Chapter 51
Criminal Procedure: Rights of Arrested, Detained and Accused Persons

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51.1 A framework for criminal procedure rights:

(a) General

(i) Introduction
FC s 35 sets out the rights of arrested, detained and accused persons. These sections are therefore not limited to 'criminal procedure', but relate as well to the rights of detainees who are not arrested for criminal prosecution.

In the pre-constitutional era, due process of law in the criminal sphere was regulated by the provisions of the Criminal Procedure Act and by a body of common law principles constituting the procedural safeguards upon which an individual could rely as he or she passed through the criminal justice system. As far as internationally recognized rights of detainees were concerned, the process in pre-constitutional days was often far from 'due'. Part of the challenge of interpreting FC s 35, and one which has much troubled the courts, is determining to what extent the constitutionalization of criminal procedure rights should be regarded as having established rights which went unrecognized before, or as having imbued existing common law principles or statutory safeguards with new content, or as having merely accorded entrenched status to familiar principles and safeguards.

(ii) The due process wall

The reference to 'due process' as the rubric for criminal procedure rights introduces the problem of the proper conceptual and structural framework for criminal justice rights in the South African constitutional context. The criminal justice process constitutes an interference with the liberty of the subject by the state — from the framing of laws prohibiting conduct, to the arrest and detention of suspects, to the process of determining guilt, to passing and enforcing sentence, up to the restoration of the subject's liberty, either upon acquittal, or after the setting aside of a conviction, or after service of sentence, or on parole. It would seem, then,


2 Under the European Convention on Human Rights art 5, for example, lawful reasons for detention are conviction, arrest for non-compliance with a court order or to secure the fulfilment of a legal obligation, arrest on suspicion of having committed an offence, or when reasonably necessary to prevent the commission of an offence or to prevent flight after commission, the detention of minors for educational supervision or to be tried, the prevention of disease, the detention of the insane, alcoholics, drug addicts or vagrants, and the detention of illegal immigrants or those to be deported or extradited. The Constitutional Court has rejected the contention, under FC s 12, that the only 'just cause' for which a person could be imprisoned was the prevention or punishment of crime or possibly 'in the broader sense' where necessary for the maintenance of law and order, but not for any other non-punitive coercion. De Lange v Smuts NO & Others 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at paras 10-11 and 29-41.

3 Act 51 of 1977


that FC s 35 should be regarded as a specific instance of the right to freedom and security of the person, FC s 12, which includes the right not to be detained without trial. FC s 12 also embraces the right not to be deprived of freedom arbitrarily or without just cause.\(^6\)

If this were the approach adopted by our courts, FC s 12 would assume the character and status of a generic and residual due process right, which would operate independently and would inform the interpretation of all the rights contained in FC s 35. Recourse to American 'due process' and Canadian 'fundamental justice' jurisprudence would then be based upon a structural and conceptual similarity in analytical processes. South African courts could have then allowed for the transplantation of persuasive doctrines and principles with relatively little scope for foundational confusion. Furthermore, such common law rights or safeguards as were based upon this conceptual structure would then be easily assimilated into analyses of constitutional criminal procedure rights. It is therefore of cardinal importance to stress that the Constitutional Court has navigated, perhaps decisively, away from the course set out above. The cumulative effect of the judgments of the court in Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others,\(^7\) Nel v Le Roux NO & Others,\(^8\) and De Lange v Smuts NO & Others\(^9\) is to erect a conceptual wall between the right not to be arbitrarily deprived of liberty (FC s 12) and the rights of persons once detained, arrested or accused (FC s 35). This wall prevents 'due process' seepage from FC s 12 to FC s 35 respectively.\(^10\)

In order to understand the different structural relationships pertaining to criminal procedure rights and to due process deprivation of liberty in the South African constitutional framework, a brief look at the conceptual framework of 'due process', and at the relationship between liberty deprivation and criminal procedure rights, in the United States, Canada and Europe is warranted.

In the United States, where 'due process' constitutional jurisprudence was born, the relevant conceptual framework that has developed over the years can be attributed mainly to two factors: first, the fact that there is no general right to a 'fair trial' in any of the enumerated rights contained in the Bill of Rights requires 'due process' seepage from the Fifth or the Fourteenth Amendments into the enumerated rights pertaining to the criminal process contained in the Fourth, Fifth, Sixth, and Eighth Amendments in order that a general or residual fair trial right may operate around or within these latter Amendments. Secondly, the complicated interplay

\(^6\) FC s 12(1)(a).

\(^7\) 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)('Ferreira').

\(^8\) 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('Nel').

\(^9\) 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)('De Lange').

between the Fifth and Fourteenth Amendments, and the consequences for state, as opposed to federal, liability for interpreting the 'due process' clause with 'independent potency', cannot be underestimated as a factor which is as important to American due process jurisprudence as it is idiosyncratic.

In Canada, as in South Africa, there is a general 'fair trial' provision, albeit one less obviously accorded residual status than its South African counterpart. It is contained within a specifically enumerated 'fair trial' right, the right to be presumed innocent. Nevertheless, the Canadian courts have opted for 'due process' seepage from the provision in the Charter relating to deprivations of liberty 'in accordance with the principles of fundamental justice' (s 7) to the specifically enumerated criminal procedure rights found in ss 10 and 11 of the Charter. In other words, the Canadian equivalent to FC s 12(1)(a) is allowed to operate as a general 'due process' provision, with residual operation in the sphere of fair trial rights. In *Re BC Motor Vehicle Act* Lamer J held that the enumerated criminal justice rights in ss 8–14 of the Canadian Charter were merely 'illustrative' of the generic due process right contained in s 7.

Now, it may well be said that a provision requiring procedure according to the 'principles of fundamental justice' is more conducive to being interpreted as a generic or residual due process right to operate 'with independent potency' than one which either lays down no express procedural requirement at all (the right to freedom and security of the person in FC s 12) or refers merely to a 'trial' (the right not to be detained without trial in FC s 12(1)(b)), or modestly prohibits deprivation of freedom 'arbitrarily or without just cause' (FC s 12(1)(a)). Furthermore, the 'fundamental justice' formulation is clearly more readily afforded the dimension of 'substantive due process' than are its South African counterparts.

Given the extent to which Canadian courts have allowed the due process right contained in the 'fundamental justice' provision in s 7 of the Canadian Charter to determine the ambit of residual or unenumerated aspects of the right to a fair trial, it is not surprising that the courts and commentators seem pressed to find any separate *raison d’être* for the general fair trial right contained in s 11(d). Peter Hogg does point out that the residual fundamental justice right operates only when

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13 Section 11(d) of the Canadian Charter of Rights and Freedoms gives any person charged with an offence the right 'to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent tribunal'.


15 For a detailed discussion of 'substantive due process', and the degree of substantive due process afforded by FC s 12, see Bishop & Woolman *Freedom & Security of the Person* (supra) at § 40.1(b).

16 See PW Hogg *Constitutional Law of Canada* (3rd Edition, 1992, 1996 supplement) § 48.5(c) and § 44.16; D Stratas *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (No 19, August 1997) § 29.
life, liberty or property is at stake, and hence affords general fair trial rights only in cases where imprisonment is a competent sentence. As a result, the general fair trial right contained in s 11(d) operates in other criminal cases.\textsuperscript{17} 

The European Convention for the Protection of Human Rights and Fundamental Freedoms possesses an analytical structure that closely resembles FC s 35 combined with FC s 12. Here, the general right to a fair trial, contained in article 6, is separated from the right not to be arbitrarily deprived of liberty in article 5. However, the latter right is combined with the rights of detained and arrested persons, leaving article 6 to deal only with fair trial rights.\textsuperscript{18} The general fair trial right in article 6(1) is not confined to criminal charges, and reads: '. . . [I]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing.'\textsuperscript{19} Although the specifically enumerated fair trial rights in article 6 are not stipulated as being included under the right to a fair hearing, they are preceded, apart from the presumption of innocence (article 6(2)), by the stipulation that 'everyone charged with a criminal offence has the following minimum rights' (article 6(3)). The Convention organs have held the ‘fair trial’ concept to imply unenumerated components – and in this respect the analysis is on all fours with that which obtains in South Africa.\textsuperscript{20} So although the article 6 fair trial right does not apply only to criminal proceedings, from the point of view of criminal procedure, article 5 rights and article 6 rights are to be distinguished on the grounds that they apply to different stages of the criminal process. Once again, the analytical structure of the European Convention resembles that of the South African criminal process rights. However, the fact that the due process right relating to the deprivation of liberty occurs with the rights of detained and arrested persons in article 5 means that due process is able to operate as a residual principle operating

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\textsuperscript{17} Hogg (supra) at § 44.10(a). This is a strange argument. It concentrates exclusively on the ultimate sentence in determining whether there is a deprivation of liberty. The reasoning seems at odds with the philosophy behind due process seepage in the first place. The coercive process — the criminal process, from arrest or detention to ultimate release — is the paradigmatic deprivation of liberty that requires due process. As Lamer J put it in Re ss 193 and 195.1 of Criminal Code, ‘the restrictions on liberty and security of the person that s 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration’. [1990] 1 SCR 1123, 1173. The resolution of this problem lies beyond the scope of this section. See, generally, Bishop & Woolman ‘Freedom & Security of the Persons' (supra) at § 40.1 and 40.2

\textsuperscript{18} Robertson and Merrills are at pains to ‘distinguish’ art 5 rights from fair trial rights. See AH Robertson & JG Merrills Human Rights in Europe: A Study of the European Convention on Human Rights (3rd Edition, 1993) 72 and 74. See also JES Fawcett The Application of the European Convention on Human Rights (2nd Edition, 1987) 69 (‘Art 5 ‘is at a number of important points linked closely with . . . in particular Article 6, so that it cannot be examined in isolation’.)

\textsuperscript{19} For detailed examination of the scope of article 6 regarding proceedings and penalties to which it relates, see S Stavros The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments (1993) 1-39.

\textsuperscript{20} See Barberá, Messegué and Jabardo v Spain (1988) 11 EHRR 360 (Illustrates the manner in which the European Court has given effect to a residual operation of the ‘fair trial’ concept in art 6 jurisprudence. See, generally, Stavros (supra) at 42ff. For the South African take on the subject, see S v Zuma & Others 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 16 (The right to a fair trial was held to be 'broader' than the list of specific fair trial rights listed under it. This interpretation is rendered compulsory by the provision FC s 35(3) that the right to a fair trial 'includes' the specific rights which follow.)
with respect to the rights of arrested and detained persons. This phenomenon is absent from the South African framework.

Article 5 'due process' is secured by the interpretation of the phrase 'prescribed by law' as a term of art: the law in question must be 'adequately accessible' and 'formulated with sufficient precision to enable the citizen to regulate his conduct'. Furthermore, it is not enough to show that the procedural and substantive rules of domestic law have been applied where these rules have resulted in arbitrary deprivation of liberty. The law must also conform to the Convention's own standards: for example it must be a 'fair and proper procedure', be free from arbitrariness, and be carried out by 'an appropriate authority'. This is, however, 'substantive due process' only in the weaker sense of requiring the law in question to possess certain minimum attributes. These attributes are in turn of a procedural nature or reflect the requirements of the rule of law. They do not reflect 'substantive due process' in the stronger sense of prohibiting certain kinds of criminal laws because their substantive content is thought to infringe a fundamental freedom.

The result of the different attitude of the Canadian courts to due process seepage into the fair trial sphere is that Canadian courts may deal more easily with the relationship between substantive liberty questions and the right to a fair trial than South African courts can. Those principles that flow from an analysis based on the concept of liberty, and which seem to underlie certain residual or potential aspects of the right to a fair trial, may be applied by Canadian courts in the fair trial context as part of an interpretation of the general due process right contained in the 'principles of fundamental justice' without engendering the sacrifice of conceptual coherence. In the South African context, on the other hand, analyses of fair trial principles will find themselves colliding with the conceptual wall erected between freedom rights and criminal procedure rights every time the analysis is framed in terms of the right to freedom from unjustifiable interference. Furthermore, once a matter has been understood to raise a fair trial question, the Constitutional Court has also accorded the fair trial provision a measure of 'pre-emptive' effect by rejecting recourse to a general right contained elsewhere.

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21 See De Wilde, Ooms and Versyp v Belgium (1971) 4 EHRR 443 at paras 66 and 76.


24 See Winterwerp v Netherlands (1979) 2 EHRR 387 at para 46; Robertson & Merrills (supra) at 60.

25 See Shabalala v Attorney-General, Transvaal 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC) at para 34 (The court held the problem of docket privilege to be a fair trial question, rather than an access to information question, and that, once the fair trial question had been answered, it was 'difficult to see how s 23 [could] take the matter any further'.)
The courts have often not been particularly concerned with this problem of conceptual foundations, and have at times based their reasoning, in the context of IC s 25, squarely upon principles of liberty and due process, thereby smuggling some due process jurisprudence through cracks in the Ferreira and Nel wall. In Moeketsi v Attorney-General, Bophuthatswana, & Another, the foundations of the right to a trial within a reasonable time after being charged were discussed in terms of liberty. This liberty foundation beneath the right to pass through the criminal justice system within a reasonable period was the sole pivot around which the court in S v Manyonyo constructed its reasoning in deciding whether there had been unreasonable delay in the review of a sentence. The Manyonyo court relied exclusively on common law material, all of which was framed in terms of the liberty of the individual.

In Msomi v Attorney-General, Natal, & Others, the court decided a question involving the taking of fingerprints without consent in terms of the right against self-incrimination contained in IC s 25(3)(d), rather than in terms of IC s 11, but relied on Canadian seepage jurisprudence relating to the 'principles of fundamental justice' to hold that there was no violation of the right against self-incrimination. Its rejection of a possible argument in terms of IC s 11 ostensibly endorsed the views of Claassen J in S v Huma & Another. However, Huma did not consider the freedom component of IC s 11 at all. Huma entertained an argument on IC s 11 only as far as the provision relating to cruel, inhuman and degrading treatment (IC s 11(2)) was concerned, and not surprisingly rejected the challenge in that regard. It is therefore quite striking to find an obiter remark in the judgment of Grobbelaar J in S v Vilakazi en 'n Ander to the effect that the learned judge could not think of an example which entailed a greater infringement of a suspect's innocence and resulting constitutional rights ('onskuld en gevolglike konstitutionele regte') than the improper taking of a fingerprint. How exactly the suspect's innocence would be infringed and which rights would be affected does not emerge from this dictum. It is would appear that the learned judge had in mind some relation between the

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26 In Ferreira itself, Chaskalson P, although expressly rejecting the idea that IC s 11(1) contained a residual fair trial right, nevertheless held that the due process analysis carried out by Ackermann J in terms of IC s 11(1) at para 79 could 'in substance' be applied to an analysis under IC s 25(3). Ferreira (supra) at para 186.

27 1996 (7) BCLR 947, 961, 964 (B), 1996 (1) SACR 675 (B).

28 1996 (11) BCLR 1463 (E)('Manyonyo').

29 See S v Letsin 1963 (1) SA 60 (O), 61, cited with approval in Manyonyo (supra) at 1465–6 ('[D]it [is] een van die hoogste roeping van ons hoe . . . om toe te sien dat die vryheid van die individu . . . gwaarborg sal word. Dit is 'n ingrypende aantasting van individuele vryheid om 'n persoon in die gevangenis te laat aanhou . . . en die indruk moet nooit geskep word dat ons hoe onverskillig staan teenoor die vryheid van die individu nie.') See also S v Ramuongiwa 1997 (2) BCLR 268, 270 (V), referring to the dictum in the Indian case of Maneka Gandhi v Union of India AIR 1978 SC 597 ("Procedural safeguards are the indispensable essence of liberty. In fact, the history of personal liberty is largely the history of procedural safeguards.")

30 1996 (8) BCLR 1109 (N).

31 1996 (1) SA 232 (W).
presumption of innocence and unlawful interference with liberty. That the extension of due process rights in an area such as the fingerprinting context requires liberty analysis seems to be a very compelling supposition. But the Constitutional Court’s due process wall does not permit conceptual clarity in this sort of case. Similarly, the link between the ‘right not to assist the state’s case’ and the ‘right to freedom’ was recognized in *S v Mathebula & Another*. However the recognition of the link was ultimately grounded in the accused’s right to a fair trial.\(^\text{33}\)

The most forthright recognition of the inextricable link between a liberty interest and the presumption of innocence occurred in *Uncedo Taxi Service Association v Maninjwa & Others*, where Pickering J declared:

> In my view it is clearly unconstitutional to deprive a person of his liberty upon proof merely on a balance of probabilities.\(^\text{34}\)

*Uncedo Taxi Service* vaults over the due process wall in the most bizarre fashion. The possibility of imprisonment on notice of motion in contempt proceedings was seen as a liberty problem under FC s 12. Instead of determining that the respondent in such proceedings was an ‘accused person’ for the purposes of FC s 35(3), Pickering J held that the principles underlying FC s 35(3) were relevant to the FC s 36 limitations analysis of the impairment of FC s 12.\(^\text{35}\) In this way, fair trial principles can always be rendered applicable to FC s 12 problems. This solution, albeit attractive, does violence to the scheme of rights as set out in FC ss 12 and 35. In any event, it demands that FC s 35(3) apply to liberty analysis only after a finding that FC s 12 has actually been violated, ie at the limitation stage. The logical conclusion of such an approach would eventually drain FC s 12 of its independent content. Still, the approach suggested itself to the court because due process rights are tradtionally understood to be rights that engage the state’s regulation of and interference with liberty. A similar example of the difficulty of heeding the existence of the due process wall occurred in *De Lange v Smuts NO & Others.*\(^\text{36}\) Ackermann J, having helped to entrench the wall, noted that the requirement of an ‘ordinary court’ for hearings which might lead to imprisonment for criminal offences. He then reasoned that this requirement was an indication that only courts of law were ‘appropriate' tribunals for proceedings that might lead to incarceration outside the criminal sphere.\(^\text{37}\)

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32 1996 (1) SACR 425 (T), 429 (‘Vilakazi’).

33 1997 (1) BCLR 123, 147 (W), 1997 (1) SACR 10 (W). See § 51.4(b) infra.

34 1998 (3) SA 417 (E), 1998 (6) BCLR 683, 692D (E) (‘Uncedo’). Of course, this finding contains an additional premise: the presumption of innocence requires not only a burden of proof upon the prosecution but also a particular standard of proof, namely proof beyond reasonable doubt.

35 The Zimbabwean Supreme Court cited *Uncedo* with approval in *In re Chinamasa*. 2001 (2) SA 902 (ZS), 921E-922F. The Court used *Uncedo* to support a finding that contempt proceedings attracted such fair trial protections as the right to be tried by an impartial tribunal. Put differently, *Uncedo* grounded, what would, in South Africa parlance, be a finding that the person on trial was an ‘accused person’ in terms of FC s 35.

36 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) (‘De Lange’).
Of course, the issue of the onus (or default position) in the granting of bail – arguably the most important difference between FC s 35 and IC s 25 – can hardly be properly analysed without doing violence to the Ferreira and Nel due process wall.\(^{38}\) The same can be said of the habeas corpus provision in IC s 25(1)(e) and FC s 35(2) (d).\(^{39}\) The Free State Provincial Division's rejection of the burden placed on an accused by s 60(11) of the Criminal Procedure Act as 'out of place' in a democratic constitutional regime was, unsurprisingly, built exclusively upon liberty analysis. In defense of its defiance of the due process wall, the High Court in Ramokhosi wrote:

Dit word algemeen aanvaar en spreek eintlik vanself dat die vryheidsontneming van 'n onveroordeelde persoon weens arrestasie neerkom op 'n ernstige en drastiese inbreukmaking van 'n fundamentele reg.\(^{40}\)

Such defiance is all the more noteworthy since the Constitutional Court, when certifying the new bail provision contained in FC s 35(1)(f), failed to undertake any form of a liberty analysis in its summary rejection of the challenge to the onus aspect of the right.\(^{41}\)

(iii) Substantive due process and criminal procedure rights

The relationship between liberty rights and the enumerated criminal procedure rights is put under particular strain in the determination of fair trial or due process questions that contain a strong 'substantive' dimension. The due process wall would, strictly speaking, require objections to the substantive content of criminal provisions to be framed in terms of the infringement of other substantive rights, or in terms of whatever succour might be found in the residual right to liberty contained in FC s 12.\(^{42}\)

The most striking illustration of this problem occurred in the Constitutional Court's decision in S v Coetzee & Others.\(^{43}\) The relevant question for our purposes was whether a provision for vicarious criminal liability by an agent of a company for criminal acts of the company – which provided that such liability attached 'unless it [was] proved that he did not take part in the commission of the offence and that he could not have prevented it' — was an infringement of the presumption of

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\(^{37}\) Ibid at para 74. The hidden premise of this reasoning is incompatible with the due process wall.

\(^{38}\) See § 51.4(d) infra.

\(^{39}\) See § 51.3(e) infra.

\(^{40}\) Prokureur-Generaal Vrystaat v Ramokhosi 1996 (11) BCLR 1514, 1524 (O), 1997 (1) SACR 127 (O).


\(^{42}\) See Bishop & Woolman (supra) at § 40.1 and § 40.2. See also De Lange (supra) at paras 22–5.

\(^{43}\) 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC)('Coetzee'). As far as its IC s 11 and FC s 12 significance is concerned, see Bishop & Woolman (supra) at §§ 40.3(c)(ii).
innocence, an unlawful interference with liberty, or neither. If the question were framed as a ‘reverse onus’ question, then the analysis could be confined to the fair trial right to be presumed innocent contained in IC s 25(3)(c) (now FC s 35(3)(h).)

This approach required regarding the attribution of liability as a separate criminal offence, guilt or innocence of which would require proof, and such proof would require an onus. If the question were considered in terms of the substantive dimension, it would entail asking whether attribution of criminal liability for someone else's undoubtedly criminal act was constitutionally objectionable. This mode of analysis would then move one into the waters of strict liability and the relationship between mens rea principles and liberty. The interesting thing about the minority judgment of Kentridge AJ is that it opted irrevocably for the latter course. It regarded the addition of a defence, not as bringing the matter back into the world of the reverse onus and IC s 25, but as saving the liability in question from being strict. In this way Kentridge AJ managed to stay on one side of the conceptual wall, but was perhaps thereby prevented from seeing how the IC s 25 question is inextricably bound up with the IC s 11 question.

The problem of accommodating substantive due process under the fair trial rights arose again in S v Lavhengwa. The problem, for present purposes, was the proper basis for a challenge to the substantive aspects of the crime of contempt in facie

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44 Section 332(5) of the Criminal Procedure Act 51 of 1977.

45 Coetzee (supra) at para 85ff.

46 See S v Meaker 1998 (8) BCLR 1038 (W), 1998 (2) SACR 73 (W), 83I–85C. In Meaker the state sought to argue that s 130 of the Road Traffic Act 29 of 1989, which presumed the owner of a vehicle photographed while speeding to have been the driver, did not contain a reverse onus, since the state had to prove the offence (speeding), after which the identity of the offender was presumed. In effect, this was Kentridge AJ's argument in another form. Cameron J rejected this argument on the authority of Coetzee. See Osman & Another v Attorney-General of Transvaal 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC)('Osman'). Osman involved a similar conceptual puzzle. The peculiar offence of being unable to provide a satisfactory explanation for possessing goods reasonably suspected of being stolen, created by s 36 of Act 62 of 1955, was challenged as violating the right to silence, the right against compelled self-incrimination, and the presumption of innocence. See § 51.4(b)(iii) infra. The court a quo analysed the offence exclusively in terms of the right to silence and against compelled self-incrimination. 1998 (2) BCLR 165 (T), 1998 (1) SACR 28 (T). The Constitutional Court did consider the possibility that a reverse onus was at stake, but rejected the argument on the ground that the inability to explain was clearly an element of the offence that the prosecution had to prove beyond reasonable doubt. Osman (supra) at para 16. But every reverse onus can be rewritten into an element of a substantive offence and essentially achieve the same result. If the legislature had provided that one who was in possession of goods reasonably suspected of being stolen would be presumed to have been harbouring stolen goods unless he or she could provide a satisfactory account of such possession, then the case would simply have been another reverse onus case. It was, after all, the difficulty of proving that those who possessed goods reasonably suspected of being stolen were harbouring stolen goods that lay behind fashioning the odd offence of being unable to explain one's position. The law is not aimed at those who are unable to explain. It is aimed at thieves and fences. Similar reasoning lay behind the court's reasoning in S v Zondo. 1999 (3) BCLR 316 (N). It found that the offence contained in s 82 of the same Act, of being in possession of housebreaking equipment and unable to explain why, did not cast an onus on the accused, but merely an evidentiary burden, which — unlike the burden struck down in Scagell & Others v Attorney-General of the Western Cape & Others 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC) — was activated only once the state had proved a prima facie case against the accused. Again the substance of the offence was clouded by its statutory form.

47 1996 (2) SACR 453 (W)('Lavhengwa').
The court rejected the position put forward in the writing of Professor J M T Labuschagne: namely, that that there was no necessity for the crime. It did so based upon the 'weight of authority' (in the common law) in favour of the existence of the crime.\textsuperscript{48} The court ignored the liberty implications behind the challenge and concerned itself entirely with the procedural aspects of the summary conviction peculiar to this offence. The portion of Labuschagne's argument cited by the court is framed in terms of liberty — if other crimes cover all possible excesses, and no other crime is being committed, why criminalize the conduct in question?\textsuperscript{49} One further objection which might have been directed against the substantive content of the crime of contempt in facie curiae is the 'chilling' effect the existence of such an offence may have on the vigorous defence by counsel of their clients' fair trial rights. It may be argued, then, that the Damoclean sword of contempt in facie curiae threatens not so much the right of the legal representative as that of the client. In this way a substantive due process liberty problem for one individual becomes a procedural due process fair trial problem for another.

The difference between substantive and procedural questions in Lavhengwa did not end there. The question whether the offence of contempt was excessively vaguely framed in the statute — another charge levelled at the offence by Labuschagne\textsuperscript{50}— was dealt with under the fair trial right 'to be informed with sufficient particularity of the charge', contained in IC s 25(3)(b). The requirement of certainty in criminal offences is one of the traditional requirements of the rule of law. It straddles the divide between substantive and procedural due process — affecting the content of a provision, as opposed to merely its enforcement, but not reaching all the way into its merits. The fact that it was termed part of 'the first essential of due process of law' in the American decision of Connolly v General Construction Co,\textsuperscript{51} cited with apparent approval and as authority by the court in Lavhengwa,\textsuperscript{52} does not tell one whether the substantive aspect or the procedural aspect of due process is thereby invoked. And it certainly does not fit in comfortably with the Lavhengwa court's analysis in terms of the right of an accused person to be informed with sufficient particularity of the charge. The vagueness of the offence and the vagueness of the charge are very different things, and it is not difficult to conceive of an immaculately formulated charge indicating with fastidious precision exactly how one has breached a very unsatisfactorily vague offence. The peculiar phenomenon of summary conviction for contempt in facie curiae obscures

\textsuperscript{48} Ibid at 472–75.  
\textsuperscript{49} For the application of similar reasoning in the sphere of free assembly, see Beatty v Gilbanks (1882) 9 QBD 308. See also In Re Chinamasa 2001 (2) SA 902 (ZS)('Chinamasa')(The Zimbabwean Supreme Court was confronted with the offence of contempt ex facie curiae. It relied on, and endorsed, the Lavhengwa assessment, but had, earlier in the judgement analysed the question of the propriety of the existence of the offence in terms of liberty (free speech).)  
\textsuperscript{50} See Lavhengwa (supra) at 476 (Provision in question was s 108(1) of the Magistrates' Courts Act 32 of 1944, and the view of Labuschagne that the offence is 'seker die misdaad met die vaagste inhoud wat aan my bekend is' is quoted.)  
\textsuperscript{51} 269 US 385, 391 (1926).  
\textsuperscript{52} Lavhengwa (supra) at 484.
this distinction. This reasoning informed the following finding in *Uncedo Taxi Service Association v Maninjwa & Others* regarding contempt *ex facie curiae*:

A wide range of conduct may fall within the ambit of contempt of court *ex facie curiae* . . . . It does not follow therefrom, however, that the 'charge' against the offender cannot be formulated with sufficient clarity and certainty in the affidavits filed in support of the summary procedure. Once the details of the alleged contempt have been so specified the requirement entrenched in section 35(3)(a) will have been met.\(^{53}\)

In *S v Mamabolo (ETV and Others Intervening)*, the Constitutional Court drew a clear and timely distinction between the substantive and procedural aspects entailed by the offence of contempt *ex facie curiae*.\(^{54}\) It analyzed the question of the desirability of the existence of the offence in terms of liberty (FC s 16's protection of free speech),\(^ {55}\) and rejected the inquisitorial aspects of the procedure on the basis of repugnance with the provisions of FC s 35.\(^ {56}\) It may be noted that part of the reasoning was based on the fact that contempt *ex facie curiae* concerned comment outside of, and after, the proceedings in question, and therefore had no disruptive effect on the proceedings that might warrant special procedures.\(^ {57}\) Whether the analysis would be applicable to the offence of contempt *in facie curiae* was therefore left an open question.\(^ {58}\) In *S v Singo*, the summary procedures found in section 72(4) of the Criminal Procedure Act, which deal with an accused who fails to appear, were expressly distinguished from the situation that obtained in *Mamabolo*.\(^ {59}\) Moreover, decisive consideration was given to the distinction drawn in *Mamabolo* between an offence that deals with conduct outside the ambit of, and merely pertaining to, court proceedings, on the one hand, and mechanisms to address disruptions to the court's proceedings, on the other hand.\(^ {60}\) The assessment in


\(^{54}\) 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC)(‘Mamabolo’).

\(^{55}\) The treatment in the Zimbabwean Supreme Court in *Chinamasa* was endorsed wholeheartedly as 'lucid and exhaustive' and the observation made that anything beyond adoption would be supererogatory. Ibid at para 20

\(^{56}\) *Mamabolo* (supra) at paras 51 to 59. For further treatment of the offence of contempt *ex facie curiae*, see *S v Bresler* 2002 (2) SACR 18 (C).

\(^{57}\) *Mamabolo* (supra) at para 52.

\(^{58}\) See *S v Mbaba* 2002 (1) SACR 43 (E)(Finding that the absence of a representative did not properly constitute the offence of contempt *in facie curiae* and finding that, even if the summary procedure found unconstitutional in *Mamabolo* as to contempt *ex facie curiae* were appropriate, it ought to have been terminated where the accused was given no opportunity to be present, essentially left the question of the constitutionality of the procedure in the sphere of contempt *in facie curiae* unaddressed.)

\(^{59}\) 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC), 2002 (2) SACR 160 (CC)(‘Singo’)

\(^{60}\) Ibid at para 17.
Singo did not rely on a comparison of the liberty impact of the one offence with that of the other, mainly because the situation of failing to appear (as opposed to, say, insulting the judicial officer) is one that does not readily appear to attract liberty.

In *S v Ntshwence*, the court followed both *Lavhengwa* and *Singo* and found that a summary procedure was justifiable in the sphere of contempt *in facie curiae*. Note that in both *S v Solomons* and in *Ntshwence*, the substantive liberty question did not feature in the assessment. *Solomons* more obviously entailed liberty concerns than did *Ntshwence*. The former concerned insulting behaviour on the part of the accused as the basis of the contempt. The latter had more to do with disrupting the court’s procedures in the true sense of the concept (although even here it was not clear whether the insulting behaviour was more significant than the disruptive effect of the behaviour).

Confusion between substantive rights and criminal procedure rights could also be found in an argument raised but rejected in *S v Phallo & Others*. The argument was that since false statements might constitute the relevant assistance for the purposes of liability as an accessory after the fact, the right to silence would be violated if the acts entailed remaining silent to shield the perpetrators. This contention was tantamount to claiming that liability for fraudulent non-disclosure violated the right to silence. Whenever the law requires one to disclose and penalizes one for not disclosing, the relevant concern is liberty, not silence.

Rigorous analytical identification of the substantive liberty question at play occurred in *S v Thebus*. A constitutional challenge was mounted against aspects of the common law doctrine of common purpose. The particular point of law challenged concerned the doctrine’s lack of a requirement of a causal link between the conduct of the accused and the consequence for which the law held the accused liable. The doctrine attributes to the accused responsibility for the conduct of others. One difficulty faced by the challenge was to enunciate the objection on the basis of a constitutional right or principle that was violated by the manifestation of causation allowed by the doctrine. The challenge was founded on dignity, liberty and the fair trial incident of the presumption of innocence. Moseneke J was not distracted by the applicant’s conceptual confusion: for the judge the issue was one of substance, and, in essence, one of liberty analysis — was the Final Constitution content to allow a person to be deemed criminally liable (and his or her freedom to be affected) on the basis of the attribution to him or her of the conduct of another without the requirement of causation? The essence of the complaint had to be against the criminal norm at issue.

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61 2004 (1) SACR 506 (Tk) (*Ntshwence*).

62 2004 (1) SACR 137 (C) (*Solomons*).

63 1998 (3) BCLR 352 (B).

64 See, eg, JW Child ‘Can Libertarianism Sustain a Fraud Standard?’ (1993-4) 104 *Ethics* 722. For a discussion of the relationship between silence and self-incrimination, see § 51.4(b) infra.

65 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC) (*Thebus*).

66 Ibid at para 17.
was held that the manner in which the doctrine approached the causation question did not amount to arbitrary deprivation of freedom, the question was settled. The Court was then only required to indicate that analysis in terms of dignity or process did not add to the proper analytical framework. This outcome is a striking illustration of the fact that the due process wall makes irrelevant the criminal procedure rights in FC 35 with respect to due process analysis of the constitutionality of a norm by which criminal liability is attributed to the individual.

(iv) Fair trial seepage

The erection of the due process wall in Ferreira v Levin NO & Others; Vryenhoek v Powell NO & Others, Nel v Le Roux NO & Others, and De Lange v Smuts NO & Others has the following consequences:

1. The right to a fair trial, and the specific instances of that right contained in FC s 35(3), apply only to accused persons. There is to be no seepage of fair trial rights from FC s 35(3) into other spheres.

2. There should be no due process seepage from FC s 12 into FC s 35. That is, 'deprivation of liberty' analysis should not inform the interpretation of the fair trial right of an accused person under FC s 35(3). It also means that there is no residual due process principle operating around the rights of detainees and arrestees contained in FC s 35(2).

3. The sort of 'trial' one is entitled to under FC s 12(1)(b) differs from the sort of trial one is entitled to under FC s 35(3). The former lays down less rigorous requirements, or requirements less generous to the individual concerned, than the latter.

The most disquieting feature of Nel v Le Roux NO & Others is the logical extension of its reasoning. In its desire to distinguish sharply between the sort of fair trial rights an accused person may expect and the sort of 'trial' that is the minimum requirement for a lawful detention the court has rendered decisive to one's chances of being afforded the 'full' right to a fair trial the degree of arbitrariness or informality in the proceedings which lead to imprisonment. The more arbitrary or informal the proceedings in question, ie the less closely they resemble a criminal trial, the less claim the imprisoned individual has to 'full' fair trial rights under FC s 35. If the state were to embark upon a general practice of instituting summary

67 Ibid at para 36.

68 Thebus (supra) at paras 36 to 40. It was not without significance that the inquiry in Coetzee was the point of reference.

69 Ibid at paras 35, 41, 42 and 43.

70 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC)(‘Ferreira’).

71 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)(‘Nel’).

72 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC)(‘De Lange’).
proceedings which bear little resemblance to criminal trials as its main process to incarcerate those suspected of crimes, the reasoning in *Nel* would

hold that the new class of criminal 'accused' would not be entitled to the right to a fair trial with trimmings. The finding of the Constitutional Court in *De Lange*, that the 'trial' required by FC s 12 was 'a hearing presided over or conducted by a judicial officer in the court structure established by the 1996 Constitution and in which section 165(1) ha[d] vested the judicial authority of the Republic',\(^73\) removed the most serious potential danger of the *Nel* finding. But the 'full' right to a fair trial remains the privilege of those who can be classified as 'accused' under the Final Constitution. One might have thought the main function of FC s 35 was to prohibit alternative routes to gaol which bypass the fair criminal trial.\(^74\)

One way around this problem is to interpret the term 'accused' generously. Of course, to the extent that courts allow seepage of fair trial rights from FC s 35(3) into the rest of FC s 35, the injunction in *Nel* is being defied. In *Legal Aid Board v Msila & Others*\(^75\) the Eastern Cape Division decided to adopt 'as wide and broad an approach as possible' in interpreting the meaning of the word 'accused' in IC s 25(3)(e), thereby achieving the award of the right to counsel as an 'accused' person to a litigant applying for the setting aside of an interdict. Since violation of an interdict created the criminal trial from which the fair trial right could be imported, 'the applicant's envisaged action in seeking to have the interdict set aside [might], in a broad sense, be equated with, and as part of (sic), his defence to the charge laid against him'.\(^76\) How this 'broad sense equation' is to be distinguished from other civil claims — which in some more or less tenuous way are also the subject-matter of criminal proceedings — does not immediately appear clear. One can only remark that the 'broad' interpretation of 'accused' in *Msila* contrasts rather sharply with the restrictive interpretation of 'trial' in *Nel*.

Whether a similar extension of the meaning of 'accused person' occurred in *S v Sebejan & Others*\(^77\) is not altogether clear. In this case, the question was whether a

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\(^73\) *De Lange* (supra) at para 57.

\(^74\) The recognition by the Supreme Court of Zimbabwe in *Mutasa v Makombe NO* of Parliament’s right to regulate its own affairs by means of disciplinary procedures without being encumbered by 'fair trial' requirements cannot be faulted, but such proceedings may be ominous breeding grounds for conducting criminal trials by means of bills of attainder. 1997 (6) BCLR 841 (ZS). As long as the 'offence' in question *as well as the punishment* remains Parliament-bound, the danger will be averted. The imposition of fines may involve questions of due process deprivation of property, and, of course, the whole would be subject to requirements of administrative justice. See *De Lille & Another v Speaker of the National Assembly* 1998 (3) SA 430 (C), 1998 (7) BCLR 916 (C) (Disciplinary proceedings of Parliament were held to be subject to constitutional scrutiny and to the requirements of natural justice. Section 5 of the Powers and Privileges of Parliament Act 91 of 1963, which ousted the court's jurisdiction in respect of some matters of parliamentary privilege, was unconstitutional.) For more on bills of attainder, see S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

\(^75\) 1997 (2) BCLR 229 (E).

\(^76\) Ibid at 243.

\(^77\) 1997 (8) BCLR 1086 (W), 1997 (1) SACR 626 (W)('Sebejan').
suspect who could not be described as a 'detained or arrested person', let alone an 'accused person', at the relevant time was entitled to be informed of constitutional rights upon being questioned by the police. Satchwell J pointed out that the accused had not been 'arrested or detained' at the relevant time, but then proceeded to consider whether she should not, as a 'suspect', have been given due process rights. The learned judge then observed that the 1931 Judges' Rules provided for cautioning suspects upon questioning them and, given the three questions the learned judge posed ('what is a suspect?' 'what rights accrue to a suspect?' and 'was the accused a suspect at the relevant time?'), one would be entitled to think that the result would be rights to which a suspect was entitled qua suspect. But the reasoning ultimately followed left the suspect qua suspect in the hands of the Judges' Rules. Satchwell J proceeded to analyse the position from the point of view of an accused whose right to a fair trial was affected by something which happened while that accused was a suspect. The conclusion was built upon the solid foundations of the proposition that '[t]he requirements of due process extend to the pre-trial conduct of law enforcement authorities', and it is clear that the judgment placed itself within the jurisprudence relating to extending the view backwards in time from the date of trial to determine whether the accused was receiving a fair trial. It is rather unfortunate, then, that the learned judge asked 'how can a suspect have a fair trial where pre-trial unfairness has been visited upon her by way of deception?' (our emphasis). How, indeed, can a suspect have a fair trial at all? Whichever way the matter is considered, Msila and Sebejan must be classed among those cases that have subverted the seepage prohibition issued by the Constitutional Court.

78 It is not clear whether the rights of which the accused claimed she should have been informed were those of an 'arrested person' under IC s 25(2), which include and add to those of a 'detained person' under IC s 25(1), or those of a 'detained' person, which do not include silence and incrimination safeguards or, indeed, whether the complaint related to 'fair trial rights' of an 'accused person' provided by IC s 25(3). The conclusion reached by the court was framed in terms of IC s 25(3).

79 Sebajan (supra) at 631.

80 See S v Melani & Others 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335 (E). Later, however, one reads: 'No less than an accused is the suspect entitled to fair pre-trial procedures.' Sebajan (supra) at 636. This does seem to be a return to the perspective of the suspect qua suspect. The right of a suspect to 'the benefit of a caution or a warning' was assumed for the purposes of argument in S v Ndlovu. 1997 (12) BCLR 1785, 1791I-J (N)'(Ndlovu'). But the definition of 'suspect' which was laid down for these purposes in Sebejan was viewed obiter as perhaps setting the standard 'too low. Ndlovu (supra) at 1792B. See Sebejan (supra) at 1092I ('[O]ne about whom there [was] some apprehension that he [might] be implicated in the offence under investigation and, it [might] further be, whose version of events [was] mistrusted or disbelieved.'). Magid J made the above assumption in the context of the Judges' Rules, having determined that IC s 25 was 'of no relevance' to the case. Ibid at 1791C. Sebejan was not followed in S v Langa & Others. 1998 (1) SACR 21 (T), 27(Held that the discussion of a suspect's rights in Sebejan was obiter, given the finding that the accused had not been a suspect at the relevant time.). The accused in Langa, however, had undoubtedly been suspects when questioned concerning their possession of goods suspected to be stolen. They had not, held MacArthur J, enjoyed rights to counsel or silence at that stage. No attention was paid to the effect on their rights as accused persons as to what had happened while they were suspects. The absence of any due process right under IC s 25 or FC s 35 outside the sphere of arrest and detention comes most starkly to the fore in such situations. For a discussion of the right to silence, see § 51.4(b)(ii).
The approach adopted by the court in *S v Mthethwa* further illustrates the blurred line between the trial sphere and the pre-trial sphere. Here, the issue was the effect, at the trial, of the absence of any caution that the accused was a suspect (at the time of questioning) and did not have to answer questions. The difficulty was discussed with reference to *Sebejan* and *S v Van der Merwe*, namely that the 'suspect', before becoming an arrested or detained person as understood in terms of FC s 35, did not appear to enjoy any FC s 35 rights. The court adopted the approach endorsed in *Van der Merwe*. It regarded the fairness of the treatment of the subject as a question of the fairness of the trial that occurred subsequently. What was interesting for present purposes was that the court still found it necessary to analyse the question whether the accused had indeed been a 'suspect' at the relevant time. The question arose again in *S v Orrie & Another*. Here, the court squarely confronted the distinction between saying, on the one hand, that there was something about being a 'suspect' that attracted FC s 35 rights, and, on the other hand, saying that the question whether one had been a suspect or not at the relevant time would be a relevant consideration, when one became an accused at trial, in considering the effect upon the fairness of the trial of what had happened while one was a suspect. Bozalek J had no difficulty in ignoring the orthodoxy underpinning the due process wall. The judge found that a purposive interpretation of the FC s 35 rights, with a view to the interests the rights were intended to protect, required according to a suspect the relevant rights of an arrested and detained person in terms of FC s 35.

An instructive decision by the Constitutional Court, and one that, if it did not vault the wall, at least offered a step-ladder, is that in *S v Baloyi*. What was at issue was the question of whether proceedings to determine violations of family violence interdicts granted in terms of the now superseded Prevention of Family Violence Act were sufficiently criminal in nature to turn those being prosecuted into 'accused persons'.

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81 See *Uncedo Taxi Service Association v Maninjwa & Others* 1998 (3) SA 417 (E), 1998 (6) BCLR 683 (E)(Court did not have to determine that proceedings on motion for 'civil contempt' *ex facie curiae* were criminal for the purposes of rendering the respondent an 'accused person' under FC s 35(3). Its application of FC s 35(3) in FC s 12 'limitation' analysis clearly subverted the seepage prohibition.) See also § 51.1(a)(ii) supra.

82 2004 (1) SACR 449 (E) ("Mthethwa").

83 1998 (1) SACR 194 (O) ("Van der Merwe").

84 *Mthethwa* (supra) at 454G.

85 Ibid at 454G-J.

86 2005 (1) SACR 63 (C) ("Orrie").

87 Ibid at 69I-70C. The reasoning was quite subversive of the due process wall, as it implied that the interests at issue would determine whether (and also which) section 35 rights applied, instead of asking whether one was dealing with the kind of person protected by the right, and then according that person all the rights set out in the relevant section.

88 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC), 2000 (1) SACR 81 (CC) ("Baloyi").
for the purposes of FC s 35(3)(h). The noteworthy aspect of the judgement was not the result — namely that the proceedings were indeed sufficiently criminal in nature for the fair trial rights to apply; it was the fact that this result occurred on the premise that the form of the proceedings was 'neither that of a normal civil trial, nor that of an ordinary criminal trial, but of a special enquiry involving elements of both'. What makes this decision so important for present purposes is the fact that it gave comfort that even proceedings that did not form part of the criminal justice system, or were not criminal trials proper, could attract section FC s 35 protection if the character of what the proceedings were aimed at achieving sufficiently approximated that of a criminal prosecution.

(v) Maintaining the wall

The Explanatory Memorandum to the Early Draft Bill of Rights of 9 October 1995 states the following:

Section 25 deals separately with the rights of detained (including sentenced), arrested and accused persons in the context of the right to freedom of the person (s 11) and the right to fair pre-trial and trial proceedings. This represents a departure from international instruments and foreign Bills of Rights, but it is an innovation which constitutes an improvement on these international and national instruments as it allows for greater clarity and certainty.

If the Ferreira and Nel wall had been scrupulously guarded by the courts, more 'clarity and certainty' might well have resulted. But that clarity would have come at the cost of recourse to liberty analysis and due process principles, and with the result that arrested and detained persons could find no generic principle to flesh out their rights under FC s 35. The interpretation of the residual right to a fair trial to which only accused persons are entitled would then be starved of philosophical foundations in the common law or in comparative human rights jurisprudence.

But the wall has been pierced in so many ways that the time has come for the courts to enforce it or to abandon it. As far as the relationship between liberty, due process, and FC s 35 is concerned, there is no sign currently of the 'clarity and certainty' to which the Explanatory Memorandum refers.

There is one more twist to the problem of due process seepage. The structure and wording of art 6 of the European Convention on Human Rights point to an interesting

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89  Baloyi (supra) at para 19 (Sachs). The observation that these special proceedings were necessary because of the inadequacy of the 'criminal justice system' in addressing family violence logically entailed the proposition that what was at issue before the Court was something outside of the 'criminal justice system'. Ibid at para 12.

90  An examination of a potential state witness in terms of section 205 of the Criminal Procedure Act 51 of 1977, although aimed at the criminal trial, did not place the witness in the position of an accused vis-à-vis the state and therefore did not attract the protections of FC s 35. See S v Mahlangu 2000 (1) SACR 565 (W). See also Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others 2000 (4) SA 621 (C)(A person appearing before an administrative tribunal in a disciplinary inquiry was not an 'accused' for the purposes of enjoyment of section 35 rights such as the right to counsel); Hamata v Chairperson, Peninsula Technikon Internal Disciplinary Committee 2002 (5) SA 449 (SCA)(Discussion of the issue on appeal); Mhlekwa v Head of The Western Tembuland Regional Authority And Another; Feni v Head of The Western Tembuland Regional Authority & Another 2000 (2) SACR 596 (Tk)(Assumed without any difficulty that those who were prosecuted in these courts were 'accused persons' for the purposes of FC s 35 rights.)
new possibility for due process seepage under the Final Constitution. Article 6(1) is the general fair trial provision. It applies to 'everyone', 'in the determination of his civil rights and obligations or of any criminal charge against him'. This general fair trial right has been afforded an 'extensive and autonomous' interpretation by the Convention organs. The result is that it not only operates as the residual fair trial right, but may also lift from the confines of liability to criminal conviction those aspects of a fair trial which are specifically provided to accused persons in art 6(2) and art 6(3). The right to be presumed innocent, for example, a right not even contained under the 'minimum' inclusionary umbrella of art 6(3) but granted in isolation to everyone 'charged with a criminal offence', has been held to apply outside the sphere of criminal conviction wherever a penalty may be exacted.

The Final Constitution contains a clause which bears uncanny resemblance to the relevant portion of art 6(1) of ECHR. It is the 'access to courts' provision contained in FC s 34, which reads:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal.

This clause is beyond question capable of performing all the due process seepage into FC s 35 which the Constitutional Court in Ferreira and Nel denied to the deprivation of liberty clause. In fact, its express mention of a 'fair public hearing', as opposed to the unqualified reference in FC s 12(1)(b) to a 'trial', and the modest reference in FC s 12(1)(a) to deprivation of freedom 'arbitrarily or without just cause', would seem to arm this new provision with a greater claim to operating as a general due process clause than the freedom clause. Be that as it may, only the most ardent supporter of due process seepage would hope that the Constitutional Court might allow FC s 34 to do what it took great pains to prohibit IC s 11 from doing. Still, if it is recognized that the courts have to turn to liberty analysis when extending the residual scope of fair trial rights, and that the conceptual wall often hampers a more foundationally secure development of the criminal procedure rights, both of accused persons and of arrested and detained persons, the court may decide to vindicate the wholesale due process smuggling discussed above by taking the jack-hammer of FC s 34 to the due process wall. The Constitutional Court has given a strong indication that it will not use this

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93 See Adolf v Austria (1982) 4 EHRR 313; Minelli v Switzerland (1983) 5 EHRR 554; Beddard (supra) at 172.


95 See Bernstein & Others v Bester & Others NNO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at paras 102-6.
jack-hammer. In *S v Pennington & Another*, the unanimous court remarked *obiter* that FC s 34 did not apply to criminal proceedings. Chaskalson P declared:96

The words 'any dispute' may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily referred to. That section 34 has no application to criminal proceedings seems to me to follow not only from the language used but also from the fact that section 35 of the Constitution deals specifically with the manner in which criminal proceedings must be conducted.

It is nevertheless interesting to note that Chaskalson P justified this *obiter* finding with regard to FC s 34 by invoking art 6(1) of the European Convention on Human Rights.97

Another possibility for 'due process' seepage is the rather enigmatic provision that is section FC s 173. FC s 173 provides that the Constitutional Court, Supreme Court of Appeal and High Courts have inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. This jurisdictional provision was employed in *Hansen v The Regional Magistrate, Cape Town and Another* to allow the court to set aside a sentence and to substitute a lesser sentence for it on review, despite the fact that the applicant had exhausted his legal remedies of appeal by the time the application had been brought.98 The facts were that two brothers had been charged with the same offence, but only the applicant had been prosecuted and convicted, as his brother had absconded. The brother was apprehended, tried, convicted and sentenced some five years later, and received a much lighter sentence than the applicant, who successfully reviewed his heavier sentence. The difficulty was finding jurisdiction for the court in circumstances where the courts were *funtus officio* in relation to the criminal proceedings, and where common law authority stood in the way. The answer was FC s 173. It should be stressed that the possibility of using FC s 173 to establish jurisdiction does not entail the power to augment or to supplant the provisions of FC s 35 with substantive liberty analysis. That said, the precise use to which FC s 173 may be put in filling in possible gaps in the due process wall have not been decisively determined.

### (b) Interpretation of FC s 35

#### (i) General

Like the other sections in the Bill of Rights, FC s 35 should be interpreted liberally, purposively and in favour of the individual arrested, detained or accused person.99

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96 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) (‘Pennington’) at para 46.

97 *Pennington* (supra) at paras 47-50. See also *Monnell and Morris v United Kingdom* (1987) 10 EHRR 205. The fact that FC s 34 does not apply to criminal proceedings does not mean it cannot apply in proceedings ancillary to criminal proceedings — such as measuring the fairness of property preservation orders obtained *ex parte* in terms of section 38 of the Prevention of Organised Crime Act 121 of 1998. See *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC), 2003 (5) BCLR 476 (CC).

98 1999 (2) SACR 430 (C).

The Constitutional Court has clearly endorsed an interpretation *in favorem libertatis* with respect to FC s 35. However, it has not wholly avoided very narrow constructions. The restrictive interpretation of the word 'trial' in *Nel v Le Roux NO & Others* discussed above — where the same word's appearance in IC s 25 was insufficient to persuade the court to accord it the IC s 25 meaning in IC s 11 because of the absence of a 'textual link' between the words — is a clear example of an interpretive method which would be regarded as restrictive in whatever field of law it operated. Enough has been said about due process seepage; suffice it to add that the decree in favour of generosity and the due process wall do not pull in the same direction. Furthermore, the extraordinarily cursory treatment meted out to the arguments against the final bail provision in the *First Certification Judgment* hardly constitutes a ringing proclamation *in favorem libertatis*. In *S v Thebus & Another*, the Constitutional Court specifically required a 'generous' interpretation of the application of FC s 35(3)(h). It held that the qualification 'during the proceedings' governed only the right not to testify, and did not limit the operation of the right to silence at issue in FC s 35(3)(h).

(ii) *Abdication*

The interpretation of difficult or vague provisions in FC s 35 (and IC s 25) has given rise to a phenomenon which can fairly be said to hamper the development of a rigorous constitutional criminal procedure jurisprudence: namely interpretive abdication. The abdication has taken the form either of insistence upon the *ad hoc* nature of the fair trial right and a concomitant refusal to lay down anything that may be in danger of being regarded as a general guiding principle, or of talk of judicial 'discretion' in the strong sense, or of a *non possumus* declaration coupled with an appeal to Parliament to fill in the details in interpreting the rights in question. It is of the utmost importance to the legitimacy of a judiciary with the power to strike down legislation that it regard itself, when interpreting fundamental rights, not as having a discretion in the strong sense, but as obeying the dictates of the supreme authority, namely the Final Constitution, even if the task calls for judgment rather sweeping in nature. The court in *S v Mathebula & Another* recognizes this imperative. (However, the court's assumption that if the question of the violation of a right is a matter of constitutional

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<td><em>S v Zuma &amp; Others</em> 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 15. See <em>Sanderson v Attorney-General, Eastern Cape</em> 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC)('Sanderson') at para 22 (Constitutional Court unanimously invoked the duty to interpret IC s 25(3) in a 'broad and open-ended' manner as an important substantiation for interpreting IC s 25(3)(a) in a manner contrary to what it regarded as a persuasive textual argument.)</td>
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<td>103</td>
<td>2003 (6) SA 505 (CC), 2003 (2) SACR 319 (CC); 2003 (10) BCLR 1100 (CC)('Thebus') at para 104. This conclusion led the court to find 'inappropriate' the drawing of a distinction between the pre-trial right to silence and the right to silence during the trial: 'The right to silence is initially conferred by FC s 35(1)(a) and thereafter by FC s 35(3)(h)'. Ibid at para 104.</td>
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interpretation and not discretion, then the determination of the remedy should likewise be a matter of constitutional interpretation and not discretion, does not necessarily follow.) Similarly, in *S v Vermaas; S v Du Plessis*, the Court held that whether an accused is entitled to representation should 'pre-eminently' left to the officer trying the case,\(^\text{108}\) and should not be read as a reference to a discretion in the strong sense. It is, rather, a reference to the privileged position of the judicial officer trying the case to make the decision required by the Final Constitution.\(^\text{109}\)

\(^{104}\) For more on 'flexibility', see *S v Nombewu* 1996 (12) BCLR 1635, 1659 1661 (E), 1996 (2) SACR 396 (E); Erasmus J found 'nothing' in the Interim Constitution that 'dictate[d] a strict test . . . or for that matter a slack test' as far as the exclusion of evidence in violation of rights was concerned. Erasmus J stated that 'the Canadian test of “disrepute”' [could not] displace our standard of "a fair trial!", but the learned judge went on to say that the Canadian test was a 'useful even necessary check in the exercise of the court's discretion' (emphasis added), only to suggest in the next paragraph that 'consideration of the public mood [ie the 'disrepute test'] [lent] flexibility to the application of Chapter 3'. (emphasis added.) See also *Coetsee & Others v Attorney-General, KwaZulu-Natal, & Others* 1997 (8) BCLR 989 (D), 1997 (1) SACR 546 (D), 560 (Thiorion J) could find 'no virtue in trying to formulate a rule for determining a point in time from which the delay in commencing a trial [had] to be reckoned for the purpose of deciding whether the delay [had] been unreasonable'. See, further, *S v Shaba en ’n Ander* 1998 (2) BCLR 220 (T), 1998 (1) SAC 16 (T), 20C ('Daar mag metertyd sekere riglyne uitkristalliseer wat ’n hof behulpsaam mag wees by die ondersoek en beoordeling van die vraag of daar aan die voorskrif van art 25 voldoen was. Sulke riglyne kan egter nooit tot wet van regskreël verhef word nie' (emphasis added)). Kriegler J’s refusal to lay down 'normal periods' for specific kinds of cases of delay in Sanderson should not be regarded as a form of ‘abication’ of this sort. *Sanderson* (supra) at para 34. There is a difference between shying away from the possibility of laying down rules and principles, on the one hand, and refusing to compile a laundry list of acceptable periods of delay for certain kinds of criminal trials, on the other. Strong dicta from the Constitutional Court have entrenched the growing orthodoxy that fairness is a fact-sensitive question essentially to arise on an *ad hoc* basis, and is not capable of being determined in the abstract with references to rules of thumb, or in a fact-free 'vacuum'. See *S v Steyn* 2001 (1) SA 1146 (CC), 2001 (1) SACR 25 (CC), 2001 (1) BCLR 52 (CC) at para 13 (Endorsed by Yacoob J in his separate concurring judgement in *Thebus* (supra) at para 111.) Very welcome, if atypical, was the endorsement in *Thebus* by the majority (on the issue in question) of a general principle at the expense of such *ad hoc* assessment — when it came to the question whether the right to silence was violated by the use in evidence of pre-trial silence on a certain issue, the question was approached as one that yielded a uniformly applied answer. *Thebus* (supra) at para 85. This question should be distinguished from the different question of whether the violation in the case in question rendered the trial unfair. Ibid at para 93. Yacoob criticized this conclusion and, not without justification, asked why an *ad hoc* approach should be avoided in the case of pre-trial silence, where fairness was used as a barometer in other cases. Ibid at paras 97 and 109. One might as readily ask why the desirability of forging general rules ought not also to apply to other inquiries into criminal due process rights violations beyond the sphere of the illegitimate use of pre-trial silence.

\(^{105}\) See R Dworkin *Taking Rights Seriously* (1977, 1996 impression) 32. Dworkin helpfully distinguishes between ‘discretion’ in a weak sense and discretion in a strong sense. Weak discretion is not ‘discretion’ properly so called, and includes: (1) the exercise of a judgment the correctness of which is difficult to ascertain, an example of which is the lieutenant’s order to the sergeant to take his five most experienced men on patrol where it is hard to determine which are the most experienced, and (2) someone’s having final authority to make a decision which cannot be reversed by someone else. Discretion in the strong sense is ‘not merely to say that an official must use judgment in applying the standards set him by authority, or that no one will review that exercise of judgment, but to say that on some issue he is simply not bound by standards set by the authority in question’. The most frequent invocation of strong discretion has been in the area of excluding evidence obtained in violation of rights. See *S v Zuma & Others* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) (*Zuma*); *Ferreira v Levin & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC); *S v Mathebulu & Another* 1997 (1) BCLR 123, 133H-135B (W). FC s 35(5), which requires the exclusion of unconstitutionally obtained evidence ‘if the exclusion of that evidence would render the trial unfair and otherwise be detrimental to the
These generous constructions once again run up against *Nel v Le Roux NO & Others*. In *Nel*, the Constitutional Court held that if conducting a trial in private was a violation of the right to a public trial, then leaving the decision as to whether to violate the right to the strong discretion of the trial judicial officer meant that 'the question of an infringement of any right of the applicant in this regard simply [did] not arise' until the discretion was exercised.\(^{110}\) This conclusion seems to be a very unfortunate violation of the principle that granting a wide discretion to infringe a right is itself an infringement of that right.\(^{111}\) The judgment of the court as to the question whether unconstitutionally obtained evidence would render the trial unfair or otherwise be detrimental to the administration of justice, circumstances that FC s 35(5) decreed 'must' lead to the exclusion of the evidence, was regarded by the administration of justice', is an excellent example of 'discretion in the weak sense'. It is properly described as a rule calling for judgment, rather than a 'discretion' in the strong sense. It is indeed fortunate for the legitimacy of fair trial interpretation that this distinction was recognized in *S v Naidoo & Another*. 1998 (1) BCLR 46 (D), 1998 (1) SACR 479 (N), 499G-500D ('Naidoo'). The High Court rejected the approach adopted in *S v Madiba & Another*. 1998 (1) BCLR 38 (D). The portion from the judgment in *Madiba*, with respect, confused a decree requiring judgment, on the one hand, with a discretion, on the other. *Naidoo* (supra) at 499A-D (See the reference in the passage to a discretion, coupled with the notion of a 'duty' to make a decision which was fair to both sides.) Having to decide what fairness requires does not equal having a discretion in the strong sense. If it did, the courts should grasp the nettle and declare all of FC s 35 to be a matter of discretion — appealable only on the principles applicable to the exercise of a judicial discretion. This is plainly not the case. It is respectfully to be regretted that the Transvaal Provincial Division in *S v Makofane* — 1998 (1) SACR 603 (T), 617A-I — based its decision that the Interim Constitution had not disturbed the discretion to refuse a discharge under s 174 of the Criminal Procedure Act 51 of 1977 on a passage in *Key v Attorney-General, Cape Provincial Division, & Another* — 1996 (4) SA 187 (CC), 1996 (6) BCLR 786 (CC) — which discussed the tension between the public interest in bringing criminals to book and the public interest in ensuring a fair trial, and which contained the observation that the trial judge was the 'person best placed to take that decision' (concerning the requirements of fairness). *Key* certainly did not say that every IC s 25 and FC s 35 question boiled down to an exercise of discretion. *S v Shongwe & Others* reiterated the misinterpretation of *Key* as laying down a 'discretion'. 1998 (9) BCLR 1170 (T), 1998 (2) SACR 321 (T). For more on *Makofane*, see § 51.5(j)(iii) infra.

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\(^{106}\) See *S v Mhlakaza & Others* 1996 (6) BCLR 814, 833H (C). Van Deventer J makes the extraordinary complaint that the governing principles and guidelines relating to the exact scope and content of the right to counsel provided in IC s 25(1)(c) should not be left to the courts. See also *S v Nortjé* 1997 (1) SA 90 (C), 101-2 ('[W]hether the system of trapping is to continue in South Africa is obviously a matter for Parliament and the Constitutional Court'. Given that the court had jurisdiction to decide the constitutional question before it, and given that it had embarked on a discussion of the constitutional merits of trapping in the context of the right to a fair trial, its disavowal of responsibility for deciding the question cannot be supported. A finding that the constitutional merits of trapping were not strictly relevant to the decision in the case would of course have been a different matter altogether.) See also *S v Dube* 2000 (2) SA 583 (N), 607D-E. The *Dube* court was confronted with an entrapment question in circumstances where the then newly enacted provisions of section 252A of the Criminal Procedure Act 51 of 1977, which comprehensively addressed the question, were held not to apply. The court approached the matter as one of determining whether the admission of the relevant evidence harmed the administration of justice and the fairness of the trial. Note that the proliferation of legislative codification of some perennial questions of due process reflected in section 35 (such as section 252A dealing with trapping, and section 342A dealing with unreasonable delays in trials) have the tendency to create doubt about the intended exhaustiveness with which the legislature has seen fit to regulate the topic, and the status of the legislative codification relative to the over-arching constitutional principle the codification seeks to address. The difficult question in each such case would arise where the legislative codification is held, on its own terms, not to apply, and whether that then means that recourse to the constitutional principle would be in conflict with the legislative intention. Of course, since the legislation in question has no constitutional status, it can only, in theory, add to the rights of an accused person, and not limit them by purporting to set criteria for the application of the FC s 35 rights. But courts would naturally tend to approach such questions as if they were comprehensively governed by the statutory provision, at the expense of the development of vibrant self-standing constitutional jurisprudence in these areas.
Supreme Court of Appeal in *S v M* as 'no doubt' entailing a 'discretion'.

Likewise, the Constitutional Court in *S v Thebus* called the determination in terms of FC s 35(5) a 'discretion'. Both cases relied on a passage in *Key v Attorney-General, Cape Provincial Division, & Another.* The passage refers to the determination as ultimately a matter for the trial judge to assess. Abdication of responsibility for interpreting the fundamental rights in FC s 35 is not the proper way of engaging issues of institutional comity. The discourse of discretion threatens to engulf the fair trial constitutional jurisprudence at the cost of the jurisprudentially important affirmation of the difference between acknowledging a discretionary power on the part of the judiciary and requiring the courts to interpret what a fair trial requires.

(iii) The common law and FC s 35

The relationship between the common law and FC s 35 is the most conceptually challenging problem of interpretation in the sphere of criminal procedure rights. There is, on the one hand, no question that the principles underlying criminal

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107 1997 (1) BCLR 123, 133–5 (W).


109 The same should be said of the decision in *Msila v Government of the Republic of South Africa & Others.* 1996 (3) BCLR 362 (C). The court in *S v Maduna en ‘n ander* admittedly did regard the decision to grant legal representation as one of a discretion in the strong sense. 1997 (1) SACR 646 (T), 664. This conclusion, with respect, is wrong.

110 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC) at para 17.


112 2003 (1) SA 341 (SCA) at para 30.

113 *Thebus* (supra) at para 108.


115 The discussion in *S v Mathebula* of the relationship between public approbation, discretion and constitutional authority, with the greatest respect, seemed to confuse the issue of legitimate authority with that of the public approval rating of a given decision to exclude improperly obtained evidence. 1997 (1) BCLR 123, 135 (W). The argument was that an exclusion which was based upon a rejection of an appeal to IC s 33(1) to save the evidence in question would have less disreputable consequences for the administration of justice than one based upon a discretion. It is true that if a constitutional decision, however much people may disagree with it, is ultimately a *bona fide* application of the dictates of the Interim Constitution, however that be understood, rather than an exercise in strong discretion, then such a decision, from the point of view of the theory of constitutional democracy, is more justifiable as consonant with the legitimate function of the court. But whether the public will cry 'the law is an ass' on a particular exclusion of evidence will be a question independent of the source of the supposedly asinine activity. A court cannot avoid the unpopular consequences of its interpretation by relying on the fact that it is in fact interpreting.
procedure rights have a venerable history in the common law. As Erasmus J put it in *S v Nombewu*:\footnote{116} The common law has special significance in the sphere of criminal procedure and evidence. The law in this regard has a long tradition of seeking to achieve much the same objectives as are now entrenched in the Constitution.

On the other hand, the Constitutional Court has made it clear that that foundational common law principles stand to be re-evaluated in light of FC s 35.\footnote{117} As Kentridge AJ stated in *S v Zuma & Others*:

Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them in line with the common law (Attorney-General v Moagi 1982 (2) Botswana LR 124 at 184). The caveat is of particular importance in interpreting section 25(3) of the Constitution.\footnote{118}

This caveat was heeded in *S v Maseko*. Borchers J held that, as far as the protection of the right to silence during plea proceedings was concerned, the principles developed in the common law were 'no longer sound reasoning' in light of the Interim Constitution's provisions, and that the court was consequently not bound by precedent based upon them.\footnote{119} A similarly pronounced example of basing the interpretation of an IC s 25 right upon a rejection of the governing common law position in favour of a conclusion more in keeping with the underlying principles of the Interim Constitution occurred in *Prokureur-Generaal, Vrystaat v Ramokhosi*. The court rejected the practice of affording deference to the Attorney General's assessment of the risks of bail. The Court's new approach flowed from the values that permeated the Interim Constitution ('[d]ie tussentydse Grondwet en veral Hoofstuk 3 daarvan, is deurdrenk met 'n nuwe en meer demokratiese benadering').\footnote{120} Where the courts are called upon expressly to consider a principle of common law criminal procedure rights protection and to measure its adequacy against the standards of the Final Constitution,\footnote{121} the break between the paradigms is most apparent. As was pointed out in *S v Thebus*:

[T]he need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted

\begin{footnotes}
\item 116 \cite{Bern2006} 1996 (12) BCLR 1635, 1656 (E), 1996 (2) SACR 396 (E).
\item 117 Bernstein (supra) at paras 59–64; *Neil v Le Roux* (supra) at paras 8–9, 18; *Shabalala v Attorney-General (Transvaal)* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC) at para 9.
\item 118 *Zuma* (supra) at para 19. See also *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC) at para 1 and *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 22.
\item 119 1996 (9) BCLR 1137, 1141 (W), 1996 (2) SACR 91 (W).
\item 120 1996 (11) BCLR 1514, 1531 (O).
\end{footnotes}
so that it grows in harmony with the 'objective normative value system' found in the Constitution.\textsuperscript{122}

There are, however, several examples of a 'pure codification' approach to the criminal procedure rights — an approach which regards FC s 35 as entrenching common law principles and doctrines. In \textit{Davis v Tip \& Others}\textsuperscript{123} Nugent J held that the right to remain silent during trial granted by IC s 25(3)(c) did not 'enlarge upon' the common law right to be presumed innocent until proved guilty beyond reasonable doubt, but merely 'guarantee[d] its future existence'. In \textit{S v Malefo en Andere}, M J Strydom J held that 'die Grondwet [het] slegs die bestaande beginsels betreffende 'n reghervoor verhoor herbevestig soos dit onder andere in die gemene reg gegeld het.'\textsuperscript{124} In \textit{Msomi v Attorney-General of Natal \& Others}\textsuperscript{125} Moodley J accepted the proposition articulated in \textit{S v Huma \& Another}\textsuperscript{126} that IC s 25(3)(d) was 'merely a codification of the common law privilege against self-incrimination and that it did not take the common law principle any further'.\textsuperscript{127} The 'weight of authority' that put paid to a constitutional challenge \textit{S v Lavhengwa} was exclusively common law authority.\textsuperscript{128} And in \textit{S v Maduna en 'n Ander} the analysis of the discretionary nature of the right to counsel was again based exclusively on common law principles.\textsuperscript{129}

In the context of self-incrimination and silence rights, the common law has proved quite resilient and the adoption of its analyses most comfortable. This approach is reflected in both \textit{S v Singo}\textsuperscript{130} and \textit{S v Monyane \& Others}.\textsuperscript{131} The appropriate manner of approaching double jeopardy, and identifying whether it was entailed by

\begin{itemize}
  \item \textsuperscript{121} See, for example, the consideration afforded to the question as to whether the Final Constitution introduced any hardening of the rule against admitting hearsay evidence against an accused person, and the conclusion that the current statutory regime passed muster, in \textit{S v Ndhlovu \& Others}. 2002 (6) SA 305 (SCA). See also \textit{Mbambo v Minister of Defence} 2005 (2) SA 226 (T)(Testing the common law principle that an appeal lay only where the statute afforded an appeal, against the requirements of the right to an appeal found in section 35(3)(o), as interpreted in \textit{S v Twala (SA Human Rights Commission Intervening)} 2000 (1) SA 879 (CC), 2000 (1) BCLR 106 (CC) at paras 9 and 10 and in \textit{S v Steyn} 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 (CC) at paras 5, 11, 13 and 23.)
  \item \textsuperscript{122} \textit{Thebus} (supra) at para 28.
  \item \textsuperscript{123} 1996 (1) SA 1152 (W), 1996 (6) BCLR 807, 811 (W).
  \item \textsuperscript{124} 1998 (2) BCLR 187 (W), 1998 (1) SACR 127 (W), 152F.
  \item \textsuperscript{125} 1996 (8) BCLR 1109 (N)('Msomi').
  \item \textsuperscript{126} 1996 (1) SA 232 (W).
  \item \textsuperscript{127} \textit{Msomi} (supra) at 1119 and 1120. The reference to the 'American common law (in so far as it was relevant to the protection afforded by the Fifth Amendment to the United States Constitution . . .)' is unfortunate: Fifth Amendment jurisprudence is not common law jurisprudence.
  \item \textsuperscript{128} 1996 (2) SACR 453 (W), 473.
  \item \textsuperscript{129} 1997 (1) SACR 646 (T).
\end{itemize}
impugned conduct or not, as considered in *S v Basson*,\(^{132}\) was determined by common law analysis. Important reiterations of codification discourse, occur in *S v M*, with its reference to ‘standards of fairness which the common law recognizes and the Constitution guarantees to an accused person’,\(^{133}\) and in *S v Manamela & Another (Director-General of Justice Intervening)*, which refers to the right to silence and the presumption of innocence as ‘procedural rights which are central to the adversarial criminal process which was developed under the common law and subsumed into the Bill of Rights.’\(^{134}\) Importation of common law principles of due process is most natural where the residual fair trial principle is at play, and may occur without much concern about the precise constitutional rubric for the importation.\(^{135}\)

Sometimes the codification approach, once adopted for the content of the right in question, is taken to apply also to the remedy to be granted. In *Klein v Attorney-General, Witwatersrand Local Division, & Another* the court adopted a codification approach to the right to a fair trial.\(^{136}\) Its statement that ‘there has . . . never been a principle that a violation of any of the specific rights encompassed by the right to a fair trial would automatically preclude the trial’ was cited with approval in *Moeketsi v Attorney-General, Bophuthatswana, & Another*.\(^{137}\) In *Moeketsi*, Friedman J seemed to assume that the common law character of a particular right necessitated compliance with the common law attitude to the remedies available upon violation of that right.\(^{138}\) This, with respect, is a *non sequitur*. A failure to be alive to the distinction between the common law character, if any, of the right in question and the common law remedies for violations of the right resulted in a lamentable
lack of clarity about the relationship between the doctrine of abuse of process and the right to a fair trial in *Coetzee v Attorney-General, KwaZulu-Natal, & Others.*

The pure codification approach can take some strange turns. In *S v Scholtz* Basson J held, as far as the right to silence during trial and inferences from silence were concerned, that the failure of the Final Constitution expressly to have altered the right and remedy in question had to be taken as an indication that the common law right had not been altered. In *S v Lavhengwa*, the only difference that the existence of the Interim Constitution seemed to have made to the merits of the offence of contempt *in facie curiae* was to have fortified the justifiability of the incursion into liberty entailed by the offence in question, since an affront to the 'authority, dignity and repute' of the courts as 'watchdogs of constitutional rights' had now seemingly become a more serious matter. In *Seapoint Computer Bureau (Pty) Ltd v McLoughlin & Others NNO*, the court based its decision on a codification approach which regarded the right to silence as the embodiment of the common law privilege against self-incrimination. But it then went on to reject counsel's arguments based upon the common law protection against self-incrimination enunciated in *Jamalodien v Ajimudien*. It did so partly on the basis that that case, not being 'concerned with the right to remain silent', was not authoritative in the instant case.

Some courts have attempted a golden mean approach to avoid the Scylla of pure codification and the Charybdis of re-inventing the wheel. In *S v Hassen & Another*, the Transvaal Provincial Division displayed a sensitivity to the problems discussed above in deciding whether the common law position, that entrapment was not a

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138 For a similar assumption, see *S v Malefo en Andere* 1998 (2) BCLR 187 (W), 1998 (1) SACR 127 (W), 152F–G. The interpretation of FC s 35(5), which provides for the exclusion of unconstitutionally obtained evidence if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice, and the jurisprudence under IC s 25, where no such remedy is expressly granted, is discussed in Pj Schwikaard ‘Evidence’ in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2006) Chapter 52.

139 1997 (8) BCLR 989 (D), 1997 (1) SACR 546 (D).

140 1996 (11) BCLR 1504, 1508 (NC), 1996 (2) SACR 40 (NC).

141 1996 (2) SACR 453 (W), 474.

142 1996 (8) BCLR 1071 (W)('Seapoint').

143 1917 CPD 293.

144 Seapoint (supra) at 1081.

145 1997 (2) SA 253 (T), 1997 (3) BCLR 377 (T).
substantive defence, was still applicable under the Interim Constitution.\(^\text{146}\) In *S v Kester* Friedman JP based his decision on the extent of the

information required to be presented to the accused on an incisive exploration of common law principles, and then added that his view was 'fortified' by the provisions of IC s 25(3)(b).\(^\text{147}\) An identical attitude was adopted by Claassen AJ in *S v Moilwa*, where the right of an unrepresented accused to assistance by the court was based on common law and first principles which were then 'supported' ('gesteun') by IC s 25(3).\(^\text{148}\) In *S v Brown & 'n Ander*, the court acknowledged the required reappraisal and refinement of common law principles which constitutionalization entailed, and came to the conclusion that, as far as the right not to testify was concerned, the Interim Constitution had not altered the substance of the law, but had brought about a shift in emphasis ('klem verskuiwing').\(^\text{149}\) And in *S v Nombewu*,\(^\text{150}\) Erasmus J noted 'a trend in recent years towards greater recognition of the role of public policy in criminal procedure and evidence',\(^\text{151}\) and found that, as far as excluding improperly obtained evidence was concerned, 'the Constitution did not leave the existing law unchanged.'\(^\text{152}\) He put the matter thus: 'With the enactment of the Constitution, public policy acquired a new dimension.'\(^\text{153}\) In *S v Letaoana* Marcus AJ came to the noteworthy conclusion that the clause in the Final Constitution which decreed the manner of interpreting the common law, FC s 39(2), had the effect of requiring judges to keep their eyes more closely on the Final Constitution in interpreting the common law than was the case under the Interim Constitution.\(^\text{154}\) The substitution of a requirement to 'promote' the spirit, purport and objects of the Bill of Rights in FC s 39(2) for the requirement to 'have due regard' to these factors in IC s 35(3) led to the following conclusion:

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146 The court's main concern was with the evidential consequences of unconstitutional trapping if trapping were to be regarded as unconstitutional and hence it did not exhaustively address the arguments in favour of the American position establishing a substantive defence in the case of entrapment on the basis of Fifth Amendment due process. Ibid at 381f. Cf *United States v Russell* 411 US 423 (1973). See also *S v Dube* 2000 (2) SA 583 (N), 2000 (1) SACR 53 (N).

147 1996 (1) SACR 456 (B), 470. See also § 50.5(n)(iii) infra (On the interpretation of the *dictum* in McIntyre & Others v Pietersen NO & Another 1998 (1) BCLR 18, 21C (T), *sub nomine S v McIntyre en Andere* 1997 (2) SACR 333 (T), that one found in the Interim Constitution a 'samevatting' of the ancient right of an accused to avail himself of the defence of autrefoit acquit.)

148 1997 (1) SACR 188 (NC), 193.

149 1996 (11) BCLR 1480, 1489 (NC), 1996 (2) SACR 49 (NC).

150 1996 (12) BCLR 1635 (E), 1996 (2) SACR 396 (E).

151 Ibid at 1657J.

152 Ibid at 1658D.

153 Ibid at 1658D

154 1997 (11) BCLR 1581 (W).
To 'promote' in this context, means to further or advance. It means more than taking into proper account.155

A rare and welcome expression of the 'a fortiori' principle occurred in *S v Legoa*.156 This doctrine (an incident of a predilection towards generosity in interpretation) holds that when one interprets the scope of a constitutional due process right, one should afford it at least the scope of its common law parent; or, put differently, the constitutional protection should always at least include the degree of protection afforded by the now codified right under common law. With regard to this principle, Cameron JA made the following observations:

Under the common law it was therefore 'desirable' that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is 'a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force'. The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is 'to be informed of the charge with sufficient detail to answer it'. What the ability to 'answer' a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.157

The courts should acknowledge without equivocation that the content of the rights contained in *FC s 35* are a matter of constitutional interpretation. The remedies to be granted upon violation are likewise a matter of constitutional interpretation. The questions are distinct. That many, if not all, of the criminal procedure rights have a common law ancestry, and require argument on the basis of the principles which justify that common law ancestry, is beyond question. But the conclusions reached by the common law courts are not authority to bind the courts when it comes to the interpretation of *FC s 35*. *FC s 35* lay down fundamental rights. These rights may mean little without their common law histories, but they may well mean a lot more than their common law histories. The common law principles were developed as a function of public or state interests over procedural safeguards in the interests of individual liberty, and parliamentary intrusion had to be accommodated as smoothly as possible. The Final Constitution shifts the paradigm by listing the individual's rights irrespective of other interests and prohibiting violation of these rights by any means other than those laid down in the limitations clause.158 The common law equation is unravelled and those interests that accrued on the other side of liberty

155 Ibid at 1591.

156 2003 (1) SACR 13 (SCA)('Legoa').

157 *Legoa* (supra) at para 20.

now require justification to overturn the listed rights. That the answer may often be the common law answer does not change the conceptual picture. Nor does this mean that the wheel will be re-invented for every question: some common law justifications speak with such authority that much of the analytical work will be done, for practical purposes, by that weight of authority. An exploration of the justification process is therefore a useful next step in the analysis.

(iv) Limitation

According to the general theory of limitation, the court should first determine the scope of FC s 35 rights, then require the applicant to indicate that the right thus interpreted has been infringed, and then allow the state or the party relying upon the law to justify a limitation of that right by discharging the burden of justification under FC s 36(1). This two-stage analysis, asking first whether the individual's right has been infringed, and then asking whether the infringement can be justified by sufficiently weighty state interests, was specifically endorsed for the purposes of criminal procedure rights by the Constitutional Court in Ferreira v Levin NO & Others; Vryenhoek v Powell NO & Others and Scagell & Others v Attorney-General of the Western Cape & Others. In fact, the application of the general 'double-barrelled approach' to criminal procedure rights was regarded as 'trite' by the Witwatersrand Local Division in S v Lavhengwa, and expressly insisted upon in S v Mathebula & Another and S v Sebejan.

Nevertheless, the criminal procedure rights, particularly the right to a fair trial, involve a nightmare for limitation analysis. First, the fair trial right and a number of the specifically enumerated criminal procedure rights contain a number of 'internal modifiers' and 'internal limitations' that make two-stage limitation analysis exceedingly difficult. The only true 'internal limitation' in the criminal procedure rights was the bail proviso contained in ICs 25(2)(d), which establishes a right to be


161 1996 (1) SACR 453 (W), 477.

162 1997 (2) BCLR 123, 135 (W), 1997 (1) SACR 10 (W).

163 1997 (8) BCLR 1086 (W), 1997 (1) SACR 626 (W), 628.
released from detention 'unless the interests of justice require otherwise'. But even this 'internal limitation' has a lesser claim to being a limitation proper if the interpretation of this clause in *Ellish en Andere v Prokureur-Generaal, Witwatersrandse Plaaslike Afdeling*¹⁶⁶ and *Prokureur-Generaal van die Witwatersrandse Plaaslike Afdeling v Van Heerden en Andere*¹⁶⁷— that the clause did not place an onus upon the State is accepted. The alteration of this clause to remove the possible burden of justification on the State in IC s 25 and to replace it with a condition ('if the interests of justice permit') in FC s 35 means that there are no 'internal limitations' proper in the Final Constitution's criminal procedure rights.¹⁶⁸

However, internal qualifications framed in terms of reasonableness, adequacy, sufficiency, or the interests of justice abound.¹⁶⁹ These qualifications, while not distinctly separable from the right concerned as a permissible 'internal limitations', are also not the kind of 'internal modifiers' which Woolman and Botha identify as distinguishable from internal limitations on the basis that they are part of an inquiry into the content of the right.¹⁷⁰ If the right to a fair trial can be transcribed as the right not to receive an unfair trial, then the problem of the relationship between defining the right in question and justifying its limitation may seem identical to that pertaining to the prohibition of 'unfair discrimination' in FC s 9(3).¹⁷¹ But whether 'unfair discrimination' should be regarded as conceivably justifiable is not the same as asking whether an unfair trial is justifiable. It seems easier in principle to separate the practice of 'unfair discrimination' from the reasons offered to justify it, especially as far as 'indirect discrimination' is concerned,¹⁷² than to separate the fairness of a trial from the interests of the state invoked as justification for conducting a trial in a certain way. This is because the common law notion of a fair trial developed as a function of the interests of the individual accused against those of the state in the first place.

¹⁶⁵ For more on internal modifiers and internal limitations, see S Woolman & H Botha 'Limitation' in S Woolman, T Roux, J Klaaren, A Stein, M Chakalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34, § 34.4 and § 34.5


¹⁶⁷ 1994 (2) SACR 469 (W).

¹⁶⁸ On 'internal limitations', see Woolman & Botha (supra) at § 34.5.

¹⁶⁹ See IC s 25(1)(b), IC s 25(1)(c), IC s 25(2)(b), IC s 25(2)(d), IC s 25(3), IC s 25(3)(e), IC s 25(3)(f); FC s 35(1)(d), FC s 35(1)(f), FC s 35(2)(c), FC s 35(2)(e), FC s 35(3), FC s 35(3)(b), FC s 35(3)(d), FC s 35(3)(g), FC s 35(5).

¹⁷⁰ See Woolman & Botha (supra) at § 34.4.

It is no wonder, then, that when it comes to the right to a fair trial the courts so often introduce the kind of balancing in the definition stage of the analysis which Woolman characterizes as 'the worst kind of analytical confusion'.\textsuperscript{173} It is truly unfortunate that the decision of the Constitutional Court in \textit{Shabalala v Attorney-General of Transvaal} did not indicate exactly to which part of the analysis competing state interests were being attached.\textsuperscript{174} In \textit{Attorney-General, Eastern Cape v D} the Eastern Cape Division was of the opinion that

'It [was] a misconception that the fundamental right to a fair trial focuse[d] exclusively on the rights and privileges of the accused as those rights [had to] be interpreted and given effect to in the context of the rights and interests of the law-abiding persons who [made] up the bulk of society and, in particular, the victims of the crime'.\textsuperscript{175}

In \textit{Klink v Regional Court Magistrate NO \\& others}, the South Eastern Cape Local Division, faced with the question whether allowing a child witness to testify through an intermediary violated the accused's right to a fair trial, held that 'in deciding whether [the accused's] rights had been violated it [was] also necessary to take into account the interest of the child witness'.\textsuperscript{176} The 'trite' two-stage analysis was also completely absent from the judgment in \textit{Moeketsi v Attorney-General},

\begin{itemize}
  \item \textsuperscript{172} 'Indirect discrimination' or 'disparate impact' refers to a practice the effect of which is disproportionally to disadvantage members of a protected group. Such a practice, while being recognized as discrimination, allows justification rendering it lawful. It is by no means contrary to the principles of anti-discrimination law to hold that indirect discrimination, while being recognized as 'unfair' from the victim's point of view, is reasonable and justifiable in many cases. If affirmative action is regarded as a form of direct discrimination, then the potential applicability of a two-stage analytical structure to \textit{direct} discrimination would of course follow naturally. See \textit{Kalanke v Freie Hansestadt Bremen} [1995] IRLR 660 (EC)) (Absolute tie-break in favour of appointing equally well-qualified women candidates to civil service a violation of EC Equal Treatment Directive, even where Directive contained allowance for affirmative action); \textit{Jepson and Dyas-Elliott v The Labour Party} [1996] IRLR 116 (Women-only constituencies for election candidates 'direct discrimination' for the purposes of British anti-discrimination statute); B Hepple 'Can Direct Discrimination be Justified?' (1994) 55 \textit{Equal Opportunity Review} 48; \textit{Adarand Constructors Inc v Pena} 115 SCt 2097 (1995) (Both state and federal affirmative action programmes in the United States subject to 'strict scrutiny' analysis). In South Africa the matter is complicated by the potential internal limitation structure of FC s 9. See \textit{Minister of Finance \\& Another v Van Heerden} 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC); \textit{Public Servants Association of South Africa \\& Others v Minister of Justice \\& Another} 1997 (3) SA 925 (T), 1997 (5) BCLR 577 (T). See also C Albertyn \\& B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson \\& M Bishop (eds) \textit{Constitutional Law of South Africa} (2nd Edition, OS, March 2007) Chapter 35.
  \item \textsuperscript{173} S Woolman 'The Limitations of Justice Sachs's Concurrence: \textit{Coetzee v Government of the Republic of South Africa}’ (1996) 12 \textit{SAJHR} 99, 115-21. See also Woolman \\& Botha (supra) at § 34.3.
  \item \textsuperscript{174} 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC) at para 52. The analysis should be regarded as maintaining the two-stage structure, but the dimensions of fairness, interest-balancing and ‘discretion’ were far too inextricably intertwined in the reasoning of the court to allow a clear vision of different analytical stages to emerge. This tension is reflected throughout the judgment. Ibid at para 52, para 56 (‘[t]he crucial determinant is what is fair in the circumstances, regard being had to what might be conflicting but legitimate considerations’) and para 68 (by the use of ‘moreover’) that the impugned rule in question, in \textit{addition} to impairing the right to a fair trial unjustifiably, could also not be justified under IC s 33.)
  \item \textsuperscript{175} 1997 (7) BCLR 918 (E), 1997 (1) SACR 473 (E). 476. See also \textit{S v Sunday \\& Another} 1994 (4) BCLR 138 (C), 1994 (2) SACR 810 (C).
  \item \textsuperscript{176} 1996 (3) BCLR 402, 412 (E).
\end{itemize}
Bophuthatswana, & Another. In its stead Friedman JP offered, as the method of defining trial within a reasonable time, ‘an "ad hoc balancing" process in certain cases requiring the skill and ability of a juggler’,\textsuperscript{177} and elaborated, not entirely helpfully, that ‘a more vital approach’ than an ‘all embracing formula’ lay in ‘an effort to weigh the factors detailed objectively within the inner framework of justice’ and that ‘[t]his process require[d] a constant intellectual communication and interflow of the relevant components as extracted from the authorities’.\textsuperscript{178} In Msomi v Attorney-General of Natal & Others\textsuperscript{179} Moodley J held that because Sachs J had expressed the view in Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others that a practice like compulsory fingerprinting would have far less difficulty in passing IC s 33 scrutiny than would testimonial compulsion,\textsuperscript{180} this dictum meant that the right against self-incrimination did not extend to fingerprinting.\textsuperscript{181} The learned judge thereby completely conflated the two discrete questions regarding the scope of the right and the justifiable limitation of the right.

It would seem as if cases introducing an internal balancing act into the definition of the relevant fair trial right threaten the sort of confusion Woolman warns against. In any event, the very idea of balancing the interests of the state against that of the individual in fleshing out the meaning of a right to a fair trial requires scrutiny, whatever objections the general doctrine of limitations might have to such an approach. Procedural due process, the idea of the rights of the accused, arrested or detained individual, operates in a sphere where the interests of the state which rendered the individual an accused, arrested or detained person in the first place are a given background to the question as to how to be fair towards that person and respectful of his or her liberty interests. Due process asks what rights a person has, \textit{given} that the state has an interest in placing him or her in the position to have the due process question asked. Of course the scope of the individual's due process rights will be determined by his or her status as an accused, arrested or detained person — in other words, the right cannot extend to the point where the individual's status is disregarded. This is the only role that state interests should play in defining the scope of internally qualified criminal procedure rights. It must be remembered that the individual complainant bears the onus of demonstrating a violation of a right. It is to be expected that such a demonstration, where a previously unrecognized aspect of the right in question is argued for, or where 'reasonableness' is to be demonstrated, will have to be sensitive to the parameters allowed by the applicant's status as accused, arrested or detained. But that is a different matter from requiring the applicant to negate the possible weight of state interests against his or her claim.

\textsuperscript{177} 1996 (7) BCLR 947, 965 (B).

\textsuperscript{178} Ibid at 970–1.

\textsuperscript{179} 1996 (8) BCLR 1109 (N).

\textsuperscript{180} 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) ('Ferreira') at para 259.

\textsuperscript{181} Ferreira (supra) at 1120.
The idea that the essence of the fair trial right ought to be arrived at by a process of balancing (i.e. in the first stage of the conceptual two-stage analysis), and that what is to be balanced in defining the right are the interests of the state (or of the community) against those of the accused, is sometimes incorrectly attributed to the following passage in the judgement in *Key v Attorney-General, Cape Provincial Division & Another*:

In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial.\(^\text{182}\)

The passage above was delivered in the context of determining the difficult question whether unconstitutionally obtained evidence was to be admitted or excluded in terms of section 35(5), which required an assessment of the question whether the administration of justice would be served by the admission of the evidence. That so much of our constitutional fair trial analysis has, in practice, been reduced to this question is a function of the practicalities of criminal prosecution — the question whether a right has been violated and what ought to be done about it tends to arise in the situation when evidence is sought to be led against the accused, or inferences of guilt are sought to be based on evidence led. But that ought not to confuse the question to what extent the orthodox two-stage analysis is capable of being appropriately applied to the question of violations of, and in particular, the question of the definition of, section 35 rights. An example of use of the passage as authority for the process of defining the right to a fair trial by means of balancing the interests of the accused against those of the state is the following passage from the separate concurring judgement of Yacoob J in *S v Thebus & Another*:

Another implication is that all the separate rights in the section must be given meaning in the light of a notion of a fair trial. Although a principal and important consideration in relation to a fair trial is that the trial must be fair in relation to the accused, the concept of a fair trial is not limited to ensuring fairness for the accused. It is much broader. A court must also ensure that the trial is fair overall, and in that process, balance the interests of the accused with that of society at large and the administration of justice.\(^\text{183}\)

Whether an unfair trial can ever be justified is a question which has been considered in Canada, in the context of the 'principles of fundamental justice' required for any procedure depriving an individual of liberty.\(^\text{184}\) The different approaches are contained in the respective views of Lamer CJ and Wilson J in *R v Swain*.\(^\text{185}\) Lamer CJ, being of the opinion that the state's interests could never operate within the definition of the 'principles of fundamental justice', was inclined to say that these

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\(^{182}\) 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC)('Key') at para 13.

\(^{183}\) Thebus (supra) at para 107. The passage was followed by a citation of the passage in Key. See also Thebus (supra) in para 109.

\(^{184}\) See D Stratas *The Charter of Rights in Litigation: Direction from the Supreme Court of Canada* (No 19, August 1997) § 17:12.
interests were to be considered under the limitation clause. Wilson J expressed the view that violations of the principles of fundamental justice could never be justified under the limitations clause.

The correct approach to this question should be to draw a distinction, first between the general (residual) fair trial right and specific instances of that right, and then between internally qualified specific rights and absolutely framed specific rights. The general right of an accused to a fair trial must be delineated as described above. State interests play the part only of keeping the inquiry within its parameters. There would seem to be no real room for justifiable limitation. Specifically enumerated rights that state baldly and without qualification that to which the accused, arrested or detained person is entitled are to be treated in the traditional two-stage way. Specifically enumerated rights that contain qualifications (or modifiers) are in principle subject also to the two-stage approach. However, in their delineation, state interests will play a parameter-maintaining part. As a result, in the second stage, justifiable limitation will be more difficult to demonstrate than in the case of the unqualified rights. Nevertheless, justifiable limitation on the right to a trial within a reasonable time is conceivable, and justifiable failure to provide legal representation at state expense where substantial injustice would result equally conceivable. It is not at all incoherent to recognize that the position of indigent accused relative to wealthy accused is a situation of 'substantial injustice', while at the same time acknowledging that state justifications for a failure to rectify the injustice may pass limitation clause muster. If it is recognized that the 'reasonableness' required by the right and the 'reasonableness' of the justifications offered by the state refer to different types of enquiries with different objects of attention, then the seeming paradox of reasonably justified limitations upon reasonably framed rights becomes less daunting.

Admittedly, in Scagell & Others v Attorney-General of the Western Cape & Others, the Constitutional Court unanimously applied limitation analysis to the residual right to a fair trial contained in IC s 25(3). The limitation in question did not pass muster, but this judgment must be taken as clear authority for the view that the general fair trial right is in principle to be subjected to the two stages of definition and limitation. Still, although O'Regan J made it clear that the right in question was the residual fair trial right, the character of the limitation reasoning adopted seemed to indicate that the court should have regarded the right at stake to have been the presumption of innocence, rather than the general fair trial right.
Such a conclusion would then have offered a more satisfactory explanation for the easy applicability of the two-stage analysis to the facts.\textsuperscript{192}

The criminal procedure rights belong to that group of rights which could be limited under IC s 33(1) only where limitations were 'necessary' in addition to being 'reasonable and justifiable in an open and democratic society based on freedom and equality'. The 'necessity' hurdle was dropped in the Final Constitution, and the limitation principles in FC s 36 have been altered, seemingly to incorporate the limitation analysis laid down by Chaskalson P in \textit{S v Makwanyane}.\textsuperscript{193} Woolman's observation that the factors as listed in FC s 36(1) reflect a 'continuing failure clearly to separate the stages of fundamental rights analysis and to recognize that not every limitation question involves issues of proportionality'\textsuperscript{194} will be especially

\textsuperscript{189} See P Hogg \textit{Constitutional Law of Canada} (3rd Edition, 1992; 1996 supplement) § 35.14(e). See \textit{Sanderson v Attorney-General, Eastern Cape} 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at paras 25 and 35 (Court referred, without approval or disapproval, to the 'balancing' approach towards speedy trial rights adopted in some jurisdictions including South Africa. Kriegler J did not adopt a balancing approach without more, but did include an assessment of state interests or burdens as factors in determining the 'reasonableness' of the delay. Culpability played a part in this assessment of 'reasonableness'. An 'objective' and an accused-centred assessment of reasonableness might be separated from the 'reasonableness' of the state's actions for two-stage analytical purposes.) For 'objective reasonableness' in the field of delict, see the discussion in PQR Boberg \textit{The Law of Delict: Vol I Aquilian Liability} (1984; 1989 revision) 39–40. The problem with trying to reserve state interest assessment for the limitation stage, a problem raised in discussion by Anthony Götz, is that few state actions would seem to comply with the requirement in FC s 36(1) of being 'law of general application'. This difficulty probably informed the finding in \textit{S v Naidoo & Another} — 1998 (1) BCLR 46 (D), 1998 (1) SACR 479 (N), 499I-500D — that Claassen J’s approach in \textit{S v Mathebula & Another} 1997 (1) SACR 10 (W), 1997 (1) BCLR 123 (W) of assessing waiver in the context of unconstitutionally obtained evidence in terms of the limitations clause was not suited to a situation where the potential justifying factor was not a 'law of general application' understood in its natural sense. The 'general application' requirement should be seen as operating as a safeguard against arbitrary or discriminatory action, rather than as requiring a measure which applies to everybody. The status of the action as 'law' need refer only to the legally empowered nature of the action, rather than to its character as a legislative stipulation or common law rule. Such legal empowerment may then entail elements of substantive due process. In this way the two-stage process can be preserved even in cases dealing with 'reasonableness' and with administrative action on a small scale. The advantage is that state interests would require justification by the state, rather than elimination by the accused. See \textit{President of the Republic of South Africa v Hugo} 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at paras 95-104. See also Woolman & Botha 'Limitations' (supra) at § 34.7 (For a detailed discussion of the meaning of 'law of general application'.) It must be conceded that such an interpretation faces severe conceptual difficulties in the light of the finding by the Constitutional Court in \textit{Premier of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal}. 1999 (2) SA 91 (CC), 1999 (2) BCLR 125 (CC)(Declined to justify \textit{ad hoc} administrative action, on the basis that such action did not constitute law of general application.)

\textsuperscript{190} 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC) at paras 16 and 19.

\textsuperscript{191} Ibid at para 16.

\textsuperscript{192} The justifiability of an evidential burden seems to require an identical sort of analysis to that pertaining to the justifiability of a persuasive burden. The fact that the possibility of justifiable limitation was framed in terms of facility of proof seems to confirm this view. Ibid at para 19.

\textsuperscript{193} 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC). See Woolman & Botha 'Limitations' (supra) at § 34.2.

pertinent in the sphere of criminal procedure rights for the reasons expounded above.

The removal of the requirement of necessity for limitations upon criminal procedure rights should in principle result in the possibility that limitations which would not pass the tests laid down under the 'necessary' regime of IC s 33(1)(b) would not fail the less restrictive requirements of FC s 36(1). Some doubt must therefore be cast upon the persuasiveness of *dicta* rejecting justification arguments under IC s 33(1)(b). Although the Constitutional Court was wary of entrenching a 'necessity' jurisprudence readily distinguishable from a 'reasonableness' jurisprudence, and indicated in *First Certification Judgment* that substitution of a general 'proportionality' approach for the two-tier 'necessity' and 'reasonableness' regime should accommodate due allowance for the possibly varying weight of rights claims,¹⁹⁵ such criminal procedure limitations analysis as has been expressly reasoned in terms of the 'necessity' requirement must at the very least be noted as subject to reappraisal. In *Scagell & Others v Attorney-General of the Western Cape & Others*, a unanimous Constitutional Court based its rejection of an offered justification for limiting the right not to be encumbered with an evidential burden exclusively on the lack of 'necessity' for the limitation in question.¹⁹⁶ And in *S v Mathebula & Another*, Claassen J expressly took cognizance of the fact that the fair trial rights were 'of a higher order' because of the presence of a 'necessity' requirement, but held that what the learned judge regarded as a limitation in that case was indeed 'reasonable, justifiable and necessary'.¹⁹⁷

The removal of the 'necessity' requirement from FC s 36(1) can be saved from meaninglessness on the one hand and ominous significance on the other by isolating the kind of consideration the necessity requirement reflected. The requirement that the state eliminate alternative routes to safeguarding the interests relied upon in an IC s 33(1) or FC s 36(1) argument is the factor most directly affected by the removal of the 'necessity' requirement.¹⁹⁸ In other words, the 'necessity' qualification is not to be regarded as permeating every factor of the limitation analysis; rather, it is to be regarded merely as adding a requirement focused upon the elimination of all reasonable alternatives. Limitation reasoning in the sphere of criminal procedure rights may, therefore, be lifted from its 'necessity' context without doing violence to the reasoning in question, once aspects of the reasoning specifically directed at the requirement of necessity have been disregarded.

But this conclusion should not be taken as far as to allow limitation analysis 'in the air'. The Cape Provincial Division's finding in *Dabelstein & Others v Hildebrandt & Others*¹⁹⁹ that an IC s 33 justification which was good for the purposes of privacy was equally good for the purposes of self-incrimination played much too fast and


₁⁹⁶ 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC) at para 19.

₁⁹⁷ 1997 (1) BCLR 123, 138 (W).

loose with the requirements of 'proportionality' and the guidelines set out in *Makwanyane* and in FC s 36(1).

In *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat* the Constitutional Court indicated that the justifiability of a statutory provision under FC s 36(1) might depend upon 'the prevailing climate'. How variable such a climate may be, is something that will require further development by the court.

### 51.2 'Arrested', 'detained' and 'accused' persons

It is clear from the structure and the wording of FC ss 35(1) and (2), that 'detention' for the purposes of the criminal procedure rights must be regarded as the generic reference to coercive physical interference with the subject's liberty, while 'arrest' always involves 'detention'. Moreover, the new wording of FC s 35 adds to 'detention' the dimension of being apprehended 'for the alleged commission of an offence'. Furthermore, the structure of the rights in question and the existence of the due process wall mean that the lawfulness of how one comes to be detained is a FC s 12 question, and the rights one possesses once one is a detainee are a FC s 35...
question. This distinction extends also to the merits of continued detention, which must be decided in terms of FC s 12. It is therefore of some moment that the term 'arrested person' for the purposes of defining the beneficiary of FC s 35(1) is narrower than that of 'arrested person' generically speaking.

The rights one enjoys qua arrested or detained person are to be distinguished from the effect on one's rights qua accused person of things that happened while one was an arrested and detained person. In S v Hlalikaya & Others Van Rensburg J spoke throughout in terms of the right of an 'accused person' to be legally represented at every pre-trial procedure. He relied for his main authority upon the

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203 See § 51.1(a)(ii) supra.

204 This distinction does not mean that a violation of a detainee's rights might not render the detention itself unlawful. Those rights of detainees which are most closely concerned with the period immediately after, or even during, initial apprehension, such as the right to reasons, may render the detention itself unlawful upon their breach. The court in Naidenov v Minister of Home Affairs & Others assumed that the information right contained in IC s 25(1)(a) set down a requirement for lawful detention. Whether killing can be regarded as a form of detention or arrest is philosophically intriguing. 1995 (7) BCLR 891, 899 (T). It would be difficult to squeeze the question of the constitutionality of s 49(2) of the Criminal Procedure Act 51 of 1977, which allows killing in an attempt to effect arrest or to prevent escape concerning Schedule 1 offences, into the confines of FC s 35 (although the wording of s 49(2) certainly seems to assume that killing is a form of arrest). Nevertheless, the question of the amount of force used in effecting arrest straddles the divide between FC s 12 and FC s 35. The ultimate use of force does not, in principle, straddle the divide any less. The practical significance of these questions may lie in a proliferation of causes of action and foundations for compensation. In Raloso v Wilson & Others, an application to refer the constitutionality of s 49(2) to the Constitutional Court was refused in the light of the intended amendment of the section. The court did, however, endorse counsel's contention that 'a manifestly unconstitutional statute remain[ed] on the statute books purporting to give legal authority for the killing of persons in circumstances which [could] not be countenanced by the Constitution', by terming it 'indeed a sorry state of affairs'. 1998 (1) BCLR 26, 35-36 (NC), 1998 (2) SACR 313 (C). The Constitutional Court in Ex parte Minister of Safety & Security: In re S v Walters remarked upon the irony of the fact that the restraint in Raloso had been partially prompted by the imminence of the legislative amendment, that had, by the time Walters was decided five years later, still not become law. 2002 (4) SA 613 (CC), 2002 (7) BCLR 663 (CC), 2002 (2) SACR 105 (CC) at para 19. The noteworthy aspect about the treatment of the constitutionality of section 49 by the Court in Walters was that it did not occur under the rubric of the FC s 35 rights, and that Kriegler J expressed what must be taken as a strong caveat about the philosophically intriguing question posed above in this footnote, when pointing out that killing a suspect defeated the fundamental purpose of an arrest, which was to bring a suspect before a court. Ibid at para 50.

205 See Lawyers for Human Rights v Minister of Home Affairs & Another 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC) ("Lawyers for Human Rights"). The question of FC s 35(1) did not arise, but there was room for debate on whether a person in certain circumstances could be said to have been 'arrested' as envisaged in the Act. It might have been interesting, had silence and self-incrimination rights been at issue, to have argued whether 'arrest' for the purposes of FC s 35(1) required, not only that the arrest be for the alleged commission of an offence, but that it be for the purposes of prosecuting for the alleged commission of an offence. One might have argued that seeking to enter the Republic illegally entailed the commission of an offence, and being arrested for deportation purposes on the basis of seeking to enter illegally entailed being arrested for the alleged commission of an offence.

206 See § 51.1(a)(iv) supra.

207 1997 (1) SACR 613 (SE) ("Hlalikaya").
decision in S v Melani.\textsuperscript{208} In Melani, the source of the right in question was said to be IC s 25(1)(c) – which pertained to detained persons (almost invariably arrested persons incorporating this right from their status as detained persons). The judgment in Melani then continued to combine IC ss 25(2) and (3) to argue that the right to counsel was a continuing right throughout the criminal process.\textsuperscript{209} It does not emerge clearly from the Hlalikaya record whether the procedure in question occurred after the person had been formally charged, but the case does illustrate the fact that, since the main focus of the inquiry in the vast majority of criminal procedure constitutional cases is on the consequences at the trial of an accused person of alleged violations that occurred somewhere during the criminal process, the analysis would tend naturally to drift towards the perspective of the accused at trial and the significance of previous stages from that perspective. Still, determining the ambit of the right of a detainee or an arrestee before he or she has become an accused, or who for some reason or other does not eventually become an accused, is crucial, since violations of the detainee's rights should entail remedial possibilities irrespective of what the consequences might be on the admissibility of evidence at some later date. In Canada and under the European Convention on Human Rights, a person is entitled to fair trial rights upon being 'charged with an offence'.\textsuperscript{210} In order to allow for a distinction between arrested and accused persons, and to enable the courts to make appropriate use of comparative jurisprudence in this area, it would make sense to interpret 'accused' in FC s 35(3) to refer to someone who has been formally charged.\textsuperscript{211} This bright line rule is always subject to the fact that pre-charge occurrences may affect the right of the accused person to a fair trial.

The structure of the rights of arrested and detained persons in FC s 35(1) and FC s 35 (2), however, casts doubt upon the picture set out above. The rights of an arrested person now appear first in the list of rights, to be followed by the rights of a detained person, and then by those of an accused person. This arrangement by itself already encourages the idea that, consonant with a popular or natural understanding of the distinction between arrest and detention, arrest is a lesser interference with liberty than detention, or that arrest is something that may be followed by detention. The former refers to the act of apprehension only, and the latter to continued restriction in custody.\textsuperscript{212} JES Fawcett assumes this latter distinction without more for the purposes of considering a particular question under art 5 of the European Convention on Human Rights.\textsuperscript{213} In Van der Leer v Netherlands, however, the generic status of detention and the specific status of arrest, and the fact that a detention need not be an arrest, came starkly to the fore.\textsuperscript{214} Since only 'arrested persons' were entitled to being informed of reasons for their arrest and of 'any charge' against them, the Dutch government argued that someone confined (ie detained) in a psychiatric hospital, and thus not 'arrested', was not entitled to reasons. The Strasbourg Court held that 'arrest' was to be interpreted

\textsuperscript{208} 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335 (E) ("Melani").

\textsuperscript{209} Ibid at 348-9.

\textsuperscript{210} Section 11 and art 6 respectively.
'autonomously' and that it 'extended beyond the realm of criminal law measures', despite the reference in art 5(2) to a 'charge'.  

Application of a similar interpretation to FC s 35(1) would mean that those who are detained but not arrested would presumably also be entitled to protection against compelled statements, the right to silence, and speedy judicial process. But Van der Leer was possible only because the rights of an 'arrested' person, although framed to include reference to a 'charge', are not expressly confined to someone 'arrested' for a particular (criminal) purpose in art 5 of ECHR, as they are in FC s 35(1). Nevertheless, although silence, compelled evidence, and speedy process rights are inextricably bound up with the criminal process, there may be scope for an application of the spirit of Van der Leer in the context of FC s 35. Since 'arrest' refers to 'detention' for the purposes of criminal prosecution, a detainee who is apprehended and detained for the purposes of an investigatory procedure which,
although it may lead to imprisonment, does not amount to 'criminal proceedings',\textsuperscript{217} would not be entitled to silence, protection from compelled evidence, and speedy process rights. He is neither an 'arrestee', nor an 'accused'.\textsuperscript{218} Application of Van der Leer reasoning would then mean that detainees who are apprehended for purposes which are quasi-criminal, yet not sufficiently 'criminal' to attract 'fair trial' rights, should be afforded those rights which accrue to an 'arrested' person under FC s 35(1). In other words, 'arrested for allegedly committing an offence' in FC s 35(1) should be interpreted broadly to apply to proceedings which may have a criminal character but are insufficiently criminal to render FC s 35(3) applicable at later stages.\textsuperscript{219}

A person who is apprehended for some reason other than 'for allegedly committing an offence' is not an arrested person. However, as soon as his or her detention is based upon his or her suspected responsibility for the commission of an offence such person becomes an arrested person. The problem with the wording of FC s 35(1), as opposed to that used in IC s 25(2), is that the new wording, if anything, narrows the definition of arrest. 'For allegedly committing an offence' must be read as relating to an offence committed by the person apprehended, whereas 'for the alleged commission of an offence' can refer to an offence committed by anybody. Someone apprehended for interrogation purposes will therefore not be an arrested person unless the apprehension can be said to be 'for allegedly committing an offence'. As soon as the detainee becomes a suspect, however, it is submitted that he or she will then be detained 'for the alleged commission of an offence', and henceforth be arrested. In this respect the effect of the finding in \textit{Park-Ross v Director: Office for Serious Economic Offences}\textsuperscript{220} on the meaning of the phrase 'for allegedly committing an offence' must be re-considered.\textsuperscript{221} The court held that the compulsory detention inherent in inquiries conducted under s 5 of the Investigation of Serious Economic Offences\textsuperscript{222} did not amount to 'arrest' for the purposes of

\textsuperscript{217} See \textit{Nel v Le Roux} 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC) (‘\textit{Nel}’) at para 11.

\textsuperscript{218} In the circumstances of \textit{Nel}, there could be no ‘arrest' stage between detention for the purposes of answering questions under s 205 of the Criminal Procedure Act and summary imposition of a sentence of imprisonment upon failure to comply under s 189. For confirmation of the applicability of \textit{Nel} in circumstances that could not be plausibly distinguished, see \textit{S v Mahlangu} 2000 (1) SACR 565 (W)(FC s 32 (the right to access to information) was at issue.)

\textsuperscript{219} It should be noted that the detainee in \textit{Nel} was expected to rely upon his right against self-incrimination as an \textit{accused} person in future possible proceedings in which his incriminating answers would operate to his prejudice. This does not mean that he was afforded a right against self-incrimination as a detainee or as an arrestee. It means merely that a violation of his rights as an accused in later proceedings could be invoked as a 'sufficient cause' not to answer questions under compulsion. \textit{Nel} (supra) at paras 5-9. His status as an accused in the notional later proceedings must not be confused with the denial of this status to him for the purposes of the summary proceedings under s 189 of the Criminal Procedure Act. Ibid at para 11.

\textsuperscript{220} 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C) (‘\textit{Park-Ross}’).

\textsuperscript{221} The applicable phrase in \textit{Park-Ross} was, in terms of IC s 25(2), ‘for the alleged commission of an offence’.
enjoyment of the rights of silence and self-incrimination granted to arrested and accused persons by IC s 25(2) and (3). The court declared:

[An enquiry under s 5 is not part of any criminal process and cannot be regarded as the investigative stage of criminal process. Non constat that, because such an inquiry takes place, criminal charges are likely to follow therefrom. Nobody is an accused at that stage nor is anyone necessarily likely to be.]

A literal interpretation of this finding would lead to great difficulties about the rights of those persons arrested for purposes of interrogation upon the suspicion that they may have committed an offence, where it is by no means clear to anybody that the persons concerned are 'necessarily likely' to become accused persons. It simply cannot be maintained that such persons are not apprehended 'for allegedly committing an offence'.

The structure of the rights of arrestees and detainees has the following consequence: the more the authorities can argue that a particular detention is not effected or continued 'for allegedly committing an offence', the more they can keep self-incrimination and speedy process rights away from the door. But the less the reasons for detention have to do with a desire to prosecute, the more pressed the authorities will be to provide proper justification for the deprivation of liberty in question. It has been held that an arrest which does not comply with the requirements for arrest under the Criminal Procedure Act renders subsequent detention unlawful. But an arrest which does not comply with the requirements of lawful arrest cannot be saved from being declared an unlawful detention by reliance upon its not being an 'arrest'. If arrest is effected 'for allegedly committing an offence', but there is no intention at all to bring the person before a court, the person is still 'arrested' for the purposes of FC s 35(1) rights. The arrest is rendered unlawful for not complying with the requirements of lawful arrest. The significance would be that violations during detention of the rights of an arrested person would


223 The compulsory proceedings would, however, be relevant at any criminal trial consequent upon them, to determine whether the affected persons' rights as accused persons were being respected. See Park-Ross (supra) at 164. See also § 51.4(b)(iii) supra.

224 Park-Ross (supra) at 164 (emphasis added).

225 The fact that s 50(1)(a) of the Criminal Procedure Act as amended by Act 85 of 1997 employs 'arrest' as a generic term which includes arrests 'for allegedly committing an offence' and 'for any other reason' is unfortunate in the extreme. More potential confusion is engendered by the reference in subsec (6)(a)(ii) to a person who 'was not arrested in respect of an offence'. This latter formulation seems to suggest that any apprehension 'in respect of an offence' is what is meant by an arrest 'for allegedly committing an offence' in s 50(1)(a). This makes sense. It indicates that the Criminal Procedure Act distinguishes between those apprehended 'for offences' and those apprehended for other reasons. The former category is 'arrested' for the purposes of the Constitution. The latter is detained, but not arrested. The Criminal Procedure Act loosely employs the term 'arrested' for both categories.

226 See Minister of Law and Order, KwaNdebele, & Others v Mathebe & Another 1990 (1) SA 114 (A).

227 See Duncan v Minister of Law and Order 1986 (2) SA 805 (A), 820.
entitle a person unlawfully arrested to compensation, irrespective of the remedies available for unlawful arrest.

More important than whether some detained persons should be entitled to the rights of arrested persons is the question whether the omission from FC s 35(1) of the express indication that 'arrest' is to be taken to include 'detention', coupled with the switch in the sequence of the rights of arrested and detained persons, is to be accorded any significance. The answer could have devastating and absurd consequences for arrested persons: they would have no right to counsel, nor to reasons immediately after apprehension, unlike detainees, who enjoy these rights under FC s 35(2)(a), (b) and (c). This rubric would make sense only if FC s 35 were to be read as having engineered a complete transformation of the definitions of 'arrested' and 'detained' persons reflected in IC s 25. If not, then every arrested person is a detained person in any event, and continues to enjoy the rights to reasons and to counsel in that capacity. The latter view is the only reasonable construction of the structure of FC s 35.

This was not, however, how Yacoob J visualized the interplay between FC s 35(1) and FC s 35(2) in S v Thebus and Another. Justice Yacoob conceived of detention as something that might follow upon arrest, but did not necessarily do so, thereby rendering an arrested person only a candidate detained person for the purposes of FC s 35(1) and FC s 35(2):

The three subsections intersect, complement each other and demonstrate a logical pattern when viewed from the point of view of the criminal justice process that might unfold in relation to a person who is suspected of having committed an offence. The first step envisaged is the arrest of a person for allegedly having committed an offence. That person is not yet an accused and the arrest itself does not render him a detainee entitled to the right set out in ss (2). The rights in ss (1) and (2) will be applicable to everyone who is arrested and thereafter detained. Every person arrested for allegedly committing an offence has the right, at the first court appearance, to be charged, to be informed of the reason for the detention to continue, or to be released. If she or he is released the process is at an end. Presumably the person may be detained further and informed that the matter is under further investigation. In that event, the person concerned remains a detainee and is entitled to the rights described in ss (1) and (2). It is only if the person is charged that he or she becomes an accused and has the right to a fair trial in terms of ss (3).

This view conflicts with the acceptance of the broader and more generic conceptualization of 'detention' endorsed by the Court in De Lange v Smuts NO & Others. De Lange's conception of 'detention' captures the restriction of physical movement — an essential way of looking at detention if it is to retain its conceptual integrity under the pressure created by the interplay between the subsections in FC s 35. One possible way of giving the new formulation some significance is to argue that, although the important notion that arrest always entails detention is

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228 The Constitutional Court has accepted the generic meaning of ‘detention’ for the purposes of FC s 12. See De Lange v Smuts NO & Others 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 28 (Ackermann J held ‘detention’ to apply to the ‘restriction of physical movement.’)

229 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC) (‘Thebus’).

230 Thebus (supra) at para 103.

maintained, the new structure should be read as preventing the trivialization of 'detention' for the purposes of FCs 35(2) rights. How restrictions on liberty not amounting to detention should be treated is a matter discussed elsewhere. As far as detention is concerned, if every compelled physical interference with liberty were deemed a 'detention' for the purposes of FC s 35, the consequence would be that the person involved would have to be informed of the right to counsel and be afforded the opportunity of actually obtaining counsel. The criticism by Peter Hogg of this consequence in Canada seems well founded. FC s 35(2), in setting out the rights of detained persons, does not contain any qualification that restricts the operation of those rights to any particular sphere (such as the criminal process). That means that, apart from the difficulties associated with silence and speedy process rights discussed above, a person detained for reasons other than to deal with him or her as a criminal suspect enjoys the rights of a detained person in terms of FC s 35(2). This consequence is imperiled by any interpretation of 'detention' as being necessarily bound up with 'arrest'. It is disconcerting to read in *S v Monyane* that 'it is clear that the provisions of s 25(1) and (2) of the Interim Constitution do permit an accused person to have legal assistance from the time of his arrest and during the interrogation process.' *Monyane* dealt with occasions, in interacting with the agents of the state, the arrested person was entitled to legal representation. But what was absent from the discussion was a consideration of the right to counsel as an incident of being detained, which, after all, is what the Final Constitution makes it. The Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs* had no difficulty accepting the applicability of FC s35(2) rights to those detained as 'illegal foreigners' for the purposes of deportation, wholly outside the sphere of criminal procedure. The right to legal representation as an incident of the rights of the illegal foreigners being detained did not feature in *Lawyers for Human Rights*. More's

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233 See P Hogg *Constitutional Law of Canada* (3rd Edition, 1992; 1996 supplement) § 47.2 citing *R v Therens* [1985] 1 SCR 613 (Demand for breath sample authorized by statute); *R v Thomsen* [1988] 1 SCR 640 (Roadside breath test where denial of right to counsel was justified under limitation clause); *R v Hufsky* [1988] 1 SCR 621 (Spot checks on motorists for licences); *R v Simmons* [1988] 2 SCR 495 (Strip search of traveller by customs officer); and the confusion generated by a right to counsel which did not entail the right to exercise it in *R v Debot* [1989] 2 SCR 1140 (Frisk on reasonable grounds under statutory authority). See also *Elliot v Commissioner of Police & Another* 1997 (2) SACR 315 (ZS)(Being stopped by policemen and asked to produce one's identification document was held to be a detention and an interference with the right to freedom of movement.) That such interferences involve FC s 12 is beyond question. Whether they should entail counsel rights there and then is a different matter altogether.

234 2001 (1) SACR 115 (T), 135C ("Monyane").

235 Although the matter was determined under IC s 25, Borchers J made it clear that the decision would have been the same if considered in terms of FC s 35. *Monyane* (supra) at 128C.

236 *Lawyers for Human Rights* (supra) at paras 19, 26 and 41. The question was whether there were territoriality problems and whether those with no right to enter the Republic were entitled to the benefits of FC s 35(2), not whether the section had any meaning outside the scope of criminal proceedings. Fortunately for such persons, it was held that 'everyone' meant 'everyone'. Ibid at para 41.
the pity, as it would have been of some interest whether the Court would have held that such rights applied only on the occasion that the illegal foreigner was in danger of incriminating himself or herself. Suffice it to note that it makes little sense to confine this right, an incident of a right that is not confined to the criminal sphere, to occasions for self-incrimination, since these occasions do not feature prominently outside the criminal sphere.\textsuperscript{237}

In \textit{S v Shongwe}, Preller AJ evinced this predisposition towards regarding detention as a condition which followed upon arrest. However, he indicated that a definition of arrest which did not include detention would have the anomalous consequence of depriving arrested persons of the rights incidental to the right to humane conditions of detention.\textsuperscript{238} The learned acting judge also enunciated some concern about the attribution to all arrested persons of all the rights of detained persons.\textsuperscript{239} The difficulty is that some of the rights of detainees are clearly aimed at detainees traditionally so called, others are relevant to all apprehended persons, and the entire scheme of the relevant rights makes sense only if all arrested persons are necessarily 'detained'. The problem with reading detention narrowly, however, is that it deprives suspects of any due process rights under FC s 35 in situations where they are being questioned without physical apprehension. The right to silence and against self-incrimination may suffer in such cases, if the absence of physical detention is abused to obtain incriminating statements without the safeguard of a caution.\textsuperscript{240} This is part of the reason why there is a perennial difficulty with dealing with 'the suspect' in that capacity.\textsuperscript{241}

\textsuperscript{237} See § 51.3(f) infra, for discussion of the link between counsel rights and the risk of self-incrimination.

\textsuperscript{238} 1998 (9) BCLR 1170, 1181E-G (T), 1998 (2) SACR 321 (T)('\textit{Shongwe}'). Such anomalies also occur in the context of the right to counsel. A striking illustration of this phenomenon occurred in \textit{S v Ngwenya & Others} 1999 (3) BCLR 308 (W). Leveson J said:

\begin{quote}
When it comes to consideration of [IC] section 25(1) the factor which gives rise to the requirement that the suspect be notified of his right to legal representation is the fact of detention. There is nothing in the section which embraces any other aspect than detention. On that basis it seems to me that the only factor relevant in notifying the suspect of his rights is the simple fact of detention. That is the \textit{raison d'être}, the very reason for the existence of the section. I cannot read into it any requirement that action is required on any other occasion.
\end{quote}

Ibid at 312E-F. The passage demonstrates that Leveson J assumed that it required no elaboration that 'detention' did not include such 'occasions' as identification parades. The traditional meaning of 'detention' retains a strong hold, despite the logic of IC s 25 and FC s 35.

\textsuperscript{239} See \textit{Shongwe} (supra) at 1181G-J ('Aan die ander kant kan dit ook problematies wees as elkeen wat gearreeste is weens besit van 'n daggasigaret of dronkenskap op straat, terwyl hy vervoer word van die plek waar hy gearreeste is na die naaste landdroshof, kan aandring op besoek van sy lewensmaat, godsdienstige raadgewer, ensovoorts. Te oordeel na die geheel van die artikel en veral subartikel [IC s 25](1)(c), behoort hy hierdie voordele te geniet minstens vanaf die oomblik wat hy in 'n sel opgesluit word.')

\textsuperscript{240} See \textit{S v Langa & Others} 1998 (1) SACR 21 (T), 27A-B('The use of the word "detained" in s 25(1) is intended ... to deal with situations where the person is incarcerated, as for example illegal immigrants. It does not deal with the situation where a policeman stops a person of whom he has cause to be suspicious and asks him what he is doing.') See § 51.1(a)(iv) supra and § 51.4(b)(ii) infra. The definition of detention as incarceration is clearly too narrow, since all arrests must entail detention.
51.3 The rights of detained persons

(a) The right to receive required information in a language one understands

In FC s 35(4), the right to receive information required in a language the person concerned understands — as required by every other subsection of FC s 35 — is substituted for the repeated addition of this qualification to some of the information rights contained in IC s 25. The strange discrepancy afflicting IC s 25 between rights to be informed of something in a language one understands and rights merely to be informed of something has therefore been remedied.

In Naidenov v Minister of Home Affairs it was pointed out that the right to be informed of the reasons for one's detention in a language one understood did not mean one had to be addressed in one's own language. In Naienou a Bulgarian's passive understanding of English was regarded as sufficient to have rendered communication to him in English constitutionally adequate. Spoelstra J's explanation that '[h]e never called for or insisted on the services of an interpreter' may be taken as a finding that, even if the Bulgarian's understanding were insufficient, his failure to call for an interpreter amounted to a waiver of his right. Or the failure may be regarded as having precluded the applicant from discharging the burden that his right had been violated. After all, later protestations based upon inadequate understanding may be difficult to refute. Still, the right is violated when one is not informed in a language one understands. If it later emerges that one did not understand the language in question, then enough has been done to prove that the right was violated. It is therefore incumbent upon arresting and detaining authorities to ascertain whether the detainee understands the language they are employing. But the fact that the answer to this question is often within the peculiar knowledge of the detainee should be borne in mind when the state wishes to justify what later turns out to have been insufficient understanding. It is best, therefore, to be alive to the operation of FC s 36(1) in this area.

241 See § 51.1(a)(iv) supra.

242 IC s 25(1)(a), IC s 25(2)(a).

243 See, eg, IC s 25(1)(c)(Right of a detainee to be informed promptly of the right to counsel), IC s 25(3)(b) (Right of an accused to be informed with sufficient particularity of the charge), and IC s 25(3)(e)(Right of an accused to be informed of the right to counsel and to state funding where substantial injustice would otherwise result). These rights are conspicuously unadorned with language qualifications, giving rise to the pernicious possibility of expressio unius est exclusio alterius arguments.

244 1995 (7) BCLR 891 (T).

245 Ibid at 899.

246 The learned judge refers to the absence of any allegation by the applicant that he had indicated his lack of understanding, if any, to those dealing with him.
The phrase 'in a language he understands' occurs in the description of the rights of arrested persons in the European Convention on Human Rights (art 5(2)). Fawcett points out that "informed" must require that the information be conveyed in language which the person understands, as well as in a language which the person understands.\textsuperscript{248} Robertson and Merrills suggest that quoting an unintelligible statutory provision, even in the detainee's home language, will not be sufficient.\textsuperscript{249}

\textbf{(b) The right to be informed promptly of the reason for being detained}

The better view is that the requirement to give reasons for detention is one of common law.\textsuperscript{250} Still, in \textit{Omar v Minister of Law and Order}\textsuperscript{251} the majority of the Appellate Division held that a detainee was not entitled to reasons for the 'renewal' of detention, and the general history of granting reasons for detention to detainees is not a happy one.\textsuperscript{252} The kind of 'reasons' accepted by the Natal Division in \textit{Kloppenberg v Minister of Justice},\textsuperscript{253} namely verbatim reproduction of the empowering statutory provision, will obviously not suffice. Since an obligation to 'inform' implies providing as much information as is not known, the extent of the detainee's knowledge of the reason for his or her detention which arises out of the circumstances will naturally enough have an effect on the extent of the obligation to inform.\textsuperscript{254} It is doubtful whether one should go as far as Fawcett does in endorsing

\begin{itemize}
  \item See \textit{S v Soci} 1998 (3) BCLR 376, 395 (E), 1998 (2) SACR 275 (E)(Police forms setting out the detainee's rights should be available in the detainee's preferred language.) See also \textit{S v Monyane & Others} 2001 (1) SACR 115 (T). The accused in \textit{Monyane} had sought to attach significance to the fact that they had had their rights explained to them in Afrikaans despite the fact that there had been 'a black policeman available at all times'. Ibid at 120. The police testified to their confidence that the accused had understood them, and there had been no evidence to the contrary. Borchers J accepted for the purposes of the judgement that the warnings had been understood (in the circumstances the finding was not decisive), but expressed reservations about addressing arrestees whose home language was clearly not Afrikaans, without an interpreter, given the technicality of constitutional rights. Ibid at 120C-E.
  
  
  \item See also \textit{S v Monyane & Others} 2001 (1) SACR 115 (T). The accused in \textit{Monyane} had sought to attach significance to the fact that they had had their rights explained to them in Afrikaans despite the fact that there had been 'a black policeman available at all times'. Ibid at 120. The police testified to their confidence that the accused had understood them, and there had been no evidence to the contrary. Borchers J accepted for the purposes of the judgement that the warnings had been understood (in the circumstances the finding was not decisive), but expressed reservations about addressing arrestees whose home language was clearly not Afrikaans, without an interpreter, given the technicality of constitutional rights. Ibid at 120C-E.
  
  \item See AH Robertson & JG Merrills \textit{Human Rights in Europe: A Study of the European Convention on Human Rights} (3rd Edition, 1993) 73. See also \textit{Kloppenberg v Minister of Justice} 1964 (4) SA 31 (N), as discussed in § 51.3(b) infra.
  
  \item \textit{Ngqumba v Staatspresident & Others} 1988 (4) SA 224 (A), 263-5; \textit{Minister of Law and Order v Parker} 1989 (2) SA 633 (A), 637-41.
  
  \item 1987 (3) SA 859 (A), 900-1.
  
  \item 'Detention' under the Constitution would include the widespread 'banning orders' passed under apartheid, which orders did not tend to come replete with reasons. See Baxter's discussion of 'the notorious case of Dr Manas Buthelezi'. L Baxter \textit{Administrative Law} (1984) 783.
  
  \item 1964 (4) SA 31 (N).
\end{itemize}
the proposition laid down by Viscount Simon in *Christie v Leachinsky*\[255\] that the requirement ‘does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.’\[256\] For when one is dealing with a detainee who is not an arrestee, such a detainee might well be more in the dark about the reason for the detention than an arrestee normally is, and is not ensured of promptly being brought before a court to determine the merits of continued detention. The problem will be one of onus: if knowledge from the circumstances amounts to being adequately informed, then the applicant will have to show not only that he or she was not informed but also that the circumstances were not such as to render information unnecessary. In *Lawyers for Human Rights v Minister of Home Affairs & Another*, the right to be informed of the reasons for being detained featured prominently (although not expressly under that rubric) in the context of persons being detained outside the criminal sphere, namely ‘illegal foreigners’.\[257\] The matter dealt with the situation where an immigration officer decreed that an illegal foreigner be detained on the 'ship' (which included all vessels) that he or she occupied at a port of entry, pending deportation, in terms of the Immigration Act\[258\]. Such ship detentions were not subject to the provisions of other sections of the Act that governed, in particular, the early release of a detainee held for the purposes of deportation.\[259\] The provision was saved from unconstitutionality largely as a result of the Court’s interpretation of the relevant section as being subject to the provision that the detainee be notified in writing of the decision to deport him or her and of his or her right to appeal such decision.\[260\] This finding reveals the main purpose behind the right to being informed — namely being placed in a position to challenge the charge effectively. That this may prove cold comfort to one who is being kept in a hull by the master of his or her ship, while the South Africans are going about their business on the port, is of course quite another matter.

In *Fox, Campbell and Hartley v UK*\[261\] the European Court held that suspects who had initially been arrested as ‘terrorists’ and not told of their suspected involvement in specific crimes were nevertheless adequately informed for the purposes of art 5(2) when the fact that they were suspected for the specific crimes appeared from

\[254\] See *Minister of Law and Order v Kader* 1991 (1) SA 41 (A).


\[256\] Fawcett (supra) at 99.

\[257\] 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC) (‘Lawyers for Human Rights’).

\[258\] Act 13 of 2002.

\[259\] Immigration Act s 34(8).


the nature of their interrogation. This holding obviously has significance also for the requirement of 'promptness'.

(c) The right to conditions of detention consistent with human dignity

The inclusion of a reference to conditions consistent with human dignity entails a potentially problematic relationship with the general right to human dignity contained in FC s 10. Furthermore, the relationship with the prohibition of cruel, inhuman or degrading treatment or punishment contained in IC s 11(2) and FC s 12(1)(e) seems to entail substantial overlap, particularly as the rights of detained persons apply to sentenced prisoners. However, that the detainee's right to humane conditions, albeit framed in terms of dignity, is not to be equated with the dignity right, nor is it merely an affirmation of the existence of the prohibition against cruel, inhuman and degrading treatment or punishment in detention. The residual right to dignified conditions indicates that the adequacy of accommodation, nutrition, reading material and medical treatment is to be interpreted in terms of dignity considerations, and the specified enumerations in their turn act as an *eiusdem generis* indication of the sort of dignity with which the provision is concerned. In FC s 35(2)(e) the right to exercise has been added to the list, and accommodation has been added to the list of things to be 'adequately' provided. Note that the qualification 'adequate' in FC s 35(2)(e) is to be read as a zeugma governing the full list of nouns following it. The reference to reading material immortalizes the notorious decision in *Rossouw v Sachs*. In *Rossouw v Sachs*, the court held that since the purpose of the detention in question was interrogation, the provision of reading material to a detainee would frustrate that purpose by relieving the tedium of the detention, thereby lessening the readiness of the detainee to talk. This reference is a clear indication of the mischief the right was intended to address: the reasons for detention are not to be relied upon to argue for envisaged discomfort.

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265 *Van Biljon & Others v Minister of Correctional Services & Others* 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C), 1997 (2) SACR 50 (C), 59 ("Van Biljon"). Brand J distinguished American cases relating to the provision of medical care to prisoners on the basis that these cases were based on standards determined by the Eighth Amendment to the United States Constitution prohibiting cruel and unusual punishment, whereas FC s 35(2)(e) specifically entrenched rights to adequate medical care.

266 Brand J interpreted it thus in *Van Biljon*.

267 1964 (2) SA 551 (A).
on the part of detainees, and conditions of detention are not to be arranged so as to maximize 'tedium'. The insistence on affording detained persons the incidents of human dignity is an important affirmation of the 'residuum' principle, namely that a prisoner remains, as a subject and a human being, entitled to all rights of a citizen save those that have been deprived him or her due to law. This principle was reaffirmed and discussed in Minister of Correctional Services & Others v Kwakwa & Another.268 in the context of the rights of so-called 'unsentenced prisoners' — i.e. those who were awaiting trial or who had been convicted but were awaiting sentence. In the world we inhabit, these events may take years. More, then, the surprise, as a matter of basic philosophy, at the law's treatment of those who are awaiting trial and have not yet been convicted of anything in the same way as, and even worse than, criminals. The 'residuum' principle is an important caveat when dealing with those whom the law has declared guilty and therefore, depending on one's views of the purpose and legitimacy of punishment, as in some sense deserving of hardship. But when it comes to the rights of those not yet found guilty of anything, it is hard to suppress indignation at an attitude that any aspect of normal life they manage to retain must be seen as a privilege.269 Of course, as with the necessary evil of pre-trial incarceration in appropriate cases, the law must have a way of making sure those it wants to try do not abscond. There ought, however, to be an insistence — when it comes to those who have not yet been convicted — on a regime of treatment that invades their liberty and comfort in as minimal a manner as possible. The misery they suffer must not be a jot greater than is necessary to ensure their continued residence in the waiting rooms of justice. Indeed, the more burdensome the need to cater properly for the as yet unconvicted, the greater the incentive on the part of the state to ensure that their trials begin and end without unreasonable delay. One may wonder to what extent the awful incidents of incarceration (rape and torture by fellow criminals, for example) are tacit fringe benefits of the punishment of prison time. But they are surely not a necessary incident of being kept from running away while the law decides, for several years, whether one is guilty of anything at all. Kwakwa dealt with the inversion of such sentiments. The unsentenced had, for badly or scantily articulated reasons of bureaucratic convenience, been deprived of most of the 'privileges' enjoyed by the convicted and sentenced prisoners. This, it was held, was not right.

In Van Biljon, the Cape Provincial Division rejected the argument that prisoners were not entitled to better medical treatment under FC s 35(2)(e) than would be provided by provincial hospitals to individuals in an identical diagnostic position. The court observed that FC s 35(2)(e) provided more extensive positive rights for detainees than were enjoyed by the population at large, and that, since imprisonment denied HIV prisoners the access to resources to obtain treatment, and

268 2002 (4) SA 455 (SCA)('Kwakwa').

269 The inappropriateness of such discourse in the context of prisoners generally, in the light of the residuum principle, was discussed in Kwakwa. See Kwakwa (supra) at 468H. The court expressed some understanding for the relative lack of sympathy among the public for the discomforts suffered by the unsentenced, and expressed the view that '[i]t is accepted that prison is a bleak place and that prisoners are not entitled to be imprisoned with all the comforts that they enjoyed before their incarceration'. Ibid at para 29. But, apart from the obvious practical need for 'some form of standardisation', how, if one decrees that 'proper effect must be given to the residuum principle', does one ever justify even a largely equivalent treatment between convicted prisoners and those awaiting trial? Ibid at paras 31–32.
put them at higher risk of opportunistic infections, the authorities could not rely on the provincial standard.\textsuperscript{270} It is unfortunate that the court regarded budgetary constraints as part of the definition of ‘adequacy’,\textsuperscript{271} since that would in principle require proof by an applicant that funds were available. The court, however, placed the onus to disprove the availability of funds upon the prison authorities,\textsuperscript{272} an exercise that should have occurred under FC s 36(1).

In \textit{S v Mpofana} the appellant in an appeal against the refusal of bail complained \textit{inter alia} of a violation of the right to dignified conditions of detention. He had been held in a cell with 14 other prisoners.\textsuperscript{273} Testimony confirmed that the cell had been designed for 10 prisoners, with 12 being ‘not bad’.\textsuperscript{274} Mbenenge AJ did not rule upon the violation question, save to hold that the appellant should first have applied to the prison authorities to remedy his complaints and, upon their failure to do so, could have challenged the constitutionality of the detention or applied for a mandamus.\textsuperscript{275}

Illegal foreigners being detained on a ship by their shipmaster at the behest of the South African immigration officers are entitled to the benefits of FC s 35(2).\textsuperscript{276} In \textit{Lawyers for Human Rights v Minister of Home Affairs and Another},\textsuperscript{277} the Court held as follows:

\begin{quote}
The fact that the s 35(2) safeguards of the Constitution are available to the person detained on a ship avoids detention in intolerable or inhumane circumstances. If the circumstances of detention on a ship render it impossible for s 35(2) to be complied with, the immigration officer will have no option but to cause the detention of the suspected illegal foreigner at a State facility in the exercise of the s 34(8) choice.\textsuperscript{278}
\end{quote}

This conclusion raises some disconcerting questions. The Court held that the substantive distinction between detentions governed by s 34(1) of the Act and the

\textsuperscript{270} The rejection of similar treatment rights to applicants who had not had the treatment in question prescribed to them, on the basis that the court should not dictate to medical practitioners what to prescribe, rested uncomfortably with the finding that those to whom the treatment had been prescribed were entitled to it, not because of their prescriptions but because it was the ‘state of the art’ treatment according to the weight of expert opinion. See \textit{Van Biljon} (supra) at 65.

\textsuperscript{271} Ibid at 62.

\textsuperscript{272} Ibid at 64.

\textsuperscript{273} 1998 (1) SACR 40 (Tk).

\textsuperscript{274} Ibid at 43D-E.

\textsuperscript{275} Ibid at 45F-I. See § 51.3(g) infra.

\textsuperscript{276} See Immigration Act 13 of 2002 s 34(8).

\textsuperscript{277} \textit{Lawyers for Human Rights} (supra) at paras 26 and 41.

\textsuperscript{278} Ibid at para 42.
detentions on the ship governed by s 34(8) of the Act to be that the former related to detentions at state facilities. Part of the reasoning behind this finding was that in the case of ship detention there was no ‘officer attending’ to whom queries could be directed, and so the provisions relating to queries to officers attending in s 34(1) clearly did not apply to detention on a ship. All of this tended to suggest that the absence of executive control might in practice give rise to difficulties of enforcement of the rights those detained on the ship were said to possess. The ultimate finding that it was reasonable for the ship detainees not to be protected by the provision for release within 48 hours, but that court confirmation of their continued detention after 30 days was required, is cause for some discomfort.

*Stanfield v Minister of Correctional Services & Others* was a review of a refusal to grant parole for medical reasons. The applicant had been convicted of tax evasion and had served some months of a six year sentence when he was diagnosed with a form of lung cancer that generally entailed further life expectancy of some six months to one year. He needed treatment of a sort that would render the risk of infection expected from prison conditions fatal. The authorities were concerned about a slippery slope of precedent, as the applicant was, to outward appearances, asymptomatic, and the precise imminence of his expected death was not a matter of certainty — a condition the authorities felt arguably applied to many cases of prisoners infected with HIV/AIDS. The court’s finding that ‘conditions consistent with human dignity’ depended on the circumstances is, perhaps, the most pertinent part of the holding for present purposes. Thus, what may be perfectly humane for a healthy prisoner would not be dignified or humane for a terminally ill prisoner. It was, for example, held to have been inconsistent with dignity not to have afforded the applicant and his condition the degree of individualization it deserved, but rather to treat his case as a precedent along with all other cases of terminal illness. Moreover, the court found it particularly degrading and inhumane to insist that the prisoner remain incarcerated for as long as he was still physically able (in theory) to commit crimes.

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279 Ibid at para 40. The provisions of s 34(1)(a) were held to apply also to detentions in terms of s 34(8).

280 Lawyers for Human Rights (supra) at para 39.

281 Ibid at paras 42–46.

282 2004 (4) SA 43 (C) (*Stanfield*).

283 Such release was governed by the provisions of section 69 of the Correctional Services 8 of 1959.

284 See *Stanfield* (supra) at paras 34 and 37.

285 Ibid at para 89.

286 Ibid at para 127.

287 Ibid at para 126.
argument on its head and joined in the call of Judge Fagan\(^{288}\) for more attention to be given to release on the grounds of terminal illness:

The alternative is grotesque: untold numbers of prisoners dying in prisons in the most inhuman and undignified way. Even the worst of convicted criminals should be entitled to a humane and dignified death.\(^{289}\)

Finally, the court concluded that the only appropriate remedy of the violation of the right to conditions of detention consistent with human dignity was an order to be released. It might have been argued that the possibilities offered by prison set the outer bounds of what could be demanded by one who was properly imprisoned. The court set no such limits. Rather, the finding amounted to saying that the right to conditions of detention consistent with human dignity sometimes demanded that those who could not be thus detained should therefore not be detained at all.

**(d) Communication and visitation rights**

Closely aligned to the right to humane conditions is the detainee's right to the opportunity to communicate with, and be visited by, his or her spouse or partner,\(^{290}\) next-of-kin,\(^{291}\) religious counsellor,\(^{292}\) and medical practitioner.\(^{293}\) These rights, apart from also respecting the dignity of the detainee, have an important consequentialist motivation: open channels of communication and frequent access to those who matter to the welfare of the detainee will minimize the opportunities for physical and psychological abuse by allowing complaints to be lodged on behalf of the detainee by those who are concerned for his or her welfare.\(^{294}\) FC s 38 provide standing to such persons to enforce the detainee's rights.

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\(^{288}\) Pursuant to the Judicial Inspectorate of Prisons.

\(^{289}\) Stanfield \(\text{supra}\) at para 128 and para 51.

\(^{290}\) How close the relationship must be is a question of nicety. Presumably a homosexual partner is included. The detainee alleging a violation of the right will bear the onus of proving that the person in question is the detainee's 'partner'.

\(^{291}\) Again one may ask whether certain degrees of relation are excluded, particularly when nearer relatives are available. Presumably the right is not so strict as to require only the 'nearest-available-of-kin', nor so generous as to extend to any number of distant relatives.

\(^{292}\) See P Farlam 'Freedom of Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41. Again, in doubtful cases, the complainant will bear the onus of convincing the court that the person in question is a 'religious counsellor' for the purposes of FC s 35(2)(f)(iii).

\(^{293}\) See *S v Mpofana* 1998 (1) SACR 40 (Tk)'\(\text{Mpofana}\)'(The appellant argued that a refusal to allow him to consult with a medical practitioner of his choice, as opposed to the district surgeon, was a circumstance sufficient to entitle him to bail. Mbenenge AJ held that the magistrate had 'quite correctly' ordered the prison officials to allow the appellant to consult with the medical practitioner of his choice, and that that had put paid to any complaint. Ibid at 45H-I.) See, further, § 51.3(g) infra. The reference to a 'chosen medical practitioner' in FC s 35(2)(f)(iv) is clear. A generous definition of 'medical practitioner' should be employed, given the importance of heeding the detainee's wishes in this regard.
The right to challenge the lawfulness of detention

FC s 35(2)(d) constitutionalize the right to habeas corpus. The common law remedy, known also as the interdictum de libero homine exhibendo, places the burden on the state to prove that the detention is not unlawful.295 FC s 35(2)(d)'s proviso — 'if the detention is unlawful' — seems at first blush to be syntactically identical to the new bail proviso contained in FC s 35(1)(f), which allows release 'if the interests of justice permit', and to the right to counsel at state expense 'if substantial injustice would otherwise result', contained in FC s 35(2)(c) and (3)(g). The equivalent provisions in IC s 25(1)(c) and (3)(e) contained 'where' rather than 'if'. It would seem that if an onus attaches to one, an onus, and the same onus, should attach to the others. But there are a number of reasons why the habeas corpus condition should not be read as imposing an onus on the applicant to prove unlawfulness. On the weight of authority, the common law positions regarding onus seem to differ.296 The effect of the same formulation in the clauses may arguably differ as well, as constitutional formulations should hardly be read as reversing a common law position which constituted a significant safeguard in favorem libertatis. The common law onus in habeas corpus cases clearly reflects the operation, in the least controversial domain of liberty, vis-a-vis freedom of the person, of the 'presumption of liberty'.297 The pivotal role that this notion plays in the jurisprudence of habeas corpus298 should not be obliterated by the use in FC s 35(2)(d) of the word 'if'. Most important of all is the grammatical logic of FC s 35(2)(d): it is a mistake to read the clause as providing the right to challenge coupled with the right to be released if a requirement (unlawfulness) is met, the existence of the requirement being a matter of proof. The clause provides the right to challenge the lawfulness of the detention. Nothing is implied about onus. The common law onus therefore operates. If the state cannot prove the lawfulness of the detention, the court declares the detention unlawful and the right to be released follows automatically from the decision of the court. That is what is meant by 'if the detention is unlawful'. The new word order of FC s 35(2)(d) confirms this reading.

The reference to the right to challenge 'in person before a court' is another indication of a specifically focused response to the past: the decision in Schermbruker v Klindt denied a detainee the right to testify in person to allegations of torture.299 The European Court of Human Rights has stated, as far as the right in

294 The Red Cross' insistence that it be given access to the 'non-combatants' held at the pleasure of the Bush administration at Guantanamo Bay is driven by this very concern.

295 See Swart v Minister of Law and Order 1987 (4) SA 452 (C); Minister of Law and Order, KwaNdebele v Mathebe 1990 (1) SA 114 (A); Visagie v State President 1989 (3) SA 859 (A).

296 On the common law onus in the case of bail and the interpretation of the bail clause, see §51.4(d) infra.

297 See Ferreira v Levin NO & Others; Vyenhoek & Others v Powell NO & Others 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). See also Bishop & Woolman (supra) at § 40.1(b).

298 See Robertson & Merrills (supra) at 80.

299 1965 (4) SA 606 (A).
art 5(4) of the European Convention is concerned — the right to ‘take proceedings by which the lawfulness of his detention shall be decided speedily by a court’ — that the envisaged proceedings ‘need not always be attended by the same guarantees as those required under art 6(1) for civil or criminal litigation’. The European Court of Human Rights also held, in *Weeks v United Kingdom*:

> The ‘court’ . . . does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country . . . The term ‘court’ serves to denote ‘bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case . . . but also the guarantees’ — ‘appropriate to the kind of deprivation of liberty in question’ — ‘of a judicial procedure’.

This approach is in line with *Nel v Le Roux NO & Others*. It is to be stressed that the merits of a detention will be an FC s 12 question, even if such merits have to be determined under the auspices FC s 35(2). However, a violation of an IC s 25(1) or FC s 35(2) right may well affect the merits of the detention. As pointed out above, the fact that an illegal foreigner being detained on a ship pending deportation had the benefit of notification of such detention and of the right to appeal it was an important reason why the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs & Another* upheld the constitutionality of detaining such persons for longer than 48 hours, subject to a requirement of court confirmation after 30 days of such detention. But one might consider what this holding implied for the presumption of unlawfulness. The Immigration Act 13 of 2002 distinguished between those illegal foreigners detained at state facilities and those declared illegal by an immigration officer and detained on the ship on which they arrived, in both cases pending deportation. The former had to be released within 48 hours if no warrant for their continued detention was obtained. The latter not. Why?

This is reasonable and justifiable bearing in mind that it applies to persons who have not formally entered South Africa and have no right to do so. It is reasonable that people who arrive in South Africa without the necessary documents to enable

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300 *De Wilde, Ooms and Versyp v Belgium* (1971) 1 EHRR 373 at para 78.


302 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC).

303 In *Mpofana*, Mbenenge AJ held that a detainee with a complaint against the conditions of his or her detention first had to call upon the prison authorities to remedy the complaint, and then, upon the authorities’ failure to heed the call, ‘it [was] available to the detainee concerned either to challenge the detention before a court of law as being unconstitutional or obtain a court interdict to force the prison authorities to comply with the law’. *Mpofana* (supra) at 45G-H. It was clearly assumed that violations of a detainee’s rights might render the detention unlawful.

304 See § 51.3(b) supra.

305 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC).

306 Ibid at para 46.
their admission into the country be sent back to the ship in which they arrived. The date of departure of the ship is not under the control of the South African authorities. That the detention of illegal foreigners on a ship is both limited to 48 hours is therefore also reasonable particularly in the context that, according to this judgment, the s 34(1)(a) safeguard\(^\text{307}\) will be applicable.

Who is to say that the people in question ‘have no right’ to enter South Africa? Who is to say that their documents are inadequate? The Immigration Officer? It should have been a court. Yes, there is an appeal. But this is detention without trial of someone entitled to the benefits of FC s 35(2).

\((f)\) The right to counsel

Every detainee is given the right, in the Interim Constitution, ‘to consult with a legal practitioner of his or her choice, to be informed of this right promptly and, where substantial injustice would otherwise result, to be provided with the services of a legal practitioner at state expense’;\(^\text{308}\) and in the Final Constitution, ‘to choose, and consult with, a legal practitioner, and to be informed of this right promptly’.

The detainee's right to counsel should be distinguished from that of the accused provided in FC s 35(3)(f) and (g). Of course, the overwhelming majority of cases will involve arrested persons, and arrested persons tend to become accused persons. Since the effects of an infringement of the right to counsel during the pre-trial stage will most often be regarded from the point of view of the rights of the accused person at trial and in terms of the possibility of the exclusion of evidence obtained by the violation, ‘right to counsel’ jurisprudence will tend to develop as an aspect of the right to a fair trial, leaving the propriety of extrapolation into the sphere of detention a matter of conceptual concern, given the problem of the due process wall discussed above.\(^\text{310}\)

The difference between the detainee's right and that of the accused, apart from the fact that the one has a right to 'consult' and the other a right to be 'represented', will lie mainly in the nature of successful justifications for denying the

\(^{307}\) This ‘safeguard’ refers to the right to be notified of the detention and intended deportation and to the right to appeal it.

\(^{308}\) IC s 25(1)(c).

\(^{309}\) FC ss 35(2)(b) and (c). The express stipulation of the right to be informed not only of the right to choose and consult but also of the right to be provided with a practitioner in appropriate cases will presumably render a finding such as that of Gihwala AJ in \textit{S v Van der Merwe} 1997 (10) BCLR 1470 (O), that there was nothing in the Interim Constitution which required any sort of caution beyond that contained in the Judges’ Rules (at 1474F), untenable under the Final Constitution, if it was at all tenable under the Interim Constitution. See \textit{Mgcina v Regional Magistrate, Lenasia, & Another} 1997 (2) SACR 711 (W), 732 (IC s 25(1)(c)) rendered it ‘incumbent upon a presiding officer to establish at the earliest opportunity whether these rights have been imparted to an accused person who appear[ed] before him without legal representation.’)
right under FC s 36(1) and in the sorts of considerations bringing about 'substantial injustice' on denial of the right to state-funded counsel. Clearly the directive of the Constitutional Court in *S v Vermaas; S v Du Plessis*, 311 that the decision to provide state-funded counsel was 'pre-eminently' that of the officer trying the case, cannot be applied in the sphere of detention, where no case is being tried. Questions about the possibility of 'substantial injustice' are more comfortably answered in the context of the trial than that of detention. 312 In this respect, however, it is submitted that the sort of 'justice' to which reference is made in IC s 25(1)(c) and FC s 35(2)(c) should not be restricted to that which is meant by 'a failure of justice', lest the 'justice' demanded for detainees outside the parameters of the criminal trial be deprived of any content. 313 It is clear that the 'injustice' contemplated by IC s 25(1)(c) and FC s

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310 See §51.1(a)(ii) supra. See also *S v Nombevu* 1996 (12) BCLR 1635, 1648-50 (E), 1996 (2) SACR 396 (E). In *Nombevu*, the point emerged starkly: the absence of a warning about the right to counsel before the operation of the Interim Constitution could not be a violation of the detainee's right because he did not have such a right; nevertheless, the pre-trial failure was capable of vitiating the accused's right to a fair trial at the time of trial, although it was held not to have done so. This, as explained by Kentridge AJ in *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC) at para 12 was the effect of the judgment in *S v Mhlungu & Others*. 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) ("Mhlungu"). The approach of the Constitutional Court in *Key v Attorney-General, Cape of Good Hope Provincial Division, & Another*, however, seemed to be in conflict with this reasoning: the infringement of privacy inherent in searches and seizures conducted in the pre-constitutional era before the right was entrenched could not be held to violate the fairness of the accused's trial conducted under the auspices of the Interim Constitution. 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC). See also *S v Khan* 1997 (2) SACR 611 (SCA), 618, in which Howie JA clearly regarded himself as bound to apply the dictates of IC s 25(3) in determining whether the admission as evidence of a confession at a trial conducted when the Interim Constitution had come into effect was constitutionally vitiated, but then went on to hold that, since the Interim Constitution had not come into effect at the time of the arrest and confession in issue, the appellant could not rely on his right to counsel under IC s 25(1)(c) to challenge the conduct at arrest. Howie JA held as follows:

> Reliance was placed on numerous passages in the judgments of Mahomed J and Kriegler J in *Mhlungu*. There is no support in those passages for the suggested retroactivity. What they deal with is the availability of the fair trial right and its related [IC] s 25(3) rights in a trial pending or incomplete as on the date of coming into operation of the Interim Constitution. They do not state, or even suggest, that [IC] s 25(1) rights applied to an arrest and confession-taking which occurred before that date.

Ibid at 618.

311 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC) at para 15.

312 *S v Gasa & Others* 1998 (1) SACR 446 (D) attached decisive significance to the failure to inform arrestees at subsequent procedures (a pointing out and the taking of a statement) of their right to be provided with the services of a legal practitioner at state expense, where there had been a reference to the right to have an attorney present at prior interviews. Nothing was said of the principles relating to substantial injustice. *S v Soci* 1998 (3) BCLR 376 (E), 1998 (2) SACR 275 (E) illustrated the difficulty of getting the meaning of FC s 35(2)(c) across to a detainee before a pointing out: the inspector who interpreted the caution to the detainee had great difficulty interpreting into isiXhosa the phrase 'waar dit andersins tot wesenlike onreg sou lei'. What was conveyed was something like 'where there can be a want from you'. Ibid at 389G. Again there was no guidance regarding the meaning of 'substantial injustice' in the context of detention.

313 See the worrying syndrome described in *S v Motsasi* 1998 (2) SACR 35 (W), 59-60, namely the difficulty experienced by pro Deo counsel in obtaining interpreters for consultations with prisoners, a matter which De Villiers J deemed to require negotiation and resolution between the Bar Council and the Department of Correctional Services. If counsel are to employ their own interpreters in this regard, as suggested by the correctional authorities, then questions of financing come into play. To what extent the state should pay for interpreters in these matters is surely a question which itself raises questions about the sort of 'justice' invoked in this right.
35(2)(c) involves questions of social justice — ie equality considerations. That the right to have counsel appointed, as opposed to the right to employ counsel, was based on considerations of equal protection of rich and poor has been beyond doubt since the decision of the US Supreme Court in *Douglas v California*. In *S v Melani & Others* Froneman J declared:

> The failure to recognize the importance of informing an accused of his right to consult with a legal adviser during the pre-trial stage has the effect of depriving persons, especially the uneducated, the unsophisticated and the poor of the protection of their right to remain silent and not to incriminate themselves. This offends not only the concept of substantive fairness . . . but also the right to equality before the law.

The importance of the right to be represented during the pre-trial stages, particularly when one is about to be invited to do something incriminating, does not mean that the degree to which a detainee ought to be advised of this right is as extensive as that pertaining to the advice one would expect an accused to be afforded about the importance of legal representation at trial. The Full Court in *S v Vumase* for example, held that the fact that it was expected of a presiding officer at trial to encourage an accused who wished to remain unrepresented to employ the services of a legal representative in serious cases did not translate into a duty on the part of an arresting officer to encourage an arrested suspect to make use of legal representation for the decision to make a statement or not. The officer need only be reasonably satisfied that the suspect understood the existence of the right and was in a position to decide whether to avail himself or herself of it.

*S v Mfene* enunciated a clear conception of the right to state-funded legal representation in the sphere of detention in the following terms:

> [I]t is necessary to inform a detainee of his right to be provided with the services of a legal practitioner by the State at least in every case in which the detainee is indigent, in the sense that he is unable to afford the services of his own legal practitioner, and he has been detained in connection with a charge which, in the event of a conviction, might lead to imprisonment.

McCall J dealt as follows with the practical problems inherent in requiring the police officer in question to make the above findings: first, the officer in question must explain the three options available to the detained person: (1) consult with a chosen legal practitioner if in a position to do so; (2) have a lawyer appointed by the state if not able to employ one and if substantial injustice would otherwise result; or (3) dispense with a lawyer, having been fully apprised of all relevant rights, particularly of the right to silence and of the potential consequences of co-operation. If the person concerned does not elect to dispense with a lawyer, he or she should be

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315 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335 (E), 347.

316 2000 (2) SACR 579 (W).

317 See *S v Mbambo* 1999 (2) SACR 421 (W).

318 1998 (9) BCLR 1157, 1167D (N)("Mfene").
questioned concerning his or her ability to employ a lawyer. If the person appears to
be unable to procure a lawyer, the option of the Legal Aid Board should be explained
and the ‘necessary arrangements' should be made to enable the detainee to consult
with the Legal Aid Board. If a lawyer is thus appointed and is not present when the
relevant act is to be carried out, the right to such lawyer's presence should be
explained. If a lawyer is not appointed, or an appointed lawyer is not present, the
procedure should not be carried out unless the officer in question is satisfied that the
detainee wishes to dispense with the services of a lawyer.\footnote{319}

The facts of \textit{S v Mphala & Another} illustrate the function of the right to counsel to
protect the right to silence.\footnote{320} The family of the accused had employed an attorney
on their behalf, and the attorney had requested the police not to take any
statements from the accused until he had seen them. The investigating officer,
however, '[stole] a march on the accused's attorney',\footnote{321} and the court held that both
the right to silence and counsel rights had been violated.\footnote{322}

In \textit{S v Mhlakaza & Others} the right of a detainee to consult with a legal
practitioner was held to apply to an identification parade.\footnote{323} The court's finding that
it could not be known what would have happened if the detainees had been allowed
the proper opportunity to consult with counsel and to have counsel present at the
parade, particularly with reference to the possibility that more people might have
been put on the parade,\footnote{324} might be read as suggesting that the right to counsel at
identification procedures was at least partly motivated by considerations of
accuracy. It was on this point that the decision in \textit{S v Hlalikaya & Others}\footnote{325} turned.
Van Rensburg J invoked\footnote{326} the following dictum of Froneman J in \textit{S v Melani & Others}:

\footnote{319} See \textit{Mfene} (supra) at 1166 and 1164.
\footnote{320} 1998 (4) BCLR 494 (W), 1998 (1) SACR 388 (W).
\footnote{321} Ibid at 501J.
\footnote{322} The accused had been warned of their rights to counsel and to silence. The key to the character of
the violation in question is this: withholding the fact that an attorney had already been appointed
from the accused meant that their choice to make statements without an attorney was not an
informed choice. ‘They were as entitled to be informed of facts obviously relevant to the exercise
of their election as they were of the express provisions of the Constitution itself.' Ibid at 504A-C
\footnote{323} 1996 (6) BCLR 814 (C)(‘Mhlakaza').
\footnote{324} Ibid at 826.
\footnote{325} 1997 (1) SACR 613 (SE)(‘Hlalikaya'). \textit{Hlalikaya}, although dealing with a pre-trial procedure arguably
more investigative than that in \textit{Mhlakaza}, considered the matter from the perspective of an
accused. See the discussion in § 51.2 supra. See also \textit{S v Zwayi} 1998 (2) BCLR 242 (Ck), 1997 (2)
SACR 772 (Ck), 779-8, which followed \textit{Hlalikaya}. \textit{S v Mphala & Others} 1998 (4) BCLR 494 (W), 1998
(1) SACR 654 (W) was decided on the assumption that the right to counsel applied at an
identification parade.
\footnote{326} \textit{Hlalikaya} (supra) at 615-16.
The purpose of the right to counsel and its corollary to be informed of that right (embodied in [IC] s 25(1)(c)) is thus to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty. Sections [IC] 25(2) and 25(3) . . . make it abundantly clear that this protection exists from the inception of the criminal process, that is on arrest, until its culmination up to and during the trial itself. *This protection has nothing to do with a need to ensure the reliability of evidence adduced at the trial.*

The analogy counsel drew between a 'photo identification parade' at which the accused was not present and the identification parade in *Mhlakaza* was rejected on the ground that the only basis for the analogy would be to ensure the reliability of the evidence adduced at the trial. The court's distinction between the kind of parade where the suspect's co-operation was required and the kind where neither the presence nor the co-operation of the suspect was required was based on the 'self-incrimination' dimension present only in the former case.

Two comments are called for: first, Froneman J's *dictum* in *Melani* about accuracy should be read as a caveat against regarding issues of fairness *solely* in terms of accuracy, and ignoring rights violations which do not affect accuracy. It ought not to be read as refusal to acknowledge the role of accuracy safeguards in the rights of arrested and accused persons. Secondly, Van Rensburg J's identification of self-incrimination with an activity which cannot be described as 'communicative' conflicts with the holdings in *S v Maphumulo & Another* and in *Msomi v Attorney-General of Natal & Others* that self-incrimination extended only to communicative acts. The danger of Van Rensburg J's interpretation of Froneman J's *dictum* is that if a restrictive meaning were to be attached to self-incrimination, the right to counsel might be regarded as operating only in spheres accompanied by this restricted notion of self-incrimination. This reading would leave the right to counsel of a detainee who was not arrested and who would not become an accused without any foundation. It would further render FC s 36(1) questions and 'substantial injustice' questions exceedingly difficult to answer. Nevertheless, one can only agree with the observation that a suspect should surely not be entitled to legal representation at investigatory procedures not involving the suspect at all, like pointings out made

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327 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335 (E), 348-49 (‘Melani’) (emphasis added).

328 *Hlalikaya* (supra) at 617.

329 Ibid at 616.

330 See JH Israel, Y Kamisar & WR LaFave *Criminal Procedure and the Constitution: Leading Supreme Court Cases and Introductory Text* (1989) 219 (The authors state without qualification that the right to counsel is aimed at ‘insuring the reliability of the guilt-determining process’, as opposed to ‘insuring respect for the dignity or liberty of the individual without regard to the reliability of the criminal process’.)

331 1996 (2) BCLR 167 (N) (‘Maphumulo’).

332 1996 (8) BCLR 1109 (N).

333 See *S v Mokoena & ’n Ander* 1998 (2) SACR 642 (W); *S v Ngwenya* 1999 (3) BCLR 308 (W).
to the police by state witnesses. The pertinent question about the analogy between photo identification and 'live' identification is whether the former involves an important interaction between the authorities and the detainee. The reason a detainee is afforded the right to counsel at important interactions with the authorities is not confined to avoiding self-incrimination. It is so that his or her interests may be duly protected in the battle between liberty and the power of the state.

Having determined that a detainee had a right to counsel at an identity parade, the court in Mhlakaza proceeded to express extreme concern about the practical and administrative difficulties attaching to the right to counsel at important pre-trial procedures and the duty upon the state to provide legal services to indigent detainees (in the context of their position as arrestees). The court adopted a non possumus attitude to filling in the details of the right in question and called for legislative codification of this area. No attempt was made to provide guidance about the meaning of 'substantial injustice' in the pre-trial sphere.

In S v Mathebula & Another, the Witwatersrand Local Division had to decide whether a detainee who had been warned of his right to silence and to counsel about an hour and a quarter before a crucial pointing out, and in the context of a discussion about the pointing out, should have been warned again of his right to counsel and to silence as the pointing out was about to commence under different police personnel. Instead of asking simply whether one was dealing with two important stages or with only one, and whether, if two, the warning given at the first about the second was to be regarded as effectively governing the second, the court took a more circuitous route. It determined first that the right to counsel and to be informed of this right had been violated at the pointing out itself. Then it observed that waiver could be a justification of this violation under IC s 33(1). It then asked whether there had, at the first warning occasion, been waiver of the rights in question for the purposes of the pointing out. It answered this question in

334 For more on the link between the right to counsel and the right against self-incrimination, see Miranda v Arizona 384 US 436 (1966).

335 Maphumulo (supra) at 617.

336 See United States v Wade 388 US 218 (1967)(US Supreme Court based its finding that there was a right to counsel in a 'line-up' on the confrontation clause of the Sixth Amendment, and there is much talk of the dangers of inaccuracy.)

337 Mhlakaza (supra) at 833-34.

338 1997 (1) BCLR 123 (W)('Mathebula').

339 See R v Schmautz [1990] 1 SCR 398 (Canadian Supreme Court regarded pre-detention warning as governing period after detention as part of a single incident.)

340 Mathebula (supra) at 133.

341 Ibid at 137.
the negative, based on the absence of clear and unequivocal evidence of informed waiver.\(^{342}\) With respect, the approach of Cameron J in \textit{S v Marx \& Another} is clearly preferable:

It seems to me that to import the rigours of the law of waiver into the area may be inappropriate and undesirable. It seems to me to be sufficient if the accused or the suspect is informed of his right, and chooses, knowing of it, to proceed to make the statement or pointing out in question.\(^{343}\)

The wording of FC s 35(2)(b) entrenches the approach adopted by Cameron J, giving as it does the right to 'choose' a legal practitioner. The choice referred to may easily accommodate also the choice \textit{whether} to consult with a legal practitioner at all.

In \textit{S v Brown \& 'n Ander}, it was said that there was obviously ('ooglopend') no 'yes' or 'no' answer to the question whether the right to counsel should be explained to a suspect at every stage of the investigation and before every interview, and that the answer would depend upon the circumstances of every case. Important factors encompass the intelligence and the 'development' ('ontwikkeling') of the suspect and the period of time between interviews.\(^{344}\) The finding that there was no onus upon an applicant to show that his or her right had not been explained to him or her, or that he or she had not understood the explanation,\(^{345}\) is strange. It is odd given the trite status of the proposition that the applicant has to prove a violation before the state must prove justification.

\(^{342}\) Ibid at 139ff. \textit{Mathebula} was followed in \textit{S v Gasa \& Others}. 1998 (1) SACR 446 (D).

\(^{343}\) 1996 (2) SACR 140 (W), 148. See also \textit{S v Shaba \& 'n Ander} 1998 (2) BCLR 220 (T), 1998 (1) SACR 16 (T), 20E-G ('\textit{Shaba}').

\(^{344}\) 1996 (11) BCLR 1480, 1502 (NC), 1996 (2) SACR 49 (NC).

\(^{345}\) Ibid.

\(^{346}\) \textit{Shaba} (supra) at 20D–E (T).


\(^{348}\) \textit{Shaba} (supra) at 20-1.
on the basis that the accused had at no stage been informed of their right to legal representation. Strydom J regarded the admissions as unconstitutionally obtained evidence, and endorsed the Canadian approach of excluding such evidence only if admissibility would bring the administration of justice into disrepute. The finding that such exclusion was inappropriate was left unsubstantiated, except for mention of the consideration that the complaint concerning the right to counsel had been dragged in by the hair (‘by die hare ingesleep’). The finding, with respect, demonstrated a problem inherent in regarding all FC s 35 violations as questions of unconstitutionally obtained evidence. If it could be recognized before the constitutional era that there was value in excluding admissions or confessions which were not freely made as a matter of rule, then it remains to be asked why the addition of constitutional guarantees to the meaning of ‘freely made admissions’ should result in a denial of that value.

Although S v Mfene & Another expressed a preference for the Shaba approach over the Mathebula approach, McCall J accurately captured the true question: at any given point, the question as to whether the arrested person had been properly informed about his or her right to counsel relative to any particular interaction with the state must be aimed at discovering the extent to which previously given explanations might still be regarded as operative, or by the extent to which the arrested person might properly be said to be aware of his or her right and of its application to the procedure at hand. But then McCall J crafted a rule every bit as peremptory as that applied in Mathebula: if the arrested person was indigent, and if the charge at hand might lead to imprisonment, failure to warn about the right to have counsel appointed at state expense would result in an unfair trial unless the person was, in fact, fully aware of the content of his or her right and elected not to be represented at the relevant procedure (in that case, a pointing-out).

Although the conclusion did not follow from the preceding premises, the rule as formulated in Mfene neatly accommodated the suggested approach of regarding this question as one dealing with informed voluntariness.

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349. 1998 (2) BCLR 187 (W), 1998 (1) SACR 127 (W) (‘Malefo’).

350. Malefo (supra) at 157G–H. Why belated awareness of a violation should be so decisive did not appear from the judgment.

351. See also the invocation in S v Makofane 1998 (1) SACR 603 (T), 617J-618H of S v Khan 1997 (2) SACR 611 (SCA). A similar approach was adopted in S v Mphala & Another 1998 (4) BCLR 494 (W), 1998 (1) SACR 654 (W), where the absence of counsel during an identification parade was regarded in terms of FC s 35(5). This meant that the delicate question whether the accused had waived their right to counsel, or, more accurately, had decided to participate in the parade without counsel, well aware of their right, was rendered unnecessary to decide, although Cloete J found in any event that the circumstances indicated informed action on the part of the accused. Ibid at 659D-E.

352. 1998 (9) BCLR 1157, 1163 (N) (‘Mfene’).

353. Ibid at 1167-68.

354. Ibid.
"S v Soci" regarded a failure to advise an accused of his right to counsel relative to the particular procedure at hand (a pointing out) as a violation of the right. 355 and correctly, with respect, declined to speculate upon whether the accused would or would not have made the incriminating pointing out had his right not been violated, consequently excluding the evidence under FC s 35(5). 356 Erasmus J decreed that police forms should set out the rights of arrested and detained persons fully, clearly and simply, and that such persons should not merely have the wording of FC s 35(2) (c) repeated to them, but should be informed 'in practical terms of the availability of the services of a legal practitioner at that place and time' and of what should be done to obtain state assistance. The forms should also be available in the detainee's language. 357

In its decision concerning the constitutionality of the new bail provisions 358 the Constitutional Court gave its stamp of approval to the approach criticized here. It preferred an ad hoc 'fair trial' test over a decision in principle as to whether a particular statutory procedure violated the right against compelled self-incrimination. 359

This approach now governs most violations of pre-trial rights: it reduces the entire analysis to an 'analysis' in terms of FC s 35(5). With its stock invocation of Key and its 'balancing of interests', this approach will inevitably lead to a hardening towards admission of cogent evidence on the basis that the violation cannot be demonstrated to have made a difference to the fairness of the trial. The incommensurable relationship between violations of pre-trial rights and the 'fair outcome' of the trial process must lead to a discarding of the weight of violations.

355 1998 (3) BCLR 376, 394G (E), 1998 (2) SACR 275 (E) ("Soci").

356 See the opposite approach adopted in S v Mphala & Another 1998 (4) BCLR 494, 660B-G (W), 1998 (1) SACR 388 (W)(Cloete J, having determined that the absence of counsel during an identification parade was a question of potentially unconstitutionally obtained evidence, held that the absence of an indication that the presence of counsel would have made any difference to the outcome of the parade was a telling factor against excluding the evidence. Cloete J specifically distinguished the position pertaining to confessions and pointings out. This, with respect, begged the question whether parades should not be regarded in a similar light, particularly given the recognition of self-incrimination considerations in S v Hlalikaya & Others 1997 (1) SACR 613 (SE).) See also S v Shongwe & Others 1998 (9) BCLR 1170 (T), 1998 (2) SACR 321 (T)(Instead of recognizing that uninformed absence of legal representation rendered statements imperfectly 'voluntary' for the purposes of admissibility, the court first regarded such statements as improperly obtained evidence to be dealt with under FC s 35(5), and then held the question to be essentially a discretionary one. The fact that the court did not invoke public outcry when excluding statements made by the co-accused from admissibility against accused number 3, although accused number 3 was 'most probably the instigator in the murders' ('bes moontlik die aanstigter van die moorde' (at 1195J)) was an indication that the rules relating to the admissibility of confessions were still regarded as sacrosanct by the court. If these 'rigid exclusionary rules' ('starre uitsluitingsreëls') could be upheld without question in the face of probable guilt, but in the absence of a self-incriminatory dimension, it is difficult to see why public disapprobation should be invoked against those who are damned by their own tainted confessions.)

357 See Soci (supra) at 394I–395C.

358 Criminal Procedure Act 85 of 1997. See S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC).

359 See § 51.5(j)(iii) infra.
Unless violations are treated as having some inherent effect upon the 'fairness of the outcome', the identity of the right violated (counsel right? silence right? self-incrimination?) will matter less and less, and the violation itself will tend to have no weight in the court's utilitarian calculus.

S v Ngcobo illustrates the state of the law. A pointing-out occurred without a warning about its consequences. Key and the interests of society were invoked. The absurdity of allowing a technical violation to result in a successful appeal was mentioned, and the conclusion drawn was that the trial remained fair nevertheless. There was no 'causal link' between the violation and the evidence obtained. Some creativity in the field of constitutional remedies for FC s 35 rights violations is required, as well as a recognition that not every question under FC s 35 is a question under FC s 35(5).

The right to counsel during identity parades was rejected in S v Mokoena & 'n Ander, S v Ngwenya & Others, and S v Monyane & Others. These cases differ significantly in their reasoning.

Claassen J in Mokoena took issue with the notion that an identification parade involved the right against self-incrimination and held that, the detainee being at all times 'passive' and the evidence in question being real and not communicative, the right against self-incrimination was simply not at issue. Yet he did hold that because the detainee had not been warned of counsel rights before the parade, his right to counsel had been violated ('geskend'). However, since the court was not dealing with the voluntariness of a confession, it was not a matter for a trial-within-a trial, but a question merely of the weight to be attached to the evidence in question. The finding that the right did exist, but not because of self-incrimination, freed the existence of counsel rights of a detainee from the requisite

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360 1998 (10) BCLR 1248 (N).

361 Ibid at 1255A. The absence of a 'causal link' was to be gleaned from the passage recognizing the significance of such a link.

362 See § 51.3(g) supra; § 51.5(b) infra.

363 S v Mhlakaza & Others 1996 (6) BCLR 814 (C); S v Hlalikaya & Others 1997 (1) SACR 613 (SE).

364 1998 (2) SACR 642 (W)('Mokoena').

365 1999 (3) BCLR 308 (W)('Ngwenya').

366 2001 (1) SACR 115 (T)('Monyane').

367 Mokoena (supra) at 650G.

368 Mokoena (supra) at 650. One might well ask exactly how one is to determine the effect upon the weight (cogency) of the evidence of the uninformed absence of a lawyer. Presumably one should speculate about questions of accuracy and participation, which would almost inevitably lead to ignoring the violation in the determination.
presence of a self-incrimination dimension. The effect of rejecting the analogy with involuntary confessions meant that the recognition of the violation of the right in this sphere would tend to have little practical meaning.

In Ngwenya Leveson J agreed that the ‘inert’ nature of a suspect at an identification parade meant that self-incrimination did not enter the picture. But, more fundamentally, Leveson J found that counsel rights, belonging only to the sphere of detention (under IC s 25(1)) and trial (under IC s 25(3)), did not operate on any 'other occasion'. He assumed therefore that it went without saying that an identification parade did not amount to 'detention' for the purposes of IC s 25(1). The effect of not having been warned of counsel rights was therefore to be tested against the standard of a fair trial. Indeed, Leveson J asked: ‘But what is there in the section [IC s 25(3)] that renders it clear that the legislation required anything more than representation at the trial itself?’ Leveson J went on to reject the reliance in Mathebula based upon the reasoning in United States v Wade. This reasoning led to the finding that counsel rights should be explained at every important pre-trial interaction between state and suspect. Leveson J held that IC s 25(3) required less than the American Sixth Amendment right to 'have the assistance of counsel for [one's] defence'. The latter right, so he held, was wider in its scope than the right to counsel at trial provided by IC s 25(3). And since IC s 25(1) did not apply outside 'detention', as it was narrowly interpreted by Leveson J, no counsel right applied to the parade.

In Monyane, although IC s 25 was at issue, Borchers J made it clear that the reasoning would not have been different had the mater fallen for consideration under FC s 35. The need to have a self-incrimination dimension present in order to trigger the counsel right was once again affirmed. This affirmation was endorsed in the subsequent decision of Bertelsmann J in S v Thapedi. Borchers J in Monyane saw the counsel right as making sense only in a context where legal advice would serve a purpose. He found that, where a detainee had no right to choose whether to participate in an identification parade, and any hypothetically present legal adviser would have no right to interfere in the manner of its conduct, it made little sense to demand that the right to counsel be triggered on such an occasion.

369 See Ngwenya (supra) at 314D. Interestingly, this was held to be so in United States v Wade — 388 US 218 (1967) (‘Wade’) — even where a suspect is made to speak words at the identification parade. See Ngwenya (supra) at 314.

370 Ibid at 312E-F.

371 See § 51.2 supra.

372 Ngwenya (supra) at 313B.

373 Monyane (supra) at 128C.

374 2002 (1) SACR 598 (T), 602E (‘Thapedi’) This confirmation was somewhat watered down by the finding, citing in support the unreported decision of the full court in S v Bailey (CPD 25/2000), that not being advised of the right to counsel at an identification parade did not ‘per se’ violate the right to counsel, or that any violation would not be material. Thapedi (supra) at 603H-I.
occasion.\textsuperscript{375} These decisions place some pressure on the foundation for the counsel right as an incident of the right of being a detainee (as opposed to being an accused person or an arrested person). It may also be asked with some pointedness whether the advice of counsel may not be seen as serving a necessary purpose in circumstances other than those where the advice can have an immediate effect on the procedure at hand. It is of immense value to a person who is being taken through the mills of some part of the state machinery to be advised by a lawyer about why some process is taking place and what he or she can do about it — even if he or she cannot lawfully do anything about it.

The finding of Magid J in \textit{S v Gumede & Others},\textsuperscript{376} that the word 'promptly' in IC s 25(1)(c) and FC s 35(2)(c) '[could] only mean immediately or as soon as possible after the person in question [had] been detained or sentenced', cannot be supported. First, it ignored the ongoing nature of detention. Secondly, it begged the pertinent question in these cases: whether any warning that was given should be regarded as operative at any particular self-incriminatory activity.\textsuperscript{377}

It is of course necessary to afford the detainee a reasonable opportunity to exercise the right to counsel.\textsuperscript{378} In \textit{R v Manninen}\textsuperscript{379} the Canadian Supreme Court held that if the detainee indicated that he or she wished to exercise the right to counsel, then he or she had to be provided with a reasonable opportunity to retain and to instruct counsel without delay, and that the authorities had to allow the detainee to telephone a relative or to make contact with counsel by telephone or otherwise.\textsuperscript{380}

The right to choose a legal representative must obviously be confined to reasonable limits of availability. Normal availability contingencies naturally should qualify the right, rather than act as a potential source of limitation clause justification. But if the circumstances of detention or the requirements of the

\textsuperscript{375} See Monyane (supra) at 129-131. The rejection of \textit{United States v Wade} was accompanied by an observation that United States jurisprudence generally did not demand counsel rights at identification parades prior to the stage of being formally charged, and the Canadian cases were distinguished on the ground that, since one had the right to refuse to participate in a parade in Canada (unlike the case in South Africa), it made sense to obtain legal advice on such an occasion. See Monyane (supra) at 134H-135B. See also \textit{Thapedi} (supra) at 603B-E.

\textsuperscript{376} 1998 (5) BCLR 530 (D).

\textsuperscript{377} The finding ibid at 540I, with respect, was equally questionable: '[IC s 25(1)(c)] has in my judgment nothing to do with the issue in this case, in the light of our unanimous finding as to the voluntariness of the pointings out.' It is submitted that the entrenched counsel rights have added an important gloss to the meaning of voluntariness.

\textsuperscript{378} This proposition can be regarded as the ratio in \textit{Mhlakaza}. See also \textit{Powell v Alabama} 287 US 45 (1932); \textit{S v McKenna} 1998 (1) SACR 106 (C), 112I-113A (In the context of the right of an accused to legal representation, Ngcobo J declared ‘. . . [if the right to legal representation is to have any meaning, it must include the right to be afforded a reasonable opportunity to secure it.’)

\textsuperscript{379} [1987] 1 SCR 1233, 1241.

\textsuperscript{380} But see \textit{R v Smith} [1989] 2 SCR 368 (The detainee should be 'reasonably diligent' in attempting to contact counsel.)
authorities render specificity of election impracticable, then these factors are best dealt with as limitation questions.

(g) Remedies for detainees

The overwhelming majority of criminal procedure constitutional cases concern the effect upon admissibility of evidence of violations of IC s 25 and FC s 35. The possibility of a permanent stay of proceedings, which occurs mainly in the context of cases dealing with delayed justice, is similarly concerned with the effect of violations upon the outcome of a criminal trial. One may well be excused for thinking that the jurisprudence around the rights of detained, arrested and accused persons and the jurisprudence of the admissibility of unconstitutionally obtained evidence are one and the same.\textsuperscript{381} Employing admissibility as a remedy assumes that there is a trial, and also that an adverse ruling on admissibility possesses a rational connection with the violation in question.\textsuperscript{382} But a detainee whose rights are violated must turn elsewhere, and so must the analyst who is to determine what remedies detainees and arrested persons have \textit{qua} detainees and arrested persons, irrespective of their intended future status as accused persons. Furthermore, as far as an accused is concerned, violations of rights that have no connection with the gathering of evidence often require remedies that are likewise not necessarily connected with the outcome of the trial.

The main weapon that the detainee possesses is the right to challenge the lawfulness of the detention.\textsuperscript{383} Some violations of detainee rights should properly render the detention unlawful.\textsuperscript{384} Since the applicant bears the onus of proving a violation, but the state bears the onus of proving lawfulness in \textit{habeas corpus} applications, the state will have to show the otherwise lawful character of the detention in question, the applicant would then have to show that a right has been violated, and the state in its turn should prove that such violation was justified under IC s 33(1) or FC s 36(1). If the violation cannot be justified, it would make most sense to require the state to show cause why the detention should not therefore be regarded as unlawful, and that another remedy would be more appropriate in the circumstances. It should be stressed that a minor violation which cannot be justified is easily conceivable; the consequences of violation, the magnitude of violation, and whether violation can be justified being distinct questions. In such cases the remedy of damages may play a very important role.\textsuperscript{385}

\begin{footnotesize}

382 Peter Hogg writes of the American approach, that unconstitutionally obtained evidence is inadmissible: ‘In favour of the American rule, it could be argued that lawless behaviour by law enforcement officers should not be rewarded by allowing them to use the fruits of such behaviour. On the other side of the argument was the point that when reliable evidence is excluded, a guilty person usually goes free; it is arguable that it would be more sensible to discipline the police officer directly than to confer such a windfall on the undeserving accused.’ P Hogg \textit{Constitutional Law of Canada} (3rd Edition, 1992; 1996 supplement) § 38.2 citing \textit{Mapp v Ohio} 367 US 643 (1961).

383 See § 51.3(e) supra.

384 Ibid.
\end{footnotesize}
an 'enforceable right to compensation' for violations of the rights of an arrested or detained person. The advantage of damages as a remedy is that it avoids the objection of remedying one evil by creating another, and it possesses the flexibility so problematically lacking in all-or-nothing rulings relating to release, or to the admissibility of evidence, or to a stay of proceedings. It should, however, be used only to fill the gaps, and not to deprive an applicant of a more effective remedy in a case where the proceeding or detention in question is vitiated beyond redemption by the violation of rights. It should also be awarded sparingly in situations where an interdict to stop violating, or a mandamus to start fully respecting, the right in question, makes more sense. Litigation of criminal procedure rights should not become a gold rush; nor should the state be encouraged to purchase violations of liberty with rands.

Before the passing of the Constitutional Court Complementary Act, a conflict of authority existed about the power of a court to order release of a detainee pending referral to the Constitutional Court of the question of the constitutionality of the empowering provision. In *Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Another*, the release of an imprisoned person was ordered pending such a referral. This decision displayed conspicuous concern for liberty. *Wehmeyer v Lane NO & Others* followed the same approach. *Bux v Officer Commanding, Pietermaritzburg Prison, & Others* and *De Kock & 'n Ander v Prokureur-Generaal van Transvaal* did not.

The remedy question fell to be decided in *S v Mpofana*. The appellant argued that violation of his right to dignified conditions of detention merited a setting aside of the refusal of his bail application. Mbenenge AJ pointed out that, while detainees had certain constitutional rights, ‘the proper course to follow when such rights [had] been violated [was] a different matter’.

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386 See, eg, the *Van Biljon & Others v Minister of Correctional Services & Others* 1997 (4) SA 441 (C), 1997 (6) BCLR 789 (C), 1997 (2) SACR 50 (C)(On the provision of adequate medical treatment).


389 1994 (4) SA 441 (C), 1994 (2) BCLR 14 (C).

390 1994 (4) SA 562 (N), 1994 (4) BCLR 10 (N).

391 1994 (2) SACR 113 (T). The Constitutional Court Complementary Act 13 of 1995 added IC s 101(7). IC s 101(7) granted provincial and local divisions of the Supreme Court (now High Courts) jurisdiction to grant an interim interdict or similar relief pending determination of referrals to the Constitutional Court).

392 1998 (1) SACR 40 (Tk).

393 Ibid at 45C.
recognized the possibility of challenging the detention before a court as unconstitutional, and obtaining a mandamus to remedy the complaint. But, with respect, what was open to question in the judgment was the ruling that internal remedies (application to the prison authorities) had first to be exhausted before the violation could be brought to the attention of a court. Such rights violations are justiciable disputes under FC s 34. The fact that a court might well order no more than compliance as a proper remedy in certain cases should not mean that FC s 35 entails some doctrine of exhaustion of internal remedies.

As discussed above, in Stanfield v Minister of Correctional Services & Others the applicant could not be detained in conditions consistent with human dignity, and was therefore released. The order was the result of a setting aside of a refusal of parole on review, rather than an order flowing from an application for release as of right, but the result was nevertheless significant for the remedial question.

51.4 The rights of arrested persons

(a) Statutory lawfulness

An arrested person is a person detained ‘for allegedly committing an offence’, and as such enjoys the rights of a detained person as well as those specified for an arrested person under IC s 25(2) and FC s 35(1). An arrest is effected under s 39 of the Criminal Procedure Act (‘The Criminal Procedure Act’). Because the manner of arrest is fully regulated by the Criminal Procedure Act, an arrest is lawful only when it complies with the statute. Physical contact with the arrested person is required for a valid arrest, unless the person in question unmistakably subjects himself or herself to the arresting officer. Section 39(2) of the Criminal Procedure Act requires that the person effecting an arrest shall at the time of

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394 Mpoana (supra) at 45H-I.

395 Ibid at 45G-H.


397 See Baramoto & Others v Minister of Home Affairs & Others 1998 (5) BCLR 562 (W)(The applicants, who were not detainees, but who were threatened with arrest, detention and deportation under s 44(1) of the Aliens Control Act 96 of 1991, inter alia sought a declarator to the effect that they were refugees under international law. The applicants argued that the informal administrative procedures that had been established for the implementation of South Africa’s obligations under international refugee law were inappropriate for the resolution of a rights dispute, for the determination of which FC s 34 demanded an independent and impartial tribunal. Joffe J did not analyse the requirements of independence and impartiality under FC s 34, holding merely that there was no reason to expect the administrative procedures in question to be unfair.) Ibid at 576E.

398 See § 51.3(c) supra.

399 2004 (4) SA 43 (C).

400 Act 51 of 1977
effecting the arrest, or immediately thereafter, inform the arrested person of the
cause of the arrest, and entitles the arrested person to demand a copy of the
warrant authorizing arrest.\textsuperscript{402} According to \textit{S v Matlawe},\textsuperscript{403} an arrested person
becomes an arrested person only upon formal notification of the reason for arrest,
whether he or she is aware of it or not.\textsuperscript{404}

\textbf{(b) Silence and self-incrimination}

\textbf{(i) The seamless web}

Silence and self-incrimination rights before trial are intimately bound up with the
right to a fair trial, and difficult to separate from the perspective of the accused at
trial. As long as it is remembered that the question of whether a person's right as an
arrested person has been violated can be distinguished from the question of whether
that person's right as an accused has been violated, pre-trial silence and self-
incrimination from both perspectives may be examined together, especially since
the remedies in this case, like the right itself, are sharply focused on the trial.
Indeed, the difficulty of separating the spheres for analytical purposes has even led
to observations such as the following from Yacoob J in his separate concurring
judgment in \textit{S v Thebus & Another}:

\begin{quote}
The distinction between the pre-trial right to silence and the right to silence during trial
is inappropriate in our constitutional jurisprudence. The right to silence is initially
conferred by s 35(1)(a) and thereafter by s 35(3)(h).\textsuperscript{405}
\end{quote}

Aspects of silence and compelled self-incrimination which are purely trial-bound will
be discussed in the section on the rights of an accused.\textsuperscript{406}

The conceptual relationship between the right to silence, the right against self-
incrimination, and the presumption of innocence is a jurisprudential minefield. Some
hold the view that the right to silence is the governing principle.\textsuperscript{407} In \textit{R v Director of
Serious Fraud Office, ex parte Smith}\textsuperscript{408} Lord Mustill expressed the opinion that the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{401} \textit{S v Thamaha} 1979 (3) SA 487, 490 (O). See E du Toit, FJ de Jager, A Paizes, A Skeen & S van der
\item \textsuperscript{402} On the right to reasons, which the accused enjoys as a detainee, see § 51.3(a) supra.
\item \textsuperscript{403} 1989 (2) SA 883 (BG), 884-85.
\item \textsuperscript{404} See §§ 51.2 and 51.3(e) and (g) supra, for a discussion of the significance of unlawful arrest upon
one's status as `arrested' for the purposes of FC s 35(1), and for the effect of violations of rights
upon the lawfulness of detention.
\item \textsuperscript{405} 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC).
\item \textsuperscript{406} § 51.5 infra.
\item \textsuperscript{407} See \textit{R v Brophy} [1982] AC 476, 481 (The right not to be compelled to incriminate oneself was
discussed in terms of the right to silence.)
\item \textsuperscript{408} [1993] AC 1, 30-1 (HL) (‘Ex Parte Smith’).
\end{itemize}
\end{footnotesize}
'right to silence' did not denote any single right, but referred to 'a disparate group of immunities, which differ[ed] in nature, origin, incidence and importance'. The six identified 'immunities' were: a universal immunity from being compelled on pain of punishment to answer questions, a universal immunity from being thus compelled to answer questions which may incriminate, a specific immunity of suspects undergoing interrogation from being thus compelled to answer questions, a specific immunity possessed by accused persons at trial from being thus compelled to testify and answer questions, a specific immunity by persons charged with an offence from being interrogated, and a specific immunity possessed by an accused in certain circumstances from having adverse comment made on a failure to answer questions before the trial or at the trial. The learned judge commented:

Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not. In particular it is necessary to keep distinct the motives which have caused them to become embedded in English law; otherwise objections to the curtailment of one immunity may draw spurious reinforcement from association with other, and different, immunities commonly grouped together under the title of the 'rights to silence'.

The view that the principle against self-incrimination, or *nemo tenetur se ipsum prodere*, is the archetype principle has been expressed by the Cape Provincial Division in *Park-Ross v Director: Office for Serious Economic Offences*, the Australian High Court, and the Canadian Supreme Court. Lamer CJ in *R v Jones* invoked the 'principle' against self-incrimination, and distinguished it from the 'privilege' against self-incrimination. The latter belongs to the 'narrow traditional common law rule relating only to testimonial evidence at trial', while the former, the principle *nemo tenetur se ipsum accusare*, possesses the 'status of a principle of fundamental justice'.

The fallacy of the argument in *S v Phallo & Others*, that all instances where silence might lead to criminal consequences involve the right to

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409 Ex parte Smith (supra) at 30-31. Lord Mustill's view is referred to by Ackermann J in *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at para 93 (In the context of the right against self-incrimination. Ackermann J refers to the second listed immunity as that applicable to the privilege against self-incrimination.)

410 1995 (2) SA 148 (C), 162, 1995 (2) BCLR 198 (C)('The underlying right embodied in [IC] s 25(2) and (3) is that no accused person shall be compelled to be a witness against himself. It has its origins in the principle *nemo tenetur se ipsum accusare*.')


412 See *R v Hebert* [1990] 2 SCR 151, 57 CCC (3d) 1, 34 (McLaghlin J).

413 [1994] 2 SCR 229, 249. The explanation was given in the course of a dissenting judgment. The subordination paradigm is often determined by the textual framework within which the particular jurisprudence operates. The US Constitution speaks of the right 'not to be compelled in any criminal case to be a witness against himself' (in the Fifth Amendment), and so silence becomes a question of self-incrimination.

414 1998 (3) BCLR 352 (B).
silence, illustrates the necessary conceptual link between the silence and self-incrimination rights.\footnote{15}{See § 51.1(a)(iii) supra; § 51.4(b)(ii) infra.}

The most coherent view is that the governing principle in the triad is the presumption of innocence. Once it is accepted that criminal justice rights flow from a concern with the justification for interference with liberty,\footnote{16}{R Dworkin \textit{Law’s Empire} (1986) 93-94 (Goes so far as to say that the point of all law is the justification of state coercion.)} and that this concern is most clearly perceived in the foundational status of the presumption of innocence in the criminal process, then the character of the right to silence and that of the right to protection from self-incrimination as natural consequences of the presumption of innocence should be readily visible. The seamless web of rights recognized by the Constitutional Court in \textit{S v Zuma & Others}, while rendering separate development of the rights in question difficult, clearly illustrates that the 'silence rights' to which Lord Mustill referred are governed by the presumption of innocence:

\[\text{T}he \text{ common law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey’s ‘golden thread’ — that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt . . . Reverse the burden of proof and all these rights are seriously undermined.}\footnote{17}{1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 33. See also \textit{Thomson Newspapers Ltd v Canada (Director of Investigation \& Research, Restrictive Trade Practices Commission} [1990] 1 SCR 425, 480 (Right against self-incrimination grounded in the notion that the ‘state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth.’)}

The conceptual difficulty in reverse onus cases of distinguishing questions that pertain to the presumption of innocence from those questions that relate to silence and (or) self-incrimination questions is further proof of the close link joining these three concepts, and of the foundational status of the presumption of innocence.\footnote{18}{See \textit{S v Zuma & Others} 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), 1995 (1) SACR 568 (CC) at para 34; \textit{S v Mabatha; S v Prinsloo} 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), 1996 (1) SACR 371 (CC) at para 11; \textit{S v Meaker} 1998 (8) BCLR 1038 (W), 1998 (2) SACR 73 (W), 85D-I (Cameron J assumed for the purposes of argument that a reverse onus provision violated the right to remain silent.)}

Madala J put it thus in \textit{Osman & Another v Attorney-General, Transvaal}:

\[
\text{Section 25(3)(c) [IC] enshrines both the right to be presumed innocent and the right to remain silent during plea proceedings or trial. The rights contained in the subsection are both integral to the right to a fair trial. That these rights stand side by side in s 25(3)(c) is not accidental; the framers of the Interim Constitution sought to demonstrate that these rights reinforce each other.}\footnote{19}{1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 33. See also \textit{Thomson Newspapers Ltd v Canada (Director of Investigation \& Research, Restrictive Trade Practices Commission} [1990] 1 SCR 425, 480 (Right against self-incrimination grounded in the notion that the ‘state must have some justification for interfering with the individual and cannot rely on the individual to produce the justification out of his own mouth.’)}
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\section*{(ii) The right to remain silent}
IC s 25(2)(a) makes only implied reference to the right to silence, incorporating it into the right to be ‘informed . . . that he or she has the right to remain silent and to be warned of the consequences of making any statement’. The substantive dimension to the right to silence is expressly provided in FC s 35(1)(a) and is clearly distinguished from the right to be informed of its existence and of the consequences of not remaining silent contained in FC s 35(1)(b)(i) and (ii). What is particularly remarkable about the wording of FC s 35(1)(b)(ii) is that, unlike the reference to ‘any statement’ in IC s 25(2)(a), the warning about the consequences of ‘not remaining silent’ can hardly be read as including a reference to the possibly incriminating consequences of indeed remaining silent. The entrenchment of the right to remain silent independently of the information right should now be read as constitutionally prohibiting the use as incriminating evidence of the exercise by the accused of the right to remain silent while he or she was an arrested person. And that is why it is justifiable to omit a reference to the right to be warned, not only of the consequences of not remaining silent, but also of the consequences of remaining silent. The two rights read together compel the interpretation that no grave consequences may attach to exercising the right to remain silent during or after arrest. The abolition of the common-law protection against use of pre-trial silence as incriminating evidence by the Criminal Justice and Public Order Act of 1994 in the United Kingdom required the caution upon arrest to be amended to a warning, not only that anything said might be used against the apprehended person in a court but also that silence inconsistent with anything relied upon at trial might harm the apprehended person's defence.  

The authority in favour of allowing negative inferences from a failure to testify at trial should not be read as allowing the use of pre-trial silence as positive evidence of guilt. There are a number of reasons for this view: first, there is a world of difference between allowing the court to draw inferences from the very course of the trial before it, and allowing conduct by the accused before trial which amounted to the exercise of a right to be used as evidence at the trial. The character of the

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419  1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC) (‘Osman’) at para 12. For more on the Court’s finding with respect to the presumption of innocence § 51, see 1(a)(iii) supra.

420  At common law an exercise of the right to silence, particularly after a caution about its existence, does not by itself amount to a positive piece of evidence of guilt. See R v Patel 1946 AD 903; R v B 1960 (2) SA 424 (T), 426; S v Maritz 1974 (1) SA 266 (NC). In England this was the position before 1994. See Hall v The Queen [1971] 1 WLR 298 (PC), R v Gilbert [1977] 66 Cr App R 237. This general rule is subject to a fine distinction between conduct (including silence) which can be taken as acceptance of an accusation of guilt, and hence as an admission (R v Christie [1914] AC 545 (HL); S v Mogotsi 1982 (1) SA 190 (B)), and a refusal to respond, especially if such silence is an exercise of the right to silence. Furthermore, a distinction, equally fine, has to be drawn between the circumstantial inference that may be drawn from the sudden and belated appearance of a defence like an alibi, on the one hand, and use of silence by itself as evidence of guilt, on the other. See R v Littleboy [1934] 2 KB 408, 413.

421  Section 34.


423  See Attorney-General v Moagi (1982)(2) BLR 124 (CA). See also S v Lavhengwa 1996 (2) SACR 453 (W), 487; § 51.5(j)(ii) infra; Osman (supra) at paras 19-22.
defence at trial, and whether it involves testimony from the accused to explain matters raised by the state, cannot easily be ignored in the determination of whether the onus has been discharged. What the accused did not say at some previous occasion, however, can be left out of the reckoning more readily. The accused at trial is fully aware of the fact that he or she is standing trial, that guilt is being determined by what people, including the accused, do or say at the trial, and that his or her testimony, or lack of it, will be his or her side of the story, as far as the court is concerned. Upon apprehension, however, the picture is radically different. The arrested person is in a vulnerable position and has been told that nothing need be said, and that grave consequences may flow from saying anything. Finally, the common law differs in relation to the respective situations. The significance of expressly adding the substantive right to pre-trial silence to the rights of an arrested person must be something other than to deprive the arrested person of a common-law protection.

It is therefore disquieting to note that Jones J in S v Nombewu stressed that, although the warning required by IC s 25(2)(a) would 'extend not only to what was said but also to what was done', the warning did not apply to 'every act or omission by an accused person which [gave] rise to an adverse inference against him because it amount[ed] to a tacit admission', and that the learned judge invoked as illustration the common-law cases concerned with acquiescent silence, on the basis that 'action spoke louder than words'. The learned judge's view that no warning as to silence was required in England did not take into account the fact that the very sort of inference in question required the alteration of the caution in England. It is not suggested that our courts should require a similarly puzzling caution; rather, it should be recognized that the absence of such a caution in our Constitution means that pre-trial silence is not to be used as evidence of guilt.

At which precise occasion one must be warned of the right to silence, and when an earlier warning may still be said to be operative, are questions considered above under the discussion of counsel rights. Where the relevant officer had deliberately refrained from warning the suspect at the scene of the pointing-out of a right to silence (the suspect having been so warned originally upon his arrest), so as not to discourage the suspect from making incriminating statements at the scene, it was hardly surprising that the court in S v Seseane found such failure to

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424 The awareness flows from the nature of the experience itself, as interpreted and explained to the accused by counsel or the court, as the case may be. If the accused is unable with guidance to comprehend the significance of what is going on, he or she would not be competent to stand trial.

425 For a similar significance attached to the greater vulnerability of a suspect due to uncertainty than that of an arrested person, see S v Sebejan & Others 1997 (8) BCLR 1086 (W), 1997 (1) SACR 626 (W), 633-4. Therefore, if a trick is used to circumvent the arrested person's opportunity to claim the right to silence at a police interview, such evidence as emerges should not be admissible. See R v Hebert [1990] 2 SCR 151. This should apply also to a person not yet arrested, when the activity aimed at extracting the admission should properly have been conducted at a police interview. The vulnerability and ignorance arguments in S v Sebejan are most apposite here. This does not mean that all cases of entrapment violate the right to silence or the right against self-incrimination. But see Mendes & Another v Kitching NO & Another 1996 (1) SA 259 (E), 1995 (2) SACR 634 (E), 646f (Kroon J's view that an accused's right not to incriminate himself or his right to silence was not 'at issue' in a trapping case overstated the case.)
activate the right at the relevant moment decisive in rejecting the evidence thus elicited. This finding stands in stark contrast with the finding in *S v Ndhlouv & Others* that an adequate warning given to the relevant accused when he was arrested immediately before setting off to the pointing-out was so 'bound up' with the pointing-out as still to have been operative for the purposes of the pointing-out.\(^{433}\)

*S v Thebus & Another* concerned the use to be made by the prosecution at trial of the late emergence of an alibi defence — ie, of the fact that an alibi defence had not been asserted on an earlier occasion.\(^{434}\) The Justices of the *Thebus* Court adopted four different approaches to the issue. The appellant, on arrest on suspicion of involvement in an offence committed in Ocean View, Cape Town, was asked whether

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\(^{426}\) 1996 (12) BCLR 1635, 1644 (E), 1996 (2) SACR 396 (E)('*Nombewu*').

\(^{427}\) Ibid at 1645.

\(^{428}\) *Nombewu* (supra) at 1646.

\(^{429}\) What a suspect is to make of the following is something for criminal psychologists to ponder: 'You do not have to say anything but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you say may be given in evidence.' *See R v Condron and Condron* [1997] 1 Cr App R 185 (CA)(For guidelines on inferences from silence in such cases.)
he wished to give an account. His answer was the rather enigmatic one that his family had been in Hanover Park at the relevant time. At trial, the appellant presented an alibi that placed him neither in Ocean View nor in Hanover Park. He was cross-examined on the version he had put about his family's presence in Hanover Park. He explained that he had told the police where his family had been at the time, not where he had been. He could not offer an explanation for why he would have done this. The interesting question was whether this line of cross-examination, and inferences arising from the appellant's performance, violated his right to silence.

The view adopted by Ngcobo J and Langa DJP that this had nothing to do with the right to silence, had much to recommend it. The other Justices all dealt with the issue as one involving a deliberate failure to speak (ie not mentioning the alibi earlier). But the judgment of Ngcobo J and Langa DJP implicitly warned against the fallacy that every version offered at trial that differed from a version offered when questioned pre-trial entailed remaining silent pre-trial about the trial version. The fallacy is that every version $x$ is silent about version $y$ to the extent that the two differ. Indeed, quite the contrary is usually true — every version $x$ talks about version $y$ to the extent that the two differ, since version $x$ implies that version $y$ is false to the extent of the difference. When the appellant had told the police officer that his family had been in Hanover Park at the time (on being asked to account in respect of an offence occurring in Ocean View), what was he saying? If he was implying that he had also been in Hanover Park, then his alibi contradicted that statement, and he ought surely to have been cross-examined accordingly, without engaing the right to silence. In testing whether that was indeed what he was implying, cross-examination about the implausibility of merely telling the police where his family had been made perfect sense. All that had happened in the instant case was that the appellant had been tested in cross-examination on his contradictory or nonsensical statements. Silence did not really enter the picture.\(^{435}\)

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430 This holding does not mean that every time the omission to speak carries criminal consequences the right to silence is involved. If fraud is perpetrated by means of non-disclosure, criminal liability has nothing to do with the right to silence. See §§ 51.1(a)(iii) and 51.4(b)(i) supra. This response is the short answer to the ingenious but, with respect, absurd argument raised in S v Phallo & Others 1998 (3) BCLR 352 (B). In order to get around the binding authority of S v Jonathan & Andere 1987 (1) SA 633 (A) in the context of accessory after the fact liability, the appellants argued that Jonathan was unconstitutional. The principle in Jonathan that was uncomfortable to the accused in Phallo was that one might be held liable as accessory after the fact to a crime which one might have committed oneself. Jonathan recognized that one might assist another to evade his or her crime by means of words as well as deeds. So, the argument went, one might do so also by means of silence. Hence the 'logical conclusion' that Jonathan violated the right to silence, and, lo!, that the holding in Jonathan was unconstitutional. The court evaded the silence question by pointing out that Jonathan did not hold that silence might constitute the actus reus of accessory-after-the-fact liability. Phallo (supra) at 364. The fact that the question could be left there proved the irrelevance of the constitutional argument to the principles from Jonathan that were actually applied in Phallo.

431 See § 51.3(f) supra.

432 2000 (2) SACR 225 (O).

433 2001 (1) SACR 85 (W) at paras 10–11, 40.

434 S v Thebus 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC), 2003 (2) SACR 319 (CC)('Thebus').

435 See Thebus (supra) at paras 119 and 121.
On the assumption that the case was properly viewed as one concerning the failure to mention an alibi earlier (as the rest of the Court viewed it), the right to silence appeared to score a victory, but one threatened by imminent defeat at the hands of defence discovery. The 'main judgment' (three judges on the silence issue) found the use of a pre-trial failure to mention an alibi to be constitutionally valid. However, the failure must go to credibility and not to guilt.\textsuperscript{436} The concurrence of four judges that constituted the majority grouping on this issue found this distinction to be too close for comfort,\textsuperscript{437} a logically appealing scruple, and did not countenance cross-examination of an accused on such pre-trial silence — the victory.\textsuperscript{438} The threat to the victory was the suggestion that an adequate pre-trial warning that failure to mention an alibi might be used at trial would take care of the violation.\textsuperscript{439} This conclusion should give us pause. In the United Kingdom, a suspect is entertained with the following gibberish: ‘You do not have to say anything. But it may harm your defence if you fail to say something now on which you later rely at your trial. Anything you do say may be used against you.’\textsuperscript{440} Furthermore, why accord an alibi special treatment? Why allow (subject to a confusing warning) making something of the failure to mention an alibi but not making something of the failure to mention other exculpatory evidence? Why tell the suspect he or she has the 'right to silence' at all? One should either tell a suspect that he or she has the right not to say anything, and actually mean it, or scrap the whole idea.

What was particularly welcome, if somewhat atypical, was the avoidance by the majority group on the silence issue of an \textit{ad hoc} approach to the question whether such silence could legitimately be used or not. In his separate concurring judgment, Yacoob J asked, quite legitimately, why an \textit{ad hoc} approach should be avoided in the case of pre-trial silence, whilst a fairness barometer was used in other cases.\textsuperscript{441} One may point out that a distinction must be maintained between the question of whether a violation occurred and the question whether the trial has been rendered unfair as a result.\textsuperscript{442} But the strong insistence on the police discipline principle to

\textsuperscript{436} \textit{Thebus} (supra) at paras 59-68.

\textsuperscript{437} Ibid at para 90.

\textsuperscript{438} Ibid at para 91. This group found cross-examination on the Hanover Park statement not to involve the right to silence. Quite how such cross-examination could be sensibly conducted without probing what that statement was meant to imply about the accused’s own presence, and therefore to what extent it was different from the trial alibi, was not clear.

\textsuperscript{439} Ibid at para 92.

\textsuperscript{440} The reservations about confusing warnings expressed by Yacoob J echoed such worries. Ibid at para 111.

\textsuperscript{441} Ibid at paras 97 and 109.

\textsuperscript{442} Indeed, the majority group held the violation to have occurred, but the trial not to have been rendered unfair as a result. Ibid at para 93.
justify outlawing the use of pre-trial silence as a deterrent\textsuperscript{443} remained noteworthy. Why limit this approach to the use of pre-trial silence?

\textbf{(iii) The right against compelled self-incrimination}

The link between the right against compelled pre-trial self-incrimination and the context of the trial itself was forged by the Constitutional Court in \textit{Ferreira v Levin NO \& Others; Vryenhoek \& Others v Powell NO \& Others}\textsuperscript{444} and \textit{Bernstein \& Others v Bester \& Others NNO},\textsuperscript{445} and reinforced in \textit{Nel v Le Roux NO \& Others}.\textsuperscript{446} In \textit{Ferreira} the subjection of company directors to which, inquiries conducted in the course of the liquidation of companies under s 417(2)(b) of the Companies Act 61 of 1973 provided no protection against use of the answers elicited in subsequent criminal proceedings, was held to violate the right against self-incrimination. The incrimination would render the envisaged criminal proceedings unfair. The criminally enforceable compulsion to answer was itself justifiable under the limitation clause, but the absence of a use immunity in the criminal proceedings could not be justified under the limitation clause. The result of this approach was the effective transformation of the right against self-incrimination into a use immunity which operated only at the specific proceedings where the incrimination might occur: where the use immunity would apply, the right was exhausted; no complaint based on self-incrimination had any meaning outside that context.\textsuperscript{447} Nevertheless, one could still validly refuse to answer questions if other rights would be threatened by the answers. However, the threatened violation would be upheld as justified under limitation analysis.\textsuperscript{448}

\textsuperscript{443} Ibid at para 85.

\textsuperscript{444} 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) ("Ferreira").

\textsuperscript{445} 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) ("Bernstein") at para 60f.

\textsuperscript{446} 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC) ("Nel"). See also \textit{Park-Ross v Director: Office for Serious Economic Offences} 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C).

\textsuperscript{447} \textit{Nel} (supra) at para 4 ('In view of the transactional indemnity and use immunity provisions in section 204(2) and (4) respectively of the CPA, the applicant could not validly (and did not) object to answering self-incriminating questions.') See also \textit{Dabelstein \& Others v Hildebrandt \& Others} 1996 (3) SA 42 (C), 66, in the context of Anton Piller orders. This was the foundation for the short shift accorded the arguments in \textit{Thatcher v Minister of Justice and Constitutional Development} 2005 (4) SA 543 (C) that the right to silence and against compelled self-incrimination had been violated in that case. The applicant brought review proceedings against various official acts that amounted to granting consent that he be questioned by officers of a foreign state concerning his knowledge of facts relating to an attempted coup d'etat in that state. Since the applicant was being prosecuted in South Africa in connection with the foreign coup, it was argued that he should not be submitted to such questioning, which would be used both to gather ammunition against him in the South African proceedings and to prepare a case for his possible extradition to face an unfair trial and a potential death penalty in the foreign state, at least until the finalization of his criminal case. The rejection of a similar argument in \textit{Mitchell \& Another v Hodes \& Others NNO} 2003 (3) SA 176 (C), which had found that no substantive basis for distinguishing the case from the \textit{Ferreira} use immunity had been presented, was invoked as almost axiomatically suggesting the untenability of the applicant's argument in \textit{Thatcher}. Ibid at paras 92 to 94.
The requirement of compulsion laid down in FC s 35(1)(c) and (3)(j) has been interpreted not to include the Hobson's choice between sacrificing one's interests in non-criminal proceedings and incriminating oneself as far as future or pending criminal proceedings are concerned. In Davis v Tip & Others and Seapoint Computer Bureau (Pty) Ltd v McLaughlin & Others NNO, the courts decided that only coercive compulsion actually to answer questions, as opposed to the exercise of a free choice to defend one's interests in the non-criminal proceedings, amounted to the sort of compulsion required for a violation of the right against self-incrimination. The Davis court based its finding upon IC s 25(3)(c) — the presumption of innocence and the right to silence at trial — rather than on the self-incrimination provision. The Seapoint court first based its decision on the equation of the common law right to silence and the right against self-incrimination, and then, perplexingly, rejected the application of a remedy granted in the self-incrimination sphere at common-law, partly because the authority in question was not concerned with the 'right to silence'. The Seapoint court's identification of the presence of the relevant kind of 'coercive power', as emphasized in a series of Canadian cases, missed the point. The cases in question were at pains to point out that the kind of coercion which the Seapoint court required was not a requirement for the

448 See Bernstein (supra) at para 61; Nel (supra) at para 6ff. The striking consequence of this approach is that, because the ability to refuse to answer criminally compelled questions would depend upon a final determination also of the applicability of the limitation clause, a person faced with compulsory questioning is able to avoid criminal liability for a refusal to answer, if and only if the fine balancing entailed by a limitation analysis would be decided in his or her favour. However, a 'just excuse' for the purposes of avoiding criminal liability should be based upon more subjective factors than the possible outcome of a limitation analysis entertaining state interests.

449 1996 (1) SA 1152 (W), 1996 (6) BCLR 807 (W)('Davis').

450 1996 (8) BCLR 1071 (W)('Seapoint').

451 See S v Mbolombo 1995 (5) BCLR 614 (C)(Bail). Mbolombo's approach was based on dicta in S v Zuma & Others 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 30. On this view, the right against self-incrimination was grounded upon an abhorrence of coercive methods of extracting confessions from accused persons especially by the Star Chamber in the seventeenth century. This is the orthodox view of the right's history. See LW Levy Origins of the Fifth Amendment (1968). In Ferreira, Ackermann J noted that recent scholarship in legal history had cast doubt upon the link between the privilege against self-incrimination and the horrors of coerced extraction of evidence during the seventeenth century. Ibid at para 92 n124. See JH Langbein 'The Historical Origins of the Privilege Against Self-Incrimination at Common Law' (1994) 92 Michigan LR 1047 (Langbein argues, and musters impressive material in support, that the structure of the pre-eighteenth-century English criminal trial was completely inconsistent with the right to remain silent, being focused upon forcing or allowing the accused to tell his side of the story, and that the origins of the right to remain silent and the privilege against self-incrimination must be sought in the development of the adversarial process and the enjoyment of legal representation by the accused.) Ackermann J also refers to the theory offered by Eban Moglen. See E Moglen 'Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege against Self-Incrimination' (1994) 92 Michigan LR 1086. This theory of the justifying principle behind the silence rights supports the status of the presumption of innocence as the governing rationale. The recognition of this governing rationale in Zuma should not be obscured by the references to the history of compelled confessions, given that Zuma itself dealt with the operation of the principle in the context of involuntary confessions, and that the Star Chamber history was apposite to that context.

452 Seapoint (supra) at 1081 (Rejects the applicability of Jamalodien v Ajimudien 1917 CPD 293.)

applicability of the self-incrimination right. A lesser form of 'coercion' in the background is deemed sufficient. The lack of an actual compulsion to speak was similarly decisive in *Osman & Another v Attorney-General of Transvaal*.

A facial challenge to a statutory provision — that created the offence of being unable to give a satisfactory account of possession of goods reasonably suspected of being stolen — failed on self-incrimination and silence grounds. It failed because the statute did not penalize silence or a failure to account. It penalized an *inability* to give a satisfactory account, i.e., being in a position where one was not possessed of a satisfactory explanation. The satisfactory account could have been produced at any time before judgment — hence the court's analogy with the position of an accused unable to rebut a *prima facie* case. The *Osman* Court held that the section did not compel anything. Since the real target of the section is harbouring stolen goods, the mechanism of explanation is nothing more than an evidential tool disguised as a substantive offence.

*Msomi v Attorney-General of Natal & Others* invoked the division between 'real' and 'communicative' evidence emphasized in Canada, and the notion that only the compulsion of the latter could be regarded as violating the right against self-incrimination. In this respect, a distinction should be drawn between real evidence independent of the person of the accused and real evidence intimately connected

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454 See *Nedcor Bank Limited v Behardien* 2000 (1) SA 307 (C).

455 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), 1998 (2) SACR 493 (CC) (*Osman*).

456 *Osman* (supra) at paras 15, 19–23.

457 Ibid at para 11.

458 See § 51.1(a)(iii) supra.

459 1996 (8) BCLR 1109 (N) (*Msomi*).

460 See *R v Collins* [1987] 1 SCR 265.

461 See *S v Huma & Another* 1996 (1) SA 232 (W); *S v Maphumulo* 1996 (2) BCLR 167 (N), both cited in *Msomi* (supra). All three cases dealt with fingerprints. See also § 51.1(a)(iii) supra; *S v Vilakazi en ‘n Ander* 1996 (1) SACR 425 (T), 428. *Msomi* followed the American decision in *Schmerber v State of California* 384 US 757 (1966) (Blood sample not self-incrimination). In Canada this reasoning was applied by the Ontario Court of Appeal to a breath sample. *R v Altseimer* (1982) 38 OR (2d) 783 (CA). But see *R v Therens* [1985] 1 SCR 613 (Supreme Court holds that a breath sample amounts to conscription of the accused against himself). See also *R v Dersch* [1993] 3 SCR 768 (Blood sample) and *R v Greffe* [1990] 1 SCR 755 (Object extracted from rectum). It should be pointed out that the self-incrimination principles recognized to be involved in these Supreme Court decisions are difficult to disentangle from violations of the right to counsel. In England the privilege against self-incrimination at common law is interpreted as not extending to the compelled production of intimate samples. See *R v Apicella* (1985) B2 Cr App Rep 295 (CA); *R v Smith* (1985) B1 Cr App R 286 (CA); and *R v Cooke* [1995] 1 Cr App Rep 318. On the confirmation of the communicative requirement, see *S v Mokoena* 1998 (2) SACR 642 (W); *S v Ngwenya* 1999 (3) BCLR 308 (W) (Dismissing the notion of a self-incrimination dimension at identification parades, in the sphere of counsel rights.) See also § 51.3(f) supra.
with the person of the accused. Compulsory production of the former does not by itself amount to self-incrimination.\textsuperscript{462} Compulsory production of the latter may be a different matter.\textsuperscript{463} The recognition in \textit{S v Hlalikaya & Others}\textsuperscript{464} of a self-incrimination dimension to a suspect's standing in an identity parade may well be seen as softening the 'communicative' requirement. And the test laid down in \textit{S v Hlalikaya & Others}\textsuperscript{464} of a

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\textsuperscript{462} The case of the compulsory production of evidence often straddles the line between communicative and real evidence, particularly when the real evidence is documentary evidence. It is important first to separate questions of seizure from questions of compelled production, and then to separate compelled production from compelled disclosure.

(1) Seizure and production: Seizure of pre-existing evidence independent of the person is not compelled self-incrimination. It may violate privacy, and such violation may have evidential consequences. For the privacy question, see \textit{Park-Ross v Director: Office for Serious Economic Offences} 1995 (2) SA 148 (C), 1995 (2) BCLR 198 (C) ("Park-Ross") and \textit{Key v Attorney-General, Cape of Good Hope Provincial Division, & Another} 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC) ("Key"). For more on the right to privacy, and its relation to search and seizure, see D McQuoid-Mason 'Privacy' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) \textit{Constitutional Law of South Africa} (2nd Edition, OS, December 2003) Chapter 38, § 38.3(a)(ii).

Documents, although containing 'communications' from their maker, do not seem to become compulsorily produced communicative evidence when they are seized. \textit{United States v Fisher} 425 US 391 (1976); \textit{United States v Doe} 465 US 605 (1984). For critical and comprehensive discussion of this issue, see DE Will 'Dear Diary — Can You be Used against Me?' (1994) 35 Boston College LR 465. The compelled production of incriminating pre-existing evidence known to be in existence should also not by itself violate the right against self-incrimination. But see \textit{Boyd v United States} 116 US 616 (1866) (Reliance upon the Fifth Amendment (self-incrimination) coupled with the Fourth Amendment (unreasonable searches and seizures) led the court to declare compulsory production of documents (incriminating invoices) \textit{per se} to violate the right against self-incrimination. This aspect of the case was seemingly overruled in \textit{United States v Fisher}.) In \textit{Bernstein}, Ackermann J implicitly distinguished the possible privacy infringement inherent in a compelled search and seizure from questions of self-incrimination: 'In the present context a claim to privacy can surely only be founded on the content of the information which the examinee is being forced to disclose, not on his desire not to disclose it.' \textit{Bernstein} (supra) at para 64. The right against self-incrimination was not directly claimed in \textit{Bernstein} for the production of documents — as the claim would in any event have been covered by the decision in \textit{Ferreira}. In \textit{Park-Ross}, the court dismissed self-incrimination complaints against production and inquisition powers conferred by s 5(8) of the Investigation of Serious Economic Offences Act 117 of 1991 on the basis that the persons concerned were not arrested or accused at the relevant time, and that a use immunity at criminal proceedings against 'evidence given by a person' in such inquiries would provide adequate protection of self-incrimination rights. The court did not distinguish the documents produced, on the one hand, from questions answered and evidence (including documents) discovered as a result of questions answered, on the other. In \textit{Key} the attack upon seizures of documents was framed on privacy grounds and dismissed on the basis that the seizures were lawfully carried out in the absence of constitutional rights before the passing of the Interim Constitution. The claim to a use immunity based on \textit{Park-Ross} was therefore primarily a question of the consequences of possible privacy infringements. The Court endorsed the reasoning in \textit{Ferreira}, \textit{Bernstein}, and \textit{Nel} regarding self-incrimination use immunities and held this reasoning to be applicable to the claim before it. \textit{Key} (supra) at paras 10-11. This should perhaps not too readily be regarded as tacit approval for the notion that the right against self-incrimination did apply to compulsory production of documents \textit{per se}. Nevertheless, the extension of the privilege against self-incrimination in England to Anton Piller orders and Mareva injunctions seems to cover the very production of the documents themselves, irrespective of any communicative significance in disclosure. See \textit{Rank Film Distributors Ltd & Others v Video Information Centre & Others} [1981] 2 All ER 76 (HL) and \textit{AT&T Tsetel Ltd & Another v Tully & Others} [1992] 3 All ER 523 (HL). For criticism of the Lord Chancellor's Department Consultation Paper, see \textit{The Privilege Against Self-Incrimination in Civil Proceedings} (1992) at para 30. Approval of the English cases expressed in \textit{Dabelstein v Hildebrandt & Others} might indicate endorsement of the application of self-incrimination principles to the production of documents \textit{per se}, although the issue was not addressed. 1996 (3) SA 42 (C) ("Dabelstein").
that conscription by the accused against himself ‘through some form of evidence emanating from himself’ — can be read as authority for a wider definition than that applied in Msomi. But in S v Mokoena, S v Ngwenya and S v Monyane, the Msomi requirement of a communicative act was reaffirmed in the sphere of counsel rights. In all of these cases, the WLD held identification parades not to involve self-incrimination at all. Furthermore, the rather firm confirmation of the communicative or testimonial requirement by the Supreme Court of Appeal in Levack v Regional Magistrate, Wynberg, in the context of the compulsion of a voice sample, probably put paid to the extension of the sphere of self-incrimination beyond the truly testimonial. More important, however, is the fact that a recognition of the status of the presumption of innocence as the governing rationale behind the cluster of silence rights would lead courts to acknowledge the argument by counsel in Msomi that these rights extend beyond the principle *nemo tenetur se ipsum prodere* to a principle that, since the state is to bear the full burden of proving its case, the individual should not be obliged to assist the state in any way in proving its case.

(2) Production and disclosure: Disclosure of (the existence of) documents, which disclosure leads to compelled production or seizure of the documents in question, creates self-incrimination problems, first, because the disclosure may be used as an admission and secondly, because of the problem of the ‘derivative use’ of compelled testimony (the disclosure) which is entailed by the use of the documents as evidence. See United States v Fisher (supra) at 410. The second problem was addressed in Dabelstein (supra) at 66-67 (Regarding the use of documents obtained by means of interrogation under an Anton Piller order.) See also Baltimore Department of Social Service v Bouknight 493 US 549 (1989)(Supreme Court held that an order addressed to a mother to produce a child to the court involved the Fifth Amendment because of the confessional effect of the act of production. Of course, an order to ‘produce’ documents the existence of which is unknown or in dispute would amount to an order to disclose and produce, and the communicative aspect of the production would involve self-incrimination problems.)

A bullet lodged in the body of the accused is an alien body the forcible removal of which may entail invasions of bodily integrity, but not self-incrimination. See Minister of Safety and Security v Gaqa 2002 (1) SACR 654 (C); Minister of Safety and Security & Another v Xaba 2004 (1) SACR 149 (D); S v Orrie & Another 2004 (1) SACR 162 (C).

This is possible especially given the fact that the learned judge did apply his mind to the question of exceptions, and confined these to ‘the discovery of existing facts or objects and not to incriminating evidence of the accused himself’. Ibid at 191-92. Evidence emanating from the accused’s own body or movements is therefore not to be classed among the ‘existing facts or objects’ exempted from the scope of the right.

See § 51.3(f) supra.

2003 (1) SACR 187 (SCA) at paras 19 and 21.
The use of a principle of not being obliged to assist the state in proving its case has significance for the question of the admissibility of 'derivative evidence' obtained because of compelled statements. This principle is especially relevant where the statements themselves would be subject to the use immunity. In *Ferreira v Levin*, Ackermann J cited with approval the conclusion of the Canadian Supreme Court in *R v S (RJ)*, that such derivative evidence ‘though not created by the accused and thus not self-incriminating by definition’ was ‘self-incriminating none the less because the evidence could not otherwise have become part of the Crown’s case’. Ackermann J further approved of the granting of ‘discretion’ to exclude such evidence to ensure a fair trial. The term ‘discretion’ is misleading if it refers to the duty of the trial judge to ensure compliance with the constitutional requirement of a
fair trial. The Ferreira majority's statement that derivative evidence was 'subject to "fair criminal trial standards"' is preferable.

In Dabelstein & Others v Hildebrandt & Others the rule applied in England in the context of Anton Pillar orders and Mareva injunctions — that self-incrimination was concerned only where there was a 'real and appreciable risk' of criminal proceedings being taken — was accepted by the Cape Provincial Division. The question whether the right against self-incrimination, as opposed to the common-law privilege, was possessed by corporations was avoided in Seapoint Computer Bureau (Pty) Ltd v McLoughlin & Others NNO. The applicant corporation relied on the right against self-incrimination of one of its directors. In England, the better view is that the privilege does apply to corporations. In the United States and Canada the human rights status of the privilege entails its non-applicability to corporations. The common-law rule's applicability to corporations was reversed in Canada as a result of the Charter incorporation of the right. This 'colonization' of

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479 Ibid at para 153. See also Dabelstein (supra) at 66-67 (Court endorses the derivative evidence 'discretion', on the authority of Ferreira, for the purposes of evidence obtained by the use of Anton Pillar orders.)

480 Ferreira (supra) at para 185 (Chaskalson P).

481 See § 51.1(b)(ii) supra.

482 1996 (3) SA 42 (C).

483 See Rank Film Distributors Ltd & Others v Video Information Centre & Others [1982] AC 380 (HL); AT&T Istel Ltd & Another v Tully & Others [1992] 3 All ER 523 (HL); Renworth Ltd v Stephenson [1996] 3 All ER 244 (CA). It is to be stressed, however, that self-incrimination in England is not limited to criminal incrimination. It extends also to 'penalties', which include penalties for civil contempt. See Bhimji v Chatwani (No 3) [1992] 1 WLR 1158. It extends to penalties imposed by the European Economic Community for breach of the terms of the EEC Treaty (Rio Tinto Zinc Corporation v Westinghouse Electric Corporation [1978] AC 547 (HL)('Rio Tinto')). It does not extend to civil liability, as the Constitutional Court in Bernstein pointed out. Bernstein (supra) at para 115. Ackermann J rejected a claim based on 'equality', alternatively on 'fairness in civil proceedings', that use of compelled self-incriminating evidence at civil proceedings provided the adversary with an unfair advantage. Ibid at paras 102-23. Reliance was placed upon the American decision in Kastigar et al v United States that government might compel testimony from a witness invoking the Fifth Amendment by conferring on the witness use and derivative use immunity in criminal proceedings only. 406 US 441 (1972). For the purposes of this analysis, it is significant that the court did not hold that the right against self-incrimination did not apply to the production of documents in any event.

484 1996 (8) BCLR 1071 (W).

485 See Triplex Safety Glass Co Ltd v Lancegay Safety Glass (1934) Ltd [1939] 2 KB 395, 404 (CA); Rio Tinto (supra)(Where it was assumed to attach without argument); Sociedade Nacional de Combustíveis de Angola UEE v Lundqvist [1991] 2 QB 310 (CA). But see British Steel Corporation v Granada Television Ltd [1981] AC 1096, 1127 (CA)(Dictum to the contrary by Lord Denning does not reflect the weight of authority.)

the privilege by natural persons because of its human rights status has been recognized even where, as in Australia, there is no Bill of Rights.\(^{488}\)

(c) The right to be brought before a court

FC s 35(1)(d) entrenches an obligation upon the authorities to bring the arrested person before a court as soon as reasonably possible, but not later than 48 hours after arrest. Allowance is made for the expiry of the period during non-court days.\(^{489}\) It is therefore possible for the arrested person to claim that his or her right has been violated if he or she is brought before a court within 48 hours of arrest, when it would have been reasonably possible to bring him or her to court sooner.\(^{490}\) The reference to a 'court' in FC s 35(1)(d), as opposed to an 'ordinary court of law' in IC s 25(2)(b), presumably has the effect that the kind of court envisaged need not be the kind associated with the full rigours of the right to a fair trial.\(^{491}\)

According to FC s 35(1)(e) (the right to be charged, informed, or released), at the first court appearance the arrested person is entitled to be charged or informed of the reason for further detention. It is a pity that it is not stipulated how or even by

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487 The common-law applicability of the privilege to corporations was recognized in *Webster v Solloway Mills & Co* [1931] 1 DLR 831, and reversed because of the new status of the privilege as a human right in *R v Amway Corporation* [1989] 1 SCR 21. See also *BC Securities Commission v Branch* [1995] 2 SCR 3, 29.


489 See also s 50 of the Criminal Procedure Act 51 of 1977 as amended by Act 85 of 1997, which came into force on 1 August 1998. Although gaps left by the provisions of IC s 25(2)(b) and FC s 35(1)(d) are filled by having recourse to the statute, such gaps as exist mean that there is no constitutional protection against adverse amendment of the statute in the areas concerned.

490 There is a body of jurisprudence under the European Convention on Human Rights relating to the meaning of the right 'promptly' to be brought before a court, but, given that the right in question does not specify a maximum period, the authority in question will be of limited use as far as a 'reasonable possibility' before 48 hours is concerned. See *Brogan et al v United Kingdom* (1988) 11 EHRR 117 (The ECHR Commission considered a period of four days and eleven hours not to violate the 'promptness' requirement. The contrary opinion of the ECHR Court was decided by a majority of twelve to seven.) See also AH Robertson & JG Merrills *Human Rights in Europe: A Study of the European Convention on Human Rights* (3rd Edition, 1993) 77-79. See, further, *Garces v Fouche & Others* 1998 (9) BCLR 1098 (Nm)(Recognized the logical implication of the equivalent provision in the Namibian Constitution: the 48-hour period was a maximum, not an entitlement. A bail application could be brought before that period had expired.)

491 For more on *De Wilde, Ooms and Versyp v Belgium* (1971) 1 EHRR 373 and *Weeks v United Kingdom* (1987) 10 EHRR 293, see § 51.3(e) supra. The European jurisprudence on the equivalent right in art 5(3) of the ECHR should not be invoked for the meaning of 'court' in the South African context, since art 5(3) expressly allows the arrested person to be brought 'before a judge or other officer authorized by law to exercise judicial power' (emphasis added). Article 5(3) has been held to apply to the Swiss District Attorney acting in his investigatory capacity. See *Schiesser v Switzerland* (1979) 2 EHRR 417. Strasbourg jurisprudence based on allowances for inquisitorial systems of justice should not be permitted to dilute the rights of an arrested person under an adversarial system. See *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at para 57 (The 'trial' required for detention under FC s 12 had to be presided over or conducted by 'a judicial officer in the court structure established by the 1996 Constitution . . . in which s 165(1) ha[d] vested the judicial authority of the Republic.')
whom the informing is to be done. A strict reading would entitle the authorities to bring the arrested person before a court, not necessarily have anything decided by the court, and then to inform the arrested person of the reasons why he or she is to remain in detention. FC’s 35(1)(e) makes it clear that the charging or informing is to be done ‘at the first court appearance after being arrested’. The right should clearly be read as requiring the informing of continued detention to be a communication to the arrested person of the decision of the judicial officer by the judicial officer himself or herself.

The structure of the speedy process rights in IC’s 25 left a potential gap between IC’s 25(2)(b) and (3)(a). The latter right related only to the period after charge. This gap seems to have been filled by the amendment to the right of an accused to trial within reasonable time contained in FC’s 35(3)(d). FC’s 35(3)(d) omits the qualification ‘after having been charged’ (IC’s 25(3)(a)) and substitutes the right ‘to have their trial begin and conclude without unreasonable delay’. But the gap has been filled only for the accused person at trial looking back at what went before. Under FC’s 35(1)(d) one is still faced with the question as to what speedy process rights the arrested person has after he or she has been brought to a court within 48 hours after arrest and has been informed that his or her detention is to continue. The fact that violations of speedy trial rights may vitiate the fairness of the trial is cold comfort to the arrested person who never reaches trial at all.

Article 5(3) of the European Convention on Human Rights, for example, expressly provides an arrested person with the right (1) to be brought before a court ‘promptly’ (although no hour limit is provided), and (2) to trial within a reasonable time or to release pending trial. This latter right is to be distinguished from the accused person’s right, provided in art 6(1), to a fair and public hearing within a reasonable time. The speedy trial right in South Africa, as in the United States and Canada, is to be viewed from the perspective of the accused, given that there is no speedy process right for an arrestee. But in the United States the absence of speedy process rights relating to the pre-charge period is easily circumvented by recourse to the due process clause. And in Canada, although the speedy trial right is expressly confined to those ‘charged with an offence’, due

492 On the right of an accused to trial within a reasonable time, see § 51.5(f) infra.

493 See R Beddard Human Rights and Europe (3rd Edition, 1993) 138. JES Fawcett The Application of the European Convention on Human Rights (2nd Edition, 1987) 105-108 (Describes the rather complicated relationship and overlap between these two undue delay rights.) See also Neumeister v Austria (1968) 1 EHRR 91 (A two-year detention period encompassing a 15-month period without any interrogation amounted to a violation of art 5(3) but not of art 6(1).); Wemhoff v Germany [1968] ECHR 2 (The Court explained that art 5(3) covered persons charged and detained and the period until the judgment of the court of first instance and that art 6(1) extended from the initial arrest to the final determination of the charges, comprising the entire appellate stage. Fawcett supra) at 107 points out, however, that the application of art 6(1) to the period after arrest and before charge should have no bearing on the applicability of art 5(3) to that period.; Koplinger v Austria (1966) Application No 1850/63, 9 Yearbook 240 (The Commission was of the opinion that ‘the reasonable nature of the period concerned should be assessed in a less restrictive manner when the length of proceedings under Art 6(1) and not the period of detention under Art 5(3) of the Convention is being considered.’) See also S Stavros The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments (1993) 77.

process seepage from s 7 of the Charter may cover pre-charge delay which is not easily accommodated under the general right to a fair trial.\textsuperscript{495}

The problem may be solved by extrapolation from the judgment of the Witwatersrand Local Division in \textit{Bate v Regional Magistrate, Randburg & Another}.\textsuperscript{496} Stegman J decided that an accused person whose trial was being delayed unreasonably could before the trial rely on a 'threatened violation' under IC s 101(3) of his or her right to trial within a reasonable time under IC s 25(3)(a), and that deciding otherwise would condemn accused persons who had good reason to fear that the trial they were facing would be in violation of their right to a fair trial, to submit to the inconvenience and expense of an unfair trial before being able to persuade this court to do anything about it . . . [I]f a proper case is made out that a trial which is due to start will be a violation of the accused's right to a fair trial, this court should intervene at once and should not leave the accused to be subjected to an unfair trial in the hope that he will be acquitted on some other ground and that the question of his constitutional right to a fair trial may never have to be dealt with.\textsuperscript{497}

The arrested person would therefore be able to rely on this reasoning, and under the Final Constitution, the arrested person, or somebody acting for him or her, would claim under FC s 38 that the right under FC s 35(3)(d) was 'threatened', and the court in question would then decide this 'constitutional matter' under FC s 172, and 'make any order that is just and equitable' under FC s 172(1)(b). The purpose of the right to be brought to court is to force the state to declare its hand when it is purporting to detain a person 'for allegedly committing an offence'. In other words, the purported purpose — charging the person with an offence, and prosecuting the charge before a court — entitles the arrested person to demand treatment as one who is reasonably soon to become an accused and tried person, and if his or her treatment under detention is such as to vitiate the envisaged trial, the arrested person has reason to complain \textit{qua} arrested person. FC s 35, however, does not provide a basis for this complaint after the requirements of FC s 35(1)(d) have been complied with, and hence the arrested person who has not been charged is to complain as a future accused person.

\textbf{(d) The right to be released (bail)}

FC s 35(1)(f) — the right of an arrested person to be released in certain circumstances — is distinct from the right to be brought before a court, charged, informed or released. The latter right operates absolutely (in the absence of a limitation justification) to entitle the arrested person to release if not charged or informed within 48 hours. The release right in FC s 35(1)(f) operates independently.\textsuperscript{498}

\textsuperscript{495} \textit{R v L (WK)} [1991] 1 SCR 1091. Once again, the concurrent operation of the general right to a fair trial and the principles of fundamental justice seemingly rendered arbitrary the decision whether the question was one under s 11(d) or s 7.

\textsuperscript{496} 1996 (7) BCLR 974 (W) ("\textit{Bate}).

\textsuperscript{497} \textit{Bate} (supra) at 991-92. For more on the aspects of this judgment which deal with an \textit{accused} person's right to trial within a reasonable time, see \S~51.5 infra.
The reference to 'bail' in IC s 25(2)(d) has been dropped in FC s 35(1)(f). Bail (in the pecuniary sense) will therefore be one of the 'reasonable conditions' to which release may be subject.\(^499\) It is significant that, unlike art 5(3) of the European Convention on Human Rights, FC s 35(1)(f) does not confine the grounds upon which bail must be set to 'guarantees to appear for trial'. The problem of 'preventive detention' as a ground for denying bail is therefore left open. In its comprehensive decision on the constitutionality of most of the bail provisions introduced into the Criminal Procedure Act\(^500\) ('the Code'),\(^501\) the Constitutional Court addressed the role of preventive detention.\(^502\) Kriegler J, for a unanimous Court, held:

Section 35(1)(f) presupposes a deprivation of freedom — by arrest — that is constitutional. This deprivation is for the limited purpose of ensuring that the arrestee is duly and fairly tried. But s 35(1)(f) neither expressly nor impliedly requires that in considering whether the interests of justice permit the release of that detainee pending trial, only trial related factors are to be taken into account. The broad policy considerations contemplated by the 'interests of justice' test, in that context, can legitimately include the risk that the detainee will endanger a particular individual or the public at large. Less obviously, but nonetheless constitutionally acceptably, a risk that the detainee will commit a fairly serious offence can be taken into account. The important proviso throughout is that there has to be a likelihood, i.e. a probability, that such risk will materialize. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are. That is not constitutionally offensive. Nor does it resemble detention without trial, the reprehensible institution really targeted when one speaks of preventive detention. Absent a proper basis for the original arrest, it will be set aside. But if there was a proper cause, one cannot justify release solely on the absence of trial-related grounds.\(^503\)

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498 Compare the right in art 5(3) of the European Convention on Human Rights, where the right of an arrested person to be charged within a reasonable time or be released subject to reasonable conditions is set out as a unit. In Canada the 'bail' right belongs to an accused (s 11(e) — 'not to be denied reasonable bail without just cause') — arrested and detained persons together being given the habeas corpus right (s 10(c)). 'Bail' is read to refer to all the conditions of release, whether pecuniary or not, 'just cause' relating to the merits of denying release, and 'reasonable bail' to the conditions of release. \(R v Pearson\) [1992] 3 SCR 665. In the United States the right to be released on bail can be read into the prohibition contained in the Eighth Amendment against 'excessive bail'. See \(Stack v Boyle\) 342 US 1 (1951). But see \(United States v Salerno\) 481 US 739 (1987) (The merits of being granted bail at all were said to flow not from the Eighth Amendment but from the due process clause of the Fifth Amendment.)

499 See Fawcett (supra) at 116 (On the European Convention provision, he writes: 'Bail is not specifically mentioned, perhaps because in some contracting states it is frowned on as unduly favouring persons of means, and seldom used . . . The amount of bail would be outside the purview of the Commission, unless there appeared to be an element of abuse.')


502 \(S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat\) 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC) (‘Dlamini’).

503 \(Dlamini\) (supra) at para 53.
What the Dlamini Court did not decide was whether such crimes and dangers as might be entailed by release had to have any bearing upon the offence, or the conduct of the case, in respect of which the bail applicant had been arrested. It is submitted that this should be so. Otherwise a person thought to be a dangerous criminal or a recidivist may be incarcerated without trial as long as any arrest for any offence would be justified. Surely such a course of conduct would indeed be detention without trial, and would violate the presumption of innocence?\textsuperscript{504}

The Dlamini Court ‘reluctantly’ accepted the constitutionality of taking into account, in deciding upon bail, the vigilante’s veto (the relevance of, broadly speaking, the public reaction to a bail decision) introduced by s (4)(e) and 60(8A) of s 60 of the Code as amended by Act 85 of 1997. The Court found these subsections to be justified limitations under FC s 36(1), mainly because ‘it would be irresponsible to ignore the harsh reality of the society in which the Constitution [was] to operate’.\textsuperscript{505} This finding, coupled with the rider that democratic societies would find these subsections ‘reasonable and justifiable in the prevailing climate in our country’,\textsuperscript{506} came very close to a finding that FC s 36(1) might operate as a quasi-emergency provision that would justify a statutory provision the one day, but not necessarily the next, depending on the vicissitudes in the harshness of realities on the ground.\textsuperscript{507} Be that as it may, there would seem to be very little scope left for an argument that the Final Constitution directs that certain considerations should not feature at bail applications. One might have thought that, when passion was at its highest, principle should stand at its most firm.\textsuperscript{508}

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\textsuperscript{504} See, eg, Stack v Boyle 342 US 1 (1951); United States v Salerno 481 US 739 (1987)(Minority decision). Contrast the majority decision in Salerno and the decision of the Canadian Supreme Court in R v Morales [1992] 3 SCR 711, 12 CRR (2d) 31. Morales is cited by Kriegler J in Dlamini. Dlamini (supra) at paras 71 and 72. But note the basis in Salerno for allowing possible criminality to feature as a factor: the state bore a heavy onus to establish ‘clear and convincing evidence’. See also the rider accepted in Morales — the denial of bail must be necessary to promote the proper functioning of the bail system and not be undertaken for any purpose extraneous to the bail system. Morales (supra) at 48. Since Morales, section 515(1)(c) of the Canadian Code introduced the possibility of denying bail to ‘maintain confidence in the administration of justice’. The argument that this violated the unconstitutionality of extraneous factors was rejected in R v Hall [2002] 3 SCR 309.

\textsuperscript{505} Bate (supra) at paras 55-56.

\textsuperscript{506} Bate (supra) at para 55.

\textsuperscript{507} The definition of a ‘prevailing climate’ may upset the certainty inherent in decisions such as S v Makwanyane & Another 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC). When does a climate change sufficiently for a different application of FC s 36 to a statutory provision?

\textsuperscript{508} The court found that ‘[e]xperience [had] shown that organized community violence, be it instigated by quasi-political motives or by territorial battles for control of communities for commercial purposes, [did] subside while ringleaders [were] in custody’. The fact that pre-trial detention was inherently temporary and followed upon a judicial determination was a source of comfort, there being ‘a close relationship and appropriate fit between the temporary withholding of liberty and the disruption that release would unleash’. Dlamini (supra) at para 56. Kriegler J expressed what is respectfully submitted to have been a sanguine confidence that ‘[c]ourts [would] no doubt be alive to the danger of public sentiment being orchestrated by pressure groups to serve their own ends’. Ibid at para 56.
It follows from this finding that the formula — ‘the interests of justice’ — bears a wide meaning.\textsuperscript{509} One cannot argue anymore, it seems, that whether certain people are intent on killing the applicant or raising a riot has nothing to do with the interests of justice relevant to the bail decision.\textsuperscript{510} Kriegler J pointed to the unfortunate use of the phrase ‘the interests of justice’ in s 60 of the Code to mean, at times, all the relevant considerations pertaining to a bail decision, and at other times, those factors within the broader question that are to be weighed against the liberty interest of the applicant.\textsuperscript{511} The Constitutional Court has now authoritatively given its blessing to the codification of the ‘interests of justice’ that is to be found in subsecs (4), (9) and (10) of s 60 of the Code.\textsuperscript{512}

In \textit{S v Mbolombo}, a bail amount was set which would be justified only on the assumption that the applicant was indeed guilty of the crime in question.\textsuperscript{513} Whether the applicant was able to afford the R50 000 bail depended upon whether he had taken part in the robbery of a large sum of money. The Cape Provincial Division pointed out that bail proceedings were investigatory, or inquisitorial, in nature (‘ondersoekend van aard’) — thus rendering hearsay evidence admissible to enable the court to take all factors into consideration\textsuperscript{514}— that action upon the risk of guilt informed the very detention of suspects in the first place, and that the possibility that guilt would render a small bail amount absurdly inappropriate could simply not be ignored (‘kan tog nie weggedink word nie’).\textsuperscript{515}

\begin{itemize}
\item \textsuperscript{509} See \textit{S v Tshabalala} 1998 (2) SACR 259 (C), 272C.
\item \textsuperscript{510} It appears as if the community reaction indeed did not form part of the ‘interests of justice’ under FC s 35(1)(f), although its invocation by the legislation was saved from unconstitutionality by the limitation provision. See \textit{Dlamini} (supra) at para 55. The use of the qualification ‘ordinarily’ obscured this finding somewhat: ‘Ordinarily, the factors listed in s 60(4)(e) and (8A) would not be relevant in establishing whether the interests of justice permit the release of the accused. It would be disturbing that an individual’s legitimate interests should so invasively be subjected to societal interests. It is indeed even more disturbing where the two provisions do not postulate that the likelihood of public disorder should in any way be laid at the door of the accused. The mere likelihood of such disorder independently of any influence on the part of the accused, would suffice. Nevertheless, . . . [the sub-sections are saved by FC s 36(1)].’ In other words, the shift of attention on to the community heralded by the amendments to the bail provisions violated FC s 35(1)(f), but justifiably so. Ibid at para 14.
\item \textsuperscript{511} \textit{Bate} (supra) at paras 47-48.
\item \textsuperscript{512} It found that subsec (4), directing when a refusal of bail \textit{shall} be in the interests of justice, did not interfere with the independence of the judicial determination of the interests of justice in any given case. The court held that the open-ended nature of the factors to be considered in deciding whether a ground in subsec (4) had been established rendered subsec (4) ‘permissive’, and meant it was not a deeming provision. Ibid at paras 42-44. With respect, it may be objected that the fact that a court is entitled to employ any criteria it pleases in deciding whether one of the grounds in subsec (4) is present can hardly mean it is not \textit{obliged} by subsec (4), as a matter of law, to regard detention as ‘in the interests of justice’ once it has concluded, as a matter of fact, that such a ground is indeed present.
\item \textsuperscript{513} 1995 (5) BCLR 614 (C).
\item \textsuperscript{514} Ibid at 616.
\end{itemize}
The reference to the 'inquisitorial' nature of bail proceedings introduces the vexed problem of onus. The onus at common law to show why release on bail should be granted lay on the applicant. An important question faced by a number of courts was whether the wording of IC s 25(2)(d), laying down a right to be released 'unless the interests of justice require otherwise', shifted the onus to the state. Magano & Another v District Magistrate, Johannesburg, & Others (1) decided that it had, and so did Southwood J in the minority judgment in Ellish & Andre v Prokureur-Generaal, Witwatersrandse Plaaslike Afdeling. The majority in Ellish, however, as well as Eloff JP in Prokureur-Generaal van die Witwatersrandse Plaaslike Afdeling v Van Heerden & Andere, decided that there was no such onus placed on the state. The state bore an evidentiary burden, and the proceedings, being inquisitorial, entailed no onus in the real sense of the word. The difficulty that this position entailed for a determination when the probabilities were evenly balanced, or when it could not be said with any degree of satisfaction which way they pointed, was persuasively expounded in the minority judgment in Ellish. The attempt of Edeling J in Prokureur-Generaal, Vrystaat v Ramokhos to reconcile the undeniable force of Southwood J's reasoning with the theory that there was no onus proper in 'inquisitorial' bail applications illustrated the very real conceptual difficulties.

515 Ibid at 617.
516 See § 51.3(e) supra.
517 See Perkins v R 1934 NPD; Leibman v Attorney-General 1950 (1) SA 607 (W), 611; R v Grigoriou 1953 (1) SA 479 (T); S v Nichas & Another 1977 (1) SA 257 (C); S v Hlongwa 1979 (4) SA 112 (D); S v Mataboge 1991 (1) SACR 539 (B); S v Acheson 1991 (2) SA 805 (Nm); Du Toit et al Commentary on the Criminal Procedure Act (2006) § 60.
518 See Nieuwoudt & Andere v Prokureur-Generaal van die Oos-Kaap 1996 (3) BCLR 340 (SE)(Court found that formulation of a charge-sheet on 27 September 1995 resulted in the onus being placed upon the applicants to show that they should be released on bail.)
519 1994 (4) SA 169 (W), 1994 (2) BCLR 125 (W).
521 1994 (2) SACR 469 (W).
522 See Bolofo & Others v Director of Public Prosecutions 1997 (8) BCLR 1135, 1143ff (Lesotho CA).
523 1996 (11) BCLR 1514 (O).
524 Having accepted the prima facie right of the applicant to be released as its starting point ('uitgangspunt'), the court pointed out that it went without saying ('spreek vanself') that, where the person opposing bail did not succeed in convincing a court that justice required detention, release was to be ordered and that in that sense there was indeed an onus on the state. Ibid at 1523-24.
525 Ibid at 1526-27.
inherent in the governing approach.\textsuperscript{526} Leveson J's remark in \textit{S v Mbele & Another}\textsuperscript{527} that he was 'unable to perceive any mystical significance in the word [ie "unless"]' cannot be comfortably reconciled with the judgment of the Constitutional Court in \textit{S v Coetzee} that the use of 'unless' in a statute was sufficient for a violation of the presumption of innocence.\textsuperscript{528} Although Marcus AJ regarded himself as bound by \textit{Ellish} in \textit{S v Letaoana},\textsuperscript{529} the learned judge relied upon the changed wording of the clause referring to the interpretation of the common law under the Final Constitution to imply, without considering it necessary to decide, that \textit{Ellish} did not 'promote' the spirit, purport and objects of the Bill of Rights.\textsuperscript{530} At the very least, Marcus AJ's pertinent digression indicated that \textit{Ellish} stood to be reconsidered concerning its adherence to the principles of due process.

The pertinent question under the Final Constitution is whether the change in wording heralded by FC s 35(1)(f), an alteration which appeared without qualifying reservations for the first time in the draft of 15 April 1996, can be said to have made any difference. The arrested person is entitled to release 'if the interests of justice permit'. Two questions need to be asked: Does this place an onus on the applicant? Is placing an onus on the applicant unconstitutional?

The Constitutional Court declined to answer these questions in \textit{First Certification Judgment}.\textsuperscript{531} The challenge to the bail provision, based on the onus it was said to place on the applicant, was rejected in a single paragraph as having 'no merit'. The only ground for denying certification to the clause would be if it failed to recognize a 'universally accepted fundamental right', and the right to bail was not universally formulated.

If the onus is placed on the applicant, it is a lamentable inversion of the ordinarily operative presumption in favour of liberty in the sphere closest to its core. The discussion in \textit{United States v Salerno} was premised upon the constitutional necessity of requiring the state to prove the applicability of the grounds for refusing bail.\textsuperscript{532} Section 11(e) of the Canadian Charter grants the right 'not to be denied reasonable bail without just cause'.\textsuperscript{533} The formulation in the International Covenant on Civil and Political Rights (art 9(3)) reads '. . . it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees

\textsuperscript{526} Ibid at 1528. The learned judge could not agree with the finding in \textit{S v Mbele & Another} 1996 (1) SACR 212 (W)/(IC s 25(2)(d) had nothing to do with onus.)

\textsuperscript{527} 1996 (1) SACR 212 (W), 215.

\textsuperscript{528} 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC). Admittedly the provision in \textit{Coetzee} included the term 'proved'.

\textsuperscript{529} 1997 (11) BCLR 1581, 1590 (W).

\textsuperscript{530} Ibid at 1590-91.


\textsuperscript{532} 481 US 739 (1987).
to appear for trial’. Prokureur-Generaal, Vrystaat v Ramokhosi\textsuperscript{534} regarded the placing of an onus on a bail applicant as something for which there was 'no place' in the new democratic constitutional order. The court in \textit{S v Tshabalala}\textsuperscript{535} disagreed. Comrie \textit{obiter} regarded FC s 35(1)(f) as allowing 'Parliament to enact bail legislation which [cast] an onus or burden of proof or persuasion on the arrestee in appropriate circumstances'.\textsuperscript{536} Canadian authority\textsuperscript{537} was invoked as \textit{a fortiori} substantiation that the constitutional standard in Canada is 'more generous to an arrestee than our own s 35(1)(f)'.\textsuperscript{538}

The Constitutional Court in \textit{Dlamini} decisively 'harmonized' FC s 35(1)(f) with the provisions of the Criminal Procedure Act ('the Code')\textsuperscript{539} regulating bail. It held that s 60(1)(a) of the Code, which entitled a bail applicant to be released unless it was found that it was in the interests of justice that the applicant be detained, favoured 'liberty more than the minimum required by the Constitution'.\textsuperscript{540} The Court recognized that the new constitutional bail provision is less generous than the old and that the old formulation reflected the more generous provision found in s 60(1)(a) of the Code. The 'non-fit' between the default position in s 60(1)(a) of the Code and the new constitutional provision was problematic because the default position changed: whereas previously the starting point was that an arrestee was entitled to be released, the position under s 35(1)(f) is more neutral.

\textsuperscript{533} Nevertheless, the Canadian Supreme Court in \textit{R v Pearson} upheld the constitutionality of a provision requiring those accused of drug trafficking to show cause why their detention was not justified. [1992] 3 SCR 665, (1993) 12 CRR 2d 1 ('\textit{Pearson}'). The Canadian Supreme Court reasoned that the statute itself amounted to a denial of bail, and then proceeded to find that such denial was for 'just cause' in the circumstances, given the ease and frequency with which drug traffickers undermined the bail system. It is submitted that it is at least arguable that s 11(e) required the 'just cause' question to be asked at every bail hearing, which logically required an onus upon the prosecution. But see the similar reasoning applied in \textit{R v Morales} [1992] 3 SCR 711, (1993) 12 CRR 2d 31 in the context of a person accused of committing a crime while on bail. Note the considerations regarded as 'vital' in \textit{Pearson} and \textit{Morales}: (1) that bail be denied only in very narrow circumstances; (2) that the denial of bail be necessary to promote the proper functioning of the bail system and not be undertaken for any purpose extraneous to the bail system. \textit{Morales} (supra) at 20 and 48. Since \textit{Morales}, section 515(1)(c) of the Canadian Code introduced the possibility of denying bail to 'maintain confidence in the administration of justice'. The argument that this violated the unconstitutionality of extraneous factors was rejected in \textit{R v Hall} [2002] 3 SCR 309.

\textsuperscript{534} 1996 (11) BCLR 1514, 1531 (O).

\textsuperscript{535} 1998 (2) SACR 259 (C).

\textsuperscript{536} Ibid at 274C-D.

\textsuperscript{537} \textit{Pearson} (supra); \textit{Morales} (supra).

\textsuperscript{538} \textit{Morales} (supra) at 274E.

\textsuperscript{539} Act 51 of 1977 as amended by Act 85 of 1997.

\textsuperscript{540} \textit{Dlamini} (supra) at para 38.
Now, unless there is sufficient material to establish that the interests of justice do permit the detainee's release, his or her detention continues.\textsuperscript{541}

Despite Kriegler J's Pilatean attempt to avoid the debate, the above paragraph lapses into the miasma of onus discourse.\textsuperscript{542} Kriegler J did, however, make it clear that an onus upon the accused was not precluded by FC s 35(1)(f).\textsuperscript{543} In fact, his 'default position' language in effect established that FC s 35(1)(f) envisages an onus upon the applicant.\textsuperscript{544}

The following propositions emerged from the judgment in \textit{Dlamini}:

1. The Code and FC s 35(1)(f) must be read together, as a harmonious whole, sanctioned by the Final Constitution.

2. The constitutional provision is 'more neutral' than s 60(1)(a) of the Code, but entails the 'default position' of continued detention.\textsuperscript{545}

3. Section 60(1)(a) of the Code (applying to all offences except the serious and the very serious found in Schedules 5 and 6 respectively) 'favours liberty more' than does the 'minimum' required by the constitutional provision.\textsuperscript{546}

4. Section 60(11)(a) and (b) (relating to very serious and serious offences respectively) entail a 'formal onus' upon the applicant.\textsuperscript{547}

5. There is nothing unconstitutional about an onus on the applicant as such.\textsuperscript{548}

6. Section 60(11)(a), requiring something more ('exceptional circumstances') than the constitutional standard ('the interests of justice') before release would be allowed, violates FC s 35(1)(f),\textsuperscript{549} but is justifiable under FC s 36(1).\textsuperscript{550}

\textsuperscript{541} \textit{Dlamini} (supra) at para 45.

\textsuperscript{542} Ibid at para 45 n74 (Kriegler J accepted that subsec (11) of the Code did indeed cast an onus upon an applicant in respect of the two categories of serious and very serious offences to which it related. The Court also found that 'a formal onus rests on a detainee to "satisfy the court"'. Ibid at para 61.)

\textsuperscript{543} Ibid at para 78.

\textsuperscript{544} Ibid para 5 n13 ("Under s 35(1)(f), of course, there is no release unless the interests of justice permit it"; and at para 41, "[FC] s 35(1)(f) . . . required something positive to permit release.")

\textsuperscript{545} Ibid at paras 5, 41 and 45.

\textsuperscript{546} Ibid at para 38.

\textsuperscript{547} Ibid at para 61.

\textsuperscript{548} Ibid at para 78.

\textsuperscript{549} Ibid at para 64.

\textsuperscript{550} Ibid at paras 66-77.
7. The ‘public outrage’ provisions are saved from unconstitutionality because they entail an onus (upon the state) to ‘establish a likelihood’ of their applicability.\textsuperscript{551}

8. The ‘exceptional circumstances’ to be proved by an accused under s 60(11)(a) and the ‘formal onus’ upon an accused laid down by s 60(11)(b) both relate to proof of the applicability of the codified incidents of the ‘interests of justice’ found in subsections (4)–(9) of s 60 of the Code, and ‘exceptional circumstances’ include an ‘exceptional degree’ of applicability.\textsuperscript{552}

Three questions require serious attention.

(i) Can the state rely on FC s 35(1)(f) as an overall standard that trumps s 60(1)(a) of the Code in cases not dealing with serious offences?

(ii) How are propositions 7 and 8 above to be reconciled?

(iii) If it is true that ‘exceptional circumstances’ do not necessarily mean something ‘above and beyond, and generically different from those enumerated’,\textsuperscript{553} then why did this test violate FC s 35(1)(f) and require justification under FC s 36?

As far as the first question is concerned, the answer must be ‘no’. The key lies in the reference by Kriegler J to a ‘minimum’ standard.\textsuperscript{554} Although one may argue that if IC s 25(2)(d) could not cast an onus upon the state it is odd to find that the similarly worded s 60(1)(a) of the Code does so. However, it can be stated with some confidence that s 60(1)(a) of the Code does indeed cast an onus upon the state.\textsuperscript{555} This standard, as Kriegler J pointed out, goes further than the ‘minimum’ required by FC s 35(1)(f). Section 35(1)(f), being a right, and not a bail test, to apply irrespective of legislation, sets out the minimum entitlement of a bail applicant. The Code simply allows an applicant more than the minimum in cases not concerned with the serious offences of Schedule 5 and the very serious offences of Schedule 6.\textsuperscript{556}

The second question is far more difficult to resolve, and entails grave practical problems. If such grounds as require ‘likelihoods’ must be established on the probabilities by the state, and if these same grounds are the factors constituting ‘the interests of justice’ in respect of which an applicant bears a ‘formal onus’ under s 60(11)(a) and (b) of the Code, how does one decide what the ‘default position’ is in respect of the existence of such grounds? The presence or absence of ‘exceptional circumstances’ is perhaps an easier question to decide in this regard. If what the

\textsuperscript{551} Ibid at para 53.

\textsuperscript{552} Ibid at paras 76 and 65.

\textsuperscript{553} Dlamini (supra) at para 76.

\textsuperscript{554} Ibid at para 38.

\textsuperscript{555} See S v Vermaas 1996 (1) SACR 528 (T), 530; S v Tshabalala 1998 (2) SACR 259 (C), 269 (‘Tshabalala’).

\textsuperscript{556} But see Tshabalala (supra) at 274A-C (Court regards FC s 35(1)(f) as an overall standard to be invoked ‘in every decision allowing or refusing bail’. This approach would allow the state to invoke its default position against the dictates of s 60(1)(a).)
applicant adduces is not 'exceptional' in some way or another, then he or she remains in custody. But what of s 60(11)(b)? The problem is particularly vexing because some of the provisions in subsecs (4) and (8A) were saved from unconstitutionality by FC s 36 only because they (also) placed an onus upon the state. If s 60(11)(b) were to be applied so as to require the applicant to negate these grounds, then the reasoning relating to the constitutionality of these grounds would be undermined. All the platitudes about the 'inquisitorial' nature of bail proceedings, and all the clichés about the 'inappropriateness' of questions relating to onus, will not lend coherence to the onus (or 'default') puzzle inherent in s 60 of the Code.557

The third question cannot be answered with any satisfaction. Time and precedent will have to build a workable and conceptually acceptable relationship between the 'ordinary' criteria and 'exceptional circumstances'.558

The bail provisions newly introduced into the Code559 survived a number of constitutional attacks in Dlamini. The 'exceptional circumstances' requirement in cases involving the most serious charges was justified under FC s 36(1). First, the extraordinary crime situation was mentioned, with a note of caution that 'one must be careful to ensure that the alarming level of crime is not used to justify extensive and inappropriate invasions of individual rights'.560 Then the situations in which bail was denied in the United Kingdom, the United States, Canada and Australia were explored.561 In this regard it is notable that the United Kingdom provisions require demonstration of a relevant danger by the state, that the United States provision allows bail to be denied in certain capital cases 'where the proof is evident or the presumption great', and that the Canadian allowance for an onus on the accused in serious drug cases was made subject to the finding that this was 'necessary to promote the proper functioning of the bail system'.562

557 It is not entirely clear what the Dlamini Court meant when it said that it went without saying that the following did not apply to applications struck by s 60(11). See Dlamini (supra) at para 49 n 80 ("In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to the five broad considerations mentioned in paragraphs (a) to (e) of subsection (4), as detailed in the succeeding subsections. And then it has to do the final weighing up of factors for and against bail as required by subsections (9) and (10).")

558 See S v C 1998 (2) SACR 721 (C). Coetzee held that if s 60(11)(a) meant that someone who could establish the ordinary criteria for release on bail did not pass the test, then there were serious reservations about the constitutionality of the test. Perhaps the finding that the applicant could with crystal clarity — 'klinkklaar' — establish the ordinary criteria was the finding Kriegler J had in mind. See S v C (supra) at 723G and 726A. But the finding that the legislature could not have intended something additional to the ordinary criteria to be required can, like Kriegler J's finding — Dlamini (supra) at para 76 — not be reconciled with Kriegler J's finding — Dlamini (supra) at para 64 — that the test violated s 35(1)(f) because it required something more than the constitutional norm codified in subsections (4)-(9) of s 60 of the Code.


560 Dlamini (supra) at para 68.

561 Ibid at paras 70-73.

562 See Pearson (supra) at 20; Morales (supra) at 48.
presumption in serious cases was perhaps the closest to our own. The Court concluded that bail was limited in open and democratic societies, and that the limitation in s 60(11)(a) might be more invasive than the comparative limitations.\textsuperscript{563} Kriegler J accepted that the 'exceptional circumstances' test retained a flexibility to allow a decision to be tailored to the requirements of a case, and dismissed an objection that the test was unconstitutionally vague.\textsuperscript{564} The fact of ultimate judicial control was essentially what saved the 'exceptional circumstances' test under FC s 36.

Another attack concerned the combined effect of s 60(11)(a), 60(14) and 60(11B) (c) of the Code. Section 60(14) deprives the bail applicant of a right of access to the docket such as would be enjoyed under FC s 35(3)(a) for the purposes of trial. Section 60(11B)(c) renders the record of the bail proceedings admissible at the criminal trial. As far as s 60(14) and 60(11)(a) together were concerned, the court found as follows: first, s 60(14) did not do violence to the decision in \textit{Shabalala \\& Others v Attorney-General, Transvaal, \\& Another},\textsuperscript{565} which established the right to 'docket access' of an accused at trial under IC s 25(3), now FC s 35(3)(a).\textsuperscript{566} Kriegler J wrote:

> The judgment makes it clear (in paragraph 56) that disclosure of material in the police docket depends, among others, on the timing of the request, and that the risk of interference with the investigation is a factor to be weighed. The judgment in \textit{Shabalala} is no authority for the proposition that applicants for bail, or their legal representatives, are entitled to access to the police docket. The case was concerned with the trial and what is fair in relation thereto. It had nothing to do with bail.\textsuperscript{567}

Second, the accused faced with the task of satisfying the court of 'exceptional circumstances', or that the interests of justice permitted release, had to be given a 'reasonable opportunity' of doing so, as stipulated in s 60(11) of the Code. So, 'a prosecutor [might] have to be ordered by the court, under sub-s (11), to lift the veil in order to afford the arrestee the reasonable opportunity prescribed there'.\textsuperscript{568}

Hence, s 60(14) had to be read to be subject to such duty of revelation as might be required to afford the applicant the 'reasonable opportunity' to discharge the burden

\textsuperscript{563} \textit{Dlamini} (supra) at para 73.

\textsuperscript{564} Ibid at paras 74-76.

\textsuperscript{565} 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC)('\textit{Shabalala}').

\textsuperscript{566} See § 51.5(c) infra.

\textsuperscript{567} \textit{Shabalala} (supra) at para 82.

\textsuperscript{568} Ibid at para 84.
in cases of serious offences. But there was no general access right corresponding to the right at trial recognized in *Shabalala*. The attack on the combined effect of s 60(11)(a) and s 60(11B)(c) was captured neatly in the rhetorical question posed by Slomowitz AJ in the court *a quo* in *S v Schietekat*: 'Is it by fashioning this weapon that those who would seek their liberty are to be discouraged from asking for it?'

This court elaborated upon this point as follows:

The accused is entitled to a reasonable opportunity to make out a case; without the testimony of the accused there is no hope of proving the requisite exceptional circumstances, especially as there is no access to the information in the police docket, and such testimony may be used against the accused at trial. In many cases such circumstances add up to compulsion on an accused to testify.

The Constitutional Court's response was to uphold s 60(11B)(c) on an independent analysis of its self-incrimination and silence implications, rather than to entertain the rhetorical question from the point of view of FC s 35(1)(f). Hence this aspect of the judgment is discussed in the section on self-incrimination at trial.

The most jurisprudentially noteworthy point about the Constitutional Court's bail judgment in *Dlamini* was its treatment of the presumption of innocence. Although the court found that the 'basic objective' of the institution of bail was to 'maximize personal liberty', its dismissal of objections to placing an onus on the applicant was essentially founded on the unexpressed premise that the presumption of innocence had to do with the determination of guilt, not with the protection of liberty. Kriegler J later declared:

This Court has in the past unhesitatingly struck down provisions that created a reverse onus carrying the risk of conviction despite the existence of a reasonable doubt; but what we have here is not a reverse onus of that kind. Here there is no risk of a wrong conviction, the objection that lies at the root of the unacceptability of reverse onuses. All that the subsection does in this regard, is to place on an accused, in whose knowledge the relevant factors lie, an onus to establish them in a special kind of interlocutory proceeding not geared to arriving at factual conclusions but designed to make informed prognoses.

See *Nieuwoudt & Andere v Prokureur-Generaal van die Oos-Kaap* 1996 (3) BCLR 340 (SE)(Court held that because the strength of the state's case was relevant at bail proceedings, an applicant for bail, under IC s 23, was entitled to access to the docket, and that the right to access was particularly important where there was an onus on the accused.) See § 51.5(c) infra. *Nieuwoudt* must now be read subject to the finding in *Dlamini*.

1999 (2) BCLR 240, 248F (C).

*Schietekat* (supra) at para 89.

See § 51.5/(j)(iii) infra.

*Dlamini* (supra) at para 6.
This argument, with respect, ignores the fact that the presumption of innocence is but an incident of the presumption in favour of liberty, and is sacred only because liberty is sacred. We are concerned about dubious convictions because they entail unjustified deprivations of liberty, and we proclaim someone innocent until proved guilty because we demand justification for a deprivation of liberty, not because we have qualms about using the term 'guilty' without adequate justification.

The relationship between the bail right and the right to liberty led the courts at common law to recognize the need to allow bail applications at all hours as a matter of urgency. The court in *Twayie & 'n Ander v Minister van Justisie & 'n Ander* declared:

> Elke verhoorafwagtende is 'n potensiële onskuldige, en onnodige inperking van die burger se vryheid druis teen alle beskaafde gevoel in . . . Teen die agtergrond van hierdie algemene beginsels sal al bevredigende antwoord wees dat beide die Hooggeregshof sowel as die laerhowe 'n gearresteerde, wat hom oor sy arrestasie beswaard voel, te enige tyd, op sy aansoek, sal aanhoor en dit wel uit hoofde van voormelde artikel 60 [of the Criminal Procedure Act 51 of 1977 before amendment] ten einde die werking van hierdie artikel ten volle effektief te maak.

The new s 50(6)(b) of the Criminal Procedure Act introduced by Act 85 of 1997 decrees bluntly:

> An arrested person contemplated in paragraph (a)(i) [arrested for allegedly committing an offence] is not entitled to be brought to court outside ordinary court hours.

What value liberty?

*Magistrate, Stutterheim v Mashiya* was one of those cases that obviously entailed dimensions only hinted at in the report. The respondent had been accused of raping his daughter. He was arrested on Saturday and appeared on Monday, when he applied for bail. The state applied for the seven-day postponement that it was possible to obtain in terms of s 50(1)(b) of the Code. The state’s application was refused, and the matter was argued on the Tuesday. The matter was then postponed, for nine days, ‘for judgment’. There ensued attempts to have the judgment delivered earlier, which culminated in an application to the High Court for a mandamus (after a rule nisi had been issued) that the matter be ‘argued’ and judgment be handed down by 16.00 of the day of the mandamus. The matter duly

575 Ibid at paras 11 and 78.

576 1986 (2) SA 101 (O), 104E–F.

577 See also *Prokureur-Generaal, Vrystaat v Ramokhosi* 1996 (11) BCLR 1514, 1519-20 (O)(Court holds bail appeals to be prima facie urgent, in spite of acknowledgement that, in the case of appeals, bail had already been judicially considered.) See also *Garces v Fouche & Others* 1998 (9) BCLR 1098, 1104-05 (Nm)(‘Garces’)(Namibian High Court entrenched an arrested person’s right to bring a bail application outside normal court hours in cases of urgency. Hannah J remarked pertinently: ‘What is of importance is that we are dealing with the liberty of the individual’. He did, however, stress that ‘real grounds for urgency [had to] exist before a court [would] hear a bail application outside normal court hours’. The recognition that the unavailability of prosecutors after hours should not preclude the determination of bail applications was particularly welcome.)

578 2004 (5) SA 209 (SCA).
commenced on the day ordered by the mandamus, was argued, but there was no judgment. The matter was postponed, again to the originally intended postponed day, for what was promised to be a 'well-considered judgment'. Further proceedings, including contempt proceedings, ensued, and the respondent was ultimately granted bail by the High Court pending the well-considered judgment of the court below. The Supreme Court of Appeal was careful, whilst affirming the entitlement of a bail applicant to a 'prompt decision one way or another', not to lay down any rule as to what such promptness would require. Indeed, the rigid time-frame decreed by the High Court was held in the circumstances not to have been justified precisely because of its rigidity.

579 Ibid at para 6.

580 Ibid at paras 16-25. Several observations left little room for doubt that the Court found it hard to believe that the well-considered judgment required so long to be delivered in the instant case. Ibid at para 17.

581 See § 51.2 supra. If arrest is detention with the purpose of charging — 'vryheidsontneming met die doel om aan te kla' — then it can hardly be coextensive with charging itself. See Hiemstra Suid-Afrikaanse Strafproses (5th Edition, 1993) 87.

582 See § 51.1(a)(ii) supra.

583 1992 (1) SA 343 (A).

584 See S v Zuma & Others 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)('Zuma') at para 16.

585 1997 (2) BCLR 268, 272 (V).

51.5 The rights of accused persons

(a) Introduction

In order to distinguish an accused person from an arrested person, the former has to be regarded as someone who has been formally charged with an offence. The fact that pre-charge occurrences are relevant to a determination whether an accused's rights have been violated should not confuse matters.

(b) The right to a fair trial

The fair trial right is expressly set out as a residual right which includes, but is not limited to, the enumerated fair trial rights in FC s 35(3). The Appellate Division in S v Rudman & Another held that the exhaustive extent of the common-law right to a fair trial was a determination 'whether there ha[d] been an irregularity or illegality', ie 'a departure from the formalities, rules, and principles of procedure according to which our law require[d] a criminal trial to be initiated or conducted'. This view left no room for a residual fair trial right. However, Rudman has been decisively overruled by the creation of a residual fair trial right. In S v Ramuongiwa Noorbhai J said that 'abstract notions of fairness and justice' were now the 'acid test' and that Khanyile had been 'resuscitated', infusing and giving

579 Ibid at para 6.

580 Ibid at paras 16-25. Several observations left little room for doubt that the Court found it hard to believe that the well-considered judgment required so long to be delivered in the instant case. Ibid at para 17.

581 See § 51.2 supra. If arrest is detention with the purpose of charging — 'vryheidsontneming met die doel om aan te kla' — then it can hardly be coextensive with charging itself. See Hiemstra Suid-Afrikaanse Strafproses (5th Edition, 1993) 87.

582 See § 51.1(a)(ii) supra.

583 1992 (1) SA 343 (A).

584 See S v Zuma & Others 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC)('Zuma') at para 16.

585 1997 (2) BCLR 268, 272 (V).
'flesh and bone to the right to a "fair trial"'. In *S v Mazingane* the High Court observed that the right to a fair trial included no fewer than fifteen rights relating to the procedure and process of a trial, but that it was also broader than this: it had been extended to 'substantive fairness' or a residual fair trial right.

The existence of a residual fair trial right must surely go without saying. How it is to be ‘given flesh and bone’ is a difficult question. The first conceptual problem is the question whether the fact that the right to a fair trial 'is broader than the list of specific rights set out' below it means:

1. There are unenumerated aspects of a fair trial to be added to the rights set out in FC s 35(3), but the enumerated rights themselves determine their own extension,

or

2. There are unenumerated aspects of a fair trial to be added to the rights set out in FC s 35(3), and the residual fair trial principle operates also within the interpretation of the extension of the specifically enumerated rights themselves.

In *Nel v Le Roux NO & Others* the Constitutional Court decided that the 'trial' referred to in the right not to be detained 'without trial' did not incorporate all the aspects of a fair trial set out in IC s 25(3), but incorporated minimum 'due process' and 'natural justice' principles only. The pertinent question, therefore, is whether this is to be taken to mean not only that the fair trial rights in FC s 35(3) extend further than the minimum requirements of due process and natural justice but also that the residual fair trial right, operating either in a sphere outside the spheres occupied by the specifically enumerated rights or operating in such a sphere as well as in the extension of the specifically enumerated rights themselves, should be interpreted and developed as 'due process and something more', given the reasoning in *Nel*. If this latter be the case, due process jurisprudence would indeed be relevant to an interpretation of the right to a fair trial, a *fortiori* to indicate what the right to a fair trial always embraces.

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586 On the relationship between the common law and the due process rights, see § 51.1(b)(iii) supra.

587 2002 (6) BCLR 634, 637 (W).

588 On the problem of accommodating state interests in the definition of the right to a fair trial, see § 51.1(b)(iv) supra.

589 *Zuma* (supra) at para 16.

590 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)('*Nel*').


592 On the 'due process wall', see § 51.1(a)(ii) supra.
What guidance does one find in the case law regarding the two alternatives set out above? Peter Hogg, writing of the residual operation of the principles of fundamental justice in Canada, where it has been held that these principles have generic status and that the fair trial and due process rights enumerated in the Charter are but 'illustrative' of the generic due process principle,\(^{593}\) argues that the enumerated rights consequently operate as an \textit{eiusdem generis} limitation upon the scope of the principles of fundamental justice.\(^{594}\) This argument is partly motivated by a desire to avoid unlimited and undefined operation of the principles of fundamental justice, and partly by a desire to avoid rendering the specific provisions otiose by allowing vague principles to determine the extension of rights contained in relatively precisely framed clauses.\(^{595}\)

This reasoning, however, was directly contradicted by the reasoning in \textit{S v Nombewu}\(^ {596}\) and in \textit{Coetzee & Others v Attorney-General, KwaZulu-Natal, & Others}.\(^ {597}\) In \textit{Coetzee} the Durban and Coast Local Division declared that the enumerated rights in FC s 35(3) 'should . . . be interpreted as extending the ambit of the main provision rather than restricting it'.\(^ {598}\) In \textit{Nombewu} Erasmus J read the specific right to counsel enumerated in IC s 25(1)(c) in effect as being limited by the residual fair trial right in IC s 25(3). The specific right could not be read in isolation, but had to be read 'as determined by the concept of a “fair trial” ', which meant that an apparent infraction of the specific right was not an infraction when read 'with' the residual right.\(^ {599}\) In \textit{S v Msenti} Snyders J in effect rendered the specific wording of an enumerated right irrelevant, given the overriding importance of 'fairness' in FC s 35 analysis.\(^ {600}\) The learned judge held that the alteration in the wording of a specific right could not have altered its relationship with substantive fairness, since 'IFC s 35 was] essentially the same as [IC s 25]'.\(^ {601}\) These decisions, in different ways, conflict with Hogg's argument that the specific rights limit the ambit of the general right.
In *Scagell & Others v Attorney-General of the Western Cape & Others*\(^{602}\) the Constitutional Court interpreted the imposition of an evidential burden on an accused as a violation of the right to a fair trial, rather than of the presumption of innocence set out in IC s 25(3)(c).\(^{603}\) Other courts have also had recourse to the residual fair trial right in situations where a specifically enumerated right was potentially applicable: *S v Mbeje*\(^{604}\), *S v Younas*\(^{605}\) and *S v Dzukuda & Others; S v Tshilo*.\(^{606}\) The problem with recourse to the residual right in spheres at least prima facie governed by the specifically enumerated rights is that such an approach seriously undermines the development of a jurisprudence incrementally defining the scope of the specifically enumerated rights, and encourages facile and idle invocation of the residual right whenever a hard case arises on any one of the enumerated rights the sort of precipitate (‘halsoorkop’) invocation of the right to a fair trial that the Free State Provincial Division decried in *S v Strauss*,\(^{607}\) and the Transvaal Provincial Division in *S v Vilakazi & ’n Ander*.\(^{608}\)

The soundest practice would be to attempt to demarcate spheres of sovereignty for the specifically enumerated rights, in which spheres the applicability of the rights in question must be determined for any challenge by those principles which inform and justify the particular right. A fair trial challenge is therefore to be dissected by attributing aspects of the challenge to particular spheres of sovereignty of particular fair trial rights. If an aspect is fully covered by such a sphere, then a determination that the right in question is not violated exhausts the challenge as far as that particular aspect is concerned. There may be aspects which do not comfortably fit into any of the domains of the enumerated rights. In such a case the question should be entertained whether the challenge should not succeed on the residual fair trial

\(^{602}\) 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC).

\(^{603}\) See § 51.1(b)(iv) supra.

\(^{604}\) 1996 (2) SACR 252 (N)(Failure to allow an unrepresented accused to address the court before judgment as required by s 175(1) of the Criminal Procedure Act 51 of 1977 was analysed in terms of a general requirement to avoid prejudice to the accused, rather than as a potential violation of the right to adduce and challenge evidence under IC s 25(3)(d).)

\(^{605}\) 1996 (2) SACR 272 (C), 274(Failure by a court in proceedings under the Prevention of Family Violence Act 133 of 1993 to allow an accused to call a witness was analysed in terms of a denial of the ‘fundamental right to a fair hearing’, rather than in terms of the right to adduce and challenge evidence under IC s 25(3)(d) although the accused’s desire to ‘adduce the evidence of others’ was specifically referred to by the court.)

\(^{606}\) 2000 (4) SA 1078 (CC), 2000 (11) BCLR 1252 (CC), 2000 (2) SACR 443 (CC)(The court considered the constitutionality of s 52 of the Criminal Law Amendment Act 105 of 1997, in terms of which an accused could be referred to the High Court for sentencing, with reference to the accused’s right to a fair trial, rather than the right to a trial that began and concluded without unreasonable delay (FC s 35(3)(d)). See also S Jagwanth ‘Recent Cases: Constitutional Application’ (2001) 14 South African Journal for Criminal Law 122.

\(^{607}\) 1995 (5) BCLR 623, 625 (O).

\(^{608}\) 1996 (1) SACR 425 (T), 428.
right. Only if an analytically rigorous practice of defining domains of operation for the enumerated fair trial rights is successfully adopted can the residual fair trial right be given meaningful ‘flesh and bones’. We should not allow the residual right to impoverish the jurisprudence of the specific rights as the favoured panacea of idle counsel.

One principle that has started to emerge as part of the domain of the residual fair trial right is the right of an unrepresented accused to the assistance of the court in conducting his or her defence. Unfairly obtained evidence which is not accommodated under self-incrimination principles has been regarded from the point of view of the residual right to a fair trial. Aspects of the trial that concern the course of evidence and its effect upon the fairness of the proceedings are most comfortably addressed in terms of the general notion of fairness. In

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609 See S v Kester 1996 (1) SACR 461 (B); S v Simxadi 1997 (1) SACR 169 (C); S v Mungoni 1997 (2) SACR 366 (W); S v N 1998 (1) BCLR 97 (Tk); S v Xaba 1997 (1) SACR 194 (W)(In which the principle could be said to have been extended to the accused defended by inexperienced counsel); S v Moiwa 1997 (1) SACR 188 (NC). In S v Malati & Another 1998 (2) SACR 622 (W)(Cameron J held that an accused’s rights had to be explained by the judicial officer through the interpreter, and not by the interpreter with no input from the judicial officer. The judgment was scathing of the conduct of the magistrate relative to the existence of fair trial rights and their explanation. FC s 35(3) was not expressly invoked.) See also S v Shiburi 2004 (2) SACR 314 (W)(The court held that there was a duty incumbent upon judicial officers to inform an unrepresented accused of his legal rights. These rights included the right to the docket or state witnesses’ statements. In the instant case the accused was not advised of his right of access to the police docket and was consequently convicted in the court a quo. The Witwatersrand Local Division held this irregularity to be so fundamental as to vitiate the trial proceedings.)

610 See Pillay & Others v S 2004 (2) BCLR 158 (SCA); D Ally ‘Pillay and Others v S: Trial Fairness; the Doctrine of Discoverability; and the Concept of ‘Detriment’ — the Impact of the Canadian s 24(2) Provision on South African s 35(5) Jurisprudence’ (2005) 1 South African Journal for Criminal Justice 66. See also S v M 2003 (1) SA 341 (SCA); Mitchell & Another v Hodes & Others NNO 2003 (1) SACR 524 (C) and N Whitear-Nel ‘Evidence’ (2003) 16 South African Journal for Criminal Justice 431. See also S v Nortjie 1997 (1) SA 90 (C); S v Hassen & Another 1997 (2) SA 253 (T), 1997 (3) BCLR 377 (T)(Both deal with trapping); S v Manuel 1997 (11) BCLR 1597 (C) at para 20 (Brand J relied upon the general right to a fair trial to rule that a confession which had been obtained unfairly on a broader constitutional basis than not freely, voluntarily and without undue influence should not have been admitted. The accused, a juvenile, had been interviewed with his mother present, and then, his mother having been sent away, had been further interviewed until he agreed to confess. The finding upon the general fair trial right was not clearly necessary, given the fact that Brand J seemed to indicate that the circumstances had amounted to ‘undue influence’ of a special kind.) See, further, S v Khan 1997 (2) SACR 611 (SCA); Key v Attorney-General, Cape Provincial Division, & Another 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC) at para 13; Ferreira v Levin NO & Others v Powell NO & Others 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC) at paras 153 and 186; S v Zuma & Others 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 16. In Khan the appellant, who was 19 years old at the time, had been arrested and warned of his right to silence before the Interim Constitution had come into effect. He had spontaneously confessed to murder and repeated this confession to a magistrate upon being asked to do so by the police after another caution. The magistrate took the confession after cautioning the appellant. At no stage was the appellant informed of his right to counsel under s 73(1) of the Criminal Procedure Act 51 of 1977. Howie JA held the right to counsel under IC s 25(1) (c) not to have been applicable at arrest. Khan (supra) at 618. The conduct in obtaining the confession, however, had been ‘unfair’. Ibid at 620. Nevertheless, s 217 of the Criminal Procedure Act being concerned with fairness, and the conduct in question revealing ‘none of the mischief against which s 217 [was] aimed’, the ‘factors which justifi[ed] admission materially outweigh[ed] those which call[ed] for exclusion’. Ibid at 621.
The court determined that the admissibility of identification evidence should be ruled upon before the accused should be required to decide whether to testify or not, because an accused was entitled to know the strength of the case against him or her before deciding whether to testify.

The role of accuracy, or truth, in the determination of fairness is a problematic one. In the context of the exclusion of improperly obtained evidence, for example, courts across the common-law world, both within the operation of rights jurisprudence and outside it, have often determined 'fairness' as very much influenced by the cogency of the evidence in question. Although the dictum of Froneman J in *S v Melani & Others*, that the rights to counsel, to the presumption of innocence, to silence and to protection from compelled self-incrimination had nothing to do with ensuring the reliability of evidence adduced at trial, was too broadly stated, and has given rise to difficulties, it represents an important caveat that the fairness of a trial should not be measured by its capacity to produce the truth. The finding by Tshabalala J in *S v Simanaga*, that the trial was fair because the accused was guilty, with respect, provides a stark illustration of the wrong approach.

Another principle that will cause more harm than good if employed as the governing principle in defining the right to a fair trial is the principle of equality. There is no doubt that equal protection concerns that all accused be afforded equal justice underlie some of the aspects of the right to a fair trial, particularly those

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611 1996 (6) BCLR 814 (C).

612 A similar concern that the accused not be forced into the box by uncertainty about the admissibility of hearsay evidence was expressed by the Appellate Division in *S v Ramavhale* 1996 (1) SACR 639 (A), 651.

613 See *R v Wray* [1971] SCR 272. The distinction between real and self-incriminatory evidence, which is so important in Canada, is influenced strongly by cogency considerations. See *R v Collins* [1987] 1 SCR 265; *R v Burlingham* [1995] 2 SCR 209. In England, s 78 of the Police and Criminal Evidence Act 1984 allows courts to exclude evidence if the admission would have 'such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. Reliability is an important factor in determining 'fairness'. *R v Smurthwaite; R v Gill* [1994] 1 All ER 898 (CA) and the House of Lords in *R v Latif and Shahzad* [1996] 1 WLR 104 (HL) attached perhaps decisive weight to the cogency of unlawfully obtained evidence in deciding that admission was not 'unfair'. Furthermore, there is the strong influence of the view that 'fairness' means 'fairness at the trial', and should be confined to prejudice in conducting the defence, or to questions of cogency. See the view of Lord Diplock in *R v Sang* [1980] AC 402 (HL). See also *R v Christou and Wright* (1992) 95 Cr App R 264.


615 See § 51.3(1) supra.


617 1998 (1) SACR 351 (Ck), 353H-J (Court rejects 'no-difference rule').
dealing with a duty upon the state or the court to assist the accused by providing information or counsel or assistance throughout the conduct of the trial to ensure that accused persons are not disadvantaged in defending themselves because of inequality.\textsuperscript{618}

Be that as it may, a concern for equal protection or equal justice for accused persons relative to other accused persons should not be conflated with the notion of 'equality of arms'. The latter term of art refers to the respective positions of defence and prosecution in a criminal trial.\textsuperscript{619} ‘Equality of arms’ is a concrete right formulated by the European tribunals out of the residual fair trial right in art 6(1) of the European Convention on Human Rights:\textsuperscript{620}

The principle of the equality of arms . . . is an expression of the rule audi alteram partem, and implies that each party to the proceedings before a tribunal must be given a full opportunity to present his case, both on facts and in law, and to comment on the case presented by his opponent. This opportunity must be equal between the parties and limited only by the duty of the tribunal to prevent in any form an undue prolongation or delay of the proceedings.\textsuperscript{621}

As Robertson and Merrills point out, the 'equality of arms' principle in criminal trials represents those procedural mechanisms with which the vast inequality in power between the state and the accused is sought to be addressed.\textsuperscript{622} The use of the principle in the criminal sphere may have unfortunate consequences if the 'equality' notion is taken too literally: the tendency would be to think an accused should not be entitled to any procedural or evidential privileges to which the prosecution is not entitled, even though those privileges might well have been created to seek to 'equalize' the forces between prosecution and defence in the first place.\textsuperscript{623}

\begin{itemize}
\item \textsuperscript{618} See S v Rens 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC), 1996 (1) SACR 105 (CC); S v Ntuli 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC); S v Melani & Others 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335 (E), 347; Douglas v California 372 US 353 (1963); Griffin v Illinois 351 US 12 (1956); S v Ramuangiwa 1997 (2) BCLR 268 (V). See also § 51.3(f) supra.
\item \textsuperscript{619} See Bernstein & Others v Bester & Others NNO 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 106.
\item \textsuperscript{620} S Stavros The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments (1993) 43.
\item \textsuperscript{623} See the rejection of the applicant's claim in Blastland v United Kingdom (1988) 10 EHR 528 that the use of hearsay evidence of third-party confessions by an accused should be allowed, given the state's ability to rely on the accused's own confessions.
\end{itemize}
An illustration of this phenomenon is provided by *S v Chavulla & Andere*.\(^{624}\) Invoking the logic employed in *S v Majavu*,\(^{625}\) that giving a 'proper meaning' to equality before the law required 'an equality before the law of both the accused and the state', Lategan J pondered whether an accused person should not be obliged to provide the state with previous inconsistent statements as a tit-for-tat for the right to 'docket access' enjoyed by an accused.\(^{626}\) Such notions indicate vividly how concepts such as 'balancing' and 'equality' may wreak havoc with the right to a fair trial. Is the presumption of innocence then to be regarded as an unfair advantage to an accused?

Whatever the proper role of 'equality of arms', it has nothing to do with non-discrimination or equal protection. The journey into the fields of equality analysis undertaken in *S v Scholtz*\(^ {627}\) and *S v Lavhengwa*,\(^ {628}\) with the greatest respect, produced the sorts of confusion that fair trial analysis could very well do without. It is sincerely hoped that the following sober observation by Cameron J in the *Lavhengwa* will be heeded in future:

I have some doubt as to whether an equality issue (from the point of view of the right to 'equality before the law') can really be said to arise when a presiding magistrate tries someone summarily on a charge of statutory contempt.\(^ {629}\)

The question of the appropriate remedy for a violation of the right to a fair trial is touched upon and discussed elsewhere.\(^ {630}\) In *S v Shikunga* the Namibian Supreme Court was confronted with the question as to what the effect of a violation of the right to a fair trial should be in a case where evidence had been admitted at trial and such admission was contrary to the right to a fair trial, but the conviction obtained was independent of the impugned evidence.\(^ {631}\) Mahomed CJ analysed the South African common-law approach and the constitutional approach adopted in

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624 1999 (1) SACR 39 (C)('Chavulla').

625 1994 (2) SACR 265 (Ck).

626 *Chavulla* (supra) at 44I-45A.

627 1997 (1) BCLR 103 (NmS).

628 1996 (2) SACR 453 (W).

629 Ibid at 496.

630 See § 51.3(g) supra (Concerning the tendency to view the criminal procedure rights as exclusively concerned with whether evidence should be admitted or proceedings be proceeded with.) See also § 51.5(f) infra (Concerning the problematic relationship between right and remedy as far as the right to a trial within a reasonable time is concerned.)

631 1997 (9) BCLR 1321 (NmS).
consequence.⁶³² Even if this assumption was valid, the learned judge continued, that did not mean the consequence should be the setting aside of the conviction on appeal. He concluded:

> It would appear to me that the test that is proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question . . . is whether the verdict has been tainted by such irregularity.⁶³³

In *S v Mazingane*, the High Court held that violations of the right to a fair trial had to be examined with reference to their causal impact on the verdict.⁶³⁴ The impact had to be clearly of such a nature that it resulted in an unfair trial or a failure of justice before a convicted person would be entitled to have a conviction set aside purely by reason of an irregularity.⁶³⁵ The question whether there had been a failure of justice was, in turn, dependent upon whether or not, when the effect of the irregularity was eliminated, there remained sufficient evidence for proof of guilt beyond reasonable doubt.⁶³⁶ In *S v Khan*, Howie JA held as follows:

> Of course we are not dealing here . . . with unconstitutionally obtained evidence but it is just, I think, to adopt the same approach if evidence is unfairly obtained or said to have been unfairly obtained.⁶³⁷

The fact of a rights violation, if not justified under the limitations clause, should always entitle the victim to a remedy. This fact is independent of the question of what to do as far as the trial is concerned, although that question will often be the answer to the remedy problem.⁶³⁸ A damages claim is always on the cards. It might not be too far-fetched to adjust the punishment a guilty person receives in

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⁶³² *Shikunga* (supra) at 1332G.

⁶³³ Ibid at 1332H-I. This approach was endorsed by the Supreme Court of Appeal in *S v Smile & Another* 1998 (5) BCLR 519 (SCA), 1998 (1) SACR 688 (SCA) (‘*Smile*’).

⁶³⁴ 2002 (6) BCLR 634 (W).

⁶³⁵ Ibid at 365. See also *S v Jaipal* 2005 (4) SA 581 (CC), 2005 (5) BCLR 423 (CC), 2005 (1) SACR 215 (CC).

⁶³⁶ See *Tshona & Others v Regional Magistrate, Uitenhage & Another* 2001 (8) BCLR 860, 879 (E). See also *S v Maputle & Another* 2003 (2) SACR 15 (SCA), 16.

⁶³⁷ 1997 (2) SACR 611 (SCA), 619.

⁶³⁸ The failure of the Supreme Court of Appeal in *Smile* to distinguish clearly between the questions whether a right had been violated and what should be done about a rights violation essentially left the appellants without any remedies for what seemed at least to have been some violation of the right to be informed with sufficient particularity of the charge, in circumstances where it was held that the ‘irregularity’ did not merit the drastic response of setting aside the conviction.
accordance with the extent to which his or her constitutional rights were violated.\textsuperscript{639} In this way violations might be treated as serious wrongs inflicted upon the person concerned without entailing the sometimes dubious consequence of completely absolving such a person of the liability to suffer punishment.\textsuperscript{640} Of course, disciplinary proceedings for rights violations are not barred by any of this, and may well be a valuable educating mechanism.\textsuperscript{641}

\textbf{(c) The right to be informed with sufficient particularity of the charge}

The Criminal Procedure Act sets out the extent to which an accused is entitled to particulars of the charge for statutory purposes, entitling the accused to object to the lack of detail, and the court to order further particulars on pain of quashing the charge.\textsuperscript{642} The most important constitutional litigation in this area has revolved around the extent to which an accused should be allowed, in the face of the common law litigation privilege, to have access to the police docket relevant to his or her case.\textsuperscript{643} The first wave of litigation in this area was concerned with the right of 'access to information' under IC s 23.\textsuperscript{644} In \textit{Shabalala & Others v Attorney-General of Transvaal & Another},\textsuperscript{645} the Constitutional Court declared that the question was a fair trial question, particularly one of the right to be informed with sufficient particularity of the charge, rather than an access to information question, the exhaustive

\begin{itemize}
\item See \textit{Wild & Another v Hoffert NO & Others} 1998 (3) SA 695 (CC), 1998 (6) BCLR 656 (CC), 1998 (2) SACR 1 (CC) at para 36 (Recognizes the possibility of adjustments 'when structuring sentence' to accommodate a rights violation (in that case the right to a speedy trial).)
\item See the discussion of the tendency to reduce questions of pre-trial violations to FC s 35(5) questions in the context of the right to counsel and its relationship with notions of voluntariness. § 51.3(ff) above. See also \textit{S v Joors} [2003] 4 All SA 628, 639 (C)(Order by Binns-Ward AJ).
\item See \textit{S v Philemon} 1997 (2) SACR 651 (W), 667(Claassen J suggested referring to the Magistrates' Commission the conduct of a magistrate who revealed a predisposition to being dismissive about an accused's right to counsel.)
\item See \textit{Hiemstra} (supra) at 216ff; E du Toit, FJ de Jager, A Paizes, AS Skeen & S van der Merwe \textit{Commentary on the Criminal Procedure Act} (RS, 29, 2003) § 84. The principle that the accused was entitled to as much information as necessary for a proper preparation of a defence was enunciated in \textit{R v Moyage & Others} 1958 (3) SA 400 (A), 413. See also \textit{S v Cooper & Others} 1976 (2) SA 875 (T), 885. The wording of FC s 35(3)(a) makes this principle explicit. The sufficiency referred to in IC s 25(3)(b) is qualified by FC s 35(3)(a) thus: 'to be informed of the charge with sufficient detail to answer it'.
\item The common law litigation privilege attaching to police dockets was authoritatively laid down in \textit{R v Steyn}. 1954 (1) SA 324 (A). See also \textit{Du Toit & Andere v Direkteur van Openbare Vervolging, Transvaal: In re S v Du Toit & Andere} 2004 (2) SACR 584 (T).
\item \textit{S v Fani & Others} 1994 (3) SA 619 (E), 1994 (1) BCLR 43 (E); \textit{Qozeleni v Minister of Law & Order & Another} 1994 (3) SA 625 (E), 1994 (1) BCLR 75 (E); \textit{S v James} 1994 (3) SA 881 (E), 1994 (1) BCLR 57 (E); \textit{S v Smith & Another} 1994 (3) SA 887 (SE), 1994 (1) BCLR 63 (SE); \textit{Khala v Minister of Safety & Security} 1994 (4) SA 218 (W), 1994 (2) BCLR 89 (W); \textit{S v Majavu} 1994 (4) SA 268 (Ck), 1994 (2) BCLR 56 (Ck); \textit{S v Botha & Andere} 1994 (4) SA 799 (W), 1994 (3) BCLR 93 (W); \textit{S v khoza & Andere} 1994 (2) SACR 611 (W); \textit{S v Sefadi} 1995 (1) SA 433 (D), 1994 (2) SACR 667 (D).
\item 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC)('Shabalala').
\end{itemize}
four categories of statement which were covered by the blanket privilege which attached to the docket at common law:

(1) The statements of witnesses which need no protection on the grounds that they deal with state secrets, methods of police investigation, the identity of informers, and communications between a legal advisor and his or her clients.

(2) The statements of witnesses in circumstances where there is no reasonable risk that such disclosure might lead to the intimidation of such witnesses or otherwise impede the proper ends of justice.

(3) The statements of witnesses made in circumstances where there is a reasonable risk that their disclosure might constitute a breach of the interests sought to be protected in paragraph (1).

(4) The statements of witnesses made in circumstances where their disclosure would constitute a reasonable risk of the nature referred to in paragraph (2).

The following principles were laid down:

(1) Exculpatory material was to be made available to the accused.

(2) The prosecution's *ipse dixit* that non-exculpatory documents in the docket fell within the third and fourth categories would not defeat a claim for disclosure unless sufficient evidence were placed before the court for it to establish whether this was the case.

(3) The test was whether a reasonable person in the position of the prosecution would believe that the documents indeed fell within those categories. The court might to this end examine the documents without revealing them to the accused.

Where the relevant risk was found to exist, the *Shabalala* Court held:

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646 Ibid at para 34.

647 *Shabalala* (supra) at para 40.

648 Ibid at para 55.

649 This requirement is recognized by English courts: *R v Maguire & Others* [1992] 2 All ER 433 (CA); *R v Ward* [1993] 2 All ER 577 (CA). Both cases were discussed comprehensively in *S v Scholtz*, 1997 (1) BCLR 103 (NmS). This obligation extends also to information the authorities are aware of, but do not wish to record. See *S v Xaba* 1997 (1) SACR 194 (W)(Witwatersrand Local Division holds that the right to a fair trial included the right to have one’s counsel informed of the existence of incriminating confessional evidence lest counsel be unable to avoid embarrassing revelations in cross-examination.)

650 See the authority for a similar practice in the field of ‘Crown privilege’ (public interest immunity) in *Van der Linde v Calitz* 1967 (2) SA 239 (A).
The court should exercise a proper discretion in such cases by balancing the degree of risk involved in attracting the consequences sought to be avoided by the prosecution (if access is permitted) against the degree of the risk that a fair trial might not ensue (if such access is denied). What is essentially involved is a judicial assessment of the balance of risk not wholly unanalogous to the function which a judicial officer performs in weighing the balance of convenience in cases pertaining to interdicts pendente lite.\footnote{651}

The Shabalala Court also held that the rule prohibiting consultation with state witnesses was too wide:\footnote{652} consultation might be refused on reasonable apprehension that witnesses would be intimidated, evidence tampered with, state secrets or the identity of informers disclosed, or the proper ends of justice otherwise threatened. Once again the court has to balance the respective interests at stake once the accused had approached the prosecution requesting consultation and consultation had been denied. Consultation might, for example, be unnecessary if cross-examination would adequately perform the same task. Witnesses could not be forced to consult with an accused.\footnote{653}

In S v Smile & Another,\footnote{654} an application by the defence for witness summaries had been dismissed at a time when the relevant provincial division had not yet authoritatively established the entitlement of an accused to such material.\footnote{655} After the existence of the relevant right had been authoritatively recognized, the state provided the appellants with statements of witnesses who had testified and of those who were yet to testify. The appellants argued that the fact that the right had not

\footnote{651} Shabalala (supra) at para 55g.

\footnote{652} Shabalala (supra) at para 60f.

\footnote{653} It should be noted that aspects of the ‘privilege’ discussed by Mahomed J refer to public interest immunity rather than litigation privilege. In this regard it is significant to note that the common-law position on public interest immunity in England has shifted radically towards accepting the position argued for in the Scott Report Volume III (1995), that no immunity should be claimable against the accused who wishes to prove his innocence in a criminal case. The innocence exception had been recognized in the sphere of the identity of police informers as early as the case of Marks v Beyfus (1890) 25 QBD 494. See R v Keane [1994] 2 All ER 478; R v Agar [1990] 2 All ER 442; R v Ward [1993] 2 All ER 577 and R v Adams [1997] Crim LR 292. Ward went so far as to suggest that if the public interest to be protected was too sensitive to yield to innocence, the proper course would be to drop the prosecution. The problem with police dockets, however, is that they attract not only the public interest immunity which yields to innocence but also at least litigation privilege, and often legal professional privilege (legal advice privilege) as well, mostly in the form of what is referred to in the United States as ‘work product’. For ‘work product’ at common law, see Kennedy v Lyell (1833) 23 ChD 387. For legal professional privilege attaching to the Department of Public Prosecutions, see Auten v Raynor (No 2) [1960] 1 QB 669. Legal professional privilege has most recently been accorded absolute status, even against the claims of an accused wishing to prove innocence. See R v Derby Magistrates’ Court ex parte B [1996] 1 AC 487 (HL), overruling R v Barton [1972] 2 All ER 1192 (Cr Ct). See also Carter v Managing Partner, Northmoore Hale Davy & Leake (1995) 183 CLR 121 (HCA). Ironically, this absolute status of the privilege is based on its being a ‘fundamental human right’. It seems as if litigation privilege does not enjoy this absolute immunity. See Re L (a minor) [1996] 2 All ER 78 (HL). See also Eis v Minister of Safety and Security 1998 (4) BCLR 434, 439, 443 (NC), 1998 (2) SACR 93 (NC)(Held the Shabalala approach to be ‘relevant, not only to docket privilege, but also to informer privilege’. This was in the civil context, where an applicant desired disclosure of the identity of an informer in order to institute an action for damages against the informer. The court held the applicant’s interests to be outweighed by the public interest served by the privilege attaching to informers.)

\footnote{654} 1998 (5) BCLR 519 (SCA), 1998 (1) SACR 688 (SCA).
been complied with before the hearing amounted to a violation of the right. The Supreme Court of Appeal held that the violation in question was 'potentially remediable' and any unfairness entailed by it had been purged before the state had closed its case: \footnote{655}{\textit{[T]he defence could have applied to recall witnesses who had already testified and sufficient time was available to consider the contents of the statements and to prepare for the further conduct of the trial}.} \footnote{656}{Melunsky JA did add the following rider:}

\begin{quote}
But it should be emphasized that this does not mean that it is open to the State, as a matter of course, to postpone disclosure of the statements of prosecution witnesses provided only that they are disclosed at some time before the closure of its case. Disclosure of statements should usually be made when the accused is furnished with the indictment or immediately thereafter in accordance with the practice suggested in \textit{Shabalala}.\footnote{658}{The High Court court’s reluctance in \textit{S v M} to allow a possible violation of the right to docket access to upset a conviction in circumstances where such a reversal would seemingly have been outrageous led it to find that no violation had occurred.\footnote{659}{It did so by requiring evidence of prejudice and a factual basis for a finding that access would have made a difference to the result of the case.\footnote{660}{The accused had applied ‘too late’ in the trial for witness statements from the state, ie after the state had closed its case.\footnote{661}{All of these findings are unfortunate, if they are taken out of context. Sensitivity to the possibility of other ways of addressing violations, rather than by allowing an appeal or excluding evidence, would lead to less anxiety about recognizing violations.\footnote{662}{Documents disclosed as a result of the right recognized in \textit{Shabalala} do not constitute ‘further particulars’ binding upon the state. They should be requested}}}}}

\end{quote}

\footnote{656}{\textit{Smile} (supra) at 524D-F.}

\footnote{657}{\textit{Smile} (supra) at 524F.}

\footnote{658}{Ibid at 524 referring to \textit{Shabalala} (supra) at para 56. The degree to which the conduct of the defence up to the point of disclosure had been prejudiced by non-disclosure should have received more attention, particularly given the court’s approach of assessing the impact of the irregularity on the verdict. See \textit{S v Chikunga & Another} 1997 (2) SACR 470 (NmS), 1997 (9) BCLR 1321 (NmS). It was also unfortunate, with respect, that the court did not clearly separate the question whether a violation had occurred from the question what should be done about any violation that did occur. Ibid at 523I-524H.}

\footnote{659}{1999 (1) SACR 664 (C)(‘M’).}

\footnote{660}{Ibid at 671J-672A and 673D–E.}

\footnote{661}{\textit{M} (supra) at 672B.}

\footnote{662}{See § 51.5(b) supra.}
from the Attorney-General and not sought by invoking the procedure for further particulars of the charge set out in s 87 of the Code.\(^{663}\)

In \textit{S v Scholtz}, the Namibian Supreme Court adopted equality analysis as the basis for determining access to police dockets.\(^{664}\) This approach, criticized above,\(^{665}\) may well entail the unfortunate development that the prosecution, in fulfilment of its entitlement to 'equality with the accused', is allowed similar disclosures of the defence work product and brief, or at least of the general nature of the defence envisaged. The court's reference to the position in England, where the requirement of prosecution disclosure of exculpatory and other relevant information to the defence was developed without a Bill of Rights, should now be viewed in the ironic light of the recent legislative provisions in that jurisdiction placing an onerous duty upon the accused to disclose in advance the general outline of the defence.\(^{666}\) It seems the English legislature has partly implemented the kind of 'equality' that the \textit{Scholtz} court had in mind. It is to be hoped that the observation of the Canadian Supreme Court in \textit{R v Stinchcombe}\(^{667}\) that account should be taken of the 'fundamental difference in the respective roles of the prosecution and the defence' will be heeded in South Africa and that 'equality' analysis will not be allowed to place the right to a fair trial on a false path.\(^{668}\)

In \textit{S v Angula & Others}; \textit{S v Lucas} the High Court of Namibia held, on the authority of \textit{Shabalala}, that the principles laid down in \textit{Scholtz} applied also to proceedings before the lower courts\(^{669}\). However, fairness did not require access to the docket in every case. The complexity and the possibility of imprisonment are important factors that point towards disclosure. Simplicity and the minor nature of an offence point against disclosure. In \textit{Koortzen & Others v Prosecutor-General & Others} the High Court of Namibia held that the state bore the onus of showing that no complexities of fact or law were involved necessitating discovery.\(^{670}\) The court held that where the

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\(^{663}\) \textit{S v Tshabalala} 1999 (1) SACR 163 (T), 166 (Van der Walt J held the right to disclosure to flow from FC ss 32 and s 35(3), despite the apparent exclusion of FC s 32 from this sphere in \textit{Shabalala}. It was pointed out that the legislature was still to lay down a procedure to be adopted for exercising the right to 'docket access'.)

\(^{664}\) 1997 (1) BCLR 103 (NmS)('\textit{Scholtz}').

\(^{665}\) See § 51.5(b) supra. The court’s proposition, '\textit{t}o achieve equality between the prosecution and the defence is what the Constitution demands when it says “All persons shall be equal before the law”, with respect, is a striking example of confusion between equality of arms and equal protection of the law. Ibid at 112.

\(^{666}\) See Criminal Procedure and Investigations Act, 1996, s 5.


\(^{668}\) See § 51.5(b) supra.

\(^{669}\) 1997 (9) BCLR 1314 (Nm).

\(^{670}\) 1997 (10) BCLR 1478 (Nm).
refusal of a lower court to order discovery had been unjustified, the High Court was entitled in terms of its inherent review power to intervene before the proceedings were completed to direct that discovery be made.

In *Nieuwoudt & Andere v Prokureur-Generaal van die Oos-Kaap*, 671 where it was assumed that the onus was on the applicant in bail proceedings to persuade the court to release him,672 the opinion was expressed that the higher the onus on an accused, the greater was the degree of access to information to which such an accused was entitled.673 This proposition is difficult to accept when an accused is defending himself or herself against a charge and the full onus is generally placed upon the state. Why should the accused defending himself or herself be entitled to less information than the accused upon whom the law has chosen to place an onus? The proposition is also not easily reconciled with the court’s argument that the stronger the state’s case against the accused, the more difficult it should be to obtain bail.674 Would an increase in the strength of the state’s case, rendering discharge of the onus more difficult, have increased the accused’s right to information?

Be that as it may, *Nieuwoudt* held that IC s 23 entitled a bail applicant to insight into the docket because of the relevance to bail proceedings of the strength of the state’s case.675 The finding in *Nieuwoudt* was left in tatters by the Constitutional Court’s judgment in *S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat*.676 A constitutional challenge to s 60(14) of the Criminal Procedure Act,677 which subsection disentitled the bail applicant from such insight into the docket as he or she would have at trial, was dismissed unanimously by the Court.678

In *S v Kester*679 it was held that the right of an unrepresented accused to be informed of the particulars of charge included a right to be informed of all competent verdicts lest an unrepresented accused be surprised by a verdict based exclusively

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671 1996 (3) BCLR 340 (SE) (‘*Nieuwoudt*’).

672 For more on the onus in bail proceedings, see § 51.4(d) supra.

673 *Nieuwoudt* (supra) at 344.

674 Ibid at 344.

675 *Nieuwoudt* (supra) at 344-45.

676 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC). See also H Axam ‘If the Interests of Justice Permit: Individual Liberty, the Limitations Clause, and the Qualified Constitutional Right to Bail’ (2001) *SAJHR* 320.


678 See § 51.4(d) supra.

679 1996 (1) SACR 461 (B).
on a plea explanation under s 115 of the Criminal Procedure Act 51 of 1977. The decision of the Witwatersrand Local Division in S v Lavhengwa to analyse the substantive question of the vagueness of an offence in terms of the right to be informed with sufficient particularity of the charge is discussed above.

(d) The right to adequate time and facilities to prepare a defence

This right, which is one of the new rights added by s 35 of the Final Constitution (FC s 35(3)(b)), seems, in its ‘facilities’ component, to represent a generic principle which is capable of covering access to information and to witnesses and consultation with legal representatives. The most helpful comment is perhaps that of Stavros, who writes:

The second function of [this right][in addition to the question of time] is to provide a rather broad and flexible rule against which to measure the opportunity of the defence in each particular case to present its case effectively to the court. The proper role of [this right] in this context is similar to that of the fair trial guarantee. The accused may be affected in his enjoyment of the right to adequate facilities for the preparation of his defence in ways which cannot be identified in advance: limited time for preparation for the hearing, failure to order an adjournment and the introduction of surprise witnesses are examples chronicled in the case law.

FC s 35(3)(b) was invoked by the court in S v Nkabinde, in which the 'bugging' of the consultations and telephone conversations between the accused and his legal advisors was held to have compromised this right.


681 1996 (2) SACR 453 (W).

682 See § 51.1(a)(iii) supra, on the finding in Uncedo Taxi Service Association v Maninjwa & Others 1998 (3) SA 417 (E), 1998 (6) BCLR 683, 690A-B (E).

683 For a discussion of the identical right in art 6(3)(b) of the European Convention on Human Rights, see AH Robertson & JG Merrills Human Rights in Europe: A Study of the European Convention on Human Rights (3rd Edition, 1993) 110ff; JES Fawcett The Application of the European Convention on Human Rights (2nd Edition, 1987) 188ff. The main concern, as far as ‘facilities’ go, is with access to information, the opportunity to consult with one’s lawyer, and the opportunity to present evidence. These rights, it would seem, are adequately covered by FC s 35(3)(a), (f), (g) and (i). See the accommodation of the right to adequate information under the ‘facilities’ right of the Namibian Constitution, effected in S v Kandovasu 1998 (9) BCLR 1148, 1152D (NmS). Counsel for the respondent in National Director of Public Prosecutions v Mohamed & Others 2003 (2) SACR 258 (C) at para 57 argued unsuccessfully that s 26(6) of the Prevention of Organised Crime Act 121 of 1998 was unconstitutional since it infringed the respondent’s right to have adequate facilities to prepare a defence.


It may be noted that the question of access to state witnesses discussed in \textit{Shabalala & Others v Attorney-General of Transvaal & Another}\footnote{1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC), 1995 (2) SACR 761 (CC).} would seem more suited to the domain of FC s 35(3)(b) than to that of FC s 35(3)(a). Furthermore, the right to assistance by the court to which an unrepresented accused has been held entitled under the residual fair trial right may well now be accommodated under this right.\footnote{See § 51.5(b) supra.}

An example of what would be a violation under FC s 35(3)(a) of the right to 'adequate time' occurred in \textit{S v N}\footnote{1998 (1) BCLR 97 (Tk), 1997 (1) SACR 84 (Tk).}, in which the 'remarkable haste' with which a juvenile offender's trial had been conducted was held to violate the residual fair trial right. The right in question serves to remind the authorities that the speedy process requirement is always subject to a prohibition on excessive speed.\footnote{See § 51.4(c) supra.}

\textbf{(e) The right to a public trial before an ordinary court}

\textbf{(i) Ordinary courts and impartiality}

The right of an accused to trial before an ordinary court can be profitably compared with the \textit{Nel} Court's gloss on the right of any person not to be detained 'without trial' under FC s 12(1)(b).\footnote{See § 51.3(e) supra.} The 'ordinary court' requirement is also absent from the right of any detainee to challenge the lawfulness of his or her detention,\footnote{See § 51.1(iv) supra; M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) \textit{Constitutional Law of South Africa} (2nd Edition, OS, July 2006) Chapter 40, § 40.4.} and from the right of an arrested person under the Final Constitution to be brought before a court within 48 hours.\footnote{Questions relating to the propriety of summary trials such as those for contempt \textit{in facie curiae} could perhaps also be properly decided under FC s 35(3)(a). See \textit{S v Lavhungwa} 1996 (2) SACR 453 (W)(Summary proceedings for contempt were upheld as constitutional, although the analysis was undertaken on equality and impartiality grounds.) See also \textit{S v Singo} 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC), 2002 (2) SACR 160 (CC) at para 20.} It is clear that, in order to lend significance to the more stringent requirement concerning the nature of the tribunal, 'ordinary court' should be interpreted to refer to a tribunal which not only is not specially constituted for the occasion\footnote{\textit{Nel v Le Roux NO & Others} 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC) (‘\textit{Nel}’). See § 51.1(a)(iv) supra; M Bishop & S Woolman 'Freedom and Security of the Person' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) \textit{Constitutional Law of South Africa} (2nd Edition, OS, July 2006) Chapter 40, § 40.4.} but is also adorned with the power and the facilities to ensure compliance with all the fair trial rights listed in FC s 35. The clear aim of this provision is to ensure that normal criminal trials with full fair-trial
protection are the only acceptable method whereby the state may prosecute individuals for committing offences. Exceptions to this rule require FC s 36(1) justification. The possibility that this aim was undermined by the reasoning in *Nel* has been discussed above.  

The 'ordinary court' requirement has to accommodate the requirement laid down in other human rights documents that the tribunal be 'independent or impartial'. Although the sorts of tribunals referred to by the prohibition against detention without 'trial' FC s 12(1)(b) do not need to comply with FC s 35(3), they do need to satisfy standards of impartiality implicit in the minimum requirements of natural justice. The 'ordinary court' standard of impartiality and independence should be read as more rigorous than the minimum standard applicable to detention in a non-criminal context.

The requirement of impartiality was discussed at length by the Witwatersrand Local Division in *S v Lavhengwa*. Doctrinal clarity in this area of the law was not advanced by the court's decision to analyze 'impartiality' in terms of the equality clause. The result was the creation of two kinds of 'impartiality' analysis: 'equality impartiality' analysis and 'general impartiality' analysis. The question in *Lavhengwa* was whether a summary conviction by the presiding judge for contempt

in facie curiae violated the requirements of impartiality: the judge in such cases was, to some extent, iudex in sua causa. The Court held that the situation itself was insufficient without more to render the officer in question not impartial. The Court

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693 The provision in s 148 of the Criminal Procedure Act 51 of 1977 for a specially constituted court by the State President and Minister of Justice in cases of state security or public order must therefore be justified under FC s 36(1) in order to be constitutional.

694 See § 51.1(a)(iv) supra.

695 See Canadian Charter s 11(d); European Convention on Human Rights art 6(1).

696 See *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC), as discussed in § 51.1(a)(iv) supra and Bishop & Woolman (supra) at § 40.4. On the independence and impartiality required for the FC s 12 ‘trial’, see *De Lange v Smuts NO & Others* 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) (*De Lange*) at paras 67-75.

697 See § 51.5(b) supra. After *De Lange*, it is going to be very difficult to maintain any conceptual space between FC s 12 and FC s 35 as far as independence and impartiality are concerned. The requirements of independence and impartiality laid down in the Canadian cases to which the court in *De Lange* referred seem to fill all the conceptual space to which FC s 35(3)(c) entitles an accused.

698 1996 (2) SACR 453 (W) (*Lavhengwa*).

699 See § 51.5(b) supra. The fact that ‘equality of arms’ jurisprudence under the European Convention on Human Rights quite often involves issues of impartiality, it is respectfully submitted, was probably the reason for the Court's journey into the world of discrimination. See Bönisch *v Austria* (1985) 9 EHRR 191.

700 *Lavhengwa* (supra) at 477f and 492f.
endorsed the reasoning of the Connecticut state court in *Naunchek v Naunchek*\(^{701}\) that evidence of ‘personal embroilment’ on the part of the presiding officer was required for summary contempt proceedings to violate the impartiality requirement.\(^{702}\) The Court ‘relied extensively’ on the decision of the Ontario Court of Appeal in *R v Cohn*\(^{703}\) and rejected the conclusion reached in the Zimbabwean case of *In re Muskwe*\(^{704}\) that the summary contempt offence violated the requirements of a fair trial.\(^{705}\) This attempt to distinguish *Cohn* and *Muskwe* would appear to be wrong in law: the principles established in *Cohn* and in *Muskwe* as far as impartiality was concerned were the same. Indeed, *Muskwe* relied on *Cohn* for its finding that the contempt before it was the sort directed at the magistrate herself and that such a contempt hearing required adjudication by a different judicial officer. It was with respect to the summary nature of the proceedings that *Muskwe* adopted a different approach. However, no complaint can be made with respect to the *Lavhengwa* Court’s adoption of the common-law test of a ‘reasonable apprehension of bias’,\(^{706}\) and the distinction between conviction for contempt directed at the dignity of the court and conviction for contempt directed at the person of the judicial officer is sound in principle. But it is surely arguable that the very fact that the two are in practice so difficult to disentangle should lead to a ‘reasonable apprehension of bias’ in the very nature of summary convictions for contempt *in facie curiae*.\(^{707}\) Such a ‘reasonable expectation of bias’ cannot be based

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\(^{701}\) 463 A 2d 603, 37 ALR 4th 995 at 1001 (1983).

\(^{702}\) *Lavhengwa* (supra) at 481. See also *S v Ntshwence* [2004] 1 All SA 328 (Tk)(Maya J acknowledged that summary proceedings for contempt *in facie curiae* infringed the right to a public trial before an ordinary court. It was found, in that case that the limitation was justified.)


\(^{704}\) 1993 (2) SA 514 (ZH)(*'Muskwe').

\(^{705}\) *Cohn* (supra) at 494.

\(^{706}\) Ibid at 493. In *S v Phallo & Others*, an objection to extensive interrogation by assessors was loosely based on the right to a fair trial. 1998 (3) BCLR 352, 357 (B). It was natural in the circumstances that the court would base its enquiry in this regard upon the common law principles relating to judicial intervention and apparent partiality.

\(^{707}\) In *S v Maghuwazuma*, Brand J referred to *Lavhengwa* and extracted the ratio that the encroachment (*inbreuk*) upon an accused’s right to a fair trial entailed by summary contempt proceedings was justified in a case where such proceedings were necessary to ‘protect the dignity, authority and procedural integrity of the Court’. 1997 (2) SACR 675 (C), 680 citing *Lavhengwa* (supra) at 474. Having determined that the *Lavhengwa* approach did not differ much from the common-law approach, Brand J regarded the case before him, involving the failure by an attorney to appear in a criminal matter, not to be appropriate for summary proceedings, particularly given the attorney’s declared and not unjustified (*nie onredelike*) fear of personal bias on the part of the magistrate in question. Ibid at 680-81. An important decision that illustrates the problematic nature of summary convictions for contempt *in facie curiae* is *S v Solomons* 2004 (1) SACR 137 (K). See also *In re Chinamasa* 2001 (2) SA 902 (ZS), 922; *S v Mamabolo (ETV & Others Intervening)* 2001 (3) SA 409 (CC), 2001 (5) BCLR 449 (CC), 2001 (1) SACR 686 (CC) at para 54 (Court held the summary procedure employed for a summary charge of contempt of court *in facie curiae* to be irreconcilable with FC s 35(3)(c).)

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on the fact that the presiding officer belongs to a different race to that of the accused. The Cape Provincial Division in *S v Collier* determined that a fair trial did not entitle an accused to be tried by a presiding officer 'more representative of the society from which the accused [came], being the previously disenfranchised majority'.

The requirements of independence and impartiality were discussed in the context of FC s 12 in *De Lange v Smuts NO & Others*. Ackermann J referred to the requirement of an 'ordinary court' for criminal incarceration in holding that anything but a court constituted or presided over by a judicial officer of the court structure established under the Final Constitution would not be 'appropriate' — in terms of FC s 34 — for a hearing which might lead to non-criminal incarceration. He endorsed the following dictum from *R v Valente*:

> Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' connotes absence of bias, actual or perceived. The word 'independent' reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive Branch of government, that rests on objective conditions or guarantees.

The three essential conditions of independence identified were security of tenure, a basic degree of financial security free from arbitrary interference, and institutional independence with respect to matters relating directly to the judicial function. Ackermann J also endorsed the elaboration provided in *R v Genereux* that independence entailed 'not only freedom from interference by the executive and legislative branches of government but also by 'any other external force, such as business or corporate interests or other pressure groups'.

The Cape Provincial Division in *Freedom of Expression Institute & Others v President of the Ordinary Court Martial NO & Others* followed the Canadian example set in Genereux and struck down as unconstitutional the general court martial. The power of interference by the executive in the constitution of the court and in the prosecution and determination of cases in courts martial constituted the core of the constitutional ill. Allowing lay people the power to convict and to imprison people for up to two years violated the 'ordinary court' provision. In rejecting an

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708 1995 (8) BCLR 975, 979 (C), 1995 (2) SACR 648 (C)('Collier').

709 *De Lange* (supra) at para 74.


711 Ibid at para 70.


713 1999 (3) BCLR 261 (C)('Freedom of Expression Institute').

714 Ibid at para 18.
argument that an ordinary court martial was rendered an 'ordinary court' by FC s 166(e),\textsuperscript{715} Hlophe ADJP held:

\begin{quote}
[W]hether the terminology ‘court’ is appropriate for [a court martial] in its present form . . . does not matter. No accused person should be subjected to being tried by just any court. It must be an ordinary court which conforms with the spirit of the Constitution and which affords an accused person a fair trial. By no stretch of the imagination can the ordinary court martial be ‘an ordinary court’ within the meaning of sections 35(3)(c) and 34 of the Constitution.\textsuperscript{716}
\end{quote}

There were ways, the Court held, of structuring courts martial without violating the independence standards required by the constitutional right to a fair trial.\textsuperscript{717} Common-law principles regulate the extent to which a judicial officer should participate in such hearings — ie, cross-examining an undefended accused — and ensure that the officer's behaviour does not have even the appearance of impropriety or bias.\textsuperscript{718}

Some food for thought was provided in the judgment of the full court of the Natal Provincial Division in \textit{S v Ngcobo}.\textsuperscript{719} Having determined that a judge's questioning of an accused to make up for an inept prosecution did not violate the principle of impartiality, Squires J held that the Final Constitution did not hold adversarial principles so sacred as to forbid the intrusion of any elements of an inquisitorial nature.\textsuperscript{720} Furthermore, the \textit{Ngcobo} Court disagreed that the Final Constitution militated against allowing a lack of sophistication on the part of the prosecuting and investigative process to lead to greater intrusion by the judge to avoid travesties of justice.\textsuperscript{721} It was held that such an approach, followed in \textit{S v Van den Berg},\textsuperscript{722} showed 'a realistic and sensible appreciation of the situation that must indeed be faced by courts from time to time in this country, as well as Namibia'.\textsuperscript{723} This may be so, but it would be a cause for concern if an accused had to fear an inept prosecutor more than a competent one, since the former might receive more help from the Bench.

\textsuperscript{715} FC s 166(e) defines the courts as including 'any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts'.

\textsuperscript{716} Freedom of Expression Institute (supra) at para 21.

\textsuperscript{717} See \\textit{Findlay v United Kingdom} (1997) 24 EHHR 221, 244-45 at paras 26-27. The panacea was to split functions and to reduce the role and interference of an executive 'convening authority'.

\textsuperscript{718} See \textit{S v Mosoinyane} 1998 (1) SACR 583 (T), 594C-597G.

\textsuperscript{719} 1999 (3) BCLR 298 (N)('Nsoco').

\textsuperscript{720} 1998 (8) BCLR 996 (N). See § 51.5(j)(ii) infra.

\textsuperscript{721} \textit{Ngcobo} (supra) at 305H-306D.

\textsuperscript{722} 1995 (4) BCLR 479 (Nm)('Van den Berg').

\textsuperscript{723} \textit{Ngcobo} (supra) at 306D.
than the latter. Indeed, the Zimbabwe Supreme Court in *Smyth v Ushewokunze & Another*\(^{724}\) held the right to a 'fair hearing . . . by an . . . impartial court', expressly entrenched in s 18(2) of the Zimbabwean Constitution, to 'include within its scope and ambit not only the impartiality of the decision-making body, but the absolute impartiality of the prosecutor himself whose function, as an officer of the court, form[ed] an indispensable part of the judicial process'.\(^{725}\)

Institutional independence is to be distinguished from 'impartiality'. The fact that the right requires the court in question to be an 'ordinary court' means that the question of institutional independence will be ensured by the provisions relating to the separation of powers. In *S v Dodo*\(^{726}\) counsel for the accused argued that the provisions of s 51(1) of the Criminal Law Amendment Act,\(^{727}\) which prescribed the imposition of minimum sentences in certain circumstances, offended the right to a trial in an ordinary court as entrenched in FC s 35(3)(c) and the separation of powers doctrine. Smuts AJ held that the extent of the infringement was significant, that there was no apparent relation between the limitation and its purpose and that there were less restrictive measures to combat crime.\(^{728}\) The High Court declared s 51(1) inconsistent with FC s 35(3)(c) and the separation of powers doctrine. It then referred this declaration to the Constitutional Court for confirmation. The declaration of invalidity was, however, not confirmed by the Constitutional Court.\(^{729}\) Ackermann J, following the approach enunciated in *S v Malgas*,\(^{730}\) held that the sentencing court retained the discretion to impose a lesser sentence than that prescribed should there exist 'substantial and compelling circumstances' to do so. The sentencing court was thus not obliged to impose a sentence which would limit the accused's FC s 12(1)(e) right.\(^{731}\) As to the argument that s 51(1), read with s 51(3) of the Criminal Law Amendment Act, constituted a breach of FC s 35(3)(c) because a sentencing

\(^{724}\) 1998 (2) BCLR 170 (ZS).

\(^{725}\) The view expressed by Etienne du Toit SC in the 1st Edition version of this chapter, that impartiality extended also to the role of the prosecutor, was specifically endorsed. Ibid at 178B. Gubbay CJ regarded this as a 'broad and creative' interpretation of the right, which was necessary to avoid the prejudice inherent in being faced with a prosecutor who bore a personal grudge. The reasoning renders problematic the propriety of private prosecutions under the right to be tried by an impartial court. Although the thrust of Gubbay CJ's reasoning was based on the role of a public prosecutor acting on behalf of the state and with its resources at his or her disposal, the fact that such impartiality was grafted on to the accused's right would mean that private prosecutions prima facie violated that right.

\(^{726}\) 2001 (1) SACR 301 (E)('Dodo HC').

\(^{727}\) 105 of 1997.

\(^{728}\) *Dodo HC* (supra) at 315.

\(^{729}\) *S v Dodo* 2001 (3) SA 382 (CC), 2001 (5) BCLR 423 (CC), 2001 (1) SACR 594 (CC)('Dodo'). See also A Pillay 'Recent Cases: Constitutional Application' (2001) 14 *South African Journal for Criminal Justice* 282.

\(^{730}\) 2001 (2) SA 1222 (SCA), 2001 (1) SACR 469 (SCA)('Malgas').
court would be bound by s 51(1) and would thus no longer be an 'ordinary court', the Constitutional Court held that this could only hold true if s 51(1) had a material effect on the sentencing court's independence or if it deprived such court of some judicial function to such an extent that it could no longer be classified as an 'ordinary court'. The Constitutional Court rejected this argument.\textsuperscript{732} Ackermann J further wrote that there was no absolute separation of powers between the judicial function and the legislative and executive functions under the Final Constitution. The latter two shared an interest in the execution of punishment imposed by the judiciary.\textsuperscript{733}

The virtues of the separation of powers doctrine and its relationship to judicial independence and impartiality were subject to further criticism from the bench in \textit{Bangindawo & Others v Head of the Nyanda Regional Authority & Another}. The \textit{Bangindawo} Court saw 'no reason whatsoever for the imposition of the Western conception of the notions of judicial impartiality and independence in the African customary law setting' and rejected an argument that regional authority courts, which had the power to conduct criminal trials, violated the principles of independence and impartiality demanded by IC s 96(2).\textsuperscript{734} Madlanga J reasoned that 'the embodiment of all these powers [judicial, executive and law-making] in a judicial officer [would] in the minds of those schooled in Western legal systems, or not exposed to or sufficiently exposed to African customary law, or not believing in African customary law, be irreconcilable with the idea of independence and impartiality of the judiciary.'\textsuperscript{735} \textit{Bangindawo} offers a striking illustration of the contrast between the universalist turn reflected in the Bill of Rights and the Final Constitution's simultaneous attempt to accommodate African customary law.\textsuperscript{736} The problem in \textit{Bangindawo} was not so much one of how to interpret judicial independence and impartiality in the African customary context as one concerning areas of penal sovereignty. It is one thing to say the Interim Constitution insulated certain courts from the strictures of IC s 25. But, with great respect, it is quite another thing to contend that there is some way in which a regional authority court can be regarded as 'independent', or even as 'impartial' in criminal matters.\textsuperscript{737}

\textsuperscript{731} Ibid at para 40.

\textsuperscript{732} Dodo (supra) at para 50.

\textsuperscript{733} Ibid at para 24. See also Mhlekwa \textit{v Head of the Western Tembuland Regional Authority and Another}; Feni \textit{v Head of the Western Tembuland Regional Authority and Another} 2000 (2) SACR 596 (Tk).

\textsuperscript{734} 1998 (3) BCLR 314, 327D (Tk), 1998 (2) SACR 16 (Tk) ("Bangindawo").

\textsuperscript{735} Ibid at 326H-I.


IC s 25(3)(a) never rates a mention in Bangindawo remains a mystery. It is particularly odd given that the court found that the right to counsel guaranteed by IC s 25(3)(e) could not yield to the procedures of African customary law — which knew, at that time, of no such phenomenon. 

(ii) The right to a public trial

The accused is given the right to a public trial in order that justice be seen to be done. Access to the public ensures the legitimacy of the criminal justice system and acts as an important safeguard of impartiality. However, an important distinction exists between democratic and free speech concerns, on the one hand, and the element of publicity inherent in an accused's right to a fair trial on the other. Indeed, publicity and free speech concerns often conflict with an accused's right to a fair trial. These two sometimes opposing interests were, unfortunately, conflated in Klink v Regional Court Magistrate NO & Others. Worse still, the distinct right to challenge evidence (our 'confrontation right') was not extricated from the following jurisprudential cocktail:

[T]he requirement that the trial must be public amounts to the constitutionalization of a long-recognized principle of transparency in criminal proceedings. The purpose of insisting on a public trial is to enable the public to be fully informed of the evidence, as far as it is possible to do so, so that it may be properly able to evaluate any judgment (S v Leepile & others (4) 1986 (3) SA 661 (W) at 665I J) [free speech interest]. The enshrinement of the right to a public trial ensures that secret trials employed by totalitarian states will not be tolerated under the Constitution [both free speech interest and fair trial interest]; but it does not guarantee the right of the accused and the witness to be physically present in the same room [confrontation problem].

738 Bangindawo (supra) at 330-331. See § 51.5(h) infra. The court could admittedly have arrived at the same finding on independence by holding that the term 'ordinary court' in IC s 25(3)(a) had to be read either as carrying a different meaning in the areas of operation of those courts the existence of which was saved for the interim in IC s 214(1), or simply as subject to such savings. See Bangindawo (supra) at 323ff.

739 In Freedom of Expression Institute, an order to convene a court martial in camera and to exclude the media was set aside. But this was based upon the interference of the executive ‘convening authority’ in the independence of the tribunal, not on any notion of the right to a public trial or the public’s right to a free flow of information relating to criminal trials. The press, who had been excluded from a court martial, succeeded in having the institution declared unconstitutional for failing to provide its accused with a fair trial. If the front door is locked, one can always get in by breaking the house down. The right to a public trial does not, however, extend to disciplinary hearings before administrative tribunals. See Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others 2000 (4) SA 621 (C).

740 See Nebraska Press Association v Stuart 427 US 539, 96 SCt 2791 (1976)(A restraining order against the press and broadcasters interdicting publication of confessions made by the accused in a high-profile murder case was struck down as an impermissible prior restraint on free speech, which ironically was more serious given the interest of the public in information about the criminal justice process. The US Supreme Court starkly subordinated fair trial rights to public access. The problem with adverse pre-trial publicity is that the press and public do not generally conduct their discourses with due regard to the presumption of innocence.) Stuart can be contrasted with the approach adopted by the Chancery Division in England in Bunn v British Broadcasting Corporation & Another The Times 23 June 1998 (On grounds of public policy the court protected the confidentiality of a statement made to the police under caution, where the defendants desired to publish the statement after the Maxwell fraud prosecutions had failed to result in any convictions.)

741 1996 (3) BCLR 402, 414 (E)('Klink').
The court left open the question of the constitutionality of ss 153 and 154 of the Criminal Procedure Act providing for trials to be held in camera and for information not to be published in certain cases.\footnote{742} The impugned provision in this case, which allowed vulnerable witnesses to testify by video-link and to be cross-examined through an intermediary, had little to do with the right to a public trial.

The Constitutional Court in \textit{Nel v Le Roux NO \& Others}\footnote{743} referred, obiter, to the 'well-recognized exceptions in our criminal procedure to the general rule that criminal proceedings [were] to be conducted in open court' and cited s 153 of the Criminal Procedure Act as an example.\footnote{744} The court also referred to exceptions recognized by the US Supreme Court to the public's right to access to trials inherent in the First Amendment right to free speech.\footnote{745} Exceptions to the public's free speech rights, however, are not the same thing as exceptions to the accused's fair trial rights.

The Zimbabwe Supreme Court in \textit{Banana v Attorney-General} was 'confronted for the first time with the contention that widespread pre-trial publicity adverse and hostile to an accused person [might] so indelibly prejudice the minds of the judge and assessors at the criminal trial as to negate the constitutional protection of a fair hearing before an independent court'.\footnote{746} Gubbay CJ stated categorically: '[T]here can be no doubt that the right to receive a fair trial, which is the central precept of our criminal law, must be given priority over freedom of the press.'\footnote{747} He proceeded by acknowledging that the administration of the criminal law in notorious cases could not be allowed to be derailed by the mere fact of publicity. He then added:

\begin{verbatim}
Media reporting of a judicial process, or in advance of it, may, in exceptional circumstances, be so irresponsible and prejudicial as to make the unfairness irreparable and the administration of justice impossible. If that were to occur then there is, quite literally, nowhere to go. The court will have no option but to grant a stay of proceedings; for it is more important to retain the integrity of the system of justice than to ensure the punishment of even the vilest offender.
\end{verbatim}

One would have expected, then, an investigation into the question as to whether \textit{Banana} reflected the sort of 'exceptional circumstances' that demanded a stay of proceedings. But the judgment did not proceed thus. It detailed the extent of the press barrage of accusation and scandal, and held this to have exceeded the

\footnotesize{\begin{itemize}
\item \footnote{742} Ibid. See the decision in \textit{Richmond Newspapers Inc v Commonwealth of Virginia} 448 US 555 (1980) (\textit{Richmond}), referred to in Klink (supra) at 413-414 (A blanket ban on public access to a criminal trial was held to violate the First Amendment protection of free speech. \textit{Richmond} was another case in which the interests of the defence were opposed to the publicity which the newspapers were seeking.)
\item \footnote{743} 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC)\textit{('Nel')}.
\item \footnote{744} Ibid at para 17. Well-established statutory exceptions and properly justified limitations on rights need not be co-extensive. See §§ 51.1(b)(iii) and (iv) supra.
\item \footnote{745} \textit{Nel} (supra) at para 17.
\item \footnote{746} 1999 (1) BCLR 27, 28J-29A (ZS)\textit{('Banana')}.
\item \footnote{747} Ibid at 32B.
\end{itemize}}
boundaries to be expected even in high-profile cases. But then, having determined the test to be whether a 'real and substantial risk' of an unfair trial had resulted, Gubbay CJ held that, given that judges and assessors could take publicity without being unduly affected by it, the challenge had to be dismissed. The reasoning cannot but be regarded as applicable to all cases, thereby undoing the notional possibility of 'exceptional circumstances', and the acknowledgement of the humanity and fallibility of judges entertained in the judgment:

To accept that there is a real or substantial risk of a judge's mind becoming so clogged with prejudice by what he has read or heard about an accused, would mean that it would be impossible to find an impartial judge for a high profile case; and that such an accused could never receive a fair trial. The result would be nothing less than judicial abdication. The proposition needs merely to be stated to convince of its unsoundness.

(f) The right to trial within a reasonable time

The relationship between the arrested person's speedy process rights and those of the accused person is discussed above. The accused person's right to trial within a reasonable time is one right which quite obviously includes consideration of a period before the commencement of the proceedings — it is, after all, the speed with which such proceedings have come about that is at issue. The right in IC s 25(3)(a) refers to a reasonable time 'after being charged', and much of the IC s 25(3)(a) jurisprudence is naturally concerned with the requirements of 'being charged'. The Final Constitution has dropped the requirement that one be 'charged' before the period of delay can be considered, and has also clarified that the scope of the right to trial within a reasonable time extends to the conclusion of the trial as well as its inception. FC s 35(3)(d) reads, in relevant part, 'to have their trial begin and conclude without unreasonable delay'. (IC s 25(3)(j) provided separately for the right to be 'sentenced within a reasonable time after conviction'.) All appellate and review procedures would seem to be embraced by the phrase 'their trial'.

However, S v Pennington & Another the Constitutional Court unanimously left this point open by way of obiter dictum. It was unnecessary for the Pennington Court to decide whether to regard the right contained in IC s 25(3)(a) or that in FC s 35(3)(d) as extending also to appellate delay, since whichever of the two rights were to be applicable, such delay as did occur would not entitle the applicants to have their convictions set aside or their sentences reduced, which was the
The Court did point out, however, that although undue delay in hearing criminal appeals was ‘obviously undesirable’, it did not follow that such delay constituted an infringement of the constitutional right to a fair trial.

The jurisprudence around the meaning of the word ‘charged’ need not be abandoned in interpreting the more openly defined right in FC s 35(3)(d). The degree of apprehension on the part of the individual that the state is intent on prosecuting him or her or the extent to which the individual’s liberty has been interfered with are animated by the same principles that underly the right to trial within a reasonable time and hence should inform our interpretation of FC s 35(3)(d).

In *Sanderson v Attorney-General, Eastern Cape*, Kriegler J wrote — of IC s 25(3)(a) and FC s 35(3)(d) — that the ‘respective sections, though not identical, [were]

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753 See Attorney-General, Eastern Cape v D 1997 (1) SACR 473 (E), 475, 1997 (7) BCLR 918 (E)(The Eastern Cape Local Division remarked: ‘An appeal is not a re-trial or a trial de novo. It . . . is an extension or a continuation of the lis between the state on the one hand and the accused person on the other.’) This seems equally applicable to the case of a review of sentence, delay in the effecting of which concerned the court in *S v Manyonyo* 1996 (11) BCLR 1463, 1465-1466 (E). The Manyonyo court decided the matter in terms of a common-law concern with not depriving the individual of his or her liberty unless it was necessary, and mentioned the possibility that such a delay might itself amount to a failure of justice. The court did not have recourse to IC s 25(3)(j).

754 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) (‘*Pennington*’) at para 41.

755 The Court held that the applicants were not entitled to invoke the provisions of the Final Constitution, which finding rendered the obiter conclusion on relief twice removed. *Pennington* (supra) at para 36.

756 Ibid at para 41. The Court’s reference to the dispute in the Canadian Supreme Court about the extension of the right to trial within a reasonable time to appeals merits consideration. The minority judgment in the case concerned — *S v Potvin* [1993] 2 SCR 880, 105 DLR (4th) 214 (‘*Potvin*’) — is to be preferred over that of the majority. The different considerations pertaining to appeal would naturally result in different factors of reasonableness. The majority decision, that the relevant right to be tried within a reasonable time did not apply to appeal delays, was decisively influenced by three considerations relevant for present purposes:

1. The general due process seepage from s 7 of the Charter could take care of any due process problems not covered by s 11(b)’s domain of the trial proper. Ibid at 229ff. One should not forget that the majority held appellate delay capable of violating the ‘principles of fundamental justice’ enshrined in s 7. The pertinent American jurisprudence invoked by the Court involves a similar structure: Fourteenth Amendment due process performs a similar sweeping function. Ibid at 228. This difference in doctrine is significant given the due process wall in the South African framework.

2. The *Potvin* majority ‘agreed’ with the European Court of Human Rights decision in *Wemhoff v Germany* (1968) 1 EHRR 55. The right to trial within a reasonable time contained in art 5(3) of the European Convention applies ‘only to trial’, whereas the right in art 6(1) to a ‘fair and public hearing’ in the determination . . . of any criminal charge against him’ applied to appeals as well. It requires little illustration that confining the only ‘speedy process’ right in a Charter to such circumstances as apply to one of a pair of twin speedy process rights in another Convention is highly questionable. Closer scrutiny of the stages of the criminal process to which art 6(1) and art 5(3) apply reveals complexity, but in any event a framework in which the gaps left by the one right are filled by the other. See § 51.4(c) supra.
substantially the same'.

Having pointed out that human rights jurisprudence had attached varying meanings to the word 'charged', ranging from 'formal arraignment or something tantamount thereto' to 'broadly and imprecisely . . . signify[ing] no more than some or other intimation to the accused of the crime(s) alleged to have been committed', Kriegler J proceeded to find it unnecessary to decide where along the continuum of meanings the word fell. The occurrence in question in the instant case (appearing in the dock for the formal remand of a criminal case) clearly fell within the meaning of the provision. What was significant was Kriegler J's intimation that the meaning of the word 'charged' in any given case, being determined by context, could be informed by the degree of 'anxiety, stress and social embarrassment suffered by a public figure accused of a morally reprehensible crime'.

Still, the difficulty of basing the significance of the pre-charge period on constitutional grounds, once 'charge' has been defined, has now been remedied.

The right to be tried within a reasonable time was comprehensively discussed in *Moeketsi v Attorney-General, Bophuthatswana, & Another*. The court did not indicate clearly whether it was adopting a comparative constitutional approach, or

3. The Potvin majority's decision was based upon the requirement that 'charged' be afforded the same narrow meaning throughout s 11. See Potvin (supra) at 223-26. This finding entails no grave consequences for a system where due process seepage can take care of pre-trial and post-trial delay. The difference for the purposes of IC s 25(3)(a) is that 'charged' requires a broader meaning there than is appropriate for determining the definition of 'accused', in order to allow pre-trial delay to be relevant to an accused's right to a fair trial, and to distinguish accused persons from arrested persons. See § 51.2 supra. For the purposes of FC s 35(3)(d), the purpose and the effect of the alteration of the wording and of the omission of the reference to speedy sentencing after conviction are to overcome the gaps referred to in § 51.4(c) supra, and to allow the speedy process right to extend in both directions beyond the confines of the trial itself, to apply to all relevant pre-trial occurrences and to apply until the *lis* between individual and state is finally concluded as the section demands.

On 'knowledge of the charge', see *Du Preez v Attorney-General of the Eastern Cape* 1997 (2) SACR 375 (E), 1997 (3) BCLR 329, 338 (E)(The person concerned must be 'advised by a competent authority that it has been decided that he is to be prosecuted'.) The Moeketsi report creates the impression that the jurisprudence around the word 'charged' entered our courts through the Canadian decision of *R v Kalanj* (1989) 1 SCR 1594, whereas the extensive passage quoted ostensibly from that case was derived from the Zimbabwean decision in *In re Mlambo*. 1992 (2) SACR 245 (ZS), 249-50('Mlambo').

757 See *Moeketsi v Attorney-General, Bophuthatswana, & Another* 1996 (7) BCLR 947, 963 (B).

758 *Mlambo* (supra) at 249-250 endorsed the approach of the European Court of Human Rights in *Eckle v Germany (Federal Republic)* (1985) 5 EHR 1 and *Foti v Italy* (1983) 5 EHRR 313 (Relevant period was from the time the situation of the suspect had been materially affected: '[T]he start of the impairment of the individual's interests in the liberty and security of his person.' *Mlambo* was followed in *Bate v Regional Magistrate, Randburg, & Another* 1996 (7) BCLR 974 (W). For a discussion of the history and rationale of the right to a speedy trial see B Farrell 'The Right to a Speedy Trial Before International Criminal Tribunals' (2003) 19 *South African Journal for Human Rights* 99.

759 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC)('Sanderson') at para 17.

760 Ibid at para 18.

761 Ibid at para 19.

762 Ibid.
whether its statement that its approach was one 'guided by principles that ha[d] been formulated by the Supreme Court over decades' was to be taken as incorporating the common law into IC s 25(3). It distilled from the Canadian and American case law the following four governing factors:

1. the length of the delay alleged;
2. the reasons for the delay;
3. any 'clearly and unequivocally' proved 'waiver of time periods' by the accused; and
4. the degree of prejudice suffered by the accused.

The reasons for the delay were then divided into:

1. those caused by the state;
2. those caused by special circumstances such as complexity;
3. those caused by systemic or institutional factors; and
4. those caused by the accused's conduct (the state to prove this cause).

Liberty, security and a just trial were identified as the interests affected, and 'prejudice' was divided into:

1. oppressive pre-trial incarceration;
2. anxiety and concern; and
3. impairment of the defence.

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763 See Du Preez v Attorney-General of the Eastern Cape 1997 (2) SACR 375 (E), 1997 (3) BCLR 329, 339 (E). See Coetzee & Others v Attorney-General, Kwazulu-Natal, & Others 1997 (8) BCLR 989 (D), 1997 (1) SACR 546 (D), 560-61 (It was remarked, for the purposes of FC s 35(3)(d), that delay before arrest might be more prejudicial than delay after arrest, there being no safeguards of direct court control before arrest as there are after arrest. The authorities may want to counter that the 'direct court control' after arrest is the consequence of a speedy process right in that sphere, not a reason for having a different speedy process right in another sphere.)

764 1996 (7) BCLR 947 (B), 1996 (1) SACR 675 (B)('Moeketsi').

765 Ibid at 959.

766 Moeketsi (supra) at 961. See also R v Askov (1990) 2 SCR 1199.

767 Moeketsi (supra) at 965.

768 Ibid at 961.

These considerations were then all to be assessed by an 'ad hoc balancing' act 'requiring the ability and skill of a juggler'.\textsuperscript{770} Conceptual problems with this analytical framework abound: the meaning of 'prejudice' and its relationship with the length of the delay (some circularity seeming unavoidable), the operation of a 'reasonableness' element within the determination of the length period itself, which is to act as a factor in determining 'reasonableness',\textsuperscript{771} the operation of a more specific species of 'actual prejudice' within the generic category of 'prejudice',\textsuperscript{772} the operation of the accused's conduct as a cause within the category of 'prejudice',\textsuperscript{773} and whether 'prejudice' is a necessary but not sufficient requirement,\textsuperscript{774} or not a necessary but often a sufficient requirement.\textsuperscript{775} It had appeared from the judgment in \textit{Coetzee & Others v Attorney-General, Kwazulu-Natal, & Others} that 'trial prejudice' — ie the impairment of the ability to present an adequate defence — was the most important and ultimately decisive factor in the juggler's act.\textsuperscript{776} The

High Court's adoption of the English abuse of process jurisprudence led to the following conclusion and problem: if undue delay was culpable, a stay of proceedings might be ordered, depending ultimately on the degree of prejudice suffered. If, on the other hand, there was only prejudice (no culpability in the undue delay), a stay could be ordered provided prejudice was sufficient to render the trial unfair. Both tests clearly turned on the degree of 'trial prejudice' suffered by the accused. The threshold for both tests was whether the threat to a 'fair trial' had reached critical mass. This threshold cannot be different for the two cases. It therefore becomes vital to ask what effect, in principle, fault on the part of the authorities should have on the fairness assessment — irrespective of the degree of prejudice. The independent force of the reasonable time right within the fair trial canon must be given some meaning. A question-begging test in terms of ultimate fairness, while perhaps appropriate for a decision on the remedy, is a conceptually unsatisfactory way of establishing whether the right has been violated in the first place.\textsuperscript{777} Abuse of process analysis has not yielded clarity.\textsuperscript{778} One should also note

that if 'trial prejudice' is to become the focal point in the inquiry, that such doubt favours the defence, and that 'trial prejudice' caused by delay may often be more

\textsuperscript{770} Moeketsi (supra) at 965.

\textsuperscript{771} Ibid.

\textsuperscript{772} Ibid at 968.

\textsuperscript{773} Ibid.

\textsuperscript{774} See \textit{United States v Lovasco} 431 US 783 (1977), as cited in \textit{Moeketsi} (supra) at 962-963.

\textsuperscript{775} See \textit{United States v Marion} 404 US 307, 320 (1971), cited in \textit{Moeketsi} (supra) at 961. See also P Hogg \textit{Constitutional Law of Canada} (3rd Edition, 1992) § 49.10 ('[A] finding of prejudice is not a necessary condition of a ruling of unreasonable delay'); \textit{Coetzee v Attorney-General, Kwazulu-Natal} 1997 (8) BCLR 989 (D), 1997 (1) SACR 546 (D)(The intensity of prejudice at trial was in effect the governing factor decisively determining whether a fair trial was possible or not.)

\textsuperscript{776} 1997 (8) BCLR 989 (D), 1997 (1) SACR 546 (D)('[Coetzee v Attorney-General]').
serious for the prosecution than for the defence. A form of 'prejudice' which is not relevant — because it is 'too remote from the exigencies of a fair trial' — is the consideration that if the trial had finished earlier, the accused would have been imprisoned earlier, and would have been closer to eventual release.

The question of unreasonable delay, and particularly the kinds of prejudice relevant to the enquiry, came before the Constitutional Court in Sanderson v Attorney-General, Eastern Cape. Kriegler J asserted in a unanimous judgment that the right to trial within a reasonable time was 'expressly cast as an incident of the right to a fair trial'. Thus, the question in South Africa was whether non-trial-related interests were catered for at all — the inverse of the question in North America. Kriegler J regarded this fact, and the fact that paras (b)-(j) of IC s 25(3) all related directly to the conduct of the trial itself, coupled with the clear emphasis of IC s 25(3) on the trial, in obvious contrast to that of IC s 25(1) and (2), as a persuasive textual argument for the proposition that only trial prejudice was contemplated by IC s 25(3)(a). We would suggest that because the right in question by definition points outwards beyond the confines of the trial as far as 'time' is concerned, one might legitimately draw the conclusion that it is not confined to the trial as far as 'prejudice' is concerned. Be that as it may, Kriegler J held that all three kinds of interest at play — liberty, security and trial-related interests — were protected by IC

777 See R v Carosella (1997) 142 DLR (4th) 595 at paras 26-40 (The majority held that a determination whether a fundamental right had been breached based upon the degree of resulting trial prejudice conflated the remedy question and the violation question. The court categorically held that the question of the degree of prejudice suffered by an accused was not a consideration to be addressed in the context of determining whether a substantive Charter right had been breached, such prejudice being relevant only to the remedy stage. Whatever the merits of this latter, rather striking pronouncement, a similar effort to distinguish the remedy question from the violation question is crucial for a proper approach to the speedy process rights in South Africa.) The Natal Provincial Division in Wild & Another v Hoffert NO & Others regretfully allowed the conclusion that there had been no violation of rights under IC s 25(3)(a) to follow from the finding that the drastic remedy of dismissing the case or granting a stay of the prosecution was not called for. 1997 (2) SACR 233 (N), 1997 (7) BCLR 974, 987 (N). The Constitutional Court, in Wild & Another v Hoffert NO & Others, made the following welcome observations about the finding:

I would respectfully suggest that the finding that there had been no infringement conflates the question of infringement under s 25(3)(a) with that of remedy under s 7(4)(a). Although the successive steps of the analysis should not be performed in watertight compartments, their separate and distinct requirements should not be overlooked. . . . A finding that the consequential relief sought is inappropriate must not be confused with the antecedent finding as to infringement.' 1998 (3) SA 695 (CC), 1998 (6) BCLR 656 (CC), 1998 (2) SACR 1 (CC) at para 28 (per Kriegler J).

778 On the extensive trawl of common law abuse of process jurisprudence, see Coetzee v Attorney-General. The jurisprudence of abuse of process, while accepting the rights of the individual and the fairness of the trial as factors within the inquiry, is concerned with essentially a different question from that posed by the definition of the rights of the individual: the question is whether the execution of a prosecution in a certain manner should be countenanced by the courts. The famous formulation of the principle in S v Ebrahim, requiring the state to come to court with clean hands ('met skoon hande'), indicates that a quasi-estoppel principle operates in the question of abuse. 1991 (2) SA 553 (A). The most recent test for abuse formulated by the House of Lords was whether continuing the prosecution would be 'shocking to the public conscience' R v Latif and Shahzad [1996] 1 WLR 104 (HL). This test suffers from the same problem, were it to be taken seriously, as afflicts the Canadian 'disrepute' test applied to the admission of unlawfully obtained evidence: the abandonment of the proceedings due to delay would almost invariably be more 'shocking to the public conscience' than a continuation of the prosecution despite delay. See Hogg (supra) at § 38.6. The decision of the House of Lords in Latif may well have sounded the death knell to the prospects of success of abuse of process claims in cases involving unlawfully engineered prosecutions: the extraordinary latitude afforded the authorities to lure suspected drug traffickers into the jurisdiction was a direct result of their lordships' concern with the effect a stay of proceedings in serious drug cases would have on the 'public conscience'.
s 25(3)(a). The pivot for the Court’s reasoning was the presumption of innocence.\(^{782}\) Given the ‘punishment’ inherent in being taken through the mills of the criminal justice system, and given that the law wished to punish only those found guilty, the right to a trial within a reasonable time served to reduce to a minimum any unnecessary punishment caused by the slow turning of the mill.\(^{783}\)

Indeed, Kriegler J conceived of the possibility of cases where a permanent stay might be appropriate without there being trial prejudice.\(^{784}\)

In the course of raising a caveat about the usefulness of slavish invocation of comparative jurisprudence in this area, Kriegler J held that the requirement of an ‘assertion of right’ laid down in *Barker v Wingo*\(^{785}\) was inappropriate in South Africa, ‘where a vast majority of South African accused [were] unrepresented and [had] no conception of a right to a speedy trial’.\(^{786}\) The Court’s approach to the role of time appears from the following dictum:

\(^{779}\) See *R v L (WK)* [1991] 1 SCR 1091, 1100; *R v Finta* [1994] 1 SCR 701, 875. See also *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) at para 36 n 41. Kriegler J points out that social prejudice might also diminish as the delay progressed. Ibid at para 30 n 31. In *Smyth v Ushewokunze & Another* the applicant complained of a five-year delay between the occurrence of an incident for which he was being charged with culpable homicide and the proceedings themselves, *inter alia* on the basis that potential defence witnesses had become unavailable or would have dimmed memories. 1998 (2) BCLR 170 (ZS). The court required the actual unavailability of these witnesses to be proved, as well as any actual loss of memory that they might have undergone. One reads: ‘Without their personal say-so, no actual prejudice to the applicant’s defence has been shown. An apprehension that there may be prejudice does not suffice. There must be real prejudice to the applicant’s ability to mount a full and fair defence resulting from the inordinate delay on the part of the state in charging him with the offences.’ Ibid at 181C.

\(^{780}\) *Coetzee v Attorney-General* (supra) at 565.

\(^{781}\) 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) (‘Sanderson’).


\(^{783}\) Kriegler J made the following important point: ‘But the object of the current exercise is not the general disadvantages suffered by an accused in consequence of serious charges being preferred. Our focus is on delay and the prejudice that it causes.’ *Sanderson* (supra) at para 40. He continues: ‘One is therefore not so much concerned with the prejudice flowing from the charges and the publicity they initially generated, but with the aggravation of that prejudice ascribable to the delay.’ Ibid at para 41.

\(^{784}\) *Sanderson* (supra) at para 42.

\(^{785}\) 407 US 514 (1972).

\(^{786}\) *Sanderson* (supra) at para 26. It was held that the question was not whether the accused wanted to go to trial but whether he had actually suffered prejudice as a result of the lapse of time. Ibid at para 32. Kriegler J did proceed to explain that this did not mean an accused who had been the primary agent of delay should be able to rely on it in vindicating his or her rights under IC s 25(3) (a). There was, however, ‘no need for an accused to assert his right or actively compel the state to accelerate the preparation of its case.’ Ibid at para 33.
Time has a pervasive significance that bears on all the factors and should not be considered at the threshold or, subsequently, in isolation. Time does not only condition the relevant considerations, such as prejudice, it is also conditioned by them. The factors generally relied upon by the state — waiver of time periods, the time requirements inherent in the case, and systemic reasons for delay — all seek to diminish the impact of elapsed time.

It then emerged clearly that for Kriegler J the most important equation was the function of time and prejudice. Employing the factors as positive and negative influences in a function was Kriegler J’s method of defining 'reasonableness' for the purposes of IC s 25(3)(a). One may describe the function thus:

\[(\text{un})\text{reasonableness} = \text{time} \times (\text{prejudice} + \text{aggravating circumstances} - \text{alleviating circumstances})\]

Alleviating circumstances encompass waiver and contributory responsibility. Kriegler J also included culpability on the part of the authorities as a factor in the equation on the side of aggravating circumstances. One should note that the calculation employed by Kriegler J was exhaustive of the question of violation and justification, and did not fit comfortably into the two-stage analysis of rights interpretation.

Mention was made in Moeketsi of the fact that the only available remedy in Canada and the United States was a stay of proceedings, and that this view had not ‘found favour in all quarters’. Commentators such as Amsterdam and Hogg had argued that ‘the primary form of judicial relief against a denial of a speedy trial

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787 Ibid at paras 28-29.
788 Ibid at para 31.
789 Ibid at para 27.
790 A similar sort of exercise obtains in assessments of negligence in the law of delict, in cases where reasonableness = risk x (seriousness of harm + cost of precaution). See Wasserman v Union Government 1934 AD 228 and Bolton & Others v Stone [1951] AC 850 (HL).
791 On 'systemic delay' being 'probably more excusable' and 'exculpatory', see Sanderson (supra) at para 35. In Wild & Another v Hoffert NO & Others Kriegler J said of Sanderson: '. . . [T]he judgment makes plain that fault on the part of the prosecution which results in delay is an important circumstance. Although the ultimate enquiry is whether the time between the charge and the trial is unreasonable, it is obviously relevant that the one or the other party is to blame, in whole or in part, for the delay.' Ibid at para 8. Later one reads: 'In a case such as this, where there is a period of ostensibly culpable inactivity on the part of the prosecution, an inference of unreasonableness can more readily be drawn if no explanation is proffered.' Ibid at para 25 citing 1998 (3) SA 695 (CC), 1998 (6) BCLR 656 (CC), 1998 (2) SACR 1 (CC)('Wild'). The operation of complexity (or simplicity) as an aggravating (or mitigating) factor, is also emphasized in Wild. Ibid at para 7.
792 See § 51.1(b)(iv) supra. Difficulties which such an approach entailed for the question as to whether there had been a violation appeared in para 35 of the judgment: it had to be accepted that South Africa had 'not yet' reached the stage where the undeniably substantial systemic burdens could 'no longer be regarded as exculpatory'. Nevertheless, the right was a right and not an aspiration. See § 51.5(h) infra, on the remedial value of a finding of a violation which is nevertheless held justified.
should be to expedite the trial, not to abort it'. 793 This suggestion makes sense in a situation where the suspect or the accused is arrested or charged, and is suffering prejudice (in the broad sense) from a failure on the part of the authorities to get the matter settled. Action on the part of the individual concerned to expedite the trial would seem to be required lest ‘waiver of time periods’ be an inescapable inference. 794 But where the individual has been surprised by a prosecution after a matter of years, or is suffering under suspicion but can hardly be expected to demand to be arrested, 795 or to be informed of the exact state of the investigation, or where the delay which has already occurred is ‘unreasonable’, then expediting the proceedings may only put an end the violation, not remedy it. In such instances, a damages claim may be regarded as more appropriate than a stay of proceedings. 796

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793 Moekesti (supra) at 970. See A Amsterdam ‘Speedy Criminal Trial: Rights and Remedies’ (1975) 27 Stanford LR 525, 535; Hogg (supra) § 49.10.

794 See Berg v Prokureur-Generaal, Gauteng 1995 (2) SACR 623 (T)(Discussion about the expectation that the accused exhaust lesser remedies before a stay of proceedings could be considered.) The pronouncement that a stay was an extraordinary and drastic remedy only to be granted exceptionally was seemingly endorsed in Moeketsi. Moeketsi (supra) at 970.

795 See Bate v Regional Magistrate, Randburg 1996 (7) BCLR 974 (W)(The applicant should have asserted the right to a trial within a reasonable time after it had been ‘intimated to him’ that he was under suspicion for murder. Before one has been formally charged or at least arrested for an offence the hope that suspicions may pass and not bloom into charges is only reasonable.) See also Du Preez v Attorney-General of the Eastern Cape 1997 (2) SACR 375 (E), 1997 (3) BCLR 329 (E) were whether there was any duty upon the authorities to speed up an investigation when there were public suspicions damaging to the person suspected, and whether a certain degree of promptness was required after a decision to charge had been reached, but before it had been communicated in any way to the person concerned, was considered. These questions, it is submitted, are best distinguished from the question of keeping to a minimum the period somebody is denied his or her liberty without having been proved guilty. The Zimbabwe Supreme Court, relying on Coetzee v Attorney-General (supra) at 999G-1000A assumed that the Zimbabwean speedy trial right, which in s 18(2) of the Zimbabwean Constitution was conferred upon someone who had been ‘charged’, permitted redress where an unreasonable delay on the part of the state in commencing the trial preceded the date upon which the accused person was officially notified that he had committed a criminal offence. Smyth v Ushekowunze & Another 1998 (2) BCLR 170, 1808-C (ZS). This was odd, given the Court’s minute attention to the question whether a person had been ‘charged’ for the purposes of s 18(2) (Ibid at 178-179), and particularly given the following finding: ‘The fact that the applicant must have realized that he was under suspicion in relation to allegations of crimen injuria and culpable homicide and that investigations were being undertaken on behalf of the second respondent, did not start the clock ticking against the State. Even the request for a statement concerning the drowning did not amount to an official notification that the applicant had committed a criminal offence’. Ibid at 179H. See also Feedmill Developments (Pty) Ltd & Another v Attorney-General, KwaZulu-Natal 1998 (9) BCLR 1072 (N)(Saw the problem of pre-summons delay in circumstances where complex investigations and vetting have to be carried out in order to determine whether a prosecution should ensue. The facts rendered the complaint of trial prejudice due to the delay rather unpersuasive. But the case illustrated that cases might arise in which the justifiable delay in deciding to prosecute occasioned by complex investigations could give rise to real trial prejudice on the part of the eventually surprised and unprepared accused.)

796 See S v Pennington & Another 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) at paras 41-43 (Dicta of the unanimous Constitutional Court in that whatever ‘appropriate relief’ the applicants were entitled to under IC s 7 for any unreasonable delay in their appeal, it would be contrary to the public interest and bring the administration of justice into disrepute if such delay were to result in excusing the applicants from serving their sentences. It should be stressed that in Pennington the relevant (and final) appeal had already failed, which meant that the persons concerned could be regarded as having been finally and authoritatively declared ‘guilty’.)
In *Sanderson*, Kriegler J established authoritatively that, unlike the 'remedial context' in the United States and Canada, our constitutional framework allowed remedies other than a stay of proceedings for violations of the speedy process right. Kriegler J pointed out that '[o]ur flexibility in providing remedies [might] affect our understanding of the right'. This statement should not be understood to conflate the right with the remedy, or as allowing a finding of violation to depend on the appropriateness of the remedy sought. On the contrary, it is to be taken as a cue to separate the question of violation from that of the remedy sought. For while the broad array of remedies available under the Final Constitution does make it easier for a court to find a violation of a fundamental right, one must keep in mind that the finding of a violation need not entail the very drastic remedy of what amounts to unconditional discharge. With a warning that one was not dealing with fixed rules, Kriegler J declared as follows:

Release from custody is appropriate relief for an awaiting-trial prisoner who has been held too long; a refusal of a postponement is appropriate relief for a person who wishes to bring matters to a head to avoid remaining under a cloud; a stay of prosecution is appropriate relief where there is trial prejudice.

One might add: damages may be appropriate relief for unjustifiable violations that cannot be redressed in any other appropriate manner.

The remedy was the focus of the Constitutional Court's judgment in *Wild & Another v Hoffert NO & Others*. The focus, however, was not so much on appropriate remedies as on the fact that a stay was inappropriate. It may now be said with some confidence that the possibility of a stay as a remedy will be entertained only where the defence has suffered trial prejudice by the delay, or where 'extraordinary circumstances' are present.

It should be noted that Kriegler J did not actually rule on whether the delay in *Sanderson* had been 'unreasonable', and therefore did not give a finding on whether the right had been violated. The ruling that the remedy sought (a stay) was inappropriate put paid to the enquiry. Kriegler J remarked that the reasonableness question was 'really beside the point' in a case where the only remedy sought was inappropriate. This was because the remedy of a permanent stay of the prosecution was competent only in cases of trial prejudice or extraordinary circumstances. It may be asked whether the unreasonableness of the delay may not in some cases be relevant to the presence of 'extraordinary circumstances'.

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797 *Sanderson* (supra) at para 27 (Invokes *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC).)

798 *Sanderson* (supra) at para 27. See also *Wild* (supra) at para 9 (Kriegler J put it thus: 'Because of the flexibility allowed by [IC s 7(4)(a)], a court can tailor a snug fit between infringement and remedy."

799 It should be noted that Kriegler J did not actually rule on whether the delay in *Sanderson* had been 'unreasonable', and therefore did not give a finding on whether the right had been violated. The ruling that the remedy sought (a stay) was inappropriate put paid to the enquiry. *Sanderson* (supra) at para 42. See also *Wild* (supra) at paras 25-26 (Kriegler J remarked that the reasonableness question was 'really beside the point' in a case where the only remedy sought was inappropriate. This was because the remedy of a permanent stay of the prosecution was competent only in cases of trial prejudice or extraordinary circumstances. It may be asked whether the unreasonableness of the delay may not in some cases be relevant to the presence of 'extraordinary circumstances'.)

800 *Sanderson* (supra) at para 42.

801 Ibid at para 41.

802 *Sanderson* (supra) at paras 25-26. The appellants had complained of what the Court a quo called 'prejudice of a personal nature': adverse publicity affecting their careers, personal and family anxiety, expense, and a difficulty in exercising access rights to children. *Wild & Another v Hoffert NO & Others* 1997 (2) SACR 233 (N), 1997 (7) BCLR 974, 987 (N). See *McCarthy v Additional Magistrate, Johannesburg* 2000 (2) SACR 542 (SCA)(Court decided that a party asserting an unreasonable delay in prosecution was required to show more than average systemic delay and
Kriegler J made it quite clear that the jurisprudence of speedy process was not merely a question of stay or no stay:

On the contrary, the true effect and scope of the protection against unreasonable delay is much wider and more significant than and should not be obscured by the more dramatic and far-reaching remedy of a stay of prosecution. The crucial point of [IC s 25(3)(a)] is that the Constitution demonstrably ranks the right to a speedy trial in the forefront of the requirements for a fair criminal trial. That means that the state is at all times and in all cases obligated to ensure that accused persons are not exposed to unreasonable delay in the prosecution of the cases against them. That, in turn, means that both state prosecutors and presiding officers must be mindful that they are constitutionally bound to prevent infringement of the right to a speedy trial. Where such infringement does occur, or where it appears imminent, there is a duty under [IC s 7(4) (a)] to devise and implement an appropriate remedy or combination of remedies.

In the instant case, a series of remands for ‘further investigation’ meant that the trial began in the new constitutional era. The obvious advantage of newly minted constitutional rights for the appellants outweighed any prejudice up to that point, and from then on ‘the prosecution was dilatory in a number of respects while the defence showed little eagerness for the trial to start’. The process was paralysed by the introduction of a constitutional defence, and the applications spawned thereby were not attended to with vigorous alacrity. A new front was opened through allegations of grand conspiracy, and the ultimate result was that the magistrate struck the matter from the roll. The focal point of ‘unreasonable delay’ became the four-month period between the withdrawal of the constitutional application (when the matter was struck) and the fresh prosecution. This period was ‘arguably . . . unreasonably long’. But, absent a showing or an allegation of trial prejudice or extraordinary circumstances, a stay of prosecution was inappropriate. This refusal to grant such a remedy, however, ‘by no means [put] paid to [the appellants’] rights under [IC s 25(3)(a)]’. These rights and the duty to devise appropriate remedial relief

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that an indefinite stay of prosecution would seldom be granted in the absence of extraordinary circumstances); Director of Public Prosecutions KZN v Regional Magistrate, Durban & Another 2001 (2) SACR 463 (N), 470 (Hugo J emphasized that a complainant had no legal right to the comfort afforded by a successful prosecution and that such complainant consequently enjoyed no right to be heard before a permanent stay in prosecution was ordered.)

803 Wild (supra) at para 11.

804 Kriegler J was at pains to criticize the phenomena of district court trials characterized by a succession of routine postponements ‘for further investigation’ and ‘the curious practice of postponing cases for no other reason than to fix a trial date later’. Ibid at para 30. The failure of prosecutors and magistrates to do what they could to alleviate the administrative chaos was lamented. Ibid at paras 31-34. On the other hand, the legislative efforts to introduce a mechanism for enforcement under s 342A of the Criminal Procedure Act 51 of 1977 was praised as a step in the right direction, though one that had to be ‘mindful of the constitutional context’. Ibid at para 32. See also S v Maredi 2000 (1) SACR 611(T), 614 (Mynhardt J had to consider a case on review after the accused had been in custody for 17 months before charges of housebreaking with the intent to steal and theft were put to him. He had been in custody for 22 months before the case was finalized. The court found that the delays amounted to a breach of the accused’s right to a speedy trial as intended by FC s 35(3)(d) and that the conduct of the prosecutors and magistrates involved in the proceedings was deserving of censure. Disciplinary steps against the prosecutors and magistrates were deemed appropriate.)

805 Wild (supra) at para 17.
for their infringement continue throughout the trial.\textsuperscript{808} \textit{Wild} should be recognized as a clear invitation to practitioners to be more selective, realistic, and perhaps inventive, in their quest for remedies for unreasonable delay. But since a stay will remain the Holy Grail, one may expect challenges in future to concentrate on showing 'extraordinary circumstances' where trial prejudice is hard to establish.\textsuperscript{809}

The grant of a stay of proceedings — essentially on grounds of 'significant extra-judicial prejudice' — was upheld by the Lesotho Court of Appeal in \textit{Director of Public Prosecutions & Another v Lebona}.\textsuperscript{810} The respondent had been summarily 'interdicted' from her civil service position without pay, and for periods at half pay, owing to investigations into alleged fraudulent activities on her part. The intended criminal proceedings underwent the most flabbergasting series of delays and abortions, described by Steyn P as a 'litany of incidents demonstrating the failure of the criminal justice system in respect of this citizen'.\textsuperscript{811} Apart from engaging in futile efforts to challenge her 'interdiction' by civil means, the respondent 'was not a willing or even supine accused who [was] content to let her criminal trial drag on at a snail’s pace determined by the authorities. Her counsel [wrote] about her criminal trial and plead[ed] to 'have this matter finalized so that [the] client [might] know her fate soonest'.\textsuperscript{812} The appellant's complaint that extra-trial prejudice was taken into account in granting the stay was dismissed on three grounds. First, extra-trial prejudice was relevant and significant.\textsuperscript{813} Secondly, society itself demanded trials within a reasonable time, irrespective of the effect on a

\textsuperscript{806} \textit{Wild} (supra) at para 25. One matter of concern to which Kriegler J referred was the fact that the withdrawal of a charge was not 'a mere formality nor a device to circumvent the refusal of a postponement' '. . . [I]t can and should be observed', said Kriegler J, 'that a withdrawal can in itself carry considerable weight in any evaluation . . . of the reasonableness of a time lapse, and also in deciding on an appropriate remedy . . . .' Ibid at para 35. This should be particularly true if the refusal of a postponement was in any way due to unreasonable delay. \textit{Director of Public Prosecutions & Another v Lebona} 1998 (5) BCLR 618, 637D (LesCA)(Argument that the respondent complaining of unfair delay should have invoked her right to a discharge where the prosecution did not appear for trial was rejected on the basis that it would be absurd if the right to a trial within a reasonable time could be 'rendered nugatory by a ready recourse to the stratagem suggested by the Crown')

\textsuperscript{807} \textit{Wild} (supra) at para 27. See also Erasmus J in \textit{Naidoo & Others v National Director of Public Prosecutions & Others} [2003] 4 All SA 380 (C).

\textsuperscript{808} \textit{Wild} (supra) at para 36.

\textsuperscript{809} The trial prejudice should, of course, have a sufficiently serious impact upon the fairness of proceedings to merit the remedy. It is submitted that once it has been determined, using the Sanderson formula, that the right has been violated, and then that the violation would lead to trial prejudice, it should be up to the state to argue why a stay should not be granted.

\textsuperscript{810} 1998 (5) BCLR 618 (LesCA)('Lebona').

\textsuperscript{811} Ibid at 627C.

\textsuperscript{812} \textit{Lebona} (supra) at 635D.

\textsuperscript{813} Ibid at 632H-635A.
particular accused’s defence. Thirdly, perhaps fortunately, there was ‘a very specific trial prejudice allegedly suffered by respondent which [was] not denied by the appellants’. As a result, a stay was upheld because of the gravity of the extra-trial prejudice suffered. While the judgment did not make a specific finding that the circumstances were ‘extraordinary’, such a finding would have been appropriate in this case more than in any other. One ironic danger about a test framed in terms of ‘extraordinary circumstances’ emerged from this matter: if chaos and paralysis become the order of the day, an argument that chaos and paralysis are ‘extraordinary’ would, strictly speaking, have little purchase. It is to be hoped that the authorities will not be allowed to invoke the frequency and ubiquity of their own failures as an argument that defeats a stay of proceedings in extreme cases.

(g) The right to be present when being tried

This right, found in FC s 35(3)(e), is another right not found in the Interim Constitution. FC s 35(3)(e) has, as its source, International Covenant on Civil and Political Rights art 14(d). Both FC s 35(3)(e) and art 14(d) have a very different purpose than such protection as is afforded by art 6(3)(c) of the European Convention on Human Rights. Article 6(3)(c) of the European Convention on Human Rights grants the accused the right ‘to defend himself in person or through legal assistance of his own choosing’. Fawcett observes that a legally represented accused has no article 6 claim to be present at the proceedings. However, if legal representation were regarded as an absolute substitute for the right to appear in person under FC s 35(3)(e), then it should be required that such legal representation be that chosen by the accused person or at least be accepted as competent to act as his or her representative at the proceedings. Unless it is so understood, FC s 35(3)(e) would be in danger of being sidestepped in the few cases where vigilant insistence upon its observance would be required. Justifiable restrictions should be a matter for FC s 36(1). The right in question is one unproblematically framed in positive and absolute terms and thus makes it easily subject to two-stage analysis.

The presence requirement is closely related to ‘confrontation’ or ‘challenge’

814 Ibid at 632E, 636C-D.

815 Ibid at 636E-G. This piece of trial prejudice entailed the unavailability of potential defence witnesses. Steyn P held that the respondent would have been well advised to furnish greater particulars of such prejudice to demonstrate it more sufficiently, but that, since the appellants had not bothered to challenge the averments concerning trial prejudice, these had to be accepted. Ibid at 636F-G.

816 See S v Motsasi 1998 (2) SACR 35 (W), 39, 48, 49 (De Villiers J discussed at length the shockingly disconcerting (‘besonder skokkend en veronrustend’) situation prevailing at Johannesburg Central Prison, which led in that case to the late arrival at court of the accused. The court exercised its powers under s 342A(3) of the Criminal Procedure Act 51 of 1977, as amended, in ordering an enquiry into the cause of this particular manifestation of tardiness, symptomatic of what De Villiers J described as the tip of an iceberg threatening to sink the ‘Titanic’ of South African society. The judgment, and the reports it engendered, would provide some insight to interested persons into the degree of chaos threatening the administration of justice in this country. The extent of the problem, which could be alleviated by the introduction of a modicum of diligence at a general level, is alarming. In the words of a prison official quoted by a newspaper: ‘Sekere beamptes doen hulle bes, maar ’n mens kan nie teen ’n muur baklei as jou kollegas net nie wil help nie.’)

considerations entailed by the right to adduce and challenge evidence in FC s 35(3) (i). Since the right to adduce and to challenge does not guarantee 'confrontation' in the strict sense required by the American Sixth Amendment, the express provision of a 'presence' right may lend a more concrete dimension to the 'challenge' rights.

The accused's constitutional right to be present when being tried is also contained in s 158 of the Criminal Procedure Act. This section, however, does not guarantee the physical presence of the witness and the accused in the same room. Provision is made for the giving of evidence by a witness 'by closed circuit television or similar electronic media'. The circumstances in which criminal proceedings may be conducted in the absence of the accused are listed in s 159. Section 160 prescribes the procedures to be followed where an accused is absent.

(h) The right to counsel

Many of the considerations that pertain to the right of a detainee to pre-trial counsel apply also to the right of an accused to counsel at the trial. The role of the right to counsel as ensuring respect for equality, the right to silence, the right against self-incrimination and the presumption of innocence must guide the courts in the kinds of protection to be offered the unrepresented accused when the court is providing...
such an accused with the right to assistance recognized under the residual fair trial right.\textsuperscript{824}

The right to be informed of the right to counsel, as well as the right to be informed of the right to have counsel appointed at state expense if substantial injustice would otherwise result, must be regarded as operating independently of the right to counsel itself, given the independent entrenchment of the information rights in FC s 35(3)(f) and (g).\textsuperscript{825} Failure to inform the accused accordingly has been held to amount to an irregularity rendering the trial unfair.\textsuperscript{826} That one is entitled to have counsel appointed at state expense if substantial injustice would otherwise result might come as a surprise to some accused — and it might well affect the extent to which waiver of the right to counsel represents an exercise of informed choice.\textsuperscript{827}

The informing duty imposed upon the presiding officer does not entail a formalistic obligation to recite the exact words of the section.\textsuperscript{828} Indeed, advice that one is entitled to appointed counsel ‘if substantial injustice would otherwise result’ might puzzle more than it informs.\textsuperscript{829} Although a court should naturally not be required to explain the conditions upon which such a finding might eventuate, some sense that the accused would be entitled to appointed counsel if the court were satisfied that it would be good for justice should be conveyed to the accused. The crucial idea is that this right exists, but that entitlement is not automatic. The question ‘are you going to conduct your own defence?’ can hardly be said to imply the extent of the entitlement sufficiently.\textsuperscript{830} Whether advice of rights given at stages prior to the proceedings may still be operative at the proceedings is a question which involves similar problems to those that obtain during pre-trial procedures.\textsuperscript{831} In S v Langa, the Natal Provincial Division was confronted with the situation where an arrested person had been informed of his rights to legal representation and silence upon arrest, but not by the presiding officer at the initiation of plea proceedings under s 119 of the Criminal Procedure Act 51 of 1977.\textsuperscript{832} The court regarded itself as bound by the pre-constitutional decision of the Appellate Division in S v Mabaso.\textsuperscript{833}

\begin{itemize}
\item \textsuperscript{823} See S v Melani 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E), 1996 (1) SACR 335 (E), 347-8 (In the pre-trial context.)
\item \textsuperscript{824} See § 51.5(b) supra.
\item \textsuperscript{825} The Final Constitution’s information right is expressly governed by the general right contained in FC s 35(4) to have all constitutionally required information provided in a language one understands. See § 51.3(a) supra.
\item \textsuperscript{826} S v Gouwe 1995 (8) BCLR 968 (B). See S v Pienaar 2000 (2) SACR 143 (NC)(The accused, who was Afrikaans speaking, asked his legal representative, who was English speaking and could not speak Afrikaans, to withdraw, which she then did. The proceedings continued without legal representation for the accused and the accused was accordingly convicted of dealing in dagga. The reviewing court held that the right to a fair trial included that the accused be entitled to the assistance of a legal representative with whom he could communicate in his own language, whether directly or in exceptional cases where this was not possible, by means of an interpreter. The magistrate's failure to explain this right to the accused resulted in a breach of his right to a fair trial, which amounted to an irregularity in the proceedings. The court held further that the magistrate's failure to explain this right to the accused was the same as a failure to inform the accused of his right to legal representation. The end result was that the accused had not received the legal assistance to which he was entitled in the case and the conviction and sentence were set aside.) See also S v M [2004] 2 All SA 74 (D) at para 13; PM Bekker ‘The Right to Legal Counsel and the Constitution’ (1997) 30 De Jure 219.
\end{itemize}
Mabaso held that failure to advise of the right to legal representation upon plea proceedings did not amount to a fatal irregularity.

the link between the failure to inform and the plea of guilty being 'entirely speculative and remote'. Magid J indicated agreement with counsel’s view that the minority judgment in Mabaso, which laid great stress on the court’s responsibility to protect the illiterate and unsophisticated accused against the consequences of ignorance, was more 'well reasoned' and more 'in accord with the legal and human rights philosophy . . . enshrined in the [Interim] Constitution than that of the majority.'

827 See Mgicina v Regional Magistrate, Lenasia, & Another 1997 (2) SACR 711 (W), 732 (Borchers J recognized that being informed by an unspecified 'lady from legal aid' that one might obtain representation through 'the Legal Aid' did not necessarily also entail being apprised of the fact that a lawyer could be appointed at state expense where substantial injustice would otherwise result.) It is submitted that speculation about the accused's probable knowledge of his or her rights given his or her past brushes with the law should not be encouraged, as it waters down an important safeguard and focuses the judicial mind upon matters threatening the presumption of innocence. The finding in S v Molewa 1997 (1) SACR 188 (NC), 192 that such an approach was a complete misdirection ('totale mistasting') must therefore be welcomed. See S v Moos 1998 (1) SACR 372 (C) (Court displayed sensitivity to the difficulty of finding waiver to have constituted an exercise of informed choice in the present context. The accused had intimated that he would arrange his own representation, but this did not come about. After conviction and referral to a regional court for sentencing, it emerged that the accused had been unaware of the possibility of appointed and funded representation, and that he would have wanted to avail himself of it throughout. On review, Van Reenen J pointed out that an awareness of one's right to employ a lawyer did not necessarily entail awareness of the right to have a lawyer appointed in the circumstances set out in IC s 25(3)(e). Ibid at 380G-381A. The learned judge then considered waiver, and was inclined to regard it as inappropriate to the right to legal representation, regarding as more apposite a species of election which did not entail irrevocable abandonment of alternatives not chosen. Ibid at 381F-G. In any event, informed election was essential, and its absence resulted in a failure of justice. Ibid at 381H-383.); S v Orrie & Another 2005 (1) SACR 63 (C)(The accused had been informed of his right to choose and consult with a legal practitioner but the state did not prove that he had been informed that he was entitled to a legal aid lawyer. The accused made use of privately-funded counsel throughout the trial. On an allegation by the accused that his rights were not properly explained to him, the Court held that the omission from the warning given to the accused had not led to his suffering any prejudice at all. Furthermore, no evidence had been led to suggest that the accused would ever have relied on state-provided counsel.)

828 M en Andere v Streeklanddros, Middelburg, Transvaal, en Andere 1995 (2) SACR 709 (T) (Substantive compliance with the requirement in IC s 25(3)(e) was required.)

829 See S v Soci 1998 (3) BCLR 376 (E), 1998 (2) SACR 275 (E). See § 51.3(f) supra.

830 See S v Ramuongiwa 1997 (2) BCLR 268 (V)(Exclusive employment of this question amounted to a fatal failure to inform); S v Solomon 2004 (1) SACR 137 (C)(Dlodlo AJ held that it would be an extremely dangerous practice to 'assume' that an accused person did not want to be legally represented. On the contrary, the court had to satisfy itself that the accused person's choice to conduct his own defence was indeed an informed decision. Ibid at para 13.)

831 See § 51.3(f) supra.

832 1996 (2) SACR 153 (N).

833 1990 (3) SA 185 (A)('Mabaso').
What did not emerge clearly from the report was what kind of advice the accused had received upon arrest. Even more than in the case of different stages of pre-trial procedure, the transition from the pre-trial situation to the plea proceedings requires a reiteration of the right to representation, given that it by no means follows — for the average reasonable person — that the right to have a lawyer present during custody translates into the right to be represented in court proceedings.836

The distinction between the right to choose a legal representative and the right to have one appointed at state expense has been held to imply that the latter right does not entitle the accused to choose the representative which the state is to appoint.837 Nevertheless, the absence of such a right does not mean that the sort of accommodation of the accused’s wishes which was respected at common law in the case of pro Deo counsel is no longer required.838 These accommodating requirements should be seen not as granting the accused the right to ‘choose’ the representative to be appointed, but as part of an assessment whether substantial injustice would otherwise result. The latter question is relevant both to the question whether to assign counsel and to the question what sort of counsel should be assigned. In S v Manguanyana an indication was given of the extent to

which courts would not allow magistrates to dismiss as 'delaying tactics' reservations or objections an accused might have about the suitability of counsel appointed by the state.839 Holding that refusal to allow the accused to reject the second of two attorneys assigned to him by the Legal Aid Board amounted to denial of the accused’s rights, the court remarked:840

It is so that an accused . . . who has been assigned a legal representative at state expense . . . is generally speaking to accept the practitioner assigned to him. . . .

834 Mabaso (supra) at 209F (Hoexter JA).

835 Ibid at 155-156. A similar stance was taken by the court in S v Mbambo, where an unrepresented accused was not informed of his rights contained in FC s 35(3)(f) and (g) and was not encouraged to exercise them. 1999 (2) SACR 421 (W). The accused faced a severe mandatory sentence upon conviction. Goldstein J held that the failure to inform the accused had the effect that the proceedings were not in accordance with justice in terms of s 52(3)(b) of the Criminal Law Amendment Act 105 of 1997 and had to be set aside.

836 The fact that the accused is a lawyer does not mean he or she is not entitled to counsel. See S v Maghuwazuma 1997 (2) SACR 675 (C), 681; S v McKenna 1998 (1) SACR 106 (C).

837 S v Lombard en ‘n Ander 1994 (3) SA 776 (T), 1994 (3) BCLR 126 (T). Although the referral of this matter to the Constitutional Court was held incompetent, the Court, did endorse this aspect of the Lombard decision, stating that it was ‘certainly so' that the right to choose pertained to the right to employ, and not to the right to have counsel appointed. S v Vermaas; S v Du Plessis 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC) at para 15.

838 See S v Solo 1995 (5) BCLR 587 (E)(A refusal to allow a postponement when the accused sought more senior and experienced counsel to be appointed upon appreciation by the accused of the seriousness of the charges was declared to be an error, given that dissatisfaction which was neither feigned nor unreasonable should be respected and postponements granted notwithstanding great inconvenience and severe disruption of the court rolls, unless other exceptional circumstances justified refusal.) See also S v Dangatye 1994 (2) SACR 1 (A).

839 1996 (2) SACR 283 (E)('Manguanyana').
Circumstances may arise where the accused person is quite justified in seeking to dispense with the services of the practitioner assigned.

The line, however, had to be 'drawn somewhere', and a further rejection by the accused would have justified refusal to countenance more.\textsuperscript{841} In \textit{S v Manale}, the accused had been convicted in a regional court of five counts of rape and was committed for sentence to the High Court.\textsuperscript{842} Being improvident and having had his right to legal representation and legal aid funding explained to him at his first appearance in the regional court, the accused elected to be legally represented and a local attorney was appointed to conduct his defence. Before the trial resumed, the accused terminated the mandate of his attorney. The High Court held that the regional magistrate had erred in failing to enquire about the reason for the termination of the attorney's mandate and in merely accepting it. The correct attitude would have been to establish the basis on which the choice to waive the right to legal representation had been made.\textsuperscript{843} In the circumstances, the conviction was, nevertheless, confirmed. An important decision concerning the degree to which the absence of counsel might be attributed to the accused was that of the Transvaal Provincial Division in \textit{S v Maduna}.\textsuperscript{844} It seems that a misunderstanding between the accused and their families concerning the appearance of legal representatives on the accused's behalf led to a failure by the accused to produce the representatives they had been intimating would appear.\textsuperscript{845} The court pointed out that the magistrate's finding — that the absence of a representative was due to negligence on the part of the accused — ignored the fact that the accused were justifiably under the impression that counsel had been arranged for them by their families.\textsuperscript{846} Furthermore, it was not competent to assume that attorneys, if properly instructed, would be present at court, and that their absence indicated negligence or deceit on the part of the accused, who had indicated that they would appear.\textsuperscript{847}

\textit{S v McKenna} saw a public prosecutor convicted of contempt for engaging in a 'go-slow' (or rather 'go-late') campaign in the magistrate's court.\textsuperscript{848} On the first occasion of lateness, the accused had been warned to arrange legal representation the next

\textsuperscript{840} Ibid at 287. See \textit{Boesak v Chairman, Legal Aid Board} 2003 (2) SACR 181 (T)(Southwood J) emphasized that the Board had a very important function in providing legal assistance at state expense in terms of the Constitution and therefore had to act responsibly in allocating funds to deserving applicants. The Board was therefore entitled to a full disclosure of all the facts pertaining to the applicant's financial position.

\textsuperscript{841} \textit{Manguanyana} (supra) at 287. The facts illustrate how the different counsel rights may operate simultaneously. The magistrate apparently dismissed the accused's assurances that his mother would be able to finance a third attorney for him, and the court held that the magistrate should have been alive to the possibility of loans and donations. This consideration involves the right to choose one's lawyer, rather than the right to have one appointed for one. The court in \textit{S & Others v Swanepoel} held, likewise, that an accused who declined to be defended by counsel instructed by the Legal Aid Board and selected according to the roster system in force, must accept that the range of choice would be constrained by his or her financial means. 2000 (7) BCLR 818 (O). See also \textit{S v Halgryn} 2002 (2) SACR 211 (CC) at paras 11-12.

\textsuperscript{842} 2000 (2) SACR 666 (NC).

\textsuperscript{843} Ibid at 671.

\textsuperscript{844} 1997 (1) SACR 646 (T)('Maduna').
day for possible contempt proceedings, and was not given more than five minutes to arrange representation when the magistrate actually decided to commence the contempt proceedings upon the second occasion. Ngcobo J held that the moment at which the reasonableness of the opportunity to obtain representation was to be assessed was when it was intimated that contempt proceedings were actually to commence, not when these proceedings were threatened as a possibility. Ngcobo J regarded the absolute terms of the following pronouncement as essential to his finding:

A denial of a reasonable opportunity to secure legal representation where one is demanded is, in my view, a denial of the right to legal representation and it is a denial of the right to a fair trial guaranteed by the Constitution. Where this occurs, the ensuing conviction and sentence cannot stand.

The Court in S & Others v Swanepoel emphasized that the right 'to choose, and be presented by, a legal practitioner, and to be informed of this right promptly' required that an accused person be given a fair and reasonable opportunity to obtain legal...
According to Cillié J, the circumstances of each case would determine what would constitute a reasonable opportunity. In determining whether an accused person has had ‘a reasonable opportunity’ the following factors should be considered: the gravity of the charges; the availability of sufficiently experienced practitioners; the amount of preparation required and the complexity of the case. Courts ought to also consider the interests of the complainants, the witnesses and the co-accused, as well as the undersirability of disrupting court rolls and delaying the disposal of criminal cases. The same stance was taken by the court in *S v Tsotetsi & Others*.

*McKenna* can be contrasted with the decision in *S v Simanaga*. In *Simanaga*, the fact that the accused’s trial had proceeded in the absence of intended legal representation was ‘a mistake’. Still, held Tshabalala J, this fact did not render the trial unfair. The conviction had to stand, the court held, because the unrepresented 17-year-old accused had proved her guilt by her answers when questioned at the plea proceedings. This finding, with respect, confuses fairness with accuracy and ignores the purpose of questioning an accused after he or she had pleaded guilty.

Guidelines concerning the difficult question of 'substantial injustice' in denying state-funded counsel to an accused were offered obiter by Didcott J in *S v Vermaas; S v Du Plessis*. Indeed, it was the learned judge who had laid down the 'common law' guidelines in this regard in *S v Khanyile*. In *Khanyile*, the factors were said to be the 'inherent simplicity or complexity of the case, so far as both the law and the facts [went]', the maturity, sophistication and level of intellect of the accused, and the gravity of the case, including the sentence. The ultimate test, 'vague' and 'fickle' though it was, was whether the accused would be 'placed at a disadvantage palpable and gross, that the trial would be palpably and grossly unfair, were it to go ahead without a lawyer.' In *Vermaas*, one reads of the 'ramifications and their complexity or simplicity, the accused person's aptitude or ineptitude to fend for himself or herself in a matter of those dimensions, how grave the disadvantage was'.

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851 2000 (7) BCLR 818 (O).

852 Ibid at 821.

853 2003 (2) SACR 623 (W), 635. See also *Pretorius & Others v Minister of Correctional Services & Others* 2004 (2) SA 658 (T).

854 1998 (1) SACR 351 (Ck).

855 Ibid at 353F-I.

856 See NC Steytler *The Undefended Accused on Trial* (1988) 107-117; § 51.5(j)(ii) infra.

857 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC)('Vermaas').

858 1988 (3) SA 795 (N), 815-816. See D McQuoid-Mason *'Rudman and the Right to Counsel: Is it Feasible to Implement Khanyile?'* (1992) 8 SAJHR 96. See also *Legal Aid Board v Msila & Others* 1997 (2) BCLR 229, 243 (SE)(Similar factors). The 'Khanyile rule' was cited at length in *S v Lavhengwa* 1996 (2) SACR 453 (W), 490-491 ('Lavhengwa').
consequences of a conviction may look, and any other factor that needs to be evaluated in the determination of the likelihood or unlikelihood that, if the trial were to proceed without a lawyer for the defence, the result would be 'substantial injustice'. Most importantly, the Vermaas Court held that the decision was 'pre-eminently' that of the officer trying the case.859

In Msila v Government of the Republic of South Africa & Others, the Court held that the application for legal assistance itself was a procedure complicated enough — though it involved essentially an indication of indigence by the applicant — to require state-funded assistance in such application lest 'substantial injustice' should result. On an appeal to a Full Bench of the decision to deny appointed counsel for an application to have an interdict set aside, the South Eastern Cape Local Division interpreted the term 'accused' generously to entitle the applicant to legal representation in the interdict application,860 and also determined that failing the Legal Aid Board's means test was not the relevant prima facie consideration entitling one to state-funded counsel. The threshold question was simply whether the accused was unable to afford a lawyer.861 In Bangindawo & Others v Head of the Nyanda Regional Authority & Another, the Transkei High Court upheld the right to counsel in criminal proceedings before regional authority courts.862

The practical difficulty of heeding the right to counsel, even where 'substantial injustice' would result from a failure, is pre-eminently a limitation question. The right to counsel is the closest the criminal procedure rights come to second-generation rights. However, the ability of the state to respect this right should not be regarded as part of the definition of the right. Two-stage analysis is possible, and the question whether substantial injustice would result need not be answered pusillanimously if it is acknowledged that such injustice might be justifiable under the limitations clause.

859 Vermaas (supra) at para 15. This ruling should not be seen as referring to a discretion. See § 51.1(b)(ii) supra. See Mgicina v Regional Magistrate, Lenasia, & Another 1997 (2) SACR 711 (W), 733 (Borchers J held that 'substantial injustice' in IC s 25(3)(e) did not refer to the narrow case where the presiding officer determined that the final decision would be wrong if the trial proceeded without representation, but referred rather to the question 'whether procedurally the trial would be a fair one'.)

860 See §§ 51.1(b)(i) and 51.2 supra.

861 Msila (supra) at 242-43. It may be pointed out that indigence is a factor of the 'injustice' test, not a necessary precondition to be considered for it. It may be difficult to argue that 'substantial injustice' would result if someone who can afford a lawyer is not provided with one at state expense, but that assumes a particular meaning to be attached to 'injustice'. It may for instance be that in a cut-throat defence involving two co-accused, not providing both with legal aid would threaten substantial injustice, irrespective of the fact that one of them is not sufficiently indigent to be entitled to assistance in other circumstances. 'Substantial injustice' is something every accused may invoke for the purposes of IC s 25(3)(e) and FC s 35(3)(f). Msila left open the position obtaining when an accused was able to contribute towards the defence. Msila (supra) at 243.

862 1998 (3) BCLR 314 (Tk). This conclusion was reached despite the court’s finding elsewhere in the judgment that there was ‘no reason whatsoever for the imposition of the Western conception of the notions of judicial impartiality and independence in the African customary law setting’ and the court’s recognition that legal representation was ‘unknown’ in African customary law. Ibid at 327, 330. See § 51.5(e)(i) supra. It was, however, pointed out in Hamata & Another v Chairperson, Peninsula Technikon Internal Disciplinary Committee & Others that the right to legal representation did not extend to persons appearing before an administrative tribunal. 2000 (4) SA 621 (C). See also G van der Walt & A van der Walt The Right to Legal Representation When Appearing Before a Disciplinary Enquiry (2004) 538.
The declaratory force of a *prima facie* violation, albeit justified, would serve to affirm the continued recognition of the right as a right rather than as a hope.\textsuperscript{863}

The Witwatersrand Local Division was asked to accept this argument as persuasive in *Mgcina v Regional Magistrate, Lenasia, & Another.*\textsuperscript{864} Trengove SC argued that imposing the punishment of imprisonment upon an undefended accused would in all cases amount to 'substantial injustice'. Borchers J declined to rule on the issue.\textsuperscript{865} He found, instead, that the accused's right to be informed of the right to counsel to have been violated. Stegmann J regarded the argument as 'very persuasive', but remarked that if the framers had intended such a simple and straightforward rule they could, and presumably would, have enshrined it in the Interim Constitution.\textsuperscript{866} He also pointed out that the *dicta* in *S v Vermaas; S v Du Plessis* did not support such a rule.\textsuperscript{867} Still, he did offer the following qualification:

> Any magistrate, faced with the trial of an indigent accused who has no legal representation, will be conscious that if he should try the accused and sentenced him to imprisonment (without the option of a fine or any other non-custodial sentence) there will be a considerable likelihood of an approach being made to the High Court on behalf of the accused for an order setting aside his trial and conviction on the ground that his fundamental rights . . . were infringed. For practical purposes, therefore, although we cannot now enunciate such a rule, we may well find that (apart from a few exceptional cases, such as those in which the accused person is himself legally qualified and experienced) no indigent accused persons will be sent to prison unless they have been provided with a defence at state expense.\textsuperscript{868}

An important decision concerning the duration of the right to legal representation is to be found in *S v Mofokeng.*\textsuperscript{869} The accused was convicted of robbery with aggravating circumstances and sentenced to eight years' imprisonment in the Regional Division of Southern Transvaal. Thereafter his counsel had filed heads of argument on appeal in which he had set out the facts and then submitted that the appellant had correctly been convicted and that the sentence imposed was appropriate. The Witwatersrand Local Division held that the right to legal representation did not end when the trial court pronounced its sentence, but that

\textsuperscript{863} See Vermaas (supra) at para 16 (On the lack of any perceptible progress.) The reasoning in Lavhengwa on this issue is hard to follow. The court tracked the gradual recognition of the right to counsel in the United States over 34 years and remarked: 'South Africa may very well require a longer period to reach the ideal of an unqualified right to legal counsel'. Ibid at 489. If the American development referred to was of a practical or economic nature, the conclusion would be sound. But the learned judge was referring to a conceptual development: the development of an argument. If this argument is persuasive, there is no reason to wait 34 years or more to accept it.

\textsuperscript{864} 1997 (2) SACR 711 (W)('Mgcina').

\textsuperscript{865} Ibid at 733.

\textsuperscript{866} Ibid at 739.

\textsuperscript{867} 1995 (3) SA 292 (CC), 1995 (7) BCLR 851 (CC), 1995 (2) SACR 125 (CC).

\textsuperscript{868} Mgcina (supra) at 739.

\textsuperscript{869} 2004 (1) SACR 349 (W)('Mofokeng'). See also *S v Ntuli* 2003 (4) SA 258 (W)('Ntuli').
this right existed during the whole of the legal process until the last court had spoken the last word.\textsuperscript{870} The sentenced person was entitled to challenge the court's decision in review proceedings or by way of an appeal. The essence of the right to legal representation is the right to effective legal representation.\textsuperscript{871} In the instant case there was no indication that the appellant had withdrawn his appeal or had instructed his counsel to concede the correctness of any of the trial court's findings. Counsel had thus breached his duty of loyalty and had been obliged to withdraw from the case if he felt he could not advance his client's case on appeal.\textsuperscript{872}

\textbf{(i) The right to be presumed innocent}

The right to be presumed innocent, in the shape of a right to expect the state to bear the full burden of proving the case and therefore not to be allowed to compel assistance from the accused, should be regarded as the governing principle behind the silence and self-incrimination rights of accused and arrested persons.\textsuperscript{873} The presumption of innocence has been linked to the right to counsel\textsuperscript{874} and played a pivotal role ascribed in determining the ambit of the right to a trial within a reasonable time.\textsuperscript{875} The presumption of innocence exerts the greatest influence, however, during the evidential sphere at trial. The presumption of innocence requires the final burden of persuasion to be on the prosecution. It is violated wherever a conviction may follow in a case where there is doubt about the accused's guilt. This aspect of the presumption is discussed in detail elsewhere.\textsuperscript{876} The presumption of innocence is by no means confined to this aspect.\textsuperscript{877} The presumption is the golden thread which runs throughout the criminal law. A Lord Sankey noted,\textsuperscript{878} and, as Sir James Fitzjames Stephen pointed out, the presumption, 'though by no means confined to the criminal law, pervades the whole of its

\textsuperscript{870} Mofokeng (supra) at para 17.

\textsuperscript{871} Ibid at para 18. See also Beyers v Director of Public Prosecutions, Western Cape & Others 2003 (1) SACR 164 (C), 166-167 and Ntuli (supra) at para 16.

\textsuperscript{872} Mofokeng (supra) at para 19.

\textsuperscript{873} See §§ 51.4(b)(i) and (iii) supra. See, particularly, S v Mathebula 1997 (1) BCLR 123 (W)(Held that the principle that an accused need not assist the state in creating a case to meet rendered a discharge under s 174 of the Criminal Procedure Act 51 of 1977 imperative where there was no admissible evidence upon which a reasonable court might convict, but there was a reasonable possibility that the accused might supplement the state's case in his or her defence); S v Jama & Another 1998 (4) BCLR 485 (N)('Jama')(In Jama this principle was applied with some vigour: the accused had all but convicted themselves of rape in their plea explanations, and there was every prospect that they would do so again in their testimony (as indeed they proceeded to do), although there was no admissible evidence at the end of the state's case linking them to the rape of the complainant.) Cf. S v Makofane 1998 (1) SACR 603 (T).

\textsuperscript{874} See § 51.5(g) supra.

\textsuperscript{875} Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC), 1997 (12) BCLR 1675 (CC) ('Sanderson')(Discussed in § 51.5(f) supra.) See also Uncedo Taxi Service Association v Maninjwa & Others 1998 (3) SA 417 (E), 1998 (6) BCLR 683 (E)(On the link between liberty and the presumption of innocence. For more on this link, see § 51.1(al)(ii) and (iv) supra. This link was responsible for the court's application of fair trial principles in the sphere of contempt proceedings brought by way of notice of motion.)
administration'. These observations have significance for the interpretation of evidence as well as for the ultimate burden of proof, and also for the opportunity of the accused to present evidence and have it entertained by the Court. Activity in court premised on the guilt of the accused threatens the presumption of innocence. Procedures designed to protect victims of crime from further victimization place considerable strain upon the presumption of innocence, since the difficult suspension of disbelief entailed by respect for the presumption becomes almost impossible where the procedures adopted assume the accused is guilty as charged.

879 In S v J the Supreme Court of Appeal rejected the cautionary rule as applied to the testimony of complainants in sexual cases, on the basis that the rule was outdated, irrational and sexually discriminatory. The court held that the rule in fact increased the burden of the state to an onus to do more than prove the accused's guilt beyond reasonable doubt. Since the presumption of innocence demanded no more than proof beyond reasonable doubt, there was no basis for the rule.

Violation of the presumption before trial may be difficult to bring under the fair trial right if the accused has not been formally charged, but where such violation

876 The main case law in this area has been that concerned with reverse onus provisions. The leading case is S v Zuma & Others 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC). Whether the presumption is at stake should not be mechanically tied to the syntax of a statutory provision, lest reverse onus provisions be easily avoided by creating peculiar statutory offences. See § 51.1(a)(iii) supra.

877 See S v Strauss 1995 (5) BCLR 623, 629 (O)(Rejects the claim that confessional evidence per se violated the presumption of innocence. Hattingh J said: 'Die reg om onskuldig geag te word is, in populêre terme, 'n manier om uitdrukking te verleen aan die feit dat die staat beklee is met die primêre en finale bewyssas om die skuld van die beskuldigde bo redelike twyfel te bewys.' See also A Skeen ‘A Bill of Rights and the Presumption of Innocence' (1993) 9 SAJHR 523.

878 Woolmington v DPP [1935] AC 462, 481.


880 See McKinley's case (1817) 33 St Tr 275 (Construction of oaths in favorem libertatis was based upon the presumption of innocence.) See also JB Thayer A Treatise on Evidence at the Common Law (1898) 272ff. The proper way to accord respect to the presumption in the forms of reasoning and chains of inference adopted by a court famously exercised the Australian High Court in Chamberlain v R(2) (1984) 153 CLR 521. See also Morin v R [1988] 2 SCR 345; R v Blom 1939 AD 188. See S v Thebus & Another 2003 (6) SA 505 (CC), 2003 (10) BCLR 1100 (CC)(The Constitutional Court upheld the constitutionality of the common purpose doctrine as it did not relate to a reverse onus or any presumption relieving the State of any part of the burden of proof.)

881 See LH Tribe 'Trial by Mathematics: Precision and Ritual in the Legal Process' (1971) 84 Harvard LR 1329, 1370-1371 ('[N]o less important are what seem to me the intangible aspects of that commitment [the presumption]: its expressive and educative nature as a refusal to acknowledge prosecutorial omniscience in the face of the defendant's protest of innocence, and as an affirmation of respect for the accused, a respect expressed by the trier's willingness to listen to all the accused has to say before reaching any judgment, even a tentative one, as to his probable guilt... The presumption retains force not as a factual judgment but as a normative one — as a judgment that society ought to speak of accused men as innocent, and treat them as innocent, until they have been properly convicted after all they have to offer in their defense has been carefully weighed. The suspicion that many are in fact guilty need not undermine either this normative conclusion or its symbolic expression through trial procedure.' (emphasis added).)
would be operative at the trial itself, the accused's right to be presumed innocent is violated at trial. A striking example of this phenomenon occurred in *S v Mbolombo*. The assumption that the bail applicant was guilty, which led to the high bail amount, would be the direct operating cause of regarding the applicant's payment of the amount as an indication of guilt at the trial. The pre-trial inversion of the presumption, in other words, became a violation of the right of an accused to be presumed innocent at the trial. It is submitted that whether the violation was justified at the granting of bail was a different question from whether it should have been allowed to operate at the trial.

882 On the rejection of a claim that use of a shield between a rape complainant and the accused violated the presumption of innocence, see *R v Levojanni* (1993) 4 SCR 475. *Levojanni* secured the approval of the court in *Klink v Regional Court Magistrate NO & Others* 1996 (3) BCLR 402, 415 (E). In *Klink*, however, the point was argued and decided on the right to a public trial. Consider the analogous problem of having the absence of a witness through fear of intimidation explained to the Court to the great prejudice of the accused's entitlement to the presumption of innocence. English courts have been anxious to avoid such prejudice. See *R v Ricketts* [1991] Crim LR 915; *R v Churchill* [1993] Crim LR 285. See also *S v Baloyi* 2000 (1) SACR 81 (CC), 2000 (2) SA 425 (CC). (Court held that s 3(5) of the Prevention of Family Violence Act 133 of 1993, read with s 170 of the Criminal Procedure Act 51 of 1977, did not impose a reverse onus on the accused as it merely invoked the procedure in s 170 and not the reverse onus it included.)

883 1998 (2) SA 984 (SCA), 1998 (4) BCLR 424 (SCA), 1998 (1) SACR 470 (SCA) (*J*). This decision was affirmed in *S v M* 2000 (1) SACR 484 (W). A contrary view was, however, taken in *S v Van der Ross* 2002 (2) SACR 362 (C).

884 *J* (supra) at 1008G-1009B.

885 Ibid at 1009F. It is respectfully submitted that the Court's reasoning, if applied literally, would mean that all rules of procedure designed to act as safeguards to ensure that the presumption of innocence was adequately protected would be unnecessary additions to the state's burden of proof. This could be so only if the 'beyond reasonable doubt' standard could be measured with mathematical precision, which is not the case. See BJ Shapiro *Beyond Reasonable Doubt* and *Probable Cause*: Historical Perspectives on the Anglo-American Law of Evidence (1991); CR Nesson *Reasonable Doubt and Permissive Inferences: The Value of Complexity* (1979) 92 Harvard LR 1187. *J* was not really concerned with a higher (or lower) standard than proof beyond reasonable doubt — it was concerned merely with the merits of some built-in pointers to potential doubt. That there was a strong thread of prejudice and stereotype to the underlying assumptions in the case of sexual complainants cannot really be denied. But the Supreme Court of Appeal, with respect, overwhelmingly over-emphasized the influence of this thread in the development of the rule. The method in the rule's madness was captured in the passage from *S v Snyman*. 1968 (2) SA 582 (A) as cited in *J* (supra) at 1007A-E. That the volatile rule will no longer be applied mechanically in every sexual case is probably for the best. But the rhetorical over-emphasis on the offensive aspects of its lineage by the Supreme Court of Appeal may have unfortunate results for the presumption of innocence. It may spawn a self-censored reluctance on the part of judicial officers, in cases where an 'evidential basis' suggests that caution is appropriate, to take into consideration the complainant's peculiar knowledge and particularly 'exculpatory' motives in situations where consensual sex would have entailed serious negative consequences for the complainant.

886 1995 (5) BCLR 614 (C). See § 51.4(d) supra.

887 For analogous reasoning which fuelled the creation of a use immunity at trial but allowed pre-trial compulsion of self-incriminating evidence, see *Ferreira v Levin & Others; Vryenhoek & Others v Powell NO & Others* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). See also *S v Botha & Others* 1995 (2) SACR 605 (W); *S v Diamini; S v Dladla & Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC) as discussed in § 51.5(j)(iii) infra.
The accused’s constitutional right to be presumed innocent has prompted the Constitutional Court to declare unconstitutional various provisions that place a reverse onus on the accused.\textsuperscript{888} Thus in \textit{S v Hoosen} the High Court held that s 37 of the General Law Amendment Act,\textsuperscript{889} which relieved the state of proving \textit{mens rea} on the part of the accused, infringed the accused’s right to be presumed innocent.\textsuperscript{890} It had the effect that an accused could be found guilty in spite of the existence of reasonable doubt as to his or her guilt. This infringement could not be justified, especially since the burden to prove the presence of \textit{mens rea} was not too onerous for the state. The Constitutional Court later confirmed this proposition in \textit{S v Manamela & Another}.\textsuperscript{891}

Section 21(1)(a)(i) of the Drugs and Drug Trafficking Act\textsuperscript{892} created a presumption that, where an accused was found in possession of more than 115 grams of dagga, such accused had been dealing in dagga and would be so convicted unless the accused could prove that he or she was not dealing in dagga. The Constitutional Court in \textit{S v Bhulwana; S v Gwadiso}\textsuperscript{893} and in \textit{S v Manyonyo}\textsuperscript{894} declared the presumption unconstitutional as an unjustifiable limitation of the accused’s right to be presumed innocent as contained in FC s 35(3)(h).\textsuperscript{895}

The Constitutional Court in \textit{S v Mbatha; S v Prinsloo}\textsuperscript{896} considered the constitutionality of s 40(i) of the Arms and Ammunitions Act.\textsuperscript{897} The Act contained a presumption assisting the state in proving the \textit{actus reus} of ‘possession’ for a conviction of unlawful possession of arms and ammunition. The \textit{Mbatha} Court held that this provision was an unjustifiable infringement of the accused’s right to be presumed innocent. In another reverse onus matter, the Constitutional Court

\begin{footnotesize}
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\item \textsuperscript{888} Presumptions against the accused are created in numerous statutory provisions. See J Burchell \textit{Principles of Criminal Law} (2005) 124 (Lists, amongst others, the following examples: s 1(2) of the Prevention of Illegal Squatting Act 52 of 1951; s 2 of the Witchcraft Suppression Act 3 of 1957; s 2 of the Gambling Act 51 of 1965; s 1A(2) of the Intimidation Act 72 of 1982; and ss 217(1)(b)(ii), 245 and 332(5) of the Criminal Procedure Act 51 of 1977.)
\item \textsuperscript{889} Act 62 of 1955.
\item \textsuperscript{890} 1999 (9) BCLR 987 (N).
\item \textsuperscript{891} 2000 (1) SACR 414 (CC), 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC) (‘\textit{Manamela}’). See also Burchell (supra) at 121.
\item \textsuperscript{892} 140 of 1992.
\item \textsuperscript{893} 1996 (1) SA 388 (CC), 1995 (2) SACR 748 (CC).
\item \textsuperscript{894} 1999 (12) BCLR 1438 (CC) (‘\textit{Manyonyo}’).
\item \textsuperscript{895} Ibid at para 16.
\item \textsuperscript{896} 1996 (2) SA 464 (CC), 1996 (3) BCLR 293 (CC), 1996 (1) SACR 371 (CC).
\item \textsuperscript{897} Act 75 of 1969.
\end{itemize}
\end{footnotesize}
in *S v Coetzee* declared unconstitutional s 245 and s 332(5) of the Criminal Procedure Act as unjustifiable infringements of the accused's right to be presumed innocent.\(^{898}\)

The constitutionality of s 72(4)\(^{899}\) of the Criminal Procedure Act was also successfully challenged in *S v Singo*.\(^{900}\) The effect of the phrase 'unless such a person satisfies the court that his failure was not due to a fault on his part' was that, if the probabilities were evenly balanced, the accused would fail to satisfy the Court as required and conviction and sentence would follow. This limited the right of an accused to be presumed innocent and the right to remain silent. Although the incursion into the right to silence was found to be justifiable,\(^{901}\) the legal burden requiring conviction despite the existence of reasonable doubt was not. The Court found it necessary to read in words to establish the evidentiary burden: s 72(4) was to be read as though the words 'there is a reasonable probability that' appeared between the words 'that' and 'his failure'.\(^{902}\)

Finally, the Transvaal Provincial Division in *Lodi v MEC for Nature and Conservation and Tourism, Gauteng, & Others*\(^{903}\) declared unconstitutional reverse onus provisions found in s 37(1)(c)\(^{904}\) and s 110(1)(b) and (c)\(^{905}\) of the Nature Conservation Ordinance.\(^{906}\) Patel J, applying both *Manamela* and *Singo*, held that these provisions violated the accused's constitutional right to be presumed innocent and to remain silent.\(^{907}\)

**\(j\)**  *Silence and self-incrimination at trial*

**\(i\)**  *Silence, self-incrimination, and the presumption of innocence*

The right to silence at trial is coupled with the right to be presumed innocent in FC s 35(3)(h). But the right not to be compelled to give self-incriminating evidence is given separately in FC s 35(3)(j).

\(^{898}\) 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC) at para 52 (Langa J).

\(^{899}\)  Section 72(4) provides for a summary judgment procedure.

\(^{900}\) 2002 (4) SA 858 (CC), 2002 (8) BCLR 793 (CC)('Singo').

\(^{901}\)  Ibid at para 37.

\(^{902}\)  Ibid at para 44.

\(^{903}\) 2005 (3) SA 381 (T).

\(^{904}\)  Section 37(1)(c) called for 'reasonable cause, proof of which shall be on the accused'.

\(^{905}\)  Sections 110(1)(b) and (c) provided for the application of certain presumptions 'until the contrary is proved'.

\(^{906}\) 12 of 1983 (G).

\(^{907}\)  *Singo* (supra) at paras 30 and 35.
That silence and self-incrimination rights at trial are based upon the presumption of innocence requires less argument than that pre-trial silence and self-incrimination rights are based upon the presumption; the endorsement of the latter proposition by the Constitutional Court in *S v Zuma & Others* \(^{908}\) must be taken as *a fortiori* confirmation of the less controversial former proposition. \(^{909}\) Furthermore, silence and self-incrimination are very closely related. \(^{910}\) The difference for practical and analytical purposes is that silence deals with the prohibition on a compulsion to testify and with the inferences that may be drawn from a failure to testify, and self-incrimination with the extent to which the accused can be said to be compulsorily conscripted against himself or herself by any given procedure. Overlap is difficult to avoid, and elements of self-incrimination are often discussed in terms of the right to silence, and silence in terms of self-incrimination. \(^{911}\)

(ii) The right to silence at trial

In *S v Maseko*, the court held that the words 'during plea proceedings' found in IC s 25(3)(c) were not restricted to proceedings following upon a plea of not guilty, but extended also to proceedings held upon a plea of guilty. \(^{912}\) Thus, the right to be informed of the right to silence applied to such proceedings and any violation of the right entailed the inadmissibility at the trial of what was said during the plea proceedings. The wording in FC s 35(3)(h) refers only to 'the proceedings'. It draws no distinction between 'plea proceedings or trial' (IC s 25(3)(c)). This phrase must be read to include plea proceedings and should not be understood to indicate that the right to silence has been limited to the trial proper. \(^{913}\)

The fact that arguments in favour of inferences from silence at trial do not support inferences from pre-trial silence does not mean that those arguments should be accepted in the trial context. The view expressed by Etienne du Toit — that an adverse inference from silence at trial would amount to an unacceptable penalty for the exercise of a right, as persuasively argued in the minority judgments of Kentridge and Baron JJA in *Attorney-General v Moagi* \(^{914}\) — was rejected by Claassen J in *S v Lavhengwa* \(^{915}\) in favour of the view expressed by Wim Trengove. The latter view holds that such inferences were in line with common sense, affected only the choice to use the right and not the right itself, and were in any event justifiable if violative of the right to silence. \(^{916}\) The argument on choice was endorsed also by the Northern Cape Division in *S v Scholtz & Another*. \(^{917}\) But in *S v Brown & 'n Ander* \(^{918}\) the same division held that use of silence at trial as evidence of guilt, as opposed to allowing the silence not to upset a *prima facie* case based on uncontroverted evidence, would be in direct conflict ('direk in stryd') with the right to silence.

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908 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) at para 33.

909 See § 51.4(b) supra.

910 On the ‘seamless web’, see § 51.4 (b)(i) supra.

911 See § 51.4(b) supra. For more on the presumption of innocence in the sphere of bail see § 51.4(d) supra.

912 1996 (9) BCLR 1137 (W), 1996 (2) SACR 91 (W)('Maseko').
guaranteed by the Interim Constitution. Moreover, the common law authorities relied upon in Scholtz were subject to reassessment in view of the ‘shift in emphasis’ brought about by the Interim Constitution: ‘Geen nadelige afleiding kan teen die beskuldigde gemaak word, bloot omdat hy sy reg om te swyg uitgeoefen het nie.’

*Brown* was endorsed in *S v Khomunala & Another*. There Noorbhai AJ held that the interaction between the right to silence, the right to present evidence, and the consequence of silence should be explained to the accused as set out in *Brown*.

The Constitutional Court refrained from ruling directly on this question in *Osman & Another v Attorney-General, Transvaal*. But it expressed clear approval of the view of the majority in *Moagi*, and based its decision upon the premise that there

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913 The decision in *S v Damons & Others* — in which Maseko was held to have been ‘clearly wrong’ — should be regarded as an aberration. 1997 (2) SACR 218 (W) (‘*Damons*’). Nugent J’s finding that it had not been settled law before the constitutional era that the accused enjoyed the right to remain silent at s 119 plea proceedings flew in the face of Milne JA’s pertinent observation in *S v Mabaso & Another* 1990 (3) SA 185 (A), 211D that *S v Nkosi & ’n Ander* 1984 (3) SA 345 (A) clearly implied that the right to silence did exist at such proceedings and that this proposition was not questioned (by the Mabaso majority or by the state). Milne JA’s principled rejection of the incongruous denial of the right to be informed of this right must now be afforded the full weight of its persuasion, in light of the constitutional authority, to allow the right to silence to make sense — particularly given the sensitivity to rights jurisprudence displayed in the minority judgment in *Mabaso*. It is remarkable that the *Damons* judgment could deny the post-constitutional existence of a right while conceding that it was assumed to exist before the Interim Constitution, merely because it was never expressly held to have existed. The argument that ‘a right to continue to remain silent [was] inherently incompatible with a plea of guilty’ — *Damons* (supra) at 224 — premised as it was on the notion that a plea of guilty constituted absolute and final incrimination in any event — *Nkosi* (supra) at 353; *Mabaso* (supra) at 205; *Damons* (supra) at 225 — begged the very question which was the only legitimate purpose of questioning under s 112(1)(b) via s 119 — namely whether the accused actually intended to admit guilt on every element of the relevant charge. See *Mabaso* (supra) at 212. If s 112(1)(b) can only substitute Star Chamber interrogation for adversarial justice, then s 112(1)(b) must go. If it is merely intended to ensure that a guilty plea was really a guilty plea, then that is all it should be allowed to do. See NC Steytler *The Undefended Accused on Trial* (1988) 107-17. If there is a contradiction between the right to silence or against self-incrimination and the s 112 procedure, then the problem is the procedure, not the right. (It should be stressed that the Damons court was not competent to pronounce upon the constitutionality of s 112(1)(b). *Damons* (supra) at 220C-D.) It is the height of irony that the procedure in our law which so closely resembles the orthodox source of the self-incrimination privilege was regarded as an exception to the exercise of this privilege as a constitutional right. The fact that the relevant guilty pleas in *Damons* were found to have been improperly offered was the best illustration of the instant abuse of s 112. See, eg, *S v Nkabinde*. 1998 (8) BCLR 996, 1001D-E (N) (‘Through our new Constitution those inquisitorial elements in the Criminal Procedure Act are being systematically hunted down and erased, where found to be inimical to the tenets of the Constitution. . . .’)

914 (1982)(2) BLR 124 (CA).


918 1996 (11) BCLR 1480 (NC), 1996 (2) SACR 49 (NC)(‘Brown’).
was no violation of the right to silence if a court took account of a failure to testify. Madala J cited with approval, as ‘aptly put’, the following extract from *S v Sidziya & Others*:

The right entrenched in [IC] s 25(3)(c) means no more than that an accused person has a right of election whether or not to say anything during the plea proceedings or during the stage when he may testify in his defence. The exercise of this right like the exercise of any other must involve the appreciation of the risks which may confront any person who has to make an election. Inasmuch as skilful cross-examination could present obvious dangers to an accused should he elect to testify, there is no sound basis for reasoning that, if he elects to remain silent, no inferences can be drawn against him.\(^9\)

It is one thing to allow the uncontroverted character of state evidence, especially if it is evidence the cogency of which depends on the degree to which it is unexplained, to ripen into proof beyond reasonable doubt when explanations are not forthcoming.\(^5\) It is quite another to employ silence as positive evidence of guilt. The distinction is fine, but real, and should be insisted upon, not only for pre-trial silence but also as far as silence at trial is concerned. The Final Constitution, after all, entrenches the right to silence separately, in addition to the right against compelled self-incrimination. A suggestion that the reasoning of the US Supreme Court in *Griffin v California*\(^6\) – which prohibited comment upon and permission for the jury to use inferences from silence — should not apply outside the context of jury trials\(^7\)

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\(^9\) Ibid at 1489-90. The fact that the relevant silence in *Brown* was silence at a *voir dire* determination of the voluntariness of a confession must not be confused with the question of the propriety of the use of admissions (including silence) made during a *voir dire* as evidence of guilt at the main trial. See § 51.5(iii) infra. The inference sought to be drawn in *Brown* was a negative inference as to voluntariness, ie an inference the effects of which were to be contained within the confines of the *voir dire*.

\(^5\) Ibid at 1491. See SE van der Merwe 'The Constitutional Passive Defence Right of an Accused Versus Prosecutorial and Judicial Comment on Silence: Must We Follow *Griffin v California*’ (1994) 15 Obiter 1; T Geldenhuys & G Joubert (eds) *Criminal Procedure Handbook* (1994) 6-7. Both works were cited with approval by the court. See also *Brown* (supra) at 1487-89 and 1491 respectively.

\(^6\) 1998 (1) SACR 362 (V) (*Khomunala*).

\(^7\) Ibid at 365E-366A. It must be respectfully submitted that the magistrate in *Khomunala* seemed to have done a good job of explaining the situation, apart from a failure to mention the fact that silence as such could not incriminate, and that a plea explanation did not act as evidence for the defence.


\(^9\) 1995 (12) BCLR 1626 (Tk) as cited in *Osman* (supra) at para 20.

\(^6\) See *Osman & Another v Attorney-General of Transvaal* 1998 (2) BCLR 165 (T), 1998 (1) SACR 28 (T), 31-32 (in the context of a failure to provide a satisfactory account of possession of goods reasonably suspected of being stolen. The facial challenge to s 36 of Act 62 of 1955 failed as a result.


\(^7\) See *Brown* (supra) at 1490.
would ignore the fact that the exposure of a judge who is the trier of fact to inadmissible evidence puts considerable strain on the presumption of innocence. A judge, hardened by a quotidian pageant of hardened criminals, may find it very hard indeed to heed the presumption, so that it may well be more, rather than less, important for rules of evidence to be strictly followed where a judge is acting as the factfinder.\textsuperscript{928}

The accused's right to silence is also protected by the rule that he or she need not disclose the nature of his or her defence in advance, and can await developments in the trial to decide whether it is necessary to lead evidence on certain points and, frankly, to determine what to say about certain things. As a result, the relevance of what the accused is up to is not always clear to the court. Determining the relevance of questions may prejudice this privilege of passivity. This problem confronted the court in \textit{S v M}.\textsuperscript{929} Because the magistrate did not know that the unrepresented accused was to employ an alibi as his defence to a charge of rape, thereby rendering irrelevant almost all the harrowing questioning of the complainant about the details of the rape,\textsuperscript{930} the accused was allowed a nine-hour free run until the alibi defence was revealed. Donen AJ (Davis J concurring) held:

\begin{quote}
The value accorded to the right to human dignity stands alongside the right to life in the Interim and Final Constitutions. Before this kind of questioning can be tolerated in cross-examination, its relevance to the issues must first be established from the cross-examiner. There are limits to an accused's right of silence. The protection of the dignity of a rape victim raises an area of reasonable and justifiable limit to an accused's right of silence. . . . In this matter the fairness of the appellant's trial would not have been affected in any way had the relevance of the offending questions to the appellant's defence been investigated and then ruled inadmissible.\textsuperscript{931}
\end{quote}

This view can be defended on the basis that the asking of a question in cross-examination amounts to a representation of its relevance. If the question is problematic for dignity, it makes sense to ask why it is relevant to the defence, with due sensitivity to the accused's passivity right. In any event, the simple question whether intercourse is at issue or not, or intercourse at a particular time or place or in a particular manner, may be answered as a matter of practice when questions suggesting such a dispute are asked in cross-examination and tacitly place the accused's version in opposition to that of the complainant. It is true that relevance to general credibility does not require relevance to the issue, but there is surely little wrong with limiting invasive and embarrassing questions that go solely to credibility and consistency. Furthermore, the biggest danger of violating this aspect of passivity, namely doing away with the accused's entitlement to be safe until a case is made out by the state, can be addressed adequately if the state may not, when

\textsuperscript{928} For a comprehensive discussion of binding judges to rules of evidence, see S Doran, JJ Jackson & ML Seigel 'Rethinking Adversariness in Nonjury Criminal Trials' (1995) 23 American Journal of Criminal Law 1.

\textsuperscript{929} 1999 (1) SACR 664 (C)('\textit{M}'). See § 51.5(k) infra.

\textsuperscript{930} 'Almost all' because the accused did allege consensual sexual intercourse with the complainant on other occasions, in order to explain the medical evidence.

\textsuperscript{931} \textit{M} (supra) at 673H-J.
seeking to avoid a discharge under s 174,\textsuperscript{932} rely upon the possibility that the accused might supplement the state case, based upon intimations from the defence during the presentation of the state case.\textsuperscript{933} In \textit{S v Ndlangamandla & Another} Willis J held that FC s 35(3)(h) had the following three consequences on the discharge of the accused under s 174 of the Criminal Procedure Act at the close of the state's case:\textsuperscript{934}

(1) The Court \textit{mero motu} had to raise the question of possible discharge of the accused where it appeared to the court that there might be no evidence that the accused committed the crime; (2) If the state's evidence was of such poor quality that no reasonable person could possibly accept it, its credibility should be considered at that stage; (3) In the absence of evidence on which a reasonable person would convict the accused, there was no basis for refusing discharge merely because there was a possibility that the defence might supplement the state's case.\textsuperscript{935}

In \textit{S v Manamela & Another}, a majority of the Constitutional Court excised a reverse onus from the offence contained in s 37(1) of the General Law Amendment Act\textsuperscript{936} (receiving stolen goods without reasonable cause for believing that the person from whom the goods were acquired was the owner thereof).\textsuperscript{937} The provisions were found to constitute a justifiable infringement of the right to silence. The court found further that the provision constituted an infringement of the accused's right to be presumed innocent and the phrase 'proof of which shall be on such first-mentioned person' in s 37(1) was declared unconstitutional. The reverse onus was recast as an evidential burden in that s 37(1) was altered to include an additional sentence: 'In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause'.\textsuperscript{938}

\textbf{(iii) Self-incrimination at trial}

The operation of the right against self-incrimination at the trial itself, according to the orthodox theory of the history of the privilege against self-incrimination, lies at the core of the principle.\textsuperscript{939} What is prohibited by this right is compelled self-incrimination at the trial and what is constitutionally relevant is what is meant by

\begin{itemize}
\item \textsuperscript{932} Criminal Procedure Act 51 of 1977.
\item \textsuperscript{933} See § 51.5(/j)(iii) infra.
\item \textsuperscript{934} 1999 (1) SACR 391 (W)('Ndlangamandla').
\item \textsuperscript{935} \textit{Ndlangamundla} (supra) at 393.
\item \textsuperscript{936} Act 62 of 1955.
\item \textsuperscript{937} 2000 (1) SACR 414 (CC), 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 (CC)('Manamela'). See also T van der Walt & S de la Harp 'The Right to Pre-Trial Silence as Part of the Right to a Free and Fair Trial: An Overview' (2005) African Human Rights Law Journal 81.
\item \textsuperscript{938} See J Burchell \textit{Principles of Criminal Law} (2005) 121. The Constitutional Court in Osman held that s 36 of the General Law Amendment Act 62 of 1955 (failure to give a satisfactory account after being found in possession of goods reasonably suspected of having been stolen) is constitutional since it contains no shift in onus or infringement of the right to silence.
\end{itemize}
self-incrimination at trial and by compulsion at trial. 940 May an accused person be compelled to perform certain activities, or undergo certain tests, at trial? 941 In *Minister of Safety and Security & Another v Gaqa* the High Court was approached for an order compelling the respondent, who was suspected of having committed attempted robbery, to submit himself for an operation for the removal of a bullet from his leg. 942 The respondent argued, unsuccessfully, that the order sought by the applicant would infringe his constitutionally entrenched right to be presumed innocent, the right not to be compelled to give self-incriminating evidence, the right to dignity and the right to bodily and psychological integrity. 943 Desai J held that s 27 of the Criminal Procedure Act, providing for the use of force in order to search a person, as well as s 37(1)(c) of the Criminal Procedure Act, permitting an official to take such steps as he deemed necessary to ascertain whether the body of any person had any mark, characteristic or distinguishing feature, permitted the order. Although the order sought involved the limitation of the respondent's rights, his interests were regarded as being of lesser significance. While the intrusion was substantial, community interests had to prevail in that instance. 944 Counsel for the respondent on a number of occasions argued that the removal of the bullet resulted in the respondent's giving self-incriminating evidence, but he did not refer to any authorities in this regard. On the facts this case was also clearly distinguishable from the application the United States Supreme Court had to consider in *Winston v Lee*. 945 In *Levack & Others v Regional Magistrate, Wynberg, & Another* 946 Cameron JA held that it would be wrong to suppose that requiring accused persons to submit voice samples infringed their right not to give self-incriminating evidence. The power that the police enjoyed under s 37 of the Criminal Procedure Act thus included the power to request the accused to supply voice samples. 947 However, the formulation of the

939 See § 51.4(b)(iii) supra.

940 Other aspects of the right against self-incrimination are dealt with in § 51.4(b)(iii) supra.

941 See the discussion on the difference between real and communicative evidence in § 51.4(b)(iii) supra, particularly the 'self-incrimination' dimension recognized by Van Rensburg J to distinguish a 'live' identification parade from a photograph identification 'parade'. *S v Hlalikaya & Others* 1997 (1) SACR 613 (SE).

942 2002 (1) SACR 654 (C)('Gaqa').

943 Ibid at 658.

944 Ibid at 659.


946 2003 (1) SACR 187 (SCA)('Levack').

947 *Levack* (supra) at para 26.
right in FC s 35(3)(j) would certainly seem to cover such compulsion. The accused would be 'giving evidence' incriminating himself or herself if forced to perform such activities or to undergo tests or experiments before the court. And should this then extend also to presenting himself or herself for identification purposes in court? In principle it should, and, given the dangers of dock identification, the ostensibly compelling reasons to justify such violations under FC s 36(1) do not appear as obvious as they might. Inferences from a refusal to co-operate with the prosecution at trial seem to demand similar treatment to that relevant to inferences from a failure to testify.

As far as compulsion at trial proceedings is concerned, an important area of concern is the relationship between various stages, or proceedings, within the same trial. The admission of guilt inherent in the payment of a bail amount, which amount was determined on the basis that the applicant had been enriched by the robbery for which he was being charged, led the court in *S v Mbolombo* to conclude that the dilemma ('verknorsing') with which the applicant was faced as a result of payment of the bail would amount to an admission of guilt was a limitation upon the applicant's rights ('inkoring van die appellant se regte') which he simply had to accept. Although this approach would accord with that of the courts in rejecting a Hobson's choice as a form of compelled self-incrimination, it is not clear whether the court in effect held that there had been a justified violation of the right against self-incrimination, or that the right did not apply. While the finding may be used as authority for the recognition of the violation of the protection against compelled self-incrimination in such circumstances, the court ultimately held the violation to have been justified. In *S v Botha & Others (2)*, the accused had not been informed of his right to silence during a bail application, and the Witwatersrand Local Division held that admissions made during the bail application could not be

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948 See the discussion in C Tapper *Cross and Tapper on Evidence* (8th Edition, 1995) 797f.

949 Mention should be made, however, of the decision of the US Supreme Court in *Holt v United States*, in which the idea that being compelled to fit a shirt as a demonstration to the jury was a violation of the Fifth Amendment was regarded as 'extravagant'. 218 US 245, 252-253 (1910). The Court remarked: 'The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material. The objection in principle would forbid a jury to look at a prisoner and compare his features with a photograph in proof.' Ibid. The Court did leave open the question as to 'how far a court would go in compelling a man to exhibit himself'.

950 See § 51.5(j)(ii) supra. See also *Thatcher v Minister of Justice and Constitutional Development & Others* 2005 (4) SA 543 (C), 2005 (1) SACR 238 (C), [2005] 1 All SA 373 (C) at para 89.

951 1995 (5) BCLR 614 (C).

952 Ibid at 617-18.

953 See § 51.4(b)(iii) supra.

954 On the presumption of innocence dimension in this case, see § 51.5(i) supra.
used against the accused at the trial. In *S v Cloete & Another*, the court, although not endorsing the blanket exclusion of evidence given by an accused at a bail application from the subsequent trial, recognized that it amounted to compelled evidence where an accused faced incarceration for lengthy periods of time. The dilemma the accused in *Mbolombo* simply 'had to accept' was regarded as sufficiently objectionable to require a *voir dire* insulating the bail application from the main trial. The objection that this dilemma does not amount to compulsion may be met by reference to those cases which have sought to protect an accused from being 'compelled' to go into the box to defend admissions elicited during a *voir dire* determination of the voluntariness of a confession. The following dictum from the House of Lords in *R v Brophy* suggests that the compulsion may be attributed to the *voir dire* determination itself:

> It is of the first importance for the administration of justice that an accused person should feel completely free to give evidence at the *voir dire* of any improper methods by which a confession or admission has been extracted from him, for he can almost never make an effective challenge of its admissibility without giving evidence himself. He is thus virtually compelled to give evidence at the *voir dire*, and if his evidence were admissible at the substantive trial, the result might be a significant impairment of his so-called right to silence at the trial.

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956 1999 (2) SACR 137 (C).

957 See *S v De Vries* 1989 (1) SA 228 (A); *S v Sithebe* 1992 (1) SACR 347 (A). See also the reference in *S v Ramavhale* 1996 (1) SACR 639 (A), 651 to an accused's being 'compelled to go into the box' if uncertain about the admissibility of state evidence. See also *S v Mhlakaza & Others* 1996 (6) BCLR 814 (C).

958 [1982] AC 476, 481. The combined effect of the decision in *Brophy* and that of the Privy Council in *Wong Kam-Ming v R* was that, prior to the passing of the Police and Criminal Evidence Act 1984 in the United Kingdom, the position regarding admissions made in the *voir dire* could be put thus: such admissions could not be used to prove guilt, irrespective of whether the confession which formed the subject-matter of the *voir dire* turned out to be admissible. [1980] AC 247. If the challenged confession did turn out to be admissible, admissions made in the *voir dire* could be used, but only as previous inconsistent statements going to credit. If the challenged confession turned out to be inadmissible, admissions could not be used even for the purposes of credit. In *S v Sabisa* it was suggested that cross-examination to credit should always be allowed. 1993 (2) SACR 525 (Tk). See also *S v Gquma & Others (2)* 1994 (2) SACR 182 (O); E Du Toit, FJ De Jager, A Paizes, AS Skeen & S Van der Merwe Commentary on the Criminal Procedure Act (2004) § 217. The 'compulsion' and presumption of innocence considerations should operate consistently: they render use at the trial of the admissions elicited at the *voir dire* repugnant. Either subsequent admissibility should undo this objection both for substantive use of the admissions and for their use as to credit, or such subsequent admissibility should have no effect on the repugnance. Clearly the latter is to be preferred. How can the arguments on 'compulsion' or on respecting the presumption of innocence be affected by what the court decides in the *voir dire*? Furthermore, the distinction between use as to credit and use as to guilt should either be applied consistently whether the challenged statement is subsequently ruled admissible or not, or should be done away with. It makes no sense to attach significance to the distinction according to whether the statement is admitted or not. The objections to attaching significance to the distinction between credit and guilt when it comes to the accused's own testimony are manifest. Whether the accused is lying when asserting his or her innocence and whether he or she is guilty are not questions liable to yield different answers in a significant number of cases. This distinction should not determine the applicability of the accused's right against compelled self-incrimination or the respect accorded the presumption of innocence.
Botha, and the force of the argument in Brophy, suffered a heavy blow in the decision of the Constitutional Court in S v Dlamini; S v Dladla & Others; S v Joubert; S v Schietekat. The applicant challenged constitutionality of s 60(11B) (c) of the Criminal Procedure Act ('the Code'). The provision rendered the record of a bail application admissible at the subsequent criminal trial. The argument was focused particularly upon the plight of the bail applicant accused of an offence under Schedule 6, since such an applicant had to demonstrate, by leading evidence, that 'exceptional circumstances' existed, which, in the interests of justice, permitted his or her release.

The applicant invoked Botha and drew an analogy between the applicant for bail and the accused at the trial within a trial challenging the voluntariness of a confession. Kriegler J held that the argument stood or fell with its invocation of Botha. He held that Botha must fall. First, Botha was distinguishable because it dealt with an accused who had not been warned at the bail hearing of the right against self-incrimination. Secondly, choice was not compulsion, even if it was Hobson's choice.

It is true that evidence given at a bail hearing may ultimately redound to the prejudice of the accused. It can therefore not be denied that there is a certain tension between the right of an arrested accused to make out an effective case for bail by adducing all the requisite supporting evidence, and the battery of rights under s 35(1) and (3) of the Constitution. But that kind of tension is by no means unique to applicants for bail. Nor does its mere existence sound constitutional alarm bells. Choices often have to be faced by people living in open and democratic societies. Indeed, the right to make one's own choices is an indispensable quality of freedom. And often such choices are hard.

This analysis, with respect, begs the question: when is a choice not a choice? After all, the robber asks one to choose between one's money and one's life. The bail provision asks one to choose between detention and testimony. If the unpleasant consequences attendant upon a choice are such as deserve disapproval of the agent responsible for them, then one is dealing with coercion. Kriegler J qualified the finding by stipulating that the choice had to be an informed choice. The analogy

959 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), 1999 (2) SACR 51 (CC)('Dlamini').


961 See § 51.4(d) supra.

962 Dlamini (supra) at para 92.

963 See § 51.4(b)(iii) supra.

964 Dlamini (supra) at para 94.

965 On the truth of the proposition that the definition of coercion is essentially normative, and depends upon our disapproval of the kind of dilemma put before the patient, see R Nozick 'Coercion' in S Morgenbesser, P Suppes & M White (eds) Philosophy, Science and Method: Essays in Honour of Ernest Nagel (1969) 440.

966 Dlamini (supra) at para 94.
with evidence elicited at the trial within a trial was left tantalizingly unaddressed. After all, the accused attempting to show that a confession was not voluntarily made also has a choice to keep quiet. Yet the protection of the trial within a trial process is accepted as important to advance the presumption of innocence and liberty. Kriegler J avoided the analogy by resorting to the device of regarding a self-incrimination question as a question of potentially unconstitutionally obtained evidence. If the trial would still be fair, the evidence went in. If not, it stayed out. Abuse of cross-examination on the merits might render the subsequent trial unfair if incriminating answers were admitted. The right against self-incrimination did not give an accused ‘the right to lie’. Again, one may ask: what exactly is the difference between the concern for the liberty of a bail applicant and the concern for the liberty of an accused asserting that a confession had been obtained improperly? Why recognize the need for a rule in the latter case but not in the former? The principle informing the following provision in the Canadian Charter addresses the concerns adequately while entrenching the right against self-incrimination:

A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

In S v Aimes & Another, the High Court declined to require admissions elicited at bail proceedings in the absence of a warning about silence and self-incrimination rights to be inadmissible at the trial itself. In this case a co-accused desired to cross-examine the accused about the accused's admissions in order to further the co-accused's defence. The court preferred the compromise of allowing the admissions to serve as previous inconsistent statements as far as the co-accused's defence was concerned, but not to be substantively admissible against the accused. The admission of the evidence against the accused would have rendered the trial unfair. In S v Cloete & Another the burden on the presiding officer properly to inform the accused of his or her right against self-incrimination was afforded more weight. In Cloete, the accused was unrepresented during a bail application and was advised of his rights only once by the presiding officer. As a result, the accused

967 Ibid at paras 97 and 100.

968 S v Chavulla en Andere 1999 (1) SACR 39 (C) at para 95.

969 Section 13.

970 1998 (1) SACR 343 (C) (‘Aimes’).

971 Ibid at 350D. Although our courts do not have to consider the prejudicial effect such evidence may have on a jury, it is nevertheless optimistic to expect the judicial officer to keep the two cases separate in the determination of respective guilt. The only way to avoid the conflict of fair trial rights (silence and self-incrimination against the right to adduce evidence) would be to allow a separation of trials. But then the opportunity to cross-examine on the admissions would fall away to the prejudice of the co-accused, and the admissions would become hearsay. This problem has vexed the common law courts in the commonwealth. See R v Beckford and Daley [1991] Crim LR 833; R v Myers [1996] 2 Cr App R 335 (England); McLay v HM Advocate (1994) SCCR 397 (Scotland); Bannon v R (1995) 132 ALR 87 (Australia); R v Crawford [1995] 1 SCR 858 (Canada). In South Africa there would be a strong argument for allowing the admissions to be proved substantively as defence hearsay in terms of s 3 of Act 45 of 1988.
gave clear, self-incriminatory evidence. Davis J held this evidence to be inadmissible during the subsequent trial. Also in *S v Sejaphale* the Transvaal Provincial Division, per Jordaan J, emphasized that the fact that an accused had legal representation during a bail application did not exempt a presiding officer from the duty to explain to the accused his rights in terms of s 60(11B)(c) of the Criminal Procedure Act. In the instant case the magistrate failed to explain to the accused his rights in terms of s 60(11B)(c) but such rights were explained to the accused by his legal representative. Jordaan J held that the magistrate did not have a discretion to allow the record of the bail proceedings at the subsequent trial. Non-compliance with the requirements of s 60(11B)(c) thus made the record inadmissible, as was the case in *S v Botha & Others*.

A much more lenient approach was adopted in *S v Thusi & Others* where the court per Magid J held that there was nothing in s 60(11B)(c) of the Criminal Procedure Act which required a court hearing a bail application to warn the applicant that the evidence given by him in the course of the application might form part of the record at the subsequent trial. If the applicant were treated fairly during the subsequent trial, the fact that no such warning was given would not render the trial unfair. It remained desirable that an unrepresented accused should be warned, although such warning was not deemed to be a prerequisite for a reference to be made to the record of the bail proceedings during the subsequent trial.

*S v Makofane* in effect ignored the effect upon the right against self-incrimination of the discretion to refuse a discharge under s 174 of the Criminal Procedure Act 51 of 1977. That a court should wait for an accused person to supplement the state’s case against him or her when there is insufficient evidence upon which a reasonable court might convict seems unquestionably to be a *prima facie* violation of the principle, underlying the right against compelled self-incrimination, that the state should bear the full burden of proof of guilt. Recourse to the ‘balancing’ nature of fairness cannot, with respect, answer the question whether a discretion to allow a *prima facie* violation withstood the transition to constitutionalism. Nor, with respect, can the question be answered by invoking principles relating to improperly obtained evidence. It is respectfully submitted that the finding in *S v Mathebula & Another*, that the constitutional right against self-incrimination displaced the discretion to refuse a discharge where there was no

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972 1999 (2) SACR 137 (C).

973 2000 (1) SACR 603 (T).

974 2000 (4) BCLR 433 (N).

975 Ibid at 439.

976 1998 (1) SACR 603 (T) (‘Makofane’).

977 See *Makofane* (supra) at 617 invoking *Key v Attorney-General, Cape Provincial Division, & Another* 1996 (4) SA 187 (CC), 1996 (6) BCLR 786 (CC). See also § 51.1(b)(ii) supra.

978 See *Makofane* (supra) at 617I-618H, invoking *S v Khan* 1997 (2) SACR 611 (SCA).
evidence upon which a reasonable court could convict, was unjustifiably rejected as 'clearly wrong' in *Makofane*. A related question (indeed the real question in *Makofane* and *Mathebula*) is whether the possibility that one's co-accused may incriminate one should be regarded as a legitimate ground upon which to refuse a discharge. The questions should not be confused. Self-incrimination problems, while relevant in the latter situation, are not as obviously present as in the former. But the latter situation undoubtedly asks fairness questions. If the material upon which the possibility is based is not admissible evidence against the accused, a separation of trials seems the only fair option, lest the inadmissible evidence, rather than that which it was hoped it would spawn, ultimately convict the accused.

*S v Ndlangamandla & Another* provided welcome resurrection of the *Mathebula* insistence on the constitutional impropriety of allowing the state to avoid a discharge on the possibility that the accused might supplement the state's case. The Canadian decision of *Du Bois v R* was invoked as substantiation for the proposition that 'the provisions of FC s 35(3)(h) with regard to the presumption of innocence, the right to silence, and the right not to testify' had the consequence of disallowing such reliance by the state. Neither *Mathebula* nor *Makofane* was mentioned. Again the close relationship between the presumption of innocence, the right to silence, and the right against compelled self-incrimination was prominent. In an appeal from the Cape Provincial Division the Supreme Court of Appeal in *S v Lubaxa*, referring to both *Mathebula* and *Makofane*, confirmed that the failure to discharge an accused where, at the close of the prosecution's case, there was no possibility of a conviction other than if the accused entered the stand and incriminated herself, constituted a breach of the accused's rights contained in FC s 35(3). Nugent AJA opined that this would ordinarily vitiate a conviction based exclusively on the accused's self-incriminatory evidence.

*(k) The right to adduce and challenge evidence*

979 1997 (1) SACR 10 (W), 1997 (1) BCLR 123 (W).

980 *Makofane* (supra) at 618H.

981 But see *R v Machinini & Others* (2) 1944 WLD 91, 96. Blackwell J remarks about the accused's dilemma in such a case: 'The prosecution's hope is not only that the co-accused may incriminate the accused but, more probably, that a combination of the co-accused's defence and the accused's efforts to deal with it may achieve what the state has failed to do.'

982 1999 (1) SACR 391 (W)('Ndlangamandla').


984 *Ndlangamandla* (supra) at 393G-I.

985 2001 (4) SA 1251 (SCA).

986 Ibid at para 13.

987 Ibid.
In *S v Mosoetsa* the Transvaal Provincial Division emphasized that an accused had to be informed of his right to dispute any evidence which the state might submit and that he could present any evidence to the contrary should he wish to.\(^{989}\) This right, however, did not override the right of the co-accused not to incriminate himself or to remain silent.\(^{990}\) This twofold right, contained in IC s 25(3)(d) and FC s 35(3)(i), may create more constitutional problems than first meet the eye. Clearly, it covers denials of the accused’s right to call witnesses. In *S v Younas*\(^{991}\) a magistrate's refusal to allow the accused in proceedings under the Prevention of Family Violence Act 133 of 1993 to call witnesses, on the basis that the Act gave presiding officers wide powers to depart from normal procedures, that the magistrate was impressed by the complainant's evidence, and that the accused was engaging in ‘delaying tactics’, was held to have been a denial of the accused's ‘fundamental right to a fair hearing’.\(^{992}\) In *S v Mbeje*\(^{993}\) the failure to allow an accused to address the court before judgment was regarded as an ‘outright denial of the *audi alteram partem* rule’.\(^{994}\) In *S v Dodo*, the Court (per Smuts AJ) held that s 51 of the Criminal Law Amendment Act 105 of 1997, which prescribed the imposition of minimum sentences in certain circumstances, did not preclude the accused from adding evidence.\(^{995}\)

The right is a twofold right rather than two separate rights because the adduction of evidence by the accused in a criminal trial represents his or her challenge to the state’s evidence: the accused is not ordinarily\(^{996}\) required to bring anything to the

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\(^{988}\) Ibid at para 18.

\(^{989}\) 2005 (1) SACR 304 (T), 310.

\(^{990}\) *S v Lungile & Another* 1999 (2) SACR 597 (SCA), 605.

\(^{991}\) 1996 (2) SACR 272 (C).

\(^{992}\) Ibid at 274. It was clearly a case calling for the application of the specific right to adduce evidence.

\(^{993}\) 1996 (2) SACR 252 (N).

\(^{994}\) The court was of the opinion that, since the ultimate question was whether the prosecution could demonstrate that the accused had not been prejudiced, overwhelming evidence against the accused might be sufficient to justify such a violation. This, it is submitted, was a violation of the principle that *audi alteram partem* should not yield where fairness would make ‘no difference’. The point was pertinently made in *S v McKenna* 1998 (1) SACR 106 (C). On a charge of contempt against a public prosecutrix, the magistrate had relied upon enquiries he had privately conducted to investigate the truth of the accused’s explanation. Ngcobo J held that the failure to allow the accused to deal with such evidence was a violation of the right to adduce and challenge evidence. The learned judge made the following welcome comment on arguments from futility: ‘There is no place for the so-called no-difference rule under our Constitution.’ Ibid at 118G. See also *S v Zingilo* 1995 (9) BCLR 1186 (O).

\(^{995}\) 2001 (1) SACR 301 (E), 315.

\(^{996}\) Whether the imposition of an evidential burden upon the accused violates the presumption of innocence was, strictly speaking, not answered by the Constitutional Court in *Scagell v Attorney-
Court's attention, and so as much evidence as he or she does adduce amounts to a challenge to the evidence produced by the state in its efforts to justify the deprivation of liberty it is urging. In Canada, the right to adduce and challenge is contained in the single 'principle of fundamental justice' to 'present full answer and defence'. The close relationship between the right to adduce evidence and the right to challenge evidence emerged starkly in the American case of Chambers v Mississippi, an inability to cross-examine a third party about a retraction of the third party's confession to the crime with which the accused was charged was compounded by an inability to adduce evidence of repetitions of the confession made to other parties. The US Supreme Court's finding that the retraction of the confession by the third party amounted to evidence against the accused illustrates the very close relationship between the two parts of the right to adduce and challenge evidence. The inabilities referred to entailed a violation of the due process clause of the Fifth Amendment, 'coupled with' the right to confront one's accusers, contained in the Sixth Amendment. The exclusion of evidence sought to be presented by an accused may therefore raise constitutional problems of much the same kind, involving much the same principles and reasoning, as are entailed by preventing the accused from cross-examining witnesses. The exclusion, for example, of hearsay evidence sought to be adduced by the defence is therefore as much of a potential problem as is the use by the prosecution of hearsay evidence to convict an accused.

General of the Western Cape & Others 1997 (2) SA 368 (CC), 1996 (11) BCLR 1446 (CC).


998 410 US 284 (1973)('Chambers').

999 Ibid at 297. This was despite the fact that the retraction contained no allegations against the accused; it was, however, inconsistent with the accused's innocence if the state's theory that there had been only one killer was accepted.

1000 Ibid at 302.

1001 See R v Seaboyer [1991] 2 SCR 577 (A rule prohibiting the defence from cross-examining a rape complainant about certain categories of her past sexual experience irrespective of the relevance of the evidence was struck down as violating the right to 'present full answer'.)

Use of hearsay evidence by the state violates the accused's right to challenge evidence by cross-examination. Schutz JA in *S v Ramavhale* said the following of the discretion to admit hearsay evidence under s 3 of the Law of Evidence Amendment Act of 1988 in criminal trials: 'An accused person usually has enough to contend with without expecting him also to engage in mortal combat with the absent witness.'

In *S v Ndlovu & Others* the Court held that the provisions of s 3(1)(c) of the Law of Evidence Amendment Act were not in conflict with the provisions of FC s 35(3)(i) as these provisions did not affect the accused's right to adduce and challenge evidence.

The constitutionality of admitting hearsay documentary evidence against an accused under s 212(4)(a) of the Criminal Procedure Act 51 of 1977 came before the

1003 There exists a close link in the United States between the hearsay rule and confrontation clause jurisprudence. See *Dutton v Evans* 400 US 74, 86 n16 (1970); *California v Green* 399 US 149, 155 (1970); *United States v Inadi* 475 US 387, 393 n5 (1986); *Idaho v Wright* 497 US 805, 814 (1990). Generally speaking, 'firmly rooted' exceptions to the hearsay rule at common law are regarded as justified. See *Ohio v Roberts* 448 US 56 (1980); *Idaho v Wright* (supra) at 814. In Canada the position is governed by *R v Potvin* [1989] 1 SCR 525 (Recognizing the implications for the right to 'full answer and defence' of admitting state hearsay) and *R v Khan* [1990] 2 SCR 531 (Subjecting the whole exercise to one of determining the 'necessity and reliability' justifying admission of hearsay evidence.) The European Convention on Human Rights art 6(3)(d) provides for the right to 'examine and have examined the witnesses against him'. Although the Convention operates with a 'margin of appreciation', (ie deference to state arrangements on procedural matters, particularly in the area of the laws of evidence and must allow for the co-existence of inquisitorial and adversarial jurisdictions) the European Court of Human Rights has confirmed the fact that the right to 'examine and have examined' the witnesses against one is seriously implicated by the use of statements, particularly of anonymous witnesses, that are not subjected to adverse cross-examination. See *Unterpertinger v Austria* (1986) 13 EHRR 434; *Barberá, Messegué and Jabardo v Spain* (1988) 11 EHRR 360; *Kostovski v Netherlands* (1989) 12 EHRR 175; *S Stavros The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights: An Analysis of the Convention and a Comparison with Other Instruments* (1993) 230-32 (For qualifications.)

1004 1996 (1) SACR 639 (A), 651.

1005 2001 (1) SACR 85 (W)('Ndlovu').

1006 Act 45 of 1988. Section 3(1) stipulates the following:

'3 Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless- (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or (c) the court, having regard to- (i) the nature of the proceedings; (ii) the nature of the evidence; (iii) the purpose for which the evidence is tendered; (iv) the probative value of the evidence; (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends; (vi) any prejudice to a party which the admission of such evidence might entail; and (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.'

1007 *Ndlovu* (supra) at para 63.
Full Court of the Witwatersrand Local Division in *S v Van der Sandt*.

The documentary hearsay in question was a certificate handed in by a forensic analyst who had taken a blood specimen from the accused and had concluded that the accused's blood-alcohol level while driving had been such as to render him guilty of an offence under the Road Traffic Act 29 of 1989. The provision in question allowed such evidence to state merely the qualifications of the deponent and the fact that the decisive result had been obtained by a process 'requiring skill in chemistry'. The objection was that the right to cross-examine was violated in the context of a statement conclusively deciding the issue before the Court. Van Dijkhorst J held that the mere fact that evidence was tendered by affidavit did not render the proceedings unfair, and that the question lay in the nature of the evidence.

The Court observed that the kind of evidence normally provided under s 212 was of a formal non-contentious nature, and that the capacity to admit such evidence on affidavit was 'essential to the proper administration of justice', which was the reason the provision would be justified under FC s 36(1) even if it did violate the right to cross-examine. The Court then focused on the nature of the evidence, particularly its conclusive effect on the issue, and avoided grasping the nettle concerning the untested nature of such evidence by pointing to the provision for calling the expert in question to testify, which would render such a witness, still a state witness, subject to cross-examination. There was therefore no denial of the opportunity to cross-examine, and the question whether such a denial relating to such evidence would be unconstitutional was in effect left open. The Court did require affidavit evidence to be subject to challenge, and held that the provision in question had to be read to require the deponent to attest to the basis of the finding and the workings of the equipment, in order to render meaningful challenge possible.

It should be clear that an attempt by the accused to adduce positive evidence would involve the same principle. If the distinction between cross-examination about past experience and adduction of evidence of past experience is one between relevance to credit and relevance to the issue respectively, then there would be a relevant distinction between cross-examination and evidence adduced, but any 'full answer' objection to denial of cross-examination as to credit should apply *a fortiori* to a denial of evidence relevant to the issue.

The existence of the right to cross-examine must be adequately explained to the unrepresented accused, and the court's duty to fill in the gaps in examining witnesses in the case of an unrepresented accused may be regarded as a fulfilment of the accused's right to adduce and challenge evidence.

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1008 1997 (2) SACR 116 (W)('Van der Sandt').

1009 Ibid at 132.


1011 In *S v Mbeje* it was held that a repetition of the right before each witness was not required, the following advice given before the first witness having been sufficient: 'It is vitally important that you put your defence to all the state witnesses. Don't allow anything you dispute to go unchallenged. Do you understand?' Magistrates might do worse than adopt this formula as a practice direction. 1996 (2) SACR 252 (N).
A strong line was taken by Khumalo J in *S v Motlhabane*\(^{1013}\) on the denial of the accused's right exhaustively to cross-examine an adverse witness. A prosecution witness who had already been extensively cross-examined died before cross-examination could be completed. The difficulty of predicting what would have emerged under further cross-examination was sufficient to render a conviction based on such incompletely tested evidence a violation of the right to a fair trial.

An equally strong line was taken in *S v Lukhandile*\(^{1014}\) to the violation of an accused's right to adduce the evidence of a witness on the ground that the witness had been present in court. Such a situation, the Court held, had to be assessed for weight; it could not be grounds for ignoring the right to adduce evidence. The irregularity was so fundamental that there had been no trial at all, and the proceedings were set aside.\(^{1015}\)

In *Klink v Regional Magistrate NO & Others*\(^{1016}\) the Court had to determine whether the provision in s 170A of the Criminal Procedure Act 51 of 1977 for a child witness to be cross-examined through an intermediary was an unconstitutional dilution of the right to cross-examination, particularly as the intermediary could convey merely the general purport of the questions put by the cross-examiner. The Court observed that s 170A did not exclude the right to cross-examine.\(^{1017}\) It added that the right to cross-examine was inevitably limited by a court's discretion to disallow oppressive or irrelevant questioning.\(^{1018}\) Whether a procedure infringed the right depended on the effect it had on the purpose of cross-examination, viz to elicit favourable evidence and to cast doubt on the state's case, and hence depended on the circumstances.\(^{1019}\) The Court examined the problems of secondary victimization of vulnerable complainants\(^{1020}\) and found that the ordinary procedures of the criminal justice system were inadequate to address the needs and

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1012 See *S v Moilwa* 1997 (1) SACR 188 (NC).

1013 1995 (8) BCLR 951 (B).

1014 1999 (1) SACR 568 (C).

1015 Ibid at 571A-B.

1016 1996 (3) BCLR 402 (SE) (*Klink*).

1017 Ibid at 409.

1018 Ibid at 410.

1019 *Klink* (supra) at 410.

1020 Ibid. For a caveat about the unfortunate effects of this discourse on the presumption of innocence see § 51.5(i) supra. See also F Cassim 'The Rights of Child Witnesses versus the Accused's Right to Confrontation: A Comparative Perspective' (2003) *Comparative and International Law Journal of South Africa* 63.
requirements of child witnesses.\textsuperscript{1021} The Court’s finding that the right to cross-examine was not impaired came by a puzzling route: first, the filtering of questions through an intermediary was regarded as no limitation on the right to cross-examine, the intermediary acting as an ‘interpreter’.\textsuperscript{1022} Then the acknowledgement that the forcefulness and full benefits of cross-examination were denied in the circumstances was accounted for by balancing the interests of the child against those of the accused, which ‘led’ to the conclusion that the right to challenge was ‘not impaired’.\textsuperscript{1023} The Court then returned to the objection about general purport and filtering, and answered it by weaving together the interests of the child and the consideration that the court’s control over the filtering process ensured that the integrity of the questions asked was maintained.\textsuperscript{1024} Finally, consideration of the importance of truth-finding ‘modified’ by due process requirements was added to conclude that the right had not been violated, and that no limitation analysis was called for.\textsuperscript{1025} It is submitted that, whatever the merits of protecting the child’s interests, these interests had no logical effect on the extent to which the right was being impaired: they should have been regarded solely as justification for such impairment as was entailed by the filtering process.

A sharp division of the degree of impairment and the extent of justification would have answered the crucial question: how much impairment of the effectiveness of rigorous cross-examination is required before the right to adduce and challenge evidence may be said to be sufficiently adversely affected to require justification of the violation under the limitations clause? That there was some impairment of the cross-examination cannot be doubted. This question should have applied also to the degree of impairment inherent in the introduction of physical or technological barriers between the cross-examiner and the witness, since such measures equally undeniably have an adverse effect upon the full force of cross-examination. It was not conducive to an engagement with the

\textsuperscript{1021} The court’s balancing of state interests (protecting the witness) against those of the accused within the definition of the right, in the face of its endorsement of the two-stage analytical structure, is discussed in § 51.1(b)(iv) supra.

\textsuperscript{1022} \textit{Klink} (supra) at 411.

\textsuperscript{1023} Ibid at 412.

\textsuperscript{1024} Ibid at 412- 413.

\textsuperscript{1025} Ibid at 413.

\textsuperscript{1026} See § 51.5(e)(ii) supra. ‘Confrontation’ aspects of the case which might be accommodated under the right to be present when being tried have been alluded to above. See § 51.5(g) supra.
confrontation reasoning in *Maryland v Craig*\(^{1028}\) and the 'full answer and defence' reasoning of the decision of the Supreme Court of Canada in *R v Levogiannis*,\(^ {1029}\) but the focus of its finding remained throughout on the right to a public trial.

The Court in *S v Nkabinde* was far more focused on the right to confront one's accusers as being integral to the adversarial system, a system that received stirring praise in the judgment.\(^ {1030}\)

*S v Stefaans*\(^ {1031}\) cautioned against too unthinking an application of the intermediary procedure without thorough investigation into its necessity and the applicability of the statutory requirements. The following caveats of fairness had to inform the decision, and the accused had to be made aware of his or her right to oppose the procedure.\(^ {1032}\)

1. An intermediary may affect the effectiveness of cross-examination.
2. An accused prima facie had the right to confront his or her accusers and to be confronted by them.
3. Human experience shows that it is easier to lie about someone behind his or her back than to his or her face.

The judgment recognized that s 170A made inroads into the right to challenge evidence, and decreed that this be borne in mind in the interpretation and application of the section. A similar sensitivity was displayed in *S v F*;\(^ {1033}\) where it was pointed out that the procedure encroached upon an accused's rights, and where the Court laid down that its jurisdictional facts had to be established on a balance of probabilities.

A socially explosive question, and one replete with human rights dilemmas, is the clash between the accused's right to challenge evidence and the rape complainant's right to dignity and to freedom from invasive interrogation not reasonably related to the protection of the rights of the accused. A focus on the plight of the 'victim' endangers the presumption of innocence; but allowing the accused a completely

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1028. 497 US 836 (1990), cited in *Klink* (supra) at 414.

1029. [1993] 4 SCR 475. See *Klink* (supra) at 415.

1030. 1998 (8) BCLR 996, 1001B-E (N).

1031. 1999 (1) SACR 182 (C).

1032. Ibid at 188. See the list of guidelines for applying the procedure.

1033. 1999 (1) SACR 571 (C).
free rein tramples the dignity of the complainant and may amount to curial brutality. This is especially problematic when the accused is unrepresented. On the one hand, far more leeway is allowed to ensure that all sources of possible doubt have been addressed, and that an injustice is not done to the innocent accused whose sense of relevance may not be acute. On the other hand, the guilty rapist gets the opportunity of subjecting his victim to another ordeal at first hand, few holds barred. In *S v M*\textsuperscript{1034} the magistrate 'seemed to have allowed the appellant a degree of leeway which ethical, moral and legal imperatives would have prevented, were the appellant legally represented. One serious consequence thereof was the failure to protect the dignity of the complainant during cross-examination'\textsuperscript{1035} It may be that the erection of a screen between the accused and the complainant during cross-examination could be called for, to reduce some of the possible trauma for the complainant.\textsuperscript{1036}

The main problem in *S v M* was the irrelevance of the offensive questioning to the accused's defence in circumstances where the irrelevance appeared only once the accused had revealed the nature of his defence (an alibi), after nine hours of cross-examination including intimate interrogation of the complainant about the most delicate and basic details of the trauma.\textsuperscript{1037}

**(l)** The right to be tried in a language one understands

The need to understand the proceedings in order to make informed choices in exercising one's rights to defend oneself is not the only rationale for this right. If it were, it could be argued that as long as the accused's lawyer understood the language spoken in court and the accused and the lawyer understood one another (a right inherent in the right to a fair trial as held by Buys J in *S v Pienaar*\textsuperscript{1038}), there would be no reason to ensure understanding on the part of the accused. The exercise of the coercive power of a criminal trial carries a burden of justifying the coercion to those who are coerced, in order to satisfy as far as reasonably possible the ideal of democratic government, which requires the constructive consent of the governed for the coercive measures attendant upon an exercise of state power. The accused is to be made a conscious participant in the exercise of state power over his

1034  1999 (1) SACR 664 (C)\textsuperscript{('M')).

1035  Ibid at 665I.

1036  See *R v Levogiannis* [1993] 4 SCR 475; § 51.5(l) supra and above in this section. See also *R v Brown* (Milton) *The Times* 7 May 1998 (CA), as reported in Archbold *Criminal Pleading: Evidence and Practice* (1999) 1032, § 8-113. The Court of Appeal reminded judges that a trial was not 'fair' when the unrepresented accused gained an advantage he would not otherwise have had by abusing the rules in relation to relevance and repetition when cross-examining. Suggestions in *Brown* relating to an examination of the relevance of various lines of enquiry in advance, in the absence of the jury, are of limited assistance in a system where the judicial officer is both factfinder and judge of law.

1037  Since this question was examined from the point of view of the right to silence, it is dealt with in § 27.5(l)(ii) above.

1038  2000 (2) SACR 143 (NC), 156. See also F Cassim 'The Accused Person's Competency to Stand Trial — A Comparative Perspective' (2004) 45 *Codicillus* 18.
or her person, so that the notion that the deprivation of the accused's liberty entailed by the trial is an exercise of collective self-government can be afforded a degree of reality. The trial is the ritual of justification in which the merits of the deprivation of the accused's liberty are authoritatively and finally determined. In the absence of a jury system, the accused must find democratic legitimacy in reasons and justifications from the Bench. Courts are equipped to act as fora of justification. For these reasons, the degree of understanding required by FC s 35(4) for information given to detained, arrested and accused persons in circumstances which do not form part of the ritual of 'being tried' is less strict than that required for participation in the trial itself. The Transvaal Provincial Division in S v Ngubane observed, in relation to the right to an interpreter, where trial in a language one understood was not practicable:

[T]he interpretation should take place simultaneously with the testimony being given by the witness; . . . the interpretation will be in a language which the accused fully understands and not into a language which he understands partially.

The conviction of the accused, an isiZulu-speaker, was accordingly set aside where the proceedings were interpreted to him in seTswana. The Eastern Cape Provincial Division in S v Siyotula, however, did not interpret the Ngubane judgment as laying down an absolute rule that, if the interpretation was not done simultaneously with the evidence given, there was automatically a failure of justice. There was no unfairness and no miscarriage of justice if this irregularity could be cured without prejudice to the parties.

In S v Ndala the Cape Provincial Division confirmed that the provision for an interpreter required a sound and faithful ('juis en getrou') translation and that, given that the very necessity for an interpreter arose because the linguistic competence of the Court and of the accused did not coincide, the safeguard of requiring an interpreter to be officially appointed after the taking of an oath was the only practically feasible way of ensuring the required peace of mind concerning the accuracy of what was being said in Court. Evidence given through an interpreter not thus appointed was therefore not evidence, and the proceedings


1040 1995 (1) BCLR 121, 122 (T).

1041 See S v Abrahams 1997 (2) SACR 47 (C) (The question of the competence of an interpreter for a 'deaf mute' was determined as one of fairness under s 6(2) of the Magistrates' Courts Act 32 of 1944, entirely on the basis of the common law principles laid down in S v Mafu 1978 (1) SA 454 (C) and S v Siwela 1981 (2) SA 56 (T.).)

1042 2003 (1) SACR 154 (E), 158 ('Siyotula').

1043 1996 (2) SACR 218 (C) ('Ndala').


1045 Ndala (supra) at 223.
had to be set aside for a trial de novo before a different magistrate: the violation was irrevocable given the requirement of simultaneity.\textsuperscript{1046} Noorbhai AJ in \textit{S v Chauke & Another}\textsuperscript{1047} sounded the 'caveat to magistrates and interpreters alike' that it had to be clear from the record that an accused was tried in a language he or she understood.\textsuperscript{1048}

The state is given the option under FC s 35(3)(k) to provide an interpreter only where it is 'impracticable' actually to try the accused in a language he or she understands. The distinction between this formulation and the formulation in IC s 25(3)(i)\textsuperscript{1049} means that the accused has the opportunity under FC s 35(3)(k) to compel the Court to try him or her in a language he or she understands, rather than leaving the choice entirely up to the state. Of course, the accused bears the burden, according to the formulation, to show that it is not 'impracticable' to accede to his or her demand, a burden which may be difficult to discharge given that the \textit{probanda} are within the knowledge of the officials concerned, rather than of the accused. Nevertheless, it is by no means inconceivable that an accused would be able to show the practicality of, for example, having a court constituted in such a way as to try the case in a language other than English or Afrikaans, particularly since the provision does not require 'reasonable practicability'.\textsuperscript{1050}

It seems that the appellant in \textit{Mthethwa v De Bruin NO & Another}\textsuperscript{1051} employed this argument, but without success.\textsuperscript{1052} The appellant, an isiZulu-speaking teacher who

\textsuperscript{1046} Ibid at 224. The decisiveness of the interpreter's unofficial status for the ratio of the case was somewhat diminished by the finding that the magistrate had additionally ('daarbenewens') displayed clear reservations about the interpreter's competence ('duidelike bedenkinge oor sy bekwaamheid'). Ibid at 223.

\textsuperscript{1047} 1998 (1) SACR 354 (V), 357.

\textsuperscript{1048} The learned judge clearly meant 'tried in a language which he understood' to include 'interpreted in a language which he understood'. Ibid at 357I.

\textsuperscript{1049} 'Every accused person shall have the right . . . to be tried in a language which he or she understands, or, failing this, to have the proceedings interpreted to him or her.'

\textsuperscript{1050} See \textit{S v Collier} 1995 (2) SACR 648 (C), discussed in § 51.5(e)(i) supra. Accused persons, it is submitted, should not be allowed to subvert the reasoning in \textit{Collier} by demanding trials by judicial officers and lawyers who speak their language. The grave consequences of such 'forum shopping' for the kind of impartiality ensured only by a reasonably strong degree of random selection of the most competent officials would seem to outweigh the demands of being tried in one's language where this is practicable. Nevertheless, such arguments, it is submitted, would have to be made under FC s 36(1) in a case where an accused person has shown the 'practicability' of being tried in a language he or she understands. For a discussion of the state's duty to pay for competent interpreters as part of a fair trial at common law, see I Currie 'Official Languages' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) \textit{Constitutional Law of South Africa} (2nd Edition, OS, December 2005) Chapter 65, § 65.7. The issues canvassed in Chapter 65 will have an effect on the proper approach a court must take to this potentially problematic provision, but it is to be remembered that the fair trial dimension of the language question is concerned with the right to a fair trial, not with cultural or linguistic equality.

\textsuperscript{1051} 1998 (3) BCLR 336 (N).

\textsuperscript{1052} The court referred, without comment, to counsel's argument that rights might be limited only under FC s 36.
understood English, was held not to have been entitled to have his trial conducted in isiZulu, for reasons of impracticability. The impracticability at issue was the linguistic constitution of the court staff and of the judiciary in the case of review or appeal. It may be added, and cannot practically or sensibly be ignored, that Afrikaans and English, apart from being thoroughly entrenched in the textual fabric of our law, are peculiarly possessed of an adequate legal infrastructure and vocabulary.\(^{1053}\)

\(m\) **Retroactivity**

The provisions in IC s 25(3)(f) and FC s 35(3)(l) and (n) incorporate the fundamental principle of legality expressed in the maxims *nullum crimen sine lege* and *nulla poena sine lege*. In 1798, Chase J said the following in *Calder v Bull*:\(^{1054}\) *'Every law that takes or impairs rights vested agreeably to existing laws is retrospective and is generally unjust and may be oppressive.'* This overriding principle indicates how closely connected are the prohibition against retroactive creation of crimes and the provision allowing the accused person the benefit of ameliorative alterations in the law relating to punishment.\(^{1055}\)

Whether a particular crime is retroactively created may not always be an easy question to answer since it involves subsidiary questions of legal philosophy about the very meaning of 'law'.\(^{1056}\) In *SW v United Kingdom*\(^{1057}\) the European Court of Human Rights confronted the problem of judicial transformation of the definition of a crime through incremental common-law development. The applicant challenged his conviction for rape of his wife on the basis that the *actus reus* had occurred before the decision of the English Court of Appeal, confirmed by the House of Lords,\(^{1058}\) which self-professedly 'changed' the position obtaining at

\(^{1053}\) See *S v Matomela* 1998 (3) BCLR 339 (Ck)(The High Court in Bisho recognized the propriety of proceedings which had been conducted and recorded entirely in isiXhosa as a matter of necessity, but pointed to the practical problems such a practice would create for appeals and reviews. ’Tshabalala J inclined to the view that one official language of record might be a practical necessity, given the impossibility of heeding linguistic equality in the courts. The matter required the urgent attention of the Department of Justice. Ibid at 342F-G. It is submitted that the sacrifice of Afrikaans, on the basis that its privileged position relative to other non-English South African languages was unwarranted, would amount to an unfortunate and short-sighted denial of the textual, linguistic and historical infrastructure of our Roman-Dutch legal system.)

\(^{1054}\) *3 US 386* (1798).


\(^{1056}\) See the classic debate between Hart and Fuller about the legal merits of arguments that the laws under which Nazi judges and officials acted during the Third Reich were not laws, and that the activities they permitted could consequently be described as crimes. HLA Hart ‘Legal Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard LR* 598 and L Fuller ‘Positivism and Fidelity to Law’ (1958) 71 *Harvard LR* 630. See also HLA Hart *The Concept of Law* (2nd Edition, 1994) 208-212.

\(^{1057}\) (1995) 21 EHR 363 (‘SW’).

\(^{1058}\) *R v R (Rape: Marital Exemption)* [1992] 1 AC 599.
common law that a husband could not rape his wife. In other words, retroactive application to the applicant's detriment of the judicial alteration of the common law would violate the prohibition of retroactive criminal provisions contained in art 7 of the European Convention. The Court pointed out that the provision in question embodied the general principle that only the law could define a crime and prescribe a penalty,\(^\text{1059}\) and proceeded to examine the application of this principle to the very difficult question of judicial development under the common law. The 'inevitable element of judicial interpretation' which was necessary both for the elucidation of the law and for its application to specific facts was held to be an entrenched and necessary part of the English legal tradition.\(^\text{1060}\) This would of course apply to our system as well. The pertinent finding was that such 'gradual clarification' of the rules of criminal liability through judicial interpretation was not inconsistent with the principle against retroactivity, provided that the resulting development was consistent with the essence of the offence and could be reasonably foreseeable.\(^\text{1061}\) Given this peg upon which to hang the finding, the court proceeded to find that the development finally recognized authoritatively by the English courts was foreseeable at the time the offence was committed, as it had followed a 'perceptible line of case law'.\(^\text{1062}\)

The clearest principle to be extracted from the case is the idea that it is the surprise entailed by retroactive provisions that is the abhorrent feature. This makes eminent sense in the context of determining moral culpability at the time the offence was committed. It is submitted that this principle should be borne in mind when the exception to retrospectivity pertaining to offences which were crimes 'under international law' is applied.\(^\text{1063}\) The provision in IC s 25(3)(f) did not allow circumvention of the retrospectivity objection by reliance upon the status of the newly enacted crime as criminal under international law at the time it was committed.\(^\text{1064}\) The most important questions in this regard will be whether persons who committed acts which were not criminal under the laws of apartheid, but were criminal under international law:

1. may be prosecuted for such acts (with or without enabling legislation);
2. may be prosecuted if they have been afforded some form of amnesty, particularly by the quasi-judicial proceedings of the Truth and Reconciliation Commission; and

\(1059\) *SW* (supra) at para 35/33.

\(1060\) Ibid at para 36/34.

\(1061\) Ibid.

\(1062\) Ibid at para 43/41.

\(1063\) This exception was added to the wording of FC s 35(3)(l).

It is well beyond the scope and purpose of this chapter to answer these questions. To some extent they have been addressed by the Constitutional Court's decision in *Azanian Peoples Organisation (AZAPO) & Others v President of the Republic of South Africa & Others*, 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC) which concerned the question whether international law as incorporated by the Interim Constitution permitted the non-prosecution of those responsible for human rights violations under apartheid, a policy that was in turn expressly authorized by the Interim Constitution. 1066 What should be noted, however, is that a distinction should be drawn not only between acts criminal under 'positive' laws during apartheid and acts criminal, not under the positive laws of apartheid but under undeniably well-established laws of international criminal law, but also between acts criminal under the undeniably well-established principles of international law and those the criminality of which under customary international law is a matter of controversy. 1067 It is submitted, for example, that it cannot be maintained that the 'crime of apartheid', as defined by the General Assembly's 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, 1068 at any stage attained the status of a well-established principle of customary international law rendering it binding upon those, including most of the West, not party to its terms. It is interesting to muse on the significance of the judgment of the Constitutional Court in *Key v Attorney-General, Cape of Good Hope Provincial Division, & Another* for retrospective trumping by international human rights norms over previously applicable positive law. The unanimous court in *Key* applied strongly positivist thinking to declare: '[T]here is no warrant in justice for retroactively casting a blanket of illegality over what was properly . . . [done] according to the law as it stood at the time.' 1070 In any event, the extreme jurisprudential niceties involved in establishing the status of an act as criminal under international law where such status is controversial should not be a decisive determinant of the surprise factor underlying the prohibition against retroactive penal laws. The person who acts under the impression that his or her action is sanctioned by law is no less surprised by a law declaring such action criminal if he or

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1065 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC).

1066 The extent to which the question of international law was left open by the Court's decision is thoroughly examined in Dugard 'Unanswered Question' (supra). See also C Braude & D Spitz 'Memory and the Spectre of International Justice: A Comment on AZAPO' (1997) 13 SAJHR 269.

1067 The leading Canadian war crimes case, *R v Finta*, while not possessed of the benefit of clarity on the principles relating to retroactivity, nor of unanimity on whether retroactivity was prohibited by the Canadian Charter, found a violation of Canadian 'positive law' as a basis for its decision, in effect rendering the degree of conflict between domestic and international penal provisions an academic issue. [1994] 1 SCR 701. The case possessed the peculiar complicating feature that the offence itself was criminal in Canada — in the abstract — at the time it was committed, but the acts in question were not committed anywhere near Canada. The relationship between substantive legality and extra-territoriality consequently assumed crucial significance for the retroactivity question in that case.

1068 See Dugard *International Law* (supra) at 214 and 351f.

1069 1996 (4) SA 187 (CC), 1996 (6) BCLR 788 (CC)('Key').

1070 Ibid at para 7.
she is informed that the source of the criminality is international law. The moral force of the argument at Nuremberg in favour of retroactivity was proportional to the extent that those concerned could simply not have been unaware of the criminality of their acts.\textsuperscript{1071} The subjective state of mind of those concerned, after all, is what the principle of retroactivity is directly concerned with. It is submitted that this dimension should be a governing factor in assessing the extremely sensitive questions involved in the area of retrospectivity.

One problem with the change of wording to accommodate international-law crimes is that the retroactivity clause relating to punishment does not lend itself to similar accommodation. The 'prescribed punishment' for a particular act is pre-eminently a question of domestic law, and the reference in FC s 35{(n)} to a 'change' in the prescribed punishment hardly fits comfortably with arguments about universally prescribed punishments. In any event, what was the 'prescribed punishment' in South Africa for an act which was not criminal under South African law but criminal under international law? Freedom, one might say. The more realistic problem, it seems, is that an indemnity for an act that was criminal and did have a prescribed punishment under apartheid operates as a change for the better as far as the 'prescribed punishment' goes, and a revocation of such an indemnity would therefore violate the right to the optimum position on punishment in the relevant period.\textsuperscript{1072}

Finally, if amnesty is consequent upon a proceeding as judicial in character as that before the Truth and Reconciliation Commission, it may well amount to a violation of the \textit{ne bis in idem} or 'double jeopardy' provision in FC s 35(3)(m) to attempt to resuscitate the prosecution.

\textbf{(n) Ne bis in idem (double jeopardy)}

\textbf{(i) General}

One possible \textit{ne bis in idem} problem raised by prosecutions which follow on indemnities or amnesties has already been mentioned.\textsuperscript{1073} 'Double jeopardy' is the American version\textsuperscript{1074} of the maxim \textit{ne bis in idem} upheld in South African law by the defences of \textit{autrefois convict} and \textit{autrefois acquit}.\textsuperscript{1075} In essence, the \textit{ne bis in idem}

\textsuperscript{1071} For a discussion of the views of Gustav Radbruch, see HLA Hart 'Legal Positivism and the Separation of Law and Morals (1958) 71 Harvard LR 598; L Fuller 'Positivism and Fidelity to Law' (1958) 71 Harvard LR 630.


\textsuperscript{1073} See § 51.5(m) supra.

\textsuperscript{1074} The Fifth Amendment decrees that no person 'shall be subject for the same offense to be twice put in jeopardy of life or limb'. The American clause stems from the English common law.

\textsuperscript{1075} See Criminal Procedure Act 51 of 1977 ss 106(1)(c) and (d).
maxim stipulates that no person shall be subjected to repeated prosecution for the same
criminal act and is recognized in international law. Certain exceptions to the
prohibition against double jeopardy do, however, exist. Furthermore, our common
law recognizes the *exceptio rei judicatae* both for civil and for criminal law. In *S v Basson* the Constitutional Court was afforded the opportunity to adjudicate upon,
amongst others, the relevance of the constitutional proscription on double jeopardy
contained in FC s 35(3)(m) to the interests of justice in the application for special
leave to appeal to the Constitutional Court against certain findings of the Supreme
Court of Appeal. It was held (per Ackermann J) that the purpose of the right
contained in FC s 35(3)(m) was to protect individuals against the possibility of
repeated prosecutions for the same criminal conduct. Such protection was deemed
necessary in the interests of fairness and the public interest in the finality of
judgments. The conclusion reached was that, since the accused's retrial did not
give rise to double jeopardy, the retrial would not amount to an unfair trial violation
of FC s 35(3)(m).

(ii) Multiple punishments

It is to be observed that the right in IC s 25(3)(g) and FC s 35(3)(m) is confined to a
prohibition against being 'tried', IC s 25(3)(g) referring to 'being tried again for any
offence of which he or she has previously been convicted or acquitted', and FC s
35(3)(m) referring to being 'tried for an offence in respect of an act or omission for
which that person has previously been either acquitted or convicted'. There is
therefore no express prohibition on being punished twice for the same offence, a
prohibition comprising one of the pillars of the 'double jeopardy' right recognized by
the US Supreme Court. Since it is not a constitutional requirement that a person

1076 See art 20 of the ICC Statute, art 10 of the ICTY Statute and art 9 of the ICTR Statute.

1077 See *Prosecutor v Akayesu* ICTR-96-4-T at para 468 and C De Than & E Shorts *International Criminal

1078 See E du Toit, FJ de Jager, A Paizes, A Skeen & S van der Merwe *Commentary on the Criminal
particularly, on the *exceptio rei judicatae*, *S v Ndou* 1971 (1) SA 668 (A).

1079 2005 (1) SA 171 (CC), 2004 (6) BCLR 620 (CC), 2004 (1) SACR 285 (CC) (*Basson*).

1080 Ibid at para 66.

1081 Ibid at para 66-67.

1082 See *United States v Di Francesco* 449 US 117 (1980); *United States v Dixon* 509 US 688 (1993);
*Watte v United States* 515 US 389 (1995) (The majority of the US Supreme Court held that the
double jeopardy clause prohibited not only the imposition of a second punishment at a second
occasion but also the imposition of two punishments for the same offence.) See also art 14.7 of the
International Covenant on Civil and Political Rights, the relevant part of which has been
incorporated into art 4 of the Seventh Additional Protocol to the European Convention on Human
Rights and declares that 'no one shall be liable to be tried or punished again.' See, further, G Kemp
*The Application of the Principle Ne Bis In Idem in Respect of Judgment Rendered by International
be 'tried' for the purposes of IC s 25(3) or FC s 35 before imprisonment may be imposed on that person,\(^{1083}\) a second punishment, even imprisonment, imposed by procedures which do not amount to 'trials' under IC s 25(3) or FC s 35 would at first sight not seem to be unconstitutional under our double jeopardy clause, and such measures would have to be challenged by reference to the rights they affect,\(^{1084}\) or by reference to the 'deprivation of liberty' provision of IC s 11 and FC s 12.\(^{1085}\) Still, if the US courts could extract the prohibition against double punishment from the clause prohibiting a person from being 'subject for the same offence to be twice put in jeopardy of life or limb', then a similar broadened meaning may well be attached to the term 'tried'. Significant in this regard is the fact that FC s 35(3)(m) has left out the qualification 'again' which occurs in IC s 25(3)(g), which may be taken to suggest that the sort of 'trying' which is prohibited by the clause is not confined to the sort of 'trying' that led to the first peril. In other words, 'tried' in FC s 35(3)(m) may encompass the kind of 'trial' which is not a 'trial' for the purposes of fair trial rights, such as identified in *Nel v Le Roux NO & Others*.\(^{1086}\) There is nothing conceptually paradoxical about a fair trial provision referring to matters outside the scope of the trial, the right to trial within a reasonable time being the clearest example.\(^{1087}\) It is, after all, the possibility of punishment that most concerns the individual who is accused of a criminal offence, and which animates the anxiety and uncertainty the repetition of which *ne bis in idem* is designed to avoid. 'Doubt about guilt is immediately translatable into doubt about the justice of punishment.'\(^{1088}\) The absurdity of a position which is indifferent to successive punishments as long as there has been only one trial requires little exposition.

If double punishment is covered by this clause, as it is submitted it should be, then penal aspects of procedures which flow from criminal convictions will require *ne bis* scrutiny — for example, forfeitures of property,\(^{1089}\) penal 'taxes',\(^{1090}\) or deportation.\(^{1091}\) It is submitted that the guiding principle in a given case should be whether the administrative, legislative or judicial measure which follows upon conviction and punishment and involves further detrimental consequences for

\(^{1083}\) *Nel v Le Roux NO & Others* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC) ('*Nel*').


\(^{1086}\) This argument has significance also for the applicability of the *ne bis in idem* clause to 'acquittals' entailed by grants of amnesty before a quasi-judicial body such as the Truth and Reconciliation Commission. See § 51.5(m) supra.

\(^{1087}\) See §§ 51.4(c) and 51.5(f) supra.

the person punished undermines the exhaustiveness of the sentence passed upon the person by the court as punishment. The sentence, after all, is the result of a careful and precise exercise of judgment applied to the individual's case, and is intended to be the full measure of punishment proportionate to the offence. In order for this principle to be respected, it is submitted, sentencing officials should take into account other possible detrimental consequences the convicted accused may face, in which case the enforcement of these consequences would be less liable to objection on the basis of double punishment.

The merits of taking previous convictions into account when imposing sentence will require consideration under the ne bis in idem clause. It is submitted, however, that a sound distinction in principle can be drawn between punishing a convicted person again for previous convictions by adding to the sentence for the current conviction, on the one hand, and, on the other, regarding the very commission of the later offence in circumstances where one has done it many times before as aggravating the blameworthiness of the later commission. In cases where the latter approach is appropriate, an increase of the sentence on the basis of previous convictions does not amount to double punishment. But in circumstances where it cannot be said that the recidivism inherent in repeat commissions augments blameworthiness, employment of previous convictions as aggravating factors should be regarded as a violation of ne bis in idem.

1089 For a discussion of relevant provisions, see Itzikowitz (supra) at 281. See also People v 1988 Mercury Cougar 607 NE 2d 217 (1992) (An Illinois state court held that forfeiture of a motor vehicle consequent upon a narcotics conviction did not violate the double jeopardy clause because the forfeiture proceedings were in rem proceedings not amounting to a penal measure.) It is to be observed that the peculiar notion in American law of regarding the property involved in crime as itself the wrongdoer was an essential premise for the finding that the forfeiture did not amount to punishment. In South African law this peculiar notion does not exist. This notion has been qualified by the US Supreme Court and cannot be relied upon without more to avoid double jeopardy scrutiny in forfeiture cases. See United States v Halper 490 US 435 (1989); Austin v United States 509 US 602 (1993); Department of Revenue of Montana v Kurth Ranch 511 US 767 (1994). See AD Ronner 'Prometheus Unbound: Accepting a Mythless Concept of Civil in Rem Forfeiture with Double Jeopardy Protection' (1996) 44 Buffalo LR 655.

1090 See Department of Revenue v Kurth Ranch 511 US 767 (1994) (The US Supreme Court held by a majority that a 'tax' on an illegal activity was not immune from double jeopardy scrutiny merely for being a tax, and that the punitive characteristics of such a tax were subject to the double jeopardy clause. The court held that taxes imposed on illegal activities were fundamentally different not only from taxes for pure revenue purposes but also from taxes imposed partly to deter undesirable activities and partly to raise money (such as 'sin taxes' on tobacco.).)

1091 See Urbina-Mauricio v INS 989 F 2d 1085 (1993) (The United States Court of Appeals for the Ninth Circuit held that deportation of an illegal alien convicted of drug offences did not constitute a second punishment for the purposes of double jeopardy, since deportation was a civil action and not a punishment.) It is submitted that state action detrimental to an accused should always be scrutinized carefully for possible penal elements — the enforcement of a private right by private individuals or the state in a private capacity being a different consideration, less likely to involve 'punishment' problems. In any event, civil action grossly disproportionate to the activity penalized may amount to double punishment if the person has already been punished for the activity. See also United States v Halper 490 US 435 (1989).


1093 Criminal Procedure Act 51 of 1977 s 271.
(iii) Multiple trials

It should be noted that the wording of FC s 35(3)(m) is less restrictive than that of IC s 25(3)(g) regarding the activities covered by the previous peril. Unlike s 25(3)(g), which limits the prohibition to being tried again for the same offence, FC s 35(3)(m) prohibits being tried for an offence in respect of an act or omission for which one has previously been either acquitted or convicted. The altered wording is strikingly broad.\(^{1094}\) It means that any criminal charge is vitiated if it relates to acts or omissions which have already to some extent formed the subject-matter of previous charges upon which the accused was acquitted or convicted. The determination of the relationship entailed by 'in respect of', as well as the degree to which the act or omission acted as the subject-matter of the previous acquittal or conviction, is therefore crucial to the meaning of 'for which'.\(^{1095}\) It cannot be assumed without more that the common-law test rides roughshod over these questions. That test, formulated in \(R v Kerr\)\(^{1096}\) and \(Petersen v R\)\(^{1097}\) and authoritatively endorsed in \(S v Ndou\),\(^{1098}\) sought 'substantial identity' between the offences concerned, as expounded thus:

\[
\text{[W]hether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first . . .; or . . . whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction.}^{1099}
\]

\(^{1094}\) The International Covenant on Civil and Political Rights art 14.7, the European Convention on Human Rights, Seventh Additional Protocol art 4, the United States Constitution's Fifth Amendment, and the Canadian Charter of Rights and Freedoms s 11(h) all refer to the 'same offence', or 'it', or 'the offence'. The Inter-American Convention on Human Rights art 8.4 refers to the 'same cause', which formulation is less exactly coextensive than 'same offence' but certainly not as broad as that in FC s 35(3)(m). See also L Jordaan 'Multiple Trials for Crimes Arising from the Same Facts and the Constitutional Right of the Accused to be Protected Against Double Jeopardy' (1998) 11 SA Journal for Criminal Justice 21.

\(^{1095}\) The facts of a New York case decided by the Second Circuit Court of Appeals, \(United States v Ahmed\), provide a useful illustration. 980 F 2d 161 (1992). The prosecution in a drug case introduced evidence of the defendant's failure to appear in court in order to show consciousness of guilt. A later prosecution was brought (in a different state) for jumping bail. The evidence for this offence was the same as that introduced in the drug prosecution. Double jeopardy was not violated. Clearly the omission in question was not an omission 'for which' the accused had already been acquitted or convicted. But if on such facts the bail offence were prosecuted first, might the drug charge not amount to being 'tried for an offence in respect of an act or omission for which that person ha[d] previously been either acquitted or convicted'? The \textit{ne bis} question in such a case should be distinguished from the possible problems raised by the rule in \(Hollington v F Hewthorn & Co Ltd\) [1943] KB 587, which bedevils proof of previous convictions based on the 'opinion' evidence comprised by a court's judgment. See \(S v Mavuso\) 1987 (3) SA 499 (A). See, generally, DT Zeffertt, AP Paizes & A St Q Skeen \textit{The South African Law of Evidence} (2003) Chapter 9.

\(^{1096}\) (1907) 21 EDC 324.

\(^{1097}\) 1910 TPD 859.

\(^{1098}\) 1971 (1) SA 668 (A).

\(^{1099}\) \(R v Kerr\) (1907) 21 EDC 324, 340.
Given the broad sweep of the common-law test, it is clear that this test does amount to a plausible interpretation of the clause in question. It captures the core idea behind that aspect of 'double jeopardy' concerned with retrial, namely that conduct which has placed a person in peril before the courts on one occasion should not be allowed to do so again, once the courts have decided the matter. Be that as it may, the altered wording seems a clear basis for concluding that the Constitution requires, in the case of a 'single transaction' giving rise to multiple offences, that those offences all be dealt with in one prosecution, and that a later retrial of the same issues determined for one offence in order to try another offence is prohibited. In *McIntyre & Others v Pietersen NO & Another* Eloff JP recognized that FC s 35(3)(m) broadened ('verbreed') the IC right:

Die klem lê op die handeling wat hom ten laste gelê word, nie so seer op die omskrywing van die misdryf wat ter sake is nie.

In *McIntyre* Eloff JP said that one found in the Constitution a 'samevatting' of the ancient right of an accused to avail himself of the defence of *autrefoil acquit*. In the context of the judgment it is clear that the word 'samevatting' should be read to mean 'inclusion' rather than 'summary'. Given the court's liberal interpretation of FC s 35(3)(m), it naturally preferred the approach of Voet 48.2.12 to that apparently endorsed by Ogilvie-Thompson JA in *S v Ndou & Others*. Voet held that, if one had been acquitted of wounding, one could not later be charged with murder if the wounded person died after the acquittal, because one had already been held innocent of the relevant act; but if one had been found guilty of wounding, one could be charged with murder if the wounded person died after the verdict. Ogilvie-Thompson JA was inclined to regard a murder charge as competent after acquittal or conviction, provided the victim died after the verdict. Eloff JP left open the question whether one could be charged with the consequence which eventuated after one had been convicted of the act. *S v Gabriel* provided an affirmative answer to this question at common law, but was distinguished in *McIntyre*. FC s 35(3)(m), however, seems to demand a negative answer. If one distinguishes between act and

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1100 See *Petersen v R* 1910 TPD 859, as cited in *S v Ndou* 1971 (1) SA 668 (A), 678.

1101 1998 (1) BCLR 18 (T); *sub nomine S v McIntyre en Andere* 1997 (2) SACR 333 (T) (*McIntyre*).

1102 'The emphasis lies on the conduct for which he is being charged rather than the formulation of the crime at issue.' See *Ashe v Swenson* 397 US 436 (1970)(Brennan, Marshall and Douglas JJ concurring). This 'single transaction' test is more generous to the accused than the traditional 'same evidence' test laid down in *Brown v Ohio*. 432 US 161 (1977). *Brown* asks whether each offence 'requires proof of a fact which the other does not'. The latter test causes problems in cases where the second (greater) offence does not theoretically require proof of a fact required by the first (lesser) offence, but the facts are such that only facts sufficient for the first offence are relied upon in proving the second offence. See *Illinois v Vitale* 447 US 410 (1980); *Grady v Corbin* 495 US 508 (1990).

1103 *McIntyre* (supra) at 21B-C.

1104 1971 (1) SA 668 (A), 776D-E.
consequence, the murder charge would be 'in respect of an act . . . for which that person has previously been . . . convicted'.

It is only if one reads 'act or omission' as capable of referring to the consequences of an act as well as to the act itself, that one may allow a charge for the consequences where the accused has already been convicted for the act. Interpretation in favorem libertatis compels the more liberal reading. Whether and to what extent the state is prohibited from appealing against an unfavourable finding is possibly the most important question to be asked about the clause. Under the Criminal Procedure Act 51 of 1977 as amended, the state may not appeal on a finding of fact, but may on a finding of law,\(^{1108}\) and the Attorney-General may appeal against a sentence.\(^{1109}\) Aspects of the state's right to appeal, or the court's power to increase a sentence \textit{mero motu},\(^{1110}\) have been constitutionally assessed, but not directly under the \textit{ne bis in idem} clause. In \textit{S v Van den Berg} the Namibian provision entitling the state to appeal on the facts was upheld as constitutional, which was unsurprising given the express provision of the Namibian Constitution allowing for state appeals. In \textit{S v Sonday \\& Another}\(^{1111}\) the power of the court to increase a sentence upon an appeal against conviction was upheld as constitutional, on the basis that it did not infringe the general fair trial right contained in IC s 25(3), nor the applicant's right to appeal under IC s 25(3)(h).\(^{1112}\) Nothing was said of the \textit{ne bis in idem} clause. The Court dismissed as 'nonsense' any suggestion that an increase of sentence on appeal could violate the fairness of a trial,\(^{1113}\) basing its finding on what is respectfully submitted to have been a misconceived 'balancing' definition of the right to a fair

\(^{1105}\) McIntyre (supra) at 22G-H

\(^{1106}\) 1971 (1) SA 646 (RA), 652E-G ('Gabriel').

\(^{1107}\) McIntyre (supra) at 23A-B.

\(^{1108}\) Section 110. The idea that it is repugnant for the Crown to appeal a finding of fact is historically connected with the sovereignty of the jury over acquittals. See Bushell's case (1670) Vaughan 135. See, generally, TA Green Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800 (1985); AW Schefflin 'Jury Nullification: The Right to Say No' (1972) 45 Southern California LR 168; P Devlin Trial by Jury (3rd Revised Impression, 1966) 84.

\(^{1109}\) Section 110A. This right gradually developed, from a right granted in 1935 to cross-appeal against sentence upon an appeal by the accused, to a unilateral right to appeal against sentence. See \textit{S v Van den Berg} 1996 (1) SACR 19 (Nm)('\textit{Van den Berg}'). \textit{Van den Berg} concerned the constitutional merits of the even further development in Namibia allowing the state to appeal against a finding on the facts.

\(^{1110}\) Criminal Procedure Act 51 of 1977 s 309(3).

\(^{1111}\) 1994 (4) BCLR 138 (C), 1994 (2) SACR 810 (C)('\textit{Sonday}').

\(^{1112}\) Presumably, the reasoning behind this claim was that the right to appeal would suffer a 'chilling effect' if exercising it could lead to an increase in sentence.

\(^{1113}\) Sonday (supra) at 822.
It may be pointed out that the sort of 'nonsense' his lordship was referring to has spawned an enormously sophisticated body of double jeopardy law in the United States. In S v Kellerman the full extent of the Court's finding that the new unilateral right of the Attorney-General to appeal against sentence was constitutional was contained in the assertion that proper administrative action and a fair trial would include the imposition of a proper sentence and its reconsideration on appeal. In Attorney-General of the Eastern Cape v D the Court was confronted with double jeopardy jurisprudence, in the shape of Benton v Maryland, in a challenge to the constitutionality of s 310A of the Criminal Procedure Act 51 of 1977. Nothing was said of the ne bis in idem provision, but the Court's reasoning did address its concerns, even though the finding was in the end based on a general sense of fairness. The Court apparently endorsed the force of the following dictum from Benton:

[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.

The Court proceeded to draw a conceptual distinction between a conviction and a sentence, but left the distinction unelaborated, answering the submission that

1114 Ibid at 820. See the discussion of 'balancing' within the determination of the scope of the right to a fair trial in § 51.1(b)(iv) supra.

1115 See P Westen 'The Three Faces of Double Jeopardy: Reflections of Government Appeals of Criminal Sentences' (1980) 78 Michigan LR 1001; CL Cantrell 'Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis' (1983) 24 Southern Texas LJ 735. The position and general principles are well summarized in United States v Di Francesco 449 US 117 (1980) (The rule is that appeals on law or reviews on sentencing are prohibited if there is a threat that the procedure would in substance amount to a successive prosecution, or if the person concerned has an 'expectation of finality' in the outcome of the first trial. Explicit enabling statutes generally negate such expectations.)

1116 1996 (1) SACR 89 (T), 93.

1117 1997 (1) SACR 473 (E), 1997 (7) BCLR 918 (E)('D').

1118 395 US 784 (1969)('Benton').

1119 D (supra) at 476-77.

1120 Ibid at 476.

1121 Ibid.

1122 The court apparently endorsed the finding in Van den Berg as applicable to a 'similar statutory provision', although the court recognized the fact that the Namibian provision upheld in that case allowed state appeals generally (including appeals on the facts). D (supra) at 476. This endorsement should not be taken as authority for the proposition that a similarly far-reaching provision would be constitutional in South Africa.
the possibility of an increased sentence entailed similar anxiety and uncertainty with the finding that the appeal provision was saved from constitutional objection by its stipulation that the appeal be brought within 30 days.\footnote{1123}{Benton (supra) at 476.} Can the Court’s distinction be read as implying the unconstitutionality of the state’s power to appeal against conviction, even on the law? Not if the following dictum is taken seriously:

An appeal is not a re-trial or a trial \textit{de novo}. It merely obliges the court to make a decision on a record of the evidence placed before the court \textit{a quo}. As such it is an extension or continuation of the \textit{lis} between the state on the one hand and the accused person on the other.\footnote{1124}{Ibid at 475.}

It may be observed that this reasoning has an absolute ring to it: there is nothing in it that would distinguish a continuation of the ‘factual’ \textit{lis} from a continuation of the ‘legal’ \textit{lis}.

\section{(o) The right to appeal or review}

Aspects of the right to appeal or review have surfaced in the domain of \textit{ne bis in idem}.\footnote{1125}{See § 51.5(n) supra. The idea is that the spectre of an increase in sentence on appeal may have a ‘chilling effect’ on the right to appeal.} The most important question to answer concerning this right is the degree to which it guarantees an appeal without subjecting such appeal to conditions, such as obtaining leave. In this respect it is important to point out that the wording of FC s 35(3)(o) differs from that of IC s 25(3)(h). Whereas the former speaks of a ‘right of appeal to, or review by, a higher court’, the latter refers to ‘recourse by way of appeal or review to a higher court’. This difference is significant because the decision in \textit{S v Rens}, which found that limitations on the right to appeal were authorized under the Interim Constitution, turned on the use of the word ‘recourse’ in IC s 25(3)(h).\footnote{1126}{1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC) (‘Rens’)} The following dictum in \textit{S v Bhengu}\footnote{1127}{1995 (3) BCLR 394, 397-8 (D) (‘Bhengu’).} endorsed by the court in \textit{Rens}\footnote{1128}{Rens (supra) at para 22.} is evidently crucial:

\begin{quote}
If that had been the intention (to create an absolute right of appeal) I should have expected the words ‘to have recourse by way’ to have been omitted from the provision of [IC] s 25(3)(h).
\end{quote}

There can be no stronger argument for the interpretation of FC s 35(3)(o) as having entrenched such an absolute right of appeal than this passage.\footnote{1129}{The objection in \textit{Rens} was to the requirement in s 316(1)(b) of the Criminal Procedure Act 51 of 1977 for leave to appeal a decision of a superior court.\footnote{1130}{Apart from equality considerations, the Court’s reasoning was not confined to the...}}
significance of the word 'recourse'. The Court observed that s 316(1)(b) gave the convicted person 'two bites of the cherry', since a refusal of leave by the trial court allowed the person concerned to seek leave from the Chief Justice, who was required to refer the matter to two members of the Appellate Division. Similarly, the convicted accused had the opportunity to petition the refusal of leave to two Appellate Division judges on points of law and procedural irregularities. Argument in writing in the petition was provided for. The Court therefore intimated that such a procedure amounted to 'recourse' (or 'resort') to a higher court, and it is but a small step away from reasoning that such a procedure amounts to 'appeal' to a higher court. \[^{1131}\] Finally, the Court's argument that 'it [could] not be in the interests of justice and fairness to allow unmeritorious and vexatious issues of procedure, law or fact to be placed before three judges of the appellate tribunal sitting in open court to rehear oral argument' as 'the rolls would be clogged by hopeless cases' \[^{1132}\] must be seen as applying whether the right is expressed as one of 'recourse' or of 'appeal'. \[^{1133}\]

\[^{1129}\] But see \[S v Msenti\] 1998 (3) BCLR 343, 347 (W), 1998 (1) SACR 401 (W) (Snyders J held that the textual argument in \[Rens\] was 'superficial and of no persuasive value' when applied to the alteration of the text in FC s 35(3)(o).) The circumvention of the textual dicta in \[Rens\] cannot be supported and may set an unfortunately cavalier precedent as far as the wording of specific rights is concerned. See § 51.5(b) supra.

\[^{1130}\] The complaint was focused on the fact that such leave was not a requirement in the case of an appeal from lower courts, leaving those appealing from superior courts in a disadvantaged position. The equality question was clearly separated from the merits of the obstacles to appeal as far as IC s 25(3)(h) was concerned, as was the case also in \[S v Ntuli\] 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC). In \[Ntuli\] the Court found a sufficiently relevant differentiation (between unrepresented prisoners and others) for a violation of the equality clause, whereas in \[Rens\] the differentiation in question related to different stages of proceedings rather than to relevantly different groups. This question can safely be set aside for the purposes of the analysis. For the constitutional principles of equality, see C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, OS, December 2006) Chapter 35.

\[^{1131}\] The Court's reference to the jurisprudence of the European Court of Human Rights under art 2 of Protocol 7 (\[Monnell and Morris v United Kingdom\] (1987) 10 EHRR 205 (cited in para 24) and \[Axen v Germany\] (1984) 6 EHRR 195; \[Sutter v Switzerland\] (1984) 6 EHRR 272 (cited in para 24n)) may be regarded as endorsing the notion accepted by the European Court that leave to appeal itself amounted to the 'appeal' guaranteed by the article. Of this notion Robertson and Merrills observe that '[t]his is, however, a very limited interpretation of the concept of review and must be regarded as questionable'. AH Robertson & JG Merrills Human Rights in Europe: A Study of the European Convention on Human Rights (3rd Edition, 1993) 248 n95. Crucial in this respect is the margin of appreciation required in this context to allow for greatly varying review and appeal procedures by the contracting states. There is no reason for our courts to be equally deferential to established procedures.

\[^{1132}\] \[Rens\] (supra) at para 25.

\[^{1133}\] The refusal in \[S v Msenti\] to attach any significance to the textual alteration was naturally accompanied by emphasis on these latter considerations in \[Rens\] 1998 (3) BCLR 343, 345–346 (W), 1998 (1) SACR 401 (W). With respect, rather than holding that the alteration in the wording of a specific right could not make any difference to the relationship between that right and 'substantive fairness', it would have been preferable for the Court to have given some effect to the textual reasoning in \[Rens\] and to the apparent expression of a deliberate intention by the framers of FC s 35(3)(o), and then to have rendered the clogging considerations decisive by way of FC s 36(1) limitation analysis.
The small step referred to above suffered a setback in *S v Ntuli*\(^{1134}\) in so far as the requirement of a judge's certificate for appeals by unrepresented prisoners is concerned.\(^{1135}\) Didcott J directly addressed the question whether the very application for a judge's certificate, irrespective of its result, constituted 'recourse by way of appeal or review to a higher court'. No, was the answer. The minimum implied by the 'recourse' requirement was 'the opportunity for an adequate reappraisal of every case and an informed decision on it'. Since the statute made no provision for such opportunity, and did not ensure that a certificate would not be refused without it, the application itself could not be the requisite 'recourse'.\(^{1136}\) It should be clear *a fortiori* that an application on a horizontal level cannot amount to an 'appeal' as guaranteed by FC s 35(3)(o). Whether 'vertical' leave would amount to an 'appeal', as opposed to 'recourse by way of appeal', will depend on whether the *Rens* Court's reasoning about clogging the rolls with hopeless cases prevails over its reasoning based on the significance of the use of the word 'recourse' instead of an unqualified right of appeal.

\(^{1134}\) 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC).

\(^{1135}\) Criminal Procedure Act 51 of 1977 s 309(4)(a) and s 305.

\(^{1136}\) *Bhengu* (supra) at para 17.

\(^{1137}\) *S v Thobakgale & Others*\(^{1137}\) raised the difficult problem of time constraints on the right to appeal. Flemming DJP held that the necessity to show cause for condonation of the late filing of an appeal did not violate the right to appeal.\(^{1138}\)

In *S v Kgampie & Others*\(^{1139}\) Cameron J expressed reservations about the finding in *Thobakgale* that prisoners who apply for condonation for the late filing of notices of

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**Notes:**

1134 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC), 1996 (1) SACR 94 (CC).

1135 Criminal Procedure Act 51 of 1977 s 309(4)(a) and s 305.

1136 *Bhengu* (supra) at para 17.

1137 1998 (1) SACR 703 (W)('Thobaglale').

1138 Ibid at 710B-C. Flemming DJP seemed to be of the opinion that such limitation upon the right as was entailed by time limits was justifiable (presumably under the limitations clause) and that time limits could not, in principle, be said to violate the right in any event. He reasoned:

I believe that the normal approach to condonation does not without adequate justification impose a limitation on or a detract from the 'right' to appeal. Should I be wrong on that score, a reason why the *Ntuli* decision does not apply is relevant. Time limits do not fall beyond permissibility of the Constitution. When a party wishes to appeal after expiry of the limited time, he no longer has a 'right' to appeal, the Court is dealing with the resuscitating of a right which perished.

With respect, the mere existence of time limits certainly does not necessarily violate the right to appeal. But a time limit is a limit as much as any other. It 'detracts' from the right so limited, unless the very concept of the right implies some sort of period for its exercise which, it is conceded, may arguably be the case as far as appeals go. If the time limit effectively renders the right nugatory, or sufficiently severely 'detracts' from it, one has reached a point of violation requiring justification under the limitations clause. Where this point is, is a question of nicety and judgment. See, for example *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC) (The six-month prescription period for claims against the Defence Force violated the right of access to courts (FC s 34).) The point of the violation requiring justification under s 36(1) will be reached more quickly under FC s 35(3)(o) than under IC s 25(3)(h), given the broader formulation of the right in FC s 35(3)(o).

1139 1998 (2) SACR 617 (W)('Kgampe').
appeal should have their prospects of success assessed upon the lower court's judgment only, as was the case with applications for condonation from those on bail pending appeal. Cameron J was of the opinion that the reasoning in Ntuli that required a proper reappraisal of an appellant's case would be violated if the usually inept and uninformed applications from inside prison were to be assessed only on the magistrate's judgment, and not on what might lie hidden in the record. The whole record was to be produced for prospects of success to be assessed for the purposes of condonation. Cameron J did not deal with the issue of a time limit on the right to appeal in Kgampe.

In S v Pennington & Another the Constitutional Court remarked obiter that FC s 34 did not apply to appeals in criminal cases, and that, since no provision was made in FC s 35(3)(o) for public appeals in person, there was no right to have an appeal heard 'in public', nor to be present when the appeal was heard, and that, although it was settled practice for appeals to be heard in public, there was no constitutional bar to considering applications for leave to appeal in chambers. It may be observed that an interpretation of FC s 35(3)(o) as not providing for appeals to be heard in public nor for the presence of the accused during appeals begs the question whether the right to a fair trial extends to the final determination of the appeal, alternatively whether the specific right to be tried before an ordinary court, and to be present when being tried, extends to appellate stages. It would be odd if the Constitution scrupulously provided for safeguards against secret trials, but had nothing to say about the question whether the decisions reached in these trials could be overturned on appeal in circumstances that would not be countenanced for the first, provisional, determination of the matter.

In some of the cases at issue in Kgampe the discovery of multiple irregularities in the record after Cameron J's order to produce the whole record led to confirmation of his view of the necessity for such full disclosure. See S v Malatji & Another 1998 (2) SACR 622 (W). In Uitenhage Transitional Local Council v South African Revenue Service, Heher JA emphasized the fact that condonation was not a right but a concession granted at the Court's discretion. 2004 (1) SA 292 (SCA), 2003 (4) All SA 37 (SCA). An application for condonation had to provide a full, detailed and accurate account of the causes of the delay and their effects to enable the Court to understand clearly the reasons and to assess the responsibility. Ibid at para 7. See also Mahlangu v S 2004 (2) All SA 652 (NC) at para 3.

But he did condone a 14-month interval between conviction and filing of the application on the basis of the 'context of imprisonment and the disabilities which that necessarily [brought] about', accepting in the circumstances 'the usual' excuse of ignorance of entitlements and requirements. Kgampe (supra) at 621B.

1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC)(Pennington').

Pennington (supra) at paras 45-51.

See §§ 51.5(e) and (g) supra. For more comment on Pennington, see § 51.1(a)(v) supra. On the related but not necessarily similarly fated question whether the right to have one's trial begin and conclude without unreasonable delay should be confined to pre-appeal stages of the lis between state and individual. see § 51.5(f) supra.
In *S v S*\(^{1145}\) the right to appeal or review filled a judicially created gap in the law relating to a convicted prisoner's entitlement to have a sentence reviewed. Courts had interpreted the entitlement to appeal against a sentence 'resulting' from a conviction not to include an entitlement to appeal against an order putting into operation a suspended sentence.\(^{1146}\) With similar parsimony, the Natal Provincial Division\(^{1147}\) had interpreted the provision allowing special review in cases not subject to ordinary review\(^{1148}\) not to include a review of such an order, because such a review would not be a review of the proceedings 'in which a magistrate's court [had] imposed a sentence'.\(^{1149}\) The result was that an order putting a suspended sentence into operation was subject neither to review nor to appeal. In the same vein, the Court in *Phillips & Others v National Director of Public Prosecutions*\(^{1150}\) had to decide whether a restraint order was appealable or not. The respondent had successfully obtained a restraint order, in terms of the Prevention of Organized Crime Act 121 of 1998, in respect of the first appellant's realizable property. The respondent argued that a restraint order was not appealable since it was not variable or rescindable by the Court that made the order. An appeal was aimed only at decisions that were final and definite and, so the argument went, restraint orders did not finally dispose of any issue. The Court, *per* Howie P, held that judicial decisions of a High Court had to be 'a judgment or order' for it to be appealable.\(^{1151}\) A judgment or order was, according to the Court, (a) final in effect,

(b) definitive of rights of the parties and (c) dispositive.\(^{1152}\) A decision meeting any of the above would be appealable. A restraint order could not be changed and this unalterable situation made restraint orders appealable.

*S v S* illustrated, with facts suggesting one of the most bizarre moments of curial injustice ever reported, precisely why such a position did not 'promote the spirit, purport and objects of the Bill of Rights', as required by FC s 39(2). Nugent and Schwartzman JJ set out the following general principle, to govern the meaning of the right in question:\(^{1153}\)

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1145 1999 (1) SACR 608 (W)('S').

1146 Ibid at 611E-H.

1147 *Gasa v Regional Magistrate for the Regional Division of Natal* 1979 (4) SA 729 (N).

1148 Section 304(4) of the Criminal Procedure Act 51 of 1977.

1149 *S* (supra) at 612C.

1150 2003 (4) All SA 16 (SCA)('Phillips').

1151 Ibid at para 18.

1152 *Phillips* (supra).

1153 *S* (supra) at 612H.
In our view it would be a parsimonious construction of the Bill of Rights which confined [the right to appeal or review] only to the immediate consequences of the trial itself. In our view the clear spirit, purport and object of that section is to ensure that no person is condemned to endure a penalty provided for by the criminal law without recourse being had to another court in order to correct any irregularity or injustice which might have occurred in the course of the proceedings which have had that result.

And in *S v Lukhhandle* Ntsebenza AJ offered the following sober reminder:

Incidentally, not so long ago, opinions and comments were solicited from the Judges, amongst others, about their views on the wisdom of the continued existence of the right to automatic review.\(^{1154}\) This is in view of proposed amendments in the Superior Courts Bill that might do away with this right of the accused. When magistrates deal with the rights of the accused in the way this presiding officer did and give 'reasons' such as he did it becomes clear that some safeguards, in the interests of the proper administration of justice, need to be built into the system to ensure that some monitoring of the process in the lower courts takes place.\(^{1155}\)

In *S v Steyn*\(^{1156}\) the Court (per Madlanga AJ) considered the constitutionality of ss 309B and 309C\(^{1157}\) of the Criminal Procedure Act with reference to the right to appeal to, or review by, a higher court in terms of FC s 35(3)(o). For an appeal procedure to serve its desired purpose, the Court held that the procedure had to be suited to the correction of error.\(^{1158}\) The unsatisfactory features\(^{1159}\) of the

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\(^{1154}\) Of an unrepresented accused convicted of an offence carrying a threshold sentence by a magistrate with less than a prescribed number of years experience s 302 of the Criminal Procedure Act 51 of 1977.

\(^{1155}\) 1999 (1) SACR 568 (C), 569B-D.

\(^{1156}\) 2001 (1) SA 1146 (CC), 2001 (1) BCLR 52 ('Steyn').

\(^{1157}\) Section 309B provides for the application procedure for leave to appeal whereas s 309C stipulates petition procedure where an application referred to in s 309B is refused.

\(^{1158}\) Steyn (supra) at para 23.

\(^{1159}\) The Court held that the paucity of information, which in terms of s 309C(3) must be lodged with the High Court, failed to allow for an adequate reappraisal. Ibid at para 10. This situation was also not much improved by the provisions of s 309C(5), which allowed a presiding officer considering a petition to call for further information. The language of these provisions was permissive and, as a result, some judges might insist on the production of the record while some might not. The court then referred to the following dictum in *S v Ntuli*:

No uniform practice prevails there. Some Judges obtain the record habitually, once the case is not the sort where the information already available satisfies them that a certificate should be granted straight away. Others do so rarely, being content by and large to rely rather on the magistrate’s account of the trial. The refusal of a certificate on that footing worries one. Those Judges who do not read the record will have no means of knowing whether the evidence substantiated the findings made by the magistrate on the credibility of witnesses and other factual issues. They will not learn of any procedural irregularities that may have marred the trial. Nothing dispels their ignorance on those scores. Nothing alerts them to flaws in the magistrate’s findings or conduct of the proceedings which are hidden for the time being but the record may in due course reveal. No petition prepared by counsel is there to guide them in that direction. Nor is the possible presence of such defects likely to have been mentioned either by the prisoner or even by the magistrate, the one oblivious to the true character of the features in question, the other failing to attribute any such character to them.

*S v Ntuli* (supra) at para 15.
procedure made it unsuitable for the purpose envisaged in the Constitution, in that the procedure did not accord with an adequate reappraisal and the making of an informed decision. The procedure accordingly constituted an unjustified limitation of the right of appeal to, or review by, a higher court, as entrenched in FC s 35(3)(o). Sections 309B and 309C were declared inconsistent with the Constitution and accordingly invalid, but the declaration of invalidity was suspended for six months from the date of the order. In *S v Danster; S v Nqido* the Court (per Davis J) confirmed that this period had come to an end. Sections 309B and 309C are thus no longer valid, and an appellant has the right to appeal in terms of the provisions of the Criminal Procedure Act read without the invalid provisions. Appeals launched but not completed by 28 May 2001 (six months from the date of the declaration of invalidity in *S v Steyn*) stand to be governed by s 309(1) and (2) of the Criminal Procedure Act.

1160 *Steyn* (supra) at para 53.

1161 2002 (4) SA 749 (C) ('Nqido').

1162 Ibid at 755. See *S v Jaars; S v Williams; S v Jantjies* 2002 (1) SACR 546 (C)(The accused had been convicted and sentenced in the magistrate’s court before 29 May 2001 — six months from the date of the declaration of invalidity in *Steyn*. In none of the cases had leave to appeal, as prescribed by ss 309B and 309C, been considered by the magistrate’s court. The Court held that the decision by the Constitutional Court in *Steyn* did not have retroactive effect and that the provisions of ss 309B and 309C were therefore still applicable to their appeals. The applicants thus ought to have obtained leave to appeal from the respective magistrates. See *S v Jafta; S v Ndondo; S v Mcontana* 2004 (2) SACR 103 (E)(The appellants were also convicted at a time when ss 309B and 309C had required them to appeal to the High Court, either from the trial court or upon petition to the Judge President. Subsequently, the appellants sought to have their appeals heard without having obtained leave to appeal from the trial courts. The Court was called upon to decide *in limine* whether the appeals were properly before the Court. The Court, per Leach J, held that they were not, since the appellants had been convicted and sentenced prior to the date upon which the declaration of invalidity came into effect and failed to obtain leave to appeal.)