BALANCING THE RIGHT OF THE ACCUSED TO ACCESS THE POLICE DOCKET WITH THE DUTY OF THE STATE TO PROSECUTE: AN ANALYSIS OF THE IMPACT OF THE CONSTITUTION.

BY

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DECLARATION OF ORIGINALITY

I hereby declare that the dissertation titled '*Balancing the right to access to the police docket with the duty of the state to prosecute: an analysis of the impact of the Constitution'* is my own work. All sources referred to in this dissertation have been properly acknowledged. This dissertation is can be made available for photocopying and inter-library loan.

Signed on the 15 November 2019 in Pietermaritzburg

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YOLOKAZI NGOBANE

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John 8 v 12 ‘I am the light of the world. Anyone who follows me will never walk in the darkness but will have the light of life.’

This dissertation I dedicate to the most intelligent man I know Mthuthuzeli Ngobhane. Even in old age your wisdom is unmatched.

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ABSTRACT

Prior to the constitutional dispensation, South Africa was under parliamentary sovereignty and as a result the right of access to the police docket was unprecedented. When the 1993 Constitution came into effect, it granted South African citizens several rights which were mostly derived from international instruments. Furthermore, the state transitioned from parliamentary sovereignty to constitutional supremacy. Constitutional supremacy guarantees that the rights entrenched in the Constitution take precedence before any other legislation or case law. Consequential to this transition, the court set new precedence by declaring blanket docket privilege unconstitutional.

This dissertation examines the extent to which the accused is granted access to the information contained in the police docket. Both presiding officers and legal scholars have submitted that the accused is not granted unfettered access to the police docket. Upon careful examination of statutory provisions, relevant case law, journal articles and textbooks, it is clear that legislature has been very slow in enacting legislation aimed at regulating the right of access to the docket and this could have a negative effect on the accused, especially those without counsel. A it stands now; this right is too complex for lay persons to understand. This dissertation concludes that accused persons must be afforded an opportunity to examine the contents of the police without all the red tape that surrounds such access.

USHWANKATHELO

Phambi kokuba uMzantsi Afrika ukhululeke phantsi korhulumente wengcinezelo, ipalalamente yiyo ebisenza imithetho kwellizwe. Kuthe kwakufika Umgaqosiseko ngonyaka ka1993 yatshintsha lonto, kwanguwo owona mthetho uphezulu kwelilizwe. Umgaqosiseko unikeze bonke abemi belilizwe amalungelo, ekubalwa kuwo ilungelo lokunikezwa idoket yasemapoliseni enengxelo malunga netyala lomtyholwa. Ilungelo elo lalingekho ngaphambili. Kwityala lokuqala, malunga nelilungela, elaxoxwa kwinkundla yomgaqosiseko, iiJaji zagqiba kwelokuba usithintelo ebesalela umtyholwa ekubeni anikelwe iincukacha ezikwi doket yamapolisa sibhengezwe njengesingavumelaniyo nomgaqosiseko welilizwe.

Eli phepha liphengulula ngelilungelo elinkwe umtyholwa loba anikezwe yena negqwetha lakhe imvume yokufunda ingxelo ekwi docket yamapolisa kunye nobungqina obungobunye malunga nelityala. Iijaji nabaphicothi bomthetho bayavumelana ukuba umtyholwa akanikwa ilungelo nje elingenasithintelo. Ndakuba ndiphicothe imithetho lelilizwe, imithetho yamanye amazwe nawehlabathi, amatyala ahlalutya elilungelo, amaphepha abhalwe ngabaphicothi bomthetho kunye neengcwadi eziphicotha imithetho, ndifikelele kwelokuba elilunelo lintsokothile kwaye liyamndzimela umntu namphina ongawufundanga umthetho kwimfundo enomsila, ingakumbi umtyholwa ongenalo igqwetha. Ngezo zithathu ndigqibe kwlokuba namphina umtyholwa kwelilizwe ufanele ukunikwezwa eli lugelo lokujonga idoket yamapolisa ngaphandle kwayo yonke lomthwalo uhapha elilungelo ngoku.

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CHAPTER 1: An Overview Of The Research Dissertation

1.1 **Background**

The South African legal system is a consolidation of Roman-Dutch law, English law and African customary law; thus it is referred to as a hybrid system.[1] The legal system is uncodified, meaning it is derived from more than one source of law.[2] The Constitution of the Republic of South Africa is founded on the values of human dignity, non-racism, supremacy of the Constitution and the rule of law, and universal adult suffrage.[3] South Africa is a constitutional democracy which means that the Constitution is the supreme law of the republic. The Constitution is defined as:[4]

> "a body of fundamental principles according to which a State is to be governed. It sets out how all the elements of government are organised and how power is carved up among different political units. It contains rules about what power is wielded, who wields it and over whom it is wielded in the governing of a country. As a kind of contract between those in power and those who are subjected to this power, a Constitution defines the rights and duties of citizens, and the devices that keep those in power in check."

Prior to both the 1993 and the 1996 Constitutions, the Constitution was merely a statute forming part of the general sources of law in the South African legal system.[5] The Final Constitution[herein referred to as the Constitution] of the Republic of South Africa is the supreme law of the land and now creates the basic standard of compliance for all legislation, organs of state, and governing bodies. The courts are granted power by the Constitution to test compliance of all legal rules with the provisions of the Constitution.[6] Any rule found to not comply with the supreme law is declared invalid to the extent of its inconsistency by our courts. Entrenched in the Bill of Rights are the basic human rights protections afforded to South African citizens. This chapter of the Constitution aims to safeguard the dignity of a

[1] A Barratt et al *Introduction to South African Law* 3 ed (2019) 1.
[2] A Barratt et al op cit 21.
[3] Section 1 of the final Constitution of the Republic of South Africa.
[4] Constitutional Court 'What is a Constitution', 2019, available at https://www.concourt.org.za/index.php/constitution/what-is-a-constitution, access on 3 November 2019.
[5] HB Kruger 'The impact of the Constitution on the South African criminal law sphere' (2001) 26:3 Journal for Juridical Science 117.
[6] Ibid.

person even when s/he is accused of criminal conduct. An accused person does not lose his or her status as a citizen just because he is accused of a criminal conduct. Section 35 of the Constitution and subsequent Acts of Parliament protect the rights of such persons. The Criminal Procedure Act 51 of 1977[herein referred to as the CPA] must, like other laws, adhere to the provisions of the Constitution.

Section 2 of the Constitution affirms that "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."[7] Chapter 2 of the Constitution,[8] affords all South Africans numerous rights including the rights in section(s) 32(1), (2) & (3); 35(1), (3) (a), (h), and (i). However, all these rights are limited by section 36 of the Constitution.[9] Section 32 of the Constitution affords everyone the right of accesss to information in the possession of the state as well as information in the possession of another person which the claimant requires to either exercise or protect his or her constitutional rights. Section 35 of the Constitution[10] affords portection to arrested, accused, and detained persons. This section ensures that such persons receive equal treatment before the law, and that they are treated with dignity and they are tried fairly.

Criminal law is an arm of public law that focuses on any behaviour that is deemed criminal by the law.[11] It falls under substantive public law. Criminal procedure refers to the procedure that must be followed in prosecuting criminal cases. The criminal process in South Africa is governed by the Criminal Procedure Act. Before the 1996 Constitution, there was an interim Constitution which was drafted in 1993 and became effective prior to the first democratic election.[12] This Constitution became the fundamental law in the republic until it was replaced by the final Constitution in 1997. Prior to the enactment of the interim Constitution, law based

[7] S 2 of the Constitution.
[8] The Bill of Rights
[9] Section 36 of the final Constitution states that the rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors in (a)-(e). (2) states that 'except as provided in subsection 1 or in any other provision of the Constitution, no law may limit any right included in the Bill of Rights.
[10] Section 35(3) of the final Constitution affords an accused person the right to a fair trial, which includes (a) to be informed of the charge with sufficient detail to answer to it; (h) to be presumed innocent, to remain silent, and not to testify during proceedings; and (i) to adduce and challenge evidence.
[11] A Barratt et al op cit 14.
[12] 27 February 1994.

on English Procedural law prevailed.[13] The two landmark cases[14] that will be discussed in this dissertation were decided before and after the operation of the Constitution[15] respectively. The supremacy of the Constitution as well as the rights guaranteed by it are the main reason for the differing judgements.

1.2 Problem Statement

Even before the operation of the both the interim Constitution and the final Constitution, the South African law of criminal procedure and the laws evidence were regulated by rules of common law and statutory law. However, when the Constitution became operational, it took its position as the supreme law, able to trump any law or provision that was inconsistent with it.[16]Furthermore, the provisions of criminal procedure law and the laws of evidence are required to conform to the provisions of the Constitution. The requirement of constitutional validity of legislation resulted in various Acts being amended and others repealed because they were deemed unconstitutional. Furthermore, the Constitutional Court was called upon to make determinations on complex questions of law,[17] hence the declaration of unconstitutionality of the blanket docket privilege in *Shabalala v Attorney-General of the Transvaal.*[18]

Section(s) 32 and 35(3) of the final Constitution support the notion that an accused person is entitled to access any information contained in a police docket for the purposes of trial; but this does not mean that this right is absolute. The prosecutor plays a vital role in affording such access. Claiming the right of access at pre-trial stage is fraught with difficulty, which then qustions the notion that a right to a fair trial begins at pre-trial stage.

1.3 Rationale

The rationale of this research is that since the coming into operation of the Constitution, only two significant cases have been decided regarding the right of the accused to access to the

[13] *R v Steyn* 1954 (1) SA 324 (A).
[14] *R v Steyn* 1954 (1) SA 324 (A) and *Shabalala v Attorney-General of the Transvaal* 1995 (2) SACR 761 (CC).
[15] 1993 and 1996 Constitution(s).
[16] Section 2 of the final Constitution.
[17]H Klug 'Finding the Constitutional Court's place in South Africa's democracy: The interaction of principle and institutional pragmatism in the court's decision making' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3520738 accessed on 23 November 2020 1.

[18] *Shabalala v Attorney-General of the Transvaal* 1995 (2) SACR 761 (CC).

police docket. These are the cases of *Shabalala v Attorney-General of the Transvaal,*[19] as well as that of *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[20]. Both these cases were decided more than a decade ago and since then little to no literature has been published that addresses the balancing of rights of the accused and the interest of society to combat crime. The available literature fails to address how the right of access to the police docket has evolved and how the law has developed since the decision of *Shabalala*[21] and *Dlamini*[22]. This raises the question of whether or not an accused person can exercise his right of access to information contained in the police docketsfor the purposes of bail.

The South African law of criminal procedure clearly states that a fair trial, as per section 35(3) of the Constitution, begins at the pre-trial stage; which includes bail applications. Authors questioned the fairness of the provision in section 60(14) of the Criminal Procedure Act.[23] The case of *Shabalala*[24] covers access to sections A,B, and C of the police docket only for the purposes of trial and does not speak of the position in bail applications. The Constitutional Court in this case declared the blanket docket privilege, as upheld in the case of *R v Steyn*,[25] unconstitutional. In addition, the court submitted that the privilege infringed on the accused's constitutional right to a fair trial. The privilege afforded in *Steyn*[26] covered all the contents of the police docket.

The consolidated case of *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[27] brought the constitutional validity of section 60(14) of the Criminal Procedure Act 51 of 1977 before the Constitutional Court, the argument being that the substance of section 60(14) of the Act was that an accused person was not permitted to access to any information contained in the police docket for bail applications, unless the prosecutor permitted such access. Furthermore, this subsection shall not be interpreted as denying an accused such access for the purposes of trial. The argument in this case was that "the combined effect of section 60(11)(a)[28] and section

[19]Ibid.
[20]*S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[21]Supra note 18.
[22]Supra note 20.
[23]Criminal Procedure Act 51 of 1977.
[24]Supra note13.
[25]Supra note 13.
[26]Supra note 13.
[27]Supra note 20.
[28]S60(11) of the Criminal Procedure Act 51 of 1977 provides that:

60(14)[29] was that the applicant incarcerated on a schedule 6 offence was denied bail,"[30] which was in conflict with the rights afforded to the accused in section 35(1)(f) of the Constitution. In making the determination as to the constitutional validity of this section, the court attempted to address the issue of bail applications but its conclusion was not exhaustive. Section 60(14)of the CPA, limits an accused's right to access to police docket for bail, by not allowing an accused access to information contained in the docket relating to the offence in question.

1.4 Research Questions

These are the primary questions that will be examined in this research:

1. How has the South African criminal law, criminal procedure and the law of evidence developed with respect to docket privilege?

2. What are the implications of the right of access to police dockets when reading section(s) 32, 35 and 36 of the Constitution?

3. How does the law balance the right of access to the police docket with the duty of the National Prosecuting Authority (NPA) to prosecute criminal offenders with the interrest of society to combat crime?

4. Is there is a duty on the state to grant unfettered access to the police docket to an accused or his/ her legal counsel?

5. Why is the operation of the right of access to the police docket different at bail applications and what are the implications of the conflict between the limitation of the right of access to

"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to- (a) in Schedule 6, the court shall order the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release; (b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt in accordance with a law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release."

[29] Section 60(14) of the Criminal Procedure Act 51 of 1977 provides that
"Notwithstanding anything contrary contained in any law, no accused shall, for the purposes of bail proceedings, have [the right] to any information, record or document relating to the offence in question, which is contained in or forms part of, a police docket, including any information, record or document which is held by a police official charged with the investigation in question, unless the prosecutor otherwise directs: provided this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for the purposes of his or her trial."

[30] Supra note 20.

police dockets for bail applications and the notion that the right to a fair trial begins at pre-trial stage?

1.5 Focus of the research

The research is an analysis of the right of access to the police docket from a constitutional law point of view. This research focuses on the role played by the Constitution in developing criminal procedure in relation to the right of accused persons to access police dockets in preparation for the bail hearing as well as trial.[31] In addition, the research will discuss the role of the NPA as the prosecuting authority of the Republic, by analyzing its duty to disclose and litigate, to establish the influence it has regarding the granting of an accused access to the police docket. The dissertation goes on to analyze the position of the international law regarding this right.

1.6 **Aim of the research**

The aim of this research is to understand the role played by the Constitution in developing South African criminal law and criminal procedure. The research aims to broaden the knowledge regarding the right of an accused together with his legal counsel to access the information contained in a police docket, as well as the limitations thereof. To achieve this aim, the research will analyze the relevant provisions of the Constitution, Acts of parliament, and South African case law; together with international law and foreign case law. Lastly, the research will examine the duty bestowed on the National Prosecuting Authority to prosecute crimes,[32] whilst adhering to the protections, afforded to accused persons, in section 35(3) of the final Constitution

1.7 Research Methodology

In this research, a qualitative approach is used. It is desktop research in which data is collected in order to compare, contrast and analyze laws relating to the right of access to police dockets by the accused person at both bail stage, and subsequently the trial stage. The data is a

[31] S 35(3)(a) of the 1996 Constitution.
[32] S 179 of the 1996 Constitution.

combination of case law, journal articles, legislation, books, internet sources and law reviews on the research topic.

1.8 Overview of the Chapters

Chapter 1 introduces all the chapters in the research and explains each chapter in short summary and at the same time way explains the focus and aim of the study. This chapter helps navigation of the research, giving the focus and aim of the research. It sets out the research questions that the dissertation aims to answer as well as the research methodology to be used in this research.

Chapter 2 deals with the comparison between the pre-constitutional and post-constitutional eras, describing how the Constitution has developed criminal procedure and law of evidence. This chapter provides an analysis of the arguments that prompted the the landmark decisions of *R v Steyn*[33] and *Shabalala v Attorney General of Transvaal*[34].

Chapter 3 analyzes how the right of access to police dockets differs in pre-trial procedure and by implication the provision of section 60(14) of the Criminal Procedure Act[35], particularly bail applications, and considers the notion that the right to a fair trial begins at the pre-trial stage.

Chapter 4 analyzes the duty of the National Prosecuting Authority to litigate, its powers in terms of section 179 of the Constitution and how the NPA purports to balance the right of the accused to a fair trial with the interest of society to combat crime.

Chapter 5 examines the influence of foreign law on South African law and also considers the binding nature of International Customary Law on South Africa as well as the International Conventions that South Africa is party to. This chapter refers to constitutional provisions in international law.

Chapter 6 contains the overall conclusion and recommendations.

[33] Supra note 13.
[34] Supra note 18.
[35] Criminal Procedure Act 51 of 1977

CHAPTER 2: COMPARISON BETWEEN PRE-CONSTITUTIONAL AND CONSTITUTIONAL ERAS

2.1 Introduction

Prior to the constitutional dispensation, South Africa exercised blanket docket privilege in line with the decision in *R v Steyn1954 (1) SA 324 (A)*, with regards to the contents of a police docket. This gave protection to any and all information contained in a police docket. Disclosure of the information contained in the police docket was at the discretion of the prosecutor, and the disclosure would occur shortly before or during trial.[36] Such privilege prevented the accused and his counsel from examining the contents of the police docket, unless permission had been provided by the prosecutor.[37] The privilege proceeded from the notion that the general rule was that the police docket was in its entirety privileged, covering all information contained in the police docket. This included witness statements, expert reports and documentary evidence contained in part A of the docket; internal reports and memoranda in part B; and the investigation diary in part C, irrespective of the significance of such information.[38] However, even at the time of *Steyn*, the prosecution was ethically obliged to bring to the attention of the defence any discrepency between the written and oral statements of a state witness, a practice referred to as a trial by ambush.[39]

The Constitutional Court declared the blanket docket privilege unconstitutional, in *Shabalala v Attorney-General of the Transvaal* 1995 (2) SACR 761 (CC), to protect the accused's constitutional right to a fair trial.[40] The court developed a test to determine whether it was imperative to grant the accused person access to the police docket for the purposes of trial, the main question being whether the defence would be able to efficaciously exercise the constitutional right of the accused to adduce and challenge evidence as provided in the Constitution[41] without seeing the police docket. Prior to the Constitutional Court ruling, there

[36] M Watney 'The prosecution's duty to disclose: More to litigate?' (2012) 1:2 *Journal of South African Law* 320
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] University of Pretoria 'Chapter 10. Access to information held by police or state officials for purposes of bail application' available at https://repository.up.ac.za/bitstream/handle/2263/23338/10chapter10.pdf?sequence=11&isAllowed=y accessed on 28 September 2019.
[41] Section 35(3)(i) of the Constitution.

were a number of conflicting debates and decisions on whether an accused required access to the docket in terms of section 23 of the interim Constitution to advance his or her case.[42] The decision in *Shabalala*[43] considered in depth the ambit of section 23 and section 25(3) of the interim Constitution in relation to docket privilege.

2.2 A critical analysis of the landmark cases of *R v Steyn* 1954 (1) SA 324 (A) and *Shabalala v Attorney-general of the Transvaal* 1995 (2) SACR 761 (CC)

2.2.1 *R v Steyn* 1954 (1) SA 324 (A)

This landmark case dealt with the issues relating to docket privilege prior to the decision of *Shabalala and others v Attorney-General of the Transvaal and another*[44], long before both the 1993 and 1996 constitutions were enacted, when South African common law, particularly influenced by English common law and statutory law was the prevailing law. This case established the concept of blanket privilege with respect to information contained in the police docket, protecting all contents of the police docket from disclosure to the accused until the close of proceedings.

The case of *Steyn* had the effect of protecting a wide range of witness statements, including statements of witnesses which did not deal with the state secrets, methods of police investigation, the identity of informers and other privileged information − even where there was no reasonable risk that disclosure might lead to the intimidation of witnesses.[45] Despite the general rule, there were instances where the prosecution was ethically obliged to disclose these statements to the defence. The case of *Steyn* is significant in that it illustrates the position of the right of access to police dockets prior to the constitutional era. In addition, *Steyn* can now be used as reference when evaluating how our legal sysytem has evolved regarding this right. In upholding the common law privilege in respect of the police docket, the court stated that the privilege applied to both civil and criminal law trials.[46]

[42] *Shabalala v Attorney-General of the Transvaal* 1995 (2) SACR 761 (CC) para31.
[43] Supra note 18.
[44] Supra note 18.
[45] *Shabalala v Attorney-General of the Transvaal* 1995 (2) SACR 761 (CC) para22.
[46] *Shabalala* supra note para15.

2.2.2 *Shabalala v Attorney-General of the Transvaal 1995 (2) SACR 761 (CC)*

This is the landmark case when dealing with the access to police dockets in the post constitutional era. The Constitutional Court decision sets ground-breaking precedent in South African criminal law and procedure as it was the first case deliberated on by the Constitutional Court on docket privilege after the coming into operation of the interim Constitution. The decision of the Court differs widely from that of *Steyn*[47]and sets new standard with regards to docket privilege. Although heard during the time of the interim Constitution, (the sections in question at that time were sections 23 and 25(3)), its decision remains relevant under the 1996 Constitution because the provisions of section(s) 23 and 25 of the interim Constitution have been incorporated in sections 32 and 35 of the final Constitution. The court considered the extent to which the previous decision *Steyn* had infringed the rights of the accused to a fair trial and access to information.[48]

The court was tasked with deciding whether or not the common law privilege relating to the contents of the police docket as ruled in *Steyn*[49] was consistent with the Constitution.[50] At issue in this case was "whether an accused was entitled, in addition to the particulars in the indictment read with the summary of substantial facts and any particulars obtained under section 87 of the Criminal Procedure Act, to the contents of the police docket itself, and whether such access was required to ensure a fair trial."[51] The Constitutional Court found the blanket docket privilege to be inconsistent with the Constitution because it tended to protect every document in the police docket from disclosure despite the fact that the accused might require that information for a fair trial.[52]

The court issued the *caveat* that if the state was able to convince the court that it was not imperative that the accused be given access to the information contained in a police docket for the purposes of a fair trial, disclosure would be considered unecessary.[53] The state may justify

[47]Supra note 13.
[48]*Shabalala v Attorney-General of the Transvaal* 1995 (2) SACR 761 (CC) para 9 B.
[49]Supra note 13.
[50] *Shabalala* supra para 9A.
[51] *Shabalala* supra para *37.*
[52] *Shabalala* supra para 72.
[53]*Shabalala* supra para 17.

its refusal of access in terms of section 33 of Interim Constitution[54], where there is a justifiable risk that the disclosure of the information would reveal state secrets or where there was a risk of intimidation of witnesses.

Logic implies that refusing the accused person access to state witness statements in the police docket denies the accused his/her constitutional right to access to information as well as his/her right to a fair trial, as the accused is not fully informed of the case he/she is to meet and therefore unable to adequately prepare a defence.[55]*Shabalala*[56] clearly states that in principle, the accused has the right of access to all witness statements in the police dockets, and the prosecution had a duty to disclose all witness statements.

2.3 The implications of section 32 read with section 35 of the Constitution

Section 32(1)(a) of the Constitution affords everyone the right of access to any information in the possession of the state; (b) grants access to any information in the possession of another person required for the exercise or protection of any rights. These provisions can be interpreted as giving arrested or detained persons the right to obtain any information in the police docket for the purposes of exercising and or protecting their right to a fair trial.[57] The issue then arises as to whether an accused person is permitted unfettered access to the information contained in a police docket.[58]

The right of access to information includes information in the possession of third parties, which is important for the purposes of preparing a defence.[59]It is possible for the right to a fair trial to contradict with a third party's right to privacy.[60] It has been argued that the ability of the defence to effectively challenge expert evidence depends on the accuracy and helpfulness of information available to it.[61] The regulation of such disclosure may prove to be crucial in

[54]Limitation clause.
[55]S35(3)(i) of the 1996 Constitution.
[56]Supra note 18.
[57] M Reddi, B Ramji 'The pre-trial right to silence whilst exercising the right to access police dockets in South African Law: A right too far?' (2014) 27:3 *South African Journal of Criminal Justice* 306.
[58]Ibid.
[59] S 32(1) (b) of the Constitution.
[60] S 14(d) of the Constitution.
[61] *Shabalala* supra para 37.

assisting the defence in preparing its case for the reason that the full expert report and pre-trial meetings between experts may assist in defining all issues in dispute. The timing of the disclosure depends on the circumstances of each case.[62] The Constitutional Court in *Shabalala*[63] did say that disclosure of information should occur when the accused has been furnished with the main indictment or immediately thereafter.

The right of access to information applies horizontally (person to person) and also to juristic persons in accordance with section 39(1)(a) of the Constitution which requires that "when interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom". It can be deduced from the wording of section 32(1)(a) that an applicant seeking information which is in the possession of the state does not have to prove that he or she requires the information for the exercise or protection of a right. The right of access to information must be supported by legislation to create an effective mechanism for their enforcement. After the commencement of the Constitution the right was suspended for three years, pending the enactment of national legislation, required by section 32(2) of the Constitution, to regulatethis right.

The Promotion of Access to Information Act of 2000[64] was enacted by Parliament in January 2000 and acceded to by the President in February 2, 2000. The right to access to information remains operative even after the enactment of PAIA. The Act intends to enforce the constitutional right to access to information held by the state and sometimes third parties that is required for the exercise or protection of any rights. The preamble of the PAIA makes reference to the limitation clause in the Constitution.[65]

The ambit of PAIA goes further than the traditional approach of freedom of information in that it applies to the public sector as well as the private sector.[66] The right of access includes

[62] Supra note 18.
[63] Ibid.
[64] Section 40 of PAIA states that: "An information officer of a public body must refuse a request for access to a record of the body if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege."
Section 67 of the PAIA states that: "The head of a private body must refuse a request to access to a record of the body if the record is privileged from production in legal proceedings unless the person entitled to the privilege has waived the privilege."
[65] Section 36 of the Constitution.
[66] GE Devenish *The South African Constitution*: Durban: LexisNexis (2005) 145.

information in the possession of third parties, which is important for the purposes of preparing a defence.

2.4 Critical overview of the right to access to the contents of the police docket

Prior to the CPIA, the issue of non-disclosure in the UK was regulated by the guidelines set out by the attorney-general in 1981 supplemented by court cases. The guidelines declared that "an accused person who is tried in a English High Court is given access to the police docket well before trial".[67] The information was made known to the defence by utilising the procedures set out in the attorney-general's guidelines. In addition to that information, the accused received the indictment and further particulars in the form of a committal bundle. Access to statements in the possession of the state was given only where extraordinary circumstances existed.[68]The prosecutor was obliged to fulfill his duty to inform the accused of his right to request advance information.[69]The guidelines were drafted to regulate the access given in these instances and minimise the abuse of power.

In cases where the prosecutor received the said request, he was obliged to furnish the defence counsel with a copy of all written statements which he intended to use during trial, or a summary of the evidence which he intended to present in court.[70] However if the prosecutor was of the view that the disclosure of any of the evidence in its possession might lead to the intimidation of a state witness or an interference of with the ends of justice, he was then not obliged to comply with the request.[71] Nevertheless, the prosecutor had to express in writing that he refused to furnish the requested information to the defence counsel.[72] Failure by the state to disclose to the defence counsel statements that would assist the defence's case amounted to denial of natural justice and any conviction obtained under such circumstances could be quashed by the divisional court.[73] The duty to disclose was placed on the prosecutor and he/she had to ensure that all relevant evidence which would assist an accused was either

[67]Attorney-General Guidelines of 1981.
[68] The University of South Africa 'Chapter 5 Right to information 'available at http://uir.unisa.ac.za/bitstream/handle/10500/1840/05chapter5.pdf accessed on 25 September 2019.
[69] The University of South Africa 'Chapter 5 Right to information 'available at http://uir.unisa.ac.za/bitstream/handle/10500/1840/05chapter5.pdf accessed on 25 September 2019.
[70] Ibid.
[71]Ibid.
[72]Ibid.
[73]Ibid.

led by them or made available to the defence. This duty ensured the right to a fair trial and fairness in this case included the requirement that rules of natural justice be observed.

When a case went to trial, English common law required the state to provide the defence counsel with all disclosable material which would be relevant to the case[74] The obligation included witness statements irrespective of their credibility and relevance to the case.[75] The prevailing position was that full disclosure of prosecution material before trial was regarded as a fundamental element of a fair trial. When the accused was indicted, he became entitled to the advance disclosure of all evidence to be used at trial.[76] In the Magistrates'Court, however, there was no obligation to disclose evidence regarding summary offences.[77]

Prior to November 15, 1996, the issue of state privilege in South Africa was covered by section 66 of the Internal Security Act 74 of 1982,[78] which provided for the furnishing of information in criminal proceedings in court. Common law did not oblige the defence to disclose the nature of the defence to the state. This obligation was introduced by statute incertain instances, including: alibi defences under the Criminal Justice Act of 1967, expert evidence in terms of section 81 of the PACE 1948[79] and for preparatory applications in fraud cases in terms of section 9 of the Criminal Justice Act of 1987.

The prosecutor reserved the right to petition the court for immunity from disclosure on the grounds of public interest immnity because the information would tend to reveal the identity of the informants or details of the police operational practices**.**[80] Section 10(1) of the Criminal Procedure Investigation Act (UK)[81] stipulates that

> "Other than early disclosure under Common Law, in the magistrates' court the streamlined certificate at the Annex (and any relevant unused material to be disclosed under it) must be disclosed to the accused either: at the hearing where a not guilty plea is entered, or as soon as possible following a formal indication from the accused or representitive that a not guilty plea will be entered at the hearing."

[74] *R v Keane* [1994] 2 All ER 478.
[75] *S v Mills* [1998] AC 385.
[76] The University of South Africa 'Chapter 5 Right to information' available at http://uir.unisa.ac.za/bitstream/handle/10500/1840/05chapter5.pdf accessed on 25 September 2019.
[77] Ibid.
[78] DT Zeffert, AP Paizes & A St Q Skeen *The South African Law of Evidence*: LexisNexis (2003) 654.
[79] Police and Criminal Evidence Act 1984.
[80] SE van der Merwe 'State Privilege' in PJ Schwikkard *Principles of Evidence*: Juta (2003) 165-170.
[81] Criminal Procedure Investigation Act (CPIA) 1996.

The non disclosure by the state does not negaitvely impact the intrinsic fairness of the trial. The court must adjourn the court, to afford the defendance counsel time to go through the newly submitted evidence. Sharpe argues that the CPIA poses restrictions on how the information flows between the prosecution and the defene, by burdening the accused with the duty to disclose before trial. Furthermore, through code, the Act has expanded the scope of immunity based on public interest. He concludes by adding that the CPIA increases the structural imbalance that is already visible between the state and the defence.

2.5 Analysis of the case law under both the interim Constitution and final Constitutions

Legal scholars have sumitted views regarding the right to access prior to and during the counstitutional era. Du Plessis and Corder argue that[82]

> "a finding of accused persons as having the right to access to witness statements as well as police dockets does not necessarily entail what they call a free for all unlicensed exercise of this right."

O Hallamby submits that

> "The accused and the state must approach the court on the same footing and neither should enjoy substantial advantage over his opponent. The right to a fair trial goes hand in hand with the right to equal protection of the law and entitlement to information in the possession of an organ of the state goes hand in hand with the right to a fair trial." [83]

Whitear-Nel submits that

> "An accused person is advantaged in the sense that the prosecution bears the burden of proof and that the accused has the right to remain silent. The accused bears no obligation to reveal his evidence prior to the trial. Furthermore, the asymetric disclosure obligations between the accused and the state can also be justified by the consideration of the vast resources enjoyed by the state, as compared to those of the average accused person."[84]

The combined effect of the views of the is that although constitutionllly valid and acceptable that he accused be given access to the contents of the police doket, such access is not absoute. The Consttitution provides section 36 of the Contitution as a limitation of this right of access. It is evident that accused persons enjoy an advantage over the prosecution, in the sense that the state is burdened with all the hardwork of

[82]The University of South Africa 'Chapter 5 Right to information' available at http://uir.unisa.ac.za/bitstream/handle/10500/1840/05chapter5.pdf accessed on 28 September 2019.
[83] Ibid.
[84] N Whitear-Nel 'The right of an accused to access evidence in the possession of the state before trial: a discussion of *S v Rowand* 2009 (2) SACR 450 (W)' (2010) 23:2 *SACJ* 266.

proving the guilt of the accused beyond a reasonable doubt, while also bearing he brurden to make the accused aware of any information which my assist in proving his innocence. However this advantage is balanced out by the state having at its disposal limitless resources to dispose of its burden of proof by conducting extensive investigation into the criminal conduct of the accused to prove guilt beyond reasonable dooubt; a luxury an accused may not have. The enjoyment of the right of access to the police docket must be to the extent that the field is leveled for both the accused and the prosecution at the start of trial and neither must enjoy unprecedented advantage. Athought the prosecutions duty is not to secure a conviction, but to assist in the truth finding process, it has a duty to safeguard the interest of the public. In addition, access is granted in so far is it satisfis the accused's section 35 rights and at no stage must access amount to an "undressing" of the states case.

When the interim Constitution became operational, the first contested question the High Court was faced with was whether the accused had the right to access information forming part of the police docket.[85] In *S v Fani*[86] Jones J held:

> "If the accused is not sufficiently informed about the case against him, he will not be able to properly prepare his case and cannot be said to have had a fair trial. The accused was entitled before plea to certain evidential information contained in the docket."

Jones then submits that the state was not compelled by the interim Constitution to allow the defence access to the entire police docket.

In *S v James*[87] the court attempted to answer the question of whether section 23 of the interim Constitution was intended to apply to criminal trials but left the question open. The court did however state that:

> "Section 23 does not require witness statements or summaries of them to be furnished to the accused. Furthermore, the requirement of section 23 is that the accused be informed sufficiently of the charges against him and that he be given adequate information to enable him to understand precisely what the allegations against him are."

The court in *S v Smith*[88] approved the decision in *Fani*[89] and added that

[85] Supra note 81.
[86] *S v Fani* 1994 (1) SACR 635 (E).
[87] *S v James* 1994 (1) SACR 1414 (E).
[88] *S v Smith* (1994) (2) SACR 116 (E).
[89] Supra note 86.

> "the effect of section 23(3)(b) was that an accused person is entitled to full particularity of the charge as to enable him to adduce and challenge evidence except where such information is protected by privilege."

In *Qozeleni v Minister of Law and order and Another*[90]

> "a two-stage was followed namely, whether a fundamental right had been infringed and if so, whether that infringement constituted a permissible limitation in terms of section 33 of the 1993 Constitution. The court held that the fundamental right contained in section 23 should be read together with section 8(1), because the basis of the right to disclosure can be foundedon the notion that a fair trial envisages an equality of arms and because of that, all parties must have access to the same documents."[91]

In the case of *S v Majavu*[92]

> "the court drew a conclusion from surveys of foreign jurisdictions, such as Canada, the United States and the United Kingdom, which have customarily acknowledged discovery as of right and have endorsed a strict procedure for the limitation of that right. In addition, the court held that while section 23 is not a discovery measure, it applies equally to the prosecution. Furthermore, the right of access to information has to be considered in conjuction with the rights in section 25(3)."[93]

Authors of the University of South Africa right to information notes[94] have suggested that "the cases of *Fani*[95], *James*[96] and *Smith*[97] all came to the conclusion that the common law privilege was not inconsistent with the provisions of the Constitution. On the other hand, *Majavu*[98] and *Qozeleni*[99]made a precise distinction between these two inquiries. The courts found that "the privilege of non-disclosure to be inconsistent with the fundamental principles of the Constitution.[100]However, refusal to divulge any of the information in the docket may, depending on the circumstances, be justified in terms of the limitations contained section 33(1) of the 193 Constitution."

In the case of *Phato v Attorney-General, Eastern Cape & Others*[101], the court had to make a determination regarding the accused's access to the witness statements and other information in the docket prior trial proceedings. In making its determination, the court held that section 23 of the Constitution afforded an accused person the right of access to the contents of the police

[90] *Qozeleni v Minister of Law and order and another* 1994 (1) BCLR 75 (E).
[91] The University of South Africa 'Chapter 5 Right to information' available at http://uir.unisa.ac.za/bitstream/handle/10500/1840/05chapter5.pdf accessed on 25 September 2019.
[92] *S v Majavu* 1994 (2) BCLR 56 (Ck).
[93] Supra note 82.
[94] The University of South Africa 'Chapter 5 Right to information' available at http://uir.unisa.ac.za/bitstream/handle/10500/1840/05chapter5.pdf accessed on 25 September 2019.
[95] Supra note 86.
[96] Supra note 87.
[97] Supra note 88.
[98] Supra note 92.
[99] Supra note 90.
[100] The University of South Africa 'Chapter 5 Right to information' available at http://uir.unisa.ac.za/bitstream/handle/10500/1840/05chapter5.pdf accessed on 25 September 2019.
[101] *Phato v Attorney-General, Eastern Cape* & Others 1994 (5) BCLR 99 (E).

docket. The court did however stipulate that this right was not absolute and remained subject to the qualifications in section 33(1) of the interim Constitution.[102]

Lord Esher M.R proposed, in the English case of *Marks v Beyfus*[103], that all materials which assist the defence prepare its case should be disclosed. In *R v Keane*[104], the court of Appeal preferred a balancing of the interest of society regarding the non-disclosure of documents with the interest of society rearding the proper administration of justice. Furthermore, the court stressed that disclosure of documents should always be ordered if the withholding of information might cause a miscarriage of justice.

In terms of the maxim *generalia specialibus non derogant*[105],

> "the rights of an accused person in a trial are governed by the specific provisions of section 25(3) and not by the ordinary (wider) provisions of section 23. Furthermore, section 23 was not intended to be a discovery mechanism in criminal trials."[106]

In the case of *Shabalala*[107], the court was called on to make a determintion as to

> "whether the right to a fair trial, as provided for in section 25(3), included the right of access to a police docket or the relevant part thereof. In making its determination, the court held that the question could not be answered in the abstract. Furthermore, regard must be given to the unique circumstances of each case."

The court in *S v Botha*[108], held that "the information ought to be given after completion of the police investigation."

In *Kala v Minister of Safety and Security*[109], in interpreting the provisions of the Constitution as well as the plaintff's rights under section 23, the court welcomed the view that

> "the information contained in the police docket was that which as in the possession of an organ of state. This refers to any information which is relevant for the protection of the plaintiff's rights to freedom and security. Section 23 does not extend an unfettered right of access to

[102] The University of South Africa 'Chapter 5 Right to information 'available at http://uir.unisa.ac.za/bitstream/handle/10500/1840/05chapter5.pdf accessed on 25 September 2019.
[103] *Marks v Beyfuss* (1890) 25 QBD 494.
[104] *R v Keane* [1994] 1 WLR 746.
[105] Latin maxim which interprets as: Latin maxim which interprets as: "the provisions of a general statute must yield to those of a special one." Also known as the "rule of implied exception". http://www.duhaime.org/LegalDictionary/G/GeneraliaSpecialibusNonDerogant.aspx
[106] University of Pretoria 'Chapter 10. Access to information held by police or state officials for purposes of bail application' available at https://repository.up.ac.za/bitstream/handle/2263/23338/10chapter10.pdf?sequence=11&isAllowed=y accessed on 28 September 2019 496.
[107] Supra note 18.
[108] *S v Botha* 1994 (3) BCLR 93 (W).
[109] *Kala v Minister of safety and Security* 1994 (2) SACR 541 (W) 569D-E and 577B.

> information, but conferred on individuals a right of access to information which is required for the exercise or probation of a right. Only then will the state be obliged to grant access.

Myburg J averred that

> "if there is a right of an accused to access the information in the police docket, that right should be exercised only after the matter has become ripe for hearing ie after the investigation is complete, the charge sheet drawn and the state prepared to proceed to trial."[110]

In the case of the *Inkatha Freedom Party v Truth and Reconciliation Commission*[111], the court held that

> " which it is claimed. The purpose of section 32 was to provide a framework for a statute guaranteeing freedom of information as well as to enable courts to examine whether a denial of information would undermine the notions of fairness, openess and transparency. Access to information includes information that is in the possession of third parties. The right is not absolute; a balance must be struck between one party's right to access and the other party's right to withhold such access."

Equal treatment , benefit and protection of the law encampaseses the righ to a fair trial.It is evident from the case law is that an accused can be said to hhave had a fair trial if he is affordered every reasonable opportunity and resource to prove his inncocence. In criminal proceedings, that means allowing one to inspect the contents of the police docket so he is fully aware of the case he has to meet. In Fani, the court submits that the right of access did not compell access to the entire docket. In my view, his submission would be subjective and based on the circumstances of the case, where the the parts of the docket he is furnished with provide the accused with information needed to adduce and challenge evidence and where denial to other parts of the docket would not be prejudicial to the the accused.

The state is said to have satisfied its section 35 obligation to the accused where the accsued is is informed of the charge with suffficient detail to answer it. It is my view that the section 35(3)(a) requirement would be sufficient to determine whether or not the accused must be granted such access for the purposes of a fair trial. The rights in section 35 of the fianl Constitution must not be read in isolation. They become meaningful when read together with section 9, 32, and 36 of the Constitution. Section 35 is a right of discovery which works for both the state and the defence. The rights in section 35, like other rights in the Constitution, is limited by section 36. The

[110] Ibid.
[111] *Inkatha Freedom Party v Truth and Reconciliation Commission* 2000 (5) BCLR 1024 (w).

above case law stress that the right is not absolute. The English case of *Bayfus* support the decisions of ourt courts to grant such access. The appoach in *Keane* suggests weighing of the public's interest of non disclosure to the proper adminstration of justice so as to make an informed decision in the best interest of society. It is advisable that the accused is granted such access upon completion of the investigation or when the invetsigation has reached climax so that the state's case as well as the public's interest to combat crime is not prejudiced. It is important to point out that in addition to the section 35(3) requirement,access to information is granted for the exercise or protection of rights.

2.6 Concluding remarks

Presiding officers have differed in their views and analysis of the right of access to the contents of the police dockets. While the rationale of some decisions is similar, in some instances, the courts differ from the conventional analysis of this right as well as the factors influencing the persons entitled to a fair trial. Althought the right to a fair trial is of vital importance in our legal system, this right does not afford the accused persons unfetterd access to the contents of the dockets; furthermore, the right is in any event subject to limitations under section 36 of the Constitution.[112] The right to a fair trial forms the basis for claiming access to the police docket. However the right on its own fails to set out the grounds upon which the right is claimed. The accused needs to take the court into his confidence by demonstrating to the court how denial of the access would infringe his or her constitutional right to a fair trial as well as the right to adduce and challenge evidence. The court has the discretion to determine whether extraordinary circumstances exist that limit the right of access. The accused must be aware that, the court has a duty to balance the rights of the accused to a fair trial, with the interest of society to combat crime. Furthermore, the rights in section 35(3) are contained within bounds of the meaning carried by section 32 of the Constitution.. Finally, the right to access to the police docket, the right to information and the right to a fair trial may be limited by section 36 of the Constitution.

[112] A Cachalia et al *Fundamental Rights in the New Constitution* Juta (1994) 70.

CHAPTER 3: RIGHT TO ACCESS POLICE DOCKET IN BAIL APPLICATIONS

3.1 Introduction

Despite preceding judgements supporting the view that the right to a fair trial begins at pre-trial stage, which includes bail applications, accused persons do not have the right of access to police dockets at this stage.[113] However, certain circumstances my exist in which the defence may make an application to court for access to the information contained in the police docket for bail purposes. The discretion to grant such access rests on the court based on the circumstanes of each case. For the purposes of trial preparation, access to police dockets is permitted unless the prosecution is able to convince the court that the accused does not need access to the docket for the purposes of a fair trial.[114]

3.2 Right of access in bail applications as opposed to trial proceedings

3.2.1 The Constitution

Section 35 of the Constitution stipulates that the information requested must be given to the accused in a language he understands.[115] Section 35(1)(f) of the Constitution supports the releasing of accused persons on bail. However, this section adds the requirement that the interest of justice should permit the release. Releasing an accused person on bail minimises the interference with his/her freedom and avoids anticipatory punishment before the start of trial, conviction and sentence.[116] This right supports the right to be presumed innocent. Every person is presumed innocent until properly convicted by a court of law. "The adverb 'properly' involves, *inter alia*, compliance with the rules of evidence and criminal procedure."[117] The decision to grant bail is made with reference to the interest of justice where the weight of the case against the accused is a relevant factor.[118] The right to bail terminates upon conviction or acquittal.

[113] Supra note 1.
[114] Supra note 1.
[115] S35(4) of the Constitution.
[116] N Steytler *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa, 1996* Butterworths (1998) 133.
[117] JJ Joubert. et al *Criminal Procedure Handbook* 12 ed Juta (2017) 19.
[118] N Steytler op cit 134.

The question then arises as to whether section 32 of the Constitution affords an accused seeking bail the right to the information held by the state. Unlike the interim Constitution, section 32 of the final Constitution affords everyone the right to information held by state.[119] The right to information for purposes of trial, whether criminal or civil, falls within the scope of section 32(1)(b). The reasoning behind the wording in section 32 of the Constitution is the creation of an open and accountable government by allowing public scrutiny[120]The Constitution does not provide directly for the right of access to the information contained in a police docket for the purposes of bail. The clear intent of section 32(1)(b) is to provide for information in every case where information is required for the exercise or protection of the right of access to police dockets.[121] An important factor to be taken into account when granting an accused persons bail is the strength of the state's case.[122]

In the case of *Shabalala*[123] the court concluded that section 25(3) must not be read isolation but with section 23 in a culture of accountability and transparency[124] The Constitutional Court has indicated that section 60(14) of the CPA does not sanction an absolute denial. The abolishing of docket privilege proved to be necessary for the protection of the constitutional right to a fair trial including the subsequent rights in section 35(3)(a)(o).[125] In cases of undefended accused persons, it is the duty of the court to inform the accused person of the right of access to the contents of police dockets.[126] It was submitted, in *S v Shiburi*[127], that failure to inform the accused did not necessarily constitute a fatal irregularity vitiating the proceedings. Van der Merwe submits that where a suspect is asked by investigating officials to respond to allegations based on information contained in a police docket, that the suspect loses his right to access to the contents of the docket.[128] The reasoning behind Van der Merwe's submission

[119] S32(1)(a) of the final Constitution clearly states that when such information is required for the protection or exercise of right then information then such person must be afforded to such access.
[120] The University of South Africa 'Chapter 5 Right to information 'available at http://uir.unisa.ac.za/bitstream/handle/10500/1840/05chapter5.pdf accessed on 25 September 2019.
[121] The University of South Africa 'Chapter 5 Right to information 'available at http://uir.unisa.ac.za/bitstream/handle/10500/1840/05chapter5.pdf accessed on 25 September 2019.
[122] Supra note 106.
[123] *Shabalala* supra note para35.
[124] *Shabalala* supra note para10.
[125] *Shabalala* supra note para72.
[126] SE Van der Merwe 'State Privilege' in PJ Schwikkard *Principle of Evidence* 3ed Juta (2003) 173.
[127] *S v Shiburi* 2004 2 SACR 314 (W).
[128] SE Van der Merwe op cit 173.

would be that during questioning, the accused becomes aware of what the allegations are based on and as a result has an idea of the incriminating evidence the state has in its possession. Allowing the defence counsel access to that information would most probably prejudice the state's case by giving the defence an advantage over the state's case.

3.2.2 The Criminal Procedure Act 51 of 1977

The consolidated cases of *S v Dladla; S v Dlamini; S v Joubert; S v Schietekat* [129] brought the constitutional validity of section 60(14) of the CPA before the Constitutional Court. The applicants contended that section 60(11)(a) and section 60(14) opposed the release on bail of an applicant confined on a schedule 6 offence.[130] They further submitted that the combined effect of these sections infringed the rights an accused contained in section 35(1)(f) of the Constitution, because under section 60(11)(a), the accused is faced with the onus of proving exceptional circumstances to permit his release.[131] In addition to the applicant bearing the onus, he had the duty to begin, which was difficult or impossible to prove without knowledge of the contents of the docket.[132] The disadvantage created by this section was at the centre of the discussion. The respondent's arguement was that section 60(11)(b) of the Act afforded the applicant a reasonable opportunity to adduce evidence which, in the interests of justice, permitted his release on bail.[133] In spite of the provisions of section 60(14), the prosecutor may be ordered by the court to "lift the veil" to afford the applicant a reasonable opportunity prescribed in section 60(11) to take the court into his confidence and grant him bail.[134]

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[129] *S v Dladla; S v Dlamini S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[130] University of Pretoria 'Chapter 10 Access to Information held by police or state officials for purposes of bail application' available at https://repository.up.ac.za/bitstream/handle/2263/23338/10chapter10.pdf?sequence=11&isAllowed=y accessed on 28 September 2019.
[131] University of Pretoria 'Chapter 10 Access to Information held by police or state officials for purposes of bail application' available at https://repository.up.ac.za/bitstream/handle/2263/23338/10chapter10.pdf?sequence=11&isAllowed=y accessed on 28 September 2019.
[132] University of Pretoria 'Chapter 10 Access to Information held by police or state officials for purposes of bail application' available at https://repository.up.ac.za/bitstream/handle/2263/23338/10chapter10.pdf?sequence=11&isAllowed=y accessed on 28 September 2019
[133] S v Dladla supra note para59.
[134] S v Dladla supra note para84.

The case of *Dladla*[135] confirms the constitutional validity of section 60(14) of the CPA. The Constitutional Court did however state that this provision should not be read as sanctioning a flat refusal from the prosecution to share any information relating to the pending charges in a bail application.[136] Section 60(14) merely vests a discretion on the prosecution but not an unfettered discretion to refuse access to the contents of a police docket.[137] The factual circumstances in a bail application, eg the personal circumstances of the accused, may persuade the court, relying on section 60(3) and section 60(10) of the CPA, to order the state to grant the applicant for bail access to some information contained in the police docket.[138] The accused's entitlement to the police docket proceeds from the requirement that such access be granted only if the contents of the docket will give the accused reasonable opportunity to adduce the necessary evidence to obtain bail.[139] The court averred that what constituted a reasonable opportunity depends on the facts of each case.[140] Furthermore,

> "The Constitutional Court did not regard section 60(14) as sanctioning an absolute denial of information for purposes of a bail application; it did however propose a less absolute interpretation of the words 'have access to' in this section to bring the subsection in harmony with section 60(11). The court did not find any general right to the contents of the docket for purposes of bail application."[141]

In some instances the admissibility of relevant information may be denied on the basis that such admission would be against public policy or harmful to public interest.[142] Claiming state privilege covers both oral and documentary evidence. It is an English common law rule which found its way into the South African law of evidence. This privilege from disclosure on grounds of public policy or public prvilege is referred to as state privilege and is governed by section 202 of the Criminal Procedure Act.[143] "Public privilege exists where the public interest in non-

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[135] *S v Dladla; and others* supra note 51.
[136] *S v Dladla; and others* supra note 104.
[137] SE van der Merwe 'State Privilege' in PJ Schwikkard *Principles of Evidence* 3ed Juta (2003) 176.
[138] Supra note 18
[139]University of Pretoria 'Chapter 10 Access to Information held by police or state officials for purposes of bail application' available at https://repository.up.ac.za/bitstream/handle/2263/23338/10chapter10.pdf?sequence=11&isAllowed=y accessed on 28 September 2019.
[140]Ibid.
[141]University of Pretoria 'Chapter 10 Access to Information held by police or state officials for purposes of bail application' available at https://repository.up.ac.za/bitstream/handle/2263/23338/10chapter10.pdf?sequence=11&isAllowed=y accessed on 28 September 2019.
[142] SE van der Merwe 'State Privilege' in PJ Schwikkard *Principle of Evidence* 3ed Juta (2003) 166-170.
[143] Criminal Procedure Act 51 of 1977.

disclosure outweighs the public interest that administration of justice should not be hampered."[144] Communications that would tend to reveal crime investigation methods are also excluded together with those that tend to reveal the identity of the informer.[145]

The contents of the police docket do not bind the state as far as its allegations in the charge are concerned.[146] Section 87 of the CPA allows an accused to request further particulars to the charge before any evidence is led. It has been expressly stated in *S v Tshabalala*[147] that the state's disclosure of the information contained in the police docket to the defence does not amount to the furnishing of further particulars as envisaged in section 87. It is submitted that this approach is not inconsistent with the decision in the case of *Shabalala*[148], as it was neither implied nor held that the police docket had a binding effect of further particulars as envisage in the CPA.[149]

Section 335 of the Criminal Procedure Act[150] entitles an accused person to a copy of any statements he personally made. In addition, section 144(3) of the Act states that

> "when an accused is arraigned for a summary trial in a superior court, he is entitled to the substantial facts of the case together within a list of witnesses and addresses. An accused is also entitled to request further particulars to clarify the charge and to enable him to prepare his defence."

The duty to furnish further particulars to the accused does not confer an onus on the state to disclose evidence it intends adduce in court to prove guilt beyond resonable doubt.[151]

3.3 The discord between the right of access to police docket and the right to silence

The right to silence originates in English law. It was first introduced in the Cape, under the Criminal Procedure Ordinance Act of 1828, and later found its way into Natal, Transvaal and Orange Free State.[152]

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[144] SE van der Merwe 'State Privilege' in PJ Schwikkard *Principle of Evidence* 3ed Juta (2003) 166-170.
[145] Supra note 135.
[146] *Shabalala v Attorney-General of the Transvaal* 1995 (2) SACR 761 (CC) para19.
[147] *S v Tshabalala* supra note 167 and 168.
[148] Supra note 18.
[149] S 87 of the Criminal procedure Act 51 of 1977.
[150] Supra note 141.
[151] Section 87(1) of the Criminal Procedure Act 51 of 1977.
[152] M Reddi, B Ramji 'The pre-trial right to silence whilst exercising the right to access police dockets in South African Law: A right too far?' (2014) 27:3 *South African Journal of Criminal Justice.*

Section 35(1)(a) of the Constitution affords everyone the right to remain silent. The Constitution insists that the accused be informed of the consequences of not remaining silent.[153]This is required to be a warning, and a warning implies danger, an element which is absent when merely conveying information.[154] When informing an accused of the consequences of not remaining silent, the official must outline to the accused the dangers of not remaining silent.[155]

The privilege against self-incrimination prohibits an accused from being compelled to give evidence that incriminates himself concerning any criminal act he is suspected of.[156] The rule forms part of our common law but has now been reflected in statutory provisions.[157]The inclusion of this right in the Constitution ensures its protection and supremacy.[158]Both the privilege against self-incrimination and the right to silence are deemed consequences of the presumption of innocence.[159]

It is submitted that section 35(1)(b), which provides that "everyone who is arrested for allegedly committing an offence has the right to be informed promptly of the right o remain silent", should be read together with section 35(4) of the Constitution, which provides that "whenever this section requires information to be given to a person, that information must be given in a language that the person understands". This ensures that there is mutual understanding between the arresting officer and the accused, thus eliminating any misunderstanding or miscommunication. Furthermore, the provision also acts a shield or an umbrella to protect the accused.

Section 203 of the CPA provides that a witness may refuse to answer a question if it would expose him/her to a criminal charge; however the witness' refusal to answer the question will

[153] S 35(1) (b) of the Constitution.
[154] N Steytler *Constitutional Criminal Procedure 'A commentary on the Constitution of the Republic of South Africa, 1996'* Butterworths (1998) 109.
[155] Ibid.
[156] SE van der Merwe 'State Privilege' in PJ Schwikkard *Principle of Evidence* 3ed Juta (2003) 124.
[157] S 35(3) (j) of the Constitution.
[158] S 2 of the Constitution safeguards the supremacy of the rights in the Constitution, although subject to limitation in section 36.
[159] S 35(3) (h) of the Constitution.

not be justified if it is based on fear of a potential legal claim. The presumption of innocence places a duty on the prosecution to prove guilt beyond a reasonable doubt.[160] The accused retains the privilege against self-incrimination even at bail applications.[161] This means that even if he elects to testify, the accused may refuse to answer incriminating questions.[162] However refusal to answer incriminating questions may lead to the accused being refused bail.[163]

An accused cannot be compelled by the state to assist in the police investigation, by providing testimony.[164] Furthermore, any refusal to participate cannot be used to draw conclusions about the innocence of the accused.[165] The participation of the accused in the investigation, by giving testimony, needs to be voluntary. This right can be used in conjunction with other pre-trial rights. The wording of this provision makes it clear that detention alone is not a sufficient condition for triggering the right.[166] "The essence of this right, which begins at the moment of arrest, is that a person cannot be obliged to provide testimonial evidence of a crime for which he or she stands accused."[167] This right is said to be limited to testimonial evidence.

The court in *Miranda v Arizona*[168] stipulated that:

> "Privilege against self incriminaltion requires law enforcement officials to advise a suspect interrogated in custody of their right to remain silent and their right to an attorrney".

It was stated in *S v Botha*[169] that

> "the right to silence, which is a result of the privilege against self-incrimination, is not unfettered or absolute: accused persons applying for bail are faced with the choice between the right to bail and the exercise of the privilege against self-incrimination."

[160] In South African criminal prosecutions, the state bears the onus of prove guilt beyond reasonable doubt.
[161] SE Van Der Merwe *'State Privilege'* in PJ Schwikkard *Principles of Evidence* 3ed Juta (2003) 137.
[162] University of Pretoria 'Chapter 10 Access to Information held by police or state officials for purposes of bail application' available at https://repository.up.ac.za/bitstream/handle/2263/23338/10chapter10.pdf?sequence=11&isAllowed=y accessed on 28 September 2019.
[163] Ibid.
[164] N Steytler *Constitutional Criminal Procedure 'A commentary on the Constitution of the Republic of South Africa, 1996'* Butterworths (1998) 112.
[165] Supra note 28.
[166] N Steytler op cit 114.
[167] N Steytler op cit 115.
[168] *Miranda v Arizona* 384 U.S. 436 (1966).
[169] *S v Botha* 1995 (2) SACR 605 (W).

The justification for the clash of these rights is premised on the notion that the interests of an accused must be balanced against other legitimate considerations, eg justice being served, as well as the legitimate pursuit of the truth.[170]

The notion of legitimate pursuit of the truth requires that neither the prosecution nor the defence be improperly advantaged or undermined through the exercise by an accused of any of the fair trial rights.[171] An accused who has access to police dockets and has elected to remain silent at pre-trial proceeding, has potential to concoct a defence based solely on information elicited from the docket.[172] This does provide basis for the argument that an accused who elects to remain silent pre-trial should not be entitled to have access to police dockets until he has indicated the basis for his defence.[173]

Reddi and Ramji submit that

> "It is widely accepted that the political conflict over the religion prompted the right to silence to enter English common law. The Judges' Rules issued by the King's Bench in 1912 required a police officer who had decided to charge a suspect with an offence and who intended to interview the suspect to first inform the person of his right to remain silent. Furthermore, the court in *S v Maritz*[174] confirmed this rule when it stated that an accused's silence after being warned in terms of the Judges' Rules that he is not obliged to say anything in answer to the charge not only does justify any deduction of a guilty conscience, but also cannot be used to rebut his defence."[175]

In 1994, the Criminal Justice and Public Order Act[176] created a general rule that adverse inferences may be drawn from an accused's silence, even at pre-trial stage. The Act does however prescribe the circumstances in which a court may draw such inferences.[177] Although the right to remain silent existed in South Africa since the mid 19th century, it is only recently that it has been protected under statute, currently under the section 35(3) of the Constitution. The accused is assured of this right at both pre-trial and trial stage.[178]

3.4 Overview of recent decisions on access to a police docket at bail stage

(i) Panayiotou v S and Others [2016] ZAECPECH 50

[170] M Reddi, B Ramji *'The pre-trial right to silence whilst exercising the right to access police dockets in South African Law: A right too far?'* (2014) 27:3 South African Journal of Criminal Justice 306.
[171]M Reddi, B Ramji op cit 307.
[172]Ibid.
[173]Ibid.
[174] *S v Maritz* 1974 (1) SA 266 (NC).
[175] M Reddi, B Ramji *'The pre-trial right to silence whilst exercising the right to access police dockets in South African Law: A right too far?'* (2014) 27:3 South African Journal of Criminal Justice 306.
[176] Criminal Justice and Public Order Act 1994 c.33 United Kingdom.
[177] M Reddi, B Ramji op cit 306.
[178] Ibid.

The applicant was arraigned for trial on seven charges arising from the murder of his wife. He sought an order that the DPP to furnish him with documents contained in Part B and Part C of the police docket. The State and the DPP opposed the application on the basis that the applicant

was seeking what was referred to as further discovery in criminal trials. The court ordered the DPP to furnish the applicant with copies of some of the documents he had requested, on the ground that access to section C of the docket depended on being being able to adduce and challenge evidence. If there was no justifiable ground for refusal, access must be granted. However, a mere assertation of relevance is insufficent to claim this right.[179] The court affirmed that the accused did not enjoy a blanket right to all information in the hands of the prosecution

***(ii) National Director of Public Prosecution v King* [2010] ZASCA 8**

This case raises the question of whether an accused is entitled to the full description of every document he is denied access to as a result of those documents forming parts B and C of the docket as well as reasons upon which access is denied on any document in order to have a fair trial? King was indicted on 322 counts of white collar crime. The docket was not a normal police docket because of the complexity of the case. The court held that the Constitution supported a more friendly and inclusive interpretation of its provisons, and the right to a fair trial was not only limited to the rights found in section 35(3) of the Constitution. Discovery in criminal cases must always be a compromise, and fairness which granted the accused favourable treatment also entailed fair treatment of the public as represented by the state. The court concluded that

(iii) *Kerkhoff v Minister of Justice and Constitutional Develelopment and others* 2011 (2) SACR 109 GNP

In considering the right of access, Southwood J held that:

> "in asserting his right of access to the documents, the applicant had relied on section 32 of the Constitution of the Republic of South Africa, 1996, ignoring the provisions of the Promotion to Access to Information Act 2 of 2000 ('PAIA'). PAIA has subsumed section 32 of the Constitution and and now regulated the right of access to information; parties had to assert the right via PAIA, not via section 32. The applicant was thus been bound to seek access to the

[179] *Panayiotou v S and others* [2016] ZAECPECH 50 para 26.

Annexure 'A' documents by way of PAIA; since he had not done so, he had failed to demostrate a right of accesss to the documents concerned, and his application must therefore be refused."[180]

(iv) *S v Rowand* 2009 (2) SACR 450 (W)

The issue before the court was whether an accused person had the right to full access to the documents in the possession of the state. Furthermore, the court had to make a determination as to whether the accused was entitled to access to the information not forming part of the police docket but related to his/her case. The court averred that the accused needs to be allowed access to all documents in the states's possession, so as to allow the accused properly prepare for trial.[181] Upon ordering the state to grant the accused such access, the accused alleged that the state did not comply with the order.[182] The state argued that its duty of disclosure should be limited only to evidence relevant to the case; however, the court dismissed the argument made by the state and held the state did not possess the right to limit the accused's right of access to the docket by leaving out material which it considered irrelevant.[183]The court also rejected the argument that the prosecuting authority was a separate state entity. This case set precedence which allows the accused person a general right of access to the full investigative material. In addition, the case avoids the dislosure obligation limiting access only to material evidence. In analying this case, Whitear submits that the case of *Rowand* may be interpreted as establishing a blanket general rule of full disloure, by the state and law enfrcement agencies, of all material relating to the case.[184]

***(v) Solomons v S* [2019] All SA 833 (WCC)**

The applicant and his co-accused were charged with murder, contravention of the Prevention of Organised Crime Act 121of 1998 and drug dealing. The applicant elected not to bring his bail application in the Magistrates' Court and instead launched a motion in the High Court for his release on bail. The court in paragraphs 8-10 outlined the requirements for bail in respect

[180] *Kerkhoff v Minister of Justice and Constitutional Development and others* 2011 (2) SACR 109 GNP para 111.
[181] N Whitear-Nel 'The right of an accused to access evidence in the possession of the state before trial: a discussion of *S v Rowand* 2009 (2) SACR 450 (W)' (2010) 23:2 *SACJ* 263.
[182] Ibid.
[183] N Whitear-Nel op cit 264.
[184] N Whitear-Nel op cit 268.

of schedule 6 offences. In doing so, the court cited the case of *Dlamini*[185] as well as the provisions of section 60 of the CPA. In this case, the court held that

> "having assessed the above, it is my view that the applicant fell substantially short of establishing that the State's case is weak in respect of the Schedule 6 charges. Yet again, his
>
> affidavits lack specificity. He does not deal, for instance, with the fact that he was found sitting in the passenger seat of a getaway car. He further elected not to subject himself to cross-examination."

This also weakens his case.[186] The court rejected the Applicant's reliance on *Dlamini*[187] to justify his refusal to testify at bail hearing, concluding that:

> "For these reasons, I do not believe that the State's case on the charges is weak to the extent that it [connotes] exceptional circumstances within the meanong of section 60(11) of the CPA. It must be borne in mind that section 60(11) requires the bail applicant to satisfy the the Court that exceptional crcumstances exist and must do so by 'adducing evidence'. This means that there was a burden on the Applicant in the present matter to adduce evidence to demonstrate that the State's case is weak. In my view the Applicant has failed to do so."[188]

(v) *S v Green* 2006 SACR 603 (SCA)

The two appellants were charged with robbery. On the day of the bail hearing, the defence counsel applied for access to the police docket for the purposes of a bail application. The court, relying on section 60(14) of the CPA, denied the application. In the SCA, counsel of the accused argued that the magistrates had erred in relying on certain aspects of the investigating officer's evidence as it was untruthful, furthermore, producing the video footage and statements relied upon would not have prejudiced the state's case.[189] The court did not agree with the approach of the magistrate and held that section 65(4) of the CPA compelled the court to court to adopt other reasoning.[190] Section 60(10) of the CPA and the decision in *Dlamini*[191] required the court adopt a more inquisitorial and proactive approach; a reasonable court should have realised that it lacked reliable and important information necessary to reach a decision.[192]The court was obliged by section 60(3) of the CPA to order that the appellants be

[185] Supra note 20.
[186] *Solomon v S* [2019] All SA 833 (WCC) 38 para 56.
[187] Supra note 20.
[188] *Solomon v S* op cit 64.
[189] *S v Green* 2006 SACR 603 (SCA) para22.
[190] S v Green op cit 23.
[191] *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
[192] Supra note 193.

granted access to the documents, but no order for bail was made; and the State was ordered to make available the video-footage and fingerprints.[193]

3.5 Concluding remarks

Incarcaration infringes a person's human right to liberty. However, this infringement is in these circumstances acceptable in an open and democratic society because it protects the liberty of other people. Although acceptable, this infringement must not be misused by our courts. In an attempt o strike a balance between the right of the accused to libery and the duty to protect public interet, our courts provide a more favourable alternative of bail to accused persons in certain instances.[194] The release of a suspect on bail secures a compromise between pre-trial detention of a suspect and the presumption of innocence. Furthermore, the purpose of bail is to strike a balance between the interests of society to combat crime and the liberty of an accused.

At all material times during all stages of trial, the court needs to take into account the best interests of society. This means the balancing the constitutional right of the accused with the constitutional rights of society as a whole. The onus on a person accused of a schedule 6 offence, to adducce evidence which shows that exceptional circumstances exist which warrant his or her release on bail, can be viewed as safeguarding the public's interest to combat crime. Schedule 6 offences are serious offences, and persons so accused, although not convicted, may pose a danger to society. Bail is not a right but a privilege which is in the descretion of the court.

The cases cited in paragraph 3.4 above support the view that access to the police docket docket at this stage is granted on a case-to-case basis as the circumstances warranting access to the police dockets differ. The accused needs to satify the court that refusal of access to the information contained in the police docket will infringe his constitutional rights, and has to illustate how his or her rights will be infringed. The arguments set by the accused must trump those set out by the prosecution. If the prosecution satisfies the court, that the accused does not need access to the docket to prepare his defence, the court will dismiss the application by the accused. When access is to the docket is granted, it is not unfettered.

[193] *S v Green* op cit 25.
[194] S35(1)(f).

CHAPTER 4: THE NATIONAL PROSECUTING AUTHORITY

4.1 Introduction

The general rule is that the police docket is made available to the requester once the investigation has been completed or has reached an advanced stage.[195] Access to the docket is granted in accordance with the provisions of the final Constitution of the Republic.[196] When performing its duties, the NPA is obliged to adhere to the Constitution as well as the rule of law.[197]

The National Prosecuting Authority replaced the office of the Attorney-General, which was incorporated in terms of the Attorney-General Act of 1992. Although not referred to directly, the NPA is provided for under chapter 8 of the final Constitution, together with the judiciary. Chapter 8 refers to the prosecuting authority of the state, which is tasked with the administration of justice in the Republic.[198] The Constitution imposes a duty on the prosecuting authority to institute criminal proccedings against criminally accused persons on behalf of the state.[199]

A number of factors influence the decision to prosecute or not to prosecute an accused person, and the decision to do so lies solely with the NPA. [200]The decision of the NPA to prosecute or not to prosecute is fettered and subject to review.[201] If the prosecutor decides not to prosecute, s/he is required by statute to outline valid reasons to support his/her refusal; furthermore, in making this decision, the prosecutor needs to take into account public interest.[202] In establishing public interest, the prosecutor must consider factors such as the nature and seriousness of the

[195] Access to information manual of the National Prosecuting Authority of South Africa available at https://www.npa.gov.za/sites/default/files/resources/PAIA%20Manual%20for%20NPA.doc accessed on 17 August 2020 52
[196] Ibid.
[197] PG du Toit, GM Ferreira 'Reasons for prosecutorial decisions' (2015) 18:5 *Potchefstroom Electronic Law Journal* 1507.
[198] L Wolf 'Pre-and Post-trial equality in criminal Justice in the context of the separation of powers' (2011) 14:5 *Potchefstroom Electronic Law Journal* 73.
[199] S 179(2) of the Constitution.
[200] Supra note 195.
[201] Ibid.
[202] Ibid.

crime, the interests of the victim and the broader community, the circumstances of the offender and the prosecution of corruption.[203]

4.2 Duty of the National Prosecuting Authority to litigate

It is imperative that at all material times the prosecutor acts in the best interest of society. The best interests of society do not necessarily mean the best wishes of society.[204] The decision to prosecute can affect not only accused person, but their families, victims, witnesses and society as a whole,[205] thus indicating the delicacy of the prosecution process and why the prosecution of an accused must be undertaken with absolute care, free of corruption and prejudice.There is no obligatory rule which compels the NPA to prosecute all cases brought to its attention. "As an organ of state the NPA must give effect to the laws of the country; as an instrument of justice it must, in accordance with its constitutional obligation, exercise its prosecutorial functions independently without fear, favour or prejudice."[206]The Constitution provides for the drafting of a prosecuting policy which must be observed by the prosecution process.

The accused may be entitled to access to the relevant parts of the police docket even when the particulars furnished to him may be considered sufficient to enable the accused to understand the charge against him or her. The circumstances of a particular case may not enable the defence to prepare its case sufficiently, or to properly exercise its right to adduce and challenge evidence; or to identify witnesses able to contradict the assertions made by the State witnesses; etc, if the accused is not granted access to the information in the police docket.[207] To determine whether or not disclosure is necessary for a fair trial, the state has to consider factors such as:

> "the simplicity of the case, either on the law or on the facts or both; the degree of particularity furnished in the indictment or the summary of substantial facts in terms of section 144 of the Criminal Procedure Act; the particulars furnished pursuant to section 87 of

[203]National Prosecuting Authority 'Prosecution Policy' available at https://www.npa.gov.za/sites/default/files/Library/Prosecution%20Policy%20%28Final%20as%20Revised%20in%20June%202013.%2027%20Nov%202014%29.pdf accessed on 10 January 2020 7.
[204] Ibid at 4.
[205] Ibid at 5
[206] Ibid at 2.
[207] JP Nordier 'Aspirant Prosecutor Programme study guide: entry examination 2020' available at https://www.npa.gov.za/sites/default/files/Aspirant%20Prosecutor%20Programme%20Study%20Guide%20Entry%20Examination%202020.pdf accessed on 20 August 2020 29.

> the Criminal Procedure Act; the details of the charge read with such particulars in the Regional and District Courts, might be such as to justify the denial of such access."[208]

The November 1999 policy directives stipulate that a defence application for access to the police docket should be in writing and made directly to the office of the prosecutor prosecuting the case.[209] The defence is normally afforded access only to section A of the docket. Applications for access to section(s) B and C of the docket are normally refused, however, the accused may make an application to court for access to these sections.[210] The NPA may deny the request to access this information where there is a real risk that:

> "the identity of an informer may be disclosed; state secrets may be revealed; the ends of justice may be defeated; investigating techniques may be disclosed; state witnesses may be intimidated; investigating techniques may be disclosed; confidential cooperation between police forces may be compromised or revealed."[211]

Refusal by the NPA to prosecute must be written in the police docket. Refusal to grant bail can be said to be in the interest of justice where any of the grounds referred to in section 60(4)(a)-(e) is present[212] The prosecutor bears the duty to entertain questions from interested parties, arising from refusal to prosecute. What constitutes a legitimate question is dependant on the circumstances of each case. When information is required from the prosecuting authority, it is imperative that the provisions of the Promotion Access of Information Act be acknowledged.[213] Section 39 of PAIA provides for refusal of information in cases where the prosecution of the accused person is being prepared or is about to commence.[214] Refusal of the request of access to information under the PAIA is said to be valid in instances where

> "such disclosure is reasonably expected to prejudice the investigation of a contravention of the law, reveal the identify of a confidential source of information in relation to the enforcement or administration of the law, result in the intimidation or coercion of a witness in criminal or other proceedings to enforce the law, prejudice or impair the fairness of a trial or the impartiality of an adjudication."[215]

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[208] JP Nordier op cit 28.
[209] Access to information manual of the National Prosecuting Authority of South Africa available at https://www.npa.gov.za/sites/default/files/resources/PAIA%20Manual%20for%20NPA.doc accessed on 17 August 2020 51.
[210] Supra note 200.
[211] Supra note 200.
[212] Criminal Procedure Act 51 of 1977
[213] PG du Toit, GM Ferreira 'Reasons for prosecutorial decisions' (2015) 18:5 *Potchefstroom Electronic Law Journal* 1512.
[214] Promotion of Access to information Act 2 of 2000.
[215] PG Du Toit, GM Ferreira op cit 1513.

PAIA requires that the decision to refuse access to information to be reasonable.[216] Reasonableness depends on the circumstances of each case and the final descision lies with the courts. There must be a differentiation between the reason for refusal of access to information and reasons for the decision to prosecute.[217]

PAIA provides for judicial review.[218] In the case of *National Director of Public Prosecutions v Freedom Under Law,*[219] the Supreme Court of Appeal held that

> "the decision to prosecute or not to prosecute were the same genus and that, although on the purely textual interpretation the exclusion in PAIA is limited to the former, it must be understood to incorporate the latter as well."

Gorvan J held in *Boysen v Acting National Director of Public Prosecutions and others*[220] that

> "the level of disclosure of the NDPP for offences cannot be such as to prejudice the state in its conduct of a future trial. It will therefrore not require an exacting or exhaustive level of dislosure. Furthermore it is not necessary for the state to disclose every detail of its case, evidence or strategy which does not form part of the criminal discovery process."

Whilst the court did not make a positive finding on the level of diclosure necessary to successfully meet an application for review, it pointed out that it can be determined on a case by case basis.

The SCA in *Minister of Police v Du Plessis*[221] held that:

> "Notwithstanding the onerous task prosecutors face, their function is not only to place a matter on roll and prolong prosecution. It is the duty of the prosecutor to pay attention to the contents of the docket, to act objectively, and to protect public interest."

The accused is said to not have the right to consult with state witnesses if they themselves object to such consultation, or if the state can prove that it has reasonable grounds to believe such consultation might lead to the intimidation of the witness or a tampering with the witness's evidence, or that it might lead to the disclosure of state secrets or the identity of informers, or that it might otherwise prejudice the proper ends of justice.[222] However, ultimately, the discretion to grant or refuse such consultation rests on the court.[223]

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[216] Ibid.
[217] Ibid.
[218] Section 6 of the Promotion of Access to Information Act 2 of 2000.
[219] *National Director of Public Prosecutions v Freedom Under Law* 2014 2 SACR 107 (SCA).
[220] *Boysen v Acting National Director of Public Prosecutions and others* 2014 2 SACR 556 (KZD) para 38.
[221] *Minister of Police v Du Plessis* 2014 1 SACR 217 (SCA) para 34.
[222] Supra note 212.
[223] Ibid.

In the case of *Du Toit v Ntshingila*,[224] the accused was charged with possession of child pornography in violation of the Children's Act 38 of 2005. The accused requested in the court a quo to he be granted access to the pornographic material seized at in his home. After the review and setting aside of the magistrates court' decision, by the high court, to dismiss the accused's application to be furnished with copies of images of child pornography he was found possession of, the both the accused and the prosecutor were granted leave to appeal to the Supreme Court of Appeal. The accused did not prosecute his appeal and as a result, it lapsed. Appearing before the SCA, the DPP unopposed, requested the court to outline the correctness of the high court's decision to set aside the magistrate's court decision in which the prosecutor was given the right to refuse to furnish the accused with copies of the images constituting the charge. In deciding this case, the SCA saw it invaluable to outline reasons from diverting from normal procedure to furnish the accused with the requested information.[225] The court pointed out that it was imperative that it makes reference to the provisions of section 28(2) of the Constitution, which puts first the best interest of the child, as well as section(s) 10, 12, and 15 of the Children's Act[226]furthermore, the court referred to article 3(1) of the UNCRC[227] as well as article (1) of the ACRW[228] which holds South Africa countable to the international community. The SCA submitted that there existed in this case, the reasonable privacy interests of children who were depicted in the pornographic images.[229] Consequential to the rising rate of child pornography in South Africa, the court felt that it was in public's interest to ensure no duplication or distribution occurs during the disclosure process than was reasonably necessary to satisfy the accused's section 35(3) Constitutional right which was limited by section 36.[230]The court held that the state must be allowed to utilize its discretion to protect public interest by commission of further crimes which were likely to occur if the accused was furnished with these images without proper safeguards in place. In concluding, the SCA held that consequent to other conflicting rights at stake, the balance would be achieved by affording an opportunity for private viewing as opposed to

[224] *Du Toit v Ntshinghila* (733/2015) [2016] ZASCA 15 (11 March 2016)
[225] D*u Toit v Ntshinghila* (733/2015) [2016] ZASCA 15 (11 March 2016) *para 11,12, and 13.*
[226] Children's Act 38 of 2005.
[227] United Nations Convention on the Rights of the child, 1989.
[228] African Charter on the Rights and Welfare of the Child, 1990.
[229] D*u Toit v Ntshingila op cit* 13.
[230] D*u Toit v Ntshingila op cit* 18.

making copies[231]. The order of the high court was set aside and the accused's application dismissed.[232]

4.3 Regulation of National Prosecuting Authority

Section 33 of the 1996 Constitution affords everyone the right to just administrative action. The Promotion of Administrative Justice Act 3 of 2000 excludes a decision to prosecute from the definition of administrative action.[233] This does not preclude the requirement that decision to prosecute or not must be accompanied by valid reasons. In *R v Gill*[234], the court stated that the submission of the reasons supporting the decision to prosecute or not to prosecute enhanced the transparency of the prosecutor's decision-making process, thus rendering fairness to the proceedings. The giving of reasons enhances efficiency and fairness of the prosecution process.

When instituting court proceedings, the prosecutor is required to ensure that all accused persons are treated equally. In addition, the prosecutor must not deny the accused access to the courts by granting arbitrary *nolle prosequis.*[235] The prosecuting authority is cautioned against overstepping the bounds of the powers vested in it by the Constitution and the National Prosecuting Act.[236] Though the PAIA, read together with section 32 of the final Constitution, would prove useful to any person requesting access to information, the NPA PAIA manual submits that access to information in police dockets, preparatory examination records and certain statements made to peace officers are provided for by other legislation. Thus, the use of the Access to Information Act to access these documents is not necessary.[237]

Section 179(2) of the Constitution grants the prosecuting authority the power to institute criminal proceeding s on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. When studying the scope of the authority of the NPA,

[231] *Du Toit v Ntshingila op cit* 19.
[232]Ibid.
[233] S 1 of the Promotion of Administrative Justice Act 3 of 2000.
[234] *R v Gill* 2012 ONCA 607 para75.
[235] L Maqutu 'When the judiciary flouts separation of powers: Attenuating the credibility of the National Prosecuting Authority' (2015) 18:7 *Potchefstroom Electronic Law Journal* 2675.
[236] L Wolf 'Pre-and Post-trial equality in criminal Justice in the context of the separation of powers' (2011) 14(5) *Potchefstroom Electronic Law Journal* 65.
[237] Supra note 214.

section 2 of the Constitution becomes vital.[238] This section gives rise to three implications, first, that all other laws are subordinate to the Constitution; secondly, that any law or conduct that is not consistent with the Constitution is to the extent of its inconsistency invalid; and thirdly, when the Constitution bestows authority on a person or institution, all the powers flowing from that authority must be cosistent with the provisions of the Constitution.

The ambit of section 179(4) of the Constitution goes beyond the mere functional independence of the prosecuting authority as it demands that prosecutors exercise their power without fear, favour or prejudice. This satisfies the requirement that all persons be treated equally under the law,[239] as well as the submission that the NPA is an independent organ and does not conform to "outside" pressures.[240] However, section 179(1)(a) increases the uncertainty about the independence of the prosecuting autthority as it provides for appointment of the National Director of the Prosecuting Authority by the President of the Republic.

4.5 Concluding remarks

The NPA, as the "motherbody" of all the prosecutors in the republic, is responsible for prosecuting criminal cases on behalf of the state. Although its incorporation is provided for in the Consitution and it is accountable to Parliament, the NPA is independent. Its independence demonstrates its trustworthiness to the public. The NPA has the authority to prosecute anyone including members of the executive and the judiciary. This assures the public that no one is above the law by affording everyone equal treatment. Prosecuting cases with minimal evidence is a misuse of the taxpayers money and as a result not in the best interest of society.

The Constitution has affirmed the right of an accused to relevant information held by the state.[241] This right has been given further definition by the Promotion of Access to

[238] Section 2 of the Constitution provides that "This Constitution is the Supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".
[239] Section 9(1) of the final Constitution: Everyone is equal before the law and has the right to equal protection and benefit of the law.
[240] Section 179(5) of the final Constitution.
[241] Section 32

Information Act. The state may refuse disclosure of witness statements if access to that section of the police docket is not necessary for a fair trial.[242] Zeffertt calls the turbulence surrounding the privilege "the collision between the fundamental rights embodied within the privilege and the right that every person has of access to any information held by the state."[243]

Pursuing cases with no feasible chance of a conviction impact negatively on the way the public views the justice system. The power of the NPA to prosecute criminal cases is regulated by section 179 of the Constitution and the National Prosecuting Authority Act. Whenever a prosecutor refuses to prosecute a case, he or she must provide written reasons that support the decision. It is important to note that what is in the best interets of the public is not always what the the public wants. So in making this decision, the prosecuting authority must favour the values of fairness and the safety of society over popularity. The accountability of the NPA to the public extends also to the accused; thus the NPA is not there to persecute the accused but to provide for that a fair and proper verdict with the hopes of rehabilitating the accused if found guilty.

[242] JP Nordier 'Aspirant Prosecutor Programme study guide: entry examination 2020' available at https://www.npa.gov.za/sites/default/files/Aspirant%20Prosecutor%20Programme%20Study%20Guide%20Entry%20Examination%202020.pdf accessed on 20 August 2020 28

[243] Supra note 212.

CHAPTER 5: THE RIGHT OF ACCESS TO POLICE DOCKETS IN INTERNATIONAL LAW AND FOREIGN JUSRISDICTIONS

5.1 Introduction

The provisions of section (s) 39,231,232, and 233 of the final Constitution stress the importance of adhering to international law.[244] Section 39 requires international law be considered whenever a right in the Bill of Rights is up for interpretation. The requirement pushes that in these instances, an interpretation which is in line with internationally accepted standards be preferred on condition that the same interpretation adheres to domestic law. Our courts, are as a matter of principle, not required to consider foreign case law. However, foreign case law may be used as point of reference which may influence which ever decision our courts reach. An interpretation which favours the fundamental values of our Constitution is favourable at all material times as this will ensure equal treatment of all South African citizens.

Section 231 of the final Constitution accepts international negotiation as well as the incorporation of international agreements into our domestic law.[245] The duty to negotiate and enter into international agreements on behalf of the state rests on the National Executive. The way international agreements are incorporated into our law varies. Agreements which are of an administrative, executory, or technical nature become binding on the Republic once they

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[244] Section 39(1) of the Constitution states that
"When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."
Section 231 of the Constitution states that
" (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3); (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament; (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."
Section 232 of the Constitution stipulates that
"Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."
Section 233 of the Constitution states that
"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[245] MD Stubbs 'Three-level games: Thoughts on Glenister, Scaw and international law' (2011) 4 Constitutional Court Review 141.

have been approved by resolution in both the National Assembly and the National Council of Provinces.[246] An international agreement has domestic effect when it has been enacted.[247] Our courts must adhere to the requirements of section 39 of the final Constitution. In fulfilling this requirement, the courts must consider all relevant international norms. This has led the courts to rely on the positions of the UDHR and the ICCPR , amongst others, to reinforce their position on a particular issue.[248] De Wet submits that the willingness to place the Constitution above the international law was implied in the case of *Sonderup v. Tondelli* 2001 (1) SA 1171 (CC), 27. In this case, the court was reluctant to ascertain international law in a thorough and proper manner and then reconcile with the Constitution.[249] De Wet argues that in practice, the courts use both international human rights law and soft law whenever the Bill of Rights are up for interpretation.[250]

The South African Constitution adopts a dualist approach of international law with certain monist traits. South Africa's strong reliance on international human rights law is because of the Bill of Rights, found both the 1993 and 1996 Constitutions, which guarantees South African citizens' rights which are recognised and protected by international law. Unlike the 1993 Constitution, the final Constitution protects not only civil and political rights, but economic and social rights too. Various steps were taken to ensure that the Bill of Rights complied with international standards, particularly, the ICCPR and the ICESCR. The final Constitution reflects the Republic's indebtedness to international law.

The Constitutional Court has accepted the obligation that section 39(1)(b) places on our courts, tribunals, and forums. Langa J acknowledges how international law may positively influence our domestic law, and in the same manner transform legal arguments and set new precedence. In *S v Williams*, he says:

> "While our ultimate definition of these concepts must necessarily reflect our own experience and contemporary circumstances as the South African community, there is no disputing that

[246]Ibid.
[247] Ibid.
[248] E De Wet 'The "Friendly but Cautious" Reception of International Law in the Jurisprudence of the South African Constitutional Court: Some Critical Remarks' (2001) 28:6 Fordham International Law Journal 1534.
[249] E De Wet op cit 1558.
[250]E De Wet op cit 1564.

valuable insights may be gained from the manner in which the concepts are dealt with in public international law as well as in foreign case law." [251].

5.2 The influence of international law on South African jurisprudence regarding the right to a fair trial.

The Constitution mandates the consideration of international law.[252] In addition, it provides for the assimilation of international law into domestic law.[253] This supports the submission that international law forms part the foundation of the drafting of South African legislation. The exact meaning of the requirement that the courts or tribunal must consider international law has resulted in several dissenting judgments. The case of *Glenister v President of the Republic of South Africa and Others*[254] raised three major questions with regards to the observation of international law:

1. "What is meant by must consider international law?
2. What kind of arguments can and must be made in terms of international law when settling Bill of Rights disputes?
3. Did the court use international law in a satisfactory manner in the *Glenister* case?"[255]

5.3 International conventions and treaties

Prior to the Council of Europe adopting the Convention on Access to Official Documents in 2009, international human rights instruments did not explicitly provide for the protection of the right to information.[256] Despite the slow acceptance and development of the right to information, the UN Human Rights Committee, European Court of Human Rights, Inter-American Court of Human Rights, and the European Committee on Social Rights now recognise the existence of a right to information in some cases[257] in recognition of the need to safeguard civil, political, social and economic rights. [258]

[251] *S v Williams* 1995 7 BCLR 1382 (CC) para 23.
[252] S 39(1) (c) of the Constitution.
[253] Section 231(4) of the Constitution.
[254] *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6, 2011 (3) SA 347 (CC).
[255] Ibid.
[256] M McDonagh 'The right to information in International Human Rights *Law' Human Rights Law Review* 13:1 28.
[257] Ibid.
[258] M McDonagh op cit 29.

At international level, the right to freedom of expression has been regarded as forming the foundation of the right to information.[259] Access to information is said to be the precondition for freedom of expression. The right not only covers information which the person voluntarily gives to the claimant, but information which either government or a third party wishes to keep private.[260] Enjoyment of the right to freedom of expression is dependant to access to information. One can argue that it is almost impossible to comment and argue a point without having all the facts. Educated opinions are impossible without research, with full information of the issue at hand. Hence the refusal of access to information infringes the right to freedom of expression. The right to freedom of expression as well as the right to freedom of information have long been international human rights concerns.[261]

The United Nations Special Rapporteur on Freedom of Opinion and Freedom of Expression supports the recognition of the right to freedom of expression in the International Covenant on Civil and Political Rights (ICCPR).[262] Article 19(2) of the Covenant[263] stipulates that

> "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media."

The article poses a positive obligation on states to ensure that people are granted access to information, including information in the possession of the state.[264] In a nutshell, article 19 of the ICCPR embodies the right of access to information which I would submit would be applicable to matters relating to the right to a fair trial and consequentially access to the police docket. International standards support the right to freedom of information only from a general point of view. The right is deduced from the expression "to see and receive information" as stipulated in Article 19 of both the UDHR and ICCPR. Article 14 of the ICCPR supports the right to a fair trial, which includes access to information by persons accused of a criminal offence. The right to information is not unfettered and must conform to the requirement of General Comment No 34.[265]

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[259] Ibid
[260] Ibid.
[261]Ibid.
[262]Ibid.
[263]Article 19(3) International Covenant on Civil and Political Rights.
[264]Ibid.
[265]M McDonagh 'The right to information in International Human Rights Law' Human Rights Law Review (2013) 13:1 31.

The right to a fair trial is a mutually recognised and accepted civil and political right protected by all highly regarded human rights treaties.[266] In the 1990s, Weeramantry anticipated that the right to a fair trial would form the foundation of the right to information. He described this right as being "dependant on information relating to the charges against the accused and the evidence on which they are based".[267]

I am of the view that Weeramantry's anticipation has happened. It is almost impossible to honestly say that an accused person has been afforded a fair trial when he or she cannot have access to the necessary information to prove innocence. Information is an important aspect of any legal argument. As much as information is vital to the prosecution to prove guilt beyond reasonable doubt, the information is invaluable to the defence for it to disprove whatever facts the prosecution gives on behalf of the state. The international agreements' recognition of these rights highlights their importance as rights afforded to all human beings despite crimes one is accused of committing.

In the case of *McGinley and Egan v. United Kingdom*[268] the European Court acknowledged the dependent relationship between the right to a fair trial and the right to information. The applicants submitted that

> "as a result of non-disclosure of portions of their military medical records and the records of radiation levels they had been denied effective access to a court in violation of the right to a fair trial contained in Article 6 of the Convention. Furthermore, interference with the right to a fair trial could arise if it the respondent State had, without good cause, prevented the applicants from gaining access to, or falsely denied the existence of, documents in its possession which could have assisted them in establishing that they had been exposed to dangerous levels of radiation, this would have been to deny them a fair hearing in violation of Article 6 (1)".[269]

The case of *Claude Reyes v Chile,*[270] came about because of a submission of a request to access information relating to a deforestation project which the Committee on Foreign Investment was petitioned to submit. In handing down its judgement, the Inter-American Court of Human Rights stipulated that

> "the right to a fair trial in the American Convention on Human Rights was violated, inter alia, by the failure of an administrative body to justify the withholding of information. Furthermore,

[266]M McDonagh op cit 42.
[267]Ibid.
[268]*McGinley and Egan v United Kingdom* 2000-I; 27 EHRR 1.
[269] Supra note 268.
[270]*Reyes v Chile* IACtHR Series C (2006).

> Chile violated the rights to freedom of expression, due process, and judicial protection by refusing the applicants' request to State-held information without legal bases and without providing a justified decision in writing explaining the reasons for the refusal. The refusal of the body was neither written nor justified."[271]

As with any other right provided for in any international instrument, the right to information is not absolute and may be restricted in certain circumstances.[272] However, in general terms, a person may be able to invoke the right to information where the information is required to institute or defend legal proceedings or where the information is needed to save a life; where the information is needed to improve social and economic rights; and where the request is for private interest.[273] Rights contained in conventions may be invoked by particular group(s) of people as stipulated in the given instrument.[274]

5.4 The right of access to police dockets in other Anglo-American jurisdictions

One of the challenges posed by apartheid was that South Africa's indigenous jurisprudence had so many "blanks" that there is not much to go on. This meant that as the Republic transitioned into Constitutional democracy, there was no reliable precedence the courts could use when making decisions. The courts have stressed that although we can derive aid from foreign case law as well as international law, we are not bound to follow it.[275]Foreign law has been said to play a persuasive role rather than a binding one. The Constitutional Court has approached foreign case law as a storehouse of principles that can be raided to offer guidance where it is considered proper.[276]In *S v Makwanyane*, Chaskalson J observed: "Comparative birth of rights jurisprudence will no doubt be of importance, particularly in the early stages of the transition where there is no developed indigenous jurisprudence in this branch of law on which to draw."[277]The South African Constitution is at large based Canadian Charter of Rights and Freedom, with a bit of German and USA influence.[278] All three Constitutions have contributed significantly in the outlining the operation of the rights contained in our final

[271]Supra note 269.
[272]M McDonagh op cit 45.
[273] Ibid.
[274] M McDonagh op cit 46.
[275] DM Davis 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' (2003) 1:2 *International Journal of Constitutional Law* 190.
[276] DM Davis op cit 189.
[277] Ibid.
[278] DM Davis op cit 187.

Constitution, especially during the first few years into the Constitutional era. South African courts have made extensive references to comparative law as an important source of persuasive authority, even before both the interim and final Constitutions. The role played by the United States of America and Canada in our transition from parliamentary sovereignty to constitutional democracy as well as their influence on our Constitution warrant their use for comparative purposes in this study.

5.4.1 United States

In *Jencks v United States*[279] the Supreme Court ruled in favour of the accused's right to obtain confidential statements by government witnesses in federal prosecutions, furthermore, upon motion the defendant was entitled to an order commanding the prosecution to grant the accused access to all materials and information relevant to his case.[280]The case does not demarcate the scope of the right to discovery and this has resulted in opposing opinions by lower courts. The ensuing Act was designed to protect the rights of both the criminally accused and the confidential information in the government's possession.[281]

Determining the correct time or stage at which an accused person may access police dockets is referred to as a crucial aspect of criminal discovery.[282] This aspect is a vital part of the criminal proceedings. The Jencks's Act enacted in 1957 grants federal court defendants the right to be given access to the statements made by a state witness only after the witness has testified in court at trial.[283] This however applies to certain states; other states allow access at different stages of the judicial process.[284]The Fifth Amendment to the United States Constitution protects the accused person from double jeopardy and self-incrimination.[285]The Amendment stipulates that: "no person shall be held to answer for a capital, or otherwise infamous crime, nor shall be compelled in any criminal case to be a witness against himself."[286] Common law held no right to discovery to a name or prosecution witness. Criminal discovery originated in

[279]*Jencks v United States* 353 U.S 657 (1957).
[280] S Fleming op cit 476.
[281] Ibid.
[282]S Fleming op cit 471.
[283]M McDonagh op cit 29.
[284]S Fleming op cit 472.
[285] Fifth Amendment available at https://www.law.cornell.edu/constitution/fifth_amendment accessed on 22 August 2020.
[286] Ibid.

England in the late 19th century and early 20th century. Prior to 1957, criminal discovery in the US was governed by appellate court decisions, and the judiciary was tasked by a number of states with the duty to regulate criminal discovery.[287] Criminal discovery was faced with a number of opposing views. Some claimed that criminal discovery prevented "honest" fact finding; discovery of the identity of a witness by the accused or his accomplices may lead to bribery and even worse, intimidation.[288] Other opponents were of the view that the right to silence coupled with the burden of proof being on the prosecution were already an added advantage to the defendant, and that access to the evidence of the prosecution would only obstruct prosecution.[289] Another submission was that discovery might be misused to "forge" a defence.[290] Advocates for the right argued that protective orders as well as sanctions by trial courts would issue in cases where secrecy is justified. In addition, they argued that criminal defendants who faced prison sentences had to be granted similar rights to those afforded to persons in civil cases.[291] Furthermore, the presumption of innocence demanded discovery in criminal cases. Their final argument was that pre-trial discovery would conserve the court's time on the accused's plea as well as the issues in dispute.[292]

In the case of *United States v Algie*[293], the Eastern District of Kentucky eased the literal time requirements of the Jencks Act and ordered testimony disclosure of government witness statements. The Sixth Circuit Court of Appeals reversed the order of the district court.[294]The presiding officer in this court pointed out that the Jencks Act must be read in *pari materia* with the Federal Rules of Evidence[295] as well as other functions of Congress.

In *Brady v Maryland*[296] the court held that the duty to disclose was limited only to the disclosure of material evidence. The *Brady* doctrine was accessed based on whether the disclosure of the individual piece of evidence created a reasonable probability of a different outcome at trial.

[287]Supra note 220.
[288]S Fleming op cit 473.
[289] S Fleming op cit 474.
[290]Ibid.
[291]Supra note 282.
[292]Supra note 230.
[293]*United States v. Algie* 503 F.Supp.783.
[294] S Fleming op cit 478.
[295]Federal Rules of Evidence 102,403, and 611(a).
[296] *Brady v Maryland* 373 U.S. 83 (1963) ARTICLE

The doctrine required prosecutors to access the materiality of evidence before trial, a task which was virtually impossible to conduct.[297]

In *Brady v. Maryland*,[298] the Court attempted to ensure that accused persons received a fair trial by instructing the prosecutor to disclose evidence to the accused evidence that may assist his case. This approach created what is now referred to as the "Brady Rule".[299]The rule affords an accused the constitutional right of disclosure of exculpatory evidence that is material to guilt or punishment.[300] Prior to Brady, courts focused on the misconduct of prosecutors and not the effect of that conduct on the accused. In this case, the court held that "suppression by the prosecution of evidence favourable evidence violated Brady's rights under the Due Process Clause of the Fourteenth Amendment."[301] This case has led to an increasing constitutional duty on the prosecutor to disclose.

The U.S court system proves to be complex and diverse as different states observe slightly different procedures. The Federal Court criminal process observes a more uniform structure. The United States attorneys bring Federal cases. Federal magistrate judges hear initial matters in federal cases but do not usually decide cases.[302] Grand juries to charge the defendant are needed in a federal felony case unless the defendant waives the grand jury indictment.[303]During the process of discovery, the prosecutor must supply to the defendant copies of materials and evidence that the prosecution intends to use at trial. This process continues until the time of trial; thus, the prosecutor is obliged to continue to provide to the defendant documents and any information relating to the case.[304] Failure to do so may lead to a fine or sanctions by the court against the prosecutor. In addition, the prosecutor must provide the defendant with exculpatory evidence.[305]

[297] LM Kurcias 'Prosecutor's Duty to Disclose Exculpatory Evidence' (2000) 69:3 Fordham Law Review 1213.
[298] Ibid.
[299] Ibid.
[300] Ibid.
[301] LM Kurcias op cit 1214.
[302] Steps in the Federal Criminal Process available at https://www.justice.gov/usao/justice-101/steps-federal-criminal-process accessed on 15 January 2020.
[303] Discovery available at https://www.justice.gov/usao/justice-101/discovery accessed on 15 January 2020..
[304] Ibid.
[305] Ibid.

5.4.2 Canada

In 1974, the Canadian Law Reform Commission publicized a Working Paper titled 'Criminal Procedure Discovery' and thereafter a report in 1984 titled 'Disclosure by the Prosecution'. Envisaged in both these papers was a recommendation that the legislature draft laws that would regulate disclosure by the Crown.[306]The case of *R v Stinchcombe*[307], decided in 1991 by the Canadian Supreme Court, is considered a landmark case. In its judgement, the court alludes that:

> "disclosure of material by the Crown to the defence has, before that judgement, been taking place on a voluntary basis and the extent of the disclosure varied from province to province, from jurisdiction to jurisdiction and from prosecutor to prosecutor."[308]

The court held that section 7 of the Canadian Charter of Rights and Freedoms requires that an accused be afforded an opportunity to make full answer and defence. Furthermore, the accused's right to make full answer and defence will be infringed if the accused is denied full disclosure of all material by the Crown.[309]Section 11 of the Canadian Charter of Rights and Freedoms provides that "any person charged with an offence has the right (c) not to be compelled to be a witness in proceedings against that person in respect of the offence." This right in Canadian law does not apply to a person who is not charged in the case before court; such person is obliged to testify if subpoenaed but his testimony may not be used against him in another case.[310]

The Access to Information Act states that the primary purpose of Part 1 of this Act is to afford persons the right to information contained in records under the command of any government institution in accordance with the principle that information which the government is in possession of should be made available to the public.[311] Exception to this right should be limited and specific.[312] Section 4 (1) of the Right to Access to Information Act states that

> "notwithstanding any other Act of Parliament, every person who is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee

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[306] University of South Africa 'The right of access by the defence to information contained in police docket' available at http://uir.unisa.ac.za/bitstream/handle/10500/19561/Joubert__JJ__0869819380__Section3. accessed on 1 December 2019 74.
[307] *R v Stinchcombe* 68 CCC (3d).
[308]Supra note 304.
[309] Ibid.
[310] S 13 of Charter of Rights and Freedoms.
[311] S 2 of the Access to Information Act R.S.C., 1985, c. A-1.
[312] Supra note 230.

> Protection Act has a right to and shall, on request, be given access to any record under the control of a government institution."

The decision to prosecute or not to prosecute is regarded as an especially weighty decision which the Crown counsel must make. Each case must be dealt with on its own merits. Failure to prosecute a case with ample evidence and prosecuting a case without prospects of securing a conviction may lead to a loss of confidence in the criminal justice system.[313]Section 3(3)(a) of the Director of Public Prosecutions Act[314] entitles the DPP to commence and administer prosecutions. The DPP delegates its duties to federal prosecutors whose function is act on behalf of the DPP when making a decision to prosecute, counsel for the Crown ensures that all prosecutions pursued are based on evidence and public interest.[315]

The accused is intended to obtain details of the charge at his first court appearance in a criminal court, and the prosecutor is obliged to disclose all the information he or she intends on using at trial in advance, regardless of whether or not they assist the case of the defence.[316] Evidence in the possesion of the state that proves the accused's innocence must also be disclosed.[317] The "disclosure package" usually consists of the police or other witness statements, surveillance videos, photographs or any type of evidence that relates to the case. If this information is not available at the first appearance, the accused will have to return to court to obtain such information from the prosecutor. [318]

5.5 Concluding remarks

South Africa is party to numerous international agreements. These agreements are of a binding nature and require that they be incorporated into our domestic law. Per such incorporation, we are bound to adhere to the provisions of such agreements. Sections 231, 232 and 233 of the 1996 Constitution speak to our responsibility as a country to adhere to international law. Customary international law is prima facie law in the Republic, unless inconsistent with either the Constitution of an Act of Parliament.[319] When read together, section(s) 39, 231,232, and 233 of the final Constitution outline the importance as well as the

[313] Public Prosecution in Canada 'Decision to Prosecute' available at https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch03.html accessed on 20 January 2020.
[314] Director of Public Prosecutions Act, SC 2006, C 9.
[315] Supra note 310.
[316] Understanding criminal courts in Canada available at https://www.danielbrownlaw.ca/legal-commentary/faq/criminal-court-procedure-toronto/ accessed on 15 January 2020.
[317] Understanding criminal courts in Canada available at https://www.danielbrownlaw.ca/legal-commentary/faq/criminal-court-procedure-toronto/ accessed on 15 January 2020.
[318] Understanding criminal courts in Canada available at https://www.danielbrownlaw.ca/legal-commentary/faq/criminal-court-procedure-toronto/ accessed on 15 January 2020.
[319] S 232 of the final Constitution

influence of international law on our domestic law. The requirement of adhering to international law ensures that legal decisions made by our courts are of the same standard as those in the international community. This standard recognises human rights which, in my view, supports the fundamental values of our country and legal system.

Incorporation of international law, which is in line with the current Constitution, promotes interconnectedness between South Africa and other nations. It allows the nation to incorporate laws which are universally accepted as being humane, fair and reasonable. The right to remain silent, though not specifically stated,[320] may be inferred from both the right against self-incrimination and the prohibition against torture and ill-treatment[321] in accordance with the right not to be compelled to make a confession or admission. Even though the right to remain silent and the right against being compelled to make an incriminating statement flow from the same notion, their impacts may differ.[322] Under the Anglo-American system, the "tradition" is that prosecutors operate under the minister of justice but are afforded functional independence.[323] It is no secret that the South African Constitution is based on the Constitution of Canada. As a result, the provisons of the Constitution and ensuing legislation are similar. [324]

The United States uses a jury system, while in the South Africa, the presiding officer decides cases. The United States and Canada have procedures which are different to those of South Africa; however the rules of discovery apply in all three jurisdictions. In all three states, the accused is afforded the right to the witness statements and all evidence which is in the possession of the state. The US takes it a step further by requiring that the state provide the defendant with exculpatory evidence. Canada provides that the information be provided to the accused on first appearance. In South Africa, the right is not automatic; as in the other two jurisdictions, the accused must make an application to court to be granted access if the prosecutor fails or refuses to grant access.

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[320] N Steytler 'Constitutional Criminal Procedure' *A commentary on the Constitution of the Republic of South Africa, 1996* Butterworths (1998) 110.
[321]Supra note 37.
[322] N Steytler *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa 1996* Butterworths (1998) 112.
[323]L Wolf 'Pre-and Post-trial equality in criminal Justice in the context of the separation of powers' (2011) 14(5) *Potchefstroom Electronic Law Journal* 66.
[324] N Steytler *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa 1996* Butterworths (1998) 112.

CHAPTER 6: CONCLUSION AND RECOMENDATIONS

6.1 Conclusion

Under the Anglo-American system, the "tradition" is that prosecutors operate under the minister of justice but are afforded functional independence.[325] The 1996 Constitution interprets the role of the prosecutors as being more than in the field of litigation. Prosecutors are able to institute criminal proceedings on behalf of the state and they can carry out any necessary functions incidental to instituting criminal proceedings.[326] This section means that the moment the police docket is opened by the police, the case must be passed on to the prosecutors to oversee the process of investigation to prepare for trial.

The criminal processes in Canada and the United States ensure that the battle lines are timeously drawn in that the accused is aware of the charges and evidence against him or her. The duty is placed on the prosecutor to ensure that neither the state nor the defence enjoy an unfair advantage. In addition, this practice allows both the prosecution and the defence to confine arguments to facts in dispute and adduce evidence that is relevant to these facts, thus not wasting the court's time. These practices also display transparency and confidence on the part of the state. These two states observe and incorporate international law in their domestic law. Furthermore, that the goal is not to imprison any person who seems to deserve it, but to ensure that the correct person receives punishment fitting of the crime and to ensure safety of society.

In South Africa, the primary duty of the prosecution is to safeguard the rights of its people. The work of a prosecutor is not only litigation but also other processes consequent to it. Over and above that, the prosecutor has the duty to the public, whose interests they must take into account when deciding whether to prosecute a case.

In the 25 years since blanket docket privilege was rules unconstitutional by the Constitutional Court, little development of this right has occurred. The ability of an accused person to be informed of the detailed particulars of the charges brought against him, statements made by

[325] L Wolf op cit 66.
[326] S 179(2) of the Constitution.

witnesses as well as any and all evidence in the possession of the state is imperative for both trial and bail purposes. The Constitutional Court was very clear in ruling on access to the contents of the police docket for the purposes of trial, with the *caveat* that the right was not a free-for-all rights by giving courts the discretion to determine whether or not refusal of access to the docket infringed on the rights of the accused. By having to make a negative determination on the question, the odds against the accused are stacked a little higher. The court also deemed section 60(11) acceptable in an open and democratic society as it acted as a limitation on access.

The lack of precise legislation that specifically deals with the right of access poses difficulty in claiming this right. There are no precise statutory sections to rely on – only assorted case law and provisions in different legislation. The fact that the decision to grant the accused access to the docket lies with the court leads to inconsistency in judgments which are notionally unfair to the accused because access to the information is solely dependent on how a particular presiding officer interprets the statute and his or her general views on the right to access.

The arguments set forth previously on access at bail stage are clear and understandable. However, I would argue that there is little to no difference, except for time, between granting access at bail stage and granting access at trial. If the state has a compelling case against the accused, then whether the accused views the information contained in the police docket prior to the bail hearing poses no threat to the state's case. The courts should apply a subjective test when determining whether to grant the accused such access at this stage. Where there is no reasonable risk that access to the police docket may be prejudicial to the state's case then the accused must be granted access. Refusal only on the basis that the investigation has not reached climax or has not been completed is ludicrous and has the potential to prejudice the accused. The court has a duty to protect the accused's right to a fair trial and that right applies in bail hearings too. Consequential to backlog of cases in our courts and the overcrowding in our prisons, it would be advantageous to the state to use its discretion to release accused persons where the crimes one is accused of do not warrant him/her remaining in custody and where information in the docket would assist the accused in preparing for the bail hearing.

6.2 Recommendations

1. The court must approach every case subjectively to detemne whether the circumstancesof that paticular case warrant the furnishing of an accused with the information vontained ia police docket for the piiurposes of bail. To avoid granting an unfettered discetion to the presiding officers, the courts may develop a test to assist in determing whether the

accused must be granted access to the dockets, and to which parts thereof. Refusing access as a general rule may be prejudicial to the accused.

2. Accused persons must procedurally be afforded an opportutnity to examine the contents of the docket, even at bail stage, to enable the accused effectively convince the court that his release on bail will not in any way interfere with the case.

3. Where granting unfettered access will not be prejucicial to the case of the state, the accused must be granted access to the docket in its entirety. However, where there is a reasonable risk that unfettered access will be prejudicial, the accused must be granted access insofar as it is sufficient to satisfy requirements in section 35(3) of the final Constitution.

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