EQUALITY BEFORE THE LAW AND ACCESS TO JUSTICE IN CRIMINAL PROCEEDINGS UNDER A BILL OF RIGHTS

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ABSTRACT

This work seeks to critically examine the right to legal representation in the South African criminal justice system under a future constitutional dispensation.

Extensive attention has been given to how the right to legal representation has been interpreted under the common law. Reference has been made to the United States of America's approach to the due process and equal protection clauses in shaping the substantive and procedural content of the right to counsel in criminal proceedings. The importance of legal representation is examined during the pre-trial, trial and sentencing stages of criminal proceedings.

A brief comparative examination has been made of the right to legal representation in other foreign jurisdictions, and how the courts have dealt with indigent accused persons facing criminal charges. Proposals from different quarters in South Africa have been discussed in the hope that these proposals may still find a place in the country's final constitution. Finally, the practical implications of a qualified right to free legal representation as provided by the Interim South African Constitution is discussed. Suggestions are also made concerning the approach to be adopted by the courts in the face of judicial precedents which would be in conflict with a new value system under a Bill of Rights after 27 April 1994.

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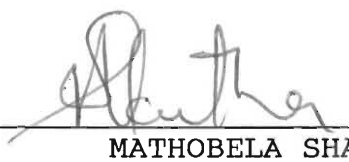
SIGNATURE : 

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TABLE OF CONTENTS

TABLE OF CASES

27. S v Hlongwane 1982 (4) SA 321(N).

28. S v Khanyile 1988 (3) SA 795(N).

29. S v Leso 1975 (3) SA 694(A).

30. S v M 1993 (2) SACR 487(A).

31. S v Mabaso 1990 (3) SA 185(A).

32. S v Masithela 1986 (3) SA 402(O).

33. S v Maxaku; S v Williams 1973 (4) SA 248(C).

34. S v Mbambeli and Others 1993 (2) SACR 388(E).

35. S v Mjikwa 1993 (1) SACR 507(A).

36. S v Mpata 1990 (2) SACR 175(NC).

37. S v Mpofu 1993 (3) SA 864(N).

38. S v Mqubasi en Andere 1993 (1) SACR 198(SE).

39. S v Mthwana 1989 (4) SA 361 (N).

40. S v Ndlovu 1993 (2) SACR 69(A).

41. S v Nene and Others (2) 1979 (2) SA 521(D).

42. S v Ngwenya 1991 (2) SACR 520(T).

43. S v Nzimande 1993 (2) SACR 218(N).

44. S v Phakati 1978 (4) SA 477(T).

45. S v Rabie 1975 (4) SA 855(A).

46. S v Radebe; S v Mbonani 1988 (1) SA 191(T).

47. S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk N O and Another 1989 (3) SA 368(E).

48. S v Rudman and Another; S v Mthwana 1992 (1) SA 343(A).

49. S v Seheri 1964 (1) SA 29(A).

50. S v Shabangu 1976 (3) SA 555(A).

51. S v Sheehama 1991 (2) SA 860(A).

52. S v Tyebela 1989 (2) SA 22(A).

53. S v Van Rensburg 1963 (2) SA 343(N).

54. S v Zinn 1969 (2) SA 537(A).

55. Thuntsi v Attorney-General, Northern Cape 1982 (4) SA 468(NC).

56. Van Zyl v Santam Insurance Co. Ltd 1977 (1) SA 223(D).

57. Zgili v McLeod (1904) 21 SC 150.

BOPHUTHATSWANA

Nyamakazi v President of Bophuthatswana 1992 (4) SA 540(B).

CISKEI

Guzana v Council of State, Republic of Ciskei 1993 (2) SA 445(CK).

TRANSKEI

S v Wanna and Others 1993 (1) SACR 582(TK).

VENDA

S v Kwinda 1993 (2) SACR 408(V).

CANADA

1. Clarkson v R [1986] 1 S.C.R. 383 (S.C.C.)

2. Dehghani v Minister of Employment and Immigration; Canadian Council for Refugees Intervener (1993) 101 D.L.R. (4th) 654 (S.C.C.)

3. R v Lundrigan (1985) 19 C.C.C. (3d) 499.

4. R v Therens (1985) 18 D.L.R. (4th) 655.

5. Re Ciglen and the Queen (1978) 45 C.C.C. (2d) 227.

6. Re Ewing and Kearney and the Queen (1974) 18 C.C.C. (2d) 356.

INDIA

1. Re Govinda Reddy [1958] A.Mys. 150.

2. State v Dukhi Dei [1963] A.Or. 144.

NAMIBIA

1. Djama v Government of the Republic of Namibia and Others 1993 (1) SA 387 (Nm).

2. Namib Wood Industries (Pty) Ltd v Mutiltha N O 1992 (1) SA 276 (Nm Hc).

3. S v Bruwer 1993 (2) SACR 306 (Nm).

4. S v D 1992 (1) SA 513 (Nm).

5. S v Minnies 1991 (3) SA 364 (Nm Hc).

6. S v Mwambazi 1991 (2) SACR 149 (Nm).

7. S v Wellington 1991 (1) SACR 144 (Nm).

TANZANIA

Khasim Hamisi Manywele v R (1990) Dodoma High Court Crim. Appeal No. 39/1990 (Unreported).

UNITED STATES OF AMERICA

1. Argersinger v Hamlin 407 US 25 (1972).

2. Betts v Brady 316 US 455 (1947).

3. Brown v Mississippi 297 US 278 (1936).

4. Escobedo v Illinois 378 US 478 (1964).

5. Gideon v Wainwright 372 US 335 (1963).

6. Griffin v Illinois 351 US 12 (1956).

7. Johnson v Zerbst 304 US 458 (1938).

8. Mapp v Ohio 367 US 643 (1961).

9. McNabb v United States 318 US 332 (1943).

10. Miranda v Arizona 384 US 436 (1966).

11. Nix v Whiteside 475 US 157 (1986).

12. Powell v Alabama 287 US 45 (1932).

13. Scott v Illinois 440 US 367 (1979).

14. Stack v Boyle 342 US 1 (1951).

15. United States v Salerno 481 US 697 (1987).

16. Williams v Twomey 510F 2d 634 (1975).

ZIMBABWE

1. Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe and Others 1993 (2) SACR 432 (ZS).

2. Maluleke v Du Pont N O 1964 (2) SA 692 (SR).

3. In re Mlambo 1992 (4) SA 144 (ZS).

4. Paweni v Acting Attorney-General 1985 (3) SA 720 (ZS).

5. R v Kuraza 1967 RLR 225.

6. S v Slatter Supreme Court Judgement No. 49 of 1984 (Unreported).

CASES UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS OF 1966

1. Antonio Vianna Acosta v Uruguay Communication No. 110/1981 (1984) (Unreported).

2. Hiber Conteris v Uruguay Communication No. 139/1983 (1985) (Unreported).

3. Tshitenge Muteba v Zaire Communication No. 124/1982 (1984) (Unreported).

TABLE OF STATUTES

1. Criminal Procedure Act 51 of 1977.
2. Criminal Law Second Amendment Act 126 of 1992.
3. Compulsory Motor Vehicle Insurance Act 56 of 1972.
4. General Law Amendment Act 62 of 1955.
5. Internal Security Act 74 of 1982.
6. Internal Security Act and Intimidation Act 138 of 1991.
7. Law of Evidence Amendment Act 45 of 1988.
8. Legal Aid Act 22 of 1969.
9. Magistrates Court Amendment Act 118 of 1991.
10. South African Act 1 of 1910.
11. South African Republican Constitution Act 32 of 1961.
12. The Republic of South Africa Constitution Act 110 of 1983.

NAMIBIA

Criminal Procedure Act 51 of 1977.

TANZANIA

1. Criminal Procedure Act of Tanzania.
2. Legal Aid Criminal Proceedings Act 21 of 1969.

UNITED STATES OF AMERICA

Illinois Post-Conviction Hearing Act III Rev. Stat. 1955.

ZIMBABWE

1. Criminal Procedure and Evidence Act 1 of 1992.
2. Legal Assistance and Representation Act 20 of 1969.

CHAPTER I : EQUALITY BEFORE THE LAW AND ACCESS TO JUSTICE IN CRIMINAL PROCEEDINGS UNDER A BILL OF RIGHTS

1.1 INTRODUCTION

In S v Khanyile and Another[1] it was held that the absence of legal representation in criminal proceedings, where such representation is required in the interests of justice, brought about by the indigence of the accused, warranted the setting aside of a conviction on the grounds that the trial of the accused was not fair. This rule was further expounded in S v Davids; S v Dladla[2]. However, it was rejected in both the cases of S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO and Another[3] and S v Mthwana[4]. The rejection of the Khanyile rule was confirmed by the Appellate Division in S v Rudman and Another; S v Mthwana[5]. Presently our law provides that the State does not have a duty to provide an indigent accused with free legal representation where the interests of justice so require.

Nicholas A J A delivering the unanimous decision of the court, said :

> "The law is clear; no such right has ever been recognised either by statute or in the practice of the courts. The Khanyile rule was a new departure, which could not claim legitimacy by reference to the 'right to a fair trial' which, as I have pointed out above, is not the test of an irregularity or illegality[6]."

Briefly, the Appellate Division acknowledged that it was empowered to create such a rule, it declined to do so because on principle, it should not issue a mandamus to the government to provide legal aid and the Court doubted the feasibility of such a rule given the limited financial and personnel resources in the whole administration of criminal justice in South Africa. The Appellate Division further went on to say that the Khanyile rule had an extra dimension of taking the matter beyond the courtroom into the realm of politics. It is against this background that the present paper seeks to examine the implications of a Bill of Rights on the criminal justice system. Needless to say that South Africa is undergoing a transition and that a new constitutional dispensation will be accompanied by a justiciable Bill of Rights. Midgley remarks :

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[1] 1988(3) S A 795(N)

[2] 1989(4) S A 172(N).

[3] 1989(3) S A 368(E).

[4] 1989(4) S A 361 (N).

[5] 1992(1) S A 343(A).

[6] At 380F.

> "A future Bill of Rights will probably contain, amongst others, a right to legal assistance in criminal cases. Such a right would conform with the right recognised in both our common law and our statute law and is also found in other human rights charters[7]."

Midgley submits that a proper implementation of a Bill of Rights requires comprehensive state funding for all legal services on an enormous scale[8].

It is submitted that the right to free legal representation for an indigent accused where the interests of justice so require should be firmly entrenched in a Bill of Rights now and should not depend for its implementation on the political myth of whether the post-apartheid economy will take off or not. This will be the recurring theme in this paper. A Bill of Rights becomes a worthless scrap of paper if those charged with its enforcement were to be answerable to either the executive or the legislature[9]. The problem of providing legal representation for indigent accused is not as difficult as it has been portrayed[10]. As a starting point, it is apposite to quote the following submission :

> "Once the South African judiciary operates under the umbrella of a Bill of Rights, it will become increasingly necessary for the courts to determine human rights issues on legal principle alone, without reference to the attitude of the government, and it is unlikely that they will be able to avoid the issue by calling for a feasibility study before making a decision[11]."

1.2 (a) PHILOSOPHICAL AND HISTORICAL ORIGINS OF THE CONCEPT OF EQUALITY BEFORE THE LAW

The principle of equality before the law is regarded as the 'foundational principle of liberal democracies[12]. Steytler contends that it is also a foundational principle of our common

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[7]J R Midgley "Access to Legal Services : A Need to Canvass Alternatives" (1992) 8 SAJHR 74 at 76; D Nicolson "Ideology and the South African Judicial Process - Lessons from the Past" (1992) 8 SAJHR 50 at 66.

[8]ibid.

[9]Nicolson op cit 68.

[10]D J McQuoid-Mason "Rudman and the Right to Counsel : Is it Feasible to Implement Khanyile? (1992) 8 SAJHR 96 at 98; cf A Chaskalson "The Unrepresented Accused" (1990) 3 Consultus 98 at 100.

[11]McQuoid-Mason, op cit 113.

[12]N C Steytler The Undefended Accused (1988) 12.

law[13]. Polyviou points out that "equality has had a long history, has figured prominently in many different contexts, and has been given a great number of meanings and definitions[14]. Drewry, for example, points out that Dicey's concern was with equality before the law, with "the idea of legality or of the universal subjection of all classes to one law administered by the ordinary courts[15]. Equality before the law may also mean a procedural concept pertaining to the application and enforcement of laws and the operation of the legal system[16]. Polyviou submits that a third possible meaning of equality before the law is that the State and the individual before the law should be equal[17]. It is submitted that whatever meaning one attaches to equality, it should be appreciated that it is a term denoting approximate equality only. Bodenheimer contends :

> "Equality is but an abstraction from actual inequality, taken from a certain point of view[18]."

The philosophical rationale for the principle of equality before the law has been expressed as follows :

> "To secure impartial laws and an equal administration of justice, and thereby to make possible the enjoyment of the rights and opportunities contemplated by a democracy, the state itself exists[19]".

The idea of equality before the law for the rich and the poor alike is one of the oldest. The Holy Bible in the Book of Leviticus, Chapter 19, Verse 15, says :

> "You people must not do injustice in the judgement. You must not treat the lowly with partiality, and you must not prefer the person of a great one. With justice you should judge your associate[20]."

The Magna Carta of 1215 in English law provided in Caption 40 :

> "To no-one will we sell, to no one will we refuse or delay,

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[13]op cit 115.

[14]P G Polyviou The Equal Protection of the Laws (1980) 5.

[15]G Drewry Law, Justice and Politics (1975) 6.

[16]Polyviou op cit 2.

[17]ibid.

[18]E Bodenheimer Jurisprudence : The Philosophy and Method of the Law (1962) 197.

[19]R H Smith Justice and the Poor (1972) 4.

[20]New World Translation of the Holy Scriptures (1984) 162.

right or justice."[21]

As it has been already stated, this notion of equality before the law is found in most of the constitutions and human rights charters all over the world. For the purpose of this paper, the focus would be narrowed to South Africa. Steytler contends that although this doctrine was not spelt out unequivocally by the Roman-Dutch authorities, Voet declared that law preserves equality and binds the citizens equally[22]. Steytler traces the idea of equality before the law as an accepted principle during the course of the nineteenth century in the Cape Colony[23]. It was contained in Article 58 of the 1854 Constitution of the Republic of Orange Free State. However, it was omitted in both the 1910 Union[24] and 1961 Republican Constitutions[25] of South Africa. The Republic of South Africa Constitution Act[26] stated as one of its national goals in the preamble the necessity of standing united and of pursuing certain national goals including the upholding of the "independence of the judiciary and the equality of all under the law[27]. Steytler further purports that our courts have also recognised this principle as part of our common law. Steytler refers to the following dictum by Kotze C J in In re Marechane[28] :

> "The court is bound to do equal justice to every individual within the jurisdiction, without regard to colour or degree[29]."

In Zgili v McCleod[30], Lord de Villiers said :

> "It is the primary function of the court to protect the rights of individuals which may be infringed, and it makes no difference whether the individual occupies a palace or a hut. The plaintiff in this case occupies a native hut but she is as much entitled to the protection of this court

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[21]Smith op cit 3.

[22]Steytler op cit 12.

[23]ibid; cf T R H Davenport "Civil Rights in South Africa 1910-1960" 1960 Acta Juridica 11 at 13.

[24]The South African Act 1 of 1910.

[25]The South African Republican Constitution Act 32 of 1961.

[26]110 of 1983.

[27]Steytler op cit 13.

[28](1882) 1 SAR 27.

[29]At 31.

[30](1904) 21 SC 150.

as if she occupied the finest residence in the country[31]."

In R v Abdurahman[32], Centlivres J A said :

"It is the duty of the court to hold the scales evenly between the different classes of the community[33]."

In Hurley and Another v Minister of Law and Order[34], Leon ADJP said :

"... it is perhaps necessary to remind oneself, from time to time, that the first and foremost sacred duty of the court, where it is possible to do so, is to administer justice to those who seek it, high and low, rich and poor, black and white; to attempt to do justice between man and man and man and State[35]."

In S v Rudman and Another; S v Mthwana[36], Nicholas AJA said :

"Our common law is informed by a broad equitable spirit and, in administering the law and in the exercise of its functions, the court pays due regard to considerations of equity in the broad general sense of the word[37]."

In Guzana v Council of State, Republic of Ciskei[38], the court, in declaring the Security Amendment Decree[39], and the Constitution Second Amendment Decree[40] null and void, said the following :

"We find ourselves unable to accept the respondent's view of the matter. Decree 5 and Decree 10, by conferring on the Chairman of the Council of State greater protection against having to testify than that possessed by other citizens, have the effect that the Chairman, on the one hand, and the other citizens of Ciskei, on the other hand,

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[31]At 152.

[32]1950 (3) SA 136 (A).

[33]At 145C.

[34]1985 (4) SA 709(D).

[35]At 715G.

[36]Supra.

[37]At 377D.

[38]1993 (2) SA 445 (Ck).

[39]No. 5 of 1992 (Ck).

[40]No. 10 of 1992 (Ck).

> are not equal before the law. This inequality is not removed by the fact that the Chairman's fellow citizens are all in the same position vis-a-vis him[41]."

With regard to the field of criminal procedure, Steytler contends that "direct references to the principle of equal justice were found in various criminal codes of the pre-union colonies[42]. Steytler further submits that "rules of criminal procedure, as formulated in general terms, have not discriminated overtly against accused persons on the basis of race, religion or class[43]." It is in this field that this paper seeks to examine the principle of equality before the law. The following observation is apposite :

> "Time-honoured expressions like all persons being equal in the eyes of the law have come to mean equality before the law if you can afford it. There is, therefore, justice only for the very rich[44]".

In an adversarial system like ours, an accused person in a criminal trial has to pit his wits against the State. As Steytler points out, the State has at its disposal the financial resources to employ as prosecutors persons trained in law[45]. The prosecutors are aided in their tasks by all the machinery of the State which includes the police in the gathering of evidence for prosecution. Accused persons with financial resources are also well off in that they can secure the services of lawyers in defending their cases. Can it be said that an accused person who cannot afford to hire a lawyer, owing to the fact that he is indigent, is on an equal footing before the law vis-a-vis the State on a complex and serious criminal charge? The answer should be emphatically in the negative. Effective equality between the prosecution and the accused is not ensured if the implementation of the principles of a fair trial is dependent upon the presence of a defence lawyer[46]. Coincidentally, indigence is in most cases accompanied by illiteracy. Drewry summarises the position as follows :

> "Since poorer people cannot afford lawyers' fees then the quality of justice in society must depend on the devices intended to secure equality before the law for those with

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[41]Per Diemont JA; Galgut JA and Rabie JA at 445I-J.

[42]op cit 13.

[43]op cit 14.

[44]D Nkadimeng "The Plight of the Unrepresented Accused in the South African Law" (1987) 1 African Law Review 14 at 16.

[45]Steytler op cit 14.

[46]ibid.

little or no funds of their own"[47].

It is submitted that one of these devices in South Africa is nothing other than a Bill of Rights. Mr Justice Mohamed remarked :

> "Fundamental to any acceptable structure of a bill of rights is the right of all persons to equal treatment under the law and the right not to be discriminated against on the ground of sex, race, colour, ethnic origin, religion, creed or social or economic status"[48].

1.2 (b) RELATIONSHIP BETWEEN THE CONCEPT OF EQUALITY BEFORE THE LAW AND THE ETHIC OF ACCESS TO JUSTICE

Nicholas A J A in S v Rudman and Another; S v Mthwana[49] said that the words "fairness", "justice" and "equity" in their ordinary popular meaning are synonyms, as are their adjectival forms respectively[50]. Taking our cue from here, Midgley contends that the concept "access to justice" highlights that a legal system must be equally accessible to all and it must lead to results that are individually and socially just[51]. It is submitted that the present writer confines the meaning of "ethic of access to justice" to the above context since the concept of justice is both complex and elusive to define. For the purpose of this paper, substantive and procedural justice are linked together and it is submitted that the pursuit of equality and fairness is of profound importance in our post-apartheid legal system.

It is an open secret that many blacks in this country emerge from their encounter with the law feeling a bitter sense of injustice. Mr Justice Milne, as he then was, pointed out that in the magistrates courts and the lower courts a vast majority of accused persons are generally unrepresented due to ignorance and poverty[52]. Milne J remarked :

> "To many unsophisticated people accused of a criminal offence, the fact that they need legal representation is not apparent. As if having legal representation somehow

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[47]op cit 133.

[48]Sunday Times 2 May 1993.

[49]Supra.

[50]At 374J-375A.

[51]Midgley op cit 75; cf M Cappelletti and B Garth Access to Justice (1981) Vol 1 A World Survey Book 1 at 22.

[52]A J Milne "Equal Access to Free and Independent Courts" (1983) 100 SALJ 681 at 683.

> revealed a need cunningly to conceal guilt. I am afraid it is also needed to establish innocence ... in South Africa, the problem is compounded : It is not just the case of a laymen who does not have specialised knowledge - it is an ignorance of the whole basis of our legal procedure arising from profound cultural and historical differences[53]."

Milne J pointed out that a further barrier to equal access to the courts was a physical barrier whereby there is a difficulty of instructing a lawyer from prison. This is a major difficulty of many black awaiting trial prisoners[54]. All these observations are still true today. Milne J contended that this inarticulate resentment should be replaced with active legal action of expanding the use of courts by blacks.[55] How do we ensure that an indigent accused has a fair trial? Obviously, by setting the principles of a fair trial in motion. But how can this be done for illiterate people to whom the legal procedures are foreign? They need a lawyer, but do not have money. The government has very limited financial and personnel resources. It is submitted that in an adversary system principles of a fair trial are combined with culturally biased procedures to make a legal system inefficient in protecting the rights of undefended accused persons. The following description is also applicable to the present day South Africa :

> "A black man who breaks the criminal law may find himself in a hostile and alien world peopled by policemen, court officials and magistrates or judges with whom he has nothing in common, hampered by procedural or other barriers which he is ill-equipped to overcome and accused of offences dreamed up by a culture completely outside his experience[56]."

Justice implies the equal treatment of equal persons in

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[53]op cit 684.

[54]ibid.

[55]Milne op cit 683.

[56]Drewry op cit 130. It is submitted that the recent procedure of appointing lay-assessors from the community of the accused person is a welcome innovation to root out cultural bias in the administration of justice. As McQuoid-Mason points out that if a lay-assessor understands the language of the accused, he or she could ensure that a correct interpretation of what the accused says is conveyed to the court. The Magistrates Court Amendment Act 118 of 1991 came into effect on 1 March 1992. See D J McQuoid-Mason "Legal Representation and the Courts" (1993) 1994 Unpublished monograph 1 at 11. It is further submitted that a stark illustration of cultural bias is the case of R v Mbombela 1993 AD 269. See further S v Khanyile Supra 812J - 813A.

the equality definition of justice fails to clarify the obvious truth that an equality of mistreatment does not live up to the expectations of mankind for a just order of things[57]. He further points out that this definition also fails to articulate the fact that justice aims at the proper judicial treatment of unique situations and unusual combinations of events which do not lend themselves to a comparison of individuals, social groups and legally relevant situations for the purpose of determining their essential likeness or dissimilarity[58]. By this, it is simply meant that justice is a very flexible concept which by its nature abhors arbitrariness. It is in this context that it is submitted that indigent accused must be placed on an equal footing, vis-a-vis the State, and vis-a-vis accused persons who can afford to hire lawyers, by being provided with legal representation at the State's expense in order to protect their interests where justice so demands. South Africa is presently seeking to establish a "rights culture" and this task will be made easier if the majority of South Africa accept the legitimacy of the legal system and identify with it. A Bill of Rights even though making a small difference in the daily lives of ordinary people of this country will go a long way in creating confidence in the legal system. This may be a good opportunity to remove the legally approved inequality of Rudman's case from out law. My submission is supported by Mr Justice Kriegler's comments on 100 000[59] people jailed every year without the benefit of legal representation:

> "I refuse to accept that it is beyond the combined talents of the profession to deal with the problem of the daily prison population[60]."

Mr Justice Kriegler further submitted that the outstanding role of lawyers was to defend the weak against the powerful and further urged lawyers to assist the mass of undefended and untried people who clog the country's jails[61].

CONCLUSION

Bodenheimer submits :

> "Frequently the success of a new idea of justice is ensured by an advance in psychological and sociological knowledge which demonstrates that the lines governing the classification of persons, groups and things for the purpose of equal or unequal treatment by the law must be

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[57]Bodenheimer op cit 194.

[58]ibid.

[59]See Legal Aid Board Annual Report 1991-92 (1992)1.

[60]The Star 8 February 1993.

[61]ibid.

redrawn in order to redress a political or social wrong[62]."

The above is true of South Africa especially with the imbalances created by the apartheid system and the prevailing injustices in our criminal justice system. Meaningful access to justice has been cogently described as follows :

> "True access to justice is achieved only when no person is deterred by financial, psychological or physical barriers from seeking a legal solution for the assertion of a right, for making a claim, or for defending a civil claim or criminal charge. While the ultimate realisation of this goal may indeed be Utopian it can be partially achieved by making the path to the court, the normal dispensive justice, easier for the underprivileged by ensuring equality before that court.[63]

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[62]Bodenheimer op cit 199.

[63]M K Robertson "Is Legal Aid the Solution?" in D J McQuoid-Mason (ed) Legal Aid Clinics in South Africa (1985) 98 at 99; cf F H Zemans (ed) Perspectives on Legal Aid (1979) 10.

CHAPTER 2 : COMMON LAW RIGHT TO LEGAL REPRESENTATION IN CRIMINAL PROCEEDINGS

2.1 COMMON LAW RIGHT TO LEGAL REPRESENTATION IN CRIMINAL PROCEEDINGS

As Steytler has pointed out[1], the principle of equality before the law is a foundational principle of our common law. Steytler comments :

> "Nicholas AJA is of course correct that there has never been a rule that an indigent accused is entitled to legal representation[2]."

Our common law, being a fluid and dynamic system, developed this right to legal representation. Selikowitz has mentioned that the fundamental right to counsel was only guaranteed to those who could afford it and even then it was subject to suspension unless prejudice resulted[3]. Selikowitz traces the evolution of this right from the Roman Law through to Roman-Dutch Law to English Law and the various enactments in the pre-union colonies, the Union of South Africa and through the case-law. In Li Kui Yu v Superintendent of Labourers[4], it was said that the denial of right to counsel is a tyrannical exercise of power and a most serious infringement of the liberty of any subject[5]. In Brink v Commissioner of Police[6] it was described as "so fundamental that in normal circumstances it has never been challenged"[7]. This right has found statutory confirmation in the Criminal Procedure Act[8]. Dugard made the following observation :

> "As far as South Africa is concerned, it is true that our system of criminal procedure does provide certain safeguards which serve to minimize the prejudice which an indigent accused may suffer as a result of his lack of

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[1]Steytler (1988) 115.

[2]N C Steytler "Equality Before the Law : Being Practical about Principle" (1992) 8 SAJHR 113 at 115.

[3]S Selikowitz "Defence by Counsel in Criminal Proceedings under South African Law" 1965-1966 Acta Juridica 53 at 91.

[4]1906 TS 181.

[5]At 187-188.

[6]1960 (3) SA 65(T).

[7]At 67.

[8]Section 73 of Act 51 of 1977.

legal representation[9]."

As has already been indicated, these procedural safeguards require the presence of defence counsel to set them in motion since many accused persons who appear in our lower courts are indigent and illiterate. This is illustrated by the following example :
Take an indigent accused who happens to be illiterate and tried for a murder in the Regional Court. The accused happens to be black and communicates with the court through the interpreter. Any misinterpretation of the evidence may have disastrous consequences for the accused. The State's case is largely based on a confession which was elicited by a senior police officer by duress. When does such accused person timeously object to the leading of this inadmissible evidence? Does he understand what a trial within a trial means? Are these procedural safeguards already at hand for him to set them in motion, even though he is illiterate and the legal procedure and jargon is foreign to him? What if he was not expecting his opportunity to cross-examine to come at that particular moment? Needless to say, his questions on the spur of the moment are unlikely to make much impression on the testimony of a senior police officer well accustomed to giving evidence in court. There is no doubt that some police officers have become accomplished liars during their daily interaction with courts[10]. The use of technicalities in legal language may also have a bearing on the outcome of the trial.

Even in capital cases, there is no legal rule that an indigent accused must be provided with pro deo counsel. In R v Mati[11], Schreiner J A said :

> "There is no rule of law that a person who is being tried for an offence may, if he is convicted, result in a death sentence must, unless he objects, be defended by counsel. But it is a well-established and most salutary practice that whenever there is a risk that a death sentence may be

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[9]C J R Dugard "The Right to Counsel : South African and American Developments" (1967) 84 SALJ 1 at 6.

[10]In S v Gwala and Others (NPD, July 1977, unreported) the accused alleged that they had been subjected to various forms of duress by the security police during their detention in solitary confinement. The court found the evidence of the police witnesses as clear and satisfactory in every respect. The court remarked that it would have been out of character for either of the two security policemen to mete out the alleged torture on accused No. 4. The court came to this conclusion on the basis of its observation of the two policemen in court! See J G Riekert "The DDD Syndrome : Solitary Confinement and a South African Security Law Trial" in A N Bell and R D A Mackie (ed) Detention and Security Legislation in South Africa (1985) 121 at 140. See Chapter 3 below for a further discussion of the case.

[11]1960 (1) SA 304 (A).

> imposed, either where that sentence is compulsory unless other factors are present, as in the case of murder, or where the death sentence is permissible by law and the circumstances make its imposition a reasonable possibility, the State should provide defence by counsel if the accused has not made his own arrangements in that behalf[12]."

McQuoid-Mason points out that it is regrettable that the court in Rudman's case as it did in S v Mabaso[13] was not even prepared to recognise an unequivocal right to counsel in capital cases[14].

The right to legal representation is endemic to a fair trial according to the current trend in legal philosophy[15]. Our courts have cautiously evolved the right at a slow pace. In S v Seheri[16] it was held that a lower court's refusal to grant a postponement requested by an accused because his attorney had neglected to arrange for counsel to be present at the trial, amounts to an irregularity, where the trial proceeds without the accused being represented[17]. In S v Shabangu[18] it was held that it is irregular for a magistrate to refuse to grant a postponement where such postponement is sought by an accused in order to obtain legal representation[19]. In S v Radebe; S v Mbonani[20], Goldstone J broke new ground by holding that a magistrate has a duty to inform an unrepresented accused of his right to legal representation.[21]. Goldstone J further went on to say that where the charge is serious and complex, magistrates have a duty to encourage unrepresented accused to exercise this right. Goldstone J, however, said a failure by a magistrate to inform the accused of this right will not in all circumstances vitiate the trial.[22] Bruinders contends that this case is also authority for the proposition that an unrepresented accused has

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[12]At 306H-307A.

[13]1990 (3) SA 185(A).

[14]McQuoid-Mason (1992) 8 SAJHR 112.

[15]cf T Bruinders "The Unrepresented Accused in the Lower Courts : S v Radebe; S v Mbonani 1988 (1) SA 191(T) (1988) 4 SAJHR 239.

[16]1964 (1) SA 29 (A).

[17]At 36D.

[18]1976 (3) SA 555 (A).

[19]At 558D-E.

[20]1988 (1) SA 191 (T).

[21]196F.

[22]196G.

a right to legal representation at any stage of the proceedings of a criminal trial[23]. This was followed by the seminal decision of S v Khanyile[24] which held that an indigent accused is entitled to legal representation at the State's expense where the interests of justice so require[25]. Didcott J enunciated a triad of factors between the extremes of most serious and less serious cases lending an indigent accused eligibility for legal representation as of right[26]. Didcott J said that firstly, the case must be of a serious nature in that it might result in dire consequences for the accused; secondly, the case must be complex, both legally and factually and, thirdly, that the accused must not have adequate personal equipment to defend himself.[27] Didcott J took his cue from American case law and went on to draw similarities between the two systems as being both essentially adversarial in nature[28]. Didcott J conceded that South Africa does not have a Bill of Rights like in the United States of America. However, he went on to say that the notions of basic fairness and justice on which our legal system is based required that an indigent accused must have legal representation in order to make the resulting trial fair[29]. It is submitted that Didcott J based the indigent accused's right to legal representation squarely on the principle of equal justice[30]. Didcott J further acknowledged the limitations of legal aid and the insufficiency of lawyers for the provision of an extensive legal aid service[31]. Didcott J also went on to highlight the difficulties faced by indigent accused persons. He said that the majority of them were black and illiterate and that this hampers them in efficiently participating in the court's proceedings. It was the people who were least able to afford legal representation who needed it most. Didcott J said that a judicial officer should refuse to proceed with the trial until representation was procured for an indigent accused. He said that judicial officers should refuse to participate in unfair trials as a result of the State's failure to provide legal representation[32]. It is submitted by the present writer that

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[23]Bruinders op cit 240.

[24]1988 (3) SA 795 (N).

[25]At 810C-D, 810G-I, 818A, 818G.

[26]At 815C-E.

[27]Ibid.

[28]At 808H-810A.

[29]At 809F.

[30]Cf Steytler (1988) 236.

[31]At 813F-814C.

[32]At 816C.

Khanyile's decision was an epitome of the transformation of the principle of equality before the law to accessible justice for all. This was a victory for justice - but it was short-lived.

The Khanyile rule has been criticised for vagueness and openness with regard to its criteria[33]. It is conceded that this may be true but our law has proved to be capable of dealing with such nebulous concepts like "interests of justice", "public policy" and "legal convictions of the community". Our common law is very dynamic and fluid and would have eventually arrived at a satisfactory criteria[34]. The present writer submits that the entitlement to legal representation for indigent accused persons should be extended to all Schedule One offences because of the significant consequences involved on conviction. These offences are the most serious in terms of the Criminal Procedure Act.[35] Most of them carry heavy criminal sentences. Even though some of these offences only carry a prison sentence of about six (6) months, the law sanctions the use of deadly force if a suspect who is reasonably suspected of having committed such an offence tries to flee in order to evade arrest.[36]

The Khanyile rule was rejected in S v Rudman; S v Johnson; S v Xaso; Xaso v van Wyk N O and Another[37] wherein Cooper J said that the role of a judicial officer in South Africa is different to that of a judicial officer in the United States of America. Cooper J distinguished American authorities on the grounds that there is no Bill of Rights in South Africa. Cooper J went on to say that a trial will be only vitiated if it is not conducted in accordance with the principles of procedural regularity. Cooper J said :

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[33]Steytler (1988) 238.

[34]S v Rudman, S v Mthwana Supra 351A-G; cf M M Corbett "The Role of Policy in the Evolution of Our Common Law" (1987) 104 SALJ 52 67-8.

[35]Schedule One Offences are : treason; sedition; murder; culpable homicide; rape; indecent assault; sodomy; bestiality; robbery; assault where a dangerous wound is inflicted; arson; breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence; theft; receiving stolen property knowing it to have been stolen; fraud; forgery; offences relating to coinage; any offence the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine; escaping from lawful custody and any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

[36]Section 49(2) of the Criminal Procedure Act. See N Haysom "Licence to Kill Part I : The South African Police and the use of deadly force" (1987) 3 SAJHR 3. See further below Chapters 5 and 6 on the discussion of the Significant Offence Test.

[37]1989 (3) SA 368(E).

> "At all stages of a criminal trial the presiding judicial officer acts as the guide of the undefended accused"[38].

Cooper J further went on to say that failure to inform an accused of his right to legal representation and availability of legal aid does not necessarily vitiate the proceedings but this will in each case depend on whether there has been a failure of justice[39]. In S v Mthwana[40] the Khanyile rule was rejected and the court followed Rudman's case[41]. The Appellate Division's decision in Rudman is a set-back to those who strive for the plight of the undefended accused. The Appellate Division held that "notions of basic fairness and justice are not the touch-stone for procedural regularity. This decision has been criticised by many academics. Davis had this to say :

> "The effect of Rudman's case is to truncate the right to a fair trial in South African law as opposed to the Khanyile approach which is to expand the content of such right and enhance its scope[42]."

Davis submits that Rudman's case illustrates the problem of leaving decisions about competing claims on scarce economic resources to the judiciary[43]. Davis contends that Rudman's case reveals a judicial conservatism which does not augur well for the demands of constitutional jurisprudence which will undoubtedly form part of a future South African legal system[44]. Davis submits : "If a South African bench is to adopt such a literal and formalistic approach to a bill of rights, it will be unlikely that an innovative and relevant jurisprudence will be created[45]."

I respectfully agree with this submission with the hope that in years to come we shall be able to look at Rudman's case as an aberration confined to the history and era of Parliamentary Sovereignty in South African Law. It was as if Dugard's prophesy had Rudman's case in mind when he said in 1967 :

> "The South African bench, more sensitive to accusations of

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[38]At 378A.

[39]At 382D.

[40]1989(4) SA 361(N).

[41]At 367I, 369F, 371D-F.

[42]D M Davis "An Impoverished Jurisprudence : When is a Right not a Right?" (1992) 8 SAJHR 90 at 95.

[43]Davis op cit 96.

[44]Davis op cit 95.

[45]Davis op cit 95-96.

judicial legislation than its American counterpart, it unlikely to extend the right to counsel to the indigent accused as was done in Gideon v Wainwright[46]."

2.2 HOW EQUALITY BEFORE THE LAW CAN BE TRANSFORMED INTO AN ETHIC OF ACCESS TO JUSTICE

The most graphic examples of how equality before the law can be transformed into accessible justice in criminal proceedings can be found in American case-law. The United States Constitution contains a justiciable Bill of Rights and the United States Supreme Court is vested with powers to strike down any legislation which is in conflict with it as being unconstitutional. Of relevance to this work is the Sixth and Fourteenth Amendments of the Constitution. The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defence". The Fourteenth Amendment provides that "no state shall make or enforce any law which shall bridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without the due process of law; nor deny to any person within its jurisdiction the equal protection of the law".

The United States Supreme Court has been instrumental and instructive on the evolution of the right to counsel. The Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment and the Sixth Amendment all serve to ensure the constitutional rights of accused persons to a fair trial are not violated under the adversary system. A chronological examination of the right to counsel through American case-law is apposite. In Powell v Alabama[47] the court held that failure to give reasonable time and opportunity to secure counsel prior to trial, to ignorant and illiterate youths, away from their families and friends, charged with a crime punishable with death, infringes the Due Process Clause of the Fourteenth Amendment. The accused were charged with the capital offence of rape and were found guilty in a State court and sentenced to death. On appeal, the court held that due process of law includes the right to counsel which involves consultation with counsel, an opportunity to prepare for trial, and to present a proper defence.[48] Justice Sutherland went on to say :

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[46]Dugard op cit 6.

[47]287 US 45 (1932).

[48]Sutherland J said at 58 : "The prompt disposition of criminal cases is to be commended and encouraged, but in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defence. To do that is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob."

> "The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he may have a perfect one. He requires the guiding hand of counsel every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect[49]."

Justice Sutherland pointed out that a judge cannot effectively discharge the obligations of counsel for the accused because the judge cannot investigate the facts, advise and direct the defence, or participate in those necessary conferences between counsel and accused which sometimes have the inviolable character of the confessional[50]. The court proceeded from the premise that the right to have counsel appointed when necessary is a logical corollary of the constitutional right to be heard by counsel[51]

In Johnson v Zerbst[52] the accused was convicted, without assistance of counsel, of possessing and uttering counterfeit money. On appeal, the United States' Supreme Court held that the conviction of a person who did not effectively waive his constitutional right to assistance of counsel for his defence, is void. The Court said that an intelligent waiver of right to assistance of counsel where one is accused of crime must depend in each case upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. Justice Black, delivering the judgment of the Court, pointed out that the Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done"[53].

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[49]At 68-70.

[50]At 61.

[51]At 72.

[52]304 US 458 (1938).

[53]He said at 462-463 : "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before

Justice Black went on to say :

> "The purpose of the constitutional guarantee of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guarantee would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution[54]."

The Court emphasised that where there has been no competent and intelligent waiver of the right to assistance of counsel, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving the accused of his life or liberty.

Then came the case of Betts v Brady[55] which has been regarded as a conservative judgement and a travesty of justice. The accused was charged with the crime of robbery. The contentious issues involved the identification of the robber and the truth of the accused's alibi. The accused requested a State-appointed counsel on the ground that he had no funds, but the trial court refused holding that the trial was before a court without a jury and that the issues in the case were simple, involving only the identification of the robber and the truth of the accused's alibi. The accused was found guilty and convicted. The accused appealed against his conviction on the basis that he had been denied due process of law by the refusal of the trial court to appoint him counsel. It was argued on behalf of the appellant that the principle enunciated in Johnson v Zerbst[56] should be extended to indigent defendants in State courts under the Fourteenth Amendment. The principle in Johnson v Zerbst was to the effect that the "Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has, or waives, the assistance of counsel[57]. The United States Supreme Court rejected this argument, holding that the due process clause did not confer on an indigent person charged with crime in a state court, an absolute right to have counsel appointed for him.

Justice Roberts, delivering the majority judgement, remarked as follows :

> "To deduce from the Due Process Clause a rule binding upon

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a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel".

[54]At 465.

[55]316 US 455 (1947). This case was followed by Didcott J in Khanyile's case. See Khanyile supra 814G.

[56]Supra.

[57]At 467.

> the states in this matter would be to impose upon them... a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction ... we cannot say that the (Fourteenth) Amendment embodies an inexorable command that no trial for any offence, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel[58]."

The court said that the Due Process Clause of the Fourteenth Amendment does not incorporate the specific guarantees found in the Sixth Amendment. The court said that the Sixth Amendment of the Federal Constitution giving to an accused the right to have the assistance of counsel for his defence in a criminal prosecution only applies to trials in the federal courts.[59] The court went on to say the phrase "due process of law" formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights, and its asserted denial is to be tested not as a matter of rule but rather by an appraisal of the totality of the facts involved in the particular case[60]. In this instant case, the court found that the appellant had not been put at a serious disadvantage by the refusal of the trial court to appoint him counsel in that the issues involved were simple, namely, the identification of the robber and the truth of the defendant's alibi[61]. The court pointed out that the appellant had been in a criminal court before and was not wholly unfamiliar with criminal procedure. The court placed emphasis on the practice of the state in other cases where, if the defendant had been seriously disadvantaged because of the lack of counsel, refusal to appoint such counsel would have resulted in a reversal of the conviction in the State Appellate Court[62]. Accordingly, in Betts' case the qualifying factors that made the assistance of counsel imperative, were absent.[63]

Justice Black, delivering the opinion of the minority, said that in view of the nature of the offence, the circumstances of the trial and his conviction, the appellant had been deprived of his right to counsel which was his procedural protection under the

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[58]At 473.

[59]At 461.

[60]At 462.

[61]At 472.

[62]Justice Roberts at 471 was at pains to point out the right to assistance of counsel in state courts was generally deemed to be one of legislative policy.

[63]At 472-473.

federal constitution[64]. Justice Black argued that the Fourteenth Amendment made the Sixth Amendment applicable to the states, and went on to say :

> "A practice cannot be reconciled with "common and fundamental ideas of fairness and right" which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude , with any satisfactory degree of certainty, that the defendant's case was adequately presented[65]."

He remarked that the denial of the request for counsel to the poor in serious criminal proceedings has long been regarded as shocking to the universal sense of justice throughout the United States of America.[66]

In Griffin v Illinois[67] the appellants were refused a certified copy of the record of their testimony adduced at their trial for armed robbery, because of their inability to pay for the cost of obtaining the transcript. Illinois law made it a prerequisite that for a full appellate review, a convicted criminal defendant must procure a transcript of the testimony adduced during the trial so as to enable him to present a complete bill of trial errors to the State Supreme Court. The Illinois Post-Conviction Hearing Act[68] made no exception for the indigent defendant and thus precluded anyone unable to pay the cost of such a transcript from obtaining an appellate review of asserted trial errors. The state courts dismissed the motion by the appellants to be furnished with the transcript without cost due to their indigence. The appellants argued on appeal to the Supreme Court that refusal to afford full appellate review solely because of poverty was a denial of due process and equal protection. The court held that this constituted an impermissible discrimination in violation of the Fourteenth Amendment[69].

Justice Black, delivering the majority decision, remarked :

> "Both equal protection and due process emphasise the central aim of our entire judicial system - all people charged with crime must, so far as the law is concerned, "stand on an equality before the bar of justice in every

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[64]At 474.

[65]At 476.

[66]At 475, 476.

[67]351 US 12 (1956).

[68]III Rev. Stat. 1955, ch 38, ss 826-832.

[69]Griffin v Illinois op cit 19.

> American court". In criminal trials a state can no more discriminate on account of poverty than on account of religion, race or colour. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial[70]."

He pointed out that there was no meaningful distinction between a rule denying the poor the right to defend themselves in a trial court, and a rule which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance[71]. He alluded to the fact that the provision of equal justice to both the rich and poor was an age-old problem which people have relentlessly strived to achieve. He said that there can be no equal justice where the kind of trial a man gets depends on the amount of money he has. He said that the denial of adequate review to the poor due to the fact that they cannot pay for transcripts meant that "many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside[72]. He concluded :

> "Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law[73]."

Justice Frankfurter concurred with the majority and delivered a separate opinion in which he said that the right to an appeal from a criminal conviction was so established that it led to the easy assumption that it is fundamental to the protection of life and liberty and was a necessary ingredient of due process of law[74]. He said that the equal protection of laws entitled a state to make classifications in law which are rooted in reason. He went on to say :

> "The equality at which the "equal protection" clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws", and laws are not abstract propositions[75]."

He pointed out that although it was not the duty of the State to equalize economic conditions, it cannot promulgate laws which produce squalid discrimination :

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[70]At 17-18.

[71]Ibid.

[72]At 19.

[73]Ibid.

[74]At 20.

[75]At 21.

> "If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity[76]."

Gideon v Wainwright[77] is regarded as the water-shed decision in respect of the right to counsel. The appellant was charged with a felony in a State court and his request to be given counsel was denied by the trial court. The court contended that under the laws of Florida, only a defendant charged with a capital offence was entitled to such an appointment. He was convicted and petitioned the Supreme Court of Florida arguing that his federal constitutional rights were violated by the trial court's refusal to appoint counsel. The United States Supreme Court over-ruled Betts v Brady[78] and held that the Fourteenth Amendment made the Sixth Amendment applicable to the states in all criminal prosecutions. This meant that it was now obligatory on states to provide the accused with the assistance of counsel for his defence in all criminal prosecutions. The court left open two questions : (a) how extensive was the right to counsel in terms of offences; and (b) at what stage of the criminal process does the right arise?[79]

Justice Black, delivering the unanimous decision of the court, remarked :

> "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realised if the poor man charged with crime has to face his accusers without a lawyer to assist him[80]."

Justice Black observed that the court in Betts v Brady made an abrupt break with its own well-considered precedents. He pointed out that there was ample precedent before Betts' case acknowledging that the Sixth Amendment was made applicable to all the states by the Due Process Clause of the Fourteenth Amendment[81].

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[76]At 24.

[77]372 US 335 (1963).

[78]Supra.

[79]At 351.

[80]At 344.

[81]At 341. He then went on to say at 344 : "Not only these precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This

Justice Clark concluded that the constitution made no distinction between capital and non-capital cases. He observed :

> "The Fourteenth Amendment requires due process of law for the deprival of "liberty" just as for deprival of "life", and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved[82]."

Justice Harlan observed that since "the special circumstances rule" was formally abandoned in capital cases. Therefore, it should be similarly abandoned in non-capital cases. However, Justice Harlan restricted this to offences carrying the possibility of a substantial prison sentence[83].

In Escobedo v Illinois[84] the accused was convicted of murder on the basis of incriminating statements made by him during police interrogation before being formally indicted and without being warned of his right to remain silent. The police turned down his request to consult with his attorney who was present in another room of the police station. The majority of the United States Supreme Court held that under these particular circumstances the accused had been denied his right to assistance of counsel under the Sixth and Fourteenth Amendment[85]. It was held by the majority that incriminating statements should not have been admitted by the trial court since the police investigation had been focused on the accused as a suspect rather than as part of a general investigation. Also, because the police had refused to honour the accused's request to consult with his attorney.[86]

Justice Goldberg, delivering the majority decision, said that the advice of counsel was essential under these circumstances to the accused because what happened during the interrogation could

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seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defence. That Government hires lawyers to defend, are the strongest indications of the widespready belief that lawyers in criminal courts are necessities, not luxuries".

[82]At 349.

[83]At 351.

[84]378 US 478 (1964).

[85]At 484.

[86]At 491.

certainly affect the whole trial since rights may be irretrievably lost if not then and there asserted[87]. In his words :

> "The rule sought by the State here, would make the trial no more than an appeal from the interrogation; and the right to use counsel at the formal trial would be a very hollow thing if, for all practical purposes, the conviction is already assured by pre-trial examination[88]."

He went on to say that no system worth preserving should have to fear that if an accused is permitted to consult with his lawyer, he will become aware of, and exercise his constitutional rights. He said "if the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system"[89].

Justice Goldberg pointed out that the principle enunciated only starts to operate when the process shifts from investigatory to accusatory and its purpose is to elicit a confession from the accused.[90]

In Miranda v Arizona[91] all the appellants were convicted in separate cases after making self-incriminating statements during custodial interrogation. In all the cases the appellants were neither warned about their right to remain silent nor their right to the presence of an attorney during custodial interrogation. The majority of the United States Supreme Court set aside all the convictions and held that the prosecution may not use exculpatory or inculpatory statements stemming from custodial interrogation unless the prosecution demonstrates that the defendant has knowingly, voluntarily and intelligently waived his procedural safeguards to the privilege against self-incrimination.[92] Chief Justice Warren, delivering the majority judgement, defined custodial interrogation as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way[93].

Chief Justice Warren held that prior to any questioning the

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[87]At 486.

[88]At 487.

[89]At 490.

[90]At 492. This is the point that the majority of the court saw as the commencement of adversary proceedings.

[91]384 US 436 (1966).

[92]At 444.

[93]Ibid.

person must be warned that he has a right to remain silent, that any statement he does make may be used against him and that he has a right to the presence of an attorney either retained or appointed[94]. He pointed out that the need for counsel in order to protect the privilege against self-incrimination exists for both the indigent and the affluent and that the financial ability of the individual has no relationship to its scope[95]. He expressed the following sentiments :

> "The cases before us, as well as the vast majority of confession cases with which we have dealt in the past, involve those unable to retain counsel. While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice[96]."

He emphasised that the couching of the warning of a right to counsel must be in such terms that it would convey to the indigent that he too has a right to have counsel present during interrogation or to consult with him prior to any questioning if the indigent defendant so desires. The Chief Justice linked the principles enunciated in this case to a situation where the individual is for the first time subjected to custodial interrogation[97].

Then came Argersinger v Hamlin[98] whereby the defendant was convicted by a judge without a jury in a state court for carrying a concealed weapon and was sentenced to ninety (90) days imprisonment. The defendant was indigent and unrepresented during the trial. The United States Supreme Court set aside the conviction holding that in the absence of a knowing and intelligent waiver, no person may be imprisoned for any offence whether classified as petty, misdemeanour or felony, unless he was represented by counsel at his trial.[99]

On the question of how extensive was the right to counsel in terms of offences, Justice Douglas speaking for the majority said:

> "It should be noted that the standard does not recommend a determination of the need for counsel in terms of the facts of each particular case; it draws a categorical line at

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[94]Ibid.

[95]At 472.

[96]Ibid.

[97]At 477.

[98]407 US 25 (1972).

[99]At 37. See Khanyile supra 808B on the absence of this distinction in our law.

> those types of offences for which incarceration as a punishment is a practical possibility. Under the rule we announce today, every judge will know when the trial of a misdemeanour starts that imprisonment may be imposed, even though local law permits it, unless the accused if represented by counsel[100]."

Justice Douglas said that in order for a judge to decide whether assistance of counsel is needed, the guiding factors would be the measure of the seriousness and gravity of the offence. Justice Powell, in his concurring judgement, disagreed with this inflexible rule enunciated by the majority as being too rigid. Instead he implied that there should be flexibility in the concept of due process by saying :

> "Due process, perhaps the most fundamental concept in our law, embodies principles of fairness rather than immutable line drawing as to every aspect of a criminal trial[101]."

Justice Powell was of the view that the right to counsel in petty offence cases should be determined by the trial court exercising a judicial discretion on a case by case basis[102]. He elicited a triad of factors for guidance in the determination of whether the appointment of counsel was necessary for a fair trial. These factors were, (a) the complexity of the offence charged; (b) the probable sentence that will follow if a conviction is obtained; and (c) the individual factors peculiar to each case[103]. Justice Powell confirmed his long-held conviction that the adversary system functions best and most fairly only when all parties are represented by competent counsel[104]. Despite Justice Powell's remarks, the majority's inflexible rule that the right to counsel should be observed in all cases within the area defined by the possibility of imprisonment now clearly represents American law[105].

Williams v Twomey[106] is a state court decision. The accused was charged with the crime of stealing a television set during riots before a jury and was duly convicted and sentenced to ten to twenty years imprisonment. An inexperienced lawyer was appointed on the day of the trial to represent him. Senior

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[100]At 39-40.

[101]At 49.

[102]At 63.

[103]At 64.

[104]At 65.

[105]P G Polyviou The Equal Protection of the Laws (1980) 504-505.

[106]510F 2d 634 (1975).

District Justice Wyzanski held that the accused was denied the effective assistance of counsel during his trial. Justice Wyzanski said the test for the effectiveness of legal assistance in a criminal case is not how much experience the lawyer has had but how well he acted. He submitted, however, that much depended on the nature of the charge, of the evidence known to be available to the prosecution, of the evidence susceptible of being produced at once or later by the defence and of the experience and capacity of defence counsel[107]. He pointed out that an inexperienced lawyer was appointed on the day of trial to represent a defendant charged with a very serious crime. He observed that the constitution does not leave the poor to a legal representation which is in any aspect - pre-trial, investigatory, trial or otherwise - shockingly inferior to what may be expected of the prosecution's representation[108].

He remarked as follows :

> "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators. The criminal defendant, whether represented by his chosen counsel, or a public agency, or a court-appointed lawyer, has the constitutional right to an advocate whose performance meets a minimum professional standard[109]."

In Scott v Illinois[110] the accused was convicted of shoplifting and fined, without the assistance of appointed counsel. The majority of the United States Supreme Court held that this conviction was not in violation of the Sixth and Fourteenth Amendments because imprisonment was not imposed even though authorised for this offence. The majority re-affirmed the actual imprisonment test adopted in Argersinger's[111] case as the line defining the constitutional right for appointment of counsel[112]. The majority were reluctant to extend the Argersinger rule to cover fines or mere threats of imprisonment because of far-reaching implications on the budgets of the fifty states and the confusion that might result[113]. Justice Powell also concurring, reiterated his views in Argersinger's case that the rule tended to impair the proper functioning of the criminal

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[107]At 639.

[108]At 640.

[109]Ibid.

[110]440 US 367 (1979).

[111]Supra.

[112]At 373.

[113]Ibid.

justice system in that trial judges often will be compelled to forego their legislatively granted option to impose a sentence of imprisonment upon conviction[114].

Justice Brennan, on behalf of the minority, criticised the actual imprisonment test, and instead opted for the "authorised imprisonment" standard as the superior and reliable one. He contended that the apparent adoption of the "actual imprisonment" standard for all misdemeanour offences by the majority was out of concern for the financial burden that an "authorised imprisonment" standard might place on the states[115]. He dismissed this concern as both irrelevant and speculative and remarked :

> "This court's role in enforcing constitutional guarantees for criminal defendants cannot be made dependent on the budgetary decisions of state governments[116]."

He listed the advantages of the "authorised imprisonment" standard as follows : Firstly, it faithfully implements the principles of the Sixth Amendment as identified in Gideon's case and is a better indicator of the stigma and other collateral consequences attaching to conviction for an offence. Secondly, it facilitates the administration of justice better because it avoids the necessity for time-consuming consideration of likely sentence in each individual case before trial, inaccurate predictions, unequal treatment, and apparent and actual bias. Thirdly, it ensures that the courts do not abrogate legislative judgements concerning the appropriate range of penalties to be considered for each offence[117].

Justice Brennan thought that the adoption of the authorised imprisonment standard might lead to the re-examination of the criminal statutes by the state legislatures or local governments to abolish incarceration for certain minor offences in order to meet the requirements of the Constitution[118]. It is submitted that the "authorised imprisonment" test is preferred because it is very wide in its scope and gives substance to the assistance of counsel to the indigent accused. It is conceded that such a scheme is difficult to implement in practice because of the requirement of a large initial capital outlay and the lack of manpower and infrastructure to make such a scheme self-generating. As has been indicated above, the Argersinger rule is still the law in America.

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[114]At 374.

[115]At 384.

[116]Ibid.

[117]At 382-383.

[118]At 388.

Nix v Whiteside[119] involved an accused who wanted to perjure his testimony at trial so as to invoke self-defence against the offence charged. The accused was assisted by counsel who refused to co-operate with him in presenting perjured testimony at trial. The attorney threatened the accused with the withdrawal of his services and of reporting this perjury to the court. The accused did not commit perjury during the trial and was duly convicted. The accused appealed arguing that his right to counsel under the Sixth Amendment had been violated by the attorney's refusal to co-operate with him during the trial. The United States Supreme Court upheld the conviction and said the right to counsel does not include a right to have a lawyer who will co-operate with planned perjury. The court said :

> "For defence counsel to take steps to persuade a criminal defendant to testify truthfully, or to withdraw deprives the defendant of neither his right to counsel nor the right to testify truthfully[120]."

Justices Blackmun and Stevens, concurring, cautioned against lawyers hastily concluding that a client was about to commit perjury since this may lead to the danger of depriving a client of the zealous and loyal advocacy required by the Sixth Amendment or they may mistake the most honest or sincerely believed recollection by the client of previously overlooked details as intended perjury[121].

CONCLUSION

The historical evolution of the right to counsel in American case law demonstrates how a bill of rights, judicial activism and creativity lends meaning and substance to seemingly ideal constitutional provisions like "due process of the law" and "equal protection of the laws" within the limited and narrow confines of a legal system. This right has moved from the confines of being applicable only to capital cases (Powell v Alabama) to all criminal proceedings in federal courts (Johnson v Zerbst) to serious offences in state courts (Gideon v Wainwright) and, finally, to Argersinger v Hamlin prohibiting incarceration without the assistance of counsel during the trial. Miranda v Arizona is authority for the proposition that the right to assistance of counsel arises from the moment of custodial interrogation.

The cases discussed above all show that not only must there be formal compliance with the Constitution's requirement but, further, there must be a substantive compliance with the right to counsel and equal protection clauses before one can speak of a fair trial. Even though the playing field is not yet level

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[119]475 US 157 (1986).

[120]Per Chief Justice Burger at 173-174.

[121]At 189 and 190.

between the prosecution and the defence in the adversary system, this has considerably alleviated the plight of the indigent accused in the criminal justice system. The American experience is an instructive example of how equality before the law can be transformed to accessible justice.[122]

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[122]Per Didcott J referring to the United States of America in Khanyile's case at 802B : "There the right to counsel, as they term it, has undergone the most sustained, searching and sophisticated examination devoted to it anywhere".

CHAPTER 3 : RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS

3. RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS

The present hallmark of our criminal justice system in our adversarial proceedings is the notion of procedural regularity. The Appellate Division in S v Rudman; S v Mthwana[1] held that a criminal trial is to be conducted in accordance with the formalities, rules and principles of procedure of our law as opposed to abstract "notions of basic fairness and justice"[2]. Nicholas A J A, delivering the unanimous decision, said that the right to legal representation due to indigence, could not claim legitimacy by reference to the "right to a fair trial"[3]. It is apparent from this decision that our highest court proceeded from the premise that our law provides for in-built procedural and substantive safeguards for the protection of the interests of an undefended accused during a criminal trial.

It is respectfully submitted that legal representation in a criminal trial is indispensable in securing a fair trial. Legal representation decreases the risk of injustices and wrong convictions during the entire criminal proceedings. It lends legitimacy and credibility to the criminal justice system in a given setting. As a starting point, we need to explode the myth and misconception that the criminal justice system only deals with the already over-protected criminals. This perception is inaccurate and inappropriate in a society which sends a high proportion of its population to prison[4]. What was said years ago by Smith referring to United States still applies with equal force today to our setting :

> "The fairness of our criminal justice system cannot be supported by lightly assuming that it deals with criminals who deserve no protection, but must depend on the provision it makes for an impartial determination of guilt or innocence after a full hearing at which both sides are adequately represented"[5].

South Africa has a high prison population. Mr Justice Kriegler

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[1]1992 (1) SA 343(A) at 377A-C, 387A.

[2]At 377A-C, 387A.

[3]At 380F.

[4]D Kairys The Politics of Law : A Progressive Critique (1982) 242. He mentions South Africa as amongst the fewest countries falling into this category of sending a high proportion of its population to gaol. Russia also falls in this category or countries.

[5]R H Smith Justice and the Poor (1972) 109.

pointed out that about 70 000 people are jailed every year without the benefit of legal representation[6]. The majority of unrepresented accused persons appear in the district and regional courts[7]. Most of them are black, working class, without substantial financial resources, fluent in neither of the official languages[8]. Needless to say, they form a large sector of our population. To complicate matters, our courts have been used over the years to legitimize apartheid and repressive laws. As a result, a significant portion of our population feel alienated from the legal system and view it with a sense of resentment. A result of this, is that the legal system is perceived in the eyes of the majority as lacking legitimacy and credibility. Without these two, a legal system cannot claim to dispense justice as between man and the State; and man and man. Our criminal justice system is marked by over-crowded prisons, long delays in getting to trial, insufficient legal aid and lack of legal representation. Steytler succinctly summarises the present position in our law as follows :

> "It is wishful thinking to assume that every accused knows about the right to legal representation and in particular,

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[6]The Star 8 February 1993. However, it is now accepted that about 100 000 persons are sentenced to gaol annually without the benefit of legal representation. See Legal Aid Board Annual Report 1991-92 (1992) 1.

[7]The Department of Justice estimated that 70 percent of all criminal accused in the regional courts and 90 percent of criminal accused in the district magistrates' courts were unrepresented. See D J McQuoid-Mason "Legal Representation and the Courts" (1992)(3) South African Human Rights Yearbook 141 at 146; cf R A Jordaan "Die Openbare Verdedigerstelsel as Vorm van Regshulp" (1991)54 THRHR 685 at 694. If the above percentages are applied to 1992 then 46 776 of the 66 823 criminal accused in the regional courts, and 2 131 452 of the 2 368 280 criminal accused in the district courts would have been unrepresented. These figures cover the period 1 July 1991 - 30 June 1992. See D J McQuoid-Mason "Legal Representation and the Courts" 1993 (1994) Unpublished monograph 1 at 3; cf Department of Justice Report (1991-92) 124.

[8]For the abovementioned period, 218 519 or 96 percent Africans and Coloureds were sentenced to prison out of the 226 841 sentenced prisoners. The assumption is that 85 percent of these prisoners were unrepresented, which means that about 185 741 African and Coloured prisoners went to gaol without legal representation for the same period. See D J McQuoid-Mason "Legal Representation and the Courts" 1993 (1994) Unpublished monograph 4; cf Department of Correctional Services Report (1991-92)52. See further D J McQuoid-Mason "Legal Representation and the Courts" 1990(1) South African Human Rights and Labour Yearbook 190 at 208.

how, when and why to invoke it.[9]"

(i) Pre-trial stage

The Law of Evidence, Criminal Law and other procedural safeguards are constant reminders to us that our criminal justice system is fallible in the detection, prosecution and punishment of crime. If all arrested persons were presumed guilty, then we would have dispensed with criminal trials because their guilt would have been conclusively proven by the act of arrest. However, this is not the case. Presumption of innocence and the onus of proof beyond reasonable doubt in a criminal trial protect both the interests of the State and the individual accused. For the State, criminal proceedings conducted in this manner lend themselves to transparency and credibility to the effect that the State is acting justly and fairly in prosecuting criminals. For the individual, it gives him or her the assurance that his or her liberty, bodily integrity and property will not be arbitrarily interfered with by the State.[10]

The police are an indispensable component of a criminal justice system. The traditional image of the police is that they are maintainers of law and order - who protect the innocent and mercilessly hunt down the guilty[11]. It is their sole responsibility to bring criminals to justice. Obviously, they rely on members of the public to be civic-minded by co-operating with them and coming forward with information to assist them in their duties. In order to effectively detect and suppress crime, the police must carry on their duties without any hindrance. In carrying out their duties, the police are required to employ lawful and proper channels since they are themselves not above the law.[12] However, what happens if the police lack credibility and legitimacy in the eyes of the public and as a result the public refuses to co-operate with them? What if the only person who knows about the commission of a crime is the suspect and he or she refuses to co-operate with the police? Do the police resort to third degree methods in order to obtain a statement or confession from him or her? Do we turn a blind eye and admit this tainted evidence? It is submitted that it is repugnant to our sense of justice if our criminal justice system has to rely on police brutality and abuses in order to secure convictions or suppress crime.[13]

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[9]N C Steytler "Equality Before the Law and the Right to Legal Representation"(1989) 2 SACJ 75.

[10]Cf Nyamakazi v President of Bophuthatswana 1992(4) SA 540(B) at 551I-J.

[11]cf The Citizen 30 November 1993.

[12]Novick v Minister of Law and Order and Another 1993(1) SACR 194(W) at 197c, 197f.

[13]Cf Brown v Mississippi 297 US 278 (1936) at 287.

It is beyond doubt that police questioning or interrogation of suspects is very important in bringing criminals to justice. However, what makes this exercise a controversial feature of the whole criminal process is the tension between the need to bring criminals to justice and the need to protect the rights and liberties of suspects[14]. The questioning of suspects takes place in the privacy of police stations and is not subject to public scrutiny. As a result, in trials within trials allegations are made about the treatment of suspects in police custody and the reliability and admissibility of statements allegedly made by them[15]. The police generally have a right to conduct interrogations subject to the limitation that a police official, without a warrant, shall not enter a private dwelling without the consent of the occupier for the purpose of interrogating a person[16]. The individual is only required to furnish the police with his or her particulars but is not compelled to answer any other questions[17].

The Criminal Procedure Act provides for the manner and effect of arrest[18]. Police interrogations are usually conducted after the suspect has been arrested and detained, but before he or she makes a court appearance. The suspect may not have been formally charged at that stage due to the weaknesses in the police case against him. It is at this stage that one has to start the balancing process. Should the emphasis be on the importance of evidence to be furnished by the suspect to the police in their enquiries or should the emphasis be on the protection of the suspect who is in a vulnerable position at the hands of his or her interrogators? It is submitted that it should be the latter. The reason being that a suspect may be induced to make incriminating statements as a result of physical or psychological coercion. This is the rationale behind the cautioning of suspects by the police about their right to silence[19]. It does not seem fair to compel a man or woman to incriminate himself or herself and thereafter convict him or her on the basis of his or her self-incriminating statement. It is submitted that the most compelling reason to protect the suspect is the fact that the police at that time have not yet accounted

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[14]P Softley Police Interrogation : An Observational Study in Four Police Stations (1980)1.

[15]Ibid.

[16]Section 26 of the Criminal Procedure Act 51 of 1977.

[17]Gosschalk v Rossouw 1966 (2) SA 476(c).

[18]Section 39(3) of Act 51 of 1977 provides that the person arrested shall be in lawful custody and that he or she shall be detained in custody until the person is lawful discharged or released from custody.

[19]Softley op cit 25.

to a court[20]. It is self-delusion to believe that the police are in the fore-front in upholding the suspect's right to remain silent. In practice, the caution and the right to remain silent is administered at the whim of the police interrogators. Incriminating statements are obtained without regard to Judges' Rules[21]. In terms of our law, the Judges' Rules have no force of law and failure to observe them is not per se fatal to statements made by the accused[22]. It is merely a circumstance to be taken into account in deciding whether a statement was made freely and voluntarily[23]. There is nothing to prevent the police from falsely claiming that they have administered the Judges' Rules. It is clear from the above that Judges' Rules do not adequately protect suspects against self-incrimination. It is submitted that the best safeguard to the right to remain silent is the presence of counsel. As a collorary to this, in the absence of counsel, there should be a stringent presumption against the waiver of right to silence.[24]

Despite claims from senior police officers that the South African Police force is apolitical, in reality it has always supported the views of a political party and has always been a political force[25]. The South African Police have largely been responsible for enforcing the harsh laws of apartheid. They ruthlessly crushed any political resistance to the apartheid state. The police were associated with the preservation of a

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[20]This point is graphically illustrated by the facts of a case recently decided by the Appellate Division. It involved 3 members of the South African Police in the Pietermaritzburg Riot Unit who detained Mr Mbongeni Jama on 24 February 1991. Briefly, the police detained Mr Jama in order to question him about a diary in his possession. Mr Jama did not answer the questions to the satisfaction of the police who then assaulted him. All this happened en route to the police station. On reaching a bottle-store, the 3 policemen decided to murder Mr Jama. The trial court ascribed this decision to the fact that the policemen realised that they had no reason to detain Mr Jama and that the assault could not be justified. They then shot him to death, dumped his body in a plantation and thoroughly covered their tracks. (The Citizen 30 November 1993).

[21]The Judges' Rules are administrative directives that the police are required to follow in questioning suspects. These rules were approved in South Africa in 1931. See S Selikowitz "Defence by Counsel in Criminal Proceedings under South Africa Law" 1965-1966 Acta Juridica 71, 76.

[22]Ibid.

[23]See S v Mabaso 1990 (3) SA 185 (A) at 209C-D.

[24]Miranda v Arizona 384 US 436 (1966) at 444.

[25]See Lloyd Vogelman "Police Fears Understandable" in The Citizen 10 November 1993.

white legal order. Even today, there is still a widely-held perception in the black community that many members of the South African Police see the world in terms of a mainly white, upper-middle class culture. As a result, lack of co-operation between the police and the black community has been the norm. Until recently, black members of the police force were ostracized by their communities[26]. Many police officers have been killed or attacked merely because they were members of the South African Police[27]. There is an overt antagonism towards them.

However, our police force is also known for its brutality, abuse and excesses. During the dark days of the apartheid era, the Security Police were known for their excesses regarding those detainees held under security legislation. A graphic example is the unreported case of S v Gwala and Others[28]. One of the accused alleged that he had been held in solitary confinement for approximately six months after his arrest. He alleged that his police interrogators had punched him, pulled his beard, deprived him of food and water, put gravel in his shoes and made him stand with his heels on a box and his toes on the floor[29]. The hand-cuffs on his wrists were jerked up and down until they bled and he was subjected to all kinds of physical abuses which were intimidatory in nature. He could not complain to the doctor who had examined him because two security policemen had attended the consultation. He did not complain to the magistrate who visited him because he thought it was prudent to consult his lawyers about his treatment[30].

It is submitted that what was disheartening most to this accused was the finding of the court that he was lying about the alleged assaults despite scars on both his wrists consistent with those made by hand-cuffs and the production of a shirt with discoloured

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[26]A police force trade union was formed in about 1989 comprising largely of black members of the force. The term "black" is used widely to refer to Africans, Asians and coloureds. This union was formed under the auspices of the Police and Prisons Civil Rights Union (POPCRU). It has aligned itself with the broad liberation movements like the African National Congress and claims to be a "peoples" police force. However, this union has not been officially recognised. See The Sowetan 30 November 1993.

[27]More than 232 police officers have been murdered so far in 1993. 1992 - 226 murders; 1991 - 145 murders; 1990 - 107 murders. See The Citizen 7 December 1993.

[28]NPD, July 1977 (unreported). See J G Riekert "Police Assaults and the Admissibility of "Voluntary" Confessions" (1982) 99 SALJ 175 176.

[29]Ibid.

[30]Ibid.

patches which he alleged were his own bloodstains[31]. The court did not give any reasons why it felt that the accused was lying. It is submitted that the court took an arm-chair view of the circumstances of the case and the realities and hardships of adducing evidence especially where one is held in security detention for a lengthy period. The court failed to appreciate "the substantial gap existing between the theoretical provision of protection for detainees and the material respects in which the legislation is either silent or capable of abuse, misuse or is just a meaningless set of words"[32].

It is submitted that one factor that can be attributed to police brutality and excesses is the misconception that a suspect is only entitled to legal assistance once he or she is formally charged with an offence[33]. Our law is clear on this aspect, an accused person is entitled to the assistance of his legal adviser as from the time of his arrest[34]. The suspect may even have his legal adviser present during questioning[35]. Due to this misconception, police officers occasionally over-step the limits in ordinary routines like booking a suspect. An illustrative example is the case of S v A en 'n ander[36]. The complainant, in this case, was a rape suspect who was brought to the charge office to be booked for rape. The two policemen, who were appellants in this case, forced the complainant to masturbate in the charge-room, right in front of a police-woman on duty desk. He was also forced to lick his urine from the floor and was

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[31]Howard J, delivering the judgement could not find the accused's version to be inconsistent nor unsatisfactory. He further said his demeanour could not be criticised but went on to find for the policemen that their evidence was clear and satisfactory in every respect. He further said it would have been out of character for the two policemen to have meted out such savage treatment to the accused. (See Riekert op cit 176 - 177).

[32]R Tucker "Protection of Detainees : Facts and Fiction" in A N Bell and R D A Mackie (ed) Detention and Security Legislation in South Africa (1985) 27.

[33]C Wides "An Arrested Person's Right of Access to his Lawyer - A Necessary Restatement of the Law" (1964) 81 SALJ 513-4.

[34]See Section 73(1) of the Criminal Procedure Act. The authorities for this proposition are : Brink Supra 68-9; Ngqulunga and Another v Minister of Law and Order 1983(2)SA 696(N) at 698B-C; Mabaso Supra 209A; Novick Supra 196j - 197a.

[35]D J McQuoid-Mason An Outline of Legal Aid in South Africa (1982)7.

[36]1993(1) SACR 600(A).

assaulted[37]. Was it not for the police-woman coming forward as a witness, the chances are that this allegation would have been dismissed under the standard official response that it is "unsubstantiated". In Minister van Polisie v Ewels[38], the plaintiff was assaulted by an off-duty policeman in a charge office in front of a senior police officer and other policemen.

The South African Police has never been accountable to the public.[39] The public's understandable fear of crime has been used to support a free hand for the police. This is true of many white South Africans who see the legal system as aimed at protecting a social order based upon their own cultural values and interests[40]. However, this fear may be manipulated to erode basic human rights and may result in sinister deeds. A telling tale is the Trust Feed Massacre case. Eleven people were killed when special constables fired into a house where mourners were holding a night vigil. The truth came to light as a result of investigations by a police officer who uncovered evidence of police complicity in the matter[41]. On convicting the policemen, Wilson J said that during the course of the trial it became clear that the evidence of senior policemen could not be accepted and that official records produced from the file were suspicious or wholly unreliable[42]. He said that it was distressing that the courts could no longer accept semi-formal documents provided by police as reliable[43]. This case is seen as just a tip of the iceberg of police excesses. There are such similar endless cases where suspects have meekly submitted to arrest and en route to the police station have become dangerous and daring criminals. How many times have we heard the story that the suspect grabbed a police officer's gun and was shot as a result, or how the suspect suddenly became aggressive and had to be restrained, or that he fell on the floor and hit his head on the cement. The morale of this case is that a society without a "rights culture" opens itself to police unaccountability, cover-ups and abuse. Lack of transparency in police activities can work against the interests of the community

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[37]At 604D-I.

[38]1975 (3) SA 590(A).

[39]N Haysom "Policing" 1991(2) South African Human Rights and Labour Law Yearbook 163 164.

[40]H M Ferrinho "An Interpretation of the Variation and Extent of Crime in South Africa" (1979)3 SACC 37.

[41]See "Human Rights Index" (1992) 8 SAJHR 278.

[42]Ibid.

[43]Ibid; cf The Weekly Mail 24 April 1992.

that the police force is supposedly serving[44].

A case which makes the right to counsel imperative at this stage as critical is the Alexandra Funeral Vigil Massacre case.[45] On acquitting the four accused on 13 counts of murder, 17 counts of attempted murder, charges of house-breaking and unlawful possession of fire-arms and ammunition, Daniels J found that the police evidence contained fabrications and was contradictory. He found that the police had : held two identity parades after the suspects had been charged and their names widely publicised; held the identity parades weeks and months after the event; leaked information to witnesses before an identity parade; allowed witnesses going to an identity parade to discuss the suspects; encouraged witnesses to give evidence to suit the State's case; failed to test the alleged murder weapons for finger-prints; lost two potential exhibits and had failed to bring to court an informer whose information had been the sole evidence used to arrest one of the accused[46]. The court found that police evidence given during bail hearings and the trial itself was contradictory and contained fabrications. The court rejected the police version as "too bizarre to be true", of how they retrieved the main murder weapon from the Alexandra men's hostel[47]. This case illustrates the fact that the police sometimes go to any lengths to secure a conviction. One shudders to think of what would have happened to the four accused if they were not legally represented. Their conviction was a foregone conclusion during the pre-trial stage as a result of police actions and fabrications.

An interesting feature in criminal cases is that most confessions, admissions and pointings out are obtained soon after arrest and during detention. The suspect is at that stage entitled to legal assistance[48]. However, it is practically difficult to instruct a lawyer whilst in prison or a police

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[44]Haysom contends that the organisational structure of the SAP render it a uniquely closed institution. He points out that it is a highly centralised, distinctly militarist, largely unaccountable and notoriously coercive institution. (Haysom op cit 164). Haysom uses the Trustfeed Massacre Case as an illustration of police partisanship within the SAP in the Pietermaritzburg area. He further points out the SAP's failure to adequately investigate complaints against their members. He refers to the Brixton Murder and Robbery Squad unit which has been a source of assault complaints by suspects awaiting trial. See N Haysom "Policing" 1992(3) South African Human Rights Yearbook 182 at 185-188.

[45]The Sowetan 12 August 1992, 13 August 1992.

[46]Ibid.

[47]Ibid.

[48]Section 73(1) of Act 51 of 1977. See Note 34 above.

station. How many police officers allow arrested persons a single phone call to their lawyers, families, relatives or friends? The suspect's next-of-kin may not know about the person's whereabouts. How many police officers bother to inform families of these people about their whereabouts? Confessions, admissions and pointings out are incriminating pieces of evidence which are fatal to the accused person if they comply with the statutory requirements[49]. Police officers can use underhanded methods and exceed their powers in their quest to secure a conviction. It is at this crucial stage that the presence of counsel in a watchdog capacity can prevent the use of coercive methods by the police[50]. The provisos in Sections 217, 218 and 219A, although in theory are intended to provide built-in safeguards for accused persons, may in practice work against them. These provisos make lawyers appear powerless in the eyes of the public since they place a fictitious veil between the ensuing police interrogation and the resultant recording of a confession, admission or pointing out. To a lay person, there does not seem to be difference between the two processes. In S v Mjikwa[51] the Appellate Division held that it was inconceivable that the spirit of non-voluntariness in which the accused made the confession should have vanished completely within a space of a couple of hours in which he thereafter made pointings out[52]. In S v Ndlovu and Another[53] the accused claimed that he was assaulted and taken to a magistrate where he told her about the assault[54]. The magistrate refused to take a statement. He was thereafter assaulted again and taken to the

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[49]Confessions are governed by Section 217 (1) of the Criminal Procedure Act for admissibility, namely; the confession must be made by the accused freely and voluntarily while he is in his sober senses, and without having been unduly influenced thereto. Admissions are governed by Section 219A of the Criminal Procedure Act and must have been voluntarily made to be admissible. Pointings out are governed by Section 218 (2) of the Criminal Procedure Act and in S v Sheehama 1991 (2) SA 860 (A) the Appellate Division held that the legislature never intended, in section 218 (1), to admit evidence of a pointing out which was otherwise inadmissible as soon as the pointing out formed part of an inadmissible statement.

[50]See Selikowitz op cit 76.

[51]1993(1) SACR 507(A).

[52]At 510h. The change took place in the space of 9 hours.

[53]1993 (2) SACR 69(A).

[54]At 70i-j. Although the court accepted the magistrate's version that the accused was brought in to her only once, it is submitted that there was nothing improbable in the accused's version.

magistrate who then recorded the statement[55]. In S v Wanna and Others[56] the court said that it hardly needed a psychiatrist to tell one that the mere threat, let alone the actual experience, of indefinite detention in solitary confinement and at a place unknown to and unreachable by family, friends and legal advisers, would be a most frightening thing for the overwhelming majority of people, and would exert a most powerful influence on their minds to speak in the hope of ending such misery as soon as possible[57].

There are rays of hope despite the technicalities and legal niceties governing confessions, admissions and pointings out. An encouraging example is the obiter remarks of Jones J, in S v Mbambeli and Others[58] wherein he said it is desirable in every case for a magistrate to enquire from the accused whether he or she has been in touch with a legal representative and, if not, to advise the person fully of his or her right to legal representation, before the statement is made[59]. Jones J remarked about the desirability for a magistrate, having done these things, to ask the accused whether he wished to avail himself of his right to legal advice before continuing with the statement[60]. This would go a long way in alleviating the plight of an undefended accused since the mere production of a confession saddles the accused with an onus of proof, on a balance of probabilities, that there was no voluntariness on his part, he was unduly influenced and he was not in his sound and sober senses[61]. The police do not have to give reasons to the court as to why the accused was suddenly overcome by a deep sense of remorse to confess during interrogation but subsequently lost this zeal during the trial[62]. As it has been pointed out

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[55]Ibid.

[56]1993 (1) SACR 582(TK).

[57]At 590c.

[58]1993 (2) SACR 388(E).

[59]At 391c.

[60]Ibid.

[61]See S v Nene and Others (2) 1979 (2) SA 521 (D) 524H-525A. The court said that if an accused does not avail himself of, or take advantage of the protection afforded by the ostensible and actual independence of the magistrate, then he must bear the consequences of the change of onus in terms of Section 217(1)(b)(ii) of the Criminal Procedure Act.

[62]Broome J said at 523E-F in Nene Supra : "When the prosecutor has possession of a document which bears to be a confession, made by a person whose name corresponds to that of the accused, to a magistrate, this may be handed in without any further ado".

above, due to a lack of a "rights culture" in South Africa, many people are ignorant about their rights. To some it might be wrongly conceived that police are by law, allowed to coerce statements from accused persons. There is something wrong with a system whose efficiency is thwarted by the exercise of basic constitutional rights[63]. The exercise of basic constitutional guarantees is applicable in the United States, but will also be applicable in South Africa after 27 April 1994.[64]

Bail is a very contentious issue. The police complain about the ease with which suspects get bail[65]. The police feel that courts do not seem to take into account their hard work. The police allege that at times bail is granted even before the investigations have begun[66]. However, this contention should be balanced against the notion of the presumption of innocence until proven guilty in favour of the accused. As a result of this notion, there should be a minimal interference with the accused's liberty. In Novick v Minister of Law and Order and Another[67], the court said that the State is not entitled to hold an accused in custody for the purposes of investigation and so to frustrate the person's right to apply for bail[68]. The court said that the State or a relevant policeman is not entitled to be the arbiter as to whether an accused is entitled to bail or not. This is in the court's sole discretion[69].

Bail applications require a delicate balancing of the interests of the State and the accused person. The State needs to ensure that society is protected and that the accused is subsequently brought to stand trial. The accused person , on the other hand, need not endure unnecessary hardships of incarceration before he or she comes to trial. Firstly, our law does not automatically

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[63]Per Goldberg J in Escobedo v Illinois 378 US 478 (1964) at 490.

[64]See Chapter 5 below.

[65]The police contend that accused persons who are arrested after good police work are released by courts on easy terms and then resume criminal activities or abscond. According to SAP statistics covering an unspecified six months, 10 353 out of 61 306 people granted bail never complied with some or all of the bail conditions. 3 850 of these people were connected to further crimes while out on bail. Another SAP survey over a nine-month period found that 1 410 people who were out on bail were arrested for serious crimes. See The Star 18 November 1993.

[66]Ibid.

[67]1993(1) SACR 194(W).

[68]At 197f.

[69]At 197g.

compensate innocent individuals put through the ordeal of a criminal trial. In order to recover compensation, the individual must sue for malicious arrest or prosecution in a civil case[70]. This is a very expensive exercise and there is no guarantee that he will succeed. An acquittal after spending nine months in gaol has a hollow ring about it. Secondly, an early release on bail enables the accused person to prepare the case, collect information, secure witnesses and to mount an effective defence in the subsequent trial. Thirdly, bail ensures that there is no adverse impact on the accused's daily business and family. The accused person may carry on with his or her job if the person is gainfully employed or pursue other lawful activities like schooling. If the accused is a bread-winner, he or she is in a position to continue supporting the family. Bail also lessens the chances of contact with hardened criminals. Mr Justice Kriegler observed that whatever a future bill of rights contained, there would probably still be 20 000 awaiting trial prisoners in gaol every day - people who have not been convicted of any crime[71].

However, the bail system has worked in favour of arrested persons who can afford the best lawyers. The poverty stricken criminals have to rely on the Legal Aid Board and if their applications are refused, that is the end of the matter. It is contended that

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[70]Malicious proceedings occur where a person abuses the process of the court by wrongfully setting the law in motion against another. South African law does not make a distinction between the institution of civil and criminal proceedings when dealing with abuse of legal procedures. Malicious criminal proceedings may take the form of malicious prosecution, malicious procurement of a search warrant, or malicious arrest or imprisonment. In order for the plaintiff to succeed in a claim for malicious prosecution, he or she must prove the following essentials :

(a) that the defendant instituted or instigated the proceedings;

(b) that the defendant acted without probable cause;

(c) that the defendant was acting out of spite or malice;

(d) that the proceedings terminated in his or her favour; and

(e) he or she has suffered damages.

The same damages, as with malicious prosecution, lie with regard to malicious arrest. See D J McQuoid-Mason "Malicious Proceedings and Prosecution" paras 596-640 in W A Joubert (ed) The Law of South Africa Vol 15 (1981). See further Mthimkhulu and Another v Minister of Law and Order 1993(3) SA 432(E).

[71]The Star 8 February 1993.

even in custody, the accused persons are treated differently, with the rich and famous receiving privileges not available to the poor[72].

A contention has been made that it is grossly unfair to the accused and the interests of justice to expect a semi-literate accused to move his own application for bail[73]. This is largely due to the complex factual and legal issues involved in bail applications[74]. An illustrative case in S v Mqubasi en Andere[75] where the presiding officer in the court a quo failed to inform the accused about the onus of proof necessary to adduce in their bail application. All four accused were unrepresented, and, as a result, made incriminating statements which were not relevant to the bail applications. Later in the trial, these statements were used to cross-examine them and they were duly convicted[76]. The court, in setting aside the convictions, found that the failure of the presiding officer to inform them about the onus of proof in bail applications constituted an irregularity. The court said that informing the accused about the onus of proof required in bail applications will not only promote fairness, but will also prevent irrelevant evidence being tendered in this application[77]. The statements were accordingly held to be inadmissible and the bail record could not be used during cross-examination as evidence[78]. How many accused persons understand that a bail application does not involve going into the merits of the case but an onus on the part of the accused to convince the court, on a balance of probabilities, that he or she will stand trial and will not abscond or interfere with state witnesses or administration of justice. If he satisfies the court that he will stand trial and not commit further offences, he has discharged this onus. As it has been pointed out, bail applications are a specialty that are handled with ease and confidence by a relatively few experienced lawyers[79].

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[72]The Star 18 November 1993.

[73]See D Nkadimeng "The Plight of the Unrepresented Accused in South African Law (1987) 1 African Law Review 14,15.

[74]See Section 61(1) of the Criminal Procedure Act providing for circumstances whereby the Attorney-General may prevent the granting of bail.

[75]1993(1) SACR 198(SE).

[76]At 199c.

[77]At 201c.

[78]At 202d.

[79]Nkadimeng op cit 15; S v Mqubasi supra 199i. In S v Ngwenya 1991 (2) SACR 520(T) it was held that it was the duty of the presiding officer to inform an unrepresented accused about

A released suspect in the Denneboom Taxi Rank Drive-By Massacre said :

> "I was told in the court that if I wanted bail I would have to write to the Attorney-General and state my case. There was no way I could do that because I did not have money or a lawyer on my side[80]."

He was held in detention for a month and later claimed that he had been threatened with death by some black policemen and fellow prisoners. This suspect's case fell under the Criminal Law Second Amendment Act[81]. Section 21(1) of this Act provides that where the Attorney-General has issued a certificate, an accused shall be held in custody and shall not be released on bail for a period of 120 days, from the date of issue of the certificate, without the written authorization of the Attorney-General. Luckily for this suspect, evidence in his favour came to light sooner. What about the many others who are illiterate and poor held under this Act? It is submitted that despite such legislations, fewer crimes are being reported even though the actual crime rate is escalating[82]. The reasons given are that potential complainants either fear the offenders or authorities; expect little or no assistance, or refuse on political grounds to give information to the authorities[83].

It is submitted that with the emergence of a rights culture it will be possible to restore trust in the criminal justice system. A constitutional guarantee like a pre-trial right to counsel for suspects is an institutional commitment to restoring confidence in the law. It is appreciated that police officers have to deal with the darker side of human nature but they should serve their communities in a professional manner. Successful policing does not have to depend on police abuses and excesses. Meticulous criminal investigations will lead to successful policing and the securing of convictions. The abolition of Section 29 of the Internal Security Act will be a welcome step in the right

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his right to apply for bail.

[80]See City Press 7 November 1993. The Massacre took place in Mamelodi, Pretoria on 2 October 1993. The name of the suspect is Peter Ngomane who, it later was discovered, was a street vendor.

[81]Act No. 126 of 1992. Section 18 of the Act provides that the Attorney-General may, irrespective of the actual charge, designate an offence as a special offence by issuing a certificate to that effect.

[82]City Press 7 November 1993.

[83]Ibid.

direction[84]. One of the most disturbing features in our criminal justice system is the number of deaths of suspects in police custody[85]. A legitimate and credible police force will always enjoy the mutual co-operation of its citizens. The observation, that police forces in Africa may yet learn that they will benefit from a fair police and criminal justice system is also true for South Africa[86].

(ii) Trial stage

More emphasis has been put on the pre-trial stage because what happens there may render the subsequent trial a mere formality. The Criminal Procedure Act distinguishes between representation of and assistance to an accused[87]. The focus of this section is on legal representation as provided in Section 73(2) of the Act. The right to counsel has been restrictively interpreted by

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[84]Internal Security Act and Intimidation Amendment Act 138 of 1991 provided for detention for purposes of interrogation, its predecessor was the Internal Security Act 74 of 1982. At the Multi-Party Talks at the World Trade Centre, all the parties agreed to abolish this provision. See The Sunday Times 14 November 1993. Chaskalson made the following observation : "... a society which depends for its survival upon harsh security laws will inevitably collapse". A Chaskalson "Opening Address" in A N Bell and R D A Mackie (eds) Detention and Security Legislation in South Africa (1985).

[85]See "Human Rights Index" (1992) 8 SAJHR 612. The late Dr J Gluckman publicly alleged that over 200 people had died in police custody. He claimed that of those on whom he conducted a postmortem, in 90% of the cases the police were responsible for the deaths(Ibid). These claims were later refuted by the South African Police (Ibid).

[86]K Kibwana and K M'Inoti "Human Rights Issues in the Criminal Justice System of Kenya and the African Charter on Human and People's Rights : A Comparative Analysis" Unpublished article (1992). Paper delivered at Conference on Protection of Human Rights and Criminal Proceedings for African Jurists in Siracusa, Italy, 19-26 July 1992 11.

[87]See Section 73 of Act 51 of 1977. A Person who represents an accused must have the necessary legal qualifications as required by law. An accused who is assisted by a person who is not legally qualified, in terms of Section 73(3), should be asked whether he wants such assistance. (See E du Toit, F de Jager, S van der Merwe, A Paizes and A st Q Skeen Commentary on the Criminal Procedure Act [Service 11, 1993] 11 - 12). What this means is that a legal representative is responsible for running the trial and makes decisions about the strategies to be employed. A person who assists the accused does not make any major decisions in the running of the trial. He may not conduct examination in chief or cross examination of witnesses. See further Steytler (1988) 69-71.

our courts to mean that an accused person is entitled to it if he can afford it[88]. The State is not under any duty to provide him with one[89]. Our courts have held, however, that a judicial officer is obliged to refer the accused to the Legal Aid Board and to advise him of how to procure legal aid[90].

As a result of the above, an anomalous situation exists in our law. Where an accused person has secured the services of a lawyer at his own expense, it will be irregular for the court to proceed with the trial if the lawyer is absent[91]. Where, however, an indigent accused fails to procure legal aid and the trial proceeds there is no irregularity[92]. What this means is that, in the first situation it is irregular for the accused to conduct his own defence whilst in the second situation it is not. This is subtle discrimination on a pecuniary basis which leads to an untenable position in our law. This distinction fails to comprehend the reality that very few people are granted legal aid[93]. Steytler contends that this discrimination on economic class coincides with race[94].

A familiar pattern in a criminal trial is that the accused is

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[88]S v Rudman; S v Mthwana supra.

[89]Ibid.

[90]S v Radebe; S v Mabaso. Supra 196D-G; Mabaso Supra 203D-G. In S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk Supra, the court said it was improper for a judicial officer to select the cases in which an undefended accused should be informed of his right to apply for legal aid. (At 381H, 382B-C).

[91]See S v Dyasi 1993 (2) SACR 376 (C) where the court held that the accused was prejudiced by the refusal of the magistrate to postpone the matter as his attorney was not in court.

[92]See S v Mpata 1990(2) SACR 175(NC) wherein the court said that if the accused is not granted legal aid, he must conduct his own defence.

[93]A Chaskalson "The Unrepresented Accused" (1990) 3 Consultus 98 100. However, things have changed a bit. During the period 1 April 1991 to 31 March 1992 57 692 legal aid applicants were referred to attorneys. This was an increase of 22 719 or 62.4 percent over the previous year. See D J McQUoid-Mason "Legal Representation and the Courts" 1993 (1994) Unpublished monograph 5; cf Legal Aid Board Annual Report 1991-92 (1992) 25.

[94]N C Steytler "Equality Before the Law : Being Practical About Principle" (1992) 8 SAJHR 113, 115. The majority of indigent accused persons who appear in the magistrates courts are black. See Note 8 above.

black whilst the judicial officer and the prosecutor are white[95]. The accused is, in most cases, illiterate or semi-illiterate and the proceedings are conducted in either English or Afrikaans[96]. The accused is usually unrepresented and participates in the court proceedings through an interpreter[97]. Nkadimeng submits that the experiences of an unrepresented accused illustrate a horrifying picture of a lay man compelled by law to try and be an expert in one of the most complicated legal systems in the world[98]. Nkadimeng contends that it is a picture lawyers shun to talk about and which the State pretends does not exist[99]. He points out that if even lawyers find it difficult to cope with changes in the law how can lay people be expected to cope[100]. It is submitted that an unrepresented accused who copes adequately in court is the exception[101].

An accused person is not entitled to a fair trial - only to procedural regularity in our law[102]. Briefly, a right to a fair trial would include the right : to a public trial by an ordinary court of law within a reasonable time after having been charged; to be informed with sufficient particularity of the charge; to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial; to adduce and challenge evidence; and not to be a compellable witness against himself or herself; to be represented by a legal practitioner or his or her choice; not to be convicted of an offence in respect of any act or omission which was not an offence at the time it was committed; not to be tried again for any offence of which he or she has previously been convicted or acquitted; to have recourse by way of appeal or review to a higher court; to be tried in a language which he or she understands or to have the proceedings interpreted to him or her; to be sentenced within a reasonable time after conviction; and an accused person has a right to free legal representation at the expense of the State if the interests of justice require[103].

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[95]Chaskalson op cit 99. Cf Khanyile Supra 812I.

[96]Ibid. Cf Khanyile Supra 812I.

[97]Ibid. Cf Khanyile Supra 812I-J.

[98]Nkadimeng op cit 14.

[99]Nkadimeng op cit 15.

[100]Nkadimeng op cit 16.

[101]B Benart "The Rule of Law" 1962 Acta Juridica 100, 120. Cf S v Khanyile. Supra 798B.

[102]S v Rudman; S v Mthwana supra

[103]N C Steytler The Undefended Accused (1988) 3-4; 63, 86, 96, 99, 127, 141, 157, 161. The list is not by Steytler but by the present writer and is not exhaustive.

It is submitted that the prosecution and the indigent accused are not on an equal footing. The State has vast resources in gathering evidence for the prosecution of an accused person. The police prepare the docket and hand it over to the prosecutor. The prosecutor's task decides on how to conduct the case. In most cases the investigating officer sits next to the prosecutor during the trial proceedings. The prosecutor has legal training. The illiterate or semi-illiterate accused is usually unschooled in law and without funds to secure the services of a lawyer. He or she does not know how to go about collecting evidence to meet the prosecutor's case. Usually the accused does not have any resources and does not fully comprehend what is at stake. • Cooper J[104] said that the presiding judicial officer acts as a guide for the undefended accused to deal with this situation[105]. It is submitted that a presiding judicial officer can never fill the shoes of the accused's counsel. A judicial officer does not conduct private consultations with the accused concerning the strategies to be employed in the trial. The accused does not confide in him. The judicial officer does not conduct interviews with defence witnesses in preparation for the trial. The judicial officer does not make objections when the prosecutor takes an unfair advantage of the accused. The judicial officer does not ask the accused before the trial whether he or she has any previous convictions. The accused does not pass pieces of paper to the court for clarification during the trial nor does the judicial officer occasionally ask indulgences to consult with the accused during the trial. At the most, the judicial officer is the neutral trier of fact. He makes his rulings and decision on the basis of the facts placed before him. He does not pre-cognise the accused before the accused's testimony nor does he cross-examine State witnesses.[106]

Two cases are apposite to illustrate that the claim that a judicial officer is the guide of an undefended accused is a red herring. In S v Hlakwane[107] the magistrate, in the court a quo, failed to advise the accused about his right to call witnesses to give evidence in his favour. The accused was unrepresented. The court set aside the convictions and held that the magistrate was not only obliged to advise the accused about their right to call witnesses but was also required to assist

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[104]In S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk.

[105]S v Rudman; S v Johnson; S v Xaso; Xaso v van Wyk Supra 378A, 382B.

[106]Cf Khanyile Supra 798F-799B; 811I-813A on the plight of the unrepresented accused and the role of counsel during criminal proceedings.

[107]1993 (2) SACR 362 (O).

them in subpoenaing their witnesses[108]. Another disturbing feature about this case was the failure by the magistrate to warn the accused about the charge of other competent verdicts[109].

In S v Nzimande[110] the magistrate failed to advise the accused at the end of the prosecution's case about the right to apply for a discharge in terms of Section 174 of the Criminal Procedure Act where there was no case to meet. The accused was unrepresented. The court said that the accused was a layman conducting his own defence who knew nothing about Section 174 and had not made an application[111]. The court held that it was misleading for a judicial officer to inform an unrepresented accused that he has a choice of testifying or remaining silent at his peril where there is no prima facie case to meet at the end of the prosecution's case[112]. The court said that the judicial officer must take it upon himself or herself to acquit the accused in such circumstances[113]. The court found that the magistrate acted irregularly by recalling the policeman to testify as this had the effect of rectifying the mistake by the prosecutor[114]. The accused had nothing to gain by this as the uncertainty operated in his favour[115]. The court found that the magistrate did not allow the accused an opportunity to object to the recalling of the two police witnesses[116]. The court also found that the magistrate had acted irregularly by neglecting to inform the accused that he was not obliged to admit that the fire-arm was the one at issue[117].

Nzimande's case is a graphic example of the hardships faced by an unrepresented accused in conducting his own defence. The accused in this case did not know how to challenge the chain of custody of the fire-arm. There was no real exhibit in front of the court. Even after it was subsequently produced, there was

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[108]At 368c, 368e. The court approved and followed S v Hlongwane 1982(4) SA 321(N) 322H - 323F.

[109]At 365d. The accused, on the basis of their concession, could have been convicted under Sections 36 and 37 of the General Law Amendment Act 62 of 1955.

[110]1993(2) SACR 218(N).

[111]At 220D.

[112]At 220E.

[113]At 220F.

[114]At 219I.

[115]Ibid.

[116]At 219J - 220A.

[117]At 220A, 220B.

no mention of how it was handed in as an exhibit. The fire-arm was never identified until the magistrate elicited an admission from the accused about its identity[118]. In addition the accused did not know how to challenge ballistics evidence.[119] Indeed, one wonders how many similar cases never came before the court on review or appeal.[120] The judicial officer cannot be counsel for the accused. The fact that he or she must see that justice is done, does not mean that it must only be done in the accused's interests but also in the State's interests. There is no doubt that sometimes judicial officers lose patience with unrepresented accused[121].

The assertion that the prosecutor also acts in the interests of the accused is also flawed. It is argued that the prosecutor is a court official and therefore interested only in discovering the truth. In practice the prosecutor only acts for the State and as a result tends to perceive matters only from the State's perspective. An over-worked prosecutor in a magistrates court tries to dispose of his or her case load expeditiously. He or she does not have time to look at the defence case and elicit factors favourable to the defence. Some prosecutors take personal pride in their mission to secure convictions at any cost. A prosecutor may be concerned with his or her promotion and may adopt an impersonal attitude to realise his or her ambition. Such a prosecutor will acquaint himself or herself with the accused's case only with a view to securing a conviction. Very few prosecutors have lived up to their image of being court officials by disclosing to the court or defence where State witnesses make inconsistent statements in favour of the accused.[122] How many prosecutors have come forward in court to disclose that the police have fabricated evidence? Prosecutors tend to believe in police infallibility. To suggest that an accused should confide in a prosecutor is untenable. How many cases have gone on appeal because of the prosecutor's unfair conduct during the trial?

As mentioned above, the presence of counsel plays a vital role where the State's case depends on the identification of the

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[118]Nzimande Supra 219G, 220A.

[119]Nzimande Supra 219H.

[120]See Sections 302 and 309 of the Criminal Procedure Act on reviews and appeals of criminal proceedings in the lower courts.

[121]See S v Tyebela 1989(2) SA 22(A).

[122]It is a rule of practice that witnesses subpoenaed but not called by the State, or the statements of such witnesses, are handed over to the defence by the prosecution. See R v Filanius 1916 TPD 415; S v van Rensburg 1963(2) SA 343 (N); Thuntsi v Attorney-General, Northern Cape 1982 (4) SA 468 (NC). See further N C Steytler The Undefended Accused (1988) 136.

accused[123]. The presence of counsel at a pre-trial identification parade prevents abuses such as those in the Alexandra Funeral Vigil Massacre case. However, unrepresented accused are often ill-equipped to rebut a prima facie case against them on the basis of identification. What makes their task difficult is the fact that they do not know how to go about rebutting it. They do not know how to obtain concessions from the State witnesses during cross-examination.

The present writer recently observed a robbery case which turned on the identification of the accused. After an eye-witness had completed her evidence-in-chief, the unrepresented accused was given an opportunity to cross-examine her. The cross-examination went like this :

Accused : "How did you recognise me?"

Witness : "By your blue overalls"

Accused : "So you did not recognise me with your eyes. Thanks your worship, no further questions."

A lawyer would have had an easy time obtaining concessions from this witness. It was never the testimony of the witness that she had observed the accused for a lengthy time nor did she testify about any of the accused's physical features. The witness only identified the accused as the one sitting in the dock. Coincidentally, he was the only accused.

One thing that should be realised is that mistakes of identity are easy to make and often in a criminal case, a witness is trying to identify someone whom he or she has seen once, briefly, under stressful circumstances[124]. What if the identification of the accused is based on circumstantial evidence? The chances are, he will not know that he only needs to raise another reasonable inference inconsistent with guilt to rebut the prima facie case established against him[125]. Bursey contends that even if the witness appears to be honest, the accuracy and reliability of his or her evidence of identification must be closely examined because of the fallibility of human observation and memory[126]. Very few unrepresented accused are able rigorously to examine identification evidence.

Furthermore, few unrepresented accused understand the significance of re-examining their own witnesses. They do not

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[123]See reference to the Alexandra Funeral Vigil Massacre in the text accompanying note 45 above.

[124]G Bursey "Evidence of Identification in a Criminal Trial" 1992 De Rebus 468.

[125]See R v Blom 1939 AD 288 on circumstantial evidence.

[126]Bursey op cit 469.

comprehend the difference between testifying under oath and an unsworn statement. They do not appreciate the inferences drawn by the court where the accused fails to testify or testifies after his or her own witnesses. They think that it is enough just to make a blank denial where a prima facie case has been established against them. Few unrepresented accused make good use of the opportunity to address the court on the merits of the case. How many unrepresented accused refer to the probabilities and improbabilities of their case or the prosecution's case? How many of them make submissions to the court on the honesty, credibility and demeanour of witnesses? How many of them understand the intricacies of the hearsay rule?[127] It often happens in practice that an unsophisticated accused only discloses a valid and genuine defence very late in the proceedings.

It is submitted that as innocent as indigent accused might be, they still need counsel to establish their innocence. Our adversary system is fallible despite its in-built safeguards. Whatever presumptions operate in establishing guilt, indigent accused need counsel to invoke them in their favour. They must never feel that the law took an unfair advantage of them because of their ignorance or economic plight.[128]

(iii) Sentencing stage

The conviction of the accused is not the end of the matter. The court, in S v Maxaku; S v Williams[129] said that the sentencing process is as distinct and vital a factual enquiry as that determining the guilt of an accused[130]. The court further said that it is criminal sanctions which ultimately sustain the criminal justice system[131]. The court mentioned that there is little point in determining the guilt or innocence of the accused in accordance with long established principles of fairness, and then to leave the assessment of a penalty to a hazardous guess based on no, or inadequate, information[132].

Sentencing is governed by Section 274 of the Criminal Procedure Act. The usual practice, after the accused is convicted, is for the prosecution to prove previous convictions or, if there are

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[127]See Section 3 of the Law of Evidence Amendment Act 45 of 1988. See S v Mpofu 1993 (3) SA 864 (N).

[128]Milne op cit 688.

[129]1973(4) SA 248(c).

[130]At 254F.

[131]At 256A.

[132]At 256B.

none, to inform the court accordingly[133]. The court may then hear such evidence as it thinks necessary to inform itself as to the proper sentence to be passed[134]. In S v Leso[135] the court said it constitutes an irregularity which amounts to a failure of justice if the convicted person is not given an opportunity to adduce evidence in mitigation of sentence[136]. The court in S v Kwinda[137] reiterated this point, and stressed that the judicial officer must record the accused's response after enquiring whether or not he or she wishes to use this opportunity.

Unrepresented accused cannot always rely on the prosecution to draw the court's attention to factors favourable to them. What if the prosecution leads evidence of aggravating factors? The unrepresented accused might not be equipped to place proper and relevant facts in mitigation of sentence. The court might not adduce all the facts favourable to the unrepresented accused. The guiding hand of counsel may be necessary at this critical stage. Counsel is in a position to lead evidence and if necessary call expert witnesses like psychologists to mitigate sentence. Counsel can strike a sensitive balance on the triad of factors elicited in S v Zinn[138]. Counsel might even request a postponement in order that a thorough pre-sentence investigation may be conducted[139]. Although the court has a discretion on the question of sentencing, counsel may request the court to blend punishment with a measure of mercy in accordance with the peculiar circumstances of the case[140]. For example, counsel may suggest a form of punishment such as correctional supervision, community service, a fine or a suspended sentence. To a sceptic, address on sentence might seem like indulging in legal niceties because the accused has already been convicted. However, from the above it is clear that the argument for a right to counsel applies with equal force even at the sentencing stage. The absence of counsel might mean the difference between the indigent accused going to gaol as a result of failure to pay a fine imposed and the affluent accused going free because of his or her money.

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[133]Du Toit et al op cit 28 - 1.

[134]Ibid.

[135]1975(3) SA 694(A).

[136]At 695. See also S v Booysen 1974(1) SA 333(c).

[137]1993 (2) SACR 408(V).

[138]1969 (2) SA 537 (A) per Rumpff J A at 542 : "What has to be considered is the triad consisting of the crime, the offender and the interests of society".

[139]See S v Phakati 1978(4) SA 477(T).

[140]See S v Rabie 1975 (4) SA 855(A).

CONCLUSION

There is a tendency to look at acquittals as failures to bring the guilty to justice. This is a fallacy. Acquittals, like convictions, should be a reflection of the fairness of our criminal justice system. To argue that criminals are not as worthy as the procedural principles which they hide behind, is to miss the point[141]. To argue that procedural rights cater to a relatively small criminal-minded part of the population is also beside the point[142]. What is at stake is the establishment of a legitimate, credible and basically fair system of criminal procedure[143]. By providing counsel for the indigent accused at each of the abovementioned stages, our legal system takes us a step further in realising our ideal of making justice accessible to all. The most compelling reason for a right to counsel in South Africa is the fact that magistrates are usually appointed from the ranks of State prosecutors[144]. Therefore, magistrates may be biased in favour of the prosecution. This might not hold good for the indigent accused, given the fact that the bulk of unrepresented accused persons are tried in the magistrates courts.[145] The indigent accused needs counsel to set in motion all the procedural safeguards necessary for a fair trial. Does the accused understand what "strict liability" is?[146] There is no more pathetic figure, in court, than an unrepresented accused faced with technical or expert evidence despite patience by the magistrate.

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[141]Hiemstra J expressed the view, which seems to be still widely held today, that our legal system acquit too many people who are not as noble as the principles behind which they shelter themselves. See V G Hiemstra "Abolition of the Right not to be Questioned" (1963) 80 SALJ 187, 190.

[142]See The Sunday Times 6 September 1993. The article reported that the Attorney-General of the Witwatersrand, Mr Klaus von Lieres und Wilkau, expressing the view of other Attorney-Generals, felt that a bill of rights will make the burden of law enforcement more onerous to deal with the already over-protected criminal.

[143]See the remarks of Mr Justice P Olivier The Sunday Times 6 September 1993.

[144]N C Steytler "The Right to a Fair Trial" in M Robertson (ed) Human Rights for South Africans (1991) 73, 76. Steytler points out that all magistrates are civil servants and that magistrates are usually appointed from the ranks of prosecutors.

[145]See McQuoid-Mason 1992 (3) South African Human Rights Yearbook 146; 1993 (1994) Unpublished Monograph 3.

[146]Strict liability refers to certain statutory crimes which exclude the concept of mens rea. This was common with regard to security legislation which was enacted under the guise of public welfare. The illustrative cases are R v Wallendorf 1920 AD 383 and S v Arenstein 1964 (1) SA 361(A). See further J R L Milton South African Criminal Law and Procedure Vol III (1971) 24-25.

CHAPTER 4 : COMPARATIVE LAW ON WHAT JUSTICE REQUIRES

(i) Comparative Law on what Justice Requires

With the abolition of apartheid and the prospect of having the first democratic elections on 27 April 1994, South Africa is in a transitional phase. As we know, change is a gradual process. The deliverance of a new government, on 27 April 1994 does not mean an immediate solution to our socio-economic and legal problems. However, as Chaskalson points out :

> "If the purpose of change is to produce a just society, then the gap that presently exists in South Africa between law and justice needs to be narrowed.[1]

What is clear is that South Africa is on course to be re-accepted into the international community of nations. We have learnt from the experience of other African states of the importance of protecting basic human rights. There is general consensus that a rights culture should be established in our country. International covenants and the jurisprudence of other African states are important and instructive on establishing a neutral set of rights and values for South Africa. However, the focus in this paper will be restricted to the provision of the right to counsel for the indigent accused.

(ii) The right to legal representation in international instruments on human rights

It should be pointed out at the outset that South Africa is not a signatory to any of the international law instruments on human rights. However, with its acceptance back into the international community, South Africa has to decide on the international law instruments to sign to form part of our human rights jurisprudence. There is no direct reference nor express provision for the right to legal representation in the Universal Declaration of Human Rights.[2] It is submitted nevertheless that the provisions of Articles 10 and 11 read together can be construed to include the provision of free legal representation to an indigent accused. It would not be straining the language too much to say that reference to an entitlement "in full

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[1]A Chaskalson "Law in a Changing Society" (1989) 5 SAJHR 293 at 298.

[2]The Declaration was promulgated in 1948. Article 10 widely refers to a person's entitlement in full equality to a fair and public hearing by an independent and impartial tribunal of any criminal charge against him. Article 11(1) provides that a person charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. See B de Villiers, D J van Vuuren and M Wiechers Human Rights : Documents that Paved the Way (1992) 5.

equality to a fair trial" in Article 10 and reference to all the guarantees necessary for the defence of an accused person in Article 11, by implication includes free legal representation where accused cannot afford their own. Due to ambiguity, these provisions do not take us far since the next question would be, if there is a right to legal representation, is it a qualified or unqualified one?

4.1 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights expressly provides for a right to counsel[3]. Article 14(3)(d) reflects the right to counsel as a basic norm of fairness[4]. The Covenant provides that legal assistance should be assigned to the indigent accused "if the interests of justice so require" in that case. Van der Berg contends that, although the criterion of "interests of justice" is vague, this should not be an insuperable difficulty as the courts are constantly engaged with value judgements[5]. Van der Berg submits that it is an overstatement to say that it is too nebulous for practical application[6]. The Covenant highlights the importance of the right by providing that an accused person who is not aware of the right to counsel should be informed of it[7]. Article 14, on its reading, guarantees the rights of a person to a fair trial after he or she is formally charged with an offence. Article 9 of the Covenant deals with the rights of a person during arrest and detention.

What makes the Covenant remarkable is that it provides for protocol which allows individual applications to the Human Rights

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[3]The Covenant was promulgated in 1966. Article 14(3) provides : "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality :

> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

[4]Cf S v Rudman; S v Mthwana 1992 (1) SA 343 (A) 351H.

[5]J Van der Berg "The Right to be Provided with Counsel" (1988)3 SACJ 462 at 467.

[6]Ibid.

[7]Article 14(3)(d).

Committee in case of grievances[8]. What this means is that it is binding on member states that have opted to sign it and its provisions can be enforced where violated. The following cases are illustrative of how the Protocol works. The case of Antonio Vianna Acosta v Uruguay involved the trial of an Uruguayan citizen by a military court[9].

Amongst the allegations by the victim, was that he was forced to accept a military ex officio counsel before the Supreme Military Tribunal, despite the fact that there was a civilian defence lawyer ready to take up his defence. The victim submitted that amongst others, his rights under Article 14(3)(b), (c) and (d) were violated[10]. He further submitted that, because of the state of lawlessness prevailing in Uruguay with regard to cases submitted to military jurisdiction, there are no further domestic remedies which could be invoked. As a result, it was impossible for him to submit the communication from his own country. The Human Rights Committee found that Article 1 of the Optional Protocol was clearly intended to apply to individuals subject to the jurisdiction of the state party concerned at the time of the alleged violation of the Covenant. This was held to be the manifest object and purpose of the Article. The Committee found that the victim's rights under Articles 7; 10(1); 14(3)(b),(c) and (d) were violated, and as a result the state party had to provide him with effective remedies and with compensation for physical and mental injury and suffering caused to him by the inhuman treatment to which he was subjected[11].

The case of Tshitenge Muteba v Zaire concerned the detention of a Zairean citizen by military security[12]. The communication was submitted by the wife of the victim who, amongst other things, alleged that her husband had been arrested by the Military Security of Zaire and had been subjected to severe torture and that he had been denied an opportunity to contact a lawyer or judge. The Committee, in finding for the victim, said that implicit, in Article 4(2) of the Optional Protocol, was the duty of the state party to investigate in good faith all the

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[8]See Article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights. See further J A Frowein "Experiences with the European Convention on Human Rights" (1989) 5 SAJHR 196 at 207.

[9]Human Rights Committee Antonio Vianna Acosta v Uruguay Communication No. 110/1981 (1984) (unreported) 148.

[10]Article 14(3)(b) deals with adequate time and facilities for the preparation of the accused's defence and communication with counsel of his own choosing; Article 14(3)(c) deals with the right to be tried without undue delay.

[11]Antonio Vianna Acosta v Uruguay supra 151.

[12]Human Rights Committee Tshitenge Muteba v Zaire Communication No. 124/1982 (1984) (unreported) 158.

allegations of violation of the Covenant made against it and its authorities, and to furnish to the Committee the information available to it. Amongst other findings, the Committee found that there was a violation of the article in that the victim did not have access to counsel and was not tried without undue delay[13]. The Committee ordered the state party to provide the victim with effective remedies and compensation for violations which he had suffered.

The case of Hiber Conteris v Uruguay concerned the detention and trial of an Uruguayan civilian by the military authorities[14]. The victim was detained incommunicado, tortured and denied access to counsel. In its findings, the Committee said that the burden of proof cannot rest alone on the author of the communication, especially considering that the author and the state party do not always have equal access to the evidence and that frequently the state party alone has access to relevant information. It went on to say that in cases where the author has submitted to the Committee, allegations supported by witness testimony, and in the absence of clarification by the state party on information exclusively in its hands, the Committee may consider such allegations as substantiated. Amongst its findings, the Committee found that the victim was tried in his absence and could not defend himself in person or through legal counsel of his own choosing[15]. The Committee ordered the state party to provide the victim with effective remedies and compensation. The Committee expressed satisfaction with the measures taken by the state party towards the observance of the Covenant and co-operation with the Committee[16].

It is submitted that the above cases illustrate the need for South Africa to be a signatory to this Covenant. The Covenant makes the rights provided therein, real, through the mechanism of the Optional Protocol where the domestic remedies have been rendered ineffective. It would be in the best interests of all involved, in South Africa, to ratify the Covenant.

4.2 European Convention on Human Rights

The European Convention on Human Rights provides for a right to counsel[17]. Article 6(3)(c) makes the right to counsel subject

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[13]Tshitenge Muteba v Zaire supra 160.

[14]Human Rights Committee Hiber Conteris v Uruguay Communication No. 139/1983 (1985) (unreported) 168.

[15]Hiber Conteris v Uruguay supra 171.

[16]Ibid.

[17]It was signed on 4 November 1950 and came into force on 3 September 1953. Article 6(3) provides : "Everyone charged with a criminal offence has the following minimum rights : "(c) to defend himself in person or through legal assistance of his own

to the vague criterion of the requirement of "interests of justice". Unlike the International Covenant on Civil and Political Rights, the European Convention on Human Rights does not explicitly state that a person has to be informed of his right to counsel[18]. Although the Convention is binding on member states, and its provisions can be enforced by the European Court of Human Rights, it is not of much use to South Africa because its application is limited to European states[19]. However, it could still be used as a guide to determine how the courts have interpreted "the interests of justice".

4.3 American Convention on Human Rights

The American Convention on Human Rights also provides for a right to counsel[20]. Article 8(2)(e) provides that the right to counsel is inalienable where the accused does not conduct his defence or engage his own counsel. The criterion is very vague, in this Convention, because it seems that counsel is provided when the prescribed time period to engage one's own counsel has elapsed. There is no mention of this time period except that it is established by law. The article does not state that the accused should be informed about his inalienable right to counsel. So one is left to guess whether the accused's choice to personally conduct his defence is an informed or ignorant one.

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choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require" See de Villiers et al op cit 45, 50.

[18]See Article 6 of the Convention.

[19]Frowein op cit 207.

[20]It was promulgated in 1969. Article 8(2) provides : "Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

> "(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
>
> (e) the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law".

See De Villiers et al, op cit 120-121.

There is no express reference to indigency in the article. It has been submitted that although the Convention does not require that legal representation, where necessary, be free, Article 8 must be understood to require legal representation to comply with the requirement of a fair hearing[21]. The factors to be taken into account, in determining whether legal representation is or is not necessary to enable an individual to have a fair hearing, are : the circumstances of a particular case or proceeding, its significance, its legal character, and its context in a particular legal system[22]. As a result, a member State, which does not provide for free legal representation to indigents, may not validly assert that an appropriate remedy exists and that it was not exhausted[23]. The court further opined that when there exists a generalised fear in the legal community which prevents legal services from being provided to those who require them and makes it impossible for an individual to obtain legal counsel, he or she is not required to exhaust domestic remedies[24]. It is submitted that the Convention has limited value to South Africa because it applies only to American states. It is further submitted that the right to counsel under this Convention is widely and ambiguously phrased.

It is apposite to look at the Canadian and Indian experiences with regard to the right to counsel. Firstly, the Canadian experience.

4.4 Canadian Charter of Rights and Freedoms

Canada has an enforceable Charter of Rights and Freedoms[25]. Article 10(b) provides for legal representation[26]. The right provided under this article is comprehensive in that it targets

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[21]See Inter-America Court of Human Rights Advisory Opinion OC - 11/90 of 10 August 1990, 8.

[22]See Advisory Opinion op cit 9.

[23]See Advisory Opinion op cit above.

[24]The court said that the exception in Article 46(2)(b) of the Covenant applies. The exception provides that a party, alleging violation of his rights by being denied access to the remedies under domestic law, can lodge his communication with the Inter-American Commission on Human Rights. He does not have to prove that he has pursued and exhausted domestic remedies. See Advisory Opinion op cit at 11.

[25]The Charter was implemented on 17 April 1982. See De Villiers et al op cit 247.

[26]Article 10 provides : "Everyone has the right on arrest or detention :

(b) to retain and instruct counsel without delay and to be informed of that right."

the arrest and detention stages. Secondly, it is explicit in its provision that a person should be informed of his right to instruct counsel. Although the article does not expressly refer to indigency, the courts' decisions prior to the Charter have treated the right to a fair trial as synonymous with the provision of counsel in certain circumstances.

Two instructive cases were decided before the adoption of this enforceable Charter. In Re Ewing and Kearney and the Queen[27] the court said that if the trial judge concluded that counsel was necessary, because of the complexity of the case, the accused's lack of competence or other circumstances, and his request for counsel was turned down, he might be obliged to stop the proceedings until the difficulties had been overcome[28]. Seaton J A, delivering the judgement of the court, pointed out that a trial judge is obliged, by law, to continue with a trial if it is properly conducted[29]. By this, the court meant that the appointment of counsel is a necessity only if it ensures the proper conducting of that particular trial.

In Re Ciglen and the Queen[30] the court said that the consequences of conducting an unfair trial, due to absence of counsel, are that the trial may be aborted and its result set aside[31]. The court said that this was the position despite the fact that there was no law or rule of practice in any Canadian jurisdiction that an accused person must be provided with counsel[32]. Van der Berg submits that at the time that these two cases were decided, the situation prevailing in Canadian law was not fundamentally different from the present situation in South African law[33].

With the coming into effect of the Charter, the Canadian courts have excluded confessions in instances where an accused person is not advised of his or her right to counsel, or is not provided with that right[34]. Previously under the common law, this was

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[27](1974) 18 CCC (2d) 356.

[28]At 365-6. Didcott J, in Khanyile Supra 801F-I, referred to this case to illustrate the attitude of the courts in Canada where the accused person has failed to procure legal aid.

[29]At 366.

[30](1978) 45 C.C.C. (2d) 227.

[31]At 231. Khanyile Supra 801J-802A.

[32]Ibid.

[33]Van der Berg op cit 465.

[34]D M Paciocco Charter Principles and Proof in Criminal Cases (1987) 375-376; Cf Clarkson v R [1986] 1 S.C.R. 383(S.C.C.); R V Lundrigan (1985) 19 C.C.C. (3d) 499.

a relevant factor in determining the voluntariness of a confession but not a sufficient condition for its exclusion[35]. In R v Therens[36] the court held that psychological compulsion was a form of detention for the purposes of Section 10(b)[37].

4.5 Indian Constitution

The Indian Constitution provides that an arrested person has the right to consult and be defended by a legal practitioner of his choice[38]. Although Article 22(1) is negatively phrased, it is similar to the Canadian one. Article 22(1) provides that the arrested person has a right to consult and be defended by counsel of his own choice[39]. The Canadian article only provides that he has a right to retain and consult with counsel[40]. Obviously, this means that he can retain and consult counsel of his own choice. The Indian article does not provide that the arrested person must be informed of the right to counsel, it only provides that he must be informed of the grounds of his arrest. The Canadian article expressly provides that the arrested person must be informed of his right to counsel. What is common in the two articles is that the right to counsel starts to operate from the moment of arrest. However, the Indian Constitution provides that Article 22 does not apply in the case of an enemy alien and

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[35]Paciocco op cit 376.

[36](1985) 18 D.L.R. (4th) 655.

[37]Per Le Dain J at 678 : "In addition to the case of deprivation of liberty by physical constraint, there is, in my opinion, a detention within s10 of the Charter when a police officer or other agent of the State assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel". In Dehghani v Minister of Employment and Immigration; Canadian Council for Refugees Intervenes (1993) 101 D.L.R. (4th) 654 (S.C.C.) the court held that a secondary examination at the airport,as part of the refugee claim determination process, was not "detention" in the sense contemplated by S10(b) of the Charter and does not include a right to counsel.

[38]Article 22(1) provides : "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice". See De Villiers et al op cit 228.

[39]My emphasis.

[40]See Section 10(b) of the Canadian Charter.

that Article 22 does not apply in the case of an enemy alien and a person arrested or detained under preventive detention[41]. This is the major difference between the two articles. The Indian article is conditional and subject to laws providing for preventive detention. The Canadian article is not subject to such limitations. It is submitted that as a result of the provision of Article 22(3) of the Indian Constitution, the right to counsel, although a fundamental right, has been watered down in security and detention cases.

It is useful to look at what the Indian jurists and courts have said with regard to right to counsel. Seervai submits that if a person is denied by a judge of his right to be defended by counsel of his choice, he is not obliged to go through a trial by engaging another lawyer since this is a violation of a fundamental right[42]. He contends that the person may invoke Article 32 which empowers the Supreme Court to enforce rights, instead of making this denial a ground of appeal[43]. As has been pointed out, Article 22(1) is subject to the provisions of Article 22(3). The fact that a constitutional remedy can be invoked to enforce Article 22, indicates that Article 22 was meant to be a procedural safeguard against arbitrary arrest and detention. Since Article 22 is a fundamental right, its effect is that it limits or restricts the exercise of legislative power[44]. Seervai contends that the correct view in India is that the right to be defended by counsel applies in both criminal and quasi-criminal proceedings.[45]

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[41]Article 22(3) is phrased in a peremptory language and provides : "Nothing in Clauses (1) and (2) shall apply -

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention".

[42]H M Seervai Constitutional Law of India 2 ed Vol II (1976) 1008.

[43]Ibid. Seervai purports that a breach of a fundamental right by a judge is not excluded from the writ jurisdiction of the Supreme Court. Article 32(2) provides : "The Supreme Court shall have the power to issue directions or orders or writs, including writs in the nature of habeas corpus, Mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part."

[44]H M Seervai Constitutional Law of India 2 ed Vol III (1979) 1649.

[45]H M Seervai Constitutional Law of India 2 ed Vol I (1975) 555.

With regard to the indigent accused's right to counsel, there are several cases[46]. In re Govinda Reddy[47] the court said that there was no statutory or constitutional requirement to provide legal assistance to an accused person. The choice of a lawyer was always at the behest of the accused person and that right had been guaranteed under Article 22 (1) of the Constitution and Section 340 of the Criminal Procedure Code[48]. The court further said that, in capital cases, the circular orders of the High Court showed that counsel should be appointed to defend an indigent accused[49]. In State v Dukhi Dei[50] the court said that a court of appeal or revision was not powerless to interfere if it found that the accused was so handicapped for want of legal aid that the proceedings against him amounted to a negation of a fair trial[51]. As it was submitted by counsel for the appellant in the Rudman case[52] the position in India seems to be equivalent to our common law. The interpretation of the right to counsel in India seems to have been intricately related to the phrase "procedure established by law" in Article 21[53].

4.6 African Charter on Human and Peoples' Rights

The African Charter on Human and People's Rights (or Banjul Charter) was adopted in 1981[54]. Article 7(c) provides for the right to counsel[55]. The right to counsel forms part of the

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[46]Cf Seervai (1975) 556.

[47][1958] A Mys 150.

[48]Ibid.

[49]Ibid.

[50][1963] A. Or 144.

[51]Ibid.

[52]S v Rudman; S v Mthwana Supra 356C. The heads of argument highlight the importance of legal representation but do not refer to the position of the indigent accused in India. See especially at 355E - 356C.

[53]Article 21 provides : "No person shall be deprived of his life or personal liberty except according to procedure established by law".

[54]It was adopted on 27 June 1981 at Nairobi, Kenya. See de Villiers et al op cit 147.

[55]Article 7 provides : "Every individual shall have the right to have his cause heard. This comprises :

(c) the right to defence, including the right to be defended by counsel of his choice".

components of a fair hearing contained in Article 7[56]. The weaknesses of the right to counsel in the Charter are clear. Firstly, there is no provision that the accused person must be informed of the right to counsel. Secondly, the Charter is not explicit on when the right to counsel comes into effect. It does not refer to the arrest or detention stage at all. Thirdly, it does not refer to the right to consult in private with counsel. It just refers to the right to be defended by counsel. However, it can be argued that consultation is a sine qua non of defence by counsel. Lastly, it does not refer to the position of an indigent accused who cannot afford his own counsel. The Charter also omits the important right to bail, which enables the accused person to mount an effective defence[57].

It is relevant, therefore, to look at the provision of right to counsel in member states of the Charter.

(a) Kenya

In Kenya[58] the right to counsel is provided under Section 77(2)(d) of the Constitution[59]. The accused person has a right to defend himself or by a legal representative of his own choice. Kibwana and M'Inoti contend that this right has been violated in political cases[60]. The authors point out that many people facing offences like sedition have been held by the police for

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[56]Other components are : the right to an effective appeal, the right to be presumed innocent until proved guilty by a competent court, the right to a speedy trial by an impartial court and the right against retrospectivity in criminal offences.

[57]K Kibwana and K M'Inoti "Human Rights Issues in the Criminal Justice of Kenya and the African Charter on Human and Peoples Rights : A Comparative Analysis" Unpublished Article (1992) Paper delivered at Conference on Protection of Human Rights and Criminal Proceedings for African Jurists in Siracusa, Italy, 19-26 July 1992, 1 at 9.

[58]Ibid. Kenya became a signatory to the Charter in February 1982. The authors point out that Kenya acceded to the International Covenant on Civil and Political Rights on 1 May 1972.

[59]Section 77(2) provides : "Every person who is charged with a criminal offence -

(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice."

See the Constitution of Kenya No. 10 of 1991 in A P Blaustein and G H Flanz Constitutions of the Countries of the World.

[60]Kibwana and M'Inoti op cit 14.

more than one month and none of them was represented by counsel[61]. The other problem, highlighted by the authors, in Kenya is the practice of punishing lawyers who represent unpopular clients or who take up politically sensitive cases[62]. It is submitted that Kenyan citizens can still enforce their right to counsel and fair trial by invoking the mechanisms of the International Covenant on Civil and Political Rights[63].

The Kenyan Constitution specifically denies the indigent accused person the right to counsel at public expense[64]. The authors contend that as a result of lack of legal aid, many of the rights guaranteed by the constitution for indigent accused remain unvindicated because they cannot hire lawyers to assert them.[65] The authors point out that there is a proposed constitutional amendment to introduce partial legal aid at government expense for indigent persons in human rights cases[66]. It is not known what exactly the authors mean by human rights cases since the right to counsel in criminal proceedings is a fundamental right under the Kenyan Constitution. The authors contend that the Kenyan provisions are superior to that of the African Charter since the former target the arrest stage and provides for the right to bail. The authors further urge that Kenya should adopt and incorporate in its law the international standard of expanding legal assistance paid at public expense where the interests of justice so require for the indigent accused person[67]. It is submitted that despite the absence of free legal representation for indigent accused, the Kenyan Constitution provides for comprehensive rights of the accused person in order to secure a fair trial[68].

(b) Tanzania

A brief look at Tanzania is apposite. The Tanzanian Bill of

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[61]Ibid; cf Amnesty International Kenya, Torture, Political Detention and Unfair Trials (1987).

[62]Kibwana and M'Inoti op cit 14.

[63]Kenya became a signatory to the International Covenant on Civil and Political Rights on 1 May 1972. See Kibwana and M'Inoti op cit 9. See further above the discussion of the Covenant in this chapter.

[64]Section 77(14) provides : "Nothing contained in Subsection (2)(d) shall be construed as entitling a person to legal representation at public expense."

[65]Kibwana and M'Inoti op cit 16.

[66]Ibid.

[67]Kibwana and M'Inoti op cit 18.

[68]See Sections 72 and 77 of the Constitution.

Rights does not provide for the right to counsel at the State's expense where the accused cannot afford a lawyer[69]. Instead there is a statutory provision for this right. The Legal Aid Criminal Proceedings Act provides for legal aid to indigent accused persons for all serious offences[70]. Mwalusanya submits that in practice legal aid is limited to offences like murder, manslaughter and treason[71]. He further submits that offences like robbery with violence, theft and forgery are excluded which, in effect, means that the bulk of the accused persons are not legally represented[72]. Mwalusanya points out that the right to counsel, statutorily and practically, apply to people who can afford to hire a lawyer and those who have been granted legal aid under the Legal Aid Act[73]. He further points out that in the primary courts, the equivalent of our magistrates courts, there is no right to legal representation[74]. He says that the bulk of the cases are heard in these primary courts including serious offences like robbery with violence, house-breaking, burglary and theft. The situation described by him is similar to that in South Africa. In a judgement delivered by Mwalusanya J himself, in Khasim Hamisi Manywele v R[75] he held that the right to counsel was a constitutional right incorporated in the right to a fair hearing. Mwalusanya J further held that the right to counsel extends to all accused persons for all offences which might attract a sentence of over five years imprisonment[76]. However, the case has been taken on appeal[77]. It is submitted

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[69]J L Mwalusanya "The Protection of Human Rights in the Criminal Justice Proceedings - The Tanzanian Experience" Unpublished Article (1992) Paper delivered at Conference on Protection of Human Rights and Criminal Proceedings for African Jurists in Siracusa, Italy 19-26 July 1992 9.

[70]Section 3 of the Legal Aid Criminal Proceedings Act 21 of 1969.

[71]Mwalusanya op cit 16.

[72]Ibid. The bulk of accused persons are charged with these offences which are excluded from legal aid.

[73]Section 310 of the Criminal Procedure Act of Tanzania. Mwalusanya says that this is the purported meaning of the right to counsel in criminal proceedings. (Mwalusanya op cit 16).

[74]Mwalusanya op cit 15. He says that advocates are prohibited from appearing in these courts under Section 33(1) of the Magistrates Court Act 2 of 1984.

[75](1990) Dodoma High Court Crim. Appeal No. 39/1990 (Unreported); cf Mwalusanya op cit 16. The Tanzanian Constitution provides for a fair hearing under Article 13(6)(a).

[76]Ibid.

[77]Ibid.

that, although this judgement is limited to the sentence of five years, it was a major stride in terms of recognising the importance of legal representation in securing a fair trial for the accused. As is the case with Kenya, Tanzania should also incorporate the international standards of the right to counsel into its Bill of Rights.

The major criticism that has been levelled against the African Charter is the absence of enforcement mechanism in its provisions. Dlamini submits that to recognise rights without a guarantee to implement them could lead to the interpretation that the African Charter is merely a set of rights to be promoted rather than protected[78]. Despite its weaknesses, the Charter has been hailed as a modest attempt to create a regional mechanism for the protection and promotion of human rights in Africa[79]. From the above discussion, the importance of the right to counsel for securing a fair trial has been acknowledged to a limited extent in the Charter. It is submitted that member State signatories to the Charter, despite their Third World content, must ceaselessly try to give a practical meaning to the right to counsel in their domestic laws.

(c) Zimbabwe

The Constitution of Zimbabwe provides for legal representation in a criminal trial[80]. In terms of Section 18(3) of the Constitution, the accused is entitled to legal representation of his own choice "at his own expense"[81]. This means that the accused's right to counsel depends entirely on his financial position. Otherwise the right is protected since the Supreme Court has the original jurisdiction to act for the purposes of enforcing or securing the enforcement of the right under Section 24 of the Constitution.[82]

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[78]C R M Dlamini "Towards a Regional Protection of Human Rights in Africa : The African Charter on Human and Peoples Rights" (1991) 24 CILSA 189 at 194.

[79]Dlamini op cit 189.

[80]Section 13(3) provides that any person who is arrested or detained "shall be permitted at his own expense, to obtain and instruct without delay a legal representative of his own choice and to hold communication with him".
Section 18(3) states that an accused "shall be permitted to defend himself in person or ... at his own expense by a legal representative of his own choice". See Blaustein et al op cit.

[81]My emphasis.

[82]The right to counsel, together with other incidental rights to a fair trial, is a fundamental right under the Declaration of Rights in the Constitution. What this means practically, is that a person who is aggrieved by a breach of his fundamental right may apply directly to the Supreme Court to

Hatchard contends that in Zimbabwe as long as the accused person desires and can afford legal representation, he is entitled to a lawyer throughout the criminal process[83]. This is evidenced by the fact that as from the time of his arrest or detention, through to the preparatory examination and the trial, the accused is entitled to legal assistance[84].

It is relevant to look at how the right to counsel has been implemented in practice in Zimbabwe. In Maluleke v Du Pont NO[85] the court held that the court has no inherent power to require an advocate to appear for a person, either in civil or criminal proceedings on the grounds of indigency and inability to obtain legal representation. It should be pointed out that this was a pre-independence case. In another pre-independence case, R v Kuraza[86] the court said that the right to counsel was not dependent upon the difficulty of the complexity of the case, but was an inherent right which every accused person possesses. In a post-independence case, S v Slatter[87], involving six accused persons who were denied access to their lawyers until after their warned and cautioned statements were recorded and confirmed, the court held that the confessions were inadmissible[88]. This was because the denial of access to a lawyer was, in itself, a form of psychological coercion and inducement which was brought to bear on the will of the accused[89]. Dumbutshena J P, delivering the judgement, said that if an accused person wants a lawyer before, or during interrogation, the police must stop their interrogation and only resume after the accused has had consultations with his lawyer[90]. Hatchard submits that

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determine its breach. See J Hatchard "The Right to Legal Representation in Africa : The Zimbabwean Experience" (1988) 4 Lesotho Law Journal 135 at 136.

[83]Ibid.

[84]Section 101 of the Zimbabwean Criminal Procedure and Evidence Act 1 of 1992 provides for access to an accused by friends and legal representatives. This extends to legal assistance during the preparatory examination. Section 183 of this Act refers to the right to legal representation during the trial. cf Ibid.

[85]1964 (2) SA 692 (SR); cf D J McQuoid-Mason An Outline of Legal Aid in South Africa (1982) 6.

[86]1967 R L R 225 per Beadle C J at 116.

[87]Supreme Court Judgement No. 49 of 1984; cf Hatchard op cit 137 ff.

[88]At 30; cf Hatchard op cit 138.

[89]Ibid.

[90]Ibid.

lawyer[90]. Hatchard submits that Slatter's case is a good example of the courts seeking to protect the right to counsel[91].

Hatchard contends that the phrase "representation of his choice", on the face of it, grants an accused the unfettered freedom to choose who will represent him[92]. He points out that in Zimbabwe, lawyers both from South Africa and the United Kingdom have been instructed by both the State and the defence in several major cases.[93] This is due to the fact that sometimes a lawyer with the appropriate skill and expertise is not always available locally. However, the fact that an accused has a right to counsel of his own choice, does not mean he may deliberately delay the administration of justice under this guise[94]. Thus the right to choose is subject to certain limits. In Paweni v Acting Attorney-General[95] the court said that the inability of an accused person to procure the services of a specific lawyer does not in itself justify the granting of the postponement of his trial. Gubbay J A, delivering the judgement, said what is protected is the right of an accused to resist a lawyer being foisted upon him even where such services will be rendered to him without charge[96]. He went on to say that an accused is entitled to engage another lawyer if his prime choice is unavailable[97]. The position is similar in South Africa. In Lombard v Esterhuizen[98] the court refused such a request for postponement and said that the overriding requirement was the smooth running of the administration of justice. The court remarked that it was an unfortunate situation which recurs in the courts where litigants or accused persons requested postponements on the ground that a particular advocate of their own choice was not available[99]. The court further remarked that as far as the circumstances would allow, these requests were accommodated

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[90]Ibid.

[91]Hatchard op cit 139.

[92]See Section 13 and 18 of the Constitution, Hatchard op cit 143.

[93]Ibid. In practice, foreign lawyers have to be temporarily enrolled in Zimbabwe or admitted there if they wish to represent accused persons.

[94]Hatchard uses the example of an accused who chooses a lawyer who he knows is not available for several months. Ibid.

[95]1985 (3) SA 720 (ZS).

[96]At 723.

[97]Ibid.

[98]1993(2) SACR 566 (W).

[99]At 572 d.

subject to the above requirement[100]. The court approved the dictum in Paweni's case[101]. Hatchard criticises Paweni's case as unsatisfactory in the determination of the rights of the accused based on the test of availability of counsel[102]. It is submitted that the guiding principle should be practical considerations like the right to a speedy trial, reasons for postponement, which party was responsible for the postponement, the availability of witnesses, the time-span involved and the impact or effect of the postponement on the criminal courts' rolls.

Like South Africa, in Zimbabwe, very few accused persons are legally represented. This is largely due to its Third World content. Many accused persons are illiterate, ignorant and impecunious. The attainment of independence was a challenge for both the legal system and the legal profession to make the law equally accessible to all. Chinamasa points out that the situation is not the same at all levels of the criminal justice system in Zimbabwe[103]. He says that in criminal proceedings at the High Court of Zimbabwe, indigent accused persons are assisted with legal aid by recourse to the Legal Assistance Act[104]. However, the provision of legal assistance for indigent accused persons is under-utilised in the magistrates courts. He contends that magistrates rarely refer accused persons to the Registrar of the High Court for legal assistance despite the fact that some offences tried there carry a minimum mandatory punishment that would qualify the accused for legal aid[105]. This is an untenable situation.

The courts in Zimbabwe have tried to address this situation. Gubbay C J enumerates a number of devices that have been resorted

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[100]Ibid.

[101]At 571i - 572a.

[102]Hatchard op cit 145.

[103]P A Chinamasa "The Protection of Human Rights in Criminal Justice Proceedings" Unpublished Article (1992) Paper delivered at Conference on Protection of Human Rights and Criminal Proceedings for African Jurists in Siracusa, Italy 19-26 July 1992 10.

[104]Section 3 of Legal Assistance and Representation Act 20 of 1969. The latest amendment of the Act is by Act 31 of 1983.

[105]Ibid. The minimum mandatory punishment can be a very substantial penalty in the absence of mitigating special circumstances. See the Magistrates Courts Rules, 1984 promulgated under this Act.

to in addressing the plight of the indigent accused[106]. The phrase "a fair hearing" in Section 18(2) has proved to be a fruitful field for judicial activism, especially in the context of whether the undefended accused should be, or should have been afforded the opportunity of obtaining legal representation[107]. He submits that the Supreme Court, in certain matters, has impressed upon judicial officers the need to ask themselves whether the undefended accused could be assured of a fair trial. He lists the following situations as those which should be used to determine whether or not legal representation is necessary :

(a) The situation where the ascertainment of the facts includes difficult issues of legal interpretation, such as those arising from concepts like possession, consent or knowledge;

(b) the situation where the charge alleges that the offence was committed many years back and the defence is an alibi difficult to establish after a long time;

(c) the situation where the State's case rests entirely on scientific evidence adduced by an expert;

(d) the situation where there is a need to prove "special circumstances" or "special reasons" in order to avoid a mandatory minimum sentence; and

(e) the situation where a very lengthy prison sentence is likely to follow upon a conviction.[108]

Gubbay cautions that the above situations are not exhaustive and not intended to lay down any fixed rule of practice. However, they are a guide in advising the accused about the necessity of being legally represented. If the judicial officer is satisfied that the accused should be legally represented, but cannot afford it, then the judicial officer can authorise legal representation under Section 3 of the Legal Assistance and Representation Act[109].

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[106]A R Gubbay "Human Rights in the Criminal Justice Proceedings : The Zimbabwean Experience" Unpublished Article (1992) Paper delivered at Conference on Protection of Human Rights and Criminal Proceedings for African Jurists in Siracusa, Italy, 19-26 July 1992 24 ff.

[107]Section 18(2) of the Constitution provides : "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law" Ibid.

[108]Gubbay op cit 25.

[109]Gubbay op cit 26.

It is encouraging to see how the courts in Zimbabwe have transformed the right to counsel into a legal reality. They have taken firm action to stop any denial of this right[110]. The judiciary, in Zimbabwe, has proved to be independent and courageous in interpreting the Constitution[111]. Though legal aid for the indigent accused persons is unsatisfactory, the Zimbabwean experience is a beacon of hope that the ideal of justice for all is attainable in spite of financial and personnel constraints of Third World countries.

(d) Namibia

The right to counsel in Namibia has not been developed much. This is due to the fact that Namibia only attained its independence in 1990. Therefore, the position before independence is the same as in South Africa[112]. The right to counsel is provided for in Article 12(1)(e) of the Namibian Constitution[113]. This article does not provide that the accused person should be informed of his right to legal representation. On the face of Articles 11 and 12, there is no mention of the exact stage that the right becomes operative[114]. Article 12(1)(e) only says that the accused is entitled to be defended by a lawyer before the commencement of and during his trial. What does "before the commencement of trial" mean? Does it mean the moment of arrest or the stage where the accused is formally charged? Although the phrase is subject to different meanings, it is submitted that this right should start to operate from the moment of arrest or detention. This should be the meaning of the article, especially since this right is a fundamental one under the Constitution. There is no provision of state funded or free legal representation for the indigent accused in the Constitution. Reference to counsel of his or her choice, obviously means at the accused person's own expense.

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[110]E Dumbutshena "The Rule of Law in a Constitutional Democracy with Particular Reference to the Zimbabwean Experience" (1989) 5 SAJHR 311 at 319.

[111]See the recent case where the court declared that long delays in carrying out the death sentence amounted to inhuman treatment which was forbidden under the Declaration of Rights : Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe and Others 1993(2) SACR 432. See In re Mlambo 1992 (4) SA 144(ZS) on the right to a speedy trial.

[112]See Chapter 2 above on the position in South Africa.

[113]Article 12(1)(e) provides : "All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice." See the Constitution of the Republic of Namibia.

[114]Article 11 deals with arrest and detention.

The provision in this article is similar to that of the African Charter on the right to counsel[115]. The Zimbabwean provision is different in that it expressly provides for a right to counsel as from the moment of arrest and detention, including where the accused person is held under preventive detention laws[116].

It is relevant to look at the substantive meaning given to this right by the courts in Namibia. In S v Wellington[117] the court approved the dictum in Tyebela's case[118] and, said that the court was in an invidious position of being an arbiter and at the same time an adviser of the unrepresented accused, even though he was not illiterate[119]. The court said that the accused was entitled to have the purpose of cross-examination explained to him otherwise the trial would be unfair[120].

In S v Mwambazi[121] the court had to consider the magistrate's failure to inform the accused of his right to legal representation and the presumption operative on a charge of fraud in terms of Section 245 of the Criminal Procedure Act[122]. The court emphasised the point that in terms of the common law every person, who is subject to the Namibian jurisdiction, is entitled to a fair and proper trial[123]. The court pointed out that the effect of Article 12 of the Constitution was that in every case where the accused is unrepresented, the magistrate must inform the accused of his or her right to be represented[124]. The court said that one failure of duty by a judicial officer will not constitute an irregularity. The court said, however, the cumulative effect of more than one minor failure can lead to the conclusion that the accused did not have a fair trial.[125]

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[115]See Article 7(c) of the African Charter.

[116]See Dumbutshena op cit 318.

[117]1991 (1) SACR 144 (Nm).

[118]1989 (2) SA 22 (A).

[119]At 148b.

[120]Ibid.

[121]1991 (2) SACR 149 (Nm).

[122]At 150i, 152g, 153a. Act 51 of 1977.

[123]At 151a. The court said that a fair trial includes the right to be legally represented by a duly recognised legal practitioner of one's own choice.

[124]At 151d.

[125]At 153a.

In Namib Wood Industries (Pty) Ltd v Mutiltha NO[126] the court said that the dicta in Wellington's case was not intended to apply to a commercial entity represented by one of its officers rather than an advocate or attorney[127]. The court said that the responsibility of explaining certain procedural matters to the accused start with the illiterate accused from a rural area and then a motor car salesman like in Wellington's case[128]. The court said this should be left to the common sense of the trial courts faced with particular circumstances[129]. In S v Bruwer[130] the court said that a trial will not be less fair if a person who knows that it is his right to be legally represented is not informed of that fact[131]. The court agreed that the concept of a "fair trial" in Namibian law differed from that of South Africa. In Namibia, this right formed part of the Bill of Rights and had to be given a wide and liberal interpretation[132]. The court said that it was the constitutional duty of the presiding officers to inform an accused person of his right to legal representation in Namibia.[133] The court further said that it was a question of fact whether failure to inform the accused of his right to legal representation has resulted in the failure of justice[134].

It is submitted that Bruwer's case should be confined to its peculiar facts. It does not augur well in a human rights value system to assume that people, because of their educational background, know what, when and how their rights are to be enforced. How many times has one encountered misconceptions such as that "all lawyers are liars" from the most educated members of the community? Even though there was no failure of justice in this case, it is submitted that presiding officers should discharge their duties of informing the accused persons of their right to legal representation, instead of engaging in speculation about knowledge of such rights by a certain class of accused persons.

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[126]1992 (1) SA 276 (Nm HC).

[127]At 280I.

[128]At 280D-E.

[129]At 280G.

[130]1993 (2) SACR 306 (Nm).

[131]The court said that in principle there is no difference between an accused being an attorney or any other accused who knows that he is entitled to be legally represented. See judgement at 309d.

[132]At 309b.

[133]At 309a.

[134]At 309c.

Although this right has not been given a substantive meaning in Namibia, it is submitted that the justiciable Bill of Rights is going to be useful in extending the right to counsel to indigent accused persons. The Bill of Rights has already started to make its impact felt in the criminal justice system. In S v D[135] the court said that the cautionary rule in sexual offences discriminated against women and that it was incompatible with the concept of equality before the law. The court rejected it as being in conflict with the constitution. In S v Minnies[136] the court, in rejecting a pointing-out, emphasised the fundamental human rights enshrined in the Constitution. The court said that a pointing-out obtained in contravention of Article 8(2)(b) was inadmissible[137], and in interpreting and giving effect to human rights provisions it would rather err on the side of the protection of the individual against police excesses[138].

In Djama v Government of the Republic of Namibia and Others[139] the court had to decide the question of a person who was detained for more than 48 hours, by government officials, on a suspicion of being an illegal immigrant. The court found in favour of the plaintiff on the basis that the government officials' conduct had been mala fide and unreasonable, and awarded attorney and client's costs against the government[140]. The court said that Section 50 of the Criminal Procedure Act[141] and Article 11(3) of the Constitution prohibit detention for more than 48 hours[142]. The court remarked that the officials, in failing to release a person unreasonably detained, acted in a manner unworthy of persons entrusted with upholding the country's Constitution[143]. The court further observed that the government had stubbornly opposed the habeas corpus application[144].

It is submitted that the constitutional safeguards for the protection of fundamental rights in both countries elevates our

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[135]1992(1) SA 513 (Nm) at 516H.

[136]1991 (3) SA 364 (Nm HC).

[137]At 385A. Article 8(2)(b) provides that "no person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

[138]At 385B.

[139]1993 (1) SA 387 (Nm).

[140]At 396C.

[141]Act 51 of 1977.

[142]At 395H-I.

[143]At 396E.

[144]At 396F.

belief that justice is attainable through the law. The human rights jurisprudence in the criminal justice systems of both countries is a source of inspiration for a new South Africa with a new value system. The lesson from these two countries is that it is not enough to recognise these basic human rights, but mechanisms should be devised to implement and enforce them in practice.

4.7 Proposed Bills of Rights for South Africa

(a) The African National Congress's Bill of Rights

The relevant provisions covering a right to counsel are in Article 2 of the Bill of Rights of the African National Congress[145]. Article 2.11 provides that a person is entitled to a lawyer of his choice as from the stage of arrest or detention. In this sense, it is similar to the Canadian, Indian, Kenyan and Zimbabwean provisions. The phrase in Article 2.11 that arrest shall be according to "procedures laid down by law" means the same thing as the phrase "procedure established by law" in Article 21 of the Indian Constitution.[146] The reference to a legal representative of his or her choice in this article, it is submitted, should mean counsel at his or her own expense[147].

Article 2.21 entitles a person, unable to pay for his own legal representation, to a State funded or free legal counsel "where the interests of justice so require". This is similar to the provisions in the International Covenant on Civil and Political Rights and the European Convention on Human Rights. The wording in the American Convention on Human Rights is slightly different.

The African National Congress' article has been criticised for being too wide and prone to create a morass of uncertainty[148]. The article has also been criticised for failing to provide that an accused person should be informed of his right to legal representation or organisations that may assist him[149]. The

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[145]Article 2.11 provides that "arrest shall take place according to procedures laid down by law, and persons taken into custody shall immediately be informed of the charges against them, shall have access to a legal representative of their choice ...". Article 2.21 provides that "if a person is unable to pay for legal representation, and the interests of justice so require, the State shall provide or pay for a competent defence". See the ANC Draft Bill of Rights - Revised Version -February 1993.

[146]See Note 53 above.

[147]See the discussion at pages 64, 72 and 75 above.

[148]The South African Law Commission Interim Report on Group and Human Rights Project 58 of August 1991 at 415.

[149]Interim Report on Group and Human Rights at 414 - 415.

article is criticised for failing to afford accused an opportunity of securing such assistance for themselves[150]. It is submitted that all the above problems are not insurmountable when extending legal representation to indigent accused persons. It is conceded that there is some merit in these criticisms. As has been pointed out above the courts have an ability to manoeuvre in situations calling for value judgements. This will be imperative for the South African judiciary espousing a new value system consistent with a human rights culture. A suggestion will be made in the last chapter of this work of how to remove the ambiguity and vagueness which might arise from the phrase "interests of justice". The courts can supplement the omissions in this article through judicial activism. An example would be by holding that an accused person should be informed of the right to counsel and the agencies which can assist him or her in that regard[151].

(b) South African Law Commission Interim Report on Group and Human Rights

The South African Law Commission Report provided for the right to counsel for the indigent accused in its first draft[152]. Article 25(d) was similar to that of the African National Congress, except that Article 25(d), instead of the words "interests of justice", used the words "if the case is a serious one". However, in its second draft, the Law Commission amended the article[153]. On its face, Article 7(e) - (f) is very

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[150]Ibid.

[151]This is already the position in our law. See the cases of S v Radebe; S v Mbonani supra and S v Rudman; S v Johnson; S v Xaso; Xaso v van Wyk N O supra.

[152]The first draft of the Bill of Rights was in 1989. Article 25(d) provided that "every accused person has a right to be assisted by a legal representative of his choice and, if he cannot afford this, and if the case is a serious one, to be defended by a legal representative renumerated by the State. See note 122 above.

[153]The second draft of 1991 provides in Article 7 : "Every accused person has the right -

(e) to be represented by a legal practitioner;

(f) to be informed by the presiding officer :

(i) of his or her right to be represented by a legal practitioner;

(ii) of the institutions which he or she may approach for legal assistance;

and to be given a reasonable opportunity to endeavour to obtain

comprehensive but it is conspicuous by the absence of State funded counsel for indigent accused. The reason advanced by the Law Commission is that such an obligation on the State, as previously placed by Article 25(d) was unworkable[154]. The Law Commission submitted that Article 2.21 of the African National Congress does not lay down definite guide-lines on the workability of such a provision.

It is submitted that the proviso in Article 7(f) reflects judicial conservatism at its best. The proviso tends to stifle and emasculate the right to counsel thus rendering it a legal fiction. It is submitted that if Article 7 did not contain this proviso, it would have still left room for judicial activism to give it a substantive meaning. Such a narrow construction of basic human rights does not augur well for the development of human rights jurisprudence. The criticism levelled at Rudman's case to the effect that expediency should not undermine legal principles applies with equal force to the Law Commission's provision.[155]

(c) National Party's Charter of Fundamental Rights

The National Party's Charter of Fundamental Rights provides for a right to counsel at the accused person's own expense[156]. Section 26(1)(f) and (g) are a reiteration of Article 7(e) and (f) of the South African Law Commission Bill of Rights[157].

The criticism of the South African Law Commission Bill of Rights applies to the National Party's Charter of Fundamental Rights. Fabricius submits that the phrase "at own expense" should be deleted as it clearly seeks to enshrine the State's unacceptable reservation not to provide an accused with legal representation at its expense[158].

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for legal assistance;

and to be given a reasonable opportunity to endeavour to obtain legal assistance : Provided that failure or neglect so to inform an accused person or to give him or her such opportunity shall not result in the setting aside of the proceedings unless on appeal or review a court finds that justice was not done".

[154]Interim Report on Group and Human Rights op cit 415.

[155]D J McQuoid-Mason "Rudman and the Right to Counsel : Is it Feasible to Implement Khanyile?" (1992) 8 SAJHR 96 at 112.

[156]Section 26(1)(f) of the Charter.

[157]See note 153 above.

[158]H J Fabricius "The Government's Proposals on a Charter of Fundamental Rights : A Critical Appraisal" (1993) 6 Consultus 32 at 37.

to legal representation in Third World countries. A provision for the right to legal representation has now been included in the South African Interim Constitution[159]. Section 25(1)(c), although a qualified right to legal representation, is a welcome acknowledgement that this is not just a procedural right, but a basic one to be protected in a constitution. The international instruments on human rights highlight the fact that this right to counsel is the core of a fair criminal justice system. The effect of including a right to counsel in the South African Interim Constitution will now be analyzed.

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[159]Section 25(1) provides : "Every person who is detained, including every sentenced prisoner, shall have the right -

(c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of the legal practitioner by the State".

See the Draft Constitution of the Republic of South Africa - 17 November 1993.

CHAPTER 5 : A JUSTICIABLE BILL OF RIGHTS AND ITS IMPACT ON THE CRIMINAL JUSTICE SYSTEM

5.1 SOUTH AFRICAN INTERIM CONSTITUTION'S BILL OF RIGHTS

At the risk of stating the obvious, South Africa will have a justiciable bill of rights in its new constitutional dispensation after the 27 April 1994[1]. The function of a bill of rights is to entrench a range of basic human rights[2]. To be enforceable in a constitution, these basic human rights must be set out and clearly defined. A bill of rights curbs the powers of the legislature and the executive to violate these rights. President F W de Klerk, addressing a joint sitting of the out-going Tri-Cameral Parliament, said that the fundamental difference between the old and new constitutions lay in the fact that Parliament was no longer "supreme"[3]. He said that the rule of law would now be sovereign, and this meant that :

". Every law passed by the future Parliament, and every Cabinet decision, would have to meet the requirements of a value system.

. No law could conflict with the constitution or bill of rights.

. The courts could declare laws that were in conflict, null and void.[4]

The April 1994 elections will signify a break with the apartheid past. A new jurisprudence, with a significant natural law element, will be ushered in to replace the rigid and primitive positivism which was hostile to individual liberty, civilized values and a rights culture in South Africa[5]. One of the criticisms levelled against the judiciary in the apartheid era was that our judges were quick to point to the high standard of the South African criminal code, but often ignored the fact that the political struggle was criminalised to avoid international

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[1]D Nicolson "The Ideology and the South African Judicial Process - Lessons from the Past" (1992) 8 SAJHR 50 66. Agreement has been reached at the multi-party talks at the World Trade Centre, Kempton Park, to hold free and democratic elections for all on 27 April 1994. See The Sowetan 20 August 1993, 22 December 1993.

[2]G Devenish and K Govender "A Bill of Rights for South Africa : Some Topical Issues" (1992) 3 South African Human Rights Yearbook 1.

[3]The Natal Mercury 23 November 1993.

[4]Ibid.

[5]Devenish et al op cit 10.

scrutiny, and the fact that the judiciary came to exist comfortably side by side with the police state that South Africa became[6]. The judiciary upheld the plethora of unjust and harsh apartheid laws under the guise of parliamentary sovereignty. The introduction of a justiciable bill of rights is a welcome innovation which signals a break with the injustices of the past and ensures that it never happens again.

It is beyond the scope of this work to examine all the dimensions and details of a bill of rights in a future dispensation. This work is limited to examining the implications of a justiciable bill of rights on legal representation in our criminal justice system. McQuoid-Mason points out that "once the South African judiciary operates under the umbrella of a bill of rights, it will become increasingly necessary for the courts to determine human rights issues on legal principle alone, without reference to the attitude of the government[7]". Therefore, a constitutionally entrenched bill of rights must be enforced by an independent and courageous judiciary. Dumbutshena contends that in the absence of a justiciable bill of rights, even though the judiciary is independent, it may be frustrated in its ideal to uphold the rule of law especially if it is an emerging nation in search of an identity and protection[8]. An independent judiciary and a constitutionally entrenched bill of rights are complimentary. It is understandable, although inexcusable, that our judiciary, in the apartheid era, was unable to uphold the rule of law. The judiciary lacked an entrenched value system as a point of reference. Despite such limitations, it is submitted that our judiciary under-utilised the option of judicial activism by failing to construe the fictitious intention of the legislature in favour of individual liberty in interpreting legislations[9].

The introduction of a bill of rights will have a far-reaching impact on the doctrine of stare decisis. The corner-stone of our present judicial precedents is that Parliament is supreme. However, with the introduction of a justiciable bill of rights, a totally new emphasis in our law comes into play; namely : Is that particular law or statute in accordance with the spirit of

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[6]C J R Dugard Human Rights and the South African Legal Order (1978) 279ff. The courts are blamed for their passiveness and aloofness in the protection of detainees' rights during the era of the State of Emergency in the mid 1980's. See further E Cameron "Nude Monarchy : The Case of South Africa's Judges (1987) 3 SAJHR 338; N Haysom and C Plasket "The War against the Law : Judicial Activism and the Appellate Division" (1988) 4 SAJHR 303.

[7]McQuoid-Mason (1992) 8 SAJHR 112.

[8]E Dumbutshena "The Rule of Law in a Constitutional Democracy with Particular Reference to the Zimbabwean Experience" (1989) 5 SAJHR 311 at 316.

[9]See Dugard (1978) 279ff.

a bill of rights? The will or intention of the legislature, as from 27 April 1994, will be no longer a founding principle of our legal system. The emphasis will be now on constitutionalism. What does this imply for the right to counsel in criminal proceedings or the criminal justice system as a whole? It is submitted that after 27 April 1994 our legal system will have to break with judicial precedents that denied the right to counsel on the basis that South Africa did not have a bill of rights[10]. The Interim Constitution which will come into effect in April 1994, provides for a qualified right to counsel for an indigent accused person[11]. The statement that an accused person is only entitled to "a trial initiated and conducted in accordance with the formalities, rules and principles of procedure required by law" will also not hold true after April 1994[12]. Section 25(3) of the Interim Constitution expressly provides that an accused person has a right to a fair trial. This right is couched in peremptory language[13]. Therefore, our courts will have to turn to the American concept of due process of law, the concept of a fair trial in international law instruments and other civilized and like-minded legal systems to give content and meaning to legal representation in our criminal justice system.

The importance of legal representation for the indigent accused is well recognised.[14] What is problematic is its implementation and enforcement. It is worthless having a bill

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[10]See S v Rudman; S v Johnson; S v Xaso; Xaso v van Wyk N O 1989 (3) SA 368(E) at 373B, 373J - 374A. The court rejected the adoption of the Gideon v Wainwright supra rule on the basis that South Africa does not have a bill of rights nor a counterpart provision similar to the Fourteenth Amendment of the American Constitution. This rejection of the right to counsel was upheld in S v Rudman; S v Mthwana 1992 (1) SA 343(A). See Chapter 2 above on the discussion of South African and American case-law on the right to counsel in criminal proceedings.

[11]Section 25(3)(e) provides that an accused person shall have a right to a fair trial which includes amongst others, the right to be provided with legal representation at State expense "where substantial injustice would otherwise result". See the Interim Constitution (Draft) of the Republic of South Africa 17 November 1993. The Interim Constitution was adopted on 22 December 1993. (See The Sowetan 23 December 1993). The deadline for amendments to the Interim Constitution has been extended to 24 January 1994. After the present State President has signed it into law, this Constitution will become effective until 1999. (See The Weekly Mail and Guardian 23-29 December 1993).

[12]See S v Rudman; S v Mthwana supra 377B - C, 380F, 387A.

[13]Section 25(3) provides : "every accused person shall have the right to a fair trial ..." (My emphasis).

[14]Cf Khanyile Supra 801D-E

of rights with an impressive list of rights which are not enforceable. Such a bill of rights will not make any difference in the daily lives of ordinary people. Hence it will tend to be meaningless and nothing more than a legal fiction. It is, therefore, apposite to examine how the new right to counsel can be implemented and enforced in every stage of criminal administration.

(a) Pre-trial stage

As it has already been pointed out above, early intervention by counsel at this stage is crucial because it may determine the outcome of the subsequent trial[15]. As a general proposition, it is submitted that all persons detained or arrested for the commission of any offence have the right to consult with a lawyer of their choice. The Interim Constitution contains such a provision[16]. This proposition envisages that these persons must be informed and advised on how to implement this right. This may be in the form of the police advising the suspect that he or she is entitled to a telephone call to a lawyer or friend, relative or family member. In terms of our law, a suspect need not be be formally charged in order to invoke this right[17]. Arrest or detention of a person is a severe curtailment of individual liberty. It may be argued that in the absence of a formal charge against the suspect, the police are merely gathering information about an unsolved crime. The answer to this claim is to be found in Escobedo v Illinois[18], where the majority held that the adversary system begins to operate when the process shifts from investigatory to accusatory[19]. The minority felt that the right to counsel only becomes applicable

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[15]See Chapter 3 above on the discussion of the importance of the right to counsel at this stage.

[16]Section 25(1) provides : "Every person who is detained, including every sentenced prisoner shall have the right :

(c) to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner by the State".

Section 25(2) provides : "Every person arrested for the alleged commission shall, in addition to the rights which he or she has as a detained person ..." (My emphasis).

[17]Ngqulunga and Another v Minister of Law and Order 1983 (2) SA 696(N) 698B-C.

[18]378 US 478 (1964). See Chapter 2 above on the discussion of the facts of this case.

[19]At 492.

after the onset of formal prosecutorial proceedings[20]. Goldberg J, however, delivering the majority decision, said that "it would be exalting form over substance to make the right to counsel dependent on whether at the time of the interrogation, the authorities had secured a formal indictment"[21]. The majority was of the opinion that there was no meaningful distinction that could be drawn between interrogation of an accused before and after formal indictment[22].

It is submitted that our courts should take this path in giving substance to a pre-trial right to counsel. Our Interim Constitution also seems to favour such an interpretation in that the right to legal representation operates from the time of detention[23]. The detention stage is very crucial in that, although the suspect is not formally charged, the most incriminating evidence like confessions, admissions and pointings out are usually obtained at this stage. In United States v Wade[24], the majority of the court said that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pre-trial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality[25].

Police identification parades also require the presence of counsel. These parades are normally conducted in such serious crimes like robberies and murders. In America, they are usually referred to as police line-ups. In United States v Wade[26] the majority of the court said that identification evidence was peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial[27]. The court said that the identification of strangers was untrustworthy and that the annals of criminal law were rife with instances of mistaken identity.[28] The court was of the view that the presence of counsel in such line-ups cannot impede legitimate law enforcement, but on the contrary, may prevent the infiltration of tainting in the prosecution's identification

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[20]At 494.

[21]At 486.

[22]Ibid.

[23]See Note 16 above.

[24]388 US 218 (1967).

[25]At 224.

[26]Supra.

[27]At 228.

[28]Ibid.

evidence[29]. In South Africa, there is a need to provide counsel at such identification parades. The Alexandra Funeral Vigil Massacre case is a graphic illustration of how this process can be abused by the police with all forms of suggestive procedures in order to secure an identification for the pending trial[30].

Police identification parades are another crucial part in pre-trial procedure for the provision of legal representation. As it has already been highlighted, most cases of identification parades involve serious offences which necessarily implies the need for the presence of counsel. Since there are insufficient lawyers to provide their services at this stage, the proposal to introduce "student practice rules" should be given serious thought[31]. If these rules are accepted, students could make a meaningful contribution to the legal system by participating in pre-trial proceedings, like identification parades, in a watch-dog capacity. This would help to develop the confidence and expertise of such students to become legal technicians if they are involved with cases from the onset. As a result, such students would become conversant with every stage of the case from the identification parades, bail applications and the trial. It is hoped that there will be senior and experienced lawyers available to work with these students and in establishing and administering the whole process for the benefit of indigent suspects.[32]

(i) Privilege against Self-incrimination

With regard to the privilege against self-incrimination, there is a provision dealing with this in the Interim Constitution[33]. It is provided that a person has a right to be informed of his right to remain silent and to be warned of the consequences of

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[29]At 238.

[30]See the discussion of the case in the texts accompanying Notes 45-47 in Chapter 3 above.

[31]The student practice rules provide that final and intermediate LLB students, or final year B Proc students, who have passed courses in Criminal Law, Criminal Procedure and Evidence, have undergone a Trial Advocacy Training course, and are attached to a university legal aid clinic, should be given the right of appearance in the criminal magistrates courts. These rules have been approved by the legal profession and the universities. See D J McQuoid-Mason (1990) South African Human Rights and Labour Law Yearbook 196.

[32]See Chaskalson (1990) 3 Consultus 101.

[33]Section 25(2)(c) provides that every arrested person "shall have the right not to be compelled to make a confession or admission which could be used in evidence against him or her".

making any statement[34]. This right is intricately linked to the right to counsel[35]. However, there is no mention about waiver of this right except that a detained person shall not be compelled to incriminate himself[36]. It will probably take some time for the courts to give this right any substantial meaning.

In McNabb v United States[37], the court said that confessions obtained from accused persons who have been arrested without a warrant and without probable cause, are inadmissible[38]. This right was substantially and meaningfully interpreted in the seminal decision of Miranda v Arizona[39]. The majority of the court held that "prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed[40]. The court said the Fifth Amendment privilege against self-incrimination countenanced the presence of counsel at any stage of questioning if the defendant so desired[41]. The court said that the financial ability of the individual did not have any relationship to the scope of the rights involved[42]. The court further said that the defendant can only waive his rights voluntarily, knowingly and intelligently[43].

South Africa clearly lacks the infra-structure and personnel to implement the right to counsel on the American scale. However, the right against self-incrimination is meaningless without the

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[34]Section 25(2)(a).

[35]Section 25(2) must be read with Sub-section (1).

[36]See Note 33 above.

[37]318 US 332 (1943).

[38]Cf G Devenish and K Govender (1992) 3 South African Human Rights and Labour Law Yearbook 16. It is submitted that the phrase "arrest without a probable cause" in this case can be interpreted as the equivalent of the phrase "arrest without reasonable suspicion" in South African law. See the interpretation of the phrase in our law in Duncan NO v Minister of Law and Order 1985 (4) SA 1(T).

[39]384 US 436 (1966). This case is also discussed in Chapter 2 of this work.

[40]At 444.

[41]At 470, 471.

[42]Per Warren C J at 472: "The need for counsel in order to protect the privilege exists for the indigent as well as the affluent".

[43]At 444.

presence of counsel. Therefore, gradual initiatives should be implemented until the full realisation of this goal has been achieved. Therefore the recent obiter dictum in S v M[44] is welcomed, wherein the Appellate Division said that, depending on the circumstances, "the failure to afford a young person the assistance of a parent or guardian where this is reasonably possibly before taking a confession from such person, could conceivably lead to the conclusion that the confession was not made freely, voluntarily, or without undue influence[45]. It is submitted that it could be a useful option, to compensate for the shortfall of attorneys, by widening the meaning of legal assistance. This could be done by providing that an arrested person has a right to demand the presence of a parent, spouse, relative or friend during any questioning. It is submitted that this option does not involve any significant financial costs. It is also practical and interferes less with the process of law enforcement since there are no major delays involved. It also tends to lend transparency to the interrogation process. Other options will take some time to implement. For instance, the public defender scheme is not yet comprehensive enough to enable lawyers to have access to suspects without any delay once cases have been referred to it[46].

The inadmissibility of confessions and admissions have often been the subject of trials within trials in South Africa. The other option would be again to resort to student practice rules and allow students to participate in a watch-dog capacity during questioning of suspects. However, it would be practically impossible to comply with each and every suspect's request to have a lawyer or student practitioner present during questioning. The other option would be for the courts to be reluctant about upholding the waiver of such rights and to scrutinize them closely before granting it. It would also be too expensive to video-tape each and every interrogation resulting in a confession or admission[47]. The costs of installing such equipment and

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[44]1993(2) SACR 487(A).

[45]At 490i.

[46]The public defender scheme is a two-year pilot project presently operating in Johannesburg. It started in January 1992 and numerous cases have to be referred to it. Optimism has been expressed that it will be a permanent feature of our legal system and will extend to other parts of the country. See The Sunday Star 28 June 1992.

[47]Since 1991, experiments of video-taping of interrogations have been conducted at police stations in England. The advantages of this method, so far observed, are the following : Firstly, it protects both the police and the suspects from resorting to improper practices. Improper practices on the part of the police might be using duress to elicit confessions, whilst on the part of the suspects might be falsely alleging police brutality during interrogations. Secondly, video-recording is

facilities in every police station in South Africa is not likely to be on the list of priorities of the interim or future government.

One other option would be to make it compulsory for an admission or confession to be accompanied by a district surgeon's certificate. The two certificates must cover the suspect's physical condition prior to interrogation, and after the interrogation[48]. It is acceded that this would be too burdensome to the district surgeons in addition to their daily workload. It would also be inconvenient for them because ironically, suspects frequently have this sense of remorse at night when they decide to confess. The district surgeons would not be in a position to detect psychological and other subtle threats made to the suspect by police interrogators. However, this option should not be discarded out of hand. Serious thought should be given to developing it as a viable option. Despite the dangers and abuses inherent in confessions and admissions, they are still part of a fair criminal justice system. The ultimate aim, however, should be the provision of counsel for all to give meaning to the right against self-incrimination. It is submitted that content can be given to this right by widening the definition of legal assistance as suggested above. Our courts, despite the lack of a bill of rights, have started to give meaning to this right as illustrated in S v Mbambeli[49]. Thus, the courts have stated that it is

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an "accurate and objective record" of what took place during interrogation. Thus the court would be in a position to look on as reality is being constructed rather than relying on the unreliable witness reconstruction process of the adversary system. The disadvantage of this method is that video recordings of interrogations might be preceded by improper police treatment of suspects. See M McConville "Video-taping Interrogations : Police Behaviour on and off Camera" 1992 Crim. L.R. 532 at 548.

[48]In England and Wales, a recommendation was made for the provision of a medical examination for any prisoner in custody on any other charge, who desires such examination. The officer in charge of the police station would be required to record the prisoner's request and the compliance thereof. If a medical examination is conducted by a private doctor, it must be in the presence of the police surgeon, but if he or she is not in attendance at the time, it must be conducted in the presence of the station officer. A police surgeon who completes his or her examination before the arrival of the private doctor must be requested to await examination by the latter. See The Royal Commission on Criminal Procedure The Investigation and Prosecution of Criminal Offences in England and Wales : The Law and Procedure (1981) 176-177. The submission in the text of this footnote is a slight modification of this recommendation even though it did not relate to confessions and admissions.

[49]1993 (2) SACR 388(E).

desirable for a magistrate, taking a statement from an accused, to enquire from him whether he has been in touch with his lawyer, and if not, to advise him fully of his right to legal representation before the statement is made[50].

(ii) Bail

The Interim Constitution provides that an arrested person has a right to be released from detention with or without bail subject to the interests of justice[51]. Even though it is not mentioned in the Constitution that the arrested persons should be informed of their right to bail, it is settled law that an unrepresented accused should be informed of this right[52]. It is submitted that such judicial precedents consistent with the bill of rights are going to be part of our law even after April 1994. In the American case of Stack v Boyle[53], the court held that the purpose of bail was to ensure that the accused stands trial and submits to sentence if found guilty. Accordingly, the setting of too high bail was held to be an arbitrary act which was excessive under the Eighth Amendment[54]. In United States v Salerno[55] the minority, disagreed with the refusal of bail by the majority on the basis of likelihood of future dangerousness. They said that to honour the presumption of innocence involves paying substantial social costs as a result of a commitment to certain values in a legal system.[56] Our courts will have to decide under which circumstances the interests of justice require

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[50]At 391c.

[51]Section 25(2)(d).

[52]See S v Ngwenya 1991(2) SACR 520(T) where the court said that a judicial officer has a duty to inform and explain the relevant procedure to an unrepresented accused to apply for bail in terms of Section 60 of the Criminal Procedure Act. The court said that, in appropriate cases, failure to do so may result in an unfair trial in which there may be a complete failure of justice.

[53]342 US 1 (1951)

[54]cf LL Weinreb (ed) Leading Constitutional Cases on Criminal Justice (1993) 832.

[55]481 US 697 (1987).

[56]Per Marshall J at 767 : "But at the end of the day the presumption of innocence protects the innocent; the short-cuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves". Brennan J concurred.

a refusal of bail[57]. Some drastic measures will be necessary to alleviate the plight of awaiting-trial prisoners[58]. Again, student practice rules could play a major role here. Another suggestion is to allow law students in the Street Law Programme to go to prisons and teach awaiting-trial prisoners how to apply for bail and to adduce relevant information to secure bail. The fixing of high amounts of bail will constantly come under the court's scrutiny on the basis that this discriminates against indigent accused. The granting of bail will be meaningless unless it is granted speedily[59].

(iii) Arrest, Search and Seizure

It is submitted that a justiciable bill of rights will have very far-reaching effects on arrest, search and seizure. Our courts will have to refer to such cases as Mapp v Ohio for guidance[60]. The realisation of the ideal to provide legal representation for all at this stage could be made easier by a police force with a respect for the basic human rights of its citizenry. It should be compulsory in the police college curricula to study human rights with special emphasis on the rights of arrested persons. The emphasis should be on constitutionalism rather than eliminating crime at any cost. By incalculating human rights values into the police force, the chances of abuses and unfairness in the criminal justice system are minimised[61]. It is further submitted that the emphasis should be that successful policing involves efficient paper-work in processing cases for trial in order to secure a high rate of convictions.

(b) Trial Stage

The present position in our law is that an accused person has no right to a fair trial, but a right to a trial conducted in accordance with the formalities, rules and principles of our

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[57]Refusal of bail will no longer be confined to the provisions of Section 61 of the Criminal Procedure Act 51 of 1977. The Act will be interpreted in terms of the Constitution.

[58]Mr Justice Kriegler, in his key-note address to the annual meeting of Lawyers for Human Rights, said that whatever a future bill of rights contains, there will still be 20 000 awaiting-trial prisoners in jail every day. The Star 8 February 1993. During the period 1 July 1991 - 30 June 1992 352 113 unsentenced prisoners were admitted to the South African prisons. (D J McQuoid-Mason "Legal Representation and the Courts" 1993 (1994) Unpublished Monograph 3-4; cf Department of Correctional Services Report (1991-2) 52.

[59]Stack v Boyle supra.

[60]367 US 643 (1961).

[61]N Haysom "Policing" (1991) 2 South African Human Rights and Labour Law Yearbook 163, 166.

law[62]. The Appellate Division emphatically said that an indigent accused person was not entitled to legal representation at the State's expense[63]. This decision was criticised for its effect on truncating the right to a fair trial in South African law as opposed to the Khanyile approach which expanded the content of such right and enhanced its scope[64]. However, as from April 1994, our courts will be able to differ from this precedent and rely more on Khanyile's case[65] in giving meaning to the right to a fair trial[66]. It is submitted that Khanyile's case provides a good foundation for a value-orientated approach in constitutional jurisprudence which will assist the courts to interpret the bill of rights. Khanyile's case was influenced by the limited parameters of Betts v Brady[67], in laying a triad of factors necessary to determine whether legal representation is required in a particular case[68]. The court said that (a) the inherent simplicity or complexity of the case on legal and factual issues; (b) the personal equipment of the individual accused and (c) the gravity of the case were the determining factors when considering whether legal representation was essential for a fair trial[69]. The Khanyile decision was welcomed as one small step towards achieving equality of all under the law in our criminal justice system, and should not be seen as a giant leap by the courts[70].

With the provisions of the new Constitution, the Khanyile test

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[62]S v Rudman; S v Mthwana 1992(1) SA 343(A). See further chapters 1 and 2 above.

[63]Ibid.

[64]D M Davis "An Impoverished Jurisprudence : When is a Right not a Right?" (1992) 8 SAJHR 90 at 94.

[65]S v Khanyile 1988(3) SA 795 (N) is the watershed decision which held that an indigent accused person is entitled to legal representation at the State's expense and has a right to a fair trial. This decision was rejected by the Eastern Cape bench and the full bench of Natal. The rejection of the Khanyile decision was confirmed in S v Rudman; S v Mthwana supra. See Chapters 1 and 2 above.

[66]Section 25(3) of the Interim Constitution provides for the right to a fair trial including the right to counsel at the State's expense where substantial injustice would otherwise result.

[67]316 US 455 (1947). See Chapter 2 above.

[68]At 814G, 815D-E.

[69]Ibid.

[70]D J McQuoid-Mason "The Right to Legal Representation : Implementing Khanyile's case (1989) 2 SACJ 57 at 60.

needs to be refined. This test has been criticised for being too vague and open.[71] Various suggestions have been made. Steytler submits that the solution to the problem should be court-appointed representation[72]. McQuoid-Mason suggests that the courts should use "an incremental approach and initially confine, the implementation of the Khanyile decision, to the unrepresented accused persons who face the possibility of a prison sentence or at those in the regional magistrates courts"[73]. Milne J suggested that it should apply in certain classes of offence but did not define these classes[74]. Other suggestions advanced have been equally vague in that they refer to "serious or complex" cases[75].

It is submitted that the courts will have to be creative and imaginative in giving practical effect to the right to counsel in the new Constitution. It is submitted that the provision of legal representation for the indigent accused persons will be a gradual evolutionary process rather than revolution. The dictum of Corbett CJ in S v Rudman; S v Mthwana that free legal representation for indigent persons accused of serious crimes is a sine qua non of a complete system of criminal justice presents fertile soil for judicial activism[76]. The referral to a feasibility study in this judgement has been interpreted as not closing the judicial door to recognising the Khanyile principle[77].

It is submitted that due to South Africa's Third World content, the right to counsel is likely to be largely confined to the trial stage. The trial stage will necessarily overlap with the sentencing stage. It is therefore submitted that the right to counsel will not initially be given the rigorous interpretation that it received in the United States, especially in respect of pre-trial proceedings[78]. Even at the trial stage, the right is not likely to be phased in on a large scale. It will probably be restricted because of the budget priorities of the new

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[71]See Steytler (1988) 238.

[72]Steytler (1988) 241.

[73]McQuoid-Mason (1992) 8 SAJHR 112.

[74]A J Milne "Equal Access to Free and Independent Courts" (1983) 100 SALJ 681, 687.

[75]See J van der Berg "The Right to be Provided with Counsel" (1988) 3 SACJ 462 at 467.

[76]Supra 392F.

[77]See D J McQuoid-Mason (1992) 3 The South African Human Rights Yearbook 145.

[78]See Chapter 2 above on American jurisprudence with regard to the right to counsel.

government like health care and primary education. It is apposite, therefore, to set short-term and long-term goals in its implementation.[79]

It is submitted that as a short-term goal, legal representation should be provided for all indigent accused persons appearing in the regional magistrates courts where the interests of justice so require, or, put differently, where substantial injustice would result.[80] In determining the interests of justice, the previously discussed guide-lines by Gubbay CJ of Zimbabwe are useful.[81]

These guidelines have been used in Zimbabwe to determine if the presence of counsel is required. It is submitted that our courts should adopt them in interpreting the vague concept of "substantial injustice". The long-term goal would be to provide legal representation for accused in all criminal cases, except if they are trivial. It is submitted that the test to be adopted here should be the "significant offence test". The significant factors, to be taken into account to determine if legal representation is required, should be pre-trial detention, maximum penalty authorised by the particular statute, the maximum authorised fine, and whether conviction for that offence will result in occupational disabilities, for example, loss of work[82]. There should be certain offences like Schedule One offences where it should automatically apply[83].

(c) Sentencing Stage

This stage is distinct and crucial as the other stages in the criminal proceedings which require the presence of legal representation[84]. In S v Radebe; S v Mbonani[85], the court said that the failure to afford an accused person an opportunity of obtaining legal assistance, even at a late stage in the proceedings, is an irregularity[86]. The court pointed out that the extremely severe sentence imposed by the magistrate on the appellant, could only be explained by the magistrate having been

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[79]Cf Rudman; Mthwana Supra 387E.

[80]Cf D J McQuoid-Mason (1992) 8 SAJHR 112.

[81]See the text accompanying Note 108 in Chapter 4 Above. These are rules of practice applied by the courts in Zimbabwe.

[82]S Duke "The Right to Appointed Counsel : Argersinger and Beyond" (1975) 12 American Criminal Law Review 601 at 613-615.

[83]See further discussion in Chapter 6.

[84]See S v Maxaku; S v Williams Supra.

[85]Supra.

[86]At 198C-D.

influenced by the one-sided nature of the evidence which was led before him[87]. The court saw this as an indication of the kind of prejudice or potential prejudice suffered by the appellant in having been without legal assistance[88]

It is submitted that the provision in Section 25(3)(d) of the Interim Constitution logically extends to the sentencing stage[89]. Section(3)(f) protects the accused person from being sentenced to a more severe punishment[90]. In order to give substance to these provisions, we need to make effective use of the student practice rules and widen the meaning of legal assistance in our law.

(d) Post-trial stage

In practice brief of counsel appearing for an accused person extends from the trial up until the sentencing. However, the courts will be required to adjudicate on issues which involve the exhaustion of appeal and review remedies for convicted persons[91]. It is possible that indigent convicted persons might challenge a review or appeal procedure as discriminatory because it requires them to pay for certified copies of the previous court record[92]. Our courts could again learn from the American

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[87]At 200G. The court found that the magistrate had referred to the history which was irrelevant to the charge, in his judgement with regard to the merits and the sentence. (At 200D-E). The court further found that the evidence of aggravating circumstances led by the State, was not challenged at all by the appellant. (At 200E). The court observed that a legal representative would have undoubtedly questioned the evidence of aggravating circumstances, with a view to placing the events to which the witness referred in proper perspective with regard to the accused. (At 200E-F).

[88]At 200F-G.

[89]Section 25(3)(d) provides that every accused person "shall have the right to adduce and challenge evidence, and not be a compellable witness against himself or herself".

[90]See the Interim Constitution.

[91]Section 25(3)(h) of the Interim Constitution provides for appeals and reviews.

[92]See Griffin v Illinois 351 US 12 (1956) discussed in Chapter 2. In van Zyl v Santam Insurance Co. Ltd 1977 (1) SA 223 (D), the court said that Section 24(2) of the Compulsory Motor Vehicle Insurance Act 56 of 1972 required the plaintiff to furnish security for costs of the defendant before it can even hear the application. Didcott J said at 224H : "It follows that Section 24(2)(b)(ii) applies indiscriminately to all third parties. What is more, its terms are absolute and peremptory. The court has no power, on the grounds of poverty, or for any

courts' approach to due process and equal protection.

It is suggested that automatic review[93] should be extended to any form of imprisonment for Schedule One offences where the convicted person was not represented during the criminal proceedings. This is to supplement for the short-fall of lawyers for indigent accused persons. Obviously, argument would be raised that our present judges are already over-worked and that this suggestion is unworkable in practice. It is submitted that senior advocates may be appointed as acting judges for the purpose of speedily and efficiently conducting automatic reviews. For all practical purposes, our judges are appointed from the ranks of senior advocates[94]. Therefore, there could be no complaints of incompetence or lowering of standards of our judiciary. It is beyond doubt that these senior advocates would carry out their duties professionally and competently.

Conclusion

The criminal justice system is an appropriate forum for the protection of human rights. However, the courts have to exercise a delicate balancing of interests. Our legal system will have to balance the tension between respect for individual freedom, as espoused in a new bill of rights and the urgent need to combat crime effectively[95]. A legal system needs the confidence of its citizenry in dealing with crime and accused persons. Fairness to an accused individual should not be at the expense of society at large. Westhuizen warns that a society

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other reason, to exempt any particular third party or class of third parties from its operation". However, in Magida v Minister of Police 1987(1) SA 1(A), the Appellate Division, relying on Roman-Dutch authorities, held that no-one should be compelled to furnish security of costs beyond his or her means. The Appellate Division said that the court must exercise its discretion, with regard to security for costs, by taking into consideration all the relevant facts, equity and fairness to both parties.(At 15D). It is submitted that after 27 April 1994, statutes like the one in van Zyl's case Supra will have to be interpreted with regard to the principle of equality before the law in our justiciable bill of rights, which will be in place then.

[93]See Sections 302 and 304 of the Criminal Procedure Act on reviews in the lower courts.

[94]See D J McQuoid-Mason "Legal Representation and the Courts" (1991) 2 South African Human Rights and Labour Law Yearbook 130 at 146. McQuoid-Mason highlights the fact that it may take from ten to fifteen years for a person to become a Senior Counsel. (Ibid).

[95]J van der Westhuizen "Rights of People Accused of Crimes" in M Robertson (ed) Human Rights for South Africans (1991) 79 at 85.

in which dangerous criminals go free because of procedural technicalities is neither safe nor just[96]. However, our courts should be able to find ways and means of striking this delicate balance without compromising the values espoused in the new legal system. It is submitted that the cost is small if it provides South Africa with a human rights culture rather than the previous oppressive criminal justice system. A bill of rights will go a long way in restoring a belief that law promotes justice for all.

[96]Ibid.

CHAPTER 6 : CONCLUSIONS AND SUGGESTIONS

6.1 CONCLUSIONS

In the light of the discussions in the previous chapters in this work, it is submitted that the following conclusions can be drawn:

(i) Effective equality before the law and true access to justice is ensured by the presence of defence counsel for indigent accused in the administration of the criminal justice system.[1]

(ii) The courts are responsible for shaping the substantive and procedural content of the right to counsel in a legal system.[2] The United States experience is an instructive example on the evolution of right to counsel in criminal proceedings.[3] The courts should adopt a policy of judicial activism and creativity in interpreting the common law, statutes and bill of rights regarding the provision of legal representation[4]

(iii) The provision of right to counsel is central to a fair trial and a fair criminal justice system.[5] It should not depend, for its implementation, on the budgetary decisions of the State or whether the post-apartheid economy will thrive.[6]

(iv) After 27 April 1994, South African courts will need increasingly to turn to international law instruments on human rights and other relevant legal systems to interpret the phrase "substantial injustice"[7] in the Interim Constitution. The courts can be guided by how other jurisdictions with a human rights jurisprudence have interpreted the phrase "the interests of justice" in the context of the provision of free legal representation for

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[1]See the text accompanying Note 63 in Chapter 1 above.

[2]See the text accompanying Note 122 in Chapter 2 above.

[3]Ibid.

[4]See the texts accompanying Notes 44 and 45 in Chapter 2 above.

[5]See the text accompanying Note 5 in Chapter 3 above.

[6]See Page 2 above.

[7]See 4.2 European Convention on Human Rights in Chapter 4 above.

the indigent accused persons.[8]

(v) A justiciable bill of rights may be used to achieve justice, to create a human rights culture and to elevate the belief and confidence of its citizens in law.[9] The criminal justice system is an appropriate forum to protect the rights provided by a bill of rights.[10]

6.2 Suggestions

In the light of the above and with particular reference to South Africa in the Third World context, the following submissions are made :

(i) The courts, legal profession and law schools should not wait until 27 April 1994 before implementing creative structures and means of incrementally introducing the right to counsel on the scale contemplated by the Interim Constitution[11].

(ii) The Interim Constitution must be enforced by an independent and credible judiciary[12].

(iii) The magistracy should be detached from the public service and made independent of the executive branch of government[13]. This will give the magistrates courts legitimacy by being impartial and independent.

(iv) The judiciary must have fiscal independence[14]. It must

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[8]See the texts accompanying Notes 108 and 109 in Chapter 4 above.

[9]See the texts accompanying Notes 95 and 96 in Chapter 5 above.

[10]Ibid.

[11]In terms of Section 25 of the Interim Constitution, the right to counsel applies in the stages of detention, arrest and trial. The detention stage includes both suspects and sentenced prisoners.

[12]E Dumbutshena "The Rule of Law in a Constitutional Democracy with Particular reference to the Zimbabwean Experience" (1989) 5 SAJHR 311, 312. It is submitted that it is beyond the scope of this work to discuss the debate on the structure of the Constitutional Court. (See G Marcus "Appointments to the Appellate Division" (1992) 5 Consultus 99).

[13]Editorial "Bill of Human Rights : The Role of the Courts" (1989) 2 Consultus 67.

[14]Dumbutshena op cit 313.

decide on its own budget.

(v) Prosecutors must participate in public debates on access to justice and the protection of human rights[15].

(vi) The courts must adopt a value orientated approach consistent with the spirit of the bill of rights in interpreting the provisions of the Interim Constitution,[16] with due regard to our Third World setting.

(vii) The South African Police must be removed from the political arena[17].

(viii) There must be compulsory human rights courses in the training of police recruits.[18]

(ix) The courts should jealously uphold the constitutional guarantees of a free press, in order to enable a free and objective mass media to publicise adverse reports on the conduct of police and prison officials.[19]

(x) The Street Law Project should be utilised to create human rights awareness in school children and public members about the importance of protecting human rights in the criminal justice system[20].

(xi) Recreational organisations, youth clubs, guilds and other community organisations should be used as platforms to advance human rights awareness in South Africa.

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[15]L Fernandez "Profile of a Vague Figure : The South African Public Prosecutor" (1993) 110 SALJ 115, 121.

[16]See Mr Justice P Olivier "Top judge in storm over bill of rights" in The Sunday Times 6 September 1993.

[17]See N Haysom (1991) 2 South African Human Rights and Labour Law Yearbook 1991 166. The Police Science Association of Southern Africa has raised concern that the proposed new South African Police Service would still be fraught with politicisation, militarisation, bureaucracy and centralisation. See The Citizen 24 November 1993.

[18]See 5.1 (a) (iii) Arrest, Search and Seizure in Chapter 5.

[19]See S v Gibson N O 1979(4) SA 820(N) as a precedent.

[20]D J McQuoid-Mason "Street Law Education for South African School Children and the Protection of Human Rights in Criminal Justice Proceedings" Unpublished Article (1992). Paper delivered at Conference on Protection of Human Rights and Criminal Proceedings for African Jurists in Siracusa, Italy 19-26 July 1992 2.

advance human rights awareness in South Africa.

(xii) Full time public defender schemes should be established in all the major South African cities.[21]

(xiii) The amount budgeted for legal aid and the public defender scheme must be increased.[22]

(xiv) The means test should be increased by at least R250 000 per person and be reviewed annually.[23]

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[21] See D J McQuoid-Mason (1992) 8 SAJHR 106-197. He discusses how the public defender programme can probably work out in practice and the number of accused persons that can be accommodated in this scheme. The public defender scheme is preferred to the present referral system which is too expensive.

[22] The current budget for legal aid and the public defender scheme is R50 million for a population of more than 30 million. (See the Chairman's contribution (1993) 6 Consultus 9.) The private sector has been approached to finance the public defender scheme. (See Justice Minister Kobie Coetsee The Star 2 July 1992.)

[23] The Legal Aid Board, established by the Legal Aid Act 22 of 1969, has fixed the means test at a calculated maximum monthly income of R500.00 for single persons and married persons with a calculated maximum monthly income of R1 000.00. An amount of R150.00 is added in both instances for each dependant of the applicant. (See Legal Aid Board Annual Report 1991-1992 (1992) 13.) The Legal Aid Board contends that an upward adjustment in the means test was not possible or advisable during the year under review, because the funds were insufficient to provide legal aid for those who fell within the means test. (Ibid). It is submitted that the proposed figure of R250.00 is a very conservative figure, i.e. R750.00 per month for a single person, R1 500.00 for married persons and R200.00 for each dependant. This amount should be reviewed annually. The Legal Aid Board has continued with the referral system despite persuasive feasibility studies that a public defender programme would be cheaper (See D J McQuoid-Mason "Rudman and the Right to Counsel : Is it Feasible to Implement Khanyile? (1992) 8 SAJHR 96, 106). The present means test militates against the very concept of equal access to the courts for indigent accused. As was pointed out in Chapter 3 above, blacks form the lowest income group and are the least well educated yet they form the majority of accused persons. The present means test fails to cater for a significant number of legal aid applicants because of the Board's failure to discard the expensive and inefficient referral system. It is submitted that after April 1994, the courts may well hold that a means test set at such a low figure results in substantial injustice in the provision of legal aid for indigent accused.

(xv) Student practice rules should be implemented to enable law students to appear on behalf of accused persons in the magistrates courts[24].

(xvi) University law graduates should render community service to their society by providing legal services to indigent persons in need of these services.[25] Alternatively where there are peace calls under the new government, university law graduates can serve their term by working as public defenders[26].

(xvii) Our courts should extend the principle of legal assistance to include any person whom the indigent accused person requires to give assistance during his or her trial.[27]

6.3 Future Developments

It is submitted that although Khanyile's case was overruled by the Appellate Division[28], it will be increasingly referred to as an important judicial precedent on the right to counsel after April 1994. Khanyile will become an important part of South Africa's constitutional jurisprudence in interpreting the phrase "substantial injustice" in Section 25 of the Interim Constitution.

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[24]See McQuoid-Mason (1992) 8 SAJHR 104. Student Practice Rules will be in the interest of law students, law graduates and indigent accused persons in need of legal representation. It was estimated that at the end of 1993, about 3 800 students will receive law degrees but only 1 500 will be accommodated as candidate attorneys. (Mr Mervyn Smith The Citizen 9 February 1993). See also the article entitled "Legal Firms Turn Away Graduates" Sunday Times 8 November 1992).

[25]This may tally well with the recent proposals by the Association of Law Societies to make up for the two-year period of articles, because many law graduates cannot find articles of clerkship, by providing that law graduates may work in poor and squatter communities for a period of 18 months or time as a credit towards the period of articles. See The Sowetan 18 June 1993.

[26]Under our new constitutional dispensation, there will no longer be military conscription. See the article "SADF becomes Colour Blind" in The Sowetan 13 January 1994.

[27]Section 73(3) of the Criminal Procedure Act; S v Masithela 1986(3) SA 402(O). See also D J McQuoid-Mason "The Right to Legal Representation : Implementing Khanyile's Case" (1989) 2 SACJ 57, 62.

[28]S v Rudman; S v Mthwana 1992 (1) SA 343(A).

As it has already been discussed[29], the provision of free legal representation in criminal proceedings will be a gradual process. Therefore, attempts will be made to attain short-term and long-term objectives concerning free legal representation for indigent accused. The Khanyile test may be used as a guide-line to give a minimum content to the right to counsel. The present writer, however, favours the "significant offence" test[30] as a guide-line to be adopted for giving a minimum content to the right to counsel.

The triad of factors elicited in Khanyile should be rejected for the following reasons :

(a) A determination that counsel is not needed because a case is "simple" becomes a self-fulfilling prophesy[31]. The factual complexity of the case cannot be known until all the facts of the case are before the judicial officer[32]

(b) The competence of the accused is an illusive proposition. An indigent accused person may be competent in the sense of not offering any defence or an impenetrable alibi, but this does not signal competence to offer something in between[33].

(c) The notion of the probable consequences on conviction is also illusive in that it interferes with the trial court's discretion to impose sentence. It has been argued that this will provide the judicial officer with adverse information[34]. However, opening addresses have been suggested as a way of indicating the likelihood of imprisonment[35].

The 'significant offence" test is preferred because it is a one-time determination since it is an abstract evaluation of offence categories[36]. However, a short-term objective, the present writer submits that "substantial injustice" would result if an indigent accused person is tried for any Schedule One Offence,

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[29]In Chapter 5.

[30]S Duke "The Right to Appointed Counsel - Argersinger and Beyond" (1975) 12 American Criminal Law Review 601 611.

[31]Duke op cit 611.

[32]Ibid.

[33]Ibid.

[34]E Grant "The Right to Counsel after Khanyile" (1989) 2 SACJ 326 at 334.

[35]Ibid.

[36]Duke op cit 610. See also Chapter 5 on the significant factors in this test.

in the absence of counsel[37]. The present writer further submits that if there is lack of legal representation in the lower courts, then the judiciary must limit the powers of arrest and detention by the authorities to protect individual liberty[38]. The first logical step for the South African judiciary, as from 27 April 1994, is to elevate the practice in R v Mati[39] to a legal rule[40], in order to avoid "substantial injustice" resulting due to lack of legal representation[41].

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[37]See Note 35 in Chapter 2 on Schedule One Offences.

[38]The Pro Deo system has been omitted in this work due to the fact that legal representation in the Supreme Court is not as problematic as in the magistrates' courts. (D J McQuoid-Mason "Legal Representation and the Courts" 1991 (2) South African Human Rights and Labour Law Yearbook 130 146). However, the submission that Schedule One Offences should be used as a guide-line for the right to counsel applies to the Supreme Court. It goes without saying that the right to legal representation should apply to the Supreme Court as well.

[39]1960(1) SA 304(A).

[40]McQuoid-Mason (1992) 8 SAJHR 112-113. McQuoid-Mason points out that the elevation of this practice into a legal rule would not have any effect on the public purse, since Pro Deo counsel is provided in capital cases. (Ibid).

[41]See Section 25 of the Interim Constitution.

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