

**LEGAL REPRESENTATION AND A BILL OF RIGHTS**

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*To Lisa, Kiri and John*

## DECLARATION

I declare that this dissertation is my own, unaided work. It is being submitted for the degree of Master of Laws in the Department of Law, University of Cape Town. It has not been submitted before for any degree or examination in any other university.

Natalie Lawrenson

30 April 1993

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## CHAPTER ONE

### INTRODUCTION

The right to legal representation has been acknowledged as a fundamental right of an accused in a criminal trial.<sup>1</sup> Traditionally, however, this right has been viewed as a right to retain counsel, rather than a positive right to be provided with legal representation in the case of indigent accused.<sup>2</sup>

The importance of legal assistance for accused persons being tried in an adversarial justice system has been recognised in other Anglo-American legal systems.<sup>3</sup> In an adversarial system the duty of a presiding officer is to act as an independent and objective adjudicator of the facts and evidence presented to him or her by the two parties to the trial. The onus is on the litigants to advance their own case.<sup>4</sup> It naturally follows that the strength of a

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<sup>1</sup> *S v Mabaso and Another* 1990(3) SA 185(A), at 201F; S73 of Act 51 of 1977; *S v Nqula* 1974 (1) SA 801 (E) at 804D; *S v Wessels and Another* 1966 (4) SA 89 (C) at 91D-92 H; *Brink v Commissioner of Police* 1960 (3) SA 65 (T).

<sup>2</sup> Grant, E 'The Right to Counsel: recent developments in South Africa' *SACJ* (1989)2 at 48; *S v Wessels* 1966(4) SA 89(C); *S v Blooms* 1966(4) SA 417(C); *S v Baloyi* 1978(3) SA 290(T); *S v Davids*; *S v Dladla* 1989 (4) SA 172 (N) at 198C; *S v Mthwana* 1989 (4) SA 361 (N) at 366B-C. Early American and English practice reflected a similar approach - see Beaney, WM 'The Right to Counsel' In: *The Rights of the Accused in Law and Action* (1972) SS Nagel (ed) at 148.

<sup>3</sup> American case law: *Gideon v Wainwright* 372 US 335 (1963); *Argersinger v Hamlin* 407 US 25 (1972); *United States v Wade* 388 US 218 (1967). English case law: *R v Elton* [1942] 68 Cr App R 126; *R v Serghiou* [1966] 3 All ER 637.

<sup>4</sup> Steytler, NC (1988) *The Undefended Accused* at 4-10.

party's case depends on the skill of the litigator.<sup>5</sup>

In *Powell v Alabama*<sup>6</sup> the court recognised that

[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law ... He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>7</sup>

It is submitted that the need of such a guiding hand for an illiterate accused is even greater.<sup>8</sup>

In a situation where one party is represented by a skilled lawyer and the other is not, the latter's chance of a successful defence could be severely prejudiced. This position is all the more critical where the unrepresented party is retarded by social, educational and economic inequalities. In the case of *Mandela v Minister of Prisons*,<sup>9</sup> the right of access to a legal adviser was described as a corollary of the right to access to the courts.

The positive right to be provided with legal representation has furthermore been recognised in the following international documents: (i) the International Covenant on Civil and Political

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<sup>5</sup> That is, in preparing and leading the necessary evidence, cross-examining witnesses and presenting a closing argument, if so requested. See also *S v Wessels and Another* 1966 (4) SA 89 (C) at 97H-98A, where Van Zyl J says that 'the manner of a man's conviction is a fundamental part of the justice he receives. The way his case is presented may have a strong bearing upon the public's moral assessment of his offence'.

<sup>6</sup> 287 US 45 (1932).

<sup>7</sup> *Ibid* at 69.

<sup>8</sup> 'In an adversarial system, the right of all persons faced with loss of liberty to have the assistance of counsel seems obvious' - Beane *op cit* note 2 at 147.

<sup>9</sup> 1983 (1) SA 938 (A) at 957.

Rights;<sup>10</sup> (ii) the European Convention for the Protection of Human Rights and Fundamental Freedoms;<sup>11</sup> (iii) the American Convention on Human Rights;<sup>12</sup> (iv) the Body of Principles for the Protection of all Persons under any form of detention or imprisonment;<sup>13</sup> and (v) the Convention on the Rights of the Child.<sup>14</sup>

The reasons behind the above developments have been based on the principles of 'equality' and 'fairness'. The basic principle underlying most democratic legal systems is that all persons shall receive equal protection of the law. By 'equal protection', it is meant that all accused persons, when faced with a criminal charge by the State, should be placed in an equal position. In other words, where an accused person wishes to be defended by a legal representative, but can not afford to pay for counsel, due to indigence, then such an accused must be provided with legal assistance in order to ensure equal protection for both rich and poor alike.<sup>15</sup>

The principle of 'fairness' entails that an accused person is placed on an equal footing *vis-à-vis* the prosecutor. The layperson lacks the necessary skill and knowledge of the science and mechanisms of the law, in order to confront a legally trained prosecutor and to present a

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<sup>10</sup> Article 14(3)(d).

<sup>11</sup> Article 6(3)(c).

<sup>12</sup> Article 8(2)(e).

<sup>13</sup> Principle 17.

<sup>14</sup> Article 40(2)(b)(ii).

<sup>15</sup> Steytler, NC 'Equality before the law: being practical about principle' (1992) *SAJHR* vol8(1) at 114; *Douglas v California* 372 US 353 (1963) at 358 - '[t]he indigent ... has only the right to a meaningless ritual, whilst the rich man has a meaningful appeal'.

possibly valid defence to the court.<sup>16</sup>

It is submitted in light of the above discussion, that if all persons are to receive equal protection of the law, the right to legal representation must include the right to be provided with legal representation where an accused is indigent and desires such assistance.

In the following chapters I shall discuss the current position in South African law regarding the right to legal representation, as well as the the American, Canadian and European Court of Human Rights and the European Commission on Human Rights jurisprudence on this issue; and shall, thereafter, look at future possibilities of this right in terms of the various proposed Charters and draft Bills of Rights that have been put forward for a future South African Bill of Rights. Two distinct strands are evident from these various proposals regarding the right to legal representation. The first strand is that of the (present) Government's draft Charter of Fundamental Human Rights and of the South African Law Commission's interim report of 1991.<sup>17</sup> Both these proposals have followed the *dictum* as enunciated in *S v Rudman and Another; S v Mithwana*,<sup>18</sup> which extends the traditional right to legal representation to include a right to be informed of the entitlements to legal representation and to apply for legal aid, but does not impose a duty on the State to provide indigent accused with State-funded legal assistance.<sup>19</sup>

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<sup>16</sup> *Powell v Alabama* 287 US 45 (1932) at 68-9.

<sup>17</sup> Project 58: Group and Human Rights, August 1991.

<sup>18</sup> 1992 (1) SA 343 (A).

<sup>19</sup> Clauses 26 and Article 7, respectively.

The other strand is that of the ANC's draft Bill of Rights, the Charter for Social Justice and the South African Law Commission Report on Group and Human Rights of 1989. The approach of these proposals is that the right to legal representation includes the right of indigent accused to be provided with legal representation 'where justice so requires'.<sup>20</sup>

The possible interpretations flowing from the adoption of either of these two approaches in a future South African Bill of Rights, will be investigated, with specific focus on a broader interpretation of the right to be provided with legal representation.<sup>21</sup>

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<sup>20</sup> Article 2(21); article 12(3); and article 25(d) respectively.

<sup>21</sup> This idea stems from a question posed by McQuoid-Mason, DJ in 'A Bill of Rights and Legal Representation' *Unpublished Paper* (January 1993) which he delivered at the Law Teachers' Conference in Stellenbosch.

## CHAPTER TWO

### CURRENT POSITION OF THE RIGHT TO LEGAL REPRESENTATION IN SOUTH AFRICAN LAW

In South African law the right to legal representation in criminal proceedings is derived from both common law<sup>1</sup> and statutory legislation.<sup>2</sup>

#### 1. Common Law

The earliest Roman litigation procedures were governed by the *legis actio*.<sup>3</sup> The most commonly used of the five *leges actiones* were the *legis actio sacramento* and the *legis actio per manus iniunctionem*.<sup>4</sup> Neither of these actions appear to have been of great assistance to the indigent plebians. In terms of the former procedure, priestly lawyers interpreted the case without the parties to the action being represented or themselves present at the trial.<sup>5</sup> The

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<sup>1</sup> *Li Kui Yu v Superintendent of Labourers* 1906 TS 181 at 187-8; *Dabner v South African Railways & Harbours* 1920 AD 583 at 586; *Brink v Commissioner of Police* 1960(3) SA 65 (T) at 67; *S v Wessels* 1966(4) SA 89 (C) at 95-7.

<sup>2</sup> McQuoid-Mason, DJ (1982) *Legal Aid in South Africa* at 5; Selikowitz, S 'Defence by counsel in criminal proceedings under South African law' *Acta Juridica* (1965/66) 53 at 77; Section 73 of Criminal Procedure Act 51 of 1977.

<sup>3</sup> Cappelletti, M (1975) *Toward equal justice: a comparative study of legal aid in modern societies* at 6.

<sup>4</sup> Fernandez, LD (1984) *A comparison between the legal aid systems of South Africa and West Germany in theory and in practice* at 5-6.

<sup>5</sup> Cappelletti states that the case was brought before a magistrate by a series of *ritual acts* and *declarations*; *op cit* note 3 at 6.

proceedings were not conducted in public and the *interpretatio* of the secular law was kept a secret. In terms of both procedures there was also invariably a payment of money involved in the form of a 'deposit', which the indigent accused could not afford to pay themselves.<sup>6</sup>

During the Classical Roman period litigation proceedings resembled modern-day practices. The hearings were open to the public and the litigants were represented by *advocati* or *patroni*, who were not lawyers but skilled orators.<sup>7</sup> Indigent accused were afforded legal representation by means of the *clientela* system.<sup>8</sup> This system was very successful during the Republic and early Empire, but did not survive the political struggles of the Post-classical period, which neglected the interests of the impecunious in favour of political justice. Legal aid was only assigned to minors, physically or mentally handicapped persons and to persons who, because of duress exercised by their adversary, were unable to obtain an advocate to represent them.<sup>9</sup>

In Roman-Dutch law the plight of the indigent accused received greater attention. Upon the request of an indigent accused, a *taelman* was appointed by the court.<sup>10</sup> A similar practice was adopted in South African law whereby several statutory and judicial provisions were

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<sup>6</sup> Fernandez *op cit* note 4 at 5-6.

<sup>7</sup> Cappelletti *op cit* note 3 at 6.

<sup>8</sup> *Clientes* were foreigners who migrated to Rome and attached themselves to wealthy patrician families. They offered the *paterfamilias* political support and performed personal services. In return, the patron offered the client protection and assistance, especially in legal matters. The patron often represented his clients in court; Fernandez *op cit* note 4 at 10-11.

<sup>9</sup> D 1.16.9.5; D 3.1.1.4; McQuoid-Mason *op cit* note 2 at 1.

<sup>10</sup> Voet *Commentarius* 3.1.11; McQuoid-Mason *op cit* note 2 at 1.

formulated in the former colonies which provided for legal aid.<sup>11</sup> The right to legal representation in a criminal charge was formally recognized in article 65 of Lord Charles Somerset's Proclamation of 1819.<sup>12</sup> However, this right could only be exercised after the accused had pleaded to the charge and answered all judicial questions.<sup>13</sup>

## 2. Statutory and Case Law

In 1917 the right to legal representation was given statutory recognition in terms of section 218 of the Criminal Procedure Act 31 of 1917 and has subsequently been confirmed in section 73 of the Criminal Procedure Act 51 of 1977.<sup>14</sup>

The precise nature and scope of the right afforded to an accused in terms of sections 73(1) and (2) of the Criminal Procedure Act 51 of 1977 is not clearly ascertainable from the words used and therefore different judicial interpretations have resulted.

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<sup>11</sup> McQuoid-Mason *op cit* note 2 at 2.

<sup>12</sup> Van der Berg, J 'Legal Representation: Right or Privilege?' 1984 *THRHR* (47) at 448.

<sup>13</sup> *loc cit.*

<sup>14</sup> The relevant provisions of section 73 are as follows:

- (1) An accused who is arrested, whether with or without warrant, shall, subject to any law relating to the management of prisons, be entitled to the assistance of his legal adviser as from the time of his arrest.
- (2) An accused shall be entitled to be represented by his legal adviser at criminal proceedings, if such legal adviser is not in terms of any law prohibited from appearing at the proceedings in question.

Other relevant sections are: s97 of Act 31 of 1917; ss84 and 158 of Act 56 of 1955; s166 of Act 51 of 1977.

The fundamental importance of the right to legal representation has been widely recognised by the judiciary.<sup>15</sup> In several cases the denial of this right has been held to amount to an irregularity which *per se* vitiates the proceedings.<sup>16</sup> However, the courts have limited the entitlement under section 73 to a right to legal representation at the accused's own expense.<sup>17</sup> Although it was regarded as a desirable practice in certain circumstances, the courts were loath to impose a duty on the presiding officer to inform unrepresented accused of their right to legal representation.<sup>18</sup> The courts have also declined to impose a duty on the State to provide indigent accused with legal representation, even in cases where the death sentence was a possibility.<sup>19</sup>

The first positive step, albeit a tentative one, towards broadening the ambit of the entitlement under section 73 was taken in *S v Radebe; S v Mbonani*.<sup>20</sup> The court argued that, given that

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<sup>15</sup> *S v Gwebu* 1988 (4) SA 155 (WLD) at 159B-C; *R v Slabbert* 1956 (4) SA 18 (T) at 21G; *S v Radebe; S v Mbonani* 1988 (1) SA 191 (T) at 193B; *S v Wessels and Another* 1966 (4) SA 89 (C) at 91D-92H; *S v Heyman and Another* 1966 (4) SA 598 (AD); *S v Blooms* 1966 (4) SA 417 (C); *S v Seheri en Andere* 1964 (1) SA 29 (A); *S v Mabaso* 1990 (3) SA 185 (A) at 202H-I. Although s 73 confirms the right to legal representation, McQuoid-Mason *op cit* note 2 at 5 - notes that this right has been severely curtailed by legislation dealing with State security. See also *S v Mabaso* 1990 (3) SA 185 (A) at 202B.

<sup>16</sup> *S v Seheri en Andere* 1964 (1) SA 29 (A); *S v Shabangu* 1976 (3) SA 555 (A); *S v Wessels* 1966 (4) SA 89 (C); *S v Blooms* 1966 (4) SA 417 (C); *S v Nqula* 1974 (1) SA 801 (E); *Ndanzonme and Another v Nel NO and Another* 1971 (3) SA 217 (E); *S v Mkhize* 1978 (3) SA 1065 (T).

More recent cases include *S v Gwebu* 1988 (4) SA 155 (WLD); *S v Tswaile* 1990 (1) SACR 279 (B); *S v Oakers* 1990 (1) SACR 147 (C); *S v Witbooi and Another* 1990 (1) SACR 329 (Tk); *S v Makeleni* 1991 (1) SACR 299 (Tk).

<sup>17</sup> *S v Baloyi* 1978 (3) SA 290 (T) at 293F-G; *Volschenk v President, SA Geneeskundige en Tandheelkundige Raad* 1985 (3) SA 124 (A) at 140H-J.

<sup>18</sup> *S v Mthetwa; S v Khanyile* 1978 (2) SA 773 (N) at 776E; *S v Baloyi (supra)* at 293G-H.

<sup>19</sup> *S v Chaane en Andere* 1978 (2) SA 891 (A) 897B; *R v Mati and Others* 1960 (1) SA 304 (A) 306H. In the latter case Schreiner JA stated that it is 'a well established and most salutary practice' that counsel is provided for indigent accused where the risk of a death sentence is a possibility; (306H-307A).

<sup>20</sup> 1988 (1) SA 191 (T).

an accused is entitled to be informed of his or her procedural rights at the outset of the trial, and given that one of these procedural rights is the right to legal representation, a duty rested with the presiding officer, depending on the complexity of the charge and the seriousness thereof, to inform an unrepresented accused of his or her right to legal representation and, furthermore, in appropriate cases, to inform such an accused of his or her right to apply for legal assistance from the Legal Aid Board.<sup>21</sup> The court was, however, cautious to indicate that a failure by the presiding officer to comply with this duty would not necessarily vitiate the proceedings, but that each case would have to be assessed individually to establish whether there had been a failure of justice.<sup>22</sup>

Since the *Radebe; Mbonani* decision, there have been three approaches to the imposition of a duty on the presiding officer to inform an accused of his or her right to legal representation and his or her entitlement to apply for legal aid.

The first approach adheres to the traditional view that no rule of law or practice exists in our law which imposes a duty on the presiding officer to inform an unrepresented accused of his or her right to legal representation.<sup>23</sup> To support his view in this regard, Heyns J in *S v*

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<sup>21</sup> *Ibid* at 196F-I. Goldstone J also held that the accused must be given a reasonable opportunity to endeavour to obtain legal assistance.

<sup>22</sup> *Ibid* at 196I-J. See comments by Grant, E in 'The Right to Counsel: recent developments in South Africa' *SACJ* (1989)2 at 51-2; and in 'The right to counsel after *Khanyile*' *SACJ* (1989)2 at 329; where Grant says that an evaluation of whether there has been a failure of justice in such circumstances 'depends on one's conception of justice. An unrepresented accused is always at a disadvantage, no matter how many times he has appeared in court before, or how much assistance is rendered by a presiding officer'.

<sup>23</sup> *S v Mashiyana* 1989 (1) SA 592 (C) at 596D-E; *S v Mthetwa*; *S v Khanyile* 1978 (2) SA 773 (N) at 776E-F; and *S v Morrison* 1988 (4) SA 164 (T) at 168A-B.

*Morrison*<sup>24</sup> relies on the judgment of Schreiner JA in *R v Mati and Others*,<sup>25</sup> which states

[t]here is no rule of law that a person who is being tried for an offence that may, if he is convicted, result in a death sentence must, unless he objects, be defended by counsel.

Furthermore, despite a reference to the rulings in *S v Radebe*; *S v Mbonani*<sup>26</sup> and *S v Gwebu*,<sup>27</sup> Heyns J is still of the opinion that these *dicta* do not impose a duty on the presiding officer to inform accused persons of their right to legal representation at every trial.<sup>28</sup>

In *S v Mashiyana*<sup>29</sup> and *S v Mtherwa*; *S v Khanyile*<sup>30</sup> the courts held that where an accused does not indicate that he or she would like to obtain legal representation, no irregularity occurs when the trial is continued without such representation. In *S v Mashiyana* it was held that '[t]he *unexpressed* desire of an accused to engage a legal representative cannot afford him a cause for complaint after his conviction and sentence' [my italics].<sup>31</sup> This approach assumes that all accused persons are aware of their rights and voluntarily choose not to

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<sup>24</sup> 1988 (4) SA 164 (T) at 168A-B.

<sup>25</sup> 1960 (1) SA 304 (A) at 306H.

<sup>26</sup> 1988 (1) SA 191 (T).

<sup>27</sup> 1988 (4) SA 155 (WLD).

<sup>28</sup> *S v Morrison* 1988 (4) SA 164 (T) at 169D-E. Coetzee J, in *S v Masilela* 1990 (2) SACR 116 (T) at 122e-f, disagrees with this interpretation of the *Radebe*; *Mbonani* judgment by Heyns J, and says that he understands Goldstone J as saying that there is such a duty. See also criticism of this judgment by Steytler, NC in 'Equality before the law and the right to legal representation' *SACJ* (1989)2 at 67; 69-75.

<sup>29</sup> 1989 (1) SA 592 (C) at 594I.

<sup>30</sup> 1978 (2) SA 773 (N) at 776C-D.

<sup>31</sup> 1989 (1) SA 592 (C) at 596E.

engage a legal representative. In fact, in *S v Morrison*<sup>32</sup> the court is of the opinion that '[t]his right is generally known to most people'.

This conservative view of the right to legal representation has been criticised in the judgments of *S v Masilela*,<sup>33</sup> *S v Davids*; *S v Dladla*<sup>34</sup> and *Nakani v Attorney-General, Ciskei, and Another*<sup>35</sup> and it is submitted in light of the Appellate Division decisions in *S v Mabaso*<sup>36</sup> and *S v Rudman and Another*; *S v Mthwana*,<sup>37</sup> which establish that a presiding officer is under a duty to inform accused persons of their right to legal representation, this approach is no longer acceptable in our law.

On the other extreme there is the view that there is a peremptory duty<sup>38</sup> on the presiding officer to inform an accused of this right.<sup>39</sup>

In *Nakani v Attorney-General, Ciskei, and Another*<sup>40</sup> Heath J emphasises the vital role played by a legal representative in the preparation and running of a trial and describes the

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<sup>32</sup> 1988 (4) SA 164 at 167I.

<sup>33</sup> 1990 (2) SACR 116 (T) at 122e-f.

<sup>34</sup> 1989 (4) SA 172 (N) at 194H.

<sup>35</sup> 1989 (3) SA 655 (Ck) at 661B-C.

<sup>36</sup> 1990 (3) SA 185 (A).

<sup>37</sup> 1992 (1) SA 343 (A).

<sup>38</sup> By 'peremptory duty' it is meant that a failure in this duty by the presiding officer would result in an irregularity, which is of so fundamental and serious a nature, that the trial proceedings are *per se* vitiated.

<sup>39</sup> *S v Khanyile and Another* 1988 (3) SA 795 (N) at 800D; *Nakani v Attorney-General, Ciskei, and Another* 1989 (3) SA 655 (Ck) at 664B.

<sup>40</sup> 1989 (3) SA 655 (Ck).

dire position of an unrepresented accused attempting to conduct his or her own trial as follows: (quoting Didcott J)

[t]he odds are stacked against him, and stacked heavily. He knows nothing about the rules of evidence, rules mastered only through training and experience, rules that no tips he receives from the trial Court can equip him to understand fully or apply effectively.<sup>41</sup>

In support of imposing a peremptory duty on the judicial officer to inform accused persons of their right to legal representation (and of the advisability of obtaining it), Heath J says that the failure to discharge this duty in effect amounts to a denial of the right to legal representation.<sup>42</sup> The learned judge criticises the approach followed in *S v Mashiyana*<sup>43</sup> as resulting in 'a situation where it is accepted that the accused has waived his right to legal representation, notwithstanding the fact that he is possibly unaware of the existence or the importance thereof or the consequences of his failure to exercise it'.<sup>44</sup>

Heath J furthermore held that the presiding officer is also under a duty to inform an accused person of his or her right to apply to the Legal Aid Board and various other similar institutions, for legal assistance.<sup>45</sup> In this regard Didcott J, in *S v Mathebula*<sup>46</sup> suggested

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<sup>41</sup> *Ibid* at 658A-H.

<sup>42</sup> *Ibid* at 659J-660B; 661D.

<sup>43</sup> 1989 (1) SA 592 (C).

<sup>44</sup> 1989 (3) SA 655 (CK) at 661C. See also criticism of the *dictum* in *Mashiyana* by Nienaber J in *S v Davids*; *S v Dladla* 1989 (4) SA 172 (N) at 194E.

<sup>45</sup> 1989 (3) SA 655 (Ck) at 661E.

<sup>46</sup> 1990 (1) SACR 20 (N).

that unrepresented accused seeking legal assistance can also be referred to the Law Society, the Bar Council, university law clinics and the Legal Resources Centre, in addition to the Legal Aid Board.

The majority of cases<sup>47</sup> have taken the view that the presiding officer is under a duty to inform unrepresented accused of their right to legal representation (and, in most cases, of their right to apply for legal aid), but that the duty is directory in nature.<sup>48</sup> This approach is similar to that of Goldstone J in *S v Radebe; S v Mbonani*.<sup>49</sup> There has, however, not been a uniform approach in the case law and individual cases will thus be discussed.

In *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO*<sup>50</sup> Cooper J states that a right has no value if the bearer of that right is unaware of its significance. He points out that considering that a large number of accused appearing in our courts are illiterate and indigent, 'the importance to an undefended accused of being informed of his right to legal representation and its significance is self-evident'.<sup>51</sup> The learned judge is of the opinion that every undefended accused should be informed of his or her right to legal representation, as

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<sup>47</sup> *S v Gwebu* 1988 (4) SA 155 (WLD); *S v Davids; S v Dladla* 1989 (4) SA 172; *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO* 1989 (3) SA 368 (E); *S v Mithwana* 1989 (4) SA 361 (N); *S v Mkhize and Others* 1990 (1) SACR 620 (N); *S v Mabaso* 1990 (3) SA 185 (A); *S v Masilela* 1990 (2) SACR 257 (N); *S v Mwambazi* 1991 (2) SACR 149 (Nm); *Rudman and Another; S v Mithwana* 1992 (1) SA 343 (A); *S v Jansen* 1992 (1) SACR 447 (C); *S v Jacobs* 1991 (2) SACR 291 (C); and *S v Makaula* 1993 (1) SACR 57 (Tk).

<sup>48</sup> Unlike in the case of a peremptory duty, a failure of a 'directory duty' does not necessarily vitiate the trial proceedings. See criticism by Grant in 'The right to counsel after *Khanyile*' *op cit* note 22 at 333.

<sup>49</sup> 1988 (1) SA 191 (T).

<sup>50</sup> 1989 (3) SA 368 (E) at 380I.

<sup>51</sup> *Ibid* at 381A.

well as the right to apply for legal aid.<sup>52</sup>

A similar position was held to prevail in Namibia in the case of *S v Mwambazi*.<sup>53</sup> The court stated that the effect of article 12(1)(e)<sup>54</sup> of the Namibian Constitution is that all unrepresented accused must be informed of their right to legal representation.<sup>55</sup>

The judgment in *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO*<sup>56</sup> can be said to extend the ambit of the rule laid down in *S v Radebe; S v Mbonani*,<sup>57</sup> by determining that the duties arise in all cases. Cooper J argues that the reason for imposing the duty in all cases is because there is no logical reason for limiting the cases in which the duties are applicable, and furthermore, that it would be improper for a court to make a ruling on matters which are governed by the Legal Aid Board and Legal Aid Act 22 of 1969.<sup>58</sup>

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<sup>52</sup> *Ibid* at 381D-G. This view was followed in *S v Mthwana* 1989 (4) SA 361 (N) at 371D-E; and *S v Mpata* 1990 (2) SACR 175 (NK) at 178b.

<sup>53</sup> 1991 (2) SACR 149 (Nm).

<sup>54</sup> Article 12(1)(e) provides as follows:

All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.

<sup>55</sup> 1991 (2) SACR 149 (Nm) at 151c-d.

<sup>56</sup> 1989 (3) SA 368 (E).

<sup>57</sup> 1988 (1) SA 191 (T). In the *Radebe; Mbonani* judgment Goldstone J held that the duty to inform unrepresented accused of their right to legal representation arises especially in 'serious' cases, and the duty to inform an accused of his or her right to apply for legal aid, applies in 'appropriate' cases; at 196G-H.

<sup>58</sup> *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO* 1989 (3) SA 368 (E) at 381D; H-J. This opinion is supported by Parmanand, SK in 'Khanyile in disarray' *De Rebus* (March 1990) at 209.

The majority of cases, including the recent Appellate Division decision in *S v Rudman and Another*; *S v Mthwana*,<sup>59</sup> have, however, followed the *dictum* in *S v Radebe*; *S v Mbonani*.<sup>60</sup> This means that the duty of a presiding officer to inform unrepresented accused of their right to legal representation and their entitlement to apply for legal assistance, is restricted to accused persons who appear to be ignorant of their rights.<sup>61</sup> Thus, in *S v Mkhize*,<sup>62</sup> Shearer J said that this duty arises in cases where the accused does not appear to be aware of his or her rights in this regard, or it is not probable that the accused is aware of these rights.

It is submitted that as the right is equally available to all accused, it is preferable to inform every accused of this right at the outset of the trial proceedings.

In *S v Makaula*<sup>63</sup> the court approved of the *dicta* in *S v Radebe*; *S v Mbonani*<sup>64</sup> and *S v Mabaso*<sup>65</sup>, regarding the duty of a judicial officer to inform accused persons of their right to legal representation and their entitlement to apply for legal assistance. However, Davies AJ says that due to the virtual absence of a legal aid system in Transkei, the gesture to

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<sup>59</sup> 1992 (1) SA 343 (A) at 391F.

<sup>60</sup> 1988 (1) SA 191 (T).

<sup>61</sup> *S v Mabaso* 1990 (3) SA 185 (A) at 204G; *S v Rudman and Another*; *S v Mthwana* 1992 (1) SA 343 (A) at 391G; *S v Mkhize* 1990 (1) SACR 620 (N) at 622e; *S v Jacobs* 1991 (2) SACR 291 (C) at 292d-e; *S v Jansen* 1992 (1) SACR 477 (C) at 479b-480b; and *S v Makaula* 1993 (1) SACR 57 (Tk).

<sup>62</sup> 1990 (1) SACR 620 (N) at 622e. Shearer J (at 622d) suggests an interesting procedure of placing a 'prisoner's friend' at each court, to assist indigent accused to apply for and obtain defence counsel.

<sup>63</sup> 1993 (1) SACR 57 (Tk).

<sup>64</sup> 1988 (1) SA 191 (T).

<sup>65</sup> 1990 (3) SA 185 (A).

inform an accused of the possibility of legal aid is 'empty and meaningless'.<sup>66</sup> The learned judge thus suggests that, in serious cases, in addition to informing unrepresented accused of their right to legal representation, the court should advise such accused persons that it would be in their interest to engage legal representation. If an accused has the means to obtain legal representation, the trial should be adjourned to enable the accused to engage a legal representative. If, however, the accused is too poor to afford a legal representative, the court may proceed with the trial.<sup>67</sup>

In all the cases discussed under this section, the courts have held that the question whether a failure to inform accused persons of their right to legal representation and their entitlement to apply for legal aid, imperils the proceedings, depends on whether the omission has amounted to an irregularity under section 309(3) of Act 51 of 1977.<sup>68</sup> In terms of this provision, trial proceedings may be set aside if an irregularity amounts to a failure of justice or real prejudice to the accused.<sup>69</sup>

Hoexter JA, in *S v Mabaso*,<sup>70</sup> states that the question of whether a failure of justice has occurred depends on the peculiar facts of each individual case and 'the extent of the

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<sup>66</sup> 1993 (1) SACR 57 (Tk) at 59b.

<sup>67</sup> *Ibid* at 59c-f.

<sup>68</sup> This section deals with the powers of a Provincial or Local Division of the Supreme Court in appeals from lower courts. See *S v Rudman*; *S v Johnson*; *S v Xaso*; *Xaso v Van Wyk NO* 1989 (3) SA 368 (E) at 374I; *S v Rudman and Another*; *S v Mthwana* 1992 (1) SA 343 (A) at 375B; *S v Jansen* 1992 (1) SACR 477 (C) at 480d-e; and *S v Mthwana* 1989 (4) SA 361 (N) at 369D-F.

<sup>69</sup> *S v Jansen* 1992 (1) SACR 447 (C) at 480d-e.

<sup>70</sup> 1990 (3) SA 185 (A).

accused's own knowledge of his rights'.<sup>71</sup> The court in *S v Mkhize*<sup>72</sup> suggests that the test to be followed is whether the accused would have chosen to be legally represented. If so, prejudice is proven and a failure of justice has occurred. No further enquiry is held to determine whether the accused, on the evidence before the court, would in any event have been convicted, 'for if he had been represented matters might conceivably have turned out differently'.<sup>73</sup> If the accused would not have chosen to be legally represented, then a failure to inform an accused of his or her right to legal representation does not affect the proceedings.<sup>74</sup>

It is interesting to note that in *S v Jacobs*<sup>75</sup> Marais J held that there is *prima facie* always a failure of justice where an accused was not informed of his or her right to apply for legal aid. However, the learned judge said that if it is clear that no such choice would have been made, the position is different.

The current position on the duty of a presiding officer to inform an unrepresented accused of his or her right to legal representation and an accused's entitlement to apply for legal aid,

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<sup>71</sup> *Ibid* at 204C-D. This *dictum* was approved in *S v G* 1992 (1) SACR 568 (B) at 570b; *S v Zacharia Masango* 1990 (2) SACR 270 (B); *S v Mwambazi* 1991 (2) SACR 149 (Nm) at 151c-d; and *S v Jacobs* 1991 (2) SACR 291 (C) at 292d-e.

<sup>72</sup> 1990 (1) SACR 620 (N) at 623a-b.

<sup>73</sup> *Ibid* at 623a-b. See also *S v Shabangu* 1976 (3) SA 555 (A) at 558G; *S v Jansen* 1992 (1) SACR (C) at 481a-b; *S v Williams* 1992 (1) SACR 260 (C); and *S v Davids; S v Dladla* 1989 (4) SA 172 (N) at 196B.

<sup>74</sup> 1990 (1) SACR 620 (N) at 623c. See also *S v Makaula* 1993 (1) SACR 57 (Tk) at 59 g-h. Nienaber J, in *S v Davids; S v Dladla* 1989 (4) SA 172 (N) at 200B, is of the opinion that once an accused has been given an opportunity to obtain legal assistance and returns to court unsuccessful in this regard, the court may continue with the case, even if it is a complex and serious matter. No irregularity in such an instance would be held to have occurred.

<sup>75</sup> 1991 (2) SACR 291 (C) at 293c.

can be said to only arise in 'serious cases' and where the accused appears to be ignorant of this right. The duty is thus not an absolute duty as a failure by the presiding officer to discharge this duty, may, but does not necessarily, vitiate the proceedings.

It is submitted that in view of the large number of illiterate and indigent accused who are charged in our criminal courts, the knowledge of entitlement to legal representation and the possibility of applying for legal aid, is vital to these accused persons. The duty is a small one to impose on judicial officers and it is regrettable that the judgment in *Nakani v Attorney-General, Ciskei, and Another*,<sup>76</sup> which imposes a peremptory duty on the presiding officer to inform accused persons of these rights, was not followed.

In the case of *S v Khanyile and Another*<sup>77</sup> Didcott J acknowledges the progressive effects of Goldstone J's judgement in *S v Radebe; S v Mbonani*.<sup>78</sup> However, he chooses not to follow it as he feels it does not bring one 'to the heart of the matter', which, for Didcott J, is that to inform an unrepresented accused of his or her right to legal representation would make no difference to the vast majority of those being charged in criminal courts. This is because 'relatively few of those charged in this country with crimes can afford to pay for the hire of a lawyer'.<sup>79</sup> The learned judge thus suggests that the only constraint against the accused being represented is a financial one - a lack of personal finance on the one hand, and

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<sup>76</sup> 1989 (3) SA 655 (Ck) at 661B-C.

<sup>77</sup> 1988 (3) SA 795 (N).

<sup>78</sup> 1988 (1) SA 191 (T).

<sup>79</sup> 1988 (3) SA 795 (N) at 800D-H.

a lack of funds from legal aid sources on the other.<sup>80</sup>

In an attempt to equate the American legal system of due process with our common law jurisprudence, Didcott J comes to the conclusion that as a matter of principle and policy all accused should be entitled to legal representation.<sup>81</sup> The learned judge argues that the right to legal representation is *fundamental and essential to a fair trial* and that a denial of this right renders the trial *per se* unfair.<sup>82</sup> In cases where accused persons have secured their own legal representation, the denial of such representation (in one form or another) has been regarded in such a serious light as to vitiate the proceedings.<sup>83</sup> The plea made in *S v Khanyile and Another*<sup>84</sup> is for the same approach should be applied to the position of indigent accused.<sup>85</sup> In other words, Didcott J argues that the right to a fair trial entails the right to be represented, and, in the case of indigent accused, to be so represented free of charge.

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<sup>80</sup> The following sentiments have been expressed in this regard by Nkademeng, D 'The Plight of the Unrepresented Accused in the South African Law' *African Law Review* (1987) Vol I (4) at 14: 'The greatest flaw in the South African criminal system lies in the failure of the State to provide free or subsidised legal services to the indigent accused ... Time-honoured expressions like all persons being equal in the eyes of the law have come to mean equality before the law, if you can afford it'.

<sup>81</sup> 1988 (3) SA 795 (N) at 802B-812H. This *dictum* was approved of in *S v Davids; S v Dladla* 1989 (4) SA 172 (N). See chapter three (ii)(a) for a discussion on the American jurisprudence.

<sup>82</sup> *S v Khanyile and Another* 1988 (3) 795 (N) at 810C-D. See comments by Van Zyl Smit in 'Indigence and the right to counsel' *SAJHR* (1988) at 367; Grant 'The right to counsel: recent developments in South Africa' *op cit* note 22 at 53-57; Grant 'The right to counsel after *Khanyile*' *op cit* note 22 at 331; Davis, DM 'An impoverished jurisprudence: when is a right not a right?' *SAJHR* (1992) vol.8(1) at 91-2; and criticism by Du Plessis, JR in 'The representation of the accused' in *SALJ* (1990) at 210.

<sup>83</sup> See the many cases referred to in *S v Davids; S v Dladla* 1989 (4) SA 172 (N) at 193G-194C.

<sup>84</sup> 1988 (3) SA 795 (N).

<sup>85</sup> *S v Davids; S v Dladla* 1989 (4) SA 172 (N).

However, acknowledging the obstacles encountered in practice, the learned judge does qualify the cases requiring *pro deo* counsel. By eliminating the two extreme situations (ie on the one hand, those cases which are so petty that the average person would not consider legal representation and, on the other hand, the severe cases, such as murder and treason, in which *pro deo* counsel is provided in any case), a dense mass of cases protrudes from which must be identified 'those in which the call for representation is the most demanding and the lack of it the most debilitating'.<sup>86</sup>

Didcott proposes the following criteria for determining whether legal representation is necessary to ensure a fair trial:<sup>87</sup>

- (1) The complexity of the case with regard to both the law and the facts involved;
- (2) The ability of the accused to defend him or herself; and
- (3) The severity of the charge and the consequences to the accused should a conviction follow.

If the judicial officer after a consideration of the above criteria decides 'that the trial would be palpably and grossly unfair if it were to go ahead without a lawyer for the defence', the officer should refer the case either to the Legal Aid Board or to a lawyer who is prepared

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<sup>86</sup> 1988 (3) SA 795 (N) at 814J-815D.

<sup>87</sup> *Ibid* at 815D-F. Steytler, in 'Equality before the law: being practical about principle' *SAHJR* (1992) vol.8(1) at 117-8, suggests that the criteria for entitlement to legal aid developed by Didcott J are too broad and should be defined as restrictively as possible. See further criticisms by Du Plessis *op cit* note 82 at 210; Parmanand *op cit* note 58 at 210, where it is suggested that the category of qualifying cases should be restricted capital offences or where legal representation is 'deemed essential'.

to act *pro bono*.<sup>88</sup> The trial would then only proceed if the accused was represented. Should the judicial officer decide in the negative and proceed with such a case, the above points might again be considered, with hindsight, by the court of appeal on review. Should the latter decide in the affirmative, the conviction might be overturned regardless of the strength of the case for the prosecution, for Didcott J argues that 'no conviction can ever be allowed to stand which is the product of a trial so discredited once all comes to light'.<sup>89</sup>

In *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO*<sup>90</sup> Cooper J strongly criticizes the judgment in *S v Khanyile and Another*<sup>91</sup> as having extended the ambit of the right too far. He objects to the comparison drawn between the American and South African legal systems on the basis that our law has no Bill of Rights -

'the right to legal representation in [American] State criminal proceedings is a fundamental right guaranteed by the Fourteenth Amendment ... [and] has no counterpart in the South African statute book'.<sup>92</sup>

Cooper J further objects to the contention that judicial power under the two systems are 'in essence the same'. The learned judge states that the South African system, having discarded with the jury system, requires the judicial officer to play a more active role. The assertion is thus that while American courts are concerned with procedural justice, the South African

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<sup>88</sup> 1988 (3) SA 795 (N) at 816A-C.

<sup>89</sup> *Ibid* at 816D-G.

<sup>90</sup> 1989 (3) SA 368 (E).

<sup>91</sup> 1988 (3) SA 795 (N).

<sup>92</sup> *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO* 1989 (3) SA 368 (E) at 373B. But see the comments in the articles referred to at note 82.

courts' concern is with substantial justice.<sup>93</sup>

In the view of Cooper J, the positive investigative duties imposed on the judicial officer, as expounded in *S v Khanyile and Another*,<sup>94</sup> are too extensive. The learned judge states that there are established obligations imposed on the magistrate and, in his view, adherence to these obligations provide sufficient assistance to the unrepresented accused.<sup>95</sup> However, Cooper J admits that this 'in no way minimises the importance of legal representation'. Cooper J further argues that the legal procedure envisaged in *S v Khanyile and Another*<sup>96</sup> is simply not feasible due to a lack of personnel and an inevitable overcrowding of the courts. It would thus appear that the learned judge's moral considerations are outweighed by practical considerations.

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<sup>93</sup> *Ibid* at 374B-H.

<sup>94</sup> 1988 (3) SA 795 (N) at 815D-816G.

<sup>95</sup> *S v Rudman; S v Johnson; S v Xaso; Xaso v Van Wyk NO* 1989 (3) SA 368 (E) at 377E-378J. This sentiment is echoed in FM Vorster's critique of the *Radebe; Mbonani (supra)* case, in which he concludes that '[o]ur legal system is also such that chances that accused persons who are innocent are convicted are slender and I am of the opinion that there is no special need to ensure legal representation on a larger scale than that which already exists', in 'Legal representation in criminal cases' *The Magistrate* (1988)23 at 94. However, notice should also be taken of the assertion made in an article published in the *Edinburgh Review* in 1826 - '[o]f all false and foolish dicta, the most trite and the most absurd is that which asserts that the judge is counsel for the prisoner ... The Judge cannot be counsel for the prisoner, ought not to be counsel for the prisoner, never is counsel for the prisoner'; as quoted by Selikowitz *op cit* note 2 at 70.

<sup>96</sup> 1988 (3) SA 795 (N).

The rule in *S v Khanyile and Another*<sup>97</sup> was also not followed in *S v Mpata*<sup>98</sup> and *S v Mthwana*,<sup>99</sup> and was finally rejected in the Appellate Division decision in *S v Rudman and Another; S v Mthwana*.<sup>100</sup>

The Appellate Division in *S v Rudman and Another; S v Mthwana*<sup>101</sup> bases its rejection of the *Khanyile* rule on three premises. It firstly argues that no right of an indigent accused to be provided with free legal representation (where such accused desires legal assistance) has been recognised by statute or court practice,<sup>102</sup> thereby confirming the *dicta* in *R v Mati and Others*<sup>103</sup> and *S v Chaane en Andere*.<sup>104</sup> The court refers to the long history of the South African legal system, during which period no mention had been made that a trial in which an accused had been unrepresented, was judged irregular or illegal.<sup>105</sup> Various authorities are quoted which confirm that our Common Law is inherently an equitable

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<sup>97</sup> 1988 (3) SA 795 (N).

<sup>98</sup> 1990 (2) SACR 175 (NC).

<sup>99</sup> 1989 (4) SA 361 (N) at 366B-C; 369D.

<sup>100</sup> 1992 (1) SA 343 (A) at 380F.

<sup>101</sup> *loc cit*. See a criticism of this judgment in Davis *op cit* note 82 at 93-5.

<sup>102</sup> *Ibid* at 380F.

<sup>103</sup> 1960 (1) SA 304 (AD).

<sup>104</sup> 1978 (2) SA 891 (A). This opinion is supported by Du Plessis *op cit* note 82 at 210; but see D van Zyl Smit *op cit* note 82 at 364 for a contrary opinion.

<sup>105</sup> *Ibid* at 378D-I. See also Nienaber J's judgment in *S v Davids; S v Dladla* 1989 (4) SA 172 (N) at 199F, where he states that '[a] point so conspicuous, emerging from one of the fundamentals of fairness, if good, could never have been overlooked - not by the Judges in *S v Chaane* (1978 (2) SA 891 (A)) nor by generations of other Judges dealing with a multitude of cases, duplicating the very situation described in *S v Khanyile* (1988 (3) SA 795 (N)).

system,<sup>106</sup> and it is argued that several judge-made rules have evolved to render assistance to undefended accused to ensure that they receive a fair trial.<sup>107</sup>

The court agrees with Didcott J that 'it is a fundamental principle of our law that an accused person is entitled to a fair trial.'<sup>108</sup> However, it argues that the issue to be determined is not whether the trial of an accused who was unrepresented (not by choice, but because of indigency of ignorance of his or her right to legal representation) was unfair, but whether, on the facts of the case, an irregularity occurs in terms of section 309 (3) of the Criminal Procedure Act 51 of 1977.<sup>109</sup>

It has invariably been held that an irregularity or illegality in criminal proceedings occurs when there has been a departure from those formalities, rules and principles of procedure in accordance with which the law requires a criminal trial to be initiated or conducted'.<sup>110</sup> Nienaber J<sup>111</sup> says that only those irregularities which result in a failure of justice, due to

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<sup>106</sup> *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) at 606A; *Kent v Transvaalsche Bank* 1907 TS 765 at 774; and *R v Mbamali and Xaba* 1938 NPD 2 at 9. See also Voet 1.1.6; Huber HR 1.1.17, 18, 21.

<sup>107</sup> *S v Rudman and Another*; *S v Mthwana* 1992 (1) SA 343 (A) at 380F; 381E-382D; *S v Mthwana* 1989 (4) SA 361 (N) at 366B-C; *S v Mpata* 1990 (2) SACR 175 (NC) at 179h-j. For a discussion on these rights, see *S v Rudman*; *S v Johnson*; *S v Xaso*; *Xaso v Van Wyk NO* 1989 (3) SA 368 (E) at 377E-379A; and *S v Radebe*; *S v Mbonani* 1988 (1) SA 191 (T) at 194H-195D.

<sup>108</sup> 1992 (1) SA 343 (A) at 369D-E. See also *R v Thielke* 1918 AD 373 at 376; *S v Mofokeng* 1962 (3) SA 551 (A) at 557G-H; *S v Alexander and Others (I)* 1965 (2) SA 796 (A) at 809C-D; and *S v Tyebela* 1989 (2) SA 22 (A) at 29G-H.

<sup>109</sup> 1992 (1) SA 343 (A) at 375B; 377B-C. See also *S v Mthwana* 1989 (4) SA 361 (N) at 369D-F. See Davis *op cit* note 82 at 93-5, for a criticism of the restricted scope of a right to a fair trial given by the Appellate Division in this case.

<sup>110</sup> Per Williamson JA in *S v Mofokeng* 1962 (3) SA 551 (A) at 557G-H. See also *S v Xaba* 1983 (3) SA 717 (A) at 728D.

<sup>111</sup> In *S v Davids*; *S v Dladla* 1989 (4) SA 172 (N) at 193E-F.

prejudice to the accused, can be fatal. Furthermore, if the facts of the case, which are untainted by the irregularity, still justify a conviction, the proceedings will not be set aside.<sup>112</sup>

The court, secondly, argues that in principle, the implementation of the *Khanyile* rule would 'constitute notice to the Government that if legal aid on the required scale is not provided, the prospect will have to be faced of numerous criminal trials being delayed and many convictions being upset on appeal because of the failure to provide the accused person with legal representation'.<sup>113</sup> The court is hereby arguing that it does not have the power to impose a positive duty on the State to provide accused persons with legal aid.<sup>114</sup>

The final premise on which the court bases its rejection of the *Khanyile* rule, is that it is of the opinion that a confirmation of this would require the judiciary to make decisions on administrative policy, 'which takes the matter beyond the courtroom'. The court, however, does not reject the project out of hand as unworkable, but says that feasibility studies will have to be done in this area to determine to possibility of implementing such a scheme.<sup>115</sup>

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<sup>112</sup> *S v Tuge* 1966 (4) SA 565 (A) at 568F; *S v Davids*; *S v Dladla* 1989 (4) SA 172 (N) at 193F.

<sup>113</sup> *S v Rudman and Another*; *S v Mthwana* 1992 (1) SA 343 (A) at 386G-H.

<sup>114</sup> *Ibid* at 386H-I. But see Steytler *op cit* note 87 at 115-116, where he points out that the courts have previously placed a positive duty on the State to provide accused persons with interpreters in Supreme Court trial proceedings.

<sup>115</sup> In *S v Mthwana* 1989 (4) SA 361 (N) at 370E and *S v Mpata* 1990 (2) SACR 175 (N) at 179j-180a the courts reject the *Khanyile* rule as being unworkable as, it is held, the funds are simply not available to cope with the flood of cases that will have to be provided with representation. This view is supported by Malan, JF in 'Die reg op regsverteenvoordiging in die lig van sekere fundamentele beginsels' *Obiter* (1992) 55-84 at 82; and by Du Plessis *op cit* note 82 at 215. But see the feasibility studies done by McQuoid-Mason, DJ in 'The right to legal representation: implementing *Khanyile's* case' *SACJ* (1989)2 at 57-66; and McQuoid-Mason 'Rudman and the right to counsel: is it feasible to implement *Khanyile*?' *SAJHR* (1992) vol.8(1) at 96-113; as well as the suggestion by Plasket, C in 'Legal assistance: a cost-effective answer to *Rudman*' *SAJHR* (1992)

In conclusion, it can be said that the court in *S v Khanyile and Another*<sup>116</sup> attempted to bring the South African law on the issue of the provision, by the State, of legal representation, in line with international developments in this area, by determining that the right to be provided with legal representation is a corollary to the initial right to legal representation. However, the Appellate Division in *S v Rudman and Another; S v Mthwana*<sup>117</sup> has refused to follow this approach. Besides confirming the rule in *S v Radebe; S v Mbonani*<sup>118</sup> that there is a directory duty on the presiding officer to inform unrepresented accused of their right to legal representation and of their entitlement to apply for legal aid, it can be said, the overall effect of the Appellate Division decision has been to maintain the *status quo*.

This position may, however, change with the adoption of a Bill of Rights in South Africa. The possibility of broadening the scope of the right to legal representation will depend on two factors, namely the actual wording of the entitlement and the manner in which the courts choose to interpret the document. These two aspects will be discussed in the following chapters.

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vol.8(1) at 119-125, of offering legal 'assistance' as opposed to legal representation, based on the English concept of a *McKenzie Friend*.

<sup>116</sup> 1988 (3) SA 795 (N).

<sup>117</sup> 1992 (1) SA 343 (A).

<sup>118</sup> 1988 (1) SA 191 (T).

## CHAPTER THREE

### APPROACHES TO INTERPRETING BILLS OF RIGHTS

The courts have not followed a common approach to interpretation, whether it be the interpretation of a contractual clause, a statutory provision or of a guarantee in terms of a bill of rights. The chosen interpretative method can have a substantial impact on the ambit of the application of the provision or right in question.

There are two main approaches followed in judicial interpretation: the first is a restrictive approach, the thrust of which is to ascertain the original intention of the drafter or legislator from the words used in the text, without reference to external factors possibly pertaining to the document.<sup>1</sup> The other is a 'purposive' approach according to which the interpreter considers the document 'as a whole to ascertain the social ends it was intended to achieve and the practical means by which it was expected to achieve them'.<sup>2</sup> Depending on which method of interpretation is followed, different results may be achieved.

The interpretation of a document containing entrenched fundamental human rights and freedoms differs, in some respects, from that of a statute or a contract, in the sense that '[a] bill of rights regime requires rules of interpretation aimed at upholding fundamental freedoms

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<sup>1</sup> Du Plessis, LM (1986) *The Interpretation of Statutes* at 35.

<sup>2</sup> Lord Diplock, quoted in Devenish, GE (1992) *Interpretation of Statutes* at 37; *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 at 549G.

rather than upholding the Legislature'.<sup>3</sup> The opinion is that although reference may be made to the rules of interpretation of statutes, a bill of rights should be interpreted 'according to those general principles which usually govern the construction of other fundamental laws'.<sup>4</sup> However, the courts broadly apply the same interpretative approaches, outlined above, to both types of documents. Each of these approaches will now be discussed in turn.

#### 1. Restrictive interpretation

Followers of this approach state that 'the paramount rule to be observed is that the [document] is to be expounded according to its expressed or manifested intention'<sup>5</sup> and that the true meaning of the text must be sought in the *ipsissima verba* used by the framers of the document.<sup>6</sup> The only situations which allow for a departure from the ordinary grammatical meaning of the words used in the text, are interpretations which lead to ambiguity, unjust or unreasonable results.<sup>7</sup> Devenish refers to this theory as one of 'qualified contextualism', as the broader considerations of the context of the words in the text are only considered in the above exceptional circumstances.<sup>8</sup> Thus, the court in *Smith v Attorney-General, Bophuthatswana*<sup>9</sup> held that it would only consider the intention of the drafter if more than

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<sup>3</sup> *S v Chabalala* 1986 (3) SA 623 (BA) at 627J-628A; Manning, M (1983) *Rights, Freedoms and the Courts: a practical analysis of the Constitution Act, 1982* at 84.

<sup>4</sup> Rotunda *et al.* (1986) *Treatise on Constitutional Law: substance and procedure* at 491.

<sup>5</sup> *R v Westenraad* 1941 OPD 103 at 105.

<sup>6</sup> Du Plessis *op cit* note 1 at 31.

<sup>7</sup> Devenish *op cit* note 2 at 28.

<sup>8</sup> *loc cit.*

<sup>9</sup> 1984 (1) SA 194 (B) at 199B-F.

one reasonable construction of the provision is possible.

A similar approach was followed in *S v Marwane*<sup>10</sup> where Miller JA says that

‘whether our Courts were to regard an Act creative of a Constitution as it would any other statute, or as an Act *sui generis*, when construing a particular provision therein, they would give effect to the ordinary accepted meaning and effect of the words used and would not deviate therefrom unless to give effect to the ordinary meaning would give rise to glaring absurdity’.<sup>11</sup>

The application of a restrictive interpretation to a legislative provision or entrenched human right can have debilitating results.

In the Canadian case of *Morgentaler, Smoling and Scott v The Queen*<sup>12</sup> McIntyre J, in a dissenting judgment, in arguing that there is no constitutional right to an abortion in Canada, stated that in determining whether legislation is contrary to the democratic values protected by the Charter of Rights and Freedoms, ‘the courts must confine themselves to such democratic values as are *clearly found and expressed* in the Charter and refrain from imposing or creating other values not so based’.<sup>13</sup>

This appears to be a very narrow reading of the Canadian Charter, as such a document could

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<sup>10</sup> 1982 (3) SA 717 (A).

<sup>11</sup> *Ibid* at 749B-C.

<sup>12</sup> (1988) 37 CCC (3d) 449.

<sup>13</sup> *Ibid* at 529 [my italics].

not possibly contain all democratic rights and freedoms which it protects. It is submitted that the concept of democracy in itself implicitly demands a broader interpretation, as there are invariably contradictory issues in terms of these rights and freedoms which need to be considered.

The two Bophuthatswana cases of *S v Chabalala*<sup>14</sup> and *Government of the Republic of Bophuthatswana and Others v Segale*<sup>15</sup> serve to illustrate how a positivist approach to the interpretation of a bill of rights can severely curtail entrenched human rights and freedoms.

In *S v Chabalala*<sup>16</sup> the question to be determined was whether the death sentence (as sanctioned by section 10 of Act 18 of 1977 (B)) amounted to 'inhuman and degrading treatment' in contravention of the provisions of section 11 of the Bophuthatswana Constitution Act 18 of 1977(B).<sup>17</sup>

The court equated the interpretation of the provisions of a Bill of Rights with that of a contract. The court was of the opinion that when interpreting a contract, in certain circumstances, absurd results may be achieved from a too literal interpretation of the words used in the text and that the nature and purpose of the contract as a whole and its provisions within that contract, need to be considered.<sup>18</sup> Applying this reasoning to the provisions of

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<sup>14</sup> 1986 (3) SA 623 (BA).

<sup>15</sup> 1990 (1) SA 434 (BA).

<sup>16</sup> 1986 (3) SA 623 (BA).

<sup>17</sup> *Ibid* at 625H-I.

<sup>18</sup> *Ibid* at 628G-H.

the Bill of Rights in question, the court accordingly stated that '[s]ection 11 must be [interpreted] within the framework of the Bill of Rights, [and] not in isolation or in contradistinction to its remaining provisions'.<sup>19</sup> Read in this fashion the court was able to uphold the other sections in the document which refer to punishment or imprisonment as valid, provided that these provisions were not executed in a 'degrading and inhuman manner'.<sup>20</sup>

It would appear that the above line of argument allows the court to avoid the main question of whether the death penalty itself amounts to 'degrading and inhuman' treatment or punishment, and is therefore in contravention of section 11 of the Bill of Rights.

The court further strengthened its view by arguing that, by enacting section 10, the representatives of the people of Bophuthatswana expressly conveyed their acceptance of the death penalty in certain circumstances being an appropriate punishment.<sup>21</sup> This statement could be considered to be in line with the court's approach to statutory interpretation, in that the intention of the Legislature must be sought in the plain meaning of the words. With regard to the legitimacy of section 277<sup>22</sup> of the Criminal Procedure Act 51 of 1977, the court accepted its validity as having been incorporated into the legal system of Bophuthatswana by section 93(1) of the Constitution.<sup>23</sup> This argument of the court appears

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<sup>19</sup> *Ibid* at 628H-I.

<sup>20</sup> *Ibid* at 628I-J.

<sup>21</sup> *Ibid* at 629C-E.

<sup>22</sup> This section provides for a mandatory death sentence, except in certain circumstances.

<sup>23</sup> *Ibid* at 630F-G.

to follow an even more restrictive approach than a literal interpretation would, as the court is in effect interpreting that which has not been expressly stated.

The above interpretations appears to be contradictory to the idea that a Bill of Rights is, in the first instance, concerned with upholding the rights and freedoms valued in a democratic society, rather than the statutory provisions of legislation.

The case of *Government of the Republic of Bophuthatswana v Segale* was concerned with section 31 of the Internal Security Act 32 of 1979 (B) (which prohibits gatherings or meeting of more than twenty people which have a political character) and whether it was *ultra vires* sections 15 and 16, of the Bophuthatswana Constitution Act 18 of 1977 (B) (which guarantee the rights of freedom of expression and of assembly, respectively).<sup>24</sup> The appellants argued that the intrusion on these fundamental rights was necessary to maintain public safety and order.<sup>25</sup>

The court relied on the approaches followed in *S v Marwane*<sup>26</sup> and *Smith v Attorney-General, Bophuthatswana*<sup>27</sup> (discussed above), as authority to adopt a positivist approach whereby statutes are applied according to their strict meaning as construed from the words used.<sup>28</sup> Galgut AJA, furthermore, chose not to interpret Hiemstra CJ's remark in the *Smith*

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<sup>24</sup> 1990 (1) SA 434 (BA) at 441I.

<sup>25</sup> *Ibid* at 441J.

<sup>26</sup> 1982 (3) SA 717 (A).

<sup>27</sup> 1984 (1) SA 196 (B).

<sup>28</sup> *Ibid* at 199F.

case, that the interpretation of the guarantees in a Bill of Rights is different and contrary to a positivist interpretation,<sup>29</sup> as suggesting that the court may deviate from the ordinary meaning of the words used by Parliament.<sup>30</sup> The court was thus of the opinion that the intention of the Legislature must be ascertained from the words of the text as used in their context and that if this intention is clear and unambiguous, '[i]t is not for the Courts to invent fancied ambiguities and usurp the functions of the Legislature'.<sup>31</sup>

The court proceeded to interpret the provisions protecting national security and public safety, contained in sections 15(2)<sup>32</sup> and 16(2)<sup>33</sup> of Act 18 of 1977 (B), as circumscribing the rights of freedom of expression and of assembly, guaranteed in sections 15(1) and 16(1) respectively.<sup>34</sup>

The court appears to have ignored the second criterion (contained in sections 15(2) and 16(2)) that the restrictions on the guaranteed rights must be *necessary in a democratic society*. This criterion is one of the pillars of the Bill of Rights which entrenches fundamental rights and freedoms and I submit that this places a heavier burden of proof on the State to justify any encroachment upon these important rights and freedoms.

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<sup>29</sup> *Ibid* at 199F.

<sup>30</sup> 1990 (1) SA 434 at 447I.

<sup>31</sup> *Ibid* at 448G-H.

<sup>32</sup> Section 15(2): The exercise of the right of expression ... may be subject to such ... restrictions as are prescribed by law and are necessary in a democratic society in the interests of national security, ... or public safety...'

<sup>33</sup> This section reads the same as section 15(2) - see note 32.

<sup>34</sup> *Ibid* at 449C.

It can be argued that in both the above judgments the respective courts effectively nullified the fundamental guarantees which the Bophuthatswana Bill of Rights attempts to uphold. Such an interpretative approach to a bill of rights has the effect of stifling the development of individual protected rights and freedoms and is contrary to the spirit of a human rights document.

## 2. Purposive interpretation

The 'purposive' theory looks to the purpose behind enacting specific provisions in a statute or enshrining certain guarantees in a constitution. In other words, 'it refers to legislative goals that transcend a particular application'.<sup>35</sup> Thus, Devenish says that an unqualified contextual approach is called for, allowing examination of 'all internal and external sources'.<sup>36</sup> A purposive interpretation can have the effect of broadening the ambit of an entitlement significantly.

The case law emanating from the jurisdictions of the United States of America, Canada and the European Court of Human Rights and the European Commission on Human Rights<sup>37</sup> will be examined to establish the potential of the purposive theory to broaden the scope of the rights and freedoms guaranteed in human rights documents. The reason for choosing these three jurisdictions is because the rights and freedoms entrenched in the various

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<sup>35</sup> Devenish *op cit* note 2 at 35.

<sup>36</sup> *Ibid* at 36.

<sup>37</sup> The European Court of Human Rights and the Commission on Human Rights were set up to supervise the observance by the contracting States of their engagements arising from the European Convention on Human Rights; P Van Dijk & GJH Van Hoof (1990) *Theory and Practice of the European Convention on Human Rights* at 20.

proposals for a future South African Bill of Rights are in many respects similar to those enshrined in the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms and the American Bill of Rights as contained in the Constitution. They can provide useful guidance in the area of purposeful interpretations, especially with regard to the right to be provided with legal representation.

## 2.1. Case law of the United States of America

The general approach of the American courts, when interpreting the Constitution, is to interpret the intention and meaning of the provisions with reference to the purpose of their enactment.<sup>38</sup> In other words, the language of the Constitution must be construed in such a way as to further the instrument's general purpose.<sup>39</sup> In the case of *Landry v Klopman*,<sup>40</sup> it was held that 'an adherence to the letter and a violation of the spirit of the instrument ought not to be tolerated or supposed possible'.

However, where there is no ambiguity in a clause and the meaning of it is clear, the courts sometimes state that in such a case it is not necessary to ascertain the intention of the drafters of the document.<sup>41</sup> This approach is qualified by the requirement that the Constitution must always be afforded a 'reasonable interpretation', having due regard to the significance of the

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<sup>38</sup> Rotunda *et al op cit* note 4 at 490.

<sup>39</sup> *Ibid* at 493.

<sup>40</sup> 13 La Ann 345 (1858) 345-6; quoted by Rotunda *et al. op cit* note 4 at 490.

<sup>41</sup> Rotunda *et al. op cit* note 4 at 491.

terms of the document.<sup>42</sup> It is further a general principle that the Constitution should be construed as a whole, according to which the individual provisions are considered in conjunction with the other clauses.<sup>43</sup>

Another important aspect of the interpretative approach to the American Bill of Rights was raised in *Gompers v United States*<sup>44</sup> where the court held that

[t]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is a vital, not formal one; it is to be gathered not simply by taking the words and a dictionary but by considering their origin and the line of their growth.

The courts are of the view that the Constitution was designed to take account of changing social, political and economical events, and therefore tend to follow a broad and flexible approach to interpreting the guarantees protected by the Bill of Rights.<sup>45</sup>

## 2.2. Case law of Canada

The Canadian Constitution Act of 1982 contains a Charter of Rights and Freedoms.

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<sup>42</sup> *Ibid* at 491.

<sup>43</sup> *Ibid* at 492.

<sup>44</sup> (1914) 233 US 604 at 610; quoted by Friedman J in *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 at 550F.

<sup>45</sup> *Ibid* at 495 - the Supreme Court has been referred to as a 'continual Constitutional Convention'. See also the cases referred to by Friedman J in this regard, in *Nyamakazi v President of Bophuthatswana* 1992 (4) SA 540 at 549H-550E.

Section 1 of the Charter provides:

*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The effect of the above section, regarding the protection of rights and freedoms, differs from that of the American Bill of Rights, in that the guaranteed rights are not absolute.<sup>46</sup> However, Strayer says that there is a presumption in favour of the rights and freedoms enshrined in the Charter.<sup>47</sup>

The courts have used similar arguments to the American courts to broaden the scope of the guarantees entrenched in the Charter or to strike down legislation which is contrary to these guarantees.

The majority judgment in the case of *Morgentaler, Smoling and Scott v The Queen*<sup>48</sup> is a good example of purposive interpretation by a court. The matter concerned the validity of section 251 of the Criminal Code which prohibits abortions, except under special circumstances set out in ss(4). The court held that by forcing a woman to carry a foetus to term contrary to her own priorities and aspirations amounts to an interference with her bodily integrity which is a violation of the right to security of persons, as guaranteed by section 7

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<sup>46</sup> In terms of the American Bill of Rights, the rights are generally proclaimed in absolute terms and the courts have had to debate possible limitations on these rights. Strayer, BL (1983) *The Canadian Constitution and the Courts* at 58.

<sup>47</sup> *Ibid* at 59.

<sup>48</sup> (1988) 37 CCC (3d) 449.

of the Charter.<sup>49</sup>

In reaching this conclusion the court followed the approach that '[t]he goal of Charter interpretation is to secure for all people the full benefit of the Charter's protection'.<sup>50</sup> It was thus held that account must be taken of the purpose of the legislation, as well as 'the administrative procedures created by law to bring that purpose into operation' as these 'may produce unconstitutional effects and such legislation should be struck down'.<sup>51</sup>

The court held that the rights guaranteed by the Charter must be analysed in terms of the interests that are meant to be protected thereby.<sup>52</sup> Manning is in agreement with this approach as he says that '[u]nlike other statutes a Constitution must be interpreted in a way that is most appropriate in order to realize its aims and objectives; not in such a way as to restrict those aims and objectives'.<sup>53</sup>

### 2.3. Case law of the European Court of Human Rights and the European Commission on Human Rights

When interpreting the European Convention on Human Rights the European Court of Human Rights and the European Commission on Human Rights (hereafter referred to as the Court

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<sup>49</sup> *Ibid* at 446-9.

<sup>50</sup> *Ibid* at 462.

<sup>51</sup> *Ibid* at 470.

<sup>52</sup> *Ibid* at 462.

<sup>53</sup> Manning *op cit* note 3 at 84.

and the Commission respectively) base their approach on the directions of the Vienna Convention on the Law of Treaties.<sup>54</sup> Article 31 determines that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and its purpose'.<sup>55</sup> Thus Merrills states that the Court interprets the words in an article in their contextual setting and against the background of the object and purpose of the Convention as a whole.<sup>56</sup> Regard is furthermore given to the broader concerns which the treaty wishes to address, when determining the meaning of the treaty.<sup>57</sup>

The important issue to be determined is the degree of relevance of the notions the 'object' and 'purpose' of a treaty. There appears to be two schools of thought in this regard. The one approach restricts the relevance of the object of the treaty to the extent that it is reflected in the words used. The other approach interprets and supplements the terms in the treaty by reference to the object and purpose of the treaty, as ascertained from the treaty itself and from other evidence.<sup>58</sup> The Court's approach appears to fall somewhere between these two schools: when interpreting the text it relies on the ordinary meaning of the words, but is always mindful that the object of the Convention is the protection of human rights.<sup>59</sup> Thus

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<sup>54</sup> 23 May 1969. The Vienna Convention is, however, not yet itself in force. Articles of this Convention which are referred to in particular, are articles 31 to 33.

<sup>55</sup> Merrills, JG (1988) *The development of international law by the European Court of Human Rights* at 63.

<sup>56</sup> *Ibid* at 66.

<sup>57</sup> *Ibid* at 70.

<sup>58</sup> *Ibid* at 70-1.

<sup>59</sup> *Ibid* at 71.

the Court would, in light of the purpose of the Convention, construe any restrictions on rights provided for in the Convention, narrowly.<sup>60</sup>

Another important feature of the Court's approach to interpreting the guarantees enshrined in the Convention, is its regard of the Convention as a 'living instrument'. The Court accordingly takes cognisance of contemporary conditions and conceptions of modern society.<sup>61</sup> An example of this attitude of the Court can be seen in the *Tyrer* case (1978), where it was held that birching of a juvenile amounted to degrading punishment in contravention of article 3 of the European Convention.<sup>62</sup>

The above discussion on restrictive and purposive interpretation, clearly illustrates the drastic impact a particular interpretative method can have on a provision or entrenched right.

As mentioned in chapter one, two approaches to the entrenchment of the right to legal representation in a future South African Bill of Rights can be discerned. The Government Charter and the South African Law Commission interim Report of 1991 only place a duty on a presiding officer to inform accused persons of their right to legal representation and of their right to apply for legal assistance. The ANC Bill of Rights, the Charter for Social Justice and the South African Law Commission Report of 1989 make special provision for unrepresented accused to be provided with legal representation when the interests of justice so require. Neither of the provisions can be said to be fully circumscribed and will therefore

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<sup>60</sup> *loc cit.*

<sup>61</sup> *Ibid* at 74.

<sup>62</sup> *loc cit.*

be open to judicial interpretation. In the chapters following, each approach will be subjected to a restrictive and a purposive interpretation. From this the possible ambit of the right to legal representation as provided for in these two approaches will be investigated.

## CHAPTER FOUR

### INTERPRETING A LIMITED RIGHT TO LEGAL REPRESENTATION

In this chapter I shall discuss the right to legal representation as enshrined in the Government draft Charter of Fundamental Human Rights and the South African Law Commission interim Report on Group and Human Rights, 1991.

Clause 26<sup>1</sup> of the (present) Government's draft Charter of Fundamental Human Rights is very similar to that devised by the South African Law Commission in its interim report.<sup>2</sup> These proposals can be said to be based on the *dictum* in the Appellate Division decision in *S v Rudman and Another; S v Mthwana*.<sup>3</sup> Because of the similarity of the two proposals, I shall, for the purpose of further discussion refer mainly to the Government Charter.

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- <sup>1</sup> Clause 26 (1) Every accused shall have the right:
- (f) to be represented by a legal practitioner at own expense;
  - (g) to be informed by the presiding officer regarding:
    - (i) his or her right to be assisted by a legal practitioner; and
    - (ii) the institution that he or she may approach for legal assistance, and to be given a reasonable opportunity to attempt to obtain legal assistance.
- (2) Any infringement of the rights of an accused referred to in subsection (1)(d) or (g) shall not result in the setting aside of the proceedings unless the court on appeal or review finds that justice has not been done.

- <sup>2</sup> Project 58: Group and Human Rights; August 1991.
- Article 7: Every accused person has the right -
- (e) to be represented by a legal practitioner;
  - (f) to be informed by the presiding officer -
    - (i) of his or her right to be represented by a legal practitioner;
    - (ii) of the institutions which he or she may approach for legal assistance;
- and to be given a reasonable opportunity to endeavour to obtain legal assistance: Provided that failure or neglect so to inform an accused person or to give him or her such opportunity shall not result in the setting aside of the proceedings unless on appeal or review a court finds that justice was not done.

- <sup>3</sup> 1992 (1) SA 343. See chapter two for a discussion on this case.

Briefly stated, article 7 (e) of the Law Commission's Report confirms an accused's fundamental right to legal representation. Subsection 7(f) obliges the presiding officer to inform an unrepresented accused of his or her right to be represented by a legal practitioner and to advise such accused of institutions which may be approached for legal assistance. Furthermore, an accused must be granted a reasonable opportunity to endeavour to obtain legal assistance. A trial may, however, be continued if the accused was unable to obtain representation in the time specified.

The actual provision of the right to legal representation need not be the last word spoken on the matter. An entitlement to be provided with legal representation could still be possible depending on whether a court interpreting the Government Charter follows a restrictive or purposive interpretation.

#### 1. Restrictive interpretation

The essence of a restrictive approach is that it looks at the letter of the provision without taking any other factors into consideration. By interpreting sections of a document in isolation, provisions which are potentially at odds with one another may go unnoticed or be deliberately ignored.

The traditional literal approach expounded in the Bophuthatswana cases, discussed in chapter three, and the judgment in *S v Rudman and Another; S v Mthwana*<sup>4</sup> will be used as a basis for a restrictive interpretation of the right to legal representation as enshrined in the

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<sup>4</sup> 1992 (1) SA 343 (A).

Government Charter (clause 26) and the Law Commission report of 1991 (article 7(f)).

By applying a strict reading of the letter of the law, it can be argued that the only right which is guaranteed in clause 26 of the Government Charter, is the right to legal representation at the accused's own expense<sup>5</sup>.

The duties imposed on a presiding officer in terms of clause 26(g),<sup>6</sup> to inform accused persons of their right to legal representation and to apply for legal aid are not absolute, as the trial proceedings will only be vitiated if, on appeal it is found that a failure by the presiding officer to comply with these duties has amounted to a failure of justice.

In *S v Rudman and Another; S v Mthwana*<sup>7</sup> the court held that the question whether an irregularity has occurred depends on 'whether there has been any irregularity or illegality, that is a departure from the formalities, rules and principles of procedure in according to which our law requires a criminal trial to be initiated or conducted'. This type of enquiry excludes the broad notions of 'basic fairness and justice'.<sup>8</sup> It was similarly held in *R v Mbamali and Xaba*<sup>9</sup> that 'under our review jurisdiction we have only to confirm proceedings where they are in accordance with justice ... but "justice" does not mean some standard of equity existing in the mind of the Court independent of the actual provisions of the law; we

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<sup>5</sup> 7(e); Clause 26(f) of Government charter.

<sup>6</sup> And article 7(f) of the Law Commission Report, 1991.

<sup>7</sup> 1992 (1) SA 343 (A) at 377C. See also *S v Mofokeng* 1962 (3) SA 551 (A) at 557.

<sup>8</sup> 1992 (1) SA 343 (A) at 378B.

<sup>9</sup> 1938 NPD 2 at 9.

have to administer justice in accordance with the law'.

As no express provision has been made for free legal assistance, the court (or State) is not obliged to provide an unrepresented accused with funded legal representation or to render any further assistance than the above-mentioned advice. There are a number of judge-made rules which have been designed over the years to assist unrepresented accused to ensure that a fair trial results and therefore the lack of legal representation can not be said to amount to an unfair trial.<sup>10</sup>

Therefore, by applying a literal interpretation to the provisions on entitlement to legal representation, it can be argued that the intention of the drafters was not to entrench a right to be provided with legal representation, but only to make it incumbent on a presiding officer to inform accused persons of their right to legal representation, as well as their right to apply for legal aid. It can be said that if such an interpretation is applied, the Government Charter's provision for legal representation merely entrenches the current position in South African law as part of the supreme law of the country and thus any further growth on the issue is stultified.

## 2. Purposive interpretation

As established in section 1 above, there is no provision in either of the South African Bills of Rights of the Government or the South African Law Commission Report of 1991, which expressly entitle an unrepresented accused to free legal representation. However, neither the

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<sup>10</sup> *S v Rudman and Another; S v Mithwana* 1992 (1) SA 343 (A) at 378D-J.

American Bill of Rights, nor the Canadian Charter of Rights and Freedoms provide specifically for such a right either. In American law the Sixth Amendment<sup>11</sup> was originally understood to entitle an accused to a legal representative of his or her own choice and expenditure.<sup>12</sup> However, through a process of creative and progressive interpretation the courts have developed the scope of the right to legal representation to include the right of an indigent accused to be provided with legal representation.<sup>13</sup>

An exposition of the development of the right to be provided with legal representation in American and Canadian case law will be discussed to illustrate how an apparently limited right can substantially be expanded by following a purposive approach to interpretation. The developments made in terms of the notion of a fair trial in case law emanating from the European Court of Human Rights and the European Commission on Human Rights is also relevant to this discussion. Reference made to American, Canadian and European (Convention) jurisprudence is justified on the grounds that the proposed bill of rights for South Africa will place our legal system on a similar legal basis as the other three systems.<sup>14</sup>

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<sup>11</sup> Sixth Amendment: 'In all criminal prosecutions, the accused shall enjoy the right ... to the assistance of counsel for his defence'.

<sup>12</sup> Perkins, RM (1984) *Criminal Law and Procedure* at 1069.

<sup>13</sup> *Powell v Alabama* 287 US 45 (1932); *Gideon v Wainwright* 372 US 335 (1963); *Douglas v California* 372 US 353 (1963); *Argersinger v Hamlin* 407 US 25 (1972).

<sup>14</sup> Article 1 of the Government Charter determines that the rights under the charter are fundamental and binding on all legislative, executive and judicial institutions. Cooper J's critique, in *S v Rudman*; *S v Johnson*; *S v Xaso*; *Xaso v Van Wyk* NO 1989 (3) SA 368 (E) at 373J-374A, of Didcott J's reliance on American jurisprudence in *S v Khanyile* 1988 (3) SA 795 (N), as being invalid because the South African principle of a fair trial can not be compared to the American concept of due process, on the basis that our system does not have a Bill of Rights, will itself no longer be valid.

## 2.1. American case law

The two Amendments of the American Bill of Rights, which are relevant to this discussion, are the Sixth and the Fourteenth Amendments. The Sixth Amendment entitles an accused to legal representation at a criminal trial, and the Fourteenth Amendment guarantees all persons equal protection of the law, as well as due process of law against State action. The latter two concepts of 'equal protection' and 'due process' provided the basis for the development of the right to be provided with legal representation.<sup>15</sup>

The notion of due process was expounded on by Frankfurter J in *Solesbee v Blakcom*,<sup>16</sup> as follows:

[i]t is now the settled doctrine of this court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the tradition and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due process is that which comports with the deepest notions of what is fair and right and just. The more fundamental the beliefs are the less likely they are to be explicitly stated. But respect for them is of the very essence of the Due Process Clause.

From the above it would appear that the essence of 'due process' is that it embodies the Common Law requirement of a fair trial.<sup>17</sup> The court in *Gideon v Wainwright*<sup>18</sup> argued

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<sup>15</sup> *Johnson v Zerbst* 304 US 458 (1937); *Betts v Brady* 316 US 455 (1941); *Gideon v Wainwright* 372 US 335 (1963); *Argersinger v Hamlin* 407 US 25 (1972).

<sup>16</sup> 339 US 9 (1950) at 16. See also *Screws v United States* 325 US 91 (1945).

<sup>17</sup> Miller, LW 'Right to Counsel: State Courts on the Front Line' *Annual Survey of American Law* (1984) Vol.1 at 184.

therefore that because the nature of the adversarial process (which forms the basis of the American criminal procedure system), places the onus on the parties to advance their own case, it is unfair to require laypersons to defend themselves against legally trained prosecutors. The plight of the undefended accused is explained as follows by Sutherland J in *Powell v Alabama*:<sup>19</sup>

[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.<sup>20</sup>

The court in *Gideon v Wainwright*<sup>21</sup> thus held that the due process clause enshrined in the Fourteenth Amendment requires that the accused is placed on an equal footing with the prosecutor, which in turn means that an unrepresented accused must be provided with legal representation (if he or she desires it and is indigent). In *Powell v Alabama*<sup>22</sup> Sutherland J held that (in capital cases) where an accused is unrepresented due to indigence and lacks the

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<sup>18</sup> 372 US 335 (1963) at 339; 341-5.

<sup>19</sup> 287 US 45 (1932) at 68-9.

<sup>20</sup> See also the judgment in *Johnson v Zerbst* 304 US 458 (1937) at 462-3, where Black J expresses a similar opinion that the law is too complicated to expect the layperson to successfully present a possibly valid defence to the court.

<sup>21</sup> 372 US 335 (1963) at 345.

<sup>22</sup> 287 US 45 (1932) at 71-2.

ability to defend him or herself (either 'because of ignorance, feeble-mindedness, illiteracy, or the like'), due process of law requires a court to appoint a legal representative to defend such an accused.

The right to be provided with counsel originally applied only in capital cases<sup>23</sup> and in 'special circumstances'.<sup>24</sup> However, in *Argersinger v Hamlin*<sup>25</sup> the court held that the entitlement of the right to counsel could not depend on the classification of a crime as serious or petty, or as a felony or a misdemeanour. The right to counsel was thereby extended to cases which entail the loss of personal liberty.<sup>26</sup>

It is of interest to note the separate opinion in the above case, of Powell J, who agrees with the result of the judgment, but not with the scope of the right, for the learned judge argues that '[w]hen the deprivation of property right and interest is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process'.<sup>27</sup> In *casu*, the accused had received a jail sentence and therefore, the majority of the court declined to consider whether the right extends to cases where the loss of life or liberty was not at issue. The upshot of this was that the court in *Scott v Illinois*<sup>28</sup> was able to limit the right to cases where a sentence of imprisonment was imposed

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<sup>23</sup> *Powell v Alabama* 287 US 45 (1932).

<sup>24</sup> *Betts v Brady* 316 US 455 (1941).

<sup>25</sup> 407 US 25 (1972).

<sup>26</sup> *Ibid* at 37.

<sup>27</sup> *Ibid* at 48.

<sup>28</sup> 440 US 367 (1979) at 369; *Miller op cit* note 17 at 179.

and not to extend it to cases where it was merely a competent verdict.

The other leg of the argument concerns the entitlement to equal protection of the law. Black J, in a dissenting judgment in *Betts v Brady*,<sup>29</sup> states that equal justice under the law entails that all accused persons must be placed in the same position when faced with a criminal charge. Therefore, although the court in *Douglas v California*<sup>30</sup> stated that absolute equality is not required, no distinction is to be drawn on the basis of financial status, otherwise '[t]he indigent ... [can be said to only have] the right to a meaningless ritual, whilst the rich man has a meaningful appeal'.<sup>31</sup>

The courts have thus by means of 'active' judicial interpretation used the notions of 'equality of all before the law' and 'due process', to establish the following principles:

- (i) no accused person should be convicted without a fair trial; and
- (ii) legal representation is fundamental and essential to a fair trial.<sup>32</sup>

## 2.2. Canadian case law

In Canada the courts have used the principles of 'fundamental justice' (as enshrined in section

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<sup>29</sup> 316 US 455 (1941) at 476-7.

<sup>30</sup> 372 US 353 (1963) at 357.

<sup>31</sup> *Ibid* at 358.

<sup>32</sup> Miller *op cit* note 17 at 184. By means of similar interpretative methods, the courts have also extended the entitlement to counsel during certain pre-trial proceedings, such as preliminary hearings (*Coleman v Alabama* 399 US 1 (1970)) entrances of pleas (*White v Maryland* 373 US 59 (1963)), arraignments (*Hamilton v Alabama* 368 US 52 (1961)) and pre-trial identification line-ups (*United States v Wade* 388 US 218 (1967); and *Gilbert v California* 388 US 263 (1967)).

7<sup>33</sup> of the Charter) and 'fair trial' (as entrenched in section 11(d)<sup>34</sup>) to establish a right to free legal representation, in certain circumstances.

In the case of *R v Deutsch*<sup>35</sup> the court argued that under the common law an accused has the right to a fair trial. Furthermore, section 7 entrenches the right of an accused not to be deprived of his or her liberty except in accordance with the principles of fundamental justice, and section 11(d) entrenches the right to a fair hearing. The court thus argues that the right to fundamental justice and to a fair hearing includes the right to a fair trial. The court concludes that in cases where an accused is undefended and 'where the trial judge is satisfied that, because of the seriousness and complexity of the case, the accused cannot receive a fair trial without counsel, there is an entrenched right to funded counsel under the Charter'.<sup>36</sup>

### 2.3. Case law in terms of the European Convention on Human Rights

Article 6(3)(c) of the European Convention on Human Rights makes special provision for the right to be provided with legal representation. The case law which has emanated from the European Court of Human Rights and the European Commission on Human Rights, concerning the notion of a 'fair trial' and the principle of 'equality of arms', also has an

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<sup>33</sup> S7: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'.

<sup>34</sup> S11(d): 'Any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal'.

<sup>35</sup> (1985) 48 CR (3d) 166 (Ont Div Ct) at 172-4.

<sup>36</sup> The court is cautious to add that it has not created a new right, but that it is the same right enjoyed by an accused at common law; *Ibid* at 174. But see Whitley, *SJ Criminal Justice and the Constitution* at 215, where the author is of the opinion that the importance of legal representation is recognised in Canadian law, but that a lack of representation does not vitiate the trial proceedings.

important contribution to make to the discussion in this section.

### 2.3.1. Principle of 'equality of arms'

Fawcett states that the principle of 'equality of arms' is an off-shoot from the *audi alteram partem* rule, and implies that each party to the proceedings must have an equal opportunity to present his or her case, both on facts and in law, and to comment on the other party's case.<sup>37</sup> In other words, neither party should enjoy an improper advantage during the litigation proceedings.<sup>38</sup> In the *Delcourt* case (1970) the meaning of this principle was explained as follows:

a trial would not be fair if it took place in such conditions as to put the accused unfairly at a disadvantage.<sup>39</sup>

Van Dijk and Van Hoof are of the opinion that the principle of 'equality of arms', as used in the civil case of *Bricmont* (1987) 'implies in particular that no element of the examination of the case may be settled when one party is present or represented, but the other is not'.<sup>40</sup> They argue that this principle is of even greater importance in criminal proceedings which, by the nature of the proceedings, automatically places the parties on an unequal footing.<sup>41</sup>

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<sup>37</sup> Fawcett, JES (1987) *The application of the European Convention on Human Rights* at 154.

<sup>38</sup> Merrills, JG (1988) *The development of international law by the European Court of Human Rights* at 166.

<sup>39</sup> As quoted by Merrills, *ibid* at 171.

<sup>40</sup> Van Dijk, P & Van Hoof, GJH *Theory and Practice of the European Convention on Human Rights* at 319.

<sup>41</sup> *Ibid* at 319.

It could therefore be argued that a failure by the State to secure legal assistance for indigent accused contravenes the principle of 'equality of arms' and that such a contravention would render the trial unfair.

The principle of 'equality of arms', although concerned with procedural inequalities,<sup>42</sup> has also played an important role in determining substantive inequalities, which Merrills refers to as 'real or imagined inequality'.<sup>43</sup> It is in other words not sufficient that an accused had been afforded procedural equality in terms of the minimum guarantees under paragraph 3. These guarantees are constituent elements of the larger concept of a 'fair trial'<sup>44</sup> and equality must be established in terms of this broader notion.

### 2.3.2. Right of 'access to court'

The other interpretative development from which a right to be provided with legal aid can possibly be argued, is the right of 'access to court'. In the *Golder* case (1975) the Court, in looking at the object and purpose of the Convention as a whole and, in particular to the reference in the Preamble to the rule of law (and also to the references to the same concept in the Statute of the Council of Europe), interpreted article 6(1) as granting a 'right to

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<sup>42</sup> See *Feldbrugge* case (1987), referred to in Merrills, JG *op cit* note 38 at 172-3.

<sup>43</sup> Merrills, JG *op cit* note 38 at 169; see also the *Bonisch* case (1985) referred to in Merrills at 170.

<sup>44</sup> As proclaimed in article 6(1); Merrills, JG *op cit* note 38 at 170.

a judicial procedure'.<sup>45</sup>

In order to comply with the principle of 'equality of arms' it is possible to argue that the right of an indigent accused to be provided with legal representation flows from the right of 'access to court'. Such a line of reasoning was followed by the European Court in the *Airey* case (1979), which indicated that the burden of legal costs in a lawsuit could be raised as evidence of an inequality of arms.<sup>46</sup> The Court held that the right of 'access to court' may oblige contracting States to facilitate access to the courts, by reducing legal costs, simplifying the proceedings or by providing free legal aid,

when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.<sup>47</sup>

The above discussion on the case law emanating from the decisions of the European Court of Human Rights and Commission on Human Rights reveals the potential for extending the right of an indigent accused to be provided with legal representation, when such concepts as the 'object' and 'purpose' of a document (as a whole) are taken into consideration.

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<sup>45</sup> Van Dijk, P & Van Hoof, GJH *op cit* note 40 at 314. The Court said that this right is a necessary implication of the right stated in article 6, arguing that it is inconceivable that the Convention 'should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court'; Merrills, JG *op cit* note 38 at 76.

<sup>46</sup> Van Dijk, P & Van Hoof, GJH *op cit* note 40 at 316-7; 322.

<sup>47</sup> As quoted in Fawcett, JES *op cit* note 37 at 157.

### 3. Purposive interpretation of the Government Charter

Turning now to the South African proposals under discussion, both the principles of 'equality of all before the law' and a 'fair trial' are arguably enshrined in the Government Charter of Fundamental Rights and the Law Commission Report of 1991.

#### 3.1. Equality before the law

Clause 6 of the Government Charter<sup>48</sup> guarantees the equality of all persons before the law and includes equal protection to all persons by the law. In subsection (2) the Charter precludes prejudice in terms of various qualifications, including 'social class', which one can read to mean 'economic class'.

It could thus be argued that if a particular accused because of financial difficulties is forced to defend him or herself this would be in breach of clause 6(1) and (2), as such accused can not be said to have received the same equal protection as an accused who can afford the skill and knowledge of a legal practitioner. The situation can be argued to amount to a prejudice being perpetrated on the basis of economic class. It is appropriate to quote the wisdom expressed in *Griffin v Illinois*:<sup>49</sup>

[i]n criminal trials a state can no more discriminate on account of poverty than on account of religion, race or color. Plainly the ability to pay costs in advance bears no relationship to a defendant's guilt or innocence and could not be used as an excuse

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<sup>48</sup> Article 3 of the South African Law Commission interim Report, 1991.

<sup>49</sup> 351 US 12 (1956) at 19; quoted by Steytler in 'Equality before the law: being practical about principle' *SAJHR* (1992) vol 8(1) at 114.

to deprive a defendant of a fair trial ... There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has'.

A further argument in support of the provision of legal assistance to indigent accused was proffered by Didcott J in *S v Khanyile and Another*.<sup>50</sup> The argument is that an accused who can afford legal representation, but who is denied this right by the court, is in a similar predicament to an accused who desires such assistance, but can not afford it. There is no distinction in principle between the two situations, 'a defence sorely handicapped being the result common to both'.<sup>51</sup> In the former instance, however, the right is regarded as fundamental to a fair trial to the extent that its denial is deemed to be an irregularity which *per se* vitiates the trial proceedings. It must surely follow that equality before the law demands that an indigent accused's trial be judged according to the same principles.

### 3.2. Fair trial

Article 7(a) of the Law Commission's interim report entrenches an accused's right to 'a fair and public trial before a court of law'. Although the Government Charter does not specifically enshrine a right to a fair trial (but only to a public trial), clause 26 falls under the heading of *Fair Trial*.

It is thus necessary to establish what importance can be attributed to headings in a legislative document. There appear to be two views. The first is the traditional literal approach which

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<sup>50</sup> 1988 (3) SA 795 (N) at 810C-D;H. See also *S v Davids*; *S v Dladla* 1989 (4) SA 172 at 175A-C.

<sup>51</sup> *S v Davids*; *S v Dladla* 1989 (4) SA 172 at 175A.

was applied in *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics*.<sup>52</sup> De Villiers CJ held that 'the headings of different portions of a Statute may be referred to for the purpose of determining the sense of any doubtful expression in a section ranged under any particular heading'.

According to this interpretation, an accused will only be said to have a right to a fair trial if it can be argued that the wording in clause 26 is either unclear or ambiguous.

It is submitted that the better view is that expounded by Innes CJ in *Turffontein Estates Ltd v Mining Commissioner, Johannesburg*.<sup>53</sup> In *casu* the learned judge held that a court is 'fully entitled to refer to [a heading] for elucidation of any clause to which it relates. It is impossible to lay down any general rule as to the weight which should be attached to such headings. The object in each case is to ascertain the intention of the Legislature, and the heading is an element in the process'. This latter case follows a purposive approach, whereby the purpose and intention of the document as a whole can be taken into consideration to establish the importance of a particular heading.

In addition to the heading of clause 26, it is necessary to consider the clause as a whole in order to establish the purpose and intention of the provision. The clause expressly defines other minimum rights to which an accused is entitled and which also pertain to the notion of a fair trial. The list of rights can not be regarded as exhaustive. It is submitted that a right

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<sup>52</sup> 1911 AD 13 at 24; quoted in Devenish, *GE Interpretation of Statutes* at 107.

<sup>53</sup> 1917 AD 419 at 431; quoted in Devenish *op cit* note 52 at 107.

to a fair trial can be interpreted under clause 26 when both the overall context and the heading are taken into consideration.

Additional arguments in favour of interpreting a right to a fair trial in the Government Charter include the recognition of this right as a fundamental one in South African law.<sup>54</sup> The importance of being legally represented in criminal proceedings in an adversarial justice system has repeatedly been stressed in the case law<sup>55</sup> and has similarly been emphasised in the Hoexter Commission's Report on the *Structure and Functioning of the Courts*:<sup>56</sup>

[a]ny state that prides itself on a democratic way of life should not regard legal representation of parties before its courts as a pure luxury or a fortuitous benefaction of the Government, but as an essential service ... Modern administration of justice is intrinsically complex, and the best guarantee of proper adjudication of a case lies in proper legal representation of the parties concerned'.

In conclusion, it can thus be argued, that the entrenchment of the principle of 'equality of all before the law' and the right to a fair trial in the Government Charter and the Law Commission's Report of 1991, together with the guidance afforded by the American and Canadian jurisprudence on this matter, offers a progressive bench ample scope for interpreting the existence of the right to be provided with legal representation.

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<sup>54</sup> *S v Tyebela* 1989 (2) SA 22 (A) at 29G-H; *S v Alexander and Others* 1965 (2) SA 796 (A) at 809C-D.

<sup>55</sup> *S v Seheri en Andere* 1964 (1) SA 29 (A) at 33H; *S v Radebe*; *S v Mbonani* 1988 (1) SA 191 (T) at 196D-I; *S v Davids*; *S v Dladla* 1989 (4) SA 172 (N) at 182D-F.

<sup>56</sup> Fifth and Final Report, vol I part II para 6.4.1.

The question to be determined now, is whether reliance on these two provisions overrides the explicit wording of the provision dealing with legal representation. When such a conflict between two provisions arises, the method of resolution depends on the presence or absence of a circumscription clause.

### 3.3. Circumscription clause

The function of a bill of rights can be said to be the 'mediation between collective social interests and individual dignity and freedom'.<sup>57</sup> It is thus inevitable that competing claims will arise in terms of this mediation. The concept of a general circumscription clause has been developed in various bills of rights to act as a measure for courts to settle competing provisions in such a document.

The function of a general circumscription clause in a bill of rights is, firstly, to guarantee the rights and freedoms enshrined in the document, and, secondly, to 'outline explicitly the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured'.<sup>58</sup> A typical justificatory criterion is an infringement which 'can be demonstrably justified in a free and democratic society'.<sup>59</sup>

Once a violation of a guarantee has been established, the question follows whether the

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<sup>57</sup> Corder *et al* (1992) *A Charter for Social Justice: a Contribution to the South African Bill of Rights debate* at 16.

<sup>58</sup> Corder *et al op cit* note 57 at 23.

<sup>59</sup> Section 1 of the *Canadian Charter of Rights and Freedoms*.

violation can be justified in terms of the standard established in the circumscription clause. Corder *et al* suggest that this second enquiry concerns the principle of proportionality. This principle is concerned with balancing the community's interests with those of the individuals, whose rights and freedoms are being infringed.<sup>60</sup> The party wishing to justify the infringement of the entrenched guarantee, bears the onus of proof.

Steytler says that there are three components to the enquiry of proportionality:<sup>61</sup> Firstly, the means employed to effect the objective must not be based on irrational or unfair considerations. Secondly, the guarantees which are being infringed, must be impaired as little as possible, by the chosen means. Thirdly, proportionality must be established between the effects of the means used, and the objective of the means. 'The more invasive the limitation on the right, the more important the objective of the measure should be'.<sup>62</sup>

The Government Charter contains a general circumscription clause in clause 1(2)(a). The limitations considered on the fundamental rights and freedoms are explained in clauses 35 and 36. Clause 35 permits a limitation of a right, which is 'reasonably necessary' (a) to ensure state security and public safety; (b) to uphold the rights and freedoms of others; (c) to prevent or combat violence or crime; and (d) to prevent and deal with natural disasters. Clause 36 permits limitations on fundamental rights during the existence of a state of emergency.

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<sup>60</sup> Steytler, NC in 'Criminal Procedure, a Bill of Rights and a General Circumscription Clause' *Unpublished Paper* (January 1993) which was delivered at the Law Teachers' Conference in Stellenbosch, at 7.

<sup>61</sup> Steytler *op cit* note 60 at 7.

<sup>62</sup> Steytler *op cit* note 60 at 8.

The criterion of 'reasonably necessary' is fairly vague, as no standard is provided according to which reasonable necessity is measured. It is submitted that the criterion should be interpreted in the light of the overall purpose and intention of the Charter as stated in clause 1(1), which is to entrench the fundamental rights and freedoms against State and other interference.

The South African Law Commission in its interim Report provides a general circumscription clause under article 34(1)(a). However, many of the provisions pertaining to criminal procedure are excluded from the general circumscription clause, and either contain specific circumscriptions, or non at all.

Steytler suggests that several problems may flow from the above situation:<sup>63</sup> (i) difficulties may arise in resolving competing provisions; (ii) artificial hierarchies are introduced between rights which are subject to the general circumscription clause, and those rights which are not; and (ii) it is possible that courts will be forced to create *ad hoc* circumscriptions to determine two competing rights.

The question of the right to be provided with legal representation presents a good example of the dilemma that might arise in terms of the Law Commission's provisions. Neither article 7(a) (which guarantees an accused a right to a fair trial), nor article 3(a) (which guarantees equality of all persons before the law) is subject to the general circumscription clause, or contains a specific circumscription. An indigent accused can argue that in order to comply with these two provision he (or she) is entitled to be provided with legal

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<sup>63</sup> Steytler *op cit* note 60 at 2.

representation. However, article 7(e) (which pertains to legal representation) only places a duty on a presiding officer to inform an accused of his or her right to legal representation. This article is also not subject to any circumscription.

The question thus arises how the court should resolve the conflict between an accused's right to equality before the law, and the State's right only to inform such accused of his or her right to legal representation. Steytler is of the opinion that '[i]t is impossible to resolve the conflict unless the Court reads an implied circumscription clause in each of the provisions ... and then tries to rank these two rights'.<sup>64</sup>

It is submitted that a general circumscription clause offers the best method of resolving conflicting provisions in a bill of rights. The question posed earlier, of whether the two provisions of equality before the law and the right to a fair trial override the express wording in the provision relating to legal representation, would have to be determined according to the guidelines offered by the circumscription clause.

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<sup>64</sup> Steytler *op cit* note 60 at 3.

## CHAPTER FIVE

### INTERPRETING AN EXPANSIVE RIGHT TO LEGAL REPRESENTATION

This chapter will investigate the ambit of the right to legal representation, as entrenched in the ANC draft Bill of Rights (hereinafter referred to as the ANC Bill), the Charter for Social Justice<sup>1</sup> and the South African Law Commission Report on Group and Human Rights of 1989, when subjected to either a restrictive or a purposive interpretation.<sup>2</sup>

All the above-mentioned documents enshrine, in addition to the traditional right to legal representation, the right of an indigent accused to be provided with free legal representation.

The ANC Bill has followed the trend of most international instruments by guaranteeing the right of an accused person to be provided with legal representation 'when the interests of justice so require'.<sup>3</sup> Article 12(3) of the Charter for Social Justice uses the same qualification as the ANC Bill, but includes 'detained persons' in the definition. This is intended to broaden the scope of the right to include 'accused persons not yet in court, as well as people falling outside the criminal justice process, such as those in mental institutions'.<sup>4</sup> The South African Law Commission Report (1989) differs from the other

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<sup>1</sup> A document drawn up by a number of Western Cape academics as a contribution to the South African Bill of Rights debate; Corder *et al* (1992) *A Charter for Social Justice: a Contribution to the South African Bill of Rights debate*.

<sup>2</sup> As all three documents are very similar in their approach and content, only the ANC document will be referred to, unless a particular point is raised in one of the other documents.

<sup>3</sup> Article 2(21).

<sup>4</sup> Corder H *et al op cit* note 1 at 42.

documents under discussion in that it only extends this right to 'serious cases'.<sup>5</sup>

An indigent accused's right to be provided with free legal assistance does not automatically apply in all cases. The right is qualified in each of the above documents by the criterion of 'when the interests of justice so require' (and by the criterion of 'serious cases', in the South African Law Commission document, 1989). Such a qualification is also found in most international documents. The *International Covenant on Civil and Political Rights*,<sup>6</sup> the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>7</sup> and the *Body of Principles for the Protection of all Persons under any form of detention or imprisonment*<sup>8</sup> all make provision for legal aid for indigent persons where the interests of justice so require.<sup>9</sup>

The reason for limiting the right to be provided with legal representation by this criterion is a question of economics. It would be unreasonable to expect the State to fund legal aid for petty cases, such as traffic fines.

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<sup>5</sup> Article 25(d).

<sup>6</sup> Article 14(3)(d).

<sup>7</sup> Article 6(3)(c).

<sup>8</sup> Principle 17.

<sup>9</sup> Two documents appear to guarantee legal assistance without any qualifications imposed on this right: the *Convention on the Rights of the Child* (art 40(2)(b)(ii)) requires the State to ensure that every child facing a criminal charge is provided with 'legal or other appropriate assistance in the preparation and presentation of his or her defence'. The *American Convention on Human Rights* provides that an accused has an 'inalienable right to be assisted by counsel provided by the state' where an accused fails to defend him or herself, or to engage legal assistance of personal choice (art 8(2)(e)).

The qualification 'when the interests of justice so require' is an open-ended qualification. The intention of using this qualification is that it allows the courts to develop criteria in terms of which the entitlement is expanded over time.<sup>10</sup>

The discussion in chapter three illustrated the effect that a particular method of interpretation can have on the operation of a bill of rights. Although the entitlement to be provided with legal representation, as entrenched in the ANC Bill, appears to meet the plea made by Didcott J in *S v Khanyile*,<sup>11</sup> the ambit of a fundamental right or freedom can still be severely curtailed by the application of a restrictive interpretation. The two Bophuthatswana cases of *S v Chabalala*<sup>12</sup> and *Government of the Republic of Bophuthatswana and Others v Segale*,<sup>13</sup> and the minority judgment in the Canadian case of *Morgentaler, Smoling and Scott v The Queen*<sup>14</sup> (discussed in chapter three), although concerned with entitlements other than the right to legal representation, serve as clear examples of how entrenched fundamental rights and freedoms can be eroded by applying a restrictive interpretation to a bill of rights.

On the other hand, a purposive interpretation has the possibility of substantially broadening the scope of an entitlement, as evidenced in the discussion on the jurisprudence emanating from the American, Canadian and European Court of Human Rights and Commission on Human Rights case law.

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<sup>10</sup> Corder H *et al.* *op cit* note 1 at 42.

<sup>11</sup> 1988 (3) SA (N) 795.

<sup>12</sup> 1986 (3) SA 623 (BA).

<sup>13</sup> 1990 (1) SA 434 (BA).

<sup>14</sup> (1988) 37 CCC (3d) 449.

## 1. Restrictive interpretation

The criterion of 'the severity of the charge' will be argued to form the major guideline for the courts when determining the application of the provision of legal representation, both in terms of a restrictive and a purposive interpretation.

The South African Law Commission (1989) specifically uses the qualification of 'serious cases' for the application of the entitlement to be provided with legal representation. If the current restrictive attitude of the courts, of being loathe to impose duties on the State (as evidenced in the case of *S v Rudman and Another; S v Mthwana*,<sup>15</sup>), is followed, then it will lead to a very limited interpretation of what constitutes a serious case. Furthermore, if the courts are compelled to impose such a duty, because of a legislative entitlement to that effect, they will do so in as limited a fashion as possible. By limiting the criterion to that of 'seriousness', additional criteria, such as complexity or public interest, do not arise for consideration.

'Serious cases' can be interpreted to equate capital cases or it can be limited to comply with the 'special circumstances' test established in *Betts v Brady*,<sup>16</sup> which would still restrict the application of this entitlement fairly severely. Such an interpretation of the provision is only possible if the provision is read restrictively and in isolation, without any reference to the overall purpose and intention of the document.

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<sup>15</sup> 1992 (1) SA 343 (A).

<sup>16</sup> 316 US 455 (1941) 476.

The qualification, of 'when the interests of justice so require', imposed by the ANC Bill on the entitlement to be provided with legal representation, can similarly, if interpreted restrictively and without reference to the entrenched rights of all accused to a fair trial and to equality before the law, be so narrowly construed by a conservative bench as to merely elevate the current *pro deo* practice in the Supreme Court to a right.

## 2. Purposive interpretation

Two important principles, essential to a fair trial in an adversarial criminal justice system, can be discerned from the American, Canadian and European jurisprudence (discussed in chapter four), namely, 'equality of all accused' and 'equality of contestants'. The development of these two principles assisted the courts to establish the existence of a right to legal representation.

The ANC Bill already entrenches an entitlement to legal representation in article 2(21). However, due to economic considerations, it is impossible to provide all indigent accused with such legal assistance. It is therefore necessary to establish criteria which would best comply with the above two principles.

As with the discussion on the restrictive interpretation, the main criterion to be considered is that of the seriousness of the charge. However, when this criterion is viewed in terms of the two principles of 'fairness' and 'equality', it is possible to attribute a much broader content to the criterion.

The American approach, in terms of *Argersinger v Hamlin*<sup>17</sup>, has been to determine the criterion of imprisonment as qualifying for the entitlement to be provided with legal representation. Therefore, seriousness can be equated with imprisonment. It is submitted that the criterion of imprisonment is a good measure to use as the applicability of the entitlement is easily establish from the outset of the trial.

In *S v Khanyile*<sup>18</sup> Didcott J suggested that the following criteria be used to establish when the entitlement to be provided with legal representation arises: (i) the severity of the charge and possible consequences if a conviction should follow - here the learned judge includes non-custodial sentences as qualifying criteria; (ii) the complexity of the case; and (iii) the ability of the accused to defend him or herself.<sup>19</sup> The learned judge furthermore indicates that a fairly extensive enquiry of all three aspects, as well as related information should be undertaken to properly assess the circumstances. In weighing up this information, if a court comes to the conclusion that the lack of legal representation would result in a trial which is palpably and grossly unfair, such an accused would qualify for *pro deo* legal assistance.<sup>20</sup>

Steytler criticises the inclusion of non-custodial sentences when determining the gravity of a charge, as he says that it 'makes this criterion difficult to apply in practice and casts the

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<sup>17</sup> 407 US 25 (1972).

<sup>18</sup> 1988 (3) SA 795 (N).

<sup>19</sup> *Ibid* at 815D-F. The European Court of Human Rights evolved an additional criterion to those suggested by Didcott J, of public importance; Fawcett, JES (1987) *The application of the European Convention on Human Rights* at 192.

<sup>20</sup> *Ibid* at 815J-816B.

net of possible beneficiaries too wide<sup>21</sup>. Particularly in South Africa, where the legal system is already overburdened, it is important to establish the qualifying criteria very clearly, so as to ensure the appointment of representatives in those cases most needed.

Furthermore, regarding the other two criteria laid down by Didcott J, Steytler is of the opinion that they are both difficult to assess at the outset of the trial, as the true complexity of the case may only become apparent once evidence is led. However, this impracticality may be overcome by the court asking the prosecution, at arraignment, to give an outline of the evidence of the case.<sup>22</sup>

Steytler suggests that the criteria established by Didcott J should, where appropriate, be considered separately, as one of the criteria may be so severe as to warrant the immediate appointment of legal representation without further regard being had to the other two criteria. Steytler gives the following example: '[w]here [an] accused's mental capacity to stand trial is in doubt and he has been referred for mental observation, that fact alone will justify the appointment of legal representation.'<sup>23</sup>

In terms of such an approach it is possible to extend the ambit of the qualification used in the South Law Commission Report (1989) beyond that envisaged earlier in this discussion. It can be argued that it is always a 'serious case' when a person is faced with the loss of his or her life or liberty.

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<sup>21</sup> Steytler, NC (1988) *The Undefended Accused* at 238.

<sup>22</sup> *Ibid* at 239.

<sup>23</sup> *Ibid* at 239-40.

It is submitted that the best criterion to follow when determining the ambit of the entitlement to be provided with legal representation, is that of imprisonment, as it offers the clearest guidelines and arguably, attends to the most severe cases.

## CHAPTER SIX

### CONCLUSION

The Appellate Division decision in *S v Rudman and Another; S v Mthwana*<sup>1</sup> has determined that the current position regarding the right to legal representation, only imposes a duty on a presiding officer to inform an accused of his or her right to legal representation, as well as his or her entitlement to apply to the Legal Aid Board for legal assistance.

It was suggested that this situation may change if a bill of rights is included in a new Constitution for South Africa. Two approaches to the right to legal representation can be discerned from proposed bills of rights: The first approach (which is that of the Government Charter on Fundamental Human Rights and the South African Law Commission interim Report, 1991) is based mainly on the above position in the *Rudman* case. The second approach (which is that of the ANC draft Bill of Rights, the Charter for Social Justice and the South African Law Commission Report, 1989) makes provision for an indigent accused person to be provided with legal representation 'when the interests of justice so require'. The latter provision can be said to be more in line with international trends in this regard.

It has been argued in this paper that should either of the two proposed provisions on legal representation be adopted in a South African Bill of Rights, it is possible, by means of a purposive interpretative approach, to determine the existence of a right to be provided with legal representation.

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<sup>1</sup> 1992 (1) SA 343 (A).

Furthermore, it is submitted that the purpose of the entrenchment of the right to be provided with free legal representation in the ANC Bill of Rights is an attempt to redress the current position where more than 80% of all accused in criminal cases are unrepresented, and over 100 000 accused are yearly sent to prison without any form of legal representation.<sup>2</sup> It is also an attempt to ensure equality and fairness to all citizens of South Africa, irrespective, in particular, of their economic status. As Steytler says,

[i]n the administration of criminal justice the principle of equality implies, inter alia, that access to rights should not be dependent upon the race, sex or class of an accused person. Rights should be accessible to all accused - black and white, male and female, rich and poor, literate and illiterate, defended and undefended.<sup>3</sup>

The specific clauses ensuring equality of all persons before the law and the protection of individuals against unfair discrimination, entrenched in all the proposed bills of rights, strengthen the proposition that the overall intention of the proposed Bills of Rights is to recognise the inherent inequalities of the *status quo* and to take positive steps to establish greater equality for all South Africans.

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<sup>2</sup> Statistics for the year 1990 estimated that 70% of accused appearing in regional magistrate's courts, and 90% of accused appearing in district magistrates' courts, were unrepresented; McQuoid-Mason, DJ 'Rudman and the Right to Counsel: is it feasible to implement Khanyile?' *SAJHR* (1992) vol 8(1) at 99-100. Recent statistics from Hansard indicate that a total of 684 246 accused persons appeared in the lower courts without legal representation, and more than 100 000 of these accused were convicted and sentenced to imprisonment during the year 1992; Davis, DM 'The high price of legal advice' *The Weekly Mail* (April 30 to May 6, 1993) at 15.

<sup>3</sup> Steytler, NC 'Equality before the law and the right to legal representation' *SACJ* (1989)2 at 68.

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