

Equality of Arms and Aspects of the Right to A Fair Criminal Trial in

Botswana

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Summary

The guarantee of a fair trial is fundamental to the criminal process of every modern society. Like all civilised nations, Botswana's legal order provides for the protection of accused persons through the guarantee of a fair trial. But equality of arms, a central feature of medieval trial by combat, seems to have disappeared from modern criminal procedural systems. The question arises, therefore, whether criminal justice systems sufficiently cater for the fair trial of accused persons. This thesis will argue that the present legal and institutional framework for the protection of fair trial rights in Botswana falls short of guaranteeing procedural equality and that this severely compromises fairness. The institutional framework does not support equality of arms and therefore leaves procedural rights in a basic state of application. The thesis, therefore, seeks to analyse the protection of fair trial rights in Botswana in light of the principle of equality of arms.

The thesis explores the origins and theoretical foundations of the principle. It recognises that the present application of the principle occurs by implicit countenance. The absence of any constitutional recognition of the principle leaves procedural rights in a basic state of application. The thesis discusses the practical implications of an express recognition and constitutional application of the principle in the adversarial system.

Equality of arms should be central in the criminal process and no party should have an unfair advantage over the other. The thesis recognises that the prosecution is in a position of advantage in that it has the support of the state. This advantage manifests itself in the

form of vast resources regarding expertise, investigatory powers and legislative powers. Disparities in resources, the ability to investigate and access to witnesses create an inequality of arms between the state and the accused. This can only be balanced and countered by empowering the accused with constitutional and procedural rights that specifically protect the accused in the face of the might of the state. These procedural rights include the presumption of innocence, the right to legal representation and the right to disclosure. It is argued, however, that though accused-based rights and constitutional rules of procedure generally protect the accused and ensure that the process is fair, they mainly remain theoretical declarations if they are not applied in line with equality of arms. In other words, the meaningful enjoyment of these rights by the accused, demands the strengthening of resources and legislative and institutional governance. Fairness in criminal trials is epitomised in the balance between the overwhelming resources of the state and the constitutional protection of the accused. Otherwise, the constitutional protection afforded to the accused is compromised.

The first part engages the reader with the development of accused-based rights and introduces the constitutionalisation of procedural rights in Botswana. It discusses the scope and application of the principle of equality of arms, develops its relevance to the adversarial system and justifies an application of the principle in Botswana domestic law. It makes a comparison between the adversarial and inquisitorial models while recognising the growing tendency towards convergence. It highlights the adversarial system as interest-based, and recognises the indispensability of the principle of equality of arms to such a system. While recognising that inquisitorial procedures often offend

equality of arms, the role of the inquisitorial system in ensuring equality of arms is also recognised. It measures and analyses the normative value, application and recognition of equality of arms in Botswana's legal system, arguing for express recognition and a conceptual application of the principle by the courts. It is reasoned that express recognition of the principle will result in fuller protection and better realisation of accused-based rights. Exploring the adversarial-inquisitorial dichotomy, it recognises the need for convergence, but emphasises the principle of equality of arms and the right to adversarial proceedings as the foundation for fair trials.

The second part analyses the investigation process and generally bemoans the great inequalities at this stage of the criminal process. It discusses procedural and evidential rules that serve to minimise the imbalances and the role that exclusionary rules play in ensuring fair trials and reliable verdicts.

The third part identifies specific trial rights which are relevant to the principle of equality of arms. Central to the discussion are the right to legal representation and the presumption of innocence which are discussed in chapters 7 and 8 respectively. These two important rights are central to the protection of the accused but unfortunately are the most compromised due to lack of resources and legislative intervention. Chapter 9 deals with other rights that are relevant to the principle as well as the ability of the accused to present his case and effectively defend himself. It emphasises the need for the courts to engage in the trial, thereby enabling the unrepresented accused.

The fourth part contains final conclusions which argue that the principle of equality of arms forms the basis for the full realisation of individual procedural rights and advocates for the recognition of the principle in the Botswana legal order. It is concluded that the constitutional enshrinement of fair trial rights and their basic application by the courts, without actual measures to ensure their realisation, are insufficient. Suggestions include legislative and institutional reforms, as well as a constitutional recognition of the principle of equality of arms.

Opsomming

Die waarborg van 'n billike verhoor is fundamenteel tot die strafprosesregstelsel van elke beskaafde gemeenskap. Soos in ander beskaafde lande, word die beskuldige in Botswana ook beskerm deur die reg op 'n billike verhoor.

In die Middeleeue was gelykheid van wapens (“equality of arms”) die sentrale kenmerk van die tweeveg as geskilberegtingmetode. Dit blyk egter dat hierdie sentrale kenmerk afwesig is in moderne strafprosesregstelsels is. Die vraag ontstaan of hierdie toedrag van sake 'n beskuldige se reg op 'n billike verhoor op risiko plaas. In hierdie tesis word betoog dat die posisie in Botswana van so 'n aard is dat “ongelyke bewapening” veroorsaak dat die reg op 'n billike verhoor belemmer word. Die plaaslike institusionele bedeling onderskraag nie die beskerming van gelykheid van wapens nie en veroorsaak derhalwe dat prosessuele regte in “a basic state of application” is, met ander woorde, op 'n eenvoudige en meganiese toepassingvlak is. Met die norm van gelyke bewapening as vertrekpunt, ondersoek hierdie tesis die beskerming van die reg op 'n billike verhoor in Botswana.

'n Ondersoek word geloods na die oorsprong en toereriese basis van die beginsel van gelyke bewapening. Die afwesigheid van uitdruklike grondwetlike erkenning van die beginsel, word vergelyk met die praktiese implikasies en uitdruklike grondwetlike erkenning en toepassing in 'n adversatiewe stelsel.

Gelykheid van wapens behoort sentraal tot die strafproses te wees en geen party behoort 'n onbillike voordeel bo die ander te geniet nie. In hierdie tesis word erken dat die vervolging bloot vanweë die feit dat dit deur die staatsmasjienerie ondersteun word, wesenlik bevoordeel word bo die individu as aangeklaagde. Dit gaan hier om toegang tot hulpbronne soos deskundigheid, asook die rol wat misdaadondersoekmagte en ander wetgewing speel. Ongelykhede byvoorbeeld in hulpbronne, in die vermoë om misdaad te ondersoek en in die toegang tot getuies, dra alles daartoe by dat 'n wanbalans tussen die staat en die individu ontstaan. Die verlening van prosessuele regte aan die beskuldigde is 'n metode om die balans te probeer herstel. Voorbeelde van sulke regte is die reg om onskuldig vermoed te wees, die reg op 'n regsverteenvoerder en die reg op insae in verklarings. In hierdie tesis word egter betoog dat alhoewel hierdie regte en ander grondwetlike strafprosedures die beskuldigde kan beskerm en die billikheid van die proses kan bevorder, dit absoluut noodsaaklik is dat voormelde regte en prosedures in lyn met die beginsel van gelykheid van wapens geïnterpreteer en toegepas moet word. Betekenisvolle afdwinging en toepassing van 'n beskuldigde se regte verg versterking van bronne en die institusionele bedeling. Billikheid in die strafverhoor word gekenmerk aan die graad van balans wat bereik kan word tussen die oorvloedige hulpbronne van die staat teenoor die grondwetlike beskerming van die beskuldigde. In die afwesigheid van 'n balans, word die beskuldigde benadeel.

Die eerste gedeelte van hierdie tesis behandel die ontwikkeling van die beskuldigde se regte en bevat 'n inleiding tot die konstitusionalisering van prosessuele regte in Botswana. In Deel Een word die omvang en toepassing van die beginsel van gelykheid van wapens

bespreek en word die relevantheid van hierdie beginsel in die adversatiewe proses identifiseer, veral wat Botswana betref. Die adversatiewe en inkwisoriese modelle word vergelyk en bespreek met erkenning aan die moderne neiging dat die twee modelle besig is om in een te vloei – die sogenaamde verskynsel van “convergence”. Daar word aangetoon dat gelykheid van wapens die adversatiewe model onderlê. Hierteenoor is dit so dat die inkwisoriese model ook erkenning aan gelykheid van wapens verleen. Daar word betoog dat gelykheid van wapens ‘n normatiewe waarde het en uitdruklik in Botswana deur die howe erken moet word. Uitdruklike erkenning sal tot groter beskerming en realisering van ‘n beskuldigde se regte lei. In Deel Een word ook tot die slotsom geraak dat alhoewel daar ‘n behoefte aan “convergence” is, dit onvermydelik tog ook so is dat gelykheid van wapens en die reg op ‘n adversatiewe proses die grondslag van ‘n billike verhoor vorm.

In Deel Twee word die misdaadondersoekproses ontleed en word die grootskaalse ongelykhede wat hier ontstaan en bestaan, bespreek. Daar word gelet op prosesregtelike en bewysregtelike reëls wat hierdie ongelykhede kan minimaliseer. Die rol van uitsluitingsreëls ter bevordering van ‘n billike verhoor en ‘n betroubare bevinding, word ook aangespreek.

Deel Drie identifiseer spesifieke verhoorregte wat in ‘n besondere direkte verband met die beginsel van gelykheid van wapens staan. Hier is veral twee regte van besondere belang: die reg op ‘n regsverteenvoorder (hoofstuk 7) en die reg om onskuldig vermoed te wees (hoofstuk 8). Ongelukkig is dit so dat hierdie twee regte erg ondermyn

word. Die reg op resverteenvoordiging word ingekort deur 'n gebrek aan finansiële bronne terwyl die vermoede van onskuld deur wetgewing ondergrawe word. In hoofstuk 9 word ander relevante regte bespreek en word die noodsaak van 'n aktiewe hof in die geval van 'n onverteenvoordigde beskuldigde bepleit

Deel Vier bevat finale gevolgtrekkings. Daar word betoog dat die beginsel van gelykheid van wapens die basis vorm in die volle realisering van individuele regte en, verder, dat hierdie beginsel ten volle in die regstelsel van Botswana erken behoort te word. Blote grondwetlike verskansing van die grondwetlike reg op 'n billike verhoor en 'n blote basiese interpretasie daarvan deur die hof, is onvoldoende wanneer daar geen maatreels is om die haalbare realisering af te dwing nie. Wetgewende en institusionele hervorming is nodig, asook 'n grondwetlike erkenning van die beginsel van gelykheid van wapens.

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PART 1

THE CONSTITUTIONALISATION OF FAIR TRIAL RIGHTS, EQUALITY OF ARMS, AND THE RELEVANCE OF THE ADVERSARIAL PROCESS

CHAPTER 1

THE EVOLUTION AND CONSTITUTIONALISATION OF FAIR TRIAL

RIGHTS IN BOTSWANA

1 1 Introduction

There is no gainsaying that one of the purposes of the criminal justice system is to punish offenders. When the guilty is punished and the innocent set free, justice is said to have been done. But even where the guilty is punished and the sentence is proportional to the crime, procedural justice is not complete without the notion of fairness.¹ Therefore, the underlying value of fairness in the criminal process is not only the discovery of the truth, but the assurance that the process is characterised by enabling factors that fully recognise the rights of the accused. The assurance of fairness is strengthened by the constitutionalisation of procedural rights which prescribes set procedural steps and guarantees the accused an opportunity to defend himself and present his case without substantial disadvantage in comparison to the prosecution.

In Botswana the basic instrument that guarantees fair trial rights is found in the Constitution.² Section 10 of the Constitution provides a statement of declaration for the protection of the accused and a guarantee for fair trials. The various rights contained in section 10 serve not only to protect the rights of the accused but can also be seen as fulfilling the principle of equality of arms between the prosecution and the accused. This is achieved by the entrenchment of certain rights which are vital to the

¹ Wasek-Wiaderek *The Principle of "Equality of Arms" in Criminal Procedure under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries* (2000) 9.

² 1966 Constitution of Botswana Cap 1.

presentation of the case of the accused. The constitutions of most nations have similar provisions which gained normative recognition and importance, consequent to the human rights revolution that followed the Second World War. Thus, the guarantee of fair trial rights has evolved and gained recognition, a far cry from ancient times when accused persons had little or no procedural rights.

1 2 The evolution of accused-based rights

1 2 1 Historical perspective

What we today glorify as rights of the accused has undergone several stages of development. Three distinct periods in history can be discerned in this process. First is the period characterised by the absence of rights, and specific restrictions on the accused in the presentation of his defence. The second period, in or about the 18th century, represents changes and the introduction of new rules. It saw the removal of these restrictions and the development of rules of procedure that saw the accused being given a fair chance to defend himself. In the third period which commenced after the Second World War, these procedural rules gained fundamental entrenchment in legal systems and emerged into constitutionally guaranteed rights.

The first historical period was precarious for an accused facing a criminal charge. Though there is evidence that Roman law encompassed procedural rules relating to the protection of the accused as early as 450BC,³ these rules seemed to have faded by medieval times, a period when the inquisition flourished. The inquisition furthered a

³ Roman legal system gave the accused the opportunity to confront his accuser and to make his defence. See O'Brian "The Right of Cross Examination: U.S. and European Perspectives" 2005 *Law Quarterly Review* 481 499.

single cause, the condemnation of the accused. Rules of procedure were determined by authorities of the state. Naturally, this led to a one-sided system whereby the rules of criminal procedure were fashioned to suit the interests of the state. This system represented a uni-ruled or uneven period where the accused was the primary source of proof. Proof was effectively a one-sided affair.⁴ This period was characterised by primitive tools of oppression that flourished in the absolutism of medieval times. In medieval times there existed no rules to protect the accused. Whatever rules existed were geared towards condemning him. He was presumed guilty and had to establish his innocence. He could be interrogated without being informed about the charge or who his accuser was. He also could not challenge his accuser. The accused could not give evidence or call witnesses. Therefore, the prosecution had an unfair advantage in what was a one-sided contest.⁵ Rather than a critical assessment on the merits, early jurisprudence was devoted to determining which of the parties should have the duty of proving the truth of the claim or defence.⁶

By the 18th to 19th century the second period had started. This period saw rules geared towards protecting the accused and giving him an opportunity to defend himself. In an adversarial sense it could be said that rules regulated the contest between the

⁴ “I have emphasised in this chapter that securing the accused as an informational resource was the central preoccupation of the early modern criminal trial...English criminal courts were determined to hear the accused speak in person and unaided at oral public trial about the charges and the evidence adduced against him”: Langbein *The Origins of Adversary Criminal Trial* (2005) 61-62; Nugent “Self-Incrimination in Perspective” 1999 *South African Law Journal* 501 504.

⁵ Nugent 1999 *South African Law Journal* 510.

⁶ Nugent 1999 *South African Law Journal* 504; Silving “The Oath: I” 1959 *Yale Law Journal* 1329 1362-1363.

contestants. There were now competing rules, some favouring the state and enabling it to investigate, prosecute and curb crime, and others ensuring that the accused was not unfairly disadvantaged and giving him a fair chance to defend himself. The rules spread gradually to a state of evenness. But because of the might of the state and its agencies, these rules could be flouted. In fact, it would be easy to flout a procedural rule. This is so because unlike substantive rights, its flouting had no penal consequences. Most often, the flouting would be by the state or judicial officers. As a result, no legal consequences would occur. The only consequence would occur where a judicial officer misdirected himself as a result of which his decision was overturned on appeal.

The third period is characterised by the solidification of accused-based rights and the galvanising of rules that act in favour of the accused against the might of the state. This period is represented by the human rights revolution that followed the Second World War. It saw procedural rules maturing and assuming a new status. This new status was attained by recasting the rules in a constitutional framework. With their recognition as fundamental rights, they attained a new legal status. They came to be codified in several instruments, thereby emphasising their significance and guaranteeing their application. This meant that a person could now go to court with the knowledge that these set of rules that protect him would not be overlooked. They were now conceptualised as rights, an infringement of which will render a trial unfair. Hence the birth of constitutional proceduralism, the measuring of the criminal process within the regime of fundamental constitutionalised rights.

1 2 2 *Constitutional proceduralism – A new system of procedural rules*

It is doubtful whether the development of rules of procedure that protect the interest of the accused would have flourished in the absence of an institutionalised and viable system. The ultimate solidification of such rules therefore lies in their constitutionalisation. Constitutional proceduralism relates to the emergence of rules of procedure and their constitutionalisation. Constitutionalisation translates rules of procedure from a vegetative dormant state to a viable institution of effective protection. These rules have become constitutionalised through two processes. First, they have become so widely used and are so fundamental for the credible function of the criminal process that they are recognised as essential elements of a fair trial. They are universally accepted rules, recognised by all civilised legal systems. Thus, there is a whole corpus of laws both international and domestic that relate to the protection of rights, that they can now be referred to as a universal charter of procedural rights. Similar basic rules apply in most legal systems even though they may vary in application, scope and content. These basic rules even form part of the legal tradition of countries with no codified Bills of Rights.⁷ Second, the human rights revolution following the Second World War resulted in the deliberate constitutionalisation of substantive and procedural rights.⁸ This saw the constitutionalisation of procedural rights in major human rights documents such as the Universal Declaration of Human

⁷ Some British officials insist that England already had a tradition of respecting fair trial rights even prior to the Human Rights Act. As the Lord Chancellor writes in the preface to Blackstone's Human Rights Digest "...It is important to emphasise that most of our laws were already compliant; that this country has as great a respect for human rights as any of our neighbours": Starmer & Byrne (eds) *Blackstone's Human Rights Digest* (2001).

⁸ Hiebert "Parliamentary Bills of Rights: An Alternative Model?" 2006 *Modern Law Review* 7.

Rights (UDHR)⁹ and International Covenant on Civil and Political Rights (ICCPR).¹⁰ The codification of procedural rights is a mark of their indispensable role to the operation of a just and fair criminal justice system. Procedural constitutional rules have evolved into a comprehensive and consistent system. In the domestic context, they appear in the forms of Bills of Rights.

Constitutional proceduralism involves the recognition of a set of rules as fundamental rights rather than formal procedural steps. Criminal procedure increasingly derives its legitimacy from constitutional foundations. Rules of procedure and their articulation, lose their legitimacy if they do not support the requirements of a fair trial. Constitutional proceduralism marks a system whereby rules of procedure are increasingly tested against constitutions to measure their fairness or validity. As a result, procedural fairness is measurable on the basis of constitutional values. In the result, a new system is discernible wherein rules of criminal procedure are given constitutional alignment. Procedure creates rules which have emerged into constitutional norms that are immutable. They are only circumventible in the interest of public order and when justice and the rights of the accused are not compromised.¹¹

⁹ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, Available on <http://www.hrcr.org/docs/index.html>.

¹⁰ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of December 1966, entry into force 23 March 1976.

¹¹ Kokott states in *The Burden of Proof in Comparative and International Human Rights Law* (1998) 13 that individual rights embodied in constitutional and international conventions reflect societal objectives. Accordingly the full enforcement of individual rights is not responsive only to the rights of the individual but the interests of the state.

1 3 The Bill of Rights under the Botswana Constitution

1 3 1 Guaranteed rights

At independence, Botswana was endowed with a written constitution. Like most written constitutions it contained a written and justiciable Bill of Rights. Though Britain, her colonial master, rejected the notion of written Bills of Rights until recently, she bestowed them on most of her former colonies.¹² The Botswana Bill of Rights is crafted on the neo-Nigerian style which is itself founded on the UDHR and European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).¹³ The Bill of Rights in the Botswana Constitution, *inter alia*, contains express provisions relating to the protection of life, liberty, security of the person and the protection of the law, freedom of conscience, expression, assembly and association, and protection of privacy of home and property.¹⁴ Though their protection is of paramount consideration, these rights are not absolute. However, limitation of rights should find justification in the Constitution in order to maintain their legitimacy.¹⁵

¹² The independence constitutions of all former British colonies in Africa except Ghana and Tanzania had Bills of Rights.

¹³ Fombad *The Protection of Human Rights in Botswana: An Overview of the Regulatory Framework* in Fombad (ed) *Essays on the Law of Botswana* (2007) 1 6; Van Blerk “The Botswana Court of Appeal: A Policy of Avoidance?” 1985 *Comparative and International Law Journal of Southern Africa* 385 386; 213 U.N.T.S. 222 entered into force on 3 September 1953.

¹⁴ S 3-15.

¹⁵ Maripe “Freezing the Press: Freedom of Expression and Statutory Limitations in Botswana” 2003 *African Human Rights Law Journal* 52 55.

There is a marked absence of so-called second and third generation rights in the Constitution. They do not even feature as non-justiciable principles of state policy.¹⁶ The South African Bill of Rights contains provisions relating to social, economic and cultural rights and the constitutions of a number of African countries¹⁷ have adopted these rights as non-justiciable principles of state policy, an indication that they recognise the importance of these rights. However, they cannot adopt them as binding legal obligations on the state due to very limited state resources. The recognition of social, economic and cultural rights in the South African context was necessitated by the fact that mass poverty and unemployment was imposed on the people as a deliberate policy of the erstwhile political system. The provision for civil and political rights therefore would have been meaningless in the absence of social, economic and cultural rights.

The absence of second and third generation rights in the Constitution of Botswana is not surprising. The independence constitutions of African states did not contain such concepts since they were the products of Western hegemony. Western legal and political philosophy does not embrace the need to express social, economic and cultural questions as rights. In any case, during the independence era those rights were

¹⁶ However the government maintains a massive social and welfare programme including free (recently subsidised) education, medication, old age pension, feeding programmes for destitutes and orphans, drought relief for farmers, citizen entrepreneurial development programmes etc.

¹⁷ Example, chapter 5 of the Constitution of Ghana PNDCL 282, 1992 (see also The Constitution of the Republic of Ghana (Amendment) Act 527 of 1996) and chapter 2 of the Constitution of Sierra Leone Act No 6 of 1991. These rights also form an integral part of the African Charter on Human and Peoples' Rights, adopted 27 June 1981, entered into force 21 October 1986; 21 International Legal Documents 58 (1982). See Arts 15, 16, 22 & 24.

not fully articulated, at least not in the African hemisphere when the prevailing ideology was centred on self-determination, a concept closely linked with civil and political rights.

Botswana's independence Constitution remained basically intact since she has maintained a stable political atmosphere. Most African constitutions that refer to second and third generation rights have gone through political journeys of upheavals, experimentation with one party systems or socialist style governments and an eventual return to multi-party democracy which saw the scrapping of their independence constitutions and the empanelling of new ones. This gave these countries the opportunity to rethink their philosophy on human rights and remake their constitutions accordingly. By then the concept of social, economic and cultural rights had taken hold in African states. Also, Botswana shunned the socialist style political system – the root of second and third generation rights – for political, strategic and economic reasons.¹⁸ It must be noted however that there is an elaborate legislative structure relating to the protection of employees, while access to social services are largely made available by the state.

1 3 2 *Determination of rights*

The High Court has original jurisdiction to determine complaints of violation, or impending violation, of the Bill of Rights.¹⁹ The final determination of constitutional

¹⁸ While giving sanctuary to several members of the African National Congress (ANC), being landlocked, with the closest seaports being in South Africa and South African controlled Namibia (formerly South West Africa), Botswana's leadership rejected radical Pan-Africanism as a means of appeasing apartheid South Africa, the economic lifeline of the country.

¹⁹ S 18 of the Constitution; Fombad *The Protection of Human Rights* 17.

matters lies with the Court of Appeal which is the highest court of the land. In some countries, authority for determining constitutional violations is vested in special tribunals.²⁰ In neighbouring South Africa, the need for a constitutional court was precipitated by the realisation that at the time of the transition, many judges hailed from conservative backgrounds and their legal expertise and experience was more or less aligned to commercial and contract law rather than constitutional law. It was thought therefore that they were ill-equipped to implement the provisions of a new constitution and its human rights provisions.²¹ Because of the centrality of human rights in criminal proceedings, the Constitution of Botswana provides for interruption of criminal proceedings in magistrates' courts in the event that questions relating to a contravention of the Bill of Rights arise. In such event, the presiding magistrate may stay the proceedings and refer the constitutional matter to the High Court for determination.²² In essence, it can be said that the High Court has original jurisdiction to determine constitutional questions.

1 3 3 *Limitation of rights*

Fundamental rights, though entrenched in the Constitution, are potentially of limited application. The provisions relating to the protection of specific rights are lacking in broadness in that the declaration of each right is followed by a cumbersome list expressly legitimising situations, the application of which will not violate these declared rights. This may have the effect of leaving the courts with little room to

²⁰ For example, South Africa, France, Austria, Turkey, Spain, Italy and Germany have constitutional courts.

²¹ Steenkamp "The South African Constitution of 1993 and the Bill of Rights: An Evaluation in Light of International Human Rights Norms" 1995 *Human Rights Quarterly* 101 121.

²² S 18(3) of the Constitution.

gravitate towards the advancement of rights. These situations under which rights suffer potential abridgement can be categorised into four situations.

First, they can be abridged in circumstances where the law makes provision that is reasonably justified in the interest of defence, public safety, public order, public morality or public health.²³ This general omnibus exception is common to modern constitutions. This provision is rooted in utilitarianism and relates to the protection of the community at large. It is primarily intended to protect the safety of the state as an entity as well as its people. In terms of the above-mentioned situations, the abridgement should be specified by law. This section potentially permits the abridgement of a constitutional right by legislation.²⁴ The abridgment of constitutional rights by legislation can create serious anxiety unless the courts subject the validity of such legislative provisions to rigorous tests.

Second, some rights are subject to the rights and freedoms of other persons as individuals or as members of certain groups.²⁵ In this way the right to freedom of expression may be abridged if it conflicts with the need to protect the reputation and private lives of other persons.²⁶ Also, the right of freedom of conscience, (which is partly meant to protect the rights of persons to practise their religions without

²³ See S 13(2)(a) of the Constitution.

²⁴ Matua "The African Human Rights System in A Comparative Perspective: The Need for Urgent Reformation" 1993 *Legal Forum* 31 32.

²⁵ S 13(2)(b) of the Constitution.

²⁶ S 12(2)(b) of the Constitution.

intervention from other religious groups), may be abridged where it conflicts with the interests of other persons to practise their religion.²⁷

Third, certain rights are circumscribed to ensure the validity of certain functions of state. The express protection of some rights under the Constitution automatically creates conflict with certain laws. Therefore while the Constitution creates rights, it also ensures that certain actions of state that are inconsistent with such rights are validated. These actions are of two kinds. In the first instance, there are some actions whose legitimacy the state specifically intends to retain. They are mainly penal in nature. While the Constitution specifically prohibits the intentional killing of another person, killing is legitimised if carried out in accordance with a sentence of a court in respect of which a person has been convicted under the law. Also, though section 7 outlaws torture, inhuman and degrading treatment, the section provides that any law that authorises the use of any punishment that was lawful before the country attained independence will not be affected by the provision. This guarantees the use of and constitutionality of corporal punishment under the criminal justice system.²⁸ In the second instance, there are some actions that are necessary for the effective administration of the state and the administration of justice. However, these actions potentially infringe on certain rights. It is imperative therefore that their legitimacy be affirmed as a matter of necessity. So while the privacy of home is guaranteed, the execution of civil debts would be impossible if this right was unlimited. Therefore the Constitution guarantees the entry into premises for the purposes of executing civil

²⁷ S 11(5)(b) of the Constitution.

²⁸ S 25 Penal Code Cap 08:01.

judgments.²⁹ Such guarantee also validates the entry into property by public officers in order to conduct inspections for taxation purposes, or to search on the issuance of a warrant.

Fourth, where a state of public emergency is declared or when Botswana is at war.³⁰ The president is empowered to declare a state of public emergency under the Constitution. Individual rights may be severely curtailed under such circumstances.

1 4 The right to a fair trial

1 4 1 What amounts to a fair trial

It is a fundamental and constitutional rule of law that every accused is entitled to a fair trial.³¹ The right to a fair trial consists of a number of component rights including but not limited to the right to a speedy hearing, legal representation, cross-examination, the presumption of innocence and pre-trial disclosure.³² To say that most of the component rights consisting of a fair trial foster equality and enables the accused to present his case is a truism. The principle of equality therefore becomes the core of

²⁹ S 9(2)(d) of the Constitution.

³⁰ S 16 & 17 of the Constitution.

³¹ Clayton & Tomlinson *The Law of Human Rights I* (2000) 589; “In terms of section 10 of our Constitution a person accused of a criminal offence must receive a fair trial before an impartial court within a reasonable time.”: Nganunu CJ in *Bosch v The State* [2001] 1 B.L.R. 71 104E-F (CA); “It is a fundamental principle of our law and, indeed, of any civilised society that an accused person is entitled to a fair trial”: Milne JA in *S v Tyebela* 1989 (2) SA 22 (A) 29G; see also *Dikgang v The State* [1987] B.L.R. 352; *Rabonko v The State* [2006] 2 B.L.R. 166.

³² Clayton & Tomlinson *Human Rights* 589-590; Trechsel classifies fair trial rights into two components. A general one which applies to the general proceedings and specific rights involving the rights of the accused: Trechsel *Human Rights in Criminal Proceedings* (2005) 85.

the structure of fairness and lies at the heart of the modern criminal process. Since the human rights revolution, constitutional rights (fair trial rights included) have become embedded in international human rights documents and are justiciable on the international and domestic plane.³³ The right to a fair trial is absolute, subject only to limitations necessary for a legitimate purpose in a democratic society that does not compromise the fairness of the trial. The question whether a trial is fair depends on the conduct of the trial as a whole.³⁴

Article 6 of the European Convention identifies a number of fair trial rights. Ferguson notes that these rights “are subsumed by, and subordinated to, the one absolute right to a fair trial, so that all other rights can be infringed to the extent that the

³³ Jackson “The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?” 2005 *Modern Law Review* 737 747; Cappelletti *The Judicial Process in A Comparative Perspective* (1984) 207.

³⁴ *Kraska v Switzerland* (1994) 18 E.H.R.R. 188 para 30. In *Khan v United Kingdom* (2001) 31 E.H.R.R. 1016 the Court rejected the argument that article 6(1) of the European Convention was breached as the only evidence that led to the conviction of the accused was obtained by a secret listening device contrary to article 8(1). The Court noted that the domestic courts had considered whether the admission of the evidence created substantial unfairness. However, the Court has also held that a single aspect of a case may contravene the notion of fairness such that it is possible to conclude that the trial was unfair without regard to the rest of the proceedings: *Crociani v Italy* (1981) 24 Y.B. 222, E.Comm HR. Cited in Clayton & Tomlinson *Human Rights* 647; *R v Forbes* [2001] 2 W.L.R. 1 13 (HL).

infringement does not render the trial unfair in overall terms and is capable of objective justification.”³⁵

Section 10 of the Constitution of Botswana is the operative provision that provides for fair trial rights. The specific rights mentioned in section 10 are not exhaustive. Therefore, a trial may still be unfair when the specific rights therein are respected, if the trial is not fair as a whole.

1 4 2 *The content of the constitutional provision for fair trial rights in Botswana*

Sections 10(1) and 10(2) of the Constitution are of significance in that they make express provisions relating to procedural rights. Though most of these rights exist as rules of common law, their embodiment in the Constitution solidifies them as important components of the legal system. Sections 10(1) and 10(2) provide:

“(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognised by law.

(2) Every person who is charged with a criminal offence –

(a) shall be presumed to be innocent until he or she is proved or has pleaded guilty;

(b) shall be informed as soon as reasonably practicable, in a language that he or she understands and in detail, of the nature of the offence charged;

³⁵ Ferguson “Trial Within A Reasonable Time” 2001 *Scottish Law Times* 141 143; Jacot-Guillarmod *Rights Related to Good Administration of Justice (Article 6)* in Macdonald, Matscher & Petzold (eds) *The European System for the Protection of Human Rights* (1993) 381 392.

(c) shall be given adequate time and facilities for the preparation of his or her defence;

(d) shall be permitted to defend himself or herself before the court in person or, at his or her own expense, by a legal representative of his or her own choice;

(e) shall be afforded facilities to examine in person or by his or her legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his or her behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(f) shall be permitted to have without payment the assistance of an interpreter if he or she cannot understand the language used at the trial of the charge,

and except with his or her own consent the trial shall not take place in his or her absence unless he or she so conducts himself or herself as to render the continuance of the proceedings in his or her presence impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence.”

Other rights falling under various subsections of section 10 include the right of access to the judgment of the court, the protection against double jeopardy and the right not to testify at one’s trial. These are core procedural rights that have gained universal recognition and are regular features of international and regional human rights conventions. The danger of Bills of Rights is that they list specific rights, sometimes creating an impression that those rights that are not listed are not protected or

otherwise of less significance.³⁶ This approach should be avoided and section 10 should be seen merely as setting up minimum standards, the basis of a normative structure to be employed by the courts.³⁷ The establishment of the provisions of section 10 as mere minimum standards is reflective of international documents with comparable provisions.³⁸ The specific rights provided for in section 10, it can be seen, serve to ensure procedural equality. While the principle of equality of arms is not specifically catered for, it runs through its provisions and is the basic underlying principle of constitutional procedural law.

1 5 Classification of procedural rights

Procedural rights may be classified according to three considerations. The first classification relates to whom the right is applicable in the criminal justice system. The second relates to the normative plane on which they operate. The third relates to a right accruing to the accused and emanating from a duty on the court to explain the procedural and evidential processes of the trial to the unrepresented accused.

1 5 1 Classification by personage of application

Classification by personage refers to the rights of persons who have legitimate interests to have access to the trial. There are three such types of persons. First, there are rights that serve to protect the accused. Rights such as the right to legal representation, presumption of innocence, the right to disclosure, the right to call witnesses, the right to cross-examination, the right to testify etc, are personal rights of

³⁶ Walker *The Rule of Law: Foundation of Constitutional Democracy* (1988) 381.

³⁷ *S v Zuma & Others* 1995 (1) SACR 568 (CC); 1995 (2) SA 642 (CC).

³⁸ See art 14(3) of the UDHR; art 6(3) of the European Convention.

the accused. Most important of all is the right of the accused to be tried in his presence. The accused has a right to hear the evidence led against him and to contest it. This ensures that the accused gets a fair trial and that he has a proper opportunity to address the issues and present his defence. *These rights are central to the application of the principle of equality of arms.* Therefore, even though the courts in Botswana have not made any pronouncement on the principle, its relevance is guaranteed by the Constitution which caters for the above-mentioned rights. However the fact that the courts have not specifically recognised the principle of equality of arms is bound to have consequences in the application of constitutional procedural rights. Consequently, there is a risk that the accused in Botswana might not receive equality and fairness in the same fullness as his counterpart in jurisdictions where the principle receives specific legal appreciation.

Second, the public has an interest in the prosecution of criminal cases. This guarantees the public a right to be present during criminal trials. Therefore, while the accused has a right to a public hearing, a right of access to trials and documents³⁹ by the press and general public has been recognised.⁴⁰ In the United States, this has been recognised both as a constitutional⁴¹ and statutory⁴² rule of law. Whereas the

³⁹ *Seattle Times Co. v U.S. Dist. Court for Western Dist. of Washington* 845 F.2d 1513 (9th Cir. 1988).

⁴⁰ In *Press-Enterprise Co. v Superior Court (Press-Enterprise II)* 478 U.S. 17 (1986) the Court stated that the “right to an open public trial is a shared right of the accused and the public.”

⁴¹ *Globe Newspaper Co. v Superior Court for Norfolk County* 457 U.S. 596 (1982); *Detroit Free Press, Inc. v Recorder’s Court Judge* 409 Mich. 364 (1980); *Shipman v State Cr.*, 639 P.2d 1248; *State v Drake* 701 S.W.2d 604.

⁴² *In re Midland Pub. Co., Inc.* 362 N.W.2d 580 (Mich. 1984); *Gannett Co. Inc. v DePasquale* 443 U.S. 368 (1979).

accused's right to a public trial derives from the Sixth and Fourteenth Amendments, the right of the press and public to attend criminal trials arises implicitly from the First Amendment.⁴³ Since the public has a right of access to trials, the accused or the state would not in the ordinary course of events be able to insist on a trial behind closed doors.⁴⁴ Representatives of the press and public must be given an opportunity to challenge and be heard on the issue of their exclusion.⁴⁵ There is authority that the right is not applicable only to those present at the trial when application to close the proceedings are made, and that notice of public exclusion should be given to the public at large.⁴⁶ A motion for courtroom closure should be docketed in the public file kept in the court clerk's office⁴⁷ and individual notice to the press and public is not required.⁴⁸ It has also been held that a copy of the motion should be served on at least one representative of the media when a motion for closure is filed and when it is heard in court.⁴⁹ There is also contrasting authority to the effect that the right of access extends only to members of the public who are actually in court when the motion is made.⁵⁰

⁴³ *Rovinsky v McKaskle* 722 F.2d 197. The First Amendment guarantees free public discussion.

⁴⁴ *State v White* 398 P.2d 903, 97 Ariz. 196; *People v Gacy* 468 N.E.2d 1171, 82 Ill.Dec.391, 103 Ill.2d 1.

⁴⁵ *Globe Newspaper Co. v Superior Court for Norfolk County supra* note 41. The Seventh Circuit held in *In re Associated Press* 162 F.3d 503 (7th Cir. 1998) that members of the press and public are entitled to intervene to raise First Amendment claims of access to proceedings and documents.

⁴⁶ *State ex rel. New Mexico Press Ass'n v Kaufman* 98 N.M.261, 648 P.2d 300 (1982); *U.S. v Criden* C.A.Pa., 675 F.2d 550.

⁴⁷ *U.S. v Criden supra* note 46; *Application of The Herald Co.* 734 F. 2d 93 (CANY, 1984).

⁴⁸ *U.S. v Criden supra* note 46.

⁴⁹ *Miami Herald Pub. Co. v Lewis* 426 So.2d 1.

⁵⁰ *U.S. v Charga* C.A.Tex 701 F.2d 354.

The recognition of public access to criminal proceedings is also reflected in South African case law although not in explicit terms. In the case of *S v Leepile & Others* (4)⁵¹ the Court held that though the evidence of a witness could be taken in camera, it was necessary that the public be informed of its contents. Of course, this case was determined before South Africa's present constitutional order. However, one can say that, even though not expressed as a right, the Court was actually laying recognition to a right of access by the public in South African common law. Also, in the case of *Magqabi v Mafundityala & Another*,⁵² the Court held that members of the public are guaranteed free access to court proceedings as long as they do not disrupt the proceedings.

In the English case of *Attorney General's Reference (No 2 of 2001)*⁵³ which involved the question whether there was a breach of the right of the accused to a trial within reasonable time under article 6(1) of the European Convention, Lord Woolf CJ recognised the right of the public when he had this to say:

“Similarly, at the trial of a defendant on a criminal charge, it is not only the defendant who is to be considered. The public are interested in whether or not defendants are tried for criminal offences they have committed. As is the case with many of the rights which are contained in the Convention, the courts are

⁵¹ 1986 (3) SA 661 (W).

⁵² 1979 (4) SA 106 (E).

⁵³ [2001] 1 W.L.R. 1869.

called upon to hold the balance between the rights of the individual and the rights of the public.”⁵⁴

The legal principles relating to the public and accused’s right to a public hearing are similar. In addition, a public hearing satisfies the public interest in seeing that offenders are brought to book. A public hearing also enhances transparency and public confidence in the system. Though the enforcement of the right of the public to access trials is well-known in the United States, in theoretical terms this right should receive universal recognition, and should, in practical terms, be enforceable in the judicial system of every civilised country.⁵⁵

Finally and closely related to the right of the public, is that of the victim in seeing that the offender is punished. The recognition of the victim as a party instead of a mere witness is in line with rights which accrue to him as the injured party.⁵⁶ Victims’ rights are realisable rather than enforceable. The concept of victims’ rights does not operate on the same level as other rights. Victims’ rights are not fully developed in modern jurisprudence and the question whether victims have procedural rights is doubtful. Traditionally, the victim’s interests are relegated and he is treated as a mere witness. To some extent his interests are contingent on the outcome of the trial. He can only claim compensation if the accused is convicted. The standard used in a criminal trial is one beyond reasonable doubt, a standard more difficult to satisfy than

⁵⁴ 1875H.

⁵⁵ This right will of course be subject to public interest and state and public security considerations.

⁵⁶ See generally Roach “Four Models of the Criminal Process” 1999 *Journal of Criminal Law and Criminology* 671.

if the victim was pursuing a civil claim. His chances of obtaining compensation in criminal proceedings are therefore more difficult to achieve than if he had instituted civil proceedings. While an accused or an individual can directly make claims for violation of their rights, the rights of victims of crime are only realisable in an obtuse manner. The right of the victim lies within the criminal justice system and is realised when the accused is convicted. Consequently, the rules of criminal procedure give the victim limited access to the process and he functions basically as a witness. In Botswana, victims of crime are able to apply for compensation within the criminal process. Other modes of accessing the system such as acknowledging the impact of the offence on the victim as in the taking of victim impact statements do not apply. Victims' rights are therefore best realised by instituting civil proceedings.

1 5 2 Procedural rules and constitutional rules of procedure

There exists a further classification of rules of procedure, separate and distinct from those mentioned above. This classification relates to the normative plane on which these rules operate. Several of the rules contained in section 10 of the Constitution also form part of the Criminal Procedure and Evidence Act,⁵⁷ the principal statute that regulates criminal procedure in Botswana. For example, the Criminal Procedure and Evidence Act contains provisions entitling the accused to cross-examine witnesses, to legal representation,⁵⁸ to present his defence in court,⁵⁹ to be informed of the charges against him,⁶⁰ and to be present at his trial.⁶¹

⁵⁷ Cap 08:02.

⁵⁸ S 177 of the Criminal Procedure and Evidence Act.

⁵⁹ S 177 and 180(4) of the Criminal Procedure and Evidence Act.

⁶⁰ S 128 and 141 of the Criminal Procedure and Evidence Act.

⁶¹ S 178 of the Criminal Procedure and Evidence Act.

The result is that there are two sets of rules regulating procedural rights. Those found in the Criminal Procedure and Evidence Act are legal and formal in nature. They are procedural rules principally regulating the mechanism or order of criminal proceedings. They are enabling mechanisms that guarantee the orderly conduct of the proceedings from arraignment to sentence. Apart from creating orderliness, certainty and form, they guarantee equality and the integrity of the proceedings. No doubt, these rules primarily regulate procedural equality between the contestants and ensure that each contestant is given an equal opportunity to present his case. *They can be described as statements of equality.* For example, they provide that accused persons should be present at their trial and should be given an opportunity to cross-examine witnesses. They preserve the integrity of the proceedings by giving the presiding officer powers to ensure that the proceedings proceed timeously and that orders of the court are effected. Of significance are powers that ensure that the accused and witnesses present themselves for trial. This enables the judicial officer to enforce basic principles of fairness such as ensuring that the trial proceeds within reasonable time and that the accused's witnesses are secured.

Section 10 on the other hand contains constitutional rules of procedure. They are a set of standards that are instrumental in determining the fairness of criminal trials. Two questions therefore arise. First, whether their inclusion in the Constitution was necessary and, second, whether any right that was left out by the Constitution is less relevant.

In relation to the first question, it must be noted that the principal purpose of section 10 of the Constitution is the provision of measures for ensuring a fair trial. It is trite that an express constitutional statement of a rule of procedure raises its hierarchy as law thereby solidifying its observance. The provisions of section 10 are couched in direct terms as opposed to some of the provisions of the Criminal Procedure and Evidence Act. For example, section 177 of the Criminal Procedure and Evidence Act provides as follows:

“Every person charged with an offence is entitled to make his defence at his trial and to have the witnesses examined or cross-examined by his counsel, or other legal representative...”

In comparison, sections 10 (2) (d) and (e) of the Constitution which contain parallel provisions (and appear above) are couched in direct terms. It can be seen therefore that the Criminal Procedure and Evidence Act is directory. Section 10 of the Constitution on the other hand contains direct commands. But this does not suggest that the rules of the Criminal Procedure and Evidence Act can be easily ignored or watered down. Indeed the misapplication of such rules will be met with severe reproach from the courts, especially where the accused is prejudiced as a result. One must hasten to note however that this is due to the general influence of the Constitution on the legal process. In *Moletsane v The State*⁶² the appellant who

⁶² [1996] B.L.R. 73 (CA); see also *Walter Madisa v Regina* [1964-67] B.L.R. 157; *Chiwaura v The State* [1985] B.L.R. 201; *Moletsane v The State* [1995] B.L.R. 83; see also the South African case of *S v Masina en andere* 1990 (1) SACR 390 (T) where the Court permitted the family of a convicted accused to present evidence on extenuating circumstances even though the accused himself had refused to participate in the proceedings.

represented himself at his trial, appealed to the Court of Appeal on the grounds that at the conclusion of the evidence he was not given an opportunity to make submissions in terms of section 181 of the Criminal Procedure and Evidence Act. He argued that such omission amounted to an irregularity that should vitiate the entire proceedings. Section 181 provides for the summing up of the case by the prosecution and the accused or his legal representative after the closure of evidence. In its judgment, the Court noted that the magistrate's omission to call upon the accused to make submissions was inadvertent and that he similarly omitted to call upon the prosecution to make submissions. The Court in making a decision did not only limit itself to the prevailing facts but considered a hypothetical question whether the magistrate's omission was *mala fide*. The Court ruled that where a trial judge inadvertently omitted to call on the accused to address the court after all the evidence had been adduced and proceeded to conviction, that would amount to an irregularity which would vitiate the proceedings only if the omission was prejudicial to the appellant or was likely to have been so. The Court ruled on the other hand that where a judge refused a request by the accused or his legal representative to address the court or deliberately refrained from calling upon him to do so and proceeded to convict, that would amount to an irregularity which would vitiate the entire proceedings and lead to a quashing of the conviction. In dismissing the appeal, the Court noted that the evidence against the accused was overwhelming beyond any possible doubt, and that the accused was not prejudiced by his not making submissions. In so holding, the Court noted all the issues that the accused said he would have mentioned in his submission and concluded that the magistrate had fairly and judiciously dealt with them during the course of the trial and any further reference to them would have been irrelevant.

It is a truism that constitutional statements of procedural rules strengthen the rules they formulate. For example section 146 of the Criminal Procedure and Evidence Act gives the courts discretionary powers to direct the prosecution to deliver to the accused any information relating to the charge. For several years the defence was denied access to copies of police statements and documents on the basis that they were privileged.⁶³ However, a change of events occurred in 2001 when the courts⁶⁴ held that access to witness' statements and other documents in possession of the police form part of the accused's constitutional right to be given adequate facilities to prepare his defence.⁶⁵ The accused, with limited exceptions, is now entitled to such statements as a right and is no longer required to furnish the court with reasons why the information should be produced,⁶⁶ as was the pre-2001 situation when the question of disclosure had no constitutional backing. The result is that the prosecution regularly and without resistance furnishes the defence with statements of witnesses.

In relation to the second question, it must be noted that every provision of law should be complied with, especially procedural rules that ensure fairness and equality in trials. The problem that arises is that procedural rules that do not have constitutional status are easily manoeuvred especially when they conflict with other rules of law that potentially have the effect of compromising the rights of the accused. For example, there is no express constitutional prohibition against pre-trial self-incrimination. Section 229(2) of the Criminal Procedure and Evidence Act permits the admissibility

⁶³ *Kenosi v The State* [1993] B.L.R. 268 (CA).

⁶⁴ *Attorney-General v Ahmed* [2003] 1 B.L.R. 158 (CA); *Ndala v The State* Misc Crim App No F 95 of 2001 (unreported).

⁶⁵ S 10(2)(c) of the Botswana Constitution.

⁶⁶ See the case of *Motsumi v The State* [1996] B.L.R. 905.

of evidence showing that anything was pointed out or its discovery was made as a result of any information given by the accused to the police, notwithstanding that such pointing out or information amounts to a confession or is inadmissible by law. This provision conflicts with section 228 of the same legislation which provides that confessions are not admissible unless reduced into writing in the presence of a judicial officer. The essence of section 228 is obviously to ensure that confession statements are made without duress. In effect, section 229(2) undercuts the guarantee that section 228 provides, the guarantee being that all confessions should be free, voluntary and obtained without duress. It waters down the use of a judicial officer as an instrument in guaranteeing the voluntariness of confessions. Further, section 229(2) opens the floodgates for the police to use unsavoury methods. It is a legislative statement in support of the use of unlawful methods to obtain information and evidence. It validates the use of the accused as an instrument to obtain evidence and the use of such evidence in court against him regardless of how it was obtained.⁶⁷ This amounts to a breach of the accused's right not to be compelled to participate in his own prosecution. This provision remains in force in the absence of any constitutional rebuttal. So is the common law rule that permits the admissibility of illegally obtained evidence.⁶⁸ In South Africa on the other hand where there is specific constitutional limitation on the admissibility of evidence that was obtained in breach of the Bill of Rights, the admissibility of illegally obtained evidence will be subject to constitutional scrutiny.

⁶⁷ In terms of S 35(5) of the South African Constitution Act 108 of 1996, evidence may be excluded if it was obtained in a manner that violates any right in the Bill of Rights, if its admission would render the trial unfair or if its admission would otherwise be detrimental to the administration of justice.

⁶⁸ *Seeletso v The State* [1992] B.L.R. 71; *Kenosi v The State supra* note 63; *Moloi v The State* [1995] B.L.R. 439 (CA).

Unlike formal procedural rules, it is difficult to disregard a rule of procedure that has constitutional support. In the case of *Ntwa v The State*⁶⁹ the applicant was first indicted in a magistrates' court in April 1997. The charge sheet filed in April 1997 as well as a subsequent charge filed in July 1997, were quashed as they were both defective. On both occasions the charges were struck down without prejudice to the state. In September 2000 the state filed yet another charge sheet and indicted the applicant. The applicant approached the High Court in terms of section 18(3) of the Constitution.⁷⁰ He contended that there had been an unreasonable delay by the prosecution resulting in an infringement of his constitutional right to be afforded a fair trial within reasonable time.⁷¹ The state argued that it was perfectly within its rights to prosecute the applicant at any time prior to the lapse of twenty years limitation period provided by section 26 of the Criminal Procedure and Evidence Act. In rejecting the state's argument, Marumo J had this to say:

“I think this submission seeks to utilise section 26 of the Criminal Procedure and Evidence Act for what it was never intended for, and inappropriately. The provision simply sets prescription periods after which criminal causes of

⁶⁹ [2001] 2 B.L.R. 212. See also *Bojang v The State* [1994] B.L.R. 146; *Leow v The State* [1995] B.L.R. 564; *Masango v The State* [2001] 2 B.L.R. 616 where it was stated that there was no constitutional duty on the court to inform the accused of his right to legal representation, this being a rule of practice. Therefore failure to do so does not necessarily vitiate the proceedings.

⁷⁰ For an explanation of this provision see the first paragraph of page 11 above, and in particular the text immediately preceding note 22.

⁷¹ As provided by S 10(1) of the Constitution. In *Masango v The State supra* note 69 the determination of the issue was based on whether the accused had suffered any prejudice.

action become time barred. It does not seek to stipulate the processes by which the State should bring matters before courts. Those processes are found elsewhere in the procedure Code and also in the Constitution. Section 10(1) is one of the applicable provisions. Furthermore, even if the provision did confer on the State the right alleged (which clearly it does not) the provision would have to yield to the supremacy of the constitutional provision, the latter document being the supreme law of the country. I shudder at the very thought of the State being in a position to notify someone that he or she is to be charged with a criminal offence, and then being able to keep such a person in a state of anxiety and suspense for a period of some 19 years prior to proceeding with the charges...It would be a crass society and a singularly supine judiciary that would tolerate such a situation.”⁷²

Both constitutional rules and rules of procedure strive to ensure that the accused is not unfairly disadvantaged as a participant in the legal process. However, while constitutional rules of procedure primarily focus on the protection of the accused, regulating the relationship between the state and the individual and in securing a fair trial, rules of procedure are able to regulate the order of the trial. The courts in Botswana protect constitutional procedural rights far more rigidly than rules of procedure which do not have constitutional status. They are usually ready to overlook the violation of a procedural rule where prejudice has not resulted. They do so in order to avoid acquittals on technical grounds. Therefore, procedural rules receive lukewarm application from time to time.

⁷² *Ntwa v The State supra* note 69 221H-222C.

1 5 3 *Secondary procedural rights*

There is a further set of “rights” that are not catered for in the Constitution, nor provided for in statutory provisions. These rights arise out of a special judicial enabling duty. In this regard, the courts have a duty to assist the accused and ensure that he is aware of legal procedural provisions. This duty bestows correlative rights on the accused. The essence of these rights is two fold. First and generally, they ensure that the accused receives instruction of the legal procedures of the court. In this regard, the level of inequality between the accused and the state is reduced and it is ensured that the accused is able to participate and defend himself. This ensures the accused procedural access to the proceedings. Second, they inform the accused of the existence of constitutionalised procedural rules. Whereas the courts of Botswana recognise the importance of the courts advising accused persons of their constitutional and procedural rights, it appears that the question whether a trial is unfair as a result of failure to inform the accused of his rights, largely depends on whether such omission results in a failure of justice.⁷³ Inevitably, procedural equality, which these rules are meant to create, is compromised. The duty to inform the accused of his rights, while forming an integral part of the regime of procedural rights, effectively consigns the rights emanating from such duty to the status of secondary procedural rights. South African jurisprudence demands as a fundamental notion of fairness that the accused should be informed of his right to legal representation noting that failure to do so may result in failure of justice.⁷⁴ In Botswana, fairness depends on whether

⁷³ *Ramogotho v Director of Public Prosecutions* [2007] 1 B.L.R. 334 (CA); *Moroka v The State* [2001] 1 BLR 134; *Bojang v The State supra* note 69; *Chanda v The State* [2007] 1 B.L.R. 400 (CA); *Rabonko v The State* [2007] 1 B.L.R. 27; *Walter Madisa v Regina supra* note 62; *Moima v The State* [1982] B.L.R. 112; *Chiwaura v The State supra* note 62; *Moletsane v The State (CA) supra* note 62.

⁷⁴ *S v Radebe*; *S v Mbonani* 1988 (1) SA 191 (T); *S v Mabaso & Another* 1990 (3) SA 185 (A).

failure to inform the accused of his right to legal representation results in prejudice to the accused. It is doubtful therefore whether these duties of the court translate into rights for the accused. In this regard, they can be described as secondary to the traditional procedural rights.

1 6 Conclusion

The state is a powerful entity with powers disproportionate to those of the individual. The articulation and recognition of procedural and constitutional rights are instruments in limiting and regulating the policing powers of the state with a view to creating equality and fairness.

The constitutionalisation of procedural rights is an important tool in protecting the accused in the interest-based adversarial system. Section 10 of the Constitution represents the constitutionalisation of several statements of procedural equality. These statements are no longer mere common law or statutory rules regulating criminal proceedings. They are fundamental, constitutional, procedural rights. *While there is no express constitutional mention of the principle of equality of arms in Botswana, the spirit, purport and object of the Bill of Rights speaks to equality.* The principle receives implicit countenance in that the accused is guaranteed an opportunity to cross-examine, call witnesses in his favour and secure legal representation.

The entrenchment of the right to a fair trial as a concept of human rights firmly caters for equality, thereby securing the place of the accused in the criminal justice system. The courts have accepted the Constitution as the supreme document against which the legitimacy of all laws are tested. In effect, it should be possible to raise the principle

of equality of arms as a constitutional question in the courts of Botswana and it should receive specific and direct judicial consideration. The courts continue their sojourn in engaging a liberal approach in the interpretation of rights. The Constitutional entrenchment of criminal procedures not only complements procedural rules but fortifies the substance of their application. The genre of constitutional proceduralism creates a system that engages the state in ensuring that the rights of the individual are protected. In spelling out specific procedural rights, the Constitution lays down the foundation for the protection of accused persons at their trial. These rights are not exhaustive but form the basic principles regarding the protection of fair trial rights in general. The entire process of the determination of rights involves a whole array of judicial action. The courts have the onerous task of working through these norms and guarding the constitutional status of procedural rights while ensuring that real justice is done.

CHAPTER 2

CONCEPTUALISATION OF THE PRINCIPLE OF EQUALITY OF ARMS

2 1 Introduction

The principle of equality of arms is of ancient origin.¹ Early trials took the form of battle wherein the accused and accuser fought in armour and rode on horses with batons and fought to the death.² The contest ended with the death of one contestant, at which point justice would have been served.³ The rules of combat ensured that neither party enjoyed advantage in terms of arms and armaments.⁴ The principle has roots both in common law and civil law traditions.⁵ It is an expression of the natural law principle *audi alteram partem* which was first formulated by St Augustine.⁶ The principle derives modern conceptual development and content from the jurisprudence of the European Court of Human Rights and the European Commission of Human Rights. The principle “involves striking a ‘fair balance’ between the parties, in order

¹ Bufford “Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice” 2007 *Northwestern Journal of International Law and Business* 351 395.

² Silver “Equality of Arms and the Adversarial Process: A New Constitutional Right” 1990 *Wisconsin Law Review* 1007; Bartlett *Trial by Fire and Water: The Medieval Judicial Order* (1986) 103-126.

³ Silver 1990 *Wisconsin Law Review* 1007.

⁴ Silver 1990 *Wisconsin Law Review* 1007.

⁵ Jackson “The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?” 2005 *Modern Law Review* 737 751.

⁶ Jackson 2005 *Modern Law Review* 751; see also Lucas *On Justice* (1980) 84; Safferling *Towards an International Criminal Procedure* (2001) 265; Lenaerts “‘In the Union We Trust’: Trust-Enhancing Principles of Community Law” 2004 *Common Market Law Review* 317 329; Laws “Beyond Rights” 2003 *Oxford Journal of Legal Studies* 265 274; Mani *International Adjudication: Procedural Aspects* (1980) 12-13; Jackson 2005 *Modern Law Review* 751.

that each party has a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent.”⁷ Though the principle has flourished and gained acceptance as the bedrock of procedural fairness in the jurisprudence of the European Court of Human Rights as well as international and internationalised tribunals,⁸ its scope and application is somewhat constricted and contextualised in the latter.⁹ It however represents a pivotal barometer in underscoring the credibility of such tribunals.¹⁰ Indeed, the principle forms part of international

⁷ Simor & Emmerson *Human Rights Practice* (2001) para 6.145; Jackson 2005 *Modern Law Review* 751.

⁸ International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (ICTY), Special Court for Sierra Leone (SCSL); *Prosecutor v Tadic* Case No. IT-94-1-A, Judgment, P. 44 (July 15, 1999): “The principle of equality of arms between the prosecutor and the accused in a criminal trial goes to the heart of the fair trial guarantee.”

⁹ The ICTY has been criticised for restricting international human rights standards in the interest of securing convictions; see generally Sloan “The International Criminal Tribunal for the Former Yugoslavia and Fair Trial Rights: A Closer Look” 1996 *Leiden Journal of International Law* 479. In deed the Court has distinguished itself from national courts and compared itself with military tribunals which often limit due process rights and relaxes rules of evidence: *Tadic First Instance (Witness Protection)* Case No. IT-94-1 – T, (10 August 1995). For further criticism and highlights of inequality in the Tribunal see McIntyre “Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia” 2003 *Leiden Journal of International Law* 269.

¹⁰ McIntyre *Equality of Arms – Defining Human Rights in the Jurisprudence of the ICTY* unpublished paper read at Workshop *Convergence of Criminal Justice Systems: Building Bridges – Bridging the Gaps* 2003-08-25, <http://www.jsrd.org/Papers/McIntyre.pdf> (accessed 31 August 2007); Knoops “The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective” 2005 *Fordham International Law Journal* 1566; Negri “The Principle of ‘Equality of Arms’ and the Evolving Law of International Criminal

human rights principles.¹¹ It is particularly relevant in the adversarial tradition which manifests itself as an interest-based system. The system demands that there must be balance and equality between the key players, and the accused should be assisted to present his case in such a manner that he is not disadvantaged in relation to the prosecution.

2 2 Conceptual framework

2 2 1 The role of the European Court

The criminal justice system was set up primarily to convict offenders. This being the focus of the system, considerations of the rights of accused persons and procedural equality were introduced at a later stage in the development of legal systems. The operation of accused-based rights are bound to raise tensions in a system that was previously set up, principally to represent the interests of the society as against the interests of the accused. State resources are devoted towards fighting crime and convicting offenders. It is not surprising therefore, that the amount of resources allocated to the realisation of the rights of the accused pales in comparison to those allocated to the prosecution. However, the system has now in practical terms, moved towards ensuring the objectives underlying the recognition of the rights of the accused. Therefore, a reconsideration of the application of procedural rules in light of the principle of equality of arms is the key to full and effective realisation of procedural equality and fair trial rights.

Procedure” 2005 *International Criminal Law Review* 513 514; DeFrancia “Due Process in International Criminal Courts: Why Procedure Matters” 2001 *Virginia Law Review* 1381 1438; Negri *Equality of Arms – Guiding Light or Empty Shell* in Bohlander (ed) *International Criminal Justice: A Critical Analysis* (2007) 13 14.

¹¹ Article 14 of the ICCPR; article 10 of the UDHR; Safferling *International Criminal Procedure* 265.

Indeed, the modern development of the principle of equality of arms stems from article 6 of the European Convention.¹² The principle is the result of a departure by the European Court on Human Rights from strict and literal appreciation of the specific rights contained in articles 6(2) and 6(3) of the Convention, and the

¹² The article provides:

“1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3) Everyone charged with a criminal offence has the following minimum rights:

a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

b) to have adequate time and facilities for the preparation of his defence;

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”

conceptualisation of its own notion of fairness.¹³ Consequently, the Court has developed the principle as a procedural norm in the European legal order.¹⁴ It has emphasised that an adversarial system governed by equality of arms is fundamental to a fair trial as enshrined in article 6(1) of the European Convention.¹⁵ The Court has interpreted and fashioned this provision, resulting in a principle that recognises as sacrosanct that neither party to proceedings is put in a position that substantially puts him at a disadvantage in relation to his opponent.¹⁶ The current established view is

¹³ Jackson 2005 *Modern Law Review* 751; "...[T]he specific guarantees of Article 6(3) are all aimed at ensuring that in criminal trials there is the procedural equality between the defence and prosecution which, as we have seen, is essential to a fair trial.": Robertson & Merrills *Human Rights in Europe* 3 ed (1993) 108; Ashworth *Legal Aid, Human Rights and Criminal Justice* in Young & Wall (eds) *Access to Criminal Justice* (1996) 55 59.

¹⁴ Lenaerts 2004 *Common Market Law Review* 328; Negri *Equality of Arms* 16.

¹⁵ *Steel and Morris v United Kingdom* (2005) 41 E.H.R.R. 22 paras 50 and 59: "The adversarial system in the United Kingdom is based on the idea that justice can be achieved if the parties to a legal dispute are able to adduce their evidence and test their opponent's evidence in circumstances of reasonable equality...The Court recalls that the Convention is intended to guarantee practical and effective rights...It is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side."; *Edwards and Lewis v United Kingdom* (2005) 40 E.H.R.R. 24 para 52: "It is in any event a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence."; *Dowsett v United Kingdom* 314 Eur. Ct. H.R. 259, P. 41 (2003).

¹⁶ McIntyre 2003 *Leiden Journal of International Law* 271; Jackson 2005 *Modern Law Review* 751; Clayton & Tomlinson *The Law of Human Rights I* (2000) 648; Knoops & Amsterdam "The Duality of State Cooperation Within International and National Criminal Cases" 2007 *Fordham International Law Journal* 260 265; *Kaufman v Belgium* (1986) 50 D.R. 98 115; *Foucher v France* (1998) 25 E.H.R.R.

that the principle gives relevance to a number of accused-based rights.¹⁷ These include the right to be afforded a reasonable opportunity to present the facts of his case to the court, the right to present his legal arguments to the court, the right to respond to evidence, the right to comment on legal arguments of the prosecution,¹⁸ the right to disclosure of evidence in the possession of the state that is necessary for preparation of the defence case,¹⁹ the right to legal representation and the right to be presumed innocent. Though the principle is not specifically spelt out in article 6, the cluster of rights contained in the article basically gives content to the principle and enables the accused to present his case and defend himself. Effectively, it gives him a status in the trial and protects him from undue disadvantage.

2 2 2 *Considering European jurisprudence*

The European Court and Commission have determined a plethora of cases involving alleged infringement of article 6 in so far as it relates to inequality between the

234; Meernik "Equality of Arms? The Individual vs. The International Community in War Crimes Tribunals" 2003 *Judicature* 312 315; Plowden & Kerrigan *Advocacy and Human Rights: Using the Convention in Courts and Tribunals* (2002) 407; Clements, Mole & Simmons *European Human Rights: Taking A Case under the Convention* (1999) 2 ed 165.

¹⁷ Bufford 2007 *Northwestern Journal of International Law and Business* 396.

¹⁸ Bufford 2007 *Northwestern Journal of International Law and Business* 396-397; Wasek-Wiaderek *The Principle of "Equality of Arms" in Criminal Procedure under Article 6 of the European Convention of Human Rights and its Functions in Criminal Justice of Selected European Countries* (2000) 23; Negri notes that equality of arms demands "attentive compliance" in areas of drafting indictments, participation of the accused in the proceedings, access to legal assistance and legal aid programmes, allocation of adequate resources and facilities to the benefit of defence teams and disclosure of evidence: Negri *Equality of Arms* 14.

¹⁹ Knoops & Amsterdam 2007 *Fordham International Law Journal* 265.

prosecution and the accused. The Court has noted that each party should be afforded reasonable opportunity to present his case, including his defence under circumstances that do not put him at a substantial disadvantage *vis-a-vis* his opponent.²⁰

In *Neumeister v Austria (No 1)*²¹ the Court held that both parties in criminal proceedings must be represented throughout the case and that by hearing the prosecuting authority in the absence of defence counsel, the principle of equality of arms was violated. The Court has also emphasised equality in the ability to present evidence. In *Bönisch v Austria*²² it was held that the expert witnesses of both sides must be heard. The Court noted that equal treatment should be given to the court appointed expert and those called by the accused, irrespective of their capacity. In this regard the accused should be opporteduned to refute the views of the court appointed expert. The Court noted in this case that the court appointed expert had acted more like a witness against the accused than an independent witness since he could attend throughout the hearing, put questions to the accused and comment on the evidence. Since he had greater control over the proceedings than the accused's expert witness, the Court held that the accused was not given equal treatment.

²⁰ *Dombo Beheer v Netherlands* (1994) 18 E.H.R.R. 213; Ashley-Norman *The Impact of the ECHR on the Investigation and Prosecution of Fraud: Rights Coming Home to Roost* http://portal.nasstar.com/3/Files/Articles/PDF/JA-N_ImpactofECHR.pdf (accessed 31 October 2007); Reid *A Practitioner's Guide to the European Convention on Human Rights* (2008) 114.

²¹ (1979-80) 1 E.H.R.R. 91.

²² (1985) 9 E.H.R.R. 191.

In *Feldbrugge v Netherlands*²³ it was held that each party must be given an opportunity to oppose the arguments of the other. In *Colozza v Italy*²⁴ the Court held that the accused should generally be present and be entitled to take part in the proceedings. The principle is not limited to equality in the presentation of formal evidence. The Court has recognised the disparity between the prosecution and the defence in terms of resources and therefore provides that the facilities which an accused charged with an offence should enjoy in terms of article 6(3)(b) should extend to access to all relevant information collected by the prosecution during its investigations.²⁵

Equality brings “participation rights” and “defence rights”²⁶ to the fore. Implicit to this is the demand that a party is entitled to reply to comments made by the other side. The right of reply has found expression in the jurisprudence of the Commission. Four Austrian cases represent the thinking of the Commission in this regard. In *Ofner and Hopfiner v Austria*,²⁷ the Austrian Supreme Court heard the Attorney-General but not the accused persons on appeal. In determining whether inequality had occurred, the Commission noted the role played by the Attorney-General in relation to the law, the circumstances under which the hearing took place and the consequence of the hearing

²³ (1986) 8 E.H.R.R. 425.

²⁴ (1985) 7 E.H.R.R. 516.

²⁵ Jackson 2005 *Modern Law Review* 751; *Jespers v Belgium* (1981) 27 D.R. 61.

²⁶ Hodgson “Codified Criminal Procedure and Human Rights: Some Observations on the French Experience” 2003 *Criminal Law Review* 165 175 & 179.

²⁷ 6 YB 676 (1962) Com. Rep.

for the accused, in particular whether there was a *reformation in peius*.²⁸ No violation of the principle was found as the role of the Attorney-General was to ensure that the laws are respected and not to secure a conviction of the accused. He was recognised as an objective and fair person who presented no threat to the rights of the accused. In the cases of *Pataki and Dunshirn v Austria*²⁹ where the public prosecutor's aim was securing a conviction, the situation was different. In those cases, the public prosecutor appealed against the sentences imposed on the applicants. Written submissions were filed and the files were sent to the chief public prosecutor for information and opinion. The files were sent to the court with the recommendation that the appeals be allowed as per the written submissions. The applicants were absent, and in both cases had no representation. In the *Pataki*³⁰ case the sentence was increased from three year's imprisonment to six years. In the *Dunshirn*³¹ case the sentence was increased from fourteen months to fifty four months. The Commission considered the question whether the presence of the public prosecutor and the absence of the applicants and their counsel was a contravention of the Convention. The Commission noted that it was difficult to establish with certainty whether the public prosecutor had taken an active part in the proceedings as no records were kept. The Commission noted that even if the public prosecutor did not play an active part in the proceedings, the fact remained that he was present and had an opportunity to influence the members of the court. The accused and his counsel on the other hand had no opportunity to contest his representations. This in the view of the Commission constituted an inequality which

²⁸ That is, whether the accused was put in a worse position. See Safferling *International Criminal Procedure* 266.

²⁹ Nos. 596/59 and 789/60, YB 714 (1983) Com. Rep.

³⁰ *Supra* note 29.

³¹ *Supra* note 29.

infringed the notion of a fair trial. The Commission concluded that the proceedings were not in conformity with the Convention. Clearly, European jurisprudence no longer regards *Procureurs-General* as neutral and emphasises the importance to be attached to appearances and to the increased sensitivity of the public to the administration of justice.³²

2 3 Scope and application of the principle

Though the discussion for the purposes of this work is limited to criminal proceedings, it is worth noting that the principle also finds application in civil proceedings. The European Court has applied the principle as contained in article 6 (3)(c) of the Convention to civil proceedings on a few occasions as a development of the provisions of article 6(1).³³ The Court has been able to do so by recognising the right of access to court and then pinning to it access to legal advice as an ancillary right.³⁴ “According to the Commissions’s case law Art. 6(1) guarantees, *inter alia*, the principle of equality of arms, *i.e.* that anyone who is a party to civil proceedings shall have a reasonable opportunity of presenting his case to the Court under conditions

³² *Borgers v Belgium* (1993) 15 E.H.R.R. 92; *Bulut v Austria* (1997) 24 E.H.R.R. 84; Reid *A Practitioner’s Guide* 115.

³³ Clements et al *European Human Rights* 165; the Human Rights Committee of the United Nations has also endorsed the position that the principle applies to criminal and civil proceedings: *General Comment No 32 CCPR/C/GC/32*.

³⁴ *Airey v Ireland* E.C.H.R. (1979) Series A, No 32; (1980) 2 E.H.R.R. 305; Harlow *Access to Justice as A Human Right: The European Convention and the European Union* in Alston (ed) *The EU and Human Rights* (1999) 186; see also *Dombo Beheer v Netherlands supra* note 20.

which do not place him at a substantial disadvantage *vis-a-vis* his opponent.”³⁵ In *Dombo Beheer v Netherlands*³⁶ the Court held that “as regards litigation involving opposing private interests, ‘equality of arms’ implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage *vis-a-vis* his opponent”.³⁷ The Court and Commission has also held that equality of arms requires parties to civil proceedings to be permitted to cross-examine witnesses,³⁸ to be informed of and be able to challenge decisions for administrative action,³⁹ and be allowed access to facilities.⁴⁰ In *Ruiz-Mateos v Spain*⁴¹ it was held that the principle was infringed when in appeal proceedings before the Spanish Constitutional Court the applicants were not allowed to reply to written submissions made to the Court by counsel for the state, their opponent in a civil case, on the constitutionality of a relevant law.

2 3 1 *Pre-trial investigation*

The scope of the principle extends to the pre-trial stage of the criminal process. Of relevance to article 6(1) of the European Convention is the question, when is one charged with a criminal offence. In determining what would amount to a criminal

³⁵ *De Geillustreerde Pers v Netherlands* (1989) 11 E.H.H.R. 85 86; see also *Airey v Ireland supra* note 34.

³⁶ *Supra* note 20.

³⁷ *Supra* note 20 para 33.

³⁸ *X v Austria* No. 5362/72, 42 C.D. 145 (1972).

³⁹ *Hentrich v France* (1994) 18 E.H.R.R. 440.

⁴⁰ *Schuler-Zgraggen v Switzerland* (1993) 16 E.H.R.R. 405.

⁴¹ (1993) 16 E.H.R.R. 505.

charge for the purposes of determining whether the accused was tried within a reasonable time, the European Court embraced the investigation argument. The European Court has interpreted the Convention's demand for a prompt trial to extend over a wide period, from investigation including periods of provisional release of the suspect up to the final determination of appeal.⁴² In this regard, the passage of time commences from the pre-trial period when the accused becomes aware that he is being investigated, or when he is arrested as a suspect. In effect, a criminal charge is not limited to the bringing of formal charges against the accused but extends to the pre-trial investigatory period. This approach has made its mark in Botswana law⁴³ where the formal argument which restricts "charge" to the formal charging of the accused to court has been rejected. To this extent the scope of the principle of equality of arms becomes immediately applicable to pre-trial procedures. In this regard, a consideration of fairness in light of the principle is not limited to an accused's appearance in court but extends to the investigation process. Therefore, an investigation that excludes the suspect from searches, seizures, the confrontation and taking of statements from witnesses, potentially puts him in a position of disadvantage. So does a denial of access to statements, documents and exhibits obtained in the course of investigations. Any model of investigations that excludes the accused and keeps information in secrecy, potentially infringes the principle.

⁴² *Neumeister v Austria (No 1)* supra note 21; *Wemhoff v Federal Republic of Germany* (1979-80) 1 E.H.R.R. 55; *Eckle v Federal Republic of Germany* (1983) 5 E.H.R.R. 1.

⁴³ *Sejammitlwa and Others v The Attorney-General and Others* [2002] 2 B.L.R. 75 (CA); *Ntwa v The State* [2001] 2 B.L.R. 212.

2 3 2 *Disciplinary proceedings*

The scope of the principle has been extended to disciplinary proceedings where the resultant sanctions involved the deprivation of personal liberty.⁴⁴ The European Court has taken the view that the state should be limited in designating offences as disciplinary when they are really criminal, otherwise, the principle and demands of article 6 could be evaded. Also, in *Campbell and Fell v United Kingdom*⁴⁵ where the question arose whether disciplinary proceedings in prison constituted criminal charges under article 6, the Court held that disciplinary proceedings resulting in serious penalties such as loss of remission and privilege, and which could be pursued as criminal offences in courts, involved criminal charges which required the protection of article 6.⁴⁶ The Court has also applied article 6 to administrative offences.⁴⁷

2 3 3 *Application to procedural rights*

The principle of equality of arms applies to a number of procedural rights. Harris and others note that the principle in article 6(1) overlaps with specific guarantees in article 6(3).⁴⁸ This is crystal clear with article 6(3)(d), which relates to the right to cross-

⁴⁴ *Engel and Others v Netherlands No 1* (1979-80) 1 E.H.R.R. 647.

⁴⁵ (1985) 7 E.H.R.R. 165.

⁴⁶ For a discussion on the criteria as to whether disciplinary proceedings would also imply a criminal charge, see *Engel and Others v Netherlands No 1 supra* note 44; Van Dijk *Access to Court* in Macdonald, Matscher & Petzold (eds) *The European System for the Protection of Human Rights* (1993) 345 363-368; Beddard *Human Rights and Europe* 3 ed (1993) 163-164; Fawcett *The Application of the European Convention on Human Rights* (1987) 145; Leigh *The Right to A Fair Trial and the European Convention on Human Rights* in Weissbrodt & Wolfrum (eds) *The Right to A Fair Trial* (1998) 645 648-649.

⁴⁷ *Ozturk v Germany* (1984) 6 E.H.R.R. 409; Lenaerts 2004 *Common Market Law Review* 324-325.

⁴⁸ Clayton & Tomlinson *Human Rights* 648; Simor & Emmerson *Human Rights Practice* para 6.146.

examination and the right to call witnesses, article 6(3)(b) in respect of facilities to prepare the accused's defence and article 6(3)(c) in respect of legal representation.⁴⁹ It however has a wider application than this, applying to all aspects of the proceedings.⁵⁰ Indeed, the underlying demand of the principle is procedural equality between the parties.

2 4 Financial equality

The issue of equality mostly refers to procedural equality. However, another component which goes to the core of fairness is financial equality. The financial resources available to the accused undoubtedly impacts on the quality of legal representation he gets, if he is able to get one at all. Meernik notes that in the United States, the “upper dogs” such as federal governments typically have success rates in trial and appellate courts as against the “underdogs” such as individual accused persons.⁵¹ According to him, “...the ‘haves’ emerge victorious more often because they can afford to hire the best legal talent and incur the expenses of lengthy and thorough litigation.”⁵² States and international tribunals are usually stringent in allocating financial resources to accused persons. In theory, international tribunals have thrown the spotlight of equality on procedural rather than financial equality.⁵³

⁴⁹ Harris, O’Boyle & Warbick *Law of the European Convention on Human Rights* (1995) 209.

⁵⁰ *Ofner and Hopfinger v Austria supra* note 27.

⁵¹ Meernik 2003 *Judicature* 313.

⁵² Meernik 2003 *Judicature* 313.

⁵³ ICTY Appeals Chamber decision of *Prosecutor v Oric* Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, P. 7 (July 20, 2005); *Prosecutor v Kayishema* Case No. ICTR 95-1-A, Appeals Chamber Judgment PP. 63-71 (June 1, 2001); *Prosecutor v Ojdanic* Case No. IT-9937-PT, Final Assessment of the Accused’s Ability to Remunerate Counsel, P. 14, 23 (June 23, 2004).

While it is conceded that the needs of the defence and prosecution are different and that the accused might not need as near as equal the resources of the prosecution, the allocation of funds to secure an experienced lawyer (or rather the lack of such funds), will definitely undermine the principle of equality of arms.

The case of *Steel and Morris v United Kingdom*⁵⁴ typically illustrates how lack of financial resources can incapacitate a party to proceedings. The matter was in respect of an application brought by two British nationals Helen Steel and David Morris. Mr Morris was unemployed and Ms Steel was either unemployed or on low wage at the material time. They were members of an environmental group called London Greenpeace which had conducted an anti McDonald's campaign in the mid 1980s. As part of the campaign a leaflet entitled "What's wrong with McDonald's?" was issued in 1986. McDonald's issued a writ on the 20th September 1990 claiming damages for libel caused by the leaflet. The applicants were denied legal aid and therefore had to defend themselves throughout the trial and the appeal, with help from some volunteer lawyers at times. The applicants submitted that they were hampered by lack of resources not only by way of legal representation, but also in terms of administration, note taking, photocopying and the tracing, preparation and payment of the costs and expenses of expert and factual witnesses. McDonald's on the other hand was represented by leading and junior counsel experienced in the law of defamation as well as solicitors and other assistants. The trial took place between the 28th June 1994

⁵⁴ *Supra* note 15; the principle of equality was applied in a civil case in South Africa. In *Cary v Cary* 1999 (8) BCLR 877 (C), the applicant wife who was divorcing her husband had applied for contribution from him towards her legal costs. The Court found that its discretion was subject to the right of equality before the law among gender, which in turn required equality of arms or finances in the action for divorce.

and 13th December 1996 and lasted for 313 court days. McDonald's was awarded damages in the sum of GBP 60,000 which was reduced to GBP 40,000 on appeal. McDonald's did not apply for costs nor did they seek to enforce the award. The applicants argued, *inter alia*, that the proceedings were unfair and contravened article 6(1) of the European Convention as they were denied legal aid. The examination of the question whether legal aid was necessary for a fair hearing had to be determined by a number of criteria namely, the particular facts and circumstances of each case and the importance of what was at stake for the applicants in the proceedings, the complexity of the relevant law and procedure and the applicant's ability to represent himself effectively. In determining what was at stake for the applicants it was noted that although defamation proceedings did not have severe implications, the financial consequences were potentially severe. In relation to the complexity of the proceedings, it was noted that the trial lasted for 313 court days which were preceded by 28 interlocutory applications. The trial involved 40,000 pages of evidence and 130 oral witnesses. The appeal lasted for 28 days. Even though the applicants had been articulate and had received intermittent help from lawyers, this was insufficient and could not be compared to representation provided by a qualified lawyer with experience in the law of libel. The Court concluded that the denial of legal aid to the applicants had put them in an unacceptable state of inequality with McDonald's and that there had been a violation of article 6(1) of the Convention.

The interaction between the allocation and availability of resources on the one hand, and the necessity for the accused to present an effective defence on the other, is peculiar to cases in international criminal tribunals which tend to be very lengthy with hundreds of witnesses being called. This has naturally led to a notion of judicial

economy wherein the tribunals play a supervisory role and seek to cut down on the number of witnesses so as to save time and funds.⁵⁵ This position has undoubtedly witnessed a shift from adversarialism to inquisitorialism in the procedure of the ICTY, ICTR and SCSL.⁵⁶ A common criticism of these tribunals has been the disparity in the allocation of resources and insufficiency of funds allocated to the defence. Significant improvements have been made however as these tribunals strive to maintain their credibility. The lesson to be learnt from these tribunals is that resources are a fundamental pillar of the equality of arms principle. The principle has however been contextualised by the ICTY Appeals Chamber. The Chamber noted that within the context of international criminal trials the prosecution bears the burden of telling the entire story and establishing every element beyond reasonable doubt whereas that of the defence is poking specifically targeted holes in the prosecution's case, an endeavour which may require less time and fewer witnesses. This position shows that both sides may not necessarily be entitled to equal resources. What is fundamentally important is that one side is not significantly disadvantaged. In this regard the principle of proportionality rather than strict mathematical equation applies.⁵⁷

There is no denying that the curtailment of financial resources to accused persons facing charges in international criminal tribunals have been a matter of concern

⁵⁵ Knoops 2005 *Fordham International Law Journal* 1570; Mundis "From Common Law Towards Civil Law: The Evolution of the ICTY Rules of Procedure and Evidence" 2001 *Leiden Journal of International Law* 367.

⁵⁶ Mundis 2001 *Leiden Journal of International Law* 367. See note 8 above for a meaning of the abbreviations.

⁵⁷ *Prosecutor v Oric supra* note 53.

though improvements have resulted from criticisms.⁵⁸ This was exacerbated by the fact that the accused persons would seek witnesses who are in far off countries and scattered within those countries thereby making it difficult to trace them. Defence teams were allocated far fewer investigators thereby compromising their efforts to secure witnesses. Documents would mostly be in the hands of government functionaries who would often refuse to cooperate with the defence, denying them access. While the office of the prosecutor is generally an independent body with huge resources, defence teams of indigent accused persons would depend on the office of the Registrar for funds.⁵⁹

The jurisprudence of the tribunals has not been of assistance to the defence either. In *Prosecutor v Milutinovic*⁶⁰ the defence filed a motion seeking an order that the Registrar allocates additional funds in respect of pre-trial preparation in relation to Dragoljub Ojdanic. The defence argued that several particularities such as the scope of the case, the nature of the accused's defence, and the extended and complex legal issues involved, justified the request for additional funds. The Trial Chamber in denying the application mentioned that while accepting the Registrar's position that it is open to some flexibility in considering the allocation of additional funds, the defence should demonstrate exceptional circumstances or events beyond its influence if such requests are to be granted. The Trial Chamber stated that the system of

⁵⁸ Knoops 2005 *Fordham International Law Journal* 1583-1584.

⁵⁹ Knoops 2005 *Fordham International Law Journal* 1583; Jones, Carlton-Hanciles, Kah-Jallow, Scratch & Yillah "The Special Court for Sierra Leone: A Defence Perspective" 2004 *Journal of International Criminal Justice* 211 230.

⁶⁰ Case No. IT-99-37, Decision on Motion for Additional Funds (Jul 8, 2003); see also Knoops 2005 *Fordham International Law Journal* 1581-1582.

allocating flat fee payments to lawyers at the pre-trial stage, taking into account the complexity, should be interpreted in light of the need to ensure a fair trial for the accused and recognition of the limited resources available in the ICTY legal aid system. The Chamber also noted that counsel who represent indigent accuseds were quite aware of the system of remuneration at the pre-trial stage and the maximum amount allocated depending on the complexity of the case. The ICTR for its part declared that the principle of equality of arms does not entitle the defence to the same means and resources as the prosecution.⁶¹

While equality of arms does not mean precise equality of resources, it is clear that there is substantial inequality in the allocation of resources to the prosecution and defence in international tribunals.⁶² This is inevitable as they depend on the goodwill and financial contributions of states and are usually under pressure to wrap up proceedings. With limited budgets, they are obviously compelled to employ judicial economy with the result that equality of arms is compromised. The situation is similar on the domestic front. As the fight against crime is seen as a pressing social demand, state machineries established for this purpose attract funding, whereas the importance of allocating funds to protect individual human dignity is relegated to the background.

2 5 Conclusion

⁶¹ *Prosecutor v Kayishema & Ruzindana* Case No. ICTR 95-I-T, Judgment, P. 60 (May 21, 1999); see also Van Dijk & Van Hoof *Theory and Practice of the European Convention of Human Rights* 3 ed (1998) 430.

⁶² Knoop 2005 *Fordham International Law Journal* 1585.

The principle of equality of arms is an essential requirement of the right to fair trial and should form the foundation for the application of a number of rights contained in section 10 of the Constitution of Botswana. The section seeks to ensure procedural equality and demands that the defence is able to present its case on terms equal to those of the prosecution which has all the advantages and resources of the state on its side. The European Court has highlighted a number of fair trial principles that are consistent with equality of arms. They include the right to be present and confront one's adversary, the right to comment on the case of one's opponents, the right to have access to documents and to comment on them, the right to engage in adversarial proceedings and to present one's case under conditions that do not put one at a substantial disadvantage in relation to his opponent. Section 10 of the Constitution of Botswana contains procedural rights which are geared towards ensuring the protection of the accused in the criminal process and can be said to be the fundamental tool that guarantees the effective application of equality of arms. Though there is no express recognition and application of the principle of equality of arms in Botswana, there are certainly instances where it has received implicit countenance. Since section 10 of the Constitution is not dissimilar from article 6 of the European Convention, the transposition and application of the principle should not come under strain in the Botswana legal order. The principle is reflected in several rules and rights enumerated in article 6 of the European Convention which are also found in section 10 of the Constitution and couched in similar terms. These rules are mainly protective of the accused in the adversarial system which principally operates in Botswana. While European jurisprudence cannot bind Botswana courts, they would most certainly serve as a positive yardstick in determining the measure of equality in Botswana's adversarial system.

CHAPTER 3

EQUALITY OF ARMS IN THE CONTEXT OF ADVERSARIAL PROCEEDINGS

3 1 Introduction

Botswana's procedural system is predominantly adversarial. This denotes the engagement of opposing contestants in dispute. Their aim is to convince the judicial officer to find in their favour. In this regard, the system is interest-based. It is within the context of adversarialism that the principle of equality of arms receives full application. Adversarialism means that the parties to the proceedings are able to fully engage and participate in the proceedings. In this regard they should be guaranteed procedural equality as a prerequisite for fairness. Participation embraces a whole range of rights that empower the accused. Such rights include his ability to have knowledge of the prosecution's case including evidence that exonerates him, the ability to comment on the evidence and documents of the prosecution, to cross-examine prosecution witnesses and to reply to comments made by the prosecution. While the guarantee of equality presupposes adversarialism, the inquisitorial model and the role of the inquiring judge is certainly relevant to equality in that he is able to probe for evidence that might otherwise be suppressed by the parties in the adversarial system. Of importance however, is the realisation that strict ideological deference to a particular model is not the ideal situation. Fairness surpasses ideological attachment and the strengths of both systems may well be tapped to pursue the ends of justice. Therefore, convergence or hybrid systems are bound to emerge.

3 2 The adversarial and inquisitorial systems compared

Two main procedural designs have emerged in relation to criminal proceedings. Courts within the common law tradition employ the adversarial approach whereas courts of the civil law tradition mainly employ the inquisitorial approach. The most convenient way to highlight the distinctive characteristics of the adversarial system lies in a comparative analysis with the inquisitorial system. In the adversarial system, the parties to the contest each have an interest in establishing their case. The question of equality is central to the adversarial procedural system since it recognises two opposing parties engaged in a contest.¹ The system is a contest between the state and the accused with the judge as the umpire. The adversarial system depends on the parties to present their evidence and shape the legal issues.² The court does not inquire into the facts but rather adjudicates on the

¹ Safferling *Towards an International Criminal Procedure* (2001) 266; Wasek-Wiaderek *The Principle of "Equality of Arms" in Criminal Procedure under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries* (2000) 43; Damaska *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986) 5.

² Goldstein "Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure" 1974 *Stanford Law Review* 1009 1016; Fawcett *The Application of the European Convention on Human Rights* (1987) 154; Langbein *The Origins of Adversary Criminal Trial* (2005) 311; Salas, revised by Alvarez *The Role of the Judge* in Delmas-Marty & Spencer (eds) *European Criminal Procedures* (2002) 488 513; Bekker "The Undefended Accused/Defendant: A Brief Overview of the Development of the American, American Indian and South African Positions" 1991 *Comparative and International Law Journal of Southern Africa* 151 151-152; Damaska "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" 1973 *University of Pennsylvania Law Review* 506 510.

matter, based on the evidence produced by the parties.³ A contest can only be fair if there is equality between the parties.⁴

Jackson and Doran⁵ note that the parties rather than the judge dominate the adversarial process whereas the process is the reverse in the inquisitorial system. In other words, the adversarial process is a contest whereas the inquisitorial process is an inquiry.⁶ The adversarial process enhances the role of the parties, giving less attention to the role of the judge or inquirer who is more or less a passive umpire.⁷ The role of the judge is even more restricted at the preliminary stages of the contest.⁸

Jackson and Doran's analysis of the adversarial system brings two issues to mind. First, their contention that the role of the judge is limited at the trial stage is only a true

³ Andrews & Hirst *Andrews & Hirst on Criminal Evidence* 3 ed (1997) 1; Damaska 1973 *University of Pennsylvania Law Review* 510.

⁴ Van Koppen & Penrod *Adversarial or Inquisitorial: Comparing Systems* in Van Koppen & Penrod (eds) *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (2003) 1 2.

⁵ Jackson & Doran *Judgment Without Jury: Diplock Trials in the Adversary System* (1995) 61.

⁶ Damaska *The Faces of Justice* 5.

⁷ Snyman "The Accusatorial and Inquisitorial Approaches to Criminal Procedure: Some Points of Comparison Between the South African and Continental Systems" 1975 *Comparative and International Law Journal of Southern Africa* 100 103; Damaska *The Faces of Justice* 5; McEwan *Evidence and the Adversarial Process (The Modern Law)* 2 ed (1998) 12; Bekker 1991 *Comparative and International Law Journal of Southern Africa* 152; Schwikkard *Possibilities of Convergence* (2008) 12.

⁸ Jackson & Doran *Judgment Without Jury* 62.

reflection of the adversarial system insofar as he does not actually manage the pre-trial process. Though the arbiter plays no primary role during the investigations, he has latent control over it. It is he who ultimately determines the admissibility of evidence and adjudges the proper use of pre-trial procedures. Therefore, during the investigation stage, the police are required to adopt approaches that will survive judicial scrutiny.

Second, their contention that the parties dominate the proceedings while the adjudicator takes a back seat represents a traditionalist view and is not entirely true. This assertion is based on the fact that judges in adversarial systems are mainly expected to remain passive while the parties conduct their cases. But the issue should be viewed from the bigger picture having regard to the substance of the role played by each actor and not merely from a quantitative assessment. While it is true that the activity of the inquirer is limited in so far as the production and presentation of evidence is concerned, he maintains a vital role as far as the determination and application of procedural and evidential rules are concerned. As an arbiter, the manner in which he regulates the procedure might have a direct bearing on the outcome of the final decision. Evidence which is wrongly admitted or excluded might lead to one conclusion or the other. Misdirections on the law might result in erroneous conclusions or in prejudice to one or more of the parties. Failure to consider vital evidence may lead to the same occurrence.

The relationship between the arbiter and the parties is a triangular one, with the parties battling each other on opposite ends while endeavouring to present a credible case to the arbiter who is at the head of the triangle. He in turn relates to each party, making

decisions on procedural and evidential matters and determining the admissibility of evidence and the proper procedure to be followed, having regard to the circumstances. The centrality of the role of the arbiter is reflected by the fact that appeals are based on his errors. His misapplication of the law or facts may have led to an unsatisfactory conclusion. His failure to apply the proper procedure and to guard the constitutional rights of the accused are usually matters for appeal. A conclusion by an appellate court that the arbiter misdirected himself may lead to a reversal of his decision. The arbiter therefore plays a dynamic role in the adversarial process.

Further, the demand for fair trial and equality is increasingly reshaping the role of the judicial officer in the adversarial system. In this regard, he increasingly participates in proceedings so as to assist the unrepresented accused who is particularly procedurally disadvantaged in relation to the prosecution.

In systems governed by the inquisitorial procedure, the court has powers to investigate and can call for evidence relating to the facts in dispute.⁹ The investigation and trial are governed by “judicial management”. The judicial officer is involved in the investigative

⁹ Andrews & Hirst *Andrews & Hirst* 1; Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche & Van der Merwe *Criminal Procedure Handbook* 8 ed (2007) 21; Muller “The Effect of the Accusatorial System on the Child Witness” 2000 *Child Abuse Research in South Africa* 13; Osborne “Hearsay and the European Court of Human Rights” 1993 *Criminal Law Review* 255 258-259.

process and police interrogation during the pre-trial phase.¹⁰ In this way it is possible to identify innocent persons early in the process. Consequently, investigations may be discontinued against them without them having to go through trial.¹¹ The judicial officer also controls and directs the trial.¹² Subjective conviction more than formal rules of evidence plays a greater part in the determination of credibility and strength attached to the evidence.¹³ The inquisitorial process shifts the emphasis away from the contestants to the judge or inquirer. The inquiry is directed at seeking the truth.¹⁴ Not only is the judicial officer involved at the early stages of the contest, it is he and not the contestants who determine the ambit of the dispute.¹⁵ He has the primary responsibility of gathering evidence and the parties are relegated to being objects of the inquiry rather than being the

¹⁰ Delmas-Marty *The Juge D'Instruction; Do the English Really Need Him?* in Markesinis (ed) *The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century* (1994) 46 51; Osborne 1993 *Criminal Law Review* 259.

¹¹ Delmas-Marty *The Juge D'Instruction* 51; see also Packer *The Limits of the Criminal Sanction* (1968) 160.

¹² Roodt "Fact Finding, Fairness and Judicial Participation in Criminal Proceedings" 2003 *Codicillus* 68 69; McKillop "The Position of Accused Persons Under The Common Law System in Australia (More Particularly in New South Wales) and the Civil Law System in France" 2003 *University of New South Wales Law Journal* 515 516-517; Osborne 1993 *Criminal Law Review* 259.

¹³ Roodt 2003 *Codicillus* 69.

¹⁴ Crombag *Adversarial or Inquisitorial: Do We Have A Choice?* in Van Koppen & Penrod (eds) *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (2003) 21 23; Zappala *Human Rights in International Criminal Proceedings* (2003) 16; Salas, revised by Alvarez *The Role of the Judge* 513; Schwikkard *Possibilities* 13.

¹⁵ Roodt 2003 *Codicillus* 69.

subjects of the action with responsibility for the conduct of their cases.¹⁶ The judicial officer introduces or elicits evidence by first questioning the witnesses and the accused. Thereafter, he may permit the prosecution or defence to question the witnesses.¹⁷

The inquisitorial process is not guided by rigid rules of evidence as in the adversarial system. Indeed, in the inquisitorial process, the judicial officer decides the case on a subjective conclusion of the facts.¹⁸ This essentially means that judicial officer takes it upon himself to unearth the truth. The judicial officer is bound not only to consider the evidence adduced by the parties, but must ensure that the issues are investigated.¹⁹ In this regard he searches for the actual truth and not merely the formal truth as presented by the parties.²⁰

3 3 Empirical assessment of the differences

3 3 1 Legal representation

¹⁶ Roodt 2003 *Codicillus* 69.

¹⁷ Snyman 1975 *Comparative and International Law Journal of Southern Africa* 103.

¹⁸ Jackson & Doran *Judgment Without Jury* 69.

¹⁹ Snyman 1975 *Comparative and International Law Journal of Southern Africa* 103.

²⁰ Snyman 1975 *Comparative and International Law Journal of Southern Africa* 103; Hodgson "Codified Criminal Procedure and Human Rights: Some Observations on the French Experience" 2003 *Criminal Law Review* 165 177; Van den Wyngaert *Belgium* in Van den Wyngaert (ed) *Criminal Procedure Systems in the European Community* (1993) 1 14; Zappala *Human Rights* 20; Salas, revised by Alvarez *The Role of the Judge* 513.

The greatest asset of the adversarial system is the active participation of lawyers. Counsels on both sides are usually able to bring out crucial issues of law and facts to the attention of the court. Defence counsel effectively confronts the evidence of the prosecution, actively and positively guarding the interest of the accused. In the inquisitorial system, the role of defence counsel is limited. There is no active presentation of the defence from a defence perspective. It has been argued that the inquisitorial system is non-confrontational and that the prosecutor's role is not necessarily to procure a conviction, but to investigate and collect all evidence whether favourable or unfavourable to the accused.²¹ Clearly, this is not really true. On many occasions the prosecutor is partisan. Therefore, the fact that defence counsel does not really take an active part, results in procedural inequality. The non-confrontational approach of the inquisitorial system, and presentation of all evidence before the judge without contention appears to compromise the right of the accused to defend himself and present his case. The accused's right to a legal representative to present his case and his right to vigorously attack the evidence proffered against him are compromised. This defeats the principle of equality of arms which primarily operates as a defence right to protect the accused.

3 3 2 *Role of the parties*

²¹ Dugard *Introduction to Criminal Procedure* (1977) 135. Adversarial jurisdictions increasingly insist that the role of the prosecutor is to ensure that the ends of justice are met and not necessarily to secure a conviction; *S v Jija and Others* 1991 (2) SA 52 (E); *R v Boucher* (1954) 110 C.C.C. 263; *Mojagi v The State* [1985] B.L.R. 560 (CA) in relation to sentencing.

The passive role of the judge and the active role of the parties in the adversarial system inhibit the truth finding process. The contest between the parties is combative.²² As has been said, the judge has a passive role in the adversarial system and the responsibility of proof and presentation of evidence rests primarily with the parties.²³ In actual fact, judicial function involves making a decision on the basis of the evidence produced by the parties, rather than ascertaining the real truth.²⁴ The inquisitorial system on the other hand is not really a contest between the parties. The primary responsibility for fact finding rests with the judge.²⁵ In the inquisitorial model the judicial officer embarks on a full investigation of the entire case.²⁶ He actually pursues the truth by eliciting evidence from the witnesses and summoning witnesses where necessary.²⁷ This might assist the unrepresented accused who lacks the resources to investigate and present evidence, thereby putting the interests of the competing parties on an even keel. In this regard, equality is enhanced. However, the opportunity for attack and combat are lost and the

²² Volkmann-Schluck "Continental European Criminal Procedures: True or Illusive Model?" 1981 *American Journal of Criminal Law* 1 2; Damaska *The Faces of Justice* 3.

²³ Van der Merwe, Barton & Kemp *Plea Procedures in Summary Criminal Trials (An Analysis of Sections 112 and 115 of the Criminal Procedure Act 51 of 1977)* (1983) 11; Damaska *The Faces of Justice* 3; Salas, revised by Alvarez *The Role of the Judge* 505 & 513.

²⁴ Eggleston *Evidence, Proof and Probability* (1983) 32. Referring to the guilty plea in the adversarial trial, Jackson comments: "Adversary procedure is not concerned with the truth of the material facts but only the truth of facts put in issue by the accused. As a result pleas of guilty, if considered voluntary, are not investigated.", see Jackson "Two Methods of Proof in Criminal Procedure" 1988 *Modern Law Review* 549.

²⁵ Van der Merwe et al *Plea Procedures* 12; Damaska *The Faces of Justice* 3.

²⁶ Williams *The Proof of Guilt* 3 ed (1963) 28; Salas, revised by Alvarez *The Role of the Judge* 506.

²⁷ McEwan *Evidence and the Adversarial Process* 3-4; Crombag *Adversarial or Inquisitorial* 25.

accused is unable to enjoy full legal representation.²⁸ It must be noted however that though the civil law prosecutor has been touted as playing a neutral role, collecting evidence for and against the accused, seeking the material truth, and merely acting as a *ministere public*, this is not always true.²⁹ In actual fact he does have a partisan disposition.³⁰ He investigates the case, formulates the indictment, requests a conviction when he thinks that the accused is guilty, applies that the judge takes coercive measures as and when necessary and appeals against an acquittal when necessary.³¹

The adversarial system with its combative nature is likely to stifle the truth finding process. In the adversarial system, since it is the parties who present their case, they usually present their side of the case and not necessarily the truth. The aim of each party is to influence the court to arrive at a conclusion favourable to him. They are more interested in winning than in eliciting the truth.³² The adversarial lawyer presents the

²⁸ As Silver notes, “In a purely inquisitorial trial, the judge questions witnesses and otherwise develops the evidence, rendering virtually meaningless such protections as the right to present evidence and the right to counsel. These and other procedural rights of the accused are based on – and meaningful only in the context of – the common law tradition of the adversarial process, a process rooted in over two hundred years of constitutional and adjudicatory experience.”: Silver “Equality of Arms and the Adversarial Process: A New Constitutional Right” 1990 *Wisconsin Law Review* 1007 1033-1034.

²⁹ Van den Wyngaert *Belgium* 14.

³⁰ Van den Wyngaert *Belgium* 14.

³¹ Van den Wyngaert *Belgium* 14.

³² Brouwer “Inquisitorial and Adversary Procedures – A Comparative Analysis” 1981 *Australian Law Journal* 207.

evidence in a manner most suited to his client's case.³³ A vital witness may be omitted if the parties fear that his evidence might be unfavourable to their case.³⁴ The determination and outcome of the adversarial dispute may therefore depend on the ability and competence of the legal representation of one side or the other,³⁵ rather than the ability of the arbiter to discover the factual truth. The adversarial cross-examination has been hailed as a very effective instrument of seeking out contradictions and inconsistencies and finally arriving at the truth.³⁶ This instrument is however not as powerful as the ability of the judge to fish out the evidence by demanding the production of evidence and witnesses, thereby revealing the full facts. Still, the adversarial process's major weakness is that it operates on the notion that each party 'owns' its evidence.³⁷ This is a major

³³ McEwan *Evidence and the Adversarial Process* 3. It has been stated however that in both systems, the aim of the process is truth finding and procedural fairness: Sanders & Young *Criminal Justice* (1994) 8; Wasek-Wiaderek *Equality of Arms* 43.

³⁴ McEwan *Evidence and the Adversarial Process* 4. The author writes at 3: "Since the judge is not entitled to demand that further evidence be produced, no participant in the courtroom process has an immediate obligation towards the truth."

³⁵ Van der Merwe et al *Plea Procedures* 13; McEwan *Evidence and the Adversarial Process* 9.

³⁶ Devlin *The Judge* (1979) 61: "The English say that the best way of getting at the truth is to have each party dig for the facts that help it; between them they will bring all to light...Two prejudiced searchers starting from opposite ends of the field will between them be less likely to miss anything than the impartial searcher starting in the middle." Cited in McEwan *Evidence and the Adversarial Process* 4; Choo *Hearsay and Confrontation in Criminal Trials* (1996) 32; for a criticism of this view see Jolowicz "Adversarial and Inquisitorial Models of Civil Procedure" 2003 *International and Comparative Law Quarterly* (2003) 281 283.

³⁷ McEwan *Co-operative Justice and the Adversarial Criminal Trial: Lessons from the Woolf Report* in Doran & Jackson (eds) *The Judicial Role in Criminal Proceedings* (2000) 171 176.

hurdle in attaining the truth but can be overcome by the capacity of the judge to seek out the truth – a matter which is more fully dealt with in paragraph 3.3.4 below. It is difficult to strike an equal balance between the parties in such circumstances. In criminal cases, it is mostly the prosecution that has monopoly on the evidence. This results in procedural inequality which can only be remedied if the prosecution is obliged to make its evidence available to the defence. This results in procedural balance and enables the accused to fully defend himself.

3.3.3 Equality

Another criticism of the adversarial system is founded on the proposition that the state and individual do not stand on equal footing. The state has limitless resources for the detection and investigation of crime, and to prove the accused's guilt.³⁸ The nature and extent of state resources cannot be matched by the individual to the extent that there is no equality of arms between the two sides.³⁹ Placing the burden of proof on the state does not necessarily redress the imbalance.⁴⁰ It is alleged that the inquisitorial system on the other hand, removes the possibility of one party dominating the proceedings such as where the accused is unrepresented.⁴¹ In this context, the interests of the accused are not properly protected. But the real fact of the issue is that there are several procedural and evidential rules which are constitutionally protective measures that serve to redress the imbalance and to empower the accused in the face of the seemingly ubiquitous powers of

³⁸ Walsh *Criminal Procedure* (2002) 5.

³⁹ Walsh *Criminal Procedure* (2002) 5.

⁴⁰ Walsh *Criminal Procedure* (2002) 5.

⁴¹ Jackson & Doran *Judgment Without Jury* 67.

the state. These include the right to silence, the privilege against self-incrimination, the right to legal representation, restrictions in relation to the admissibility of confessions, and provisions enabling an impecunious accused to approach the court to subpoena witnesses on his behalf.⁴² It must be noted further that in several adversarial jurisdictions, the judge does not just sit in court as a lame arbiter. In Botswana for example, in practice, judicial officers use their discretion to ensure that the rights of unrepresented accused are protected. A judicial officer will not be slow in ensuring that prosecutors comply strictly with the rules of procedure and evidence when the accused is unrepresented.

3 3 4 *Judicial participation*

The demand for a fair trial and the requirement to maintain balance between the parties often requires that the judicial officer participates in the adversarial contest often to the aid of the unrepresented accused. In this way, the judicial officer becomes an active participant. The courts have developed a number of legal duties in relation to an accused, non-compliance of which may attract an acquittal on appeal if the accused is prejudiced as a result. For example, it is a fundamental duty of the courts to keep the accused fully informed of his rights at every stage of the trial. These rights should be fully explained and it should be ensured that the accused understands them. They include the duty to inform the accused of his right to legal representation, the duty to inform him of his rights and options at the close of the prosecution's case, the duty to inform him of his right of cross-examination and the purpose thereof, the duty to explain the facts of the case in

⁴² S 198 of the Criminal Procedure and Evidence Act.

detail and to give him an opportunity to admit or deny every element of the offence where he pleads guilty to a charge.

Though Botswana has an adversarial procedural system, it is laced with traces of inquisitorial constructs. These are in the form of statutory powers. For example, the courts are empowered at any stage of the proceedings to subpoena and examine any witness or to recall and re-examine any witness.⁴³ It must be noted however that the application of the adversarial model has been reiterated by judicial pronouncements. In the case of *Macheng v The State*,⁴⁴ the Court of Appeal rejected the views of O'Brien Quinn CJ in *Macheng v The State*⁴⁵ that a judge is not a mere umpire and had a duty to call a witness who is vital to the case of the accused. Insisting on the adversarial approach, the Court, citing the case of an unrepresented accused who is in custody as an exception, stated that it is for the accused to present his witnesses in court. The Court held that failure of a judge to call a witness would not normally be a ground for appeal and that section 201⁴⁶ should only be resorted to where its use would be essential to

⁴³ S 201 of the Criminal Procedure and Evidence Act; *Boitshupo v The State* [2007] 3 B.L.R. 557.

⁴⁴ [1985] B.L.R. 533 (CA); *Ronald Lemme v The State* [1985] B.L.R. 576 (CA).

⁴⁵ [1985] B.L.R. 294; "...I would point out that a magistrate does not sit in court merely to come to a decision on the evidence adduced but he also has the important role of directing and controlling the proceedings in accordance with recognised rules of evidence and procedure": *Kalabeng v The State* [1983] B.L.R. 106 112F-G.

⁴⁶ This section empowers courts to call any person as a witness if it appears that his evidence is essential for the purpose of arriving at a just decision.

achieve justice. It is submitted, therefore, that the Court of Appeal in *Macheng*⁴⁷ permits a court to call a witness when necessary. This position has been followed in subsequent case law. In *Nkgageng v The State*⁴⁸ the Court suggested that a court should call an expert witness to testify if in its opinion the contents of his affidavit are insufficient. It seems that the Court, which did not consider *Macheng*, went too far. Though courts should call witnesses where the interest of justice so dictates, it seems that within the context of this case, the Court's suggestion would amount to the judicial officer taking over the prosecution's case. The result is that the court will be descending into the arena to fill in a major gap in the prosecution's case. Whereas in principle the courts should call witnesses if the justice of the case so demands, one does not see how the justice of this particular case demanded the calling of the witness in question. In fact, the offence in this case⁴⁹ involved unlawful possession of dagga, a victimless crime. Also, the state has trained prosecutors who are expected to conduct their cases with candour. Under the circumstances therefore, the justice of the case did not deserve the intervention of the judicial officer.

The courts may put questions to any person who is available in court even if he was not subpoenaed.⁵⁰ The purpose of such powers is to assist the court in arriving at a just decision.⁵¹ South African jurisprudence – even pre-1994 jurisprudence for that matter – it

⁴⁷ *Supra* note 44.

⁴⁸ [1984] B.L.R. 230.

⁴⁹ *Supra* note 48.

⁵⁰ S 201 of the Criminal Procedure and Evidence Act; *Ronald Lemme v The State supra* note 44.

⁵¹ See *Keipheditse v The State* [1994] B.L.R. 204.

must be noted, supports the inquisitorial methodology to the extent that it aids truth finding and the realisation of justice,⁵² even though that country operates on the adversarial model. Perhaps courts should recognise truth finding as their ultimate goal and should not be satisfied with the limited truth presented by the parties.⁵³ This will no doubt lead to visible changes and deviations in the criminal procedural methodology. But a system based on a pragmatic constitutional procedural process is more important than legal ideologies, traditions, methods and models. Therefore, if the result of this shift assists a disadvantaged accused, it might be the right route to follow as long as a proper structure based on effectiveness, efficiency and guided principles is developed.

3 4 Convergence of features

The challenges of a modern society including rising crime, terrorism, organised crime, drug trafficking, victims' rights, costs and delays have led states to reform their systems to the extent that they are willing to borrow from each other.⁵⁴ Regardless of the system,

⁵² *R v Hepworth* 1928 AD 265 277; *R v Majosi and Others* 1956 (1) SA 167 (N); *S v Mseleku and Others* 2006 (2) SACR 237.

⁵³ Roodt 2003 *Codicillus* 83.

⁵⁴ Jackson "The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?" 2005 *Modern Law Review* 737; a report of the South African Law Commission reads – "During the past five years significant changes have been brought about in the administration of criminal justice. Many of them are directed at the problems caused by the adversarial mode of criminal procedure as outlined above. The reforms developed along two diverging tracks – the one seeking to strengthen the adversarial process, the other leading to a more inquisitorial process.": SA Law Commission *Simplification of Criminal Procedure (A More Inquisitorial Approach to Criminal Procedure – Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of*

procedural jurisprudence and practice can reconcile their differing competing values.⁵⁵ The characteristics, methodologies, reasoning and values of each procedural system can support each other.⁵⁶ These values are not to be regarded as distinct features that operate in the abstract, but as tools central to the approximation of truth.⁵⁷ The features of both systems continue to converge⁵⁸ in what must be seen as continuing refinements geared at arriving at proper decisions and ensuring that the interests of justice are served. In the past, certain features of the adversarial system were pitted as sterling characteristics applicable only to the Anglo-American tradition. But this is no longer the position.⁵⁹ For example, the German Criminal Procedure Code of 1877, and article 6 of the European Convention which has been adopted by several European countries operating the civil tradition, contain rules which are in harmony with the adversarial system.⁶⁰ Recent reforms in Italy compelled an author to declare that some civil law systems have “crossed

Trials) Discussion Paper 96 Project 73 (2001) available on <http://www.saflii.org/za/other/zalc/dp> (accessed 11 December 2007) para 3.1.

⁵⁵ Roodt 2003 *Codicillus* 70.

⁵⁶ Roodt 2003 *Codicillus* 70.

⁵⁷ Roodt 2003 *Codicillus* 70.

⁵⁸ Snyman 1975 *Comparative and International Law Journal of Southern Africa* 101; Dugard “1570 Revisited: An Examination of South African Criminal Procedure and the ‘Hiemstra Proposals’” 1970 *South African Law Journal* 410 412; Van Koppen & Penrod *Adversarial or Inquisitorial* 1; Markenisis (ed) *The Gradual Convergence* (1994) 31; for an argument that no convergence is taking place between the systems see Legrand “European Legal Systems are not Converging” 1996 *International and Comparative Law Quarterly* 52; Jolowicz 2003 *International and Comparative Law Quarterly* 281.

⁵⁹ See the judgment of Franfurter J in the case of *Watts v Indiana* 338 U.S. 49 (1949).

⁶⁰ Jackson & Doran *Judge Without Jury* 57.

the Rubicon” into the zone of adversarial systems.⁶¹ The oral adversarial tradition and the written inquisitorial tradition are constantly borrowing from each other as both systems continue to converge.⁶² In civil law countries, increasing importance is being given to participation by the parties and their lawyers, with a concomitant shift from pre-trial processes to trial adjudication, oral evidence and the right to confrontation.⁶³ Movement from adversarialism in common law countries include the requirement of disclosure by the parties, the use of pre-trial procedures to protect vulnerable witnesses, greater judicial management of proceedings and curtailing the right to silence in some instances.⁶⁴ Regardless of whatever virtue is attached to either of these systems, what is important is that countries practising both systems have over the years sought to develop them and

⁶¹ Damaska “Models of Criminal Procedure” 2001 *Zbornik* 477 485. Cited in Jackson 2005 *Modern Law Review* 741; “Legal systems are in a constant state of flux and consequently the roles played by those who operate them must constantly be adjusted. Even when the continental systems borrow certain elements of the English model, as is the case in Italy for example, they cannot disregard the sociological burdens that they have inherited along with the inquisitorial system, a system rooted in a centuries-old tradition of State authority”: Salas, revised by Alvarez *The Role of the Judge* 489.

⁶² Jackson 2005 *Modern Law Review* 738; Bradley *Criminal Procedure: A Worldwide Study* (1998) xxi; Van Kessel *European Trends Towards Adversary Styles in Procedure and Evidence* in Feeley & Miyazawa (eds) *The Japanese Adversary System in Context* (2002) 225 see also Schwikkard *Possibilities* 13-14.

⁶³ Jackson 2005 *Modern Law Review* 738; Van Kessel *European Trends* 227.

⁶⁴ Jackson 2005 *Modern Law Review* 738; Van Kessel *European Trends* 227; McEwan *Co-operative Justice* 171; Jackson *The Adversary Trial and Trial by Judge Alone* in McConville & Wilson (eds) *Handbook of the Criminal Justice Process* (2002) 335; Smith “Criminal Law – The Future” 2004 *Criminal Law Review* 971 972-973.

have not shied away from moving progressively towards internationally recognised human right standards.⁶⁵

It is important that the system of criminal procedure of any jurisdiction should be able to balance the interests of the public with the liberties of the individual.⁶⁶ A criminal justice system based solely on interest-based considerations whereby each party engages in combat solely for the purpose of winning a case is no longer viable in contemporary legal systems. The primary rules of procedure should enable the court to arrive at the truth and ensure that the parties act fairly and receive fair treatment.

3 5 Adversarialism and the interest-based system

3 5 1 Binary application

The adversarial system is interest-based. The interest-based system manifests itself in a binary and a comprehensive form. The binary form finds application in the competing interests of the prosecution and accused.⁶⁷ It represents the limited and immediate interests operating in the criminal justice system. In the criminal justice system, the prosecution and the accused have traditionally been the focus of proceedings. Their

⁶⁵ Dugard *Introduction to Criminal Procedure* 135.

⁶⁶ Dugard *Introduction to Criminal Procedure* 135.

⁶⁷ In *Ragg v Magistrates' Court of Victoria & Corcoris* [2008] VSC 1 Bell J at para 45 notes: "The criminal trial is 'an accusatory and adversarial process' ...The rationale is that the general objectives of the criminal justice system – finding the truth and attributing criminal responsibility – are best achieved by a trial conducted before an independent and impartial judge, or judge and jury, in which both sides participate according to their best interests."

interests in the system are immediate. In its crude state, criminal proceedings was about condemning the accused. However, with time, the accused has become a focus of protection. The consequences of a conviction are grave and the protection of the accused is essential to a fair trial. But the protection of the public from crime cannot be left behind. In consequence, criminal proceedings are premised on two stakes. The first is the development and more recently, constitutionalisation of fair trial rules that are meant to protect the interests of the accused. These rules stem from the realisation that the accused runs the greatest risk in the event of a failure of justice. The second stake falls under the power of the state. The state has powers to legislate laws governing the criminal process. The state from time to time passes laws in the interest of crime prevention and public protection. This presents a situation whereby the protection of the accused can be compromised as the interests represented by each stake inevitably compete with each other. No doubt, the right of the accused features strongly within the concept of individual rights, a concept that has gained fundamental importance and recognition. The emergence and prominence of individual rights and its displacement of other interests play a central role in criminal proceedings. Unfortunately, in the struggle of managing the interests of the accused on the one hand and those of the state and public on the other, other interests such as those of victims have been sidelined.

3 5 2 Comprehensive application

The credibility of the criminal justice system is measured by various actors. These actors fall into various categories depending on how they interrelate with the system. The actors in this regard can be categorised into observers and participants. Each category has

various interests in relation to the system, depending on how it interacts with the system and how the workings of the system affect individuals or their concerns. In relation to the observers, however, their connection with the system is based on perception. Their perception is based on how the system is able to demonstrate its regard for equality and fairness. Credibility is determined by judicial application of standards of protection and constitutional and legal guarantees. The degree to which the courts are willing to enforce these guarantees is central to the grades scored by legal systems. For example, in systems where courts rigorously enforce rights, the executive is constrained to respect the rights of the individual. In effect, the courts manage, influence and supervise standards of human rights. Whereas the participants are directly affected by the system, the observers may not necessarily be affected by the decisions of the courts. The observers nevertheless have an interest in the system. Both participants and observers therefore form part of the interest-based system.

3 5 2 1 Objective and subjective observers

There are two types of observers. The objective observer and subjective observer. The objective observer includes persons who are able to make independent, informed and detached assessment of the system. Such persons are not directly affected by the outcome of litigation. A proper exposure to the complexities of the law equips such persons to make a proper examination and analysis of the system and its decisions. Persons such as lawyers, academics and journalists belong to this group. They measure credibility on the basis of court processes, procedural rules and their implementation. Measuring factors include the speed of trials and unnecessary delays, openness, the application of equality,

independence and the absence of corruption. The objective observer does not have a specific interest. His interest is in seeing justice being done. When justice is done in a transparent and open manner, the objective observer has confidence in the system. If the perception of the system by the multitude of objective observers who form part of the general public is positive, it can be said that there is general public confidence in the system.

Like the objective observer, the subjective observer is not directly involved or affected by litigation. However, the subjective observer has an obsession or takes on a cause. Probably he believes that all offenders of certain kinds of offences deserve sterner punishment or long term imprisonment. Therefore, any system that does not continuously implement his chosen form of punishment is not performing justice. In this regard, he has an interest in the way the system operates. He is fixated and stubbornly opinionated in his views. He creates his own norms and values of the system and benchmarks the system against them. These are his personal norms and values. Personal norms are usually drastic or based on what he perceives as problem-solving, regardless of basic and fundamental legal values. To this group belong certain members of the public, including activists. For example, an environmental or gender activist might steadfastly want to see a crackdown on all crimes directed at the object of his protection, the environment or violent spouses.

3 5 2 2 Myopic and open participants

There is of course the participant who is directly affected by the system. The outcome of the procedures and processes impact on his life. Because of this, his analysis of the

system will tend to be based on subjective inclinations. His judgment is conditioned by the result of the process or his expectations of the process. His expectations might be reasonably subjective, unreasonable, unrealistic or self-serving. Notwithstanding, in each case, he assesses the system based on whether his interests or expectations are met. To this group belong the accused, victim of crime and the state. The accused who has pleaded not guilty wants to be acquitted while the state and the victim expect the condemnation of the perceived offender.

There are two kinds of participants. First, there is the myopic participant. The myopic participant generally wants an efficient legal system that convicts offenders or perceived offenders regardless of whether the system is seen as high-handed on offenders or whether arbitrary procedures are used. When the myopic participant says that he wants justice, what he really wants is revenge. He measures credibility on the basis of his individual nuances, situation, background, and the capacity in which he comes into contact with the legal system. His assessment of the system is therefore strictly interest-based.

The second kind of participant is the open participant. Though he has an interest-based stance in that he wants the case to be decided in his favour, he is able to comprehend the system and appreciate the reasoning of the court even when he does not get his just desserts. As long as the process is transparent he is willing to follow them and to accept that evidentially and legally, the results could not have favoured him. He accepts the decision of the courts and the process on which it is based, and moves on. Alternatively,

he follows regular appeal procedures if he believes that the decision of the trial court is wrong.

As has been said, the binary application of the interest-based system relates to the interests of the prosecution and the accused. Unfortunately, the prosecution has greater advantages due to its support by the state. It is the state's responsibility to fight crime. It does so partly by investigating and prosecuting alleged offenders. Therefore, the police and prosecution are state institutions. They benefit from state funding and resources. The investigative powers and resources of the police and prosecution are enormous when compared with the accused, thereby making the accused the weaker party. An accused, therefore, is disadvantaged during investigations and as a courtroom adversary. Equality of arms is only guaranteed if the accused is reasonably funded in preparing and presenting his defence.

Equality between the parties and a recognition of the right of the accused to defend himself and to present his defence bear legitimate reference in the mind of each observer and participant. The ability of the accused to call and cross-examine witnesses, to have access to information, to give evidence, and to seek legal representation are standards which are crucial to the measuring of the application of the equality principle. The candour with which these standards are administered by the court and perceived by the observer and participant is the basis for the acceptance and credibility of the adversarial system. That these standards be applied fairly and equally is crucial to public perception of the judicial process, a process that is alien to the majority of the public and can easily

be misinterpreted and misunderstood. The operative interests of the parties in the adversarial system demand that each party is afforded procedural equality.

Inevitably, fairness is the operative denominator that the observer and participant invoke in the deliberation of their interests. Interests are considered as met when the system is seen as fair. Equality of arms is a mainstay in the consideration of fairness. A recognition of the principle undoubtedly promotes and strengthens the court's appreciation of the accused's access to substantive and procedural justice, a better application of rules of procedure, and the strengthening of those rules that are meant to cater for the disadvantaged accused in light of the powers of the state. This will in turn satisfy the observer and participant that the requirements of fairness have been met.

3 6 The right to adversarial proceedings

Adversarialism is interest-based. In this regard, fairness demands that both sides to the contest participate equally. Central to the process is formal equality between the parties,⁶⁸ allowing a party to respond to each step taken by the opponent. This response component ensures that no party is disadvantaged and is central to the realisation of equality. In *Milatová v Czech Republic*,⁶⁹ the right to adversarial proceedings was emphasised when the Court noted:

⁶⁸ Van Koppen & Penrod *Adversarial or Inquisitorial* 2; McEwan *Evidence and the Adversarial Process* 1; Crombag *Adversarial or Inquisitorial* 22; Safferling *International Criminal Procedure* 266.

⁶⁹ (2007) 45 E.H.R.R. 534; in *Singer v United States* 380 U.S. 24 (1965), the Court noted that the Constitution recognises an adversarial system as the proper method of determining guilt; see also *Rowe and Davis v United Kingdom* (2000) 30 E.H.R.R. 1.

“The Court further reiterates that the concept of a fair hearing implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court’s decision.”⁷⁰

A whole range of continental inquisitorial procedures have been held by the European Court to flout the principle of equality of arms due to the absence of the response component. These include procedures that deny the accused the opportunity to participate in the proceedings, to respond to the evidence or the prosecutor’s conduct of the case and to properly articulate his defence. In *Borgers v Belgium*⁷¹ the Court held that there was lack of equal standing between the *Procureur-General* and the appellant before the Court of Cassation and that this breached article 6(1) of the European Convention. In particular, the *Procureur-General* was entitled to state his opinion in open court as to whether the appellant’s appeal in a criminal case should be allowed and then retire with the court to take part (without a vote) in its discussion of the appeal. By contrast, the appellant and his lawyer could not respond to the *Procureur-General’s* opinion or retire with the judges.

⁷⁰ Para 59; See *Nideröst-Huber v Switzerland* (1998) 25 E.H.R.R. 709; “In order to comply with article 6, judicial proceedings must be adversarial, a concept which is similar to that of equality of arms. The right to adversarial proceedings means, in principle, the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed.”: Clements, Mole & Simmons *European Human Rights: Taking A Case under the Convention* (1999) 2 ed 165.

⁷¹ (1993) 15 E.H.R.R. 92.

The Court accepted that the *Procureur-General* was not part of the prosecution and that his function was to give an independent and impartial advice to the court in the manner of an advocate-general. However, once he mentioned an opinion on the merits of an appellant's appeal, he became an opponent to whose arguments the appellant should have been able to respond. In reaching its decision the Court emphasised the importance of "appearances" and the increased sensitivity of the public to the fair administration of justice.

*Pataki and Dunshirn v Austria*⁷² concerned a practice in terms of which the Public Prosecutor could present arguments before the Austrian Criminal Court of Appeal whilst the appellant had no right of audience. The Commission held that the absence of the appellant constituted an inequality which infringed the right to a fair trial. Austria changed its law following the Commission's finding against it.

In *Stran Greek Refineries and Stratis Andreadis v Greece*⁷³ the Court dealt with a Greek legislation which made inevitable a decision against the appellant in his pending civil claim against the government. In this legislation the Greek parliament provided that all clauses including arbitration clauses in preferential contracts concluded under the military regime were revoked and that any arbitration was null and void. It also provided that all claims arising from the termination of such contracts were barred by statute. The Court

⁷² Nos. 596/59 and 789/60, YB 714 (1983) Com. Rep.

⁷³ (1995) 19 E.H.R.R. 293; see Harris, O'Boyle & Warbick *Law of the European Convention on Human Rights* (1995) 209; Simor & Emmerson *Human Rights Practice* (2001) para 6.085; Reid *A Practitioner's Guide to the European Convention on Human Rights* (2008) 118.

found a breach of article 6(1), stating that equality of arms precluded any interference by the legislature with the administration of justice designed to influence the determination of the dispute. The Court noted that the legislature's intervention had taken place when judicial proceedings in which the state was a party, was pending. The Court held that the notion of fair trial precluded any interference with the administration of justice by the legislature designed to influence the adjudication of a legal dispute.

The underlying principle of these cases is that adversarial procedure, including procedural equality, is fundamental to a fair trial. Procedural equality includes the right of audience and an opportunity for the accused to comment on the case of the prosecution and the prohibition of measures, including legislative measures, which disadvantage the accused procedurally. The cases signify that procedural rules that operate to the disadvantage to the accused will fall foul of the principle of equality of arms.

Though both the adversarial and inquisitorial models set out to do justice, the practical methods of achieving it are different.⁷⁴ The assumed position in the adversarial tradition is that justice is served if the parties are treated equally in presenting their case.⁷⁵ Fairness is the mainstay even at the sacrifice of attaining the truth.⁷⁶ In the inquisitorial system on the other hand, the search for the truth is the ultimate goal even at the instance of

⁷⁴ Crombag *Adversarial or Inquisitorial* 23.

⁷⁵ Crombag *Adversarial or Inquisitorial* 23; Reid notes that equality of arms is linked to considerations that proceedings must be adversarial: Reid *A Practitioner's Guide* 114.

⁷⁶ Crombag *Adversarial or Inquisitorial* 24.

sacrificing fair play and equality.⁷⁷ The inquisitorial system does not countenance equality and the judge is the instrument of truth finding. The philosophy of inquisitorialism is that, since the parties to a contest are basically interested in presenting their own side of the case, a “detached and wise adjudicator, using whichever method he deems fit, is much better placed to do so [finding the truth].”⁷⁸ The inquisitorial argument is that the outcome of a case should not depend on which party has a better advocate or is able to present a “highly selective” version of its case.⁷⁹

The extent to which the parties are involved in the criminal process implicates the equality of the process. Adversarialism guarantees an involvement of the accused in the trial process. The accused has an immediate presence in that he presents his evidence and cross-examines prosecution witnesses. Inquisitorialism on the other hand involves the court having access to a dossier of evidence against the accused and the accused’s right to confrontation which demands that he faces and contends with his in court is limited. Though it may be argued that the contents of the dossier are of no real consequence unless produced orally in evidence, the presiding officer might be indirectly affected by knowledge of their contents, often to the detriment of the accused.⁸⁰ Adversarialism on the other hand functions around equality as it recognises two opposing parties engaged in

⁷⁷ Crombag *Adversarial or Inquisitorial* 24.

⁷⁸ Crombag *Adversarial or Inquisitorial* 24.

⁷⁹ McEwan *Evidence and the Adversarial Process* 11.

⁸⁰ Safferling *International Criminal Procedure* 267.

combat.⁸¹ The procedural polarity of adversarialism therefore enables the parties to present their respective cases uninhibited.⁸² This is essential for fairness.

3 7 Conclusion

Clearly and without any doubt, the application of the principle of equality of arms involves the right to confront, to make and respond to submissions, to cross-examine the opponent's witnesses and to object to inadmissible evidence. These are underlying characteristics of the adversarial system which implies that the application of the principle lies within the domain of adversarialism. In the inquisitorial system by contrast, a dossier forms part of the evidence before the court. The dossier is completed at the pre-trial stage. The dossier is completed by an investigating judge or public prosecutor and their conclusions as well as reports from the testimony of witnesses are placed before the court in advance, thereby considerably influencing the court.⁸³ The inquisitorial system therefore severely restricts the right of the accused to defend himself. Indeed, the European Court and Commission have on a number of occasions found continental procedures to flout the principle.

⁸¹ Safferling *International Criminal Procedure* 266; Zappala notes that the adversarial system is more suitable to offering protection to the rights of the accused: Zappala *Human Rights* 16.

⁸² Crombag *Adversarial or Inquisitorial* 23.

⁸³ Stavros *The Guarantees for the Accused Person Under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and A Comparison with other Instruments* (1993) 231; Osborne 1993 *Criminal Law Review* 258-259; Wasek-Wiaderek *Equality of Arms* 27; Safferling *International Criminal Procedure* 266.

It must be noted however that employing the active inquisitorial judge does have some positive effects in that he is able to elicit evidence and shed more light on the issues, a situation that might not be tenable in the adversarial framework. Rather than relying on evidence which is presented to him and the limitations which this might cause, he is able to unearth the truth. In this process he may be able to assist the unrepresented accused and create some form of balance. While the Botswana criminal procedural system is predominantly adversarial, the practice of judicial intervention in assisting the unrepresented accused serves well to redress the imbalances in the system. While both systems can contribute positively to the enhanced application of the principle, it must be noted that conceptually, the principle of equality of arms demands the adversarial process. Article 6 of the European Convention from which the principle derives application and its attendant rights upon which it grew, is principally framed on the adversarial context. It is not surprising therefore that the procedures of civil law jurisdictions have on several occasions fallen foul of the principle. The principle involves giving appropriate recognition to the presence of the opposing sides, the very premise upon which adversarialism operates. Inevitably, the principle demands a right to adversarial proceedings.

CHAPTER 4

NORMATIVE VALUE AND LEGAL RECOGNITION OF THE PRINCIPLE OF EQUALITY OF ARMS IN DOMESTIC LAW

4 1 Introduction

How does the principle of equality of arms become relevant in the scheme of the Botswana legal order. After all, it is of international origin and popularly limited to international procedural law. Moreover, its normative value does not qualify it as “law”. But perhaps, the inability to treat the principle strictly as law gives it some measure of flexibility which should make its application even more convenient. To be able to justify the application of the principle in Botswana’s legal order, it is necessary to determine its normative value. Comparative analysis of a number of jurisdictions demonstrates that the principle has received application in domestic law. There is therefore some precedent for the application of the principle in the Botswana legal order.

4 2 Normative value

Equality in proceedings is recognised in international law. It is engraved in article 14(3)(e) of the ICCPR and article 6 of the European Convention. The European Court has formulated equality of arms as a “principle”, on the basis of article 6 of the European Convention. It has also been coined as a “requirement” or “concept”.¹ However, it would appear that it has not attained the status of law. Toney describes the principle as “a lens through which the requisite procedural fairness in any criminal proceeding can be ascertained. It is a central element of the concept of a fair trial guaranteed by article 6 of

¹ Trechsel *Human Rights in Criminal Proceedings* (2005) 97.

the Convention.”² The principle therefore remains an essential element of a fair trial, non-observance of which may render a trial unfair.³ In *Foucher v France*,⁴ it was described as “...one of the features of the wider concept of a fair trial...”⁵ Consequently, the principle is not recognised as a right.⁶ This results in relativity in its application such that there may be no violation if both parties are equally deprived of a fair trial right.⁷ Thus, in the case of *Jasper v United Kingdom*⁸ the applicant complained that the results of wire-tapping were withheld from the defence. The Court stated that both the prosecution and defence were prohibited from adducing any evidence which tended to suggest that calls

² Toney “English Criminal Procedure Under Article 6 of the European Convention on Human Rights: Implications for Custodial Interrogation Practices” 2002 *Houston Journal of International Law* 411 438; Bufford notes that the principle “is recogni[s]ed as an uncodified element of the right to a fair trial provided in Article 6. Thus, Article 6 makes ‘equality of arms’ a core element of the adversary criminal process.”: Bufford “Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision and the European Court of Justice” 2007 *Northwestern Journal of International Law and Business* 351 396; while recognising equality of arms as a principle, Silver advocates for the need to “...recogni[s]e an implied constitutional right to the equality of arms.”: Silver “Equality of Arms and the Adversarial Process: A New Constitutional Right” 1990 *Wisconsin Law Review* 1007 1032 &1041 respectively.

³ Conte *The Judicial Process* in Conte, Davidson & Burchill (eds) *Defining Civil and Political Rights (The Jurisprudence of the United Nations Human Rights Committee)* (2004) 117 122; Robertson & Merrills *Human Rights in Europe* 3 ed (1993) 108.

⁴ (1998) 25 E.H.R.R. 234.

⁵ Para 34.

⁶ Bufford 2007 *Northwestern Journal of International Law and Business* 396.

⁷ Trechsel *Human Rights* 97.

⁸ (2000) 30 E.H.R.R. 441.

had been intercepted by the state and therefore the principle was respected. It has also been held that there was no violation of the principle where both the prosecution and accused were absent during an application for leave to appeal proceedings.⁹ It can be seen therefore that a violation of the principle attracts consequences when the accused has suffered a disadvantage and not because he was deprived of a “right.” It applies in the criminal process in an overlapping form, giving more expression and reality in the application of procedural rights.

The Human Rights Committee of the United Nations in its interpretation of article 14 of the ICCPR has linked the normative footprint of the principle to the right of equality before the courts.¹⁰ According to the Committee, the right to equality before the courts, which the article sets to guarantee, is important in safeguarding the rule of law. According to the Committee:

“The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.”¹¹

⁹ *X v United Kingdom* Application 5871/72; *X v United Kingdom* Application 7413/76; *EM v Norway* Application 20087/92.

¹⁰ *General Comment No 32 CCPR/C/GC/32*.

¹¹ Para 8.

The right to equality before the courts ensures equality of arms. This guarantees that the same procedural rights are available to both parties unless distinctions are based on the law and can be justified on reasonable grounds.¹² It can be seen therefore that though the principle receives compelling recognition which is of normative value, it has not been conceptualised as law but as an integral element in the determination of fairness.

4 3 Express recognition

There is express recognition of the principle of equality of arms by international and internationalised tribunals. The express recognition of the principle by the European Court, the European Commission and other internationalised tribunals such as the ICTY, ICTR and SCSL have had immediate consequences in that the importance of the preparation of the defence case, and to some extent the allocation of resources, have been given due consideration. Though equality of arms is considered as a single aspect of the right to a fair trial, it is the most crucial factor underlying the fairness of an adversarial trial. The European Court recognises equality of arms and the right to adversarial proceedings as the two main aspects of a fair trial.¹³ In the setting of adversaries, fairness is likened to sporting activities which involve rules and values like respect for the opponent, honesty, self-restraint, the desire for victory but not victory at any cost.¹⁴ The acknowledgement of the rights of the accused and the fact that the procedure is designed

¹² Para 13.

¹³ Trechsel *Human Rights* 88; *Brandsetter v Austria* (1993) 15 E.H.R.R. 378; *Jasper v United Kingdom* *supra* note 8; *Dombo Beheer v Netherlands* (1994) 18 E.H.R.R. 213.

¹⁴ Trechsel *Human Rights* 82.

to permit him to defend himself demands equal participation by the accused and the ability to do so.

Express recognition of the principle is few and far between in domestic law, especially in jurisdictions outside the European Union where article 6 of the European Convention and the jurisprudence of the European Court and the Commission are of little consequence. However, specific reference has been made to the principle in South African case law. In *Ex Parte Institute for Security Studies: In Re S v Basson*,¹⁵ a prominent South African research institution, the Institute for Security Studies (ISS), had applied to be admitted as *amicus curiae* in a criminal appeal to the Constitutional Court. The intended submissions of the ISS were unfavourable to the respondent. The state consented while the respondent (the accused) opposed the application. The Court outlined the principles relating to the application in question. It noted that in order to be admitted as *amicus curiae*, the applicant should satisfy the court that it will be raising new issues not already covered by the parties. The Court was of the view that since the issues that the ISS intended to raise had already been covered by the state, there was no need to admit the ISS as *amicus curiae*. Therefore, the application was dismissed. Having discussed the rules relating to the admission of an *amicus curiae*, the Court noted at the end of the judgment:

“As a general matter, in criminal matters a court should be astute not to allow the submissions of an *amicus* to stack the odds against an accused person. Ordinarily, an accused in criminal matters is entitled to a well-defined case emanating from

¹⁵ 2006 (2) SACR 350 (CC).

the State. If the submissions of an *amicus* tend to strengthen the case against the accused, this is cause for caution. This, however, is not an inflexible rule. *But it is a consideration based on fairness, equality of arms, and more importantly, what is in the interests of justice.* In these special circumstances we did not consider it to be in the interests of justice to admit the applicant as an *amicus*.¹⁶

The Court did not set out to embrace the principle of equality of arms as a functional part of South African law. If this was the intention, the Court would have given a conceptual and in-depth analysis of the principle as it did in relation to the *amicus curiae* question. What is clear however is that it did recognise the principle as a part of fairness in criminal proceedings. It recognised that criminal proceedings are a contest between the state and the accused. It therefore saw unfairness in permitting arguments that would strengthen the state's case and create an unnecessary imbalance. It is clear that the respondent would have had an opportunity to respond to the arguments of the ISS. One wonders therefore why the Court was of the view that allowing the submissions of the ISS was against the interests of justice. The Court did not elaborate and one is left to speculate. Of course, though the submission of the ISS was principled and done from purely a human rights perspective, the respondent would clearly be disadvantaged as this would have added to the already elaborate resources at the state's disposal. The respondent and his lawyers would not have had sufficient resources to counter the manpower in terms of lawyers and the amount of research that the ISS would have brought into the forum. Whereas it appears from the judgment that the issue of equality was mentioned *obiter*, the Court did refer to the imbalance of the situation as "special circumstances" which one may say is a

¹⁶ Paras 15-16. (Emphasis added).

determining factor in the Court's decision. The normative notion of the Court's reference to equality of arms is not clear. The issue before the Court did not arise from matters relating to the constitutional right to a fair trial. Therefore, though mention was made of "fairness" and the "interests of justice", the Court did not link the principle to any specific constitutional right or the right to a fair trial. It is not clear therefore whether the Court had in mind a general common law fairness or whether the Court was referring to the constitutional framework. One cannot infer from the jurisdiction of the Court that it could only have been referring to constitutional fairness, and there is no bar to it relying on a general common law notion of fairness and justice. Even though several questions were left open, the case clearly establishes that imbalances between the state and the accused in criminal proceedings may fall foul of the principle of equality of arms. The case is significant in that it lays the foundation for the application of the principle in South African law.

The principle has been specifically referred to, albeit in passing, in Australian¹⁷ and New Zealand¹⁸ case law mostly in civil and administrative matters. However, in the Australian

¹⁷ *R v Rich (Ruling No 2)* [2008] VSC 141.

¹⁸ *Ch'Elle Properties (NZ) Ltd v CIR* [2005] NZHC 190; *Ministry of Fisheries v District Court at Christchurch and Ors* [2007] NZHC 1093; *Chesterfield Preschools Ltd and Ors v The Commissioner of Inland Revenue* [2005] NZHC 37; *The Queen v King and Stevens* [2008] NZCA 79; *The Queen v Philip Wayne Tukuafu* [2003] NZCA 325.

case of *Ragg v Magistrates' Court of Victoria & Corcoris*¹⁹ the principle received full analysis and articulation.

In *Ragg*, Mr Ragg an officer of the Australian Federal Police had brought six charges of tax evasion against Mr Corcoris, a Melbourne property developer. To assist in his defence at the committal, Mr Corcoris had issued two summonses to Mr Ragg to produce certain specified documents to the Magistrates' court of Victoria. Mr Ragg made an application to a magistrate for orders striking out most of the paragraphs of the summonses. The magistrate rejected the application. Mr Ragg then applied to the Supreme Court of Victoria for a review of the magistrate's decision. He contended that the summonses were too wide and required the production of a large number of irrelevant documents. He further contended that the evidence to be led against Corcoris and certain other evidence had already been handed over to him in preparation for the committal. Corcoris on the other hand contended that the police had obtained a large number of documents during extensive investigations, and that only some of those documents had been produced.

Bell J held that the magistrate did not err in upholding the summonses. He noted that the right to equality before the law was relevant to the duty of a prosecutor to disclose material documents to the accused in criminal proceedings. The Court recognised the principle of equality of arms as emanating from articles 14(1) and (3) of the ICCPR to

¹⁹ [2008] VSC 1. The principle was also briefly discussed by the New Zealand Supreme Court in *Paul Rodney Hansen v The Queen* [2007] NZSC 7.

which Australia is a party. According to Bell J, the principle is relevant to the issue of disclosure. Recognising the superior resources of the state, he noted that the principle of equality of arms applies in an adversarial trial. According to him, this gives rise to the issue of disclosure by the prosecution. He concluded that the right to equality before the courts ensures equality of arms which requires that the same procedural rights be provided to all the parties unless distinctions are based on the law and can be justified on objective and reasonable grounds. While recognising the principle as an international human rights principle, the Court noted the importance of international human rights law, noting Australia's international obligations under the ICCPR. He noted a close interaction between the principle of equality of arms as recognised in international human rights jurisprudence and a common law duty on the prosecution to disclose, with the former strengthening the latter. He noted that without disclosure, there can hardly be equality of arms between the prosecution and the accused.

4 4 Implicit countenance

Though the principle is relatively unknown in domestic jurisdictions, various rights which the principle seeks to foster have long been embraced in domestic jurisdictions. The Botswana Constitution and Criminal Procedure and Evidence Act consciously ensure that a balance exists and that the accused gets his day in court. The principle receives implicit countenance in that rights such as the right to cross-examine, the right to testify and the right to comment on the submissions of the state are engraved in section 10 of the Constitution of Botswana.

There are a few cases in Botswana where the need to address the imbalances between the prosecution and the defence have been mentioned *obiter*, thus giving implicit countenance to the principle of equality of arms. In *Mmopi and Another v The State*²⁰ the Court noted that an unrepresented accused is under severe disadvantage. As Murray J put it:

“When a person is on trial for a serious offence and does not have the advantage of legal representation I consider that it is essential that the magistrate should offer advice by way of explaining court procedure to such a person. An unrepresented accused is under a severe disadvantage. If he is given no assistance on matters of procedure that one would not necessarily expect to be known to an unrepresented accused person injustice could easily result.”²¹

The Court noted therefore that there exists a duty on the presiding officer to explain the procedure of the court to him. The Court noted in effect that where an accused had elected to give evidence in his defence and then upon taking oath states that he has

²⁰ [1986] B.L.R. 8.

²¹ 10F; In *State v Jaba* [1987] B.L.R. 315, four previous adjournments had been taken, mostly at the instance of the defence. The magistrate having warned the parties that he would grant no further adjournments, refused to grant the prosecution an adjournment to call a witness. O’Brien Quinn CJ remarked at 319A-B: “Justice must not only be done but must be seen to be done and all parties must be treated alike; the state being in no better or worse situation than an accused where the question of adjournments is concerned.”

nothing to say, the court has a duty to explain to him that he could use the opportunity to explain his side of the story and explain to him what the issues were.

In *Motshwane and Others v The State*,²² the Court, in examining section 10(2)(c) of the Constitution which requires the accused to be given adequate time and facilities to prepare his defence, observed that section 10 generally purports to guarantee “the protection of the fundamental rights and freedoms of an individual facing a criminal charge *vis-a-vis* the state and its powerful agents such as the police, prosecution etc.”²³ The Court stated that the section “affords the individual ammunition to challenge any act by the state or its agents that is perceived to offend against the rights of the individual to a fair trial as enshrined under the provision...”²⁴ This is a resounding declaration that the purpose of section 10 is to protect the rights of the accused as well as to ensure equality of arms.

Section 3 of the Constitution, which relates to equal protection under the law, is usually applied in relation to substantive rights, more often to cases in respect of discrimination.²⁵

²² [2002] 2 B.L.R. 368.

²³ 383F; *State v Jaba supra* note 21 319.

²⁴ 383G.

²⁵ See *Sesana and Others v Attorney-General* [2006] 2 B.L.R. 633; *Ntloyakhumo and Another v The State* [2004] 2 B.L.R. 269; *Kanane v The State* [2003] 2 B.L.R. 67 (CA); *Kamanakao I and Others v Attorney-General and Another* [2001] 2 B.L.R. 654; *Diau v Botswana Building Society* [2003] 2 B.L.R. 409; *Attorney-General v Dow* [1992] B.L.R.119 (CA).

However, in the civil case of *O'Reilly v Gibbons and Another*,²⁶ the Court observed that it is an integral requirement of the procedural system that the respondent to an application to be made in court, be notified. The Court remarked:

“The requirement to notify the respondent of an application to be made to the court is an important and integral part of our procedural system. So is the requirement to serve on such party the application documents. Not only are these principles inherent in the scheme created by Order 12 of the Rules, [of the High Court] they readily appeal to our basic sense of fair play, and find unequivocal favour in no less an authority than the provisions of our Constitution relating to secure equal protection of the law.”²⁷

The principle of equality manifests itself when the Court noted that the need for the respondent to file a notice of opposition and answering affidavits is founded on a “principle of fairness and natural justice.”²⁸ While the principle is not known in the Botswana legal order, the courts implicitly recognise its application as an instrument for fair trial rights. This is made possible by the structure and content of section 10 of the Constitution. It must be noted however that an express application of the principle and an alignment and the appreciation of procedural rights in terms of the principle will do well for the full enjoyment of such rights.

²⁶ [2001] 2 B.L.R. 605.

²⁷ 609H-610A.

²⁸ 607H.

Recent decisions of the courts of Botswana, binding the prosecution to disclose all information obtained during investigation to the accused, enhance equality between the parties.²⁹ It must be noted however that these cases, even those that refer to the need for procedural equality, do not expressly incorporate the principle of equality of arms. In support of its ruling for disclosure, the Court in *Ahmed v Attorney-General*³⁰ quoted passages from several foreign cases. Reference to procedural equality was very scant in these quoted passages and the principle was not mentioned. None of the passages quoted, except for one,³¹ incorporated the principle of equality of arms. When the Court finally addressed the issue of procedural equality, deriving support from the Namibian case of *S v Nasser*,³² it appeared that the issue of equality merely came into the discussion by chance. The Court specifically adopted a passage from this case wherein the Namibian court in dealing with the issue of disclosure remarked:

“The State inevitably enjoys an enormous advantage in a criminal trial. It has the might of the police force at its disposal, it has a specialised prosecuting authority, it has access to expert witnesses and modern methods of communication and, not least, it has the power to legislate procedures to be followed. The State and an

²⁹ *Motshwane and Others v The State* *supra* note 22; *State v Fane* [2001] 1 B.L.R. 319; *Ahmed v Attorney-General* [2002] 2 B.L.R. 431; *Attorney-General v Ahmed* [2003] 1 B.L.R. 158 (CA).

³⁰ *Supra* note 29.

³¹ *Aston Little* (Communication No 283/1988) Human Rights Committee of the United Nations. Cited at 454.

³² 1995 (2) SA 82 (Nm).

accused at a criminal trial do not stand on an equal footing and the purpose of art 12 is to ensure that the imbalance is, so far as possible, redressed.”³³

The Court in *Ahmed v Attorney-General* went on to note that:

“I respectfully adopt that line of reasoning and its conclusion, viz that the issue at stake is to redress the imbalance in a criminal trial given the advantages which the State enjoys. It is not to balance an accused’s right to a fair trial against the interest of the State.”³⁴

As can be seen from the above passage, the reference to *Nasser* was made solely in support of the Court’s rejection of the state’s argument that should the accused have a right of disclosure, the state should have a similar right for the sake of equality. Equality was not the central issue in the Court’s discussion. Though the Court recognised the imbalances in resources between the state and the accused, it appeared to have merely stumbled upon the issue in support of its contention. However, *Ahmed v Attorney-General* remains the closest the courts have come in recognising the principle in criminal proceedings. Except for *Motshwane*,³⁵ none of the cases finding in favour of disclosure made reference to procedural equality.

³³ *Supra* note 32 111B-C.

³⁴ *Supra* note 29 456C-D.

³⁵ *Supra* note 22.

4 5 Justifying the application of the principle in the Botswana legal order

While noting that the Victoria Charter of Human Rights and Responsibilities Act³⁶ did not apply to the action as it commenced before the Charter entered into force, Bell J in *Ragg* discussed the right to a fair trial under article 14 of the ICCPR to which section 24³⁷ of the Victoria Charter is similar. The Court stated that the principle of equality of arms emanates from article 14 of the ICCPR, reiterating that the principle is an aspect of the right to a fair trial. While the Court also noted the foundational relation of article 6 of the European Convention in relation to the principle, it understandably focused its attention on the ICCPR to which Australia is a party. The Court observed that international human rights may be relevant to judicial discretion where the human rights instrument is relevant to the matter in question and where the consideration of the instrument is not inconsistent with the relevant legislation or common law. The Court noted that an international human right in a convention that has not been incorporated into domestic law can be taken into account in the exercise of a judicial power or discretion, to strike out the summonses, if the subject matter of the case comes within its scope. In the Court's view, the human rights contained in articles 14(1) and (3) of the ICCPR and the principle of equality of arms were directly relevant to the issue.

States ratify treaties, thereby undertaking to comply with their terms.³⁸ Article 14 of the ICCPR, to which Botswana is a party and to which section 10 of the Constitution is very

³⁶ Act 43 of 2006.

³⁷ Sections 24 and 25 of the Charter provide for various rights relating to a fair hearing.

³⁸ Drzemczewski *European Human Rights in Domestic Law: A Comparative Study* (1983) 20.

similar, and article 6 of the European Convention after which section 10 of the Constitution is modelled, justify judicial embracement of the principle in Botswana. Of course the ICCPR has not been transformed into domestic law and therefore does not have consequential binding effect on the Constitution, rules of procedure and judicial organ of government.³⁹ In any case, the same procedural norms in the European Convention and ICCPR are also found in section 10 of the Botswana Constitution. The transposition of the principle into the Botswana legal order should therefore not be a difficult task.

In *Tomasevic v Travaglini*,⁴⁰ a case involving a court's duty to ensure a fair trial by assisting an unrepresented accused, the Victorian Supreme Court held that international human rights are significant in the exercise of judicial powers and discretions. The Court stated:

“Apart from the Charter, the ICCPR does not ‘operate as a direct source of individual rights and obligations’ because it has not otherwise been incorporated into Australian law. But like other international instruments to which Australia is

³⁹ Drzemczewski *European Human Rights* 35; “It is a firmly established principle of English constitutional law, received as part of the common law received in Botswana, that an international instrument does not constitute part of the domestic law until it has been incorporated by an Act of Parliament”: Fombad *The Protection of Human Rights in Botswana: An Overview of the Regulatory Framework* in Fombad (ed) *Essays on the Law of Botswana* (2007) 1 10; Tshosa *The Status and Role of International Law in the National Law of Botswana* in Fombad (ed) *Essays on the Law of Botswana* (2007) 229 237.

⁴⁰ [2007] VSC 337.

a party, the ICCPR has an independent and ongoing legal significance in Australian and therefore Victorian domestic law, a significance which is not diminished, but can only be enhanced, by the enactment of the Charter.”⁴¹

The Court in taking into account the duty to ensure a fair trial by assisting the accused, noted the importance of promoting and respecting the right of equality before the law and access to justice that are contained in the ICCPR.

Botswana inherited the dualist system from her former colonial master Britain. Therefore, international conventions that are ratified or acceded to by the executive only bind the state on the international plane. They are not applicable in domestic law unless they are translated into law or adopted by domestic legislation. In addition, customary international law enjoys direct application.

International human rights law as a subject is a recent and developing area of the law. It essentially finds substance in conventions though it may be said that some of the principles of these conventions such as the prohibition against torture have crystallised into rules of customary international law. It is axiomatic that the courts are bound by conventions adopted by parliament, and rules of customary international law. Further, there is a presumption that parliament will not deliberately enact laws in breach of the country’s international obligations.⁴² Therefore, the courts as a matter of construction will

⁴¹ Para 72.

⁴² In *Attorney-General v Dow* supra note 25, Amisshah JP noted: “I am in agreement that Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of

presume that the legislature did not intend to breach the country's international obligations unless this is the clear indication from the statute. The presumption that parliament will not legislate in contravention of the country's international obligations supports the argument that international conventions to which the country subscribe, and the jurisprudence surrounding them should validly serve as an aid to the interpretation of local statutes as well as the Constitution.⁴³ Of course it cannot be said that the precise legal status of conventions form the basis of statutory or constitutional interpretation, rather it is the philosophy, general purpose and practice behind the conventions that are of significance.⁴⁴ While formal domestication of conventions is significant, the practical judicial application of the relevant principles ensures their realisation.⁴⁵ States are bound

conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken." 154D-E; in the same case, Aguda JA stated: "We have a written Constitution, and if there are two possible ways of interpreting that Constitution or any of the laws enacted under it, one of which obliges our country to act contrary to its international undertakings and the other obliges our country to conform with such undertaking, then the courts should give their authority to the latter.": 169G-H; *Good v Attorney-General* [2005] 2 B.L.R. 333 (CA); Fombad & Quansah *The Botswana Legal System* (2006) 224; Fombad *The Protection of Human Rights* 11; Tshosa *The Status and Role of International Law* 242.

⁴³ Clapman *Human Rights in the Private Sphere* (1993) 15; "... [A]n instrument which has been signed, whether or not it has been ratified and domesticated, still has important legal consequences domestically as an aid to statutory interpretation.": Fombad *The Protection of Human Rights* 11; Tshosa *The Status and Role of International Law* 240.

⁴⁴ Clapman *Human Rights* 15; Schachter *The Obligation to Implement the Convention in Domestic Law* in Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 311 317.

⁴⁵ Drzewicki *The Status of International Human Rights Instruments in Domestic Law* in Rosas (ed) *International Human Rights Norms in Domestic Law: Finnish and Polish Perspectives* (1990) 1 6.

under the *pacta sunt servanda* principle to perform treaty obligations such as ensuring their effects domestically.⁴⁶ However, the ICCPR has not been incorporated into domestic law and the question still remains as to what should be the court's approach to those norms of international human rights law that are not binding in the domestic legal order.

Consideration for international conventions might be said to breach the transformation tradition that Botswana has inherited from Britain.⁴⁷ But an interpretation that will enhance or enforce rights provided for in international conventions and especially those to which the country is a party, should always be preferred.⁴⁸ In any case, it must be noted that there are instances where the European Convention was invoked as a guide to the interpretation of local law in Britain, even though Britain was not at the time a party to the Convention.⁴⁹ Indications are that the courts in Botswana have no difficulty in adopting this approach. Indeed, there is statutory support in Botswana for the use of international law as an aid to statutory interpretation. In this regard a court may have

⁴⁶ Clapman *Human Rights* 9-10.

⁴⁷ Clapman *Human Rights* 18; Fombad *The Protection of Human Rights* 10; Tshosa *The Status and Role of International Law* 237; *Good v Attorney-General supra* note 42 337.

⁴⁸ Loucaides *Essays on the Developing Law of Human Rights* (1995) 172.

⁴⁹ Schachter *The Obligation to Implement* 316; see *R v Miah* [1974] 1 W.L.R. 683; *R v Secretary of State for the Home Department, ex parte Bhajan Singh* [1975] 3 W.L.R. 225.

regard to a relevant treaty as an aid to the interpretation of any enactment.⁵⁰ This approach was supported in *Dow* in relation to constitutional interpretation when the Court declared:

“Even if it is accepted that those treaties and conventions [UDHR and African Charter] do not confer enforceable rights on individuals within the State until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution.”⁵¹

There is an emerging constitutional trend requiring domestic courts to employ international and comparative law.⁵² The Angolan,⁵³ Cape Verde⁵⁴ and South African⁵⁵

⁵⁰ S 24(1) Interpretation Act Cap 01:04. The Court in *Attorney-General v Dow supra* note 25 154, noted that this provision supports the principle that international conventions should be used as an aid to legislative and constitutional interpretation; *Good v Attorney-General supra* note 42.

⁵¹ *Attorney-General Dow supra* note 25 153H. In *Petrus and Another v The State* [1984] B.L.R. 14 (CA), making reference to the UDHR and the African Charter, the Court was of the view that as a member of the United Nations and Organisation of African Unity (now African Union), it must be presumed that the country is willing to be bound by the instruments of those bodies.

⁵² Udombana “Interpreting Rights Globally: Courts and Constitutional Rights in Emerging Democracies” 2005 *African Human Rights Law Journal* 47 59.

Constitutions provide that constitutional and legal norms related to fundamental rights must be interpreted in light of international instruments. The Malawian Constitution provides that when interpreting the Constitution, the courts should “where applicable, have regard to current norms of public international law and comparable foreign case law.”⁵⁶ Though “international-law-referral” provisions are absent in the Botswana Constitution, it is significant that the courts have made references to provisions of international conventions that relate to human rights in general, and in relation to fair trial rights in particular.⁵⁷ Even though reference to international law is few and far between, there is clear evidence that human rights conventions are regarded as creating human rights law. Reference is made not only to conventions but other instruments such as resolutions and protocols. These norms are regarded as compelling where such conventions have become widely accepted by states even if Botswana is not a party.⁵⁸ It seems that there is an underlying realisation that international law can be employed as an important benchmark of the domestic human rights regime. International instruments can

⁵³ S 21(2). ICL Document Status: 25 August 1992. Available on www.servat.unibe.ch/law/icl/ao00000_.html. (Accessed on 30 December 2008).

⁵⁴ Art 17(3). Constitutional Law n. 01/IV/92 of 25 September. Substantially amended in 1995 and 1999. Available on <http://confinder.richmond.edu/admin/docs/capeverde.pdf>. (Accessed on 30 December 2008).

⁵⁵ S 39(1).

⁵⁶ S 11(2). Came into force on 18 May 1994. Available on www.africa.upenn.edu/Govern_Political/mlwi_const.html. (Accessed on 30 December 2008).

⁵⁷ See *Attorney-General v Dow* *supra* note 25; *Bojang v The State* [1994] B.L.R. 146. In addition, the Interpretation Act Cap 01:04 authorises the courts to consider international treaties when interpreting domestic legislation.

⁵⁸ *Bojang v The State* *supra* note 57 157.

be a compelling source of human rights law. Indeed, the courts should not hesitate to embrace international conventions to which the country is a party. In *Dow*⁵⁹ the Court made extensive references to the provisions of the African Charter in dealing with issues of equality before the law, equal protection of the law and elimination of discrimination against women. The Court also referred to the UN Declaration on the Elimination of Discrimination Against Women. In *Bojang*⁶⁰ reference was made to the UDHR and the African Charter in respect of the presumption of innocence. The Court also referred to the ICCPR, European Convention, the African Charter and the American Convention on Human Rights⁶¹ in respect of the right to legal representation. In *Attorney-General's Reference: In Re The State v Marapo*⁶² the Court stated that "...international human rights norms should receive expression in the constitutional guarantees of this country."⁶³

Parties to the ICCPR must, regardless of their legal traditions and domestic law, apply the guarantees of article 14.⁶⁴ Clearly, the application of the principle of equality of arms in the Botswana legal landscape should be possible without any strain. The basic infrastructure exists. What is lacking is the active development of the jurisprudence accommodating the application of the principle.

⁵⁹ *Supra* note 25.

⁶⁰ *Supra* note 57.

⁶¹ Signed at the Inter-American Specialised Conference on Human Rights, San Jose, Costa Rica, 22 November 1969. Available on <http://www.hrcr.org>. (Accessed on 12 July 2009).

⁶² [2002] 2 B.L.R. 26 (CA).

⁶³ 33E.

⁶⁴ *General Comment No 32* para 4.

It has been pointed out also that courts in giving deference to international law might be stifled by the principle of *stare decisis* which applies in domestic law.⁶⁵ This is because the decisions of the highest courts bear significant leverage on domestic legal frameworks. Domestic courts are bound by decisions of higher domestic courts. Also, international law usually has an uneasy status in dualist states in the absence of incorporation.⁶⁶ However, judges should follow the internationalist approach and be bold to interpret the law in a manner compatible with international trends even when such interpretation is incompatible with domestic trends.⁶⁷ Botswana can certainly in terms of constitutional interpretation benefit from European jurisprudence since its Bill of Rights is based on the principles of the European Convention. In this regard European jurisprudence on article 6 should become relevant in the interpretation and application of the procedural rights provided for in section 10 of the Constitution.

4 6 Conclusion

International conventions can be valuable sources of legal norms even without forming part of domestic law.⁶⁸ Principles of law that have received universal acceptance by frequent embodiment in international instruments bear heavily on and are likely to be

⁶⁵ Tshosa *National Law and International Human Rights Laws: Cases of Botswana, Namibia and Zimbabwe* (2001) 69; Tshosa *The Status and Role of International Law* 237.

⁶⁶ Hunnings *The European Courts* (1996) 30.

⁶⁷ Hunnings *The European Courts* 172.

⁶⁸ Tshosa *National Law* 71.

recognised by domestic courts. Such principles are relevant to the development of the legal components of a fair trial.⁶⁹

Recognition and application of the principle of equality of arms in Botswana is possible because of the general acceptance by the courts of the vital role international human rights values and norms play in the domestic order. Recognition is possible due to a number of factors.

First, there is some acceptance that international human rights serve as an aid to constitutional construction. Therefore, section 10 of the Constitution may be interpreted in line with the principle. Already, the section has been interpreted and applied in a manner that avoids imbalances between the prosecution and the accused.

Second, there is a general recognition of international human rights norms in Botswana case law. In this regard, they influence domestic law.

Third, the expression of equality of arms as a principle rather than as a rule of law does not weaken the case for its recognition. On the contrary, it strengthens it. Being a principle, it carries a measure of flexibility which might not apply in relation to the domestic application of an international rule of law in a dualist legal system. While it remains a principle, its recognition by the main international human rights tribunals, gives it a “force of general acceptance” in international law.

⁶⁹ *Kgolagano v The State* [1997] B.L.R. 914 924.

Fourth, constitutional and legal foundations of the principle do exist. Section 10 of the Constitution generally lays down the foundation for the application of the principle of equality of arms. There are also statutory provisions that clearly provide for procedural equality. While there is implicit recognition of the principle, it is imperative that the courts push the boundaries further by express engagement of the principle as a constitutional imperative. Its recognition as an essential element for a fair trial only adds to its validity, making it a *sine qua non* in the realisation of fair trials. It is surprising that though the central role played by the principle in relation to fairness has been emphasised several times, the European Court, the foremost proponent of the principle has not conceptualised it as a constitutional right. Surely, the central role of the principle in guaranteeing fair trials, demands that it operates at a higher level.

Fifth, the courts can simply develop and conceptualise the principle as part of the common law of the country. This should not be difficult as there is already implicit countenance of the principle in case law. Unfortunately, however, reference to equality is based on a common law notion of fairness rather than on any theoretical or constitutionalised basis. The development of human rights principles is still evolving and therefore there is room for expression of the principle. But this is not enough. Constitutional alignment of the principle is essential. The principle is central to the right of an accused to a fair trial. It lies at the heart of a fair trial and ought to be expressed by the courts as such.

PART 2

PRE-TRIAL RIGHTS: STATE AUTOCRACY AND THE PROTECTION OF THE SUSPECT

CHAPTER 5

IMBALANCES IN THE INVESTIGATION PROCESS

5 1 Introduction

The investigation process represents the greatest inequality in the criminal justice process. The state is adorned with so much power that equality between the prosecution and the defence can only be achieved by imposing limitations on the powers of the state. However, the possibility of achieving equality is somewhat limited at the pre-trial stage of the criminal process as opposed to the trial process. This is principally so in common law jurisdictions where there is no investigating judge and the accused is left at the mercy of the police who carry out the investigations. The investigation process therefore represents an autocratic process wherein the state has monopoly over the process, with minimum opportunity for participation and challenge by the suspect.

There are however a number of safeguards for the suspect and limitations on the investigative powers of the state. Without limits, the state will possess sweeping powers which will intolerably allow the police to obtain evidence and confessions by any means such that the accused will be put in a position of substantial disadvantage, to the extent that the trial will be a merciless walk-over for the state. Instruments of limitation include exclusionary rules. They are latent and mainly gain effect at the trial stage wherein the courts may disallow evidence obtained in violation of the accused's rights. There are also procedural requirements such as the requirement for warrants. However, even though there is a semblance of limitation of police powers in that they are required to obtain warrants from judicial officers to effect searches or arrests, this is weakened by three factors. First, such warrants are usually granted as a

matter of course. Second, requests for warrants of arrest and search warrants are made *ex parte* and the subjects of the search or arrest are not given an opportunity to oppose them. Third, there are several exceptions wherein the police can arrest and search without a warrant. As opposed to South Africa,¹ there are no express pre-trial constitutional provisions protecting suspects in Botswana. Pre-trial protection is founded on statute and common law. This therefore puts the suspect in Botswana in a state of procedural inequality and a distinct disadvantage since constitutional pre-trial rights would naturally offer a better framework for the protection of those rights.

Discussion of the principle of equality of arms is usually limited to the trial stage and not extended to pre-trial investigation.² However, a discussion of the imbalances in the pre-trial investigation in light of the principle is pertinent for a number of reasons. First, the European Commission and the Court have diluted their position in limiting the application of the principle to trial rights.³ Second, the Commission and the Court when determining fairness, consider the case in its entirety, bearing in mind that a breach of a pre-trial right might have a direct impact on the entire proceedings.⁴ This is a truism.⁵ Third, the presumption of innocence operates even at the pre-trial stage.⁶

¹ See section 35 (1) & (2) of the South African Constitution.

² Van den Wyngaert *Belgium* in Van den Wyngaert (ed) *Criminal Procedure Systems in the European Community* (1993) 32.

³ Van den Wyngaert *Belgium* 32.

⁴ Van den Wyngaert *Belgium* 32.

⁵ As Colvin notes, "Moreover, if evidence was obtained in a way that violated equality before the law, the resulting unfairness could carry through to its use at trial and to an eventual conviction. Investigative unfairness would produce adjudicative unfairness because the violation of equality before the law would continue throughout the stages of the criminal process...Equality before the law is a standard applicable at all stages of the criminal justice process, from the initial deployment of police

Therefore, the ability of the suspect to challenge the process at that stage is relevant to its fairness. Fourth, as has been said before, inequalities are greater at the pre-trial stage.

5 2 Sole-enterprised authority

The authority to investigate and prosecute crimes lies with the state. This situation represents the realities of our contemporary societies. While powers of arrest and detention are necessary to investigate and prevent crime, there is a distinct inequality when the judicial supervision of the process is limited only to determining whether a warrant should be issued. The fact that the police may arrest and detain without a warrant, though necessary in certain situations, also negates legal safeguards against unwarranted arrest and detention. In Botswana, there are no constitutional provisions for legal representation at the pre-trial stage. Suspects remain the “property” of the police during the forty eight hours for which they can be legally detained. They are objects of the investigation. They have no right of access to information gathered during the investigation and are only told what the police wants them to know. There are legal instruments regulating the arrest and detention of suspects. While these regulations protect suspects from unwarranted police behaviour, they do not sufficiently regulate the process when measured in light of the equality principle. Warrants only serve to protect substantive rights of liberty, privacy and property and do very little to ensure procedural equality. The absence of judicial supervision during investigation puts the accused at a disadvantage. Adversarialism underlies a formal

resources through to sentences, penal regimes and releases.”: Colvin “Fairness and Equality in the Criminal Process” 2006 *Oxford University Commonwealth Law Journal* 1 2-3 & 11.

⁶ Van den Wyngaert *Belgium* 32.

and theoretical equality between the contestants.⁷ However, the investigation and prosecution of crime is organised and funded by the state. The state is therefore in an inevitable position of strength. Fairness requires that the parties are in a position to access the investigations equally. The prevailing and traditional state of affairs wherein the suspect is unaware of the results of the investigations as and when they are carried out, is a negation of the principle of equality. In this regard, the scales of equality are skewed heavily in favour of the state. Though warrants and time limits serve as instruments for limiting arbitrary use of state powers, the system was definitely not developed with equality between the parties as a prerequisite.

Notwithstanding various measures intended to protect the suspect, the pre-trial process represents one of state autocracy. The suspect has no official or formal powers to investigate. He is often incarcerated during investigations. Ideally, the suspect should be able to witness searches, interview witnesses and be made aware of the investigation process.⁸ Contemporary criminal frameworks, however, exclude the

⁷ Van Koppen & Penrod *Adversarial or Inquisitorial: Comparing Systems* in Van Koppen & Penrod (eds) *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (2003) 1 2; McEwan *Evidence and the Adversarial Process* (1998) 2; Crombag *Adversarial or Inquisitorial: Do We Have A Choice?* in Van Koppen & Penrod (eds) *Adversarial Versus Inquisitorial Justice: Psychological Perspectives on Criminal Justice Systems* (2003) 21 22; Safferling *Towards an International Criminal Procedure* (2001) 266.

⁸ “It seems then that procedures should be devised which allow the dialectic between prosecution and defence to begin at a much earlier stage of the inquiry than is permitted at present in adversarial and continental procedures. These would have to provide for the availability of defence lawyers to suspects at an early stage if necessary before charge, the full disclosure of information by each side including written records of interviews that may later be relied upon, the presence of both sides at certain important stages of the inquiry such as, for example, at an identification parade or at interrogation after

suspect from any participation in the investigation process. Any attempt by him to conduct his own investigations which overlap with the police investigations, will be interpreted as interference with the investigations. This clearly leaves the suspect hamstrung in a state of procedural inequality.

5 3 Powers of arrest and detention

Powers of arrest and detention are in principle the preserve of the state. The period between arrest and the formal charge represents a period where a suspect suddenly comes into contact with state autocracy and police powers. The suspect has several rights which converge with police action. The polarisation of individual rights and the overall security of society become continuums on opposite ends. These are manifested by the fact that the rights to liberty and privacy on the one hand, and the overriding necessity to control crime on the other, become matters of competing interests.⁹ Perhaps this can be described as the pre-trial manifestation of the interest-based adversarial system. Thus, while the accused has an inalienable right of privacy to property and personal liberty, the invasion of liberty and privacy is permitted in the interests of the detection and control of crime.¹⁰ Without such powers, the detection of

charge or at a confrontation between the suspect and other witnesses, and the availability to both sides of experts to conduct forensic or medical examinations. These rules would have to provide some means of enforcement, probably the appointment of an independent magistrate who could always be available to both sides and would be present at certain key stages of the inquiry. This magistrate would be able to require certain steps to be taken at the request of a party or of his own motion but he would not be a formal trier of fact and in this respect his position would differ from that of the *juge d'instruction* in France.”: Jackson “Two Methods of Proof in Criminal Procedure” 1988 *Modern Law Review* 549 566.

⁹ See generally Packer *The Limits of the Criminal Sanction* (1968).

¹⁰ Fenwick *Civil Liberties* 2 ed (1998) 393.

crime would prove to be so arduous that the very essence of the criminal justice system will be brought to naught. In essence, the rules governing police powers of arrest and detention and their implementation are of crucial importance.

5 3 1 *Basis of the powers*

In common law countries (which include Botswana) powers of arrest and detention have common law origins, but such powers have with time, become principally regulated by statute.¹¹ The Criminal Procedure and Evidence Act imposes obligations on the police in the exercise of their powers of arrest. Generally, arrests should be authorised by a judicial officer. The underlying principle is that the state should not exercise arbitrary powers of arrest. The state therefore should be able to arrest and detain a person only with the consent of the judiciary, an independent body, after furnishing it with information justifying such arrest. A warrantless arrest should be the exception. A public prosecutor or commissioned officer may forward an application to a judicial officer stating the offence alleged to have been committed and that there are reasonable grounds of suspicion against the suspect.¹²

¹¹ Healy “Investigative Detention in Canada” 2005 *Criminal Law Review* 98 106.

¹² S 37(1) Criminal Procedure and Evidence Act. Stating the procedure for obtaining a warrant, Aboagye J noted in *Aphiri v Attorney-General* [1997] B.L.R. 192 200C-D: “It is clear from the wording of the section (section 37(1)) that before a valid warrant of arrest can be issued by a judicial officer the proper applicant, [sic] for it must either state in his written application that he is in possession of information *taken upon oath* from which there are reasonable grounds of suspicion against the person sought to be arrested or to take the informant to the judicial officer for him to swear to the information before him. The information upon which the warrant is issued must therefore be one obtained upon oath.” (Emphasis appears in law report).

The Act also contemplates situations where it might be necessary to arrest an offender as a matter of urgency or in respect of serious offences. For example a policeman may arrest without a warrant if he finds a person attempting to commit an offence or clearly manifesting an intention of doing so;¹³ if the offence is committed in his presence;¹⁴ if the offence is one other than an offence specified in the Penal Code for which the punishment may be a prison term exceeding six months without the option of a fine;¹⁵ if the person is found in possession of stolen property or house breaking implements;¹⁶ any person whom he has reasonable grounds to suspect of committing “any of the offences specified in the Penal Code, other than the offences specified in such Code and the other enactments as are set out in Part II of the First Schedule to this Act.”¹⁷

Aboagye J cautioned in *Mosaninda v Attorney-General*¹⁸ that section 28(b) of the Criminal Procedure and Evidence Act does not give the police powers to arrest people arbitrarily without a warrant of arrest. According to him “[i]t affords an arresting officer a defence to an action against him for wrongful arrest only if in effecting the arrest he had reasonable grounds to suspect that the plaintiff had committed any of the offences specified in section 28(b)(i),(ii) and (iii).”¹⁹ The exercise of the powers conferred by section 28(b) should be exercised on an objective basis. Indeed one

¹³ S 28 (c).

¹⁴ S 28(a); *Kgosiemang and Another v The State* [1989] B.L.R. 12.

¹⁵ S 28 (b) (ii).

¹⁶ S 29.

¹⁷ S 28(b)(i).

¹⁸ [1994] B.L.R. 411.

¹⁹ 423F.

would not expect the legislature to permit the police to make arrests without warrants on an arbitrary basis. In the case of *Tlharesegolo v Attorney-General*²⁰ the plaintiff had been arrested and detained “pending investigations” by the police upon information received from a vendor that he had sold marijuana to the plaintiff. Referring to the section, Collins AJ observed:

“And so, the subjective assessment and suspicions of defendant’s witnesses [arresting officers] in regard to plaintiff [suing for unlawful search and unlawful detention], although relevant, are to be tested not solely on what was going on in their heads but rather whether their heads were properly directed and the thoughts going on in them were measured and reasonable on the basis of the facts at their disposal at the time they took a decision to arrest and detain. This has to be correct because if it is not it means that arrestees or detainees might be at the mercy of the unsupported hunches or whims of their captors.”²¹

²⁰ [2001] 2 B.L.R. 730.

²¹ 740B-C; “In order to comply with the requirements of section 28(b) the officer must have a suspicion that the individual whom he seeks to detain has committed the offence in question. Suspicion, in my view, must be something more than idle speculation but is far short of a firm conviction that the person has committed the offence...But mere suspicion is not enough. Suspicion founded on instinct or guesswork will not do. The suspicion which forms itself in the mind of the officer must be based on grounds which are capable of explanation and can be said to be reasonable”: per Lord Weir JA in *Aphiri v Attorney-General* [2000] 1 B.L.R. 65 68E-F (CA); “Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; ‘I suspect but I cannot prove’. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.”: per Lord Devlin in *Shabaan Bin Hussein v Chong Fook Kam* [1969] 3 All E.R. 1626 1630C-D; in *Kebafetotse v Attorney-General* [2004] 1 B.L.R. 419 427D Mosojane J stated that the police must “act

From the above statement, it follows that:

“...There must be an investigation into the essentials relevant to the particular offence before there can be a reasonable suspicion that it has been committed. *A fortiori* there can be no reasonable suspicion where, as in this case, there was no investigation relating to one of the essentials of the offence.”²²

It is true that a full and complete investigation might cause a fatal delay in securing an arrest. However, as Sarkodie-Mensah AJ puts it:

with great circumspection before they deprive anyone of his liberty without a warrant.”; see also *Sekobye v Attorney-General* [2004] 2 B.L.R. 294; *Sekobye v Attorney-General* [2006] 1 B.L.R. 271 (CA); *Thokwane v Attorney-General* [1998] B.L.R. 221; *Moleboge v Botswana Police Service* [2006] 1 B.L.R. 430; *R v Van Heerden* 1958 (3) SA 150 (T); *Minister of Law and Order v Hurley and Another* 1986 (3) SA 568 (A); *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A).

²² *R v Nkala and Another* 1962 (1) SA 248 (SR) 250D; “It is my experience that it is not uncommon for certain officers within the ranks of the police force to first arrest and detain a possible suspect, and thereafter, at the convenience of the detail concerned, to institute inquiries and investigations in order to ascertain whether the arrest was justified. I sincerely hope that this is not the general, and sanctioned practice, for, if it is, I consider that such procedure would be improper and objectionable. It appeared to me that it was this undesirable practice that was adopted in the present case. This is unfortunate, for it is essential, in my view, for any person entrusted with the signal power of arrest to recognise, and to keep constantly in the forefront of his mind, the concept that this power should be exercised only in cases of urgency or real necessity. Had the Section Officer carried out his duties on this basis, I do not think that the plaintiff would have been arrested at all.”: Reynolds J in *Allan v Minister of Home Affairs* 1985 (1) Z.L.R. 339 345G. Cited with approval in *Tlharesegolo v Attorney-General supra* note 20 741H-742B where the Court concluded that the police officers jumped the gun and arrested the plaintiff before they had reasonable grounds to suspect him.

“It is required that the defendant [police] must have sufficient facts from which a reasonable man could justifiably conclude that the alleged offence has been committed. This implies that the defendant is required to have taken reasonable measures to discover the facts. He need not test all the facts. His failure to test any particular fact or follow any particular lead which he genuinely believed to be irrelevant and unnecessary cannot amount to absence of reasonable and probable cause, nor animus injurandi.”²³

Persons arrested without a warrant should not be detained longer than forty eight hours unless a warrant is obtained for their further detention.²⁴ Where a person is arrested with a warrant, the Criminal Procedure and Evidence Act merely states that he shall be brought before a court “as soon as possible.”²⁵ What amounts to “as soon as possible” has not been tested by the courts²⁶ because in practice, the police keep to the forty eight hours rule even in the event of an arrest with warrant. However, the practice of detaining persons for the longest permissible period – that is forty eight hours – has not escaped judicial scrutiny. The Court in *Tlharesegolo*²⁷ noted, and quite rightly so, that the police are under the misapprehension that they are entitled to detain a person arrested without a warrant for up to forty eight hours on the basis of section 36(1) of the Criminal Procedure and Evidence Act. The Court stated

²³ *Moleboge v Botswana Police Service supra* note 21 435G-H.

²⁴ S 36(1) Criminal Procedure and Evidence Act.

²⁵ S 39(5) Criminal Procedure and Evidence Act.

²⁶ See *Aphiri v Attorney-General supra* note 21 69C-70B for a brief reference to the term in respect of S 36(1) of the Criminal Procedure and Evidence Act which relates to arrest without warrant.

²⁷ *Supra* note 20 742F.

categorically that the section does not empower the police to detain persons up to forty eight hours. The Court noted that, a person should be detained without a warrant only for a reasonable time, to be determined on an objective test. The reference to forty eight hours is a maximum period which is prescribed for the benefit of the detainee. Unnecessary reliance on the maximum period therefore amounts “to an arrogation of ‘rights’ which the legislature never intended.”²⁸ What the section intends is that if the forty eight hours were to expire, the police must obtain a warrant for the continued detention of the detainee.

Taking into account practical realities of pre-trial investigations, it is extremely difficult – as far as arrest and detention are concerned – to create room for the full and rigorous application of the principle of equality of arms. Botswana’s justice system is principally adversarial, and the police do not conduct impartial investigations. The investigations are interest-based (discussed more fully in paragraph 3 5, chapter 3) and conducted with the aim to secure a conviction. In addition, pre-trial legal representation is not guaranteed. However, one way of trying to alleviate the position of the accused, is to set strict rules and standards governing arrest (see paragraph 5 3 3 below). If arrests and their concomitant periods of detention are strictly controlled and limited to what is absolutely required to ensure the smooth functioning of the criminal

²⁸ 743A; also in *Kebafetotse v Attorney-General supra* note 21 427C-D Mosojane J observed: “Contrary to Martin’s belief, however, this section does not give the police a blank cheque to detain a suspect for as long as the period of detention does not exceed 48 hours. This section merely allows the police a discretion to detain a person arrested without a warrant for up to 48 hours only if there is good cause for such detention or the detention is lawful or authori[s]ed by law. The police are not covered by this section if they, without good cause or unlawfully, detain a person for 48 hours, or even for less.”

justice system, the pre-trial investigative period of inequality can be kept to the bare minimum.

5 3 2 *Procedural elements of a valid arrest*

The validity of an arrest depends on the proper exercise of the procedural elements.²⁹ These elements are important, considering the legal consequences that may flow from an unprocedural arrest.³⁰ The consequences of an unprocedural or illegal arrest may be immediate or latent. An immediate consequence is that if the arrest is illegal, technically the suspect is not under arrest and is free to go wherever he wants.³¹ Therefore, any charge brought against him for resisting arrest, assaulting or obstructing a police officer in due execution of his duty, or escape from custody might not stand.³² Also, the arresting party may be liable for assault or false imprisonment. In an action for unlawful arrest and false imprisonment the onus lies with the arresting party to prove that the arrest was lawful.³³ A latent consequence is that a court might

²⁹ Fenwick *Civil Liberties* 414; an arrest which is made with a warrant obtained on the basis of false information knowingly given to a judicial officer who issued it is unlawful: *Aphiri v Attorney-General supra* note 12 192.

³⁰ Fenwick *Civil Liberties* 414.

³¹ Fenwick *Civil Liberties* 414.

³² *State v Shamukuni Munikasu* [1968-1970] B.L.R. 255; *State v Setshameko France & Another* [1974] 2 B.L.R. 53.

³³ “Mr. *Maisels*, for the plaintiff, advanced two main propositions in support of his contention that the *onus* of proof, in regard to justification for the admitted arrest, rests on the defendants. On the view I take of this matter it is only necessary to refer to the first of these propositions, which is that, in actions for damages for wrongful arrest, the Courts have adopted the rule that all arrests are *prima facie* illegal and that it is for the defendant to allege and prove the existence of grounds in justification of the arrest. In my view that proposition is correct.”: Margo J in *Newman v Prinsloo and Another* 1973 (1) SA 125

refuse to admit evidence elicited or obtained from the suspect. Incriminating statements might be rejected from someone who is not warned of his rights, particularly his right to remain silent.³⁴

Statutory rules relating to the procedure for arrest in Botswana are terse. The Criminal Procedure and Evidence Act merely provides as a matter of procedure, that the police should produce the warrant or notify the suspect of the contents or permit him to read it if he so demands.³⁵ It is submitted that the police should have a positive duty under the law to produce the warrant and inform the suspect of the reason for the arrest. The Act however provides that a person arrested without a warrant should be immediately informed of the reason for the arrest.³⁶ Generally, a person effecting arrest should

(W) 126G-H. Cited with approval in *Mosaninda v Attorney-General supra* note 18; *Tlharesegolo v Attorney-General supra* note 20; “I stated in my ruling that every detention of a person by another is unlawful unless it is justified.”: *Onkabetse v Attorney-General and Others* [1989] B.L.R. 120 121H; see also *Kebafetotse v Attorney-General supra* note 21; *Thokwane v Attorney-General supra* note 21; *Sekobye v Attorney-General (CA) supra* note 21. In the South African case of *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) 153D-E the position was set in respect of a claim for damages based on unlawful deprivation of property as follows: “The plain and fundamental rule is that every individual’s person is inviolable. In actions for damages for wrongful arrest or imprisonment our Courts have adopted the rule that such infractions are *prima facie* illegal. Once the arrest or imprisonment has been admitted or proved it is for the defendant to allege and prove the existence of grounds in justification of the infraction.”

³⁴ Schwikkard *Arrested, Detained and Accused Persons* in Currie & De Waal (eds) *The Bill of Rights Handbook* 5 ed (2005) 737 752.

³⁵ S 39(4) Criminal Procedure and Evidence Act.

³⁶ S 36(4) Criminal Procedure and Evidence Act; *Onkabetse v Attorney-General and Others supra* note 33. See also *Christie v Leachinsky* [1947] 1 All E.R. 567 (HL).

actually touch the body of the person arrested unless the person submits verbally or by conduct.³⁷

5 3 3 Detention

The right to personal liberty is enshrined in articles 3 and 9 of the UDHR. Article 9 forms the foundation for safeguards against arbitrary detention in other human rights documents as well as domestic documents.³⁸ This right finds expression in section 5 of the Constitution of Botswana. In a simplistic sense, the right to liberty is breached if a person is detained in furtherance of an unlawful arrest or if he is detained longer than the legally permissible period. Upon the expiration of this period, the state is under a duty to either charge the suspect to court or release him. But it must be noted that there is a whole range of possible violations that can take place during this period. Also, policing practice involves “inviting” suspects to the police station to assist with investigations. There is a misconception that suspects are bound to honour the invitation of the police to accompany them to the police station. Strictly speaking, they are not.³⁹ They are also entitled to leave at any time. It is unfortunate that sometimes suspects having been “invited” to the police station end up being detained, as the police usually believe that they have a right of detention for the period of forty eight hours. Such detentions are illegal except made in pursuance of a valid arrest.

³⁷ S 46(1) Criminal Procedure and Evidence Act.

³⁸ ICCPR art 9(1), ACHPR art 6, European Convention art 5(1); Cook *Preventive Detention – International Standards and the Protection of the Individual* in Frankowski & Shelton (eds) *Preventive Detention: A Comparative and International Law Perspective* (1992) 1.

³⁹ O’Flaherty & Heffernan *International Covenant on Civil and Political Rights: International Human Rights Law in Ireland* (1995) 51.

5 4 Interrogation

It is axiomatic that pre-trial custodial interrogation of a suspect by the police, is one of the methods employed by the police to obtain incriminating statements at a time when the suspect is in a vulnerable position. The police have the upper hand and seek to take advantage of the suspect. The suspect's right to silence (see paragraph 5 4 1 below) and the pre-trial right to a lawyer (see paragraph 5 5 below) seek to restore or correct what would otherwise be a most unequal contest.

5 4 1 *The right to silence*

5 4 1 1 The privilege against self-incrimination

The privilege against self-incrimination is based on the premise that the accused or a suspect should not be recruited to assist the state in his own prosecution.⁴⁰ It ensures “a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load.”⁴¹ This privilege is expressed in several ways such as the general right to silence, the right of the accused not to testify at his trial and a very crucial right to be informed of his right to silence upon arrest.⁴²

⁴⁰ Dennis “Instrumental Protection, Human Rights or Functional Necessity? Reassessing the Privilege against Self-Incrimination” 1995 *Cambridge Law Journal* 342 345.

⁴¹ *Murphy v Waterfront Commission of New York Harbor* 378 U.S. 52 55 (1964); see also Redmayne “Rethinking the Privilege Against Self-Incrimination: 2007 *Oxford Journal of Legal Studies* 209 232.

⁴² Theophilopoulos “An Analysis of American Fifth Amendment Jurisprudence and its Relevance to the South African Right to Silence” 2006 *South African Law Journal* 516; Lewis “Rethinking Miranda: Truth, Lies, and Videotape” 2007-2008 *Gonzaga Law Review* 199 206.

The privilege against self-incrimination or right to silence is widely recognised and affirmed by many constitutions worldwide. It is famously echoed in the American Fifth Amendment to the effect that “No person...shall be compelled in any criminal case to be a witness against himself.” It is also found in the constitutions of South African,⁴³ Botswana,⁴⁴ Namibia⁴⁵ and the Canadian Charter of Rights and Freedoms.⁴⁶ It is said to prevent the eliciting of self-incriminating statements by inhumane means.⁴⁷ It therefore protects a suspect when faced with custodial interrogation. Clearly, the basis of the *Miranda*⁴⁸ decision was to institute safeguards around custodial interrogation, since such interrogation by itself exerts a heavy toll on the individual.⁴⁹ The *Miranda* warnings were therefore designed to secure the privilege⁵⁰ by ensuring that incriminating statements are made freely and voluntarily.

⁴³ S 35(1)(a) & 35(3)(h) & (j). See Theophilopoulos “The Historical Antecedents of the Right to Silence and the Evolution of the Adversarial Trial System” 2004 *Stellenbosch Law Review* 161.

⁴⁴ S 10(7). The provision reads: “No person who is tried for a criminal offence shall be compelled to give evidence at the trial.”

⁴⁵ Art 12(1)(f). Came into force 21 March 1990. See Flanz & Ward *Constitutions of the World* issue 2008.

⁴⁶ Schedule B, Constitution Act 1982, S 11(c). Available on <http://laws.justice.gc.ca/en/charter> (accessed on 14 March 2009).

⁴⁷ *Murphy v Waterfront Commission of New York Harbor* *supra* note 41; Van der Walt & De la Harpe “The Right to Pre-Trial Silence As Part of the Right to A Free and Fair Trial: An Overview” 2005 *African Human Rights Law Journal* 70 86-87.

⁴⁸ *Miranda v Arizona* 384 U.S. 436 (1966).

⁴⁹ Ciarelli “Pre-Arrest Silence: Minding That Gap between Fourth Amendment Stops and Fifth Amendment Custody” 2003 *Journal of Criminal Law and Criminology* 651 657.

⁵⁰ Ciarelli 2003 *Journal of Criminal Law and Criminology* 656.

The privilege is a negative procedural right in the process of securing equality. In this regard, if the suspect cannot be compelled to say anything, the state cannot use it against him. After all, the state has resources to investigate crime. Also, self-incriminating statements usually assist the state in its investigation. Therefore, the accused's silence reinforces his decision not to assist the state. He can retain a purely adversarial stance. Again, should the accused assist the state, he should choose to do so voluntarily, knowingly and intelligently.

Conceptually, it would appear that there are differences in the right to silence and the privilege against self-incrimination in South Africa and Botswana. Section 10(7) of Botswana's Constitution is similar to the United States' Fifth Amendment. In the United States, the Fifth Amendment is a defence against state compulsion. It is expressed as a prohibition against compulsion of the accused to incriminate himself. However, the application of this provision has been extended by the courts to include pre-trial silence. In effect, self-incrimination and the right to silence are viewed against the same background with the right to silence being subsumed by the question of self-incrimination.⁵¹ In effect, the distinction is relatively weak. In South Africa the rule against self-incrimination is a rule of statutory procedure on which a witness testifying may rely.⁵² The right to silence is a constitutional right which the accused may invoke in criminal proceedings.⁵³ In Botswana, there is no express constitutional pre-trial right to silence. However, since section 10(7) is similar in wording to the American Fifth Amendment, there is no reason why the privilege should not extend to

⁵¹ Theophilopoulos 2006 *South African Law Journal* 517.

⁵² Theophilopoulos 2006 *South African Law Journal* 517.

⁵³ Theophilopoulos 2006 *South African Law Journal* 517.

the accused's pre-trial rights as the American courts have done with the Fifth Amendment in the form of the *Miranda* guidelines. However, a slight variation must be noted in Botswana's section 10(7). While the United States' Fifth Amendment is expressed as a rule against self-incrimination protecting the accused from being compelled to testify against himself, Botswana's section 10(7) is expressed as a right to silence. It is a rule establishing a right not to testify at his trial. An extension of section 10(7) to the pre-trial investigation in Botswana as the American courts have done in relation to the Fifth Amendment would sanctify a pre-trial right to silence in Botswana. Consequently, this will have the effect of redressing the imbalances and strengthening the position of the accused during pre-trial interrogation. This is very significant as there is no judicial supervision at this stage and pre-trial legal representation is not expressed as a constitutional right. Whereas the application of section 10(7) to pre-trial procedures will assist in redressing imbalances in the system, it must be noted that this interpretation of the section is doubtful. As one of the three judges in the case of *Phiri and Others v The State*⁵⁴ mentioned, the section refers to the accused's constitutional right to remain silent at trial and does not extend to pre-trial questioning. The inequality which exists at the pre-trial stage is obvious. The prosecution may profit at the expense of the accused.

5 4 1 2 Adverse inference from an accused's pre-trial silence

The question arises whether an adverse inference can be drawn from the accused's pre-trial silence. In South Africa, the Constitutional Court in *S v Thebus and*

⁵⁴ [1992] B.L.R. 317 (CA), Amisshah JP 323.

*Another*⁵⁵ has held that it was unconstitutional to draw an adverse inference from the pre-trial silence of the accused. However, two of the judges⁵⁶ suggested that it might be constitutional to draw such inference if the accused was warned of the consequences of his silence. Moseneke J⁵⁷ noted that the drawing of an inference of guilt from a pre-trial silence undermines his right to remain silent and to be presumed innocent. According to him such an inference would make the mandatory warning of the right to silence a trap. Moseneke J drew a distinction between an inference as to guilt and an inference as to credibility on the basis of an accused's pre-trial silence. According to him, an inference as to credibility will not necessarily infringe the presumption of innocence. However, he noted that late disclosure of an *alibi* may be legitimately taken into account in determining the weight to be attached to it. He noted that a decision of an accused to disclose his defence only when he appears in court is legitimate but that he could properly be cross-examined on his decision to remain silent and that such cross-examination would go to credit and would not amount to an infringement on his right to remain silent. In a separate judgment, Goldstone J and O'Regan J reached the same conclusion but concluded that drawing an adverse inference from an accused's failure to disclose his *alibi* timeously amounts to an infringement of his right to remain silent. They also rejected the view that drawing an adverse inference infringes the presumption of innocence. According to them the Constitution does not stipulate that only the state's evidence should be used to prove the guilt of the accused. They, however, stated that considering the historical

⁵⁵ 2003 (6) SA 505 (CC). For a discussion of this case, see Schwikkard & Van der Merwe *Principles of Evidence* 3 ed (2009) 308-313; Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche & Van der Merwe *Criminal Procedure Handbook* 8 ed (2007) 263.

⁵⁶ Goldstone J & O'Regan J (Ackermann J & Mokgoro J concurring).

⁵⁷ Chaskalson CJ & Madala J concurring.

record of policing, a prohibition on adverse inferences is justified in so far as it protects an accused from improper police questioning and procedures.⁵⁸ They also emphasised the need to warn the accused of the consequences of his electing to remain silent. They highlighted the unfairness of warning a person in a manner that implies no penalty for remaining silent and then proceeding to penalise him for exercising that right. They rejected the distinction between inferences drawn as to guilt and inferences drawn as to credit. In their view, “the practical effect of the adverse inference to be drawn for the purposes of credit, namely, that the *alibi* evidence is not to be believed, will often be no different to the effect of the inference to be drawn with respect to guilt, namely that the late tender of the *alibi* suggested that it is manufactured and that the accused is guilty.”⁵⁹ They also rejected Moseneke J’s stance that the accused could be cross-examined for choosing to remain silent as this would amount to penalising him for exercising a constitutional right.

Out of the ten judges who heard this case, seven found that it was unconstitutional to draw an adverse inference from the pre-trial silence of the accused.⁶⁰ Four, however, thought that if the warning was rephrased so as to inform an arrested person of the consequences of remaining silent, an adverse inference might be constitutionally sustainable.⁶¹ Another three judges ruled that though an adverse inference as to guilt was not justifiable, an adverse inference as to credibility was a justifiable limitation

⁵⁸ Schwikkard *Arrested, Detained and Accused Persons* 754.

⁵⁹ *S v Thebus and Another supra* note 55 para 90.

⁶⁰ Schwikkard *Arrested, Detained and Accused Persons* 756.

⁶¹ Schwikkard *Arrested, Detained and Accused Persons* 756.

on the right to remain silent and that an accused could be cross-examined on failure to disclose his *alibi* timeously.⁶² Four judges specifically rejected this view.⁶³

This case is phenomenal in that the Court though coming up with varying views, has set the ground for discussion on the effect of pre-trial silence. What is more interesting is that the accused did not elect to remain silent upon arrest but did make a statement which amounted to an *alibi*. His testimony during the trial contradicted his *alibi*. In effect, the real issue at hand was that the accused had made a previous inconsistent statement. The importance of the privilege against self-incrimination cannot be overstated. It protects suspects from physical and mental abuse during the course of investigation. At the same time it leads to the exclusion of credible and valuable evidence. As a result it is inevitably in conflict with the public policy of combating crime,⁶⁴ while at the same time redressing imbalances in the system. What can be said is that it would be improper to draw an adverse inference as to guilt or credibility on the basis of the accused's election to exercise a legitimate right. *Equating an accused's pre-trial silence to substantive evidence of guilt on the basis that the circumstances required him to explain himself when asked to account for certain actions, would undermine the principle of equality.* The presumption of innocence implies that the burden lies on the state to prove its case. Not only does equating silence as substantive evidence of guilt relieve the state, at least in part, of proving the accused's guilt, it demands that the accused assists the state in its

⁶² Schwikkard *Arrested, Detained and Accused Persons* 756-757.

⁶³ Schwikkard *Arrested, Detained and Accused Persons* 757.

⁶⁴ Zuckerman "The Right Against Self-Incrimination: An Obstacle to the Supervision of Interrogation" 1986 *Law Quarterly Review* 43.

investigation. This creates inroads into the protection against police coercion which might very well arise at a time when the accused has not availed himself of legal representation. At best, such silence can only fortify an assertion of guilt when considered in light of the rest of the evidence.

5 4 1 3 Protective right or obstacle to truth finding

Present comment on the privilege against self-incrimination has taken varying dimensions. Whereas it is supposed to act as a fundamental protecting mechanism in maintaining equality during the interrogation stage, it is seen in some quarters as the bane of any meaningful measure of effective law enforcement. One would ask whether a self-incriminating statement obtained by unfair means should not be used in evidence if its contents are clearly true. If someone is accused of a wrongdoing or found at a crime scene, is it not natural that if he is innocent that he would give an explanation of his presence there if so required?⁶⁵ It has been argued that the privilege serves as a shield to the guilty.⁶⁶ The matter at hand therefore is whether this privilege is a legitimate protective right or amounts to usurping a legitimate truth seeking process. Van Dijkhorst,⁶⁷ who launches a scathing attack on the privilege, states that its historical antecedents are no longer relevant in a complex modern society. He states that though originally intended to prevent abuse, the privilege now effectively

⁶⁵ Palmer “Silence in Court – The Evidential Significance of an Accused Person’s Failure to Testify” 1995 *University of New South Wales Law Journal* 130 138.

⁶⁶ Williams *The Proof of Guilt* 3 ed (1963) 53; Van Dijkhorst “The Right To Silence: Is the Game Worth the Candle?” 2001 *South African Law Journal* 26; Van der Walt & De la Harpe 2005 *African Human Rights Law Journal* 84.

⁶⁷ Van Dijkhorst 2001 *South African Law Journal* 26.

shields the truth from coming out.⁶⁸ It has been argued that the use of pre-arrest silence as substantive evidence of guilt in the truth seeking process outweighs the privilege against self-incrimination.⁶⁹

What was originally developed to protect persons against cruel systems seems to have grown into an instrument which is difficult to justify and manage.⁷⁰ It is seen as a shield for criminals, unnecessary in present society and unnecessary in the criminal justice system. It is true that during the period between arrest and trial, the accused is potentially exposed to overbearing circumstances due to overzealous policing. What is important is that the accused should be informed of his right to silence and the fact that any incriminating statement might be used against him at his trial, before any questioning by the police commences. In practice, there is really no line between when a suspect is arrested or not. It is a well known fact that the police in Botswana merely approach and commence questioning of suspects without any formal warning in relation to his rights. The police have developed a tendency to rely on incriminating statements made by suspects during this period as the main vein of their case. Sometimes the suspect would have been incarcerated (prior to questioning) if he refuses to “cooperate.” The questioning then restarts and he makes incriminating statements. Most of the time, he still would not have been informed whether he is under arrest, nor would he be advised of his rights. It seems imperative that a suspect should be informed of his rights before the police start any questioning whatsoever.

⁶⁸ Van Dijkhorst 2001 *South African Law Journal* 28.

⁶⁹ Notz “Prearrest Silence as Evidence of Guilt: What You Don’t Say Should Be Used Against You” 1997 *University of Chicago Law Review* 1009 1017.

⁷⁰ See para 9 3 2 for further discussion. Schwikkard & Van der Merwe *Principles* 124-125.

South African cases are divided on the operation of the pre-arrest rights of a suspect. In *S v Sebejan & Others*⁷¹ it was stated *obiter* that a suspect even though not arrested or detained is entitled to fair pre-trial procedures including all rights that are open to an arrested suspect. The Court stated that a suspect should be cautioned in terms of the Judges' Rules. In *S v Langa & Others*,⁷² the Court in distinguishing the case on its facts, declined to follow *Sebejan*.⁷³ In my view, the protection against self-incrimination commences immediately the suspect has his first encounter with the police. If the police are to successfully make use of his statements in evidence, such statement should be made under caution whether or not the suspect has been formally arrested. Any view to the contrary would seriously undermine the notion that pre-trial equality of arms ought to be promoted where possible.

5 4 1 4 Partial state silence

The state would want the court to draw an adverse inference from the suspect's silence. It must be noted, however, that the state also maintains partial silence. The requirement for an arrest only requires that the suspect be told why he is being arrested. It does not demand that the state furnish him with details of their investigation at that stage. The duty to disclose comes only after the state has collected all its evidence and has decided to lay charges. *Failure to disclose details of the offence to the suspect creates an imbalance and implicates his right to present his*

⁷¹ 1997 (1) SACR 626 (W); Schwikkard & Van der Merwe *Principles* 132.

⁷² 1998 (1) SACR 21 (T).

⁷³ See Du Toit, De Jager, Paizes, Skeen & Van der Merwe *Commentary on the South African Criminal Procedure Act* (2008) 24-56B.

case. If he is required to answer questions during investigations, all information gathered should be placed before him. Otherwise he is placed in a position of substantial disadvantage and procedural inequality. The right of the suspect to adequate facilities to prepare his defence, should operate on the basis of procedural equality with the state. Fairness demands that this be the case. To keep the suspect in the dark and to allow him access to information only after the state has marshalled and sieved the evidence, flies in the face of procedural equality.

5 5 Pre-trial legal representation

The Constitution of Botswana does not expressly extend the right to legal representation to the pre-trial stage. In fact, the provision relating to legal representation provides that “Every person who is charged with a criminal offence...shall be permitted to defend himself *before the court*⁷⁴ in person or, at his own expense, by a legal representative of his own choice.”⁷⁵ The question whether legal representation applies to the pre-trial stage has unfortunately not been determined extensively. Nesereko and Molatlhegi note that it is the practice in Botswana to deny suspects access to attorneys during investigations and that when they are granted the privilege, they insist that consultations should be in the presence of the police.⁷⁶ This is, to say the least, a ridiculous situation. Molatlhegi suggests that

⁷⁴ Emphasis added.

⁷⁵ Section 10(2)(d).

⁷⁶ Ntanda Nsereko “Legal Representation in Botswana” 1988 *Israel Yearbook on Human Rights* 211 213; Molatlhegi “The Right to Legal Representation in Criminal Proceedings in Botswana: More than a Court-Room Right for the Knowledgeable Suspect?” 1997 *South African Journal of Human Rights* 458 460; for a discussion on pre-trial right to counsel in the United States see Hungate-Noland “Texas v

this attitude is encouraged by the very wording of the Constitution. The Constitution extends the right to legal representation to “every person who is charged with a criminal offence” and not to a suspect. A plausible argument therefore is that if the framers of the Constitution intended to extend the right to the pre-trial stage, they would have stated so. Applying the *expressio unius exclusio alterius* canon of interpretation, the express mention of certain benefits or burdens implies the exclusion of those not mentioned.⁷⁷ In *Bojang v The State*,⁷⁸ while citing the *Miranda* principles in full and referring extensively to the Chief Justice Warren’s declaration on the requirement for counsel during interrogation, the Court noted that the wording of section 10(2)(d) is different from the American Sixth and Fourteenth Amendments and that they have different spheres of operation.⁷⁹ In embracing the restrictive approach the Court noted that “applying the principle that in the interpretation of a completely self-governing Constitution founded upon a written organic instrument, if the text is explicit, the text is conclusive, alike in what it directs and what it forbids.”⁸⁰ Molatlhegi opines that this constitutional interpretation allows an illegality to continue unchallenged. In his view, it is restrictive and erroneous.⁸¹ He contends that the aim of the Constitution is to adopt a purposive approach to the right to legal representation.⁸² In my view, there is great merit in this contention. Indeed, the courts have adopted a

Cobb: A Narrow Road Ahead for the Sixth Amendment Right to Counsel” 2002 *University of Richmond Law Review* 1191.

⁷⁷ Molatlhegi 1997 *South African Journal of Human Rights* 460.

⁷⁸ [1994] B.L.R. 146.

⁷⁹ 155.

⁸⁰ 156A-B.

⁸¹ Molatlhegi 1997 *South African Journal of Human Rights* 460.

⁸² Molatlhegi 1997 *South African Journal of Human Rights* 460.

generous approach to constitutional interpretation.⁸³ In this regard, the courts have declared that the Constitution should be interpreted so as to expand the rights of the citizen and restrict the powers of the state.⁸⁴ This approach which has resonated in the courts of Botswana should be relied upon to extend the right to legal representation to the pre-trial suspect.⁸⁵ Otherwise, the inequalities between the state and the individual

⁸³ In *Dow v Attorney-General* [1991] B.L.R. 233 where the Court had to determine whether the Citizenship Act was inconsistent with the Constitution the Court noted at 242A-B, “I have no doubt that upon the authorities I have quoted, and they come from different jurisdictions and different contexts, social, legal, political and socio-economic, I am driven to take a generous or liberal approach to the questions raised in this matter.”; “In my view these statements of learned judges who have had occasion to grapple with the problem of constitutional interpretation capture the spirit of the document they had to interpret, and I find them apposite in considering the provisions of the Botswana Constitution which we are now asked to construe. The lessons they teach are that the very nature of a Constitution requires that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the Constitution; and that where rights and freedoms are conferred on persons by the Constitution, derogations from such rights and freedoms should be narrowly or strictly construed.”: *Attorney-General v Dow* [1992] B.L.R. 119 131H-132A (CA); “...[A] constitution such as the Constitution of Botswana, embodying fundamental rights, should as far as its language permits be given a broad construction. Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.”: *Attorney-General v Moagi* [1981] B.L.R. 1 32 (CA); see also *Sejammitlwa and Others v Attorney-General and Others* [2002] 2 B.L.R. 75 82 (CA).

⁸⁴ “It is another well known principle of construction that exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad, constructions.”: *Petrus and Another v The State* [1984] B.L.R. 14 35E (CA).

⁸⁵ “Every citizen is entitled to be defended at his trial and when he is arrested the presence of his solicitor is important when statement is taken from him. A solicitor will properly advise him as to his rights and ensure that he does not say anything that will incriminate him. Further, he will be protected

at this stage, cannot sufficiently be bridged. *Pre-trial investigations cannot be divorced from the trial.* The police are tempted to violate the rights of suspects in their sole custody. *This in itself violates the principle of equality of arms as the suspect is at the absolute mercy of the state.* Certain rights such as the right to silence and the protection against torture which have a direct impact on the fairness of the trial are at stake while a suspect is in custody. One would hope that the courts in Botswana adopt a purposive approach to legal representation. The Court of Appeal in *Lesego Thebe v The State*⁸⁶ noted *obiter* that “a constitution such as the Constitution of the Republic of Botswana which guarantees a defendant a fair trial must vouch-safe no less to a suspect in the custody of the police.”⁸⁷ This case faintly echoes American judicial pronouncements that legal representation is a prerequisite for legally permissible interrogation, unless properly waived.⁸⁸ Unfortunately the matter has not been

from the usual police duress.”: Cole “Protection of the Liberty of the Individual in Sierra Leone” 1998 *Review of the African Commission on Human and Peoples’ Rights* 82 86.

⁸⁶ Criminal Appeal Number 2 of 1994 (unreported).

⁸⁷ 20-21 of the typed judgment. The Court also cited with approval the declaration of Chief Justice Warren in *Miranda v Arizona supra* note 48 444-445 that: “Prior to questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of any attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If however, he indicates in any manner and at any stage of the process that he wishes to consult an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.”

⁸⁸ In *Massiah v United States* 377 U.S. 201 204 (1963): “[A] Constitution which guarantees a defendant the aid of counsel at...trial could surely vouch safe no less to an indicted defendant under interrogation by the police in a completely extra-judicial proceeding. Anything less...might deny a defendant effective representations by counsel at the only stage when legal aid and advice would help

determined extensively since then. The Bill of Rights should be given a liberal and teleological approach if it were to survive the challenges of society. Legal representation is essential to the fairness of the pre-trial process and contributes to some extent to the role the equality principle ought to play at this stage.

5 6 Extra judicial confessions

A confession is defined as “an unequivocal acknowledgment [by an accused or suspect] of his guilt, the equivalent of a plea of guilty before the court.”⁸⁹ Extra judicial confessions mostly happen before an accused seeks legal advice. It is therefore important that confessions are made freely and voluntarily by suspects, in their sound and sober senses and without any undue influence.⁹⁰ A suspect should not

him.” ; *Escobedo v Illinois* 378 U.S. 478 (1963); see *Nyembe v The State* [2008] 1 B.L.R. 129 (CA) where it is faintly suggested that the right to legal representation comes into effect from the time of arrest .

⁸⁹ *Mohalenyane v The State* [1984] B.L.R. 291 301F adopting the words of De Villiers ACJ in *R v Becker* 1929 AD 167; see also *State v Miclas Habane* [1971] 2 B.L.R. 66; *Martlouw v The State* [1993] B.L.R. 306; *Moseki v The State* [1995] B.L.R. 690; *State v Khama* [2000] 1 B.L.R. 209; *State v Ramatswidi* [2005] 1 B.L.R. 452; see also the dissenting judgment of Dendy Young JA in *Mashabile v The State* [1984] B.L.R. 96 (CA); Shuy notes, “The primary law governing eliciting confessions is that the confessor voluntarily acknowledge his or her guilt”: Shuy *The Language of Confession, Interrogation, and Deception* (1998) 51.

⁹⁰ Section 228(1)(i) of the Botswana Criminal Procedure and Evidence Act. See *State v Nfanyana Njuanje* [1968-1970] B.L.R. 237; *Masina and Another v The State* [1983] B.L.R. 237 (CA); *State v Mponda* [1986] B.L.R. 286; *Kablay v The State* [1990] B.L.R. 279; *Sekga v The State* [1997] B.L.R. 972; *Tsholofelo v The State* [1992] B.L.R. 282 (CA); *Mokwena v The State* [1992] B.L.R. 14 (CA); *Tshekiso v The State* [1997] B.L.R. 22 (CA); *Mosetlhanyane v The State* [2007] 3 B.L.R. 123; Quansah *The Botswana Law of Evidence* (2004) 145.

be subjected to fear, prejudice, or hope of advantage exercised or held out by a person in authority.⁹¹ South African law has expressed the requirements of “freely and voluntarily” and “without undue influence” to be separate components, both of which have to be complied with.⁹² However, this distinction is, it seems, irrelevant for practical purposes.⁹³ Indeed, it was pointed out in *S v Mpetha and Others (2)*⁹⁴ that the concept of undue influence is wider than being “free and voluntary”. Therefore, if the voluntariness of a statement is challenged in a court of law, the onus lies on the prosecution to prove that the confession was not induced by any promise of favour or advantage, or by the use of fear, threat or pressure.⁹⁵ An inducement includes the use or threat of force, compulsion, or promise of material gain.⁹⁶ Prolonged interrogation may also amount to “an undue influence.”⁹⁷ Therefore, it is for the state to disprove any allegation that a confession was made under circumstances that render it inadmissible.⁹⁸ In South Africa, in addition to the statutory provisions⁹⁹ that regulate

⁹¹ *Setswalo v The State* [1985] B.L.R. 298; *State v Kobedi* [1990] B.L.R. 458; *Tshekiso v The State supra* note 90; *State v Bothapile and Others* [1968-1970] B.L.R. 154; see the South African case of *R v Barlin* 1926 AD 459; see also the Namibian case of *S v Kau and Others* [1993] NASC 2; 1995 NR 1.

⁹² *S v Pieterse and Others* 1987 (4) SA 98 (C) 110; *S v Lebone* 1965 (2) SA 837 (A) 844; *S v Colt and Others* 1992 (2) SACR 120 (E) 127; Du Toit et al *Commentary* 24-56H.

⁹³ Du Toit et al *Commentary* 24-56H.

⁹⁴ 1983 (1) SA 576 (C).

⁹⁵ *State v Nfanyana Njuanje supra* note 90; *State v Bothapile and Others supra* note 91; *State v Mokwena* [1990] B.L.R. 1; *State v Ramatswidi supra* note 89; *State v Ncube* [1982] 2 B.L.R. 73 (CA).

⁹⁶ *Kwae v The State* [1996] B.L.R. 159 (CA).

⁹⁷ *Mokwena v The State supra* note 90 26B; *State v Bitsang Bagwasi* [1968-1970] B.L.R. 129; *State v Nfanyana Njuanje supra* note 90.

⁹⁸ See the case of *State v Zindaba & Others* [1976] B.L.R. 49 where allegations of torture were made against the police; *State v Mponda supra* note 90; Quansah *Law of Evidence* 153.

the requirements of a valid confession, broader constitutional guarantees of fairness apply. In *S v Marx and Another*¹⁰⁰ it was held that confessions might be excluded in evidence where an accused was advised of his right to legal representation upon arrest, but not advised of such right when the statement was actually made. The Court emphasised that basic notions of fairness apply. It was held that the general question in considering the admissibility of evidence, including statements made to a police officer, is whether admission will infringe the requirements of a fair trial.¹⁰¹ Therefore, a confession might meet the statutory requirements but yet remain inadmissible on “broader constitutional grounds”.¹⁰² Such grounds according to the Court include any breach of constitutional pre-trial and trial rights.¹⁰³

In Botswana, legislation provides for conditions relating to the taking of confessions. In terms of section 228(1)(ii) of the Criminal Procedure and Evidence Act, a confession made to a police officer should be confirmed in writing by a magistrate or “any justice” who is not a member of the Botswana police. A voluntary confession made to a police officer is therefore inadmissible in a court of law, except if it was confirmed and reduced into writing in the presence of a magistrate or any justice.¹⁰⁴ It

⁹⁹ S 217 Criminal Procedure Act 51 of 1977 which is similar to S 228 of the Criminal Procedure and Evidence Act of Botswana.

¹⁰⁰ 1996 (2) SACR 140 (W).

¹⁰¹ 144.

¹⁰² 144B.

¹⁰³ S 35 of the South African Constitution. Unlike the Botswana Constitution her South African counterpart specifically provides for the rights of arrested and detained persons.

¹⁰⁴ *Malope v Regina* [1964-1967] B.L.R. 133 (CA); *State v Malebadi* [1986] B.L.R. 405; *State v Mponda supra* note 90; *Masina and Another v The State supra* note 90; *State v Moithoke* [1981] B.L.R.

follows that if a suspect makes a confession to a police officer, he should be taken before a magistrate or justice who will again record a statement from the suspect after being satisfied that he is not under any undue influence and that the statement is voluntary. Courts strictly apply this statutory provision. In a case where a statement was made before an administrative officer who was a district assistant but not a justice or magistrate, the court declined to admit the statement.¹⁰⁵ The rationale for the provision was summarised as follows by the Court of Appeal in the case of *Kgaodi v The State*:¹⁰⁶

“The provision prohibits the admission in evidence of confessions made to police officers *simpliciter*. It does not matter whether the confession to the police officer is voluntary or not. The object of the prohibition is obviously to avoid arguments at trial over whether confessions to police officers were freely made, without inducement, physical or otherwise. As is well known, allegations are often made of police officers torturing or beating up suspects and accused persons or using other unlawful means in order to obtain statements which advance the investigation or prosecution of the cases. Some of these allegations have been found to be true by the courts although the majority of them often turn out to be unfounded. True or not, it is in the interest of justice that these charges, or opportunities for them to be made, should be minimised, if not altogether eliminated. *The prohibition discourages*

219; *State v Moseki* [1986] B.L.R. 206; *State v Gabatlwaelwe* [1996] B.L.R. 540; *Moje v The State* [1999] 1 B.L.R. 38 (CA); *State v Nkwali and Others* [2001] 1 B.L.R. 397; *Moseki v The State supra* note 89; *State v Dube* [2007] 3 B.L.R. 313; *Mosetlhanyane v The State supra* note 90.

¹⁰⁵ *State v Thako* [1978] B.L.R. 31.

¹⁰⁶ [1996] B.L.R. 23 (CA).

*the police from using force or other forms of inducement in extracting confessions to bolster up their cases, because if the court would not admit any confessions obtained by them at all, there should be no need for them to use unlawful methods to obtain them. But in order not to exclude genuine confessions made by accused persons even if made to police officers altogether, the law permits the admission of such confessions if 'confirmed and reduced to writing in the presence of a magistrate or any justice who is not a member of the Botswana Police Force.'*¹⁰⁷

The legal requirement and procedural safeguard regarding the voluntariness of confessions, is a recognition of the uneven state of affairs between the state and the individual at the pre-trial stage. At this stage, state agents secure confessions through threats, torture or incentives. The provision is a sterling legal safeguard in that it brings the judicial officer into the process. The judicial control and verification of the voluntariness of confessions compensate to some extent for the absence of a mandatory provision requiring the presence of counsel when statements are made. Even if such provision existed, suspects would have had to provide their own attorneys since the state only provides attorneys for capital offences, and even so, not at the pre-trial stage. Since the majority of people cannot afford attorneys, this provision is significant in protecting the large number of people who cannot have attorneys present when making their statements. Further, it serves to overcome arguments as to whether confessions made to the police are voluntary or not.

¹⁰⁷ Per Amissah JP 28C-F. (Emphasis added).

5 6 1 *The admission gap*

Despite the provisions of section 228(1)(ii), there are gaps in the law that permit the admission of self-incriminating statements in evidence. The common law of Botswana permits this.¹⁰⁸ As has been said, suspects are not usually advised of their right to remain silent upon arrest. The law requires confirmation of a confession by a magistrate. Admissions on the other hand do not fall under the statutory ambit of section 228(1)(ii) and the law makes a clear distinction between confessions and admissions. Confessions are defined as “an unequivocal acknowledgment [by an accused or suspect] of his guilt, the equivalent of a plea of guilty before a court of law.”¹⁰⁹ An admission on the other hand is an acceptance of certain facts. In the case of *Desai and Another v The State*,¹¹⁰ an appeal from the magistrates’ court, the accused persons were charged with unlawful possession of Mandrax tablets. The police had found a briefcase in their car and asked them what the contents were. They said it was tablets but did not state what kind of tablets. The appellant contended that this amounted to a confession and that it should have been confirmed in the presence of a judicial officer. O’Brien Quinn CJ rejected this argument and concluded that the statement was an admission and therefore admissible. He advanced two reasons.

First, he relied on the reasoning of two authorities. He adopted the definition of a confession in *R v Becker*,¹¹¹ a definition which is overly narrow. In *Becker*, De

¹⁰⁸ See *Mpharilthe v The State* [2004] 1 B.L.R. 53 (CA).

¹⁰⁹ *Mohalenyane v The State supra* note 89 301F; see paragraph 5 6 above.

¹¹⁰ [1985] B.L.R. 582.

¹¹¹ *Supra* note 89; referring to *R v Becker*, Corduff J stated in *State v Moithoke supra* note 104 223: “This is a very restricted and artificial definition and the only purpose it serves is to free a greater number of statements from the effects of the Second Proviso [That is, S 228(1)(ii) of the Criminal

Villiers ACJ stated that an admission of the facts when pieced together may lead to an inference of the accused's guilt. However, according to him, that does not amount to a confession. O'Brien Quinn also relied on the case of *R v Deacon*¹¹² which ruled that for a statement to amount to a confession, it must admit to the act and negate any exceptions which would exempt the accused from liability. Such formalistic definitions have no regard for the informal settings under which incriminating evidence is usually obtained and tend to demand a formalised interrogation of the suspect which itself encourages abuse.

Second, he held that the police were merely making formal enquiries and that no caution was required at that stage. According to him "the police were merely in the early stages of their investigation and the question of charging or arresting the appellants had not arisen."¹¹³ His view was that when the appellants said the briefcase contained tablets, such evidence was merely an admission which was voluntary as no threat, promise or inducement was made. One may ask, if a statement can only amount to a confession after the accused is formally arrested as suggested. What happens during pre-arrest contact between the police and the citizen? One wonders

Procedure and Evidence Act], which requires that confessions made to police officers are inadmissible unless they are confirmed in writing in the presence of a magistrate or any justice." It was suggested by Murray J in *State v Mosarwa and Mapitsi* High Court, Criminal Trial No 37 of 1985 (Unreported), that a better definition would be: "An admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence." Cited in *State v Julius and Another* [1985] B.L.R. 495 496G-H; Quansah *Law of Evidence* 144.

¹¹² 1930 TPD 233.

¹¹³ *Desai and Another v The State supra* note 110 590E-F; see also *Phiri and Others v The State supra* note 54 326.

whether his rights remain dormant until the police decide to formally arrest him. The distinction between a confession and admission is based on a formalistic artificiality that seeks unsuccessfully to distinguish same-set facts.

The police are therefore at liberty to obtain confessions through any means and then instruct the accused to appear before a magistrate to rubber-stamp what has already been extracted through unfair means. Suspects have been found to still be under the influence of the police when making their statements in the presence of a magistrate.¹¹⁴

Also, suppose these so-called admissions are not voluntarily obtained, what protection does the suspect have? More importantly, it must be stressed that there are no tangible safeguards against the unlawful extraction of admissions or pre-arrest confessions as they operate outside the protective net of section 228(1)(ii). There is no procedural framework for ensuring that the suspect does not speak under duress in respect of admissions. In a case that preceded *Desai*,¹¹⁵ Dyke CJ appeared to have appreciated

¹¹⁴ This finding was reached by Dyke CJ in the case of *S v Baalakani Moloise* [1977] B.L.R. 28. In that case the accused was taken before a District Commissioner to make a statement. The reason given by the accused for making the statement was – “I was asked to go to make [sic] statement before the D.C. by the C.I.D. Police.”; *Masina and Another v The State supra* note 90; *Tsholofelo v The State supra* note 90; see also *State v Ramatswidi supra* note 89 where the accused had spent two days in police cells and was told by the investigating officer that he would only be released if he made a confession.

¹¹⁵ *Supra* note 110; the South African Law Commission has suggested that the admissibility of confessions, admissions and pointing outs be put on the same footing, that is, the requirement of proof that they were made freely and voluntarily: SA Law Commission *Simplification of Criminal Procedure (A More Inquisitorial Approach to Criminal Procedure – Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials)* Discussion Paper 96 Project 73 (2001).

the dangers of admitting statements made to the police on the grounds that they were admissions. In the case of *S v Baalakani Moloise*¹¹⁶ he doubted the reliability of an admission made to a police officer. He noted that if the state is to rely on a statement made to police officers, the Judges' Rules should at least be employed and it should be taken down in writing and read back to the accused and he should have signed his statement. Though it can be said that Dyke CJ might be replicating section 228(1)(ii) of the Criminal Procedure and Evidence Act, his argument is that the statement should have been preceded by a warning and caution. Therefore, even if it were argued that the statement should be admitted on the basis of an admission, I still strongly argue that the accused should be warned and cautioned before he says anything. Though Dyke's requirement for writing seems to duplicate section 228(1)(ii), it appears that he was not impressed with the distinction made between confessions and admissions and would rather prefer that all statements made to the police were made under caution and reduced into writing, more particularly incriminating statements. In this vein one would reckon that by insisting on written statements, he in fact had the provision in his contemplation. It must be admitted however that in addition to his regard for the protection of the accused, Dyke's contention was equally based on the reliability of the evidence of the police. He noted that the policeman was merely repeating from memory what the accused had told him and that he did not write it in his notebook even though he had one. He therefore wondered how credible the evidence was. Bailey also notes a similar problem in the Australian system when he writes "...many important protections to individuals during inquiry stages prior to a formal prosecution lack legal backing, and leave the citizen potentially exposed to

¹¹⁶ *S v Baalakani Moloise supra* note 114.

unfair questioning.”¹¹⁷ Foxcroft J in the South African case of *S v Agnew and Another*¹¹⁸ rightly questioned the artificial distinction drawn between admissions and confessions. He noted that admissions can be as damaging as confessions. He pointed out that if the rule that no one should be permitted to incriminate himself is given its full effect, it is difficult to understand how incriminating statements in confessions should be treated differently from incriminating words amounting to admissions only.¹¹⁹ Therefore, a situation exists whereby a suspect may make several self-incriminating statements which are admissible in court even though he was not warned and regardless of whether such statements were elicited under duress.

In Botswana, a suspect is usually only warned of his right to remain silent when he appears before a judicial officer to make a confession. So an accused may make several incriminating so-called admissions that can be used against him since admissions are admissible in evidence. The distinction between confessions and admissions is therefore problematic. The reality of the situation remains that both confessions and admissions are incriminating and any exculpatory rules designed to protect suspects from making forced statements should be based on the incriminatory test. It seems therefore that suspects should be warned and cautioned before pre-arrest interviews are conducted.

The right to silence is a fundamental constitutional right and a vital instrument in ensuring that the state does not misuse its position of strength and the powers and

¹¹⁷ Bailey *Human Rights: Australia in an International Context* (1990) 304.

¹¹⁸ 1996 (2) SACR 535 (C).

¹¹⁹ 538; see Schwikkard *Arrested, Detained and Accused Persons* 764.

resources at its disposal. Therefore, the Judges' Rules must always be followed before any questioning commences and an automatic inference of guilt cannot be drawn from the exercise of the right to silence.¹²⁰

5 6 2 Evidence of pointing out

The requirements of section 228(1)(ii) are further undermined by section 229(2).

Section 229(2) reads:

“ It shall be lawful to admit evidence that anything was pointed out by the person under trial or that any fact or thing was discovered in consequence of information given by such person, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible against him on such trial.”

This provision was a legislative response, overruling the decision in the case of *State v Ndleleni Dube and Others*¹²¹ in which it was held that evidence of pointing out would be inadmissible if not freely and voluntarily made and if it did not satisfy the requirements of section 228(1)(ii). Section 229(2) tilts the advantage at the pre-trial process in favour of the state with telling consequences in a number of respects.

First, it opens the floodgates for obtaining information by coercion. It simply means that the police can coerce a suspect to give them information of, or lead them to the

¹²⁰ *Leonard v The State* [1987] B.L.R. 6; *S v Viljoen (bail appeal)* 2002 (2) SACR 550 (SCA).

¹²¹ [1981] B.L.R. 175; Ntanda Nsereko *Constitutional Law in Botswana* (2002) 65; see also *Ellen Paledi and Kediemetse Bembe v Regina* [1964-1967] B.L.R.137.

whereabouts of anything connected with an offence. Therefore, coercion or even torture is inadvertently sanctioned, especially in respect of theft related offences. All the police need to do is to torture the accused into telling them where the loot is hidden.

Second, knowledge of the whereabouts of evidence linked to the offence, does not by itself imply guilt. A strictly literal application of the provision can therefore lead to distorted conclusions. It must be noted, however, that this provision has received judicial endorsement in Botswana. In the case of *Nkgatogang v The State*¹²² Aguda JA sitting in the Court of Appeal had this to say:

“The view I take of this provision is that it is not meant to permit the admissibility of a confessional statement which in law is inadmissible. What the subsection says is that it is lawful to admit evidence that an accused person pointed out something; and that it is lawful to admit evidence that some fact or some thing was discovered in consequence of information supplied by an accused person.”¹²³

¹²² [1988] B.L.R. 219 (CA). See also *Motlhale and Others v The State* [1985] B.L.R. 330; *Motlhale v The State* [1986] B.L.R. 304 (CA); *Edwin Seja v The State* Cr App No 116/89 (unreported); *Kenosi v The State* [1993] B.L.R. 329 341.

¹²³ *Nkgatogang v The State supra* note 122 224A-B; *State v Mokhe* [2007] 1 B.L.R. 52; according to Dennis, “English law has not adopted a general rule that evidence obtained in consequence of unlawful action by the police is inadmissible because of illegality. For example under S 76(4) of Police and Criminal Evidence Act the exclusion of a confession because it has been obtained by oppression does not affect the admissibility of any facts discovered as a result of the confession.”: Dennis 1995 *Cambridge Law Journal* 359; “An important comment that can be made about s. 229(1) is that it does

The legal proposition gathered from the tone of this case law is that the information from the accused on the whereabouts of the real evidence and the fact that the real evidence was found as a result of such information are distinguishable even if it can be ruled that the information amounted to a confession. I do not see how any disentanglement of the two is possible. In *Edwin Seja and Kenosi*, in endorsing section 229(2), Gyeke-Dako J finds comfort in highlighting that the provision is a restatement of the English common law rule that though a confession may not be received in evidence for reasons of impropriety, any discovery made as a result of such inadmissible confession or act done by the prisoner will be admitted as evidence. But this rule of law defeats the very purpose of excluding inadmissible confessions, the purpose being to avoid forced self-incrimination, coercion and torture.

For as long as section 229(2) remains in force, the courts need to develop a framework for its just and reasonable application. In the case of *State v Honka*¹²⁴ the accused was convicted in a magistrate court with the offence of hunting protected game without a licence. The evidence is that a police constable introduced himself to the accused and told him that he suspected him of unlawful hunting. The accused did not say anything but took him to a hunting area where he pointed out two elephant skulls. The accused also handed a rifle to him without comment or stating that he used it to hunt, nor was there any evidence to that effect. On review, Hannah J noted that

not permit the court to admit evidence, which would otherwise be inadmissible. All that it sanctions is the admission of an otherwise admissible fact notwithstanding that it was discovered by means of an inadmissible confession.”: Quansah *Law of Evidence* 156.

¹²⁴ [1985] B.L.R. 121; *Akanyang v The State* [1997] B.L.R. 513.

the evidence did not show that an offence had been committed. He pointed out that the magistrate's comment that the police could not have reached the scene if he was not taken there by the person responsible for the offence showed that he failed to take note of the fact that the accused could have innocently gained knowledge of the scene in a variety of ways. The learned judge rightly stated that knowledge by the accused of the scene, by itself, does not impute guilt. What he did not determine, however, is how a court should determine the guilt or otherwise, of an accused who leads the police to incriminating evidence.

Clearly, the courts should not be satisfied with the mere fact that the accused had knowledge of incriminating evidence. The courts should look beyond that fact and examine how the accused came by that knowledge. It must be noted that a person may gain knowledge because he participated in the offence, he saw others perpetrating it or was given information about the offence. The court should be satisfied that the only reason why the accused was able to lead the police to incriminating evidence was as a result of his personal knowledge gained by his commission or participation in the crime.¹²⁵ This knowledge should be firsthand, and not gained by secondary means. The circumstances under which "pointing out" or "information given" is obtained should also be a matter of scrutiny. It is submitted that voluntariness is essential here. It might be argued that it does not matter that the pointing out or the information was given under duress, since it is a positive indication of the accused's guilt. But it must be noted that for every one guilty person that is unlawfully compelled to make such pointing out or give such information, several more innocent people might be put in

¹²⁵ These factors were briefly discussed by Murray J in *Twala v The State* [1986] B.L.R. 371 374.

the same situation.¹²⁶ This is where the danger of this provision lies. Further, the section sanctions compulsory and involuntary participation by the accused which violates the privilege against self-incrimination. Evidence obtained in such a manner opens the doors to investigative unfairness which in turn taints the fairness of the trial.

The South African Criminal Procedure Act contains a provision¹²⁷ similar to Botswana's 229(2). The South African courts have taken the provision further by requiring that the pointing out or giving out of information must be voluntary.¹²⁸ But it must be noted that before 1991, the courts in South Africa permitted evidence obtained as a result of a pointing out even if it was improperly obtained or involuntarily given. This was permitted on the basis of a so-called reliability theory that an accused's knowledge of where incriminating evidence was, was relevant to his guilt.¹²⁹ However, in the case of *S v Sheehama*¹³⁰ the Court noted that evidence of

¹²⁶ In the Canadian case of *R v Collins* [1987] 1 S.C.R. 265; (1987) 38 D.L.R. (4th) 508, the Supreme Court mentioned that an accused should not be conscripted against himself through a confession or other evidence emanating from him.

¹²⁷ S 218.

¹²⁸ In *S v Mathebula and Another* 1997 (1) SACR 10 (W) where a police officer had warned the accused of his right to legal representation and his right not to be compelled to make any admission or confession, a pointing out one and a quarter hours later to another police officer who did not warn him likewise, was held to be inadmissible.

¹²⁹ *R v Samhando* 1943 AD 608; *R v Tebetha* 1959 (2) SA 337 (A); *R v Duetsimi* 1950 (3) SA 674 (A).

¹³⁰ 1991 (2) SA 860 (A). The Court noted that the evidence in *Samhando* was received in accordance with the theory of "confirmation by subsequently discovered facts", which operated in England as an exception to the general rule that an accused's statement must be freely and voluntarily made and on the proposition that a thing discovered as the result of a forced pointing out lends to the evidence a guarantee of truthfulness and reliability. In *S v Khumalo* 1992 (2) SACR 411 (N) where the Court again

pointing out were to be viewed as admissions by conduct and that their admission was to be governed by the provisions of the Criminal Procedure Act dealing with admissions and confessions. In effect, they must be freely and voluntarily made. Also, in *S v Mokahtsa*¹³¹ where, as a result of extensive interrogation, the accused told his wife to hand over money apparently stolen in a bank robbery, and the wife took the police to a house where the money was dug up, it was held that the information which led to the discovery of the money was an admission by conduct. Since the information was given under duress the admission was not made voluntarily and was thus inadmissible. Though the reliability theory sounds attractive on the basis that the information was given by the accused or the pointing out led to the discovery of incriminating evidence, it must be rejected on the basis of fundamentally higher values.

First, voluntariness is a key factor. The reliability theory does not consider whether the accused voluntarily gives the information. Second, and closely related to the first, the theory shows no regard for the ill-treatment and torture to which an accused might be subjected in order to obtain the information. Rather, it encourages it. It says to the police, “you go and torture the suspect and force him to reveal the incriminating evidence. Regardless whether this amounts to a confession, it will be admitted in evidence.” Clothing the state with such powers is unnecessary, having regard to the

endorsed the inapplicability of *Samhando*, Thirion J took the view that the theory of confirmation by subsequently discovered facts which was adopted from England was “a rule of questionable growth which was authoritatively engrafted on to our law of evidence from England where it had never firmly taken root and where it might well have become extinct before the turn of the century.” 424 B-C; Schwikkard & Van der Merwe *Principles* 352.

¹³¹ 1993 (1) SACR 408 (O).

already dominant position of the state in the criminal justice system. It is clear that while the reliability theory encourages inequality, voluntariness puts the suspect on a pedestal of equality with the state. State powers should be curtailed and kept to the relevant minimum so as to maintain the balance between the opposing sides to the contest. Third, it disregards the rule that no one should be compelled to give incriminating evidence against himself against his will. The element of voluntariness is crucial and the courts in Botswana must have regard to this in their application of section 228.

5 7 Search and seizure

Search and seizure involves the invasion of a person's privacy. His property rights are infringed and personal effects and documents seized. However, this is the most powerful instrument of police investigation. Without the power to enter and search premises, most of the incriminating evidence that can be used to convict criminals will not be found and the individual's property will become the citadel of illegal activities and a repository of evidence linking the individual to crime. The absence of powers of search and seizure would register a form of "individual centralism", thereby making individual rights so inviolable as to totally negate all other social interests.

5 7 1 The power to search

In terms of the laws of Botswana, the police require written permission to enter and search private premises. This authorisation is issued by a judicial officer who should be satisfied on oath that there are reasonable grounds for suspecting that there is stolen property or anything related to the commission of an offence on the

premises.¹³² The requirement for a search warrant should be seen as the perfect compromise that reconciles individual centralism with executive absolutism or state autocracy. The state in this regard should however show cause in order to obtain the authority to search.¹³³ In Botswana, the practice is that there is no inquiry into the information provided by the police and the search is authorised as a matter of course. The warrant may direct the police to search the premises and any person found there and to seize anything from them.

A warrantless search is also permissible if a delay might defeat the object of the search. But there are procedural safeguards which curb state absolutist tendencies. The person conducting the search must be of the rank of sergeant or above.¹³⁴ The search must as far as possible be conducted in the day and in the presence of two or more respectable inhabitants of the locality where the search is made.¹³⁵ A police officer of the rank of sergeant or above may also search without warrant or grant written permission for the search of any premises if he has reason to suspect that stolen stock is kept there or anything is kept there in contravention of any law relating to intoxicating liquor or habit-forming drugs.¹³⁶ A judicial officer may order the seizure of any document or account book that may be required as evidence in any trial at which he is presiding.¹³⁷ Any person may without a warrant seize counterfeit

¹³² S 51 Criminal Procedure and Evidence Act.

¹³³ Brigham *Civil Liberties and American Democracy* (1984) 93.

¹³⁴ S 52(1) Criminal Procedure and Evidence Act.

¹³⁵ S 52(2) Criminal Procedure and Evidence Act.

¹³⁶ S 53(1) Criminal Procedure and Evidence Act.

¹³⁷ S 54(1) Criminal Procedure and Evidence Act.

currency, instruments used for making them, gold and silver dust and related materials.¹³⁸

In making a decision to search without a warrant, the belief of the officer that a delay in obtaining a search warrant would defeat the purpose of the search should be based on reasonable grounds. In the case of *Useya v The State*,¹³⁹ the phrase reasonable grounds was given interpretation in relation to section 17(1) of the Drugs and Related Substances Act¹⁴⁰ which provides *inter alia*:

“If any police officer has reasonable grounds for believing that any person has committed an offence under this Part or any regulations made under this Act in relation to this Part he may -

(a) enter without search warrant upon any land...”

The Court noted that any statutory enactment that curtails individual rights relating to liberty, privacy and property are drastic in nature and should therefore be interpreted strictly.¹⁴¹ The Court referred with approval to the English case of *Inland Revenue Commissioners et al v Rossminster Ltd*¹⁴² where the Court in interpreting “reasonable grounds” noted that the officer must in fact have had reasonable cause and that it was not enough to show that he had an honest belief. In other words, it had to be shown that grounds existed that led to a suspicion or belief before such arbitrary powers

¹³⁸ S 55 Criminal Procedure and Evidence Act.

¹³⁹ [1995] B.L.R. 708.

¹⁴⁰ Act No 18 of 1992.

¹⁴¹ *Useya v The State* *Supra* note 139 711.

¹⁴² [1980] 1 All E.R. 80.

could be exercised.¹⁴³ In a number of South African cases¹⁴⁴ the courts applied the objective test to the reasonable ground or reasonable belief phrase. In *Sigaba v Minister of Defence and Police and Another*¹⁴⁵ the Court held that the phrase “reasonable grounds to suspect” should be interpreted objectively and the grounds of suspicion should be that which would cause the reasonable man to be suspicious.¹⁴⁶ The objective test was applied in *Useya*.¹⁴⁷ The Court found that the entering of a house by the police on “mere curiosity or suspicion”¹⁴⁸ and in the absence of information that an offence had been committed, will amount to wrongful conduct.¹⁴⁹ The restriction placed on the use of arbitrary police power by the reasonable grounds provision serves as a legitimate and necessary limitation on such powers thereby reducing the inequalities between statal powers and individual freedoms.

5 7 2 Procedural elements

A search warrant may be directed to a policeman or policemen named in it, authorising them to search any premises, vehicle or any other place including persons found in the place of search and to seize items found there.¹⁵⁰ A warrant may only be executed during the day unless the judicial officer specifically authorises execution at night. In effecting the arrest, a policeman is also empowered to search the person

¹⁴³ See *Useya v The State* *supra* note 139 711.

¹⁴⁴ *Watson v Commissioner of Customs and Excise* 1960 (3) SA 212 (N); *R v Mbombela* 1933 AD 269.

¹⁴⁵ 1980 (3) SA 535 (Tk).

¹⁴⁶ 544.

¹⁴⁷ *Supra* note 139.

¹⁴⁸ 712G-H.

¹⁴⁹ 712.

¹⁵⁰ S 51(1)(C).

arrested and seize any property that may be evidence of a crime.¹⁵¹ The thing should be given identification marks¹⁵² and kept until the conclusion of investigations or trial.¹⁵³

The extent to which the police are bound to comply with the procedural safeguards provided by section 52(2) of the Criminal Procedure and Evidence Act¹⁵⁴ has come up for judicial consideration. The Court in the case of *Kenosi v The State*¹⁵⁵ held that the provision is permissive in nature and that conducting the search in question in the absence of two respectable persons, does not *per se* render it unlawful. The Court reasoned that the use of the words “as far as possible” in the section is indicative of its permissive nature.¹⁵⁶ The Court pointed out that the purpose of the section is to ensure the fairness of the search. It was pointed out however that non-compliance with the section should be justified by good and reasonable reasons. It seems, however, that even where non-compliance of the section is proved, the admissibility of the evidence will not be affected and the accused can only seek remedial measures in other proceedings. The courts therefore will not shut their eyes to the guilt of a man on the basis that the evidence was tainted, except with regard to confessions. In this regard

¹⁵¹ S 57 & 58(1).

¹⁵² S 58(2).

¹⁵³ S 58(3).

¹⁵⁴ *Supra* note 135.

¹⁵⁵ *Supra* note 122; *Moloi v The State* [1995] B.L.R. 439 443 (CA).

¹⁵⁶ *Kenosi v The State supra* note 122 337.

the laws of Botswana follow the English common law principle that all relevant evidence is admissible.¹⁵⁷

5 8 The use of exclusionary evidentiary rules in protecting the interests of the accused

The unfairness of the autocratic process of investigations needs to be countered. If not, the rights of citizens will be diminished and inevitably become irrelevant. Exclusionary rules have become instruments of the courts in protecting the rights of the accused. At the same time the courts show their displeasure by putting a damper on the excesses of the state. This in effect enhances the equalisation of the accused's position *vis-a-vis* that of the state. Wasek-Wiaderek states:

“The rule against hearsay and inadmissibility of written documentary evidence are the main safeguards for the equal level of bargaining between the parties. *The court's power to declare inadmissible the evidence obtained by the police at the pre-trial stage of the proceedings allows to balance at the hearing the inequalities between the parties which could occur during the pre-trial investigation.*”¹⁵⁸

¹⁵⁷ American courts have held that evidence obtained as a result of an illegal search is inadmissible. See *Weeks v United States* 232 U.S. 383 (1914); *Wolf v Colorado* 338 U.S. 25 (1949); *Mapp v Ohio* 367 U.S. 643 (1961).

¹⁵⁸ Wasek-Wiaderek *The Principle of “Equality of Arms” in Criminal Procedure under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries* (2000) 44-45 (Emphasis added); see generally Mialon & Mialon “The Effects of the Fourth Amendment: An Economic Analysis” 2008 *Journal of Law, Economics and Organization* 22.

The gathering and presentation of evidence should be guided by rules that ensure not only that the evidence is credible and reliable but also that the individual's rights are not infringed. The need to protect the rights of the individual has culminated in a number of evidential rules such as the rule against hearsay, possible exclusion of illegally obtained evidence, identification evidence and opinion evidence. In effect, the strength of a case is not determined on the amount of evidence a party can muster, but whether it is admissible in court, whether the evidence as a whole establishes every element of the offence to the required degree and the effect of the evidence on the totality of the case. The prosecution in a criminal case can amass as much evidence it can lay its hands on. After all, it has all the resources to do so. But such evidence will have no impact on the case if it is inadmissible or is insufficient to establish the particular offence.

Absolute power can be misused even when the intention of the perpetrator is subjectively noble. Procedural rules are double-functional in that they do not only protect the public from police abuse, but in fact allow the police to lawfully invade privacy and personal liberty so as to detect or prevent crime.¹⁵⁹ In consequence, the police have legitimate powers of search, arrest and detention. Procedural rules therefore regulate police powers in a positive and negative sense. It empowers them to carry out certain acts thereby making legitimate policing activities lawful, but prevents them from doing other acts which might unnecessarily infringe on fundamental liberties.¹⁶⁰ These rules are meant to curb executive excesses, and they

¹⁵⁹ Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche & Van der Merwe *Criminal Procedure Handbook* 8 ed (2007) 6-7.

¹⁶⁰ Bekker et al *Criminal Procedure* 7.

play a delicate role of balancing the interests of the state against those of the suspect. They also operate at trial level. Mainly, it is then that the courts are given an opportunity to measure the compliance of the investigating process in what has crystallised into a question of whether violations of due process rights occurred. The question whether procedure was violated may affect the court's attitude towards the evidence and may ultimately result in its exclusion.

5 8 1 *Exclusionary rules*

The application of exclusionary rules typifies the meeting point in the relationship between criminal procedure and evidence. The collection of evidence during investigations and its production in court are governed by procedural rules. In this regard, the procedural collection of evidence during investigation and the production in court reveals two classes of procedure.

First, there is what I call affective procedure. Affective procedure relates to legality and processes. Legality simply means that there should be a legal basis for the commencement of investigations. There should be a valid basis upon which the state can commence investigating an offence and disturb the liberty, privacy and property of the individual. The investigation of a crime involves the use of processes and procedures. The collecting of evidence and information is a process. The investigation of crime and collection of evidence should be done within set legal parameters which are in the form of procedures. These procedures are geared towards ensuring that the process of gathering evidence against the accused is lawful. They limit the powers of the state and ensure that these powers are exercised within reasonable bounds so as to protect the accused.

Second, there is also procedure used in the presentation of evidence. This I call effective procedure. Evidence is obtained by affective procedure and produced through effective procedure. Exclusionary rules serve to bar at the effective stage, evidence that was improperly obtained at the affective stage. The exclusion of improperly obtained evidence is rationalised by a number of considerations. In this regard, the courts will not condone an illegality if this brings the administration of justice into disrepute.¹⁶¹ Also, the courts will not rely on evidence emanating from unreliable circumstances. In this sense exclusionary rules form a safety-catch system to ensure that convictions are based on evidence that is credible, safe and reliable. While exclusionary rules mark the cornerstone of the due process system, it has been argued that they form an unnecessary protection for criminals.¹⁶² What becomes clear is that while exclusionary rules form an essential instrument in ensuring a fair trial of the accused, other rules like the rule against hearsay, if applied too rigidly might result in the exclusion of valuable and credible evidence that is necessary for the state to secure a conviction of a guilty man. In essence, the decision to exclude evidence or not may determine at what stage the interests of the accused ceases to be relevant and when the interests of the state become necessary and justifiable.

Exclusionary rules provide some form of remote control over the police when they operate in the field in that the police should know that a failure to tow the constitutional line would or might lead to the inadmissibility of evidence.

¹⁶¹ Healy 2005 *Criminal Law Review* 98.

¹⁶² Brigham *Civil Liberties* 99.

5 8 2 *The legality principle*

This principle reflects a high standing legal moralistic attitude and a shunning of pragmatic flexibility. Evidence obtained by illegal procedure will not be accepted to support a conviction¹⁶³ even when its reliability is not in doubt.¹⁶⁴ This approach embraces a disciplinary principle by excluding evidence improperly obtained to discourage the police from employing underhand tactics.¹⁶⁵ It also embraces a protective principle which seeks to protect suspects from serious breaches of the law.¹⁶⁶

5 8 2 1 Illegally obtained evidence

From a procedural and moralistic point of view evidence should be lawfully obtained. Indeed, this position is sustained in a number of countries. In the United States the courts originally enforced the exclusionary rule strictly and on a constitutional basis. The Supreme Court acknowledged its deterrent effect in that it discouraged the neglect of constitutional guarantees.¹⁶⁷

¹⁶³ *Weeks v United States supra* note 157; *Mapp v Ohio supra* note 157; *Stone v Powell* 428 U.S. 465 (1976); Mirfield *Silence, Confessions and Improperly Obtained Evidence* (1997) 24; Ashworth “Excluding Evidence as Protecting Rights” 1977 *Criminal Law Review* 723.

¹⁶⁴ Ashworth 1977 *Criminal Law Review* 723; Mirfield *Silence* 24.

¹⁶⁵ Keane *The Modern Law of Evidence* 5 ed (2000) 58; Ormerod & Birch “The Evolution of the Discretionary Exclusion of Evidence” 2004 *Criminal Law Review* 767 770; the court noted in *R v Alladice* (1988) 87 Cr. App. R. 380 that when there is bad faith on the part of the police the court will have little difficulty in ruling any confession inadmissible under S 78 of Police and Criminal Evidence Act. For more on the disciplinary principle see Mirfield *Silence* 19.

¹⁶⁶ Keane *The Modern Law* 59.

¹⁶⁷ *Mapp v Ohio supra* note 157 656.

A gradual shift has taken place as inroads are made into the sanctity of the exclusionary rule. The courts have recently held that illegally obtained evidence will not be excluded if a policeman acted in good faith upon an apparently valid warrant,¹⁶⁸ where the link between the illegality and discovery are so attenuated as to dissipate any taint¹⁶⁹ or in the case of immigration proceedings.¹⁷⁰

In Scotland, the courts have recognised a need to balance the interests of the citizen to be protected and the interests of the state to secure evidence that will enable justice to be done. But there is also a positive recognition that “the interest of the State cannot be magnified to the point of causing all the safeguards for the protection of the citizen to vanish, and of offering a positive inducement to the authorities to proceed by irregular methods.”¹⁷¹

The exclusionary treatment of illegally obtained evidence has long been weakened in English common law with the notorious statement of Crompton J in the case of *R v Leatham*¹⁷² when he quipped, “it matters not how you get it; if you steal it even, it would be admissible in evidence.”¹⁷³ This statement represents the high watermark of state interest. In the case of *Kuruma, Son of Kanui v R*¹⁷⁴ the accused was charged with unlawful possession of ammunition. The ammunition was found in the course of

¹⁶⁸ *United States v Leon* 104 S. Ct. 3405 (1984).

¹⁶⁹ *Segura v United States* 104 S. Ct. 3380 (1984); Schwikkard & Van der Merwe *Principles* 196.

¹⁷⁰ *Immigration and Naturalisation Service v Lopez-Mendoza* 104 S. Ct. 3479 (1984).

¹⁷¹ *Lawrie v Muir* (1950) S.C. (J) 19 29.

¹⁷² (1861) 8 Cox C.C. 498 501.

¹⁷³ 501.

¹⁷⁴ [1955] A.C. 197 P.C.; [1955] 1 All E.R. 236.

a search by police officers who, due to their rank, were not qualified to conduct the search. The Privy Council reiterated that where evidence is relevant and admissible, the court is not concerned with how it was obtained.¹⁷⁵ Therefore an irregularity in the obtaining of evidence is irrelevant and does not render it inadmissible. Its admissibility depends on its relevance to the case.¹⁷⁶ In the result therefore, there exists a presumptive “inclusionary” approach to all evidence and it seems that the rule is that all relevant evidence will be admitted. Interestingly, in the case of *R v Sang*¹⁷⁷ the House of Lords accepted that as part of a judge’s discretion to ensure that the accused receives a fair trial, he has a discretion to exclude illegally obtained evidence if its prejudicial effect on the minds of the jury will outweigh its probative value. Their Lordships, however, went on to state that since the court is not concerned with how evidence is obtained, a judge has no discretion to refuse to admit admissible evidence on the grounds that it was obtained by improper or unfair means except for admissions, confessions and evidence obtained from the accused after the commission of the offence. The scope of the discretion and the reference to evidence obtained from the accused after the commission of the offence, though made *obiter* has raised considerable controversy as to its true meaning.¹⁷⁸ In the view of Lord Roskill it would be unfortunate to enlarge the narrow limits of *Sang*.¹⁷⁹ For Lord Diplock, the phrase refers to self-incriminating admissions obtained from an accused under circumstances that would justify a judge in excluding confessions.¹⁸⁰ In Lord

¹⁷⁵ Keane *The Modern Law* 51.

¹⁷⁶ *Jeffrey v Black* [1978] Q.B. 490 497.

¹⁷⁷ [1980] A.C. 402.

¹⁷⁸ Keane *The Modern Law* 53.

¹⁷⁹ *Morris v Beardmore* [1981] A.C. 446. Cited in Keane *The Modern Law* 53.

¹⁸⁰ Keane *The Modern Law* 54.

Salmon's opinion the decision to exclude depends on the circumstances of each case and the category of cases under which evidence will be excluded on the ground that it might result in an unfair trial, are never closed. Though little has been done to clarify the situation, what is clear however is that the discretion to exclude should not be exercised if those who obtained the evidence did so under a *bona fide* mistake as to the true extent of their powers.¹⁸¹ It must be noted that the scope of the discretion in *Sang*¹⁸² was expanded by the Police and Criminal Evidence Act of 1984 in England, to include any evidence the prosecution intends to rely on. In effect the discretion to exclude is no longer limited only to admissions, confessions and evidence obtained from the accused after the commission of the offence. It extends to all evidence regardless of when it was obtained or whether it was obtained from the accused or some other source.¹⁸³ The relevant provision of the Act is broadly worded and extends to all kinds of evidence¹⁸⁴ including evidence of bad character, depositions and

¹⁸¹ *R v Trump* [1979] 70 Cr. App. R. 300 (CA) 302; *Fox v Chief Constable of Gwent* [1985] 3 All E.R. 392 397 (HL).

¹⁸² *Supra* note 177.

¹⁸³ Keane *The Modern Law* 56.

¹⁸⁴ S 78 (1) reads:

“In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.”

documentary records.¹⁸⁵ The English courts tend to approach the section on the basis of reliability while noting the possibility of exclusion to protect rights.¹⁸⁶

The English common law approach of equating relevance with admissibility applies in Botswana. In the case of *Seeletso v The State*¹⁸⁷ the appellant was arrested upon suspicion of having stolen twenty one motor vehicle tyres and four jerry cans. Upon interrogation the appellant led the police to his premises where upon a search they discovered the stolen articles. The appellant was charged with and convicted of theft. On appeal to the High Court he argued *inter alia* that the search was conducted without a warrant. He further argued that the provisions of section 52 of the Criminal Procedure and Evidence Act was not followed. This section provides that in the absence of a warrant, the search must be conducted by a policeman of the rank of sergeant or above and that such search must, as far as possible, be made in the day time and in the presence of two or more respectable inhabitants of the locality. He contended therefore that no article recovered during the search should have been admitted in evidence. In rejecting this argument, Gyeke-Dako J stated that the test to be applied in considering whether evidence obtained under such circumstances is admissible is whether it is relevant to the matters in issue. According to him, “If it is, [relevant] then barring express statutory provisions to the contrary, it is admissible

¹⁸⁵ Keane *The Modern Law* 56; see *R v O’ Loughlin* [1988] 3 All E.R. 431 (CA).

¹⁸⁶ Colvin 2006 *Oxford University Commonwealth Law Journal* 7; Ormerod & Birch 2004 *Criminal Law Review* 779; see also Grevling “Fairness and the Exclusion of Evidence under Section 78(1) of the Police and Criminal Evidence Act” 1997 *Law Quarterly Review* 667.

¹⁸⁷ [1992] B.L.R. 71.

and the court is not concerned with how the evidence was obtained.”¹⁸⁸ The Court further recognised a general judicial discretion to exclude evidence that would operate unfairly against the accused. This statement was made *obiter* and no attempt was made to define the parameters of the discretion. However, reference was made to a number of English and Scottish cases that have dealt with the situation.¹⁸⁹ These cases were merely listed in support of Gyeke-Dako’s contention. They were not discussed and it is uncertain whether the judge was merely referring to them in passing or using them as the basis for his reasoning and finding. His approach, however, should be followed with the understanding that the principles of English common law of evidence apply in Botswana except where expressly excluded.

Gyeke-Dako J however had an opportunity to state the position in specific terms in the case of *Kenosi v The State*¹⁹⁰ where he was faced with similar arguments. He clearly stated that Botswana law follows English law on the issue of illegally obtained evidence and declared that all relevant evidence apart from confessions is admissible.¹⁹¹ Though it appears therefore that the position in *Sang*¹⁹² will apply,

¹⁸⁸ 76G-H. See however the case of *State v David Modukwe* Review Case No 117 of 1980 (unreported) where Hayfron-Benjamin CJ who was by all intents a great constitutionalist, excluded the admission of evidence that was obtained by unlawful, inhuman and degrading treatment of the accused; see also *State v Bitsang Bagwasi supra* note 97.

¹⁸⁹ *Noor Mohamed v R* [1949] A.C. 182; [1949] 1 All E.R.365 (PC); *Harris v DPP* [1952] A.C. 694; *H.M. Advocate v Turnbull* (1951) S.C. (J) 96; *Lawrie v Muir supra* note 171; *Rattray v Rattray* (1897) 25 Rettie 315.

¹⁹⁰ *Supra* note 122.

¹⁹¹ 339.

¹⁹² *Supra* note 177.

Kenosi seems to create a slight diversion. In *Kenosi*, no reference was made to admissions and evidence obtained from the accused after the commission of the crime. Indeed, admissions are admissible in evidence in Botswana. The Court in this case stated as a general rule of law that all relevant evidence is admissible “provided that it involves neither a reference to an inadmissible confession of guilt, nor the commission of an act of contempt of court.”¹⁹³

The admissibility of illegally obtained evidence is justified by public interest considerations according to the Court of Appeal in the case of *Moloi v The State*.¹⁹⁴ Again, the argument was similar to the cases referred to above. The appellant argued that the police who conducted the search without a warrant had failed to call two witnesses as provided by section 52 of the Criminal Procedure and Evidence Act. The Court did not embark on a discussion of illegally obtained evidence. The Court, it seems, regarded the matter as a mere legal technicality. In the words of Lord Wylie JA who wrote on behalf of the Court:

“In any event, where relevant evidence has been obtained, albeit in circumstances of technical impropriety, it would offend against the public interest that it should be excluded on that ground.”¹⁹⁵

It must be noted that in all these cases, the courts only dealt with the matter *obiter*, or did not embark on a full discussion even where it was a central issue at hand.

¹⁹³ *Kenosi v The State supra* note 122 339H-340A.

¹⁹⁴ *Supra* note 155.

¹⁹⁵ 443A-B.

5 8 2 2 Entrapment

A method that the police sometimes use in obtaining evidence is by setting up the crime or giving a suspect an opportunity to commit one. Again, the question arises as to whether the courts will partake of the fruits of the poisoned tree. The answer manifests itself in the courts' approach to the admissibility of such evidence at the trial stage. Because of the inherent immoral pervasiveness of this procedure it results in unfairness that should not be condoned by the courts. It is reprehensible to encourage someone to commit an offence and then arrest him. Entrapment is fundamentally illegal and should be met with the exclusionary approach. Generally in the United States, this approach manifests itself in the form of a defence. This defence protects people who are caught in unfair traps.¹⁹⁶ Since entrapment is a defence, the prosecution is unable to rely on evidence obtained by such means.

In English and Roman-Dutch common law, however, an inclusionary approach applies. The argument is that entrapment is not a defence to a criminal charge principally because when an accused commits an offence, even though he might have been encouraged to do so, he does so with the relevant and required *actus reus* and *mens rea*.¹⁹⁷ It is argued that several offences are instigated in the first place and the fact that the police are the instigator does not affect the guilt of the offender.¹⁹⁸ This argument flies in the face of reason and is manifestly inconsistent with the principle of

¹⁹⁶ *Sorrells v United States* 287 U.S. 435 (1932).

¹⁹⁷ Ntanda Nsereko "Police Informers and Agents Provocateurs: Accomplices or Handmaidens of the Law? Perspectives from the Courts of Eastern and Southern Africa" 1999 *Criminal Law Forum* 151 164.

¹⁹⁸ *R v Sang supra* note 177 432.

equality. The principle operates on the basis that the accused is presumed innocent and that it is the state's duty to detect and prosecute crime, not instigate crime. No moral fibre lies in the state prosecuting crime for which it is the author. The principle of equality does not fit into a scheme wherein the state is the instigator and at the same time the prosecutor of crime.

It would seem that the Privy Council established an inclusionary rule in *Kuruma*¹⁹⁹ when it acceded to the general admissibility of all relevant evidence but stated as an exception that a judge has a discretion to disallow evidence that would operate unfairly against the accused such as evidence obtained by trick.²⁰⁰ But this exception was shot down in *Sang*.²⁰¹ Section 78 of the Police and Criminal Evidence Act brought back some form of discretion which even extended to evidence obtained before the commission of the offence thereby reinstating *Kuruma*.²⁰² But the Court of Appeal stated in *R v Smurthwaite*²⁰³ that the Act has not altered the substantive rule of law that the use of an *agent provocateur* does not afford a defence to a criminal charge. While stating that the use of an *agent provocateur* does not *per se* create a defence, the Court stated that if in the view of the judge, the circumstances in obtaining the evidence would have adverse effects on the fairness of the trial, he may

¹⁹⁹ *Supra* note 174.

²⁰⁰ Ntanda Nsereko 1999 *Criminal Law Forum* 166.

²⁰¹ *Supra* note 177.

²⁰² *Supra* note 174; See Ntanda Nsereko 1999 *Criminal Law Forum* 167.

²⁰³ [1994] 1 All E.R. 898 902 (CA). Cited in Ntanda Nsereko 1999 *Criminal Law Forum* 167. This case set guidelines for the use of informers and undercover agents. This has been superseded by the Regulation of Investigatory Powers Act 2000 c 23.

exclude it.²⁰⁴ It seems therefore that the courts in England have seen a gradual progression towards exclusion.²⁰⁵

More recently, English law has ultimately taken a stance against police practice of entrapment. It has recognised that it is unacceptable for the state to lure its citizens into committing offences and then prosecute them for it.²⁰⁶ Remedies have consequently been developed. The courts are empowered to stay the proceedings or exclude the evidence.²⁰⁷

Botswana²⁰⁸ and South Africa²⁰⁹ have followed the inclusionary stance in consonance with their common laws. Recent trends in South Africa and Namibia,²¹⁰ however, show that the law of entrapment has undergone a process of re-engineering in the

²⁰⁴ *R v Smurthwaite supra* note 203 902.

²⁰⁵ Ntanda Nsereko 1999 *Criminal Law Forum* 168.

²⁰⁶ *R v Loosely and Attorney-General's Reference (No. 3 of 2000)* 2002 *Criminal Law Review* 301; [2001] 4 All E.R. 897; Squires "The Problem with Entrapment" 2006 *Oxford Journal of Legal Studies* 351 361.

²⁰⁷ *Supra* note 206.

²⁰⁸ See the case of *Mmamonyane Segobaetso v The State* High Ct. Cr. App. No. 16 of 1995 (unreported). However, it was stated in *Moleleledi v The State* [1990] B.L.R.630 (CA), that the evidence of *agents provocateurs* must be approached with caution as they may tend to perjure themselves for improper motives.

²⁰⁹ *R v Ahmed* 1958 (3) SA 313 (T); *S v Maslangho* 1983 (4) SA 292 (T).

²¹⁰ See the Namibian case of *S v De Bruyn* 1992 (2) SACR 574 (Nm) where Hannah J outrightly rejected evidence obtained by entrapment, as the accused was not predisposed to commit a crime but was instigated by state officials. It was held therefore, that the evidence will prejudice the right of the accused to a fair trial.

face of new constitutional orders. A positional shift has occurred in South Africa with the introduction of a Bill of Rights and the Criminal Procedure Second Amendment Act 1996.²¹¹ The latter regulates the setting up of traps and determines the admissibility of evidence obtained under such circumstances. Unfair trapping has also been met with constitutional scrutiny.²¹² The fairness of traps is scrutinised to ensure that they do not infringe on the rights of citizens as guaranteed by the Constitution²¹³ including the right of an accused to a fair trial.²¹⁴ This view is based on the proposition that a fair trial refers not only to what happens in court but to the activities of the police while they conduct their investigations.²¹⁵

The courts in Botswana have maintained that entrapment is not a defence even though they have expressed their displeasure with the practice. Instead, it is a mitigating factor in sentence.²¹⁶ Several people who are entrapped are not predisposed to commit crime in the first place.²¹⁷ Therefore, where the idea of the crime originates from the state and the accused was not predisposed as such, inequality is evident and a

²¹¹ Act 85 of 1996. See Schwikkard & Van der Merwe *Principles* 262-263 for a further analysis of this provision.

²¹² *S v Harding* 1996 (1) SARC 503 (C) 508; Bronstein “Unconstitutionally Obtained Evidence-A Study of Entrapment” 1997 *South African Law Journal* 108 115; Schwikkard & Van der Merwe *Principles* 262.

²¹³ *S v Harding supra* note 212 508.

²¹⁴ *S v Nortjé* 1996 (2) SARC 308 (C); *Amod v S* 2001 (4) All SA 13 (E).

²¹⁵ *S v Koekemoer and Another* 1991 (1) SARC 427 (Nm) 434.

²¹⁶ *R v Rosinah Mmamitwa* [1974] 1 B.L.R. 41 (CA); *Raditholo v The State* [1982] 2 B.L.R. 30 (CA).

²¹⁷ Dillof “Unravelling Unlawful Entrapment” 2004 *Journal of Criminal Law and Criminology* 827 897. Brief reference was made to the need to distinguish between fair and unfair traps in *Moleleke v The State supra* note 208 633.

conviction on such evidence in my view is a miscarriage of justice and an indictment on the entire judicial system. Entrapment, when misused, represents the use of state authority and resources against the individual. Many individuals are not predisposed to commit crime but vulnerable, leading them to succumb to the temptations of the state. *Limitations on unfair state activity is a measure in securing equality.* The courts have a duty to limit the activities of the state in relation to entrapment by refusing to admit such evidence. To accept evidence resulting from unfair traps and then rely on the circumstances under which the evidence was obtained in mitigation, is a contradiction in terms.

The difference between the approach of the courts of Botswana and that of South Africa can be attributed to a number of reasons. First, in Botswana, the issue of entrapment does not arise often and has not been given a comprehensive review. Entrapment has never been challenged in the courts on a constitutional basis. One can only hope that perspectives will change as the law develops in this area. Second, and more importantly, Botswana's legal thought is still influenced by English common law tradition. The issue has not been seen through the constitutional mirror as in the case of South Africa and Namibia. South Africa and Namibia have recent constitutional dispensations crafted at a time when human rights were issues of serious socio-political concern in those countries and the world at large. Therefore, constitutional values have heavy doctrinal impact on the criminal justice system of those countries. The courts of Botswana on the other hand, have clung to outdated common law principles in respect of entrapment.

5 8 3 *The reliability principle*

The consequences of conviction in a criminal trial are dire. Therefore, the evidence on which the prosecution relies must be cogent and reliable. As such, evidential rules relating to admissibility are designed to ensure reliability such that the court can safely rely on the evidence. In the search for the truth, evidence should be admitted or excluded solely on the basis of reliability.²¹⁸ The reliability principle finds expression in a number of evidential rules such as the best evidence rule²¹⁹ and cautionary rules relating to the weight to be given to identification evidence. Original and firsthand evidence is preferred over second-hand and hearsay evidence. In the case of identification evidence the court will insist that the circumstances were such that it could be safely concluded that the observer was not mistaken as to the identity of the accused.²²⁰

Some authors have advocated strict adherence to the reliability principle.²²¹ In their view the purpose of the courts is to seek the truth while matters of police impropriety must be handled in disciplinary proceedings. Investigating improprieties is not the duty of the courts and these issues are only collateral to the

²¹⁸ *Mirfield Silence 7*; Ashworth 1977 *Criminal Law Review* 723.

²¹⁹ Lord Hardwicke exemplified this rule in the case of *Omychund v Barker* [1745] 1 Atk 21 49 when he ruled that: “the judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.”

²²⁰ See *Boy v The State (Practice Note)* [1993] B.L.R. 83; *State v Thomas* [1996] B.L.R. 860; *Nkgatogang v The State supra* note 122.

²²¹ Wigmore *Treatise on Evidence* 3 ed (1940) paras 2183-2184; Andrews “Involuntary and Illegally Obtained Evidence in Criminal Cases I” 1963 *Criminal Law Review* 15; Andrews “Involuntary and Illegally Obtained Evidence in Criminal Cases II” 1963 *Criminal Law Review* 77.

main issues at the trial. The court is not in a position to thoroughly investigate improprieties at trial. It is unfair that a police officer be left under suspicion at a trial which has no mandate to investigate his misconduct.²²² It is argued that it is unfair to acquit an accused merely because the investigating officer acted improperly.²²³ The exclusion of evidence improperly obtained, it is argued, is to confuse the accused's criminal liability in the case for which he is charged with his rights against those who perpetrated violence or threats against him.²²⁴ In my view, a strict application of the reliability principle will mean that the courts will turn a blind eye to police impropriety thereby encouraging unfair practices at the pre-trial stage.

The exclusion of evidence generally serves to counterbalance investigative unfairness.²²⁵ Whereas police indiscipline, legality and reliability are determinant factors in the decision to exclude, there always remains the nagging question that guilty accused are allowed to escape justice because of legal technicalities. What is important, however, is the fairness of the process. The state should not be permitted to use its institutions to obtain evidence by unfair means. The courts of Botswana, it

²²² See Ashworth 1977 *Criminal Law Review* 724; even in respect of the admissibility of confessions obtained by torture, Andrews states rhetorically, "But is this not to confuse the accused's criminal liability in the case at hand with his rights against those guilty of violence or threats against him? These rights are entirely irrelevant to the issue of guilt in the present trial, though they may be of great social and legal significance in another context. There is no more justification for excluding the confession as a sanction against police malpractices than for rejecting any other illegally obtained evidence. In both cases we should refrain from confusing the two independent issues of the accused's guilt and the police's guilt.": Andrews 1963 *Criminal Law Review* 18-19.

²²³ Ashworth 1977 *Criminal Law Review* 724; Wigmore *Treatise on Evidence* (1940) paras 2183-2184.

²²⁴ Andrews 1963 *Criminal Law Review* 19.

²²⁵ Colvin 2006 *Oxford University Commonwealth Law Journal* 2.

seems, will admit relevant evidence though unlawfully obtained. Perhaps this approach prevails due to the absence of a constitutional provision requiring the exclusion of unfairly or unconstitutionally obtained evidence.²²⁶ A contextualisation of the criminal process in relation to equality before the law forms a basis for the exclusion of evidence obtained by unfair means.

5 9 Conclusion

The pre-trial process represents a tension-filled sphere wherein the competing interests of the individual and the state comes to the fore most vividly. The fundamental individual rights of privacy, personal freedom and the right to silence are in stiff competition with public interest demands requiring police powers of search, arrest and questioning, all important in the detection and suppression of crime. The various legal rules encompassing pre-trial procedure are geared towards protecting the substantive rights of liberty, privacy and the inviolability of property. These legal rules have developed and manifested themselves in the form of procedural rights. Since it is impermissible for the liberty and privacy of the individual to manifest themselves by “individualist registration” (a utopian state of affairs, permitting the individual to insist on complete inviolability of the right to liberty and privacy) on the one hand, and since there is a need to guard against executive absolutism on the other, statutory provisions regulate the relationship between the state and the individual. The warrant has become a very important and universally recognised instrument for

²²⁶ See for example section 24(2) of the Canadian Charter and section 35(5) of the South African Constitution. The Canadian Supreme Court has also recognised the common law rule of excluding involuntary confessions on the grounds of unfairness rather than reliability: *R v Oickle* [2000] 2 S.C.R. 3.

regulating and setting the limits of state intrusion on individual liberty and privacy. Warrants are granted by a neutral body, the judiciary, after being persuaded by the state that there is reasonable cause to disturb the rights of the individual. *Procedural rules and instruments that place boundaries on powers of investigation, furthers equality by ensuring that the police do not ride rough-shod over the rights of the suspect during investigations. A second instrument of safeguard, is time-limits relating to the period the state can legally detain a suspect.*

The odds are stacked against the suspect if during the pre-trial stage no full acknowledgement is given to his passive defence right. The police want the accused to cooperate by making testimonial communications. However, the police do not share their evidence with the accused. So the accused is in double danger as the police take every advantage they can from the accused without any *quid pro quo* to restore the balance. The accused is expected to provide the police with information they do not have and yet the accused is restricted in having access to the course of the investigations against him. The police have prior knowledge of the evidence and the accused starts getting information only when he is charged to court. The prosecution is able to prepare their case while the suspect's lawyer is furnished with the statements of prosecution witnesses only when the accused is charged to court. It is only then that he starts preparing the defence. In practical terms, the suspect cannot conduct effective investigations if he intends to since all vital evidence would have been scooped up by the state. This is in essence a sole-enterprised authoritarian process which clearly results in substantial inequality. The absence of equality of arms at the pre-trial stage can ultimately affect the fairness of the trial and its result.

CHAPTER 6

DISCLOSURE AS A MEANS OF PROMOTING EQUALITY OF ARMS

6 1 Introduction

Disclosure represents a key procedural instrument in remedying the autocratic and one-sided process of criminal investigations. The state conducts investigations using powers of search, arrest and interrogation. It gathers evidence in a manner the accused cannot match. It collects documents, and lines up and prepares witnesses for trial; a feat the accused cannot accomplish. Possibly, the accused would have been in detention during investigations, thereby incapacitating him from collecting vital evidence which would be scooped by the state before he laid hands on them. Any attempt by the accused to conduct his own investigations which overlap with those of the police, will be seen as interference with possible state witnesses and obstruction of the investigation process. The appropriate remedy to this one-sided feature of the investigation process therefore is that the prosecution discloses any material in their possession which “may assist the accused in exonerating himself or obtaining a reduction in sentence.”¹

It is axiomatic that the prosecution enjoys a disproportionately huge advantage not only in obtaining evidence, but also has the liberty of preparing its case for months or years prior to charging the accused. That this situation creates inequality is not a theoretical statement. It represents the stark realities of the criminal process as we know it today.

¹ *Jespers v Belgium* (1981) 27 D.R. 61 para 54; see also *Edwards v United Kingdom* (1993) 15 E.H.R.R. 417; *Bendenoun v France* (1994) 18 E.H.R.R. 54; Simor & Emmerson *Human Rights Practice* (2001) para 6.146.

The state maintains and retains great powers and resources in all spheres of life and the criminal process is no exception. The power of the state as against the individual is mightiest at the pre-trial stage. The state has powers to investigate, search and seize; and the accused does not.² In a constitutional democracy this imbalance is redressed by compelling the prosecution to share incriminating as well as exculpatory evidence with the accused. To assist the accused to face the state in a criminal trial, it is important that he is put on full notice of the charges against him, that he be given full information of the nature of the evidence before he takes a plea,³ and that he be given sufficient time to prepare his defence. As was noted in the English case of *R v McIlkenny*:⁴ “Inequality of resources is ameliorated by the obligation on the part of the prosecution to make available all material which may prove helpful to the defence.”⁵

6 2 The right to adequate time and facilities to prepare his defence

The principle of equality of arms seeks to ensure that the accused does not suffer significant disadvantage in preparing and presenting his case as opposed to the

² Hinton “Unused Material and the Prosecutor’s Duty of Disclosure” 2001 *Criminal Law Journal* 121. The Special Court for Sierra Leone, for example, presently assigns investigators to the defence, to assist with the securing of witnesses and evidence that may assist the defence in its case.

³ Ferguson “Recent Developments in Canadian Criminal Law” 2000 *Criminal Law Journal* 248 259.

⁴ [1992] All E.R. 417.

⁵ 426; “Since the prosecution enjoys considerable facilities derived from its powers of investigation, equality demands that the results of these investigations be shared with the defence.”: Jackson “The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?” 2005 *Modern Law Review* 737 752.

prosecution which has the support of the state to its advantage.⁶ Equality of arms means that the accused must have knowledge of and an opportunity to comment on all evidence adduced or observations filed.⁷ To this extent, the accused must be granted access to records and documents in the prosecution's possession and to comment on such documents and other evidence produced during trial.⁸ This includes material which exculpates the accused and material on which the prosecution does not intend to rely.

The right of the accused to adequate time and facilities to prepare his defence is provided for by section 10(2)(c) of the Constitution of Botswana. The right to adequate time and facilities means that the accused must be given sufficient time to prepare for trial and to be able to effectively put his case and arguments before the court.⁹ The essence of this requirement is to achieve equality of arms between the prosecution and defence which is essential to a fair trial under section 10 of the Constitution of Botswana.¹⁰ The measurability of adequate time will naturally depend on the circumstances of each case,

⁶ McDonald & Swaak-Goldman *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts II* (2000) 996.

⁷ *Lobo Machado v Portugal* (1997) 23 E.H.R.R. 79; *Ruiz-Mateos v Spain* (1993) 16 E.H.R.R. 505; Negri *Equality of Arms – Guiding Light or Empty Shell* in Bohlander (ed) *International Criminal Justice: A Critical Analysis* (2007) 13 64.

⁸ Matthews & Malek *Disclosure* (2000) 508; Weissbrodt *The Right to A Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (2001) 121-122; Corker *Disclosure in Criminal Proceedings* (1996) 4.

⁹ *Can v Austria* (1985) 7 E.H.R.R. 421; Karlen & Schultz *Justice in Accusation* in Nigel (ed) *The Rights of the Accused in Law and Action* (1972) 113 128.

¹⁰ Clayton & Tomlinson *The Law of Human Rights I* (2000) 665.

the complexity of the case and the number of witnesses to be called by the prosecution. The issue of facilities can be extensive and nebulous as it encompasses both physical materials required by the accused and procedural access to information within the knowledge of the state and which are crucial to the accused's case. If the accused is remanded the state will be obliged to provide him with stationery, equipment and services as well as any legal literature he may own.¹¹ Where the accused is not remanded the state may, where the accused is unable to do so, secure his witnesses and provide him with statements of state witnesses. This provision furthers the principle of equality of arms and seeks to ensure that the accused is not disadvantaged. The question whether the accused is entitled to the statements of prosecution witnesses has been controversial in the courts of Botswana. This question has been particularly relevant to magistrate courts where no depositions of prosecution witnesses are prepared for the benefit of the accused.

6 2 1 Access to statements

The question of disclosure in Botswana has beset the judiciary for several years. The jurisprudence on this question can be divided into two periods.

The first period spans from 1993 commencing with the case of *Kenosi v The State*.¹² The Court of Appeal in that case established that the prosecution was not under a duty to provide the accused with statements of its witnesses.

¹¹ *Macauley v Attorney General* 1968/69 A.L.R. (Sierra Leone Series) 58.

¹² [1993] B.L.R. 268 (CA); the case of *Pandor v The State* [1985] B.L.R. 177 which relates to whether the prosecution should disclose the identity of its informant must be noted however. Though implying that non-

The second period commenced in 2001 when the courts started moving away from the common law position of *Kenosi* until the Court of Appeal finally overturned its earlier decision in *Kenosi* in 2002, in the case of *Attorney-General v Ahmed*,¹³ thereby bringing an end to the rule of non-disclosure or docket privilege.

6 2 1 1 *Kenosi* and the rule of non-disclosure

The Court in *Kenosi* held that the prosecution was not under a duty to furnish the accused with statements of possible witnesses. In so doing, the Court likened such statements to those made by clients to their attorneys in civil litigation which are covered by attorney-client privilege. The Court accordingly stated therefore that the statements of prosecution witnesses were privileged. The Court also mentioned that the prosecution may waive this privilege. In recognising the duty of all parties to litigation to assist a court in arriving at the truth, the Court affirmed a positive duty on the prosecutor to make statements of prosecution witnesses available to the defence for cross-examination, where there is material discrepancy between a statement made by a witness and his evidence.

6 2 1 2 *Kenosi* and privilege

The Court in *Kenosi* drew a parallel between statements of prosecution witnesses and those made by a client to his attorney in civil cases. The premise on which such comparison is based results in a flawed conclusion. First, this is a wrong reading of the

disclosure was the rule, Hannah J noted as an exception that the state should disclose the identity of an informant if that would tend to show that the accused was innocent.

¹³ [2003] 1 B.L.R. 158 (CA).

concept of client-lawyer privilege. It must be noted that the concept of confidentiality on which the privilege is premised, does not permit one side to conceal evidence from the other and spring it by surprise during trial. In fact, civil litigation amply caters for transparency and open disclosure of evidence and exchange of documents prior to trial. In civil proceedings the parties are able to exchange pleadings so that they are acquainted with the case of the other side. A party may even apply for and compel the other side to provide further details if the information contained in the pleadings are insufficient. Parties are also required to make discovery and produce copies of documents they intend to use in advance of trial. These mechanisms of disclosure are not always available in criminal proceedings.

Second, civil proceedings are quite different in terms of their results and the consequences for the accused in the future. Unlike civil proceedings, the reputation and liberty of the accused are at stake in criminal matters. A conviction may result in loss of liberty or disqualification from certain privileges or rights that may permanently affect the life of the accused.

Third, charge sheets, which are meant to provide accused persons with information of the allegation made against them, contain a minimum of information. The accused has a right to know the facts constituting the allegation against him. These lie in the statements of witnesses and other documents.

Fourth, the use of client-attorney privilege in civil proceedings as a basis for non-disclosure in criminal cases is not in order. Civil proceedings are private in nature, affecting two or more individuals. Criminal trials on the other hand are public. The general public is interested in seeing that justice is done. Prosecutors are public institutions in which members of the public are stakeholders. Therefore it is in order that the process is as transparent as possible and the accused be fully informed of the charges against him.

The Court in *Kenosi* also put a positive duty on the prosecutor to provide the defence with copies of statements for cross-examination if there is a material discrepancy between the evidence of a witness and his statement to the police.¹⁴ But, since the prosecutor is in exclusive possession of all statements, it is he and he alone who determines what amounts to a material inconsistency and when it is necessary to produce a statement. One can therefore say that he is the sole judge on this matter. One must also not lose sight of the fact that production of a statement at this stage will disrupt the proceedings since a defence attorney may require an adjournment to study the statement or recall previous witnesses, a situation which could have been avoided had full disclosure been provided

¹⁴ See also the South African case of *S v Naude* 2005 (2) SACR 218 (W) where it was held that the prosecutor has a duty to point out inconsistencies in a witness's statement and evidence. The Court held that failure by the prosecutor to inform the regional magistrate of such inconsistency resulted in an unfair trial since the content of the statement may have had an impact on the magistrate's finding of credibility of the complainant, a single witness in the case. The Court noted that the prosecutor has a duty to ensure that the accused gets a fair trial and thus, even though statements are no longer privileged, the prosecutor has a duty to point out inconsistencies to the court if the defence counsel fails to do so.

beforehand. The preferred situation is that full disclosure be made before the trial commences.

The Court in establishing that the prosecution has a discretion to determine whether there is material discrepancy, did so on the basis of what it termed a special relationship between the prosecution and the court. The Court noted that the prosecutor stands in a special relation to the court and, therefore, the prosecutor has a duty to disclose a serious discrepancy between the evidence of a witness and his previous statement. This suggests that the accused is not entitled to full disclosure and that the prosecution can choose what to disclose. It creates inequality and disregards the imbalances in resources between the prosecution and the accused. The accused has no facilities to conduct investigations and should be entitled to all information collected by the state whether they implicate or exculpate him. Criminal trials should not be conducted by ambush and the accused should be aware beforehand of the state's allegations against him. The Court's recognition of discretion on the part of the state whether to disclose, as opposed to a right on the part of the accused to disclosure, violates the principle of equality of arms. The Court's recognition of a special relationship with the prosecution goes against the tenet of the neutral function of the judicial officer in the adversarial process.

6 2 1 3 The "special reason" rule

The rule in *Kenosi* was partly eroded in the case of *Motsumi v The State*.¹⁵ In this case, the Court rejected counsel's argument that the accused was entitled to the statement as of

¹⁵ [1996] B.L.R. 905 913.

right. The Court stated that the accused was not entitled to such statement unless he advanced special reasons why the statement should be produced. Certain issues need to be noted about this case. First, the Court suggested that a special reason will arise in a situation where the evidence of a witness contradicted his statement. However, it did not set out a formula as to how the accused could investigate whether the evidence contradicted the statement since he has no access to it in the first place. In effect, this brings us back to the situation in *Kenosi*. Second, counsel for the defence did not rely on any authority in support of his argument for disclosure.¹⁶ This was quite unhelpful having regard to the fact that *Kenosi*, a decision of the Court of Appeal, then represented the law. Of course, one can only speculate that had the Court been alerted to a number of cases that had embraced disclosure, its conclusion could have been different. Third, it seems quite clear that in the face of *Kenosi*, a decision of a higher court, the Court in *Motsumi* felt bound by the doctrine of *stare decisis*.¹⁷

The special reason rule is based on an onus requiring the accused to furnish the court with reasons why disclosure should be made. In this regard, the accused has no general right to access information but should rather justify disclosure.¹⁸ This position had earlier been reached in *Pandor*.¹⁹ In that case, the Court noted as an exception to the privilege rule,

¹⁶ In subsequent cases where the disclosure principle was accepted, defence counsel in their arguments, relied heavily on foreign authorities that had embraced the principle.

¹⁷ This doctrine did not prevent the High Court from ruling in favour of disclosure in subsequent cases however.

¹⁸ *Kenosi v The State supra* note 12; *Motsumi v The State supra* note 15.

¹⁹ *Supra* note 12.

that the identity of an informer may be revealed to show that the accused is innocent only if the accused can show “that good reason for disclosure exists.”²⁰ This rule is averse to a general right of disclosure which should assist to equalise the imbalances between the state and the accused. It rather permits disclosure for special or good reasons that should be justified by the defence. It must be noted that the accused has limited information in the first place. Therefore, the justification of disclosure by the accused is a Herculean task.

6 2 1 4 Movement from *Kenosi* towards disclosure

Notwithstanding *Kenosi*, the legal fraternity did not allow the matter to rest. A multitude of court applications were launched, attacking the principle of non-disclosure on the grounds that it infringes the constitutional right of an accused to be availed adequate facilities to prepare his defence. Finally in 2001, the position started to change with the result that a number of High Court decisions consistently ignored or sidelined *Kenosi*. In the case of *Ndala v The State*²¹ Lisimba J sitting in the High Court, was able to cast doubt

²⁰ 181H.

²¹ Miscellaneous Criminal Application No F 95 of 2001 (unreported); in *Bosch v The State* [2001] 1 B.L.R. 71 (CA) the Court rejected the appellant’s argument that failure by the prosecution to disclose to the defence that a prosecution witness had been granted immunity from prosecution amounted to a miscarriage of justice. The defence had contended at the trial that the witness had a motive to murder the deceased and argued that disclosure would have enabled counsel for the appellant to prove the witness’s connection with the crime; otherwise he would not have required immunity from the prosecution. The Court held that there was no miscarriage of justice as the defence was carried on on the basis that the witness in question was the murderer and he was exhaustively and extensively cross-examined in this regard. The witness was probed on his motive during cross-examination and the issue was fully advanced before the court. It could not have

on *Kenosi*. In that case, Lisimba J emphasised that the accused should not be taken by surprise at the trial and that he should come to his trial fully prepared to answer the charges against him. Lisimba J rejected the state's argument that the word "facilities" should be limited to physical facilities and equipment. He stated that it included disclosure of information, documents and materials in possession of the state. He took the view that the so-called rule of privilege in *Kenosi* was *obiter* and did not bind the High Court. He found support for this view on account of the fact that in *Kenosi* the prosecution consented to disclose the statement. On this basis he concluded that disclosure was not an issue in *Kenosi*. In my view, a reading of *Kenosi* shows differently. Though the Court in *Kenosi* acknowledged that the prosecution consented to disclosure, it is clear that the Court was at the same time firmly establishing the principle of non-disclosure as the law. Lisimba J's stance is representative of a pro-active protective approach. It is indicative of the evolutionary process of the protection of human rights by the courts. When examined against *Kenosi* and *Motsumi, Ndala* affirms the possibility of judicial innovation even in the face of the *stare decisis* principle. Such bravery would certainly raise the eye brows of legal purists, but it was a move that opened the gates and shifted the tide towards disclosure.

In *State v Fane*,²² the Court relied solely on the statutory provisions of the Criminal Procedure and Evidence Act in coming to a conclusion that statements in the police

been advanced further by the disclosure of immunity by the prosecution. The disclosure of immunity therefore could not have added anything to the case of the defence.

²² [2001] 1 B.L.R. 319.

docket were not privileged. In that case, defence counsel during the cross-examination of a witness requested the prosecution to furnish him with a previously recorded statement made by the witness, in order to impeach the credibility of the latter. The state objected, claiming that the document was privileged under Roman-Dutch common law, citing *Kenosi* in support of its argument. According to Mwaikasu J, the court in *Kenosi* failed to take into consideration the provisions of section 98²³ of the Criminal Procedure and Evidence Act. This statutory provision in his view, overrides the common law position.²⁴ The Court noted the mandatory nature of the provision and found that statements of witnesses in possession of the prosecution are not privileged. According to the Court, section 98 overrules the common law position. However, disclosure as permitted by this case appears to be of limited application. First, the decision is strictly based on statute and section 98 applies only to persons committed for trials in the High Court. The Court also clearly directed its attention only to proceedings in the High Court. This makes the rule meaningless as most cases are heard in the magistrates' courts.

²³ "Every accused person who is committed for trial or sentence for any offence, shall be entitled to demand, and to have within a reasonable time in that behalf, from the person who has the lawful custody thereof, a copy of the depositions of the witnesses upon which he has been so committed and of his own statement and evidence (if any), and the person who has lawful custody of such depositions, statements and evidence shall deliver a copy thereof to the person aforesaid or his legal representative on payment of a reasonable sum not exceeding seven thebe for each folio of 100 words, or, in any case where counsel is assigned by the court to defend the accused *pro deo*, shall deliver a copy thereof to the accused or such counsel free of charge..."

²⁴ *State v Fane supra* note 22 323.

Second, section 98 and the Court, specifically limited disclosure to statements and not other documents or evidence that may be in possession of the prosecution. The decision is therefore of limited application. The effect of this is that the prosecution is still able to keep vital evidence from the defence.

Third, the Court did not emphasise the importance of the need for the accused to prepare his defence. The Court talks about the need for the accused to inspect the statements “at the trial”²⁵ and the need to supply the statements “to the defense when needed in the course of the cross-examination to test the credibility of any prosecution witness who has testified before the court.”²⁶ Indeed the Court was limited by the arguments of counsels. Defence counsel requested the statement for the purposes of impeaching the witness. The constitutional right to disclosure was not raised. Therefore the Court did not address the wider question of disclosure and the need for the accused to be furnished with information timeously so as to prepare in time thereby enhancing equality between the prosecution and defence. Whereas the case was a significant contribution towards lifting the sacred veil of privilege, it did not go far enough nor did it bring the question of equality into the equation.

The case of *Motshwane and Others v The State*²⁷ marks a departure from the common law position to that of constitutional proceduralism. In this case, the rule of non-

²⁵ 322G-F.

²⁶ 323C-D.

²⁷ [2002] 2 B.L.R. 368 delivered on 18th November 2002.

disclosure suffered another blow and the equality principle was actually embraced. Phumaphi J totally regarded the issue as one of constitutional interpretation, noting that the rule in *Kenosi* represented the common law. The Court made an excursion into cases that had embraced disclosure as a constitutional right, relevant for the attainment of a fair trial.²⁸ He relied on the cardinal rule of constitutional interpretation which demands that a generous and purposive interpretation is required when interpreting the Bill of Rights. The Court also appeared to have been fortified by *Ndala* where a similar review was made of Canadian, South African and Namibian cases that have embraced disclosure. The Court, however, disagreed with Lisimba J that the views expressed in *Kenosi* were *obiter*. According to the Court, *Kenosi* laid down the common law position whereas the present matter was one of constitutional interpretation.²⁹ Phumaphi J noted that the statements were relevant to enable the accused to prepare in full and respond to the case he has to meet.³⁰ The Court in following the generous and purposive approach, interpreted the word “facilities” to include providing statements to the accused in advance of trial.³¹ While noting that *Nassar*³² dealt only with superior courts, Phumaphi J sought to apply the rule to all courts, observing that the distinction between inferior and superior

²⁸ *R v Stinchcombe* [1991] 3 S.C.R. 326. This case was restated in *R v Taillefer* [2003] 3 S.C.R. 307; *S v Nassar* 1995 (2) SA 82 (Nm); *Shabalala and Others v Attorney-General of Transvaal and Another* 1995 (2) SACR 761 (CC).

²⁹ *Supra* note 27 385.

³⁰ 384.

³¹ 384.

³² *Supra* note 28.

courts is irrelevant in respect of issues dealing with fundamental human rights.³³ This case is very significant in that the Court interpreted the meaning of the term “facilities” in relation to the need for procedural equality. In so doing, it reflects European jurisprudence.³⁴ In an attempt to interpret the term, the Court noted that “The spirit of the section is that accused persons shall be tried in a free, fair and transparent atmosphere that will enable them to defend themselves without any impediments.”³⁵ Interestingly, the Court did not refer to any cases that have dealt with the principle of equality. However, the Court demonstrated an appreciation for the imbalances between the prosecution and defence, and the need to redress such imbalances. In this regard Phumaphi J noted:

“In my view the section is intended to guarantee the protection of the fundamental rights and freedoms of an individual facing a criminal charge vis-à-vis the state and its powerful agents such as the police, prosecution, etc. It is intended to ensure that whenever the state and/or its agents decide to prosecute an individual it is done fairly and strictly within the framework of the law, in a transparent manner. Put in a different way, the section [10 of the Constitution] affords the individual the ammunition to challenge any act by the state or its agents that is

³³ 378.

³⁴ In *Can v Austria supra* note 9, the European Court interpreted “adequate facilities” to mean that the accused must be afforded an opportunity to prepare for his defence without restriction. In *Jespers v Belgium, supra* note 1 the Commission, referring to equality of arms, interpreted “facilities” to mean that the accused should be given an opportunity to acquaint himself with information gathered throughout the investigations for the purposes of preparing for his defence.

³⁵ 384E-F.

perceived to offend against the rights of the individual to a fair trial as enshrined under the provision, subject only, to derogations provided for in the same section.”³⁶

The case makes an implicit countenance of the principle of equality of arms. It would appear that the court was more interested in the general concept of fairness and transparency. In so doing, the inequality in the criminal process was recognised and the need for balance emphasised. The stringing in of the need for equality on the basis of general fairness and transparency clearly fortifies the assertion that the equality principle is a fundamental requirement for a fair trial. The Court also noted that the section enables the accused to contest the evidence of the state, a fundamental requirement for equality.

In another case in the High Court, *Ahmed v Attorney-General*,³⁷ Collins J made no attempt to manoeuvre around *Kenosi* but rather launched a scathing attack on the principle of non-disclosure. Though Collins J in *Ahmed* arrived at the same conclusion as Lisimba J in *Ndala*, it appears from his judgment that he arrived at his decision oblivious of *Ndala*.³⁸ It is remarkable that two judges within a short space of time chose to deviate from *Kenosi*, oblivious of what the other was doing. Collins J stated clearly that full disclosure of prosecution witness’s statements is a *sine qua non* for a fair trial. According

³⁶ 383F-G.

³⁷ [2002] 2 B.L.R. 431.

³⁸ He stated that he only had sight of *Ndala* after he had made up his mind and was in the concluding stages of his judgment. The *Ndala* judgment was delivered on the 31st October 2002 and *Ahmed* on the 5th December 2002.

to him the state is however entitled to refuse disclosure if it can show on a balance of probabilities that such disclosure might reasonably impede the ends of justice or otherwise be against public interest. He suggested a number of situations where the state may refuse disclosure. The situations are:

1. Where the information sought to be withheld will disclose the identity of an informant which it is necessary to protect.
2. Where such disclosure might imperil the safety of an informant.
3. Where the information will disclose police techniques of investigation which it is necessary to protect.
4. Where such disclosure would otherwise not be in the interest of the public or the state.

In relation to police diaries he drew a distinction. According to him the accused should show on a balance of probabilities that their disclosure is necessary for the preparation of his defence. His reasoning is that police diaries contain written matters that the investigating team would discuss among themselves in furtherance of the investigation. The diary may contain certain confidential information relating to various investigation techniques, the identity of informers, discussions between police officers reduced to writing and other discussions which might not be in the public interest to disclose.

One of the findings of Collins J deserves comment. In the course of the argument, the state averred that if it was required to disclose statements of prosecution witnesses, the accused should be required to reciprocally disclose defence statements in order to

maintain equality. Collins J rejected this argument. In so doing, he adopted the position of a Namibian court³⁹ before which a similar provision of the Namibian Constitution⁴⁰ came up for determination. Collins J stated that the provision is concerned with the rights of the individual and not the protection of the interests of the state. Therefore, when determining what is required to enable the accused to have a fair trial the court does not balance his fundamental rights against the interests of the state. He noted that the state enjoys an enormous advantage in a criminal trial, as it has the police force at its disposal as well as prosecutors and access to expert witnesses and modern methods of communication and powers to legislate procedures to be followed. According to him since the accused does not stand on an equal footing with the state, the provision is meant to redress the imbalance and the accused may maintain a purely adversarial role toward the prosecution. Collins J clearly encapsulated the need for equality, recognising disclosure as a way of bridging the inequalities between the state and the accused. This stance is similar to the stance of the Canadian Supreme Court when it stated that the accused may maintain a purely adversarial stance towards the prosecution and has no obligation to assist the prosecution.⁴¹

Ahmed is a classic example where the principle of equality of arms received implicit countenance in Botswana and disclosure was recognised as an instrument for redressing

³⁹ *S v Nassar supra* note 28.

⁴⁰ Article 12 of the Namibian Constitution 1990.

⁴¹ *R v Stinchcombe supra* note 28.

the imbalances in the criminal justice system. It denotes that disclosure is an accused-based right that counters the might of the state.

The Court's rejection of the state's assertion that the defence should also disclose, is significant. It underlies the fact that the principle of equality is intended to ensure that the defence has the means to prepare and present its case on equal basis with the prosecution which has all the resources of the state on its side.⁴² It clearly brings the equality principle within the realm of accused-based rights, bringing the accused at par with the prosecution in the presentation of the defence. It also demonstrates that statements taken by the defence in preparation for hearing are privileged. This ensures that the state is not able to use these statements to influence potential defence witnesses. The defence will be severely limited in seeking out information on its own if those who have potential information for them are aware that their identity and information will end up in the hands of the state. Potential defence witnesses will shy away from testifying. Witnesses are generally vulnerable, but defence witnesses are more vulnerable and the state is in a better position to seek out its witnesses and bring them to court should they be elusive due to fear or unwillingness. It must be noted, however, that while it will be inimical to the interests of the state to disclose details of its case and to list its witnesses (perhaps with the exception of *alibi* witnesses), basic disclosure such as the disclosure of special defences might be necessary and justifiable.⁴³

⁴² See *Prosecutor v Dusko Tadic A/K/A/ "Dule"* Separate opinion of Judge Vohrah on prosecution motion for production of defence witness statements, decision of 27 November 1996. Available on www.un.org/icty/tadic/trialc2/decision-e/61127ws21.htm (accessed 12 August 2008).

⁴³ See para 6 3 below.

6 2 1 5 The rule of disclosure

The state appealed against the judgment of Collins J and the matter was finally settled in the Court of Appeal⁴⁴ where the judgment of Collins was affirmed, thereby firmly establishing the rule of disclosure. The Court of Appeal established disclosure as the rule⁴⁵ and privilege the exception. The Court confirmed that the accused is entitled to statements of witnesses, whether or not the state wishes to call them, and also copies of all documents relevant to the charge. The Court, however, recognised some special situations where some limitations are necessary. Two situations were listed.

⁴⁴ *Attorney-General v Ahmed* [2003] 1 B.L.R. 158 (CA); in *Bosch v The State supra* note 21 Nganunu CJ sitting in the Court of Appeal noted *obiter* 104E-F: “In terms of section 10 of our Constitution a person accused of a criminal offence must receive a fair trial before an impartial court within a reasonable time. It seems to me that within certain circumstances a non-disclosure of information held or known by the prosecution to the accused person which information may have a material impact on the case of the accused may amount to a violation of the requirements of a fair trial.”; Lord Justice Steyn also emphatically noted in *R v Winston Brown* [1995] 1 Cr. App.R. 191 (CA) 198F-G: “In our adversarial system, in which the police and prosecution control the investigatory process, an accused’s right to fair disclosure is an inseparable part of his right to a fair trial. This is the framework in which the development of common law rules about disclosure by the Crown must be seen.”

⁴⁵ However in *Masilo v The State* [2006] 1 B.L.R. 250 (CA) the Court suggested that even where the defence was not given the statements, it was not a fatal irregularity as no failure of justice had occurred as the evidence establishing the identity of the accused as one of the perpetrators of the offence and his guilt was overwhelming. It was held in *Moraeng v The State* [2007] 1 B.L.R. 657 that the documents should be translated if the accused is unrepresented and cannot understand the language in which they are written.

First, if a witness' statement discloses the name of a police informant or contains information which might expose his identity, it is possible that his life could be endangered. The state under such circumstances has a duty to protect its informant.⁴⁶

Second, police diaries should not normally be disclosed to the defence as they are likely to contain confidential matters which might bear on investigation techniques which the accused has no particular right to discover and which will not assist him in preparing his defence. But if there is a particular issue about which the defence needs particular information, they would be entitled to ask for the diary.⁴⁷ But as opposed to the view of Collins J, the Court placed the onus on the state to justify the non-disclosure of the diary. The Court, however, emphasised that privilege should only be exercised on rare occasions. The state should show that they have good reasons to exercise the privilege, and that this will not hamper the defence in the preparation of their case.

This case overrules the common law position, giving the question of disclosure constitutional alignment. It significantly enhances the truth finding process by opening the police docket to the accused. It also practically changes the role of the police and prosecution in Botswana. Its practical effect is that when the police collect information, they do so for their benefit as well as the benefit of the accused. This ensures that the

⁴⁶ See also *Pandor v The State supra* note 12 181; see also the South African case of *Shabalala and Others v Attorney-General of Transvaal and Another supra* note 28.

⁴⁷ For example if the witnesses' statements disclosed to the defence throw some discrepancy on the whereabouts of a police officer at a particular time, the defence may be entitled to seek disclosure of this information contained in the police diary.

parties are treated equally. The cliché that the prosecutor is a disinterested combatant with an eye only for the truth, becomes more than mere rhetoric. His role is significantly changed to that of a true minister of justice with a duty to carry out his functions impartially and act with objectivity. The decision is based on the constitutional right to a fair trial. With access to prosecution materials, the credibility and reliability of the prosecution witnesses can be tested. Significantly, disclosure may shorten trials as the defence may be in a position to admit the statements of witnesses whose evidence they do not wish to contend with.⁴⁸ Disclosure also enhances the principle of equality within the adversarial context. The recognition of inequality between the state and the accused was significant in the determination of this case. The case therefore signifies the effect of the principle of equality and the extent to which it can dictate the application of fair procedures in the criminal justice system.

The disclosure rule was also established in English common law prior to England's adoption of the Human Rights Act.⁴⁹ English courts have articulated a balancing act to be performed by the courts when the state objects to disclosure on public interest grounds. On the one hand is the desirability to preserve public interest, and on the other, the interests of justice. Where the interests of justice concern the liberty of the individual,

⁴⁸ S 373 of the Criminal Procedure and Evidence Act.

⁴⁹ See *R v Maguire and Others* [1992] 2 W.L.R. 767 (CA) (regarding scientific evidence. On this case see also Barrie "Criminal Law: Failure of Prosecution's Expert Witness to Disclose Information – Whether Material Irregularity" 1992 *De Rebus* 836; *R v Ward (Judith)* [1993] 1 W.L.R. 619; *R v Keane* [1994] 1 W.L.R. 746; [1994] 2 All E.R. 478 (CA). This rule was extensively modified by the English Criminal Procedure and Investigations Act 1996 c 25.

much weight should be attached to the interests of justice.⁵⁰ Lord Taylor of Gosforth CJ⁵¹ in adopting the “balancing act” approach, emphasised that the disputed material should be disclosed if it would establish the innocence of the accused and avoid a miscarriage of justice. Lord Taylor also recognised a duty of the defence in the determination of the matter when he had this to say:

“Accordingly, the more full and specific the indication the defendant’s lawyers give of the defense or issues they are likely to raise, the more accurately the prosecution and judge will be able to assess the value to the defense of the material.”⁵²

In South Africa the Constitutional Court ushered in the disclosure rule in the case *Shabalala and Others v Attorney-General of Transvaal and Another*.⁵³ In that case the Court had to consider a) whether the common law rule in *R v Steyn*⁵⁴ establishing that police dockets were privileged was consistent with the Constitution, and b) whether the

⁵⁰ *R v Governor of Brixton Prison ex P Osman (No1)* [1992] 1 All E.R. 108.

⁵¹ *R v Keane supra* note 49; Barrie “Evidence: Disclosure of Police Sources of Information to Defence – Public Interest Immunity” 1995 *De Rebus* 628 628-629.

⁵² *R v Keane supra* note 49 485.

⁵³ *Supra* note 28.

⁵⁴ 1954 (1) SA 324 (A). This case was authority for the proposition that statements of witnesses made to the police were privileged and could not be disclosed to the accused. See also *R v Leibbrandt and Others* 1947 (3) SA 740 (T); *R v Clarke* 1955 PH 1 H78 (DCLD); *S v Alexander and Others (1)* 1965 (2) SA 796 (A). See Burse “Privilege and Police Pocket Books” 1992 *The Magistrate* 122 for a discussion of the non-disclosure principle in South Africa.

common law rule of practice which prohibited the accused or his representative from consulting with prosecution witnesses without the prosecution's permission was consistent with the Constitution.

On the first question Mohamed DP stated that accused persons should ordinarily have access to all statements in the police docket. The police, however, may be able to resist such disclosure on the grounds that they may expose the identity of an informer or police methods of investigations. He stated that no rigid rules were desirable and that it was for the courts to exercise their discretion based on the circumstances of each case. The Court noted that a blanket docket privilege was unreasonable and not justifiable in a democratic society. In cases where there was a reasonable risk that disclosure will act against state interest, the courts would have to exercise proper discretion in balancing the right of the accused to a fair trial against legitimate state interests in furthering the ends of justice.⁵⁵

On the second question the Court stated that the rule that prohibited the accused or his representative from consulting with the prosecution witnesses without the consent of the prosecution in all cases and regardless of the circumstances, was inconsistent with the Constitution. In the Court's view, an accused had a right to consult a witness without permission if his right to a fair trial would be compromised by the absence of such consultation. The Court was of the view that it was for courts to exercise their discretion in balancing the rights of the accused against the interests of the state.

⁵⁵ *Shabalala and Others v Attorney-General of Transvaal and Another* supra note 28.

The question whether a judicial officer has a duty to inform an accused of his right of access to police docket has been addressed in South African law. This question was considered in the case of *S v Shiburi*⁵⁶ where the majority of the Court held that such a duty exists. Satchwell J stated that the right of access to police docket was central to the right to adduce and challenge evidence which was a valuable component of the right to a fair trial. The right of access in her view is a vital part of cross-examination, a right of which accused persons are usually informed. Where an accused is unrepresented, these rights would be rendered nugatory if the accused was unaware of his right of access to the docket. She rejected the argument that such a duty would amount to the judicial officer descending into the arena as the duty of the judicial officer to assist an unrepresented accused is well established. The majority also held that while failure to inform the accused of this right will amount to an irregularity, the accused would have to prove actual prejudice which led to a failure of justice in order to warrant a setting aside of the conviction.

The South African case of *S v Mayo and Another*⁵⁷ is quite instructive on the question of access to police diaries. The question here was whether the pocket book of a police officer was privileged. During cross-examination of the investigating officer, defence counsel applied that his pocket book be produced. The state opposed the application, contending that it was privileged in that it disclosed the identity of the informer. It was further contended that it may contain a privileged statement. In other words it might

⁵⁶ 2004 (2) SACR 314 (W).

⁵⁷ 1990 (1) SACR 659 (E).

contain part of the brief of counsel for the state. The Court dismissed these arguments. The Court noted that relevant material must not be excluded whether they are in issue or relevant to matters in issue. The Court emphasised the need for openness in legal proceedings both criminal and civil. The Court recognised that while policy, privilege and other restraints on free exchange of information may sometime defeat the production of all relevant information, such instances should be kept to an absolute minimum. The Court noted that it is normal and in the course of the duty of the police to record certain information in their pocket books. It was noted that the fact that some of these entries may later be used for the purpose of compiling privileged statements does not make the content of the pocket book itself privileged. The Court, however, declined to admit the pocket book as it was not relevant to the matters at hand. Like *Ahmed*, it is clear that the rule of disclosure takes precedence over privilege in the South African legal system.

European jurisprudence has significantly noted the centrality of disclosure in maintaining equality in the adversarial context. It is in this respect that the European Commission noted in *Jespers v Belgium*⁵⁸ that when the prosecution gathers evidence, it does so for the prosecution and the accused. The accused is therefore entitled to evidence collected by the prosecution, for the purpose of exonerating himself or securing a reduction in his sentence. Similarly, the European Court in *Lamy v Belgium*⁵⁹ held that when the accused first appeared before the *chambre du conseil* for a determination whether to confirm his

⁵⁸ *Supra* note 1.

⁵⁹ (1989) 11 E.H.R.R. 529. See also Azzopardi "Disclosure at the Police Station, The Right of Silence and *DPP v Ara*" 2002 *Criminal Law Review* 295 297.

arrest, non-access of defence counsel to documents in possession of the prosecution deprived him from properly challenging the lawfulness of his arrest warrant. The Court noted that it was essential that defence counsel had access to the documents in order to challenge the lawfulness of the arrest warrant. The Court specifically noted that the prosecutor on the other hand was familiar with the case file while the defence was not, a situation which fails to meet the principle of equality of arms.

In *Jasper v United Kingdom*⁶⁰ the Court weighed the competing interests in the criminal process when it noted:

“...[T]he entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6(1).”⁶¹

⁶⁰ (2000) 30 E.H.R.R. 441.

⁶¹ Para 52.

The state has the necessary apparatus to access and retain documents and real evidence and secure witnesses in preparation for trial. Even in the unlikely of cases where individuals have the resource to conduct private investigations, they usually do not have half the resources of the state and the legal backing to access, search for and retain evidence. In any case, most of the vital evidence would already be in the state's possession even before the commencement of trial. The state is able to gain prior access to evidence which effectively denies the accused access to such evidence. Effectively, the accused is usually not in a position to access evidence. This greatly disadvantages the accused if the prosecution were able to keep this evidence exclusively to itself, thereby rendering the trial unfair. McIntyre notes in relation to the ICTY:

“The power of seizure granted to the prosecution is a very powerful weapon in its hands. By seizing material, the prosecution denies such accused persons access to that material. Experience has demonstrated that the results can be seriously deleterious to the rights of those accused. In one case, in which the accused became aware of the seizure by the prosecution, the prosecution waited over six months before providing the accused with a copy of the documents. In another case, in which the accused was unaware of the seizure by the prosecution, the accused had obtained an order requiring the relevant Bosnian authorities to produce the documents which was not complied with. Only after the trial had

ended was it discovered that the documents had been in the possession of the prosecution throughout trial.”⁶²

6 3 Pre-trial defence disclosure

The dominant argument against defence disclosure is that it infringes core constitutional rights such as the presumption of innocence,⁶³ the right to silence and the privilege against self-incrimination.⁶⁴ On the other hand, defence disclosure can be evaluated from a theoretical standpoint, in that criminal trials seek to discover the truth.⁶⁵ Practically, it enhances efficiency, prevents ambushes by the defence and makes trials less complex and shorter.⁶⁶ In Botswana and South Africa there is no general duty on the defence to make disclosure. However, the question of defence disclosure has been discussed in Botswana and South African case law in relation to the *alibi* defence. In Botswana the duty to

⁶² McIntyre “Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the former Yugoslavia” 2003 *Leiden Journal of International Law* 269 280-281.

⁶³ McEwan *Co-operative Justice and the Adversarial Criminal Trial: Lessons from the Woolf Report* in Doran & Jackson (eds) *The Judicial Role in Criminal Proceedings* (2000) 171 179; McEwan *Evidence and the Adversarial Process (The Modern Law)* 2 ed (1998) 18.

⁶⁴ Sharpe “Article 6 and the Disclosure of Evidence in Criminal Trials” 1999 *Criminal Law Review* 273 284. In *Williams v Florida* 399 U.S. (1970) Black J questioned whether any form of defence statement (in this case an *alibi*) was compatible with the Fifth Amendment.

⁶⁵ Griffith *Pre-trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000* Briefing Paper No 12/2000 introduction.

⁶⁶ McEwan *Co-operative Justice* 178; McEwan *Evidence and the Adversarial Process* 17; Leng “Losing Sight of the Defendant: The Government’s Proposals on Pre-Trial Disclosure” 1995 *Criminal Law Review* 704 706.

disclose an *alibi* prior to trial is founded on the common law. The duty is based on practical considerations. In the case of *Mogatla v The State*,⁶⁷ the Court noted that since the state has a duty to rebut the *alibi* evidence, the accused has a duty to put the state on notice before the trial commences so that the state is afforded an opportunity to investigate it. The Court noted:

“Now, according to the law of evidence, the onus of proving that an alibi is false rests on the prosecution. It therefore, accords with common sense that, where an accused person relies on an alibi as a defence, notice of it should be given to the prosecution before the commencement of the case in order to afford the State the opportunity to verify the truth or falsity of the alibi. It is normal for a person against whom a charge is levelled to inform his accusers at the earliest possible moment that evidence tending to show that by reason of his presence at a particular place or in a particular area at a particular time he was not, or was unlikely to have been at the place where the offence was alleged to have been committed, at the time of its alleged commission.”⁶⁸

Mogatla was followed in *Ross v The State*⁶⁹ where Lesetedi J had this to say:

⁶⁷ [2001] 1 B.L.R. 192 (CA).

⁶⁸ 199E-F; *State v Molatlhegi alias Sekukuru* [2007] 3 B.L.R. 507.

⁶⁹ [2003] 1 B.L.R. 563.

“The onus is upon the prosecution to prove the falsity of an alibi when it is being raised by the defence. As to prove the falsity of such a defence would require the prosecution to investigate the said alibi and also to present before the court evidence negating such alibi should the need arise, it is imperative that notice that such defence would be raised and its nature or particulars should be given to the prosecution before or at the commencement of the trial to give the prosecution the opportunity to investigate it, and not to be just sprung up on the prosecution during the presentation of the defence case.”⁷⁰

Though the legal effect of failure to disclose an *alibi* was not discussed in *Mogatla*, the Court in *Ross* briefly mentioned that the court is entitled to consider it as an afterthought and reject it. Though it is clear that the Court was referring to the case in question rather than setting a general rule of law, the relevant facts were that throughout the case, the accused did not mention his *alibi*, nor did he put it to the state witnesses in cross-examination. The situation was the same in the *Mogatla* case. In fact, in that case the accused in cross-examination was more concerned with whether the prosecution witnesses could identify him or attest to the clothing he was wearing when he committed the offence. To make matters worse, the accused himself did not testify as to his *alibi*. The issue was left to his last witness. A reading of these cases leaves one with the impression that they were determined with reference to the specific facts in issue. In *July v The State*,⁷¹ an appeal from the magistrates’ court, the Court confirmed as correct the

⁷⁰ 565G-H.

⁷¹ [2006] 1 B.L.R. 496.

factors considered by the magistrate in determining the credibility of the accused's *alibi*.

These were:

1, that no questions were put to the prosecution witnesses suggesting that the accused was elsewhere when the offence was committed.

2, that the accused failed to put forward the defence when confronted by the investigating officers.⁷²

The above factors are quite similar to those considered in *Mogatla*. While one cannot discern a firm rule to the effect that an *alibi* should be excluded as a result of failure to disclose it, it is clear that the court should examine the *alibi* evidence, and that failure to disclose is a relevant factor in determining its acceptability. *Mogatla* represents the law and, therefore, failure to disclose timeously diminishes the weight to be attached to the *alibi* evidence.

The South African Constitutional Court in *S v Thebus and Another*⁷³ held that it was constitutionally impermissible to draw an adverse inference from the pre-trial silence of the accused. Two of the judges, however,⁷⁴ suggested that such inferences might be constitutional if the accused had been warned of the consequences of silence. Although adverse inferences from silence are prohibited, the Court made it clear that there may well be adverse consequences to remaining silent. Consequently, it is permissible to take

⁷² 506; *Nyembe v The State* [2008] 1 B.L.R. 129 (CA).

⁷³ 2003 (6) SA 505 (CC).

⁷⁴ Goldstone J and O'Regan J.

the late disclosure of the *alibi* into account in determining what weight should be attached to the *alibi* evidence.

Some jurisdictions for obvious practical reasons recognise the duty of the defence to disclose special procedural steps or specific and special defences it intends to take during trial. In Canadian common law, the defence is required to make timely and adequate disclosure of an *alibi*.⁷⁵ The defence also has a duty to give the prosecution notice of any application it intends to make under the Canadian Charter of Rights and Freedom.⁷⁶ The defence is under an obligation to give written notice of its intention to adduce evidence of a complainant's previous sexual activities.⁷⁷ In England, the defence is required to furnish the court and prosecution with a defence statement setting out the general nature of its defence and stating matters in respect of which it will take issue with the prosecution in respect of indictable offences. If it sets up an *alibi*, it is required to give particulars.⁷⁸

⁷⁵ Maude "Reciprocal Disclosure in Criminal Trials: Stacking the Deck Against the Accused, or Calling Defence Counsel's Bluff?" 1999 *Alberta Law Review* 715 717; Costom "Disclosure by the Defence: Why Should I Tell?" 1996 *Canadian Criminal Law Review* 73 85.

⁷⁶ Tochor and Kilback "Defence Disclosure: Is it Written in Stone?" 2000 *Criminal Law Quarterly* 393 407-408.

⁷⁷ Section 276 Canadian Criminal Code, RS, 1985, c 46. Available on <http://laws.justice.gc.ca/en/C-46>. (Accessed on 14 March 2009).

⁷⁸ In England S 11(3)(b) of the Criminal Procedure and Investigations Act 1996 provides a penalty for failure to provide a defence statement. It provides that the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned; the United Kingdom Royal Commission on Criminal Justice noted: "Where defendants advance a defence at trial it does not amount to an infringement of their privilege not to incriminate themselves if advance warning of the substance of such

While it is true that the state will in the majority of cases be able to anticipate the defence of the accused, the disclosure of specific defences does not disadvantage the accused in practical terms and any resistance to such an approach in my view is merely theoretical. It is clear that every person accused of an offence, particularly the innocent, knows what his defence is. In the situation where reliance is placed on special defences which require rebuttal based on investigation and especially scientific investigation, the state will be disadvantaged if not put on notice. After all, the burden lies with the state to disprove the defence of the accused. Recognition of defence disclosure in Scottish law presents a perfect example of this reasoning.

In Scottish law the accused is required to disclose ten days before trial, a special defence plea in respect of an *alibi*, insanity, automatism, identification and self-defence. Disclosure of a defence relating to any impairment of the mind is justifiable on the basis that it is a matter within the peculiar knowledge of the defence. Rebuttal may also require the support of scientific evidence. Therefore, the prosecution will be forced to take an adjournment to consult with experts or produce its own expert evidence in order to rebut the assertion of the defence. Disclosure of a defence involving an impairment of the mind or self-defence does not really infringe the right to silence or presumption of innocence since such defences imply that the accused actually committed the act. His argument is that no offence was committed under the circumstances. Thus the argument for non-disclosure on such grounds are mere theoretical and have no practical basis.

a defence has to be given.” – *Report of the Royal Commission on Criminal Justice* Cm 2263 (1993) 97-98; McEwan *Co-operative Justice* 178; McEwan *Evidence and the Adversarial Process* 16.

Pre-trial defence disclosure leads to efficiency in the proceedings. It prevents the defence from ambushing the prosecution and raising last minute defences that will require rebuttal and further investigation by the prosecution. Of course, the issue of defence disclosure should be approached carefully and must be narrow in application. Indeed the defence should not be expected to be burdened with the wide scope of disclosure required of the prosecution. This will only serve to exacerbate the already prevailing imbalance between the parties. The matter of paramount importance in addressing the question of defence disclosure is the question of fairness of the trial. The question to be answered at the end of the day is whether defence disclosure of specific and limited facts will infringe fair trial rights or enhance fairness and truth finding for all practical purposes. The latter is the justification for limited defence disclosure.

6 4 The charge

It is a fundamental requirement of a fair trial that a) the state informs the accused of the charges against him⁷⁹ and b) the evidence is communicated to him in a language he understands. The requirement that the accused has a proper understanding of the charge and the evidence is a prerequisite to his being able to defend himself. This requirement is guaranteed by two constitutional provisions. Section 10(2)(b) of the Constitution provides that every person shall be informed as soon as reasonably practicable, in a

⁷⁹ *State v Keboletse* [1979-1980] B.L.R. 74; *Basupi v The State* [2000] 2 B.L.R. 1 5 (CA); *Rankalo v The State* [2000] 2 B.L.R. 164 (CA); *Mmlati and Another v The State* [1999] 1 B.L.R. 4 (CA); *Makaba v The State* [1989] B.L.R. 574.

language he understands and in detail, the nature of the offence with which he is charged.⁸⁰ Section 10(2)(f) provides that the accused shall be provided with an interpreter if he does not understand the language of the court.

The procedural manifestation of section 10(2)(b) is expressed by the Criminal Procedure and Evidence Act which provides that an indictment charging a person with a criminal offence in the High Court shall be in writing⁸¹ and should be served on the person.⁸² Similarly, in magistrates' courts the summons containing the charge against the accused

⁸⁰ "...[T]he purpose of the laying of a charge or an indictment is to bring to the notice of the accused the nature of the offence with which he is being charged and the appropriate section of the law with reasonable clarity so that he will not be prejudiced in making his defence,...": *Sefolana v The State* [1985] B.L.R. 337 338E-F; "When an accused is charged with stealing stock the particulars of offence must state whether the animals allegedly stolen are cattle, goats, sheep, donkeys and so forth and such animals must be described fully by their colours, earmarks and brand marks if they have been earmarked or branded, or both because that information would be available to the prosecution at the time when they decided to charge the accused. The disclosure of these details as well as the owner of the animals where he is known to the prosecution in the particulars of offence in the charge are of paramount importance because they enable the person charged to know in advance what he is alleged to have stolen in order to prepare his defence and in my view failure to disclose these particulars of the animals which it is alleged the accused has stolen cannot be cured by evidence led in the trial. It is not enough to state in the charge that the accused stole a certain number of beasts belonging to the complainant.": *Lesetedi and Another v The State* [2001] 1 B.L.R. 393 396G-397A; this dictum was followed in *Paki v The State* [2005] 1 B.L.R. 479 where the facts were almost on all fours with the former; *Mmlati and Another v The State supra* note 79; *State v Keboletse supra* note 79.

⁸¹ S 123(1) Criminal Procedure and Evidence Act.

⁸² S 123(4) Criminal Procedure and Evidence Act.

should be served on him.⁸³ A summons or indictment should contain sufficient information of the offence with which the accused is charged together with necessary particulars to provide reasonable information as to the nature of the offence.⁸⁴ The primary function of the indictment or summons is to inform the accused of the charge against him. In this regard, it is of importance that he be informed of all the elements of the offence.⁸⁵ Disclosure of detailed allegations is crucial to the ability of the accused to defend himself.⁸⁶ This was considered by O'Brien Quinn CJ in *State v Mompoti*⁸⁷ when he noted that the accused must be given as exact a date as possible on which the offence was alleged to have been committed. Citing the defence of *alibi* as an example, he noted that vagueness as to date will hinder the accused in giving his evidence.⁸⁸ It should be noted that “*the principle of equality of arms is not respected where the accused is not served with a properly motivated indictment.*”⁸⁹ To this end, *defective charges should be rendered invalid for non-compliance with the principle of equality of arms in so far as*

⁸³ S 125 Criminal Procedure and Evidence Act.

⁸⁴ S 128 Criminal Procedure and Evidence Act.

⁸⁵ *State v Mavela* [1976-1978] B.L.R. 75; Hollander & Bergman *Wharton's Criminal Procedure I* 14 ed (2005) para 5:4; *Hamlin v U.S.* 418 U.S. 87, 117, 94 S. Ct. 2887, 41 L. Ed. 2d 590, 1 Media L. Rep. (BNA) 1479 (1974).

⁸⁶ *Ndubiwa v The State* [1994] B.L.R. 30 (CA).

⁸⁷ [1989] B.L.R. 89.

⁸⁸ See *S v Pholoba* [1981] B.L.R. 247.

⁸⁹ Human Rights Committee. Communication No. 289/1988, *D. Wolf v Panama* (Views adopted on 26 March 1992), U.N. Doc. GAOR, A/47/40, pp. 289-290, para 6.6. (Emphasis added).

*they fail to properly inform the accused of the charges against him or deny him the ability to properly prepare his defence.*⁹⁰

It must be noted that the purpose of the charge sheet is to inform the accused of the allegations against him. Therefore, proper and reasonable disclosure of information will supersede the requirement for exactness. While it is important that all the essential elements of the offence are averred in the charge sheet,⁹¹ the court will not quash a charge sheet where the accused is sufficiently informed of the case he has to meet.⁹² Therefore, where the flaw in the charge sheet is not so serious as to be fatal or does not prejudice the accused, the court will not interfere with a conviction based on it.⁹³ What is of importance is that the charge gives the accused the state's allegations such that he is able to defend himself. In *July v The State*⁹⁴ Mosojane J gave a clear articulation of the

⁹⁰ Negri "The Principle of 'Equality of Arms' and the Evolving Law of International Criminal Procedure" 2005 *International Criminal Law Review* 513 551.

⁹¹ In *Kumalo v Regina* Prentice Hall Reports 1954 (1) 55 the accused was charged with assault of a police man in the execution of his duties. It was held that the charge sheet was defective as it did not allege that the person assaulted was a member of the police force.

⁹² *State v Shadrack Tshibogo* [1976-1978] B.L.R. 61; a conviction will not be allowed to stand where the charge sheet does not disclose an offence: *State v Botolamang Madi* [1972] 2 B.L.R. 56.

⁹³ *Tsekane v The State* [1988] B.L.R. 95; see also *Kalabeng v The State* [1983] B.L.R. 106.

⁹⁴ *Supra* note 71. In *Molome v The State* [1992] B.L.R. 335 344F-G Gyeke-Dako J noted: "In my view, the principle is that, if the body of the charge, i.e. the particulars of offence, as in this case is clear and unambiguous in its description of the offence alleged against the accused, e.g. where the offence is a statutory and not a common law offence and the offence is correctly described in the actual terms of the statute, the attaching of a wrong label to the offence or an error made in quoting in the charge the statute or

situation, drawing a distinction between a charge that is defective due to some technicality but nevertheless discloses the offence to the accused on the one hand, and a charge that discloses no offence on the other. In his words:

“It seems to me elementary that where in charging a person, a wrong section of the law is cited but the offence is nonetheless correctly described in a manner that the accused cannot be said not to have understood what he was charged with, such a charge, though technically defective does not vitiate the proceedings taken under it. To argue otherwise is to be pedantic. In my view, the only basis upon which an argument of this nature could prevail would be where the charge was cast in such vague terms that no offence is disclosed or the accused could not have appreciated what he was charged with.”⁹⁵

In effect, where it is clear that the accused was aware of the allegations against him, and was properly able to defend himself, suffering no prejudice, a technical error in the charge sheet will not vitiate the proceedings.⁹⁶

statutory regulation alleged to have been contravened, may, in my opinion, be regarded as an error not fatal to the charge.”; see also *State v Phale* [1985] B.L.R. 123.

⁹⁵ *July v The State supra* note 71 504B-E.

⁹⁶ *Modise and Another v The State* [2006] 2 B.L.R. 17 (CA); *Motswasele v The State* [2006] 2 B.L.R. 477 (CA); *Mabutho v The State* [2002] 1 B.L.R. 67 (CA).

6 5 Conclusion

The theme of equality runs implicitly through all the cases that ruled in favour of prosecution disclosure. Without expressly stating so, it becomes abundantly clear that inequality between the parties and the disadvantaged position of the accused is the core justification for disclosure.

The existence of the office of the Director of Public Prosecutions as an organ funded by public funds and assisted by the police in the gathering of evidence leads to a great disparity between the prosecution and the accused as far as resources are concerned. The police have massive manpower and resources and are able to investigate crimes and gather evidence relating to all sides of the dispute. That the state is able to take its time, perhaps months if not years, to gather evidence and decide when to prosecute, gives it a head start over the accused.

The police also have instruments to collect evidence in the form of powers of search and seizure. There is no comparable institution or organ of state that assists the accused in the gathering of evidence and prosecution of his case. This remains so even though the Constitution provides that the accused should be provided with adequate facilities to present his defence. One wonders whether the legal system of Botswana will reach a stage where an office of the defence assisted by investigators will be set up. This trend is developing in relation to international tribunals, the Special Court for Sierra Leone leading the way in this regard.

The lack of legal representation in Botswana makes the plight of the accused even more precarious. To some extent the constitutional and legal framework provides for disclosure. The state is required to put the accused on notice in relation to charges proffered against him. Full disclosure is required in relation to the particulars and details of the offence. The courts have been liberal in relation to their interpretation of the constitutional demand that the accused be given adequate time and facilities to prepare his defence. By moving away from privilege, as enunciated in *Kenosi*, to disclosure, the laws of the country have been brought in line with international standards. *Surely, to deny the accused access to relevant information is a breach of the principle of equality of arms and results in a denial of fair trial as the accused's ability to properly defend himself and present his case would have been compromised.*

As has been stated before, the state maintains great powers in the criminal process. A suspect, though presumed to be innocent, is treated as a villain during the investigation. The police in Botswana make full use of their "right" to detain suspects for the prescribed forty eight hours limit, even for very minor offences. This is usually done on the pretext that suspects will interfere with the investigations. But often, detention is resorted to for no obvious reason at all. Suspects have no say at all in the way investigations are conducted. One would suggest a new approach whereby suspects are incorporated into the investigation processes. Suspects should be provided with information collected against them. Such disclosure should be made promptly, not during or a few days before trial. Details should be given of real evidence and suspects should be provided with copies of documents obtained by the state. Suspects should, where possible, be allowed to

witness searches and seizure of evidence. In other words, the accused should as far as possible be able to prepare his defence as the state prepares for prosecution. He should have full access to, and information of evidence obtained against him. This will go a long way in equalising the inequalities between the state and the accused.

PART 3

TRIAL RIGHTS: LEVELLING THE PLANE WITH ACCUSED-BASED RIGHTS

CHAPTER 7

THE RIGHT TO LEGAL REPRESENTATION AND EQUALITY BEFORE THE LAW

7 1 Introduction

Prosecutorial powers are wide, but the rights of the accused generally serve to counter the inherent imbalances in the system.¹ The extent to which these rights of the accused are realised, play a vital part in ensuring a fair trial. Perhaps the most significant of these rights is the right to legal representation. Legal representation and the provision of legal aid are key indicators in determining whether the principle of equality of arms is attained. No matter how fair the process, how generous the prosecutor and how helpful the court to the accused, if he is made to stand trial unrepresented and face a trained prosecutor, he is immediately and fundamentally disadvantaged.² So significant is the right that it has received universal recognition in democratic societies. Article 14(3)(d) of the ICCPR

¹ Silver “Equality of Arms and the Adversarial Process: A New Constitutional Right” 1990 *Wisconsin Law Review* 1007 1038.

² In the civil case of *Airey v Ireland* E.C.H.R. (1979), Series A, No 32; (1980) 2 E.H.R.R. 305 314-315, the applicant wanted to petition for judicial separation in the Irish High Court but could not afford to hire a lawyer. The test applied by the Court was whether the applicant was able to present her case satisfactorily and properly. The Court, applying the adversarial requirement, said:

“It seems certain to the Court that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not. Quite apart from this eventuality, it is not realistic, in the Court’s opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the government, the judge affords to parties acting in person.”

provides that every person charged with a criminal offence is entitled to legal assistance of his own choosing and to have legal assistance assigned to him if he cannot afford one where the interests of justice so require.³ The right to legal representation as pronounced by article 6(3)(c) of the European Convention has been developed in line with the principle of equality of arms, with the result that legal representation becomes mandatory in certain circumstances.⁴ Concepts like equality before the law, access to justice and other procedural rights remain hollow promises if the right to legal representation is not attainable.⁵ The right to legal representation should ideally include the provision of a lawyer by the state where the accused cannot afford one. In Botswana, there is a constitutional right to legal representation without a concomitant provision of legal aid.

³ See also article 7(1)(c) of the African Charter; Hatchard "The Right to Legal Representation in Africa: The Zimbabwean Experience" 1988 *Lesotho Law Journal* 135.

⁴ In *Boner v United Kingdom* (1995) 19 E.H.R.R. 246 it was held that legal representation and legal aid were required where an appellant was sentenced to a prison term of eight years; Harlow *Access to Justice as Human Rights: The European Convention and the European Union* in Alston (ed) *The EU and Human Rights* (1999) 186 203; Robertson & Merrills *Human Rights in Europe* 3 ed (1993) 97.

⁵ Harlow *Access to Justice* 186; Traest & Gombeer "The Autonomy of Defense and Defense Counsel" 2007 *Ius Gentium* 97; Schroeter "Attorney Representation: An Essential Right or Not?" *Washington State Access to Justice Board* <http://www.wsba.org/atj/committees/jurisprudence/attyrep.htm> (accessed 20 November 2007). The European Court of Human Rights has relied on the principle of equality of arms to ensure that unrepresented litigants in civil cases present their cases properly and satisfactorily. In this regard the Court held that the state should provide legal representation for unrepresented litigants in civil cases in an adversarial system: see *Airey v Ireland supra* note 2.

Legal aid is central to equality of arms.⁶ Therefore, the main obstacle to the full realisation of the right is the availability and allocation of funds for legal aid.⁷

7 2 Constitutional provisions

7 2 1 Scope of the right

The right of an accused to legal representation at his trial is guaranteed by constitutional and procedural provisions. It is a fundamental right and is entrenched in the Constitution of Botswana.⁸ Section 10(2)(d) of the Constitution provides as follows:

⁶ Clayton & Tomlinson *The Law of Human Rights I* (2000) 649.

⁷ As Lester notes, "...It was well understood that poverty, ignorance and fear among would-be litigants, the obscurity of the law, and the cost of delays of litigation, were major impediments to the attainment of genuine equality before the law.": Lester *Legal Aid in A Democratic Society* (1974) paper read at a conference *Legal Aid in South Africa* hosted by the Faculty of Law, University of Natal, Durban, 1973-7-2 to 1973-7-6, published by Faculty of Law University of Natal Durban South Africa (1974) 1 2; Frynas "Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners" 2001 *Social and Legal Studies* 397 406; Reyntjens *Africa – South of the Sahara* in Zemans (ed) *Perspectives on Legal Aid: An International Survey* (1979) 12 13-14; Bekker "The Right to Legal Representation, Including Effective Assistance, for an Accused in the Criminal Justice System of South Africa" 2004 *Comparative and International Law of Southern Africa* 173 179.

⁸ Tebbutt JA in *Moroka v The State* [2001] 1 B.L.R. 134 139E-F declares: "There is in the common law a fundamental right of an individual to have access to legal advice and to legal representation. That right of an accused person to legal representation is now also enshrined in section 10 of the Constitution of Botswana."; *Chanda v The State* [2007] 1 B.L.R. 400 (CA).

“Every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice.”

The scope of this provision is limited. The accused is entitled to legal representation only if he can afford one. The state does not have a constitutional duty to provide him with legal representation. Rather, the Constitution burdens the accused to provide legal representation “at his own expense.” On the other hand, the state has a permanent and well funded directorate of public prosecutions which is well staffed by qualified lawyers. The directorate has support staff, materials, vehicles, equipment and office space all over the country. On the other hand, the accused generally speaking, has no resources provided for him. The constitutional recognition of the right to legal representation does not operate on the principle of equality but rather sanctions the absence of a legal aid system. By providing that the accused is entitled to legal representation at his own expense, the Constitution directs the state not to provide legal aid to the indigent. Also there is no constitutional provision for legal representation at the pre-trial stage. Though section 10 of the Constitution is modelled after article 6 of the European Convention, the provision relating to legal representation marks a glaring and deliberate departure from article 6(3)(c) which specifically require that the accused be provided with legal representation if he cannot afford one and if the interests of justice so require.

7 2 2 Application of the right

Case law states that section 10(2)(d) requires that the accused has a right to brief a legal practitioner and be given time to do so.⁹ This provision accentuates the time-honoured right of an accused to engage legal counsel and is mandatory in application.¹⁰ This is in conjunction with the fact that the right to legal representation is essential if an accused were to get a fair trial within the context of an adversarial system.¹¹ The concept of the right to fair trial spans over a number of areas, from the accused's right to be represented by counsel of his own choice to his right to be provided with counsel at state expense under certain circumstances and the attendant limitations that go with the realisation of the right.¹² The right to counsel presupposes that the court or the state should not in any way prevent the accused from securing an attorney.¹³ Therefore, if a trial court willfully excludes or prevents the accused's counsel from representing him, or refuses to allow the accused reasonable time to engage the services of counsel, this will amount to a denial of justice.¹⁴ So where counsel withdraws unexpectedly from a case, and the accused is suddenly abandoned, the court should grant an adjournment to afford him an opportunity

⁹ *Richard Macha v The State* [1982] 1 B.L.R. 98.

¹⁰ *Maposa v The State* [1989] B.L.R. 556.

¹¹ Steytler *The Undefended Accused on Trial* (1988) 10; Cowling "Recent Cases" 2004 *South African Journal of Criminal Justice* 108 124.

¹² Cowling 2004 *South African Journal of Criminal Justice* 124.

¹³ Ntanda Nsereko "Legal Representation in Botswana" 1988 *Israel Yearbook on Human Rights* 211; Molatlhegi "The Right to Legal Representation in Criminal Proceedings in Botswana: More than a Court-Room Right for the Knowledgeable Suspect?" 1997 *South African Journal on Human Rights* 458 459.

¹⁴ *Maposa v The State supra* note 10; *Mosala and Others v The State* [1996] B.L.R. 978.

to secure the services of another counsel.¹⁵ Failure to do so will amount to a denial of his constitutional right to legal representation.¹⁶ The constitutionalisation of the right to legal representation is a reflection of its importance. It is a core right of immediate relevance to anyone facing trial.¹⁷ It is clear from section 10(2)(d) that the right to legal representation does not include the right to legal aid. *The constitutional right to legal representation in Botswana therefore falls foul of the equality principle.* Without the right to legal aid, section 10(2)(d) of the Constitution is no more than a pious promise as far as the indigent accused is concerned.

7 3 Procedural provision

The Constitution apart, the entitlement to legal representation should be observed as a matter of procedure. The Criminal Procedure and Evidence Act regulates the procedural content and operation of the right. The proper application of the procedural elements of this right is crucial in the determination of its field of application as a constitutional requirement. The right to legal representation is clearly relevant to the realisation of other fair trial rights. For example, the Criminal Procedure and Evidence Act¹⁸ makes it clear that either the accused or his counsel may cross-examine the prosecution's witnesses.

¹⁵ *Maposa v The State* *Supra* note 10; *Mosala and Others v The State* *supra* note 14.

¹⁶ *Molatlhegi v The State (Practice Note)* [1990] B.L.R. 477; *Mazibuko v The State* [1994] B.L.R. 460.

¹⁷ In the South African case of *S v Pitso* 2002 (2) SACR 586 (O) the Court describes the right to legal representation as the right closest to an absolute right in the Bill of Rights.

¹⁸ S 176.

Also, at the close of the trial, the accused or his legal representative has a right to address the court.¹⁹

7 4 The right to be informed of the right to legal representation

The question arises whether there is a duty on a judicial officer to inform the accused of his right to legal representation.²⁰ The law in Botswana in this regard is not fully developed and fairly unclear. The right to be informed of the right to legal representation does not seem to have achieved constitutional status. The views of Gyeke-Dako J in *Bojang v The State*²¹ are somewhat wavering. In this case, the magistrate did not advise the accused of his right to legal representation. Though she had consulted with a lawyer before she was charged, she decided to proceed without him as the prosecutor and a police officer had told her that the matter was a simple one and did not require a lawyer. She was convicted on a plea of guilty and sentenced to a prison term of nine months of which three months were suspended. At first Gyke-Dako J expressed the right as a constitutional requirement when he stated:

“Section 10(1) of our Constitution speaks of a ‘fair hearing’ being afforded to every accused person who appears before our courts. It is for the attainment of this goal that certain rights are conferred on accused persons by our laws. To what

¹⁹ S 180(4).

²⁰ See Mohamed “Right to Representation Reiterated” 2001 *De Rebus* 53.

²¹ [1994] B.L.R. 146; see Quansah *Judicial Attitudes to the Fair Trial Provisions in the Botswana Constitution* in Fombad (ed) *Essays on the Law of Botswana* (2007) 65 67-68 for a discussion of this case.

use are those rights to a beneficiary if that beneficiary does not even know of their existence and is not told or reminded of their existence?”²²

He noted that on the first appearance of an accused the judicial officer should inform him of his right to defend himself. If he states that he requires legal representation and that he will be able to pay, the court should adjourn the case for a sufficient period to enable him to secure legal representation. But he watered down this statement when he stated:

“Having regard to the present state of our laws on the subject, the above suggestion, however salutary it may be, is only a desirability, a breach of which will not per se amount to an irregularity vitiating the proceedings.”²³

The purport of the first quotation above then becomes questionable. It becomes doubtful whether his Lordship was emphasising the right to be informed of legal representation as a constitutional right or whether he was stating that the importance of the right to legal representation makes it vital that the accused be so informed. It is doubtful whether he was aligning the right to legal representation or the right to be so informed, to the constitutional requirement for a fair trial. He continued:

²² 159H.

²³ 160D-E; *Rakgole v The State* [2008] 1 B.L.R. 139 (CA); *Phologolo v The State* [2007] 1 B.L.R. 61; *Moroka v The State supra* note 8; *Masango v The State* [2001] 2 B.L.R. 616; *Ramogotho v Director of Public Prosecutions* [2007] 1 B.L.R. 334 (CA); *Chanda v The State supra* note 8.

“Having expressed my complete agreement with the principle that failure of a presiding officer to inform an unrepresented accused of his right to legal representation may only vitiate the proceedings if such failure results in a miscarriage of justice, I now turn to consider whether or not in the circumstances of this case, a miscarriage of justice was occasioned through the absence of the suggested advice to the applicant per se.”²⁴

A constitutional right is a fundamental one. That his Lordship was willing to condone its breach on the grounds that no prejudice occurred to the accused leads one to construe his conflicting statements to the effect that he did not regard the right to be informed of the right to legal representation as a constitutional right and fundamental rule of law, but rather as a rule of convenience.²⁵ It appears that the Court was merely stating that the only way the constitutional right of the accused to legal representation can be realised is by a legal duty on judicial officers to inform him accordingly. But if this is so, why is the duty to inform not a fundamental constitutional requirement?

On the basis of *Bojang*, the failure to advise an accused of his right to legal representation will depend on whether the irregularity amounted to prejudice to the accused with each case depending on its peculiar facts and circumstances.²⁶ Similarly in *Leow v The State*,²⁷

²⁴ 161B-C.

²⁵ Molatlhegi is however of the view that the purport of the judgment is to the effect that there exists a constitutional duty to inform the accused of his right to legal representation. *Supra* note 13 464.

²⁶ See also *Rakgole v The State supra* note 23; *Phologolo v The State supra* note 23; *Moroka v The State supra* note 8; *Melore v The State* [1998] B.L.R. 449; *Masango v The State supra* note 23; *Ramogotho v*

Lesetedi J also commented that there existed no constitutional or statutory duty on a judicial officer to inform the accused of his right to legal representation. He, however, noted that it is a salutary rule of practice which has developed to ensure a fair trial. This approach was confirmed by the Court of Appeal in *Moroka v The State*²⁸ where the Court noted that the duty to inform an accused of his right to legal representation is not mandatory but a salutary practice, the failure of which would not necessarily vitiate the proceedings except where a failure of justice occurs.²⁹ It is clear that in the Botswana legal order there exists a duty on the judicial officer to inform the accused of his right to legal representation.³⁰ The consequences of failure to do so amounts to an irregularity which may vitiate the proceedings only if the accused suffers prejudice. That the right to information in respect of such a crucial right is not a constitutional right is both

Director of Public Prosecutions supra note 23; *Chanda v The State supra* note 8. See also the South African case of *S v May* 2005 (2) SACR 331 (SCA); Pillay “Case Reviews” 2005 *South African Journal of Criminal Justice* 400 402.

²⁷ [1995] B.L.R. 564.

²⁸ *Supra* 8; *Matlapeng v The State* [2001] 1 B.L.R. 161 (CA).

²⁹ 140.

³⁰ *Bojang v The State supra* note 21; see the Namibian case of *S v Kau and Others* [1993] NASC 2; 1995 NR 1; see also the South African case of *S v Moos* 1998 (1) SACR 372 (C); In *S v Mbambo* 1999 (2) SACR 421 (W) the accused was charged with a offence which carried a mandatory life sentence by virtue of S 51, 52 and 53 of the Criminal Law Amendment Act 105 of 1997. The trial Court advised the accused of the right to legal representation. However, the Court did not inform him of the possibility of life sentences if convicted, nor was he encouraged to exercise his right to legal representation. It was held that these failures constituted irregularities and therefore not in accordance with justice as contemplated by the Act. See also *S v Nkondo* 2000 (1) SACR 358 (W); *S v Manale* 2000 (2) SACR 666 (NC).

unfortunate and mundane. It seems that this approach is partly due to three factors. First, there is no positive duty on the state to provide legal representation for the accused. Second, the right to be informed of the right to legal representation is one of recent origin.³¹ Third, the legal system has not embraced and does not recognise the import of the principle of equality of arms in relation to procedural rights. It is my view that had the principle been embraced as a fundamental rule of constitutional proceduralism, the demand that the accused be made aware that he may engage counsel will definitely receive application as a rule of constitutional practice. Lack of legal representation immediately results in procedural inequality and consequently has a telling and negative impact on the fairness of the trial. Failure by the court to inform the accused of the right significantly disadvantages him in the course of the trial. It therefore goes to the core of fundamental fairness that the accused be informed of the right.

It is wrong to use the absence or presence of prejudice as a criterion for determining the consequences of judicial failure to advise the accused of such a fundamental right. A procedural right is of no value unless the bearer of the right is aware of it. Prejudice is a relative term. When does prejudice arise and how is it assessed? Does it occur when an accused is convicted? Is it possible to say that no prejudice occurred if an unrepresented accused is convicted even though he was not made aware that he can hire an expert? An attorney is able to raise several issues that an unrepresented accused cannot. Therefore, one can never know how different the proceedings would have turned out had an accused

³¹ Sarkin "Restructuring the Legal Profession and Access to Justice: The Duty of Law Graduates and Lawyers to Provide Legal Services" 1993 *South African Journal of Human Rights* 223 224.

been represented. To state therefore that the failure to advise the accused of his right to legal representation is cured by the lack of prejudice is highly presumptuous. The fact remains that several cases do not go on appeal and several people can suffer dire consequences for failure to brief an attorney just because they were unaware of their right to do so. In an adversarial system, the fact that an accused has to defend himself without legal expertise results in inequality which in itself, I submit, amounts to prejudice. It is vitally important therefore that he should be made aware of this right. Legal proceedings should be handled by those specially trained in the field. The demand therefore that an accused should be made aware of his right to legal representation is as fundamental as the right which such information seeks to protect. *Equality of arms demands informed participation of the accused in the trial.* The right to be informed of the right to legal representation is a clear demonstration of the underlying connectivity that the principle plays in relation to various procedural rights. The principle therefore forms the foundation for the full application of various procedural rights.

The South African Constitution declares in clear terms that an accused must be promptly informed of his right to legal representation.³² This serves as the basis of this essential right to access information in that country's legal order and makes it fundamental to the procedural process. In consequence, a judicial officer has a bounden duty to inform an

³² S 35(3)(f); see also section 73(A) South African Criminal Procedure Act. In South Africa, where an accused declines legal representation, the presiding officer has a duty to encourage him to exercise his right to legal representation especially in cases of serious offences: *S v Mitshama & Another* 2000 (2) SACR 181 (W); Cowling "Recent Cases - Criminal Procedure" 2000 *South African Journal of Criminal Justice* 368 378-379. However, he should not be compelled to do so: *S v Mbambo supra* note 30.

accused of his right to legal representation. Failure to inform an accused of his right to legal representation therefore may result in a failure of justice.³³ The courts in their bid to protect the rights of the accused have established that when an accused is facing a serious charge and elects to represent himself, the judicial officer should ensure that the accused is not labouring under some misunderstanding, and if he is, the matter must be put right.³⁴ South African jurisprudence is informed by the reasoning that it is meaningless to advise an accused of his right to legal representation if he is unable to afford one. This was recognised in the old order³⁵ and has been embraced by the new constitutional order which demands that an accused must be informed of his right to have a legal practitioner assigned to him if substantial injustice would otherwise result.³⁶ In my view, a failure to inform the accused of his right to legal representation can only avoid scrutiny when it is clear from the proceedings that he was aware of such right and opted not to exercise it.³⁷

³³ *S v Radebe*; *S v Mbonani* 1988 (1) SA 191 (T); *S v Mabaso and Another* 1990 (3) SA 185 (A); Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche & Van der Merwe *Criminal Procedure Handbook* 8 ed (2007) 77; Sarkin “Can South Africa Afford Justice? The Need and Future of A Public Defender System” 1993 *Stellenbosch Law Review* 261 269.

³⁴ *S v Nkondo supra* note 30; *S v Manale supra* note 30; Bekker et al *Criminal Procedure Handbook* 77.

³⁵ *S v Davids*; *S v Dladla* 1989 (4) SA 172 (N); *S v Mthwana* 1989 (4) SA 361 (N).

³⁶ S 35(3)(g); Steytler “Equality Before the Law and the Right to Legal Representation” 1989 *South African Journal of Criminal Justice* 66 69.

³⁷ As Wallia J stated in *Morobatseng and Others v The State* [2003] 1 B.L.R. 466 468F, referring to the duty of a magistrate to advise an accused of his rights and options at the close of the state’s case: “Unless it appears on the face of the record that the accused was aware or made aware of his constitutional rights, the accused cannot be said to have received a fair trial.”

The Namibian Supreme Court held in *S v Kau and Others*³⁸ that since the right to legal representation is a constitutional right, the court has a duty to inform the accused of this right except when it is apparent that the accused is aware of the right. The Court noted that there were exceptional circumstances where failure to inform the accused of this right will not breach a fair trial. In this regard, the Court noted that failure to inform persons who are aware of the right (such as educated or knowledgeable persons, or lawyers) will not breach the requirements of a fair trial. The Court noted that the appellants were illiterate and did not understand the proceedings and that under the circumstances, they should have been informed of their right to legal representation.

7 5 Equality before the law

Equality before the law is unattainable if the accused is unrepresented.³⁹ The guiding hand of counsel and the reality that an unrepresented accused faces the risk of improper

³⁸ *Supra* note 30.

³⁹ Ramirez & Ronner “Voiceless Billy Budd: Melville’s Tribute to the Sixth Amendment” 2004 *California Western Law Review* 103 142-144; “The response in the Anglo-American jurisdictions to the indigent, and hence undefended accused, has been the provision of free legal assistance to certain classes of accused to ensure, by placing the accused on an equal footing with the prosecution, a fair trial.”: Steytler *The Undefended Accused* 10-11; “The first and basic requirement for making the right to legal representation accessible to all accused persons is the duty to inform them about its existence and, in particular, how, when and why it should be exercised. This duty is squarely based on the principle of equality before the law.”: McQuoid-Mason “The Right to Legal Representation: Implementing *Khanyile’s* Case” 1989 *South African Journal of Criminal Justice* 57 60.

conviction has long been recognised in American jurisprudence.⁴⁰ This is especially crucial when the accused faces serious punishment such as capital punishment or imprisonment. The unrepresented accused lacks the skill to properly prepare his defence, though he may have a perfect one. The importance of the guiding hand of a lawyer and the inequality suffered by the self-actor is epitomised in the words of Sutherland J in *Powell v Alabama*:⁴¹

“Even 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 defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without

⁴⁰ *Powell v Alabama* 287 U.S. 45 (1932); *Betts v Brady* 316 U.S. 455 (1942). As Lord Devlin remarks, “[W]here there is no legal representation and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down.”: *The Judge* (1979) 67; see generally Bekker “The Right to Counsel at Trial for A Defendant in the Criminal Justice System of the United States of America, Including the Right to Effective Assistance of Counsel” 2005 *Comparative and International Law Journal of Southern Africa* 453. For a historical analysis of the right to legal representation in the USA, see Bekker “The Undefended Accused/Defendant: A Brief Overview of the Development of the American, American Indian and South African Positions” 1991 *Comparative and International Law Journal of Southern Africa* 151 152-159.

⁴¹ *Supra* note 40.

it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”⁴²

In Botswana, the severe disadvantage suffered by an unrepresented accused was recognised in the case of *Mmopi and Another v The State*⁴³ where Murray J had this to say:

“When a person is on trial for a serious offence and does not have the advantage of legal representation I consider that it is essential that the magistrate should offer advice by way of explaining court procedure to such a person. An unrepresented accused is under a severe disadvantage. If he is given no assistance on matters of procedure that one would not necessarily expect to be known to an unrepresented accused person injustice could easily result.”⁴⁴

⁴² 69; this passage was cited with approval in the case of *Leow v The State supra* note 27; in relation to whether counsel may lead an accused when making an unsworn statement, Aguda CJ noted in *State v Gaoratwe Xhaa* [1974] 1 B.L.R. 117 118 that : “An accused person must be allowed the help and guidance of counsel of his own choice from the moment he is charged with an offence and throughout the course of proceedings which may be brought in court as a result of such a charge until such proceedings finally terminate. If an accused is not permitted to be led by his counsel and for that reason refuses to take any further part in the proceedings then clearly any verdict which may be returned against him will most likely be set aside by a Court of Appeal as it would appear that in those circumstances he had not been accorded a fair hearing as provided for in section 10(1) [of the Constitution]”; see however the contrasting case of *State v Bathusi* [1978] B.L.R. 20.

⁴³ [1986] B.L.R. 8.

⁴⁴ 10F-G; *Morobatseng and Others v The State supra* note 37.

The recognition of the disadvantage suffered by an unrepresented accused is clear from the passage. The case implicitly recognises the need for equality, and bemoans the attendant inequality that occurs in the absence of legal representation. It clearly recognises equality as a fundamental requirement for fairness. The case further highlights the need for procedural equality and also highlights the fact that procedural inequality results in the case of an unrepresented accused.

7 6 The duty to afford the accused an opportunity to secure legal representation

The court is duty bound to grant the accused an opportunity to secure an attorney.⁴⁵ This is all too important to ensure equality before the law. While the state has a standing and ready prosecutorial team, defence lawyers are engaged on *ad hoc* bases. It is only fair that the accused be given time to secure legal representation. However, the accused in turn has a duty to secure an attorney within a reasonable time. In *Basupi v The State*,⁴⁶ the Court noted the unacceptability of delay occasioned by frequent adjournments and the adverse consequences of such delays to the administration of justice.⁴⁷ The courts have recognised that antecedent to the accused's right to legal representation is the demand that he be given reasonable time to exercise the right.⁴⁸ However this does not grant the accused a licence to seek unnecessary adjournments or counsel to be absent without

⁴⁵ *Bojang v The State supra* note 21 160.

⁴⁶ [2000] 2 B.L.R. 1 (CA).

⁴⁷ 9.

⁴⁸ 9; *Maphane v The State* [1991] B.L.R. 60.

trying to inform the court.⁴⁹ As was noted by O'Brien-Quinn CJ in *Richard Macha v The State*:⁵⁰

“The position, therefore, is that an accused has the right to brief a legal practitioner and that he must be given reasonable time in which to do so. However, if the accused does not avail himself of his right and opportunity within a reasonable time or if he seeks unnecessary or unreasonable adjournments or if his legal practitioner fails to appear in Court without making a reasonable effort to get in touch with the Court to explain his absence and seek an adjournment a Court is entitled, in interests of the expeditious administration of justice, to try the case in the absence of the accused’s Counsel.”⁵¹

⁴⁹ *Marumo v The State* [1990] B.L.R. 659 662; *Basupi v The State supra* note 46; in *Maphane v The State supra* note 48 64A-C Gyeke-Dako J noted: “[T]he accused has a right to brief and be defended by counsel at his trial and that he must be given reasonable time in which to do so. However, if he does not avail himself of this right and the opportunity within a reasonable time or if he seeks unnecessary or unreasonable adjournments or if his legal representative fails to appear in court without making a reasonable effort to get in touch with the court to explain his absence and seek an adjournment, then, I think the court is perfectly entitled in the light of section 10(1) of the very Constitution which demands expeditious administration of justice, to proceed with the hearing in the absence of the accused’s counsel.”

⁵⁰ *Supra* note 9.

⁵¹ 101; see *Talane v The State* [2001] 1 B.L.R. 150 (CA) where it was held that the accused had not been deprived of his right to legal representation as he did not avail himself of legal representation, having been given several adjournments to do so; *Mosala and Others v The State supra* note 14.

The courts have a duty to ensure that the accused gets a fair trial. Therefore, when the accused has engaged the services of an attorney and he fails to turn up on the trial date, the court has a duty to find out from the accused the reasons for his absence. The court should permit them to contact their attorney or to secure another one if they so request.⁵² Denial of legal representation will be unjust when it involves positive rather than passive conduct. Gaongalelwe J gives a classic demonstration of denial of legal representation in answer to his rhetoric thus:

“Can deprivation of such a fundamental right be imputed to the court for its passivism? In my view deprivation of such a right would be constituted by an express refusal by the court. For instance, where the court refuses his application for postponement or adjournment when he so demands.”⁵³

Three consequences flow from this position. First, that the duty is on the accused to secure legal representation. Second, the accused should desire a postponement for the purposes of securing legal representation. Third, when the request is reasonable the court should afford him the opportunity to secure one. The question whether the request is

⁵² *Lesetedi and Another v The State* [2001] 1 B.L.R. 393; *Basima v The State* [1999] 1 B.L.R. 202; *Mosala and Others v The State supra* note 14; *Dikgang v The State* [1999] 2 B.L.R. 154; see however, *Ngwenya v The State* [1983] B.L.R. 187, where it was held that where a lawyer fails to turn up and does not make efforts to contact the court, it may be assumed that the services of a lawyer has not been secured, and the court is entitled to proceed.

⁵³ *Masuku v The State* [2004] 2 B.L.R. 239 242F-G; see also *State v Ramatswidi* [2005] 1 B.L.R. 452; *Mosala and Others v The State supra* note 14.

reasonable will depend on whether the accused repeatedly requests postponements to secure legal representation, and fails to do so, thereby causing unnecessary delays. Further, the accused may have to show that he has taken reasonable steps to secure legal representation.

7 7 Access to justice and legal assistance

7 7 1 The provision of legal aid

Equality before the law and access to justice are enhanced by equal access to the court and its procedures.⁵⁴ The rationale of the Court in the *Airey*⁵⁵ case is that states are not only under a duty not to obstruct access to court but to ensure that access is effective and practical. Legal assistance determines whether or not an accused can effectively participate in the trial. Equality and fairness can therefore be adequately guaranteed by committing substantial resources to the provision of legal aid.⁵⁶ In Botswana (as in

⁵⁴ Lester *Legal Aid in A Democratic Society* 1; Harlow argues that access to court is a human right: Harlow *Access to Justice* 203; in *Golder v United Kingdom* (1979-80) 1 E.H.R.R. 524 it was noted that the right of access to court was an inherent element of the European Convention and that refusing the applicant access to a solicitor was in breach of article 6(1); see also *Campbell and Fell v United Kingdom* (1985) 7 E.H.R.R. 165; *Artico v Italy* (1981) 3 E.H.R.R. 1.

⁵⁵ *Supra* note 2.

⁵⁶ *S v Kau and Others supra* note 30; Steytler *The Undefended Accused* 10; As Bekker notes, equality before the law means that an accused should not be denied access to the courts because of poverty: Bekker 2004 *Comparative and International Law of Southern Africa* 179; "Equality before the law is so manifestly incompatible with the possibility that an important right may be available only to a wealthy minority (those who can afford counsel) that judicial steps towards the elimination of this possibility cannot be regarded as

several third world commonwealth countries where there is no comprehensive legal aid scheme) the state provides *pro deo* attorneys only in respect of cases that carry the capital punishment. The approach in such countries is that in cases requiring capital punishment it is presumed that the interests of justice require that the accused be represented and therefore be entitled to legal aid.⁵⁷ There is no such presumption in other cases. In non-capital cases the issue of legal aid is determined on whether it is desirable in the interests of justice. A similar trend obtained in the United States prior to 1963.⁵⁸ Prior to 1963, while counsel was only provided for an indigent in capital cases, in other cases the courts examined each case to determine whether the absence of counsel would result in a trial that is “offensive to the common and fundamental ideas of fairness and right...”⁵⁹ The approach of determining each case to enquire whether the “special circumstances” of each case demanded the presence of an attorney was developed. The special circumstances test was used to overturn several convictions where the accused did not have an attorney.⁶⁰ But in 1963 in *Gideon v Wainwright*,⁶¹ the Court emphasised the need for legal representation in all cases of serious offences. This case involved a felony and

a fundamental innovation.”: Van Zyl Smit “Indigence and the Right to Counsel: S v Khanyile 1988 (3) SA 795 (N)” 1988 *South African Journal on Human Rights* 363 366.

⁵⁷ *Mohamed s/o Salim v R* 1958 E.A.L.R. 202.

⁵⁸ In 1932 the United States Supreme Court ruled that the Fourteenth Amendment required the provision of counsel at least in capital cases: *Powell v Alabama supra* note 40; Lentine “Gideon v Wainwright at Forty-Fulfilling the Promise?” 2003 *American Journal of Trial Advocacy* 613 615.

⁵⁹ *Betts v Brady supra* note 40 472; Franck *Comparative Constitutional Process: Cases and Materials* (1968) 426.

⁶⁰ *Gora Due Process of Law* (1977) 39.

⁶¹ (1963) 372 U.S. 335 9 L. Ed. 2d 799 83 S. Ct. 792 93 ALR2d 733.

there remained an uncertainty as to whether the decision related only to serious offences. However, the situation was clarified in *Argersinger v Hamlin*⁶² where it was held that no person may be imprisoned unless he was represented, whether the offence was classified as petty, misdemeanour or felony, unless the accused had waived such right. *Argersinger* was interpreted in *Scott v Illinois*⁶³ to mean that the appointment of counsel for an indigent accused is only required if imprisonment is actually imposed and not if it is threatened or authorised.

In South Africa, the Constitution provides that a legal practitioner shall be assigned to an accused by the state and at state expense if substantial injustice would result.⁶⁴ The

⁶² (1972) 407 U.S. 25 32 L. Ed 2d 530 92 S. Ct. 2006; Torcia *Wharton's Criminal Procedure III* 13 ed (1991) 240-242; Senna & Siegel *Introduction to Criminal Justice* (1978) 287-291; Gross *Legal Aid and its Management* (1976) 37; McQuoid-Mason 1989 *South African Journal of Criminal Justice* 58-59.

⁶³ (1979) 440 U.S. 367, 59 L. Ed. 383 99 S. Ct. 1158. The Court noted: "Although the intentions of the *Argersinger* Court are not unmistakably clear from its opinion, we conclude today that *Argersinger* did indeed delimit the constitutional right to appointed counsel in state criminal proceedings. Even were the matter *res nova*, we believe that the central premise of *Argersinger*-that imprisonment is a penalty different in kind from fines or the mere threat of imprisonment-is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States. We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."

⁶⁴ S 35(3)(g); see Van As "Legal Aid in South Africa: Making Justice Reality" 2005 *Journal of African Law* 54 58 for the Legal Aid Board's guide as to when "substantial injustice would otherwise result."

Constitutional Court has identified certain factors in deciding whether substantial injustice would arise from failure to provide legal representation. These factors include the complexity or simplicity of the case, the ability of the accused to defend himself and the gravity of the possible consequences of conviction.⁶⁵ Therefore, though legal representation is guaranteed as a right, the Constitution does not ensure that everyone gets legal representation at state expense except where substantial injustice would result.⁶⁶ However, should the Legal Aid Board, having regard to its guidelines and policies, decide not to provide an indigent accused with a lawyer, a court may overrule their decision if in its view the provision of counsel is essential to a fair trial.⁶⁷ The

⁶⁵ *S v Vermaas; S v Du Plessis* 1995 (2) SACR 125 (CC); *Legal Aid Board v Msila and Others* 1997 (2) BCLR 229 (E); Budlender “Access to Courts” 2004 *South African Law Journal* 339 342; *Mgcina v Regional Magistrate, Lenasia and Another* 1997 (2) SACR 711 (W). These criteria had earlier been set by Didcott J in *S v Khanyile and Another* 1988 (3) SA 795 (N) 815, having adopted them from the United States Supreme Court decision of *Betts v Brady supra* note 40. It was stated in *S v Lombard en 'n Ander* 1994 (3) SA 776 (T) (a case dealing with the Interim Constitution whose provisions on legal representation are similar to those of the present Constitution) that substantial injustice would occur if the state does not provide legal representation for an offence for which imprisonment is possible. Bekker “The Right to Legal Counsel and the Constitution” 1997 *De Jure* 213 221; Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa, 1996* (1998) 307-313.

⁶⁶ Ellmann “Weighing and Implementing the Right to Counsel” 2004 *South African Law Journal* 318 319. It was held in *S v Ambros* 2005 (2) SACR 211 (C) that the obligation under S35(3)(g) is not necessarily satisfied by the setting up of a Legal Aid Board and that where the Board rejects an application for legal representation the state should still consider whether substantial injustice would result if the accused were unrepresented. This case recognises that some people who do not qualify for legal aid may be unable to defend themselves.

⁶⁷ *S v Du Toit and Others* (2) 2005 (2) SACR 411 (T).

entrenchment of legal aid in the Constitution sets to strengthen equality of arms within the adversarial system.⁶⁸

In England, “any question as to whether a right to representation should be granted shall be determined according to the interests of justice.”⁶⁹ In considering the “interests of justice” what has come to be known as the Widgery criteria is employed.⁷⁰ The criteria include consequential factors and factors relating to legal complexity.⁷¹ These include whether the accused is likely to lose his liberty, the likelihood that he may suffer serious damage to reputation, whether the proceedings may involve complex questions of law, tracing, interviewing or cross-examination of expert witnesses, and whether the accused will be able to understand the proceedings or state his case. These criteria typically

⁶⁸ SA Law Commission *Simplification of Criminal Procedure (A More Inquisitorial Approach to Criminal Procedure – Police Questioning, Defence Disclosure, the Role of Judicial Officers and Judicial Management of Trials)* Discussion Paper 96 Project 73 (2001) available on <http://www.saflii.org/za/other/zalc/dp> (accessed 11 December 2007) para 3.2; as Steytler points out, “To ensure equality before the law, the only solution is to provide legal aid for accused who are too poor to employ a lawyer.” Steytler *The Undefended Accused* 236.

⁶⁹ Sch 3 para 5 Access to Justice Act 1999 c 22; Young & Wilcox “The Merits of Legal Aid in Magistrates’ Courts Revisited” 2007 *Criminal Law Review* 109 110.

⁷⁰ The criteria emanates from Report of the Departmental Committee *Legal Aid in Criminal Proceedings* Cmnd 2934 (1966) (HMSO London) para 80. The Committee was chaired by Widgery J. For a commentary on the Report see Griew “The Widgery Committee on Legal Aid in Criminal Proceedings” 1966 *Criminal Law Review* 246.

⁷¹ Young & Wilcox 2007 *Criminal Law Review* 111; see also *S v Khanyile and Another* *supra* note 65.

represent the significant role played by counsel, which cannot in anyway be covered by a self actor.

In Botswana, by contrast, the Constitution requires the accused to engage legal representation at his own expense.⁷² The state therefore has no duty to provide the accused with counsel. The only legal obligation on the court is to permit him to secure legal representation. The non-application of the principle of equality of arms results in a negation of a full and proper recognition of the right to legal representation. In my view it is a fundamental path of legal reasoning that an accused should be represented in respect of an offence where imprisonment is certain if convicted. A need to ensure legal representation in cases of serious offences cannot be understated. Therefore, an accused should be represented in all cases where he faces the prospect of imprisonment.⁷³

⁷² S 10(2)(d); “In spite of Botswana’s impressive economic growth rates in the last decades, the majority of its population is poor and unable to afford adequate legal services.”: Fombad *The Protection of Human Rights in Botswana: An Overview of the Regulatory Framework* in Fombad (ed) *Essays on the Law of Botswana* (2007) 1 21; “...[T]he current economic situation of many Batswana render the fundamental rights, especially those of access to legal representation, nugatory in view of their inability to access legal services to uphold or vindicate their rights.”: Quansah “Legal Aid in Botswana: A Problem in Search of a Solution” 2007 *Comparative and International Law Journal of Southern Africa* 509 511.

⁷³ *Argersinger v Hamlin supra* note 62; Gross notes that legal aid is necessary to add any meaning to the right to legal representation: Gross *Legal Aid* 33. Gyeke-Dako J states that depending on the resources of the state, legal representation must be provided “where there is the probability of the accused losing his liberty even for a day.”: *Bojang v The State supra* note 21 158 G-H; Ashworth notes, “...[I]t is contrary to the principle of equality before the law that the ability to defend oneself adequately against a criminal charge should depend on one’s financial resources. Thus, to allow legal representation without providing

The constitutional provision that legal representation is available to the accused at his own expense is contrary to the notion of fairness. It makes the constitutional guarantee of legal representation an empty declaration. One would therefore recommend that legal representation be provided in respect of all cases that attract minimum sentences. One may ask what kind of system is it that passes minimum prison sentences, reverses the onus of proof and hails the accused into court without the assistance of an expert to defend him?⁷⁴ This is oppressive in design. The state cannot have its cake and eat it. The trial of a person under such circumstances is an act and a sham, where the fate of the accused is predestined by state policy. It gives the prosecution monumental advantage in the proceedings and deprives the accused of his right to equality before the law. The criminal process is unfairly skewed in favour of the state and the trial is reduced to mere formal and procedural steps aimed at conviction. Under the circumstances, there is an urgent demand for the institution of a legal aid system.

7 7 2 Inadequacies in state funded defence

The right to legal representation is only attained and equality met if the accused is afforded adequate representation. The provision of legal representation by itself does not satisfy the operation of the right. While the law on the right to quality legal representation

state funding for the indigent would be to respect the right of the innocent not to be convicted only in so far as they have money, and would fail to ensure equal access to justice.”: Ashworth *Legal Aid, Human Rights and Criminal Justice* in Young & Wall (eds) *Access to Criminal Justice* (1996) 55 57.

⁷⁴ Several statutes in Botswana have minimum sentences and reverse onuses. See paragraph 8 5 1 chapter 8.

is still developing in Botswana,⁷⁵ the law of South Africa is more comprehensive in this regard.⁷⁶ A key problem with legal aid systems is quality representation.⁷⁷ In this regard the experience of the practitioner and the diligence with which he conducts the case, are usually matters that compromise the quality of representation and thus the fairness of the trial.⁷⁸ That quality representation is an essential component of the right to legal representation is reflected in the well-developed legal tradition and dilectual-based concept of placing a high duty of care on counsel to his client. The experience of counsel and his dedication to *pro deo* cases often impact on the quality of representation. The remuneration in respect of *pro deo* cases is usually low, thereby attracting mostly junior counsel, or resulting in less time and attention being given to such cases. Practising lawyers with several years' experience loose interest in criminal matters. In *S v Huma and Another (1)*⁷⁹ Claassen J highlighted the practical problems encountered by *pro deo* counsel when he opined: “*Pro deo* counsel is, however, in a peculiar and difficult position, because he does not normally have the assistance of an attorney, nor funds to

⁷⁵ See *Ditshwanelo and Others v The Attorney-General and Another (No. 2)* [1999] 2 B.L.R. 222.

⁷⁶ *S v Halgryn* 2002 (2) SACR 211 (SCA); *S v Mofokeng* 2004 (1) SACR 349 (W); *S v Charles* 2002 (2) SACR 492 (E); *S v Chabedi* 2004 (1) SACR 477 (W); *S v Ntuli* 2003 (1) SACR 613 (W).

⁷⁷ Moore “Alternative Strategies for Public Defenders and Assigned Counsel” 2004 *New York Review of Law and Social Change* 83 91; Fombad *The Protection of Human Rights* 21.

⁷⁸ Cape “Incompetent Police Station Advice and the Exclusion of Evidence” 2002 *Criminal Law Review* 471 476.

⁷⁹ 1995 (2) SACR 407 (W).

pay for the proper preparation of the accused's defence."⁸⁰ He also alluded to the fact that *pro deo* counsel are mostly junior counsel. Consequently, there is an imbalance if the accused is represented by a lawyer with a significantly lower level of experience and limited resources, than a prosecutor who in addition to his experience will be assigned one or more junior counsel who will assist with research. Accused persons are short-changed because more experienced attorneys are not prepared to accept the fees allocated under legal aid schemes and this implicates the principle of equality. Accused persons who cannot afford or do not possess the quality of legal resources possessed by the prosecution, are placed at a substantial disadvantage.⁸¹ The more complicated the charges, the more profound the effects of insufficient legal resources will be.⁸²

It was pointed out earlier that there is a manifest and disproportionate imbalance between the prosecution and the defence in terms of resources. The office of the prosecution is well-established and funded by state resources. However, several accused persons go undefended because of the non-availability of legal aid in Botswana. It is a fundamental pillar of fairness that an accused be given adequate facilities to put up his defence.⁸³ The

⁸⁰ 409A-B; in *S v Mayo and Another* 1990 (1) SACR 659 (E) Jones J also referred *obiter* to the fact that junior counsel are usually assigned to do *pro deo* work; see also *S v Siebert* 1998 (1) SACR 554 (A) in relation to incompetent defence counsel.

⁸¹ Meernik "Equality of Arms? The Individual vs. The International Community in War Crimes Tribunals" 2003 *Judicature* 312 314.

⁸² Meernik 2003 *Judicature* 315.

⁸³ Negri "The Principle of 'Equality of Arms' and the Evolving Law of International Criminal Procedure" 2005 *International Criminal Law Review* 513 552.

lack of funding for legal representation is a recipe for disproportionality in competing interests. *An effective prosecution without an effective defence flouts the equality principle for theoretical as well as practical purposes.* Therefore, a comprehensive legal aid system needs to be established and provided for in the national budget just as state prosecution is budgeted for. For the prosecutor and defence to have procedural equality of arms, indigent accused persons must be supported by an adequate level of resources. The rationalisation of a system that takes into consideration the remuneration of attorneys for the defence, considering issues like their experience and complexity of each case so as to bring in experienced attorneys, will enhance quality representation.⁸⁴ The Constitution of Botswana clearly states that legal representation is at the expense of the accused, thereby absolving the state of any duty to provide legal aid. Therefore, the rationalisation of access to legal representation remains purely a procedural matter without any consideration to resources and affordability. Though the state provides legal

⁸⁴ It should be noted however that the Trial Chamber and ICTR Appeals Chamber in *Prosecutor v Clément Kayishema and Obed Ruzindana* Case No. ICTR-95 – 1-A, Appeals Chamber Judgment (Reasons), 1 June 2001 and *Prosecutor v Clément Kayishema and Obed Ruzindana* Case No. ICTR-95 – 1-A, Trial Chamber II, Judgment and Sentence, 21 May 1999 respectively ruled that equality of opportunity between the parties to present their case does not extend to equality of resources and that the rights of the accused should not be interpreted to mean entitlement to the same personal and financial resources. See also *Prosecutor v Milan Milutinovic et al* Case No. IT-99 – 37-AR73, Appeals Chamber, Decision on Interlocutory Appeal on Motion for Additional Funds, 13 November 2003. However, the Special Court for Sierra Leone established a Defence Office as a permanent institution of the court to counterbalance the Prosecution. In the words of the president of the Court, equality of arms includes “reasonable equivalence in ability and resources of Prosecution and Defence”: First Annual Report of the President of the Special Court for Sierra Leone, December 2002 – December 2003, cited in Negri 2005 *International Criminal Law Review* 558.

representation for capital offences, there is a vast number of offences that are complex in nature, laden with statutory reverse onuses, mandatory and lengthy minimum sentences, for which the state has no duty to provide legal representation. At the risk of sending accused persons to lengthy prison sentences, the state is able to say that it has limited resources to assist with legal representation. This is a sad state of affairs.⁸⁵

7 8 Legal and procedural limitations

Though the courts have been strict in the application of the right to legal representation, employing a pro-active protective approach, they have at the same time made it clear that this right like any other is not absolute. If the right were to have an unlimited field of application, it will be open to abuse. The right encompasses a duty on the accused to make efforts to secure legal representation within a reasonable time. The courts are not expected to wait indefinitely for the accused. Therefore, the accused should avail himself of his right within a reasonable time. In determining what a reasonable time is, the court must weigh the rights of the individual against the rights of the state, bearing in mind that justice should be done expeditiously by the courts.⁸⁶ The courts should ensure that the judicial process is not stifled by unnecessary adjournments.⁸⁷ When the process in

⁸⁵ However, there is currently a pilot project geared to the establishment of a national legal aid programme. This follows the acceptance of the consultancy report, *Government of Botswana/UNDP Project on Legal Aid and ADR* (2008). Government is in the process of constituting an Interim Legal Aid Board to advise the Interim Legal Aid Coordinator in implementing the pilot project.

⁸⁶ *Richard Macha v The State* supra note 9; *Harrison v The State* [2003] 1 B.L.R. 584; *Basima v The State* supra note 52; *Mosala and Others v The State* supra note 14; *Malela v The State* [1997] B.L.R. 561.

⁸⁷ *Maphane v The State* supra note 48; *Basima v The State* supra note 52; *Malela v The State* supra note 86.

securing legal representation results in unnecessary delays, the right to a trial within a reasonable time is implicated.⁸⁸

The limiting aspect of the right involves a number of considerations which are best described by negative expressions. Though courts must afford accused persons certain latitude to defend themselves by employing counsel, they must not allow the process of the court to be abused by the seeking of unnecessary adjournments.⁸⁹ The right to legal representation means that the court must not prevent counsel who is entitled to appear before the court from acting for the accused. It does not mean that the court is obliged to postpone the case until counsel finds it convenient, where he has been given adequate notice.⁹⁰ The exercise of the right to legal representation is subject to the accused making the necessary financial arrangements and securing a lawyer who is available to perform his mandate having regard to “the court’s organisation and the prompt dispatch of the business of the court.”⁹¹ Therefore, “...the convenience of counsel is not overriding.”⁹² The position was aptly explained in the case of *Marumo v The State*.⁹³ In that case, defence counsel was present in court when the trial date was fixed and he consented to the date. Counsel was absent on the trial date and did not communicate reasons for his

⁸⁸ Hatchard 1988 *Lesotho Law Journal* 147.

⁸⁹ *Richard Macha v The State supra* note 9; *Harrison v The State supra* note 86; *Basima v The State supra* note 85; *Kaang v The State* [1991] B.L.R. 39.

⁹⁰ *Makhura and Another v The State* [1991] B.L.R. 104.

⁹¹ Per Harms JA in *S v Halgryn supra* note 76 216A-B.

⁹² 216B-C.

⁹³ *Supra* note 49.

absence to the court. The trial magistrate therefore proceeded with the trial. On appeal, Livesey-Luke CJ had this to say:

“In my opinion the above recited facts show that the appellant was given full opportunity to exercise his right to be represented by a legal practitioner of his own choice. There is no basis for saying that the court deprived him of his right to legal representation. On the contrary it was his counsel who failed to appear to represent him, although he had full knowledge of the date fixed for the trial... There is no doubt that the right of an accused to be represented by a counsel of his own choice is not only a fundamental but also an important right. This is borne out by the fact that it is entrenched in the Constitution. It means that an accused has the freedom of choosing a legal practitioner, who is entitled to practise before the court, to represent him, provided of course that the services of the legal practitioner will be at the accused’s and not the State’s expense. But, in my opinion, that right does not include a right or licence on the part of an accused or his counsel to delay or frustrate court proceedings. The important consideration is the convenience of the court. Neither an accused person, nor his counsel has the right, fundamental or otherwise, to dictate to the court that it should hear his case at the convenience of the accused or his counsel. So if the counsel of an accused person’s choice fails to appear in court to defend him on the date fixed for the trial after adequate notice of the date fixed has been given, and the trial proceeds it is not the court that has deprived him of his right, but on the contrary it is his

counsel, assuming he had been properly briefed, who has failed to fulfill his obligations to his client and thereby prevented him from enjoying his right.”⁹⁴

Livesey-Luke CJ made it clear that the court should not be inconvenienced. He stated that neither the accused nor his counsel has a right, fundamental or otherwise, to dictate to the court that it should hear the case at their convenience. Citing the dictum of Wilkinson CJ in the American case of *R v Raselo and Benson*⁹⁵ he stated that if a legal practitioner is not likely to be available on the scheduled date of trial, he should not act for the accused. According to him, the accused would have been deprived of his right to legal representation if he is prevented by the state in any of its manifestations, whether judicial or executive, from securing counsel and not when counsel fails to appear without reasonable excuse.⁹⁶

Also, the choice of counsel operates within certain parameters, as an accused’s right to an attorney of his choice is limited to attorneys that are entitled to practise in the courts of

⁹⁴ *Marumo v The State supra* note 49 662A-E; see however *Thapelo Tshipo v The State* High Court Cr. App No 171 of 1984 (unreported) where Hannah J in noting the factors to be considered by the court in exercising its discretion whether to postpone a trial when counsel is absent, stated that, too much weight should not be placed on the conduct of counsel, and that his sins should not be visited on his client. See also *Maphane v The State* [1991] B.L.R. 304 (CA) 313; Also, in the South African case of *S v Yelani* 1986 (3) SA 802 (E), it was held that the appellant was entitled to a postponement when it was clear that his attorney’s absence was through no fault of his.

⁹⁵ (1960) R & N 803 (NY) P 807 F; *S v Molenbeek and andere* 1997 (2) SACR 346 (O).

⁹⁶ Referring to the English case of *Robinson v R* [1985] 3 W.L.R. 84 (PC).

Botswana.⁹⁷ Like several other countries, only attorneys who are admitted to practise at the bar in Botswana are entitled to represent accused persons in her courts. An accused cannot look further afield.⁹⁸ The right of an accused to an attorney is also subject to the availability of the attorney. The inability of an accused to procure the services of a particular attorney does not by itself justify an adjournment.⁹⁹ A court is not obliged to keep proceedings in abeyance pending the availability of the attorney. Though the accused is entitled to select whom he wishes to represent him, if his choice is not available, he is obliged to look elsewhere.¹⁰⁰

The constitutional demand for the expeditious administration of justice was highlighted in the *Maphane*¹⁰¹ case. In that case the accused was arraigned on the 31st October 1989. On that date he informed the court of his intention to employ the services of an attorney and was put on bail in his own recognisance. The matter was adjourned to the 29th November 1989 and another adjournment was made to the 29th December 1989. On that date a trial date was fixed for the 31st January 1990. On the 31st January 1990 no lawyer was present. The accused named a lawyer but said that he was not in court and that he

⁹⁷ *Marumo v The State supra* note 49.

⁹⁸ However, see S 7 of the Legal Practitioners Act 13 of 1996 which provides that “a foreign advocate” may be admitted to practise as an advocate for a specific matter of importance and complexity upon an application of the Attorney-General or an attorney in Botswana; Fombad & Quansah *The Botswana Legal System* (2006) 169.

⁹⁹ *Paweni and Another v Attorney-General* 1984 (2) ZLR 39 (ZSC).

¹⁰⁰ *Bapusi v The State supra* note 46.

¹⁰¹ *Supra* note 48.

was unable to proceed on his own. The trial magistrate proceeded as there was no indication that the named attorney would appear. He also took into consideration the fact that the state had brought its witnesses who had travelled from very long distances. On appeal, Gyeke-Dako J recognised the right of an accused to brief and be defended by counsel at his trial, and to be given reasonable time to do so. He however pointed out that if the accused does not avail himself of this right within reasonable time or if his legal representative fails to appear in court without making reasonable effort to get in touch with the court to explain his absence and seek an adjournment, then the court is entitled to proceed. He based his argument on section 10(1) of the Constitution which demands expeditious administration of justice.

The *Maphane* case was cited with approval by the Court of Appeal in *Bapusi*.¹⁰² In that case several postponements were taken as the result of unexplained absences of the accused's attorney. Four adjournments were taken between 19th April 1995 and 28th July 1998 to enable the appellant (who was charged together with another person) to secure appropriate legal representation. In dismissing the appeal, Steyn JA delivering the judgment on behalf of the Court stated thus:

“It must also be borne in mind that it is not only the prejudice to the appellant that had to be considered by the court, but also the unacceptability of the delay occasioned by the frequent postponements and the consequences of such delay on

¹⁰² *Supra* note 46.

the course of justice. The prejudice suffered by appellant's co-accused was also an important consideration."¹⁰³

In short, one may say that the right to legal representation is a fundamental right in respect of which an accused must not be deprived. He is entitled to a reasonable time to secure an attorney though this should not result in unnecessary delays. Once a trial date has been fixed attorneys are expected to be present.

7 9 Conclusion

An appreciation of fair trial rights in light of the principle of equality of arms will give the right to legal representation a new meaning, creating a positive duty on the state to provide the accused with legal representation if he cannot afford one. The constitutional right to legal representation in Botswana unfortunately does not operate on the guarantee of equality of arms. The constitutional and legal framework regarding legal representation fails to recognise the relationship between legal representation and the accused's right to equality before the law. It does not impose a burden on the state to provide legal representation for the accused but rather makes the right conditional on the accused providing legal representation at his own expense. Functionally, the system only seems to proscribe a conduct that prevents an accused from securing legal representation. In this regard, the constitutional right to legal representation is inadequate. Equality of arms demands that an accused be advised of his right to legal representation and be provided with a lawyer if he cannot afford one.

¹⁰³ 9B-C.

Whereas prosecutors are in the permanent employment of the state, defence counsel usually work on hourly rates and are employed on a contractual basis. As opposed to the more permanent relationship between the state and prosecutors, the relationship between the accused and his attorney are more transient and fluid, based on *ad hoc* monetary considerations. The adversarial system can only be fair when counsel for the prosecution and accused operate on a level of relative equality. Therefore, the issue of funding and resources are crucial challenges to the attainment of legal representation.

Botswana is a developing country with scarce skills and resources. Though there are strong macro economic indicators, resources are scarce and there is a deficit of legal skills. This poses a challenge to the provision of legal assistance for accused persons. Under the circumstances, one would suggest that, as a starting point, the state should provide legal representation in respect of capital offences and offences for which prison sentences are mandatory.¹⁰⁴ This should be incrementally extended to other offences in order of seriousness. The state should make the allocation of funds in this regard a paramount objective of state policy. One would further suggest the introduction of a community legal services programme.¹⁰⁵ In this way, lawyers on completion of their studies would engage in *pro deo* or legal aid work for a period of time or total number of hours so as to repay the debt owed to society whose taxes paid for or contributed to their university fees. Law degrees, or perhaps practising certificates, would only be awarded

¹⁰⁴ These include rape, grievous harm, robbery and stock theft.

¹⁰⁵ Sarkin 1993 *South African Journal on Human Rights* 224.

upon completion of service.¹⁰⁶ The programme should be legislated and contractually regulated so that prospective law students understand the ramifications of pursuing a law degree.¹⁰⁷ The programme could form part of the degree curriculum or pupillage. Where it is part of pupillage it will be the duty of the pupil master to ensure that he takes on cases of indigent accused persons and that pupils work on them with his supervision. Practising lawyers, law students and paralegals could also be required to contribute their services.¹⁰⁸ Naturally, the issue of resources will arise. Young graduates should not be allocated complicated cases as this will be a disservice to them and the accused. It must be noted, however, that such services should serve as a temporary immediate necessity and the government should take quicker steps in setting up a legal aid system.

¹⁰⁶ Sarkin 1993 *South African Journal on Human Rights* 227.

¹⁰⁷ Sarkin 1993 *South African Journal on Human Rights* 228.

¹⁰⁸ Sarkin 1993 *South African Journal on Human Rights* 224; the impact of this scheme however will be dampened by the shortage of manpower in Botswana. South Africa by contrast has developed several models for the delivery of legal aid services such as *pro bono* work, *judicare* or referral to private lawyers, public defenders, legal aid funded interns in rural law firms, legal aid funded law clinics, justice centres, public interest law firms, university law clinics (the University of Botswana law faculty operates one), and para-legal advice offices; see Acer "Making A Difference: A Legacy of Pro Bono Representation" 2004 *Journal of Refugee Studies* 347 for a discussion of *pro bono* legal representation of asylum seekers in the United States; see also Sarkin 1993 *Stellenbosch Law Review* 261 where the author advocates for a public defender system.

CHAPTER 8

THE PRESUMPTION OF INNOCENCE AND THE REVERSAL OF PROOF

8 1 Introduction

It is arguably a universal rule of law, that the state bears the burden to prove its case against the accused.¹ So notorious is the rule that it has become a cliché. The question is, to what extent is this well acclaimed rule true. During the inquisition, the accused practically had a duty to establish his innocence. It is not surprising therefore that notwithstanding the capacity of the modern state to investigate and prosecute crime and the consequent demand that the prosecution should prove its case, there are still instances where the burden lies with the accused. While reversal of proof is supported by the common law and is well embedded in statutes, it is clear that the movement from the inquisition to the placing of the modern proof on the prosecution, has not resulted in a complete break with the past. While there are arguably practical reasons that dictate that the accused be called upon to explain certain matters relating to his innocence, the constitutionality of some of these circumstances are questionable. More importantly, the state has all the resources and infrastructure to investigate and prosecute crime. The accused on the other hand has no such means. Therefore, requiring the accused to prove certain issues relating to his innocence puts him at a significantly disadvantaged position and violates the principle of equality of arms and the presumption of innocence.

¹ See Kofele-Kale “Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes” 2006 *International Lawyer* 909 915.

8 2 The human right to be presumed innocent

8 2 1 *The basis of the right*

The procedural actualisation of the right to be presumed innocent lies with the allocation of proof. The presumption of innocence guards against erroneous convictions and is an aspect of a fair trial.²

The general rule that the prosecution bears a burden to prove its case beyond reasonable doubt has gained universal recognition. Article 11(1) of the Universal Declaration of Human Rights provides that everyone charged with an offence shall be presumed innocent until proved guilty according to law in a public trial. This provision gives content to this principle as an international legal norm. The principle is also to be found in article 14(2) of the ICCPR and article 7(1)(b) of the African Charter. This rule of law is also well established in the English common law and was reaffirmed in the English *locus classicus* of *Woolmington v DPP*³ by Lord Sankey. The rule has been endorsed by the Constitution of Botswana⁴ as well as its case law.⁵

The presumption of innocence, therefore, is a universally recognised human right, which forbids a presumption of guilt in relation to the accused. To call upon the accused to prove his innocence, is contrary to the spirit of a democratic order. The presumption of innocence is a central basis for the recognition and preservation of the

² *Paul Rodney Hansen v The Queen* [2007] NZSC 7.

³ [1935] All E.R. Rep 1; *Mancini v DPP* [1942] A.C. 1; see also the South African case of *R v Ndhlovu* 1945 AD 369; the Botswana case of *State v Boy Ntibela* [1968-1970] B.L.R. 74.

⁴ S 10(2)(a).

⁵ *Johnson Seane v The State* [1968-1970] B.L.R. 19; *Regina v Khan* [1964-1967] B.L.R. 83; *State v Oake* [1981] B.L.R. 228; *Bosch v The State* [2001] 1 B.L.R. 71 (CA).

concept of human dignity.⁶ The threat to liberty, social stigma and psychological harm which a person accused of a crime is subjected to makes the presumption crucial to a society committed to fairness.⁷ The demand that the prosecution proves each element of the offence, though lacking any theoretical connection with the principle of equality, procedurally and substantively supports the principle. Proof by the prosecution is an assurance that weak as the plight of the accused is in the criminal process, he is not unnecessarily burdened by being called upon to prove his innocence, especially in light of the resources available to the state to prove his guilt. In any event, it is to be assumed that the prosecution charges an accused to court on the basis of evidence which suggests reasonable prospects of success.

8 2 2 *Qualifications of the right*

8 2 2 1 The common law exception of insanity

Of course, human rights are usually subject to exceptions. Notwithstanding the general recognition of the presumption of innocence, practical considerations sometimes require certain information from the accused that demonstrate that he cannot be held culpable for an offence. The defence of insanity represents a well-known and widely recognised exception to the general rule.⁸ The burden is on the accused if he raises the defence of insanity. This common law principle has received statutory endorsement. In Botswana, section 10 of the Penal Code establishes a

⁶ Hoor “Dignity, Criminal Law, and the Bill of Rights” 2004 *South African Law Journal* 304 307.

⁷ *R v Oakes* 1986 26 D.L.R. (4th) 200.

⁸ *Sodeman v The King* (1936) 55 C.L.R. 192; Paizes “A Closer Look at the Presumption of Innocence in our Constitution: What is an Accused Presumed to be Innocent of?” 1998 *South African Journal of Criminal Justice* 409; Denning “Presumptions and Burdens” 1945 *Law Quarterly Review* 379 382; Dlamini “The Burden of Proof: Its Role and Meaning” 2001 *Stellenbosch Law Review* 68 84.

presumption of sanity in respect of persons charged with any offence. Section 11 of the Penal Code provides that a person shall not be liable for a criminal act if at the time of commission he suffered from a disease of the mind which caused him not to appreciate his conduct. It follows therefore that the accused has a duty to prove insanity or a disease of the mind, on a balance of probabilities.⁹

8 2 2 2 Statutory exceptions

A second qualification lies in relation to exceptions created by statute.¹⁰ Statutory exceptions usually place the burden on accused persons to explain certain facts on a balance of probabilities. The placing of an evidential burden on the accused is well recognised in respect of regulatory offences. The legitimacy of such burdens is

⁹ *State v Mase* [1979-1980] B.L.R. 70 71(CA); *State v Saamu* [1989] B.L.R. 191; *State v Mogampana* [1990] B.L.R. 534; *State v Masinga* [1990] B.L.R. 47; *State v Lesedi Mothibamela* [1968-1970] B.L.R. 251; *Kgaodi v The State* [1996] B.L.R. 23 (CA); *State v Gaopatwe* [1997] B.L.R. 523; *State v Motlhale* [2002] 2 B.L.R. 283; *State v Masupe* [1992] B.L.R. 1; *State v Collet Mothibi* [1974] 2 B.L.R. 21; *State v Moyo* [1985] B.L.R. 239; *Kaome v The State* [1999] 2 B.L.R. 187. See also Cole “Determining the Constitutionality of Reverse Onus Clauses in Botswana” 2008 *African Journal of International and Comparative Law* 236 237; Quansah *The Botswana Law of Evidence* (2004) 36.

¹⁰ *R v Edwards* [1975] Q.B. 27; *R v Hunt* [1987] A.C. 352. For analyses of statutory exceptions see Zuckerman “The Third Exception to the *Woolmington* Rule” 1976 *Law Quarterly Review* 402; Zuckerman “No Third Exception to the *Woolmington* Rule” 1987 *Law Quarterly Review* 170 171; Smith “The Presumption of Innocence” 1987 *Northern Ireland Legal Quarterly* 223; Bennion “Statutory Exceptions: A Third Knot in the Golden Thread?” 1988 *Criminal Law Review* 31; Mirfield “The Legacy of *Hunt*” 1988 *Criminal Law Review* 19; Mirfield “An Ungrateful Reply” 1988 *Criminal Law Review* 233; Stein “After *Hunt*: The Burden of Proof, Risk of Non-Persuasion and Judicial Pragmatism” 1991 *Modern Law Review* 570; Birch “Hunting the Snark: The Elusive Statutory Exception” 1988 *Criminal Law Review* 221; Quansah *Law of Evidence* 37.

guaranteed by the Constitution. Section 10(12)(a) makes it crystal clear that no law that imposes on any person charged with a criminal offence the burden of proving particular facts shall be inconsistent with section 10(2)(a). Section 272 of the Criminal Procedure and Evidence Act gives content to this constitutional provision. It provides that where a person carries on an occupation or business or is in possession of an article or is in an area whereby he is required to obtain a licence, permission or authorisation, it shall be presumed that he does not have such licence or permission unless he proves the contrary. It is submitted that such burdens should be evidential only, and should not relieve the prosecution of the ultimate burden. A statutory exception that effectively relieves the prosecution of the burden of proof, places the accused at the risk of improper conviction.

8 3 The rationale of the burden of proof

There are clear and principled arguments why the burden of proof should lie with the prosecution. First, logic and common sense dictates that a party making an allegation must establish it. This correlates with the presumption of innocence which prescribes that an accused is presumed innocent unless proven guilty.¹¹ The problem with legal proof however is that proof is determined not on the “whole” of the evidence. Rather, the whole is established upon proof of each element, some of which might be difficult for the prosecution to establish in explicit terms.

The relative ease with which the prosecution can discharge its burden represents a second reason for placing the burden on it. There are vast inequalities between the

¹¹ Nobles & Schiff “Guilt and Innocence in the Criminal Justice System: A comment on *R (Mullen) v Secretary of State for the Home Department*” 2006 *Modern Law Review* 80 81 & 91.

state and the individual. With all its resources, it is relatively simple for the state to collect and produce enough evidence in order to secure a conviction.¹² The state has a professional crime gathering organisation (the police) to its advantage.¹³ The police have special powers of arrest, detention, entry into property and seizure of incriminating evidence – a matter already dealt with in chapter 5 above. The state has the resources and experts to do forensic analyses of evidence. The prosecution decides when to proffer charges and therefore has the advantage of being well prepared for trial.¹⁴ The state has a great advantage in that it is able to investigate cases in advance and even before the accused is charged. Because of its resources it is able to secure and interview a large number of witnesses and gather substantial evidence. This

¹² “The resources that are mobilised by the state for the purpose of gathering evidence to prove beyond reasonable doubt that an accused has committed a particular offence are immense by comparison to those generally available to the accused. Listening devices, telephone intercepts, forensic scientists, surveillance, power to search and seize, powers to compel answers to questions, informants and the sheer number of people devoted to the detection of crime, result inevitably in the creation of a significant repository of information related to the offence under investigation.”: Hinton “Unused Material and the Prosecutor’s Duty of Disclosure” 2001 *Criminal Law Journal* 121 121; Dlamini 2001 *Stellenbosch Law Review* 80; Bakken “Truth and Innocence Procedures to Free Innocent Persons: Beyond the Adversarial System” 2008 *University of Michigan Journal of Law Reform* 547 581; “A powerful link between the presumption and the conception of a fair trial emerges from the foregoing analysis: because the presumption is inherent in a proper relationship between the state and citizen, because there is a *considerable imbalance of resources between the state and the defendant*...It is surely fundamental that the prosecution should establish guilt beyond reasonable doubt.” (emphasis added): Ashworth “Four Threats to the Presumption of Innocence” 2006 *South African Law Journal* 63 75; Silver “Equality of Arms and the Adversarial Process: A New Constitutional Right” 1990 *Wisconsin Law Review* 1007 1038.

¹³ Ashworth 2006 *South African Law Journal* 71; *State v Jaba* [1987] B.L.R. 315 319.

¹⁴ Roberts “Taking the Burden of Proof Seriously” 1995 *Criminal Law Review* 783 786.

clearly puts the accused in a position of inequality. The state is therefore able to amass evidence and prepare well before charges are drafted, in effect giving the prosecution a head start. The accused does not have the resources to go after witnesses. Nor does the accused have police powers to investigate crime. A sure way of creating equality is by the fair allocation of the burden of proof between the adversaries.¹⁵ It is not easy for an accused - especially for an innocent man who has no intention to invent evidence - to account for his past actions, motives or movements. As Roberts notes, guilty persons might be concerned with and invest time in covering their tracks and setting up false *alibis*, but innocent persons are not usually concerned with proving their innocence except when called upon to do so. It is quite difficult for an accused to prove lack of knowledge, motive or intent, which reverse burdens often demand, thereby making rebuttal a formidable task. To put unreasonable onuses on the accused therefore severely inflames the already natural imbalances that exist between both parties.

Christie and Pye argue that accused persons must be able to challenge the existence of a presumed fact with ease, thereby making it possible to defeat a presumption unfavourable to them.¹⁶ They state that theoretical analysis counts for nothing in the absence of structured criminal procedural rules that enable the accused to carry out sufficient enquiry so as to be able to rebut a presumption.¹⁷ Christie and Pye postulate practical situations including the ability of the accused to access information from the

¹⁵ Dlamini 2001 *Stellenbosch Law Review* 80.

¹⁶ Christie & Pye "Presumptions and Assumptions in Criminal Law: Another View" 1970 *Duke Law Journal* 919.

¹⁷ Christie & Pye 1970 *Duke Law Journal* 939-942.

prosecution to enable them to carry out their own investigations so as to be able to get evidence to rebut a presumption. They opine that the problem was not in the inability of innocent accused to sufficiently challenge the existence of the presumed fact but that he in practical terms lacks the resources that can unearth evidence favourable to himself concerning the basic or presumed facts. They refer to the difficulties in criminal procedure. They identify these difficulties as the inadequacy of criminal discovery, which prevents the accused from knowing in advance of trial what evidence the state will use against him, the absence of funds for investigation or for securing expert witnesses so as to pursue independent investigation, and the unwillingness which is sometimes encouraged by the prosecution, of witnesses to discuss the case with defence counsel before the trial. They identify these as handicaps in the criminal justice system which are exacerbated by reverse onus clauses.¹⁸ They claim that the accused should be able to investigate a case effectively without the necessity of relying on the state. They suggest that the state should therefore provide subsidised investigative services either by providing a permanent staff or through the allocation of funds for investigators and experts to be hired by the accused. They suggest that this system, rather than limitations on the use of presumptions, will improve the position of the innocent accused.¹⁹

Clearly, history has shown that these proposals are not very helpful as modern legal systems have not developed on such lines. Whereas disclosure and defence investigation assist the defence case, it does not necessarily help in the rebuttal of presumptions as several presumptions do not really depend on matters that need to be

¹⁸ Christie & Pye 1970 *Duke Law Journal* 939.

¹⁹ Christie & Pye 1970 *Duke Law Journal* 941-942.

investigated but rather on normal factual explanations which are nebulous, unexplainable and difficult to investigate. Also, their suggestion goes against the theory of the presumption of innocence which demands that the onus of proof lies with the prosecution. Further, production of evidence and proof are not the same. The accused may be able to produce evidence, but may not satisfy the court on a balance of probabilities. The evidence produced by the accused can be contested, challenged and disputed. So his ability to unearth evidence may not actually overcome the theoretical and constitutional implications of reverse onus clauses. The accused remains at risk if he fails to satisfy the court that the inference created by the reverse onus cannot be drawn.

Further, the procedural structure of criminal proceedings and constitutional theory demand that the prosecution produces evidence on every allegation it makes. In criminal proceedings, the prosecution has the right to begin. This is logically so because it presents its allegations against the accused after which the accused is called upon to answer them. It is a skewed application of the rules that the accused has to answer to an allegation which the prosecution has not made out. Proof by the prosecution by legislative inference is a dangerous misapplication of the process. It is an interference by the legislature in the legal process and its effect is to influence the determination of the dispute. Constitutionally, on a plea of not guilty, the accused is shielded by the presumption of innocence until he is proved guilty beyond reasonable doubt. Such standard of proof cannot be attained if the court entertains a reasonable doubt from the evidence.²⁰ The placing of the onus of proof on the state, places the

²⁰ Bridge "Presumptions and Burdens" 1949 *Modern Law Review* 273 288.

accused at an advantage, and limits the state's overriding powers, thereby equalising both parties.²¹

Finally, criminal conviction comes with censure and punishment. Punishment for a criminal offence may result in limitations to the basic rights of the individual such as deprivation of his right of liberty and disqualification from participation in key aspects of social life. It is of great importance, therefore, that innocent persons are not convicted. The avoidance of this prospect underlies the demand for a fair trial and with it, the presumption of innocence.²²

8 4 Institutional governance and the shifting of the burden

8 4 1 Positivist governance

Political, legal and constitutional traditions of states have implicated the acceptability of shifting of the burden to the accused. Reverse onuses flourish and tend to survive constitutional scrutiny in legal systems with a positivist set-up. The positivist paradigm derives from the English common law system and is founded on the Westminster model of government which operates on the principle of parliamentary supremacy. In this regard, the power to legislate is vested with parliament and none, the courts included, can question the validity of Acts of parliament.²³ The result is that

²¹ Dlamini 2001 *Stellenbosch Law Review* 87.

²² Ashworth 2006 *South African Law Journal* 71-72.

²³ Ekins "Judicial Supremacy and the Rule of Law" 2003 *Law Quarterly Review* 127 135; Cole 2008 *African Journal of International and Comparative Law* 238; Dicey *Introduction to the Study of the Law of the Constitution* (1982) 19; see generally Gordon "The Conceptual Foundations of Parliamentary Sovereignty: Reconsidering Jennings and Wade" 2009 *Public Law* 519; see also Lakin "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution" 2008

parliament is at liberty to allocate onuses to the accused. It has the authority to determine the elements of offences and to relieve the prosecution of the duty to prove any element of an offence.²⁴ Therefore, though the presumption of innocence is firmly entrenched in English common law, it can be sidetracked by the legislature as it thinks fit.²⁵ Indeed, when Lord Sankey reaffirmed in his famous declaration that the common law burden is on the prosecution, he subjected this “common thread” to statutory exceptions.²⁶ One wonders whether Lord Sankey’s embracement of statutory exceptions was inadvertent, deliberate, or a mere attempt to restate English law. But by so doing the golden thread so firmly and eloquently put by him, was wholly undermined. According to him, the burden on the prosecution is subject to any statutory exception. This open-ended qualification puts the presumption of innocence under tremendous legislative pressure. Ashworth states perhaps rightly so: “So the legislature might decide, for the most inadequate reason or for no particular reason at all, to place a burden of proof on the defendant.”²⁷ He suggests that Lord Sankey

Oxford Journal of Legal Studies 709 where the author contends that the idea of parliamentary sovereignty is misconceived and argues that the British Constitution rests instead on the ideal of government under the law or the principle of legality.

²⁴ Mosikatsana “The Presumption of Innocence and Reverse Onus: Due Process under the South African Bill of Rights” 1996 *South African Journal of Human Rights* 125; Mthembu “The Constitutionality of Presumptions in South African Law” 1998 *Comparative and International Law Journal of Southern Africa* 213 215.

²⁵ Egonda-Ntende “Presumption of Innocence and the Reverse Onus Clause: Does the 1995 Uganda Constitution Establish A New Standard?” 2003 *East African Journal of Peace and Human Rights* 194 195.

²⁶ *Woolmington v DPP supra* note 3.

²⁷ Ashworth 2006 *South African Law Journal* 70.

should have stated a strong principle of interpreting statutes as not imposing a legal burden on the accused, unless where the words to the contrary are clear.²⁸

Some scholars have registered unease and opposition to the positivist tradition.

Dlamini notes:

“English law recognises the authority of Parliament to impose a persuasive burden on the accused. The courts seem to be overzealous in approving and applying statutory presumptions of this kind.”²⁹

Williams registers a diametrical opposition to the positivist paradigm when he states:

“When it is said that a defendant to a criminal charge is presumed innocent, what is really meant is that the burden of proving his guilt is upon the prosecution...Unhappily, Parliament regards the principle with indifference - one might almost say with contempt. The Statute Book contains many offences in which the burden of proving his innocence is cast on the accused...The sad thing is that there has never been any reason of expediency

²⁸ Ashworth 2006 *South African Law Journal* 70. The author complains: “The wider problem was that Lord Sankey, for all his romantic imagery about webs and golden threads, failed to give an account of the reasons why the presumption of innocence was important. And then he gave it all away by stating that the presumption was subject ‘to any statutory exception’ – *any*.” At 70. (Emphasis appears in the text).

²⁹ Dlamini “Presumptions in the South African Law of Evidence III” 2002 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 147 165. This appears to be the situation in Botswana. See *Patram v The State* [1999] 1 B.L.R. 123; *Tshipinare v The State* [1993] B.L.R. 434.

for these departures from the cherished principle; it has been done through carelessness and lack of subtlety.”³⁰

Ashworth notes:

“For the judges simply to stand by and do nothing was a distinctly pusillanimous treatment of a principle that Lord Sankey had described as a ‘golden thread’”.³¹

The European Court of Human Rights appears to have followed the positivist paradigm. In effect, it tends to be open-ended on the issue and it permits member states to place the burden of proof on the accused.³² In *Salabiaku v France*³³ the applicant had been convicted of unlawful importation of drugs. In terms of French law, once it was proved that the accused was in possession of an article, there was a presumption that he was aware of its contents. The European court in confirming the validity of offences of strict liability noted: “Contracting states may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.”³⁴ The Court, however, emphasised

³⁰ Williams *The Proof of Guilt* 3 ed (1963)184-185.

³¹ Ashworth 2006 *South African Law Journal* 70.

³² Tadros & Tierney “The Presumption of Innocence and the Human Rights Act” 2004 *Modern Law Review* 402 416.

³³ (1991) 13 E.H.R.R. 379. Cited in Ashworth “Article 6 and the Fairness of Trials II” 1999 *Criminal Law Review* 261 266.

³⁴ Ashworth 1999 *Criminal Law Review* 266.

that the criminal law must be kept “within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”³⁵

One can immediately see that the powers of the state are heightened in this setup. The legislature steps in to alter the incidence of proof in favour of the state and to the detriment of the accused. Legislators decide that the accused should prove vital elements of certain offences. The courts in which these offences are prosecuted do not readily step in to remedy the imbalance which this situation creates in the system. This is because parliament is supreme and its legislations cannot be questioned.

8 4 2 *Constitutionalist governance*

In countries where constitutional supremacy is upheld and whose constitutions are adorned with bills of rights, it is possible for the courts to question the validity of reverse onuses.³⁶ In this regard, a strong framework exists to balance the interests of policy makers as against those of the individual. The courts are able to question statutory provisions that unfairly disadvantage the accused. The accused is able to rely on the constitutionally guaranteed right to presumption of innocence to challenge a statutory provision that declares him guilty before trial. The introduction of bills of rights in Canada³⁷ and South Africa³⁸ saw an immediate shift from the positivist

³⁵ Ashworth 1999 *Criminal Law Review* 266.

³⁶ The United States is a perfect example of such situation. Dlamini 2002 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 164; *Leary v US* 395 U.S. 6 (1969); *Tot v Delia* 319 U.S. 463 (1943); Cole 2008 *African Journal of International and Comparative Law* 239.

³⁷ Charter of Rights and Freedoms.

³⁸ South Africa Interim Constitution Act 200 of 1993 and final Constitution Act 108 of 1996.

paradigm to the constitutionalist paradigm.³⁹ It is no coincidence therefore that in 1986⁴⁰ and 1995⁴¹ the Supreme Court of Canada and the South African Constitutional Court determined the constitutionality of reverse onuses and found that they infringed the constitutionally entrenched presumption of innocence. Clearly, constitutionalism enhances the normative value of the presumption of innocence.⁴²

The South African Constitution recognises the presumption of innocence.⁴³ The courts have been most robust in defending this provision and are well-known for striking down reverse onus clauses.⁴⁴ In holding that reverse onus clauses are inconsistent with the presumption of innocence, South African courts have drawn inspiration from Canadian jurisprudence.⁴⁵ South African and Canadian jurisprudence recognise that the presumption of innocence is breached where a person can be convicted despite the existence of a reasonable doubt. Constitutionalist governance therefore recognises that any provision which requires the accused to prove an element of an offence or lowers the standard placed on the prosecution, will infringe the presumption of innocence unless it can be justified in terms of the limitation

³⁹ Dlamini 2002 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 175.

⁴⁰ *R v Oakes supra* note 7.

⁴¹ *S v Zuma and Others* 1995 (1) SACR 568 (CC); 1995 (2) SA 642 (CC).

⁴² Schwikkard *Presumption of Innocence* (1999) 87.

⁴³ S 35(3)(h).

⁴⁴ *S v Zuma supra* note 41; *S v Mumba* 1997 (1) SA 854 (W); *S v Coetzee and Others* 1997 (3) SA 527 (CC); *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC); *Nortje v Attorney-General of the Cape* 1995 (2) BCLR 236 (C); *Osman v Attorney-General of Transvaal* 1998 (2) BCLR 165 (T); *S v Manamela and Others* 2000 (1) SACR 414 (CC); *S v Mello and Others* 1998 (3) SA 712 (CC); Cole 2008 *African Journal of International and Comparative Law* 240.

⁴⁵ *R v Oakes supra* note 7.

clause.⁴⁶ This approach recognises the fact that a provision which places a persuasive burden on the accused, violates the presumption of innocence as it permits a conviction despite the existence of a reasonable doubt.⁴⁷

8 4 3 *Institutional governance*

The business of crime control is vested in the state. State institutions are dedicated to this role. All offences in Botswana are created by legislation. The legislature creates offences, the police investigate crimes and the Director of Public Prosecutions prosecutes crimes. Reverse onuses stem from legislative action. The parameters for investigating crime and the powers of the police relating to investigation, search and seizure, are set by legislation. The fact that the state determines such powers is unavoidable. The Hobbesian social contract postulates the ceding of certain rights to a central authority in exchange for societal order and individual protection. State institutions therefore determine the governance of the criminal justice system. While it is accepted that the legislature consists of the elected representatives of the people, one may ask what real influence the individual has on the legislative process. The relationship between the legislature and the populace can be likened to that between directors of a company and its share holders. The legislature is the board of directors and the electorate the share holders. The share holders may outnumber the board

⁴⁶ De Villiers “The Operation of the Presumption of Innocence and its Role in Bail Proceedings under Canadian and South African Law II” 2002 *De Jure* 195 196; Govender “Determining the Constitutionality of Presumptions” 1995 *South African Journal of Criminal Justice* 205 213; Mendes & Karmali “Are There Hierarchies of Rights and Vulnerabilities Emerging Due to Deference, Context and Burden of Proof Standards?” 2003 *National Journal of Constitutional Law* 107 108.

⁴⁷ De Villiers “The Burden of Proof and the Weighing of Evidence in Criminal Cases Revisited” 2003 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 634 635.

members and together can overrule or even vote out the directors. But this can hardly happen in practice. It is unlikely that share holders can gang up and form a formidable voice against the board. They are powerless and do not really influence board decisions. Similarly, the electorate does not really get involved or concern themselves with legislation and more often than not, unpopular legislation gets passed in the face of popular opposition. These are the limits of modern democratic practice. To this extent, reverse onuses have become a reality of modern legal practice.

While there are reasoned arguments in favour of reversing the burden, the fact remains that it is the product of state institutionalism and political policy which tilt the scale in favour of the state, regardless of the individuals who elect them. The politicians who make the law hardly face criminal prosecution. When they do, they have the resources to brief the best legal brains. Their chances of an acquittal are high. To the ordinary accused or share holder, legal representation is a luxury which he cannot afford. The chances of an improper conviction are real. These are the realities of modern institutional governance and its effect on the criminal justice system.

8 5 Reversing the presumption of innocence

Legislative reversal of the presumption of innocence takes two forms. First, legislation may impose an onus. The second is in the form of evidential burdens. The accused is required to point to some facts or issues which may determine his innocence. Evidential burdens are not regarded as creating an onus. Whether one is dealing with a reverse onus or evidential burden, the fact remains that they both act as “stiflers” on the accused’s constitutional presumption of innocence. Evidential burdens and reverse onuses are usually justified on practical and public interest

considerations. However, requiring the accused to point to or prove his innocence puts him in a procedural and constitutional minefield. The rationalisation of placing the burden of proof on the prosecution on the basis that this remedies procedural imbalances is thus defeated.

8 5 1 *Reverse onus clauses*

It is a fundamental principle of the criminal process that the burden is on the prosecution to prove its case against the accused beyond reasonable doubt. This principle is articulated by the fundamental trilogy of the criminal justice system of Botswana: the Constitution, the Criminal Procedure and Evidence Act⁴⁸ and the Penal Code⁴⁹ which are the principal instruments regulating criminal law and procedure. The principle that he who avers must prove, forms the basis of all modern legal systems and international criminal tribunals, and can be said to have attained the status of customary international procedural law.

Recent developments in Botswana and indeed other countries have witnessed a new category of statutes that are littered with reverse onus clauses.⁵⁰ A reverse onus clause

⁴⁸ Cap 08:02.

⁴⁹ Cap 08:01; the Court of Appeal noted in *Attorney-General v Moagi* [1981] B.L.R. 1 26 (CA) that “In all cases, however, the trial court must always remind itself that the onus to establish a criminal charge against an accused person beyond reasonable doubt is on the prosecution, and that this ultimate burden never shifts.”

⁵⁰ Roberts 1995 *Criminal Law Review* 788. For examples of reverse onus clauses in Botswana see S 4(a) of the Motor Vehicle Theft Act Cap 09:04; S 20(1),(2) & (3) of the Drugs and Related Substances Act Cap 63:04; S 19(5) of the Arms and Ammunition Act Cap 24:01; S 386 of the Penal Code; S 31(1)

is “a burden on the defendant to prove some matter the effect of which is that he is not guilty of the offence charged.”⁵¹ In this regard the burden of proof is placed on the accused and in the result, he has a persuasive burden.⁵² Parliament creates reverse burdens requiring the accused to disprove some elements of an offence. In this regard parliament assists the prosecution in proving its case notwithstanding its overwhelming resources. Reverse onus clauses are in themselves a breach of the equality principle since they unnecessarily tip the scales in favour of the state. The placing of the onus on the accused should be the exception and should be justified by clear and convincing principles and without weakening or eroding the general rule that the burden of proof lies with the state.⁵³

Reverse onus clauses are usually based on presumptive inferences some of which are not reasonable in the least. Presumptions usually require that certain facts be taken for granted upon proof of evidence whose probative force fails to establish the fact to be inferred.⁵⁴ Some presumptions have no justifiable basis as they require the courts to draw a legally important fact from evidence which does not really imply its

& 31(2) of the Immigration Act Cap 25:02; S 4(4) of the Employment of Non-Citizens Act Cap 47:02; S 72 of the Wildlife Conservation and National Parks Act Cap 38:01.

⁵¹ Dennis “Reverse Onuses and the Presumption of Innocence: In Search of Principle” 2005 *Criminal Law Review* 901 901; see also Ashworth 1999 *Criminal Law Review* 266; Kofele-Kale 2006 *International Lawyer* 925; Cole 2008 *African Journal of International and Comparative Law* 237.

⁵² Tadros & Tierney 2004 *Modern Law Review* 416.

⁵³ Healey “Proof and Policy: No Golden Threads” 1987 *Criminal Law Review* 355.

⁵⁴ Bohlen “The Effect of Rebuttable Presumptions of Law upon the Burden of Proof” 1920 *University of Pennsylvania Law Review* 307 310.

existence.⁵⁵ Reverse onuses are based on legislation which instructs the court to take for granted the existence of the presumed fact, based on evidence that lacks the probative value required to support such a finding.⁵⁶ The presumption is therefore created by institutional governance, which requires additional weight to be given to evidence in order to achieve a desired result, irrespective of evidential and judicial considerations.⁵⁷ Because of the difficulties of the prosecution in proving a positive, an accused who does not have equality of arms with the prosecution is compelled to prove a negative assertion which is even more onerous to accomplish.⁵⁸ Such provisions are clearly inconsistent with the presumption of innocence and are therefore unconstitutional.

Further afield from Botswana, reverse onus clauses have received judicial support on the basis that they curb crime. It has been held in Ireland that reverse onus clauses are necessary to strike a balance between individual freedoms and an ordered society.⁵⁹ The European Commission on Human Rights has also upheld a reverse onus clause in England which provided that a man who is proved to be living with a prostitute is deemed to be knowingly living on the earnings of prostitution unless the contrary is proved, holding that the provision was reasonable in the interests of legal order and that it will be an impossible task to require the prosecution to obtain direct evidence

⁵⁵ Bohlen 1920 *University of Pennsylvania Law Review* 311.

⁵⁶ Bohlen 1920 *University of Pennsylvania Law Review* 312.

⁵⁷ Bohlen 1920 *University of Pennsylvania Law Review* 313.

⁵⁸ See the judgment of Anderson J in *Paul Rodney Hansen v The Queen supra* note 2 para 280.

⁵⁹ *Re Article 26 and the Criminal Law (Jurisdiction Bill)* 1977 IR 129 152; see Casey *Constitutional Law in Ireland* (1987) 408.

that the accused was living on immoral earnings.⁶⁰ The Divisional Court⁶¹ in England ruled that a mandatory presumption of guilt in respect of an element of an offence based upon the proof of another, breached the presumption of innocence.⁶² However, the House of Lords overruled the decision on other grounds, declining to comment on the issue of reverse onus.

The argument that reverse onus clauses help to create an ordered society lacks theoretical foundation and scientific proof. Reverse onus clauses totally impinge on judicial reasoning. An example of this is obvious with reference to rules developed by judicial officers relating to the assessment of evidence and the drawing of inferences in cases of circumstantial evidence. What most reverse onus clauses do is to remove the reasonableness from judicial analysis of circumstantial evidence and, by legislative decree, compel a judicial officer to reach to a conclusion devoid of logic and common sense. The legislature therefore makes it possible to condemn a person on the basis of mere whimsical suspicion, a situation usually justified by increase in crime.

The Canadian Supreme Court has struck down reverse onus clauses as being inconsistent with the presumption of innocence when they are not rationally connected with or proportionate to the law's objective.⁶³ In England, the Privy Council in *Attorney-General for Hong Kong v Lee Kwong-Kut*⁶⁴ dealt with two

⁶⁰ *X v UK* Application No 5124/71. Cited in Casey *Constitutional Law* 408.

⁶¹ *R v DPP ex parte Kebilene* [1999] 3 W.L.R. 972; [2000] 1 Cr. App. R. 275.

⁶² Dealing with S 16A (4) of the Prevention of Terrorism (Temporary Provisions) Act 1989.

⁶³ *R v Oakes* *supra* note 7; *R v Laba* (1995) 34 C.R. (4th) 360 (S.C.C.); [1994] 3 S.C.R. 965.

⁶⁴ [1993] A.C. 951.

offences. The first offence was that of possessing cash reasonably suspected of being stolen. The Privy Council held that this offence was inconsistent with the presumption of innocence as the prosecution merely had to prove possession of cash which was a formal or non-incriminating matter, leaving the accused to disprove his guilt. The Privy Council stated that it was the duty of the prosecution to prove all the elements of the offence. The second offence required the prosecution to establish that the accused was involved in dealing with the proceeds of another's drugs trafficking, while the accused had to prove a number of defences on a balance of probabilities. The Privy Council held that this was consistent with the presumption of innocence. The distinction between both offences clearly demonstrates the difference between what should be reasonably expected of the prosecution. Indeed, the first offence required the prosecution to do nothing and created a presumption of guilt based on suspicion that is not established. Definitely, the state, with its police services should be able to establish more than the mere possession of cash. The prosecution must be further burdened to establish circumstances from which a reasonable suspicion of theft could be established. Unfortunately, similar statutory provisions exist in Botswana.⁶⁵ The courts in Botswana would do well to borrow from the combined approach of *Oakes*, *Laba* and *Lee Kwong-Kut*. The Canadian tests in *Oakes* and *Laba* clearly recognises the criminal law not as a phenomenon operating in a vacuum but as an instrument forming part of the social process in responding to crime. *Lee Kwong-Kut* clearly recognises the theoretical importance of the duty of the state in criminal proceedings. This is dictated by the common sense demand that he who avers must prove.

⁶⁵ See note 50.

8 5 2 *Permissible inferences*

The placing of evidential burdens on the accused is generally recognised as acceptable. Social justification requires that a person accounts for facts that are known only to him.⁶⁶ Rational consideration of comparative convenience dictates that the accused is the only person who can explain certain facts.⁶⁷ In this regard, evidential burdens may be compatible with the presumption of innocence.⁶⁸ Unlike legal burdens, they do not carry the risk of non-persuasion.⁶⁹ Presumptions may be based on considerations that are founded on human experience or a need to further a socially desirable result or the accomplishment of procedural convenience.

Justification for the placing of evidential burdens on the accused has been made on the basis that there are offences that are not truly criminal but rather regulatory. Therefore, provisions that require proof of licences to do certain regulated acts are usually held to be compatible with the presumption of innocence.⁷⁰ As has been said before, in Botswana, such provisions are solidified by section 272 of the Criminal Procedure and Evidence Act which requires that a person charged with acting in

⁶⁶ Bennion 1988 *Criminal Law Review* 32.

⁶⁷ Ashford & Risinger "Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview" 1969 *Yale Law Journal* 165 180.

⁶⁸ *R v DPP ex parte Kebilene supra* note 61.

⁶⁹ Dennis 2005 *Criminal Law Review* 902.

⁷⁰ In *State v Magubane* [1990] B.L.R. 332, Gyeke-Dako J, who was not dealing with a constitutional question noted at 358C-D: "As in all licensing cases, where the prosecution has proved possession, the evidential burden as opposed to the legal burden shifts onto the accused. In the instant case, it is for the accused to show that he possesses a licence issued under section 9(3) of the Arms and Ammunition Act or that he falls within the category of persons exempted under section 10(1) of the Act."

contravention of a licensing requirement shall be deemed not to hold such licence unless the contrary is proved. This provision relates to situations where permission is required to have a licence, permit or authorisation to carry on an act or possess certain prohibited items. In terms of this provision, the person is deemed not to be the holder of the relevant licence, permit or authorisation. The logic of provisions of these kinds is that the accused merely has to produce his certificate or authorisation. On the other hand, however, all such licences, exemptions and authorisations are usually in the form of written certificates or documents issued by government agencies which usually have records of them. The state therefore should have no difficulty accessing such information. Therefore, even though these kinds of information are within the knowledge of the accused, they are not peculiar to him and the state has unrestricted access to them. The inequalities arising from such presumptions lies in the fact that in Botswana, most accused are illiterate. They are not familiar with procedural and evidential matters. While they may argue in court that they have the relevant licences or authorisations, they might not be aware of the prerequisite to produce them. Often, the judicial officer will have to intervene and require the accused to produce the relevant documentation, thereby triggering an adjournment.

In recognising the distinction between truly criminal and regulatory offences, the Court in *Sheldrake v DPP*⁷¹ noted that the lower in the scale the offence is, the easier it is to justify an interference with the presumption of innocence. Dennis, however, rightly notes the difficulties of using this classification as a basis for justifying reverse onuses.⁷² He points out that a classification based on the moral quality of an act is

⁷¹ [2003] 2 Cr. App.R. 206.

⁷² Dennis 2005 *Criminal Law Review* 910-911.

open to scrutiny as many might consider certain “public welfare” offences such as environmental offences or breaches of health and safety legislation as very serious and immoral.⁷³ For example, a situation whereby an employee is exposed to health risks due to failure by the employer to take certain health precautions and the employee dies as a result, gives a very serious tone to an offence that is otherwise punishable by a fine under regulatory legislation.⁷⁴ Also, the fact that a reverse onus applies to a regulatory offence does not make it easier to discharge than if it appeared in a truly criminal offence.⁷⁵ There is no relationship between the degree of onerousness and the type of offence involved.

8 6 The constitutionality of reverse onus clauses

In Botswana, the above issue is hardly ever raised as a defence. The constitutionality of reverse onuses has been determined in only one reported case in Botswana. The matter was determined both in the High Court⁷⁶ and Court of Appeal⁷⁷ with slightly varied results. The courts relied heavily on the Canadian and South African experiences and it is therefore apt to start the discussion by reference to the jurisprudence of those two countries.

⁷³ Dennis 2005 *Criminal Law Review* 911.

⁷⁴ Dennis 2005 *Criminal Law Review* 911.

⁷⁵ Dennis 2005 *Criminal Law Review* 911.

⁷⁶ *Otlhomile v The State* [2002] 2 B.L.R. 295.

⁷⁷ *Attorney-General v Otlhomile* [2004] 1 B.L.R. 21 (CA).

8 6 1 *The Canadian experience*

8 6 1 1 The burden of proof

The common law imposes a burden on the Crown to prove its case against the accused beyond reasonable doubt.⁷⁸ The *Woolmington* principle which recognises that the burden lies with the prosecution finds recognition in Canadian law.⁷⁹ The liberty of the legislature to enact statutory exceptions is also recognised.⁸⁰ In *R v Appleby*⁸¹ the Supreme Court held that the words “presumed innocent until proven guilty according to law” should be taken to envisage a law which recognises statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence.⁸² This view represents the positivist approach and was rejected by the Supreme Court in *R v Oakes* where it was noted that the term “according to law” in section 11(d) of the Charter does not embrace statutory exceptions. The Court noted that such a provision does not apply to an entrenched Charter which tempered parliamentary supremacy.⁸³ The Court emphasised therefore that section 11(d) of the Charter requires that an accused is presumed innocent until the state proves his guilt. The Court noted that the state bears the burden of proving the guilt of the accused and that criminal trials must be conducted in accordance with lawful procedures and fairness.⁸⁴

⁷⁸ Clayton & Tomlinson *The Law of Human Rights I* (2001) 732.

⁷⁹ *R v Manchuk* [1938] S.C.R. 341.

⁸⁰ Stuart *Charter Justice in Canadian Criminal Law* 3 ed (2001) 336.

⁸¹ [1972] S.C.R. 303.

⁸² 315-316.

⁸³ Stuart *Charter Justice* 336.

⁸⁴ Stuart *Charter Justice* 337.

8 6 1 2 Evidential burdens

In *R v Fontaine*, Fish J made a classic distinction between an evidential burden and a persuasive burden when he wrote on behalf of the Court:

“An ‘evidential burden’ is not a burden of proof. It determines whether an issue should be left to the trier of fact, while the ‘persuasive burden’ determines how the issue should be decided. These are fundamentally different questions. The first is a matter of law; the second, a question of fact. Accordingly, on a trial by judge and jury, the judge decides whether the evidential burden has been met.”⁸⁵

In essence, an evidential burden does not require an accused to prove anything. Rather, the burden is discharged by pointing to enough evidence to put the matter in issue.⁸⁶ Evidential burdens therefore will not infringe the presumption of innocence in section 11(d) since they do not require proof on a balance of probabilities.⁸⁷

8 6 1 3 Reverse onuses

In *R v Oakes*,⁸⁸ the Supreme Court held that a provision that requires the accused to disprove an element of an offence on a balance of probabilities was a breach of the presumption of innocence as it permits a conviction of the accused despite the existence of a reasonable doubt. It accordingly ruled that section 8 of the federal

⁸⁵ [2004] 1 S.C.R. 702; [2004] S.C.C. 27. Obtained from

<http://scc.lexum.umontreal.ca/en/2004/2004scc27.pdf> (accessed 12th March 2007).

⁸⁶ See the dictum of Dickson CJ in *R v Schwartz* (1988) 66 C.R. (3d) 251 (S.C.C.) 229.

⁸⁷ *Stuart Charter Justice* 345.

⁸⁸ *Supra* note 7; see also *R v Laba supra* note 63.

Narcotic Control Act which placed a burden on an accused to prove on a balance of probabilities that he or she was not in possession of a narcotic for the purposes of trafficking, contravened the presumption of innocence contained in section 11(d) of the Canadian Charter of Rights. The Court held that the lower standard of proof did not make a reverse onus clause constitutional as the accused might be able to raise a reasonable doubt but yet still fail to prove his innocence on a balance of probabilities.

In the dictum of Dickson CJ:

“...[A] provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence it would be possible for him to be convicted despite the existence of a reasonable doubt.”⁸⁹

The Court noted that the provision’s use of the words “to establish” has the same meaning as the words “to prove”, thereby imposing a legal burden on the accused.

For a reverse onus clause to be reasonable and hence constitutional, the facts proved must have a rational connection with the facts presumed.⁹⁰ The rational connection test was enunciated by the United States Supreme Court in *Tot v Delia*⁹¹ where Roberts J had this to say:

⁸⁹ 201.

⁹⁰ Clayton & Tomlinson *Human Rights* 336.

⁹¹ *Supra* note 36.

“...[W]e think, that a criminal statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.”⁹²

Also in *Leary v US*⁹³ the Court stated as follows:

“...[A] criminal statutory presumption must be regarded as ‘irrational’ or ‘arbitrary’, and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.”⁹⁴

In this regard, the facts proved must tend to establish the facts presumed. Dickson CJ held in *Oakes* that the test still allowed a conviction despite the existence of a reasonable doubt.

In the case of *R v Whyte*⁹⁵ the accused was charged with being in “care and control” of a motor vehicle while intoxicated in terms of section 234(1) of the Criminal Code. The section provides that everyone who drives a motor vehicle or has in his care and control a motor vehicle, whether it is in motion or not, while his ability to drive is

⁹² *Supra* note 36 467-468.

⁹³ *Supra* note 36.

⁹⁴ 36.

⁹⁵ [1980] 2 S.C.R. 3.

impaired by alcohol or drug is guilty of an offence. In terms of section 237(1)(a) of the Code, the accused is presumed to be in care and control of the vehicle if he is found occupying the driver's seat unless he could prove on a balance of probabilities that he did not enter the vehicle with the intention of setting it in motion. The Court noted that any provision which requires an accused to prove anything in order to avoid conviction violated his right to the presumption of innocence. The provision was, however, saved by section 1 of the Charter on the basis that there was a need to clamp down on drunken driving.

In the case of *R v Downey*⁹⁶ the Supreme Court had to deal with a statutory presumption⁹⁷ which provided that evidence that a person lives with or is habitually in the company of prostitutes is, in the absence of evidence to the contrary, proof that he lives on the proceeds of prostitution. This presumption was held to infringe the presumption of innocence. Again, the Court held it to be justifiable under the circumstances. Cory J summarised the position as follows:

I – The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

II – If by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s 11(d). Such a provision would permit a conviction in spite of a reasonable doubt.

⁹⁶ [1992] 2 S.C.R. 10.

⁹⁷ Criminal Code S 195(2).

III – Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence.

IV – Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if, as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted facts leads inexorably to the proof of the other. However, the statutory presumption will infringe s 11(d) if it requires the trier of fact to convict in spite of a reasonable doubt.

V – A permissive assumption from which a trier of fact may but must not draw an inference of guilt will not infringe s 11(d).

VI – A provision that might have been intended to play a minor role in providing relief from conviction will nonetheless contravene the Charter if the provision (such as the truth of a statement) must be established by the accused.

VII – It must of course be remembered that statutory presumptions which infringe s 11(d) may still be justified pursuant to s 1 of the Charter.⁹⁸

8 6 1 4 Justification of reverse onus clauses under section 1 of the Charter

In determining reverse onus clauses the courts have applied a two-pronged approach. The first question for consideration is whether the Charter has been breached. The second question is whether such breach is justifiable under the limitation clause.⁹⁹ The

⁹⁸ *R v Downey* *supra* note 96 30.

⁹⁹ Section 1 of the Canadian Charter provides:

Court in *Oakes* set out two criteria that would satisfy the limitation of a Charter freedom under section 1. Firstly, “the objective which the measures responsible for a limit on a Charter right or freedom are designed to serve must be of ‘sufficient importance to warrant overriding a constitutionally protected right or freedom’”.¹⁰⁰ Secondly, the means chosen for the limitation must be demonstrably justified. The second criteria involves a proportionality test which has three components. First, the measures adopted must be designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations but must be rationally connected with the objective.¹⁰¹ Second, the means must impair as little as possible the right in question.¹⁰² Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance. Thus the more severe the deleterious effects of the measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society. The Court in *Oakes* noted that section 8 of the Narcotics Control Act fulfilled an important objective for the purposes of section 1 of the Charter, that objective being to protect the society from the ills associated with drug trafficking. However, it did not survive the rational connection test as possession of small amounts of drugs

“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.”

See Schwikkard *Presumption* 133.

¹⁰⁰ *R v Oakes supra* note 7 201-202.

¹⁰¹ 202.

¹⁰² 202.

does not satisfy an inference that the accused was trafficking.¹⁰³ The Court noted that it will be irrational to infer on the basis that an accused had a small quantity of narcotics in his possession that he had an intention to traffic.

In *Whyte*,¹⁰⁴ the Court held that though section 237(1)(a) of the Criminal Code infringed the presumption of innocence, it constituted a justifiable limitation. According to the Court, though the section enabled a conviction in spite of a reasonable doubt, its objective was sufficiently important to justify the overriding of a constitutionally protected right. The Court further recognised that there was a rational connection between the fact presumed and the fact proved. It held that the impairment of the presumption of innocence was very limited and that parliament had restrained itself while responding to a pressing social problem.

In *R v Chaulk*¹⁰⁵ the Supreme Court held by a majority of five to one that section 16(4) which creates a presumption of sanity, thereby requiring the accused to prove a defence of insanity, violates the presumption of innocence. It concluded that the provision constitutes a justifiable limitation. In the Court's view, the object of section 16(4) was to avoid the almost impossible task of the Crown disproving insanity. Certainly, it would be very difficult for the Crown to prove sanity.¹⁰⁶ It was noted that while parliament may not have chosen from the least intrusive measure of attaining its objective, it had chosen from a range of means that impairs section 11 as little as

¹⁰³ 202.

¹⁰⁴ *Supra* note 95.

¹⁰⁵ (1990) 2 C.R. (4th) 1 (S.C.C.).

¹⁰⁶ *Stuart Charter Justice* 349-350.

reasonably possible. Within this range it would be virtually impossible to know, let alone be sure, which means violate the Charter the least.¹⁰⁷ Dissenting, Wilson J opined that though the object of the reverse onus was to keep sane people who had committed crimes from pretending to be insane so as to escape criminal liability, the Crown had not produced evidence to establish that this was a social problem that warranted overriding a fundamental rule of the criminal justice system.¹⁰⁸

Also in *R v Downey*,¹⁰⁹ the Supreme Court found on a majority that the violation of the presumption of innocence by a mandatory presumption that persons living with prostitutes benefitted from their proceeds is a justifiable limit under section 1 as the provision was aimed at the cruel and social ills associated with pimping. The Court was also satisfied that the presumption satisfied the rational connection and proportionality tests as an inference that a person living with prostitutes was living on their proceeds was not unreasonable, and that the measure adopted was rationally connected to its objective.

In *R v Laba*¹¹⁰ the Supreme Court held, for the first time since *Oakes*, that a reverse onus clause could not be saved under section 1 of the Charter. In that case, the Court considered the constitutionality of section 394(1)(b) of the Criminal Code which provides that anyone who sells or purchases certain precious minerals is guilty of an offence “...unless he establishes that he is the owner or agent of the owner or is acting

¹⁰⁷ Stuart *Charter Justice* 350.

¹⁰⁸ *R v Chaulk supra* note 105.

¹⁰⁹ *Supra* note 96.

¹¹⁰ *R v Laba Supra* note 63.

under lawful authority...” The Court found that this section was not justifiable under section 1 of the Charter unless the words “unless he establishes that” could be replaced by the words “in the absence of evidence which raises a reasonable doubt.”¹¹¹ Sopinka J considered evidence that theft of precious minerals was a serious problem and that it was usually difficult to prove such theft. He concluded therefore that the provision served a sufficiently pressing and substantial purpose. Referring to the *Oakes* test, he stated that the test should be re-stated as follows:

“(1) In order to be sufficiently important to warrant overriding a constitutionally protected right or freedom the impugned provision must relate to concerns which are pressing and substantial in a free and democratic society;

(2) The means chosen to achieve the legislative objective must pass a three-part proportionality test which requires that they (a) be rationally connected to the objective, (b) impair the right or freedom in question as little as possible and (c) have deleterious effects which are proportional to both their salutary effects and the importance of the objective which has been identified as being of ‘sufficient importance’.”¹¹²

Sopinka J held that the provision satisfied the rational connection test. He rejected the view that it was imperative that a provision be internally rational to overcome the hurdle of the rational connection test, though this would be a relevant factor in determining proportionality. He held that for the purpose of the rational connection

¹¹¹ See Schwikard *Presumption* 140. This phrase would merely create an evidential burden.

¹¹² *R v Laba supra* 63 79.

test, the only relevant matter for determination was whether the presumption is a logical method of meeting the objective of the legislature. The Court noted however that the provision did not meet the minimal impairment test as the legislative objective could have been satisfied by imposing an evidential burden. While parliament should be accorded some leeway, this was a case where the government could “be characterised as the singular antagonist of an individual attempting to assert a legal right which is fundamental to our criminal justice system.”¹¹³ The Crown had not demonstrated that an evidential burden would be insufficient and the provision was read down as an evidential burden.

Canadian cases have moved away from the traditional English common law tolerance of onuses that require accused persons to establish certain facts on a balance of probabilities. Though it must be noted that the Canadian courts will in theory not allow a conviction where a reasonable doubt exists, the courts have often found justification of such clauses under its limitation clause.

8 6 2 *The South African approach*

Canadian law on reverse onus has greatly influenced South African law.¹¹⁴ A reverse onus clause was first considered by the South African Constitutional Court in the case of *S v Zuma*.¹¹⁵ In that case, the Court considered the constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act which placed an onus on an accused to

¹¹³ 86.

¹¹⁴ South Africa and Botswana have very similar legal systems and reference is often made to South African law by Botswana courts.

¹¹⁵ *Supra* note 41.

establish on a balance of probabilities that a confession was involuntarily made. Kentridge AJ, delivering the unanimous decision of the Court, held that the presumption of innocence will be infringed whenever the possibility of a conviction existed notwithstanding the existence of a reasonable doubt. Among the foreign cases referred to in the judgment, the Court found Canadian cases¹¹⁶ particularly helpful because of their “persuasive reasoning”¹¹⁷ and because the Canadian limitation clause is very similar to the South African one. Since South African and Canadian legal principles on the presumption of innocence originate from English principles which were re-stated in *Woolmington*,¹¹⁸ the Court found it easy to adopt Canadian law.¹¹⁹ Three principles set out by the Canadian cases were noted. First, the presumption of innocence is infringed if the accused may be convicted despite the existence of a reasonable doubt. Second, if an accused is required by a statutory provision to establish, either by proving or disproving, on a balance of probabilities either an element of an offence or an excuse, the presumption of innocence is infringed as this permits a conviction despite the existence of a reasonable doubt. Third, even if a rational connection exists between the fact proved and the facts presumed, this could be insufficient to make a valid presumption requiring the accused to disprove an element of the offence.¹²⁰ The argument by the state that the presumption did not relate to any element of the offence was rejected. The Court held that the fact that a conviction could follow from the admission of a confession notwithstanding the

¹¹⁶ *R v Oakes supra* note 7; *R v White supra* note 95; *R v Downey supra* note 96.

¹¹⁷ *S v Zuma supra* note 41 582.

¹¹⁸ *Supra* note 3.

¹¹⁹ Du Toit, De Jager, Paizes, Skeen & Van der Merwe *Commentary on the Criminal Procedure Act* (2007) para 24-66A.

¹²⁰ Du Toit et al *Commentary* Para 24-66A.

existence of a reasonable doubt as to whether it was freely and voluntarily obtained, was decisive. The onus of the state to prove the voluntariness of a confession was an integral and essential part of the accused's right to remain silent, the right not to be compelled to make a confession and the right not to incriminate oneself.¹²¹ A reversal of the onus would therefore compromise these rights.¹²² Kentridge AJ further considered the question whether the provision could be saved by the limitation clause. He came to the conclusion that it could not. In so holding, he noted that the infringed rights were fundamental to the concept of justice and forensic fairness. The state had not shown that it was in practice unduly burdensome or impossible for it to discharge its burden. The rationale of the provision, to prevent unduly long *voir dire*s and the prevention of some dishonest accused persons retracting their confessions, were in the Court's opinion rather doubtful and did not justify overriding the important rights mentioned above.¹²³

In *S v Bhulwana; S v Gwadiso*¹²⁴ the Constitutional Court held that the presumption contained in section 21(1)(a)(i) of the Drugs and Drug Trafficking Act which provided that any person found in possession of dagga exceeding 115 grams is presumed to be dealing in such substance unless the contrary was proved, was unconstitutional. O'Regan J noted that the presumption of innocence is a fundamental principle of South African law. Therefore, the imposition of a legal burden on the accused violated the Constitution.

¹²¹ *S v Zuma supra* note 41 587-588.

¹²² Du Toit et al *Commentary* para 24-66B.

¹²³ Du Toit et al *Commentary* para 24-66B.

¹²⁴ *Supra* note 44.

In *S v Coetzee and Others*¹²⁵ the Constitutional Court dealt with the effect of a statutory provision which requires the accused to prove an exemption, exception or defence. In that case, the Court considered section 332(5) of the Criminal Procedure Act which provides:

“When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the offence, unless it is proved that he did not take part in the commission of the offence and that he could have prevented it, and shall be liable to prosecution therefore, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.”

Langa J held that the provision required the accused to prove an element relevant to the verdict and that it was irrelevant whether the section related to an element of the offence or an exemption. The majority rejected Kentridge AJ’s dissenting view that the section did not infringe the right to be presumed innocent because the legislature by creating a special defence in respect of which the accused bears the burden, mitigated the hardship the accused would have suffered had it chosen to create an

¹²⁵ *Supra* note 44.

offence of absolute liability. Consequently, a reverse onus cannot be saved by the “greater includes the lesser test.”¹²⁶

The Canadian Supreme Court has been inconsistent in its determination at the limitation stage. It has also been inconsistent in its determination of whether a less intrusive measure could have met the objectives of the legislation. It has similarly varied in respect of the degree of rationality required between the reverse onus clause and its objective.¹²⁷ Whereas Canadian case law has maintained a strict theoretical stance against reverse onuses, in actual fact, several such provisions are saved under the limitation clause. The South African Constitutional Court on the other hand has maintained a robust approach against such clauses, often declining to find any justification for their existence. While the Canadian Supreme Court tends to justify reverse onus clauses because of pressing social demands, the South African Constitutional Court tends to give more credence to individual rights by insisting on evidence in support of their justification.¹²⁸

8 6 3 *The Botswana approach*

¹²⁶ An American term which represents the argument that since the legislature is not obliged to provide defences to offences, it may determine the rules of proof in relation to any defences it gratuitously creates; Schwikkard *Presumption* 130.

¹²⁷ Schwikkard *Presumption* 162.

¹²⁸ Schwikkard *Presumption* 162; *Scagell and Others v Attorney-General, Western Cape and Others* 1997 (2) SA 368 (CC).

In the case of *Otlhomile v The State*¹²⁹ the matter went on appeal from the magistrate's court to the High Court. The accused had been convicted of stock theft under the Stock Theft Act in the magistrate's court.¹³⁰ Section 4 of the Act provides:

“In any proceedings, where it is proved to the satisfaction of the court that a person was found in possession of any stock or produce reasonably suspected of being stolen it shall be presumed that such person is guilty of an offence under section 3 in relation to the stock or produce concerned, and shall suffer the penalties provided thereunder, unless the contrary is proved.”

Marumo J rejected the state's argument that once it was established that the accused was in possession of the cattle, section 4 kicked in and the accused was liable for conviction unless he proved his innocence to the court. The judge relied on Canadian cases, drawing inspiration from *Downey* and *Oakes*.¹³¹ The Court emphasised that the presumption of innocence and the standard of proof beyond reasonable doubt are embedded in section 10(2)(a) of the Constitution of Botswana.¹³² The Court set out the test in *Downey* in exact terms as was done in *Zuma*. The Court noted that section 10(12)(a) of the Constitution of Botswana limits the presumption of innocence as guaranteed by section 10(2)(a), by permitting the legislature to enact legislation which imposes a burden on an accused to prove specific facts. He noted however that this section merely permits an evidential burden on the accused to prove certain facts and

¹²⁹ *Supra* note 76.

¹³⁰ Cap 09:01.

¹³¹ Reference was also made to South African cases that have followed the Canadian approach.

¹³² *Otlhomile v The State supra* note 76 303.

does not shift the legal burden to him to prove his own innocence.¹³³ According to the Court, section 4 of the Stock Theft Act clearly imposes a legal burden on the accused to establish his innocence upon proof of possession of stock reasonably suspected to be stolen. In effect, rather than being required to prove the offence to the requisite legal standard, the state is excused from doing so. In the Court's view, therefore, section 4 "cannot fit itself into the scheme created by the plain and simple wording of the constitutional provision in question."¹³⁴ The Court noted that contrary to the fundamental principle that the state proves every element of an offence beyond reasonable doubt, section 4 of the Stock Theft Act permits a situation whereby upon proof of possession and a suspicion, the state is relieved of proving any other element of the offence. Instead, a legal presumption is created, placing a burden of proof on the accused. The Court continued: "Once the fact of possession is established, sitting back and awaiting proof of the other elements on the part of the accused is to almost certainly invite a conviction and a minimum imprisonment term of five years."¹³⁵ The Court recognised and adopted the dictum in *Oakes* that if an accused bears a burden of disproving an element of an offence on a balance of probabilities it would be possible to convict despite the existence of a reasonable doubt. For even where the accused raises a reasonable doubt as to his guilt, it "would be a doubt of little or no consequence, for the converse of guilt, ie innocence will not have been established."¹³⁶ The Court therefore concluded that the provision was unacceptable in light of the Constitution and consequently struck it down.

¹³³ 304.

¹³⁴ 304F-G.

¹³⁵ 306A-B. The offence of stock theft carries a minimum sentence of five years imprisonment.

¹³⁶ *Otlhomile v The State supra* note 76 306B-C; see for example, *Patram v The State supra* note 29

126.

The judgment of Marumo J did not mark the end of the matter. The state appealed to the Court of Appeal where Marumo J's decision was overturned by a unanimous decision of five judges.¹³⁷ The Court found that there was a rational connection between the facts to be proved and the facts presumed. Tebbutt JP noted:

“There is, I would agree, a rational connection between the facts to be proved and the facts presumed. There is, I find, a connection between the two in common experience. It would not be irrational to presume that if a person is found in possession of stock eg cattle or sheep of which he is not the owner and of which there is a reasonable suspicion that such cattle or sheep have been stolen, that the person in possession of it has stolen it. That would accord with the circumstances of life as we know them.”¹³⁸

The Court noted that what the prosecution should prove is that the suspicion is a reasonable one on the basis of an objective test. The suspicion must be founded on reasonable grounds objectively viewed.

While agreeing that the provision imposed a legal burden on the accused, the Court recognised three circumstances wherein reverse onus clauses may be justified. First, a reverse onus may be justifiable and rational when it requires the accused to prove facts to which he has easy access and it would be unreasonable to require the prosecution to disprove. Second, where they are necessary for the prosecution of

¹³⁷ *Attorney-General v Otlhomile supra* note 77.

¹³⁸ 25H-26A.

certain types of offences, and third, where in terms of section 3 of the Constitution the presumptions are reasonable and demonstrably justified in a free and democratic society.¹³⁹

The Court proceeded to find for a justification of the provision on the basis of public interests. In so doing, the Court stated that cattle is “a golden thread in the economic fabric of Botswana...”¹⁴⁰ It noted that in many parts of the country, particularly in rural areas, cattle are a person’s most valuable asset, ranking in importance with his dwelling and if he has one, his motor vehicle. In a country like Botswana where much of the economy rests on cattle and other stock, the public interest requires that the rights of the owners be adequately protected from those who would deprive them of ownership. It noted that cattle is capable of being easily stolen. It also noted the high incidence of stock theft in the country. Proving the offence of stock theft is difficult and “those guilty of such theft often in the past escaped conviction because of the state’s inability to prove that they did not come by suspected stolen cattle innocently.”¹⁴¹ According to the Court, the person in whose possession cattle is found can in fact provide facts showing that he came into possession of them innocently. It should ordinarily not be difficult for him to do so as such facts lie within his peculiar knowledge.

¹³⁹ 27. This section provides a general declaration of the guarantee of various civil rights, while stating that each right may be limited to ensure that individual rights do not prejudice the rights of others or the public interest.

¹⁴⁰ 30B.

¹⁴¹ 30C.

The decision of the Court marks a backward step in maintaining equality. The Court did not consider whether a reverse onus clause is the only and most practical step available to the state in combating stock theft. Surely, there are scientific methods available in Botswana for identifying the origins of cattle. The Court made a finding on the prevalence of stock theft without any statistics or other scientific evidence. The assertion that stock theft is at such proportions that it is a threat to the economy was neither demonstrated nor justified. The Court made a skewed juxtaposition of individual rights and the rights of cattle owners when it stated thus:

“In the setting of Botswana society it is my view that in balancing the interests of the rights of its citizens to the protection of their ownership of cattle and other stock and the interests of those thought to infringe those rights to be presumed innocent until proved guilty, the rights of the former must prevail.”¹⁴²

Such statement is surprising, coming from a judiciary that has earned the reputation of protecting fundamental human rights. What is unique about Botswana that justifies the above approach, one may ask. While cattle is a source of individual wealth and pride in Botswana, that does not justify a limitation of such a crucial right as the presumption of innocence, especially in respect of an offence that carries a statutory minimum five year prison sentence. The legislation is certainly harsh and has no place in a democratic dispensation. The Court leaves the law uncertain in respect of the rationalisation of reverse onuses. Though the decision of Marumo J was overturned, the Court merely did so by relying on public interest considerations. The Court

¹⁴² 30E-F.

proceeded to make reference to Canadian and South African cases, but did not state whether it relied on the principles enunciated by the former and followed by the latter. Though the Court held that there was a rational connection between the proved fact and presumed fact, it did not make any doctrinal analysis or clear principles for the purposes of the law of Botswana.¹⁴³ This results in uncertainty and leaves little guidance for future determination of reverse onus clauses. *The Court's justification of the clause results in a violation of a fundamental right which is important in maintaining the balance of equality between the prosecution and the accused.* The rationale of placing the burden of proof on the prosecution is based on the fact that the state is an all powerful entity with massive and unrivalled resources to investigate crime and prosecute cases. The resources of the state range from manpower, administrative, legal, legislative and financial resources. Armed with all these resources, the state has access to information and is generally able to prosecute crime effectively. *The shifting of an onus to an accused therefore further weakens his position in the contest.* It is important therefore that the reversal of burdens should be discouraged in a system that upholds the values of a fair trial.

8 7 Conclusion

The Court of Appeal's saving of the reverse onus in Othlomite, loses sight of the principle of equality of arms which is a fundamental feature of the adversarial system.

The decision unhinges a central procedural feature, proof by the prosecution. The state is relieved of the duty to prove. A vital accused-based right and the matrix of modern procedural constitutionalism are washed away. The Court showed a total lack of faith in the modern adversarial tradition and the basic underlying value which is the

¹⁴³ Cole 2008 *African Journal of International and Comparative Law* 246.

presumption of innocence. It instead put the interest of curbing stock theft ahead of the presumption of innocence, a basic and fundamental procedural right without which the criminal process becomes irrelevant. Clearly, *there is an urgent need for the courts to read in the principle of equality of arms into the constitutionally protected presumption of innocence*. Whereas the courts of Canada, South Africa and Botswana have failed to recognise any nexus between the presumption of innocence and the principle, the statement of Anderson J in the New Zealand Supreme Court¹⁴⁴ is significant and should form the basis of the determination of the constitutionality of reverse onus clauses. In his words:

“Because of prosecutorial difficulty in proving a positive, *an accused who does not have equality of arms in terms of resources, and may lack articulateness, is forced to carry the even heavier burden of proving a negative*. That such negative is subjective and intangible only exacerbates the difficulty for an accused.”¹⁴⁵

The presumption of innocence, which places the burden of proving every elemental aspect of an offence on the prosecution, is a fundamental principle of modern constitutional and procedural theory. Any unjustified reversal of the presumption undermines the application of the principle of equality of arms and the right to a fair trial. Such reversal weakens the protection which the presumption affords to the accused. Up until the *Otlhomile* case, the courts in Botswana have followed the positivist approach. This is as a result of the influence of the English common law.

¹⁴⁴ *Paul Rodney Hansen v The Queen supra* note 2.

¹⁴⁵ Para 280. (Emphasis added).

Whereas the introduction of bills of rights in Canada and South Africa had an immediate impact which resulted in a shift to the constitutionalist approach, Botswana maintained the positivist approach even though it has had a Bill of Rights since 1966. Perhaps this is due to the fact that the constitutionality of reverse onuses had never been questioned in the courts. In *Otlhomile*, it is interesting to note that the issue was raised by the judge *mero motu*. The results of the *Otlhomile* case are encouraging in that the recognition that a reverse onus infringes on the presumption of innocence has the effect of curing the great disadvantage that reverse onuses causes to the accused. What is disheartening however is that the Court of Appeal decided to justify the offending provision. Even the Court's analysis and finding that the clause was unconstitutional was begrudging and cursory while most of the judgment was dedicated to its justification. This creates a nagging feeling that the present Court of Appeal will if faced with the question of constitutionality in the future will follow the Canadian approach of finding for invalidity but justifying the offending provision. There are several reverse onus clauses in the statute books of Botswana. Generally, such clauses are usually determined on a case by case basis. Therefore, even where there are successes in relation to their being struck down, many accused persons will still be faced with situations where they carry the risk of non-persuasion as it will take a lot of challenge and litigation before such provisions are determined. This does not augur well in maintaining the balance between the prosecution and accused, a cardinal demand of modern criminal jurisprudence. The presence of reverse onus clauses in the statute books makes everyone presumptive criminals. For example, if cattle stray into someone's land, the law declares him a thief. He faces the difficulty of explaining that he was indifferent to the presence of the cattle, or was making a search to find the owner, or that he just arrived from work and found them there. Several times, the

explanation of the innocent is ridiculous, unbelievable, and cannot be corroborated. Therefore, reverse onuses, puts the entire populace in danger of being accused of an offence and being convicted.

It must be noted that it is the accused who needs the presumption of innocence. By the time a case is taken to court, the stacks are against him. The prosecution has completed its investigation. They believe that they have reasonable prospects of success. The accused needs the presumption of innocence to level the playing field. But unfortunately, the legislature further assists the prosecution by asking the accused to prove something. It is the prosecution who comes with allegations and must be called upon to prove them. “The presumption of innocence, which is in reality not a presumption...is merely a statement of the prosecutions’ burden of proof.”¹⁴⁶ The presumption of innocence represents the allocation of the burden of proof. The prosecution alleges that the accused is guilty. By taking a case to court they believe that they have reasonable prospects of success. This implies that they have evidence to substantiate their claim. Unfortunately, parliament says that the accused is considered guilty and must prove the contrary. If the prosecution is favoured by a statutory provision which reverses the burden of proof, it is inevitable that there will be convictions despite a reasonable doubt. Clearly, the reversal of proof is the greatest impediment to equality of arms.

¹⁴⁶ Rothblatt *Handbook of Evidence for Criminal Trials* (1965) 60.

CHAPTER 9

THE RIGHT TO INFORMED AND EQUAL PARTICIPATION BY THE ACCUSED

9 1 Introduction

The essential notion of a fair trial is that the parties must have an equal opportunity to present their cases and, in particular, that an accused should be present to take part in his trial and be able to comment on the evidence of the prosecution.¹ The ability of the accused to present his case in his defence is a fundamental pillar of the principle of equality of arms. The cardinal rule of natural justice is *audi alteram partem* – let the other side be heard – and the extent to which the accused is procedurally able to present his defence, is essential to the notion of a fair trial. Conceptually, the right to adversarial proceedings arises from the right to be heard. The right to participate and be heard demands that the person against whom a decision is to be taken must be heard and must be given an opportunity to defend himself.² This requires that he be given an opportunity

¹ Clayton & Tomlinson *The Law of Human Rights I* (2000) 647; Plowden & Kerrigan *Advocacy and Human Rights: Using the Convention in Courts and Tribunals* (2002) 407; Cassim “The Right to be Present: A Key to Meaningful Participation in the Criminal Process” 2005 *Comparative and International Law Journal of Southern Africa* 285; see generally Cassim *Meaningful and Informed Participation in the Criminal Process* (2003); the right of the accused to put his case before the court in which he is charged is guaranteed by article 6(1) of the European Convention, article 14(1) of the ICCPR and article 8(1) of the American Convention on Human Rights.

² Trechsel *Human Rights in Criminal Proceedings* (2005) 89; Kofele-Kale “Presumed Guilty: Balancing Competing Rights and Interests in Combating Economic Crimes” 2006 *International Lawyer* 909 918; Cassim *Meaningful and Informed Participation* 306; *Mbisana v Attorney-General and Another* [1999] 1 B.L.R. 189; “The basic rule is that an accused must be present at the trial of any issue and afforded an

to present his evidence and arguments.³ The right to be heard assists the court in arriving at a value judgment.⁴ The accused's case is heard and he is given an opportunity to influence the decision of the court.⁵ He may be of assistance to the court as he may have information which is unknown to the court.⁶ The right underlies the proposition that the accused is a subject and not an object of the proceedings.⁷ It plays a major factor in the accused's acceptance of judgment and sentence of the court.⁸

The accused's right to participate in his trial consists of a number of component or cluster rights that are crucial to the realisation of this over-arching right. These cluster rights are of immediate relevance to the presentation of the accused's case. They are all inter-related and overlapping and tend to strengthen the accused as a courtroom adversary. Characteristically, they take the form of two overlapping divisions. The *first* is the right to challenge. The accused has a right to challenge the evidence of the prosecution. Examples of these rights are the overarching right to confrontation, the right to be present at the proceedings, the right to understand the proceedings and the right to cross-examine

opportunity to produce evidence and make representations.”: *State v Segana Ntibi* [1968-1970] B.L.R. 330 331.

³ Trechsel *Human Rights* 89; Jackson “The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment” 2005 *Modern Law Review* 737 751.

⁴ Trechsel *Human Rights* 89.

⁵ Trechsel *Human Rights* 89.

⁶ Trechsel *Human Rights* 89.

⁷ Trechsel *Human Rights* 89.

⁸ Trechsel *Human Rights* 90; Casper “Having their Day in Court: Defendant Evaluation of the Fairness of their Treatment” 1978 *Law and Society Review* 237.

prosecution witnesses. The *second* is the right to produce. The accused has a right to produce evidence in his defence. In this regard the accused has a right to testify, the right to call witnesses and the negative right to elect to remain silent. It must be noted however that these rights overlap and easily fit into both categories. The right to be tried in the language he understands overlaps both into the spheres of the right to confront and the right to produce, for the accused cannot do either if he does not understand the proceedings or if he cannot communicate with the court. The right to cross-examination also falls under the overlapping regime, since the purpose of cross-examination is to challenge the evidence of the prosecution witnesses and to put the version of the accused before the court at the earliest opportunity.

Before discussing the component rights, it must be noted that their realisation are dependent on a collateral and primary enabling duty which demands that the accused be assisted in the exercise of his procedural rights. The right is fundamental to the accused's participation in the proceedings. A discussion of the enabling process is apt at this stage.

9 2 The primary enabling duty and the holding-hand process

Unless the accused is able to appreciate the procedure and legal steps involved in the proceedings, he cannot effectively defend himself or exercise the rights available to him. An accused has a right to understand criminal proceedings and basic legal steps, otherwise, there can be no equality between the parties and the proceedings become a mere formal procedure, with the accused being unable to access justice. In a situation where the accused is unrepresented, the duty of enabling the accused lies with the judicial

officer. Due to economic inequalities between the state and the unrepresented accused or even where he is represented, the courts should take a stand in lessening the inequalities in the court room.⁹ The principle of equality of arms demands that the prosecution and accused are procedurally equal before the court. Therefore, the court has a duty to assist the accused. Failure of the court to assist an unrepresented accused may render the trial unfair especially if the accused suffers prejudice. To this extent, it might be said that the unrepresented accused has a right to be assisted by the courts.

9 2 1 Evidential and instrumental procedural obstacles

Impediments to access to justice are normally discussed around issues of lack of funds to hire a lawyer or lack of court structures and staff, especially in rural areas. But when faced with the practicalities of third world countries where basic services are a luxury, the ability of the state to provide services like legal aid is mostly far-fetched. In such states, one is therefore faced with a scenario where thousands of accused persons go through the criminal justice system without the assistance of a lawyer. Usually, the state is legally bound to provide lawyers only in cases involving the capital punishment. This situation is compelled by the lack of resources. Even if the resources were available, the manpower and political will may be lacking. A situation wherein an accused is compelled to conduct his own defence can be compared with a situation where sick persons are required to diagnose their own diseases and administer self-medication.

⁹ Meernik "Equality of Arms? The Individual vs. The International Community in War Crimes Tribunals" 2003 *Judicature* 312 315.

A criminal trial consists of evidential and instrumental procedural processes. These processes may be unintelligible to the unrepresented accused. In this regard, they become obstacles. *Evidential procedural processes* directly relate to the rules governing presentation of evidential material in court. From the perspective of the accused, such processes include his ability to present his evidence fully, to present his defence fully and to be afforded the facilities to do so.¹⁰ *Instrumental procedural processes* enable the accused to access the courts through rules of procedure. Without knowledge of the law regulating the procedure, the litigant is lost and this places him at a great disadvantage *vis-a-vis* the prosecution. To bring any semblance of equality to the system, the courts are left with no alternative but to alert the unrepresented accused to the basic and fundamental rules of procedure. The unrepresented accused is in a difficult position basically because of his lack of knowledge of court procedure. In this regard, the courts have a positive duty in granting such accused persons procedural access to the courts. This includes explaining the procedures, and carrying the accused through them while also condoning their irregularities to some extent. The courts are under a duty to engage in a process of continuous information in relation to the accused.

The accused is denied full access to the court's system if he is unaware of and unable to use the basic court mechanisms. They are unintelligible to the accused. This kind of access is inanimate or intangible. He is not even aware of their existence and even when brought to his attention, he may not even know how they assist his case. Though these instruments are obstacles in a latent sense, they may result in a positive breach of the

¹⁰ *Motshwane and Others v The State* [2002] 2 B.L.R. 368.

accused's rights if his failure to use them results in prejudice. It can be said therefore that they manifest themselves in the form of rights. The court process consists of mechanisms that enable the litigant to access the court and follow the procedures. Initially, a litigant may have to file certain documents to ignite legal proceedings. Once this is done, the filing of a number of documents will follow. In a criminal trial, while it may not be necessary for the accused to file any document for simple straightforward trials, he may still be at a loss as to the procedural steps involved. The judicial officer therefore has a duty to ensure that the accused does not suffer inequality due to his lack of knowledge of the formal process.

9 2 2 Special judicial enabling duty

There is an emergent legal culture imposing a special duty on the court to assist the accused. The courts have a duty to ensure that an accused, especially when he is unrepresented, gets a fair trial.¹¹ Without descending into the arena, a trend has arisen whereby the court assists an unrepresented accused. This is crucial in ensuring that the accused gets access to the court as well as promoting the principle of equality before the law. Access to the court involves enabling the accused to use the rules of procedure efficiently, failing which he might suffer unfair advantage. This requires that the accused be fully informed of legal rules. In South Africa, judicial assistance and the duty of the courts to inform accused persons of various rights appear to have constitutional

¹¹ *Lesetedi and Another v The State* [2001] 1 B.L.R. 393; *Gare v The State* [2001] 1 B.L.R. 143 (CA); *Morobatseng and Others v The State* [2003] 1 B.L.R. 466; *Chanda v The State* [2007] 1 B.L.R. 400 (CA); see also the Australian cases of *Ragg v Magistrates' Court of Victoria & Corcoris* [2008] VSC 1; *Tomasevic v Travagnili* [2007] VSC 337.

backing.¹² There is also a general rule of law requiring the courts to assist the unrepresented accused in conducting his case.¹³ The duty to inform the accused of his right to legal representation and legal aid are also constitutionalised.¹⁴ The South African Criminal Procedure Act¹⁵ also empowers the court to question witnesses or to subpoena witnesses other than those called by the parties as well as to recall witnesses. The court is obliged to exercise these powers if it is essential to the justice of the case and a failure to do so will amount to an irregularity.¹⁶ Botswana and South African case law also requires courts to explain to undefended accused persons certain statutory provisions,¹⁷ as well as unfavourable presumptions so as to enable them to give evidence to rebut such presumptions if they so desire.¹⁸

¹² S 35(3)(f) & (g) of the South African Constitution.

¹³ Steytler notes: “The court is obliged to inform the accused of some of his procedural rights and duties and to assist him in exercising some of those where he clearly experiences difficulty in doing so.” Steytler *The Undefended Accused on Trial* (1988) 222; Bekker “The Right to Legal Representation, Including Effective Assistance, for an Accused in the Criminal Justice System of South Africa” 2004 *Comparative and International Law of Southern Africa* 173 181; Meernik 2003 *Judicature* 315; see the Botswana cases of *Obonetse Ngakaemang v Regina* [1964-1967] B.L.R. 131; *Walter Madisa v Regina* [1964-1967] B.L.R.157; *Mmopi and Another v The State* [1986] B.L.R. 8; *Moima v The State* [1982] 1 B.L.R.112; *Mhaladi v The State* [1990] B.L.R. 168; *Tsie v The State* [1999] 2 B.L.R. 305; *Kelebile v The State* [1983] B.L.R. 92; see also the South African case of *S v May* 2005 (2) SACR 331 (SCA).

¹⁴ S 35 (3)(g) of the South African Constitution.

¹⁵ S 167 of the Criminal Procedure Act.

¹⁶ *S v Mayiya* 1997 (3) BCLR 386 (C).

¹⁷ *Gaosenkwe v The State* [2001] 1 B.L.R. 324; *S v Ngwani* 1990 (1) SACR 449 (N).

¹⁸ *Gare v The State supra* note 11; *Gaosenkwe v The State supra* note 17; *S v Lango* 1962 (1) SA 107 (N); see also the Namibian case of *S v Kau and Others* [1993] NASC 2; 1995 NR 1.

The courts in Botswana have moved towards the enabling or hand-holding process. While there is an underlying principle of court assistance in respect of unrepresented accused persons,¹⁹ such assistance continues to develop piecemeal and on a case by case basis rather than by any positive or general rule of law. Thus, the court has a duty at the close of the prosecution's case to explain the accused's rights and options in full.²⁰ An accused should be informed of his right to cross-examine, to object to the tendering of evidence, and of the risk of his being convicted of a lesser offence even if acquitted of the

¹⁹ “When a person is on trial for a serious offence and does not have the advantage of legal representation I consider that it is essential that the magistrate should offer advice by way of explaining court procedure to such a person. An unrepresented accused is under a severe disadvantage. If he is given no assistance on matters of procedure that one would not necessarily expect to be known to an unrepresented accused person injustice could easily result.”: per Murray J in *Mmopi and Another v The State* *supra* note 13 10F-H; *State v Ncube* [2008] 1 B.L.R. 64; the court has a duty to warn an unrepresented accused of the consequences of asking incriminating questions in cross-examination: *State v Khumo Khumo and Tumelo Gaoage* CRHFT-000019-07 (unreported).

²⁰ See *Obonetse Ngakaemang v Regina* *supra* note 13; *State v Rantabana and Another* [1981] B.L.R. 255; *State v Molatlhegi* [1997] B.L.R. 911; *Mhaladi v The State* *supra* note 13 on failure of the court to ask the accused whether he intends to adduce evidence in his defence; *Tshukudu v The State* [2000] 1 B.L.R. 400. At 402G-H Dibotelo J had this to say: “In my view it is often not enough for a trial court, especially where an accused is not represented by counsel, merely to record that it had fully explained to the accused his rights without briefly recording on the record what those rights were and any such omission may be fatal to a conviction.”; *Boniface v The State* [2002] 1 B.L.R. 183; *Morobatseng and Others v The State* *supra* note 11; where the accused is represented his attorney may perform this duty: *Tsae v The State* [2003] 2 B.L.R. 55 (CA).

offence with which he is charged.²¹ Also, a court may not convict an accused on the basis of a guilty plea. Where an accused pleads guilty to a charge, the facts of the case must be presented to the accused and he must be asked whether he admits to all the elements of the offence.²² For instance, in a case of rape the accused should be asked if he admits to (a) unlawfully having had sexual intercourse with the complainant and (b) that it was without her consent.²³ Particular care should be taken where there is a statutory defence to the offence. Thus, in a case of defilement the accused should not only be asked if he had sexual intercourse with the victim and if she was below the age of sixteen. He should also be asked if he admits that (a) he knew that the girl was below the age of sixteen or (b) that he had no reasonable grounds to believe that she was below sixteen.²⁴ A court should only enter a plea of guilty when the accused admits to all the essential elements of the offence. If the accused disagrees with an essential element the court cannot conclude that his plea was unequivocal.²⁵ Instead, a plea of not guilty should be entered and the matter should proceed to trial. The courts have warned that a formalistic approach should

²¹ *Ntwayame v The State* [2008] 1 B.L.R. 167 (CA); *State v Ncube supra* note 19; *Chalaome v The State* [1986] B.L.R. 261 (CA); *State v Sethunya* [1986] B.L.R. 483; *State v Mponda* [1986] B.L.R. 286.

²² See *Practice Direction* Judicial Circular No 1 of 1975 (Conviction on an Unequivocal Plea of Guilty) [1984] B.L.R. 256; *State v Monthopitsa* [1981] B.L.R. 207; *Tachipulu v The State* [1987] B.L.R. 188; *Makuni v The State* [1984] B.L.R. 257; *State v Maphorisa* [1988] B.L.R. 65; *Kolagano v The State* [1992] B.L.R. 49; *Nchindo v The State* [1996] B.L.R. 927; *Mmolotsi v The State* [2001] 2 B.L.R. 621; *Kebiditswe v The State* [2004] 1 B.L.R. 386.

²³ *Practice Direction supra* note 22.

²⁴ 257.

²⁵ *Kolagano v The State supra* note 22; *Ledimo v The State* [1986] B.L.R. 78; *Moipei v The State* [1986] B.L.R. 14.

be avoided and the *Practice Direction*²⁶ on recording a guilty plea need not be followed with exactitude.²⁷ This procedure clearly enables the accused to understand the legal position²⁸ and to participate in the proceedings as well as balancing the level of equality in the plea process.

Also, during the course of the trial, if it appears to the court that the accused may be convicted of a lesser offence, he should be so informed and should be given an opportunity to defend himself in respect of that offence when he prepares his defence.²⁹ Thus in the case of *State v Bareki*³⁰ it was held that on a charge of rape, where the complainant is alleged to have been under the age of sixteen years, if the accused is undefended he must be alerted that a conviction of defilement is a competent verdict and must be afforded the opportunity of meeting additional issues such as the age of the complainant if it appears that he is in danger of a conviction for defilement. It has been held that the accused is entitled to an acquittal if he was not advised of the special defence set out in section 147(5) of the Penal Code.³¹

²⁶ *Supra* note 22.

²⁷ *Lucas Mapiwa v The State* Miscellaneous Criminal Appeal No F132 of 2001 (unreported); *State v Kabelo* [1979-1980] B.L.R. 241 242; *Macheme Ncube v The State* (CA) Criminal Appeal No 36 of 1998 (unreported); see also *Van Niekerk and Another v The State* [1968-1970] B.L.R. 60 (CA) where an earlier, but similar Practice Direction was considered.

²⁸ *Galebonwe v The State* [2002] 1 B.L.R. 46 (CA); *Moshokoa v The State* [1999] 1 B.L.R. 172.

²⁹ *Chalaome v The State supra* note 21; *State v Sethunya supra* note 21.

³⁰ [1979-1980] B.L.R. 35.

³¹ *Gare v The State supra* note 11; *Ramabe v The State* [2002] 1 B.L.R. 523; *Galebonwe v The State supra* note 28; *Matlakadibe v The State* [2004] 1 B.L.R. 44 (CA); *Tsunke v The State* [2004] 2 B.L.R. 155;

In the case of *Rabonko v The State*³² the Court was alive to the disadvantages and inequalities an unrepresented accused suffers in presenting his case and the attendant duty of the court to bridge the gap. In that case the appellant had been charged with and convicted of attempted rape. In fact, the evidence of the complainant was to the effect that he had raped her. In cross-examination his only question to her was “Did I rape you?”, to which she answered in the affirmative. Also to the mother of the complainant who testified that the complainant reported the rape to her, the appellant’s only question was, “Did your daughter say I raped her?” At the close of the state’s case after his rights had been explained to him, he stated: “[M]y defence is the medical results from the doctor nothing else to say.” The doctor’s opinion was that there was no evidence of penetration. Clearly, the accused thought that he was charged with rape. The Court noted that notwithstanding the clear misunderstanding on the part of the accused that he was charged with rape, the magistrate did not explain the real charge to the accused nor was the object and purpose of cross-examination explained to him. The Court proceeded to set out the duty of the presiding officer in relation to an unrepresented accused as follows:

Mfwazala v The State [2007] 3 B.L.R. 476; *Gaosenkwe v The State supra* note 17. Section 147(5) provides: “It shall be a sufficient defence to any charge under this section if it appears to the court before whom the charge is brought that the person so charged had reasonable cause to believe and did in fact believe that the person was of or above the age of 16 years or was such charged person’s spouse.”; In *Kgopiso v The State* [1986] B.L.R. 446, it was held that a trial court has a duty to alert an accused of self-defence on a charge of grievous harm.

³² [2006] 2 B.L.R. 166.

“An accused person has in terms of s 10(1) of the Constitution an entitlement to a fair trial. In my view, a fair trial cannot be reali[s]ed where an accused person does not understand the import of the criminal proceedings which he is facing nor have a rudimentary idea as to how not only to present his case but to conduct his defence by way of putting the essential elements of his defence to the prosecution witnesses. That there is a duty upon a presiding officer to assist an accused person who is unrepresented and seems not to understand the court procedures, in the conduct of his defence has been expressed in a number of cases...[W]here a magistrate fails to render advice by way of explaining court procedure to an unrepresented accused person who is under a severe disadvantage of failing to appreciate the procedure, such a failure may result in an injustice being occasioned.”³³

This case presents a classic example of the effects of inequality and the injustice caused as a result. But more significantly, it recognises the inequality and disadvantage suffered by the unrepresented accused. Indeed it is a statement of the principle of equality of arms. It also brings to the fore the solemnity of the duty of judicial officers as enforcers of equality and balance. The appellant in this case, believing that he was charged with rape, clearly based his defence on the fact that there was no evidence of penetration from the medical evidence. The Court noted that instrumental procedural processes are clearly

³³ 168D-F; “...[I]n a contest where the undefended accused is patently unequal to the prosecution in ability and resources, a judicial officer, by remaining passive and allowing the prosecutor to take unfair advantage of the accused’s inability, sides most decidedly with the prosecution.”: Steytler *The Undefended Accused* 230.

inaccessible to accused persons. It enjoins judicial officers to assist unrepresented accused persons. The implications of this case and indeed the hand-holding process are three-fold.

First, it represents a paradigm shift in the prevailing criminal procedure model. No longer is a strict adversarial model permissible. Certainly, not when the accused is unrepresented. The Court is duty bound to ensure that the accused gets a fair trial. In so doing, the court should ensure that he understands the proceedings by engaging him in the evidential and procedural processes. This duty is meant to obviate the disadvantages and equalities suffered by the unrepresented accused.

Second, new normative values are introduced into the system. The hand-holding process certainly creates a new set of norms centred around the duty and role of the judicial officer. He becomes more engaged and drawn into the system. He is compelled to explain the rights of the accused at various stages in the proceedings and perhaps to continuously guide the accused when it appears that he is handicapped and awed by the legal process. In this regard, the system has embraced a new procedural order. This order is the result of an acknowledgement that due to his inability to appreciate complex legal procedures, the accused suffers a disadvantage in the criminal justice system. Effectively, a procedural right to informed participation in the criminal process is confirmed.

Third, there is implicit countenance of the principle of equality of arms. The disadvantage and prejudice suffered by the unrepresented accused are recognised. This situation results

in unfairness. Hand-holding represents the judicial officer's attempt to maintain the balance of the trial.

9 3 Incidences of the right to challenge and the correlative right to produce

9 3 1 The right to be present at his trial

9 3 1 1 The right to confrontation

The right to confrontation can be traced back to Roman law which required that an accused be given an opportunity to defend himself face to face with his accusers.³⁴ The practice of bringing accusing witnesses before the accused has been practised by the English for centuries in a system called "altercation".³⁵ The right to confrontation is regarded as closely related to the right of the accused to be present at his trial, the right to present his case,³⁶ and the right to cross-examination. As Cassim notes: "Cross-examination is regarded as an example of confronting one's adversary. Thus, the right to challenge evidence may well include the right to confrontation."³⁷ Confrontation gives the accused and the court an opportunity to observe the demeanour of witnesses as they

³⁴ Cassim "The Rights of Child Witnesses Versus the Accused's Right to Confrontation: A Comparative Perspective" 2003 *Comparative and International Law Journal of Southern Africa* 65; Cassim *Meaningful and Informed Participation* 273; see also *State v Segana Ntibi supra* note 2.

³⁵ Cassim 2003 *Comparative and International Law Journal of Southern Africa* 65-66; Langbein *The Origins of Adversary Criminal Trial* (2005) 13-16; Cassim *Meaningful and Informed Participation* 274.

³⁶ Cassim 2003 *Comparative and International Law Journal of Southern Africa* 66.

³⁷ Cassim 2003 *Comparative and International Law Journal of Southern Africa* 66.

give evidence and to determine their credibility.³⁸ This was echoed by Colman J in the South African case of *S v Motlatla*³⁹ when he noted:

“...[E]xcept in special circumstances which were not relevant here, every criminal trial shall take place, and the witnesses shall give their evidence, *viva voce*, in open court in the presence of the accused. That is a very important provision in our criminal law and it means more than that an accused person must know what the State witnesses are saying or have said about him. It means even more than that he shall be able to hear them saying it. There must be a confrontation; he must see them as they depose against him so that he can observe their demeanour. And they for their part must give their evidence in the face of a present accused.”⁴⁰

The United States Supreme Court has noted that the right of an accused to confront and cross-examine witnesses and to call witnesses of his own is a well-recognised essential to due process.⁴¹

³⁸ Indeed, the accused has a right to be present and hear all the evidence led against him; *Lee v Illinois* 476 U.S. 530 (1986); see Muller “The Effect of the Accusatorial System on the Child Witness” 2000 *Child Abuse Research in South Africa* 2000 13 14; O’Neil “Davis & Hammon: Redefining the Constitutional Right to Confrontation” 2007 *Connecticut Law Review* 511 513; Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche & Van der Merwe *Criminal Procedure Handbook* 8 ed (2007) 82.

³⁹ 1975 (1) SA 814 (T); Cassim *Meaningful and Informed Participation* 275.

⁴⁰ 815D-F.

⁴¹ *Chambers v Mississippi* 410 U.S. 284 (1973).

9 3 1 2 Procedural considerations

The presence of the accused during his trial is important even where he is represented by an attorney. Section 178(1) of the Criminal Procedure and Evidence Act, provides that evidence shall be given in the presence of the accused, unless he conducts himself in a manner that makes his presence impracticable. Since the presence of the accused at his trial is so vital, he should be put on notice in the event that his conduct warrants his expulsion from court. Therefore, before an accused is ordered out of court it is desirable to warn him of the consequences of his conduct, namely, that if he persists in disrupting the proceedings he will be removed from the court and that the trial will be continued in his absence.⁴²

The importance of the accused being able to present his defence by giving evidence was highlighted in the English case of *R v Cunningham*.⁴³ In that case the appellant, a male, was charged with *inter alia* defrauding the Department of Health and Social Sciences in that he had claimed supplementary benefit by claiming that he was a married woman with three children. His defence was that there had been no dishonesty as the representations were true. Accordingly, an application was made that he attend court dressed as a woman. The judge stated that he would not allow him to appear in court dressed “in a

⁴² *Mafunye v The State* [1990] B.L.R. 474 476; *Lekgotla v The State* [1990] B.L.R. 445; *Tshupo and Others v The State* [1991] B.L.R. 230; *R v Pauline* 1928 TPD 643; *S v Maoka* 1985 (1) SA 350 (O); Cassim 2005 *Comparative and International Law Journal of Southern Africa* 295.

⁴³ 1988 *Criminal Law Review* 543.

frock.”⁴⁴ The appellant was not arraigned and the court entered pleas of “not guilty.” His counsel, assuming that the judge’s ruling meant that the appellant would not be allowed in court and thus would not be allowed to give evidence, cross-examined a prosecution witness on matters of credibility, putting previous convictions of dishonesty to him. This situation opened the appellant to grave embarrassment in the event that he gave evidence. At the close of the prosecution’s case, counsel stated that he could not call the appellant to give evidence because of the judge’s ruling. The judge stated that he was willing to reconsider his earlier ruling if the appellant wished to give evidence. He stated that he did not intend to shut him out from giving evidence and that he had anticipated that counsel would ask at the end of the prosecution case whether the ruling extended to the appellant giving evidence. Counsel however stated that he had conducted the defence on the basis that the appellant would not give evidence and that he would have conducted the matter differently had he anticipated that the appellant would be permitted to give evidence in a dress.

The conviction was quashed by the Court of Appeal as the trial judge did not make himself explicit at the start of the case when he said that he would not allow the appellant in the courtroom dressed in a frock. Had he considered the consequences of such a sweeping statement, he would have added a rider that the appellant would be permitted in

⁴⁴ Suggesting that the appellant wears “neutral garb”, the judge stated: “Your client can appear in this court appropriately dressed as a man otherwise he or she can stay in the cells. If he wants to give evidence he can come appropriately dressed. I am not having this court turned into a rarity show for an exhibitionist transvestite unless you can point to some authority from a higher court.”: *R v Cunningham supra* note 43 543.

court to give evidence, no matter how he was dressed. The misunderstanding which arose had the effect of depriving the accused of his right to give evidence. The Court held that, so fundamental was that right that the deprivation amounted to a material irregularity.⁴⁵

In another English case,⁴⁶ the judge imposed restrictions on the accused's right to call witnesses and to address the jury due to his intolerable behaviour. The accused defended himself. In the exceptional circumstances of the case, this was held justified as the accused's rights had to be read in context with the judge's obligation in ensuring a proper conduct of the trial as a whole. The Court noted that the right does not give the accused licence to behave as he likes and say what he wishes, irrespective of the impact of his behaviour on the proper conduct of the proceedings. The accused's rights were not to be used to frustrate the course of justice.

Interestingly, the European Convention does not specifically demand the presence of the accused at his trial.⁴⁷ Article 6(3)(c) provides that the accused may defend himself in person or through legal assistance of his own choosing. This led to a tendency to apply the provision restrictively. The Commission gave a restrictive interpretation to this provision, stating that while it guarantees that the trial does not take place without adequate presentation of the case for the accused, it does not give the accused the right to

⁴⁵ 544.

⁴⁶ *R v Morley* [1988] 2 All E.R. 396.

⁴⁷ Stavros *The Guarantees for Accused Persons Under Article 6 of the European Convention on Human Rights: An Analysis of the Application of the Convention and A Comparison with other Instruments* (1993) 194.

determine for himself in what manner his defence will be secured. The decision as to which of the two alternatives should apply (that is whether the accused should defend himself or be represented by attorney of his choice on the one hand, or whether a lawyer would be appointed by the court on the other) depends on the relevant officials concerned.⁴⁸ However, there is more progressive European jurisprudence on this issue, and the European Court has recognised the right of an accused to be present and take part at an oral adversarial trial.⁴⁹ The Court has held that a trial in the absence of the accused will only be acceptable if the state has made diligent but unsuccessful efforts to trace him⁵⁰ or if he has unequivocally waived such right.⁵¹ The European Court has also extended the accused's right of presence to appellate proceedings. In *Belziuk v Poland*⁵² the government argued that the public prosecutor was present at an appellate hearing not in his capacity as prosecutor but as "guardian of the public interest." The Court however noted that the prosecutor's submissions were directed towards having the accused's appeal dismissed and his conviction upheld. It noted therefore that respect of the principle of equality of arms and the right to adversarial proceedings required that the appellant be present to contest the submissions of the prosecutor.

⁴⁸ Stavros *The Guarantees* 194.

⁴⁹ *Colozza v Italy* (1985) 7 E.H.R.R. 516; *Monnell and Morris v United Kingdom* (1985) 7 E.H.R.R. 579; *Zana v Turkey* (1999) 27 E.H.R.R. 667; *Brandstetter v Austria* (1993) 15 E.H.R.R. 378.

⁵⁰ *Colozza v Italy* *supra* note 49.

⁵¹ *Colozza v Italy* *supra* note 49; *Albert and Le Compte v Belgium* (1983) 5 E.H.R.R. 533; *Poitrimol v France* (1993) 18 E.H.R.R. 130.

⁵² (2000) 30 E.H.R.R. 614.

9 3 2 *The right to testify and the right to remain silent*

9 3 2 1 The right to testify

The requirement that a person against whom an allegation is made shall be given an opportunity to say something in his defence, is universally engraved in every civilised legal system. The European Court has developed the right to be heard not just in relation to the principle of equality of arms, but also as a principle that the accused must be present and all evidence must be produced in his presence within the adversarial context.⁵³ Section 177 of the Criminal Procedure and Evidence Act of Botswana provides that every person charged with an offence is entitled to make a defence. The court has a duty to explain his rights in full at the close of the prosecution's case. The effect and consequences of giving evidence on oath, making an unsworn statement or remaining silent should be explained so that the accused makes an informed decision.⁵⁴

9 3 2 2 The right not to testify

If the accused has a right to testify, then he should also be able to exercise a concomitant right not to testify⁵⁵ without any adverse consequences. The question here is whether the exercise of a right to silence can be used as substantive evidence of guilt. United States jurisdictions are split on this issue. The United States Supreme Court in the case of

⁵³ Jackson 2005 *Modern Law Review* 752; *Barbera, Messegue and Jabardo v Spain* (1989) 11 E.H.R.R. 360.

⁵⁴ *S v Makhubo* 1990 (2) SACR 320 (O); "Every criminal defendant is privileged to testify in his own defence, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.": *Harris v New York* 401 U.S. 222, 225 (1971).

⁵⁵ Laws "Beyond Rights" 2003 *Oxford Journal of Legal Studies* 265 274.

*Griffin v California*⁵⁶ held that a prosecutor may not comment on an accused's choice not to testify at his trial. It forbids an imposition of a penalty – the “penalty doctrine” – on the accused for relying on a constitutional privilege⁵⁷ or his constitutional passive defence as it has been more recently described.⁵⁸ *Griffin* has been stretched out with time. In an extension of this approach, judges may if defence counsel so requests, instruct juries not to draw an adverse inference from the accused's failure to testify.⁵⁹ Though dealing with the failure of the accused to testify at his trial, it has been extended to pre-trial silence.⁶⁰ The Court⁶¹ has also used a combination of the *Miranda*⁶² warnings and the penalty doctrine in support of its conclusion that any adverse use, whether substantive or for impeachment purposes, of pre-trial silence, amounts to a violation of the accused's due process rights.⁶³

In the Canadian case of *R v Noble*⁶⁴ the Supreme Court held that the failure of an accused to testify could not be used as evidence of guilt. The Court reasoned that if silence is

⁵⁶ 380 U.S. 609 (1965).

⁵⁷ 614.

⁵⁸ Van der Merwe “The Constitutional Passive Defence Right of an Accused *Versus* Prosecutorial and Judicial Comment on Silence: Must We Follow *Griffin v California*?” 1994 *Obiter* 1.

⁵⁹ *Carter v Kentucky* 450 U.S. 288 (1981).

⁶⁰ Ciarelli “Pre-Arrest Silence: Minding That Gap Between Fourth Amendment Stops and Fifth Amendment Custody” 2003 *Journal of Criminal Law and Criminology* 651 661.

⁶¹ *Doyle v Ohio* 426 U.S. 610 (1976).

⁶² *Miranda v Arizona* 384 U.S. 436 (1966).

⁶³ *Doyle v Ohio supra* note 61 618; see Ciarelli 2003 *Journal of Criminal Law and Criminology* 662.

⁶⁴ (1997) 146 D.L.R. (4th) 385.

treated as evidence, the accused has no alternative but to furnish evidence whether he desires to testify or not. It went on to state that the use of silence to establish a *prima facie* case infringes on the presumption of innocence because it actually relieves the prosecution of the duty to establish a *prima facie* case without the assistance of the accused.⁶⁵ The state, it is argued, should establish a *prima facie* case from sources other than the accused.⁶⁶ One should note that flowing from this reasoning, the drawing of an inference of guilt from failure to testify will infringe on the principle of equality of arms. Not only does it relieve the prosecution of proof, it demands proof from the accused. The right of the accused not to offer any evidence and to demand proof from the prosecution is his greatest protection against the might of the state. Its rationality is obvious in view of the fact that the accused has a minimum of evidence. Without the ability to gather evidence, the defence of the accused is mostly a mere denial of the state's case or the setting up of a defence in law. The success of the accused's case is largely dependent on its success in discrediting the evidence of state witnesses rather than on his denial. The accused's denial usually gains strength when the state's case is discredited or fails to meet the relevant standard of proof.

On the other side of the argument, the rule against self-incrimination has been criticised on the grounds that its historical basis is no longer relevant in present day society, that it is a bane in truth seeking and a shield for criminals and that its reasoning is flawed. A

⁶⁵ See Schwikkard "A Dilution of the Presumption of Innocence and the Right to Remain Silent?—*Osman v Attorney-General, Transvaal*" 1999 *South African Law Journal* 462 463.

⁶⁶ Van der Merwe 1994 *Obiter* 6. Quoting Wigmore *Evidence in Trials at Common Law* (2003) par 2251.

brief excursion into the historical reason for the rule against self-incrimination begs the question as to its relevance in current modern society.⁶⁷ It arose in response to a need to protect the accused from the ills of medieval inquisition in continental Europe.⁶⁸ In the *ius commune* (common law) which is a combination of Roman and medieval canon laws, a product of twelfth century jurisprudence, the rule was developed to guard against over zealous officials and not as a substantive right that could be invoked by anyone facing prosecution or the prospects of being prosecuted.⁶⁹ It was a tool to protect the private lives of people from officials and was not recognised as a subjective right.⁷⁰ The rule developed against the background of extreme cruelty such as occurred in the Star Chamber in England which used torture to extract confessions from accused persons⁷¹ who were, in any event, considered or presumed guilty. Ecclesiastical Courts forced the accused to go through the “cruel trilemma” whereby he was forced to answer questions

⁶⁷ See Theophilopoulos “The Historical Antecedents of the Right to Silence and the Evolution of the Adversarial Trial System” 2003 *Stellenbosch Law Review* 161 and Helmholz, Gray, Langbein, Moglen, Smith & Alschuler *The Privilege Against Self-Incrimination: Its Origins and Developments* (1997) for a detailed analysis of the origins and development of the rule.

⁶⁸ Van Dijkhorst “The Right to Silence: Is the Game Worth the Candle?” 2001 *South African Law Journal* 26 29.

⁶⁹ Helmholz et al *The Privilege Against Self-Incrimination* 6-7.

⁷⁰ Van Dijkhorst 2001 *South African Law Journal* 29.

⁷¹ Van Dijkhorst 2001 *South African Law Journal* 29; Palmer “Silence in Court – The Evidential Significance of an Accused Person’s Failure to Testify” 1995 *University of New South Wales Law Journal* 130 137.

on oath and face the possibility of incriminating himself,⁷² committing perjury while at the same time condemning his soul to hell for lying under oath,⁷³ or being held in contempt for failure to answer questions.⁷⁴ Accused persons usually went through trial by ordeal in order to establish their innocence. This included trial by fire, water or poison.⁷⁵ By the time the Star Chamber and the king's Prerogative Courts were abolished in 1641, their practices had become intolerable.⁷⁶ This is the historical background that demanded the privilege against self-incrimination. Theophilopoulos⁷⁷ draws a distinct evolutionary path between the privilege against self-incrimination and the right to silence. According to him, the origin of the privilege against self-incrimination is found in seventeenth century political and religious struggle against the inquisitorial use of the *ex officio* oath.

⁷² This method was usually used by judicial officers who also acted as prosecutors, to probe accused persons so as to discover any possible offence they might have committed. The system was used to persecute opposition to the church and state and to enforce political and religious orthodoxy. Theophilopoulos 2003 *Stellenbosch Law Review* 171; Van Kessel "Quieting the Guilty and Acquitting the Innocent: A Close Look at A New Twist on the Right to Silence" 2002 *Indiana Law Review* 925 929.

⁷³ Religion had a strong influence on society in the seventeenth century and lying on oath effectively meant condemning one's soul to hell. See Theophilopoulos 2003 *Stellenbosch Law Review* 170; Schwikkard & Van der Merwe *Principles of Evidence* 3 ed (2009) 124-125.

⁷⁴ Ciarelli 2003 *Journal of Criminal Law and Criminology* 655.

⁷⁵ See generally Bartlett *Trial by Fire and Water: The Medieval Judicial Order* (1986); Nugent "Self-Incrimination in Perspective" 1999 *South African Law Journal* 501 504.

⁷⁶ Nugent 1999 *South African Law Journal* 508.

⁷⁷ Theophilopoulos 2003 *Stellenbosch Law Review* 161; see also Dennis "Instrumental Protection, Human Rights or Functional Necessity? Reassessing the Privilege against Self-Incrimination" 1995 *Cambridge Law Journal* 342 345.

It later developed into a shield against religious and political oppression in the Prerogative Courts.⁷⁸ The accused's right to silence arose from the genesis of the lawyer-centered adversarial system of the eighteenth and nineteenth centuries.⁷⁹

The illogicality of the privilege is made out by the fact that it is a normal fact of life that a person who is accused of wrongdoing, if innocent would normally proffer a denial or an explanation of his innocence. It is contended that no man will make a declaration against himself except if it is the truth.⁸⁰ In any situation, the best person in a position to know whether someone has committed an offence is the offender himself. The best factual evidence therefore emanates from the accused and its relevance cannot be downplayed in the process of fact finding.⁸¹ The ultimate effect of the privilege therefore is the exclusion of the most reliable evidence of truth which would logically emanate from the offender.⁸²

As Van Dijkhorst states:

“It is normal for a child who has stolen a cookie to be questioned by his parent on its disappearance. It would be absurd if the child's defence is that he may not be questioned and in any event cannot be expected to reply as this might incriminate him. Yet when he has stolen a bicycle this is the accepted situation vis-à-vis

⁷⁸ Theophilopoulos 2003 *Stellenbosch Law Review* 183.

⁷⁹ Theophilopoulos 2003 *Stellenbosch Law Review* 183.

⁸⁰ Elliot & Phipson *Manual of the Law of Evidence* 12 ed (1987) 273.

⁸¹ Van Dijkhorst 2001 *South African Law Journal* 26.

⁸² Helmholz et al *The Privilege Against Self-Incrimination* 3.

police and court, entrenched in our Constitution. He does not even have to raise this defence, as the Constitution does it for him. And we do not find it absurd!”⁸³

This attitude is reflective of the Anglo-American system that is combative in nature with opposing sides pitched against each other in a contest and unwilling to give ground to the other. Therein lays the right not to cooperate with police during investigations and not to testify at one’s trial within the adversarial context.⁸⁴ Inquisitorial systems on the other hand embrace the view that an accused should be liable to give evidence of his innocence and to cooperate with the police in clarifying issues so long as they are not forced to incriminate themselves.

Without the court’s or counsel’s comment, the normal course of human thinking dictates that a juror will draw inferences from an accused’s failure to testify where the state has established a *prima facie* case. The fact remains that no constitution can change the human mind.⁸⁵ The question that arises therefore is whether adverse comment can be prejudicial where a judge sits without jurors. Does the failure of the accused to testify really have a negative effect on the mind of a legally trained judicial officer? The rule in *Griffin* should not be read to prohibit a court sitting without a jury⁸⁶ from drawing

⁸³ Van Dijkhorst 2003 *South African Law Journal* 30.

⁸⁴ Van Dijkhorst 2003 *South African Law Journal* 30; Dennis 1995 *Cambridge Law Journal* 345.

⁸⁵ Van der Merwe 1994 *Obiter* 12-13.

⁸⁶ Van der Merwe 1994 *Obiter* 15.

inferences from the silence of the accused. In the case of *Attorney-General v Moagi*⁸⁷ the Court of Appeal of Botswana reasoned that while *Griffin* prohibits comment on silence, it does not rule that silence is not evidential material against the accused.⁸⁸ If it were so, the Court stated, the Court in *Griffin* would have specifically instructed the jury that they cannot draw any unfavourable inference from the accused's silence. The Court was of the view that the rule in *Griffin* is inapplicable where a court sits without jurors. The Court further went on to state that while failure of the accused to testify should not be used to bolster the prosecution's case, it cannot be treated as a non-event. In the words of Aguda JA:

“If there is a preponderance of direct evidence pointing to the guilt of the accused and which calls for an answer from him, the Court must be free to draw an inference that he has no exculpatory answer to offer. By this the accused is not being compelled to prove anything, the Judge is only being permitted to draw or not to draw any inference as a matter of human experience from the failure of the accused to say something in the face of a preponderance of incriminating evidence. Whatever might have impelled the accused to refuse to give an answer to such damaging evidence becomes immaterial. He must be presumed to have

⁸⁷ [1981] B.L.R. 1 (CA); *Mothale and Others v The State* [1985] B.L.R. 330; see also *State v Phale* [1985] B.L.R. 123 where Hannah J noted *obiter*, “He [the trial magistrate] said in his judgment that one of the factors which pointed to the guilt of the accused was ‘refraining to make a statement before the court whether under oath or unsworn.’ This is an incorrect approach to an election by an accused to exercise his right of silence.” 125C.

⁸⁸ This view is supported by Van der Merwe 1994 *Obiter* 15.

weighed the consequences of his offering an explanation on the one hand with his keeping quiet knowing full well that an inference may be drawn adverse to him on the other, in the face of such evidence, and he must be presumed that after such weighing he had decided that it would be to his best interest either on advice or otherwise to keep quiet.”⁸⁹

In the same case Maisels JP rationalises the issue by distinguishing the existence of a right and the exercise of it as follows:

“When the prosecution has not established a case calling for an answer from him the accused properly exercises his right not to testify. Where, however, the prosecution has produced evidence calling for an answer the position is different. Unless the accused’s silence is reasonably explicable on other grounds, it may point to his guilt. There is an evident distinction between the possession of a right (or power) albeit unquestionable, and its exercise, which may, in appropriate circumstances, be highly questionable, and indeed warrant the drawing of inferences adverse to the possessor...I do not think that, if an adverse inference is drawn from the failure of an accused to testify when the prosecution has adduced evidence which calls for an answer, that should be considered to violate the object

⁸⁹ *Attorney-General v Moagi supra* note 87 25-26.

which the right not to testify is intended to achieve – that is, to protect accused persons from being improperly coerced to answer questions...”⁹⁰

A well-balanced articulation of the operation and effect of the self-incrimination rule is provided by the European Court in *Murray v U.K.*⁹¹ The Court had to determine whether adverse inferences drawn from the applicant’s failure to give an explanation of his presence at the scene and to testify at his trial rendered his trial unfair. In holding that this did not render the trial unfair as a whole, the Court noted three fundamental points. First, the trial was conducted by a professional judge sitting alone who gave an explanation for his decision. A different approach might be taken in a jury trial where the reasoning processes are unknown. Second, it would be contrary to articles 6(1) and 6(2) of the

⁹⁰ 8; see also *Mphakela v The State* [1990] B.L.R. 42; further see *Nkwe v The State* [1991] B.L.R. 18 31D-F, where Gyeke-Dako J wrote: “...I think I am right in saying that an accused person is not bound to give evidence; that he can sit back and see if the prosecution have proved their case, and that, while the judge or magistrate has been deprived of the opportunity of hearing his story tested in cross-examination, the one thing which the court should not do is to assume that he is guilty because he has not gone into the witness box to depose on oath and be cross-examined. To hold otherwise would in my judgment, rock the very bottom of our accusatorial system, by which an accused person is presumed innocent until his guilt has been proved beyond reasonable doubt by the prosecution.”; However, in *State v Koloti and Others* [1979-1980] B.L.R. 98 98 the words of Edwards J gave a clear and practical analysis. In his words: “I have come to the conclusion that there is before the Court evidence on which a reasonable tribunal might, in the absence of further evidence, hold it proved beyond reasonable doubt that the first accused struck the fatal blow or blows to the head of the deceased...In the present case I consider that the failure of the first accused to testify goes to reinforce that evidence.”

⁹¹ (1996) 22 E.H.R.R. 29.

European Convention to base a conviction solely on an accused's silence or failure to give an explanation or testify at his trial. However, in the present case, there was other evidence that justified a conviction. Third, an adverse inference may be drawn in situations that clearly call for an explanation from him. Those inferences may be taken into account in assessing the persuasiveness of the evidence adduced for the prosecution.

In my view, the conclusion in *Moagi* represents the rational approach and is not inconsistent with the principle of equality of arms. This position does not affect the burden of proof nor lower the standard of proof. The burden still remains on the prosecution to prove its case beyond reasonable doubt. The trained judge is guided by the law and the law does not operate on presumptive and subjective suspicions or unfounded conclusions that would lead one to believe that the accused did not testify merely because he had something to hide or did not have a reasonable explanation. A judge's duty where the accused exercises his constitutional right to remain silent and not to offer any evidence will be to assess the *prima facie* evidence of the prosecution and determine whether the state's case matures to the required standard from which the guilt of the accused can be declared, in the absence of any evidence to disturb it.

The fact that the state has produced sufficient evidence which calls upon the accused to answer the state's case is a natural and expected consequence of a trial. The accused is not compelled to testify but rather is required by evidential necessity, to rebut the state's

evidence. It must be noted, however, that failure of the accused to testify should only have evidential consequences and cannot qualify as substantive evidence of guilt.⁹²

9 3 3 *The right to call and cross-examine witnesses*

9 3 3 1 The right to call witnesses

Section 10(2)(e) of the Constitution of Botswana which is similar to article 6(3)(d) of the European Convention, expresses the principle of equality of arms with regard to the right to call witnesses as regards the prosecution and the accused.⁹³ An accused should be given adequate opportunity and if need be, assistance, to call his witnesses. The realisation of the right to call witnesses becomes crucial when the accused is unrepresented, incarcerated and without resources. The accused in such a situation does not have sufficient resources like the state to call and bring witnesses to court. As part of its special duty to the unrepresented accused, the court should advise him of his right to call witnesses and to assist him to do so if he lacks the resources.⁹⁴ In Botswana, the procedural provisions relating to the facilitation of the attendance of witnesses are

⁹² However, see Quansah *Judicial Attitudes to the Fair Trial Provisions in the Botswana Constitution* in Fombad (ed) *Essays on the Law of Botswana* (2007) 65 72-73, for a criticism of the *Moagi* case.

⁹³ “This provision [article 6(3)(d) of the European Convention] has two limbs. Taking first the second limb, the provision requires that there should be an adequate procedure to enable one to compel one’s own witnesses to come to court; and to ensure equality between the prosecution and the defence.”: Osborne “Hearsay and the European Court of Human Rights” 1993 *Criminal Law Review* 255 260; *Obonetse Ngakaemang v Regina supra* note 13; *Moima v The State supra* note 13; *Kotlhao v The State* [1999] 1 B.L.R. 364 (CA); *Lufu v The State* [1998] B.L.R.562; *Macheng v The State* [1985] B.L.R. 294.

⁹⁴ S 198(2) Criminal Procedure and Evidence Act; see *Macheng v The State supra* note 93 296-297.

unequal in terms of financial provision. While witnesses for the state are entitled to payment of witness fees as a matter of course,⁹⁵ witnesses of the accused are not necessarily entitled to payment of fees unless at the discretion of the presiding officer.⁹⁶ This results in a disparity of treatment and certainly flouts the principle of equality of arms as expressed in section 10(2)(e) of the Constitution.

Botswana is a vast country with several scattered settlements where people live below the poverty line. People usually rely on public transport to travel hundreds of miles to give evidence. Therefore, non-payment of defence witnesses disadvantages the accused, as it makes it difficult for him to secure their attendance. Though section 10(2)(e) of the Constitution provides that an accused should be afforded facilities to obtain the attendance of his witnesses on the same conditions as those applying to the state, section 10(12)(c) of the Constitution validates any law that “imposes reasonable conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds.” Therefore, the inequality which the proviso to section 209(1), and section 209(2) of the Criminal Procedure and Evidence Act creates by giving the judicial officer a discretion to direct the non-payment of a defence witness or payment of a lesser amount than the prescribed amount, can potentially survive any constitutional challenge. This state of affairs significantly disadvantages the accused in his defence.

⁹⁵ S 209(1) Criminal Procedure and Evidence Act.

⁹⁶ S 209(2) Criminal Procedure and Evidence Act.

European jurisprudence appears to impose a sterner duty on courts to assist an accused in securing witnesses. Article 6(3)(d) of the European Convention guarantees the accused's right to call witnesses and examine witnesses on his behalf under the same conditions as witnesses against him. A court must take all steps within its control to ensure that a witness called by the accused appears in court.⁹⁷ The European Court of Human Rights held in *Bricmont v Belgium*⁹⁸ that a court must give reasons for not summoning a witness requested by the accused. This case marks the importance of the duty of courts to give assistance to the accused in securing his witnesses. The European Court also held that the principle of equality of arms was violated when a Belgian court failed to explain why it had rejected the accused's request to call four witnesses.⁹⁹

9 3 3 2 The right to cross-examination

The accused's right to be given an opportunity to challenge the evidence of the prosecution by cross-examination, is equally important. The right to cross-examination is an essential element of confrontation in the adversarial system and is well grounded in the Botswana legal system.¹⁰⁰ The United States Sixth Amendment Confrontation Clause

⁹⁷ *X v Germany* Application 3566/68 (1969) 31 C.D. 31.

⁹⁸ (1990) 12 E.H.R.R. 217.

⁹⁹ *Vidal v Belgium* European Courts on Human Rights (14/1991/266/377) 22 April 1992. Cited in Wilson "Defending A Criminal Case With International Human Rights Law" 2000 *Champion* 28 29.

¹⁰⁰ Ellert Nato "Fair Trial" *Safeguards: Precursor to an International Bill of Procedural Rights* (1963) 30; A denial of the right to cross-examination amounts to an irregularity: *State v Tshékiso Kebabireng* [1984] B.L.R. 167; *State v Etang Thai and Another* [1971-1973] B.L.R. 25; *State v Tsatsi Piet and Another* [1971-

gives the accused a right to confront adverse witnesses.¹⁰¹ The Confrontation Clause guarantees the presence of the accused at all stages of the trial so as to ensure effective cross-examination.¹⁰² This gives the accused an opportunity to test the veracity and credibility of witnesses while at the same time presenting his case by putting his side of the story to them. Presiding officers have a duty to explain the concept and purpose of cross-examination to unrepresented accused persons in full.¹⁰³

The accused should be given adequate opportunity to cross-examine the witness either at the time he makes the allegation against him or at his trial. The European Court has found a breach of the Convention where the prosecution produced statements without producing the makers to give evidence and be cross-examined, especially where conviction was

1973] B.L.R. 59; *Motswedi and Another v The State* [1984] B.L.R. 223; *Ntwayame v The State supra* note 21; *State v Ncube supra* note 19.

¹⁰¹ The Georgetown University Law Center “Sixth Amendment at Trial” 2006 *Georgetown Law Journal Annual Review of Criminal Procedure* 608 615; *Md. v Craig* 497 U.S. 836, 846 (1990): “[F]ace-to-face confrontation enhances the accuracy of fact-finding by reducing the risk that a witness will wrongfully implicate an innocent person.”; *Coy v Iowa* 487 U.S. 1012, 1019 (1988): “It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”

¹⁰² The Georgetown University Law Center 2006 *Georgetown Law Journal Annual Review of Criminal Procedure* 624; Dunn “‘Face to face’ With the Right of Confrontation: A Critique of the Supreme Court of Kentucky’s Approach to the Confrontation Clause of the Kentucky Constitution” 2007-2008 *Kentucky Law Journal* 301 310.

¹⁰³ *S v Lekhetho* 2002 (2) SACR 13 (O); *S v Mashaba* 2004 (1) SACR 214 (T).

based solely on the statements.¹⁰⁴ For example in *Luca v Italy*¹⁰⁵ where the accused was convicted of drug trafficking, the evidence was mainly based on statements made to the police and public prosecutor by a co-accused who refused to testify when he appeared in court. The Court found that the trial violated article 6 of the Convention. The Court observed, *inter alia*, that had the accused been given an opportunity to challenge the witness's depositions when made or at a latter stage, article 6 would not have been contravened. However, if a conviction is substantially based on the deposition of a person whom the accused had no opportunity to examine either during the investigations or at trial, this will amount to a violation of article 6.¹⁰⁶

9 3 3 3 Cross-examination and hearsay evidence

The admissibility of hearsay evidence has received judicial attention in the United States. The United States Supreme Court held in the case of *Ohio v Roberts*¹⁰⁷ that the Confrontation Clause did not necessarily prohibit the use of hearsay evidence by the prosecution. It stated that hearsay could be admitted if it met two requirements, namely,

¹⁰⁴ *Unterpertinger v Austria* (1991) 13 E.H.R.R. 175; *Kostovski v Netherlands* (1990) 12 E.H.R.R. 434; *Ludi v Switzerland* (1993) 15 E.H.R.R. 173; *Asch v Austria* (1993) 15 E.H.R.R. 597; *Windisch v Austria* (1991) 13 E.H.R.R. 281; *Delta v France* (1993) 16 E.H.R.R. 574. In the continental system it might be possible to cross-examine a witness at a preliminary hearing and this may satisfy article 6(3)(d) which provides for the right to cross-examination.

¹⁰⁵ (2003) 36 E.H.R.R. 807.

¹⁰⁶ See also *PS v Germany* (2003) 36 E.H.R.R. 1139; *Sadak v Turkey* (2003) 36 E.H.R.R. 26; *Windisch v Austria supra* note 104; Andrews "Fair Trial in Austria" 1987 *European Law Review* 69.

¹⁰⁷ 448 U.S. 56 (1980).

unavailability and reliability. The requirement of unavailability would be met if the maker was unavailable to testify at the trial. The requirement of reliability was met under two circumstances. First, if the statement fell within a “firmly rooted” hearsay exception, the requirement would be met without more. Second, if it did not fall within a firmly rooted exception, it would be admitted if it contained “particulari[s]ed guarantees of trustworthiness” such that cross-examination would do little to test its reliability.¹⁰⁸ *Roberts* attracted severe criticism.¹⁰⁹ The second part of the second test was attacked as been uncertain and open to manipulation. It was contended that courts will simply hold that hearsay which they wished to admit was reliable, and that which they wished to exclude was unreliable.¹¹⁰ It was also contended that it was unsafe to assume that all hearsay that falls under the firmly rooted exception is reliable, thereby making the need of further enquiry unnecessary. The Supreme Court rejected *Roberts* in the case of *Crawford v Washington*,¹¹¹ formulating a new test based on whether the evidence was “testimonial.” The Court made a distinction between “testimonial” and “non-testimonial” statements.¹¹² The Court held that the admission of testimonial hearsay violates the Sixth

¹⁰⁸ 68.

¹⁰⁹ See Friedman “Thoughts From Across the Water on Hearsay and Confrontation” 1998 *Criminal Law Review* 697; Friedman “Confrontation: The Search for Basic Principles” 1998 *Georgetown Law Journal* 1011.

¹¹⁰ O’ Brian “The Right of Cross Examination: U.S. and European Perspectives” 2005 *Law Quarterly Review* 481 486.

¹¹¹ 541 U.S. 36, 68 (2004); 541 U.S. 36 124 S. Ct. 1354 (2004).

¹¹² A testimonial statement is that made for the purposes of criminal investigations. The test is whether a reasonable person in the declarant’s position would anticipate that the statement will be used for evidential purposes: *U.S. v Cromer* 389 F.3d 662 (6th Cir. 2004).

Amendment unless the maker is unavailable and the accused had had a prior opportunity to cross-examine him, regardless of whether the evidence is considered reliable by the court. The Court held that the admission of hearsay evidence violates the Sixth Amendment because the accused would not have an opportunity to confront the out of court statement of the maker. Scalia J, in criticising the *Roberts* approach, stated that admitting statements deemed reliable is at odds with the right to confrontation.¹¹³ He traced the right of confrontation back to Roman times and noted that the Confrontation Clause was principally designed to guard against the civil law mode of criminal procedure and its use of *ex parte* examinations as evidence against the accused. He noted that the Confrontation Clause creates a procedural rather than a substantive guarantee and that it demands not that evidence be reliable but that reliability is tested on the crucible of cross-examination.¹¹⁴ In other words, the only means of testing reliability is that provided by the Constitution, being confrontation. However, non-testimonial hearsay statements may be admitted pursuant to the jurisdiction's hearsay rules without violating the Sixth Amendment as long as the exception is considered "firmly rooted."¹¹⁵ Firmly rooted exceptions include excited utterances, dying declarations, public records, agency admissions and co-conspirator statements.¹¹⁶ A non-testimonial statement that does not fall within a firmly rooted exception may still be admissible if it has "particulari[s]ed

¹¹³ *Crawford v Washington supra* note 111.

¹¹⁴ *Supra* note 111.

¹¹⁵ The Georgetown University Law Center 2006 *Georgetown Law Journal Annual Review of Criminal Procedure* 630; *Ohio v Roberts supra* note 107 66.

¹¹⁶ The Georgetown University Law Center 2006 *Georgetown Law Journal Annual Review of Criminal Procedure* 630-631.

guarantees of trustworthiness.”¹¹⁷ The trustworthiness of hearsay evidence must be evaluated in light of the rest of the evidence including the circumstances surrounding the making of the statement which makes the maker “particularly worthy of belief.”¹¹⁸

Crawford is consistent with the majority of decisions of the European Court of Human Rights’ interpretation of section 6(3)(d) of the European Convention which guarantees the accused’s right to cross-examine witnesses.¹¹⁹

9 3 3 4 Cross-examination and anonymous witnesses

The right to cross-examination can come into direct conflict with state interests in keeping its witnesses anonymous, as can be seen in European jurisprudence. This point is exemplified by two cases arising from a Dutch law that provides for the prosecution to keep its witnesses anonymous.¹²⁰ In *Doorson v Netherlands*¹²¹ the Court held that the trial was fair even though the witness remained anonymous as he was questioned by the judge in the presence of counsel though not in the presence of the accused. In *Van Mechelen v*

¹¹⁷ *Ohio v Roberts supra* note 107 68.

¹¹⁸ *Idaho v Wright* 497 U.S. 805, 819 (1990). In *U.S. v Gibson* 409 F.3d 325, 338 (6th Cir. 2005), the Court held that the Confrontation Clause was not violated by an admission of the co-accused’s statement because it bore “particulari[s]ed guarantees of trustworthiness” and it was not made to a police nor during the course of investigation and the co-accused was not trying to shift blame from himself.

¹¹⁹ O’ Brian 2005 *Law Quarterly Review* 481.

¹²⁰ Ashworth “Article 6 and the Fairness of Trials II” 1999 *Criminal Law Review* 261 268.

¹²¹ (1996) 22 E.H.R.R. 330.

*Netherlands*¹²² the Court held the trial unfair where the witnesses who were police officers remained anonymous and were questioned by the judge while defence counsel was in another room with only a sound link to the judge's chambers. These cases allow for anonymity of witnesses in certain cases but stress the need for defence counsel to be present and to be able to observe the demeanour of the witnesses.¹²³ At the same time the rights of the accused were curtailed in the interest of the witnesses as it was feared that revealing their identity would lead to reprisals against them and their families.¹²⁴ The decision in *Doorson* is significant as the European Convention does not recognise rights of witnesses. The Court, however, took into consideration public order interests. The Court noted that even though the Convention does not recognise the rights of witnesses and victims in general, it emphasised that their life, liberty and security were at stake. The Court stated that contracting states should organise their criminal proceedings in such a way that these interests are not imperiled. The Court recognised that in appropriate circumstances, the principles of a fair trial require that the interests of the defence are balanced against those of the witnesses or victims called to testify.¹²⁵ While conceding that the anonymity of the witnesses posed a problem for the defence, it held that the defence was able to ensure that all necessary questions were put to the witnesses and to observe their demeanour by the presence of counsel. In *Van Mechelen* on the other hand, the Court observed that the witnesses were police officers and it was part of their normal duties to give evidence. Further, counsel was excluded and had no opportunity to observe

¹²² (1998) 25 E.H.R.R. 647.

¹²³ Ashworth 1999 *Criminal Law Review* 268.

¹²⁴ Ashworth 1999 *Criminal Law Review* 268.

¹²⁵ *Doorson v Netherlands supra* note 121 para 45.

the demeanour of the witnesses. On these grounds, it was held that the accused and counsel were improperly excluded from observing the demeanour of the witnesses during questioning. The Court also emphasised that any measure restricting the rights of the accused must be strictly necessary and that if a less restrictive measure can be applied, it should be adopted.¹²⁶

9 3 4 *The right to make submissions*

Procureurs-General were once considered as neutral and impartial and, therefore, failure to give the accused an opportunity to respond to his representations to the court would not impugn the principle of equality of arms.¹²⁷ However, the Court has noted that where a legal officer recommends that an application be recommended, he ceases to be neutral and the accused should be given an opportunity to respond to his comments.¹²⁸ In *Borgers v Belgium*,¹²⁹ the Court noted that the concept of a fair trial had undergone considerable evolution. It noted that no matter the unquestionable objectivity of the *Avocat-General*, he could not be regarded as neutral from the point of view of the parties in the Court of Cassation. By making submissions which were unfavourable to the accused, he became the accused's opponent. There was no justification in preventing the accused from replying to the unfavourable submissions of the *Avocat-General*. The Court noted that the inequality was promoted by the fact that the *Avocat-General* participated in

¹²⁶ Para 59.

¹²⁷ *Delcourt v Belgium* (1979-80) 1 E.H.R.R. 355; Reid *A Practitioner's Guide to the European Convention on Human Rights* (2008) 115.

¹²⁸ Reid *A Practitioner's Guide* 115.

¹²⁹ (1993) 15 E.H.R.R. 92.

the deliberations of the Court prior to its decision. The Court therefore held that the rights of the accused and equality of arms had been violated.

In *Bulut v Austria*¹³⁰ the Attorney-General had passed on undisclosed observations to the Supreme Court that determined the applicant's appeal. These observations were not brought to the attention of the applicant. The Court noted that the Attorney-General's office was the institution charged with prosecuting the applicant and that the submission of observations allowed the Attorney-General to take up a position which was not communicated and to which the applicant could not reply. The Court noted the importance that is attached to appearances and the increased sensitivity to the fair administration of justice. The Court noted that equality of arms does not depend on quantifiable unfairness emanating from a procedural inequality. It is for the defence to decide whether a submission requires a response. It is therefore unfair and a contravention of equality of arms for the prosecution to make a submission to the court of which the defence is not aware.

In Botswana, section 181 of the Criminal Procedure and Evidence Act provides that the prosecution and accused are entitled to address the court after all the evidence has been adduced. Though the courts have not articulated the right in light of the principle of equality of arms, it has been rigorously protected. In *Walter Madisa v Regina*¹³¹ the accused was charged with the offence of assault of a woman with whom he was

¹³⁰ (1997) 24 E.H.R.R. 84.

¹³¹ *Supra* note 13.

cohabiting and had three children. The Court concluded the evidence shortly before lunch. The magistrate then adjourned the matter intimating that he will give judgment after lunch. When the matter resumed, the magistrate proceeded to deliver the judgment and sentence, and informed the accused of his right to appeal. It was after this that defence counsel who was present right through, informed the Court that he had not been given an opportunity to address the Court before judgment. On appeal, the Court accepted defence counsel's explanation that he misunderstood the magistrate when he said that he will give judgment after lunch. The Court was also of the view that counsel had not deliberately refrained from exercising his right only to take advantage of this later. The Court held that argument was desirable in this case. The Court noted that the magistrate relied solely on the evidence of the complainant, having discounted the evidence of the other witness. The Court noted that counsel in his submission could have commented on the credibility of the complainant. This is so as the complainant stated that she only realised that she was six months pregnant when she received medical examination after the assault, whereas she already had three children. The Court's rationale clearly is based on the circumstances of the case and the fact that the accused might have been prejudiced.¹³² No recognition was made of equality or the constitutional right to make submissions.

In *Chiwaura v The State*¹³³ the Court again took the prejudice route, clearly stating that failure to allow the defence to address the court does not by itself vitiate the proceedings.

¹³² See also *Moima v The State* *supra* note 13.

¹³³ [1985] B.L.R. 201.

The Court however recognised that such failure is a breach of the accused's right to fully present his defence.

Though, the right to make submissions is recognised, an omission by the court to afford the accused such right will only vitiate the proceedings where the accused is prejudiced.¹³⁴ On the other hand, should the court deliberately refuse the accused the opportunity even when he makes a request to submit, the trial will be rendered unfair.¹³⁵ This approach negates the right to submit as a constitutional right. Indeed, there is no express constitutional provision in relation to final submissions and the cases did not give constitutional alignment to their interpretation of section 181 of the Criminal Procedure and Evidence Act. In all these cases, both the prosecution and accused did not make submissions. It is therefore difficult to contemplate whether the courts would have assessed these situations on the basis of prejudice had the prosecution made submissions. However, failure to rationalise the right to make submissions as a constitutional right still gives room for the courts to assess the effect of such irregularity on the basis of prejudice. This approach runs contrary to the principle of equality of arms and is a result of its non-recognition. Section 10(2)(d) of the Constitution requires that the accused be permitted to defend himself either in person or by a legal representative. Clearly, a recognition of equality of arms would permit the right to make submissions as a fundamental

¹³⁴ *Walter Madisa v Regina supra* note 13; *Moima v The State supra* note 13; *Chiwaura v The State supra* note 133; *Moletsane v The State* [1995] B.L.R. 83; *Moletsane v The State* [1996] B.L.R. 73 (CA); *Moraeng v The State* [2007] 1 B.L.R. 657; *Masango v The State* [2001] 2 B.L.R. 616.

¹³⁵ *Moletsane v The State supra* note 134.

constitutional right in line with section 10(2)(d). However, in *Goletiweng v The State*,¹³⁶ the Court of Appeal reversed its earlier position. The Court declared that the right of an accused to address a court which holds his fate in the balance is a fundamental one. In the Court's view, any speculation as to what the results might have been had the accused addressed the court, is impermissible. An accused is entitled to a fair trial which includes the right to address the court. The exercise of that right is in no way dependent on the strength or weaknesses of the defence raised by him. The Court concluded that the fact that the accused was denied a right to address the court represents a fatal irregularity. This case ensures that in the event that the prosecution makes submissions and the accused as a result of some inadvertence does not, the courts will not overlook this transgression on the grounds that no prejudice resulted. The result of this case is that procedural equality between the prosecution and the accused will be effectively maintained. However, this position was soon to change.

In *Makwapeng v The State*,¹³⁷ the appellant appealed to the Court of Appeal on the grounds that he was not called upon to make final submissions. In its head of arguments, the appellant relied on *Goletiweng v The State*. On realising that the state was capitulating on the basis of *Goletiweng*, the three judges who had been assigned to hear the appeal, referred the matter to the president of the Court who then empanelled a full bench of five judges including himself. The state also filed subsequent heads of argument, now relying on *Moletsane*. The stage for the reversal of *Goletiweng* was set.

¹³⁶ [1998] B.L.R. 64 (CA).

¹³⁷ [1999] 1 B.L.R. 48 (CA).

The Court in *Makwapeng*, stated that the effect of *Goletiweng* is that, convicted persons who have no grounds upon which to seek their freedom on the evidence, could easily pounce on non-compliance of section 181 of the Criminal Procedure and Evidence Act. In the view of the Court, this served as a platform for convicted persons whose appeals are devoid of merit, to escape on a technicality. The Court opined:

“It seems to me, at least in this country, that an ordinary member of the public who sat throughout a trial in a magistrate’s court and heard overwhelming evidence given against an accused person who refused to give any evidence or to make any statement whatsoever, or whose defence is obviously a lie without any redeeming feature, will feel disenchanting with our system of justice if he subsequently hears that the accused person who is convicted in his very presence is subsequently acquitted and discharged only because the trial magistrate forgot to ask him to make a speech after the conclusion of the trial when it is clear to that ordinary on-looker that there was nothing useful that the accused could have added to what was already on record. Such an ordinary citizen may well call in question the sense of justice of the judiciary.”¹³⁸

The Court noted that while the accused’s right to a fair trial was important, the interests of the victim and society at large should be considered. The Court held that a failure to comply with section 181 of the Criminal Procedure and Evidence Act amounted to an irregularity. The Court held that in deciding whether to set aside the judgment following

¹³⁸ 52H-53B.

such irregularity, the totality of the evidence should be considered. If the evidence established the accused's guilt beyond reasonable doubt, and there was nothing that he could have told the court that would affect the verdict, then the court should dismiss the appeal. In this way, *Moletsane* was reinstated.

It must be noted that in these cases, both the state and accused did not make submissions. Therefore, the question as to the legal effect of one of the parties not making submissions has not been addressed. It appears that a genuine omission on the part of a judicial officer to call both parties to make submissions is of no legal consequence if the accused is not prejudiced. The courts have determined the issue of prejudice on the question of whether the submission would have affected its decision at all. It appears that this approach takes consideration of evidential matters only. It is submitted that if an accused raises issues that go to fundamental legal issues which should demand an acquittal, he may well be prejudiced if he is deprived of his right to make submissions. It cannot be assumed that the issue would subsequently be cured on appeal as not all matters go on appeal, and there is no automatic review of cases in Botswana.

9 4 Conclusion

While the Constitution, statutory provisions and case law do not expressly recognise the principle of equality of arms, the principle is incorporated in the trial process by certain guarantees that are available to the accused. These are expressed in the form of accused-based rights which enable the accused to defend himself. They include the right to cross-examine prosecution witnesses, the right to testify and the right to call witnesses. But it is

the express and positive application of the principle of equality of arms by the courts, that that will ensure the full and fair realisation of these rights. The reality of the Botswana criminal process is that most accused are unrepresented and uninformed. The right of the accused to be heard is central to the determination of equality and fairness within the context of the adversarial process. This essentially involves the ability and right to challenge the evidence of the prosecution and produce evidence in his favour on terms equal to those of the prosecution. The concept of a fair trial includes the right to informed participation by the accused. However, the unrepresented accused is procedurally disadvantaged. This clearly results in unfairness. Traditionally, the adversarial process is underlined by a passive judge who does not take control of the proceedings or solicit evidence. Though there are constitutional and procedural rules that guarantee that the accused is able to present his case, they only reflect a theoretical and conceptual promise, constituting a mere framework for the enjoyment and application of the principle of equality. The rules do not really bring the unrepresented accused in line with the prosecution. It is now accepted that the practical realisation of equality and the use of instrumental rights are impossible without the assistance of the judicial officer. Adversarialism involves persuasion, and instrumental procedural processes erect a barrier in the path of the unrepresented accused. In this regard the hand-holding process imposes on the judicial officer a crucial duty in assisting the accused in the context of Botswana where the majority of accused persons are unrepresented.

PART 4

CONCLUSIONS

CHAPTER 10

CONCLUDING REMARKS

10 1 Introduction

This thesis has discussed the application of equality of arms in Botswana's criminal process. In doing so, it has been necessary to limit the discussion to those procedural rights that interrelate with the principle of equality of arms. Therefore, no attempt was made to discuss all procedural rights in Botswana. Indeed, to argue for equality of arms in respect of each and every procedural right is not possible. It is clear that the accused is disadvantaged in the system and that the present application of section 10 of the Constitution is insufficient to put the accused in relative equality with the state in order to ensure true fairness. The thesis has highlighted certain accused-based rights which, if applied in stricter terms, can lead to greater equality. These rights relate to disclosure, legal representation, confrontation, cross-examination and calling of witnesses, the privilege against self-incrimination and the presumption of innocence.

Fairness can only be attained by maintaining a balance between the prosecution and the accused. The prosecution has certain advantages that the accused does not. These include powers of investigation, a permanent team of prosecutors, access to forensic evidence and budgetary allocation. The state must possess these powers and resources if it is to maintain social order. The accused-based rights referred to earlier, specifically cater for some balance in the system. These rights are not meant to undermine the powers of the state. They are meant to provide equality, fairness and the protection of the accused. Unfortunately, these rights remain in a state of basic

application. To some extent, they remain dormant and are not effectively enforced to the benefit of the accused.

10 2 Fair trial rights and the application of the principle of equality of arms

While the specific rights referred to above are central to equality, they have been applied rather superficially. It is submitted that only a reconceptualisation and revitalisation of the right to a fair trial can see a meaningful enjoyment of these rights by accused persons in Botswana.

The pre-trial stage marks the first contact between the state and a suspect. The suspect is, therefore, at his most vulnerable. The police possess powers of investigation. These powers are necessary for the detection and prevention of crime. However, if the rights of the individual are not protected at this stage, manifest unfairness and arbitrary use of powers are inevitable and can ultimately have a grave impact on trial fairness. In this regard, modern societies and legal systems have developed protective barriers for the individual. These barriers exist at the affective and effective stage of the criminal process.¹ At the affective stage, are procedural formalities that the state has to follow as a condition for limiting the liberty and privacy of the suspect. In this regard, the police are generally required to obtain warrants which empower them to arrest and search.² Time limits for detention have developed.³ The need to inform suspects of their rights including the right to silence is required at the time of arrest.⁴ These

¹ See para 5 8 1.

² Para 5 1; 5 3.

³ Para 5 3 3.

⁴ Para 5 4.

procedural requirements serve to remedy the imbalances between the state and the suspect during the investigations. Exclusionary rules have also developed.⁵ The courts may exclude forced confessions.⁶ The courts may also exclude illegally obtained evidence if their prejudicial effect outweighs their probative value.

However, these pre-trial protective measures are clearly inadequate. In Botswana, the accused does not have a mandatory pre-trial right to legal representation.⁷ This is a single most important requirement for securing any meaningful balance between the state and the suspect at the pre-trial stage. While confessions made to the police should be confirmed by a judicial officer, this is not really a foolproof system. The requirement for confirmation is meant to ensure that the confession is voluntary and obtained without coercion. It must be noted that it is the police who take the suspect to the judicial officer for confessions and this very suspect is handed back to the police after confession. Therefore, there is no guarantee that any threat operating in the mind of the suspect (including threats to make a false confession in the presence of a judicial officer) does not operate in his mind at the time of “confessing” to the judicial officer.

The investigation of crime is a sole-enterprised process that is monopolised by the state.⁸ The adversarial system is interest-based.⁹ Investigations are conducted by the police with almost no judicial involvement. When the police investigate crime, their

⁵ Para 5 8.

⁶ Para 5 6.

⁷ Para 5 2; 5 5.

⁸ Para 5 2.

⁹ Para 3 5.

intention is to build up a case that will result in a conviction. This is especially so when it is clear that an offence has been committed and, perhaps, a suspect identified. The intention is to get sufficient information to convict the suspect and not necessarily to find the truth. As a result, miscarriages of justice and wrongful convictions are bound to occur. The suspect does not take part in the investigations.¹⁰ The state may seize documents, interview witnesses and obtain incriminating evidence in the absence of and without the participation of the suspect. The suspect has little knowledge of the information collected during the investigation.¹¹ However, the police may interrogate him and he is generally expected to answer questions put to him.

The present investigative system in Botswana is police-dominated and limits the possibility of early judicial and prosecutorial control of the pre-trial process. However, as has been said, the might and coercive powers of the state during the investigation period is particularly recognised and countered by instruments of limitation such as warrants and time limits in relation to detention and exclusionary rules. In this way the ubiquitous and coercive nature of the state are put in check. While exclusionary rules serve to exclude evidence obtained by unfair means, the general rule in Botswana is that all relevant evidence, except confessions, is admissible no matter how it was obtained. It is vitally important that the accused be incorporated into the investigation process. Active participation of the suspect during investigations is required. Searches and seizures should be made in his presence when possible, and not only when the police require him to point out incriminating evidence.

¹⁰ Para 5 2.

¹¹ Para 5 2.

There needs to be more active judicial intervention during the pre-trial process. Suspects should be able to approach the courts when unfair processes are resorted to during investigation. The courts should extend the right to legal representation to the pre-trial stage.

Disclosure forms part of the system. The state is bound to disclose all evidence in its possession. In Botswana, the power to investigate crime lies with the state. Suspects usually do not have the resources or the power to investigate crime. Attempts by the accused to interview possible witnesses or obtain relevant document or other evidence might well be interpreted as interference with the investigation process.¹² That the state shares its information with the suspect is a significant measure in ensuring equality. The fact remains that disclosure is made after the state has collected all its evidence and have proffered charges. Therefore, the accused is deprived of accessing the information at the earliest opportunity. The legislature and courts should now take the matter one step further by determining that suspects are able to access information, so far as possible, as and when obtained so that they are able to prepare for their case as the prosecution prepares for theirs. Whereas it might be argued that this will only allow the suspect to tailor and fabricate his evidence, this argument cannot really hold. It must be noted that disclosure is presently made after arraignment and the accused will still require time to prepare his case. Therefore, in the present situation, an accused who intends to fabricate evidence will still have the opportunity to do so. Fabrication can still be done even in the absence of disclosure. It must be noted also

¹² Para 5 2. The rule that the prosecution is for trial purposes required to disclose all evidence in its possession, hardly compensates for the fact that the accused cannot access information at an early stage.

that fabrication will not necessarily hold in the face of tangible evidence and the process of cross-examination.

At the trial stage, there are rights which enable the accused to defend himself. Two of these rights stand out significantly. These are the right to legal representation and the right to be presumed innocent. Unfortunately, it is these two rights that are stifled the most in Botswana. While they are recognised by the Constitution and case law, their application is severely constrained. The right to legal representation is constrained by the Constitution, and by the absence of resources to support its realisation. The right to be presumed innocent is constrained by the fact that it is quite often taken away by legislation creating reverse onuses, a situation that is tolerated by a lack of judicial intervention.

The right to legal representation at trial is guaranteed by the Constitution of Botswana. But like all other rights, it is an empty declaration. Not only does the constitutional right to legal representation fail to ensure equality of arms, it actually undermines the principle of equality of arms. The Constitution provides that the accused may secure legal representation at his own expense. It entitles the accused to legal representation but does not ensure that the accused gets one.¹³ The provision is an empty declaration which is unsupported by mechanisms to ensure its realisation.

The state has a directorate of public prosecutions which employs full-time lawyers. However, several accused persons cannot afford legal representation, and are also not represented by legal aid lawyers. This represents grave inequalities in the system. The

¹³ Para 7 2.

absence of a legal aid system is of grave concern. Any legal system that fails to provide legal aid for accused persons, deprives them of equality before the law.¹⁴ The unrepresented accused is effectively denied access to the legal process and procedures. Forcing an unrepresented accused to face a trained prosecutor is a great injustice and is inconsistent with modern democratic values. The Constitution itself runs counter to the principle of equality of arms by expressly excluding any duty on the state to provide the accused with legal assistance. While the state provides legal assistance in respect of capital offences, this is not enough. A comprehensive legal aid system is desirable. It is of importance to note that the state itself derives at least two benefits from legal aid. First, criminal cases (and especially the complex ones) are processed through the courts with greater efficiency. Second, legal aid assists the state in legitimising the operation of the criminal justice system. The ideal system would be the setting up of a public defender system, which allows for the allocation of lawyers to assist suspects from the pre-trial investigations. It is conceded that the resources of Botswana are scarce and as a developing country, there are other pressing social demands. However, legal aid can be instituted incrementally, extending legal aid to all offences that attract minimum sentences.¹⁵ Indeed, there are several such offences in the country's statute books.

The presumption of innocence has constitutional endorsement in Botswana. The presumption of innocence should ensure that the burden lies with the prosecution to prove every element of an offence. The state has all the resources to prove offences. It also has sufficient time and forensic experts to analyse the evidence. The decision to

¹⁴ Para 7 5; 7 7.

¹⁵ Para 7 9.

take a matter to court is taken by the state after it has sufficiently analysed the evidence. It must be assumed therefore that when charges are instituted, the state is satisfied that it has sufficient evidence to secure a conviction. It is unfortunate, therefore, that the courts have acquiesced to the legislation of reverse onus clauses which declare the accused guilty, calling upon him to prove to the contrary.¹⁶ The words of Anderson J in *Paul Rodney Hansen v The Queen*¹⁷ cannot be overemphasised:

“Because of prosecutorial difficulty in proving a positive, an accused who does not have equality of arms in terms of resources, and may lack articulateness, is forced to carry the even heavier burden of proving a negative. That such negative is subjective and intangible only exacerbates the difficulty for an accused.”¹⁸

The legislature should refrain from casting the burden of proof on the accused. Otherwise, the accused is significantly disadvantaged in the articulation and realisation of his right to be presumed innocent, a right which is the foil of the state’s powers and resources to investigate crime, which the accused does not have.

There are other trial rights which relate to the guarantee of equal participation by the accused at trial. These rights enable the accused to challenge the evidence of the state and to present his evidence. These rights include the right of the accused to be tried in

¹⁶ Para 8 6 3.

¹⁷ [2007] NZSC 7.

¹⁸ Para 280.

his presence, the right to testify or to remain silent, the right to call witnesses and to cross-examine witnesses and the right to make submissions. Because of the non-application of the principle of equality of arms, these rights do not receive immediate application. They rather receive contingent application. Therefore, failure to apply them does not attract immediate sanction. In Botswana, sanction will depend on whether the accused was prejudiced as a result of their non-application. What is unfortunate about this approach is that the courts will not necessarily be in a position to know what prejudice the violation of these rights would have caused the accused. For example, one can only speculate what difference a cross-examination or argument (which did not take place) would have had on the proceedings. In determining that the accused was not prejudiced, the courts have mainly relied on the existence of overwhelming evidence against the accused. But the fact remains that the accused would have been deprived of exercising a constitutional right which is meant to bring him at par with the state. The courts have similarly held that failure to advise an accused of his right to legal representation will only amount to an irregularity if the accused was prejudiced. Again, even where the evidence is overwhelming, it is true that an attorney could have succeeded in tearing such evidence into shreds, which the accused could not do. It is well-known that in cases where lawyers have later entered the fray and succeeded in recalling witnesses for cross-examination, their presence and participation demonstrably lead to acquittals where convictions seemed probable or certain, had a lawyer not appeared. Therefore had the accused been informed of such right, he would have decided to secure the services of counsel and the results of the trial would have been different. It is clear, therefore, that effective application of the principle of equality of arms would avoid situations where the application of constitutional rights is contingent and not immediate. The fact that the evidence is

overwhelming might be because the accused is not allowed to counter it due to the violation of a constitutional right. It can be said, therefore, that the non-application of equality of arms results in an inefficient system.

10 3 The inefficiencies of implicit countenance and the demand for express recognition

10 3 1 Implicit countenance

It can be seen that the concept of equality has been accepted by the courts of Botswana, albeit in a passive sense.¹⁹ The recognition of the might of the state and the fact that the accused must have a fair chance in defending himself, has been stated in a number of cases. These cases represent a natural response to the need for equality and balance in the criminal process. While there is no express recognition of the principle of equality of arms by the courts, there are instances of its countenance which naturally come into the system. In the court's bid to ensure fair trials, procedural equality has naturally received recognition. It must be noted that the recognition of procedural equality in Botswana is mainly ensconced by a common law notion of fairness rather than by constitutional theoretical foundation.²⁰ The underlying tone of the courts relates more to an underlying common law of procedural equality based on the notion that no party should suffer procedural prejudice and that trials should be procedurally fair. Though there is no express constitutional articulation of the principle of equality of arms, section 10 has generally been interpreted so as to ensure that the accused is able to compete in the face of the

¹⁹ Para 4 4.

²⁰ Para 4 6.

enormous resources of the state.²¹ The courts have given recognition to the fact that equality applies in relation to section 10.²² However, this does not amount to a constitutional recognition of the principle.

Section 10 of the Constitution creates accused-based and participation rights which should effectively create balance and equality.²³ The need to prevent severe disadvantage has been recognised by the courts, particularly in the case of the unrepresented accused. This duty translates to a general right of the accused to be assisted by the courts. This right flows from the right to confront and equal participation by the accused at his trial. This has resulted in the development of an enabling duty on the part of the judicial officer in relation to the unrepresented accused. In this regard, the judicial officer has a duty to explain the rights and procedural steps to the unrepresented accused.²⁴ These include informing him of his right to call witnesses, his right to cross-examination, his right to make submissions and his right to legal representation. The accused should also be made aware of specific defences, and presumptions that are unfavourable to him.

10 3 2 *Express recognition*

The principle of equality of arms permits the application of section 10 as a minimum non-exhaustive right. In this regard, the courts may venture beyond specific rights and, like the European Court, develop a broader concept of fairness. Like article 6 of the

²¹ *Motshwane v The State* [2002] 2 B.L.R. 368 383F-G.

²² *Motshwane v The State supra* note 21.

²³ Para 2 2.

²⁴ Para 9 2. The mere judicial explanation of rights and procedural steps to an unrepresented accused, is of course no guarantee that the accused will understand and appreciate the situation.

European Convention and article 14 of the ICCPR, section 10 of the Constitution of Botswana which provides for the right to a fair trial does not specifically map out the principle of equality of arms, except in respect of securing witnesses. However, European and international case law recognises this principle as part of the overarching notion of a fair trial. The principle is of general and not specific normative application. Since section 10 of the Constitution is not very dissimilar from article 6 of the European Convention, borrowing from European jurisprudence, the principle should find easy and acceptable application in the Botswana constitutional and legal order. Its application in the absence of any specific provision should not be problematic, since with consistent application in international and domestic systems, it can be said that the principle has gained the status of a general principle of law and a general principle of international procedural law. The courts in Botswana though not expressly recognising the principle, conduct procedural fairness in light of the principle.²⁵ Its application in international jurisprudence beyond the strict provisions of statutory or regulatory provisions is a path for the courts of Botswana to follow. The application of the principle in Botswana is relevant to the accused's right to a fair trial, having regard to the adversarial procedure of the system.²⁶ In consequence, its application as a fundamental constitutional right rather than a guiding principle will strengthen the right to a fair trial in the adversarial context. It will enhance a number of separate rights which lie at the heart of the adversarial trial. These include the right to legal representation, the right to defend and participate in the proceedings and to call and cross-examine witnesses, the right to be presumed innocent and the right to be protected against self-incrimination.

²⁵ Para 4 4.

²⁶ Para 3 6.

The principle, if expressly recognised, essentially removes the articulation and application of these and other rights from a state of rhetoric and theoretical analyses, to the practical realisation of the rights of the accused. In so doing, the principle translates the natural law principle expressed as *audi alteram partem* into reality by allowing its permeation into several component fair trial rights.²⁷ Compliance with the principle therefore should be the minimum threshold for a trial to be considered fair and consistent with human rights standards.²⁸ The words of Silver cannot be more appropriate: “Thus, the more direct route to ensuring balance is to accord formal recognition to the principle of equality of arms, a principle essential to fairness and effectiveness in our adversarial search for the truth.”²⁹ The author continues: “Ultimately, the Court’s lack of faith in the adversarial process undermines the fairness and effectiveness of the process, underscoring, in turn, the need to recognise an implied constitutional right to the equality of arms.”³⁰

The development and growth of human rights are not yet closed. This becomes evident when one considers the ever growing categories of human rights over the past decades. So central is equality of arms to the fairness of trial that it can no longer be relegated to some obscure principle. The principle represents the center-piece of

²⁷ Para 2 1; 9 1.

²⁸ Negri “The Principle of ‘Equality of Arms’ and the Evolving Law of International Criminal Procedure” 2005 *International Criminal Law Review* 513 514.

²⁹ Silver “Equality of Arms and the Adversarial Process: A New Constitutional Right” 1990 *Wisconsin Law Review* 1007 1032.

³⁰ Silver 1990 *Wisconsin Law Review* 1041.

fairness but has not been recognised as a positive procedural right.³¹ Though the principle has been recognised over and over as central to the notion of fairness, its non-recognition as a fundamental constitutional and procedural right is a grave omission.³² The principle therefore remains in a shadowy state of basic application in the absence of express recognition and application. In Botswana, a firm and robust application of the principle will certainly result in a fuller and better articulation of these rights. The moment equality of arms is identified as a procedural right, the impermissible breach thereof should have measurable consequences, like the setting aside of a conviction.

10 4 Conclusion – Towards a more efficient system

10 4 1 Institutional development

The attainment of fairness is incomplete without some measure of equality. Whereas basic protective structures exist, there is a clear and pressing need to reconsider the practical difficulties faced by the accused in Botswana. Special consideration should be given to the fact that the majority of accused persons are indigent and unrepresented. Some changes to the criminal justice system are, therefore, of paramount importance.

The demand for fairness and equality at the pre-trial stage requires that the suspect be integrated and incorporated into the investigation process. The fact that the state collects and prepares evidence well in advance of the accused gives the former an unfair advantage over the latter. The state's information should be shared with the accused, as and when obtained. Forensic and scientific reports should be supplied to

³¹ Para 4 6.

³² Para 4 6.

the accused as and when obtained, and not only once he is formally charged. The fact that information, especially scientific information is provided late in the day, limits the accused's opportunity for challenge. The accused should also be able to witness searches and seizures, where possible. An opportunity should be created for a suspect to approach a court to intervene, in the event of unreasonable pre-trial and investigation procedures. A right to legal representation at the pre-trial stage, should be embraced by the courts and the Constitution.

The allocation of resources is central to the attainment of equality. It is laudable that the state allocates significant funding for the investigation and prosecution of crime. It is well-known that the state allocates significant funding to the police and the Director of Public Prosecutions. The offices of these institutions continue to spread all over the country. They are provided with training, increasing manpower and modern equipment. That these measures have paid off in containing crime in the country, cannot be disputed. However, the protection of societies does not lie with the police alone. The police in their bid to protect the society come into contact with individuals in the natural course of their duties. The state is a powerful institution and the individual should be protected against its might and excesses. The allocation of funding to set up a public defender and legal aid system will serve to remedy the imbalances between the state and the accused.

10 4 2 *Legislative intervention*

While the Constitution recognises various procedural rights, their realisation remain in a state of flux. An unfortunate state of flux and contentment has developed. Section 10 rights are in their basic state. Their application and normative value are stifled.

Without the means to enforce them, they are empty promises and meaningless declarations. We glorify the system and have become satisfied that the Constitution provides for various procedural rights and that these rights are upheld by the courts. However, one should not turn a blind eye to the clear inefficiencies in the system. These inefficiencies are clear when the state enacts reverse onus clauses, or forces the unrepresented accused to contend with a trained prosecutor by declining to provide legal aid, or accepts that legal sanction for breach of a constitutional right should depend on prejudice to the accused. What is clear, therefore, is that these rights remain muted in the absence of a recognised constitutional right to equality of arms. A constitutional amendment to this effect is highly desirable and should be strongly considered.

10 4 3 *Judicial intervention*

While a constitutional amendment to constitutionalise the right to equality of arms is desirable, it is not a precondition for its recognition by the courts. The courts should be bold and elevate the principle to the status of a right (as indeed, they did with disclosure). This will ensure that the system is responsive to the actualisation of constitutional procedural rights. The courts of Botswana have been alive to democratic traditions. They have demonstrated their ability to uphold the rights of the individual. However, they need to be more activist. They have failed to tackle the ever-increasing problem of reverse onuses. While these clauses clearly present dangers in that they erode the presumption of innocence, thereby weakening the position of the accused, they ultimately preempt unjust and unsafe convictions. The courts should also be bold to recognise the principle of equality of arms and

incorporate it in the application of procedural rights. Again, the position of Silver can only be reiterated here:

“To ensure that the adversarial process achieves its end, the optimisation of the search for truth, the Supreme Court must formally recognise a new right designed to restore and protect the delicate balance of power between the prosecution and defence. As described above, the adversarial process functions effectively only when opposing counsel can fashion and present their strongest case from positions of relative equality. This equality, as significant as the other protections underlying the adversarial process in ascribing meaning to the nebulous guarantee of due process, must be extended formal protection.”³³

³³ Silver 1990 *Wisconsin Law Review* 1007 1037.

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