SOUTH AFRICA: THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS IN CRIMINAL PROCES

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1. INTRODUCTION

One of the first priorities of the democratic government that assumed power in 1994 was to transform the racially oppressive criminal justice system that existed until then. In line with its *Justice Vision 2000* reform document, the new Government enacted several pieces of legislation giving effect to the Rule of Law and the Bill of Rights tenets underpinning the right to a fair trial. Important reforms occurred in the demographic transformation of the judiciary and the way judges are appointed. Legal aid in criminal proceedings was introduced on a wide scale. Lay assessors were introduced into the lower courts. The prosecution service, too, was brought on an even keel with the creation of one single national prosecuting authority whose prosecutorial discretionary powers are insulated against political interference. Despite the introduction of these and other enlightened enactments, the South African criminal justice system is subject to severe criticism for its failure to live up to the human rights standards set out in the Constitution and in international human rights instruments. This Report describes the manner in which human rights and fundamental rights are protected in the South African criminal process, and it begins with a look at the country's human rights obligations under international law.

2. APPLICABLE INTERNATIONAL LAW

South Africa is a contracting party to the following human rights treaties: The International Covenant on Civil and Political Rights[2]; International Convention on the Elimination of All Forms of racial Discrimination[3]; Convention on the Elimination of all Forms of Discrimination against Women[4]; Convention on the Rights of the Child[5]; Convention concerning the prohibition and Immediate Action for the Elimination of the Worst Forms of

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[2] Ratified on 10 December 1998.
[3] Ratified on 10 December 1998.
[4] Ratified on 15 December 1995.
[5] Ratified on 16 June 1995.

Child Labour (ILO No. 182)[6]; Convention concerning Minimum Age for Admission to Employment (ILO No.138)[7]; African Charter on Human and People's Rights[8]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[9]; Convention on the Protection and Promotion of the Diversity of Cultural Expressions[10]; Convention on the Rights of Persons with Disabilities[11]

For a treaty to become part of South African law it must be incorporated into an Act of Parliament.[12] But a self-executing provision of a treaty has the force of law domestically if Parliament approves it, unless it is inconsistent with the Constitution or another domestic law.[13] The South African constitution gives effect to the common law rule requiring the courts to interpret laws in compliance with international law.[14] The Constitution expressly commands that a court "must consider" international law in interpreting the Bill of Rights, which is modelled on international human rights conventions.[15] In S v Makwanyane and Another,[16]which dealt with the constitutionality of the death penalty, the Constitutional Court stated that international law includes non-binding as well as binding law.[17] Whereas courts are obliged to consider international law, they are under no constitutional injunction to do more than "consider" foreign law.

In practice, South African courts, including the Constitutional court, have been more disposed to interpret the Bill of Rights through the prism of case law enunciated by international judicial bodies and international supervisory bodies than to apply human rights treaty law directly.[18] However, in the recent case of Mthembu v S,[19] the Supreme Court of Appeals held that evidence, including real evidence, of an accomplice obtained through torture is inadmissible. This case is important for the fact that it recognizes the international crime of torture as defined in the UN Convention against Torture and Other

[6] Ratified on 7 June 2001.
[7] Ratified on 30 March 2000.
[8] Ratified on 9 July 1996.
[9] Ratified on 10 December 1998.
[10] Ratified on 21 December 2006.
[11] Ratified on 30 November 2007. On the same day, South Africa ratified the Optional Protocol to the Convention on the Rights of Persons with Disabilities.
[12] An Act of Parliament, which is national law, includes (a) subordinate legislation made under an Act of Parliament, and (b) a law that was in force when the Constitution came into effect and that is administered by the national government (Section 239 of the Constitution).
[13] Sec 239 of the Constitution.
[14] Ibid. sec 232.
[15] Ibid. Sec 39(10).
[16] 1995 (3) SA 391 (CC).
[17] Ibid at 413-414.
[18] See, for example, *S v Williams* 1995 (3) SA 632 (CC); *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC); *Bernstein v Bester* 1996 (2) SA 631 (CC*); In re Gauteng School Education Bill* 1995 1996 (3) SA 165 (CC); *Mohamed v President of the Republic of South Africa* 2001 (3) SA 893 (CC); Minister *of Safety and Security v Carmichele* 2004 (3) SA 305 (SCA). For critical discussion of the courts' recourse to foreign jurisprudence, see J. Ford, International and Comparative Influence on the Rights Jurisprudence of South Africa's Constitutional Court, in: M du Plessis and S Pete (eds.) *Constitutional Democracy in South Africa 1994-2004,* p. 37ff.
[19] *(64/2007)* [2008] ZASCA 51 (10 April 2008).

Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) as applicable in South Africa (even though torture is not criminalised in South Africa) by virtue of South Africa having ratified the Convention on 10 December 1998. In practice, acts of torture in South Africa have been traditionally prosecuted under the common law crime of assault or assault with intention to do grievous bodily harm.[20]

In the context of African human rights treaties, South African courts have shown themselves less inclined to use the African Charter and the decisions of the African Commission of Human Rights as interpretive tools to give more rigorous effect to the fundamental rights of the individual in the area of criminal justice. Although the Constitutional Court has referred to the Charter in a host of its decisions, this has been chiefly to confirm the rights contained in the South African Bill of Rights.[21]

The fundamental rights laid down in the Bill of Rights are directly enforceable by domestic courts. While a few constitutional rights are meant to benefit citizens (for example, the right to vote and the right to freedom of trade) most of the rights in the Bill of Rights are intended for everyone. Thus, anyone who is arrested, detained and accused may invoke the fair trial rights enshrined in Section 35 of the Constitution. Everyone, too, has the right to freedom and security of the person,[22] and the right to privacy.[23]

The courts have a constitutional obligation to inform legally unrepresented accused persons of their fair trial rights. But not all breaches of the accused person's constitutional rights will automatically result in a trial being held to be unfair by a reviewing court, for fairness is a matter that has to be determined by the facts of the case.[24] Thus, an accused who is not informed of his or her right to silence cannot successfully claim to have been tried unfairly if he or she was in fact aware of this right. Equally, no prejudice and hence, no failure of justice will be held to have occurred where the accused would in any event have been

[20] Parliament has, in response to strong pressure exerted by both national and international human rights groups, drafted the Combating of Torture Bill, 2008 (now in its third version) aimed at criminalising torture. But the Bill has been criticized for falling short of giving effect to the provisions of UNCAT. See generally, L. Muntingh, Comments on the Combating of Torture Bill, 2008 (Prepared for CSVR-CSPRI Roundtable discussion on the Combating of Torture Bill held in Cape Town on 28 October 2008, Cape Town), CSPRI, 2008; L. Muntingh, *Guide to the UN Convention Against Torture in South Africa*, 2008.

[21] For a critical discussion see F. Viljoen, *International Human Rights Law in Africa*, 2007, p. 557-558. See also J. Dugard, *International Law: A South African Perspective* (3rd ed.). 2005, p. 67-69 for a critique of the Constitutional Court's decision in *Azapo v President of the Republic of South Africa* 1996 (4) SA 671 (CC), a case in which the Court decided that a victim's constitutional right to have a justiciable dispute settled by a court of law, or by another independent or impartial forum was qualified by the Postamble in South Africa's 1993 Interim Constitution.

[22] Sec 12 of the Constitution.

[23] Sec 14 of the Constitution.

[24] See *Director of Public Prosecutions, Natal v Magidela* 2000 (1) SACR 458 at Para 18.

convicted, despite the court's failure to inform him or her of his or her right to legal representation.

Citizens have a right to complain to the African Commission of Human Rights, which is the supervisory organ of the African Charter on Human and People's Rights. One of the admissibility requirements is that the individual or NGO must have exhausted the domestic remedies.[25] The communication brought need not allege a violation of a specific right in the Charter; it suffices if it relates to human and people's rights and is compatible with the Charter.[26]

3. THE CRIMINAL PROCESS

South Africa has a Constitution with a Bill of Rights which entrenches the rights of individuals in the criminal process. While the Bill of Rights entrenches the norms to be applied in the criminal process, it does not replace the ordinary common law and statutory rules and principles of criminal procedure.[27] These must, however, comply with the Bill of Rights and the rest of the Constitution.

A. Constitutional Rights

Every arrested person has the right to remain silent; to be informed promptly of the right to remain silent and of the consequences of not remaining silent; not to be compelled to make any confession or admission that could be used in evidence against that person; to be brought before a court as soon as reasonably possible but not later than 48 hours after the arrest; at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and to be released from detention if the interests of justice permit, subject to reasonable conditions.[28]

Everyone who is detained, including every sentenced prisoner, has the right to be informed promptly of the reason for being detained; to choose, and to consult with, a lawyer, and to be informed of this right promptly; to have a lawyer assigned to the detained person by the state and at state expense, if a substantial injustice would otherwise result, and to be informed of this right promptly; to challenge the lawfulness of the detention in person

[25] Art 56 of the Charter. See also *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004).
[26] Viljoen op cit 332.
[27] See, generally, N. Steytler, *Constitutional Criminal Procedure*, 1998, p. 1-6.
[28] Sec 35 (1) of the Constitution.

before a court and, if the detention is unlawful, to be released; to conditions of detention that are consistent with human dignity, including at least exercise and its provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and to communicate with, and be visited by, that person's spouse or partner, next of kin, religious counsellor and medical practitioner of his or her choice.[29]

Every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it; to have adequate time and facilities to prepare a defence; to a public trial before an ordinary court; to have their trial begin and conclude without reasonable delay; to be present when being tried; to choose, and to be represented by, a lawyer, and to be informed of this right promptly; to be presumed innocent, to remain silent, and not to testify during the proceedings; to adduce and challenge evidence; not to be compelled to give self-incriminating evidence; not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and to appeal to, or review by, a higher court.[30]

All information communicated to the person in respect of the above rights must be given to him or to her in a language that the person understands.[31] The Constitution provides further that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.[32]

B. Administration of Criminal Justice

The administration of criminal justice involves three state organs, namely, the police, the courts and the prisons. The Minister of Safety and Security, who is a member of Cabinet, is politically accountable to Parliament for policing.[33] The National Commissioner of the police, who is appointed by the President, as head of the national executive, is responsible for the control and management of the police in accordance with the national policing

[29] *Ibid* sec 35(2) (f).
[29] Sec 35 (3ec 35 (2) of the Constitution.
[30] Sec 35 (3) of the Constitution.
[31] Sec 35 (4) of the Constitution.
[32] Sec 35 (5) of the Constitution.
[33] Secs 92 (1) and 206 (1) of the Constitution.

policy and the directions of the Minister.[34] Political accountability to Parliament for the prisons is structured similarly.

The Minister of Justice is the political head of the Department of Justice and as such, is politically accountable to Parliament for its workings. The Director-General of Justice, who is appointed by the President, heads up the Department of Justice and is accountable to the Minister. Judicial authority, however, vests in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.[35] The Constitution not only forbids any person or organ of state from interfering with the functioning of the courts,[36] but also obliges organs of state to assist and protect the independence of the courts through legislative and other measures.[37]

The powers of the criminal justice authorities may take effect if there are *reasonable* grounds for suspecting or believing that certain circumstances exist. For example, a police officer may without a warrant arrest any person whom he or she "reasonably suspects" of having committed a serious offence, or who, at night, is found in any place in circumstances which afford "reasonable grounds for believing" that such person has committed or is about to commit an offence.[38]

a. Judiciary and courts

Assessors are members of the court, and the finding of the majority of the court with regard to matters of fact, is the decision of the court.[39] This means that assessors may outvote the presiding officer. But assessors have no say in the assessment of the sentence as this is a matter for the judge or the magistrate.

In line with the role of judicial officers in accusatorial criminal justice systems, judges and magistrates play a passive role, which is limited to finding the truth and ensuring that the rules of due procedure are observed. The presiding officer assumes an active role during certain stages of the proceedings. This happens, for example, when the accused pleads guilty to offence charged and the presiding officer is of the opinion that the offence merits a sentence of imprisonment or any other form of detention without the option of a fine. In

[34] Sec 207 (1) and (2) of the Constitution.
[35] Sec 165 (1) and (2) of the Constitution.
[36] Sec 165 (3) of the Constitution.
[37] Sec 165 (4) of the Constitution.
[38] Sec 40 (1) (f) of the Criminal Procedure Act, 51 of 1977.
[39] Du Toit, *Commentary on the Criminal Procedure Act*, Revision Service, 2004, commentary to Para 112.

such a case, the judge or magistrate is obliged to question the accused with regard to the alleged facts of the case in order to establish whether or not he or she admits the allegations to which he or she has pleaded guilty.[40] The idea is to protect an uneducated or legally unrepresented accused person from the negative consequences of an ill-considered plea of guilty.[41]

b. Prosecution

South Africa has one National Prosecuting Authority at the head of which is the National Director of Public Prosecutions.[42]The National Director is accountable to Parliament through the Minister of Justice, who exercises final responsibility over the prosecuting authority. The prosecution service is professionally independent in the sense that "[t]he Constitution guarantees the professional independence of the National Director of Public Prosecutions and every professional member of his staff, with the obvious aim of ensuring their freedom from any interference in their functions by the powerful, the well-connected, the rich and the peddlers of political influence."[43]

The prosecution service is a hierarchical organisation consisting of a National Director, deputy national directors, directors, deputy directors and prosecutors. Every prosecutor is accountable to the national director who, in turn, is responsible for the performance of the Prosecuting Authority.[44]

All prosecutors are required to have a bachelor of laws (LLB) degree. As is the case with magistrates, vocational training for prosecutors is provided by the Department of Justice.

Prosecutors are responsible for instituting and conducting criminal proceedings on behalf of the State. However, where the prosecutor declines to prosecute, a private person who qualifies under the Criminal Procedure Act may institute and conduct a prosecution either in person or through a legal representative. Such a prosecution must be conducted in the name of the private prosecutor.[45] In order to obtain the process of any court to summons any person to answer any charge, the private prosecutor must produce a certificate *nolle prosequi* signed by a Director of Public Prosecutions (DPP), confirming that he or she has

[40] Sec 112 (1) (b) of the Criminal procedure Act, 51 of 1977.
[41] Du Toit, *op cit*, commentary to Para 145.
[42] The national prosecution service is regulated by the National Prosecuting Authority Act, 32 of 1998, which was enacted to give effect to Sec 179 of the Constitution.
[43] *S v Yengeni* 2006 (1) SACR 405 (T) at 51.
[44] *Prosecution Policy* 1 at A.1.
[45] Sec 10 (1) of the Criminal Procedure Act, 51 of 1977.

examined the statements or affidavits on which the charge is based and that he or she declines to prosecute.[46] Private prosecutions are costly[47] and therefore rare.

Apart from the DPP, who may overrule a decision of a local public prosecutor not to institute a prosecution, no one may compel a public prosecutor to prosecute a matter. The decision whether or not to prosecute is based on whether there is sufficient and admissible evidence to provide a reasonable prospect of securing a conviction. Once a public prosecutor is satisfied that there is a reasonable prospect of a successful prosecution, the prosecution will usually go ahead, unless public interest demands otherwise.[48] Factors taken into account when considering the public interest include the nature and the seriousness of the offence, the interests of the victim and the broader community, and the circumstances of the offender. The weight and the relevance attached to each of these factors depend on the circumstances of each case.[49]

A prosecutor may withdraw the charges against the accused without the consent of the DPP before the plea stage of the proceedings.[50] The accused is not entitled to an acquittal and may be prosecuted again on the same or related charges if, say, new evidence comes to light. A public prosecutor may stop the prosecution at any time after an accused has pleaded but before conviction, but this may be done only with the consent of the DPP. Should the prosecution be stopped, the accused is entitled to an acquittal.[51]

Plea negotiations and plea agreements are regulated by the Criminal Procedure Act.[52] There is also the traditional form of plea bargaining, according to which the accused may, for example, offer a plea to a lesser offence than that charged by the State. In such a case "an agreement is reached with the prosecutor on the facts which are to be placed before the court to justify a conviction on the basis agreed to."[53] Under the statutory provisions, only legally represented accused persons may negotiate an agreement on plea and sentence. The agreement, which provides for the participation of the complainant or victim, is between the public prosecutor and the legally represented accused and must be in writing. It is entered into before trial, without the participation of the presiding officer in the case. It is a

[46] *Ibid* Sec 7 (2) (a).
[47] The private prosecutor is required to deposit, as security that the prosecution will be instituted and concluded without delay, a sum of R5 000 with the magistrates' court in whose area of jurisdiction the crime was committed. *Ibid* Sec 9.
[48] Prosecution Policy A.5.
[49] *Ibid* A.6.
[50] Sec 6 (a) of the Criminal Procedure Act, 51 of 1977.
[51] *Ibid*. Sec 6 (b).
[52] Sec 2 of the Criminal Procedure Second Amendment Act, 62 of 2001 inserted Sec 105A into the Criminal procedure Act, 51 of 1977.
[53] J J Joubert (ed) *Criminal Procedure Handbook* (2007) 215.

one-off agreement, which means that if the court rules for a trial *de novo* on the merits of the sentence, the parties are forbidden from entering into a plea and sentence agreement in respect of a charge arising out of the same facts.[54] If the court is satisfied with the sentence agreement, it convicts the accused and imposes the sentence agreed to, but if not, it informs the parties of what it considers to be a just sentence. In the latter case, the parties may choose to stick to the agreement on the merits, with the court convicting the accused and imposing sentence as it ordinarily does, or the parties may elect to withdraw from the agreement, meaning that the trial starts afresh before another judicial officer.

Prosecutors have a code of conduct which emphasizes that prosecutions must be fair and effective and that prosecutors must act without fear, favour or prejudice.[55] Prosecutorial decisions are supervised by DPPs, their Deputy Directors and by the Chief Prosecutors in the lower courts. Although local public prosecutors, as a rule, exercise their own discretion in deciding whether or not to prosecute, a DPP can direct and control the decisions of prosecutors within his or her jurisdiction by issuing internal circulars which provide prosecutors with guidelines with regarding the prosecution or non-prosecution of certain kinds of offences. When the DPP receives a complaint from a member of the public relating to a decision taken by a public prosecutor, the DPP may call for the case docket and require a public prosecutor to account for the prosecutorial decision taken. The DPP may then either confirm the prosecutor's decision or reverse it.

c. Police

The prosecution service operates independently of the police services. Within the criminal justice process, the police are responsible for obtaining evidence of the commission of crimes, securing the attendance of the accused in court and are authorized to grant bail in less serious offences. In carrying out their work they are, as an organ of state exercising power and performing a function in terms of the Constitution, under a Constitutional obligation to respect, protect, promote and fulfil the rights of individuals.[56] The police draft the original criminal charge and gather the evidence in a docket, which is forwarded to the public prosecutor. The prosecutor relies on the docket whether or not to prosecute. Based

[54] *Ibid* 217.
[55] Preamble to the Code of Conduct for members of the National Prosecuting Authority C.1.
[56] Sec 7 (2) of the Constitution. See also Sec 13 (1) of the South African Police Service Act, 68 of 1995; Steytler, *op cit*, p. 15.

on the evidence, the prosecutor decides whether there is a *prima facie* case against the accused and whether to institute a prosecution.

d. Directorate of Special Operations (DSO)

Besides the police and the public prosecution service, there is the Directorate of Special Operations (DSO), known as the "Scorpions", which is a multidisciplinary agency with a legislative mandate to investigate and prosecute organized crime, corruption, serious and complex financial crimes and money laundering and racketeering.[57] The Directorate is headed up by a Deputy National Director of Public Prosecutions, who is appointed by the President and assigned by the National Director. Section 28 of the National Prosecuting Authority Act gives the Investigating Director of the DSO wide powers to hold *in camera* investigative inquiries on reasonable belief that the facts warrant it. For the purposes of such an inquiry, he or she may summons any person who is believed to be able to furnish any information on the subject of the inquiry to appear before him or her to be questioned. The person is, however, entitled to be legally represented at such an inquiry.[58] The decision of the Investigating Director to conduct such an inquiry is not subject to review.

The fact that the Director may single-handedly authorize such an investigation has attracted fierce criticism from quarters within the ruling African National Congress (ANC), particularly because of the charges of corruption that the Scorpions have now brought against ANC leaders, such as the president of the ANC, Jacob Zuma, and the now suspended Commissioner of Police, Jackie Selebi. As at the time of writing, there is a concerted effort coming from within the ANC, to enact a law which will transfer the Scorpions to the police, thus depriving the unit of the independence it has hitherto enjoyed.

e. Defence

As regards the practicing legal profession, South Africa has a divided bar consisting of attorneys and advocates. The academic admission-requirements to either branch of the legal profession entail a four year LLB or a three year undergraduate degree plus a two year LLB from any South African university. The practical training required for admission as an advocate differs from that of an attorney. In order to be admitted to the bar (the

[57] See Sec 7 (1) (a) of the National Prosecuting Authority Act, 32 of 1998.
[58] Sec 28 (9).

representative body of advocates), the candidate must complete a year-long pupilage and pass the National Bar Examination of the General Council of the Bar. The admission-requirements to practise as an attorney cover the practice and procedure in the High Court and Magistrates' Court. The examination also includes the practice, functions, practical bookkeeping, and duties of an attorney. Before sitting for the examination, the candidate must have served under articles or contract of service, or must be serving under articles or a contract of service for at least six months, or must be exempt from serving under articles, or have attended a training course which is approved by the Law Society (the umbrella body of the attorneys' profession) for a minimum of four months.[59] Advocates may appear in all South African courts and when engaged in court work, they are instructed by attorneys. Whereas previously, only advocates were entitled to appear in the High Court, since 1995 attorneys holding an LLB degree or its equivalent or with three years practical experience may apply to appear in the higher courts, including the Constitutional Court.[60] Advocates, unlike attorneys, are not statutorily compelled to be members of the bar and are not required to occupy chambers together with other members of the bar.

Attorneys are bound by the professional ethics of attorneys, which derives from both statute and the common law. The statutory misconduct is expressed in both the Attorneys Act and in the rules made by the law societies under the Act.[61] Advocates are bound by the professional standards and code of ethics of the bar, which also has disciplinary powers.[62] Unprofessional, dishonourable or unworthy conduct, in the case of both attorneys and advocates, is visited with disciplinary action, such as a reprimand or a fine, at the instance of the respective professional body, and may even result in application to court to have the practitioner suspended or removed from the roll.

In the lawyer-client relationship, the lawyer owes the client a duty of utmost good faith and must not do or be a party to anything tainted with fraud, or be mean or dishonourable. An attorney, unlike an advocate, has a duty to report to the client when it is reasonable and necessary, and is required at all times to act subject to the proper instructions of the client.[63] A client may not prescribe how services must be rendered. As a general principle, the legal representative is, for the duration of the mandate, in complete control of how the defence

[59] Secs 12 and 14 of the Attorneys Act, 53 of 1979.
[60] Right of Appearance in Courts Act, 62 of 1995.
[61] E.A.L. Lewis, *Legal Ethics A Guide to Professional Conduct for South African Attorneys*, 1982, p. 5.
[62] See Joubert, *The Law of South Africa* (2nd ed.), 1999, p. 251-255.
[63] See *Goodriche and Son v Auto Protecction Insurance Co Ltd (In Liquidation) per Cillié J* at 504-508.

presents its case.[64] In *Beyers v Director of Public Prosecutions, Western Cape*[65] the Court observed that the idea of being legally represented means more than having somebody standing next to the accused, speaking on his behalf: "Representation entails that the legal adviser will act in your best interests, will represent you, will say everything that needs to be said in your favour, and will call such evidence as is justified by the circumstances in order to put the best case possible before the court in your defence." In *S v Halgryn* the Supreme Court of Appeal held that judicial scrutiny of counsel's performance must be highly deferential, but Harmse JA emphasized that "[t]he constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to proper, effective or competent defence.[66] The courts have an inherent power to order an attorney to pay the costs *de bonis propriis* for being guilty of breach of duty.[67]

C. Pre-trial, Trial and Appeal

In the pre-trial phase, the legal representative has to conduct a thorough investigation of the case. The investigations are directed at ascertaining the following: the case against the client; what statements or admissions the client has made; the client's defence; which witnesses may be called by the State; what factors bear upon the conduct of the defence; and the difficulties in the client's case.[68] Where an expert witness is to be called, the legal representative should also acquire some background understanding of the technical knowledge on which the expert witness will be approached. The defence has a right to gain access to the docket, but an application to do so, which must be in writing, will only be considered after the investigation has been completed. Copies of statements and documents are supplied freely if the accused cannot afford to pay for them.[69] The Constitutional Court has held that access to the docket may be opposed where there is a real risk that the identity of an informer may be disclosed; State secrets may be revealed; State witnesses may be intimidated; the proper ends of justice may be impeded; policing methods and investigative techniques may be disclosed; or confidential co-operation between various police forces may be revealed.[70]

[64] *R v Matonsi* 1958 (2) SA 450 (A); *R v Patrick* 1962 (1) SA 263 (FC).
[65] 2003 (1) SACR 164 C at 166j-167a.
[66] 2002 (2) SACR 211 at 216h-217c.
[67] See E. Morris, *Technique in Litigation* (5th ed.) by H. Daniels, 2003 44.
[68] *Ibid* 316.
[69] Policy Directives of the National Prosecuting Authority B.31.
[70] *Shabalala and Others v Attorney-General Transvaal and Another* 1995 (2) SACR 761 (CC).

The defence has the right to consult with state witnesses under certain conditions, but the prosecutor has to consent to this. If the prosecutor refuses, the defence may apply to the court for an order. The prosecutor may still oppose the application for consultation even though the witness agrees to it. The prosecutor has an obligation to inform the witness of his or her right to refuse to be consulted by the defence and that should the witness agree to a consultation, the prosecutor, attorney or advocate of the witness's choice can be present during the consultation.[71]

The tribunal of fact is not acquainted with the case before the trial starts. Lay assessors in the Magistrates' Courts, and professionally qualified assessors in the High Court, are appointed before evidence is led and commence with their function after the plea has been recorded. An assessor who receives information which is detrimental to the accused and which has not been proved in evidence must retire from the case. If the judge considers it to be in the interests of justice that the assessors do not participate in any decision upon the question whether evidence of any confession or other statement made by the accused is admissible as evidence against him or her, the judge alone decides on the question, and may sit alone for this purpose.[72]

At the trial, witnesses are questioned by the parties and not by the judicial officer. The accused has a right to call witnesses, to give evidence and to cross-examine State witnesses. Where the presiding officer asks questions, these are of a clarifying nature. The court may not conduct its questioning in such a way that its impartiality becomes questionable.[73]

Although the law allows for a retrial on appeal, in practice this is a rarity. The approach adopted by an appeal court was spelt out in S V Hadebe *and Others*[74] where it was held that "in the absence of demonstrable and material misdirection by the trial court, its findings of fact were presumed to be correct, and would only be disregarded if the recorded evidence showed them to be clearly wrong." A court of appeal takes the view that the trial judge is best placed to make reliable findings of fact. But if the trial magistrate or judge fails to make use of this advantageous position, the court of appeal will be free to make its own findings, which means "that the entire case is retried in the sense that the court of appeal will attempt to establish whether the appellant is actually guilty beyond a reasonable doubt,

[71] Policy Directives B.32.
[72] Sec 145 (4) (a) of the Criminal Procedure Act, 51 of 1977.
[73] See *S v Mabuza* 1991 (1) SACR 636 (O).
[74] 1997 (2) SACR 64 (SCA) 645e-f.

particularly in the light of the record of the evidence and the impression which the witnesses made upon the trial judge."[75]

The law provides for appeals on points of law. The State may appeal to the Supreme Court of Appeal on a point of law against a judgment in favour of a convicted accused on an appeal originating from a lower court. The Supreme Court of Appeal cannot then substitute a conviction for an acquittal, but if it finds in favour of the prosecution, it may order that the accused be prosecuted afresh.

The Constitutional Court is the highest court in all constitutional matters. It has the final say on the constitutionality of legislation and also makes the final decision on whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.[76] The Constitutional Court and must confirm any order of invalidity made by a High Court or the Supreme Court of Appeal on an Act of parliament or a provincial Act before the order has any force.[77] The Constitutional Court may be approached for relief by anyone with sufficient interest in the matter to be admitted as a party, who alleges that a right in the Bill of Rights has been infringed or threatened.[78]

4. HUMAN RIGHTS IN THE CRIMINAL PROCESS

A. Death Penalty and Cruel or Unusual Treatment

As of June 1995 the death penalty may not be imposed in South Africa. In that year the Constitutional Court decided in *S v Makwanyane*[79] that the death sentence is inconsistent with the Constitution on the basis that it is a form of cruel, inhuman or degrading punishment, the imposition of which is prohibited by the Constitution. The Court also found that it infringes the Constitutional rights to life and to dignity. The right to life necessarily entails that the State has a duty to protect the individual from a life-endangering situation. In the *Makwanyane* judgment, Ackermann J described the State's obligation to protect the rights of the individuals as being part of the "constitutional state compact" in which citizens renounced their right to self-help in return for state protection against

[75] Du Toit, *op cit*, commentary to Sec 309 at 30-30.
[76] Sec 167 (3) and (5) of the Constitution.
[77] *Ibid* sec 167 (5).
[78] *Ibid* Sec 38.
[79] 1995 (2) SACR 1 (CC).

violence.[80] This obligation has been interpreted to mean that the State has a duty to "enforce the criminal law to the best of its ability".[81]

Following its decision in Makwanyane, the Constitutional Court, in S v Williams,[82] held that corporal punishment violated the right to human dignity and the protection against cruel, inhuman or degrading punishment. The Court rejected the contention that the whipping of a juvenile was a justifiable limitation of the right not to be subjected to cruel, inhuman or degrading punishment because it was an effective deterrent. The Court held that such punishment was not sufficient to override a constitutionally entrenched legal right and could not be saved by the limitation clause. But the Court seemed to draw a distinction between cruel punishment and degrading punishment, intimating that in the case of the right against degrading punishment, the State would have to meet very stringent requirements before such a right can be limited.[83]

B. Habeas Corpus

Section 35(2)(d) of the Constitution has restored the common law *habeas corpus* remedy where an individual is arbitrarily deprived of his or her liberty. The Constitution gives everyone who is detained, including every sentenced prisoner, the right to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released. The application, which may be *ex parte*,[84] is made to the Court, asking it for an order that the relevant state authorities bring the detainee before the court at a stipulated date and time. The Court couples the order with a rule *nisi*, which requires the respondent to show reason why the detainee should not be released. The court will then order the release of the detainee if whichever state authority holding the detainee is unable to show reason why he or she should not be released.

Both the Constitution[85] and the Criminal Procedure Act[86] oblige the police to bring an arrested person before a court within 48 hours. If the 48 hours expire outside court hours or on a day when the court does not sit, then the arrestee must be brought for court not later

[80] *Ibid* para 168.
[81] De Waal *et al.*, *op cit*, p. 242.
[82] 1995 (7) BCLR 861 (CC).
[83] *Ibid* para 76. See also Steytler, *op cit*, p. 413.
[84] Joubert, *op cit*, p. 25.
[85] Sec 35 (1) (d) (i).
[86] Sec 50 (1).

than the end of the first court day after the expiry of 48 hours.[87] The Constitution further requires that the arrested person be brought before a court "as soon as reasonably possible". This means that if the police, after investigating the matter and satisfying themselves within the 48-hour period that the arrested person is innocent, that person must be released immediately otherwise the detention becomes unlawful.[88]

a. Bail

Before the accused person's first appearance in court, the police may release that person on "police bail" if the accused is charged with a less serious crime.[89] Police bail is conditional only upon the payment of cash, which means the police may not impose other discretionary conditions[90] other than the essential conditions that the accused appear at a specific court on a specific day and time. The DPP or authorized public prosecutor may also grant the accused bail before the first court appearance subject to reasonable discretionary conditions.[91]

The accused may apply to be released on bail at the first court appearance, and the court may release him or her subject to discretionary bail conditions, which may be that the accused must report to a specified police station once or twice a day, or that the accused surrender his or her passport to the police, or that he or she not leave the magisterial district without first informing the police investigating the case. A court may also release the accused from custody and warm him or her to appear in court at a later date, in lieu of granting bail. The warning may be made subject to similar conditions as may be imposed when bail is granted.[92]

Either the accused or the prosecution may raise the question of the possible release on bail, and if neither does this, the court is obliged to ask the accused whether he or she wishes the question to be considered.[93] If a remand is requested, the presiding officer will first hear the reasons for the request and the opposing party's reply. Should the request be acceded to, it is the presiding officer who decides whether the accused should be remanded in custody, or released, until the next appearance date. The court may postpone the hearing of the bail

[87] Sec 35 (1) d (ii).
[88] Joubert, *op cit*, p. 109.
[89] Sec 59 (1) of the Criminal Procedure Act, 51 of 1977.
[90] J Vander Berg, *Bail: A Practitioner's Guide* (2nd ed.), 2001, p. 34.
[91] *Ibid* 35. See also *Brink v Commissioner of Police* 1960 (3) SA 65 (T) and *S v Nquala* 1974 (2) SA 445 (NC).
[92] Sec 72 (1) (a) of the Criminal Procedure Act, 51 of 1977.
[93] *Ibid* sec 60 (1) (C).

application or proceedings to a future date or to another court for not more than seven days at a time. One reason for this, for example, would be when the court considers this necessary in order to give the state a reasonable opportunity to procure material evidence that may be lost if bail is granted.[94]

The National Prosecution Policy Directives[95] require the prosecutors to reassess continually the State's attitude to bail in respect of the awaiting-trial detainee. Where an accused has spent more than three months awaiting trial behind bars, the prosecutor must, at each subsequent court appearance, specifically raise the issue and ask the court to record the reasons for further detention. However, the head of a prison where the accused is being detained may apply to a lower court that the detainee be released on bail or on warning, if he or she is satisfied that the prison population of the particular detention centre is reaching such proportions that "it constitutes a material and imminent threat to the human dignity, physical health or safety of the accused" who meets certain criteria (for example, the accused is charged with an offence which would qualify him to be granted bail by the police, or has been granted bail by a lower court but is unable to pay the bail amount set).[96]

C. Independent and Impartial Tribunal

Permanent judges of the High Court are appointed by the President on the advice of the Judicial Service Commission, which comprises the Chief Justice, the Minister of Justice, representatives of the practising and academic legal professions, National Assembly, and the Council of Provinces. Constitutional Court judges are appointed by the President from a list of nominees submitted by the Judicial Service Commission.[97] The latter are appointed for a non-renewable term of 12 years, and the other judges until they are discharged from active service under an Act of Parliament.[98] Judges may be removed from office only on grounds of incapacity, gross incompetence or gross misconduct, which must be established by the Judicial Service Commission and called for by at least a two-thirds majority of the National Assembly. They are remunerated relatively well. Their salaries, allowances and benefits are constitutionally protected and may not be reduced.[99]

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[94] *Ibid* sec 50 (6) (a) (i) (aa).
[95] B.17.
[96] See sec 63A (1) of Correctional Services Act, 111 of 1998.
[97] Sec 174 (4) of the Constitution.
[98] *Ibid* sec 177.
[99] *Ibid* sec 176 (3).

Magistrates are appointed by the Minister of Justice in consultation with the Magistrates' Commission, which consists of political appointees, representatives from the magistrates, high court judges, and the practising legal profession. Magistrates must vacate office at the age of 65, and may be removed or suspended from office by the Minister, on the recommendation of the Commission, for misconduct, continued illness, or incapacity to carry out office duties efficiently.[100] This is subject to the confirmation of Parliament, which itself may order the removal of a magistrate on the same grounds.[101] Their salaries, based on rank, are determined by the Minister in agreement with the Commission and after consultation with the Minister of Finance, and are subject to parliamentary approval. Although they do not enjoy the same constitutionally protected financial security as judges do, their salaries may not be reduced, except by an Act of Parliament.[102] While magistrates earn less than judges, their salary scales have improved very considerably from 1993, when they were elevated from the ranks of the civil service.[103]

The independence of the courts is further entrenched by the constitutional tenet that no person or organ of state may interfere with the functioning of the courts.[104] The individual's right to be tried by an impartial court derives not only from the Constitution, but from the common law as well. What is important is that from a public point of view the courts are seen to be genuinely free from Executive interference. And over the past 14 years since South Africa became a democracy, judges, especially the Constitutional Court judges, have in a number of decisions enunciated their resolute commitment to uphold the doctrine of separation of powers as contemplated by the Constitution.[105]

The question of recusal is governed not by statute, but by common law principles. Any or both the parties may apply for recusal when the impartiality of the judicial officer or an assessor is being challenged. The presiding officer may also act *mero motu.* The application should preferably be brought at the start of the trial to avoid a fresh trial, but it may also be

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[100] Sec 13 (3) of the Magistrates Act, 90 of 1993.
[101] Ibid sec 13 (4).
[102] Ibid sec 92.
[103] This happened with the enactment of the Magistrates Act, 90 of 1993.
[104] Sec 165 (3).
[105] Thus, in *S v Mamabolo (E TV, Business Day and Freedom of Expression Institute intervening)2001 (7) BCLR 685 (CC)* at para 16 the Constitutional Court, per Kriegler J, asserted the independence of the judiciary as follows: "In our constitutional order the judiciary is an independent pillar of state, constitutional mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of the state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the state."

made during the course of the trial.[106] The test is whether there is a reasonable perception of bias and not only whether real bias exists.[107] The test is an objective one. After the recusal the judicial officer is *functus officio*. The trial becomes void and can start again against the person charged.[108]The *audi alteram partem* rule applies in all recusal procedures. A decision by a magistrate to recuse himself or herself is reviewable by a High Court and may be set aside. But if the magistrate refuses to recuse him or herself, the matter would not ordinarily be reviewed before the case is completed, unless exceptional circumstances exist.[109]

A judicial officer who has conducted inquest proceedings should not hear any criminal trial emanating from the inquest, unless there is no other judicial officer available.[110] It is desirable that a magistrate who has presided over lengthy bail proceedings should not preside over the trial. However, if he or she is satisfied that his or her presiding will not prejudice the accused, he or she may proceed with the matter. But the option of applying for recusal must be explained to the accused.[111]

The appointment of assessors is not regulated by law. In practice, for criminal trials before the High Court, the judges appoint their own assessors, who are chosen for the expertise they have in a particular field, for example, engineering, accountancy, etc. For criminal cases in the lower courts, lay assessors are appointed. The manner of appointment differs from area to area. In some magisterial jurisdictions, the lay assessors are appointed by the magistrate from a pool of nominees recommended by community-based organisations. Where such an arrangement exists, the lay assessors are usually appointed on a rota system, but this need not necessarily be the case. Some magistrates choose their own lay assessors, and these are usually leaders in the community, such as retired school teachers, religious leaders, members of civic organisations, etc. [112]

B. Defence Rights

a. Right to counsel

[106] *R v Silber 1952* (2) SA 475 (A).
[107] *S v Khala* 1995 (1) SACR 246 (A); *S v Malindi* 1990 (1) SA 962 (A): *S v Basson* [2003] 3 All SA 51 (A).
[108] *Magubane v Van der Merwe* 1969 (2) SA 417 (N).
[109] S v *Burns 1988* (3) SA 366 (C).
[110] *R v Segal* 1949 (3) SA 67 (C).
[111] *Criminal Court Benchbook* (Issued by the Justice College, Pretoria, September 2002) Ch 6.4.
[112] See, generally, Joubert, *op cit*, p. 198-201 and Steytler, *op cit*, p. 263-264.

Everyone who is arrested is entitled to a legal adviser from the time of arrest and to be informed of this right.[113] The Constitution obliges the police to inform promptly everyone who is detained of his or her right to consult with a lawyer of his or her choice.[114] The Constitution also requires that an accused be informed promptly of the right to state-assigned legal representation at state expense, if substantial injustice would otherwise result.[115]

Indigent accused persons are entitled to legal aid where a substantial injustice would otherwise result. A single person or an estranged spouse with a calculated income not exceeding R600 per month, plus R180 per child per month qualifies for legal aid on the means test. For married persons the combined income must not exceed R1200, with a rebate of R180 per month per child. The second criterion, *substantial injustice would otherwise result*, means that, if convicted, the accused would probably receive a prison sentence of which the unsuspended portion would exceed three months, without the option of a fine or, if given the option of a fine, the accused would not pay the fine within two weeks of being sentenced.[116] Accused persons who do not qualify for legal aid, are referred to Justice Centres, where salaried public defenders are assigned to them in criminal matters. At the instance of law societies, *pro bono* legal services offered by attorneys in private practice have sprung up over the past five years, but so far, they are offered mainly in the large metropolitan areas, and predominantly in relation to civil matters. Lawyers who are assigned criminal matters by the Legal Aid Board under the judicare system receive a smaller fee than that ordinarily charged paying clients. In practice, legal aid cases in criminal matters constitute the bulk of all legal aid cases. For the Year 2006-2007, legal aid in criminal matters made up over 90% of all legal aid cases.[117]

Counsel may be present during police interrogation, and the police are under an obligation to inform the accused of his or her right to legal representation at every further stage after the arrest, such as when he or she is being questioned, when the police take a statement or the suspect makes a confession.[118] However, in *S v Melani*[119] the Court held that the

[113] Sec 73 (1) and (2A) of the Criminal Procedure Act, 51 of 1977.
[114] Sec 35 (2).
[115] *Ibid* sec 35 (3).
[116] H. Van As, Legal Aid in South Africa: Making Justice Reality, 49 *Journal of African Law*, 2005, p. 58. For criticism of this eligibility criterion, see S. Ellmann, Weighing and Implementing the Right to Counsel, 121 *SALJ*, 2004, p. 357.
[117] *Annual Report of the Legal Aid Board 2006-2007* at 24.
[118] See, for example, *S V Marx* 1996 (2) SACR 140 (W); *S v Agnew* 1996 (2) SACR 535 (C). For a general discussion, see Joubert, *op cit*, p. 76 ; Steytler, *op cit*, p. 162 on the policy duty to "hold off" the accused's participation in the investigation during the period afforded to engage legal representation.

Constitution does not absolutely prohibit the questioning of an accused or obtaining a statement from him or her without the accused being legally represented, if the accused has waived the right to consult a lawyer, knowing and understanding what he or she is waiving.[120] In *S v Mphala and Another*[121] it was held that where the arrested person's waiver of the right to legal representation is uninformed –where, in this case, the accused were not informed before making confessions that a legal representative had been obtained for them and had requested that they not make any statements without consulting him - such a waiver is invalid.

A detainee has the common law right to confidential communications with his or her lawyer outside the earshot of the detaining authority.[122] The fact that an accused has a constitutional right to counsel means that privileged communications between accused and defence counsel enjoy constitutional status.[123] Written instructions, too, may not be censored by prison authorities.[124] Infringements of any aspect of this right must be subjected to the requirements of the limitation clause.[125] In *S v Naidoo*[126] the police falsely misled a judge to direct that a telephone be tapped, meaning that the direction was unlawful. The monitoring could thus not constitute a limitation in terms of the Monitoring Act; rather, it was an unjustifiable violation of the accused's right to privacy, and since the evidence amounted to a violation of the accused's right against self-incrimination, it was excluded. Police monitoring of communication between an accused and his counsel is not covered by the Monitoring Act, and where this happens, it is a violation of the accused's right to privacy.[127] A written communication between the accused between a lawyer and the client is subject to legal professional privilege and may not be seized by the state and admitted as evidence at the trial without the client's consent. Such a document may not be seized. Legal professional privilege does not apply where the communication between client and the legal representative is made for purposes of committing a crime.[128]

A defence lawyer in South Africa is protected against prosecution for making defamatory statements in the interests of a client, provided the statement is germane to the issue being

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[119] 1996 (1)SACR 335 (E).
[120] *Ibid* 350D.
[121] 1998 (1) SACR 388 (W).
[122] Steytler *op cit* 164-165.
[123] *Ibid* 165.
[124] *Ibid*.
[125] *Ibid*.
[126] 1998 (1) BCLR 46 (D).
[127] S v Nkabinde 1998 (8) BCLR 996 (N).
[128] Waste Products Utilisation (Pty) Ltd v Wilkes and Another 2003 (2)SA 515 (W).

tried in court.[129] "It is the occasion that is privileged not the capacity (of a lawyer)" and it is not the tribunal that matters but "it is its capacity (of a forum) that creates a privileged occasion." He or she is protected "unless he or she knew the statement to be untrue or unless there was no reasonable ground to believe that it might be true."[130] However, where a defence lawyer misleads a court, even carelessly, concerning the evidence on any significant point, this would be seen in a very serious light,[131] and would presumably result in a prosecution on the charge of attempting to defeat the course of justice, for example, where it can be proved that the statement led to a guilty person being acquitted.[132]

b. Defendant's rights

In principle, the fair trial rights enumerated in Section 35 of the Constitution apply to everyone. Before we deal with them in detail, however, it should be noted that the guarantees of a fair trial are undermined by vestiges pre-Constitutional criminal procedural provisions which fly in the face of the Bill of Rights. For example, under the Drugs and Drug Trafficking Act,[133] a magistrate may order the arrest of someone for the purpose of interrogation if, in his or her opinion, that person is withholding information about a drug offence. Although such a person must be brought before a magistrate within 48 hours of the arrest, he or she may be kept detained until, in the opinion of the magistrate, that person has satisfactorily answered all questions put at the interrogation or if the considers his or her further detention futile.[134] The detention is subject to the condition that the detainee must appear before a magistrate every 10 days after the first appearance for the magistrate to satisfy him- or herself that the detainee has answered all questions satisfactorily. The detainee is entitled to legal advice and representation for the purpose of such appearances. But this could hardly be said to be an effective procedural safeguard, given the fact that the detainee has no access to a lawyer during the interrogation. That said, the following rights are applicable outside of such exceptional situations.

Right to know the charge

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[129] Morris, *op cit*, p. 56.
[130] *Ibid* 57.
[131] Lewis, *op cit*, p. 157.
[132] See C.R. Snyman, *Criminal Law* (3rd ed.), 1995, p. 319, also for the distinction between "defeating" and "obstructing" the course of justice. The latter would probably apply where, as Snyman points out, the conduct leads to a trial being delayed or postponed.
[133] 140 of 1992.
[134] *Ibid* sec 12(3).

At the time of the arrest, it is not necessary that the arrestee know the exact wording of the charge; it sufficient if he or she is informed in broad terms of the allegations prompting the arrest.[135] However, the constitutional right to a fair trial requires that the accused be informed of the charge with sufficient details to answer it.[136] The Criminal Procedure Act[137] prescribes specifically that the charge should, where applicable, contain details as to the time and place where the offence was allegedly committed, the victim of the offence, and the property in respect of which the offence was committed. The prosecutor must put the charge to the accused before the trial starts,[138] the idea being that the accused should be given adequate time to evaluate his or her plea options and, if necessary, to contemplate and to prepare a defence strategy.

As *dominus litis*, the prosecutor may amend or rectify the charge at any time before plea without the permission of the court. After the plea but before judgment, the prosecutor may make a *viva voce* application to amend the charge, but the defence must be given an opportunity to reply to the application. The court may only order the amendment if this will not prejudice the accused in his or her or their defence.[139]

Plea bargaining offers the accused incentives to settle matters expeditiously, thus dispensing with lengthy trials. The accused persons are spared the costs of litigation, the emotional stress, and the potential social stigmatisation associated with criminal trials. Plea bargaining also gives the accused a chance to assume a degree of control "over the criminal process whether they offer a guilty plea on a less offensive serious charge or simply by allowing them to take control of the way justice is dispensed by expediting the trial process and sentencing."[140] The Legal Aid Board, which played a role in bringing about the statutory plea-bargaining dispensation, offers indigent accused legal assistance for plea-bargaining purposes.

While plea bargaining involves the party's relinquishing the right to be tried by an independent court, in exchange for a reduction in sentence, this does not mean that recourse to a trial is altogether barred. If the magistrate or judge is dissatisfied with the sentence agreed upon, the accused may still opt to withdraw from the agreement, which means that

[135] *Minister of Law and Order v Kader* 1991 (1) SA 41 (A)
[136] Sec 35 (3) (d) of the Constitution. See also *S v Sithole and Others* 1999 (1) SACR 227 (T) at 230c-d.
[137] Sec 84.
[138] Sec 105 of the Criminal Procedure Act, 51 of 1977.
[139] *Ibid* sec 86 (1).
[140] E. Steyn, Plea-bargaining in South Africa: current concerns and future prospect, 2 *SACJ*, 2002, p. 212.

the agreement is then *pro non scripto* and the trial starts afresh before another judicial officer. Also, to ensure that the accused was consulted and understands the agreement, the court must question him or her to ensure that he or she is admitting all the allegations in the charge.

Right to interpretation

The suspect must be told of the right to legal representation in a language that he or she understands.[141] The accused has the right to be tried in the language that he or she understands or, if that is not practicable, to have the proceedings interpreted into that language.[142] Most of the criminal trials in South Africa are held in English, which, together with Afrikaans, is the language of record. Most of the accused do not speak English as their mother tongue, which means that they have to use interpreters. In practice, interpreters are used mainly for the court proceedings and only rarely are they required to translate documents in the pre-trial phases. South Africa does not have sufficient qualified interpreters, and courts have at times to rely on casual interpreters, which could compromise the right to a fair trial. For example, in *S v Abrahams*[143] the Cape High Court set aside a conviction on the ground that the trial magistrate had appointed an incompetent interpreter, which constituted a serious irregularity. Given the fact that, barring Afrikaans, South Africa has nine other official indigenous languages, it will require a huge intellectual and material effort to develop the legal vocabulary of the indigenous languages to the point that they, too, can be used as languages of record in the courts.[144] For the present, the situation remains substantially the same as under the old Apartheid order, which means that the accused decides on the language in which he or she would like to express him- or herself, while the undermining of this right will fundamentally subvert the requirements of a fair trial.[145]

Trial within a reasonable time

In determining the question of undue or unreasonable delay in proceedings, the court holds an enquiry as mandated by the Criminal Procedure Act.[146] All relevant factors are taken into account, and these were listed in *Feedmill Development (Pty) Ltd and Another v*

[141] *Naidenov v Minister of Home Affairs* 1995 (7) BCLR 891 (T) at 898I-899B.
[142] *Mthetwa v De Bruin* 1998 (3) BCLR 336 (N).
[143] 1997 (2) SACR 47 (C).
[144] For a searching and critical discussion on the language issue in South African courts, see M.G. Cowling, The Tower of Babel – Language Usage and the Courts, 124 *SALJ*, 2007, p. 84.
[145] *S v Lesaena* 1993 (2) SACR 264 (T).
[146] Sec 342A (1).

Attorney-General of KwaZulu-Natal[147] to be: the length of the delay from the commission of the crime to the commencement of the trial; the reasons for the delay, among which would be the availability of witnesses, the degree of complexity of the case, its inherent requirements, the difficulties encountered in the investigation of the case, the marshalling of the evidence, the tracing of witnesses and the preparation of the case for trial; and any prejudice which the accused suffered or is likely to suffer as a result of the delay.

Public trial

The accused has a constitutional right to a public trial before an ordinary court.[148] Judgments should be handed down in open court,[149] and the sentence should be made public in order to have its full deterrent effect.[150] The former provisions of the Defence Act[151] and the Military Disciplinary Code, which provided for the convening of an *in camera* court martial were held to violate the right to a public trial and not to conform to the concept of an "ordinary" court. They have since been replaced.[152] A court does have the discretion to direct that the proceeding be held *in camera* where: it is in the interests of: state security; good order; public morals; the administration of justice; where a witness might be harmed; where a complainant has to testify about acts of an indecent nature; and where a witness is under 18 years.[153]

As a rule, the media may report freely on ongoing criminal proceedings at both the investigative and the trial phase. But as regards the proceedings in the courtroom, the court has the discretion, as part of its inherent power to control the proceedings, to determine the method of reporting.[154] In *South African broadcasting Corporation Ltd v National Director of Public Prosecutions and Others,*[155] the Constitutional Court, without deciding the issue of live broadcast of trial proceedings, noted that "[o]rdinarily, it would not be in the interests of justice for trial proceedings to be subjected to live broadcasts". The Court approvingly cited an earlier High Court decision which held that, given the overriding importance of the right of privacy of each individual witness, the court will not consent to a

[147] 1998 (2) SACR 539 (N).
[148] Sec 35 93) (c) of the Constitution.
[149] *S v Dinwa* 1967 (3) SA 339 (E).
[150] *S v Musiyazvirinyo* 1976 (1) SA 804 (RA).
[151] 44 of 1957.
[152] See De Waal *et al.*, *op cit*, p. 623-624 for a more detailed and differentiated discussion.
[153] *Criminal Court Benchbook* op cit 10.6.2.
[154] Steytler, *op cit*, p. 254.
[155] 2007 (2) BCLR 167 (CC).

live broadcast, unless both the State and defence witnesses consented to the televising of their evidence.[156]

In practice, the courts are not equipped with media rooms, but provision is made in the courtroom for the seating of members of the media.

Right to silence and presumption of innocence

Every accused person has the constitutional right to remain silent and not to be conscripted into giving self-incriminating evidence against him- or herself. Evidence obtained in violation of this principle is subject to the exclusionary rule.[157] This means that unconstitutionally obtained evidence is not *per se* excluded, but must be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice.[158]

No adverse inference can be made against an accused merely by virtue of his or her exercise of the right to remain silent. However, where the prosecution presents *prima facie* evidence of the accused person's involvement in the commission of crime, his or her failure to give evidence will lend support to the State's case, given that it is not contradicted and therefore less subject to doubt.[159]

In principle, the burden of proof in criminal proceedings rests with the prosecution. The core of the right to a fair trial is the common law principle that the state is required to discharge its onus against the accused beyond a reasonable doubt.[160] There are, however, circumstances where the burden of proof or onus shifts to the accused. For example, where an accused alleges that a right in the Bill of Rights has been violated, the onus is not on the State to disprove an alleged violation of an accused person's right under the Constitution.[161] Some writers argue that the terms "onus" and "burden of proof" are ill-suited to use in Bill of Rights litigation, and that the American term "showing" is preferable: "An applicant for relief under the Bill of Rights has to make a showing (i.e. present an argument) that a right in the Bill of Rights has been violated by law or by conduct of the respondent. The

[156] *Ibid* para 6.
[157] See above.
[158] Sec 35 (c) of the Constitution.
[159] *S v Chabalala* 2003 (1) SACR 134 (SCA). See also *S v Mvelase* 2004 (2) SACR 531 (W) where it was held that the court may assume that defence counsel fully informed the accused of his procedural rights and that the accused's decision not to testify was his own.
[160] *S v Zuma* 1995 (1) SACR 568 (CC).
[161] *S v Soci* 1998 (1) SACR 479 (N).

respondent in turn can deny the violation, or can attempt to show that the violation is justifiable in terms of the limitation clause."[162]

Thus, within the criminal procedural context, the accused has to show, on a balance of probabilities, the existence of the right in the Bill of Rights on which he or she relies and its violation.[163]Another example of the reverse onus is in bail proceedings, where the accused is charged with a serious offence falling under Schedule 5 or 6 of the Criminal Procedure Act. In respect of the alleged commission of such an offence, the bail applicant must persuade the court that *the interests of justice* (in the case of a Schedule 5 offence), or (in the case of a Schedule 6 offence) *exceptional circumstances* exist which in the interests of justice permit his or her release.[164] The standard of proof is a civil one, which is on a balance of probability.

Anyone, including a public official or a politician, who makes public statements about a person's guilt before the court reaches a verdict, is liable to be prosecuted before a High Court for contempt of court *ex facie curiae*. It is immaterial whether the court gets to know about the statement, and if so, whether the court has in fact believed or been influenced by it.[165] The statement must have been made when the case is *sub iudice*, which means from the time summons is issued or arrest "until it has been finally disposed of in the judicial process, which includes the judgment of the final possible appeal."[166]

Section 14 of the Bill of Rights guarantees everyone the right not to have the privacy of their communications infringed. The Interception and Monitoring Prohibition Act [167]goes even further by prohibiting intentional interception and monitoring of communications for purpose of gathering information about someone. Before any interception takes place, it must be authorized by a directive issued by a High Court judge designated by the Minister of Justice. The application must be in writing and may only be brought by a commissioned police official, with the approval of an assistant commissioner. The judge must, however, be convinced that : a) a serious offence which requires investigation but which cannot be investigated in any other way, is being or probably will be committed; or the security of the State is being threatened;[168] or the investigation may reveal information that may help to

[162] De Waal *et al op cit* Footnote 2 at 29.
[163] See *S v Mathebula* 1997 (1) SACR 10 (W); *S v Sebejan* 1997 (1) SACR 626 (W); and *S v Naidoo* 1998 (1) SACR 479 (N).
[164] Sec 60 (11) (a) and sec 60 (11) (b) of the Criminal Procedure Act, 51 of 1977.
[165] Snyman, *op cit*, p. 315-316.
[166] *Ibid* 315.
[167] 127 of 1992.
[168] *Ibid* sec 3 (1) (b) read with sec 3 (2) (a).

forestall the commission of a serious crime.[169]Such a directive is valid for three months only, but may be extended for three months at a time should the judge deem this necessary.[170]

However, the Act says *nothing* about the standard of suspicion required to trigger the interceptive process, nor does it explicitly say what should be done with the intercepted material should no prosecution be instituted. One writer has suggested that because the judge must first be "convinced" would imply that an objective standard of reasonableness would apply.[171] Evidence obtained by furnishing a judge with false and misleading information in order to obtain a directive, makes the directive unlawful and constitutes a violation of the accused's right to a fair trial.[172] Such evidence would violate the right against self-incrimination.

Right to know and contest the evidence

The accused has a right to be present during a search and seizure of items. The minimum time in which to bring a case is governed by the same set of factors listed above in relation to "reasonable time". Section 35 (3) of the Constitution gives the accused the right "to have adequate time and facilities to prepare a defence".[173]

The accused or his or her legal representative has the constitutional right to "adduce and challenge evidence."[174] This means that the defence may call and examine witnesses, including expert witnesses, for the defence. Expert witnesses for the State may be cross-examined only by the accused or defence counsel. The defence has the right to cross-examine witnesses for the state. Every witness who has been cross-examined by the other party may be re-examined by the party who called the witness on any matter raised during the cross-examination of that witness.[175]

Hearsay testimony is inadmissible[176] except if the party against whom the evidence is adduced agrees to it being admitted[177] or if the person upon whose credibility the evidential value of the evidence rests testifies or will testify later in the trial, in which case the

[169] *Ibid* sec 3 (6).
[170] *Ibid* sec 3 (4).
[171] Steytler, *op cit*, p. 105.
[172] *S v Naidoo* 1998 (1) BCLR 46 (D).
[173] See *S v Nkabinde* 1998 98) BCLR 996 (N).
[174] Section 35 93) (i) of the Constitution.
[175] Sec 166 (1) of the Criminal Procedure Act, 51 of 1977.
[176] Sec 3(1) of the Law of Evidence Amendment Act
[177] *Ibid* sec 3 (1) (a).

evidence may be provisionally admitted;[178] The court may also admit hearsay evidence if, in its opinion, it should be admitted in the interests of justice, having considered the following factors: the nature of the proceedings; the nature of the evidence; the purpose for which the evidence is tendered; the probative value of the evidence; the reason why the eye-witness is not testifying; any prejudice to any party caused by such admission; and any other factor that should, in the opinion of the court be taken into account.[179]A witness need not reveal his or her name to the court, but if the defence requires the name, it can make an application for disclosure at a later stage.[180]

Any witness who has reason to believe that his or her safety or that of any related person is or may be threatened by a by any person may apply to the prosecutor to be placed under the Witness Protection Programme.[181] The Director of the programme may place such a witness under temporary protection for not more than 14 days. Prosecutors may oppose defence requests for access to the docket where witnesses may be tampered with if their identity becomes known by disclosing the contents of the docket.[182] And High Court prosecutors must also try to protect the identity of witnesses if they believe that such witnesses may be intimidated should they be named in the list of witnesses accompanying the indictment.[183] The Criminal Procedure Act also provides for *in camera* proceedings[184] and for witnesses to give evidence by way of closed circuit television where there is reasonable fear that witnesses may be intimidated or harassed if they give evidence in open court. The safeguards afforded the witness does not derogate from the public's right to know the evidence.[185]

Ne bis in idem

The Bill of Rights guarantees every accused person the right not to be tried for the same offence in respect of which that person has already been convicted (*autrefois convict*) or acquitted (*autrefois acquit*).[186] The acquittal must have been on the merits, meaning the

[178] *Ibid* sec 3(1) (b) read with sec 3(3).
[179] *Criminal Court Benchbook op cit* 20-42 to 20-43, and see the cases cited at 20-43 for the seven factors.
[180] *S v Pastoors* 1986 (4) SA 222 (W) and *S v Ntoae and Others* 2000 (1) SACR 17 (W).
[181] Established by the Witness Protection Act, 112 of 1998.
[182] *Shabalala and Others v Attorney-General Transvaal and Another* 1995 (2) SACR 761 (CC) at 781g-785b.
[183] Sec 144(3) of the Criminal Procedure Act, 51 of 1977.
[184] *Ibid* secs 153 and 154.
[185] *S v Leepile and Others (4)* 1986 (3) SA 661 (W).
[186] Sec 35 (3) (l). See also secs 106 (1) (c) and (d)of the Criminal Procedure Act, 51 of 1977.

accused must not have been acquitted on a mere technicality.[187] The acquittal will be sustained even if the decision was given by a foreign court.[188]

C. Consequences of Abuse of Power and/or Infringement of Rights

Outside the police services, South Africa has two statutory bodies and one Constitutional body charged with looking into the treatment of persons involuntarily deprived of their freedom. The constitutional body is the South African Human Rights Commission, which has a general mandate to address all human rights violations.[189] The other bodies are; (a) the Independent Complaints Directorate[190], which investigates complaints against the police, though it does not proactively visit people suspects in police custody; and (b) the Judicial Inspectorate of Prisons[191], which visits prisons proactively through its Independent Prison Visitors and Compliance Directors.

Infringements of the accused person's pre-trial rights may be raised during the trial itself. The Constitution thus expressly forbids the admission of evidence obtained in violation of any right in the Bill of Rights if this would otherwise result in an unfair trial or be detrimental to the administration of justice. Evidence obtained in breach of the detainee's pre-trial rights to remain silent, to be not compelled to make a confession or an admission, and to legal representation, must be excluded from the trial.[192]

The State is vicariously liable for delictual claims against the police arising from their conduct in the course and execution of their duties. Thus, *in Fose v Minister of Safety and Security*,[193] where the plaintiff sought constitutional plus delictual damages for torture suffered at the hands of the police, the Constitutional Court declined to grant relief, reasoning that damages caused by the violation of constitutional rights were immaterial to the vindication of the right to security of the person, given the fact that the claim could by vindicated at civil law. In the recent case of *Mthembu v The State*,[194] which concerned the admissibility of evidence obtained through the use of torture, the court held that torture stains the evidence "irredeemably" and defiles the judicial process morally, thereby

[187] See, generally, Joubert, *op cit*, p. 233.
[188] *S v Pokela* 1968 (4) SA 702 (E).
[189] See sec 184 of the Constitution.
[190] Established under the South African Police Service Act, 68 of 1995.
[191] Established under the Correctional Services Act, 111 of 1998.
[192] *Pillay and Others v S* 2004 (2) BCLR 158 (SCA); *S v Motloutsi* 1996 (1) SA 584 (C) 584; and *S v Mayekiso en Andere* 1996 (2) SACR 298 (C).
[193] (64/2007) [2008] ZASCA 51 (10 April 2008).
[194] Case No 379/07

compromising the integrity of the judicial process. For these reasons, the court held that public interest demands that such tainted evidence be excluded regardless of whether such evidence has an impact of the fairness of the trial.[195]

Prejudice caused by prosecutorial delay in bringing the case will not necessarily lead to a court ordering a permanent stay of prosecution. Courts rarely bar prosecutions and if they do, this would occur only after a court has established that the accused has suffered irreparable trial prejudice as a result of the delay. In *Fose v Minister of Safety and Security* the Constitutional Court pointed out that where the alleged prejudice is not trial-related, courts may apply other remedies, such as a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by the accused.*[196]*

D. State of Emergency

A state of emergency, which may be declared only by the President, may result in measures being taken that derogate from the protection afforded by the Bill of Rights. However, no law enacted in consequence the state of emergency may authorise any derogation from the non-derogable rights listed in the Constitution.[197] "The fact that some rights are derogable does not make them 'weaker' rights. They may still only be derogated to the extent 'strictly required by the emergency'".[198] The proclamation declaring the state of emergency must state the reasons for it, and any competent court has power to decide on the validity of the declaration.

During a state of emergency, people may be detained without trial but only with the aim of restoring peace and order. Such detainees are protected by rules set out in Section 37 (c) of the Constitution. This Section affords them the right to have access to a lawyer, a medical doctor, family or friends. Furthermore, a detainee "must be allowed to appear in person before any court considering the detention, to be represented by a legal practitioner at such a hearing, and to make representations against continued detention."[199]

5. RECENT LEGAL CHANGES AFFECTING HUMAN RIGHTS

[195] *Ibid* 17.
[196] 1997 7 BCLR 851 (CC) at para 39.
[197] Sec 37 (5) (c) of the Constitution.
[198] De Waal *et al*, *op cit*, p. 671.
[199] Sec 37 (6((g) of the Constitution.

In 2004, Parliament enacted an anti-terrorism law to give effect to UN Security Council Resolution 1373, requiring all UN member states to enact anti-terrorist measures in response to the September 11 attack in the United States. This law, known as the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, defines terrorist activity very broadly,[200] and imposes onerous and extensive obligations on the individual to report terrorism offences, both past and future.[201] The Act provides, *inter alia*, for broad powers of investigation and secretive investigative hearings,[202] the constitutionality of which is questionable.[203] Furthermore, as regards suspected terrorist property,[204] the Act contains the notorious reverse onus provision, according to which the accused facing charges of aiding or funding terrorist activity has to disprove that he or she doing so. The penalties provided for by the Act are severe, ranging from two years imprisonment to life imprisonment with or without a fine of up to R100-million.[205]

6. CONCLUSION

Despite the enlightened reforms that have been introduced by both the Legislature and the courts since the onset of democracy, the criminal justice system is presently under severe public criticism for failing to combat crime effectively. In practice, the problem revolves essentially around the uncoordinated and fragmented way in which the key criminal justice organs, namely the police, the prosecution service, the courts and the prisons (which house the majority of pre-trial detainees) discharge their respective functions. In August 2008, for example, the Regional Magistrates' Courts, which handle the bulk of the criminal trials, had a backlog of 70 000 cases. These involve some 10 000 people who are being held as awaiting-trial prisoners, either because they cannot afford to pay the small amounts required for bail or because they are charged with petty crimes.[206] This state of affairs not only undermines public trust in the administration of criminal justice, but from a human rights point of view as well, the intolerably long periods the courts take to process cases

[200] This includes any act which causes the destruction of or substantial damage to any property, natural resource, or the environmental or cultural heritage, whether public or private, or which causes any major national economic loss – Secs 1 (1) (xxv)(a) (v) and 1 (1) (xxv) (a) (vii) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004.
[201] See Sec 12 *Ibid*.
[202] *Ibid* sec 22.
[203] *Cf Shaik v Minister of Justice and Constitutional Development and Others* 2004 (4) BCLR 333 (CC) para 38.
[204] Sec 4.
[205] Sec 18 (1).
[206] *The Star* 22 November 2008.

amount to a negation of the accused person's right to a fair trial. Victims of crime, too, suffer psychologically as a result of procedural delays and adjournments.

By its own admission, the Government is aware of the flaws within the system, and in August 2008 the President established the Office of Criminal Justice Reform, the aim of which will be to realign the various elements of the criminal justice system. Admittedly, there is a glaring need of technical harmonization, but even more important is the necessity to inculcate amongst the personnel in the criminal justice system, a fuller appreciation of the importance of upholding the human rights ethic in their work. Technical, knee-jerk legislative responses to public calls for harsh anti-crime measures might be one way of fishing for votes. But one ought not to overlook the fact that South Africa is a young and fragile democracy, and one which can ill-afford to slide back to sheer horror that characterised the country's criminal justice system just less than 14 years ago.