ONE: INTRODUCTION

1.1 Motivation

The reasonable person is a legal fiction created by judges, that aims to standardise the application of the law by referring to a hypothetical person who demonstrates the 'average' judgment or skill expected and exhibited by the society within which it is being applied.[9] The reasonable person test asserts that the average member of society possesses certain attributes including, but not limited to, risk aversion, sound judgment, and a sense of self-preservation. [10] The test is positioned as predominantly objective and individual characteristics like intelligence, strength, maturity, temperament as well as cultural and racial norms and predispositions are not given consideration.[11] Additionally, the reasonable person test seeks to take into account both the practicalities of what 'ordinary' people do and what the judges believe ordinary people should do. It is this objective position and disregard for individuality that I find issue with.

In its transformative constitutional dispensation, the South African legal system has expressed a commitment to pursuing substantive equality and justice.[12] One of the major assertions of the proponents of substantive equality is that "the law cannot simply treat an entire population as like when significant and persistent structural obstacles" inform the decision making processes of individuals and "effectively prevent entire segments of a population from competing for success on even remotely equal terms."[13]

The South African legal system's apparent commitment to the pursuit of substantive equality and justice leads me to question and problematise its continued use of the reasonable person test. Firstly, the test places a great weight on the perceptions of reasonable behaviour that have been created and upheld in decisions in previous cases. These

[9] F Motley 'What is the Reasonable Person Test?' https://www.prosperlaw.com.au/post/what-is-the-reasonable-person-test (accessed on 19 March 2022).
[10] *Ibid.*
[11] A Peerani 'The Reasonable Person' https://www.lawnow.org/the-reasonable-person/ (accessed on 19 March 2022).
[12] E Christiansen 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race and Justice* 576.
[13] P Stancil 'Substantive Equality and Procedural Justice' (2017) 4 *Iowa Law Review* 1637.

decisions were handed down in the context of an undemocratic, colonial, and racist system. These decisions are potentially dangerous as the doctrine of *stare decisis* means that courts are bound to and must consider the approaches followed in past judgments when deciding on present matters.[14] This obligation allows for the possibility for the racist and imperialist views of colonial judges to still be reflected in the determination of reasonable conduct and being today. Secondly, with regards to substantive equality and justice, the aim is to consider the uniqueness of individuals and their particular circumstances,[15] which appears to be the very concern the reasonable test seems to eradicate with its objective approach.

I argue that there is a mismatch between the current constitutional goals pertaining to equitable justice and the use of the reasonable person test.

1.2 Problem statement

The problem that I address in this dissertation is the suitability and relevance of the reasonable person test as a standard for behaviour in a seemingly post-colonial and post-1994 South Africa. I argue that the test is ill-fitted for three reasons. Firstly, the test does not account for varying definitions of reasonableness. This foundational, definitional flaw already makes the test difficult to apply. Secondly, the South African legal system is allegedly undergoing processes of decolonisation and transformation. The reasonable person test was introduced into the South African legal system as a result of colonial conquest. Because of this process of colonial conquest, the standards set by the test are based on Western conceptions of reasonableness and are therefore inherently colonial. Lastly, the aim of the test is to implement an objective approach to the classification of reasonable behaviour. An objective approach to ascertain "reasonable" behaviour is problematic in a post-colonial South African context because of the imperative to achieve subjective equality and substantive justice.

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[14] 'African Charter on Human and People's Rights - Chapter 2' https://www.justice.gov.za/policy/african%20charter/afr-charter02.html#:~:text=Previous%20judicial%20decisions%20therefore%20constitute,which%20applies%20in%20South%20Africa (accessed on 2 May 2022).

[15] S Fredman 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law 713.*

1.3 Significance of study

The reasonable person test has been applied positively in numerous domestic and international cases leading to its apparent legitimacy. There is an abundance of general research on the nature and contents of the reasonable person test. This dissertation, however, aims to address the lack of research on the use of the reasonable person test in the post-colonial and post-1994 South African context specifically. The reasonable person test is used in multiple spheres of the law. The standard of reasonableness set by the test does not only find application in courts but extends to the everyday lives of South African citizens. Many codes of conduct, societal norms, and rules, reflect the standards set by the test. This shows that a transformation of the test will have more than just a theoretical effect but may filter down to affect the day-to-day actions of many South Africans.

1.4 Research questions

In this dissertation I highlight and problematise the 'reasonable person' test that has been used to establish the benchmark of acceptable conduct in various areas of the South African legal system by answering the following questions:

I. What is the definition, origins and aims of the reasonable person test?
II. What are the theoretical and philosophical problems with the application of the test?
III. What are the practical and material problems with the application of the test?
IV. What are the possible methods of transforming the test?

1.5 Methodology/ Approach

I conducted desktop library-based research. This study was of an inquisitorial, descriptive, and critical nature. An enquiry into the history and construction of the test and how it came to hold weight in the South African legal system formed the basis for a critique of the test and an exposition of its theoretical, philosophical, and practical shortcomings.

1.6 Limitations and delineations

The major delineation set for this study is the confining of it to the South African context. By confining the study to South Africa, a focus is placed on the proclaimed goals, aims and expectations set by the constitution [16] amidst claims of the country being within its constitutional dispensation underpinned by the ideals of equality and substantive justice. It is this context that provides reasons for the critique of the reasonable person test as outlined in the motivation for study. While exploring the inherent biases of the reasonable person test, I have discovered that the issues with the test are multi-dimensional and span over many facets of being human. For the sake of this study, I limit the exploration of the inherent biases in the application of the reasonable person test to race, gender, and social class.

When planning my research, I intended to make use of case law to illustrate the hypothesised biases of the reasonable person test. The biases are not always obviously stated and I will have to draw certain inferences from an understanding of the societal and political contexts of the cases. This has proven difficult due to the sheer number of cases available that make use of the reasonable person test. Additionally, the reasonable person test is rarely the main focus in a judgment but is rather used to subliminally enforce bias. In order to handle this limitation, I have opted to reference and discuss cases where the reasonable person test is a major issue of contention that gravely influences the final ruling.

The reasonable person test is used across various fields of the law. For the purposes of this dissertation I will only be looking at the use and misuse of the test in the law of delict and in criminal law as one of the requirements to prove negligence.

1.7 Literature review

1.7.1. What is the definition, origins and aims of the reasonable person test?

In law, the reasonable person is a hypothetical person, or legal fiction, created by the courts and conveyed through case law. [17] The reasonable person belongs to a family of

[16] The word constitution is not capitalised as a direct indication that it is not the written document that is being made reference to but rather the formless and ever-changing body of constitutional norms, customs, and traditions.
A Vermeule,'The Small-C Constitution Circa 1925'(2010) *Jotwell.*

[17] *Regina v Smith,* 4 AER 289 (2000).

hypothetical figures in the law including, but not limited to: the "right-thinking member of society", the "officious bystander", the "reasonable parent", the "fair-minded and informed observer" and stretching back to Roman jurists, the figure of the *bonus paterfamilias*, which are all used to define legal standards.[18] As with most legal fictions and concepts of common law in general, the reasonable person test is somewhat susceptible to *ad hoc* manipulation or transformation.[19]

To the average person, there is the idea that in order to establish how the reasonable person would have acted or what they would have foreseen, the conduct of actual people must be assessed.[20] In actuality, this reasonable person's character and care conduct under any common set of facts, is generally decided through reasoning of good practice or policy decided by high courts.[21]

The first sighting of the "reasonable man" comes from Richard Hooker's defence of conservatism in religion in the *Laws of Ecclesiastical Polity*.[22] Additionally, in 1835, Adolphe Quetelet detailed the characteristics of *l'homme moyen* (French for; "average man"). His work is translated into English several ways and as a result, some authors use the terms "average man", "common man" or "reasonable man".[23]

Two years later in 1837, the "reasonable person" makes its first appearance in case law, in the English case of *Vaughan v. Menlove*.[24] In the case, the defendant had stacked hay on his rental property in a manner that was prone to spontaneous ignition. After he had been repeatedly warned about the way in which he had stacked the hay, the hay ignited and burned the defendant's barns and stable and then spread to the landlord's two cottages on the adjacent property. Menlove's attorney admitted his client's "misfortune of not possessing

[18] *Healthcare at Home Limited v The Common Services Agency*, UKSC 49 (2014).
[19] *Bedder v Director of Public Prosecutions*, 1 WLR 1119 (1954).
[20] 'The Legal Test in Provocation' Quentsons Legal Services. https://web.archive.org/web/20150518085503/http://www.quentsons.com/provocation (accessed on 5 May 2022).
[21] O Holmes 'Lecture III - D. Liability for Unintended Harm is Determined by what would be Blameworthy in Average Man'. https://archive.org/details/commonlaw00holmuoft/page/108/mode/2up?view=theater (accessed on 7 May 2022).
[22] J Franklin '*The Science of Conjecture Evidence and Probability Before Pascal*' (2015) 63.
[23] A. Quetelet 'On Man, and the Developement of his Faculties, &c.—[Sur l'Homme et le Developpe-´ ment de ses Facutes´ &c.]' *The Athenæum* (1835) 593-594.
[24] *Vaughan v. Menlove* 132 ER 490 (1837).

the highest order of intelligence," and argued that negligence should only be found if the jury decided Menlove had not acted "*bona fide* and to the best of his own judgment." The *Menlove* court disagreed, reasoning that such a standard would be too subjective, instead preferring to set an objective standard which provides that:

> "The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question. Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was, in substance, the criterion presented to the jury in this case and, therefore, the present rule must be discharged."[25]

The English courts upheld this standard again nearly 20 years later in the case of *Blyth v. Company Proprietors of the Birmingham Water Works,* holding that:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."[26]

The *Menlove* and *Blyth* cases show the English origins of the reasonable person test as well as the rationale behind the creation of an objective standard for reasonableness.

Miller and Perry inquire into the definition of reasonableness by first answering the question of whether reasonableness should be considered a normative or a positive notion.[27] The authors ask if the reasonable person should be defined in accordance with a particular normative ethical commitment, or in accordance with an empirically observed practice or perception and assert that it is only after this question is answered, that a concrete definition of reasonableness can be constructed.[28] The article shows preference to normative definitions of reasonableness as opposed to positive ones.[29] Their reasoning behind this is

[25] *Vaughan v. Menlove* 132 ER 490 (1837).
[26] *Blyth v. Company Proprietors of the Birmingham Water Works* 156 ER 1047 (1856).
[27] A Miller & R Perry 'The Reasonable Person' (2012) 87 *New York University Law Review* 324.
[28] *Idem* 323.
[29] *Idem* 326.

that normative definitions are logically acceptable,[30] and even though they have their own practical weaknesses, these weaknesses surface mostly at the margins and can be alleviated to some extent.[31] In contrast, the authors impose what they call the five axioms on the reasonable person as they view all of them as necessary characteristics of any positive definition.[32] These axioms require that: (a) the reasonable person will respect unanimous agreements; (b) holding all else constant, additional data in support of a particular conclusion will increase the probability that the conclusion is true; (c) the definition will not make *ex ante* distinctions between individuals in society; (d) the definition will not make *ex ante* distinctions between actions individuals may take; and (e) it will be possible, at least occasionally, to find some behaviour unreasonable.[33] It is demonstrated that a positive definition of the reasonable person cannot possibly satisfy all five of these properties and the authors therefore conclude that any statistical methodology used to study the reasonable person is necessarily invalid.[34]

Miller and Perry highlight the far-reaching implications of the various conceptions of reasonableness. They justify the importance of this study by showing that the concept of reasonableness extends beyond just the law of delict but also prevails in many other areas of both domestic and international law.[35]

Roederer explains that South Africa follows a mixed or hybrid legal system with both separate and overlapping influences from Roman-Dutch law, English common law, indigenous law, and religious law.[36] The article explains that common law systems use the reasonable person standard, and those following the civil law traditions, including South Africa, use the notion of a *diligens paterfamilias* which translates to “diligent patron of the family”. This standard is however completely interchangeable with that of the reasonable person standard in South Africa.[37] Roederer also provides the context of the reasonable man test and its use in the law of delict as one of the requirements to prove negligence. The

[30] *Idem* 1.
[31] *Idem* 391.
[32] Miller and Terry 327.
[33] Idem 328.
[34] Idem 328.
[35] *Idem* 392.
[36] C Roederer ‘Working the Common Law Pure: Developing the South African Law of Delict (Torts) in Light of the Spirit, Purport and Objects of the South African Constitution's Bill of Rights’ (2009) 26 *Arizona Journal of International &* Comparative *Law* 43.
[37] *Idem* 451.

classic test for negligence was formulated in *Kruger v Coetzee*[38] where the court stated that liability for negligence will arise if a reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and would take reasonable steps to guard against such occurrence and the defendant failed to take such steps.[39] Roederer helps to provide an understanding of how the notion was inherited from the English common law and incorporated into the South African legal system.

1.7.2. What are the theoretical and philosophical problems with the application of the test?

Heyns provides an in-depth investigation of the reasonableness legal norm and the reasonable person test in South Africa.[40] He begins by questioning the very need for the norm and asks what level of importance should be placed on the legal norm of reasonableness given the deep divisions in the value structures of the South African society.[41] He explains that deciding an answer to this question is difficult because of the history of South Africa and would need to be a decision of which culture's value system should take precedence whether be it African or Western, or a combination of both.[42]

Heyns is also able to highlight the significance of the reasonableness standard beyond just deciding negligence in criminal and delictual matters.[43] He explains how the legitimacy of a legal system ultimately depends on the degree to which its rules and enactments are considered reasonable or just by the people subjected to them. Party to this, the legal system should be perceived, as far as is possible, to be unbiased or/and to reflect to a significant extent the biases of everyone subjected to it. The interpretation of reasonableness therefore becomes important as it may have an impact on the degree of legitimacy of the legal system in the community as a whole.[44]

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[38] 1966 (2) SA 428 (A).
[39] *Ibid.*
[40] CH Heyns 'Reasonableness in a Divided Society' (1990) 107 *South African Law Journal* 107 (2) 279.
[41] *Ibid.*
[42] *Idem* 280.
[43] *Idem* 283.
[44] *Ibid.*

Through using the examples of both witchcraft (a belief mostly held by African members of society) and racism (common in Western members of society), Heyns illustrates how vast and varying perceptions of reasonable conduct may be in the South African context.[45]

In his conclusion Heyns does not formulate clear guidelines or prescriptions on the way forward for the transformation of the reasonable person. He does however, acknowledge that in order to have a new start and jurisprudential framework, there must be a conviction that society is an organic whole and that the interests of one must be seen as the interests of all.[46]

This article will form the basis for my problematisation of the reasonable person test in South Africa as it expresses the same concerns around the suitability of the test in a transformed, post-colonial society and explains both the theoretical and practical effects of using a standard of reasonableness that is highly objective and in line with colonial western thought.

Martin conducts a jurisprudential examination of the reasonable man test, that furthers the discussion around the extent to which a single standard of care can ever be an objective test of behaviour.[47] The focus of this article is however, the gender neutrality of the test.[48] Martin begins this inquiry by looking at the effects of the obviously masculine language used in the test.[49] She begins by explaining how the language of orthodox jurisprudence mirrors the language of science,[50] and then shows how the language used to formulate the test is heavily influenced by a positivist approach to the law,[51] that aims to reduce the content of law to single, universal and quasi-scientific rules.[52] Martin's conclusion is that this positivist language is inherently patriarchal and inconsistent with feminist legal theory.[53] The second area of focus for Martin is that of the discrepancies between the traditional and female

[45] *Idem* 293.
[46] *Idem* 303.
[47] R Martin 'Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury' (1994) 23(3) *Anglo-American Law Review* 334.
[48] *Ibid.*
[49] *Idem* 341.
[50] *Idem* 335.
[51] *Idem* 352.
[52] *Idem* 335.
[53] *Idem* 353.

conceptions of morality.[54] The traditional determinations of morality are based on a rights and duties paradigm, and the reduction of justness and fairness to rights and duties has also strongly influenced the development of the law of negligence.[55] An alternative model of justice and fairness proposed by Martin is one that is not solely based on rights and duties but on responsibilities and the reduction of conflict in society.[56] To conclude the article, Martin asserts that the feminist critique provided of the reasonable man test rejects an ideal standard of behaviour based on the experience, values and morality of a male person as a frame of reference for determining legal liability.[57] This article proved extremely valuable in my research as it provides a view on one of the outlined theoretical problems with the reasonable-man test in the context of an equal, democratic and decolonial society. Additionally, the article also goes a step forward and advocates for the complete abandoning of the reasonable-man test, and asserts that a complete replacement of the test and not a move to an alternative standard of behaviour is needed as there can be no single ideal or objective measure which is representative of the ideas of reasonableness of all of society.[58] Martin proposes that the liability in negligence should be decided based on the scope of responsibility of each individual actor and each individual activity. Such responsibilities will need to be imposed not by individual judges but by Parliament, where the framing of the law can openly reflect, to the extent that this can ever be possible, the morality of society.[59]

The 'reasonable-person' test's interaction with race and ethnicity.

When looking for material on the interaction of the reasonable person with race and ethnicity, I was continually directed to the American interpretation of the issue which finds most of its practical case study in scenarios of police bias and violence. Although my study is focused on the transformation of the test in South Africa, I do think the American perspective is able to provide insight and perspective of how the construction of the reasonable person is affected by ethnic and racial issues.

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[54] *Idem* 334.
[55] *Ibid.*
[56] *Ibid.*
[57] *Idem* 342.
[58] *Idem* 372.
[59] *Idem* 371-372.

Marvin and Scott Astrada begin by pointing out the fact that one of the most pressing internal challenges facing the administration of justice today is its capacity to have equal application and protection of the law.

In the context of American constitutional law, more specifically, the Fourth Amendment, the conceptualisation of reasonableness is a lynch pin for the functioning of law as a process. This conception of reasonableness however also has the potential to be the most insidious forms of injustice for people of colour and other marginalised communities.[60] M & S Astrada outline the various conversations and precautions members of ethnic communities have to have amongst themselves about police brutality and violence.[61] A commentary given by a Chief Justice reveals that the historical conception of a "reasonable person" employed by the law has become a means of perpetuating a politics of racial and ethnic exclusion of the "other," who in this case, is a non-white racial or ethnic subject. This "other" is required to comport themselves as a reasonable person that bears very little resemblance to their lived reality. This results in them being constrained within a concept that excludes them by imposing a set of norms, values and essentially an entire worldview, that may be reflective of the constructed reasonable person, but that is not reflective of their individual worlds.[62] M & S Astrada also show how the reasonable person test is a contributory factor to the law's significant disconnect from the human communities that are emplaced into the legal process.[63]

This article proved valuable as the authors explain how the problem of reasonableness is central to the relevance of the law for various communities. It also provides a voice from a judge who themselves has had to apply the test and has seen the racial issues with it.

1.7.3. What are the practical and material problems with the application of the test?

[60] M Astrada & S Astrada 'The Enduring Problem of the Race-Blind Reasonable Person' (2020) *American Constitution Society Expert Forum Blog* 2.
[61] *Idem* 3.
[62] *Idem* 4.
[63] *Idem* 5.

My illustration of the practical problems with the reasonable person test can be described as a sliding scale. It begins with an analysis of the *Rex v Mbombela*[64] case which as the most problematic of the cases discussed in the chapter, highlights a completely untransformed and non-contextual application of the reasonable person test. Next, I analyse *Afriforum v Malema*[65] which is a more recent judgement that applies a slightly higher level of consideration. Despite this, the judgement still exposes the un-transformed nature of the reasonable test due to the courts refusal to sufficiently engage with the ideological nature of law and the politics of race that help keep colonial formalism and racism embedded in the law and legal culture. Finally, I analyse *Qwelane v South African Human Rights Commission and Another*[66] which acts as a signal for how a tweaked version of the objective reasonable person test can aid in the acquisition of true substantive justice.

The 1933 case of *R v Mbombela* addresses the standard of reasonableness as a requirement to prove negligence.[67] The accused, between eighteen and twenty years of age, living in a rural area, was described by the court as of "rather below the normal" intelligence. On the day in question, some children were outside a hut they supposed to be empty. They saw what they described as "something that had two small feet like those of a human being." They were frightened and called the accused, who apparently thought the object was a "tikoloshe," an evil spirit that, according to the widespread, culturally accepted superstitious belief, occasionally took the form of a little old man with small feet. According to this belief, it would be fatal to look the "tikoloshe" in the face. The accused went to fetch a hatchet and, in the half-light, struck the form several times with the hatchet. When he dragged the object out of the hut, he found that he had killed his young nephew. Mbombela's defence was *bona fide* mistake: He believed he was killing a "tikoloshe," not a human being. A jury in the trial court found him guilty of murder. Applying a standard of reasonableness that ignored the "race or the idiosyncrasies [sic], or the superstitions, or the intelligence of the person accused," the Appellate Division held that, although his belief was unreasonable, it was based on a *bona fide* mistake of fact, so the killing fell within the Native Territories

[64] *R v Mbombela* 1933 AD 269.
[65] *Afriforum v Malema* 2011 6 SA 240 (EqC).
[66] *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) (31 July 2021).
[67] R Ahmed 'The Standard of the Reasonable Person in Determining Negligence – Comparative Conclusions' *PER / PELJ* 2021(24) 2.

Penal Code definition of culpable homicide rather than murder.[68] This case provides a clear indication of how the definition of reasonableness, although in the reasonable person test is constructed as objective, is an inherently subjective standard that is heavily influenced by racial, cultural and spiritual beliefs.[69] It leads us to consider the possibility that had Mbombela been measured against his own beliefs he would've been found to have acted reasonably.

I intend to provide a full assessment of how the intentionally objective nature of the reasonable person test is ill-fit for South Africa's subjective transformative goals.

1.7.4. What are the possible methods of transforming and decolonising the test?

Himonga and Diallo examine the idea of decolonising the law in African states previously under the influence of an English or Roman-Dutch colonial/apartheid legal history.[70] They begin by situating the decolonisation of the law as a framework where the law is defined from a non-colonial position and from alternative legal epistemologies.[71] As a move from a hegemonic or Eurocentric conception of law connected to legal cultures historically rooted in colonialism (and apartheid) in Africa, they assert that decolonisation must draw from different sources of law and normative agencies to promote the transformative potential of law in achieving more social and economic justice.[72]

The authors explain that there are three main elements that are essential for the decolonisation of the law namely the inclusion of living customary law in legal education and adjudication; a shift in the theoretical paradigm within which law is taught and practiced; as well as an interdisciplinary study of the law.[73]

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[68] *R v Mbombela* 1933 AD 269.
[69] P Lenta 'The Tikoloshe and the Reasonable Man: Transgressing South African Legal Fictions' (2004) 16 *Law and Literature.*
[70] C Himonga & F Diallo F 'Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law' *PER / PELJ* 2017(20) 1.
[71] *Idem* 5.
[72] *Ibid*.
[73] *Idem* 7.

This reading proves valuable to my research as it is already situated in the South African context. By using the teaching of living customary law as an example to illustrate the decolonisation of the law[74] it shows how decolonisation can be effected in an area of the law that is meant to represent the legal realities of its subjects.[75]

1.8 Chapter outline

Chapter two provides an understanding of the definition, origin, nature, and scope of the reasonable person test by firstly describing its contents and the historical and chronological emergence of the test starting with its European roots. Following this, an explanation of how the reasonable person test came to be used in the current South African legal system will situate the test as a colonial instrument. Lastly, the reasonable person test will be classified according to the dimensions of social enquiry.

Chapter three explains the definitional challenges of the reasonable person test. The first of these challenges is that of defining reasonableness itself. The second challenge that will be discussed is the inherent colonial nature of the reasonable person test and how this is illustrated through its interactions with race, gender, and class. Finally, the chapter will narrow down the problematisation of the reasonable person test to its application in a post-colonial South Africa. The test's objective standards will be pinned against South Africa's subjective goals of equality and justice to show how the reasonable person test undermines democracy.

Chapter four goes a step further and explains the real-life consequences and practical problems of implementing the reasonable person test as it is currently constructed in a diverse and polarised society. This is done by discussing the cases of *Rex v Mbombela* and *Afriforum v Malema.*

After problematising the reasonable test in both the theoretical and practical sense, chapter five puts forward three actions that could possibly aid the transformation of the reasonable person test.

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[74] *Idem* 3.
[75] *Idem* 16.

CHAPTER TWO: THE CONCEPTION AND HISTORY OF THE REASONABLE PERSON TEST

2.1 Introduction

Before a critique on the reasonable test can be given, we must first understand from an archival perspective, how and why the test came into existence. Additionally, a thorough explanation of the present nature of the test needs to be given in order to understand why there is a need for its transformation.

This chapter seeks to explain how the reasonable person test came to be used in the current South African legal system. This chapter will add to the definition provided in the introduction by outlining the nature, scope, aims and standards of the reasonable person test.

The information from this chapter will situate the reasonable person test as a colonial instrument and lay ground for a discussion on the theoretical and philosophical problems with the reasonable person test in chapter three.

2.2 The introduction and use of the test in South Africa.

In present day South Africa, the reasonable person test is most frequently used in the law of delict, which primarily engages with circumstances where one party is trying to claim compensation from another for harm that they have suffered.[76]

The law of delict is a product of colonial influence as prior to the arrival of European settlers in the Cape, the inhabitants of the territory that is now known as South Africa employed their own systems of law that we have now come to collectively call customary/indigenous law.[77] Under customary law there is no distinction made between criminal law and the law of

[76] M Loubser *et al The Law of Delict in South Africa* (2009) 4.
[77] M Ndulo 'African Customary Law, Customs, and Women's Rights' (2011) 18(1) *Indiana Journal of Global Legal Studies* 88.

delict,[78] and when disputes between two parties arise, the restorative justice approach is used. Under this approach, great emphasis is placed on solidarity, group interests, rights, duties and obligations.[79] The aim under customary law is not to penalise or punish an individual but rather to restore justice based on healing between the parties as well as the community.[80] There is no explicit mention of reasonableness under customary law, but it may be inferred in the idea of restorative justice.[81]

The reasonable person test's first sighting in South African law comes from its use to formulate the classic test for negligence in the case of *Kruger v Coetzee.*[82] In the case, the court stated that liability for negligence will arise if a reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss and would take reasonable steps to guard against such occurrence and the defendant failed to take such steps.[83]

Due to the lack of a mention of reasonableness under customary law, we can conclude that it made its way into the South African mixed legal system[84] through colonialism and the English common law, thus directly making it a colonial instrument. This is important as it is the first justification for a study into the transformation of the reasonable person test.

2.3 The scope and nature of the reasonable person test

The reasonable person test was defined in the introduction as the "a legal fiction created by judges, that aims to standardise the application of the law by referring to a hypothetical

[78] R Ahmed 'The Historical Development of the Concept Reasonableness in the Law of Delict (2019) 82:2 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 265.
[79] *Idem* 264.
[80] *Ibid.*
[81] R Ahmed 'The Historical Development of the Concept Reasonableness in the Law of Delict (2019) 82(2) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law)* 266.
[82] *Kruger v Coetzee.* 1966 (2) SA 428 (A).
[83] *Ibid.*
[84] C Roederer 'Working the Common Law Pure: Developing the South African Law of Delict (Torts) in Light of the Spirit, Purport and Objects of the South African Constitution's Bill of Rights' (2009) 26 *Arizona Journal of International & Comparative Law* 431.

person who demonstrates the 'average' judgment or skill expected and exhibited by the society within which it is being applied." In order to provide a decolonial critique of the reasonable person test it is important to fully understand its goals and what scope its nature actually allows for.

2.3.1 The objective nature of the reasonable person test

Like most legal rules, standards, and tests,[85] the reasonable person test is constructed in a way that is said to be purely objective.[86] This is evident from the decision given by the court in *Menlove* which created the test. The court explicitly seeks to set an objective standard for deciding cases by stating that:

> "The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question. Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was, in substance, the criterion presented to the jury in this case and, therefore, the present rule must be discharged."

By situating the reasonable person test as an objective method of assessment, this means it has the aim of applying uniformly and universally to all parties.[87] This aim is significant because when an objective measure is utilised in a personified form, debates around how generic or specific the measure must be, as well as whether or not (and how) to factor in certain personal traits soon follow.[88] We can therefore see that by the reasonable person

[85] S Stern '*R. v. Jones* (1703): The Origins of the "Reasonable Person' in P Handler & H Mares & I Williams (eds) Landmark Cases in Criminal Law (2017) 59.
[86] F Motley 'What Is The Reasonable Person Test?' https://prosperlaw.com.au/post/what-is-the-reasonable-person-test/ (Accessed on 1 August 2022.)
[87] S Stern '*R. v. Jones* (1703): The Origins of the 'Reasonable Person' in P Handler & H Mares & I Williams (eds) Landmark Cases in Criminal Law (2017) 59.
[88] *Ibid.*

test aiming to personify an objective standard, the resulting personification acquires specific features. It is this specificity that ultimately undermines the test's universal application.[89]

The argument here is not completely against the uniformity and universality of legal rules. In its formal application universality can be seen as a positive feature that provides access by making certain legal norms applicable to all legal subjects.[90] For example, in the context of human rights, universality is understood as being closely related to the principles of equality and dignity because human rights apply to every person, simply by virtue of being human, regardless of any other status or particular characteristics.[91]

However, in a material sense and in the context of the reasonable person test in South Africa, a universal approach cannot work because of how profusely diversity pervades our society.[92] The concept of reasonableness is often connected to several ethical or moral, considerations;[93] and this is further justification for why universality is ill suited. The diverse and stratified nature of the South African society makes universality almost implausible because even if there were to be moral universals,[94] one might think them too few or too vague, and the settings of their operation too diverse, to inform legal rules and norms.[95]

The discussion of the chronological history of the reasonable person test provided above proves that the reasonable person test is a western creation and in the South African context, a colonial instrument. It can therefore be said that it was created to represent the western view of reasonableness. Given the discussion on how its objective application is

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[89] S Stern '*R. v. Jones* (1703): The Origins of the 'Reasonable Person' in P Handler & H Mares & I Williams (eds) Landmark Cases in Criminal Law (2017) 59.
[90] M Mahlmann 'Universalism' (2016) https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e500#:~:text=In%20law%2C%20universalism%20can%20have,applicable%20to%20all%20human%20beings (Accessed on 17 August 2022).
[91] 'Universality and Diversity, Special Rapporteur in the Field of Cultural Rights' https://www.ohchr.org/en/special-procedures/sr-cultural-rights/universality-and-diversity (Accessed on 17 August 2022).
[92] E Blumenson 'How are Human Rights Universal?'(2020) *Carr Center for Human Rights Policy* 2.
[93] O Corten & Robert Kolb 'Reasonableness in International Law' (2021) https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1679 (Accessed on 18 August 2022).
[94] 'The People of South Africa' https://www.sa-venues.com/sa_languages_and_culture.htm (accessed on 6 June 2022).
[95] E Blumenson 'How are Human Rights Universal?'(2020) *Carr Center for Human Rights Policy* 2.

closely linked to universality it can be concluded that applying a reasonable person test objectively creates the risk of the test being utilised as a weapon of western cultural hegemony.[96]

2.3.2 The 'reasonable-person' test according to the dimensions of social inquiry.

Another key aspect of the nature of the reasonable person test is the scope within which it situates 'reasonableness' itself. The definitional challenges of defining reasonableness are dealt with under chapter 3, however for the sake of this chapter, I look to make a philosophical inquiry into whether the 'reasonableness' aspired to by the reasonable person test is of a positive or normative nature. This distinction is important because of the commitments that the transforming South African legal system looks to uphold.[97]

A positive theory is one that simply expresses what is and explains how the world works in a value-free way. In contrast, a normative theory provides a value-based view about what the world ought to be.[98] In terms of the reasonable person test, the difference between these two would be whether the reasonable person is defined positively, in accordance with an empirically observed practice or perception or normatively in accordance with a particular normative ethical commitment.[99]

The constitution contains and endorses a normative legal framework as it is underpinned by a set of higher, fundamental values of an open and democratic society based on human dignity, equality and freedom.[100] Section 2 of the constituion provides that it is the "supreme law in the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed

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[96] A Shaheed & R Richter 'Is Human Rights a Western Concept' https://theglobalobservatory.org/2018/10/are-human-rights-a-western-concept/ (Accessed on 27 November 2021).
[97] E Kibet & C Fombad 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa' (2017) 17 *African Human Rights Law Journal* 348.
[98] A Lanes 'Is a Building Task a Positive or a Normative Theory?' http://www.atlas101.ca/pm/concepts/positive-or-descriptive-vs-normative/#:~:text=%E2%80%9CPositive%20theory%20is%20a%20theory,how%20it%20should%20to%20work. (Accessed on 21 August 2022)
[99] A Miller & R Perry 'The Reasonable Person' (2012) 87 *New York University Law Review* 323.
[100] F Moosa 'Understanding the "Spirit, Purport and Objects' of South Africa's Bill of Rights' (2018) *HSOA Journal of Forensic Legal & Investigative Sciences.*

by it must be fulfilled".[101] True to its normative nature, the constitution is based on subjective values. Though the reasonable person test is a normative, flexible and value based standard,[102] it does embrace certain positivist principles.

Positivist legal theory is characterised by its assertion that there is no necessary connection between the law and morality. Under positivist theory, the existence and contents of a law do not depend on whether or not it lives up to the ideals of justice, democracy, or even morality.[103]

The first aspect of the reasonable person test that is compatible with positivist theory is its commitment to objectivity. Positivism emphasises the objectivity of law, treating it as a social fact that can be objectively determined and applied.[104] Similarly, the reasonable person test aims to establish an objective standard of behaviour by considering how a hypothetical average person would act in a given situation.[105]

Secondly, positivist legal theory separates the law from subjective moral judgments.[106] The reasonable person test, in its application, does not consider the subjective intentions or moral beliefs of the individual involved. Instead, it places its focus on the objective standard of how a reasonable person would behave, irrespective of their personal moral values.[107]

While these elements illustrate some alignment between the reasonable person test in its current construction and positivist theory, the reasonable person test is only one aspect of legal analysis and does not encompass the entirety of positivist legal theory. These

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[101] The Constitution of the Republic of South Africa, 1996.
[102] Ahmed 14 pg 4.
[103] M Sevel & B Leiter 'Legal Positivism' (2010) Available at https://www.oxfordbibliographies.com/display/document/obo-9780195396577/obo-9780195396577-0065.xml#:~:text=Legal%20positivism%20is%20one%20of,between%20law%20and%20morality%E2%80%94more (Accessed on 21 April 2023).
[104] K Himmer 'Legal Positivism' *The Internet Encyclopedia of Philosophy* available at https://iep.utm.edu/legalpos/ (Accessed on 13 July 2023).
[105] 'The Reasonable Person Standard: Measuring Negligence' available at https://genthelaw.com/reasonable-person-standard/ (Accessed on 13 July 2023)
[106] L Green & T Adams 'Legal Positivism' *The Stanford Encyclopedia of Philosophy* (2019) available *at:* https://plato.stanford.edu/archives/win2019/entries/legal-positivism/ (Accessed on 13 July 2023).
[107] WA Seavey 'Negligence. Subjective or Objective?'(1927) *Harvard Law Review 41 (1) 10.*

similarities are however enough to raise suspicion into the reasonable person test being in conflict with the normative nature of the constitution and the bill of rights. This gives a justification for the transformation of the reasonable person test from a moral standpoint. Because the test forms part of the common law, there is also an obligation (under section 39(2) of the constitution) for the test to be developed[108] to be completely in line with the normative ideals of the constitution

2.4 Conclusion

By describing the European roots of the reasonable person test and how it cannot be traced back to any specific rule of customary law, this chapter has made it clear that the reasonable person test found its way into the South African legal system through colonial means. This is therefore the first piece of evidence that warrants the test's transformation.

The bulk of the discussion around the problems with the reasonable person test in the context of a post-colonial society are dealt with under chapters 3 and 4. However, if we directly compare the goals and standards of a post-colonial South Africa and those of the un-transformed reasonable person test we will see a degree of misalignment.

The goals and standards of a post-colonial South Africa include but are not limited to; an awareness of the imposed social, psychological, and cultural inferiority enforced by being in a colonised state, the active struggle for ethnic, cultural, and political autonomy, and a growing awareness of cultural overlap and hybridity.[109] In addition to this, post-colonialism in South Africa seeks to convey legitimacy on the experiences, perspectives, and cultural identities of formerly colonised peoples. The un-transformed reasonable person test is misaligned with these goals. The test's history and objectivity makes it unable to contort itself to accommodate the ethnic and cultural hybridity.

[108] The Constitution of the Republic of South Africa, 1996.
[109] 'Key Terms' (2023) Dallas Baptist University https://www.dbu.edu/mitchell/worldview-literature/post-colonialism/key-terms.html (Accessed on 10 September 2023).

CHAPTER 3: THE THEORETICAL AND PHILOSOPHICAL PROBLEMS WITH THE REASONABLE PERSON TEST.

3.1 Introduction

From Chapter two, there is now a clear outline of how the concept of the reasonable person was developed, the specifics of what it encapsulates and evidence of it being a colonial instrument in the South African legal system.

The legitimacy of a legal system ultimately depends on the degree to which its rules and enactments are considered reasonable and just by those subjected to them.[110] An important aspect of legitimacy is that a legal system should be perceived, as far as is possible, to be unbiased or, more correctly, to reflect, to a significant extent, the biases of everyone subjected to it.[111] These biases are informed by the contextual, cultural and historical situation of a people. The legitimacy of a legal system will be strengthened by how well it is able to demonstrate the theoretical and philosophical views of its subjects.[112] South Africa currently finds itself in its 'formally' defined post-colonial and post-apartheid era. The use of the word 'formally' is intentional as one cannot comfortably make that assertion when legacies of these eras are still so perceptible in the real-life condition and in the application of laws in South Africa.[113] When delineating the post-colonial and post-apartheid time frames, it is immediately relevant to distinguish between them as purely temporal aftermaths (a period of time after colonialism and apartheid, empirically defined) and them as theories (metaphysical, ethical and political theories dealing with issues such as identity, race, ethnicity and the challenges of developing post-colonial national identities).[114]

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[110] CH Heyns 'Reasonableness in a Divided Society' (1990) 107 *South African Law Journal* 107 (2) 280.
[111] *Ibid.*
[112] Waldron, Jeremy, 'The Rule of Law', *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.), forthcoming URL = <https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/>.
[113] CM Shackleton & N Gwedla (2021) 'The Legacy Effects of Colonial and Apartheid Imprints on Urban Greening in South Africa: Spaces, Species, and Suitability.' *Frontiers in Ecology and Evolution* 1.
[114] W Greffwrath 'The Demise of Post Apartheid and the Emergence of Post-Colonial South Africa' (2016) *Journal for Contemporary History* 41(2) 164-165.

According to the principle of legitimacy discussed above, all legal principles must reflect the values and goals characteristic of this transformed era. If they do not, there is a constitutional obligation to develop and transform them.[115] In order for this to take place in the context of the reasonable person test, it is important to fully identify, explain and critique its colonial elements. This chapter aims to do just that by firstly showing the definitional challenges of reasonableness in and of itself. This is followed by a clear illustration of the colonial nature of the reasonable person test through its interactions with race and gender. Finally, the chapter will narrow down the problematisation of the reasonable person test to its application in a post-colonial South Africa. The test's objective standards will be pinned against South Africa's subjective goals of equality and justice to show how the reasonable person test has not been sufficiently transformed according to the directive provided in section 39(2) of the constituion.[116]

3.2 The definitional challenges of the reasonable person test

The logical place to begin with a critique on the reasonable person test is an exposition of its definitional challenges and biases. The South African law adequately provides guidance for who is considered a person by stating that every natural person is a legal subject who bears juristic capacity, subjective rights (including the appropriate entitlements) and legal duties.[117] The contention arises around the definition of the word reasonable and the idea of reasonableness as it is multi-vocal and permeable.[118]

The dictionary defines reasonableness as "sound judgment", "fairness" and "the quality of being as much as is appropriate or fair; moderateness".[119] The first definitional challenge is a critique on the plainness of such a definition. The meaning of reasonableness may shift from one context to another, therefore using only this definition to understand the standard of reasonableness expected from the reasonable person test will leave us with a blanket

[115] The Constitution of the Republic of South Africa, 1996.
[116] *Ibid.*
[117] T Boezaart *Law of Persons* (2020) 3-4.
[118] AL Epstein 'The Reasonable Man Revisited: Some Problems in the Anthropology of Law' (1973) 7 *Law & Society Review* 645.
[119] The Oxford English Dictionary https://languages.oup.com/research/oxford-english-dictionary/ (accessed on 16 June 2022).

word that obscures rather than advances the analysis.[120] The legal use of the word 'reasonable' has also been criticised for being intentionally vague or indefinite, and merely a means of delaying what should be discussed and deciding to resolve a potential issue or problem.[121]

The second definitional challenge comes in deciding whether the value of reasonableness used in the reasonable person test should be considered as a normative or a positive notion.[122] This distinction is important because it will inform whether the reasonable person is defined in accordance with a particular normative ethical commitment, or in accordance with an empirically observed practice or perception.[123] In the South African post-colonial society, legal norms are still being applied within a system of precedents.[124] Because of this it can be argued that legal norms need to hold an appropriate level of certainty and permanency.[125] The third definitional challenge with the concept of reasonableness is its inability to do this as its individual conceptions are dependent on both situational and temporal factors.[126] The situational factors are informed by an individual's subjective background, biases and predispositions.[127] Given the diverse composition of the South African population,[128] it can be deduced that several different situational realities exist and therefore a corresponding number of ideas of reasonableness will be present. With regards to the temporal factors surrounding reasonableness, evidence for its malleability is present in the fact that in just the past decade many established behaviours, morals and value systems that have long been regarded as unreasonable, are coming to be explained and

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[120] AL Epstein 'The Reasonable Man Revisited: Some Problems in the Anthropology of Law' (1973) 7 *Law & Society Review* 645.
[121] S Carr 'Let's be reasonable – the meaning of reasonableness – part 1' https://www.ellingercarr.com/lets-be-reasonable-the-meaning-of-reasonableness-part-1/\ (Accessed on 1 July 2022).
[122] A Miller & R Perry 'The Reasonable Person' (2012) 87 New York University Law Review 324.
[123] *Idem* 323.
[124] 'African Charter on Human and People's Rights- Chapter 2' https://www.justice.gov.za/policy/african%20charter/afr-charter02.html#:~:text=Previous%20judicial%20decisions%20therefore%20constitute,which%20applies%20in%20South%20Africa (Accessed on 2 May 2022).
[125] T Zych 'In search for legal certainty. Precedent and predictability of court decisions in the common law tradition' https://collegiumintermarium.org/en/in-search-for-legal-certainty-precedent-and-predictability-of-court-decisions-in-the-common-law-tradition/ (Accessed on 4 July 2022).
[126] S Zorzetto 'Reasonableness' (2015) 107 *Italian Law Journal* 110.
[127] *Idem* 138.
[128] 'The people of South Africa' https://www.sa-venues.com/sa_languages_and_culture.htm (Accessed on 6 June 2022).

accepted as the opposite.[129] A simple example of this change is the thoughts around homosexuality and gender identity. Previously, diversions from the traditional male-female relationships and gender identities were criminalised. We now have legal protection for those who choose to divert from those boundaries under various statutes and safeguarded by the constitution.[130] This expansion of the law's scope is just one example from many that prove that adaptation and adjustment is critical to the law's retention of legitimacy.

Finally, a notable problem with defining reasonableness in a post-colonial society is the historical origins of the currently accepted definitions of reasonableness as highlighted under chapter one. The constructions of reasonable conduct that inform the reasonable person test come predominantly from traditional western philosophy.[131] This means that the reasonableness standard largely reflects the values, morals, and biases of the western world. It is therefore implied that the standard of reasonableness currently being used comes from the same scholars and schools of thought that have also justified racism, sexism, and many other forms of prejudice.[132] Section 39(2) of the constituion now inhibits the reasonable person from outwardly being racist, sexist or displaying any other prejudices;[133] but many constitutional skeptics and abolitionists assert that the stance of the constitution is not firm enough and is "non-discriminatory" rather than "anti-discriminatory."[134] By taking a stance that is "non-discriminatory" the constitution is agreeing to not actively provide means of mistreatment, destruction and domination of one group over another.[135] An "anti-discriminatory" stance in contrast would be a commitment to laboriously seeking out,

[129] 'Societies change their minds faster than people do' https://www.economist.com/graphic-detail/2019/10/31/societies-change-their-minds-faster-than-people-do (Accessed on 10 July 2022).
[130] 'Gay and Lesbian Rights' https://www.concourt.org.za/index.php/gay-and-lesbian-rights (Accessed 10 September 2023).
[131] M Linsenayer 'Be Reasonable!' (2012) https://partiallyexaminedlife.com/2012/08/21/be-reasonable/ (Accessed on 10 July 2022).
[132] A Sears 'Aristotle, father of scientific racism. How the famous philosopher paved the way for books like "The Bell Curve."' (2018) https://www.washingtonpost.com/news/made-by-history/wp/2018/04/06/aristotle-father-of-scientific-racism/ (Accessed on 10 July 2022).
[133] The Constitution of the Republic of South Africa, 1996.
[134] E Fakir 'The South African Constitution and its malcontents - Is the Constitution permissive or prohibitive of social and economic justice?' (2021) https://www.polity.org.za/article/the-south-african-constitution-and-its-malcontents---is-the-constitution-permissive-or-prohibitive-of-social-and-economic-justice-2021-06-07 (Accessed on 15 July 2023).
[135] 'What is a non-racist?' (2023) Boise State University https://boisestate.pressbooks.pub/antiracist/chapter/what-is-a-non-racist/ (Accessed on 10 September 2023).

unmasking, engaging and preventing discriminatory behaviour.[136] In the context of the reasonable person test, this would mean that the test must not only be non-discriminatory in itself but when the test is applied, there should be an investigation into all the relevant conduct with the aim of uncovering, labelling and setting a precedent of unreasonableness for exclusionary and discriminatory behaviour.

3.3 The interaction of the reasonable person test with different facets of human life

3.3.1 Race

The issue of race does not fit neatly into the conventional objective or subjective analysis of the reasonable person test, but because of how greatly one's race affects their interactions with the law and society on a whole, the conflict between the reasonable person test and race issues is a relevant consideration.[137] If the reasonable person test is to be used as the standard according to which everyone in society is measured,[138] excluding considerations of race, will undermine any effort to have universal applicability and desired objectivity and instead perpetuate a white, male and privileged norm.[139] In the South African context specifically, excluding race as a factor in the determination of reasonable conduct will create a reasonableness standard which is detached from reality and subjectively contributes to the further marginalisation of disadvantaged groups.[140]

Racism is irrefutably the most crippling, pervasive and enduring effect of colonialism in South Africa.[141] Beginning in 1652 with the arrival of Jan van Riebeck in the Cape,[142] South

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[136] NB du Toit 'Anti-Racism vs. Non-racialism? A Fork in the Road' (2019) https://www.sun.ac.za/english/Documents/2019/N%20Bowers%20Du%20Toit%20-%20Antiracismethics.pdf (Accessed 10 September 2023).
[137] AH Bloom 'Objective Enough: Race is relevant to the reasonable person in Criminal Procedure' (2023 forthcoming) 19 *Stanford Journal of Civil Rights and Civil Liberties* 1.
[138] CH Heyns 'Reasonableness in a Divided Society' (1990) 107 *South African Law Journal* 107 (2) 279.
[139] AH Bloom 'Objective Enough: Race is relevant to the reasonable person in Criminal Procedure' (2023 forthcoming) 19 *Stanford Journal of Civil Rights and Civil Liberties* 5.
[140] *Idem* 6.
[141] D Olusoga 'The roots of European racism lie in the slave trade, colonialism – and Edward Long' https://www.theguardian.com/commentisfree/2015/sep/08/european-racism-africa-slavery (Accessed on 2 July 20221).
[142] J Saul 'The making of South Africa…and apartheid, to 1970' in South Africa-The Present as History from Mrs Ples to Mandela and Marikana 21.

Africa has a history characterised by colonial conquest.[143] Carried on through the apartheid regime from 1948 to 1994, race and racism were notoriously used to exclude non-whites from economic and political participation.[144] Legislation like the Bantu Education Act[145] and the Group Areas Act[146] were used to subjugate and purposefully marginalised non-white people.[147] The effects of apartheid-era legislation can still be felt today through the presence of many black-inhabited, impoverished townships and a weak educational system.[148]

A less common and more extreme use of race and racism that is also worthy of acknowledgement was as a means of dehumanising non-whites through the self-deceiving belief that the white race is not only superior to any other race but also, that the white "race is the only race qualified to be considered human".[149] This direct attack on the personhood of non-whites is particularly important for a critique on the reasonable person test's ability to be applicable in the post-colonial era as if non-whites are not seen as human, they are immediately excluded from the ambit of reasonableness purely on a definitional technicality.[150]

South Africa's population is comprised of 80.8% black people.[151] If the reasonable person test is to be legitimate and consider the experiences of the majority of the subjects it looks to apply to, one could easily argue that it would need to be empirically constructed under

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[143] J Modiri 'Conquest and constitutionalism: first thoughts on an alternative jurisprudence' (2018) 34(3) South African Journal on Human Rights 304.
[144] S Terreblanche 'The reproduction of systemic exclusion in post-apartheid Africa' https://www.ekon.sun.ac.za/sampieterreblanche/wp-content/uploads/2020/07/Reproduction-of-systemic-exclusion-in-post-apartheid-South-Africa.pdf (Accessed on 21 June 2022).
[145] Bantu Education. Act No. 47 of 1953.
[146] Group Areas Act No. 41 of 1950.
[147] S Terreblanche 'The reproduction of systemic exclusion in post-apartheid Africa' https://www.ekon.sun.ac.za/sampieterreblanche/wp-content/uploads/2020/07/Reproduction-of-systemic-exclusion-in-post-apartheid-South-Africa.pdf (Accessed on 21 June 2022).
[148] Z Larson 'South Africa: Twenty-Five Years Since Apartheid' https://origins.osu.edu/article/south-africa-mandela-apartheid-ramaphosa-zuma-corruption?language_content_entity=en (Accessed on 16 June 2022).
[149] M More 'Black Consciousness Movement's Ontology: The Politics of Being' (2012) *Philosophia Africana 26.*
[150] 'Concept of Personhood' https://medicine.missouri.edu/centers-institutes-labs/health-ethics/faq/personhood (Accessed on 22 June 2022).
[151] 'South Africa's Population' https://southafrica-info.com/people/south-africa-population/#:~:text=According%20to%20Statistics%20South%20Africa's,%E2%80%93%2080.8%25%20of%20the%20total (Accessed on 16 June 2022).

the views of black individuals.[152] Swinging from one extreme to another is never ideal, however. A transformation of the reasonable person test would require that the test begin to move away from its purely objective nature and consider the susceptibilities and differences individuals may have purely because of the racial group they are part. Examples of this can be found in countless medical malpractice suits which see a positive skew towards non-white victims[153] as well as the ongoing creation of black criminality in South Africa.[154] A transformed reasonable person test would consider these predispositions and apply a higher level of scrutiny to ensure that the trends do not continue.

Under its objective approach, which is informed by the views held by white individuals, the reasonable person test has the potential to exacerbate the administration of injustice.[155] Its present construction perpetuates a politics of racial and ethnic exclusion of the 'other', who in this case, is any non-white racial or ethnic subject.[156] This 'other' is required to comport themselves as a reasonable person that bears very little resemblance to their lived reality. This results in them being constrained within a concept that excludes them by imposing a set of norms, values and essentially an entire worldview, that may be reflective of the constructed reasonable person, but that is not reflective of their individual worlds.[157] Examples of this are explored through the case law discussed in chapter four. The reasonable person test is thus a contributory factor to the law's significant disconnect from the human communities that are emplaced into the legal process and can therefore not be considered legitimate without a transformed scope of what is considered reasonable.[158]

[152] CH Heyns 'Reasonableness in a Divided Society' (1990) 107 *South African Law Journal* 107 (2) 279.
[153] CE Mischler 'African American Disparities within the Medical World' (2020) *Student Publications* 2.
[154] G Baderoon 'The creation of black criminality in South Africa' Africa is a country available at https://africasacountry.com/2018/12/the-creation-of-black-criminality-in-south-africa (Accessed on 15 July 2023).
[155] M Astrada & S Astrada 'The Enduring Problem of the Race-Blind Reasonable Person' (2020) *American Constitution Society Expert Forum Blog* 3.
[156] *Ibid.*
[157] *Idem* 4.
[158] *Idem* 5.

3.3.2 Gender

The existing gender bias is another one of the contributing factors to the colonial nature of the reasonable person test.[159] Therefore, in order to understand how a transformation of the reasonable person test would occur, we must have an understanding of how the test came to further gender inequality and how these biases can be removed.

The colonial roots of gender inequality manifest in the vast of political, educational, and economic opportunities between men and women.[160] According to the Global Gender Gap Index report published in 2018, it is estimated that it would take 135 years to close the gender gap between men and women in southern Africa and nearly 153 years to close the this same gap in North Africa.[161] There are competing theories about the root cause of gender inequality in Africa, but many scholars suggest that its genesis can be found in both slavery and colonialism.[162] As this dissertation aims to focus on the transformation of the reasonable person test, only the colonial history of gender inequality will be discussed. .

Women in pre-colonial Africa were seen to have held numerous positions of prominence (except where Islam was predominant)[163] and were heralded as queen-mothers, queen-sisters, princesses, chiefs, holders of offices, occasional warriors, and in the well known case of the Lovedu, the supreme monarch.[164] The reverence for female leadership and participation was altered when colonialism changed gender relations. History would see the role of female leaders and chiefs decrease as males predominantly negotiated with the European colonial administrations in the oversight of taxes and governance.[165] Additionally,

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[159] W Parker 'The reasonable person a gendered concept?' (1993) 28 *Victoria University of Wellington Law Review* 108.
[160] E Jaiyeola & A Issac 'Patriarchy and Colonization: The "Brooder House" for Gender Inequality in Nigeria' (2020) 10 *Journal of Research on Women and Gender* 6.
[161] World Economic Forum 'Global Gender Gap Report 2018' viii.
[162] L Ware 'Traditional Gender Roles and Slavery' https://blogs.uw.edu/ses9/hstcmp-358-spring-2015/body-for-trade/traditional-gender-roles-and-slavery/ (Accessed on 20 June 2022).
[163] T Falola 'The role of Nigerian Women' *Encyclopedia Britannica* (2007) https://www.britannica.com/topic/role-of-Nigerian-women-1360615 (Accessed on 20 June 2022).
[164] N Sudarkasa 'The Status of Women in Indigenous African Societies' (1986) 12 *Feminist Studies* 91.
[165] FJS Saungweme 'A Critique of Africa's Post-Colonial Freedoms Through a Feminist Lens: Challenging Patriarchy and Assessing the Gains' (2021) https://za.boell.org/en/2021/07/07/critique-africas-post-colonial-freedoms-through-feminist-lens-challenging-patriarchy (Accessed on 12 June 2022).

in colonial systems the majority of the indigenous peoples that were educated and employed in the white-collar economy built by the Europeans were male.

The understanding of this history becomes important when looking to transform the reasonable person test as the test holds a standard of universality.[166] It can be argued that if the test is to be applied equally to everyone, it should be inclusive of women's perspectives.[167] The hierarchal differences between men and women also play a significant role in the conception of reasonable conduct.[168]

The first important contention between the reasonable person test and gender can be found in the obviously masculine language used in the construction of the test.[169] In this dissertation, I make use of the term 'reasonable person' but this has not always been the norm. Though technically incorrect, the terms 'reasonable person' and 'reasonable man' are often still used interchangeably.[170] In order to provide a thorough critique of the colonial nature of the reasonable person test, the connotations and meanings held by its synonymous term 'the reasonable man' are worth discussing and critiquing through a feminist lens.

The law is filled with male-based terminology,[171] and legislation and case law have for a long time used the word 'man' as a generic, all encompassing term to refer to all people.[172] The masculinity of legal language is attributed to history and tradition and its preservation is often justified by its seemingly inoffensive and inconsequential results.[173] If everyone knows that the male terminology extends to the female, where's the harm? The harm is in its leaning

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[166] W Parker 'The reasonable person a gendered concept?' (1993) 28 *Victoria University of Wellington Law Review* 105.
[167] *Ibid.*
[168] J Acker 'Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations' (1990) 4 *Gender and Society* 148.
[169] R Martin 'A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury' (1994) 23 *Anglo-American Law Review* 341.
[170] D Donovan & S Wildman 'Is the Reasonable Man Obsolete: A Critical Perspective on SelfDefense and Provocation' (1981) 14 *Layola of Los Angeles Law Review* 435.
[171] R Martin 'A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury' (1994) 23 *Anglo-American Law Review* 341.
[172] W Parker 'The reasonable person a gendered concept?' (1993) 28 *Victoria University of Wellington Law Review* 106.
[173] R Martin 'A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury' (1994) 23 *Anglo-American Law Review* 341.

towards phallocentricism.[174] When females in the law are not represented in autonomous terms and only as a subset of the male, their separate existence goes unacknowledged.[175] This in turn means that there is no true acknowledgement of the validity of an alternative female view.[176]

The reasonable man envisioned in the formation of the reasonable man test was clearly by description of the male gender. This means that the conduct of both men and women was measured with reference to a concept defined and informed by the beliefs of the male gender.[177] The first step in a transformation of the reasonable man test in so far as it interacts with gender would therefore be the rejection of an ideal standard of behaviour that is based on the experience, values and morality of only the male person.[178]

Neutralisation of language is a start, but because of how closely linked the concept of reasonableness is to that of morality,[179] a comparison of the traditional and female conceptions of morality is also warranted.[180]

Feminist studies on the concept of morality suggest that women may not make moral judgments in the same way or based on the same premises as traditional (male-influenced) moral thinking.[181] The traditional determinations of morality are based on a rights and duties paradigm, and the reduction of justness and fairness to rights and duties has also strongly influenced the development of the law of negligence.[182] Echoed in the factors considered when testing for negligence under the reasonable person test, traditional moral thinking is objective, focuses on abstracting and sees morality as relating to competing rights or claims

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[174] *Ibid*.
[175] *Ibid*.
[176] *Ibid*.
[177] W Parker 'The reasonable person a gendered concept?' (1993) 28 *Victoria University of Wellington Law Review* 106.
[178] R Martin 'A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury' (1994) 23 *Anglo-American Law Review* 342.
[179] JT Stevenson 'Reasonableness in Morals' (1989) 8 *Journal of Business Ethics* 95.
[180] R Martin 'A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury' (1994) 23 *Anglo-American Law Review* 334.
[181] R Martin 'A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury' (1994) 23 *Anglo-American Law Review* 356.
[182] *Ibid.*

for the obtainment of justice.[183] Alternatively, the feminist approach to morality differs as it allows for subjectivity and a greater focus on the particular.[184] It also has a concern for societal responsibility[185] and care as well as (or instead of) justice.[186]

With the understanding that gender inequality is an inherent consequence of colonialism, making room for equal contribution from men and women to the construction of the reasonable person test is essential to its transformation.

3.4 The South African context

Chapter two provided an analysis into the objective nature and goals of the reasonable person test. This discussion was crucial as it laid the foundation for understanding what is arguably the central reason for deeming the reasonable person test (in its present construction) unfit for the South African context.

The adoption of the constitution as the supreme law of South Africa in 1996 ushered the country into its democratic era, underpinned by the notion of transformative constitutionalism.[187] In its transformative constitutional dispensation, the South African legal system has expressed a firm commitment to the pursuit of substantive equality[188], equal justice[189] and a legal culture of justification.[190] All three of these commitments have subjectivity at their core and are essential to the transformation of the South African legal system.

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[183] C Palmer '401 Ethical Theory and Philosophical Method Feminist Ethics' https://www.lancaster.ac.uk/users/philosophy/awaymave/401/feminist.htm (Accessed on 16 June 2022).
[184] *Ibid.*
[185] R Martin 'A Feminist View of the Reasonable Man: An Alternative Approach to Liability in Negligence for Personal Injury' (1994) 23 *Anglo-American Law Review* 358.
[186] C Palmer '401 Ethical Theory and Philosophical Method Feminist Ethics' https://www.lancaster.ac.uk/users/philosophy/awaymave/401/feminist.htm (Accessed on 16 June 2022).
[187] P Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 351.
[188] *Idem* 352.
[189] E Christiansen 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race and Justice* 576.
[190] Langa 353.

The substantive equality that the South African legal system has committed itself to orients the right to equality as a positively-oriented right that requires laws and policies to treat individuals as substantive equals,[191] while still recognising, affirming and accommodating diversity and difference.[192] One of the major assertions of the proponents of substantive equality is that the law cannot simply treat an entire population as like when significant and persistent structural obstacles inform the decision making processes of individuals and effectively prevent entire segments of a population from competing for success on even remotely equal terms.[193] The antithesis of this is formal equality, which similar to the goals of the reasonable person test discussed earlier, seeks to disregard arbitrary characteristics like race, religion and gender, and rather demands that all persons who are in the same situation be afforded the same or similar treatment.[194]

From this contrast, it is now clear that the aims of the reasonable person test as it is currently constituted are inconsistent with the commitments that underpin South Africa's transformation. These three commitments have also been hailed as essential to the achievement of true representative democracy and the reasonable person test's failure to be in line with them is thus a threat to democracy.

3.5 Conclusion

As a part of a legitimate legal system, the reasonable person test is meant to both reflect and influence human conduct and therefore has a role that extends beyond just questions of liability but rather to the kind of values that are deemed worthy of promotion.[195]

This chapter has demonstrated the ways in which, in its present construction, the reasonable person test is unable to fulfil this function. The primary reason for this is its reliance on a definition of reasonableness that is predominantly informed by western philosophy and

[191] A Smith 'Equality Constitutional Adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 613.
[192] *Idem* 614.
[193] P Stancil 'Substantive Equality and Procedural Justice' (2017) 4 *Iowa Law Review* 1637.
[194] A Smith 'Equality Constitutional Adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 611.
[195] W Parker 'The Reasonable Person a Gendered Concept?' (1993) 28 *Victoria University of Wellington Law Review* 112.

unable to accommodate varying individual contexts. It has been proven that the test is still tainted by its colonial origins, as illustrated by its failure to sufficiently interact with and acknowledge the racial and gender based context of the present South Africa. Most importantly, the objective nature of the reasonable person test is distinctly incompatible with the goals of the post-colonial South African society as outlined in the constitution.

These contentions are easy to ignore when they exist only as theoretical and philosophical conclusions but as will be illustrated in the next chapter, they have material consequences on the lives of individuals and on the achievement of justice, equity, and democracy.

CHAPTER 4: THE PRACTICAL AND MATERIAL PROBLEMS FACED IN THE APPLICATION OF THE REASONABLE PERSON TEST

4.1 Introduction

Chapter 3 provided a purely theoretical and philosophical analysis of the various negative effects and interactions that the current construction of the reasonable person test may have. Though an understanding of the issues from this perspective is important, to truly understand why the transformation of the reasonable person test is necessary and urgent, we must assess how the test is practically applied by the courts in our diverse and polarised society. The application of the reasonable person test in various judgments has both practical problems and real-life consequences that will be highlighted in this chapter.

As highlighted under the delineations of this dissertation, there are copious amounts of cases that make use of the reasonable person test. The reasonable person test is not often the major legal principle under contention and is usually used as a means to determine the presence of negligence as part of delictual liability.[196] The test is therefore open to quickly and discreetly being used in a detrimental and unjust way without undergoing much scrutiny. Additionally, the biases and issues explained under chapters 2 and 3 are not always obviously stated and certain inferences have to be drawn from an understanding of the societal and political contexts of the cases.[197] This chapter will critically analyse various cases that bring the reasonable person test forward as a central argument. By explaining how the current construction of the test is used in judgments, these analyses will show why the reasonable person test cannot remain a blind, objective standard that does not consider an individual's context.

4.2. *Rex v Mbombela*

[196] R Ahmed 'The Standard of the Reasonable Person in Determining Negligence – Comparative Conclusions' (2021) 24 *Potchefstroom Electronic Law Journal* 2.
[197] L Juma & C Okpaluba 'The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa' (2011) 14 *Potchefstroom Electronic Law Journal 14.*

The 1933 case of *R v Mbombela* is often cited as the case that describes the general characteristics the reasonable person is meant to hold.[198] The case is used in the law of delict to describe the reasonable person as one of "of ordinary intelligence, knowledge and prudence".[199] In this instance however, I seek to use the case not to focus on the mental capacity of the reasonable person, but rather to show how race, culture and one's situational context have an impact on what a person may view as reasonable conduct.

4.2.1 Facts of the case:

The accused was somewhere between the age of 18 and 20 years old and lived in a rural village.[200] In this village, the existence of evil spirits called "Tokoloshes" who occasionally took the form of a little old man with small feet was widely accepted.[201] Further, it was also believed that looking the spirit in the face would be fatal.[202]

On the day in question, some children were outside a hut they supposed to be empty. They saw what they described as "something that had two small feet like those of a human being".[203] They were frightened and called the accused, who apparently thought the object was a "Tikoloshe". The accused then went to fetch a hatchet and, in the half-light, struck the form a number of times with the hatchet. When he dragged the object out of the hut, he found that he had actually killed his young nephew.[204] The accused made use of the *bona fide* mistake defence as he believed he was killing a "Tikoloshe", not a human being.[205] The court did not accept this defence as it argued that the belief in Tikoloshes is in and of itself unreasonable and therefore makes the belief that the victim was a Tikoloshe unreasonable as well.[206]

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198 'Chapter 6 :Negligence' https://africanlii.org/book/chapter-16-negligence (Accessed on 46 September 2022).
199 *Ibid.*
200 *R v Mbombela* 1933 AD 270.
201 *Ibid.*
202 *Ibid.*
203 *Ibid.*
204 *Idem* 271.
205 *Ibid.*
206 P Lenta 'The Tikoloshe and the Reasonable Man: Transgressing South African Legal Fictions' (2004) 16 *Law and Literature* 354.

Initially, a jury in the trial court found the accused guilty of murder and he was sentenced to death. On appeal, this conviction was set aside and the accused was rather found guilty of culpable homicide, and sentenced to twelve months imprisonment with hard labour.[207]

4.2.2 Analysis

This case provides a practical illustration of three of the problematic elements of the reasonable person test that were discussed under Chapters 2 and 3. The first of these is the objective nature of the reasonable person test.

The objective framing used in the case is explicit in the identity given to the reasonable man by De Villiers JA . He states that:

> by the law of this country there is only one standard of 'reasonable man'. . . . the man of ordinary knowledge and intelligence. . . . [T]he race, or the idiosyncrasies, or the superstitions, or the intelligence of the person do not enter into the question.[208]

The court's commitment to an objective application of the reasonable person test is further established as it is stated in the judgment that:

> if the standard were taken to be "an ordinary 18 year old native living at home in his kraal," then in each and every case the standard would have to be varied so as to suit the description of the particular accused. In other words there would be no standard and all that the jury would have to enquire was whether a person with the mental and moral and temperamental and racial idiosyncrasies of the accused, could reasonably fall into such a mistake of fact . . . the element of reasonableness would be practically eliminated.

I agree that a subjective scrutiny of the personal contextual circumstances of the accused would mean a refusal of one standard of reasonableness, but I do not think it would equate to a complete abandonment of reasonableness as a means of assessment. The objective

[207] *R v Mbombela* 1933 AD 275.
[208] *Idem* 274.

nature of the reasonable person test is a key feature that allows colonial legal regulations to uphold their power. [209] The hesitance to retreat from a purely objective test for reasonableness reflects the inflexible and uncompromising nature of colonial legal regulation.[210] The effect of utilising an objective identification of the reasonable man in this case implies that this figure is an ideal one, who has been bleached of their cultural and religious affiliations.[211] In order to use the reasonable man test to show the accused's guilt, the reasonable man is reanimated with the cultural and religious beliefs of the colonial official. This official who is deemed 'reasonable' would not have shared the belief in the Tikoloshe that underpinned the accused's mistake and thus the test would be impossible for the accused to pass.[212]

The second element that is illustrated in the *Mbombela* case is the practical effect that the colonial history behind the standard of reasonableness has. By marking the accused's belief in the Tikoloshe as unreasonable, it raises the question of what a court underpinned by colonial thought would classify as a reasonable and legally persuasive argument. My argument here is not completely against any and all forms of accountability or liability for Mbombela. The argument is that the outcome would have been different as it could have been said that the accused was in fact acting in a reasonable manner by trying to ward off what he perceived as a life-threatening attack.

Stanley Fish argued that an argument will only be deemed by courts to be persuasive if "it chimes with judges' already in-place beliefs—that are not so much being urged as traded on".[213] These beliefs, Fish urges, are "so much a part of the [judge's] background that they are partly determinative of what will be heard as an argument".[214] Fish identifies that the kinds of beliefs that constitute judges' interpretative assumptions are often framed positively,

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[209] P Lenta 'The Tikoloshe and the Reasonable Man: Transgressing South African Legal Fictions' (2004) 16 *Law and Literature* 356.
[210] *Ibid.*
[211] P Lenta 'The Tikoloshe and the Reasonable Man: Transgressing South African Legal Fictions' (2004) 16 *Law and Literature* 354.
[212] *Ibid.*
[213] S Fish 'The Law Wishes to Have Formal Existence' in Alan Norrie (ed) *Closure or Critique: New Directions in Legal Theory"* (1993) 168.
[214] *Ibid.*

in accordance with an empirically observed practice or as "beliefs that are 'moral' dispositions as to the way things are.[215]

With this in mind, we can frame the decision in *Mbombela* as the outcome of the competing belief systems of the coloniser and the colonised.[216] The *Mbombela* decision shows the dominance of the beliefs of the court, over those of the colonised subject. The beliefs informing the accused's narrative are divergent from those of the court and as such are written off as unreasonable and unpersuasive.

The third element is the interaction between the reasonable person test and race and culture. The court in *Mbombela* does not distinguish between the reasonableness of the belief in the existence of Tikoloshes (including belief in their malevolence and threat to human life) in general, and the reasonableness of the accused's mistaken belief that his victim was in fact a Tikoloshe.[217] Focusing only on the first prong of this exposition, the court stated that it "will not regard [a] superstition as reasonable unless it is believed by the majority of reasonable people."[218] The test is therefore not centred around the knowledge that individual may deem as true, but rather around "whether the person in question does not know what is known to all or most of the inhabitants of the state."[219] Without any qualitative research or evidence, the court made the assumption that most inhabitants of the state did not believe in the existence of the Tikoloshe. I assert that this assumption could not have confidently been made without the intentional exclusion of indigenous people from the category of "inhabitants of the state". This therefore means that non-white and non-Europeans as well as their beliefs and practices are excluded from consideration under reasonableness. Although there is formal provision made for the recognition of customary/indigenous law under section 211 of the constituion,[220] indigenous peoples are often "othered" and deemed for legal purposes not to have the beliefs that they do. They are rather judged in accordance with colonial beliefs and knowledge that they do not share. An

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[215] *Ibid.*
[216] H Bhabha 'Postcolonial Criticism' in S Greenblatt & G Gunn (eds) *Redrawing the Boundaries: The Transformation of English and American Studies* (1992) 439.
[217] P Lenta 'The Tikoloshe and the Reasonable Man: Transgressing South African Legal Fictions' (2004) 16 *Law and Literature* 354.
[218] *R v Mbombela* 1933 AD 270.
[219] *Idem* 273.
[220] The Constitution of the Republic of South Africa, 1996.

example of this is the Traditional Courts Bill.[221] The bill has been contentious since its introduction to parliament in 2008. The contention was centred around the complaint that by requiring traditional courts to "function in accordance with customary law, subject to the constituion", Western values are imposed on indigenous customs.[222] This has the above-mentioned effect of distorting indigenous beliefs and posing them as illegitimate due to their non-conformity with Western ideals.

From this analysis, we can conclude that the logic of the court's argument in *Mbombela* is colonial in its instantiation of a single normative standard at the expense of demolishing the subjectivity of the (colonised) accused.[223] The court disguises the perspectival nature of its own belief system behind its definition of a neutral and objective "reasonable man." This reasonable man however is actually an idealised projection of the colonial legal official, whose beliefs are European and Christian.[224] Through the figure of the reasonable man,

> [t]he standpoint of the privileged, their particular experience and standards, is constructed as normal and neutral. If some groups' experience differs from this neutral experience, or they do not move up to those standards, their difference is constructed as deviance and inferiority. Not only are the experience and the values of the oppressed thereby ignored and silenced, but they become disadvantaged by their situated identities.[225]

4.3 Afriforum vs Malema 2011

Another case that highlights the inefficacy and adverse outcomes of applying the reasonable person test in its current construction is the 2011 case of *Afriforum v Malema.*[226]

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[221] (B1-2017).
[222] A Diala 'Understanding the relevance of African customary law in modern times' (2020) available at: https://theconversation.com/understanding-the-relevance-of-african-customary-law-in-modern-times-150762 (accessed on 30 April 2023).
[223] P Lenta 'The Tikoloshe and the Reasonable Man: Transgressing South African Legal Fictions' (2004) 16 *Law and Literature* 355.
[224] H Corder *Judges at Work* (1984) 237.
[225] IM Young *Justice and the Politics of Difference* (1990) 116.
[226] *Afriforum v Malema* 2011 6 SA 240 (EqC).

The 2011 judgment is particularly useful for this study for three reasons. Firstly, from a purely temporal perspective, unlike the *Mbombela* case, it illustrates how the reasonable person test functions in a post-1994 South Africa. Secondly, the case makes clear the fact that the reasonable person test is an instrument that enables the law to continue to function in an autopoietic manner.[227] Finally, the case also demonstrates how the court's refusal to engage with the ideological nature of law and the politics of race helps keep colonial formalism and racism embedded in the law and legal culture. This refusal to engage has the ultimate result of the law and legal reasoning continuing to favour the socially and economically dominant members of society.[228]

4.3.1 Facts of the case

The complainant (Afriforum) launched an application in the South Gauteng High Court (sitting as the Equality Court) requesting that the court bans the African National Congress ('ANC hereafter') struggle song entitled "dhubula 'ibhunu" (literally translated as 'shoot the boer').[229] The complainants asserted that the respondent (Julius Malema), who at the time was president of the ANC Youth League, would sing/chant the song, which contained "objectionable utterances" while addressing public audiences. Afriforum brought their application against Malema forth on the grounds that these "objectionable utterances" undermined their human dignity and adversely affected the rights and freedoms of Afrikaners and Afrikaner farmers.[230] They also argued that the utterances demonstrated an intent to hurt an ethnic group and to incite and promote hatred.[231]

In defence, Malema argued he had a right to sing these words because liberation songs such as this one are part of South African heritage and should be preserved as part of the commemoration of the struggle against apartheid and the celebration of the new freedoms purportedly enjoyed by all in the 'new South Africa'. He also argued that the words aimed to

[227] N Luhmann *Law as a Social System* (2008) 22.
[228] J Modiri 'Race, Realism and Critique : The Politics of Race and *Afriforum v Malema* in the (in)Equality Court' (2013) 130 *The South African Law Journal* 274.
[229] *Afriforum v Malema* 2011 6 SA 240 (EqC) para 49.
[230] *Ibid.*
[231] *Ibid.*

speak to the symbolic destruction of white oppression, rather than to a specific desire to shoot Boers.[232]

The Equality Court held that, even though the song may be a part of South Africa's history, to sing it now is no longer acceptable.[233] The court found that Malema's words constituted hate speech, and further declared that : "[t]he words undermine [the speakers'] dignity, are discriminatory and harmful…[n]o justification exists allowing the words to be sung.[234] Malema was thereby banned from singing the song, in public or in private.[235]

4.3.2 Analysis

The *Afriforum v Malema* case lends itself as a demonstration of how the reasonable person test fails to function effectively in a post-1994 South Africa. Under the apartheid system, applying the reasonableness standard was fairly uninvolved as it was believed that reasonableness was a characteristic only found in White, Christian thoughts and ideals.[236] Authoritatively, various legislature endorsed the exclusion of non-white beliefs and behaviours from the ambit of reasonableness.[237] However, with the transition into the current constitutional dispensation, the law could no longer formally serve as an obvious shield for such an exclusion.[238] Courts would seemingly now have the duty to consider the multiracial and multicultural nature of South African society.[239] I intentionally word this in an unconvinced manner as the case proves that though a duty may exist, it is not always undertaken. This is especially true when solely by definition and construction the duty itself exempts this responsibility.

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[232] *Afriforum v Malema* 2011 6 SA 240 (EqC) para 53.
[233] *Idem* para 108.
[234] *Idem* para 108-109.
[235] *Idem* para 120.
[236] P Lenta 'The Tikoloshe and the Reasonable Man: Transgressing South African Legal Fictions' (2004) 16 *Law and Literature* 359.
[237] *Idem* 362.
[238] 'Constitutional history of South Africa' https://constitutionnet.org/country/south-africa (accessed on 4 December 2022).
[239] T Nhlapo *'South Africa's Courts and Lawmakers have Failed the ideal of Cultural Diversity'* https://theconversation.com/africa (Accessed on 20 January 2023).

I have already alluded to the fact that the law is an autopoietic system. This has the effect of describing the law as a self-referential system that purposefully isolates itself from the complexities of its environment and prefers to handle disputes in a highly selective and instrumentalised manner.[240] The objective nature of the reasonableness standard and how it isolates it from most, if not all, contextual factors have also been explained at length. By logic, the classification of the reasonableness standard as a weapon of our autopoietic legal system becomes warranted. The negative effects of such a weaponisation are clear in the *Afriforum v Malema* case.

The judge affirms the projection of the reasonable person as colonial legal official in his refusal to consider a 'black point of view' and choosing rather to accept the meaning of the song as interpreted by whites as reasonable.[241] Further, by using the collective term of 'the public' to refer to the white Afrikaner community, all South Africans become subsumed under a banner of white Afrikaner interests. This, in line with the objective nature of the reasonableness standard, negates all forms of difference and plurality while simultaneously universalising the perspective of whites as the normative point of reference.[242] The *Afriforum v Malema* judgment illustrates how autopoietic legal thinking uses abstraction and instrumentality to nullify aspects of problems that require thoughtful engagement. This in turn has the long-term effect of preventing the law from truly considering justice as well as its own future improvement.[243]

In its transformative constitutional dispensation, the South African legal system has expressed a firm commitment to the pursuit of substantive equality[244], equal justice[245] and a legal culture of justification.[246] All three of these commitments have subjectivity at their core and are essential to the transformation and ultimately the transformation of the South

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[240] N Buitendag & K van Marle '*Afriforum v Malema*: The Limits of Law and Complexity' (2014) 17 *Potchefstroom Electronic Law Journal* 2893.
[241] J Modiri 'Race, Realism and Critique : The Politics of Race and *Afriforum v Malema* in the (in)Equality Court' (2013) 130 *The South African Law Journal* 285.
[242] *Idem* 286.
[243] N Buitendag & K van Marle '*Afriforum v Malema*: The Limits of Law and Complexity' (2014) 17 *Potchefstroom Electronic Law Journal 2909.*
[244] *Idem* 352.
[245] E Christiansen 'Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice' (2010) 13 *Journal of Gender, Race and Justice* 576.
[246] P Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 353.

African legal system. The achievement of all the above-mentioned goals is impossible without having a comprehensive consideration for the ideological nature of law and the politics of race.[247] In *Afriforum v Malema* we see a refusal by the court to give such consideration. This has the effect of distorting the social reality of race in South Africa; a reality that is still plagued by racial inequalities, black subordination, and white dominance. The court also legitimises the politics of white nationalist organisations, which in turn encourages a culture of race-denialism and colour-blindness with the effect of silencing radical demands for social justice, reparations, and redress.[248]

Under the guise of reasonableness, the law and legal reasoning in this case demonstrates a continuation of the favouring of socially and economically dominant members of society;[249] thus keeping colonial formalism and racism embedded in the law and legal culture, contrary to the goals of our legal system that is postulated on the pursuit of substantive equality and justice.[250]

4.4 *Qwelane v South African Human Rights Commission and Another*

The 2021 constitutional ruling in *Qwelane v South African Human Rights Commission* [251] ('SAHRC' hereafter) sets an important precedent for the use of the reasonable person test. The precedent set in this case is used in the 2022 *Afriforum v Malema*[252] judgment which demonstrates the correct way to use a modified objective form of the reasonable person test.

4.4.1 Facts of the case

[247] J Modiri 'The colour of Law, Power and Knowledge: Introducing Critical Race Theory in (Post-) Apartheid South Africa' (2012) 28 *South African journal on Human Rights 405.*
[248] J Modiri 'Race, realism and critique: the politics of race and *Afriforum v Malema* in the (in)Equality Court' (2013) 130 *The South African Law Journal* 291.
[249] *Idem* 274.
[250] P Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 352.
[251] *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) (31 July 2021).
[252] *Afriforum v Economic Freedom Fighters and Others* (EQ 04/2020) [2022] ZAGPJHC 599; 2022 (6) SA 357 (GJ) (25 August 2022)

Mr Qwelane, penned an article titled "Call me names – but gay is not okay", which was published by the Sunday Sun newspaper in 2008.[253] In the article, Mr Qwelane compared gay and lesbian people to animals and suggested that gay and lesbian people were responsible for the degeneration of values in society.[254] The article was met with a public outcry, and saw the SAHRC receive over 350 complaints of hate speech in reference to Mr Qwelane's comments. The SAHRC referred the complaints to the Equality Court.[255]

The proceedings were consolidated for hearing before a single Judge sitting as both the Equality Court and the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court).

In the High Court, the applicant argued that section 10(1) read with sections 1, 11, and 12 of the the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA' hereafter) were too broad in that they unjustifiably limited the right to free expression.[256] Further, he argued that section 10(1) was impermissibly vague, especially when it is read with section 12 of the PEPUDA.[257]

The High Court dismissed both the applicant's challenges.[258] It reasoned that section 10(1) of PEPUDA was not overbroad because it could be read in conformity with section 16(2)(c) of the constituion, and passed the limitation test pursuant to section 36 of the constituion. Similarly, the High Court dismissed the vagueness challenge, as the proviso in section 12 qualifies section 10(1).[259] Ultimately, Mr Qwelane's statements were found to constitute hate speech as contemplated in section 10(1) of PEPUDA. The High Court ordered that the applicant tender a written apology to the LGBTI+ community and pay the costs of proceedings.[260]

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[253] *Idem* para 2.
[254] *Idem* para 3.
[255] *Idem* para 2.
[256] *Idem* para 12.
[257] *Ibid.*
[258] *Idem* paras, 19-22.
[259] *Ibid.*
[260] Idem para 19.

Discontented with the High Court's decision, Mr Qwelane appealed to the Supreme Court of Appeal.[261] In a unanimous judgment handed down on 29 November 2019, the Supreme Court of Appeal upheld the finding on overbreadth and held that the impugned section was inconsistent with the provisions of section 16 of the constituion, and was therefore invalid.[262]

In response to this, Mr Qwelane instituted a constitutional challenge against section 10(1) of PEPUDA which defines and prohibits hate speech as follows:

> "Subject to the proviso in section 12. No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention (a) be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred".[263]

In a unanimous judgment written by Majiedt J, the Constitutional Court established that Mr Qwelane's article constituted hate speech in terms of the elements of section 10(1) as it had clearly been harmful and incited hatred.[264] The Court reasoned that Mr Qwelane was advocating hatred, as the article plainly constitutes detestation and vilification of homosexuals on the grounds of sexual orientation.[265]

4.4.2 Analysis

The most important part of the Constitutional Court judgement for the purposes of this dissertation is the focus the court placed on the difference in language between the constitution and PEPUDA with regards to the regulation of hate speech. Under the definition provided in PEPUDA hate speech is conduct that "could reasonably be construed to demonstrate a clear intention to (a) be hurtful, (b) be harmful or to incite harm, (c) promote

[261] *Idem* 23.
[262] *Idem* 28.
[263] The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000.
[264] *Qwelane v South African Human Rights Commission and Another* para 198.
[265] *Idem* 179.

or propagate hatred".[266] In contrast, the constitutional definition poses hate speech as the "advocacy of hatred … that constitutes incitement to cause harm".[267]

Here we can see the constitutional standard is an objective one that aligns with the international justification for regulating the freedom of expression on the grounds of protecting public order and the welfare of society.[268] The Court in *Qwelane* held that the subsections of section 10 of PEPUDA must be read conjunctively.[269] The Court also noted that the phrase "reasonably construed" amounts to an objective opinion of a reasonable person, which is concurrent with the constituion's objective standard.[270]

The Constitutional Court describes the reasonable person as a "reasonable reader of ordinary intelligence" who "would understand the statement in its context and that [they] would have had regard not only to what is expressly stated but also to what is implied".[271] This means that the reasonable person should be positioned not as an isolated, idealistic figure but rather as someone who is aware of the context and circumstances surrounding the issue in debate.

This case supports the argument made throughout this dissertation in support of an understanding of reasonableness that is not purely objective. The case also establishes a precedent for the utilisation of the reasonable person test.

4.5 *Afriforum v Malema 2022*

4.5.1 Facts of the case

[266] Section 10 (1) of The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000,
[267] Section 16(2)(c) of The Constitution of the Republic of South Africa, 1996.
[268] P de Vos 'AfriForum should consider introspection after losing 'Kill the Boer' hate speech case against EFF' (2022) available at: https://www.dailymaverick.co.za/article/2022-08-30-afriforum-should-consider-introspection-after-losing-kill-the-boer-hate-speech-case-against-eff/ (accessed on 30 April 2022).
[269] *Qwelane v South African Human Rights Commission and Another* para 102.
[270] *Idem* 96.
[271] *Idem fn128.*

The facts of this case are similar to those stated in 4.3.1.

In October 2020, Julius Malema and EFF supporters sang 'struggle songs' outside the Senekal magistrate's court where the accused murderers of farm manager, Brendin Horner, were being tried. After this event, *Afriforum* filed a complaint to have the two songs — *Dubul' ibhunu!* (*Shoot the Boer*) and *Biza a ma'firebrigate* (*Call the Fire Brigade*) — declared hate speech and unfair discrimination in terms of PEPUDA.[272]

In the judgement written by Molahleli J, both of *Afriforum's* complaints were dismissed and they were ordered to pay the costs of the suit.[273]

4.5.2 Analysis

Unlike the 2011 judgment discussed above, this 2022 judgment shows an effective use and understanding of the reasonable person test in the present context. The way in which contextual factors are used to establish what the actions and reasoning of a reasonable person would be, clearly demonstrate the correct way to apply the test.

Heavily informed by the precedent set in the *Qwelane* judgement, the focus in the 2022 judgment is no longer how the "target audience" understands the words, but rather how a "reasonable person" would understand the words.[274] The "target audience" can be clearly personified as a white South African, while the "reasonable person" is left devoid of any definite racial or ethnic descriptions.[275]

By stressing that the "facts and circumstances surrounding the expression, and not mere inferences or assumptions that are made by the targeted group" must be considered, the court extends the reasonable person test to include views and understandings outside of

[272] *Afriforum v Economic Freedom Fighters and Others* (EQ 04/2020) [2022] ZAGPJHC 599; 2022 (6) SA 357 (GJ) (25 August 2022) Para 1.
[273] *Idem* 116.
[274] *Idem* para 92.
[275] *Idem* para 11.

those that belong to the target audience.[276] This also opens the door for the consideration of the broader historical context within which the comments are being made.[277]

The court shows that a reasonable person would understand the history of the songs, and would appreciate that when the songs were historically sung during the anti-apartheid struggle, they functioned as a call for the destruction of the apartheid regime and the apartheid police force.[278] This same reasonable person would also be able to understand that despite a racially charged history, the songs may mean something different in 2022 when sung outside a courtroom in a volatile situation that is equally racially charged.[279]

Under these understandings, *Afriforum* asking the court to declare the singing of the songs hate speech, regardless of the place and context where they are sung, was no longer an attempt to combat hate speech. The case now became about the banning of a songs, and thus a matter of freedom of expression.[280]

4.6 Conclusion

The reasonable person test is rarely ever used in isolation and because of this it has managed to evade heavy scrutiny and critical inspection. As only a small part of an overall judgment, the test is very rarely highlighted as an indisputable and destructive colonial instrument. By analysing the test's use in both "pre" and "post" apartheid adjudication this chapter has shown how the reasonable person test has the potential to perpetuate colonial rhetoric around who and what constitutes the reasonable person. By providing a hypothesised example as well as a recent judgment, this chapter has also shown how the application of a transformed reasonable person test encourages and supports the positive values enshrined in the constitution.

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[276] *Idem* para 92.
[277] *Idem* para 95.
[278] *Idem* para 75.
[279] P de Vos 'AfriForum should consider introspection after losing 'Kill the Boer' hate speech case against EFF' (2022) available at: https://www.dailymaverick.co.za/article/2022-08-30-afriforum-should-consider-introspection-after-losing-kill-the-boer-hate-speech-case-against-eff/ (accessed on 30 April 2022).
[280] *Ibid.*

CHAPTER 5: SUMMARY, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

Thus far in this dissertation I have dissected the reasonable person test. The deconstruction of the test expectedly revealed various theoretical, philosophical, and material shortfalls of the test. The inquisition made into the formative aspects (its colonial history, its objective nature and its tensions with various different facets of human identity) of the reasonable person test was necessary to justify the need for the test to be transformed. Now that just cause has been established for the transformation of the test, it is only right that an exploration into how this transformation can actually take place is embarked upon. This chapter will begin by outlining my understanding on what transformation entails. After creating this scope, the chapter will put forward three actions that are directly aimed at addressing the major issues outlined in this dissertation and therefore aiding the transformation of the reasonable person test.

5.2 What is transformation?

In order to comment on the transformation of the reasonable person test it is important to first define transformation and have a clear mandate from which action can be taken. The term "transformation" in the context of South Africa refers to the processes of social, political, and economic change that have taken place in the country since the end of legally supported apartheid and the establishment of a democratic government in 1994.[281]

The process of transformation was initiated by the desire to transition into a state of democracy and equality.[282] Transformation aims to address historical injustices while promoting equality, inclusivity, and reconciliation.[283]

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[281] L Harvey 'Transformation' *Analytic Quality Glossary* (2004-23) available at http://www.qualityresearchinternational.com/glossary/transformation.htm#:~:text=In%20the%20South%20African%20context,apartheid%20but%20addressing%20technological%20change (Accessed on 2 August 2023).

[282] P Langa 'Transformative Constitutionalism' *Stellenbosch Law Review* (2006) *17* 353.

[283] S Badat 'Redressing the Colonial/Apartheid Legacy: social equity, redress and Higher Education admissions in democratic South Africa' available at https://core.ac.uk/download/pdf/49241219.pdf (Accessed on 2 August 2023).

The transformation effort in South Africa can be divided into five sub-categories. The first of these is political transformation. Political transformation is concerned with the dismantling of apartheid laws and institutions and the establishment of a democratic government based on principles of non-racialism, equal representation, and universal suffrage.[284] The second is constitutional transformation. Constitutional transformation is characterised by adoption of the new constitution in 1996 that is supreme and enshrines fundamental rights and freedoms, establishes a system of checks and balances, and provides a framework for inclusive governance.[285] Third is social transformation which is the effort to address social inequalities and promote inclusivity in areas such as education, healthcare, housing, and social welfare. This includes affirmative action policies aimed at redressing historical imbalances and promoting representation of previously disadvantaged groups.[286] Economic transformation is the fourth sub-category and manifests theory the implementation of initiatives to address economic disparities and promote inclusive economic growth, including black economic empowerment programs, land reform, and efforts to foster economic participation and skills development among marginalised communities. [287] Finally, transformation also includes reconciliation and nation-building. These are the efforts made to promote social cohesion, healing, and understanding among different racial and ethnic groups through processes such as the Truth and Reconciliation Commission, which aimed to address past human rights violations and promote reconciliation.[288]

The main goal of transforming the reasonable person test that is proposed in this dissertation is to distance the test's current application from its racial, cultural and gender based biases in order to have better representation for all members of society and subsequently accurately reflect the goals of the constitution. This goal is directly in line with the political, constitutional and social transformation sub-categories.

It's important to note that the process of transformation in South Africa is ongoing and complex. This dissertation and its problematisation of the reasonable person test is an

[284] The Constitution of the Republic of South Africa, 1996.
[285] P Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 355.
[286] *Idem* 352.
[287] SJ Mosala, JCM Venter & E. G. Bain 'South Africa's Economic Transformation since 1994: What Influence has the National Democratic Revolution (NDR) Had?' *The Review of Black Political Economy* (2017) 44(3-4) 327-340.
[288] P Langa 'Transformative Constitutionalism' (2006) 3 *Stellenbosch Law Review* 358.

example of one of the many ongoing debates and challenges surrounding the implementation and effectiveness of transformation. Nonetheless, transformation remains a key objective in South Africa's pursuit of a more just, inclusive, and equitable society.

5.3. Recognition

The first action I would like to propose for the transformation of the reasonable person test is recognition. I am not referring to recognition in its political manifestation as "a process whereby certain facts are accepted and endowed with a certain legal status, such as statehood or sovereignty over newly acquired territory",[289] because I am aware of the politics of recognition and how they have functioned, not to ameliorate colonialism's negative effects, but to rather reproduce them.[290] I am referring to recognition in its use as a synonym for acknowledgement or acceptance.[291] The recognition I propose is based on Honneth's theory that states: "recognition consists in a cognitive identification of another's value and a practical treatment of the other that expresses this value".[292] This definition of recognition can be used to justify the claim that "the concept of justice presupposes the concept of recognition". Because there is an analytic connection between justice and recognition, one can conclude that acts of injustice can also be constructed as acts of misrecognition or the denial of recognition.[293]

The first issue that was identified in chapter two was the historical fact that the reasonable person test's incorporation into the South African law is a direct result of colonial conquest. Nothing can be done to retroactively change the events or course history and thus the reasonable person test will always have a colonial origin. The restatement of this fact is not

[289] M Shaw 'Recognition' available at: https://www.britannica.com/topic/recognition-international-law (Accessed on 12 March 2023).
[290] S Balaton-Chrimes & V Stead 'Recognition, Power and Coloniality' (2017) *Postcolonial Studies* 20(1) 1.
[291] 'Recognition' available at https://www.thesaurus.com/browse/recognition (Accessed on 13 March 2023).
[292] G Gottlieb 'The Experience of Injustice: A Theory of Recognition' (2019) *Notre Dame Philosophical Reviews* available at: https://ndpr.nd.edu/reviews/the-experience-of-injustice-a-theory-of-recognition/(Accessed on 13 March 2023).
[293] *Ibid.*

meant to evoke feelings of futility towards the decolonial project but rather to aid the endeavour by creating a clear and defined starting point.

The recognition of the history of the reasonable person test is necessary because history does not stay behind us.[294] History impacts and informs the problems of the present.[295] A failure to recognise the origin of the reasonable person test will result in solutions that do not target the root cause and will therefore not be able to solve the issue permanently.

The second recognition that needs to take place is the recognition of the bias that is attached to the reasonable person test. Biases, whether conscious or unconscious, are extremely harmful. In our "post-colonial", constitutional dispensation, bias is rarely ever explicit but is rather implicit and justified by objective legal construction like the reasonable person test.[296]

Because of the implicit nature of bias, it is often difficult to provide indubitable evidence of its existence. A 2018 study conducted by Carin Bergh and Jenny M. Hoobler examined various manager-employee relations in "democratic" South Africa.[297] By using the Multicategory IAT, the researchers measured the automatic associations of managers with the four most prevalent racial groups in South Africa (African black, Indian, coloured, and white).[298] The managers and employees were asked to categorise the racial group category name (African black, Indian, coloured, and white) with either positive words (e.g., love, pleasant, great, and wonderful) or "anything else" (e.g., hate, unpleasant, awful and terrible).[299]

The empirical results showed that white managers exhibited the most negative bias in the form of automatic negative associations with African black people, as revealed by an

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[294] 'Why is it important to study history' available at:https://www.mooc.org/blog/why-is-it-important-to-study-history (Accessed on 15 March 2023).
[295] J Chamberlin 'Don't know much about history. Educators worry that the psych history course may become a thing of the past.' (2010) *Monitor Staff* 41(2) *44.*
[296] I Bilotta *et al* 'How Subtle Bias Infects the Law' (2019)*Annual Review of Law and Social Science* 15(1) 228.
[297] C Bergh & JM Hoobler (2018) 'Implicit Racial Bias in South Africa: How Far Have Manager-Employee Relations Come in 'The Rainbow Nation'?' *Africa Journal of Management* 4(4) 447.
[298] *Idem* 456.
[299] *Ibid.*

automatic association between "African black" and negative words.[300] In contrast, it was found that white managers had an automatic positive evaluation of white people as revealed by an automatic association between "White" and positive words.[301]

This research was conducted to be used in studies pertaining to human resources and superficially does not have any relevance to the law. However, I include this research in my discussion because it depicts individual attitudes. If these attitudes can be held in the workplace, it is not unreasonable to hypothesise that they can extend to social and legal constructions. In a legal sense, if "African black" is said to invoke negative feelings it could include unfairly viewing non-white people as violent, irrational, uncooperative and unreasonable.

The presence of bias in legal constructions carries the risk of critical consequences that may cumulatively hinder true transformation and justice.[302] The recognition of the inherent biases of the reasonable person test can allow for reflection and reframing of the test.

The final recognition that needs to be made in order to transform the reasonable person test is the recognition of the duty to change. Chapter two outlined how the reasonable person test is inconsistent with the constitutional imperatives and authority is found in the constitution itself for the command and duty to change. The constituion provides that:

> "Where the common law or legislation is inconsistent with the constituion, it must be struck down."[303]

The recognition I propose is one that directly grapples with the predispositions "former" colonial subjects have towards victimhood and "former" colonial masters have towards suppression. Recognition will only be possible if it is accompanied by decolonisation of the mind from both parties. Methods of decolonising the colonised mind are well documented and call for the colonised to impress changes in their belief systems in order to embrace self-definition, self-determination, self-affirmation, self-love, and self-defence. Authors ask

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[300] *Idem* 457.
[301] *Ibid.*
[302] I Bilotta *et al* 'How Subtle Bias Infects the Law' (2019) *Annual Review of Law and Social Science* 15(1) 228.
[303] Section 172(1)(a) of The Constitution of the Republic of South Africa, 1996.

for the colonised to re-discover their lost humanness and renounce their complicity in their crime of entanglement in the colonial system.[304] A lesser explored sect of the decolonisation of the mind, is the actions that need to be taken by the coloniser. In order for the coloniser to decolonise their mind and work towards ally-ship they must challenge the resilience of settler privilege. There must be a turn away from romanticised and fantastical narratives of commonality and hope. This should be replaced with accountability and an active confrontation with the assumptions behind their actions and aspirations.[305]

Until both parties decolonise their minds, it is going to be very difficult to decolonise the legal system in a way that people can begin to feel that they are living in a system of true constitutionalism.[306]

5.4. The incorporation of diverse perspectives and alternative standards

The confrontation of the colonial history of the reasonable person test and the call to decolonise the mind directly leads to my next proposed action for the transformation of the reasonable person test: the incorporation of diverse perspectives and alternative standards.

One of the major decolonial critiques of our current legal system is that it is historicist and assimilationist in that it seeks to incorporate the historically conquered into an un-decolonised bifurcated societal structure.[307] Assimilationist logic is inherent to the politics of social justice and serves to reconfirm hierarchical social structures.[308] In the context of the reasonable person test, this underhanded goal of assimilation is achieved through the test's objective framing as explained in chapter 2 and 3. As a response to the issue of objectivity

[304] S Kgatla 'The decolonisation of the mind. Black consciousness community projects by the Limpopo council of churches' (2018) *Missionalia* 46 (1) 151.
[305] KP Whyte 'White Allies, Let's Be Honest About Decolonization' (2018) available at: https://www.yesmagazine.org/issue/decolonize/2018/04/03/white-allies-lets-be-honest-about-decolonization (Accessed on 18 March 2023)
[306] S Gutto 'Decolonising the law: Do we have a choice?' (2012) *Third World Resurgence 267* 42-43.
[307] T Madlingozi 'Social Justice and neo-apartheid constitutionalism' (2017) *Stellenbosch Law Review* 1 146.
[308] *Idem* 129.

I believe that the only way to ensure that the project of transforming the reasonable person test accounts for even the most remote of beliefs, is to give fair consideration to the indigenous thoughts on reasonableness. Under this action I call for a subjective approach that allows for the incorporation of the beliefs of previously conquered peoples. The incorporation of the perspectives and experiences of diverse groups, especially those who have historically been marginalised and excluded, can aid the creation of a more inclusive scope for the reasonable person test.[309]

From the earliest moments of its imposition, colonial law in Africa sought to enforce its supremacy and sole validity by disparaging indigenous legal systems that would deal with African accused in accordance with their own cultural norms.[310] In doing this, the colonial law would impose an alien normativity that falsely zoned the racial 'other' into sites of criminality.[311] Colonial legality participates in the control, manipulation and exclusion of any deviation from the imperatives of the systemic regulation of others and the environment.[312]

The incorporation of diverse approaches and alternative standards holds the potential to be of great value. Rather than relying solely on the reasonable person test, the legal system could consider alternative standards that better reflect the needs and experiences of individual members of varying communities.[313] An example of this would be a bigger draw from the rules of living customary law.

Living customary law emerges from people's adaptation of their customs to the socioeconomic changes of globalisation.[314] What makes living customary law unique is its

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[309] 'OECD Framework and Good Practice Principles for People-Centered Justice GOV/PGC' (2021) 26.

[310] P Lenta 'The Tikoloshe and the Reasonable Man: Transgressing South African Legal Fictions' (2004) 16 *Law and Literature* 375.

[311] *Ibid.*

[312] *Ibid.*

[313] 'OECD Global-competency-for-an-inclusive-world' (2018) available at: https://www.oecd.org/education/Global-competency-for-an-inclusive-world.pdf (Accessed on 21 March 2023).

[314] A Diala 'Understanding the relevance of African customary law in modern times' (2020) Available at: https://theconversation.com/understanding-the-relevance-of-african-customary-law-in-modern-times-150762 (Accessed on 22 March 2023).

consensus-seeking nature and its accountability to those who practice it.[315] This makes living customary law flexible, the direct opposite of objectiveness. In line with transformative theory, the constitution and human rights should be merged into the common law.[316] More specifically, the infiltration of an indigenous, Africanist conception of human rights into the common law is important to ensure its legitimacy.[317] If living customary law is to be implemented and incorporated into our understanding of what constitutes a reasonable person there would effectively be a reconciliation between the practical needs of a modern legal system; the cultural heritage of the society, and the observance of internationally recognised human rights norms.[318]

5.5. Emphasise context and intersectionality

In an effort to apply the reasonable person test in a less discriminatory direction, one might think it needs to be posed as a homogenous, context-free standard of behaviour. Though this may be better than outright exclusion of certain groups, it is not sufficient for a totally transformed construction. Transforming the test requires an understanding of context and intersectionality.[319]

Intersectional theory asserts that people are simultaneously either privileged or disadvantaged by multiple sources of oppression including their race, class, gender identity, sexual orientation, religion, and other identity markers. Intersectionality recognises that these various identity markers do not exist independently of each other,[320] but rather inform one another and create a complex convergence of interrelated systems of oppression or

[315] C Maimela & K Maunatlala 'Implementation of customary law of succession and common law of succession' (2020) *De Jure Law Journal 37.*
[316] E Zitzke 'Constitutional heedlessness and over-excitement' (2015) *Constitutional Court Review* 7(1) 266.
[317] *Idem* 267.
[318] *Idem* 47.
[319] 'Decolonisation & the Law School: Initial thoughts' (2019) available at: https://folukeafrica.com/decolonisation-the-law-school-initial-thoughts/ (Accessed on 31 March 2023).
[320] K Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *The University of Chicago Legal Forum* 140 139-167.

domination.[321] These interrelated systems can decisively shape individual experiences, behaviours and situations of oneself within a society.[322] This becomes relevant in assessing the reasonable person test because the interconnected nature of the above mentioned identity markers can influence what behaviours one considers reasonable.

5.5.1 *Mahlangu and Another v. Minister of Labour and Others.*

The landmark decision of the Constitutional Court in *Mahlangu and Another v. Minister of Labour and Others*, recognised intersectional discrimination under section 9(3) of the constituion. This decision shows that intersectionality can be recognised by the courts not just as part of discrimination law, but also as part of general constitutional law.[323] This decision serves as a prime example of how an intersectional approach can aid the furthering of the objectives of substantive equality.

5.5.2 Facts of the case:

Ms. Mahlangu was a domestic worker who drowned in the swimming pool of her employer of over 22 years. She was partially blind and unable to swim. Her daughter ('the appellant') was financially dependent on her. After her mother's death, the appellant approached the Department of Labour and discovered that she was not entitled to any compensation under Compensation for Occupational Injuries and Diseases Act 1993 ('COIDA' hereafter). Assisted by the South African Domestic Service and Allied Workers Union, and with the Commission for Gender Equality and the Women's Legal Centre Trust as amici, the appellant challenged the exclusion of domestic workers from compensation under

[321] *Ibid.*

[322] E Bešić 'Intersectionality: A pathway towards inclusive education?' (2020) *Prospects* 49 114.

[323] S Atrey 'Beyond discrimination: Mahlangu and the use of intersectionality as a general theory of constitutional interpretation' (2021) *International Journal of Discrimination and the Law* 21(2) 165.

COIDA.[324] The High Court at Pretoria upheld the challenge, and the matter was subsequently appealed to the South African Constitutional Court.[325]

The argument given before the Constitutional Court was that the exclusion of domestic workers from COIDA infringed upon their rights to equality, human dignity and access to social security under sections 9, 10 and 27 of the constitution respectively.[326] Because domestic workers, like Ms. Mahlangu, were predominantly black women, the appellant claimed that the exclusion constituted indirect discrimination against black women on the basis of their social status, gender, race and class.[327]

The main judgment in the constitutional court confirmed the order of constitutional invalidity that was previously made by the High Court and ordered an immediate and retrospective effect from 27 April 1994.[328] The court held that the exclusion of domestic workers from the definition of "employee" constitutes an infringement of the rights mentioned above and the right to equal protection and benefit of the law according to section 9(1) of the constituion.[329]

5.5.3 Analysis

The major aspect of majority judgment I wish to discuss is how it frames the use of intersectionality as a general interpretive theory of the constituion. According to Victor AJ:

> Adopting intersectionality as an interpretative criterion enables courts to consider the social structures that shape the experience of marginalised people. It also reveals how individual experiences vary according to multiple combinations of privilege, power, and vulnerability as structural elements of discrimination. An intersectional approach is the kind of interpretative approach which will achieve "the progressive realisation of our transformative constitutionalism.[330]

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[324] *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24 para 7-9.
[325] *Idem* para 11.
[326] *Idem* para 6.
[327] *Idem* para 18.
[328] *Idem* para 129.
[329] *Idem* para 70.
[330] *Idem* para 79.

From this it is clear that intersectionality is considered not just as the point of departure for inquiry into intersectional discrimination based on the multiple grounds listed under section 9(3) of the constituion, but also as a general theory that should be used to guide the interpretation of all rights.[331] The majority judgment shows how intersectionality is almost inescapable when assessing the impact of the possible violation of rights in reference to those who are most vulnerable or most in need.[332]

This judgment and comments made by Victor AJ also show that intersectionality is central to South African constitutionalism.[333] This is supported by an intersectional view of transformation that is recognised in the first provision of the constituion itself in section 1 which sets out the founding values of the country as based on 'non-racialism **and** non-sexism'.[334]

Notably, for the purposes of transformation of the reasonable person test, the *Mahlangu* case integrates the concept of intersectionality into legal precedent.[335] The reasoning given by the Constitutional Court has the potential to serve as a template for the application of intersectionality as an interpretive framework[336] in the application of the reasonable person test.

5.6 Conclusion

Like with most transformative projects, consensus will probably never be reached on what the precise methods of transforming the reasonable person test are. This is because they are not, nor will there ever be a finite number of possible remedies. Whatever actions are taken to transform the test need to embody the subjective philosophy that they seek to transfer on to the reasonable person test. This means that the decolonial actions will need to be ever-changing and situationally nuanced. However, after considering the argument

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[331] S Atrey 'Beyond discrimination: Mahlangu and the Use of Intersectionality as a General Theory of Constitutional Interpretation' (2021) *International Journal of Discrimination and the Law* 21(2) 172.
[332] *Ibid.*
[333] *Idem* 173.
[334] The Constitution of the Republic of South Africa, 1996.
[335] *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24.
[336] S Atrey 'Beyond discrimination: Mahlangu and the Use of Intersectionality as a General Theory of Constitutional Interpretation' (2021) *International Journal of Discrimination and the Law* 21(2) 175.

presented in this dissertation, it can be decided that consensus does exist on the obligation to transform the construction and application of the reasonable test. By suggesting recognition, diverse thinking and consideration for intersectionality, this dissertation has provided examples of how we can begin to transform the reasonable person test and bring it in line with the goals of our pursuit of substantive equality and justice for all.

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